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The Dodd-Frank Wall Street Reform and Consumer Protection Act

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The financial crisis began nearly three years ago following the collapse of the subprime mortgage-backed securities market and resulting credit crunch, deepened with the bailout of Bear Stearns in March 2008 and became full blown with the failure of Lehman Brothers in September 2008. Now, nearly three years since the beginning of the crisis, nearly two years after the collapse of Lehman Brothers and more than a year after the Administration announced its proposal for addressing the causes of the crisis through financial regulatory reform legislation, that legislation has become a reality. On July 21, 2010, President Obama signed the “Dodd-Frank Wall Street Reform and Consumer Protection Act” (the “Act”) into law.

The crisis spawned calls for financial regulatory reform on numerous fronts. The subprime crisis led to proposals for more stringent regulation of the securitization markets and the credit rating process as well as enhanced consumer protection from predatory lending practices. The rescues of Bear Stearns and AIG and investment of substantial amounts of TARP funds in a number of large bank holding companies led to concerns about moral hazard and “too big to fail”. The collapse of AIG, caused largely by credit default swaps, led to calls for greater transparency and reform of the derivatives market. The bankruptcy of Lehman Brothers, as well as the prospect of bankruptcies for Bear Stearns and AIG, led to proposals for a more orderly resolution process for systemically important institutions. Pay packages at firms that collapsed or received Government financial assistance led to proposals to reform executive compensation and corporate governance practices at financial institutions. Calls for similar reforms at all public companies followed. The crisis as a whole led to calls for an enhanced regulatory framework to identify and regulate institutions and activities that pose systemic risk. The Act seeks to address all these concerns and more, although notably it does not address certain key players such as Fannie Mae and Freddie Mac. As with all major pieces of legislation, it embodies a number of compromises and reflects judgments and assumptions that may or may not prove to be correct.

Despite its breadth and extensive coverage, the Act remains, in many respects, conceptual in nature, with many of the details left to future rulemaking and study. The Act requires several hundred separate rulemaking actions and numerous studies by different agencies. For this reason, its complete scope and impact will not become clear for a number of years, and these projects will require a substantially increased commitment of resources by the relevant Federal agencies. Moreover, it remains to be seen how the Act will ultimately affect the U.S. economy, including the availability and allocation of credit by the banking system.

Although the Act is a significant overhaul of the substantive aspects of Federal regulation of financial institutions, it is also notable for giving substantial new authority and influence over financial regulation to the Treasury Secretary, a political appointee.

While much of the Act is directly applicable only to financial institutions, it will affect all participants in the U.S. financial system and has important provisions that will apply to public companies generally.

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The Act expands and overhauls the regulation of financial institutions, and includes (i) provisions designed to mitigate systemic risk, (ii) enactment of the "Volcker Rule", (iii) establishment of the Bureau of Consumer Financial Protection (the "Bureau") within the Federal Reserve and (iv) other financial regulatory reforms.

Corporate Governance and Executive Compensation Provisions for Public Companies 6

The Act includes a number of important corporate governance and executive compensation provisions applicable to public companies generally, including (i) heightened independence obligations for compensation committees, (ii) expanded authority for compensation committees regarding compensation consultants, legal counsel and other advisors, (iii) new required disclosures about executive compensation and hedging policies for directors and employees, (iv) a requirement that companies adopt and implement clawback policies, (v) the imposition of advisory shareholder votes on executive compensation ("say-on-pay") and "golden parachutes", (vi) additional limitations on broker discretionary voting and (vii) an express grant to the Securities and Exchange Commission (the "SEC") of authority to adopt proxy access rules.

Reform of the Swaps Market 7

The Act mandates central clearing, margining and exchange trading for many swaps, mandates central reporting of all swaps and gives the Commodity Futures Trading Commission (the "CFTC") and the SEC broad authority over the "new" swaps market and its participants.

Securities Litigation and Enforcement 9

The Act makes a number of changes affecting securities litigation and enforcement, including (i) expansion of the SEC's authority to bring "aiding and abetting actions", (ii) expansion of the anti-manipulation provisions of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), (iii) the grant of subject matter jurisdiction to federal district courts over regulatory and criminal antifraud actions, (iv) expansion of the SEC's enforcement powers, (v) creation of an expansive whistleblower regime and (vi) amendments to the statute of limitations and sentencing guidelines for securities fraud.

Regulation of Credit Ratings Disclosures and Credit Ratings Agencies 11

The Act changes the rules for the public disclosure of credit ratings and imposes new statutory requirements on credit ratings agencies (or nationally recognized statistical rating organizations ("NRSROs")). These changes include (i) immediate repeal of SEC Rule 436(g), (ii) elimination of the specific Regulation FD exemption for credit ratings agencies, (iii) SEC regulation of NRSROs and (iv) application of the enforcement and civil liability provisions of the Exchange Act to statements by credit ratings agencies.

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The Act makes certain other changes to the securities laws and mandates studies that may lead to other future changes. These provisions affect, among other things, (i) securities lending, (ii) short sales, (iii) the definition of "accredited investor" under the Securities Act of 1933, as amended (the "Securities Act"), (iv) Section 13 and 16(a) reporting, (v) disclosure by resource extraction issuers and (vi) asset-backed securities transactions.

This memorandum is a summary for general information only and does not address all provisions of the Act or constitute legal advice. Facts and circumstances vary. We make no undertaking to advise recipients of any legal changes or developments.

OVERHAUL OF REGULATION OF FINANCIAL INSTITUTIONS

Mitigation of Systemic Risk

The Act seeks to mitigate the risks of another threatened collapse of the financial system in several ways, including: the creation of a new body to monitor systemic risk and identify institutions and activities that pose threats to financial stability; enhanced supervision and regulation of systemically important institutions; and the establishment of a new resolution process administered by the Federal Depository Insurance Corporation (the "FDIC") for the reorganization or liquidation of distressed financial institutions whose failure threatens the financial stability of the United States.

Financial Stability Oversight Council: The Act creates a new body, the Financial Stability Oversight Council (the "Council"), with the following purposes:

- to identify risks to U.S. financial stability that could arise from large, interconnected bank holding companies or nonbank financial companies, or risks that could arise outside the financial services marketplace;
- to promote market discipline, by eliminating expectations on the part of shareholders, creditors and counterparties that the Government will shield them from losses in the event of failure; and
- to respond to emerging threats to the stability of the U.S. financial system.

The Council will have 10 voting members, consisting of the Treasury Secretary, who also acts as Chairman of the Council, the Chairman of the Federal Reserve, the Comptroller of the Currency, the Director of the Bureau of Consumer Financial Protection (a new agency created by the Act), the Chairmen of the FDIC, SEC and CFTC, the Director of the Federal Housing Finance Agency, the Chairman of the National Credit Union Administration Board and an independent member having insurance expertise appointed by the President and confirmed by the Senate, and five nonvoting members. Certain important actions such as designating systemically important nonbank financial companies require a two-thirds vote, including the affirmative vote of the Treasury Secretary (giving the Secretary an effective veto over those actions).

The Council is authorized to determine which domestic or foreign nonbank financial companies,[1] which financial activities of domestic or foreign nonfinancial companies and which financial market utilities and payment, clearance and settlement activities are systemically important, and to require the supervision and regulation of those companies and activities by the Federal Reserve. The Council may also make recommendations to the Federal Reserve concerning the establishment and refinement of more stringent prudential standards and reporting and disclosure requirements applicable to systemically important institutions and activities.

Enhanced Supervision and Regulation of Systemically Important Institutions: The Act contains provisions aimed at enhancing the supervision and regulation of systemically important institutions and reducing the systemic risk that they present. The Federal Reserve must establish prudential standards (including risk-based capital requirements and leverage limits, liquidity requirements, overall risk management requirements, resolution plan and credit exposure report requirements and concentration limits) for systemically important institutions that are more stringent than those applicable to other financial institutions, and is also authorized to establish contingent capital requirements, short-term debt limits (including off-balance sheet exposures) and other prudential standards.

The Act also gives the Federal Reserve authority to impose additional requirements and limitations on systemically important institutions that pose a threat to U.S. financial stability and requires that systemically important institutions must periodically prepare and submit resolution plans (so-called "living wills") for their rapid and orderly resolution in the event of material financial distress or failure.

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[1] In this memorandum, the term "systemically important institution" refers to domestic or foreign nonbank financial companies designated by the Council for supervision and regulation by the Federal Reserve as well as bank holding companies with $50 billion or more in total consolidated assets (which are automatically subject to heightened prudential standards without the requirement of any determination by the Council). In addition, under the so-called "Hotel California" rule, any company that was a bank holding company with $50 billion or more in total consolidated assets as of January 1, 2010 and received TARP funds will be treated as a systemically important institution even if that company ceases to be a bank holding company at any time after January 1, 2010.

Finally, the Act contemplates additional measures applicable to a broad range of financial companies, such as more stringent leverage and risk-based capital requirements for all banks and bank holding companies, “stress tests” for systemically important institutions and all financial companies with $10 billion or more in assets and requirements that certain public financial companies have risk committees.

Orderly Liquidation Authority: The Act establishes a new resolution process administered by the FDIC that, if used, will govern the reorganization or liquidation of a wide range of U.S. financial companies (including bank holding companies, insurance companies and broker-dealers) and their subsidiaries instead of the Bankruptcy Code and other applicable insolvency laws. To appoint the FDIC as receiver of a failing financial company, the Treasury Secretary, acting upon the recommendation of both the Federal Reserve and the applicable Federal agency and in consultation with the President, must determine, among other things, that the financial company is in default or in danger of default, that the failure of the financial company and its resolution under otherwise applicable insolvency laws would have serious adverse effects on financial stability in the United States and that no viable private sector alternative is available.

The appointment of the FDIC as receiver also requires the consent of the financial company’s board of directors or, if the board does not consent, an order from the U.S. District Court for the District of Columbia. Any appeal of the District Court’s decision must be considered on an expedited basis, but the decision is not subject to stay or injunction pending appeal.

As receiver, the FDIC will have the power to take over, operate and collect the assets of the financial company, merge the financial company with another company, transfer any asset or liability of the financial company, organize one or more “bridge financial companies” to assume liabilities and purchase assets of the financial company and liquidate and wind-up the affairs of the financial company. The FDIC may provide financial assistance in connection with the resolution of the financial company, but may not acquire an equity stake. The FDIC is required to ensure that creditors and shareholders bear any losses and that management and the directors responsible for the failed condition are removed.

The orderly liquidation authority established under the Act does not apply to insured depository institutions, so the FDIC’s existing resolution powers for those institutions (which served as the basis for many features of the new authority) will remain in place.

Volcker Rule

The so-called Volcker Rule of the Act provides that a “banking entity” may not engage in proprietary trading or acquire ownership interests in or sponsor hedge funds or private equity funds, with certain exceptions. The Volcker Rule becomes effective on the earlier of 12 months after the issuance of final rules and two years after enactment, subject to a transition period and possible extensions. “Banking entity” means an insured depository institution, any company that controls an insured depository institution or that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978, and any affiliate or subsidiary of any of those entities.

The ban on proprietary trading excludes underwriting and market-making activities (to the extent such activities are designed not to exceed the reasonably expected near-term demands of clients, customers or counterparties), risk-mitigating hedging activities that are designed to reduce the specific risks in connection with or related to individual or aggregated positions, contracts or other holdings and certain other permitted activities.

In addition, the Act includes exceptions to the ban on sponsoring or investing in hedge funds or private equity funds that permit a banking entity to organize and offer a fund as long as, among other things, the banking entity provides bona fide trust, fiduciary or investment advisory services, the fund is organized and offered only in connection with providing those services and only to customers of those services and the banking entity does not acquire or retain an investment in the fund other than investments for the purpose of establishing the fund and providing the fund with sufficient initial equity to attract unaffiliated investors so long as the investment is reduced to 3% or less of the total ownership interests in the fund within one year.

Although the Volcker Rule’s bans on proprietary trading and sponsoring or investing in hedge funds or private equity funds do not apply to systemically important nonbank financial companies, the Act subjects those companies to additional capital requirements and certain other quantitative limits with respect to these activities.

Consumer Financial Protection

The Act establishes a new Bureau of Consumer Financial Protection within the Federal Reserve headed by a Director appointed by the President and confirmed by the Senate. The Bureau will have broad authority over consumer financial products and

services. The Bureau's jurisdiction will not cover specified entities and activities, including those regulated by the SEC or the CFTC, insurance, auto dealers, real estate brokers, accountants and lawyers.

The Bureau will have autonomous authority to make consumer protection rules governing all financial institutions and other persons offering consumer financial services or products, including most banks, mortgage lenders, credit card and private student loan companies and payday lenders. The Bureau will also have the authority to examine and enforce Federal consumer financial protection law for insured depository institutions and credit unions with assets over $10 billion (and their affiliates) and all mortgage-related businesses, payday lenders, student lenders and other large participants in any market for consumer financial products or services (which participants will be defined by the Bureau). Insured depository institutions and credit unions with assets of $10 billion or less (but not their affiliates) will have to comply with the Bureau's rules, but enforcement and supervision for these entities will remain with their current primary regulator.

Other Financial Regulatory Reforms

The Fed's "Lender of Last Resort" Authority: The Act limits the Federal Reserve's "lender of last resort" authority under Section 13(3) of the Federal Reserve Act to programs or facilities with broad-based eligibility instead of loans to individual firms (as in the case of AIG) in order to ensure that any emergency lending program or facility is for the purpose of providing liquidity to the financial system, and not to aid a failing financial company, and requires that the collateral securing any emergency loans is sufficient to protect taxpayers from losses and that any such program is terminated in a timely and orderly fashion. The establishment of any program or facility by the Federal Reserve also requires the prior approval of the Treasury Secretary. The Federal Reserve must report to Congress on the justification for the program or facility, the identity of the recipients and other material terms of any loans or financial assistance, within seven days.

FDIC Guarantee Programs: The Act authorizes the FDIC to create a widely available program to guarantee obligations of solvent insured depository institutions or solvent depository institution holding companies (including affiliates) during times of severe economic distress upon a determination by the FDIC and the Federal Reserve that there is a liquidity event and that failure to take action would have serious adverse effects on financial stability or economic conditions in the United States. The Treasury Secretary, in consultation with the President, must determine the maximum amount of debt that the FDIC may guarantee, and the issuance of guarantees by the FDIC up to this amount is subject to approval by Congress.

Elimination of the Office of Thrift Supervision: The Act provides for the elimination of the Office of Thrift Supervision and the transfer of its responsibilities to the Federal Reserve, the Office of the Comptroller of the Currency and the FDIC. As a result, the Federal Reserve will supervise savings and loan holding companies and their non-depository institution subsidiaries, the Office of the Comptroller of the Currency will supervise federal savings associations and the FDIC will supervise state savings associations. The transfer of responsibilities will occur one year after enactment (subject to extension to 18 months after enactment) and the Office of Thrift Supervision will be abolished 90 days after the transfer date.

Collins Amendment: Since a Federal Reserve ruling in the late 1990s, U.S. bank holding companies have been permitted to include trust preferred securities as an element of Tier 1 capital. The Act, in a provision known as the Collins Amendment, imposes new minimum leverage capital standards on U.S. bank holding companies, including U.S. intermediate holding companies of foreign banking organizations, thrift holding companies and systemically important nonbank financial companies. After a three-year transition period that begins in January 2013, hybrid securities such as trust preferred securities may be included only in Tier 2 capital. The Act includes limited exceptions, including for bank and thrift holding companies with less than $15 billion in assets and for TARP Preferred. One obvious consequence of this change is that many bank holding companies will need to come to the capital markets in the coming years to issue securities that meet the new definition of Tier 1 capital to replace the capital represented by trust preferred securities.

Limitations and Conditions on Mergers and Acquisitions: The Act imposes several new approval requirements and restrictions on mergers and acquisitions by financial institutions based on the size of the transaction or the total deposits or liabilities of the combined company.

Source of Strength: The existing requirement that bank holding companies serve as a source of financial and managerial strength for their subsidiary banks has been extended to all holding companies controlling insured depository institutions, including thrifts, industrial banks and industrial loan companies.

CORPORATE GOVERNANCE AND EXECUTIVE COMPENSATION PROVISIONS FOR PUBLIC COMPANIES

The Act makes a number of important changes to the corporate governance and executive compensation landscape for public companies generally (that is, not just financial institutions). Many of these changes require implementing regulations from the SEC and the stock exchanges (through listing standards).

Corporate Governance Matters

Proxy Access: The Act expressly authorizes the SEC to adopt so-called "proxy access" rules that would entitle shareholders meeting certain criteria to place their own nominees for a company's board of directors upon the company's proxy card (at company expense). The Act does not, however, require the SEC to adopt any such rules. Proxy access has been a key, and controversial, issue for the SEC during the past year and the agency currently has a proxy access proposal pending. Observers expect the SEC to act quickly to adopt final rules in this area now that the Act has settled any question of the SEC's authority and it is expected that those rules will be effective for the 2011 proxy season.

Disclosure of CEO/Chairman of the Board Structure: The Act will require U.S. public companies to disclose in their annual proxy statements the reasons why the company decided to have the positions of chief executive officer and chairman of the board of directors filled by the same person or by different individuals. The SEC has already adopted rules requiring this disclosure, so this provision of the Act is not considered to have a great impact. This is a disclosure requirement for proxy statements and thus will not apply to foreign private issuers absent the SEC taking additional steps to extend the requirement.

Limitations on Broker Discretionary Voting (Rule 452): Following up on the New York Stock Exchange's rule change last year, which eliminated the ability of brokers to cast uninstructed votes for client shares with regard to director elections, the Act has codified this limitation and also prohibits broker discretionary voting with regard to shareholder votes on executive compensation matters (including so-called "say-on-pay" votes discussed below) and any other "significant matter" as defined by SEC rule. To the extent that U.S. brokers are casting votes on these matters with regard to shares held in foreign companies, the limitations will apply to those votes just as they apply to votes cast with regard to U.S. domestic companies.

Executive Compensation Matters

"Say-on-Pay" and "Say-on-Golden-Parachutes" Votes: The Act mandates that shareholders be given an advisory (non-binding) vote on the compensation paid to executive officers at least once every three years (but possibly every year, or once every two years), with the frequency of that vote to be determined by the shareholders themselves. That vote on the frequency of say-on-pay votes must itself be afforded shareholders at least once every six years. The Act also mandates that shareholders be given an advisory vote on so-called "golden parachutes" (compensation arrangements that are tied to mergers or acquisitions) in connection with any merger or acquisition transaction requiring a proxy or consent solicitation, unless those arrangements had already been covered by a prior say-on-pay vote. The new say-on-pay requirement will be effective for any annual meeting that occurs after January 21, 2011. Similarly, the new say-on-golden-parachutes provision will be effective for any merger or acquisition transaction on which the shareholders are voting after January 21, 2011.

As a corollary to these new vote requirements, the Act also obliges every institutional investment manager subject to Section 13(f) of the Exchange Act to disclose, at least annually, how it voted on such matters.

Compensation Committee Independence and Responsibilities for Consultants, Legal Counsel and Other Advisors: The Act requires, through future listing standards, that all members of any public company's compensation committee be independent directors. For this purpose, the Act also provides guidance on factors that the stock exchanges should consider in crafting their definitions of "independent". Foreign private issuers are expressly exempted from this listing standard requirement as long as they provide annual disclosure about why they do not have an independent compensation committee. In addition to these independence requirements, the Act also mandates that compensation committees must be empowered to retain, oversee and compensate consultants, independent legal counsel and other advisors. While not requiring that compensation committees retain only independent consultants and advisors, the Act does impose an obligation that compensation committees consider the SEC's definition of "independent" before engaging consultants, legal counsel or other advisors. The SEC and stock exchanges have been given fairly broad exemptive authority with regard to this requirement but these new required listing standards will apply to foreign private issuers listed in the U.S. unless the regulators use that exemptive authority to provide otherwise.

Required New Compensation Disclosures: The Act will require that public companies provide three new pieces of compensation disclosure. Companies will be required to describe in their annual proxy statements (i) the relationship between "executive compensation actually paid" and the financial performance of the issuer, "taking into account any change in the

value of the shares of stock and dividends of the issuer and any distributions", and (ii) whether directors and employees are permitted to purchase financial instruments designed to "hedge or offset any decrease in the market value of equity securities", whether granted to the director or employee as compensation or held, directly or indirectly, by the director or employee.

These disclosure changes will be accomplished through future SEC amendments to Item 402 of Regulation S-K and Schedule 14A upon which U.S. domestic issuers file their proxy statements. Presumably therefore, these rules will not apply to foreign private issuers, although nothing can be certain pending the SEC's required rulemakings.

As the third new disclosure item, companies will be required to disclose the median of the annual total compensation of all employees of the company (other than the CEO) as well as the annual total compensation of the CEO and a ratio comparing those two figures. Interestingly, the Act directs the SEC to accomplish this new requirement by amending Item 402 of Regulation S-K and imposing the requirement with regard to any filing described in Item 10 of Regulation S-K. Although foreign private issuers do not generally have to provide disclosure pursuant to Item 402, the various reports they do file with the SEC (such as Form 20-F) are covered by Item 10, so it is unclear how this provision will affect foreign private issuers.

Clawbacks: The Act requires that the stock exchanges adopt listing standards requiring that a listed company develop and implement a clawback policy that provides that in the case of an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirement, the company will recover from all present and former "executive officers" any incentive-based compensation (including stock options) received in excess of what would have been paid based on the company's results after giving effect to the accounting restatement during the three-year period preceding the date on which the company is required to prepare the restatement, regardless of whether there was any fraud or misconduct involved (that is, the policy must apply to any accounting errors, intentional or not, resulting in a material restatement).

There is no express exemption for foreign private issuers from this clawback policy, although we understand that restatements are relatively rare under International Financial Reporting Standards and for other legal reasons in many countries other than the U.S., so this provision may have only a limited effect on foreign private issuers. At the same time, unless the SEC or stock exchanges create an exemption for foreign private issuers from this new required listing standard, it will cover all companies listed in the U.S. and those companies will need to adopt and implement policies meeting the Act's criteria.

For a more detailed discussion of the corporate governance and executive compensation provisions in the Act and their implications for public companies generally, see our client memorandum dated July 21, 2010, entitled "Public Company Alert: Corporate Governance and Executive Compensation Provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act".

REFORM OF THE SWAPS MARKET

Title VII of the Act, titled "Wall Street Transparency and Accountability Act of 2010" ("Title VII"), provides for new Federal regulation of the swaps market and gives the CFTC and the SEC broad authority to regulate the market and its principal participants. While most of the provisions of Title VII are directed at "swap dealers" and "major swap participants", the results of these changes will affect all companies that use swaps to hedge exposures in their businesses. Unless otherwise provided, Title VII becomes effective on the later of (i) July 16, 2011, which is 360 days after the date of the Act's enactment, and (ii) if rulemaking is required, 60 days after the publication of the final rule or regulation.

Summary of Key Changes to the Swaps Market under Title VII

To a large extent, Title VII looks to the exchange-traded futures market as the model for the regulatory scheme for the "new" swaps market. An important difference is that the Act would allow an over-the-counter market in non-standardized swaps to continue to exist, but subject to margin, capital and reporting requirements. While these changes may improve price transparency and overall market efficiency, they may also make swaps more costly for "end users".[2]

Centralized Clearing and Margining: Today, the swaps market is largely conducted on the basis of individually negotiated bilateral contracts, individual credit assessments and individually negotiated credit support. Under Title VII, whenever persons

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[2] Title VII generally defines swaps and security-based swaps as including a broad array of derivatives transactions. Throughout this section, "swaps" and "security-based swaps" will collectively be referred to as "swaps".

other than end users enter into swaps with each other, they will generally be required to execute those swaps through a central clearinghouse and support the exposure of those swaps with cash or other acceptable margin that varies daily based on changes in the mark-to-market exposure of those swaps.[3]

- The Act's clearing and margin requirements are intended to convert the inter-dealer market in standardized swaps from one that is based on individual credit assessments and collateral negotiations to one that is based on centrally-cleared positions that are fully collateralized by cash or other acceptable margin.

- While the Act is not intended to require margin from end users,[4] it may nevertheless have that effect, to the extent that dealers elect to "pass through" the requirements for margin to their customers. In addition, end users will generally be permitted to require that their swaps be submitted for clearing and as a result voluntarily accept clearinghouse margin requirements.

Trading and Reporting: Today, swaps are not exchange traded and the reporting of swap prices is based largely on informal dealer surveys or internal dealer databases. End users seeking to enter into swaps usually obtain quotes from several dealers before negotiating definitive transaction terms with a single dealer and can only terminate a swap through a negotiation with their original dealer counterparty. Dealers offset these positions in a variety of ways, including by entry into swaps with other dealers. Title VII will generally require standardized swaps between dealers and/or major swap participants to be executed through an exchange or trading facility and in other cases require the swap prices to be centrally reported. These changes are intended to affect all participants in the swaps market, including end users.

- Increased transparency of pricing through real-time reporting requirements may increase price competition and reduce the spread between bids and offers for all participants in the swaps market.

- The ability to "close out" a standardized swap that is exchange traded and centrally cleared through an offsetting transaction should facilitate the ability of end users to terminate transactions without having to negotiate individual terminations with original counterparties. It may also increase use of standardized swaps, even if they provide less "complete" hedges than individually tailored swaps.

Capital, Conduct and Other Regulation: Today, there is no single system of regulation for the swap market in the United States. Under the Act, the SEC and the CFTC would, together with the banking regulators, be charged with creating a harmonized system of regulation. Specifically, Title VII gives the CFTC regulatory authority over swaps, swap dealers and major swap participants and the SEC regulatory authority over security-based swaps, security-based swap dealers and major security-based swap participants. The system of regulation will include, among other things, registration requirements for swap dealers and major swap participants, capital requirements, margin requirements, business conduct standards and various recordkeeping and reporting requirements.

Title VII also makes certain changes to the existing provisions of the Commodity Exchange Act, including a provision that specifically excludes motion picture box office receipts from the definition of "commodity". This should eliminate the authority of the CFTC to authorize exchange trading in futures contracts on motion picture box office receipts.

Changes to Beneficial Ownership and Short-Swing Profits Rules: Title VII amends Sections 13 and 16 of the Exchange Act to (i) establish that persons will be deemed to have acquired beneficial ownership of an equity security as the result of the purchase or sale of a security-based swap to the extent the SEC so provides in future rulemaking and (ii) require reporting of beneficial ownership positions created by security-based swaps to the extent provided in the SEC rules. Moreover, Title VII expands the definitions of "purchase" and "sale" under the Exchange Act and the Securities Act, which will presumably be reflected in the SEC rules on this subject.

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[3] The "end user exemption" exempts entities from Title VII's clearing and exchange trading requirements if the entities: (i) are not a financial entity, (ii) are using swaps to hedge or mitigate commercial risk and (iii) notify the relevant Commission, in a manner to be determined, that they meet the financial obligations of entering into a non-cleared swap transaction.

[4] It is possible that Title VII, as enacted, could be interpreted as imposing margin requirements on all parties to non-cleared swap transactions, including end users. However, in response to criticism of this apparent error, Senators Dodd and Lincoln wrote a letter on June 30, 2010, to state that Congress did not intend to subject end users to margin requirements. We expect Congress's intent to be reflected in the regulations that implement the Act's margin requirements.

For a more detailed discussion of the key provisions of Title VII and Title VII's implications for end users, see our client memorandum dated July 22, 2010, entitled "Reform of the Swaps Market under the Dodd-Frank Act".

SECURITIES LITIGATION AND ENFORCEMENT

Under the Act, both the SEC and private litigants have greater ability to pursue perceived violations of the securities laws. The Act also expands the categories of both actors and actions potentially subject to liability under existing enforcement regimes, and adds additional penalties for securities law violations. While no one component of the Act can be categorized as a "sea change" for securities litigation, when viewed together, it seems clear that companies and persons subject to U.S. securities laws will face additional regulatory hurdles and possible increased litigation risk in the future. As with much of the rest of the Act, near-term uncertainty about the scope and effect of the new provisions will also be a challenge, due to the lack of current interpretive authority and the Act's frequent delegation of rulemaking to the SEC or other bodies.

Aiding and Abetting Liability

The Act expands the authority of the SEC to bring "aiding and abetting" enforcement actions. In addition to the SEC's existing authority to bring actions against alleged aiders and abetters under the Exchange Act, the Act empowers the SEC to do the same under the Securities Act, the Investment Advisers Act of 1940 (the "Investment Advisers Act"), and the Investment Company Act of 1940 (the "Investment Company Act"), as well as rules and regulations issued thereunder. Relatedly, the required mental state ("scienter") for any person accused of aiding and abetting another person in a securities law violation has been clarified and broadened to include "knowingly or recklessly" providing such assistance. Federal courts had previously struggled to determine whether the "knowingly" standard, embodied in the Exchange Act, also included reckless behavior.

Notably, the Act does not provide a private cause of action for aiding and abetting claims. That change had been suggested in conference, but was not included in the final bill. Consequently, the Act does not alter the Supreme Court's prior ruling that no such cause of action exists in *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164 (1994), and confirmed in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008). However, the Act does require the Government Accountability Office ("GAO") to conduct a study concerning what impact introducing such a cause of action might have.

Anti-Manipulation Provisions

The Act expands significantly the anti-manipulation provisions of Section 9 of the Exchange Act. First, the manipulation prohibitions of Section 9(a) now apply to all securities other than "government securit[ies]". Previously, those prohibitions had applied only to securities "registered on a national securities exchange". Similarly, Section 9(b) has been expanded to reach all options, whereas its reach previously had been limited to options transactions using the "facility of a national securities exchange". Section 9(c)'s restrictions on options have also been broadened to cover all brokers and dealers, and not just those that are members of a "national securities exchange".

In a parallel move, the Act also expands the short-sale coverage of Section 10(a)(1) of the Exchange Act to apply to all non-government securities. Section 9 of the Exchange Act was also amended to make it unlawful for any person to effect a manipulative short sale of any security. The Act also instructs the SEC to issue rules to ensure that appropriate enforcement options and remedies are available to protect the public interest from manipulative short selling.

What effect these provisions will have on the over-the-counter ("OTC") securities market remains to be seen. For example, some manipulative behavior in the OTC market previously had been pursued under Section 10(b). However, through summaries of the Act released by the relevant Senate and House Committees, Congress has signaled its desire to pursue aggressively "manipulation of the system", which could signal an era of greater interest in those markets.

Extraterritorial Jurisdiction

The recent Supreme Court decision, *Morrison v. National Australia Bank Ltd.*, 561 U.S. __, 2010 WL 2518523 (2010), narrowed dramatically the ability of the SEC or private litigants to bring actions under Section 10(b) of the Exchange Act, by confirming that Section 10(b) and Rule 10b-5 do not apply extraterritorially. In that decision, the Court rejected the notion that the extraterritorial application of Section 10(b) is a question of a court's subject-matter jurisdiction – traditionally ascertained under the so-called "conduct" and "effects" test – holding instead that it is a "merits question", determined by the scope of Section 10(b) itself. The Court confirmed that Section 10(b) applies "only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States". The Court's

decision thus precludes a variety of extraterritorial Section 10(b) claims – including, but not limited to, so-called "f-cubed" suits, where a foreign plaintiff attempts to sue a foreign issuer for alleged violations of U.S. securities laws based upon transactions on a foreign stock exchange.

Post-*Morrison*, the Act purports to restore to the SEC and the Department of Justice (but not private litigants) the ability to bring proceedings to enforce the antifraud provisions of the U.S. securities laws in cases with an extraterritorial component. But it does so by approaching the issue from a jurisdictional perspective – rejected by the Supreme Court in *Morrison* – instead of by expanding the reach of Section 10(b) itself. Specifically, the Act provides that a federal district court will have subject matter jurisdiction over regulatory and criminal antifraud actions brought by the SEC or United States where there has been either (i) conduct within the United States that constitutes significant steps in furtherance of a violation, even if the other aspects of the suits are foreign, or (ii) a foreseeable substantial effect on the United States, even if the action that caused the result was foreign. That provision basically tracks the old "conduct" and "effects" tests that the Court held were irrelevant to determining the extraterritorial application of Section 10(b). That seeming disconnect between the Act and the *Morrison* decision raises uncertainty about the operation and effect of this provision that may be the subject of future litigation or congressional action.

This provision does not apply to private suits. However, the Act does require the SEC to conduct a study as to whether the same jurisdictional test should be extended to private suits.

Other Enhancements of the SEC's Enforcement Powers

The Act enhances and expands several of the SEC's other enforcement powers, as follows:

Individuals: The Act now confirms that the SEC, rather than just private plaintiffs, can assert claims for joint and several liability against control persons (*i.e.*, those who "directly or indirectly control" a violator) under Section 20(a) of the Exchange Act. The SEC also is now permitted to pursue individuals who "associated" with certain registered entities (*e.g.*, members of a national securities exchange, public accounting firms, and officers and directors of investment companies) at the time of an alleged violation, but who no longer do so.

Penalties: The most significant new penalty available to the SEC is the ability to impose monetary penalties in cease and desist proceedings brought before the SEC's own administrative judges. This may result in a rise in the number of actions brought administratively, rather than in front of federal courts, which had previously been the only entities that could award monetary penalties in those circumstances. In addition, the SEC can now bar individuals who have violated the Exchange Act or the Investment Advisers Act from becoming associated with almost any entity in the securities industry. Previously, violators could be barred only from the field in which the violation occurred.

Procedural Tools: The Act now permits trial subpoenas to be served and enforced nationwide in actions or proceedings instituted by the SEC in federal court. Previously, the SEC's nationwide subpoena power was limited to its own administrative proceedings. In addition, the Act provides that the SEC will not waive any otherwise applicable privilege by sharing information with federal agencies, self-regulatory organizations, foreign securities authorities, foreign law enforcement authorities, or state securities and law enforcement authorities. A reciprocal non-waiver applies to information shared with the SEC by certain of those entities. Finally, in certain circumstances the SEC can now require foreign public accounting firms to produce work papers and other documents related to audits or interim reviews of any issuer.

Budget: While the SEC did not achieve "self-funded" status through the Act, its new budgeting process provides it with greater independence and the possibility of a greatly increased budget. For example, the SEC's budget will be transmitted to Congress separately, without the need for presidential approval. The SEC will also be permitted to establish a $100 million "Reserve Fund" to use for its long-term and special projects.

Whistleblower Incentives and Protections

The Act creates an expansive whistleblower regime that both encourages individuals who know of a securities violation to come forward and protects those individuals from retaliation. Under the program (and subject to certain caveats), if an individual voluntarily comes forward with independent knowledge that leads to a successful enforcement and results in sanctions exceeding $1 million, then that individual stands to receive 10%-30% of the monetary sanctions imposed. A previous and little-known program had rewarded whistleblowers with lower amounts and only in connection with insider trading matters. In addition, the Act grants protection to whistleblowers and others who assist SEC investigations by providing them a private cause of action against retaliating employers. Remedies include reinstatement, double back pay and attorneys' fees. This new regime appears to address many of the financial considerations that would have influenced a potential whistleblower's decision to come forward in the past. The SEC will report annually to Congress on the effectiveness of the whistleblower program.

Criminal Enforcement: Statute of Limitations and Sentencing Guidelines

While the Act does not focus on criminal statutory liability, it does address two issues solely related to criminal enforcement matters. First, it extends the statute of limitations for securities fraud from five to six years. Second, it directs the U.S. Sentencing Commission to amend the sentencing guidelines for financial fraud to take into account "the potential and actual harm to the public and the financial markets resulting from the offenses". This is undoubtedly a reaction to the sentencing debates surrounding Bernard Madoff and other high-profile financial fraud cases. However, given the already lengthy sentences imposed on Mr. Madoff and others, it is unclear whether this direction will have much practical effect.

REGULATION OF CREDIT RATINGS DISCLOSURES AND CREDIT RATINGS AGENCIES

As a result of the mountain of criticism leveled at credit ratings agencies in connection with the financial crisis, primarily in connection with highly structured investment securities, the Act imposes significant new statutory requirements on credit ratings agencies, or NRSROs, and new burdens on companies that publicly disclose the ratings given to their securities. Below are discussed some of the more significant changes.

Immediate Repeal of Rule 436(g)

The Act immediately repealed Rule 436(g) under the Securities Act, which formerly provided an exemption for credit ratings provided by NRSROs from being considered an expertized part of a registration statement. Accordingly, prior to the repeal, the rule eliminated any need to obtain a consent from the NRSRO to use the ratings in a registration statement or prospectus. As a result of the repeal, NRSROs will be considered "experts" for liability and other purposes under the Securities Act and registrants will generally be required to file the NRSRO's consent along with the registration statement whenever ratings information is included or incorporated by reference in a registration statement or Section 10(a) prospectus. Certain rating agencies have already indicated that they are currently unwilling to deliver consents in relation to such disclosures and other rating agencies are expected to take a similar position. This action has given rise to a number of questions as to its applicability, particularly in the case of companies that have effective registration statements that include ratings information and in the case of companies that regularly include ratings information in their periodic reports.

To address many of the questions raised by the congressional repeal of Rule 436(g), the Staff of the Division of Corporation Finance published on July 22, 2010, some Compliance and Disclosure Interpretations ("CDIs") which, although not having the official weight of Commission rulemaking, offer some useful guidance to public companies on how to comply with the new limitations on the use of credit ratings.[5] The CDIs confirm the advice we included in our client memorandum dated July 22, 2010, entitled "The Implications of the Repeal of Rule 436(g)".

Permitted Ratings Disclosures Without Consent: The CDIs (which do not apply to companies that are subject to Regulation AB disclosure requirements) use a defined term, "*issuer disclosure-related ratings information*", to collectively refer to certain types of ratings disclosure that can be used by registrants in registration statements, prospectuses and incorporated Exchange Act filings without the need to file the consent of the relevant NRSROs. Such issuer disclosure-related ratings information consists of disclosures about "changes to a credit rating, the liquidity of the registrant, the cost of funds for a registrant or the terms of agreements that refer to credit ratings". The most common locations for such disclosure for most registrants will be in risk factor discussions and Management's Discussion & Analysis of Financial Condition and Results of Operations ("MD&A"). While we believe that "issuer disclosure-related ratings information" should be read broadly, and the CDIs clearly permit the description of the actual ratings in such discussions, registrants may want to include such descriptions in the context of a larger discussion of how the registrant's ratings (or changes in them) affect its costs of borrowing, liquidity or covenant compliance.

Effective Registration Statements: The CDIs also clarify that any ratings disclosures contained in filings made prior to July 22, 2010 that do not fit within the meaning of issuer disclosure-related ratings information and that are included or incorporated in registration statements that became *effective* prior to July 22, 2010 are "grandfathered", meaning no consents would be necessary to continue to use such registration statements. However, no new filings made on or after July 22, 2010 with respect

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[5] In addition, on July 22, 2010, the staff in the Division of Corporation Finance (the "Division") issued a no-action letter to Ford Motor Credit Company that indicated that, in light of the repeal of Rule 436(g), the Division would not recommend enforcement action to the SEC if asset-backed issuers did not provide the ratings disclosures that are required in prospectuses for asset-backed offerings. The Division indicated that its no-action position will expire with respect to any registered offerings of asset-backed securities "commencing with an initial bona fide offer on or after January 24, 2011". Until that time, we understand that all asset-backed issuers will be allowed to rely on this no-action letter in order to omit ratings information from their prospectuses.

to such already-effective registration statements (*e.g.*, prospectus supplements, post-effective amendments, or any Exchange Act filings that are incorporated by reference) can include ratings disclosure, other than issuer disclosure-related ratings information, without the filing of a consent from the applicable NRSROs.

New Registration Statements: If a registrant files a *new* registration statement that includes or incorporates by reference Exchange Act filings that have ratings disclosures that do not qualify as issuer disclosure-related ratings information (including Exchange Act filings made prior to July 22, 2010), then such registrant will either have to (i) obtain the applicable NRSRO consent before such new registration statement can become effective or (ii) change or amend the prior disclosures to eliminate the need for a consent.

Disclosures Outside Prospectuses/Registration Statements: The CDIs confirm that ratings disclosures made outside of prospectuses and registration statements, such as in free writing prospectuses and Rule 134 communications, are not affected by the repeal of Rule 436(g) and may continue to be used, even if they do not qualify as issuer disclosure-related ratings information.

Elimination of Regulation FD Exemption

The Act directs the SEC to remove by October 22, 2010 the current exemption in Regulation FD for credit ratings agencies. Currently, companies seeking credit ratings provide to the NRSRO a certain amount of non-public information, primarily financial projections, to enable the credit ratings agency to develop a conclusion and issue a rating. Such practice will need to be discontinued with the repeal of the special FD exemption for credit ratings agencies unless some other exemption is available, such as the one available for disclosures made pursuant to a confidentiality agreement. We expect that by the time the exemption is actually removed, issuers and the agencies will develop a new practice of identifying information that is material, non-public information and which therefore must remain confidential pursuant to such an agreement. There will likely need to be greater coordination between the agencies and issuers at the time a ratings note is issued to ensure that the agency has not inadvertently disclosed any of the identified confidential information.

References to Credit Ratings in Other Statutes

The Act requires the substitution in various federal statutes, including the Exchange Act, the Federal Deposit Insurance Act and the Investment Company Act, of any references to “investment grade” categories of credit ratings with “such standards of creditworthiness” as the applicable federal agency shall adopt.

Regulation of NRSROs

The Act requires each NRSRO to have a board of directors with at least one half, but a minimum of two, independent members, including individuals that are users of NRSRO ratings. The Act requires each NRSRO to establish and maintain an internal control structure related to procedures for determining ratings. The Act requires the SEC to promulgate rules requiring each NRSRO to establish procedures that clearly define the meaning of any ratings symbol and to apply this symbol consistently for all instruments for which the symbol is used. In an attempt to achieve some level of standardization of ratings among different ratings agencies, the Act directs the SEC to issue rules requiring each NRSRO to establish procedures that assess the probability that an issuer will default, fail to make timely payments, or otherwise not make payments in accordance with the terms of an instrument. The SEC is also directed to issue rules (i) to ensure that individuals that develop specific ratings are tested for knowledge of the ratings process and meet standards of training, experience and competence, (ii) to require each NRSRO to develop a new form to accompany its ratings publications that describes the assumptions underlying the applicable procedures and methodologies, the data relied upon to determine the rating, and other information that might help users of ratings better understand the ratings, and (iii) to prevent sales and marketing functions from influencing the production of ratings. The Act requires the SEC to establish a new Office of Credit Ratings, which will be charged with administering the new SEC rules with respect to NRSRO practices in determining ratings.

Enforcement and Civil Liability Provisions

The Act provides that the enforcement and civil liability provisions of the Exchange Act apply to statements made by credit rating agencies to the same extent as they apply to statements made by registered public accounting firms or securities analysts under the securities laws. The Act also provides that statements made by credit rating agencies are not forward-looking statements for purposes of the Exchange Act’s Section 21E safe-harbor.

Future Studies

The Act requires the SEC to study and within three years issue a report to Congress on the independence of NRSROs and how independence affects ratings. The study must evaluate how NRSROs that provide non-rating services to the same companies for

which they publish ratings manage the inherent conflicts of interest and must also evaluate whether such services by NRSROs should be prohibited. The Act directs the GAO to conduct a study and issue a report to Congress on the feasibility and merits of creating an independent professional organization for NRSRO rating analysts that would develop independence standards and an ethics code and oversee the industry. The Act requires the SEC to conduct a study and within one year issue a report to Congress of the feasibility and desirability of standardizing credit ratings terminology and underlying assumptions (including market stress conditions) across credit rating agencies and across asset classes. Finally, the Act requires the SEC to conduct a study and within two years issue a report to Congress on the feasibility of establishing an independent method for matching credit ratings agencies with issuers, so as to mitigate conflicts of interest in the selection process for ratings of structured finance products.

CHANGES AFFECTING THE SECURITIES AND SECURITIZATION MARKETS

Changes Affecting Securities Laws

The Act makes some changes to the securities laws with immediate effect and further requires the SEC (or in some cases the GAO) to issue rules or to conduct studies over the coming months or years that will likely have significant impact on the capital markets for public companies generally. In addition to the changes previously mentioned in this memorandum related to the repeal of Rule 436(g) under the Securities Act and the removal of the exemption from Regulation FD for credit ratings agencies, and the requirement for the SEC to remove references to ratings in various rules, forms and regulations, and in our July 22, 2010 client memorandum on “Reform of the Swaps Market under the Dodd-Frank Act” describing the changes to Sections 13 and 16 of the Exchange Act for beneficial ownership reporting and short-swing profits related to derivatives, here are some of the other more important provisions:

Securities Lending: The Act requires the SEC, by July 2012, to issue rules designed to promote greater transparency in the public disclosure of information regarding securities lending and borrowing.

Short Sales: The Act requires the SEC to adopt rules requiring public disclosure on at least a monthly basis of the activity of short sales conducted by certain institutional investment managers, and the Act authorizes the SEC to issue rules that include enforcement remedies to address manipulative short selling, which the Act now specifically proscribes as an unlawful activity.

Definition of Accredited Investor: The Act establishes a new net worth standard for determining whether a natural person shall be considered an accredited investor under Rule 501 under the Securities Act. Under the new standard, which the SEC is required to review every four years starting in July 2014, any natural person with an individual net worth, or joint net worth with the spouse of such person, at the time of purchase of a security, of more than $1,000,000, excluding the value of the primary residence of such natural person, shall be considered an accredited investor.

“Bad Actors” under Regulation D: The Act directs the SEC to issue rules to disqualify certain “bad actors” from participating in offerings exempt under Rule 506 of Regulation D of the Securities Act. Previously, bad actors had been unable to participate only in offerings exempt under Rule 505 of Regulation D and under Regulation A.

GAO Study on Conflicts of Interest: The GAO is required report to Congress by January 2012 the results of a study on any conflicts of interest that potentially exist in any firms that have both securities underwriting and securities analyst functions.

Section 13 and 16(a) Reporting: The Act allows the SEC to reduce the maximum time frames for Section 13 reporting and for filing initial Section 16(a) reports.

SEC Internal Operations: The Act requires the SEC to report to Congress on an annual basis, and the GAO to report to Congress every three years, with an assessment of the effectiveness of its internal supervisory controls and of its internal examination, investigatory and review procedures. The Act also requires the GAO to report to Congress every three years with an evaluation of the quality of personnel management at the SEC, including supervisor effectiveness, promotions, staff turnover, training and internal communications, among others.

Sarbanes-Oxley: The Act permanently exempts non-accelerated filers (that is, companies with a market capitalization of less than $75 million) from the requirement under Sarbanes-Oxley Section 404(b) that there be an audit of management’s annual assessment of internal control over financial reporting. The SEC had provided a series of temporary exemptions from this requirement since 2002, but had indicated that it would no longer be doing so. The annual management assessment for such

filers is still required. The Act also requires the SEC to conduct a study to determine how to reduce the burden of complying with Section 404(b) for issuers that have a market capitalization between $75 million and $250 million. The Act also amends Sarbanes-Oxley to authorize the Public Company Accounting Oversight Board (the "PCAOB") to share information with foreign auditor oversight authorities without waiving confidentiality or privilege, subject to verification that the foreign authority has adequate information systems and controls in place.

Resource Extraction Issuers: The SEC must issue final rules that will require public companies that engage in the commercial development of oil, natural gas or minerals to disclose annually any payments made by the company to a foreign government or the U.S. Government for the purpose of commercial development of those resources.

Mine Operators: The Act requires public mining companies to disclose in their periodic reports filed with the SEC the number of violations of health or safety standards, and the identity of any mines that have a pattern of health and safety violations.

Minerals from Congo: The SEC must issue final rules that will require public companies to disclose whether their products include certain minerals that originate in the Democratic Republic of the Congo.

Securitization Reforms

The Act makes several changes to the regulation of asset-backed securities:

Credit Retention: The Federal banking agencies and the SEC must jointly adopt rules requiring sponsors, originators and issuers of asset-backed securities to retain at least 5% (or a lower percentage for assets that meet underwriting standards to be prescribed) of the credit risk in the underlying assets unless all the assets are "qualified residential mortgages" (to be defined).

Disclosure and Reporting: The SEC must adopt rules requiring issuers of asset-backed securities to disclose information on the assets backing each tranche or class of security. The Act also amends Section 15(d) of the Exchange Act to exclude asset-backed securities from the automatic suspension of reporting with respect to securities held of record by fewer than 300 persons and authorizes the SEC to provide for different suspension rules for asset-backed securities, which may vary for different classes of issuers. It remains to be seen how the Act's rulemaking requirements will affect the SEC's proposal of April 7, 2010, for significant revisions to Regulation AB and other rules regarding the offering process, disclosure and reporting for asset-backed securities.

Representations and Warranties: The SEC must adopt rules requiring rating agencies to describe in any credit rating report the representations, warranties and enforcement mechanisms for investors in asset-backed securities and how they differ from those in similar asset-backed securities. The rules must also require sponsors, originators and issuers to disclose fulfilled and unfulfilled repurchase requests on an aggregate basis across all trusts so that investors may identify asset originators with clear underwriting deficiencies.

Due Diligence: The SEC must adopt rules requiring issuers of registered asset-backed securities to perform a review of the underlying assets and disclose the nature of the review. In addition, issuers and underwriters of asset-backed securities must make publicly available the findings and conclusions of any third-party diligence report.

Conflicts of Interest: Underwriters, placement agents, initial purchasers and sponsors of asset-backed securities (or any affiliate or subsidiary of those entities) will be prohibited, for a period of one year, from engaging in any transaction (excluding hedging, performance of liquidity commitments and market-making) involving or resulting in any material conflict of interest with respect to an investor.

This memorandum is a summary for general information only and does not address all provisions of the Act or constitute legal advice. Facts and circumstances vary. We make no undertaking to advise recipients of any legal changes or developments.