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Over-The-Counter Derivatives Markets Act to Provide Comprehensive Regulation of OTC Derivatives

The US Department of Treasury recently delivered draft legislation to Congress titled "Over-the-Counter Derivatives Markets Act of 2009," that, if enacted, will provide comprehensive regulation of over-the-counter (OTC) derivatives. The most notable features of the proposed legislation are the requirement for mandatory clearing of standardized OTC derivatives, stronger capital and margin requirements for dealers and major swap participants, new disclosure obligations and certain limitations on participating in different types of derivatives. The proposed legislation calls for the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) to jointly adopt further rules and regulations under the legislation within 180 days of its effective date.

The legislation would require "standardized" OTC derivatives to be cleared centrally by a derivatives clearing organization and to be traded on an exchange or alternative swap execution facility, all under the regulation of the CFTC or SEC. By imposing higher capital requirements and higher margin requirements for non-standardized derivatives, the legislation intends to encourage greater use of standardized derivatives, which would facilitate migration of OTC derivatives onto these central clearinghouses and exchanges. In addition, the legislation would, for the first time, impose federal supervision and regulation of all firms dealing in OTC derivatives and all firms that take large positions in OTC derivatives, with dealers and major market participants that are banks being regulated by the federal banking agencies and those that are not banks being regulated by the CFTC or SEC.

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The relevant federal financial regulatory agencies will have access, on a confidential basis, to the OTC derivative transactions and the open positions of market participants, and the public will have access to aggregated data on trading volumes and open positions. A key component to achieving this transparency will be new reporting requirements imposed on all current and future market participants obligating them to disclose the terms of swaps to either a registered swap repository or the CFTC. This requirement relates both to swaps entered into prior to the effective date of the proposed legislation, as well as swaps entered into after such date. As currently drafted, the legislation would require that all swaps entered into prior to the enactment of the legislation be reported to an approved swap repository or the CFTC.

For further information on financial regulatory reform and securities laws, please contact your principal Squire Sanders lawyer or one of the individuals listed in this Alert.

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations. Counsel should be consulted for legal planning and advice.

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