

*Statute file*



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SECURITIES DIVISION  
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ARIZONA CORPORATION COMMISSION

November 10, 1993

Ms. Patricia A. Miklos  
Watson, Ess, Marshall & Enggas  
1010 Grand Avenue  
Kansas City, MO 64106-2271

RE: Investors Fiduciary Trust Corporation/No-Action Request  
A.R.S. §§ 44-1801(22), 44-1843(A)(1),(2)

Dear Ms. Miklos:

The Securities Division is in receipt of your letter of April 16, 1993, requesting a no-action position for the above captioned issuer. We are unable to concur with your conclusion that the money market deposit accounts will not constitute "securities" for purposes of A.R.S. § 44-1801(22). It is the Division's position that such accounts constitute securities and require registration or an exemption from registration.

Additionally, with respect to our telephone conversations, the Division does not concur with the position that, in the context of the described transaction, the existence of Federal Depository Institute Corporation insurance constitutes a "guarantee" for purposes of the registration exemption provided for by A.R.S. § 44-1843(A)(1). Nor does the Division concur with the position that trust companies fall within the language of A.R.S. § 44-1843(A)(2).

For the foregoing reasons, the Securities Division declines to take a no-action position with respect to the proposed activities of Investors Fiduciary Trust Corporation. We have attached a photocopy of your letter. By doing this we are able to avoid having to recite or summarize the facts set forth therein.

Very truly yours,

DEE RIDDELL HARRIS  
Director of Securities

DRH:jb  
Attachment

WATSON, ESS, MARSHALL & ENGGAS

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By  
I.N. Watson

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April 16, 1993

VIA FEDERAL EXPRESS

State of Arizona  
Securities Division  
Mr. Dee R. Harris, Director  
1200 West Washington, Suite 201  
Phoenix, Arizona 85007

Re: INVESTORS MONEYACCOUNT  
Investors Fiduciary Trust Corporation

Dear Mr. Harris:

On behalf of Investors Fiduciary Trust Corporation ("IFTC"), we respectfully request that you provide us with interpretive advice regarding the definition of "security" set forth in Section 44-1801(22) of the Arizona Revised Statutes, as amended, as applied to the INVESTORS MONEYACCOUNT (the "Account"), a federally insured money market deposit account as fully described below, and that you advise us that such account may be offered in Arizona without registration under Arizona blue sky laws.

Background

IFTC is a trust company organized and existing under the laws of the State of Missouri, the deposits of which are insured by the Federal Deposit Insurance Corporation (the "FDIC") under the Federal Deposit Insurance Act of 1933, as amended. The Account is a variable rate deposit account of IFTC. IFTC determines the interest rate in its sole discretion on a weekly basis and may change the rate without prior notice to customers. The Account has no stated maturity and customers may close the Account at any time. Customers may make up to six withdrawals from the Account per month, no more than three of which may be by check, in accordance with applicable banking law. The Account, like all other deposits of IFTC, is insured by the FDIC up to the normal limits of FDIC insurance coverage (currently \$100,000). Customers whose deposits exceed \$100,000, including principal and accrued interest, may enter into an INVESTORS MONEYACCOUNT and the Insurance Plus Service Agreement (the "IPSA") authorizing IFTC to place excess deposits with other institutions whose deposits are also FDIC insured.

IFTC intends to make the Account available in all fifty states

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through registered broker-dealers who have entered into agreements with IFTC. These broker-dealers will place initial deposits into the Account on behalf of their customers. Additional deposits may be made directly by the customer or by the designated broker-dealer. Broker-dealers will maintain no secondary market for the Account and there will be no pooling of the Accounts.

Conclusion

Based on the following, is our view that the Account described above should not be deemed to constitute a security, the offering of which must be registered or exempted under Arizona law. We request from you confirmation of this conclusion.

Discussion

Section 44-1801(22) defines a "security" to mean, among other things, an investment contract. Arizona case law interpreting Section 44-1801(22) provides that, because the definition of security is patterned after and virtually identical to the federal statutory definition, Arizona looks to federal interpretations of securities laws for guidance. First Citizens Federal Sav. & Loan Ass'n v. Worthen Bank & Trust Co., N.A., C.A., 919 F.2d 510 (1990). Therefore, we have looked to federal authority for our analysis.

According to the United States Supreme Court, an investment contract is found where there is "an investment of money in a common enterprise with profits to come solely from the efforts of others." SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946). The Account does not meet this definition. There is no pooling of the Accounts of individual investors, thus the investor has no opportunity for profit and undertakes no investment risk that a combining of the Accounts might provide. The broker-dealers who distribute the Accounts exert no bargaining power upon IFTC based on the aggregation of Accounts under their control and put forth no special efforts to increase the return on the Accounts. In other words, an investor receives a no more favorable interest rate because he or she opens an Account through a broker-dealer than he or she could have achieved as a holder of a money market deposit account purchased directly from IFTC.

In addition, a security may be found when a variable rate of interest is set with reference to the profitability of either a stock portfolio or the issuing company. S.E.C. v. Variable Annuity Life Insurance Co., 359 U.S. 65 (1959). In that case, the Court

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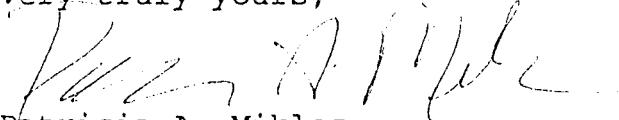
based its holding on the existence of an investment risk akin to a risk involved in securities generally. The interest rate on the Account, though variable, is determined in the sole discretion of IFTC. IFTC exercises its discretion based on a desire to maintain a rate competitive with rates of other issuers of money market deposit accounts. The rate is not tied to the performance of any investment or entity. The profits to be derived from the Account do not "come solely from the efforts of others."

In Marine Bank v. Weaver, 455 U.S. 551 (1982), the Supreme Court addressed investment products insured by the federal government. The Court ruled that an insured certificate of deposit issued by a bank subject to a scheme of comprehensive federal regulation was not a "security" because the protection of insurance and regulation eliminated the risk of loss to the investor. Id. Under this rationale, the Accounts, which are insured by the FDIC up to \$100,000 and further protected by IPSA, should also not be deemed to constitute securities.

At least one federal appellate court has refused to extend the holding in Marine to a situation where a certificate of deposit was distributed by a broker-dealer that aggregated the certificates in order to negotiate a higher rate of return from the issuing banks, then maintained a secondary market for the accounts. Gary Plastic Packaging Corporation v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 756 F.2d 230 (2nd Cir. 1985). The broker in Gary Plastic effectively created a new product: a liquid, insured certificate of deposit. As explained above, the broker-dealers that distribute the Accounts will engage in no such aggregation nor is a secondary market contemplated. The Account amounts to a standard money market deposit account offered through a broker-dealer, and does not constitute a security, the offering of which must be registered under Arizona law.

Please telephone the undersigned at 816/842-3132 with any questions regarding this request.

Very truly yours,



Patricia A. Miklos

cc: Susan Escher  
Dennis R. Rilinger, Esq.