

November 7, 2006

MEMORANDUM TO: Board of Directors

FROM: Mitchell Glassman
Director
Division of Resolutions and Receiverships

SUBJECT: Recommendation That the Board Approve Amendments to 12 C.F.R. Part 313 To Authorize the FDIC To Refer Delinquent Criminal Restitution Debt to the Treasury Offset Program for Collection

I. Recommendation

The attached final rule amends 12 C.F.R. Part 313 to authorize the FDIC to refer delinquent criminal restitution debt for collection to the Treasury Offset Program (TOP). The TOP is administered by the Financial Management Service (FMS) of the Department of the Treasury (Treasury) as authorized by the Federal Debt Collection Improvement Act of 1996 (DCIA), 31 U.S.C. §§ 3701 *et seq.* As amended, Part 313 would:

- add procedures authorizing the Division of Resolutions and Receiverships (DRR) to refer to TOP delinquent criminal restitution debt owed to the FDIC either in its corporate or its receivership capacity; and
- leave unchanged existing procedures in Part 313 authorizing the Division of Finance (DOF) and the Division of Administration (DOA) to refer to TOP certain debts owed to the FDIC in its corporate capacity.

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Concur: _____
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II. Discussion

A. Background

The DCIA, enacted in 1996, expanded the applicability of the former Debt Collection Act (DCA) to include the FDIC and other agencies. Previously, the FDIC was not legally required to comply with the DCA. The principal purpose of the DCIA was to enhance the efficiency and effectiveness of federal agencies' efforts to collect debts owed to the United States.

The DCIA requires an agency, prior to collecting debts by means of administrative offset, to either adopt offset regulations promulgated by the Department of Justice (DOJ) or Treasury or prescribe its own regulations consistent with the DOJ or Treasury regulations. 31 U.S.C. § 3711. These DOJ-Treasury standards, known as the Federal Claims Collection Standards (FCCS), 31 C.F.R. Chapter IX and Parts 900-04, became effective on December 22, 2000.

A principal feature of the DCIA is the creation of TOP, a government-wide database of delinquent debtors that, through computer matching, offsets (reduces) federal payments to recipients who also owe delinquent debt to the United States. FMS then remits the offset amount to the creditor agency – which, in the case of delinquent restitution debt owed to the FDIC, would be the FDIC in either its receivership capacity or its corporate capacity depending on the capacity in which the FDIC holds the restitution order in question.

B. Part 313 as Currently in Effect

In compliance with the DCIA, the FDIC in 2002 promulgated a new Part 313 in Title 12 of the Code of Federal Regulations, Chapter III, Subchapter A, governing the collection of certain debts owed to the FDIC in its corporate capacity. In its present form, Part 313 is very limited in scope. By its express terms it

applies only to debts owed to and payments made by the FDIC acting in its corporate capacity; that is, in connection with employee matters such as travel-

related claims and erroneous overpayments, contracting activities involving corporate operations, debts related to requests to the FDIC for documents under the Freedom of Information Act (FOIA) or where a request for an offset is received by the FDIC from another federal agency.

12 C.F.R. § 313.1(c). At the same time, the FDIC made Part 313 inapplicable to all other types of debt owed to the FDIC, including many other types of debt owed to the FDIC in its corporate capacity as well as all debt owed to the FDIC in its receivership capacity. Thus, Part 313 further states that

It does not apply to debts owed to or payments made by the FDIC in connection with the FDIC's liquidation, supervision, enforcement, or insurance responsibilities

Id.

Part 313 also delegated to the Directors of DOF and DOA the authority to make referrals to TOP of the eligible debt owed to the FDIC in its corporate capacity. Under Part 313, when the Director of DOF or the Director of DOA decides to refer debt of the type allowed by Part 313 to TOP, the Director first must comply with the procedural standards for collecting such debts specified in Part 313, which are patterned after the FCCS. These standards generally provide for the following: prompt demand for payment of the debt; upon the debtor's request for a final agency determination, verification of the existence and amount of the debt; standards for collecting the debt in installments; assessment of interest, penalties, and administrative costs on delinquent debt; standards for compromising overdue debt; standards for determining whether to suspend or terminate collection action; reporting delinquent debt to consumer reporting agencies; and requirements for the sale of delinquent debts to third parties. The Director also must follow the procedures for the specific offset remedy to be utilized, which are found in the following Subparts of Part 313: administrative offset (Subpart B), salary offset (Subpart C), administrative wage garnishment (Subpart D), tax refund offset (Subpart E), Civil Service retirement and

disability fund offset (Subpart F), and mandatory centralized administrative offset (Subpart G). Approximately 90% of all payments offset under TOP come from tax refunds.

C. The Need for the Recommended Amendments

In virtually all instances, the FDIC acquires its criminal restitution orders in its receivership capacity. The FDIC also acquires a small number of restitution orders in its corporate capacity that are unrelated to failed financial institutions. Over time, the FDIC as receiver has transferred a substantial number of restitution orders to the FDIC in its corporate capacity – with the result that criminal restitution debt originally acquired by the FDIC as receiver is today held by the FDIC in both its receivership and corporate capacities. Because Part 313 as presently drafted excludes all of the FDIC’s receivership and liquidation functions (among other functions) from its scope, Part 313 must be amended to authorize the FDIC to collect its criminal restitution debt through TOP.

Currently, the FDIC has 768 criminal restitution orders still open on its books with a face value of \$1.65 billion. DRR expects to submit approximately 550 of these to TOP, which are those orders eligible for referral because they are delinquent and otherwise satisfy TOP’s referral criteria. DRR also expects to submit up to another 1100 of approximately 3000 restitution orders previously closed over the past decade. A large number of these 3000 orders were closed because of the disproportionate expense of further collection efforts. However, FMS charges a fee of only \$17 to run a computer match (and it charges this fee only if the match results in a successful collection of at least \$25).¹ Thus, it likely will be cost effective for the FDIC to

¹ The FMS fee, currently \$15, will increase to \$17 beginning in 2007 and is assessed for any successful offset regardless of the type of offset utilized (tax refund offset, salary offset, social security offset, etc.). For salary offset, FMS charges an additional fee of 3% of the funds collected. However, the FDIC expects to recover most of its offset amounts from tax refund offset, since tax refunds provide 90% of debt collections according to FMS, and thus expects to use salary offset rarely.

reopen many of these orders to refer them to TOP. The estimated 1100 closed orders that DRR expects to refer collectively have an amount still owing of \$675 million. The pool of criminal restitution orders that would be submitted to TOP, therefore, is quite large and totals about 1650 orders. DRR estimates that it would collect an additional \$3.5 million to \$5.5 million as a result of referring these 1650 orders to TOP.

D. Legal Authority for the Recommended Amendments

The legal authority for the recommended amendments is found in the DCIA itself.

Section 3701(b)(1)(D) of the DCIA defines “claim” or “debt” to include:

- (D) any amount the United States is authorized by statute to collect for the benefit of any person.

Criminal restitution debt owed to the FDIC falls squarely within this definition – regardless of whether it is owed to the FDIC in its receivership or corporate capacity. A separate federal statute, enacted in the same year, 1996, as well as an earlier federal statute enacted in 1990, provide very clearly that the United States (through the United States Department of Justice) is primarily responsible for collecting unpaid federal criminal restitution debt. The Mandatory Victims Restitution Act (MVRA) of 1996, 18 U.S.C. §§ 3556 & 3663 *et seq.*, for the first time made imposition of restitution a mandatory component of sentencing for many federal crimes, including banking crimes, and section 3664(m) of the MVRA expressly gives the “United States” the authority to enforce all federal criminal restitution orders. Moreover, the Federal Debt Collection Procedures Act (FDCPA), 28 U.S.C. § 3001 *et seq.*, originally enacted in 1990, is the primary statutory authority for collecting criminal restitution orders and other debt owed to the United States, and the FDCPA explicitly defines “debt” to include “an amount that is owing to the United States on account of . . . restitution.” 28 U.S.C. § 3002(3)(B).

United States Attorney's Offices throughout the United States routinely use the MVRA and FDCPA to collect and enforce criminal restitution orders on behalf of victims named in the orders. In the case of FDIC restitution orders, the named victim is the FDIC as receiver. If DOJ is unable (through lack of funding or staffing, for example) to enforce a restitution order, the victim named in the order may seek to enforce it instead.

DOJ itself is increasingly referring criminal restitution debt to TOP. In August 2005 the Executive Office for United States Attorneys within DOJ entered into a Memorandum of Understanding (MOU) with the Administrative Office of the United States Courts regarding the collection of all criminal restitution debt, including non-federal restitution debt, and it encourages United States Attorneys to utilize TOP as a collection tool. By October 2005, DOJ had submitted to TOP 7018 restitution orders from 35 federal districts with a collective balance owed of over \$71 million. However, none of these referrals have been FDIC orders, and for this reason the FDIC needs its own authority to refer criminal restitution debt to TOP.

III. Summary of the Recommended Amendments

The recommended amendments would modify Part 313 in three respects as follows:

1. A number of individual sections of Part 313 would be amended to provide that Part 313 applies to criminal restitution debt owed to the FDIC in either its corporate or receivership capacities in addition to the corporate debts already identified in § 313.1.
2. Section 313.4 would be amended to have the Board delegate to the Director of DRR authority to refer delinquent criminal restitution debt to TOP.
3. A new § 313.125 would be added to Subpart E, the Tax Refund Offset regulations, to clarify that duplicate notice to a debtor is not required if notice and an opportunity for review regarding his or her debt previously has been provided to that debtor. This

provision is identical to the existing § 313.28 found in the Administrative Offset regulations in Subpart B. While § 313.28 arguably already applies to Subpart E (because tax refund offset is generally considered to be a form of “administrative” offset), we recommend adding the new § 313.125 to eliminate any possible uncertainty on this point.

The recommended amendments would leave intact the current delegations of authority in § 313.4 to the Directors of DOF and DOA to administer the regulations to collect certain debt owed to the FDIC in its corporate capacity. This pre-existing authority would not be co-delegated to the Director of DRR. Concomitantly, the recommended delegation to refer criminal restitution debt to FMS would be a delegation exclusively to the Director of DRR and would not be co-delegated to the Director of DOF or to the Director of DOA.²

IV. Inapplicability of Part 313 to Other FDIC Functions

As previously noted, Part 313 currently applies only to certain debts owed to the FDIC in its corporate capacity and explicitly does not apply to the FDIC’s “liquidation, supervision, enforcement, or insurance responsibilities.” The FDIC promulgated Part 313 in 2002 in this limited manner to avoid having deposit insurance payments made by the FDIC in its corporate capacity and debt on delinquent loans and other assets owed to the FDIC in its receivership capacity subject to the offset and debt collection provisions of the DCIA. Following enactment of the DCIA in 1996, the FDIC and Treasury engaged in an extended discussion about this issue. Treasury ultimately conceded that receivership debts are not subject to the debt collection or offset provisions of the DCIA, but it continued to press the applicability of those provisions to

² The delegations of authority in section 313.4, as amended, to the Directors of DOF, DOA, and DRR include the authority to take any administrative action necessary to refer delinquent debt to TOP and thus include authority to sign, on behalf of the FDIC, the “Certification Agreement” that is required by FMS before an agency like the FDIC is authorized to refer debt to TOP.

deposit insurance payments and to assets purchased by the FDIC as corporate liquidator. To date, however, Treasury has taken no further action to enforce its views.

The recommended amendments to Part 313 do not represent any revision to the FDIC's position regarding deposit insurance payments and delinquent loan debt held by failed financial institutions. The amendments merely treat one unique type of receivership and corporate liquidation debt – criminal restitution debt – as a limited exception to Part 313's general proscription that debt owed to the FDIC as receiver or in its corporate liquidation capacity is not subject to the DCIA. The amendments do so based on the clear legal authority found in the DCIA's definition of "debt" as noted previously. No other category of receivership debt is explicitly defined as "debt" in the DCIA.

It also must be kept in mind that federal agencies have no authority to refer debt to TOP unless they first either adopt DOJ-Treasury's FCCS regulations or promulgate their own regulations based on the FCCS. The recommended amendments give the FDIC only the authority to refer criminal restitution debt (while preserving the FDIC's existing authority to refer certain corporate debt) to TOP and at the same time make it clear that Part 313 does not apply to any other type of debt. Accordingly, if the recommended amendments become effective, the FDIC would continue to lack authority to submit, and FMS would continue to lack authority to accept, for offset any delinquent debt not explicitly allowed by Part 313.

We also have obtained assurances from FMS staff responsible for administering the FMS offset program that, if the FDIC refers criminal restitution debt to FMS for collection, FMS has no interest in re-asserting its earlier position that other types of debt currently excluded from Part 313 must be referred also. FDIC staff from both the Legal Division and DRR have met twice at length with the FMS staff responsible for administering TOP to review the FDIC staff's proposal

to refer criminal restitution debt to FMS. These meetings have been preceded and followed by numerous telephone calls between FMS and FDIC staff. Throughout these discussions, FMS has assured the FDIC that it has no intention of using the FDIC's referral of criminal restitution debt as a basis for insisting that other types of debt currently excluded by Part 313 be referred to FMS as well. Indeed, FMS has further assured the FDIC that it is free to refer some but not all criminal restitution debt to TOP in its discretion and that, even with respect to debt that is referred to FMS for offset, the FDIC may continue to work to collect that debt, including negotiating a settlement of that debt, even after referring it to FMS.

V. Effective Date

As was the case with Part 313 when it was originally promulgated in 2002, the attached proposed amendments to Part 313 are being recommended as a Final Rule to become effective without the need for prior public notice and an opportunity to comment. The Administrative Procedure Act does not require prior notice and comment when a rule relates solely to agency "procedure, or practice." 5 U.S.C. § 553(b)(3)(A). Furthermore, although in 2002 the effective date of Part 313 was delayed for 30 days, there is no legal requirement for a delayed effective date, and we see no practical reason to delay the effective date of the recommended amendments. Accordingly, we recommend that the amendments be made effective immediately upon publication in the Federal Register.

VI. Continued Compliance with the FCCS

If the Board adopts the recommended amendments, the FDIC debt collection and administrative offset regulations would remain consistent with the FCCS promulgated by Treasury and DOJ at 31 C.F.R. Chapter IX and Parts 900-04.