organized for the purpose of investing in equity or debt securities, the interest of such person in any enterprise in which the group holds securities shall be based upon said person's equity share of the holdings of the group in that enterprise.

(3) For purposes of paragraph (a)(1) of this section, computations of dollar value of financial interests in corporations shall be by means of:

(i) Market value in the case of stocks listed on national exchanges; or

(ii) Over-the-counter market quotations as reported by the National Daily Quotation Service in the case of unlisted stocks; or

(iii) By means of net book value (i.e. assets less liabilities) in the case of stocks not covered by the preceding two categories. With respect to debt securities, face value shall be used for valuation purposes.

(4) The dollar value and percentage of financial interests listed above in paragraph (a)(1) of this section shall be computed as of the date on which the employee first participated personally and substantially in any particular matter, within the meaning of 18 U.S.C. 208(a), relating to the enterprise concerned. The dollar value and percentage so computed shall govern during the entire period that the employee participates in the particular matter unless, after the date of computation, the employee, or other person or organization referred to in paragraph (a) of this section acquires an additional interest in the same enterprise. In the event of such subsequent acquisition, the dollar value and percentage shall be recomputed as of the date of the subsequent acquisition. If, as a result of the subsequent acquisition, the dollar value and percentage computed exceeds the limitations described in paragraph (a)(1) of this section, the general exemption provided therein shall no longer be applicable and an ad hoc exemption must be sought in accordance with the provisions of 18 U.S.C. 208(b)(1).

(b) *Special exemption for special Government employees.* Federal Personnel Manual Chapter 735, Appendix C provides that a special Government employee should in general be disqualified from participating as such in a matter of any type the outcome of which will have a direct and predictable effect upon the financial interests covered by 18 U.S.C. 208. However, that chapter states that the power of exemption may be exercised in this situation "if the special Government employee renders advice of a general nature from which no preference or advantage over others might be gained by any particular person or organization." It is the policy of the Nuclear Regulatory Commission in conformity with the foregoing to exercise the power of exemption pursuant to 18 U.S.C. 208(b) in such situations.

§ 0.735–22 [Removed]

4. Section 0.735–22 is removed.

§ 0.735–23 [Removed]

5. Section 0.735–23 is removed.

§ 0.735–26 [Removed]

6. Section 0.735–26 is removed.

Annex A [Removed]

7. Annex A to 10 CFR part 0 is removed.

Dated at Rockville, Maryland this 12th day of May, 1993.

For the Nuclear Regulatory Commission.

James M. Taylor,

Executive Director for Operations.

[FR Doc. 93–12302 Filed 5–24–93; 8:45 am]

BILLING CODE 7590–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 330

RIN 3064–AB01

Deposit Insurance Coverage

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The FDIC has adopted final amendments to its deposit insurance regulations which specify the extent of insurance coverage provided by the FDIC for deposit accounts in FDIC-insured institutions. Most of the final amendments are required to implement section 311 of the Federal Deposit Insurance Corporation Improvement Act of 1991, which amended various provisions of the Federal Deposit Insurance Act governing deposit insurance coverage. The FDIC is also adopting other amendments to its deposit insurance regulations that the FDIC believes are necessary to further clarify the extent of deposit insurance provided by the Federal Deposit Insurance Act and the FDIC's regulations. The intended effect of this amendment is to make the FDIC's regulations consistent with the statutory provisions governing insurance coverage.

EFFECTIVE DATE: This regulation is effective on June 24, 1993, except §§ 330.1(j), 330.10(a), 330.12(c), 330.12(d)(3), and 330.13 which are effective December 19, 1993.

FOR FURTHER INFORMATION CONTACT: Claude A. Rollin, Counsel, Legal Division (202–898–3985).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

No collections of information pursuant to section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) are contained in this notice. Consequently, no information has been submitted to the Office of Management and Budget for review.

Background

On December 19, 1991, the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA), Pub. L. 102–242, 105 Stat. 2236, was signed into law. Section 311 of FDICIA, inter alia, amended certain provisions of sections 3, 7 and 11 of the Federal Deposit Insurance Act (the FDI Act), 12 U.S.C. 1813, 1817, 1821, which govern the extent of insurance coverage provided by the FDIC for deposits in FDIC-insured institutions. Some of those statutory amendments were effective as of December 19, 1991, others became effective on December 19, 1992, and still other amendments will become effective on December 19, 1993.

On October 13, 1992, the FDIC's Board of Directors authorized the publication, for comment, of certain proposed amendments to the FDIC's deposit insurance regulations (12 CFR part 330). The proposed amendments, which were primarily to implement the statutory changes noted above, were published in the **Federal Register** (57 FR 49026) on October 29, 1992. The proposed amendments were published for a 60-day comment period which closed on December 28, 1992. The FDIC received a total of 144 comment letters that were carefully reviewed and considered by FDIC staff members. The comment letters were from many different sources, including insured depository institutions, bank and thrift holding companies, trade associations, corporations, law firms, members of Congress, government agencies and various other persons and entities. Those comment letters are summarized throughout the following discussion of the final amendments.

Rights and Capacities

Under the amended statutory provisions, deposit insurance is still based upon the ownership "rights and capacities" in which deposit accounts are maintained in FDIC-insured institutions. Although section 311 of FDICIA deleted the "rights and capacities" provisions from section 3(m) of the FDI Act, 12 U.S.C. 1813(m), it

added a similar provision to section 11(a)(1) of the FDI Act, 12 U.S.C. 1821(a)(1). The revised section 11(a)(1) requires the FDIC to aggregate all deposits in a single insured institution that are maintained by the depositor "in the same capacity and the same right." Since this language is virtually identical to the language that was deleted from section 3(m) of the FDI Act, the FDIC will, as proposed, continue to aggregate deposits maintained in the same right and capacity and, conversely, separately insure deposits maintained in different rights and capacities. This means there will be no change in the basic rules which provide that accounts owned in different manners are insured separately (provided that certain requirements are satisfied) and accounts owned in the same ways are added together and insured up to $100,000.

For instance, if an individual has two single ownership accounts at the same insured depository institution, those accounts are added together and insured up to $100,000 in the aggregate. But individual accounts are insured separately from joint accounts and also from some revocable and irrevocable trust accounts, provided that certain regulatory requirements are satisfied.

Authority and Purpose

As proposed, the FDIC amended § 330.2 of its deposit insurance regulations, 12 CFR 330.2, to revise the description of the FDIC's authority to prescribe deposit insurance regulations. The only statutory provisions which speak to the amount of deposit insurance that must be provided by the FDIC for various types of accounts are in sections 3, 7, 8, 11 and 12 of the FDI Act, 12 U.S.C. 1813, 1817, 1818, 1821, 1822. Section 311 of FDICIA deleted the provision in section 3 of the FDI Act, 12 U.S.C. 1813, which expressly authorized the FDIC to clarify and define, by regulation, the extent of deposit insurance coverage resulting from subsections 3(m)(1), 3(p), 7(i) and 11(a) of the FDI Act, 12 U.S.C. 1813(m)(1), 1813(p), 1817(i) and 1821(a), and to define the terms used in those sections. The FDIC does not believe, however, that by deleting this provision, Congress intended to specifically eliminate the FDIC's authority to prescribe deposit insurance regulations. Neither the language nor the legislative history of FDICIA evidences any intent on the part of Congress to drastically reduce the amount of deposit insurance coverage which would be the practical result of revoking the FDIC's deposit insurance regulations. In addition, Congress did not define the vast majority of terms in sections 3, 7 and 11 of the FDI Act, 12 U.S.C. 1813, 1817 and 1821, which govern the amount of deposit insurance coverage provided by the FDIC, including the "rights and capacities" language upon which all of the deposit insurance rules are based. Therefore, the FDIC must continue to define those terms and to provide more specificity concerning the extent of insurance coverage through regulations.

We not the FDICIA did not change the FDIC's authority, in section 9(a) (Tenth) of the FDI Act, to prescribe by its Board of Directors such rules and regulations as it may deem necessary to carry out the provisions of this Act or of any other law which it has the responsibility of administering or enforcing (except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to any other regulatory agency). 12 U.S.C. 1819(a) (Tenth).

Moreover, in section 302(d) of FDICIA, Congress added a new subsection (f)[1] section 10 of the FDI Act, 12 U.S.C. 1820(f), which provides that, except to the extent that authority under this Act is conferred on any of the Federal banking agencies other than the corporation, the Corporation may prescribe regulations to carry out this Act and by regulation define terms as necessary to carry out this Act.

The FDIC continues to believe that it is absolutely necessary to promulgate deposit insurance regulations in order to fulfill its deposit insurance obligations under the FDI Act. The FDIC further believes that the adoption of regulations, after public notice and comment, is the most appropriate way to clarify the rules and define the terms employed in affording deposit insurance coverage under the FDI Act and to provide rules for the recognition of deposit ownership in various circumstances. Since the authority to prescribe deposit insurance regulations has not been expressly and exclusively granted to any other regulatory agency, the FDIC does have the authority to continue to prescribe such regulations. Accordingly, the FDIC has amended § 330.2 of its deposit insurance regulations to modify the description of its authority to prescribe deposit insurance regulations.

[1] Section 302(d) erroneously designates this new subsection as "subsection (f)." FDICIA section 113(a)(1) already redesignated subsection (e) of section 10 of the FDI Act as subsection (f). The FDIC drafted, and submitted to Congress, a technical amendment to take care of this problem but that amendment has not been adopted by the Congress as of this date.

"Pass-Through" Deposit Insurance Coverage for Retirement and Other Employee Benefit Plan Accounts

As proposed, the FDIC has substantially revised § 330.12 of its deposit insurance regulations, 12 CFR 330.12, which concerns employee benefit plan accounts, since section 311 of FDICIA made numerous statutory amendments which affect the deposit insurance provided for employee benefit plan accounts.

The revised § 330.12(a) states the general rule that "pass-through" deposit insurance, in the amount of up to $100,000 per plan participant, shall be provided for the deposits of any employee benefit plan or eligible deferred compensation plan described in section 457 of the Internal Revenue Code of 1986 (457 Plan)[2], provided that the FDIC's recordkeeping requirements, as outlined in § 330.4, are satisfied. The term "employee benefit plan" is defined in § 330.12(g)(1) so as to include all employee benefit plans for which FDICIA mandates that the FDIC provide "pass-through" insurance coverage except for "457 Plans" (which are separately referenced in § 330.12(a)). The term "employee benefit plan" is defined as any plan which is described in section 3(3) of the Employee Retirement Income Security Act of 1974 (ERISA), including any plan described in sections 401(d) of the Internal Revenue Code of 1986.

As noted in the preamble to the proposed rule, this definition is broader than the current definition in that it

[2] "457 Plans" are deferred compensation plans provided by State and local governments, as well as not-for-profit organizations, that qualify under section 457 of the Internal Revenue Code of 1986. Before enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 457 Plan accounts in FSLIC-insured savings and loan institutions were insured on a "pass-through" basis, up to $100,000 per-participant, but in FDIC-insured banks they were insured only up to $100,000 per-plan. As a result of FIRREA, the FDIC enacted uniform deposit insurance regulations which eliminated the "pass-through" insurance regulations which eliminated the "pass-through" insurance coverage for 457 Plan deposits in S&Ls but provided what was, in essence, an 18-month delayed effective date for this provision. Consequently, under the FDIC's rules, all 457 Plan deposits in S&Ls were entitled to "pass-through" insurance until January 29, 1992, or the first maturity date of any certificate of deposit after that date. One of the stated purposes of this delayed effective date or "grandfather" provision was to give Congress time to change the law so as to continue to provide "pass-through" insurance for 457 Plan deposits if it so desired. Congress ultimately opted to change the law by providing, in section 311(b)(1) of FDICIA, that 457 Plan deposits must be insured on a "pass-through" basis. 457 Plan deposits will, however, only be entitled to "pass-through" deposit insurance if they are in insured institutions that, at the time the deposits are accepted, can accept brokered deposits pursuant to section 29 of the FDI Act.

includes plans that have not previously been accorded "pass-through" coverage. For instance, section 3(3) of ERISA includes not only defined contribution and defined benefit plans but also certain employee welfare benefit plans. The deposits of employee welfare benefit plans have traditionally been entitled to deposit insurance only in the amount of up to $100,000 per-plan. Under FDICIA, such plans may be entitled to insurance in the amount of up to $100,000 per-participant.

Whether or not a particular plan will actually be entitled to coverage on a per-participant basis will depend on whether the interests of the participants are ascertainable. This is because the FDIC has decided to retain its current requirement that the interest of each plan participant be a "non-contingent interest" in order to be recognized for deposit insurance purposes. That term is defined, in § 330.12(g)(3) of the regulations, to mean an interest capable of determination without evaluation of contingencies except for those covered by the present worth tables and rules of calculation for their use set forth in § 20.2031–7 of the Federal Estate Tax Regulations (26 CFR 20.2031–7) or any similar present worth or life expectancy tables as may be published by the Internal Revenue Service. This definition is identical to the one in the pre-existing regulations.

The FDIC recognizes, however, that Congress has specifically directed the FDIC to provide "pass-through" deposit insurance for plans qualifying under section 457 of the Internal Revenue Code. Accordingly, even if participants in such plans were deemed to have contingent interests, the FDIC will still provide "pass-through" deposit insurance for "457 Plan" deposits provided that the FDIC's recordkeeping requirements are satisfied.

Brokered Deposit Exception to "Pass-Through" Insurance Coverage

1. General Rule and Exception to General Rule

Section 330.12(b) indicates the exception, as mandated by FDICIA, to the general rule that employee benefit plans can be entitled to "pass-through" deposit insurance. Section 11(a)(1)(D) of the FDI Act, as amended by section 311 of FDICIA, only permits "pass-through" insurance coverage for employee benefit plan deposits (including "457 Plan" deposits) that are in insured institutions that could accept brokered deposits (pursuant to section 29 of the FDI Act) at the time they accepted the employee benefit plan deposits. See, 57 FR 23933–44 (June 5, 1992), amending 12 CFR 337.6. This would exclude undercapitalized institutions and institutions that are "adequately capitalized" but have not obtained a waiver from the FDIC to accept brokered deposits at the time they accepted the employee benefit plan deposits.

There is an exception to this exception which provides that "pass-through" insurance can still be accorded to employee benefit plan deposits in an institution that could not accept brokered deposits if, at the time the deposits are accepted, the institution meets each applicable capital standard. This would apply to "adequately capitalized" institutions that have not applied to the FDIC for permission to receive brokered deposits and those that have applied and been denied a waiver. In addition, the exception only applies if the depositor has received written notification that such deposits at the institution are entitled to insurance coverage on a pass-through basis.

2. Disclosure of Capital Ratios and Capital Category

Since the "pass-through" insurance rules are now dependent, in part, upon the capital categories of insured depository institutions, the issue of whether insured institutions can or must disclose their capital ratios/categories is very important. A number of commenters expressed concern about the availability of capital information generally.

Regulations implementing the Prompt Corrective Action (PCA) statutory provisions of FDICIA, state as follows:

> The assignment of a bank or insured branch under this subpart within a particular capital category is for purposes of implementing and applying the provisions of section 38. Unless permitted by the FDIC or otherwise required by law, no bank may state in any advertisement or promotional material its capital category under this subpart or that the FDIC or any other federal banking agency has assigned the bank to a particular capital category. 12 CFR 325.101(e).

The FDIC has received a number of inquiries concerning whether or not the quoted provision would prohibit insured institutions from disclosing their capital categories to depositors. The FDIC believes that the above-noted provision would not prohibit an insured state nonmember bank [3] from disclosing its capital category to an individual depositor so that the depositor can make a decision about depositing funds in the institution. Moreover, the FDIC believes that this provision would not prohibit the bank from disclosing its total risk-based capital, Tier 1 risk-based capital and leverage capital ratios, to the extent the institution has calculated such ratios, to an individual depositor. In addition, there is no other written FDIC policy or regulation that prohibits the disclosure of this type of capital information by any insured depository institution. Accordingly, we would suggest that pension plan fiduciaries and other interested parties who would like to obtain capital information should first contact their depository institutions directly to obtain such information.

The FDIC recognizes, however, that some employee benefit plan administrators and advisors may not find it sufficient to obtain capital ratios or the capital category directly from an insured institution. A number of commenters indicated that some employee benefit plan administrators may find it necessary to independently verify the capital status of an insured institution in order to satisfy their fiduciary obligations.

There are several sources, other than insured institutions, to obtain information about the capital status of insured institutions. Currently, a depositor can request and obtain (for a fee of $2.50) a particular institution's Consolidated Reports of Condition and Income (Call Reports), which contain balance sheets and income statements as well as some detailed schedule information for individual banks. Call Reports, which are filed on a quarterly basis, are available from the FDIC or the institution's primary federal regulator (the Office of the Comptroller of the Currency for nationally-chartered banks, the Office of Thrift Supervision for savings and loan associations, and the Board of Governors of the Federal Reserve System for banks that are members of the Federal Reserve system). Call Reports provide information necessary to determine an institution's leverage capital ratio and to estimate an institution's risk-based capital ratio.

A depositor can also obtain Uniform Bank Performance Reports, which compare individual banks to their peer groups, from any of the federal bank regulatory agencies. Such reports, which contain capital ratios, are available from the FDIC for a fee of $30.00 each. To order copies of Call Reports and/or Uniform Bank Performance Reports from the FDIC, members of the public should contact:

> Federal Deposit Insurance Corporation, Financial Disclosure Group, Room F–518, 550 17th Street, NW., Washington, DC 20429, Telephone: 1–800–843–1669.

[3] Other federal banking regulators have very similar regulatory provisions but they should be consulted with respect to how this provision is interpreted for institutions for which they are the primary federal regulator.

Reports are also available which provide composite data for all banks within a state (at a cost of $40.00 each) and can be obtained by contacting:

Federal Financial Institutions Examination Council, Uniform Bank Performance Reports, Department 4320, Chicago, Illinois 60673, Telephone: 1–800–843–1669.

Finally, there are a number of private rating services such as Sheshunoff Information Services, Veribank and IDC Financial Publishing, which publish individual bank ratings and frequently include capital ratios. However, the FDIC does not, in any way, endorse or verify the accuracy of the information provided by any of the private rating services.

3. Time of Acceptance

In the preamble to the proposed rules (57 FR 49028, October 29, 1992), it was noted that the relevant time period for determining whether or not a particular insured depository institution can accept brokered deposits is the time at which the institution accepts the employee benefit plan deposit. Therefore, if an institution can accept brokered deposits at the time it accepts an employee benefit plan deposit because it is "well-capitalized" but is subsequently unable to accept brokered deposits because it becomes "undercapitalized," the employee benefit plan deposit would not lose its "pass-through" insurance coverage.

One of the more commonly asked questions since the proposed rules were released is: How often does a depositor have to ascertain the capital status of an insured depository institution? By focusing on "the time such deposits are accepted," the revised section 11(a)(1)(D)(ii) of the FDI Act requires that employee benefit plans determine the capital status of an insured institution each and every time a deposit is made. The FDIC recognizes that this requirement may be quite burdensome for some employee benefit plans which make deposits on a daily, weekly bi-weekly or monthly basis, frequently in many different insured institutions.

Some commenters suggested that perhaps the FDIC should define the term "acceptance" to mean whenever an employee benefit plan first establishes a deposit account (certificate of deposit, money market account, demand deposit account, etc.) with an insured institution. Since the statute speaks in terms of "deposits" being accepted rather than "accounts" being accepted, the FDIC does not find the suggested interpretation to be in accordance with the plain meaning of the statutory language. Moreover, it seems that this approach would circumvent the intent of Congress to cut-off employee benefit plan deposit funding for "undercapitalized" institutions since, under the suggested approach, a $10,000 CD acquired today from a "well capitalized" institution could grow to $10 million and have "pass-through" insurance five years from now even though the institution becomes "critically undercapitalized" two years from now. Accordingly, the FDIC has decided to retain the proposed approach, which was that a deposit is "accepted" anytime funds are received by the bank.

In the preamble to the proposed rule, the FDIC indicated its intent to construe the term "acceptance" to include any rollover or renewal of a time deposit (57 FR 49028, October 29, 1992). Under this approach, the ability of an insured institution to accept brokered deposits at the time any employee benefit plan deposit is rolled over or renewed would determine whether or not that deposit was henceforth entitled to "pass-through" coverage. This is consistent with the FDIC's interpretation under its brokered deposit regulation (12 CFR 337.6) and recognizes the fact that when a CD or other time deposit matures, an employee benefit plan has an opportunity to re-evaluate the capital status of the depository institution.

Of the commenters who addressed this issue, three agreed with the FDIC's proposed approach with respect to rollovers and renewals and six opposed the FDIC's approach. Those commenters not in favor of the proposed approach indicated that including rollovers and renewals would create an unnecessary burden for plan administrators by requiring them to keep detailed records and constantly monitor maturity dates. Although the FDIC is sensitive to the additional burden created by this interpretation, the FDIC believes that if automatic renewals or rollovers were not deemed to be acceptances of new deposits, the intent of Congress to provide "pass-through" insurance coverage for employee benefit plan deposits only in institutions that meet minimum capital requirements could be circumvented. This is because, under the alternative interpretation, employee benefit plan deposits could be automatically rolled over or renewed indefinitely and be entitled to "pass-through" insurance regardless of the capital level of the institution each time the deposit is rolled over or renewed.

The proposed rules did not address the issue of time deposits that mature and are not rolled over or renewed but are converted to demand deposits. Although the FDIC does not believe that this situation is very common, if it does occur, such a deposit would be treated as a new deposit since some of the major terms of the deposit (e.g., maturity date and interest rate) would change.

In the preamble to the proposed rules, we recognized that the application of the "time of acceptance" rule would be particularly difficult for some employee benefit plans given the constant in-flow and out-flow of some employee benefit plan deposits at banks. The FDIC recognized that applying a rule that would require employee benefit plans to verify the capital status of all insured institutions in which they have deposits on a daily basis would be extremely burdensome especially for non-professional or less sophisticated employee benefit plan managers. The problem is that, under a strict reading of the statute, an employee benefit plan that makes deposits at an insured institution on a day in which the institution is "well capitalized," and thus can accept brokered deposits, would be entitled to "pass-through" deposit insurance, but if several weeks later the same institution is "undercapitalized," and thus cannot accept brokered deposits, the employee benefit plan would not be entitled to "pass-through" insurance for any funds deposited by the plan at that time. Since benefits may be paid from the deposits in the interim, it would also be very difficult for the FDIC to determine which of the employee benefit plan's deposits are entitled to "pass-through" deposit insurance.

In recognition of the fact that not all banks calculate their capital ratios on a daily basis and in an effort to minimize the burden on depositors, the FDIC has decided to adopt an approach which is consistent with the approach taken under the Prompt Corrective Action (PCA) regulations. See, 12 CFR part 325, subpart B. Under the PCA regulations, an institution's capital category is, in essence, held constant for an entire calendar quarter unless there is an intervening event which causes the institution to be in a different category. Under the PCA regulations, an institution is deemed to be in a particular capital category when its quarterly Call Report is due. It remains in that category until the next Call Report is due unless and until: (1) There is an intervening Report of Examination which causes the institution to be placed in a different capital category; or (2) a major event occurs which causes the institution to be in a different capital category, the institution sends its primary federal regulator a notice thereof, and the primary regulator sends

a notice back to the institution confirming that the institution's capital category has changed; or (3) the institution receives written notice from its primary federal regulator that it has been reclassified.

By holding an institution's capital category constant for an entire quarter, unless there is an intervening event, employee benefit plan administrators only have to ascertain the capital category of an institution once every three months. Some employee benefit plans administrators have indicated that they are planning to make arrangements with their depository institutions to notify them whenever the institution's capital category changes.

With respect to the effective date of the brokered deposit exception, the statute directs the FDIC not to provide "pass-through" insurance, as of December 19, 1992, for any employee benefit plan deposits in an insured depository institution that, at the time the deposits were accepted, could not accept brokered deposits under section 29 of the FDI Act. Although the final regulations implementing section 29 became effective on June 16, 1992, the FDIC has decided to apply this prohibition only to deposits accepted by insured depository institutions on or after December 19, 1992.

4. Exception to Exception

As noted above, even if an institution cannot accept brokered deposits, it can still provide "pass-through" insurance for employee benefit plan deposits if, at the time the deposit is accepted, it: (1) Meets each applicable capital standard; and (2) the depositor receives a written statement from the institution that such deposits are eligible for insurance coverage on a "pass-through" basis. Quite a few commenters requested additional clarification or expressed concern about the meaning of the term "each applicable capital standard" and the mechanics of the written statement provision.

One issue on which the FDIC specifically requested comment is whether the term "each applicable capital standard" should be interpreted to include not only the minimum leverage and risk-based capital standards established for all insured institutions but also any higher standards established for a particular institution in an order, capital directive, written agreement, or as a condition for approval of an application for deposit insurance. The FDIC indicated in the preamble to the proposed rule that it was inclined to interpret the term "each applicable capital standard" in a narrow sense so as to mean only the leverage and risk-based capital standards established by regulation and/or policy statement of the institution's primary federal regulator.

With the exception of one commenter, all parties who commented on the issue supported the FDIC's interpretation of the term "each applicable capital standard." Commenters generally agreed that the FDIC's interpretation of the term to mean only the leverage and risk-based capital standards established by regulation and/or policy statement of the institution's primary federal regulator was the most appropriate interpretation. The commenter opposing the FDIC's interpretation expressed the opinion that "each applicable capital standard" should mean either the minimum leverage ratio or the minimum risk-based capital ratio. Given the fact that the statute says "each" applicable capital standard, the FDIC believes that it cannot interpret the language in the manner suggested by that commenter.

The FDIC has not found, nor been made aware of, any legislative history which suggests that Congress intended a broader meaning of the term "each applicable capital standard." Moreover, capital directives, orders and agreements requiring institutions to raise additional capital often require institutions to use their "best efforts" to raise capital. With that type of language, it would be extremely difficult (if not impossible) for depositors (i.e., pension plan administrators) to determine whether or not a particular institution was complying with a "best efforts" requirement. In addition, under the brokered deposit rule, an institution that satisfies its minimum regulatory capital requirements is deemed to be "adequately capitalized" regardless of whether or not the institution is required to meet some higher level of capital pursuant to an order, directive or written agreement. 12 CFR 337.6. The final prompt corrective action regulations (57 FR 44866, September 29, 1992) also define an "adequately capitalized" institution to be one that meets its minimum regulatory capital requirements regardless of whether or not the institution is required to meet some higher level of capital pursuant to an order, directive or written agreement. Accordingly, the FDIC has decided to interpret "each applicable capital standard" to mean only the leverage and risk-based capital standards established by regulation and/or policy statement of the institution's primary federal regulator, as originally proposed.

In addition to the depository institution meeting each applicable capital standard, the employee benefit plan depositor must receive a written statement from the institution that the plan's deposits are entitled to "pass-through" deposit insurance coverage in order to take advantage of this exception. Commenters on the proposed rules and others have raised a number of questions about what the written statement concerning "pass-through" insurance coverage should say, how often the written statement must be given to a depositor, to whom the written statement must be given and other implementation questions.

As a preliminary matter, the FDIC wishes to point out that depositors need to obtain the written statement only from "adequately capitalized" institutions that have not obtained a waiver from the FDIC to accept brokered deposits pursuant to section 29 of the FDI Act. Institutions that are "well capitalized" can accept brokered deposits without a waiver from the FDIC and thus can provide "pass-through" insurance coverage for employee benefit plan deposits without providing a written statement to depositors of employee benefit plan funds. Institutions that are "undercapitalized" or fail to meet any of their minimum capital requirements cannot accept brokered deposits or provide "pass-through" insurance for employee benefit plan deposits and thus there is no need for such institutions to give any kind of notice to depositors. The FDIC may, in the future, consider requiring institutions that are unable to accept brokered deposits and thus unable to provide "pass-through" insurance for employee benefit plan deposits to notify depositors of employee benefit plan funds. Any such requirements would only be imposed through a rulemaking proceeding which would afford all interested parties an opportunity to comment on a specific proposal for implementing the requirement.

The FDIC has received a number of inquiries concerning what the written statement should say. Section 11(a)(1)(D)(iii)(II) of the FDI Act, as amended by section 311(b)(1) of FDICIA, merely provides that the written statement must provide that such deposits at such institution are eligible for insurance coverage on a pro rata or "pass-through" basis. The FDIC has not found, nor been made aware of, any legislative history which would provide any further guidance on the language of the notice. In the proposed rules, the FDIC did not provide any standard language or prototype written statement since the FDIC believed that it would be more appropriate to allow each institution to draft its own written statement. The FDIC still believes that it

is not necessary to require that specific language be utilized in the written statement. However, in an effort to provide some guidance for insured institutions who have requested it, the FDIC does not believe that the written statement needs to be lengthy or complicated. A simple notice which indicates that the institution meets each applicable minimum capital requirement, as of a specific date, and thus employee benefit plan deposits made on that date would be entitled to "pass-through" coverage (provided that the FDIC's recordkeeping requirements are satisfied), would, in the opinion of the FDIC, constitute a sufficient statement for purposes of satisfying the statutory provision requiring a written statement.

Another commonly asked question concerns the frequency with which an employee benefit plan has to obtain a written statement from an insured institution in order to preserve "pass-through" deposit insurance coverage. Some commenters suggested that the statement should be given only when an account is first opened. However, the amended statutory provisions indicates that the exception applies if a written statement is given "at the time the deposit is accepted." The statute seems to contemplate that the written statement be given each time a deposit is made which means each time additional funds are deposited in the insured institution. Of course, a depositor of employee benefit plan funds does not have to continue obtaining written statements from an insured depository institution if the institution becomes "well capitalized" or if the institution obtains a brokered deposit waiver from the FDIC.

Another issue concerns the appropriate recipient(s) of the written statement. A number of bankers have inquired whether or not the written statement must be given to plan participants or just the plan trustees/administrators. The FDIC believes that, in general, the "pass-through" statement need be given only to the plan themselves or the person(s) managing or administering the plans since those are, in most cases, the only parties who are the depositors and thus have a direct relationship with the insured depository institution. In the vast majority of cases, the institutions do not have the names and/or addresses of the plan participants. Once an insured institution notifies an employee benefit plan sponsor, manager, or administrator, then the FDIC believes that it is the responsibility of the plan fiduciaries to determine whether or not they have a fiduciary duty to, in turn, notify plan participants. In cases where the insured institution is acting as trustee or plan administrator of an employee benefit plan, then the institution must determine whether it has an obligation, as a fiduciary, to notify plan participants.

Finally, the FDIC wishes to note that when the written statement is given to the depositor, the statement, in and of itself, does not guarantee "pass-through" insurance coverage for the employee benefit plan's deposits. The requirement that an institution meet "each applicable capital requirement" at the time it accepts the employee benefit plan deposit is an independent requirement that must be satisfied in order for the deposit to be entitled to "pass-through" deposit insurance coverage.

Aggregation of Multiple Plans

The FDIC proposed to continue to aggregate, for insurance purposes, the non-contingent interests of an employee in all deposit accounts for employee benefit plans (including "457 plans") established by the same employer or employee organization. The FDIC received no comments on this proposal and has decided to adopt this provision as proposed. The rule, which is stated in § 330.12(c)(1) of the deposit insurance regulations, simply reiterates the pre-existing rule.

In addition, the term "employee organization" would continue to be defined, as it is defined in the current regulations, to mean:

> Any labor union, organization, employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or an employees' beneficiary association organized for the purpose, in whole or in part, of establishing such a plan. 12 CFR 330.12(f)(2).

Aggregation of Self-Directed Retirement Accounts

Section 311(b)(2) of FDICIA amended section 11(a)(3) of the FDI Act, 12 U.S.C. 1821(a)(3), to require the FDIC to aggregate an employee's interests in all deposits made in connection with the following types of retirement plans and insure the total up to $100,000:

> (1) Any individual retirement account described in section 408(a) of the Internal Revenue Code of 1986;
>
> (2) Any eligible deferred compensation plan described in section 457 of the Internal Revenue Code of 1986; and
>
> (3) any individual account plan defined in section 3(34) of the Employee Retirement Income Security Act (ERISA) and any plan described in section 401(d) of the Internal Revenue Code of 1986, to the extent that participants and beneficiaries under such plans have the right to direct the investment of assets held in individual accounts maintained on their behalf by the plans.

To implement this statutory requirement, the FDIC proposed § 330.12(c)(2) which was patterned after the language in FDICIA. Commenters addressing this proposed provision were generally not in favor of the proposed aggregation of an employee's interests in self-directed retirement accounts. Some commenters pointed out that under the pre-existing rules, an employee's interest in each of these types of accounts could potentially be entitled to separate insurance coverage of up to $100,000. With the implementation of the proposed rule, however, if an individual had an interest in each type of account, his/her deposit insurance coverage would be significantly reduced from a total of up to $400,000 to a total of up to $100,000. Some commenters noted that this aggregation rule would reduce insurance coverage on consumers' most important assets, namely, their retirement funds. Commenters went further to suggest that this reduction in coverage could erode consumer confidence and discourage their desire to establish insured retirement funds. Although the FDIC recognizes that the proposed aggregation provision represents a substantial reduction in the existing level of coverage for those types of employee benefit plan deposits, the FDIC believes that the reduction in coverage is mandated by Congress. The regulatory provision in question closely tracks the statutory language to implement a statutory mandate.

A number of commenters asked the FDIC to provide some guidance as to which Keogh and defined contribution plans would be deemed to be "self-directed" and thus subject to the aggregation rules. As noted above, the revised section 11(a)(3) of the FDI Act, 12 U.S.C. 1821(a)(3), requires the FDIC to aggregate, inter alia, Keogh plans and defined contribution plans "to the extent that participants and beneficiaries under such plans have the right to direct the investment of assets held in individual accounts maintained on their behalf by the plan." The quoted language is what is often referred to as "self-directed." A number of commenters asked the FDIC to clarify the meaning of this language. The issue is as follows: If a defined contribution plan allows participants to invest their money in a fund consisting of deposits in various insured institutions or a fund consisting not only of such deposits but

also investments in commercial paper and other short-term investments which are not deposits, is this the type of "self-directed" plan that would come within the above-quoted provision and thus be subject to the aggregation rule?

Some commenters suggested that the FDIC should include this type of plan within the types of plans which are deemed "self-directed." One of the stated rationales is "because ERISA defines the term 'self-directed' to include those plans that permit fund, as opposed to individual investment product selection, the FDIC's regulations should do no less."

One commenter suggested that perhaps a more appropriate term would be "participant directed," which would indicate that "the participant has actually selected a specific institution for his plan deposits or that a plan administrator has advised him that a specific institution has been selected." Yet another commenter pointed out that most employee benefit plans that allow investment choices only provide for the participant to choose a "fund" not a particular bond, certificate of deposit, stock, etc. This commenter opined that "pass-through" coverage should be provided in such cases and denied only where the participant has the right to actually choose the particular instrument.

Although the FDIC has not discovered any legislative history on this point, we must assume that the reason the drafters singled out employee interests in self-directed Keogh plans, self-directed defined contribution plans, IRAs and "457 Plans" to be aggregated, is because plan participants in those types of plans typically know where their funds are deposited and could protect themselves from being uninsured more so than in other types of plans. Accordingly, the FDIC intends to interpret the relevant language to mean that "self-directed" plans, for our purposes, are only those plans where the plan participants have the right to direct funds into a specific insured institution. Funds consisting of deposits in more than one insured institution, investments in a mixture of insured deposits and other non-deposit liabilities, or investments solely in non-deposit liabilities, would be excluded.

Application of "Brokered Deposit" Exception to Self-Directed Retirement Plan Accounts

In the preamble to the proposed rule, the FDIC noted that section 11(a)(3)(A) of the FDI Act, 12 U.S.C. 1821(a)(3)(A), as amended by section 311(b)(2) of FDICIA, which requires the FDIC to aggregate and insure the above-noted retirement plan accounts in the amount of up to $100,000 per-participant, begins with the following words:

> Notwithstanding any limitation in this Act relating to the amount of deposit insurance available for the account of any 1 depositor * * *.

The FDIC proposed to interpret this language to mean that, for self-directed employee benefit plan accounts described in section 11(a)(3)(A) of the FDI Act (except for "457 plan" accounts), pass-through insurance coverage must be provided regardless of whether or not the insured institution could accept brokered deposits at the time it accepted the employee benefit plan deposit.

However, the provision requiring the FDIC to aggregate an individual's interest in the above-noted employee benefit plan accounts is to take effect only on December 19, 1993. Since the brokered deposit exception to "pass-through" insurance coverage (described above) became effective on December 19, 1992, the FDIC's proposed interpretation creates a one-year gap: Self-directed employee benefit plan deposits in undercapitalized institutions would not be entitled to "pass-through" insurance coverage as of December 19, 1992 but would be entitled to such coverage again on December 19, 1993.

The proposed interpretation of the "notwithstanding" language seemed to make sense since it created a situation whereby deposits of self-directed employee benefit plans (where the employees make the investment decisions) would be entitled to "pass-through" insurance coverage regardless of whether or not the depository institution could accept brokered deposits, while deposits of non-self-directed plans would be entitled to "pass-through" coverage only if the depository institution could accept brokered deposits. It appeared that Congress was attempting to make a distinction between funds invested by employers, who presumably are more sophisticated than individual employees and would have to monitor the capital level of the depository institution in order to obtain "pass-through" insurance coverage, and those invested by employees who are presumably less able to monitor the capital levels of the insured depository institution and thus would be entitled to "pass-through" deposit insurance regardless of the capital level of the insured institution.

However, the one-year gap created by this interpretation is illogical. If Congress intended to provide "pass-through" insurance for self-directed employee benefit plan deposits regardless of the capital level of insured institutions, it makes no sense to eliminate the coverage for deposits in "undercapitalized" institutions on December 19, 1992 and reinstate it on December 19, 1993. Either the effective date of the aggregation provision (which contains the "notwithstanding" language) was erroneously stated or the FDIC misinterpreted Congress' intent with respect to that provision.

The FDIC has not found, nor been made aware of, any legislative history which sheds light on this issue. The FDIC staff has had discussions with staff members from the Committee on Banking, Finance and Urban Affairs of the House of Representatives who were involved in the drafting of FDICIA. The Banking Committee staff have indicated that the drafters of the relevant provisions did not intend to create a one-year gap. The staff members indicated that the drafters did not intend the FDIC to treat self-directed employee benefit plans any differently than non-self-directed plans. According to those staff members, the "notwithstanding" language was just a carryover from the existing statutory language and was not intended to exempt self-directed plans from the brokered deposit exception to "pass-through" insurance coverage. Although such opinions expressed by Congressional staff members are certainly not accorded the same weight as legislative history and are, in no way, binding upon the FDIC, they are useful to the FDIC in determining what may have been the intent of the drafters and ultimately the intent of Congress when it adopted the provision.

Given the fact that the one-year gap created by the FDIC's proposed interpretation is illogical and Congress could not have intended an illogical result, the FDIC has reconsidered its proposed interpretation and decided to adopt an alternative interpretation, which is that all employee benefit plan deposits, regardless of the type of plan, are subject to the "brokered deposit" exception to "pass-through" insurance coverage which appears in section 11(a)(1)(D) of the FDI Act, 12 U.S.C. 1821(a)(1)(D), as amended by section 311 of FDICIA.

However, only deposits of employee benefits plans which are entitled to "pass-through" deposit insurance (those that are made in institutions which, at the time the deposits are made, can accept brokered deposits or which are made in "adequately capitalized" institutions that have provided written statements to the depositor assuring "pass-through" coverage) will be subject to the aggregation provision. Deposits of

employee benefit plans that are not entitled to "pass-through" insurance will be aggregated and insured in the amount of up to $100,000 per plan.

As a technical matter, the FDIC will no longer address the deposit insurance provided for IRA and Keogh deposits in a separate section of the FDIC's regulations (those rules were enumerated in § 330.13 of our regulations). Since IRA and self-directed Keogh accounts will no longer be separately insured from each other or from certain other retirement accounts, the FDIC does not believe that a separate section in its regulations for IRA and Keogh accounts is warranted.

Accordingly, the rules governing IRA and Keogh accounts are now included within the general retirement account provisions of § 330.12 of the regulations, 12 CFR 330.12.

Determination of Interests

The FDIC has decided to retain the pre-existing provisions which explain the methods by which an employee's interests in the deposits of a defined contribution or defined benefit plan are determined for insurance purposes. The FDIC is, however, clarifying the existing rules by substituting the word "employee" for "beneficiary." There have been some questions raised about the extent to which a spouse or other person may have an interest in an employee benefit plan deposit upon the failure of an insured institution. Although such persons may be entitled to benefits under an employee benefit plan upon the death or divorce of a plan participant, the FDIC has not historically recognized that such persons have an insurable interest in the deposits of the plan while the plan participant is still alive and married. Accordingly, the FDIC proposed to clarify this point by changing the existing references to the "beneficiary's account balance" in § § 330.12(b)(1) and (2), 12 CFR 330.12(b)(1) and (2), so that they will refer to the "employee's account balance." This proposed change in language, which did not represent any change in the FDIC's existing policy, was not commented on by any of the commenters. The FDIC has decided to adopt the clarifying language change as initially proposed.

Vested Interests

In aggregating participants' interests in certain retirement plan accounts, Congress directed the FDIC to consider only the present vested and ascertainable interest of each participant under [an employee benefit] plan excluding any remainder interest created by, or as a result of, the plan. See, section 11(a)(3)(B) of the FDI Act as amended by section 311(b)(2) of FDICIA. Under the FDIC's pre-existing rules, the interest of each employee in an employee benefit plan, whether vested or unvested, has been insured up to $100,000. By directing the FDIC to recognize only vested interests in certain employee benefit plan accounts, the total amount of insurance coverage available for the accounts of those employee benefit plans will be reduced. The FDIC proposed to apply this limitation to all employee benefit plan accounts that will be, under the amended regulations, entitled to "pass-through" deposit insurance coverage. The FDIC indicated, in the preamble to the proposed rules, that it believed that it would be fairer to apply this rule to all employee benefit plan accounts rather than just to those that are required by Congress to be aggregated. The FDIC pointed out that to do only what Congress mandated would be to recognize both vested and non-vested interests of participants in defined benefit plan accounts (which are not subject to aggregation) but only vested interests in self-directed defined contribution plan accounts. The FDIC specifically requested comment on this approach. In addition, the FDIC indicated that it was particularly interested in receiving any financial data or statistics indicating the amounts or percentages of unvested funds deposited in insured institutions which would be affected by this proposed rule change.

Of the 144 comment letters received by the FDIC, only 11 specifically addressed the issue of providing coverage only for participants' vested interests in employee benefit plan accounts. Most of those commenters (9 of 11) opposed the FDIC's proposed approach of applying the "vested interests only" rule to all types of employee benefit plan accounts. They recommended not going beyond the statutory mandate of recognizing only vested interests of employees in IRA accounts, self-directed Keogh Plan accounts, self-directed defined contribution plan accounts and "457 Plan" accounts. Some commenters asserted that the types of employee benefit plans that were specifically enumerated differ significantly from other types of employee benefit plans in, inter alia, the methods and sources of funding used by the plans, the extent to which participant interests are vested, and the extent of a participant's control over the investment of his or her interest.

The FDIC acknowledges that there are significant differences among different types of employee benefit plans and that it is generally easier to determine an employee's vested interest in a self-directed defined contribution plan than it is to determine an employee's interest in a defined contribution plan. In addition, the FDIC recognizes that its proposal may be more costly and burdensome for both employee benefit plans and insured institutions than following the more limited mandate of Congress. One commenter asserted that the FDIC's proposal would also negatively impact the collateralization requirements for national banks by requiring such banks to collateralize additional funds.

After carefully considering the comment letters and reconsidering the issue, the FDIC has decided to apply the "vested interests only" rule to only those types of employee benefit plan accounts where the application of this rule is mandated. The FDIC recognizes that it would be more difficult for employee benefit plan administrators to determine vested interests of employees in the types of plans that Congress did not require the FDIC to apply the "vested interests only" rule than in plans to which Congress required the FDIC to apply this rule.

Bank Investment Contracts (BICs) and Similar Contracts

The FDIC has decided to amend § 330.13 of its regulations, 12 CFR 330.13, so that it states the rules applicable to Bank Investment Contract (BICs) and similar instruments. Under the pre-existing deposit insurance regulations, BICs were treated like any other deposit instruments and were generally insured in the amount of $100,000 per employee benefit plan participant, provided that certain recordkeeping requirements were satisfied. FDICIA directs the FDIC not to assess, nor provide any deposit insurance for, certain benefit-responsive BICs and similar instruments. However, investment contracts without the benefit-responsive features and other types of deposit instruments, such as regular CDs, acquired by employee benefit plans would still be insured.

Section 311(a) of FDICIA provides that any insured depository investment contract between an employee benefit plan and an insured depository institution which expressly permits benefit-responsive withdrawals or transfers shall neither be entitled to deposit insurance nor subject to assessment. The term "benefit-responsive withdrawals or transfers" is defined to mean any withdrawal or transfer of funds (consisting of any portion of the principal and any interest

credited at a rate guaranteed by the insured depository institution investment contract) during the period in which any guaranteed rate is in effect, without substantial penalty or adjustment, to pay benefits provided by the employee benefit plan or to permit a plan participant or beneficiary to redirect the investment of his or her account balance.

The final language of § 330.13 closely tracks the statutory language for the purpose of incorporating this statutory mandate into the deposit insurance regulations.

The FDIC proposed to define the term "employee benefit plan" in exactly the same manner as FDICIA defines the term, which was to say that it would be given the same meaning as the term is given in section 3(3) of the Employee Retirement Income Security Act of 1974 (ERISA) and it includes any plan described in section 401(d) of the Internal Revenue Code of 1986.

One issue raised by several commenters is whether plans established pursuant to section 457 of the Internal Revenue Code, 26 U.S.C. 457 ("457 Plans"), would be included in the definition of "employee benefit plan." Section 3(3) of ERISA provides that the term "employee benefit plan" includes, inter alia, an "employee pension benefit plan." The term "employee pension benefit plan" is defined, in relevant part, to mean "any plan, fund, or program * * * established or maintained by an employer * * * to the extent that * * * such plan fund or program provides retirement income to employees or * * * results in the deferral of income for periods extending to the termination of covered employment or beyond * * *".

Some commenters expressed the opinion that this broad definition would include "457 Plans," most of which are exempt from regulation under ERISA solely as a result of specific jurisdictional restrictions set forth in section 4 of ERISA which limit the scope of ERISA's coverage by excluding certain classes of employee benefit plans, including "governmental plans" (separately defined in section 3(32) of ERISA as any plan "established or maintained * * * by the government of any State or political subdivision thereof * * *"). In addition, some commenters asserted that there is no logical basis for distinguishing between "457 Plans" and other types of employee benefit plans since, unlike ERISA, FDICIA was intended to address risks of deposit insurance coverage (which would be indistinguishable among all types of employee benefit plans) rather than the safety of pension money (which may involve different considerations depending upon the nature of the plan and its sponsor).

Other commenters, however, pointed to a colloquy which took place at the time that both the BIC amendment and the "457 Plan" amendments were adopted by the Subcommittee on Financial Institutions of the House Banking Committee. The sponsor of the "457 Plan" provision (Congressman Barney Frank) and the BIC amendment (Congressman Richard Neal) discussed the potential overlap in the two provisions as follows:

> Mr. Frank: I would ask if I am correct that this would not interfere with a later amendment I intend to offer on 457 plans, contributory retirement plans for public employees. Some people who read the amendment thought that it was broad in stroke.
>
> I think it is clear what we mean with the BICs. For instance, the 457 plan wouldn't be intended to be excluded [from insurance coverage].
>
> I yield to my friend from Massachusetts.
>
> Mr. Neal of Massachusetts: Thank you, Mr. Chairman.
>
> I intend to support your amendment when it comes up. Years ago I helped to implement a deferred compensation plan.
>
> I trust the spirit of your amendment. I intend to support it. My intention was not to interfere with it.
>
> Mr. Schumer: I agree with that. The 457 analog is not to these [meaning BICs] but to the IRAs.
>
> Mr. Frank: Mr. Chairman, I would note that if both amendments pass, when we get to the technical conforming stage, we would make sure there is no potential conflict between them.
>
> Transcript from Executive Session, Consideration of H.R. 1505 before the Subcommittee on Financial Institutions, Committee on Banking, Finance and Urban Affairs, U.S. House of Representatives, 102nd Congress, 1st Sess. (May 1991).

This colloquy suggests that the sponsors of the BIC and "457 Plan" amendments did not intend "457 Plans" to come within the meaning of the term "employee benefit plan" for the purposes of the BIC provision. Since "457 Plans" are not governed by ERISA and the intent of the drafters of the BIC and "457 Plan" amendments did not intend "457 Plans" to be subject to the BIC provisions, the FDIC has decided to specifically exclude "457 Plans" from the definition of "employee benefit plan" in the BIC provision of the regulations (12 CFR 330.13(b)(2)).

As noted in the preamble to the proposed rule, the definition of "employee benefit plan" expressly includes Keogh plans and thus Keogh plans will be subject to the BIC provisions. A number of commenters expressed concern about the application of the BIC provisions to some Keogh plan deposits that allow penalty-free withdrawals in accordance with certain provisions of the Internal Revenue Code. The issue concerns the meaning of the term "benefit responsive withdrawal or transfer." The term is defined in the statute as

> any withdrawal or transfer of funds (consisting of any portion of the principal and any interest credited at a rate guaranteed by the insured depository institution investment contract) during the period in which any guaranteed rate is in effect, without substantial penalty or adjustment, to pay benefits provided by the employee benefit plan or to permit a plan participant or beneficiary to redirect the investment of his or her account balance.

The issue is whether this term would include penalty-free withdrawals from employee benefit plan deposits which are based on penalty-free withdrawals of funds from the underlying Keogh plans that are permitted upon the death or disability of a plan participant or to pay benefits (permitted at age 59½ or required at age 70½) by the Internal Revenue Code.

The FDIC believes that since the Internal Revenue Code permits and then requires distributions upon the occurrence of certain events and banks have historically permitted penalty-free withdrawals from deposits to permit the employee benefit plan to make such distributions, a rule that would now treat such deposit liabilities as having no insurance would be unfair to depositors. A 71 year-old plan participant might be required to decide between a deposit that is uninsured but allows penalty-free withdrawals and one that is insured but imposes a substantial penalty for any type of withdrawal.

In the preamble to the proposed rule, the FDIC indicated that it did not have enough information about current industry forms or practices to distinguish between investment contracts typically acquired by employee benefit plans and regular certificates of deposit. The FDIC indicated its belief, however, that Congress intended only to address benefit-responsive investment contracts typically acquired by employee benefit plans. Therefore, the FDIC specifically requested comment on how it should define the term "investment contract" so as to exclude regular certificates of deposit if appropriate.

Few commenters provided specific suggestions to the FDIC concerning how the term "investment contract" should be defined. Those who commented on the issue generally supported the FDIC's

proposed approach of excluding regular certificates of deposit from the definition of "investment contract."

After much consideration, the FDIC has decided not to adopt a specific regulatory definition of the term "investment contract." Apparently, there are many different versions of BIC-type instruments currently being utilized by employee benefit plans and insured depository institutions and thus it would be very difficult for the FDIC to adopt a definition which encompasses all such instruments but is, at the same time, no over-inclusive. However, the FDIC still believes that Congress did not intend to include ordinary certificates of deposit in the definition. The FDIC believes that an "investment contract" is generally a separately negotiated deposit agreement between an employee benefit plan and an insured depository institution which has terms that differ, in any material respect, from the terms offered by the insured depository institution for certificates of deposit or other time deposits, and moneymarket accounts or other savings accounts, available to individual retail customers of the insured depository institution.

Another issue concerns how the term "substantial penalty or adjustment" should be defined for purposes of the BIC provision. The FDIC proposed to define the term to mean, in the case of a deposit having an original term which exceeds one year, all interest earned on the amount withdrawn from the date of deposit or for six months, whichever is less, or, in the case of a deposit having an original term of one year or less, all interest earned on the amount withdrawn from the date of deposit or three months, whichever is less. This definition was taken from a former provision of part 329 of the FDIC's regulations, 12 CFR part 329, which required insured banks to impose a substantial penalty for early withdrawal of funds placed in time deposits. Although the requirement that banks impose a substantial penalty for early withdrawals was revoked in 1985, the FDIC believes that many banks still choose to assess such a penalty and that the amount of such penalty is determined in accordance with the rule that was revoked.

Although the FDIC specifically requested comment on the manner in which the term "substantial penalty or adjustment" should be defined for this purpose, few commenters provided suggestions on this issue. One commenter did suggest that we recognize the IRS's early withdrawal penalty for non-authorized withdrawals of plan assets (the penalty is 10% of the principal amount withdrawn) as satisfying the "substantial penalty" provision of the BIC provision. That penalty, however, is paid to the United States Treasury (through the Internal Revenue Service), not the insured institution, and penalizes the plan participant for withdrawing money prior to retirement that was permitted to be invested on a tax-deferred basis on the premise that it would be saved for retirement. Moreover, the BIC provision speaks in terms of imposing a penalty for "any withdrawals" not just "unauthorized withdrawals" (which are the only withdrawals subject to the 10% IRS penalty). Accordingly, the FDIC does not believe that it can view the IRS's 10% penalty for unauthorized withdrawals from employee benefit plans as satisfying the "substantial penalty" part of the BIC provision.

As proposed, the final amendments would also change the references to the Internal Revenue Code in our existing regulations so that such references are to the "Internal Revenue Code of 1986" rather than to the "Internal Revenue Code of 1954." These references are being changed in light of the official name change of the Code made by the Tax Reform Act of 1986.

Accounts Held by Insured Institutions in a Fiduciary Capacity

Section 311(b)(3) of FDICIA substantially reduces the level of insurance coverage available for accounts held by an insured institution in a fiduciary capacity. Under pre-existing FDIC rules, when an insured institution held funds as an agent, nominee, guardian, custodian, conservator, trustee or in any other fiduciary capacity, those funds were insured in the amount of up to $100,000 for the interest of each principal or beneficiary and that insurance was separate from the insurance provided for any other accounts maintained by the principals or beneficiaries at the same insured institution. Section 311(b)(3) of FDICIA amended section 7(i) of the FDI Act, 12 U.S.C. 1817(i), so as to still provide insurance coverage for such accounts on a per-beneficiary basis but to eliminate the separate insurance coverage that was provided for the beneficiaries' interests. In other words, a principal's or beneficiary's interest in such an account will be aggregated with other accounts maintained by that person in the same right and capacity at the same insured institution and the total of that principal's or beneficiary's interests will be insured up to $100,000 in the aggregate. However, section 7(i) still provides separate insurance coverage, in the amount of up to $100,000 per-trust estate, whenever an insured institution is acting as trustee under an irrevocable trust established pursuant to a statute or written trust agreement. This separate insurance coverage is provided both for funds deposited within the fiduciary institution itself and for funds deposited by the fiduciary institution in another insured depository institution. As proposed, the FDIC has amended § 330.10(a) of its regulations, 12 CFR 330.10(a), to reflect these statutory changes. The statutory changes have a two-year delayed effective date and thus the regulatory changes will become effective on December 19, 1993.

Unallocated Trust Funds

Finally, the FDIC has decided to revise the description, in 12 CFR 330.10(b)(2), of how to determine the interest of a particular trust estate in the deposits of unallocated trust funds. The FDIC is not changing the manner in which the calculation is performed, nor the amount of deposit insurance that is currently provided for such funds; we are merely attempting to simplify the description of what is admittedly an extremely difficult concept.

The revised regulatory language in § 330.10(b) is exactly as it was proposed.

Notice Requirements

The FDIC's proposed rules included a provision requiring insured institutions to notify all of their depositors of the impending rule changes. The FDIC proposed this customer notification requirement because the FDIC believed that the changes would affect a substantial number of individuals. The FDIC acknowledged, however, that any customer notification requirement would impose a substantial financial and administrative burden on insured institutions. In an effort to minimize that burden, the FDIC proposed requiring insured institutions to send a short one-time notice to each of its depositors, containing the following language:

> In December, 1993, some of the FDIC's deposit insurance rules will change. The rule changes will primarily affect the total amount of coverage which is provided for IRA, Keogh, self-directed employee benefit plan accounts, "457 Plan" accounts and accounts where an insured institution is acting in a fiduciary capacity. If the total of your interests in all accounts at this institution is less than $100,000, the rule changes will not affect you. For further information, contact [insert "your branch office" or some other contact point for the institutional].

As expected, this proposed customer notification requirement generated more comments than any other provision of

the proposed rules. Out of the 144 comment letters received by the FDIC, 101 addressed the notice requirement, with the vast majority of those (88 out of 101) advocating that we change the requirement so that institutions are required to notify only those customers that they believe would be affected by the rule changes. Some commenters suggested that the FDIC should not require any customer notification at all because it would (1) confuse and alarm depositors, particularly individuals not affected by the changes; (2) cost too much to print and mail the notice to all customers; and/or (3) take up too much staff time both in preparing the notice and answering depositor questions generated by the notice. Many bankers indicated that they simply do not need another expense at this time when banks are struggling to become profitable.

The FDIC fully understands and appreciates the concerns expressed by the many commenters. The FDIC still believes, however, the broad scope of the changes and the substantial number of depositors who are likely to be affected by the changes, some customer notification is warranted. The FDIC will make a concerted effort to make affected depositors aware of the rule changes but the FDIC cannot do the job by itself. Insured depository institutions are in the best position to notify depositors since they generally have regular contact with their depositors. The FDIC wishes to maximize the probability that depositors become aware of the rule changes so that they do not unknowingly have uninsured funds in an insured institution. All too frequently, depositors only find out that they have uninsured funds after an insured institution fails.

In the final rules, the language of the required notice has been modified slightly as a result of a change in the FDIC's interpretation of a statutory provision. The notice to depositors is now required to read as follows:

> In December 1993, some of the FDIC's deposit insurance rules will change. The rule changes will primarily affect the total amount of coverage which is provided for IRA, self-directed Keogh plan accounts, self-directed defined contribution plan accounts, "457 Plan" accounts and accounts where an insured institution is acting in a fiduciary capacity. If you do not have these types of accounts, those rule changes will not affect you. For further information, contact [insert "your branch office" or some other contact point for the institution].

In the preamble to the proposed rule, the FDIC said that it would welcome any suggestions concerning alternative means for notifying depositors of the pending rule changes. Specifically, the FDIC requested comment on the feasibility of institutions identifying and notifying only those customers who have deposit accounts that could potentially be affected by the rule changes. As noted above, many of the commenters seized this opportunity to suggest that the FDIC should require the notice to be sent only to affected customers. A number of bankers have indicated that it may be easier and less expensive for some institutions to identify and notify only those customers that would potentially be affected by the rule changes. Other bankers have indicated that it may be easier and less expensive to notify all of their depositors.

In recognition of the burden that this customer notification imposes on insured institutions, the FDIC has decided to give all insured institutions the option of either notifying all of their depositors or identifying and notifying only those depositors who may potentially be affected by the rule changes. If an institution chooses the latter option, the institution must notify all customers who have the types of accounts affected by the rule changes, not just those who have retirement or other accounts that individually, or in the aggregate, exceed the $100,000 limit. The FDIC expects institutions to make a good faith effort to identify and notify all potentially affected customers if the more limited notification procedure is followed.

The FDIC's proposal would have required that this notice be sent to all account holders no later than June 30, 1993 (with certain exceptions). In light of the fact that most of the rule changes do not become effective until December 19, 1993, and the fact that this final regulation is being published later than originally anticipated, the FDIC has decided to extend the deadline for institutions to provide the required notice to their customers to no later than October 10, 1993.

As stated in the preamble to the proposed rules, the FDIC is requiring that this notice be sent to depositors without materially altering its language. However, under the final rule, institutions have the flexibility to include the required notice on the face of account statements, include it as a separate enclosure with account statements, or send it to depositors in a separate mailing. With respect to any depositor who maintains a time deposit and would not otherwise receive a regular monthly or quarterly account statement prior to October 10, 1993, the required notice would have to be sent to said depositor prior to the later of: (1) 60 days before the first maturity date of that time deposit; or (2) October 10, 1993. This provision provides some flexibility to institutions so that they do not have to complete a special mailing to holders of time deposits that would not ordinarily receive an account statement prior to October 10, 1993.

In the preamble to the proposed rule, we also requested comment on the desirability of institutions posting notices (for a limited time period) in all of their branches and main banking facilities, either on a voluntary or mandatory basis, informing depositors of the pending rule changes. Some bankers commenting on this proposal supported this approach. At this point, however, the FDIC has decided not to require or make available any sort of poster explaining the deposit insurance rule changes since many depositors (especially employee benefit plan administrators) may never enter a bank's lobby and such a notice might not be noticeable among the many notices that are already required to be posted in a bank's lobby.

The FDIC is currently studying additional means by which the FDIC can inform the public about the deposit insurance rule changes and is committed to educating the public while being careful not to unduly alarm depositors. The FDIC recognizes that, because of all the recent publicity concerning failures of insured institutions, some depositors are already quite concerned about the safety of their funds in general and, more specifically, the deposit insurance limits. Accordingly, the FDIC will endeavor to make the public aware of the rule changes without generating unnecessary concern among depositors.

Effective Dates

Section 311(c) of FDICIA specifies the effective dates for the statutory changes section 311 makes to the deposit insurance provisions of the FDI Act. The amendments to section 11(a)(1)(B) of the FDI Act (made by section 311(b)(1) of FDICIA), which contain the basic $100,000 insurance limit, require the FDIC to add together all deposits maintained by a depositor in the same capacity and the same right, and which require the FDIC to provide "pass-through" deposit insurance for certain employee benefit plan deposits, became effective upon enactment of FDICIA on December 19, 1991. However, the exception (in section 11(a)(1)(D)(ii) of the FDI Act (as amended by section 311(b)(1) of FDICIA) which prohibits the FDIC from providing "pass-through" insurance coverage for employee benefit plant deposits made in insured

depository institutions that, at the time the deposits are accepted, could not accept brokered deposits, became effective one year after enactment of FDICIA (on December 19, 1992). [See above discussion].

The new paragraph (8) of section 11(a) of the FDI Act, as added by section 311(a)(1) of FDICIA, which concerns Bank Investment Contracts (BICs) and other similar instruments, becomes effective on December 19, 1993. Likewise, the amendments to section 11(a)(3)(A) of the FDI Act, made by section 311(b)(2) of FDICIA, which required the FDIC to aggregate a depositor's interest in all IRA, self-directed Keogh plan, 457 plan and self-directed defined contribution plans becomes effective on December 19, 1993. Finally, the amendments to section 7(i) of the FDI Act made by section 311(b)(3) of FDICIA concerning funds deposited by insured institutions acting in a fiduciary capacity also becomes effective on December 19, 1993.

"Grandfather" Provisions for Time Deposits

Pursuant to section 311(c)(2) of FDICIA, most time deposits made before December 19, 1991 (the date of enactment) which mature after December 19, 1993 will not be subject to the new rules (with certain limited exceptions) until the first maturity date after December 19, 1993. Any rollover or renewal of a time deposit before December 19, 1993 is deemed to be a new deposit which would not be "grandfathered" (it would be subject to the rules then in effect for new deposits).

The FDIC has also adopted its proposal that, with respect to any time deposit made after December 19, 1991 but before December 19, 1993, the rules in effect at the time the deposit is made would govern the amount of insurance available until the first maturity date after December 19, 1993. Any rollover or renewal of a time deposit during that period would be deemed a new deposit which would be subject to the rules then in effect for new deposits. This "grandfather" provision was adopted to give depositors an opportunity to adjust to the new deposit insurance rule changes and to prevent some depositors who have outstanding time deposits when the rules become effective from having to choose between maintaining an uninsured deposit or withdrawing their funds and paying an early withdrawal penalty.

Regulatory Flexibility Act Statement

The Board of Directors of the FDIC hereby certifies that these amendments to part 330 will not have a significant economic impact on a substantial number of small business entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). In light of this certification, the Regulatory Flexibility Act requirements (at 5 U.S.C. 503, 604) to prepare initial and final regulatory flexibility analyses do not apply.

List of Subjects in 12 CFR Part 330

Bank deposit insurance, Banks, banking, Savings and loan associations, Trusts and trustees.

The Board of Directors of the Federal Deposit Insurance Corporation hereby amends part 330 of title 12 of the Code of Federal Regulations as follows:

PART 330—[AMENDED]

1. The authority citation for part 330 is revised to read as follows:

Authority: 12 U.S.C. 1813(l), 1813(m), 1817(i), 1818(q), 1819[Tenth], 1820(f), 1821(a), 1822(c).

2. Section 330.1(j) is revised to read as follows:

§ 330.1 Definitions.

* * * * *

(j) *Trust funds* means funds held by an insured depository institution as trustee pursuant to any irrevocable trust established pursuant to any statute or written trust agreement.

* * * * *

3. Section 330.2 is revised to read as follows:

§ 330.2 Authority and purpose.

Section 311 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA), Pub. L. 102–242, 105 Stat. 2236, amended sections 3, 7 and 11 of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1813, 1817 and 1821, which govern the amount of deposit insurance provided by the FDIC. Section 311 of FDICIA deleted the provision in section 3 of the Federal Deposit Insurance Act which authorized the FDIC to clarify and define, by regulation, the extent of deposit insurance coverage resulting from subsections 3(m)(1), 3(p), 7(i) and 11(a) of the FDI Act, 12 U.S.C. 1813(m)(1), 1813(p), 1817(i) and 1821(a) and to define the terms used in those sections. However, FDICIA did not change the FDIC's authority, in section 9 [Tenth] of the FDI Act, to prescribe by its Board of Directors such rules and regulations as it may deem necessary to carry out the provisions of the FDI Act or of any other law which it has the responsibility of administering or enforcing (except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to any other regulatory agency). Moreover, in section 302(d) of FDICIA, Congress added a new subsection to section 10 of the FDI Act which provides that except to the extent that authority under the FDI Act is conferred on any of the Federal banking agencies other than the Corporation, the Corporation may prescribe regulations to carry out the FDI Act and by regulation define terms as necessary to carry out the FDI Act. The purpose of the regulations in this part is to clarify the rules and define the terms employed in affording deposit insurance coverage under the Act and provide rules for the recognition of deposit ownership in various circumstances.

4. Section 330.10 is amended as follows:

a. In paragraph (b) introductory text, by removing "in a fiduciary capacity" and adding in lieu thereof "in its capacity as trustee of an irrevocable trust"; and

b. By revising paragraphs (a) and (b)(2) to read as follows:

§ 330.10 Accounts held by depository institutions in fiduciary capacities.

(a) *Separate insurance coverage.* Trust funds held by an insured depository institution in its capacity as trustee of an irrevocable trust, whether held in its trust department, held or deposited in any other department of the fiduciary institution, or deposited by the fiduciary institution in another insured depository institution, shall be insured up to $100,000 of each owner or beneficiary represented. This insurance shall be separate from, and in addition to, the insurance provided for any other deposits of the owners or the beneficiaries.

(b) * * *

(2) *Interest of a trust estate in unallocated trust funds.* If funds of a particular trust estate are commingled with funds of other trust estates and deposited by the fiduciary institution in one or more insured depository institutions to the credit of the depository institution as fiduciary, without allocation of specific amounts from a particular trust estate to an account in such institution(s), the percentage interest of that trust estate in the unallocated deposits in any institution in default is the same as that trust estate's percentage interest in the entire commingled investment pool.

* * * * *

5. Section 330.12 is revised to read as follows:

§ 330.12 Retirement and other employee benefit plan accounts.

(a) *"Pass-through" insurance.* Except as provided in paragraph (b) of this section, any deposits of an employee benefit plan or of any eligible deferred compensation plan described in section 457 of the Internal Revenue Code of 1986 (26 U.S.C. 457) in an insured depository institution shall be insured on a "pass-through" basis, in the amount of up to $100,000 for the non-contingent interest of each plan participant, provided that the FDIC's recordkeeping requirements, as outlined in § 330.4, are satisfied.

(b) *Exception.* "Pass-through" insurance shall not be provided pursuant to paragraph (a) of this section with respect to any deposit accepted by an insured depository institution which, at the time the deposit is accepted, may not accept brokered deposits pursuant to section 29 of the Act unless, at the time the deposit is accepted:

(1) The institution meets each applicable capital standard; and

(2) The depositor receives a written statement from the institution indicating that such deposits are eligible for insurance coverage on a "pass-through" basis.

(c) *Aggregation—(1) Multiple plans.* Funds representing the non-contingent interests of a beneficiary in an employee benefit plan, or eligible deferred compensation plan described in section 457 of the Internal Revenue Code of 1986, which are deposited in one or more deposit accounts shall be aggregated with any other deposited funds representing such interests of the same beneficiary in other employee benefit plans, or eligible deferred compensation plans described in section 457 of the Internal Revenue Code of 1986, established by the same employer or employee organization.

(2) *Certain retirement accounts.* (i) Deposits in an insured depository institution made in connection with the following types of retirement plans shall be aggregated and insured in the amount of up to $100,000 per participant:

(A) Any individual retirement account described in section 408(a) of the Internal Revenue Code of 1986 (26 U.S.C. 408(a));

(B) Any eligible deferred compensation plan described in section 457 of the Internal Revenue Code of 1986; and

C. Any individual account plan defined in section 3(34) of the Employee Retirement Income Security Act (ERISA) (29 U.S.C. 1002) and any plan described in section 401(d) of the Internal Revenue Code of 1986 (26 U.S.C. 401(d), to the extent that participants and beneficiaries under such plans have the right to direct the investment of assets held in individual accounts maintained on their behalf by the plans.

(ii) The provisions of this paragraph (c) shall not apply with respect to the deposits of any employee benefit plan, or eligible deferred compensation plan described in section 457 of the Internal Revenue Code of 1986, which is not entitled to "pass-through" insurance pursuant to paragraph (b) of this section. Such deposits shall be aggregated and insured in the amount of $100,000 per-plan.

(d) *Determination of interests—(1) Definded contribution plans.* The value of an employee's non-contingent interest in a defined contribution plan shall be deemed to be the employee's account balance as of the date of default of the insured depository institution, regardless of whether said amount was derived, in whole or in part, from contributions of the employee and/or the employer to the account.

(2) *Defined benefit plans.* The value of an employee's non-contingent interest in a defined benefit plan shall be deemed to be the present value of the employee's interest in the plan, evaluated in accordance with the method of calculation ordinarily used under such plan, as of the date of default of the insured depository institution.

(3) *Amounts taken into account.* For the purposes of applying the rule under paragraph (c)(2) of this section, only the present vested and ascertainable interests of each participant in an employee benefit plan or "457 Plan," excluding any remainder interest created by, or as a result of, the plan, shall be taken into account in determining the amount of deposit insurance accorded to the deposits of the plan.

(e) *Treatment of contingent interests.* In the event that employee' interests in an employee benefit plan are not capable of evaluation in accordance with the rules contained in this section, or an account established for any such plan includes amounts for future participants in the plan, payment by the FDIC with respect to all such interests shall not exceed $100,000 in the aggregate.

(f) *Overfunded pension plan deposits.* Any portion(s) of an employee benefit plan's deposits which are not attributable to the interests of the beneficiaries under the plan shall be deemed attributable to the overfunded portion of the plan's assets and shall be aggregated and insured up to $100,000, separately from any other deposits.

(g) *Definitions of "employee benefit plan", "employee organization" and "non-contingent interest".* For purposes of this section:

(1) The term *employee benefit plan* has the same meaning given to such term in section 3(3) of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. 1002) and includes any plan described in section 401(d) of the Internal Revenue Code of 1986.

(2) The term *employee organization* means any labor union, organization, employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose, in whole or in part, of establishing such a plan.

(3) The term *non-contingent interest* means an interest capable of determination without evaluation of contingencies except for those covered by the present worth tables and rules of calculation for their use set forth in § 20.2031–7 of the Federal Estate Tax Regulations (26 CFR 20.2031–7) or any similar present worth or life expectancy tables as may be published by the Internal Revenue Service.

6. Section 330.13 is revised to read as follows:

§ 330.13 Bank investment contracts.

(a) *General rule.* Any liability arising under any insured depository institution investment contract between any insured depository institution and any employee benefit plan which expressly permits benefit-responsive withdrawals or transfers shall not be treated as an "insured deposit" and thus shall not be entitled to deposit insurance.

(b) *Definitions.* For purposes of paragraph (a) of this section:

(1) *Benefit-responsive withdrawals or transfers* means any withdrawal or transfer of funds (consisting of any portion of the principal and any interest credited at a rate guaranteed by the insured depository institution investment contract) during the period in which any guaranteed rate is in effect, without substantial penalty or adjustment, to pay benefits provided by the employee benefit plan or to permit a plan participant or beneficiary to redirect the investment of his or her account balance. This term excludes penalty-free withdrawals from employee benefit plan deposits which are based on penalty-free withdrawals of funds from an employee benefit plan that are permitted or required pursuant to the Employee Retirement Income Security

Act of 1974 or the Internal Revenue Code.

(2) *Employee benefit plan:*

(i) Has the meaning given to such term in section 3(3) of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. 1002); and

(ii) Includes any plan described in section 401(d) of the Internal Revenue Code of 1986 (26 U.S.C. 401(d)); and

(iii) Excludes any deferred compensation plan described in section 457 of the Internal Revenue Code of 1986 (26 U.S.C. 457).

(3) *Substantial penalty or adjustment* means, in the case of a deposit having an original term which exceeds one year, all interest earned on the amount withdrawn from the date of deposit or for six months, whichever is less; or, in the case of a deposit having an original term of one year or less, all interest earned on the amount withdrawn from the date of deposit or three months, whichever is less.

7. Section 330.15 is revised to read as follows:

§ 330.15 Notice to depositors.

(a) Each insured depository institution shall send, no later than October 10, 1993 (except as provided in paragraph (b) of this section), a notice to each of its depositors or, at the option of the institution, to all depositors having deposit accounts which could potentially be affected by the rules in this part which are effective December 19, 1993, a notice containing the following language:

In December 1993, some of the FDIC's deposit insurance rules will change. The rule changes will primarily affect the total amount of coverage which is provided for IRA, self-directed Keogh plan accounts, self-directed defined contribution plan accounts, "457 Plan" accounts and accounts where an insured institution is acting in a fiduciary capacity. If you do not have these types of accounts, those rule changes will not affect you. For further information contact [insert "your branch office" or some other contact point for the institution].

(b) The language of this notice may not be materially altered in any way. The required notice may be included on account statements, included as a separate enclosure with account statements or it may be sent to all depositors/accountholders in a separate mailing. With respect to any depositor/accountholder who maintains a time deposit and would not otherwise receive a regular monthly or quarterly account statement prior to October 10, 1993, the required notice may be sent to said depositor/accountholder at any time prior to the later of:

(1) 60 days prior to the first maturity date of that time deposit; or

(2) October 10, 1993.

8. Section 330.16 is revised to read as follows:

§ 330.16 Effective dates.

(a) *Delayed effective dates.* Sections 330.1(j), 330.10(a), 330.12(c), 330.12(d)(3) and 330.13 shall become effective on December 19, 1993.

(b) *Time deposits.* Except with respect to the provisions in § 330.12 (a) and (b), any time deposits made before December 19, 1991 that do not mature until after December 19, 1993, shall be subject to the rules as they existed on the date the deposits were made. Any time deposits made after December 19, 1991 but before December 19, 1993, shall be subject to the rules as they existed on the date the deposits were made. Any rollover or renewal of such time deposits prior to December 19, 1993 shall subject those deposits to the rules in effect on the date of such rollover or renewal. With respect to time deposits which mature only after a prescribed notice period, the provisions of this part shall be effective on the earliest possible maturity date after June 24, 1993 assuming (solely for purposes of this section) that notice had been given on that date.

By order of the Board of Directors.

Dated at Washington, DC, this 11th day of May, 1993.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Exeucitve Secretary.

[FR Doc. 93–12227 Filed 5–24–93; 8:45 am]

BILLING CODE 6714–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 90–CE–21–AD; Amendment 39–8586; AD 93–10–06]

Airworthiness Directives; All Piper Aircraft Corporation Model Airplanes Equipped With Wing Lift Struts

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes two airworthiness directives, which currently require repetitively inspecting the wing lift struts and wing lift strut forks for cracks or corrosion on all Piper Aircraft Corporation (Piper) model airplanes equipped with wing lift struts, and replacing any strut or fork found cracked or corroded. The Federal Aviation Administration (FAA) has determined that installing certain wing lift strut and wing lift strut fork designs will eliminate the need for the inspections currently required. This action incorporates the option of repetitively inspecting or replacing the wing lift struts and wing lift strut forks. The actions specified by this AD are intended to prevent in-flight separation of the wing from the airplane caused by corroded wing lift struts or cracked forks.

DATES: Effective July 9, 1993.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of July 9, 1993.

ADDRESSES: Service information that applies to this AD may be obtained from the Piper Aircraft Corporation, 2926 Piper Drive, Vero Beach, Florida 32960. This information may also be examined at the FAA, Central Region, Office of the Assistant Chief Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. Charles Perry, Aerospace Engineer, FAA, Atlanta Aircraft Certification Office, 1669 Phoenix Parkway, suite 210C, Atlanta, Georgia 30349; Telephone (404) 991–2910; Facsimile (404) 991–3606.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations to include an AD that would apply to all Piper model airplanes equipped with wing lift struts was published in the Federal Register on December 7, 1992 (57 FR 57702). The action proposed to require either repetitively inspecting the wing lift struts and wing lift strut forks for cracks or corrosion and replacing any cracked or corroded strut or fork, or replacing the wing lift struts and wing lift strut forks with a new part of certain design. The proposed actions would be accomplished in accordance with Piper Service Bulletin (SB) No. 910A, dated October 10, 1989, or Piper SB No. 528D, dated October 19, 1990.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

Three commenters express their agreement with the section of the proposed action that specifies exemption from repetitive inspections if sealed strut assemblies are installed.

Two commenters oppose the change in repetitive inspection intervals from five years to two years. The FAA maintains that the repetitive inspection interval should be changed to two years

because, within a six-month period, two incidents occurred that were caused by progressive corrosion growth. Both of these airplanes were in compliance with the current AD's and the five-year repetitive inspection interval. The proposed AD is unchanged as a result of these comments.

One commenter requests eliminating the repetitive inspection requirements on struts installed in accordance with Supplemental Type Certificate (STC) SA4635NM. Specifications of that STC call for treating the strut with corrosion impedance preservatives and sealing hermetically. The FAA does not concur because there is no way of knowing the condition of the strut prior to the STC alteration. The proposed rule is unchanged as a result of this comment.

One commenter states that the Maule punch test (as specified in Piper SB 528D and Piper SB 910A) is not a reliable means of detecting corrosion, and could actually damage the strut. The FAA does not concur, and has determined that, if performed properly and thoroughly, the Maule punch test is extremely reliable. Strut wall thicknesses are typically between .035 and .039 inches. The force level generated by the Maule tester produces noticeable denting when the strut wall thickness is less than .024 inches. Struts with wall thicknesses under .024 inches generally indicate corrosion presence. The proposed AD is unchanged as a result of this comment.

Another commenter suggests that, in addition to allowing inspection of the struts in accordance with Piper SB 528D or Piper SB 910A, the proposed AD allow inspection in accordance with Piper SB 528B, dated March 10, 1978. Piper SB 528B specifies strut inspection without removing the struts. The commenter states that the accomplishment of Piper SB 528D or Piper SB 910A should only be mandatory if the wing lift struts are removed for strut fork inspection. The FAA does not concur because service history reveals that there is water entering the struts, which goes undetected when the struts are not removed for inspection. The service report of one fatal accident shows that the plane of the fractures and locations and orientations of the most severe areas of corrosion strongly suggested that there was presence of standing water in the struts. The proposed AD is unchanged as a result of this comment.

One commenter disagrees with the initial compliance of 30 calendar days because there is not two full years credit given if the struts have been inspected as required by AD 77–03–08. In addition, the commenter stresses that this initial compliance period may add airplane damage that could occur during strut and fork disassembly, and has the potential for lack of maintenance facilities available for inspections and potential unavailability of parts if the manufacturer received an influx of orders. The commenter suggests that the initial compliance of the proposed AD be revised to allow the operator to inspect: (1) The lift struts two calendar years after the last inspection required by AD 77–03–08; and (2) the forks 500 hours time-in-service (TIS) after the last inspection required by AD 81–25–05. The FAA concurs that credit should be given for the inspections required by the current AD's and has revised the initial compliance of each inspection to include: (1) Struts—within the next 30 calendar days after the effective date of this AD or 2 calendar years after the last inspection accomplished in accordance with AD 77–03–08, whichever occurs later; and (2) forks—within the next 100 hours TIS after the effective date of this AD or 500 hours TIS after the last inspection accomplished in accordance with AD 81–25–05, whichever occurs later. The FAA maintains the 30 day compliance time on the struts so airplanes that have not been inspected for two to five calendar years per AD 77–03–08 are not inadvertently grounded by the two-calendar-year after the last inspection compliance time, while still giving two years credit for previously accomplished inspections.

No comments were received on the proposed rule or the FAA's determination of the cost to the public.

After careful review of all information including the comments discussed above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed except for the revision of the initial compliance times and minor editorial corrections. The FAA has determined that these revisions and minor corrections will not change the meaning of the AD nor add any additional burden upon the public than was already proposed.

The FAA estimates that 22,000 airplanes in the U.S. registry will be affected by this AD, that it will take approximately 8 workhours per airplane to accomplish the required inspections, and that the average labor rate is approximately $55 an hour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $9,680,000. AD 77–03–08 currently requires the same inspections on the wing lift struts and AD 81–25–05 currently requires the same inspections on the wing lift strut forks. Both of these AD's would be superseded by this action, but the cost impact of the initial inspections required by this action upon U.S. operators would be the same ($9,680,000) as is currently required by the superseded actions. The only difference between the requirements of the superseded AD's and the required AD is the option of eliminating or reducing the number of repetitive inspections by installing certain wing lift struts and wing lift strut forks.

The compliance times for the required strut inspections or replacements are presented in calendar time instead of hours time-in-service (TIS). The FAA has determined that a calendar time for the strut inspections or replacements is most desirable because operators of the affected airplanes have already established inspection programs for the struts through AD 77–03–08, Amendment 39–2833. In addition, the strut inspections are to detect corrosion, and corrosion can occur regardless of whether the airplane is in flight. For these reasons, the compliance times for the strut inspections or replacements are presented in calendar time. The compliance time for the fork inspections or replacements is presented in hours TIS.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action: (1) Is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption ADDRESSES.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39

of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§39.13 [Amended]

2. Section 39.13 is amended by removing AD 77–03–08, Amendment 39–2833, and AD 81–25–05, Amendment 39–4276, and adding the following new AD:

93–10–06 Piper Aircraft Corporation: Amendment 39–8586; Docket No. 90–CE–21–AD. Supersedes AD 77–03–08, Amendment 39–2833, and AD 81–25–05, Amendment 39–4276.

Applicability: The following model and serial number airplanes, certificated in any category:

Models and Serial Numbers

J–2 Series
500 through 1975
J–3, NE–1, and L–4
All serial numbers
J–4 Series
4–401 through 4–1649
J–5, J–5C, L–14, AE–1, and HE–1 Series
5–1 through 5–1389
PA–11 Series
11–1 through 11–1678
PA–12 Series
12–1 through 12–4036
PA–14 Series
14–1 through 14–523
PA–15
15–1 through 15–388
PA–16
16–1 through 16–736
PA–17
17–1 through 17–215
PA–18 and PA–18A
18–1 through 18–8309025, 1809001 through 1809032, and 1809034 through 1809040
PA–19
19–1, 19–2, and 19–3
PA–20 Series
20–1 through 20–1121
PA–22 Series
22–1 through 22–9848
PA–25 Series
25–1 through 25–8156024

Compliance: Required as indicated, unless already accomplished.

To prevent in-flight separation of the wing from the airplane caused by corroded wing lift struts or cracked forks, accomplish the following:

(a) Within the next 30 calendar days after the effective date of this AD or within two calendar years after the last inspection accomplished in accordance with AD 77–03–08, whichever occurs later, remove the wing lift struts in accordance with the applicable maintenance manual, and accomplish the actions of either paragraph (a)(1), (a)(2), (a)(3), or (a)(4) below:

(1) Inspect the wing lift struts for corrosion in accordance with the instructions in either Piper Service Bulletin (SB) No. 528D, dated October 19, 1990, or Piper SB No. 910A, dated October 10, 1989, as applicable.

Note 1: Inspection methods such as x-ray or boroscope may be utilized provided they are approved as an alternative method of compliance in accordance with the procedures specified in paragraph (f) of this AD.

(i) If corrosion is not found, reinspect at intervals not to exceed 2 calendar years.

(ii) If corrosion is found, prior to further flight, accomplish either paragraph (a)(2), (a)(3), or (a)(4) of this AD.

(iii) If holes have been drilled in sealed struts to attach cuffs, door clips, or other hardware, reinspect the wing lift struts at intervals not to exceed 2 calendar years.

(2) Install original equipment manufacturer (OEM) part number wing lift struts or FAA-approved equivalent wing lift struts that have been inspected and found airworthy. Inspect these wing lift struts as specified in paragraph (a)(1) of this AD at intervals not to exceed 2 calendar years.

(3) Install new sealed wing lift strut assemblies (part numbers as specified in Piper SB No. 528D or Piper SB No. 910A) or Univair FAA Parts Manufacturer Approved (PMA) equivalent wing lift strut assemblies on each wing.

Note 2: These new sealed wing lift strut assemblies contain both a sealed strut and redesigned fork.

(4) Install F. Atlee Dodge wing lift struts in accordance with the instructions to Supplemental Type Certificate (STC) SA4635NM, and inspect the wing lift struts as specified in paragraph (a)(1) of this AD at intervals not to exceed 5 calendar years.

(b) Within the next 100 hours time-in-service (TIS) after the effective date of this AD or within 500 hours TIS after the last inspection accomplished in accordance with AD 81–25–05, whichever occurs later, remove the wing lift strut forks and accomplish the actions of either paragraph (b)(1), (b)(2), (b)(3), or (b)(4) below:

(1) Inspect the wing lift strut forks using currently approved magnetic procedures.

(i) If no cracks are found, reinspect at intervals not to exceed 500 hours TIS and replace the lift strut forks at the time specified in either paragraph (b)(1)(i)(A) or (b)(1)(i)(B) below:

(A) If airplane is or has been equipped with floats, upon the accumulation of 1,000 hours TIS.

(B) If airplane has never been equipped with floats, upon the accumulation of 2,000 hours TIS.

(ii) Replacement parts shall be of the same part number of the existing part and shall be manufactured with rolled threads or an FAA-approved equivalent part. Lift strut forks manufactured with machined (cut) threads shall not be utilized.

(iii) If cracks are found, prior to further flight, install forks as specified in either paragraph (b)(2), (b)(3), or (b)(4) of this AD.

(2) Install OEM part number wing lift strut forks that have been inspected and found airworthy. Reinspect using currently approved magnetic procedures at intervals specified in paragraph (b)(1) of this AD.

(3) Install new sealed wing lift strut assemblies (part numbers as specified in Piper SB No. 528D or Piper SB No. 910A) or Univair FAA PMA equivalent wing lift strut assemblies on each wing. The installation of these assemblies may have already been accomplished in accordance with paragraph (a)(3) of this AD.

(4) Install F. Atlee Dodge wing lift strut forks in accordance with the instructions to STC SA4635NM.

(c) The installation of new sealed wing lift strut assemblies as specified in paragraphs (a)(3) and (b)(3) of this AD is considered terminating action for the repetitive inspection requirement of this AD.

(d) The installation of F. Atlee Dodge wing lift strut forks as specified in paragraph (b)(4) of this AD is considered terminating action for the repetitive inspection requirement of paragraph (b)(1) of this AD.

(e) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(f) An alternative method of compliance or adjustment of the initial or repetitive compliance times that provides an equivalent level of safety may be approved by the Manager, Atlanta Aircraft Certification Office, 1669 Phoenix Parkway, suite 210C, Atlanta, Georgia 30349. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Atlanta Aircraft Certification Office.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Atlanta Aircraft Certification Office.

(g) The inspections required by this AD shall be done in accordance with Piper Service Bulletin No. 528D, dated October 19, 1990, or Piper Service Bulletin No. 910A, dated October 10, 1989, as applicable. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the Piper Aircraft Corporation, 2926 Piper Drive, Vero Beach, Florida 32960. Copies may be inspected at the FAA, Central Region, Office of the Assistant Chief Counsel, room 1558, 601 E. 12th Street, Kansas City, Missouri, or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(h) This amendment (39–8586) supersedes AD 77–03–08, Amendment 39–2833, and AD 81–25–05, Amendment 39–4276.

(i) This amendment (39–8586) becomes effective on July 9, 1993.

Issued in Kansas City, Missouri, on May 17, 1993.

Barry D. Clements,

Manager, Small Airplane Directorate, Aircraft Certification Service.

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