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DEVELOPMENTS OF NOTE

House Combines Regulatory Reform Bills Into the Wall Street Reform and Consumer Protection Act of 2009

The various regulatory reform bills passed by the House Financial Services Committee have been combined into a single 1,279 page omnibus regulatory reform bill, the Wall Street Reform and Consumer Protection Act of 2009 ([H.R. 4173](#)) (the "Bill"). The Bill is expected to be introduced to the floor of the House on December 9, 2009. It is anticipated that the Bill will require three full days of debate, and many amendments to the Bill have already been proposed, including a 200 page manager's amendment by House Financial Services Committee Chairman Barney Frank relating to mortgage lending reform. The Bill combines the language of the following bills:

- Financial Stability Improvement Act of 2009 (H.R. 3996), (for more on H.R. 3996 please see the [November 3, 2009 Alert](#) and the [November 24, 2009 Alert](#));
- Corporate and Financial Institution Compensation Fairness Act of 2009 (H.R. 3269);
- Over-the-Counter Derivatives Markets Act of 2009 (H.R. 3795), (for more on H.R. 3795 please see the [November 3, 2009 Alert](#));
- Consumer Financial Protection Agency Act of 2009 (H.R. 3126), (for more on H.R. 3126 please see the [October 20, 2009 Alert](#) and the [October 27, 2009 Alert](#));
- Private Fund Investment Advisers Registration Act of 2009 (H.R. 3818), (for more on H.R. 3818 please see the [October 20, 2009 Alert](#));
- Accountability and Transparency in Rating Agencies Act of 2009 (H.R. 3890);
- Investor Protection Act of 2009 (H.R. 3817); and
- Federal Insurance Office Act of 2009 (H.R. 2609).

In addition, the Bill includes a new provision that would amend the Securities Act of 1933 to require securitizers of asset-backed securities to retain an economic interest in the underlying debt instruments. Lawmakers in Europe are also seeking similar regulatory reforms for asset-backed securitizations in accordance with the agreement reached at the September 2009 summit of the Group of 20 nations that such reform is necessary to create incentives for minimizing the risk of default in the underlying debt.

As discussed in the [November 3, 2009 Alert](#) and the [November 24, 2009 Alert](#), the Bill provides for the resolution of systemically significant financial companies, which in the past may have been considered “too big to fail.” Amendments to the Financial Stability Improvement Act of 2009 approved by the House Financial Services Committee on November 18, 2009 and November 19, 2009 severely curtailed the FDIC’s power to help a failing financial company from becoming insolvent. The amendments removed any reference to a “qualified receiver” and provide that the FDIC could only provide industry-wide debt guarantees — not guarantees for the benefit of an individual company. Though the FDIC could still lend to a failing financial company, it could only do so in order to wind it down.

Chairman Frank and House Energy and Commerce Committee Chairman Henry Waxman have also reached an agreement regarding the governance of the proposed Consumer Financial Protection Agency (the “CFPA”). The House Financial Services Committee and the House Energy and Commerce Committee had each passed a version of the Consumer Financial Protection Agency Act of 2009 with differing governance structures for the CFPA. The Chairmen agreed to resolve the differences by initially appointing a single director in charge of the CFPA for a temporary period and then establish a commission to run the agency, much like other federal regulatory agencies.

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

SEC Approves Amendments to NYSE Corporate Governance Requirements for Listed Companies

The SEC issued a [release](#) approving [proposed changes](#) to the corporate governance requirements applicable to companies listed on the New York Stock Exchange (the “NYSE”), [as amended](#). These changes, which become effective January 1, 2010, affect a number of areas in the NYSE’s corporate governance standards, and include:

(a) substituting the requirements of Item 407 of Regulation S-K for comparable existing standards in the NYSE requirements, (b) allowing more extensive use of listed company websites to make required disclosures, (c) removing the materiality standard for a listed company’s chief executive officer to notify the NYSE in writing after any executive officer becomes aware of non-compliance with NYSE corporate governance listing standards, (d) allowing a listed company to hold regular executive sessions of independent directors as an alternative to executive sessions of non-management directors, (e) requiring a listed company to disclose a method for all interested parties, not just shareholders, to communicate their concerns to non-management or independent directors, and (f) modifying the transition periods for newly listed companies. As with the corporate governance standards themselves, only certain of the changes apply to closed-end investment companies listed on the NYSE, including the following:

- Closed-end funds will be subject to the shareholder approval requirement for equity compensation plans.
- Service on multiple boards in the same fund complex will be treated as service on a single board for purposes of the disclosure requirements that apply when a fund has a director who serves on the audit committees of more than three public companies.
- If a closed-end fund “chooses to voluntarily include a ‘Management’s Discussion of Fund Performance’ in its Form N-CSR,” the fund’s audit committee must meet to review and discuss this disclosure.
- Any non-compliance with applicable NYSE corporate governance requirements, without reference to materiality, that becomes known to a closed-end fund’s executive officers triggers an obligation on the part of the fund’s CEO to promptly notify the NYSE in writing of the non-compliance.

SEC Publishes Formal Releases for Proposed and Final Credit Rating Agency Regulations

The SEC issued formal releases adopting amendments, and proposing additional amendments, to its rules regulating credit rating agencies registered as Nationally Recognized Statistical Rating Organizations (“NRSROs”). The releases, which are briefly described below, relate to action taken at the SEC’s September 17, 2009 meeting when the SEC acted on a number of other proposals relating to its rules governing NRSROs (as discussed in the [September 22, 2009 Alert](#)). (Formal releases relating to other action taken at the September 17, 2009 meeting were discussed in the [October 20, 2009 Alert](#).)

Final Rules – Additional Disclosure and Conflict of Interest Requirements. The SEC issued a formal release adopting amendments to Rules 17g-2 and 17g-5 under the Securities Exchange Act of 1934 that require broader disclosure of credit ratings history information, including disclosure of all ratings actions histories in eXtensible Business Reporting Language for ratings initially determined on or after June 26, 2007. In addition, NRSROs that are hired by an issuer, sponsor or underwriter of a structured finance product (an “arranger”) to determine an initial rating must (1) disclose to non-hired NRSROs that the arranger is in the process of determining such a credit rating and (2) must obtain representations from the arranger that the arranger will provide the information given to the hired NRSRO to non-hired NRSROs so long as the non-hired NRSROs have filed certain certifications with the SEC. The amendments also accommodate disclosures contemplated under the SEC’s NRSRO regulatory scheme by revising Regulation FD to permit the disclosure of material non-public information to an NRSRO regardless of whether the NRSRO makes its ratings publicly available. The compliance date for the final rules is June 2, 2010.

Proposed Rules – Annual Report and Disclosures for NRSROs. The SEC issued a [formal release](#) proposing rule amendments that would impose additional disclosure requirements on NRSROs. The revised proposed rules would require NRSROs to (1) provide an annual report to the SEC describing the steps taken by the firm during the fiscal year with respect to compliance matters, (2) disclose additional information about sources of revenues on Form NRSRO, and (3) make publicly available on its website a consolidated report containing information about revenues of the NRSRO attributable to persons paying the

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NRSRO for the issuance or maintenance of a credit rating. In the release, the SEC also announced that it is deferring consideration of a proposed rule that would have required an NRSRO to include with any published credit rating for a structured finance product, a report describing how the credit ratings procedures and methodologies and credit risk characteristics for structured finance products differ from those for other types of rated instruments, or, alternatively, to use distinct ratings symbols for structured finance products differentiating them from credit ratings for other types of financial instruments. The SEC also solicited comment regarding alternative means of differentiating structured finance credit ratings from the credit ratings for other types of financial instruments. Comments are due no later than February 2, 2010.

OTS Issues Revised Guidance in Enforcement Policy Statement on Civil Money Penalties

The OTS issued an updated Enforcement Policy Statement on Civil Money Penalties (the "[Policy Statement](#)") that replaces and supersedes prior guidance issued by the OTS in a 1993 OTS Regulatory Bulletin. The Policy Statement describes the statutory framework for civil money penalties ("CMPs"), the factors considered by the OTS in assessing CMPs and the procedures used by the OTS in making a decision whether or not to assess CMPs. Included as appendices to the Policy Statement are updated matrices used by the OTS in considering whether to assess CMPs and in deciding the amount of any CMPs to be assessed. The matrices take into account the severity of: (1) violations of law, (2) reckless, unsafe or unsound practices and (3) breaches of fiduciary duty and reflect 13 assessment factors, originally recommended in 1993 by the Federal Financial Institutions Examination Council to the federal banking agencies.

FDIC Issues Further Guidance Concerning Process for Determining if Depository Institution Subject to Interest Rate Restrictions is Operating in a "High-Rate Area"

The FDIC issued a financial institution letter ("[FIL-69-2009](#)") providing guidance to FDIC-insured depository institutions ("DIs") that are subject to interest rate restrictions, concerning the process under Section 29 of the Federal Deposit Insurance Act and Section 337.6 of the FDIC Rules and Regulations ("Section 337.6") for determining whether a DI is operating in a "high-rate area". [FIL-69-2009](#) updated FDIC guidance previously provided in [FIL-62-2009](#).

As described in the [November 17, 2009 Alert](#), Section 337.6 restricts the use of brokered deposits and limits interest rates paid on interest-bearing deposits solicited by less than well-capitalized DIs and DIs that meet the quantitative tests for being "well-capitalized," but are subject to a capital maintenance provision issued by a federal banking regulator within a formal written agreement, consent order, order to cease and desist, capital directive or prompt corrective action directive. Effective January 1, 2010, a DI subject to the interest rate restrictions under Section 337.6 is required to use the "national rate" to determine whether it complies with regulatory requirements. A DI, however, that believes it is operating in a geographical area where the rates paid on deposits are higher than the "national rate" may seek a determination from the FDIC that the DI is operating in a "high-rate area." [FIL-69-2009](#) states that the DI making a request to the DI should specify its market area and regardless of the FDIC's determination, DIs must use the national rate caps to determine conformance for all areas outside of the DI's market area.