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## DEVELOPMENTS OF NOTE

### **FDIC Approves Phase Out of Temporary Liquidity Guarantee Program - Debt Guarantee Program to End October 31, 2009**

The FDIC adopted a Notice of Proposed Rulemaking (the "NPR") that reaffirms the expiration of the Debt Guarantee Program (the "DGP") of the Temporary Liquidity Guarantee Program (the "TLGP") on October 31, 2009. In October 2008, the FDIC adopted the TLGP as part of a coordinated effort by the FDIC and other federal agencies to address disruptions in credit markets and the resultant inability of financial institutions to obtain funding and make loans to creditworthy borrowers. For more on the TLGP program generally please see the [October 14, 2008 Alert](#) and the [November 25, 2008 Alert](#). The FDIC had previously extended the DGP for four months, and recently extended the Transaction Account Guarantee Program of the TLGP for six months. For further discussion on the previous extension of the DGP, please see the [February 17, 2009 Alert](#); and for further discussion on the extension of the Transaction Account Guarantee Program please see the [September 1, 2009 Alert](#).

The NPR contemplates two alternatives for the expiration of the DGP. Under the first alternative, the DGP would expire as planned on October 31, 2009. All insured depository institutions and other qualifying entities currently participating in the DGP would be permitted to issue FDIC-guaranteed senior unsecured debt until October 31, 2009, with the FDIC's guarantee expiring no later than December 31, 2012. Under the second alternative,

the DGP would expire on October 31, 2009, as in the first alternative. However, the FDIC would establish a limited emergency guarantee facility that would permit insured depository institutions participating in the DGP and any other entities that have issued FDIC-guaranteed senior unsecured debt by September 9, 2009 to apply to the FDIC to issue FDIC-guaranteed debt for an additional six months. To use the emergency guarantee facility, applicants would be required to demonstrate their inability to issue non-guaranteed debt or to replace maturing debt as a result of market disruptions or other circumstances beyond their control. Any application under the emergency guarantee facility would require the approval of the Chairman of the FDIC, after consultation with the FDIC Board. Applicants approved by the FDIC would pay an annualized participation fee of at least 300 basis points on the FDIC-guaranteed debt issued under the emergency guarantee facility and would be subject to other conditions imposed by the FDIC. As with the first alternative, the FDIC's guarantee would expire no later than December 31, 2012.

The FDIC has requested comments on the two proposed alternatives and will accept such comments for 15 days following the publication of the NPR in the *Federal Register*.

### **Obama Administration Issues New Guidance on Retirement Savings**

The Treasury Department and Internal Revenue Service (the "IRS") released guidance intended to promote individual retirement savings. The guidance is part of an overall Obama Administration initiative to increase savings through 401(k) plans and IRAs, and complements elements of the Administration's 2010 budget proposal.

Specifically, the guidance addresses the following matters:

- **Automatic Enrollment.** The new guidance expands the opportunity for employers to offer automatic enrollment in 401(k) and other retirement savings plans such as SIMPLE IRA plans. The guidance also clarifies rules for automatic enrollment in these vehicles, and provides rules for escalating participants' default contributions over time. The IRS notices include sample amendments for 401(k) plans and SIMPLE IRAs covering the adoption of such automatic enrollment and escalation features. The IRS notices explain that if an employer adopts one of these IRS sample amendments, it may continue to rely on a favorable IRS opinion, advisory or determination letter that it has already received.
- **Contribution of Unused Leave.** The IRS has provided new rules for amending tax-qualified retirement plans in order to require or permit contribution of unused "paid time off" (*i.e.*, payments for unused sick and vacation leave that meets certain requirements) to employees' 401(k) plan accounts on an annual basis or upon termination of employment, subject to certain IRS limits.
- **Roll-Over Distributions.** The IRS updated the safe harbor explanations that an employer may provide to recipients of eligible roll-over distributions. The updates are intended to encourage employees to elect to roll over distributions to an IRA or other retirement plan, instead of directly receiving the payment.
- **Explanation of Savings Options.** The IRS also created user-friendly website materials explaining retirement plan options for employers. These materials, which can be accessed through the IRS website, are intended to assist employers in selecting the right type of retirement plans for their business and employees.

- **U.S. Savings Bond Initiative.** Beginning in early 2010, taxpayers will have the ability to use their tax refunds to directly purchase up to \$5,000 of Series I U.S. savings bonds by checking a box on their tax return.

The IRS and Treasury guidance and an explanation of the overall savings initiative can be found at <http://www.irs.gov/retirement>.

### **Federal District Court Finds Broker-Dealer Affiliate of Insurance Company Did Not Owe Fiduciary Duty under Advisers Act to Purchaser of Variable Insurance Product**

On August 31, 2009, the United States District Court for the Western District of Oklahoma (the “District Court”) granted a motion for summary judgment by an insurance company and its affiliated broker-dealer (collectively referred to as the “company”) that were being sued for alleged violations of the Investment Advisers Act of 1940 (the “Advisers Act” or “Act”) in connection with the sale of a variable universal life insurance policy. The plaintiffs alleged that a sales representative of the company had acted as an investment adviser in recommending that the plaintiffs purchase the policy, and thus the company was subject to the Advisers Act. The plaintiffs further alleged that the company had violated the fiduciary duty it owed to the plaintiffs under the Advisers Act by failing to disclose the conflicts of interest created by the commission structures, fees and other policies that gave the sales representative an incentive to put his own financial interest ahead of the plaintiffs’.

In granting the company’s motion for summary judgment, the District Court examined whether the investment advisory services provided by the sales representative fell within the broker-dealer exclusion in Section 202(a)(11)(C) of the Act, which provides that that “any broker or dealer whose performance of [advisory] services is solely incidental to the conduct of its business as a broker or dealer and who receives no special compensation therefor” is not an investment adviser for purposes of the Act. (Although the District Court and this article refer to the insurance company and its affiliated broker-dealer collectively, the opinion’s clear focus is on the issue of whether the broker-dealer, not the insurance company, could rely on the broker-dealer exclusion.) The District Court found that there was no genuine issue of material fact to be litigated because the evidence presented, even when viewed in the light most favorable to the plaintiffs, indicated that each of the requirements of the broker-dealer exclusion had been satisfied – namely, (i) the sales representative was a broker of the company’s products; (ii) the sales representative’s provision of investment advisory services to the plaintiffs was solely incidental to the conduct of his and the company’s business as brokers of the company’s products; and (iii) no special compensation for providing advisory services was paid to the company or the sales representative.

*Solely Incidental.* In addressing the “solely incidental” requirement, the District Court analyzed the statutory language, the legislative history and past SEC interpretations to conclude that under this element of the broker-dealer exclusion advisory services must be solely attendant to or solely in connection with brokerage activities, and need not be only a minor or insignificant part of the conduct of the company’s brokerage business as the plaintiffs contended. The District Court noted the dearth of appellate guidance on the “solely incidental” element of the broker-dealer exclusion, which it regarded as the most difficult element of the exclusion analytically.

*Special Compensation.* Regarding the receipt of special compensation, the District Court focused on the fact that (a) the plaintiffs were never presented with a separate charge for

investment advisory services, (b) the only payments received by the insurance company with respect to the policy were the premiums paid by the plaintiffs and (c) the only compensation received by the sales representative with respect to the policy was a “Production Credit” paid related to the policy’s sale.

*The Broader Context.* This decision comes against a backdrop of judicial, regulatory and legislative developments over the last several years addressing how broker-dealers and investment advisers should be regulated, particularly in areas where their activities may overlap. As discussed in the [April 10, 2007 Alert](#), a decision of the United States Court of Appeals for the D.C. Circuit, which was cited in the District Court’s decision, vacated a 2005 SEC rule that created additional exceptions from the definition of “investment adviser” under the Advisers Act for certain fee-based and discount brokerage programs. In conjunction with its adoption of the vacated rule, the SEC had also begun examining how it might improve its oversight and regulation of broker-dealers and investment advisers to better reflect current industry practices and investor perceptions. To date, this effort has resulted in a RAND Corporation [report](#) on investor and industry perspectives on investment advisers and broker-dealers (see the [January 8, 2008 Alert](#)). More recently, the financial crisis has prompted legislative efforts to address the duty broker-dealers owe their customers. Following up on recommendations in the Treasury’s June 2009 white paper on financial regulatory reform (see the [June 23, 2009 Alert](#)), the Obama administration submitted to Congress proposed legislation designed to increase investor protections, which included a provision granting the SEC broad authority to promulgate rules requiring brokers, dealers and investment advisers providing investment advice to act solely in the interest of the customer or client without regard to any interest of the broker, dealer or investment adviser (see the [August 4, 2009 Alert](#)). *Thomas v. Metropolitan Life Ins. Co.*, CIV-07-0121-F (WD Okla. Aug. 31, 2009).

### **DOL Approves Use of Summary Prospectus under Section 404(c)**

The Department of Labor (the “DOL”) issued Field Assistance Bulletin 2009-3 under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). This advisory opinion addresses the prospectus delivery requirement for participant-directed retirement plans, including so-called 401(k) plans, that are intended to comply with Section 404(c) of ERISA. Section 404(c), if satisfied, relieves all plan fiduciaries of any responsibility for the participants’ investment directions. Among other things, Section 404(c) requires that a mutual fund prospectus be delivered to each participant either immediately before or immediately after a participant’s initial investment in the mutual fund. In this advisory opinion, the DOL concludes that the delivery of a mutual fund’s “Summary Prospectus” satisfies the prospectus delivery requirement under Section 404(c) of ERISA. The Summary Prospectus is a recently introduced short-form “plain English” disclosure document that may be used as an alternative to the full blown statutory prospectus to satisfy prospectus delivery requirements under the federal securities laws in connection with mutual fund sales, as discussed in the [January 20, 2009 Alert](#).

### **IDC Issues Task Force Report on Board Oversight of Fund Compliance**

The Independent Directors Council issued another in a series of reports discussing the duties of mutual fund boards of directors. This report focuses on board oversight of fund compliance. The report examines how fund boards may help define the mission and goals of a fund’s compliance function and describes some common themes among fund groups in this area. The role of the fund chief compliance officer (“CCO”) is discussed including the

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potential issues related to using a CCO who serves only as fund CCO and not as CCO of the fund's adviser, as compared to a fund CCO who also serves as the adviser's CCO. The report also explores the role of fund management in supporting compliance and the CCO role. Finally, the report addresses the board's role in compliance, primarily in the areas of (a) board communication with a CCO at and between board meetings; (b) board evaluation of a fund's compliance program and its CCO (including possible considerations for such an evaluation) and (c) board review and approval of CCO compensation. Appendices to the report provide a sample fund CCO job description and suggested fund CCO goals.

**OTHER ITEMS OF NOTE**

**FDIC Board Adopts Final Regulation Concerning Deposit Insurance Coverage**

The FDIC Board of Directors approved a [final rule](#) (the "Final Rule") that amends the FDIC's deposit insurance regulations to: (1) reflect the May 2009 Congressional action that extends until December 31, 2013 the temporary increase in the standard maximum deposit insurance amount (referred to as the "SMDIA") from \$100,000 to \$250,000; (2) finalize, without substantive changes, the FDIC deposit insurance coverage rules for revocable trust accounts that had been adopted as an Interim Rule in September 2008 and that were designed to make the coverage rules for revocable trust accounts easier to understand and apply; and (3) finalize, without substantive changes, the revisions to the mortgage servicing account (*i.e.*, payments collected by mortgage servicers and deposited in accounts at depository institutions) deposit insurance regulations, which had been adopted by the FDIC as an Interim Rule in October 2008.

The Final Rule will be effective 30 days after its publication in the *Federal Register*.

**SEC Securities Lending and Short Sale Roundtable**

The SEC [announced](#) that it will hold a roundtable on securities lending and short sale issues on September 29 (securities lending) and September 30, 2009 (short sales). The public is invited to the roundtable on first come, first served basis, and the roundtable discussion will be available via webcast on the SEC website. The SEC has posted an [agenda](#) for the roundtable. Panelists, who are expected to include investors, corporate issuers, financial services firms, beneficial owner lenders, lending agents, borrowers of securities, self-regulatory organizations, international regulators, and the academic community, will be announced prior to the roundtable. The SEC will accept comments regarding issues addressed in the roundtable discussion until October 30, 2009.

**Treasury Issues Report on 529 Plans**

The Treasury issued a [report](#) examining 529 plans that it prepared for the White House Task Force on Middle Class Working Families. The report examines how 529 plans are used by investors and makes recommendations regarding (a) increased availability of age-based index funds, (b) elimination of home-state bias, (c) introduction of per beneficiary contribution limits, (d) improved reporting of investment option performance, (e) additional reporting to policy makers on 529 plan use and (f) strengthened compliance and monitoring of 529 plans and their disbursements.

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