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**in this issue**

**Economic Crisis Response Group**

*FDIC Adopts Interim Rule Extending the Securitization Safe Harbor* **1**

*Bernanke Signals Support of Government Intervention to Shrink Large Financial Companies* **1**

*Obama Administration Creates Multi-Agency Financial Crime Task Force; SEC Reports Increase in Enforcement Activity* **2**

*Senate Committee on Agriculture Considers Derivatives Regulation* **2**

*House Committee on Agriculture Considers Proposed Bill's Effect on Derivatives Regulation* **3**

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**FDIC Adopts Interim Rule Extending the Securitization Safe Harbor**

On November 12, the FDIC adopted an interim rule amending 12 C.F.R. §360.6 (the “Securitization Rule”), temporarily extending the safe harbor in the Securitization Rule. The safe harbor protects certain financial assets connected to securitizations or special purpose entities from FDIC seizure in the event of a bank failure. The interim rule was issued to address concerns that new accounting standards that took effect on November 15 would require many securitizations to be characterized as secured on-balance sheet borrowings rather than “sales” under GAAP.

The Securitization Rule safe harbor prevents the FDIC from seizing financial assets transferred from an insured depository institution to a special purpose entity in connection with a securitization, if the transfer meets all of the conditions for sale accounting treatment under GAAP. Insured depository institutions use the safe harbor to isolate assets, enabling their asset-backed securities to earn higher credit ratings than if such assets were vulnerable to the failures of such institutions. The new accounting rules raised concerns about whether such asset-backed securities could continue to benefit from the existing safe harbor, because these rules required companies to consolidate the financial statements of certain special purpose entities created for the purpose of securitizations. The FDIC’s interim rule temporarily remedies this issue by providing that the FDIC will not reclaim, recover or recharacterize any securitized financial assets transferred on or before March 31, 2010, if those assets qualified for safe harbor protection under the accounting rules in effect before November 15.

**Bernanke Signals Support of Government Intervention to Shrink Large Financial Companies**

In a speech delivered to the Economic Club of New York on November 16, Federal Reserve Chairman Ben Bernanke stated his belief that regulatory authorities should be granted the power to shrink companies or force them to divest assets if they pose a risk to financial markets or the economy. This speech signals support for various legislative proposals being considered in Congress to allow the government to reduce the size of financial companies, the failure or bankruptcy of which would threaten the economy.

“The supervisors should be allowed by law to insist that the company divest itself or shrink its activities,” Bernanke noted.

## **Obama Administration Creates Multi-Agency Financial Crime Task Force; SEC Reports Increase in Enforcement Activity**

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On November 17, President Obama signed an executive order creating a new multi-agency, multi-jurisdictional task force to increase investigation and prosecution of financial crimes connected to the financial crisis and to try to deter future fraud.

The Financial Fraud Enforcement Task Force, led by the Justice Department and Attorney General Eric Holder, replaces a corporate fraud task force created in 2002. It includes more than 20 different federal agencies, including the SEC, the Treasury Department and the Department of Housing and Urban Development, as well as state-level agencies. The task force’s initial meeting is scheduled to be held within 30 days.

Robert Khuzami, head of enforcement at the SEC, said that specialized units at the SEC would focus on derivatives and securities, insider trading and market manipulation, and fraud among hedge funds and investment advisers.

The SEC announced that it opened more inquiries and doubled sanctions in the fiscal year that ended on September 30. Fines and orders to forfeit illegal profits more than doubled, totaling \$2.4 billion in the 12 months through September 30, while new investigations rose 6 percent to 944.

## **Senate Committee on Agriculture Considers Derivatives Regulation**

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The Senate Committee on Agriculture held a hearing on November 18 to consider the Senate Banking Committee’s draft bill for financial regulatory reform. Chairman Blanche Lincoln and Ranking Member Saxby Chambliss stated that the Committee “will play a significant role in the effort to provide oversight and transparency to our nation’s financial regulatory system”, mostly in the regulation of derivatives, particularly forward contracts (which are crucial to the agricultural industry). Committee members and CFTC Chairman Gary Gensler stated that the CFTC should decide which contracts must be cleared through a clearinghouse and were skeptical of any proposal to grant the Federal Reserve Board or other regulatory authority jurisdiction over the CFTC and its regulation of forwards and other derivatives. End-users of commodities and products that are hedged by derivatives, such as energy producers, testified that the requirement to clear their contracts would be too expensive and would prevent them from hedging their risks.

On December 2, the Committee will hold a second hearing, at which Treasury Secretary Geithner will testify. On the same day, the House Energy and Commerce Committee’s subcommittee on energy and the environment will also hold a hearing on whether H.R. 3795, the Over-the-Counter Derivatives Market Act of 2009, might disrupt electric and natural gas production by making protective hedges too costly, echoing the testimony of energy producers at the November 18 Committee hearing.

## House Committee on Agriculture Considers Proposed Bill's Effect on Derivatives Regulation

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On November 17, the House Agriculture Committee held a hearing to review the portions of the draft Financial Stability Improvement Act that would grant the Federal Reserve Board the power to oversee financial institutions considered “too big to fail.” The Committee’s primary focus is the effect of such legislation on the CFTC and on the regulation of various derivatives.

Committee Chairman Collin C. Peterson and witness Gary Gensler, Chairman of the CFTC, both expressed doubts about giving the Federal Reserve Board such powers, and stated that the CFTC should be the sole regulator over futures and other derivatives currently within the CFTC’s jurisdiction. Chairman Peterson stated that any provisions in the draft providing for a regulator with authority over the CFTC would need to be removed before the Committee would support the draft.

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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.

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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.

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