

Financial Services Regulatory Highlights

volume 11 no. 8 August 2009

Administration Delivers OTC Derivative Regulation Legislation to Capitol Hill	1
FDIC Board Approves Final Statement of Policy on the Acquisition of Failed Depository Institutions	3
SEC Seeks Comment on Alternative Uptick Rule for Short Sales	3
OCC Issues Additional Guidance on Credit Card Account Rate Increases	4
FinCEN Issues Interim Guidance and Requests for Comment Regarding FBAR Reporting	4
The OCC Publishes Updates to "Other Consumer Protection Laws and Regulations" Booklet in the Comptroller's Handbook	5
SEC and CFTC to Hold Joint Meeting on Regulation Harmonization ...	6

Administration Delivers OTC Derivative Regulation Legislation to Capitol Hill

On August 11, 2009, the Obama Administration delivered proposed legislation to Capitol Hill focusing on regulating over-the-counter (OTC) derivatives. Under the Administration's proposed legislation, the OTC derivative markets will be comprehensively regulated for the first time. The legislation provides:

- Regulation and transparency for all OTC Derivative transactions;
- Strong prudential and business conduct regulation of all OTC Derivative dealers and other major participants in the OTC Derivative markets; and
- Improved regulatory and enforcement tools to prevent manipulation, fraud, and other abuses in these markets.

As part of the Administration's proposed legislation, the credit default swaps (CDS) market and all other OTC Derivative markets will be subject to comprehensive regulation to:

- Guard against activities in those markets posing excessive risk to the financial system;
- Promote the transparency and efficiency of those markets;
- Prevent market manipulation, fraud, insider trading, and other market abuses; and
- Block OTC Derivatives from being marketed inappropriately to unsophisticated parties.

These goals will be reached through comprehensive regulation that includes the following:

Regulation of OTC Derivative Markets

Require Central Clearing and Trading of Standardized OTC Derivatives:

- To reduce risks to financial stability that arise from the web of bilateral connections among major financial institutions, the legislation will require standardized OTC derivatives to be centrally cleared by a derivatives clearing organization regulated by the CFTC or a securities clearing agency regulated by the SEC.
- To improve transparency and price discovery, standardized OTC derivatives will be required to be traded on a CFTC- or SEC-regulated exchange or a CFTC- or SEC-regulated alternative swap execution facility.

Move More OTC Derivatives into Central Clearing and Exchange Trading:

- Through higher capital requirements and higher margin requirements for non-standardized derivatives, the legislation will encourage substantially greater use of standardized derivatives and thereby will facilitate substantial migration of OTC derivatives onto central clearinghouses and exchanges.
- The legislation proposes a broad definition of a standardized OTC derivative that will be capable of evolving with the markets.
 - An OTC derivative that is accepted for clearing by any regulated central clearinghouse will be presumed to be standardized.
 - The CFTC and SEC will be given clear authority to prevent attempts by market participants to use spurious customization to avoid central clearing and exchange trading.

Require Transparency for All OTC Derivative Markets:

- Accordingly, all relevant federal financial regulatory agencies will have access on a confidential basis to the OTC derivative transactions and related open positions of individual market participants.
- In addition, the public will have access to aggregated data on open positions and trading volumes.

Regulation of All OTC Derivative Dealers and Other Major Market Participants

Extend the Scope of Regulation to Cover All OTC Derivative Dealers and other Major Participants in the OTC Derivative Markets:

- The proposed legislation will require, for the first time, the federal supervision and regulation of any firm that deals in OTC derivatives and any other firm that takes large positions in OTC derivatives.

Bring Robust and Comprehensive Prudential Regulation to all OTC Derivative Dealers and other Major Participants in the OTC Derivative Markets:

- Under the legislation, OTC derivative dealers and major market participants that are banks will be regulated by the federal banking agencies. OTC derivative dealers and major market participants that are not banks will be regulated by the CFTC or SEC.
- The federal banking agencies, CFTC, and SEC will be required to provide robust and comprehensive prudential supervision and regulation – including strict capital and margin requirements – for all OTC derivative dealers and major market participants.
- The CFTC and SEC will be required to issue and enforce strong business conduct, reporting, and recordkeeping (including audit trail) rules for all OTC derivative dealers and major market participants.

Preventing Market Manipulation, Fraud, and other Market Abuses

- The legislation gives the CFTC and SEC clear, unimpeded authority to deter market manipulation, fraud, insider trading, and other abuses in the OTC derivative markets.
- The CFTC and SEC will be given the authority to set position limits and large trader reporting requirements for OTC derivatives that perform or affect a significant price discovery function with respect to regulated markets.
- The full regulatory transparency that the legislation will bring to the OTC derivative markets will assist regulators in detecting and deterring manipulation, fraud, insider trading, and other abuses.

Protecting Unsophisticated Investors

- The legislation will tighten the definition of eligible investors that are able to engage in OTC derivative transactions to better protect individuals and small municipalities.

FDIC Board Approves Final Statement of Policy on the Acquisition of Failed Depository Institutions

On August 26, 2009, the FDIC Board adopted a final Statement of Policy on the Acquisition of Failed Insured Depository Institutions (Final Statement). This Final Statement provides guidance to investors interested in acquiring or investing in deposit liabilities of failed banks or thrifts about the standards they will be expected to meet in order to qualify to bid on a failed institution.

The FDIC wants all owners of banks or thrifts, whether they are individuals, partnerships, limited liability companies, or corporations, to have the experience, competence, and willingness to run the banks in a prudent manner, to support them when they face difficulties, and to protect them from abuses. At the same time, the FDIC has noted that the banking industry is in need of additional capital. In order to facilitate private capital investments in the banking industry, the FDIC issued in July a Proposed Statement and sought public comment on the proposal. In the Proposed Policy Statement, the FDIC set forth the following nine specific questions for consideration by the commenters:

- Definition of the "investors" to whom the policies would apply;
- Bidding eligibility of so-called "silo" structures;
- Appropriate capital levels for failed insured depositor institutions acquired by private capital investors;
- Whether source of strength commitments should be required and the scope of such commitments;

- Whether cross guarantee commitments should be required and the scope of such commitments;
- Bidding eligibility of entities established in bank secrecy jurisdictions;
- Whether a three-year continuity of ownership rule is the appropriate period of time;
- Bidding eligibility of investors that directly or indirectly hold 10% or more of the equity of a bank or thrift in receivership; and
- Whether the proposed limitations should be lifted after a certain number of years of successful operation of a bank or thrift holding company.

The FDIC received a substantial number of comments on these standards and they provided helpful insight regarding the issues related to private capital investments. After careful consideration of those comments, the FDIC has incorporated a number of significant changes into the Final Statement. Those changes include refining the description of the types of investors covered, changing the capital standard to one that is a better measure of the capital available to absorb losses, eliminating the course of strength requirement, defining a bank secrecy jurisdiction, prohibited structure, and clarifying the circumstances in which the cross support obligation would apply. The FDIC Board will review the operation and impact of this Final Statement within 6 months of its approval date and shall make adjustments, as it deems necessary.

SEC Seeks Comment on Alternative Uptick Rule for Short Sales

As discussed in the April Issue of the Financial Services Regulatory Highlights, the SEC proposed two approaches to restrictions on short selling. The first approach is a price test that would apply on a market wide and permanent basis. The second approach would apply only to a particular security during severe market declines in that security. On August 17, 2009, the SEC

announced that it is seeking public comment on an alternative approach to short selling price test restrictions that may be more effective and easier to implement than the previously proposed price test restrictions currently under consideration.

The alternative uptick rule would allow short selling only at an increment above the national best bid. Unlike the proposals in April, the alternative uptick rule would not require monitoring of the sequence of bids and as a result, the alternative uptick rule would be easier to

monitor. It may also be possible to implement this approach more quickly and more cost effectively than the prior proposals. As a result, the SEC has reopened the comment period to receive input on this alternative. Comments should be received by September 21, 2009.

OCC Issues Additional Guidance on Credit Card Account Rate Increases

On August 26, 2009, the OCC issued a bulletin on provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act). The bulletin describes an interim final rule issued by the Federal Reserve Board that requires banks to notify customers 45 days in advance of any rate increase or significant changes in credit card account terms. The rules also require lenders to disclose that their customers have the right to reject those changes. However, under the new rules, the new rates or terms can be applied to any transaction that occurs more than

14 days after the notice is provided - even if the customer ultimately rejects the changes. The rules do not require creditors to tell their customers that new terms can be applied during the 45-day period.

The OCC is directing national banks to include an additional disclosure to notify customers of their rights surrounding prospective changes to account terms. The OCC believes that this additional disclosure will prevent consumer confusion, particularly for customers who opt to reject the changes in terms.

FinCEN Issues Interim Guidance and Requests for Comment Regarding FBAR Reporting

On August 11, 2009, FinCEN issued new interim guidance provided by the Internal Revenue Service (IRS), as well as a request for public comment by the Department of Treasury on the Report of Foreign Bank and Financial Accounts (FBARs).

The current instructions to the FBAR provide, with certain exceptions, that U.S. persons that have the signature authority over, but no financial interest in, a foreign financial account are required to file an FBAR. These persons must report the account on an FBAR even if the foreign financial account is reported on an FBAR filed by the owner of the accounts (or other person that has a financial interest in the account). The current instructions also provide that a foreign financial account that must be reported on an FBAR include any bank, securities, securities derivatives, or other financial instruments accounts. Currently, FBARs must be filed

with the Department of Treasury on or before June 30 of the succeeding year.

In light of the additional time needed for the Department of Treasury to address issues pertaining to FBAR filing requirements and the need to provide administrative relief for (i) persons with signatory over, but no financial interest in, a foreign financial accounts, and (ii) persons with a financial interest in, or signature authority over, a foreign commingled fund, these persons now have until June 30, 2010, to file an FBAR for the 2008 and earlier calendar years with respect to these foreign financial accounts.

Additionally, the Department of Treasury is interested in receiving comments on the following issues affecting a person's FBAR filing obligation:

- Should a person with signature authority, but no financial interest in, a foreign financial account be relieved of filing an FBAR for the account?
- Under what circumstances, might the exception from FBAR filing, currently available for officers and employees of banks and certain publicly-traded domestic companies, be expanded to apply to all officer and employees with only signature authority over, and no financial interest in, an employer's foreign financial accounts, including circumstances in which an individual has been advised that an FBAR has been filed with respect to a foreign financial account for which that person has signature authority?
- How a bank or publicly-traded company exception might apply to officers and employees with only

signature authority over accounts owned by clients of their employers?

- When an interest in a foreign entity should be subject to FBAR reporting?
- Are passive asset and passive income thresholds of 50% and 75%, respectively, appropriate and whether the tests should apply conjunctively?
- Should a U.S. person be relieved from an FBAR filing requirement with respect to a foreign commingled fund in other circumstances, such as when filing would be duplicative of other reporting?

Comments should be received on or before October 6, 2009.

The OCC Publishes Updates to "Other Consumer Protection Laws and Regulations" Booklet in the Comptroller's Handbook

On August 10, 2009, the Office of the Comptroller of the Currency (OCC) issued its revised electronic version of the "Other Consumer Protection Laws and Regulations" booklet (Other Consumer Booklet), which is a part of the Comptroller's Handbook. The revisions include both new and revised procedures, as well as the incorporation of procedures that were distributed previously in OCC bulletins. The decision to utilize the expanded procedures found in the booklet will be determined after examiners complete their compliance core assessment of a bank.

The updates add the following new procedures to the following laws:

- Service Members Civil Relief Act of 2003 - Examiners must verify that when a security interest is taken on real estate for active duty service members that the bank maintains the interest rate reduction of 6% for one year after active duty service ends, and that it does not foreclose, seize, or sale the real or personal property owned by the

service member for the period of military service or nine months thereafter.

- Limitations on Terms of Consumer Credit Extended to Service Members and Dependents - Examiners must confirm that the total charges on covered transactions ("payday loans," "vehicle title loans," and "tax refund anticipation loans") do not exceed the Military Annual Percentage Rate (MAPR) of 36% and that the dollar amount of these fees are disclosed separately since they are not included in the Truth in Lending Act (TILA) finance charges or APR.

The updates add the following revised procedures to the following regulation:

- Regulation M (Consumer Leases) - Examiners must check to confirm that electronic delivery of disclosures is in compliance with consumer consent and other provisions of the E-Sign Act. Additionally, examiners should verify that disclosures are provided either before consummation of the lease, during renegotiation, or to multiple lessees/lessors, that they are clear and conspicuous, dated, and

identify the lessor and lessee. These disclosures may be grouped together on either the contract or a separate statement, as applicable.

Procedures for the following laws, which were previously distributed via OCC bulletins, were also incorporated into the revised electronic version of the booklet:

- Children's Online Privacy Protection Act;
- Privacy of Consumer Financial Information;

- Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003; and
- Telephone Consumer Protection Act and Junk Fax Prevention Act.

The Other Consumer Booklet is available on the OCC Web site.

SEC and CFTC to Hold Joint Meeting on Regulation Harmonization

On August 20, 2009, the SEC and the Commodity Futures Trading Commission (CFTC) announced that the two regulatory agencies (Agencies) will hold joint meetings to seek input from the public on harmonization of market regulation. This past June, the Department of Treasury released a White Paper on Financial Regulatory Reform calling on the SEC and CFTC to make recommendations to Congress for changes to statutes and regulations that would harmonize regulation of futures and securities. Specifically, the White Paper recommended that the CFTC and SEC complete a report to Congress by September 30, 2009, that identifies all existing conflicts in statutes and regulations with respect to similar types of financial instruments and either explains why those differences are essential to achieve underlying policy objectives with respect to investor protection, market integrity, and price transparency or makes recommendations for changes to

statutes and regulations that would eliminate the differences.

The first meeting will take place on September 2, 2009 at the CFTC and the second meeting will take place on September 3, 2009 at the SEC. The meetings will consist of five panels and topics will include:

- Regulation of exchanges and markets;
- Regulation of intermediaries;
- Regulation of clearance and settlement; and
- Regulation of investment funds.

The meetings will be open to the public with seating on a first-come, first-served basis. A transcript of the meetings will be made and entered into the Agencies' public comment files, which will remain open for the receipt of written comments until September 14, 2009.

Additional Information

If you would like additional information about the topics discussed in this newsletter, or about PwC Financial Services Regulatory, please call:

David Albright, Principal	703-918-1364
Thomas Biolsi, Principal	646-471-3000
John Campbell, Principal	646-471-7120
Carlo di Florio, Principal	646-471-2275
Jeff Lavine, Partner	703-918-1379
Ric Pace, Principal	703-918-1385
Bruce Roland, Principal	410-783-7650
Ellen Walsh, Principal	646-471-7274
David Sapin, Principal	703-918-1391
Gary Welsh, Managing Director	703-918-1432
Dan Weiss, Managing Director	703-918-1431

www.pwcregulatory.com

© 2009 PricewaterhouseCoopers LLP. All rights reserved. "PricewaterhouseCoopers" refers to PricewaterhouseCoopers LLP, a Delaware limited liability partnership, or, as the context requires, the PricewaterhouseCoopers global network or other member firms of the network, each of which is a separate

and independent legal entity. This document is for general information purposes only, and should not be used as a substitute for consultation with professional advisors.