The FDIC and Your Estate Plan

In this time of economic uncertainty, FDIC coverage has gained increased attention. It is important to know whether your accounts are FDIC insured and to monitor the value of your accounts and the FDIC limits.[1]

It is also important to keep your estate planning goals in mind while taking advantage of the opportunities to maximize FDIC coverage. Certain choices regarding the ownership and beneficiary designations on your accounts could result in better FDIC coverage, but sabotage your estate plan.

FDIC Overview

FDIC stands for "Federal Deposit Insurance Corporation." It is an independent agency of the federal government created in 1933 in response to the thousands of bank failures that occurred in the 1920s and early 1930s. The FDIC provides insurance coverage for funds held at participating financial institutions. If you have an insured account within the FDIC limits, and the financial institution fails, you will be reimbursed.

The recent bank failures that have occurred serve as a reminder of the risk of loss when: 1) funds are kept in an account that is not FDIC insured, or 2) funds exceed the FDIC insured limits.

In October 2008, the basic limit on FDIC coverage increased from $100,000 to $250,000 per depositor. The basic deposit insurance limit will return to $100,000 for all deposit accounts (except for certain retirement accounts) after December 31, 2009, unless Congress enacts a law to extend the increase.

In February 2009, the FDIC created the Temporary Liquidity Guarantee Program (the "TLG Program") which provides for *non-interest bearing* accounts at *participating* financial institutions to be guaranteed without any limit on the amount of coverage. The TLG Program applies through December 31, 2009. The TLG Program offers an important opportunity to obtain increased FDIC coverage. However, many people may want to keep their funds in accounts that pay interest, in which case the FDIC limits described below need to be understood and monitored.

Examples of FDIC Limits on Interest Bearing Accounts in 2009

Please note that, while the TLG program is in effect, the FDIC limits outlined below only apply to interest bearing accounts.

In the case of an account held in one individual's name, with no named beneficiary, the account is insured up to $250,000. This is the combined limit for all such accounts held by the individual at the same financial institution. For example, if a single person owns a checking account holding $100,000 at one financial institution, and $200,000 in a savings account at the same financial institution (for a total of $300,000), the FDIC limit is $250,000, and therefore will be exceeded by $50,000.

If two owners, such as a husband and wife, set up a joint account (from which both owners have equal rights to withdraw), each person's share of all joint accounts at the same insured bank are added together and the total is insured up to a combined amount of $250,000 per person. For example, if husband and wife have a joint checking account (holding $200,000) and a joint saving account (holding $400,000) at the same financial institution (for a total of $600,000), the FDIC limit is $500,000, and therefore will be exceeded by $100,000.[2]

Extended FDIC coverage may be available when multiple POD beneficiaries are named on an account. The owner of a POD account can be insured up to $250,000 for each beneficiary. For example, if an individual holds a savings account in the name of the individual with his or her two children named as POD beneficiaries, the FDIC coverage for the account is $500,000 ($250,000 for each beneficiary). Strangely, only the beneficiaries (not the owner) are counted in determining the FDIC coverage for the POD account.

Holding an account in the name of a revocable trust (also known as a "living trust") may also provide extended FDIC coverage. The FDIC coverage for the trust is generally $250,000 times the number of beneficiaries of the trust. The "beneficiaries" who are counted for this purpose are individuals or charities who will receive the trust assets at the death of the settlor (creator) of the trust. For example, if an individual creates a revocable trust which provides that the trust will distribute at his or her death in equal shares to the individual's three children, the FDIC coverage is $750,000.[3]

Note that irrevocable trusts and accounts established by a personal representative (executor) for a decedent's estate are also limited to $250,000 of coverage at any one financial institution.

Effect of POD and Joint Tenancy

Although holding an account in joint tenancy or with a POD beneficiary may extend your FDIC coverage, it is important to understand that holding an account in these manners can be contrary to your estate planning objectives.

Joint Tenancy: If you hold an account in joint tenancy, the other joint tenant will have unrestricted access to the account, with the result that he or she can withdraw all of the funds from the account. For example, if a mother establishes an account with her daughter as joint tenant, the daughter can withdraw all of the funds from the account without notice to the mother. The withdrawal would be considered a gift which, depending upon the amount withdrawn, may require that the mother file a gift tax return. Also, if the account remains in place at the mother's death, the daughter will receive the entire account at that time regardless of the directions in the mother's will. For example, if the mother's will directs that her estate be distributed at her death equally to her four children, the daughter named on the account will receive the full amount in the joint account in addition to one-quarter of the assets passing under the will.[4]

POD Beneficiaries: Naming someone as POD beneficiary does not grant the person access to the account during the account owner's life. However, the effect at death is essentially the same as holding the account in joint tenancy (the beneficiary receives the account regardless of the directions in the will).

In the case of the mother with four children, she might be tempted to name her four children equally as POD beneficiaries. The FDIC coverage would be up to $1,000,000 in 2009. This arrangement would result in the four children receiving equal shares of the account at the mother's death, which is consistent with the mother's estate plan in this case. However, there are potential problems with this approach.

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Thomas L. Stover was the only Longmont lawyer included in the Colorado Super Lawyers® 2009 publication. It is the fourth consecutive year that Tom has been selected for the annual publication. As always, Tom has a full schedule of teaching and bar association activities, including recent presentations on generation skipping transfer tax (GST) and marital deduction tax planning to CLE of Colorado, the Colorado Society of CPAs and the Boulder County and Southeast Denver Estate Planning Councils. He is also looking forward to riding his bicycle in the Tour of the Tucson Mountains in late April.

Jennifer M. Spitz was recently listed in Best Lawyers In America,® which is widely regarded as the preeminent referral guide to the legal profession in the United States. Jennifer gave a presentation for the Colorado Bar Association in November 2008 on the topic of planning for other states' estate taxes, and she is giving a similar presentation for the Boulder County Bar Association this spring. Jennifer was recently elected to serve as Secretary/Treasurer of the Trust and Estate Section of the Colorado Bar Association for the 2009-2010 year.

David Brantz continues to be an active member of Legal Committee of the Community Foundation for Boulder County and the Boulder County Bar Association's Trust and Estates Section. David's role with the Community Foundation has also expanded to include serving on the most recent Environmental Committee awarding grants from the Community Trust, a permanent endowment of the Community Foundation. David has also become a regular participant in the Colorado Bar Association's Trust and Estates Section Subcommittees on Rules & Forms and Statutory Revisions.

One problem arises if a child predeceases. In that case, will the deceased child's share pass to his or her children, or will it instead pass to the deceased child's siblings (the mother's other children)? The beneficiary designation and applicable state law would need to be consulted. In contrast, if the account is solely in the mother's name, with no POD beneficiaries, the account passes under the mother's will at her death, and the mother's properly drafted will directs what happens to the deceased child's share.

In the case of individuals with estate plans that provide for creation of trusts at their deaths, naming individuals as POD beneficiaries subverts the estate plan. The individuals named as beneficiaries will receive the accounts outright (free of trust) at death, rather than those accounts passing under the decedent's will and into the trusts.

NOTE:
This article highlights some aspects of FDIC coverage, but does not explain all of the FDIC rules.
You should consult us before relying on this article.

[1] The National Credit Union Share Insurance Fund (NCUSIF) insures participating credit unions. The NCUSIF rules are similar to those of FDIC. Therefore, the information in this article is also generally applicable to NCUSIF coverage.

[2] This example assumes that the husband and wife are the only owners of the account, there are no POD (payable on death) beneficiary designations on the accounts, and that the husband and wife do not own any other accounts individually or together at the financial institution.

[3] The rules regarding FDIC limits for revocable trusts are complex. It is important that any revocable trust be professionally drafted, and that the FDIC limits be carefully considered on a case-by-case basis for any such trust.

[4] Under Colorado law, a joint tenancy account may be treated as owned solely by one of the owners (*i.e.* the mother in this example) if it can be established that the account was held in joint tenancy for convenience only. However, relying on this provision of the law can lead to disputes and potential gift tax issues for the joint tenant (the daughter in this case) if she does not take the entire account following the mother's death.

2009 Estate and Gift Tax Law Update

The existing federal estate and gift tax laws were last updated comprehensively in 2001. For 2009, the current estate tax laws provide for an estate tax exclusion amount of $3.5 million. This means that, assuming no taxable gifts were made during one's life, an individual can leave $3.5 million of assets free of estate tax in 2009.

Also for 2009, the gift tax lifetime exclusion amount will remain at $1 million. However, the 2009 gift tax annual exclusion amount is now $13,000. This means that an individual can give a present interest in property valued at up to $13,000 to as many people as he or she wishes in 2009 without incurring any gift tax or using any of the individual's lifetime gift tax exclusion.

An Uncertain Future for the Estate and Gift Tax Laws

Under the existing laws, the estate tax will be repealed entirely for 2010. For 2011, the estate tax is scheduled to return to is original form (*i.e.*, prior to 2001), so that the estate tax exclusion amount will drop to $1 million. Over the past eight years, Congress has considered several proposals to either repeal the estate tax permanently or to provide for a revised estate and gift taxes for the years 2010 and beyond. Described below are some of the most recent proposals for the future of the estate and gift taxes.

On January 9, 2009, Representative Earl Pomeroy (ND) introduced proposed legislation (H.R. 436) that includes amendments to the Internal Revenue Code. Specifically, among other amendments, H.R. 436 would: (a) retain the federal estate tax with a $3.5 million exclusion amount; (b) set the top estate tax rate at 45%; (c) reinstate the 5% surtax on estates valued between $10-$41 million; and (d) severely limit the use of valuation discounts for estate and gift tax purposes in regard to entities that are not actively traded, particularly if such entities are controlled by members of a single family.

On January 19, 2009, Representative Harry Mitchell (AZ) introduced proposed legislation (H.R. 498) that would also reform the estate and gift taxes. The primary provisions of this bill would: (a) raise the estate tax exclusion amount to $5 million (phased in between the years 2010 and 2015); (b) index the estate tax exclusion amount for inflation after 2015; (c) re-unify the gift tax exemption amount (currently $1 million) with the estate tax exclusion amount; (d) set the top estate tax rate at the capital gains rate for estates up to $25 million, with a doubled rate for larger estates; and (e) make the unused exclusion amount of the first spouse to die available to the surviving spouse.

On March 26, 2009, Senator Max Baucus (MT) introduced proposed legislation (S. 722) that would make the estate and gift taxes permanent. The primary provisions of this bill would: (a) re-unify the gift tax exclusion amount (currently $1 million) with the estate tax exclusion amount (discussed below); (b) make permanent the $3.5 million estate tax exclusion amount and the newly re-unified gift tax exclusion amount (discussed above), both indexed for inflation after 2010; (c) make permanent the 45% top estate and gift tax rate bracket; and (d) make the unused exclusion amount of the first spouse to die available to the surviving spouse.

As of March 2009, the bills sponsored by members of the House of Representatives were each being investigated and deliberated by the Ways and Means Committee, and the bill sponsored by Senator Baucus had been referred to the Senate Finance Committee, which may result in revisions before any one of the bills is enacted. At this time, it is impossible to determine what the final legislation, if any, would include. However, any final legislation that is enacted could affect a number of individuals' existing estate plans.

SPRING 2009 NEWSLETTER

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2009 MRDs for Retirement Plans

The minimum required distribution (MRD) rules dictate when a participant (or his or her beneficiaries) must take assets out of certain retirement plans, whether they want to or not. Generally, an individual participant who is over age 70½ (or the beneficiaries of a deceased participant) must take MRDs from a retirement plan over a predetermined period of time (which is generally calculated using the life expectancy of the applicable individual, but could be as short as the five year period after a participant's date of death).

On December 23, 2008, President Bush signed into law the "Worker, Retiree, and Employer Recovery Act of 2008" (WRERA). This act was intended to provide older Americans some much-needed financial flexibility as they struggle to manage their finances during this difficult economic time. Among other provisions, WRERA effectively suspends the MRD rules for 2009 for both participants and beneficiaries. This means that anyone *who would have been required* to take a distribution from a retirement plan in 2009 can now take as much or as little from that retirement plan as may be desired in 2009. WRERA only affects MRDs for the year 2009; it does not affect MRDs for 2008 or for 2010 and subsequent years.