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A legal update from Dechert's Financial Services and Finance and Real Estate Groups

President's Plan for Comprehensive Financial Regulatory Reform and the Effect on Private Funds, Structured Finance, and Money Market Funds

President Obama announced on June 17, 2009 his Comprehensive Plan for Regulatory Reform of the U.S. Financial System (the "Plan"). While the overall scope of the Plan and its numerous elements are important, we are focusing here on the proposed structural changes to the U.S. financial regulatory system, and the effect of those changes on private pools of capital (e.g., hedge funds, private equity funds, venture capital funds, and real estate funds—"private funds") and structured finance, as well as the effect on money market funds.

The Plan was set forth in a white paper titled *Financial Regulatory Reform, A New Foundation: Rebuilding Financial Supervision and Regulation.* The Plan's elements include structural, regulatory, consumer protection, crisis management, and international standards reforms designed to address the causes of the recent financial crisis and "to restore confidence in the integrity of [the U.S.] financial system." The key components of the five major elements of the Plan are as follows:

- Structural Changes
  - Financial Services Oversight Council of financial regulators
  - Federal Reserve authority to supervise "too-big-to-fail" financial services firms
  - Stronger capital and prudential standards, especially for large interconnected firms
  - Create National Bank Supervisor
  - Eliminate federal thrift charter and Office of Thrift Supervision
  - Register investment advisers to private pools of capital
  - Reduce money market fund susceptibility to extraordinary redemption demands
  - Reevaluate the role of Government Sponsored Entities
- Financial Market Supervision
  - Enhanced regulation of securitization markets, including
    - Market transparency
    - Stronger credit rating agency regulation
    - "Skin in the game" requirement for issuers and originators
  - Derivatives regulation
  - Harmonize futures and securities regulation
  - Federal Reserve authority over payment, clearing and settlement systems

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- Consumer Protection
  - Create a Consumer Financial Protection Agency[1]
  - Improved transparency, fairness and appropriateness of consumer and investor products and services
  - SEC authority to equalize and improve standards for consumer financial product and services providers
- Crisis Management
  - Non-bank financial institution intervention regime
  - Improved Federal Reserve emergency lending authority accountability
- International Regulatory Standards and Cooperation
  - Improved global financial markets oversight
  - Strengthened capital framework for international firms
  - Coordinated supervision of internationally active firms
  - Enhanced crisis management

Structural Changes to U.S. Regulatory System

The sweeping structural changes proposed in the Plan are designed to address certain risks and systemic flaws that the Administration believes accumulated in the U.S. financial system in the years leading up to the recent financial crisis, including: (i) capital and liquidity requirements applicable to financial firms were too low; (ii) regulators did not take into account the harm that large, interconnected institutions could have on the economy if they failed; (iii) supervision of financial firms was fragmented among various federal and state agencies; and (iv) certain financial institutions were permitted to operate with insufficient or, in some cases, no governmental oversight.

The structural changes proposed in the Plan include, among others:

- Delegation of broad new supervisory authority over certain financial firms to the Federal Reserve Board;
- Creation of a new "Financial Services Oversight Council;"
- Establishment of a new agency, the "National Bank Supervisor;"
- Implementation of higher net capital standards and strengthening of other standards applicable to banks and bank holding companies;
- Elimination of certain loopholes in current statutes that enable certain financial firms to avoid regulation as banks or bank holding companies; and
- Registration of private fund advisers.

Consolidated supervision and regulation of "Tier 1 FHCs" by the Federal Reserve. Any financial firm whose "size, leverage, and interconnectedness could pose a threat to financial stability if it failed" would be classified as a Tier 1 Financial Holding Company ("Tier 1 FHC") and subject to direct supervision and regulation by the Federal Reserve. The Federal Reserve, with the assistance of a newly created Financial Services Oversight Council, would be responsible for identifying Tier 1 FHCs and for regularly reviewing their classification as such. The Federal Reserve would be given authority to collect such periodic and other reports from U.S. financial firms as are necessary to determine whether a firm is a Tier 1 FHC, to the extent such information cannot be obtained from reports provided to other regulators. Consolidated supervision over Tier 1 FHCs by the Federal Reserve would extend to the parent company and all of its subsidiaries, U.S. and foreign, regulated and unregulated (however, regulated subsidiaries would continue to be primarily regulated by their current functional or bank regulator). Tier 1 FHCs

[1] Proposed legislation to implement the Consumer Financial Protection Agency was delivered to Capitol Hill by the Administration on June 30, 2009. Press Release, U.S. Department of the Treasury, Administration's Regulatory Reform Agenda Moves Forward: Legislation for Strengthening Consumer Protection Delivered to Capitol Hill (June 30, 2009), available at www.treas.gov/press/releases/tg189.htm.

would be subject to higher capital, liquidity, and risk management standards than those applicable to other financial firms. Additionally, Tier 1 FHCs would be required to comply with the same non-financial activity restrictions that apply to bank holding companies. (See additional discussion below as it relates to private funds.)

Creation of a Financial Services Oversight Council ("FSOC"). The FSOC, which would replace the President's Working Group on Financial Markets ("PWG"), would be responsible for facilitating information sharing and coordination, identifying emerging risks, assisting the Federal Reserve in the identification of Tier 1 FHCs, and providing a forum for resolving jurisdictional disputes among regulators. To meet these obligations, FSOC would have the authority to require regular periodic reporting from U.S. financial firms. The FSOC would be chaired by the Secretary of the Treasury, with the Chairmen of the Federal Reserve Board of Governors, the Securities and Exchange Commission ("SEC"), the Commodity Futures Trading Commission ("CFTC"), and the Federal Deposit Insurance Corporation ("FDIC"), and the Directors of the proposed National Bank Supervisor, the proposed Consumer Financial Protection Agency, and the Federal Housing Finance Agency as members. The FSOC would be supported by a permanent staff at the Treasury.

Creation of a National Bank Supervisor ("NBS"). The Administration believes that competition among different government agencies responsible for regulating similar financial firms led to reduced regulation. The proposed NBS would be an agency within the Treasury, dedicated to the chartering and prudential supervision and regulation of all federally chartered depository institutions, as well as all federal branches and agencies of foreign banks, in place of the Office of the Comptroller of the Currency ("OCC") and the Office of Thrift Supervision ("OTS"). Like the OCC and the OTS, the NBS would have the ability to require reports, conduct examinations, impose and enforce prudential standards, and conduct overall supervision of the depository institutions under its jurisdiction.

Strengthening of Capital and Other Prudential Standards for Banks and Bank Holding Companies ("BHCs"). In addition to the heightened standards that would apply to Tier 1 FHCs, discussed above, the Administration also proposes heightened standards for banks and BHCs. Under the proposals, the Treasury would lead working groups that would be tasked with (i) assessing existing capital requirements applicable to banks and BHCs, and reporting on those findings by December 31, 2009; and (ii) assessing the current supervision of banks and BHCs, and reporting on those findings by October 1, 2009.

Federal regulators would issue standards and guidelines with respect to compensation practices "to better align executive compensation practices . . . with long-term shareholder value and to prevent compensation practices from providing incentives that could threaten the safety and soundness of supervised institutions." The Plan states that the Administration will support legislation requiring public companies to submit their senior executive officer compensation packages to an annual shareholder vote.

Other measures that would be taken with respect to capital and prudential standards for banks and BHCs include:

- Review of current accounting standards;
- Implementation of capital and management requirements on a consolidated basis at the financial holding company level, in addition to the requirements applicable at the level of each subsidiary depository institution; and
- Increased firewalls between banks and their affiliates.

Closing Existing Loopholes in Bank Regulation. Under the proposals, the federal thrift charter would be eliminated, subject to "reasonable transition arrangements." Thrift holding companies and companies that hold industrial loan companies, credit card banks and other entities that are not considered "banks" for purposes of the Bank Holding Company Act ("BHCA") would become BHCs, subject to regulation by the Federal Reserve as such, and subject to the non-banking activity restrictions of the BHCA. Additionally, state restrictions on interstate branching would be eliminated, permitting banks to expand across state lines.

Elimination of SEC's Supervised Investment Bank Holding Company Program. Eliminating the SEC's SIBHC Program would subject investment banking firms that seek consolidated supervision by a U.S. regulator to supervision and regulation by the Federal Reserve.

Registration of Private Fund Advisers. All advisers to hedge funds, private equity funds, venture capital funds, real estate funds and other private pools of capital whose assets exceed a to-be-determined "modest" threshold would be required to register with the SEC under the Investment Advisers Act of 1940 ("Investment Advisers Act"). (See discussion below under Private Funds and Structured Finance.)

Money Market Fund Reform. The Plan calls for the SEC to strengthen the regulatory framework around money market funds, both to reduce the credit and liquidity risk profile of individual funds and to make the money market fund industry as a whole less susceptible to extraordinary redemption or withdrawal demands. (See discussion below on Money Market Fund Reform.)

Enhancing Oversight of the Insurance Sector. The Plan calls for legislation establishing an "Office of National Insurance" ("ONI") within the Treasury. The ONI would be tasked with gathering information, developing expertise, negotiating international agreements, and coordinating policy in the insurance sector. The Plan states that the Treasury will support proposals to modernize and improve insurance regulation in accordance with six principles: (i) effective systemic risk regulation; (ii) strong capital standards and an appropriate match between capital allocation and liabilities; (iii) meaningful and consistent consumer protection for insurance products and practices; (iv) increased national uniformity through a federal charter or state action; (v) improved/broadened regulation of insurance companies on a consolidated basis; and (vi) international coordination.

Government Sponsored Enterprises ("GSEs"). Under the Plan, culminating with the release of the 2011 Federal budget, a team of government agencies, led by the Departments of the Treasury and Housing and Urban Development, will issue recommendations on the future of Fannie Mae, Freddie Mac and the Federal Home Loan Bank system. Potential outcomes may include merger with a federal agency, liquidation, division into smaller companies, operating under a "public utility" model with continued government sponsorship and guarantees but under enhanced regulation, or conversion into an insurance company (providing policies insuring the performance of covered bonds). The goals to be advanced by such recommendations are to maximize private shareholder return and preserve the American dream of home ownership.

Private Funds

Investment Advisers Act Registration. As part of its goal of filling "regulatory gaps," the Plan proposes requiring all advisers to private funds whose assets under management exceed some modest threshold (and without regard to the number of clients of the adviser) to register with the SEC under the Investment Advisers Act, with all of the attendant recordkeeping and compliance-related requirements. The Plan also proposes subjecting investment funds advised by such advisers to (i) recordkeeping requirements; (ii) mandatory disclosure obligations to investors, creditors and counterparties; and (iii) certain additional regulatory requirements, all intended to provide the SEC with sufficient information to review as part of a regular, periodic compliance examination program and to allow the SEC to make a determination as to whether the fund or fund family is so large, leveraged or interconnected that it poses a threat to financial stability.

The Plan indicates that the requirements may vary across different types of private funds. It also recommends that some of the regulatory reporting requirements (such as assets under management, borrowings, off-balance sheet exposures, etc.) should be made on a confidential basis. It is unclear whether the Freedom of Information Act would permit the confidential nature of these filings to be respected under all circumstances.

International Cooperation on Regulation of Hedge Funds. The Plan contains a call to regulatory authorities to implement by the end of 2009 the G-20 commitment to require hedge funds or their managers to register and disclose appropriate information to regulators in such countries. Any such registration would be subject to a threshold limit and would require private funds to disclose appropriate information on an ongoing basis to allow national regulators to assess the systemic risk they pose individually or collectively.

Private Funds as Tier 1 Financial Holding Companies ("FHCs")

To the extent a private fund is classified as a Tier 1 FHC, it would be supervised and regulated by the Federal Reserve Board, which would, in consultation with the FSOC, set prudential standards. The contemplated prudential standards most relevant to private investment funds include:

Capital Requirements. Private funds that are Tier 1 FHCs would be obligated to maintain enough high-quality capital during good economic times to keep them above prudential minimum capital requirements during stressed economic times. A Treasury working group will determine the regulatory capital requirements that should apply to Tier 1 FHCs in a report to be issued by December 13, 2009. The Plan contemplates increases in regulatory capital requirements on things such as trading positions and equity investments, but it is unclear whether the private fund capital requirements will differ from the capital requirements imposed on a lending institution or insurance company, or how the Treasury will determine the minimum capital requirements for a private fund.

Liquidity Standard. The Plan contemplates the Federal Reserve imposing rigorous liquidity risk requirements on Tier 1 FHCs to mitigate the potential negative impact that the financial distress, rapid deleveraging, or disorderly failure of any such firm could have on the financial system. Further, it asks that the Federal Reserve establish explicit internal liquidity risk exposure limits and risk management policies. Tier 1 FHCs should have sound processes for monitoring and controlling the full range of their liquidity risks and should regularly stress test them across a variety of scenarios.

Restrictions on Non-financial Activities. Notwithstanding the fact that some Tier 1 FHCs may not control insured depository institutions, the Plan seeks to have them be subject to the full range of prudential regulations and supervisory guidance applicable to BHCs. In addition, the wall between banking and commerce will be extended to apply to this new class of financial firm such that each Tier 1 FHC will be required to comply with the non-financial activity restrictions of the BHCA. A Tier 1 FHC that has not been previously subject to the BHCA will be given five years to conform to the existing activity restrictions imposed on Tier 1 FHCs by the BHCA.

Structured Finance

Citing broken relationships between borrowers and lenders, over-reliance by market participants on rating agencies, conflicts of interest, and a lack of transparency at all levels of the securitization process, the Plan proposes several initiatives to address this "breakdown in market discipline." According to the authors of the proposal, originators and brokers were subject to little or "nonexistent" regulation and there was a "lack of sufficient incentives" for lenders and securitizers to "consider the performance of the underlying loans after the asset backed securities ('ABS') were issued" or perform adequate due diligence.

Asset-Backed Securities. The Plan's structured finance proposals center on increased regulation of securitization markets at all levels (issuer, underwriter, originator, broker and rating agency) and new "skin in the game" requirements for originators and/or securitization sponsors, in the form of the non-transferable, non-hedged retention of "five percent of the credit risk of securitized exposures." Potential retention requirements could mandate on-balance-sheet holding of first-loss positions, or a vertical, *pro-rata* portion of each tranche of newly-issued securities, either of which would likely result in the consolidation of the assets and liabilities of the securitization vehicle on the balance sheet of the originator/securitization sponsor for both financial and regulatory accounting purposes.

On a case-by-case basis, allowing for exceptions or adjustments, federal banking agencies would decide the duration of such retention, as well as maintain discretion to regulate either sponsors or originators. Regulators would also be tasked with linking the compensation (including fee structures) of brokers, originators, sponsors, underwriters and others to the "longer-term performance of the securitized assets, rather than only to the production, creation or inception of those products." In addition, disclosure and reporting requirements would be significantly increased.

In line with several new accounting proposals from the Financial Accounting Standards Board ("FASB"), the Plan suggests the elimination of "gain on sale" treatment for originators, and would create material impediments for securitizations designed to be off-balance-sheet as to the originator. Sponsors would be required to make "strong" standardized representations, and to disclose loan-level data and the "nature and extent of broker, originator and sponsor compensation and risk retention." For residential mortgage-backed securities, modification rules would need to be "clear and uniform" and consideration should be given to whether the modification benefits the "securitization trust as a whole."

Under the proposal, ABS would be added to the Financial Industry Regulatory Authority's Trade Reporting and Compliance Engine ("TRACE") system, to track performance and value over time. Credit rating agencies would also be required to (i) ensure that conflicts of interest are disclosed; (ii) provide their methodologies publicly (including qualitative reviews of originators); (iii) provide any non-public methodologies or ratings information directly to the SEC; and (iv) differentiate their treatment of structured products from other products "in a manner that facilitates comparisons across products and credit ratings and that provides meaningful measures of the uncertainty and potential volatility associated with credit ratings." An implicit goal of the Plan's proposals is to reduce investor confusion in differentiating structured products from corporate debt. The proposal also requests that regulators avoid reliance on credit ratings when promulgating new regulations.

With respect to ABS and regulatory capital requirements, the Plan urges risk-based capital requirements to reflect the risks of structured products and "minimize opportunities for firms to use securitization to reduce their regulatory capital requirements without a commensurate reduction in risk."

Derivatives

Under the Plan, over-the-counter ("OTC") derivatives would be "comprehensively" regulated and "standardized." Principally, this would limit market participants to entry into only those derivatives contracts that are cleared through a number of regulated central counterparties, under the supervision of the CFTC and the SEC (it is unclear which agency would have primary responsibility). In particular, the proposal contemplates restrictions on marketing derivatives (and particularly credit default swaps) to municipalities.

The Plan outlines four broad policy objectives: (1) preventing activities in those markets from posing risk to the financial system; (2) promoting the efficiency and transparency of those markets; (3) preventing market manipulation, fraud, and other market abuses; and (4) ensuring that OTC derivatives are not marketed inappropriately to unsophisticated parties.

In order to contain systemic risks, the Plan recommends that the Commodity Exchange Act ("CEA") and the securities laws should be amended to require clearing of all standardized OTC derivatives through regulated central counterparties ("CCPs"). It should be noted that firms will not be permitted to avoid the clearing requirement by customizing trades and, in this regard, if an OTC derivative is accepted for clearing by one or more fully regulated CCPs, there would be a presumption that it is a standardized contract. It is contemplated that the CCPs will impose robust margin requirements as well as other risk mitigation methods. To the extent dealers elect to utilize customized OTC derivatives in a manner permitted by the Plan, the Plan contemplates higher regulatory capital requirements on such OTC derivatives. Further, all OTC derivatives dealers and all other firms whose activities in those markets create large exposures to counterparties would be subject to a robust regime of prudential supervision and regulation, which would include (i) conservative capital requirements; (ii) business conduct standards; (iii) reporting requirements; and (iv) conservative requirements relating to initial margins on counterparty credit exposures.

The Plan would also seek to make the OTC derivatives markets more transparent by amending the CEA and the securities laws to authorize the CFTC and the SEC, consistent with their respective missions, to impose recordkeeping and reporting requirements (including an audit trail) on all OTC derivatives. With respect to reporting requirements, the Plan recommends that CCPs and trade repositories make aggregate data on open positions and trading volumes available to the public and make data on any individual counterparty's trades and positions available on a confidential basis to the CFTC, SEC, and the institution's primary regulators. The belief is that such reporting will provide the regulators with a complete picture of activity in the OTC derivatives markets and should assist those regulators in detecting and deterring all such market abuses.

By requiring the clearing of standardized contracts through regulated CCPs, moving the standardized part of these markets onto regulated exchanges and regulated transparent electronic trade execution systems for OTC derivatives, and requiring development of a system for timely reporting of trades and prompt dissemination of prices and other trade information, it is believed that market efficiency and price transparency should be improved in derivatives markets. Although the

Plan is silent on this point, it will need to take into account the positions of other jurisdictions on the regulation of OTC derivatives to ensure that the trading of these derivative contracts does not move outside of the United States, thus, creating a new regulatory gap. The Plan also recommends that the CFTC have the authority to set position limits on OTC derivatives that perform or affect a significant price discovery function with respect to regulated markets.

Money Market Fund Reform

The Plan notes that following the fall of Lehman Brothers, a money market fund "broke the buck" that sparked a run on other prime money market funds and a loss of liquidity in the money markets. The run on money funds was stopped only by introduction of Treasury's Temporary Guarantee Program for money market funds and new Federal Reserve liquidity facilities targeted at money market funds.

The Plan states that "[t]he vulnerability of [money market funds] to breaking the buck and the susceptibility of the entire prime [money market fund] industry to a run in such circumstances remains a significant source of systemic risk." As a result, the Plan includes certain proposed measures that are intended to enhance investor protection and mitigate the risk of runs. The Plan recommends that the SEC consider the following measures:

- Require money market funds to maintain substantial liquidity buffers;
- Reduce the maximum weighted average maturity of money market fund assets;
- Tighten the credit concentration limits applicable to money market funds;
- Improve the credit risk analysis and management of money market funds; and
- Empower money market funds' boards of directors to suspend redemptions in extraordinary circumstances to protect the interests of fund shareholders.

The Plan also directs the PWG to deliver a report by September 15, 2009 (due to the need for immediate action, the Plan directs the PWG rather than the yet-to-be-authorized FSOC to address the issues relating to money market funds) that considers more fundamental changes to address systemic risk in a more direct manner. Examples of these proposed changes include: (i) moving away from a stable net asset value for money market funds (since the Plan was released, the SEC has backed away from this proposal); and (ii) requiring money market funds to obtain access to reliable emergency liquidity facilities from private sources. The Plan further explains that in order for the liquidity facilities to provide money market funds with meaningful protection against runs, the facilities should be reliable, scalable, and designed so that drawing on the facilities to meet redemptions will not disadvantage remaining money market fund shareholders.

The Plan also identifies a number of potential adverse effects resulting from the proposed regulatory framework, and asks the SEC and PWG to carefully consider these effects as they flesh out the details of the new regulatory framework. These potential adverse effects include: (i) investor flight from money market funds into unregulated or less regulated money market investment vehicles; and (ii) reductions in the term of money market liabilities issued by major financial and non-financial firms.

The SEC held an open meeting on June 24, 2009 to consider whether to propose amendments that are widely expected to build on the PWG Report recommendations. The SEC is also expected to give strong consideration to the proposals of the ICI Money Market Working Group when formulating the details of the new regulations.

Point of Sale Disclosure

To address concerns that investors may not be receiving adequate information, the Plan proposes that the SEC should be authorized to require that certain disclosures (including a summary prospectus) be provided to investors at or before the point of sale, if it finds that such disclosures would improve investor understanding of the particular financial products, and their costs and risks.

As the Plan notes, most prospectuses are delivered with the confirmation of sale, *after* the sale has taken place.

To address these concerns, the Plan contemplates additional study by the SEC of this issue:

> The SEC can better evaluate the effectiveness of investor disclosures if it can meaningfully engage in consumer testing of those disclosures. The SEC should be better enabled to engage in field testing, consumer outreach and testing of disclosures to individual investors, including by providing budgetary support for those activities.

The Plan is an ambitious but general set of goals, instructions, and policy pronouncements. Implementation will require numerous Congressional actions, myriad studies and reports, extensive rulemaking by several agencies and departments, and input into those processes by countless public and private stakeholders. We have focused on just some of the issues and proposals—the ones most likely to have a significant impact on our clients. We will continue to monitor developments and publish updates as necessary to keep abreast of events.

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