

## Financial Services Legislative and Regulatory Update - May 29, 2012

Article By:

Financial Services Industry at Mintz Levin

---

### Leading the Past Week

With the **House of Representatives** in Recess this past week all action was found in the Senate where the Banking Committee heard from emboldened regulators seeking to capitalize on the events of the JP Morgan trading loss as justification for tougher regulation and strong implementation of the **Dodd-Frank Act**, in addition to considering legislation to help spur refinancing and aid the Housing market. Also, the **CFPB** made the news this week as it announced yet another effort to regulate a heretofore lightly regulated financial product – in this case general purpose prepaid cards.

However the biggest story was the partisan sniping between the Obama and Romney campaigns about the President's efforts to paint Romney as a vampire capitalist for his work at Bain Capital. This line of attack, which we should expect to see, in some form of another until November, really represents a broader philosophical question about how one should view wealth – through the prism of the short-term profit or the long-term growth. This question, to which it seems that neither party has an answer, will be elevated as Congress try to deal with the looming ?fiscal cliff? our country is facing, especially during the debate that the House will engage in late July on whether to extend the Bush tax cuts.

### Legislative Branch

#### *CBO Releases Projections on the Effect of the Fiscal Cliff*

On May 22nd the **Congressional Budget Office (CBO)** released a [report](#) detailing how the U.S. economy could be thrown into another recession in early 2013 if the sequestration kicks in and the 2001 and 2003 tax cuts are allowed to expire at the end of the year. Both parties have advanced plans by which to replace or entirely avoid the sequester and the CBO report is likely to strengthen calls to avoid this 'fiscal cliff.' "Under those fiscal conditions, which will occur under current law, growth in real (inflation-adjusted) [gross domestic product] in calendar year 2013 will be just 0.5 percent" said the report. Both parties have already sought to spin the report for their own political benefit. For example, Ranking **Member of the House Budget Committee Chris Van Hollen (D-MD)** said the report underscores the "reckless and irresponsible" threats of Speaker Boehner to "prevent the United States from paying its bills unless Republicans are able to impose additional economy-

---

slowing austerity measures.” Meanwhile, **Senator Orrin Hatch (R-UT)** said while some are calling it a ‘fiscal cliff,’ it is really “Taxmageddon,” charging that the Obama Administration “seems content to pursue misguided micro-policies that target the so-called rich in the name of so-called fairness.”

## Senate

### *Senate Banking Holds First of Multiple Hearings to Examine JP Morgan Trading Loss*

On May 22nd, the Senate Banking Committee heard testimony from the heads of the **SEC** and **CFTC** on the risks of derivatives trading—especially as connected to the recent JP Morgan trading loss. While **SEC Chairman Mary Schapiro** and **CFTC Chairman Gary Gensler** told lawmakers that JP Morgan’s trading activity did not currently fall within their agencies’ jurisdiction, both regulators said they are investigating aspects of the bank’s public disclosure, financial reporting and clearinghouse transactions. One key theme of the hearing was whether the JP Morgan trades would have run afoul of the Volcker Rule. In response to questions from **Senator Robert Menendez (D-NJ)**, Schapiro told the Committee the trades would not have triggered enforcement under the proprietary trading ban. Still, Menendez encouraged regulators to use the JP Morgan loss as a rationale to revise the Volcker rule and make it stronger. In response, Schapiro highlighted one of the tensions regulators have had in trying to craft a rule, namely, allowing for risk mitigating hedges to take place. Not all Committee members favored a strengthened Volcker Rule—Senator Bob Corker (R-TN) cautioned that using JP Morgan as a basis to strengthen language could backfire, noting a “tension between risk-management and profit-taking.”

Regulators also noted that it is not unexpected that the events of JP Morgan affect rulemakings going forward. In her testimony, Schapiro noted that the SEC expects to complete the proposal phase of Dodd-Frank rulemakings in the coming months, including a cross-border release before adopting more rules beyond product and entity definitions. JP Morgan has been “very instructive,” said Schapiro, “it would be wrong for us not to take this example as a real life, real world example of what can happen, whether it’s the application of the cross-border provisions or it’s the Volcker rule itself, to use this example and to see what the impact would be of all the things we propose to do.” Another notable topic of the hearing was the effect overseas trades can have on the United States. As the losses sustained by JP Morgan occurred due to trades undertaken in London. Over the coming months, we anticipate continued pressure on regulators from lawmakers attempting to tighten rules on hedging, push-outs and cross-border transactions.

### *Senate Banking Committee Sets Date for Dimon Appearance*

**Chairman Tim Johnson (D-SD)** announced Jamie Dimon, CEO of JP Morgan, will appear before the Senate Banking Committee on June 7th at 10:00am—a day after the Committee is scheduled to hear from regulators on their implementation of the Dodd-Frank Act. In his statement, Johnson said he expects “Mr. Dimon to come prepared to provide the Committee a better understanding of this massive trading loss so we can take the implications into account as we continue to conduct our robust oversight over the full implementation of Wall Street reform.”

### *Senators Introduce Bill to Oust Bankers from Fed Board*

Soon after JP Morgan’s trading loss, **Senators Barbara Boxer (D-CA), Bernie Sanders (I-VT), and Mark Begich (D-AK)** introduced [legislation](#) that would ban financial executives from serving in positions at the Federal Reserve. Unveiling the bill on May 22nd, Sanders said “allowing currently employed banking industry executives to serve as directors on the boards of directors of Federal

---

Reserve banks is a clear conflict of interest that must be eliminated.” Boxer and Sanders also called on Jamie Dimon, CEO of JP Morgan, to resign from the Board of Directors for the New York Federal Reserve. The Senators are not the first to call for Dimon’s resignation, following calls from Senate candidate and former CFPB head Elizabeth Warren. Boxer and Sanders noted they had yet to discuss their proposal with Senate leadership and it is unclear whether the bill will see movement.

### *Senate Banking Considers Legislation Expanding Refinancing Options*

On May 24th, before a packed room, the **Senate Banking Committee** held a hearing to consider the **Responsible Homeowner Refinancing Act of 2012** ([S. 3085](#)), introduced earlier in the month by Senators Robert Menendez (D-NJ) and Barbara Boxer (D-CA). The legislation would expand streamlined refinancings under the Home Affordable Refinance Program (HARP) to all borrowers with Fannie Mae or Freddie Mac loans—not just those with little or negative equity as under current law. Testifying before the Committee, Mark Zandi, Chief Economist for Moody’s Analytics, told lawmakers the proposed expansion of HARP would likely precipitate a significant refinancing boom, which could provide \$6 to \$7 billion in annual benefits to borrowers and the economy. Similarly, Moe Veissi, President of the National Association of Realtors, praised the proposal, saying extending HARP would spur competition and result in better refinancing options for borrowers, who would take advantage of historically low interest rates.

Not all witnesses viewed the bill as a positive; Christopher Papagianis, of the economic policy group E21, cautioned the Committee that legislation would be detrimental to mortgage investors and could allow borrowers to refinance through HARP more than once and extend program eligibility to loans originated as early as 2010. Republicans have also expressed concerns with the legislation and have criticized Democrats for not tackling comprehensive housing reform, though While both Ranking Member Richard Shelby (R-AL) and Senator Bob Corker (R-TN) said they would be willing to work on the proposed bill. However, Senator Corker expressed concerns that the bill would result in multiple refinancing and that the bill includes penalties for second lien holders and mortgage issuers that inhibit refinancing.

### *Senate Close to Extending Flood Insurance Before Expiration*

On May 24th, the Senate passed a 60-day extension of the National Flood Insurance Program (NFIP). The Senate vote came a week after the House approved a one month extension of the expiration deadline and just days before the program was set to lapse. Both Chambers must reconcile their different approaches to the NFIP before the end of the month.

### *Senate Approves Provision to Require Companies to Disclose all Iran-Related Activities to SEC*

On May 21st, the Senate approved by voice vote [H.R. 1905](#), a bill to authorize new sanctions on Iran—including a provision requiring public companies to disclose their dealings with Iran to the SEC. The bill would amend the 1934 Securities Exchange Act to require companies listed on U.S. exchanges to make regular disclosures to the SEC of activities with Iran of the parent company and all foreign subsidiaries. The bill requires reconciliation with a similar measure already passed in the House Still, recently SEC Chairman Mary Schapiro noted that the Commission “well under way” on a rule to require such disclosures of companies.

## **House of Representatives**

### *Pelosi Calls for Vote to Extend Bush Tax Cuts for those Making up to \$1million*

---

Last week, in the most recent shot fired between parties on the looming ‘fiscal cliff,’ House Minority Leader Nancy Pelosi (D-CA) sent a letter calling on House Speaker John Boehner to set a vote to immediately extend the 2001 and 2003 “middle class tax cuts” for those earning less than \$1 million in income—far above the White House’s definition of ‘middle class’ of those earning up to \$250,000. The disparity between Pelosi’s request and the White House’s definition is likely to be moot as the House Republican leadership is unlikely to schedule a vote on a proposal that does not extend all of the cuts. While Pelosi has characterized the request as asking “the very wealthiest Americans to pay their fair share,” liberal groups see it as a shift away from the Democratic position on tax cuts. Similarly, Senate Majority Leader Richard Durbin (D-IL), making clear he respects Pelosi’s position, embraced the \$250,000 threshold as a “reasonable break point.” It will be interesting to see if Pelosi’s position creates a real schism among House Democrats.

### *Lawmakers Call on Administration to Clarify Position on Capital Controls*

In a May 23rd [letter](#), Representative Barney Frank (D-MA), Ranking Member of the House Financial Services Committee and Sander Levin (D-MI), Ranking Member of the House Committee on Ways and Means, asked Treasury Secretary Geithner to affirm that specific provisions in U.S. Trade and investment treaties would allow governments to use controls to protect and strengthen the stability of their financial systems. Both lawmakers have long expressed concern that language in the U.S. trade and investment treaties is overly restrictive and would not provide adequate flexibility for governments to use controls to stem the massive flows of speculative capital. The letter requests an “official written statement of U.S. policy on the Administration’s interpretation that the scope and coverage of the “prudential exception” in U.S. free trade agreements and bilateral investment treaties grants parties the ability to deploy capital controls on the inflow or outflow of capital without being challenged by private investors.”

### *House Democrats Urge on Oversight Committee Chairman to Hold Hearings on JP Morgan*

Even as the Senate Banking Committee locked down JP Morgan CEO Jamie Dimon to appear before the Committee June 7th, House Democrats were calling on the House Oversight and Government Reform Committee to call the CEO and other banking executives to testify on the recent trading loss. In a May 22nd [letter](#) to Representative Darrell Issa (R-CA), Ranking Member Elijah Cummings (D-MD) and Representative Peter Welch (D-VT) said it is important for Congress “to understand the true nature of [J.P. Morgan’s] trade, as well as the potential for the bank’s losses to grow.” The lawmakers added that the event has “clear implications” for efforts to implement Dodd-Frank rulemakings and “exemplif[ies] the risks that continue to threaten the stability of our financial system.”

## **Executive Branch**

### **CFPB**

#### *CFPB Poised to Regulate General Purpose Prepaid Cards*

On May 22nd, the CFPB announced an advanced notice of proposed rulemaking ([ANPRM](#)) indicating the Bureau intends to develop new rules on general purpose prepaid cards. General purpose reloadable (GPR) cards are those that provide access to a preloaded amount of money and can be used at all establishments that also accept the network brand of the card, such as Visa or MasterCard. To date GPR cards have been a lightly regulated component of the industry. The ANPRM seeks input on how to ensure that consumers’ funds on prepaid cards are safe and that

---

card terms and fees are transparent, including whether to expand the Electronic Funds Transfer Act and Regulation E to include all GPR cards. Regulation E was amended in 2006 by the Fed to include payroll cards but not prepaid cards as they intent to be for “limited purposes or on a short-term basis.” CFPB is taking public comment on the potential rule until July 22.

The CFPB will also examine whether banks using GPR cards should be required to adhere to FDIC “pass-through” requirements to ensure cardholders receive FDIC insurance and if card issuers should be required to provide protection from unauthorized transactions. The Bureau is also looking at balancing “the need for disclosure with the fact that many cards are purchased at retail locations and space for disclosures is limited.” In conjunction with these actions, the Bureau also launched “[Ask CFPB: Prepaid Cards](#),” a searchable database with easy, quick answers surrounding prepaid cards and held a field hearing on GPR cards in Durham, North Carolina.

### *CFPB Proposes Procedure for Notifying Nonbanks Tagged with Supervision*

On May 24th, the CFPB issued a [proposed rule](#) that would create a procedure for notifying nonbank financial firms that they are under consideration for supervision by the Bureau. The goal of the proposed rule is to notify a nonbank firm if the CFPB has “reasonable cause” to determine that the financial products or services offered pose risks to consumers. CFPB Director Richard Cordray applauded the proposal, saying it will provide greater clarity to companies subject to Bureau supervision. The proposed rule also sets up a means by which identified entities can respond and contest the proposal—nonbank mortgage providers, student lenders, consumer reporting agencies, debt collectors, money services companies and others under the CFPB’s purview may respond in writing to the Bureau’s Assistant Director for Nonbank Supervision. The rule makes clear that the CFPB will make the final decision based on recommendations from the Assistant Director for Nonbank Supervision and provides a process whereby nonbanks can file a petition to terminate supervision after 2 years. The rule is open for comment for 60 days following publication.

## **CFTC**

### *CFTC Approves NPRM on Regulations on Aggregation for Position Limits for Futures and Swaps*

As indicated in last week’s update, the CFTC announced a notice of proposed rulemaking (NPRM) to modify existing exemptions to aggregation requirements for limits on speculative positions. On May 18th, the CFTC approved an [NPRM](#) permitting any person with a greater than 10 percent ownership or equity interest in an entity to disaggregate the owned positions, assuming there are protections and firewalls to ensure trading decisions are made independently. Specifically, the rulemaking proposes that aggregation would always be required if one entity owns greater than 50 percent of another entity and in order to be permitted to disaggregate:

- Trading must be conducted in separate locations;
- Risk management systems must not allow the sharing of trades or trading strategy;
- Different traders must be doing the trading;
- Information about individual trades or trading strategies may not be shared between entities.

### *CFTC to Hold Roundtable on Volcker Rule*

The CFTC will be holding a public hearing on May 31st to consider proposed regulations to implement Section 619 of the Dodd-Frank Act, the Volcker Rule. The roundtable will be composed of two panels featuring a variety of market participants and members of the public. The first panel will

---

discuss the various hedging provisions and requirements of the CFTC's proposed Volcker Rule. The second panel will discuss the market-making sections of the CFTC's proposed Volcker Rule. According to the Commission input provided during the roundtable will play into the Commission's final rulemaking.

## **SEC**

### *SEC Official Speaks to Pressing Commission Priorities*

As Chairman Schapiro testified in front of the Senate Banking Committee on JP Morgan, derivatives and cross-border regulation, David Blass, Associate Director and Chief Counsel for the Division of Trading and Markets, told participants at a the Financial Industry Regulatory Authority's annual conference the SEC's approach to cross border regulation of OTC derivatives will likely build on the 1934 Securities Exchange Act rule dealing with registration of foreign broker-dealers. Saying it was "premature" to say whether the SEC's cross border treatment will differ from the CFTC's but indicating that the proposal will be issued in the "near term." The SEC's approach to cross-border issues does not have to be identical to the CFTC's.

Blass also outlined the SEC's next steps on the Volcker Rule, the imposition of the universal fiduciary duty for investment advisers and broker-dealers and the Jumpstart Our Business Startups (JOBS) Act. On the Volcker Rule, he noted that the JP Morgan loss will have an impact on the proprietary trading ban rulemaking and that the SEC will provide additional detail on how it views the standard of care and the standard of loyalty under a harmonized fiduciary duty. Finally, Blass indicated there is a "fairly immediate need" to issue guidance on how the JOBS Act will interplay with the SEC's 2003 precedent that set up a firewall between banks' analysts and underwriters.

## **DOL**

### *DOL Reopens Comment on Target Date Fund Rulemakings*

On May 23rd, the Department of Labor (DOL) announced it will reopen the comment period for its proposed rule to require more detailed information about target date fund investments. DOL originally released the proposed rule in November 2010 to amend the participant level disclosure rule and the qualified investment alternative regulation. DOL consulted with the SEC throughout the proposal process and said it continues to work with the Commission to avoid creation of inconsistent rules. The comment period is being reopened so DOL can collect on additional comment on research commission by the SEC.

### *GAO Examines 401(k) Investment Fees*

A GAO [report](#) on 401(k) plans, released May 23rd, found that small plans are more likely to pay higher fees as a percentage of plan assets. The report cites figures that, in 2010, the average fees paid for recordkeeping and administrative services for plans with 50 or fewer participants were 1.33 percent of assets while fees for plans with 500 or more participants were 0.15 percent. Notably, the report found that, while investment management fees often account for a large amount of 401(k) plan fees, approximately half of plan sponsors were not aware if the plan or its participants paid investment management fees. GAO commended DOL for its efforts to improve transparency of 401(k) plan fees but suggested the agency improve its outreach to better understand the types of fees being levied. The GAO also recommended DOL examine the definition of fiduciary to make sure it encompasses the modern fiduciary. The report, was prepared at the request of by Representatives

---

George Miller (D-CA) and Robert Andrews (D-NJ) Ranking Member of the House Education and the Workforce Committee and Ranking Member of the Committee's Health Employment, Labor, and Pensions Subcommittee, respectively.

## **Miscellaneous**

### *Facebook IPO Stumbles, Regulators and Congress See Opportunity for Oversight*

Facebook's much anticipated public offering last week has been marked with controversy and the key Congressional committees and the Financial Industry Regulatory Authority have all announced intentions to examine the issue. It appears the Banking Committees have begun to engage on this issue as Tim Johnson (D-SD) released a statement directing his staff due "due diligence regarding issues raised in the news about Facebook's IPO" and House Financial Services spokesman said staff is receiving briefings and "gathering information and facts."

One issue that will likely draw scrutiny is the activities of underwriting banks which revised revenue projections but only provided the information to large investors, and not many smaller investors, and Facebook's own disclosures leading up to the IPO. Additionally, the problems surrounding the IPO have provided opponents of the JOBS Act with ammunition to attack the legislation. For example, Senator Jack Reed (D-RI) noted that "during the debate over the misnamed JOBS Act there was a lot of talk about driving more companies toward the so-called IPO on-ramp, but little discussion and no hearings about the efficiency and transparency of the IPO system." Despite the attention it seems unlikely that Reed or others could repeal the JOBS Act. Rather, the 'failed' IPO will impact the SEC as it works to implement the JOBS Act

## **International**

### *European Commissioner Discusses Pros and Cons of Bank Relief*

On May 23rd European Competition Commissioner Joaquín Almunia discussed ways with which to overcome the current European banking crisis. Given that since 2008, Eurozone states have "used more than €1.5 trillion to support and rescue their banks," Almunia predicted that Europe will have to change the way banks are regulated and restructure or liquidate institutions that cannot survive the medium-term without support. The relief package—75 percent of which was delivered in the form of guarantees—was necessary to maintain stability said Almunia but it exacerbated risks by moving risk from banks' books to government accounts. The statement came as Greece appears ready to leave the common currency union and the whole of Europe teeters on the brink of a troubling recession.

## **UPCOMING HEARINGS**

### *The Senate is in Recess this Week*

On Thursday, May 31st at 10am, in 2128 Rayburn, the House Financial Services Committee will mark up H.R. 1588, the Consumer Rental Purchase Agreement Act, and H.R. 3128.

On Friday, June 1st at 9:30am, in 2128 Rayburn, the House Financial Services Capital Markets and Government Sponsored Enterprises Subcommittee will hold a hearing on cyber threats to capital markets and corporate accounts.

On Wednesday, June 6th at 10am, in 2128 Rayburn, the House Financial Services Committee will examine H.R. 4624, the Investment Adviser Oversight Act of 2012.

On Wednesday, June 6th at 2pm, in 2128 Rayburn, the House Financial Services Financial Institutions and Consumer Credit Subcommittee will hold a hearing on CARD Act implementation.

On Thursday, June 7th at 10am, in 2128 Rayburn, the House Financial Services Insurance, Housing and Community Opportunity Subcommittee will hold a hearing on multi-family housing programs.

On Thursday, June 7th at 2pm, in 2128 Rayburn, the House Financial Services Capital Markets and Government Sponsored Enterprises Subcommittee will examine protection for U.S. investors.

©1994-2025 Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. All Rights Reserved.

---

National Law Review, Volume II, Number 150

Source URL: <https://natlawreview.com/article/financial-services-legislative-and-regulatory-update-may-29-2012>