COMMENTS OF HARVEY SHULMAN
ON
PROPOSED CHANGES TO 12 CFR PART 330 – REVOCABLE TRUST ACCOUNTS

I, Harvey Shulman, a resident of Washington, D.C., hereby submit these comments on December 1, 2008 in support of the proposed changes to 12 CFR Part 330 regarding revocable trust accounts (including Payable On Death, i.e., POD, accounts) that appeared as an interim final rule in the September 30, 2008 Federal Register.

My interest in this matter is as both an account owner at FDIC insured banks and as a named beneficiary of at least another account owner at an FDIC insured bank.

The FDIC deserves congratulations for its proposed changes to 12 CFR Part 330. I urge their acceptance in final form, along with some further minor changes and clarifications, all within the scope of the interim final rule. In particular:

I. As proposed, the final rule should apply to revocable trust accounts in which the beneficiary is a natural person, charity or other non-profit organization, and the concept of "qualifying beneficiary" should be eliminated.

II. As proposed, the final rule should allow for coverage of multiple beneficiaries, but because the FDIC insurance limits have been raised to $250,000 per depositor through December 31, 2009, the maximum amount insured in revocable trust accounts for that period (or longer, if the higher insurance limits are extended) should be the greater of $250,000 per beneficiary or $1,000,000 – rather than the maximum amount of $500,000 which was proposed when the FDIC insurance limits were only $100,000 per depositor.

III. The final rule should clarify that the terms used in 12 CFR 330.10(a) – i.e., an "individual", an "owner" and an "account owner" – and the term used in 12 CFR 330.10(c) – i.e., "natural persons" – all mean the same thing. In addition, the final rule should clarify that when a "sole proprietor" holds title as an account owner or when a "sole proprietor" is a titled beneficiary, then the "sole proprietor" in his or her "individual" capacity is covered by the final rule.

I. Beneficiaries of Revocable Trust Accounts

From personal experience, I wish to offer facts to support the observation made by the FDIC in its comments accompanying the interim final rule that the concept of "qualifying beneficiary" should be eliminated in order to achieve an "easier understanding" of how revocable trust accounts will be handled as well as to achieve greater "fairness"

As to an "easier understanding" of how the FDIC rule applies to POD accounts, I can cite my own experience in opening such accounts. In the past, I have set up a POD account and advised the bank officials that I wished to include my non-spouse domestic partner as a POD beneficiary and to have my account's insurance limits thereby increased above $100,000. I had no problem having my partner's name added years ago. However, what I did not learn until just a few months ago during some recent bank failures when I plowed on-line through pages of the FDIC rule – and apparently what the bank officials themselves did not understand when they set up my account – is that my partner was not a "qualifying beneficiary" within the narrow definition of that term in the old FDIC rule. . Indeed, from reading some of the other comments already filed in this proceeding, many other POD account owners were likewise surprised to find out that when they had added their nieces and/or nephews (or even their grandparents, partners or others) as POD beneficiaries, none of these persons were considered "qualified beneficiaries" for purposes of increased FDIC insurance limits under the old FDIC rule. As the FDIC correctly said in the comments accompanying its rationale for adopting the new interim final rule, "Depositors and bankers [will] no longer need to know who is a qualifying beneficiary and who is not."

The FDIC faced a similar situation in 1999 when it expanded the definition of "qualifying beneficiaries" in order to protect "most depositors who misunderstood" – or were misinformed about – "the rules governing POD accounts" and who, because of such "depositor's confusion", suffered in "a loss of funds". See 64 Fed. Reg. at 15654 and 15655 (April 1, 1999). Although that expansion in 1999 to include parents and siblings as "qualifying beneficiaries" was helpful, my own experience and the experience of others who have already filed comments here makes clear that the 1999 expansion did not solve the problem of "confusion" among depositors and banking officials, and so the changes in the interim final rule are justified to further eliminate continued "confusion".

As to achieving greater "fairness" by eliminating the concept of "qualifying beneficiary", the FDIC has recognized that accounts established on the basis of many different types of relationships should enjoy the increased insurance protections. Indeed, the old FDIC rule that pre-existed the interim final rule was both over-inclusive and under-inclusive. The old rule automatically allowed siblings as "qualifying beneficiaries" even though an account owner might not have had contact with his or her sibling in years or decades – whereas the old rule automatically excluded grandparents and nieces and nephews as "qualifying beneficiaries" even though an account owner might have a vital, ongoing relationship with those relatives. Similarly, the old rule categorically excluded from "qualifying beneficiary" a domestic partner or a good friend with whom an account owner might be living, and co-paying monthly expenses, and co-paying a mortgage loan, and co-owning property – an unfair and illogical exclusion.

For all of these reasons, the concept of "qualifying beneficiary" should be eliminated, as per the interim final rule , and any "natural person" -- or charity or other non-profit organization – should be able to be named as a POD beneficiary with the resultant increase in the FDIC insurance protection for the account holder's POD account.[1]

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[1] Prior to the proposed elimination of the concept of "qualifying beneficiary", the FDIC website relating to EDIE had the following note on it: " **Note:** Spouse only means a person of the opposite sex who is a husband or wife, as defined under the federal Defense of Marriage Act (1 U.S.C. § 7)." Under the interim final rule, the Defense of Marriage Act is irrelevant because domestic partners and persons united in civil unions (whether both persons are of the opposite sex or same sex) come within the category of "friends" – much like nieces, nephews, grandparents and relatives are also "friends". Accordingly, any reference to DOMA in rules or any other FDIC pronouncements that deal with beneficiaries under revocable trust accounts should be eliminated.

II. Maximum Insurance Coverage of $1,000,000

The interim final rule proposed maximum FDIC insurance coverage as follows:

> Under the interim rule, revocable trust account owners with more than $500,000 and more than five beneficiaries named in the trusts are insured for the greater of either: $500,000 or the aggregate amount of all the beneficiaries' interests in the trusts(s), limited to $100,000 per beneficiary.

I agree that it is reasonable for the FDIC to put reasonable limits on the amount of insurance coverage associated with multiple beneficiaries of a revocable trust account. However, at the time the interim final rule was proposed, the FDIC limit for an individual, non-revocable trust account was $100,000. Now that limit has been raised to $250,000 through December 31, 2009, the cap on the insurance limits for POD accounts should be increased above $500,000.

To conform to the new temporary FDIC individual limit of $250,000 – and for as long as such an increased limit remains in effect – the coverage for POD accounts with more than four beneficiaries should be the greater of either $1,000,000 or the aggregate amount of all the beneficiaries' interests in the trust(s), limited to $250,000 per beneficiary. Although one could argue that if there are five (or more) beneficiaries, as provided for the interim final rule, then the cap should be $1,250,000, it would not be unreasonable to have a cap of $1,000,000 based on four beneficiaries, which cap is double the amount proposed in the interim final rule.

To the extent that an increase to the higher limit of $1,000,000 may be criticized by some as too high, there is a practical response: if the limit remains at $500,000, account owners with more than $500,000 will simply move their excess funds to other banks or even move all of their funds to the banks perceived to be the strongest. This swap of funds between banks would do little to benefit the banking system, and instead would only make financial recordkeeping more complicated for account owners who would be unable to keep more than $500,000 in a single POD account in a single bank.

For these reasons, the cap on coverage of POD accounts should be modified as stated above.

III. Individuals, Owners, and Natural Persons Under 12 CFR 330.10

Finally, there is some uncertainty in the interim final rule because of somewhat different language used in different parts of the rule. This uncertainty should be eliminated and, in conjunction with clarifications, the inclusion of "sole proprietors" should be specifically provided for in the rule.

In 12 CFR 330.10(a), reference is made to "the funds owned by an **individual** and deposited into one or more accounts with respect to which the **owner** evidences an intention that upon his or her death" the funds will go to certain beneficiaries. It seems clear that the words "individual" and "owner" are limited to natural persons because the situation of "his or her death" is discussed. See also 330.10(b)'s reference to "the owner's death". However, the word "natural person" is not used in this part of the rule.

In contrast, in conjunction with eliminating the concept of "qualifying beneficiary", 12 CFR 330.10(c) states that a beneficiary for purposes of increased FDIC insurance coverage limits includes a "**natural person**". The word "individual" is not used, thereby leaving the question of whether "individuals" and "natural persons" are the same or different.

From the context of the interim final rule, it appears that "individuals" and "natural persons" are the same, in which case the same word should be used both in 330.10(a) and 330.10(c) – perhaps the word "individual". The first time this word is used in 330.10(a), it may be useful to state the following: "the funds owned by an individual, i.e., a natural person, and deposited into one or more accounts …."

In addition, the final rule should add an explanation that where either the account "owner" and/or a "beneficiary" is engaged in business as a sole proprietor and is identified on the account in his or her business name, the benefits of 12 CFR 330 are not lost. For example, Marci Jones may operate a consulting business as a sole proprietor for which she has a bank account in the name of her business, e.g., "Jones Consulting Services"; the account might alternatively be titled "Marci Jones, dba Jones Consulting Services". The tax ID number for the account might be a social security number or an employer identification number. But the fact remains that for all legal purposes – e.g., income tax liability, employment tax liability, tort liability, etc. – there is no separate legal entity that is a sole proprietorship and Mary Jones, the natural person, is personally responsible for all such liabilities. For that reason, when an account owner or a beneficiary is a sole proprietor, then for FDIC insurance coverage purposes – as with virtually every other aspect of the law – the sole proprietor should be treated no differently than a natural person.

The interim final rule already takes one step in this direction when it explains, in footnote 7, that "If in establishing a POD account, the owner names a living trust as the beneficiary, we will consider the beneficiaries of the trust to be the beneficiaries of the POD account." Thus, the FDIC has shown a willingness to look behind a designated separate legal entity, i.e., a "living trust", and to focus on the "beneficiaries of the trust". By analogy, this principle has even greater relevance where a "sole proprietor" is either the account owner and/or a beneficiary because there is no separate legal entity that constitutes a "sole proprietor".

Further, based on the FDIC website, it appears that the FDIC may in fact already be treating "sole proprietors" as individuals (and natural persons). For example, as part of the information provider online by "EDIE the Estimator", https://www.fdic.gov/edie/fdic_info.html#03, the following appears under the category "Single Accounts": "**4. How are sole proprietorship accounts insured?** These are deposits owned by an unincorporated business, in contrast to a business that is incorporated or a partnership. Deposit accounts owned by a sole proprietor are insured as the single funds of the person who owns the business…." Also, as part of another explanation of "Single Accounts" at http://www.fdic.gov/deposit/deposits/insured/ownership.html, the FDIC provides the following: "**Explanation:** Marci Jones has four single accounts at the same insured bank: three accounts held in her name alone and one account held by her business, which is a sole proprietorship. Deposits owned by a sole proprietorship are insured as the single ownership deposits of the person who owns the business."

As the above FDIC explanations make clear, a “sole proprietor” cannot increase his or her insurance coverage at a bank by opening two accounts, one in his or her own name and the other in the name of the “sole proprietorship”. But just as a “sole proprietor” remains a single natural person and thus cannot increase coverage limits by in effect using different titles for his or her account, the “sole proprietor” should likewise be treated as a single natural person for purposes of being a covered account owner under 12 CFR 330.10(a) and/or a covered beneficiary under 12 CFR 330.10(c). It is important to clarify in the final rule itself how “sole proprietors” will be treated, and it should not be necessary to consult EDIE or other “informal” FDIC pronouncements in order to understand this result. Thus, for example, if a “sole proprietor” who holds title to an account in the name of his or her business, e.g. ,Jones Consulting Services, and if she names as POD beneficiaries her niece, her domestic partner, and her nephew’s “sole proprietorship” (e.g., Tom Jones dba Jones Plumbing), then the final rule should make clear that this situation is no different than if Marci Jones (as the account owner) and Tom Jones (as one of the beneficiaries) were treated as natural persons without regard to their “sole proprietorships”. One should not have to go beyond the text of the rule itself to know with certainty that this is the correct result.

Accordingly, the final rule should explain that “individual” and “natural person” are the same thing, and it should also state that a “sole proprietor” qualifies as a protected account owner and/or beneficiary covered by 12 CFR 330.

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Again, the FDIC is to be congratulated for its important changes in 12 CFR 330. With the above further changes and clarifications, both depositors and financial institutions will be even better protected, consistent with fairness, simplicity and security of our financial system.

Thank you.