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## FINANCIAL SERVICES LEGISLATIVE AND REGULATORY UPDATE

April 2, 2012

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### Leading the Past Week

The great hope for a continued bipartisan renaissance, started the week with a bang, as the House overwhelmingly passed legislation intended to loosen the regulations for companies seeking access to capital, but then ended with a whimper as Congress was unable to bridge partisan differences over a transportation funding bill and were forced to pass yet another short term extension. However, it might be too soon to officially declare this resurgence quashed, and with increasing signals of a potential Dodd-Frank corrections bill on the horizon, the scope of which has yet to be determined, any effort to modify Dodd-Frank will require real bipartisan deal making to get to the President's desk. With both Houses out of town for the next two weeks, it will be interesting to see how, if at all, the extended time back in the State/district impacts these issues. Counterbalancing corrections efforts, we saw key Regulators announce that the controversial swap push-out rule would go into effect as of July 16, 2013. Despite this, many view the implementation of the law as inconsequential, if not actually helpful, to legislative efforts to "correct" it.

### Legislative Branch

#### **Senate**

*Chairman Johnson continues to indicate openness to Possible Dodd-Frank Technical Corrections Bill:*

At a March 29<sup>th</sup> hearing Senate Banking Chairman Tim Johnson (D-SD) again indicated that he was "open to the idea of improving Wall Street reform by making technical corrections to [Dodd-Frank] and fixing unintended consequences." Despite the Chairman's statement, there is not an actual technical corrections bill in existence, however we are hearing that various ideas are being floated for consideration.

*Senate Confirms Key Banking Regulators:*

On March 29<sup>th</sup>, the Senate approved by unanimous consent a number of financial regulators including: Thomas Curry to be Comptroller of the Currency, Martin Gruenberg, Thomas Hoenig and Jeremiah Norton to serve on the FDIC Board and Christy Romero to be special inspector general to TARP. The vote came shortly after the Senate Banking Committee approved the nominees, and was part of an agreement between Leader Reid, Minority Leader McConnell and President Obama not to do any recess appointments during this two week Congressional recess. Approved earlier in the day but not taken up on the floor were the nominations of Richard Berner to head the Treasury's new Office of Financial Research (OFR) and Jerome Powell and Jeremy Stein to serve on the Federal Reserve Board of Governors. Interestingly, Powell and Stein's nominations passed by voice vote off the Senate floor, instead of during a roll call in the Committee. All but two members of the Banking Committee members voted in favor of the Fed nominees but opposition remains: the two lawmakers who missed the vote, Senators David Vitter (R-LA) and Jim DeMint (R-SC) have indicated their plans to block the nominations from full Senate consideration.

*Senate Banking Committee Examines Mobile Payments:*

Following a similar hearing on the House side the previous week, the Senate Banking Committee held a hearing on mobile payments and explored how the existing regulatory and statutory frame work either accelerated or inhibited deployment of new technologies that may one day make cash obsolete. It was clear that the witnesses believed that America was in the infancy of the adoption of these technologies and that going forward, collaboration among the Federal Communications Commission, the Federal Trade Commission, and the Bureau of Consumer Financial Protection, will be needed to ensure that appropriate security standards are developed and implemented to manage the potential risks associated with mobile payments. It also seemed that one area of future regulation will be with prepaid cards, as one witness noted that when the mobile payment draws upon a credit or debit card, the rules in place for those payment methods provide protection. But when the payment draws on another source, such as a prepaid or prefunded card, the rules are not as clear. Although it should be clarified that prepaid cards used for payroll payments are already regulated, but other prepaid cards, such as general purpose cards or cards used to pay for cell phones lack similar regulatory oversight. While the hearings wasn't widely attended, perhaps because Senators are concerned about their unfamiliarity with the topic, Senator Warner clearly has been thinking about these issues and his questions showed his concern about the interaction between mobile transactions, cellphone carriers and the lack of a regulatory structure to deal with the emergence of cellphone carriers as a players in this field. The general uncertainty around various regulatory structures surrounding mobile payments will continue to be fleshed out during future congressional hearings and at an FTC workshop on April 26<sup>th</sup>.

*Geithner Signals Desire to Work with Congress to Reform Student Loans:*

Appearing before the Senate Appropriations Subcommittee on Financial Services and General Government on March 28<sup>th</sup>, Treasury Secretary Tim Geithner expressed a desire to work on increasing consumer protections in the student loan market. Specifically, Geithner said he would like to work with Senator Richard Durbin (D-IL) on his bill, the Fairness for Struggling Students

Act of 2011 (S. 1102). Durbin's bill would repeal the existing exemption for private student loans under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Examination of the student loan market is already underway at the CFPB which has been taking complaints from borrowers with private student loans. Recently, the CFPB released estimates that outstanding student debt is approaching the \$1 trillion level. CFPB Student Loan Ombudsman, Rohit Chopra, in a March 21<sup>st</sup> blog post, warned that excessive student debt could slow the recovery of the housing market: "Student loan borrowers are sending big payments every month to their loan servicers, rather than becoming first-time homebuyers," Chopra said. At Wednesday's hearing Durbin also drew parallels between the burdens of mortgage debt and student loan debt.

*Senate Banking Panel Considers Options to Increase Retirement Savings and Planning:*

On March 28th, the Senate Banking Subcommittee Economic Policy held a hearing to consider Retirement Insecurity and ways in which to boost retirement savings. The focus of the hearing was the retirement savings deficit—which represents an estimated shortfall of \$6.6 trillion or \$22,000 per capita. Witnesses spoke to the need to educate Americans about the need to save for retirement outside of Social Security contributions. One popular solution among witnesses and Chairman Tester was the use of auto-enrollment of individuals into plans such as Auto-IRAs, although no one had any suggestions as to how to generate the political support necessary to push the proposal into law. Notably, witnesses warned that increased health care costs and the uncertainty of end-of-life medical needs will continue to drive insufficient lifetime income streams.

*Buffet Rule Vote to Come After Recess:*

Last week, Senate Majority Leader Harry Reid scheduled a test vote for the Buffett Rule—which would set a minimum tax rate for high income individuals. For those making more than \$1 million, the rule would require them annually to pay a minimum income tax rate of 30 percent. Reid filed a motion to limit debate on proceeding to the measure on March 29<sup>th</sup>. The cloture vote is expected soon after the Senate returns from recess on April 16<sup>th</sup>.

## **House of Representatives**

*House Sends Senate Amended Jobs Act to the President:*

On March 27<sup>th</sup>, the House, in a 380 to 41 vote, approved the Senate amended version of the White House supported bill to ease capital formation requirements for small businesses. The President will sign the bill into law this coming Thursday.

The bill makes a number of changes to the current regulation of securities, including: creating an IPO 'on-ramp' for emerging growth companies; carving out exemptions for crowdfunding registration; raising shareholder reporting thresholds to 2,000 for companies and community banks; ending the general solicitation ban; and increasing the Regulation A offering limit to \$50 million. The Senate added amendment, offered by Senator Jeff Merkley (D-OR), increased regulatory oversight of crowdfunding. Representative Patrick McHenry, author of the original House language legalizing crowdfunding, called the change "riddled with burdens on issuers,

investors, and intermediaries” and challenged that Senator Merkley “misunderstood” the intent of the provisions. Following McHenry’s statements, Chairman Bachus said the Financial Services Committee will continue to look at issues related to crowdfunding.

*House Passes Two Bills To Ease Dodd-Frank Derivatives Requirements:*

On March 26<sup>th</sup>, the House approved two bills aimed at narrowing the scope of Dodd-Frank Act derivatives provisions. Representative Steve Stivers’ (R-OH) H.R. 2779, a bill to exempt inter-affiliate swaps from certain regulatory requirements, passed the House in a vote of 357 to 36. H.R. 2779 would exclude from the definition of swaps contracts made between affiliated entities controlled by the same parent company. The change exempts inter-affiliate swaps from Dodd-Frank clearing, margin and collateral requirements; however, it maintains the requirement such transactions be reported to a swap data repository or the SEC and the CFTC. Representative Michael Grimm’s H.R. 2682, which would take away regulators’ authority to impose margin requirements on end users of financial derivatives, passed the House in a 370 to 24 vote.

Although Democrats have, to date, been resistant to many changes to Dodd-Frank reforms, there was significant bipartisan support for the bills. Democrats expressed hope that the bills would ease requirements which would otherwise cause derivatives users to divert capital from other activities. The measures were considered on the suspension calendar, which is generally used for non-controversial measures. Another bill which passed on Monday was H.R. 4014, Representative Huizenga’s (R-MI) bill to amend the Federal Deposit Insurance Act to clarify privileged information saved with the CFPB will be protected by attorney-client privilege. The bill, which mirrors Senate Banking Chairman Tim Johnson’s S. 2099, was expected to sail quickly in the Senate before it was announced that it was being anonymously blocked by two Republican Senators. According to published reports, Democrat aides have said that they will not consider any other technical corrections until S. 2099 is enacted.

*House Financial Services Committee Advances Swaps and Housing Bills:*

On March 27<sup>th</sup>, the House Financial Services Committee reported four bills, two aimed at blunting the extraterritorial impact of the Dodd-Frank Act and a bill to shore up the FHA. The Swap Data Repository and Clearinghouse Indemnification Correction Act of 2012 (H.R. 4235) repeals the indemnification requirement of the Dodd-Frank Act. The vote follows concerns expressed by a senior SEC official in a March 21<sup>st</sup> Capital Markets Subcommittee hearing that foreign regulators could not legally meet the requirement. The legislation—sponsored by Representatives Robert Dold (R-IL) and Gwen Moore (D-WI)—passed the Committee by voice vote. The Swap Jurisdiction Certainty Act (H.R. 3283) would amend the Commodity Exchange Act and the 1934 Securities Exchange Act to allow non-US companies registered as swap dealers to follow the capital rules of their home jurisdiction. To accomplish this, the bill exempts swaps from Dodd-Frank regulation if the swap dealer counterpart is a US firm or under a US parent company. The bipartisan bill, sponsored by Representatives Scott Garrett (R-NJ) and Jim Himes (D-CT), passed in a 41 to 18 vote. Notably, prominent Committee democrats, including Representatives Barney Frank (D-MA) and Maxine Waters (D-CA), did not vote in favor of the measure, causing Himes to defend the bill, rebuffing suggestions that it was creating opportunities for regulatory arbitrage.

In other business, the Committee reported out the FHA Emergency Fiscal Solvency Act of 2012 (H.R. 4264) which would bolster the FHA's low capital reserves through stricter lender enforcement. With the FHA's FY 2013 budget plan projecting a \$700 million shortfall, the bill seeks to increase agency flexibility in insurance premiums and add new internal financial controls and reporting. The measure, sponsored by Representative Judy Biggert (R-IL) passed by voice vote after an amendment offered by Representative Lynn Westmoreland (R-GA) to institute maximum annual insurance fees failed. The bill also strengthens the FHA's indemnification and reimbursement authorities and requires the agency to draft a plan to monitor and address delinquencies. A second bill offered by Biggert, the RESPA Home Warranty Clarification Act of 2011 (H.R. 2446) also passed the Committee by voice vote.

*House Agriculture Panel Examines Dodd-Frank Act Swap Provisions:*

On March 28<sup>th</sup>, representatives from industry told lawmakers that failure to adopt proposed changes to the Dodd-Frank Act would result in costs to market participants. The hearing was the subject of three bills: H.R. 1838 to repeal Section 716 of Dodd-Frank; H.R. 3283, the Swap Jurisdiction Certainty Act; and H.R. 4235, the Swap Data Repository & Clearinghouse Indemnification Correction Act of 2012. H.R. 1838 modifies the Dodd-Frank's push-out clause allowing US insured banks to trade swaps on equity, commodities and credit default swaps for hedging (see more below on the implementation of this provision). H.R. 4325 repeals language requiring regulators to indemnify swap data repositories (SDRs). The indemnification provision has been the recent subject of significant concern from SEC for its potential to cause problems accessing foreign SDR information. Witnesses at the hearing also blasted the indemnification provision calling it "well-intentioned" but "unworkable." H.R. 3282 exempts swaps from regulation under Dodd-Frank if the dealer counterparty or parent company is a US entity reporting to the SEC or CFTC. All three bills had already been cleared by the Financial Services Committee, which shares joint jurisdiction over these measures with the Ag Committee.

*Cordray Once Again Appears Before Lawmakers on Bureau Authority:*

On March 29<sup>th</sup>, Director Richard Cordray sought to assure the House Financial Services Committee members that the Bureau will attempt to reduce unnecessary regulations and disclosures. During the hearing, Republicans appeared to take particular aim at the Bureau's authority to prohibit practices it deems abusive, and expressed their concerns that the underlying statutory is overly vague, which could lead to problems for lenders of financial institutions. The hearing also focused on the CFPB's role in the mortgage and student lending markets. On mortgage market rulemakings, Cordray told lawmakers that that continued access to credit is one of the Bureau's primary goals.

*House Panel Hounds MF Global Executives on Missing Funds:*

On March 28<sup>th</sup>, three senior MF Global executives testified before the House Financial Services Subcommittee on Oversight and Investigations that they did not know how as much as \$1.6 billion in customer funds went missing or how up to \$200 million of that number may have been inappropriately transferred. A fourth MF Global official, Edith O'Brien did not testify before the Subcommittee, invoking her Fifth Amendment right. The purpose of the hearing was

to examine the run up to MF Global's bankruptcy, including improper treatment of customer funds. Throughout the hearing, lawmakers from both parties expressed exasperation at the lack of information provided by the witnesses and accused the officials of testifying in a self-serving manner. CFO Henri Steenkamp drew the ire of Chairman Randy Neugebauer (R-TX) for repeatedly telling the Committee that he had no knowledge of MF Global transactions. Neugebauer told Steenkamp that it was shocking he had no knowledge of the matters before the Committee and told the CFO he did not think Steenkamp was "being honest."

*Joint Economic Committee Considers What Makes a "Sound" Dollar:*

On March 27<sup>th</sup>, the Joint Economic Committee met to consider H.R. 4180, the Sound Dollar Act. The bill would end the Fed's dual mandate to promote both price stability and maximum employment. In addition to eliminating the dual mandate, the bill would limit the Fed's market purchase abilities. Committee Vice Chairman Kevin Brady (R-TX), sponsor of the bill, said it is a simple fix which would preserve the dollar's value. Still, prominent economists testifying at the hearing disagreed over the wisdom of legislation to make inflation the Fed's primary mandate. Brady acknowledged that his measure is not likely to become law under the Obama Administration, but reinforced that the legislation would not prevent the Fed from being the lender of last resort or lowering interest rates in a downturn. While Fed Chairman Ben Bernanke has said the Fed would accept a legislative change to a single mandate, but that the dual mandate is workable. Currently, the House Financial Services Committee hasn't schedule a hearing for the bill.

Executive Branch

**Agencies Clarify Date of Swap Pushout Rule:**

Late Friday evening, the FDIC, OCC, and Federal Reserve issued joint guidance that the effective date of section 716, also known as the Swaps Pushout provision, of the Dodd-Frank Act will be July 16, 2013. The guidance was issued by the Agencies after receiving inquiries seeking clarification about the effective date.

Section 716 prohibits receiving certain types of Federal assistance, including discount window lending and deposit insurance, for certain uses to a swaps entity, subject to specified exceptions, with respect to its swap, security-based swap, or other activity.

**CFTC**

*CFTC Issues Advisories to Clarify Position Limits Powers:*

On March 22<sup>nd</sup>, the CFTC issued two advisories addressing current position limits rules—new position limits rules proposed by the Commission cannot go into effect until a definition of a swap is finalized. In the [first advisory](#), the CFTC nudged industry to remember the Commission's special call authority regarding exemptions from speculative position limits. [The second advisory](#) addressed the treatment of legitimate hedging transactions and exemptions that will no longer exist when new position limit rules go into effect. The special call advisory explains that market participants may be subject to special call authority for information when claiming bona fide hedging exemptions if: positions owner of controlled by the one claiming the exemption; trading conducted related to the exemption; swaps, futures or cash positions that

support the exemption; relevant business relationships; a list of pass-through swap counterparties. The transition period will extend 60 days after the CFTC and SEC finalize a definition for swaps.

*CFTC Technology Advisory Committee Meets to Discuss Dodd-Frank Issues:*

On March 29<sup>th</sup>, the CFTC's Technology Advisory Committee met to consider three Dodd-Frank related issues, including: exchange oversight and definitions related to automated and high-frequency trading; credit limit checks and related market structure and technology issues; and recommendations from the Committee's data standardization subcommittee. The meeting was the first empanelment of the Committee's new subcommittee on automated and high-frequency trading which will focus on developing definitions of high-frequency trading "in the context of the larger universe of automated trading."

*Congressional Agriculture Leaders Press Gensler on Swaps:*

Last week, Chairman of the Senate and House Agriculture Committees, Debbie Stabenow (D-MI) and Frank Lucas (R-OK) wrote to CFTC Chairman Gary Gensler on the proposed definition of swap dealer. The letter enforced that the lawmakers "remain concerned that the breadth of the proposed rule further defining 'swap dealer' will result in the registration of many entities that Congress never intended to be regulated as dealers."

UPCOMING HEARINGS

*The House and Senate will be in recess for the next two weeks.*