

# FINANCIAL SERVICES ALERT

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## DEVELOPMENTS OF NOTE

### U.S. Senate Passes Financial Regulatory Reform Bill

The U.S. Senate has passed the Restoring American Financial Stability Act of 2010 (the "Senate Bill"), which would comprehensively reform the regulation of financial products and services by providing, among other things, for the establishment of a Financial Stability Oversight Council (the "Council") to monitor systemic risk, a new resolution process for systemically important financial institutions, a new Consumer Financial Protection Bureau (the "CFPB"), the registration of private fund advisers and the regulation of derivatives. For more on the Senate Bill, please see the [March 16, 2010 Alert](#), the [March 23, 2010 Alert](#) and the [April 27, 2010 Alert](#). The Senate Bill must now be reconciled with the Wall Street Reform and Consumer Protection Act of 2009 (the "House Bill"), a similar comprehensive financial reform bill that was passed by the U.S. House of Representatives on December 11, 2009. For more on the House Bill, please see the [November 3, 2009 Alert](#), [December 8, 2009 Alert](#) and the [December 15, 2009 Alert](#).

*Amendments.* During three weeks of contentious debate, the following amendments to the Senate Bill were adopted:

- *Resolution Authority.* An amendment by Senators Christopher Dodd and Richard Shelby that implements a bipartisan agreement on the Senate Bill's resolution title, which establishes a new federal process for shutting down large, interconnected financial companies in an orderly manner. The amendment strikes the provisions of the Senate Bill that would create a \$50 billion resolution fund for the FDIC to liquidate certain failing systemically important financial firms and direct the FDIC to use

Treasury funds for liquidation. Under the amendment, creditors of such a failing firm would have to pay back any funds received in excess of what they would have received in liquidation. The amendment also requires Congress to approve FDIC debt guarantees and provides that the FRB may only use its emergency lending authority for solvent companies. A separate amendment by Senator Barbara Boxer stipulates that any financial firm that enters into the federal resolution process shall be liquidated and provides that no taxpayer funds shall be used to prevent the liquidation of such financial firm. Senator Boxer's amendment further provides that any funds spent to liquidate such a financial firm shall be recovered from the disposition of assets of such financial firm, or shall be the responsibility of the financial industry, through assessments, in order to prevent taxpayers from bearing any losses from such resolution process.

- *Risk-Based Capital Requirements.* An amendment by Senator Susan Collins that mandates minimum leverage and risk-based capital requirements for insured depository institutions, depository institution holding companies (including savings and loan holding companies), and nonbank financial companies subject to FRB supervision. The current leverage and risk-based capital requirements applicable to insured depository institutions shall serve as a floor for any such capital requirements. This amendment would also eliminate the ability of financial institutions to include trust preferred securities in the calculation of Tier 1 capital. Senator Collins indicated that she wants these restrictions to apply only to systemically important firms and to be phased in over time; however, the amendment does not contain any such language, so any such changes would have to be implemented by the conference committee during the reconciliation process.
- *Preemption of State Laws.* An amendment by Senator Thomas Carper that allows for the preemption of state laws that apply to national banks if such state law (i) has a discriminatory affect on national banks, (ii) is preempted in accordance with the decision of the U.S. Supreme Court in *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996) by a court or by the OCC on a case by case basis, or (iii) is preempted by another provision of federal law. The amendment also allows state attorneys general to enforce new rules enacted by the CFPB against both national and state-chartered banks; however, under the amendment state attorneys general are prohibited from bringing federal class actions against national banks or bringing an enforcement action against a national bank for activities conducted in another state.
- *Federal Reserve Bank Supervision.* An amendment by Senator Kay Bailey Hutchison that preserves the FRB's authority to regulate state member banks. The original version of the Senate Bill would have limited the FRB to the supervision of financial firms with assets of greater than \$50 billion, transferring the supervision of approximately 800 state members banks to the FDIC.
- *Deposit Insurance Assessments.* An amendment by Senators Jon Tester and Kay Bailey Hutchison that changes the formula for deposit insurance assessments by basing such assessments on a depository institution's average asset total during the assessment period less its tangible equity, rather than its insured deposits. Under the amendment the deposit insurance assessment for custodial banks will be based on factors including the percentage of total revenues generated by custodial businesses and the level of assets under custody.

- *Definition of “Non-Bank Financial Company.”* An amendment by Senator David Vitter that was modified by an amendment by Senator David Pryor that revises the Senate Bill’s definition of a “non-bank financial company.” Under the amendments, the Council would use a revised standard to determine that a company is “predominantly engaged in financial activities.” Such a company would either (i) earn at least 85 percent of its gross annual revenues (including revenue from subsidiaries) from activities that are financial in nature, or (ii) have consolidated assets related to financial activities that make up more than 85 percent of its total consolidated assets. Senator Pryor’s amendment includes a provision allowing the Council to impose prudential standards on a company found to be using such provisions to evade supervision by the Council.
- *Interchange Fees.* An amendment by Senator Richard Durbin that requires the FRB to restrict the ability of card networks and issuers to set debit card interchange fees for merchants, although financial institutions with assets of less than \$10 billion would be exempt from such restrictions. The amendment also bars restrictions on (a) offering discounts for (1) the use of a competing payment card network or (2) use of a form of payment and (b) setting transaction minimums or maximums. Though financial institutions with less than \$10 billion in assets are exempted from the provisions of the amendment, as a practical matter such institutions will be affected by such restrictions as their larger competitors lower interchange fees.
- *Risk Retention and Mortgage Underwriting.* An amendment by Senator Jeff Merkley mandates loan underwriting standards but preserves the Senate Bill’s risk retention requirement. Senator Merkley’s amendment prohibits mortgage brokers and originators from being compensated based on loan terms, such as yield spread premiums, and requires lenders to verify a borrower’s ability to repay based on the maximum interest rate allowed on the first five years of the loan. The amendment also prohibits loan originators from financing closing costs if they receive compensation from a third party as well as the borrower. A separate amendment by Senator Michael Crapo addresses how the risk retention requirement of the Senate Bill applies to commercial mortgages, including the permissible types, forms, and amounts of risk retention that financial regulators would require, such as the retention of the first-loss position by a third-party purchaser. A separate amendment by Senator Mary Landrieu allows the federal banking agencies and the federal housing agencies to exempt certain loans, such as fixed-rate, fully amortizing mortgages, from the Senate Bill’s five percent retention requirement.
- *Credit Scores.* An amendment by Senator Mark Udall that requires the disclosure of a consumer’s credit score, without charge, if adverse action to the consumer has been taken based in whole or part on any information in the consumer’s credit report.
- *Federal Trade Commission (“FTC”) Enforcement Authority.* An amendment by Senators Jay Rockefeller and Kay Bailey Hutchison that preserves the FTC’s authority to enforce rules relating to unfair, deceptive or abusive practices, which the Senate Bill would otherwise have transferred to the CFPB; however, the CFPB would retain rulemaking authority for unfair, deceptive or abusive practices in the market for financial products and services.
- *CFPB.* An amendment by Senator Olympia Snowe that clarifies that non-financial small businesses would not fall within the jurisdiction of the CFPB. Another

amendment by Senator Snowe requires the CFPB, as well as the Environmental Protection Agency and the Occupational Safety and Health Administration, to analyze the effects of any new rules on small businesses before issuing such rules. A further pair of amendments by Senator Snowe were approved en bloc. The first struck Section 1071 of the Senate Bill. The second requires the rules of the CFPB to provide for, with regard to a mortgage loan where the borrower has documented income from a small business as a repayment source, a creditor to consider seasonality and irregularity of income in the underwriting and scheduling of payments for credit. An amendment by Senator Jack Reed establishes an Office of Service Member Affairs within the CFPB, which would be responsible for developing and implementing initiatives for service members and their families intended to educate and empower service members and their families to make better informed decisions regarding consumer financial products and services. An amendment by Senator John Ensign revises the Senate Bill's definition of "credit" to exclude no-interest credit extended by casinos, and deletes provisions regulating non-financial merchants that extend credit to customers and allow for interest-free repayment in more than four installments. Additionally, Senator Ensign's amendment clarifies that casinos and other entities that give no-interest loans would not be considered lenders under the jurisdiction of the CFPB.

- *Credit Rating Agencies.* An amendment by Senator Al Franken that requires the SEC to establish a self-regulatory organization that will qualify nationally recognized securities rating organizations to rate structured finance products ("qualified NRSROs") and require the issuer of a structured finance product that seeks a credit rating to obtain the rating from a qualified NRSRO designated by the self-regulatory organization. A separate amendment by Senator George LeMieux would remove statutory references to credit rating agencies. A separate amendment by Senators Benjamin Cardin and Charles Grassley would make employees of larger credit rating agencies eligible for whistleblower protection under the Sarbanes-Oxley Act of 2002.
- *Regulation D Offerings.* An amendment by Senators Kit Bond and Mark Warner that modifies two sections of the Senate Bill relating to Regulation D. (Regulation D provides exemptions from the registration requirements of the Securities Act of 1933 for private placements of securities that meet specified conditions.) The amendment removes a provision from the Senate Bill that would have given the SEC 120 days to review such private placements, after which the sales would have been overseen by state securities regulators if the SEC had not yet acted. Under the amendment, the SEC would adopt rules disqualifying felons and certain other "bad actors" from relying on Section 506 of Regulation D, which provides an exemption based in large part on limiting sales of securities to investors who are not "accredited investors." The amendment also modifies the provisions of the Senate Bill relating to increasing the net worth threshold for a natural person to be considered an "accredited investor" eligible to participate in such private placements and excluding the value of a primary residence from the calculation of net worth.
- *CFTC Authority.* An amendment by Senator Maria Cantwell that facilitates the ability of the CFTC to bring cases against individuals accused of trying to artificially inflate or deflate commodity futures prices.
- *FRB Audit.* An amendment by Senator Bernie Sanders that provides for a limited audit of the FRB's emergency lending during the financial crisis. Under the amendment, the Government Accountability Office is required to perform a one-year, one-time audit of

all loans and financial assistance extended by the FRB since 2007. The FRB must disclose the amounts lent to each borrower, the dates such loans were made, the terms of repayment and the “specific rationale” for making such loans.

- *Government Sponsored Entities.* An amendment by Senator Dodd that requires the Treasury Secretary to conduct a study on ending Fannie Mae and Freddie Mac’s conservatorship and reforming the housing finance system, while ensuring that consumers have access to 30-year, fixed-rate mortgages.
- *Deficit Reduction.* An amendment by Senator Michael Bennet that requires the Treasury to use money paid back by companies that participated in the Troubled Asset Relief Program (TARP) to be used for deficit reduction, unless there is an immediate and substantial threat to financial stability. The amendment would reduce the amount of funds authorized for the TARP from \$700 billion to \$550 billion, and would require the Treasury to direct any revenue from sales of the assets of Fannie Mae and Freddie Mac toward deficit reduction. Additionally, any funds allocated by the American Reinvestment and Recovery Act would also have to be directed toward deficit reduction if they were not spent by January 2013.
- *Financial Agency Inspectors General.* An amendment by Senators Grassley and Claire McCaskill that strengthens the independence and accountability of agency appointed inspectors general. The amendment also establishes a new Council of Inspectors General on Financial Oversight.
- *Other Amendments.* Amendments relating to the Federal Energy Regulatory Commission’s authority over energy rates (S.A. 3892), Congo conflict minerals (S.A. 3997), International Monetary Fund loans (S.A. 3986), and foreign payments by resource extraction companies (S.A. 4050).

Several anticipated amendments to the Senate Bill were not adopted, including a manager’s amendment by Senator Dodd, an amendment that would have required advisers to private equity and venture capital funds to register with the SEC, an amendment that would have imposed fiduciary duties on broker-dealers, an amendment to exempt auto dealers from the CFPB and an amendment strengthening the Senate Bill’s prohibition on proprietary trading by depository institutions and bank holding companies.

*Reconciliation.* The Senate Bill must now be reconciled with the House Bill. Senator Dodd and House Financial Services Committee Chairman Barney Frank will form a conference committee to reconcile the bills. It is expected that the conference committee will convene the first week of June and the reconciled bill may be enacted by the July 4<sup>th</sup> congressional recess. There are many similarities between the Senate Bill and the House Bill, however, significant differences exist that must be resolved. A requirement in the Senate Bill that prohibits depository institutions from operating derivatives trading operations is likely to be fiercely debated in the conference committee, as will the proposed ban on proprietary trading and sponsorship of hedge funds by depository institutions. Another point of contention may include the CFPB, which the House Bill establishes as an independent agency, the Consumer Financial Protection Agency (“CFPA”). Unlike the House Bill, under the Senate Bill, the federal banking agencies would be able to veto rules promulgated by the CFPB. The House Bill excludes auto dealers from the CFPA’s authority; a similar amendment excluding auto dealers from the CFPB’s authority failed in the Senate. The House Bill also grants the FTC greater authority for consumer protection than the Senate

Bill. The preemption standards are very different in each bill; the House Bill largely eliminated federal preemption, while Senate Bill preserves some federal preemption, as discussed above. Unlike the Senate Bill, the House Bill provides for a standing fund for the resolution of systemically important financial firms. The House Bill does not contain the minimum leverage and risk based capital requirements provided for in Senator Collins' amendment, discussed above. Other contentious points during the reconciliation process may include the reach of audits of the FRB and restrictions on interchange fees.

The *Alert* will continue to follow the developments surrounding financial regulatory reform and the reconciliation process.

### **Compliance with Internet Gambling Regulations is Mandatory by June 1, 2010**

By June 1, 2010, financial services providers must implement the compliance requirements of a final rule (the "[Final Rule](#)") that requires policies and procedures designed to identify and prevent restricted transactions related to unlawful Internet gambling under the Unlawful Internet Gambling Enforcement Act of 2006 (the "UIGEA" or the "Act"). The U.S. Treasury Department (the "Treasury") and the FRB (together the "Agencies") have prescribed the Final Rule. On May 20, 2010, the Office of the Comptroller of the Currency issued interagency [guidance](#) for reviewing compliance with the Final Rule.

As more fully discussed in the [December 9, 2008 Alert](#), the Final Rule requires, among other things, that non-exempt financial institutions that participate in payment systems that may be used to transfer money for purposes of unlawful Internet gambling "establish and implement written policies and procedures that are reasonably designed to identify and block or otherwise prevent or prohibit unlawful Internet gambling transactions restricted by the Act." The Final Rule generally applies to financial institutions ("Participants") that operate, contract for, or otherwise participate in payment systems ("Designated Payment Systems") that may be used to transfer money for purposes of unlawful Internet gambling. Specifically, the Designated Payment Systems include: automated clearing house systems; systems for credit, debit, pre-paid or stored-value cards; check collection systems; wire transfer systems and certain money transmitting businesses.

Rather than establish an absolute prohibition on processing any and all restricted transactions, the Final Rule supplies guidance and non-exclusive examples of policies and procedures that the Agencies deem to be reasonably designed to identify and block restricted transactions. For Participants in Designated Payment Systems other than card systems, the core procedure for compliance with the Final Rule may be achieved through flexible, risk-based due diligence in account-opening procedures designed to ensure that commercial customers do not originate or receive restricted transactions. Participants in card systems may comply with the core requirement of the Final Rule by using a coding framework during processing to identify and block transactions with indicia of being restricted transactions. The Final Rule also contains provisions for when and how Participants in Designated Payment Systems may justifiably rely on the policies and procedures of the operator of a money transmitting business. It is important for Participants to understand both the extent and limits of their obligations under the Final Rule.

As discussed in the [December 1, 2009 Alert](#), compliance with the Final Rule, which was published on November 18, 2008 and became effective January 19, 2009, was delayed from December 1, 2009 to June 1, 2010. The delay was intended to give banks and other covered financial services providers more time to comply with what the Agencies described as the

“challenging” definition of “unlawful Internet gambling” and to give members of Congress, including the House Financial Services Committee and its Chairman Barney Frank, time to prepare and enact amendments to the UIGEA that would reduce the regulatory burden on financial institutions.

There are currently three pieces of legislation pending in Congress to amend the UIGEA: (i) the Reasonable Prudence in Regulation Act, H.R. 2266, which would delay mandatory compliance with the Final Rule by one year; (ii) the Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2267, which would establish a framework for licensing and regulating Internet gambling operations in the United States; (iii) the Internet Gambling Regulation and Tax Enforcement Act of 2010, H.R. 4976, which would regulate and tax Internet gambling. A hearing which had been set for April 16, 2010 to debate H.R. 2266 and H.R. 2267 before the House Financial Services Committee, has been postponed with no new hearing date scheduled. On May 19, 2010, the House Ways and Means Committee met to discuss proposals related to legalizing and taxing Internet gambling activities and the implications of such proposals. It is uncertain if and when hearings on any of the pending legislation will resume. To date, no new legislation has passed, and no changes have been made to the UIGEA or Final Rule.

In March 2010, the *Washington Post* reported that Treasury Secretary Timothy Geithner struck a deal with Senate Minority Whip Jon Kyl, a staunch opponent of Internet gambling, not to further delay the compliance date for the Final Rule in exchange for Senator Kyl lifting a hold on Treasury nominees. June 1, 2010 is the compliance date for the Final Rule. Covered financial institutions should be prepared to comply.

### **FinCEN Director Discusses Impact of Regulatory Reform on Anti-Money Laundering**

Speaking at the Institute of International Bankers’ International Banking Anti-Money Laundering (“AML”) seminar, FinCEN Director James Freis discussed the impact of financial regulatory reform on the regulatory framework for AML and counter-terrorist financing (“CFT”). In his [remarks](#), Freis acknowledged that AML/CFT regulation has not received close attention in the regulatory reform debate, but noted that reform will nonetheless have indirect effects on AML/CFT, making it necessary for FinCEN to take into account the impact of regulatory changes on financial institutions and their regulators.

Freis framed his remarks by stating that, like any regulator, FinCEN must understand its “line of business,” which in FinCEN’s case includes (1) alignment of specific AML/CFT requirements with the operating obligations of financial sector participants, (2) involvement and integration with safety and soundness regulation more broadly, and (3) detection and prevention of money laundering and terrorist financing. Freis explained that FinCEN’s main regulatory tool is to impose basic standards of behavior, minimum standards of knowledge, and consistent standards of transparency.

Looking forward, Freis predicted that, unlike other areas of financial regulation which will be directly impacted by regulatory reform, the changes in AML/CFT regulation are more likely to be in the nature of evolution, maturation and integration, with a focus on effective implementation. Freis also explained that he believes there will be continued focus on AML/CFT issues because combating abuses of financial crime is a part of promoting financial stability. In addition, Freis noted that AML/CFT obligations are consistent with the main principles outlined by the G-20 countries regarding potential changes in regulation of the financial services industry: Strengthening Transparency and Accountability,

## Enhancing Sound Regulation, Promoting Integrity in Financial Markets, Reinforcing International Cooperation, and Reforming International Financial Institutions.

Focusing on the practical by financial institutions implications of regulatory reform, Freis outlined the business case for continued investment by financial institutions in AML/CFT compliance during periods of financial stress. Freis explained, for example, that a 2009 survey by the American Bankers Association showed \$788 million in fraud related losses on payment cards in 2008, and more than \$1 billion under the umbrella of check fraud during the same period. In light of such statistics, Freis highlighted his continued support for close integration of AML/CFT compliance with longstanding efforts to prevent fraud and other losses, explaining that a complete and correct risk assessment, customer identification program, and transaction monitoring process can pay for itself through the prevention and detection of fraud committed against the institution, the prevention and detection of identity theft and corporate account hijacking, the accurate evaluation and pricing of new products and services, the discovery of market products not properly served, and compliance with non-AML/CFT regulations, such as consumer protection rules.

### **OTS Revises Handbook Section on “Fraud and Insider Abuse”**

The OTS issued updated guidance (the “Updated Guidance”) in a revised version of Section 360 of the OTS’s examination handbook concerning fraud and insider abuse. Included among the revisions made in the [Updated Guidance](#) are: (1) a discussion on suspicious activity report (“SAR”) filing and reporting requirements and the applicability of the related “safe harbor” provisions for SAR filers, (2) updated statistics and red flags concerning mortgage fraud, identity theft, check fraud and payment card fraud; and (3) a discussion on fraud risk management and detection of fraud.

The Updated Guidance also includes a brief summary of the FDIC’s white paper entitled “Impact of New Activities and Structures on Bank Failures,” which examines the four depository institution failures from 1997 through 2007 whose resolutions were most costly to the FDIC. Examples of high risk new activities and complex operating structures noted by the FDIC in those four failures of depository institutions were: (a) rapid growth in securitization of subprime loans; (b) information technology fueling rapid growth in a national deposit market; and (c) heavy reliance on outsourcing, adversely affecting complex organizational and operating structures. The OTS characterizes these failures as having arisen from unsafe and unsound practices that were a form of insider abuse, although they may not have involved criminal activities.

### **OTHER ITEMS OF NOTE**

#### **Goodwin Procter Issues Client Alert on Proposed Carried Interest Legislation**

Goodwin Procter issued a [Client Alert](#) discussing proposed legislation anticipated to be enacted shortly that would affect the treatment of “carried interest” incentive allocations received by sponsors of investment funds organized as partnerships and LLCs. Under the legislation, 50% of such allocations would be treated as ordinary income (rather than capital gain as is generally the case under current law) through 2012, with 75% of such allocations treated as ordinary income thereafter.

## **The SEC and CFTC Release Report with Preliminary Findings Regarding May 6 Market Events**

The staffs of the SEC and CFTC released a [report](#) with preliminary findings from their review of the unusual market events of May 6, 2010.

### **Exchanges File Stock-by-Stock Circuit Breaker Rule Proposals**

The SEC [announced](#) that in response to the market disruption of May 6, 2010 the national securities exchanges have filed proposed rules under which they would pause trading in certain individual stocks if the price moves 10 percent or more in a five minute period. The New York Stock Exchange filing is available [here](#).

### **PARTNERS AND COUNSEL**

[Marco E. Adelfio](#)  
[Lynne B. Barr](#)  
[Raymond P. Boulanger](#)  
[John J. Cleary](#)  
[Daniel T. Condon](#)  
[Margaret B. Crockett](#)  
[James S. Dittmar](#)  
[Anna E. Dodson](#)  
[Alison V. Douglass](#)  
[Eric R. Fischer](#)  
[James O. Fleckner](#)  
[Elizabeth Shea Fries](#)  
[Lynda T. Galligan](#)  
[Jackson B.R. Galloway](#)  
[Stuart M. Glass](#)  
[Mark Holland](#)  
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[James J. Kelly](#)  
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[Robert M. Kurucz](#)  
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[Paul W. Lee](#)  
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[Byron C. Pavano](#)  
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[William E. Stern](#)  
[Marian A. Tse](#)  
[Kimberly K. Vargo](#)  
[Scott A. Webster](#)  
[Michael P. Whalen](#)

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