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Landmark Financial Regulatory Reform Legislation Passed By U.S. Congress

Introduction

On July 15th, the Senate passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or the "Act") by a vote of 60 to 39, bringing to an apparent end the year-long Congressional consideration of the steps needed to respond to the financial crisis.[1] The President is expected to sign it into law tomorrow. Oceans of ink have already been spilled on the twists and turns that the legislation has taken in getting to this place, and we do not propose to add any more than necessary. This memorandum discusses the significant terms of the legislation and their importance as we perceive them today. Developments relating to the Act, including pre-vote Senate proceedings held on July 15th, are covered.[2]

The Act is enormous in number of words and expansive in its scope but arguably not as comprehensive in terms of its vision.[3] It provides a mechanism to deal expeditiously with a failing non-bank financial institution, to monitor systemic risk and formulate recommendations to address serious risks, to regulate the derivatives and consumer financial services markets, to strengthen regulation of private funds and credit rating agencies and to provide formal statutory authority to regulate payment, clearance and settlement utilities, all of which are useful, though their effectiveness remains to be proved. However, it does not address the reforms needed for Fannie Mae and Freddie Mac, the two quasi-governmental entities that arguably provided the means for the subprime mortgage market and its securitization to develop to the point that the crisis occurred. It also makes only the most obvious change in the financial regulatory agency structure by merging the Office of Thrift Supervision ("OTS") with the Comptroller of the Currency ("OCC"), but does not otherwise take significant action to

1 The House of Representatives approved the Act on June 30th by a vote of 237 to 192. It is anticipated that another bill (a so-called "corrections bill") will likely be required in order to fix certain technical problems (e.g., inconsistencies or inadvertent omissions) in the Act.

2 This memorandum also includes an Annex that provides additional detail on many of the concepts discussed in the memorandum and a compilation of the remaining provisions that do not merit extended discussion. The Annex also provides for important provisions of the Act, specific section citations, implementation deadlines and commentary.

3 The Act reflects numerous political compromises negotiated during several rounds of bipartisan talks including a 20-hour session near the conclusion of the legislative process. In the end, however, the Act did not receive broad bipartisan support with only three Republican Senators and Representatives voting for its passage.

further streamline the regulatory system. Reforms intended to end government "bailouts" greatly limit the authority of the two agencies - the Federal Reserve (the "Federal Reserve") and the Federal Deposit Insurance Corporation ("FDIC") - that provided the emergency liquidity and guarantees that may have done the most to save the financial system from collapse. Thus, if another liquidity crisis occurs, their ability to take fast action may be greatly impeded. With the continuing potential problems looming - commercial real estate lending and European sovereign debt have been the most recent examples - the financial system is not yet on a stable footing, likely presenting serious challenges to the system. Another round of legislation to address Fannie Mae and Freddie Mac has been promised for next year.

With the statutory framework now set, specific interpretive issues will need to be addressed in coming months and years through the issuance of hundreds of administrative regulations.[4] We will continue to provide memoranda in the future discussing the actions that the regulatory agencies and others will take to implement the Act's provisions as well as the opportunities, as well as pitfalls, that emerge as the process unfolds.

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[4] Senator Christopher Dodd (D-Conn.), Chairman of the Senate Banking Committee recently remarked "We won't know the full results of what we have done until the very institutions we have created, the regulations we have suggested and provided for are actually tested . . .We can't legislate wisdom or passion. We can't legislate competency. All we can do is create the structures and hope that good people will be appointed who will attract other good people – people who will make careers and listen and see to it that never again do we go through what we have gone through."

Title I: Financial Stability

The Financial Stability Oversight Council

From very early on in the financial regulatory reform process, the Obama Administration stated that an important objective of any final law would be to introduce a "systemic risk" framework in order to better monitor emerging risks (e.g., the pre-financial crisis housing "bubble") to the economy as a whole. The Administration's vision in this regard included the establishment of a new systemic risk council to help identify and monitor system-wide risks. Under the Act, the Financial Stability Oversight Council ("FSOC") will be established to serve in that role.

The FSOC will have 10 voting members and five non-voting members, added during the House-Senate Conference (the "Conference"), who will serve in an advisory capacity. FSOC membership is principally populated by the heads of the major U.S. federal financial regulatory agencies. The Secretary of the Treasury will serve as Chairman of the FSOC.

The FSOC, which will meet at least quarterly, is tasked with:

- identifying risks and responding to emerging threats to U.S. financial market stability,
- promoting market discipline by mitigating the "too big to fail" problem through the elimination of expectations on the part of market participants that losses will be shielded by the Government in the event of failure,
- offering recommendations to the U.S. financial regulatory agencies for heightened prudential standards for systemically important institutions and market practices, and
- identifying systemically-important non-bank financial institutions.

Each voting member of the FSOC is required to sign an annual report submitted to Congress indicating whether in his or her view the "[FSOC], government and private sector are all taking all reasonable steps to ensure financial stability and to mitigate systemic risk that would negatively affect the economy." To the extent a voting member of the FSOC does not agree that all reasonable steps are being taken, the member must submit a signed statement to Congress stating what actions such member believes need to be taken in order to ensure that all reasonable steps are being taken.

Establishment of the Office of Financial Research

The Dodd-Frank Act establishes the Office of Financial Research (the "OFR") within the U.S. Treasury Department in order to assist the FSOC with its responsibilities - especially, collection and analysis of data relating to systemic risk levels and patterns. The OFR has broad authority to both (i) issue rules regarding the format and scope of data that it will collect from financial institutions to carry out its responsibilities, and (ii) compel production of information (including potentially sensitive and proprietary information) through the issuance of subpoenas.

At the direction of, or in consultation with, the FSOC (and, in some cases, in coordination with another "functional" regulator), the "Data Center" of the OFR may require any financial institution (not merely large institutions) to submit periodic and other reports for the purpose of assessing the extent to which a financial activity or market or the company itself poses a threat to the financial stability of the United States (i.e., "systemic significance"). Beginning two years after enactment, the OFR will be funded through assessments on large financial institutions including bank holding companies with at least $50 billion in consolidated assets.

Federal Reserve Supervision of Systemically Important "Non-Bank Financial Institutions"

With a two-thirds vote and vote of the Secretary of the Treasury, the FSOC may place a U.S. non-bank financial company - whether, e.g., a broker-dealer, investment company, proprietary trading firm, hedge fund group, insurance company, etc. - under Federal Reserve supervision if the FSOC believes there would be negative effects on the financial system if either the company failed or its activities or its size pose a risk to the financial stability of the United States.[5] In making these "systemic risk" determinations, the FSOC is instructed to take into account a number of considerations including: (i) leverage, (ii) off-balance sheet exposures, (iii) linkages to other institutions, and (iv) overall importance to the American financial system. Significantly, there is no size threshold (or other factor) that by itself is determinative of systemic status. Additional clarity on those non-bank entities potentially subject to Federal Reserve supervision should come in the form of Federal Reserve regulations. The Act requires the Federal Reserve, on behalf of, or in consultation with, the FSOC, to set forth the criteria for exempting certain types or classes of U.S. and non-U.S. financial companies from supervision by the Federal Reserve.

Institutions placed under Federal Reserve supervision are required to submit periodic reports to update the federal authorities on the institution's financial condition, risk management systems and activities. In addition to these reporting requirements, systemically important non-bank financial institutions are subject to the examination and enforcement authority of the Federal Reserve as well as heightened prudential standards as discussed below.

Placement of Systemically Important Non-U.S. Financial Companies Under Supervision of the Federal Reserve

The FSOC may place a systemically important non-bank financial company under the supervision of the Federal Reserve even if the company is organized outside of the United States.[6] In determining whether a non-U.S. company meets the requisite level of systemic importance, the FSOC must focus in particular on the company's U.S. activities and connections (e.g., U.S. financial assets, U.S. related off-balance sheet exposures, and the importance of the company as a source of credit and liquidity in the United States) and take into account the extent to which the non-U.S. company is subject to prudential standards in its home country.

Heightened Prudential Standards for Systemically Important "Non-Bank Financial Institutions" and Large Banking Institutions

The Federal Reserve is required to subject both (i) non-bank financial institutions (both U.S. and non-U.S.) placed under its supervision, as well as (ii) U.S. bank holding companies and non-U.S. banking groups with U.S. banking operations with consolidated assets of at least $50 billion (each, "Systemically Significant Institutions"), to certain heightened prudential standards (i.e., more stringent than those normally applicable to other financial institutions that do not pose the same risk to the American economy). The Federal Reserve may tailor these standards to companies on an individual basis or by category,

[5] For purposes of the Dodd-Frank Act, a "U.S. non-bank financial company" is one that is "predominantly-engaged" in financial activities (i.e., it should not cover manufacturers, retailers, or commercial companies). The term does not include a U.S. bank holding company or a bank holding company subsidiary. In addition, "predominantly engaged" has been defined as deriving at least 85 percent of consolidated gross annual revenues from financial activities (as defined in section 4(k) of the BHCA).

There has been much recent speculation over which entities will be the first "targets" of the FSOC for Federal Reserve oversight.

[6] The Dodd-Frank Act uses the term "foreign non-bank financial company" for these entities. The term does not include a non-U.S. bank that has U.S. banking operations.

taking into consideration their capital structure, riskiness, complexity, financial activities, size, and other risk-related factors as deemed appropriate. The FSOC may offer recommendations to the Federal Reserve relating to the implementation of any of these standards.[7]

Mandatory standards that the Federal Reserve must establish for each Systemically Significant Institution are:

- risk-based capital requirements and leverage limits (with possible exceptions for non-banks such as investment companies),
- liquidity requirements,
- overall risk management requirements,
- resolution plan and credit exposure reports, and
- concentration limits on exposures to unaffiliated companies.

Moreover, the Federal Reserve is required to conduct annual "stress" tests of Systemically Significant Institutions.

The mandatory resolution plan requirement for Systemically Significant Institutions is particularly noteworthy.[8] It requires these institutions to periodically report to the Federal Reserve, FDIC and the FSOC the plan of such institution for rapid and orderly resolution in the event of material financial distress or failure. Preparation of the resolution plan report will likely become an important part of the normal supervisory process for Systemically Significant Institutions and failure to prepare a satisfactory plan in a timely manner can result in severe penalties. The Federal Reserve and the FDIC have begun considering how best to implement resolution plans and similar requirements as well as expanding the scope of such requirements to other institutions within their respective jurisdictions.[9]

In addition to the mandatory standards identified above, the Federal Reserve may determine to require any or all Systemically Significant Institutions to: (i) maintain an amount of contingent capital,[10] (ii) make enhanced public disclosures, and/or (iii) comply with limits on "short-term debt," as the Federal Reserve deems appropriate in order to mitigate risks.

Application of Heightened Prudential Standards to Systemically Important Non-U.S. Financial Institutions and Non-U.S. Banks Operating in the U.S. with at Least $50 Billion in Assets

[7] The standards may well be set so as to conform with standards being developed by international supervisory groups, with modifications as deemed appropriate.

[8] See our client alert, dated May 26, 2010, "Financial Institution Recovery and Resolution Plans" *available at* http://www.shearman.com/financial-institution-recovery-and-resolution-plans-05-26-2010/ for additional information in this regard.

[9] See, e.g., Notice of proposed rulemaking "Special Reporting, Analysis and Contingent Resolution Plans at Certain Large Insured Depository Institutions" FDIC Release RIN 3064-AD59 (May 11, 2010), 75 Fed. Reg. 27464 (May 17, 2010).

[10] Contingent capital is long-term hybrid debt convertible to equity in times of financial stress. The FSOC is required to conduct a study of the feasibility, benefits, and costs of such a requirement and report to Congress. The Federal Reserve may only issue regulations in this regard following the submission of this report.

In applying heightened prudential standards to non-U.S. institutions, the Dodd-Frank Act directs the Federal Reserve to consider the principle of "national treatment" (i.e., treating U.S. and non-U.S. institutions alike) and competitive opportunity. In addition, the FSOC must take into account the extent to which the institution is subject to home country supervision (on a consolidated basis) and to what extent those standards are comparable to those existing in the United States.

Historically, the Federal Reserve's general approach in applying these principles has been to limit the extraterritorial reach of prudential standards such as those set out in the Dodd-Frank Act. With respect to certain requirements, such as preparation of resolution plans, the Federal Reserve could be expected to attempt to work closely with "home country" authorities. In many areas, however, it is not yet certain how the Federal Reserve would apply heightened prudential requirements on a cross-border or "global" basis.

Leverage Cap Applicable to Systemically Significant Institutions Posing a "Grave" Threat to the U.S. Economy

Systemically Significant Institutions deemed by the FSOC to pose a "grave" threat to the American economy will become subject to a debt-to-equity ratio cap of no more than 15 to 1, thus limiting the amount of leverage that can be used to fund operations. An earlier version of this cap - included in the reform bill approved by the House in December - would have required that each Systemically Significant Institution maintain at least a 15 to 1 debt-to-equity ratio. Perhaps due in part to criticism leveled at the measure (e.g., according to some, a "one size fits all" approach would unnecessarily tie the hands of the regulators who may be best positioned to fine-tune leverage limits as appropriate), its application in the final Act has been significantly pared back to only apply in what will, in all likelihood, be only rare circumstances.[11]

Mitigation of Risks to Financial Stability

If the Federal Reserve determines that a Systemically Significant Institution presents a "grave" threat to the financial stability of the American economy, the Federal Reserve, upon a two-thirds majority vote of the FSOC, may take the following actions:[12]

- Limit the institution's ability to merge, acquire, consolidate with, or otherwise become affiliated with another company,
- Restrict the institution's ability to offer a financial product or products, and
- Terminate or impose restrictions on one or more activities.

If the Federal Reserve determines that none of the foregoing are adequate to mitigate the threat to financial stability, it may force the Systemically Significant Institution posing such threat to sell or otherwise transfer assets or off-balance sheet items to unaffiliated entities. In each case, the Federal Reserve, in consultation with the FSOC, is required to provide a

[11] The term "grave" is not further defined in the Act but will likely be clarified by Federal Reserve regulation.

[12] The Federal Reserve is authorized to issue regulations regarding the application of its authority in this regard to non-U.S. institutions.

Systemically Significant Institution being considered for mitigatory action advance written notice of such fact and an opportunity for a hearing.

Requirement for Large Non-Bank Financial Institutions and Bank Holding Companies to Establish a Risk Committee

Publicly traded (i) non-bank financial institutions supervised by the Federal Reserve, and (ii) bank holding companies with consolidated assets of at least $10 billion, are required to establish a risk committee. The risk committee is responsible for the risk management practices of the entity as a whole and must include a certain number of independent directors as the Federal Reserve may deem appropriate based on the nature of its operations, the size of its assets and other relevant factors. The risk committee must also include at least one expert in the area of identifying, assessing, and managing risk exposures of large, complex firms.

The Collins Amendment: New Minimum Capital Adequacy Requirements for Banks, Holding Companies and Systemically Important Non-Bank Financial Institutions

The so-called "Collins Amendment" provision requires the U.S. federal banking agencies to impose minimum leverage and risk-based capital standards for depository institutions, depository institution holding companies and non-bank financial institutions subject to Federal Reserve supervision.[13] In each case, the minima would be based on the existing regulatory capital standards and rules applicable to U.S. insured depository institutions under the so-called "prompt corrective action" regulations (i.e., to be distinguished from a similar but distinct set of capital rules that currently apply to U.S. bank holding companies). Under the Collins Amendment, quantitative limits on leverage and risk-based capital ratios could not be set below those currently in effect for banks today (i.e., 3-4% leverage ratio, 4% Tier 1 capital ratio and 8% total capital ratio). In establishing capital requirements, the Collins Amendment instructs regulators to take into account the spillover (or systemic) effects generated by the failure of an institution.

Since "trust preferred securities" as well as certain hybrid instruments are not treated as Tier 1 capital for U.S. insured depository institutions, they will no longer be treated as such for non-exempt bank holding companies by reason of the Collins Amendment. (Most small bank holding companies with less than $500 million in assets and non-U.S. headquartered institutions are exempt from the application of the Collins Amendment.) The Collins Amendment, however, would allow institutions with less than $15 billion in assets to continue to count trust preferred securities issued prior to May 19, 2010 as Tier 1 capital and provides a three-year phase-in period for larger institutions in respect of their outstanding trust preferred securities issued before such date.[14] Nonetheless, a number of bank holding companies with outstanding trust preferred

[13] U.S. savings and loan holding companies and intermediate U.S. bank holding companies of a non-U.S. financial group (with financial holding company status) will become subject to U.S. capital guidelines under the Collins Amendment five years after enactment of the Act.

[14] Bank holding companies with less than $15 billion in assets will be able to rely on a grandfathering provision that will allow such entities to continue treating trust preferred securities issued prior to May 19, 2010 as Tier 1 capital. On the other hand, such Tier 1 treatment for bank holding companies that had assets of $15 billion or more at the end of 2009 will be phased out over a three-year period beginning on January 1, 2013.

securities expect that they will need to seek "replacement capital" in order to continue to meet applicable regulatory capital standards as a consequence of the Collins Amendment.

Key Elements of Title I Described in Further Detail in the Annex

- Voting and non-voting membership of the FSOC (p.1);
- Specific duties and responsibilities of the FSOC (p.2);
- Factors for the FSOC to consider in assigning "systemic" importance to non-bank financial institutions (p.3);
- Examination of systemically important non-bank financial companies by the Federal Reserve and reporting requirements (p.4);
- Heightened prudential standards imposed by the Federal Reserve on systemically significant institutions (including non-bank financial companies and banking institutions with at least $50 billion in assets) (p.4); and
- The Collins Amendment and bank holding companies (p.6).

Title II: Orderly Liquidation Authority

The Dodd-Frank Act gives the FDIC broad new authority to manage the resolution of certain systemically important financial companies. In doing so, the Dodd-Frank Act substitutes a new regime, modeled on the Federal Deposit Insurance Act of 1950 (the "FDIA"), in place of title 11 of the United States Code (the "Bankruptcy Code") with respect to certain financial companies whose financial distress could pose systemic risks to the financial system.

The Dodd-Frank Act is an attempt to fill a perceived gap in the role of regulators under the U.S. insolvency regime that arose during the height of the recent financial crisis. During the crisis, the U.S. Government essentially utilized an *ad hoc* approach to deal with the failures or near failure of Bear Stearns, Lehman Brothers, AIG, Merrill Lynch and other institutions, all in an attempt to prevent a broader collapse of the financial system. Other than resorting, as Lehman did, to the bankruptcy code - which lacks a specific role for regulators in cases where the entities involved were not otherwise regulated (as was the case for Lehman Brothers Holding Inc., and most of its subsidiaries, other than it's broker-dealer subsidiary) – there was no regulatory framework for governmental control over the process of liquidating systemically important financial companies. The Dodd-Frank Act is the U.S. Government's attempt to fill the perceived regulatory gap in the insolvency regime.

How the New Federal Resolution Authority Works

Under the Act, if a "financial company" is designated as a "covered financial company" by the Treasury Secretary, it will be placed into a receivership administered by the FDIC (except for a covered financial company that is an insurance company). As a condition to making such a designation, the Treasury Secretary must determine, after consultation with the President, that the company is in default or in danger of default and that the company's default presents a systemic risk to U.S. financial stability. After the FDIC has been appointed receiver, it has the authority to appoint itself as receiver of any U.S.-organized subsidiary of the "covered financial company" that has not itself been designated as a covered financial company, other than a broker-dealer, an insurance company or an insured depository institution (for which the FDIC may instead appoint itself as a conservator or receiver under the FDIA as appropriate).

As a receiver, the FDIC may exercise many of the same powers it has under the FDIA, including the ability to sell or transfer the assets or liabilities of the company or merge it with another company. The Dodd-Frank Act requires that the FDIC exercise its authority so that creditors and shareholders bear the losses of the company and the board of directors and management responsible for the failure are removed. Furthermore, the FDIC is prohibited from taking an equity interest in a covered financial company, the company is required to be liquidated, and taxpayers must bear no loss from the liquidation.

Finally, the Act provides for the establishment of an "Orderly Liquidation Fund" to fund the liquidation of a covered financial company. House lawmakers originally favored the creation of a standing fund (i.e., a pre-paid liquidation fund) into which large financial firms would be required to contribute significant sums and that the government would have on hand to deal with the costs of a failing financial institution. Proponents of this approach (principally Democrats) were unable to obtain the necessary support for this funding requirement and were forced to remove it. The final text of the Dodd-Frank Act instead requires the FDIC to develop a plan to repay the government for any costs of resolving a covered financial company under Title II. The plan must set forth a repayment schedule and demonstrate that income from the liquidation will be sufficient to satisfy the repayment. If income from the liquidation is not sufficient, the FDIC is authorized to assess financial institutions that it determines have benefited from the FDIC's receivership. The FDIC will make assessments first against entities that received more in the resolution than they would have received in liquidation (to the extent of such excess), and second, against financial companies with total consolidated assets of $50 billion or more. In making such assessments, the FDIC is required to establish a "risk matrix," which will take into account various factors related to the activities of the respective financial companies. Companies with greater assets and risk would be assessed at a higher rate.

Impact on Market Participants and Effectiveness of the New Law

Title II of the Dodd-Frank Act may create some certainty, but likely also will create some uncertainties and new burdens on market participants.

- Title II likely will provide some comfort to market participants by creating some certainty that there are processes and legal authority for the federal government to effect an orderly liquidation of a large financial institution on an emergency basis. However, it likely also introduces a certain degree of uncertainty into insolvency proceedings. Whereas there is a well-established body of bankruptcy law, the case law related to the FDIA, on which Title II is based, is less well-developed. As a consequence, the outcome of proceedings under the new legislation is difficult to predict. For example, Title II of the Act contains both a requirement that any agreement that tends to diminish the interest of the FDIC be in writing, and a provision preserving a creditor's right to setoff. In contrast, bankruptcy laws currently allow creditors to rely on their common law, non-written rights of setoff. It, therefore, is unclear whether a creditor's right to setoff would need to be reduced to writing to be enforceable. For reasons such as this, counterparties to agreements with large financial companies should consider reviewing agreements memorializing their credit and other exposures to ensure that the avoidance powers, priorities and distribution scheme contained in the Dodd-Frank Act will not alter their anticipated rights.
- The management of a failing institution that otherwise would be subject to the Bankruptcy Code would be displaced by the FDIC and would not manage the company's restructuring as a "debtor in possession" under the Bankruptcy Code. Although the management of Lehman ultimately was displaced in its chapter 11 case, the Act ensures that in each and every instance, management will not continue in place. Depending on the circumstances, the loss of key management that is most familiar with the company's assets, liabilities and operations could result in transaction costs associated with the introduction of new management; in extreme cases, it could make it difficult for the FDIC to liquidate the company most effectively (although the resolution plan requirement for Systemically Significant Institutions (discussed on p.5 above) is intended, in large part, to aid the FDIC in efficiently liquidating institutions that could become subject to the new resolution regime).
- The new Act's Orderly Liquidation Fund requirement will affect market participants directly by making them liable for the costs of the liquidation of any covered financial company. The discretion given to the FDIC and the uncertainty

regarding how that liability will be determined and assessed will make it difficult for market participants to determine any potential future liability.

- Although the Act would apply to the parent company of a large financial group, it may not apply to any subsidiary that is an insured depository institution, insurance company, or SEC-registered broker-dealer. This virtually guarantees the continued involvement of multiple authorities and regulatory schemes, including the FDIC, the FDIA, the Bankruptcy Code, the Securities Investment Protection Corporation and the Securities Investor Protection Act, and state bank and insurance regulators.
- Although the Act may lend a certain degree of transparency to the process, the transfer of assets or merger of a troubled financial company pursuant to the Act may not necessarily occur any more expeditiously or effectively than previous "emergency" sales of troubled companies such as Bear Stearns, Lehman or Merrill Lynch. The Act does, however, grant the FDIC the ability to force a troubled company into such a sale – a power that no federal regulator previously had.
- Had the Act been in effect in 2008, a relatively large number of companies could have been eligible to be placed in receivership. In such a scenario, it is unclear whether there would have remained an adequate pool of potential buyers to purchase the assets of all the companies being liquidated.
- The Act may not be able to resolve systemic issues related to the insolvency of large financial companies. The FDIA, on which the new law is based, was designed to address depository banks. If a depository bank fails and depositors are unable to withdraw their deposits, a run on otherwise healthy banks could result. Thus, the FDIA grants the FDIC the power to transfer deposits (and other assets) of a depository bank to a healthy bank, thereby averting a run on the failing bank. It is unclear, however, that the power to transfer assets of a systemically important distressed financial company to a healthy company is enough to avert the systemic risk posed by a Lehman-type default. During the financial crisis of 2008, the federal government relied on both asset sales and taxpayer funded programs such as the Troubled Asset Relief Program ("TARP") in its attempt to stabilize systemically important distressed companies.
- Finally, the Dodd-Frank Act may succeed in eliminating future taxpayer funded bailouts. However, in eliminating the use of taxpayer dollars for the resolution of non-bank financial companies, the Act may inhibit the FDIC's ability to deal with contagion should it arise in the future as it did in 2008. For example, the TARP arguably prevented the collapse of a number of the largest financial companies in the country. The Act requires the FDIC to develop a repayment plan for all funds used in the liquidation of the failed company. Any shortfall ultimately would be covered by other large financial firms. In a repeat of the 2008 credit crisis, it is possible that this requirement ultimately could constrain the FDIC because of the difficulties associated with repayment due to market uncertainty and punish remaining healthy financial companies.

Key Elements of Title II Described in Further Detail in the Annex

- "Financial companies" potentially subject to FDIC resolution authority (p.7);
- Criteria for a systemic risk determination (p.7);
- Judicial review of a systemic risk determination by the Secretary of the Treasury (p.8);
- Treatment of "covered subsidiaries" of an entity subject to the FDIC's resolution authority (p.8);
- Provisions addressing the liquidation of brokers and dealers (p.8);
- Liquidating an insurance company (p.9);
- Receivership powers of the FDIC (p.9);

- Treatment of "qualified financial contracts" (p.10); and
- Establishment of the Orderly Liquidation Fund (p.11).

Title III: Transfer of Powers from the OTS

Since its creation in 1989, succeeding to an agency (the Federal Home Loan Bank Board) created in the 1930s, the OTS has been primarily responsible for regulating federal savings banks, other federally chartered thrift institutions, and state thrifts and their holding companies (so-called "savings and loan holding companies"). Traditionally, the services provided by institutions holding a thrift charter focused on basic retail consumer needs, such as providing residential mortgages and small business loans while commercial banks provided banking products and services to commercial enterprises. Over time, however, the services provided by OTS-regulated institutions progressively evolved from retail-focused transactions into a wide range of complex services geared toward commercial institutions, rather than, or in addition to, retail consumers. This evolution has called into question the continuing relevance of the thrift platform. This fact coupled with the fact that the OTS regulated many of the institutions that either failed or were on the brink of failure during the financial crisis, including AIG, Washington Mutual and Countrywide, made the OTS an obvious target for elimination. While the thrift charter (unlike the OTS) has survived the legislative reform, many commentators believe that the thrift and commercial banking charters will continue to converge over time, particularly now that the Act calls for rulemaking and supervisory authority over thrifts and their holding companies to be transferred from the OTS to the remaining U.S. federal banking agencies.

Elimination of the OTS and Transfer of its Responsibilities to the OCC, Federal Reserve and the FDIC

The elimination of the OTS - which is currently housed within the Treasury Department - is designed to simplify (but, in reality, only to a very limited extent), the U.S. federal supervisory structure for FDIC-insured depository institutions and their holding companies. Title III of the Dodd-Frank Act transfers the current responsibilities of the OTS to the three remaining U.S. federal supervisory agencies of FDIC-insured depository institutions in the following manner:

- OTS responsibilities to be transferred to the OCC[15]
  - Supervision and examination of federal savings associations (i.e., federal thrifts); and
  - Rulemaking authority relating to all thrifts (federal and state).
- OTS responsibilities to be transferred to the Federal Reserve
  - Supervision and examination of savings and loan holding companies (i.e., thrift holding companies) and their non-bank subsidiaries; and
  - Rulemaking authority relating to thrift holding companies.
- OTS responsibilities to be transferred to the FDIC
  - Supervision and examination of state thrifts (to the extent currently authorized for the OTS).

[15] The Comptroller of the Currency is required to name a Deputy Comptroller of the Currency who will have responsibility for the supervision and examination of federal thrifts.

The transfers of authority will take effect within one year of the enactment of the Dodd-Frank Act. The Secretary of the Treasury, in consultation with the Comptroller of the Currency, however, has an option to delay the transition by a further six months. Significantly, existing OTS rules relating to thrift institutions and thrift holding companies will remain in effect until amended or replaced by the appropriate successor agency for the rule at issue.

The OTS itself will cease to exist within 90 days following the transfer of all of its responsibilities to other U.S. federal financial agencies.

Permanent Increase in FDIC Deposit Insurance Limit

The Dodd-Frank Act permanently increases the standard maximum FDIC-insured deposit amount from $100,000 to $250,000 per account. The amount - which was raised temporarily to $250,000 as a measure to instill additional confidence in the banking system during the financial crisis - was originally scheduled to return to $100,000 by January 1, 2014.

Title IV: Regulations of Advisers to Hedge Funds and Others

Within a year's time, private fund managers generally will be required to be registered with the SEC. This requirement will affect many U.S. and non-U.S. managers that are currently exempt from registration in reliance on the "private adviser" or "14 or fewer client" exemption, which has been repealed. Absent an extension, to meet the legislative deadline and account for the registration process with the U.S. Securities and Exchange Commission (the "SEC"), investment adviser registration applications would need to be filed with the SEC no later than early June 2011.

The legislation provides for certain new exemptions, including for a new category called the "mid-sized" adviser. An investment adviser may not register with the SEC, and thus becomes subject to the jurisdiction of individual U.S. states, if the adviser has assets under management ("AUM") between $25 million and $100 million (which may be raised by the SEC), is otherwise required to register with its home state, and would be subject to examination by the home state. If, however, an investment adviser with at least $25 million AUM would be required to register with 15 or more states, then it nonetheless would be eligible for SEC registration. Investment advisers to registered investment companies and business development companies continue to be required to be SEC-registered regardless of their AUM.

Other exemptions are included in the legislation. Non-U.S. managers have available a new "foreign private adviser" exemption, but it is quite narrow - for example, among other things, the adviser can have no place of business in the United States and is limited in the number (14 or fewer), and amount invested by (less than $25 million), U.S. investors in its funds. Family offices are excluded from the definition of "investment adviser." Certain venture capital fund managers may rely on a new exemption from registration, but will be subject to new reporting and recordkeeping requirements. The SEC is called upon to define "family office" and "venture capital fund." Private equity fund managers will not be exempted from registration, despite a special exemption in the Senate bill that persisted through the amendment process for some time. Investment advisers with less than $150 million AUM are to be exempt from SEC registration, but only if they advise "solely" private funds, and they will be subject to SEC reporting and recordkeeping requirements.

The SEC will periodically adjust the "accredited investor" standard under Regulation D under the Securities Act of 1933, as amended (the "Securities Act") (which relates to private placements of securities, such as interests in private funds), and the "qualified client" standard under Rule 205-3 under the Investment Advisers Act of 1940, as amended (the "Advisers Act") (which is relevant when a registered adviser receives performance-based compensation). The U.S. Government Accountability Office (the "GAO") will conduct studies on the accredited investor standard and other standards for eligibility to invest in private funds, and on the prospect for a self-regulatory organization ("SRO") for private funds. The SEC will conduct a study on various approaches to short selling regulation.

Key Elements of Title IV Described in Further Detail in the Annex

- Repeal of "fourteen or fewer client" exemption (p.13);
- New $100 million and $150 million AUM thresholds (p.13);
- Exemption for non-U.S. investment advisers (p.13);
- Exclusions for venture capital funds and family offices (p.14);
- Potential SEC registration of CFTC-registered commodity trading advisors (p.14);
- Required books and records; confidentiality of records and reports (p.14);
- Definition of "client" as used in the Advisers Act (p.15); and
- Revisiting the "accredited investor" and "qualified client" standards (p.15).

Title V: Insurance

Reform of the state-based framework for insurance company regulation and supervision has been on the Congressional agenda for several years. Nonetheless, Title V of the Dodd-Frank Act generally takes a more moderate approach in the area of insurance supervision. Insurance companies will still continue to be supervised at the state level, and a federal charter option for insurance companies, a concept that has attracted some Congressional support in recent years, was not included.[16]

Title V does, however, establish a new Federal Insurance Office ("FIO") as part of an attempt to address the fact that a lack of uniformity across state and international boundaries has resulted in inefficiency and reduced innovation.[17]

In addition, it includes state-based reforms to streamline the regulatory process for surplus lines (or non-admitted insurance) insurance carriers, surplus line brokers and reinsurers. Moreover, like in so many other areas of the Act, Congress commissioned a study (due within 18 months of enactment) with any eye towards further modernization and improvement of insurance supervision in the United States, including the possibility of federal regulation and supervision of insurance companies at some point in the future.

[16] Title V did not receive as much Congressional attention during the legislative process as many of the other portions of the Act. In many respects, the final version of Title V closely tracks the Obama Administration's blueprint set out in the U.S. Treasury's White Paper ("Financial Regulatory Reform: A New Foundation") dated June 2010.

[17] During the Conference, the House conferees suggested that the FIO be called the "Federal Insurance Office" rather than the "Office of National Insurance," which was used in prior versions of the legislation.

Title V broadens the role of the U.S. federal government in the area of insurance oversight and regulation in the following key respects:[18]

- Establishes the FIO within the Treasury Department to collect information from, study and monitor the insurance industry, assist in the identification of systemically important insurance companies (if any) to be subject to Federal Reserve supervision, and negotiate international agreements on behalf of the U.S. in the area of insurance.
- Provides for federal pre-emption of state insurance law where deemed necessary by the Director of the FIO to ensure that state laws that treat non-U.S. insurers less favorably than domestic insurers do not interfere with U.S. treaties with other countries relating to the mutual recognition of prudential standards for insurance companies.

Title VI: Improvements to Regulation of Bank and Savings Association Holding Companies and Depository Institutions

Title VI imposes additional prudential and regulatory restrictions on banks and their holding companies and affiliates, the most prominent of which is the so-called "Volcker Rule."[19] Unlike most Titles, Title VI consists of a miscellany of revisions and repeals of existing statutes and additions of certain others, primarily with the purpose of tightening the limits currently in place on FDIC-insured financial institutions and their holding companies.

Volcker Rule - Proprietary Trading

The Volcker Rule prohibits a "banking entity"[20] from engaging in proprietary trading and sponsoring, controlling or investing in a private equity fund or hedge fund, but with a host of exceptions and exclusions.

"Proprietary trading" is defined as engaging as a principal for the trading account of the banking entity or non-bank financial company supervised by the Federal Reserve in any transaction to purchase or sell, or otherwise acquire or dispose of, any security, any derivative, any contract of sale of a commodity for future delivery, any option on any such security, derivative, or contract, or any other security or financial instrument that the appropriate Federal banking agencies, the SEC, and the U.S. Commodity Futures Trading Commission (the "<u>CFTC</u>") may determine. The term "trading account" means any account used for acquiring or taking positions in such derivatives, securities and instruments principally for the purpose of selling in

[18] It warrants mention in this regard that the FSOC will have a voting member with expertise in insurance. It will also have two-non voting members with insurance backgrounds: The Director of the FIO and a state insurance commissioner.

[19] The Volcker Rule is found in Section 619 of the Dodd-Frank Act.

[20] This is defined as any insured bank or thrift company that controls an insured bank or thrift, a company that is treated as a bank holding company under Section 8 of the International Banking Act of 1978, and any affiliate of such an entity. A narrow exemption is provided for insured depository institutions that function principally for trust purposes.

the near term (or otherwise with the intent to resell in order to profit from short-term price movements), and any such other accounts as the appropriate Federal agencies may determine.[21]

The prohibition against proprietary trading is not absolute. Certain activities are deemed to be permissible, which include, for example:[22]

- Transactions involving securities issued or guaranteed by the U.S. Government, certain Federal instrumentalities (including Fannie Mae and Freddie Mac) and states and municipalities;
- Purchases, sales, acquisitions or dispositions of instruments on *behalf of customers*;
- Trading *in connection with underwriting* or *market-making-related activities* to the extent that any such activities "are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties";
- *Risk-mitigating* or *hedging activities* in connection with, and related to, individual or aggregated positions, contracts, or other holdings of the banking entity that are designed to reduce the specific risks to the banking entity; and
- Proprietary trading conducted by a foreign bank (not controlled by a U.S. company) solely outside of the United States pursuant to Sections 4(c)(9) or 4(c)(13) of the Bank Holding Company Act of 1956 (the "BHCA").[23]

Regulators also maintain the authority to add other activities to the list of "permitted activities" if it would "promote and protect the safety and soundness" of the banking entity and U.S. financial stability.

Permitted activities will not include transactions that (i) would involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties, (ii) would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies, (iii) would pose a threat to the safety and soundness of such banking entity, or (iv) would pose a threat to the financial stability of the United States. These limitations are expected to be further defined by regulation. How they are eventually implemented (and interpreted) will be critical to determining the scope of activities that a banking entity is permitted to engage in.

[21] According to Senator Jeff Merkely (D-OR) – a principal drafter of the Volcker Rule as it is written into the Act – for bank entities that do not maintain a distinction between a trading account and an investment account, all accounts should be presumed to be trading accounts and covered by the Volcker Rule's prohibition on proprietary trading.

While the Volcker Rule only covers trading for short-term profit, Section 620 directs the Federal banking agencies to review the assets, trading strategies and other investments of banking entities to identify assets or activities that pose unacceptable risks to a bank, even when held in longer-term accounts.

[22] The U.S. Federal agencies will ultimately determine the scope of carve outs from the Volcker Rule for, among others, "market-making related" activities, trades "on behalf of a customer," "risk-mitigating hedging" activities.

[23] It remains to be seen whether the U.S. Federal agencies will interpret this carve out in conformity with and incorporating the Federal Reserve's precedents and regulations under Section 4(c)(9) and 4(c)(13) of the BHCA (which include restrictions on holding securities issued by a company that engages in U.S. activities). Senator Kay Hagan (D-NC) suggested that the Federal Reserve adopt this approach during Senate proceedings that took place on July 15th.

Any non-bank financial company supervised by the Federal Reserve that engages in proprietary trading will be subject to additional capital requirements and quantitative limits. Certain "permitted activities," as discussed above, will not be subject to the additional limits unless the appropriate Federal agencies determine that they are appropriate to protect safety and soundness.

Volcker Rule - Fund Prohibition

The prohibition on sponsorship of and investment in hedge and private equity funds applies to any fund that is exempt from registration as an investment company pursuant to Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940, as amended (the "Investment Company Act") or a "similar fund" as determined by the Federal banking agencies. "Sponsorship" means (1) serving as a general partner, managing member, or trustee of a fund, (2) controlling the majority of directors, trustees or management of a fund, or (3) sharing the same name or a variation with a fund. Advising a fund sponsored by a third party seems to be clearly permissible so long as the other requirements are met.

The Conference added exceptions to the blanket rule. First, it allows "organizing and offering" a fund, including acting as general manager but not having the same or similar name, if the banking entity offers bona fide trust, fiduciary or investment advisory services and effectively establishes the fund for the purpose of serving its trust, fiduciary and advisory customers, subject to additional restrictions. In this sense, the exception is consistent with the exception to the prohibition on proprietary trading discussed above, which permits trading to address customer demand. In establishing such a fund, the banking entity may make an investment in the fund, usually called "seed" money, so long as its percentage interest in the fund is below 3% within one year. Second, it allows a banking entity to invest in its own hedge and private equity funds so long as the aggregate investments in all such funds are "immaterial" to the banking entity, which must be an amount set by the Federal banking agencies no greater than 3% of the banking entity's Tier I capital.[24] It is not clear whether investments in funds sponsored by third parties are permissible within this limit.

Transactions between a permissible sponsored fund or an advised fund and the banking entity, including all subsidiaries of a bank holding company, are not permitted to the extent that the transaction would be a "covered transaction" under Section 23A of the Federal Reserve Act of 1913, as amended (the "Federal Reserve Act"). "Covered transactions" generally include loans by the bank affiliate, purchases of assets by an affiliate, and, due to other provisions of the Act, derivative transactions. However, services provided by a banking entity to a third-party fund in which an advised fund invests would be permissible in many cases with Federal Reserve approval so long as the services qualify as those of a "prime broker."

Effectiveness of the Capital Markets Restrictions of the Volcker Rule

Not later than six months after the date of enactment of the Act, the FSOC is required to study and make recommendations on implementing these provisions. Following that, not later than nine months after the completion of the FSOC's study, the appropriate Federal agencies are to consider the findings of the study and adopt rules to further the purpose of this particular

[24] The Volcker Rule does not specifically address how special limited partnership interests used as a means to receive the "carried interest" of a Fund would be treated for purposes of the caps.

The Act requires at least a 100% capital charge on these proprietary investments increasing their effective "cost" to the banking entity from a capital perspective.

aspect of the Act. The provisions of the Volcker Rule are to take effect on the earlier of (i) 12 months after the date of the issuance of the final rules or (ii) two years after the date of enactment of the Act. A banking entity or non-bank financial company supervised by the Federal Reserve will be required to bring its activities and investments into compliance with the requirements of the Volcker Rule not later than two years after the date on which the requirements become effective. The Federal Reserve may, however, extend this two-year period by up to three additional one-year periods. It may also provide an additional five-year period to divest holdings of "illiquid funds."

Volcker Rule - Concentration Limit

The Volcker Rule's market concentration limit would apply in the case of acquisitions and mergers among banking institutions or with a non-bank financial institution designated as systemically important. Such a combination would not be permissible if the combined organization would control more than 10 percent of the total "liabilities" of covered financial institutions in the United States. Accordingly, the limit would apply only in cases similar to the currently effective rule applicable to FDIC-insured deposits by banks but with a broader measure to include a measure of "liabilities" of the entire organization and not only bank deposits (in the case of a non-U.S. institution, only U.S. liabilities are taken into account).[25]

Other Provisions of Title VI

Apart from the Volcker Rule, there are only a few provisions in Title VI that are likely to be of significance across the range of financial institutions.

Derivative transactions, repurchase agreements and securities loans entered into by national banks would be subject to the single-borrower lending limit, which heretofore have not been subject to the limits, instead being limited by general safety and soundness concerns. It is not at all clear that the absence of a strict limit contributed to the financial crisis. However, this limit would be consistent with the general intent to bring derivatives generally within the ambit of formal recognition and limitations. This provision is effective 18 months after enactment.

Consistent with that theory, FDIC-insured state banks would be prohibited from engaging in derivative transactions unless state law requires "consideration" of the resulting credit exposure in applicable state single-borrower lending limits, effective 18 months after enactment. The intent of this provision seems clearly to require the states to bring derivatives within the ambit of single-borrower lending limits as would apply to national banks. State bank regulatory agencies will have to determine whether their law applies those limits to derivatives, and if not to obtain legislative action to do so. Otherwise, their banks apparently could not enter into any derivative transactions at all. The provision was added in Conference to replace a broader provision that would have imposed national bank lending limits on all FDIC-insured state banks for all purposes, effectively pre-empting state law on lending limits.

The Title would repeal the prohibition on the payment of interest on demand deposits that has been in effect for commercial transaction deposit accounts since passage of the Glass-Steagall Act of 1933. Transaction accounts (that is, checking and similar accounts) for consumers, non-profit entities, and governmental entities have been allowed to earn interest since the

25 "Liabilities" under the Volcker Rule's concentration limit would generally be determined by reference to the risk-based capital rules applicable to the financial institution. Since 1994, U.S. banks and bank holding companies have been subject to a 10% cap on the accumulation of nationwide deposits through inter-state merger with, or acquisition of, an unaffiliated insured bank.

1980s. This provision has been on almost everyone's list of outmoded statutes to be repealed, and apparently someone in the Conference decided that it should be added to everything else. It will allow banks to stop engaging in so-called "sweep" arrangements whereby funds in commercial transaction accounts are transferred at the close of business to an offshore account or a money market fund overnight in order to earn interest for one day. It is effective one year after enactment.

The Title would tighten the restrictions on bank transactions with affiliates under Sections 23A and 23B of the Federal Reserve Act, primarily by requiring credit exposures from derivative transactions to be subject to the generally applicable limits. This provision effectively reverses a Federal Reserve decision in 2002 not to impose derivative transactions between banks and affiliates to the full rigor of Section 23A, instead simply requiring that they be on market terms. Many banks have organized their derivatives business so that derivatives entered into by any affiliate with a third party are effectively hedged internally by entering into a mirror-image derivative with the central entity, usually the bank but sometimes a non-bank company. This change will require that organizations following such a practice consider how to arrange their internal hedging practices. This provision is effective 18 months after enactment.

Key Elements of Title VI Described in Further Detail in the Annex

- Additional regulations regarding lending limits, authorization of interest bearing transaction accounts and restrictions on transactions with affiliates (p.17); and
- A variety of "technical" provisions of the Title not addressed in the discussion above (p.17).

Title VII: Wall Street Transparency and Accountability

The Dodd-Frank Act will profoundly change the way derivative products, and the market participants that use them, will be regulated.[26] The derivatives title of the Act will, among other things:

- Subject a broad category of derivatives to regulation by the CFTC and/or SEC;
- Establish a comprehensive framework for the registration and regulation of dealers and "major" non-dealer market participants;
- Require clearing and exchange trading of many derivatives;
- Impose additional margin and capital requirements on uncleared derivatives;
- Prohibit certain swap market participants from receiving federal assistance, a change that will force many (but not all) derivatives activities to be "pushed out" of insured banks into separately capitalized affiliates.

These changes will affect a wide range of market participants, including derivatives dealers and end-users, both corporate and fund. Several of these changes, particularly the "push-out" requirement and the scope of end-user exemptions from clearing and other requirements, have been controversial throughout the House and Senate debates over the legislation and

[26] For a more detailed summary of these provisions, please see our firm's memorandum available at the following website: http://www.shearman.com/files/Publication/7e376e3e-2089-49c3-9ec6-f831cc646693/Presentation/PublicationAttachment/a4107256-3cea-45b1-ab23-02726f06b011/AM-070610-Dodd-Frank-Wall-Street-Reform-and-Consumer-Protection-Act.pdf. Additional detail is also available in Appendix A.

the conference process. The legislation leaves key details of the new framework to be determined by regulations to be adopted by the SEC, CFTC and other financial regulators. Most of the provisions in the derivatives title will become effective approximately one year after enactment.

Regulation of Derivatives Markets by CFTC and SEC

The Act divides jurisdiction over the derivatives markets between the CFTC and SEC. The CFTC will have jurisdiction over "swaps" and certain participants in the swap market. The SEC will have similar jurisdiction except with respect to "security-based swaps" and participants in the market for those products.

Definition of "Swap"

For purposes of the Act, a "swap" will include a broad range of derivative transactions, including interest rate, currency, equity, credit, fixed income and commodity derivatives, with exceptions for certain physically-settled commodity forwards (including options thereon) and certain securities transactions (such as security options). Over-the-counter foreign exchange swaps and forwards are included in the definition of "swap" under the Act, but the Secretary of the Treasury may exempt foreign exchange swap and forwards.

Definition of "Security-based Swap"

The term "security-based swap" is defined as a swap on a single security (or loan) or index comprised of a narrow group of securities. Security-based swaps are excluded from the definition of "swap" and accordingly are subject to the jurisdiction of the SEC rather than the CFTC. Swaps on a broad-based index of securities, however, will be subject to CFTC jurisdiction. There is also a category of "mixed swaps," involving securities and other reference assets, that will be subject to regulation by both agencies. For convenience, swaps and security-based swaps will be referred to herein as simply "swaps."

Regulation of Market Participants

The Act creates two new categories of regulated entity: swap dealers and major swap participants.

Swap Dealer

The term "swap dealer" means "any person who (i) holds itself out as a dealer in swaps; (ii) makes a market in swaps; (iii) regularly enters into swaps with counterparties as an ordinary course of business for its account; or (iv) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps." The term excludes persons who enter into swaps for their own account, either individually or in a fiduciary capacity, but not as part of a regular business. In addition, the Act provides that the relevant agencies must adopt an exemption for a *de minimis* amount of swap dealing in connection with transactions with or on behalf of customers. In general, the contours of the swap dealer definition are subject to further clarification by regulation.

The Act contains a parallel category, "security-based swap dealers" with respect to dealings in security-based swaps. For convenience, both swap dealers and security-based swap dealers will be referred to herein as "swap dealers."

Major Swap Participant

The definition of major swap participant, which is intended to cover significant non-dealer market participants, has been controversial throughout the legislative process. As defined in the Act, major swap participants will include:

- any non-swap dealer that maintains a substantial position in swaps for any major swap category, excluding positions held for hedging or mitigating commercial risk and positions maintained by any employee benefit plan for the primary purpose of hedging risk directly associated with the operation of the plan,
- any non-swap dealer whose outstanding swaps create "substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets," or
- any non-swap dealer that (i) is a financial entity that is highly leveraged relative to the amount of capital it holds and that is not subject to capital requirements established by an appropriate federal banking agency and (ii) maintains a substantial position in outstanding swaps in any major swap category.

Notably, the second and third categories do not provide any exemption for hedging activity.

The Act includes a parallel registration category for security-based swaps called "major security-based swap participants." For convenience, both major swap participants and major security-based swap participants will be referred to herein as "major swap participants."

The Act leaves key aspects of this definition to be elaborated upon by CFTC and/or SEC regulation, such as the definition of "substantial position" and the major swap categories.

Registration and Regulation of Swap Dealers and Major Swap Participants

Swap dealers and major swap participants will be required to register with the CFTC and/or SEC, as applicable (regardless of whether they are otherwise regulated).

The CFTC or SEC, as applicable, will set minimum capital requirements and minimum initial and variation margin requirements for non-bank swap dealers and major swap participants. The applicable bank regulators will set such requirements for swap dealers and major swap participants that are banks.

Unlike some of the prior versions of the legislation, the Act does not provide an explicit exemption from the margin requirement for end-users. Depending on how the margin requirement is implemented, this requirement may substantially increase the cost of derivative transactions for end users that are not currently required to post collateral to their dealer counterparties. Market participants have expressed concerns over this provision. Senators Dodd and Blanche Lincoln (D-Ark.) have written a letter indicating their view that the legislation was not intended to impose margin requirements on end-users, although the impact of this letter is uncertain.[27]

Under the Act, the CFTC and SEC will adopt business conduct requirements for swap dealers and major swap participants, including certain disclosure requirements to counterparties. Additional requirements will apply where a swap dealer or major swap participant advises, or transacts with a so-called "special entity," including municipalities and pension plans.

[27] Letter from Chairman Christopher Dodd and Chairman Blanche Lincoln to Chairman Barney Frank and Chairman Colin Peterson (June 30, 2010).

Clearing and Trading Requirements

Clearing Requirements

The Act will require central clearing for certain categories of derivatives. The CFTC, in the case of a swap, or the SEC, in the case of a security-based swap, will determine whether a derivative or category of derivatives is subject to the clearing requirements, either at the request of a clearing organization or on its own motion. If a swap is required to be cleared, a party to that swap must submit it for clearing, unless an exemption is available.

Trading Requirement

Transactions that are subject to the clearing requirement must also be executed on a designated contract market or securities exchange or a registered swap execution facility or security-based swap execution facility, as the case may be. The trading requirement does not apply if the transaction is exempt from the clearing requirement or if no exchange or swap execution facility makes the swap available for trading.

Exceptions

The mandatory clearing requirement does not apply to a swap if one of the counterparties (i) is not a financial entity, (ii) is using swaps to hedge or mitigate commercial risk, and (iii) notifies the CFTC or SEC, as applicable, how it generally meets it financial obligations associated with entering into non-cleared swaps. A "financial entity" is defined in the Act as (i) a swap dealer, (ii) a major swap participant, (iii) a commodity pool, (iv) a private fund as defined in the Advisers Act, (v) an employee benefit plan as defined under the Employment Retirement Income Security Act of 1974, or (vi) a person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature.

The effect of this provision is to limit the clearing/trading exemption to corporate end users engaged in hedging transactions. Hedge funds and similar entities, whether or not they are major swap participants, will likely constitute private funds or commodity pools and thus be ineligible for the exemption.

Clearing Member Requirements and Segregation of Collateral Requirements for Cleared Transactions

The Act requires that cleared swaps of non-clearing members (i.e., customers) be cleared through a registered futures commission merchant ("FCM"). (This may require push-out of customer clearing business currently conducted by banks into an FCM.) With respect to cleared security-based swaps on behalf of customers, however, the clearing member is permitted to be a broker-dealer or a security-based swap dealer. In either case, the act imposes a customer margin segregation regime broadly similar to the FCM segregation model under Section 4d of the Commodity Exchange Act of 1936, as amended (the "Commodity Exchange Act"), although the details are left to implementing regulations to be adopted by the CFTC and SEC.

Segregation Requirements for Non-Cleared Transactions

Swap dealers and major swap participants must, upon request of a counterparty, segregate the funds or other property transferred as collateral in connection with a non-cleared trade, and maintain those funds in a separate account with an independent third-party custodian for the benefit of the counterparty. However, this requirement only applies to initial margin, not variation margin.

"Push-Out" of Certain Bank Derivatives Activities

The Act contains a modified version of the "push-out" provision originally proposed by Senator Lincoln.[28] The Act requires that no Federal assistance be provided to any swaps entity with respect to any swap, security-based swap, or other activity of the swaps entity. The Act defines "Federal assistance" as the use of any advances from a Federal Reserve credit facility or discount window for the purpose of (a) making any loan to, or purchasing any stock, equity interest, or debt obligation of, any swaps entity, (b) purchasing the assets of any swaps entity, (c) guaranteeing any loan or debt issuance of any swaps entity, or (d) entering into any assistance arrangement, loss sharing, or profit sharing with any swap entity. A swap entity is defined as any swap dealer, security-based swap dealer, major swap participant or major security-based swap participant registered under the Commodity Exchange Act or Securities Exchange Act of 1934, as amended (the "Exchange Act"). (The definition of "swap entity" excludes insured depository institutions that are major swap participants, but not swap dealers.) In practice, this provision would require banks that currently deal in swaps to transfer their swap businesses to another entity to avoid losing access to Federal assistance, but banks that are non-dealers would be able to retain their swap activities.

The prohibition on Federal assistance does not prevent an insured depository institution from having or establishing an affiliate that is a swaps entity, as long as such insured depository institution is part of a bank holding company that is supervised by the Federal Reserve and such swaps entity affiliate complies with Sections 23A and 23B of the Federal Reserve Act and certain other requirements.

Insured depository institutions that would otherwise be swap dealers will also be able to retain certain limited derivatives activities without losing the benefits of federal assistance. Specifically, the institution may (1) engage in hedging and other similar risk mitigating activities directly related to the insured depository institution's activities; and (2) act as a swaps entity for swaps or security-based swaps involving rates or reference assets that are permissible for investment by a national bank. These reference assets would include interest rates, foreign exchange, gold and silver, government securities and investment grade corporate debt securities, but would generally exclude non-investment grade debt, commodities and equity securities. In addition, credit default swaps may only be entered into under (2) above if cleared. As currently drafted, insured depository institutions would be able to engage in a broader range of derivatives activities than U.S. branches of non-U.S. banks (i.e., specifically those identified under (1) and (2) above). During Congressional proceedings held on July 15th, however, Senators Dodd and Lincoln agreed that this was an oversight that will need to be corrected.

The bank would have at least up to 24 months to divest the swaps entity or cease the activities that require registration as a swaps entity. This transition period may also be extended by up to one additional year upon approval by the appropriate Federal banking agency in consultation with the CFTC and the SEC, and conditions to operation may be imposed during the transition period.

[28] The swap "push-out" provision is found in Section 716 of the Act.

Key Elements of Title VII Described in Further Detail in the Annex

- Definition of "swap" (p.22);
- Definition of "security-based swap" (p.22);
- Definition of "swap dealer" (p.22);
- Definition of "major swap participant" (p.23);
- CFTC/SEC registration requirements for dealers and major swap participants (p.24);
- Business conduct rules (p.24);
- Additional requirements for transactions with "special entities" (p.24);
- Trading and clearing requirements (p.25);
- Extraterritorial reach (p.27); and
- State law issues (p.27).

Title VIII: Payment, Clearing, and Settlement Supervision

Title VIII provides clear statutory authority for the Federal Reserve to exercise general supervision over the U.S. payment, clearing and settlement system. To date, the Federal Reserve has exercised a great deal of authority over these systems by virtue of its control of the Federal Reserve Banks' electronic payment system, known as "Fedwire," and Government securities transfer system as well as its statutory authority over various elements of the system, such as its authority over state member banks. Title VIII formalizes and regularizes this authority for purposes of federal law. However, as discussed below, amendments made in the Conference significantly limit the scope of that authority when an entity registered with the SEC or the CFTC is involved. The Title is effective upon enactment.

The Title as originally proposed would have granted authority for the Federal Reserve to promote uniform standards for the management of risks by systemically important financial market utilities and the conduct of systemically important payment, clearing and settlement activities by financial institutions, and to have an enhanced role in the supervision of such standards. The FSOC would have had the authority to designate the financial market utilities or payment, clearing or settlement activities that are or are likely to become systemically important, with opportunity for any affected market utility or financial institution to request a hearing before the FSOC makes a final determination.

The Conference agreed to significant amendments that scaled back Federal Reserve authority with respect to derivatives clearing organizations registered with the CFTC, clearing agencies registered with the SEC and designated contract markets, swap execution facilities, securities exchanges and similar organizations registered with the CFTC or SEC, with the exclusion only applicable to the activities requiring such registration. The purpose of these amendments seems to be to exclude the Federal Reserve from having the authority to prescribe risk management standards or otherwise supervise those particular activities and leave them solely within the domain of the SEC and CFTC.

Under the Title, the Federal Reserve has the authority to prescribe risk management standards governing operations of the payment, clearing and settlement activities of market utilities and of financial institutions, with the objectives of promoting robust risk management, safety and soundness, reduce systemic risks, and support stability of the financial system, and using policies and procedures, margin and collateral requirements, default policies and procedures, timely clearing and settlement requirements, and capital and financial requirements. As noted above, the scope of this authority over CFTC- and SEC-registered entities is strictly limited; the SEC and CFTC have authority to prescribe these standards for their regulated entities in consultation with the FSOC and the Federal Reserve. In addition, the FSOC and the Federal Reserve are explicitly denied authority over the classes of swaps accepted for clearing by a designated clearing entity or required to be cleared, over reporting requirements, and the like. The SEC and CFTC are required to coordinate the development of risk management supervision programs with the Federal Reserve and to consult with the Federal Reserve prior to exercising approval of rule changes and similar actions as to derivatives clearing organizations and clearing agencies.

The Federal Reserve may authorize Federal Reserve Banks to open accounts for market utilities and provide services, including discount window services, and to pay earnings on balances in the accounts, but, as amended by the Conference, discount window advances are available only in unusual and exigent circumstances.[29]

A market utility is required to give prior notice to its supervisory authority of certain significant rule changes, with the terms of such notice to be determined in consultation with the Federal Reserve, and the authority could object to the change. The Federal Reserve may impose record-keeping and reporting requirements on market utilities and financial institutions, may recommend that a supervisory authority take enforcement action against a market utility or financial institution, and has back-up authority to make examinations and take enforcement action against a market utility or financial institution for reasons related to the regulations and requirements of the Title, in coordination and consultation with the FSOC and the relevant supervisory authority.[30]

Key Elements of Title VIII Described in Further Detail in the Annex

- Designation of systemic importance (p.29);
- Risk-management standards and conduct of certain entities (p.29);
- Definitions of "financial market utility" and "financial institution" (p.29);
- Standards for systemically important financial market utilities and payment, clearing, or settlement activities (p.30);
- Consultation/common framework for designated clearing entity management (p.30); and
- Operations of designated financial market utilities (p.30).

Title IX: Investor Protections and Improvements to the Regulation of Securities

Increasing Investor Protection – Subtitle A

Subtitle A of Title IX of the D0dd-Frank Act focuses on strengthening investor protection by increasing the representation of investors' interests within the SEC, authorizing rules imposing greater standards of care for investment advisers and broker-dealers, streamlining the rulemaking ability of SROs, and mandating studies for areas of future legislation or regulation.

The Dodd-Frank Act increases investor representation within the SEC by establishing three separate offices within the SEC that are dedicated to representing investors' interests: the Investor Advisory Committee, the Office of Investor Advocate, and

[29] This provision will be an exception to the new requirement, discussed below under Title XI, limiting the Federal Reserve's authority to extend credit to non-bank entities in unusual and exigent circumstances only in broad-based programs and not to individual institutions.

[30] Sections 808 and 809.

the Ombudsman. The Investor Advocate represents the interests of retail investors, the Ombudsman effectively acts as a liaison between retail investors and the SEC, and the Investor Advisory Committee will be made up of regulators and investor advocates and represent the interests of investors with respect to the regulatory priorities of the SEC, the SEC's regulation of securities products and disclosure, and investor protection initiatives.

In deciding whether to impose a fiduciary standard on broker-dealers, the Conference struck a compromise between the House bill and the Senate bill. The House bill would have set a uniform federal fiduciary duty on broker-dealers and advisers, whereas the Senate bill would have only required the SEC to study the appropriate legal standard of care for broker-dealers and advisers and persons associated with them. The Act not only mandates the SEC to study the issue, but also provides the SEC with the authority to impose a fiduciary duty on broker-dealers, and to impose an equal or more stringent standard of care on investment advisers, as well as broker-dealers, with respect to certain customers such as "retail customers" (defined without regard to accreditation, but rather to include natural persons who use personalized investment advice on securities for personal, family or household purposes).

The Dodd-Frank Act clarifies the SEC's authority to require brokers and dealers to disclose certain information before selling investment products or services to retail investors.

Furthermore, the Dodd-Frank Act streamlines an SRO's ability to change its rules to adapt to new circumstances. The SEC now has at most 240 days to accept or reject a rule change by an SRO. Failure to act by the SEC will be deemed to be an approval.

The SEC will also conduct studies on various investor protection issues, and these studies may spark future legislation. The areas that the SEC and other governmental offices will study include: enhancing investment adviser examinations, financial literacy among investors, mutual fund advertising, conflicts of interest between investment bankers and securities analysts in the same firm, improved investor access to information on investment advisers and broker-dealers, and financial planners and the use of financial designations.

Key Elements of Title IX (Subtitle A) Described in Further Detail in the Annex

- Study and rulemaking regarding obligations of brokers, dealers, and investment advisers (p.31);
- Offices dedicated to investor protection (p.31); and
- Miscellaneous studies (p.32).

Increasing Regulatory Enforcement and Remedies – Subtitle B

Title IX of the Dodd-Frank Act strengthens regulatory enforcement and remedies by increasing incentives, protection and coverage for whistleblowers, providing the SEC with authority to restrict certain arbitration clauses, expanding the SEC's authority to penalize misconduct and serve subpoenas nationwide, and streamlining the SEC's operations.

The Dodd-Frank Act increases whistleblower incentives, protection and coverage. Whistleblowers will be entitled to receive between 10%-30% of the amount recovered in actions that result in more than $1 million in sanctions. Whistleblowers will also now have a private right of action against retaliatory discrimination by their employers. Furthermore, even violators themselves can be whistleblowers, as long as they are not criminally convicted.

The Dodd-Frank Act also increases the scope of misconduct liability by voiding contractual arrangements designed to limit liability. The Dodd-Frank Act abrogates contractual waivers of SRO rules, and allows the SEC to restrict mandatory pre-dispute arbitration if such restriction serves the public interest and is for the protection of investors.

Under the Dodd-Frank Act, the SEC is given greater authority to penalize misconduct:

- The Dodd-Frank Act lowers the threshold for aiding and abetting liability to recklessness, and extends its availability beyond the Exchange Act to include the Securities Act and the Advisers Act and the Investment Company Act. The Dodd-Frank Act commissions a GAO study regarding a private right of action under aiding and abetting liability.
- The Dodd-Frank Act also allows the SEC to impose civil penalties against persons during cease-and-desist proceedings.
- The extraterritorial reach of SEC enforcement is restored when substantial conduct occurs in or effects are felt in the United States. The conducts-or-effects requirements for extraterritorial jurisdiction apply only to the SEC and the U.S. Justice Department, and partially reverse the potential effects of the Supreme Court's decision in *Morrison v. National Australia Bank* on government securities fraud actions. The Dodd-Frank Act directs the SEC to study the possibility of extraterritorial expansion of private rights of action for antifraud claims.
- Create a list of disqualifying events that will serve as a bar to "offering a sale of securities" by such person in a private placement under Regulation D.
- The Dodd-Frank Act grants the SEC authority to prohibit manipulative short sales.

The Dodd-Frank Act includes provisions intended to improve the operation of the SEC. For example, the SEC can use its streamlined hiring authority to employ markets specialists. The SEC is able to retain privileges when it chooses to share information, and protection of this privilege should facilitate greater cooperation between the SEC and other agencies. The SEC is also given greater discretion in channeling sanctions into funds to compensate victims.

Key Elements of Title IX (Subtitle B) Described in Further Detail in the Annex

- Provisions relating to whistleblowers (p.34);
- Strengthening enforcement by the SEC/study on extra-territorial rights of action (p.34);
- Revision to recordkeeping rule (p.34); and
- Short-sale reforms (p.34).

Improvements to the Regulation of Credit Rating Agencies – Subtitle C

The Dodd-Frank Act subjects nationally recognized statistical rating organizations ("NRSROs") to increased regulation and oversight by the SEC, creates public disclosure requirements designed to make credit ratings more transparent, monitors conflicts of interest and imposes an increased level of accountability on NRSROs.

SEC Oversight of NRSROs

Office of Credit Ratings. The Dodd-Frank Act calls for the SEC to establish an Office of Credit Ratings (the "OCR") staffed by persons with expertise in corporate, municipal and structured debt finance to administer the new rules. The OCR will be required to conduct a review of each NRSRO at least annually and produce a report available to the public summarizing its findings.

Internal Controls and Corporate Governance

Internal Controls Over Processes for Determining Credit Ratings. The Dodd-Frank Act will require NRSROs to establish, maintain, enforce and document an internal control structure that puts into place polices, procedures and methodologies for determining credit ratings. NRSROs will be required to file an annual internal controls report with the SEC that contains a description of the responsibility of management of the NRSRO in establishing and maintaining an internal control structure, an assessment of its effectiveness and an attestation of the chief executive officer of the NRSRO.

Board of Directors. Each NRSRO will be required to have a board of directors, at least half of the members of which, but not fewer than two members, must be independent of the NRSRO. A portion of the independent directors must be users of credit ratings from an NRSRO. In order to be considered independent, a board member may not accept any compensation from the NRSRO (other than in his or her capacity as a board member), may not be associated with the NRSRO or any of its affiliated companies and would be disqualified from any rating decision if he or she has a financial interest in the outcome. An independent director is subject to a five year term limit.

The board will oversee the establishment, maintenance and enforcement of policies and procedures for determining credit ratings and for addressing, managing and disclosing any conflicts of interest. The board will also oversee the effectiveness of the internal control system and the compensation and promotion policies and practices of the NRSRO.

Compliance Officers and Compliance Reports. The Dodd-Frank Act will prohibit an NRSRO compliance officer from performing credit ratings, participating in the development of ratings methodologies, performing sales or marketing functions, or participating in setting compensation levels for NRSRO employees. The compliance officer must also establish procedures for the receipt, retention and treatment of complaints about credit ratings, models and methodologies and compliance with the securities laws. The compensation of the compliance officer may not be linked to the financial performance of the NRSRO. The compliance officer will be required to submit to the NRSRO and file with the SEC annually a report on its compliance with the securities laws and the policies and procedures of the NRSRO that includes a description of any material changes to the code of ethics and conflict of interest policies of the NRSRO and a certification that the report is accurate and complete.

Conflicts of Interest

Separation of Ratings from Sales and Marketing. In an effort to curb conflicts of interest, the Dodd-Frank Act directs the SEC to issue rules to prevent the sales and marketing considerations of an NRSRO from influencing its ratings.

Employee Look-back Provision. NRSROs will be required to have policies and procedures reasonably designed to ensure that if an employee of an entity subject to the NRSRO's credit rating or of an issuer, underwriter or sponsor of a security or money market instrument subject to the NRSRO's credit rating, was formerly an employee of the NRSRO and participated in any capacity in determining credit ratings for that entity or the securities or money market instruments involved, during the one-year period preceding the date a rating action was taken, then the NRSRO shall (i) conduct a review to determine whether any conflicts of interest of the employee influenced the credit rating and (ii) take action to revise the rating if appropriate.

Employment Transitions. NRSROs will be required to report to the SEC any case of which it knows, or can reasonably be expected to know, in which a person associated with the NRSRO within the previous five years is employed by any obligor, issuer, underwriter, or sponsor of a security or money market instrument for which the NRSRO issued a credit rating during the 12-month period prior to such employment, if such employee was (i) a senior officer of such organization, (ii) participated in any capacity in determining the credit rating for such obligor, issuer, underwriter or sponsor, or (iii) supervised an employee who did participate. The SEC would make these reports publicly available.

Transparency Provisions and Enhancement to Credit Ratings Methodologies

Ratings Performance. The Dodd-Frank Act directs the SEC to establish rules that require NRSROs to publicly disclose information on the initial credit ratings determined by the NRSRO for each type of obligor, security and money market instrument it rates, and any subsequent changes to such credit ratings. At a minimum, the SEC's rules must require disclosures that (i) are comparable among NRSROs, (ii) are clear and informative, (iii) include performance information over a range of years and for a variety of types of credit ratings, (iv) are published and made freely available on an easily accessible portion of its website, (v) are appropriate to the business model of an NRSRO, and (vi) include an attestation with any credit rating it issues affirming that no part of the rating was influenced by any other business activities, that the rating was based solely on the merits of the instrument being rated, and that such rating was an independent evaluation of the risks and merits of the instrument.

Credit Rating Methodologies. The Dodd-Frank Act directs the SEC to prescribe rules with respect to the procedures and methodologies, including qualitative and quantitative data and models, used by the NRSRO to (i) ensure that credit ratings are determined using procedures and methodologies that are approved by the board of directors of the NRSRO and in accordance with the policies and procedures of the NRSRO, (ii) ensure that when material changes are made to credit rating procedures and methodologies that the changes are consistently applied to all credit ratings, that changes to surveillance procedures are applied to the then current ratings and the NRSRO publicly discloses the reason for the change, and (iii) notify users of credit ratings of the procedure or methodology used with respect to a particular credit rating, when a material change is made to the procedure or methodology and the likelihood that it would result in a change to current ratings, or a significant error is identified and the likelihood of a credit rating action because of the error.

Credit Rating Methodologies and Information Reviewed. The Dodd-Frank Act directs the SEC to establish rules requiring NRSROs to develop a form to accompany the publication of each credit rating that discloses qualitative and quantitative information relating to (i) the assumptions underlying the credit rating procedures and methodologies, (ii) the data relied upon to determine the credit rating, (iii) how the NRSRO used servicer or remittance reports to conduct surveillance of the credit rating, and (iv) other information that an investor can use to better understand the credit ratings in each class of credit ratings issued by the NRSRO. The Dodd-Frank Act proscribes the content of the form which should include disclosure of (i) the credit rating, (ii) the main assumptions and principles used in constructing procedures and methodologies, including assumptions about the correlation of defaults across underlying assets used in rating structured products, (iii) potential limitations of the credit ratings, (iv) information on the uncertainty of the credit rating, (v) whether third-party due diligence services were used, (vi) a description of the data that were relied upon, (vii) a statement of the overall assessment of the quality of the information, and (viii) information relating to conflicts of interest. The disclosure must also address quantitative content, including an explanation of the potential volatility of the credit rating and information on the sensitivity of the rating to assumptions made by the NRSRO.

Due Diligence Services for Asset-Backed Securities. An issuer or underwriter of any asset-backed security will be required to make publicly available the findings and conclusions of any third-party due diligence report that it or the underwriter obtains and the person providing the due diligence services will be required to provide a written certification to the NRSRO that produces a rating to which such services relate to ensure that the provider has conducted a thorough review of the information necessary for an NRSRO to provide an accurate rating. The SEC is also directed to adopt rules requiring the NRSRO to publicly disclose the certification at the time it produces a rating.

Information from Sources Other than the Issuer in Rating Decisions. In producing a credit rating, an NRSRO must consider information about an issuer that the NRSRO has or receives from a source other than the issuer or underwriter if it considers such information credible and potentially significant to the credit rating.

Qualification Standards for Credit Rating Analysts. The Dodd-Frank Act directs the SEC to issue rules designed to ensure that NRSRO employees meet standards of training, experience and competence necessary to produce accurate credit ratings and are tested for knowledge of the credit rating process.

Universal Rating Symbols. The Dodd-Frank Act directs the SEC to adopt rules requiring each NRSRO to have written policies and procedures that (i) assess the probability that an issuer of a security or money market instrument will default, fail to make timely payments, or otherwise not make payments to investors in accordance with the terms of the security or money market instrument, (ii) clearly define and disclose the meaning of any symbol that it uses and (iii) apply any such symbol in a consistent manner for all types of securities and money market instruments for which it is used.

Accountability of NRSROs.

SEC Enforcement Power. The Dodd-Frank Act authorizes the SEC to temporarily suspend or permanently revoke the registration of an NRSRO with respect to a particular class or subclass of securities if the SEC finds that the NRSRO does not have adequate financial and managerial resources to consistently produce credit ratings with integrity. In making this determination, the SEC must consider whether the NRSRO has failed over a sustained period of time to produce ratings that are accurate for the relevant class or subclass of securities.

Private Right of Action. The Dodd-Frank Act increases the accountability of credit rating agencies by applying the enforcement and penalty provisions of the Exchange Act to statements made by a credit rating agency to the same extent that such provisions apply to statements made by a registered public accounting firm or a securities analyst under the securities laws. Statements made by credit rating agencies will not be deemed forward looking statements for the purpose of the safe harbor under Section 21E of the Exchange Act. In addition, in establishing the requisite state of mind in a private action for damages brought against a credit rating agency or a controlling person under the Exchange Act, the Dodd-Frank Act provides that it is sufficient to state with particularity facts giving rise to a strong inference that the credit rating agency knowingly or recklessly failed to conduct a reasonable investigation or obtain reasonable independent verification of the factual elements it relied on in rating a security. These provisions would apply to all credit rating agencies, not just NRSROs.

Repeal of Rule 436(g). The Dodd-Frank Act repeals Rule 436(g) under the Securities Act, which deemed a security rating provided by an NRSRO not to be part of the registration statement that has been prepared or certified by an expert. The repeal of Rule 436(g) will subject NRSROs to potential liability under Section 11 of the Securities Act for material misstatements or omissions with respect to a credit rating that is included in a registration statement. The repeal of Rule 436(g) will be effective upon enactment of the Act.

Elimination of Exemption from Regulation FD. The Dodd-Frank Act requires the SEC, within 90 days of enactment of the Act, to revise Regulation FD to remove the exemption for entities whose primary business is the issuance of credit ratings, which means that selective disclosure of material nonpublic information to a credit rating agency would violate Regulation FD.

Duty to Report Material Violations of Law. Each NRSRO will be required to refer to the appropriate authorities any information that it receives from a third party and finds credible that alleges an issuer of securities rated by the NRSRO has committed a material violation of law.

Removal of Statutory References to Credit Ratings and Review of Reliance on Credit Ratings.

Various statutes will be amended to remove references to credit ratings, effective two years from enactment. The Dodd-Frank Act also requires Federal agencies, within one year of enactment of the Act, to review any regulation issued by such agency and remove any reference to or requirement of reliance on credit ratings and replace it with such standard of credit-worthiness as the agency determines appropriate.

Timing of New Regulations

Where the SEC is directed to issue regulations, the SEC must issue final regulations not later than one year after the date of enactment of the Act, unless different timing is specified. Those provisions that do not require an SEC rulemaking are effective upon signing of the legislation.

Key Elements of Title IX (Subtitle C) Described in Further Detail in the Annex

- Overview of future studies relating to credit rating agenices (p.35).

Improvements to the "Asset-Backed Securitization Process" – Subtitle D

Title IX of the Dodd-Frank Act amends the laws that relate to asset-backed securities ("ABS"),[31] including adding credit-risk retention requirements and augmenting disclosure obligations. Most significantly, Title IX directs the Federal banking agencies[32] and the SEC to jointly prescribe regulations requiring any securitizer (i.e., the issuer of an ABS or a person who organizes and initiates an ABS transaction) to retain at least 5% of the credit risk of any securitized asset other than securitizations of (i) qualified residential mortgages and (ii) certain assets that meet high underwriting standards to be defined by the regulators. The regulators are required to define different classes of ABS that meet these high underwriting standards and to adopt regulations requiring different credit risk retention requirements depending on the nature of the asset class. The regulations must generally prohibit a securitizer from hedging the credit risk, but the regulators may create exemptions to this prohibition.[33]

Under current law, Section 15(d) of the Exchange Act excludes issuers from periodic filing requirements if, at the beginning of such fiscal year, the securities of each class to which the issuer's registration statement relates are held by fewer than 300 persons. The Dodd-Frank Act amends the Exchange Act to provide that ABSs are no longer subject to this exclusion, but that the SEC may adopt rules or regulations that provide for the suspension or termination of the duty to file periodic information for ABS, on such terms and conditions as the SEC deems necessary.

[31] The Dodd-Frank Act defines an asset-backed security as a security that is collateralized by any type of self-liquidating financial asset (including a loan, a lease, a mortgage, or a secured or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flow from the asset.

[32] The Federal banking agencies include the OCC, the Federal Reserve, and the FDIC. The Chairperson of the FSOC is charged with coordinating the joint rulemaking.

[33] The regulators are required to prescribe the regulations within 270 days of enactment of the Dodd-Frank Act; the regulations will be effective one year after publication in the Federal Register with respect to residential mortgage-backed securities and two years after publication in the Federal Register with respect to other ABSs. The Chairperson of the FSOC is required to submit to Congress, within 180 days of enactment of the Dodd-Frank Act, a report on the macroeconomic effects of the risk retention requirements and amendments, including, among others, an analysis of the effects of risk retention on real estate asset price bubbles, an analysis of the feasibility of minimizing real estate price bubbles by proactively adjusting the percentage of risk retention that must be borne by creditors and securitizers of real estate debt and a comparable analysis for proactively adjusting mortgage origination requirements.

The Dodd-Frank Act instructs the SEC to adopt regulations requiring issuers of ABS to disclose information regarding the assets backing such ABS. The SEC is directed to set standards for the format of the data provided by securities in similar types of asset classes and require issuers of ABS to disclose asset-level or loan-level data, if necessary for investors to independently perform due diligence. The Dodd-Frank Act amends the Securities Act to require the SEC to adopt rules within 180 days of enactment requiring an issuer of an asset-backed security that files a registration statement to perform a review of the assets underlying the ABS and to disclose the nature of such review. The SEC is also required to prescribe regulations concerning the use of representations and warranties that (i) require securitizers to disclose fulfilled and unfulfilled repurchase requests, so that investors may identify those securitizers with clear underwriting deficiencies; and (ii) require NRSROs to include in any report accompanying a credit rating a description of the representations, warranties, and enforcement mechanisms available to investors and how they differ from the representations, warranties, and enforcement mechanisms in issuances of similar securities.

Key Elements of Title IX (Subtitle D) Described in Further Detail in the Annex

- Definition of ABS (p.36);
- Regulation of credit risk retention (p.36); and
- Exceptions to risk retention requirements (p.37).

Accountability and Executive Compensation – Subtitle E

Highlights

The Dodd-Frank Act contains a number of executive pay regulations that require all public companies to institute clawback policies, conduct advisory shareholder say-on-pay votes and votes on "golden parachute" payments in connection with certain change-in-control transactions, enforce independence standards for compensation committees, consider independence of compensation committee advisers, and make enhanced proxy statement disclosures. While the implementation of these provisions have long been expected, they represent a significant change and will require companies to reexamine their compensation policies and procedures.

Compromises in Conference

The Dodd-Frank Act is a true amalgamation of the House and Senate bills. Provisions that were in one proposal but not the other (including clawbacks, shareholder votes on "golden parachute" payments and certain enhanced proxy disclosures) survived to the final legislation. Notably, after debate in Conference, the Dodd-Frank Act does not require that compensation committee advisers be independent. Rather, it directs the SEC to identify independence factors that compensation committees should take into consideration in selecting its advisers. It also requires issuers to disclose whether there are any conflicts and how those conflicts are being addressed.

In addition, while the say-on-pay shareholder vote provision contained in both the House and the Senate proposals would have provided shareholders with an annual say-on-pay vote, the final rules provide that the vote must be held at least once every three years and grant shareholders the right to determine how often the vote will be held.

Things to Think About in the Next Year

With say-on-pay advisory votes mandated for most issuers in the 2011 proxy season, proxy statements must be carefully drafted to provide clear disclosure of compensation policies and procedures to ensure that shareholders understand what they are voting on. To date, only a handful of public companies have voluntarily implemented say-on-pay policies. While shareholder approval was obtained at a significant majority of these companies, several companies failed to win support for their compensation policies during the 2010 proxy season. As broker discretionary votes will no longer be permitted for compensation-related shareholder proposals, obtaining majority approval of say-on-pay votes will become even more difficult next year.

Compensation committees should also begin to review the independence of their advisers to prepare for disclosure in the next proxy. Finally, although there is no deadline for the internal pay equity disclosure, issuers should begin to review these numbers and what disclosure might look like with their boards, as it is likely to be a factor taken into consideration for the say-on-pay vote.

Key Elements of Title IX (Subtitle E) Described in Further Detail in the Annex

- Clawback policies (p.40);
- Mandatory say-on-pay (p.40);
- Disclosure and vote on golden parachutes (p.40);
- Compensation committee independence (p.41);
- Compensation consultant independence (p.41); and
- Additional disclosure (p.41).

Improvements to the Management of the SEC – Subtitle F

Reforms included in Title IX Subtitle F summarized in the Annex include:

- Internal supervisory controls of SEC (p.43);
- Personnel management of SEC (p.43);
- Financial controls audit of SEC (p.43);
- SEC's oversight of national securities associations (p.43);
- Compliance examiners (p.43);
- Organizational study of SEC (p.44); and
- SEC's "revolving door" (p.44).

Strengthening Corporate Governance – Subtitle G

Title IX of the Dodd-Frank Act includes two provisions aimed at strengthening corporate governance of public companies. Neither of the provisions is unexpected in light of recent actions by the SEC and the current SEC disclosure rules.

The first provision authorizes the SEC to issue "proxy access" rules, which permit shareholders to use the company's proxy solicitation materials to nominate candidates to the board of directors. The Act does not mandate that the SEC issue proxy access rules or specify the terms and conditions that must be included in the rules, leaving all decisions regarding proxy access to the SEC. The SEC proposed proxy access rules in May 2009. Under the proposed rules, shareholders would need to satisfy certain requirements in order to use the proxy system to nominate an individual to the board, including both a minimum ownership threshold ranging from 1 percent to 5 percent of shares (based on the size of a company) and a one-year holding period. In addition, companies would only be required to include in their proxy materials shareholder nominees representing no more than the greater of one shareholder nominee or 25% of the board. In October 2009, the SEC, after receiving numerous comment letters and facing questions regarding its authority to issue proxy access rules, decided to postpone its decision regarding adoption of the rules. Now that the Dodd-Frank Act provides the SEC with explicit authority to issue rules, the SEC is expected to revisit proxy access in 2010 with a view to have rules in effect by the 2011 proxy season. Public companies should stay apprised of the status of the SEC's actions, particularly as to whether it plans to consider the same proposed rules from 2009 or propose new rules and whether there will be any comment period.

The second provision requires the SEC to issue rules within 180 days of the enactment of the Dodd-Frank Act requiring all public companies to disclose in their annual proxy statements the reasons why the company has the same or different persons serving as chairman of the board of directors and chief executive officers. The current SEC rules already require that companies disclose why they determined that their leadership structure is appropriate; therefore, the Act is not expected to create any additional disclosure requirements.

The Dodd-Frank Act did not adopt the corporate governance provision requiring a director in an uncontested election to receive a majority of votes in order to be elected. This provision was proposed in the Senate bill but was not adopted after the meeting of the Conference. Although it was not included in the Act, companies should continue to assess whether adopting majority voting may be appropriate since it is likely to remain the focus of shareholders and advocacy groups in the future.

Key Elements of Title IX (Subtitle G) Described in Further Detail in the Annex

- Overview of reforms relating to corporate governance (p.45).

Municipal Securities – Subtitle H

The provisions of the Dodd-Frank Act relating to municipal securities serve to increase oversight over the municipal securities industry by providing for regulation of advisors to municipal entities and increasing protection of public interests by changing the composition of the Municipal Securities Rulemaking Board (the "MSRB").

In particular, the Dodd-Frank Act amends Section 15B of the Exchange Act to subject municipal advisors (rather than just municipal securities brokers and dealers) to both registration under the Exchange Act and the full rules of the MSRB, which is responsible for regulating the industry. Moreover, the Dodd-Frank Act also imposes a fiduciary duty on municipal advisors which is owed to all municipal entities they advise. The effective date for these amendments is October 1, 2010.

The composition of the MSRB is also altered by the Dodd-Frank Act, requiring that a majority of the MSRB members be "public representatives" (i.e., independent from any municipal securities broker, municipal securities dealers or municipal advisors), in Congress's attempt to better protect the interests of the public in the regulation of the municipal securities industry.

Key Elements of Title IX (Subtitle H) Described in Further Detail in the Annex

- Overview of reforms relating to the regulation of municipal securities markets (p.46).

Public Company Accounting Oversight Board Authority ("PCAOB") Portfolio Margining and Other Matters – Subtitle I

Title IX contains several provisions *principally* aimed at protecting investors and regulating securities. To increase investor protection, the PCAOB is granted the authority to (i) share information regarding foreign accounting firms with foreign oversight authorities and (ii) oversee public accounting firms that audit brokers and dealers. In addition, the SEC is tasked with issuing rules to increase transparency with respect to lending or borrowing of securities, and the federal government is authorized to grant funds to states and other entities to establish programs that help to prevent seniors from being misled by fraudulent marketing. Title IX also requires the GAO to study the risks and conflicts associated with proprietary trading by depository institutions, bank holding companies and financial holding companies, and to provide a report assessing whether additional disclosure or further limitation is required.

Key Elements of Title IX (Subtitle I) Described in Further Detail in the Annex

- An overview of reform provisions of Title IX Subtitle I are included in the Annex (p.47).

SEC Funding and Budget – Subtitle J

The SEC remains subject to the annual Congressional appropriations process, pursuant to a new "match funding" mechanism. An earlier proposal that the SEC fund itself through transaction fees and assessments (but not through administrative fines and penalties) – "self-funding" – was replaced during the Conference. Under match funding, the SEC is to provide each year for transaction fees and assessments designed to match the level of appropriations to the SEC by Congress. Subtitle J also provides instructions with respect to the SEC's setting of fee rates and establishes an SEC reserve fund of up to $100 million, and the SEC will generally have discretion with respect to expenditures made from the reserve fund.

Key Elements of Title IX (Subtitle J) Described in Further Detail in the Annex

- SEC funding (p.49);
- Annual SEC budget (p.49); and
- SEC reserve fund (p.49).

Title X: Bureau of Consumer Financial Protection

Title X (or the "Consumer Financial Protection Act of 2010") establishes a new consumer financial protection bureau to regulate the offering and sale of consumer financial products and services to individuals (or "consumers"). In addition, Title X narrows federal preemption of state law in cases where a national bank or federal thrift offers a consumer financial product and also includes new rules for debit and credit card transactions. The principal objective of Title X is to better protect consumers of credit, savings, and payment services from unfair and deceptive practices of banks, mortgage lenders and other institutions participating in consumer financial services markets.

The Establishment and Operation of the Bureau of Consumer Financial Protection

Under current law, responsibility for protection of the interests of consumers is split among seven different U.S. financial regulatory agencies (the four U.S. federal banking agencies, the Department of Housing and Urban Development ("HUD"), the National Credit Union Administration and the Federal Trade Commission (the "FTC")), each of which also has other major regulatory responsibilities.[34] Arguably, under the current structure, consumer protection has often taken a backseat to

[34] In many cases (e.g., in the area of financial privacy) the U.S. federal financial agencies have frequently issued joint rules or rules that are substantially similar in the area of consumer protection.

other regulatory objectives. According to many observers, this was particularly evident in the years prior to the financial crisis when there were pervasive failures in consumer protection, particularly in the "sub-prime" mortgage market.

Title X is intended to address perceived deficiencies in U.S. federal regulation of consumer financial products and services principally through the establishment and operation of a new Bureau of Consumer Financial Protection ("BCFP") of the Federal Reserve. Within 18 months of the enactment date of the Dodd-Frank Act (i.e., by 2012), the principal consumer financial protection functions of the U.S. financial regulatory agencies identified above will be transferred to, and to a great extent centralized at, the BCFP.[35] The core mission of the BCFP is to strengthen the consumer protection responsibilities currently handled by these agencies and to consolidate accountability for consumer financial-related matters.

The BCFP will be established as an "independent" new arm of the Federal Reserve with a director appointed by the President serving a five-year term. Senator Dodd's initial reform plan (released in November 2009) as well as the version of the reform legislation passed by the House would have created an independent, stand-alone agency to serve in this role. The placement of the BCFP within the Federal Reserve – an agency which Senator Dodd has harshly criticized for inaction with respect to consumer protection during the financial crisis – reflects a political compromise between Democrats and Republicans.[36]

Title X establishes a legal framework for the BCFP to propose and issue new requirements and restrictions on consumer financial products and services providers, as the BCFP deems appropriate in view of its mission and relevant statutory guidelines.[37] In particular, the BCFP may issue new rules to administer, enforce and otherwise implement provisions of existing federal consumer laws such as the Truth in Lending Act ("TILA") (which the Federal Reserve currently administers) and also to otherwise prohibit practices or acts it determines to be "unfair, deceptive, or abusive." In prescribing new rules, the BCFP is required to consult with other appropriate U.S. federal agencies to ensure consistency with prudential, market, or systemic objectives administered by such agencies.

Subject to several limited exceptions (e.g., in the case of automobile dealers and real estate brokers), the BCFP's rules may directly or indirectly apply to any institution that offers a consumer financial product or service (regardless of whether the institution is a bank (state or federally chartered), credit union, thrift, mortgage lender, broker or servicer, payday lender or any other type of institution).[38] Title X identifies 20 broad categories of "financial products or services" that when offered to individuals who intend to use such products/services for non-commercial (i.e., "personal, family, or household") purposes,

[35] The FTC will continue to have a role – especially in the enforcement area – in consumer financial protection.

[36] Republicans on the Senate Banking Committee voiced passionate dissent against the idea of a stand-alone agency principally on the grounds that, in their view, rules created by an independent agency could potentially be inconsistent with, and even undermine, efforts by the "prudential" financial supervisors to ensure the "safety and soundness" of financial institutions.

[37] As described below, Title XIV, which can be thought of as a complement to Title X, provides for new underwriting standards for residential mortgage lenders and certain other requirements.

[38] Lending activities of automobile dealers will be supervised by the FTC.

are considered consumer financial products.[39] These include, for example: (i) deposit-taking and transmission of funds, (ii) extension or brokering leases, (iii) extension of credit and servicing loans, (iv) check cashing, check collection, or check guaranty services, (v) financial advisory services, and (vi) collection services. The BCFP is authorized to expand the list of consumer financial products to include additional products or services.

Title X and rules issued by the BCFP thereunder should not directly apply to the operations of an institution whose business is exclusively "wholesale" in nature (i.e., does not serve "retail" or individual consumers) unless the institution functions as a "services provider" to participants in consumer financial services markets, in which case the institution could potentially be subject to the rulemaking and supervisory authority of the BCFP.

Title X gives the BCFP specific examination and enforcement authority over the following types of institutions, each believed by Congress to present heightened or special consumer compliance risks and issues:

- Non-bank residential mortgage originators, brokers and servicers, as well as companies that provide loan modification and foreclosure relief services in connection with residential mortgages,
- Pay-day lenders,
- Student loan providers,
- Certain non-bank entities deemed by the BCFP (after consulting with the FTC) to be "larger participants" in a consumer financial product market,
- Non-bank entities that the BCFP has reasonable cause to determine are engaging, or have engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services, and
- FDIC-insured depository institutions and credit unions with more than $10 billion in assets and any affiliate of such depository institutions/credit unions.

The new consumer financial protection framework could have very important implications for a large number of financial institutions. In this regard, many observers believe that the BCFP will be quick to adopt a proactive approach to carrying out its mission especially given that pre-crisis abuses in the sub-prime mortgage market are still relatively fresh in the minds of the public and Congress. The actual impact (e.g., in terms of the availability of consumer financial products such as consumer loans, improved consumer protections and increased compliance costs for institutions), however, will only become apparent in the months and years ahead as the BCFP begins issuing rules and exercising its supervisory, investigative and enforcement authorities.

State Law Preemption Standards for National Banks and Federal Thrifts

As a general principle, state consumer financial laws (e.g., including so-called anti-predatory lending laws and other state laws that regulate the "manner, content, or terms and conditions of a financial transaction" with a consumer) may provide greater protections to consumers than Title X or the rules of the BCFP promulgated thereunder. Certain exceptions to this

[39] Insurance products and securities-related advisory services provided by an entity regulated by the SEC or state securities commission are not considered a consumer financial product for purposes of Title X.

general principle would apply, however, where the institution providing the consumer financial product or service at issue is either a national bank or federal thrift and federal "preemption" substitutes a federal standard in place of the state standard.

Generally speaking, the Title X framework in this regard would revert preemption standards back to their pre-2004 state for national banks at least in so far as state consumer financial laws are concerned, (i.e., before the OCC issued broad preemption rules that effectively allow a national bank to determine whether a state law is preempted under the parameters established by the OCC and pending court or OCC review). Under Title X, preemption determinations for both national banks and federal thrifts would generally be made under the so-called Barnett standard (i.e., the state consumer financial law "prevents or significantly interferes with" the operations of a national bank) by a court or by regulation or order of the OCC on a case-by-case basis, and not by a national bank itself.[40] A court reviewing an OCC determination would be directed to assess the OCC's reasoning, thoroughness, and consistency, as well as any other factors the court considers relevant.

While Title X does not repeal preemption for national banks and federal thrifts, the new more "narrow" preemption regime could make it more burdensome and expensive for national banks and federal thrifts to operate across state lines (especially when coupled with the fact that bank subsidiaries will no longer benefit from federal preemption of state financial consumer laws). For example, some institutions may need to acquire new state licenses or comply with new sets of state disclosure requirements. As a result, the preemption regime established under Title X will likely prompt at least some institutions to consider possible restructuring options in order to minimize regulatory compliance costs.

Limits on Debit Card Interchange Fees and Related Provisions

The so-called "Durbin Amendment" provisions of Title X authorize the Federal Reserve to regulate the fees debit card issuers receive from retailers to process debit card purchases (i.e., so called "interchange fees"). The Act specifies that Federal Reserve rules should require that such fees be "reasonable" and "proportionate." Related provisions would also prevent card networks such as Visa and MasterCard from penalizing sellers for offering discounts to customers who pay by cash, check or debit card and/or for refusing credit card transactions below $10 (or a higher amount set by the Federal Reserve). Given the large amount of money at issue (for both retailers and the banking industry), these provisions have been a significant source of uncertainty and concern for card issuers.

Key Elements of Title X Described in Further Detail in the Annex

- Establishment and structure of the BCFP (p.50);
- Overview of key functions of the BCFP (p.50);
- Rule making and monitoring authority of the BCFP (p.52);
- Supervision and examination authority of the BCFP (p.53);
- Enforcement authority of the BCFP (p.53);
- State law preemption and related issues for national banks and federal thrifts (p.54); and

[40] Barnett Bank v. Nelson, 517 U.S. 25 (1996).

- Limits on interchange fees and rules for payment card transactions (p.55).

Title XI: Federal Reserve System Provisions

Title XI's changes to statutes affecting the Federal Reserve System were generally provoked by the Federal Reserve's role in the financial crisis, both in the quality of its supervision of financial institutions that had significant roles in causing the crisis and in its response to the crisis. The final version of the Title is significantly watered down from the earlier ones that would have imposed much more severe limitations on the Federal Reserve's scope of action, and so is not nearly as constraining as it could have been. However, it has provisions that may have negative effects on the ability of the Federal Reserve and of the FDIC to address future financial crises.

Federal Reserve Emergency Lending Authority

Title XI makes an extremely long addition to Section 13, Paragraph 3, of the Federal Reserve Act ("Section 13(3)"), the provision under which a Federal Reserve Bank is authorized to extend credit to non-bank borrowers in extraordinary and unusual situations with the approval of at least five Governors. This provision gave authority to extend credit in connection with the Bear Stearns acquisition by JP Morgan in March 2008 and to establish the Temporary Asset-Backed Loan Facility, Commercial Paper Loan Facility and several other facilities during 2008 in order to avoid having the financial crisis spin completely out of control. The amendment imposes a host of limits on the Federal Reserve's authority to extend such credit in the future, as summarized below.

The Federal Reserve, in consultation with Treasury, must issue a regulation with policies and procedures for emergency lending, and the regulations must be designed to provide liquidity to the financial system and not to aid a particular company. In addition, security must be sufficient to protect taxpayers and the program must terminate in a "timely and orderly fashion." Also, the program must prohibit borrowing by borrowers that are insolvent. A program structured to remove assets from a "single and specific company" or to assist a company to avoid bankruptcy is explicitly stated not to meet these standards.[41]

Prior Treasury approval for any program must be obtained, and any use of such a program must be reported to Congressional committees within seven days after authorization of the loan with the terms of the credit, including conditions imposed on the borrower concerning employee compensation and distribution of dividends. Every 30 days written updates must be provided on the value of collateral, amount of interest and other revenue earned, and expected final cost to taxpayers. Names of borrowers, amount borrowed and identifying details about collateral will be confidential upon Federal Reserve request but must be disclosed to Congressional committee chairs and ranking members, and must be disclosed publicly one year after termination of a program.

The Comptroller General may conduct audits of any special lending program under Section 13(3) and any open-market transaction or discount window advance. The audit is to assess the operational integrity and controls of the program or

[41] Another portion of the Dodd-Frank Act in Title VIII, discussed above, specifically allows a market utility, such as a derivatives clearing organization or clearing agency, to obtain discount window credit in "unusual and exigent circumstances," the same standard as in Section 13(3) but not technically subject to Section 13(3). This stands as an exception to the generally applicable requirements added to Section 13(3) in Title XI.

transaction, the effectiveness of collateral policies, whether the program favors particular participants, and the policies governing use of third party contractors. Delayed release of such audits is authorized for one year, except that such delay is not authorized for the three facilities (Maiden Lane, Maiden Lane II and Maiden Lane III) established in 2008 by the Federal Reserve Bank of New York. The audit reports must be placed by the Federal Reserve on its website.

The names of borrowers, amounts borrowed, and the nature of collateral securing the borrowing under any special facility established under Section 13(3) must be disclosed within one year after the facility is terminated, and the same information concerning every open-market transaction and discount window advance must be disclosed within roughly two years of the transaction. The Inspector General of the Federal Reserve must prepare a study of the effect of nondisclosure of this information before those dates under the Freedom of Information Act within 30 months of enactment of the Dodd-Frank Act.

Emergency Financial Stabilization

The FDIC's authority to issue special guarantees of bank or bank holding company obligations is strictly limited. It must issue regulations as soon as possible after enactment of the Dodd-Frank Act with policies and procedures for such special guarantees. Any such guarantees may be provided only upon a finding, by a two-thirds vote of each of the FDIC board and the Board of Governors, that a "liquidity event" has occurred and the Treasury Secretary agrees.[42] Any such guarantees must be widely available to solvent banks and bank holding companies, but may not consist of the provision of equity. Upon a finding of a liquidity event, the FDIC with Treasury concurrence must set a maximum amount of guarantees that may be issued, and that amount must be transmitted to both Houses of Congress. Guarantees may not be issued until both Houses pass a joint resolution authorizing issuance. The FDIC must establish fees sufficient to cover the cost of projected losses and administrative expenses. Any excess funds must be turned over to Treasury, and any losses must be made up by a special assessment only on participants in the program.

Federal Reserve Bank Governance and GAO Audits

Federal Reserve Bank presidents may be selected only by Bank directors who represent commerce and the public, but not those representing member banks. One of the members of the Board of Governors must be appointed by the President as the Vice Chairman for Supervision, and that Governor will be responsible for supervising Federal Reserve bank supervision and regulation policies and procedures and report regularly to Congress in that capacity.

The Comptroller General is to conduct a special audit of the Federal Reserve's special facilities established during 2007 and 2008 for the same purposes as the audits described above, and is also to prepare a report on Reserve Bank governance and the possible conflict of interest faced by directors of Reserve Banks in light of the bank supervisory responsibilities of the Reserve Banks.

[42] A "liquidity event" is defined as "(A) an exceptional and broad reduction in the general ability of financial market participants (i) to sell financial assets without an unusual and significant discount; or (ii) to borrow using financial assets as collateral without an unusual and significant increase in margin; or (B) an unusual and significant reduction in the ability of financial market participants to obtain unsecured credit." Section 1105(g)(3) of the Act.

Key Elements of Title XI Described in Further Detail in the Annex

- A summary of each of the provisions of Title XI (p.56).

Title XII: Improving Access to Mainstream Financial Institutions

In the United States, roughly 9 million adults do not have proper access to basic banking services, such as an FDIC-insured bank account, and another 21 million are consistently forced to rely on costly alternatives, such as payday lenders and check-cashing outlets, to satisfy their financial needs.[43] In order to address these concerns, Title XII authorizes the Treasury to fund a program of grants and other contracts to encourage the development of financial products and services that enable low- and moderate-income Americans to establish bank accounts with FDIC-insured depository institutions and access other financial products such as small personal loans.

The eligible participants for providing these products and services include federally insured depository institutions, 501(c)(3) entities (i.e., charitable organizations), community development financial institutions and other government entities. Subject to rules promulgated by the Treasury, these participating institutions will be authorized to provide small-dollar loans and to offer counseling in the areas of conducting transactions and managing bank accounts.

Title XII has also amended the Community Development Banking and Financial Institutions Act of 1994 (12 U.S.C. 4701 et seq.) to establish a loan-loss reserve fund for entities participating in this program. Assistance will be available from the Community Development Financial Institutions Fund in order to finance the costs of operating a small-dollar loan program and to also allow participating entities to establish their own funds to reduce potential losses arising from these programs.

Key Elements of Title XII Described in Further Detail in the Annex

- Additional information regarding the program described above is provided in the Annex (p.58).

Title XIII: Pay It Back Act

Title XIII reduces the amount that the Treasury can have outstanding at any one time for the purpose of purchasing troubled assets from $700 billion to $550 billion. Additionally, the Dodd-Frank Act provides that if the Treasury determines there is an immediate and substantial threat to the financial stability of the American economy, the Treasury, with the concurrence of the Chairman of the Federal Reserve, can purchase troubled assets with the funds that have been repaid from earlier bailouts.

Title XIII also provides that the Treasury must deposit all amounts received from the sale of any Fannie Mae, Freddie Mac or Federal Home Loan Bank System member obligation by the Treasury in the General Fund of the Treasury for the sole

[43] www.fordfoundation.org.

purpose of reducing the deficit.[44] Moreover, Title XIII specifies that the Treasury is prohibited from using these proceeds as an offset for other spending increases or revenue reductions.

Title XIV: Mortgage Reform and Anti-Predatory Lending Act

The Mortgage Reform and Anti-Predatory Lending Act (Title XIV) ("Mortgage Act"), intends to reform the mortgage lending industry with an eye towards consumer protection. The Mortgage Act increases the liability for mortgage lenders by establishing a federal duty of care for lenders, increasing loan disclosure requirements, and requiring licensing and registration of mortgage originators (including brokers and loan officers) under the Secure and Fair Enforcement for Mortgage Licensing Act of 2008. The Mortgage Act also sets minimum standards for all mortgages based on a borrower's reasonable and documented ability to repay and expands the scope of consumer protections against "high-cost mortgages" under the Home Ownership and Equity Protection Act.

Increased Lender Accountability

The Mortgage Act mandates additional disclosure to borrowers regarding mortgage rates. Creditors, assignees, or servicers of a residential mortgage loan must provide borrowers with a monthly statement disclosing information about the borrower's mortgage loan, such as the amount of outstanding principal on the mortgage, all charges and monthly payment amounts, the interest over the life of the loan and any other information as may be required by the Federal Reserve. Borrowers with variable rate mortgages must be told the maximum amount they could pay. The Mortgage Act additionally requires lenders and mortgage servicers participating in the Home Affordable Modification Program to provide to every borrower whose mortgage modification was denied certain data related to that determination.

The Mortgage Act also aims to impose stricter penalties on lenders who violate anti-predatory regulations to be issued by the BCFP. Borrowers have new defenses against such lending, including the ability to sue lenders for rescission of their loan and the use of violations of the Mortgage Act as defense or counterclaim to foreclosure. Damages for violations under the Mortgage Act are the greater of (i) actual damages or (ii) an amount equal to three times the total amount of direct/indirect compensation or gain accruing to the lender in connection with the loan, plus costs and reasonable attorney's fees.

Enhanced Borrower Protections

Unfair, predatory or abusive loan practices are severely limited or prohibited outright, including negative amortization, certain prepayment penalties, "yield spread premiums," single premium credit insurance, mandatory arbitration clauses and other practices. Additionally, the BCFP has wide latitude to proscribe additional abusive and predatory practices as it deems fit.

The Mortgage Act increases regulation of High-Cost Mortgages ("HCMs") and amends the definition of HCMs in the TILA to include more loans under its fold. For those loans considered HCMs, balloon payments, modification and deferral fees and

[44] Title XIII also provides that any repayment of fees the Secretary receives from Fannie Mae or Freddie Mac resulting from any preferred stock purchase agreement, mortgage-backed security purchase program, or any other program carried out under section 1117 of the Housing and Economic Recovery Act of 2008 (Public Law 110-289; 122 Stat. 2683) will also have to be placed in the General Fund of the Treasury for the sole purpose of reducing the deficit.

payoff statement fees are now prohibited, while late fees and acceleration rights are severely curtailed. Lenders cannot recommend that borrowers default on existing loans in order to refinance to a high-cost mortgage. Additionally, consumers are required to receive pre-loan counseling before they may enter into HCMs.

The Mortgage Act also reforms many mortgage servicing practices, expanding on TILA and the Real Estate Settlement Procedures Act. These reforms include a new requirement that an escrow or impound accounts be established for payment of taxes and insurance in connection with certain mortgage loans.

Assistance to Borrowers

The Mortgage Act authorizes funds to provide legal assistance to homeowners and renters who are experiencing problems related to foreclosure and also establishes an Office of Housing Counseling within HUD. The Office is charged with homeownership and rental housing counseling and to certify housing counselors. A central function will be to provide grants to states, local governments and non-profits for housing counseling. The Mortgage Act also provides for grants for emergency mortgage relief and the redevelopment of abandoned and foreclosed homes.

Appraisal Requirements

The Mortgage Act sets new appraisal and appraiser-independence obligations, requiring lenders to obtain an independent property appraisal prior to extending credit. Specifically, creditors need a property appraisal by an independent licensed appraiser before extending higher-risk mortgages to consumers. The Mortgage Act specifies further the independence guidelines and other monitoring compliance procedures, including making it a violation to interfere with the independence of appraisers.

Key Elements of Title XIV Described in Further Detail in the Annex

- Overview of important provisions of Title XIV (p.59).

Title XV: Miscellaneous Provisions

Provisions of Title XV summarized in the Annex include:

- Disclosure of and reports regarding conflict minerals (p.64).

Title XVI: Financial Crisis and Assessment Fund

Title XVI includes a provision that clarifies Section 1256 of the Internal Revenue Code ("Section 1256") is not applicable to various exchange-traded derivatives contracts, such as swaps and similar agreements. In particular, Title XVI provides that "swaps," including interest rate, currency, basis, commodity, equity, equity index and credit default swaps, or any "similar agreement," will not be subject to Section 1256 for taxable years beginning after the date of enactment. Section 1256 requires that a taxpayer report gain or loss on "section 1256 contracts" on an annual basis under a mark-to-market rule. In general, under Section 1256, any resulting capital gain or loss is treated as if (i) 60 percent of the gain or loss is a long-term capital gain or loss, and (ii) 40 percent is a short-term capital gain or loss. Title XVI clarifies that the derivatives market reforms of the Act will not cause these derivative contracts to be subject to Section 1256.

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This publication is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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Landmark Financial Regulatory Reform Legislation Passed By U.S. Congress

Supplemental Annex

CONTENTS

Title I – Financial Stability

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Establishment of the Financial Stability Oversight Council (the "FSOC") as a New Systemic Regulatory Body – Section 111 FSOC Voting Members 1. Secretary of the Department of the Treasury (the "Treasury") (who will act as Chairman of the FSOC); 2. Chairman of the Federal Reserve (the "Federal Reserve"); 3. Comptroller of the Currency; 4. Director of the Bureau of Consumer Financial Protection (the "BCFP"); 5. Chairman of the Securities and Exchange Commission (the "SEC"); 6. Chairperson of the Federal Deposit Insurance Corporation (the "FDIC"); 7. Chairperson of the Commodity Futures Trading Commission (the "CFTC"); 8. Director of the Federal Housing Finance Agency; 9. Chairman of the National Credit Union Administration; and 10. An independent member appointed by the President (with the advice and consent of the Senate), having expertise with insurance. FSOC Non-Voting Members 1. Director of the Office of Financial Research (the "OFR"); 2. Director of the Federal Insurance Office (the "FIO"); 3. A state insurance commissioner; 4. A state banking supervisor; and 5. A state securities commissioner. Commentary/Impact: *The FSOC will serve as the first U.S. "systemic" financial regulatory body and its first chairman will be the Secretary of the Treasury, Timothy Geithner. This structure may have the virtue of effectively requiring regulators to think more broadly about the functioning of the financial system and how the key parts of the economy are interacting with each other, rather than only about entities subject to their regulatory purview. On the other hand, a systemic risk body independent of the prudential regulators could have served as a check on the regulators who may be prone to "regulators capture" and have other responsibilities that may take priority over systemic risk.*	The FSOC comes into existence upon the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or the "Act").

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Role of the FSOC – Section 112 Mission 1. Identify risks to the financial stability of the U.S. arising from the financial distress or failure of a large, interconnected financial institution; 2. Promote market discipline by eliminating the expectations of market participants that the federal government will cover their losses in the event of a failure of a large, interconnected financial institution; and 3. Address emerging threats to the stability of the U.S. financial system. Duties 1. Collect information from member agencies and other regulatory agencies and, if necessary, direct the OFR to gather information from bank holding companies and non-bank financial companies; 2. Provide direction to, and request data and analyses from, the OFR to support the work of the FSOC; 3. Monitor the financial services marketplace to identify possible threats to the financial stability of the U.S.; 4. Monitor domestic and international financial regulatory developments and advise Congress and make recommendations in such areas that will increase the stability of the U.S. financial markets; 5. Facilitate information sharing among its member agencies regarding domestic financial services policy development, rulemaking, examinations, reporting requirements, and enforcement actions; 6. Recommend to the member agencies general supervisory priorities and principles reflecting the outcome of discussions among the member agencies; 7. Identify gaps in regulation that could pose risks to U.S. financial system stability; 8. Require supervision by the Federal Reserve for non-bank financial companies that could potentially pose risks to the financial stability of the U.S. should they experience material distress or failure; 9. Make recommendations to the Federal Reserve regarding the establishment of heightened prudential standards for non-bank financial companies and large, interconnected bank holding companies supervised by the Federal Reserve; 10. Identify systemically important financial market utilities and payment, clearing, and settlement activities; 11. Make recommendations to U.S. financial regulatory agencies to apply new or heightened standards and safeguards for financial activities that could increase risks of significant liquidity, credit, or other problems; 12. Resolve jurisdictional disputes among the members of the FSOC; and 13. Report annually on the activities of the FSOC and its findings. Commentary/Impact: *The FSOC is scheduled to only meet on a quarterly basis (unless the Secretary of the Treasury calls for more frequent meetings). The "real work" of the FSOC*	

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
may take place in between meetings by staff of the OFR (described below), the prudential regulators or special advisory committees that may be appointed.	

Authority to Require Supervision and Regulation of Certain Non-Bank Financial Companies – Section 113

Factors for the FSOC to Consider: Assigning "Systemic" Importance to Non-Bank Financial Institutions

1. The extent of leverage of the company;
2. The extent and nature of the (U.S. related) off-balance sheet exposures of the company;
3. The extent and nature of the transactions and relationships of the company with other significant non-bank financial companies and significant bank holding companies;
4. The importance of the company as a source of credit and liquidity for the U.S. financial system;
5. The importance of the company as a source of credit for low-income, underserved communities, and the impact that the failure of such company would have on the availability of credit in such communities;
6. The extent to which assets are managed, rather than owned, by the company, and the extent to which ownership of assets under management is diffuse;
7. The nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the company;
8. The degree to which the company is already regulated by one or more primary financial regulatory agencies;
9. The amount and nature of the (U.S.) financial assets of the company;
10. The amount and types of the liabilities of the company (used to fund activities and operations in the U.S.), including the degree of reliance on short-term funding; and
11. Any other risk-related factors that the FSOC deems appropriate.

Additional Factors for the FSOC to Consider: Assigning "Systemic" Importance to Non-U.S. Headquartered Financial Institutions

The FSOC must also consider the extent to which the company is subject to prudential standards on a consolidated basis in the home country of its parent that are administered and enforced by a comparable foreign supervisory authority.

Commentary/Impact:

The FSOC will be responsible for ensuring that no financial institution that, in its judgment, poses systemic risk, escapes comprehensive oversight and supervision by the Federal Reserve. For these purposes, a non-bank financial company could include, for example, an insurance company, hedge fund, broker-dealers or proprietary trader, provided that, the institution is not subject to the Bank Holding Company Act. There has been much recent speculation over which entities (particularly in the hedge fund and private equity fund community) will be designated as "systemically important," and thus, subject to the Federal Reserve's supervisory regime.

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<tr><th>KEY ELEMENTS</th><th>IMPLEMENTATION/ DEADLINE</th></tr>
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Reports and Examinations of Non-Bank Financial Companies by the Federal Reserve – Section 161

The Federal Reserve may require each non-bank financial company supervised by the Federal Reserve, and any of its subsidiaries, to submit reports to inform the Federal Reserve of the financial condition of the company or subsidiary, systems of the company or subsidiary for monitoring and controlling financial, operating, and other risks, and the extent to which activities and operations of the company or subsidiary pose a threat to the financial stability of the U.S.

The Federal Reserve may examine any non-bank financial company supervised by the Federal Reserve and any subsidiary of such company, to inform the Federal Reserve of:

1. The nature of the operations and financial condition of the company and such subsidiary;
2. The financial, operational, and other risks of the company or such subsidiary that may pose a threat to the safety and soundness of such subsidiary or to the financial stability of the United States;
3. The systems for monitoring and controlling such risks; and
4. Compliance by the company or such subsidiary with the requirements of this title.

Commentary/Impact:

By allowing the Federal Reserve to conduct examinations of non-bank financial companies, the Dodd-Frank Act is expanding the scope of the Federal Reserve's regulatory duties. This provision is designed to give the Federal Reserve a glimpse into the operations of systemically important non-bank companies which will allow the regulator to discover potential weaknesses in large companies that could ultimately place stress on the broader economy. Practically speaking, non-bank entities subject to supervision of the Federal Reserve will have to ensure that their risk metrics are kept current in order to satisfy the examiners at the Federal Reserve. Ultimately, this may force entities to devote more resources to such areas.

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Heightened Prudential Standards Imposed by the Federal Reserve – Section 165

Mandatory Requirements for Systemically Significant Non-Bank Financial Institutions and Banks with $50 billion in consolidated assets

1. Risk-based capital requirements and leverage limits;
2. Liquidity requirements;
3. Overall risk management requirements;
4. Resolution plan (see below) and credit exposure report requirements (detailing the extent of exposures to and from systemically significant institutions); and
5. Concentration limits.

Discretionary Requirements (i.e., Requirements that the Federal Reserve is authorized to impose)

6. Contingent capital requirement (whether this requirement will be utilized in practice is dependent on the findings of a study that will be undertaken by the FSOC and presented to Congress);
7. Enhanced public disclosures;

</td><td>In general, Federal Reserve rules due within 18 months of enactment.</td></tr>
</table>

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
8. Short-term debt limits; and 9. Such other prudential standards as the Federal Reserve determines are appropriate. Resolution Plan Requirements: Application: Any bank holding company with over $50 billion in consolidated assets and any non-bank financial company under Federal Reserve supervision. Requirement for Plan: Submitted on a periodic basis to the Federal Reserve, FSOC and FDIC. Information Requirements: 1. Manner and extent to which any insured depository institution affiliated with the company is adequately protected from risks arising from the activities of any non-bank subsidiaries of the company; 2. Full descriptions of the ownership structure, assets, liabilities, and contractual obligations of the company; 3. Identification of the cross-guarantees tied to different securities, identification of major counterparties, and a process for determining to whom the collateral of the company is pledged; and 4. Any other information that the Federal Reserve and the FDIC jointly require by rule or order. Stress Test Requirements *Performed by the Federal Reserve*: Generally applicable to banking organizations with greater than $50 billion in consolidated assets and any non-bank financial company under Federal Reserve supervision. In conducting the stress tests, the Federal Reserve must/may carry out the following actions: 1. Provide for at least three different sets of conditions under which the evaluation shall be conducted; 2. Develop and apply other analytic techniques as necessary to identify, measure, and monitor risks to the financial stability of the United States; 3. Require updated resolution plans as the Federal Reserve determines appropriate, based on the results of the analyses; and 4. Publish a summary of the results of the stress tests. *Performed by the Company*: A non-bank financial company supervised by the Federal Reserve and a bank holding company with assets of not less than $50 billion must conduct semi-annual stress tests. All other financial companies that have total consolidated assets of more than $10 billion and that are regulated by a primary Federal financial regulatory agency shall conduct annual stress tests. Each primary Federal financial regulatory agency, in coordination with the Federal Reserve, will issue regulations that: 1. Define the term "stress test" for purposes of this section; 2. Establish methodologies for the conduct of stress tests that shall provide for at least three different sets of conditions under which to carry-out the tests; 3. Establish the form and content of the report that must be submitted to the Federal Reserve and the company's primary financial regulator; 4. Require companies subject to this provision to publish the results from the stress tests. Establishment of a Risk Committee	

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Application: Any public non-bank financial company supervised by the Federal Reserve and each public bank holding company with total consolidated assets of not less than $10 billion must establish a risk committee. The risk committee established under this section will: 1. Oversee enterprise-wide risk management practices; 2. Include a certain number of independent directors as may be determined by the Federal Reserve, based on the nature of operations, size of assets and other appropriate criteria; and 3. Include at least one risk management expert having experience in identifying, assessing, and managing risk exposures of large, complex firms.	
Leverage and Risk Based Capital Requirements (the "Collins Amendment") – Section 171 The Collins Amendment restricts the ability of a depository institution holding company to include trust preferred securities as a Tier 1 asset when calculating regulatory capital ratios. Certain grandfathering is provided for outstanding trust preferred securities. Bank holding companies with more than $15 billion in assets: a three-year phase-out period beginning January 1, 2013 after which trust preferred securities issued before May 19, 2010 will no longer be treated as Tier 1 capital. Bank holding companies with assets between $500 million and $15 billion: trust preferred securities issued before May 19, 2010 will continue to count as Tier 1 capital. Bank holding companies with less than $500 million in assets: In general, exempt from the Collins Amendment requirements.	The Collins Amendment will be applicable anywhere between 18 months and five years after enactment of the Dodd-Frank Act, depending on the type of entity (i.e., bank holding company, thrift holding company, mutual holding company, etc.).

Title II – Orderly Liquidation Authority

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Definition of "<u>Financial Company</u>" – Section 201(a)(11)

A "financial company" means a U.S. organized company that is (1) a bank holding company, as defined in Section 2(a) of the Bank Holding Company Act of 1956 (the "<u>BHC Act</u>"), (2) a non-bank financial company supervised by the Federal Reserve, (3) any company that is "predominantly engaged" in activities the Federal Reserve has determined are "financial in nature" under Section 4(k) of the BHC Act, or (4) any subsidiary of any of the foregoing, other than a subsidiary that is an "insured depository institution" or an "insurance company."

Commentary/Impact:

For purposes of (3), a company would not be deemed to be "predominantly engaged" in activities that are financial in nature if the consolidated revenues of the company and all its subsidiaries, including those from depository institutions, derived from such activities constitute less than 85% of the total consolidated revenues of such company and all of its subsidiaries, including those from depository institutions, under regulations to be established by the FDIC, in consultation with the Treasury.

</td><td>Effective as of enactment.</td></tr>
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Systemic Risk Determination – Section 203

The FDIC (or the SEC in the case of a broker-dealer, or the FIO in the case of an insurance company) and the Federal Reserve, on their own initiative or at the request of the Treasury Secretary, may recommend to the Treasury Secretary to appoint the FDIC as receiver for a financial company. Such a determination can be made by the Treasury Secretary only if, after consultation with the President, the Treasury Secretary determines that:

1. the company satisfies the definition of "financial company";
2. the company is in default or in danger of default;
3. the failure of the financial company and its resolution under the law that would otherwise apply would have "serious adverse effects on financial stability in the United States";
4. no viable private sector alternative is available to prevent the default;
5. the impact on creditors, counterparties and shareholders of the financial company and other market participants of utilizing Title II would be outweighed by the impact on financial stability in the United States;
6. the proposed course of action under Title II would mitigate the adverse effects on the financial system; and
7. a federal agency has ordered the financial company to convert all of its convertible debt instruments that are subject to the regulatory order.

Such a company is a "covered financial company."

Commentary/Impact:

While the Bankruptcy Code applies to most individuals and business entities with specified connections to the United States, the orderly liquidation authority under the Dodd-Frank Act would be limited to financial companies that have significant amounts of assets and public debt. Insured depository institutions and insurance companies are not covered under either regime.

</td><td>Effective as of enactment.</td></tr>
</table>

COMMENTARY/IMPACT	IMPLEMENTATION/ DEADLINE
Section 203 imposes fairly rigorous required findings to be made before a financial company can become subject to FDIC receivership. Of particular note, the Treasury Secretary must make a determination that application of the provisions of the Bankruptcy Code would have "serious adverse effects on financial stability in the United States." This seems to limit the scope of Title II to firms that are truly "too big to fail." The grounds upon which the FDIC is appointed receiver are significantly more limited under the Dodd-Frank Act than under Sections 11 and 13 of the Federal Deposit Insurance Act (the "FDIA") with respect to depository institutions. *Under the Bankruptcy Code, proceedings can be commenced either voluntarily by the debtor or involuntarily by creditors (it is more common for the debtor to commence proceedings). In this way, the Dodd-Frank Act grants the Treasury Secretary a newly created power to force a financial company into receivership after making certain financial distress and systemic risk determinations.*	
Judicial Review – Section 202(a)(1)(A)(i) After the Treasury Secretary determines that a financial company is a "covered financial company" under Section 203: (i) if the financial company consents to the appointment of the FDIC as receiver, the Treasury Secretary shall appoint the FDIC as receiver, or (ii) if the financial company does not consent, the Treasury Secretary shall petition the Washington, D.C. District Court for an order authorizing the appointment of the FDIC as receiver. Commentary/Impact: *The inclusion of this provision is intended as a safeguard, although the petition would be deemed to be automatically granted if not acted upon by the district court within 24 hours of receipt.*	Effective as of enactment.
Subsidiaries of Covered Financial Companies – Section 210 (a)(1)(E) The FDIC may appoint itself as receiver of any "covered subsidiary" of a covered financial company. A "covered subsidiary" excludes an insured depository institution, an insurance company, or an SEC-registered broker-dealer. Commentary/Impact: *The exclusion of insured depository institutions, insurance companies and broker-dealers from the definition of "covered subsidiaries" means that various regimes and regulators will likely continue to be employed in the liquidation of a large financial group.*	Effective as of enactment.
Orderly Liquidation of Covered Brokers and Dealers – Section 205 This section requires the FDIC as receiver of a broker-dealer to appoint the Securities Investor Protection Corporation ("SIPC") to act as trustee for liquidation of broker-dealers covered by the Securities Investor Protection Act ("SIPA") (a "covered broker or dealer"). SIPC would have full authority to liquidate the broker-dealer under SIPA, except that the FDIC would retain the power to make funds available in the liquidation of those entities, establish bridge financial companies, transfer assets and liabilities, repudiate contracts and determine claims. However, the FDIC as receiver of the broker-dealer would have to consult with SIPC and the SEC (Section 204(c)(4)). Commentary/Impact: *Although SIPC would be appointed trustee under Section 205, the FDIC retains some authority in resolving a broker-dealer. Previously, the liquidation of a broker-dealer would have been handled exclusively by SIPC. This is an important feature of the Dodd-Frank Act, as many companies that would qualify as covered financial companies have broker-dealer subsidiaries.*	Effective as of enactment.

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<tr><th>COMMENTARY/IMPACT</th><th>IMPLEMENTATION/ DEADLINE</th></tr>
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Insurance Companies – Section 203(e)

Liquidation or rehabilitation of an insurance company that is a covered financial company, or of a covered financial company's insurance subsidiaries (which are excluded from the definition of "covered subsidiaries"), would be conducted as provided under state rehabilitation and liquidation laws.

Section 203(a)(1)(C) provides that the FIO and the Federal Reserve can recommend that the Treasury Secretary make a systemic risk determination with respect to an insurance company, upon which it would become a "covered financial company."

Commentary/Impact:

Section 203(a)(1)(C) indicates that insurance companies can be determined to be "covered financial companies." However, the sole effect would be to force the state to take action with respect to a failing insurance company, as the FDIC has the authority to stand in for the state regulator if the insurance company has not been placed in liquidation within 60 days of the Treasury Secretary's systemic risk determination.

</td><td>Effective as of enactment.</td></tr>
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Modeled on Section 11 of FDIA – Section 210

The FDIC has substantially the same receivership powers it has under the FDIA. These include the power to:

1. merge the covered financial company with another company (Section 210(a)(1)(G)(I));
2. transfer assets and liabilities of the institution without regard to contractual or other restrictions (Section 210(a)(1)(G)(II));
3. administer the claims process – distinguishing valid from invalid claims, determining priorities and administering distributions (Section 210(a)(2));
4. seek a stay of judicial actions or proceedings, which the court is required to grant (Section 210(a)(8)(B));
5. repudiate any contract, including but not limited to, executory contracts that the FDIC determines within a "reasonable period" to be "burdensome" if such repudiation will promote the orderly administration of the covered financial company (Section 210(c)(1));
6. enforce all contracts, other than "qualified financial contracts," notwithstanding the existence of an ipso facto clause (which would otherwise allow counterparties to terminate, accelerate, or declare a default upon the appointment of the FDIC as receiver) (Section 210(c)(13)(C));
7. bring actions against directors or officers of the covered financial company for gross negligence (Section 210(f)); and
8. establish and operate federally-chartered bridge financial companies to maximize the net asset value of the business and protect interests of stakeholders upon liquidation of the covered financial company (Section 210(h)).

In addition, as under the FDIA, the FDIC:

1. is exempt from taxes and levies when acting as receiver (Section 210(q)(1)(A)); and
2. is prohibited from transferring assets to any person that has defaulted on obligations in excess of $1 million, engaged in fraudulent activity with respect to any such obligation, or proposes to use a loan from the FDIC to effect such transfer (Section 210(r)(1)).

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COMMENTARY/IMPACT	IMPLEMENTATION/ DEADLINE
### Similarities to the Bankruptcy Code: <u>Fraudulent transfers (Section 210(a)(11)(A))</u>: the FDIC may avoid a transfer made within the two years preceding commencement if (i) the covered financial company made such transfer with actual intent to hinder, delay or defraud the receivership, or received less than a reasonable equivalent value in exchange for such transfer, and (ii) (among other things) the covered financial company was insolvent on the date of the transfer or became insolvent as a result thereof. <u>Preferences (Section 210(a)(11)(B))</u>: the FDIC may avoid a transfer to a creditor on account of an existing debt if (i) the transfer was made while the financial company was insolvent within the 90 days preceding the appointment of the FDIC as receiver (or within one year preceding the appointment if the creditor was an insider) and (ii) such transfer enables the creditor to receive more than it otherwise would have received. <u>Setoff (Section 210(a)(12))</u>: Section 210(a)(12) of the Dodd-Frank Act provides that a creditor's right to offset a mutual debt is unaffected, subject to certain exceptions. Commentary/Impact: *The fraudulent conveyance prohibition closely tracks Section 548 of the Bankruptcy Code, with the exception that the insolvency requirement applies to transfers made with actual intent to hinder, delay or defraud the receivership.* *The preferential transfers prohibition closely tracks Section 547 of the Bankruptcy Code and cross-references the defenses in Section 547(c), including the new value exception.* *The express preservation of a creditor's setoff rights mirrors the language of Section 553 of the Bankruptcy Code.*	Effective as of enactment.
### Qualified Financial Contracts ("<u>QFC</u>") – Sections 210(c)(8)-(11) Like the FDIA, the Dodd-Frank Act contains safe harbor provisions expressly permitting a counterparty to a QFC to exercise its contractual right to terminate, liquidate, accelerate, net or offset under the QFC (unless such right arises solely as a result of or incidental to the appointment of the FDIC as receiver), notwithstanding anything to the contrary in the Dodd-Frank Act (or any other provision of federal law). However, the counterparty is stayed from exercising any such rights until 5:00 p.m. on the business day following the date of appointment of the FDIC as receiver. QFCs include "any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, and any similar agreement that the FDIC determines by regulation, resolution or order to be a qualified financial contract." The FDIC must transfer to a single transferee either all the QFCs of a counterparty or none of the QFCs of such counterparty. "Walkaway clauses," which are provisions that would suspend or extinguish a counterparty's payment obligations to the covered financial company, are not enforceable. Section 210(a)(6)(A) contains a requirement that to be enforceable against the FDIC as receiver, an agreement must be in writing. Commentary/Impact: *Under the Bankruptcy Code, QFCs can be closed-out/netted immediately and remedies against collateral can be exercised as an exception to the automatic stay. Earlier drafts of the Dodd-Frank Act stayed counterparties from exercising remedies for three days, which was reduced to one day in the final draft (as under the FDIA).*	Effective as of enactment.

COMMENTARY/IMPACT	IMPLEMENTATION/ DEADLINE
The purpose of the provisions related to QFCs is to reduce systemic risk within the financial markets arising from the interrelatedness of these transactions between financial institutions.	
Orderly Liquidation Fund – Sections 204 and 210 Under Section 204, upon its appointment as receiver for a covered financial company, the FDIC may make funds available for the orderly liquidation of the covered financial company. These funds would be made available to the receivership from the "Orderly Liquidation Fund" established pursuant to section 210(n). Section 210(n) directs the Treasury to establish an Orderly Liquidation Fund, which will be available to the FDIC to carry out its functions as receiver under the Dodd-Frank Act. Amounts in the fund will be made available to the FDIC as receiver only if (i) the FDIC has developed an orderly liquidation plan that is acceptable to the Treasury Secretary and (ii) the Treasury Secretary and the FDIC have entered an agreement that provides a specific schedule for the repayment of any amount borrowed and demonstrates that the FDIC will receive sufficient income from the assets of the liquidated company to make such payments. To repay any borrowings, the FDIC will first make assessments on entities that received more in the resolution than they would have received in liquidation to the extent of such excess (less amounts necessary to initiate or continue receivership or bridge financial company operations), and second, if necessary, on Bank Holding Companies with total consolidated assets of $50 billion or more, non-bank financial companies supervised by the Federal Reserve, and other financial companies with total consolidated assets of $50 billion or more. In making such assessments, the FDIC is required to establish a "risk matrix," which will take into account recommendations from the FSOC. Factors to be considered in creating this risk matrix include: 1. economic conditions generally affecting financial companies; 2. assessments imposed on a financial company under other law; and 3. risks presented by the financial company to the financial system. Commentary/Impact: *Unlike the FDIA, the deposit insurance fund would not be used for any financial assistance provided by the FDIC under the Dodd-Frank Act. House lawmakers had originally favored the creation of a standing pool of money paid for by large financial firms that the government would have on hand to deal with the costs of a failing financial institution. In exchange for dropping that requirement, the final text of the Act contains the requirement of a mandatory repayment plan. This is probably a response to the politically unpopular 2008 bailouts. However, the development of such a plan may be difficult if the FDIC is faced with a repeat of the 2008 financial crisis because of market uncertainty.* *A noteworthy feature of this section is that if costs cannot be covered by the failing company and its claimants, financial firms with more than $50 billion in total assets will be assessed.*	Effective as of enactment.
Miscellaneous provisions Section 206 – The FDIC shall not take an equity interest in or become a shareholder of any covered financial company and shall ensure that management and the board of directors of the covered financial company are removed. Section 214 – All financial companies put into receivership under the Dodd-Frank Act shall be liquidated. No taxpayer funds shall be used to prevent the	Effective as of enactment.

COMMENTARY/IMPACT	IMPLEMENTATION/ DEADLINE
liquidation of any financial company. Commentary/Impact: *These provisions can probably be attributed to the unpopularity of the 2008 bailouts. The fact that all companies placed into receivership will be liquidated arguably eliminates the "moral hazard" that troubled opponents of the bailouts.* *While the inclusion of provisions limiting the use of taxpayer money may be politically expedient, it is unclear how they address systemic risk.*	

Title IV – Regulation of Advisers to Hedge Funds and Others

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Repeal of "Fourteen or Fewer Client" Exemption – Section 403

Current Section 203(b)(3) of the Investment Advisers Act of 1940, as amended (the "Advisers Act") is repealed. That section had provided for an exemption from registration for an investment adviser that, during the preceding twelve months, had 14 or fewer clients and did not hold itself out to the public as an investment adviser.

Commentary/Impact:

Many managers of private funds, including hedge funds and private equity funds, currently rely on this exemption from the requirement to register with the SEC as an investment adviser. With its repeal, virtually all U.S. fund managers and many non-U.S. fund managers must register, unless one of the new, more limited exemptions apply.

An exemption for private fund managers was not included in the final legislation.

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Registration with the SEC as an investment adviser required by the date one year after enactment.

Registration process would need to begin earlier.

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New $100 Million and $150 Million AUM Thresholds – Sections 408 and 410

A "mid-sized" adviser with between $25 million and $100 million AUM may not register with the SEC if it is required to register with its home state and is subject to state examination (except that it may register with the SEC if it would otherwise be required to register with 15 or more states, and must register if it advises a registered investment company or business development company). In addition, an adviser that has less than $150 million AUM and advises "solely" private funds is now exempt from SEC registration.

Commentary/Impact:

Consistent with previous law, an investment adviser that has less than $25 million AUM generally may not register with the SEC (with certain exceptions such as if it advises a registered investment company or business development company).

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One year before the "mid-sized" adviser provision takes effect.

No deadline for SEC rulemaking regarding the $150 million AUM threshold.

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Non-U.S. Investment Advisers – Section 402

A non-U.S. adviser is exempt from SEC registration only so long as the adviser:

1. Has no place of business in the United States;
2. Has fewer than 15 U.S. clients and investors in private funds;
3. Has less than $25 million aggregate AUM attributable to U.S. clients and investors in private funds (that $25 million threshold can be increased by SEC rulemaking);
4. Does not "hold itself out" to the public as a securities investment adviser in United States; and
5. Does not advise a U.S. registered investment company or business development company.

Commentary/Impact:

The SEC registration provisions in the legislation have broad extraterritorial effect. The new "foreign private adviser" exemption from SEC registration is very

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Registration with the SEC as an investment adviser required by the date one year after enactment.

Registration process would need to begin earlier.

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KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
narrow, and is much narrower than is available to non-U.S. advisers currently. Non-U.S. advisers should watch for other guidance that may somewhat limit the extraterritorial effect of the new law. For example, we currently expect that the so-called Unibanco guidance from the SEC staff will remain in effect, which may limit the effect on non-U.S. affiliates of the SEC-registered non-U.S. adviser. It is also possible that the SEC will adopt a form of "registration lite" - as some called the SEC's different requirements for certain non-U.S. advisers before the Goldstein case was decided.	
No SEC Registration Exemption for Private Equity Fund Managers Commentary/Impact: *Although Congress for months had considered exempting private equity fund managers from SEC registration requirements, that exemption was removed by the time the bill came to its final vote in Congress.*	N/A
Exemption for Venture Capital Fund Managers – Section 407 An investment adviser "solely" to one or more venture capital funds is to be exempt from SEC registration, but will become subject to recordkeeping and reporting requirements. Commentary/Impact: *It is not clear how burdensome the recordkeeping or reporting requirements will be.*	One year for the SEC to define "venture capital fund." No deadline for the SEC to impose recordkeeping and reporting requirements.
Exclusion for Family Offices – Section 409 A "family office" is now excluded from the definition of "investment adviser." This provides for the grandfathering of certain limited family office activities, but a family office relying on the grandfathering provision will be subject to the antifraud provisions in Sections 206(1), (2) and (4) of the Advisers Act. Commentary/Impact: *This means that parts of the Advisers Act that apply to all investment advisers – whether registered or exempt from registration – no longer apply to family offices that previously were investment advisers.*	No deadline for the SEC to define "family office."
SEC Registration of CFTC-Registered Commodity Trading Advisor – Section 403 An investment adviser registered with the CFTC as a commodity trading advisor must register with the SEC should its business become predominantly the provision of securities-related advice.	Effective one year after enactment.
Required Books and Records; Confidentiality of Records and Reports – Sections 404 and 406 The SEC will adopt recordkeeping and reporting requirements regarding private funds, for purposes of investor protection or systemic risk assessment. Various reporting topics are specified, including asset size, leverage, and investment positions. The SEC must generally hold the records and reports confidential, but certain exceptions are included.	SEC to adopt rules within one year after enactment.

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Commentary/Impact: *Private fund managers will have to become accustomed to unprecedented levels of transparency and a new layer of internal administration as they prepare and submit detailed reports to the SEC.*	
Definition of "Client" – Section 406 The SEC is now granted broad authority to define technical, trade and other terms used in the Advisers Act. It is prohibited, however, from defining "client" for purposes of Sections 206(1) and (2) to include an investor in a private fund managed by an investment adviser if the private fund has entered into an advisory contract with the adviser. Commentary/Impact: *The SEC had lost a court case (Goldstein v. SEC) that focused on the SEC's authority to consider private fund investors to be "clients" of the fund's investment adviser for certain purposes. Congress has now granted the SEC broad authority to define terms used in the Advisers Act, including "client." As a significant exception, the SEC is expressly prohibited from defining the term "client" to include an investor in a private fund for purposes of the broad antifraud provisions in Sections 206(1) and (2) of the Advisers Act, from which courts have derived the federal fiduciary duty that advisers owe clients. As fund investors are bound that have conflicting interests among themselves, it is generally not practicable to comply with a fiduciary duty owed to each fund investor. As a result of this exception, a fund's adviser will not owe a fiduciary duty to particular fund investors but rather to the fund itself, as under previous law.*	Effective one year after enactment.
Revisiting the Accredited Investor and Qualified Client Standards – Sections 413, 415, and 418 The accredited investor standard established in Regulation D under the Securities Act of 1933, as amended (the "Securities Act"), which relates to private placements of securities, is to remove the value of a primary residence when determining whether a natural person has $1 million net worth. Every four years, the SEC is to review and, as appropriate, adjust the "accredited investor" standard in its entirety. The GAO to complete a study and report to Congress on the appropriate criteria for the accredited investor standard and eligibility to invest in private funds. The qualified client standard established in Rule 205-3 under the Advisers Act is to be adjusted by the SEC after one year, and every five years thereafter, to reflect inflation. Commentary/Impact: *Private fund managers can expect to have to update subscription documents and related compliance systems periodically as the accredited investor and qualified client standards are adjusted.* *The effect of amendments to the "accredited investor" standard may not be limited to private funds, and may affect all issuers that conduct private placements under Regulation D.*	New accredited investor standard to apply for four years and then be subject to regular updating (at least every four years). GAO study due within three years. Qualified client standard to adjust in one year. Afterwards, periodic adjustments will be made to the thresholds for being an accredited investor (every four years) and qualified client (every five years).

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Commentary/Impact: *The Act resolves any uncertainty surrounding the possibility of a state insurance regulator recharacterizing a swap (such as a credit default swap) as an insurance contract.* *The lack of explicit preemption of state gaming and bucket shop laws for swaps reintroduces legal uncertainty for these products, however.*	

Title VIII – Payment, Clearing and Settlement Supervision

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Designation of Systemic Importance – Section 804 The FSOC (by a two-thirds vote) given authority to designate the financial market utilities or payment, clearing or settlement activities that are or are likely to become systemically important, with opportunity for any affected market utility or financial institution to request a hearing before the FSOC makes a final determination. For these purposes, “systemic importance” means a situation where the failure of or a disruption to the functioning of a financial market utility or the conduct of a payment, clearing, or settlement activity could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the financial system of the United States. Commentary/Impact: *Provides for Federal oversight by statute over systemically important payment, clearing and settlement systems for funds, securities and other financial instruments. Currently, the Federal Reserve is the only Federal authority over funds payment systems while the SEC and CFTC supervise securities and futures clearing organizations.*	Effective as of enactment.
Risk-Management Standards and Conduct of Certain Entities – Section 802(b) Federal Reserve given authority to promote uniform standards for the management of risks by systemically important financial market utilities and the conduct of systemically important payment, clearing and settlement activities by financial institutions, and to have an enhanced role in the supervision of such standards. Commentary/Impact: *Federal Reserve authority significantly limited in Conference to restrict its ability to perform these functions for utilities registered with the SEC or CFTC.*	Effective as of enactment.
Financial Market Utility and Financial Institution Defined – Section 803 The term “financial market utility” means any person that manages or operates a multilateral system for the purpose of transferring, clearing, or settling payments, securities, or other financial transactions among financial institutions or between financial institutions and the person. The term “financial market utility” does not include derivatives clearing organizations registered with the CFTC or clearing agencies registered with the SEC and “financial institution” does not include designated contract markets, swap execution facilities, securities exchanges and similar organizations registered with the CFTC or SEC, with the exclusion only applicable to the activities requiring such registration. Commentary/Impact: *See above on limits on Federal Reserve authority.*	Effective as of enactment.

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Standards for Systemically Important Financial Market Utilities and Payment, Clearing, or Settlement Activities – Section 805 Federal Reserve given authority to prescribe risk management standards governing operations of the payment, clearing and settlement activities of market utilities and of financial institutions, with the objectives of promoting robust risk management, safety and soundness, reducing systemic risks, supporting stability of the financial system, and using policies and procedures, margin and collateral requirements, default policies and procedures, timely clearing and settlement requirements, and capital and financial requirements (but see the following box). Scope of Federal Reserve authority over CFTC- and SEC-registered entities is strictly limited; the SEC and CFTC have authority to prescribe these standards for their regulated entities in consultation with the FSOC and Federal Reserve. In addition, the FSOC and Federal Reserve are explicitly denied authority over the classes of swaps accepted for clearing by a designated clearing entity or required to be cleared, over reporting requirements, and the like.	Effective as of enactment.
Consultation/Common Framework for Designated Clearing Entity Management – Sections 812 and 813 The SEC and CFTC required to coordinate the development of risk management supervision programs with the Federal Reserve and to consult with the Federal Reserve prior to exercising approval of rule changes and similar actions as to derivatives clearing organizations and clearing agencies.	Effective as of enactment.
Operations of Designated Financial Market Utilities – Section 806(a)-(d) The Federal Reserve may authorize Federal Reserve Banks to open accounts for market utilities and provide services, including discount window services, and to pay earnings on balances in the accounts, but, as amended by the Conference, discount window advances are available only in unusual and exigent circumstances. Market utilities required to give prior notice to their supervisory authorities of any rule change, with the terms of such notice to be determined in consultation with the Federal Reserve, and the authority could object to the change. Commentary/Impact: *Limit on discount window advances imposed in Conference. Limit is based on Section 13, paragraph 3 of Federal Reserve Act requirements.*	Effective as of enactment.

Title IX – Investor Protections and Improvements to the Regulation of Securities

Subtitle A – Increasing Investor Protection - Sections 911-919D

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Study and Rulemaking Regarding Obligations of Brokers, Dealers, and Investment Advisers – Section 913 Authorization for the SEC to impose a fiduciary duty on broker-dealers, and to set a new standard of care for investment advisers. The SEC is given authority to adopt rules that a broker-dealer or investment adviser, when providing personalized investment advice about securities to a retail customer (or such other customers as the SEC may provide), would be subject to a standard of care requiring it to act in the best interest of the customer without regard to the financial or other interest of the broker-dealer or adviser. Any material conflicts of interest would have to be disclosed and may be consented to by the customer. The rules would have to provide that the standard of care is no less stringent than the standard currently applicable to investment advisers under Sections 206(1) and (2) of the Advisers Act. A customer would not be defined to include an investor in a private fund managed pursuant to an advisory contract. The level of fees could not, by itself, be considered a violation of the standard of care. A "retail" customer is defined more broadly than its plain meaning, as set out in the adjacent box. Commentary/Impact: *The question of whether broker-dealers should be subject to a fiduciary duty has been a subject of debate for years. The imposition of such a duty by the SEC - which is not required, simply authorized - would have significant risk management implications for financial service firms, as would rules expressly defining the standard of care for investment advisers. Courts have found that advisers owe a fiduciary duty to clients under Sections 206(1) and (2) of the Advisers Act, but that duty has not necessarily required that an adviser act without regard to its own interests, as would be the case in rules adopted pursuant to this provision. The apparent consent requirement with respect to material conflicts of interest would be a steeper standard than the currently accepted practice of, as a general matter, disclosing material conflicts. If the rules were to apply only to retail customers, defined by the provision to include natural persons (without regard to net worth or other accreditation factors) who invest for personal, family or household purposes, broker-dealers and investment advisers may have an incentive not to accept individuals as clients.*	Effective as of enactment.
Offices Dedicated to Investor Protection – Sections 911, 912, 915, and 919D Establishing the following offices in the SEC dedicated to investor protection: Investor Advisory Committee, Office of Investor Advocate, and Ombudsman.	Effective as of enactment.
Clarifies SEC authority on: (i) investor testing, and (ii) mandatory investor disclosures by broker-dealers before purchase of investment products and services by retail investors. Commentary/Impact: *The Investor Advocate will represent the interests of retail investors, and the Ombudsman will act as middleman between the Commission and the retail investors. The Investor Advisory Committee will meet at least twice a year to work with the SEC on investor protection issues. The Committee comprises the Investor Advocate, a representative of state securities commissions, a representative of senior citizens' interests, and between 10 and 20 members appointed*	Effective as of enactment.

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
by the SEC to represent interests of equity and debt investors, including investors in mutual funds, and interests of institutional investors, including interests of pension funds and registered investment companies. *Clarification of SEC authority to collect data from investors through its investor testing programs, and to consult with academics and consultants in executing these programs. The SEC can also require brokers or dealers to disclose certain information or documents to a retail investor before the purchase of an investment product or service by the retail investor.*	
Streamlining of Filing Procedures for Self-Regulatory Organizations ("SROs") – Section 916 Provides for streamlining of SRO procedures. Commentary/Impact: *The SEC must approve or disapprove of a rule change by the SRO within 180 days, or under certain circumstances, 240 days. The SEC's failure to act within this time period will validate the rule change.*	SEC to promulgate rules within 180 days of enactment.
Miscellaneous SEC Studies	
Mandates the SEC to study the appropriate standard of care for broker-dealers and investment advisers. Section 913	Study due within six months of enactment.
Mandates the SEC to study enhancing investment adviser examinations. Section 914	Study due within 180 days from enactment.
Mandates the SEC to study financial literacy among investors. Section 918	Study due within two years from enactment.
Mandates the Comptroller General of the United States to study mutual fund advertising. Section 918	Study due within 18 months from enactment.
Mandates the Comptroller General of the United States to study conflicts of interests. Section 919A	Study due within 18 months from enactment.
Mandates the SEC to study improved investor access to information on investment advisers & broker-dealers. Section 919B	Study due within six months from enactment. SEC to implement any

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
	recommendations of the study within 18 months of enactment.
Mandates the Comptroller General of the United States to study financial planners and the use of financial designations. Section 919C Commentary/Impact: *Studies may be a launching point for future legislation.*	Study due within 180 days from enactment.

Subtitle B – Increasing Regulatory Enforcement and Remedies - Sections 921 to 929Z

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Provisions Relating to Whistleblowers – Sections 922, 923, 924, and 929A Accords more protection and monetary incentives to whistleblowers. There will also be a study evaluating the whistleblower program. Commentary/Impact: *A whistleblower can be a violator, as long as the whistleblower is not criminally convicted. If the whistleblower provides information that leads to an SEC action resulting in more than $1 million in sanctions, the whistleblower is entitled to between 10-30% of the sanction. Awards will be paid from an SEC Investor Protection Fund established in the Treasury, which contains securities laws sanctions minus compensation distributed to victims.* *A whistleblower is protected from retaliation from its employer. A whistleblower has a private right of action for employer retaliation. Whistleblower protection against retaliation also extends to employees of subsidiaries and affiliates of publicly traded companies. The SEC is also bound to protect the whistleblower's identity until disclosure of such identity is necessary in a public proceeding. Other agencies with whom the SEC shares the whistleblower's identity must also protect the identity.*	Final regulations due 270 days after enactment. Study due within 30 months after enactment.
Strengthening Enforcement by the SEC/Study on Extra-Territorial Rights of Action – Sections 929P and 929Y Strengthens the SEC's enforcement powers by allowing the SEC to impose monetary penalties against persons, not just entities, in cease-and-desist proceedings, and restores SEC's extraterritorial jurisdiction for violation of the antifraud provisions when substantial conduct occurs or effects are felt in the United States. Also clarifies that control person liability under Section 20(a) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), applies in SEC enforcement actions as well as in private actions. There will also be a study on private rights of action for extraterritorial antifraud claims. Commentary/Impact: *The SEC's ability to penalize executives, instead of just the regulated entities, would provide great incentives for compliance. Note that the extraterritorial provision only partially overrules the Supreme Court decision in Morrison (2010) that emphasizes effects over conduct. This extraterritorial amendment addresses SEC enforcement while the Morrison case involved a private cause of action.*	Effective as of enactment. Study due within 18 months of enactment.
Revision to Recordkeeping Rule – Section 929Q Requires any person having custody or using securities, deposits or credits of a registered investment company to maintain records of such custody and use. Also requires registered investment companies to maintain records of persons having custody or use of securities, deposits or credits of clients.	Effective as of enactment.
Short-Sale Reforms – Section 929X Adopts reforms to (i) prohibit manipulative short sales, (ii) to mandate the SEC to prescribe rules for public disclosure of short sales, and (iii) to mandate disclosure by registered broker/ dealer to customers of option to not facilitate short sales, and of possibility that broker/dealer may benefit from lending of securities as part of short sales.	

Subtitle C – Improvements to the Regulation of Credit Rating Agencies - Sections 931-939H

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Future Studies Related to Credit Rating Agencies – Section 939H; Section 939C-F

The Dodd-Frank Act calls for the following studies in relation to credit rating industry:

1. The SEC must study standardizing credit rating terminology across credit rating agencies, standardizing the market stress conditions under which ratings are evaluated, requiring a quantitative correspondence between credit ratings and a range of default probabilities and loss expectations under standardized conditions of economic stress, and standardizing credit rating terminology across asset classes and to submit a report to Congress not later than one year after the date of enactment;
2. The SEC must study the independence of nationally recognized statistical rating organizations ("NRSROs") and how independence affects ratings (including whether NRSROs should be prohibited from providing other services to an issuer to which it provides a credit rating) and to submit a report to Congress not later than three years after the date of enactment;
3. The Comptroller General must study alternative means for compensating NRSROs in order to create incentives for NRSROs to provide more accurate credit ratings and to study the feasibility and merits of creating an independent professional organization for rating analysts employed by NRSROs and to submit a report not later than 18 months after the date of enactment;
4. The Comptroller General must study the feasibility and merits of creating an independent professional organization for rating analysts employed by NRSROs and to submit a report not later than one year after the SEC issues rules on credit rating analyst qualifications; and
5. The SEC must study the credit rating process for structured finance products and the conflicts of interest associated with the issuer-pay and subscriber-pay modes, the feasibility of establishing a system in which a public or private utility or an SRO assigns NRSROs to determine the credit ratings of structured finance products, the range of metrics that could be used to determine the accuracy of credit ratings, and alternative means for compensating NRSROs that would create incentives for accurate credit ratings, to submit a report not later than 24 months after the date of enactment and to issues rules, if appropriate, establishing a system for the assignment of NRSROs to determine the initial credit ratings of structured finance products, in a manner that prevents the issuer, sponsor or underwriter of the structured finance product from selecting the NRSRO that will determine the initial credit ratings and monitor such credit ratings.

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Subtitle D – Improvements to the Asset-Backed Securitization Process - Sections 941-957

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Definition of ABS – Section 941(a)

The Act defines an ABS as a security collateralized by any type of self-liquidating financial asset (including a loan, a lease, a mortgage, or a secured or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flow from the asset.

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Regulation of Credit Risk Retention – Section 941(b)

"Skin in the Game" [1] – The Act requires the regulators to prescribe regulations to require any securitizer (<u>i.e.</u>, the issuer of an ABS or a person who organizes and initiates an ABS transaction) to retain an economic interest in a portion of the credit risk for any asset that the securitizer, through the issuance of an ABS, transfers to a third party. The regulations to be prescribed will:

1. prohibit a securitizer from hedging the credit risk;
2. require a securitizer to retain (i) not less than 5% of the credit risk for any asset (I) that is not a qualified residential mortgage, or (II) that is a qualified residential mortgage if one or more of the assets that collateralize the ABS are not qualified residential mortgages; or (ii) less than 5% of the credit risk for an asset that is not a qualified residential mortgage if the originator of the asset meets the underwriting standards to be prescribed by the SEC;
3. specify (i) the permissible forms of risk retention; (ii) the minimum duration of the risk retention; and (iii) that a securitizer is not required to retain any part of the credit risk for an asset that is transferred, sold or conveyed through the issuance of an ABS by the securitizer, if all of the assets that collateralize the ABS are qualified residential mortgages;
4. apply, regardless of whether the securitizer is an insured depository institution;
5. with respect to a commercial mortgage, specify the permissible types, forms, and amounts of risk retention that would meet the requirements of subparagraph (B) above;
6. establish appropriate standards for retention of an economic interest with respect to collateralized debt obligations, securities collateralized by collateralized

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Effective Date – The proposed regulations will become effective (i) with respect to securitizers and originators of ABS backed by residential mortgages, one year after the date on which final rules are published in the Federal Register; and (ii) with respect to securitizers and originators of all other classes of ABS, two years after the date on which final rules are published in the Federal Register.

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[1] Risk retention has also been addressed in the proposing release approved for public comment by the SEC on April 7, 2010. *See* "IT'S A BRAVE NEW (ABS) WORLD: SEC Proposes New Regulations for Asset–Backed Securities Offerings" at: <u>http://www.shearman.com/files/Publication/240d7633-0919-4664-bdd8-16a1bcd3b31c/Presentation/PublicationAttachment/28f9816d-4903-4acc-be4f-fe5af08abf1b/CM-041510-Its-a-Brave-New-ABS-World.pdf</u>

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
debt obligations, and similar instruments collateralized by other ABSs; 7. provide for (i) a total or partial exemption of any securitization; (ii) a total or partial exemption for the securitization of an asset issued or guaranteed by the United States, an agency of the United States, or any state of the United States; and (iii) the allocation of risk retention obligations between a securitizer and an originator in the case of a securitizer that purchases assets from an originator; and 8. establish asset classes with separate rules, including residential mortgages, commercial mortgages, commercial loans and auto loans, and establish underwriting standards that specify the terms, conditions and characteristics of a loan within the asset class that indicate a low credit risk with respect to the loan. Regulators must prescribe the appropriate regulations no later than 270 days after the enactment of the Act.	
Exceptions to Risk Retention Defined – Section 941(b) The Act authorizes the regulators to adopt exemptions, exceptions and adjustments to the proposed rules, provided that they help ensure high-quality underwriting standards for the securitizers and originators and encourage them to implement appropriate risk management practices. The Dodd-Frank Act provides that: 1. "qualified residential mortgages," which term shall be defined by the regulators, 2. financial assets made, insured, guaranteed or purchased by any institution that is subject to the supervision of the Farm Credit Administration, and 3. any residential, multi-family or health care facility mortgage loan asset or securitization based on such asset, which is insured or guaranteed by the United States or any agency thereof, will be exempted, under certain conditions, from the proposed risk retention provisions.	
Authority to Coordinate – Section 941(b) The Act provides that the Chairperson of the FSOC will coordinate all joint rulemaking required by the Dodd-Frank Act.	
Study on Risk Retention – Section 941(c) The Dodd-Frank Act requires the regulators to conduct a study of the combined impact on each individual class of ABS of the new credit risk retention requirements contained in the Act and FAS 166 and 167, and to submit to Congress, not later than 90 days after the date of the enactment of the Dodd-Frank Act, a report on such study, including statutory and regulatory recommendations for eliminating any negative impacts on the continued viability of the asset-backed securitization markets and on the availability of credit for new lending identified by such study.	
Reporting Obligations – Section 942(a) The Dodd-Frank Act amends Section 15(d) of the Exchange Act to exclude ABSs from the automatic suspension of the duty to file periodic information as to any fiscal year (other than the fiscal year within which the registration statement became effective) if, at the beginning of such fiscal year, the securities of each class to which the registration statement relates are held of record by less than 300 persons, while such automatic suspension remains in effect for securities other than ABSs. The Act, instead, requires the SEC to provide for the suspension or termination of the duty to file periodic information for ABSs, on such terms and conditions as the SEC deems necessary.	

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Disclosure Obligations – Section 942(b) The Dodd-Frank Act amends Section 7 of the Securities Act to instruct the SEC to adopt regulations requiring issuers of ABSs to disclose information regarding the assets backing such ABS. In adopting such regulations, the SEC is directed to: 1. set standards for the format of the data provided by issuers of an ABS, which shall, to the extent feasible, facilitate comparison of such data across securities in similar types of asset classes; and 2. require issuers of ABSs, at a minimum, to disclose asset-level or loan-level data, if such data are necessary for investors to independently perform due diligence, including: (i) data having unique identifiers relating to loan brokers or originators; (ii) the nature and extent of the compensation of the broker or originator of the assets backing the security; and (iii) the amount of risk retention by the originator and the securitizer of such assets.	
ABS Representations and Warranties – Section 943 The Act instructs the SEC to prescribe regulations on the use of representations and warranties in the market for ABSs that: 1. require each NRSRO to include in any report accompanying a credit rating a description of: (A) the representations, warranties, and enforcement mechanisms available to investors; and (B) how they differ from the representations, warranties, and enforcement mechanisms in issuances of similar securities; and 2. require any securitizer to disclose fulfilled and unfulfilled repurchase requests across all trusts aggregated by the securitizer, so that investors may identify asset originators with clear underwriting deficiencies.	Regulations must be prescribed no later than 180 days after the enactment of the Dodd-Frank Act.
Elimination of Securities Act Exemption – Section 944 The Act eliminates Section 4(5) of the Securities Act, which currently sets forth an exemption from the registration requirements under the Securities Act for transactions involving offers of promissory notes directly secured by a first lien on a single parcel of real estate upon which is located a dwelling or other residential or commercial structure where such securities are originated, under certain conditions, by (i) a savings and loan association, savings bank, commercial bank, or similar banking institution, or (ii) a mortgagee approved by the Secretary of Housing and Urban Development ("HUD").	
Registration Statement and Asset Review – Section 945 The Dodd-Frank Act instructs the SEC to issue rules relating to the registration statement required to be filed by any issuer of an ABS that require any issuer of an ABS to perform a review of the assets underlying the ABS and disclose the nature of such review.	Rules must be issued no later than 180 days after the date of enactment of this Text.
Study on the Macroeconomic Effects of Risk Retention Requirements – Section 946 The Chairman of the FSOC must submit to Congress a report on the macroeconomic effects of the risk retention requirements and the other amendments made by the Act, including: 1. an analysis of the effects of risk retention on real estate asset price bubbles, including a retrospective estimate of what fraction of real estate losses may have been averted had such requirements been in force in recent years; 2. an analysis of the feasibility of minimizing real estate price bubbles by proactively adjusting the percentage of risk retention that must be borne by creditors	Report must be submitted no later than 180 days after the date of enactment of this Text.

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
and securitizers of real estate debt, as a function of regional or national market conditions; 3. a comparable analysis for proactively adjusting mortgage origination requirements; 4. an assessment of whether such proactive adjustments should be made by an independent regulator, or in a formulaic and transparent manner; 5. an assessment of whether such adjustments should take place independently or in concert with monetary policy; and 6. recommendations for implementation and enabling legislation.	

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Clawback Policies – Section 954

When a company prepares an accounting restatement on account of its material noncompliance with any financial reporting requirement, the company must recoup all incentive-based compensation (including stock options) paid to current or former executives during the three years preceding the date on which the restatement is required. The amount of compensation recoverable would be the excess of what was actually paid to the executive over the amount that would have been paid under the accounting restatement.

Commentary/Impact:

Incentive compensation clawback policies have become increasingly widespread in recent years. In this light, a clawback requirement may seemingly not represent a significant change from current practice. However, clawback practice is hardly uniform. Most public companies will likely need to revisit existing policies to ensure they comply with the Dodd-Frank Act requirements.

</td><td>The Dodd-Frank Act does not specify an implementation date for this listing rule.</td></tr>
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Mandatory Say-on-Pay – Section 951

Issuers must provide shareholders with the right to cast a non-binding vote approving the company's executive compensation as disclosed in the Compensation Discussion and Analysis section of the proxy statement and accompanying tabular and narrative disclosure. The vote must occur at least once every three years, with a frequency to be determined by a shareholder vote at least every six years.

Commentary/Impact:

Unlike prior proposals, the Dodd-Frank Act does not require an annual vote.

Winning approval for say-on-pay (and other compensation-related shareholder proposals) may prove more challenging in future years as the Dodd-Frank Act would disallow discretionary votes by brokers on these proposals.

</td><td>The vote must be held at all meetings occurring on or after the date that is six months following the enactment of the Dodd-Frank Act.</td></tr>
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Disclosure and Vote on Golden Parachutes – Section 951

Proxy statements and consent solicitations filed in connection with mergers, acquisitions, and major asset sales must describe, in clear and simple form, the arrangements with any named executive officers ("<u>NEOs</u>") of the company or the acquiring issuer concerning all compensation (whether present, deferred or contingent) related to the transaction. Companies would also be required to disclose the aggregate amount of compensation that will be paid or may become payable to the NEOs (together with the conditions to payment) as a result of the transaction.

Issuers must provide shareholders the opportunity to cast a separate non-binding vote to approve these payments unless the arrangements have been previously subject to a say-on-pay vote.

Commentary/Impact:

As is the case with the say-on-pay vote, the golden parachute vote is non-binding and will not overrule the board's compensation decisions or impose additional fiduciary duties on the board.

</td><td>This provision applies to all meetings occurring on or after the date that is six months following enactment of the Act.</td></tr>
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KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Compensation Committee Independence – Section 952 The SEC must direct the national securities exchanges and associations to prohibit the listing of securities of any issuer whose compensation committee is not comprised exclusively of independent directors. The Dodd-Frank Act tasks listing authorities with defining independence. In formulating the definition, factors to be considered include: 1. the source of compensation of the director, including any consulting, advisory, or other fees paid by the issuer; and 2. whether a director is affiliated with the issuer, a subsidiary of the issuer, or an affiliate of a subsidiary of the issuer. Commentary/Impact: *The compensation committee independence requirements do not apply to certain issuers including "controlled companies" (e.g., companies where more than 50% of the voting power is held by an individual, a group or another issuer) and foreign private issuers.*	SEC must enact rules no later than 360 days following enactment of the Act.
Compensation Consultant Independence – Section 952 Compensation committees are authorized to obtain advice of independent consultants, legal counsel and other advisors in their sole discretion. In selecting their advisers, compensation committees must take into account factors affecting independence. The SEC must identify competitively neutral independence factors and it provides the following partial list of considerations: 1. provision of other services by the adviser's employer; 2. the amount of fees paid to the adviser's employer, considered as a percentage of the employer's total revenues; 3. the policies and procedures of the adviser's employer that are designed to prevent conflicts of interest; 4. any business or personal relationship between the adviser and a member of the compensation committee; and 5. the adviser's ownership of stock of the issuer. Issuers must disclose whether (1) the compensation committee retained a consultant, (2) the consultant's work raised a conflict of interest, and (3) if so, how that conflict is being addressed. Commentary/Impact: *Unlike proposed rules, there is no mandatory independence requirement.* *The compensation consultant independence provisions do not apply to "controlled companies."*	Within one year following enactment of the Dodd-Frank Act, the SEC must adopt rules that require the listing authorities to prohibit the listing of securities of any issuer who does not comply with the consultant and adviser independence rules. SEC is required to adopt disclosure rules to be effective on or prior to the first anniversary of the date of enactment of the Dodd-Frank Act.
Additional Disclosure – Section 953 The SEC will require additional compensation-related proxy disclosure regarding: 1. The relationship between compensation actually paid and the financial performance of the issuer, taking into account any change in the stock value and dividends paid.	The Dodd-Frank Act does not specify a deadline for the SEC's rulemaking relating to additional disclosures.

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
2. Internal pay equity. Specifically, issuers would be required to disclose the median total annual compensation of all employees (other than the CEO), the annual total compensation of the CEO, and the ratio of these two amounts. 3. Whether employees (not only executive officers) or directors (or their designees) can hedge against decreases in the value of equity securities granted as compensation or otherwise directly or indirectly held by the employee or director. Commentary/Impact: *These requirements add additional compensation disclosure burdens for issuers.*	

Subtitle F – Improvements to the Management of the SEC – Sections 961-968

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Internal Supervisory Controls of SEC – Section 961 1. SEC must submit a report to the Senate Committee on Banking, Housing, and Urban Affairs and the House Committee on Financial Services (the "Committees"), generally within 90 days of the end of the fiscal year, which assesses the effectiveness of the SEC's internal supervisory controls and the effectiveness of procedures of the staff who perform examinations of registered entities, enforcement investigations, and reviews corporate filings, and is certified by the director of each division. 2. Government Accountability Office ("GAO") must also submit a report to the Committees, at least once every three years, reviewing the adequacy and effectiveness of the SEC's internal supervisory controls.	SEC's report due 90 days after fiscal year ends.
Personnel Management of SEC – Section 962 1. GAO must submit a triennial report to the Committees evaluating the quality of the personnel management of the SEC (including the effectiveness of supervisors in utilizing employees, promotion process, efficiency of internal communication, and initiatives to increase competence of staff). 2. After GAO issues report, the SEC is to submit a report to the Committees within 90 days, describing actions taken by the SEC in response to the recommendations in the GAO's report.	GAO's report due once every three years.
Financial Controls Audit of SEC – Section 963 1. SEC must submit a report to Congress, not later than six months after the fiscal year-end, describing management's responsibility to maintain adequate internal controls for financial reporting of the SEC, and its assessment of the effectiveness of such controls. 2. GAO must submit a report, for the first fiscal year after the enactment of the Dodd-Frank Act, assessing the effectiveness of the SEC's internal controls for financial reporting.	SEC's report due six months after fiscal year ends. GAO's report due six months after fiscal year ends.
SEC's Oversight of National Securities Associations – Section 964 GAO must submit a report to the Committees, not later than two years after enactment of the Dodd-Frank Act and at least every three years thereafter, that evaluate the SEC's oversight of national securities associations.	GAO's report due two years after enactment.
Compliance Examiners – Section 965 SEC's Division of Trading and Markets and Division of Investment Management will each have a staff of examiners to perform compliance inspections of entities under the jurisdiction of such division.	Effective upon enactment.

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Organizational Study of SEC – Section 967 SEC must hire, within 90 days of enactment of the Act, an independent consultant to examine the internal operations and need for reform of the SEC as well as the SEC's relationship with self-regulatory organizations. The consultant is to submit a report, to which the SEC is to file a response every six months for the following two years describing the implementation of recommendations.	SEC to hire consultant within 90 days after enactment. Consultant to submit report within 150 days after being retained.
SEC's "Revolving Door" – Section 968 GAO must conduct a study to examine the regularity and effect of employees leaving the SEC and later being employed by financial institutions regulated by the SEC (including whether any greater post-employment restrictions are necessary) and provide a report to the Committees within one year of enactment of the Act.	GAO's report due one year after enactment.

Subtitle G – Strengthening Corporate Governance – Sections 971-972

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<h3>Proxy Access – Section 971</h3>

The SEC is given the authority to issue rules requiring a company to permit its shareholders to use the company's proxy solicitation materials to nominate candidates for the board of directors.
The SEC is not required to issue such "proxy access" rules. If the SEC does issue rules, it also has the authority to set forth the terms and conditions of the requirements for proxy access.
The SEC may also grant exemptions from the proxy access rules to smaller issuers if it determines that they will be disproportionately burdened.

Commentary/Impact:
The SEC proposed proxy access rules in May 2009, but decided in October 2009 to postpone adopting the rules. Since the Dodd-Frank Act provides the SEC with explicit authority to issue rules, the SEC is expected to revisit proxy access in 2010. The impact on board elections will depend on the scope of the substantive and procedural requirements of the SEC's rules issued by the SEC, including minimum ownership thresholds, required holding periods and limits on the number of candidates that can be nominated by shareholders.
</td><td>No time period for implementation is required.</td></tr>
<tr><td>
<h3>Chairman and CEO Structure – Section 972</h3>
The SEC is mandated to enact rules requiring a company to disclose in its proxy statement the reasons why the company has the same person or different persons serving as chairman of the board of directors and CEO.
Commentary/Impact:
Since the current SEC rules already require disclosure by companies, the Act is not expected to create additional disclosure requirements.
</td><td>The SEC must issue rules within 180 days of enactment.</td></tr>
</table>

Subtitle H – Municipal Securities – Sections 975-979

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Registration of Municipal Advisors – Section 975(a) Requires "municipal advisors" to be registered under Section 15B of the Exchange Act and subjects them to the rules of the Municipal Securities Rulemaking Board (the "MSRB"). Commentary/Impact: *Advisors to municipal entities will need to adjust their practices to comply with the rules of the MSRB.*	Effective on October 1, 2010.
Composition of MSRB – Section 975(b) Requires that a majority of the MSRB members be "public representatives" (i.e., independent from any municipal securities broker, municipal securities dealers or municipal advisors).	Effective on October 1, 2010.
Fiduciary Duty of Municipal Advisors – Section 975(c) Municipal advisors are deemed to have a fiduciary duty to any municipal entity that they advise.	Effective on October 1, 2010.
Review of Increased Disclosure to Investors – Section 976 The GAO is to conduct a study and review disclosure made by issuers of municipal securities, and submit a report to Congress which includes recommendations relating to disclosure requirements.	GAO's report due 24 months after enactment.
Review of Municipal Securities Markets – Section 977 The GAO is tasked with studying and reporting on the municipal securities market, including the mechanisms for trading, transparency and efficiency of trading in the municipal securities markets and potential uses of derivatives in the markets.	GAO's report due 18 months after enactment.

Subtitle I – Public Company Accounting Oversight Board, Portfolio Margining, and Other Matters – Sections 981-989J

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Public Company Accounting Oversight Board ("PCAOB") Authority – Sections 981 and 982 1. Foreign Accounting Firms: PCAOB is permitted to share information relating to accounting firms for which a foreign authority has oversight if the PCAOB finds it necessary to protect investors, provided that the foreign oversight authority provides assurance of confidentiality of the information and provides a description of the relevant laws and regulations of the such foreign government. 2. Brokers and Dealers: PCAOB is provided with authority for oversight of registered public accounting firms that provide audit reports for brokers and dealers, including inspections of audit reports.	Effective as of enactment.
Portfolio Margining – Section 983 SIPA is amended to include futures held in a securities account pursuant to a portfolio margining program approved by the SEC and CFTC, effectively allowing SIPC coverage over such instruments. Commentary/Impact: *This section must be read in tandem with Section 713, which specifically authorizes use of both securities and futures to satisfy SEC and CFTC margin requirements pursuant to a portfolio margining program.*	Effective as of enactment.
Loan or Borrowing of Securities – Section 984 SEC must issue rules, within two years of enactment of the Dodd-Frank Act, that are designed to increase transparency of information available to brokers, dealers and investors with respect to loan or borrowing of securities.	SEC must issue rules within two years of enactment.
Proprietary Trading – Section 989 The GAO is tasked with conducting a study regarding the risks and conflicts associated with proprietary trading by insured depository institutions, bank holding companies and financial holding companies, including an evaluation of whether proprietary trading presents a material risk to the stability of the U.S. financial system or such entities or creates material conflicts of interest between such entities engaged in proprietary trading and the clients of such entities. The GAO is to provide a report to Congress with 15 months of enactment of the Dodd-Frank Act, which is to include whether there is adequate disclosure about such trading and an evaluation regarding the advisability of a complete ban or limitations on proprietary trading by such entities.	GAO's report due 15 months after enactment.
Protection of Senior Investors – Section 989A 1. The U.S. Office of Financial Literacy is directed to establish a program under which it may make grants to states or eligible entities to set up programs designed to protect investors who are senior citizens from being misled by fraudulent marketing. 2. The amount of the grant to a state may not exceed $500,000 for each of three consecutive fiscal years. The amount of the grant to a non-state may not exceed $100,000 for each of three consecutive fiscal years.	Effective as of enactment.

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Additional Oversight of Financial Regulatory System – Section 989E 1. A Council of Inspectors General on Financial Oversight is to be established, chaired by the Inspector General of the Treasury, and composed of inspectors general from government organizations, including the Federal Reserve System, the Commodity Futures Trading Commission, the Treasury, the FDIC, TARP and the SEC. 2. The FSOC is to meet at least once every quarter and deliver an annual report to Congress with concerns, observations and recommendations on improving financial oversight.	Effective as of enactment.
Person to Person Lending – Section 989F The GAO is tasked with conducting a study of person to person lending to determine the optimal federal regulatory structure.	GAO's report due one year after enactment.
Exemption from Sarbanes-Oxley Act for Non-Accelerated Filers – Sections 989G and 989I 1. Nonaccelerated filers are exempt from complying with Section 404(b) of Sarbanes-Oxley Act of 2002 (which requires public accounting firm to report on assessment made by management regarding internal controls). 2. The SEC to conduct study of how to reduce burden of compliance with Section 404(b) for companies with market capitalization between $75 million and $250 million while maintaining investor protections. 3. The GAO is to conduct a study on the impact of the exemption.	Exemption effective as of enactment. SEC's study due nine months after enactment. GAO's study due three years after enactment.

Subtitle J – SEC Match Funding – Section 991

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
SEC Funding – Section 991 The SEC is to collect transaction fees and assessments designed to recover the cost of the annual appropriation to the SEC by Congress. The SEC is to adjust the fee and assessment levels in the middle of each year, in consultation with Congressional Budget Office and the Office of Management and Budget, based on a determination whether, based on data from the previous five months, the estimate used to establish the rates is reasonably likely to result in less than a 10% margin of error. Commentary/Impact: *SEC Chairman Mary L. Schapiro has been a vocal advocate of self-funding for the SEC. She has argued that allowing for the SEC to fund itself through its fees and assessments on issuers and financial firms "ensures independence, facilitates long-term planning, and closes the resource gap between the agency and the entities we regulate." Statement Concerning Agency Self-Funding (speech), April 15, 2010, available at http://www.sec.gov/news/speech/2010/spch041510mls.htm. Other notable proponents of SEC self-funding have included SEC Commissioner Luis A. Aguilar and the Executive Council of the Securities Law Committee of the Federal Bar Association. The effect of the match funding mechanism on the status quo with regards to the SEC's independence and strategic planning is unclear at this time.*	These provisions go into effect on the later of October 1, 2011 or the date of enactment of an act making a regular appropriation to the SEC for fiscal year 2012. Certain fee rates to be published by August 31, 2011.
Annual SEC Budget – Section 991 Section 35 of the Exchange Act is amended to provide for annual increases in appropriations to the SEC from $1.3 billion in fiscal year 2011 to $2.25 billion in fiscal year 2015, in addition to any other funds to be appropriated to the SEC. The SEC is also instructed as to its annual transmission of its budget request. Commentary/Impact: *The resource gap cited by Chairman Schapiro is perhaps addressed in some part by the undertaking in amended Section 35 of the Exchange Act to appropriate increasing amounts to the SEC. Chairman Schapiro's foregoing speech cites a current appropriations figure of $1.1 billion, and amended Section 35 provides for an increase to $2.25 billion in fiscal year 2015, in addition to any other funds to be appropriated to the SEC.*	These provisions go into effect on the later of October 1, 2011 or the date of enactment of an act making a regular appropriation to the SEC for fiscal year 2012.
SEC Reserve Fund – Section 991 A reserve fund of up to $100 million (up to $50 million from any one fiscal year) is established; excess amounts become part of the Treasury's general fund. Registration fees collected under Section 6(b) of the Securities Act or Section 24(f) of the Investment Company Act are to be deposited into the reserve fund. The SEC may obligate up to $100 million per fiscal year from the reserve fund as the SEC determines necessary to carry out its functions, and must report the expenditure to Congress not later than 10 days later. Commentary/Impact: *The SEC will generally have discretion with respect to spending amounts in the reserve fund.*	October 1, 2011.

Title X – Bureau of Consumer Financial Protection

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<tr><th>KEY ELEMENTS</th><th>IMPLEMENTATION/ DEADLINE</th></tr>
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Establishment and Structure of the Bureau of Consumer Financial Protection ("BCFP") – Sections 1011-1018

1. The BCFP would be led by an independent director (the "BCFP Director") who would be appointed by the President and confirmed by the Senate (the BCFP Director would serve a five-year term).
2. In order to ensure the BCFP's "independence" from the Federal Reserve, the BCFP would receive a dedicated budget paid by the Federal Reserve, rather than Congress (although some funds may be appropriated by Congress to the BCFP until 2014), and the Federal Reserve is not permitted to:
   - intervene in any matter or proceeding before the BCFP,
   - appoint, direct, or remove any officer or employee of the BCFP, or
   - merge or consolidate the BCFP, or any function or responsibility of the BCFP, with any division or office of the Federal Reserve.
3. Several offices, boards and bureaus will be established within the BCFP including a Consumer Advisory Board which would consult with the BCFP and provide information on emerging practices in the consumer financial products or services industry, including regional trends, concerns, and other relevant information.

Commentary/Impact:

The identity of the first BCFP Director has become a major source of speculation. According to recent reports, leading candidates include Elizabeth Warren (Harvard Law professor), Michael Barr (Treasury assistant secretary for financial institutions), and Eugene Kimmelman (deputy assistant attorney general in the Antitrust Division of the Department of Justice).

Title X includes a number of measures to ensure that the BCFP will take into account the interests of diverse and underserved communities. For example, Title X requires that the Consumer Advisory Board include, among others, experts in community development, fair housing and civil rights, and an Office of Fair Lending and Equal Opportunity.

</td><td>The BCFP establishment is effective as of enactment. (The BCFP, however, will not have authorities and personnel from other agencies transferred to it at that point in time.)</td></tr>
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Overview of Key Functions of the BCFP – Section 1021-1037

1. Assuming major consumer protection functions (including rule-making and monitoring functions and examination authority) of the Federal Reserve, the OCC, the OTS, the FDIC, the NCUA, HUD, and certain functions of the FTC,
2. Conducting financial education programs,
3. Collecting, investigating and responding to consumer complaints,
4. Identifying risks to consumers of a "consumer financial product or service",
5. Supervising specified "covered persons" (essentially providers of consumer financial products (and certain affiliates thereof) that provide services to the provider) for compliance with "federal consumer financial law" and taking appropriate enforcement action, and

</td><td>Effective within 60 days of the enactment of the Act, the Treasury Secretary must designate that date (the "Designated Transfer Date") which must be between six and 18 months following the enactment date of the Act.</td></tr>
</table>

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
6. Issuing rules, orders, and guidance implementing federal consumer financial laws. "Federal consumer financial laws" transferred to the BCFP's jurisdiction: 1. Alternative Mortgage Transaction Parity Act, 2. Electronic Fund Transfer Act, 3. Equal Credit Opportunity Act, 4. Fair Credit Billing Act, 5. Home Owners Protection Act, 6. Fair Debt Collection Practices Act, 7. Home Mortgage Disclosure Act, 8. S.A.F.E. Mortgage Licensing Act, 9. Consumer Leasing Act, 10. Title X of the Dodd-Frank Act, 11. Real Estate Settlement Procedures Act, 12. Home Ownership and Equity Protection Act, 13. The Truth in Lending Act, 14. Fair Credit Reporting Act, 15. Truth in Savings Act, 16. The financial privacy provisions of the Gramm-Leach-Bliley Act, and 17. The mortgage reform provisions of Title XIV of the Dodd-Frank Act. Generally speaking, a "consumer financial product or service" is a credit, savings or payment product or service (a "consumer financial product") offered or provided for use by a "consumer" (i.e., an individual or an agent of an individual) for "personal, family, or household purposes." The term does not include either: 1. the business of insurance, or 2. electronic conduit services. Commentary/Impact: *Hundreds of employees of the federal financial agencies will be transferred to the BCFP. A number of "consumer financial products" are identified in Title X. BCFP may expand the list of consumer financial products through rulemakings (and, thus, effectively expand the scope of its jurisdiction). The BCFP will not have rulemaking authority under the Federal Trade Commission Act or the Fair Housing Act.*	

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Rule Making and Monitoring Authority of the BCFP – Sections 1022, 1027-1029, 1031 1. The BCFP is authorized to require providers of consumer financial products to file reports with the BCFP to enable it to carry out its responsibilities to monitor risks to purchasers of consumer financial products. 2. The BCFP has the power to prescribe rules and issue orders and guidance, as may be necessary or appropriate to carry out various U.S. federal consumer financial laws. 3. The BCFP also has the general power to prescribe rules identifying as unlawful, unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service and requirements for purpose of preventing such acts or practices. 4. The BCFP is authorized to write rules without interference from the Federal Reserve. 5. The types of entities covered by the rule-making authority of the BCFP may differ depending upon the statutory authority for the rules at issue. 6. There are certain restrictions on the BCFP's rule-making authority in the case of: ▪ merchants, retailers, or sellers of any non-financial good or services that extend credit to enable a consumer to purchase a non-financial good, ▪ real estate brokers, ▪ accountants/tax preparers, ▪ employee benefit and compensation plans, and ▪ automobile dealers. The BCFP must consider the views of the U.S. federal "prudential" regulators when issuing proposed regulations. A BCFP regulation would be set aside if a federal financial or "prudential" regulatory authority raises an objection to the regulation, and the FSOC by a two-thirds vote determines that the regulation would jeopardize the safety and soundness of the U.S. banking system or the stability of the U.S. financial sector. Commentary/Impact: *There are many questions relating to how the BCFP will "work in practice". Much attention will be paid to (i) how expansively the BCFP (a) exercises its broad rulemaking powers, and (b) defines the scope of products subject to its jurisdiction (i.e., "consumer financial products"), and (ii) whether the "prudential regulators" attempt to challenge a BCFP rulemaking under procedures which would allow the FSOC to set aside a rule if determined to jeopardize the "safety and soundness" of the U.S. banking system or the stability of the U.S. financial sector.* *There is much speculation over where the BCFP will focus its attention. Particularly if Elizabeth Warren is selected as the first BCFP director, it appears as though simplification of the terms of credit agreements will be high on the BCFP's rulemaking agenda.*	In general, effective on the Designated Transfer Date (i.e., within 6-18 months of enactment of the Act).

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Supervision and Examination Authority of the BCFP – Sections 1024-1026 The BCFP would have full supervisory authority over the following types of entities (in certain cases, examination authority is shared with the entity's assigned federal or state "prudential" regulator or other agency) for purposes of assessing compliance with federal consumer financial law and related purposes: 1. Non-bank residential mortgage originators, brokers and servicers as well as companies that provide loan modification and foreclosure relief services in connection with residential mortgages, 2. Pay-day lenders, 3. Student loan providers, 4. Certain non-bank entities deemed by regulation to be "larger participants" in a consumer financial product market (e.g., the credit card, check cashing, debt collector, consumer reporting agency, etc.), and 5. FDIC-insured depository institutions and credit unions with more than $10 billion in assets and any affiliate of such depository institutions/credit unions. The BCFP has the more limited authority to only require reports from FDIC-insured depository institutions and credit unions with $10 billion or less in assets. (The BCFP would be required to rely upon existing reports provided to another federal or state agency to the fullest extent possible.) Commentary/Impact: *As a result of Title X, many large banking groups will effectively have a new supervisor and examiner (the BCFP). Many non-bank providers of consumer financial products (e.g., mortgages) would become subject to examination (on a "periodic basis") by a U.S. federal agency for the first time. It is unclear at this time, however, how many non-bank entities will fall within the category of "larger participants" and thus be subject to BCFP supervision.*	BCFP to issue rules with respect to those non-depository institutions subject to BCFP supervision one year after the Designated Transfer Date. Supervision of large depository institutions becomes effective one year from enactment of the Act.
Enforcement Authority of the BCFP – Sections 1027-1029 and 1051-1058 The BCFP's enforcement authority may be summarized as follows: 1. Subject to certain restrictions, the BCFP may take appropriate enforcement action with respect to (i) any entity offering or providing a consumer financial product or service to prohibit unfair, deceptive, or abusive acts, and (ii) as otherwise provided under a U.S. federal consumer financial law. 2. The BCFP generally has primary enforcement authority with respect to those institutions over which it has full supervisory and examination authority. (The BCFP and the FTC are directed to negotiate an agreement for coordinating with respect to enforcement authority over non-bank depository institutions subject to BCFP supervision.) 3. The BCFP may not enforce compliance with respect to: ▪ an FDIC-insured depository institution or a credit union with $10 billion or less in assets, ▪ attorneys, and ▪ automobile dealers. 4. The BCFP may not enforce any consumer financial protection provisions of Title X, or rules promulgated by BCFP thereunder, with respect to various	Effective on the Designated Transfer Date (i.e., within 6-18 months of enactment of the Act).

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
entities including: ▪ insurance companies/agents (but enforcement authority exists where the entity is engaged in the offering or provision of consumer financial products (i.e., non-insurance products)), ▪ an entity regulated by a state securities commission (but only to the extent that the entity acts in a regulated capacity), ▪ an entity (e.g., a broker-dealer) regulated by the SEC, and ▪ an entity (e.g., an FCM) regulated by the CFTC. 5. The BCFP has broad remedial powers, e.g., order civil money penalties up to $1 million per day, rescind or reform contracts. Commentary/Impact: *Title X does not completely consolidate enforcement authority with respect to the provision of financial consumer products in the hands of BCFP. The FTC will retain its current enforcement authority under the Federal Trade Commission Act with respect to non-depository institutions.*	
State Law Preemption and Related Issues for National Banks and Federal Thrifts – Sections 1041-1048 As a general principle, state consumer financial laws that provide greater protections than the rules of the BCFP (and are not otherwise inconsistent with the consumer financial protection provisions of Title X) would not be preempted from applying to national banks and federal thrifts. Exceptions to this general principle would apply where: 1. The application of a state consumer financial law would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered in that state, 2. A determination regarding preemption of a state consumer financial law is made in accordance with the legal standard of the U.S. Supreme Court's Barnett Bank v. Nelson decision (i.e., the state consumer financial law "prevents or significantly interferes with" the operations of a national bank), or 3. The state consumer financial law is otherwise preempted by federal law (other than the consumer financial protection provisions of Title X). Subsidiaries or affiliates of a national bank would not benefit from any special preemption provisions (i.e., even if the state law at issue is deemed not to apply to the national bank itself). The right under existing U.S. federal law for national banks to continue to "export" interest rates permissible in their "home" states to the state of a borrower is preserved. The Act preserves limits on state officials' ability to investigate and request information from a national bank or federal thrift. State attorneys general may bring civil actions against institutions to enforce violations of state and federal consumer financial protection laws. However, state attorneys general can only bring actions against national banks and federal thrifts to enforce rules promulgated under Title X in their own state and can not enforce the statutory provisions of Title X against national banks and federal thrifts.	Effective date is the Designated Transfer Date (i.e., within 6-18 months of enactment of the Act).

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<tr><th>KEY ELEMENTS</th><th>IMPLEMENTATION/ DEADLINE</th></tr>
<tr><td>Commentary/Impact:

Under current law, federal thrifts benefit from a somewhat more expansive federal preemption regime than do national banks. Title X provides for parity between national banks and federal thrifts in terms of federal preemption of state consumer financial laws.

As a technical matter, the preemption provisions of Title X only apply with respect to “state consumer financial” laws. Whether or not a particular law is a “state consumer financial” law could be a possible source of uncertainty and litigation. (According to Title X, a state consumer financial law “specifically regulates the manner, content, or terms and conditions of any financial transaction, or any account related thereto, with respect to a consumer.”)

The loss of the availability of federal preemption for “operating subsidiaries” of national banks could make it more difficult for such entities to operate across state lines.</td><td></td></tr>
<tr><td>Limits on Interchange Fees and Rules for Payment Card Transactions – Section 1075

1. The Federal Reserve would be authorized to regulate the fees debit card issuers receive from retailers to process debit card purchases. The fees charged would have to be “reasonable” and “proportional” to actual costs incurred (as determined by the Federal Reserve).
2. Payment card networks are prohibited from (directly or indirectly) preventing a merchant from (i) providing a discount for payment by the use of cash, checks, debit cards, or credit cards, and (ii) refusing credit card transactions of below $10 (or a higher amount as established by the Federal Reserve).
3. The restrictions do not apply to any issuer that together with its affiliates has assets less than $10 billion in assets.

Commentary/Impact:

According to Senator Durbin (who initially introduced the measure), the provision would prevent card networks such as Visa and MasterCard from penalizing sellers for offering discounts to customers who pay by cash, check or debit card. Given the large amount of money at stake (for both retailers and the banking industry), this issue attracted significant attention from the financial services industry. (Bank of America recently stated that it expects to lose between $1.8 billion and $2.3 billion in annual revenue starting in the third quarter of 2011 because of new limits on interchange fees.)</td><td>The Federal Reserve is required to prescribe regulations in final form not later than nine months after the enactment date of the Act.</td></tr>
</table>

Title XI – Federal Reserve System Provisions

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Emergency Lending Authority – Section 1101 The Federal Reserve's discretion to extend credit to non-bank borrowers in unusual and exigent circumstances under Section 13(3) of the Federal Reserve Act would be significantly curtailed. It must issue regulations with policies and procedures for emergency lending designed to provide liquidity broadly and not to a particular borrower. Prior Treasury approval must be obtained for any such program, and regular reports must be made promptly to Congress. Names of borrowers and other data must be publicly disclosed with a delay. Commentary/Impact: *Federal Reserve's ability to respond as quickly and effectively as it did in the Bear Stearns and AIG situation, and in creating special credit programs in late 2008, would likely be significantly constrained in future crises. Mandate to disclose borrower information may be a significant disincentive for potential borrowers to use such programs.*	Effective as of enactment. Regulations to be issued "as soon as is practicable" after enactment.
Audits of Special Federal Reserve Credit Facilities – Section 1102 The GAO is authorized to audit the Federal Reserve's future credit facilities under Section 13(3), all open-market transactions, and all discount window advances, to assess operational integrity and reporting, effectiveness of collateral policies, discrimination among applicants, use of third-party vendors, and conflicts of interest. Any report, including names of counterparties and borrowers and related data, is to be publicly disclosed with a delay. Commentary/Impact: *Audits may cover routine open-market transactions and discount window loans, despite the section title's reference to "special" facilities. Sensitive because open-market transactions touch on monetary policy considerations. Mandate to disclose counterparty and borrower information may be a significant disincentive to transact with a Reserve Bank.*	
Public Access to Information – Section 1103 New Section 2B of the Federal Reserve Act requires disclosure of audit reports and other information on the Federal Reserve's website. New Section 11(s) of the Federal Reserve Act requires disclosure of counterparty and borrower names and related data with a delay. Commentary/Impact: *Mandate to disclose counterparty and borrower information may be a significant disincentive to transact with a Reserve Bank.*	
Emergency Financial Stabilization and Liquidity Event Determination – Sections 1104, 1105 and 1106 The FDIC shall create a widely available program to guarantee obligations of solvent banks and bank holding companies during times of severe economic distress upon a determination by the FDIC and Federal Reserve, with Treasury consent, that a liquidity event exists. A "liquidity event" is generally an "exceptional and broad reduction" in the market's ability to sell assets without an "unusual and significant discount" and the like. The FDIC must establish a maximum amount that may be guaranteed under the program, and that amount must be approved by joint resolution of Congress before any guarantees are issued. Conforming amendments to existing law are made.	

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Commentary/Impact: *This provision, like the above ones as to the Federal Reserve, significantly limits the FDIC's authority to provide guarantees of deposits and debt of banks and bank holding companies that it provided beginning in October 2008. The constitutionality of the requirement for Congressional approval might be questioned.*	
Federal Reserve Bank Governance – Section 1107 Reserve Bank presidents are to be appointed by the six directors of a Reserve Bank that represent commerce and the public interest, and not the three that represent member banks. Commentary/Impact: *Amended in Conference to greatly water down the earlier provision that would have required the New York Bank president to be appointed by the President and disallow member banks regulated by the Federal Reserve to elect directors. The new version is of almost no significance because the Board of Governors must approve all appointments.*	
Amendments on Bank Supervision – Section 1108 One of the Governors is to be appointed by the President as Vice Chairman for Supervision to oversee bank and bank holding company supervision by the Federal Reserve. Reserve Banks and their presidents may not be delegated authority to take actions under Title I. Commentary/Impact: *This provision appears intended to require the Federal Reserve to focus more closely on supervision matters, primarily due to the perceived failures of the Federal Reserve's supervision prior to the financial crisis.*	Effective as of enactment.
GAO Audit of Credit Facilities – Section 1109 The GAO shall conduct a one-time audit of Federal Reserve credit facilities created between December 2007 and the date of enactment to assess the same matters as under Section 1102 above. The GAO shall also audit the governance of the Federal Reserve Banks to examine whether the current system of Bank directors effectively represents the public, gives rise to conflicts of interest with the supervisory function, the role of each Bank in any special credit facility, and changes that might improve the system. Commentary/Impact: *Amended in Conference as part of the compromise to water down earlier provisions on Reserve Bank directors.*	Credit facilities audit: Required to begin within 30 days of enactment and be submitted within one year. Reserve Banks audit: To be submitted within one year of enactment.

Title XII – Improving Access to Mainstream Financial Institutions

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Expanded Access to Mainstream Financial Institutions – Sections 1201-1206

Title XII will increase access to mainstream financial products and services, such as bank accounts insured by the FDIC and small-dollar loans. Title XII will also seek to provide counseling for account and transaction management to those consumers who have traditionally been excluded from the mainstream financial services market.

Under the Dodd-Frank Act, small-dollar loan programs will be structured as follows:

1. principal amounts cannot exceed $2,500;
2. the loan must be repaid in installments;
3. there can be no pre-payment penalty;
4. the loan provider must report payments to at least one consumer reporting agency that maintains consumer files on a nationwide basis; and
5. meet any other affordability requirements as may be established by the Administrator (as that term is defined in the Community Development Banking and Financial Institutions Act of 1994).

Commentary/Impact:

This program will target roughly 30 million low- to moderate-income Americans that do not have sufficient access to the financial system, and provide realistic alternatives for these consumers to obtain traditional banking services such as FDIC-insured bank accounts and small personal loans. Title XII authorizes the Secretary of the Treasury to establish grants, cooperative agreements, financial agency agreements and similar contracts to fund these endeavors.

One of the main goals of this provision is designed to educate those Americans who do not understand basic personal finance. In doing so, the Dodd-Frank Act is designed to provide this segment of the demographic with the introductory knowledge needed to manage such elements of personal finance as maintaining a budget and using a bank account.

</td><td>Effective as of enactment.</td></tr>
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Title XIV – Mortgage Reform and Anti-Predatory Lending Act (the "Mortgage Act")

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Subtitle A – Residential Mortgage Loan Origination Standards – Sections 1401-1404 Mortgage originators must be qualified, registered and licensed in accordance with applicable state or Federal law, including the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (the "SAFE Act"), and include on all loan documents the unique identifier provided by the Nationwide Mortgage Licensing System and Registry (the "NMLS"). The BCFP will assume responsibility for administering the SAFE Act and maintaining the NMLS registration system. Mortgage originators generally cannot receive compensation that varies based on the terms of the loan (other than the amount of principal) or in some cases an origination fee. "Mortgage originators" include any person (either an individual or company) who for direct or indirect compensation or gain, or the expectation of direct or indirect compensation or gain: (i) takes a residential mortgage loan application; (ii) assists a consumer in obtaining or applying to obtain a residential mortgage loan; or (iii) offers or negotiates terms of a residential mortgage loan. It should be noted that this is broader than the definition under the SAFE Act and specifically excludes (i) servicers and their employees, agents and contractors and (ii) creditors (except in a table-funded transaction). **Board Regulations – Section 1403** The BCFP will prescribe regulations that, among other things, prevent mortgage originators from steering consumers to loans that they will be unable to repay or that have predatory characteristics (e.g., equity stripping, excessive fees or abusive terms) and to prevent other abusive or unfair lending practices. **Liability for Violations – Section 1404** Mortgage originators that fail to comply with the applicable regulations will be subject to damages equal to the greater of (i) actual damages or (ii) an amount equal to three times the total amount of direct/indirect compensation or gain accruing to the mortgage originator in connection with the residential mortgage loan involved in the violation, plus costs and reasonable attorneys' fees. *Commentary/Impact:* *These provisions amend the Truth in Lending Act ("TILA") and, most significantly, establish a federal "duty of care" for mortgage originators in line with its stated purpose: "to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive or abusive."* *Originators who fail to comply with this new duty of care would be in violation of federal law and directly liable to borrowers for civil damages.*	Where regulations are required, the earlier of (i) 12 months after final regulations or (ii) 18 months after the Designated Transfer Date. (see Title X Summary above.)
Subtitle B – Minimum Standards for Mortgages **Determination of Ability to Repay – Section 1411** Residential mortgage lenders cannot make loans unless they make a reasonable and good faith determination that the consumer can pay, based on verified and documented information. Lenders must take into account a variety of factors in making this determination, including credit history, current and future expected income, obligations, etc.	Where regulations are required, the earlier of (i) 12 months after final regulations or (ii) 18 months after the Designated Transfer Date.

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Defense to Foreclosure – Section 1413 If a mortgage lender attempts to foreclose, either through judicial or non-judicial methods, consumers may assert violations of disclosure requirements in order to recoup or set off the amounts owed. The recoupment or set off is equal to the amount to which the consumer would be entitled under 15 U.S.C. § 1640 for damages, plus costs and reasonable attorneys' fees. Consumers can assert the defense even if the time limit on private action for damages under the section has expired. **Additional Standards and Requirements – Section 1414** **Prepayment Penalties** A residential mortgage that does not qualify as a "qualified mortgage" may not contain terms which require a consumer to pay a prepayment penalty for paying all or part of the principal after the loan is consummated. In addition, prepayment penalties on qualified mortgages are subject to the following limitations: (i) during the first year of the loan, the prepayment penalty must not exceed three percent of the outstanding balance of the loan; (ii) during the second year, not to exceed two percent of the outstanding balance of the loan; (iii) during the third year, not to exceed one percent of the outstanding balance of the loan; and (iv) after the third year from the date that the loan is consummated, no prepayment penalty may be imposed. Additionally, lenders must offer consumers a loan without a prepayment penalty if a loan with a prepayment penalty is also offered. **Single Premium Credit Insurance Prohibited** In general, lenders may not may finance, directly or indirectly, in connection with any residential mortgage loan or with any extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer, any credit line, credit disability, credit unemployment, or credit property insurance, or any other accident, loss of income, life, or health insurance, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract. **Required Arbitration Clauses, Cause of Action Waivers Banned** Lenders cannot include required arbitration clauses or other required non-judicial procedure clauses in residential mortgage loans, or waivers of consumers' statutory causes of action. **Negative Amortization Limited** Lenders cannot extend credit secured by a dwelling that results in negative amortization, unless the lender provides certain disclosures mandated by the BCFP and if a first-time borrower, that borrower receives homeownership counseling from certified organizations or counselors. **Protection Against Loss of Anti-Deficiency Protection** If the refinancing of a loan would cause the loan to lose the statutory anti-deficiency protections of the State where the mortgage is located, the lender is required to notify the consumer and explain the significance of the loss of protection. **Increase of Civil Penalties, Statute of Limitations – Section 1416** Increases civil penalties for violations of TILA and extends statute of limitations to three years. **Required Disclosures – Sections 1419-1420** The mortgage lender must disclose all charges, monthly payment amounts, interest over the life of the loan, settlement charges and fees paid to the originator and other requirements up front and then in every billing statement, as applicable. The mortgage lender must also disclose in the case of a variable rate residential mortgage for which an escrow or impound account is established, the amount of the monthly deposit for all applicable taxes, insurance and assessments.	

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Subtitle C – High-Cost Mortgages A "high-cost mortgage" ("HCM") in most cases means a consumer credit transaction that is secured by a first mortgage lien on the consumer's principal dwelling (other than a reverse mortgage transaction) and the annual percentage rate ("APR") at consummation of the transaction will exceed the average prime offer rate (as determined by the BFCP) for a comparable transaction by more than 6.5 percentage points, or for junior lien mortgages, if the APR is more than 8.5 percentage points over the average prime offer rate for a comparable transaction. **Prepayment Penalty Provisions – Section 1432** No HCM may contain a schedule payment that is more than twice as large as the average of earlier scheduled payments, other than payments adjusted to seasonal or irregular income of the consumer. **Encouraging Default Prohibited – Section 1433** Creditors cannot recommend or encourage default on existing loans or other debt prior to and in connection with the closing of an HCM that refinances all or any portion of such existing loan or debt. **Late Fees Curtailed – Section 1433** Creditors cannot impose late fees in connection with an HCM (i) in excess of four percent of payment past due (ii) unless the loan documents specifically authorize the charge or fee (iii) before the applicable 15 or 30 day grace period depending on whether interest is paid in advance. **Acceleration Curtailed – Section 1433** Creditors cannot have a provision in HCMs that accelerates debt except by default of payment, or pursuant to a due-on-sale provision, or pursuant to a material violation of some other provision of the loan documentation unrelated to a payment schedule. **Modification and Deferral Fees Prohibited – Section 1433** Creditors may not charge a consumer any fee to modify, renew, extend, or amend an HCM, or to defer any payment due under the terms of such mortgage. **Payoff Statement Fees Prohibited – Section 1433** Creditors are prohibited from charging a fee for informing/transmitting any person the balance due to pay off the outstanding balance on an HCM, except processing fees. **Pre-Loan Counseling Required – Section 1433** Creditors may not extend credit without evidence that the customer has received pre-loan counseling from a certified counselor before consumers get HCMs.	Where regulations are required, the earlier of (i) 12 months after final regulations or (ii) 18 months after the Designated Transfer Date.
Subtitle D – Office of Housing Counseling – Sections 1441-1452 The Dodd-Frank Act sets up the Office of Housing Counseling within HUD for homeownership counseling and rental housing counseling and to certify counselors. **Foreclosure and Default Database – Sections 1447** The Secretary of HUD and the Director of the BCFP in consultation with applicable Federal agencies will establish and maintain a database of information on	Where regulations are required, the earlier of (i) 12 months after final regulations or (ii) 18 months after the Designated Transfer

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
foreclosures and defaults on mortgage loans for one- to four-unit residential properties. Such information will be publicly available.	Date.
Subtitle E – Mortgage Servicing **Required Escrow Accounts – Section 1461-1462** For first lien mortgages on consumer's principal dwelling, the creditor is required to establish escrow or impound account for payments of taxes, hazard insurance, flood insurance, mortgage insurance, ground rents and any other required periodic payments with respect to the property in certain cases, and is required to disclose the accounts and how much is needed. If the consumer closes or waives escrow account, servicer needs to provide disclosures relating to the consumer's liability for the costs if unpaid. The escrow or impound account is required to remain in place for at least five years commencing upon the consummation of the loan. **Force-Placed Hazard Insurance Limitations under RESPA– Sections 1463** The creditor or servicer of the loan may only obtain force-placed hazard insurance if it has a good faith belief that borrower has failed to comply with loan contract's requirements to maintain property insurance. **Truth in Lending Act Amendments – Section 1464** The Mortgage Act amends certain provisions of TILA with respect to consumer credit transactions secured by a consumer's primary residence, such as adding requirements that mortgage servicers promptly credit payments and promptly respond with accurate information regarding payoff amounts.	Where regulations are required, the earlier of (i) 12 months after final regulations or (ii) 18 months after the Designated Transfer Date.
Subtitle F – Appraisal Activities **Property Appraisal & Independent Appraiser Requirements – Sections 1471-1475** Creditors are required to obtain a property appraisal by an independent licensed appraiser before extending higher-risk mortgages to consumers. The Act also specifies the independence requirements for appraisers and other compliance and monitoring requirements.	Where regulations are required, the earlier of (i) 12 months after final regulations or (ii) 18 months after the Designated Transfer Date.
Subtitle G – Mortgage Resolution and Modification **Multifamily Mortgage Resolution Program – Section 1481** The Secretary of HUD is tasked with developing a program to ensure the protection of current and future tenants and at-risk multi-family properties. **Home Affordable Modification Program Guidelines – Sections 1482-1483** Mortgage servicers participating in the program are required to provide each borrower under a mortgage whose request for mortgage modification is denied with all borrower and mortgage related input data used in any net present value analysis performed in connection with the mortgage. The formulae for calculating net present value will be made publicly available and data will include the number of requests for modification received, processed, approved and denied.	Where regulations are required, the earlier of (i) 12 months after final regulations or (ii) 18 months after the Designated Transfer Date.

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Subtitle H – Miscellaneous Provisions $1 Billion for Emergency Mortgage Relief – Section 1496 Effective Oct 1, 2010, the Secretary of HUD is to receive $1 billion in assistance through the Emergency Homeowners' Relief Fund to use for emergency mortgage assistance, but assistance per homeowner may not exceed $50,000. $1 Billion for Neighborhood Stabilization Program – Section 1497 Effective Oct 1, 2010, the Secretary of HUD is to receive $1 billion for assistance to states and local governments for redevelopment of abandoned and foreclosed homes. Fannie Mae and Freddie Mac – Sections 1491-1492 The Act calls for meaningful structural reforms of Fannie Mae and Freddie Mac and orders a report on government efforts to combat mortgage foreclosure rescue scams and loan modification fraud. Legal Assistance for Foreclosure-Related Issues – Sections 1498 The Secretary of HUD is to establish a program for making grants for providing a full range of foreclosure legal assistance to low- and moderate-income homeowners and tenants related to home ownership preservation, home foreclosure prevention and tenancy associated with home foreclosure.	Where regulations are required, the earlier of (i) 12 months after final regulations or (ii) 18 months after the Designated Transfer Date.

Title XV – Miscellaneous Provisions

KEY ELEMENTS	IMPLEMENTATION/ DEADLINE
Disclosure of Conflict Minerals – Section 1502 Title XV requires public companies that obtain conflict minerals from the Democratic Republic of the Congo to file disclosures with the SEC indicating the methods of due diligence taken to verify the source and chain of title of the minerals. Parties relying on conflict minerals for their business operations must also file a report with the SEC, which will be available for public inspection. Commentary/Impact: *The requirement to file public disclosures regarding the origin of conflict minerals will force corporations to closely analyze the costs and benefits of relying on resources from the Congo and the surrounding area. This provision of the Dodd-Frank Act uses a disclosure requirement as a means to increase reputational risks to companies using conflict minerals.*	SEC must promulgate rules within 270 days after the date of enactment of the Dodd-Frank Act.
Report – Section 1502 The Secretary of State, in consultation with the Administrator of the United States Agency for International Development, must submit a strategy to address the connections between human rights abuses, armed groups, mining of conflict minerals, and commercial products. Commentary/Impact: *The plan described by Section 1502 is designed to find ways to promote peace and security in Central Africa by supporting the Government of the Democratic Republic of the Congo to monitor and ultimately prevent commercial activities that contribute to human rights violations. The report will recommend methods to develop stronger governance and economic institutions to improve transparency in the cross-border trade involving the natural resources of the Congo and to reduce exploitation by armed groups and promote local and regional development. Additionally, the plan will also provide guidance to commercial entities seeking to exercise due diligence to determine the origin and chain of custody of conflict minerals to ensure they do not originate from suppliers that finance armed conflict or result in human rights or labor violations. Finally, the plan will also set out a description of the punitive measures that can be imposed upon entities whose commercial activities support armed groups and human rights violations in the Congo.*	Report must be submitted within 180 days after the date of enactment of the Dodd-Frank Act.

This publication is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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