



# Gazing Into the Crystal Ball:

Financial Markets Intervention, Economic  
Recovery, and the 2009 Agenda

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# Current Landscape & Recent Developments

- Treasury Programs
  - CPP
  - Broader TARP
- Fed facilities
  - TALF
  - CPFF
- Congress
  - Oversight
  - Auto Relief
  - Stimulus
- Obama Transition
  - Key Players
  - Agenda



# Glossary of Key Terms

- Bank Holding Company – BHC
- Capital Purchase Program – CPP
- Commercial Paper Funding Facility – CPFF
- Commodity Futures Trading Commission – CFTC
- Credit Default Swaps – CDS
- Debtor In Possession – DIP
- Emergency Economic Stabilization Act – EESA
- Federal Deposit Insurance Corporation – FDIC
- Government Sponsored Enterprise – GSE
- Mortgage Backed Securities – MBS
- Office of Comptroller of the Currency – OCC
- Office of Thrift Supervision – OTS
- Optional Federal Charter- OFC
- Over the Counter – OTC
- Risk Retention Group – RRG
- Worker's Compensation – WC
- Securities & Exchange Commission- SEC
- Troubled Assets Relief Program – TARP
- Term Asset-Backed Securities Loan Facility – TALF



# Key Items on the Horizon

- Future developments under TARP
  - [http://www.sonnenschein.com/docs/TARP\\_chart.pdf](http://www.sonnenschein.com/docs/TARP_chart.pdf)
- Bankruptcy Trends
- Litigation Potential
- Insurance Market Challenges
- Business Risk Planning
- Stimulus, Recovery, and Market Interventions
- Tax Code Changes
- Regulatory Reform (CFTC, SEC, OTS, OCC)



# TARP: The Next Generation

- **Foreclosure mitigation**
  - FDIC Program
  - Mortgage Interest Rate Proposals
- **Insurance program**
  - Citi Precedent?
- **Distressed asset opportunities**
  - Acquisition of assets in private market
  - Bankruptcy
- **New regulations on comp, oversight, and disclosure**
- **Future of the BHC and Thrift Acquisition Process**
- **Goals of the Next \$350 billion**



# Bankruptcy Trends

- Bulk of recent filings have been retailers
- Next wave of filings (starting now) will be more broad-based
- Liquidations from Chapter 11 Likely to Proliferate and Accelerate
- Scarce DIP financing
- Limited Exit Financing



# Auto Industry Issue: Case Study

- DIP financing - USG?
- Managed Restructuring Inside/Outside of Chapter 11
- Collective Bargaining Agreement Issues - Section 1113
- Dealer Contracts
- Trade Support from Suppliers



# Is a Tsunami of Litigation Coming?

- No Surprise: Subprime mortgage litigation has reached record levels in 2008
- But much of the litigation that can be expected from the overall financial crisis has not been filed yet



# Is a Tsunami of Litigation Coming?

- Why not?
  - Companies are still assessing harm and identifying targets
  - Shortage of cash
  - Attempts to negotiate solutions ongoing
  - No “unified field theory”
  - In the post-Milberg world, who takes the lead?



# Is a Tsunami of Litigation Coming?

- What new kinds of litigation will we see?
- Institutional investor class actions:
  - *Greenwich Financial Services v. Bank of America* (N.Y. County Supreme Court December 1, 2008)
- Plaintiffs' cases by governmental investors:
  - *San Mateo County Investment Pool v. Richard Fuld et al.* (S.F. Superior Court, Nov. 13, 2008)
  - *Kenosha Unified School Dist. v. Stifel Nicolaus & Co.* (E.D. Wisc. Oct, 31, 2008)
- Banks against banks:
  - *Barclay v. Bear Stearns Asset Management, Inc.* (S.D.N.Y.)
- Lawsuits against rating agencies:
  - *In re: National Century Financial Ent. Inv. Litig.* (S.D. Ohio)
- Expect large quantity of one-off, fraud/misrepresentation/failure to disclose cases



# Insurance Industry Outlook

- Short-Term Impact on Commercial Market
- Long-Term Impact on Commercial Market



# Short-Term Impact on Commercial Market

- Initial Response of Consumers
  - Panic?
  - Mid-Term Cancellations?
  - Response to Bailout(s)
- Concerns regarding January Renewal Cycle
- Fear of What's Next (*i.e.*, change in ownership, loss of intellectual capital and further downgrades)
- Increased Competition in the Marketplace (*i.e.*, more quotes at renewal)
- Heightened scrutiny of premium and collateral provisions (particularly as credit markets tighten)



# Long-Term Impact on Commercial Market

- Non-admitted may no longer be a non-starter for insureds
- More employers considering becoming qualified self-insurers for WC risks
- Increased/expanded use of captives and RRGs by insureds
- Fear of the impact an insolvency would have on the solvency of state guaranty funds
- Reactive risk management vs. proactive risk management (*i.e.*, this is not an AIG issue)
- Recognition of need for better understanding of financial regulation and insurer insolvency issues



# Managing Business Risk: Insurer Insolvency

- **Key Issues**

- Financial Solvency Regulation
- State Guaranty Associations & Net Worth Exceptions
- Policyholder Collateral
- Special Considerations for Captives
- Recovery from a Liquidator
- Disengagement Transactions

- **Minimizing Insolvency Exposures**

- Know your Exposure
- Understand & Protect Your Collateral Position
- Protect Your Collateral
- Close Claims
- Plan and Prepare for the Liquidation
- Consider a “Disengagement Transaction”



# Stimulus and Economic Policy

- **Key Players**
  - Bernanke
  - Geithner
  - Advisors and Councils
- **Elements of 2009 Stimulus**
  - Infrastructure
  - Green Economy
  - State Relief
  - Purchase Incentives



# Tax Code Developments

- Offshore assets
- Section 382 Notices
  - Acquisitions of Banks (the Wells Fargo Rule)
  - Treasury CPP Program
- FDIC Assistance and FDIC-Assisted Acquisitions
- Tax reform under Obama and a Democratic Congress



# Financial Markets Regulation

- Paulson Plan Revisited
  - Functional Regulators
  - SEC/CFTC Merger
  - OTC Swaps Regulation
  - CDS and Other Derivatives
- Insurance: OFC, Regulatory Crossover
- Potential options: Frank/Dodd/Treasury



# Regulation of CDS - Future

- Remember Barney Frank's theme – deregulation mode got us into this mess
- NY Commissioner of Insurance attempt to regulate CDS as insurance fizzled already
- 2009 will be a big year for financial services regulation
- Expect a lot of bad ideas; remember Sarbanes Oxley as an example of overreaction
- “Super regulator” or coordinating agency at Federal level, even for insurance



# Regulation of CDS - Future

- Proposals for a clearinghouse for CDS (to mutualize risk of any counterparty failure); Federal Reserve, SEC and CFTC signed a memorandum of understanding  
<<http://www.treas.gov/press/releases/reports/finalmou.pdf>>
- Dates to watch:
  - 1/20/09 Congressional oversight panel has to release blueprint of principles of financial regulatory reform
  - 4/30/09 Treasury report due



# Regulation of CDS - Future

- Industry goal should be education
  - How derivatives function, who uses them, what is their value to the market, how can they be more transparent and more functional
  - Accept that there will be regulation and help to achieve stated goals of Congress and White House
- Progress Summary  
<<http://www.treas.gov/press/releases/reports/progresssummary.pdf>>
- Policy Objectives  
<<http://www.treas.gov/press/releases/reports/policyobjectives.pdf>>



# Business Planning: Executive Compensation

- Deduction Limitations under § 162(m)
  - Lower dollar limit
  - Applied to compensation “earned” in the year rather than “paid” in the year
  - Performance-Based Exception
- Corporate Governance
  - Risk Assessment for Incentive Comp
  - Clawback
- Golden Parachute taxes
- Taxation of Carried Interests



# Questions?



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