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# Financial Services Alert

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***In this issue:***

*Developments of Note*

1. Banking Agencies Publish Final Supplemental Guidance on Basel II – Supervisory Review Process
2. Department of Labor Explains Changes to ERISA Plan Annual Reporting Requirements Concerning Service Provider Compensation, and Grants Limited Transition Relief
3. SEC Staff Indicates that Advisers Act Cash Solicitation Rule Not Applicable When Solicitation/Referral Solely with Respect to Adviser's Fund Offerings
4. First Circuit Court of Appeals to Entertain Amicus Briefs in Case Involving Conflicts of Interest in Denying ERISA Benefits Claims
5. SEC Staff Denies No-Action Relief for "3(c)(1) Plus Fund"
6. SEC Proposes to Expand the Broker-Dealer Registration Exemptions under Rule 15a-6 for Foreign Broker-Dealers

*Other Items of Note*

7. Special Edition Discussing Amendments to SEC's Emergency Order Regarding Short Sales of Securities of Certain Financial Firms and Related Additional SEC Guidance Available on Goodwin Procter Website
8. DOL Issues Proposed Regulation on Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans

# *Developments of Note*

## ➢ Banking Agencies Publish Final Supplemental Guidance on Basel II – Supervisory Review Process

The four federal banking agencies published final guidance relating to supervisory review of capital adequacy (the "Supervisory Review Guidance") meant to supplement the US Basel II Advanced Capital Adequacy Framework (the "Advanced Framework") final rule discussed in the November 6, 2007 and November 27, 2007 issues of the *Alert*. The final Supervisory Review Guidance does not differ significantly from the proposal published in February, 2007, and becomes effective 30 days from its publication in the *Federal Register*.

The Supervisory Review Guidance includes three components: (1) comprehensive supervisory review of capital adequacy; (2) compliance with regulatory capital requirements; and (3) internal capital adequacy assessment process ("ICAAP"). The Supervisory Review Guidance makes clear that it does not supersede the US Prompt Corrective Action Rules or the otherwise applicable risk management practices. Rather, it is intended to help bank regulators intervene when necessary to protect an institution's capital safety and soundness.

*Comprehensive Supervisory Assessment*. The Supervisory Review Guidance first reiterates that, consistent with historical practice, regulators expect banks to hold capital above their minimum capital requirements, commensurate with their overall risk profile. In evaluating the extent to which banks should hold excess capital, the regulators will consider the combined implications of a bank's compliance with qualification requirements for regulatory capital standards, the bank's ICAAP, and the

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bank's own risk management and control structure. The relevant federal bank regulator has the authority to evaluate whether a bank's capital is adequate as circumstances change, and to take action if it determines that a bank's capital is inadequate. In response to a commentator's suggestion, the final Supervisory Review Guidance makes clear that an increased risk profile will not necessarily result in a need for additional capital if the bank already holds capital well in excess of what its internal processes and supervisors consider adequate.

*Regulatory Capital Compliance*. The Supervisory Review Guidance highlights that regulators must ensure that banks are meeting the qualification requirements that the Advanced Approach imposes for the calculation of regulatory capital. Banks must demonstrate that they meet this qualification requirements not just initially, but also on an ongoing basis. If a bank fails to satisfy the ongoing standards, it would be required to develop a satisfactory plan explaining how it would return to compliance. The Supervisory Review Guidance also makes clear that banks using the Advanced Approach must satisfy the qualification requirements at the subsidiary bank level (unless the subsidiary bank is not subject to the Advanced Approach), as well as at the consolidated entity level.

*ICAAP*. The proposal emphasizes that, in addition to calculation of regulatory capital, a bank must calculate ICAAP, which is the bank's assessment of its overall capital adequacy in relation to its risk profile. The Supervisory Review Guidance further details that the three main objectives of a sound ICAAP policy are to: (1) identify and measure material risks; (2) establish and assess internal adequacy goals that directly relate to that risk; and (3) ensure the integrity of the foregoing assessments on an ongoing basis. Each bank should have an ICAAP unique to its risk profile and should not just rely on assessments at the parent level. A bank also may use assumptions built into its minimum capital requirements, or economic capital models, but must ensure its ICAAP model meets the three objectives listed above and further detailed below.

> *Identification and Measurement of Material Risks*. The Supervisory Review Guidance states that the bank must identify all material risks, including credit risk (including concentrations and exposure dependencies), market risk (including illiquid instruments, leverage and correlations), operational risk, interest rate risk (including on and off balance sheet exposures in the bank both from a short and long term perspective), liquidity risk (which remained part of ICAAP despite commentator objections), and also (if material) reputational risk, strategic risk, and country risk. If a bank uses risk mitigation techniques, it should be able to specify how each of those techniques apply to each risk. In assessing these risks, a quantitative approach should be the foundation of the bank's framework, but qualitative methods are appropriate, particularly when risks cannot be reliably measured quantitatively. These risks should be measured across the entire bank (understanding the challenges of risk aggregation), and include the possible effects of new products, markets and activities concentration and diversification. Banks using internal or third party models should recognize the limitations on their accuracy, and in any event banks should regularly stress test their qualitative measures.
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> *Internal Capital Adequacy Goals*. The Supervisory Review Guidance provides that a bank's goal should be to set and assess capital adequacy goals in relation to all material risks, with capital reflecting not only measured risk, but also uncertainty, such as contingent exposures and changing environments. In assessing capital adequacy, a bank should consider internal factors and assumptions, external conditions, and also ensure capital is held not with respect only to a point in time, but also over time to account for periodic changes in the bank's direction or in the market place. The bank should clearly state how it defines "capital" for purposes of ICAAP (and how its capital components provide adequate capital), and also how the capital plan will address both short and long term capital adequacy.
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> *Integrity.* Finally, as to the third subpart, the Supervisory Review Guidance also highlights that a bank's determination of adequate capital also must be subject to proper oversight and controls. Adequate internal controls and documentation (including designation of the bank's overall capital management process, the committees and individuals responsible for ICAAP, the

frequency and distribution of ICAAP reporting, and the procedures for periodic ICAAP evaluation) should exist to ensure transparency, objectivity, and consistency with ICAAP. The controls and documentations should be enhanced and refined over time as learning and experience warrant. The system created should be subject to validation policies and procedures. Moreover, while the primary use of an ICAAP is to provide an assessment of internal capital adequacy, management should be able to demonstrate that it uses the data in decision making. Furthermore, the Board and senior management of the bank should be involved in this process, and at least annually should review the assessment of overall capital adequacy.

### ➢ Department of Labor Explains Changes to ERISA Plan Annual Reporting Requirements Concerning Service Provider Compensation, and Grants Limited Transition Relief

The Department of Labor ("DOL") issued a set of Questions and Answers (the "DOL Qs & As") regarding the new requirements for reporting compensation paid to entities providing services (directly or indirectly) to employee benefit plans and certain investment funds that file Form 5500, Schedule C with the DOL. These changes, which were discussed in the January 1, 2008 *Alert*, are effective for the Form 5500 to be filed by a plan for the plan's fiscal year beginning in 2009. The DOL Qs & As respond to a wide range of questions that have arisen with regard to these new reporting requirements, including the special rules for the reporting of "eligible indirect compensation" and other types of indirect compensation, reporting requirements that apply where the plan receives services under a "bundled services arrangement," treatment of float income, situations where compensation disclosures by service providers can be made based on estimates or formulas, and rules for reporting gifts, meals, and entertainment.

Selected highlights of the DOL Qs & As are summarized briefly below:

- The DOL Qs & As provide limited transition relief from the requirement that service providers that fail to provide a plan administrator with information necessary to complete Schedule C must be listed on the schedule. Under this transition relief, a plan need not list a service provider who fails to provide needed information for the Form 5500 filed with regard to the plan year beginning in 2009, if the plan administrator receives a statement from the service provider that the service provider made a good faith effort to make necessary recordkeeping and information system changes in a timely fashion and, despite such efforts, was unable to complete the changes for the 2009 year.
- While direct compensation paid by a plan must be reported based on the plan's fiscal year, information regarding indirect compensation (including an estimate or the formula for determining such indirect compensation) may be reported based on the service provider's fiscal year that ends within the plan's year (as long as the same method is used consistently from year to year).
- The indirect compensation that must generally be reported includes only compensation received in situations where the person's eligibility for payment is based on services rendered to the plan or on a transaction with the plan. Thus, indirect compensation includes, for example, asset-based management fees paid by an investment fund (such as a mutual fund) in which the plan invests, commissions or fees related to purchases and sales of interests in the fund, and fees for shareholder services or compensation received from an investment fund (or its agents) by an entity for plan recordkeeping or administrative services. Indirect compensation would not include, for example, the investment fund's ordinary operating expenses (*e.g.*, accountants' fees) or brokerage commissions for effecting securities transactions within the fund's portfolio.
- The general rule that compensation received under a bundled services arrangement need not be broken out and reported separately with regard to each entity providing services through the bundle does not apply where a "separate fee" is charged against the plan's investment in a fund. Examples of such a "separate fee" include a revenue sharing payment to a third party administrator that is charged against the plan's investment in the fund as a separate amount or pursuant to a separate formula. However, payment to the third party administrator by the fund's investment manager, out

of the overall investment management or shareholder services fees it receives from the fund, would not be a separate fee for this purpose.

- While the alternative (and less onerous) reporting rules regarding "eligible indirect compensation" require written disclosure to the plan administrator of specific information concerning that compensation (*e.g.*, the purpose, amount (including estimate or formula), recipient, and payer of the compensation), this disclosure requirement may be satisfied using documents prepared and provided to the plan administrator for other purposes – *e.g.*, a prospectus, brokerage fee schedule, or Form ADV.

## ➢ SEC Staff Indicates that Advisers Act Cash Solicitation Rule Not Applicable When Solicitation/Referral Solely with Respect to Adviser's Fund Offerings

The staff of the SEC's Division of Investment Management issued a no-action letter stating its view that Advisers Act Rule 206(4)-3, the cash solicitation rule (the "Rule"), generally does not apply when a registered investment adviser makes cash payments to a person solely to compensate that person for soliciting investors or prospective investors for, or referring them to, a fund the adviser manages (a "fund" being an investment pool that either is registered under the 1940 Act or excluded from the definition of investment company under Section 3(c) of the 1940 Act (*e.g.*, a 3(c)(1) or 3(c)(7) fund)). The SEC staff had previously issued no-action letters indicating that the Rule applied to a registered adviser that made cash payments to a party soliciting investors in the adviser's funds. The current no-action letter supersedes those letters to the extent of any conflict.

The current guidance indicates that the determination of whether or not the Rule applies to a solicitation arrangement depends on the particular facts and circumstances, with the most pertinent being those related to:

- the nature of the arrangement between the soliciting/referring person and the investment adviser,
- the nature of the relationship between the investment adviser and the solicited/referred person, and
- the purpose of the adviser's cash payment to the soliciting/referring person.

Under this analysis, the staff believes that the Rule "would not appear to apply to a registered adviser's cash payment to a person for referring other persons to the adviser where the adviser manages only [funds] and is not seeking to enter into investment advisory relationships with other persons, and the adviser's cash payment, under the adviser's arrangement with the referring person, compensates the referring person solely for referring the other persons to the adviser as investors or as prospective investors in one or more of the [funds] managed by the adviser. In contrast, the Rule would appear to apply if the adviser manages or seeks to manage [funds] and individual accounts, is seeking to enter into investment advisory relationships with other persons, and the adviser's cash payment, under the adviser's arrangement with the referring person, compensates the referring person for referring the other persons as prospective advisory clients."

The no-action letter expressly notes that when the Rule does not apply, a solicitor does not have to provide an investor or prospective investor with any of the documentation required by the Rule. The SEC staff later observes, however, that a solicitor's activities may constitute "advising others … as to the advisability of investing in … securities," thereby bringing the solicitor within the definition of investment adviser and subjecting it to the Section 206 requirement to disclosure to clients and prospective clients any material facts relating to conflicts of interest. (In the 1979 adopting release for the Rule, the SEC indicated that because the Rule contains a requirement for adviser oversight of an unaffiliated solicitor and an unaffiliated solicitor's activities must be conducted in accordance with the agreement required by the Rule, an unaffiliated solicitor would be, with respect to solicitation activities under a solicitation agreement with an adviser, an associated person of that adviser. As a consequence,

the solicitor would not be required to register under the Advisers Act solely as a result of those solicitation activities.)

The no-action letter expressly states that it does not address the question of whether receiving cash compensation from an adviser for soliciting or referring investors or prospective investors to a fund would result in a solicitor's being considered a "broker" under Section 3(a)(4) of the Securities Exchange Act of 1934, as amended.

## ➢ First Circuit Court of Appeals to Entertain Amicus Briefs in Case Involving Conflicts of Interest in Denying ERISA Benefits Claims

Following the recent Supreme Court decision in *Metropolitan Life Insurance Co. v. Glenn,* No. 06-923 (S. Ct. June 19, 2008), discussed in the June 24, 2008 *Alert*, the United States Court of Appeals for the First Circuit ("First Circuit") will reexamine whether to affirm the denial of ERISA benefits by an administrator who both determines eligibility for claims and also is responsible for paying eligible benefits. Following *Glenn*, the First Circuit vacated its judgment affirming the denial of benefits in a case with facts that are similar to those found by the Supreme Court last month to create a conflict of interest. The First Circuit stated expressly that it "will entertain motions for leave to file amicus briefs by new potential amici." Amici, or friends of the court, could present to the panel that will decide the first case after *Glenn* their views on topics relevant to the disposition of the case, such as the appropriate standard courts should use in weighing any perceived conflict. Under the current briefing schedule, any amicus briefs supporting the appellee are due September 17, 2008. *Denmark v. Liberty Life Assur. Co. of Boston*, 2008 WL 2602158 (1st Cir. July 2, 2008).

Goodwin Procter litigators have been at the forefront of these and other cutting edge ERISA cases, and have won important victories for clients at the First Circuit and elsewhere. Our lawyers would be pleased to discuss the filing of amicus briefs with interested clients.

## ➢ SEC Staff Denies No-Action Relief for "3(c)(1) Plus Fund"

The staff of the SEC's Division of Investment Management denied no-action relief that would have permitted a single fund not registered under the Investment Company Act of 1940, as amended (the "1940 Act"), to have no more than 100 beneficial owners who were not qualified purchasers at the time of purchase within the meaning of the 1940 Act, *i.e.*, they did not meet specified investment ownership tests, and a potentially unlimited number of investors who were qualified purchasers. The relief was sought to allow the combination of an existing unregistered fund relying on Section 3(c)(1) of the 1940 Act, which generally limits a relying fund's beneficial owners to 100 investors, with another fund relying on Section 3(c)(7) of the 1940 Act, which generally limits a relying fund's owners to qualified purchasers and to certain fund insiders. As described in the request for relief, the two funds share essentially the same investment objectives, and have overlapping portfolios and substantially similar portfolio risk/return characteristics, such that the two funds would be subject to integration under the 1940 Act but for Section 3(c)(7)(E) of the 1940 Act, which provides that a Section 3(c)(1) fund will not be integrated with a Section 3(c)(7) fund. The request for relief asserted that combining the two funds would result in reduced expenses compared to those they would experience in continued side-by-side operation. In declining to grant relief, the SEC staff noted that its 1992 study of investment company regulation, which recommended Congress adopt what became Section 3(c)(7) of the 1940 Act, rejected the idea of amending Section 3(c)(1) to permit an unlimited number of sophisticated investors. The SEC staff also cited the reason given in the 1992 study that "the 100 investor limit in the current private investment company exception reasonably reflects the point at which federal regulatory concerns are raised if any unsophisticated investors are involved …. In comparison, pools owned exclusively by sophisticated investors do not present these concerns, regardless of the number of investors."

## ➢ SEC Proposes to Expand the Broker-Dealer Registration Exemptions under Rule 15a-6 for Foreign Broker-Dealers

The SEC recently proposed much-anticipated amendments to Rule 15a-6 under the Securities Exchange Act of 1934 (the "Exchange Act"). The proposed amendments are designed to update and expand the ability of U.S. investors to do business with foreign broker-dealers, which would not need to register under the Exchange Act by reason of engaging in such business.

The Exchange Act generally requires entities using any means of interstate commerce to effect transactions in, or to induce or attempt to induce purchases and sales of, securities to register with the SEC. Absent an exemption, broker-dealers outside the United States engaged in transactions with persons in the United States would need to register under U.S. securities rules. Rule 15a-6 was adopted by the SEC in 1989 to provide certain exemptions from this registration requirement for non-U.S. broker-dealers engaged in certain narrowly defined types of transactions with U.S. persons. Specifically, Rule 15a-6 allows foreign broker-dealers to effect transactions with U.S. persons that have not been solicited by the foreign broker-dealer (*Rule 15a-6(a)(1)*); to provide research reports to certain so-called "major institutional investors" (*Rule 15a-6(a)(2)*); to solicit brokerage transactions from other "institutional investors," so long as such dealings are chaperoned by SEC-registered broker-dealers (*Rule 15a-6(a)(3)*); and to effect securities transactions with certain other U.S. entities and persons, such as U.S. banks and persons temporarily resident in the United States (*Rule 15a-6(a)(4)*).

The SEC's proposal is designed to update Rule 15a-6, which, by many accounts, is significantly outmoded in an era of increasingly international securities markets. As described in greater detail below, the proposal generally (i) broadens the category of U.S. investors that foreign broker-dealers may contact for the purpose of providing research reports and soliciting securities transactions, and (ii) reduces the required involvement of SEC-registered broker-dealers in intermediating transactions effected by foreign broker-dealers on behalf of certain U.S. investors.

Unsolicited Trades – Rule 15a-6(a)(1)

The proposal reaffirms the SEC's view – as embodied in current Rule 15a-6 – that a foreign broker-dealer does not trigger the Exchange Act's registration requirements when a U.S. investor has sought out the foreign broker-dealer outside the U. S. and initiated transactions in foreign securities markets entirely of the investor's own accord. The principal change proposed by the SEC is to add the title "Unsolicited Trades" to Rule 15a-6(a)(1). The proposing release also emphasizes that the SEC construes the term "solicitation" broadly and, thus, relatively few transactions would qualify for the unsolicited trades exemption.

The release also proposes to revise past interpretive guidance regarding the U.S. distribution of foreign broker-dealers' quotations by third-party systems. Under the proposed interpretation, the distribution in the United States of foreign broker-dealers' quotations by a third-party system would not be viewed as a form of "solicitation" under revised Rule 15a-6 so long as (i) the third-party system did not itself allow execution of securities transactions between the foreign broker-dealer and persons in the United States, and (ii) there were no other contacts with U.S. investors initiated by the third-party system or the foreign broker-dealer.

Extension of Rule 15a-6 to "Qualified Investors" – *Rules 15a-6(a)(2) and 15a-6(a)(3)*

The proposal broadens the category of U.S. investors with which a foreign broker-dealer may interact without triggering registration and other requirements of the Exchange Act. Citing its belief that advances in communications and other technology have made it increasingly likely that a broader group of U.S. investors have the skills and experience to be able to assess independently the integrity and competence of foreign broker-dealers providing access to foreign markets, the SEC proposes to replace the categories of "major U.S. institutional investor" and "U.S. institutional investor" with a "qualified

investor" standard, which is defined in Section 3(a)(54) of the Exchange Act. Such "qualified investors" generally would include entities engaged primarily in financial activities (including the business of investing) and corporations and other entities that, or natural persons who, own and invest on a discretionary basis not less than $25 million in investments.

As a general matter, this proposed change effectively would lower the asset level at which a foreign broker-dealer may deal with U.S. investors from the current level of more than $100 million in total assets to $25 million or more in investments. That said, there are limitations in the proposed revision. First, there are certain instances in which the qualified investor standard would require a U.S. investor to have greater investment experience than currently required under the Rule 15a-6. For example, the current standard encompasses employee benefit plans that have $5 million or more in assets, while the proposed standard would only encompass employee benefit plans in which investment decisions are made by certain plan fiduciaries. Second, the proposed amendments would not affect the applicability of U.S. state securities (blue sky) laws, which may impose other limits on foreign broker-dealers.

Provision of Research Reports – *Rule 15a-6(a)(2)*

The proposed amendments also would expand the class of investors to which a foreign broker-dealer could directly provide research reports. Under the current Rule 15a-6, foreign broker-dealers may only furnish research reports to major institutional investors – those investors having assets in excess of $100 million. The proposed rule would permit a foreign broker-dealer to provide research reports to qualified investors and to effect transactions in the securities discussed in the research reports with or for those qualified investors, under certain conditions. This exemption would be available where (i) the research reports did not recommend the use of the foreign broker-dealer to effect trades in any security, (ii) the foreign broker-dealer did not initiate follow-up contacts with the qualified investors, (iii) if the foreign broker-dealer had a relationship with a U.S. registered broker-dealer that would enable it to satisfy the requirements of Rule 15a-6(a)(3) as revised by the proposed amendments (see the discussion below under "Solicited Trades"), any transactions with the foreign broker-dealer in securities discussed in the research reports were effected in accordance with the conditions of Rule 15a-6(a)(3) as proposed to be amended, and (iv) the foreign broker-dealer did not provide research to U.S. persons pursuant to any express or implied understanding that those U.S. persons would direct commission income to the foreign broker-dealer.

Solicited Trades – Rule 15a-6(a)(3)

The proposed amendments to Rule 15a-6(a)(3) would significantly revise the conditions under which a regulated foreign broker-dealer (*i.e.*, a foreign broker-dealer that is in the business of and regulated for conducting securities activities in a foreign country by a foreign securities authority) could induce or attempt to induce the purchase or sale of a security by certain U.S. investors and still rely on the exemption available under Rule 15a-6(a)(3). Under the SEC's proposed changes, Rule 15a-6(a)(3) would offer an exemption to a foreign broker-dealer that solicits trades from U.S. investors under two sets of circumstances. Notably, neither set of circumstances includes Rule 15a-6(a)(3)'s current so-called "chaperoning" requirement under which a U.S. registered broker-dealer must accompany a foreign broker-dealer during in-person visits with U.S. investors.

In the first set of circumstances under the proposed amendments, a foreign broker-dealer could solicit trades and effect securities transactions if the broker-dealer conducted a so-called "foreign business." In general terms, a foreign broker-dealer would be deemed to conduct "foreign business" if at least 85% of the aggregate value of the securities purchased or sold in transactions with U.S. investors (calculated on a rolling, two-year basis) is derived from transactions in foreign securities. The proposed definition of "foreign securities" is broad, including issues of debt and equity securities of issuers organized or incorporated in the United States that have been distributed outside the United States in compliance with Regulation S, and certain securities issued by foreign governments. A foreign broker-dealer would

be permitted to custody the funds and securities of qualified investors in connection with transactions as to which it was relying on this exemption.

A U.S. registered broker-dealer would be required to maintain copies of all books and records relating to any transactions effected by a foreign broker-dealer pursuant to this exemption, but could maintain them (i) in the form, manner and for the periods prescribed by the foreign securities authority that regulates the foreign broker-dealer or (ii) with the foreign broker-dealer so long as the U.S. registered broker-dealer reasonably determined that copies of such books and records could be furnished promptly to the SEC (and promptly provided any such books and records on request).

In the second set of circumstances under the proposed amendments, a foreign broker-dealer could solicit trades from and effect securities transactions for qualified investors that already had an account with a U.S. registered broker-dealer, provided that, among other things, a U.S. registered broker-dealer acted as a custodian (and, thus, held the funds and securities of the qualified investor) for any resulting transactions. A foreign broker-dealer would not be permitted to maintain custody of qualified investor funds and securities relating to any resulting transactions. This exemption would be available to all foreign broker-dealers and not just those that conduct a foreign business.

To rely on either exemption, a foreign broker-dealer would be required to make specific disclosures to qualified investors related to the fact that the broker-dealer was not regulated by the SEC and, in the case of the exemption available only to foreign broker-dealers that conduct a foreign business, that funds and securities being held by the foreign broker-dealer were not being held subject to certain protections under the Exchange Act and other U.S. securities laws. The foreign broker-dealer also would need to meet certain other requirements, including determining that none of its associated persons are subject to statutory disqualification under the Exchange Act.

Counterparties and Specific Customers – *Rule 15a-6(a)(4)*

The proposal would add to a new category to current Rule 15a-6(a)(4)'s exemptions, which allow foreign broker-dealers that effect securities transactions with SEC-registered broker-dealers, certain banks, certain foreign persons temporarily present in the United States, and certain U.S. persons or groups of U.S. persons abroad. The additional exemption would be for U.S. persons that act in a fiduciary capacity for an account of a "foreign resident client," which would be defined as (i) any entity not organized or incorporated under the laws of the United States and not engaged in a trade or business in the United States for federal income tax purposes, (ii) any natural person not a U.S. resident for U.S. tax purposes and (iii) any entity not incorporated or organized under U.S. law, 85% or more of whose outstanding securities are beneficially owned by persons described in clauses (i) or (ii).

Familiarization with Foreign Options Exchanges – *Rule 15a-6(a)(5)*

Under the proposed amendments, new Rule 15a-6(a)(5) would allow a foreign broker-dealer that is a member of a foreign options exchange to effect transactions in options on foreign securities listed on that exchange for a qualified investor that the foreign broker-dealer has not otherwise solicited. A foreign broker-dealer, a foreign options exchange and representatives of the foreign options exchange could conduct certain activities or communicate with a qualified investor in a manner that might otherwise be considered a form of solicitation, and transactions effected by or through the foreign broker-dealer with or for qualified investors that result from these activities or communications would not require registration and, in some cases, would not require compliance with proposed Rule 15a-6(a)(3).

Public Comment

The SEC has solicited public comment on numerous aspects of its fairly sweeping proposal, which is likely to draw close scrutiny from many in the securities industry, both in the United States and abroad.

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As a result, there is likely to be a significant volume of comment on the proposed revisions, which could substantially influence any amendments to Rule 15a-6 that the SEC ultimately adopts. Comments on the SEC's proposal are due by September 8, 2008.

# *Other Items of Note*

### ➢ Special Edition Discussing Amendments to SEC's Emergency Order Regarding Short Sales of Securities of Certain Financial Firms and Related Additional SEC Guidance Available on Goodwin Procter Website

Alert readers should have received a Special Edition discussing amendments issued by the SEC to clarify and provide certain relief regarding the Emergency Order (the "Order") it issued on July 15, 2008 regarding "naked" short sales of the securities of 19 specified financial firms, including Fannie Mae and Freddie Mac. The Order went into effect after midnight (EST) on Monday July 21, 2008 and continues until 11:59 pm (EST) Tuesday July 29, 2008, subject to extension by the SEC for up to 30 days. The Special Edition also examines additional guidance provided by the SEC staff along with the amendments in the form of Frequently Asked Questions regarding the Order. The Special Edition is available on the Goodwin Procter website at http://www.goodwinprocter.com/~/media/0EAC4D8FDD1F4C818D40235C90906278.ashx.

### ➢ DOL Issues Proposed Regulation on Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans

The DOL issued a proposed regulation intended to address fiduciary requirements regarding disclosure of certain plan and investment-related information, such as fee and expense information, to participants who have been allocated investment responsibility under ERISA individual account plans (including so-called Section 404(c) plans). More detailed coverage of the proposed regulation will appear in a future edition of the *Alert*.