MARKET SOLUTIONS

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Dodd-Frank Changes Fiduciary Oversight and Duties

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In This Issue

MARKET SOLUTIONS

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FINANCIAL MARKETS ASSOCIATION

Synopsis

Dodd-Frank is a game changer. It is almost complete and is being implemented – and repeal is unlikely. New and different fiduciary duties are dictated by the changes in market structure and risk allocation which has emerged. Fiduciaries need to begin designing and implementing oversight policies, procedures and investment decision matrices to reflect these changes. Service providers need to anticipate supporting the new requirements. Because the law will increase the need for high grade collateral, it will become scarce, requiring sophisticated collateral management programs to optimize the use of collateral, and the use of securities lending and/or repos to affect upgrades in collateral. The use of derivatives will generally decline due to increased costs and capital requirements.

Market and Regulatory Uncertainty

Financial markets are in flux. Big issues loom – such as the future of the Euro; solvency in the Euro-zone and a growing U.S. debt. The possible effects of Dodd-Frank and parallel efforts to reform and rein-in the financial sector abroad have increased the amount of uncertainty and general anxiety in the market several fold.

We are now at the point where new exchanges, new reporting requirements and new capital and collateral requirements are being rolled out.[1] These changes will alter the way most derivative investment strategy is carried out and therefore, the way risk must be assessed.

To complicate things, Republicans have marked Dodd-Frank for repeal and replacement. Should fiduciaries take a wait-and-see approach? Probably not. The Republican CFTC appointees have supported much of the CFTC's efforts to date, and the emerging Republican position on a Dodd-Frank replacement indicates support for greater transparency in inter-bank relationships, increased capital requirements and "new forms of complex financial transactions."[2] This signals that the changes discussed in this memo should not be significantly impacted by a change in administration. Either way, derivative regulation and market changes are on the way. The financial services industry is already responding, creating new trading platforms and entities for exchange-based derivative trading. The market is also bracing for the impact of increased capital and collateral requirements.

How Dodd-Frank Will Change Fiduciary Oversight and Duties

The new requirements and structures emerging from Dodd-Frank and other regulations[3] will introduce new market participants, such as Central Clearing Parties

(Continued on Page 3)

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Legislative/Regulatory Actions

This column was written by lawyers from Morrison & Foerster LLP to update selected key legislative and regulatory developments affecting financial services and capital markets activities. Because of the generality of this column, the information provided herein may not be applicable in all situations, and should not be acted upon without specific legal advice based on particular situations.

In this issue we address various selected developments in connection with the capital and disclosure requirements under the **Basel Accord**, the **Dodd-Frank Act** (including developments related to *Stress Tests* and the filing of the first *Living Wills*), the **CFTC** and **Derivatives**, and **Consumer Protection** issues.

CAPITAL, DISCLOSURE AND STRESS TESTING

Regulatory Capital Proposals

Perhaps the most significant bank regulatory development over the summer was the release of three regulatory capital proposals by, jointly, the three federal banking agencies. The proposals were published in the Federal Register on August 30, 2012. The comment period on the proposals expires on October 22, 2012.

The proposals address three different aspects of Basel III: the composition of capital (the "Basel III Proposal"), the risk-weighting of assets (the "Standardized Approach Proposal"), and market risk standards (the "Market Risk Proposal"). For students of Basel III, the significance of the proposals may lie simply in the fact that the United States is now committed to the implementation of Basel III, but each of the proposals has interesting features that could affect a bank's business.

The Basel III and the Standardized Approach proposals would implement Basel III for all banking and thrift organizations in the United States, with the exception of bank holding companies with total consolidated assets of $500 million or less. Indeed, for the U.S. banking industry as a whole, this is the most significant feature. U.S. banking organizations not covered by Basel II did not expect that Basel III would be pushed down to them, at least not in the comprehensive fashion that it was.

The timing of the new rules has not yet been determined. The understanding of the U.S. and foreign bank regulators was that the new Basel III standards would take effect on January 1, 2013. This appears to have been the U.S. agencies' original goal, with the June release of the proposals. Now, however, the comment deadline is in October, and it is nearly certain that the agencies will be unable to develop a final rule by then. Moving on something of a parallel path, European supervisors appear unlikely to have final rules in place by the first of next year.

The Basel III Proposal would adopt the various new capital ratios set forth in the original Basel III documentation, and the ratios would take effect along the same timeframe. Common equity Tier 1 capital would now be the highest form of capital, emphasizing the importance of common stock. Noncumulative perpetual preferred stock would qualify for the second level of capital, Additional Tier 1; and cumulative preferred would fall into Tier 2. The Proposal also gives effect to the Collins Amendment (section 171 of the Dodd-Frank Act), which among other things eliminates trust-preferred and other hybrid securities from Tier 1 capital. The capital treatment of minority interests would become more stringent. New deductions from or adjustments to capital would come into play, including the full deduction of any gain-on-sale associated with a securitization and the partial deduction of mortgage

(Continued on Page 8)

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Dodd-Frank Changes Fiduciary Oversight…

Continued from Page 1

and Swap Execution Facilities with different risk profiles. They will also impact how and where losses are borne. Fiduciaries[4] need to understand these fundamental changes and consider their impact. Now is the time for fiduciaries to begin crafting – and documenting – new policies and procedures.

New Fiduciary Duties

- Bilateral swaps (to the extent used), will have new collateral requirements. What can be posted, where the collateral is kept, who controls it and how it is controlled will be critical decisions impacting both return and risk.
  - Collateral is best kept with a third party (or away from a broker counterparty), and either jointly controlled or if controlled by the secured party, its access should be subject to a bona fide determination of default, but ideally subject to advance notice and objection by the party posting the collateral.[5]
  - Controls which can be placed on the release of collateral will depend on the custodian holding the collateral. Custodians will not independently determine if and when collateral may be released, and do not proactively manage collateral. However, regulatory demands and/or market opportunities may lead custodians to provide more comprehensive collateral services.[6]
  - Returns, and whether a strategy is viable, will be much more dependent upon the efficient use of collateral and/or its availability.
- Where transactions must be cleared through an exchange with a Central Clearing Party ("CCP"); or where a fiduciary decides that using exchange-traded vehicles is appropriate, counterparty risk must now be focused on the CCP.
  - The fiduciary selecting the exchange/CCP should be responsible for risk assessment, exercising prudence in making decisions to use of an exchange/CCP—as a counterparty.
  - Where there are alternative CCP/exchanges, they all should be considered, and the reason for selection should be documented.
  - Relying on a CCP's rating is not enough. Risk assessment of CCP's needs to focus on their "risk waterfall" (where and how losses are absorbed and ultimately allocated in the event of a member default), as well as the strength/ratings of the members of the exchange.

> *"…Republicans have marked Dodd-Frank for repeal and replacement. Should fiduciaries take a wait-and-see approach? Probably not."*

  - The CFTC's adoption of the Complete Legal Segregation Model for collateral held by Derivative Clearing Organizations is good, but it may not provide complete protection for non-defaulting investors. In the event of a member default which exceeds protections, leading to insolvency of a CCP, collateral posted by non-defaulting customers may still be used by a bankruptcy trustee to satisfy claims of all customers.[7] This may yet be further clarified, but….*Dodd-Frank was designed to mutualize risk.*
- When posting collateral with a CCP, consideration should be given to third party custody if permissible.
  - On July 23, 2012, the CME proposed a plan to hold customer assets at clearinghouses or other depositories. This was to avoid the type of losses experienced by MF Global and Peregrine customers. As noted regarding bilateral swaps, unless *control* of the assets is limited, and ideally advance notice and objection by the posting party is permitted, it will be less effective. *It's not where assets are held, but who controls them and how the control can be exercised that counts.* No doubt, inquiries will find that custodians for MF Global and Peregrine acted upon properly authorized instructions.
  - Dodd-Frank requires independent auditors to verify the existence and amount of customer assets. On July 25, 2012, CFTC

(Continued on Page 4)

Dodd-Frank Changes Fiduciary Oversight…

Continued from Page 3

Chairman Gensler noted this safeguard in commenting on Peregrine.[8] But an annual audit only looks at an instant in time. As noted above, it is best if release of collateral is subject to joint direction or notice and objection. In both MF Global and Peregrine, the broker had sole control. They breached customer agreements, and that breach was possible due to the terms and conditions of the customer collateral accounts.

- On July 26, 2012, the CFTC held a public meeting of the Technology Advisory Committee to consider "technological issues and possible solutions relating to the ability of the CFTC, self-regulatory organizations and futures commission merchant (FCM) customers to verify the location and status of funds held in customer segregated accounts."[9] Fiduciary reaction to this proposal should be the same: without proper controls, collateral can be in place one moment and gone the next.
- The requirements for control of collateral under SEC Rule 15c3-3, which applies to short selling arrangements, should be reconsidered. It should not be extended to the new collateral requirements. FINRA and the SEC have interpreted the Rule to require exclusive, unconditional control of collateral by the broker at all times. If not, the collateral cannot be counted under Reg T margin requirements, and the broker will have increased capital requirements. Discussions with the SEC indicated that they generally opposed holding assets away from a broker. Where it has been permitted for ERISA funds, 40's Act funds or Government funds, the SEC will not recognize typical UCC provisions for the perfection of security interests, which would permit the types of controls suggested here to protect investors. The reason for their position was essentially to maintain the brokerage business model, permitting brokers to use customer assets. Regulatory change will probably be difficult to achieve, despite the fact that the regulators are supposed to protect investors – and *not* the industry.

- Collateral management will need to be considered.
  - Because of the new and increased requirements for high-quality margin or collateral, it will become scarce.
  - Determining where eligible securities or cash can or must be posted, and optimizing its use between secured parties can significantly impact portfolio returns.
  - Fiduciaries which engage managers should inquire into their collateral management practices.
    - Where several portfolio managers have the need to post collateral, a central collateral pool might be considered. Such a pool could be separately managed and the collateral optimization function could be either provided by such manager, the custodian, or outsourced.
  - Fiduciaries will need to consider the incremental costs and risks of upgrading collateral through securities lending or repo activities.
- Appropriate documentation for new exchanges and services will need to be developed and negotiated. Existing manager and service provider agreements should be reviewed and amended as needed.
  - Fiduciaries at appropriate levels need to read, understand and, as needed, negotiate agreements. Agreements must reflect new legal requirements, any rights and protections noted by service providers in promotional materials and any other provisions fiduciaries may decide are necessary or desirable to protect their interests.
  - Special attention should be given to descriptions of risk waterfalls and the posting and administration of collateral.
- Bases for selection of alternative CCP's and/or exchanges (or other trading methodologies), as well as service providers for critical outsourcing, such as collateral management systems, must

(Continued on Page 5)

Dodd-Frank Changes Fiduciary Oversight…

Continued from Page 4

be prudent. (This is not a new duty, but it bears repeating in the new environment.)

- Prudent decisions result from well-considered (and ideally documented) processes, which should probably include most or all of the factors noted above.
- Prudent decisions need not be based on the same factors and need not result in the "right" choice. It is possible to be both prudent and wrong! *It's having a reasoned process, and not the outcome, that counts.*

New Types of Risk Under Dodd-Frank

Information Risk. Before the meltdown of 2007-8, derivatives were thought to be safe. After all, the counterparties were AAA rated. Fiduciaries almost felt obliged to engage in derivative strategies to meet investment objectives and "protect" portfolios, despite unregulated markets and opaque vehicles. They generally avoided liability following the meltdown because it impacted everyone pretty much the same. Now, under Dodd-Frank, fiduciaries will ostensibly have much more useful information on markets and funds. Accordingly, they will need to *assess the utility of new types of information* as it becomes available and *utilize it appropriately*. Failure to do so opens fiduciaries to potential liability.

> *"Now is the time for fiduciaries to begin crafting – and documenting – new policies and procedures."*

Regulatory Risk. Due to the vast increase in the power of regulators, there is now a new, if somewhat intangible, risk in the derivatives marketplace: the regulators themselves. Dodd-Frank, which is more complex than any previous statute, gave regulators unprecedented power to craft its scope and operation. New infrastructure has been mandated. We do not yet know if it will work—or if it will only result in increased costs and market glitches or failures due to ever-increasing reliance on sophisticated trading systems.[10] The CFTC and the SEC are making great efforts to upgrade their systems to best regulate and monitor the systems of market participants. But there is concern that they may wind up like the dog that finally caught a car!

The most important aspect of the law may be its new requirements for capital and collateral. How aggressive the regulators will be in this regard is a concern. Increased collateralization is probably good to the extent it helps to de-leverage market participants. That is the true key to reducing systemic risk and an ultimate objective of the law. But the screws need to be tightened carefully. Everyone knows that for some time the financial community has been playing a game of musical chairs. If the music was to stop (participants exit the market due to excessive capital or collateral requirements, necessitating a massive unwinding of positions), many participants would be figuratively left without a chair – to the extent their

(Continued on Page 6)

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Dodd-Frank Changes Fiduciary Oversight…

Continued from Page 5

counterparties fail. Dodd-Frank mutualizes this risk to the extent the market shifts to exchange-based transactions.[11] But the risk that regulators could seriously harm or even crash a market is more real now than ever before.

This is not a risk that fiduciaries can objectively analyze or be expected to consider, per se. But it is out there—part of the general market uncertainty—and the response of fiduciaries has been to proceed cautiously.

General Fiduciary Impact

In general, fund and plan sponsors will need to have more sophisticated oversight and clearly allocate new fiduciary duties and responsibilities to their managers. Managers will have to revise their decision-making matrices. Banks acting as directed trustees or custodians will continue to look to the directing fiduciaries to have performed necessary due diligence, but they may also begin providing independent collateral management functions which should be considered fiduciary in nature.

> *"…without proper controls, collateral can be in place one moment and gone the next."*

The highest common denominator defining fiduciary duties will continue to be ERISA. Whether the parties are acting in the pension or mutual fund arena, procedures and policies relating to fiduciary duties will usually be similar due to common operating platforms and controls.

- Plan/Fund Sponsors will need to:
  - Develop or modify their policies and checklists relative to the oversight of managers or sub-advisors.
  - Enhance their focus on collateral, including how and where it should be held and managed.
  - Consider implementing cross-portfolio collateral management.
  - Consider (or be advised regarding), the costs and risks of new alternative derivative strategies.
  - Include appropriate representations in agreements with managers and service providers to clearly allocate new fiduciary duties.
  - Assure that investment guidelines reflect new investment alternatives, and in particular, the use, control and administration of collateral.
- Managers will need to:
  - Revise counterparty risk assessment.
  - Develop matrices, including objectives, costs and risks to determine when bi-lateral trading arrangements *can* and *should* be used, versus using alternative exchange-traded vehicles.
    - Develop methods to assess the risks and expenses of different exchanges;
    - Consider new technology for trade execution and reporting.
    - Focus carefully on collateral management decisions and technology.
  - Consider outsourcing where appropriate.
  - Consider the impact of new reporting requirements and information.
- Banks acting as Directed Trustees and Custodians will need to:
  - Develop more robust/sophisticated collateral platforms and procedures to meet demands for collateral management, whether provided by the bank or a third party.
  - Develop checklists and protocol for trading account documentation and agreements.
  - Consider offering sophisticated cross-portfolio collateral management solutions.
  - Consider offering sophisticated lending and repo facilities to meet the increasing demand for qualified collateral.
  - Update client agreements to define and limit the scope of fiduciary duties.
  - Develop appropriate direction letters and checklists with respect to their entering into new investment structures and instruments.

(Continued on Page 7)

Dodd-Frank Changes Fiduciary Oversight…

Continued from Page 6

Conclusion

Dodd-Frank and its global counterparts are untested. It is also clear that markets will remain highly leveraged for the foreseeable future. On the other hand, the new regulatory structures may ultimately lead to a reduction of systemic risk due to over-leveraging, but it will depend on how regulations are fine-tuned and implemented. In this environment, there is much uncertainty.

What is certain is that Dodd-Frank has changed the derivatives landscape. The operational changes and new market structures which have already been implemented make it necessary for fiduciaries to consider new oversight duties as well as risk assessment and avoidance practices. As the final details and requirements of Dodd-Frank emerge, policies, procedures and controls will have to be adjusted accordingly. Complacency could lead to liability if there is a loss which could have been avoided had new fiduciary duties been better understood and considered. ■

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[1]Two helpful sources to keep abreast of these changes are: 1) the CFTC's website: ***http://www.cftc.gov/lawregulation/doddfrankact/index.htm***; and the Markets Reform-Wiki site, ***http://www.marketsreformwiki.com/mktreformwiki/index.php/Main_Page***.

[2]This phrase comes from a Romney whitepaper on regulation: ***http://www.mittromney.com/sites/default/files/shared/BelieveInAmerica-PlanForJobsAndEconomicGrowth-Full.pdf***.

[3]Basel III will also have a significant impact, since it will increase capital costs on sell-side banks if they engage in bilateral derivative transactions. High quality collateral will also be mandated. The European Commission's proposals broadly referred to as European Market Infrastructure Regulation (EMIR), largely parallels Dodd-Frank.

[4]There are different levels of fiduciaries. A plan or fund sponsor under ERISA or the 40's Act may have general oversight. Managers or sub-advisors would have more detailed obligations.

[5]A bank acting as the custodian or trustee of a counterparty is legally able to act separately as the custodian of the collateral, but the secured party should require the bank to be a "securities intermediary" under the Uniform Commercial Code to perfect its security interest.

[6]Custodian banks are just beginning to realize the need for comprehensive collateral management, and it is likely to become a new product for some. Typically, a bank's management and custody units are in separate organizations, separated by a firewall. This operational and legal separation presents a challenge to providing a seamless collateral management product, due to firewall concerns, but it can be achieved.

[7]The CFTC has stated that under the Complete Legal Segregation model, *the DCO* cannot apply one customer's collateral to another customer's default. But it also notes that in the event of insolvency, collateral would be subject to the "protections" of the Bankruptcy Code. Analysis indicates that Customer Assets are pooled as a class and may be returned by *a bankruptcy trustee* pro-rata, subject to customer claims. See Q&A – Protection of Cleared Swaps Customer Contracts and Collateral, ***http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/sb_qa.pdf***; and the CFTC' interpretive statement concerning the Bankruptcy Code: ***http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/e8-23277a.pdf***.

[8]See Gensler's Testimony before the House Committee on Agriculture: ***http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-119***.

[9]As noted, this is not a strong protection. See notice of meeting: ***http://www.cftc.gov/PressRoom/Events/opaevent_tac072612***.

[10]See the lead Editorial in the *Wall Street Journal* of August 3, 2012, concerning Knight Capital's trading problems as part of series of technological glitches from the "flash crash" of 2010 to Facebook's IPO and other recent problems.

[11] Risk mutualization presents a conundrum. In the event of a loss exceeding the protections of an exchange resulting in bankruptcy, a fund or plan's assets posted as collateral may be used to cover exchange customer losses generally: i.e. for other than the "exclusive benefit" of a plan or its beneficiaries or participants. See Footnote 7, ante. No doubt, favorable regulatory rulings will be issued if necessary to allow ERISA plans and other investors with fiduciary duties to continue to use derivative strategies, but it is an issue to consider.

Legislative/Regulatory Actions

Continued from Page 2

servicing assets and significant investments in the capital of unconsolidated financial institutions.

The Standardized Approach Proposal would change some well-established capital charges and would recognize the credit risks associated with on- and off-balance sheet assets that the current rules have not addressed. For example, residential mortgage lending could be significantly affected: only the most conservatively underwritten loans will remain eligible for the 50% risk weight. Commercial real estate loans face a punitive 50% increase in the risk weight unless they are underwritten more stringently and include a substantial equity investment by the borrower. Securitization exposures likely will become more costly since the Proposal eliminates (as required by the Dodd-Frank Act) the use of credit ratings to determine credit risk. As to newly recognized credit risks, the Proposal includes new capital charges for unsettled transactions: both securities, commodities, and foreign exchange transactions where delivery and payment are matched but that fail to settle within normal periods, and unmatched transactions where a bank must pay or deliver in advance and the counterparty has not performed on the day required. The Proposal also risk-weights derivative transactions at a substantially higher level if they are traded over the counter than if they are cleared through certain eligible facilities.

The Market Risk Proposal is not an industry-wide proposal. It is limited to banking organizations either with $250 billion or more in consolidated assets or with foreign exposures of $10 billion or more, and then only if these organizations must comply with the Basel II advanced approach requirements. The Proposal focuses on three issues: counterparty credit risk, securitizations, and disclosure requirements. The Proposal would introduce a more sophisticated approach to measuring counterparty credit risk. It would also impose a new and complex method for evaluating the risk associated with a securitization.

For additional details, please see the Morrison & Foerster publication, "The Banking Agencies' New Regulatory Capital Proposals," available at ***http://www.mofo.com/files/Uploads/Images/120613-Banking-Agencies-New-Regulatory-Capital-Proposals.pdf***. The news bulletin is available at ***http://www.mofo.com/files/Uploads/Images/120613-Federal-Banking-Agencies-Regulatory-Capital-Proposals-Summary.pdf***.

The full text of the proposals is available at ***http://www.gpo.gov/fdsys/pkg/FR-2012-08-30/pdf/2012-16757.pdf*** (Basel III), ***http://www.gpo.gov/fdsys/pkg/FR-2012-08-30/pdf/2012-17010.pdf*** (Standardized Approach), and ***http://www.gpo.gov/fdsys/pkg/FR-2012-08-30/pdf/2012-16761.pdf*** (Market Risk).

New Basel Disclosure Rules

Basel II banks can expect to become subject to a uniform set of requirements for the disclosure of the composition of their regulatory capital. It is possible that these requirements would extend to smaller banks that are not customarily the subject of Basel concerns. On June 26, 2012, the Basel Committee on Banking Supervision published its *Compilation of Capital Disclosure Requirements* ("Disclosure Rules"). These rules are intended to be implemented by national supervisors by June 30, 2013, and affected banks will be expected to comply with all but one of the new requirements for any balance sheet financial statements published after that date. One fully phased-in requirement, a "common disclosure template," becomes effective on January 1, 2018.

The concept of disclosures should have come as no surprise, since disclosures are discussed in the basic Basel III documents, but the level of detail may have been a little unexpected. There is every

(Continued on Page 9)

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Legislative/Regulatory Actions

Continued from Page 8

reason to think that national supervisors will give effect to the Disclosure Rules. Basel II and certain other large banks in the United States already must comply with related disclosure rules involving stress testing, capital planning, and the development of resolution plan. U.S. regulators will have to figure out how to integrate the Disclosure Rules with these requirements.

Disclosures will, of course, become necessary only as the underlying Basel III capital requirements begin to take effect. The disclosures ultimately could become lengthy and considerably detailed. Among other things, the common disclosure template will require the reporting of 85 different items. Banks will be required to reconcile all of their regulatory capital elements back to their balance sheets, an intricate three-step process. The reports must also explain in detail all capital ratios that the banks report outside of the specific Basel III standards.

For additional details, please see the Morrison & Foerster news bulletin at ***http://www.mofo.com/files/Uploads/Images/120627-New-Basel-Disclosure-Rules.pdf***. The full text of the Disclosure Rules is available at ***http://www.bis.org/publ/bcbs221.pdf***.

Possible Deferral of Annual Stress Testing for Banking Institutions between $10 Billion and $50 Billion

Bank holding companies, savings and loan holding companies, and state member banks with more than $10 billion but with less than $50 billion in total consolidated assets may have received some temporary relief from new Dodd-Frank standards on August 27, 2012, when the Federal Reserve Board announced that it was considering delaying the implementation of the requirement for annual company-run stress tests until September 2013. The requirement otherwise would take effect on the effective date of a final rule governing stress tests.

The Board's announcement came as part of its review of comments on the proposed "enhanced prudential standards" that it released in December 2011. These standards, mandated by section 165 of Dodd-Frank, generally apply only to banking institutions with more than $50 billion in consolidated assets and to nonbank financial institutions that are deemed systemically important ("nonbank SIFIs"). However, section 165(i)(2) pushes annual stress testing down to bank and thrift organizations with more than $10 billion in consolidated assets. Banking organizations over the $50 billion threshold and nonbank SIFIs will be required to test twice a year and will separately be tested by the Board on an annual basis.

The Board explained that several commenters had expressed concern about the proposed timing and whether they would have the resources, readiness, and ability to conduct stress tests, given the likely short period between publication of a final rule and the start of the stress-testing process. Since a priority in the rulemaking is to ensure that banking organizations have robust systems and processes, a delay would, according to the Board, provide sufficient time for these banking organizations to develop high-quality testing programs.

The effect of the Board's announcement is uncertain. It is not a final decision. Moreover, any decision on timing should be consistent with the timing of stress testing at the depository institution level. The Board has consulted with the OCC and the FDIC, which have stress-testing proposals outstanding for national banks and state nonmember banks, respectively. So far, neither agency has made an announcement.

LIVING WILLS

Banking organizations required to file resolution plans, or "living wills," received some additional instruction this past summer when the FDIC and the Federal Reserve Board released the public portions of the living wills that had been submitted on July 2, 2012. Fundamentally, banking organizations are required in their living wills to demonstrate how they could be resolved under the U.S. Bankruptcy Code without disruption to the financial system and the economy.

The July 2012 submissions marked the first wave of living will filings by nine banking institutions with U.S. operations and $250 billion or more in nonbank assets. The living wills are required by section 165(d) of the Dodd-Frank Act, and the requirement extends to all banking organizations with $50 billion or more in consolidated assets. The $50 billion threshold applies to assets located outside the United States as well as within; as a result, more than 90 foreign banking organizations ("FBOs") are expected to file resolution plans.

(Continued on Page 10)

Legislative/Regulatory Actions

Continued from Page 9

The next wave of filings will come ashore on July 1, 2013, when banking organizations with $100 billion or more in total nonbank assets must submit living wills. The remainder of the organizations subject to the requirement must submit living wills by December 31, 2013.

Recently, remarks made by Acting FDIC Chairman Martin Gruenberg on September 14, 2012, to the American Banker Regulatory Symposium made clear that living wills "take on an important role as a new tool for [covered companies] to make themselves resolvable under the bankruptcy code." In addition, Chairman Gruenberg confirmed that the FDIC and the Federal Reserve Board are now in the process of reviewing the plans for information completeness and compliance with the requirements of the rulemaking.

"This will be a thorough and in-depth review process that takes into account each financial company's unique characteristics. It involves an ongoing interactive dialogue between the financial companies and the regulators," stated Chairman Gruenberg. Whether or not living wills would allow firms to be resolvable, the bankruptcy process is the standard that the FDIC and the Federal Reserve Board will jointly apply in determining the credibility of each living will.

The living will process will continue to evolve. The FDIC and the Board will need to identify the factors that would show whether a plan would enable a banking organization to be resolved solely through the bankruptcy process. Also, the FDIC and other national supervisors are still discussing cross-border resolutions; in the meantime and in the apparent absence of international agreement, how the FDIC will analyze the cross-border provisions in a living will is unclear. Further, the FDIC appears to have focused on idiosyncratic resolutions—where only one bank fails. A plan for resolution during a system-wide crisis will be difficult to assess.

Additional information can be found at ***http://www.mofo.com/files/Uploads/Images/120629-Living-Wills-The-First-Submissions.pdf*** and ***http://www.mofo.com/files/Uploads/Images/120705-Living-Wills-Public-Portions-Released.pdf***.

CFTC AND DERIVATIVES

CFTC Guidance on Extraterritoriality

In July 2012, the CFTC released its long-awaited proposals regarding the extraterritorial application of Title VII. These proposals consist of proposed interpretive guidance for swap dealers and major swap participants (MSPs) regarding the extraterritorial application of Title VII (the "Proposed Guidance") and a proposed exemptive order that would allow for delayed compliance with certain aspects of Title VII by some cross-border entities (the "Proposed Exemptive Order"). The Proposed Guidance addressed the following matters: (1) defining a "U.S. Person" for purposes of determining which swaps and swap activities are covered by Title VII; (2) providing guidance on how foreign branches and affiliates are to be treated for Title VII purposes; (3) addressing the treatment of interaffiliate transactions between U.S. and non-U.S. entities, as well as guaranties of non-U.S. entities by U.S. affiliates; (4) providing for how positions among affiliated non-U.S. Persons are to be aggregated for purposes of swap dealer and MSP determinations; (5) distinguishing between compliance by a swap dealer or MSP with "entity-level" requirements (such as those relating to capital, risk management and chief compliance officers, swap data recordkeeping and general reporting) and "transaction-level" requirements (such as those relating to clearing,

(Continued on Page 11)

FMA Welcomes *More* New Members!

Knox McIlwain	Cleary Gottlieb Steen & Hamilton LLP
Tanya Otsuka	FDIC
Yuna Peng	Capital One
Jamila Piracci	National Futures Association
Larry Platt	K&L Gates LLP
Curtis Tao	Citigroup Inc.
Pratin Vallabhaneni	Debevoise & Plimpton LLP

Legislative/Regulatory Actions

Continued from Page 10

margining, trade execution, trade documentation, trade confirmation, portfolio reconciliation, real-time reporting, and daily trading records), and (6) contemplating, in the case of some entity-level requirements, potential "Substituted Compliance" based on comparably robust home country regulation of a non-U.S. swap dealer or MSP. The Proposed Exemptive Order would allow for delayed compliance by non-U.S. swap dealers and MSPs with some, but not all, of the entity-level requirements, provided a timely compliance plan is filed and other conditions are met. The comment periods on these proposals closed during August 2012, with numerous substantial comments being submitted to the CFTC, particularly from foreign regulators, trade groups, and major financial institutions. Given the scope of the comments received, the timeframe in which the CFTC might finalize either or both of these proposals is uncertain. You may find more information in our client alert at ***http://www.mofo.com/files/Uploads/Images/120702-CFTC-Provides-Guidance-on-Extraterritoriality.pdf***. The Proposed Guidance is available at ***http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-16496a.pdf*** and the Proposed Exemptive Order at ***http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-16498a.pdf***.

Product Definitions

In July, the SEC and CFTC approved the final product definitions. Publication of the final product definitions in the Federal Register in August triggered a cavalcade of compliance dates for various Title VII requirements. The product definitions provide that the CFTC retains jurisdiction over swaps, the SEC retains jurisdiction over security-based swaps, and the agencies share jurisdiction over mixed swaps. Given that Title VII defines "swaps" broadly, the agencies adopted a number of exclusions from the swap and security-based swap definitions in order to provide greater certainty for market participants. Certain consumer transactions (understood to include transactions entered into primarily for personal, family, or household purposes, such as real estate transactions, mortgages, personal service contracts, and related rate locks and caps) are excluded. Likewise, commercial transactions, including employment, sales, and servicing arrangements, business combinations, inventory and IP transfers, and other similar financial arrangements, are excluded from the definitions. The final rule provides for a safe harbor for insurance contracts that satisfy safe-harbor criteria, such as a safe harbor available for certain enumerated products, a safe harbor available based on certain "product" characteristics, and a safe harbor available based on the nature of the provider. Loan participations (including LSTA and LMA participations) are outside of the scope of the definitions. The guidance confirms that the agencies will continue to apply longstanding guidance in considering forward contracts, and provides clarifications regarding book-outs, and contracts with embedded optionality. The agencies also provide extensive guidance regarding the characteristics of an "index" for purposes of ascertaining whether a product referencing an index should be characterized as a swap (if it references a broad-based index), a security-based swap (if it references a narrow-based index), or a mixed swap (if it references a "migrating index").

The rule also provides for a process whereby market participants may seek joint interpretations from the agencies regarding the status of any new instrument. The final rules can be found at ***http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-18003a.pdf***.

Regstration Deadline

The CFTC recently confirmed that swap dealers generally will have until December 31 (instead of October 12) to complete their dealer registration. The "swap dealer" definition incorporates an activity threshold such that a swap dealer is required to register within two months of the dealer's activities exceeding the *de minimis* threshold in the entity definition with counting beginning with the effective date. Given that there was significant confusion among market participants regarding whether the CFTC understood this "phase in" to provide additional time for registration, the CFTC published Frequently Asked Questions, available here: ***http://www.cftc.gov/PressRoom/PressReleases/pr6348-12***. The CFTC, in connection with adopting final rules relating to documentation requirements (see: ***http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister082712.pdf***), had already deferred the compliance dates for various

(Continued on Page 12)

Legislative/Regulatory Actions

Continued from Page 11

documentation related provisions of the external business conduct standards applicable to swap dealers until January 1, 2013.

ISDA DF Protocol

Swap dealers and major swap participants will need to implement enhanced diligence and documentation procedures in order to comply with external business conduct standards requirements. In August, ISDA introduced a suite of documents, the ISDA DF Protocol, intended to facilitate compliance with certain of these requirements. The ISDA DF Protocol consists of various documents, including the Protocol Agreement (with the adherence letter), the Supplement (including Schedules, with new representations), a Questionnaire, and a Terms Agreement (for use when parties are not bound by an ISDA Master Agreement). By adhering to the Protocol (which can be done online) and delivering a completed Questionnaire, a party will have amended its covered agreements to include new representations regarding its status and other matters (designed to address documentation issues arising from the external business conduct standards). Information about the Protocol is available at the ISDA website.

Commodity Pools

Section 721 of the Dodd-Frank Act amended the definition of "commodity pool," broadening it by including within the definition of a commodity pool any pool operated "for the purpose of trading in commodity interests, including any…swap." The CFTC has interpreted "trading in" swaps broadly so that this new definition may now apply to entities such as securitization trusts, REITs, and other similar vehicles that may use swaps for hedging purposes. The CFTC rule on commodity pool operators and CTAs is available at ***http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-3390a.pdf***. The CFTC has also published a set of Frequently Asked Questions, available at ***http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/faq_cpocta.pdf***. Market participants should consider whether the scope of their activities may be such that they may be characterized as commodity pools.

CONSUMER PROTECTION

Consumer Protection Update

This summer, the Consumer Financial Protection Bureau ("CFPB") marked a series of firsts to coincide with its first anniversary.

Report to Congress Highlights Digital Avenues to Enhance Transparency. During his testimony to Congress regarding the CFPB's semi-annual report, Director Richard Cordray reminded members of Congress that the CFPB has used technology, such as its credit card complaint database, to increase transparency and empower consumers. Cordray noted that harnessing digital tools has allowed the CFPB to receive 72,297 complaints through early September. *See* ***http://www.consumerfinance.gov/reports/semi-annual-report/***.

Advisory Board Members Announced. In September, the CFPB announced the first slate of members for its Consumer Advisory Board. In addition to several consumer advocates, the Board features prominent regulatory and industry figures such as Donna Tanoue (former chair of the FDIC), Ellen Seidman (former director of the OTS) Jo Ann Barefoot (formerly a deputy Comptroller of the Currency), Jane Thompson (former head of financial services at Walmart), and Josh Silverman (current President for U.S. Consumer Services with American Express). *See* ***http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-announces-consumer-advisory-board-members/***.

Release of Consumer Reporting Larger Participant Examination Guide. The CFPB's exam procedures marked the Bureau's first major attempt to exercise its statutory authority to supervise larger participants. In the procedures, examiners are instructed to review how consumer reporting larger participants use information, handle consumer complaints, and prevent fraud and identity theft. *See* ***http://www.mofo.com/files/Uploads/Images/120905-CFPB-Examination-Procedures-for-Larger-Participants.pdf***.

Notice of Intent for Preemption Determination. Signaling another first, the CFPB requested comments on whether it should exercise its authority to preempt unclaimed property laws in Maine and Tennessee, as those laws relate to federal law on gift cards under the EFTA and Regulation E. In making

(Continued on Page 13)

Legislative/Regulatory Actions

Continued from Page 12

its determination, the CFPB will examine whether the state laws provide additional protections for consumers, or if the two sets of laws could exist in tandem. *See* **http://www.mofo.com/files/Uploads/Images/120824-CFPB.pdf**.

Capital One Enforcement Order. The CFPB's first official enforcement action was a consent order with credit card giant Capital One regarding the sale of payment protection and credit monitoring services, also known as add-on products. The order required Capital One to refund $140 million to consumers, pay an additional $25 million penalty to the CFPB, and institute extensive remediation practices to increase controls over the company's supervision of third-party service providers. Separately, the OCC also entered into a consent order with Capital One that required the company to pay additional fines. *See* **http://www.consumerfinance.gov/pressreleases/cfpb-capital-one-probe/**.

Guidance for Marketing of Add-On Products. To coincide with its consent order with Capital One, the CPFB released guidance for other financial institutions regarding the marketing of add-on products. Though the title of the release specifically mentions the marketing of these products in relation to credit cards, the release's text clarifies that the CFPB expects all consumer financial services providers to adhere to the guidance's standards, regardless of what product the providers offer. *See* **http://www.mofo.com/files/Uploads/Images/120720-Add-on-Products.pdf**.

Definition of Consumer Reporting Larger Participant. Preceding its exam procedures, the CFPB finalized its rule defining larger participants in the consumer reporting context. The rule casts a broad supervisory net, aggregating annual receipts from affiliated entities, and alerting larger participants that CFPB considers its supervisory jurisdiction to extend to all of a covered-person's activities, and not just those that caused it to be designated as a larger participant. *See* **http://www.mofo.com/files/Uploads/Images/120717-CFPB-Defining-Larger-Participants.pdf**.

Confidentiality via Rulemaking. Addressing one of Congress's technical shortcomings with the Dodd-Frank Act, the CFPB started the summer by issuing a final rule protecting privileged information received from the institutions the CFPB supervises. The rule clarifies that transmitting privileged information to the CFPB will not waive its confidential status, nor will any subsequent transfer by the CFPB to another federal or state agency. *See* **http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-adopts-rule-for-the-protection-of-privileged-information/**. ■

Matthew W. Janiga, David H. Kaufman, Anna Pinedo, Dwight C. Smith, and Alexandra Steinberg Barrage contributed to this column.

Directory

FMA will distribute the **2012 Membership Directory** next month. The Directory will include each member's full name, title/department, mailing address (including floor/suite # or mail sort/code), phone/cell (if used for business) numbers, email and firm web site (if provided).

Supplementary sections will include a calendar of upcoming FMA events and a listing of various regulatory contacts.

Members were emailed earlier this month and given a few weeks to provide current profile information. If you missed the September 19 deadline, there's still time…please respond within the next week by email (*dp-fma@starpower.net* – easiest!) or phone (202/544-6327). FMA wants your directory to be as accurate as possible...so be sure to submit your information ASAP!

Watch For

MSRB Notice 2012-47 (September 13, 2012) – The MSRB made available free online training videos to assist municipal securities dealers and issuers in making primary market and continuing disclosure submissions to the EMMA website.

OCC Bulletin 2012-26 (September 12, 2012) – The OCC advised federal savings associations to review the FDIC's final rule and guidance issued July 24, 2012 on permissible investments in corporate debt securities. Federal savings associations have until January 1, 2013, to comply with the rule. The OCC also reminded federal savings associations they must comply by January 1, 2013 with the OCC's final rules and guidance regarding investments in other securities, published June 26, 2012.

MSRB Press Release (September 12, 2012) – The MSRB began providing data on new issues of municipal securities.

CFTC Press Release 6351-12 (September 11, 2012) – The CFTC requested public comment on a request from ICE Clear Europe for an order permitting portfolio margining of futures and foreign futures contracts. Comments are due by September 25, 2012.

CFTC Press Release 6348-12 (September 10, 2012) – CFTC staff responded to questions from market participants and other interested parties on the timing of swap dealer registration rules by issuing a FAQ document to help market participants better understand them.

MSRB Press Release (September 10, 2012) – The MSRB expanded their online "toolkit" of educational materials for state and local governments to help them improve their understanding of the municipal securities market.

MSRB Press Release (September 6, 2012) – The MSRB's EMMA website spotlights 529 college savings plan information.

FINRA Regulatory Notice 12-40 (September 5, 2012) – The SEC approved new FINRA Rule 5123 regarding private placements of securities. The rule becomes effective December 3, 2012. Also effective that date, firms must submit filings regarding member firm private offerings, as required by FINRA Rule 5122, through the Firm Gateway.

FINRA Regulatory Notice 12-39 (September 5, 2012) – FINRA requested comment on two TRACE dissemination issues. The comment period will expire October 10, 2012.

SEC Press Release 2012-173 (August 31, 2012) – The SEC issued a risk alert on "pay-to-play" prohibitions under MSRB rules.

OCC Bulletin 2012-25 (August 30, 2012) – The OCC, FRB and FDIC published in the *Federal Register* a final rule that amends their respective market risk capital rules, which generally apply to banking organizations that engage in substantial trading activity. The effective date of the rule is January 1, 2013.

OCC Bulletin 2012-24 (August 30, 2012) – The OCC, FRB and FDIC sought comment on three notices of proposed rulemaking that propose to revise and replace the agencies' regulatory capital rules. The proposed revisions were published in the *Federal Register* on August 30, 2012 as separate NPRs. Comments are due by October 22, 2012.

SEC Press Release 2012-170 (August 29, 2012) – The SEC proposed rules to implement a JOBS Act provision about general solicitation and advertising in securities offerings.

(Continued on Page 15)

Watch For *(Continued from page 14)*

CFTC Press Release 6336-12 (August 27, 2012) – The CFTC issued final rules establishing swap dealer and major swap participant requirements for swap trading relationship documentation, swap confirmation, reconciliation and compression of swap portfolios.

Federal Reserve Press Release (August 27, 2012) – The FRB is considering changes to the implementation timeline for the annual company-run stress test requirements required by the Dodd-Frank Act. The changes would delay implementation until September 2013 for bank holding companies, state member banks, and savings and loan holding companies with between $10 billion and $50 billion in total consolidated assets.

MSRB Notice 2012-45 (August 24, 2012) – The MSRB filed amendments with the SEC to enhance price transparency for large trades. The MSRB proposed that the amendments be made effective on November 5, 2012 to coincide with other planned changes to the Real-Time Transaction Reporting System.

FINRA Regulatory Notice 12-38 (August 24, 2012) – The SEC approved amendments to FINRA's short-interest reporting rule. The effective date is November 30, 2012.

CFTC Press Release 6334-12 (August 23, 2012) – The CFTC approved conforming amendments to Part 4 regulations governing operations and activities of commodity pool operators and commodity trading advisors.

MSRB Press Release (August 22, 2012) – The MSRB published a report on municipal bond continuing disclosure documents.

CFTC Press Release 6331-12 (August 21, 2012) – The CFTC announced the launch of a website for market participants to register for CFTC Interim Compliant Identifiers.

CFTC Press Release 6329-12 (August 17, 2012) – The CFTC approved a final conforming rule on the registration of intermediaries.

CFTC Press Release 6328-12 (August 16, 2012) – The CFTC issued a proposed rule to exempt swaps between certain affiliated entities within a corporate group from the clearing requirement of the Dodd-Frank Act.

MSRB Notice 2012-43 (August 15, 2012) – The MSRB requested comment on draft amendments to MSRB Rule G-37 (on political contributions and prohibitions on municipal securities business– bond ballot campaign committee contributions) and MSRB Rule G-8 (on books and records to be made by dealers). Comments were due by September 17, 2012.

CFTC Press Release 6326-12 (August 14, 2012) – The CFTC's Division of Swap Dealer and Intermediary Oversight issued a set of responses to FAQs regarding compliance obligations for Commodity Pool Operators and Commodity Trading Advisors.

MSRB Notice 2012-41 (August 9, 2012) – The MSRB requested comment on a concept proposal to strengthen account opening and supervisory practices of dealers effecting online municipal securities transactions with individual investors. Comments were due by September 21, 2012.

MSRB Notice 2012-40 (August 6, 2012) – The MSRB requested comment on a draft proposal to collect 529 college savings plan data. Comments were due by September 14, 2012.

FINRA Regulatory Notice 12-37 (August 3, 2012) – The SEC approved amended minimum quotation sizes for OTC equity securities on a pilot basis.

(Continued on Page 16)

Watch For *(Continued from page 15)*

FINRA will implement the new quotation sizes on November 5, 2012 and ending on October 31, 2013, unless extended or made permanent.

MSRB Notice 2012-39 (August 2, 2012) – The MSRB reminded brokers, dealers, and municipal securities dealers that their new interpretative notice on the application of MSRB Rule G-17 to underwriters of municipal securities became effective on August 2, 2012.

SEC Press Release 2012-147 (July 31, 2012) – The SEC recommended improvements to help investors in the municipal securities market.

Federal Reserve Press Release (July 30, 2012) – The Federal Reserve Board announced the approval of a final rule, effective September 14, 2012, establishing risk-management standards for certain financial market utilities designated as systemically important by the Financial Stability Oversight Council.

OCC News Release 2012-114 (July 25, 2012) – The OCC released an update to the Bank Accounting Advisory Series (BAAS), a widely used source of accounting guidance for financial institutions. The OCC plans to update the BAAS annually every June.

CFTC Press Release 6314-12 (July 24, 2012) – The CFTC's Division of Market Oversight issued temporary no-action relief from the aggregation requirements of the Commission's rule regarding position limits for futures and swaps, and provided two alternative methods for compliance. The relief is time-limited to no later than December 31, 2012.

CFTC Press Release 6312-12 (July 24, 2012) – The CFTC approved regulations to phase in compliance with clearing requirements of the Dodd-Frank Act.

CFTC Press Release 6311-12 (July 24, 2012) – The CFTC proposed new rules to require certain credit default swaps and interest rate swaps to be cleared by registered derivatives clearing organizations.

CFTC Press Release 6306-12 (July 18, 2012) – The CFTC's Division of Market Oversight issued temporary no-action relief to non-clearing swap dealers to comply with large trader reporting requirements for physical commodity swaps and swaptions. Swap dealers that are not clearing members must be fully compliant with the Commission's reporting requirements no later than 60 days after the Commission's deadline for entities to apply to be registered as swap dealers.

MSRB Notice 2012-38 (July 18, 2012) – The MSRB published comprehensive implementation guidance to assist underwriters in meeting their newly expanded legal obligations to state and local governments (MSRB Rule G-17) that became effective on August 2, 2012.

FINRA Regulatory Notice 12-36 (July 18, 2012) – FINRA and other members of the Intermarket Surveillance Group extended the effective date for enhanced electronic blue sheet submissions. The new dates are November 30, 2012 and May 1, 2013.

SEC Press Release 2012-134 (July 11, 2012) – The SEC approved a new rule requiring a consolidated audit trail to monitor and analyze trading activity.

MSRB Notice 2012-37 (July 9, 2012) – The MSRB reminded brokers, dealers, and municipal securities dealers of the revised definition of sophisticated municipal market professional (SMMP) and changes in applicability of MSRB rules to such market participants.

(Continued on Page 17)

Watch For *(Continued from page 16)*

SEC Press Release 2012-130 (July 9, 2012) – The SEC approved rules and interpretations on key terms for regulating derivatives.

MSRB Notice 2012-36 (July 5, 2012) – The MSRB requested comment on a draft amendment to limit dealer consents to changes in authorizing documents for municipal securities. Comments were due by August 13, 2012.

FINRA Regulatory Notice 12-34 (July 5, 2012) – FINRA requested comment on proposed regulation of crowdfunding activities. Comments were due August 31, 2012.

FINRA Regulatory Notice 12-33 (July 5, 2012) – FINRA amended electronic Form NMA and adopted new electronic Form CMA filing requirements. Effective implementation dates were July 23, 2012 and August 27, 2012, respectively.

FDIC (July 3, 2012) – The FDIC has made available the public sections of the initial resolution plans submitted to the FDIC and Federal Reserve under Title I of the Dodd-Frank Act. Firms in this group include U.S. bank holding companies with $250 billion or more in total nonbank assets and foreign-based bank holding companies with $250 billion or more in total U.S. nonbank assets. All submissions were received by the deadline of July 2, 2012.

MSRB Notice 2012-35 (June 28, 2012) – The MSRB filed a proposed amendment to Rule G-34 concerning the designation of "not reoffered" in connection with new issues of municipal securities.

SEC Press Release 2012-124 (June 28, 2012) – The SEC adopted new procedures for reviewing clearing submissions under the Dodd-Frank Act.

OCC Bulletin 2012-19 (June 29, 2012) – The OCC issued an interim final rule that amended its lending limits rule, 12 CFR 32, to implement section 610 of the Dodd-Frank Act.

MSRB Press Release (June 25, 2012) – The MSRB received SEC approval to implement measures to strengthen regulation of broker's brokers. The MSRB's new rule, Rule G-43, affirms a broker's broker's duty to make a reasonable effort to obtain a fair and reasonable price for municipal securities, and reminds selling and bidding dealers of their fair pricing obligations. The new rule is effective December 22, 2012.

Available Publications

September 14, 2012 – The Basel Committee on Banking Supervision published a new edition of "Core Principles for Effective Banking Supervision – ***http://www.bis.org/publ/bcbs230.htm***.

August 23, 2012 – The OCC issued a new booklet of the Comptroler's Handbook in the asset management series. To download a copy, visit the Comptroller's Handbook Booklets page on ***occ.gov.***

Program Update

2012 Legal & Legislative Conference

Last Chance to Register! FMA's 21st **Legal & Legislative Conference** will take place **October 25 – 26** at the Four Points Sheraton Hotel here in Washington, DC. This annual program is a high-level forum for banking and securities attorneys as well as senior compliance officers/risk managers, internal auditors and regulators. Participants are provided an opportunity to share information on current legal and regulatory developments as well as network with peers. And, **attendees are eligible for CLE and CPE accreditation (among others)**.

The Program Planning Committee has devised a timely agenda including noted industry leaders and senior regulatory officials. Members include: **Russell Bruemmer** *(WilmerHale LLP)*; **Hugh Conroy, Jr.** *(Cleary Gottlieb Steen & Hamilton LLP)*; **Douglas Harris** *(Promontory Financial Group, LLC)*; **Michael Kadish** *(Royal Bank of Scotland)*; **Sara Kelsey** *(Sara A. Kelsey Law, PLLC)*; **Andrew Miller** *(PNC Financial Services Group)*; and **Gregg Rozansky** *(Shearman & Sterling LLP)*.

The agenda, focusing on current areas of regulatory and Congressional activity/scrutiny, includes these sessions and confirmed speakers:

General Counsels

- Scott Alvarez ■ FRB
- Dan Berkovitz ■ CFTC
- Mark Cahn ■ SEC
- Robert Colby ■ FINRA
- Richard Osterman, Jr. ■ FDIC
- Daniel Stipano ■ OCC

Legislative Update with Hill Staffers

- Jim Clinger ■ House Financial Services Committee
- Andrew Olmem ■ Senate Banking Committee
- Jeanne Roslanowick ■ House Financial Services Committee
- Charles Yi ■ Senate Banking Committee

Capital and Liquidity: Impact on Banks, Bank Products and the Economy

- William Hobbs ■ Bank of America Merrill Lynch
- Beth Knickerbocker ■ American Bankers Association
- Margot Schwadron ■ OCC

SIFIS—Planning for Birth, Death and Governance: Designation and Supervision

- Susan Krause Bell ■ Promontory Financial Group, LLC
- Laurie Schaffer ■ Federal Reserve Board
- James Wigand ■ FDIC

The Impact of New Rules on SIFI Transactions

- Gregory Baer ■ JPMorgan Chase & Co.
- Donald Lamson ■ Shearman & Sterling LLP
- Knox McIlwain ■ Cleary Gottlieb Steen & Hamilton LLP

Secondary Mortgage Market Developments: Is There a Path Toward More Clarity?

- John Buchman ■ E*TRADE Bank
- Meg Burns ■ Federal Housing Finance Agency
- Laurence Platt ■ K&L Gates LLP

SEC Division Reports

- George Canellos ■ Enforcement
- James Daly ■ Corporation Finance
- Carlo di Florio ■ Office of Compliance Inspections and Examinations
- Hunter Jones ■ Investment Management
- Jennifer Marietta-Westberg ■ Risk, Strategy, and Financial Innovation
- Emily Westerberg Russell ■ Trading and Markets

Derivatives

- Conrad Bahlke ■ Stroock & Stroock & Lavan LLP
- Joshua Cohn ■ Mayer Brown LLP
- Susan Ervin ■ Davis Polk & Wardwell LLP
- Jamila Piracci ■ National Futures Association

Volcker Rule

- Amy Friend ■ Promontory Financial Services, LLC
- Jeremy Newell ■ Federal Reserve Board
- Curtis Tao ■ Citigroup Inc.

To view the complete program, go to ***www.fmaweb.org*** and click on the pdf. Online registration is also available.

Please alert your colleagues to this annual fall conference (someone may need CLE or CPE by year-end). And, contact Dorcas Pearce *(dp-fma@starpower.net or 202/544-6327)* if you have questions or wish to register…**2-for-1 team & agency/government personnel discounts are available**.

(Continued on page 19)

Program Update *(continued from page 18)*

FMA gratefully acknowledges these sponsors of FMA's 2011 Legal and Legislative Issues Conference:

PROMONTORY

Sara A. Kelsey Law, PLLC
Banking Law

SHEARMAN & STERLING LLP

WILMERHALE WH

Important Reminder!

A large citywide convention will take place in Washington the same dates as our conference. If you plan an overnight stay, please make your reservation at the Four Points Sheraton Hotel by October 3—the day FMA's low group rate will expire. Otherwise the hotel may sell out and you may need to stay elsewhere. You can always cancel your reservation up to 6:00 p.m. the day before arrival without penalty.

If you have any questions, contact Dorcas Pearce, ***dp-fma@starpower** or 202/544-6327*

2013 Securities Compliance Seminar

Ft. Lauderdale is the front-runner city to host FMA's 2013 spring **Securities Compliance Seminar**, a three-day educational and networking experience for securities compliance professionals, internal auditors, risk managers, attorneys and regulators. Current dates under consideration include April 17 – 19, April 24 – 26, May 3 – 5 and May 8 – 10. Final dates will appear on FMA's website shortly and will also be included in the December issue of *Market Solutions*.

The Planning Committee is now being assembled to begin work on program development. Contact Dorcas Pearce (***dp-fma@starpower** or 202/544-6327*) to volunteer…as a committee member, a general session panelist, workshop facilitator or peer discussion leader…or to share topical and/or speaker suggestions. Please note…speakers receive a complimentary registration and are encouraged to attend as much of the seminar as possible…a great incentive in this budget-challenged environment.

FMA needs your input! A survey will be emailed within the next few days asking for "hot topic"/best practice ideas and speaker recommendations…you may even choose to volunteer! **Please email your thoughts to Dorcas Pearce by October 17.**

CPE / CLE accreditation…and team discounts…will be available, so be sure to budget for, and plan to attend, the 22nd annual Securities Compliance Seminar next spring.

FMA is currently seeking seminar exhibitors and vendors. So that FMA can be most responsive, please suggest vendors or products that FMA can invite to participate at the 2013 Securities Compliance Seminar. *Thanks!*

Who's News

Thom Barrett, formerly Partner at Pricewaterhouse-Coopers LLP, has retired after over 25 years in the financial services/audit industry. Best of luck, Thom!

John Bowman, former Acting Director of the Office of Thrift Supervision, has joined the Financial Services Practice at Venable LLP as a Partner in their Washington, DC and Los Angeles, CA offices.

Jay Buccafusca, formerly Senior Risk Manager at CCO Investment Services Corp., has joined Edward Jones as a Financial Advisor.

Matt Cardile, formerly a Sales & Channel Sales Manager at Interactive Data, now manages the strategic technology partner program for Acquity Group, a digital marketing agency and consulting firm headquartered in Chicago.

Sue Chen has joined Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP in Washington DC as an associate.

Tony Curry, formerly Product Manager at SS&C Technologies, has joined U.S. Bank as a Senior Product Manager-Mobile Banking.

Louis "Hoyt" DeMers, formerly VP/Compliance at Wells Fargo, recently retired after 45 years in the financial services industry. Best of luck, Hoyt!

William Brian Edwards, formerly VP/Global Banking and Market Compliance Manager at Bank of America Merrill Lynch, has joined Wells Fargo Securities as VP/Controls & Infrastructure Compliance.

Pam Friedman, formerly Director and Americas Head, Compliance Risk Review at Barclays Global, has joined RBS Citizens Financial as SVP, Senior Counsel/Fair Treatment and Marketing.

Preetha Gist, formerly General Counsel for Capital Markets at U.S. Bank, has joined the Banking Department at Chapman and Cutler LLP as a Partner in their Washington, DC office.

Gary Goldsholle, currently VP & Associate General Counsel at FINRA, will soon join the Municipal Securities Rulemaking Board as General Counsel

Nadir Isfahani was recently appointed manager of the Stored Value Cards program at the U. S. Department of the Treasury. Nadir's role will focus on both consolidating and growing the program, while adopting leading practices and technologies of the card industry. He can be reached at *nadir.isfahani@fms.treas.gov*.

Jack King, formerly SVP & Deputy General Counsel at Union Bank, has retired after 40 years in the financial services industry. Best of luck, Jack!

Michael Krimminger, formerly General Counsel at the FDIC, has joined Cleary Gottlieb Steen & Hamilton LLP as a Partner in their Washington, DC office.

After 35 years at WilmerHale (most recently as Partner), **Christopher Lipsett** has joined the Consumer Financial Protection Bureau as a Senior Counsel (Senior Advisor and Counselor to the Deputy Director).

Brandon Meadows, formerly SVP & Senior Corporate Counsel at BBVA Compass, has joined IBERIABANK as SVP & Associate General Counsel.

Serena Moe, formerly General Counsel for Economic Sanctions at Citigroup, has joined Wiley Rein as Counsel in their Washington, DC office. She will be advising on economic sanctions and anticorruption as well as other matters as part of their International Trade Practice.

Paul Patton, formerly Executive Director of Morgan Stanley and General Counsel of Morgan Stanley Private Bank, NA, has joined Debevoise & Plimpton LLP's Financial Institutions and Banking practices as Counsel in their New York City office.

Christopher Siderys, formerly at Waller Lansden Dortch & Davis, LLP, has joined the Federal Reserve Board in Washington, DC as Counsel.

Brian W. Smith, formerly a Partner at Latham & Watkins LLP, has left to form Smith Regulatory Strategies, LLC. The firm provides management consulting and strategic advisory services to participants in the banking, financial services and payments industries.

Marcus Wendehog, formerly an attorney at Paul, Weiss, Rifkind, Wharton & Garrison LLP in New York, has joined Dexia as VP & Associate Counsel.

Julie Williams, Chief Counsel of the Office of the Comptroller of the Currency, will step down on September 30, 2012 and plans to retire from federal service at the end of the year.