

Client Alert

# Economic Crisis Response Group

October 2009

Economic Crisis  
Response Group

Edited by  
Charles E. Dropkin

## **SEC and CFTC Issue Joint Report on Regulatory Harmonization**

On October 16, the Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC") issued a Joint Report on Regulatory Harmonization (the "Report"), which had been requested by the Obama Administration in June, to "make recommendations to Congress for changes to statutes and regulations that would harmonize regulation of futures and securities." The Report describes the differences in the respective regulatory schemes of the agencies and makes 20 recommendations to harmonize their approaches to the regulation of futures and securities.

The agencies held their first joint public meetings in early September to hear testimony and seek written comments on issues regarding harmonization, including clearance and settlement, regulation of exchanges and markets, margin requirements, regulation of intermediaries, portfolio margining, enforcement and investor rights and remedies, and regulation of pooled investment vehicles.

Although some testimony and comments supported combining the SEC and CFTC, Congress is not currently considering any proposed bills that would do so. The Report stated that the recommendations of the SEC and CFTC would improve enforcement powers, market and intermediary oversight and operational coordination. SEC Chairman Mary Schapiro said that the agencies want to "fill regulatory gaps, eliminate inconsistent oversight, and promote greater collaboration."

The Report focuses on differences in regulatory framework and approach in the following areas: (i) product listing and approval; (ii) exchange/clearinghouse rule changes; (iii) risk-based portfolio margining and bankruptcy/insolvency regimes; (iv) linked national market and common clearing versus separate markets and exchange-directed clearing; (v) price manipulation and insider trading; (vi) customer protection standards applicable to financial advisers; (vii) regulatory compliance by dual registrants; and (viii) cross-border regulatory matters.

The Report contained the following recommendations:

## **Markets**

1. The enactment of legislation to facilitate portfolio margining, including holding futures products in self-regulatory organization securities portfolio margin accounts and holding securities options and certain other securities derivatives in futures portfolio margin accounts.
2. The imposition of steps to facilitate the product approval process and the enactment of legislation to clarify the respective jurisdiction of the agencies; disputes over jurisdiction would be resolved by petitions for expedited review by the U.S. Court of Appeals. This suggested approach differs from various bills currently in Congress that provide for jurisdiction to be resolved by the Treasury or an oversight agency.
3. The enactment of legislation to increase the CFTC's authority over exchange and clearinghouse compliance, including exchange and clearinghouse rules under the Commodity Exchange Act ("CEA").
4. Review by the SEC of its approach to cross-border access regarding cross-border transactions in securities; in particular, the SEC will consider whether certain U.S. investors should be permitted to deal directly with non-U.S. broker-dealers.
5. Amendment of the CEA to provide that the CFTC can require foreign boards of trade to comply with certain requirements and register with the CFTC if they provide U.S. participants direct access to foreign markets. Under the amended CEA, the CFTC would be permitted to rely on the foreign regulatory authorities to avoid duplicative regulation.

## **Financial Intermediaries**

6. To better protect consumer and business counterparties, enactment of legislation establishing consistent fiduciary duties and a uniform standard of conduct for investment advisor and broker-dealer intermediaries, whether regulated by the SEC or CFTC.
7. Conforming the SEC's record keeping requirements to the CFTC's five-year standard.
8. Simplifying the SEC's disclosure documents and conforming them to the CFTC's requirements.
9. Conforming the agencies' rules regarding private funds such as hedge funds, regarding the use of performance track records, reporting to investors, and recordkeeping.
10. Granting the CFTC broader authority to implement conflict of interest procedures to separate the divisions of financial institutions that perform research on or analysis of commodity prices from those involved in trading or clearing.

## **Enforcement**

11. Enactment of legislation providing rewards and protections to whistleblowers for information.
12. Enactment of legislation giving the CFTC broader authority to grant customer restitution in its administrative enforcement proceedings.
13. Enactment of legislation granting the CFTC greater enforcement authority to stop disruptive trading practices that harm the integrity of the futures markets or price formation.
14. Enactment of legislation expanding insider trading prohibitions under the CEA, including the addition of prohibitions on misappropriation and trading on the basis of material non-public information obtained from any governmental authority.
15. Amending existing legislation to grant the SEC specific statutory authority to prohibit aiding and abetting offences under the Securities Act of 1933, as amended, and the Investment Company Act of 1940, as amended.

## **Operational Coordination**

16. Authorizing the SEC and CFTC to form, fund, and operate a Joint Advisory Committee to consider and solve shared issues in the futures and securities markets.
17. Creation of a Joint Agency Enforcement Task Force to share market surveillance data, improve market oversight, enhance enforcement, and eliminate duplicative regulation.
18. Establishment of a joint cross-agency training program for staff of the SEC and CFTC regarding enforcement matters.
19. Establishment of a program for the SEC and CFTC to share staff between the agencies through temporary detail positions and rotation.
20. Development of a Joint Information Technology Task Force to link information on CFTC- and SEC-regulated persons, and other information; such information would be made available to the public.

Proskauer's Economic Crisis Response Group includes lawyers with extensive experience representing private and public companies, institutional investors, financial services companies, private equity and hedge funds, lenders, commercial banks and individuals in the complex and interrelated areas impacted by the current financial situation. Our multidisciplinary group brings together the talents of our business and transactional lawyers with our litigation capabilities, particularly as they pertain to acquiring, managing or disposing of distressed assets; issues concerning investments in financial services companies; and complex financial instruments and transactions, including structured finance products, as well as a broad range of other areas such as corporate governance and defense, insurance coverage, reductions in force and other employment and benefit-related issues, securities regulation, and bankruptcy and restructuring matters.

If you have any questions regarding the matters discussed in this Client Alert, please contact any of the lawyers listed below:

**Charles E. Dropkin**

212.969.3535 – [cdropkin@proskauer.com](mailto:cdropkin@proskauer.com)

**James P. Gerkis**

212.969.3135 – [jgerkis@proskauer.com](mailto:jgerkis@proskauer.com)

**Jeffrey A. Horwitz**

212.969.3229 – [jhorwitz@proskauer.com](mailto:jhorwitz@proskauer.com)

**Bruce L. Lieb**

212.969.3320 – [blieb@proskauer.com](mailto:blieb@proskauer.com)

**David A. Picon**

212.969.3974 – [dpicon@proskauer.com](mailto:dpicon@proskauer.com)

**Stephen L. Ratner**

212.969.3290 – [sratner@proskauer.com](mailto:sratner@proskauer.com)

**D. Eric Remensperger**

310.284.4590 – [eremensperger@proskauer.com](mailto:eremensperger@proskauer.com)

**Kathy H. Rocklen**

212.969.3755 – [krocklen@proskauer.com](mailto:krocklen@proskauer.com)

**David W. Tegeler**

617.526.9795 – [dtegeler@proskauer.com](mailto:dtegeler@proskauer.com)

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.

BOCA RATON | BOSTON | CHICAGO | HONG KONG | LONDON | LOS ANGELES | NEWARK | NEW ORLEANS | NEW YORK | PARIS | SÃO PAULO | WASHINGTON, D.C.

[www.proskauer.com](http://www.proskauer.com)

© 2009 PROSKAUER ROSE LLP. All Rights Reserved. Attorney Advertising.