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## Obama Administration Releases Proposed Legislation to Strengthen the SEC's Authority to Protect Investors

On July 10, 2009, the Obama Administration released proposed legislation titled the "Investor Protection Act of 2009" (the "Proposed Act"), which aims to strengthen the SEC's authority to protect investors. The Proposed Act would amend various provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940 and the Investment Company Act of 1940 to incorporate some of the financial reform measures outlined in the U.S. Department of Treasury's June publication, "Financial Regulatory Reform." The Proposed Act includes the following:

- **Consistent Standard of Conduct for Broker-Dealers and Investment Advisers:** As noted in the fact sheet for the Proposed Act released by the U.S. Department of Treasury, broker-dealers and investment advisers are subject to different standards of conduct under existing law, even though investors frequently rely on the investment advice of broker-dealers in the same manner as that of an investment adviser. The Proposed Act would give the SEC authority to impose a fiduciary duty on any broker, dealer or investment adviser who provides investment advice about securities. In addition, the Proposed Act would authorize the SEC to examine and prohibit sales practices, conflicts of interest and compensation schemes that encourage financial intermediaries to offer investors products that are profitable to the intermediary, but may not be in the best interest of investors.
- **SEC Authority to Restrict or Limit Mandatory Arbitration:** The Proposed Act would give the SEC authority to prohibit, or impose restrictions on, the use of mandatory arbitration clauses in investment advisory, broker-dealer and municipal securities dealer agreements.
- **SEC Consumer Testing of Disclosures and Rules:** The Proposed Act would authorize the SEC to gather information, communicate with investors and engage in such temporary or experimental programs as the SEC determines is in the public interest or for the protection of investors.
- **Expand SEC Enforcement Authority for Securities Fraud:** The Proposed Act would give the SEC authority to pursue actions against those who aid and abet securities fraud

in cases brought under the Securities Act of 1933 and the Investment Company Act of 1940 (under current law, the SEC has this authority only in respect of securities fraud cases brought under the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940).

- **Require Accountability of Securities Professionals throughout the Financial Services Industry:** The Proposed Act would give the SEC authority to ban a regulated person (including broker-dealers and investment advisers) from all aspects of the securities industry rather than just a specific segment. Under this proposal, the SEC could bar a broker-dealer not only from being a broker-dealer but also from being an investment adviser.
- **Establish a Permanent Investor Advisory Committee:** The Proposed Act would make permanent the Investor Advisory Committee that the SEC initially established in June 2009. The committee's purpose would include advising the SEC on the SEC's investor protection initiatives and the SEC's regulatory priorities regarding new products, trading strategies, fee structures and the effectiveness of disclosure.
- **Establish a Whistleblower Award Program and Expand Whistleblower Protection.** The Proposed Act would authorize the SEC to compensate sources that provide evidence leading to securities law enforcement actions resulting in monetary sanctions exceeding \$1 million. Awards for whistleblowers would be paid out of a new fund created with monies that the SEC collects from enforcement actions that are not otherwise distributed to investors. This fund would also be available to the SEC to fund investor education initiatives. In addition, the Proposed Act provides that whistleblowers would be entitled to all relief necessary to make them whole if they are discharged, demoted or subject to any other discriminatory employment treatment due to lawful whistleblowing activities.

The Proposed Act does not contain an effective date and whether it will be passed in its current form is uncertain at this time. We will continue to monitor developments and update you accordingly.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues discussed in this memorandum may be addressed to any of the following:

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