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A legal update from Dechert's Financial Institutions Group

Financial Stability Oversight Council Begins to Chart a New Course for U.S. Financial Regulation

The Financial Services Oversight Council ("Council") established by Title I of the Dodd-Frank Act held its much anticipated first meeting on October 1, 2010. The Council is poised to play a critical role in the implementation of key elements of the Dodd-Frank Act. At this point, the Council has three principal responsibilities it must address: (i) developing a process for determining whether a particular financial institution will be deemed to be systemically significant ("Significant Nonbank"), (ii) making recommendations to the Board of Governors of the Federal Reserve System as to the heightened capital and other prudential standards that will apply to Significant Nonbanks and bank holding companies with consolidated assets of $50 billion or more; and (iii) preparing a study regarding the Volcker Rule.

The Council held a brief session accessible to the public by webcast following a closed meeting. After a week that included news reports suggesting that some federal regulatory authorities had opposed the FDIC's decision to adopt a sweeping new rule regarding depository institution securitizations without further coordination among the regulatory community, see FDIC Board Approves Final Rule Regarding Safe Harbor Protections for Securitizations, and controversy in a Senate hearing regarding the timing for the Bureau of Consumer Financial Protection to take binding regulatory actions, there was significant attention to how the fifteen-member Council would work together.

The Council members' statements conveyed a sense that the Council would play a leading role in a cooperative effort to set the direction for financial services regulation as well as a sense that the Council needs to accomplish a large amount in a short period of time. The Council explained that its discussions would be conducted in public to the maximum extent possible, but noted that certain matters, such as those involving particular companies, might have to be addressed in a closed session.

Designation of Significant Nonbanks

The Dodd-Frank Act provides only general guidance as to how the Council should determine whether a financial institution should be designated as a Significant Nonbank. This has led to speculation as to whether the Council would develop some type of matrix of factors that it would consider in determining the treatment of particular institutions and whether such a matrix would be made available in some type of public process. It now appears that the Council intends to conduct a rulemaking process to adopt the criteria that it will use. As the first step in the process, the Council announced that it will be issuing an advance notice of proposed rulemaking ("ANPR") regarding the designation process. The ANPR will consist of 15 questions and will have a 30-day comment period. The Council expects to follow the ANPR with a proposed regulation to be issued by the end of the year, with a final regulation targeted for adoption by March 31, 2011.

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This rulemaking process will be of great importance to many non-banking financial services firms that may become subject to comprehensive and strict federal regulation if designated as a Significant Nonbank.

Volcker Rule Study

As has been widely observed, the Volcker Rule raises a wide range of critical issues that should be clarified before it becomes effective. See Dodd-Frank's Limitations on Risk Taking: An Analysis of the Volcker Rule's Restrictions on Proprietary Trading and Investments In and Sponsorship of Hedge Funds and Private Equity Funds.

The Volcker Rule requires the Council to conduct a study and make recommendations ("Study") regarding the implementation of the Rule that addresses, among other matters, (i) minimizing the risk that insured depository institutions and their affiliates will engage in unsafe and unsound activities, (ii) reducing the conflicts of interest between the self-interest of banking entities or Significant Nonbanks and the interests of their customers, and (iii) limiting activities that have caused or may cause undue risk or loss to banking entities and Significant Nonbanks. The Dodd-Frank Act requires that the Study be completed by January 22, 2011. Following completion of the Study, specified federal financial regulatory agencies are generally given nine months to adopt rules implementing the Volcker Rule.

The Council announced that it will publish a request for public input in connection with the Study. The request will have a 30-day comment period following its publication in the Federal Register. This notice will offer an important opportunity for parties potentially impacted by the Volcker Rule to identify inconsistencies and unintended impacts of the Rule that should be addressed and resolved in the rulemaking process.

Dodd-Frank Implementation Roadmap

In what may be a signal that the Council intends to perform a coordinating role across agencies as the Dodd-Frank implementation process proceeds, the Council published a 20-page Integrated Implementation Roadmap that outlines a wide range of rulemakings, studies and other actions that will be undertaken under Dodd-Frank, with anticipated timeframes.

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The process of reconstructing the financial services business to allow government regulation to catch up with the markets has begun. Ultimately, systemic oversight will be a difficult and complex balancing of interests since too much regulation creates its own set of problems, as does too little. One compromise may be for the Council through its Office of Financial Research to focus on the quality rather than the quantity of regulation.

The Council's proposal to identify the factors that will determine systemic significance demands as much participation by industry participants as possible, but for some companies, it raises the proverbial chicken and egg question: how does one impact the process without ultimately being impacted by the process?

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