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The Dodd-Frank Wall Street Reform and Consumer Protection Act

An Overview of Key Provisions

Broken or not – it's being fixed. The Dodd-Frank Wall Street Reform and Consumer Protection Act (the Act) presents sweeping changes to the financial services industry – the deepest and broadest transformation to that industry since the Great Depression. The new legislation – all 2,300 pages – will significantly impact financial services firms, investors and consumers by modifying existing law, giving regulators a mandate to unleash new regulations, and creating another federal regulatory agency, the Federal Bureau of Consumer Financial Protection.

This *GT Financial Services Reform Update* provides a high-level overview of changes in the following areas, as set forth in the Act. In addition, the Act calls for numerous studies and provides various agencies with rulemaking authority, which will further define the scope of the law. As regulators interpret and implement the law, we will continue to provide in-depth analysis of key areas that are impacted.

- Changes Affecting Unregistered Investment Advisers - Title IV
- Changes Affecting Accredited Investors - Title IV
- Changes to Bank Regulations - Various Titles
- Consumer Financial Protection - Title X
- Mortgage Reform and Anti-Predatory Lending Act - Title XIV
- Increased Securities Regulation and Protections for Retail Investors - Title IX
- Enhanced Regulation of Public Company Executive Compensation and Corporate Governance - Title IX
- Strengthening Corporate Governance - Title IX
- Improvements to the Asset-Backed Securitization Process - Title IX
- Increased Oversight and Regulation of the Municipal Securities Market - Title IX
- Insurance Reforms - Title V
- Financial Company Liquidation Authority - Title II

To view the complete text of the Act in the conference report, click here.

Changes Affecting Unregistered Investment Advisers - Title IV

- **The Private Fund Investment Advisers Registration Act of 2010.** Title IV of the Act will affect many financial services firms and capital raising activities, and provides for both on-going studies and extensive rule-making by the SEC.

- **Many advisers previously exempt from registration under the Investment Advisers Act of 1940 are required to register with the SEC. Exemptions from registration are provided for:**

- advisers who serve only a "venture capital fund," as defined in the Act;
- certain foreign private advisers;
- advisers (including private fund advisers) that oversee less than $150 million;
- certain advisers registered with the Commodity Futures Trading Commission (CFTC);
- Small Business Investment Company (SBIC) advisers; and
- family offices.

- **The threshold level for SEC registration increases from $25 million to $100 million of assets under management.** This will place more advisers under the supervision of state securities regulators. Exempt advisers will remain subject to the authority of the SEC to impose record-keeping and compliance requirements.

Changes Affecting Accredited Investors - Title IV

- **The "accredited investor" standard for private offerings to individuals will be increased.** This will reduce significantly the universe of such investors in many offerings, not just for investments in private funds.
  - The $1 million net worth requirement will now exclude the value of an investor's home.
  - The SEC is authorized to make further adjustments to this standard beginning four years after enactment.
  - Separately, the SEC is authorized to study other qualifying criteria, such as the income test, and is likely to adopt rules to increase these standards at an early date.

Changes to Bank Regulations - Various Titles

New Capital Requirements for Financial Institutions - Title I

- **The Collins Amendment** imposes new risk-based and leverage capital standards for U.S. institutions and their holding companies, subject to delayed effective dates and grandfathering provisions. Under the Collins Amendment:
  - trust preferred securities may no longer be considered an element of Tier 1 capital, excluding bank and thrift holding companies with less than $15 billion in assets as of December 31, 2009 that had such securities issued before May 19, 2010;
  - for thrift holding companies, any regulatory capital deductions for debt or equity issued before May 19, 2010 will be phased in from January 1, 2013 to January 1, 2016; and
  - debt or equity instruments issued to the U.S. Government under TARP are exempt from the Collins Amendment. All TARP preferred issuances are grandfathered.

- Holding companies of industrial banks, credit card banks and trust banks – are not subject to the Collins Amendment.

- Foreign parent holding companies of U.S. bank and thrift holding companies and their subsidiary depository institutions are not subject to the Collins Amendment.

Deposit Insurance Reforms - Title III

- Maximum deposit insurance coverage permanently increases to $250,000, with retroactive effect for banks that failed between January 1, 2008 and October 3, 2008.
- Transaction or non-interest bearing accounts are fully insured from December 31, 2010 until December 31, 2012.
- The FDIC will now calculate deposit insurance assessments on average consolidated total assets minus average Tier 1 capital, not deposit base.
- The Act increases the minimum statutory reserve ratio for the Deposit Insurance Fund from 1.15% of estimated insured deposits to 1.35% of estimated insured deposits.

Abolition of the Office of Thrift Supervision (OTS) - Title III

- Effective July 21, 2011, the OTS must transfer its powers and duties to the OCC, FDIC and Federal Reserve.
  - The Federal Reserve will regulate savings and loan holding companies and their non-thrift subsidiaries.
  - The OCC will regulate federal thrifts.
  - The FDIC will regulate state thrifts.
- Effective October 21, 2011, the OTS is abolished.
- Importantly, the OCC is now required to "assure the safety and soundness of, and compliance with the laws and regulations, fair access to financial services and fair treatment of customers by, the institutions and other persons subject to its jurisdiction."
- What happens to the federal thrift charter?
  - The Act preserves the federal thrift charter.
  - The Act imposes new penalties for failure of thrifts to comply with the QTL test.
  - A thrift that converts to a bank charter is permitted to retain its branches and to establish additional branches within states where it operated a branch prior to becoming a bank to the same extent permitted to state-chartered banks in such states under state law.

Depository Institution and Bank Holding Company (BHC) Regulation - Title VI

- **Nonbank Bank Application Moratorium.** Effective immediately until July 21, 2013, the FDIC may not approve any application for federal deposit insurance received after November 23, 2009 for an industrial bank, credit card bank or trust bank that is directly or indirectly owned or controlled by a "commercial firm" – i.e. a company that derives less than 15% of its revenues from BHC Act Section 4(k) activities.
- **Increasing the Federal Reserve's Examination and Enforcement Authority.** The Act authorizes the Federal Reserve to:

- examine compliance with federal law by functionally regulated subsidiaries and insured depository institutions;
- examine bank permissible activities of each non-depository institution subsidiary that is not a functionally regulated subsidiary; and
- take enforcement action, as appropriate, under Section 8 of the Federal Deposit Insurance Act with respect to all subsidiaries of a bank holding company, including functionally regulated subsidiaries.

- **M&A Limits and Branching.** Section 3 applications by a BHC to acquire control or the assets of a bank may be approved only if the BHC is well-capitalized and well-managed.
    - Interstate merger transactions may be approved only if the resulting bank will be well-capitalized and well-managed after the transaction.
    - The Act permits national banks to establish de novo branches in another state if the host state's banking law permits a state-chartered bank to establish the branch.
- **Source of Strength.** The Act codifies the Federal Reserve's controversial source of strength doctrine.
- **Charter Conversions.** Bank charter conversions are generally prohibited if the converting entity is subject to a formal or even informal enforcement action.
- **Section 23A/23B.** The Act permits the FDIC and OCC – not just the Federal Reserve – to grant exemptions from Section 23A with respect to their regulated institutions.
- **Loans to Insiders.** The Act extends insider loan restrictions to derivatives, repos and securities loans.
- **Lending Limits.** The Act extends loan to one borrower limits to derivatives, repos and securities loans.
- **New Bank Products.** Effective July 2011, the Act eliminates prohibitions on paying interest on demand deposit accounts. Accordingly, businesses may have interest-bearing checking accounts.
- **The Volcker Rule.** No later than July 21, 2012, the federal banking agencies, SEC and CFTC must issues regulations that generally provide that a U.S. insured depository institution, any BHC (including companies treated as BHCs under the International Banking Act of 1978) and any of their affiliates cannot (i) engage in proprietary trading or (ii) acquire an ownership interest in or sponsor a hedge fund or private equity fund.
    - "Proprietary trading" means engaging as principal for one's trading account in any transaction to purchase or sell any security, derivative, futures contract, or option therein.
    - The Volcker Rule does not apply to, among others:
        - investments in U.S. federal, state or local obligations (including agency obligations and obligations of Ginnie Mae, Fannie Mae, Freddie Mac and any Federal Home Loan Bank) and in Small Business Investment Companies;
        - the purchase or sale of securities in connection with underwriting activities;
        - risk-mitigating hedging activities;

    - the purchase or sale of securities issued by a regulated insurance company for the general account of the insurance company; and
    - organizing or offering a private equity or hedge fund, including servicing as a general partner or managing member, if the banking entity among other things satisfies the de minimis investment test.
  - De minimis investment. If a banking entity organizes and offers a hedge fund or private equity fund, the banking entity may make and hold an initial investment in that fund. Not later than one year after the date of formation of the fund, the investment must be reduced through redemption or sale to an amount that does not exceed 3% of the total ownership interest in the fund and be immaterial to the banking entity (with reference to the banking entity's Tier 1 capital).

Changes to the Inspector General Function - Title IX

- The Act makes a number of changes to the way that Inspector Generals ("IGs") function within federal banking agencies. Specifically the Act:
  - increases independence requirements for IGs;
  - requires IGs to disclose the results of their peer reviews;
  - requires a two-thirds vote of the board or commission to remove an IG;
  - creates a council composed of financial regulatory agency IGs that meet regularly and must produce an annual report on issues that affect the financial sector; and
  - requires the heads of the financial agencies to either address deficiencies found by IGs or certify to the House and Senate why no action is necessary.

Consumer Financial Protection - Title X

The Consumer Financial Protection Act of 2010 (CFPA) embodied in Title X of the Act represents a complete overhaul of federal consumer financial protection law.

- **Creation of a Watchdog Bureau of Consumer Financial Protection.** CFPA creates an autonomous Federal Bureau of Consumer Financial Protection (CFPB) to be housed within the Federal Reserve. The CFPB will be headed by a director appointed by the President, subject to confirmation by the Senate. The director serves a five-year term and is only removable for cause.
  - The Bureau is established ***immediately*** upon enactment. Most portions of the CFPA go into effect upon a "transfer date" determined under an interagency process, not to exceed twelve months from enactment unless extended with the approval of Congress.
- **Federal Consumer Financial Law.** The CFPB will be dedicated to the vigorous implementation and enforcement of "federal consumer financial law," which includes new rulemaking, penalty, and enforcement provisions under CFPA, plus the transfer of authority over existing enumerated consumer financial protection laws. These enumerated consumer laws to be transferred to the CFPB's jurisdiction include, among others, Truth in Lending (including the Consumer Leasing Act, Fair Credit Billing Act and Home Ownership and Equity Protection Act), the Equal Credit Opportunity Act, the Electronic Fund

Transfer Act, the Real Estate Settlement Procedures Act, Fair Credit Reporting Act (with limited exceptions), the privacy provisions of Title V of the Gramm-Leach-Bliley Act (with limited exceptions), the Fair Debt Collection Practices Act, the Home Mortgage Disclosure Act, and Truth in Savings Act.

- **Unfair, deceptive or abusive acts or practices.** The CFPB also has rulemaking and enforcement authority over "unfair, deceptive or abusive acts or practices" relating to consumer financial products or services.
- **Covered Persons.** Persons and entities subject to the CFPB's jurisdiction include all persons who engage in directly or indirectly offering or providing a consumer financial product or service (called "covered persons"), those who provide material services to covered persons (called "service providers") and those who are in management or materially participate in the affairs of a covered person (called "related persons"). Besides registration requirements, some covered persons will be subject to direct supervision and periodic examination by the CFPB.
- **Exemptions.** Complete and partial exemptions are provided for, among others, automobile dealers, manufactured home sellers, merchants who hold their own accounts, real estate brokers and agents, attorneys, accountants, tax preparers, state regulated insurance providers, the regulated securities industry and employee benefit and compensation plans.
- **Transfer of Functions.** With few exceptions, the consumer financial protection functions of existing federal agencies such as the Federal Reserve, OCC, OTS, FDIC, National Credit Union Administration (NCUA), and HUD will be transferred to the CFPB. However, primary examination of depository institutions with assets of $10 billion or less will remain with those institutions' primary federal prudential regulator (i.e., the FDIC, Federal Reserve, OCC, OTS or NCUA).
- **Concurrent Jurisdiction.** The Federal Trade Commission will retain a limited amount of concurrent jurisdiction.
- **Public Enforcement.** Generally, the CFPA provides public enforcement powers to the CFPB in its own name, related enforcement by the Federal Trade Commission within its modified jurisdiction, and state Attorneys General. The CFPA specifically incorporates the visitorial standards upon national banks for state Attorneys General enunciated by the Supreme Court in Cuomo v. Clearing House Assn. L.L.C., 129 S. Ct. 2710 (2009).
- **Civil Penalties.** Although punitive damages are not authorized, the CFPA establishes civil fines of between $5,000 and $1 million per day depending upon a series of statutorily prescribed factors.
- **Federal Preemption and State Law.** National banks have retained their authority to export their home state interest rates. However, preemption of state consumer laws has been substantially scaled back to the standard of "irreconcilable conflict" as outlined in Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996). "Field preemption" has been eliminated, and the powers of federal savings associations will now be on par with those of national banks.

- **Pre-dispute Arbitration.** The CFPB is directed to conduct a study and report to Congress on pre-dispute arbitration clauses, but the CFPB is also granted authority to prohibit or condition the use of pre-dispute arbitration clauses based upon findings consistent with the mandated study.

Mortgage Reform and Anti-Predatory Lending Act - Title XIV

Title XIV of the Act embodies the Mortgage Reform and Anti-Predatory Lending Act (the Mortgage Reform Act). The Mortgage Reform Act is designated as an "enumerated consumer law" that will be subject to the jurisdiction of the CFPB. Regulations and amendments to regulations prescribed in the Mortgage Reform Act must be adopted in final form within 18 months of the transfer of Truth in Lending, RESPA and other enumerated consumer laws to the CFPB. The effective date of those regulations would be no later than 12 months after their issuance.

Residential Mortgage Loan Origination Standards

- Regulates "mortgage originators" who can be entities such as mortgage brokers, as well as individuals. A mortgage originator under the Mortgage Reform Act is not the same as a "mortgage loan originator" in the S.A.F.E. Mortgage Licensing Act.
- Covers "residential mortgage loans" that are limited to closed-end loans secured by a dwelling.
- Prohibits compensation to mortgage originators that varies based on terms of loan other than principal amount of loan (i.e., no yield spread premiums).
    - Origination fee may only be paid by either consumer or third party, but not both.
    - Does not affect compensation received by a creditor upon sale of a consummated loan to a subsequent purchaser.
- Requires rules to prohibit:
    - steering consumers to loans if consumer lacks "reasonable ability to repay;"
    - steering loans with "predatory characteristics or effects;" and
    - "abusive or unfair lending practices that promote disparity among consumers of equal credit worthiness but of different race, ethnicity, gender or age."

Standards and Requirements for Mortgage Loans

- Authorizes discretionary authority to issue regulations to prohibit or condition terms, acts or practices found to be "abusive, unfair, deceptive, predatory, necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers."
- Creditors must make "reasonable and good faith determination" based on verified documented information that consumer has reasonable ability to repay loan.
- Rebuttable presumption safe harbor from ability to repay requirement created for a "qualified mortgage" that has, among other characteristics:

- Regular periodic payments that may not result in increase of principal balance;
- With limited exception, no balloon payment;
- Income and financial resources verified and documented;
- Fully amortizes over loan term;
- Complies with guidelines or regulations relating to ratio of total monthly debt to monthly income or alternative means of ability to pay regular expenses;
- Total "points and fees" do not exceed 3% of loan amount; and
- Loan term does not exceed 30 years, with limited exception for high cost areas.

- A qualified mortgage under the Mortgage Reform Act is not the same as a "qualified residential mortgage" under Title IX of the Act relating to credit risk retention in asset-backed securities transactions.
- Consumers may assert violations of the anti-steering rules and ability to repay rules as a defense to a judicial or nonjudicial foreclosure or action to collect a debt in connection with a residential mortgage loan.
- Prepayment penalties are prohibited or limited depending on loan characteristics.
- No residential mortgage loan or home equity line of credit secured by a consumer's principal dwelling may include a requirement for arbitration or other nonjudicial procedure for resolving controversies or claims arising out of the loan transaction.
- Negative amortization is not permitted unless a special disclosure is provided to the borrower.
- Borrowers must be protected from loss of state law anti-deficiency protection.
- Civil liability under the Truth in Lending Act has been increased for certain violations.
- The statute of limitations has also been increased for some violations.
- Limited liability protection is provided to creditors if the borrower is "convicted" of obtaining a residential mortgage loan by "actual fraud."
- Numerous additional disclosures are required regarding escrow payments, settlement closing charges, payments to mortgage originators, interest paid over life of loan and periodic statements.

High-Cost Mortgage Loans

- Expanded to cover purchase money loans.
- Generally, APR threshold reduced to 6.5% over the "average prime offer rate" (APOR) for first lien loans and 8.5% above the APOR for subordinate lien loans.
- Points and fees trigger reduced from 8% to 5% of total loan amount.

- Additional limitations and prohibitions included relating to balloon payments, late fees, acceleration of loan, funding of points and fees and payoff statements.

Mortgage Servicing

- New rules added for escrow or impound accounts for payment of taxes, hazard and flood insurance, mortgage guaranty insurance and similar items.
- Additional obligations imposed upon servicers relating to force-place hazard insurance, responding to borrowers, corrections of errors, providing identity information of owner of loan, refunds of escrow accounts upon loan payoff, prompt crediting of payments and failure to comply with any other obligation found by the CFPB by regulation to be appropriate to carry out consumer protection purposes of the Act.
- Qualified written request response times reduced.
- Servicer penalties under Section 6 of RESPA increased.

Government-Sponsored Entities (GSEs) Reform

- The Miscellaneous Provisions of the Mortgage Reform Act includes the following regarding GSEs:
  - "It is the sense of the Congress that efforts to enhance the protection, limitation, and regulation of the terms of residential mortgage credit and the practices related to such would be incomplete without enactment of meaningful structural reforms of Fannie Mae and Freddie Mac."

Increased Securities Regulation and Protections for Retail Investors - Title IX

- **Increasing Investor Protections.** Subtitle A of Title IX establishes within the SEC an Investor Advisory Committee, whose purpose is to advise and consult with the SEC on issues related to regulation and investor interest and confidence. It also establishes an Office of Investor Advocate that is charged with assisting retail investors. Additionally, this subtitle provides for a variety of studies, including (i) a study on ways to improve the financial literacy of retail investors; (ii) a study on ways to improve access of investors to registration information about investment advisers, broker-dealers and their associated persons; (iii) a study on mutual fund advertising; (iv) a study on the potential conflicts of interest that exist between securities underwriting and securities analyst functions within the same firms; (v) a study on the effectiveness of state and federal regulations to protect consumers from individuals who hold themselves out as financial planners; and (vi) a study on enhancing examination and enforcement resources for investment advisers. In addition, the Act mandates both a study, and then rule-making, on the fiduciary duty of brokers, dealers, and advisers to their customers, and possible increases in these duties.
- **Increasing Regulatory Enforcement and Remedies.** Subtitle B contains a variety of important provisions. Some of the most noteworthy are:
  - **Aiding and Abetting Liability.** The Act expands the scope of liability for aiders and abettors in government enforcement actions to allow recklessness, as well as knowledge, to satisfy the mental state requirement for SEC aiding and abetting actions. The Act gives the SEC explicit

authority under the Securities Act, the Investment Company Act and the Investment Advisers Act to bring enforcement actions against aiders and abettors. The Act does not include a provision allowing for private civil actions against individuals who knowingly or recklessly aid or abet a violation of the Exchange Act. Instead, the Act requires a GAO study on the impact of authorizing such a private right of action.

- **SIPC Insurance Coverage.** The Act will increase the amount of SIPC (Securities Investor Protection Corporation) coverage for customer losses immediately, and then will require further adjustments to reflect inflation every five years.
- **Whistleblower Protection.** The Act creates substantial monetary awards for whistleblowers who provide original information in any SEC enforcement action resulting in a sanction of over $1,000,000. Whistleblowers can receive award amounts between 10% and 30% of the amount of the sanctions. It also grants whistleblowers a private right of action against employers that retaliate. The Act extends whistleblower protection to employees of nationally recognized statistical rating organizations. The Act extends the current statute of limitations on Sarbanes-Oxley (SOX) whistleblower claims from 90 days to 180 days, and provides that any rights or remedies provided under SOX may not be waived.
- **"Bad Actors."** The Act disqualifies certain offerings from the protections of Regulation D under the Securities Act, if such offerings are made by "bad actors." "Bad actors" are defined as persons who (i) have been convicted of a felony or misdemeanor in connection with the purchase or sale of any security or a false filing with the SEC, or (ii) are barred from association with regulated entities or from engaging in the business of securities, insurance or banking, or in savings association or credit union activities because of fraud, manipulation or deception.
- **Strengthening SEC Enforcement.** The Act strengthens the SEC's enforcement powers in three keys respects. First, it allows the SEC, under certain circumstances, to impose monetary penalties in administrative cease and desist proceedings against any person, not only regulated entities. Second, it expands federal court jurisdiction by allowing the SEC to bring enforcement actions against (i) persons taking "significant steps in furtherance" of a violation, even where the securities transaction takes place outside the United States and (ii) persons engaging in conduct outside the United States that has a foreseeable impact within the United States. Third, it specifies that control person liability under Section 20(a) of the Exchange Act applies in SEC enforcement actions, as well as in private actions.
- **Limitations on Mandatory Pre-dispute Arbitration.** The Act amends the Exchange Act and the Investment Advisers Act to allow the SEC to prohibit or impose limits upon the ability of brokers, dealers and investment advisers to require their customers and clients to arbitrate disputes arising under the federal securities laws.
- **Deadlines for the SEC.** The Act requires the SEC to either file an action or provide notice of its intent not to file an action within 180 days of providing a Wells notification to any person. Similarly, it provides that the SEC will have a maximum of 180 days after completing an onsite compliance examination or inspection or receiving all requested records to issue a written notification providing the results of the examination.

- Short Sale Reforms. The Act requires the SEC to prescribe rules providing for certain public disclosures and notifications to investors relating to short sales of securities. It also specifically makes unlawful the manipulative short sale of any security.

- **Improvements to the Regulation of Credit Rating Agencies.** The Act will increase internal controls, require greater transparency, provide investors with a private right of action, and provide the SEC with greater enforcement and examination tools regarding nationally recognized statistical rating organizations (NRSROs). Specifically, the SEC is directed to establish the Office of Credit Ratings to monitor and control NRSROs.

- **Improvements to the Management of the SEC.** The Act requires the SEC to submit annual reports on its internal supervisory controls and annual reports describing and evaluating the SEC's internal controls and procedures for financial reporting. The Comptroller General is required to submit a report, every three years, evaluating the personnel management of the SEC and its oversight of the national securities associations registered under section 15A of the Exchange Act.

- **Public Company Accounting Oversight Board (PCAOB), Portfolio Margining, Securities Lending and Other Matters.** The Act amends SOX to allow the PCAOB to share information with foreign auditor oversight authorities and extends its authority to auditors of broker-dealers, and exempts small issuers from portions of the internal control requirements of SOX. In addition, the SEC is required to conduct a study to determine how to reduce the burden of compliance with Section 404(b) for companies with a market capitalization between $75 million and $250 million. It allows the SEC to approve a portfolio margining program and directs the CFTC to ensure that securities held in a portfolio margin account that is carried as a futures account are "customer property" and holders of such accounts are "customers" for purposes of the Bankruptcy Code. The Act amends Section 10 of the Exchange Act to encompass the loan or borrowing of securities and requires the SEC to promulgate rules designed to increase the transparency of information available about securities lending. The Act also creates a grant to fund programs that help protect seniors from misleading investment information, and requires the GAO to study the risks of proprietary trading and determine the optimal regulatory structure for person to person lending.

Enhanced Regulation of Public Company Executive Compensation and Corporate Governance - Title IX

Title IX, Subtitle E of the Act will require the SEC to adopt rules imposing more stringent requirements on the manner in which executives in public companies are compensated.

- **Shareholder Vote on Executive Compensation.** The Act requires public companies to include a non-binding stockholder vote on executive compensation. The "say on pay" proposal must be held at least once every three years and for all golden parachute related compensation. These provisions take effect six months after enactment of the Act.

- **Compensation Committee Independence.** Compensation committee members of listed companies will be required to meet heightened independence standards. The independence and relationships of consultants, legal counsel and other advisors must be considered and approved by the compensation committee prior to engagement. Compensation committees will also be directly responsible for the appointment, compensation and oversight of such consultants. Public companies will also be required to disclose in an annual proxy statement whether the compensation committee engaged a compensation consultant, whether such work raised a conflict of interest and how such conflict is being addressed. The SEC must adopt rules within one year of enactment requiring stock exchanges to prohibit the listing of the securities of any company that does not meet the independence requirements.

- **Executive Compensation Disclosures.** Public companies will be required to disclose in an annual proxy statement: (i) the relationship between compensation of the company's named executive officers and the company's financial performance (which may be done graphically) and (ii) the (A) annual total compensation of the CEO and (B) median of the annual total compensation of all employees other than the CEO, and the ratio of (A) to (B). No timeframe was set out in the Act for SEC rule-making on these matters.
- **Recovery of Erroneously Awarded Compensation.** All listed companies must adopt a clawback policy providing for a three-year lookback, from the date of an accounting restatement, for recapture of excess incentive-based executive compensation (including stock options) due to accounting restatements because of material non-compliance with financial reporting requirements. No timeframe was set out in the Act for SEC rule-making on these matters.
- **Disclosure Regarding Employee and Director Hedging.** Public companies will be required to disclose in their annual proxy statement whether employees and directors are allowed to hedge any equity securities granted to or otherwise held, directly or indirectly, by them. No timeframe was set out in the Act for SEC rule-making on these matters.
- **Voting by Brokers.** The Act prohibits, with immediate effect, broker discretionary voting in director elections, executive compensation or any other significant matter, as determined by the SEC.

Strengthening Corporate Governance - Title IX

Title IX, Subtitle G of the Act requires the SEC to engage in rule-making with respect to board oversight and senior governance and authorizes the SEC to adopt rules relating to shareholder proxy access.

- **Proxy Access.** Upon enactment, the SEC will be authorized, but not required, to adopt rules allowing stockholders to nominate directors through a company's proxy solicitation materials.
- **Disclosure Regarding Chairman and CEO Structures.** Within six months of enactment, the SEC must adopt rules requiring public companies to disclose in an annual proxy statement the reasons why the positions of Chairman and CEO have been combined or separated.
- **Board Approval for Swap Transactions.** Effective one year after enactment, public companies will be required to have an appropriate committee of the board of directors review and approve swap transactions relying on a clearing exemption.

Improvements to the Asset-Backed Securitization Process - Title IX

- **Credit Risk Retention.** Regulators will issue regulations requiring a "securitizer" to retain part of the asset credit risk. While basic standards are set forth, regulators have broad authority to establish rules, guidelines and exemptions for different asset classes.
  - **Risk Retention of at least 5%:** General rule requires securitizer to retain no less than 5% of asset credit risk, subject to exemptions, exceptions and adjustments.
  - **Qualified Residential Mortgages exemption:** No risk retention is required if all assets are "qualified residential mortgages" as determined based on underwriting and product features that historically have lower risk of default.
  - **Commercial mortgages:** Reduce risk retention of securitizer if third party retains first-loss position and meets standards, including adequate financial resources.
  - **Underwriting standards:** Reduce risk retention if for each asset class the originator meets underwriting standards indicating low credit risk.
  - **Originator allocation:** Reduce risk retention of securitizer by portion of risk retained by originator as considered appropriate.
  - **Other exemptions:** Provide for total or partial exemptions as may be appropriate in the public interest or for assets issued or guaranteed by U.S. or its agencies (but excluding Fannie Mae and Freddie Mac), or by any State or its instrumentalities.
  - **Regulators:** Within 270 days of enactment, Federal Reserve, FDIC, OCC and SEC will jointly prescribe risk retention regulations for all asset classes, except that HUD and FHFA also will join in regulations for residential mortgages.
  - **Effective Date:** After the publication of the final regulations, the regulations will be effective for asset-backed securities backed by (i) residential mortgages after one year, and (ii) two years for all other classes of assets.

- **Disclosures and Reporting for Asset-Backed Securities.** The SEC will adopt regulations requiring disclosure of asset data by asset classes that facilitates investor comparison.

- **Representations and Warranties in Asset Backed Offerings.** The SEC will prescribe regulations requiring NRSRO to describe representations, warranties and enforcement mechanisms available to investors with comparison to similar securities.

- **Due Diligence Analysis and Disclosures in Asset-Backed Securities Issues.** The SEC will issue rules requiring issuer review of underlying assets and disclosure of this review.

- **Study on the Macroeconomic Effects of Risk Retention Requirements.** The Chairman of Financial Services Oversight Council will conduct a study on macroeconomic effects of credit risk retention requirements and report results to Congress.

Increased Oversight and Regulation of the Municipal Securities Market - Title IX

- **Oversight of "Municipal Advisors."** Effective October 1, 2010, "municipal advisors" must be registered with the SEC to provide advice to, or on behalf of, a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person.

- The term “municipal advisor” is defined as any person that provides advice to, or on behalf of, a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms and other similar matters concerning such financial products or issues, or undertakes solicitation of a municipal entity.
- This definition explicitly includes financial advisors, GIC brokers, third-party marketers, placement agents, solicitors, finders and swap advisors, if such persons are described in the definition above.
- This definition does not include underwriters, investment advisers, commodity trading advisers providing advice on swaps, attorneys or engineers.

- **Municipal Advisors Have Fiduciary Duty.** The Act provides that municipal advisors are deemed to have a fiduciary duty to the advised municipal entity and prohibits municipal advisors from engaging in any act, practice or course of business which is not consistent with the municipal advisor’s fiduciary duty to its client.

- **Municipal Securities Rulemaking Board’s Rule-Making Authority.** The Act expands the Municipal Securities Rulemaking Board’s (MSRB) rule-making authority to include advice provided to, and solicitations of, municipal entities or obligated persons by brokers, dealers, municipal securities dealers and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons. With respect to municipal advisors, the Act requires the MSRB to adopt rules that: (i) provide continuing education requirements for municipal advisors, (ii) provide professional standards and (iii) not impose an inappropriate regulatory burden on small municipal advisors.

- In an effort to increase transparency in the municipal securities markets, the Act reconstitutes the MSRB to give investors and public representatives a majority on the MSRB.

- The Act establishes an Office of Municipal Securities within the SEC that reports directly to the Chairman.

Insurance Reforms - Title V

- The Act creates the Office of National Insurance (the ONI) within the Department of Treasury.

- The ONI will:
  - monitor the national insurance industry for systemic risks and may designate insurers for federal financial regulation;
  - coordinate federal efforts on prudential aspects of international insurance matters and determine preemption of state laws in those matters; and
  - work with state regulators to collect relevant information from insurers related to its duties.

- The ONI is tasked with reporting to Congress on improvements to U.S. insurance regulatory system.

- The Act streamlines regulation of non-admitted insurance transactions and taxations
    - Regulation and taxation based on state of domicile of insured only
    - Limits states' authority to regulate surplus lines brokers and insurers
    - GAO to study market impact
- The Act sets standards for credit for reinsurance
    - Preempts most non-domiciliary regulation of state reinsurance transactions and solvency

Financial Company Liquidation Authority - Title II

In addition to the reforms below, the Act requires delivery to Congress of detailed studies on topics as diverse as the efficacy of the existing bankruptcy process and the coordination of enforcement activities with foreign regulators, each of which may lead to further legislation.

- **Title II of the Act creates a new process for receivership or liquidation of systemically important financial companies.** The Act creates a mechanism for the FDIC to be appointed as receiver for bank holding companies, any other companies supervised by the Federal Reserve, and any company that derives at least 85% of its revenue from financial activities, if failure of the company would have serious adverse consequences on the financial stability of the United States.
- **The Act grants extraordinarily broad authority to the FDIC as receiver.** The powers of the FDIC as receiver for a failed financial company combine the "superpowers" granted to the FDIC under existing bank receivership law with certain powers available to bankruptcy courts, including the ability to avoid fraudulent and preferential transfers that occurred prior to the receivership. The FDIC will control all aspect of the liquidation through an administrative claims process, except that the SIPC will act as trustee with respect to any broker-dealer subsidiary of a failed financial company, and any insurance subsidiaries will be liquidated in accordance with state law.
- **Directors and senior executive officers of failed financial companies face significant penalties.** The FDIC has the authority to claw back all compensation paid during the prior two years to directors and senior officers who were substantially responsible for the failure of the company. The FDIC may also prohibit such persons from any further participation in the operations of any financial company.
- **Large financial companies face additional costs.** The Act authorizes the FDIC to impose risk-based assessments on all bank holding companies with more than $50 billion in assets.

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