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DEVELOPMENTS OF NOTE

DOL Issues Proposed Regulation to Replace Previously-Issued Guidance on Investment Advice for Participant-Directed ERISA Plans and IRAs

The Department of Labor (the "DOL") issued a proposed regulation (the "Proposed Regulation") under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and the Internal Revenue Code of 1986, as amended (the "Code"), addressing the provision of investment advice by a firm to participant-directed ERISA plan participants and individual retirement account beneficiaries regarding investments in products offered by the firm or its affiliates. The Proposed Regulation replaces guidance contained in the final rule published on January 21, 2009 (the "Withdrawn Regulation"), the effective date of which was delayed several times in 2009 and which was ultimately withdrawn by the DOL on November 20, 2009 in anticipation of proposing a new rule. (The Withdrawn Regulation was originally proposed in 2008, as described in the [September 2, 2008 Alert](#). The subsequent delays of the effective date and withdrawal of the Withdrawn Regulation are described in the [February 17, 2009 Alert](#), the [May 26, 2009 Alert](#) and the [November 24, 2009 Alert](#).)

The Proposed Regulation provides guidance regarding two statutory prohibited transaction exemptions that were included in amendments to ERISA and the Code in 2006 – a "fee-leveling" exemption and a "computer model" exemption. Although the Proposed

Regulation is substantially similar to the Withdrawn Regulation, there are notable differences. First, the Proposed Regulation does not include an administrative prohibited transaction class exemption that had been incorporated within the Withdrawn Regulation, which (among other things) would have permitted the firm providing the advice to receive fees or compensation based upon the selection of an investment option by a plan participant or IRA beneficiary. Second, the Proposed Regulation expressly prohibits a firm providing investment advice (including any employee, agent or representative of the firm) from receiving any payment from an affiliate of the firm that is based upon the selection of an investment option by a plan participant or IRA beneficiary. Therefore, even though an affiliate may receive fees that vary based upon the investment option selected, the affiliate may not provide financial or economic incentives to the firm providing the advice (or any employee, agent or representative of the firm) based upon the investment option selected. Finally, the Proposed Regulation provides that, in connection with investment advice arrangements that use computer models, the computer models may not inappropriately distinguish among investment options within a single asset class based upon factors that may not continue in the future. The DOL indicated that, in its view, this would prohibit computer models from distinguishing among investment options in a single asset class based on historical performance.

The Proposed Regulation is proposed to be effective 60 days after the final version is published in the Federal Register. (The statutory exemptions are generally effective already.) Comments are due by May 5, 2010. For more information regarding the Proposed Regulation, please see the discussion of the Withdrawn Regulation in the [September 2, 2008 Alert](#).

IRS Issues Guidance and FinCEN Publishes Proposed Rule on FBAR Filings

The U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") and the Internal Revenue Service (the "IRS") issued guidance regarding Reports of Foreign Bank and Financial Accounts ("FBARs" and each an "FBAR") required to be filed with the IRS on Form TD F 90-22.1.

IRS Issues Guidance

The IRS published [Notice 2010-23](#) (the "Notice") which postpones until June 30, 2011 the filing due date for FBARs for the calendar year 2009 and previous years by U.S. persons: (1) U.S. persons who have signature authority over, but no financial interest in, foreign financial accounts. The Notice further delays the filing deadline for such filers, which, along with the filing deadline for U.S. persons with a financial interest in, or signature authority over, a foreign commingled fund, had been postponed until June 30, 2010. (The previous deadline extension was provided in August, 2009 by Notice 2009-62, which was covered in an August 10, 2009 Goodwin Procter *Client Alert*.) In addition, the Notice provides that a "commingled fund" does not include any type of fund other than a mutual fund with respect to FBARs for calendar year 2009 and earlier years. Accordingly, hedge funds and other private investment funds are not foreign commingled funds for purposes of FBAR reporting for calendar year 2009 and earlier years.

The IRS also issued [Announcement 2010-16](#) (the "Announcement"), which clarifies that persons who are not U.S. citizens, U.S. residents, or domestic entities (corporations, partnerships, trusts, or estates) are not subject to FBAR filings requirements for 2009 or earlier years, even if such persons have been present in, or doing business in, the United

States. Because the Notice and the Announcement apply only to reporting periods through 2009, FBAR filings could nevertheless apply for calendar year 2010 and later years, unless additional guidance provides otherwise.

FinCEN Issues Proposed Rule

FinCEN published a proposed [rule](#) (the “Proposed Rule”) that would amend its regulations regarding FBARs. FinCEN’s existing regulations require that, with certain exceptions, any U.S. person who holds a “financial interest” in or has “signature or other authority” over any “bank, securities, or other financial account” in a foreign country, the aggregate value of which is more than \$10,000 at any time during any calendar year, must file an FBAR with the IRS by June 30 of the following calendar year. The Proposed Rule would clarify various aspects of the requirements for filing FBARs.

FinCEN’s existing regulations provide few specifics regarding the FBAR filing requirements, and guidance to date has been provided primarily in the FBAR filing instructions (the “Filing Instructions”) and certain other guidance from the IRS. The most recent version of the Filing Instructions and a revised FBAR form, which were issued in October 2008, broadened the definition of “United States person” subject to the FBAR filing requirement and sought to clarify the scope of foreign financial accounts that trigger FBAR filing requirements. In response to numerous comments and questions regarding the revised FBAR form and Filing Instructions, the Treasury Department published Notice 2009-62, which is mentioned above. Notice 2009-62 also announced the Treasury Department’s intention to issue regulations clarifying certain aspects of the FBAR filing requirements. In drafting the Proposed Rule, FinCEN reviewed the public comments received in response to Notice 2009-62.

Much of the Proposed Rule incorporates guidance from the existing Filing Instructions, but the Proposed Rule aims to provide greater clarity regarding various aspects of the FBAR filing requirements and expands certain of the reporting exemptions now provided in the Filing Instructions. The Proposed Rule:

- defines a “United States person” required to file FBARs and defines the types of reportable bank, securities, and other financial accounts;
- clarifies what it means to have a “financial interest” in a foreign account;
- exempts certain persons with signature or other authority over, but no financial interest in, foreign financial accounts from filing FBARs;
- exempts certain low-risk accounts for which reporting will not be required, such as accounts of federal or state governmental entities;
- exempts participants and beneficiaries in certain types of retirement plans and includes a similar exemption for certain trust beneficiaries;
- includes provisions intended to prevent persons from avoiding FBAR reporting requirements; and

- permits summary filing by persons who have a financial interest in or signature or other authority over 25 or more foreign financial accounts and permits consolidated filings by an entity on behalf of subsidiaries in which it owns more than a 50 percent interest.

Proposed Definition of “United States Persons”

A “United States person” subject to the FBAR filing requirement would be defined by the Proposed Rule as a citizen or resident of the United States, or an entity “created, organized, or formed under the laws of the United States or any state, the District of Columbia, the Territories and Insular Possessions of the United States or the Indian Tribes.” Any entity, including but not limited to a corporation, partnership, trust, or limited liability company, meeting this definition would be a U.S. person for purposes of the Proposed Rule, regardless of whether an election has been made to disregard the entity for federal income tax purposes.

With respect to individuals, the determination of whether an individual is a resident of the United States would be made under the rules of the Internal Revenue Code (the “Code”), except that the definition of “United States” under FinCEN’s regulations would be used rather than the definition from the IRS’s regulations. FinCEN has chosen this approach because it provides uniformity regardless of where in the United States an individual may be, and takes into account the fact that individuals may attempt to hide their residency to obscure the source of their income or location of their assets. With respect to FBARs for 2009 and prior years, the IRS stated in the announcement that it will allow all persons to refer to the definition of U.S. person in the July 2000 version of the FBAR filing instructions.

Proposed Definitions of “Bank,” “Securities” and “Other Financial Accounts” in a Foreign Country

In defining the types of foreign financial accounts that must be reported on FBARs, FinCEN has focused on the kinds of financial services provided rather than references to U.S. law or terminology. First, a “bank account” would mean “a savings deposit, demand deposit, checking, or any other account maintained with a person engaged in the business of banking.” A “securities account” would be “an account with a person in the business of buying, selling, holding or trading stock or other securities.”

With respect to “other financial accounts,” FinCEN believes that compliance would be improved by specifying the types of relationships that must be reported. Therefore, the term would be defined to mean any of the following:

- an account with a person “in the business of accepting deposits as a financial agency;”
- an insurance policy with a cash value or an annuity;
- an account with certain brokers or dealers for commodity futures and options; or
- an account with a “mutual fund or similar pooled fund which issues shares available to the general public that have a regular net asset value determination and regular redemptions.”

Notably, FinCEN excluded from this definition privately offered funds, such as private equity funds, venture capital funds, and hedge funds. Recognizing that the lack of functional regulation makes these types of funds difficult to define and distinguish, FinCEN would limit the funds subject to FBAR filing requirements to mutual funds and similar pooled funds meeting the definition described above. Although the exclusion of privately-offered funds appears to provide relief for U.S. investors in such funds, the exception may prove to be only temporary. In the preamble to the Proposed Rule, FinCEN expressed its concern that privately offered funds may be used by U.S. persons to evade taxes and stated that it will continue to study that issue. In addition, the Notice implicitly leaves open the possibility that FBAR filings could be required for calendar year 2010 and later years if FinCEN ultimately includes private investment funds in the definition of “commingled fund”.

Definition of “Financial Interest”

Under the Proposed Rule, a U.S. person would have a “financial interest” in a bank, securities or other financial account subject to FBAR filing requirements if the U.S. person is the owner of record or holds legal title to the account, even if the account is held for the benefit of others. A U.S. person would also have a “financial interest” in a foreign financial institution if the U.S. person record owner or holder of legal title is a person acting on behalf of the U.S. person, such as an attorney, agent or nominee.

In addition, the Proposed Rule would specify that a U.S. entity would have a “financial interest” in a foreign account if the record owner or holder of legal title is any of the following.

- A corporation in which the U.S. person owns directly or indirectly more than 50 percent of the voting power or the total value of the shares;
- A partnership in which the United States person owns directly or indirectly more than 50 percent of the interest in profits or capital;
- Any other entity (other than a trust) in which the U.S. person owns directly or indirectly more than 50 percent of the voting power, total value of the equity interest or assets, or interest in profits;
- A trust, if the U.S. person is the trust settlor and has an ownership interest in the account for United States federal tax purposes (whether a settlor has an ownership interest in a trust’s financial account for a year should be determined with reference to 26 U.S.C. §§ 671– 679);
- A trust in which the U.S. person either has a beneficial interest in more than 50 percent of the assets or from which such person receives more than 50 percent of the current income; or
- A trust that was established by the U.S. person and for which the U.S. person has appointed a trust protector that is subject to such person’s direct or indirect instruction.

Exemptions for Certain Persons with “Signature or Other Authority” over an Account

A U.S. person also may be subject to FBAR filing requirements if the U.S. person has “signature or other authority” over a foreign bank, securities, or other financial account. The Proposed Rule would define “signature or other authority” as “authority of an individual (alone or in conjunction with another) to control the disposition of money, funds or other assets held in a financial account by delivery of instructions (whether communicated in writing or otherwise) directly to the person with whom the financial account is maintained.”

The Proposed Rule would provide exceptions for officers or employees of certain U.S. entities. Reporting by officers or employees who are signatories of foreign accounts maintained by the following types of entities would not be required, *provided the officer or employee does not have a financial interest in the reportable account.*

- An officer or employee of a bank examined by a federal banking agency;
- An officer or employee of a financial institution, such as a securities broker-dealer or a futures commission merchant, which is registered with or examined by the SEC or the CFTC;
- An officer or employee of an “Authorized Service Provider” (such as an investment adviser) that is registered with and examined by the SEC and provides services to an SEC-registered investment company, with respect to accounts owned or maintained by the investment company;
- An officer or employee of an entity with a class of equity securities listed on a U.S. national securities exchange or a subsidiary that is named in the consolidated FBAR report of such an entity; or
- An officer or employee of a U.S. corporation that a class of equity securities registered under section 12(g) of the Securities Exchange Act.

By exempting officers and employees of SEC-registered broker-dealers and investment advisers, the Proposed Rule would expand this exemption beyond the scope provided by the existing Filing Instructions.

Exemptions for Certain Low-Risk Accounts

The Proposed Rule would include exemptions under which FBAR reporting would not be required for the following types of low-risk accounts:

- An account of a department or agency of the United States; an Indian Tribe; or any State or any political subdivision of a State; or a wholly-owned entity, agency, or instrumentality or an account of an entity established under the laws of the United States; of an Indian Tribe; of any State; or of any political subdivision of any State; or under an intergovernmental compact between two or more States or Indian Tribes that exercises governmental authority on behalf of the United States, an Indian Tribe, or any such State or political subdivision.

- An account of an international financial institution of which the United States government is a member.
- An account in an institution known as a “United States military banking facility” (or “United States military finance facility”) operated by a United States financial institution designated by the United States Government to serve United States government installations abroad.
- Correspondent or nostro accounts that are maintained by banks and used solely for bank-to-bank settlements.

Exemptions for Certain Trust Beneficiaries and Certain Retirement Plan Participants and Beneficiaries

The Proposed Rule would provide clarity regarding FBAR filing obligations for certain trust beneficiaries. A beneficiary of a trust in which a U.S. person either has a beneficial interest in more than 50 percent of the assets or from which such person receives more than 50 percent of the current income would not be required to report the trust’s foreign financial accounts if the trust or a trustee or agent of the trust is a U.S. person that files an FBAR with respect to the trust’s foreign financial accounts and provides any additional information required by the report. FinCEN would not require reporting by such beneficiaries because it believes that, in most cases, the trust or its trustees are better positioned to determine whether FBAR reporting is required.

The Proposed Rule also would exempt participants and beneficiaries in retirement plans under sections 401(a), 403(a) or 403(b) of the Code and owners and beneficiaries of IRAs under section 408 of the Code or Roth IRAs under section 408A of the Code from reporting with respect to foreign financial accounts held by or on behalf of the retirement plan or IRA.

Anti-Avoidance Rule

The Proposed Rule would include an anti-avoidance rule under which a U.S. person would be deemed to hold a financial interest in any foreign bank, securities or other financial account that the U.S. person creates to evade FBAR reporting requirements. This anti-avoidance rule is not intended to apply to a person who makes a good faith effort to comply with FBAR reporting requirements.

Summary Filing and Consolidated Reports

As permitted under the existing Filing Instructions, a U.S. person with a financial interest in 25 or more foreign financial accounts would only be required to report the number of financial accounts and certain basic information regarding the accounts in an FBAR. In addition, the Proposed Rule would clarify that a U.S. person with signature or other authority over 25 or more foreign financial accounts would similarly be permitted to report only the number of accounts and provide basic information. All such persons would be required to provide detailed information regarding the foreign financial accounts in which they have a financial interest or over which they have signature or authority to the Treasury Department upon request.

In addition, a U.S. entity that owns directly or indirectly more than a 50 percent interest in an entity required to report foreign accounts would be permitted to file a consolidated FBAR on behalf of itself and such entity. The broad language of the Proposed Rule would clarify that consolidated reporting is available for non-corporate subsidiaries, such as LLCs or partnerships.

Comment Deadline

Comments on the Proposed Rule are due to FinCEN by April 27, 2010.

SEC Amends Rule Requiring Internet Availability of Proxy Materials

The SEC approved [amendments](#) to the notice and access proxy rules (the “e-proxy Rules”). In general, the e-proxy Rules require that proxy materials are made available on the internet and that shareholders receive notice regarding the availability of those materials (the “Notice”). (For more detail on these requirements, see the [July 31, 2007 Alert](#).) Issuers have two options for distributing proxy materials to shareholders: (i) send only the Notice (the “Notice Only Method”) or (ii) use the traditional method of mailing full proxy materials along with, or including, a Notice. In October 2009, the SEC proposed amendments to the e-proxy Rules designed primarily to facilitate the response of shareholders who have received a Notice under the Notice Only Method. The final rule amendments, as set forth in the SEC adopting release, largely track the proposed amendments, with only a few changes made in response to comments received by the SEC on its October 2009 proposal.

Notice Requirements and Explanatory Materials. The final rule amendments provide companies and other soliciting persons with additional flexibility regarding the format of the Notice by eliminating the specific legend requirements. Instead, in an effort to avoid boilerplate disclosure, the information appearing in the Notice is required to address certain topics, without specifying the exact language to be used. The final rule amendments also permit companies and other soliciting persons to accompany the Notice with an explanation of (i) the process for the use of the Notice Only Method and (ii) the process of receiving and reviewing the proxy materials and voting under the Notice Only Method. The explanatory materials may not, however, be designed to persuade shareholders to vote in a particular manner or change the method of delivery of proxy materials.

In response to comments, the SEC revised the proposed amendments to allow an explanation of the reasons the Notice is being used and to require that an issuer or other soliciting person indicate that the Notice is not a form for voting. The adopting release notes that the SEC is not specifically requiring intermediaries and their agents to forward explanatory materials prepared in reliance on the amended rules, but observed that to the extent materials accompanying a Notice are “other soliciting materials” then the proxy rules specifically require that intermediaries and their agents distribute them. The adopting release also confirms guidance provided in the proposing release to the effect that a Notice need not directly mirror the proxy card. A Notice must clearly and impartially identify each separate matter intended to be acted on that will be considered at the shareholder meeting, but it does not have to conform to the specific formatting and content requirements for proxy cards.

Notice Deadlines for Non-Issuers. The deadline for a soliciting person other than an issuer using the Notice Only Method to send the Notice has been changed. Under the current

rules, a soliciting shareholder must send its proxy materials by the later of (i) 40 calendar days before the shareholder meeting to which the proxy materials relate or (ii) 10 calendar days after the issuer first sends proxy materials to shareholders. The SEC staff review process for preliminary proxy materials may limit the ability of a soliciting shareholder subject to the latter deadline to use the Notice Only Method if there are outstanding comments more than 10 calendar days after the soliciting shareholder has initially filed its preliminary proxy materials. The final rule amendments address this issue by substituting a requirement that the soliciting person send its Notice to shareholders no later than the date on which it files its definitive proxy statement with the SEC and have filed its preliminary proxy statement within 10 calendar days after the issuer files its definitive proxy statement.

Summary Prospectus Accompanying the Notice. As proposed, the final rule amendments permit registered open-end funds using the Notice Only Method to accompany the Notice with a summary prospectus.

Ongoing SEC Focus on Proxy Process. In the adopting release, the SEC acknowledged that it was not addressing broader concerns with the proxy system and the e-proxy Rules expressed by those who commented on its October 2009 proposal, but was continuing to consider these and other concerns that have been raised regarding the proxy process. The adopting release also noted that, at the direction of the SEC Chairman, the SEC staff is conducting a comprehensive review of the mechanics by which proxies are voted and the way in which information is conveyed to shareholders, in order to issue a concept release seeking public comment on these issues.

Effective Date. The effective date for the final rule amendments is March 29, 2010.

Federal Banking Agencies Clarify Risk Weights for FDIC Claims and Guarantees

The federal banking agencies (the “Agencies”) clarified the risk weights for claims on or guaranteed by the FDIC for purposes of banking organizations’ risk-based capital requirements. Direct claims on and claims unconditionally guaranteed by the FDIC (such as FDIC-insured deposits, prepaid assessments of deposit insurance premiums and debt guaranteed under the Temporary Liquidity Guarantee Program) may be assigned a zero percent risk weight. Recent loss-sharing agreements entered into by the FDIC, though, are considered conditional guarantees for risk-based capital purposes due to contractual conditions that acquirers must meet, and therefore are not eligible for a zero percent risk weight. Instead, the guaranteed portion of assets subject to such a loss-sharing agreement may be assigned a 20 percent risk weight. The Agencies also advised banking organizations to consult with their primary federal regulator to determine the appropriate risk-based capital treatment for specific loss-sharing agreements, as the specific terms of each agreement may vary.

IOSCO Publishes Template for Collection of Data from Hedge Funds to Assist Securities Regulators’ Assessment of Systemic Risk

The Technical Committee of the International Organization of Securities Commissions (“IOSCO”) [has released](#) a template designed to allow securities regulators to gather comparable and consistent data from hedge fund managers and advisers to facilitate international supervisory cooperation in identifying possible systemic risks in the hedge fund sector. The template was released in view of planned legislative changes being considered in various jurisdictions, with a recommendation that the first gathering of data

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be carried out on a best efforts basis in September 2010. SEC Commissioner Kathleen Casey chairs the Technical Committee. As discussed in a [November 20, 2009 Goodwin Procter Client Alert](#), the various U.S. financial regulatory reform proposals to date would grant the SEC considerable rulemaking power to require advisers to privately offered funds to report on their activities and those of their funds.

SEC Issues Adopting Release for Amendments to Regulation SHO

The SEC issued the [adopting release](#) for amendments to Regulation SHO that impose an alternative uptick rule on short selling in a security covered by the rules once trading in the security trips a “circuit breaker” by causing the security to experience a price decline of at least 10 percent from the prior day’s close. Under the alternative uptick rule, short selling is permitted only if the price of the security is above the current national best bid. The restriction applies to short sale orders in that security for the remainder of the day on which the circuit breaker is tripped and on the following day. The alternative uptick rule generally applies to all equity securities that are listed on a national securities exchange, whether traded on an exchange or in the over-the-counter market. This new requirement will be implemented by requiring trading centers to establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent the execution or display of a prohibited short sale. The compliance date for the amendments is November 10, 2010.

OTHER ITEMS OF NOTE

Additional Developments in EU Alternative Investment Fund Managers Directive with Implications for Non-EU Managers and Funds

As it makes its way through the legislative process, the EU’s Alternative Investment Fund Managers Directive continues to include elements that would significantly affect non-EU funds and managers that want to market to investors in the EU. For commentary and analysis from our colleagues at SJ Berwin LLP on amendments to the Directive recently proposed in the European Parliament and proposals put forward by the new Spanish Presidency of the EU, click [here](#).

Reminder: Annual Update Requirement for Ongoing Regulation D Offerings

Form D filers who filed a Form D for a continuing offering prior to the March 16, 2009 compliance date for SEC rule changes affecting Form D should bear in mind that if their Regulation D offering continues to be ongoing, they must file an amendment to Form D at least annually on or before the anniversary of the most recent Form D filed with the SEC for that offering, even if there has been no change that would otherwise require an amendment. Form D filers that have not previously filed Form D electronically should allow adequate lead time to secure the EDGAR access code necessary to make an electronic filing.