Federal Regulation of Swap Agreements Proposed

May 20, 2009

THE FOLEY ADVISER - MAY 20, 2009

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Senate Bill would authorize Regulation of Swap Agreements

On May 4, 2009, Senators Carl Levin, D-Michigan and Susan Collins, R-Maine introduced the Authorizing the Regulation of Swaps Act (the “Swaps Bill” or “Bill”) which, if passed, would repeal a number of provisions of US law that currently bar the regulation of swap agreements. The Swaps Bill (S. 961) has been referred to the Senate Committee on Banking, Housing and Urban Affairs.

If adopted, the Swaps Bill would grant immediate authority to “Federal financial regulators” to oversee any swap agreements subject to the oversight of such Federal financial regulator or entered into by any entity, person or financial institution regulated by such Federal financial regulator. “Federal financial regulator” is defined to include to include the Securities and Exchange Commission (“SEC”), the Commodity Futures Trading Commission (“CFTC”), the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision and all other federal agencies that have authority under law to regulate financial institutions or financial instruments. The Bill would further grant the SEC and CFTC sole authority to oversee and regulate their respective exchanges or clearing agencies and any swap agreements traded on such exchanges or clearing agencies. The Bill would not require Federal financial regulators to regulate such swap agreements, but would merely grant them the authority to do so.

The Bill adopts the same definition of “swap agreement” as is used in the Gramm-Leach-Bliley Act (15 U.S.C. § 78c note), and specifically includes within this definition any master agreement providing for a transaction, agreement or contract relating to a swap agreement. The Bill does not include specifics regarding the proposed structure or substance of any such regulations, but does require that, prior to the promulgation or enforcement of any regulations of swap agreements, the Federal financial regulators work together to “promote consistency in the treatment of swap agreements.”

In statements accompanying the introduction of the bill, both Senators Levin and Collins proclaimed this Bill to merely be an “interim measure intended to clear the way for more specific swaps requirements” to be found in subsequent, more comprehensive financial regulation reform legislation. Senator Levin asserted that this Bill is a “first step” in regulating swap markets and in a statement released by his office cited numerous regulators and current administration officials that have urged swift and strong swap regulation.

Obama Administration Proposal to Regulate OTC derivatives market

In addition to the proposed Swaps Bill, on May 13, 2009, the Obama administration announced its own plan to regulate the over-the-counter derivatives market, which would include the regulation of credit default swaps. The administration noted that the proposed regulatory framework is aimed at addressing the concerns raised by, among other things, the recent AIG situation.

Among the specifics of the plan is the call for amendments to the Commodity Exchange Act and the securities laws to allow for the supervision and regulation of all OTC derivatives dealers, including the imposition of reporting and capital requirements. In addition, the plan calls for amendments to such laws as may be needed to permit the SEC and CFTC to impose reporting and recordkeeping requirements and allow for standardized trades of derivative instruments to be moved onto a regulated exchange, as well as giving market regulators "clear and unimpeded authority" to monitor fraud and market abuses, including market manipulation.

Investment advisers or Managers with questions about either of these proposals should contact Peter Rosenblum or Jeffrey Collins or Meredith Haviland in Foley Hoag's Investment Management Group at 617 832 1000.