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MARKET SOLUTIONS

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The Regulation of Municipal Advisors After the Dodd-Frank Act—Recent SEC and MSRB Initiatives

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MARKET SOLUTIONS

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The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), which became law July 21, 2010, established a new securities intermediary registration category for "municipal advisors" and imposed a very short compliance date, October 1, 2010. Depending on the types of services provided by a bank or other financial services firm to cities, counties, and other public and quasi-public entities, the bank or financial services firm may be a "municipal advisor" and required to register with the Securities and Exchange Commission (the "SEC") and the Municipal Securities Rule-making Board ("MSRB").

In order to fill a perceived gap left by historical regulation and supervision of the activities of brokers, dealers and municipal securities dealers, Section 975 of the Dodd-Frank Act amended several provisions of the Securities Exchange Act of 1934 (the "Exchange Act") to establish the "municipal advisor" registration category. In most cases in which the Exchange Act previously provided for substantive regulation of the activities of brokers, dealers and municipal securities dealers, the Dodd-Frank Act extends the same or a comparable level of regulation or, in some instances, a more extensive level of regulation, to the activities of municipal advisors. By virtue of these amendments, the following rules apply effective October 1, 2010:

> *"It is unlawful for a person that fits within the definition of "municipal advisor" to provide advice to or on behalf of a "municipal entity" or "obligated person" with respect to municipal financial products or the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, unless such person is registered as a municipal advisor."*

- It is unlawful for a person that fits within the definition of "municipal advisor" to provide advice to or on behalf of a "municipal entity" or "obligated person" with respect to municipal financial products or the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, unless such person is registered as a municipal advisor.
- No municipal advisor is permitted to use the mails or any means or instrumentality of interstate commerce to provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial

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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 developments in connection with **Capital**, the **Dodd-Frank Act** (including developments relating to *Living Wills, Credit Risk Retention, Derivatives, Credit Ratings, and Compensation Committees*), and **BSA/AML** issues.

CAPITAL

Capital Plans Annually

On June 10, 2011, the Federal Reserve released a proposed rule (amending Regulation Y) for comment that would require that bank holding companies domiciled in the United States with total consolidated assets of $50 billion or greater submit capital plans annually for review, beginning in 2012. This capital plan review would build on this year's Comprehensive Capital Analysis and Review, which applied to 19 banks. The Federal Reserve would evaluate any plans to engage in share repurchases, pay dividends, etc. Based on available data, 35 bank holding companies would be affected. As outlined, a capital plan is defined as a written presentation of a company's capital planning strategies and capital adequacy processes that includes: (i) an assessment of the expected uses and sources of capital over a nine-quarter, forward-looking planning period that reflects the bank holding company's size, complexity, risk profile and scope of operations, assuming both expected and stressful conditions, (ii) a description of the processes and procedures used to asses capital adequacy, and (iii) an analysis of the effectiveness of those procedures. Detail and analysis would vary depending on the institution's business operations and complexity. The release outlines various mandatory elements of a capital plan and outlines the Federal Reserve's review process for the plans. Comments are due by August 5, 2011. The text of the rule proposal is available at ***http://federalreserve.gov/newsevents/press/bcreg/20110610a.htm.***

Stress Testing

On June 9, 2011, the Federal Reserve, the OCC, and the FDIC issued proposed guidance on stress testing for all banks with total consolidated assets of $10 billion or greater. The guidance outlines the principles for a stress-testing framework. The guidance specifically identifies these four principles: **Principle 1**—a banking organization's stress testing framework should include activities and exercises that are tailored to and sufficiently capture the banking organization's exposures, activities and risks; **Principle 2—**an effective stress testing framework employs multiple conceptually sound stress testing activities and approaches; **Principle 3—**an effective stress testing framework is forward-looking and flexible; and **Principle 4—**stress test results should be clear, actionable, well supported, and inform decision-making. The guidance includes a discussion of several different approaches to stress tests, including scenario analysis, sensitivity analysis, enterprise-wide stress testing and reverse stress testing. This guidance does not address the Dodd-Frank mandated stress test requirements. See ***http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20110609a1.pdf.*** Comments are due by July 29, 2011.

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FMA Welcomes New Members!

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New Municipal Advisor Registration Requirements…

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products, the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, in connection with which the municipal advisor engages in any fraudulent, deceptive, or manipulative act or practice.

- A municipal advisor and any person associated with the municipal advisor will be deemed to have a fiduciary duty to any municipal entity for whom such municipal advisor acts as a municipal advisor, and no municipal advisor may engage in any act, practice, or course of practice, or course of business which is not consistent with the municipal advisor's fiduciary duty or that is in contravention of any rule adopted by the MSRB.

In addition, the provisions of the Dodd-Frank Act pertaining to municipal advisors establish a framework for a potentially broad and far-reaching regulatory scheme that will be implemented by the SEC and the MSRB. Among other things, the MSRB is granted broad authority and responsibility to prescribe rules pertaining to the activities of municipal advisors and their associated persons, as well as the activities of persons engaging in solicitation activities on behalf of municipal advisors, including to (1) prescribe means reasonably designed to prevent acts, practices, and courses of business that are not consistent with a municipal advisor's fiduciary duty to its clients, (2) provide continuing education requirements for municipal advisors, and (3) provide professional standards. In adopting its municipal advisor rules, the MSRB is instructed to avoid imposing a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities and obligated persons, provided there is robust protection of investors against fraud.

As is discussed below, the municipal advisor provisions of the Dodd-Frank Act have generated a flurry of regulatory initiatives, including the issuance by the SEC of a temporary registration procedure and a proposed rule to create a permanent registration procedure and various recordkeeping requirements, and the adoption by the MSRB of amendments to a number of its rules, as well as the proposal by the MSRB of several additional rule amendments, an interpretation of an existing rule and several entirely new rules.

The Registration Process

Because of the short compliance period allowed, the SEC published a temporary registration procedure a month before the compliance date. A number of institutions, including numerous banks and broker-dealers, have filed registrations under the temporary procedure. Under the temporary procedure, registration is accomplished by completing and filing Form MA-T.

On December 20, 2010, the SEC published a proposed rule (the "Proposed SEC Rule") to provide a permanent, and far more detailed, registration procedure, establish recordkeeping requirements, and adopt other requirements applicable to firms required to register as municipal advisors ***(www.sec.gov/rules/proposed/2010/34-63576fr.pdf)***. The Proposed SEC Rule would establish a Form MA (to be used by persons other than natural persons and by sole proprietorships) and Form MA-1 (to be used by natural persons). The Proposed SEC Rule reinforces the broad potential interpretation by the SEC of the scope of the new municipal advisor registration category.

Firms that register as municipal advisors with the SEC also are required to register with the MSRB. On November 1, 2010, the MSRB filed a rule change with the SEC that requires municipal advisor businesses to register with the MSRB after registering with the SEC, similar to the MSRB registration requirement for dealers. Soon thereafter, the MSRB issued MSRB Notice 2010-50 announcing that, effective November 15, 2010, municipal advisors could begin registering with the MSRB and that municipal advisors must register with the MSRB by December 31, 2010 in order to engage in municipal advisory activities. The MSRB notice provided the following guidance:

- Individual (i.e., natural person) municipal advisors are not required to register with the MSRB (even if they are required to register with the SEC) unless they are sole proprietors.
- Any municipal advisor that previously registered with the MSRB as a broker, dealer or municipal securities dealer is required to separately register with the MSRB as a municipal advisor by updating its existing MSRB account.
- The SEC municipal advisor registration process must be completed prior to MSRB registration.

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Who Are "Municipal Advisors"?

The definition of "municipal advisor" includes persons who provide advice to or on behalf of a "municipal entity" or "obligated person" with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues, or who undertake a solicitation of a municipal entity or obligated person. Specifically included are "financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors" if such persons provide "municipal advisory activities." The treatment of some key categories of potential registrants is summarized below.

Banks. As in the case of municipal securities dealer activities, banks are not excluded from the definition of "municipal advisor." Whether a bank is required to register as a municipal advisor is dependent on the types of activities the bank conducts in connection with public and quasi-public entities. Some banks have registered their municipal bond departments as municipal securities dealers under the federal securities laws (Section 15B of the Securities Exchange Act of 1934). Those banks will need to analyze their activities to determine whether they also are required to register as a municipal advisor. It should be noted, however, that municipal advisor registration certainly may be required by virtue of activities conducted by a bank outside its municipal dealer or public finance departments. In addition, the new registration requirement could impact a bank's subsidiary or affiliate that is registered as a securities broker-dealer or investment adviser.

As in the case of municipal securities dealer activities, banks are not excluded from the definition of "municipal advisor." Whether a bank is required to register as a municipal advisor is dependent on the types of activities the bank conducts in connection with public and quasi-public entities.

Banks that have registered their bond departments or similar divisions as municipal securities dealers under Section ISB have done so in reliance on provisions of the Exchange Act and the MSRB rules that permit the registration of a "separately identifiable department or division" (a "SID"), rather than the bank as a whole. Section 975 of the Dodd-Frank Act does not contain similar provisions regarding municipal advisor SIDs. However, in its release relating to the Proposed SEC Rule, the Commission requested comment concerning whether it should permit the registration of bank municipal advisor SIDs in a manner similar to the procedures applicable to bank municipal securities dealer SIDs under MSRB Rule G-1.

Brokers, Dealers and Municipal Securities Dealers: Brokers, dealers and municipal securities dealers are excluded if they are serving as underwriter for a municipal issuance and their actions as municipal advisor are incidental to the underwriting services. Providing "municipal advisory" services in connection with acting as placement agent would not be exempt from registration.

Investment Advisers: Advising a municipal entity, including a municipal pension plan, regarding investments is a municipal advisory activity. SEC-registered advisers are exempt from registration as municipal advisors to the extent their services to municipal entities are limited to investment advice that would subject the adviser to the Investment Advisers Act of 1940.

Solicitors: The statutory definition of municipal advisor expressly includes persons who engage in the "solicitation of a municipal entity or obligated person." A person will be deemed to have engaged in a "solicitation of a municipal entity or obligated person" if the solicitation is "for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of a broker, dealer, municipal securities dealer, or municipal advisor for or in connection with municipal financial products, the issuance of municipal securities, or of any investment adviser to provide investment advisory services

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to or on behalf of a municipal entity." Banks and other financial service firms need to take this definition into account in connection with solicitation, referral or finder activities conducted by the bank (or any of its employees) or its affiliates (or any of their employees) on behalf of unaffiliated firms, including brokers, dealers, municipal securities dealers, municipal advisors and registered investment advisers.

Members of the Governing Body of Municipal Entities: The statutory definition of municipal advisor excludes the employees of a municipal entity. In the Proposed SEC Rule, the Commission would interpret this exclusion as extending to an elected member of the municipal entity's governing body to the extent the elected member is acting within the scope of his or her role as an elected member. In addition, the SEC proposes to extend the exclusion to appointed members who are serving *ex officio* by virtue of holding an elective office. However, in a controversial provision, the Proposed SEC Rule would require registration by other appointed members of municipal entity governing bodies to the extent such appointed officials engage in municipal advisory activities involving such municipal entities. This provision generated a significant number of comment letters expressing strongly held views that all appointed members should be excluded.

SEC-registered advisers are exempt from registration as municipal advisors to the extent their services to municipal entities are limited to investment advice that would subject the adviser to the Investment Advisers Act of 1940.

Who Are "Municipal Entities" and "Obligated Persons"?

"Municipal entities" means any state, political subdivision, or municipal corporate instrumentality, including 1) any agency, authority, or instrumentality of the state, political subdivision, or municipal corporate instrumentality, 2) any plan, program, or instrumentality of the state, political subdivision, or municipal corporate instrumentality, and 3) any issuer of municipal securities. Among the broad range of entities that the SEC has indicated fall within the scope of "municipal entities" are public pension funds, pooled investment funds maintained by public entities, Section 529 plans, and charter schools.

Various provisions of the statute and the Proposed SEC Rule extend protections not only to "municipal entities," but also to "obligated persons." Any person (including any issuer of municipal securities) who is either generally, or through an enterprise, fund, or account of such person, committed by contract or other arrangement to support the payment of all or part of the obligations on the municipal securities to be sold in any offering of municipal securities, will be considered an "obligated person." However, under the Proposed SEC Rule, banks and others that provide credit support in the form of letters of credit, bond insurance and the like are excluded from the definition of obligated persons.

What Are "Municipal Financial Products"?

The Dodd-Frank Act defines "municipal financial products" as encompassing 1) municipal derivatives, 2) guaranteed investment contracts, and 3) "investment strategies." "Municipal derivatives" includes, among other things, interest rate swaps and similar products if a "municipal entity" is a counterparty to the transaction. In the Proposed SEC Rule, the Commission proposes to define "investment strategies" to encompass all "plans, programs, or pools of assets that invest funds held by or on behalf of a municipal entity." This proposed interpretation of "investment strategies" appears to be considerably broader than the wording of the statute, which defines the term to mean "plans or programs for the investment of the proceeds of municipal securities that are not municipal derivatives, guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments." The potential breadth of the SEC's definition is illustrated by the following statement, among others, in the SEC's rule release:

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> "Also, because every bank account of a municipal entity is comprised of funds 'held by or on behalf of a municipal entity,' money managers providing advice to municipal entities with respect to their bank accounts could be municipal advisors."

In issuing the Proposed SEC Rule, the SEC requested comment as to whether the SEC should adopt an administrative exemption for banks providing advice concerning transactions that involve deposits. The SEC's potentially broad view of what types of activities should be viewed as "municipal advisory activities" prompted the Office of the Comptroller of the Currency to submit a detailed comment letter. Among other things, the OCC's comment letter takes the following positions:

- The Proposed SEC Rule would require registration by banks that provide various "traditional banking products and services" to municipal clients, including deposit products, and trust and fiduciary services. Among the types of traditional bank products that appear to be covered are deposits of municipal funds in commercial, checking, savings, time and trust accounts at insured depository institutions and providing advice to municipal entities in connection with trust and fiduciary services provided by the bank.
- Bank deposit accounts, loan transactions, trust and fiduciary services, and other traditional products and services are already subject to an extensive and comprehensive regulatory framework and supervision by the federal banking agencies. Applying the municipal advisor framework to such traditional bank activities would be unnecessary, duplicative and contrary to the intent of Congress in enacting the municipal advisor provisions of the Dodd-Frank Act.
- Although the Proposed SEC Rule would exclude banks providing letters of credit to municipal entities from the definition of "obligated person," the rule should be revised to also clarify that banks will not be considered to be municipal advisors merely by virtue of providing letters of credit to municipal entities or obligated persons (without providing advice to them).
- The SEC should clarify that banks would not be deemed to be providing "advice" to a municipal entity by providing terms upon which the bank would purchase for the bank's own account securities issued by the municipal entity (such as bond, tax and revenue anticipation notes) or by responding to RFPs relating to the investment of operating funds received from tax collections and other sources (for example, sweeps into mutual funds, repurchase agreements and certificates of deposit).

What About Uncompensated Services?

Can you be a municipal advisor even if you do not receive separate compensation for assisting a municipal entity? Except in connection with solicitation activities involving municipal entities, the SEC's position is that whether a person or firm is compensated is not relevant in determining if the person or firm is required to register as a municipal advisor. According to the statutory definition of "solicitation of municipal entity or obligated person," however, solicitation activities will not subject a person or firm to municipal advisor registration unless the person or firm receives "direct or indirect compensation."

The MSRB Initiatives

The following MSRB rules have been amended to expressly reference municipal advisors or other terms and provisions relating to municipal advisors:

Rule A-7 (Assessments)

Rule A-8 (Rulemaking Procedures)

Rule A-12 (Initial Fee)

Rule A-14 (Annual Fee)

Rule D-11 (Definition of Associated Persons)

Rule D-14 (Definition of Appropriate Regulatory Agency)

Rule G-5 (Disciplinary Actions; Remedial Notices)

Rule G-17 (Conduct of Municipal Securities and Advisory Activities)

Rule G-40 (Electronic Mail Contacts)

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The amendments to Rule D-11 provide that references to "municipal advisor" in the MSRB rules will be deemed to include a municipal advisor's "associated persons" unless the context otherwise requires. This puts municipal advisors on the same footing as brokers, dealers and other entities regulated under the MSRB rules.

Rule D-14, as amended, provides that, in the case of municipal advisors, "appropriate regulatory authority" means the SEC. In the case of "municipal securities dealers" that are banks, the "appropriate regulatory authority" is the bank's primary federal banking regulator. Accordingly, in the case of a bank acting as a municipal advisor, the bank's primary regulatory authority is the SEC, whereas in the case of the bank's municipal securities dealer activities, the bank's primary regulatory authority is the bank's primary banking regulator.

As amended, Rule G-17 states that "[i]n the conduct of its municipal securities or municipal advisory activities, each broker, dealer, municipal securities dealer, and municipal advisor shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice." In addition, the MSRB has proposed an interpretation of Rule G-17 (MSRB Interpretive Notice 2011-13). The amendments to Rule G-17 and the proposed interpretive notice are discussed in more detail below.

Except in connection with solicitation activities involving municipal entities, the SEC's position is that whether a person or firm is compensated is not relevant in determining if the person or firm is required to register as a municipal advisor.

In addition to the rule amendments described above, Rule D-13 was added to correspond to specific provisions of the Dodd-Frank Act. Rule D-13 states that "municipal advisory activities" shall have the meaning in Exchange Act 15B(e)(4)(A)(i) and (ii).

The foregoing is by no means the end of the MSRB's rulemaking efforts relating to municipal advisors. To date, the MSRB has proposed the following additional rule changes:

- Rule G-20: Proposed amendments would extend the restrictions on gifts and gratuities to gifts, benefits and inducements directed by municipal advisors and their associated persons to municipal entities and obligated persons.
- Rule G-36: New Rule G-36 would implement the provisions of the Dodd-Frank Act that extend fiduciary duties to municipal advisors. Some of the key implications of this rule proposal are discussed below.
- Rule G-42: New Rule G-42 would extend pay-to-play restrictions, similar to those applicable to brokers, dealers and municipal securities dealers under Rule G-37, to municipal advisors and their associated persons.
- Rule G-44: New Rule G-44 would establish detailed and extensive supervision requirements relating to the activities of municipal advisors and their associated persons.

Municipal Advisor Standards of Care

Section 975 of the Dodd-Frank Act minces no words regarding the standard of care applicable to municipal advisors. Specifically, the Dodd-Frank Act amends section 15B(c)(1) of the Exchange Act to provide that "[a] municipal advisor and any person associated with such municipal advisor shall be deemed to have a fiduciary duty to any municipal entity for whom such municipal advisor acts as a municipal advisor, and no municipal advisor may engage in any act, practice or course of business which is not consistent with a municipal advisor's fiduciary duty or that is in contravention of any rule of the [Municipal Securities Rulemaking] Board." The Proposed SEC Rule does not seek to elaborate on the fiduciary standard. The Dodd-Frank Act, however, expressly authorizes the MSRB to "prescribe means reasonably designed to prevent acts, practices, and courses of business as are not consistent with a municipal advisor's fiduciary duty to its clients." In addition, the Dodd-Frank Act directed the MSRB to adopt rules designed to, among other things, prevent "fraudulent and manipulative acts and practices [and] to promote just and equitable principles of trade . . ." As noted below, the MSRB has proposed two key initiatives pursuant to this authority, which are summarized below.

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Proposed Adoption of New Rule G-36

On February 14, 2011 the MSRB issued MSRB Notice 2011-14 requesting comment on draft Rule G-36, and a related interpretive notice, which are designed to establish rules designed to prevent acts, practices and courses of business that are not consistent with a municipal advisor's fiduciary duty to its clients. Draft Rule G-36 would provide that "[i]n the conduct of its municipal activities on behalf of municipal entities, a municipal advisor shall be subject to a fiduciary duty, which shall include a duty of loyalty and a duty of care." The accompanying proposed interpretive notice includes the following, among other, guidance:

Draft Rule G-36 would provide that "[i]n the conduct of its municipal activities on behalf of municipal entities, a municipal advisor shall be subject to a fiduciary duty, which shall include a duty of loyalty and a duty of care."

- The *duty of loyalty* requires a municipal advisor to deal honestly and in good faith with the municipal entity and to act in the municipal entity's best interests. Among other things, this demands that all material conflicts of interest must be disclosed in sufficient detail in writing to an authorized official of the municipal entity and the informed consent of such authorized official must be obtained. Under certain circumstances, a municipal advisor may proceed with the engagement after documenting with specificity why it was unable to obtain consent, unless the conflict is "unmanageable."
- The MSRB has offered the following as examples of material conflicts of interest that must be disclosed and appropriately consented to by the client: (1) payments for the purpose of obtaining or retaining municipal advisory business; (2) payments from third parties in relation to the municipal advisory engagement; (3) payments (other that reasonable fees paid to the municipal advisor) from third parties to enlist recommendation of their services to the municipal entity; and (4) acting as a principal in certain matters concerning the municipal advisory engagement.
- A municipal advisor must not enter into an engagement with a municipal entity client if it cannot manage its conflicts of interest. Examples of unmanageable conflicts of interest identified by the MSRB include kickback arrangements, certain fee-splitting arrangements, payments for the purpose of obtaining or retaining municipal advisory business, excessive compensation, and acting as principal under certain circumstances.
- Under most circumstances, an unmanageable conflict of interest will arise from the municipal advisor, or its affiliate, acting as principal in connection with the same transaction for which it acts as municipal advisor. However, the proposed rule interpretation states that a municipal advisor or its affiliate may act as principal in connection with the investment of bond proceeds if it is the lowest cost provider and the fair market value is determined in accordance with certain IRS safe harbor requirements. The municipal advisor or its affiliate acting as principal on transactions other than transactions for which it is acting as municipal advisor generally would not be considered an unmanageable conflict of interest.
- The municipal advisor must provide written disclosure of the scope of its services and the amount of all direct or indirect compensation, and also must provide written disclosure of the conflicts of interest associated with its compensation. A sample disclosure form is provided in the proposed interpretive notice.
- A municipal advisor is required to exercise due care in performing its responsibilities. Among other things, the MSRB has indicated that this requires that the municipal advisor (1) must possess the degree of knowledge and expertise needed to provide informed advice, (2) has a duty to investigate and disclose alternatives to the proposed financing structure or product that are reasonably feasible, if the alternatives would better serve the interests of the municipal entity, (3) must make reasonable inquiry as to facts relevant to the municipal entity's determination of whether to proceed with a course of action, and (4) if it is providing a certificate that will be relied upon by the municipal entity or investors, must make a reasonable inquiry as to pertinent facts. Subject to certain disclosure obligations, a municipal advisor

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is permitted to take reasonable actions to define the scope of its engagement, however, and thereby limit the actions to which its fiduciary duty applies.

Amendments to Rule G-17

The provisions of the Dodd-Frank Act extend a fiduciary standard to advice provided by a municipal advisor and its associated persons to municipal entity clients, but not to advice or other services provided to "obligated persons." The MSRB sought to address the standard of conduct for advice given to obligated persons in its amendments to Rule G-17, which became effective December 22, 2010. In amending Rule G-17, the MSRB extended the provisions of the existing rule applicable to brokers, dealers and municipal securities dealers to municipal advisors. As amended, Rule G-17 provides that "[i]n the conduct of its municipal securities or municipal advisory activities, each broker, dealer, municipal securities dealer, and municipal advisor shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice."

In addition, the MSRB has requested comment on a draft interpretive notice regarding the application of MSRB Rule G-17 to municipal advisors. There is considerable overlap between the G-17 interpretive notice and proposed Rule G-36 and the related interpretive notice to implement the municipal advisor fiduciary standard. The MSRB has offered the following points of differentiation:

- MSRB Rule G-17 does not require acting in the "best interests" of a client. Instead, Rule G-17 requires that the advisor act in a fair and non-fraudulent manner.
- Rule G-17 applies to advice and other services rendered to "obligated persons," whereas the fiduciary standard under the Dodd-Frank Act and proposed Rule G-36 applies only to advice given to "municipal entities."
- The standard of conduct in Rule G-17 applies to solicitors, whereas the fiduciary standard under the Dodd-Frank Act and proposed Rule G-36 does not.

Key components of the proposed interpretive notice under Rule G-17 include the following:

- In connection with recommending a transaction or product to an obligated person, the *fair dealing standard* under Rule G-17 requires that a municipal advisor (1) conclude that the transaction or product is appropriate given the client's financial circumstances, objectives, and market conditions, (2) advise the client of the material risks and characteristics of the transaction or product, and (3) advise the client of any incentives for the municipal advisor to recommend the transaction or product. Similarly, in reviewing a transaction or product recommended by another party, the fair dealing standard requires that a municipal advisor advise the client of the material risks and characteristics of the transaction or product and the appropriateness based on the client's financial circumstances, objectives, and market conditions, but (1) the municipal advisor is not required to consider reasonably feasible alternatives, *unless requested to do so*, and (2) the municipal advisor is not required to advise the client about the appropriateness of the transaction or product if the obligation to do so is *expressly disclaimed in writing*.
- Under the *standard of due care,* a municipal advisor must exercise due care in the provision of advice to its obligated person client, must have the necessary capacity, resources and knowledge to perform the services it agrees to provide, and must have a reasonable basis for any representations it makes in any certificate it signs that will be relied upon by other parties to a transaction.
- Material conflicts of interest must be disclosed to an authorized official of the obligated person, who must give his or her *informed* consent to the conflict of interest. The proposed interpretation indicates that material conflicts of interest will include those that color the municipal advisor's judgment or impact the municipal advisor's ability to render unbiased advice.
- The municipal advisor's compensation must be disclosed in essentially the same manner as under proposed Rule G-36. The receipt of excessive compensation or certain types of "prohibited" compensation (e.g., kickbacks and certain fee-splitting arrangements) will be deemed a violation of Rule G-17.

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- Solicitors are subject to the conduct standards under Rule G-17 and, pursuant to the proposed interpretive notice, are required to disclose all material facts relating to their solicitation activities. Material facts that must be disclosed include the following: (1) the solicitor's name; (2) the type of business being solicited; (3) the amount of the solicitor's compensation; (4) the source of all compensation received by the solicitor; (5) payments made by the solicitor to facilitate solicitation; and (6) all relationships of the solicitor with employees or board members of the municipal entity or any affiliated persons who may have influence over the selection of the solicitor's client. In addition, solicitors must disclose all material information about the solicited products or services, including all material risks and characteristics of the products or services, must advise the municipal entity of any incentives received by the solicitor to recommend the product or service and any associated conflicts of interest, and must not make any material misstatements or omissions when discussing products or services.
- Solicitors are prohibited from providing any kickbacks or engaging in fee-splitting arrangements, and, in addition, are prohibited from providing lavish gifts or gratuities (generally defined as in excess of $100 in value per year) to municipal entity officials or affiliated persons.

What Lies Ahead?

Although the compliance date for municipal advisor registration was October 1, 2010, key issues relating to the registration and regulation of municipal advisors seem to be anything but settled. The SEC received extensive comments to the Proposed SEC Rule, including numerous key interpretive issues on which the Commission requested comment. Meanwhile, the amendments to several MSRB rules, including the substantive conduct rules in Rule G-17, are already in effect. But, the MSRB has proposed important new rules and interpretations and has received substantial comments regarding those proposals. Moreover, the MSRB itself has acknowledged that certain aspects of its rulemaking may be impacted by the actions which the SEC takes in finalizing its own municipal advisor rule. In addition, the American Bankers Association, among others, has called for the MSRB to hold its rulemaking in abeyance until the SEC completes the process of defining what are, and are not, municipal advisory activities.

Although the compliance date for municipal advisor registration was October 1, 2010, key issues relating to the registration and regulation of municipal advisors seem to be anything but settled.

Perhaps some meaningful clarifications and limitations on the scope of what activities require municipal advisor registration and the substantive rules of conduct that apply to such activities will emanate from the rulemaking process. Yet, it is inescapable that the registration requirements and fiduciary standard imposed by the Dodd-Frank Act are in place and applicable to those whose activities fit within the statutory definitions as they ultimately are interpreted. No doubt many firms have registered as municipal advisors as a precautionary measure and did not believe that their activities should subject them to registration. To this point, there is little to encourage those firms to prepare a withdrawal of their registration. Instead, those firms would be well-advised to continue to focus on the development of processes and procedures to comply with the conduct standards imposed by the Dodd-Frank Act, as interpreted by the SEC and MSRB, as well as the regulatory proposals relating to supervision and recordkeeping requirements. ■

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Alternatives to Dealing with Bail-in Proposals

The international dialogue on bail-in has not come to a conclusion yet; however, we are beginning to see some of the effects of a bail-in regime for financial institutions. As we discussed in prior newsletters, the BCBS made clear that tier 1 and tier 2 instruments should provide for loss-absorbency at the point of non-viability. Additional discussions are ongoing relating to requirements for institutions that are deemed systemically important, as well as whether financial institutions should be subject to a requirement to issue a fixed amount of debt that is subject to bail-in provisions. Proposed EU frameworks for resolution of financial institutions have introduced the possibility that regulatory authorities would be given a statutory power, exercisable when certain trigger conditions are met, to write-down or convert to equity all senior debt of the financial institution deemed necessary to ensure the credit institution is returned to solvency. Discussions of this proposal already have had a chilling effect on the market for bank debt in Europe. Investors already are forcing a repricing of senior unsecured bank debt. Investors have been expressing a preference for structures and alternatives that would not be affected by bail-in. In the short-term, banks are looking to covered bonds and quasi-asset-backed structures as funding alternatives. In light of these discussions and market developments, we have set out some thoughts on structures that may provide funding alternative in a post bail-in world. See our alert at ***http://www.mofo.com/files/Uploads/Images/110400-Bail-In-Proposals.pdf.***

DODD-FRANK ACT

Living Wills and the Proposed Rule on Resolution Plans and Credit Exposure Reports

On April 22, 2011, the FDIC and the Federal Reserve (together, the "Agencies") jointly published a proposed rule concerning resolution plans and credit exposure reports (the "Proposed Rule"). The Proposed Rule is the first of several rulemakings necessary to implement Section 165 of the Dodd-Frank Act. The text of the Proposed Rule is available at ***http://edocket.access.gpo.gov/2011/pdf/2011-9357.pdf***.

Before turning to the specifics of the Proposed Rule, we would note several practical considerations:

- The first resolution plan likely will be due in July 2012, just over one year from now. Timing already is of the essence, since the board of directors must approve the plan. However, the nonbank financial companies that will be required to file resolution plans have not been identified yet.
- Further, the contents of the plan for different institutions may be in flux. There have been suggestions by the regulators and comments by affected institutions that less stringent content requirements should apply to institutions that are generally covered by Section 165, but that may pose less systemic risk than other institutions.
- The Agencies likely will use the credit exposure reports to test the continuing vitality of a resolution plan. Accordingly, communication between the institutions' staff responsible for these two documents is essential.
- A resolution plan serves two separate and potentially inconsistent functions: it provides additional data for ongoing supervision by the

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FMA Welcomes *More* New Members!

Anthony Cavallaro	FINRA
Brian Daeschner	PNC Investments
Srini Darbha	Oracle Financial Services Software
Amanda Demas	Chase Investment Services Corp.
Thomas Emanuelson	Northern Trust Corporation
Paul Ferak	Greenberg Traurig, LLP
Blair Foster	Wells Fargo
Daniel Gregus	Securities and Exchange Commission (Chicago Regional Office)
Sara Grohl	FINRA

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Federal Reserve, and it also sets the stage for resolution by the FDIC.

Section 165 requires enhanced supervision and prudential standards for U.S. and foreign nonbank financial companies designated under Section 113 of the Dodd-Frank Act as systemically important ("SIFIs") and bank holding companies and "foreign-based bank holding companies with total consolidated assets of $50 billion or greater (collectively, "Covered Companies"). Foreign-based bank holding companies are, in turn, defined as any foreign bank or company that is a bank holding company or is treated as such under Section 8(a) of the International Banking Act.

The Proposed Rule would require each Covered Company to submit periodically to the Agencies a "Resolution Plan" and "Credit Exposure Report." The Resolution Plan is a detailed contingency plan for the "rapid and orderly resolution" of the Covered Company under the Bankruptcy Code, or other applicable insolvency regime, in the event of material financial distress or failure. The Proposed Rule defines "rapid and orderly resolution" as "a reorganization or liquidation of the Covered Company . . . under the Bankruptcy Code that can be accomplished within a reasonable period of time and in a manner that substantially mitigates the risk that the failure of the Covered Company would have serious adverse effects on financial stability in the United States."

Resolution Plans

Under the Proposed Rule, a Resolution Plan would include seven parts: (i) an executive summary, (ii) a strategic analysis, (iii) a description of corporate governance structure for resolution planning, (iv) a description of overall organizational structure, (v) a description of management information systems, (vi) a description of interconnections and interdependencies, and (vii) an identification of supervisory authorities and regulators. Arguably, the most innovative and challenging part of the Resolution Plan is the strategic analysis, which would require, among other things, that the Covered Company develop a plan to utilize resources (e.g., funding, liquidity, and capital resources) to facilitate an orderly resolution of "material entities," "core business lines," and "critical operations," as these terms are defined in the Proposed Rule, under different stress scenarios. (Note that Section 165(i) requires specific stress tests for all Covered Companies; presumably these tests, once put in place, would provide the necessary stress scenarios. See our summary on *Stress Testing* above.)

The Proposed Rule would require that each Covered Company submit a Resolution Plan within 180 days of the effective date of a final rule, or within 180 days after the company becomes a Covered Company, and annually thereafter. A Covered Company would also be required to file an updated plan within 45 days after any "material change,"

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To save on printing/postage costs, FMA uses e-mail "blasts" as much as possible to let our members and contacts know about our upcoming educational programs. FMA's e-mail 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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which is broadly defined in the Proposed Rule. A Covered Company's board of directors would be required to approve the initial and each annual plan, although a delegee of the board of directors may approve updates in connection with a material change. In the case of a foreign-based Covered Company, a delegee of the board of the directors may approve the initial plan and any updates.

In reviewing a Covered Company's plan, the Agencies would first determine whether the plan appears "informationally complete," and, therefore, accepted for further review. If the plan is "informationally incomplete," the Agencies would require that the Covered Company resubmit an informationally complete plan within 30 days. After a Resolution Plan is accepted for further review, the Agencies would review the plan for its compliance with the requirements of the Proposed Rule. If, based on this review, the Agencies determine that the Resolution Plan is not credible or would not facilitate an orderly resolution, the Agencies would notify the Covered Company in writing, specifically identifying the deficiencies. Generally, within 90 days of receiving a notice of deficiencies, a Covered Company would be required to submit a revised plan that describes in detail, among other things, the revisions that address the identified deficiencies and why the revised plan is credible and would facilitate an orderly resolution. If the Covered Company fails to submit a credible revised plan, the Agencies may jointly subject the Covered Company or any of its subsidiaries to more stringent capital, leverage, or liquidity requirements, or restrictions on growth, activities, or operations. If, within two years of the imposition of the more stringent requirements, the Covered Company fails to submit a credible revised plan the Agencies may issue an order directing the Covered Company to divest certain assets or operations that the Agencies determine are necessary to facilitate an orderly resolution.

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Credit Exposure Report

The Credit Exposure Report would require reporting on the nature and extent to which the Covered Company has credit exposure to significant nonbank financial companies and significant bank holding companies, as defined by the Federal Reserve (76 Fed. Reg. 7731 (February 11, 2011)), and vice versa. The Credit Exposure Report is one of several Dodd-Frank Act-related initiatives concerning counterparty credit exposure limits and stress testing and, in the supplementary information to the Proposed Rule, the Agencies commit to coordinating and harmonizing, to the extent possible, the reports required by all of these credit exposure initiatives. The Credit Exposure Report necessarily will reflect new substantive requirements on credit exposures set forth in Sections 165(e), (g), and (j) of the Dodd-Frank Act. A Covered Company would be required to submit a Credit Exposure Report quarterly; however, the Proposed Rule does not provide a deadline for the initial report. Board of directors' approval would not be required for Credit Exposure Reports.

In sum, barring a dramatic change in course in the final rule, these two new regulatory tools, which are aimed at ending "too big to fail," will impose a significant regulatory burden on Covered Companies. For a more detailed discussion of these concerns, see our news bulletin ***http://www.mofo.com/files/Uploads/Images/110331-Dodd-Frank.pdf.***

Credit Risk Retention Rule Update

In late March, the "Joint Regulators" (*i.e.*, the Federal Reserve, the FDIC, the SEC, the Department of Housing and Urban Development, the Federal Housing Finance Agency, and the OCC) issued a notice of proposed rulemaking (the "NPR") that included text of a draft rule on credit risk retention in securitizations proposed to be adopted by each Joint Regulator as required by Section 941 of the Dodd-Frank Act. The NPR solicited public comment on the proposed risk retention rule, and established a June

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10, 2011 deadline for the submission of comments. The text of the proposed rule is available at ***http://www.sec.gov/rules/proposed/2011/34-64148.pdf.*** On June 6, 2011, the Joint Regulators extended the comment deadline to August 1, 2011. The Dodd-Frank Act required that the Section 941 credit risk retention rule be finalized by April 17, 2011 (a deadline already missed).

The NPR generally requires issuers of securitizations to retain 5% of the credit risk of each securitization unless an exemption is available. In addition, the NPR prohibits a sponsor from transferring any interest or assets that it is required to retain under the NPR to any person other than a consolidated affiliate and prohibits a sponsor or any consolidated affiliate from hedging the credit risk the sponsor is required to retain. The prohibition on hedging is limited to the credit risk the sponsor is required to retain; therefore, hedge positions that are not materially related to the credit risk of a particular ABS interest or exposure required to be retained, such as general interest rate risk, currency exchange rate risk, and overall market movement risk are permitted. For an overview of the NPR, see our news bulletin ***http://www.mofo.com/files/Uploads/Images/110407-Credit-Risk-Rules.pdf.*** Since the issuance of the NPR, the Joint Regulators have been meeting with various industry participants and consumer advocacy groups to discuss concerns over the complexity of the NPR and its potential effects on the securitization market. According to the Joint Regulators, the extension was granted to allow commenters additional time to analyze the issues and provide their comments.

The NPR has caused concern among industry participants, consumer advocacy groups and policy makers; and it has been the subject of Congressional hearings and letters from members of Congress to the Joint Regulators. The NPR's qualified residential mortgage ("QRM") exemption from the 5% risk retention requirement has received the most attention across constituent groups because of the perceived substantial economic and policy impacts of the QRM exemption on the housing market generally. Despite a lack of private financing in the U.S. housing market, the NPR exempts residential mortgage-backed securities ("RMBS') issued or guaranteed by the federal government, including those issued by the GSEs, while only exempting RMBS issued by the private sector if all assets in the asset pool consist solely of QRMs.

To qualify as a QRM, a mortgage loan must meet the following criteria: (i) maximum front-end and back-end borrower debt-to-income ratios of 28% and 36%, respectively; (ii) a maximum loan-to-value ratio of 80% in the case of a purchase transaction; (iii) a 20% down payment requirement in the case of a purchase transaction; (iv) no risky payment features, such as negative amortization, balloon payments, or the ability of the lender or servicer to raise interest rates excessively; and (v) borrower credit history restrictions, including no 60-day delinquencies on any debt obligation within the previous 24 months.

The criteria causing the most debate are the 20% down payment, the debt-to-income ratio and the loan-to-value ratio. Industry participants, consumer advocacy groups and policy makers view these criteria as too inflexible and higher than necessary to minimize borrower defaults. To make this point, it has been noted that less than 20% of the loans purchased or securitized by the GSEs from 1997 to 2009 would have qualified as QRMs.

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FMA Welcomes *More* New Members!

Garrett Gross	Zions First National Bank
Terry Hankins	Northern Trust Corporation
Nancy Hornberger	Wells Fargo
Marc Horwitz	DLA Piper US LLP
Benjamin Kavanagh	Frost National Bank
John Kramer	Chase Investment Services Corp.
Ernesto Lanza	Municipal Securities Rulemaking Board
Mike Levickas	Mesirow Financial
Joseph Levigne	Northern Trust Corporation
Jeffrey Levine	Mesirow Financial
Scott Lien	Harris NA

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With respect to RMBS, issuers also are concerned about the premium cash reserve account requirement and the discrepancies between U.S. and European Union risk retention rules. With respect to risk retention generally, industry participants are concerned about the rule's interaction with existing accounting and capital requirement standards, and the one-size-fits-all approach across asset classes that may make it difficult for issuers of other ABS to comply with certain provisions. For a more detailed discussion of these concerns, see our news bulletin ***http://www.mofo.com/files/Uploads/Images/110610-Credit-Risk-Retention-Rule-Comments.pdf.***

Derivatives

April was an important month for Title VII of the Dodd-Frank Act. Through various proposed rulemakings and actions, regulators addressed the scope of the product definitions and provided the long-awaited margin and capital requirements for swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants (collectively, "swap entities").

Foreign Exchange Swaps and Forwards

Acting under its authority under the Dodd-Frank Act, the Secretary of the Treasury issued its proposed determination that any "foreign exchange swap" or "foreign exchange forward" would be exempt from the "swap" definition. In the accompanying release, the Secretary stated that its authority to issue such an exemption is limited to foreign exchange swaps and forwards and does not extend to other types of foreign exchange derivatives. Accordingly, foreign exchange options, currency swaps, and non-deliverable forwards would remain within the swap definition. In addition, the proposed determination would not exempt any foreign exchange swap or forward that is traded on a Designated Contract Market (DCM) or Swap Execution Facility (SEF) from any applicable antimanipulation provisions under the Commodities Exchange Act.

The Secretary based its proposed determination on the distinctive characteristics of the narrowly defined, statutory foreign exchange definitions. Specifically, unlike most other derivatives, foreign exchange swaps and forwards have fixed payment obligations (i.e., counterparties know their payment obligations and the full extent of their exposure throughout the life of those transactions), are physically settled, and are predominantly short-term instruments. Based on those characteristics, the Secretary found that the risk profile for foreign exchange swaps and forwards was centered on settlement risk, rather than counterparty credit risk.

Notwithstanding the proposed exemption, all foreign exchange swaps and forwards will remain subject to the swap trade-reporting requirements and business conduct standards for swaps entities. They also would be subject to the CFTC's proposed anti-evasion rules discussed below.

Note that the Dodd–Frank Act amends the Commodity Exchange Act to prohibit national banks, federal branches or agencies of foreign banks, and their operation subsidiaries from engaging in certain off-exchange transactions in foreign currency with retail customers (so-called retail forex transactions) except pursuant to an OCC rule authorizing such activity. On April 22, 2011, the OCC published a proposed rule that would authorize national banks, federal branches or agencies of foreign banks, and their operating subsidiaries to engage in retail forex transactions and describes the various requirements with respect to disclosure, recordkeeping, capital and margin, reporting, business conduct, and documentation with which such entities would have to comply when conducting forex transactions. The proposed rule is available at ***http://www.occ.treas.gov/news-issuances/federal-register/76fr22633.pdf.***

Product Definitions

The CFTC and SEC jointly issued proposed rules and interpretive guidance to, among other things,

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further define the terms "swap" and "security-based swap" (such rules and interpretive guidance, the "Product Definition Rules"). Similar to the Secretary's discussion of the proposed determination, the Product Definition Rules would expressly provide that currency swaps, cross-currency swaps, currency options, foreign currency options, foreign exchange options, and non-deliverable forwards involving foreign exchange would not be included in the definitions of foreign exchange swap and foreign exchange forward. The Product Definition Rules also would include forward rate agreements within the meaning of the term swap.

In addition to clarifying what products are within the scope of the swap definition, the Product Definition Rules also provide which transactions are outside of that definition. In particular, none of the following products would be treated as swaps under the Product Definition Rules: traditional insurance products provided by qualifying persons, forward contracts in nonfinancial commodities, security forwards, including forward sales of mortgage-backed securities in the "To-Be-Announced" market, consumer and commercial agreements (e.g., interest rate locks on consumer mortgages), and "true sale" loan participations.

In one of the more troubling aspects of the Product Definition Rules, the CFTC proposed a number of broad anti-evasion provisions. For example, an agreement, contract, or transaction that is willfully structured to evade any provision of Subtitle A of Title VII would be deemed to be a swap. The SEC did not propose any specific rules regarding anti-evasion in the Product Definition Rules.

Margin Requirements

The prudential regulators (the Federal Reserve, the OCC, the FDIC, the Farm Credit Administration, and the Federal Housing Finance Agency) issued proposed margin requirements that would require swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants ("Swap Entities") that are prudentially regulated by a prudential regulator ("Covered Swap Entities") to collect initial and variation margin from their swap and security-based swap counterparties. Initial margin would have to be based on an approved initial margin model or a set percentage of the applicable notional amount, based on the asset class and tenor of the transaction involved. The amount of initial and variation margin that would be required to be collected would be reduced by the amount of any applicable initial margin or variation margin threshold amount, each set by the Covered Swap Entity based on its credit risk analysis. Any such threshold amount would be zero for any counterparty that is a swap entity or a high-risk financial end user. Low-risk financial end user counterparties would be permitted to have threshold amounts, subject to a cap, and nonfinancial end users would have no limit on the threshold amounts applicable to them. Additionally, initial margin posted to swap entities would be required to be segregated at an independent third-party custodian and would not be subject to rehypothecation.

The CFTC's proposed margin requirements would apply to swap dealers and major swap participants ("Covered CFTC Entities") for which there is no prudential regulator and are, in many respects, similar to the prudential regulators' proposed rules (although the defined terms differ). One important difference, however, is that the CFTC's proposed margin requirements would only require the collection of initial and variation margin from nonfinancial end user counterparties to the extent required under the applicable credit support arrangements with the Covered CFTC Entities. To the extent that any margin would be required from a nonfinancial end user under such a credit support arrangement, the CFTC's proposed margin requirement would permit the use of noncash collateral for which the value is reasonably ascertainable on a periodic basis. Another difference is that initial margin would be calculated based on an approved risk-based model or an alternative model that relates to margin required by Derivatives Clearing Organizations (DCO) for comparable swaps or futures contracts.

The SEC has yet to propose any margin requirements for security-based swap dealers and major security-based swap participants with respect to security-based swaps.

Capital Requirements

Under the prudential regulators' proposed capital requirements, Covered Swap Entities would be required to comply with the regulatory capital

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rules already made applicable to them under their prudential regulatory regimes. For Covered CFTC Entities, the CFTC's proposed capital requirements would vary depending on whether they are FCMs, are not FCMs but are nonbank subsidiaries of U.S. bank holding companies, or are neither FCMs nor nonbank subsidiaries of U.S. bank holding companies. The SEC has yet to propose any capital requirements for security-based swap dealers and major security-based swap participants.

SEC Proposes a Series of Amendments to Remove References to Credit Ratings

Section 939A of the Dodd-Frank Act requires federal agencies to review how existing regulations rely on credit ratings and remove such references from their rules and replace them with standards of creditworthiness as each agency deems appropriate. In order to comply with Section 939A, the SEC has proposed a series of rule amendments to remove references to credit ratings and replace them with alternative criteria. (The federal banking regulators published their proposed rules in connection with Section 939A of the Dodd-Frank Act on August 25, 2010: ***http://edocket.access.gpo.gov/2010/pdf/2010-21051.pdf.)***

On February 9, 2011, the SEC proposed amendments to its rules that would remove credit ratings as one of the conditions for companies seeking to use short-form registration when registering securities for public sale. On March 3, 2011, the SEC proposed amendments to rules under the Investment Company Act and a new rule to establish a standard of creditworthiness for purposes of Section 6(a)(5) of the Investment Company Act. On April 27, 2011, the SEC proposed another set of amendments to various Exchange Act rules, including Rules 101 and 102 of Regulation M and rules relating to broker-dealer recordkeeping. The text of the respective rules is available at ***http://www.sec.gov/rules/proposed/2011/33-9186.pdf, http://www.sec.gov/rules/proposed/2011/33-9193.pdf,*** and ***http://www.sec.gov/rules/proposed/2011/34-64352.pdf.***

Removal of Credit Ratings for Use of Short-Form Registration

Under the proposed amendments for use of the short-form registration, Forms S-3 and F-3 would be revised to remove the eligibility standard based on an investment-grade rating by a nationally recognized statistical rating organization ("NRSRO"). Instead, a company seeking to qualify for short-form registration, as well as the expedited "shelf" process, for the purpose of registering the offer and sale of non-convertible securities, would have to have issued over $1 billion of nonconvertible securities for cash in registered, primary offerings within the previous three years. The three-year period would be measured as of a date within 60 days of the filing of the registration statement. Calculating the amount of nonconvertible securities issued would be done in a manner consistent with the calculation for determining whether an issuer is a well-known seasoned issuer. This change will also impact other forms such as Forms S-4, F-4, Rules 138, 139 and

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FMA Welcomes *More* New Members!

Michael Lugowski	SunGard
Catherine McKendry	Northern Trust Corporation
Doug MacKinnon	PNC Investments
Michal Martinek	Compliance11
Louis Matrone	Oracle Financial Services
Christopher Mendoza	Katten Muchin Rosenman LLP
Susan Meyers	PNC Financial Services Group
Trasha Mims	JPMorgan Chase Bank
Shelly O'Brien	Envestnet Asset Management
Ravi Ramnarain	Mercantil Commercebank
Meaghan Reim-Strange	FINRA
Chris Riley	RegEd
Rick Rogoff	JPMorgan Chase & Co.

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169, as well as Schedule 14A under the Exchange Act. The reference to the investment grade standard would be amended to either use the $1 billion threshold or to refer to the relevant instruction in Form S-3 or Form F-3, as appropriate.

The proposed rule eliminates the safe harbor provided by Rule 134 for a rating provided by an NRSRO in certain communications deemed not to be a prospectus or a free writing prospectus.

The proposed rules also would rescind Form F-9, used by Canadian registrants to register nonconvertible investment-grade debt.

The SEC sought public comment on these proposed rules through March 28, 2011.

Removal of Credit Ratings in Certain Investment Company Act Rules and Forms

The SEC proposed to remove references to credit ratings in Rules 2a-7 (money markets); 3a-7 (issuers of asset-backed securities) and 5b-3 (repurchase agreements and refunded securities) under the Investment Company Act of 1940, and replace them with alternative standards of credit-worthiness. The proposal also covers four forms under the 1940 Act. In addition, the SEC proposed a new rule, 6a-5, which would establish alternative creditworthiness standards.

The most visible of these rules, Rule 2a-7, currently limits a money market fund's portfolio investments to securities that have received credit ratings from the requisite NRSROs in one of the two highest short-term rating categories or comparable unrated securities. (Fund directors must also determine that the security presents "minimal credit risks.")

Recent amendments to Rule 2a-7 require fund directors to designate NRSROs. While eliminating the requirement of an NRSRO rating, as required by Congress, the SEC would maintain the current two-step analysis.

Under the proposed rules, a security would be a "first tier security" (regardless of NRSRO ratings) if the fund's board (or its delegate) determines that the issuer (or if the security is subject to a guarantee, the guarantor) has the "highest capacity to meet its short-term financial obligations." In addition, fund directors must conclude, as they are now required, to determine that the security presents minimal credit risks.

The proposals make corresponding changes in other aspects of Rule 2a-7 and the other rules. For example, a current rule requiring money market funds to adopt written stress testing procedures will no longer refer to downgrades. Rather, the reference to ratings downgrades would be replaced with a hypothetical event that is designed to have a similar impact on a money market fund's portfolio.

The SEC sought public comment on these proposed rules through April 25, 2011.

Removal of Credit Ratings in Rules 101 and 102 of Regulation M

The SEC has proposed rules that would, if adopted, remove the references to credit ratings in Rules 101 and 102 of Regulation M and replace them with new standards relating to trading characteristics of covered securities. Rules 101 and 102 of Regulation M except from their respective provisions nonconvertible debt, nonconvertible preferred

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FMA Welcomes *More* New Members!

Victor Sandoval	Protiviti
Jacki Saylor	Northern Trust Corporation
David Scott	E*Trade Financial
Jason Shaffer	JPMorgan Chase & Co.
Victor Shier	Broker Dealer Services
Ramy Sidhom	PNC Investments
John Sikora, Jr.	Securities and Exchange Commission (Chicago Regional Office)
Tim Stearns	Envestnet Asset Management
Holland Stimac	Wells Fargo Audit & Security

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securities, and asset-backed securities that are rated investment grade by at least one NRSRO.

The proposed rules replace these references to credit ratings with new standards relating to trading characteristics of the security such as liquidity relative to the market for that asset class, the ability to trade in relation to general market interest rates and yield spreads, and whether the security is relatively fungible with securities of similar characteristics and interest yield spreads.

In order to determine whether nonconvertible debt, nonconvertible preferred securities, and asset-backed securities are liquid relative to the market for their respective asset class, factors such as size of the issuance, the percentage of the ADTV by persons other than the person seeking to rely on the exception, the number of market makers in the security being distributed other than the person seeking to rely on the exception, overall trading volume, the number of liquidity providers who participate in the market for the security, trading volume in similar securities or other securities of the same issuer, overall liquidity of all outstanding debt issued by the same issuer, how quickly an investor can sell the security after purchase, and in the case of asset-backed securities, the liquidity and nature of underlying assets could be considered.

Nonconvertible debt, nonconvertible preferred securities, and asset-backed securities also would need to trade at prices that are primarily driven by general market interest rates and spreads applicable to a broad range of similar securities to qualify for the proposed exception. As a result, only securities that trade in relation to changes in broader interest rates would qualify for this exception.

In order for a security to be relatively fungible under the proposed amendments, a portfolio manager would have to be willing to purchase it in lieu of another security with similar characteristics such as yield spreads and credit risk.

A person seeking to rely on the exception must use reasonable judgment in order to determine that the specific nonconvertible debt, nonconvertible preferred, and asset-backed security meets the proposed standards. Such determination must be subsequently verified by an independent third party. To determine whether a third party is independent, relevant professional background, experience, knowledge and skills must be considered. Counsel to, or affiliates of, the underwriter or issuer would fail the independence test under these rules.

The SEC is seeking public comment on these proposed rules by July 5, 2011. For a more detailed discussion of this matter, see our news bulletin ***SEC http://www.mofo.com/files/Uploads/Images/110524-Regulation-M.pdf.***

SEC Proposes Dodd-Frank Compensation Committee and Adviser Independence Rules

Pursuant to Section 952 of the Dodd-Frank Act, the SEC has proposed rules that, if adopted, would affect the composition of compensation committees and the use of compensation advisers by companies listed on the national securities exchanges, as well as the disclosure provided by companies regarding their use of compensation consultants.

Under the proposed rules, the national securities exchanges would be directed to adopt listing standards regarding the independence of compensation committee members, as well as the independence of advisers engaged by the compensation committee. The proposed rules would also require additional disclosure under Item 407 of Regulation S-K regarding the retention of compensation consultants and any conflicts of interest raised by the work of compensation consultants. The text of the proposed rule is available at ***http://www.sec.gov/rules/proposed/2011/33-9199.pdf.***

Section 952 of the Dodd-Frank Act added Section 10C to the Exchange Act. Section 10C requires that the SEC must direct the national securities exchanges and associations to prohibit listing of any company issuing equity securities, subject to limited exceptions, unless specific conditions are satisfied with respect to the compensation committee authority, the independence of compensation committee members and the consideration of specific factors relating to the independence of compensation advisors retained by the compensation committee. Under proposed Rule 10C-1, national securities exchanges, including the NYSE and Nasdaq, would be directed to adopt listing standards regarding compensation committees and the compensation

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Legislative/Regulatory Actions

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advisors that they retain. Once the final rules are adopted, the national securities exchanges will propose and adopt listing standards in accordance with the SEC's final rules.

Under the SEC's proposed rules, the exchanges would be directed to adopt listing standards that require each member of a compensation committee to be an independent member of the board of directors. In determining independence, the exchanges must consider the source of compensation of the director, including any consulting, advisory or other compensatory fee paid by the company to the director, and whether the director is affiliated with the company or any of its subsidiaries or their affiliates.

The SEC has proposed to provide the exchanges discretion in setting independence standards and is seeking comments on whether this approach is appropriate. The SEC has also requested comment on whether a "look back" period should be specified with respect to the independence determination.

Under the proposed rules, the compensation committee, in its sole discretion, must have authority to obtain or retain the advice of compensation advisers, must be directly responsible for the appointment, retention, compensation and oversight of such adviser's work, and the issuer must provide the appropriate funding for the payment of reasonable compensation to the adviser. When hiring compensation advisers, the proposed rules require that compensation committees consider certain independence criteria such as the provision of other services to the company by the firm employing the adviser, the amount of fees received from the company by the company employing the adviser as a percentage of that firm's revenue, the policies and procedures adopted by the firm employing the adviser that are designed to prevent conflicts of interest, any business or personal relationship that the adviser may have with any member of the compensation committee, and the compensation adviser's ownership of company stock.

The listing standards requirements for compensation committee member independence and compensation committee advisers would not apply to controlled companies, issuers of securities futures products cleared by a registered clearing agency or a clearing agency exempt from registration, or registered clearing agencies that issue standardized options. Limited partnerships, companies in bankruptcy proceedings, open-end management investment companies registered under the Investment Company Act of 1940, and foreign private issuers that disclose annually that they do not have an independent compensation committee are also exempt from these requirements.

In addition, the proposed rules require public companies to provide more disclosures about the compensation consultant such as the identity, whether the consultant was engaged directly by the committee, the nature and scope of the consultant's assignment, the instructions given to the consultant and whether there are any conflicts of interest raised by the work of the compensation consultant. The SEC sought public comment on these proposed rules by April 29, 2011 and the rules must be adopted by July 16, 2011. The SEC is expected to adopt final rules in the coming months, and then the exchanges will propose and seek comment on their own listing standards. For a more detailed overview of the proposed rule, see our news bulletin ***http://www.mofo.com/files/Uploads/Images/110415-Dodd-Frank-Compensation-Committee.pdf.***

(Continued on Page 21)

FMA Welcomes *More* New Members!

Bill Sweet	Skadden, Arps, Slate, Meagher & Flom LLP
Nancy Szymula	Harris Investor Services
Laura Thompson	Interactive Data Pricing and Reference Data
Karen Van Ness	Oracle Financial Services Software
Donna-Lynn Williams	Frost National Bank
Penny Winter	Mercantil Commercebank
Arlynn Woodley	Northern Trust Corporation
Lance Zinman	Katten Muchin Rosenman LLP

Legislative/Regulatory Actions

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BSA/AML

FinCEN Proposed Rule Implementing 104(e) of CISADA

On May 2, 2011, the Financial Crimes Enforcement Network (FinCEN) published a notice of a proposed rulemaking to implement Section 104(e) of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA). The text of the proposed rulemaking is available at ***http://www.gpo.gov/fdsys/pkg/FR-2011-05-02/pdf/2011-10482.pdf.***

CISADA, signed into law by President Obama on July 1, 2010, gives the President authority to impose sanctions on financial institutions and other companies doing business with Iran. Section 104(e) of CISADA directs the Treasury Department to establish certain reporting or other requirements for U.S. financial institutions that maintain correspondent or payable-through accounts for foreign financial institutions. FinCEN is meeting this mandate by implementing Section 104(e)(1)(B), under which the Treasury is authorized to require domestic financial institutions maintaining correspondent accounts for foreign financial institutions to report certain transactions to Treasury that are designed to elicit information relevant to the implementation of CISADA. The comment period for the proposed regulation closed on June 1, 2011. It is not certain when FinCEN will issue its final rulemaking notice.

The proposed regulations would require a U.S. bank to report to FinCEN the following information about foreign banks for which the U.S. bank maintains a correspondent account: (1) Whether the foreign bank maintains a correspondent account for an Iranian-linked financial institution designated under the International Emergency Economic Powers Act (IEEPA); (2) Whether the foreign bank has processed one or more transfers of funds within the preceding 90 calendar days related to an Iranian-linked financial institution designated under IEEPA, other than through a correspondent account; or (3) Whether the foreign bank has processed one or more transfers of funds within the preceding 90 calendar days related to Iran's Islamic Revolutionary Guard Corps (IRGC) or any of its agents or affiliates designated under IEEPA. The specific information to be provided includes all relevant identifying information for such transactions, including account name and numbers and value of transactions processed.

The proposed regulations make clear that a U.S. bank is only required to obtain such information in response to a specific request from FinCEN with respect to specific foreign banks, and includes a model certification that the U.S. bank can send to the foreign bank to provide the required information. The foreign bank is also required to certify that it will notify the requesting U.S. bank if the foreign bank establishes a new correspondent account for an Iranian-linked financial institution under IEEPA within 365 days from the date of its response. The U.S. bank must respond to FinCEN's request within 30 days of receiving the request from FinCEN, and if the bank receives notification from a foreign bank that it has established a new correspondent account for an Iranian-linked financial institution under IEEPA, then the bank must report the required information to FinCEN within 10 days of receiving such notification. The proposed regulations make clear that if the foreign bank does not respond to an inquiry made by the U.S. bank, the U.S. bank will be in compliance with the reporting requirements so long as the U.S. bank notifies FinCEN that the foreign bank did not respond to the inquiry.

Significantly, the reporting requirements are imposed on U.S. banks—as opposed to all financial institutions—because FinCEN took the view that banks provide services traditionally associated with correspondent banking. Bank is defined broadly in the proposed regulations to include any commercial bank, trust company, private bank, savings and loan association, national bank, thrift institution, credit union, any other organization chartered under banking laws and supervised by banking supervisors of any State, and any bank organized under foreign law. Thus, the U.S. branches of non-U.S. banks are subject to the reporting requirements applicable to U.S. banks under the proposed regulations. FinCEN requested comments as to whether the reporting requirements should be expanded to include other types of financial institutions. FinCEN also requested comments as to whether it should provide additional clarification as to the phrase "processed one or more transfers" which is intended to cover transfers that are made without requiring a correspondent account.

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Legislative/Regulatory Actions

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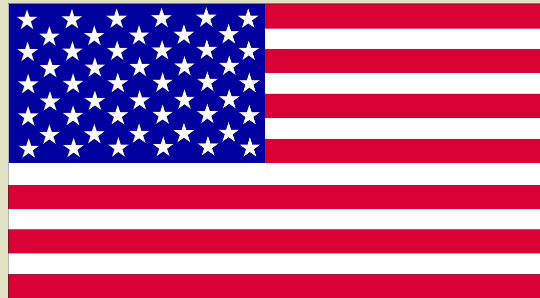
Comments were provided by, among others, Senator Jon Kyl, the American Israel Public Affairs Committee (AIPAC), the Clearing House Association, and the European Banking Federation (EBF). Both AIPAC and Senator Kyl expressed concern that the requirements of Section 104(e) are not met. In particular, the proposed regulation fails to impose mandatory reporting requirements on all domestic financial institutions that maintain correspondent accounts for foreign banks and therefore does not make the institutions responsible in their own right for ensuring that foreign banks are not conducting transactions or providing services prohibited by CISADA. On the other hand, the banking trade groups expressed concerns that the proposed regulation is potentially overly broad and excessively burdensome. ■

**Jay G. Baris, David H. Kaufman, David M. Lynn, Anna T. Pinedo, Dwight C. Smith, Aki Bayz, Alexandra Steinberg Barrage, David A. Trapani, Melissa D. Beck, Indira Lall, and Jeremy R. Mandell contributed to this column.*

Happy 4th of July!



Watch For

MSRB Notice 2011-31 (June 21, 2011) – The MSRB filed revisions to the study outline for the Municipal Fund Securities Limited Principal Qualification Examination (Series 51); effective August 1, 2011.

FINRA Regulatory Notice 11-28 (June 16, 2011) – FINRA requested comment on amendments to Schedule A of FINRA By-Laws implementing an accounting support fee to fund the Governmental Accounting Standard Board. The comment period will expire August 1, 2011.

SEC Press Release 2011-130 (June 15, 2011) – The SEC provided guidance and temporary relief regarding security-based swap provisions of the Dodd-Frank Act.

SEC Press Release 2011-128 (June 15, 2011) – The SEC proposed ways to strengthen audits and reporting of broker-dealers to protect customer assets.

OCC Bulletin 2011-24 (June 15, 2011) – The OCC, FRB and FDIC are seeking comment (due July 29, 2011) on the proposed interagency stress testing guidance.

Joint Press Release (June 14, 2011) – Three federal banking regulatory agencies (FRB, FDIC, OCC) adopted a final rule that establishes a floor for the risk-based capital requirements applicable to the largest internationally active banking organizations.

SEC Press Release 2011-125 (June 10, 2011) – The SEC announced steps to address the one-year effective date of Title VII of the Dodd-Frank Act. The SEC also announced proposed rules that would exempt transactions by clearing agencies in security-based swaps that they issue from all provisions of the Securities Act, other than the Section 17(a) anti-fraud provisions, as well as exempt these security-based swaps from Exchange Act registration requirements and from the provisions of the Trust Indenture Act, provided certain conditions are met. A complete list of the SEC's work implementing the Dodd-Frank Act is available on the SEC website.

Federal Reserve Press Release (June 10, 2011) – The Federal Reserve Board is seeking comment (by August 5, 2011) on a proposal to require top-tier U.S. bank holding companies with total consolidated assets of $50 billion or greater to submit annual capital plans for review.

SEC Press Release 2011-124 (June 10, 2011) – The SEC proposed exemptions from registration requirements for security-based swaps issued by certain clearing agencies.

Joint Press Release (June 9, 2011) – Three federal banking regulatory agencies (FRB, FDIC, OCC) are seeking comment (by July 29, 2011) on proposed stress testing guidance at banking organizations with total consolidated assets of more than $10 billion.

SEC Press Release 2011-123 (June 9, 2011) – The SEC issued an Investor Bulletin on the risks of investing in reverse merger companies.

FINRA Regulatory Notice 11-27 (June 8, 2011) – The SEC approved an increase (effective July 1, 2011) in the TAF rate for sales of covered equity securities.

Joint Press Release (June 7, 2011) – Six federal agencies extended the comment period (from June 10, 2011 to August 1, 2011) on risk retention proposed rulemaking.

FINRA Information Notice (June 6, 2011) – FINRA encouraged firms to make reasonable efforts to assist investment advisers seeking information pursuant to Rule 206(4)-5 under the Investment Advisers Act of 1940.

OCC Bulletin 2011-21 (June 3, 2011) – Interagency guidance on the advanced measurement approaches for operational risk.

FINRA Trade Reporting Notice (June 3, 2011) – FINRA reminded firms of their trade reporting obligations and announced a new submission process for Form T (effective July 5, 2011).

SEC Press Release 2011-118 (June 2, 2011) – SEC and FINRA warned retail investors about investing in structured notes with principal protection.

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Watch For *(Continued from page 23)*

MSRB Notice 2011-29 (May 31, 2011) – The SEC approved amendments to MSRB Rule G-23 relating to the activities of financial advisors.

FINRA Regulatory Notice 11-26 (May 27, 2011) – The SEC approved consolidated financial responsibility and related operational rules; effective August 1, 2011.

OCC Bulletin 2011-19 (May 25, 2011) – Regulators requested comment (by June 24, 2011) on a proposed rule on margin and capital requirements for covered swap entities.

MSRB Notice 2011-28 (May 25, 2011) – The MSRB requested comment (due by June 24, 2011) on draft Rule G-44 (supervision of municipal advisory activities) and associated amendments to Rules G-8 (books and records) and G-9 (records preservation).

MSRB Press Release (May 23, 2011) – The MSRB Board of Directors held a special meeting May 19-20, 2011 where it advanced major rule proposals governing fiduciary duty, conflicts of interest and fair dealing requirements for firms and individuals that provide financial advisory and underwriting services for municipal entities.

MSRB Notice 2011-27 (May 23, 2011) – EMMA enhancements providing for additional voluntary submissions by issuers and obligated persons became effective.

FINRA Regulatory Notice 11-25 (May 18, 2011) – A new implementation date (July 9, 2012) for (and additional guidance on) the consolidated FINRA rules governing know-your-customer and suitability obligations.

SEC Press Release 2011-113 (May 18, 2011) – The SEC proposed rules to increase transparency and improve integrity of credit ratings.

MSRB Notice 2011-26 (May 16, 2011) – The MSRB reminded dealers of effective changes to MSRB Rule G-34(c) and set a new transparency standard for municipal variable rate securities.

FDIC Press Release 86-2011 (May 12, 2011) – The FDIC approved a proposed rule on retail foreign exchange transactions.

FINRA Regulatory Notice 11-24 (May 12, 2011) – The SEC approved the consolidated FINRA customer order protection rule; effective September 12, 2011.

FINRA Regulatory Notice 11-21 (May 5, 2011) – The SEC approved the consolidated FINRA rule governing fidelity bonds. The new rule will take effect January 1, 2012.

FINRA Regulatory Notice 11-20 (May 2, 2011) – The SEC approved amendments to transaction reporting and trading activity fee rules related to the reporting of asset-backed securities transactions; effective date May 16, 2011.

SEC Press Release 2011-100 (April 27, 2011) – The SEC proposed amendments to remove credit rating references in Exchange Act rules.

FINRA Regulatory Notice 11-19 (April 27, 2011) – The SEC approved consolidated FINRA rules governing books and records. The effective date was December 5, 2011. The new rules, FINRA Rules 2268, 4511, 4512, 4513, 4514, 4515, 5340 and 7440(a)(4), were based in large part on NASD Rule 3110, NYSE Rule 440 and NYSE Rule Interpretations 410/01 and 410/02.

SEC Press Release 2011-99 (April 27, 2011) – The SEC proposed rules further defining the terms "swap," "security-based swap," and "security-based swap agreement."

FINRA Information Notice (April 20, 2011) – The SEC approved a supplement to the *Options Disclosure Document*, which contains general disclosures on the characteristics and risks of trading standardized options, on March 31, 2011.

(Continued on Page 25)

Watch For *(Continued from page 24)*

FINRA Regulatory Notice 11-17 (April 15, 2011) – FINRA revised the Discovery Guide and Document Production Lists for customer arbitration proceedings; effective date was May 16, 2011.

CFTC Press Release 6019-11 (April 12, 2011) – The CFTC issued a notice of proposed rulemaking on swap data recordkeeping and reporting requirements for pre-enactment and transition swaps.

Joint Press Release (April 12, 2011) – Five federal agencies are seeking comment (by June 24, 2011) on a proposed rule to establish swap margin and capital requirements.

MSRB Notice 2011-21 (April 11, 2011) – The SEC approved amendments to the MSRB's SHORT system subscription service.

SEC Press Release 2011-89 (April 8, 2011) – The SEC delivered to Congress a joint staff study on the feasibility of mandating algorithmic descriptions for derivatives.

FINRA Regulatory Notice 11-16 (April 7, 2011) – This notice clarified customer maintenance margin requirements; effective date is July 1, 2011.

Federal Reserve Press Release (April 6, 2011) – The Federal Reserve Board requested comment on a proposed rule to repeal Regulation Q, which prohibits the payment of interest on demand deposits by institutions that are member banks of the Federal Reserve System.

SEC Press Release 2011-84 (April 5, 2011) – The SEC announced the filing of a new "limit up-limit-down" proposal to address extraordinary market volatility.

FINRA Regulatory Notice 11-15 (April 4, 2011) – This notice provided guidance to firms on low-priced equity securities in customer margin and firm proprietary accounts.

OCC News Release 2011-41 (April 4, 2011) – The OCC issued guidance laying out supervisory expectations for banks using quantitative models.

OCC Bulletin 2011-12 (April 4, 2011) – "Sound Practices for Model Risk Management" – Inter-agency guidance on model risk management emphasized the importance of effective validation and comprehensive governance and controls to address the development, implementation and use of models by banks.

Joint Press Release (March 31, 2011) – Six federal agencies sought comment on a proposed rule that would require sponsors of asset-backed securities to retain at least five percent of the credit risk of the assets underlying the securities and would not permit sponsors to transfer or hedge that credit risk.

SEC Press Release 2011-78 (March 30, 2011) – The SEC proposed rules requiring listing standards for compensation committees and compensation consultants.

FDIC Press Release 60-2011 (March 29, 2011) – The FDIC Board approved a joint proposed rule on resolution plans and credit exposure reports for covered systemic organizations.

FINRA Regulatory Notice 11-14 (March 29, 2011) – FINRA requested comment on proposed new Rule 3190 to clarify the scope of a firm's obligations and supervisory responsibilities for functions or activities outsourced to a third-party service provider. The comment period expired May 13, 2011.

OCC Bulletin 2011-11 (March 29, 2011) – "Collective Investment Funds: Risk Management Elements: Collective Investment Funds and Outsourced Arrangements" – National banks that establish collective investment funds and rely on third parties to offer them to investors are not relieved of their fiduciary responsibilities.

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Watch For (Continued from page 25)

Federal Reserve Press Release (March 28, 2011) – The Federal Reserve Board launched a new interactive web-based guide to the Flow of Funds Accounts. The guide can be accessed at ***www.federalreserve.gov/apps/fof/.***

OCC Bulletin 2011-9 (March 24, 2011) – "Bank Secrecy Act/Anti-Money Laundering: Guidance on Accepting Accounts From Foreign Embassies, Consulates and Missions" – Guidance clarified financial institutions' ability to provide banking services to diplomatic missions and comply with the Bank Secrecy Act.

MSRB Notice 2011-20 (March 23, 2011) – EMMA enhancements on voluntary issuer submissions became effective.

FINRA Regulatory Notice 11-13 (March 22, 2011) – FINRA revised two sections of its *Sanction Guidelines* to reflect recent developments in disciplinary cases.

FINRA Regulatory Notice 11-12 (March 18, 2011) – FINRA reminded firms of their obligations under the Foreign Corrupt Practices Act.

SEC Press Release 2011-64 (March 10, 2011) – U.S. regulators encouraged comments on CPSS-IOSCO consultative report on Principles for Financial Market Infrastructures.

Available Publication

FINRA Information Notice (April 15, 2011) – The Security Industry/Regulatory Council on Continuing Education released the semi-annual *Firm Element Advisory* (see Regulatory Notice 11-18). The Council suggests that firms consult the FEA when developing their Firm Element training needs analysis.

Spotlight on Service Member

Alternative Regulatory Solutions, LLC
147 Columbia Turnpike, Suite 201
Florham Park, NJ 07932
973/845-6660 Office
973/845-6659 Fax
kimberlymcars@optonline.net

Alternative Regulatory Solutions, LLC ("ARS") is a regulatory compliance consulting firm. Kimberly McManus founded ARS to provide broker-dealers and bank dealers with expert advisory services for fixed income products, specializing in municipals. The ARS staff is comprised of veterans in the fixed income compliance/audit space with with over 50 years total experience. ARS services include, but are not limited to the following:

- Writing policies and procedures for new and existing FINRA, MSRB, and SEC Rules, including the Dodd Frank Act as it pertains to broker dealers and municipal dealers;
- Implementing and/or carrying out surveillance programs;
- Providing training, including innovative interactive e-learning courses (political contributions/G-37, financial advisory, supervisory responsibilities, etc.) and annual training modules;
- Management reporting, including 3130 reports, G-37 filings, and annual AML reviews; and
- Submitting new/continuous membership applications to FINRA for new and/or expanded businesses.

Please refer to the following links to obtain more information about ARS and to view a G-37 interactive demo training module: ***http://makewavesenterprises.com/ARS_TriFold_Brochure.pdf*** and ***http://makewavesenterprises.com/G37_DEMO_FROM_ARS/.***

Program Update

2011 Legal & Legislative Conference

Save these dates! FMA's 20th annual **Legal & Legislative Conference** will take place **October 20 – 21** at the Four Points Sheraton Hotel here in Washington, DC. This annual program is a high-level forum for banking and securities attorneys as well as senior compliance officers and regulators, providing participants with an opportunity to share information on current legal and regulatory developments as well as network with peers.

The Program Planning Committee is currently developing an agenda focusing on current areas of regulatory and Congressional/agency scrutiny and activity. Members include: **Russell Bruemmer** *(WilmerHale LLP)*; **Kevin Fein** *(Citizens Wealth Management Group)*; **Kevin MacMillan** *(Bank of America)*; **Barbara Mendelson** *(Morrison & Foerster LLP)*; and **Richard Pearson** *(Balch & Bingham LLP)*.

The working agenda currently features these preliminary panels:

- **General Counsels: FRB, FDIC, FINRA, OCC, CFTC**
- **Current Developments** (Robert L. Tortoriello, *Cleary Gottlieb Steen & Hamilton LLP*)
- **Legislative Update from Hill Staffers**
- **Derivatives**
- **SIFIs, Living Wills and Orderly Liquidation Authority**
- **Secondary Mortgage Market**
- **More DFA—Volcker Rule, Lincoln Amendment, Basel**
- **SEC Division Reports** (Enforcement, Corporation Finance, Investment Management, Trading & Markets, OCIE and Risk, Strategy & Financial Innovation)
- **FINRA Compliance Hot Topics**
- **Cross-Border Transactions**
- **Public Finance Initiatives**
- **Whisteblower Rule**

If you would like to volunteer to speak on any of these topics…or suggest other noted leaders in their field as panelists…please contact Dorcas Pearce and she will advise the program planning committee of your interest/input.

The e-brochure will be distributed late July and will also be featured on FMA's website – ***www.fmaweb.org.*** **CLE and CPE accreditation…as well as team discounts…will be available, so be sure to budget for (and plan to attend) the 20th annual Legal & Legislative Issues Conference**.

Contact Dorcas Pearce ***(dp-fma@starpower.net or 202/544-6327)*** if you have questions or wish to register. Online registration is also an option.

ATTENTION SPONSORS!

FMA is actively pursuing sponsorship opportunities regarding this conference. Please contact FMA if your firm would like to support this event.

* * * * * * *

2011 Securities Compliance Seminar

FMA's 20th annual **Securities Compliance Seminar**, which took place April 27 – 29, 2011 at the Doubletree Hotel (on the Magnificent Mile) in Chicago, Illinois, broke all previous attendance records. This annual program was a three-day educational and networking experience for securities compliance professionals, internal auditors, risk managers, attorneys and regulators. This year's agenda was particularly timely—in addition to focusing on current compliance topics, new rules or interpretations and regulatory developments, the program featured a **Dodd-Frank regulatory reform update**. And, attendees were eligible for CPE and CLE accreditation.

(Continued on Page 28)

2011 Securities Compliance Seminar

(Continued from page 27)

Congratulations to the Program Planning Committee for developing a varied agenda and securing noted industry leaders and regulators as speakers. Members included: **Mitchell Avnet** *(Lincoln Financial Group)*; **James Connors** *(Wells Fargo Audit Services)*; **Earl Humphrey** *(Consultant)*; **Marie Jordan** *(JPMorgan Chase Bank, NA)*; and **Barbara Lane** *(GE Capital Americas)*.

The agenda featured:

General Sessions

Key 2011 Legislative and Regulatory Initiatives

- Beth Haddock ■ Brown Brothers Harriman & Co.
- James Kaplan ■ DLA Piper US LLP
- Julius Loeser ■ Winston & Strawn LLP
- Saverio Mirarchi ■ Northern Trust Corporation

Control Room 101

- Barbara Lane ■ GE Capital Americas
- Michael Sullivan ■ Wells Fargo Securities
- Vaughn Swartz ■ PNC Financial Services Group

The Municipal Industry in the Wake of Dodd-Frank

- Sara Grohl ■ FINRA
- Jaqueline Hummel, IACCP ■ Hardin Compliance Consulting LLC
- Ernesto Lanza ■ MSRB
- Kimberly McManus ■ Alternative Regulatory Solutions, LLC

The Role of Technology in a Robust Compliance / Risk Management Program

- Mitchell Avnet ■ Lincoln Financial Group
- Chuck Hester ■ Oracle Financial Services Software
- Allen Sellars ■ RegEd.com
- Martin Williams ■ Interactive Data Pricing and Reference Data

Regulatory Forum

- Judith Foster ■ OCC
- Ernesto Lanza ■ MSRB
- Barbara Lorenzen ■ SEC, Chicago Regional Office
- Malcolm Northam ■ FINRA
- Timothy Thompson ■ CBOE

Internal Auditor Hot Topics

- Gina Adelphia ■ Northern Trust Corporation
- Michael Brauneis, CRCM ■ Protiviti
- Don Temple ■ KPMG LLP

Private Funds

- Fadi Samman ■ Akin Gump Strauss Hauer & Feld LLP
- Michael Sefton ■ Henderson & Lyman
- John Sikora, Jr. ■ SEC, Chicago Regional Office

A New Fiduciary Standard for Broker-Dealers?

- Sean Gray ■ PNC Financial Services Group
- Steven Malina ■ Greenberg Traurig, LLP

Anti-Money Laundering / Bank Secrecy Act

- James Van De Graaff ■ Katten Muchin Rosenman LLP
- Karen Van Ness ■ Oracle Financial Services Software
- Meg Zucker ■ Morgan Stanley

Surviving Increased Regulatory Oversight

- Joseph Adamczyk ■ CME Group Inc.
- Daniel Gregus ■ SEC, Chicago Regional Office
- Phillip Stern ■ Neal, Gerber & Eisenberg LLP

The Dodd-Frank Whistleblower Provisions

- Anthony Cavallaro ■ FINRA
- Barbara Jones ■ Greenberg Traurig, LLP
- Anne McKinley ■ SEC, Chicago Regional Office

Workshops

Retail Compliance

- Christine Kaufman ■ Impact Consultants, Inc.

Institutional Compliance

- Matthew Hardin ■ Hardin Compliance Consulting LLC
- Jaqueline Hummel, IACCP ■ Hardin Compliance Consulting LLC

Peer Discussions

Broker-Dealer Compliance Hot Topics

- Judith Foster & James Kaplan
- Daniel Gregus

Fixed Income Pricing and Valuation

- Martin Williams

Legislative and Regulatory Update/Regulatory Reform

- Julius Loeser & Saverio Mirarchi

(Continued on Page 29)

2011 Securities Compliance Seminar

(Continued from page 28)

Municipal Industry & the Dodd-Frank Act
› Ernesto Lanza & Kimberly McManus

Compliance & Technology
› Mitchell Avnet

Internal Auditor Hot Topics
› Don Temple

New Fiduciary Standard
› Sean Gray

Building Metrics Around Compliance Activities
› Jaqueline Hummel

AML / BSA
› Gina Adelphia

Thanks to everyone that participated and contributed to the success of this annual spring program…committee members, speakers, attendees and sponsors.

FMA gratefully acknowledges these sponsors of FMA's 2011 Securities Compliance Seminar:

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2012 Securities Compliance Seminar

Phoenix, Arizona (followed closely by Boston & San Diego) received the most votes from attendees at the Chicago seminar to host FMA's 2012 **Securities Compliance Seminar** next April/May. The final decision won't be made until later this year, so contact Dorcas Pearce ***(dp-fma@starpower.net or 202/544-6327)*** and vote today for your favorite city (if you haven't already done so).

The announcement will appear on FMA's website ***(www.fmaweb.org)*** around Labor Day and will also be included in the September issue of *Market Solutions*.

The Planning Committee will then be assembled to begin work on program development. **Contact Dorcas Pearce to volunteer…as a committee member, a general session panelist/workshop facilitator or peer discussion leader…or to share topical and/or speaker suggestions.**

CPE / CLE accreditation will be available, so be sure to budget for, and plan to attend, the 21st annual Securities Compliance Seminar next spring.

Who's News

Conrad Bahlke, formerly a Partner at Weil, Gotshal & Manges LLP, has joined Stroock & Stroock & Lavan LLP as a Partner in their Derivatives and Commodities group out of their New York City office.

Christopher Bellini has joined Fried, Frank, Harris, Shriver & Jacobson LLP as a Corporate Partner in their financial institution practice group in the Washington, DC office.

Kieran Fallon, formerly Associate General Counsel at the Federal Reserve Board in Washington, DC, has joined PNC as Chief Counsel-Regulatory Affairs.

Sean Gray was recently promoted to SVP/ Head of Asset Management and Broker Dealer Compliance at The PNC Financial Services Group. In his new role Sean has Compliance responsibilities for PNC's Wealth Management, Institutional Investments, Family Office, Registered Investment Adviser, retail Broker Dealer, and Mutual Fund business lines.

Ernesto Lanza, currently General Counsel at the Municipal Securities Rulemaking Board, has also been named Deputy Executive Director at the agency.

Jack Murphy, formerly co-head of the Financial Institutions Group at Cleary Gottlieb Steen & Hamilton LLP, has joined Promontory Financial Group as Managing Director and Promontory Regulatory Analytics as CEO.

Mark Oesterle, formerly Chief Minority Counsel for the Senate Banking Committee, has joined Reed Smith LLP as Counsel in their Financial Industry Group out of their Washington, DC office.

Chris Pedersen, formerly Manager/Risk Consulting at Protiviti, has joined Ernst & Young LLP as a Manager in the Financial Services Advisory practice group specializing in consumer compliance regulatory matters.

Sal Scotto, formerly a Senior Compliance Officer at OFAC/U.S. Department of the Treasury, has joined HSBC Bank USA as Deputy Director of Global Sanctions.

Pratin Vallabhaneni, formerly an attorney with the FDIC, has joined Debevoise & Plimpton LLP as a corporate associate in their Washington, DC office.