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MARKET SOLUTIONS

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FINANCIAL MARKETS ASSOCIATION

The Federal Reserve's Proposed Enhanced Prudential Standards for Foreign Banking Organizations

By Russell J. Bruemmer, Jeremy R. Newell, Jonathan McKernan, & Casey J. Jennings
WilmerHale

On December 14, 2012, the Board of Governors of the Federal Reserve System (the "Federal Reserve") issued proposed rules under §§ 165 and 166 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act")[1] that would establish enhanced prudential standards for certain foreign banking organizations that own or maintain a U.S. depository institution, branch, agency, or commercial lending company (the "FBO §§ 165/166 Proposal").[2] That proposal follows a similar Federal Reserve proposal issued one year earlier that would implement the same sections of the Dodd-Frank with respect to certain U.S.-headquartered bank holding companies (the "Domestic §§ 165/166 Proposal"),[3] but which the Federal Reserve has not yet finalized.

As we describe in this article, the FBO §§ 165/166 Proposal would likely require significant changes to how many foreign banks that own or operate a bank or branch in the United States structure, manage, capitalize and provide liquidity to their U.S. operations. Many of these proposed changes were anticipated in a speech given by Federal Reserve Governor Daniel Tarullo on November 28, 2012, entitled *Regulation of Foreign Banking Organizations*.[4] In Part I of this article, we describe the current status of the proposal and the scope of institutions that it would impact and provide an executive summary of the proposal's key elements. In Part II of this article, we provide some preliminary observations regarding the potential practical consequences of the proposal and the steps that foreign banking organizations may wish to take to assess the significance of the proposed changes to their U.S. activities and operations.

Part I: Summary of the FBO §§ 165/166 Proposal

A. General Overview

Sections 165 and 166 of the Dodd-Frank Act require the Federal Reserve to establish enhanced capital, liquidity and other standards for both U.S. bank holding companies ("BHCs") and foreign banking organizations with certain U.S. operations that have total consolidated assets of $50 billion or more. The Federal Reserve proposed rules in December 2011 to implement §§ 165 and 166 for U.S. BHCs, which it has not yet finalized, and on December 14, 2012 issued similar proposed rules that would implement §§ 165 and 166 for foreign banking organizations. Conceptually, the FBO §§ 165/166 Proposal marks a major shift away from the Federal Reserve's traditional approach to regulating

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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 **Dodd-Frank Act** (including developments related to *Systemically Important Financial Institutions* and *Stress Tests*), the **CFTC** and **Derivatives**, and **Consumer Protection** issues.

SYSTEMICALLY IMPORTANT FINANCIAL INSTITUTIONS

Prudential Regulation of Large Foreign Financial Institutions

On December 14, 2012, the Federal Reserve Board proposed regulations to implement the enhanced prudential regulation and early remediation requirements of Sections 165 and 166 of the Dodd-Frank Act for systemically important and other foreign banks, and foreign nonbank financial institutions. Comments on these proposals are due by March 31, 2013.

The proposed regulations apply to foreign banking organizations ("covered FBOs") and nonbank financial institutions ("covered foreign FIs") that have $50 billion or more of consolidated worldwide assets, and that have any U.S. banking or nonbanking operations. The substance of the requirements may vary depending on the amount of the institution's U.S. assets. Foreign banking or financial institutions with more than $10 billion in global assets and U.S. operations are subject to risk management and stress testing requirements.

A covered FBO with $10 billion or more of U.S. banking or nonbanking assets (excluding its U.S. branch and agency assets) would have to organize a U.S. intermediate holding company (IHC) and place, with certain limited exceptions, its U.S. operations under the IHC. U.S. branches and agencies of covered FBOs, however, would be permitted to operate outside of the IHC structure.

IHCs would be subject to the same risk-based capital and leverage requirements that apply to U.S. bank holding companies. Covered FBOs would also be required to meet home-country capital standards that are consistent with the Basel Capital Accord. In addition, any IHC with total consolidated assets of $50 billion or more would be required to comply with the Board's annual capital plan rule and its associated capital planning requirements (including limits on capital distributions) applicable to U.S. bank holding companies.

Covered FBOs with combined U.S. assets of $50 billion or more would have to comply with liquidity requirements that are substantially similar to those set forth in the Board's December 2011 proposals for large U.S. banking organizations. These FBOs, however, would be subject to a specific requirement to maintain a 30-day buffer of highly liquid assets in the United States, the first 14 days of which would have to be held by the FBO's U.S. branch and agency network. Covered FBOs with a smaller U.S. presence would be subject to more limited requirements.

Covered FBOs, and FBOs that have total global consolidated assets of between $10 billion and $50 billion, would be required to certify that they have a U.S. risk committee that has at least one member with appropriate risk expertise. Covered FBOs with $50 billion or more of U.S. assets would be subject to additional U.S. risk committee requirements.

The proposed rules would impose a series of stress testing requirements on FBOs that have total global consolidated assets of $10 billion or more. First, an

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foreign banks—which featured substantial deference to home country regulation—and may require many foreign banking organizations to make significant changes in how they structure, manage, capitalize and provide liquidity to their U.S. operations.

In particular, as described in more detail below, the Federal Reserve's proposal would:

- Establish a variety of size-based thresholds to govern the proposal's scope of application to different types of foreign banking organizations;
- Require certain foreign banking organizations to place their non-branch U.S. activities under a U.S. intermediate holding company ("U.S. IHC");
- Establish new regulatory capital requirements for foreign banking organizations and their U.S. IHCs;
- Establish new liquidity standards for U.S. IHCs and U.S. branches and agencies;
- Require many foreign banking organizations to form U.S. risk committees and meet other risk to management standards;
- Subject the U.S. operations of foreign banking organizations to new stress testing standards;
- Apply a single-counterparty credit limit to U.S. operations of foreign banking organizations; and
- Establish early remediation requirements and debt-to-equity limits for foreign banking organizations.

> *"...the FBO §§ 165/166 Proposal would likely require significant changes to how many foreign banks that own or operate a bank or branch in the United States structure, manage, capitalize and provide liquidity to their U.S. operations."*

The proposal has been published in the Federal Register,[5] and the deadline for public comments is March 31, 2013.

B. Scope of Application

Generally speaking, the FBO §§ 165/166 Proposal would apply to foreign banking organizations that either own a U.S. depository institution or operate a U.S. branch, agency, or commercial lending company subsidiary ("FBOs") and have total, *global* consolidated assets of $50 billion or more (a "covered FBO").[6] However, the Federal Reserve's proposal also establishes a variety of other quantitative thresholds, including thresholds based on total U.S. assets and total non-branch U.S. assets, which would trigger the application (or not) of individual elements of the proposal.

In addition, a few of the proposal's individual elements, such as risk management and stress testing requirements, would apply to certain FBOs with as little as $10 billion in total, global consolidated assets.[7] The Federal Reserve's proposal would generally require FBOs to begin complying with the new requirements in July 2015.[8]

C. U.S. Intermediate Holding Company

Perhaps the most prominent feature of the FBO §§ 165/166 Proposal is the requirement that certain FBOs reorganize their U.S. operations under a U.S. IHC. The proposal would require any covered FBO with more than $10 billion in total U.S. assets, *exclud*ing assets held at its U.S. branches or agencies, to form a U.S. IHC.[9] All U.S. subsidiaries, as well as any merchant banking investments in U.S. companies, would have to be held under the U.S. IHC.[10] Importantly though, the covered FBO's U.S. branches and agencies would not have to be subsidiarized, and could continue to operate outside of the U.S. IHC structure.[11] U.S. branches and agencies would, however, become subject to a variety of significant new liquidity and other requirements, as described below.[12]

D. Capital

The FBO §§ 165/166 Proposal would also establish more stringent capital requirements on covered FBOs and, in particular, their non-branch U.S. operations. First, each covered FBO would be required to certify that it meets home country capital adequacy standards that are consistent with the Basel III capital framework, including that framework's additional capital buffers and leverage ratio, as and when that framework becomes effective over time.[13] Second, if the covered FBO must form a U.S. IHC under the proposal's new framework, the U.S. IHC would also

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be required to meet separately, on a consolidated basis, the regulatory capital rules applicable *to U.S. BHCs*. The U.S. IHC would be required to comply with these capital rules regardless of whether it controlled a U.S. depository institution. The capital rules that would thus be made applicable would include, importantly, both (i) the Collins Amendment's risk-based capital floor, which generally requires BHCs to maintain minimum capital ratios under both the standardized and advanced approaches to calculating risk-weighted assets,[14] and (ii) the U.S. Tier 1 leverage ratio.

> *"Conceptually, the … Proposal marks a major shift away from the Federal Reserve's traditional approach to regulating foreign banks—which featured substantial deference to home country regulation—and may require many foreign banking organizations to make significant changes in how they structure, manage, capitalize and provide liquidity to their U.S. operations.*

E. Liquidity

Each covered FBO with combined U.S. assets (i.e., assets held at U.S. subsidiaries together with assets held at U.S. branches and agencies) of $50 billion or more would also be required to satisfy a new set of liquidity requirements encompassing both the U.S. IHCs and U.S. branches and agencies. First, with respect to any U.S. IHC, the FBO §§ 165/166 Proposal would require U.S. IHCs to satisfy the same liquidity standards applicable to large U.S. BHCs under the Federal Reserve's Domestic §§ 165/166 Proposal—that is, the U.S. IHC would be required to engage in monthly cash flow projection and liquidity stress testing exercises and required to hold, *in the United States*, unencumbered, highly-liquid assets sufficient to meet its net, stressed cash outflow needs over a 30-day horizon.[15] "Highly-liquid assets" for this purpose would include (i) cash, (ii) U.S. government, government agency, and government-sponsored-enterprise securities, and (iii) any other asset the covered FBO can demonstrate to the Federal Reserve has low credit and market risk, is actively-traded in a two-way market, and has historically served as a flight-to-quality asset during market distress.[16]

Second, with respect to any U.S. branches and/or agencies of a covered FBO with combined U.S. assets of $50 billion or more, the FBO §§ 165/166 Proposal would require that a covered FBO engage in similar monthly cash flow projections and liquidity stress testing exercises and hold unencumbered, highly-liquid assets sufficient to meet the net, stressed cash outflow needs of such branches and agencies over a 30-day horizon.[17] Unlike U.S. IHCs, however, liquid assets covering only the first *14 days* of that horizon would have to be held at the U.S. branch or agency itself; the proposal would permit the remainder to be held at the head office.[18] In addition, although the proposal is not entirely clear on the point, it appears that, under the proposal, potential cash inflows related to any "due from head office" (i.e., amounts on-lent by a U.S. branch or agency to an FBO head office) could not be used to "net down" the amount of liquid assets the U.S. branch or agency must maintain to meet its projected net stressed cash outflows to third parties.[19] If this were the case, it would effectively require a U.S. branch/agency network to hold sufficient *local* liquidity resources to cover its entire net stressed cash outflows to third parties—for example, to wholesale depositors and holders of commercial paper—over the first 14 days of the stress horizon.

The FBO §§ 165/166 Proposal would establish less stringent liquidity standards for any covered FBO that maintains combined U.S. assets of *less than $50 billion*. In particular, such a covered FBO would be required to annually conduct and report to the Federal Reserve the results of an internal liquidity stress test that meets certain enumerated criteria.[20] If this requirement were not satisfied, the FBO's U.S. operations would become subject to a cap on their total net "due from" position relative to head office and non-U.S. affiliates.[21]

F. Risk Management and Corporate Governance

The FBO §§ 165/166 Proposal would also introduce a series of new risk management and corporate governance requirements and standards for foreign banking organizations, including those with

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significantly less than $50 billion in total, global consolidated assets. First, the FBO §§ 165/166 Proposal would require any FBO that is publicly traded and has $10 billion or more in total, global consolidated assets to establish a board of directors-level risk management committee to oversee the U.S. risk management practices of the FBO.[22] "Publicly traded" FBOs for this purpose would include FBOs whose securities are publicly traded in either a U.S. or foreign securities market.[23] The same requirement would also apply to any covered FBO with $50 billion or more in total, global consolidated assets, even if it is not publicly traded.[24]

Second, covered FBOs with $50 billion or more in combined U.S. assets would also be required to establish a risk committee at the U.S. IHC's board of directors.[25] Other covered FBOs (i.e., those with less than $50 in combined U.S. assets) would be given the option of establishing the committee at either their global board of directors or at their U.S. IHC's board of directors.[26]

> *"Perhaps the most prominent feature of the FBO §§ 165/166 Proposal is the requirement that certain FBOs reorganize their U.S. operations under a U.S. IHC."*

G. Stress Testing

The FBO §§ 165/166 Proposal would also establish a variety of new stress testing requirements for FBOs, the scope of which would depend on the relative size of an FBO and its U.S. operations, and which would apply differently to U.S. IHCs and U.S. branches and agencies.

First, at the U.S. IHC level, each U.S. IHC with $50 billion or more in total consolidated assets would be required to conduct semi-annual, company-run stress tests, and would also be subject to annual supervisory stress tests conducted by the Federal Reserve.[27] Each U.S. IHC with more than $10 billion, but less than $50 billion, in total consolidated assets would be required to conduct annual, company-run stress tests, but would *not* be subject to annual supervisory stress tests.[28] These stress testing requirements for the U.S. IHC are similar to those applicable to similar-sized U.S. BHCs under the Domestic §§ 165/166 Proposal.

Second, at the U.S. branch and agency level, the FBO §§ 165/166 Proposal would require that any covered FBO with $50 billion or more in combined U.S. assets, regardless of whether it is required to establish a U.S. IHC, (i) be subject to a consolidated capital stress testing regime conducted by its home country supervisor that is "broadly consistent" with the U.S. capital stress testing regime, and (ii) provide the Federal Reserve with information regarding the results of its home country stress test.[29] If the covered FBO were *not* subject to such a regime, its U.S. branches and agencies would become subject to a 108% asset maintenance requirement and other additional restrictions, including potential intragroup funding restrictions.[30]

The FBO §§ 165/166 Proposal would also require any FBO with $10 billion or more in total, *global* consolidated assets that is not otherwise covered by the proposal's stress testing provisions to either (i) be subject to a stress testing regime in which its home country supervisor either conducts or evaluates and reviews an annual capital stress test or (ii) satisfy a 105% asset maintenance requirement at its U.S. branches and agencies.[31]

H. Single-Counterparty Credit Limits

The FBO §§ 165/166 Proposal would largely apply to covered FBOs the same single-counterparty credit limit ("SCCL") the Board proposed for U.S. BHCs in the Domestic §§ 165/166 Proposal, and would generally limit a BHC's credit exposure to any single counterparty to no more than 25% of the BHC's capital and surplus, with a more stringent 10% limit applicable to credit exposures between "major" covered companies and "major" counterparties, which are defined as counterparties with $500 billion or more in total assets.[32] However, the FBO §§ 165/166 Proposal would apply the SCCL in two different ways. First, the SCCL would apply to transactions between the combined U.S. operations of a covered FBO—including both its U.S. branch and agency network and U.S. IHC—and any single counterparty, which would be measured relative to the FBO's total global consolidated capital.[33] Second, the proposal would also separately apply the same SCCL to transactions between a covered FBO's U.S. IHC and any single counterparty, *based upon the U.S.*

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IHC's consolidated capital. Because that capital base is likely to be significantly smaller, the result may be a significantly more restrictive SCCL at the U.S. IHC level.[34]

I. Other Enhanced Prudential Standards

The FBO §§ 165/166 Proposal would also establish other enhanced prudential standards for covered FBOs included in §§ 165 and 166 of the Dodd-Frank Act, all broadly consistent with the Federal Reserve's Domestic §§ 165/166 Proposal. These enhanced prudential standards include: (i) debt-to-equity limits that would become applicable upon a finding of the Financial Stability Oversight Council that a covered FBO poses a grave threat to U.S. financial stability, and (ii) early remediation requirements incorporating a variety of remedial measures that would be triggered by a variety of capital, stress test, risk management, liquidity management and market indicators.[35]

Part II. Potential Practical Consequences and Considerations

A. The Federal Reserve's Stated Policy Rationale

Although the Federal Reserve has described a variety of policy concerns and considerations in articulating its new approach to FBO regulation, several have been featured more prominently in both the proposal and in Governor Tarullo's November 2012 speech anticipating many of its key elements. Those policy concerns and considerations cited by the Federal Reserve, which FBOs may wish to carefully consider as the develop comment letters on the proposal and assess its potential impact, include the following:

> *"The...Proposal would also establish more stringent capital requirements on covered FBOs and, in particular, their non-branch U.S. operations."*

- Recent increases in the overall size and interconnectedness of FBOs' U.S. operations, and the effect of those increases on systemic risk;[36]
- The purported financial stability risks the Federal Reserve believes are posed by certain U.S. business models that may be employed by FBOs, and in particular (i) the use of U.S. branches to raise less stable U.S. dollar funding that is on-lent to head offices and invested outside of the United States in less liquid assets, and (ii) U.S. broker-dealer subsidiaries' reliance on short-term funding markets and overall levels of leverage;[37]
- The Federal Reserve's stated belief that FBOs are unlikely, as a result of trends in home country supervision, to act as a source of strength to their U.S. operations;[38] and
- The difficulties the Federal Reserve has indicated it believes are associated with resolving a large and complex cross-border financial institution.[39]

B. Restructuring and Reorganization of U.S. Operations

The FBO §§ 165/166 Proposal may require many foreign banks to restructure their U.S. operations significantly, including through the internal reorganization of legal entities, business lines and personnel to accommodate the new U.S. IHC structure. Depending on the particular circumstance of the relevant firm, this reorganization may entail a review of, and changes to, accounting, financial control, and intercompany processes and arrangements, including the creation of new infrastructure to calculate risk-weighted assets under U.S. BHC capital rules and preparation of regulatory financial statements for the U.S. IHC under U.S. GAAP. In addition, FBOs may also need to analyze in detail the potential international and U.S. tax implications of the reorganization, and the potential capital and liquidity costs of different approaches to reorganization. Additionally, the reorganizational changes contemplated in the FBO §§ 165/166 Proposal may also result in a variety of applications and notices to securities and other regulators regarding changes in organizational structure. The proposal may also require changes to compliance, risk management and other oversight functions to reflect the centralization of Federal Reserve regulation and supervision at the U.S. IHC, where required.

In addition to these practical considerations, the FBO §§ 165/166 Proposal may also require that covered FBOs revisit and reassess the funding and capital strategies currently employed with respect to

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their U.S. operations. In particular, the proposed new requirement that regulatory capital and liquidity be held at the U.S. IHC level, as well as the proposed new liquidity restrictions for U.S. branches and agencies, may effectively reduce or eliminate the fungibility of capital and liquidity currently enjoyed by covered FBOs across their U.S. and non-U.S. operations. In addition to raising concerns about the efficiency with which capital and liquidity may be used, these new requirements would also limit an FBO's current flexibility to deploy its aggregate capital and liquidity resources to absorb losses and meet cash outflows globally, wherever they might arise.

Finally, the application of U.S. BHC capital rules to a U.S. IHC that holds only non-branch U.S. assets may raise issues for certain firms depending on the composition of the assets on their balance sheet, particularly where the leverage ratio component of U.S. BHC capital rules—which were designed for and contemplate a diversified banking organization holding a variety of banking and non-banking assets—are applied to activities that are primarily non-banking in nature. Moreover, the application of the Collins Amendment's risk-based capital floor and the U.S. Tier 1 leverage ratio may require particular scrutiny by FBOs whose non-U.S. branches engage in significant amounts of balance-sheet-intensive trading activity.

> *"The...Proposal would also introduce a series of new risk management and corporate governance requirements and standards for foreign banking organizations, including those with significantly less than $50 billion in total, global consolidated assets."*

C. Branching v. Subsidiarization

Although the proposal does not go so far as to require the full, legal subsidiarization of FBOs' U.S. branches and agencies, it may compel the effective "prudential" subsidiarization of all non-branch activities at the U.S. IHC by applying a full range of capital, liquidity and other prudential regulatory requirements to those U.S. operations on something akin to a ring-fenced, standalone basis. In addition, the proposal would establish significant new liquidity restrictions at the U.S. branch/agency level that may largely replicate, at least with respect to some intercompany transfers and funding models, the results of legal subsidiarization at the branch/agency level. This marks a significant shift in the Federal Reserve's regulatory approach to FBOs' U.S. operations, which historically emphasized the branching model and deference to home country supervision.

D. Changing Incentives for Booking Models

Because the Federal Reserve's proposal would establish more stringent restrictions at a covered FBO's U.S. IHC than it would at its U.S. branch and agency network, the proposal may create meaningful regulatory incentives for FBOs to shift activities out of their U.S. subsidiaries and into U.S. branches and agencies. However, although there is likely to be some scope for such moves, there are also several important constraints to keep in mind here, including (i) state and federal laws limiting the activities of U.S. branches and agencies, (ii) separate requirements that limit the securities activities a U.S. branch or agency may perform without registering as a broker-dealer (e.g., the Gramm-Leach-Bliley Act's broker-dealer "push-out" provisions), and (iii) a separate Dodd-Frank Act provision limiting the derivatives activities of U.S. branches and agencies (i.e., the so-called Lincoln Amendment[40]). On this very point, the Federal Reserve notes in the preamble accompanying the FBO §§ 165/166 Proposal (and Federal Reserve staff emphasized at the open meeting held to approve the proposal) that it intends to monitor carefully and scrutinize the migration of activities to U.S. branches and agencies as a supervisory matter.[41]

For similar reasons, the proposal may also create meaningful new regulatory incentives for FBOs to shift activities out of their U.S. subsidiaries and U.S. branches and agencies and on to the balance sheet of the FBO's head office or foreign affiliates.

E. Reaction of Foreign Regulators

The proposal may also draw considerable attention from regulators and supervisors in foreign countries as they themselves consider the appropriate approach to the regulation of U.S. or other foreign financial institutions in their countries. Although the

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Federal Reserve goes to great lengths in its proposal to emphasize that it is not requiring full legal subsidiarization of the U.S. branches and agencies of FBOs, the Federal Reserve's general approach—reducing deference to home country regulation and supervision and applying enhanced prudential regulation to local operations—may prompt foreign bank regulators to consider or evaluate similar approaches with respect to the local operations of U.S. or other cross-border banks that operate in their countries.

F. Impact on FBO Corporate Governance

The Federal Reserve makes clear in its proposal that it expects certain U.S. IHCs to have its own U.S. board of directors, which maintains its own risk committee. This may raise at least the possibility that the Federal Reserve may ultimately expect, as a matter of supervisory practice, other traditional corporate governance features at the U.S. IHC-level as well. This type of formal U.S. corporate governance is likely to raise a number of important organizational and cultural questions for FBOs, which may employ a diverse array of models and approaches with respect to the management of U.S. operations, the relative involvement and authority of U.S. versus head office management and personnel, and the coordination of management and oversight across different U.S. business lines. The approach suggested by the FBO §§ 165/166 Proposal may also subject the U.S. IHC's board of directors to a variety of difficult issues raised by the potentially competing expectations of U.S. regulators, its sole FBO shareholder, and home country regulators.

> *"The…Proposal would also establish a variety of new stress testing requirements for FBOs, the scope of which would depend on the relative size of an FBO and its U.S. operations…."*

G. The Exportation of U.S. Stress Testing Requirements and Potential Return of Asset Maintenance Requirements

In a final, potentially noteworthy measure, several aspects of the FBO §§ 165/166 Proposal would establish significant new asset maintenance requirements for the U.S. branches and agencies of FBOs whose home country has not implemented a capital stress testing regime that is "broadly consistent" with the Federal Reserve's U.S. approach to stress testing. Given the ambiguity of what might constitute a "broadly consistent" stress testing regime, the less-developed nature of capital stress testing requirements in many foreign countries, and the significant impact of asset maintenance requirements on certain existing business models, the potential impact of this approach to stress test requirements may be much more significant than anticipated.

* * * * *

As we have described, the Federal Reserve's FBO §§ 165/166 Proposal is a significant and noteworthy regulatory development, and may require significant changes in how FBOs operate. The proposal would subject covered FBOs to a number of new layers of regulation by imposing a new U.S. IHC requirement, heightened liquidity standards, enhanced risk management and stress testing standards, single-counterparty credit limits, early remediation requirements, and debt-to-equity limits. These changes may not only increase compliance risks and costs for covered FBOs, but also impact the design, the structure, and profitability of FBOs' U.S. business models. Taken together, the FBO §§ 165/166 Proposal will likely merit very careful study by covered FBOs to assess the impact of both the proposal itself and the more complex, more intrusive U.S. regulatory environment that it appears to signal is forthcoming. ■

[1] Pub. L. No. 111-203; 124 Stat. 1376–2223 (2010).

[2] Enhanced Prudential Standards and Early Remediation Requirements for Foreign Banking Organizations and Foreign Nonbank Financial Companies, 77 Fed. Reg. 76,628 (proposed Dec. 28, 2012) (to be codified at 12 C.F.R. pt. 252) (hereinafter "Proposed Rule").

[3] Enhanced Prudential Standards and Early Remediation Requirements for Covered Companies, 77 Fed. Reg. 594 (proposed Jan. 5, 2012) (to be codified at 12 C.F.R. pt. 252).

[4] Daniel K. Tarullo, Member, Federal Reserve Board of Governors, Remarks at Yale School of Management Leaders Forum 5–8 (Nov. 28, 2012).

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[5]Proposed Rule, *supra* note 2.

[6]*See* Proposed Rule § 252.200.

[7]*See* Proposed Rule §§ 252.250.50–252.264.

[8]Proposed Rule § 252.200(b).

[9]Proposed Rule § 252.201.

[10]Proposed Rule § 252.3.

[11]*See* Proposed Rule Preamble 42.

[12]*See* infra, Sections I.E.–I.

[13]Proposed Rule § 252.212.

[14]Dodd-Frank Act § 171 (codified at 12 U.S.C. § 5371).

[15]Proposed Rule §§ 252.225–252.227.

[16]Proposed Rule § 252.220. We note that the Federal Reserve issued the FBO §§ 165/166 Proposal prior to the Basel Committee on Banking Supervision's revisions to the Basel III liquidity framework announced on January 7, 2012. *See* Basel Committee on Banking Supervision, Basel III: The Liquidity Coverage Ratio and Liquidity Risk Monitoring Tools (Jan. 7, 2013), available at ***http://www.bis.org/publ/bcbs238.pdf***. It remains to be seen whether and how certain aspects of the proposed enhanced liquidity standards— such as its definition of "highly-liquid assets"—will ultimately be conformed to the final contours of the Basel III liquidity framework.

[17]Proposed Rule §§ 252.225–252.227.

[18]Proposed Rule § 252.227(f).

[19]Proposed Rule § 252.227(e).

[20]Proposed Rule § 252.231(a). The stress test must be conducted consistent with the Basel Committee on Banking Supervision's principles for liquidity risk management and incorporate 30-day, 90-day, and one-year stress test horizons. *Id.*

[21]Proposed Rule § 252.231(b) (imposing a cap on the total net "due from" position relative to the head office and non-U.S. affiliates at 25 percent or less of the third-party liabilities of its combined U.S. operations, on a daily basis).

[22]Proposed Rule § 252.250(a)(1); *See* Dodd-Frank Act § 165(h) (codified at 12 U.S.C. § 5365(h)).

"The…Proposal may require many foreign banks to restructure their U.S. operations significantly, including through the internal reorganization of legal entities, business lines and personnel to accommodate the new U.S. IHC structure."

"Although the proposal does not go so far as to require the full, legal subsidiarization of FBOs' U.S. branches and agencies, it may compel the effective "prudential" subsidiarization of all non-branch activities at the U.S. IHC by applying a full range of capital, liquidity and other prudential regulatory requirements to those U.S. operations on something akin to a ring-fenced, stand alone basis."

[23]Proposed Rule § 252.3.

[24]Proposed Rule § 252.250(a)(1).

[25]Proposed Rule § 252.251(b)(2).

[26]Proposed Rule § 252.251(b)(1)(i).

[27]Proposed Rule § 252.262(a).

[28]Proposed Rule § 252.262(b).

[29]Proposed Rule § 252.263(a).

[30]Proposed Rule § 252.263(c)(1).

[31]Proposed Rule § 252.264.

[32]Proposed Rule § 252.242. Notably, however, the FBO §§ 165/166 Proposal exempts some transactions from the definition of "credit exposure" not exempted in the Domestic §§ 165/166 Proposal, such as an FBO's exposure to its home country sovereign entity, and intraday credit exposure to a counterparty.

[33]Proposed Rule § 252.241(a)(1).

[34]Proposed Rule § 252.242(a).

[35]Proposed Rule §§ 252.271, 252.282.

[36]*See* Tarullo, *supra* note 4, at 5–8.

[37]*Id.* at 5; Proposed Rule Preamble 9–12.

[38]Proposed Rule Preamble 14.

[39]*Id.* at 13.

[40]*See* Dodd-Frank Act § 716.

[41]Proposed Rule Preamble 44.

Messrs. Bruemmer, Newell, McKernan and Jennings are Partner, Counsel, Senior Associate and Associate, respectively, in the Financial Institution Group of the law firm WilmerHale, Washington, DC. *This article is intended for the general information of the reader.* ***It does not constitute legal advice and should not be used as the basis for any legal or business decision.***

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FBO with global assets of $10 billion or more would be required to show that it is subject to home-country stress testing that is generally consistent with U.S. requirements. Further, an IHC with assets of between $10 billion and $50 billion would be required to conduct company-run stress tests as if it were a U.S. bank holding; company, whereas IHCs of $50 billion or more would also be subject to Board-run stress testing. A more complex process for stress testing of U.S. branches and agencies would be created, the particulars of which would depend on the nature, tenor and adequacy of home-country stress testing and whether the branches and agencies provide net funding to their home offices. The Proposed rules would impose a two-tier single-counterparty credit limit on the U.S. operations of covered FBOs.

The proposed rules also address counterparty credit exposures, debt-to-equity limits, and early remediation.

The proposed effective date for the new prudential regulations would be July 1, 2015, in order to allow affected FBOs adequate time to implement the proposal's requirements.

You may find additional details in Morrison & Foerster's news bulletin available at ***http://www.mofo.com/files/Uploads/Images/121215-Prudential-Regulations-Foreign-Banks.pdf.*** The proposed regulations are available at ***http://www.gpo.gov/fdsys/pkg/FR-2012-12-28/pdf/2012-30734.pdf.***

Cross-Border Resolutions

On December 10, 2012, the FDIC and the Bank of England released a white paper, *Resolving Globally Active, Systemically Important, Financial Institutions,* describing how each would resolve a materially distressed or failing financial institution that is globally active and systemically important ("G-SIFI") in order to maintain the G-SIFI's ongoing and viable operations, and contains any threats to financial stability.

The paper memorializes the consensus view of the FDIC and the Bank of England that a top-down or single-point-of-entry approach is the preferred (although not the sole) method of resolving a G-SIFI. This approach could transform certain unsecured debt into equity or convertible debt.

The first step in this approach is the appointment of a receiver or administrator for the top-tier holding company. In the United States, the FDIC will make the appointment, after receiving go-aheads from the FSOC, the Federal Reserve Board, and the Secretary of the Treasury. The UK process differs and will fundamentally depend on a decision by the soon-to-be-formed Prudential Regulatory Authority, which will operate under the auspices of the Bank of England in consultation with HM Treasury.

Losses in the G-SIFI will be allocated first to shareholders and then to unsecured creditors. Shareholders are likely to lose all value. The unsecured debt will be written down to cover losses remaining after the equity has been exhausted. After the write-down, the unsecured debt will be exchanged for equity, and possibly also some subordinated convertible debt, in either a new bridge institution (in the United States and the United Kingdom) or possibly the original institution (in the United Kingdom). Culpable management will be removed. Viable subsidiaries will continue their operations, with funding to be arranged by the FDIC or the Bank of England if private capital markets are unavailable.

The debt-for-equity exchange causes certain existing unsecured debt in the G-SIFIs operating today to take on certain features of convertible debt and a form of bail-in capital. For a G-SIFI whose top-tier holding company is in the United States, the

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FMA Welcomes *More* New Members!

Amy D'Addetta	RBS Citizens
Betsy Falloon	Federal Deposit Insurance Corporation
Sylvia Favretto	Shearman & Sterling LLP
Carl Fornaris	Greenberg Traurig, PA
Preetha Gist	Chapman and Cutler LLP
Rachel Graham	Investment Company Institute
Steve Greenbaum	Trade Station Securities, Inc.
David Harris	Dechert LLP
Kenji Hayashi	Bank of Japan

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FDIC will serve as receiver. Even before its formal appointment as receiver, the FDIC is likely to have chartered a new bridge corporation of which the FDIC will be the sole shareholder. Upon the FDIC's appointment as receiver, the FDIC will immediately transfer the assets of the G-SIFI to the bridge corporation. Liabilities and any equity in the original G-SIFI will remain behind in the receivership. Unless the equity is sufficient to cover all losses, debt—specifically, subordinated debt and possibly even senior unsecured debt claims—will be written down in an amount to cover the remaining losses. The remaining debt will be exchanged for equity or subordinated debt in the bridge institution.

Since the bridge institution will be well capitalized (as a result of taking on the assets but not the liabilities of the G-SIFI in receivership), the equity or subordinated debt issued to the debtholders will have some value. The former debtholders may be able to realize this value in the relatively near term if the receiver succeeds in promptly selling the bridge company to a third party. Securities laws may require the registration of any securities transferred to the debtholders; the white paper notes this issue as one for discussion between the relevant regulators.

The FDIC and the Bank of England have designed the top-down approach to have little, if no, effect on viable and operating subsidiaries. A receiver or similar authority will not automatically be appointed for subsidiaries, and if a subsidiary should be liquidated or resolved, well-established bankruptcy or similar proceedings should be sufficient.

Further information is available in Morrison & Foerster's news bulletin, available at ***http://www.mofo.com/files/Uploads/Images/121217-Cross-Border-Resolutions.pdf***. The white paper is available at ***http://www.fdic.gov/about/srac/2012/gsifi.pdf.***

STRESS TESTING

Stress Testing for Large and Mid-Size Institutions

On October 9, 2012, the OCC, the FDIC, and the Federal Reserve Board approved final rules implementing the Dodd-Frank Act's company-run stress testing requirements for all insured depository institutions with total consolidated assets of $10 billion or more. The Board simultaneously published final stress-testing rules, covering the Dodd-Frank Act's requirements for Board-run and company-run stress-testing requirements for bank holding companies with $50 billion or more in total consolidated assets and nonbank financial institutions that have been deemed significantly important. Federal branches and agencies of foreign banks are not subject to the rules, regardless of their asset size. The final rules confirm several points.

First, the stress tests are based on sets of assumptions, and each banking agency will provide its respective regulated institutions with at least three economic stress scenarios—baseline, adverse, and severely adverse. Covered companies and covered banks with significant trading activities may be required to include trading and counterparty components in their adverse and severely adverse scenarios.

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Second, the 2013 testing cycle for banking organizations over the $50 billion threshold began in the fall of 2012, and the agencies provided the necessary scenarios to these organizations in November 2012. Banking organizations above the $10 billion floor and below the $50 billion ceiling will start testing in the 2014 cycle, which begins in October 2013.

Third, in conducting a stress test, each covered company and covered bank must use a planning horizon of at least nine quarters over which the impact of specified scenarios would be assessed. Each covered company and covered bank will be required to calculate pre-provision net revenues, potential losses, loan loss provisions, net income, and regulatory capital levels and ratios that result from each specified scenario. In testing capital, a covered company and covered bank must incorporate the effects of any capital actions over the planning horizon and the maintenance of an appropriate allowance for lease losses.

Fourth, there are different reports and reporting deadlines required for covered companies and large covered banks on the one hand, and all other covered banks on the other hand. Covered companies also must, among other things, conduct and report on a "mid-cycle" stress test (a test conducted in June of each year) to the Board. Further, covered companies' stress-testing activities will be incorporated into the covered company requirements under Board rules to prepare and submit an annual capital plan.

Fifth, while the test reports above will be treated as confidential and exempt from disclosure under the Freedom of Information Act, all covered companies and covered banks must publish a summary of their stress test results after submitting their reports. The summary must include a description of the types of risks included in the testing; a summary description of the methodologies; estimates of aggregate losses, pre-provision net revenue, provisions for loan and lease losses, net income, and pro forma capital ratios for each of the nine quarters; and an explanation of the most significant causes of the changes in the regulatory capital ratios. Additional disclosure requirements apply to the test results under the severely adverse scenario. Further, covered companies must publish the results of their mid-cycle stress tests.

Finally, the Board will conduct an annual stress test of covered companies, in general using the same scenarios, data points and methodologies as are used for the company-run stress tests.

For more information, please see Morrison & Foerster's news bulletin, available at ***http://www.mofo.com/files/Uploads/Images/121009-Stress-Testing.pdf.***

The OCC final rule may be accessed at ***http://www.occ.treas.gov/news-issuances/news-releases/2012/nr-occ-2012-142a.pdf.*** The FDIC's final rule is available at ***http://www.fdic.gov/news/board/2012/2012-10-09_notice_dis-a_res.pdf.*** The Board's final rule for the company-run stress test is available at ***http://www.gpo.gov/fdsys/pkg/FR-2012-10-12/pdf/2012-24988.pdf*** and the final rule regarding the Board-run and company-run stress test is available at ***http://www.gpo.gov/fdsys/pkg/FR-2012-10-12/pdf/2012-24987.pdf.***

Stress Testing for Community Banks

On October 18, 2012, the OCC published a supervisory guidance for the stress testing of community banks ("Guidance"). The Guidance effectively requires "every bank, regardless of size, or risk profile, to have an effective internal process to (1) assess its capital adequacy in relation to its overall risks, and (2) plan for maintaining appropriate capital levels." The nature of the testing will vary substantially, depending on the size and diversification of a bank. The Guidance includes four points.

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FMA Welcomes *More* New Members!

Bianca Heslop	National Futures Association
Grace Hinchman	Financial Accounting Foundation
Wes Holston	Bressler, Amery & Ross, PC
Thor Imsdahl	Dechert LLP
Katie Iverson	Federal Deposit Insurance Corporation
Tom Kicak	SunTrust Robinson Humphrey
Mark Knoll	Bressler, Amery & Ross, PC
Stephen Kowitt	JPMorgan Chase

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First, depending on its size and credit concentrations, a community bank may conduct stress tests at any or all of the transaction, portfolio, and enterprise-wide levels. Discussions of testing throughout the Guidance imply that portfolio-level testing may be the most useful approach, but the different tests are not mutually exclusive, and a bank should consider all three. Reverse stress testing may be helpful.

Second, unlike the Federal Reserve Board has done for the stress testing by systemically important institutions, the Guidance does not provide any assumptions about the stress conditions that a community bank should use. The Guidance notes that common scenarios include a severe recession, loss of a major client, or a localized economic downturn.

Third, for a bank conducting a test, Appendix B to the Guidance presents an example of an acceptable stress test that does not require complex calculations. Rather, taking asset categories as they appear on the latest call report, a bank can apply a simple loss rate for each category over two years to arrive at estimated values and losses.

Fourth, with regard to test results, the stress testing should generate estimates of three items over a two-year time horizon: loan portfolio stress losses, impact on earnings, and impact on capital. The OCC expects a bank to use the test results to establish risk tolerances, set concentration limits, and adjust its strategies. The OCC also expects that a bank be prepared to increase its portfolio monitoring, adjust underwriting standards, and sell or hedge assets.

Additional information is available in Morrison & Foerster's news bulletin at ***http://www.mofo.com/files/Uploads/Images/121022-Stress-Tests-Community-Banks.pdf.***

The Guidance is available at ***http://www.occ.treas.gov/news-issuances/bulletins/2012/bulletin-2012-33.html.***

FDIC INSURANCE

Expiration of Temporary Unlimited Coverage for Noninterest-Bearing Transaction Accounts

In the wake of the financial crisis, the FDIC launched the so-called Transaction Account Guarantee ("TAG") program, which was extended by Section 242 of the Dodd-Frank Act to support liquidity and bank stability. The program provided unlimited FDIC insurance for noninterest-bearing transaction accounts and was highly popular (an estimated $1.4 to $1.5 trillion was insured). However, the Dodd-Frank Act extended the program for only a two-year period, and absent action by Congress, the TAG program was to end on December 31, 2012.

On December 13, 2012, the Senate blocked an extension of the TAG program. Senate Majority Leader Harry Reid had attempted a vote on a bill extending the program for another two-year period. But Republicans filed a procedural motion, arguing that a finding by the Congressional Budget Office about TAG's potential costs suggests the legislation would violate constraints on spending for financial services legislation. Although 50 senators voted to waive the budget rules, a waiver required 60 votes. As a consequence, since January 1, 2013, FDIC insurance for noninterest-bearing transactions accounts will be limited to $250,000 per bank and account holder in accordance with FDIC rules.

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FMA Welcomes *More* New Members!

David Kuhr	Green Bar Consulting, Inc.
Peter LaVigne	Goodwin Procter LLP
Wayne Lee	Greenberg Traurig, PA
Jonathan McKernan	WilmerHale
Meredith MacVicar	FINRA
Karen Main	Federal Deposit Insurance Corporation
Peter Nickoloff	U.S. Department of the Treasury
Margaret Paradis	Morris, Manning & Martin LLP
Paul Patton	Debevoise & Plimpton LLP
David Porteous	Ulmer & Berne LLP
Grace Pyun	Federal Deposit Insurance Corporation

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The FDIC published a list of FAQs and the respective answers at ***http://www.fdic.gov/deposit/deposits/unlimited/expiration.html.***

CFTC AND DERIVATIVES

Summary

The final quarter of 2012 witnessed a torrent of regulatory activity relating to swaps particularly on the part of the CFTC, but also by the SEC and the Department of Treasury. December 31, 2012 represented the first effective registration date for swap dealers and major swap participants, as well as a registration date for many potential CPOs and CTAs. Facing this critical deadline, the CFTC finalized its long-awaited initial determination of swaps designated for mandatory clearing focusing on certain categories of interest rate and credit default swaps. For trades between regulated entities, the mandatory clearing requirement for these designated categories will commence in March 2013. In an effort to avoid potential chaos and market disruptions from the abrupt implementation of its Title VII regulatory regime, the CFTC issued dozens of no-action and interpretive letters providing various forms of temporary or permanent relief to swap dealers, MSPs, CPOs, CTAs, DCOs and market participants in general. In response to intense pressure from international regulators and global market participants, the CFTC finalized the exemptive order it had originally proposed in July 2012 to provide partial relief for certain compliance obligations faced by entities engaged in cross-border activities, as well as to modify and extend temporary no-action relief relating to the definition of U.S. persons to be used in determining the regulatory status of a market participant.

Among the many topics addressed by the CFTC in its no-action and interpretive letters are the following (and in many cases the relief granted is temporary):

- relief from CPO and CTA registration requirements for securitization vehicles, equity REITs, mortgage REITs, certain family offices, business development companies and certain funds of funds;
- relief from certain swap reporting and recordkeeping requirements, including reporting information for certain bespoke or customized trades, certain information relating to prime brokerage transactions, "combo" swaps, counterparty status, valuation data for certain cleared swaps, information from emerging market branches and certain other classes of information that present technological challenges, as well as delayed commencement of data repository reporting for certain new and legacy swaps;
- relief from requirements to maintain "identifiable and searchable" transaction records, record all pre-trade oral communications, and use UTC timestamps for certain pre-trade quotations;
- relief from complying with certain external business conduct standards and end-user verification requirements, including KYC, reasonable reliance and record retention requirements, confidentiality obligations, and risk and clearing disclosures;

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FMA Welcomes *More* New Members!

Lindsey Randall	Skadden, Arps, Slate, Meather & Flom LLP
Paul Saltzman	The Clearing House Association
Kimiaki Shinozaki	Bank of Japan
Frances Stadler	Investment Company Institute
Henry Stiles	Shutts & Bowen LLP
Dan Tannebaum	Booz Allen Hamilton
Taylor Tipton	Skadden, Arps, Slate, Meather & Flom LLP
Claudia Tobler	Paul, Weiss, Rifkind, Wharton & Garrison LLP
John Valentine	Valentine Law, LLC
Joe Vitale	Schulte Roth & Zabel LLP
Adam Weber	Northern Trust
Julius Williams III	Regions

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- relief relating to the clearing of certain inter-affiliate trades;
- relief from potential registration for certain domestic banking subsidiaries owned by foreign financial institutions;
- relief from compliance with portfolio reconciliation and trading documentation requirements;
- relief from certain large trader reporting requirements applicable to non-clearing members; and
- relief from certain dual registered derivative clearing organizations/clearing agencies.

One of the most significant actions taken by the CFTC very close to year-end was the finalization of its exemptive order that provides temporary relief for certain entities engaged in the cross-border derivatives market. In general, this order extended on a modified basis the no-action relief the CFTC had provided relating to the definition of U.S. person to be applied in determining regulatory status and, for those swap dealers and MSPs headquartered outside of the U.S., the order provided general relief relating to the compliance dates for many of the so-called "entity-level" requirements. Further action in this area is expected as the CFTC continues its discussions with the international regulatory community with the objective of finalizing definitive regulatory guidance for cross-border activities sometime in 2013.

Somewhat belatedly, the Department of Treasury issued its determination exempting certain "plain-vanilla" deliverable foreign exchange forwards and swaps from most of the Title VII regulatory requirements, other than swap data reporting and swap dealer/MSP business conduct requirements (see below).

For its part, the SEC finalized rules establishing procedures for designating security-based swaps for clearing as well as standards for clearing agencies and proposed rules providing for capital, margin and margin segregation for security-based swap dealers and major security-based swap participants. However, unlike the CFTC, the SEC continues to endeavor to finalize all of its Title VII rulemaking before requiring registration by security-based swap dealers or major security-based swap participants.

Treasury Exempts Foreign Exchange Swaps and Forwards from Dodd-Frank Act Swaps Regulation Requirements

At long last, the Secretary of the Treasury Department issued a formal determination ("Determination") exempting certain foreign exchange ("FX") swaps and forwards from regulation as "swaps" under the Commodity Exchange Act ("CEA"), as amended by Title VII of the Dodd-Frank Act. The Secretary's action was taken pursuant to Sections 721 and

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To save on printing/postage costs, FMA uses email "blasts" as much as possible to let our members and contacts know about our upcoming educational programs. FMA's email program format necessitates that these "blasts" be addressed "To: Dorcas Pearce/FMA" / "From: Dorcas Pearce/FMA" with the recipients in the "Bcc" section. Please make sure your technology department allows these e-mails, typically providing information on our annual **Compliance Seminar** and **Legal & Legislative Issues Conference**, to get through to you.

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722 of the Dodd-Frank Act, and became effective on November 20, 2012 upon its publication in the Federal Register.

Title VII of the Dodd-Frank Act created a comprehensive regime for the regulation of over-the-counter swaps, including registration, regulatory, central clearing, and trading requirements that the federal financial regulatory agencies have been implementing over the past two years. Section 721 of the Dodd-Frank Act amended the definition of "swap" to include FX swaps, forward, and futures contracts, but gave the Secretary the authority, by specific determination, to exempt FX swaps and forwards from the definition of "swap" under the CEA and thus exclude such instruments from swaps regulation under the CEA.

In substance, the Determination was based on the Secretary's conclusion that FX markets did not present the types of counterparty credit and market risks present in other swaps markets, and that the one type of risk associated with the FX markets, namely, settlement risk, was effectively mitigated through various measures, including the predominance of payment-versus-payment settlement arrangements, and the activities of the Continuous Linked Settlement system in the settlement of transactions in major currencies.

In addition, the Secretary was concerned about the implications of subjecting what is a very large market to the CEA's centralized clearing and trading requirements, including the creation of a central counterparty (CCP) that by all accounts would be an "instant" systemically significant financial market utility under Title VIII of the Dodd-Frank Act. As the Determination stated, "combining [the trading and clearing] functions in a market that involves settlement of the full principal amounts of the contracts would require massive capital backing in a very large number of currencies, representing a much greater commitment for a CCP in the FX swaps and forwards market than for any other type of derivatives market."

Subjecting FX swaps to mandatory clearing would have introduced new risks into a stable market that performed well during the recent crisis, with serious negative consequences for corporate and asset manager end-users who use foreign exchange hedges for international trade and investing and as a key element of their risk management programs.

The exclusion of FX swaps and forwards from regulation under the CEA is not absolute, in that the CFTC still retains the express statutory authority to apply business conduct standards to FX swaps and forwards, exercise its anti-evasion authority over these instruments, and require the reporting of FX swap and forward trade data to a swap data repository. And, last but not least, the Determination acts only to exclude FX swaps and forwards from regulation under the CEA; other FX instruments such as FX options, currency swaps and non-deliverable forwards continue to be included in the CEA definition of "swap" and therefore regulated under the CEA.

For more details please see Morrison & Foerster's news bulletin at ***http://www.mofo.com/files/Uploads/Images/121119-Treasury-Exempts-Foreign-Exchange-Swaps.pdf.***

The CFTC's No-Action Letter Relating to Eligible Contract Participants and Swap Guarantee Arrangements

In October 2012, the CFTC's Office of the General Counsel ("CFTC OGC") issued guidance (the "ECP Guidance") regarding the definition of "Eligible Contract Participant" ("ECP"). For swap dealers and others in the derivatives market, this is a key term because, under the Dodd-Frank Act, in order for a party to enter into a swap (other than on or subject to the rules of a designated contract market), such party must qualify as an ECP. The Dodd-Frank Act amended the ECP definition, contained in Section 1a(18) of the CEA; in a previous rulemaking, the CFTC had published rules further defining the term.

In the ECP Guidance, the CFTC OGC determined that (i) a non-ECP generally may not be jointly and severally liable for obligations under a swap; (ii) a guarantor of obligations under a swap must generally be an ECP; and (iii) cash proceeds from a loan may count as assets for purposes of determining whether an entity's "total assets" meet the $10 million threshold for such entity to constitute an ECP under CEA Section 1a(18)(A)(v)(I).

In addition, in the ECP Guidance, the CFTC OGC provided no-action relief with respect to (i) certain ECP guarantee arrangements relating to small businesses, (ii) so-called "anticipatory ECPs," which

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are entities anticipating the receipt of loan proceeds that will enable them to qualify as ECPs, and (iii) the nature of the "amounts invested on a discretionary basis" that an individual must have in order to qualify as an ECP under CEA Section 1a(18)(A)(xi).

Finally, the ECP Guidance provided temporary, transitional relief relating to certain situations in which a counterparty or a guarantor fails to qualify as an ECP. Until March 31, 2013, enforcement action will not be recommended with respect to situations in which a non-ECP guarantees obligations under a swap, assuming the directly liable swap counterparty, the obligations of which are guaranteed, is either an ECP or otherwise satisfies the terms for a no-action determination under the ECP Guidance. The ECP Guidance also gave temporary relief (now expired) with respect to certain situations in which a swap counterparty failed to qualify as an ECP.

For additional details, please see the Morrison & Foerster news bulletin at ***http://www.mofo.com/files/Uploads/Images/121018-CFTC-No-Action-Letter.pdf.***

The CFTC's Interpretive Letters Regarding Securitizations, REITs and the Definition of "Commodity Pool"

In two interpretive letters issued in October 2012, the CFTC's Division of Swap Dealers and Intermediary Oversight (the "CFTC DSDIO") gave guidance as to which securitization vehicles ("SV") and which equity real estate investment trusts ("equity REIT") may enter into swaps and yet fall outside of the definition of "commodity pool" under the CEA, as amended by the Dodd-Frank Act.

The possibility that equity REITs and SVs that enter into swaps might be characterized as commodity pools arises primarily because the Dodd-Frank Act amended the definition of "commodity pool" to include enterprises that are operated for the purpose of trading in swaps. Whether or not an enterprise may constitute a commodity pool by reason of its entering into derivatives may matter greatly to the enterprise and persons associated with it because, among other things, (i) commodity pools and the persons operating them are subject

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Directory Updates

The **2012 FMA Membership Directory** was emailed to all current members on October 22. See below for additional updates received since its distribution. If you are a current FMA member and did not receive (or perhaps misplaced?) the Directory, contact Dorcas Pearce at 202/544-6327 or *dp-fma@starpower.net*.

Job Change

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New Title

James Connors (CAMS)
Senior Audit Manager
Wells Fargo Audit Services

Address Change

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Menchel Consulting LLC
mm@menchelconsultingllc.com

New Phone Number

Alfred M. Pollard
General Counsel
Federal Housing Finance Agency
202/649-3050

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to regulation by the CFTC, including, without limitation, the requirement that such persons register as commodity pool operators and (ii) an entity that is not a commodity pool may, subject to certain requirements, avail itself of the end-user exception from the mandatory clearing of swap transactions; however, a commodity pool may not.

In its letter relating to securitization vehicles, the CFTC DSDIO rejected the premise that an entity could constitute a commodity pool only if its "principal purpose" is to trade in commodity interests. Rather, the CFTC DSDIO found, whether or not an entity constitutes a commodity pool depends on an evaluation of the relevant facts and circumstances in their entirety. (Our Morrison & Foerster news bulletin contains a more detailed discussion of the relevant facts and circumstances: *see link below*)

In its letter relating to equity REITs, the CFTC DSDIO determined that such a REIT may fall outside the definition of "commodity pool" if it (i) primarily derives its income from the ownership and management of real estate and uses derivatives for the limited purpose of mitigating exposure to interest rate or currency fluctuation risk, (ii) is operated so as to comply with all of the requirements of a REIT election under the Internal Revenue Code (including requirements as to the entity's income deriving primarily from qualifying real estate related sources and from passive income such as interest and dividends), and (iii) has identified itself as an equity REIT in its last U.S. income tax return and continues to qualify as such or, if the equity REIT has not yet filed its first tax filing with the Internal Revenue Service, it has stated its intention to do so and effectuates its stated intention.

For additional details, please see the Morrison & Foerster news bulletin at ***http://www.mofo.com/files/Uploads/Images/121031-CFTC.pdf.***

CONSUMER PROTECTION

Consumer Protection Update

After spending the summer and early fall issuing enforcement actions against several large credit card issuers, the CFPB has taken the past few months to expand its efforts to other financial services participants, most notably consumer reporting agencies and mortgage providers. The following is a brief summary of recent regulatory actions by the Bureau.

Final Mortgage Rules Released. On January 10, 2013, the CFPB released a final ability-to-repay rule for the mortgage market. The final rule sets forth standards for making an ability-to-repay determination and also defines "qualified mortgage." Specifically, when making an ability-to-repay determination, lenders will be required to consider eight underwriting factors: (1) current or reasonably expected income or assets; (2) current employment status; (3) the monthly payment on the covered transaction; (4) the monthly payment on any simultaneous loan; (5) the monthly payment for mortgage-related obligations; (6) current debt obligations, alimony, and child support; (7) the monthly debt-to-income ratio or residual income; and (8) credit history. Lenders must also use reasonably reliable third-party records to verify the information they use to evaluate the factors.

The rule also further defines "qualified mortgage." Pursuant to the rule, such mortgages cannot include negative amortization, interest-only payments, balloon payments, or terms exceeding 30 years. Additionally, "low-doc" or "no-doc" loans cannot be qualified mortgages; points and fees cannot exceed 3 percent of the total loan amount; and debt-to-income ratios must be less than or equal to 43 percent, or the loan must be eligible for purchase by Fannie Mae or Freddie Mac (as long as they remain in federal conservatorship), or VA, FHA or certain other federal housing agencies. The Ability-to-Repay Rule will take effect in January 2014. For additional information, see ***http://files.consumerfinance.gov/f/201301_cfpb_ability-to-repay-summary.pdf.***

CFPB to Examine CARD Act Impacts. On December 19, 2012, the CFPB announced it would formally request public comment regarding the impact of the CARD Act, as required by Section 502(a) of the CARD Act. In the announcement, CFPB Director Cordray explains "the Bureau is seeking to understand how the credit card market is working in practice and how the CARD Act changes have affected consumers and credit card issuers." The information collected will form the basis of a CFPB report to Congress, and will be used to "inform future policy decisions" by the CFPB.

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Comments will be due on February 19, 2013. For additional information, see ***http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-launches-public-inquiry-on-the-impact-of-the-card-act/.***

Proposal Would Allow Exemption from Disclosure Requirements for Consumer Testing. On December 13, 2012, the CFPB proposed a new policy that, if implemented, would allow individual companies to apply to the CFPB for specific exemptions from federal disclosure laws to allow those companies to test the effectiveness of new disclosures. In proposing its policy, the CFPB is exercising its authority pursuant to Section 1032(e) of the Dodd-Frank Act, which authorizes the CFPB to approve "trial disclosure programs." In order to take advantage of the exemption, the individual companies involved would be required to share the results of their disclosure testing with the CFPB. Comments are due February 15, 2013. For additional information, see ***http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-proposes-allowing-companies-to-run-trial-disclosure-programs/.***

CFPB Warns Specialty Nationwide CRAs of Noncompliance. On November 29, 2012, the CFPB announced it had sent warning letters to several nationwide specialty consumer reporting agencies ("CRAs"), notifying the CRAs that the CFPB believes that the CRAs are not complying with the Fair Credit Reporting Act ("FCRA") provisions designed to ensure easy consumer access to free annual credit reports and requiring a response within 30 days. The CFPB also issued a Bulletin on the same topic. The warning letters and Bulletin underscore the importance that the CFPB is placing on the FCRA's free credit report provisions.

Specifically, the warning letters cite several violations of the streamlined process requirement including: (i) failing to provide a toll-free number in its Yellow Pages listings and on its website so consumers may request a free annual file report, (ii) lacking "capacity" to accept consumer disclosure requests, and (iii) failing to provide "clear and easily understandable information and instructions to consumers."

The warning letters instruct the recipients to review their disclosures and informational listings to ensure compliance, and to contact the CFPB within 30 days to "advise [the CFPB] of the steps you have taken or will take to ensure compliance . . . or, if you believe these legal requirements do not apply . . . provide an explanation." In this respect, the warning letters depart from those issued by other law enforcement agencies, which typically instruct the recipient to review its policies or procedures, but do not require a response. By requiring companies to respond with a justification for their actions within 30 days, these warning letters more closely resemble a Civil Investigative Demand.

For more information, see ***http://www.mofo.com/files/Uploads/Images/121130-Nationwide-Specialty-CRAs.pdf.***

Proposal Seeks to Address Ability-to-Pay Concerns. On November 7, 2012, the CFPB published a proposed rule to amend the Regulation Z ability-to-pay requirements. The CFPB stated that it "believes that § 1026.51(a), as currently in effect, may unduly limit the ability of certain individuals who are 21 or older to obtain credit and is proposing amendments to Regulation Z that it believes are more consistent with the plain language and intent of the [CARD] Act." The CFPB proposed to alter the Board's extension of the independent ability-to-pay requirement to applicants age 21 or older by amending Section 1026.51(a) in two ways. First, the proposal would remove all references to the "independent" ability to pay, as that requirement currently applies to applicants who are 21 or older. Second, the proposal would amend Section 1026.51(a)(1)(ii) to allow credit card issuers to consider income and assets to which an applicant who is 21 or older has a "reasonable expectation of access." The CFPB also proposed to amend the Commentary to Regulation Z to provide that a credit card issuer may consider any income or assets to which an applicant has a reasonable expectation of access. The comment period closed on January 7, 2013. For more information, see ***http://www.mofo.com/files/Uploads/Images/121019-CFPB-Reg-Z.pdf.***

CFPB Releases Supervisory Highlights. On October 31, 2012, the CFPB released a report,

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entitled "Supervisory Highlights: Fall 2012," which contains an overview of the CFPB's supervisory and enforcement actions through September 30, 2012. The report underscores the CFPB's continued focus on governance and compliance issues, noting that several institutions exhibited weak or non-existent compliance management systems, including in the fair lending and credit reporting contexts. The report also illustrates the CFPB's continued focus on credit card issuers, citing multiple violations of the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("Card Act"). There were also several failures by institutions to institute proper controls over third-party service providers. For more information, see ***http://files.consumerfinance.gov/f/201210_cfpb_supervisory-highlights-fall-2012.pdf.***

Debt Collectors Now Supervised as Larger Participants. On October 24, 2012, the CFPB released examination procedures for larger participants in the debt collection market, which direct examiners to focus on disclosures, complaint resolution procedures and compliance with the Fair Credit Reporting Act, Gramm-Leach-Bliley Act, Electronic Fund Transfer Act, and Equal Credit Opportunity Act, in addition to the Fair Debt Collection Practices Act ("FDCPA").

Similar to its consumer reporting market larger participant rule, the CFPB asserted that it may examine any activity of a debt collector larger participant once that entity becomes subject to supervision by the CFPB. Examiners also are directed to review a debt collection firm's litigation activities, including whether litigation involves "unfair or unconscionable means," "false, deceptive or misleading representations" or "harassing, oppressive, or abusive conduct in violation of the FDCPA."

For additional information, see ***http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-to-oversee-debt-collectors/.*** ■

Larry Abrams, Matthew W. Janiga, David H. Kaufman, Anna Pinedo, James Schwartz and Dwight C. Smith contributed to this column.

Watch For

MSRB Notice 2013-02 (January 17, 2013) – The MSRB requested input from municipal securities market participants to guide the design of the next generation of electronic reporting and public dissemination of municipal securities trades. Comments should be submitted no later than March 15, 2013.

January 11, 2013 – FINRA published their eighth annual Regulatory and Examination Priorities Letter to highlight their key issues for 2013 – ***http://www.finra.org/Industry/Regulation/Guidance/CommunicationstoFirms/P197650.***

CFTC Press Release 6493-13 (January 11, 2013) – The CFTC extended (from January 14, 2013 to February 15, 2013) the public comment period on rulemaking enhancing protections afforded customers and customer funds held by future commission merchants and derivatives clearing organizations.

FINRA Regulatory Notice 13-03 (January 7, 2013) – FINRA provided guidance on new rules governing communications with the public which become effective February 4, 2013.

OCC Bulletin 2013-1 (January 4, 2013) – The OCC issued a final rule that extends from January 1, 2013 to July 1, 2013 the temporary exception for the application of its lending limits rule, 12 CFR 32, to certain credit exposures arising from derivative transactions and securities financing transactions.

FINRA Regulatory Notice 13-02 (January 4, 2013) – FINRA requested comment on a proposed rule to require disclosure of conflicts of interest relating to recruitment compensation practices. The comment period will expire March 5, 2013.

OCC News Release 2013-2 (January 3, 2013) – The OCC provided guidance regarding requests for a transition period pursuant to section 716(f) of the Dodd-Frank Act. Written requests for transition periods should be submitted to the OCC by January 31, 2013.

FINRA Regulatory Notice 13-01 (January 2, 2013) – FINRA issued a notice to help firms review, reconcile and respond to their Final Renewal Statements as well as view the reports that are currently available in Web CRD/IARD for the annual registration renewal process. The payment deadline is February 1, 2013.

CFTC Press Release 6489-13 (January 2, 2013) – The CFTC announced that real-time public reporting of swap transactions and swap dealer registration began on December 31, 2012.

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Watch For *(Continued from page 20)*

FINRA Regulatory Notice 12-58 (December 27, 2012) – The SEC issued no-action guidance expanding the definition of "ready market" for certain foreign equity securities.

SEC Press Release 2012-279 (December 26, 2012) – The SEC issued an Investor Bulletin to help investors better assess municipal bond credit risk.

MSRB Notice 2012-64 (December 24, 2012) – The SEC approved amendments to MSRB Rules G-32 and G-34 to streamline the process by which underwriters submit data in connection with primary offerings. The effective date for the amendments is May 6, 2013.

CFTC Press Release 6478-12 (December 21, 2012) – The CFTC approved an exemptive order providing time-limited relief from certain cross-border applications of the swaps provisions of the Dodd-Frank Act. The order expires July 12, 2013.

SEC Press Release 2012-277 (December 21, 2012) – The SEC approved new rules regarding lost holders of securities.

OCC Bulletin 2012-41 (December 20, 2012) – Final rule for Dodd-Frank Act Section 165(i) (stress tests).

FINRA Regulatory Notice 12-56 (December 20, 2012) – The SEC approved amendments to TRACE rules and dissemination protocols to disseminate specified pool transactions and SBA-backed ABS transactions and to reduce the time to report such transactions. The effective date is July 22, 2013.

CFTC Press Release 6470-12 (December 18, 2012) – The CFTC issued interim final rules regarding business conduct and documentation requirements for swap dealers and major swap participants.

MSRB Notice 2012-63 (December 18, 2012) – The MSRB requested comment on its regulation of the municipal securities market as it engages in a comprehensive review to ensure that its rules reflect current market practices. Comments should be submitted by February 19, 2013.

CFTC Press Release 6464-12 (December 17, 2012) – The CFTC approved a final rule on the adaptation of regulations to incorporate swaps – records of transactions.

MSRB Notice 2012-62 (December 17, 2012) – The MSRB reminded brokers, dealers, and municipal securities dealers of the December 22, 2012 effective date of new Rule G-43 (among others) and provided an interpretive notice concerning regulation of broker's brokers.

MSRB Notice 2012-61 (December 12, 2012) – The MSRB requested comment on a concept proposal to require underwriters to submit preliminary official statements to their Electronic Municipal Market Access (EMMA) system. Comments should be submitted no later than February 8, 2013.

MSRB Press Release (December 12, 2012) – The MSRB sought public comment on a proposal to improve investor access to preliminary official statements. Comments should be submitted no later than February 8, 2013.

FINRA Regulatory Notice 12-55 (December 10, 2012) – FINRA provided guidance on their Suitability Rule 2111.

CFTC Press Release 6439-12 (December 4, 2012) – Leaders issued a joint press statement on operating principles and areas of exploration in the regulation of the cross-border OTC derivatives market.

FINRA Regulatory Notice 12-52 (December 3, 2012) – The SEC approved the consolidated front running rule; effective June 1, 2013.

MSRB Notice 2012-60 (November 29, 2012) – The MSRB extended the implementation date of the inter-dealer regulatory dollar price reporting requirement. The new date is yet to be announced.

Joint Press Release (November 29, 2012) – FinCEN and the Federal Reserve Board sought comment on Bank Secrecy Act definitions. Comments are due by January 25, 2013.

CFTC Press Release 6429-12 (November 28, 2012) – The CFTC issued new rules to require certain credit default swaps and interest rate swaps to be cleared by registered derivatives clearing organizations. The rules establish the first clearing determination by the Commission under the Dodd-Frank Act.

CFTC Press Release 6428-12 (November 28, 2012) – CFTC staff withdrew parts of the "Frequently Asked Questions on Reporting of Cleared Swaps."

OCC Bulletin 2012-39 (November 26, 2012) – "Interagency Statement on Section 612 of the Dodd-Frank Act: Restrictions on Conversions of Troubled Banks" was issued.

MSRB Notice 2012-59 (November 23, 2012) – The MSRB requested further comment on a draft rule, G-45, requiring underwriters to submit 529 college savings plan information to the MSRB. Comments were due no later than December 21, 2012, not December 21, 2013 as was previously indicated

MSRB Press Release (November 21, 2012) – The MSRB announced the availability of MyEMMA, a free tool that provides customized access to municipal securities information on the EMMA website.

MSRB Notice 2012-58 (November 21, 2012) – The MSRB requested comment on exception provisions of a draft rule amendment to Rule G-11 to limit dealer consents to changes in authorizing documents for municipal securities. Comments were due by December 21, 2012.

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Watch For *(Continued from page 21)*

MSRB Notice 2012-57 (November 16, 2012) – The MSRB revised the Series 53 study outline. Series 53 examinations based on the revised study outline commenced on December 22, 2012.

November 15, 2012 – The OCC, FDIC and Federal Reserve Board released interim guidance on large bank stress testing scenarios.

CFTC Press Release 6412-12 (November 14, 2012) – The CFTC issued for public comment a proposed CFTC Swaps Report that, when the proposal is finalized, will give the public a view into the previously dark swaps market.

CFTC Press Release 6410-12 (November 14, 2012) – The CFTC sought public comment on a request from ICE Clear Europe Limited for an order permitting portfolio margining of swaps and security-based swaps in a customer account. Comments were due on or before December 14, 2012.

Federal Reserve Press Release (November 9, 2012) – The Federal Reserve Board launched the 2013 capital planning and stress testing program.

MSRB Press Release (November 9, 2012) – The MSRB enhanced price transparency for large trades.

Joint Press Release (November 9, 2012) – The U.S. federal banking agencies provided guidance on regulatory capital rulemakings and suggested an effective date of January 1, 2013.

FINRA Regulatory Notice 12-51 (November 2, 2012) – FINRA changed the effective date of the minimum quotation size pilot for OTC equity securities in FINRA Rule 6433 from November 5, 2012 to November 12, 2012.

FINRA Regulatory Notice 12-50 (November 2, 2012) – The SEC approved amendments relating to stop orders, effective January 21, 2013.

FINRA Regulatory Notice 12-49 (November 1, 2012) – The SEC approved amendments to NASD Rule 2711 and incorporated NYSE Rule 472 to conform to JOBS Act Requirements; effective April 5, 2012 and October 11, 2012.

FINRA Regulatory Notice 12-48 (November 1, 2012) – FINRA changed the effective date for amendments to TRACE rules relating to the reporting and dissemination of agency pass-through mortgage-backed securities traded to be announced and related TRACE fees in FINRA Rule 7730 from November 5, 2012 to November 12, 2012.

OCC Bulletin 2012-35 (October 31, 2012) – The OCC proposed to amend its retail foreign exchange rule for transactions with collective investment funds and insurance company separate accounts.

FINRA Regulatory Notice 12-47 (October 31, 2012) – FINRA and ISG extended the effective date for certain Electronic Blue Sheet data elements to May 1, 2013.

Federal Reserve Press Release (October 26, 2012) – The Federal Reserve Board announced a five month delay in the implementation of the second phase of its program to simplify the administration of reserve requirements. The new effective date is June 27, 2013.

FINRA Regulatory Notice 12-44 (October 26, 2012) – The SEC approved amendments to FINRA Rule 4210 (Margin Requirements); effective October 26, 2012 and January 23, 2013.

MSRB Notice 2012-54 (October 25, 2012) – The MSRB reminded brokers, dealers, and municipal securities dealers of the November 1, 2012 effective date of amendments to MSRB Rule G-34 concerning the use of the term "not reoffered" for new issues of municipal securities.

MSRB Notice 2012-53 (October 25, 2012) – The SEC approved enhancement to large trade price transparency.

CFTC Press Release 6396-12 (October 23, 2012) – The CFTC sought public comment on proposed new regulations and to amend existing regulations to enhance protections for customers and customer funds held by futures commission merchants and derivatives clearing organizations.

MSRB Notice 2012-52 (October 23, 2012) – The MSRB filed amendments with the SEC to streamline new issue information submission requirements under MSRB Rules G-32 and G-34.

SEC Press Release 2012-215 (October 22, 2012) – The SEC adopted standards for risk management and operations of clearing agencies.

FINRA Regulatory Notice 12-43 (October 19, 2012) – The Securities Industry/Regulatory Council on Continuing Education released its Fall 2012 Firm Element Advisory. The updated FEA is available at: ***www.cecouncil.com/Documents/FEA_Semi_Annual_ Update.pdf.***

SEC Press Release 2012-210 (October 17, 2012) – The SEC proposed rules for security-based swap dealers and major security-based swap participants.

CFTC Press Release 6391-12 (October 16, 2012) – The CFTC issued a final rule amending existing commission regulations to incorporate swaps.

CFTC Press Release 6387-12 (October 12, 2012) – The CFTC's Division of Swap Dealer and Intermediary Oversight issued an interpretive letter regarding the scope of the bona fide hedging exemption for registered investment companies.

CFTC Press Release 6383-12 (October 11, 2012) – The CFTC's Division of Swap Dealer and Intermediary Oversight issued interpretive guidance to equity REITs and certain securitization funds.

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Watch For *(Continued from page 22)*

FINRA Regulatory Notice 12-42 (October 11, 2012) – FINRA requested comment on a revised proposal to identify and manage conflicts involving the preparation and distribution of debt research reports. The comment period ended December 20, 2012.

OCC Bulletin 2012-31 (October 10, 2012) – The OCC published a final rule that revises the requirements imposed on U.S. banks and federal branches of foreign banks pursuant to 12 CFR 9.18(b)(4)(ii)(B), the short-term investment fund (STIF) rule. The effective date of the final rule is July 1, 2013.

FDIC Press Release (October 9, 2012) – The FDIC approved final rules regarding large bank stress tests and large bank assessment pricing and also released an update on the DIF projections.

CFTC Press Release 6377-12 (October 4, 2012) – The CFTC's Division of Swap Dealer and Intermediary Oversight provided guidance on segregated and secured funds maintained in a combined omnibus account.

MSRB Notice 2012-50 (October 2, 2012) – The MSRB requested comment on revised draft rule amendments and a revised draft interpretive notice on retail order periods. Comments were due by November 2, 2012.

SEC Press Release 2012-200 (September 27, 2012) – The SEC issued a staff report on brokerage firms' handling of confidential information.

CFTC Press Release 6366-12 (September 26, 2012) – The CFTC's Division of Clearing and Risk issued an extension of time for compliance from certain pre-trade screening requirements. This extension is intended to provide sufficient time to transition to fully compliant pre-trade screening no later than June 1, 2013.

MSRB Notice 2012-48 (September 24, 2012) – The SEC approved amendments to MSRB Rule G-34 relating to the use of the term "not reoffered" for new issues of municipal securities.

Joint Press Release (September 24, 2012) – The federal banking agencies released a regulatory capital estimation tool to assist in assessing the potential effects of recently proposed regulatory capital rules.

Available Publications

January 15, 2013 – Newly updated GASB 2012-2013 Annual Bound Editions – *Codification, Original Pronouncements, and Comprehensive Implementation Guide* equip preparers, auditors, and financial statement analysts with resources needed to stay abreast of the evolving governmental accounting environment. They are available for purchase at ***www.gasb.org/store***.

January 8, 2013 – The MSRB published its *2012 Annual Report* which highlights the organization's activities and provides financial highlights for the fiscal year that ended September 30, 2012.

December 21, 2012 – FDIC's Compliance Examination Manual updates. Several sections were updated to incorporate citations to consumer protection regulations reissued by the Consumer Financial Protection Bureau.

SEC Press Release 2012-225 (November 14, 2012) – The SEC and Department of Justice released "A Resource Guide to the U.S. Foreign Corrupt Practices Act." The guide is available online at: ***www.sec.gov/spotlight/fcpa.shtml or www.justice.gov/criminal/fraud/fcpa.***

OCC Bulletin 2012-34 (October 31, 2012) – The FFIEC issued a revised "Supervision of Technology Service Providers" booklet and the Federal Reserve Board, OCC and FDIC issued new "Administrative Guidelines – Implementation of Interagency Programs for the Supervision of Technology Service Providers." ■

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Announcement from Morrison & Foerster LLP

Haven't been able to keep track of all of the CFPB's activities? We have a solution for you. The folks who brought you FrankNDodd proudly introduce BureauTrak. BureauTrak is a new module dedicated entirely to the CFPB. BureauTrak monitors every CFPB rulemaking, report, and enforcement action, as well as news concerning the CFPB. Access to BureauTrak is available through our FrankNDodd platform. If you have a password for FrankNDodd, you already have access to BureauTrak. If you need to obtain a password, please send an email naming your contact at Morrison & Foerster, or, alternatively, explaining how you heard about BureauTrak to ***subscribe@frankndodd.com***.

Program Update

2013 Securities Compliance Seminar

Registrations are now being accepted for FMA's 22nd Securities Compliance Seminar taking place April 24–26, 2013 at the B Ocean Hotel in Fort Lauderdale, Florida. This annual program is a three-day educational and networking experience for securities compliance professionals, internal auditors, risk managers, attorneys and regulators. And, CPE and CLE accreditation will be available.

The Program Planning Committee has been hard at work developing varied agenda topics and confirming noted industry leaders and regulators as speakers. Members include: **Michelle Dávila** *(Franklin Templeton Investments)*; **Ann DiGiorgio** *(UnionBanc Investment Services LLC)*; **Lauren Epstein** *(Renaissance Regulatory Services, Inc.)*; **Richard Kerr** *(Goodwin Procter LLP); and* **Mike Poell** *(U.S. Bank)*.

A complete brochure will be emailed next week and will then also be available on the FMA website – ***www.fmaweb.org.*** Currently, the working agenda includes these general sessions, concurrent workshops and confirmed speakers:

Key 2013 Legislative and Regulatory Initiatives
- Russell Bruemmer ■ WilmerHale
- Kevin Fein ■ TD Bank, NA
- Richard Pearson ■ Balch & Bingham LLP

Dodd-Frank Act Update
- Preetha Gist ■ Chapman and Cutler LLP
- Thomas Kicak ■ SunTrust Robinson Humphrey
- Jeremy Newell ■ WilmerHale LLP

Internal Auditor Hot Topics
- James Connors ■ Wells Fargo Audit Services
- Louis Dempsey ■ Renaissance Regulatory Services Inc. *(Invited)*

AML/OFAC/FCPA Updates
- Barbara Alonso ■ Greenberg Traurig, PA
- Paul Patton ■ Debevoise & Plimpton LLP
- Daniel Tannebaum ■ Booz Allen Hamilton

Regulatory Forum
- Jametriss Roulhac Boone ■ Florida Office of Financial Regulation
- Jeri Dresner ■ SEC
- Martin Pfinsgraff ■ OCC *(Invited)*
- Brandon Reddington ■ OFAC *(Invited)*
- Lisa Stepuszek ■ FINRA

Municipal Bond Rules Update
- Cynthia Friedlander ■ FINRA

Volcker Rule Developments
- David Block ■ Union Bank, NA
- Donald Lamson ■ Shearman & Sterling LLP

Workshop: Electronic Trading Platform Compliance
- Steven Greenbaum ■ Trade Station Securities, Inc.

Workshop: FINRA Suitability Rule
- Peter LaVigne ■ Goodwin Procter LLP

Workshop: Retail Compliance
- Christine Kaufman ■ Impact Consultants, Inc.

Workshop: Institutional Compliance
- Matthew Hardin ■ Hardin Compliance Consulting
- James Rabenstine ■ Nationwide Financial Services

Communicating with the Public/ Social Media
- Sarah Carter ■ Actiance, Inc.
- Margaret Paradis ■ Morris, Manning & Martin LLP
- Henry Stiles ■ Shutts & Bowen LLP

Litigation—The Good, the Bad, and the Ugly—What You Need to Know
- David Chase ■ The Law Firm of David R. Chase, PA
- Wes Holston ■ Bressler, Amery & Ross, PC
- David Porteous ■ Ulmer & Berne LLP

Risk 2013 & Beyond—What You Must Know
- Mitchell Avnet ■ Compliance Risk Concepts
- Mark Knoll ■ Bressler, Amery & Ross, PA

In addition, peer group discussions (lead by facilitators) will take place on Wednesday and Thursday afternoon. Possible topics include: *AML/OFAC/FCPA; Ask the Regulators; Broker-Dealer Compliance Hot Topics; Business Continuity;*

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Program Update *(continued from page 24)*

Communicating with the Public/Social Media; Compliance & Technology; Conflicts of Interest/Insider Trading; Current Investment Adviser Issues; Customer Due Diligence; Dodd-Frank Act; Internal Audit Hot Topics; Legislative & Regulatory Initiatives; Litigation; Municipal Advisors; Municipal Bond Rules; Protection of Customer Information; Risk 2013 & Beyond; Surviving a Regulatory Exam; and Volcker Rule Developments. If you would like to facilitate one of these discussions, or if you have additional topical suggestions, please contact FMA (see below).

Register today for this important spring conference – CPE / CLE accreditation and team discounts will be available. Contact Dorcas Pearce at ***dp-fma@starpower.net*** or 202/544-6327 with questions and/or to register. Online registration is also available at ***www.fmaweb.org.***

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!

2012 Legal & Legislative Conference

FMA's 21st **Legal & Legislative Conference** took place **October 25 – 26** at the Sheraton Four Points 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. The two-day program provided participants with an opportunity to share information on current legal and regulatory developments as well as network with peers. And, **attendees were eligible for CLE and CPE accreditation.**

Congratulations to the Program Planning Committee for developing a timely agenda that included noted industry leaders and senior regulatory officials. Members included: **Russell Bruemmer** *(WilmerHale)*; **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, which focused on current areas of regulatory and Congressional activity/scrutiny, included these sessions and speakers:

General Counsels

- Scott Alvarez ■ FRB
- Dan Berkovitz ■ CFTC
- David Blass ■ 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

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Program Update *(continued from page 25)*

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

- Stephen Cohen ■ Enforcement
- James Daly ■ Corporation Finance
- Hunter Jones ■ Investment Management
- George Kramer ■ Office of Compliance Inspections and Examinations
- 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
- Angela Moudy ■ SEC
- Jeremy Newell ■ FRB
- Curtis Tao ■ Citigroup Inc.

Thanks to all the committee members, speakers and attendees for their participation at this annual fall conference.

FMA gratefully acknowledges these sponsors of FMA's 2012 Legal and Legislative Issues Conference:

PROMONTORY

Sara A. Kelsey Law, PLLC
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SHEARMAN & STERLING LLP

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Who's News

Mitch Avnet, formerly SVP & Chief Ethics and Compliance Officer at Lincoln Financial Group, has founded Compliance Risk Concepts (CRC), located in New York City. In his role as Managing Partner, he is responsible for business development, relationship management and overseeing the execution of all Compliance, Ethics and Operational Risk Management strategic engagements.

Congratulations to **Michael** and **Stephanie Aktipis** on the birth of their son, Theodore William, born October 14, 2012.

Geoffrey Aronow, formerly a Partner in the Washington, DC office of Bingham McCutchen LLP, has been appointed General Counsel of the U.S. Securities and Exchange Commission.

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Who's News *(Continued from Page 26)*

Xiomara Corral, formerly Senior Counsel at RBS Citizens, NA, has joined BNY Mellon's Legal Dept as Managing Counsel and Managing Director in their New York office.

John Douglas, head of the bank regulatory practice at Davis Polk, is taking a sabbatical to direct his church's operations in the northern half of the Dominican Republic.

Michael Dube, formerly Counsel at WilmerHale LLP, has joined Choate, Hall & Stewart LLP as a Partner in their Securities Litigation and Major Commercial Litigation groups.

David Felt, former Deputy General Counsel of the Federal Housing Finance Agency and Acting General Counsel of the Office of Federal Housing Enterprise Oversight, has left his solo practice to join the DC office of Arnall Golden Gregory LLP as Of Counsel in the Government and Regulatory Affairs, where he will specialize in banking and housing and consumer finance regulatory matters and related litigation.

Judy Foster, Risk Specialist/Capital and Market Risk at the OCC, will retire January 31 after 11 years of service. Enjoy your retirement, Judy!

James H. Freis, Jr., formerly the Director of FinCEN, U.S. Treasury Department, has joined Cleary Gottlieb Steen & Hamilton LLP as Counsel in their Washington, DC office.

Cynthia Friedlander has been promoted to Director of Fixed Income Regulation at FINRA.

Amy Friend, a Managing Director at Promontory Financial Group, has been named General Counsel at the Office of the Comptroller of the Currency.

Steve Heineman, formerly General Counsel–Americas at Societe Generale, has been appointed General Counsel at ConvergEx.

Mark Jain has been promoted to Partner/Advisory Services in the San Francisco office of Ernst & Young LLP.

Stephen Luparello, formerly Vice Chairman at FINRA, has joined WilmerHale LLP in Washington, DC.

Jeremy Newell, formerly a counsel and regulatory policy advisor to the Board of Governors of the Federal Reserve System, has joined WilmerHale LLP's Washington office as Counsel.

Mac Northam, Director of Fixed Income Securities at FINRA for the last 15 years, retired December 31, 2012. He intends to remain an active participant in the fixed income underwriting, sales and transparency process through a program of education and consultative compliance. He can be reached at ***malcolmnortham@TheBondMan-USA.com.***

Selwyn Notelovitz, formerly CCO at Wellington Management Company, has joined Dimensional Fund Advisors in Austin, Texas as Deputy Chief Compliance Officer and VP of Compliance.

Bill Reilly, former Chief of Florida's Bureau of Securities Regulation, has joined the compliance and regulatory consulting practice of Virginia-based Oyster Consulting as Associate Director.

Ann Robinson, formerly First Vice President/ Compliance at Morgan Keegan & Company, Inc., has joined RegEd as Senior Project Manager in their Morrisville, NC office.

Bala Subramaniam, formerly Vice President, Corporate Audit at Fidelity Investments,India has joined Goldman Sachs & Co. as Vice President-Internal Audit, India.

Elisse Walter has been named Chairwoman of the U.S. Securities and Exchange Commission, succeeding Mary Shapiro.

Julie Williams, formerly First Senior Deputy Comptroller & Chief Counsel at the Office of the Comptroller of the Currency, has joined Promontory Financial Group where she will be a managing director of the firm and director of their domestic advisory practice.