

FINANCIAL SERVICES ALERT

Goodwin Procter LLP has one of the largest financial services practices in the United States.

SUBSCRIBE

CONTACT US

FSA BACK ISSUES

CONSUMER FINANCIAL SERVICES ALERT

OTHER PUBLICATIONS

EDITORS

[Eric R. Fischer](#)

[Jackson B.R. Galloway](#)

[Elizabeth Shea Fries](#)

Disclaimer:

This publication, which may be considered advertising under the ethical rules of certain jurisdictions, is provided with the understanding that it does not constitute the rendering of legal advice or other professional advice by Goodwin Procter LLP or its attorneys.

IRS Circular 230 Notice:

To ensure compliance with requirements under Treasury Department Circular 230, we inform you that the contents of this *Alert* are not intended or written to be used, and may not be used, for the purpose of (i) avoiding U.S. federal tax penalties or (ii) promoting, marketing or recommending to another party any matter addressed herein. Each taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax adviser.

©2009 Goodwin Procter LLP
All rights reserved.

In this Issue:

Developments of Note

- Senator Dodd Introduces Financial Regulatory Reform Bill
- Dodd Bill Addresses Derivatives Regulation
- FDIC Issues Guidance on Deposit Interest Restrictions
- FDIC Continues Securitization Safe Harbor on a Transitional Basis
- CFTC Adopts Amendments to Commodity Pool Operator Reporting Requirements
- FINRA Provides Six Month Opt-In Period for Changes to Registration and Examination Requirements for Registered Representatives and Principals Involved in Investment Banking Activities
- SEC Issues Release for Dark Pools Proposal

Other Items of Note

- Goodwin Procter Issues Client Alert on New Legislation Providing an Elective NOL Carryback Period of up to Five Years
- SEC Staff Announces 2010 National CCO Outreach Seminar
- SEC Postpones Reg. S-AM Compliance Date until June 1, 2010

DEVELOPMENTS OF NOTE

Senator Dodd Introduces Financial Regulatory Reform Bill

Senate Banking Committee Chairman Christopher Dodd has introduced a discussion draft of the Restoring American Financial Stability Act of 2009 (the "Dodd Bill"), which comprehensively addresses financial regulatory reform, encompassing the range of issues covered in the Obama Administration's proposed legislation and several bills pending in the House of Representatives. For further discussion of the Administration's proposed legislation, please see the [July 28, 2009 Alert](#) and the [August 4, 2009 Alert](#) and for the House legislation please see the [October 20, 2009 Alert](#), the [October 27, 2009 Alert](#) and the [November 3, 2009 Alert](#). Many provisions of the Dodd Bill are similar to other regulatory reform bills, such as the creation of a Consumer Financial Protection Agency ("CFPA"). However, the Dodd Bill also contains significant differences from other regulatory reform proposals, such as (a) combining all prudential bank supervision into a new agency, the Financial Institutions Regulatory Authority (the "FIRA"), (b) creating an entire new agency to regulate systemic risk, the Agency for Financial Stability (the "AFS"), and (c) reducing the powers of the FRB. Based on recent testimony, the Dodd Bill largely reflects the viewpoint of FDIC Chairman Sheila Bair, while the legislation introduced by House Financial Services Chairman Barney Frank largely reflects the viewpoint of FRB Chairman Ben Bernanke.

Senator Dodd introduced a revised version of the Dodd Bill on November 16, 2009 which will be used for the Senate Banking Committee's markup of the bill. The opening statements for the markup of the Dodd Bill are scheduled for November 19, 2009. Senator Dodd has set a November 23, 2009 deadline for the submission of first-degree amendments, with consideration of those amendments by the Senate Banking Committee set for December 2.

Agency for Financial Stability. The Dodd Bill would create a new federal agency, the AFS, to monitor and regulate systemic risk. The AFS would be comparable to the Financial Services Oversight Council (the "Council") that would be created under the House legislation, but with greater authority. The AFS would be governed by a board of directors consisting of an independent chairperson (appointed by the President with the advice and consent of the Senate), the Treasury Secretary, the FRB Chairman, the FIRA Chairperson, the CFPB Director, the SEC Chairman, the FDIC Chairman, the CFTC Chairman, and an independent member with experience in the insurance industry or regulation who would be appointed by the President with the advice and consent of the Senate.

The AFS would be charged with identifying risks to the stability of the U.S. financial system and economy and monitoring those risks. It would also facilitate information sharing between federal and state financial regulatory agencies and identify gaps in the financial regulation regime. Further, the AFS would identify "specified bank holding companies" and "specified non-bank holding companies," collectively, "specified financial companies," whose failure or financial distress would pose a risk to the U.S. financial system or economy. (The term used to describe systemically important firms differs under each proposal: the Administration's proposed legislation refers to "Tier 1 financial holding companies" while the current draft of the House legislation refers to "identified financial holding companies," which may soon be changed to "financial companies subject to stricter standards.") These functions of the AFS are comparable to those of the Council under the House legislation. Unlike the House legislation, the Dodd Bill provides for a full notice and hearing process before the final determination that a company is a specified financial company (and subject to regulation in accordance with that status). Foreign financial companies with substantial assets or operations in the U.S. could also be designated a specified financial company.

Specified financial companies would be required to register with the FIRA and would be subject to similar heightened prudential standards to those provided in the House legislation, including leverage limits, liquidity requirements, concentration requirements and risk management requirements. Such heightened standards would be prescribed by the AFS, a significant difference from the House legislation which calls for the Council to identify systemically significant firms but vests rulemaking authority with the FRB. Unlike the other regulatory reform proposals, the Dodd Bill requires specified financial companies to maintain a minimum amount of contingent capital. Another unique provision of the Dodd Bill subjects all bank holding companies with total assets of \$10 billion or greater to heightened prudential standards including risk-based capital requirements, leverage limits, and liquidity requirements. The Dodd Bill also requires publicly-traded specified financial companies and publicly-traded bank holding companies with total assets of \$10 billion or greater to establish a risk committee responsible for the oversight of the enterprise-wide risk management practices of the company. Like the House legislation, the Dodd Bill requires specified financial companies to create a resolution plan and provides for the divestiture of assets or termination of activities that would pose a threat to the U.S. financial system or the company itself. The Dodd Bill also provides that specified financial companies that

conduct nonfinancial activities create intermediate holding companies to conduct all activities that are financial in nature.

Enhanced Resolution Authority. Similar to the House legislation, the Dodd Bill creates resolution authority for systemically important financial institutions. Under the Dodd Bill, the FDIC would be appointed as receiver of a failing financial company upon the recommendation of the FIRA board and the FDIC (or the SEC in cases involving broker-dealers) and a subsequent determination by the Treasury Secretary. The Dodd Bill provides for an ex-post risk-based assessment on financial companies with total assets of \$10 billion or greater to recoup any losses relating to the resolution of a failed financial company that could not be satisfied from the sale of such company's assets. This provision is comparable to the funding mechanism in the current draft legislation in the House; however, the House is expected to amend its bill to provide for regular risk-based assessments to fund the systemic resolution fund.

Financial Institutions Regulatory Authority. A core distinction between the Dodd Bill and the other regulatory reform proposals is the creation of the FIRA, which would combine the OCC, the OTS, the supervisory functions of the FRB with respect to bank holding companies and state member banks, and the supervisory functions of the FDIC with respect to state nonmember banks. The FIRA would also be the supervisor of any branch, agency, representative office, or commercial lending company of a foreign bank. Accordingly, the FRB would be left with monetary policy and the role of lender of last resort and the FDIC with the deposit insurance fund and resolution authority. Senator Dodd has stated that the goal in removing the FRB and the FDIC's supervisory powers is to focus each institution on its core competencies, such as monetary policy or deposit insurance. The Administration has heavily criticized removing the FRB's supervisory functions, stating that such powers give the FRB timely and complete information necessary for it to serve as the lender of last resort in the event of a crisis. The FIRA board would consist of the FRB Chairman, the FDIC Chairman and three persons appointed by the President with the advice and consent of the Senate.

The Dodd Bill would establish a State Bank Advisory Board to make recommendations concerning the FIRA's supervision of state-chartered institutions and to advise the FIRA on streamlining the regulation and supervision of such institutions. Community banks would be examined and supervised by a separate Division of Community Banks, which would also make recommendations to the FIRA Board regarding standards appropriate to the supervision of community banks. The Dodd Bill also provides that no member of the FIRA Board or FIRA employee may promote the conversion of a state-chartered bank to a national bank, subject to rules issued by the FIRA board in consultation with the State Bank Advisory Board.

The Dodd Bill would not immediately eliminate the thrift charter, but would prohibit any new charters for federal savings associations. The FIRA would continue to have authority to examine and regulate federal savings associations as long as any exist; however, the Dodd Bill appears to be designed to encourage the demise of the thrift charter.

Bank Holding Company Regulatory Reforms. The Dodd Bill would impose a moratorium on the approval of new applications for deposit insurance from industrial loan companies, trust banks and credit card banks. Limits would also be placed on the change in control of industrial loan companies, credit card banks or trust banks if such change in control would result in control of the institution by a commercial firm. The Dodd Bill also provides for a

study by the Government Accountability Office of the exceptions under the Bank Holding Company Act of 1956, as amended, for thrifts, industrial loan companies, credit card banks, trust banks and other grandfathered financial institutions.

Similar to the House legislation, the Dodd Bill expands regulation over banks, thrifts, savings and loan holding companies and bank holding companies, including enhanced capital and management requirements for interstate acquisitions, enhanced affiliate transaction requirements, enhanced lending limitations and restrictions on conversions of troubled institutions. The Dodd Bill also would create a more permissive interstate branching regime. National banks and state-chartered banks would be allowed establish a branch *de novo* in a state if a bank chartered by such state would have been permitted to establish the branch.

Payment, Clearing and Settlement Systems. The provisions of the Dodd Bill relating to payment, clearing and settlement systems are broadly similar to the House legislation. Additionally, the Dodd provides for access to the FRB's discount window for systemically important payment, clearing and settlement companies.

Consumer Financial Protection Agency. Much like the other regulatory reform proposals, the Dodd Bill provides for the establishment of the CFPA to regulate comprehensively the provision of consumer financial products and services. The Dodd Bill is generally similar to the House's Consumer Financial Protection Act of 2009 (the "CFPA Act") and includes many of the CFPA Act's most controversial provisions, such as the elimination of federal preemption for state consumer laws. However, certain differences between the bills do exist. Unlike the House version, the Dodd Bill includes the Community Reinvestment Act in the list of enumerated consumer laws for which the CFPA has jurisdiction. Many of the exclusions for certain entities and activities added during the House's markup of the CFPA Act are not included in the Dodd Bill. Further, the Dodd Bill does not exclude banks with less than \$10 billion in assets or credit unions with less than \$1.5 billion in assets from examination and enforcement by the CFPA.

Under the Dodd Bill, the CFPA would be governed by a five member board, which is similar to the version of the CFPA Act passed by the House Energy and Commerce Committee, but differs from the single director structure of the version of the CFPA Act passed by the House Financial Services Committee.

Transition Oversight Commission. The Dodd Bill creates a Financial Regulatory Agencies Transition Oversight Commission to oversee the creation of the AFS, the FIRA and the CFPA.

Reforms to the Federal Reserve System. In addition to the removal of authority discussed above, the Dodd Bill contains other limitations on the powers of the FRB and, unlike the other regulatory reform proposals, does not create any significant new authority for the FRB. Similar to the House legislation, the Dodd Bill restricts the FRB's emergency lending powers under Section 13(3) of the Federal Reserve Act. Emergency assistance would only be available in a program or facility with broad-based participation. Upon the exercise of such emergency lending powers, the FRB would be required to provide within 7 days a report to the House Financial Services Committee and the Senate Banking Committee regarding such assistance, and continue to provide updates every 30 days thereafter. The FRB would be able to withhold identifying information about the recipient of such assistance for one year.

The Dodd Bill would also modify the process by which the boards of directors of the Federal Reserve Banks are selected. Rather than be chosen by the stock holding banks or elected by the public, all directors of the Federal Reserve Banks would be appointed by the FRB, except for the chairman of each board who would be appointed by the President with the advise and consent of the Senate. The Dodd Bill also would authorize the Government Accountability Office to conduct audits of the FRB's credit facilities, including the facilities set up in response to the financial crisis.

Regulation of Over-the-Counter Derivatives. The Dodd Bill's proposal for regulation of over-the-counter derivatives markets is discussed in the next article of this issue of the *Alert*.

Private Fund Adviser Registration. Like H.R. 3818, which was approved as amended by the House Financial Services Committee, the Dodd Bill proposes to eliminate the exemption from registration under the Investment Advisers Act of 1940 (the "Advisers Act") that is currently available to advisers that do not hold themselves out to the public as investment advisers, have fewer than 15 clients and do not advise registered funds. This exemption, frequently called the "private adviser" exemption, is used by many advisers to private funds who are able to treat each fund as a single client. The Dodd Bill creates several new exemptions: for (1) foreign private advisers (generally, who are not holding themselves out to the public or advising registered funds or business development companies, have no place of business in the US, have fewer than 15 US domiciled or US resident clients, and manage assets from such clients totaling less than \$25 million), (2) family offices (to be defined by SEC regulation), (3) advisers to venture capital funds (to be defined by SEC regulation within six months of enactment of the legislation), and (4) advisers to private equity funds (also to be defined by SEC regulation within six months of enactment of the legislation). H.R. 3818 includes similar foreign private adviser and venture capital fund adviser exemptions. However, where the Dodd Bill simply provides an exemption from registration for a venture capital fund adviser Dodd Bill, H.R. 3818 would require the SEC to promulgate recordkeeping and reporting regulations for advisers relying on the venture capital fund adviser exemption. In its private equity fund adviser exemption, the Dodd Bill generally mirrors H.R. 3818's treatment of venture capital fund advisers in directing the SEC to adopt recordkeeping and reporting by private equity fund advisers. The Dodd Bill does not include the exemption in H.R. 3818 that would apply to advisers whose clients are exclusively (a) small business investment companies or (b) private funds each with less than \$150 million in assets; however, the Dodd Bill does suggest that advisers with less than \$100 million under management in the aggregate be subject to state rather than federal registration (representing an increase in the minimum for federal registration from the current threshold of \$25 million).

The Dodd Bill would specifically provide the SEC with recordkeeping, reporting and inspection authority so that it can gather and share information, *e.g.*, about "private funds" managed by registered advisers. As in H.R. 3818, the Dodd Bill defines "private funds" by reference to the exceptions from the definition of "investment company" under Sections 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940, although the Dodd Bill further limits the definition to those funds created under US law or having ten percent or more of its securities owned by US persons. Although the Dodd Bill's recordkeeping and reporting requirements are similar to H.R. 3818's, the Dodd Bill does not give the SEC rulemaking power to require specific disclosures by a registered advisers to a private fund's investors, prospective investors, counterparties and creditors. There are also subtle differences in that the Dodd Bill has a longer list of required information (including valuation methodologies,

types of assets held and side letters) and the Dodd Bill suggests this information must be “filed” with the SEC whereas H.R. 3818, as amended, suggests the records would be “maintained or filed” with the SEC. The Dodd Bill also would give the SEC authority to promulgate additional regulations on a variety of related topics. Apart from regulation of advisers of private funds, the Dodd Bill suggests adjusting (for inflation) the “accredited investor” standard under the Securities Act of 1933. Finally, the Dodd Bill suggests three studies on (1) the appropriate criteria for accredited investors status for hedge funds, (2) feasibility of a self-regulatory organization to oversee hedge funds, private equity funds and venture capital funds, and (3) the state of short selling in the stock market.

Insurance and Securities Laws. The Dodd Bill includes a number of provisions that will be discussed in a future edition of the *Alert*. Among other matters, these provisions involve the creation of an office of national insurance, limited state-based insurance reform, corporate governance (including shareholder proxy access), executive compensation, enforcement and remedies under the federal securities laws, NRSRO regulation and asset-backed securities.

Dodd Bill Addresses Derivatives Regulation

On November 10, 2009, Sen. Chris Dodd (D-CT), who chairs the Senate Committee on Banking, Housing, and Urban Affairs, circulated a discussion draft of the [Restoring American Financial Stability Act of 2009](#) (the “Dodd Bill”). Title VII of the Dodd Bill (“Improvements to Regulation of Over-the-Counter Derivatives Markets”) is the newest (arguably, the sixth) proposal to create an entirely new federal regulatory regime for over-the-counter (“OTC”) and other derivatives.

Although the Dodd Bill encompasses the U.S. Treasury’s proposed OTC derivatives legislation issued in August 2009 (“Treasury’s Proposal,” discussed in Goodwin Procter’s [August 27, 2009 Client Alert](#)), the [Over-the-Counter Derivatives Markets Act of 2009](#) that was passed by the House Financial Services Committee on October 15, 2009 (the “Frank Bill”) and the [Derivatives Markets Transparency & Accountability Act](#) that was passed by the House Agriculture Committee on October 21, 2009 (the “Peterson Bill,” and together with the Frank Bill, the “House Bills,” discussed in Goodwin Procter’s [November 2, 2009 Client Alert](#)), it differs in certain important respects from both Treasury’s Proposal and the House Bills. Highlights of where the Dodd Bill follows and diverges from earlier proposals are discussed below.

Parallel Regimes for Swaps and Security-Based Swaps. The Dodd Bill, like Treasury’s Proposal and the House Bills, would grant the SEC oversight authority over “security-based swaps” and grant the CFTC oversight authority over all other instruments defined as “swaps.”

- Unlike Treasury’s Proposal and the House Bills, under the Dodd Bill, banks that are major swap participants and major security-based swap participants (collectively, “major market participants”) and swap dealers and security-based swap dealers (collectively, “dealers”) would be overseen by the Financial Institutions Regulatory Administration (the “FIRA”), the new and sole bank regulator under the Dodd Bill.
- Under the Dodd Bill, the CFTC and SEC would have the authority to grant exemptions from the swap and security-based swap provisions, but this authority would be limited to “as expressly authorized” by the Dodd Bill as opposed to the more general exemptive authority granted to the two agencies and bank regulators under the House Bills.

- Under the Dodd Bill (like the Frank Bill but not the Peterson Bill), the CFTC and SEC would be given *joint* rule-making authority and would be expected to *jointly* adopt rules and regulations no later than 180 days after the effective date of the bill. Unlike the Frank Bill, however, if the CFTC and SEC fail to meet that aggressive deadline, the new Agency for Financial Stability (the “AFS”) would be authorized to prescribe rules.

Mandatory Clearing Requirements. The Dodd Bill would impose a requirement that all swaps and security-based swaps be submitted for clearing. This approach contrasts with the House Bills that would establish a presumption of mandatory clearing if a registered clearing agency accepted a swap or security-based swap for clearing and Treasury’s Proposal, which would require “standardized” swaps and security-based swaps to be centrally cleared. However, under the Dodd Bill and the House Bills, the CFTC or SEC would be able to conditionally or unconditionally exempt certain swaps or security-based swaps from the clearing requirement.

- Under the Dodd Bill, before exempting a swap or security-based swap (or a class of swaps or security-based swaps), the CFTC or SEC would be required to “consult with” and “consider the views of” the SEC or CFTC (as applicable) and the AFS “concerning whether such exemption is necessary and appropriate for the reduction of systemic risk and in the public interest.” The CFTC and SEC would be required to give the other agency and the AFS 45 days notice before issuing any such exemption, and those agencies would be able to prevent any exemption by issuing a finding. In contrast, the Peterson Bill would introduce a dispute resolution mechanism that would allow the SEC or CFTC to petition the Court of Appeals for the DC Circuit.

Mandatory Exchange Trading. Like the House Bills and Treasury’s Proposal, the Dodd Bill would also impose mandatory trading for all centrally cleared swaps and security-based swaps and would provide for similar exemptions from the mandatory exchange trading requirement.

New Capital and Margin Requirements. The Dodd Bill would require the FIRA to impose capital and margin requirements on bank participants in the derivatives markets. Capital and margin requirements for nonbank dealers and major market participants would have to be “as strict or stricter” than the capital and margin requirements set by the FIRA, which is similar to the structures proposed in Treasury’s Proposal and in the Frank Bill.

- The Dodd Bill includes the imposition of initial and variation margin requirements which are also a part of Treasury’s Proposal and the Peterson Bill but are not included in the proposed regime under the Frank Bill.

CFTC and SEC Authorized to Set Position Limits. Similar to the Treasury’s Proposal and the House Bills, the Dodd Bill would promulgate rules setting aggregate position limits for large swap and security-based swap traders. Specifically, a swap trader would not be permitted to enter into a swap that “performs or affects a significant price discovery function” in the relevant market if the transaction would cause the trader to exceed single-day or aggregate position limits set by the CFTC, unless the trader reported the transaction to the CFTC and maintained detailed books and records regarding its positions (which would be open to inspection at all times by the CFTC).

- As under the Treasury’s Proposal and the House Bills, a security-based swap trader would be subject to limits on the aggregate amount or number of positions in securities

listed on a national securities exchange or that “perform or affect a significant price discovery function with respect to regulated markets” unless it complied with SEC mandated reporting and record-keeping requirements.

- And, consistent with earlier proposals, the Dodd Bill also would permit the SEC to delegate to self-regulatory organizations (“SROs”) authority with respect to establishing and enforcing position limits.
- Under the Dodd Bill alternative swap execution facilities would, as under the Treasury’s Proposal, be required to adopt position limits or position accountability for each traded contract in order to reduce the threat of market manipulation or congestion and to eliminate or prevent excessive speculation. Such limits would not be permitted to be higher than those set by the CFTC or SEC for the relevant contract.

Dealers and Major Market Participants Subject to New Registration, Capital and Reporting Requirements. Like the Frank Bill and the Treasury’s Proposal, the Dodd Bill would require dealers and major market participants to register with the CFTC and/or the SEC, which would subject them to a host of new disclosure, reporting and business conduct rules.

- The Dodd Bill and the Frank Bill have similar definitions of “major swap participant” and “major security-based swap participant.” The Dodd Bill, however, adds to those definitions persons whose outstanding swaps “create substantial net counterparty exposure (current and potential future) to other market participants that would expose those other market participants to significant credit losses in the event of the person’s default.” Additionally, the Dodd Bill does not include a hedging exemption (as the House Bills do), nor would the Dodd Bill give the SEC and CFTC general exemptive powers.
- Unlike the Peterson Bill, certain dealers and major market participants (including banks) would be required to register with both the CFTC and SEC if they dealt in swaps and security-based swaps.
- Unlike the House Bills, the Dodd Bill would require a dealer or major market participant to disclose the source and amount of any fees or other material incentives it may have in connection with the transaction.

Segregation of Assets. Like the House Bills, the Dodd Bill would require, under certain circumstances, the segregation of collateral in connection with both swaps and security-based swaps. With respect to non-cleared transactions, the Dodd Bill (similar to the Peterson Bill) would require, upon the request of a counterparty, that a dealer segregate funds or property held “to margin, guarantee, or secure the obligations of the counterparty under [the] swap” and maintain such funds or property in a separate account carried by an independent custodian. With respect to cleared transactions, the Dodd Bill would require a dealer, a futures commission merchant or a clearing agency to “segregate, maintain, and use the funds or other property for the benefit of the counterparty” pursuant to CFTC, SEC or FIRA rules. In contrast, the Peterson Bill, would only apply these collateral and margin segregation rules to security-based swap dealers and clearing agencies. And, also in contrast, the Frank Bill would require compliance reporting on the back office procedures with respect to meeting margin and collateral requirements in certain circumstances (and potentially as an alternative to segregation).

Mandatory Reporting for Transactions. The Dodd Bill generally follows the Treasury's Proposal and the House Bills with respect to reporting. Clearing agencies, exchanges and swap execution facilities would be required to report transaction information to the CFTC or SEC, as applicable (in the case of clearing agencies, to be shared with the CFTC, the SEC, federal banking authorities, the AFS, other federal governmental agencies and foreign financial supervisors). Swap repositories also would be subject to similar reporting requirements. The Dodd Bill would require large swap traders to submit transaction and position reports for *all* of their swaps (rather than only transactions in regulated markets, as under the House Bills).

Security-Based Swaps Specifically Incorporated into Securities Laws; Exempt from Registration. The Dodd Bill would expressly make a security-based swap a "security" for purposes of federal securities laws, thereby making these instruments subject to the full panoply of regulations and rules applicable to most other securities. The Dodd Bill (like the House Bills) would require registration under the Securities Act of 1933 of security-based swaps offered or entered into with any person not an eligible contract participant. As under the House Bills, the SEC would be authorized to exempt certain security-based swaps.

International Harmonization. Similar to the House Bills, the Dodd Bill would require the SEC, the CFTC, FIRA, the AFS and the Treasury to "consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation of swaps," and permit those agencies to agree to information-sharing agreements. Unlike the Frank Bill (but similar to the Treasury's Proposal and the Peterson Bill), the Dodd Bill would not give the CFTC and SEC the power to exempt foreign financial institutions that are subject to comparable regulation in their home countries from the registration requirements. Furthermore, the Dodd Bill would not authorize the Secretary of the Treasury to ban foreign entities that are not subject to sufficient swap regulation in their domestic countries from participating in the U.S. swap markets.

FDIC Issues Guidance on Deposit Interest Restrictions

The FDIC issued Financial Institution Letter [FIL-62-2009](#) (the "Guidance"), to assist banks in complying with the FDIC's final rule (the "Final Rule") on restrictions on interest rates paid by banks that are less than "well capitalized" under Section 337.6 of the FDIC Rules and Regulations ("Section 337.6"). The Guidance includes a list of questions and answers. Banks that must comply with the restrictions under Section 337.6 include those that are subject to an enforcement order that requires a specific capital level. The [Final Rule](#) (discussed in the [June 2, 2009 Alert](#)), takes effect on January 1, 2010. Section 337.6 restricts the use of brokered deposits and limits rates paid on interest-bearing deposits solicited by less than well capitalized FDIC-insured institutions. The interest rate cap is determined by adding 75 basis points to the national rate. The Final Rule defines the "national rate" as "a simple average of rates paid by U.S. depository institutions as calculated by the FDIC." (The Final Rule does not change the brokered deposit restrictions.) The Final Rule provides an exception if an institution presents evidence confirming that the prevailing rate in a particular area exceeds the national rate.

The Guidance provides clarification on several aspects of the Final Rule and addresses some of the issues presented by the American Bankers Association ("ABA") in an August 20, 2009 letter (discussed in the [August 25, 2009 Alert](#)) requesting clarification of the Final Rule, including the following:

- In order to rely on the high-rate area exception, an institution must have received a determination from the FDIC that it is operating in a high-rate area. The FDIC will provide further guidance setting forth how to file a request for such a determination in time for the FDIC to process the request before the January 1, 2010 effective date.
- All individual branches of other institutions are considered for purposes of calculating the prevailing rate for a local market.
- The FDIC would not object to the immediate use by less than well capitalized institutions of the national rates and rate caps posted weekly on the FDIC's website, although such use is not mandatory.

In the Guidance, the FDIC strongly encourages institutions that already fall below the well capitalized standard and those that are close to doing so to revise their funding strategies to place less reliance on brokered and high-cost deposits.

FDIC Continues Securitization Safe Harbor on a Transitional Basis

The FDIC issued on November 13, 2009 an interim rule (the "Interim Rule") continuing on a transitional basis the safe harbor provided at 12 C.F.R. §360.6 (the "Safe Harbor") from the FDIC's ability, as conservator or receiver, to recover assets securitized or participated out by a federally insured depository institution (an "IDI"). The Interim Rule is intended to prevent substantial downgrades in the ratings on existing securitizations and to enable planned securitizations to be brought to market. It is expected to remain effective until the FDIC and other regulatory agencies develop a permanent regulation to address the FDIC's powers in this area. The effectiveness and legal certainty of the Safe Harbor was threatened by changes to the "true sale" accounting rules upon which the Safe Harbor expressly relies (and in particular by FAS 166 and FAS 167, both adopted June 12, 2009. See the [June 16, 2009 Alert](#)). The accounting rules changes are effective for reporting periods which begin after November 15, 2009.

The Safe Harbor, which was implemented by FDIC rulemaking in 2000, clarified the limits of the FDIC's authority, in its role as conservator or receiver of a failed IDI, to disaffirm or repudiate securitization or participation contracts in order to recover assets purportedly transferred or participated out by such IDI. (The Safe Harbor is viewed as a clarification of the Federal Deposit Insurance Act because the FDIC's power to repudiate contracts does not give it the right to recover previously transferred assets.) The Safe Harbor provides that to the extent a securitization or a participation could be characterized as a sale under generally accepted accounting principles ("GAAP"), with the exception of the "legal isolation" requirement under GAAP (which requirement would be accomplished by the Safe Harbor itself), the transfer of the assets from the IDI would not be reclaimed, recharacterized, or recovered as the property of an IDI or a receivership of an IDI by the FDIC acting as conservator or receiver. In addition to the requirement that the transfer satisfy the criteria for a true sale under GAAP (with the exception of the "legal isolation" requirement), the Safe Harbor requires that the IDI receive adequate consideration for the transferred assets, but eliminates the FDIC's "contemporaneous" requirement with respect to otherwise enforceable transfers of assets in connection with a participation or a securitization.

Questions over the continuing availability of the Safe Harbor arose as a consequence of recent changes to GAAP that would make it impossible for some participations and most

securitizations to satisfy the requirements of the Safe Harbor (absent the Interim Rule). These changes, set forth in FAS 166 and FAS 167, amend FAS 140 and FAS 46(R), and will result in many securitizations and some participations being treated as secured borrowings rather than sales for accounting purposes. Therefore, absent relief, many securitizations originated by IDIs after November 15, 2009 would not have satisfied the requirements of the Safe Harbor.

The Interim Rule provides temporary relief by making the Safe Harbor applicable to securitizations and participations in which the assets are transferred from IDIs, or, with respect to revolving securitization trusts, the beneficial interests are issued on or before March 31, 2010. In order to take advantage of the Safe Harbor, a transaction's structure must meet the sale accounting standards in effect prior to November 15, 2009.

The FDIC also stated its intent to promulgate a new, permanent regulation to replace the Safe Harbor and take into account the new accounting regime for transactions in which assets will be transferred or beneficial interests issued after March 31, 2010. In this regard, the FDIC anticipates publishing a Notice of Proposed Rulemaking seeking comment on the expected proposed rule on December 15, 2009.

CFTC Adopts Amendments to Commodity Pool Operator Reporting Requirements

The CFTC has issued [final amendments](#) (the "Amendments") to its regulations governing (a) the periodic account statements that Commodity Pool Operators ("CPOs") provide to commodity pool participants ("participants") and (b) the annual financial reports that CPOs provide to participants and file with the National Futures Association ("NFA"). The Amendments specify the disclosure required in periodic account statements for certain types of commodity pools ("pools"), clarify the reporting requirements for pools that are series and multi-class funds, extend financial reporting filing deadlines for pools ("funds of funds") that invest in other funds, streamline certain filing requirements for pools ceasing operation, and enhance guidance on certain reporting requirements and the accounting treatment of such pools.

Regulation 4.7 Exempt Funds. The Amendments clarify the account information that is required to be disclosed in the periodic account statements distributed by pools that have claimed an exemption under CFTC Regulation 4.7. Specifically, the Amendments require such pools to provide each participant with a periodic account statement that discloses either the net asset value per outstanding participation unit or the total value of the participant's interest or share.

Series and Multi-Class Funds. The Amendments clarify that, for pools that are series funds structured with a limitation on liability among the different series, the periodic account statements and annual reports filed under CFTC regulations may include only the information for the series being reported, but may also include information on other series of a respective pool. Additionally, the Amendments state that for multi-class funds and series funds that are not structured with a limitation on liability among the different series or classes, net asset value and other required information must be presented for both the pool as a whole and for each series or class of ownership. These clarifications are intended to address issues raised under U.S. Generally Accepted Accounting Principals ("GAAP") for pools that are series and multi-class funds.

Funds of Funds. The Amendments: (a) extend the additional time period for filing and distributing annual reports of pools that are funds of funds from 150 calendar days after the end of the pool's fiscal year to 180 calendar days; (b) extend the application of such extension to funds of funds that do not provide audited financial statements; and (c) eliminate the requirement that a CPO, which has already filed a claim of extension, restate certain representations in a separate filed statement. These changes are intended to address the increase in additional extensions that have been requested and to ease the burden on funds of funds which may themselves obtain annual reports and other necessary information from underlying funds that are pools.

Liquidating Pools. The Amendments assist pools that have already ceased operations by amending the procedures for CPOs to file final reports for such pools. The Amendments specify that a pool's final annual report must generally be distributed to pool participants within 90 days after the pool permanently ceases trading and requires that, if such pool does not distribute all funds at the time the final report is issued, the final report must disclose the value of the remaining assets and expected timeframe for their distribution. Further, if the pool has not completed distribution within the timeframe estimated in the final report, then the CPO must provide notice to such participants and the NFA that includes, among other things, the value of the remaining assets and the expected timeframe liquidation. The Amendments permit such liquidating pools to prepare and provide unaudited final reports as long as the CPO obtains from all participants the necessary waivers.

Reporting Requirements and Accounting Treatment. The Amendments codify certain CFTC staff interpretations regarding how a pool's annual financial report: (a) special allocations of partnership equity; (b) the combination of gains and losses on regulated futures transactions with gains and losses on non-CFTC regulated transactions that are parties of the same trading strategy; and (c) the disclosure of the amounts of management and incentive fees and expenses indirectly incurred through the investment in any underlying fund when an investment exceeds five percent. In connection with the disclosure of fees and expenses, the Amendments provide an option for a CPO that is unable to obtain the specific amount of an underlying fund's fees and expenses. Under this option, the CPO may provide the percentage amounts and computational basis for each underlying fund fee or expense and indicate that it is not able to obtain the specific amounts for the fund.

The Amendments permit a CPO that operates a pool organized under the laws of a foreign jurisdiction to, under certain conditions, use International Financial Reporting Standards in lieu of GAAP as long as the use of such standards does not conflict with any representations made in an offering memorandum or other operative document and the CPO files a notice with the NFA within 90 days of the end of the pool's fiscal year.

Effective Date. The Amendments become effective on December 9, 2009, with the Amendments affecting annual financial reports applying to reports for fiscal years ending December 31, 2009 and later.

FINRA Provides Six Month Opt-In Period for Changes to Registration and Examination Requirements for Registered Representatives and Principals Involved in Investment Banking Activities

In [Regulatory Notice 09-41](#), FINRA notified its members of amendments to NASD Rules 1022 and 1032 that create new registration and examination requirements for registered

representatives involved in investment banking activities and principals supervising them. The new registration category, Limited Representative – Investment Banking, became effective on November 2, 2009. It is required for personnel whose activities include the following:

- (1) Advising on or facilitating debt or equity securities offerings through a private placement or a public offering, including but not limited to origination, underwriting, marketing, structuring, syndication, and pricing of such securities and managing the allocation and stabilization activities of such offerings, or
- (2) Advising on or facilitating mergers and acquisitions, tender offers, financial restructurings, asset sales, divestitures or other corporate reorganizations or business combination transactions, including but not limited to rendering a fairness, solvency or similar opinion.

It is important to note that currently registered representatives who have passed the Series 7 or a Series 7-equivalent examination and who engage in any of the activities listed above are required to either pass the new Series 79 or opt-in to the new registration. The opt-in process is discussed in further detail below. The new registration category does not cover individuals whose investment banking work is limited to public (municipal) finance or direct participation programs as defined in NASD Rule 1022(e)(2), or private securities offerings as defined by NASD Rule 1032(h)(1)(A). Each of those activities is covered by its own separate registration category. States will also continue to require the Series 7 Exam for use with the Series 66 Exam for individuals seeking to qualify and register as investment adviser representatives.

Individuals whose activities require registration as an Investment Banking Representative will be required to pass the Investment Banking Representative Qualification Examination (Series 79) or obtain a waiver. The examination questions are distributed among the following four major functions reflecting the overall knowledge, skills and abilities required of an investment banker: (i) collection, analysis and evaluation of data, (ii) underwriting/new financing transactions, types of offerings and registration of securities, (iii) mergers and acquisitions, tender offers and financial restructuring transactions, and (iv) general securities industry regulations.

Opt-In Period. Through May 3, 2010, investment bankers who hold the Series 7 registration, as well as those who have passed and are registered with a “Series 7-equivalent exam” may opt-in to the new registration category simply by amending their Form U-4, provided their firm’s Form BD indicates that the firm engages in these activities. After May 3, 2009, representatives who engage in investment banking, and the individuals who supervise them, will be required to pass the new Series 79 examination or obtain a waiver.

Principals. Individuals who wish to function as a general securities principal for the investment banking activities listed above must also obtain the new Investment Banking Registration, either by opting-in or passing the Series 79 Exam, and also passing the General Securities Principal Exam (Series 24). Individuals functioning as a general securities principal supervising the investment banking activities listed above have the same six-month opt-in period, lasting until May 3, 2010, during which they may opt-in to the Investment Banking Representative registration.

PARTNERS AND COUNSEL

[Marco E. Adelfio](#)
[Lynne B. Barr](#)
[Gary A. Beller](#)
[Raymond P. Boulanger](#)
[John J. Cleary](#)
[Daniel T. Condon](#)
[Margaret B. Crockett](#)
[James S. Dittmar](#)
[Anna E. Dodson](#)
[Eric R. Fischer](#)
[James O. Fleckner](#)
[Elizabeth Shea Fries](#)
[Lynda T. Galligan](#)
[Jackson B.R. Galloway](#)
[John Hunt](#)
[James J. Kelly](#)
[Robert G. Kester](#)
[Robert M. Kurucz](#)
[Thomas J. LaFond](#)
[Paul W. Lee](#)
[William P. Mayer](#)
[Philip H. Newman](#)
[Sean P. O'Malley](#)
[Christopher E. Palmer](#)
[Byron C. Pavano](#)
[Regina M. Pisa](#)
[Mark S. Raffman](#)
[Robert S. Seigal](#)
[Brenda R. Sharton](#)
[Kevin L. Sheridan, Jr.](#)
[Derek N. Steingarten](#)
[William E. Stern](#)
[Marian A. Tse](#)
[Kimberly K. Vargo](#)
[Scott A. Webster](#)
[Michael P. Whalen](#)

SEC Issues Release for Dark Pools Proposal

The SEC issued the [formal release](#) describing its proposal to amend the regulatory requirements that apply to non-public trading interest in National Market System (“NMS”) stocks, including so-called “dark pools” of liquidity, which the SEC defines as “alternative trading systems (“ATs”) that do not publicly display quotations in the consolidated quotation data for NMS stocks that is widely disseminated to the public. The proposal has three principal elements: (1) it would amend the definition of “bid” and “offer” in the quotation requirements under the Securities Exchange Act of 1934 (the “1934 Act”) to expressly include actionable indications of interest (“IOIs”) privately transmitted by dark pools and other trading venues to selected market participants; (2) it would lower the trading volume threshold in ATS that triggers the obligation to display best-priced orders in the consolidated quote stream from 5% to 0.25% to give public access to quote data regarding the best prices and sizes (including actionable IOIs) for NMS stocks that trade in ATs; and (3) it would amend the joint self regulatory organization (“SRO”) plans for publicly disseminating consolidated trade data to require real-time disclosure of the identity of ATs on the reports of their executed trades to FINRA/SROs in an effort to improve post-trade transparency. In discussing the first and second elements of the proposal, the proposing release states that “[t]he practical result of the proposed amendment to the definition of bid or offer and the proposed lowering of the ATS volume threshold would be that ATs could not privately display actionable IOIs only to select market participants and thereby create two-tiered access to information on the best available prices for NMS stocks.” Notably, the SEC has not proposed to amend the “fair access” requirements of Regulation ATS. Comments are due 90 days after the release’s publication in the *Federal Register*.

OTHER ITEMS OF NOTE

Goodwin Procter Issues Client Alert on New Legislation Providing an Elective NOL Carryback Period of up to Five Years

Goodwin Procter issued a [Client Alert](#) discussing provisions of the recently enacted Worker, Homeownership, and Business Assistance Act of 2009, under which taxpayers may elect to carry back net operating losses arising in a 2008 or 2009 tax year for up to 5 years.

SEC Staff Announces 2010 National CCO Outreach Seminar

The SEC staff announced that it will be holding a National CCO Outreach Seminar for investment adviser, investment company, and broker-dealer chief compliance officers in Washington, DC on January 26, 2010. The Seminar will be webcast on the SEC website at <http://www.sec.gov/news/otherwebcasts.shtml>, with the webcast archived for future access. The agenda for the January 2010 Seminar is available at <http://www.sec.gov/info/cco/ccons2010agenda.htm>.

SEC Postpones Reg. S-AM Compliance Date until June 1, 2010

SEC issued a [release](#) announcing the postponement of the compliance date for Regulation S-AM (discussed in the [October 27, 2009 Alert](#)) from January 1, 2010 to June 1, 2010.

Goodwin Procter LLP
Boston
Hong Kong
London
Los Angeles
New York
San Diego
San Francisco
Silicon Valley
Washington, D.C.