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U P D A T E

News of Developments in the Financial Sector and Related Areas

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Directors and Officers Liability Insurance

Directors and officers liability insurance coverage ("D&O") is designed to protect the personal assets of directors and officers commonly referred to as insured persons of an institution against *losses* arising from *wrongful acts* and *claims* against them. *Losses* are generally defined in a D&O policy to include defense costs, judgments and settlements which an insured person may incur in serving as a director or officer of an institution. *Wrongful acts* generally include alleged omissions, misleading statements, neglect or breach of fiduciary duties in the discharge of duties as an officer or director of an institution. *Claims* are generally defined to include written demands, civil and criminal proceedings, arbitrations, administrative and regulatory proceedings and investigations.

The preferable coverage for D&O coverage is one where the insurer has the duty to defend the claim. Otherwise the insured is responsible for obtaining its own defense counsel and then having to obtain reimbursement from the insurance company for its costs and expenses.

It is important to determine in connection with indemnification of officers and directors if the institution has adopted indemnification protections in its articles of incorporation, by-laws or other corporate documents whereby the institution will reimburse its directors and officers for expenses or damages incurred for claims brought against them. Otherwise, the director or officer may not be entitled to indemnification once a claim is made against them.

D&O policies are claims made policies which mean that they cover claims made only during the existence of the policy period regardless of whether the alleged wrongdoing occurred during or before the policy. As a result it is important for institutions to maintain D&O coverage after a director's or officer's service ends.

There are three types of D&O coverage available. The first is known as "Side A" which provides coverage on those claims made against individual directors and officers for losses that are not indemnified by the institution. The second is referred to as corporate reimbursement or "Side B" coverage which provides reimbursement for those amounts the institution incurs in its indemnification of claims brought against its directors and officers. The third is referred to as "Side C" which provides coverage when the institution itself is the subject of a claim as in the case of securities violations. Although the forms of coverage will be generally contained in the same policy, each is separate and distinct and may be subject to different deductibles and exclusions.

It is important to understand the difference between derivative actions versus third-party actions. Derivative actions are actions in the name and on behalf of the institution and in the event of recovery, the amount of the recovery goes to the institution. A director's and officer's right to be indemnified in connection with a derivative action is more limited than the right to be indemnified with respect to third-party actions. With respect to third-party actions, the institution may indemnify directors and officers against defense costs, judgments and amounts paid in settlement in those cases where the person acted in good faith and in a manner reasonably believed to be in or not opposed to the best interests of the institution, and in regard to criminal actions, the director or officer had no reasonable cause to believe that his conduct was unlawful.

Because the institution may not indemnify a director or officer in a derivative action or if the institution is financially unable or has failed, it is important for directors and officers to address the need for Side A coverage. In most instances, there is not a deductible in policies providing Side A coverage. Directors and officers need to be aware of the limits for liability under Side A, Side B and Side C policy coverage.

It is important for institutions to provide indemnification of directors and officers in their governing instruments and to maintain adequate insurance coverage to afford protection from directors and officers having to use their own resources to bear the costs for any claims. D&O policies should be carefully reviewed to ensure that they provide the broadest protection for the personal resources of individual directors and officers. Our firm is available to assist and answer questions involving D&O coverage.

SIGTARP Quarterly Report

The Office of the Special Inspector General for the Troubled Asset Relief Program ("SIGTARP") was established by the Emergency Economic Stabilization Act of 2008. Under the Act, the Special Inspector General has the responsibility to conduct, supervise and coordinate audits and investigations of the purchase, management and sale of assets under the Troubled Asset Relief Program ("TARP"). Treasury's stated goal for the Capital Purchase Program ("CPP") was to invest in healthy, viable institutions as a way to promote financial stability, maintain confidence in the financial system, and enable lenders to meet the nation's credit needs. Treasury invested $204.9 billion in TARP funds predominantly to purchase preferred equity interests in 707 financial institutions that paid dividends although it also received debt in the form of subordinated debentures.

Earlier this year, SIGTARP issued its quarterly report to Congress. As of June 30, 2016, 23 institutions remained in TARP as follows: 13 institutions remaining in the CPP with principal investments owned by the Treasury and 10 CPP institutions for which Treasury only holds warrants to purchase stock. The Treasury does not consider the 10 CPP institutions in which it holds only warrants to be in the TARP program, however, the Treasury applies all proceeds from the sale of warrants in these institutions to recover amounts in TARP's CPP program. As of June 30, 2016, 10 of the 13 institutions with remaining principal investments had missed at least six dividend and interest payments totaling $34.3 million. OneFinancial Corporation, Little Rock, Arkansas has principal investments owing to the Treasury of $17.3 million and has missed 17 interest payments totaling $8,018,964.