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AMERICAN BAR ASSOCIATION

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December 1, 2008

By e-mail to Comments@FDIC.gov

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: Revocable Trust Accounts
12 CFR Part 330, RIN 3064-AD33

Dear Mr. Feldman:

The attached comments are in response to the interim rule promulgated by the Federal Deposit Insurance Corporation ("FDIC"), appearing in Pages 56706-56712 of the Federal Register dated September 30, 2008 (Volume 73, Number 190), effective September 26, 2008 for insurance coverage on revocable trust accounts (the "Interim Rule"). The comments are being submitted on behalf of the American Bar Association Section of Real Property, Trust and Estate Law (the "Section"). They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

The comments were prepared by members of the Non-Tax Issues Affecting the Planning and Administration of Estates and Trusts Committee of the Trust and Estate Division of the Section. Although the members of the Section who prepared these comments have clients who would be affected by the principles addressed, or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a submission with respect to, or otherwise influence the development or the outcome of, the specific subject matter of these comments.

If you have any questions regarding these comments, please do not hesitate to contact Elizabeth Lindsay-Ochoa, Vice-Chair of the Non-Tax Issues Affecting the Planning and Administration of Estates and Trusts Committee, at lizochoa@gmail.com.

Very truly yours,

Steve R. Akers

Steve R. Akers
Section Chair

ABA SECTION OF REAL PROPERTY | TRUST & ESTATE LAW
Your Source for Success

cc: Bernice B. Donald, ABA Secretary
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Steven B. Gorin, Committee on Governmental Submissions, ABA Section of Real Property, Trust and Estate Law

COMMENTS OF THE AMERICAN BAR ASSOCIATION, SECTION OF REAL PROPERTY, TRUST AND ESTATE LAW CONCERNING IN RESPONSE TO FEDERAL DEPOSIT INSURANCE CORPORATION (the "FDIC") INTERIM RULE WITH REQUEST FOR COMMENTS REGARDING REVOCABLE TRUST ACCOUNTS

I. INFORMATION ON THE DRAFT OF THIS RESPONSE

The following comments are submitted on behalf of the American Bar Association Section of Real Property, Trust and Estate Law. These comments have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

The comments were prepared by members of the Non-Tax Issues Affecting the Planning and Administration of Estates and Trusts Committee (the "Committee") of the Trust and Estate Division of the ABA's Section of Real Property, Trust and Estate Law (the "Section"). Mary O'Reilly, Chair of the Committee, supervised the preparation of these comments and participated in their preparation.

The principal drafting responsibility was exercised by Jason G. Neroulias, and substantive contributions were made by Elizabeth Lindsay-Ochoa and Mary O'Reilly. Others who participated were Mario A. Pacione, Suzanne Luna and Mina Sirkin. These comments were reviewed Steven B. Gorin on behalf of the Section's Committee on Governmental Submissions.

Contact person: Phone Number:
Elizabeth Lindsay-Ochoa 212-314-4650

Although the members of the Section of Real Property, Trust and Estate Law of the American Bar Association who participated in preparing these comments have clients who would be affected by the federal tax principles addressed, or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a submission with respect to, or otherwise influence the development or outcome of, the specific subject matter of these comments.

II. BACKGROUND

The Emergency Economic Stabilization Act of 2008, signed by President George W. Bush on October 3, 2008 temporarily increased the basic limit on FDIC insurance coverage from $100,000 to $250,000 per depositor. The increase is effective from October 3, 2008 through December 31, 2009, after which the coverage limit will return to $100,000.

The FDIC issued the Interim Rule to simplify the rules for revocable trust accounts "to make the rules easier to understand and apply, without decreasing coverage currently available for revocable trust account owners." [1]

III. FDIC REQUESTS SPECIFIC COMMENTS ON THE INTERIM RULE

The FDIC invited comments on all aspects of the Interim Rule. Additionally, the FDIC requested specific comments on: (1) whether "over $500,000" is the proper threshold for determining coverage for revocable trust account owners based on the beneficial interests of the trust beneficiaries[2]; (2) whether the FDIC's irrevocable trust account rules should be revised so that all trusts are covered by substantially the same rules; and (3) what effect the Interim Rule will have on the level of insured deposits.

The Section appreciates the opportunity to comment. However, our comments are limited to how any thresholds the FDIC deems appropriate should apply to trusts..

IV. SUMMARY OF RECOMMENDATIONS

The Section respectfully suggests that the FDIC:

1. Apply the Interim Rule to both revocable and irrevocable trusts. This would provide certainty and clarify FDIC coverage for all trusts while eliminating the complex evaluations under the current rules due to variation in coverage amounts available between revocable and irrevocable trusts with contingent and non-contingent beneficiaries.

2. Expand the definition of "non-contingent trust interest" so that beneficiaries other than beneficiaries with a life estate and other than beneficiaries who receive their interests outright will also be entitled to FDIC coverage.

V. THE FDIC'S IRREVOCABLE TRUST ACCOUNT RULES SHOULD BE REVISED SO THAT ALL TRUSTS ARE COVERED BY SUBSTANTIALLY THE SAME RULES

In light of the FDIC's goal of alleviating confusion and uncertainty when determining deposit insurance amounts of revocable trusts with the Interim Rule, we recommend that the FDIC amend the Interim Rule so that it applies to both revocable and irrevocable trust accounts. The Interim Rule provides that irrevocable trusts which are created from a revocable trust upon the death of the revocable trust owner will continue to be insured

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[1] Interim rule issued September 26, 2008. 12 CFR Part 330.

[2] FDIC Financial Institution Letters (FIL-99-2008, revised as of October 8, 2008) increased the previous $500,000 limit to a $1,250,000 limit.

under the revocable trust rules. We suggest that the Interim Rule apply to all irrevocable trusts regardless of whether the irrevocable trust is created at the moment a revocable trusts becomes irrevocable or if it is irrevocable from the outset. This will simplify the tasks of advisors making recommendations based on insurance amounts, as well as simplify the tasks of the FDIC in making claim determinations. Further, we are unaware of any policy reason to distinguish between irrevocable trusts merely due to the circumstances of their creation, since the rights of a trust's beneficiaries do not depend on such a distinction.

VI. EXPAND THE DEFINITION OF "NON-CONTINGENT TRUST INTEREST"

We are pleased that the Interim Rule expanded the class of beneficiaries entitled to coverage to include any beneficiary who is a natural person, a charity or other non-profit, regardless of marriage, lineal or collateral relationship. However, only those beneficiaries who possess a trust interest capable of determination without evaluation of contingencies except for those covered by the present worth tables and rules of calculation for their use set forth in § 20.2031-7 of the Federal Estate Tax Regulations are eligible for coverage.[3]

Essentially, under the current rules, including the Interim Rule (the "Current Rules"), only those beneficiaries who are granted a life estate or who will receive their interest outright are entitled to coverage. Although this rule provides appropriate protection for beneficiaries of informal revocable trusts accounts, such as Totten Trusts or POD accounts, it does not provide sufficient coverage for beneficiaries of formal revocable trusts and irrevocable trusts, which are commonly used as estate planning vehicles.

Commonly used trust vehicles, such as a sprinkle trust or a dynasty trust, can be left with minimal FDIC coverage because the trust beneficiaries' interests do not fall under the definition of a "non-contingent trust interest." Such estate planning vehicles are often an integral part of a comprehensive estate plan because of their significant tax and non-tax advantages. As a consequence of limiting the coverage available to those beneficiaries who posses a "non-contingent" interest, individuals and their advisor are left having to choose between increased FDIC coverage and the appropriate estate planning vehicle.

Thus, we recommend that the definition of "non-contingent trust interest" be expanded to include discretionary beneficiaries and presumptive remainderman of discretionary trusts. If such a change is not possible, we recommend that such definition be expanded to include any beneficiary whose distributions are subject to an ascertainable standard, as such term is defined in section 2514(c)(1) of the Internal Revenue Code and the Treasury

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[3] Definition from 330.10:

(l) *Non-contingent trust interest* means a trust interest capable of determination without evaluation of contingencies except for those covered by the present worth tables and rules of calculation for their use set forth in § 20.2031--7 of the Federal Estate Tax Regulations (26 CFR 20.2031--7) or any similar present worth or life expectancy tables which may be adopted by the Internal Revenue Service.

Regulations thereunder. The tax laws view such a standard as granting beneficiaries enforceable rights.

VII. CONCLUSION

We hope that additional consideration by the FDIC on revocable and irrevocable trust accounts will provide rules that increase consumer confidence while ensuring the rules are easy for the public to understand and treat similarly situated beneficiaries in a similar manner. We appreciate your consideration of our comments and welcome the opportunity to discuss them further with you.