

# FINANCIAL SERVICES ALERT

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## DEVELOPMENTS OF NOTE

### House and Senate Debate and Amend Financial Regulatory Reform Proposals

During the week of November 16, 2009, the House Financial Services Committee and the Senate Banking Committee each continued to work on their respective financial regulatory reform bills. For more on the House financial regulatory reform bill please see the [November 3, 2009 Alert](#) and for the Senate financial regulatory reform bill please see the [November 17, 2009 Alert](#). The House Financial Services Committee has finished its markup of the Financial Stability Improvement Act of 2009 (the "House Bill") and has scheduled a final vote on the House Bill after the Thanksgiving recess. House Financial Services Committee Chairman Barney Frank has indicated that the House Bill may be combined with several other House regulatory reform bills, such as those pertaining to the regulation of derivatives or consumer protection, when it is taken to the floor during the second or third week of December 2009. The Restoring American Financial Stability Act of 2009, introduced by Senate Banking Committee Chairman Christopher Dodd, (the "Dodd Bill") was subject to heavy bipartisan criticism during opening statements of the Senate Banking Committee's markup. Following these objections by nearly every member of the Senate Banking Committee, the deadline for amendments to the Dodd Bill has been delayed and it is expected that it will be entirely rewritten before consideration begins again in December 2009.

The House Financial Services Committee approved several significant amendments to the House Bill during the Committee's markup. An anticipated amendment provides for the

creation of a standing Systemic Dissolution Fund (the “Fund”) for use in the resolution of systemically significant financial companies. The Fund would be funded by risk-based assessments on financial companies with assets of more than \$50 billion and hedge funds with assets of more than \$10 billion until the balance of the Fund reached \$150 billion. Assessments would then be suspended until the Fund dropped below the \$150 billion level. The Fund would also have the ability to borrow up to \$50 billion from the Treasury Department. A separate amendment would allow the FDIC to impose a 20% haircut on all secured creditors, including holders of qualified financial contracts such as repurchase agreements, when resolving the failure of systemically significant financial companies. This amendment would significantly increase the cost of borrowing for such financial companies, and would prevent them from obtaining advances from the Federal Home Loan Banks.

Another amendment to the House Bill grants the proposed Financial Services Oversight Council (the “Council”) the explicit authority to require a “financial company subject to stricter prudential standards” (the House’s current terminology for systemically significant financial companies) to divest itself of assets or operations and restrict its ability to merge or offer certain products if the Council determined that the collapse of such company would cause harm to the financial stability or economy of the United States. The amendment sets forth standards that the Council would have to consider when determining if a financial company posed such a threat, including the scope, scale, exposure, leverage, and interconnectedness of the financial company. A further amendment to the House Bill provides that the Council could review and submit comments to the SEC and the Financial Accounting Standards Board regarding existing or proposed accounting standards, such as mark-to-market accounting.

The *Alert* will continue its coverage of these and other issues concerning financial regulatory reform in future issues.

### **FDIC Issues Final Rule that Requires Banks to Prepay Deposit Issuance Assessments for Three Years (through 2012)**

The FDIC issued a final rule (the “Rule”) that mandates that insured depository institutions (“DIs” and each a “DI”) prepay their quarterly risk-based assessments to the FDIC for the fourth quarter of 2009, and for all of 2010, 2011, and 2012 on December 30, 2009, when they pay their risk-based deposits insurance assessment for the third quarter of 2009. See discussion of the proposed version of the Rule in the [October 6, 2009 Alert](#).

In the short-term, the prepayment of assessments under the Rule addresses the FDIC’s liquidity needs. The prepayment of assessments is expected to provide the FDIC with a cash infusion of about \$45 billion. Although the FDIC can use the prepaid premiums under the Rule to help pay resolution costs, the FDIC cannot immediately count such prepayments towards the Deposit Insurance Fund (“DIF”) reserves. Under the Rule, each DI will record the entire amount of its prepayment as an asset (a prepaid expense). This is a benefit to DIs, which can count the payments as a depreciating asset, while the FDIC will have more liquid cash available for resolution costs. The prepaid assessments will bear a zero-percent risk weight for risk-based capital purposes.

Specifically under the Rule, the prepaid assessment base for each institution will be calculated using its third quarter 2009 assessment rate (using its CAMELS rating on that date). That assessment base will then be adjusted quarterly with an estimated 5 percent

annual growth in the assessment base through the end of 2012. The prepaid assessment rate for the fourth quarter of 2009 and for 2010 will be based on each DI's total base assessment rate for the third quarter of 2009, adjusted as if the assessment rate in effect on September 30, 2009 had been in effect for the entire third quarter. Further, the assessment rate for 2011 and 2012 will be equal to the adjusted third quarter 2009 total base assessment rate plus 3 basis points. As of December 31, 2009, and each quarter thereafter, each DI will record an expense for its regular quarterly assessment for the quarter and a corresponding credit to the prepaid assessment until the asset is exhausted. The FDIC will not refund or collect additional prepaid assessments because of a decrease or growth in deposits over the next three years. However, should the prepaid assessment not be exhausted after collection of the amount due on June 30, 2013, the remaining amount of the prepayment will be returned to the DI.

Under the Rule, DIs that view the prepayment of over three years worth of assessments as too great a financial hardship can apply to the FDIC for an exemption from such prepayment. The FDIC stated that they would consider such exemptions on a case-by-case basis. In addition, in consultation with a DI's primary regulator, the FDIC may (on its own initiative, *i.e.*, without a request for an exemption from the DI) exempt a DI from the prepayment requirements if prepayment would threaten the DI's safety and soundness.

The Rule became effective November 17, 2009.

### **Final Model Privacy Notice Form Issued**

Eight federal regulatory agencies (FRB, FDIC, OCC, OTS, NCUA, FTC, CFTC and SEC, together "the Agencies") [jointly issued](#) a final version of the model Gramm-Leach-Bliley Act ("GLBA") privacy notice form (the "model form"). Financial institutions using the model form will be granted a legal safe harbor for compliance with the GLBA privacy disclosure requirements. As mandated by the Financial Services Regulatory Relief Act of 2006, the model form is designed to "(A) be comprehensible to consumers, with a clear format and design; (B) provide for clear and conspicuous disclosures; (C) enable consumers easily to identify the sharing practices of a financial institution and to compare privacy practices among financial institutions; and (D) be succinct, and use an easily readable type font."

The Agencies issued an advance notice of proposed rulemaking on a model form in December 2003 (as discussed in the [December 30, 2003 Alert](#)) and a proposed model form in March 2007 (as discussed in the [March 27, 2007 Alert](#)), soliciting comments with each proposal. In April 2009, the SEC reopened the 2007 proposed model form for comment (as discussed in the [April 21, 2009 Alert](#)). The Agencies also performed multiple rounds of consumer testing of the proposed forms. Industry criticisms of the proposed model forms centered primarily on the belief that the proposed model forms were too rigid and did not permit a financial institution to accurately describe complex information sharing arrangements and could lead to consumer misperceptions of a financial institution's information sharing practices. In issuing the final model form, the Agencies note such criticisms, but reiterate that the statutory mandate requires the creation of a standard form, but that use of the form is voluntary.

The Agencies' current rules relating to privacy notices contain sample clauses that may be used by financial institutions to satisfy provisions of the rules. In releasing the model form and against strong opposition from industry, the Agencies announced that the sample

clauses and their safe harbor would be eliminated from the privacy rules through a transition period. Beginning on a date 30 days after *Federal Register* publication of the model form until December 31, 2010, privacy notices using sample clauses will continue to have safe harbor status for one year from their delivery or posting. Privacy notices delivered or posted on or after January 1, 2011 using the sample clauses will not be eligible for the current safe harbor.

Although the model form is effective 30 days from publication in the *Federal Register*, it should be remembered that use of the form is optional. Use of the form will ensure compliance with the privacy notice requirements, but financial institutions may comply without using the model form. There are two versions of the model form, [one for those required to provide consumers with an opt-out right](#), and [one without the opt-out](#).

### **FinCEN Proposes Rule to Expand Information Sharing Procedures**

The U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") proposed a rule (the "[Proposed Rule](#)") that would expand the range of law enforcement agencies eligible to make requests for information under the information sharing procedures adopted by FinCEN pursuant to Section 314(a) of the USA Patriot Act. Under the current regulation, federal law enforcement agencies may request that FinCEN require U.S. financial institutions to search their records to determine whether they have maintained an account or conducted a transaction with specified individuals, entities, or organizations suspected of engaging in terrorist activity or money laundering ("Section 314(a) Requests").

The Proposed Rule would allow certain foreign law enforcement agencies to make Section 314(a) Requests. To be eligible, the foreign law enforcement agency would need to be from a jurisdiction that is party to a treaty, such as the U.S.-E.U. Agreement on Mutual Legal Assistance, that provides U.S. law enforcement with reciprocal access to information in the foreign law enforcement agency's home jurisdiction. The Proposed Rule also would extend the authority to make Section 314(a) Requests to state and local law enforcement agencies. In each case, the foreign, state or local law enforcement agency making the request would be subject to the information sharing rules' requirement that the requesting law enforcement agency certify that, in the case of a money laundering investigation, the matter is significant and the law enforcement agency has not been able to locate the requested information through traditional methods of investigation.

Recognizing FinCEN's ability to use its own resources to support and enhance the efforts of law enforcement agencies, the Proposed Rule also would allow FinCEN to initiate Section 314(a) Requests on its own behalf or on behalf of other divisions of the U.S. Treasury Department. Comments on the Proposed Rule must be submitted to FinCEN by December 16, 2009.

### **OTHER ITEMS OF NOTE**

#### **Goodwin Procter Issues Client Alert on U.S. Senate Version of Private Fund Investment Advisers Registration Act of 2009**

Goodwin Procter's Private Investment Funds and Hedge Funds Practices issued a [Client Alert](#) discussing the private equity adviser and venture capital adviser exemptions included in the private adviser registration component of the discussion draft of Senator Dodd's

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Restoring American Financial Stability Act of 2009. The Client Alert contrasts the Dodd bill's proposed exemptions with those included in legislation proposed by the Obama Administration and legislation approved by the House Financial Services Committee, in addition to discussing other aspects of the Dodd bill.

**Effective Date for DOL Final Regulation and Exemption for Investment Advice to 401(k) Plan Participants and IRA Holders is Further Delayed**

The Department of Labor (the "DOL") recently announced that it is further delaying until May 17, 2010 the effective date of a final rule under Sections 408(b)(14) and 408(g) of the Employee Retirement Income Security Act of 1974, addressing the provision of investment advice to participants in defined contribution plans, including 401(k) plans, and individual retirement account holders. (The final rule was described in the September 2, 2008 *Alert*.) The DOL, which had previously extended the effective date of the final rule from March 23 to May 22, and then to November 18, indicated that it is withdrawing the previously issued final rule and will be proposing a new rule. It is expected that the new proposed rule will contain significant changes from the previously issued final rule.

**The Impact of Financial Services Reform on Real Estate Investors**

[The Fall 2009 issue of \*REsource: A Goodwin Procter Publication for the Real Estate Industry\*](#) includes an article by William E. Stern, a partner in Goodwin Procter's Banking Practice, that discusses the potential impact on real estate investors of a Treasury legislative proposal that could potentially subject a broad range of organizations to regulation under the Bank Holding Company Act.