



## NATIONAL CREDIT UNION ADMINISTRATION

### 12 CFR Part 745

[NCUA-2023-0082]

RIN 3133-AF53

### Simplification of Share Insurance Rules

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Proposed rule.

**SUMMARY:** The NCUA Board (Board) is seeking comment on proposed amendments to its regulations governing share insurance coverage. The proposed rule would address the following items: simplify the share insurance regulations by establishing a “trust accounts” category that would provide for coverage of funds of both revocable trusts and irrevocable trusts deposited at federally insured credit unions (FICUs); provide consistent share insurance treatment for all mortgage servicing account balances held to satisfy principal and interest obligations to a lender; and provide more flexibility for the NCUA to consider various records in determining share insurance coverage in liquidations.

**DATES:** Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER.]

**ADDRESSES:** You may submit written comments by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. The docket number for this proposed rule is NCUA-2023-0082. Follow the instructions for submitting comments.
- *Mail:* Address to Melane Conyers-Ausbrooks, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314.
- *Hand Delivery/Courier:* Same as mail address.

*Public inspection:* All public comments are available on the Federal eRulemaking Portal at <https://www.regulations.gov> as submitted, except when impossible for technical reasons. Public comments will not be edited to remove any identifying or contact information. If you are unable to access public comments on the internet, you may contact the NCUA for alternative access by calling (703) 518-6540 or emailing [OGCMail@ncua.gov](mailto:OGCMail@ncua.gov).

**FOR FURTHER INFORMATION CONTACT:** Thomas Zells, Senior Staff Attorney, Office of General Counsel, at (703) 518-6540 or by mail at National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314.

**SUPPLEMENTARY INFORMATION:**

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## **I. General Background and Legal Authority**

### **A. General Background**

The NCUA is an independent Federal agency that insures funds maintained in accounts of members or those otherwise eligible to maintain insured accounts (member accounts) at FICUs, protects the members who own credit unions, and charters and regulates Federal credit unions (FCUs). The NCUA protects the safety and soundness of the credit union system by identifying, monitoring, and reducing risks to the National Credit Union Share Insurance Fund (Share Insurance Fund). Backed by the full faith and credit of the United States, the Share Insurance Fund provides Federal share insurance to millions of account holders in all FCUs and the majority of state-chartered credit unions.

Under the Federal Credit Union Act (FCU Act), the NCUA is responsible for paying share insurance to any member, or to any person with funds lawfully held in a member account, in the event of a FICU's failure up to the standard maximum share insurance amount (SMSIA),

which is currently set at \$250,000.<sup>1</sup> The FCU Act states the determination of the net amount of share insurance paid “shall be in accordance with such regulations as the Board may prescribe” and requires that, “in determining the amount payable to any member, there shall be added together all accounts in the credit union maintained by that member for that member’s own benefit, either in the member’s own name or in the names of others.”<sup>2</sup> However, the FCU Act also specifically authorizes the Board to “define, with such classifications and exceptions as it may prescribe, the extent of the share insurance coverage provided for member accounts, including member accounts in the name of a minor, in trust, or in joint tenancy.”<sup>3</sup>

The NCUA has implemented these requirements by issuing regulations recognizing particular categories of accounts, such as single ownership accounts, joint ownership accounts, revocable trust accounts, and irrevocable trust accounts.<sup>4</sup> If an account meets the requirements for a particular category, the account is insured up to the \$250,000 limit separately from shares held by the member in a different account category at the same FICU. For example, provided all requirements are met, shares in the single ownership category will be separately insured from shares in the joint ownership category held by the same member at the same FICU.

The NCUA’s share insurance categories have been defined through both statute and regulation. Certain categories, such as the accounts held by government depositors<sup>5</sup> and certain retirement accounts, including individual retirement accounts, have been expressly defined by Congress.<sup>6</sup> Other categories, such as joint accounts<sup>7</sup> and corporate accounts,<sup>8</sup> have been based on statutory interpretation and recognized through regulations issued in 12 CFR part 745 pursuant to the NCUA’s rulemaking authority. In addition to defining the insurance categories,

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<sup>1</sup> 12 U.S.C. 1787(k)(1)(A), (k)(6).

<sup>2</sup> 12 U.S.C. 1787(k)(1)(B).

<sup>3</sup> 12 U.S.C. 1787(k)(1)(C).

<sup>4</sup> 12 CFR part 745.

<sup>5</sup> See 12 U.S.C. 1787(k)(2).

<sup>6</sup> See 12 U.S.C. 1787(k)(3).

<sup>7</sup> 12 CFR 745.8.

<sup>8</sup> 12 CFR 745.6.

the share insurance regulations in part 745 provide the criteria used to determine insurance coverage for shares in each category.

It is also worth noting that the FCU Act provides a definition of the term “member account.” The NCUA insures “member accounts” at all FICUs.<sup>9</sup> Importantly, the term “member account” is not limited to those persons enumerated in the credit union’s field of membership who have become members. It also permits certain nonmembers, such as other nonmember credit unions, nonmember public units and political subdivisions, and, in the case of low-income designated credit unions, deposits of nonmembers generally. In other words, the NCUA provides share insurance coverage to members and those otherwise eligible to maintain insured accounts at FICUs.

As discussed in more detail below, the proposed amendments reflect the Board’s aim to: (1) provide FICUs, FICU employees, and those with member accounts at FICUs, with a rule that is easier to understand; (2) provide parity with changes adopted by the FDIC in January 2022; and (3) facilitate the prompt payment of share insurance in accordance with the FCU Act, among other objectives.

## **B. Legal Authority**

The Board has issued this proposed rule pursuant to its authority under the FCU Act. Under the FCU Act, the NCUA is the chartering and supervisory authority for FCUs and the Federal supervisory authority for FICUs.<sup>10</sup> The FCU Act grants the NCUA a broad mandate to issue regulations governing both FCUs and FICUs. Section 120 of the FCU Act is a general grant of regulatory authority and authorizes the Board to prescribe rules and regulations for the administration of the FCU Act.<sup>11</sup> Section 207 of the FCU Act is a specific grant of authority

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<sup>9</sup> 12 U.S.C. 1752(5).

<sup>10</sup> 12 U.S.C. 1751 *et seq.*

<sup>11</sup> 12 U.S.C. 1766(a).

over share insurance coverage, conservatorships, and liquidations.<sup>12</sup> Section 209 of the FCU Act is a plenary grant of regulatory authority to the NCUA to issue rules and regulations necessary or appropriate to carry out its role as share insurer for all FICUs.<sup>13</sup> Accordingly, the FCU Act grants the Board broad rulemaking authority to ensure that the credit union industry and the Share Insurance Fund remain safe and sound.

## **II. Simplification of Share Insurance Trust Rules**

### **A. Policy Objectives**

The Board is seeking comment on proposed amendments to its regulations governing share insurance coverage for funds held in member accounts at FICUs in connection with trusts.<sup>14</sup> The proposed amendments are intended to: (1) provide FICUs, FICU employees, and those with member accounts at FICUs with a rule for trust account coverage that is easier to understand; (2) provide parity with changes adopted by the FDIC in January 2022;<sup>15</sup> and (3) facilitate the prompt payment of share insurance in accordance with the FCU Act, among other objectives. Accomplishing these objectives also would further the NCUA's mission in other respects, as discussed in greater detail below.

#### *Clarifying Insurance Coverage for Trust Accounts*

The share insurance trust rules have evolved over time and can be difficult to apply in some circumstances. The proposed amendments would clarify for FICUs, their employees, their accountholders, and other interested parties the insurance rules and limits for trust accounts. The proposal both reduces the number of rules governing coverage for trust accounts and establishes a straightforward calculation to determine coverage. The proposed amendments are intended to

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<sup>12</sup> 12 U.S.C. 1787.

<sup>13</sup> 12 U.S.C. 1789(a)(11).

<sup>14</sup> Trusts include informal revocable trusts (commonly referred to as payable-on-death accounts, in-trust-for accounts, or Totten trusts), formal revocable trusts, and irrevocable trusts.

<sup>15</sup> 87 FR 4455 (Jan. 28, 2022).

alleviate some of the confusion that FICUs, their employees, and their accountholders may experience with respect to insurance coverage and limits.

Under the current regulations, there are distinct and separate sets of rules applicable to shares of revocable trusts as opposed to irrevocable trusts. Each set of rules has its own criteria for coverage and methods by which coverage is calculated. Despite the NCUA's efforts to simplify the revocable trust rules in 2008, the consistently high volume of complex inquiries about trust accounts over an extended period suggests continued confusion about insurance limits.<sup>16</sup> NCUA share insurance specialists have answered over 13,000 calls with questions since the fourth quarter of 2019 alone.<sup>17</sup> It is estimated that over 50 percent of these inquiries, which do not include those received through email or submitted through mycreditunion.gov, pertain to share insurance coverage for trust accounts (revocable or irrevocable). To help clarify insurance limits, the proposed amendments would further simplify insurance coverage of trust accounts (revocable and irrevocable) by harmonizing the coverage criteria for revocable and irrevocable trust accounts and by establishing a simplified formula for calculating coverage that would apply to these funds deposited at FICUs. The NCUA proposes using the calculation the NCUA first adopted in 2008 for revocable trust accounts with five or fewer beneficiaries. This formula is straightforward and is already generally familiar to FICUs and their members.<sup>18</sup> The current formulas for revocable trust accounts with more than five beneficiaries and irrevocable trust accounts would be eliminated.

### *Parity*

Adoption of the proposed changes would also align with changes the FDIC adopted in January 2022, which are set to take effect on April 1, 2024.<sup>19</sup> As it stressed in its 2021 final rule

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<sup>16</sup> 73 FR 60616 (Oct. 14, 2008).

<sup>17</sup> The NCUA's Office of Credit Union Resources and Expansion, which fields most share insurance inquiries, only began tracking calls received on October 31, 2019. The high volume of trust-related inquiries predates this tracking.

<sup>18</sup> In 2008, the NCUA adopted an insurance calculation for revocable trusts that have five or fewer beneficiaries. Under this rule, 12 CFR 745.4(a), each trust grantor is insured up to \$250,000 per beneficiary.

<sup>19</sup> 87 FR 4455 (Jan. 28, 2022).

addressing the share insurance coverage of joint ownership accounts, the Board believes it is important to maintain parity between the nation's two Federal deposit/share insurance programs, which are backed by the full faith and credit of the United States.<sup>20</sup> The Board believes it is important that members of the public who use trust accounts receive the same protection whether the accounts are maintained at FICUs or other federally insured institutions.

#### *Prompt Payment of Share Insurance*

The FCU Act requires the NCUA to pay accountholders “as soon as possible” after a FICU liquidation.<sup>21</sup> However, the insurance determination and subsequent payment for many trust accounts can be delayed when NCUA staff must review complex trust agreements and apply various rules for determining share insurance coverage. The proposed amendments are intended to facilitate more timely share insurance determinations for trust accounts by reducing the time needed to review trust agreements and determine coverage. These amendments should promote the NCUA's ability to pay insurance proceeds to accountholders more quickly following the liquidation of a FICU, enabling accountholders to meet their financial needs and obligations.

#### *Facilitating Liquidations*

The proposed changes will also facilitate the liquidation of failed FICUs. The NCUA is routinely required to make share insurance determinations in connection with FICU liquidations. In many of these instances, however, share insurance coverage for certain trust accounts is based upon information that is not maintained in the FICU's account records. As a result, NCUA staff work with accountholders to obtain trust documentation following a FICU's liquidation to complete share insurance determinations. The difficulties associated with completing such a

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<sup>20</sup> 86 FR 11098 (Feb. 24, 2021).

<sup>21</sup> 12 U.S.C. 1787(d)(1).

determination are exacerbated by the substantial growth in the use of formal trusts in recent decades. The proposed amendments could reduce the time spent reviewing such information, thereby reducing potential delays in the completion of share insurance determinations and payments.

## **B. Background and Need for Rulemaking**

### **1. Evolution of Insurance Coverage of Funds Held in Trust Accounts**

The NCUA first adopted regulations governing share insurance coverage in 1971.<sup>22</sup> Over the years, share insurance coverage has evolved to reflect both the NCUA's experience and changes in the credit union industry. While the regulations addressing irrevocable trusts have undergone minimal change, the regulations addressing revocable trusts have seen numerous changes, largely aimed at providing increased flexibility and simplifying coverage. Of note, in 2004 the NCUA amended the revocable trust rules, pointing to continued confusion about the coverage for revocable trust deposits and the need for parity with then recent FDIC amendments.<sup>23</sup> Specifically, the NCUA eliminated the defeating contingency provisions of the rules, with the result that coverage would be based on the interests of qualifying beneficiaries, irrespective of any defeating contingencies in the trust agreement.<sup>24</sup> This more closely aligned coverage for formal revocable trust accounts with payable-on-death accounts. Importantly, and of relevance to this proposal, defeating contingency provisions were not eliminated for irrevocable trusts and remain relevant for calculating share insurance coverage under the irrevocable trust provisions.<sup>25</sup> At the same time, the NCUA also eliminated the requirement to

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<sup>22</sup> 36 FR 2477 (Feb. 5, 1971).

<sup>23</sup> 69 FR 8798 (Feb. 26, 2004).

<sup>24</sup> Prior to the changes adopted in 2004, if the interest of a qualifying beneficiary in an account established under the terms of a living trust agreement was contingent upon fulfillment of a specified condition, referred to as a defeating contingency, separate insurance was not available for that beneficial interest. Instead, the beneficial interest would be added to any individual account(s) of the grantor and insured up to the SMSIA, then \$100,000. An example of a defeating contingency is where an account owner names his son as a beneficiary but specifies in the living trust document that his son's ability to receive any share of the trust funds is dependent upon him successfully completing college.

<sup>25</sup> 12 CFR 745.2(d).

name the beneficiaries of a formal revocable trust in the FICU's account records.<sup>26</sup> The NCUA recognized that a grantor may elect to change the beneficiaries or their interests at any time before his or her death and that requiring a FICU to maintain a current record of this information is impractical and unnecessarily burdensome.

More recently, the NCUA's experience and adoption of similar revisions by the FDIC suggested that further changes to the trust rules were necessary. Specifically, in 2008, the NCUA simplified the rules in several respects.<sup>27</sup> First, it eliminated the kinship requirement for revocable trust beneficiaries, instead allowing any natural person, charitable organization, or non-profit to qualify for per-beneficiary coverage. Second, a simplified calculation was established if a revocable trust named five or fewer beneficiaries; coverage would be determined without regard to the allocation of interests among the beneficiaries. This eliminated the need to discern and consider beneficial interests in many cases.

A different insurance calculation applied to revocable trusts with more than five beneficiaries. At that time, the SMSIA was \$100,000, and thus, if more than five beneficiaries were named in a revocable trust, coverage would be the greater of (1) \$500,000; or (2) the aggregate amount of all beneficiaries' interests in the trust(s), limited to \$100,000 per beneficiary. When the SMSIA was increased to \$250,000, a similar adjustment was made from \$100,000 to \$250,000 for the calculation of per beneficiary coverage.

## **2. Current Rules for Coverage of Funds Held in Trust Accounts**

The NCUA recognizes two different insurance categories for funds held in connection with trusts at FICUs: (1) revocable trusts and (2) irrevocable trusts. The current rules for determining insurance coverage for shares in each of these categories are described below. Additionally, share insurance coverage is always limited to FICU members and those otherwise

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<sup>26</sup> 69 FR 8798, 8799 (Feb. 26, 2004).

<sup>27</sup> 73 FR 60616 (Oct. 14, 2008).

eligible to maintain insured accounts at the FICU. The NCUA's longstanding position has been that, for revocable trust accounts, all grantors (sometimes described as settlors) of the trust must be members of the FICU or otherwise eligible to maintain an insured account.<sup>28</sup> For irrevocable trust accounts, the NCUA has maintained the position that either all grantors/settlors or all beneficiaries of the trust must be members of the FICU or otherwise eligible to maintain an insured account.<sup>29</sup> As described in greater detail in section II.E., the NCUA appreciates commenter feedback as to whether these positions should be revisited.

### *Revocable Trust Accounts*

The revocable trust category applies to funds for which the member has evidenced an intention that the funds shall belong to one or more beneficiaries upon his/her/their death. This category includes funds held in connection with formal revocable trusts — that is, revocable trusts established through a written trust agreement. It also includes funds that are not subject to a formal trust agreement, where the FICU makes payment to the beneficiaries identified in the FICU's records upon the member's death, based on account titling and applicable state law. The NCUA refers to these types of accounts, including Totten trust accounts, payable-on-death accounts, and similar accounts, as “informal revocable trusts.” Funds associated with formal and informal revocable trusts are aggregated for the purposes of the share insurance rules; thus, funds that will pass from the same grantor to beneficiaries are aggregated and insured up to the SMSIA, currently \$250,000, per beneficiary, regardless of whether the transfer would be accomplished through a written revocable trust or an informal revocable trust.<sup>30</sup>

Under the current revocable trust rules, beneficiaries with insurable interests are limited to natural persons, charitable organizations, and non-profit entities recognized as such under the

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<sup>28</sup> See 12 CFR part 701, app. A. Art. III, sec. 6 (“Shares issued in a revocable trust — the settlor must be a member of this credit union in his or her own right.”).

<sup>29</sup> See 12 CFR part 701, app. A. Art. III, sec. 6 (“Shares issued in an irrevocable trust — either the settlor or the beneficiary must be a member of this credit union.”).

<sup>30</sup> 12 CFR 745.4(a).

Internal Revenue Code of 1986.<sup>31</sup> If a named beneficiary does not satisfy this requirement, funds held in trust for that beneficiary are treated as single ownership funds of the grantor and aggregated with any other single ownership accounts the grantor maintains at the same FICU.<sup>32</sup>

Certain requirements also must be satisfied for an account to be insured in the revocable trust category. The required intention that the funds shall belong to the beneficiaries upon the grantor's death must be manifested in the "title" of the account or elsewhere in the account records of the credit union using commonly accepted terms such as "in trust for," "as trustee for," "payable-on-death to," or any acronym for these terms.<sup>33</sup> For the purposes of this requirement, a FICU's electronic account records are included. For example, a FICU's electronic account records could identify the account as a revocable trust account through coding or a similar mechanism. In addition, the beneficiaries of informal trusts (i.e., payable-on-death accounts) must be named in the FICU's account records.<sup>34</sup> The requirement to name beneficiaries in the FICU's account records does not apply to formal revocable trusts; the NCUA generally obtains information on beneficiaries of such trusts from accountholders following a FICU's liquidation. Therefore, if a member's account funds exceed \$250,000 at a liquidated FICU, this will result in a hold being placed on the member's funds in excess of the SMSIA until the NCUA can review the ownership documents and trust agreement to verify the beneficiary rules are satisfied, thereby delaying insurance determinations and full insurance payments to some insured accountholders.

The calculation of share insurance coverage for revocable trust accounts depends upon the number of unique beneficiaries named by a member accountholder.<sup>35</sup> If five or fewer beneficiaries have been named, the member accountholder is insured in an amount up to the total

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<sup>31</sup> 12 CFR 745.4(c).

<sup>32</sup> 12 CFR 745.4(d).

<sup>33</sup> 12 CFR 745.4(b).

<sup>34</sup> *Id.*

<sup>35</sup> For a FICU to open a revocable trust account, all grantors/settlors of the trust must be members of the FICU or otherwise eligible to maintain an insured account. *See* 12 CFR part 701, app. A. Art. III, sec. 6 ("Shares issued in a revocable trust — the settlor must be a member of this credit union in his or her own right.").

number of named beneficiaries multiplied by the SMSIA, and the specific allocation of interests among the beneficiaries is not considered.<sup>36</sup> If more than five beneficiaries have been named, the member accountholder is insured up to the greater of: (1) five times the SMSIA; or (2) the total of the interests of each beneficiary, with each such interest limited to the SMSIA.<sup>37</sup> For the purposes of this calculation, a life estate interest is valued at the SMSIA.<sup>38</sup>

Where a revocable trust account is jointly owned, the interests of each account owner are separately insured up to the SMSIA per beneficiary.<sup>39</sup> However, if the co-owners are the only beneficiaries of the trust, the account is instead insured under the NCUA's joint account rule.<sup>40</sup>

The current revocable trust rule also contains a provision that was intended to reduce confusion and the potential for a decrease in share insurance coverage in the case of the death of a grantor. Specifically, if a revocable trust becomes irrevocable due to the death of the grantor, the trust account may continue to be insured under the revocable trust rules.<sup>41</sup> Absent this provision, the irrevocable trust rules would apply following the grantor's death, as the revocable trust becomes irrevocable at that time, which could result in a reduction in coverage.<sup>42</sup>

### *Irrevocable Trust Accounts*

Accounts maintaining funds held by an irrevocable trust that has been established either by written agreement or by statute are insured in the irrevocable trust share insurance category. Calculating coverage in this category requires a determination of whether beneficiaries' interests in the trust are contingent or non-contingent.<sup>43</sup> Non-contingent interests are interests that may be

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<sup>36</sup> 12 CFR 745.4(a).

<sup>37</sup> 12 CFR 745.4(e).

<sup>38</sup> 12 CFR 745.4(g). For example, if a revocable trust provides a life estate for the member accountholder's spouse and remainder interests for six other beneficiaries, the spouse's life estate interest would be valued at the lesser of \$250,000 or the amount held in the trust for the purposes of the share insurance calculation.

<sup>39</sup> 12 CFR 745.4(f)(1).

<sup>40</sup> 12 CFR 745.4(f)(2).

<sup>41</sup> 12 CFR 745.4(h).

<sup>42</sup> The revocable trust rules tend to provide greater coverage than the irrevocable trust rules because contingencies are not considered for revocable trusts. In addition, where five or fewer beneficiaries are named by a revocable trust, specific allocations to beneficiaries also are not considered.

<sup>43</sup> 12 CFR 745.2(d) and 745.9-1.

determined without evaluation of any contingencies, except for those covered by the present worth and life expectancy tables and the rules for their use set forth in the Internal Revenue Service (IRS) Federal Estate Tax Regulations.<sup>44</sup> Funds held for non-contingent trust interests are insured up to the SMSIA for each such beneficiary.<sup>45</sup> Funds held for contingent trust interests are aggregated and insured up to the SMSIA in total.<sup>46</sup>

The irrevocable trust rules do not apply to funds held for a grantor's retained interest in an irrevocable trust.<sup>47</sup> Such funds are aggregated with the grantor's other single ownership funds for the purposes of applying the share insurance limit.

### **3. Need for Further Rulemaking**

As noted, the rules governing share insurance coverage for trust accounts have been simplified on several occasions. However, these rules are still frequently misunderstood and can present some implementation challenges. The trust rules can require overly detailed, time-consuming, and resource-intensive reviews of trust documentation to obtain the information necessary to calculate share insurance coverage. This information is often not found in a FICU's records and must be obtained from members after a FICU's liquidation. Revision of the share insurance coverage rules for trust accounts along the lines proposed would reduce the amount of information that must be provided for trust accounts, as well as the complexity of the NCUA's review. This revision should enable the NCUA to complete share insurance determinations more rapidly if a FICU with a large number of trust accounts is liquidated. Delays in the payment of share insurance can be consequential for accountholders and the proposal would help to mitigate those delays.

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<sup>44</sup> 12 CFR 745.2(d)(1). For example, a life estate interest is generally non-contingent, as it may be valued using the life expectancy tables. However, where a trustee has discretion to divert funds from one beneficiary to another to provide for the second beneficiary's medical needs, the first beneficiary's interest is contingent upon the trustee's discretion.

<sup>45</sup> 12 CFR 745.9-1(b).

<sup>46</sup> 12 CFR 745.2(d)(2).

<sup>47</sup> See 12 CFR 745.2(d)(4) (The term "trust interest" does not include any interest retained by the settlor.).

Several factors contribute to the challenges of making insurance determinations for trust accounts. First, there are two different sets of rules governing share insurance coverage for trust accounts. Understanding the coverage for a particular account requires a threshold inquiry to determine which set of rules to apply — the revocable trust rules or the irrevocable trust rules. This requires review of the trust agreement to determine the type of trust (revocable or irrevocable), and the inquiry may be complicated by innovations in state trust law that are intended to increase the flexibility and utility of trusts. In some cases, this threshold inquiry is also complicated by the provision of the revocable trust rules that allows for continued coverage under the revocable trust rules where a trust becomes irrevocable upon the grantor's death. The result of an irrevocable trust deposit being insured under the revocable trust rules has proven confusing for both accountholders and FICUs.

Second, even after determining which set of rules applies to a particular account, it may be challenging to apply the rules. For example, the revocable trust rules include unique titling requirements and beneficiary requirements. These rules also provide for two separate calculations to determine insurance coverage, depending in part upon whether there are five or fewer trust beneficiaries or at least six beneficiaries. In addition, for revocable trusts that provide benefits to multiple generations of potential beneficiaries, the NCUA needs to evaluate the trust agreement to determine whether a beneficiary is a primary beneficiary (immediately entitled to funds when a grantor dies), contingent beneficiary, or remainder beneficiary. Only eligible primary beneficiaries and remainder beneficiaries are considered in calculating NCUA share insurance coverage. The irrevocable trust rules may require detailed review of trust agreements to determine whether beneficiaries' interests are contingent and may also require actuarial or present value calculations. These types of requirements complicate the determination of insurance coverage for trust deposits, have proven confusing for accountholders, and extend the time needed to complete a share insurance determination and insurance payment.

Third, the complexity and variety of account holders' trust arrangements adds to the difficulty of determining share insurance coverage. For example, trust interests are sometimes defined through numerous conditions and formulas, and a careful analysis of these provisions may be necessary to calculate share insurance coverage under the current rules. Arrangements involving multiple trusts where the same beneficiaries are named by the same grantor(s) in different trusts add to the difficulty of applying the trust rules. The NCUA believes simplification of the share insurance rules presents an opportunity to more closely align the coverage provided for different types of trust funds. For example, the revocable trust rules generally provide for a greater amount of coverage than the irrevocable trust rules. This outcome occurs because contingent interests for irrevocable trusts are aggregated and insured up to the SMSIA rather than up to the SMSIA per beneficiary, while contingencies are not considered and therefore do not limit coverage in the same manner for revocable trusts.

Finally, as previously noted, adoption of the proposed changes would align with changes the FDIC adopted in January 2022, which are set to take effect on April 1, 2024. The Board believes it is important to maintain parity between the nation's two Federal deposit/share insurance programs. It is imperative that members of the public who use trust accounts for the transfer of ownership of assets better understand the rules governing such accounts and receive the same protection, whether the accounts are maintained at FICUs or other federally insured institutions.

### **C. Description of Proposed Rule**

The NCUA is proposing to amend the rules governing share insurance coverage for funds held in trust accounts at FICUs. Generally, the proposed amendments would: (1) merge the revocable and irrevocable trust categories into one category; (2) apply a simpler, common calculation method to determine insurance coverage for funds held by revocable and irrevocable

trusts; and (3) eliminate certain requirements found in the current rules for revocable and irrevocable trusts.

### *Merger of Revocable and Irrevocable Trust Categories*

As discussed above, the NCUA historically has insured revocable trust funds and irrevocable trust funds held at FICUs under two separate insurance categories. The NCUA's experience has been that this bifurcation often confuses FICUs and their members, as it requires a threshold inquiry to determine which set of rules to apply to a trust account. Moreover, all trust funds deposited at a FICU must be categorized before the aggregation of trust funds deposited within each category can be completed. The NCUA believes funds held in connection with revocable and irrevocable trusts are sufficiently similar, for the purposes of share insurance coverage, to warrant the merger of these two categories into one category. Under the NCUA's current rules, share insurance coverage is provided because the trustee maintains the funds for the benefit of the beneficiaries. This is true regardless of whether the trust is revocable or irrevocable. Merger of the revocable and irrevocable trust categories would better conform share insurance coverage to the substance — rather than the legal form — of the trust arrangement. This underlying principle of the share insurance rules is particularly important in the context of trusts, as state law often provides flexibility to structure arrangements in different ways to accomplish a given purpose.<sup>48</sup>

FICU members may have a variety of reasons for selecting a particular legal arrangement, but that decision should not significantly affect share insurance coverage. Importantly, the proposed merger of the revocable trust and irrevocable trust categories into one category for share insurance purposes would not affect the application or operation of state trust

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<sup>48</sup> For example, the NCUA currently aggregates funds in payable-on-death accounts and funds of written revocable trusts for the purposes of share insurance coverage, despite their separate and distinct legal mechanisms. Also, where the co-owners of a revocable trust are also that trust's sole beneficiaries, the NCUA instead insures the trust's funds as joint funds, reflecting the arrangement's substance rather than its legal form.

law; this would only affect the determination of share insurance coverage for these types of trust funds in the event of a FICU's liquidation.

Accordingly, the NCUA is proposing to amend § 745.4 of its regulations, which currently applies only to revocable trust accounts, to establish a new "trust accounts" category that would include both revocable and irrevocable trust funds deposited at a FICU. The proposed rule defines the funds that would be included in this category as follows: (1) informal revocable trust funds, such as payable-on-death accounts, in-trust-for accounts, and Totten trust accounts; (2) formal revocable trust funds, defined to mean funds held pursuant to a written revocable trust agreement under which funds pass to one or more beneficiaries upon the grantor's death; and (3) irrevocable trust funds, meaning funds held pursuant to an irrevocable trust established by written agreement or by statute.

In addition, the merger of the revocable trust and irrevocable trust categories eliminates the need for §§ 745.4(h) through (i) of the current revocable trust rules, which provide that the revocable trust rules may continue to apply to an account where a formal revocable trust becomes irrevocable due to the death of one or more of the trust's grantors. These provisions were intended to benefit accountholders, who sometimes were unaware that a trust owner's death could trigger a significant decrease in insurance coverage as a revocable trust becomes irrevocable.

However, in the NCUA's experience, this rule has proven complex in part because it results in some irrevocable trusts being insured per the revocable trust rules, while other irrevocable trusts are insured under the irrevocable trust rules.<sup>49</sup> As a result, an accountholder could know a trust was irrevocable but not know which share insurance rules to apply. The proposed rule would insure funds of formal and informal revocable trusts and irrevocable trusts according to a common set of rules, eliminating the need for these provisions (§§ 745.4(h)

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<sup>49</sup> As noted above, if a revocable trust becomes irrevocable due to the death of the grantor, the account continues to be insured under the revocable trust rules. 12 CFR 745.4(h).

through (i)) and simplifying coverage for accountholders. Accordingly, the death of a formal revocable trust owner would not result in a decrease in share insurance coverage for the trust. Coverage for irrevocable and formal revocable trusts would fall under the same category and share insurance coverage would remain the same, even after the expiration of the six-month grace period following the death of an account owner.<sup>50</sup>

Informal revocable trust accounts would also be insured under this same trust account category but are highly unlikely to result in the creation of an irrevocable trust account upon an owner or co-owner's death. As is the case under the existing share insurance regulations, when a co-owner of an informal revocable trust account dies, share insurance coverage for the deceased owner's interest in the account will cease after the expiration of the 6-month grace period allowed for the death of share account owners. After the expiration of the 6-month grace period, share insurance coverage will be calculated as if the deceased co-owner did not exist and the deceased co-owner's name did not remain on the account. This treatment of the account will be based upon the fact that all funds in the account will be owned by one person (i.e., the surviving co-owner).

#### *Calculation of Coverage*

The NCUA is proposing to use one streamlined calculation to determine the amount of share insurance coverage for funds of both revocable and irrevocable trusts. This method is already used by the NCUA to calculate coverage for revocable trusts that have five or fewer beneficiaries, and it is an aspect of the rules that is generally well-understood by FICUs and their members. The proposed rule would provide that a grantor's trust funds are insured in an amount up to the SMSIA (currently \$250,000) multiplied by the number of trust beneficiaries, not to

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<sup>50</sup> The death of an account owner can affect share insurance coverage, often reducing the amount of coverage that applies to a family's accounts. To ensure that families dealing with the death of a family member have adequate time to review and restructure accounts if necessary, the NCUA insures a deceased owner's accounts as if he/she/they were still alive for a period of 6 months after his/her/their death. 12 CFR 745.2(e).

exceed five beneficiaries. The NCUA would presume that, for share insurance purposes, the trust provides for equal treatment of beneficiaries such that specific allocation of the funds to the respective beneficiaries will not be relevant, consistent with the NCUA's current treatment of revocable trusts with five or fewer beneficiaries. This would, in effect, limit coverage for a grantor's trust funds at each FICU to a total of \$1,250,000; in other words, maximum coverage would be equivalent to \$250,000 per beneficiary for up to five beneficiaries. In determining share insurance coverage, the NCUA would continue to consider only beneficiaries who are expected to receive the funds held by the trust in a member account at the FICU; the NCUA would not consider beneficiaries who are expected to receive only non-deposit assets of the trust.

The NCUA is proposing to calculate coverage in this manner, in part, based on its experience with the revocable trust rules after the modifications to these rules in 2008.<sup>51</sup> The NCUA has found that the share insurance calculation method for revocable trusts with five or fewer beneficiaries has been the most straightforward and is easy for FICUs and the public to understand. This calculation provides for insurance in an amount up to the total number of unique grantor-beneficiary trust relationships (i.e., the number of grantors, multiplied by the total number of beneficiaries, multiplied by the SMSIA).<sup>52</sup> In addition to being simpler, this calculation has proven beneficial in liquidations, as it leads to more prompt share insurance determinations and quicker access to insured funds for accountholders. Accordingly, the NCUA proposes to calculate share insurance coverage for trust accounts based on the simpler calculation currently used for revocable trusts with five or fewer beneficiaries.

The streamlined calculation that would be used to determine coverage for revocable trust funds and irrevocable trust funds includes a limit on the total amount of share insurance coverage for all of an accountholder's funds in the trust category at the same FICU. The proposed rule would provide coverage for trust funds at each FICU up to a total of \$1,250,000 per grantor; in

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<sup>51</sup> 73 FR 60616 (Oct. 14, 2008).

<sup>52</sup> For example, two co-grantors that designate five beneficiaries are insured for up to \$2,500,000 (2 times 5 times \$250,000).

other words, each grantor's insurance limit would be \$250,000 per beneficiary up to a maximum of five beneficiaries. The level of five beneficiaries is an important threshold in the current revocable trust rules, as it defines whether a grantor's coverage is determined using the simpler calculation of the number of beneficiaries multiplied by the SMSIA or the more complex calculation involving the consideration of the amount of each beneficiary's specific interest (which applies when there are six or more beneficiaries). The trust rules currently limit coverage by tying coverage to the specific interests of each beneficiary of an irrevocable trust or of each beneficiary of a revocable trust with more than five beneficiaries. The proposed rule's \$1,250,000 per-grantor, per-FICU limit is more straightforward and balances the objectives of simplifying the trust rules, promoting timely payment of share insurance, facilitating liquidations, ensuring consistency with the FCU Act, and limiting risk to the Share Insurance Fund. The proposed rule would also provide parity between the NCUA's regulations and those adopted by the FDIC in early 2022.<sup>53</sup>

The NCUA anticipates that limiting coverage to \$1,250,000 per grantor, per FICU, for trust funds would not have a substantial effect on accountholders, as most trust accounts in past FICU liquidations have had balances well below this level. The NCUA lacks sufficient information, however, to project the exact effects of the proposed limit on current accountholders and requests that commenters provide information that might be helpful in this regard.

Under the proposed rule, to determine the level of insurance coverage that would apply to funds held in trust accounts, accountholders would still need to identify the grantors and the eligible beneficiaries of the trust. The level of coverage that applies to trust accounts would no longer be affected by the specific allocation of trust funds to each of the beneficiaries of the trust or by contingencies outlined in the trust agreement. Instead, the proposed rule would provide that a grantor's trust funds are insured up to a total of \$1,250,000 per grantor, or an amount up to

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<sup>53</sup> 87 FR 4455 (Jan. 28, 2022).

the SMSIA multiplied by the number of eligible beneficiaries, with a limit of no more than five beneficiaries.

### *Aggregation*

The proposed rule also provides for the aggregation of funds held in revocable and irrevocable trust accounts for the purposes of applying the share insurance limit. Under the current rules, funds held in informal revocable trust accounts and formal revocable trust accounts are aggregated for this purpose.<sup>54</sup> The proposed rule would aggregate a grantor's informal and formal revocable trust accounts, as well as irrevocable trust accounts. For example, all informal revocable trusts, formal revocable trusts, and irrevocable trusts held for the same grantor at the same FICU would be aggregated, and the grantor's insurance limit would be determined by how many eligible and unique beneficiaries were identified among all of their trust accounts.<sup>55</sup> The share insurance coverage provided in the "trust accounts" category would remain separate from the coverage provided for other funds held in a different right and capacity at the same FICU. However, some accountholders who currently maintain both revocable trust and irrevocable trust deposits at the same FICU may have funds in excess of the insurance limit if these separate categories are combined. The NCUA lacks data on accountholders' trust arrangements that would allow it to estimate the number of accountholders who might be affected in this manner. The agency does not believe this would impact a substantial number of accountholders but requests that commenters provide information that might be helpful in this regard.

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<sup>54</sup> See 12 CFR 745.4(a) ("All funds that an owner holds in both living trust accounts and payable-on-death accounts, at the same NCUA-insured credit union and naming the same beneficiaries, are aggregated for insurance purposes and insured to the applicable coverage limits....").

<sup>55</sup> For example, if a grantor maintained both an informal revocable trust account with three beneficiaries and a formal revocable trust account with three separate and unique beneficiaries, the two accounts would be aggregated and the maximum share insurance available would be \$1.25 million (1 grantor times the SMSIA times the number of unique beneficiaries, limited to 5). However, if the same three people were the beneficiaries of both accounts, the maximum share insurance available would be \$750,000 (1 grantor times the SMSIA times the 3 unique beneficiaries).

### *Eligible Beneficiaries*

Currently, the revocable trust rules provide that eligible beneficiaries include natural persons, charitable organizations, and non-profit entities recognized as such under the Internal Revenue Code of 1986,<sup>56</sup> while the irrevocable trust rules do not establish criteria for beneficiaries. The NCUA believes that a single definition should be used to determine whether an entity is an eligible beneficiary for all trust funds and proposes to use the current revocable trust rule's definition. The NCUA believes that this single definition will result in a change in share insurance coverage only in very rare cases.

The proposed rule also would exclude from the calculation of share insurance coverage beneficiaries who only would obtain an interest in a trust if one or more named beneficiaries are deceased (often referred to as contingent beneficiaries). In this respect, the proposed rule would codify existing practice to include only primary, unique beneficiaries in the share insurance calculation.<sup>57</sup> This would not represent a substantive change in coverage. Consistent with treatment under the current trust rules, naming a chain of contingent beneficiaries that would obtain trust interests only in the event of a beneficiary's death would not increase share insurance coverage.

Finally, the proposed rule would codify an interpretation of the trust rules where an informal revocable trust designates the depositor's formal trust as its beneficiary. A formal trust generally does not meet the definition of an eligible beneficiary for share insurance purposes, but the NCUA has treated such accounts as revocable trust accounts under the trust rules, insuring the account as if it were titled in the name of the formal trust.<sup>58</sup>

### *Retained Interests and Ineligible Beneficiaries' Interests*

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<sup>56</sup> 12 CFR 754.4(c).

<sup>57</sup> See *NCUA Your Insured Funds* at 42 ("The beneficiaries are the people or entities entitled to an interest in the trust. Contingent or alternative trust beneficiaries are not considered to have an interest in the trust funds and other assets as long as the primary or initial beneficiaries are still living, with the exception of revocable living trusts with a life estate interest.").

<sup>58</sup> See 74 FR 55747, 55748 (Oct. 29, 2009).

The current trust rules provide that, in some instances, funds corresponding to specific beneficiaries are aggregated with a grantor's single ownership deposits at the same FICU for the purposes of the share insurance calculation. These instances include a grantor's retained interest in an irrevocable trust<sup>59</sup> and interests of beneficiaries who do not satisfy the definition of "beneficiary."<sup>60</sup> This adds complexity to the share insurance calculation, as a detailed review of a trust agreement may be required to value such interests so they may be aggregated with a grantor's other funds. To implement the streamlined calculation for funds held in trust accounts, the NCUA is proposing to eliminate these provisions. Under the proposed rule, the grantor and other beneficiaries who do not satisfy the definition of "eligible beneficiary" would not be included for the purposes of the share insurance calculation.<sup>61</sup> Importantly, this would not in any way limit a grantor's ability to establish such trust interests under state law. These interests simply would not factor into the calculation of share insurance coverage.

#### *Future Trusts Named as Beneficiaries*

Trusts often contain provisions for the establishment of one or more new trusts upon the grantor's death, and the proposed rule also would clarify share insurance coverage in these situations. Specifically, if a trust agreement provides that trust funds will pass into one or more new trusts upon the death of the grantor (or grantors), the future trust (or trusts) would not be treated as beneficiaries for the purposes of the calculation. The future trust(s) instead would be considered mechanisms for distributing trust funds, and the natural persons or organizations that receive the trust funds through the future trusts would be considered the beneficiaries for the purposes of the share insurance calculation. This clarification is consistent with the NCUA's current interpretations and would not represent a substantive change in share insurance coverage.

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<sup>59</sup> See 12 CFR 745.2(d)(4).

<sup>60</sup> 12 CFR 745.4(d).

<sup>61</sup> In the unlikely event a trust does not name any eligible beneficiaries, the NCUA would treat the funds in the trust account as funds held in a single ownership account. Such funds would be aggregated with any other single ownership funds that the grantor maintains at the same FICU and insured up to the SMSIA of \$250,000.

### *Naming of Beneficiaries in Share Account Records*

Consistent with the current revocable trust rules, the proposed rule would continue to require the beneficiaries of an informal revocable trust to be specifically named in the account records of the FICU.<sup>62</sup> The NCUA does not believe this requirement imposes a burden on FICUs, as informal revocable trusts by their nature require the FICU to be able to identify the individuals or entities to which funds would be paid upon the accountholder's death.

### *Presumption of Ownership*

The proposed rule also would state that, unless otherwise specified in a FICU's account records, funds held in an account for a trust established by multiple grantors are presumed to be owned in equal shares. This presumption is consistent with the current revocable trust rules.<sup>63</sup>

### *Funds Covered Under Other Rules*

The proposed rule would exclude from coverage under § 745.4 certain trust funds that are covered by other sections of the share insurance regulations. For example, employee benefit plan accounts are insured pursuant to current § 745.9-2. In addition, if the co-owners of an informal or formal revocable trust are the trust's sole beneficiaries, funds held in connection with the trust would be treated as a joint ownership account under § 745.8. In each of these cases, the NCUA is not proposing to change the current rule.

### *Removal of the Appendix to Part 745*

Finally, the NCUA is proposing to remove the appendix to part 745, which provides examples of share insurance coverage. The NCUA plans to update its *Your Insured Funds*

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<sup>62</sup> See 12 CFR 745.4(b).

<sup>63</sup> See 12 CFR 745.4(f).

brochure to reflect any amendments made to part 745.<sup>64</sup> The Board believes an updated brochure and other updated resources available on [mycreditunion.gov](https://mycreditunion.gov) will provide a more consumer friendly and easier-to-update avenue for providing examples of share insurance coverage.

The NCUA is also proposing to remove references to the appendix in the heading of part 745 and § 745.0, § 745.2, and § 745.13. This would mean that provision of the appendix would no longer satisfy the notification to members/shareholders requirement in § 745.13. Instead, FICUs would have to make available either the rules in part 745 of the NCUA's regulations or the *Your Insured Funds* brochure.

### *Conforming Changes*

The proposed simplification of the calculation for insurance coverage for funds held in trust accounts also would permit the elimination of current § 745.2(d) of the regulations addressing the valuation of trust interests. As discussed further below, the description of non-contingent interests in §§ 745.2(d)(1) and (2) would no longer be relevant to trust accounts under the proposed rule. Additionally, § 745.2(d)(3) regarding the deemed pro rata contribution of settlors to a trust would be replaced by proposed § 745.4(b)(4), which would presume equal allocation. Section 745.2(d)(4) defining a "trust interest" would be replaced by the proposed definition of "irrevocable trust" in § 745.4(a)(3).

Regarding non-contingent interests, the NCUA is also proposing to move the current description of a non-contingent interest in § 745.2(d)(1) to the definitions section of part 745. The new definition of "non-contingent interest" in § 745.1 would remain substantively the same but would now only be relevant to evaluating participants' non-contingent interests in shares of an employee benefit plan under § 745.9-2(a). The proposed definition of "non-contingent interest" would add language to include any present worth or life expectancy tables that the IRS may adopt that are similar to those set forth in § 20.2031-7 of the Federal Estate Tax Regulations

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<sup>64</sup> <https://mycreditunion.gov/sites/default/static-files/insured-funds-brochure.pdf>

(26 CFR 20.2031-7). This is not intended to be a substantive change but is instead intended to provide flexibility should the IRS make any changes. As part of this change, the NCUA is also proposing to make non-substantive changes to § 745.1 to improve readability. Additionally, the NCUA proposes to remove the reference to § 745.2 in current § 745.9-2.

Finally, the NCUA is proposing to redesignate current § 745.9-2 as § 745.9 to reflect the elimination of current § 745.9-1 governing irrevocable trust accounts. The reference in § 745.9-2(a) to § 745.2 would also be removed to reflect the elimination of the description of a non-contingent interest in current § 745.2(d) and adoption of a definition of “non-contingent interest” in proposed § 745.1.

#### **D. Examples Demonstrating Coverage Under Current and Proposed Rules**

To assist commenters, the NCUA is providing examples demonstrating how the proposed rule would apply to determine share insurance coverage for funds held in trust accounts. These examples are not intended to be all-inclusive; they merely address a few possible scenarios involving funds held in trust accounts. The NCUA expects that for most accountholders, insurance coverage would not change under the proposed rule. The examples here specifically highlight a few instances where coverage could be reduced to ensure that commenters are aware of them.

In addition, all examples involve members or those otherwise entitled to maintain insured accounts at the FICU. It is worth reiterating that share insurance coverage is only available to FICU members and those otherwise entitled to maintain insured accounts. For revocable trust accounts, all grantors must be members of the FICU or otherwise eligible to maintain an insured account to receive share insurance coverage. In the case of an irrevocable trust account, all grantors or all beneficiaries must be members of the FICU or otherwise eligible to maintain an insured account to receive share insurance coverage. Where a revocable trust account has become irrevocable because of the death of a grantor, the deceased grantor’s membership will

continue to satisfy their membership requirement as long as the trust account continues to be maintained at the FICU.

*Example 1: Payable-on-Death Account*

Member A establishes a payable-on-death account at a FICU. Member A has designated three beneficiaries for this account — B, C, and D — who will receive the funds upon member A's death and listed all three on a form provided to the FICU. The only other share account that member A maintains at the same FICU is a share draft account with no designated beneficiaries. What is the maximum amount of share insurance coverage for member A's shares at the FICU?

Under the proposed rule, member A's payable-on-death account represents an informal revocable trust and would be insured in the trust accounts category. The maximum coverage for this account would be equal to the SMSIA (currently \$250,000) multiplied by the number of grantors (in this case one because member A established the account) multiplied by the number of beneficiaries, up to a maximum of five (here three, the number of beneficiaries is less than five). Member A's payable-on-death account would be insured for up to  $(\$250,000) \times (1) \times (3) = \$750,000$ .

The coverage for member A's payable-on-death account is separate from the coverage provided for member A's share draft account, which would be insured in the single ownership category because she has not named any beneficiaries for that account. The single ownership share draft account would be insured up to the SMSIA, \$250,000. Member A's total insurance coverage for shares at the FICU would be  $\$750,000 + \$250,000 = \$1,000,000$ . Notably, this level of coverage is the same as that provided by the current share insurance rules.

*Example 2: Formal Revocable Trust and Informal Revocable Trust*

Members E and F jointly establish a payable-on-death account at a FICU. Members E and F have designated three beneficiaries for this account — G, H, and I — who will receive the

funds after both members E and F are deceased. They list these beneficiaries on a form provided to the FICU. Members E and F also jointly establish an account titled in the name of the “E and F Living Trust” at the same FICU. Members E and F are the grantors of the living trust, a formal revocable trust that includes the same three beneficiaries, G, H, and I. The grantors, members E and F, do not maintain any other share accounts at this same FICU. What is the maximum amount of share insurance coverage for members E and F’s shares?

Under the proposed rule, members E and F’s payable-on-death account represents an informal revocable trust and would be insured in the trust accounts category. Members E and F’s living trust account constitutes a formal revocable trust and would also be insured in the trust accounts category. To the extent the funds in these accounts would pass from the same grantor (E or F) to beneficiaries (G, H, and I), the funds would be aggregated for the purpose of applying the share insurance limit. As under the current rules, it would be irrelevant that the grantors’ shares are divided between the payable-on-death account and the living trust account.

The maximum coverage for members E and F’s shares would be equal to the SMSIA (\$250,000) multiplied by the number of grantors (two, because members E and F are the grantors with respect to both accounts) multiplied by the number of unique beneficiaries, up to a maximum of five (here three, the number of beneficiaries, is less than five). Therefore, the coverage for E and F’s trust accounts would be: (\$250,000) times (2) times (3) = \$1,500,000. This level of coverage is the same as that provided by the current share insurance rules.

*Example 3: Two-owner Trust and a One-owner Trust*

Members J and K jointly establish a payable-on-death account at a FICU. Members J and K have designated three beneficiaries for this account — L, M, and N — who will receive the funds after both J and K are deceased. They list these beneficiaries on a form provided to the FICU. At the same FICU, member J establishes a payable-on-death account and designates

member K as the beneficiary upon J's death. What is the maximum amount of coverage for members J and K's shares?

Under the proposed rule, both accounts would be insured under the trust account category. To the extent these shares would pass from the same grantor (J or K) to beneficiaries (such as L, M, and N), they would be aggregated for the purpose of applying the share insurance limit. For example, member K identified three beneficiaries (L, M, and N), and therefore, member K's insurance limit is \$750,000 (or 1 times 3 times SMSIA). Member K would be fully insured as long as one-half interest of the co-owned trust account was \$750,000 or less, which is the same level of coverage provided under current rules. In this example, member J's situation differs from member K's because J has a second trust account, but the insurance calculation remains the same. Specifically, member J has two trust accounts and identified four unique beneficiaries (L, M, N, and K); therefore, member J's insurance limit is \$1,000,000 (or 1 times 4 times SMSIA). Member J would remain fully insured as long as J's trust shares — equal to one-half of the co-owned trust account plus J's personal trust account — total no more than \$1,000,000. This methodology and level of coverage is the same as that provided by the current share insurance rules.

*Example 4: Revocable and Irrevocable Trusts*

Member O establishes a share account at a FICU titled the "O Living Trust." Member O is the grantor of this living trust, a formal revocable trust that includes three beneficiaries — P, Q, and R. The grantor, member O, also establishes an irrevocable trust for the benefit of the same three beneficiaries. The trustee of the irrevocable trust maintains a share account at the same FICU as the living trust account, titled in the name of the irrevocable trust. Neither member O nor the trustee maintains other share accounts at the same FICU. What is the insurance coverage for these accounts?

Under the proposed rule, the living trust account is a formal revocable trust and would be insured in the trust accounts category. The account containing the funds from the irrevocable trust account would also be insured in the trust accounts category. To the extent these shares would pass from the same grantor (member O) to beneficiaries (P, Q, or R), they would be aggregated for the purposes of applying the share insurance limit. It would be irrelevant that the shares are divided between the living trust account and the irrevocable trust account. The maximum coverage for these shares would be equal to the SMSIA (\$250,000) multiplied by the number of grantors (one, because member O is the grantor with respect to both accounts) multiplied by the number of beneficiaries, up to a maximum of five (here three, the number of beneficiaries, is less than five). Therefore, the maximum coverage for the shares in the trust accounts would be: (\$250,000) times (1) times (3) = \$750,000.

This is one of the isolated instances where the proposed rule may provide a reduced amount of coverage as a result of the aggregation of revocable and irrevocable trust accounts, depending on the structure of the trust agreement. Under the current rules, member O would be insured for up to \$750,000 for revocable trust shares and separately insured for up to \$750,000 for irrevocable trust shares (assuming non-contingent beneficial interests), resulting in \$1,500,000 in total coverage. If that were the case, current coverage would exceed that provided by the proposed rule. However, the terms of irrevocable trusts sometimes lead to less coverage than expected. It is often the case that irrevocable trust accounts are only insured up to \$250,000 under the current rules due to contingencies in the trust agreement, but determining this with certainty often requires careful consideration of the trust agreement's contingency provisions. Under the current rule, if contingencies existed, current coverage would exceed that provided by the proposed rule, as member O would be insured up to \$1,000,000; \$750,000 for the revocable trust and \$250,000 for the irrevocable trust. In the NCUA's view, one of the key benefits of the proposed rule versus the current rule would be greater clarity and predictability in share

insurance coverage because whether contingencies exist would no longer be a factor that could affect share insurance.

*Example 5: Many Beneficiaries Named*

Member S establishes a share account at a FICU titled in the name of the “S Living Trust.” This trust is a revocable trust naming seven beneficiaries — T, U, V, W, X, Y, and Z. The grantor, member S, does not maintain any other shares at the same FICU. What is the coverage for this account?

Under the proposed rule, the living trust is a formal revocable trust and would be insured in the trust accounts category. The maximum coverage for this account would be equal to the SMSIA (\$250,000) multiplied by the number of grantors (one, because member S is the sole grantor) multiplied by the number of beneficiaries, up to a maximum of five. Here the number of named beneficiaries (seven) exceeds the maximum (five), so insurance is calculated using the maximum (five). Coverage for the account would be: (\$250,000) times (1) times (5) = \$1,250,000.

This is another limited instance where the proposed rule may provide for less coverage than the current rule. Under the current rule, because more than five beneficiaries are named, the account is insured up to the greater of the following: (1) five times the SMSIA; or (2) the total of the interests of each beneficiary, with each such interest limited to the SMSIA. Determining coverage requires review of the trust agreement to ascertain each beneficiary’s interest. Each such insurable interest is limited to the SMSIA, and the total of all these interests is compared with \$1,250,000 (five times the SMSIA). The current rule provides coverage in the greater of these two amounts. The result would fall into a range from \$1,250,000 to \$1,750,000, depending on the precise allocation of trust interests among the beneficiaries.<sup>65</sup> In the NCUA’s view, one of

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<sup>65</sup> For example, if all the beneficiaries’ interests were equal, coverage would be: \$250,000 times (7 beneficiaries) = \$1,750,000. This is the maximum coverage possible under the current rule. Conversely, if a few beneficiaries had a

the key benefits of the proposed rule versus the current rule would be greater clarity and predictability in share insurance coverage because a single formula would be used to determine maximum coverage, and this formula would not depend upon the specific allocation of funds among beneficiaries.

### **E. Request for Comment**

The NCUA is requesting comment on all aspects of the proposed rule. Comment is specifically invited with respect to the following questions:

- Would the proposed amendments to the share insurance rules make insurance coverage for trust accounts easier to understand for FICUs and the public?
- The NCUA believes that accountholders generally would have the information necessary to readily calculate share insurance coverage for their trust accounts under the proposed rule, allowing them to better understand insurance coverage for their trust accounts. Are there instances where an accountholder would not likely have the necessary information?
- Are there any other types of trusts not described in this proposal whose funds maintained in FICU accounts would be affected by the proposed rule if adopted? What types of trusts are those, and how would they be impacted?
- While the NCUA has substantial experience regarding trust arrangements, the NCUA does not possess sufficiently detailed information on accountholders' existing trust arrangements to allow the NCUA to project the proposed rule's effects on current accountholders. Are there any other sources of empirical information the NCUA should consider that may be helpful in understanding the effects of the proposed rule? The NCUA also encourages commenters to provide such information, if possible.

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large interest in the trust, the total of all beneficiaries' interests (limited to the SMSIA per beneficiary) could be less than \$1,250,000, in which case the current rule would provide a minimum of \$1,250,000 in coverage. Depending upon the precise allocation of interests, the amount of coverage provided would fall somewhere within this range.

- Grandfathering of the share insurance rules would result in significantly greater complexity for the period during which two sets of rules could apply to accounts — especially in conducting liquidations. Therefore, the NCUA is not inclined to consider allowing grandfathering but prefers to rely on a delayed implementation date to allow stakeholders to make necessary adjustments because of the new rules. However, the NCUA recognizes there are instances, such as trusts holding share certificates or other account relationships, which may not be easily restructured without adverse consequences to the accountholder. Are there fact patterns where grandfathering the current rules may be appropriate? Would grandfathering be appropriate with respect to the proposed rule’s coverage limit of \$1,250,000 per FICU for an accountholder’s funds held in trust accounts?
- Are the examples provided clear and understandable? Are there other common trust scenarios that would benefit from an example being provided?
- Historically, the NCUA has maintained the position that the membership requirement for a revocable trust account is satisfied when all grantors (sometimes described as settlors) of the trust are members of the FICU or otherwise eligible to maintain an insured account. For an irrevocable trust account, the NCUA has said that the membership requirement is satisfied if either all the grantors/settlors or all the beneficiaries of the trust are members of the FICU or otherwise eligible to maintain an insured account. Are there alternatives the NCUA should consider for fulfilling the membership requirement for share insurance coverage of revocable and irrevocable trust accounts? Should informal revocable trust accounts that are established with a right of survivorship be treated akin to joint accounts with member and nonmember co-owners who own the account with a right of survivorship?<sup>66</sup> Should a trustee who deposits funds at a FICU pursuant to a revocable

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<sup>66</sup> See 12 CFR 745.8(e) (“A nonmember may become a joint owner with a member on a joint account with right of survivorship. The nonmember’s interest in such accounts will be insured in the same manner as the member joint-owner’s interest.”).

or irrevocable trust they administer be considered to be maintaining a member account, providing share insurance coverage to eligible beneficiaries?

- Are there any other amendments to the share insurance rules applicable to trusts that the NCUA should consider?

### **III. Amendments to Mortgage Servicing Account Rule**

#### **A. Policy Objectives**

The NCUA's regulations governing share insurance coverage include specific rules on accounts maintained at FICUs by mortgage servicers.<sup>67</sup> These rules are intended to be easy to understand and apply in determining the amount of share insurance coverage for a mortgage servicer's account. The NCUA generally strives to maintain parity with FDIC's regulations in furtherance of this aim.

The NCUA is proposing an amendment to its rules governing insurance coverage for accounts maintained at FICUs by mortgage servicers that consist of mortgagors' principal and interest payments. The proposed rule would mirror a change made by the FDIC in early 2022,<sup>68</sup> scheduled to become effective in April 2024, intended to address a servicing arrangement that is not addressed in the current rules. Specifically, some servicing arrangements may permit or require servicers to advance their own funds to the lenders when mortgagors are delinquent in making principal and interest payments, and servicers might commingle such advances in the mortgage servicing account (MSA) with principal and interest payments collected directly from mortgagors. The FDIC reasoned that the factors that motivated the FDIC to establish its current rules for mortgage servicing accounts, which the NCUA also adopted and are further described below, weigh in favor of treating funds advanced by a mortgage servicer in order to satisfy mortgagors' principal and interest obligations to the lender as if such funds were collected

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<sup>67</sup> 12 CFR 745.3(a)(3).

<sup>68</sup> 87 FR 4455 (Jan. 28, 2022).

directly from borrowers. The FDIC also noted that it seeks to avoid uncertainty concerning the extent of deposit insurance coverage for such accounts. The NCUA concurs with the importance of avoiding uncertainty regarding the extent of insurance coverage and believes that an important aspect of avoiding uncertainty is maintaining parity between the share insurance and deposit insurance regimes.

## **B. Background and Need for Rulemaking**

The NCUA's rules governing coverage for MSAs were last amended in 2008 and corresponded to changes made by the FDIC. More specifically, in 2008 the FDIC recognized that securitization methods and vehicles for mortgages had become more complex, exacerbating the difficulty of determining the ownership of deposits consisting of principal and interest payments by mortgagors and extending the time required to make a deposit insurance determination for deposits of a mortgage servicer in the event of an insured depository institution's (IDI's) failure.<sup>69</sup> The FDIC expressed concern that a lengthy insurance determination could lead to continuous withdrawal of deposits of principal and interest payments from IDIs and unnecessarily reduce a funding source for such institutions. The FDIC therefore amended its rules to provide coverage to lenders based on each mortgagor's payments of principal and interest into the MSA, up to the standard maximum deposit insurance amount (SMDIA) (currently \$250,000) per mortgagor. The FDIC did not amend the rule for coverage of tax and insurance payments, which continued to be insured to each mortgagor on a pass-through basis and aggregated with any other deposits maintained by each mortgagor at the same IDI in the same right and capacity. The NCUA agreed that this treatment of principal and interest payments provided greater and fairer coverage for credit union members and decided to take the same approach in its share insurance rules.<sup>70</sup>

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<sup>69</sup> See 73 FR 61658, 61658-59 (Oct. 17, 2008).

<sup>70</sup> 73 FR 62856, 62857 (Oct. 22, 2008).

Importantly, the 2008 amendments to the rules for MSAs did not provide for the fact that servicers may be required to advance their own funds to make payments of principal and interest on behalf of delinquent borrowers to the lenders. However, in its recent rulemaking the FDIC identified that this is required of mortgage servicers in some instances. For example, the FDIC noted that some IDIs identified challenges to implementing certain recordkeeping requirements with respect to MSA deposit balances because of the way in which servicer advances are administered and accounted.<sup>71</sup>

The NCUA's and the FDIC's rules currently in effect provide coverage for principal and interest funds only to the extent "paid into the account by the mortgagors"; they do not provide coverage for funds paid into the account from other sources, such as the servicer's own operating funds, even if those funds satisfy mortgagors' principal and interest payments. As a result, advances are not provided the same level of coverage as other deposits in an MSA consisting of principal and interest payments directly from the borrower, which are insured up to the SMSIA/SMDIA for each borrower. Instead, the advances are aggregated and insured to the servicer as corporate funds for a total of \$250,000. In adopting changes to its rule in early 2022, the FDIC expressed concern that this inconsistent treatment of principal and interest amounts could result in financial instability during times of stress, and could further complicate the insurance determination process, a result that is inconsistent with their policy objective. The NCUA shares these concerns and believes it is important that parity is maintained between the insurance regimes.

### **C. Description of Proposed Rule**

The NCUA is proposing to amend the rules governing coverage for funds in MSAs to provide parity with the FDIC's regulation and provide consistent share insurance treatment for

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<sup>71</sup> The FDIC noted that, to fulfill their contractual obligations with investors, covered IDIs maintain mortgage principal and interest balances at a pool level and remittances, advances, advance reimbursements, and excess funds applications that affect pool-level balances are not allocated back to individual borrowers.

all MSA balances held to satisfy principal and interest obligations to a lender, regardless of whether those funds are paid into the account by borrowers, or paid into the account by another party (such as the servicer) to satisfy a periodic obligation to remit principal and interest due to the lender. Under the proposed rule, accounts maintained by a mortgage servicer in an agency, custodial, or fiduciary capacity, which consist of payments of principal and interest, would be insured for the cumulative balance paid into the account to satisfy principal and interest obligations to the lender, whether paid directly by the borrower or by another party, up to the limit of the SMSIA per mortgagor. Mortgage servicers' advances of principal and interest funds on behalf of delinquent borrowers would therefore be insured up to the SMSIA per mortgagor, consistent with the coverage rules for payments of principal and interest collected directly from borrowers.

The composition of an MSA attributable to principal and interest payments would also include collections by a servicer, such as foreclosure proceeds, that are used to satisfy a borrower's principal and interest obligation to the lender. In some cases, foreclosure proceeds may not be paid directly by a mortgagor. The current rule does not address whether foreclosure collections represent payments of principal and interest by a mortgagor. Under the proposed rule, foreclosure proceeds used to satisfy a borrower's principal and interest obligation would be insured up to the limit of the SMSIA per mortgagor.

The proposed rule would make no change to the share insurance coverage provided for MSAs comprised of payments from mortgagors of taxes and insurance premiums. Such aggregate escrow accounts are held separately from the principal and interest MSAs, and the funds therein are held for the mortgagors until such time as tax and insurance payments are disbursed by the servicer on the borrower's behalf. Under the proposed rule, such funds would continue to be insured based on the ownership interest of each mortgagor in the account and aggregated with other funds maintained by the mortgagor at the same FICU in the same capacity and right.

## **D. Request for Comment**

The NCUA is requesting comment on all aspects of the proposed rule. Comment is specifically invited with respect to the following questions:

- Would the proposed amendments to the rules governing coverage for MSAs adequately address servicers' practices with respect to these accounts, as described above? Are there any other funds representing principal and interest that are commingled with borrowers' payments that the NCUA should consider in the share insurance calculation, consistent with its policy objectives?
- Would share insurance coverage of servicer principal and interest advances help to promote financial stability in the financial system? If the NCUA does not amend the rule as proposed, how would mortgage servicers react if their FICU, or the credit union industry as a whole, appears stressed? How would funding arrangements or deposit relationships change?
- Are there any alternatives to the proposed rule that would better achieve the NCUA's policy objectives in connection with this rulemaking? Are there any other amendments to the share insurance rules applicable to MSAs that the NCUA should consider?
- If the NCUA opts to issue a final rule adopting the proposed change is there any reason to delay its effective date, as is being contemplated for the proposed changes to trust accounts? Or should the NCUA make the change effective as soon as possible?

## **IV. Recordkeeping Requirements**

### **A. Policy Objectives**

The NCUA's regulations governing share insurance coverage include general principles applicable in determining insurance of accounts.<sup>72</sup> Among these general principles are provisions addressing recordkeeping.<sup>73</sup> The NCUA intends for these provisions to clearly articulate the records the agency will look to in order to evaluate insurance coverage. As discussed in more detail below, over time it has become apparent that the recordkeeping provisions do not clearly address all situations and may be especially unclear as to accounts maintained by an agent, custodian, fiduciary, or other party on behalf of a member or beneficial owner eligible to maintain an insured account at a FICU. To better address these situations, the NCUA proposes to amend the recordkeeping requirements as discussed below.

## **B. Background and Need for Rulemaking**

Section 745.2(c) of the NCUA's regulations addresses general recordkeeping requirements. Other recordkeeping requirements applicable to specific account types are addressed as needed in the relevant sections of part 745. Current § 745.2(c)(1) provides that, as a general matter, the account records of the FICU shall be conclusive as to the existence of any relationship pursuant to which the funds in the account are deposited and on which a claim for insurance coverage is founded. Examples would be trustee, agent, custodian, or executor. No claim for insurance based on such a relationship will be recognized in the absence of such disclosure.

Section 745.2(c)(2) provides that, if the account records of a FICU disclose the existence of a relationship which may provide a basis for additional insurance, as required under § 745.2(c)(1), the details of the relationship and the interest of other parties in the account must be ascertainable either from the records of the FICU or the records of the member maintained in good faith and in the regular course of business. It is this provision that has raised questions

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<sup>72</sup> 12 CFR 745.2.

<sup>73</sup> 12 CFR 745.2(c).

regarding accounts maintained by an agent, fiduciary, or similar party. Specifically, the NCUA has received several questions regarding whether records maintained by an agent, fiduciary, or similar third party on behalf of the member or beneficial owner eligible to maintain an insured account would qualify as the “records of the member.” Due to the frequency with which these agent or fiduciary arrangements will involve a party other than the FICU or member maintaining records on the FICU’s or member’s behalf, the NCUA is proposing to add language explicitly clarifying that such records, when maintained in good faith and in the regular course of business, can be looked to when evaluating the details of the relationship and the interest of other parties in the account at the FICU.

### **C. Description of Proposed Rule**

Section 745.3(a)(2) of the NCUA’s regulations provides that when an account is held by an agent or nominee, funds owned by a principal and deposited in one or more accounts in the name or names of agents or nominees shall be added to any individual account of the principal and insured up to the SMSIA in the aggregate. The NCUA will also generally look to the principal or beneficial owner for satisfying the membership requirement or other eligibility to maintain an insured account at the FICU. As such, records maintained by an agent or nominee on behalf of the member principal or beneficial owner may not clearly be considered “records of the member” for the purpose of ascertaining their interests in the account under current § 745.2(c)(2).

The NCUA’s Office of General Counsel has previously issued a legal opinion stating that where an agent or custodian “has an agreement with the beneficial owner/member to maintain custody of the beneficial owner/member’s records, [the] NCUA would consider those records to be ‘records of the member’ within the meaning of 12 C.F.R. 745(c)(2).”<sup>74</sup> However, the NCUA

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<sup>74</sup> NCUA Legal Op. 97-0909 (Feb. 6, 1998), available at <https://www.ncua.gov/regulation-supervision/legal-opinions/1997/pass-through-insurance>.

acknowledges that it would be beneficial for the regulation to more clearly address this situation to allow the details of the relationship and the interests of other parties in the account to be ascertainable either from the account records of the FICU or from records maintained, in good faith and in the regular course of business, by the member or by some person or entity that has undertaken to maintain such records for the member. Such a change would provide much greater clarity, particularly in the event of multi-tiered fiduciary relationships, and would more closely compare to language previously adopted by the FDIC.<sup>75</sup> Importantly, the NCUA retains discretion to determine when records are maintained on behalf of a member, in good faith and in the regular course of business. Ultimately, the NCUA must be able to establish ownership interests in the account by following the chain of records maintained by parties at each level of the relationship from the account records maintained at the FICU.

Additionally, § 745.2(c)(3) of the current regulations provides that the account records of a FICU in connection with a trust account shall disclose the name of both the settlor (grantor) and the trustee of the trust and shall contain an account signature card executed by the trustee. This requirement goes beyond the recordkeeping requirements of § 745.2(c)(1) through (2) and poses an unnecessary burden on FICUs and their members. Further, the FDIC previously eliminated a similar requirement.<sup>76</sup> To eliminate unnecessary recordkeeping complexity and provide parity with FDIC, the NCUA is proposing to eliminate current § 745.2(c)(3).

Section 745.2(c)(4) states that the interests of the co-owners of a joint account shall be deemed equal, unless otherwise stated on the insured credit union's records in the case of a tenancy in common. The NCUA is not proposing any substantive amendments to this provision but is proposing to move it to § 745.2(c)(3) given the proposed elimination of the current requirement in that section.

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<sup>75</sup> 12 CFR 330.5(b)(2).

<sup>76</sup> 51 FR 21137 (June 11, 1986).

Finally, § 745.14(a)(2) notes that interest on lawyers' trust accounts (IOLTAs) and other similar escrow accounts are subject to the recordkeeping requirements of § 745.2(c)(1) and (2). In doing so, § 745.14(a)(2) provides an example of how the details of the relationship between the attorney or escrow agent and their clients and principals must be ascertainable from the records of the FICU or from records maintained, in good faith and in the regular course of business, by the member attorney or member escrow agent administering the account. The NCUA proposes to amend this description to conform to the change to § 745.2(c)(2) to explicitly state that the records detailing the relationship and the interest of other parties in the account must be maintained, in good faith and in the regular course of business, by (1) the FICU or (2) the member attorney or member escrow agent, or a person or entity acting on their behalf.

#### **D. Request for Comment**

The NCUA is requesting comment on all aspects of the proposed rule. Comment is specifically invited with respect to the following questions:

- Would the proposed amendments to the recordkeeping requirements in part 745 provide adequate clarity for FICUs, members, and other relevant third parties as to the records the NCUA will look to in evaluating the details of account relationships and the interests of other parties in accounts maintained at FICUs?
- Are there any alternatives to the proposed rule that would better achieve the NCUA's policy objectives in connection with this rulemaking?
- Are there any other amendments to the recordkeeping requirements applicable to the share insurance rules that the NCUA should consider? For example, should the NCUA consider adopting a definition of "account records" similar to the definition the FDIC has provided for "deposit account records" in its regulations governing deposit insurance

coverage?<sup>77</sup> Or, similarly, should the NCUA adopt specific provisions addressing multi-tiered fiduciary relationships like the FDIC has done?<sup>78</sup>

- Relatedly, the FDIC has adopted regulations to facilitate prompt payment of FDIC-insured deposits when large IDIs fail.<sup>79</sup> The FDIC’s recordkeeping for timely deposit insurance determination regulations require each IDI that has two million or more deposit accounts to (1) configure its information technology system to be capable of calculating the insured and uninsured amount in each deposit account by ownership right and capacity, which would be used by the FDIC to make deposit insurance determinations in the event of the institution’s failure, and (2) maintain complete and accurate information needed by the FDIC to determine deposit insurance coverage with respect to each deposit account, except as otherwise provided. These requirements are intended to facilitate the FDIC’s prompt payment of deposit insurance after the failure of covered IDIs. By law, the FDIC must pay deposit insurance “as soon as possible” after an IDI fails while also resolving the IDI in the manner least costly to the Deposit Insurance Fund.<sup>80</sup> Similarly, the FCU Act requires the NCUA to pay accountholders “as soon as possible” after a FICU liquidation.<sup>81</sup> Should the NCUA consider adopting similar requirements for FICUs? If so, would a lower threshold, such as 500,000 or 1 million member accounts, be more appropriate?
- If the NCUA opts to issue a final rule adopting the proposed change, is there any reason to delay its effective date, as contemplated for the proposed changes to trust accounts? Or should the NCUA make the change effective as soon as permitted by law?

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<sup>77</sup> See 12 CFR 330.1 (“*Deposit account records* means account ledgers, signature cards, certificates of deposit, passbooks, corporate resolutions authorizing accounts in the possession of the insured depository institution and other books and records of the insured depository institution, including records maintained by computer, which relate to the insured depository institution’s deposit taking function, but does not mean account statements, deposit slips, items deposited or cancelled checks.”).

<sup>78</sup> See 12 CFR 330.5(b)(3).

<sup>79</sup> See 12 CFR part 370.

<sup>80</sup> 12 U.S.C. 1821(f)(1); 12 U.S.C. 1823(c)(4).

<sup>81</sup> 12 U.S.C. 1787(d)(1).

## V. Regulatory Procedures

### A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities. A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined for the purposes of the RFA to include credit unions with assets less than \$100 million)<sup>82</sup> and publishes its certification and a short, explanatory statement in the *Federal Register* together with the rule.

The NCUA fully considered the potential economic impact of the proposed changes during the development of the proposed rule. As noted in the preamble, the proposed rule would simplify the NCUA's current share insurance regulations covering various types of trust accounts. It would also provide more flexibility on the coverage of MSAs. Finally, it would explicitly provide for additional flexibility in what records the NCUA can look to when determining the details of account relationships and various parties' interests in the accounts.

In short, the NCUA believes the principal impact of the proposed rule will be to streamline its administrative procedures for insurance payouts on trust accounts when FICUs fail. While the proposed rule would require FICUs and their members to be familiar with the new trust rules and the coverage limits imposed on trust accounts, the NCUA believes this will not impose any new significant burden on FICUs, may ease some existing requirements, and should reduce the complexity of questions FICUs receive from their members on share insurance coverage. Additionally, FICUs and their members are familiar with the proposed formula as it is already applied to revocable trust accounts with five or fewer beneficiaries. The formula is also simpler to understand and implement than the previous rules governing revocable trust accounts

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<sup>82</sup> See 80 FR 57512 (Sept. 24, 2015).

with six or more beneficiaries and irrevocable trusts. The proposed changes to the rule governing coverage of MSAs and the changes to the recordkeeping requirements should only provide greater flexibility for coverage of these accounts and should not cause any new burden on FICUs or their members. Accordingly, the NCUA certifies that it would not have a significant economic impact on a substantial number of small FICUs.

## **B. Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden.<sup>83</sup> For the purposes of the PRA, a paperwork burden may take the form of a reporting, disclosure, or recordkeeping requirement, each referred to as an information collection. The NCUA may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The proposed rule does not contain information collection requirements that require approval by OMB under the PRA. The proposed rule will not create new or modify any existing paperwork burdens. Rather, the proposed rule will simplify the share insurance regulations by merging the revocable and irrevocable trust account categories into one trust account category and applying a simpler, common calculation method to determine insurance coverage for funds held in revocable and irrevocable trust accounts. The proposed rule will also provide consistent share insurance treatment for all MSA balances held to satisfy principal and interest obligations to a lender, regardless of whether those funds are paid into the account by borrowers or paid into the account by another party (such as the servicer) to satisfy a periodic obligation to remit principal and interest due to the lender. Finally, the proposed rule will also explicitly allow the NCUA, when making share insurance determinations, to look to records held in the normal course of business that are maintained by parties other than a FICU and its members on their

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<sup>83</sup> 44 U.S.C. 3507(d).

behalf. As such, no PRA submissions to OMB will be made with respect to this proposed rule.

The NCUA invites comments on its PRA determination.

### **C. Executive Order 13132**

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the principles of the executive order to adhere to fundamental federalism principles. This proposed rule would only impact the NCUA's regulations related to share insurance coverage; it would not affect state law related to trust accounts. The proposed rule would also not alter the NCUA's relationship or division of responsibilities with state regulatory agencies or bodies because the proposed rule would affect the NCUA's Federal share insurance determinations exclusively. This proposal would not have a substantial direct effect on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The NCUA has determined that this proposal does not constitute a policy that has federalism implications for the purposes of the executive order.

### **D. Assessment of Federal Regulations and Policies on Families**

The NCUA has determined that this proposed rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105-277, 112 Stat. 2681 (1998). Under this statute, if the agency determines the proposed regulation may negatively affect family well-being, then the agency must provide an adequate rationale for its implementation.

The NCUA has determined that the implementation of this proposed rule would not negatively affect family well-being, but rather would strengthen it. The NCUA believes that any effect would be limited because the change may not affect many accounts, and members or

others maintaining those accounts would have time and notice to modify the accounts before the NCUA adopts and implements any final rule on this subject. Overall, the NCUA believes that the proposed rule would not negatively affect family well-being despite this possible effect but welcomes public comment on this issue. If the NCUA ultimately finds that the rule would have a negative effect as the statute describes, it believes the benefits that the preamble describes in simplifying coverage and potentially reducing costs for the NCUA and for FICUs would support implementing the rule.

### **E. Providing Accountability Through Transparency Act of 2023**

The Providing Accountability Through Transparency Act of 2023 (5 U.S.C. 553(b)(4)) (Act) requires that a notice of proposed rulemaking include the Internet address of a summary of not more than 100 words in length of a proposed rule, in plain language, that shall be posted on the Internet website under section 206(d) of the E-Government Act of 2002 (44 U.S.C. 3501 note) (commonly known as regulations.gov).

In summary, the proposed rule would simplify the share insurance regulations by establishing a “trust accounts” category that would provide for coverage of funds of both revocable trusts and irrevocable trusts deposited at FICUs, provide consistent share insurance treatment for all mortgage servicing account balances held to satisfy principal and interest obligations to a lender, and provide more flexibility for the NCUA to consider various records in determining share insurance coverage in liquidations.

The proposal and the required summary can be found at <https://www.regulations.gov>.

### **List of Subjects in 12 CFR Part 745**

Credit, Credit Unions, Share Insurance.

By the National Credit Union Administration Board on October 19, 2023.

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Melane Conyers-Ausbrooks,  
Secretary of the Board.

For the reasons discussed in the preamble, the Board proposes to amend 12 CFR part 745 as follows:

#### **PART 745—SHARE INSURANCE COVERAGE**

1. The authority citation for part 745 continues to read as follows:

**Authority:** 12 U.S.C. 1752(5), 1757, 1765, 1766, 1781, 1782, 1787, 1789; title V, Pub. L. 109-351; 120 Stat. 1966.

2. The heading for part 745 is revised to read as set forth above.

#### **§ 745.0 [Amended]**

3. Amend § 745.0 by removing the words “and appendix”.

4. Revise § 745.1 to read as follows:

#### **§ 745.1 Definitions.**

For the purposes of this part:

*Account or accounts* mean share, share certificate, or share draft accounts (or their equivalent under state law, as determined by the Board in the case of insured state-chartered credit unions) of a member (which includes other credit unions, public units, and nonmembers where permitted under the Act) in a credit union of a type approved by the Board which evidences money or its

equivalent received or held by a credit union in the usual course of business and for which it has given or is obligated to give credit to the account of the member.

*Member or members* mean those persons enumerated in the credit union's field of membership who have been elected to membership in accordance with the Act or state law in the case of state-chartered credit unions. It also includes those nonmembers permitted under the Act to maintain accounts in an insured credit union, including nonmember credit unions and nonmember public units and political subdivisions.

*Non-contingent interest* means an interest capable of determination without evaluation of contingencies except for those covered by the present worth tables and rules of calculation for their use set forth in § 20.2031-7 of the Federal Estate Tax Regulations (26 CFR 20.2031-7) or any similar present worth or life expectancy tables which may be adopted by the Internal Revenue Service.

*Political subdivision* includes any subdivision of a public unit, as defined in paragraph (c) of this section, or any principal department of such public unit,

- (1) The creation of which subdivision or department has been expressly authorized by state statute;
- (2) To which some functions of government have been delegated by state statute; and
- (3) To which funds have been allocated by statute or ordinance for its exclusive use and control. It also includes drainage, irrigation, navigation improvement, levee, sanitary, school or power districts and bridge or port authorities, and other special districts created by state statute or compacts between the states. Excluded from the term are subordinate or nonautonomous divisions, agencies, or boards within principal departments.

*Public unit* means the United States, any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Panama Canal Zone, any territory or possession of the United States, any county, municipality, or political subdivision thereof, or any Indian tribe as defined in section 3(c) of the Indian Financing Act of 1974.

*Standard maximum share insurance amount* referred to as the “SMSIA” hereafter, means \$250,000 adjusted pursuant to subparagraph (F) of section 11(a)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1821(a)(1)(F)).

5. Amend § 745.2 by:

- a. Revising paragraph (a);
- b. Revising paragraph (c)(2);
- c. Removing paragraph (c)(3);
- d. Redesignating paragraph (c)(4) as paragraph (c)(3);
- e. Removing paragraph (d); and
- f. Redesignating paragraphs (e) and (f) as paragraphs (d) and (e).

The revisions read as follows:

**§ 745.2 General principles applicable in determining insurance of accounts.**

(a) *General.* This part provides for determination by the Board of the amount of members’ insured accounts. The rules for determining the insurance coverage of accounts maintained by members in the same or different rights and capacities in the same insured credit union are set forth in the following provisions of this part. While the provisions of this part govern in determining share insurance coverage, to the extent local law enters into a share insurance determination, the local law of the jurisdiction in which the insured credit union’s principal office is located will control over the local law of other jurisdictions where the insured credit union has offices or service facilities.

\* \* \* \* \*

(c) \* \* \*

(2) If the account records of an insured credit union disclose the existence of a relationship which may provide a basis for additional insurance, the details of the relationship and the interest of other parties in the account must be ascertainable either from the records of the credit union or the records of the member, maintained in good faith and in the regular course of business by the member or by some person or entity that has undertaken to maintain such records for the member.

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6. Amend § 745.3 by revising paragraph (a)(3) to read as follows:

**§ 745.3 Single ownership accounts.**

(a) \* \* \*

(3) *Mortgage servicing accounts.* Accounts maintained by a mortgage servicer, in a custodial or other fiduciary capacity, which are comprised of payments of principal and interest, shall be insured for the cumulative balance paid into the account by mortgagors, or in order to satisfy mortgagors' principal or interest obligations to the lender, up to the limit of the SMSIA per mortgagor. Accounts maintained by a mortgage servicer, in a custodial or other fiduciary capacity, which are comprised of payments by mortgagors of taxes and insurance premiums shall be added together and insured in accordance with paragraph (a)(2) of this section for the ownership interest of each mortgagor in such accounts.

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7. Revise § 745.4 to read as follows:

**§ 745.4 Trust accounts.**

(a) *Scope and definitions.* This section governs coverage for funds held in connection with informal revocable trusts, formal revocable trusts, and irrevocable trusts. For the purposes of this section:

(1) *Informal revocable trust* means a trust under which deposited funds pass directly to one or more beneficiaries upon the owner's death without a written trust agreement, commonly referred to as a payable-on-death account, in-trust-for account, or Totten trust account.

(2) *Formal revocable trust* means a revocable trust established by a written trust agreement under which deposited funds pass to one or more beneficiaries upon the grantor's death.

(3) *Irrevocable trust* means an irrevocable trust established by statute or a written trust agreement, except as described in paragraph (e) of this section.

(b) *Calculation of coverage—* (1) *General calculation.* Deposited trust funds are insured in an amount up to the SMSIA multiplied by the total number of beneficiaries identified by each grantor, up to a maximum of five beneficiaries.

(2) *Aggregation for purposes of insurance limit.* Deposited trust funds that pass from the same grantor to beneficiaries are aggregated for the purposes of determining coverage under this section, regardless of whether those funds are held in connection with an informal revocable trust, formal revocable trust, or irrevocable trust.

(3) *Separate insurance coverage.* The share insurance coverage provided under this section is separate from coverage provided for other funds at the same federally insured credit union.

(4) *Equal allocation presumed.* Unless otherwise specified in the account records of the federally insured credit union, deposited funds held in connection with a trust established by multiple grantors are presumed to have been owned or funded by the grantors in equal shares.

(c) *Number of beneficiaries.* The total number of beneficiaries for trust funds deposited under paragraph (b) of this section will be determined as follows:

(1) *Eligible beneficiaries.* Subject to paragraph (c)(2) of this section, beneficiaries include natural persons, as well as charitable organizations and other non-profit entities recognized as such under the Internal Revenue Code of 1986, as amended.

(2) *Ineligible beneficiaries.* Beneficiaries do not include:

(i) The grantor of a trust; or

(ii) A person or entity that would only obtain an interest in the deposited funds if one or more named beneficiaries are deceased.

(3) *Future trust(s) named as beneficiaries.* If a trust agreement provides that trust funds will pass into one or more new trusts upon the death of the grantor(s) (“future trusts”), the future trust(s) are not treated as beneficiaries of the trust; rather, the future trust(s) are viewed as mechanisms for distributing trust funds, and the beneficiaries are the natural persons or organizations that shall receive the trust funds through the future trusts.

(4) *Informal trust account payable to member’s formal trust.* If an informal revocable trust designates the account owner’s formal trust as its beneficiary, the informal revocable trust account will be treated as if titled in the name of the formal trust.

(d) *Account records—* (1) *Informal revocable trusts.* The beneficiaries of an informal revocable trust must be specifically named in the account records of the federally insured credit union.

(2) *Formal revocable trusts.* The title of a formal trust account must include terminology sufficient to identify the account as a trust account, such as “family trust” or “living trust,” or must otherwise be identified as a testamentary trust in the account records of the federally insured credit union. If eligible beneficiaries of such formal revocable trust are specifically named in the account records of the federally insured credit union, the NCUA shall presume the continued validity of the named beneficiaries’ interest in the trust.

(e) *Deposited funds excluded from coverage under this section—* (1) *Revocable trust co-owners that are sole beneficiaries of a trust.* If the co-owners of an informal or formal revocable trust

are the trust's sole beneficiaries, deposited funds held in connection with the trust are treated as joint ownership funds under § 745.8.

(2) *Employee benefit plan deposits.* Deposited funds of employee benefit plans, even if held in connection with a trust, are treated as employee benefit plan funds under § 745.9.

#### **§ 745.9-1 [Removed]**

8. Remove § 745.9-1.

#### **§ 745.9-2 [Redesignated as § 745.9 and Amended]**

9. Redesignate § 745.9-2 as § 745.9 and remove the words “, in accordance with § 745.2 of this part” in newly redesignated paragraph (a).

#### **§ 745.13 [Amended]**

10. Amend § 745.13 by removing the words “the appendix”.

11. Amend § 745.14 by revising paragraph (a)(2) to read as follows:

§ 745.14 Interest on lawyers trust accounts and other similar escrow accounts.

(a) \* \* \*

(2) Pass-through coverage will only be available if the recordkeeping requirements of § 745.2(c)(1) of this part and the relationship disclosure requirements of § 745.2(c)(2) of this part are satisfied. In the event those requirements are satisfied, funds attributable to each client and principal will be insured on a pass-through basis in whatever right and capacity the client or principal owns the funds. For example, an IOLTA or other similar escrow account must be titled as such, and the underlying account records of the insured credit union must sufficiently indicate the existence of the relationship on which a claim for insurance is founded. The details of the relationship between the attorney or escrow agent and their clients and principals must be

ascertainable from the records of the insured credit union or from records maintained, in good faith and in the regular course of business, by the attorney or the escrow agent administering the account, or by some person or entity that has undertaken to maintain such records for the attorney or escrow agent. The NCUA will determine, in its sole discretion, the sufficiency of these records for an IOLTA or other similar escrow account.

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### **Appendix to Part 745 [Removed]**

12. Remove Appendix to Part 745.

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