SIMPSON THACHER MEMORANDUM

Federal Banking Regulators Clarify Effective Date for the Swaps "Push-Out" Rule Under Dodd-Frank

April 2, 2012

On March 30, 2012, the Federal Reserve, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation jointly issued guidance clarifying that the effective date of Section 716 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank")—known more commonly as the swaps "push-out" rule—is July 16, 2013.

The guidance is in response to inquiries seeking clarification about the effective date. Confusion surrounded a reference in Section 716 to the effective date being two years following the date on which "the Act" is effective. The banking regulators concluded that the reference to "the Act" was to Title VII of Dodd-Frank (known as the Wall Street Transparency and Accountability Act of 2010, which became effective on July 16, 2011), rather than Dodd-Frank itself (which became effective on July 21, 2010).

The swaps "push-out" rule prohibits federal assistance to any "swaps entity" with respect to any swap, security-based swap, or other activity of the swaps entity, which includes registered "swap dealers" and "major swap participants"—terms that have yet to be defined by the Commodity Futures Trading Commission and the Securities and Exchange Commission. Prohibited federal assistance would include, among other things, FDIC deposit insurance or guarantees, advances from Federal Reserve credit facilities or the Federal Reserve's discount window (unless part of a program with broad-based eligibility), loss sharing arrangements, and tax breaks. Subject to important exceptions (such as those relating to *bona fide* risk-mitigating hedging activities by banks), the prohibition effectively requires a U.S. depository institution, as well as a U.S. branch or office of a foreign banking organization, to "push-out" its swap dealing activities to a separate affiliate within the bank holding company or savings and loan holding company organization that does not receive federal assistance. The entity engaging in such activities would be subject to compliance with the affiliate transaction requirements of Sections 23A and 23B of the Federal Reserve Act, among other things.

As noted earlier, the prohibition on federal assistance to a swaps entity will be effective on July 16, 2013. Section 716(f) of Dodd-Frank will generally provide an insured depository institution that qualifies as a swaps entity up to two years to divest the part of its business that engages in disqualified derivative activities (including by transfer to an affiliate, as discussed above) or cease these activities altogether. The transition period may be extended by the appropriate federal banking regulator, after consultation with the CFTC and the SEC, for up to an additional year. In the guidance released on March 30, the federal banking regulators stated they intend to invite comment on a separate proposal that would establish the appropriate transition period for insured depository institutions.

* * *

For more information regarding the swaps push-out rule, please contact any of the members of our Derivatives and Financial Institutions groups.

This memorandum is for general informational purposes and should not be regarded as legal advice. Furthermore, the information contained in this memorandum does not represent, and should not be regarded as, the view of any particular client of Simpson Thacher & Bartlett LLP. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as additional memoranda, can be obtained from our website, www.simpsonthacher.com.

The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship. Simpson Thacher & Bartlett LLP assumes no liability in connection with the use of this publication.

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
2 Houston Center
909 Fannin Street
Houston, TX 77010
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2550 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
1155 F Street, N.W.
Washington, D.C. 20004
+1-202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3919 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Tokyo
Ark Mori Building
12-32, Akasaka 1-Chome
Minato-Ku, Tokyo 107-6037
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000