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DEVELOPMENTS OF NOTE

FDIC Issues Letter Extending Supervisory Procedures for *De Novo* FDIC - Supervised Depository Institutions

The FDIC issued a financial institution letter (FIL-50-2009, the "Letter") in which it advised the banking industry that it was extending its special supervisory period for *de novo* state member depository institutions ("DIs") from three to seven years. Throughout the *de novo* period, newly FDIC-insured DIs will be subject to higher capital requirements, more frequent examinations, and other requirements. The 8% Tier 1 leverage capital ratio requirement will now apply to *de novo* DIs for seven years rather than for three years. Furthermore, *de novo* DIs will now be required to obtain prior FDIC approval for material changes to their business plans for seven years from establishment rather than only during the three years. The new business plan requirements will not apply to DIs that are currently more than three years old. The FDIC said in the Letter that experience during the current economic downturn had demonstrated that "*de novo* DIs pose an elevated risk to the FDIC's Deposit Insurance Fund," and that many of the failures of the *de novo* DIs in 2008 and 2009 occurred during the fourth through seventh years of the *de novo* DI's operation.

With respect to examinations, the Letter said that the FDIC is revising its risk management compliance and Community Reinvestment Act ("CRA") examination schedules for *de novo* DIs. *De novo* DIs will undergo a limited scope risk management examination within the first six months of operation and a full-scope risk management examination within the first twelve months. In subsequent years through year seven *de novo* DIs will be on a twelve month risk management examination schedule. For compliance and CRA examinations, *de*

novo DIs will have full-scope examinations during the first twelve months of operation, will have a visitation in the second year, a compliance examination (but not a CRA examination) in the third year, a visitation in the fourth year and both a compliance and CRA examination in the fifth year. Thereafter *de novo* DIs may be placed on a regular compliance and CRA examination schedule (with longer intervals between examinations).

The Letter further states that before the end of its third year of operation, a *de novo* DI must submit updated financial statements, pro forma financial projections and business plans for years four through seven. In this submission the *de novo* DIs will also be required to provide a strategic plan that highlights capital maintenance plans, dividend payment plans, proposed product offerings and other strategies that may alter the *de novo* DI's risk profile.

Finally, the FDIC states in the Letter that these expanded supervisory procedures will generally not apply to *de novo* DIs that are subsidiaries of existing "eligible" holding companies (in general, those that are highly rated and not subject to supervisory orders or agreements).

FDIC Extends the Transaction Account Guarantee Portion of the Temporary Liquidity Guarantee Program

The FDIC adopted a final rule extending the Transaction Account Guarantee ("TAG") portion of the Temporary Liquidity Guarantee Program for six months, through June 30, 2010. The TAG program provides an unlimited FDIC guarantee for deposits in qualifying noninterest-bearing transaction accounts. For more on the TAG program, please see the [October 14, 2008 Alert](#) and the [November 25, 2008 Alert](#).

Any insured depository institution that is currently participating in the TAG program may continue in the program during the extension period that ends on June 30, 2010. Any institution currently participating in the TAG program that wishes to opt out of the TAG extension must submit its opt-out election via email to the FDIC on or before November 2, 2009. Any such election to opt out will be effective on January 1, 2010 and any institution that opts out will continue in the TAG program through December 31, 2009, and must continue to report its TAG deposits accordingly. The FDIC expects that every institution currently participating in the TAG program will review its disclosures and modify them as necessary to ensure that they will be accurate after December 31, 2009.

For those institutions that choose to remain in the program, the fee for the TAG program will be raised and adjusted to reflect the risk category assigned to the institution under the FDIC's risk-based premium system. The annual assessment rate that will apply to participating institutions during the extension period will be (a) 15 basis points for institutions in risk category 1, (b) 20 basis points for institutions in risk category 2 or (c) 25 basis points for institutions in risk category 3 or 4. The fee will apply to any deposit amounts exceeding the existing deposit insurance limit of \$250,000, as reported on the quarterly call report in any noninterest-bearing transaction accounts, including any such amounts swept from a noninterest-bearing transaction account into a noninterest-bearing savings deposit account.

The maximum interest rate limit for covered NOW accounts remains unchanged, which for purposes of the TAG program, will continue to include only those NOW accounts with interest rates no higher than 0.50 percent.

Federal Banking Agencies Issue NPR Regarding Regulatory Capital Standards Related to Adoption of FAS No. 166 and 167

The OCC, FRB, FDIC, and OTS (collectively, the “Agencies”) issued a notice of proposed rulemaking with request for public comment (the “NPR”) on a proposed regulatory capital rule related to the implementation of Financial Accounting Standards Board’s Statement of Financial Accounting Standards No. 166 and 167 (“FAS No. 166 and 167” or the “2009 GAAP Modifications”), which will be effective for most companies starting January 1, 2010. (For further discussion of the 2009 GAAP Modifications, please see the [June 16, 2009 Alert](#).) The Agencies are proposing to modify their general risk-based and advanced risk-based capital adequacy frameworks to eliminate the exclusion of certain consolidated asset-backed commercial paper (“ABCP”) programs from risk-weighted assets. The Agencies also propose to eliminate the associated provisions excluding from Tier 1 capital the minority interest in a consolidated ABCP program not included in a banking organization’s risk-weighted assets. Furthermore, the Agencies note that there may be instances when a banking organization structures a financial transaction with a special purpose entity to avoid consolidation under FAS No. 166 and 167, and the resulting capital treatment is not commensurate with the actual risk relationship of the banking organization to the entity. Accordingly, the NPR provides a reservation of authority in the capital adequacy frameworks that would permit the Agencies to require banking organizations to treat entities that are not consolidated under accounting standards as if they were consolidated for risk-based capital purposes, commensurate with the risk relationship of the banking organization. The Agencies are issuing the NPR to better align regulatory capital requirements with the actual risks of certain exposures.

The Agencies noted in the NPR that their capital standards generally use GAAP treatment of an exposure as a starting point for assessing regulatory capital requirements for that exposure. As the 2009 GAAP Modifications generally will increase the amount of exposures recognized on banking organizations’ balance sheets, which will generally result in higher regulatory capital requirements for those banking organizations affected by the new accounting standards. The NPR notes that, in light of recent experience, the Agencies believe that the accounting consolidation requirements that will be implemented by the 2009 GAAP Modifications will result in a regulatory capital treatment that more appropriately reflects the risks to which banking organizations are exposed. Accordingly, the Agencies provide in the NPR that they “do not, at this time, find a compelling basis exists for modifying their regulatory capital requirements to alter the effect of the 2009 GAAP Modifications on banking organizations’ minimum regulatory capital requirements.”

The Agencies are seeking comment on all aspects of the NPR, including, (i) with respect to the types of variable interest entities a bank will have to consolidate, the features and characteristics of securitization transactions or other transactions with variable interest entities or other special purpose entities that are more or less likely to cause a bank to provide non-contractual (implicit) support, and (ii) the effect the 2009 GAAP Modifications will have on banking organizations’ financial positions, lending and activities. The Agencies also specifically requested comment and supporting data on the impact of immediate application of the 2009 GAAP Modifications on the regulatory capital requirements of banking organizations, and whether the Agencies should consider a phase-in of the capital requirements that would result from the 2009 GAAP Modifications (such as over the course of a four-quarter period).

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Comments on the NPR are due within 30 days after its publication in the *Federal Register*, which is expected soon.

Australia and New Zealand Bank Group, Ltd. Pays \$5.75 Million Settlement to OFAC for Alleged Foreign Exchange Activity Violations

Australia and New Zealand Bank Group, Ltd. (“ANZ”) has paid \$5.75 million to the Office of Foreign Assets Control (“OFAC”) to settle alleged violations by ANZ of OFAC’s Sudanese sanctions regulations and Cuban sanctions regulations between 2004 and 2006. In its [notice](#) regarding the penalty, OFAC stated that ANZ actively manipulated SWIFT messages related to transactions through correspondent accounts by removing references to OFAC sanctioned jurisdictions and entities, thereby concealing the identities of targets of U.S. sanctions and impeding the ability of U.S. banks to detect the violations. The settlement covers 16 transactions involving a total of \$28 million that allegedly violated the Sudan sanctions regulations and 15 transactions involving a total of \$78 million that allegedly violated the Cuban sanctions regulations.

Although ANZ did not voluntarily disclose the violations to OFAC prior to OFAC’s detection of them, and therefore was unable to take advantage of OFAC’s policy of reducing penalties when violations are self-disclosed, OFAC did mitigate the total penalty based on ANZ’s substantial cooperation, its prompt and thorough remedial response, and the fact that ANZ had not been subject to an OFAC enforcement action in the five years preceding the transactions at issue. As part of the settlement, ANZ has agreed to make further revisions to its OFAC compliance policies and procedures as needed to ensure that OFAC prohibited transactions are not processed by or through U.S. financial institutions.

OTHER ITEM OF NOTE

Goodwin Procter Issues Client Alert on Obama Administration's Proposed OTC Derivatives Legislation

Goodwin Procter issued a [Client Alert](#) discussing [proposed legislation](#) regulating the over-the-counter (OTC) derivatives markets submitted by the Obama Administration to Congress. The proposed legislation follows up on the recommendations regarding OTC derivatives markets regulation outlined in the Treasury’s white paper on financial regulatory reform issued in June 2009, as discussed in the [June 23, 2009 Alert](#).

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