Regulatory Update – June 27, 2011

Commodity Futures Trading Commission

• The Commission recently announced it would grant temporary relief with respect to various provisions that reference terms such as “swap,” “swap dealer,” “major swap participant,” or “eligible contract participant.” The relief for certain provisions would extend until the earlier of December 31, 2011 or the date that final rules are implemented. Other requirements which necessitate specific CFTC rulemaking would be delayed until those rules are completed.

• Chairman Gary Gensler recently said that the CFTC would largely meet the implementation timeline laid out by the G20. Gensler also stated that the earliest set of completed rules will most likely focus on anti-manipulation, reporting by large trading firms, and certain clearinghouse procedures.

Securities and Exchange Commission

• The SEC similarly published its order granting temporary exemptions and other temporary relief, delaying effectiveness of certain provisions from the Dodd-Frank Act until implemented, and providing temporary relief from certain provisions otherwise due to become effective on July 16, 2011.

Congressional Oversight

• Congress continues to hold hearings assessing the implementation and overall impact of Dodd-Frank. Key issues addressed during recent hearings include the ability of Dodd-Frank and the FDIC to end “too big to fail,” international harmonization, the extraterritoriality/indemnification provisions, threats to domestic competitiveness, and capital and margin requirements.

What is Washington talking about?

• The debt ceiling – The debate to reach a debt ceiling deal intensified as the Administration/Congressional negotiations, headed by Vice President Joe Biden, broke down when House Majority Leader Eric Cantor (R-VA) walked away after reaching an impasse related to taxes. Republicans are demanding direct involvement by President Barack Obama to continue the negotiations.

• Regulatory vacancies – Many of the top regulatory positions—including the directors of the new CFPB and Office of Financial Research, the FSOC’s insurance post, the Office of the Comptroller of the Currency (currently led by acting comptroller), and soon, the FDIC— are currently vacant and awaiting nominees, or involved in uphill confirmation battles. Nobel Prize winning economist Peter Diamond recently withdrew his nomination for the Federal Reserve’s board of governors in the face of Republican opposition, ending an almost 14-month nomination process. Already facing vast new responsibilities under Dodd-Frank and budget shortfalls, many are beginning to question how effective these agencies will be if left leaderless for extended periods of time.

• International Harmonization – Recent congressional hearings reflect a growing recognition of the importance of international regulatory harmonization and that intensive dialogue is required to overcome the challenges presented by extraterritorial provisions of Dodd-Frank and EMIR. At a Senate Agriculture Committee hearing on June 15, CFTC Chairman Gensler—citing his recent letter to Commissioner Barnier—acknowledged the indemnification provisions as being problematic to data collection efforts, and stated that he was working to address the issue in conjunction with the office of Senator Debbie Stabenow (D-MI), chair of the Senate Agriculture Committee. The House Financial Services Committee brought similar attention to international regulatory issues in a hearing entitled “Financial Regulatory Reform: The International Context”.

Do you Speak ‘Dodd-Frank’?

Office of Financial Research (OFR) – The OFR is a new regulatory body charged with assisting the Financial Stability Oversight Council by providing data and information critical to monitoring systemic risk in the financial services marketplace. Created by the Dodd-Frank Act, the OFR is housed within the Treasury Department and is responsible for improving the quality of financial data available to policymakers and facilitating robust analysis of the financial system. While the FSOC will direct some of its activities, the OFR may independently promulgate regulations regarding the scope and format for data collected, as well as for data collected by other regulatory agencies. Additionally, it will have independent authority to collect reports, data, and information without outside approval.

For more information, please contact Dan Cohen at dcohen1@dtcc.com.
Do you Speak ‘European’?

**European Securities Markets Authority (ESMA)** – In September 2010, European lawmakers agreed on a financial supervision package which included creating three pan-European supervisory authorities for insurance, payments and securities markets and institutions. ESMA is the Securities authority. In January 2011, ESMA became operational, replacing the Committee of European Securities Regulators (CESR). It is based in Paris and responsible for, amongst other things, drafting binding technical standards and supervising trade repositories. ESMA aims to strengthen global supervisory coordination, promote supervisory convergence and advise EU institutions in areas including corporate governance, clearing and settlement and derivative issues. ESMA will also settle disputes between national supervisors, work with national supervisors in a crisis situation and have the power to temporarily ban certain financial activities (ex. naked CDS). ESMA chair’s is Steven Maijoor, formerly of the Dutch regulator AFM while Verena Ross, formerly of the FSA, is the body’s executive director.

For more information, please contact Andrew W. Douglas at awdouglas@dtcc.com.

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**Council of Ministers**

- **The Hungarian Presidency** produced its final version of EMIR for discussion at Ambassadorial Level (COREPER) on Friday 17th June as a precursor to sending the bill for agreement to the EU Finance Ministers (ECOFIN) meeting on the 20th June.

- **As predicted, no political agreement was achieved** so the bill will not be approved by ECOFIN in June. It appears likely that approval will now be delayed until October 2011.

- The key sticking point is the **scope of clearing obligations**. EU member-states lead most vocally by Germany support the OTC-only scope in line with the original G20 mandate. This is opposed by some member-states, led by the UK, that believe the clearing obligation should apply to all derivatives in line with the US proposal.

**European Parliament**

- Dr Werner Langen recently responded to Treasury Secretary Timothy Geithner’s letter encouraging the EU to broaden the EMIR scope to all derivatives, confirming that Parliament has adopted an OTC-only scope for clearing derivatives and encouraging the US to do the same in compliance with G20.

**European Commission**

- At a Commission-sponsored Commodities conference in Brussels, President Sarkozy called for a central global repository for all commodities trades.

- At the same conference, Commissioner Michel Barnier indicated that the EU and the US are working well together and not trying to ‘teach the other how to do their job’.

**What is Brussels talking about?**

**Glass Steagall-Lite** – Is the UK reviving a form of the US Glass-Steagall Act, the 1999 repeal of which is thought by some to have contributed to the crisis, by ring-fencing retail from wholesale banking activity?

**Letter diplomacy** – The recent flurry of letters from Secretary Geithner, CFTC Chairman Gary Gensler, various Senators, Commissioner Barnier and MEP Langen regarding transatlantic regulations should not be seen as a substitute for good old fashioned diplomacy, discussion and negotiation which will surely be critical to “getting it right” and preventing regulatory arbitrage.

**All together now** – To this end, the formation of a US/EU task force dedicated to identifying regulatory “overlaps” between the two regions, such as extraterritorial provisions and general fears of regulatory arbitrage, is a welcome development.

**Excessive turbulence can cause items to fall from the luggage racks** – The delays in the MiFID, MAD and CSD regulatory proposals—and the recently announced delays in the implementation of the Dodd Frank Act – is prompting discussion of other potential delays and the general feasibility of meeting the G20 deadline. Will a more expanded timetable bring about a better result or simply allow the financial community to forget the seriousness of the 2008 financial crisis?

**Eurozone in crisis** – The EU and Europe as a political power enters the third and most serious phase of the crisis – contemplation of a potential sovereign default!