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August 28, 2003

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street N.W.
Washington, D.C. 20429
Attention: Comments/Legal ESS

Re: Deposit Insurance Coverage for Revocable Living Trust Accounts
68 *Federal Register* 38645, June 30, 2003

Dear Mr. Feldman:

The American Bankers Association ("ABA") is responding to the proposal by the Federal Deposit Insurance Corporation ("FDIC") to simplify the deposit insurance rules for living trust accounts to make them more understandable to depositors and financial institutions.[1] Our members are keenly interested in this proposal, especially given the recent popularity of living trusts as an estate administration tool. We commend the agency for its ongoing attempts to make sure its deposit insurance rules are understandable.

FDIC's proposal is in response to existing confusion about the coverage of living trust accounts, which has accounted for a disproportionately large percentage of uninsured deposits in recent bank failures as compared to other types of deposit accounts. The culprit is the current requirement that beneficiaries of such trusts unconditionally own the funds upon the owner's death without any qualifications or defeating contingencies. Because many written living trusts provide that the funds *might* belong to the beneficiaries upon the owner's death, such accounts do not qualify for per-beneficiary coverage. Rather, the funds are insured as the individual funds of the owner and are added to any other of the owner's individually owned accounts at the same institution.

[1] The ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership—which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks—makes ABA the largest banking trade association in the country.

FDIC has proposed two alternatives to simplify the deposit insurance coverage for such accounts. Alternative One would provide $100,000 of insurance per qualifying beneficiary whether or not the living trust documents contain defeating contingencies. Alternative Two would provide $100,000 of insurance per owner of the account. In both cases, defeating contingencies would no longer be a factor in determining insurance coverage. Both alternatives would require depositors to certify the existence of a revocable living trust at account opening. Alternative One would further require that the kinship relationships and the ownership interests of the beneficiaries be specified in the deposit account records.

ABA supports Alternative One, but only with significant modification to the recordkeeping requirements. Our members believe that Alternative One would be readily understood by depositors, while at the same time preserving the ability of financial institutions to retain deposits exceeding $100,000 because of the expanded per-beneficiary coverage. Unlike Alternative Two, it avoids the need to change the deposit insurance treatment of existing living trust accounts to conform to a new rule, with the attendant depositor confusion. Finally, the certification requirement in both alternatives poses significant legal and practical problems.

Background

The most common type of revocable trust account is the payable-on-death account that generally consists only of the statement in the deposit account records of the financial institution that the funds go to specifically named qualifying beneficiaries upon the account owner's death. Qualifying beneficiaries are spouses, children, grandchildren, parents, or siblings. Payable-on-death accounts must also satisfy the requirement for no defeating contingencies; however, because there is no formal trust document, this is not a bar to per-beneficiary insurance coverage of these types of informal revocable trust accounts.

By contrast, formal revocable living trusts, which have become more and more popular of late, are formal written trusts that may contain defeating contingencies, such as providing that a beneficiary will receive the funds once he or she attains a certain age.

Alternative One. The first alternative would provide coverage for formal revocable living trusts that parallels the current treatment of payable-on-death accounts. To qualify, the account owners would have to have named specific, qualifying beneficiaries to receive the funds upon the owners' deaths. Under this alternative, if an account owner had both payable-on-death accounts and revocable living trust accounts naming the same beneficiaries, the funds would be aggregated and receive $100,000 per-beneficiary treatment.

Alternative One would require that the institution's deposit account records: 1) indicate in the account title that the funds are held pursuant to a formal revocable trust; 2) certify the existence of a living trust; and 3) name the beneficiaries of the living trust and their ownership. Finally, the proposal seeks comment on whether the deposit account records should contain beneficiary kinship relationships to expedite insurance payouts.

Alternative Two. The second alternative would establish a new category of coverage for formal revocable living trusts and insure such accounts on a per-account owner basis. Each owner of such accounts would be eligible for up to $100,000 of insurance. As with Alternative One, this version would require that the institution's deposit account records: 1) indicate in the account title that the funds are held pursuant to a formal revocable trust; and 2) certify the existence of a living trust. FDIC believes Alternative Two would also expedite payouts to depositors in failure situations because the agency would no longer need to determine the names of beneficiaries and their ascertainable interests in the trust documents.

ABA Position

As noted above, ABA supports Alternative One because we believe that consumers will readily understand the coverage rules. In fact, eliminating the prohibition on defeating contingencies is likely to conform the coverage rules to the expectations (whether or not justified) of existing depositors that their accounts will receive per-beneficiary coverage. Additionally, Alternative One will preserve the ability of financial institutions, particularly community banks, to retain deposits in excess of the insurance limit because of the expanded per-beneficiary coverage. By contrast, having to explain the change in coverage to existing living trust account owners is sure to generate significant confusion, if not downright hostility due to the perception that their deposit insurance coverage is being reduced. Such confusion would seem to be exactly the opposite of what FDIC is trying to achieve.

Recordkeeping Requirements. As discussed below, ABA opposes the requirement that the institution's account records certify the existence of a living trust (in both alternatives) and include beneficiary information.

First, a number of state laws provide statutory protection from liability for third parties when dealing with trustees, so long as the third party does not have actual knowledge that the trustee is exceeding or improperly exercising trust authority.[2]

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[2] For example, Illinois, Michigan, and Wisconsin each have such statutes. *See, e.g.,* 760 Ill. Comp. Stat. 5/8; Mich. Comp. Laws § 700.7404; Wis. Stat.§ 701.19(11).

However, if depository institutions were to comply with the proposed record-keeping requirements, it could be argued that they have imputed knowledge of the trusts and thereby lose the protections afforded by statute. For example, for many years attorneys practicing in Wisconsin as well as the Wisconsin Bankers Association, have strongly discouraged financial institutions that are not specifically in the trust business from reading, reviewing or obtaining customers' trust documents. If an institution is determined to have actual knowledge, it could be held liable by beneficiaries to act in accordance with the terms of the trust.

Although it is common practice in some states to retain a copy of the front and back pages of a living trust, that clearly is not the case in all states. Moreover, as discussed below, ABA strongly believes that FDIC would still have to verify the existence of a living trust and current beneficiaries when they close an institution, thereby negating any need for such information at account opening.

ABA believes there are compelling practical reasons that FDIC should not rely on deposit-account records when closing an institution. First, unlike payable-on-death accounts for which the only document is the institution's account-opening record, living trusts can be lengthy, complicated documents with tiered beneficiaries. Our members report that it is very difficult to get information from accountholders who may be confused by the complexity and terminology of living trust documents.

Moreover, living trusts can be amended or revoked; beneficiaries can be added or removed; contingencies can be fulfilled. However, account owners do not routinely communicate any of these changes to depository institutions. In most cases, it would not even occur to them to notify their institutions.

Nor is it the responsibility of financial institutions to repeatedly contact their customers to determine whether their account information is up to date. To do so would place an unwarranted burden on financial institutions, both from a monetary perspective and from a customer relations perspective. In fact, customers might well perceive such actions as an invasion of privacy.

Although we commend FDIC for seeking to provide expedited payouts to depositors of failed institutions by relying on institutions' account records, ABA believes that FDIC should continue to do exactly what it does today—have the account owner certify the existence of the living trust along with beneficiary, interest, and kinship information *at the time the institution is closed.* Only at that time can FDIC be certain that their actions are based on the current status of the trust.

Conclusion

As discussed above, ABA supports Alternative One with significant modifications. We do not believe the requirements for certification and beneficiary information in the account records are practicable or reliable. Moreover, those requirements may, in some states, serve to eliminate statutory protections provided to third parties dealing with trustees. Finally, we believe FDIC should continue its current practice of ascertaining the existence of a living trust, and beneficiary and kinship information at the time an institution is closed.

If you have any questions, please don't hesitate to contact me.

Sincerely,

Cristeena G. Naser