Frank Act is temporary through December 31, 2012.

2. The Proposed Rule

In December 2010, the NCUA Board issued a proposed rule to clarify its interpretation of the Dodd-Frank Act provisions regarding noninterest-bearing transaction accounts. 75 FR 80367 (December 22, 2010). The following summarizes the issues discussed in the proposal.

Amendments to Share Insurance Rules

Section 343 of the Dodd-Frank Act amended the share insurance provisions of the FCU Act (12 U.S.C. 1787(k)(1)) to provide separate insurance coverage for noninterest-bearing transaction accounts. Accordingly, as discussed in detail below, NCUA proposed to revise its share insurance regulations in 12 CFR Part 745 to include this new temporary share insurance account category.

Definition of Noninterest-Bearing Transaction Account

The proposed rule incorporated the definition of noninterest-bearing transaction account in section 343 of the Dodd-Frank Act. Section 343 defines a noninterest-bearing transaction account as "an account or deposit maintained at an insured credit union with respect to which interest is neither accrued nor paid; on which the account holder or depositor is permitted to make withdrawals by negotiable or transferable instrument, payment orders of withdrawal, telephone or other electronic media transfers, or other similar items for the purpose of making payments or transfers to third parties or others; and on which the insured credit union does not reserve the right to require advance notice of an intended withdrawal." This definition of noninterest-bearing transaction account encompasses only traditional, noninterest-bearing demand deposit (checking or share draft) accounts that allow for an unlimited number of deposits and withdrawals at any time,[4] whether held by a business, an individual, or other type of member. It does not include negotiable order of withdrawal (NOW) accounts, money-market accounts (MMA), or Interest on Lawyers Trust Accounts (IOLTA).

Under the proposal, whether an account is considered noninterest-bearing or nondividend bearing is determined by the terms of the account agreement and not by the fact that the dividend rate on an account may be zero percent at a particular point in time. For example, an insured credit union might offer an account with a dividend rate of zero percent except when the balance exceeds a prescribed threshold. Similarly, an account that normally bears dividends might have a dividend rate of zero for a particular period if the board of directors of the insured credit union where the account is maintained determines not to, or is prohibited from, declaring a dividend for that period.

Such an account would not qualify as a noninterest-bearing transaction account even when the balance is less than the prescribed threshold or no dividend is declared and the dividend rate is zero percent for a particular period. Under the proposed rule, such an account would be treated as an interest-bearing or dividend-bearing account at all times because the account agreement provides for the payment of dividends under certain circumstances. However, under the proposal, the waiving of fees on an account would not be treated as the earning of dividends. For example, an insured credit union can sometimes waive fees or provide fee-reducing credits for members with share draft accounts. Under the proposed rule, such account features would not prevent an account from qualifying as a noninterest-bearing transaction account, as long as the account otherwise satisfies the definition of a noninterest-bearing transaction account.

The proposed rule's definition of noninterest-bearing transaction account would include official checks issued by insured credit unions, such as negotiable cashier's or certified checks. Ownership of such instruments and the right to full insurance coverage are determined pursuant to § 745.11 of NCUA's share insurance rules regarding accounts evidenced by negotiable instruments.

Under the proposal, funds swept (or transferred) from a share account to either another type of share account or a non-deposit account are treated as being in the account to which the funds were transferred prior to the time of failure. For example, if pursuant to an agreement between an insured credit union and its member, funds are swept daily from a noninterest-bearing transaction account to an account or product that is not a noninterest-bearing transaction account, then the funds in the resulting account or product would not be eligible for full insurance coverage as a noninterest-bearing transaction account. However, the proposed rule includes an exception from this treatment of swept funds in situations where funds are swept from a noninterest-bearing transaction account to a noninterest-bearing savings account, such as an MMA. Often referred to as "reserve sweeps," these products could entail an arrangement in which a single account is divided into two sub-accounts, a transaction account and an MMA. The amount and frequency of sweeps are often determined by an algorithm designed to minimize required reserves. In some situations, members may be unaware that this sweep mechanism is in place. Under the proposed rule, such accounts would be considered noninterest-bearing transaction accounts. Apart from this exception for reserve sweeps, MMAs and noninterest-bearing savings accounts do not qualify as noninterest-bearing transaction accounts.

Insurance Coverage

As noted in the proposal, pursuant to section 343 of the Dodd-Frank Act, all funds held in noninterest-bearing transaction accounts are fully insured, without limit. As specifically provided for in section 343 of the Dodd-Frank Act, this unlimited coverage is separate from, and in addition to, the coverage provided to members with respect to other accounts held at an insured credit union. This means that funds held in noninterest-bearing transaction accounts will not be counted for purposes of determining the amount of share insurance on shares held in other accounts, and in other rights and capacities, at the same insured credit union. For example, if a member has a $225,000 share certificate and a no-dividend share draft account with a balance of $300,000, both held in a single ownership capacity, he or she would be fully insured for $525,000 (plus dividends accrued on the share certificate), assuming the member has no other single-ownership funds at the same credit union. First, coverage of $225,000 (plus accrued dividends) would be provided for the share certificate as a single ownership account (12 CFR 745.3) up to the SMSIA of $250,000. Second, full coverage of the $300,000 share draft account would be provided separately, despite the share draft account also being held as a single ownership account, because the account

[4] The NCUA Board does not believe the general provisions of Article III, Section 5(a) of the Federal Credit Union Bylaws, or other similar provisions, affect the definition of noninterest-bearing transaction account or the share insurance coverage of this kind of account. Article III, Section 5(a) of the bylaws states that with respect to member withdrawals from share accounts, the federal credit union's board of directors has the right, at any time, to require members to give up to 60 days written notice of intention to withdraw the whole or any part of the amounts paid in by members. The NCUA Board considers this a broad, administrative provision that does not alter the nature of an account that otherwise satisfies the definition of a noninterest-bearing transaction account.