

in the deposit account records of the depository institution. And fourth, the account must evidence an intent that the funds shall belong unconditionally to the designated beneficiaries upon the owner's death (12 CFR 330.10(a) and (b)).

As noted, the most common form of revocable trust account is the POD account, consisting simply of a signature card. With POD accounts, the fourth requirement for per-beneficiary coverage does not present a problem because the signature card normally will not include any conditions upon the interests of the designated beneficiaries. In other words, the signature card provides that the funds shall belong to the beneficiaries upon the owner's death. In contrast, many living trust agreements provide, in effect, that the funds *might* belong to the beneficiaries depending on various conditions.

The FDIC refers to such conditions as "defeating contingencies" if they create the possibility that the beneficiaries may never receive the funds following the owner's death. In the presence of a defeating contingency, the revocable trust account is not entitled to separate insurance coverage. Rather, the funds are aggregated with the funds in any single-ownership accounts held by the owner at the same insured depository institution and insured to a combined limit of \$100,000 (12 CFR 330.10(c) and (f)).

Living trust accounts started to emerge in the late 1980s and early 1990s. At that time, the FDIC responded to a significant number of questions about the insurance coverage of such accounts, often times reviewing the actual trust agreements to determine whether the requirements for per-beneficiary insurance were satisfied. In the FDIC's review of numerous such trusts, it determined that many of the trusts included conditions that needed to be satisfied before the named beneficiaries would become the owners of the trust assets. For example, some trusts required that the trust assets first be used to satisfy legacies in the grantor's will; the remaining assets, if any, would then be distributed to the trust beneficiaries. Other trusts provided that, in order to receive any benefit under the trust, the beneficiary must graduate from college. Because of the prevalence of defeating contingencies among living trust agreements and the increasing number of requests to render opinions on the insurance coverage of specific living trust accounts, in 1994 the FDIC issued "Guidelines for Insurance Coverage of Revocable Trust Accounts (Including 'Living Trust' Accounts)" (FDIC Advisory Opinion

94-32, May 18, 1994). The Guidelines, which were revised in April 1999 to reflect changes to the regulations (adding parents and siblings as qualifying beneficiaries), provide a general explanation of the insurance coverage for revocable trust accounts and a detailed explanation of how those rules apply to living trust accounts. The subject of defeating contingencies is explained at length in the Guidelines. The Guidelines are available at the FDIC's Web site, [www.FDIC.gov](http://www.FDIC.gov), and are available upon request from the FDIC.

As part of its overall simplification of the deposit insurance regulations, in 1998 the FDIC revised § 330.10 to include a provision explaining the insurance coverage rules for living trust accounts (12 CFR 330.10(f)). That provision includes a definition of defeating contingencies.

Despite the FDIC's issuance of guidelines on the insurance coverage of living trust accounts and its inclusion of a special provision in the insurance regulations explaining the coverage of these accounts, there still is significant public and industry confusion about the insurance of living trusts accounts.

Time has shown that the basic rules on the coverage of POD accounts are not adaptable to living trust accounts. The POD rules were written to apply to signature-card accounts, not lengthy, detailed trust documents. Because living trust accounts and PODs are subject to the same insurance rules and analysis, depositors often mistakenly believe that living trust accounts are automatically insured up to \$100,000 per qualifying beneficiary without regard to any terms in the trust that might prevent the beneficiary from ever receiving the funds. Our experience indicates that in a significant number of cases that is not so. Because of the existence of defeating contingencies in the trust agreement, a living trust account often fails to satisfy the requirements for per-beneficiary coverage. Thus, the funds in the account are treated as the owner's single-ownership funds and, after being added to any other single-ownership funds the owner has at the same institution, insured to a limit of \$100,000. The funds in a non-qualifying living trust account with more than one owner are deemed the single-ownership funds of each owner, with the corresponding attribution of the funds to each owner's single-ownership accounts.

The FDIC believes the rules governing the insurance of living trust accounts are too complex and confusing. Under the current rules, the amount of insurance coverage for a living trust account can only be determined after the trust document has been reviewed to

determine whether there are any defeating contingencies. Consequently, in response to questions about coverage of living trust accounts, the FDIC can only advise depositors and bankers that they should assume that such accounts will be insured for no more than \$100,000 per grantor. Otherwise, the FDIC suggests that the owners of living trust accounts seek advice from the attorney who prepared the trust document. Depositors who contact the FDIC about their living trust insurance coverage are often troubled to learn that they cannot definitively determine the amount of their coverage without a legal analysis of their trust document. Also, when a depository institution fails the FDIC must review each living trust to determine whether the beneficiaries' interests are subject to defeating contingencies. This often is a time-consuming process, sometimes resulting in a significant delay in making deposit insurance payments to living trust account owners.

## II. Alternative Proposed Rules

To address this situation, the FDIC is proposing to simplify the insurance coverage rules for living trust accounts. The FDIC has identified what it believes to be two viable alternatives to address the confusion surrounding the insurance coverage of living trust accounts.

### *Proposed Rule—Alternative One*

The first alternative for simplifying and clarifying the insurance rules for living trust accounts would be to provide coverage up to \$100,000 per qualifying beneficiary named in the living trust irrespective of defeating contingencies ("Alternative One"). As explained above, currently both POD and living trust accounts are insured as revocable trust accounts and thus are subject to the same rules. Alternative One would retain this parallel treatment of POD accounts and living trust accounts by continuing to provide per-qualifying-beneficiary coverage, but no longer requiring that a beneficiary's interest in a living trust be free from defeating contingencies.

Any conditions in the trust document affecting whether a beneficiary would ultimately receive his or her share of the trust assets would be irrelevant. The FDIC would identify the beneficiaries and their ascertainable interests in the trust from the depository institution's account records and provide coverage on the account up to \$100,000 per qualifying beneficiary, subject to the same rules that now apply to POD accounts. For example, a deposit account for a living trust naming three