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NewsRelease

For Immediate Release:

Dodd-Frank's Swaps Definition is Impossibly Broad, Difficult to Fix, Says Cadwalader

New York, NY, April 12, 2012 -- Cadwalader, Wickersham & Taft LLP (Cadwalader), a leading counselor to global financial institutions and corporations, today distributed two legal memos by Steven Lofchie, Co-Chairman of the Financial Services Department, calling the definition of "swap" under Dodd-Frank impossibly over-broad and providing examples of ordinary commercial, insurance and consumer contracts that could be considered swaps under Dodd-Frank.

"While [the term "swap"] does not include the kitchen sink, it does include the contract to purchase and install the kitchen sink--if that contract has a price contingency relating to the timing of delivery and installation, the quality of work, or allowing the buyer to back-out of the deal for a fee," writes Steven Lofchie.

"In just a few pages, Steve Lofchie provides a few easy-to-understand illustrations that sharpen the regulators' expansive definition of the term "swap." Failure to more precisely define the concept of a "swap" could adversely reshape a large part of our real economy," said Lawrence Goodman, President of the Center for Financial Stability, a think tank dedicated to financial markets.

"Steve's practical discussion of complex legal topics is a clear example of why so many financial institutions, legal practitioners, and academics find his published material invaluable for research, compliance, legal, and regulatory support," added Goodman.

Lofchie notes that 18 months after the passage of Dodd-Frank, key issues including the definitions of "swap," and "dealer," and the geographic scope of the legislation have not yet been established by regulators. The regulators have not been able to define these terms because the statutory language is impossibly and unintentionally broad, and making matters worse, Congress also removed the regulators' authority to grant exemptions or limit the statutory definitions.

Unless the regulators provide "interpretative" exemptions (ignoring their lack of authority to do so) , many of the most routine commercial, insurance and consumer and contracts--if they have

an uncertain payment amount, or if they have a performance "out,"--will be within the statutory definition of a swap, and will be subject to heavy regulation and penalties for non-compliance. Potentially regulated contracts would include:

A home buyer obtains a floating rate mortgage from a credit union on which the required payments are linked to LIBOR. Since the payments are tied to an interest index, the mortgage may be a "swap." This has significant legal consequences, including that the mortgage is illegal unless, among other things, the buyer qualifies as an eligible contract participant.

A car owner purchases accident insurance for the vehicle. The insurance is a contract that will pay off if the vehicle smashes into another vehicle (an event of economic consequence to the car owner). The insurance policy may be a swap.

Lofchie calls for corrective legislation, or, failing that, a far more aggressive regulatory effort to limit the swap definition. Lofchie's discussion of the definitional problems appear in two memos, (i) a brief Client & Friends Memo http://www.cadwalader.com/assets/client_friend/041212WhatIsASwap.pdf that serves as an "executive summary" of some of the major points, and (ii) in a longer memo for the legal-academic community, which serves as Chapter Two of the on-line *Guide for Commodity Pool Operators and Commodity Trading Advisors*. The longer memo is temporarily freely available on-line as part of the Cadwalader Cabinet [<http://www.cadwalader.com/thecabinet/>], an on-line resource for industry practitioners, lawyers and academics. Other resources on the Cabinet include Lofchie's *Guide to Broker-Dealer Regulation*, guides to hedge fund regulations, compliance manuals, and automated compliance and transaction analysis tools for industry practitioners, which are being developed in partnership with the firm Compliance 11.

About Cadwalader, Wickersham & Taft LLP

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