

Two other commenters suggested that a "yes/no" box be included on the Call Report that would indicate whether "pass-through" coverage was available. They opined that this one disclosure would provide employee benefit plan depositors with an explicit statement on a quarterly basis on whether an institution could provide "pass-through" coverage and would avoid the question whether an institution classified as "adequately capitalized" was able to offer "pass-through" insurance coverage.

The FDIC does not have the authority to change the Call Report or the TFR on its own and has decided not to reach a conclusion at this time. Instead it will recommend to the Federal Financial Institutions Examination Council that it consider whether the Call Report and the TFR should be amended to include a line item for designating an institution's PCA capital category.

Although public disclosure of this information would be beneficial to the public, it also could be misleading without further information or investigation. For example, the continued availability of "pass-through" coverage would not be known in the case of institutions reporting an "adequately capitalized" condition, although this information would raise a "red flag" that depositors could investigate further. In addition, a Call Report disclosure is as of the date of the report and it may not reflect interim events between Call Report dates. Moreover, an institution's PCA capital category may not constitute an accurate representation of an institution's overall financial condition or future prospects—factors that employee benefit plan depositors also need to consider. Finally, it should be noted that the PCA rules do not prohibit an institution from disclosing its PCA capital category in response to inquiries from investors, depositors, or other third parties. However, such disclosures should include appropriate caveats in order to avoid misleading the public.

The FDIC considered the recommendation of including a "yes/no" box on the Call Report but does not favor this proposal out of a concern that the disclosure would be more prone to reporting error and would create a greater regulatory burden on institutions.

#### *I. Definition of "Employee Benefit Plan Depositor"*

The FDIC indicated in the preamble of the proposed rule that the required information may be provided to an employee benefit plan administrator or manager instead of to each participant

in a plan. One commenter recommended that the final rule define the term "employee benefit plan depositor" to mean managers or administrators of such plans. Thus, it would make clear that the required disclosures only need be made to the administrator or manager of an employee benefit plan and not to each individual beneficiary of the plan. The FDIC has decided to include such a definition in the final rule. The final rule also specifies that, for purposes of the requirements of the final rule, the definition of the term "employee benefit plan" includes eligible deferred compensation plans described in section 457 of the Internal Revenue Code (26 U.S.C. 457).

#### *J. Sample Disclosures*

1. A sample disclosure that an insured depository institution may use when a depositor opens an account consisting of employee benefit plan deposits is as follows:

Under federal law, whether an employee benefit plan deposit is entitled to per-participant (or "pass-through") deposit insurance coverage is based, in part, upon the capital status of the insured institution at the time each deposit is made. Specifically, "pass-through" coverage is not provided if, at the time an employee benefit plan deposit is accepted by an FDIC-insured bank or savings association, the institution may not accept brokered deposits under the applicable provisions of the Federal Deposit Insurance Act. Whether an institution may accept brokered deposits depends, in turn, upon the institution's capital level. If an institution's capital category is either "well capitalized," or is "adequately capitalized" and the institution has received the necessary broker deposit waiver from the FDIC, then the institution may accept brokered deposits. If an institution is either "adequately capitalized" without a waiver from the FDIC or is in a capital category below "adequately capitalized," then the institution may not accept brokered deposits. The FDI Act and FDIC regulations provide an exception from this general rule on the availability of "pass-through" insurance coverage for employee benefit plan deposits when, although an institution is not permitted to accept brokered deposits, the institution is "adequately capitalized" and the depositor receives a written statement from the institution indicating that such deposits are eligible for insurance coverage on a "pass-through" basis. The availability of "pass-through" insurance coverage for employee benefit plan deposits also is dependent upon the institution's compliance with FDIC recordkeeping requirements.

[Name of institution]'s capital category currently is [insert prompt corrective action capital category]. Thus, in our best judgment, employee benefit plan deposits are currently eligible for "pass-through" insurance coverage under the applicable federal law and FDIC insurance regulations.

Under the FDIC's insurance regulations on employee benefit plan deposits, an insured bank or savings association must notify employee benefit plan depositors if new, rolled-over or renewed employee benefit plan deposits would be ineligible for "pass-through" insurance and must provide certain ratios on the institution's capital condition to employee benefit plan depositors who request such information. If you would like additional information on [name of institution]'s capital condition, please make a request [describe procedures for obtaining the additional capital information].

2. A sample disclosure that an insured depository institution may use when new, renewed or rolled-over employee benefit plan deposits will not be eligible for "pass-through" insurance coverage is as follows:

On [date] [name of institution]'s capital category changed from [previous PCA category] to [current PCA category]. Because of this change in [name of institution]'s capital category and the institution's inability otherwise to satisfy the applicable FDIC requirements in this regard, any employee benefit plan funds deposited, rolled-over or renewed with [name of institution] after [date] will NOT be eligible for "pass-through" (or per-participant) deposit insurance coverage under § 330.12 of the FDIC's regulations. Accordingly, plan deposits made, rolled-over or renewed after [date] will be aggregated and insured only up to \$100,000. This unavailability of "pass-through" insurance coverage on new, rolled-over or renewed deposits will continue until the institution's capital category improves and/or other applicable requirements are satisfied. Deposits made over the period of time when "pass-through" insurance coverage is unavailable will not be eligible for "pass-through" coverage unless and until these deposits are rolled-over or renewed at a time when "pass-through" insurance coverage is again available. "Pass-through" insurance coverage on deposits made before [insert date when "pass-through" coverage no longer is available] is not affected.

#### *K. Delayed Effective Date of the Disclosure Requirements*

Four commenters recommended that the effective date of the final rule be delayed 150 to 180 days to permit institutions the time needed to develop automation systems, and policies and procedures to ensure compliance. Many commenters indicated they presently do not have a recordkeeping system that will identify employee benefit plan accounts. Some commenters indicated that they would have to notify all existing depositors in order to develop such a recordkeeping system.

As indicated in § 330.12 of the FDIC's regulations, in order for employee benefit plan deposits to be eligible for pass-through insurance coverage, among other things, the recordkeeping requirements of § 330.4 of the FDIC's