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MARKET SOLUTIONS

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MARKET SOLUTIONS

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FINANCIAL MARKETS ASSOCIATION

Federal Preemption After Dodd-Frank: A Precarious Rebalancing Act

By Timothy E. Keehan

Introduction

With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act in July 2010, Congress embarked on a bold initiative to alter the financial services regulatory landscape. A major component of this landmark legislation is the Act's ambitious overhaul of the laws governing the federal preemption of state laws that regulate consumer financial transactions. Under Dodd-Frank, preemption will no longer be driven by federal banking agency staff interpretations and rulemaking; instead, an assortment of federal and state regulators, including newly created federal agencies, will play an active role in determining whether, and the extent to which, federal law will preempt state consumer financial laws. This rebalancing of federal-state authority, and the jockeying it will surely engender among the regulators, will play a crucial role in shaping how state consumer financial laws will impact the businesses of national banks and federal savings associations.

> *"Dodd-Frank is not clear on the precise reach of its provisions governing federal preemption. Interpretations of key terms governing the scope of preemption are thus left to the potentially fractious and grudging give-and-take of the federal and state regulators."*

Prior to Dodd-Frank, federal preemption was driven largely by the pro-active stance of the Office of the Comptroller of the Currency, the chief regulator of national banks, and the Office of Thrift Supervision, the chief regulator of federal savings associations. Both agencies employed broad staff interpretations and rulemaking to enlarge the authority of federal law over state law, primarily in the areas governing consumer deposit and loan products. The OCC, for example, took the position that state laws that "*obstruct, impair, or condition*" a national bank's ability to fully exercise its federally authorized powers were preempted.[1] The OCC went further by concluding that operating subsidiaries of national banks, even though they are nonbank state-chartered entities, also could rely on OCC federal preemption determinations.[2] Judicial decisions on preemption, notably U.S. Supreme Court decisions such as *Barnett Bank of Marion County, N.A. v. Nelson*, generally affirmed the OCC's authority to apply federal preemption principles to state laws that were deemed to

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Legislative/Regulatory Actions

This column was written by lawyers from Morrison & Foerster LLP to update 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 developments relating to the **Dodd-Frank Act**, **Capital**, **SEC Actions**, **AML/OFAC**, and **Consumer Credit**.

DODD-FRANK ACT

Derivatives

The CFTC and the SEC have been working actively on the rulemakings required to be undertaken by the agencies in connection with Title VII of the Dodd-Frank Act. Each of the CFTC and the SEC maintains websites that provide timely updates on the status of current rulemakings (see ***http://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/index.htm*** and ***http://www.sec.gov/spotlight/dodd-frank/accomplishments.shtml***). The following section provides only the briefest of highlights regarding the proposed rules that have been released by the agencies. A more detailed discussion of these proposed rules also can be found at ***http://www.mofo.com/files/Uploads/Images/DerivativesChart100630.pdf***. **While the comment period for some proposed rules has already closed, many comment periods end late January/early February 2011.**

The proposed rules address the following areas: conflicts of interest for contract markets, swap execution facilities, and clearing organizations; financial integrity of clearing organizations; anti-fraud and market manipulation measures; process for identifying swaps for mandatory clearing; treatment of collateral for cleared and non-cleared swaps; registration requirements and procedures for certain market participants; recordkeeping and data reporting requirements; duties and ongoing compliance requirements; and finally, key definitions, such as swap dealer and major swap participant. Below are some selected highlights from these proposed rules.

Conflict of Interest: Both the CFTC and the SEC have proposed new rules intended to address potential conflicts of interest. The CFTC proposed limits on ownership interests and on voting control for derivatives clearing organizations, designated contract markets, and swap execution facilities. The SEC proposed rules (Regulation MC) take a similar approach with regard to security-based swap clearing agencies, security-based execution facilities, and similar entities. Both the CFTC and the SEC have published proposed rules to prohibit fraud, manipulation, and deception in connection with swaps. The proposed SEC rule would make market conduct in connection with the offer, purchase, or sale of any swap subject to the general antifraud provisions applicable to all securities in the case of security-based swaps. The CFTC proposed rule is modeled on SEC Rule 10b-5 and is intended to serve as a catch-all provision prohibiting fraud in all of its forms. The rules would also apply to misconduct occurring after the purchase of a security-based swap, but before its termination or sale, which affects the value of ongoing payments

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"prevent or significantly interfere" with national bank operations.[3] By continuing to apply the "deference" standard accorded to agency decisions, the courts consistently upheld the OCC's expansive position on federal preemption.[4]

A Revamped Regulatory Apparatus

Dodd-Frank has greatly altered the doctrine of federal preemption as applied to consumer financial transactions. Not only has the OCC's authority to define the parameters of federal preemption been circumscribed; federal preemption will now be subject to substantive input and review by the following additional players: (1) a newly created federal regulator – the Consumer Financial Protection Bureau; (2) the states (banking agencies, Attorneys General, and perhaps other key state players); and (3) the courts. Moreover, Dodd-Frank is not clear on the precise reach of its provisions governing federal preemption. Interpretations of key terms governing the scope of preemption are thus left to the potentially fractious and grudging give-and-take of the federal and state regulators. No one can be certain how oversight by multiple regulatory bodies will play out for national banks and federal thrifts.

"Interestingly, a concerted effort among the states, combined with a pro-consumer CFPB favorably disposed to adopting state-proposed rules or amendments, raises the intriguing possibility of a state-friendly federal regulatory scheme going forward."

CFPB: The New Bureau on the Block

Dodd-Frank's creation of the CFPB inexorably changes the complexion of federal preemption. As the federal consumer watchdog agency, the CFPB is charged with regulating the provision of consumer financial products and services under the federal consumer protection laws. While not directly supervising banks, the Bureau may adopt regulations and issue orders and guidance with respect to consumer financial laws applicable to banks and other providers of consumer financial products and services. Although housed within the Federal Reserve, the CFPB, as an independent bureau, is not subject to Federal Reserve jurisdiction, oversight, or review.[5] Bureau interpretations of the federal consumer financial laws and regulations, moreover, are entitled to judicial deference.

States: Increased Enforcement Powers and Rulemaking Authority

In addition to establishing the CFPB, Dodd-Frank empowers the states to apply non-preempted state laws to national banks and federal thrifts. Sections 1041 and 1042 of Dodd-Frank provide that:

- A state Attorney General can bring a civil action under state law against national banks/federal thrifts to enforce the CFPB's rules, thus expanding the Supreme Court's ruling in *Cuomo v. Clearing House Association, L.L.C.*, which authorized state law enforcement authorities to sue national banks under non-preempted state law.[6]
- A state Attorney General or state banking agency can bring an action to enforce *both* Dodd-Frank's provisions and CFPB rules against operating subsidiaries of national banks as well as other nonbank covered institutions.
- In an unusual legislative move to circumscribe federal preemption, a majority of states may require the CFPB "by resolution" to propose new or amended federal consumer financial regulations, which after consideration, the CFPB may adopt.

The states thus have increased leverage to enforce state consumer financial laws and directly influence the federal rulemaking process. Interestingly, a concerted effort among the states, combined with a pro-consumer CFPB favorably disposed to adopting state-proposed rules or amendments, raises the intriguing possibility of a *state*-friendly federal regulatory scheme going forward.

OCC: Diminished Authority and a Plodding Preemption Process

In creating the CFPB, Congress has (i) stripped the OCC of its authority to administer and enforce consumer laws that apply to national banks; and (ii) substantially reduced the OCC's interpretive and rulemaking authority on federal preemption. Although national banks retain some preemption protection (such as their ability to export interest rates and preserve existing contracts that rely on prior federal

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preemption determinations), a national bank's operating subsidiaries can no longer take refuge under the federal preemption umbrella, as they are now subject to state consumer financial laws to the same extent as other state entities.[7]

Furthermore, the federal preemption process itself has been tightened in several respects:

- Under Dodd-Frank, state consumer financial laws are preempted only in three circumstances: (1) the state law would have a discriminatory effect on national banks and federal thrifts when compared to its effect on state banks; (2) the law "prevents or significantly interferes" with the ability of national banks/federal thrifts to exercise their banking powers as set forth in the *Barnett Bank* decision; and (3) the state law is preempted by another federal law. The focus for virtually all preemption rulings will be on the application of the *Barnett Bank* standard in place of the OCC's more flexible standard of state laws that "obstruct, impair, or condition" a national bank's business.
- OCC preemption determinations must now be made by the Comptroller directly rather than by staff interpretation or rulemaking.[8] Moreover, Comptroller determinations on state law preemption must: (i) be made on a case-by-case basis rather than by wholesale reference to categories of state laws regulating a particular activity; (ii) be supported by "substantial evidence" made on the record which support specific findings; and (iii) be periodically reviewed, with the results of such reviews reported to Congress.

This protracted review and decision-making process is likely to significantly inhibit the OCC's ability to preempt conflicting state law.

Courts: Determining Federal Preemption's Reach

Finally, judicial review provisions of Dodd-Frank further tilt the balance against federal preemption. In contrast to the judicial deference accorded to CFPB interpretations, Dodd-Frank requires the courts to examine an OCC federal preemption determination based on how well supported and reasoned the Comptroller's ruling is, and whether the ruling is consistent with prior valid OCC preemption determinations. This more rigorous form of scrutiny may slow the judicial preemption process to a crawl. The ability of each of the 50 states to bring actions under Dodd-Frank, furthermore, might lead to forum-shopping and a patchwork quilt of divergent judicial rulings on the meaning and reach of the federal consumer financial regulations.

"Dodd-Frank requires the courts to examine an OCC federal preemption determination on how well supported and reasoned the Comptroller's ruling is and whether the ruling is consistent with prior valid OCC preemption determinations. This more rigorous form of scrutiny may slow the judicial preemption process to a crawl."

Flashpoints for Testing the Rebalanced Preemption Scheme

Dodd-Frank leaves open a host of questions impacting a rebalanced regulatory scheme. Among the issues raised:

- **CFPB's interpretation of "state consumer financial law."** Preemption under Dodd-Frank applies exclusively to "state consumer financial laws." This term, however, is defined only in general terms, as any state law that regulates "the manner, content, or terms and conditions of any financial transaction . . . or any account thereto, with respect to a consumer."[9] Will the CFPB interpret the term to include state "mini-FTC" statutes, or state laws that regulate bank advertising or referral fee arrangements? How the CFPB fleshes out this critical term will determine the scope of federal preemption.
- **State activism in enforcing/influencing CFPB regulations.** How active will the states be in enforcing their own laws and CFPB regulations against national banks/federal thrifts? Will the states collectively establish a coordinated mechanism to regularly "convert" state consumer laws to CFPB regulations applicable to national banks/federal thrifts? Will states be able to bring actions based on their own interpretation of CFPB regulations?
- **OCC strategy and focus.** Given the new limitations on its authority and review, on which national bank activities will the OCC choose to concentrate

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its federal preemption efforts? How far will the OCC construe the *Barnett* standard? Will it continue to routinely preempt state laws falling outside the definition of "state consumer financial law"?

- **Multiple consultation requirements.** Dodd-Frank requires the regulators to consult with one another at multiple stages of the rulemaking and judicial process.[10] Will these consultations lead to a negotiated regulatory "middle ground"? Is this even possible?

Regulatory Cooperation the Key

Has Dodd-Frank's balancing act consigned federal preemption to regulatory uncertainty and tumult? Not necessarily, but the CFPB, the states, and the OCC will need to make a conscious effort at ongoing communication and coordination to hammer out a regulatory consensus on federal preemption's proper role. Specifically, state and federal regulators together must ensure that national banks and federal thrifts can conduct their regional and nationwide operations with minimal adverse impact on their respective businesses while upholding financial laws that will advance and preserve consumer protection. Subsequent regulatory actions should readily indicate whether these seemingly disparate goals can be realistically achieved. ■

[1]See 12 C.F.R. § 7.4009(b) (2010).

[2]See 12 C.F.R. § 7.4006.

[3]517 U.S. 25 (1996).

[4]A notable exception was the Supreme Court's decision in *Cuomo v. Clearing House Association, L.L.C.*, infra, where the Court held that the state Attorneys General could sue national banks for violating state laws, notwithstanding the OCC's position that the federal "visitorial" statute precluded a state from enforcing its own laws against national banks.

[5]The CFPB, however, is subject to the supervision of the Financial Stability Oversight Council ("FSOC"), which among other things may review, stay, and set aside CFPB regulations. See Dodd-Frank § 1023.

[6]129 S. Ct. 2710 (2009).

[7] Dodd-Frank § 1044(e).

[8]Dodd-Frank does not address the legislation's impact on current OCC regulations on federal preemption. Presumably, the OCC will need to undertake a review of its regulations to determine whether to repeal its regulations altogether or engage in new rulemaking that would substantially modify its preemption regulations.

[9] Dodd-Frank § 1044(a) (2).

[10] For example: (i) the OCC is required to consult with the CFPB in connection with the OCC's case-by-case preemption determinations; and (ii) state Attorneys General must consult with the CFPB and the OCC prior to initiating an enforcement action against a national bank. See Dodd-Frank § 1044(b)(3)(B), § 1042(b),

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and deliveries under the swap. Prohibited misconduct could occur in connection with the swap itself or the reference obligation underlying the swap. The CFTC published a notice of proposed rulemaking to implement new Section 23 of the Commodities Exchange Act requiring the CFTC to reward whistleblowers who voluntarily provide original information to the CFTC that leads to successful enforcement of a CFTC action resulting in sanctions exceeding $1 million. The statute also prohibits a whistleblower's employer from retaliating against a whistleblower by affecting any terms and conditions of employment as a result of the original information provided by the whistleblower to the CFTC.

Financial Integrity: Given the importance placed by the Dodd-Frank Act on clearing entities, the agencies also have focused on regulations that will ensure that clearing organizations have adequate financial resources. Both agencies adopted interim final rules for the reporting of pre-enactment swaps. The rules are substantially similar and require that counterparties retain the following information to facilitate reporting once the data repositories have been established: information necessary to identify and value the transaction; the date and time of execution of the transaction; information related to the price of the transaction; information as to whether the transaction was accepted for clearing and, if so, the identity of the clearing organization; any modifications to the terms of the transaction; and the final confirmation of the transaction. Along similar lines the agencies also have proposed a series of risk management rules for swap dealers and major swap participants, as well as rules intended to prevent bias in, or interference with, the provision of clearing activities, including restriction and disclosure requirements related to research reports produced or provided by swap dealers, major swap participants, futures commissions merchants, and introducing brokers.

Mandatory Clearing: The CFTC has proposed rules relating to the implementation of swap clearing and setting forth the approach by which a clearing organization will propose to accept swaps for clearing and the CFTC will assess the eligibility and qualifications of the clearing organization to clear the proposed category of swaps. The CFTC and the SEC also published proposed rules requiring real time public reporting of swap data in an effort to increase transparency. Under the SEC proposed rules (Regulation SBSR), parties to a security-based swap (SBS) transaction must report specified information about each transaction to a registered data repository or to the SEC. The repository would then disseminate certain information to the public, such as volume and pricing information in a timely fashion. Regulation SBSR also requires data repositories to provide the SEC with access to the SBS data; register with the SEC as securities information processors; and establish and maintain policies and procedures regarding the reporting and dissemination of transaction data. The CFTC has also proposed rules providing for the transaction recordkeeping, including daily trade reporting and recordkeeping.

Key Definitions: Finally, on December 3, 2010, the SEC and the CFTC jointly proposed definitions for key terms, including "security-based swap dealer" and "major security-based swap participant."

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Shane Kiernan	FDIC

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A *swap dealer* would be any person who holds itself out as a dealer in swaps, makes a market in swaps, regularly enters into swaps with counterparties as an ordinary course of business for its own account, or engages in activity causing itself to be commonly known in the trade as a dealer or market maker in swaps. There are a number of characteristics identified that characterize swap dealers. Swap dealers: tend to accommodate demand for swaps from other parties; are generally available to enter into swaps to facilitate other parties' interest in entering into swaps; tend not to request that other parties propose the terms of swaps, but tend to enter into swaps on their own standard terms or on terms they arrange in response to other parties' interests; and tend to be able to arrange customized swaps. Entities that engage in limited or *de minimis* swap dealing would be exempted based on a four-part test. Insured depository institutions that offer a swap to a customer in connection with originating a loan are excluded from the definition.

A *major swap participant* is an entity that meets any of the following criteria: a person that maintains a substantial position in any major swap category (excluding positions held for hedging or mitigating commercial risk or for employee benefit plans or operational risk); a person whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the U.S. banking system or financial markets; or any financial entity that is highly leveraged relative to the amount of capital such entity holds, is not subject to federal bank regulatory capital requirements, and maintains a substantial position in any of the major swap categories. There are two alternative tests to identify a substantial position. A person holds a substantial position in any major swap category if it has: daily average current uncollateralized exposure, on a mark-to-market basis, of $1 billion in credit swaps, equity swaps, or other commodity swaps, or $3 billion in rate swaps, after deducting collateral posted for swap positions and after netting as provided in a master netting arrangement, or daily average current uncollateralized exposure plus potential future exposure of $2 billion for credit swaps, equity swaps, or other commodity swaps, or $6 billion in rate swaps. Potential future exposure is calculated by applying a risk factor (.5-15%) to total notional principal amounts and by discounting swaps by 80% if they are cleared or subject to daily mark-to-market margining or by up to 60% if they are netted pursuant to master netting agreements. A swap would be deemed to hedge or to mitigate commercial risk if it is a bona fide hedge under CEA rules, it qualifies for hedging treatment under FASB 133, or it is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise where the risk arises in the ordinary course of business and it is not held for purposes of speculating, investing, or trading. An entity with current uncollateralized exposure of $5 billion or current uncollateralized exposure plus future exposure of $8 billion across all of its

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swap positions has substantial counterparty exposure and may be a major swap participant.

Orderly Liquidation Authority

On October 19, 2010, the FDIC published the first of its proposed rules regarding the OLA established by Title II of the Dodd-Frank Act. Under the OLA, a new regime that is separate from the federal bankruptcy and state dissolution laws, a covered financial company (CFC), such as a bank holding company whose failure threatens to have serious adverse effects on the financial stability of the United States, can be seized and liquidated by the FDIC. The proposed rule addresses the FDIC's authority (i) to make additional payments to certain creditors of a CFC under the Dodd-Frank Act; (ii) to continue operations of the CFC and personal service agreements, including collective bargaining agreements, during the receivership or any period during which the operations of the CFC are continued by a bridge financing company; and (iii) regarding claims based on contingent obligations that are not due and payable on the date of appointment of the FDIC as receiver. The proposed rule also addresses the application of proceeds from the liquidation of insurance company subsidiaries.

The FDIC requests comments on a broad range of issues by January 18, 2011, including: (i) areas of the OLA that would benefit from additional rulemaking; (ii) key areas in which the FDIC should issue rules to harmonize the OLA with applicable insolvency laws, greater clarification regarding the FDIC's liquidation authority under the OLA, and whether greater clarification is required regarding the treatment of claims in liquidation; (iii) whether certain CFCs may require different rules regarding the application of the FDIC's authority; and (iv) whether greater clarification is required for certain terms defined in the proposed rule.

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The FDIC has clarified that its authority to make additional payments under the Dodd-Frank Act would not be used to provide additional payments to certain categories of creditors, such as shareholders and subordinated debt and long-term bondholders. The proposed rule would require a vote of the Board of Directors of the FDIC to make any additional payments to general or senior creditors of the CFC under section 210(b)(1)(E) of the Dodd-Frank Act. Secured claims against the CFC's assets would be paid in full to the extent of the fair market value of the assets, and any remaining claim would be treated as an unsecured claim to be paid in accordance with the priorities set forth in section 210(b) of the Dodd-Frank Act.

The proposed rule would permit the terms of any personal service agreement to continue for any services accepted by the FDIC as receiver of a CFC or a bridge financial company and payments for such services would be treated as administrative expenses. Acceptance of such services would not, however, limit or impair the FDIC's authority to disaffirm or repudiate any personal service agreement in accordance with the provisions of the Dodd-Frank Act. In addition, a party acquiring a CFC or any operational unit, subsidiary, or assets of the CFC would not be bound by any personal service agreement unless the acquiring party expressly assumes the agreement. The provisions of any personal service agreement with a senior executive or director of the CFC or covered subsidiary would not apply to services rendered by any such individuals, nor would they limit or impair FDIC's ability to recover compensation from such individuals.

In addition, the proposed rule would permit a contingent obligation of the CFC to be provable against the FDIC/receiver even though the obligation may not have become due and payable as of the date of appointment of FDIC as receiver. Nevertheless, the FDIC may repudiate the contingent liability, in which case compensatory damages would be valued based on the estimated value of the claim on the date of appointment of the FDIC as receiver.

The proposed rule also addresses the FDIC's obligations to distribute value realized from the liquidation, transfer, sale, or other disposition of the assets of direct or indirect subsidiaries of insurance companies, but which are not themselves insurance companies.

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Although the FDIC's efforts to clarify provisions of Title II of the Dodd-Frank Act are notable, the proposed rule is just the beginning of a longer process to clarify the Dodd-Frank Act prior to implementation. The industry and academic scholars have expressed concerns that the proposed rule may create greater uncertainty for both companies and creditors.

Additional and more detailed information of the OLA under Title II of the Dodd-Frank Act can be found at ***http://www.mofo.com/files/Uploads/Images/100831TitleII.pdf.***

Volcker Rule

On November 17, 2010, the Federal Reserve published a proposed rule to implement provisions of the Dodd-Frank Act that give banking entities a defined period of time to conform their activities and investments to the Volcker Rule. **Comments are due by January 10, 2011**. Under the Volcker Rule (which is added as a new section 13 to the BHC Act and codified at 12 U.S.C. 1851), banking entities are provided with a two-year conformance period after the Volcker Rule takes effect (generally, the earlier of July 21, 2010, or twelve months after the federal agencies issue final rules), during which they can wind down, sell, or otherwise conform their activities, investments, and relationship to the requirements of the Volcker Rule. The proposed rule implements this two-year period and clarifies that a company becoming a banking entity after the enactment of the Dodd-Frank Act (July 21, 2010) would be provided with the same two-year conformance period, starting from the day such company becomes a banking entity. The Federal Reserve may extend the two-year conformance period by up to three additional one-year periods if it determines that such extension is consistent with the purposes of the Volcker Rule and would not be detrimental to the public interest.

New Section 13 of the BHC Act provides banking entities with the option to apply to the Federal Reserve for an extension of the conformance period up to five years in order to meet any contractual obligations in place as of May 1, 2010 to a hedge fund or a private equity fund that qualifies as an "illiquid fund." The proposed rule clarifies that such extended transition period for illiquid funds would be *in addition* to the general conformance period, meaning that banking entities may be able to retain certain investments in or fulfill commitments to an illiquid fund made as of May 1, 2010 until ten years after the Volcker Rule takes effect. However, any extension granted would terminate automatically once the contractual obligations expire, whether or not the five-year period has passed.

The proposed rule defines "illiquid fund" as a hedge fund or private equity fund that as of May 1, 2010 (i) was principally invested in illiquid assets or was invested in, and contractually committed to principally invest in, illiquid assets, and (ii) makes all its investment pursuant to, and consistent with, an investment strategy to principally invest in illiquid assets. "Illiquid assets" would generally be defined as assets that do not fit within the existing standards for "liquid assets" under the federal banking and securities laws, in particular the Securities and Exchange Commission's Rule 3b-8 and the Federal Reserve's Regulation W, *i.e.*, assets that may be promptly bought and sold at a price reasonably related to their fair value. A hedge fund or private equity fund would be "principally invested" in illiquid assets under the proposed rule, if at least 75% of the fund's consoli-

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dated total assets are comprised of illiquid assets or risk-mitigating hedges related thereto.

A banking entity seeking an extension of the conformance period or applying for an extended transition period for illiquid funds must (i) submit a request to the Federal Reserve in writing at least 90 days prior to the expiration of the applicable time period, (ii) provide reasons why the banking entity believes the extension should be granted, and (iii) provide a detailed explanation of the banking entity's plan for divesting or conforming the activity or investment. The proposed rule lists a variety of factors and circumstances the Federal Reserve may consider in granting such extension and the Federal Reserve specifically requests comments on whether these factors are appropriate, certain factors should be removed, or any additional factors should be included.

Under the propose rule, nonbank financial companies supervised by the Federal Reserve would be provided the same two-year conformance period, including the possibility of three additional one-year extensions, for additional capital requirements, quantitative limits, or other restrictions imposed by the federal agencies in connection with the Volcker Rule.

The **2010 FMA Membership Directory** was e-mailed to all current members on October 21. See below for additional updates received since its publication. (If you are a current FMA member and have not yet received (or misplaced!) your Directory, contact Dorcas Pearce directly…202/544-6327 or ***dp-fma@starpower.net.)***

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CAPITAL MARKETS

The Basel III Framework

Almost all of the puzzle pieces comprising the Basel III framework are now in place. Earlier this month, the BCBS agreed on the details of the Basel III rules text, which is expected to be published before year-end. Currently, all of the various documents comprising the Basel III framework are available at ***http://www.bis.org/list/basel3/index.htm.***

The new framework responds to the comments and statements of the G-20, as well as of policymakers and commentators, and their collective assessments regarding the factors that contributed to the financial crisis. Basel III improves the quality, consistency, and transparency of the capital base; strengthens risk coverage through enhanced capital requirements for counterparty credit risk; implements changes to the non-risk adjusted leverage ratio; and adopts measures intended to improve the countercyclical capital framework.

Basel III requires that banks hold additional regulatory capital, after required regulatory deductions (for example, for unrealized losses, goodwill, and other intangibles, deferred tax assets above specified minimums, etc.), and narrows the types of instruments that are qualifying capital instruments. Tier 1 capital must consist predominantly of "common equity," which includes common shares and retained earnings. This new definition of Tier 1 capital is closer to the definition of "tangible common equity." There are a number of criteria that must be satisfied in order for non-common equity to be classified as Tier 1. These criteria indicate that a Tier 1 security must be subordinated to depositor and general creditor claims, cannot be secured or guaranteed, must be perpetual with no incentives to redeem, must have fully discretionary non-cumulative dividends, must be capable of principal loss absorption, and cannot hinder recapitalization. Several "innovative" Tier 1 instruments will be phased out, including, for example, step up instruments, cumulative preferred stock, and trust preferred stock. The implementation period will begin in 2013.

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Basel III sets the minimum common equity requirement at 4.5% of risk-weighted assets, the minimum Tier 1 capital requirement at 6%, and the minimum total capital requirement at 8%. For each category, there will be a 2.5% capital conservation buffer. The capital conservation buffer must be met with equity. If an institution "uses up" the capital conservation buffer and approaches any of the previously specified capital requirements, it will become subject to progressively more stringent constraints on dividend declarations and on executive compensation. This likely means that most institutions will calculate the minimums with the conservation buffer as they will not want to become subject to operating restrictions associated with "eating into" the buffer. These basic requirements will be phased in between 2013 and 2015 and the buffer will be phased in from 2016 to 2018. The requirements set out in the Dodd-Frank Act, taken together with the Basel III requirements, have many banks and their advisers working to understand which types of instruments, other than common stock and preferred stock (the issuance of which would result in dilution and be expensive from a funding perspective), might be useful funding tools going forward. There will also be a countercyclical buffer of 0% to 2.5% of common equity or other loss-absorbing capital that "will be implemented according to national circumstances" as an "extension" of the conservation buffer.

Basel III addresses leverage and liquidity through a number of different measures. The Basel Committee has agreed to test a global minimum Tier 1 leverage ratio (Tier 1 capital to average consolidated assets) of 3% beginning in 2011. In addition, the Basel III framework introduces a liquidity coverage ratio and a net stable funding ratio, both of which are intended to address shorter term borrowings and leverage. The liquidity coverage ratio will be tested beginning in 2011 and become effective in 2015. The net stable funding ratio will be tested beginning in 2012 and become effective in 2018.

In addition, before year-end, the BCBS is expected to put forward its final views regarding contingent capital or loss absorbing capital instruments. The BCBS had released for comment a consultative document that contained a proposal to require that the contractual terms of capital instruments issued by banks provide for write-off or conversion to common equity at the discretion of regulators in the event that the bank issuer is unable to support itself in the private markets (referred to as a "gone-concern proposal"). The BCBS is expected to finalize its views regarding this loss absorbent gone-concern capital, as well as its views regarding going-concern contingent capital before year-end.

Now that the pieces have come together, the real challenge of addressing these new measures will begin in earnest. For more on Basel see ***http://www.mofo.com/resources/regulatory-reform/#basel.***

Supervisory Capital Assessment Program

On November 17, 2010, the Federal Reserve issued guidelines (see ***http://www.federalreserve.gov/newsevents/press/bcreg/20101117b.htm)*** applicable to large bank holding companies that participated in the 2009 Supervisory Capital Assessment Program (SCAP BHCs - a/k/a the stress test) requiring that each SCAP BHC submit a comprehensive capital plan to the Federal Reserve and its primary federal bank regulator by January 7, 2011. Each SCAP BHC is required to conduct a new stress test. There is no contemplation that the results of this stress test will be made public. The Federal Reserve guidance identifies a number of specific requirements that should be included in the capital plan. A capital plan that includes a request to increase dividends, implement a stock buyback, or redeem or repurchase capital instruments will be evaluated in light of a set of special considerations,

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Award

Morrison & Foerster is seeking nominations for the 2011 Regulatory Innovation Award. Morrison & Foerster established the award in 2008 through the Burton Foundation to honor an academic or non-elected public official whose innovative ideas have made a significant contribution to the discourse on regulatory reform in the areas of corporate governance and executive compensation, securities, capital markets, regulatory capital or the regulation of financial institutions.

For more information, please view the attached **brochure** or visit the dedicated website to submit a nomination at ***www.regulatoryinnovationaward.com***.

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which are outlined in a revised temporary addendum to SR Letter 09-4 "Dividend Increases and Other Capital Distributions for the 19 Supervisory Capital Assessment Program Firms." The criteria focuses on, among other things, the SCAP BHC's ability to withstand losses under stress scenarios and the SCAP BHC's ability to comply with fully phased-in Basel III requirements.

SEC ACTIONS

CFO Letter

At the end of October 2010, the SEC posted on its site a sample letter that had been sent to financial services companies concerning accounting and disclosure issues related to the risks and costs associated with mortgage- and foreclosure-related activities and exposures (***http://www.sec.gov/divisions/corpfin/guidance/cfoforeclosure1010.htm***). The letter reminds SEC reporting companies of their disclosure obligations regarding loss contingencies (ASC 450-20) and their disclosure obligations in MD&A and in other sections of their upcoming 34 Act filings. The SEC instructs issuers to consider a number of factors in preparing their filings and evaluating their disclosures, including the impact of representations and warranties regarding mortgages made to purchasers of the mortgages or of MBS, litigation risks and uncertainties related to defects in the securitization process or in mortgage documentation, litigation risks related to the servicing or the foreclosure process, and the potential effects of changes in the timing of sales of loans. The SEC points out that these issues also should be closely considered by companies other than financial institutions who may have engaged in mortgage servicing, title insurance, mortgage insurance, or other related businesses.

More on Ratings

The SEC recently indefinitely extended its no action letter guidance permitting securitizers to omit disclosure of ratings in their registration statements filed under Regulation AB. See the no action letter at ***http://www.sec.gov/divisions/corpfin/cf-noaction/2010/ford072210-1120.htm***. The SEC's prior guidance, which provided relief following the repeal of Rule 436(g) upon enactment of the Dodd-Frank Act, would have expired in January 2011. The SEC also issued an order (see ***http://www.sec.gov/rules/other/2010/34-63363.pdf***) extending its temporary conditional exemption from the requirements of Rule 17g-5 (regarding steps to be taken by NSRSOs to address conflicts of interest related to rating structured finance products) with respect to credit ratings where the issuer of the structured finance product is a non-U.S. person and the NSRSO has a reasonable basis to conclude that the product will be sold only in transactions occurring outside of the United States. This guidance is very helpful to market participants in the short-term while more permanent solutions are devised to address the ratings conundrum.

ANTI-MONEY LAUNDERING AND FOREIGN ASSETS CONTROL

SAR Confidentiality

On November 23, 2010, FinCEN released a final rule on the Confidentiality of Suspicious Activity Reports (SAR) as well as an advisory, and two guidance documents and a related Notice of Availability of

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FMA Welcomes *More* New Members!

Peter Nickoloff	U.S. Department of the Treasury
Mark Oesterle	Senate Banking Committee
Becky Orlich	Farm Credit Administration
Shelley Parratt	SEC
Christopher Pedersen	Protiviti, Inc.
Jeff Pienta	Farm Credit Administration
John Popeo	FDIC
Jay Powers	Wells Fargo & Company
Deborah Prutzman	The Regulatory Fundamentals Group
Lorin Reisner	SEC
Martin Rex	Bank of America

Legislative/Regulatory Actions

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Guidance, which clarify and strengthen the scope of SAR confidentiality, and expand the ability of certain financial institutions to share SAR information with most affiliates. The final rule codifies existing case law and clarifies that "[a] SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized" under the rule. In its section-by-section discussion of the final rule, FinCEN states that this includes any document or other information that would reveal whether a SAR has been filed or has not been filed. However, a document that may merely identify suspicious activity upon which a SAR may be based, but does not reveal whether a SAR has been filed or not, is not deemed to be confidential under FinCEN's rules. The final rule also clarifies that any financial institution, or any director, officer, employee, or agent of a financial institution, that is subpoenaed or otherwise requested to disclose a SAR or information that would reveal the existence of a SAR, must decline to provide such information and notify FinCEN of the respective request and any response thereto. In addition, the final rule contains certain rules of construction to clarify the scope of the SAR disclosure prohibition and implement statutory modifications to the BSA made by the USA PATRIOT Act and clarifies that the safe harbor provisions apply to any "disclosures" (and not only "reports") made to a government agency.

The advisory, "Maintaining the Confidentiality of SARs", is addressed to all BSA stakeholders and emphasizes the importance of SAR confidentiality for maintaining a vigorous suspicious activity regime. Alarmed by recent media reports of possible disclosure incidents, FinCEN advises all BSA stakeholders to be vigilant in ensuring SAR confidentiality is maintained, and emphasizes that this obligation applies not only to the SAR itself but also to information that would reveal the existence of a SAR.

The two guidance documents, one for depository institutions and one for securities broker-dealers, mutual funds, future commission merchants, and introducing brokers in commodities, clarify that a SAR may be shared with certain affiliates. The term "affiliate" includes any company that is under common control, or controlled by, the SAR-sharing institution. In addition to being allowed to share a SAR with the parent company (whether foreign or domestic), a SAR or any information that would reveal the existence of a SAR, may be shared with any other U.S. affiliate within the corporate organizational structure, provided that such affiliate is also subject to a SAR regulation issued by FinCEN or another federal regulator. FinCEN encourages financial institutions to have policies and procedures in place to ensure that affiliates protect the confidentiality of SARs and emphasizes that a SAR or any information that would reveal the existence of a SAR must not be disclosed to or shared with an affiliate under the guidance if the information would or might be disclosed to any person involved in the suspicious activity that is subject of the SAR.

New Iranian Sanctions

On July 1, 2010, President Obama signed into law the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA) (Pub. L. 111-195), which expanded the scope of the Iran Sanctions Act

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FMA Welcomes *More* New Members!

Mark Riccardi	**Orrick, Herrington & Sutcliffe LLP**
Pat Robinson	**Wachtell, Lipton, Rosen & Katz (formerly at the Federal Reserve Board)**
Brian Rubin	**Sutherland Asbill & Brennan LLP**
Michael Rufino	**FINRA**
Kevin Saunders	**Federal Reserve Bank of Chicago**
Robert Sjogren	**Carpenter Community BancFund**
Cole Smith	**Cleary Gottlieb Steen & Hamilton LLP**

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of 1996 (ISA) by imposing new penalties on financial institutions and other companies doing business with Iran. The new sanctions are intended to discourage financial and other support for the Iranian refined petroleum sector, Iranian financial institutions suspected of financing Iran's nuclear program, and various organizations related to the Government of Iran. Provided below is a summary of certain of the key provisions of CISADA.

Petroleum Industry: Under CISADA, the United States can sanction non-U.S. entities that engage in certain specified activities that "directly and significantly" contribute to the enhancement of Iran's ability to develop petroleum resources or that export refined petroleum products to Iran. The scope of the prohibitions includes providing "support" for such prohibited activities, which is defined broadly to include financing and underwriting activities.

Financial Services: CISADA and its implementing regulations impose prohibitions and restrictions on domestic and foreign financial institutions that seek to establish or maintain correspondent or payable-through accounts for foreign financial institutions that knowingly engage in certain prohibited transactions (such as facilitating Iran's efforts to develop weapons of mass destruction and engaging in money laundering to facilitate such activities). On August 16, 2010, OFAC published the Iranian Financial Sanctions Regulations, 31 C.F.R. Part 561, to implement certain sections of CISADA that prohibit, or impose strict conditions on, the opening or maintaining of a U.S. correspondent account or a payable-through account for a foreign financial institution that the Secretary of the Treasury finds knowingly engages in certain prohibited activities or that engages in transactions with or benefitting Iran's Islamic Revolutionary Guard Corps.

Government Procurement: CISADA bars U.S. Government agencies from contracting with persons that are engaged in sanctionable activities or that export to Iran technologies used to restrict communications or access to technologies. Regulations published on September 29, 2010 (75 Fed. Reg. 60254) amended the Federal Acquisition Regulations by requiring U.S. Government contractors to certify that neither the contractor nor any person owned or controlled by the contractor engages in certain activities sanctionable under CISADA.

Additional Provisions: CISADA also implements measures for identifying governments that allow diversion of certain U.S. goods and services to Iran and potentially subjecting such governments to increased licensing requirements, enhances the U.S. embargo of Iran, increases criminal penalties for a variety of statutes, and authorizes state and local governments to divest assets from, and prohibit investment in, any person that engages in certain investment activities in Iran.

The ISA as amended by CISADA requires the President to impose at least 3 (out of 9) sanctions on persons engaged in prohibited conduct. The sanctions can be imposed not only on the entity that engaged in the prohibited activity, but also on (1) successors in interest to that entity, (2) persons who own or control the entity that engaged in a prohibited activity if they had actual knowledge or should have known of the violation, and (3) entities owned or controlled by, or under common ownership with, an entity that know-

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FMA Welcomes *More* New Members!

Stuart Stein	Hogan Lovells US LLP
Daniel Stipano	OCC
Curtis Tao	Goldman, Sachs & Co.
Ryan Thomas	FINRA
Pratin Vallabhaneni	FDIC
Mark Van Der Weide	Federal Reserve Board
Kurt Wilhelm	Office of the Comptroller of the Currency
Thomas Wyler	Debevoise & Plimpton LLP
Young Woo	FDIC

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ingly engaged in prohibited conduct. The President can waive the imposition of sanctions if he determines it is "necessary" to the national interest.

CONSUMER CREDIT

Truth in Lending

On October 19, 2010, the Board issued a proposed rule to clarify certain recent amendments to Regulation Z (Truth in Lending), particularly those implementing the Credit CARD Act of 2009. **The comment period for the proposed rule will close on January 3, 2011**, and final clarifications are expected in April 2011, with a mandatory compliance date in October 2011.

While the Board indicated that the proposed rule is intended to enhance consumer protection and to facilitate compliance by resolving areas of uncertainty, the proposal could significantly impact current industry practices and, in some instances, would require issuers to again revise compliance policies and procedures, application and account-opening disclosures, and change-in-terms notices and other consumer communications.

In particular, the proposed rule would fundamentally change the ability-to-pay requirements. First, an issuer would not be permitted to use household income in evaluating a consumer's ability to pay. Second, the Board indicates that the proposed rule is not inconsistent with Regulation B, which implements the Equal Credit Opportunity Act, and does not compel an issuer to consider spousal or other income. Third, the proposed rule would clarify the interrelationship of the obligation of an issuer to consider the ability of an applicant to repay amounts extended, on one hand, and the manner in which income information is requested on application forms, on the other. The proposed rule also provides a number of clarifications concerning the application of the penalty fee provisions, which prohibit the imposition of fees unless the fee is reasonable and proportional to the total costs incurred by the issuer or consistent with the applicable safe harbor amounts established by the Board.

In addition, recognizing that the failure to provide an exception for temporary fee reductions would discourage issuers from offering beneficial fee reductions, the proposed rule would expressly permit an issuer to impose a fee increase after a corresponding temporary fee reduction without providing advance notice, and without being subject to rate and fee limitations, so long as the issuer provides certain disclosures.

If adopted, the proposed rule would limit an issuer's ability to offer certain promotional waivers or rebate programs. Specifically, a waiver or rebate of interest, fees, or other charges limited by Section 226.55 of Regulation Z, such as a rebate of interest or an annual fee that is later revoked, would be considered an increase in a rate, fee, or charge for purposes of Section 226.55 of Regulation Z. As such, an issuer would be prohibited from applying the increase to existing balances and would be required to provide a 45-day advance notice. The proposed rule would not, however, apply to benefits, such as rewards points or cash-back programs, unless such programs promote the benefits as reducing interest, fees, or finance charges.

The proposed rule would make a number of other substantive proscriptions. Specifically, the proposed rule would:

- Expand the cap on fees associated with certain credit cards to provide that the 25 percent limitation also applies to fees charged prior to account opening and fees collected through other sources during the first year the account is open;
- Expand the Servicemembers Civil Relief Act exception to cover fees in addition to the rate. Currently Regulation Z provides an exception for rate increases when an issuer is required by the SCRA to reduce a rate, but then increases the rate when the SCRA no longer applies;
- Amend certain disclosure requirements;
- Provide guidance on certain requirements to post agreements on the Internet;
- Require an issuer to include variable rate disclosures with the disclosures required to be provided with checks that access a credit card account.

In addition to these substantive revisions, the Board also proposed a number of technical revisions to Regulation Z. For more on this topic, please see ***http://www.mofo.com/files/Uploads/Images/101116-CARD-Act.pdf.*** ■

David H. Kaufman, Anna T. Pinedo, Panagiotis Bayz, Alexandra Barrage, Joyita Basu, and Beth Zorc contributed to this column.

Watch For

FINRA Regulatory Notice 10-61 (December 3, 2010) – The SEC approved new FINRA Rule 4160 relating to the verification of assets at a non-member financial institution; effective date is February 1, 2011.

SEC Press Release 2010-237 (December 3, 2010) – The SEC proposed joint rules with the CFTC to define swap related terms.

Joint Press Release (December 2, 2010) – The federal financial regulatory agencies issued final supervisory guidance on sound practices by financial institutions for real estate appraisals and evaluations.

MSRB Notice 2010-54 (December 1, 2010) – Reminder of changes to the continuing disclosure service of the EMMA system relating to new SEC Rule 15c2-12 provisions; effective date was August 9, 2010 and compliance date was December 1, 2010 for the 15c2-12 Amendments.

FINRA Regulatory Notice 10-60 (November 29, 2010) – The SEC approved a new FINRA rule (Rule 5131) to address abuses in the allocation and distribution of new issues; effective date is May 27, 2011.

FINRA Regulatory Notice 10-59 (November 29, 2010) – The SEC approved amendments to FINRA Rule 8210 to require encryption of information provided via a portable media device; effective date is December 29, 2010.

MSRB Notice 2010-51 (November 24, 2010) – The MSRB received SEC approval to modify transaction data subscription services. The effective date for the rule changes is January 2, 2011.

SEC Press Release 2010-230 (November 19, 2010) – The SEC proposed new rules on security-based swap reporting.

SEC Press Release 2010-229 (November 19, 2010) – The SEC proposed new rules to outline obligations of security-based swap repositories.

SEC Press Release 2010-228 (November 19, 2010) – The SEC proposed new rules to improve oversight of investment advisers and fill key gaps in the regulatory landscape.

MSRB Notice 2010-49 (November 15, 2010) – The MSRB amended registration rules for dealers and municipal advisors.

SEC Press Release 2010-216 (November 8, 2010) – The SEC approved new rules to strengthen the minimum quoting standards for market makers and effectively prohibit "stub quotes" in the U.S. equity markets.

SEC Press Release 2010-215 (November 4, 2010) – The SEC extended the new short sale rule compliance date to February 28, 2011.

SEC Press Release 2010-210 (November 3, 2010) – The SEC adopted a new rule preventing unfiltered market access. The rule requires brokers and dealers to have risk controls in place before providing their customers with access to the market.

MSRB Press Release (November 1, 2010) – The MSRB proposed an initial set of rules for municipal advisors which would extend a core MSRB rule of conduct to them and permit them to register with the MSRB, among other changes. See also MSRB Notice 2010-47.

FINRA Regulatory Notice 10-57 (November 1, 2010) – In adverse circumstances, whether the result of firm-specific events or systemic credit events, the cost of funding a broker-dealer's operations could become prohibitively expensive; in extreme cases funding could become unavailable. FINRA expects broker-dealers to develop and maintain robust funding and liquidity risk management practices to prepare for adverse circumstances. Further, FINRA expects broker-dealers affiliated with holding companies to undertake these efforts at the broker-dealer level, in addition to their planning at the holding-company level.

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Watch For *(Continued from page 16)*

FINRA Regulatory Notice 10-56 (October 29, 2010) – The SEC approved amendments to the trading activity fee and FINRA announced publication of frequently asked questions (***www.finra.org/taf/faq***); effective date was November 1, 2010.

FINRA Regulatory Notice 10-55 (October 27, 2010) – FINRA established a new effective date – May 16, 2011 – for reporting asset-backed securities to TRACE and related rule changes.

FINRA Regulatory Notice 10-54 (October 27, 2010) – FINRA requested comment on a concept proposal to require a disclosure statement for retail investors at or before commencing a business relationship. The comment period expires December 27, 2010.

MSRB Press Release (October 26, 2010) – The MSRB filed Series 52 program revisions with the SEC. If approved, the changes will be effective January 3, 2011. See also MSRB Notice 2010-46.

FINRA Regulatory Notice 10-53 (October 26, 2010) – Effective October 26, 2010, FINRA advised firms of customer margin requirements for exempted securities mutual funds and exempted securities ETFs in Regulation T margin accounts. FINRA also reminded firms of customer margin requirements for money market mutual funds.

MSRB Notice 2010-45 (October 21, 2010) – The MSRB received SEC approval of interpretive guidance on dealer-affiliated PACs under Rule G-27.

MSRB Notice 2010-44 (October 21, 2010) – The MSRB received SEC approval to provide credit ratings and related information for municipal securities on EMMA.

FINRA Regulatory Notice 10-51 (October 20, 2010) – FINRA reminded firms of their sales practice obligations for commodity futures-linked securities.

FINRA Regulatory Notice 10-49 (October 15, 2010) – The SEC approved three rule filings relating to the Consolidated FINRA Rulebook – Rule 5121 (Public Offerings of Securities with Conflicts of Interest; Rule 11000 Series (Uniform Practice Code); and Rule 3270 (Outside Business Activities of Registered Persons). The effective date was December 15, 2010.

SEC Press Release 2010-192 (October 13, 2010) – The SEC proposed rules to enhance disclosure to investors by requiring issuer review of assets underlying asset-backed securities.

SEC Press Release 2010-191 (October 13, 2010) – The SEC adopted an interim rule to require reporting of security-based swaps.

SEC Press Release 2010-190 (October 13, 2010) – The SEC proposed rules to mitigate conflicts of interest involving security-based swaps.

FINRA Regulatory Notice 10-48 (October 12, 2010) – The SEC approved amendments to FINRA trade reporting and OATS rules to reinstitute short sale exempt marking and to require price and short exempt identifier on route reports. The effective date has been extended to February 28, 2011.

FINRA Regulatory Notice 10-47 (October 11, 2010) – The SEC approved a consolidated FINRA rule change (Rule 5141) on the sale of securities in a fixed price offering. The effective date is February 8, 2011.

FINRA Regulatory Notice 10-46 (October 4, 2010) – Supplemental FOCUS filing requirement applicable to certain joint broker-dealers/futures commission merchants; effective date was November 23, 2010 for the FOCUS Report due on November 23, 2010, covering the October 2010 reporting period.

FINRA Regulatory Notice 10-45 (October 4, 2010) – The SEC approved new consolidated FINRA rules regarding margin requirements, daily record of required margin and extension of time requests; effective date was December 2, 2010.

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Watch For *(Continued from page 17)*

Available Publications

Federal Reserve Press Release (October 25, 2010) – The Federal Reserve Board released a new publication, "Addressing the Impact of the Foreclosure Crisis."

FINRA Regulatory Notice 10-50 (October 15, 2010) – The Securities Industry/Regulatory Council on Continuing Education issued its Fall 2010 Firm Element Advisory Update (***www.cecouncil.com/publications/council_publications/***

Who's News

Andrea Al-Attar, formerly an associate in the global corporate group at Milbank, Tweed, Hadley & McCloy LLP, has joined the Office of Foreign Assets Control as an Enforcement Investigations Officer.

Monica Berger, formerly the Chief Compliance Officer at MassMutual Financial Group, has joined the Enterprise Risk Management Department of the Federal Home Loan Bank of Seattle.

Natalie Dolgireff has been promoted to Business Compliance Officer of corporate banking at Union Bank, N.A.'s Global Treasury Management division.

Jim Embersit, currently Deputy Associate Director for Credit, Market, Liquidity & Operational Risk Policy at the Federal Reserve Board, will join Ernst & Young as an Executive Director in their Financial Services Advisory practice on January 3.

Jorge Gonzalez, a Senior Audit Leader at Wells Fargo, has been temporarily assigned to the bank's London Office to cover their European branches and UK broker/dealer activities.

Paul S. Pilecki has joined the Financial Institutions Team of Kilpatrick Stockton LLP in the Washington, DC office

Program Update

2011 Securities Compliance Seminar

Save These Dates! FMA's 20th **Securities Compliance Seminar** will take place April 27 – 29, 2011 at the Doubletree Hotel (on the Magnificent Mile) in Chicago, Illinois. 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: **Mitchell Avnet** *(The PNC Financial Services Group)*; **James Connors** *(Wells Fargo Audit Services)*; **Earl Humphrey** *(Interactive Data Pricing and Reference Data)*; **Marie Jordan** *(JPMorgan Chase Bank, NA)*; **Barbara Lane** *(GE Capital Americas)*; and **Christopher Pedersen** *(Protiviti, Inc.)*.

A complete brochure will be e-mailed mid- to late January and will also be available on the FMA website – ***www.fmaweb.org.*** Currently, the working agenda includes these general sessions, concurrent workshops and **confirmed speakers**:

Legislative and Regulatory Update

Control Room 101

- Barbara Lane ■ GE Capital Americas
- Michael Sullivan ■ Wells Fargo Securities
- Eric Young ■ GE Capital Corporation

The Impact of the Dodd-Frank Act on Municipal Investment Advisers

- Sara Grohl ■ FINRA
- Kim McManus ■ Alternative Regulatory Solutions, LLC
- Vaughn Swartz ■ PNC Capital Markets
- Representative ■ MSRB *(Invited)*

Valuation from a Compliance and Risk Perspective

Regulatory Forum

- Carlo di Florio ■ SEC *(Invited)*
- Judy Foster ■ OCC *(Invited)*
- Ernie Lanza ■ MSRB *(Invited)*
- Malcolm Northam ■ FINRA *(Invited)*
- Ananda Radhakrishnan ■ CFTC *(Invited)*

Internal Auditor Roles and Responsibilities

The Effect on Financial Institutions' Investments in Private Equity Funds in the Wake of Volcker

- Fadi Samman ■ Akin Gump Strauss Hauer & Feld LLP
- Michael Sefton ■ Henderson & Lyman
- Representative ■ SEC *(Invited)*

New Fiduciary Standard

- Steve Malina ■ Greenberg Traurig, LLP
- Representative ■ SEC *(Invited)*

Retail Compliance Workshop

- Chris Kaufman ■ Impact Consultants, Inc.

Institutional Compliance Workshop

- Matt Hardin ■ Hardin Compliance Consulting
- Jim Rabenstine ■ Nationwide *(Invited)*

AML / BSA

- David Amster ■ CRT Capital Group, LLC
- James Van De Graaff ■ Katten Muchin Rosenman LLP

Surviving Increased Regulatory Oversight

- Joe Adamczyk ■ CME Group *(Invited)*
- Phillip Stern ■ Neal, Gerber & Eisenberg LLP
- Representative ■ SEC *(Invited)*

The Role of Compliance in Light of the Dodd-Frank Whistleblower Provisions

- Barbara Jones ■ Greenberg Traurig, LLP
- Representative ■ SEC *(Invited)*

In addition, peer group discussions (lead by facilitators) will take place on Wednesday and Thursday afternoon. Tentative topics include: AML/BSA; Broker-Dealer Compliance Training; Building Metrics Around Compliance Activities; Communicating with the Public (Advertising-

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Program Update

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Marketing); Compliance & Technology; Compliance & Whistleblower Provisions; Control Room 101; Customer Complaints; Insider Trading/Conflicts of Interest; Internal Audit Updates; Managing Remote Offices & Employees; Municipal Investment Advisers; Mutual Funds & Annuities; New Fiduciary Standard; Privacy & Protection of Information; Private Equity Funds; Regulation R; Surviving Increased Regulatory Oversight; and Valuations. If you would like to facilitate one of these discussions, or if you have additional topical suggestions, please contact FMA (see below).

Registrations are now being accepted for this spring conference – and team discounts are 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 2011 Securities Compliance Seminar. Thanks!

2010 Legal & Legislative Conference

FMA's 19th **Legal & Legislative Conference** took place **October 27 – 28** at the Madison Hotel here in Washington, DC. This annual program is a high-level forum for banking and securities attorneys as well as senior compliance officers 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: **Joseph Bielawa** *(Natixis New York Branch)*; **Russell Bruemmer** *(WilmerHale LLP)*; **John Douglas** *(Davis, Polk & Wardwell LLP)*; **Satish Kini** *(Debevoise & Plimpton LLP)*; **Linda Lord** *(UBS Securities LLC)*; and **Katherine Vines Trumbull** *(Webster Bank)*.

The agenda, which focused on current areas of regulatory and Congressional activity/scrutiny, included these sessions and speakers:

Agency OGCs

- Scott Alvarez ■ FRB
- Dan Berkovitz ■ CFTC
- Michael Rufino ■ FINRA
- John Thomas ■ FDIC
- Julie Williams ■ OCC

Current Developments

- Robert Tortoriello ■ Cleary Gottlieb Steen & Hamilton LLP

Legislative Update with Hill Staffers

- Amy Friend ■ Senate Banking Committee
- Mark Oesterle ■ Senate Banking Committee
- Lawranne Stewart ■ House Financial Services Committee

Derivatives

- Conrad Bahlke ■ Weil, Gotshal & Manges LLP
- Michael Halloran ■ Haynes and Boone, LLP
- Kurt Wilhelm ■ OCC

Legislative Changes Affecting the Private Funds Industry

- Linda Filardi ■ GE Capital–Americas
- Satish Kini ■ Debevoise & Plimpton LLP
- Lee Meyerson ■ Simpson Thacher & Bartlett LLP

Life as a Systemically Important Institution After Financial Reform

- Michael Krimminger ■ FDIC
- Kathryn McCulloch ■ JP Morgan Chase & Co.
- Curtis Tao ■ Goldman, Sachs & Co.

Securitization and Capital Markets

- Sara Kelsey ■ WilmerHale LLP
- Michael Krimminger ■ FDIC
- Jerry Marlatt ■ Morrison & Foerster LLP

SEC Division Reports

- James Brigagliano ■ Trading and Markets
- Carlo di Florio ■ Office of Compliance Inspections and Examinations
- Hunter Jones Investment Management
- Shelley Parratt ■ Corporation Finance
- Lorin Reisner ■ Enforcement

Changes to Capital and Liquidity Standards

- Adam Gilbert ■ JP Morgan Chase & Co.
- Christopher Maher ■ Ernst & Young LLP
- Mark Van Der Weide ■ FRB

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Program Update

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Iranian Financial Sanctions Regulations Implementing the CISADA

- Dorothy Bennett ■ OFAC
- Brandon Reddington ■ OFAC

Significant Enforcement Actions and Litigation Update

- Scott Musoff ■ Skadden Arps Slate Meagher & Flom LLP
- Stuart Stein ■ Hogan Lovells US LLP
- Dan Stipano ■ OCC

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

2011 Legal & Legislative Conference

Late October/early November dates and DC hotels are currently being considered for FMA's 20th Legal & Legislative Issues Conference next fall.

FMA will assemble a Program Planning Committee in the spring to develop an agenda focusing on current areas of regulatory ad Congressional scrutiny/activity. If you would like to volunteer for the committee (or serve as a speaker), contact Dorcas Pearce at 202/544-6327 or *dp-fma@starpower.net*.

CLE and CPE accreditation…as well as team discounts…will be available, so be sure to budget for (and plan to attend) the 2011 Legal & Legislative Issues Conference.

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