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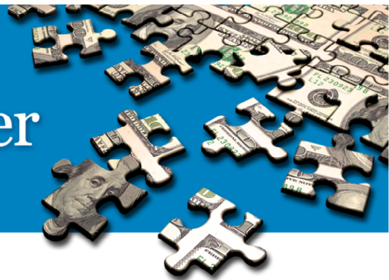
Dodd-Frank: One Year Later



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TAB 1

AGENDA

8:30 a.m.	**Registration and Breakfast**

9:00 a.m. – 9:45 a.m. **Volcker Rule Implementation and the New Registration Requirements for Fund Managers**

This panel will address the status and issues surrounding implementation of the Volcker Rule prohibitions on proprietary trading and private fund sponsorship and investment, as well as provide an analysis of the new Advisers Act registration requirements for fund managers.

Volcker Rule implementation:

- Coverage of proposed or adopted regulations (if released)
- Prohibition on proprietary trading
- Prohibition on sponsoring or investing in private funds

New Requirements for Fund Managers:

- Removal of *de minimis* registration exception
- New exemptions for foreign advisers, small private fund advisers, and venture capital advisers
- Timing and advice for fund managers that now have to register

Panelists: *Stephanie M. Monaco & David R. Sahr*

9:45 a.m. – 10:30 a.m. **Changes in Bank Regulation and Structure**

This panel will address several recent key regulatory initiatives affecting the structure and approach to regulation of traditional depository institutions and their holding companies.

- Designation and regulation of large banking organizations and Systemically Important Financial Institutions, including enhanced capital and prudential standards, and “living wills”
- The Collins Amendment, including the recently adopted “Capital Floor” amendments
- The transfer of OTS authority and the status of the thrift charter
- Changes to the FDIC insurance regime

Panelists: *Scott A. Anenberg & Thomas J. Delaney*

10:30 a.m. – 10:45 a.m.	**BREAK**
10:45 a.m. – 11:30 a.m.	**OTC Derivatives Regulation: The Long and Winding Road**

This panel will discuss the ongoing saga of derivatives regulation under Title VII of Dodd-Frank.

- Status of regulatory implementation of Dodd-Frank
- International issues
- "Push out" of derivatives activities

Panelists: *Joshua Cohn & David R. Sahr*

11:30 a.m. – 12:15 p.m. **The Consumer Financial Protection Bureau: What to Expect**

This panel will focus on the newly formed Consumer Financial Protection Bureau (CFPB), its broad powers, and the initial challenges facing entities offering consumer financial products and their service providers.

- CFPB structure, leadership, funding and coordination with other federal agencies
- Activities and entities subject to supervision and examination by CFPB
- CFPB's broad rulemaking authority and its potential impact on consumer financial products and regulated entities
- Enforcement of federal consumer protection laws by the CFPB and state attorneys general and the potential for additional private litigation

Panelists: *Andrew J. Pincus & Jeffrey P. Taft*

12:15 p.m. – 1:15 p.m. **LUNCH**

1:15 p.m. – 1:45 p.m. **Special presentation: Subpoena Season: The Great Regulatory and Enforcement Reaction to the Fiscal Crisis**

Richard M. Rosenfeld, former Chief Investigative Counsel with the Office of the Special Inspector General for the Troubled Asset Relief Program, and Mayer Brown Partner

1:45 p.m. – 2:30 p.m.

Impact of Dodd-Frank on Internal Investigations, Employment Litigation and Securities Litigation

This panel will address several key issues related to litigation as a result of the Dodd-Frank Act and the SEC's recently promulgated Dodd-Frank Whistleblower Bounty Rules.

- Corporate compliance programs under the SEC Final Whistleblower Rules
- Eligibility for whistleblower status
- Impact of Dodd-Frank on securities litigation
- Impact of Dodd-Frank on SEC enforcement
- Conducting an investigation in the face of hotline tips in the new regime
- Contact with a represented party pursuant to Rule 4.2
- Whistleblowers outside the US in a multinational organization
- Retaliation claims in federal court and the DOL
- Resolving retaliation claims in light of the anti-waiver provisions

Panelists: *Anthony Alexis, Matthew D. Ingber & Marcia E. Goodman*

2:30 p.m. – 2:45 p.m. **BREAK**

2:45 p.m. – 3:30 p.m.

The Effects of Dodd-Frank on Securitization

This panel will focus on the effects of Dodd-Frank on the securitization industry and what the panelists predict for the future in view of the proposed regulations.

- The proposed rule on risk retention, including the most controversial issues such as premium recapture, Qualified Residential Mortgages, the status of the GSEs, and ABCP conduits
- Impact of the Collins Amendment and Volcker Rule
- Conflicts of interest
- Disclosure and due diligence
- Rating agency and ratings prohibition issues

Panelists: *Jason H.P. Kravitt, Stuart M. Litwin & Jon D. Van Gorp*

3:30 p.m. – 4:15 p.m.

Dodd-Frank – Year Two: Preview of Key US and International Issues for the Next Year

This panel will highlight several key but less publicized Dodd-Frank provisions taking effect over the next year, efforts on Capitol Hill to affect implementation of the Act, and the status of financial reform efforts in the EU.

- Revisions to the affiliate transaction limitations in Section 23A and the new statutory source of strength provisions
- Areas of Congressional interest, including derivatives, CFPB, and international competitiveness, as well as the prospects for legislative changes
- EU developments, including regulatory restructuring, derivatives, alternative investment funds and capital requirements, as well as the European Commission MiFID review

Panelists: *Marc R. Cohen, Thomas J. Delaney & Jeffrey P. Taft*

TAB 2

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Volcker Rule Implementation and the New Registration Requirements for Fund Managers

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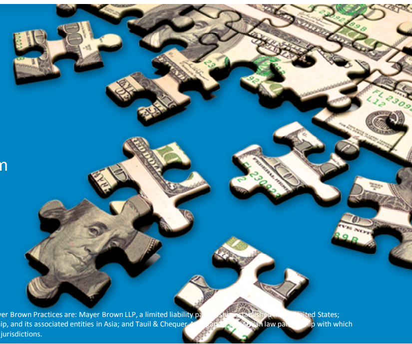

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Volcker Rule

- Section 619 of DF will prohibit (i) “proprietary trading” in derivatives, securities and other instruments and (ii) sponsoring or investing in private equity and hedge funds
- Financial Stability Oversight Council (FSOC) issued study in January but left open many questions
- GAO issued study on proprietary trading on July 13
- Many issues of definitions and scope require implementing regulations

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Volcker Rule – Prohibition on Proprietary Trading

- Proprietary trading defined as “engaging as a principal for the trading account…in any transaction to purchase or sell…any security, any derivative, any contract of sale of a commodity for future delivery, any option on any such [instrument],or any other security or financial instrument designated by [the US regulators].”
- Applies to any “banking entity” including “affiliates”
- “Trading account” includes any account used “principally for the purpose of selling in the near term (or otherwise with the intent to resell in order to profit from short-term price movements).”

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Volcker Rule – Definition of Banking Entity

- Any FDIC-insured depository institution
- Any company that controls such an institution
- Any foreign bank (and any parent FBO) with a US branch or agency or a US insured depository institution subsidiary
- Any affiliate or subsidiary of the above
- Applies to all of these entities on a global basis (subject to exemptions
- Does not apply to a foreign bank that does not have a US branch or agency or a US depository institution subsidiary and that is not otherwise affiliated with a “banking entity.”

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Volcker Rule – Permitted Activities Exempt From Prohibition on Proprietary Trading

- In connection with market making and designed not to exceed near term demands of clients
- Hedging relating to the banking entity's positions
- Transactions on behalf of customers
- US government securities
- Activities engaged in "solely" outside the US pursuant to sections 4(c)(9) /4(c)(13)of the BHCA
- Regulated insurance company investment activities

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Volcker Rule – Proprietary Trading – FSOC Study

- Close down traditional prop desks
- Asset-liability management activities should be permitted
- Recommends development of metrics to identify by asset class prohibited trading that may be taking place in context of other "permitted activities"
- "Robust" monitoring and compliance systems to be put in place to identify trading
- CEO public attestation of effective compliance regime
- No discussion of offshore exemption

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Volcker Rule – Proprietary Trading – Major Issues

- Investment/ALM activities
- Market making/customer transactions
- Potential burdens of regulatory compliance structure/use of metrics/CEO attestation
- Scope of offshore exemption

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Volcker Rule – Ban on Sponsoring and Investing in Private Funds

- Applies to “banking entity” including “affiliates”
- Definition of “private equity fund” and “hedge fund”
  - Any “issuer” exempt from registration under the Investment Company Act of 1940 under sections 3(c)(1) or 3(c)(7) and any “similar fund”
  - Potential broad scope of definition
    - Non-US regulated funds
  - Legislative history urges exemptions for corporate vehicles, joint ventures, venture capital funds

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Volcker Rule – Permitted Activities Exempt From the Ban on Sponsoring and Investing in Private Funds

- Organizing and offering funds under the bona fide fiduciary exemption. Conditions include:
  - In connection with providing trust, fiduciary, or investment advice to customers
  - 3% de minimis investment limit in the fund after one year
  - 3% Tier 1 capital limit in aggregate
  - No 23A covered transactions and no guarantee of fund
  - No sharing of name
  - Limits on employee investments
- SBIC

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Volcker Rule – Permitted Activities Exempt From the Ban on Sponsoring and Investing in Private Funds

- Investment in or sponsorship of a private fund under sections 4(c)(9)/4(c)(13) of the BHCA "solely" outside of the US
  - No interest may be offered or sold to a US resident
  - Exemption not available to any banking entity controlled by a US banking entity
  - Definition of "solely"

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- Volcker also prohibits any covered transaction as defined in section 23A between a banking entity/affiliate and any private fund advised or sponsored by a banking entity or its affiliate
- Arms length requirements of 23B also apply
- For example, a US bank may not lend to or purchase an asset from a private fund advised by an affiliate

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- Scope of offshore exemption
- Impact on non-US funds relying on 3(c)(1) or 3(c)(7) for any US investors

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- Recognizes 3(c)(1) and 3(c)(7) tests may pick up wide range of funds or vehicles not intended to be covered
  - Suggests venture capital funds should not be covered
  - Suggests joint ventures and other corporate vehicles used by banking entities should be exempt
  - Silent on securitization and similar vehicles
- On the other hand, suggests that regulators should not permit "evasion" by "similar funds" that technically may not need to rely on 3(c)(1) or 3(c)(7)
- Did not address many comments such as Canadian banks' letter about impact on non-US regulated funds

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- GAO examined stand-alone prop trading desks of the six largest US bank holding companies—over a recent 4.5 year period they had a net loss of $221 million in their prop trading activities.
- GAO did not analyze prop trading in other parts of the firms (e.g., in connection with market making) because the firms did not keep separate records of such activities.
- GAO concluded that regulators need more comprehensive information on prop trading in order to monitor for prohibited activities

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Questions?

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US Securities and Exchange Commission Adopts New Exemptions for Investment Advisers

On July 21, 2010, The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) was signed into law, amending certain portions of the Investment Advisers Act of 1940, as amended (Advisers Act) effective July 21, 2011.[1] Among other things, Dodd-Frank repealed the longstanding "private adviser exemption" set forth in Advisers Act Section 203(b)(3). At the same time, Dodd-Frank enacted three new statutory exemptions, each of which is more limited than the exemption repealed, and directed the US Securities and Exchange Commission (SEC) to adopt rules defining the new exemptions. On June 22, 2011, less than one month before the effective date of several of the amendments made as part of Dodd-Frank, the SEC simultaneously issued two releases (together, the "Adopting Releases") implementing these statutory changes and establishing registration deadlines for advisers that no longer qualify for an exemption.[2]

The "private adviser exemption" has been widely relied upon by managers of hedge funds, private equity funds, real estate funds and securitization special purpose entities, as well as by advisers based outside of the United States, to avoid registration as investment advisers with the SEC. Repeal of the exemption will result in new registration and compliance requirements for many advisers that were previously subject only to the SEC's antifraud jurisdiction and were exempt from substantive regulation. The new exemptions may be available to some advisers that had previously relied on the old exemption, but they are generally much narrower in scope than the old exemption.

Advisers that are currently relying on the private adviser exemption in Section 203(b)(3) but will be unable to rely on any of these new exemptions will be required to apply for registration with the SEC no later than **February 14, 2012** (allowing the adviser to be registered by March 30, 2012), so long as they continue to qualify for the old exemption throughout the entire period.[3] This Legal Update reviews these new exemptions as they apply both to US-based advisers (US Advisers) and advisers that have their "principal office and place of business" outside of the United States (Non-US Advisers). It also briefly addresses the compliance requirements that will be imposed on advisers that will be required to register with the SEC (or to file reports as an "exempt reporting adviser"), and certain new reporting requirements imposed on existing registrants.[4]

The New Exemptions

One of the Adopting Releases clarifies three new Dodd-Frank exemptions from registration under the Advisers Act.[5] These include exemptions for: (i) "foreign private advisers" (Foreign Private Advisers), (ii) certain "private fund advisers" (Private Fund Advisers), and (iii) advisers that solely advise venture capital funds (Venture Capital Advisers).

Not all of these exemptions are created equal—while the Foreign Private Adviser exemption results in a fairly straightforward exemption from registration, Private Fund Advisers and Venture Capital Advisers are subject to a form of registration "lite" as a result of new reporting requirements applicable to these two exemptions. As such, they are referred to as "exempt reporting advisers" (Exempt Reporting Advisers). Advisers relying on any of the three exemptions remain subject to certain antifraud provisions and rules under the Advisers Act, but Exempt Reporting Advisers are also required to make initial, annual and final filings with the SEC on Form ADV Part 1, the adviser registration form. Certain US Advisers that are Exempt Reporting Advisers may also be subject to state registration in the state(s) where they do business.

COMMON THREADS

"Private Funds". All three exemptions make use of the new defined term "private fund" that was added to the Advisers Act as part of Dodd-Frank. A private fund is an issuer that would be an "investment company" under the Investment Company Act of 1940, as amended (1940 Act), *but for* the exceptions in Section 3(c)(1), which is generally available for companies with fewer than 100 beneficial owners, or Section 3(c)(7), which is generally available for companies all of whose securities are owned by "qualified purchasers."[6]

The SEC addressed whether a "fund" with a single investor could be considered a private fund. Generally, the SEC announced the view that single investor "funds" are tantamount to managed accounts and concluded that it would be inconsistent with Advisers Act Section 208(d) to treat such "funds" as private funds.[7] However, the SEC also noted that such funds could be considered "private funds" under limited circumstances where the creation of the fund was unrelated to any attempt to circumvent application of the Advisers Act.[8] Also, for purposes of all three exemptions, funds are considered to be "clients" of the fund's adviser, but fund investors are not.

Assets Under Management. Both the Foreign Private Adviser exemption and the Private Fund Adviser exemption include an assets under management test as part of the exemption. For these purposes, assets under management are determined based on "regulatory assets under management" (RAUM), a new term meaning how assets under management as calculated according to the revised Form ADV. The rules for calculating RAUM are summarized as follows:

- Only count portfolios to which an adviser provides "continuous and regular supervisory or management services." Also, if an adviser manages only a portion of a portfolio (e.g., because it is a subadviser), it should count only the portion actually managed.
- Only count assets held in "securities portfolios" (i.e., portfolios that are at least 50 percent composed of securities). An exception to this general rule is that assets held in a private fund are always counted, even if less than 50 percent of the fund is made up of securities. Private fund RAUM also includes capital commitments.
- Do not deduct indebtedness or other accrued but unpaid liabilities (e.g., mortgages on real estate or margin for securities would not be deducted).
- All assets must be valued at market value, or if no market value is available, at fair value. Subject to certain exceptions, assets generally may not be valued at cost, except that the SEC noted that with respect to real estate assets held by a private fund, the assets should be valued the same way as the fund values assets for financial reporting purposes.[9]

FOREIGN PRIVATE ADVISER EXEMPTION

Under new Section 202(a)(30) and amended Section 203(b)(3) of the Advisers Act, the

Foreign Private Adviser exemption is available to an investment adviser that:

- Has no place of business in the United States;
- Has, in total, fewer than 15 clients in the United States and investors in the United States in private funds advised by the adviser;
- Has, in the aggregate, less than $25 million in RAUM attributable to such US clients and investors; and
- Does not hold itself out to the public in the United States as an investment adviser, or act as an adviser to a US-registered investment company.[10]

Evaluating whether each of these factors has been satisfied can be a complicated analysis. New Rule 202(a)(30)-1 was adopted by the SEC in an attempt to help clarify the evaluation, often by incorporating guidance from the SEC and its staff on existing concepts into the new framework of the Foreign Private Adviser exemption. For example:

Place of Business. The new rule defines "place of business" by reference to existing Rule 222-1, which is used to determine the state(s) in which an adviser has a place of business. Rule 222-1 generally defines a place of business to include any location where an adviser provides investment advisory services or meets or communicates with clients, and any location that is held out to the public as a location at which the advisor does such things. SEC guidance has previously articulated some of the bounds of this definition, under which even temporary locations, such as a hotel room, may be deemed to be a place of business, under certain circumstances.[11] The SEC also provided new guidance, explaining that an office from which an adviser performs solely administrative and "back-office" functions (e.g., no research) would not be a place of business for purposes of the exemption, so long as they "are not intrinsic to providing investment advisory services and do not involve communicating with clients."[12] The SEC also clarified that a Non-US Adviser would not be presumed to have a place of business in the United States merely because it was affiliated with a US Adviser, although it cautioned that in situations where the Non-US Adviser's personnel regularly conduct activities at the US Adviser's US offices, a place of business could exist.[13]

Clients and Investors "in the United States". In determining whether a client or investor is "in the United States" for purposes of the exemption, the rule generally incorporates the definition of "US person" from Section 902(k) of Regulation S under the Securities Act of 1933, as amended (Securities Act). Regulation S generally provides that US-resident natural persons, and partnerships and corporations organized under US law, are US persons. The lone deviation from Regulation S is in the context of certain types of discretionary accounts held for the benefit of US persons where the account is held by a non-US affiliate of the adviser. In a note, the rule clarifies that if a client or investor was not a US person at the time of becoming a client, or at *each time* the investor acquires securities issued by the private fund, as applicable, the client/investor need not be considered a US person. Private funds that have dividend reinvestment plans in place should review existing SEC and staff guidance and consider whether those plans result in the "issuance" of a security to any fund investors that relocate to the United States after making their initial investment.[14] In addition, participants in Canadian retirement accounts that invest in funds through those accounts need not be counted as investors if they make additional investments after relocating to the United States if the fund is in compliance with 1940 Act Rule 7d-2.[15]

Counting Clients and Investors. The rule incorporates certain mechanisms for avoiding "double counting" of clients similar to those previously used by advisers relying on the private adviser exemption. For example, accounts of spouses (or new "spousal equivalents")[16] may be considered a single "client" for counting purposes. Also for purposes of counting, the rule

provides that an adviser need not count a private fund as a client in the United States if at least one investor in the fund is counted as an investor in the United States—however, for purposes of counting *assets under management*, the full amount of assets of any private fund that is a US person must be counted.[17]

"Investors" should be determined generally by considering who would be counted for purposes of determining the fund's ability to rely on 1940 Act Sections 3(c)(1) or 3(c)(7). This means the adviser must look at holders of *all* securities issued by the funds—equity, debt and short-term paper[18] —and also at persons that the adviser knows, *or should know*, have entered into derivative instruments such as total return swaps that effectively provide the holder with the same investment experience as they would receive if they held the actual securities of the private fund.[19] Advisers intending to take advantage of the exception should consider revising subscription documents to address this issue. In a change from the proposed rule, "knowledgeable employees," as defined in 1940 Act Rule 3c-5, are not required to be counted under the final rule.

PRIVATE FUND ADVISER EXEMPTION

Dodd-Frank also added Section 203(m) to the Advisers Act, providing an exemption for certain advisers to private funds, and directed the SEC to create the specific bounds of the exemption by rule. New Rule 203(m)-1 defines the Private Fund Advisers exemption. Largely unchanged from the original proposal, this exemption applies differently depending upon whether the adviser seeking to rely on the exemption has its "principal office and place of business" inside the United States or outside the United States. An adviser's "principal office and place of business" is defined as the "executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control and coordinate the activities of the investment adviser."

For an adviser that has its principal office and place of business within the United States (US Advisers), all of its clients must be private funds, and the total amount of private fund-derived RAUM must be less than $150 million in total. For an adviser that has its principal office outside the United States (Non-US Adviser):

- All clients that are US persons (generally determined by reference to Regulation S) must be private funds;
- The adviser may manage any kind of non-US person client assets (i.e., non-US clients are not limited to private funds);
- If the adviser has a US office from which personnel assist in managing assets, the personnel may only provide assistance in managing the private funds, and the total RAUM of those private funds cannot exceed $150 million; and
- If the adviser has no US office, then there is no limit on the amount of assets it may have under management.

Under certain circumstances, the rule affords a grace period for an adviser that relies on the exemption and experiences an increase in RAUM that pushes the adviser over the $150 million limit. An adviser relying on this exemption is only required to calculate its RAUM once each year as part of an annual updating amendment to Form ADV, filed within 90 days after the adviser's fiscal year end. In the event that this filing results in an amount of RAUM in excess of $150 million, the adviser will have 90 days to become fully registered with the SEC. However, this grace period is *not available* to advisers relying on the exemption that begin advising a client other than a non-private fund client—in such a case, the adviser would be required to become fully registered *prior* to beginning to manage the new, non-private fund client.

Under Rule 203(m)-1, an adviser has the option to treat as a "private fund" certain other funds that would not normally come within the definition. Specifically, funds that meet other

exceptions under 1940 Act Section 3 may, at the adviser's option, be treated as a private fund if they *also qualify* for the exception in Section 3(c)(1) or Section 3(c)(7)—for example, a real estate fund that relies on Section 3(c)(5)(C) but only sells securities to qualified purchasers. However, any such fund treated as a private fund for these purposes would be required to be treated as a private fund for all purposes under the Advisers Act, such as reporting requirements on Form ADV Part 1 (discussed below).

If a real estate adviser makes an election to treat a Section 3(c)(5)(C) fund as a private fund, it could have a profound impact on how the adviser will calculate its RAUM. The adviser will be required to count the fund's assets in its RAUM (because it would not apply the "securities portfolio" test), and would be required to include the value of any outstanding mortgage or other indebtedness on the property, and therefore it could be very difficult for a US Adviser (or a Non-US Adviser that has personnel managing fund assets within the United States) to remain below the $150 million limit if managing real estate funds.

VENTURE CAPITAL ADVISER EXEMPTION

Dodd-Frank added Section 203(l) to the Advisers Act, creating an exemption from registration for advisers that solely advise "venture capital funds." New Rule 203(l)-1 defines "venture capital fund" for these purposes. The definition contains a number of fairly strict requirements regarding the characteristics of the fund, as well as the portfolio companies held by the fund (although some of these requirements were relaxed slightly from those originally proposed).

In order for an adviser to qualify for the Venture Capital Adviser exemption, *all* of the adviser's clients must be "venture capital funds." Each venture capital fund must be a private fund that meets the following requirements:

- It must represent to investors and potential investors that it pursues a venture capital strategy (notably, the SEC has indicated that any fund listed in a database of "hedge funds" or that is a component of a hedge fund index would *not* meet this element);[20]
- Immediately after acquisition of an asset (other than a "Qualifying Investment," as defined below, or certain short-term holdings), the cost or fair value of all assets other than Qualifying Investments held by the fund is no more than 20 percent of the fund's aggregate capital contributions plus uncalled capital commitments (the addition of this "non-conforming bucket" is a change from the proposed rule);
- It does not borrow, issue debt obligations, provide guarantees, or otherwise incur leverage in excess of 15 percent of the fund's aggregate capital contributions and uncalled committed capital, and any such leverage it does incur is for a non-renewable term of no longer than 120 calendar days (subject to certain exceptions for guarantees of obligations of "Qualifying Portfolio Companies," as defined below);
- The securities it issues may not be redeemed except in extraordinary circumstances; and
- It is not registered under the 1940 Act and has not elected to be treated as a business development company under that statute.

In order for an investment in a portfolio company to be considered a "Qualifying Investment," the portfolio company must be a "Qualifying Portfolio Company," and generally the fund must hold *equity securities* of the portfolio company that, subject to certain exceptions, were acquired directly from the company. Although a fund could hold debt securities of a portfolio company, any such debt (and any equity that did not count as a "Qualifying Investment") would count toward the 20 percent non-conforming bucket.

The rule provides that a "Qualifying Portfolio Company" in turn (i) must not have been, at the time of any investment by the fund, a US public reporting company or a company listed or traded

on a foreign exchange (or in a control relationship with such a company); (ii) may not have borrowed money or issued debt in connection with the fund's investment in the company and distributed the proceeds of such borrowing or debt issuance in exchange for the investment; and (iii) must not itself be an investment company, a private fund, a 1940 Act Rule 3a-7 fund, or a commodity pool.

Recognizing that many existing funds would not come within the restrictions the SEC was imposing after the fact, the SEC also provided a "grandfathering" provision for certain existing funds. To qualify, the private fund:

- Must have represented to investors and potential investors at the time of offering that it pursues a venture capital strategy;
- Must have sold securities to one or more investors not affiliated with the adviser prior to December 31, 2010; and
- Must not sell any securities to, or accept any committed capital from, any person after July 21, 2011.

Unlike the Private Fund Adviser exemption which permits Non-US Advisers to have clients other than private funds so long as they are all non-US persons, the Venture Capital Adviser exemption does *not* permit a Venture Capital Adviser to advise any fund other than a venture capital fund, as defined, regardless of whether the fund is a US person. An adviser will be unable to rely on the exemption if it begins providing advice to any client other than a venture capital fund, and accordingly, if no other exemption is available, it must prepare and file its registration application (and wait up to 45 days to become registered) prior to taking on the non-venture capital fund client.

Compliance

COMPLIANCE REQUIREMENTS FOR FOREIGN PRIVATE ADVISERS

Although the requirements for relying on the Foreign Private Adviser exemption are perhaps the least forgiving of the three exemptions, this exemption results in the lowest degree of SEC compliance responsibility. Foreign Private Advisers are not required to make any filings under the Advisers Act, although they remain subject to the general antifraud provisions in Section 206 of the Advisers Act. These advisers are also subject to Rule 206(4)-5, the "pay-to-play rule," which places certain limits on political contributions to US state and local candidates and officials, and Rule 206(4)-8, the pooled investment vehicle antifraud rule, which prohibits fraudulent conduct in connection with prospective and existing investors in funds.

COMPLIANCE REQUIREMENTS FOR EXEMPT REPORTING ADVISERS

Like Foreign Private Advisers, Exempt Reporting Advisers are subject to the antifraud provision in Section 206 of the Advisers Act, as well as Rules 206(4)-5 and 206(4)-8. In addition, Exempt Reporting Advisers are required to make an initial filing and annual updating filings (within 90 days of fiscal year end) of a subset of items on Form ADV, as well as certain additional interim filings in the event of material changes to certain answers in these filings. They will also be required to make a "final" filing, either when they cease to do business, cease to need to rely on the exemption, or become fully registered with the SEC. Information required to be reported on Form ADV for Exempt Reporting Advisers includes:

- Item 1—basic identifying information and contact information.
- Item 2—basis for exemption.
- Item 3—form of organization and fiscal year end.

- Item 6—identification of other business activities (e.g., if the adviser is also a broker-dealer).
- Item 7:
  - Identification of, and certain information regarding, financial industry affiliates, e.g., banks or other investment advisers, except that no affiliate need be disclosed if (i) the adviser has no business dealings with the related person in connection with its advisory services provided to clients; (ii) the adviser does not conduct shared operations with the affiliate (although the SEC considers any shared information technology infrastructure to be "shared operations"); (iii) the adviser does not refer clients or business to the affiliate, or vice versa; (iv) the adviser does not share personnel or premises with the affiliate; and (v) the adviser has no reason to believe that its relationship with the affiliate otherwise creates a conflict of interest with its clients; and
  - Certain detailed information on all private funds advised by the adviser, including:
    - The fund's name, ID number (every private fund will be assigned one), and jurisdiction of organization;
    - Identification of the fund's general partner, manager, trustees and/or directors;
    - Specification of which 1940 Act exemption(s) are relied on by the fund, and specification of whether the fund is relying on Regulation D for exemption from registration under the Securities Act (and if so, a cross-reference to the fund's Form D file number);
    - Identification of any foreign regulatory authorities with which the fund is registered;
    - Master/feeder and fund of fund questions;
    - General identification of the type of fund (e.g., hedge, private equity, venture capital, real estate, securitized asset, etc.);
    - Gross asset value of the fund;
    - Information regarding interest holders (e.g., minimum commitment, approximate number of holders, percentage buckets for how much of the fund is owned by affiliates, non-US persons, or funds of funds);
    - Identification of, and questions regarding, certain fund service providers—auditors, prime brokers, custodians, administrators, and marketers.
  - Non-US Advisers are not required to report any private fund that during the adviser's last fiscal year (i) was not itself a US person, (ii) was not offered in the United States, and (iii) was not beneficially owned by any US person.
- Item 10—identification of direct and indirect owners of the adviser.
- Item 11—disclosure of any disciplinary events involving the adviser and its personnel.

These filings will be made through the existing Investment Adviser Registration Depositary (IARD) which is administered by the Financial Industry Regulatory Authority (FINRA), and will be publicly available online. Advisers may be required to file "entitlement forms" with FINRA similar to those that would be required for registered advisers (as discussed below), and it is expected that there will be fees associated with these filings, although details have not yet been made public.

Exempt Reporting Advisers may also be required to register with one or more states. These advisers should review the laws of the state(s) in which they have offices and in which their clients are located.

SUMMARY OF COMPLIANCE REQUIREMENTS FIRST-TIME REGISTRANTS

Currently exempt advisers that are unable to take advantage of any of the new exemptions mentioned above will need to file to register with the SEC no later than **February 14, 2012**. Such advisers should consider starting the registration and compliance process earlier rather than later. At the time an adviser's SEC registration becomes effective, the adviser must be in compliance with the Advisers Act and its rules. The SEC has 45 days to respond to a filing, by either declaring it effective or starting the process to deny the registration, but need not take the full 45 days. This means that the SEC could declare an adviser's registration effective at any time after filing, so as a practical matter the adviser needs to be ready to be in full compliance before filing. However, the SEC generally does not start the 45-day clock running based on an incomplete filing; for this reason, applicants should ensure that their filings are complete to guarantee a determination within 45 days.

Making sure an adviser's business and operations are compliant with the Advisers Act, and the rules thereunder, can be a lengthy and often costly process, which may involve changes or additions to computer systems and software, personnel, client communications, recordkeeping, etc. One of the most important, and most time consuming, tasks is the creation and implementation of compliance policies and procedures and an overall compliance program. Registered advisers are required to adopt and implement policies and procedures that are reasonably designed to prevent Advisers Act violations and appropriately tailored to the adviser's business and operations (as opposed to an "off-the-shelf" compliance manual). Advisers are also required to appoint a chief compliance officer who will be responsible for the administration and enforcement of the adviser's compliance policies and procedures and overall compliance program.

An adviser's compliance policies and procedures should be tailored to the adviser's business and operations. That said, most advisers, in some fashion, address the following subjects in their policies and procedures:

- Advisory agreements and account set up;
- Performance fees;
- Solicitation/referral arrangements;
- Client communications and account statements;
- Review of client accounts;
- Advertising and marketing;
- Chief compliance officer/compliance program (including annual reviews and employee training);
- Personal trading/code of ethics;
- Insider trading;
- Custody;
- Recordkeeping and record destruction;
- Form ADV updates and other disclosure obligations;
- SEC examinations;
- Portfolio management processes (including compliance with client investment objectives and restrictions);
- Allocation of investment opportunities among clients;
- Brokerage and trading practices;
- Trade errors;
- Aggregation of client trades;
- Principal trades, agency cross trades and advisory cross trades;
- Valuation of client assets for purposes of calculating advisory fees;
- Privacy policy and related procedures;
- Proxy voting;
- Pay-to-play/political contributions;
- Gifts and entertainment;
- Social media/networking;

- Speaking with the press and other public communications;
- OFAC/anti-money laundering/FCPA; and
- Emergency preparedness/disaster recovery.

Advisers that are currently exempt from registration may have a basic employee or compliance manual, with personal trading, insider trading, political contributions, gifts and entertainment, disaster recovery, OFAC/anti-money laundering and other policies. Such a manual could serve as a starting point for an Advisers Act compliance manual.

Advisers expecting to register with the SEC should test their compliance policies and procedures, and work out any "glitches" or weaknesses, as far as possible in advance of filing for registration. Some advisers do this by giving their procedures a "dry run," operating and functioning as if they were already registered for a period of time before filing for registration. This also provides an opportunity for the chief compliance officer to become more familiar with his or her role and responsibilities. In addition, personnel of the adviser will need to receive education and training regarding the adviser's compliance policies and procedures. Again, all of this should be done well before filing for registration with the SEC.

To register with the SEC, an adviser must prepare and file Form ADV, which consists of several different parts. Part 1 requires general, census-type information about an adviser's business, primarily in check the box or fill in the blank formats, and must be completed and filed electronically. Some examples of the types of information required by Part 1 are noted above in the section discussing Exempt Reporting Advisers.

Part 2 of Form ADV is a narrative brochure in which the adviser must respond to a number of open-ended prompts intended to require disclosure to clients about the adviser's business, affiliations and conflicts of interest. Part 2 consists of two sub-parts: Part 2A, the adviser's brochure, must also be filed electronically and, along with the Part 1, is publicly available; Part 2B, the brochure supplement, covers certain personnel of the adviser and is not filed with the SEC but instead must be maintained in the adviser's records. Both Part 2A and Part 2B of Form ADV must be provided to clients.

Electronic filings are accomplished through the IARD. To access the IARD, an adviser needs to complete and mail to FINRA an entitlement packet and designate an account administrator, who will be primarily responsible for determining who can access the adviser's IARD account and otherwise update and file Form ADV. The entitlement process may take up to one week, depending on the volume of requests. There are filing fees associated with filing Form ADV (ranging from $40 to $225, depending on the adviser's RAUM), and state notice filing fees, which vary widely by state (some up to $500). Advisers will need to fund their IARD accounts in advance to pay for these fees, which can take two days to process.

There are likely to be myriad other tasks that must be completed before an adviser becomes registered with the SEC. For example, the adviser may need to update various existing documents (e.g., client agreements, service provider agreements, client communications, advertising or marketing materials, offering or other disclosure documents, website text) to reflect its registration status or otherwise to bring them into compliance with Advisers Act requirements. Depending upon the circumstances, the updating process could take a considerable amount of time, particularly if client involvement is needed. *Advisers to funds that anticipate being in the middle of an offering process at the time of registration should consider bringing all fund marketing material into compliance with Advisers Act requirements now, so that they are not forced to revise marketing materials and offering documents mid-way through an offering.*

Other Issues

In addition to the exemptions discussed above, the Adopting Releases touched on other issues impacting registered advisers and advisers that are exempt from registration.

Pay-to-Play. Advisers Act Rule 206(4)-5, the pay-to-play rule, was amended to apply to Foreign Private Advisers and Exempt Reporting Advisers, as well as registered advisers. It was also revised to adjust the types of third parties that these advisers may use to solicit "government entities," as defined under the rule. As revised, an adviser may use: (i) another investment adviser that is acting in compliance with the rule; (ii) an SEC-registered and FINRA-member broker or dealer, provided that FINRA promulgates a pay-to-play rule acceptable to the SEC; or (iii) a registered municipal advisor, provided that the Municipal Securities Rulemaking Board promulgates a pay-to-play rule acceptable to the SEC. In connection with these changes, the SEC extended the compliance date for the third party solicitation portion of the rule from September 13, 2011 to June 13, 2012.

Unibanco/Cross-Border. The SEC has, for the time being, left intact the existing guidance of the SEC staff regarding the cross-border and affiliated entity issues addressed in the line of letters beginning with *Unibanco*.[21] However, the SEC noted that the *Unibanco* line of letters was based on the private adviser exemption contained in existing Section 203(b)(3), which is soon to be repealed, and that the SEC staff will provide additional guidance going forward, as appropriate.[22] The SEC also appeared to affirm the existing staff position that the substantive provisions of the Advisers Act should not apply to Non-US Advisers' activities with respect to "offshore" funds.[23]

Subadvisers. The SEC explained that for the purposes of determining whether an adviser qualified for an exemption, an adviser acting as a "subadviser" to another adviser could essentially put itself in the "primary" adviser's shoes. For example, an adviser that subadvised solely venture capital funds could rely on the Venture Capital Adviser exemption, notwithstanding that it might also consider the primary adviser to be a "client."

Transition Rule. As was widely expected based on public comments from the SEC staff, the SEC extended through Q1 2012 any filing requirements for advisers currently relying on the private adviser exemption in current Section 203(b)(3). However, the extension is premised upon the adviser qualifying for the exemption as of the date the statute will be repealed, July 20, 2011, and continuing to qualify for that exemption through the date of eventual registration, no later than March 30, 2012 (however, because it takes up to 45 days to register, all advisers that will be required to register must file no later than **February 14, 2012**).

Form PF. Although the SEC referenced proposed Form PF in several different places in the Adopting Releases, the form has not yet been finalized. It is currently expected that only fully registered advisers—not Foreign Private Advisers and not Exempt Reporting Advisers—will be required to file Form PF, which will require additional disclosure regarding advised private funds.

Recap of Important Dates

Existing Registrants. Must file an amended Form ADV Part 1A no later than **March 30, 2012**, and if required to transition to state registration, must withdraw from SEC registration and transition to state registration no later than **June 28, 2012**.

New Registrants. Advisers unable to rely on any of the new exemptions must:

- If in existence prior to July 21, 2011, and able to continue to rely on the "private adviser exemption" contained in the current version of Advisers Act Section 203(b)(3), file Form ADV

Part 1A and Part 2A no later than **February 14, 2012**.

- If in existence prior to July 21, 2011 but would, during the period between July 21, 2011, and February 14, 2012, fail to qualify for the old "private adviser exemption" (e.g., because the adviser is about to take on its fifteenth client), file Form ADV Part 1A and Part 2A **immediately**, prior to taking on the fifteenth client (or otherwise failing to qualify).
- If organized after July 21, 2011, the adviser must file Form ADV Part 1A and Part 2A **immediately**, prior to beginning to advise any clients.

Exempt Reporting Advisers. Must file Form ADV Part 1A no later than **March 30, 2012**.

Pay-to-Play. Third party solicitation provisions come into effect on **June 13, 2012**.

Endnotes

[1] For a full overview of Dodd-Frank, see "Understanding the New Financial Reform Legislation," available at http://www.mayerbrown.com/publications/article.asp?id=9307&nid=6.

[2] *See Rules Implementing Amendments to the Investment Advisers Act of 1940*, Advisers Act Release No. 3221 (June 22, 2011), available at http://www.sec.gov/rules/final/2011/ia-3221.pdf ("Implementing Release"), *Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less than $150 Million in Assets Under Management, and Foreign Private Advisers*, Advisers Act Release No. 3222 (June 22, 2011) [76 Fed. Reg. 39646 (July 6, 2011)], available at http://www.sec.gov/rules/final/2011/ia-3222fr.pdf ("Exemptions Release," and together the "Adopting Releases").

[3] This compliance date is premised upon the adviser qualifying for the exemption as of the day before that section of the statute will be repealed, July 20, 2011. Advisers who are not currently relying on, or eligible to continue relying on, the existing private adviser exemption (or any new exemption) must register before acting as an adviser to new clients. See "Recap of Important Dates" below, for more information on relevant registration deadlines.

[4] This Legal Update does not address issues relating to the re-drawing of the lines between SEC and state registration for US Advisers and the new division of responsibility between the SEC and the various states.

[5] Dodd-Frank also created exemptions for certain advisers to small business investment companies and for "family offices." These exemptions are not addressed in this Legal Update. However, final rules implementing the family office exemption can be found at http://www.sec.gov/rules/final/2011/ia-3220fr.pdf, "Family Offices, Advisers Act Release No. 3221 (June 22, 2011) [76 Fed. Reg. 37983 (June 29, 2011)].

[6] The SEC also confirmed that a fund organized outside the US relying on existing SEC and staff guidance imposing the requirements of Section 3(c)(1) or Section 3(c)(7) would be considered a "private fund."

[7] *See* Exemptions Release, *supra* note 2, at nn.323-25, and accompanying text.

[8] *See id.*

[9] The SEC explained that under limited circumstances, real estate assets may not need to be fair valued, although it noted that the Financial Accounting Standards Board has a current project underway that may in the future require fair valuation of real estate assets. Implementing Release, *supra* note 2, at n.100 and accompanying text.

[10] Advisers Act Section 202(a)(30).

[11] *See Rules Implementing Amendments to the Investment Advisers Act of 1940*, Advisers Act Release No. 1633 (May 15, 1997) [62 Fed. Reg. 28112 (May 22, 1997)].

[12] Exemptions Release, *supra* note 2, at n.493 and accompanying text.

[13] *See id.* at nn.494-95 and accompanying text.

[14] *See id.* at n.480 and accompanying text (citing Securities Act Release No. 929 (July 29, 1936)).

[15] *See id.* at nn.481-85 and accompanying text.

[16] This term is defined in the new family office rules. *See supra* note 6.

[17] See Exemptions Release, supra note 2, at n.429.

[18] Holders of short-term paper must be considered for these purposes even though they are not considered for purposes of determining the availability of the exception under 1940 Act Section 3(c)(1).

[19] *See* Exemptions Release, *supra* note 2, at n.443.

[20] *See id.* at text following n.272.

[21] *See, e.g., Uniao de Bancos de Brasileiros S.A.*, SEC Staff No-Action Letter (Jul. 28, 1992).

[22] *See* Exemptions Release, *supra* note 2, at nn.507-516 and accompanying text.

[23] *See id.* at n.515 and accompanying text.

For more information about the Adopting Releases or any of the other topics discussed in this Legal Update, please contact the Mayer Brown lawyer with whom you normally communicate, or any of the following lawyers.

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Summary of Certain Exemptions Added to the Advisers Act by Dodd-Frank and Related SEC Rulemakings[1]

<table>
<tr><th>(Exempt from Registration)</th><th colspan="3">(Exempt Reporting Adviser)</th></tr>
<tr><th rowspan="2">Foreign Private Adviser</th><th colspan="2">Private Fund Adviser[2]</th><th rowspan="2">Venture Capital Adviser</th></tr>
<tr><th>Principal Office In U.S.</th><th>Principal Office Outside U.S.</th></tr>
<tr>
<td rowspan="2">• IA must have no place of business in the U.S. This is very broadly defined by the SEC, and could include, for example, hotel rooms in the U.S. if used to meet with clients.
• IA must have, in the aggregate, fewer than 15:
o U.S. person clients; and
o U.S. person investors in "private funds" (i.e., funds that rely on ICA Sections 3(c)(1) or (7));
• Those U.S. person clients and investors must account for less than $25 million in assets under management; and
• The IA must not "hold itself out to the public" as an investment adviser, and may not advise a U.S. registered investment company.
• Other issues to keep in mind:
o "U.S. person" status is generally determined by Regulation S, with some exceptions, and is based on status at time of becoming a client or at the time of acquiring securities in the private fund, as applicable;
o "Investors" includes holders of short-term paper and persons with swap-based exposure;
o IAs are required to count proprietary assets and investors and clients from whom they do not receive compensation toward their U.S. person limitations;
o Use of offshore vehicles that do not rely on 3(c)(1) or (7) would prevent a look through to investors for U.S. person counting (e.g., 3(c)(5), 3a-7).</td>
<td>• IA's only clients must be funds relying on ICA Sections 3(c)(1) or (7);
• IA must manage assets of less than $150 million.</td>
<td>• IA's only U.S. person clients must be funds relying on ICA Sections 3(c)(1) or (7)—IA may have non-fund clients provided that they are not U.S. persons;
• If IA also has a U.S. office, <u>personnel in that office</u> may only manage the IA's 3(c)(1) or (7) fund clients, and those assets must account for less than $150 million.
• If IA does not have a U.S. office, there is <u>no limit</u> on the number of U.S.-based private funds, U.S. investors, or U.S. assets under management.</td>
<td rowspan="2">IAs whose only clients are private funds that meet the following requirements are exempt from registration.

• Fund must represent to investors that it pursues a VC strategy;
• Immediately after acquisition of any asset other than a "Qualifying Investment" or short-term holdings (cash, cash equivalents, and U.S. treasuries with remaining maturity of 60 days or less), the cost or fair value of all assets other than Qualifying Investments held by the fund is no more than 20% of the fund's aggregate capital contributions plus uncalled capital commitments
o A "Qualifying Investment" is essentially one where the fund holds an equity security acquired directly from a "Qualifying Portfolio Company" ("QPC"), or certain specified, related transactions.
o Although a fund can use cost or fair value, it must pick one and use it consistently
• Fund may not borrow, issue debt, provide guarantees, or otherwise employ leverage in excess of 15% of the fund's aggregate capital contributions and uncalled capital commitments, and all such leverage (in any form) must be for a non-renewable term of less than 120 days;
• Generally, the fund may not issue any securities that have a withdrawal, redemption, or repurchase provision; and
• Fund must not be registered as an investment company under the ICA.

QPCs are limited to companies that:
• At the time of investment by the fund, are not, and are not controlling, controlled by, or be under common control with, a U.S. public reporting company or a company that has a security traded or listed on a foreign exchange or organized market;
• Do not borrow or issue debt in connection with the fund's investment in the company and distribute the proceeds of the borrowing or debt issuance in exchange for the fund's investment;
• Are not an investment company, a 3(c)(1) or (7) fund, a commodity pool, or a vehicle relying on ICA Rule 3a-7.

"Grandfathering" is available for certain funds that opened prior to December 31, 2010 and have ceased taking capital commitments by July 21, 2011.</td>
</tr>
<tr>
<td colspan="2">• Other issues to keep in mind:
o AUM based on "regulatory assets under management" as defined in Form ADV[3]
o Rule provides a grace period for IAs relying on the exemption in the event of a change in RAUM. At the time of filing its annual update to Form ADV (within 90 days of its fiscal year-end), if the IA's RAUM exceeds $150 million in that filing, it must, within 90 days, register with the SEC (unless another exemption is available).
o No grace period is available if the IA takes on a client other than a private fund, which causes the exemption to become unavailable—the IA must be fully registered (or have another exemption available) prior to beginning to manage the non-private fund client.
o IA may, at its option, choose to treat certain funds that are able to rely on exceptions under ICA Section 3 other than Section 3(c)(1) or (7) as private funds, but if it does so, it must treat such funds as private funds for all purposes under the Advisers Act.</td>
</tr>
<tr>
<td>Not an exempt reporting adviser.
Foreign private advisers remain subject to general antifraud provisions under the Advisers Act, as well as the pay-to-play rule and the pooled investment vehicle antifraud rule.</td>
<td colspan="3"><u>Exempt Reporting Advisers</u>
• Subject to general antifraud provisions under the Advisers Act, the pay-to-play rule, and the pooled investment vehicle antifraud rule.
• Required to file census-type information on a version of Form ADV Part 1, which includes information regarding advised private funds;
• Although subject to some form of inspection/examination authority from the SEC, the SEC has indicated that at its current resource levels it will not be making use of this authority outside of the enforcement context.</td>
</tr>
</table>

[1] This summary is intended only to help familiarize readers with the broad concepts of the new Advisers Act exemptions and does not address all of the nuances included in the rules and the SEC's guidance. The summary is not intended as a substitute for a more thorough legal analysis. This summary does *not* address "collapsing" issues that may arise for organizations that have affiliates in multiple countries, or organizations have an affiliate that is registered as an investment adviser with the SEC.

Definitions
Advisers Act – Investment Advisers Act of 1940
Assets / Assets under management – refers to "regulatory assets under management"
IA – investment adviser
ICA – Investment Company Act of 1940
VC – venture capital

[2] The private fund adviser exemption applies differently depending upon whether the IA's "principal office and place of business" is located inside or outside of the U.S. This is a fact-specific inquiry that looks at the location of the IA's executive management.

[3] Form ADV provides a number of rules for calculation of regulatory assets under management. A summarized version of those rules follows:

- Only count portfolios to which the adviser provides "continuous and regular supervisory or management services."
- Only count assets held in "securities portfolios" (i.e., portfolios that are at least 50% composed of securities). An exception to this general rule is that assets held in a "private fund" are always counted, even if less than 50% of the fund is made up of securities. Private fund regulatory assets under management also includes capital commitments.
- If the adviser only manages a portion of a portfolio (e.g., because it is a subadviser), only count the portion actually managed.
- Do not deduct indebtedness or other accrued but unpaid liabilities (e.g., mortgages on real estate would not be deducted or margin for securities).
- All assets must be valued at market value, or if no market value is available, at fair value. Subject to certain exceptions, assets generally may not be valued at cost, except that the SEC noted that with respect to real estate assets held by a private fund, the assets should be valued the same way as the fund values assets for financial reporting purposes. The SEC explained that under limited circumstances, real estate assets may not need to be fair valued, although it noted that the Financial Accounting Standards Board has a current project underway that may in the future require fair valuation of real estate assets.

TAB 3

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Changes in Bank Regulation and Structure

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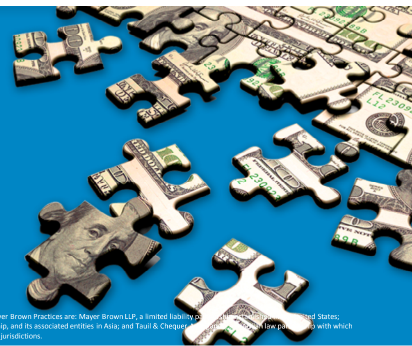

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Capital Provisions of Dodd-Frank – Overview

- Move to strengthen capital requirements post-crisis
- Reflected throughout Dodd-Frank and BCBS actions
- Key D-F provisions
  - Collins Amendment (§171)
  - Requirement for FHCs to be well-capitalized (§ 606)
  - Higher capital for SIFI's (§§115(b), 165(b))
- Other key developments
  - Basel 2.5 and Basel 3
  - Global SIFI's
  - Stress tests/capital plans

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- Challenges for banking organizations
  - Complex and rapidly evolving standards
  - Multiple sources (e.g., BCBS, US regulators, Dodd-Frank)
  - Global implementation/coordination
  - Regulator/market expectations

- Not particularly well-drafted and lots of interpretational issues
- Requires US bank regulators to establish minimum leverage and risk-based capital requirements for insured depositories, their holding companies, and systemic nonbank financial companies
- Holding company standards can’t be lower than existing bank-level requirements
- New standards can’t be lower than July 21, 2010 requirements

- 3 key consequences
  - Eliminates trust preferred (and other cumulative preferred) as Tier 1 capital
    - Instruments issued before May 19, 2010 eligible for permanent grandfathering (for BHCs with < $15B in assets) or 3-year phase-out beginning January 1, 2013 (for BHCs with ≥ $15B in assets)
  - Subjects all but smallest (i.e., < $500M in assets) intermediate US holding companies of foreign bank FHCs that control US bank subsidiaries to US regulatory capital requirements, effectively overriding 10-year FRB policy (SR 01-1)
    - Effective July 21, 2015
    - GAO study due January 2013

- Results in establishment of Basel II capital floor
  - Collins Amendment requires that US risk-based capital standards (such as Basel II-Advanced Framework for core and opt-in banks) can't be less than "generally applicable" risk-based standards (currently Basel I)
  - Implemented in June 28, 2011 interagency amendments to 2007 US Basel II-Advanced rule (virtually identical to December 30, 2010 proposal)
  - Amends Basel II-Advanced by replacing 3-year transitional sliding scale tied to Basel I with a permanent floor tied to 100% of Basel I
    - US Basel II banks must now compute capital ratios under both Basel I and Basel II and use lower ratios
    - No immediate impact because no US banks have yet entered parallel run period
  - In response to negative comments on proposal, agencies decided not to automatically apply Basel I capital floor when evaluating a foreign bank's capital as part of the application process (e.g., FHC qualification, bank and nonbank acquisitions)

Collins Amendment (§171)

  - Final rule indicates agencies will evaluate foreign bank capital on a case-by-case basis, "taking into consideration" competitive considerations, and working within BCBS and other global bodies to mitigate any competitive inequities across jurisdictions
- Final rule also provides some hopeful insight on a key interpretational issue under Collins Amendment: how to apply the Collins Amendment's requirement that any new risk-based capital requirements cannot be "quantitatively lower" than US Basel I in effect on July 21, 2010
  - Key issue because if applied too literally, could preclude any aspects of Basel II which result in lower capital requirements for any particular asset, even if overall capital requirements (per Basel III) increase substantially
  - Final rule indicates agencies are leaning toward applying the Collins Amendment standard on an industry-wide aggregate capital basis

Other Dodd-Frank Capital Provisions

- Requires FHCs to be well-capitalized and well-managed at FHC not just bank subsidiary level (§606)
  - Effective July 21, 2011
  - Likely to be interpreted to apply to foreign banks with only US bank subsidiary (already applies to foreign banks with US branches or agencies)
- Authorizes FSOC to recommend and requires FRB to apply higher regulatory capital requirements to SIFI's (§§115(b), 165(b))
  - Relationship to BCBS G-SIFI's requirement
  - Likely to be addressed as part of broader FRB proposal to apply range of enhanced prudential standards to SIFI's
  - Potentially includes all foreign banks with global assets of $50 billion or more

- Basel II only for largest US (“core”) banks
  - No US banks have yet even entered the transitional floor period
- Dodd-Frank creates significant complications for US implementation of Basel III
  - Collins Amendment floors
  - Collins Amendment’s treatment of hybrid capital
  - §939A ban on use of credit ratings
  - Hundreds of other regulations

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- And lots of issues beyond Dodd-Frank
  - Opportunity to revisit controversial aspects (e.g., MSR’s, DTA’s and trade finance)
  - Whether and to what extent Basel III will be applied to vast majority of US banks not even subject to Basel II
  - Need to achieve consensus among 3 different agencies, including new leadership at FDIC/OCC
  - Relationship to prompt corrective action regime
  - Congressional oversight
  - International competitiveness/global coordination
  - Economic impact

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- Curbing systemic risk is a central tenet of Dodd-Frank
- A response to the risk that large financial services firms are thought to have posed to the U.S. financial system.
- A significant number of these institutions (Lehman, AIG) were not subject to comprehensive supervisory oversight at the federal level.
- FSOC authorized to identify "systemically significant" institutions and for FRB to impose additional supervisory requirements.
- Applies to banks and nonbanks, domestic and foreign firms with US operations.
- Designation significant
  - Increased supervision and reporting
  - Resolution planning
  - Prudential standards and stress testing
  - Limits on executive compensation

- Three significant proposals
  - January 26, 2011 FSOC proposal to establish the criteria for subjecting nonbank financial firms to FRB supervision (comment period closed February 25, 2011)
  - February 11, 2011 FRB proposal to define "Predominantly Engaged in Financial Activities" and "Significant" Nonbank Financial Company and Bank Holding Company." (comment period closed March 30, 2011)
  - April 22, 1011 FRB and FDIC proposal to require bank holding companies and foreign banks subject to BHC regulation to develop resolution plans and to file credit exposure reports as required by Section 165(d) of Dodd-Frank. (comment period closed June 10, 2011)

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- SIFI designation tailored to type of industry in which a firm operates
- Six broad analytical categories
  - Size
  - Lack of substitutes for the financial services the company provides
  - Interconnectedness with other financial firms
  - Leverage
  - Liquidity risk and maturity mismatch
  - Existing regulatory scrutiny
- First three categories seek to assess spillover to other parts of the financial system or economy
- Second three categories seek to assess vulnerability to financial distress

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- Criteria for determination of “predominantly engaged” in financial activities
  - A company generally can be designated by FSOC as a SIFI only if 85 percent or more of the company's revenues or assets are related to activities that have been determined to be financial in nature under the Bank Holding Company Act.
- Two year test based on consolidated financial statements – two measures:
  - Gross financial revenues in either of a company’s two most recent fiscal years represent 85% or more of consolidated gross revenues; or
  - Consolidated total financial assets in either of a company’s two most recent fiscal years represents 85% or more of the company’s consolidated assets
- Two important rules of construction governing application of the rule to a company’s minority, less-than-controlling equity investments in unconsolidated entities:
  - Revenues derived from and assets related to, a company’s equity investment in another company would be considered as financial revenues or assets if the investee company is predominately engaged in financial activities under the 85% two year test.
  - Permit companies to treat as nonfinancial the revenues and assets attributable to a limited amount of *de minimis* equity investment s in investee companies without separately determining whether the investee company is itself predominantly engaged in financial activities
- FRB retains ability to make case-by-case determinations

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- Definition of Significant NonBank Financial Company:
  - Any nonbank financial company supervised by the FRB; and
  - Any other nonbank financial company that had $50 billion or more in total consolidated assets as of the end of its most recently completed fiscal year.
- A nonbank firm defined as significant does not become subject to any additional supervision or regulation by virtue of that definition alone.
  - Relationships between firms and "significant" financial companies become a relevant factor in other determinations by FSOC and FRB and can result in the collection of additional information
  - Relevant to requiring firms to file credit exposure reports
  - Section 113 permits FSOC to consider risk relationships among nonbank financial companies or BHCs that are not treated as significant
- Definition of Significant Bank Holding Company
  - Any BHC or foreign bank that is treated as a BHC that had $50 billion or more in total consolidated assets at the end of the most recently completed calendar year.

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- Would apply to systemically significant institutions
  - BHCs and foreign banks treated as BHCs with more than $50 billion in total consolidated assets
  - Nonbank financial companies designated by the FSOC as SIFIs
- Annual filing (first filing due January 21, 2012)
  - Updated when material changes occur
    - Acquisition, sale, reorganization, discontinuation of a business, bankruptcy of a material entity.
- Potentially complex, expensive, resource-intensive, time-consuming
- Reporting requirements are the minimum; regulators may require more for large, complex companies
- Failure to submit a satisfactory plan can lead to punitive measures up to and including forced divestiture

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FDIC and FRB Resolution Plan Proposal

- Resolution plan definitions
  - Material financial distress
    - Substantial depletion of capital
    - Assets less than obligation to creditors
    - Inability to pay obligations in the normal course of business
    - Various scenarios – idiosyncratic or wide-spread crisis
  - Core business lines
    - Lines, services and functions that upon failure would result in a material loss of revenue, profit or franchise value
  - Material entity
    - Subsidiary or foreign office significant to activities of a critical operation or core business
  - Critical operations
    - Operations that upon disruption or failure would result in disruption to the US financial markets

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FDIC and FRB Resolution Plan Proposal

- Resolution plan components
  - Executive summary
  - Strategic analysis
    - Detailed information on how a reorganization or liquidation of US operations under the Bankruptcy Code could be accomplished to mitigate impact on financial stability of the US
    - Identification and mapping of funding, liquidity and capital resources available to material entities, core business lines and critical operations
  - Corporate governance relating to resolution planning
  - Organizational structure
    - Hierarchical list of legal entities
    - Unconsolidated balance sheet
    - Describe material components of liabilities
    - Derivatives activities
    - Hedging strategies
  - Management Information Systems
  - Interconnectedness and Interdependencies
  - Supervisory Information

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FDIC and FRB Resolution Plan Proposal

- Resolution plan review
  - 60 days following receipt FDIC and FRB determine whether plan satisfies minimum information requirements
  - If information is incomplete, returned for additional work and resubmission within 30 days, unless provided additional time
  - After review, FDIC and FRB can determine plans are deficient
  - If deficient 90 days to remedy, unless extension is granted
  - Failure to cure deficiencies can result the imposition of more stringent capital, leverage or liquidity requirements or restrictions on growth
  - Two years following the imposition of such restrictions, FRB or FDIC can jointly move to require divestiture of US assets
    - Following consultation with FSOC

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FDIC and FRB Resolution Plan Proposal

- Resolution plan foreign banks
  - Resolution plan requirements generally limited to US operations (subsidiaries, branches and agencies) with the exception of the requirement to map interconnections and interdependencies of core business lines of covered companies
  - Plans must identify the extent of the risks related to foreign operations and strategy for addressing such risks
  - Describe extent to which US resolution strategy is incorporated into parent’s overall resolution or contingency planning process

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FDIC and FRB Resolution Plan Proposal

- Credit exposure reporting
  - Quarterly reporting covering the covered company and its subsidiaries to systemically significant companies and their subsidiaries, and vice versa with respect to the following credit exposures:
    - Loans, leases and funded lines of credit
    - Committed but undrawn lines of credit
    - Deposits
    - Repurchase agreements and reverse repurchase agreements
    - Securities borrowing transactions
    - Securities lending transactions
    - Guarantees, acceptances or letters of credit
    - Purchases or investments of securities of systemically significant companies
  - For foreign banking organizations reporting to apply only to US subsidiaries, offices, etc.

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Additional Implications of SIFI Designation

- Enhanced supervision and prudential standards
  - Risk-based capital and leverage limits
  - Liquidity requirements
  - Risk management requirements
  - Resolution plan and credit reports
  - Potential additional standards
    - Contingent capital
    - Enhanced public disclosures
    - Short term debt limits
    - Others as determined by FRB
  - Risk committee
  - Annual stress testing

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Stress Testing

- Guidance
  - June 15 guidance (comment period closes July 29, 2011)
    - Likely to reflect final rule as required by Section 165 of Dodd-Frank
  - Guiding Principles
    - Forward looking and flexible
    - Utilize multiple testing techniques
    - Tailored to and capturing the organization's exposure
    - Clear, actionable, well supported and used to inform decision making
    - Subject to strong governance and controls.
  - Approaches
    - Scenario analysis
    - Sensitivity analysis
    - Enterprise wide
    - Reverse stress testing

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Executive Compensation

- SEC. 956. aimed at incentive based pay that is deemed to be excessive or could lead to material financial loss
- Institutions with $50 billion or more in consolidated assets subject to more stringent requirements
  - Executive officers (President, CEO, Chairman, CFO, COO, CIO, CLO, GC, Chief Risk Officer, Business Line Head)
    - Deferral of at least 50% of annual incentive based compensation for no less than 3 years
    - Must reflect actual losses
  - Additional limitations imposed on employees that present particular risk exposure
    - Determined by board of directors
    - Directed at traders

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Potential Considerations

- Modification of “financial activity” to exclude liquidation, DPC workout, and fiduciary activities, which are excluded from the BHC Section 4(k) definition? Other exclusions?
- Did the FRB overreach in defining nonbank SIFIs?
- Will foreign banks currently regulated as BHCs divest to avoid SIFI regulation?
- Will non-US foreign financial companies hesitate to enter the US market?
- Uncertainty regarding elements of resolution plan and potential impact on other market factors.

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OTS and Thrift Provisions--Recap

- Effective July 21, 2011 (OTS formally abolished 90 days later)
- OCC is primary regulator of federal thrifts
- FDIC is primary federal regulator of state-chartered thrifts
- FRB is primary regulator of thrift holding companies
- OCC has rulemaking authority for both federal and state thrifts; FRB for thrift holding companies
- Thrift charter and statutory/regulatory regime largely preserved

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Transition Developments

- Joint implementation plan (FRB, FDIC, OCC, OTS)
  - Issued January 2011; revised April 2011
  - Focuses on personnel, regional and field offices, supervisory functions, buildings and property, funding (note no assessments for state thrifts or SLHC's with less than $50B in assets), etc.
  - OCC's controversial May 26, 2011 preemption proposal also contains proposed amendments to OCC regulations necessary to implement transfer of supervisory jurisdiction over thrifts to OCC (e.g., assessments, organization)

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Transition Developments

- Reporting forms
  - See 76 Fed Reg 7082 (FRB, FDIC, OCC, OTS) and 7091 (FRB) (February 8, 2011)
  - Conversion of thrifts from TFR to call reports beginning with March 31, 2012 quarter
  - Conversion of thrift holding companies from H-(b)11 to FR Y-6, Y-9, Y-10, etc. beginning with March 31, 2012 quarter

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Transition Developments

- Thrift holding company supervision
  - FRB Notice (78 Fed Reg 22662 (April 22, 2011)
  - Intent to apply BHC-type consolidated holding company supervision to thrift holding companies "to maximum extent possible taking into account any unique characteristics" and statutory requirements
  - More rigorous than OTS re internal controls, consolidated liquidity, review of activities including nonbank subs, continuous monitoring of large holding companies, etc.
  - Tentative plans to switch from OTS "CORE" (capital, organizational structure, risk management, earnings) to FRB "RFI" (risk management, financial condition (capital, asset quality, earnings, liquidity), impact of non-DI's on DI

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Transition Developments

- Per Collins Amendment, thrift holding companies will become subject to bank/BHC regulatory capital requirements beginning in July 2015
  - FRB plans to address specific thrift holding company capital requirements as part of upcoming Basel II/III/Collins Amendment rulemaking process
  - But effective July 21, 2011, thrift holding companies that engage in FHC activities must meet FHC well-capitalized (and well-managed) standards per section 606(b)

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Transition Developments

- Status of OTS regulations
  - OCC/FDIC list of OTS regulations to be enforced published July 6, 2011 (76 Fed Reg 39246)
    - Pretty much everything but preemption regulations
  - Post-July 21, 2011, agencies will amend their own regulations to incorporate these continued OTS regulations
  - Longer term, agencies will propose more comprehensive substantive changes to inherited OTS regulations (e.g., OCC/OTS regulations substantially overlap; differences not required by statute or unique aspects of charter)

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Prospects for Thrift Charter

- Thrift charter preserved in Dodd-Frank but future in doubt
  - number of thrifts already steadily declining, from 3000 in 1988 to 731 in 2010
- Dodd-Frank eliminates lots of advantages of thrift charter
  - Nationwide de novo interstate branching
  - Broad preemption
  - Lighter holding company regulation
  - Unified regulator for thrift and holding company
  - New statutory source of strength requirement

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Prospects for Thrift Charter

- Disadvantages remain
  - Restrictive asset basket for commercial loans
  - QTL test (Dodd-Frank eliminates one-year cure period)
- Who's left?
  - Mutuals
  - Thrifts with significant real estate development subsidiaries
  - Trust-only federal thrifts (exempt from holding company regulations under Section 604(i))
  - Grandfathered unitaries who can't become BHC's
    - Need to establish intermediate holding companies to shelter parent?
  - Companies seeking to control insured depository but avoid automatic SIFI designation for BHC's with $50B or more in assets?

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Standard Maximum Deposit Insurance Amount

- Increases FDIC insurance coverage to $250,000 per account (§ 335)
  - Conforming amendments to FDIC regulations published Aug. 13, 2010 (75 Fed. Reg. 49,363)
  - Effective Aug. 13, 2010
  - Makes permanent the temporary increase during financial crisis
  - Also impacts deposit-taking powers of uninsured branches of foreign banks

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Unlimited Coverage for Noninterest-Bearing Transaction Accounts

- 2-year extension of emergency TAG Program until Dec. 31, 2012 (§ 343)
  - Conforming amendments to FDIC regulations published Nov. 15, 2010 (75 Fed. Reg. 69,577)
  - Effective Dec. 31, 2010
- Statutory changes to program
  - Mandatory not voluntary
  - No separate fee, but the FDIC will take the added cost of the program into account in determining deposit insurance assessments
  - Low interest-paying NOW accounts excluded
  - Attorney trust accounts originally excluded from Dodd-Frank coverage
    - Legislative fix in Pub. L. No. 111-343 (Dec. 29, 2010); implemented in 76 Fed. Reg. 4,813 (Jan. 27, 2011)

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Asset-Based Premiums

- Redefines deposit insurance assessment base to be based on assets (less tangible equity) rather than deposits (§ 331)
  - Implementing regulations published by FDIC Feb. 25, 2011 (76 Fed. Reg. 10,672)
  - Effective April 1, 2011
- Effectively shifts some of the assessment burden from smaller to larger institutions which typically rely more on non-deposit funding
- Assessment base is average consolidated total assets during the assessment period, less tier one capital
  - Special asset calculation rules for banker’s banks and custodial banks
  - “Eligible assets” less third party liabilities as Tier 1 capital for FDIC-insured branches of foreign banks

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Changes to Designated Reserve Ratio

- Eliminated 1.5% maximum for designated reserve ratio (§ 334)
  - Implementing regulations published by the FDIC Dec. 20, 2010 (75 Fed. Reg. 79,286)
  - Effective Jan. 1, 2011
- Statutory minimum increased from 1.15% to 1.35%, but allowed 4 more years to reach it (Sept. 30, 2020)
- Dodd-Frank mandates that the effect of any premium increase required to meet the increased statutory minimum must be offset for small (less than $10B in assets) insured depository institutions
  - Currently unclear how the FDIC will satisfy this requirement
  - Current assessments target only 1.15% by September 30, 2020

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Changes to Designated Reserve Ratio

- FDIC set 2011 ratio at 2% of estimated insured deposits
  - FDIC estimates that this approximates .9% of newly defined assessment base
  - Minimum goal rather than final target
  - As of March 31, 2011, Deposit Insurance Fund at -0.02%
  - FDIC hopes that this reserve ratio will eliminate a need to repeat the February 2009 special assessment

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Discretionary Rebates

- Statutory changes provide FDIC with discretion whether to pay dividends when insurance fund reaches 1.5% and eliminated requirement to pay dividends between 1.35-1.5% (§ 332)
  - Implementing regulations published by FDIC Feb. 25, 2011 (76 Fed. Reg. 10,683)
  - Effective April 1, 2011
  - Previously, dividends were mandatory beyond 1.35% (100% over 1.5% and 50% over 1.35%)
- FDIC has decided to not pay dividends when the reserve ratio exceeds 1.5%
  - Instead, assessment rates will decrease when the DRR rises above 2% and 2.5%

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Core Deposit Study

- FDIC conducted study of core and brokered deposits (§ 1506)
  - Submitted to Congress on July 8, 2011
- Recommends that Congress not repeal or amend current brokered deposit statute
- Finds that brokered deposits correlate with a higher risk of bank failure than core deposits
- Suggests that reciprocal deposits based upon real customer relationships, deposits swept from affiliated broker-dealers, and referrals from affiliates pose fewer problems than other brokered deposits, although they should not be considered core deposits

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Core Deposit Study

- Finds that high rate deposits and non-brokered listing services are likely to pose problems similar to most brokered deposits
- Suggests that the current statute provides necessary flexibility for the FDIC
- Likely to amend FDIC assessment regime to vary treatment of different types of brokered deposits
- Contains useful background on regulatory treatment of brokered deposits

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Interest-Bearing Corporate Checking Accounts

- Authorizes interest-bearing transaction accounts (§ 627)
  - Repealed longstanding prohibitions in Federal Deposit Insurance Act, § 18(g) and Federal Reserve Act, § 19(i)
  - Conforming amendments to FRB regulations published July 18, 2011 (76 Fed. Reg. 42,015)
  - Conforming amendments to FDIC regulations published July 14, 2011 (76 Fed. Reg. 41,392)
  - Effective July 21, 2011
- Issues include competitive impact, relationship to TAG, impact on sweep accounts

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TAB 4

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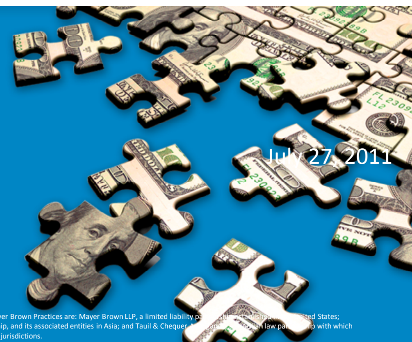
OTC Derivatives Regulation: The Long and Winding Road



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July 27, 2011

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OTC Derivatives

- Title VII – Wall Street Transparency and Accountability Act of 2010
- Feverish activity by CFTC and SEC to issue regulations because of statutory deadlines
- Both CFTC and SEC have deferred July 16 effective date
- CFTC offers rough *status quo* until the completion of required regulations, including those containing key definitions, or December 31, 2011, whichever is earlier"
- SEC offers temporary exemptions, subject to extension, and permanent exemptions from registration and qualification in specified circumstances

- "Swap" is broadly defined by DF and includes commodity derivatives, interest rate swaps, equity swaps and credit derivatives
- "Security-based swap" is defined to include any swap based on a narrow-based security index or on a single security or loan
- Final regulations further defining swaps and security–based swaps not yet adopted

- Swap/Securities-swap dealer
  - Hold out as a dealer, act as market maker, regularly enter into swaps with counterparties as ordinary course of business for its own account, or commonly known as a dealer/market maker
  - CFTC proposal: "any person accommodating demand for swaps from other parties and entering into swaps in response to interest expressed by others"
- Regulations have been proposed but are not yet final
  - Some differences in approach between CFTC and SEC

Who Must Register?

- Major swap participants
  - Not a swap dealer but maintains “substantial net position in swaps” (excluding those positions held primarily for hedging commercial risk) or meets other criteria
  - Most banks more likely to be covered by dealer definition; CFTC expects only a handful of entities will be MSPs
- Firms engaged in both swap and security-based swap activities will register with both CFTC and SEC

Who Must Register?

- Dealer exemptions
  - Enter into swaps for own account but not as part of regular business
  - As proposed, *de minimis* quantity of swaps (less than $100 million notional amount over last 12 months plus other conditions)
  - Does not include acting as agent
  - Swaps entered into by insured depository institution in connection with originating a loan to that customer
    - Not available to uninsured branches and agencies of foreign banks or to their non-US offices

- CFTC requirements will apply to non-US activities that "have a direct and significant connection" with activities or commerce in the US or constitute evasion of rules
- SEC requirements will not apply to transactions outside US jurisdiction, unless evasion is occurring
  - "US jurisdiction" means use of "means and instrumentalities of interstate commerce" such as telephone, mail or e-mail
- CFTC :
  - "A person outside the US who engages in swap dealing activities and regularly enters into swaps with US persons would likely be required to register as a swap dealer"

- Which parts of a global financial group will be swap dealers or MSPs?
  - US broker-dealer or FCM?
  - US bank?
  - Other US nonbank affiliate?
  - US branch or agency of a foreign bank?
  - Head office or other non-US offices of a foreign bank?
  - Non-US affiliates?

- Banks are subject to capital and margin requirements of their US banking regulator
  - In case of foreign banks, Fed may defer to home country capital requirements if adequate, with respect to branches or agencies or non-US offices
- Non-bank swap dealers subject to CFTC/SEC prudential requirements
- Proposed regulations have been issued

- Most regulations still in proposed form; 5 were voted through as final on July 7
- Registration procedure
  - FCM model
- Reporting
  - Real time reporting
  - Reporting to swap data repositories
  - Large trader reporting (voted final on July 7)
- Recordkeeping
- Position limits
- Anti-manipulation (voted final on July 7)

CFTC Requirements Applicable to All Swap Dealers

- Business conduct rules
  - Disclosures
  - Treatment of special entities
- Conflicts of interest
- Chief Compliance Officer/Risk Management
- Documentation requirements
  - Relationship documentation requirements
  - Confirmation requirements

Clearing and Execution Requirements

- Clearing orgs and CFTC/SEC to determine swaps subject to mandatory clearing
- Exemption for swaps entered into prior to implementation of clearing requirement so long as reported to data repository
- Commercial end user may opt out of clearing
- Swaps subject to mandatory clearing also subject to mandatory execution if there is an available trading facility (exchange or swap execution facility)

Margin Requirements

- Cleared and uncleared swaps require margin
- Only FCMs may hold margin for cleared swaps
- Margin for non-cleared swaps must be segregated with a third party custodian
- Commercial end users to be exempt from margin for uncleared swaps

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Push-Out of Swap Activities

- Push-out may impact US banks and US branches and agencies of foreign banks
  - Registered swap dealer may not obtain advances from Fed discount window or other "federal assistance" (FDIC insurance)
  - Exclusion for certain swap activities of FDIC insured depository institutions
  - Hopefully not effective until July 2013 plus insured depository institutions get up to three year transition period

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- Swaps and activities eligible for the safe harbor exemption for insured depository institutions
  - Interest rate and currency swaps
  - Other swaps based on instruments that banks can invest in directly such as precious metals, investment securities
  - CDS that are cleared
  - Bonafide hedging directly related to the bank's activities
- Swaps that are not eligible
  - Swaps based on commodities or equities that are not eligible for investment by a bank
  - CDS that are not subject to clearing

- Safe harbor exemption for insured depository institutions
  - Because of conference committee oversight, not available to branches of foreign banks
  - Senator Lincoln colloquy recognizes this as an oversight
  - If no clarifying amendment to DF, US uninsured branches that are "swap dealers" will need to push out all swap activities to an affiliate or give up access to the Fed discount window
  - NB: Volcker Rule prohibits "proprietary trading" in derivatives

- Identify entities/offices that could be subject to swap dealer registration
- Explore whether any exemptions might be available
- Analyze impact of proposed and final substantive requirements on the business
- Consider whether any restructuring options are available that might mitigate the impact

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TAB 5

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The Consumer Financial Protection Bureau: What to Expect

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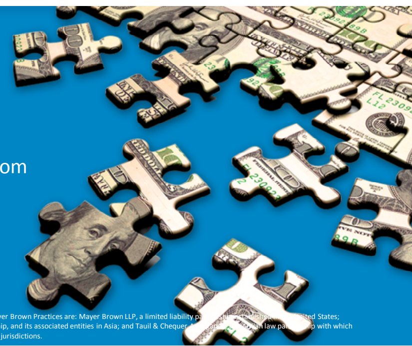

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Consumer Financial Protection Bureau (CFPB)

- CFPB leadership and independence
  - Dodd-Frank Act placed CFPB within the Federal Reserve (FRB)
  - Expressly prohibits the FRB from intervening in any examination or enforcement action, appointing or removing any officer or employee of CFPB, or merging or consolidating CFPB
  - Director of CFPB appointed for a five-year term by the President, with the advice and consent of Senate
  - Director is a member of the FSOC and the FDIC's Board of Directors

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Consumer Financial Protection Bureau

- CFPB Structure
  - CFPB has specific functional units focused on research, community affairs, and collecting and tracking complaints
  - CFPB has four subordinate offices: Office of Fair Lending and Equal Opportunity, the Office of Financial Education, the Office of Service Member Affairs, and the Office of Financial Protection for Older Americans
  - Secretary of the Treasury (Secretary) and the Director are also required to designate a private education loan ombudsman

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Consumer Financial Protection Bureau

- CFPB Staffing
  - Elizabeth Warren (special assistant to President)
  - Richard Cordray (director nominee; former Ohio AG)
  - Steve Antonakes (large bank supervision; former Mass. Bank Comm'r)
  - Peggy Twohig (non-bank supervision; previously at FTC and Treasury)
  - Leonard Chanin (rulemaking; former FRB)

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Consumer Financial Protection Bureau

- Dodd-Frank Act provided for the transfer of certain functions, authority, and certain personnel from the federal banking agencies and other federal agencies on the Designated Transfer Date
  - Designated Transfer Date was July 21, 2011

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Consumer Financial Protection Bureau

- CFPB Priorities
  - TILA/RESPA
    - Primary effort is to promulgate a single form that will combine the information required by TILA with the standard GFE estimate required by RESPA
    - Two forms posted to CFPB’s website in May 2011; received over 13,000 comments; posted revised drafts for comment on June 27
  - Credit Cards
    - “Credit cards are the top priority because they are the most widely held credit products in the country. Four out of five families have a credit card and 50 million American families cannot pay off their credit card debt each month in full.” Elizabeth Warren, Dec. 2010.

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Consumer Financial Protection Bureau

- CFPB authority is limited without director
  - Secretary of the Treasury has authority to perform certain functions after Designated Transfer Date
  - CFPB can exercise authority transferred from other federal agencies, including rulemaking under enumerated consumer laws, examination of insured depository institutions with assets in excess of $10B, enforce existing agreement between banks and federal banking agencies and replace the federal banking agencies and HUD in any lawsuit or proceeding that was commenced prior to Designated Transfer Date
  - Not clear that funding or administrative authority available to enable the CFPB or Secretary to exercise this authority

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Consumer Financial Protection Bureau

- Activities are limited without a Director
  - Cannot supervise non-depository institutions, prescribed rules regarding recordkeeping needed to facilitate supervision
  - Cannot exercise rulemaking with respect to unfair, deceptive or abusive practices
  - Cannot conduct examinations of non-depository institutions

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- CFPB funding
  - CFPB funded primarily from the FRB's budget rather than from assessments or through the budget appropriations process
  - CFPB will receive an amount not to exceed 10 percent of the FRB's total operating expenses (over $400m) in fiscal year 2011, 11 percent for fiscal year 2012, and 12 percent for fiscal year 2013 and beyond
  - Director may also request Congressional appropriation of $200 million for each of fiscal years 2010 -2014
  - Significance of funding arrangement

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- Regulation of "covered persons"
  - CFBP has broad authority to regulate "covered persons"
    - Covered person is any person engaged in offering or providing a consumer financial product or service
  - CFBP also has the authority to supervise and examine service providers and related persons

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Consumer Financial Protection Bureau

- Examples of consumer financial products or services
  - Lending and servicing loans;
  - Deposit-taking activities;
  - Check cashing
  - Providing real estate settlement services;
  - Money transmission
  - Selling or issuing stored value or payment instruments;
  - Debt collection; and
  - Any other financial product or service that CFPB defines by regulation.

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Consumer Financial Protection Bureau

- Non-bank supervision
  - CFPB will exercise supervisory authority over any person who:
    - Offers or provides origination, brokerage, or servicing with respect to residential real estate loans;
    - Is a “larger participant” in a market for other consumer financial products or services to be defined in a regulation;
    - CFPB has reasonable cause to determine based upon complaints or information from other sources that the person is engaging or has engaged in a pattern of conduct that poses undue risk to consumers with respect to a financial product or service;
    - Offers or provides any private education loan; or
    - Offers or provides any payday loan.
  - Other entities regulated by FTC and States

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- Defining larger participants
  - Notice and request for comment issued in June; proposed rule to be issued at later date with final rule required by July 21, 2012
  - Issues for consideration
    - Criteria and thresholds
    - Data to measure criteria
    - Measurement dates and supervision time frames
  - Markets to include:
    - Debt collection, money transmitting, debt relief services
    - Consumer reporting, prepaid cards
    - Consumer credit (auto finance, unsecured, secured cards)

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- Significance of non-bank supervision
  - Most of these providers are not regulated or examined by any federal agency, but generally subject to state regulation and FTC enforcement
  - Potential for overlapping regulation/supervision/enforcement by CFPB, state regulators and FTC
  - CFPB will rely upon “technology” and be “data driven” agency
    - Risk-based supervision program
    - Profile institutions
    - Rely upon filed complaints filed under Section 1013 and “information from other sources”

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Consumer Financial Protection Bureau

- Bank supervision
  - CFPB will exercise supervisory authority over:
    - Any insured depository institution with more than $10 billion in total assets, and any affiliate thereof; and
    - Any insured credit union with more than $10 billion in total assets, and any affiliate thereof.
  - For smaller institutions ($10 billion or less), primary federal banking regulator will retain responsibility for examination and enforcement
    - CFPB can request reports from primary federal banking regulator
    - Request enforcement for violations of federal consumer financial protection laws

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Consumer Financial Protection Bureau

- Significance of bank supervision
  - Banking regulators have examined banks for compliance with consumer financial laws and "safety and soundness"
  - CFPB replaces the banking regulators as examiner of large banks for compliance with consumer laws
    - Separation of safety and soundness regulation from consumer protection regulation
    - Potential "turf" battles
  - Some examination and supervision personnel from the federal banking agencies will move to CFPB
  - Same examination staff will examine both banks and non-banks

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Consumer Financial Protection Bureau

- CFP Act generally excludes the following persons from CFPB's rulemaking jurisdiction when engaged in customary activities
  - SEC and CFTC – registered persons (broker-dealers, registered advisors, FCMs, commodity pool operators)
  - Insurance business
  - Merchants/retailers of nonfinancial products and services
  - Auto dealers
  - Accountants
  - Lawyers
  - Employee benefit plans
  - Any other category exempted by the CFPB

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Consumer Financial Protection Bureau

- CFPB rulemaking authority
  - Dodd-Frank Act grants broad rulemaking authority to CFPB and imposes few restrictions
  - FSOC has the ability to set aside CFPB regulation upon a vote of two-thirds of its members if rule threatens safety and soundness of banking system or economy
    - Process for setting aside CFPB regulation is detailed and relatively cumbersome
    - Unlikely as a practical matter that the FSOC will override CFPB regulations
- States can compel CFPB to engage in rulemaking process if majority of states enact resolution in support of regulation

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Consumer Financial Protection Bureau

- CFPB receives rulemaking authority from other federal agencies for federal consumer laws, including:
  - Electronic Fund Transfer Act
  - Equal Credit Opportunity Act
  - Fair Credit Reporting Act
  - Fair Debt Collection Practices Act
  - Gramm-Leach-Bliley Act
  - Real Estate Settlement Procedures Act
  - Truth in Lending Act
  - Truth in Savings Act

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Consumer Financial Protection Bureau

- CFPB and other federal agencies will share some rulemaking authority
  - Title V of the Gramm-Leach-Bliley Act
    - Safeguarding rules remain with the federal banking regulators
  - Fair Credit Reporting Act
    - FTC retains some joint rulemaking authority
    - Identity theft rules remain with the federal banking regulators

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Consumer Financial Protection Bureau

- Disclosures related to consumer financial products and services
- Unfair, Deceptive or Abusive Act or Practice
  - CFPB authorized to prescribe regulations designed to prevent a covered person or service provider from engaging in unfair, deceptive, or abusive acts or practices
  - Unfair or deceptive act or practice authority is similar to FTC's authority under Section 5 of FTC Act
  - Well established body of case law and standards for Section 5 of the FTC Act and state law counterparts

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Consumer Financial Protection Bureau

- Abusive practice
  - CFPB can declare an act or practice abusive if it:
    - (i) materially interferes with the ability of a consumer to understand a term or condition of the consumer financial product or service, or
    - (ii) takes unreasonable advantage of consumer's lack of understanding of the material risks, costs, or conditions, the inability of the consumer to protect his or her interest in selecting a product or service, or the reasonable reliance by the consumer on the covered person to act in the interest of the consumer
  - Not much precedent and limited legislative history

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- Federal preemption under Dodd-Frank Act
  - State consumer financial laws
    - Defined: State law that does not directly or indirectly discriminate against national banks/thrifts and that directly or specifically regulates the manner, content, or terms and conditions of any financial transaction or account with respect to a consumer
    - Significance: Subject to revised preemption requirements under Dodd-Frank Act
  - Laws other than state consumer financial laws
    - Existing preemption regime not changed

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- State consumer financial laws preempted only if:
  - Discriminatory impact,
  - *Prevents or significantly interferes with exercise by national bank of its powers,* or
  - Preempted by other federal law

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- *Barnett Bank* standard
  - Recently proposed OCC regulation and OCC letter to Senator Carper intended to clarify that *Barnett Bank* is relevant standard and prior preemption determinations remain valid.
  - OCC proposed regulation provides that prior preemption determinations remain valid
  - Initial concerns have diminished to some extent but battle is just starting (see comment letters in response to OCC proposed regulation)
  - Preemption will remain a contentious point and future determinations will be shaped in large part by litigation

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- Procedural requirements for Preemption
  - Determinations by OCC or court on a “case-by-case basis”
  - Comptroller cannot delegate responsibility
  - OCC must periodically review determinations
  - OCC must consult with CFPB
  - Substantial evidence standard for determinations
  - Conflict preemption rather than field preemption

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Consumer Financial Protection Bureau

- Operating subsidiaries
  - Federal preemption no longer available to national bank and thrift operating subsidiaries and agents
    - Overturns *Wachovia v. Watters* case
    - Op subs rolled-up into bank or licensed

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Consumer Financial Protection Bureau

- Enforcement of CFP Act
  - State AGs generally permitted to bring civil actions against third parties to enforce CFP Act or CFPB regulations
  - State regulators can bring actions against any entity licensed, chartered, or doing business in their state, to enforce the provisions of CFP Act or CFPB regulations
  - No private right of action under CFP Act but enumerated federal consumer protections laws generally permit such actions

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Consumer Financial Protection Bureau

- Coordination among agencies and State AGs
  - CFPB and FTC required to negotiate an agreement for coordinating on enforcement actions against non-banks and service providers
  - CFPB required to coordinate its supervisory activities with those of the federal prudential regulators and state banking authorities and, to the fullest extent possible, use existing reports and publicly reported information to discharge its monitoring functions
  - State AGs notify CFPB prior to bringing action and CFPB may intervene

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Consumer Financial Protection Bureau

- Visitorial powers
  - Decision in *Cuomo v. Clearing House Association* is codified by Dodd-Frank Act
  - State AGs also may bring civil suit against national banks and federal thrifts to enforce non-preempted laws
  - State regulators cannot bring administrative enforcement actions against national banks and thrifts
  - No general right to examine books and records of national banks

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Consumer Financial Protection Bureau

- Interest rates and fees
  - CFP Act does not eliminate the ability of national banks, federal savings banks and other insured depository institutions to "export" interest rates and fees
  - CFPB prohibited by CFP Act from establishing usury limits
  - CFPB could still use rulemaking authority to address unfair, deceptive or abusive terms

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Consumer Financial Protection Bureau

- Arbitration
  - Section 1028 of the CFP Act requires the CFPB to conduct a study of, and provide a report to Congress concerning, the use mandatory pre-dispute arbitration in connection with the offering or providing of consumer financial products or services.
  - Based upon report findings, CFPB could prohibit or impose conditions on mandatory arbitration clauses in consumer financial product contracts and effectively reverse recent US Supreme Court cases generally upholding the use of arbitration provisions in such contracts.

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TAB 6

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Impact of Dodd-Frank on Internal Investigations, Employment Litigation and Securities Litigation

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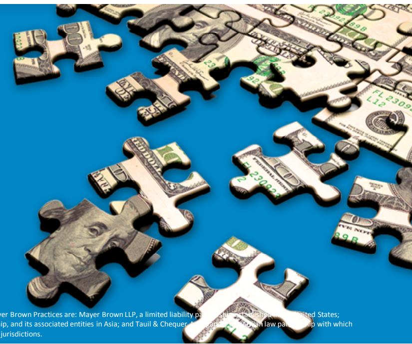

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Incentives and Protections for Whistleblowers

Background

- As part of Congress' stated desire to increase regulatory enforcement remedies available to the SEC
  - Dodd-Frank amended the Securities Exchange Act of 1934 (34 Act) by creating a new Section 21F — whistleblower/bounty program designed to provide monetary incentives for people who provide information to the SEC leading to successful SEC enforcement actions

- New Section 21F of the 34 Act ***requires*** that the SEC provide an award to a qualifying whistleblower of no less than 10% and no greater than 30% of any sanction imposed against a violator of any securities laws as a result of “original information” that is “voluntarily provided” to the SEC which leads to a successful enforcement or related action provided by the whistleblower

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Goal of the New Program

- Specifically designed to increase the size of the reward to the whistleblower to encourage people to come forward in the face of the potential adverse risks regarding employment and the adverse personal toll of being involved as a whistleblower
- Senate noted:
  - Whistleblowers often face the “difficult choice” between coming forward versus committing “career suicide”
  - A rich reward between 10% and 30% is critical for a successful Whistleblower Program — minimum payout for an individual who takes the enormous risk of blowing the whistle in calling attention to fraud

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- Important points for bounty awards
  - A whistleblower is anyone who brings a "possible violation" of the federal securities laws, including SOX and Dodd-Frank, to the attention of the SEC or, in most cases, directly to the company
  - Certain exclusions for attorneys, auditors, compliance personnel and others with obligation to report, as well as person guilty of criminal conduct
  - The "possible violation" is one that has "occurred, is ongoing, or is about to occur"
  - Bounty awards must be a minimum of 10% and can range to 30%; minimum fine eligible for a bounty award is $1 million, but awards on related matters may be aggregated

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- Important points for bounty awards
  - An internal complaint may qualify for a bounty, and voluntary participation in internal compliance procedures is a factor that may increase the amount of the bounty award; interference with internal procedures may decrease the award
  - The whistleblower or company must convey the information to the SEC within 120 days from the original complaint for the information provided internally to form the basis for a bounty award

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Incentives and Protections for Whistleblowers

Nuts and Bolts

- Provisions apply to any:
  - Judicial or administrative action brought by the SEC or related proceeding brought by the United States Department of Justice under any securities law which results in a monetary sanction (either by judgment or settlement) which ***exceeds $1 million dollars*** 21F(a)(1)
- The amount on which the share will be calculated specifically includes penalties, disgorgement and interest paid 21F(a)(4) and (5)
- Size of the reward will be on sliding scale between 10-30 percent of the government's recovery based on:

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Incentives and Protections for Whistleblowers

- 1) The significance of the information provided;
- 2) The degree of assistance of the whistleblower; and
- 3) The programmatic interest of the Commission in deterring violations of the laws 21F(c)

- Whistleblower must provide "original information" derived from the independent knowledge or analysis of the whistleblower that is not known to the SEC from another source nor derived from allegations made in a judicial or administrative hearing or a government report, hearing, audit or investigation or the news media 21F(b)
- Whistleblower is disqualified from recovering a bounty if:

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Incentives and Protections for Whistleblowers

- He was convicted of a criminal violation related to the subject of the disclosure or if he is an employee of various relevant regulatory and governmental agencies and authorities such as the SEC, or the Department of Justice 21F(c)(2)

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Incentives and Protections for Whistleblowers

No Qui Tam Provision

- Whistleblower may challenge in Court of Appeals denial of reward or the reward of an amount outside of the 10-30% range 21f(f)
- No independent cause of action by whistleblower if the SEC does not pursue the allegations contained in the original information
- Limits target's ability to challenge whistleblower's allegations through the whistleblower process
- Limits target's ability to challenge the appropriateness or amount of the bounty

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FCPA

- Although the FCPA is not mentioned by name it clearly falls under the "securities law" provision and is covered within the ambit of Dodd-Frank, due to the disgorgement provision within the FCPA statute, the monetary amounts involved in many FCPA settlement matters routinely are in the tens of millions of dollars
  - Codified at 15 USC Sections 78m(b), (d)(1), (g)-(h), 78dd-1 to 78dd-3, 78ff
  - Prohibits illicit payments to foreign public officials by businesses and individuals to influence or induce their influence to assist the company in obtaining or retaining business
  - Books and records requirement to keep and report the transactions of the corporations

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Developments

- SEC promulgated rules and regulations for whistleblower program on May 25, 2011. They become effective August 12, 2011
  - Attempted to address complaints that whistleblowers would bypass internal corporate reporting before submitting information to SEC and privileged sources providing information to SEC
    - Participation in internal compliance is now a factor that SEC will consider in determination of size of bounty
    - Look back provision from 120 days
    - Excludes information obtained from privileged communications

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Incentives and Protections for Whistleblowers

Criticisms

Post—May 2011 concerns:

- May continue to undermine compliance programs which promote employee reporting of activities to company management
- People without all facts may file based on weak claims
- Increased claims will cause SEC to divert resources to handle claims and cause unnecessary opening investigations
- Increased chance of unnecessary regulatory filings related to minor reports that could increase private litigation

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Incentives and Protections for Whistleblowers

- SEC's new investigation tool
  - SEC proclaims right to communicate with corporate employee (whistleblower) without corporate counsel's presence or input
  - SEC Rule 240.21F-17. Staff communications with individuals reporting possible securities law violations
    - Calls into question ability to enforce certain confidentiality agreements
    - SEC staff may "communicate directly" with person who made the contact (whistleblower) without consent of entity's counsel
      - Makes it difficult to coordinate investigation with SEC
      - Could be ripe for court challenge

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Incentives and Protections for Whistleblowers

- Investigating allegations of possible violations
  - ABA Model Rule 4.2 communication with person represented by counsel
  - In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order
    - Proceed with caution

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Incentives and Protections for Whistleblowers

Best Practices

- Review and modify internal procedures and compliance programs to emphasize early reporting to management
  - Should be clear and easy for employees to understand
  - Respond to internal complaints timely
  - Consider features such as
    - Hotlines
    - Audit
    - Internal reporting requirements
    - Internal reporting incentives
    - Training

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Whistleblower Protections: Anti-Retaliation Provisions

- The Act provides employment protections to whistleblowers in a number of contexts, including:
  - Protections for whistleblowing added to the Securities Exchange Act of 1934 (covering the Securities Act of 1933, the Securities Exchange Act of 1934, the FCPA, the Investment Advisors Act, and the Investment Company Act);
  - Protections for whistleblowing added to the Commodities Exchange Act;
  - Protections for whistleblowing within the Consumer Financial Protection Act;
  - Expanded protections for whistleblowing under the False Claims Act; and,
  - Expanded protections for whistleblowing under Sarbanes-Oxley

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Whistleblower Protections: Anti-Retaliation Provisions

- With respect to the Securities Exchange Act protections, Section 922 provides that:

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of a lawful act done by the whistleblower—

"(i) in providing information to the Commission in accordance with this Section,

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information, or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*, including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of title 18, United States Code, and any other law, rule or regulation subject to the jurisdiction of the Commission"

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SEC's Whistleblower Programs

- Quick guide to anti-retaliation protection for whistleblowers under Dodd-Frank final rules
  - An internal report of a "possible violation" can make a Dodd-Frank whistleblower in some circumstances, but is not required
  - A report to the SEC (or other listed government agency) of a "possible violation" makes a Dodd-Frank whistleblower -- even with no internal report and no SEC fine
  - Only a "reasonable belief" of a "possible violation" is required to be a Dodd-Frank whistleblower
  - A whistleblower may file a claim of retaliation with the SEC, with the Department of Labor, with a federal court
  - Anti-retaliation rights are non-waivable (yet to be interpreted)
  - Pre-dispute arbitration agreements for SOX claims are prohibited
  - Enforcing a confidentiality agreement may be retaliation per the SEC

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Whistleblower Protections: Anti-Retaliation Provisions

- Who is a "whistleblower" under Section 922 and Rule 21F-2?
  - "You are a whistleblower if, alone or jointly with others, you provide the Commission with information pursuant to the procedures set forth in 240.21F-9)a) of this chapter, and the information relates to a possible violation of the federal securities laws…that has occurred, is ongoing, or is about to occur"

  17 CFR § 240.21F-2(a)

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Whistleblower Protections: Anti-Retaliation Provisions

Who is a “whistleblower” under Section 922 and Rule 21F-2?

- Successful SEC enforcement is *not* required for protections (i.e., separate from bounty provisions)
- “Reasonable belief” must be subjectively genuine AND objectively reasonable for a similarly situated employee
- Reasonable Belief of “possible violation” is required
- Possible violation has occurred, is ongoing, or is “about to occur”
- Dodd-Frank does not reward knowingly false, fictitious, or fraudulent representations
- Frivolous and bad faith complaints are not protected

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Whistleblower Protections: Anti-Retaliation Provisions

- What activity is protected?
  - Section 922 specifies three types of protected activity:
    - Providing information to the SEC relating to a violation of securities laws
    - Participating in a Commission investigation or prosecution based on information relating to a violation of securities laws
    - Making disclosures required or protected by (a) Sarbanes-Oxley, (b) Section 10A(m) of the Securities Exchange Act, (c) 18 U.S.C. §1513(e), or (d) any law, rule or regulation subject to the jurisdiction of the SEC

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Whistleblower Protections: Anti-Retaliation Provisions

- Protections are not limited to disclosures to the SEC
  - Final Rules protect internal disclosure if either (1) the company later reports to the SEC; or (2) the whistleblower reports to the SEC within 120 days
  - SOX-protected disclosures are still protected under Dodd-Frank even if made only internally under SOX provisions
    - To appropriate person in publicly traded company, subsidiary or certain affiliates
  - 18 U.S.C. §1513(e) protects disclosures to a law enforcement officer "relating to the commission or possible commission of any Federal offense"

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Whistleblower Protections: Anti-Retaliation Provisions

- Who is an "employer" under Section 922?
  - Employer is not defined by the Act
  - Publicly-traded vs. non-publicly traded companies
  - Anti-retaliation provisions are not limited to publicly-traded companies or entities related to publicly-traded entities
  - Rather, the Act's anti-retaliation provisions apply to any company or transaction that is subject to regulation by the SEC

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Whistleblower Protections: Anti-Retaliation Provisions

- What about non-US companies or companies with employees outside of the United States?
  - Under appropriate circumstances (e.g. through the offering of ADRs or private placements), non-U.S. companies can be subject to regulation by the SEC
  - Bounty provisions likely apply to employees anywhere in the world who provide information about violations of securities laws by such companies
  - Retaliation claims brought under Section 922 by employees physically located outside of the U.S. raise jurisdictional issues without clear answers
  - Changes to the extraterritorial jurisdiction of the securities laws' antifraud provisions (§929P) raises additional questions
  - Final rules did not answer these questions – will be left to courts and ALJ's to figure this out
  - Decisions under SOX will likely be cited

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Whistleblower Protections: Anti-Retaliation Provisions

- SEC cites employment cases and False Claims Act cases in discussion of precedent for Dodd-Frank whistleblower anti-retaliation protections
- Courts have addressed extraterritorial application issues with respect to other US employment laws
- In a few cases at DOL and courts, judges have suggested that anti-fraud principles should apply when considering whistleblower activity outside the US

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Whistleblower Protections: Anti-Retaliation Provisions

- Under other US employment laws, activities outside the US may be covered:
  - US citizens working outside the US for a US company or a foreign subsidiary controlled by a US company would likely be covered.
    - "Control" is often determined by the interrelation of operations, common management, centralized control of labor relations, and common ownership/financial control
  - Non-US citizens working outside the US for a US company or a foreign subsidiary controlled by a US company would likely be covered, unless compliance with the whistleblower protection provisions would require the company to violate a law of the country in which the company is physically located
  - Non-US citizens working outside the US for a foreign company not controlled by a US company would likely not be covered

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Whistleblower Protections: Anti-Retaliation Provisions

- Suggested resources under US employment laws:
  - *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (federal employment laws will not be presumed to apply beyond U.S. territorial jurisdiction without clear Congressional intent)
  - *But see* 42 U.S.C.§§2000e(f), 2000e-1(a) and 12111(4) (amending Title VII and ADA to cover employees working outside the U.S. for a U.S. company or a foreign subsidiary controlled by a U.S. company); 29 U.S.C. §623(h) (same for ADEA)
  - EEOC's*Enforcement Guidance on Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States*, available at http://www.eeoc.gov/policy/docs/extraterritorial-vii-ada.html (Oct. 20, 1993)

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- Representative cases re non-US whistleblowing under SOX:
  - *O'Mahony v. Accenture Ltd.*,537 F.Supp.2d 506 (S.D.N.Y. 2008) (subject matter asserted overAmerican employee of Bermuda company's French subsidiary who brought SOX whistleblower action against Bermuda company and its US subsidiary)
  - *Carnero v. Boston Scientific Corp*., 433 F.3d 1 (1st Cir. 2006) (Non-US citizen employee of foreign sub of US publicly traded corporation was not covered by SOX because statute did not "reflect the necessary clear expression of congressional intent to extend its reach beyond our nation's borders"
  - *Neuer v. Bessellieu*, 2006-ALJ-000132 (ALJ Aug. 1, 2006) (Israeli citizen who engaged in protected activity in Israel but worked fulltime in the US covered by SOX)
  - *Walters v. Deutsche Bank, AG*, 2008-SOX-00070 (ALJ Mar. 23, 2009) (If SOX viewed as an employment law, then location of employment is key; but SOX could be viewed as an antifraud securities law with focus on "conduct" and "effects")

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- Section 922 procedural Issues:
  - Direct access to Courts:
    - Purported whistleblowers are not required to bring their retaliation claims before an administrative agency, but rather can proceed directly to "the appropriate district court of the United States"
    - Increased costs of litigation, and the potential for increased publicity
  - Statute of limitations:
    - Claims can be brought up to six years after the violation, or three years after material facts become known by the employee, but no more than 10 years after the violation
    - Significant impact on available defenses, availability of relevant witnesses and amount of accrued damages

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Whistleblower Protections: Anti-Retaliation Provisions

- Remedies under Section 922:
  - Available remedies include:
    - (1) Reinstatement with the same seniority status that the individual would have had, but for the discrimination;
    - (2) Two times the amount of back pay otherwise owed to the individual, with interest; and
    - (3) Compensation for litigation costs, expert witness fees, and reasonable attorneys' fees
  - The lengthy statute of limitations period means that the back pay awards that get doubled are larger than in other retaliation cases, and that reinstatement could be required years after the fact
  - Federal court likely means higher attorneys' fee damages

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Whistleblower Protections: Anti-Retaliation Provisions

- Other procedure and remedies Issues
  - Commodities Exchange Act (Section 748):
    - As with Section 922 claims, direct access to federal district court is provided
    - Shorter statute of limitations: claims must be brought within two years after the date on which the alleged violation is committed
    - Back-pay *not* doubled: remedies include reinstatement, straight back-pay with interest, litigation costs, expert witness fees, and reasonable attorneys' fees

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- Consumer Financial Protection Act (Section 1057):
  - No direct access to courts: Administrative complaint must be filed with Secretary of Labor within 180 days of the alleged violation
  - Available remedies include: an order requiring the employer take affirmative action to abate the violation, reinstatement, straight back pay, compensatory damages, attorneys' and expert witness fees, and litigation costs
- Amended False Claims Act (Section 1079A):
  - Purported whistleblowers now have three years after the date when the alleged retaliation occurred to file claims
  - Process and available remedies remain unchanged

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- Changes to Sarbanes-Oxley's whistleblower protections:
  - Covered employers: both "nationally recognized statistical rating organizations" and "any subsidiary or affiliate whose financial information is included in the consolidated financial statements" of a publicly-traded company have been added to the definition of a covered employer
  - Statute of limitations: extended from "90 days after the date on which the violation occurs" to 180 days after the date on which the employee became aware of the violation
  - Arbitration and waiver of claims: rights provided by Sarbanes anti-retaliation provisions "may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement"
  - Jury trial: Sarbanes claimants are now clearly entitled to a jury trial

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Whistleblower Protections: Anti-Retaliation Provisions

- Legal issues for future development
  - Reasonable belief
    - What is "Possible Violation"?
    - Subjective genuine belief – what evidence is required?
    - Evidence for what a "reasonable similarly situated employee" would believe?
    - When is a violation "about to occur"?
  - What is a sufficient report?
  - Application of anti-retaliation protections for employees outside the US

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Whistleblower Protections: Anti-Retaliation Provisions

- Legal issues for future development
  - Protection of "third party" whistleblowers – ie, employed by company that is not the target of the complaint
  - Damages
  - Prohibition on waiving rights under Dodd-Frank
  - Enforceability of separation agreements, releases, and confidentiality agreements with actual or potential whistleblowers

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Whistleblower Protections: Anti-Retaliation Provisions

- Steps employers can take
  - Ensure proper reporting mechanisms and anti-retaliation policies are in place and working
  - Confirm employees are aware of and have easy access to policy on reporting procedures—try a dry run
  - Train managers to recognize when a business dispute could turn into a retaliation claim and what to do in that situation
  - Train HR and managers to recognize corporate whistleblower complaints, identify to whom complaints should be referred, and respond appropriately
  - Use exit interviews to discover potential whistleblower complaints
  - Consider altering document retention policies in light of lengthy statute of limitations period
  - Other ideas?

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Aiding and Abetting Liability

- GAO study
- Effect of Supreme Court decision on ability of Congress to amend Dodd-Frank to allow for private aiding and abetting securities cases
  - *Janus Capital Group Inc. et al. v. First Derivative Traders et al.* (June 13, 2011) effectively blocked the plaintiffs' bar from bringing private aiding-and-abetting lawsuits over misleading prospectuses against the people and firms that may have prepared the statements but did not have ultimate authority over them.
- Retroactive application

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- *SEC v. Daifotis* – Northern District of California dismissed SEC's claims for aiding and abetting violations of Sections 13 and 34 of the Investment Company Act, holding that 929M cannot be applied retroactively
- Failed to meet the Supreme Court's two-part test in *Landgraf v. USI Film Products* (1994) for retroactive application of new statutes
  - Congressional intent: No express directive in Dodd-Frank to apply statute retroactively;
  - Retroactive effect: it impaired defendant's rights, increased liability, and imposed new duties

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- *Morrison* has had a significant impact in private securities litigations as well as private and government RICO and criminal matters
  - Private civil RICO
    - *Cedeño v. Intech Group, Inc.* (S.D.N.Y. 2010)
    - *Norex Petroleum Limited v. Access Industries, Inc.* (2d Cir. 2010)
  - Government RICO
    - *U.S. v. Philip Morris USA, Inc.* (D.D.C. Mar. 28, 2011)
  - Criminal
    - *U.S. v. Mandell* (S.D.N.Y. Mar. 16, 2011)

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- Practical impact on case resolution
  - As a result of *Morrison*, defendants have been able to eliminate several claims *and* groups of plaintiffs from lawsuits
  - Induces favorable settlements
    - E.g., *In re: Infineon Technologies AG Securities Litigation* (N.D. Cal. Mar. 17, 2011)– within months after US District Court for the Northern District of California dismissed claims from Infineon shareholders who had purchased ordinary shares outside of the United States, the company reached a $6.2 million settlement with investors
    - According to a settlement motion, “substantial changes in the law regarding the claims of foreign investors” resulted in the parties reaching a deal, referring to *Morrison*

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- *SEC v. Tourre*
  - While the SEC reached a settlement with Goldman Sachs last summer for approximately $500 million, it proceeded with its securities fraud claims against one of Goldman’s primary CDO traders, Fabrice (“Fab”) Tourre
  - Citing *Morrison*, Tourre moved to dismiss on the basis that the CDO transactions at issue occurred abroad and thus were not subject to US securities laws
  - Referring to Dodd-Frank only in a footnote, the SEC expressly disclaimed reliance on Dodd-Frank, characterizing it as affecting only “civil enforcement actions”

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Extraterritorial Jurisdiction

- This limitation appears nowhere in the text, and was disclaimed by the bill’s drafter
  - Cong Rec H 5237 (Daily Ed. June 30, 2010) (statement of Rep. Kanjorski) (“One final investor protection reform that I drafted and want to highlight concerns the new authority of the SEC and the Justice Department to bring civil or criminal law enforcement proceedings involving transnational securities frauds.”)
- Though Tourre could not get the case dismissed in its entirety, Judge Barbara Jones of the Southern District of New York found that several of the claims did in fact occur overseas, thus narrowing the scope of the SEC’s case significantly

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Cease and Desist Proceedings

- *Gupta v. Securities and Exchange Commission* (S.D.N.Y. July 11, 2011)
  - Rajat Gupta, ex-Goldman director lodged a suit against the SEC in response to an agency administrative case accusing him of leaking inside information to Galleon founder Raj Rajaratnam about Goldman Sachs
  - Argued that the SEC acted unconstitutionally by singling him out for an administrative proceeding and for trying to apply Dodd-Frank retroactively
  - Judge Rakoff’s refusal to grant the SEC’s motion to dismiss allows Gupta to move forward with his request for injunctive relief concerning the agency's proceeding

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TAB 7

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The Effects of Dodd-Frank on Securitization

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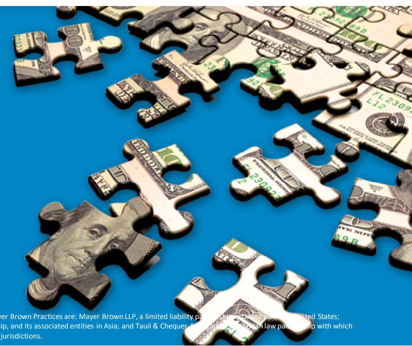

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The Effects of Dodd-Frank on Securitization

This panel will focus on the effects of Dodd-Frank on the securitization industry and what the panelists predict for the future in view of the proposed regulations.

- Risk retention rules
- Impact of the Collins Amendment and Volcker Rule
- Conflicts of interest
- New additional due diligence requirements
- Rating agency and ratings prohibition issues

Risk Retention Overview

- General definitions and scope
  - Dodd-Frank created a new Section 15G of Exchange Act
  - Proposed Rules
    - Intended to align incentives
    - “Skin in the game”
  - Generally requires the sponsor of an asset backed security to retain a 5% economic interest in the credit risk of the securitized assets
    - Registered and unregistered deals
    - Sponsor may not transfer or hedge the retained interest
  - Comments to proposed rule due: August 1, 2011
  - Compliance dates:
    - RMBS: One year after final rules
    - Everything else: Two years after final rules

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Risk Retention Overview

- Exemptions from retaining risk
  - Qualified residential mortgages (QRMs)
  - Asset class exemptions with specified high underwriting standards
    - Very restrictive and unlikely to be used much
      - Commercial loans
      - Commercial mortgages
      - Automobile loans
  - Observation: Increased compliance costs don’t increase issuance

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Basic Forms of Risk Retention

- Vertical risk retention
  - Sponsor to retain at least 5% of each class of ABS interests issued in the securitization
  - Better for bank regulatory capital if bank retains senior highly rated risks rather than first loss unrated horizontal risk
    - Investors may nonetheless demand that sponsor hold some horizontal risk
    - For some assets (e.g., mortgages, student loans), representative sample might be better for capital than vertical slice

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Basic Forms of Risk Retention

- Horizontal risk retention
  - “Eligible horizontal residual interest”
    - Is allocated all losses on securitized assets until reduced to zero
      - Most non-mortgage amortizing ABS do not expressly allocate losses
      - Can you still apply losses against excess spread, or must you do vertical slice to do so?
    - Has most subordinated claim to payments of principal and interest
      - Combination of residual and subordinated notes does not appear possible
      - Does this restrict reinvestment of principal in a revolving deal?
    - Can’t receive payments of principal on a securitized asset until all other ABS interests are paid in full
      - Permitted to receive pro rata share of scheduled payments of principal
      - Requires full turbo of prepayments
    - Forces you to charge fees upfront if you want any profit upfront

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Basic Forms of Risk Retention

- Horizontal risk retention
  - Do you now need three waterfalls: (1) interest, (2) scheduled principal and (3) other (i.e., prepaid) principal collections?
    - Many asset classes don’t have “scheduled” principal payments
      - Auto loans are often simple interest
      - Leases just have a monthly payment of “rent”
      - Floorplan loans pay when the inventory is sold
      - Credit card payments are not really “scheduled” principal payments
  - Must be at least 5% of the “par value” of all ABS interests issued
    - How do you calculate the “par value” of the residual interest?
    - Can you issue ABS Interests with a 97 par value to the public and call your retained residual a 6 par value if transaction is backed by 100 of assets?
      - Rule requires disclosure of assumptions pertaining to “estimated cash flows and discount rate used”
      - Can reserve account be included in calculation?

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Basic Forms of Risk Retention

- Horizontal risk retention – reserve fund option
  - Alternatively, create a reserve account equal to at least 5% of the par value of all ABS interests issued
    - Must be held by a trustee
    - Invested only in US Treasury bills or bank deposits fully insured by FDIC – very restrictive
    - No releases until ABS interests are paid in full except:
      - To satisfy shortfalls in required payments on ABS interests,
      - Permitted to release due to receipt of scheduled payments of principal if you maintain ratio of account balance to ABS interests
      - Interest on investments may be released upon receipt

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- "L-shaped" risk retention
  - Combination of:
    - Vertical Slice (2.5% of all classes of ABS interests issued), and
    - Eligible Horizontal Residual Interest (2.564% of all ABS interests other than the retained Vertical Slice)
      - Does not appear to permit mixing and matching of risk retention options (e.g. 4% horizontal and 1% vertical)

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- Representative sample risk retention
  - Select a designated pool size equal to at least 105.264% of the intended securitized pool
    - At least 1,000 assets
    - No assets other than the securitized pool and the pool to be retained
  - Select retained assets randomly in an amount not less than 5% of the designated pool
    - Selection process can't take into account any characteristics of receivables other than unpaid principal balance
    - Statistical determination: Mean or proportion of each material characteristic of retained sample must be within a 95% two-tailed confidence interval of the mean or proportion in the designated pool

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Basic Forms of Risk Retention

- Representative sample risk retention
  - Sponsor must have and adhere to policies and procedures for:
    - Making all of the preceding determinations
    - Prohibiting assets in retained sample from being included in designated pool for any other securitization
  - Accountant must deliver AUP letter confirming all of these requirements prior to sale of the ABS
  - Servicing of retained and securitized pools
    - Identical servicer and servicing standards
    - Individuals doing the servicing must not be able to tell whether they are servicing securitized or retained assets
  - Biggest issue with representative sample: Investors will still require enhancement for the securitized pool
    - Consider "recourse pool" alternative

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Premium Capture Reserve Account

- Premium capture reserve account
  - Risk retention is generally measured as a requirement to retain 5% of the par value of the ABS interests sold
    - What if you have $100 of ABS interests retain $5 of ABS but sell $95 of securities at a premium (e.g., $97)?
    - What if you can monetize excess spread by selling an "I/O"?
  - Premium recapture is intended to stop sponsors from effectively retaining less than 5% risk if they can sell ABS at a premium
    - However, could result in required retention of more than 5%
  - Reserve account amount equals excess of
    - Proceeds received from sale of ABS interests to third parties, over
    - Either:
      - 95% of par value of all ABS interests issued (if using vertical slice, horizontal, L-shaped or seller's interest in master trust), or
      - 100% of par value of all ABS interests issued (if using rep. sample, eligible ABCP conduit, or CMBS retention)
        - Note: Mistake in applying 95% to seller interest in master trust

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Premium Capture Reserve Account

- Release conditions are similar to horizontal reserve account, but premium recapture account gets hit first.
- Some mortgage issues:
  - Premium basis in purchased assets is ignored
  - Can’t give borrower a locked in rate until you know where you’re selling the loan
  - Why should this apply at all to vertical slice retention, which can’t be “gamed”?
- Proposed rule also contains an anti-evasion provision

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QRM and Special Problems for Mortgages

- The RMBS basics
  - Unless an exemption applies, residential mortgage securitization transactions are subject to 5% retention requirement and all other risk retention rules
  - For RMBS, it’s all about the exemptions
    - Qualified residential mortgage loan exemption
    - GSE (Fannie Mae and Freddie Mac) exemptions

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QRM and Special Problems for Mortgages

- The QRM exemption
  - Focused on key factors in mortgage meltdown
    - Absence of down payments (now 20% – 30%) required
    - Exotic mortgage products (e.g., pay option arms)
    - Bad appraisals
    - Shaky borrower balance sheets
    - Servicers refusing loan modifications
  - ARMs permitted, subject to lifetime [8%] cap on increase in rate
  - This "lowest common denominator" approach eliminates most of the mortgage market
  - Resulting political issues create odd bed fellows (securities and consumer finance trade groups)

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QRM and Special Problems for Mortgages

- Other QRM problems
  - Premium recapture provisions
    - Creates additional subordination not included in risk retention levels
    - Prevents rate locks because premium loans could be created
    - Radically changes upfront economics
  - QRM servicing standards
    - Putting this in mortgage documents creates new causes of action or defenses for borrowers
    - Potential problem if servicing standards change down the road
    - Not a simpler plain English mortgage document for obligors
    - Possibly exceeds D-F authority
    - Would Consumer Financial Protection Bureau enforce these obligations
  - Modified loans are permitted in pool
  - Mortgage insurance is disregarded – competitive advantage to GSEs
  - 28% debt-to-income ratio is restrictive

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- Exemptions from the risk retention requirement for the GSEs
  - Fannie Mae and Freddie Mac
  - Limited life regulated entity succeeding to Fannie Mae or Freddie Mac and operating with capital support from the US

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- Special risk retention option for eligible ABCP conduits
  - Under the proposed rules a sponsor of an eligible ABCP conduit may satisfy its retention obligation if:
    - Each originator-seller in each transaction with the conduit retains an eligible 5% horizontal residual interest in each intermediate SPV that transfers asset interests to the ABCP conduit; and
    - The horizontal interest satisfies the same requirements for an “eligible horizontal interest" available for any other type of securitization transaction.

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Risk Retention and ABCP Conduits

- An “eligible ABCP conduit" is an issuing entity that issues ABCP (with maturities of nine months or less) that meets the following criteria:
  - Is bankruptcy remote.
  - The asset interests issued to the conduit by each customers' SPV must be collateralized solely by the assets originated by a single origination-seller.
  - The ABCP conduit must have 100% committed liquidity coverage for the ABCP from a bank, a bank holding company or a savings and loan company.
  - All the interests issued by an intermediate SPV are transferred to one or more ABCP conduits (or retained by the originator-seller).

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Risk Retention and ABCP Conduits

- In addition, the sponsor of the ABCP conduit:
  - Must have established policies and procedures governing the assets permitted to be transferred to the conduit.
  - Must have approved each originator-seller and the assets.
  - Must otherwise be responsible for administering and monitoring the conduit.

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Risk Retention and ABCP Conduits

- Disclosures
  - The proposed rules would require the Sponsor to disclose the names of each originator-seller, together with a description of the form, amount and nature of the retention held by the originator-seller, to each prospective ABCP investor and, upon request, to the SEC and the applicable Federal Banking Regulators.
  - The proposed rules would also require the sponsor of the ABCP Conduit to monitor the originator-seller's compliance with its retention obligations and notify ABCP investors of its failure to comply.

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Risk Retention and ABCP Conduits

- Issues
  - Is ABCP as issued by ABCP conduits a security within the meaning of the Exchange Act?
  - Are traditional "sponsors" of ABCP Conduits "sponsors" within the meaning of Dodd-Frank?
  - Disclosure of Sellers.
  - Does not appear to permit multiple originator-sellers (including affiliates) in an underlying customer transaction, or assets not originated by the originator-seller.
  - Does not appear to permit non-ABCP Conduits to participate in the securitization transaction with ABCP Conduits.
  - Does not permit other forms of risk retention to be used by the originator-seller, such as the vertical slice, the "L" shaped option or the representative sample option.

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Risk Retention and ABCP Conduits

- Use of program level credit enhancement to satisfy sponsor's retention obligation
  - The special ABCP rule is optional and sponsors are free to use any other method available to satisfy their retention obligations.
  - Idea
    - Structure the PCE as a horizontal slice to satisfy sponsor's retention obligation.
  - Benefits
    - No disclosure or sellers' names or sellers' retention to ABCP investors would appear to be required.

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Risk Retention and ABCP Conduits

- Technical issues
  - Any such PCE must be an "ABS Interest" in the ABCP conduit, defined as any type of interest or obligation issued by the ABCP conduit, the payments on which depend primarily on the cash flows of the collateral owned or held by the ABCP conduit.
  - A letter of credit or a structured liquidity facility is technically not an ABS interest because it is not an interest or obligation issued by the ABCP conduit.
  - A subordinated loan made by the sponsor to fund a cash collateral account would appear to be an ABS Interest because it would be an obligation of the ABCP conduit to repay the loan.

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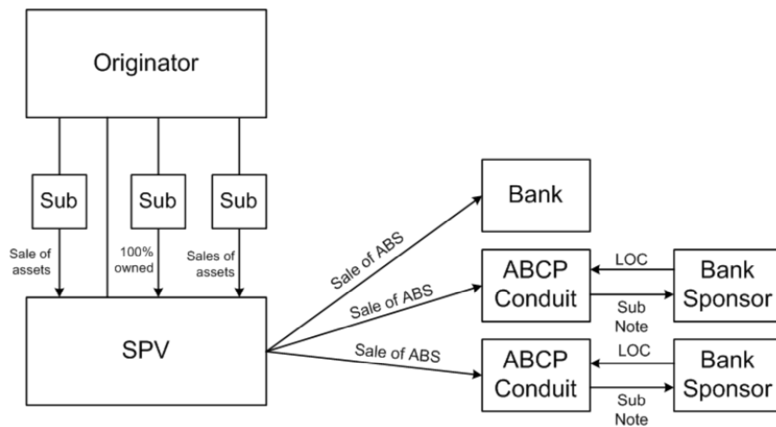
Risk Retention and ABCP Conduits

Conduit Transaction



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Qualified Auto Loans and Special Issues for Autos

- Qualifying auto loan exemption does not work
  - No prime auto deal ever done would satisfy this exemption
  - All loans in pool must be qualifying assets – does not permit prime lenders to securitize a portion of portfolio

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Qualified Auto Loans and Special Issues for Autos

- Some Requirements
  - Debt-to-verified income ratio < 36% - nobody brings W-2s and tax returns to dealership
  - 20% down payment (cash or trade-in) + tax, title, registration fees – Unrealistic, particularly in states with 10% sales tax
  - Borrower credit history (safe harbor: two credit reports w/i 90 days)
    - Not more than 30 days past due on any debt
    - Not more than 60 days past due over past 24 months
    - 36 month look-back for bankruptcy, collection judgments, foreclosures or repossessions
  - Just loans to individuals no commercial – Ford said 14% of their pools are commercial
    - Mary Smith can be included in pool, but not Mary Smith LLC
    - Just passenger vehicles for personal, family, or household use, not business
      - Can some motorcycles or RVs be included?
  - Maximum 5 year term for new – not more than 5 years past model year for used
    - 35% of the auto loans in prime auto deals are more than 5 year terms
  - Fixed interest rate, straight line, no deferrals

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Some Auto Loan Comment Topics

- Not requiring changes in basic waterfall
- Allowing some residual cash to come back without distinguishing between interest, scheduled or unscheduled principal
- QAL exemption alternatives proposed by issuers
  - Weighted average rather than loan-by-loan
  - Blended pool approach with lower than 5%

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Hedging, Pledging, Transfers

- Prohibitions on transfer and hedging retained interest
  - Can't transfer except to a consolidated affiliate
  - Can't enter into hedges or other contracts if payments are materially related to the retained interest and in any way reduces or limits the financial exposure
  - It's OK to hedge interest rate or currency risk or market indices that are not materially tied to the retained interest
  - Recourse financing of the retained interest is permitted. Non-recourse financing is not permitted.
    - What if the recourse entity has limited assets?

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Volcker Rule

- Volcker Rule
  - Restricts proprietary trading by banking entities
  - Prohibits ownership or sponsorship of hedge funds or private equity funds (includes all 3(c)(1) / 3(c)(7) entities)
  - Subjects more funds to "23A/23B" restrictions
  - FSOC study not very helpful

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- Elimination of suspension of periodic reporting for ABS Issuers
  - Very difficult in long term transactions to get third party servicers to agree to do attestation reports and get them from outsourcing parties

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- D-F Section 621 prohibits “material conflicts of interest” with ABS investors for year after closing
  - SEC was required to issue final rules by April 15, 2011.
  - Timing for proposed rules is uncertain
- Will proposed rules be broad or narrow?
  - SEC staff reached out to us
- Some of the many possible concerns:
  - Warehouse financing
  - Servicing
  - Chinese walls at investment banks

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- The Act requires additional regulation of NRSROs.
  - The additions deal mostly with the internal workings of NRSROs and their oversight by the SEC. The changes with the most direct effects on market participants (other than the NRSROs themselves) are:
    - A requirement that the SEC amend regulation FD to remove the exemption for rating agencies within 90 days of enactment;
    - Withdrawal of the SEC's rule 436(g) opens up NRSROs to expert liability under the Securities Act if their ratings are referenced in a prospectus; NRSROs refused to let their ratings be so referenced.
      - Now every deal has a ratings FWP
    - An apparent mandate for federal agencies to conduct a review of their regulations and eliminate references to credit ratings. While the SEC has taken considerable steps in this direction, numerous references to credit ratings remain in regulations issued by the SEC and the federal banking agencies, including many where there is no obvious substitute for the ratings references;
      - This will mean a material rewrite of Basel II Risk Based Capital Rules for Securitization as those rules rely on ratings in many respects, including the IAA and also the Standardized Approach.
    - A clarification that investors have a private right of action against NRSROs under the Securities Exchange Act (in the same fashion as those rights against registered public accounting firms or a securities analyst), which removes credit ratings from the safe harbor for "forward-looking statements" under section 21E of the Securities Exchange Act.

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- The Act did not include the highly controversial "Franken Amendment"
  - Would have established a system in which a public or private utility or a self-regulatory organization assigned NRSROs to determine the ratings of structured finance products.
  - Act directs the SEC to study the feasibility of such a system and report to Congress on the results of the study within 24 months after enactment of the Act.
  - Act requires the SEC to implement this type of system following submission of the report unless the SEC determines that an alternative system would better serve the public interest and the protection of investors.

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- Prospectus disclosure beginning 2/14/12
  - Look-back period generally three years for all asset-backed securities of same asset class
    - One year for prospectuses filed prior to 2/14/13,two years prior to 2/14/14
    - Information presented must be not more than 135 days old
    - Disclosure includes information for repurchase requests in all deals, including private deals such as ABCP warehouse deals
  - Disclose fulfilled and unfulfilled repurchase requests for all such ABS deals in chart format specified by the rule
- Reports filed quarterly (or annually for issuers with no repurchase requests).
  - First report by 2/14/12 containing information for three year period ending 12/31/11
  - Subsequent reports within 45 calendar days of quarter end
  - No duty to file if no securities held by non-affiliates

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- Is reporting required when:
  - Sponsor "self-discovers" a receivable and makes a voluntary repurchase?
  - Sponsor indemnifies against loss from a breach of representation rather than a repurchase?
    - What if amount of indemnity is stated to be unpaid balance plus accrued interest?
    - What if, after indemnity payment, sponsor has right to cause the receivable to be transferred?

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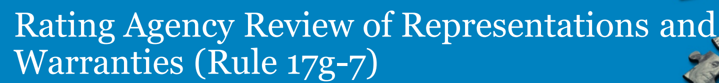

Rating Agency Review of Representations and Warranties (Rule 17g-7)

- NRSROs must include in their rating reports:
  - Description of reps and enforcement mechanisms; and
  - How those differ from similar securities
- Compliance date: Any rating report on or after September 26, 2011 for a new ABS offering
- Rating agencies expect to establish benchmarks to meet comparison requirements for representations
- Issuers in many asset classes will begin to standardize before compliance date

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Issuer Due Diligence Review of Pool Assets

- New Rule 193 requires that issuers in registered public ABS deals perform a review of the pool assets underlying the asset-backed security
  - Review must provide "reasonable assurance that the disclosure regarding the pool assets …is accurate in all material respects."
  - Issuer can employ third parties, but can't rely on a review performed by an unaffiliated originator
  - If findings are attributed to a third party, the third party must consent to being named in registration statement as an expert and accept "expert" liability

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Issuer Due Diligence Review of Pool Assets

- Changes to Reg AB Item 1111(a) require disclosure of the nature and findings/conclusions of such review, including:
  - An understanding of how the review related to the disclosure regarding the assets
  - If a sample, sample size and criteria used to select the sample
  - Whether issuer engaged a third party and attributes the findings to the third party, and identification of the third party as an expert
- SEC deferred Dodd-Frank Section 932(a) rules, which will require ABS issuers and underwriters to make publicly available the conclusions of any third-party due diligence report
- Compliance Date: Public offerings commenced January 1, 2012 or later

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Disclosure of Underwriting Deviations

- Disclosure of deviations from disclosed underwriting criteria or benchmarks, which entity determined to include those assets in the pool, and factors behind that determination
  - Where originators approve at higher levels of approval, criteria for first level of underwriting should be disclosed
    - Does this require disclosure of proprietary scoring models?

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TAB 8

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Dodd-Frank – Year Two: Preview of Key US and International Issues for the Next Year

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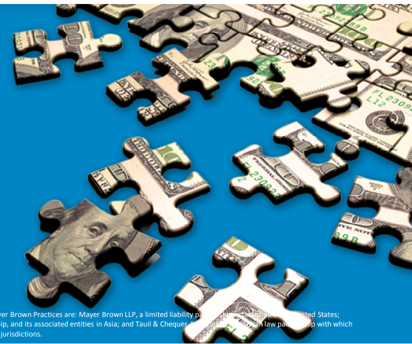

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Affiliate Transactions/Sections 23A/B

- Key changes
  - Expands the definition of "affiliate" to cover investment funds where bank or affiliate acts as investment advisor
  - Expands definition of "covered transaction" to include:
    - Securities borrowing or lending transactions with an affiliate, and all derivatives transactions with an affiliate, to extent there is credit exposure
  - Subjects repurchase agreements to the collateral requirements of Section 23A
  - Credit transactions must be collateralized at all times, rather than just at the time of the transaction

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- Other changes
  - FRB to issue regulations or interpretations regarding the manner in which netting agreements should be taken into account in determining the amount of a covered transaction
  - Scales back FRB's unilateral authority to issue exemptions
  - Interpretations must be issued jointly by FRB and bank's primary regulator
  - Additional restrictions imposed by Volcker Rule
- Changes to Sections 23A/B are effective in July 2012

- Applicability to foreign banks
  - Changes will apply to US branches and agencies of foreign banks to the extent that an affiliate is subject to affiliate transaction restrictions under the FRB's Regulation W

- Concentration limits
  - Prohibits mergers if total consolidated liabilities of resulting financial company exceed 10% of aggregate consolidated liabilities of all financial companies
  - "Financial companies" include non-US banks that have a US branch, agency, or bank subsidiary
  - For foreign-based companies, liabilities determined on basis of total risk-weighted assets of US operations calculated under applicable risk-based capital rules
    - Would require estimation of risk-weighted assets and regulatory capital of US operations

- FSOC study issued in Jan. 2011
  - Discusses several practical implementation issues and recommends changes
  - Study highlights potential unequal treatment of acquisitions by US-based firms and foreign-based firms
  - FRB required to issue proposed regulation by September 2011 to implement concentration limits

- FDIC implementation of OLA (Title II)
- Cross-border insolvencies
  - Difficult to have an orderly liquidation of a large interconnected multi-national financial services firm without some coordination amongst regulators and insolvency regimes
  - Study on international coordination in bankruptcy process required by Section 217 of Dodd-Frank Act
  - Study on bankruptcy process for financial and nonbank financial institutions required by Section 216 of Dodd-Frank Act

- Residential mortgage lending reforms (Title XIV)
  - Substantial number of rulemakings over the next 12-24 months
  - Ability to repay regulations
    - Qualified mortgage loans
  - New obligations on mortgage lenders
  - Restrictions on mortgage servicing practices
  - Appraisals

olitical Reality

- Administration focused on implementation
  - Establishment of CFPB
  - Regulatory Agencies issuing required regulations
  - Making Appointments to Open Positions
    - FDIC Board
    - OCC
- Republican majority in House focused on correcting Dodd Frank
  - Hearings in Financial Services Committee
  - Agency budget requests scrutinized
- Senate Democrat majority satisfied with status quo
  - Republican minority in Senate focused on:
    - Appointments

Significant Legislative Initiatives in 2010

- Senate
  - Economic development legislation
    - Proposed Dodd Frank Amendments
      - Repeal Dodd Frank Act (Senator DeMint)
      - Place a six member board over the CFPB and require Congressional approval of CFPB budget (Senator Moran)
      - Limit FSOC authority over SIFIs (Senator Vitter)
  - Senator Tester legislation to delay implementation of Durbin Amendment on Interchange Fees (S.575)
    - Proposed 6 month study
    - Defeated 54-45 (insufficient number of yea votes to overcome a filibuster)

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- House
  - H.R. 87 – Dodd Frank repeal
  - H.R. 1062 – The Burdensome Data Collection Relief Act
    - Repeal of Dodd Frank provisions on disclosure of executive compensation
  - H.R. 1573 – Amendment to Title VII of Dodd Frank
    - To delay the implementation of derivatives rules by 18 months
    - Currently pending in House, could be passed prior to August recess
  - H.R. 1082 – The Small Business Capital Access and Job Preservation Act
    - To exempt advisors of private equity funds from SEC registration
  - H.R. 1121 – The Responsible Consumer Financial Protection Regulations Act
    - Establishes a bipartisan commission to oversee the CFPB

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- As election approaches the potential for legislative action diminishes
  - House may pass bills but Senate unlikely to take them up
- CFPB could remain in limbo for remainder of year
- Ongoing battleground will be over nominees
  - CFPB nomination will remain a lightening rod
  - Appointments to OCC, FDIC and FRB likely to remain contentious

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Post Election Outlook

- Scenario 1: Republicans retain control of House and gain control of Senate and President Obama is reelected
  - Greater likelihood for agreement on discrete legislative initiatives
  - Total repeal of Dodd-Frank unlikely
  - Could see amendments to trim independence of CFPB, derivatives and Volcker rule
  - Administration will resist significant changes but more likely to negotiate compromises
- Scenario 2: Republicans in control of Congress and White House
  - Potentially substantial amendment of Dodd Frank
  - Privatization of Housing GSEs

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Regulatory Restructuring - Europe

- New European financial supervisory framework
  - Became operational on January 1, 2011
  - European Systemic Risk Board:
    - Monitors/assesses potential threats to financial stability at macro-economic level
  - European Supervisory Authorities (ESAs)
    - European Banking Authority
    - European Securities and Markets Authority
    - European Insurance and Occupational Pensions Authority
    - ESAs work with national regulators
    - Micro-prudential supervision

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- Replacement of UK Financial Services Authority by:
  - Financial Policy Committee (FPC)
    - Macro-prudential regulation
  - Prudential Regulation Authority (PRA)
    - Prudential regulation of banks, building societies, insurers, and certain investment firms of systemic importance
  - Financial Conduct Authority (FCA)
    - Prudential regulation of firms not regulated by PRA
    - Conduct of business regulation of **all** firms
    - Market regulatory functions
  - Expected by late 2012/early 2013

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- European Market Infrastructure Regulation (EMIR)
  - Addresses similar issues to Dodd-Frank
  - Proposed legislation published September 2010:
    - OTC derivatives
    - Risk mitigation
    - Central counterparties
    - Interoperability
    - Reporting obligations to trade repositories
  - Final vote on legislation delayed

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- Alternative Investment Fund Managers (AIFMs) directive
  - Implementation by July 2013
  - Harmonised EU regulatory framework for EU-established AIFMs
  - Managers of hedge funds, private equity funds and other AIFs (including commodity funds, venture capital funds, real estate funds and investment trusts) within scope
  - Includes provisions applying to non-EU AIFMs marketing into EU:
    - Impact on US managers marketing funds to European investors

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- CRD 4
  - Legislative proposal expected July 2011
  - EU implementation of Basel III reforms
  - Major reforms to existing Capital Requirements Directive
  - May also address non-Basel III issues
- Solvency II
  - Capital adequacy regime for European insurance/reinsurance industry

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- MiFID (Markets in Financial Instruments Directive)
  - Harmonised regulation of investment services within EEA
  - Effectiveness of MiFID under review
  - Guiding principles of review:
    - More responsible financial players
    - Increased transparency requirements, including additional markets such as bond markets and derivative markets
    - Fair competition rules
    - Restore trust in markets and financial intermediaries
  - Legislative proposal expected October 2011

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TAB 9

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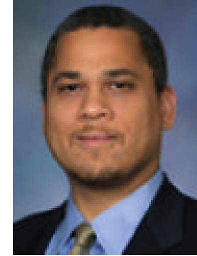

Experience

Tony Alexis is a partner in the Washington, DC office. His practice focuses primarily on complex commercial litigation, as well as on white collar defense and compliance, including health care fraud and civil fraud investigations. Tony represents companies and individuals in state, federal and administrative proceedings and investigations. He is a seasoned trial lawyer who has tried several jury trials to verdict. His federal and criminal litigation experience includes commercial fraud, public corruption, health care fraud and accounting fraud.

Prior to joining Mayer Brown in 2008, Tony had been an Assistant United States Attorney in the District of Columbia for more than 13 years. During that time, he served in the Fraud & Public Corruption Section and as the Deputy Chief of the Federal Major Crimes Section, where he was responsible for supervising and conducting the investigation and prosecution of federal criminal offenses, including health care fraud, economic crimes fraud, extra-territorial crimes, money laundering, immigration fraud and environmental crimes. He also investigated and prosecuted a number of high-profile complex white-collar crimes, including bribery, public corruption, embezzlement and Foreign Corrupt Practices Act violations.

In addition to his service as an Assistant US Attorney, Tony spent four years as a trial attorney for the Commercial Litigation Branch of the US Department of Justice, where he worked on dozens of investigations and complex, wide-ranging False Claims Act and fraud matters ranging from procurement and health care fraud to kickbacks, bribes and conflicts of interest.

Tony frequently received Awards and Honors for his outstanding performances.

Notable Engagements

- Represented a corporation in a large national procurement fraud investigation by the Department of Justice.
- Represented an international company regarding a government investigation into allegations that products had been transshipped to foreign countries in violation of import-export laws.
- Represented an individual regarding allegations of violations of Food and Drug Administration laws and regulations.
- Represented an accounting company regarding allegations that it failed to disclose information discovered during a corporate audit to the corporation’s board of directors.
- Provided advice to a company regarding the applicability of various Medicare and Medicaid statutes and regulations to its sales, promotions and marketing policies and practices.
- Provided advice to a pharmaceutical company in a False Claims Act investigation.

Education

Howard University School of Law, JD, 1984 • George Washington University, BA, 1981

Admissions

- District of Columbia, 1984
- US District Court for the District of Columbia
- US Court of Appeals for the District of Columbia Circuit
- US Court of Appeals for the Fourth Circuit
- US Court of Appeals for the Eighth Circuit

Publications

- "Importers and Consignees Increasingly Facing Criminal Prosecutions in Trade Remedy and Customs Enforcement Cases," *Mayer Brown LLP Legal Update*, May 17, 2011
- "Fourth Circuit Court of Appeals Overturns Trial Court Award of Roughly $500,000 in Attorneys' Fees under the False Claims Act," *Mayer Brown LLP Legal Update*, April 27, 2011
- American Bar Association, Section of Public Contract Law, Co-Author and Contributor to section and chapter to publication "Guide to the Mandatory Disclosure Rule: Issues, Guidelines and Best Practices." January 2010.
- Business Crimes Bulletin Co-Authored with David Krakoff and Joseph Baker, "Electronic Search and Seizure, New Protocols from the Ninth Circuit." December 2009.
- Client Update, "US Court of Appeals for the Ninth Circuit Establishes Protocols for Searches of Electronically Stored Information." Co-Authored with Joseph Baker. September 10, 2009.
- "Requests to Waive Attorney-Client Privilege: History and Analysis," (co-author with Thomas Durkin, Michael Bornhorst and Scott Claffee), *Mayer Brown*, 2009
- Client Alert on Criminal Investigations related to Immigration Policy, Co-Authored with Clancy Galgay, titled "New Focus of Obama Administration Immigration Enforcement Strategy Threatens Companies with Civil, Administrative and Criminal Penalties." July 24, 2009.
- Client Update on Passage of FERA and False Claims Act Amendments, Co-Authored with Marcia Madsen and Jeffrey Taft on May 28, 2009, "New US Law Combats Fraud Waste and Abuse in Federal Contracts, Programs, and Financial Institutions, Including New Federal Bailout Stimulus Programs."
- Client Alert on Relaxed Pleading Standard related to False Claims Act, Co-Authored with Marcia Madsen in April 2009, "Fifth Circuit Modifies Pleading Standard for Claims Pursuant to False Claims Act."
- Client Update on False Claims Act related to indirect billings to the government through contractors Co-Authored with Marcia Madsen and Cameron Hamrick, "Fourth Circuit Reverses District Court in Custer Battles." April 20, 2009.
- Business Crimes Bulletin Author, "How Much Knowledge Makes Crime?" Perspectives on Mens Rea element of Federal Criminal Statute. January 2009.
- Client Alert on Health Care Fraud – "Free Labeling and Specimen Collection Could Violate the Anti-Kickback Statute." Authored in May 2008.
- Client Alert regarding Corporate Prosecutions "Department of Justice to Change Position on Corporate Privileges Waiver." Authored with Thomas Durkin, Scott Claffee and Matthew Burke in May 2008.

- White Paper on Dilemma of Waiving Corporate Privilege, Co-Authored with Thomas Durkin in Winter 2008.
- Credit Market and Subprime Distress, Responding to Legal Issues, PLI. Authored the 6th Chapter titled "Searches and Seizures of Computers, Storage Devices, Equipment and Software," published in December 2008.
- "The US Government begins Solicitation of New Safe Harbors for the Federal Health Care Anti-Kickback Statute." Client Alert, December 22, 2008.
- "The 'Wolff' At Importers' Doors — §1519," (co-author), *Law360*, November 9, 2010

Seminars & Presentations

- "Overcoming Anti-Bribery Challenges: How to Comply with India's Anti-Corruption Requirements, US FCPA and *UK Bribery Act* Throughout the Procurement Process," ACI - India Defense Procurement Conference, June 14, 2011.
- "Managing, Defending and Curtailing Whistleblower and Relator Allegations Under an Expanded False Claims Act," ACI's Fraud & Abuse in the Sale & Marketing of Drugs, March 2011.
- False Claims Act presentation delivered with Marcia Madsen titled "The American Recovery and Reinvestment Act of 2009 New Recipient Reporting Requirements and Increased Oversight—The New Normal and/or The Perfect Storm." Webinar Panel Presentation to the Executive Board Regulatory Compliance. October 22, 2009.

- False Claims Act presentation delivered with Marcia Madsen titled "Current/Future Regulation: What Every IT Professional Should Know." Governance, Risk & Compliance Conference. August 4, 2009.
- Homeland Security and Defense Business Council Panel presentation regarding False Claims Act investigations. June 2009.
- Interpreting the False Claims Act. November 2008. Howard University School of Law.
- Corporate Counsel Seminar delivered with Thomas Durkin of Chicago, and firm client David R. DeVeau. July 2008. The presentation was titled "Handling Government Requests to Waive Privilege."
- "The False Claims Act – Recent Developments," webinar, June 25, 2008
- Web based Seminar delivered with Marcia Madsen and David Gossett. June 2008. The presentation was titled "The False Claims Act, Recent Developments – the Implications of Allison Engine and Pending Legislation."

Civic Activities

- Volunteer Board Member and Coach for McLean Youth Basketball, McLean, Virginia 2002 to date
- Volunteer Mentor Program, Amidon Elementary School, Washington, DC 1995-2000
- Board Member, Bureau of Rehabilitation, Inc. 1990-1991

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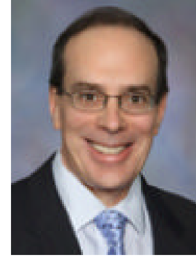

"Frames issues in a business context and clearly illustrates the pros and cons of alternative strategies." — *Legal 500 2011*

Experience

Scott Anenberg is co-head of the Firm's Financial Services Regulatory and Enforcement Practice. He has over 25 years of experience representing global and domestic commercial banks, thrifts, and other financial services companies, as well as their holding companies and affiliates, on a wide variety of strategic, regulatory, compliance, and enforcement issues before federal and state agencies. Scott has consistently been ranked by *Chambers USA* and *Legal500* and he is noted for being "client focused and proactive in identifying relevant regulatory proposals and explaining their impact," *Chambers USA 2011*.

He regularly advises banking and financial services clients on legislative and regulatory developments; geographic and product expansion; acquisitions and reorganizations; anti-money laundering, USA PATRIOT Act and Bank Secrecy Act compliance; preemption; privacy; transactions with affiliates; regulatory capital; consumer compliance; and electronic banking and commerce.

Earlier in his career, Scott worked for the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency. He is also active in the firm's Israel-related practice.

Notable Engagements

- Advising financial institutions on the strategic and operational implications of the "Dodd-Frank Wall Street Reform and Consumer Protection Act".
- Represented the sellers in the seventh largest US bank merger announced in 2008.
- Represented a foreign bank in several transactions designed to rationalize and consolidate its US operations, including precedent-setting transfers of its FDIC-insured branches to its US bank subsidiary made possible by first obtaining an innovative ruling from the FDIC under the Riegle-Neal Interstate Banking Act.
- Helped a federal savings bank in establishing the first-of-its-kind REIT subsidiary as a vehicle to issue tax-advantaged Tier 1 capital.
- Represented a foreign bank in US matters relating to its privatization and subsequent sale of its New York bank subsidiary.
- Advised the US subsidiary of a foreign bank in its acquisition from the FDIC of a failed Florida bank, culminating in a strategy designed to enable the bank to better serve its customer base and pursue new business opportunities in Florida despite that state's restrictive interstate banking laws.

- Represented a large insurance company in various regulatory and enforcement matters relating to its ownership of a thrift.
- Assisted several banks with reviews, internal investigations and potential enforcement actions related to anti-money laundering issues.
- Helped several foreign banks apply to establish branches, representative offices and agencies in the US.
- Helped a major financial services trade group obtain amendments to various aspects of the FDIC's regulations governing US branches of foreign banks.
- Represented domestic and foreign banking clients in establishing securities brokerage subsidiaries in order to comply with the "push-out" provisions of the Gramm-Leach-Bliley Act.
- Obtained the first official interpretation involving the application of FDIC deposit insurance rules to electronic banking products.

Education

The George Washington University Law School, JD, with high honors, 1978 • Washington University, BA, magna cum laude, 1975; Order of the Coif

Admissions

- District of Columbia, 1978

Publications

- Monthly column on "Selected Regulatory Developments," *Electronic Banking Law & Commerce Report* (2000-2008)
- E-Commerce in the Financial Services Sector, *A Written Course in IT Law, IBC Global Conferences Limited*, Co-Authored with Anthony Higgins, October 13, 2000
- "Traps for the Unwary Lender: State Law Issues Related to Internet Lending," *Electronic Banking Law and Commerce Report*, Vol. 3, No. 4, Co-Authored with Steven W. Pearlman, September 1, 1998
- "Lender Regulatory Aspects of Real Estate Workouts," *The Real Estate Workout Deskbook*, 1992
- "Regulation of Foreign Banks in the United States," *International Banking: US Laws and Regulations,* American Bankers Association, 1984

Seminars & Presentations

- Frequent speaker on variety of financial services topics
- Participant in the Federal Financial Institutions Examination Council's Examiner Education Program

Professional Activities

- American Bar Association, Banking Law Committee
- Contributing Editor, Electronic Banking Law and Commerce Report (2000-2008)

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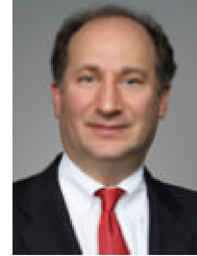

Experience

Marc Cohen's practice includes litigation, banking and securities, regulatory, enforcement, legislative, and strategic counseling matters on behalf of global financial services firms. He focuses on addressing problems that require experience in several of the foregoing areas at the same time, such as private cross-border litigation with parallel regulatory or congressional investigations.

Marc works with all the US financial services regulators – the Federal Reserve, Treasury (OCC, OTS, FinCEN, OFAC), FDIC, SEC – and state banking and insurance departments, as well as with Congress. He also deals with non-US financial supervisors, including the UK FSA, German BaFin, and Swiss Federal Banking Commission.

Marc has extensive experience with anti-money laundering issues, including those involving the USA PATRIOT Act and politically exposed persons, as well as US economic (OFAC) sanctions. He is currently counseling several leading non-US-based institutions on adoption of their global sanctions policies.

Marc clerked for the Honorable José A. Cabranes in 1984-85.

Education

Yale Law School, JD, 1984 • Yale University, BA, 1981

Admissions

- District of Columbia, 1991
- Connecticut, 1985

Publications

- "Morrison v. National Australia Bank: The U.S. Supreme Court and the Extraterritorial Application of U.S. Law," *Finantzplatz*, No. 5, September 2010
- "How to Debank from the US Markets; Debanking: A Strategic Option for Foreign Banks in the US," *International Financial Law Review*, May 1, 1996
- "Commercial Bank Lending to LDCs: Balancing Bank Overexposure and Credit Undersupply," *8 Yale J. World Public Order 201*, January 1, 1983

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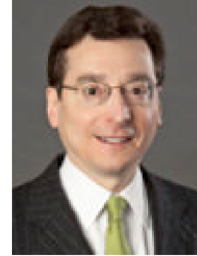

Experience

Josh Cohn is the head of Mayer Brown's US Derivatives & Structured Products practice and co-leader of the global Derivatives & Structured Products practice. He concentrates his practice on derivatives and has extensive experience as U.S. counsel to the International Swaps and Derivatives Association (ISDA), and represents dealers and end-users in a wide range of transactions.

Prior to joining Mayer Brown from Allen & Overy, Josh was the Derivatives Counsel at Cravath Swaine & Moore in New York; a Senior Vice President and General Counsel at DKB Financial Products, Inc.; a First Vice President and Counsel at Security Pacific National Bank; an Associate at LeBoeuf, Lamb, Leiby & Macrae; and a Law Clerk at the U.S. Court of Appeals - Ninth Circuit, San Francisco, CA.

Josh has been ranked in band 1 of *Chambers USA* since 2008. In 2010, sources noted his "great depth of experience and understanding of market trends." In 2008 and 2009, clients noted he was "doubtless one of the best derivatives lawyers in the world" and that he "…is one of the greats in derivatives because of his extensive knowledge." Josh is also listed for derivatives law in the 2010 and 2011 editions of *The Best Lawyers in America*.

Education

New York University School of Law, JD • Columbia College, BA

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Experience

Tom Delaney's practice is concentrated on banking and financial services matters, and especially on issues associated with the federal and state regulation of financial institutions. He advises clients on formation, acquisition, compliance, and cross-border concerns, with particular emphasis on anti-money laundering, the USA Patriot Act, OFAC, and international funds transfer matters. In addition, Mr. Delaney supervises internal investigations and defends financial services firms involved in supervisory enforcement proceedings, including investigations by the US Congress.

Mr. Delaney is respected for his insightful corporate and regulatory counsel and for his experience in providing comprehensive strategic advice to organizations facing regulatory or legislative infringement of business opportunity or potential damage to their reputations. He has been practicing law for more than 20 years, initially as an attorney with the US Treasury Department's Office of Thrift Supervision. Mr. Delaney entered private practice in 1991 and joined Mayer Brown in 2006. Prior to practicing law, he served on the staff of the Committee on Financial Services of the US House of Representatives and on the staff of the US Senate.

During the course of his career, Mr. Delaney has advised the full range of financial services firms that operate in the United States. He has successfully counseled organizations through the process of establishing or acquiring banks, thrift institutions, credit unions and US branches of foreign banks and then complying with the aspects of US law that relate to such operations. In recent years, one focus of his practice has been on representing internationally active firms, based in the US and abroad, and assisting such organizations to reconcile and comply with overlapping and potentially conflicting aspects of US and international law. *Chambers USA* 2008 found that Mr. Delaney "is applauded for 'taking a longer-term view and bringing a global prospective to matters.'" In addition to financial services firms, Mr. Delaney's counsel has been sought by foreign governments for guidance in establishing supervisory and enforcement systems that conform with US and international standards, including those specified by such bodies as the OECD's Financial Action Task Force.

Education

American University - Washington College of Law, JD, 1986 • Georgetown University, BA, 1979

Admissions

- District of Columbia, 1995
- New Jersey, 1987
- Pennsylvania, 1987

Publications

- "The Foreign Account Tax Compliance Act and Its Implications to Non-U.S. Banks and Brokerage Houses," *Bloomberg Law Reports*, September 7, 2010

Professional Activities

- American Bar Association, Section of Business Law

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"Very smart from a strategic standpoint." "Her years of experience ensure that clients are confident in asking her to negotiate on their behalf." — *Chambers USA*

Experience

Marcia Goodman primarily represents employers on a wide range of employment law matters.

She defends employers in federal class claims of race, age, sex, disability, national origin discrimination under EEO laws (e.g., reductions in force, promotions, sexual harassment, discriminatory terms, and conditions of employment) and in pattern and practice discrimination claims by the EEOC, as well as defending employee benefit plans and employers in ERISA class actions. Marcia also defends employers in litigation involving individual claims, such as a wide variety of EEO actions (race, age, national origin, sex, disability), Section 301 actions and Duty of Fair Representation Actions under collective bargaining agreements, Whistleblower claims under the Sarbanes-Oxley Act, federal and state court actions involving disputes over employment contracts, defamation, fraud, tortious interference with employment or business opportunity, FMLA actions, wage and hour issues, independent contractor/employee status, post-employment competition, and misappropriation of trade secrets. She defends employee benefit plans and employers against challenges to plan interpretation of medical plans, the application of severance pay plans, the formula for calculating benefits and payment terms under defined benefit plans, retiree medical and other benefit changes, deferred compensation plan interpretation and changes, alleged fiduciary breaches in investments and use of plan assets, characterization of alleged plan assets, and independent contractor/employee status challenges.

In addition to her litigation experience, Marcia has significant experience with administrative proceedings. She represents employers before the EEOC and state human rights agencies (administrative charges and hearings), the National Labor Relations Board (unfair labor practice claims, unit determinations, election proceedings) and the Department of Labor (Veterans Rights, Whistleblower actions under the Sarbanes-Oxley Act). Her mediation and arbitration experience encompasses issues such as utilizing mediation effectively in the context of class action litigation resolution, representing employers in employment contract dispute arbitrations and private mediations, court and agency-sponsored formal mediation programs, and labor arbitrations under collective bargaining agreements.

Marcia's trial work includes temporary restraining order and preliminary injunction work, bench trials and jury trials. Her appellate work includes arguing cases before the Sixth Circuit Court of Appeals, the Seventh Circuit Court of Appeals, the Illinois Appellate Court and the Illinois Supreme Court. She has also filed a writ of certiorari with the United States Supreme Court. Her mediation and arbitration background extends to representing employers in employment contract dispute arbitrations and private

mediations, court and agency-sponsored formal mediation programs, and labor arbitrations under collective bargaining agreements.

In addition to her trial, appellate, administrative, and alternate dispute resolution experience, Marcia provides transactional services and advises clients on a wide range of employment matters, including terms of employment, policies and practices, executive investigations, employment terminations, diversity, collective labor issues, employment benefits, covenants not to compete and trade secrets, business transactions, and independent contractor and related employee issues.

Marcia also advises foreign-owned companies on employee issues, national origin and diversity issues, employment status of seconded or jointly employed employees, and manager training regarding US employment sensitivities.

Marcia has been recognized as a leading employment lawyer by *Chambers USA* in 2008 and 2009 and *Best Lawyers in America* 2010. *Chambers USA 2009* acknowledged Marcia "as a well-respected ERISA lawyer and a key partner, [who] has a well-rounded employment practice and is *"very smart from a strategic standpoint.""* According to *Chambers USA* 2008, "in labor and employment, she wins praise for her 'broad level of knowledge in employment law. Her years of experience ensure that clients are confident in asking her to negotiate on their behalf.'"

Education

Tokyo University, (Japanese Ministry of Education Fellowship in Law), 1980-1981 • Harvard Law School, JD, 1980 • The University of Michigan, MA, Japanese Studies, 1974-1976 • Stanford Center for Japanese Language Studies, Tokyo, 1974-1975 • The University of Michigan, AB, with high honors, 1974

Admissions

- Illinois, 1985
- District of Columbia, 1980
- US District Court for the Northern District of Illinois (including Trial Bar)
- US District Courts for the Central District of Illinois, Western District of Michigan, Western District of Wisconsin, and the District of Colorado
- US Court of Appeals for the Sixth Circuit
- US Court of Appeals for the Seventh Circuit

Publications

- *Securities Investigations: Internal, Civil and Criminal*, PLI Corporate and Securities Law Library (2d ed. 2010)
- "*Dukes v Wal-Mart Stores*: En Banc Ninth Circuit Lowers the Bar for Class Certification and Creates Circuit Splits in Approving Largest Class Action Ever Certified," *The CPI Antitrust Journal*, August 2010
- "Whistleblower Litigation: Dealing with SOX Allegations in the Current Economic Climate," INFOCUS Corporate Litigation Whitepaper, Mayer Brown LLP, 2009

- "Negotiating Arbitration Agreements for the Effective Resolution of Disputes Arising Out of International Commercial Transactions," *X-7 International Legal Strategy* (2001) (co-author with Javier Rubinstein)
- *"*Testing, Testing, A-D-A," *Corporate Counsel* (February 2000) (co-author with Jeffrey Piell)
- "Continuing Series on U.S. Equal Employment Litigation," *Journal Interworld* (in Japanese) (Multiple issues – 1995) (co-author with Keiichiro Sue)
- "Legal Pitfalls for Japanese-Owned Companies in the US -Labor Relations," 121 *Zaigai Kigyo* 30 (1990)
- "The Exercise and Control of Prosecutorial Discretion in Japan," 5 *UCLA Pacific Basin Law Journal* 16 (1986)
- "Guide to the Amended Foreign Exchange and Foreign Trade Control Law," *The Japanese Business Law Journal* (February 1981) (co-author with Yuko Miyazaki)

Civic Activities

- Vice President, Director of the Japan America Society of Chicago
- Booster Committee for the Lincoln Park Juniors Rowing Club ("Changing the Face of Junior Rowing")
- Adjunct faculty in deposition training program

Professional Activities

- American Bar Association, Section on Labor and Employment Relations, Section on Litigation

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Matthew D. Ingber

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Experience

Matthew Ingber is a litigator who represents major corporations and individuals in complex, sensitive and high-profile matters. Matthew conducts a general litigation practice before state and federal courts and arbitration panels, with cases ranging from complex commercial disputes to civil and criminal securities fraud actions and cutting edge intellectual property matters. He performs internal corporate investigations on behalf of management and audit committees, represents issuers and underwriters in federal securities class actions, and represents individuals and corporations in connection with criminal investigations and related civil and administrative proceedings. Matthew has argued numerous dispositive motions and tried several cases in federal and state courts.

Matthew also has represented pro bono, among others, the NAACP in corporate governance matters, the City of New York, and individuals in asylum and civil rights actions.

Matthew joined Mayer Brown in 1998.

Notable Engagements

- Representing BNY Mellon in all aspects of litigation and SEC and CFTC investigations relating to the bankruptcy of Sentinel Management Group. Most recently, Matthew, as co-lead counsel, won a trial victory for BNY Mellon when a federal district judge, after a month-long bench trial on the bankruptcy trustee's $500 million claims for fraudulent and preferential transfers and equitable subordination, rejected all of the trustee's claims. (*Grede v. The Bank of New York et al.*, N.D. Ill. 2010)
- Won summary judgment for YouTube and its parent Google in a billion-dollar copyright infringement suit brought by Viacom in federal district court in New York. The *Washington Post* called the win "an immense legal victory" for Google, and the *New York Times* observed that "the ruling in the closely watched case could have major implications for the scores of Internet sites" that rely on user-generated content. (*Viacom et al. v. Google et al.*, S.D.N.Y. 2010)
- Won acquittal on all counts for NYSE Specialist Broker accused of securities fraud in two-week jury trial. *The Wall Street Journal* noted that the victory was the government's "first defeat in prosecutions of allegedly improper trading activity on the New York Stock Exchange." (*U.S. v. Scavone*, S.D.N.Y. 2006)
- Represented a multi-national corporation in connection with an internal investigation relating to irregularities in the management of employee benefit plans for the corporation's U.S. subsidiaries.

- Represented a leading education and finance company in connection with investigations of the student loan industry by the Attorneys General of ten States and various Congressional committees.
- Lead trial counsel in successful Section 1983 civil rights action against The State of New York.
- Represented a Big Four accounting firm in connection with litigation arising out of its audit of a company accused of orchestrating a $600 million Ponzi scheme.
- Represented a UK television auction channel in a trade secret misappropriation and breach of contract matter.
- Represented major soft-drink manufacturer in tortious interference and breach of contract matter.
- Won a motion to dismiss with prejudice for all defendants in a Rule 10b-5 class action, *In re eSpeed Securities Litigation*, No. 05 Civ. 2091 (S.D.N.Y. 2006).
- Won a motion to dismiss with prejudice for all defendants in a Rule 10b-5 action, *Abbad v. Amman*, 285 F. Supp. 2d 411 (S.D.N.Y. 2003); the decision was affirmed on appeal in *Abbad v. Amman*, No. 03-9169, 2004 U.S. App. LEXIS 21033 (2d Cir. Oct. 8, 2004).
- Won summary judgment for a major banking client in a lender liability action.

Education

The George Washington University Law School, JD, with honors, 1998; Articles Editor, The George Washington Journal of International Law and Economics • University of Pennsylvania, BA, magna cum laude with distinction, 1995

Admissions

- US Court of Appeals for the Second Circuit, 2010
- US District Court for the Northern District of Illinois, 2009
- US Court of Appeals for the Tenth Circuit, 2003
- US District Court for the Southern District of New York, 2000
- US District Court for the Eastern District of New York, 2000
- New York, 1999

Publications

- "Litigation: Who is a Foreign Official Under the FCPA?" *Inside Counsel*, June 2, 2011
- "Litigation: Be Careful What You Ask for—You Might Have to Pay for it," *Inside Counsel*, May 19, 2011
- "Litigation: Materiality under the Securities Act," *Inside Counsel*, May 5, 2011
- "Litigation: Basic Principles," *Inside Counsel*, April 21, 2011
- "A Guide to the Guidance: A Primer on the UK Bribery Act's Newly Released Guidance," *Inside Counsel*, April 1, 2011
- "Between Whistle and Buzzer, There is Much to Be Done," *Inside Counsel*, March 18, 2011
- "Morrison Revisited – The Case That Keeps On Giving," *InsideCounsel*, March 4, 2011
- "An Unequal Playing Field?" *InsideCounsel*, February 18, 2011
- "Broker-Dealers Beware," *InsideCounsel*, February 4, 2011
- "Tracing Liability in the Aftermath of Madoff," *InsideCounsel*, January 21, 2011
- "2011: The Year of the Sheriff?" *InsideCounsel*, January 7, 2011
- "Wrapping Things Up for the Holidays," *InsideCounsel*, December 24, 2010

- "Legal Principles for Principals," *InsideCounsel*, December 10, 2010
- *Securities Investigations: Internal, Civil and Criminal*, PLI Corporate and Securities Law Library (2d ed. 2010)
- "Technology: Picketing Online – Has Protesting Become as Simple as Posting?" *Inside Counsel*, November 26, 2010
- "The 'Write' Way to Complain?" *Inside Counsel*, November 12, 2010
- "Give Us Your Tired, Your Poor, Your Aggrieved Foreign Securities Plaintiffs," *Inside Counsel*, October 29, 2010
- "The Privileged Few," *Inside Counsel*, October 15, 2010
- "To Tweet or Not to Tweet (at Work)," *Inside Counsel*, October 1, 2010
- "There's No "I" in Pro Bono," *Inside Counsel*, September 17, 2010
- "Navigating the Shadowy Borderland Between Contract and Tort," *New York Law Journal*, September 13, 2010
- "Waiving (Goodbye to) Privilege Under Rule 502," *Inside Counsel,* September 3, 2010
- *Electronic Discovery Deskbook*, PLI Litigation Law Library, November 2009
- "Is *Booker* a 'Loss' for White-Collar Defendants?" with Hector Gonzalez and Scott Chesin, *Federal Sentencing Reporter* Vol. 20, No. 3, February 2008
- "*Asher* to *Asher* and Dust To Dust: The Demise of the PSLRA Safe Harbor?" *NYU Journal of Law & Business*, May 2005
- "*Asher* Roils PSLRA Safe Harbor," *New York Law Journal*, February 22, 2005
- "High Court Should Review Ruling on Securities Fraud 'Safe Harbor,'" *Washington Legal Foundation*, December 3, 2004

Seminars & Presentations

- "The Growing Bureaucracy: What Happens When They Knock on Your Door," Education Finance Council Annual Membership Meeting, 2011
- "The Dodd-Frank Act's Impact on Securities Litigation and Enforcement," 2010
- "Managing the Preservation and Collection of Data on Custodians' Personal Email and Personal Devices," 2010
- "International Discovery and Privacy," 2009

Civic Activities

- Member, Board of Directors, The Legal Aid Society
- New York Lawyers for the Public Interest, Pro Bono Advisory Council, 2005 to date

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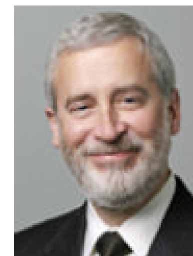

"An incredible legal strategist and a fantastic leader."

"His academic and practical contribution to the field is outstanding,' say observers, adding that he 'wrote the book on securitization, literally' and 'has played a pivotal role in many regulatory initiatives.'" — *Chambers USA*

Experience

Jason Kravitt is the founder and current co-head of Mayer Brown's securitization practice. He has helped the firm's clients create some of the most significant securitization products used in the capital markets today.

Jason represents commercial or investment banks, issuers, and other financial institutions or entities in negotiating, documenting, and underwriting sales of receivables, asset-backed or mortgage-backed securities, and other structured financings, or securitization transactions, including whole business Securitizations. In light of recent industry turmoil, Jason is also hired often to advise issuers, underwriters and trustees in connection with government investigations or lawsuits concerning securitization practices.

Jason is currently best known for three achievements. He is a Co-Founder of the Securitization Industry's preeminent trade association, the American Securitization Forum. He often helps to lead industry groups in large projects with regard to new regulation or legislation such as risk based capital guidelines, disclosure rules, accounting rules, and industry transparency projects. He was one of the lawyers chosen to help lead the proposed $100 billion rescue of SIVs by means of an SPV called Liquidity Enhancement Conduit, or "M-LEC". He also represented Citigroup and Morgan Stanley in the structuring of Straight-A Funding LLC, the $60 billion conduit to help rescue the financing of student loans.

In 2010, Jason was chosen by the *Financial Times* as one of the 10 most innovative lawyers in America. He is regularly ranked as a leading lawyer in the industry by legal directories. He is commended for his 'industry and regulatory knowledge, strength of counsel, and accuracy in prediction" by *Legal 500 USA* 2010. *Chambers USA* 2010 describes him as "an incredible legal strategist and a fantastic leader". Jason is listed as a "pre-eminent securitization lawyer" by Chambers Global and "wrote the Bible on securitization" according to clients in Chambers USA 2009. In Legal 500 USA 2009, Jason is lauded as "absolutely the number one lawyer in securitization." He is also an Adjunct Professor of Law at Northwestern University Law School and New York University Law School and an Adjunct Professor of Finance at the Kellogg School of Management of Northwestern University.

Notable Engagements

- Creation of Straight-A Funding, LLC, a $60 billion asset-backed commercial paper conduit to finance the student loan industry with support from the Department of Education and the Federal Financing Bank.
- Creation of the form customer agreement documentation for the TALF program (and representing many of the primary dealers in their customer agreement negotiations) and several of the first TALF transactions.
- Represented industry groups such as large issuers of asset-backed securities, sponsors of ABCP Conduits, the Securities Industry and Financial Markets Association (SIFMA), and the European Securitization Forum with regard to securitization regulatory initiatives, including, for example, the Basel Committee on Banking Supervision's Risk-Based Capital Consultative Papers, the FFIEC's Risk-Based Capital projects, the FASB's new Standards for Securitization, SFAS #125 and #140, the FASB's Standard for Consolidation, Fin 46R, and SEC Amendments to Rule 2a-7 and Reg AB.
- Served as one of the organizers and senior officers of the securitization industry's trade association, the American Securitization Forum.
- Represented the Sponsoring Banks in structuring the $100 Billion SIV rescue vehicle, Master Liquidity Enhancement Conduit.
- Helped to create some of the most significant securitization products used in the capital markets today, including the first partially enhanced, multi-seller, asset-backed commercial paper vehicle in 1989 and the first CLO, FRENDS in 1988.

Education

Cambridge University, Diploma, Comparative Law, 1973 • Harvard Law School, JD, cum laude, 1972 • The Johns Hopkins University, AB, 1969; Phi Beta Kappa

Admissions

- New York, 2002
- US Court of Appeals for the Seventh Circuit, 1974
- Illinois, 1974

Publications

- "What to Look for In Securitization Regulation in 2011" (author) *Total Securitization*, March 2011
- "Basel II Modified in Response to Market Crisis" by Miles Bake, Kevin P. Hawken, Carol Hitselberger, Robert F. Hugi and Jason H.P. Kravitt. This article appeared in the Winter 2010 edition of *The Journal of Structured Finance*.
- "Changing the Rules," (co-author) *Mortgage Risk Magazine* , 2007
- "Securitization of Financial Assets," (editor) *Aspen Law & Business* , 1996 (2nd Ed.)
- "Securitization of Project Finance Loans and Other Private Sector Infrastructure Loans," (co-author) *The Financier* , February 1994
- "How Feasible Is the Securitization of Loans to Small and Medium-Sized Businesses," (co-author) *Commercial Lending Review* , Fall 1993
- "Legal Issues in Securitization," *Journal of Applied Corporate Finance*, No. 3, p. 61, 1988

- "Full Service Brokerage Activities and the Glass-Steagall Act," *The Review of Financial Services Regulation*, Vol. 4, No. 7, April 6, 1988
- "Combined Investment Advice and Securities Brokerage Activities: Full Service Brokerage Not a 'Public Sale' by Another Name," *The Ninth Annual Banking Expansion Institute*, 1988
- "Defense Against Takeovers of Community Banks," *The National Law Journal*, Vol. 9, p. 24, September 21, 1987
- "Community Banks Can Deter and Defend Takeover Attempts," *The American Banker*, March 25, 1987
- *Mayer, Brown & Platt Financial Law Newsletter*, editor, 1986-1987

Seminars & Presentations

- Participated in or chaired numerous professional and law school seminars and conferences on securitization

Civic Activities

- The Johns Hopkins University Alumni Advisory Council, 1991-1997, Advisory Board to the Dean of the School of Arts & Sciences, 1999 to 2009; Chair 2006-2007
- The Johns Hopkins University Illinois Alumni Executive Committee, Chairman, 1990-1994
- The Cameron Kravitt Foundation, Director and Chairman, 1985 to date
- YMCA of Metropolitan Chicago, Board of Managers, 1999-2001
- Chicago United, Principal, 1997-2001

Professional Activities

- Deputy Chair, American Securitization Forum
- Director, European Securitization Forum
- American Bar Association, Committee on Business Financing; Vice Chair Subcommittee on Securitization Litigation
- Chicago Bar Association Committees on Financial Institutions and Commercial Transactions
- Chicago Council of Lawyers
- New York City Bar Association, Subcommittee on Securitization
- Adjunct Professor of Law, Northwestern University School of Law
- Adjunct Professor of Finance, Kellogg Graduate School of Management of Northwestern University
- Fellow, American College of Commercial Finance Lawyers
- Advisory Board, The Financier and The Securitization Conduit, 1996 to date
- Advisory Board of The Securitization Conduit Publications
- Advisory Board, American Securitization
- Advisory Board, Duke University Capital Markets Center

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"...focuses on auto loan and equipment lease securitization and has 'clearly established himself as an expert in his field.'" — *Chambers USA 2004-2005*

Experience

Stuart Litwin is a finance and transactional attorney and co-Head of Mayer Brown's global Securitization Practice and Capital Markets Group. His practice is primarily focused on securitization and lease financing. Stuart is widely recognized as an authority on the securitization and financing of auto leases, auto loans, equipment leases, dealer floorplan receivables, catastrophic and residual value risk and the creation of asset-backed securities for money market funds. Stuart is listed by *Chambers USA* 2009 as "one of the country's best and brightest for auto securitizations." *Legal 500 USA* 2009 noted that Stuart "has handled every variety of complex asset-backed products."

Stuart represents originators, investment banks, commercial banks, asset-backed commercial paper conduits and investors (including money market and other mutual funds) in public and private US and international asset-backed securities transactions. In addition, he is experienced in the securitization of virtually all asset types, and he regularly represents parties in leasing transactions, including leveraged leases involving autos and other equipment.

Stuart's practice is also focused on Securities and Corporate Law. Stuart is experienced in negotiated and contested acquisitions and mergers (including acquisitions of finance companies, banks and other financial institutions), tender offers, takeover defenses, leveraged acquisitions, asset acquisitions and dispositions of subsidiaries. He also provides comprehensive advice to clients engaged in public offerings, private placements of debt and equity securities and joint ventures.

Stuart joined Mayer Brown in 1985 and was named partner in 1994. He has written and presented extensively on topics of securitization and structured finance.

Education

University of Chicago Law School, JD, cum laude, 1985 • University of Chicago, MBA, 1985 • University of Illinois, BS, summa cum laude, 1981; Bronze Tablet • Certified Public Accountant (CPA), Illinois, 1981; Winner of Elijah Watt Sells Award on Uniform CPA Examination

Admissions

- Illinois, 1985

Publications

- *The Future of Auto Lease Financing,* Monograph, February 1997
- "Auto Lease Double Dips: Is There a Possibility," *Asset Finance International*, September 1996
- "Unlocking the Mysteries of Auto Lease Securitization," *The Financier*, May 1996
- "Security Measures: Auto Lease Securitization," *Asset Finance & Leasing Digest*, March 1996
- "Review of Defensive Charter and By-Law Provisions for Delaware Corporations," *International Company and Commercial Law Review*, March 1996
- "Reorganization of Corporate Capital Structures," Chapter 8 of *Closely Held Corporations*, Ill. Inst. for CLE, 1996
- "The Merger and Acquisition Process: A Primer on Getting the Deal Done," *The Financier*, November 1995
- "Investments in Asset-Backed Securities by Money Market Funds," *The Securitization of Financial Assets*, Prentice Hall Law & Business, 1994 edition

Seminars & Presentations

- Speaker, "Fifth Annual Investors & Issuers Summit on Asset Securitization, Information Management Network," ABS East, Bermuda, October 3, 1999
- Speaker, "The 1999 Puerto Rico Securitization Symposium," Strategic Research Institute, San Juan, Puerto Rico, September 22, 1999
- Speaker, "Analyzing Legal and Tax Considerations under the New Rule 2a-7," IBC USA Conferences, New York, NY, June 29, 1999
- Chair, "Implementing Rule 2a-7 for Asset-Backed Commercial Paper," IBC USA Conferences, New York, New York, June 28, 1999
- Chair, "Emerging & Niche Asset Securitization: Auto Lease Securitization," Information Management Network, New York, New York, May 3, 1999
- Chair, "Rule 2a-7 Seminar — Develop Effective Strategies to Ensure Compliance for the Upcoming SEC Inspection Sweep," IBC USA Conferences, Inc., New York, New York, March 10, 1999
- Speaker, "Developing Effective Strategies to Ensure Compliance for the Upcoming SEC Inspection Sweep," IBC USA Conferences, Inc., New York, NY, March 10, 1999
- Speaker, "Auto Loan & Sub-Prime Auto Securitization: Despite a Few Speed Bumps, This Market Continues to Drive On," Strategic Research Institute Asset Securitization Symposium, Phoenix, AZ, February 9, 1999
- Speaker, "Auto Leases Get Revved Up, Information Management Network," ABS West, Phoenix, AZ, February 3, 1999
- Speaker, "Current Status of Rule 2a-7," IBC USA Conferences Inc., New York, New York, January 25, 1999
- Speaker, "Regulatory Environment for Asset-Backed Commercial Paper," ICM Conferences, Inc., New York, New York, January 21, 1999
- Speaker, "Less Than Prime Auto Leases: Is There Money To Be Made Subprime Consumer Finance?" ABS & Servicing Forum, Information Management Network, Las Vegas, NV, November 8, 1998
- Speaker, "Rule 2a-7 Seminar — Develop Effective Strategies to Ensure Compliance," IBC USA Conferences Inc., New York, NY, October 28, 1998
- Speaker, "Automobile Leases, Hot Asset Classes and New Laws, Rules, Regulations and Standards," Insight Information Co., New York, NY, October 22, 1998

- Speaker, "Update on the Auto Market: New Developments and Opportunities in the Auto Loan, Lease and Rental Car Sectors," SRI ABS East Symposium, Bermuda, October 4, 1998
- Speaker, "Update on the Auto Market: New Developments and Opportunities in the Auto Loan, Lease and Rental Car Sectors," Information Management Network ABS East Symposium, Bermuda, October 4, 1998
- Speaker, "New Developments In European Structured Finance: A Case Study Approach," Euromoney, London, England, September 10, 1998
- Speaker, "Auto Securitization," AIC Conferences, London, England, May 1998
- Speaker, "Innovations in the Auto Market: Auto Loan, Lease & Rental Car Securitization," Strategic Research Institute, Scottsdale, AZ, February 8, 1998
- Speaker, "Auto Lease Securitization Takes to the Road," Information Management Network ABS West, Phoenix, AZ, February 4, 1998
- Speaker, "Auto Lease Securitization," Information Management Network ABS West, Phoenix, AZ, February 1998
- Speaker, "Auto Lease Securitization Takes to the Road," Information Management Network ABS East, Bermuda, September 28, 1997
- Speaker, "Evaluating and Investing In Asset-Backed Commercial Paper," IBC USA Conferences Inc., New York, NY, September 15, 1997
- Chair, "Asset Securitization — Exploring the Latest Developments in the UK, Europe and USA," Euromoney, London, England, June 10, 1997
- Speaker, "Evaluating and Investing In Asset-Backed Commercial Paper," IBC USA Conferences Inc., New York, NY, March 7, 1997
- Speaker, "American versus European Outlook," AIC Conferences, London, March 4, 1997
- Speaker, "Proxy Battles: Trials, Tribulations & Successes: Acquire Or Be Acquired," *Bank Director Magazine,* Scottsdale, AZ, February 23, 1997
- Speaker, "Innovations in Auto Lease and Loan Securitizations: Staying Ahead of the Race for This Billion Dollar Market," Strategic Research Institute, Scottsdale, AZ, February 9, 1997
- Speaker, "Auto Lease Securitization Takes to the Road," Information Management Network ABS East, Bermuda, September 29, 1996
- Speaker, "Auto Lease Securitization: The Market, Titling Trusts, Residual Value Protection & Accounting Issues," Amembal, Deane & Associates, Oak Brook, IL, September 26, 1996
- Chair, "Asset Securitization in the Leasing Industry," Euromoney, London, England, September 12, 1996
- Speaker, "Drafting Acquisition Agreements," Practising Law Institute, May 13, 1996
- Speaker, "Merger & Acquisition Due Diligence," 16th Annual Ray Garrett Jr. Corporate and Securities Law Institute, Northwestern University School of Law, April 26, 1996
- Speaker, "The Legal Framework of Joint Ventures," Phoenix, Arizona, March 7, 1996
- Speaker, "Current Issues in Federal Securities Law," Chicago Bar Association seminar, March 5, 1996
- Speaker, "New Developments and Recent Trends in Structured Finance, Securities Superconference: Current Trends and Regulatory Developments," The Canadian Institute, Toronto, Canada, February 29, 1996
- Speaker, "New Structures In Financing Auto Leases, Information Management Network," ABS West, Phoenix, AZ, February 4, 1996; and Asset Securitization Symposium, Strategic Research Institute, Tucson, AZ, February 4, 1996
- Speaker, "Poison Pills," Chicago Bar Association seminar, October 31, 1995
- Speaker, "Auto Lease Securitization Takes to the Road," Information Management Network ABS East, Bermuda, October 22, 1995

- Speaker, "Auto Lease Securitization: The Market, Titling Trusts, Residual Value Protection & Accounting Issues," Amembal, Deane & Associates, Oak Brook, IL, September 26, 1996
- Speaker, "Introduction to Securitization," Chicago Bar Association, April 5, 1995
- Speaker, "Disclosure Duties for Preliminary Merger Negotiations," Chicago Bar Association seminar, March 1, 1995
- Speaker, "Voting Trusts and Stockholder Agreements," Chicago Bar Association seminar, January 24, 1995
- Speaker, "Investments in Asset-Backed Securities by Money Market Funds," Institute for International Research, New York, June 16, 1994

Civic Activities

- Chicago Lawyers Committee for Civil Rights Under Law — President, 1999–2000; Vice President, 1998–1999; Secretary, 1997–1998; Treasurer, 1996–1997
- Member, Boards of Directors of the following organizations: Pegasus Players Theatre; Chicago Lawyers Committee for Civil Rights Under Law; American Jewish Congress, Midwest Region; The Cameron Kravitt Foundation; East Village Youth Program; CityPAC; United Jewish Appeal, National Cabinet

Professional Activities

- Adjunct Professor of Law, Northwestern University Law School
- Co-chair, Outside Counsel Sub-forum of the American Securitization Forum
- Chairman, Securities Law Committee, Chicago Bar Association, 1998–1999
- Chairman, Corporate Control Subcommittee, Chicago Bar Association, 1996–1998
- American Bar Association, Section of Corporation, Banking, and Business Law

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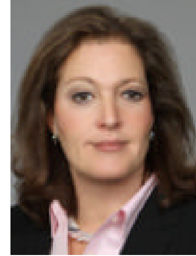

"great attitude, great business sense and responsiveness" — *Chambers USA 2007*

Experience

Stephanie Monaco is a member of the Financial Services Regulatory & Enforcement practice group. She advises investment management firms, investment companies and hedge funds across a broad range of investment management needs. Formerly an attorney with the US Securities and Exchange Commission, Stephanie brings a deep understanding of the regulatory environment to counseling clients on issues of compliance and product development.

In 2007, *Chambers USA* recommended Stephanie based on her "great attitude, great business sense and responsiveness." Previously (2006), *Chambers* noted that Stephanie "has a keen understanding of industry issues" and "knows when to step back and when an issue has to be forced."

Stephanie joined Mayer Brown in 2005. Previously, she was a partner at other prominent law firms in Washington, DC. She also worked with the SEC's Division of Investment Management, first in the Division's Chief Counsel's Office (1983–1986) and, later, in the Division's Office of Investment Company Regulation (1988–1991).

Education

University of Baltimore School of Law, JD, 1982 • University of Maryland, BA, 1979

Admissions

- District of Columbia, 1992
- Maryland, 1982

Publications

- *Securities Investigations: Internal, Civil and Criminal, PLI Corporate and Securities Law Library (2d ed. 2010)*
- *Operating a Hedge Fund in a Regulated Environment, The Review of Securities & Commodities Regulation — An Analysis of Current Laws and Regulations Affecting the Securities and Futures Industries*, (co-author with Jeffrey Blockinger)

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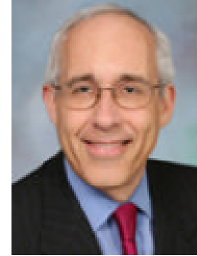

Experience

Andrew Pincus focuses his appellate practice on briefing and arguing cases in the Supreme Court of the United States and in federal and state appellate courts, as well as on developing legal arguments in trial courts. Andy has argued 22 cases in the Supreme Court of the United States, including *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006), and *Weyerhaeuser Company v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007), both of which he won unanimously. In addition, Andy has filed briefs in more than 100 other cases in the Court. Prior to joining Mayer Brown, Andy was an Assistant to the Solicitor General in the United States Department of Justice (1984-1988).

According to *Legal 500* (2008), Andy "is cited by clients as 'a total superstar' who is 'unbelievably smart,' and who 'objectively belongs on any list of leaders.'" *Chambers USA* (2009) reports that Andy "is commended for his 'masterful performances' before the Supreme Court. Andy's appellate experience has also won him recognition in *The Best Lawyers in America* (2006-2008). Andy serves as co-director of the Yale Law School's Supreme Court Advocacy Clinic.

Andy also advises clients on legislative and regulatory matters. While serving as General Counsel of the United States Department of Commerce (1997-2000), he formulated and implemented policy concerning intellectual property, electronic authentication, privacy, domain name management, taxation of electronic commerce, telecommunications matters, export controls, international trade, and consumer protection. Andy advocated these policies in negotiations with foreign governments and in testimony before Congress; and he had principal responsibility for the Digital Millennium Copyright Act and the Electronic Signatures in Global and National Commerce Act. Andy successfully represented clients in connection with passage of the Securities Litigation Reform Act of 1995.

Before joining Mayer Brown, Andy served as General Counsel of Andersen Worldwide S.C. Following law school graduation, Andy was Law Clerk to The Honorable Harold H. Greene, United States District Court for the District of Columbia (1981-1982), after which he practiced with another major law firm in Washington.

Education

Columbia University Law School, JD, 1981; James Kent Scholar; Harlan Fiske Stone Scholar; Notes & Comments Editor, Columbia Law Review • Yale University, BA, cum laude, 1977

Admissions

- United States Supreme Court, 1985
- District of Columbia, 1983
- New York, 1982

Seminars & Presentations

- "Damages in Patent Litigation Cases," George Washington University Law School, Symposium on Intellectual Property, Washington DC, May 3, 2011
- "The Most Important Supreme Court Business Decision You Haven't Heard Of," Mayer Brown LLP Webinar, August 3, 2009

Civic Activities

- Andy served as a member of the Advisory Commission on Electronic Commerce established by the Internet Tax Freedom Act, 1999-2000

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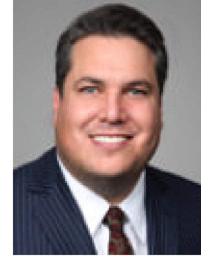

Experience

Richard M. Rosenfeld is co-lead of Mayer Brown's US Securities Litigation & Enforcement group working from both the Washington, DC and New York offices.

Richard has nearly 17 years of experience practicing in the securities field, including more than a decade in government regulatory and enforcement positions. Most recently, he was asked to return to the government from private practice in the midst of the financial crisis to serve as Chief Investigative Counsel in the Office of the Special Inspector General for the Troubled Asset Relief Program (SIGTARP).

In his role at SIGTARP, Richard helped build and lead a team of top white collar, securities and bank fraud specialists tasked with conducting criminal and civil investigations into some of the most complex bank, securities and mortgage frauds in US history. He managed more than 80 lawyers, federal agents, accountants and analysts pursuing more than 150 investigations. Additionally, he led SIGTARP's involvement in several of the TARP-related bailout programs, including the investment management agreements for the more than $100 billion Public/Private Investment program.

In private practice, Richard represents financial institutions, funds, companies and individuals in a variety of business, regulatory and compliance issues. He advises on transactions, policies and procedures, investigations, regulatory enforcement and litigation before the SEC, other financial services regulators and the US Department of Justice. These matters typically involve allegations of fraud, whether it be financial reporting violations, insider trading, market manipulation, or other regulatory or compliance issues. Richard has substantial securities litigation experience in the federal courts, in addition to leading internal investigations and advising clients on regulatory compliance, corporate governance and other SEC-related issues.

Earlier in his career, he served in the Division of Enforcement at the SEC. During his time with the Commission, he handled some of the most complex securities frauds in SEC history and was detailed as a special prosecutor to multiple US Attorney's offices across the country to assist in matters involving cross border money laundering, tax evasion and securities, bank, mail and wire fraud. He ended his career with the Commission as the first and only internationally based SEC representative in London where he organized, managed and directed one of the largest multinational financial fraud litigations in SEC history and worked with the highest ranking regulators of several countries to address cooperation in international securities matters.

Richard was a partner at two prominent firms in London and Washington, DC prior to his return to the government to assist with the bailout.

Education

Cornell Law School, JD • Rutgers University, BA, with highest honors

Admissions

- District of Columbia 1997
- Connecticut 1995
- Maryland 1995

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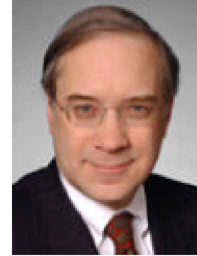

Experience

David Sahr advises domestic and foreign financial institutions on establishing and expanding their operations in the United States as well as on related regulatory, enforcement and compliance matters. He represents banks and their affiliates before federal and state agencies, including the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation and the Securities and Exchange Commission. He assists financial institutions in the development and sale of new products including compliance with state and federal banking, securities and commodities laws. David also advises and represents foreign banks on federal legislative developments affecting their US banking and non-banking operations.

Notable Engagements

- Represented a foreign bank in the establishment of a US bank subsidiary including obtaining regulatory approvals from the chartering authority, the Federal Deposit Insurance Corporation and the Board of Governors of the Federal Reserve System.
- Represented a foreign bank in acquiring a US energy trader including obtaining approval of the Board of Governors of the Federal Reserve System for authority to engage in activities that are "complementary" to activities that are financial in nature.
- Represented a foreign bank in complying with banking, securities and other laws in connection with the development and sale of complex financial products and structures.
- Represented foreign and domestic banks in complying with Bank Secrecy Act requirements and in responding to enforcement actions brought by federal banking agencies.
- Represented several foreign banks in establishing branches, agencies and representative offices in the United States.

Education

Georgetown University Law Center, JD, magna cum laude, 1982 • London School of Economics, MS, 1977 • Georgetown University, BS, magna cum laude, 1976

Admissions

- District of Columbia, 1982

Publications

- "Developments & Perspectives: Cross-Border Aspects of US Regulation of German Banks," chapter in *Bankaufsichtsrecht - Entwicklungen und Perspektiven*, edited by Dr. Simon G. Grieser and Dr. Manfred Heeman, December 2009
- "Must Private Banking Be "Pushed" Out of Banks? --- Implications of the SEC's Proposed Regulation B," co-author, *The Investment Lawyer*, Vol. 11 No. 9, September 2004, Aspen Publishers
- "U.S. Anti-Money Laundering Legislation," co-author, *Law and Business Review of the Americas*, Fall 2002, Kluwer Law
- "The EC's Single Banking Market and Its Implications for the U.S. Financial System," Section C of the ABA's *EC 1992: Reciprocity and Market Access Issure for Financial Services*, 1992, ABA Division for Professional Development

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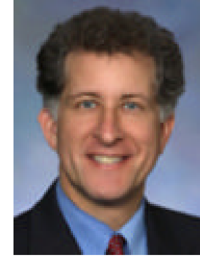

Experience

Jeffrey Taft is a regulatory attorney whose practice focuses primarily on banking regulations, bank receivership and insolvency issues, payment systems, consumer financial services, privacy issues and anti-money laundering laws. He has extensive experience counseling financial institutions, merchants and other entities on various federal and state consumer credit issues, including compliance with the Consumer Financial Protection Act, Truth-in-Lending Act, the Fair Credit Reporting Act, the Electronic Fund Transfer Act, the Equal Credit Opportunity Act, the Fair Debt Collection Practices Act, the Real Estate Settlement Procedures Act, state and federal unfair or deceptive practices statutes, the Bank Secrecy Act, the USA PATRIOT Act, OFAC regulations and other anti-money laundering laws; and the creation and implementation of privacy and information security programs under Title V of the Gramm-Leach Bliley Act and state privacy laws.

Jeff regularly represents banks, bank holding companies, trust companies and other financial service providers on regulatory matters, including the development and operation of multi-state fiduciary, deposit and credit card programs. He has also advised merchants and financial services companies on issues relating to credit cards, debit cards, gift cards, wire and ACH transfers and other payment products.

Prior to joining the Washington, DC office of Mayer Brown in 1998, Jeff held a senior position with a prominent Ohio law firm.

Notable Engagements

- Advised several diversified financial services companies in connection with data security breaches and their security breach response plans and procedures.
- Represented several clients in evaluating alternative structures for delivering consumer financial services and chartering industrial loan corporations, thrifts and banks.
- Advised investment banks, and other secondary market participants on federal, state and local predatory lending laws and assignee liability.
- Advised several financial services companies on interest rate exportation, preemption and licensing issues in connection with their multi-state consumer lending programs.

Education

Harvard Law School, LLM, 1993 • University of Pittsburgh School of Law, JD, cum laude, 1992 • Tulane University, BA, 1989

Admissions

- District of Columbia, 2001
- Ohio, 1994
- New York, 1993

Publications

Author

- "Banking and Consumer Credit Regulation," Chapter 13, *Credit Market and Subprime Distress: Responding to Legal Issues*, Jon Van Gorp, ed., Practising Law Institute, 2008
- "Disclosure Better Than Limiting Credit," *American Banker*, May 9, 2008
- "The Latest Attempt to Regulate Subprime Mortgage Lending: The Federal Banking Agencies Issue the Subprime Lending Guidance," *Real Estate Finance*, October 2007
- "Federal Banking Agencies Issue Final Rules Regarding Medical Information," *Electronic Banking Law and Commerce Report*, January/February 2006
- "E-Commerce Activities of Financial Institutions Including the Delivery of Loan, Deposit and Stored Value Products," Chapter 7, *E-Commerce: Financial Products and Services,* Brian W. Smith, ed., Law Journal Press, 2001/supp. 2005
- "An Overview of the Electronic Fund Transfer Act and Regulation E and their Application to E-Commerce," 57 *Cons. Fin. L.Q. Rep.* 198, 2003
- "Internet-based Payment Systems: An Overview of the Regulatory and Compliance Issues," 56 *Cons. Fin. L.Q. Rep.* 42, 2002
- "Bank Insurance Activities After the Gramm-Leach-Bliley Act," 54 *Cons. Fin. L.Q. Rep*. 306, 2000
- "Changes to the Lending Process Necessitate Changes to Regulation B and the Equal Credit Opportunity Act," 53 *Cons. Fin. L.Q. Rep*. 156, 1999
- "The Equal Credit Opportunity Act's Self-Testing Privilege: A Setback for Creditors," 115 *Bank L.J.* 671, 1998

Co-Author

- "The Federal Government's Response to the Subprime Meltdown of 2007 and Related Market Crises," Chapter 21, *Securitization of Financial Assets*, Jason H. P. Kravitt, ed., Aspen Publishers, 2010
- "Recent U.S. Financial Reforms Affecting Structured Finance: Missing the Mark or Too Soon to Tell," Journal of Structured Finance, Fall 2010
- "The Troubled Asset Relief Program," Chapter 2, *The Federal Financial Markets Rescue*, Charles Horn, ed., Practising Law Institute, 2009
- "Other Emergency Economic Stabilization Act Provisions," *The Federal Financial Markets Rescue*, Charles Horn, ed., Practising Law Institute, 2009
- "Related Financial Rescue Provisions," Chapter 7, *The Federal Financial Markets Rescue*, Charles Horn, ed., Practising Law Institute, 2009
- "Federal Reserve Board Issues Final Rule Addressing Mortgage Lending and Servicing Practices Under Regulation Z," *Real Estate Fin. J. 81*, Fall 2008
- "Changing the Rules," *Mortgage Risk Magazine*, November 2007
- "Compliance Obligations and Enforcement Actions under the USA PATRIOT Act," 60 *Cons. Fin. L.Q. Rep*. 316, 2006

- "Customer Identification, Money Laundering Compliance and Safeguarding of Customer Information," 58 *Cons. Fin. L.Q. Rep.* 286, 2004
- "SEC Is in a Can't Win Position with Broker-Dealer Proposal," *American Banker* (July 16, 2004)
- "The FACT Act: The Latest Attempt at Overhauling the Fair Credit Reporting Act and the Fairness and Accuracy of Consumer Reports," 121 *Bank L.J.* 194, 2004
- "Federal Banking Agencies Issue Final Customer Identification Rules under the USA PATRIOT Act," *Real Estate Fin. J*. 79, Fall 2003
- "The Changing Landscape of Federal Money Laundering, An Overview of the USA PATRIOT Act and Related Developments," 57 *Cons. Fin. L.Q. Rep*. 108, 2003
- "Financial Modernization in the New Millennium: Implementation of the Gramm-Leach-Bliley Act," 116 *Bank. L.J*. 689, 1999
- "The Latest Attempt to Make the Fair Credit Reporting Act More Fair," 51 *Cons. Fin. L.Q. Rep.* 304, 1997
- "Credit Screening: The Rest of the Story," 49 *Cons. Fin. L.Q. Rep*. 391, 1995

Contributor

- Chapter 13, "Public Enforcement"; and Chapter 15, "Summary of TILA Regulation and Litigation Developments" in Alvin Harrell, ed., *Truth in Lending,* American Bar Association Supplement, 2007, 2008 and 2009

Seminars & Presentations

- "What You Should Expect from the CFPB?" – Source Media 23rd Annual Card Forum, April 2011
- "Data Privacy: A Modern Day Mission Impossible?" – 55th Annual Canadian Reinsurance Conference, April 2011
- "Implementation of the Dodd-Frank Act – Implications for Foreign Banking Organizations," Institute of International Bankers Webinar, April 2011
- "The Dodd-Frank Act: An Overview," George Mason University School of Law – Attorneys General Education Program, March 2011
- "The Consumer Financial Protection Act and the BCFP," UNC School of Law Festival of Legal Learning, February 2011
- "Loan Modifications, Privacy and Other Federal Developments including the Dodd-Frank Act," Consumer Credit 2010, October 2010
- "Securitization Reform: Will the Cure Kill the Patient," American Bar Association's Annual Meeting, August 2010
- "Regulatory Developments Involving Credit Cards and Overdrafts," UNC School of Law Festival of Legal Learning, February 2010
- "Financial Reform," 9th Banking and Finance Forum, Mecklenberg County Bar, North Carolina, November 2009
- "Treasury Loan Modification Program Developments," Consumer Credit 2009, November 2009
- "FTC Decision Jolts Collection of Customer Data," Mayer Brown LLP, July 22, 2009
- "The Financial Crisis: Legislative and Regulatory Responses," UNC Banking Law Institute, March 2009
- "Where is Washington Headed," BNA Regulatory Reform Briefing, March 2009
- "Overview of Federal and State Consumer Credit Laws," UNC School of Law Festival of Legal Learning, February 2009

- "Financial Rescues and Failures," 8th Banking and Finance Forum, Mecklenburg County Bar, North Carolina, November 2008
- “Know Your Customer, SAR, CTR, Identity Theft and USA PATRIOT Act Developments,” Consumer Credit 2008, November 2008
- "Impact of the Credit Crisis on Banking Regulations: New Rules of the Road,“ American Fiduciary Network, October 2008
- “Getting Under the TARP: Selling Toxic Assets to the Government & Government Purchase of Bank Stock,” American Fiduciary Network, October 2008
- “Financial Institution Insolvency Issues,” Consumer Debt Collection Loan Servicing and Bankruptcy, October 2008
- “Subprime Lending: Critical Legislative and Regulatory Developments,” PLI Briefing, July 2008
- “The Deal Perspective: Addressing Privacy and Security in Commercial Transactions,” PLI’s Ninth Annual Institute on Privacy and Security Law, July 2008
- “Overview of the Fair Credit Reporting Act and Recent Developments,” UNC School of Law Festival of Legal Learning, February 2008
- “Deceptive or Unfair Practices Involving the Sale and Marketing of Consumer Financial Products and Services,” UNC School of Law Festival of Legal Learning, February 2008
- "The Upheaval in the Subprime Market: The Direct and Indirect Effects of Same on the Structured Finance Market," Structured Finance Committee of the New York City Bar Association, January 2008
- “Regulatory Developments,” 7th Banking and Finance Forum, Mecklenburg County Bar, North Carolina, November 2007
- “Privacy, Safeguarding and Information Data Security,” Consumer Credit 2007, November 2007
- “Legal, Regulatory and Compliance Issues,” Mortgage Servicing Conference – Source Media, June 2007
- “Subprime Mortgage Finance Public Policy,” American Securitization Forum Annual Meeting, June 2007
- “Fair Credit Reporting Act: Rights of Consumers and Obligations on Users and Furnishers of Credit Information,” UNC School of Law Festival of Legal Learning, February 2007
- "Update on the FACT Act, the USA PATRIOT Act, BSA, Anti-Terrorism and Related Issues," Consumer Credit 2006, November 2006
- "Securitization Ethics and Professional Responsibility: Perspectives on the Appropriate Handling of Customer Data in Securitization Transactions," American Securitization Forum, July 2006
- "Federal Preemption in Mortgage Lending and Finance" and "Privacy, FCRA, the FACT Act and Related Concerns in Mortgage Lending and Loan Servicing," Conference on Consumer Finance Law — Residential Mortgage Lending and Servicing, July 2006
- "FACT Act Implementation," UNC School of Law Festival of Legal Learning, February 2006
- "Information Security," Consumer Credit 2005, November 2005
- “FACT Act Implementation,” America’s Community Bankers 2005 National Compliance and Attorneys Conference, September 2005
- "Unfair or Deceptive Practices in the Sales, Marketing and Servicing of Consumer Financial Services and Products," UNC School of Law Festival of Legal Learning, February 2005
- “Lessons From ChoicePoint and Lexis-Nexis,” Stafford Publishing Teleseminar, August 2005
- "The Impact of Predatory Lending Laws on Secondary Market Transactions and Participants," Consumer Credit 2004, November 2004
- “Operational Risk,” America’s Community Bankers 2004 National Compliance and Attorneys Conference, September 2004

Professional Activities

- American Bar Association: Business Law Section, Cyberspace Law, Banking Law and Consumer Financial Services subcommittees
- New York State Bar Association: Business Law Section

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"A pleasure to work with and does excellent work." — *Chambers USA 2010*

Experience

Jon Van Gorp leads the Chicago office's banking and finance practice. His experience includes public and private securities offerings, assets sales, structured finance transactions, leveraged leases, derivatives, synthetic risk transfer programs and financial insurance. He brings this broad range of knowledge to bear for clients seeking to fund their operations, sell or acquire asset portfolios and businesses, or manage and hedge their exposures by buying and selling risk.

Jon has built his practice on innovation. He has been part of the legal team that completed many first of its kind transactions including the first auto leveraged lease transaction funded with asset-backed debt, the first synthetic transfer of risk related to a portfolio of consumer auto leases, the first issuance of bank debt guaranteed by Farmer Mac, the first auto receivables shelf registration statement to go effective under regulation AB, the first publicly offered CDO of mezzanine MBS debt, and the first securitization of Mexican mortgage loans funded in the US capital markets. He is highly skilled at finding ways to fund difficult to finance assets such as nonperforming mortgage loans, distressed ABS and MBS, mortgage servicing rights and servicing advances.

Jon's reputation for innovation was recently recognized by the Financial Times, which ranked a risk protection arrangement that he helped design as the second most innovative M&A transaction of 2010.

For several years Jon has been ranked as an outstanding lawyer by *Chambers USA*, *Chambers Global*, *Legal 500* and *IFLR 1000*. Clients praise his creative lawyering and commitment to client service. *Chambers USA*'s 2009 edition highlighted Jon's ability to devise creative solutions to a variety of issues. *Legal 500*'s 2010 edition called him "an excellent Structured Finance lawyer, outstanding on all of the elements." *IFLR 1000*'s 2008 edition noted that Jon's work receives "substantial praise from clients and competitors."

In 2008, Jon was named on *Crain's Chicago Business* "40 Under 40," a prestigious honor where he was applauded for his ability to "operate like an executive, moving beyond legal questions and offering strategic and tactical insight rare for a lawyer of his vintage." This is one of the most prestigious awards that a young professional can receive, and Jon now joins other "40 Under 40" alumni including President Barack Obama.

Jon is a frequent speaker and author on finance related topics. In 2008, Jon edited and co-authored *Credit Market & Subprime Distress: Responding To Legal Issues* , which is a best-selling legal treatise on the credit crisis published by the Practicing Law Institute. Reviews of this book have praised it for providing "a clear analysis of the relevant issues without getting bogged down in the minutiae of the procedures."

Top-tier media such as the Associated Press, Bloomberg News, Dow Jones Newswires, Financial Times, New York Times and The Wall Street Journal turn to Jon for his insights and analysis of issues related to the finance and banking industries.

Jon is also active in the Chicago community as a Leadership Greater Chicago fellow and an adjunct professor at the John Marshall Law School, Chicago, Illinois.

Notable Engagements

- Structured and negotiated multiple public auto loan and auto lease term securitization transactions, including transactions with asset-backed derivative instruments and financial guaranty insurance.
- Structured and negotiated multiple home equity loan securitization transactions issuing both public and private securities, including REMIC and non-REMIC structures for home equity lines of credit, home equity loans and nonperforming loans.
- Prepared multiple Regulation AB compliant shelf registration statements for auto receivables, mortgage loans and home equity loans, including registrations by foreign issuers.
- Negotiated asset-backed interest rate and currency swap transactions, including transactions conforming with criteria for ratings dependent swaps.
- Negotiated and documented multiple market value swaps for mortgage loan-backed and securities-backed funding vehicles.
- Negotiated credit derivatives for a large monoline insurance company.
- Structured and negotiated multiple one-off and flow asset purchase arrangements for mortgage loans, mortgage servicing rights, auto loans, insurance policies, and consumer finance origination and servicing platforms, ranging in size up to $55 billion.
- Structured and negotiated several cross border mortgage loan securitization transactions, including transactions issuing publicly registered asset-backed securities.

Education

Southern Methodist University Dedman School of Law, JD, cum laude, 1994; Staff Editor, The International Lawyer • Calvin College, BA, 1991

Admissions

- New York, 2004
- Illinois, 1998
- Texas, 1994

Publications

- Editor and author, Practicing Law Institute (PLI) treatise, *Credit Market & Subprime Distress: Responding To Legal Issues*, November 2008
- "Synthetics Securitizations under Basel I and Basel II," *Review of Banking & Financial Services*, July 2008
- "Securitizations After Securities Offering Reform," *Journal of Structured Finance*, Winter 2006
- "Impact of Regulation AB on Auto Loan and Lease Securitization," *Journal of Structured Finance*, Spring 2005
- "Funding Mortgage Loans With Extendible Note Funding Facilities," *Journal of Structured Finance*, Fall 2004
- "Collateral in Eastern Europe: Problems and Solutions," 29 *International Lawyer*, 83 (1994)

TAB 10

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