Skadden DERIVATIVES ALERT

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Congress Lessens Impact of Swaps Push-Out Rule

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On December 16, 2014, President Barack Obama signed into law a bill that lessens the impact of Section 716 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, more commonly known as the "Swaps Push-Out Rule." The Swaps Push-Out Rule, which is slated to take effect on July 16, 2015, broadly prohibits the extension of federal assistance, such as an advance from a Federal Reserve credit facility or discount window, to any "swaps entity," which is defined to include any registered swap dealer, security-based swap dealer, major swap participant (MSP) or major security-based swap participant (MSBSP), but excludes an insured depository institution that is an MSP or MSBSP. For a more complete summary of the Swaps Push-Out Rule, please see our prior client alert at p. 22.

As adopted, the Swaps Push-Out Rule included a key exclusion permitting insured depository institutions to engage in swap and security-based swap activities that constitute bona fide hedging or traditional banking activities. The amendments to the Swaps Push-Out Rule will expand this key exclusion in the following three ways:

First, the exclusion now will apply to any "covered depository institution" — a term that includes insured depository institutions as well as uninsured U.S. branches or agencies of foreign banks.

Second, the exclusion now will permit covered depository institutions to act as a swaps entity for any swaps or security-based swaps that are not "structured finance swaps."[1]

Third, the exclusion will now permit covered depository institutions to act as a swaps entity for structured finance swaps if (i) such transactions are undertaken for hedging or risk management purposes, or (ii) each asset-backed security underlying the structured finance swaps is of a credit quality and of a type or category with respect to which the prudential regulators have jointly adopted rules authorizing swap or security-based swap activity by covered depository institutions.[2]

The amendments to the Swaps Push-Out Rule do not address the effective date or extend its transition period. Therefore, covered depository institutions should anticipate the amended Swaps Push-Out Rule will take effect on July 16, 2015.

[1] The original exclusion was limited in this regard to insured depository institutions' activities in swaps and security-based swaps on rates and certain permitted reference assets.

[2] The original exclusion was limited in this regard to insured depository institutions' activities in credit default swaps referencing the credit risk of asset-backed securities that are cleared by a registered derivatives clearing organization or clearing agency.