

May 6, 2009

Authorizing the Regulation of Swaps Act

On May 4, 2009, Senators Carl Levin (D-MI) and Susan Collins (R-ME) launched another salvo in the battle over derivatives regulation with their introduction of the “[Authorizing the Regulation of Swaps Act](#)” (the Swaps Act). The Swaps Act seeks to dramatically alter the regulatory landscape by providing Federal financial regulators with immediate oversight of all swap markets. This far-reaching authority is achieved by removing all current exemptions provided to derivatives transactions under Federal statute.

The Swaps Act repeals provisions in Federal securities and commodities laws that exempt a variety of derivatives from full regulation under such laws. Included in these revisions are the elimination of the “security-based swaps” exemptions under the Securities Act of 1933 and the Securities Exchange Act of 1934, passed as part of the Gramm-Leach-Bliley Act, as well as the Commodity Futures Modernization Act of 2000 statutory exemption from full regulation for swap contracts under the Commodity Exchange Act. Under the Swaps Act, all swap contracts, whether privately negotiated “over-the-counter” or transacted on an exchange, would be subject to broader Federal regulation.

While the Swaps Act opens up the entire derivatives industry to expansive Federal regulation, it does not specify how swaps should be regulated or which regulators should take a leading role. The Swaps Act confers authority on the U.S. Commodity Futures Trading Commission, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the U.S. Securities and Exchange Commission, and “any other Federal agency that is authorized under any provision of Federal law to regulate any financial institution or type or class of financial instrument or offering thereof.” Each Federal regulator is called upon by the Swaps Act to regulate all swaps within its regulatory jurisdiction and is required to “consult, work, and cooperate with each other to promote consistency in the treatment of swap agreements.”

Senators Levin and Collins presented their bill as a stopgap measure, providing immediate regulation of derivatives in advance of more comprehensive regulation of the entire financial industry.¹ Understanding that broad changes to regulation of the financial system as a whole will take significant time, Senators Levin and Collins stated that the Swaps Act can quickly “...bring transparency, accountability, and stability to financial markets that are badly in need of all three, and where government oversight is now prohibited by laws proven to have been a mistake.”

¹ Calls for an overhaul of Federal oversight of the financial industry have been widespread during the recent economic slowdown, with numerous proposals being put forth to address the perceived problems with the current system. On January 15, 2009, Senator Harkin (D-IA) introduced the Derivatives Trading Integrity Act of 2009 in order to remove from the Commodity Exchange Act the exemptions for exempt and excluded over-the-counter derivatives, including credit derivatives. Representative Peterson (D-MN) introduced the Derivatives Markets Transparency and Accountability Act of 2009 on February 11, 2009, which, although broader in scope than the Harkin bill, contains a number of provisions specifically aimed at the credit derivatives market. Representative Castle (R-DE) introduced the Financial System Stabilization and Reform Act of 2009 on March 26, 2009, which focused primarily on establishing a systemic risk monitor for the U.S. financial system and requiring increased recordkeeping for, and centralized clearing of, credit derivatives. Also on March 26, 2009, Treasury Secretary Geithner introduced the Obama Administration’s framework for comprehensive regulatory reform of the financial regulatory system (the Treasury Framework). ([link](#))

© 2009 Sutherland. All Rights Reserved.

This communication is for general informational purposes only and is not intended to constitute legal advice or a recommended course of action in any given situation. This communication is not intended to be, and should not be, relied upon by the recipient in making decisions of a legal nature with respect to the issues discussed herein. The recipient is encouraged to consult independent counsel before making any decisions or taking any action concerning the matters in this communication. This communication does not create an attorney-client relationship between Sutherland and the recipient.

The Swaps Act reflects a sentiment widespread among legislators in Washington that under- or unregulated derivatives instruments are to blame for recent turmoil in the nation's financial markets. The proposal seems to reflect a lack of legislative awareness of the current broad authority of Federal bank, securities and commodities regulators to regulate the derivatives activities of institutions subject to their oversight, including banks, broker dealers, futures commission merchants, mutual funds, and commodity pools, as well as the antifraud, disclosure and other regulatory authority that currently exists with respect to transactions in the over-the-counter market. We will continue to monitor legislative and regulatory developments and keep you abreast of all relevant changes.



If you have any questions regarding this Legal Alert, or the services we provide, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

James M. Cain	202.383.0180	james.cain@sutherland.com
Paul B. Turner	713.470.6105	paul.turner@sutherland.com
Warren N. Davis	202.383.0133	warren.davis@sutherland.com
William H. Hope II	404.853.8103	william.hope@sutherland.com
Robin J. Powers	212.389.5067	robin.powers@sutherland.com
Doyle Campbell	212.389.5073	doyle.campbell@sutherland.com
Richard E. Grant	202.383.0909	richard.grant@sutherland.com
Meltem F. Kodaman	202.383.0674	meltem.kodaman@sutherland.com
Mark D. Sherrill	202.383.0360	mark.sherrill@sutherland.com