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DEVELOPMENTS OF NOTE

FDIC Levies Special Premium Based on Assets; Obtains Greater Borrowing Authority under Helping Families Save Their Homes Act

The Board of Directors of the FDIC voted 4-1 on May 22, 2009 to levy a special assessment of 5 cents per \$100, or 5 basis points, of each insured institution's total assets less Tier 1 capital. The special assessment – a reduction from the original proposed assessment of 20 basis points on the regular assessment base of domestic deposits – is part of the FDIC's efforts to rebuild the Deposit Insurance Fund (the "DIF"). The special assessment will be capped at 10 basis points of an institution's domestic deposits so that no institution will pay an amount higher than it would have paid under the original proposal. The special assessment will be based on each institution's report of condition of June 30, 2009, billed on June 30, collected on September 30, and booked as a second quarter expense for banks.

The special assessment, which is the subject of a final rule (the “Final Rule”) is in addition to the regular quarterly risk-based assessment billed at the same time, which is not changed by the Final Rule.

The special assessment will generate approximately \$5.6 billion in revenue for the DIF – equivalent to a 7.3 basis point assessment on the regular assessment base. According to the FDIC, the reserve ratio of the DIF declined from 1.22 percent as of December 31, 2007 to 0.40 percent (preliminary) as of December 31, 2008, and is expected to decline further by March 31, 2009. The FDIC currently projects approximately \$70 billion in losses due to bank failures over the next five years, the great majority of which are expected to occur in 2009 and 2010, leading to a further decline in the reserve ratio. Because the reserve ratio fell below, and was expected to remain below, 1.15 percent, the FDIC was required under the Federal Deposit Insurance Act to establish and implement a Restoration Plan to restore the DIF. The FDIC projects that without a special assessment, the fund balance and reserve ratio of the DIF will become negative by the end of 2009. With the special assessment, the FDIC projects that the fund balance and reserve ratio will be low, but positive through 2009 and will begin to rise in 2010.

The Final Rule also allows the FDIC to impose additional special assessments of 5 basis points on the expanded assessment base for the third and fourth quarters of 2009, if the FDIC estimates that the DIF reserve ratio will fall to a level that would adversely affect public confidence in federal deposit insurance or to a level that would be close to or below zero. Any additional special assessment would also be capped at 10 basis points of domestic deposits. FDIC authority to impose any additional special assessment terminates under the Final Rule on January 1, 2010. (The FDIC, however, always has the authority to propose a new premium for quarterly risk-based assessments). FDIC Chairman Sheila C. Bair stated that while it is “probable” that one additional special assessment will be necessary, in the fourth quarter of 2009, a third special assessment is unlikely. The FDIC must set aside by year-end reserves for possible bank failures for all of 2010.

The original proposal, which was outlined in an interim rule with request for comment adopted by the FDIC on February 27, 2009, provided for a one-time special assessment of 20 basis points of domestic deposits and allowed additional special assessments of 10 basis points. The FDIC received over 14,000 comments on the interim rule. The vast majority of comment letters stated that the proposed 20 basis point assessment could have a significant adverse effect on the industry at a very difficult time, and many letters from smaller institutions and their trade groups noted that it would be particularly hard for community banks to absorb. Recognizing that assessments are a significant expense, particularly when bank earnings are under pressure, and that assessments reduce funds banks have available to lend in their communities, the FDIC sought ways to reduce the amount of the assessment.

The reduction is possible primarily because of an increase in the FDIC’s borrowing authority included in the Helping Families Save Their Homes Act signed into law by President Barack Obama on May 20, 2009. The new law extends the temporary increase in the standard maximum deposit insurance amount to \$250,000 per depositor (from the permanent limit of \$100,000 for deposit accounts other than retirement accounts) through December 31, 2013. It also increases the FDIC’s authority to borrow from Treasury from \$30 billion to \$100 billion, and authorizes a temporary increase in the FDIC’s borrowing authority above \$100 billion (but not to exceed \$500 billion) until December 31, 2010. The FDIC expects this increase in borrowing authority to provide a sufficient cushion against

unforeseen bank failures to allow it to reduce the special assessment significantly, while continuing to assess at a level that maintains the DIF through industry funding.

The FDIC also imposed a surcharge on senior unsecured debt guaranteed under the Temporary Liquidity Guarantee Program (TLGP), with the revenue from the surcharge to be channeled to the DIF. Broadening the assessment base also permitted a smaller special assessment. However, this aspect of the Final Rule was not without controversy. Not only did several large banks object to the change, Comptroller of the Currency John Dugan also objected to the asset-based assessment. At the FDIC Board meeting Comptroller Dugan argued that the FDIC insures deposits, not assets, and that losses in the DIF were caused by “actual and projected failures of smaller banks.” Chairman Bair responded that some large banks would have failed if not for special government programs designed to help them.

The reduction in the special assessment and the passage of the new law followed an intense lobbying effort by trade groups. The Final Rule will produce an immediate savings of approximately \$9 billion for banks compared to the interim rule. (Because of the cap, all banks will pay less under the Final Rule than they would have under the interim rule.) How an individual bank will fare using the expanded assessment base compared to the regular assessment base, however, depends on its balance sheet. Banks that are largely deposit funded would pay less than average, while banks that rely on non-deposit sources of funding, such as Federal Home Loan Bank Advances, repos, foreign deposits and other non-deposit liabilities, may pay more. About two-thirds of the largest 20 banks would pay more, and generally so would bankers’ banks and trust institutions. The majority of mid-sized and community banks would pay less.

For the industry as a whole, the FDIC projects that the 5 basis point special assessment in 2009 would result in March 31, 2010 equity capital that would be approximately 0.2 percent lower than in the absence of a special assessment, and for profitable institutions, pre-tax income that would be approximately 5.1 percent lower. For unprofitable institutions, pre-tax losses are projected to increase by an average of approximately 2.0 percent.

In response to concerns expressed in many comment letters, all the bank regulators have indicated that they would instruct examiners to assign component and composite CAMELS ratings without regard to the payment of the special assessment. The FDIC also noted that it excluded Tier 1 capital from the assessment base to ensure no institution would be penalized for holding large amounts of capital. The effective date of the Final Rule is June 30, 2009.

SEC Proposes Amendments to Advisers Act Custody Rule

The SEC last week proposed amendments (the “Proposed Amendments”) to Rule 206(4)-2 under the Investment Advisers Act of 1940 (the “Advisers Act”), which imposes a number of requirements on an SEC-registered investment adviser that is deemed to have custody of its clients’ funds and securities. In general terms, the SEC views an adviser as having custody of client assets not only when the adviser has physical custody of those assets, but also when the adviser has the authority to obtain client assets, such as by deducting advisory fees from a client account, writing checks or withdrawing funds on behalf of a client, or by acting in a capacity, such as general partner of a limited partnership, that gives an adviser or its supervised person the authority to withdraw funds or securities from the limited partnership’s account. The Proposed Amendments come in the wake of a number of enforcement actions recently brought by the SEC against broker-dealers and advisers

involving the misappropriation or misuse of customer assets, including the action brought against Bernard Madoff.

The Proposed Amendments, if adopted, would make four principal changes to Rule 206(4)-2.

- *Client Assets held by a Related Person.* Currently, the SEC takes the position that when a “related person” of an adviser, for example, an affiliated broker-dealer, has access to client funds, the adviser may have custody of those funds depending on the circumstances, and the SEC staff has provided no-action guidance on the considerations relevant to determining whether or not custody ultimately exists. The Proposed Amendments would deem an investment adviser to have custody of client assets if a related person of the adviser has access to those assets, provided that the investment adviser is providing investment advisory services to the client. Under the Proposed Amendments, a related person would be any person directly or indirectly controlling, controlled by, or under common control with the investment adviser. The Proposed Amendments also would define “control” generally to mean the power to direct the management or policies of a person. The Proposed Amendments include several presumptions of control in the cases of certain officers, partners and directors, certain 25 percent shareholders of corporations, partnerships and limited liability companies, and trustees and managing agents of trusts.
- *Surprise Examination Requirement.* The Proposed Amendments would require all registered investment advisers with custody of client assets to engage an independent public accountant to conduct an annual surprise examination of those assets. The most recent amendments to Rule 206(4)-2 adopted in 2003 generally eliminated this requirement when a qualified custodian provides statements to clients or, in the case of a pooled investment vehicle, the pool is audited annually and a copy of the auditor’s report is sent to the investors in the pool. Under the Proposed Amendments, privately offered securities that an investment adviser holds on behalf of its clients also would be subject to the surprise examination requirement, although they would continue to be excluded from the other requirements of the rule. The Proposed Amendments also would require, among other things, that the independent public accountant be a member of, and subject to regular inspection by, the Public Company Accounting Oversight Board (“PCAOB”).
- *Quarterly Account Statements.* Rule 206(4)-2 currently requires delivery of quarterly account statements to clients when an adviser has custody of their assets, either by (a) the qualified custodian used to hold client assets or (b) the adviser itself, provided the adviser undergoes surprise audits at least annually. The Proposed Amendments would eliminate the latter option so that in all cases where an adviser has custody of client assets, the qualified custodian holding the client assets would have to deliver the quarterly statements. In addition, where the current rule requires an adviser that relies on a qualified custodian to deliver quarterly accounts statements to have a reasonable basis for believing that such delivery takes place, the Proposed Amendments would require that reasonable basis to be after due inquiry. According to the SEC’s proposing release, an investment adviser could satisfy the due inquiry standard by receiving copies of quarterly account statements from the qualified custodian or a written confirmation each quarter that the necessary account statement was sent.

- *Controls Report for Related Person Custodian.* When an investment adviser or a related person serves as a “qualified custodian” of client assets in connection with the advisory services provided by the investment adviser, the Proposed Amendments would require the investment adviser to obtain, or receive from its related person, at least annually a report from an independent public accountant that includes an opinion on the investment adviser’s or related person’s controls relating to the custody of client assets, such as a Type II SAS 70 report. The Proposed Amendments also would require, among other things, that the independent public accountant be a member of, and subject to regular inspection by, the PCAOB.

The Proposed Amendments also would, among other things, make corresponding changes to Form ADV, and they would impose additional restrictions on when and under what circumstances the independent public accountant must file Form ADV-E relating to surprise examinations under Rule 206(4)-2.

As with the current Rule 206(4)-2, the Proposed Amendments, if adopted, only would apply to client securities and funds, and would not apply to other types of investments. Also as with the current Rule 206(4)-2, the Proposed Amendments would not require an investment adviser to comply with the rule with respect to the account of a registered investment company. Finally, the Proposed Amendments would not materially change Rule 206(4)-2’s current definition of a “qualified custodian.”

Comments on the Proposed Amendments are due to the SEC on or before July 28, 2009.

FINRA Disciplines Broker-Dealer for Failure to Protect Customer Information and Inadequate Breach Notification

A registered broker-dealer recently executed a Letter of Acceptance, Waiver and Consent (the “AWC”) with FINRA regarding alleged violations of Regulation S-P and certain FINRA Rules with respect to its computer firewall and a computer fax server set up to facilitate submission of time sensitive client information by the Broker-Dealer’s registered representatives. This article describes FINRA’s findings set forth in the AWC.

Factual Background

FINRA found that from April 2006 through July 2007, the Broker-Dealer failed to protect certain confidential customer records and information by using an improperly configured computer firewall and employing an ineffective username and password (username = “Administrator” and password = “password”) on its computer fax server. These failures permitted unauthorized persons to access stored images of faxes received by the Broker-Dealer that contained confidential customer information, such as social security numbers, account numbers and other sensitive, personal and confidential data.

FINRA found that when the Broker-Dealer became aware of the failure to protect customer information, it conducted an inadequate investigation and then proceeded to send a misleading notification letter to affected customers and their brokers. In particular, the Broker-Dealer improperly limited its investigation to a one-month period during which it was aware that a so-called “phishing” scam had been making unauthorized use of the firm’s computer fax server. According to FINRA’s findings, the Broker-Dealer should have expanded its investigation to the date almost a year before on which the computer fax server was put into operation since the lack of safeguards to protect customer information had

existed since that time. This more complete investigation would have revealed multiple unauthorized logins to the computer fax server long before the start of the phishing scam.

The letter that the Broker-Dealer provided to affected customers and the firm's registered representatives incorrectly indicated that unauthorized access to the computer fax server was limited to one "benevolent" person (a third person who had alerted the Broker-Dealer to the breach) and also omitted certain facts that made the letter misleading. In particular, the letter failed to indicate that the unauthorized access to the computer fax server was made possible by the firm's inadequate firewall and weak username and password, both of which the Broker-Dealer was aware of when it provided the letter to its customers and their brokers.

Violations

FINRA found that, as a result of the actions described above, the Broker-Dealer violated Rule 30 of Regulation S-P, which provides that brokers, dealers and other financial institutions must adopt written policies and procedures that address administrative, technical and physical safeguards for the protection of customer records and information.

FINRA further found that the Broker-Dealer's insecure firewall, weak username/password and inadequate investigation following notice of unauthorized access violated NASD Rule 3010, which states the requirements for a member firm's supervisory systems, and NASD Rule 2110, which states the general standard of conduct for member firms. In addition, FINRA found that, by sending a misleading notification letter to clients and its registered representatives, the Broker-Dealer violated NASD Rules 2210 and 2211, which specify standards for communications with the public and registered representatives, and NASD Rule 2110.

Summary of Sanctions

The Broker-Dealer consented to certain sanctions, including the following:

- a censure
- a \$175,000 fine
- certain undertakings, including (a) to provide corrected and accurate notification letters to affected clients and their brokers, (b) to offer to provide affected clients at no cost credit-monitoring services for a period of one year and (c) to submit certifications by the Broker-Dealer's CEO regarding various remedial measures.

Corrective Action Statement

In connection with the AWC, the Broker-Dealer submitted a Corrective Action Statement in which it described its efforts to improve its information technology systems and related procedures, which included the following:

- installing a state-of-the-art enterprise-class firewall
- restricting third party connectivity to its systems
- making substantial upgrades to the physical security of the network, including keycard access and door force open and ajar notifications

- enhancing password restriction protocols for employees and administrators
- performing a forensic audit and implemented recommendations to harden and securing the network
- installing two state-of-the-art “intrusion detection devices” that identify and protect against outside threats to the network
- revising its Written Supervisory Procedures and Work Flow Procedures

FRB Adopts Final Rule on Treatment of Senior Preferred Shares Issued to the Treasury under the TARP Programs and Adopts Interim Rule Concerning Capital Treatment of Subordinated Debt Issued by Mutual and Subchapter S Bank Holding Companies

Final Rule on Capital Treatment of TARP Senior Preferred Stock. The FRB adopted a final rule (the “Rule”) on the treatment of senior perpetual preferred shares (“Senior Preferred Shares”) issued to the Treasury pursuant to the Troubled Asset Relief Program’s (“TARP”) Capital Purchase Program as well as under the TARP’s Targeted Investment Program, Capital Assistance Program and Asset Guarantee Program (collectively, the “TARP Programs”). The Rule permits bank holding companies to include without limit all Senior Preferred Shares issued under the TARP Programs in Tier 1 capital for purposes of the FRB’s risk-based and leverage capital rules and guidelines for bank holding companies. The Rule leaves largely unchanged and makes final the interim final rule (the “IF Rule”) discussed in the [October 21, 2008 Alert](#).

The FRB noted that, without the relief provided by the Rule, some features of the Senior Preferred Shares would otherwise render it ineligible for Tier 1 capital treatment or limit its inclusion in Tier 1 capital under the FRB’s capital guidelines for bank holding companies. The amount of cumulative perpetual preferred stock that a bank holding company may include in its Tier 1 capital is currently subject to a 25 percent limit. Further, bank holding companies may not include in Tier 1 capital perpetual preferred stock, whether cumulative or non-cumulative, that has a step-up dividend rate. As noted in the IF Rule, the terms of the Senior Preferred Shares call for an initial dividend rate of 5%, which increases to 9% after five years. The FRB noted in the IF Rule that it has long expressed concern that a step-up dividend rate undermines the permanence of a capital instrument and poses safety and soundness concerns. In issuing the Rule, the FRB recognizes, however, that Senior Preferred Shares are being issued with the strong public policy objective of increasing capital available to banking organizations and include features designed to incentivize issuers to redeem Senior Preferred Shares and replace such shares with private qualifying Tier 1 capital as soon as practicable. In the IF Rule, the FRB strongly cautioned bank holding companies against construing the inclusion of Senior Preferred Shares in Tier 1 capital as in any way detracting from the FRB’s longstanding stance regarding the unacceptability of a rate step-up in other regulatory capital instruments.

The FRB expects bank holding companies that issue Senior Preferred Shares to hold capital commensurate with the level and nature of the risks to which they are exposed. The FRB further expects such bank holding companies to appropriately incorporate the dividend features of the Senior Preferred Shares into their liquidity and capital funding plans.

Interim Rule for Subchapter S and Mutual Bank Holding Companies. In addition, in a separate release, the FRB adopted an interim final rule (the “Interim Rule”), which permits

Subchapter S bank holding companies and bank holding companies organized in mutual form to include new subordinated debt securities issued to the Treasury under the TARP in their Tier 1 capital, provided that the subordinated debt securities will count toward the limit on the amount of other restricted core capital elements includable in the applicable bank holding company's Tier 1 capital.

The Rule and the Interim Rule will be effective on the date they are published in the *Federal Register*. The FRB seeks public comments on the Interim Rule within 30 days of the Interim Rule's publication in the *Federal Register*.

SEC Votes to Propose Proxy Rule Amendments relating to Shareholder Nomination of Directors and Shareholder Proposals

At an open meeting on May 20, 2009, the SEC voted to propose amendments to the proxy rules under the Securities Exchange Act of 1934 (the "1934 Act") that would facilitate director nominations by shareholders. These amendments would apply to all companies that report under the 1934 Act, including investment companies, but would not apply to debt-only companies. The proposed amendments would also modify Rule 14a-8 under the 1934 Act so that a company could not exclude from its proxy materials a shareholder proposal affecting the issuer's nomination procedures or disclosure requirements. (Rule 14a-8 provides shareholders with an opportunity to place a proposal in a company's proxy materials for consideration at an annual or special meeting of shareholders. A shareholder proposal that meets certain procedural requirements and does not fall within one of the categories of proposals that the Rule allows a company to exclude, must appear alongside management's proposals in the issuer's proxy materials.) The information in this article on the substance of the SEC's proposals is based on the SEC press release announcing the action taken at the open meeting (<http://www.sec.gov/news/press/2009/2009-116.htm>), which represents the only official information available thus far.

Shareholders Nominating Directors – Eligibility and Obligations. Under proposed Rule 14a-11 under the 1934 Act, an eligible shareholder would be able to include nominees for director in a company's proxy materials unless otherwise prohibited from doing so, either by applicable state law or the company's charter/bylaws. In order to be eligible, a shareholder would have to:

- own at least 1 percent of the voting securities of a "large accelerated filer" (a company with a worldwide market value of \$700 million or more) or of a registered investment company with net assets of \$700 million or more.
- own at least 3 percent of the voting securities of an "accelerated filer" (a company with a worldwide market value of \$75 million or more but less than \$700 million), or of a registered investment company with net assets of \$75 million or more but less than \$700 million.
- own at least 5 percent of the voting securities of a non-accelerated filer (a company with a worldwide market value of less than \$75 million) or of a registered investment company with net assets of less than \$75 million.

A shareholder could aggregate holdings to meet one of these thresholds, but would have to have held the securities for at least one year. The nominating shareholder would have to file with the SEC and submit to the company proposed Schedule 14N. Schedule 14N would

require (a) disclosure of the amount and percentage of securities owned by the nominating shareholder and the length of ownership and (b) a statement of the shareholder's intent to continue to hold the securities through the date of the shareholder meeting at which the director election is to take place. The Schedule 14N would require a certification that the nominating shareholder is not seeking to change the control of the company or to gain more than minority representation on the board of directors. A nominating shareholder could not have any direct or indirect agreement with the company regarding the nomination of the nominee.

Shareholder Nominees. A shareholder nominee's candidacy or, if elected, board membership could not violate applicable law. For publicly traded companies, a shareholder nominee would have to satisfy objective independence standards of the applicable national securities exchange or national securities association.

Company Proxy Materials. A company would be required to include in its proxy materials no more than the greater of (a) one shareholder nominee or (b) the number of nominees that represents up to 25 percent of the company's board of directors. A company would include in its proxy materials disclosure concerning a nominating shareholder and a shareholder nominee or nominees similar to the disclosure currently required by the proxy rules in a contested election. As when directors nominate candidates, a nominating shareholder or group would be liable for any false or misleading statements in information provided to the company that was subsequently included in the company's proxy materials. Under the proposed rule, a company would not be responsible for information provided by a nominating shareholder, unless the company knew or had reason to know the information was false.

Shareholder Proposals. Currently, Rule 14a-8(i)(8) permits a company to exclude shareholder proposals that "relate to an election." (In 2007, in response to a decision of the US Court of Appeals for the Second Circuit, the SEC codified what it regarded as its long-standing interpretation of this exclusion by revising Rule 14a-8(i)(8) to specify that, in addition to being able to exclude a shareholder proposal from its proxy materials when that proposal relates to an election for membership on the issuer's board of directors or analogous governing body, an issuer may also exclude a proposal that relates to a procedure for such nomination or election, as discussed in the [December 11, 2007 Alert](#).) The proposed amendment would narrow this exclusion so that a company could not exclude a proposal by a qualifying shareholder that would amend, or that requested an amendment to, provisions of a company's governing documents concerning the company's nomination procedures or other director nomination disclosure provisions (provided the proposal does not conflict with proposed Rule 14a-11).

Public Comment. The deadline for comments on the SEC proposals is 60 days after their publication in the *Federal Register*.

OTHER ITEMS OF NOTE

IOSCO Publishes Consultation Report on Unregulated Financial Products

The Task Force on Unregulated Financial Markets and Products for the International Organization of Securities Commissions ("IOSCO") published a report (the "Report") for public comment that includes interim recommendations designed to introduce greater

transparency and oversight in unregulated financial markets and products in order to improve investor confidence in, and the quality of, these markets. The interim recommendations address (a) securitized products, including asset-backed securities (ABS), asset-backed commercial paper (ABCP) and structured credit products such as collateralized debt obligations (CDOs), synthetic CDOs, and collateralized loan obligations (CLOs), and (b) credit default swaps (CDSs). The Report makes recommendations about regulatory approaches to the securitized product and credit default swap markets and also discusses the broader unregulated financial markets and related products. Comments must be received no later than June 15, 2009. The Report is available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD290.pdf>.

Investment Management Compliance Testing Survey Released

The Investment Adviser Association, ACA Compliance Group, ACA Insight, and Old Mutual Asset Management made available the aggregate results of a survey of 440 compliance professionals, representing a range of SEC-registered investment advisers. The survey focuses on the impact of recent events in the financial markets and regulatory/enforcement activity on compliance programs and examines testing practices in the areas of risk management, custody and safekeeping of client assets, marketing and advertising, and portfolio management.

http://www.investmentadviser.org/eweb/Dynamicpage.aspx?webcode=DocRedirect&wps_key=787b5ec9-da8a-4d6d-973b-2e480b266332&RURL=./eweb/docs/Publications_News/Reports_and_Brochures/Investment_Management_Compliance_Testing_Surveys/IMCTS_2009.pdf

FINRA Proposes Consolidated Rules for Suitability and Know-Your-Customer Obligations

As part of the ongoing process of developing a single rulebook following the consolidation of the member regulation, enforcement and arbitration operations of the New York Stock Exchange (“NYSE”) into the NASD to create FINRA, FINRA has issued a Regulatory Notice seeking public comment on a proposal to include in the Consolidated FINRA Rulebook modified versions of (a) NASD Rule 2310, which deals with suitability obligations, and (b) Incorporated NYSE Rule 405, which deals with know-your-customer obligations. Comments must be received by June 29, 2009. The Regulatory Notice is available at <http://www.finra.org/Industry/Regulation/Notices/2009/P118711>.

Effective Date for DOL Final Regulation and Exemption for Investment Advice Is Further Delayed

The Department of Labor (the “DOL”) recently announced that it is further delaying until November 18, 2009 the effective date of a final rule under Sections 408(b)(14) and 408(g) of the Employee Retirement Income Security Act of 1974, addressing the provision of investment advice to participants in 401(k) plans and individual retirement account holders (the “Investment Advice Regulation”). (The Investment Advice Regulation was described in the [September 2, 2008 Alert](#).) The DOL, which had previously extended the effective date from March 23 to May 22, indicated in its announcement that additional time was needed to consider the legal and policy issues raised by comments on the Investment Advice Regulation. It is expected that significant changes could be made to the Investment Advice Regulation during this period, including through possible legislative action.

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SEC and DOL to Hold Joint Hearing on Target Date Funds

The SEC and DOL will be holding a joint public hearing on June 18, 2009 examining target date funds, life cycle funds and other similar investments products (collectively, "TDFs"). TDFs typically are mutual funds that allocate their investments among various asset classes and adjust the allocation toward more conservative investments as a specified "target date" approaches. The SEC and DOL are accepting requests to participate by presenting testimony and answering questions at the hearing. Discussion topics at the joint hearing will include issues related to how TDF managers determine asset allocations and changes to asset allocations over time; how they select and monitor underlying investments; how the foregoing and related risks are disclosed to investors; and approaches to comparing and evaluating TDFs. Additional information on making a request to participate in the public hearing, which must be submitted by 3:30 p.m., EST, June 5, 2009, is available at <http://www.sec.gov/rules/other/2009/ic-28725.pdf>.

CFTC Seeks Public Comment on Possible Changes to Regulations for Investment of Customer Funds Deposited with Clearing Organizations and Futures Commission Merchants

The CFTC published a notice in the *Federal Register* indicating that it is reconsidering the standards that apply to derivatives clearing organizations and futures commissions merchants with respect to the investment of customer segregated funds (e.g., those held as margin) and customer money, securities, and property associated with positions in foreign futures and foreign options ("30.7 funds"). Current CFTC Rule 1.25 specifies a range of permissible vehicles, including money market funds, for the investment of customer segregated funds. The investment of 30.7 funds is subject to a less specific fiduciary standard that requires the investment chosen to be at all times liquid and sufficient to cover all obligations to the customer in question; Regulation 1.25 investments are appropriate, as are investments in "any other readily marketable securities." The notice cites concern that "the market events of the past year, notably the failures of certain government sponsored enterprises, difficulties encountered by certain money market mutual funds in honoring redemption requests, illiquidity of certain adjustable rate securities, and turmoil in the credit ratings industry, have challenged many of the fundamental assumptions regarding investments." The CFTC believes it is an especially appropriate time to review permitted investments for customer segregated funds and 30.7 funds, and is considering significantly revising the scope and character of permitted investments for customer segregated funds and 30.7 funds. The notice is designed to elicit public comment to inform the CFTC in issuing any proposed amendments to Regulations 1.25 or 30.7. Comments must be received no later than July 21, 2009. The CFTC release is available at <http://edocket.access.gpo.gov/2009/pdf/E9-12020.pdf>.