
Dodd-Frank One-Year Progress Report

Presented by

Annette L. Nazareth

Margaret E. Tahyar

Gabriel D. Rosenberg

July 22, 2011

Davis Polk

Davis Polk & Wardwell LLP

Presenters



Annette L. Nazareth

Annette is a partner in our Financial Institutions Group, practicing in the Washington DC office. She advises clients across a broad range of complex regulatory matters and transactions. She also works closely with our SEC enforcement practice, counseling non-financial sector corporations that are subject to government regulatory and enforcement actions.



Margaret E. Tahyar

Margaret is a partner in our Financial Institutions Group. Her practice focuses on providing strategic bank regulatory and financial regulatory reform advice and advising on troubled bank M&A and recapitalizations and capital markets transactions where the target or issuer is a financial institution. She also advises on corporate governance and securities settlement systems and payment systems.



Gabriel D. Rosenberg

Gabriel is an associate in our Financial Institutions Group. He advises financial institutions, corporations and industry groups on the requirements, impact and implementation of the Dodd-Frank financial reform legislation, particularly the regulatory treatment, trading and clearing of swaps.

Dodd-Frank Webcast Series

One Year Progress Report

July 22, 11:00 a.m. EDT / 8:00 a.m. PDT

Impact on Bank Holding Companies

July 25, 11:00 a.m. EDT / 8:00 a.m. PDT

Impact on Swap Dealers

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**Impact on Private Equity/
Hedge Funds**

July 27, 11:00 a.m. EDT / 8:00 a.m. PDT

Impact on End Users of Swaps

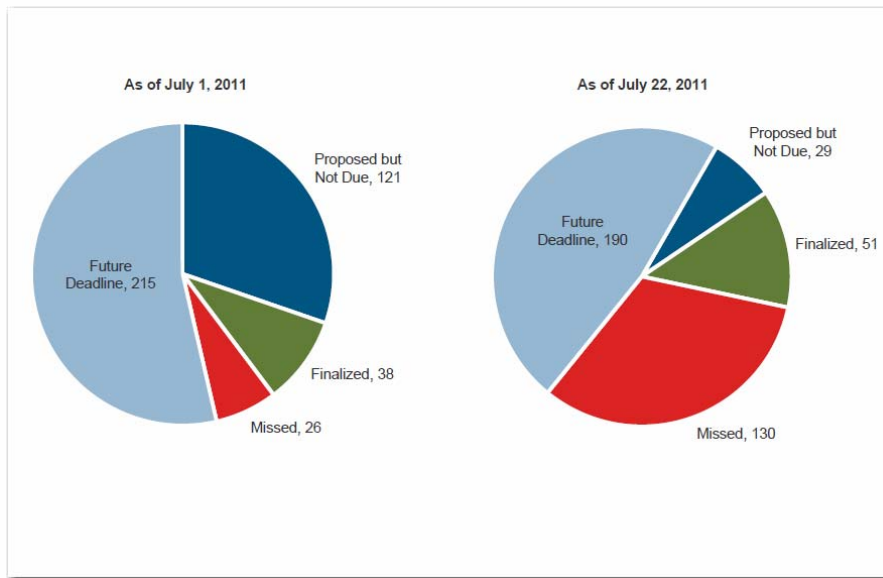
July 28, 11:00 a.m. EDT / 8:00 a.m. PDT

Emerging Litigation Trends

July 29, 11:00 a.m. EDT / 8:00 a.m. PDT

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Dodd-Frank Progress Report



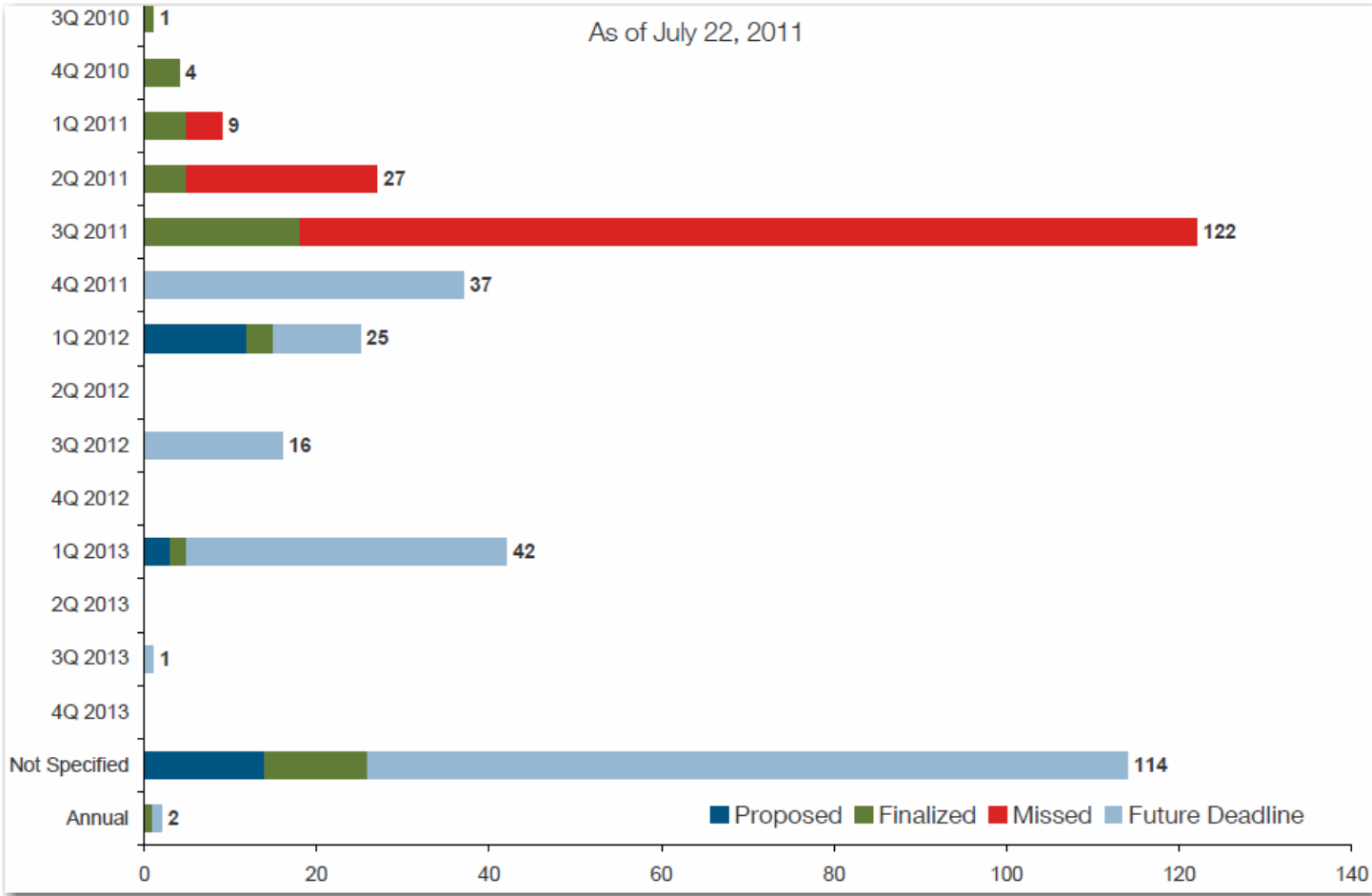
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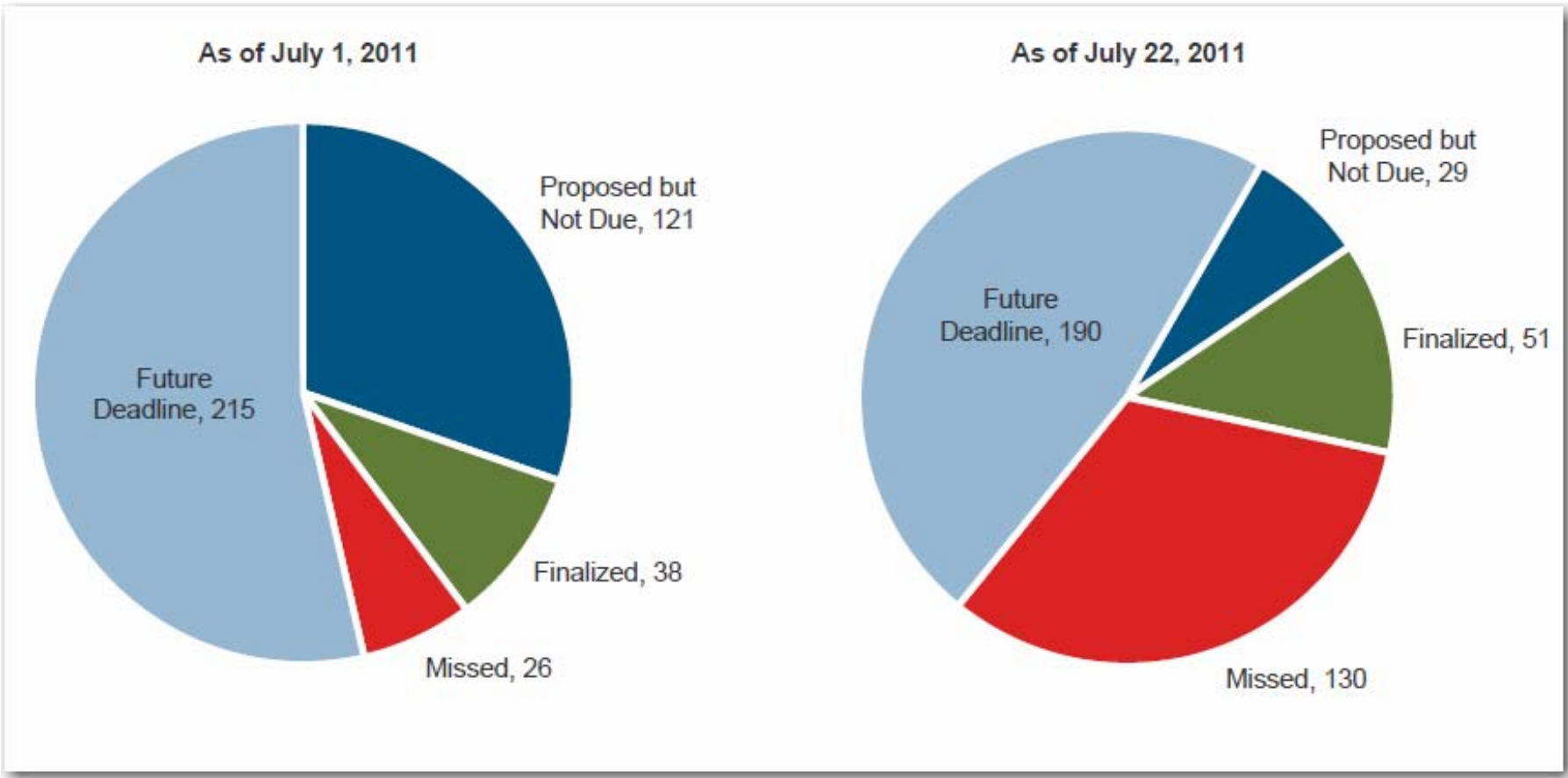
Regulator Resources



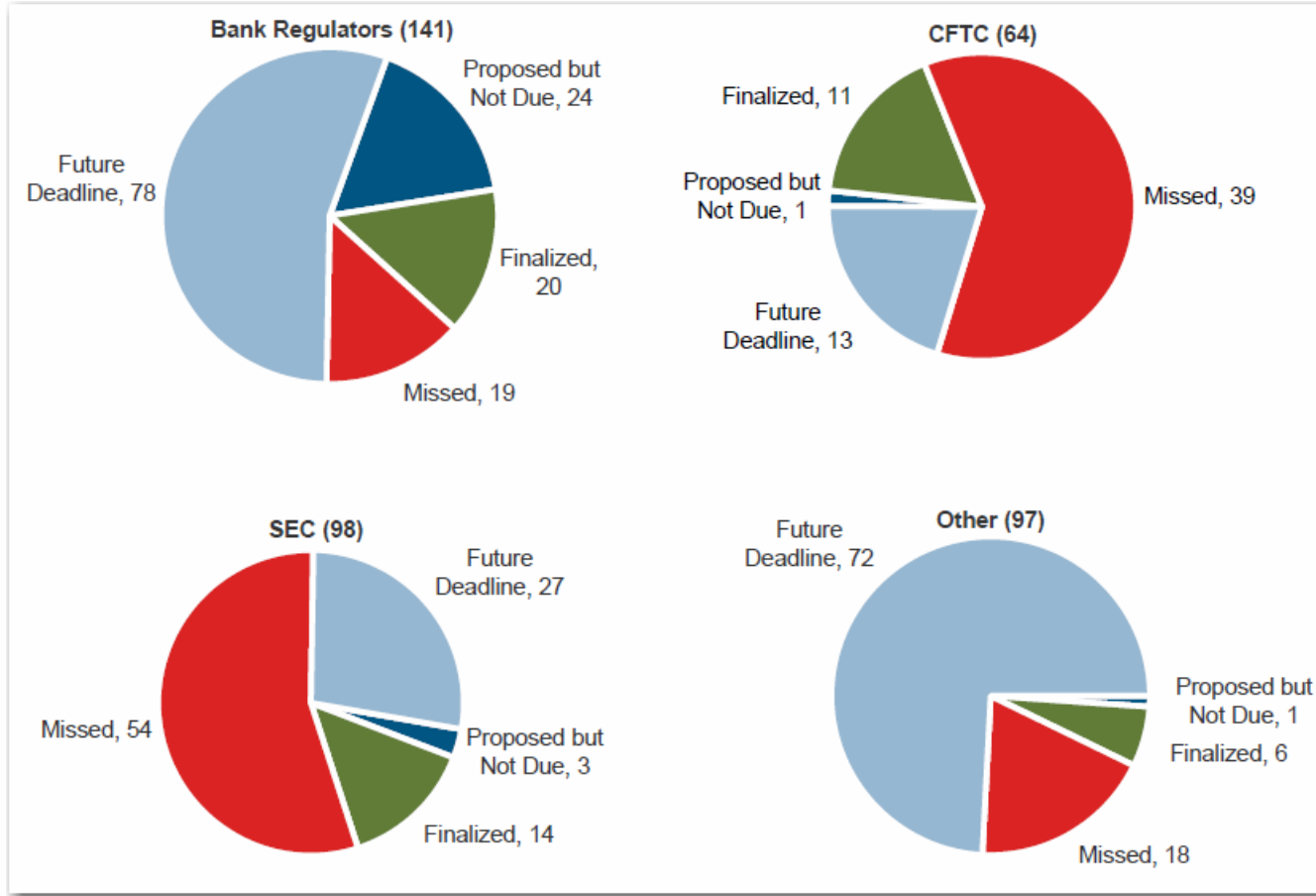
Dodd-Frank Rulemaking Progress by Due Date



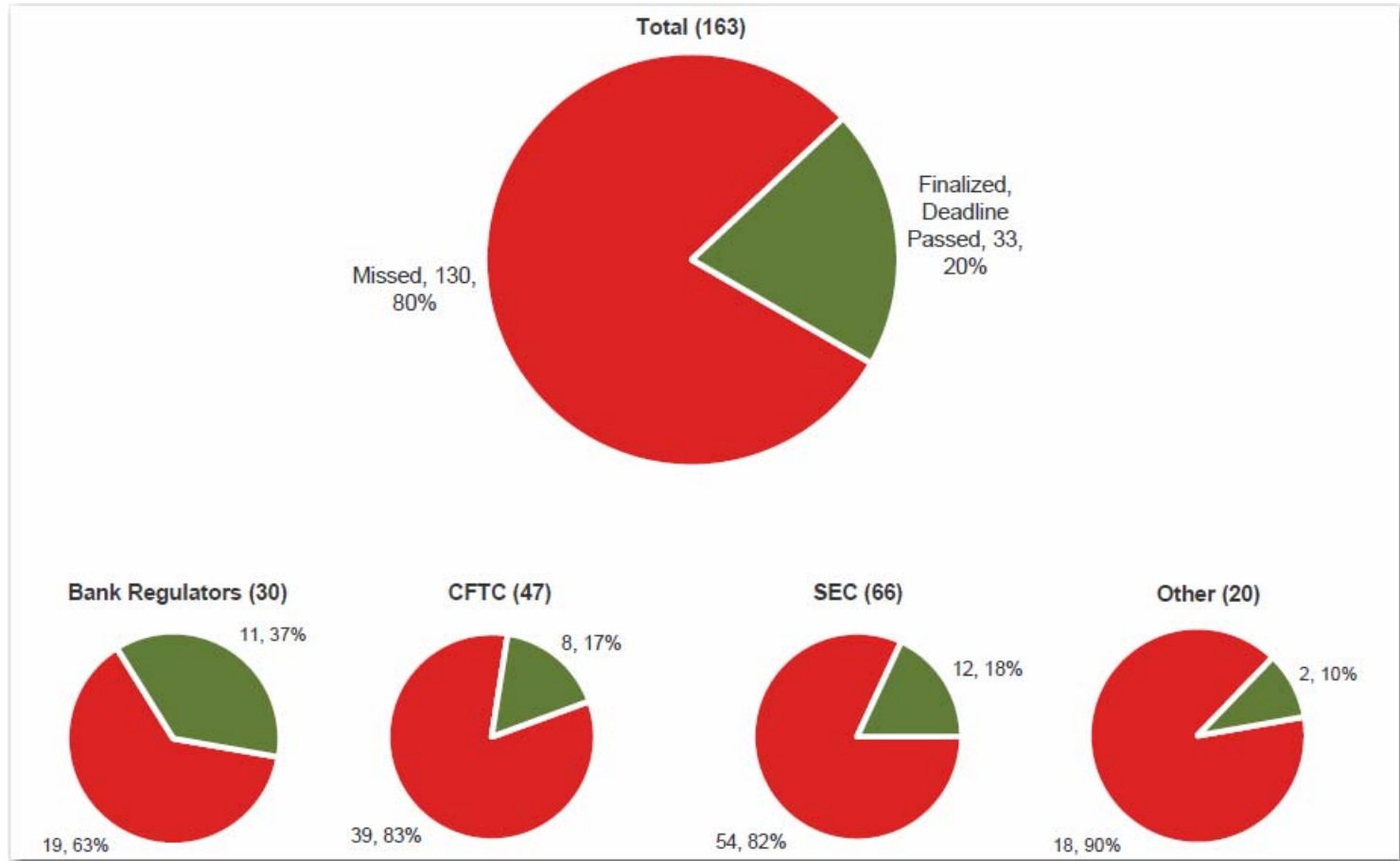
Dodd-Frank Rulemaking Progress by Month



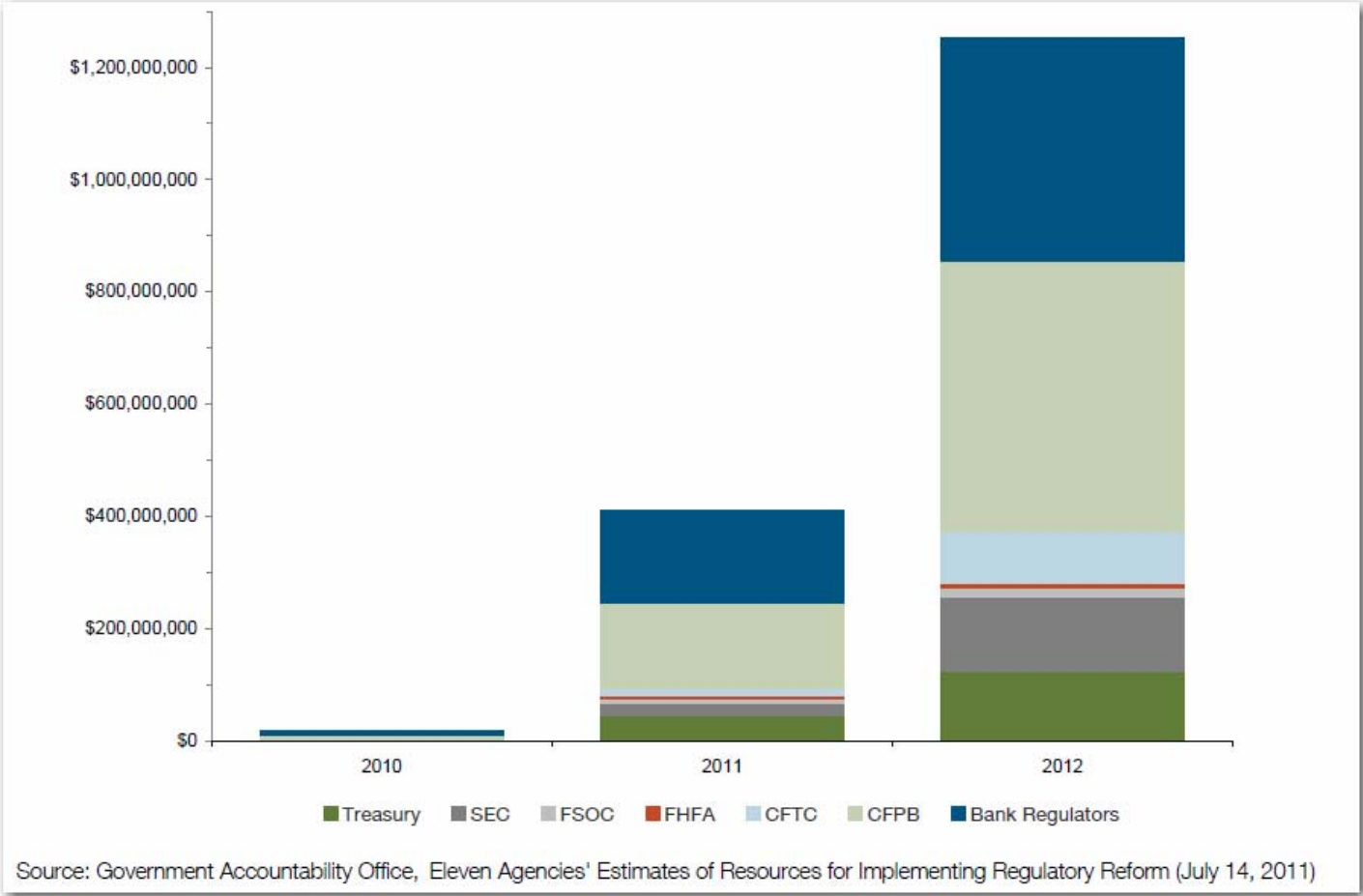
Dodd-Frank Rulemaking Progress by Agency



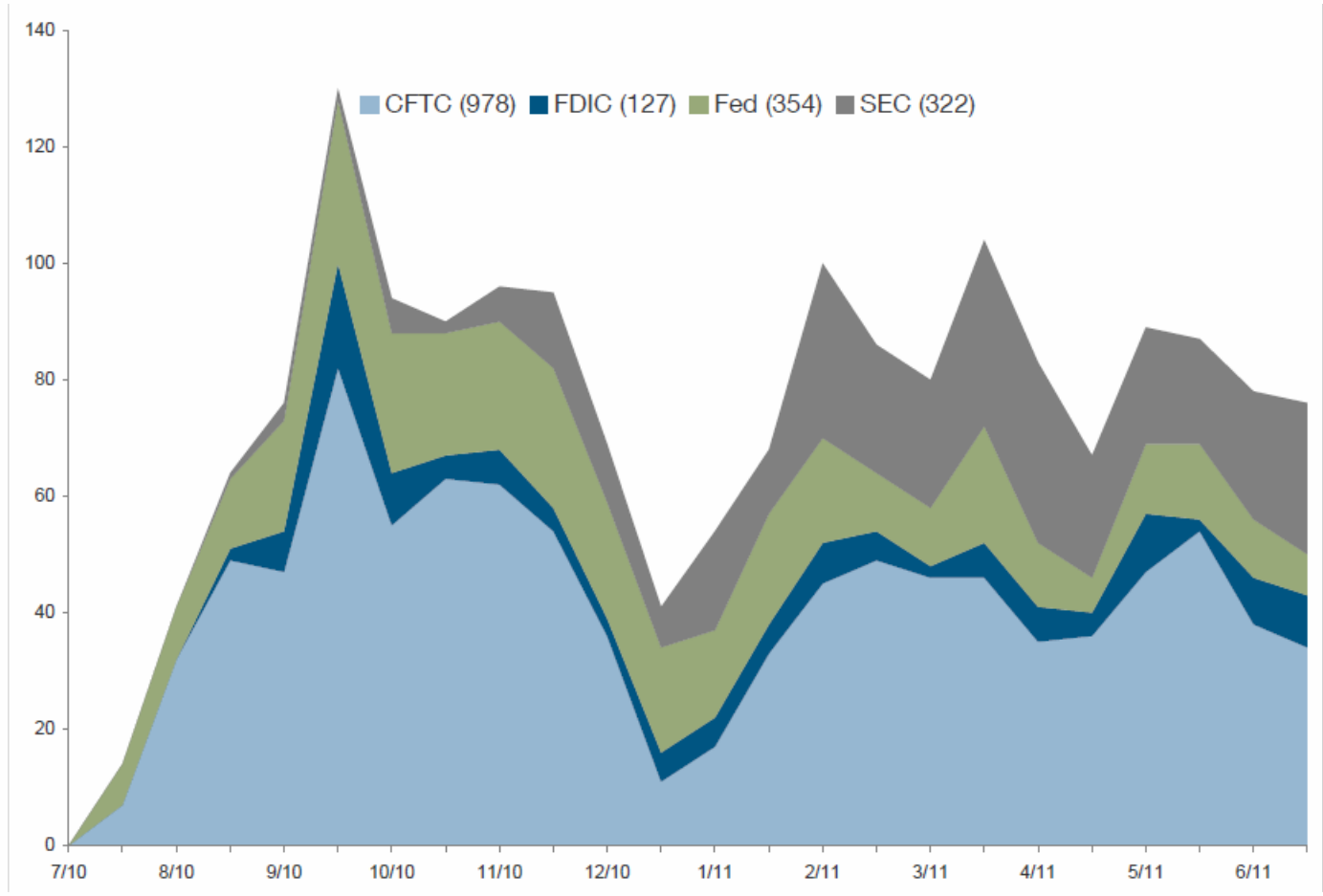
Rulemaking Progress on 163 Passed Deadlines



GAO: Agency Dodd-Frank Implementation Resources



Regulator Meetings with Outside Participants Over Time



Regulator Meetings with Outside Participants – Top 5 Topics

FDIC

- Bank Assessments
- Orderly Liquidation Authority
- Credit Risk Retention
- Study on Core and Brokered Deposits
- Risk-Based Capital Guidelines for Banks

CFTC

- Swap and Security-Based Swap Entity Definitions
- Swap and Security-Based Swap Reporting and Recordkeeping
- Position Limits for Derivatives
- Swap Execution Facilities
- Capital and Margin for Swaps and Security-Based Swaps

Federal Reserve

- Debit Card Interchange Fees and Routing
- Credit Risk Retention
- Implementation of the Volcker Rule
- Designation of Non-Bank Financial Companies as Systemically Important
- Remittance Transfers

SEC

- Swap and Security-Based Swap Reporting and Recordkeeping
- Swap and Security-Based Swap Entity Definitions
- Conflict Minerals
- Whistleblower Regulations
- Security-Based Swap Execution Facilities / Municipal Advisors / Infrastructure Ownership and Governance (tie)

Presenters' Contact Information

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Annette L. Nazareth	202 962 7075	annette.nazareth@davispolk.com

Dodd-Frank One-Year Anniversary: Impact on Bank Holding Companies

Presented by

John L. Douglas

Randall D. Guynn

Margaret E. Tahyar

Alexander Young-Anglim

July 25, 2011

Davis Polk

Davis Polk & Wardwell LLP

Presenters



John L. Douglas

John is a partner in our Financial Institutions Group and head of the firm's bank regulatory practice, with a focus on bank restructuring and resolutions and other issues arising from the banking and financial crisis. He has been involved in some of the most difficult and sensitive matters during the financial crisis, and advises various private equity firms and financial institutions on proposed investments in troubled or failed banks.



Randall D. Guynn

Randy is head of our Financial Institutions Group. His practice focuses on providing strategic bank regulatory and enforcement advice and advising on M&A and capital markets transactions when the target or issuer is a banking organization or other financial institution. He also advises on bank failures and recapitalizations, corporate governance and internal controls, cross-border collateral transactions, credit risk management, securities settlement systems and payment systems.

Presenters



Margaret E. Tahyar

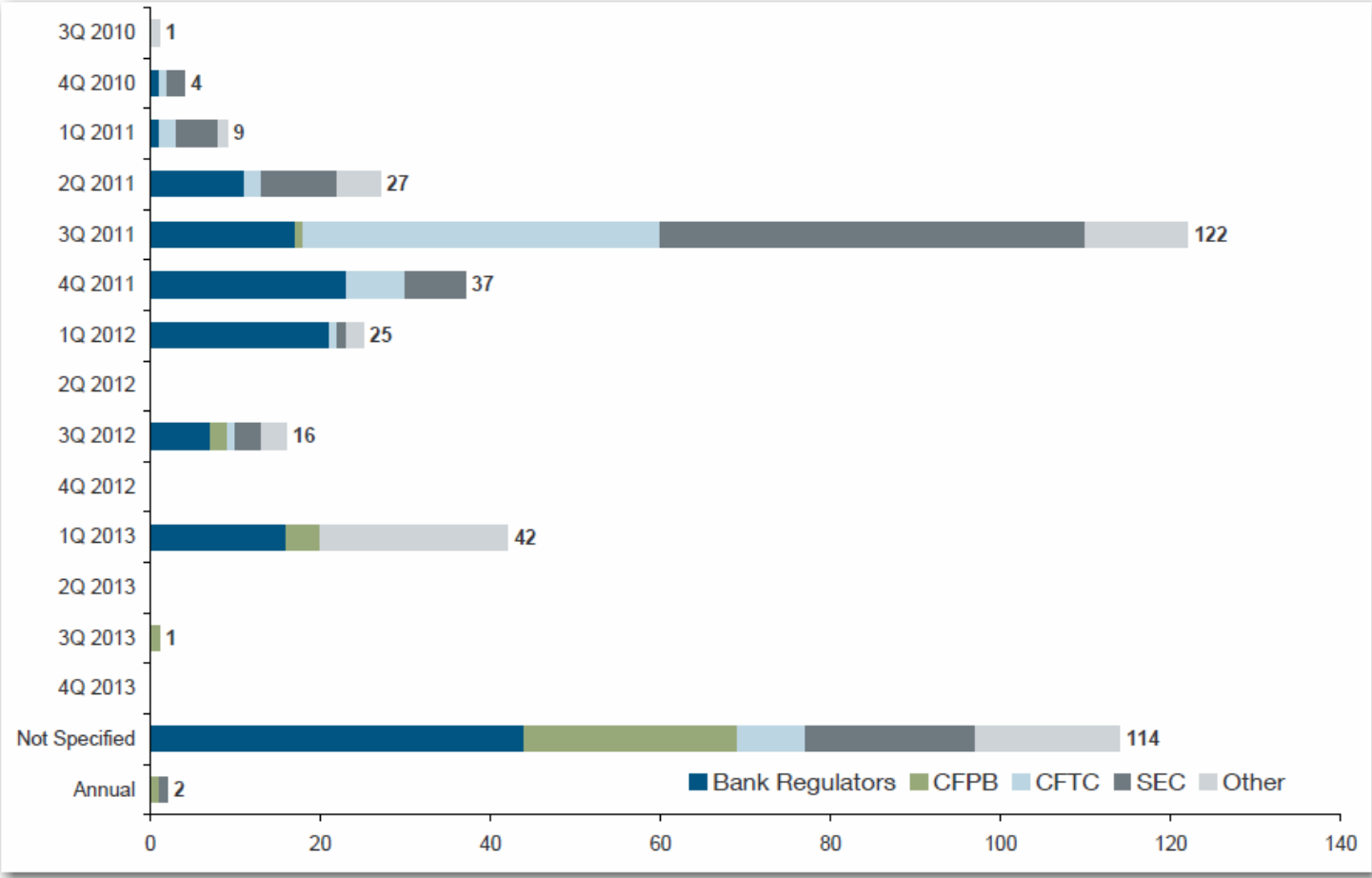
Meg is a partner in our Financial Institutions Group. Her practice focuses on providing strategic bank regulatory and financial regulatory reform advice and advising on troubled bank M&A and recapitalizations and capital markets transactions where the target or issuer is a financial institution. She also advises on corporate governance and securities settlement systems and payment systems.



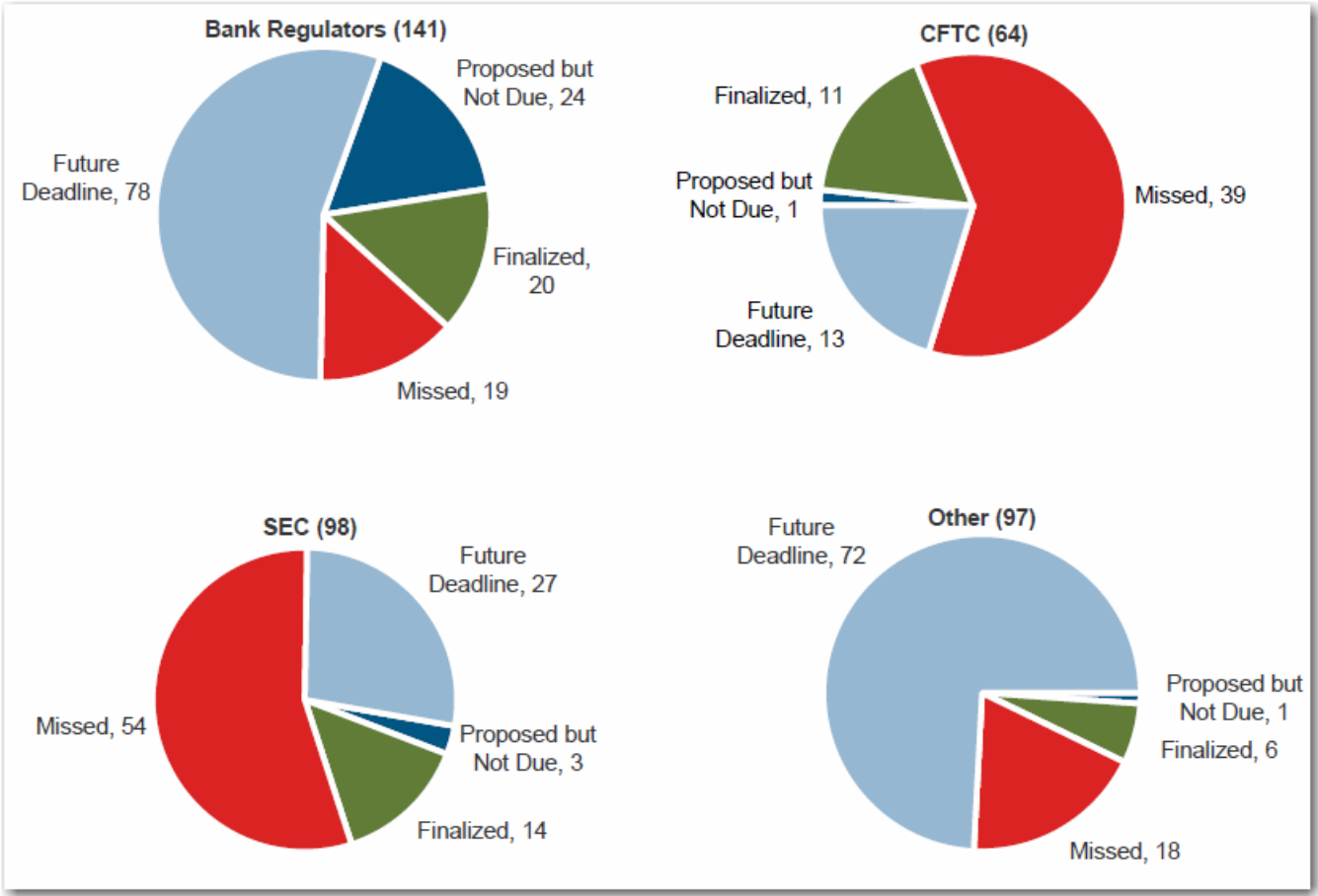
Alexander Young-Anglim

Alex is an associate in our Financial Institutions Group. He has worked on a wide range of Bank Holding Company Act and related regulatory matters, Dodd-Frank Act implementation and other financial regulatory reform matters, and troubled and failed bank M&A and capital markets transactions.

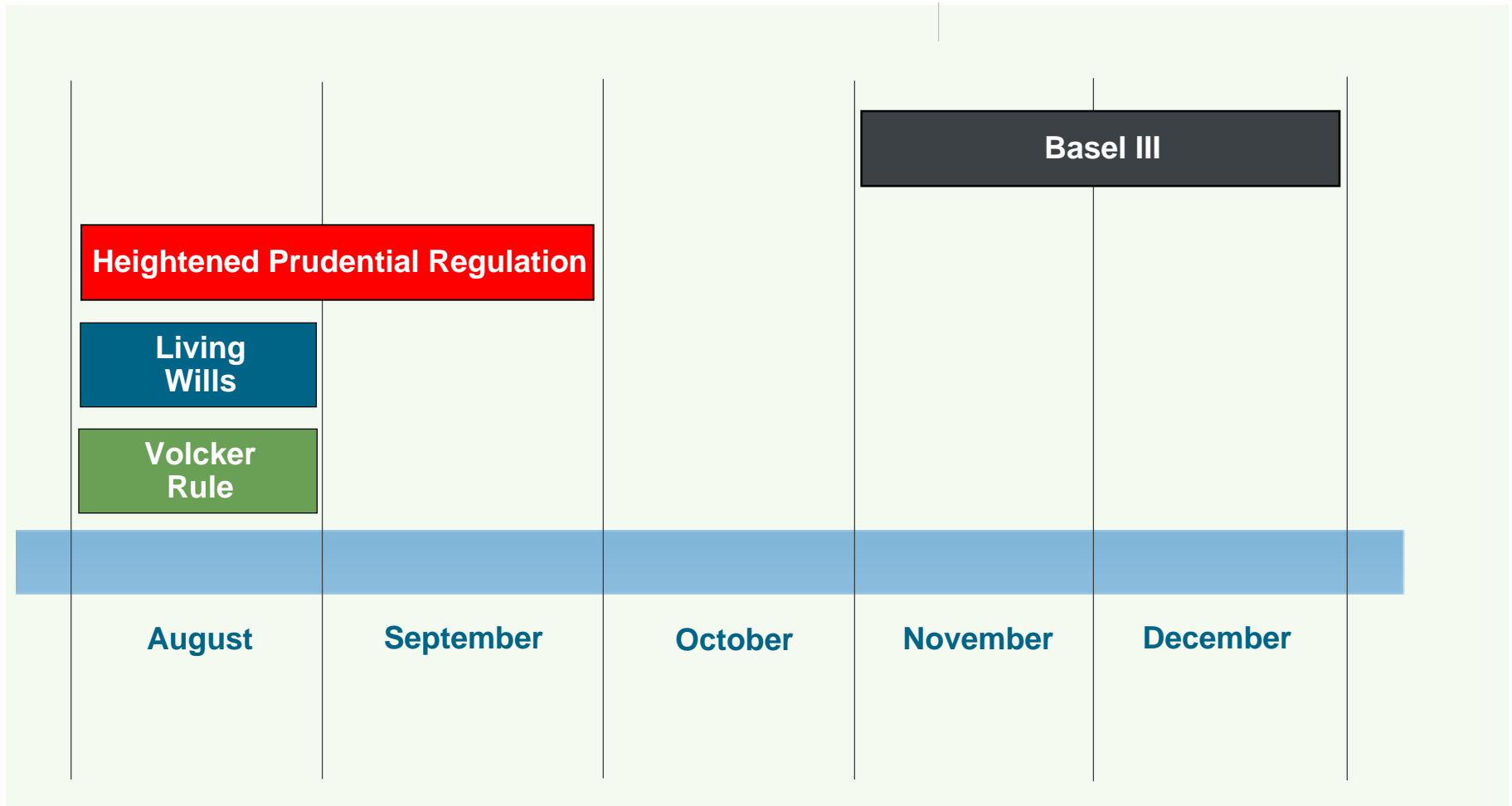
Timing of Important Rulemakings for BHCs



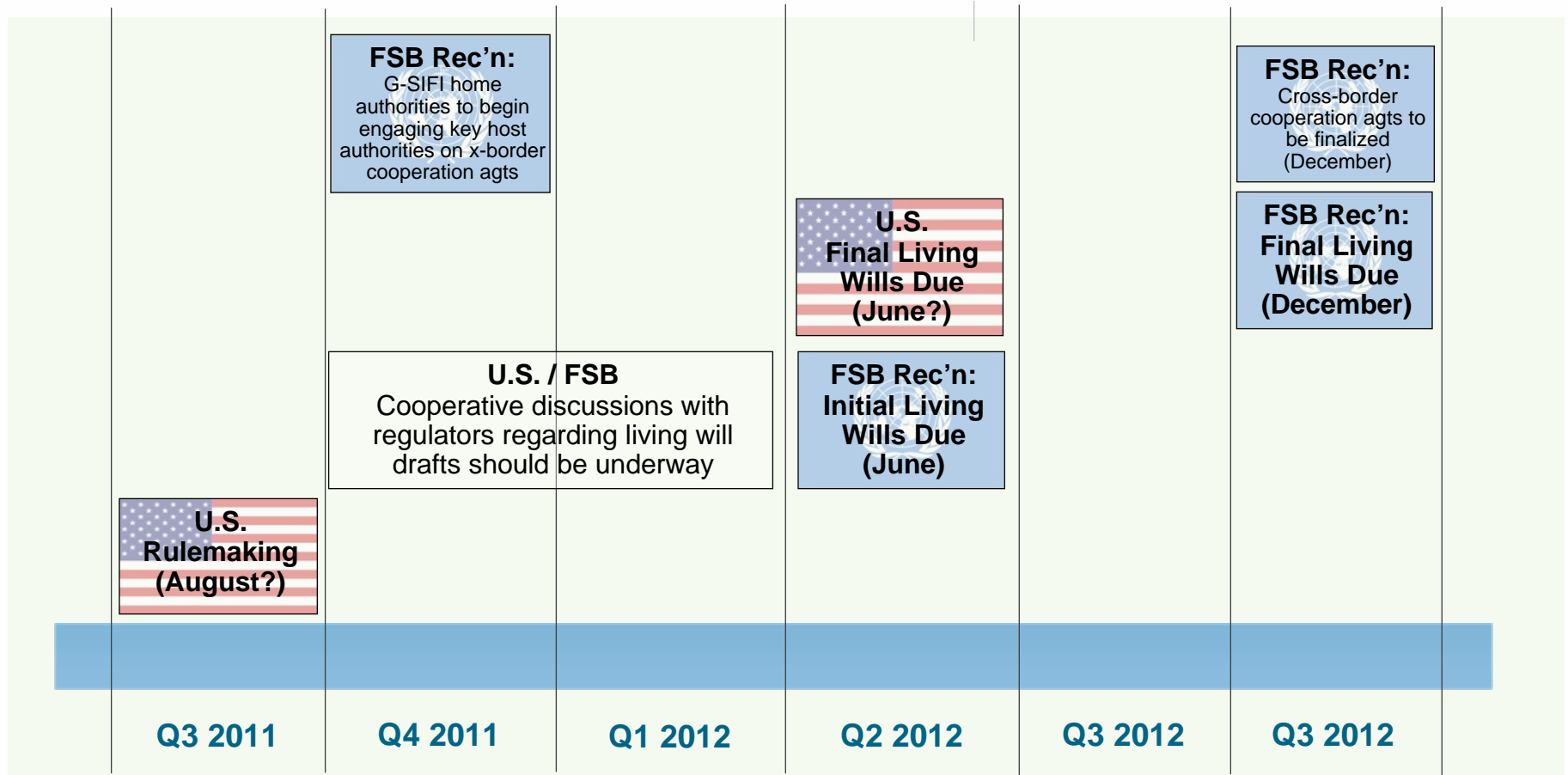
Rulemaking Progress by Agency



Expected Timeline for Selected BHC Rules



Living Wills: U.S. and International Timeline



† FSB Recommendation Source: Consultative Document, Effective Resolution of Systemically Important Financial Institutions (July 19, 2011)

Basel III: Phase-In Schedule

Phase-in arrangements

(shading indicates transition periods - all dates are as of 1 January)

	2011	2012	2013	2014	2015	2016	2017	2018	As of 1 January 2019
Leverage Ratio	Supervisory monitoring		Parallel run 1 Jan 2013 – 1 Jan 2017 Disclosure starts 1 Jan 2015					Migration to Pillar 1	
Minimum Common Equity Capital Ratio			3.5%	4.0%	4.5%	4.5%	4.5%	4.5%	4.5%
Capital Conservation Buffer						0.625%	1.25%	1.875%	2.50%
Minimum common equity plus capital conservation buffer			3.5%	4.0%	4.5%	5.125%	5.75%	6.375%	7.0%
Phase-in of deductions from CET1 (including amounts exceeding the limit for DTAs, MSRs and financials)				20%	40%	60%	80%	100%	100%
Minimum Tier 1 Capital			4.5%	5.5%	6.0%	6.0%	6.0%	6.0%	6.0%
Minimum Total Capital			8.0%	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%
Minimum Total Capital plus conservation buffer			8.0%	8.0%	8.0%	8.625%	9.25%	9.875%	10.5%
Capital instruments that no longer qualify as non-core Tier 1 capital or Tier 2 capital			Phased out over 10 year horizon beginning 2013						
Liquidity coverage ratio	Observation period begins				Introduce minimum standard				
Net stable funding ratio	Observation period begins							Introduce minimum standard	

† Source: Basel Committee on Banking Supervision

Nominations to top regulatory posts



OCC

Thomas Curry



CFPB

Richard Cordray



FDIC

Martin Gruenberg

Other unconfirmed or acting top posts:

- FHFA Director
- Fed Vice Chairman for Banking Supervision
- Office of Financial Research Head
- FSOC Insurance Representative

Progress on Selected Topics Important to BHCs

- **Capital**

- Basel
- Heightened prudential standards for SIFIs
- Collins Amendment, etc.
- Q3 / Q4 2011 rulemaking expected

- **Living Wills**

- Q3 2011 rulemaking expected
- Initial living wills may be due in early 2012

- **Consumer Financial Protection Bureau**

- “Went live” on July 21, 2011
- Preemption; possibility of contentious Director confirmation process

Progress on Selected Topics Important to BHCs

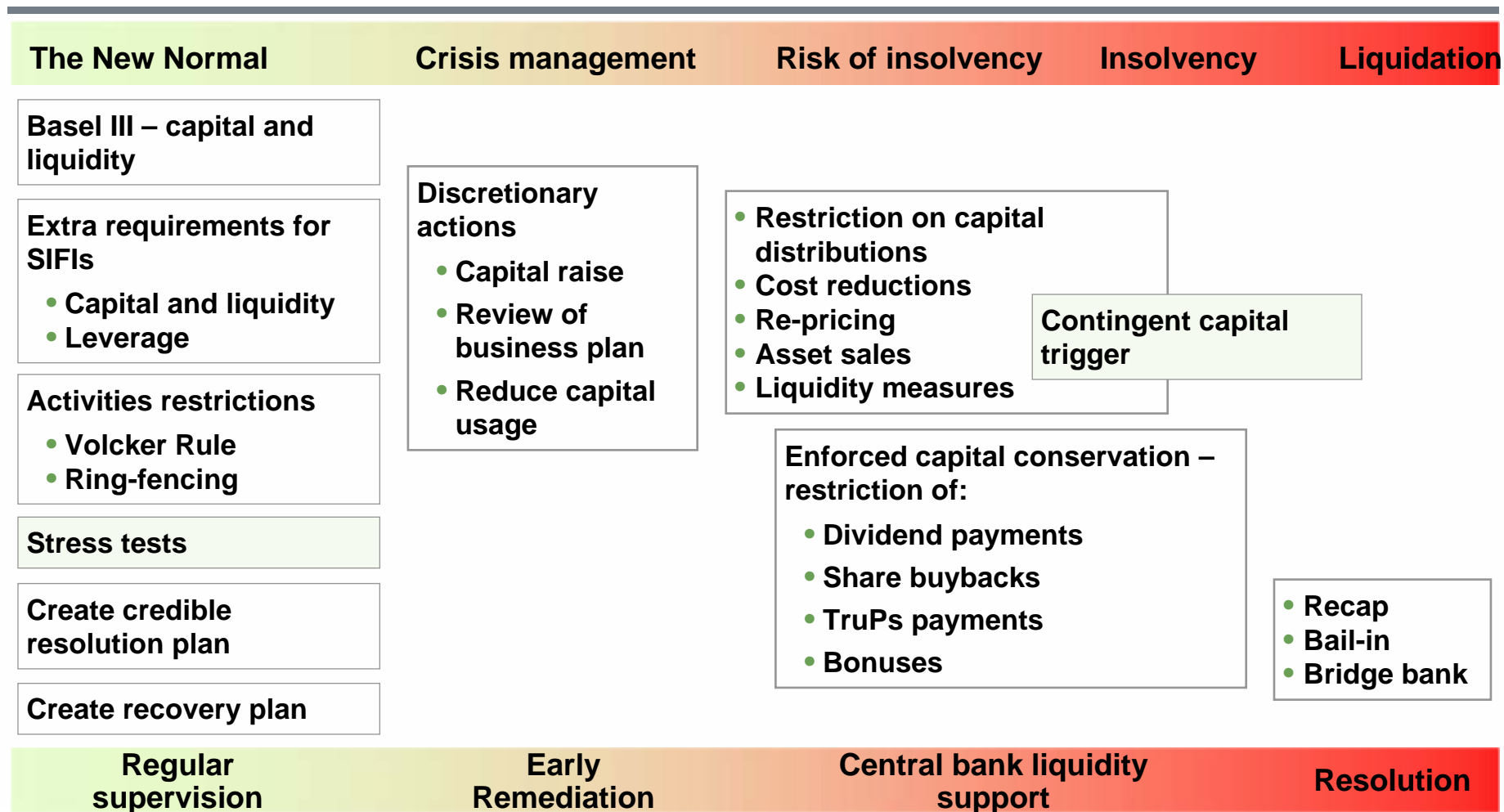
- **Derivatives**

- Temporary relief issued; bulk of rulemaking to come in Q3 and Q4 2011
- See upcoming Davis Polk webcasts on Swap Dealers (Tuesday, July 26) and End Users (Thursday, July 28)

- **Swaps Pushout**

- Not yet on regulatory radar
- Not effective until July 2013

Focus: Systemic Regulation



Focus: Systemic Regulation

- **Rulemaking timeline**
 - Omnibus proposed rules on heightened prudential standards expected Q3 2011
- **Interaction with Basel**
- **International coordination – G-SIFI surcharge**

Focus: The Volcker Rule



Focus: The Volcker Rule

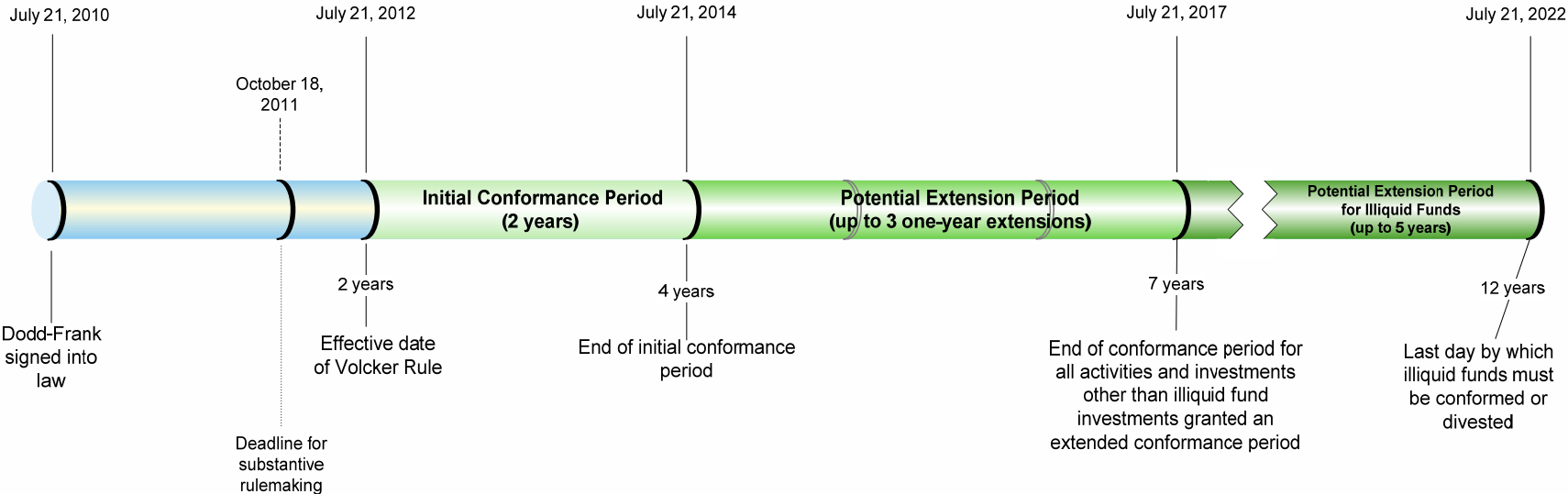
- **Rulemaking timeline**

- FSOC implementation study issued January 2011
- Final conformance rules issued February 2011
- GAO report on prop trading issued July 2011
- Proposed substantive rules expected August 2011
- Final rulemaking deadline October 2011

- **Effectively joint rulemaking**

- **What to expect from proposed rules?**

Volcker Rule Implementation Timeline



Questions



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Alexander Young-Anglim	212 450 4809	alexander.young-anglim@davispolk.com

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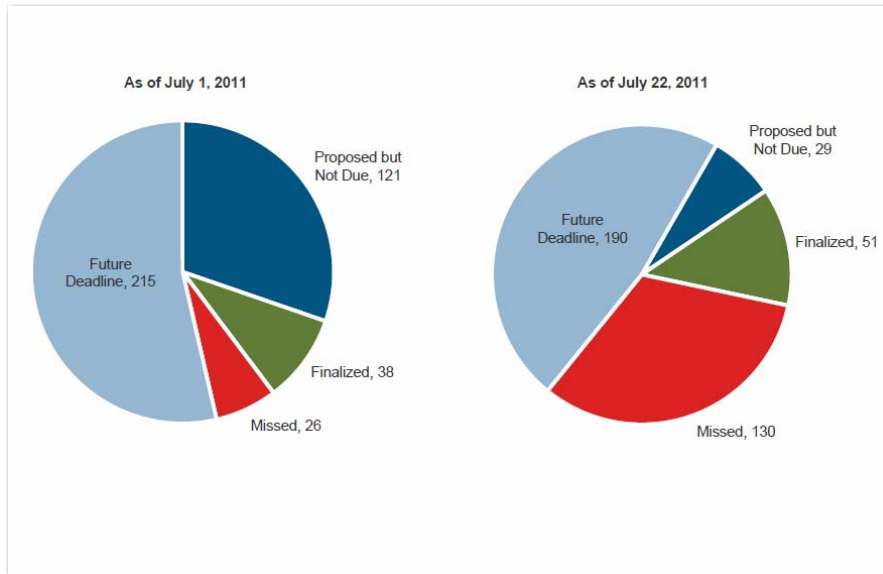
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July 29, 11:00 a.m. EDT / 8:00 a.m. PDT

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Dodd-Frank One-Year Anniversary: Impact on Swap Dealers

Presented by

Robert L.D. Colby

Annette L. Nazareth

Lanny A. Schwartz

Gabriel D. Rosenberg (Moderator)

July 26, 2011

Davis Polk

Davis Polk & Wardwell LLP

Presenters



Robert L.D. Colby

Bob is a partner in our Financial Institutions Group, practicing in the Washington office. He advises on complex regulatory and compliance matters involving securities and derivatives for broker-dealers, financial institutions, investment advisers, markets, and clearing organizations.



Annette L. Nazareth

Annette is a partner in our Financial Institutions Group, practicing in the Washington office. She advises clients across a broad range of complex regulatory matters and transactions. She also works closely with our SEC enforcement practice, counseling non-financial sector corporations that are subject to government regulatory and enforcement actions.

Presenters *(cont.)*



Lanny A. Schwartz

Lanny is a partner in our Financial Institutions Group, practicing the New York office. He advises on securities compliance, regulatory and transactional matters. His clients include major international banks, broker-dealers, securities exchanges and consulting firms



Moderator: Gabriel D. Rosenberg

Gabe is an associate in our Financial Institutions Group. He advises clients on the requirements, impact and implementation of the Dodd-Frank financial reform legislation, particularly the regulatory treatment, trading and clearing of swaps.

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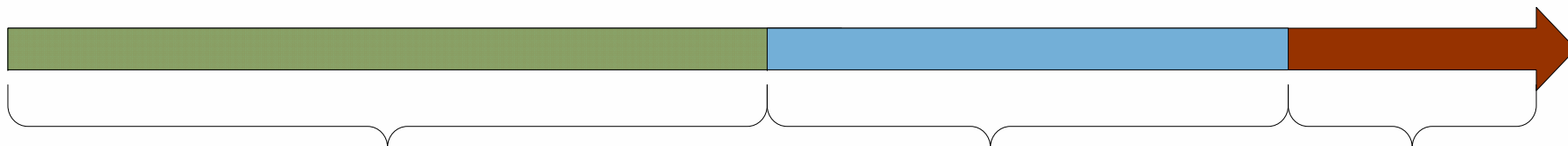
Dodd-Frank Rulemaking Progress by Agency

Title VII Rulemaking



Implementation Timeline

Regulatory Timeline



Phase I: Proposed Rulemaking

Regulators propose rules and solicit comments

- Extract technological and compliance requirements from the statute and proposed rules
- Assign responsibility and define workplan for creating technology solutions and writing policies and procedures
- Initiate development of systems and preliminary compliance and supervisory policies
- Gather/create necessary information for entity registration
- Determine which legal entities to use for swaps activity
- Create new entities and reorganize business units as necessary
- Create new forms of customer documentation

Phase 2: Rule Adoption

Most rules become final

- Seek interpretative guidance
- Reassess and revise technological and compliance requirements based on final rules
- Develop compliance manuals and supervisory procedures
- Join clearing organizations, exchanges and SEFs
- Redocument customer relationships
- Conduct personnel training
- Establish connectivity
- Conduct testing with SDRs, exchanges and clearing organizations
- File entity registrations

Phase 3: Implementation

Possible rule-by-rule phase-in

- Ensure ongoing compliance

Firm Implementation Tasks

Potential Headaches for Swap Dealers

- Entity Registration
- Global Structuring Issues
- Treatment of Interaffiliate Swaps
- Fiduciary Issues
- Reporting Requirements
- Overlapping Compliance Issues
- Trading with Customers on Swap Execution Facilities

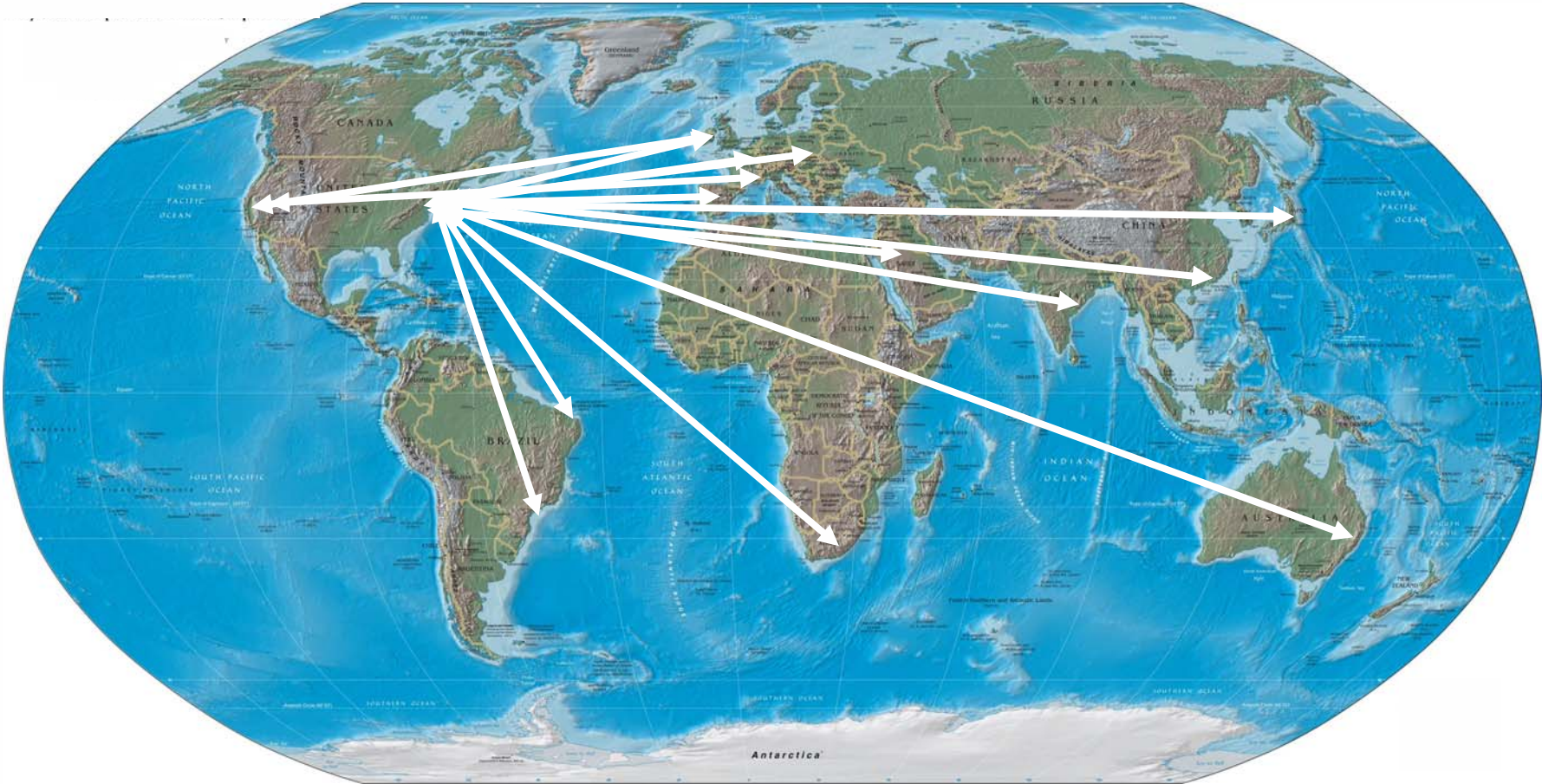
Entity Registration

- Swap Dealer
- Major Swap Participant
- Introducing Broker
- Broker-Dealer
- Security-Based Swap Dealer
- Major Security-Based Swap Participant
- Futures Commission Merchant

Global Structuring Issues



Treatment of Interaffiliate Swaps



Fiduciary Issues

Swap Dealers
and
Major Swap Participants

Broker-Dealers

ERISA

Municipal
Advisors

Investment
Advisers

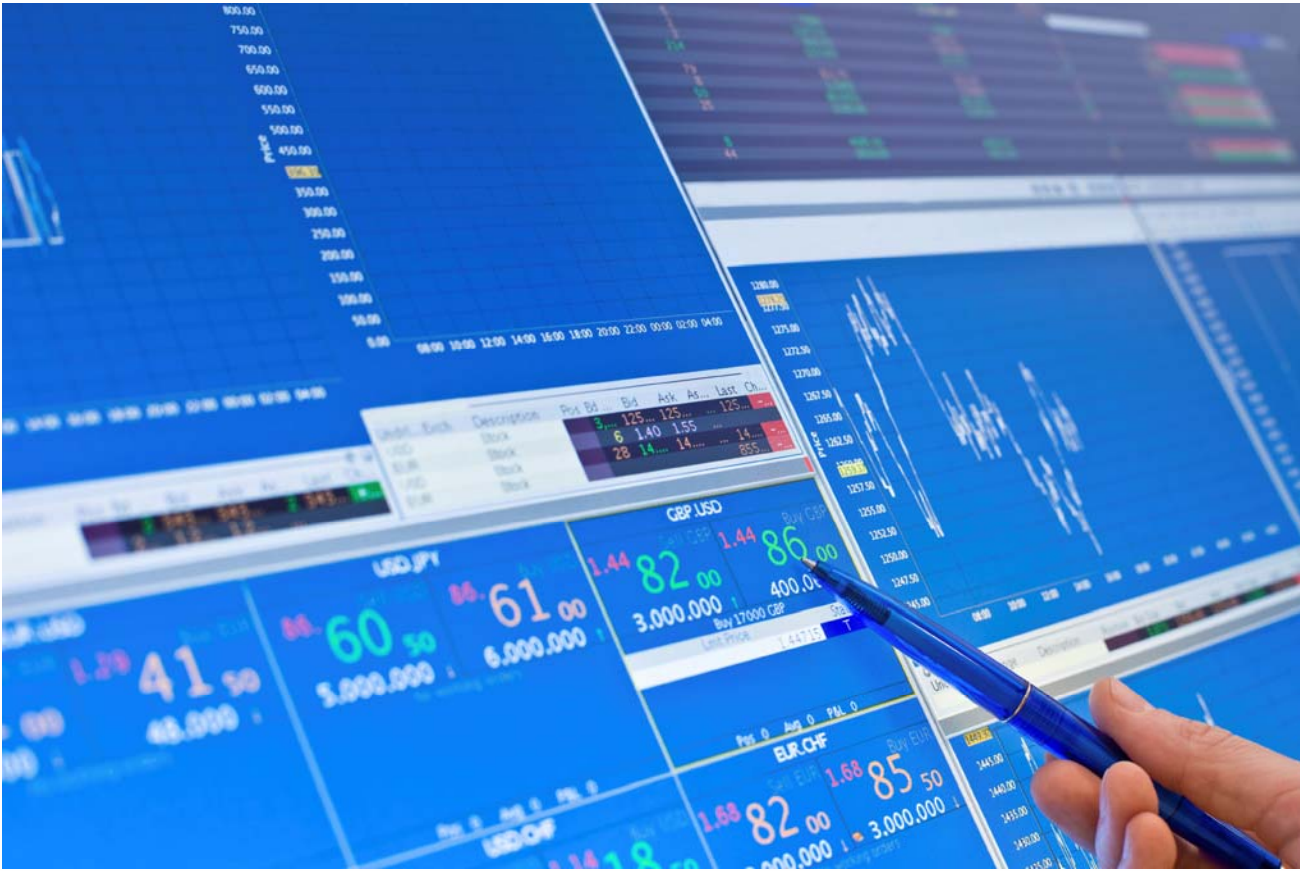
Reporting Requirements



Overlapping Compliance Issues



Trading with Customers on SEFs



Presenters' Contact Information

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Dodd-Frank One-Year Anniversary: Impact on Private Equity/Hedge Funds

Presented by

Yukako Kawata

Leor Landa

Danforth Townley

July 27, 2011

Davis Polk

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Presenters



Yukako Kawata

Yukako is co-head of Davis Polk's Investment Management/Private Funds Group. She advises clients on the formation and operation of private investment funds and other investment vehicles exempt under the U.S. Investment Company Act, including private equity funds, hedge funds, venture capital funds, fund of funds and funds investing in particular sectors or countries. She also advises clients on the establishment and operations of private fund managers, including private equity and hedge fund firms.



Leor Landa

Leor is a partner in Davis Polk's Investment Management/Private Funds Group. He advises a wide range of clients on the development, formation, marketing and operation of private investment fund complexes, including private equity funds, hedge funds, hybrid funds, real estate funds, funds of funds and asset allocation products. Leor also advises clients in connection with structuring and executing private equity, structured equity and public market transactions as well as acquisitions of investment advisers.



Danforth Townley

Dan is a partner in Davis Polk's Investment Management/Private Funds Group. He advises clients on investment funds and related corporate finance transactions, including the structuring and offering of hedge funds, private equity funds and other investment vehicles. Dan advises clients on the establishment and operation of hedge fund managers and private equity sponsors, including the structuring of carried interest plans and other profit sharing arrangements, as well as on mergers and acquisitions of fund managers.

New Registration Requirements for Private Fund Managers

Elimination of the Private Investment Adviser Exemption

- Effective July 2011, the Dodd-Frank Act eliminated the “private adviser exemption” under Section 203(b)(3).
 - Generally, investment advisers were exempt from registration if they: (i) had fewer than 15 clients during the preceding 12 months and (ii) did not hold themselves out to the public as investment advisers (the “**private adviser exemption**”)
 - One hedge fund or private equity fund was generally considered one client for purposes of the registration exemption, thus most private fund advisers were exempt from registering because they had less than 15 clients

Transition Rule

- Although the private adviser exemption was statutorily rescinded on July 21, 2011, in order to give advisers who had been relying on the exemption additional time to register and comply with the requirements for registered investment advisers, the SEC extended until March 30, 2012 the date by which these advisers must register.

New Registration Requirements for Private Fund Managers *(cont.)*

Impact of SEC Registration

- All investment advisers are subject to anti-fraud provisions of the Advisers Act, but registered advisers are subject to additional compliance obligations:
 - Appoint a chief compliance officer
 - Establish a compliance program and a code of ethics
 - Comply with custody and recordkeeping requirements
 - Subject to periodic SEC inspection
 - Reporting requirements

New Exemptions from Advisers Act Registration

New Exemptions from Advisers Act Registration

- **Private Fund Advisers (w/ less than \$150 million AUM)**
 - Exempt reporting adviser (limited amount of Form ADV reporting; no Form PF reporting)
- **Foreign Private Advisers**
 - Full 203(b) exemption from the Advisers Act
- **CFTC Registered Advisers that Advise Private Funds**
 - Full 203(b) exemption from the Advisers Act
- **Venture Capital Fund Advisers**
 - Exempt reporting adviser (limited amount of Form ADV reporting; no Form PF reporting)

New Exemptions from Registration *(cont.)*

Application of Advisers Act to Different Types of Advisers

	Form ADV Part 1A	Full Form ADV and Schedules	Brochure	Form PF	Subject to Entire Advisers Act	Subject to Certain Portions of Advisers Act
Registered Advisers	✓	✓	✓	✓	✓	✓
Venture Capital Fund Advisers (Exempt Reporting Adviser)	✓					✓
Private Fund Advisers with less than \$150 million AUM (Exempt Reporting Adviser)	✓					✓
Foreign Private Advisers						✓
CFTC Registered Advisers						✓

New Exemptions from Advisers Act Registration

(cont.)

Private Fund Adviser Exemption

- The Dodd-Frank Act directed the SEC to provide an exemption to an investment adviser that:
 - Acts **solely** as an adviser to private funds; and
 - Has assets under management in the U.S. of less than \$150 million.
- On June 22, 2011, the SEC issued rules implementing this exemption

SEC: Private Fund Adviser Exemption

- ***U.S. Advisers*** (those with a “principal office and place of business” in the U.S.)
 - Acts solely as an investment adviser to one or more “qualifying private funds”; and
 - “Qualifying private fund” means any private fund (i.e., 3(c)(1) or 3(c)(7) fund) that is not a registered investment company or a business development company.
 - Manages private fund assets of less than \$150 million.
 - “Principal office and place of business” means the executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser.

New Exemptions from Advisers Act Registration

(cont.)

SEC: Private Fund Adviser Exemption (cont.)

- **Non-U.S. Advisers** (those with a “principal office and place of business” outside the U.S.)
 - Adviser has no client that is a U.S. Person (as defined in Regulation S) except for qualifying private funds; and
 - All assets managed at a “place of business” in the United States are solely attributable to private fund assets, the value of which is less than \$150 million.
 - “Place of business” means any office where the investment adviser regularly provides investment advisory services, solicits, meets with, or otherwise communicates with clients, and any other location that is held out to the general public as a location at which the adviser conducts any such activities.

New Exemptions from Advisers Act Registration

(cont.)

Foreign Private Advisers Exemption

- The Dodd-Frank Act includes a narrow registration exemption for any “foreign private adviser” who:
 - Has no “place of business” in the United States;
 - Has, in total, ***fewer than 15 U.S. clients and U.S. investors in private funds*** advised by the adviser;
 - Has aggregate assets under management attributable to U.S. clients and U.S. investors in private funds of ***less than \$25M***; and
 - Does not (i) hold itself out generally to the U.S. public as an investment adviser, (ii) act as an investment adviser to a RIC or (iii) act as a business development company.

New Exemptions from Advisers Act Registration

(cont.)

Foreign Private Advisers

- The SEC issued rules to clarify the meanings of certain undefined terms in the foreign private adviser exemption.
 - “Place of business” has the same meaning as in the private fund advisers rule (see prior slide).
 - “In the United States” is defined by reference to the definitions of “U.S. person” and “United States” in Regulation S under the Securities Act.
 - An adviser would generally only be required to look to the point in time when the person either became a client or an investor for determining whether the person was “in the United States.”

CPO/CTA Registration Issues Under the Commodity Exchange Act (“CEA”)

Proposed Rescission of CFTC Rules 4.13(a)(3) and (4)

- On January 26, 2011, the CFTC proposed rescinding the CPO registration exemptions for commodity pools that meet sophisticated investor requirements under CFTC Rules 4.13(a)(3) and (4).
- Rescission of CFTC Rules 4.13(a)(3) and (4) was not mandated by the Dodd-Frank Act; CFTC stated that purpose is to “promote transparency” with respect to market participants and to impose additional registration requirements so that pool operators currently relying upon such exemptions cannot engage in regulatory arbitrage and avoid oversight by either the CFTC or the SEC.

Potential Alternative Exemptions

- CFTC Rule 4.7 is not an exemption from registration, but provides relief from certain recordkeeping / reporting and disclosure requirements for CPOs of pools limited to qualified eligible persons (“QEPs”) and CTAs whose clients are QEPs.
- Note: New Section 4m(3) under the CEA provides a statutory exemption for SEC-registered advisers whose business does not consist “primarily” of acting as a CTA and who do not act as a CTA to any commodity pool that engages “primarily” in trading commodity interests. Exemption covers only CTA registration, however; CPO registration remains potential issue for advisers to pools.

Note that these CFTC proposals were not mandated by the Dodd-Frank Act.

New Exemptions from Advisers Act Registration

(cont.)

Dodd-Frank: Venture Capital Fund Advisers

- The Dodd-Frank Act directed the SEC to provide an exemption from registration for any investment adviser who **solely** acts as an adviser to one or more venture capital funds.

SEC: Definition of Venture Capital Fund

- A private fund that holds no more than 20% of the amount of the fund's aggregate capital commitments in "non-qualifying investments" (other than short-term holdings);
- Does not borrow, issue debt obligations, provide guarantees or otherwise incur leverage in excess of 15% of the fund's contributed capital and uncalled capital commitments and any such borrowing is for a non-renewable term of no longer than 120 calendar days (except for any guarantee of "qualifying portfolio company" (QPC) obligations by the fund, which is not subject to the 120-day term limit);
- Generally does not offer investors redemption rights except in exceptional circumstances; and
- Represents itself to investors as pursuing a venture capital strategy.

New Exemptions from Advisers Act Registration

(cont.)

SEC: Definition of Venture Capital Fund (cont.)

- “Qualifying Investments”
 - “Equity securities” issued by a QPC directly acquired by the VC fund (“directly acquired equity”).
 - Equity securities include common stock, preferred stock, warrants and other securities convertible into equity.
 - Equity securities issued by a QPC in exchange for directly acquired equity issued by the same QPC.
 - Equity securities issued by a company of which a QPC is a majority-owned subsidiary (or a predecessor) and that are acquired by the fund in exchange for directly acquired equity.
- “Qualifying Portfolio Company” (QPC)
 - Is not a reporting or foreign traded company (and does not have a control relationship with a reporting or foreign traded company) at the time of investment;
 - Does not incur leverage in connection with investment by the VC fund and distribute the proceeds of any such borrowing to the VC fund in exchange for the VC fund investment; and
 - Is not a fund (i.e., is an operating company).
- Grandfathering Provision for any private fund that sold securities to one or more investors prior to December 31, 2010 and represented to investors that it pursues a venture capital strategy.

New SEC Registration Criteria

Increased AUM Threshold for SEC Registration

- Previously, advisers having less than \$25 million assets under management (“AUM”) were prohibited from SEC registration.
- Effective July 21, 2011, the minimum AUM for SEC registration for most U.S. investment advisers (that do not manage registered investment companies) is:
 - \$100 million in general; but
 - \$25 million for advisers that would either (i) not be subject to registration and examination in the state in which they maintain their respective principal offices and places of business or (ii) otherwise be required to register with 15 or more states.
- AUM calculated in the same manner as for Form ADV reporting purposes.
- “Mid-sized advisers” (*i.e.*, those that have between \$25 million and \$100 million of AUM) having their principal office and place of business in New York or Wyoming must continue to register with the SEC; such states treated as states where state-registered mid-sized advisers would not be subject to examination.

New SEC Registration Criteria *(cont.)*

- \$10 Million Registration Buffer:
 - Advisers with greater than \$100 million in assets under management but less than \$110 million are permitted, but not required, to register with the SEC.
 - Advisers that are registered with the SEC and have at least \$90 million in assets under management need not withdraw their SEC registrations.
- Transition Period:
 - If an adviser is no longer eligible for SEC registration at the end of its fiscal year, it must withdraw SEC registration within 180 days of its fiscal year end.
- Compliance Dates:
 - Every SEC-registered adviser must file a one-time Form ADV amendment by March 30, 2012 to report its eligibility for SEC registration.
 - An SEC-registered mid-sized adviser that does not meet the new eligibility criteria rules for registration with the SEC must withdraw its SEC registration and become registered in one or more states no later than June 28, 2012.

New Reporting and Recordkeeping Requirements

New Reporting Requirements for Managers

- The Dodd-Frank Act requires the SEC to issue rules requiring registered investment advisers (and certain “Exempt Reporting Advisers”) to private funds to file reports containing certain information as the SEC deems necessary.

Two Types of New Dodd-Frank Reporting Requirements

- Revised reporting requirements on Form ADV
- Proposed reporting requirements on new Form PF

New Reporting and Recordkeeping Requirements

(cont.)

Revised Form ADV Reporting Requirements

- Applicable to all registered investment advisers that file Form ADV
- “Exempt Reporting Advisers” are be required to complete only a subset of the information required for registered investment advisers on Form ADV.
 - 7 Items under Part 1A, and corresponding schedules
 - Includes new private fund reporting obligations

New Reporting and Recordkeeping Requirements

(cont.)

Form ADV Reporting Requirements (all registered advisers)

- Additional disclosures about the adviser and its advisory business:
 - Information about the adviser's clients and employees
 - Business practices that may present conflicts of interest (e.g., use of affiliated brokers, soft dollar arrangement, payments for client referrals)
 - Information about the adviser's related persons and certain non-advisory financial activities
- New disclosures about private funds
 - Substantial reporting requirements about private funds
 - Census data, approximate number of beneficial owners, investment strategy, gross asset value, etc.
 - Reporting of private fund service providers
 - Auditors, prime brokers, custodians, administrators and marketers
 - Fair value reporting of private fund assets (including illiquid securities)

New Reporting and Recordkeeping Requirements

(cont.)

Exempt Reporting Advisers –Reporting Requirements

- Must complete 7 items on Part 1A of Form ADV and corresponding schedules
 - Item 1 – Identifying Information
 - Item 2.B – SEC Reporting by Exempt Reporting Advisers
 - Item 3 – Form of Organization
 - Item 6 – Other Business Activities
 - Item 7 – Financial Industry Affiliations and Private Fund Reporting
 - Item 10 – Control Persons (including disclosure of the owners of the adviser); and
 - Item 11 – Disclosure Information (including the disciplinary history for the adviser and its employees).
- Not required to complete remaining items of Part 1A or prepare a brochure (Part 2)
- **Timing:** An Exempt Reporting Adviser must file its initial report on Form ADV by March 30, 2012.

New Reporting and Recordkeeping Requirements

(cont.)

Form PF Reporting (registered advisers that advise 3(c)(1) or 3(c)(7) funds)

- Joint rule proposed by the SEC and CFTC in January 2011
- Required to be filed by registered investment advisers that advise one or more “private funds” (i.e., 3(c)(1) and 3(c)(7) funds)
 - “Exempt Reporting Advisers” do not have to complete Form PF
- Reporting requirements about adviser’s various private funds
 - Hedge Funds
 - “Liquidity Funds” (i.e., unregistered money market funds)
 - Private Equity Funds
- Advisers with >\$1B AUM for any of the above private funds:
 - Subject to greater reporting frequency (quarterly vs. annually)
 - Subject to more onerous reporting requirements (completing multiple sections of Form PF)
- Initially proposed compliance date was December 15, 2011 (with reporting to begin in 1Q 2012). However, compliance date expected to be pushed back as the SEC has indicated that final rules may not be adopted until August - December 2011.

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Dodd-Frank One-Year Anniversary: Impact on End Users of Swaps

Presented by

Daniel N. Budofsky

Susan C. Ervin

Gabriel D. Rosenberg (Moderator)

July 28, 2011

Davis Polk

Davis Polk & Wardwell LLP

Presenters



Daniel N. Budofsky

Dan is a partner in Davis Polk's Derivatives and Structured Products Group. He advises financial institutions, corporations and hedge funds on financial products in domestic and international transactions and has worked on numerous convertible, exchangeable and over-the-counter derivatives and financing transactions.



Susan C. Ervin

Susan is a partner in Davis Polk's Financial Institutions Group, practicing in the Washington DC office. She has a unique and powerful mix of direct regulatory and private practice experience in futures, commodities and derivatives, including the new swaps regulatory requirements.



Gabriel D. Rosenberg (Moderator)

Gabe is an associate in Davis Polk's Financial Institutions Group. He advises financial institutions, corporations and industry groups on the requirements, impact and implementation of the Dodd-Frank financial reform legislation, particularly the regulatory treatment, trading and clearing of swaps.

Dodd-Frank Webcast Series

One Year Progress Report

July 22, 11:00 a.m. EDT / 8:00 a.m. PDT

Impact on Bank Holding Companies

July 25, 11:00 a.m. EDT / 8:00 a.m. PDT

Impact on Swap Dealers

July 26, 11:00 a.m. EDT / 8:00 a.m. PDT

**Impact on Private Equity/
Hedge Funds**

July 27, 11:00 a.m. EDT / 8:00 a.m. PDT

Impact on End Users of Swaps

July 28, 11:00 a.m. EDT / 8:00 a.m. PDT

Emerging Litigation Trends

July 29, 11:00 a.m. EDT / 8:00 a.m. PDT

If you are interested in participating in any of these events, email [**dodd.frank.progress.report@davispolk.com**](mailto:dodd.frank.progress.report@davispolk.com) for registration information.

Archived webcasts are available at [**www.davispolk.com/dodd-frank**](http://www.davispolk.com/dodd-frank).

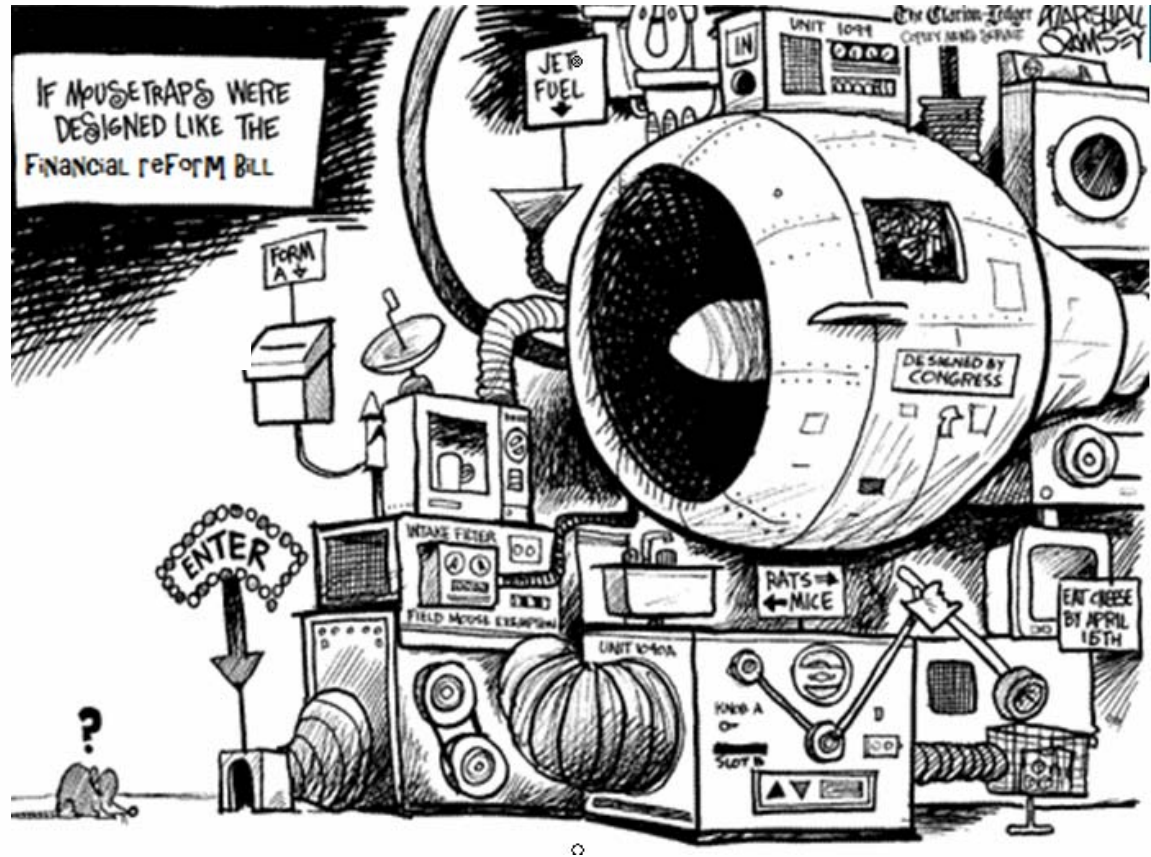
Key Elements of Derivatives Reform

Title VII of the Dodd-Frank Act provides the SEC and the CFTC with the authority to regulate OTC derivatives. It was designed to address gaps in the regulation of OTC derivatives and was intended to promote four principal objectives:

- (1) transparency of pricing and trading of OTC derivatives so that regulators and market participants can more easily evaluate pricing and trading activity;
- (2) regulation of market participants, trading facilities and transactions;
- (3) counterparty protection; and
- (4) protection against systemic risk

Key Elements of Derivatives Reform *(cont.)*

- Registration and regulatory requirements for swap dealers and major swap participants
- Margin and capital requirements
- Clearing and exchange trading requirements
- Trade reporting
- Position limits
- Business conduct requirements



Regulatory Status of Products

CFTC

- Swaps on non-securities:
 - Interest rate swaps
 - Energy and metal swaps
 - Agricultural swaps
 - Commodity swaps
- Swaps on broad-based indices
- Swaps on government securities
- Cross-currency swaps & NDFs

SEC

Security-Based Swaps

- Swaps on narrow-based security indices
- Swaps on a single security or loan
- Swaps on 9 or fewer securities

“Mixed Swaps”

Exclusions

- Puts, calls, options on securities, indices of securities, CODs
- Contracts for purchase or sale of securities on a fixed basis or based on contingencies not related to creditworthiness
- Commodities contracts and security futures products traded on a contract market
- Sale of a nonfinancial commodity for deferred delivery, where physically settled
- FX forwards and swaps (proposed)

**Identified banking products are excluded unless bank regulators find that they are actually swaps or security-based swaps or they are not regulated by a bank regulator and are swaps or security-based swaps.*

Swap Dealers and Major Swap Participants

- **Swap dealers** and **major swap participants** will need to register and be subject to comprehensive regulation
- **Swap dealer** is any person (subject to limited exceptions) who:
 - holds itself out as a dealer in swaps;
 - makes a market in swaps;
 - regularly enters into swaps with counterparties as an ordinary course of business for its own account; or
 - engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps.
- **Major swap participants** are non-swap dealers with high levels of swap activity, excluding certain hedging activity
- **Based on the proposed rules, it appears that corporate end users *generally* will not need to worry about being swap dealers or major swap participants**

Clearing and Trade Execution

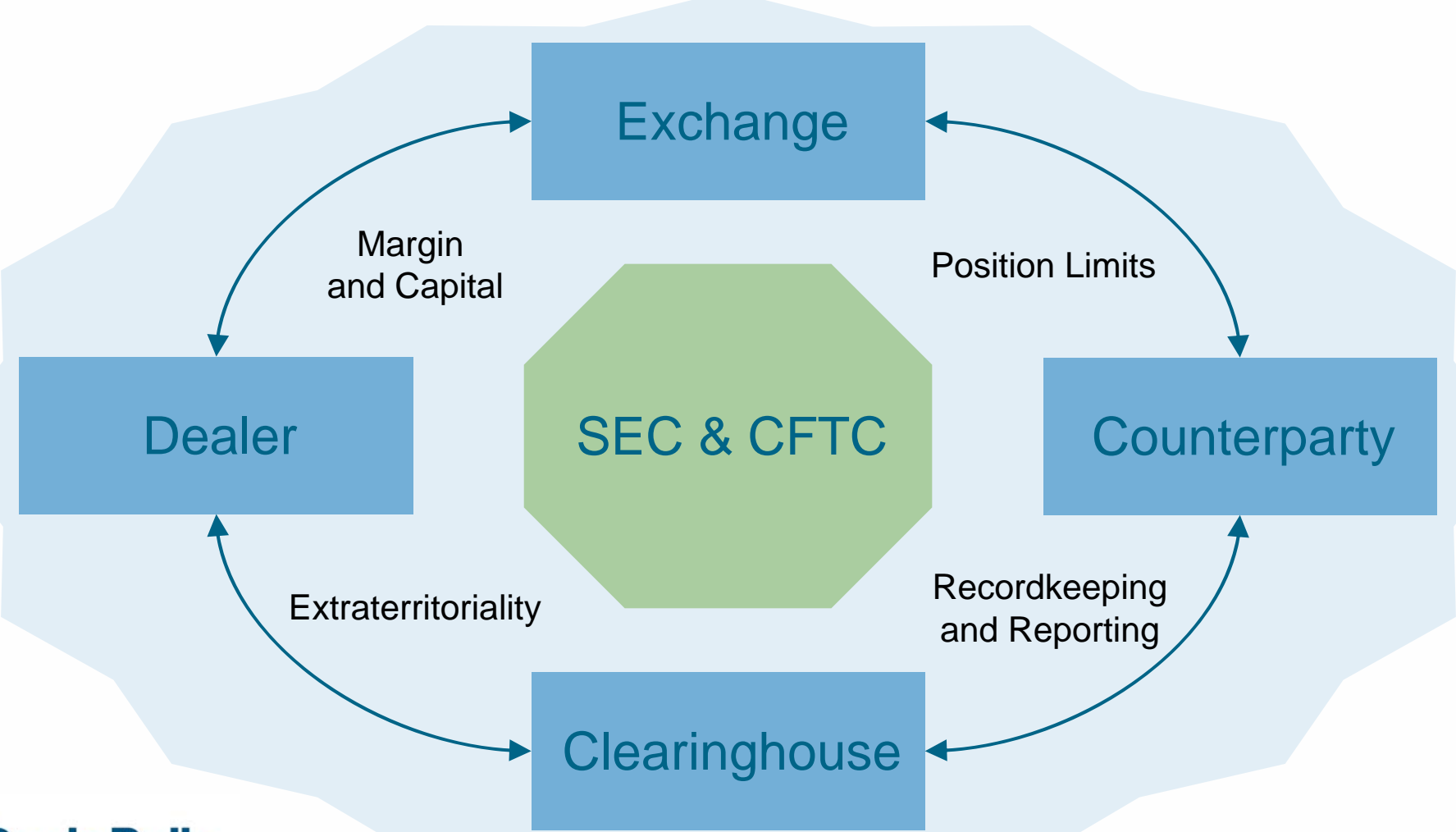
- **Clearing** - transactions in swaps must be cleared through a clearing agency if they are of a type that the agencies determine must be cleared, unless an exemption applies.
- **Trade Execution** - if a swap is subject to the clearing requirement, then it must be traded on a registered trading platform – a swap execution facility, a designated contract market or an exchange – unless no facility makes such swap or security-based swap available for trading.

The focus here will be on the CFTC rules. To the extent a client engages in swaps on single or narrow-based indices of securities, additional analysis may be required.

The OTC Derivatives Market Before Dodd-Frank



The OTC Derivatives Market After Dodd-Frank



Direct Effects on End Users

- Clearing and exchange trading
 - Implication of clearing swaps
 - End-user exception from clearing
- Margin for cleared and uncleared swaps
- Position limits
- Recordkeeping

Commercial End User Exception from Clearing and Exchange Trading

Available to any swap counterparty that

- is not a financial entity;
- is using the swap to hedge or mitigate commercial risk; and
- notifies the CFTC how it generally meets its financial obligations associated with entering into non-cleared swaps

Available to certain affiliates of exempt swap counterparties to hedge or mitigate the commercial risk of the exempt person using non-cleared swaps.

Requires board approval by entities issuing securities registered under the Securities Act or reporting under the Exchange Act

“Financial Entity”

Financial entity means a counterparty that is:

- a swap dealer, security-based swap dealer, major swap participant or major security-based swap participant;
- a commodity pool;
- a private fund;
- an employee benefit plan under ERISA; or
- a person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature as defined in Section 4(k) of the Bank Holding Company Act.

“Hedge or Mitigate Commercial Risk”

A swap is deemed to be used to hedge or mitigate commercial risk when it:

- is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise, where the risks arise from the potential change in the value of assets, liabilities or services which are part of the ordinary course of the business of the enterprise;
- qualifies as bona fide hedging for purposes of an exemption from position limits; or
- qualifies for hedging treatment under FASB Accounting Standards Codification Topic 815, Derivatives and Hedging.

In addition, the swap must not be used:

- for a purpose that is in the nature of speculation, investing, or trading; or
- to hedge or mitigate the risk of another swap or security-based swap.

The SEC uses a slightly different definition.

Notification

Notification

- End users are required to notify swap data repositories each time they use the exception
- If the end user is an issuer of securities or required to file periodic reports with the SEC, the end user is required to confirm that the board has approved the decision not to clear the swap

Board Approval

End users that issue securities or report under Section 15(d) of the Exchange Act must have an appropriate committee of its board or governing body approve the decision to enter into non-cleared swaps.

An “appropriate committee” is one specifically authorized to review and approve the entity’s decision to enter into swaps.

This can be accomplished through a board resolution or amendment to a board committee’s charter authorizing the committee to review and approve decisions not to clear swaps being reported.

The board committee may adopt policies and procedures to review and approve decisions not to clear swaps on a periodic basis.

Margin for Corporate End Users

■ Cleared swaps

- End-users that clear swaps will be required to post initial and variation margin to their “clearing member,” who must be a futures commission merchant for CFTC-regulated swaps
- Clearing members must charge clients the clearinghouse minimum but can charge “excess margin”

■ Uncleared swaps

- The prudential regulators would require bank swap entities to calculate their own credit exposure limits for nonfinancial end users and collect initial and variation margin from the nonfinancial user when the credit exposure exceeds the calculated limit
- The CFTC does not require swap entities to collect margin from nonfinancial end users

Other Provisions

Position Limits

- Dodd-Frank requires the establishment of position limits on certain commodities, and the CFTC has published a rule on position limits for 28 physical delivery contracts and related swaps with an exemption for bona fide hedging transactions

Swap Position Reporting Requirements

- The details of all swaps will be required to be reported to an SDR immediately and kept updated throughout the life of the swap
- Generally, the end-user would be responsible for filing the report only if no DCM, SEF, swap dealer, or major swap participant is involved, but SDRs are required to confirm with end-users the accuracy of the data submitted about that swap
- End-users will be required to obtain a unique identifier from a yet to be determined “standards body”

Reporting and Recordkeeping

Recordkeeping

- End users will be required to keep full, complete, and systematic records including:
 - Data regarding the creation of the swap, and
 - All data elements of the swap on an ongoing basis
- Must be kept for the entire life of the swap and for five years thereafter

Segregation of Margin

- End users will have the right to require the segregation of margin collateral in a segregated account.

New Counterparties, Documentation and Systems

- End-users will find themselves facing new legal entities as their counterparties and will need to assess the creditworthiness of these new entities
- End-users will also need to negotiate new execution and clearing agreements and choose the clearinghouses at which they prefer to clear swaps

Title VII Rulemaking Progress



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Dodd-Frank One-Year Anniversary: Emerging Litigation Trends Post Dodd-Frank and the Financial Crisis

Presented by

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Linda Chatman Thomsen

Raul F. Yanes

July 29, 2011

Davis Polk

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Presenters



Edmund Polubinski III

Ted is a partner in our Litigation Group and practices in our New York office. He represents clients in securities, derivative, professional liability, acquisition-related, and other complex litigation in federal and state courts around the country, as well as in arbitration. He also represents companies and boards of directors in internal investigations, as well as in investigations and other proceedings before various regulatory agencies, including the Securities and Exchange Commission. His recent clients include Bank of America, CVS Caremark, GSC Group, Hitachi, Morgan Stanley, PartnerRe, Pfizer, Toll Brothers, and Warner Chilcott.



Linda Chatman Thomsen

Linda is a partner in our Litigation Group and practices in our Washington DC office. Her practice concentrates in matters related to the enforcement of the federal securities laws. She returned to the firm after serving for 14 years in various positions within the SEC. Linda joined the SEC staff in 1995 as Assistant Chief Litigation Counsel. In 1997, she was named Assistant Director of the Enforcement Division. She became an Associate Director in 2000, Deputy Director in 2002 and was named Director of the Enforcement Division in 2005, a position she held until 2009.



Raul F. Yanes

Raul is a partner in Davis Polk's Litigation Department, practicing in our Washington DC office. He represents clients in Congressional investigations, white collar criminal defense matters, securities enforcement actions, internal investigations and complex civil litigation. Mr. Yanes left the firm from 2003-2009 to serve in various government positions including, Associate Counsel to the President, Senior Counselor to the Attorney General at the U.S. Department of Justice, General Counsel of the Office of Management and Budget, and Staff Secretary and Assistant to the President.

Today's Discussion

- Key Enforcement and Litigation Provisions in Dodd-Frank
 - Whistleblowers
 - Extraterritoriality
 - Aiding and Abetting
 - Administrative Proceedings
 - Proxy Access
 - Say on Pay

- Recent Trends in Financial Crisis and Securities Litigation
 - Recent Trends
 - Recent Supreme Court Decisions

Dodd-Frank Whistleblower Provisions

KEY STATUTORY REQUIREMENTS

Mandatory awards of 10-30% when:

- One or more whistleblowers ***voluntarily*** provides the SEC/CFTC
- With ***original information***
 - Derived from independent knowledge or analysis
- That leads to the ***successful enforcement*** by the SEC/CFTC of an action
 - Which caused the staff to commence an action; or
 - Where the information would not have otherwise been received and was essential to the success of an ongoing action
- In which the SEC/CFTC obtains monetary sanctions totaling ***more than \$1 million***

Dodd-Frank Whistleblower Provisions

ANTI-RETALIATION

- **Sarbanes-Oxley**

- Covers whistleblowers who report both internally and externally.
- Must go to Department of Labor with complaint first.

- **Dodd-Frank**

- More generous procedurally to whistleblowers.
 - Allows a claim to be filed six years after the retaliation or three years after the date when the facts about the retaliation should have been known.
 - Whistleblower may go directly to district court.
- May also be enforced by the SEC.

Dodd-Frank Whistleblower Provisions

REGULATIONS

- Rule requires that the person have a “reasonable belief” as to a possible securities law violation.
- Rules do not require whistleblowers to use internal compliance systems first.
- Auditors, compliance personnel and officers and directors will be eligible for an award if (1) disclosure is necessary to prevent substantial injury to the financial interests of the entity or investors; or (2) the entity is engaging in conduct that will impede an investigation; or (3) 120 days has passed since the whistleblower reported internally.
- Attorneys or others with privileged information will be eligible for an award if disclosure is permitted under attorney conduct rules.

Dodd-Frank Whistleblower Provisions

IMPACT ON SEC ENFORCEMENT PROCESSES

- Enforcement Staff has indicated that in most cases it will refer complaints to issuers for initial response.
- Staff's handling of initial whistleblower rewards will be key.
- Staff will need to make it clear that:
 - Use or misuse of internal compliance systems will be a “real” factor in determining rewards.
 - Reports by legal, audit and compliance personnel will only be rewarded where internal compliance systems are clearly broken.
 - Staff cooperation with compliance systems and internal investigations will be a key part of the program.

Dodd-Frank Whistleblower Provisions

DEVELOPMENT AND TRENDS SO FAR

- “While the SEC has a long history of receiving high volumes of tips and complaints, the quality of the tips has improved since the enactment of [the whistleblower provisions], and this trend is expected to continue.”
– SEC Chairman Mary Schapiro
- Anecdotally, Commission staff have said that many of the referrals are coming from senior personnel, but often not from individuals at the company itself, but rather from individuals employed by competitors.
- An industry has already developed to represent and assist potential whistleblowers.

Dodd-Frank Extraterritoriality Provisions

EXTRATERRITORIAL REACH OF DOJ AND SEC

- Dodd-Frank extends the reach of the jurisdiction of the antifraud provisions of the securities laws, but only with respect to actions by the DOJ or the SEC.
 - Conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors.
 - Conduct occurring outside the United States that has a foreseeable substantial effect within the U.S.

- Implements Second Circuit test originally articulated by Judge Friendly.

Dodd-Frank Extraterritoriality Provisions

PRIVATE ACTIONS POST MORRISON v. AUSTRALIA BANK

- Dodd-Frank purports to expand territorial reach for government actors only. Private actions remain limited in the way articulated in Morrison.
- Lower courts have since grappled with the application of the limitations articulated in Morrison.
 - Courts have held that “transactions in securities listed on domestic exchanges” do not permit actions by U.S. investors in foreign securities even if some aspect of the transaction occurred in the U.S. and even if the same issuer also has securities listed on a U.S. exchange.
 - Courts have taken different approaches to the more fact-specific question of what constitutes “domestic transactions in other securities.”

Dodd-Frank Aiding and Abetting Provisions

SUMMARY

- Gives the SEC explicit authority under the Securities Act, the Investment Company Act, and the Investment Advisers Act to bring enforcement actions against aiders and abettors.
- Lowers the scienter standard for SEC aiding and abetting actions to include both knowledge and recklessness.
- Since Dodd-Frank, the SEC has exercised its authority to pursue individuals on aiding and abetting theories.

Dodd-Frank Aiding and Abetting Provisions

PRIVATE RIGHTS OF ACTION AND GAO REPORT

- In connection with the passage of Dodd-Frank, Congress considered, but ultimately rejected, proposals to expand private rights of action to include aiding and abetting liability for secondary actors.
- In Dodd-Frank, Congress commissioned a report from the GAO on the impact of a possible private right of action against aiders and abettors.
- The GAO Report sets forth arguments for and against authorizing a private right of action for aiding and abetting securities fraud, but did not offer a conclusion or recommendation on the advisability of doing so.

Dodd-Frank Aiding and Abetting Provisions

JANUS CAPITAL GROUP, INC v. FIRST DERIVATIVE TRADERS

- The Court in *Janus* addressed the question of who can be liable under Rule 10b-5 for “making” false statements.
- The Court held that a person or entity generally does not “make” a statement within the meaning of Section 10(b) unless that person actually states it.
- The Court rejected the notion that individuals who “substantially participate” in the creation of statements made by others face primary liability under Rule 10b-5.
- The Court focused on attribution and control as key considerations in determining whether a party can be deemed to have “made” a statement.

Dodd-Frank Administrative Proceedings Provisions

SUMMARY

- The Act provides the SEC with uniform authority to seek civil penalties in cease and desist proceedings.
- This allows the SEC to bring numerous actions in an administrative proceeding that would have previously only been able to be brought in district court.
 - SEC administrative proceedings provide fewer procedural protections like the Federal Rules of Evidence and full discovery.
 - Some would also argue that they give the SEC a home court advantage.

Dodd-Frank Administrative Proceedings Provisions

RAJAT GUPTA

- The SEC has charged Gupta with insider trading in connection with his alleged assistance to Galleon Group founder Raj Rajaratnam.
- Before Dodd-Frank it is arguable that this action would only have been able to have been brought in District Court.
- All other Galleon-related insider trading actions have been filed in District Court.

Dodd-Frank Administrative Proceedings Provisions

GUPTA v. SEC

- Gupta filed a complaint in the Southern District of New York challenging the action on Equal Protection and Due Process grounds.
 - Gupta's Equal Protection argument is that the SEC has singled him out for uniquely unfavorable treatment.
 - Gupta's Due Process argument is that the SEC is trying to retroactively apply Dodd-Frank to Gupta in order to deprive him of the procedural safeguards of federal court including the constitutional right to a jury trial.

- Judge Rakoff has so far allowed this suit to proceed.

Dodd-Frank Proxy Access

BUSINESS ROUNDTABLE AND CHAMBER OF COMMERCE v. SEC

- Exchange Act Rule 14a-11, would have required U.S. public companies to include shareholder nominees for election as directors in their proxy materials under certain conditions.
- The D.C. Circuit found that, in adopting the rule, the SEC violated the Administrative Procedure Act by failing to adequately consider the rule's effect on efficiency, competition, and capital formation.

Dodd-Frank Say-on-Pay Provisions

SUMMARY

- Not less frequently than once every 3 years, at any annual or other meeting of shareholders companies must provide their shareholders with a non-binding shareholder vote to approve the compensation of executives as disclosed pursuant to the SEC rules.
- Shareholders will also be provided with a non-binding shareholder vote, at least once every 6 years, to determine whether this vote should be held every 1, 2 or 3 years.

Dodd-Frank Say-on-Pay Provisions

CURRENT LITIGATION

- To date, derivative lawsuits have been filed against 7 companies with failed say on pay votes.
- Complaints allege a disconnect between pay and performance – e.g., increasing executive pay in the face of declining earnings – and bring claims for breaches of fiduciary duty, corporate waste, and aiding and abetting by compensation consultants.
- Though these claims would likely be very difficult to prove under Delaware law, they may also be expensive and distracting to litigate. Some have already settled for injunctive relief and attorneys' fees.

Financial Crisis and Securities Litigation

RECENT TRENDS

- Cornerstone and NERA report that financial crisis filings have now tailed off, reflecting the passage of time and the associated expiration of statutes of limitations.
- Cases against financial institutions in connection with their crisis-related write-downs have met with mixed results.
 - Some dismissals.
 - Some cases have survived motions to dismiss and are proceeding into class certification and discovery.
- Large volume of cases involving CDOs, RMBSs, and SIVs have largely proceeded as individual actions, often under state law in state court.

Notable Supreme Court Decision

ERICA P. JOHN FUND, INC. v. HALLIBURTON CO.

- The Supreme Court rejected a Fifth Circuit requirement that plaintiffs must establish loss causation at the class certification stage as an additional requirement to invoke the *Basic* presumption of reliance.
- The Court's decision should not disturb the law in other circuits, including the Second Circuit, which expressly permits defendants to rebut market impact on class certification.
- The Court also reaffirmed that the *Basic* presumption of reliance is rebuttable, and that the presumption applied only “so long as” the alleged misrepresentation “was reflected in the market price at the time of [the plaintiff’s] transaction.”

Notable Supreme Court Decision

MATRIX INITIATIVES v. SIRACUSANO

- The Court reaffirmed the standard first articulated in *Basic* for when an omission of information can be actionable.
 - “Whether a reasonable investor would have viewed the nondisclosed information as having significantly altered the ‘total mix’ of information made available.”
 - Rejected any bright-line test for determining whether plaintiffs had sufficiently pled that the company made material misstatements and omissions.
- The Court also confirmed the well-known rule, and stated that it “bears emphasis” that § 10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information.
- The Court assumed, without deciding, that the recklessness standard applied by the Court of Appeals is sufficient to establish scienter.

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