

collateral requirements accordingly, provided that the FDIC Board takes formal action assuring such accounts pass-through coverage. For this reason, the Board has decided to include an amendment to the FDIC's insurance regulations, in the form of a new § 330.11(d), confirming that pass-through insurance coverage will be provided for such bankruptcy trustee accounts.

The technical amendment codifying the long-standing interpretation by FDIC staff of the insurance coverage available to the commingled account of a bankruptcy trustee qualifies as an interpretative rule; thus, it is exempt from the prior notice and comment requirements ordinarily imposed by the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(A).

#### *B. Joint Deposit Accounts*

Another technical amendment clarifies the meaning of § 330.7(c) of the FDIC's regulations (12 CFR 330.7(c)), which specifies the requirements an account must meet to qualify for separate insurance coverage as a joint account. Section 330.7(c) exempts certain types of accounts, such as certificates of deposit, from the general requirement that each co-owner must sign a signature card, but the regulation states that "all such deposit accounts, must, in fact, be jointly owned". Contrary to the FDIC's long-standing interpretation, some courts have interpreted the quoted language to require the FDIC to consider state law and evidence outside the deposit account records of the insured institution to contradict otherwise unambiguous deposit account records, in connection with claims that what appear to be joint accounts are in fact individually-owned. The FDIC intended, however, that depositors be bound by its recordkeeping regulation at 12 CFR 330.4(a), which requires that the deposit account records be considered conclusive if they are unambiguous. Reliance on the deposit account records is critical if the FDIC is to fulfill its obligation to make insurance determinations and issue checks in a timely fashion after a bank fails. It is also critical in preventing fraudulent claims. Several courts have recognized the need for the FDIC to rely on such records in making insurance determinations. *Fouad & Sons v. FDIC*, 898 F.2d 482 (5th Cir. 1990), *In re Collins Securities Corp.*, 998 F.2d 551 (8th Cir. 1993), *Jones v. FDIC*, 748 F.2d 1400 (10th Cir. 1984).

For this reason, the amendment as presently proposed would remove the "but all such deposits must, in fact, be

jointly owned" language from § 330.7(c), and add that all deposit accounts which meet the requirements for qualifying joint accounts, including those which are exempted from the requirement that every co-owner must sign a signature card, will be deemed to be jointly-owned if the FDIC determines that the deposit account records are clear and unambiguous. The signatures of two or more persons on a deposit account signature card or the names of two or more persons on a certificate of deposit shall be conclusive evidence of a joint account if the deposit account records are clear and unambiguous. Only if the deposit account records are found to be ambiguous on the issue of ownership will evidence outside the deposit account records be considered, in accordance with the recordkeeping provisions of § 330.4(a). After taking into account the comments received on this amendment, FDIC staff has revised the amendment proposed earlier (and published for comment at 58 FR 64525 (December 8, 1993)) to conform more closely to the long-standing FDIC practice articulated by § 330.4(a).

The technical amendment on joint account coverage was published for comment as part of the proposed version of this capital disclosure regulation. 58 FR 64521 (December 8, 1993). The FDIC received two comments on the proposed amendment clarifying what evidence is necessary to determine the ownership of a joint account. An industry trade group opposed the amendment because of concern that it might permit the FDIC to ignore outside evidence of "fundamental claims" about the "viability" of a joint account under state law—for example, evidence that an account signature was forged, that one of the signers was incompetent when he signed, or that his signature was coerced. A savings association cited similar concerns but suggested that any outside evidence on such issues be considered under federal law, not state law.

It is important to emphasize that, when the FDIC says that it will rely on the deposit account records if they are clear and unambiguous, it will do so only to determine the appropriate ownership category for insurance purposes. Such reliance will not necessarily preclude a depositor from proving that a deposit account existed when the bank's deposit account records show no evidence of such an account, or that an account actually contained more funds than are reflected in the bank's deposit account records. When the FDIC determines that the deposit account records are ambiguous or unclear, it has the discretion to

consider evidence beyond the deposit account records. Of course, the FDIC need not find such extrinsic evidence persuasive. However, while the FDIC understands that account records may not always accurately reflect the intent of the parties to the account, and that circumstances may sometimes render the accounts invalid under state law,<sup>4</sup> the FDIC believes that it is essential to make insurance determinations without considering outside evidence concerning the ownership category of accounts as long as the account records are clear.

The recordkeeping regulations, by requiring that the deposit account records be considered conclusive if they are unambiguous, serve several important purposes. When a bank fails, it is important that the FDIC be permitted to make insurance determinations and issue checks to depositors in a timely fashion, a timeliness made possible by the FDIC's reliance on those deposit account records that are clear. Reliance on unambiguous account records also permits the FDIC to determine the least cost resolution of a failed institution and to prevent fraudulent insurance claims. These purposes require that the deposit account records, even if they do not correctly reflect the parties' intent, be deemed conclusive if they are unambiguous. Of course, if the records are ambiguous or unclear, the FDIC may, in its discretion, rely on other evidence. Moreover, as the regulations already provide, state law concerning ownership of ambiguously-owned accounts are only the starting point for determining the ownership issue; federal law ultimately controls.

For this reason, the Board has decided to include as part of this final rule the proposed amendment to the FDIC's deposit insurance rules on joint accounts. The amendment clarifies that an account holder seeking to prove that what appears to be a joint account is actually an account held in a right and capacity other than joint ownership (for example, as an individually-owned account) must satisfy the requirements of § 330.4(a) of the FDIC's regulations

<sup>4</sup> On the subject of state law, § 330.3(h) of the FDIC's insurance regulations states that "while ownership under state law of deposited funds is a necessary condition for deposit insurance, ownership under state law is not sufficient for, or decisive in, determining deposit insurance coverage." Instead, "[d]eposit insurance coverage is also a function of the deposit account records of the insured depository institution, of recordkeeping requirements, and of other provisions of this part, which, in the interest of uniform national rules for deposit insurance coverage, are controlling for purposes of determining deposit insurance coverage". 12 CFR 330.3(h).