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INCREASED FDIC PROTECTION FOR BANK ACCOUNTS

By **Teresa V. Fleming**

On Friday, October 3, 2008, the Federal Deposit Insurance Corporation ("FDIC") increased the amount of automatic federal insurance on savings accounts held by FDIC participating banks from $100,000 to $250,000. This move was in response to investors withdrawing large amounts from their savings accounts in reaction to the recent dramatic shake up of the financial industry and the failure of several of its large established organizations.

In the past, investors were aware of the FDIC limit, but generally felt safe in exceeding that limit – sometimes by a large amount. With the current instability in the financial world, many are taking a closer look at the safety of all of their investments. The increase in the FDIC limit is designed to give investors greater confidence and encourage them to maintain larger savings account balances. This, in turn, will provide banks with more money to lend, thereby easing the credit crunch.

The increase means that an individual may have up to $250,000 in any one bank secured by the federal government. The $250,000 limit includes all deposits at a single bank held in checking accounts, savings accounts, certificates of deposit ("CDs"), and half of the value of a joint account. The other joint owner will be able to apply that owner's own FDIC insurance to that owner's own accounts and to the other half of the joint account.

Many banks have offered creative programs to expand FDIC protection for their customers. When a customer holds funds in excess of the limit, a bank may partner with other banks to "share" the deposit. While the customer deals with only one bank, the customer's funds are actually held by multiple banks taking advantage of the full $250,000 protection for each bank. Advertisements thus offer $1,000,000 or more of FDIC protected funds.

In addition to the increased protection for savings accounts and CDs, investors' funds held by a bank in Individual Retirement Accounts ("IRAs") or certain other types of retirement accounts are insured up to a separate $250,000 limit. This limit has not been increased.

What happens if a revocable trust opens an account? Trust accounts are counted separately and have their own $250,000 limit. Although during the trust creator's (the "grantor's") life, the revocable trust assets are considered to belong to the grantor, the FDIC insurance limit is based on the number of beneficiaries. For example, a typical living trust could provide that after the grantor's death the trust will provide life income for the spouse and then at the spouse's death pass outright to the children. In that case, the trust owned account will be eligible for $250,000 of insurance for the spouse and for each of the children. A trust providing for a spouse and four children would receive $1,250,000 of protection.

An account that is payable on death ("POD") to specific beneficiaries is also treated as a trust account with a $250,000 coverage limit for each beneficiary. Previously, FDIC trust account coverage was calculated based upon the number of "qualifying beneficiaries." Qualifying beneficiaries were primarily limited to spouses, children, and parents. Under the new law, any trust account with beneficiaries that are persons, charities, or Internal Revenue Service recognized nonprofit organizations will have the same protection.

The expansion in FDIC coverage is in effect until the end of 2009. However, commentators are expecting that the increased protection will be made permanent. Congress is also considering lifting the limit to cover all bank deposits. In addition, as of October 14, 2008 and through the end of 2009, FDIC coverage is unlimited for non-interest bearing deposits such as checking accounts.

For more information and more examples, visit www.fdic.gov.

PROPER TRUST FUNDING IS CRUCIAL DUE TO INCREASED ESTATE TAX EXEMPTION

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EMPLOYERS FACE MORE CHALLENGES UNDER THE ADA REVISIONS

By **Robert W. Morgan**

Under the Americans with Disabilities Act of 1990 ("ADA"), a covered employer (one with fifteen or more employees) was prohibited from discriminating against a qualified individual with a disability because of that individual's disability. To prove a case under the ADA, a claimant must first establish that he is "an individual with a disability." The ADA defined that term as someone who: 1) has an impairment that substantially limits one or more major life activities; 2) has a record of such impairment; or 3) is regarded as someone with such an impairment.

Under the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"), which goes into effect on January 1, 2009, the above legal requirements remain unchanged. What has changed is a legislative enlargement of the definition of "disabled." This expanded definition will create a vastly larger pool of individuals to be afforded protection under the Act.

Congress asserts that it took this action in response to several US Supreme Court decisions which applied a more restrictive interpretation of the provisions of the ADA than Congress had intended. Two of those offending decisions cited in the legislation were the 1999 decision in *Sutton v United Airlines* and the 2002 decision in *Toyota Mfg Co of KY, Inc v Williams*.

In the *Sutton* decision, the Supreme Court found that mitigating measures had to be taken into account in determining whether an individual is substantially limited in a major life activity. In the *Toyota* decision, the Court took a restrictive view of what constitutes a substantial limitation in the major life activity of working. In addition, Congress disapproved of the Equal Employment Opportunity Commission's ("EEOC's") ADA Regulations which it believed too narrowly defined "substantially limits."

The ADAAA expands the list of "major life activities" which the EEOC had established in its regulations for the ADA. The EEOC had listed "caring for oneself, performing manual tasks, seeing, hearing, walking, speaking, breathing, learning, and working." To this list, the ADAAA adds eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating.

The ADAAA also adds a new category of disabilities – "major bodily functions." Under "major bodily functions," it lists "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." Therefore, if an individual has a "physical or mental impairment" that "substantially limits" any of the listed "major life activities" or "major bodily functions," then the individual must be considered "disabled" for the purposes of the Act.

While the Supreme Court had found that the determination of an individual's status of being "disabled" under the ADA required consideration of any mitigating measures that might be available to the individual, the ADAAA now makes that consideration irrelevant. Under the ADAAA, the individual would be considered "disabled" if the unmitigated impairment would be substantially limiting. The ADAAA does note an exception to its unmitigated impairment rule for visual impairments that can be corrected by eyeglasses or contact lenses. However, selection criteria based on uncorrected vision must be job-related and consistent with business necessity.

As to the third criterion of the ADA's definition of "disabled," that is, "regarded as disabled," most courts had found that to be "regarded as disabled," the employer must be found to have perceived that the individual was "substantially limited in a major life activity." However, if the employer only perceived that the individual was impaired, but not "substantially limited," there was no "regarded as" claim.

Under the ADAAA, a "regarded as" claim can be made if the employer perceives the individual has an "impairment," but it is now unnecessary for the employer to also perceive that the impairment is substantially limiting. However, the ADAAA appears to prohibit "regarded as" claims if the individual's impairment is "transitory and minor." The ADAAA defines "transitory and minor" as having an "actual or expected duration of 6 months or less."

In an implicit repudiation of the EEOC's ADA Regulations' definitions of "substantially limits," the ADAAA requires the term be interpreted consistently with the findings and purposes of the ADAAA. To this end, the ADAAA states that "[a]n impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability." The ADAAA also states "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity." Finally, as mentioned above, whether a substantial limitation exists is to be determined "without regard to the ameliorative effects of mitigating measures."

However, other than enlarging the class of individuals covered, the ADAAA does not change an employer's obligation of non-discrimination or reasonable accommodation. Further, it does not change the existing exclusions for "sex-based" or "psychological-criminal" conditions. Finally, it makes no changes to the current requirements of confidentiality of an employee's medical information or to the rules regarding post-offer/pre-employment medical examinations.

Of some minor benefit to employers, the ADAAA does put to rest two questions raised under the ADA. The ADAAA expressly states that reasonable accommodations need not be made to individuals "regarded as" having a disability and that reverse discrimination claims brought by those who are not disabled will not be recognized.

In summary, the ADAAA makes it much more difficult for employers to assert that any given individual is not "disabled" within the meaning of the Act. The obvious consequence will be more accommodation requests and decisions as well as more discrimination charges and lawsuits. In the current state of our business economy, this is just one more financial burden for employers to bear.

THE 2009 DRAMATIC INCREASE IN THE ESTATE TAX EXEMPTION MAKES IT IMPORTANT TO REVIEW TRUST FUNDING

By **Dennis M. Mitzel**

The largest increase that has ever taken place in the federal estate tax exemption will come into effect on January 1, 2009. The estate tax exemption will increase from $2,000,000 to $3,500,000 for each individual. It is crucial for married couples to take advantage of the larger exemption by properly dividing their assets and by confirming that their revocable trusts are fully funded. In addition, because of the uncertainty in the future of the estate tax, proper funding is necessary for estates of all sizes.

Individuals with larger estates may have funded their trusts at a time when the exemption was equal to $1 million or less. If their trusts hold less than the new $3.5 million exemption amount, they will fail to use their available exemption at a potential cost of 45% of the unused exemption amount.

For example, if a couple owns $7 million of assets, they will pay no estate tax if their assets are properly divided between their two trusts. However, if one spouse holds only $1 million of assets in his or her trust and that spouse dies first, the other spouse will have an estate of $6 million – resulting in an unnecessary tax of $1,125,000 at the second spouse's death.

Dealing with qualified plans can be a complicating factor in the proper division of assets between spouses. From an income tax standpoint, it is often desirable to roll over qualified plan benefits, including Individual Retirement Accounts, to a surviving spouse. However, from an estate planning standpoint, transferring the assets to a surviving spouse will prevent the assets from being used as part of the deceased spouse's estate tax exemption.

Depending on the specific circumstances and the value of other assets, it may be desirable for those qualified plan benefits to be made payable to a trust. Trusts can receive qualified plan benefits and distribute them over the spouse's or beneficiary's life expectancy if specific language is included to meet Internal Revenue Service technical requirements.

While the increased federal estate tax exemption may completely eliminate estate tax liability for smaller estates, it is still advisable for a married couple to properly divide assets between their two trusts. The future estate tax exemption amounts are unknown. Under existing law the estate tax will be **eliminated in the year 2010 but revived in 2011 with the exemption reduced to $1 million**.

We expect Congress to address this situation and eliminate this bizarre result. Hopefully, next year Congress will set a permanent exemption level. The President-elect has indicated that the estate tax exemption should remain at $3.5 million with the top tax rate of 45%. Nonetheless, if Congress is not able to agree upon a permanent solution, then the currently planned reduction to a $1 million exemption level will take place.

Year-end is an excellent time to review the funding of your trusts. As income and tax records and year-end statements are received, it is a good idea to update your asset list and review the values and the division of those assets between your two trusts.

2009 TAX NOTES

The Annual Exclusion from Gift Tax

The gift tax annual exclusion is indexed for inflation and will increase from $12,000 to $13,000 beginning in 2009. This is the amount that any individual may give to any other individual without the requirement of filing a gift tax return. The portion of $3.5 million estate tax exemption that may be used during a person's lifetime by making gifts not qualifying for the annual exclusion remains at $1 million.

The Capital Gains Rate

Now that the elections have been decided, it is probable that the capital gains rate will be increased from the current 15% federal rate to a higher rate of 28%. The rate change could affect the timing of asset sales planned to occur in a relatively short time period. Consider accelerating to 2008 sales planned for 2009. Also consider capturing capital losses at the current depressed stock prices in order to use them in the future against gains taxed at the potentially higher rate. In order to capture the loss, the identical security cannot be repurchased within 30 days before or after the sale. To stay "invested," investors may purchase a different security or wait 31 days to repurchase the same security.

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