[6741-01-P]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 330

RIN 3064-AD37

Deposit Insurance Regulations; Unlimited Coverage for Noninterest-bearing Transaction Accounts; Inclusion of Interest on Lawyers Trust Accounts

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final Rule.

SUMMARY: The FDIC is adopting a final rule amending its deposit insurance regulations to implement an amendment to section 11(a)(1)(B)(iii) of the Federal Deposit Insurance Act (FDI Act), as added by section 343 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203), that includes Interest on Lawyers Trust Accounts ("IOLTAs") in the definition of "noninterest-bearing transaction account" for purposes of providing unlimited deposit insurance for such accounts for two years starting December 31, 2010.

EFFECTIVE DATE: The final rule is effective [insert date of publication in the Federal Register].

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SUPPLEMENTARY INFORMATION:

I. Background

On November 15, 2010, the FDIC published a final rule ("November final rule")[1] to implement section 343 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Section 343").[2] Section 343 amended the deposit insurance provisions of the FDI Act (12 U.S.C. 1821(a)(1)) to provide temporary separate insurance coverage for noninterest-bearing transaction accounts. The November final rule followed the definition of *noninterest-bearing transaction account* in Section 343. Section 343 defined a noninterest-bearing transaction account as "a deposit or account maintained at an insured depository institution with respect to which interest is neither accrued nor paid; on which the depositor or account holder is permitted to make withdrawals by negotiable or transferable instrument, payment orders of withdrawal, telephone or other electronic media transfers, or other similar items for the purpose of making payments or transfers to third parties or others; and on which the insured depository institution does not reserve the right to require advance notice of an intended withdrawal."

[1] 75 Fed. Reg. 69577 (Nov. 15, 2010).
[2] Public Law 111–203 (July 21, 2010).

In the November final rule, the FDIC noted that, unlike the definition of *noninterest-bearing transaction account* in the FDIC's Transaction Account Guarantee Program ("TAGP"), the Section 343 definition did not include NOW accounts (regardless of the interest rate paid on the account) or IOLTAs. Therefore, neither NOW accounts nor IOLTAs were within the November final rule's definition of *noninterest-bearing transaction account*.

The November final rule included disclosure and notice requirements as part of the implementation of Section 343. These included, among other requirements, the requirements that: (1) insured depository institutions ("IDIs") post a prescribed notice in their main office, at each branch and, if applicable, on their Website that indicated that noninterest-bearing transactions accounts do not include NOW accounts or IOLTAs; and (2) IDIs then participating in the TAGP notify NOW account and IOLTA depositors that, beginning January 1, 2011, those accounts no longer will be eligible for unlimited protection but would be insured under the general deposit insurance rules.

On December 29, 2010, the President signed an act (the "Act") that amended the definition of *noninterest-bearing transaction account* in Section 11(a)(1)(B)(iii) of the FDI Act. The Act replaced the Section 343 definition with one that explicitly includes IOLTAs. Section 11(a)(1)(B)(iii), as amended, defines the term *noninterest-bearing transaction account* as "a deposit or account maintained at an insured depository institution with respect to which interest is neither accrued nor paid; on which the depositor or account holder is permitted to make withdrawals by negotiable or

transferable instrument, payment orders of withdrawal, telephone or other electronic media transfers, or other similar items for the purpose of making payments or transfers to third parties or others; and on which the insured depository institution does not reserve the right to require advance notice of an intended withdrawal; and a trust account established by an attorney or law firm on behalf of a client, commonly known as an *Interest on Lawyers Trust Account*, or a functionally equivalent account, as determined by the Corporation."

II. The Final Rule

This final rule is in the form of a technical amendment that generally leaves intact the notice requirements of the November final rule, but amends the prescribed notice required by 12 C.F.R. 330.16(c)(1). IDIs must post the revised notice no later than February 28, 2011. Also, this final rule eliminates the requirement that IDIs participating in the TAGP as of December 31, 2010 notify IOLTA depositors that, beginning January 1, 2011, IOLTAs will no longer will be eligible for unlimited protection.

As indicated in informal guidance the FDIC has provided to the industry,[3] IDIs that already have sent the notice required in the November final rule to IOLTA depositors are encouraged, but not required, to send a revised notice to such IOLTA depositors that their funds will be fully insured from December 31, 2010 through December 31, 2012.

[3] *See* FIL-2-2011 (Jan. 21, 2011); *See also*: http://www.fdic.gov/deposit/deposits/changes2.html

III. Administrative Procedure Act

The FDIC invokes the *good cause* exception to the requirement in the Administrative Procedure Act ("APA")[4] that, before a rulemaking can be finalized, it must first be issued for public comment. The FDIC believes that good cause exists for issuing a final rule without providing an opportunity for comment because seeking public comment is "unnecessary," "impracticable," and "contrary to the public interest" under these circumstances.[5]

The Act, signed into law on December 29, 2010, revises Section 11(a)(1)(B) of the Federal Deposit Insurance Act[6] to include IOLTAs within the definition of *noninterest-bearing transaction account* for purposes of providing IOLTAs with temporary unlimited deposit insurance coverage. This amendment is effective December 31, 2010, to coincide with the amendment to the FDI Act providing temporary unlimited deposit insurance coverage to noninterest-bearing transaction accounts generally, as required by Section 343. This final rule amends the FDIC's deposit insurance regulations to reflect this change made by Congress; none of the other regulations affecting the calculation of deposit insurance are changed by the final rule. Additionally, the final rule revises the prescribed notice to reflect that IOLTAs are not excluded from the separate deposit insurance coverage for noninterest-bearing accounts enacted by Congress; this change in the prescribed notice is meant to allow institutions to post the updated prescribed notice immediately so that depositors will be aware of this change in deposit insurance

[4] 5 U.S.C. § 553.
[5] 5 U.S.C. § 553(b)(3)(B).
[6] 12 U.S.C. § 1821(a)(1)(B).

coverage. Finally, the final rule eliminates the requirement that IDIs participating in the TAGP notify IOLTA holders that, as of January 1, 2011, such accounts no longer will be eligible for unlimited protection.

Because the final rule involves mere technical amendments that conform the FDIC's definition of *noninterest-bearing transaction account* to the language of the revised statute, revise the prescribed notice to indicate this change in deposit insurance coverage, and reduce the number of required notifications, the FDIC finds that notice and comment procedures are "unnecessary," and the good cause exception to the APA's notice-and-comment requirement applies. *See, e.g.*, *Gray Panthers Advocacy Comm.* v. *Sullivan*, 936 F.2d 1284, 1290–92 (D.C. Cir. 1991) (regulations that "either restate or paraphrase the detailed requirements" of a self-executing statute do not require notice and comment); *Nat'l Customs Brokers & Forwarders Ass'n* v. *United States*, 59 F.3d 1219, 1223–24 (Fed. Cir. 1995) (notice and comment unnecessary where Congress directed agency to change regulations and public would benefit from amendments).

Additionally, staff believes that a finding of good cause is warranted because it would be "impracticable" and "contrary to the public interest" to delay revising the disclosure requirements to seek public comment on the revision. Because the amendment to the definition of *noninterest-bearing transaction account* was effective two days after enactment of the December 29 Act, it is in the public interest for the Corporation to take immediate steps to make depositors aware of this change in deposit insurance coverage. A delay in distribution of required notices and prescribed lobby disclosures would be

detrimental to this goal, and therefore, complying with formal notice and comment procedures would be "impracticable" and "contrary to the public interest."

Finally, a finding of good cause for waiving the requirement of a 30-day delayed effective date is warranted because of the need for immediate guidance to depositors, which implementation and posting of the prescribed notice would provide. A delayed effective date is unnecessary because the only provision of the final rule requiring institutions to take certain actions – *i.e.*, the change in the prescribed notice – would not be enforced until February 28, 2011.

IV. Regulatory Analysis and Procedure

A. Effective Date

Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 (12 U.S.C. Section 4802(b)) requires, subject to certain exceptions, that regulations imposing additional reporting, disclosure or other requirements take effect on the first day of the calendar quarter after publication of the final rule. One of the statutory exceptions to this requirement is when the regulation is required to take effect on a date other than on the first day of the calendar quarter after publication of the final rule. The effective date of Section 343 is December 31, 2010, and the effective date of the additional amendments to Section 11(a)(i)(B) of the FDI Act is December 31, 2010. Thus, the effective date of the final rule is the *Federal Register* publication date.

B. Paperwork Reduction Act

In accordance with section 3512 of the Paperwork Reduction Act of 1995 ("PRA"), 44 U.S.C. 3501 *et seq.*, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget ("OMB") control number. This final rule modifies existing disclosure requirements in sections 330.16(c)(1) and (c)(2). Specifically, section 330.16(c)(1) revises the language of the "Notice of Changes In Temporary FDIC Insurance Coverage For Transaction Accounts" to be posted by insured depository institutions offering noninterest-bearing transaction accounts in the lobbies of their main office and domestic branches and, if they offer Internet deposit services, on their Websites. Disclosure requirements are typically subject to PRA. However, because the FDIC has provided the specific text for the notice and allows for no variance in the language, the disclosure is excluded from coverage under PRA because "the public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public is not included" within the definition of "collection of information." 5 CFR 1320.3(c)(2). Therefore, the FDIC is not submitting the revised section 330.16(c)(1) disclosure to OMB for review.

This final rule also modifies the existing section 330.16(c)(2). Currently, section 330.16(c)(2) requires IDIs participating in the TAGP to provide individual notices to depositors alerting them to the fact that IOLTAs and low-interest NOWs are not eligible for unlimited coverage under the new temporary insurance category for noninterest-

bearing transaction accounts. Although this final rule will eliminate the requirement for institutions to provide the disclosure to depositors with IOLTAs, any change to current burden estimates is assumed by the FDIC to be negligible because the rule retains the disclosure requirements for low-interest NOW accounts. Since there is no change to the current estimated burden for section 330.16(c)(2), the FDIC is not submitting the revised section 330.16(c)(2) disclosure to OMB for review.

C. Regulatory Flexibility Act

In accordance with section 3(a) of the Regulatory Flexibility Act ("RFA"), 5 U.S.C. 603(a), the FDIC must publish an initial regulatory flexibility analysis with this final rulemaking or certify that the final rule does not have a significant economic impact on a substantial number of small entities. For purposes of the RFA analysis or certification, financial institutions with total assets of $175 million or less are considered to be "small entities." The FDIC hereby certifies pursuant to 5 U.S.C. 605(b) that the final rule will not have a significant economic impact on a substantial number of small entities.

As of June 30, 2010, there were 4,294 IDIs that were considered small entities. As of December 31, 2010, 3,173 of these small IDIs participated in the TAGP. Within this group of small institutions, 618, or 19.5 percent, did not have TAGP eligible deposits as of the June 2010 Report of Condition and Income for banks and the Thrift Financial Report for thrifts (collectively, "June 2010 Call Reports"); thus, they were not required to pay the fee assessed for participation in the TAGP. As to the remaining 2,555 small

entities that had TAGP eligible deposits as of the June 2010 Call Reports, they will no longer be assessed a fee after the termination of the TAGP, and they will not be charged a separate assessment for the new deposit insurance coverage.

The FDIC has determined that under the final rule, the economic impact on small entities will not be significant for the following reasons. Because there is no separate FDIC assessment for the insurance of noninterest-bearing transaction accounts under section 343 of the Dodd-Frank Act, small entities assessed fees for participation in the TAGP will realize an average annual cost savings of $2,373 per institution. All other small entities, whether they participated in the TAGP or not, will gain additional insurance coverage with no separate direct cost. The FDIC asserts that the economic benefit of additional insurance coverage and coverage extension until 2013 outweighs any future costs associated with the temporary insurance of noninterest-bearing transaction accounts.

With respect to amending the disclosures related to Section 343, the FDIC asserts that the economic impact on all small entities participating in the program (regardless of whether they currently pay a fee) is de minimis in nature and is outweighed by the economic benefit of additional insurance coverage.

Accordingly, the final rule does not have a significant economic impact on a substantial number of small entities.

D. The Treasury and General Government Appropriations Act, 1999 – Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Public Law 105-277, 112 Stat. 2681).

E. Small Business Regulatory Enforcement Fairness Act

The Office of Management and Budget has determined that the final rule is not a "major rule" within the meaning of the relevant sections of the Small Business Regulatory Enforcement Act of 1996 ("SBREFA") (5 U.S.C. 801 et seq.). As required by SBREFA, the FDIC will file the appropriate reports with Congress and the General Accounting Office so that the final rule may be reviewed.

F. Plain Language

Section 722 of the Gramm-Leach-Bliley Act (Pub. L. No. 106-102, 113 Stat. 1338, 1471), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC has sought to present the final rule in a simple and straightforward manner, and has previously made revisions to the

proposed rule in response to commenter concerns seeking clarification of the application of the deposit insurance rules.

List of Subjects in 12 CFR Part 330

Bank deposit insurance, Banks, Banking, Reporting and recordkeeping requirements, Savings and loan associations, Trusts and trustees.

For the reasons stated above, 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 – DEPOSIT INSURANCE COVERAGE

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

Authority: 12 U.S.C. 1813(1), 1813(m), 1817(i), 1818(q), 1819 (Tenth), 1820(f), 1821(a), 1822(c).

2. In § 330.1, paragraph (r) is revised to read as follows:

330.1. Definitions.

* * * * *

(r) *Noninterest-bearing transaction account* means—

(1) A deposit or account maintained at an insured depository institution—

(i) With respect to which interest is neither accrued nor paid;

(ii) On which the depositor or account holder is permitted to make withdrawals by negotiable or transferable instrument, payment orders of withdrawal, telephone or other

electronic media transfers, or other similar items for the purpose of making payments or transfers to third parties or others; and

(iii) On which the insured depository institution does not reserve the right to require advance notice of an intended withdrawal; and

(2) A trust account established by an attorney or law firm on behalf of a client, commonly known as an *Interest on Lawyers Trust Account*, or a functionally equivalent account, as determined by the Corporation.

3. Paragraphs (c) (1) and (c) (2) of § 330.16 are revised to read as follows:

§ 330.16 Noninterest-bearing transaction accounts.

* * * * *

(c) * * *

(1) By no later than February 28, 2011, each depository institution that offers noninterest-bearing transaction accounts must post prominently the following notice in the lobby of its main office, in each domestic branch and, if it offers Internet deposit services, on its website:

NOTICE OF CHANGES IN TEMPORARY FDIC INSURANCE COVERAGE FOR TRANSACTION ACCOUNTS

All funds in a "noninterest-bearing transaction account" are insured in full by the Federal Deposit Insurance Corporation from December 31, 2010, through December 31, 2012. This temporary unlimited coverage is in addition to, and separate from, the coverage of at least $250,000 available to depositors under the FDIC's general deposit insurance rules.

The term "noninterest-bearing transaction account" includes a traditional checking account or demand deposit account on which the insured depository institution pays no interest. It also includes Interest on Lawyers Trust Accounts ("IOLTAs"). It does *not* include other accounts, such as traditional checking or demand deposit accounts that may earn interest, NOW accounts, and money-market deposit accounts.

For more information about temporary FDIC insurance coverage of transaction accounts, visit www.fdic.gov.

(2) Institutions participating in the FDIC's Transaction Account Guarantee Program on December 31, 2010, must provide a notice by mail to depositors with negotiable order of withdrawal accounts that are protected in full as of that date under the Transaction Account Guarantee Program that, as of January 1, 2011, such accounts no longer will be eligible for unlimited protection. This notice must be provided to such depositors no later than December 31, 2010.

* * * * *

Dated at Washington DC, this 18th day of January 2011.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary