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NEWSLETTER
KPMG LLP (U.S.)

Americas' Financial Services Regulatory Center of Excellence (CoE)
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In this issue: Dodd-Frank Quick Hits

Regulatory Reform for the Financial Services Industry – *and Beyond*

This newsletter, published by Americas' Financial Services Regulatory Center of Excellence (CoE), is intended to provide an overview of a number of the key aspects of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Act or Dodd-Frank) across those industry lines. This issue includes updates on the following:

Tips for using this newsletter

Due to copyright considerations, we are unable to hyperlink to all articles; however, where we have not provided a hyperlink, we expect that we have provided sufficient information for you to easily find the article by performing an Internet search.

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Key developments this month...

Dodd-Frank Marks Its First Year

In the year since the Dodd-Frank Act was passed into law with President Barack Obama's signature on July 21, 2010, the process of creating rules required by the law has been cumbersome. A recent Davis Polk & Wardwell LLP report indicates that regulators "have completed 33, or 20 percent, of the 163 required rulemakings to date. Overall, regulators have completed 51, or 13 percent, of the 400 rulemaking requirements in Dodd-Frank." In addition, the report notes that "rules fulfilling 13 rulemaking requirements were finalized in July and 104 rulemaking deadlines were missed."

Reading

- "Dodd-Frank Progress Report,'' *Davis Polk & Wardwell LLP* – July 22, 2011
- "Dodd-Frank Act Marks Its One-Year Anniversary,'' *Financial Executives International* – July 21, 2011
- "Dodd-Frank: One Year On,'' *Pew Financial Reform Project and New York University Stern School of Business* – July 2011

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New Short-Form Registration Rules

The Securities and Exchange Commission (SEC) has voted unanimously to adopt new rules to implement the requirements of Section 939A of the Dodd-Frank Act to remove references to and reliance on credit ratings. The final rules delete credit ratings as eligibility criteria for companies seeking to use "short form" registration when registering securities for public sale. Forms S-3 and F-3 are the "short forms" used by eligible issuers to register securities offerings under the Securities Act of 1933. Companies currently qualify to use these forms if they are registering an offering of non-convertible securities that have received an investment grade rating by at least one nationally recognized statistical rating organization. The new rules eliminate the credit ratings criteria and replace it with four new tests, one of which must be satisfied for an issuer to use Form S-3 or Form F-3. In order to ease transition for companies, the rules include a temporary, three-year grandfather provision. The new rules are generally effective on September 2, 2011, though certain provisions become effective December 31, 2012. Click here to read the SEC announcement on the short-form registration rules.

Reading

- "Short-Form Registration: SEC Removes References to Credit Ratings,'' *The Corporate Counsel.net* – July 27, 2011

- “SEC Adopts New Rules to Replace Use of Credit Ratings in Short-Form Eligibility Criteria,'' *Gibson, Dunn & Crutcher LLP* – August 2, 2011
- Washington Report – August 1, 2011

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CFTC Approves Final Rules on Swap Data, Whistleblowers, Agricultural Swaps

The Commodity Futures Trading Commission (CFTC) has approved three new rules required by the Dodd-Frank Act – on registering databases that collect information on swaps, on whistleblower reward processes, and on agricultural swaps.

The rule on registering the databases requires that all swap transactions be reported to swap data repositories, making information on trading volumes and prices available to financial regulators. The whistleblower rule implements Section 748 of the Dodd-Frank Act, which requires the CFTC to pay awards to whistleblowers who provide information that leads to successful enforcement action resulting in sanctions of over $1 million. And, the agricultural swaps ruled makes swaps in an agricultural commodity subject to all rules and regulations that apply to any other swap. The final rule takes effect on December 31, 2011.

With the action, the CFTC has now completed about one-fifth of the regulations it is required to write by the Dodd-Frank Act.

Reading

- “CFTC Finalizes Swap-Database Rules to Expose ‘Dark Market,'' *Bloomberg* – August 5, 2011
- “CFTC Approves Three Final Dodd-Frank Rules,'' *Capital Interest.com* – August 5, 2011
- Washington Report – August 8, 2011

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Will Proxy-Access Defeat Spawn Other Dodd-Frank Lawsuits?

Now that the U.S. Court of Appeals for the D.C. Circuit has struck down the SEC's proxy access rule, speculation is high that similar legal challenges could be coming relating to other SEC rules required by the Dodd-Frank financial oversight law – such as those covering conflict minerals, capital and margin rules for derivatives traders, and the Commodity Futures Trading Commission's proposal to cap the number of futures and related swaps contracts that any one speculative trader can control.

The unanimous ruling that struck down the proxy access rule has been called a major setback for the SEC – and possibly for other federal agencies that are required by the Dodd-Frank Act to create hundreds of new rules as part of the regulatory reform mandate. The appeals court panel said the SEC's proxy rule was "arbitrary and capricious" and that the agency did not properly weigh the economic consequences of the new regulations. The appeals court ruling came after the U.S. Chamber of Commerce and the Business Roundtable filed lawsuits, claiming the SEC had failed to adequately assess the rule's costs.

Reading

- "Factbox: Five Endangered Dodd-Frank Rules,'' Reuters – August 4, 2011

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FSOC Rule on Systemically Important Financial Market Utilities

The Financial Stability Oversight Council (FSOC) has issued its final rule on designating financial market utilities (FMU) as systemically important. The Dodd-Frank Act defines an FMU as an organization "that manages or operates a multilateral system for the purpose of transferring, clearing, or settling payments, securities, or other financial transactions among financial institutions or between financial institutions and the person," with certain exclusions for designated contract markets, national securities exchanges, and some others.

The final rule, which implements Section 804 of the Dodd-Frank Act, creates a two-stage process to be used for the designation of FMUs as systemically important. The process takes into account the organization's systemic "connectedness,'' and other specific factors that could impact its designation. Any designated organization would be subject to risk management oversight and examinations.

Click here to read the final rule published in the Federal Register.

Reading

- "FSOC Issues Final Rule on Authority to Designate Financial Market Utilities as Systemically Important,'' *Weil, Gotshal & Manges LLP* – July 27, 2011
- Regulatory Practice Letter 11–17

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CFPB Issues Interim Alternative Mortgage Rule

In a move intended to address a regulatory gap caused by the passage of the Dodd-Frank Act, the Bureau of Consumer Financial Protection (CFPB) has released for public comment an interim final rule that would amend the Alternative Mortgage Transaction Parity Act (AMTPA). The rule would authorize state-licensed loan originators to make variable-rate loans and other alternative mortgages under federal law, rather than state law. The CFPB proposed the interim rule to allow some lenders at the state level to continue to use the AMTPA as a source for making alternative mortgages. After passage of Dodd-Frank, concerns were raised that a regulatory gap had been created that would negatively affect some rural lenders that rely on AMTPA. Consequently, consumers in those areas could have faced limited access to mortgages from those lenders. Comments on the interim rule are due by September 22.

Reading

- "CFPB Issues Interim Final Rule On AMTPA,'' *Mortgageorb* – July 25, 2011
- "CFPB Issues First Stopgap Mortgage Rule,'' *Housing Wire* – July 22, 2011

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Acting Comptroller Provides Senate a 'Progress Report' on OCC's Implementation of the Dodd-Frank Act

In recent testimony before the Senate Committee on Banking, Housing, and Urban Affairs, the Acting Comptroller of the Currency John Walsh provided a "progress report'' on the Office of the Comptroller of the Currency's (OCC) implementation of the Dodd-Frank Act. Walsh's remarks focused on the integration of the staff and functions of the Office of Thrift Supervision; efforts to support the Bureau of Consumer Financial Protection; OCC's contributions and participation in the Financial Stability Oversight Committee; efforts to strengthen risk-based capital, leverage, and liquidity requirements; and the agency's progress on key rulemakings. Read Walsh's written remarks by clicking here.

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Legislative Complexity Challenges Traditional Business and Compliance Strategies

KPMG has published a Public Policy Alert that highlights why the new legislative landscape may require challenging the historical compliance approach – including compliance structures, budgets, technology enablers, skills, roles, and responsibilities. This Alert also focuses on the ways compliance professionals are integrated into the business planning, reporting, and governance processes. Migration from traditional structures will not happen overnight. But those companies able to quickly establish a vision, a pragmatic roadmap, and execution strategy will be better equipped than their competitors to handle the continuing legislative complexity that has become a business reality. The Alert addresses legislative considerations such as Dodd-Frank's conflict minerals and whistleblower provisions, as well as increased regulatory scrutiny. An example of a refreshed compliance strategy is presented in the Alert in a conflict minerals case study. Click here to read the Alert.

Click here to read the Public Policy Alert on legislative complexity.

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SEC Rejects Clawback Deal with ex-CEO

A recent Securities and Exchange Commission (SEC) action involving a high-profile clawback case is being followed closely across industries and among regulators. The SEC recently decided to reject a proposal by its enforcement staff to settle a case involving a retired chief executive who was the subject of a widely followed clawback action.

The retired CEO had headed a company that restated earnings for three consecutive years, beginning in 2002. In 2009, the SEC brought its clawback lawsuit against the former CEO, under the provisions in Section 304 of the Sarbanes-Oxley Act. The suit demanded that the former CEO repay the company an estimated $4 million in bonuses and other incentive-based and equity-based compensation, without alleging that the CEO engaged in any personal misconduct. The SEC earlier had filed a civil action against a number of the company's senior executives, alleging numerous violations of securities laws. No action was brought against the CEO, however.

In March, the SEC's enforcement staff told a federal court judge hearing the case that it and the former CEO had reached a settlement, but SEC commissioners in July rejected the staff recommendation. According to published reports, the SEC had described the case as the first clawback case under the Sarbanes-Oxley Act against an individual who was not alleged to have otherwise violated the securities laws. The federal court has asked for comments from both parties.

Reading

- "Negotiations in SEC Clawback Case Collapse When Commission Rejects Settlement Proposal from Its Own Staff,'' *Federal Securities Law Blog* – July 21, 2011

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Financial Institutions and Their Executives Buying Clawback

Insurance

In July, the Federal Deposit Insurance Corporation (FDIC) approved a final rule that addresses certain provisions related to its regulations governing the resolution of nonbank financial companies that are designated as systemically important – frequently referred to as the FDIC's Orderly Liquidation Authority under Title II of the Dodd-Frank Act. With the passage of these final rules, the FDIC clarifies its authority to clawback compensation from executives and directors judged responsible for the failure of a covered financial institution. News reports are now surfacing that insurance companies are offering policies that would cover the institutions against legal costs if they come under investigation by the FDIC.

The new rules, which became effective August 15, give the FDIC the authority to recover any compensation received by such executives during the two-year period prior to the FDIC's appointment as receiver, or for an unlimited period in the case of fraud. A recent article in *The Economist* reported that "dozens of financial institutions, from bank holding companies to hedge funds and private equity firms, have taken out its cover, as an add-on to their broader directors and officers liability insurance.'' None of the institutions buying the coverage were named in the article.

Reading

- "Insuring the Bosses' Wallets,'' *The Economist* – July 19, 2011
- Federal Register notice for the final rule
  http://www.fdic.gov/regulations/laws/federal/2011/11finaljuly15.pdf

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Basel Releases Guidance on Assessments for SIFIs

The Basel Committee on Banking Supervision has issued a consultative document on regulatory oversight for systemically important financial institutions (SIFIs). Under the provisions of the consultative document, an assessment methodology would be employed to determine whether an entity qualified as a SIFI. The assessment methodology would be based on an indicator-based approach that would be comprised of five broad categories: size, interconnectedness, lack of substitutability, global (cross-jurisdictional) activity, and complexity. Entities determined to be SIFIs would be required to hold additional capital termed a "loss absorbency requirement."

This assessment is applied at a global level which will influence national treatment. Based on the current results of applying the assessment methodology, 28 banks would be subject to the additional loss absorbency requirement due to their global systemic importance. Comments on the document should be submitted by Friday, August 26, 2011.

Click here to read *Global Systemically Important Banks: Assessment Methodology and the Additional Loss Absorbency Requirement*.

Washington Report – July 25, 2011

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SEC Boosts Thresholds for Investors Performance Fees

The SEC has adopted a rule that raises certain financial thresholds for determining whether an investment adviser can charge its clients performance fees (the "qualified client" thresholds). The rule, coming out of the Dodd-Frank Act, mandates that investors must have at least $1 million under management or $2 million in net worth, excluding the value of the investor's primary residence, in order to be assessed a performance fee by a hedge fund or private equity adviser. These thresholds were last updated almost 15 years ago, and were previously at $750,000 and $1.5 million, respectively. Click here to read an SEC statement on the matter.

Washington Report – July 18, 2011

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Dodd-Frank and Practical Considerations for the Mining Industry

The KPMG Global Energy Institute offers a publication that discusses provisions in the Dodd-Frank Act that affects mining companies. It particularly examines three provisions that could impact mining companies that are required to file an annual report with the Securities and Exchange Commission (SEC). These provisions include more stringent safety disclosures for resource extraction issuers that operate mines; disclosure requirements for issuers that use conflict minerals originating in the Democratic Republic of the Congo (DRC) or bordering countries; and disclosure requirements for payments to governments related to the commercial development of oil, natural gas, or minerals. Notably, the Act could apply to nonmining companies and companies that do not file with the SEC, as companies that use conflict minerals will be required to prove that the minerals did not originate in the DRC.

Click here to read the KPMG report.

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thorough examination of the particular situation. KPMG LLP does not provide legal services.

KPMG is providing industry and subject-matter resources to assist a client with their understanding of the limitation of federal preemption of state laws.