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Office of Thrift Supervision

Regulatory Bulletin

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Handbook: Thrift Activities
Subjects: Capital Adequacy

Section: 120
RB 33

RESCINDED

August 31, 1995

New FDIC "Pass-Through" Deposit Insurance Coverage Disclosure Rule

Summary: This Bulletin establishes new OTS examination procedures for the FDIC's newly adopted "pass-through" deposit insurance disclosure rule covering employee benefit plan deposits.

For Further Information Contact: Your Regional Office, or Thrift Supervision Policy, Washington, D.C.

Regulatory Bulletin 33

New Examination Procedures

Attached is a Federal Deposit Insurance Corporation (FDIC) June 1, 1995 memorandum that:

- Provides background information on the FDIC's newly adopted "pass-through" deposit insurance coverage disclosure rule[1] concerning employee benefit plan deposits (section 2);
- Explains the Federal Deposit Insurance Act "pass-through" deposit insurance coverage statutory requirements for employee benefit plans (section 2a);
- Summarizes the new regulation (section 2c); and
- Establishes examination procedures for determining insured institutions' regulatory compliance (section 3).

The Office of Thrift Supervision is, by this regulatory bulletin, adopting the same section 3 examination procedures for savings association safety and soundness examinations. We will, at a later date, incorporate the procedures into the Thrift Activities Regulatory Handbook, Section 120, Capital Adequacy.

Examination workpapers should include documentation of the examination procedures performed.

Purpose of New 12 CFR § 330.12(h)

The FDIC Improvement Act of 1991, and the FDIC's implementing regulation[2] adopted on May 11, 1993, limit the availability of employee benefit plan "pass-through" insurance coverage to such deposits made at banks and thrifts that meet certain capital requirements. "Pass-through" coverage means that the insurance passes through the depositor (plan administrators or managers) of the funds to each owner of the funds (each employee participant in the plan).

Effective July 1, 1995, the FDIC added paragraph (h) to § 12 CFR 330.12 to provide a means for employee benefit plan depositors to obtain timely capital level information needed to determine whether deposits qualify for "pass-through" insurance coverage. The new regulation requires an insured institution to provide, in the circumstances set forth in the regulation, written notices to any depositor of employee benefit plan funds of the institution's capital levels and prompt corrective action capital categories.

Savings Association Compliance

Publication of this regulatory bulletin is also to assist insured savings associations in complying with the new disclosure requirements.

Attachment

John F. Downey
—John F. Downey
Director of Supervision

[1] 12 CFR § 330.12(h), "Disclosure of capital status."

[2] 12 CFR § 330.12, "Retirement and other employee benefit plan accounts."

Division of Supervision

MEMORANDUM SYSTEM

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MEMORANDUM TO: Regional Directors

FROM: Stanley J. Poling
Director

SUBJECT: Examination Procedures for the New "Pass-Through" Deposit Insurance Disclosure Rules Concerning Employee Benefit Plan Deposits - Part 330.12

1. Purpose. To summarize the new "pass-through" deposit insurance disclosure requirements for employee benefit plan deposits, and to describe the examination procedures to be implemented when conducting onsite safety and soundness examinations of insured institutions for which the FDIC is the primary Federal regulator.

2. Background. Section 311 of FDICIA amended section 11(a) of Federal Deposit Insurance Act (FDI Act) concerning "pass-through" deposit insurance coverage. In May 1993, section 330.12(a) to (g) of the FDIC's regulations was revised to incorporate the new statutory limitation on "pass-through" deposit insurance coverage for employee benefit plan accounts.

The FDIC proposed disclosure rules on the new deposit insurance statute on November 30, 1993 (see FIL-84-93, dated December 10, 1993). This was in response to numerous comments about the difficulty of obtaining information on an insured institution's capital levels and its prompt corrective action (PCA) capital category, information critical to employee benefit plan depositors wishing to determine whether "pass-through" insurance coverage is available. On January 31, 1995, the FDIC adopted section 330.12(h) of its regulations (see FIL-14-95, dated February 13, 1995).

a. Statutory Requirements. Section 11(a) of the FDI Act applies to all FDIC-insured institutions. Under this statute, whether an employee benefit plan deposit is entitled to "pass-through" deposit insurance coverage is based, in part, upon the capital status of an insured depository institution "at the time that a deposit is accepted."

(1) "Pass-through" insurance coverage means that the insurance coverage passes through to each owner/beneficiary of the applicable deposit. Insurance coverage under this rule is based on the institution's condition as of each deposit date.

Transmittal #95-064

(2) "Pass-through" insurance coverage is provided for employee benefit plan deposits placed with all "well capitalized" insured institutions and for "adequately capitalized" institutions when:

(a) the institution has obtained a brokered deposit waiver from the FDIC; or

(b) the institution meets each applicable capital standard and provides a specific written statement (each time that a deposit is accepted) to an employee benefit plan depositor that such deposits are eligible for "pass-through" insurance coverage.

(3) Employee benefit plan deposits are not entitled to "pass-through" insurance coverage when placed with:

(a) insured institutions that are "adequately capitalized," and have NOT obtained a brokered deposit waiver from the FDIC or have elected NOT to provide a written statement under the statutory exception (see above); or

(b) "undercapitalized" institutions.

b. Types of Deposit Accounts Affected. Among the types of accounts affected by the new "pass-through" insurance rule are:

- 401(k) retirement accounts,
- deferred compensation plans under section 457 of the Internal Revenue Code of 1986,
- Keogh plan accounts,
- Simplified Employee Pension plan accounts (SEPs)
- corporate pension plans and,
- profit-sharing plan accounts.

c. Summary of New Section 330.12(h). The new "pass-through" insurance disclosure rules are effective July 1, 1995. The five-month delayed effective date was designed to provide insured institutions the time needed to establish policies and procedures in order to comply with the new requirements. Section 330.12(h) of the FDIC's regulations contains the following requirements:

(1) Disclosure Upon Request. Within five business days of a request, at any time by a depositor of employee benefit plan deposits, an institution must provide in writing:

(a) the three capital ratios (total risk-based capital

ratio, Tier 1 risk-based capital ratio and leverage ratio),

(b) the PCA capital category of the institution, and

(c) whether, in the institution's judgement, employee benefit plan deposits would be eligible for "pass-through" insurance protection.

(2) Disclosure Upon Opening an Account. When a new employee benefit plan account is opened, the institution must provide in writing:

(a) an accurate description of the requirements for "pass-through" insurance coverage, the current PCA capital category of the institution, and

(b) whether, in the institution's judgement, at that time, the employee benefit plan deposits are eligible for "pass-through" insurance coverage.

This required disclosure applies only to new accounts. While existing, renewed or rolled-over accounts are not subject to the upon-opening-an-account disclosure requirements, institutions have the discretion to make such disclosures. A sample disclosure is included in the Federal Register preamble to the final regulation and a copy is attached.

(3) Disclosures When "Pass-Through" is No Longer Available. Whenever new, rolled-over, or renewed employee benefit plan deposits are no longer eligible for "pass-through" insurance coverage, the institution has 10 business days to disclose in writing to all affected employee benefit plan depositors:

(a) the institution's new PCA capital category, and

(b) that new, rolled-over or renewed employee benefit plan deposits will not be eligible for "pass-through" insurance coverage.

Previously obtained employee benefit deposits continue to receive "pass-through" insurance coverage unless or until they are renewed, rolled-over or redeposited at a time when "pass-through" insurance coverage is not available. A sample disclosure is included in the Federal Register preamble to the final regulation and a copy is attached.

(4) "Catch-Up Disclosure Provision." If an institution has, as of July 1, 1995, employee benefit plan deposits that, at the time such deposits were placed with the institution, were not eligible for "pass-through" deposit insurance coverage (i.e., deposits made between December 19, 1992, the effective date of section 311 of FDICIA, and July 1, 1995, the effective date of the final rule, and the institution did not satisfy the criteria of 2(a)(2) of this memorandum) then the institu-

tion must provide the upon-opening-an-account disclosures to the affected employee benefit plan depositors. The disclosure must be made within 10 business days of July 1, 1995 (i.e., by July 17, 1995).

(5) Definition of "Employee Benefit Plan Depositor." The term "employee benefit plan depositor" means the person(s) administrating or managing an employee benefit plan and not each plan participant that would receive "pass-through" insurance coverage.

d. Form of Disclosure. The final rule does not establish any specific procedures for the required disclosures except for a general requirement that they be "clear and conspicuous." Additional information may be provided with the required disclosure as long as it continues to meet the "clear and conspicuous" standard. For example, an institution that is opening an employee benefit plan account may provide a separate written disclosure statement to the employee benefit plan depositor or clearly reference the specific section in the deposit agreement that contains the disclosure information.

The two sample disclosures attached are included in the preamble to the final rule. One applies when a bank is opening an account and the other applies when "pass-through" insurance coverage would no longer be available for new, rolled-over or redeposited funds. These sample disclosures are intended to ease the compliance burden and to provide a "safe harbor" for banks. However, institutions do not have to use the sample disclosures and modification of the sample disclosures is permissible. For example, institutions may combine the upon-request and the upon-opening-an-account disclosures.

3. Examination Procedures. The following examination procedures should be implemented when conducting onsite safety and soundness examinations:

a. Quickly determine whether the bank has any employee benefit plan deposits or intends to accept any employee benefit plan deposits.

b. If so, briefly review the procedures developed by the bank to ensure compliance with section 330.12 of the FDIC's regulations. This would include:

(1) a determination that sample disclosures have been developed and shared with the appropriate bank personnel, and

(2) that procedures have been developed to provide the appropriate disclosures to employee benefit plan depositors when opening a new account and when an existing employee benefit plan depositor (administrator or manager) makes a request for information.

c. Determine if the bank was less than "well capitalized" between December 19, 1992 and July 1, 1995 and is therefore subject to the one time, required "catch-up" disclosure requirements. If so, determine if the required disclosures have been made. Examiners only need to perform this procedure at the first examination conducted after July 1, 1995.

d. Determine if the institution may become less than "well capitalized" in the near future. If so, advise institution management of the required disclosures under section 330.12(h)(3) when "pass-through" insurance coverage is no longer available and remind them to have procedures ready to quickly notify front-line deposit services persons.

No institution is required to maintain any list of employee benefit plan depositors. A list can be made when needed. However, if an institution is unable to identify which deposit accounts are employee benefit plan deposits, a blanket disclosure to all depositors may be necessary to comply with this section. Institutions can avoid this situation by identifying employee benefit plan deposits on their books.

4. Responsibility and Action. Please distribute a copy of this memorandum to all examiners. Although the final rule is not effective until July 1, 1995, the above-described examination procedures should be implemented immediately to assist effected institutions in complying with this new rule. Copies of this memorandum will be provided to the other federal regulators for distribution to their examiners.

5. Effective Date. This memorandum is effective upon receipt and is outstanding until cancelled.

Attachment

Sample disclosures[1]

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

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[1] Federal Register, Vol. 60, No. 27, February 9, 1995, at 7706.

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.