

FINANCIAL SERVICES ALERT

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DEVELOPMENTS OF NOTE

National Association of Insurance Commissioners Mandates Climate Change-Related Disclosures

The National Association of Insurance Commissioners (“NAIC”) voted to require large insurers to disclose the strategies they are utilizing to address climate change-related risks. This decision highlights the increased attention being devoted to climate change issues in the financial services sector and creates a significant new responsibility for insurers. Further, the reporting requirements appear intended to induce insurance companies to take steps within their power to mitigate climate risks.

The disclosure requirement consists of responding to an eight-part questionnaire. The questions focus on how insurance companies are assessing and addressing climate change. Specifically, each covered company must address the following topics by May 1, 2010:

- How the company assesses and mitigates its own greenhouse gas emissions
- What risks climate change poses to the company
- How the company accounts for climate change risks in its risk and investment management strategies and other business decisions, including whether the company engages in computerized climate modeling
- What steps the company has taken to encourage its policyholders to mitigate climate change

- What steps the company has taken to “engage key constituencies” on the topic of climate change

These questions are broad, and could potentially reveal the inner workings of proprietary insurance risk models and investment strategies. To protect against this concern, NAIC placed several limits on the types of information that must be disclosed in response to these questions. Specifically, insurers are not required to provide any quantitative, commercially sensitive, proprietary, or forward-looking information. All that is required is a narrative description of company policies.

Further, disclosure is only mandatory for larger insurers. For fiscal year 2009, only insurance groups with over \$500 million in direct written premiums must respond to the questionnaire. For 2010, the threshold drops to \$300 million. Responses are due annually on May 1, beginning in 2010. After they are submitted, they will be made publicly available by NAIC. NAIC will review the questionnaire and responses on an annual basis.

The questionnaire focuses on several aspects of insurer activities – how they manage their own greenhouse gas emissions, how they account for climate change in their investments, how they evaluate climate change when issuing policies, and how they are incentivizing climate change mitigation behavior in the insured. Although not stated expressly in the rules, a reasonable inference is that NAIC hopes to induce insurance companies to substantively address topics covered by the questionnaire if they have not done so already. Moreover, in addition to requiring insurers to explicitly address climate change-related risks, the new reporting rules may likewise help insurers focus on business opportunities presented by such risks. A report completed last year by NAIC entitled *The Potential Impact of Climate Change on Insurance Regulation* (available through the NAIC website) delves into further detail on how climate change may affect various types of insurance – property, casualty, life, and health – as well as potential investment consequences and climate change-related business opportunities.

A copy of the draft disclosure form can be found at http://www.naic.org/documents/committees_ex_climate_090224_survey.pdf.

Treasury Announces Extension of Temporary Money Market Funds Guarantee Program through September 18, 2009

The US Treasury announced that it is extending its temporary Money Market Funds Guarantee Program (the “Program”) through September 18, 2009. As a result of the extension, the Program will provide coverage to shareholders of participating money market funds up to the amounts held in participating money market funds as of the close of business on September 19, 2008. Only money market funds that currently participate in the Program, have a market-based net asset value at least equal to 99.50% of the stable share price on May 1, 2009 (the Program’s extension date), have not had a “Guarantee Event” on or before May 1, 2009, and meet the other extension requirements under their Guarantee Agreements with the US Treasury are eligible to participate in the Program’s extension.

A money market fund that elects to continue participating in the Program during the extension period must submit to the Treasury a Program extension payment, an extension notice and an updated Annex A by 11:59 pm Washington D.C. time on April 13, 2009, and a Bring-Down Notice by 11:59 pm Washington D.C. time on May 11, 2009. For a money market fund that as of September 19, 2008 had a market-based net asset value greater than

or equal to 99.75% of its stable share price, the payment will be 0.015% multiplied by the number of shares outstanding on September 19, 2008. For a money market fund that as of September 19, 2008 had a market-based net asset value less than 99.75% of its stable share price, but greater than or equal to 99.50%, the payment is 0.023% multiplied by the number of shares outstanding on September 19, 2008.

Prior to the Treasury's announcement, the Program was scheduled to end on April 30, 2009. The Treasury currently is not authorized by Congress to extend the Program past September 18, 2009.

FINRA Provides Guidance on its Enforcement Process

FINRA issued Regulatory Notice 09-17 (the "Notice") to provide member firms with additional information regarding its investigative and enforcement process and related procedural safeguards. The Notice is available on the FINRA website at <http://www.finra.org/Industry/Regulation/Notices/2009/P118170>. Key aspects of the Notice are discussed below.

- **Roles of Enforcement and Market Regulation Departments.** Both FINRA's Enforcement Department and Market Regulation Department (collectively, "Enforcement") have responsibility for investigating and bringing formal disciplinary actions against firms and their associated persons. The Enforcement Department focuses its efforts across a broad range of investigations and cases, while the Market Regulation Department more narrowly focuses mainly on issues surrounding trading and quality of markets.
- **Basis for Investigations.** FINRA investigations may be prompted by information from a variety of sources, including automated surveillance reports, examination findings, filings made with FINRA, customer complaints, anonymous tips, referrals from other regulators or other FINRA departments, and press reports. FINRA investigations are non-public and confidential. Information is requested from firms and their associated persons pursuant to FINRA Rule 8210. Firms must respond to a request made pursuant to Rule 8210. Failure to do so may result in a fine, suspension or bar from the industry. Information acquired during an investigation may be disclosed in connection with an investigation or disciplinary proceeding, in response to requests from the SEC or other governmental agencies and pursuant to a lawfully issued subpoena and/or information-sharing agreements entered into between FINRA and other regulators.
- **Sufficiency of Evidence Process.** The Notice discusses FINRA's Sufficiency of Evidence process, in which senior Enforcement staff analyze the information and evidence gathered at the conclusion of an investigation and determine whether a violation appears to have occurred. The senior staff then determine whether to recommend formal disciplinary action. If the violation is of a minor nature and there is an absence of customer harm or detrimental market impact, the matter may be resolved through an informal disciplinary action, *e.g.*, by issuing a Cautionary Action. Cautionary Actions do not constitute formal discipline and are not reportable on FINRA's Central Registration Depository (CRD) system or Form BD, but are considered by FINRA staff in any future disciplinary matter.
- **Wells Calls and Wells Submissions.** Should the Sufficiency of Evidence process result in a recommendation for formal disciplinary action, the staff will generally conduct a

Wells Call with the potential respondent. The process is discretionary and there may be instances where senior Enforcement staff determine to move forward without providing this opportunity, such as when customer funds are at risk. The potential respondent has the opportunity to respond to the Wells Call by submitting a written Wells Submission discussing the facts and applicable law associated with the formal charges and explaining why those charges may not be appropriate. An associated person who receives a written Wells Notice is required to report that event on his or her Form U4. Firms also may have disclosure obligations depending on the circumstances. A closing letter is sent to each individual who has received a Wells Notice if the matter is closed without formal disciplinary action.

- Office of Disciplinary Affairs. FINRA's Office of Disciplinary Affairs ("ODA") reviews each proposed settlement or complaint, including all Wells Submissions, and provides an independent review of the legal and evidentiary sufficiency of the charges proposed by the staff. ODA's main function is to ensure consistency with FINRA's Sanction Guidelines as well as applicable precedent. (The Sanction Guidelines are available on the FINRA website at <http://www.finra.org/Industry/Enforcement/SanctionGuidelines/index.htm>.)
- Disciplinary Advisory Committee. When FINRA determines a particular case is significant, or particular matters pose novel legal or factual issues, the Disciplinary Advisory Committee ("DAC") reviews those cases or matters to ensure consistency and proportionality in FINRA's charging decisions and sanction recommendations. The DAC also considers whether credit for "extraordinary cooperation" in the investigative and enforcement process is appropriate. (For a discussion of recent FINRA guidance regarding extraordinary cooperation, see the [December 23, 2008 Alert](#).)
- Litigation Group Consultation. FINRA explains that while most cases are settled prior to litigation with an Acceptance, Waiver and Consent letter, Enforcement staff are still required to hold a consultation with the Litigation Group in any case in which a complaint will be filed to determine whether sufficient evidence exists to support the proposed charges.
- Hearings/Appeals. FINRA's hearing process is governed by FINRA's Code of Procedures and administered by FINRA's independent Office of Hearing Officers. Following the conclusion of a hearing, appeals may be made first to FINRA's National Adjudicatory Council, then to the SEC and further to a United States Court of Appeals.

OTHER ITEMS OF NOTE

Client Advisory on Opportunities for Real Estate Funds in Troubled Assets Program

Goodwin Procter's Real Estate, REITs & RE Capital Markets Group issued a Client Advisory on opportunities for real estate funds in the federal Public-Private Investment Program. The Client Advisory is available on the Goodwin Procter website at <http://www.goodwinprocter.com/~media/EEA83A3624EF49548FD5BE86240DBBD7.ashx>.

ERISA Litigation Update

Goodwin Procter's ERISA Litigation Practice issued a newsletter providing updates on recent 401(k) plan litigation and ERISA stock drop lawsuits to keep our clients up-to-date regarding developments in this rapidly evolving area of law. Click here to view

<http://www.goodwinprocter.com/~media/834054DD028E4D00937D79A4A82E5B4E.ashx>

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