Dodd-Frank Wall Street Reform and Consumer Protection Act

Review and Analysis

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INTRODUCTION

The President signed the Dodd-Frank Wall Street Reform and Consumer Protection Act into law on July 21, 2010. The Act is not only one of the most sweeping laws affecting the banking and financial services industries ever to be approved by Congress, but it is also one of the most restrictive. In general, the Act provides virtually no new authority to banks or financial services companies. Instead, the Act imposes layers upon layers of new regulation and oversight designed to address different causes of the 2007-2009 crisis in the U.S. financial markets and prevent their recurrence.

SUMMARY

The law is comprised of sixteen broad Titles. Title I establishes the Financial Stability Oversight Council and requires it to identify systemically significant "nonbank financial companies" for heightened regulation by the Federal Reserve, alongside large bank holding companies. Title I also includes an amendment offered by Sen. Collins requiring the federal banking agencies to establish new, and likely higher, minimum leverage and risk-based capital requirements that will eliminate trust preferred securities as a permissible component of Tier 1 capital, with certain exceptions.

Title II creates a process for liquidating distressed, systemically significant financial companies that is similar to the receivership process contained in the Federal Deposit Insurance Act. Title III eliminates the Office of Thrift Supervision and provides for the transfers of its powers to the Federal Reserve, the Comptroller of the Currency and the FDIC. Title III also makes changes to federal deposit insurance coverage, the assessment base, and the reserve ratio.

Title IV eliminates the private adviser exemption under the Investment Advisers Act of 1940, provides for the regulation of advisers to hedge funds and other funds, and imposes related requirements. Title V establishes the Federal Insurance Office within the Department of the Treasury and defines its powers and responsibilities.

Title VI makes various changes in the ways depository institutions and depository institution holding companies are regulated. Among other things, Title VI expands the scope of insider transaction rules and per-borrower lending limits, imposes new limits on proprietary trading in securities (the so-called "Volcker Rule"), imposes new restrictions on thrifts that do not satisfy the qualified thrift lender test, and changes the rules on dividend waivers by mutual holding companies that have partially converted to stock.

Title VII establishes a regulatory and reporting framework for the over-the-counter and security-based swap markets. Title VII requires the registration of swap dealers and major participants, requires that certain swap contracts be cleared and exchange-traded, and imposes other related requirements.

Title VIII establishes a new framework for the regulation of payment, clearing and settlement activities. Among other things, Title VIII requires the establishment of uniform risk-

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management standards for systemically important payment, clearing, and settlement activities and the institutions that manage or operate systems in which activities of that kind are carried out.

Title IX seeks to better protect investors in securities. Among other provisions, Title IX grants the SEC authority to hold brokers and dealers providing investment advice to the same standards that investment advisers are held to, establishes an Office of Credit Ratings within the SEC to ensure that ratings are not unduly influenced by conflicts of interest, requires firms that package loans or securities and sell units in them to retain an ownership interest, imposes new executive compensation requirements, and requires registration of advisors to municipalities.

Title X establishes the Bureau of Consumer Financial Protection as an independent bureau in the Federal Reserve System to regulate the offering of consumer financial products and services, makes it harder for courts and the Comptroller of the Currency to determine that state laws protecting consumers in financial matters are preempted by federal laws that apply to national banks and federal savings banks and, among other provisions, authorizes the regulation of interchange fees and makes it harder for payment networks to dictate terms to merchants.

Title XI restricts the Federal Reserve's ability to provide emergency financial assistance in the future. Among other provisions, Title XI requires the Federal Reserve to establish policies and procedures governing its emergency lending authority to ensure that any emergency lending program in the future does not aid a particular failing financial company, protects taxpayers from losses, and is ended in a timely fashion. Title XI also requires the Federal Reserve to report, in detail, on its website, all financial assistance provided from December 1, 2007 to July 21, 2010.

Title XII is intended to improve access to mainstream financial institutions. Title XIII reduces the maximum amount available under the Emergency Economic Stabilization Act of 2008, and provides, among other things, that no authority under the Emergency Economic Stabilization Act may be used to incur any obligations under any new programs.

Title XIV imposes new requirements on mortgage lenders including, among others, a prohibition on certain financial incentives that would encourage a mortgage originator to steer a consumer to a higher-cost mortgage, and a prohibition on making a residential mortgage loan unless a determination is made that the borrower has a reasonable ability to repay the loan. The rules apply to depository institutions and other mortgage lenders.

Title XV imposes miscellaneous requirements. Among other provisions, the Government Accountability Office is required to issue a report assessing the relative independence, effectiveness, and expertise of presidentially appointed inspectors general and inspectors general of designated federal entities. Title XVI Act amends Section 1256 of the Internal Revenue Code.

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OUR APPROACH

The review and analysis that follows tracks the Titles in the Act, in order, but includes headings and sub-headings that we prepared in order to enable the reader to move to topics of interest quickly and with an understanding of the context. Given the scope and length of the Act, a Table of Contents is included for ease of reference.

This review and analysis was prepared by the Banking and Financial Services Group, Commercial Finance Group, and Securities Regulation Group of Nutter McClennen & Fish LLP. We hope that this information is useful to you. If you have questions or would like further information, please contact your attorney at Nutter.

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1. Section 1256 Contracts 103

TITLE I: FINANCIAL STABILITY

1. Financial Stability Oversight Council

Purposes

The Act establishes the Financial Stability Oversight Council ("Council") effective as of the date of enactment of the Act. The purposes of the Council are to identify risks to the financial stability of the United States that could arise from large, interconnected bank holding companies or "nonbank financial companies," or that could arise outside the financial services marketplace; to promote market discipline by eliminating expectations on the part of shareholders, creditors, and counter-parties that the government will shield them from losses in the event of failure; and to respond to emerging threats to the stability of the United States financial system. The Council meets quarterly and, in addition, at the call of the Chairperson or a majority of the members. [Sections 111, 112]

Membership

The Council consists of the following voting members: the Secretary of the Treasury, who serves as Chairperson of the Council; the Chairman of the Board of Governors of the Federal Reserve System; the Comptroller of the Currency; the Director of the Consumer Financial Protection Bureau; the Chairman of the Securities and Exchange Commission; the Chairperson of the Federal Deposit Insurance Corporation; the Chairperson of the Commodity Futures Trading Commission; the Director of the Federal Housing Finance Agency; the Chairman of the National Credit Union Administration Board; and an independent member appointed by the President, by and with the advice and consent of the Senate, having insurance expertise. [Section 111]

The non-voting members of the Council, who serve in an advisory capacity, are the Director of the Office of Financial Research; the Director of the Federal Insurance Office; a State insurance commissioner, to be designated by a selection process determined by the State insurance commissioners; a State banking supervisor, to be designated by a selection process determined by the State banking supervisors; and a State securities commissioner (or an officer performing similar functions), to be designated by a selection process determined by State securities commissioners. [Section 111]

General Duties and Responsibilities

Duties and responsibilities of the Council include monitoring the financial services marketplace to identify potential threats to the financial stability of the United States; recommending to the member agencies general supervisory priorities and principles; identifying gaps in regulation that could pose risks to the financial stability of the United States; making recommendations to the Federal Reserve concerning heightened prudential standards for nonbank financial companies and large, interconnected bank holding companies supervised by the Federal Reserve; identifying systemically important financial market utilities and payment, clearing, and settlement activities; making recommendations to primary financial regulatory agencies on

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new or heightened standards for financial activities or practices; submitting comments to the SEC and any standard-setting body with respect to accounting principles or procedures; and annually reporting to and testifying before Congress on, among other matters, the activities of the Council, significant financial market and regulatory developments, and emerging threats to the financial stability of the United States. [Section 112]

Identifying Systemically Significant Nonbank Financial Companies

One of the Council's most important duties is identifying "nonbank financial companies" that could pose risks to the financial stability of the United States and requiring the Federal Reserve to supervise them. A U.S. "nonbank financial company" is a company (other than a bank holding company or other type of excluded company) organized under the laws of the United States or any state and predominantly engaged in financial activities. A foreign "nonbank financial company" is a company (other than a company that is, or is treated in the United States as, a bank holding company) organized in a country other than the United States and predominantly engaged in, including through a branch in the United States, financial activities. [Sections 111, 112, 113]

Meaning of "Predominantly Engaged in Financial Activities"

A company is "predominantly engaged in financial activities" for these purposes if annual gross revenues derived by the company and all of its subsidiaries from activities that are financial in nature and, if applicable, from the ownership or control of one or more insured depository institutions, represents 85 percent or more of the consolidated annual gross revenues of the company; or the consolidated assets of the company and all of its subsidiaries related to activities that are financial in nature and, if applicable, related to the ownership or control of one or more insured depository institutions, represent 85 percent or more of the consolidated assets of the company. An activity is "financial in nature" if it is a "financial" activity as defined in Section 4(k) of the Bank Holding Company Act of 1956, as amended. [Section 111]

Factors Considered in Making Determination

The Council may determine that a U.S. nonbank financial company must be supervised by the Federal Reserve and subject to prudential standards if the Council determines that material financial distress at the U.S. nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the U.S. nonbank financial company, could pose a threat to the financial stability of the United States. In making a determination, the Council will consider, among other factors, the extent of the leverage of the company and the extent and nature of its off-balance-sheet exposure; the extent and nature of the transactions and relationships of the company with other significant nonbank financial companies and significant bank holding companies; the importance of the company as a source of credit for households, businesses, and state and local governments and as a source of liquidity for the United States financial system; the nature, scope, size, scale, concentration, inter-connectedness, and mix of the activities of the company; and any other risk-related factors that the Council deems appropriate. Similar factors are taken into account in

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determining that a foreign nonbank financial company must be supervised by the Federal Reserve and subject to prudential standards. [Section 113]

Registration

Not later than 180 days after the date of a final Council determination that a nonbank financial company is to be supervised by the Federal Reserve, the company is required to register with the Federal Reserve and provide information that the Federal Reserve determines is necessary or appropriate. [Section 114]

Other Systemically Significant Companies

If the Council determines that a systemically significant company has been operating in a manner so as to avoid being considered a nonbank financial company and to evade the Council's authority to require nonbank financial companies to be supervised by the Federal Reserve, the Council may require a company to establish an intermediate holding company, which would be subject to the supervision of the Federal Reserve and to prudential standards as if the intermediate holding company were a nonbank financial company supervised by the Federal Reserve. [Section 113]

Court May Overturn Determination if Arbitrary and Capricious

The Council is required to consult with other regulatory agencies, if any, having jurisdiction over the activities of any nonbank financial company being considered by the Council for supervision by the Federal Reserve. Nonbank financial companies that the Council has determined must be supervised by the Federal Reserve have a right to written notice and opportunity for hearing. The Council may waive or modify those rights in emergency circumstances. There is a right of judicial review, but the court may not upset the Council's determination unless the court finds that the determination was arbitrary and capricious, a difficult standard to satisfy. At least annually, the Council is required to reevaluate each determination that a nonbank financial company must be supervised by the Federal Reserve and rescind any prior determination if the Council determines that the nonbank financial company no longer meets the standards required for the determination. [Section 113]

Enhanced Supervision of Systemically Significant Companies

The Council is permitted to make recommendations to the Federal Reserve concerning prudential standards and reporting and disclosure requirements applicable to nonbank financial companies supervised by the Federal Reserve and large, interconnected bank holding companies, that are more stringent than those applicable to other nonbank financial companies and bank holding companies that do not present similar risks to the financial stability of the United States. In making recommendations, the Council may differentiate among companies that are subject to heightened standards on an individual basis or by category, or recommend an asset threshold that is higher than $50 billion for the application of certain requirements. The recommendations of the Council may include risk-based capital requirements, leverage limits, liquidity requirements, resolution plan and credit exposure report requirements,

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concentration limits, contingent capital requirements, enhanced public disclosures, short-term debt limits, and overall risk management requirements. [Section 115]

Certain Capital Purchase Program Participants

If a company received financial assistance under the Capital Purchase Program and was a bank holding company having total assets of $50 billion or more as of January 1, 2010, but ceases to be a bank holding company at any time after January 1, 2010, the entity is automatically treated as a nonbank financial company supervised by the Board of Governors, as if the Council had made a determination with respect to that entity. There is a right of appeal to the Council. There is no express right to judicial review. [Section 117]

Enhanced Regulation of Other Financial Companies

The Council may provide for stricter regulation of a financial activity by issuing recommendations to the primary financial regulatory agencies to apply new or heightened standards and safeguards for a financial activity or practice conducted by bank holding companies or nonbank financial companies, if the Council determines that the conduct, scope, nature, size, scale, concentration, or interconnectedness of the activity or practice could create or increase the risk of significant liquidity, credit, or other problems spreading among bank holding companies and nonbank financial companies, financial markets of the United States, or low-income, minority, or underserved communities. The primary financial regulatory agency is required to impose the standards recommended by the Council or explain in writing why the agency has determined not to follow the recommendation. The Council will make related reports to Congress. [Section 120]

2. Federal Reserve's Authority Over Systemically Significant Companies

Authority to Mitigate "Grave" Risks

If the Federal Reserve determines that a bank holding company with total assets of $50 billion or more, or a nonbank financial company supervised by the Federal Reserve, poses a "grave threat" to the financial stability of the United States, the Federal Reserve, on an affirmative vote of the Council, is required to take one or more of the following actions: limit the ability of the company to merge with, acquire, or otherwise become affiliated with another company; restrict the ability of the company to offer a financial product; require the company to terminate one or more activities; impose conditions on the manner in which the company conducts one or more activities; or, if the Federal Reserve determines that the actions described above are inadequate, require the company to sell or otherwise transfer assets or off-balance-sheet items to unaffiliated entities. Before taking action, the Federal Reserve must provide the company with written notice and opportunity for a hearing. [Section 121]

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Reports

The Federal Reserve may require each nonbank financial company supervised by the Federal Reserve, and any subsidiary, to submit reports on 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 the activities and operations of the company or subsidiary pose a threat to the financial stability of the United States, as well as compliance by the company or subsidiary with the requirements of relevant provisions of the Act. To the fullest extent possible, the Federal Reserve is required to use otherwise available reports and supervisory information. [Section 161]

Examinations

The Federal Reserve may examine any nonbank financial company supervised by the Federal Reserve and any subsidiary to determine the nature of the operations and financial condition of the company and subsidiary, risks that may pose a threat to the safety and soundness of the company or subsidiary or the financial stability of the United States, systems for monitoring and controlling those risks, and compliance by the company or subsidiary with the relevant requirements of the Act. To the fullest extent possible, the Federal Reserve is required to use otherwise available examination reports. The Federal Reserve is required to consult with other agencies with jurisdiction over subsidiaries of the company, and avoid duplication of activities, reporting requirements and requests for information. [Section 161]

Enforcement Authority

The Federal Reserve has enforcement authority over nonbank financial companies supervised by the Federal Reserve and their subsidiaries (other than any depository institution subsidiaries) and can utilize the powers granted in Section 8 of the Federal Deposit Insurance Act to issue cease and desist, civil money penalty, suspension, removal, and prohibition orders. If the Federal Reserve determines that a condition, practice, or activity of a depository institution subsidiary or functionally regulated subsidiary of a nonbank financial company supervised by the Federal Reserve does not comply with the regulations or orders issued by the Federal Reserve, or otherwise poses a threat to the financial stability of the United States, the Federal Reserve is permitted to recommend to the primary financial regulatory agency for the subsidiary that the agency initiate a supervisory action or enforcement proceeding. The Federal Reserve retains back-up authority in the event that action is not taken within the applicable time frame by the primary financial regulatory agency. [Section 162]

Acquisitions of Banks and Companies Engaged in Financial Activities

A nonbank financial company supervised by the Federal Reserve may acquire another bank only after complying with the requirements of the Bank Holding Company Act, as if the nonbank financial company supervised by the Federal Reserve were a bank holding company. A bank holding company with total assets of $50 billion or more, or a nonbank financial company supervised by the Federal Reserve, may not acquire direct or indirect ownership or control of any voting shares of any company having total assets of $10 billion or more (other

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than an insured depository institution) that is engaged in financial activities described in Section 4(k) of the Bank Holding Company Act, without providing written notice to the Federal Reserve in advance. The Federal Reserve may disapprove the transaction on the basis of various factors including, among others, that the proposed acquisition would result in greater or more concentrated risks to global or United States financial stability, or the United States economy. [Section 163]

Management Interlocks

A nonbank financial company supervised by the Federal Reserve is treated as a bank holding company for purposes of the restrictions on management interlocks in the Depository Institutions Management Interlocks Act. However, the Federal Reserve is prohibited from exercising authority in the Depository Institutions Management Interlocks Act to permit service by a management official of a nonbank financial company supervised by the Federal Reserve as a management official of any bank holding company with total assets of $50 billion or more or other nonaffiliated nonbank financial company supervised by the Federal Reserve (other than to provide a temporary exemption for interlocks resulting from a merger, acquisition, or consolidation). [Section 164]

Enhanced Supervision of Systemically Significant Companies

The Federal Reserve is required, on its own or as a result of recommendations by the Council, to establish prudential standards for nonbank financial companies supervised by the Federal Reserve and bank holding companies with total assets of $50 billion or more that are stricter than the standards applicable to nonbank financial companies and bank holding companies that do not present similar risks to the financial stability of the United States, and increase in stringency on the basis of certain factors. In prescribing more stringent standards, the Federal Reserve may differentiate among companies on an individual basis or by category. The Federal Reserve may, in accordance with a recommendation of the Council, establish an asset threshold that is higher than $50 billion for the application of certain requirements. The standards are required to include risk-based capital requirements, leverage limits, liquidity requirements, resolution plan and credit exposure report requirements, concentration limits, contingent capital requirements, enhanced public disclosures, short-term debt limits, and overall risk management requirements. [Section 165]

Risk Committee

The Federal Reserve must require each publicly traded nonbank financial company supervised by the Federal Reserve and each publicly traded bank holding company that has total consolidated assets of $10 billion or more to establish a risk committee. The risk committee must be responsible for the oversight of enterprise-wide risk management; include such number of independent directors as the Federal Reserve determines to be appropriate based on the nature of operations, size of assets, and other appropriate criteria; and include at least one risk management expert having experience in identifying, assessing, and managing risk exposures of large, complex firms. [Section 165]

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Nutter Notes: The Federal Reserve is permitted to issue regulations requiring each publicly traded bank holding company that has total assets of less than $10 billion to establish a risk committee, if the Federal Reserve determines it is necessary or appropriate to promote sound risk management practices.

Stress Tests

The Federal Reserve, in coordination with appropriate primary financial regulatory agencies and the Federal Insurance Office, is required to conduct annual stress testing in which nonbank financial companies supervised by the Federal Reserve and bank holding companies with total assets of $50 billion or more are evaluated to determine whether they have the capital necessary to absorb losses as a result of adverse economic conditions. The Federal Reserve is required to provide at least three different sets of conditions under which the evaluation is conducted, including baseline, adverse, and severely adverse conditions. Nonbank financial company supervised by the Federal Reserve and bank holding companies with total assets of $50 billion or more are required to conduct semiannual stress self-testing. All other financial companies that have total assets of more than $10 billion and are regulated by a primary financial regulatory agency are required to conduct annual stress self-testing. [Section 165]

Leverage Limits

The Federal Reserve must require any bank holding company with total assets of $50 billion or more and any nonbank financial company supervised by the Federal Reserve to maintain a debt-to-equity ratio of no more than 15-to-1 on a determination by the Council that the company poses a “grave threat” to the financial stability of the United States and that the imposition of the requirement is necessary to mitigate the risk that the company poses. The Federal Reserve is required to issue regulations to establish procedures and timelines for complying with these requirements. [Section 165]

Inclusion of Off-Balance Sheet Activities in Computing Capital

Nonbank financial companies supervised by the Federal Reserve and bank holding companies with total assets of $50 billion or more, when computing capital for purposes of meeting capital requirements, are required to take into account any off-balance-sheet activities. “Off-balance-sheet activities” means “an existing liability of a company that is not currently a balance sheet liability, but may become one upon the happening of some future event,” including direct credit substitutes in which a bank substitutes its own credit for a third party (such as standby letters of credit), irrevocable letters of credit that guarantee repayment of commercial paper or tax-exempt securities, risk participations in bankers’ acceptances, sale and repurchase agreements, asset sales with recourse against the seller, interest rate swaps, credit swaps, commodities contracts, forward contracts, securities contracts, and such other activities as the Federal Reserve may determine. [Section 165]

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Early Remediation Requirements

The Federal Reserve, in consultation with the Council and the FDIC, is required to issue regulations providing for the early remediation of financial distress of a nonbank financial company supervised by the Federal Reserve or a bank holding company with assets of $50 billion or more. The Act states that this requirement does not authorize the provision of financial assistance from the U.S. Government. The regulations prescribed by the Federal Reserve are required to define measures of the financial condition of the company, including regulatory capital, liquidity measures, and other forward-looking indicators. The regulations are also required to establish requirements that increase in stringency as the financial condition of the company declines, including requirements in the initial stages of financial decline (such as limits on capital distributions, acquisitions, and asset growth), and requirements at later stages of financial decline (such as capital restoration plans and capital-raising requirements, limits on transactions with affiliates, management changes, and asset sales). [Section 166]

Intermediate Holding Companies

If a nonbank financial company supervised by the Federal Reserve conducts activities other than those that are financial in nature or incidental activities under Section 4(k) of the Bank Holding Company Act, the Federal Reserve may require the company to establish and conduct all or a portion of the activities that are determined to be financial in nature and incidental activities in an intermediate holding company not later than 90 days after the date on which the nonbank financial company supervised by the Federal Reserve is notified by the Federal Reserve (or by any later deadline established by the Federal Reserve). The Federal Reserve must require the establishment of an intermediate holding company if the Federal Reserve determines that it is necessary to appropriately supervise activities that are determined to be financial in nature or incidental activities, or to ensure that supervision by the Federal Reserve does not extend to the commercial activities of the nonbank financial company. Activities that are financial in nature or incidental do not include internal financial activities, including internal treasury, investment, and employee benefit functions. Certain activities are grandfathered. Any company that controls an intermediate holding company is required to serve as a source of strength for the intermediate holding company. [Section 167]

3. Leverage and Risk-Based Capital Requirements (Collins Amendment)

New Leverage Capital Requirements

The federal banking agencies are required to establish minimum leverage capital requirements on a consolidated basis for insured depository institutions, depository institution holding companies, and nonbank financial companies supervised by the Federal Reserve. The minimum requirements may not be less than the "generally applicable leverage capital requirements" (as defined below), which are required to serve as a "floor" for the new capital requirements, nor "quantitatively lower than the generally applicable leverage capital requirements" that were in effect for insured depository institutions as of the date of enactment of the Act. [Section 171]

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Leverage Capital Defined

The term "generally applicable leverage capital requirements" means the minimum ratios of Tier 1 capital to average total assets, as established by the appropriate federal banking agencies to apply to insured depository institutions under the prompt corrective action regulations implementing Section 38 of the Federal Deposit Insurance Act, regardless of total consolidated asset size or foreign financial exposure, and includes the regulatory capital components in the numerator of that capital requirement, average total assets in the denominator of that capital requirement, and the required ratio of the numerator to the denominator. [Section 171]

Nutter Notes: Under the generally applicable leverage capital requirements, the "regulatory capital components in the numerator" do not include trust preferred securities. As a result, trust preferred securities, subject to the exceptions and grandfather provisions discussed below, are no longer permissible components of Tier 1 capital.

New Risk-Based Capital Requirements

The federal banking agencies are required to establish minimum risk-based capital requirements on a consolidated basis for insured depository institutions, depository institution holding companies, and nonbank financial companies supervised by the Federal Reserve. The minimum requirements may not be less than the "generally applicable risk-based capital requirements," which are required to serve as a "floor" for the new capital requirements, nor quantitatively lower than the generally applicable risk-based capital requirements that were in effect for insured depository institutions as of the date of enactment of the Act. [Section 171]

Risk-Based Capital Defined

The term "generally applicable risk-based capital requirements" means the risk-based capital requirements, as established by the federal banking agencies to apply to insured depository institutions under the prompt corrective action regulations implementing Section 38 of the Federal Deposit Insurance Act, regardless of total consolidated asset size or foreign financial exposure, and includes the regulatory capital components in the numerator of those capital requirements, the risk-weighted assets in the denominator of those capital requirements, and the required ratio of the numerator to the denominator. [Section 171]

Investments in Financial Subsidiaries

Investments in financial subsidiaries that insured depository institutions are required to deduct from regulatory capital need not be deducted from regulatory capital by depository institution holding companies or nonbank financial companies supervised by the Federal Reserve, unless a capital deduction is required by the Federal Reserve or the primary financial regulatory agency in the case of a nonbank financial company supervised by the Federal Reserve. [Section 171]

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Effective Dates and Phase-In Periods

For debt or equity instruments issued on or after May 19, 2010 by depository institution holding companies or by nonbank financial companies supervised by the Federal Reserve, the provisions summarized above are deemed to have become effective as of May 19, 2010. For debt or equity instruments issued before May 19, 2010 by depository institution holding companies or by nonbank financial companies supervised by the Federal Reserve, any regulatory capital deductions required under this section are to be phased in incrementally over a period of three years, with the phase-in period to begin on January 1, 2013, except that, for debt or equity instruments issued before May 19, 2010 by depository institution holding companies with total consolidated assets of less than $15 billion as of December 31, 2009, and by organizations that were mutual holding companies on May 19, 2010, the capital deductions that would be required for other institutions under this section are not required. For any depository institution holding company that was not supervised by the Federal Reserve as of May 19, 2010, the requirements of this provision, except as described above, are to be effective five years after the date of enactment of this Act, except as to debt or equity instruments that are currently outstanding (whether or not they were issued before May 19, 2010). [Section 171]

Exceptions

The provisions summarized above do not apply to debt or equity instruments issued to the United States or any agency or instrumentality under the Emergency Economic Stabilization Act of 2008, including securities issued under the Capital Purchase Program prior to October 4, 2010, nor do the provisions summarized above apply to any federal home loan bank, or any small bank holding company that is subject to the Small Bank Holding Company Policy Statement of the Federal Reserve, as in effect on May 19, 2010. [Section 171]

Studies on Hybrid Capital Instruments and Access to Capital by Smaller Institutions

The GAO, after consulting with the Federal Reserve, OCC and FDIC, is required to conduct a study of the use of hybrid capital instruments as a component of Tier 1 capital for banking institutions and bank holding companies. The study is required to consider, among other matters, the current use of hybrid capital instruments, such as trust preferred securities, as a component of Tier 1 capital; the benefits and risks of allowing hybrid capital instruments to be used to comply with Tier 1 capital requirements; a review of the consequences of disqualifying trust preferred instruments, and whether it could lead to the failure or undercapitalization of existing banking organizations; and the availability of capital for financial institutions with less than $10 billion in total assets. The report is due not later than 18 months after the date of enactment of the Act. The GAO, after consulting with the federal banking agencies, is also required to conduct a study of access to capital by insured depository institutions with total consolidated assets of $5 billion or less. The report is due no later than 18 months after the date of enactment of the Act. [Sections 171, 174]

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4. Office of Financial Research

Duties

The Act establishes the Office of Financial Research ("Office") within the Department of the Treasury. The purpose of the Office is to support the Council in fulfilling its duties and to support member agencies by collecting data on behalf of the Council, and providing data to the Council and member agencies; standardizing the types and formats of data reported and collected; performing applied research and essential long-term research; developing tools for risk measurement and monitoring; performing other related services; making the results of the activities of the Office available to financial regulatory agencies; and assisting member agencies in determining the types of data authorized by the Act to be collected by member agencies. The Office may issue regulations, in consultation with the Chairperson of the Council, to the extent necessary, and may issue subpoenas for the production of information under certain circumstances. [Sections 152, 153]

Permanent Self-Funding

The Secretary of the Treasury is required to establish, with the approval of the Council, beginning two years after the date of enactment of the Act, an assessment schedule, including the assessment base and rates applicable to bank holding companies with total consolidated assets of $50 billion or more and nonbank financial companies supervised by the Board of Governors, to collect assessments equal to the total expenses of the Office. [Section 155]

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TITLE II: ORDERLY LIQUIDATION AUTHORITY

1. Overview

Title II creates a process for liquidating distressed financial companies that are systemically significant ("Title II Process") that is substantially similar to the receivership process contained in the Federal Deposit Insurance Act.

2. Companies Subject to Title II Process

Financial Companies

The Title II Process applies only to "financial companies." The term "financial company" means any U.S. bank holding company, any nonbank financial company supervised by the Federal Reserve under Title I of the Act, any other company that is predominantly engaged in activities that the Federal Reserve has determined are financial in nature or incidental to financial activities, or any subsidiary that is predominantly engaged in financial activities but does not include a depository institution. The receivership provisions of the Act do not apply to insured depository institutions, Farm Credit System institutions or certain other specified entities. [Section 201]

Predominantly Engaged in Financial Activities

A company is not considered to be predominantly engaged in financial activities if the consolidated revenues of the company from financial activities and activities that are considered incidental to financial activities constitute less than 85 percent of the total consolidated revenues of the company. In determining whether a company is a financial company, the consolidated revenues derived from the company's ownership or control of a depository institution are included. [Section 201]

3. Determination of Systemic Significance, Financial Distress and Other Factors

Key Factors

The Title II Process is reserved for financial companies that are first determined to be systemically significant. Specifically, a determination ("Determination") must be made that the company is in default or in danger of default, the failure of the company and its resolution under other applicable law would have serious adverse effects on financial stability in the United States, no viable private sector alternative is available to prevent the company's default, any effects on the interests of creditors and shareholders of the company and other market participants are appropriate, the Title II Process would avoid or mitigate any adverse effects, a federal regulatory agency has already ordered the company to convert all of its convertible debt instruments, and the company satisfies the definition of a "financial company" under Section 201. [Section 203]

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Agency Recommendations

The Federal Reserve and FDIC are required by the Act to consider whether to make a written recommendation to the Secretary of the Treasury that the Secretary should appoint the FDIC as receiver for a distressed, systemically significant financial company. In the case of a securities broker or dealer, or where the largest U.S. subsidiary of a financial company is a broker or dealer, the Federal Reserve and the SEC consider whether to make the written recommendation. In the case of an insurance company, or where the largest U.S. subsidiary of a financial company is an insurance company, the Federal Reserve and the Director of the Federal Insurance Office consider whether to make the written recommendation. [Section 203]

Contents of Recommendations

Any recommendation must contain an evaluation of whether the financial company is in default or in danger of default, a description of the effect the default would have on financial stability in the United States, a description of the effect the default would have on economic conditions or financial stability for various communities, a recommendation regarding the nature and the extent of actions to be taken in connection with the Title II Process, an evaluation of the likelihood of a private sector alternative to prevent default, an evaluation of why a Bankruptcy Code case is not appropriate, an evaluation of the effects on creditors and shareholders of the financial company and other market participants, and an evaluation of whether the company is a "financial company" under Section 201. [Section 203]

Determination by Secretary of the Treasury

The Secretary of the Treasury is required to take certain actions if, on the written recommendation of the agencies described above, the Secretary (in consultation with the President) makes the Determination summarized above. The Secretary is required to document the Determination, retain the documentation for review, and notify the financial company and the FDIC of the Determination. [Section 203]

Report to Congress Within 24 Hours

Not later than 24 hours after the date of appointment of the FDIC as receiver for a covered financial company, the Secretary is required to provide written notice of the recommendations and Determination to the Majority Leader and the Minority Leader of the Senate and the Speaker and the Minority Leader of the House of Representatives, the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives. [Section 203]

Contents of Report to Congress

The report is required to consist of a summary of the basis for the Determination including information on the size and financial condition of the company, the sources of capital and credit support available to the company, the operations of the company that could have had a significant impact on financial stability, identification of banks and financial companies which

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may be able to provide the services offered by the covered financial company, any potential international ramifications of the resolution under other applicable insolvency law, an estimate of the potential effect of the resolution under other applicable insolvency law on the financial stability of the United States, the potential effect of the Title II Process on consumers, the potential effect of the Title II Process on the financial system, financial markets, and banks and other financial companies, and whether resolution of the company under other applicable insolvency law would cause banks or other financial companies to experience severe liquidity distress. [Section 203]

4. Commencing the Title II Receivership Process

Notifying the FDIC and the Financial Company

After a Determination by the Secretary, the Secretary is required to notify the FDIC and the financial company. If the board of directors of the financial company consents to the appointment of the FDIC as receiver, the Secretary is required to appoint the FDIC as receiver. [Section 202]

Petitioning the U.S. District Court

If the board of directors of the financial company does not consent to the appointment of the FDIC as receiver, the Secretary must petition the United States District Court for the District of Columbia (the "Court") for an order authorizing the Secretary to appoint the FDIC as receiver. The Secretary is required to present all relevant findings and the recommendations of the agencies described above. [Section 202]

Court Order

On a strictly confidential basis, without any prior public disclosure, and after notice to the financial company and a hearing in which the financial company may oppose the petition, the Court is required to determine whether the Determination of the Secretary that the financial company is in default or in danger of default and satisfies the definition of "financial company" is arbitrary and capricious. [Section 202]

Arbitrary and Capricious Standard

If the Court determines that the Determination of the Secretary that the financial company is in default or in danger of default and satisfies the definition of "financial company" is not arbitrary and capricious, the Court is required to issue an order immediately authorizing the Secretary to appoint the FDIC as receiver of the financial company. If the Determination of the Secretary is judged to be arbitrary and capricious, the Court is required to immediately provide to the Secretary a written statement of each reason supporting its determination, and afford the Secretary an immediate opportunity to amend and re-file the petition. [Section 202]

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Court Has 24 Hours to Issue Ruling

If the Court does not make a determination within 24 hours of receipt of the petition, the petition is deemed granted by operation of law. The Secretary is then required by the Act to appoint the FDIC as receiver and liquidation under the Title II Process "shall automatically and without further notice or action be commenced" and the FDIC may immediately take all actions authorized in connection with a Title II Process, as described below. [Section 202]

Right of Appeal

The United States Court of Appeals for the District of Columbia Circuit has jurisdiction to hear an appeal of a final decision of the District Court filed by the Secretary or the financial company not later than 30 days after the date of the decision. The Court of Appeals has jurisdiction to hear an appeal by the financial company only if the financial company did not consent to the appointment of a receiver by the Secretary. The Court of Appeals must consider any appeal on an expedited basis. A petition for a writ of certiorari to review a decision of the Court of Appeals may be filed by the Secretary or the financial company with the U.S. Supreme Court not later than 30 days after the date of a final decision of the Court of Appeals. The Supreme Court has discretionary jurisdiction. The Supreme Court must consider any petition on an expedited basis. [Section 202]

5. How Title II Receiverships Operate

Governing Law

The provisions of Title II exclusively apply to and govern all matters relating to financial companies for which the FDIC is appointed receiver, and no provisions of the Bankruptcy Code or the rules issued under the Bankruptcy Code apply in the Title II Process, except as expressly provided in Title II. [Section 202]

Orderly Liquidation Authority

The Title II Process is intended to provide "the necessary authority to liquidate failing financial companies that pose a significant risk to the financial stability of the United States in a manner that mitigates such risk and minimizes moral hazard." The authority provided in Title II "shall be exercised in the manner that best fulfills" that purpose. [Section 204]

Consequences for Shareholders, Directors and Management

The FDIC and other appropriate agencies "will take all steps necessary and appropriate to assure that all parties, including management, directors, and third parties, having responsibility for the condition of the financial company, bear losses consistent with their responsibility, including actions for damages, restitution, and recoupment of compensation and other gains not compatible with such responsibility." [Section 204]

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FDIC As Receiver

Upon the appointment of the FDIC as receiver, the FDIC acts as the receiver for the financial company, with all of the rights and obligations set forth in Title II. The FDIC, as receiver, is required to consult with the primary financial regulatory agency or agencies of the financial company and its covered subsidiaries for purposes of ensuring an orderly liquidation of the financial company. [Section 204]

Time Limit for Receivership

Any appointment of the FDIC as receiver under Title II terminates at the end of the three-year period beginning on the date on which such appointment is made. The 3-year limit may be extended by the FDIC for up to one additional year, if the Chairperson of the FDIC determines and certifies in writing to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives that continuation of the receivership is necessary. The limit may be extended for up to one additional year, subject to certain conditions. [Section 202]

Insurance Company Liquidations in Accordance with State Law

If an insurance company is a financial company or a subsidiary or affiliate of a financial company, the liquidation or rehabilitation of the insurance company, and any subsidiary or affiliate of the company, are required to be conducted as provided under applicable state law. [Section 203]

Cases Involving Securities Broker-Dealers

The FDIC, as receiver, is required to consult with the SEC and the Securities Investor Protection Corporation ("SIPC") in the case of any financial company for which the FDIC has been appointed receiver that is a broker or dealer registered with the SEC under the Securities Exchange Act of 1934 and is a member of the SIPC. On the appointment of the FDIC as receiver for any broker or dealer, the FDIC is required to appoint, without any need for court approval, the SIPC to act as trustee for the liquidation of the broker or dealer under the Securities Investor Protection Act of 1970. [Sections 204, 205]

Powers as Receiver

The rights and obligations of the FDIC as receiver are substantially similar to the rights and obligations of the FDIC as receiver under Section 11 of the Federal Deposit Insurance Act. The FDIC, upon appointment as receiver, succeeds to all rights, titles, powers, and privileges of the financial company and its assets, and of any stockholder, member, officer, or director of the company, and title to the books, records, and assets of any previous receiver or other legal custodian of the financial company. [Section 210]

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Receiver May Operate the Company

The FDIC, as receiver, may take over the assets of and operate the covered financial company with all of the powers of the members or shareholders, the directors, and the officers of the company, and conduct all business of the company, collect all obligations and money owed to the company, perform all functions of the company, in the name of the company, manage the assets and property of the company, and provide by contract for assistance in fulfilling any function, activity, action, or duty as receiver. [Section 210]

Bridge Financial Companies

The FDIC, as receiver for a financial company under Title II, may organize a bridge financial company. [Section 210]

Mergers and Transfers of Assets

The FDIC, as receiver for a financial company under Title II, may merge the company with another company or transfer any asset or liability of the company (including any assets and liabilities held by the company for security entitlement holders, any customer property, or any assets and liabilities associated with any trust or custody business) without obtaining any approval, assignment, or consent with respect to the transfer. [Section 210]

Determination of Claims

The FDIC, as receiver for a financial company under Title II, is required to determine claims in accordance with the requirements of Title II. After providing notice to potential claimants to present claims, together with proof, to the FDIC as receiver by a date specified in the notice, the FDIC is required to notify claimants whether it allows or disallows the claim. The receiver must allow any claim received by the receiver on or before the date specified in the notice which is proved to the satisfaction of the receiver. The FDIC as receiver may disallow any portion of any claim by a creditor or claim of a security, preference, setoff, or priority which is not proved to the satisfaction of the Corporation. [Section 210]

Payment of Valid Claims

The FDIC, as receiver for a covered financial company under Title II, is required, to the extent that funds are available, to pay all valid obligations of the company that are due and payable at the time of the appointment of the FDIC as receiver, in accordance with the provisions of Title II. [Section 210]

Written Agreements Required

No agreement that tends to diminish or defeat the interest of the FDIC as receiver in any asset acquired by the receiver is valid against the receiver, unless the agreement is in writing, was executed by an authorized officer or representative of the company, or confirmed in the ordinary course of business by the company, and has been, since the time of its execution, an

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official record of the company, or the party claiming under the agreement provides documentation, acceptable to the receiver, of the agreement and its authorized execution or confirmation by the company. [Section 210]

Fraudulent and Preferential Transfers

The FDIC as receiver may avoid fraudulent transfers made or incurred within two years before the date on which the FDIC was appointed receiver, and may also avoid preferential transfers of an interest of the company in property to or for the benefit of a creditor that was made while the company was insolvent, provided in each case that certain other conditions are satisfied. [Section 210]

Authority to Repudiate Contracts

The FDIC as receiver for any financial company may disaffirm or repudiate any contract or lease to which the financial company is a party, the performance of which the FDIC as receiver, in the discretion of the FDIC, determines to be burdensome, and the repudiation of which the FDIC as receiver determines, in its discretion, will promote the orderly administration of the affairs of the financial company. As in Section 11 of the Federal Deposit Insurance Act, the rights of holders of qualified financial contracts are set forth in Title II. [Section 210]

6. Remedies, Recoupment and Assessments

Liability of Officers, Directors and Others

A director or officer of a covered financial company may be held personally liable for monetary damages in any civil action for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care than gross negligence including intentional wrongful conduct, as those terms are defined and determined under applicable state law. In any proceeding related to any claim against a director, officer, employee, agent, attorney, accountant, or appraiser of a covered financial company, or any other party employed by or providing services to a financial company, recoverable damages determined to result from the improper use or investment of any assets of the financial company include principal losses and appropriate interest.

Assessments on Eligible Financial Companies

The FDIC is required to charge one or more risk-based assessments if the assessments are necessary to pay the obligations issued by the FDIC to the Secretary. The FDIC is required to impose assessments on any claimant that received payments or amounts from the FDIC in excess of the value that the claimant was entitled to receive and, if the amounts recovered are insufficient, impose assessments on "eligible financial companies" and financial companies with total consolidated assets equal to or greater than $50 billion that are not "eligible financial companies." The term "eligible financial company" means any bank holding company with

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total consolidated assets equal to or greater than $50 billion and any nonbank financial company supervised by the Federal Reserve under Title I. [Section 210]

Recoupment of Compensation from Officers and Directors

The FDIC, as receiver of a covered financial company, may recover from any current or former senior executive officer or director substantially responsible for the failed condition of the financial company any compensation received during the two-year period preceding the date on which the FDIC was appointed receiver of the financial company, except that, in the case of fraud, no time limit applies. The FDIC is required to issue rules implementing these requirements including defining the term "compensation" to mean any financial remuneration, including salary, bonuses, incentives, benefits, severance, deferred compensation, or golden parachute benefits, and any profits realized from the sale of the securities of the financial company. [Section 210]

Prohibition Orders Against Insiders

The Federal Reserve or, if the financial company was not supervised by the Federal Reserve, the FDIC, may prohibit a senior executive officer or director of the failed company who engaged in wrongful conduct and profited as a result from any further participation, in any manner, in the conduct of the affairs of any financial company for a period of time determined by the appropriate agency, except that the period cannot be less than two years. The Federal Reserve and FDIC, in consultation with the Financial Stability Oversight Council established under Title I, are required to jointly prescribe rules or regulations to implement this provision including rules further defining the term "senior executive" for purposes of this provision. [Section 213]

Prohibition on Taxpayer Funding

All financial companies placed in receivership under Title II are required to be liquidated. No taxpayer funds may be used to prevent the liquidation of any financial company under Title II. All funds expended in the liquidation of a financial company under Title II are required to be recovered from the disposition of assets of the financial company or, in the alternative, must be the responsibility of the "financial sector," through assessments. Taxpayers "shall bear no losses from the exercise of any authority under this title." [Section 214]

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TITLE III: TRANSFER OR POWERS TO OCC, FDIC AND FEDERAL RESERVE

1. OTS Abolished; Powers Transferred to Federal Reserve, OCC and FDIC

The OTS will be abolished effective 15 months from the date of enactment of the Act. In general, on the date that is 12 months from the date of enactment of the Act (the "transfer date"), the powers and functions of the OTS will be transferred to the Federal Reserve, the OCC or the FDIC, as described below, except that the transfer date may be extended for an additional six months if the Secretary of the Treasury determines an extension is necessary and satisfies certain conditions, including publishing notice of the extension no later than 270 days from the date of enactment of the Act. [Sections 311, 312, and 313]

Thrift Holding Companies

On the transfer date, the powers of the OTS to regulate, supervise and examine savings and loan holding companies are transferred to the Federal Reserve. The Federal Reserve succeeds to all powers, authorities, rights, and duties that were vested in the OTS with respect to savings and loan holding companies. This includes, among other powers, the authority to issue rules with respect to affiliate transactions, insider lending, and unlawful tying arrangements. [Sections 312 and 313]

Federal Savings Associations

On the transfer date, the powers of the OTS to regulate, supervise and examine federal savings associations are transferred to the OCC. The OCC is required to designate a Deputy Comptroller to be responsible for the supervision and examination of federal savings associations. OTS rule-making authority with respect to *all* savings associations – federally chartered and state chartered – is also transferred to the OCC, although supervisory and examination authority over *state chartered savings associations* is transferred to the FDIC, as described below. The OCC succeeds to all powers, authorities, rights, and duties that were vested in the Office of Thrift Supervision with respect to the functions described above. [Sections 312, 313, 314, and 369]

State Chartered Savings Associations

On the transfer date, the powers of the OTS to supervise and examine state chartered savings associations are transferred to the FDIC. The FDIC succeeds to all powers, authorities, rights, and duties of the OTS with respect to state chartered savings associations except prospective rule-making functions which are transferred to the OCC. [Sections 312, 313, and 369]

Nutter Notes: The FDIC is given responsibility for supervising and examining state chartered savings associations without the authority to write new rules regulating state chartered savings associations (which the Act gives only to the OCC). However, the FDIC can enforce existing regulations applicable to state chartered savings associations, despite its inability to write new regulations.

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Prior OTS Rules and Actions Remain Effective

Not later than the transfer date, the Federal Reserve, OCC and FDIC will publish a list of OTS regulations that the three agencies will adopt and continue to enforce. The transfers of powers do not affect the validity of any right, duty, or obligation of the United States, the OTS, or any other person that existed on the day before the transfer of functions. All orders, resolutions, determinations, agreements, regulations, interpretations, guidelines, procedures, and advisory materials that have been issued by the OTS or by a court, which are in effect on the day before the transfer date, will continue in effect according to their terms and are enforceable by or against the successor agency. [Section 316]

OTS Employees

In general, OTS employees who have been involved in regulating, supervising or examining federal savings associations will be transferred to the OCC, and OTS employees who have been involved in regulating, supervising or examining state chartered savings associations will be transferred to the FDIC. OTS employees who have been involved in thrift holding company regulation, supervision or examination, however, will not be transferred to the Federal Reserve. In general, for 30 months after the transfer date, a transferred employee cannot be involuntarily separated or reassigned outside his or her local area. However, the OCC or FDIC may reassign an employee outside the employee's local area when necessary for the "efficient operation" of the agency. [Section 322]

Grandfathered Branching Rights for Banks that Convert from Thrifts

A savings association that "becomes" a bank may continue to operate any branch or agency that the savings association operated immediately before the savings association became a bank regardless of whether the law of the state in which the branch is located would permit establishment of the branch if the bank were chartered by that state. [Section 341]

In addition, a savings association that "becomes" a bank may establish, acquire, and operate additional branches and agencies at any location within any state in which the savings association operated a branch immediately before the savings association became a bank, if the law of the state in which the branch is located, or is to be located, would permit establishment of the branch if the bank were chartered by that state. [Section 341]

Nutter Notes: The rule would appear to apply in the event of a charter conversion as well as in the event of a merger of a savings association with and into a bank, where the bank charter survives the merger.

2. Increase In Insurance Coverage; Assessment Base and Reserve Ratio Changed

The provisions of the Act summarized below, relating to changes in deposit insurance coverage, the assessment base, the reserve ratio, and related matters, are effective on the date of enactment of the Act unless otherwise indicated.

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Deposit Insurance Increased

The standard maximum deposit insurance amount is permanently increased to $250,000 from $100,000. [Section 335]

Assessment Base

The Act requires the FDIC to amend its regulations to define the "assessment base" with respect to an insured bank or thrift as an amount equal to its average consolidated total assets minus average tangible equity (and certain other amounts in the case of a custodial bank or a banker's bank). Currently, the FDIC's assessment base is calculated on the basis of deposits. [Section 331]

The Act removes a provision that had barred the FDIC from placing a bank or thrift in the lowest risk category solely because of its size. [Section 331]

Dividends

The current requirement that the FDIC pay out in dividends to insured banks and thrifts 50 percent of the amount by which the reserve ratio of the Deposit Insurance Fund exceeds 1.35 percent of estimated insured deposits is repealed. [Section 332]

The current requirement that the FDIC pay out in dividends to insured banks and thrifts 100 percent of the amount by which the reserve ratio of the Deposit Insurance Fund exceeds 1.50 percent of estimated insured deposits is changed from a mandatory requirement to discretionary authority. [Section 332]

Reserve Ratio

The minimum reserve ratio is increased. The Act provides that the minimum reserve ratio may not be less than 1.35 percent of estimated insured deposits, or the "comparable percentage" of the assessment base involving average consolidated total assets minus average tangible equity (and certain other amounts in the case of a custodial bank or a banker's bank). Currently, the minimum reserve ratio is 1.15 percent of estimated insured deposits and the maximum reserve ratio is 1.50 percent of estimated insured deposits. The maximum reserve ratio is removed. [Section 334]

The FDIC is required to take steps necessary to ensure that the reserve ratio of the Deposit Insurance Fund reaches 1.35 percent of estimated insured deposits by September 30, 2020. In setting the assessments necessary to meet that requirement, the FDIC is required to "offset" the effect of the increase in the reserve ratio floor on each insured bank and thrift with total consolidated assets of less than $10 billion. [Section 334]

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Board of Directors of FDIC

The seat on the five-member FDIC Board of Directors presently held by the Director of the OTS will be held by the Director of the Bureau of Consumer Financial Protection. This change takes effect on the transfer date. [Section 336]

Non-Interest Bearing Transaction Accounts Fully Insured

Non-interest bearing transaction accounts will be fully insured as of December 31, 2010, and the amount that any depositor at an insured bank or thrift maintains in non-interest bearing transaction accounts will not be counted when calculating the maximum insured amount due to any depositor. [Section 343]

The term "non-interest bearing transaction account" does not include NOW accounts or any other account with respect to which the bank or thrift reserves the right to require advance notice of an intended withdrawal. The full coverage of non-interest bearing transaction accounts is automatically repealed on January 1, 2013, unless Congress acts to re-establish it. [Section 343]

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TITLE IV: REGULATION OF ADVISERS TO HEDGE FUNDS AND OTHERS

1. General Elimination of Private Adviser Exemption

The Act eliminates the private adviser exemption under Section 203(b)(3) of the Investment Advisers Act of 1940 (the "Investor Advisers Act") for those acting as investment advisers to a private fund. [Section 403]

Private funds are issuers that would be an investment company (as defined in Section 3 of the Investment Company Act of 1940), but for Section 3(c)(1) or 3(c)(7) of that Act.

2. Exemptions to Registration Requirements for Investment Advisers

Despite the elimination of the general private adviser exemption discussed above, the Act provides for specific exemptions to the registration requirements for certain private fund advisers:

Foreign Private Advisers

The Act creates a limited exemption from the registration requirements for foreign private advisers, who (i) have no place of business in the United States, (ii) in total, advise fewer than 15 clients and investors in the United States in private funds, (iii) have aggregate assets under managements attributable to such United States clients of less than $25 million (or such higher amount as the Commission may, by rule, deem appropriate, and (iv) neither hold themselves out to the public in the United States as investment advisers, nor act as investment advisers to any registered investment companies or business development companies. [Sections 402, 403]

CFTC-Registered Advisers; Advisers to SBICs, VC Funds, Mid-Size Private Funds and Family Offices

The Act also creates a limited exemption from the registration requirements for (i) investment advisers registered with the Commodity Futures Trading Commission as a commodity trading adviser (provided that the business of the adviser does not become predominately the provision of securities-related advice), (ii) investment advisers who solely advise small business investment companies (or affiliates of small business investment companies) licensed under (or applying for licenses under) the Small Business Investment Act of 1958, (iii) investment advisers who solely advise one or more venture capital funds, (iv) investment advisers who solely advise private funds and have less than $150 million in assets under management in the United States and (v) family offices (subject to the SEC's promulgation of future rules relating to such exemption). [Sections 403, 407, 408, 409]

Asset Threshold for SEC Registration

The SEC requires that investment advisers with assets under management of between $25 million and $100 million (or such higher amounts as the SEC may deem appropriate) register with the state securities commissioner of the state where it maintains its principal place of

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business, if it would be subject to examination as an investment adviser by such state regulator. An investment adviser meeting these two criteria need only to register with the SEC if it (i) is an adviser to a registered investment company, (ii) is an adviser to a business development company or (iii) is required to register with more than 15 states. [Section 410]

3. Record Keeping and Reporting Requirements

Registered Advisers

The SEC may require a registered investment adviser to maintain records for a prescribed period of time and periodically file reports with the SEC regarding the private funds advised by the investment adviser. The records will be subject to inspection by the SEC and must include (i) the amount of assets under management and the use of leverage (including off-balance sheet leverage), (ii) counterparty credit risk exposure, (iii) trading and investment positions, (iv) valuation policies and practices of the fund, (v) types of assets held, (vi) any side arrangements or side letters with certain investors, (vii) trading practices and (viii) any other information the SEC determines is necessary. The SEC will make all reports available to the Financial Stability Oversight Council as necessary in order to assess the systemic risk posed by a private fund. [Section 404]

Exempted Advisers

The SEC may also require (i) advisers to venture capital funds and (ii) advisers who solely advise private funds and have less than $150 million in assets under management in the United States to maintain such records and provide the SEC with annual or other periodic reports as the SEC determines is necessary or appropriate to protect investors. [Section 407, 408]

Confidentiality

The SEC cannot generally be compelled to disclose any information that it receives from investment advisers and such information is exempt from disclosure under the Freedom of Information Act (Section 552 of Title 5 of the United States Code), except such information may be shared (i) with Congress, (ii) in response to relevant requests from any other federal agency, department or self-regulatory organization within the scope of its respective jurisdiction, or (iii) in order to comply with an order of a court of the United States in an action brought by the federal government of the SEC. All recipients of information from the SEC are bound by similar confidentiality provisions, and the SEC must limit the public disclosure of any sensitive, non-public proprietary information as any facts ascertained during an SEC examination. [Section 404]

Report to Congress

The SEC will provide an annual report to Congress explaining how the SEC has used this information to monitor the markets for the protection of investors and the integrity of the markets. [Section 404]

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Disclosure by Investment Advisers

The SEC may require an investment adviser to disclose the identity, investments or affairs of its clients for purposes of assessment of potential systemic risk. [Section 405]

Custody of Client Accounts

The SEC may require registered investment advisers to take steps to safeguard client assets over which it has custody, including verification of the assets by an independent public accountant. [Section 411]

4. Adjusting the Accredited Investor Standard

The SEC will adjust the accredited investor standard of natural persons such that the net worth threshold of $1 million will exclude the value of the primary residence of such person immediately upon passage of the Act. The SEC may also review and modify the other provisions of the "accredited investor" definition in order to protect investors, in the public interest or in light of the economy. [Section 413]

Periodic Review

In addition, every 4 years after the enactment of the Act, the SEC will review the definition of "accredited investor" (including the net worth requirement) to determine whether the definition should be adjusted or modified for the protection of investors, in the public interest or in light of the economy. [Section 413]

5. Qualified Client Standard

Within 1 year after the effective date of the Act, and every 5 years thereafter, the SEC is required to adjust any dollar amount tests in the Investment Advisers Act for the effects of inflation. All adjustments will be rounded to the nearest $100,000 multiple. [Section 418]

6. Definition of Client

The SEC is prohibited from defining the term "client" for purposes of Sections 206(1) and 206(2) of the Investment Advisers Act to include investors in a private fund. [Section 406]

7. Studies and Reports

Compliance Costs; Accredited Investors; Self-Regulatory Organization

The Comptroller General of the United States will conduct a study of (i) the compliance costs associated with custody rules, (ii) the appropriate criteria for determining financial thresholds of accredited investors, and (iii) the feasibility of forming a self-regulatory organization to oversee private funds. The Comptroller General will deliver a report to the Senate and Congress with respect to compliance costs and accredited investor status within 3 years of the

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effective date of the Act, and with respect to the oversight of private funds within 1 year of the effective date of the Act. [Sections 412, 415, 416]

Short Selling

The SEC will conduct a study on (i) the state of short selling on national securities exchanges and over-the-counter markets, (ii) the feasibility, benefits and costs of real time reporting on short sale positions and (iii) the feasibility, benefit and costs of conducting a pilot program where public companies report the status (i.e. "short," "market maker short," "buy," "buy-to-cover," and "long") of all trades in real time. The SEC will deliver a report to the Senate and Congress with respect to short selling within two years of the effective date of the Act, and with respect to the feasibility studies, within one year of the effective date of the Act. [Section 417]

8. Timing

Unless otherwise noted, all amendments under Title IV will become effective one year after the date of enactment of the Act. [Section 419]

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TITLE V: INSURANCE

1. Federal Insurance Office established within Department of Treasury

The Federal Insurance Office ("FIO") is established effective immediately within the Department of the Treasury. FIO is headed by a Director appointed by the Secretary of the Treasury. The Director also serves in an advisory capacity to the Financial Stability Oversight Council established under Section 111 of the Act. [Section 502]

Insurance Industry Segments Covered

Within FIO's purview are all lines of insurance except (1) health insurance, as determined by the Secretary of the Treasury in coordination with the Secretary of Health and Human Services ("HHS"); (2) long-term care insurance, except long-term care insurance that is included with life or annuity insurance components, as determined by the Secretary of the Treasury in coordination with the Secretary of HHS; and (3) crop insurance. [Section 502]

FIO Responsibilities

FIO's primarily role is to monitor, not regulate. Specifically, FIO is charged with

- monitoring all aspects of the insurance industry, including identifying issues or gaps in the regulation of insurers that could contribute to a systemic crisis;
- monitoring the extent to which traditionally under-served communities and consumers, minorities and low- and moderate-income persons have access to affordable insurance products;
- recommending to the Financial Stability Oversight Council that the Council designate an insurer, or an affiliate of an insurer, as an entity subject to regulation as a nonbank financial company supervised by the Board of Governors of the Federal Reserve pursuant to Section 102 of the Act;
- assisting the Secretary in administering the Terrorism Insurance Program established under the Terrorism Risk Insurance Act of 2002;
- coordinating Federal efforts and developing Federal policy on prudential aspects of international insurance matters and assisting the Secretary in negotiating "covered agreements" (as defined in Section 502 of the Act);
- determining whether state insurance measures are preempted by covered agreements;
- consulting with the states (including state insurance regulators) regarding insurance matters of national importance and prudential insurance matters of international importance; and
- performing such other related duties and authorities as may be assigned to FIO by the Secretary of the Treasury.

[Sections 502(a)-(d)]

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Nutter Notes: Although FIO has no direct regulatory authority, FIO may indirectly affect the regulation of insurance through its power to recommend to the Financial Stability Oversight Council that an insurer be designated as an entity subject to regulation as a nonbank financial company supervised by the Federal Reserve. Such a designation would potentially require the designee to meet financial stability requirements different from those required under state regulations.

Collection of Information from Insurers and Affiliates

FIO is broadly authorized to collect information from insurers and their affiliates (other than "small insurers," a term to be defined by Secretary of the Treasury), and is permitted to issue subpoenas. However, before requesting any information from an insurer or any of its affiliates FIO must satisfy two conditions. First, FIO must seek to obtain such information from the relevant Federal agency and state insurance regulator (or other relevant Federal or state regulatory agency in the case of an affiliate of an insurer) and any publicly available sources. Second, if FIO determines that such information is not so available, FIO must comply with the Paperwork Reduction Act in collecting such data or information. Notwithstanding any other provision of law, each such relevant Federal agency and state insurance regulator or other Federal or state regulatory agency is authorized to provide to FIO any information that FIO may request in accordance with the Act. [Section 502(e)]

FIO Authorized to Preempt State Insurance Measures Under Limited Circumstances

FIO is authorized to preempt a state insurance measure if, and only to the extent that FIO determines that the measure results in less favorable treatment of a non-United States insurer domiciled in a foreign jurisdiction that is subject to a covered agreement than a United States insurer domiciled, licensed, or otherwise admitted in that state; and is inconsistent with a "covered agreement." [Section 502(f)]

The term 'covered agreement' means a written bilateral or multilateral agreement regarding prudential measures with respect to the business of insurance or reinsurance that (A) is entered into between the United States and one or more foreign governments, authorities, or regulatory entities; and (B) relates to the recognition of prudential measures with respect to the business of insurance or reinsurance that achieves a level of protection for insurance or reinsurance consumers that is substantially equivalent to the level of protection achieved under state insurance or reinsurance regulation. [Section 502(r)]

Study and Report on Regulation of Insurance

FIO is required to submit a report to Congress on how to modernize and improve the system of insurance regulation in the United States. The report is due in December, 2011. The Act directs FIO to take into account the following considerations, among others, in preparing the report: systemic risk regulation with respect to insurance; capital standards and the relationship between capital allocation and liabilities, including standards relating to liquidity and duration risk; consumer protection for insurance products and practices, including gaps in state regulation; the degree of national uniformity of state insurance regulation; the costs and benefits of potential Federal regulation of insurance across various lines of insurance (except

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health insurance); the feasibility of regulating only certain lines of insurance at the Federal level, while leaving other lines of insurance to be regulated at the state level; the ability of any potential Federal regulation or Federal regulators to eliminate or minimize regulatory arbitrage; and the potential consequences of subjecting insurance companies to a Federal resolution authority. [Section 502(p)]

2. State-Based Insurance Reform

The Act simplifies the state regulation of surplus lines insurance and reinsurance through various state-based reforms. [Sections 521 to 533]

Surplus Lines Insurance

The Act gives the home state of the insured sole regulatory authority over the collection and allocation of premium tax obligations related to nonadmitted (surplus lines) insurance. States are authorized to enter into a compact or other agreement to establish uniform allocation and remittance procedures. The insured's home state can require surplus lines brokers and insureds to file tax allocation reports detailing the portion of premiums attributable to properties, risks or exposures located in each state. [Section 521]

Two years after enactment of the Act, states will not be allowed to collect fees relating to licensing of nonadmitted brokers unless the states participate in the national insurance producer database of the National Association of Insurance Commissioners ("NAIC"). The Act streamlines eligibility requirements for nonadmitted insurance providers with the eligibility requirements set forth in the NAIC's Nonadmitted Insurance Model Act. Also, a state may not prohibit a surplus lines broker from placing nonadmitted insurance with, or procuring nonadmitted insurance from, a nonadmitted insurer domiciled outside the United States that is listed on the Quarterly Listing of Alien Insurers maintained by the NAIC. [Sections 523-524]

The Act streamlines the purchase process for large insureds by providing that a surplus lines broker seeking to procure or place nonadmitted coverage for an exempt commercial purchaser may not be required to make a due diligence search to determine whether the insurance could be obtained from admitted carriers if (1) the broker has disclosed that the insurance might be available from an admitted carrier that might provide greater protection; and (2) the exempt commercial purchaser subsequently has requested in writing that the broker procure the insurance from the nonadmitted insurer. [Section 525]

Reinsurance

The Act provides that if the state of domicile of a ceding insurer is accredited by the NAIC, and that state recognizes credit for reinsurance for the insurer's ceded risk, no other state can deny such credit for reinsurance. The Act also prohibits non-domiciliary states from restricting or eliminating the rights of reinsurers to resolve disputes pursuant to contractual arbitration clauses, ignoring or eliminating contractual agreements on choice of law determinations, and enforcing reinsurance contracts on terms different from those set forth in the reinsurance contract. [Section 531]

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The Act provides that if a state is an NAIC accredited state, or has financial solvency requirements substantially similar to the requirements for NAIC accreditation, it has sole responsibility for regulating the financial solvency of reinsurers domiciled in the state. Non-domiciliary states cannot require a reinsurer to provide any financial information other than the information required by the state of domicile. Non-domiciliary states also get copies of the financial information that is required to be filed with the state of domicile. [Section 532]

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TITLE VI: DEPOSITORY INSTITUTION REGULATORY IMPROVEMENTS

1. Moratorium on Industrial Banks, Credit Card Banks and Trust Banks

The FDIC is barred from approving an application for deposit insurance for an industrial bank, credit card bank, or trust bank if the bank is owned or to be owned by a commercial firm. A company is a "commercial firm" if the annual gross revenues of the company and its affiliates from banking and financial activities represent less than 15 percent of the consolidated annual gross revenues of the company. Applications received on or before November 23, 2009 are not covered by the prohibition. [Section 603]

In addition, the banking agencies are required to deny an application for a change in control of an industrial bank, credit card bank, or trust bank if the change would result in direct or indirect control of the bank by a commercial firm, with certain exceptions. Among other exceptions, this requirement will not apply to a change in control of an industrial bank, credit card bank, or trust bank resulting from the merger or acquisition of a commercial firm that currently controls such a bank, or to a change in control necessary to prevent the default of the bank. [Section 603]

These provisions will sunset three years after the date of enactment of the Act. [Section 603]

The Comptroller General is required to study whether eliminating various exceptions from the definition of "bank" in the Bank Holding Company Act of 1956 – thereby eliminating the ability of various companies that control institutions covered by those exception to escape regulation as bank holding companies – is necessary in order to strengthen those institutions or the financial system. Included in the matters to be studied are whether separate regulation of savings and loan holding companies makes sense, or whether companies that control savings associations should be regulated as bank holding companies. The GAO report to Congress is due within 18 months of the date of enactment. [Section 603]

2. Holding Company Reports and Examinations

The Federal Reserve's authority to require reports from bank holding companies and savings and loan holding companies is expanded to include reports with respect to compliance with other applicable federal laws in addition to the Bank Holding Company Act, the Savings and Loan Holding Company Act, and laws that the Federal Reserve already has specific jurisdiction to enforce. The Federal Reserve's examination authority is also expanded with respect to holding companies and subsidiaries of holding companies to include, among other things, authority to examine for risks to the financial system. Various restrictions on the Federal Reserve's authority over functionally regulated subsidiaries are eliminated. However, the Federal Reserve is required to provide notice to, and consult with, appropriate federal banking agencies, the SEC, the CFTC, and state regulators before examining a holding company subsidiary that is a depository institution or a functionally regulated subsidiary. These amendments take effect on the transfer date. [Section 604]

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The Federal Reserve is required to examine the activities of subsidiaries of bank holding companies and savings and loan holding companies (other than banks, thrifts, functionally regulated subsidiaries and subsidiaries of the banks or thrifts) that are permissible for the banks or thrifts in the same manner, subject to the same standards, and with the same frequency as would be required if the activities were conducted in the lead bank or thrift subsidiary of the holding company. If a subsidiary is supervised by a state bank supervisor or other state regulatory authority, the Federal Reserve is required to consult and coordinate with the state regulator. Back-up authority is given to the appropriate federal banking agencies. These amendments take effect on the transfer date. [Section 605]

3. More Restrictive Standards in Connection with Mergers and Acquisitions

The Federal Reserve, in acting on acquisitions under Section 3 of the Bank Holding Company Act, is required to take into consideration the extent to which a proposed acquisition, merger, or consolidation would result in greater or more concentrated risks to the stability of the United States banking or financial system. Similar changes are made to the Bank Merger Act. A financial holding company may not acquire a company under Section 4(k) of the Bank Holding Company Act without the prior approval of the Federal Reserve in a transaction in which the total consolidated assets to be acquired by the financial holding company exceed $10 billion. These amendments take effect on the transfer date. [Section 604]

A bank holding company may not make an interstate bank acquisition unless the bank holding company is well capitalized and well managed. Under current law, the bank holding company must only be adequately capitalized and adequately managed. A federal banking agency before approving an interstate bank merger must determine that, following the merger, the resulting bank will be well capitalized and well managed. Under current law, the agency must determine that the resulting bank will be adequately capitalized and adequately managed. These amendments take effect on the transfer date. [Section 607]

4. Financial Holding Companies Must Be Well Capitalized and Well Managed

The Act prohibits a bank holding company that has elected to be a financial holding company from engaging in any financial activity, or directly or indirectly acquiring or retaining shares of any company engaged in any financial activity (other than activities that are closely related to banking or managing or controlling banks) unless, among other requirements, the bank holding company is well capitalized and well managed, and all of the depository institution subsidiaries of the bank holding company are well capitalized and well managed. The requirement that the bank holding company itself be well capitalized and well managed is new. Similar requirements are imposed on savings and loan holding companies. These amendments take effect on the transfer date. [Section 606].

5. More Restrictive Affiliate Transaction Rules

Transactions covered under Section 23A of the Federal Reserve Act are broadened to include any transaction with an affiliate that involves the borrowing or lending of securities and any derivative transaction with an affiliate, to the extent that either type of transaction causes a

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member bank or a subsidiary to have credit exposure to the affiliate. Collateralization requirements are extended to credit exposure resulting from a securities borrowing or lending transaction, or a derivative transaction. [Section 608]

The Federal Reserve is permitted to issue regulations and interpretations with respect to the manner in which a so-called "netting agreement" may be taken into account in determining the amount of a covered transaction between a member bank and an affiliate, including the extent to which netting agreements between a member bank and an affiliate may be taken into account in determining whether a covered transaction is fully secured. These provisions take effect one year from the transfer date. [Section 608]

The Act provides that the 10 percent of capital limit on a bank's covered transactions with any affiliate will now apply to covered transactions between a bank and any financial subsidiary of the bank. Currently, that quantitative limit does not apply to covered transactions between a bank and a financial subsidiary of the bank. The Act also removes a provision from Section 23A that provides that a bank's investment in a financial subsidiary does not include retained earnings of the financial subsidiary. These provisions do not apply to existing covered transactions with financial subsidiaries and become effective one year after the transfer date. [Section 609]

6. More Restrictive Per-Borrower Lending Limits

The term "loans and extensions of credit" for purposes of the per-borrower lending limit applicable to national banks will now also include any credit exposure the national bank may have to a person arising from a derivative transaction, repurchase agreement, reverse repurchase agreement, securities lending transaction, or securities borrowing transaction between the national bank and the other person. These provisions take effect one year from the transfer date. [Section 610]

The authority of a state chartered bank to enter into a derivative transaction depends on whether the lending limit in the state in which the bank is chartered "takes into consideration credit exposure to derivative transactions." This provision takes effect 18 months after the transfer date. [Section 611]

Nutter Notes: The Commissioner of Banks is authorized to issue directives, guidelines and regulations to further define terms used in, and to otherwise carry out, the Massachusetts limits. The Commissioner of Banks has not previously issued any directives, guidelines or regulations specifically concluding that Massachusetts lending limits take into consideration credit exposure in connection with derivative transactions.

7. Restrictions on Charter Conversions

A bank or savings association may not convert to a different charter during any period in which the bank is subject to a cease and desist order (or other formal enforcement order) issued by, or a memorandum of understanding entered into with, its regulator with respect to a significant supervisory matter. The prohibitions on the approval of charter conversions do not

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apply if the federal banking agency that would be the appropriate federal banking agency after the proposed conversion gives the appropriate federal banking agency or state bank supervisor that issued the cease and desist order, other formal enforcement order, or memorandum of understanding, as appropriate, written notice of the proposed conversion, including a plan to address the significant supervisory matter in a manner that is consistent with the safe and sound operation of the institution. These provisions are effective on the date of enactment. [Section 612]

8. Modified Interstate Branching Rules

The Act modifies the current rules on de novo interstate branching by allowing national banks and state chartered banks to branch into another state, with regulatory approval, if the law of the state in which the branch is located, or would be located, would permit establishment of the branch if the bank seeking to establish the branch were a state chartered bank chartered by that state. The current rule, which the Act eliminates, is that there must be in effect in the host state a law that applies equally to all banks and expressly permits all out-of-state banks to establish de novo branches in the host state. The new provisions are effective on the date of enactment. [Section 613]

9. Insider Lending Rules Broadened to Cover Derivatives and Other Transactions

The insider lending rules are broadened to cover exposure to an executive officer, director, principal shareholder, or any related interest arising from a derivative transaction, repurchase agreement, reverse repurchase agreement, securities lending transaction, or securities borrowing transaction between the member bank and the insider. The amendments take effect one year after the transfer date. [Section 614]

10. New Insider Transaction Rules Cover Purchases and Sales of Assets

The Act prohibits a bank or savings association from purchasing an asset from, or selling an asset to, an executive officer, director, or principal shareholder, or any related interest, unless the transaction is on market terms and, if the transaction represents more than 10 percent of the capital stock and surplus of the bank or savings association, the transaction has been approved in advance by a majority of the members of the board of directors who do not have an interest in the transaction. The Federal Reserve may issue rules implementing the provision after consulting with the OCC and FDIC. The Act eliminates an existing law that imposes restrictions on national banks and state member banks that purchase assets from or sell assets to directors and related companies. These amendments take effect on the transfer date. [Section 615]

11. Countercyclical Capital Requirements

The Bank Holding Company Act and the Savings and Loan Holding Company Act are amended to specifically authorize the Federal Reserve to issue regulations and orders relating to capital requirements. In establishing capital regulations, the Federal Reserve is required to attempt to make the requirements "countercyclical," so that "the amount of capital required to

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be maintained by a company increases in times of economic expansion and decreases in times of economic contraction, consistent with the safety and soundness of the company." Separate language requires each federal banking agency to attempt to make the capital standards it imposes on banks and savings associations "countercyclical" so that "the amount of capital required to be maintained by an insured depository institution increases in times of economic expansion and decreases in times of economic contraction, consistent with the safety and soundness of the insured depository institution." These amendments take effect on the transfer date. [Section 616]

12. Source of Strength Doctrine Expanded Beyond Bank Holding Companies

The Act requires the Federal Reserve to require bank holding companies to serve as a source of financial strength for bank subsidiaries, and savings and loan holding companies to serve as a source of financial strength for savings association subsidiaries. The term "source of financial strength" means "the ability of a company that directly or indirectly owns or controls an insured depository institution to provide financial assistance to such insured depository institution in the event of the financial distress of the insured depository institution." Similar requirements are imposed on other companies that control insured depository institutions. The federal banking agency may require companies to submit reports, under oath, for the purpose of assessing the ability of the company to comply with the requirements. The amendments take effect on the transfer date. [Section 616]

Nutter Notes: Bank holding companies are already required to serve as a source of strength for banks that they control. The Act extends that requirement to savings and loan holding companies and other companies that control banks that are outside of the sweep of the Bank Holding Company Act or the Savings and Loan Holding Company Act.

13. Holding Companies for Broker-Dealers

The Act removes existing provisions that allow certain companies that control securities broker-dealers to register with the SEC as investment bank holding companies. The amendments eliminating the investment bank holding company regulatory framework take effect on the transfer date. In its place, the Act creates a new regulatory framework that allows companies that control securities broker-dealers that may be required by foreign law to be subject to comprehensive consolidated supervision to register with the Federal Reserve as "supervised securities holding companies." Securities holding companies do not include, among other companies, nonbank financial companies supervised by the Federal Reserve under Title I of the Act, most banks or savings associations or their affiliates, or foreign banks. [Sections 617, 618]

Supervised securities holding companies are regulated and supervised by the Federal Reserve. The Federal Reserve is required to prescribe capital adequacy and other risk management standards for supervised securities holding companies. In general, the Federal Reserve may examine any supervised securities holding company and any affiliate, and may issue cease and desist orders, civil money penalties and other sanctions under Section 8 of the Federal Deposit Insurance Act against any supervised securities holding company. A securities holding

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company that registers with the Federal Reserve is deemed to be a supervised securities holding company, effective on the date that is 45 days after the date of receipt of registration information, or within such shorter period as Federal Reserve may determine. [Section 618]

14. Restrictions on Proprietary Trading and Relationships with Certain Funds (Volcker Rule)

In General

The Act adds new language to the Bank Holding Company Act of 1956 to prohibit, with certain exceptions, a "banking entity" from engaging in "proprietary trading" or sponsoring, acquiring, or retaining any equity, partnership, or other ownership interest in a hedge fund or a private equity fund. In contrast, nonbank financial companies supervised by the Federal Reserve under Title I of the Act may engage in those activities, but are subject to additional capital requirements and additional quantitative limits, with certain exceptions. So-called "permitted activities" that are exempt from the restrictions are described below. [Section 619]

"Banking Entities"

For purposes of these requirements, the term "banking entity" means any insured bank or savings association, any company that controls an insured bank or savings association (or that is otherwise treated as a bank holding company for purposes of Section 8 of the International Banking Act of 1978), and any affiliate or subsidiary of any such entity. The term "banking entity" does not include an institution that functions solely in a trust or fiduciary capacity provided certain conditions are satisfied. [Section 619]

"Proprietary Trading" and "Trading Account"

The term "proprietary trading" means engaging as a principal for the "trading account" of the banking entity or nonbank 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 CFTC may by rule determine. A "trading account" is any account used to acquire or take positions in the securities and instruments included in the definition of "proprietary trading" principally for the purpose of "selling in 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 banking agencies, the SEC, and the CFTC may by rule determine. [Section 619]

Nutter Notes: A bank exercising grandfathered authority under Section 24(f)(2) of the Federal Deposit Insurance Act – added by FDICIA – to acquire and retain publicly traded equity securities would not appear to be subject to the prohibition on proprietary trading as long as the bank's activities are not geared toward selling in the near term (or otherwise with the intent to resell in order to profit from short-term price movements).

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Restrictions on Nonbank Financial Companies

Any nonbank financial company supervised by the Federal Reserve that engages in proprietary trading or takes or retains any equity, partnership, or other ownership interest in, or sponsors, a hedge fund or a private equity fund is subject to additional capital requirements and additional quantitative limits, with certain exceptions. "Permitted activities" as described below are not, in general, subject to the additional capital requirements and additional quantitative limits. [Section 619]

Rulemaking

The Act requires the Financial Stability Oversight Council to study and make recommendations not later than six months after the date of enactment of the Act on implementing the prohibitions and restrictions described in this section. Not later than nine months after the completion of the study, the federal banking agencies, the SEC, and the CFTC, are required, with certain exceptions, to consider the findings of the study and adopt rules to carry out the statute. [Section 619]

Effective Dates

In general, the section takes effect on the earlier of 12 months after the date the rules are issued or two years after the date of enactment of the Act. A banking entity or nonbank financial company supervised by the Federal Reserve is required to bring its activities and investments into compliance with the requirements of this section not later than two years after the date on which the requirements become effective or two years after the date on which the entity or company becomes a nonbank financial company supervised by the Board. The Federal Reserve may, by rule or order, extend the two-year period for not more than one year at a time. The extensions made by the Board under the preceding sentence may not exceed an aggregate of three years. In certain circumstances, the Federal Reserve may give additional extensions in the case of illiquid funds. [Section 619]

Permitted Activities

The following activities, among others, are permitted: the purchase or sale of obligations of the United States or any agency, GNMA, FNMA, FHLMC, a federal home loan bank, the Federal Agricultural Mortgage Corporation, or a Farm Credit System institution, or obligations of any State or of any political subdivision; certain purchases or sales of securities 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 or counterparties; certain risk-mitigating hedging activities; certain purchases or sales on behalf of customers; investments in small business investment companies, investments designed primarily to promote the public welfare, and qualified rehabilitation expenditures with respect to qualified rehabilitated building or certified historic structures; certain investments by insurance companies permitted under state insurance laws; organizing and offering a private equity or hedge fund, provided certain conditions are satisfied; certain proprietary trading conducted by a banking entity outside of the United States; certain activities related to a hedge fund or a

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private equity fund outside of the United States; and other activities that the federal banking agencies, the SEC and CFTC determine are appropriate. A banking entity may make and retain a de minimis investment in a hedge fund or private equity fund subject to certain conditions. Nothing is intended to limit or restrict the ability of a banking entity or nonbank financial company supervised by the Federal Reserve to sell or securitize loans in a manner otherwise permitted by law. [Section 619]

Limitations on Permitted Activities

A transaction, class of transactions, or activity will fail to qualify as a permitted activity if it would involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties; would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies; would pose a threat to the safety and soundness of such banking entity; or would pose a threat to the financial stability of the United States. The appropriate federal banking agencies,SEC and CFTC are required to issue rules imposing additional capital requirements and quantitative limitations, including diversification requirements, in connection with permitted activities if the agencies determine that additional capital and quantitative limitations are appropriate to protect the safety and soundness of banking entities involved. [Section 619]

Additional Restrictions on Transactions with Certain Funds

Additional restrictions are imposed on transactions between banking entities that organize, sponsor or advise hedge funds or private equity funds and those hedge funds or private equity funds. Transactions that would be “covered transactions” under Section 23A of the Federal Reserve Act are prohibited, with certain exceptions for prime brokerage transactions. Section 23B of the Federal Reserve Act is made applicable to transactions between banking entities that organize, sponsor, or advise hedge funds or private equity funds and those hedge funds or private equity funds. The Act requires the banking agencies, SEC and CFTC to issue rules imposing additional capital charges or other restrictions on nonbank financial companies supervised by the Federal Reserve to address these kinds of risks. [Section 619]

15. Conflicts of Interest Relating to Certain Securitizations

The Act prohibits an underwriter, placement agent, initial purchaser, or sponsor (or any affiliate or subsidiary), of an asset-backed security including a synthetic asset-backed security from engaging in any transaction that would involve or result in any material conflict of interest with any investor in a transaction arising out of such activity for a period of one year from the date of the first closing of the sale of the asset-backed security. These prohibitions do not apply to risk-mitigating hedging activities in connection with holdings arising out of the underwriting, placement, initial purchase, or sponsorship of an asset-backed security or purchases or sales of asset-backed securities made under commitments of the underwriter, placement agent, initial purchaser, sponsor, or any affiliate or subsidiary to provide liquidity for the asset-backed security, or bona fide market-making in the asset-backed security. These provisions take effect on the effective date of final rules issued by the SEC. [Section 621]

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16. Concentration Limits on Large Financial Firms

In general, a "financial company" may not merge or consolidate with, acquire all or substantially all of the assets of, or acquire control of, another company, if the total consolidated liabilities of the acquiring financial company on consummation of the transaction would exceed 10 percent of the aggregate consolidated liabilities of all financial companies at the end of the calendar year preceding the transaction. The term "financial company" means an insured depository institution, a bank holding company, a savings and loan holding company, a company that controls an insured depository institution, a nonbank financial company supervised by the Federal Reserve Board under Title I, and a foreign bank or company that is treated as a bank holding company. [Section 622]

17. Interstate Bank Mergers

The Act amends the Bank Merger Act by adding language forbidding the banking agencies from approving an application for an interstate merger transaction if the resulting bank or savings association (including all affiliated insured depository institutions), upon consummation of the transaction, would control more than 10 percent of the total amount of deposits of insured depository institutions in the United States. The Act also amends the Bank Holding Company Act and Savings and Loan Holding Company Act by adding language forbidding the banking agencies from approving an application to acquire a bank or savings association if the applicant (including all affiliated insured depository institutions) controls, or on consummation of the transaction would control, more than 10 percent of the total amount of deposits of insured depository institutions in the United States. Among other exceptions, the prohibition would not apply to an interstate merger that involves one or more insured depository institutions in default or in danger of default. [Section 623]

18. New Consequences for Thrifts that Fail to Satisfy QTL Test

The Act prohibits a savings association that fails to satisfy the qualified thrift lender test from paying dividends other than dividends that would be permissible for a national bank, are necessary to meet obligations of the company that controls the savings association, and are specifically approved by the OCC and the Federal Reserve after a written request. The OTS is also authorized to take enforcement action under Section 5(d) of the Home Owners' Loan Act against a savings association that fails to satisfy the qualified thrift lender test. The provisions are effective on the date of enactment. [Section 624]

19. Dividend Waivers by Mutual Holding Companies Controlling Thrifts

The Act permits a mutual holding company that controls a savings association and that has also issued a minority equity stake in the company to waive the mutual holding company's right to receive dividends from the savings association if the mutual holding company gives written notice to the Federal Reserve of the intended waiver and the Federal Reserve does not object. The notice is required to include a copy of a board resolution, in a form determined by the Federal Reserve, with any supporting materials relied on by the board in concluding that the waiver is consistent with the fiduciary duties of the board to the mutual members of the mutual

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holding company. The notice and non-objection requirements do not apply if no insider of the mutual holding company, associate of any insider, or employee stock benefit plan holds any stock in the class of stock to which the waiver would apply. [Section 625]

The Federal Reserve may not object to the proposed dividend waiver if the minority stock was issued before December 1, 2009 and the mutual holding company waived a dividend before that date, provided that Federal Reserve determines that the waiver would not be detrimental to the safe and sound operation of the savings association, and the mutual holding company's board has expressly determined that the waiver is consistent with the board's fiduciary duties to the mutual members of the mutual holding company. [Section 625]

The Act requires the appropriate federal banking agency to consider waived dividends in determining an appropriate exchange ratio in the event of a full conversion to stock form. However, in the case of a savings association that reorganized into a mutual holding company, issued minority stock, and waived a dividend before December 1, 2009, the appropriate federal banking agency is barred from considering waived dividends in determining an appropriate exchange ratio in the event of a full conversion to stock form. The amendments take effect on the transfer date. [Section 625]

20. Breaking Out Financial Activities from Grandfathered Unitary Holding Companies

The Act provides that, if a grandfathered unitary savings and loan holding company conducts activities other than financial activities, the Federal Reserve may require the company to establish an intermediate savings and loan holding company and conduct all or a portion of the company's financial activities in the intermediate savings and loan holding company, not later than 90 days (or any longer period that the Federal Reserve deems appropriate) after the transfer date. In any case, a grandfathered unitary savings and loan holding company is required to establish an intermediate holding company if the Federal Reserve makes a determination that the establishment of the intermediate holding company is necessary to appropriately supervise the financial activities carried on by the company or to ensure that supervision by the Federal Reserve Board does not extend to activities that are not financial activities. A grandfathered unitary savings and loan holding company that directly or indirectly controls an intermediate holding company is required to serve as a source of strength to the intermediate holding company. [Section 626]

The "internal financial activities" of a grandfathered unitary savings and loan holding company are not required to be placed in an intermediate holding company. "Internal financial activities" include "internal financial activities conducted by a grandfathered savings and loan holding company or any affiliate" and "internal treasury, investment, and employee benefit functions." A grandfathered unitary savings and loan holding company is permitted to engage in an internal financial activity if the company engaged in the activity during the year before the date of enactment of the Act, and at least two-thirds of the assets or two-thirds of the revenues generated from the activity are from or attributable to the company. However, this authority is subject to review by the Federal Reserve to determine whether the activities present undue risk to the company or to the financial stability of the United States. The

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Federal Reserve is required to issue regulations implementing these provisions. These provisions take effect on the date of enactment of the Act. [Section 626]

21. Interest on Demand Deposits Permitted

The Act repeals laws that had prohibited the payment of interest on demand deposits by banks and savings associations. These amendments take effect one year after the date of the enactment of the Act. [Section 627]

22. Small Business Lending by Credit Card Banks

Credit card banks are authorized to make small business loans by credit card. Credit card banks are specialized banks exempt from regulation under the Bank Holding Company Act. These amendments take effect on the date of enactment of the Act. [Section 628]

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TITLE VII: WALL STREET TRANSPARENCY AND ACCOUNTABILITY

1. Purpose

Title VII establishes a regulatory and reporting framework for the over-the-counter and security-based swap markets.

2. Scope

Title VII requires the registration of swap dealers and Major Participants and also requires that swap contracts that can be cleared, be cleared and exchange-traded. Title VII provides an exemption for swap end users from the clearing and exchange trading requirements and provides for a potential regulatory exemption for financial institutions with less than $10 billion in total assets. Title VII requires regulators to set minimum capital requirements and minimum initial and variation margin requirements, including requirements for swap end users. Many of the specifics regarding definitions, registration requirements and reporting requirements have been delegated to the CFTC and the SEC, which generally have one year to implement rulemaking and regulations.

3. Implementation

Title VII generally becomes effective on July 16, 2011 (the effective date for certain provisions may be delayed to no later than 60 days after the publication of the final rule or regulation regarding those provisions). The Prohibition on Federal Assistance to Swaps Entities (the so-called "Swap Pushout Rule") becomes effective no later than July 21, 2015.

4. Regulatory Authority

The regulation of over-the-counter derivatives is divided between the Commodity Futures Trading Commission ("CFTC"), which is charged with regulating "swaps," and the Securities and Exchange Commission ("SEC"), which is charged with regulating "security-based swaps." Before issuing any rule or order regarding swaps (in the case of the CFTC) or security-based swaps (in the case of the SEC), the CFTC and SEC must consult and coordinate to the extent possible with each other and the prudential regulators for the purposes of assuring regulatory consistency. In adopting rules, the CFTC and SEC are required to treat functionally or economically similar products or entities in a similar manner. In the event the CFTC and SEC fail to jointly prescribe rules in a timely manner, the Financial Stability Oversight Council will resolve any dispute in a timely manner. [Section 712]

"Swap" is generally defined to include most over-the-counter derivatives including, without limitation, puts, calls, caps, floors, collars, currency, foreign exchange, equity index, credit default, energy and any other agreement, contract or transaction that is commonly known to the trade as a swap. The definition of swap excludes:

- security-based swaps; nonfinancial commodities for deferred shipment or delivery, as long as the transaction is intended to be physically settled;

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- leverage contracts; or
- options on securities that are subject to the Securities Act of 1933 and the Securities Exchange Act of 1934. [Section 721(a)(21)]

"Security-based Swap" is defined as any swap based on a narrow-based security index, a single loan or security, or the occurrence or nonoccurrence of an event relating to a single issuer of a security. [Section 721(a)(19)]

Foreign exchange swaps and foreign exchange forwards are considered swaps unless (i) the Secretary of the Treasury makes a written determination that either or both should not be regulated as swaps under Title VII and (ii) the swaps and forwards are not structured to evade any rules prescribed under Title VII. Foreign exchange swaps and foreign exchange forwards must be reported to a swap data repository and any swap dealer or Major Participant (as defined below) that is a counterparty to the contract is subject to the business conduct standards of the Commodity Exchange Act. Additionally, the exclusion from regulation as swaps does not exclude foreign exchange swaps and foreign exchange forwards from the fraud and manipulation provisions of Title VII. [Section 721(a)(21)]

5. Amendments to the Securities Act and the Securities Exchange Act

Title VII amends the definition of "security" under the Securities Exchange Act to include "security-based swaps" and prohibits the manipulation of security-based swap prices. Title VII also adds a new Section 10B to the Securities Exchange Act, authorizing the SEC to set limits on the size of positions in any security-based swap that may be held by any person. Section 13 of the Securities Exchange Act is amended so that a person is deemed to acquire beneficial ownership of an equity security based on the purchase or sale of a security-based swap, to the extent determined by the SEC. [Sections 762, 763]

Title VII amends the Securities Act by adding "security-based swap" to the definition of "security," providing that the offer and sale of a security-based swap by or on behalf of an issuer of the referenced securities constitutes a contract for the sale or offer of the sale of the referenced securities, and subjects security-based swaps to the registration requirements of the Securities Act. [Section 768]

6. Mandatory Clearinghouses

The clearing requirements of swaps and security-based swaps are similar and are analyzed and summarized here together, except as noted.

Swaps are required to be cleared if they are a type that the CFTC or SEC determines must be cleared and they are accepted for clearing by a derivatives clearing organization ("DCO"), unless an exemption applies. In general, a swap is not required to be cleared if one of the counterparties:

- is not a Financial Entity;

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- is using swaps to hedge or mitigate commercial risk; and
- notifies the CFTC or SEC how it generally meets its financial obligations associated with entering into non-cleared swaps.

The CFTC and SEC will consider whether to exempt small banks, savings associations, farm credit system institutions and credit unions with $10 billion or less in total assets. [Section 723]

Title VII authorizes the SEC to further define "commercial risk" and presumably whether swaps hedge or mitigate such risk. [Section 761]

A DCO is required to submit to the CFTC or SEC each swap or any group, category, type or class of swap that the DCO plans to accept for clearing and provide notice to its members. The CFTC or SEC will provide at least a 30-day public comment period regarding any determination that a swap or class of swaps should be required to be cleared. After making a determination for review, the CFTC or SEC may stay the clearing requirement until it completes a review of the terms of the swap or class and the clearing arrangement. Upon completion of the review, which will be completed within 90 days of the issuance of a stay, the CFTC or SEC may determine that a swap or class of swaps must be cleared or that the clearing requirement will not apply. [Sections 723, 763]

Swaps subject to clearing requirements must be traded on a board of trade designated as a contract market or swap execution facility unless no relevant facility will make the particular swap available for trade. Uncleared swaps are subject to reporting and recordkeeping requirements (see below). [Section 723]

7. Exemptions for Certain End Users

As stated above, a swap is not required to be cleared 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 how it generally meets its financial obligations associated with entering into non-cleared swaps.

A "Financial Entity" is defined as any of the following:

- a swap dealer or Major Participant;
- a commodity pool as defined by the Commodity Exchange Act;
- a private fund as defined by the Investment Advisers Act;
- an ERISA plan; or
- a person predominately engaged in activities that are in the business of banking and "financial in nature" as defined by the Bank Holding Company Act.

Financial Entity does not include a "captive finance entity" whose primary business is providing financing, and uses derivatives for the purpose of hedging underlying commercial risks related to interest rate and foreign currency exposures, 90 percent or more of which arise

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from financing that facilitates the purchase or lease of products, 90 percent or more of which are manufactured by the parent company or another subsidiary of the parent company. [Sections 721, 763]

An issuer of securities registered under Section 12 of the Securities Exchange Act or required to file reports pursuant to section 15(d) of the Securities Exchange Act may rely on the end user exemption only if an appropriate committee of the issuer's board of directors has reviewed and approved its decision to enter into swaps that are subject to such exemptions. [Sections 721, 763]

Swaps entered into prior to Title VII's enactment will be exempt from the clearing requirements if they are reported to a registered swap data repository or appropriate regulatory authority no later than 180 days after the clearing requirement becomes effective. [Sections 721, 763]

8. Registration, Capital and Margin Requirements

Title VII requires swap dealers and Major Swap Participants and Major Security-Based Participants (as defined below and collectively referred to as "Major Participants") to register with the CFTC or SEC no later than one year after enactment and to satisfy initial capital and minimum initial and variation margin requirements for nonbank swap dealers and Major Participants. The appropriate federal banking regulators will set the capital and margin requirements for banks that are required to be registered as swap dealers or Major Participants. The standards for capital and margin requirements set by the CFTC and SEC will be established to help ensure the safety and soundness of the swap dealer or Major Participant; and must be appropriate for the risk associated with the non-cleared swaps held as a swap dealer Major Participant. [Sections 731, 764]

9. Major Swap Participants and Major Security-Based Participants

A "Major Swap Participant" is defined as any person that is not a swap dealer and that satisfies any of the following conditions:

- maintains a substantial position in swaps for any of the major swap categories as determined by the CFTC, excluding positions held for hedging or mitigating commercial risk or directly associated with the operation of an ERISA plan;
- its outstanding swaps create substantial counterparty risk that could have serious adverse effects on the financial stability of the United States banking system or financial markets; or
- is a financial entity that is highly leveraged and is not subject to capital requirements established by an appropriate Federal banking agency; and maintains a substantial position in outstanding swaps in any major swap category as determined by the CFTC.

The definition of "Major Security-Based Participant" is nearly identical to the definition of "Major Swap Participant" except the definition excludes any entity whose primary business is

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providing financing, and uses derivatives for the purpose of hedging underlying commercial risks related to interest rate and foreign currency exposures, 90 percent or more of which arise from financing that facilitates the purchase or lease of products, 90 percent or more of which are manufactured by the parent company or another subsidiary of the parent company. [Sections 721, 761]

Each of CFTC and SEC are to define "substantial position" at the threshold that they determine to be prudent for the effective monitoring, management, and oversight of entities that are systemically important or can significantly impact the financial system of the United States. In setting the definition, the CFTC and SEC will consider the person's relative position in uncleared as opposed to cleared swaps and may take into consideration the value and quality of collateral held against counterparty exposures. [Section 721, 761]

10. Mandatory Reporting and Compliance of Swap Dealers and Major Participants

Title VII requires swap dealers and Major Participants to:

- make reports regarding the transactions, including pricing, and positions and financial condition of the registered swap dealer or Major Participant;
- keep books and records of all activities related to the business as a swap dealer or Major Participant as required by the CFTC or SEC or applicable prudential regulator;
- keep books and records open to inspection and examination by any representative of the CFTC or SEC;
- keep books and records relating to swaps open to inspection and examination by the CFTC or SEC;
- comply with business conduct standards; and
- comply with documentation and back office standards to be established by the CFTC or SEC.

Title VII requires swap dealers and Major Participants comply with the following duties at all times:

- monitor trading;
- establish risk management procedures;
- disclose general information to regulators;
- establish systems and procedures to obtain necessary information;
- implement structural and institutional conflict of interest procedures;
- not adopt any process or take any action that would result in unreasonable restraint of trade; and
- appoint a chief compliance officer. [Section 731]

In addition to these generally applicable standards, Title VII imposes additional requirements on swap dealers acting as advisors and to swap dealers and Major Participants when acting as a counterparty to a "Special Entity." A "Special Entity" is defined as a federal agency, state or political subdivision of a state, an ERISA plan and any endowment. The swap dealer and Major Participant has a duty to act in the best interest of the Special Entity and is required to

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make a reasonable determination that any swap recommendation is in the best interest of the Special Entity. [Section 731]

11. Reporting and Recordkeeping for Uncleared Swaps

Uncleared swaps are required to be reported to a swap data repository or to the applicable Commission pursuant to rules and regulations to be promulgated by the CFTC and SEC. Uncleared swaps are to be reported by a swap dealer if the swap dealer is involved in the transaction. Uncleared swaps are to be reported by a Major Participant if the Major Participant is involved in a transaction and the counterparty is not a swap dealer. If neither party in the transaction is a swap dealer or Major Participant, the parties may select which party reports to the swap data repository. [Sections 729, 766]

Swap data repositories are required to accept data from swap counterparties, confirm the accuracy of the data and maintain the data pursuant to standards to be established by the CFTC or SEC. Swap data repositories are also required to register with the CFTC or SEC and are subject to inspection and examination by any representative of the CFTC or SEC and, on a confidential basis, representatives from each appropriate prudential regulator, the Financial Stability Oversight Board, the Department of Justice and other persons the CFTC or SEC determine appropriate. [Sections 728, 763]
If a swap is not cleared or accepted by a swap data repository, each counterparty is responsible for maintaining books and records available for regulators and providing reports as requested by CFTC or SEC. [Sections 729, 766]

12. Public Reporting of Swap Transaction Data

Title VII requires the CFTC and SEC to prescribe rules and regulations to monitor trading in swaps to prevent manipulation and disruptions through surveillance and real-time monitoring of trading and comprehensive and accurate trade reconstructions. [Sections 729. 766]

13. Position Limits

The CFTC is authorized to impose aggregate position limits across markets to (i) diminish, eliminate, or prevent excessive speculation; (ii) deter and prevent market manipulation, squeezes, and corners; (iii) ensure sufficient market liquidity for bona fide hedgers; and (iv) ensure that the price discovery function of the underlying market is not disrupted. [Sections 739]

The SEC is authorized to establish limits on the size of positions in any security-based swap that may be held by any person and may require reporting by such person. [Section 763]

14. Segregation of Swap Collateral; Bankruptcy Treatment of Swaps

Any person who holds margin for DCO-cleared swaps on behalf of a customer is required to register with the CFTC as a futures commission merchant. Any person who holds margin for

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clearing agency-cleared swaps on behalf of a customer is required to register with the SEC as a broker-dealer or security-based swap dealer. [Sections 724, 763]

DCO-cleared swaps are to be treated as "commodity contracts" under the Bankruptcy Code with respect to funds and property of a swap customer received from a futures commission merchant. Margin posted by counterparties to security-based swaps will be held in "security accounts" by a broker, dealer or security-based swap dealer registered with the SEC. [Sections 724, 763]

A swap dealer or Major Participant is required to notify the counterparty at the beginning of a transaction that the counterparty has the right to require segregation of the funds or other property supplied to margin or secure the obligations of the counterparty. Upon request, the swap dealer or Major Participant must segregate the funds for the benefit of the counterparty and maintain the funds in a segregated account separate from the assets and other interests of the swap dealer or Major Participant.

15. Prohibition Against Federal Government Bailouts of Swaps Entities (the "Pushout Rule")

Title VII prohibits Federal Assistance (as defined below) to any Swaps Entity (as defined below) with respect to any swap, security-based swap or other activity of the Swaps Entity. [Section 716]
"Swaps Entity" is defined as any swap dealer or Major Participant that is registered under the Commodity Exchange Act or Securities Exchange Act excluding any swap dealer or Major Participant that is an insured depository institution.

"Federal Assistance" is defined as the use of any advances from (i) any Federal Reserve credit facility or discount window that is not part of a program or facility with broad-based eligibility under the Federal Reserve Act, or (ii) Federal Deposit Insurance Corporation insurance or guarantees for the purposes of:

- making any loan to or purchasing equity interests of any Swaps Entity;
- purchasing assets of any Swaps Entity;
- guaranteeing any loan or debt issuance of any Swaps Entity; or
- entering into any assistance program with any Swaps Entity.

The prohibition on Federal Assistance does not apply to an insured depository institution and does not prevent such an institution from establishing an affiliate which is a Swaps Entity, provided such institution is part of a bank holding company or savings and loan holding company and such Swaps Entity complies with Sections 23A and 23B of the Federal Reserve Act.

The prohibition on Federal Assistance will apply to insured depository institutions unless the institution limits its activities to (i) hedging and other risk mitigating activities directly related to the institutions' activities and (ii) acting as a Swaps Entity for transactions involving rates or

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reference assets that are permissible for investment by a national bank. The second permitted category relates to credit default swaps (including asset-backed securities) to only CDO-cleared swaps or clearing-agency cleared security-based swaps.

The prohibition on Federal Assistance becomes effective two years after the effective date of the Act. There is a two year transition period, which may be extended for an additional year, following the effective date. [Section 716]

16. Preemption of State Regulation

Title VII prohibits the regulation of swaps or security-based swaps as insurance contracts under state law. [Section 722]

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TITLE VIII: PAYMENT, CLEARING AND SETTLEMENT SUPERVISION

1. New Framework for Regulation of Payment, Clearing and Settlement Activities

Risk Management Standards

The Act directs the Federal Reserve, SEC and CFTC to establish uniform risk-management standards for systemically important payment, clearing, and settlement (PCS) activities and the institutions that manage or operate PCS systems, referred to as financial market utilities (FMUs). The Federal Reserve is primarily responsible for establishing and enforcing risk-management standards for FMUs and PCS activities that the Financial Stability Oversight Council determines are systemically important. The SEC and CFTC are responsible for establishing and enforcing such standards for systemically important registered clearing agencies and systemically important registered derivatives clearing organizations, respectively, and for any financial institution engaged in a systemically important PCS activity for which the SEC or CFTC serves as the primary federal regulator. If the Federal Reserve determines that the risk-management standards imposed by the SEC or the CFTC or the enforcement actions of either agency are insufficient, then the Council can require the SEC or CFTC to impose additional standards or take additional enforcement actions. [Section 805]

Payment, Clearing, and Settlement Activities

The Act defines the term "payment, clearing, or settlement activity" as an activity carried out by one or more financial institutions to facilitate the completion of financial transactions, such as funds transfers, securities contracts, commodity futures contracts, forward contracts, repurchase agreements, swaps and swap agreements, foreign exchange contracts, financial derivatives contracts, and any similar transaction that the Council determines to be a financial transaction. Examples of PCS activities include calculation and communication of unsettled transactions between counterparties, netting of transactions, provision and maintenance of trade, contract, or instrument information, management of risks associated with continuing financial transactions, transmittal and storage of payment instructions, movement of funds, final settlement of financial transactions, and other similar functions that the Council may determine are PCS activities. PCS activities do not include an offer or sale of a security under the Securities Act of 1933, any quotation, order entry, negotiation, or other pre-trade activity or execution activity, or public reporting of swap transaction data under Sections 727 or 763 of the Act. [Section 803]

Financial Market Utilities (FMUs)

The Act defines the term "financial market utility" as any person or legal entity 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 that person or entity. There are certain limited exclusions from the definition of an FMU for designated contract markets under Section 735 of the Act, and national securities exchanges, futures associations and other organizations registered with the SEC or CFTC that provide facilities for comparing data on the terms of settlement of securities or

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futures transactions. There are also exclusions from the definition of an FMU for brokers, dealers, transfer agents, investment companies, futures commission merchants, introducing brokers, commodity trading advisors, or commodity pool operators under certain circumstances. [Section 803]

Financial Institutions

The Act defines the term "financial institution" broadly to include depository institutions, any branch or agency of a foreign bank, organizations engaged in foreign banking, credit unions, securities brokers and dealers, investment companies, insurance companies, investment advisers, futures commission merchants, commodity trading advisors, commodity pool operators, and any company engaged in activities that are financial in nature or incidental to a financial activity, as described in Section 4 of the Bank Holding Company Act of 1956. There are certain limited exclusions from the definition of a financial institution for designated contract markets under Section 735 of the Act, national securities exchanges, futures associations and similar organizations registered with the SEC or CFTC. [Section 803]

2. Objectives of Risk-Management Standards

The risk-management standards prescribed under the Act for systemically important FMUs and PCS activities are to promote robust risk-management, promote safety and soundness, reduce systemic risks and support the stability of the broader financial system. The standards may address risk-management policies and procedures, margin and collateral requirements, participant or counterparty default policies and procedures, the ability to complete timely clearing and settlement of financial transactions, capital and financial resource requirements for FMUs, and other areas that are necessary to achieve the foregoing objectives and principles. The standards governing the conduct of any PCS activity by financial institutions must, where appropriate, establish a threshold as to the level or significance of engagement in the activity at which a financial institution will become subject to the standards. In establishing the risk-management standards, the Council's and the Federal Reserve's authority is generally limited to the extent that it conflicts with certain market regulation authorities granted to the SEC and the CFTC. [Section 805]

3. Council to Designate Systemically Important FMUs and PCS Activities

The Financial Stability Oversight Council must identify those FMUs or PCS activities that are, or are likely to become, systemically important—where the failure of or a disruption to the functioning of the FMU or the conduct of a PCS 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. In determining whether an FMU or PCS activity is systemically important, the Council must take into consideration certain factors including the aggregate value of transactions processed by the FMU or carried out through the PCS activity, the aggregate exposure of the FMU or a financial institution engaged in PCS activities to its counterparties, relationships among the FMU or PCS activity with other FMUs or PCS activities, the effects of a failure of, or disruption to, the FMU or PCS activity, and any other appropriate factors. [Section 804]

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Systemic Importance Designations Subject to Notice and Hearing Process

Before making any determination that an FMU or a PCS activity is systemically important, the Council must consult with the relevant federal supervisory agency and the Federal Reserve and the Council must provide the FMU or the financial institutions engaged in the PCS activity with advance notice of the proposed determination of systemic importance. The notice will be published in the Federal Register, and the FMU or any financial institution engaged in the PCS activity, as applicable, will have 30 days to submit a written request for a hearing before the Council to demonstrate that the proposed designation is not supported by substantial evidence. The Council may also rescind any determination that an FMU or PCS activity is systemically important after the same notice and hearing process. The Council may waive or modify the notice and hearing process if it determines that such waiver or modification is necessary to prevent or mitigate an immediate threat to the financial system posed by the FMU or the PCS activity. [Section 804]

4. Access to Discount Window, Other Fed Services for Systemically Important FMUs

The Act authorizes the Federal Reserve to allow a systemically important FMU to have access to short-term, secured loans under discount window credit facilities in unusual or exigent circumstances. Before allowing an FMU to have access to the discount window, the Federal Reserve must consult with the Treasury Secretary and the FMU must establish that it is unable to secure adequate credit accommodations from other banking institutions. The Act also authorizes the Federal Reserve to allow a systemically important FMU to open a deposit account with a Federal Reserve Bank and allow the FMU to access other Federal Reserve Bank services available to depository institutions, including currency and coin services, check clearing and collection, wire transfer, automated clearinghouse, settlement, securities safekeeping, Federal Reserve float, and payment services to effectuate the electronic funds transfers. The provision of any loan, deposit account or other service to a systemically important FMU is subject to any applicable Federal Reserve rules, orders, standards, or guidelines. [Section 806]

5. Oversight, Examination and Enforcement

A systemically important FMU must provide 60 days' advance notice to its primary federal regulator of any proposed change to its rules, procedures or operations that could materially affect the nature or level of risks presented by the FMU. Each of the federal financial regulatory agencies is to adopt rules, in consultation with the Federal Reserve, defining and describing the standards for determining when such notice is required to be provided by FMUs. If the FMU's primary federal regulator objects to the proposed rule change, the change may not be implemented. The Act directs the primary federal regulator of each systemically important FMU and each financial institution engaged in a systemically important PCS activity to examine the FMU or financial institution for compliance with applicable risk-management standards established under the Act, safety and soundness and the financial and operational risks posed by such FMU or PCS activity to financial institutions, critical markets or the broader financial system. Examinations of each systemically important FMU must be

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conducted at least annually and may include an examination of any affiliated or non-affiliated provider of a service integral to the operation of the FMU. Any of the other federal financial regulatory agencies may request that the Federal Reserve participate in or conduct examinations of financial institutions engaged in systemically important PCS activities for compliance with applicable risk-management standards, and the Federal Reserve may elect to participate in any examination of a systemically important FMU. Each federal financial regulatory agency has authority comparable to the FDIC's enforcement authority under Section 8 of the Federal Deposit Insurance Act to enforce Title VIII of the Act. The Federal Reserve may also exercise back-up examination and enforcement authority under certain circumstances. [Sections 806, 807 and 808]

6. Reporting

The Act authorizes the Council to require any FMU or financial institution to submit such information as the Council requires to assess whether the FMU is systemically important or whether any PCS activity engaged in or supported by the financial institution is systemically important, but only if the Council has reasonable cause to believe that the FMU or the PCS activity meets the standards for systemic importance described above. The Federal Reserve and the Council may each require any systemically important FMU and any financial institution engaged in a systemically important PCS activity to submit regular reports or data as deemed necessary to assess the safety and soundness of the FMU and the systemic risk that the FMU's operations pose to the financial system, and to assess the financial institution's compliance with applicable risk-management standards established under the Act for a systemically important PCS activity and whether such standards appropriately address the risks to the financial system presented by the activity. [Section 809]

7. Rulemaking Authority

The federal financial regulatory agencies and the Council are authorized to establish any rules and issue any orders necessary to administer and carry out Title VIII of the Act. [Section 810]

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TITLE IX: INVESTOR PROTECTIONS AND REGULATION OF SECURITIES

1. Increasing Investor Protection

Investor Advisory Committee and Office of the Investor Advocate

The Act establishes two new organizations within the SEC:

- The Investment Advisory Committee will advise and consult with the SEC regarding regulatory priorities, the regulation of securities products, trading strategies, fee structures, and the effectiveness of disclosure, as well as initiatives to protect investors and promote investor confidence. The Investment Advisory Committee will be comprised of between 13 and 23 members, many of whom will be appointed by the SEC, and who represent, among others, individual investors, institutional investors and state securities commissions. [Section 911]

- The Office of the Investor Advocate will assist retail investors in resolving problems, identify areas where investors would benefit from regulatory changes, identify problems investors have with financial service providers, and recommend changes to regulations or orders proposed by the SEC that will benefit investors. [Section 915]

2. Brokers, Dealers and Investment Advisers

Broker-Dealer and Investment Adviser Standards of Care and Disclosure

The Act grants the SEC express authority to enact a rule addressing the standards of care for broker-dealers and investment advisers, including

- rules subjecting brokers and dealers who provide investment advice about securities to retail customers to the same standard of conduct that is currently applicable to investment advisers under the Investment Advisers Act; and
- rules establishing that the standard of conduct for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers, is to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice. [Section 913]
- rules regarding information that brokers and dealers are required to provide to retail investors before they purchase an investment product or service. [Section 919]

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PCAOB Oversight of Brokers-Dealers

The Act extends the authority of the PCAOB to include auditors of registered brokers and dealers, requiring such auditors to register with the PCAOB and potentially requiring a program of inspection for such auditors. Additionally, beginning in July, 2011, the PCAOB will collect accounting support fees from brokers and dealers, in addition to issuers. [Section 982]

Short Sale Reforms

The SEC will enact rules requiring institutional investment managers to publicly disclose short sale activity each month. Additionally, the Act makes it unlawful for any person to effect a manipulative short sale of any security. [Section 929X]

Every broker or dealer must provide notice to customers that the customer can elect not to allow their fully paid securities to be used in connection with short sales, and if the broker or dealer uses customer's securities in short sales, the broker or dealer must provide notice to the customer that he or she may receive compensation. [Section 929 X]

Authority to Restrict Mandatory Arbitration

The SEC may issue a rule prohibiting or limiting the use of agreements that require customers or clients of any broker or dealer to arbitrate any future dispute between them. [Section 921]

Recordkeeping Rule

The Act requires persons having custody or use of securities, deposits or credits of a registered investment company (under the Investment Company Act) or of a client (under the Investment Adviser Act), to maintain records related to such custody or use for an amount of time to be prescribed by the SEC. Additionally, the records of persons having custody or use of securities, deposits or credits of a registered investment company are subject to periodic and special examinations, as well as information and document requests, by the SEC. [Section 929Q]

Contract Waiver Provisions

Any condition or provision requiring any person to waive compliance with any rule or regulation of a self-regulatory organization is void. [Section 927]

3. Enhanced Enforcement and Remedies

Whistleblowing and Collateral Bars

The Act includes enhanced enforcement regulations and remedies for violations, including:

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- augmented whistleblower protection and rewards for those who voluntarily provide information that leads to the successful enforcement of an action by the SEC [Section 922];
- regulations making it unlawful for any employer to discriminate against or harass any individual who becomes a whistleblower for their actions as a whistleblower [Section 922];
- a private right of action for any whistleblower who is discriminated against or harassed based on his or her actions as a whistleblower [Section 922];
- barring an individual who engaged in certain misconduct from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization. [Section 925]

Regulation D Offerings – Bar on Activity by "Bad Actors"

By July, 2011, the SEC will issue rules disqualifying any offering or sale of securities under Regulation D by certain "bad actors," including individuals who have been barred from engaging in the business of securities, insurance or banking, or who have been convicted of any felony or misdemeanor in connection with the purchase or sale of a security or the making of any false filing with the SEC. [Section 926]

Fair Fund Amendments

The Act allows the SEC to add civil penalty payments to a fund for distribution to the victims of securities law violation, regardless of whether the SEC has collected any disgorgement in a particular case. [Section 929B]

Nutter Notes: Previously, under Sarbanes-Oxley, the SEC could only pay penalties to victims if the SEC had also collected disgorgement.

Formerly Associated Persons

The SEC has authority to remove from office, censure or place limitations on individuals formerly associated with a registered entity if they were affiliated with the registered entity at the time of the alleged misconduct, regardless of whether they are still associated with that entity. [Section 929F]

Enhanced Application of Antifraud Provisions

The Act expands the anti-fraud provisions of the Securities Exchange Act of 1934 by:

- Amending Section 9, relating to market manipulation, and 10(a)(1), relating to short sales, by expanding them to cover any security "other than a government security," rather than just securities "registered on a national securities exchange;"

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- Extending Section 9(b), which relates to options, to non-exchange transactions in options;
- Amending Section 9(c) to subject all brokers and dealers to the provision, not just "member[s] of a national securities exchange;" and
- Expanding Section 15(c)(1)(A) to cover exchange transactions, not just over-the-counter transactions. [Section 929L]

Aiding and Abetting

The Act gives the SEC authority to prosecute persons who knowingly or recklessly provide substantial assistance to another person in violation of the Securities Act, the Investment Company Act or the Investment Advisers Act or the rules and regulations under those laws. [Sections 929M & 929N]

The Act expands the authority of the SEC to prosecute persons who recklessly provide substantial assistance to a person who violates the Exchange Act, compared to current law, which allows the SEC to prosecute someone only for knowingly aiding and abetting. [Section 929O]

Control Person Liability

The Act clarifies that the SEC may impose joint and several liability on control persons, including in any actions brought by the SEC for injunctions or monetary penalties. [Section 929P]

Fingerprinting

Registered securities information processors, national securities exchanges, and national securities associations must require their officers, directors, partners and employees to be fingerprinted and submit the fingerprints to the U.S. Attorney General. [Section 929S]

4. Protecting and Sharing Confidential Information

Sharing Privileged Information with Other Authorities

The Act permits the SEC to disclose privileged information to agencies, the PCAOB, self-regulatory organizations, foreign securities or law enforcement authorities and any State securities or law enforcement authorities without waiving any privilege applicable to the information. Additionally, the entities listed above do not waive any privilege by giving the information to the SEC. [Section 929K]
In addition, the Act amends Sarbanes-Oxley to allow the PCAOB to share information with a foreign auditor oversight authority without waiving privilege if the foreign auditor oversight authority provides assurances of confidentiality and a description of the information systems, controls and laws and regulations applicable to the foreign auditor oversight authority. [Section 981]

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5. Security Investor Protection Act Amendments

Minimum Assessment

The minimum assessment paid by SIPC members is increased from $150 per year to 0.02 percent of the member's gross revenues from the securities business. [Section 929V]

Fines

The maximum fines for violations of the Securities Investor Protection Act are increased from $50,000 to $250,000. Additionally, it is a crime for any person to knowingly falsely represent, with an intent to deceive, that such person is a member of SIPC or that any person or account is protected or is eligible for protection under the Securities Investor Protection Act. [Section 929V]

SIPC Limits

The Act increases SIPC protection for investors by raising the customer cash amount from $100,000 to $250,000. This amount may be adjusted by the SIPC every five years to account for inflation. A member of the SIPC with customer accounts must obtain the consent of the SIPC before entering into any insolvency, receivership or bankruptcy proceeding. [Section 929H]

Portfolio Margining Accounts

The Act generally provides SIPC protection to futures and options on futures in portfolio margining accounts. The Act clarifies that the lower limit on SPIC advances with regard to net equity claims of customers, where all or any portion of the net equity claim is cash (as distinct from a claim for securities), does not apply to claims for options or commodity futures contracts. The Act generally expands the definitions of "customer," "customer property" and "gross revenues from the securities business" to broaden the application of the regulation of margin accounts and their assets. In addition, the Act also expands the amount of recovery and some of the parameters under which a party can recover. [Section 983]

6. Regulation of Credit Rating Agencies

Nationally Recognized Statistical Rating Organizations ("NRSROs")

The Act establishes an Office of Credit Ratings within the SEC to administer the rules of the SEC regarding the practices of NRSROs and to promote accuracy in credit ratings and ensure that the ratings are not unduly influenced by conflicts of interest. The Office of Credit Ratings will conduct an annual examination of each NRSRO to review compliance with the NRSRO's policies and procedures, the management of conflicts of interest, and the governance of the NRSRO. [Section 932(a)(8)]

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Disclosures

The SEC must establish rules to require each NRSRO to publicly disclose performance information on initial ratings and any subsequent changes. The rules must require disclosure of performance information over a range of years and for a variety of types of credit ratings and an attestation that each credit rating is not influenced by any other business activities of the NRSRO. The disclosures must be comparable among NRSROs and be clear and informative to investors. [Section 932(a)(8)]

The issuer or underwriter of any asset-backed security must make publicly-available the findings of any third-party due diligence report obtained by the issuer or underwriter. The third-party who prepared the report must provide the issuer or underwriter a written certification designed to ensure that a thorough review was conducted. [Section 932(a)(8)]

Credit Rating Methodologies

The SEC must establish rules regarding the procedures and methodologies, including qualitative and quantitative data and models, used by NRSROs, and requiring that each NRSRO ensure credit ratings are determined using such procedures and methodologies. Additionally, the rules must require each NRSRO to notify users of credit ratings of the procedure or methodology used with respect to any particular credit rating, any material changes and the likelihood of a resulting change in current credit ratings, and when a significant error is identified in a procedure or methodology that may result in credit rating actions. [Section 932(a)(8)]

An NRSRO must consider any information that it receives from an outside source that it finds credible in producing a credit rating. [Section 935]

Private Actions

Under the Act, statements made by a credit rating agency are subject to the enforcement and penalty provisions of the Exchange Act to the same extent as statements made by a registered public accounting firm or a securities analyst under the securities laws. Additionally, the Act clarifies that such statements are not considered forward-looking statements. [Section 933]

The Act modifies the pleading standard with regard to securities fraud actions against a credit rating agency or controlling person, making it easier to pursue a credit rating agency. [Section 933]

Duty to Report Tips

If an NRSRO receives any information from a third-party that if finds credible alleging that an issuer rated by the NRSRO has committed or is committing a material violation of law, it must report that information to the appropriate law enforcement or regulatory authority. [Section 934]

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Credit Rating Analyst

By July, 2011, the SEC will issue rules to ensure that any person employed by an NRSRO to perform credit ratings meets certain standards and is tested for knowledge of the credit rating process. [Section 936]

Ratings Symbols

The SEC will issue a rule by July, 2011 requiring each NRSRO to establish, maintain and enforce written policies that asses the probability that an issuer will default or otherwise not make payments to investors. Additionally, the rule will require that each NRSRO adopt policies that clearly define and disclose the meaning of any ratings symbol used by the NRSRO and that require any such symbol to be used consistently across all types of securities and money market instruments for which the symbol is used. [Section 938]

Governance

The Act overhauls the requirements of corporate governance within each NRSRO. This overhaul includes the establishment of internal control structures and SEC review of the code of ethics and conflict of interest policies of each NRSRO at least annually. The Act further requires that each NRSRO have a board of directors, with at least a majority of independent directors, a portion of which must be users of NRSRO ratings.

Penalties

The Act grants the SEC the authority to sanction individuals associated with an NRSRO and expands the misconduct to which penalties apply to include failure to adequately supervise an individual who commits a violation. Further, if the SEC finds that an NRSRO does not have adequate managerial and financial resources, the SEC may suspend or permanently revoke an NRSRO's registration with respect to a particular class or subclass of securities. [Section 932(a)(3)]

Conflicts of Interest

The SEC will issue rules to prevent the sales and marketing considerations of NRSROs from influencing the production of ratings by the NRSRO and requiring each NRSRO to establish, maintain and enforce conflict of interest policies relative to its employees. [Section 932(a)(4)]

Regulation FD

Within 90 days of the date of enactment of the Act, the SEC will revise Regulation FD so that entities whose primary business is the issuance of credit ratings are no longer exempt from the regulation. [Section 939B]

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Rule 436(g)

Rule 436(g) under the Securities Act has no force and effect. [Section 939G]

Nutter Notes: Rule 436(g) previously exempted credit ratings by an NRSRO from being considered part of a registration statement. The change in law means that an NRSRO will be required to consent to the inclusion of a credit rating in a registration statement, which would expose the NRSRO to liability as an expert under Section 11 of the Securities Act for material statements or omissions with respect to the credit ratings.

7. Improvements to the Asset-Backed Securitization Process

Credit Risk Retention

The Federal banking agencies and the SEC will jointly issue regulations requiring any securitizer to retain at least five percent of the credit risk for any asset, including a residential mortgage asset, that he or she sells or transfers to a third party through the issuance of an asset-backed security. [Section 941(b)]

The Act defines "asset-backed security" as "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." A "securitizer" is defined as an issuer of asset-backed securities or person who initiates an asset-backed securities transaction by selling or transferring assets to the issuer. [Section 941(a)]

The five percent requirement does not apply where the asset is a qualified residential mortgage loan that is transferred or sold through an asset-backed security, so long as all of the assets that collateralize the asset-backed security are qualified residential mortgages. Additionally, the rules may require that the securitizer retain less than five percent of the credit risk if the originator of the assets meets certain underwriting standards. The criteria for determining what constitutes a "qualified residential mortgage" will be determined jointly by the Federal banking agencies, the SEC, the Secretary of Housing and Urban Development, and the Director of the Federal Housing Finance Agency, taking into consideration underwriting and product features that historically have resulted in a lower risk of default. The issuer will have to certify that it has evaluated the effectiveness of its internal controls with respect to the process for ensuring that all assets that collateralize the asset-backed security are qualified residential mortgages. [Section 941(b)]

Provisions of the Regulations

The regulations must:

- prohibit a securitizer from hedging or otherwise transferring the credit risk that the securitizer is required to retain;

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- specify the permissible forms of risk retention, the minimum duration of the risk retention, including the forms and duration that will apply with respect to a commercial mortgage;
- provide for certain exemptions in cases where the securitization is backed by certain government entities;
- allocate the risk retention between a securitizer and an originator when the securitizer purchases assets from an originator; and
- establish different asset classes with different credit retention rules, including asset-backed securities backed by residential mortgages, commercial mortgages, commercial loans, auto loans and any other class of assets deemed appropriate. [Section 941(b)]

The regulations issued with respect to asset-backed securities backed by residential mortgages become effective one year after the date on which the final rules are published. The regulations issued with respect to all other classes of asset-backed securities become effective two years after the date on which the final rules are published. [Section 941(b)]

Disclosures and Reporting

The SEC will adopt rules requiring issuers of asset-backed securities to disclose, for each tranche or class of security, information regarding the assets backing that security, as well as the nature and extent of the compensation of the broker or originator of the assets and the amount of risk retention by the originator and securitizer. [Section 942(b)]

By January, 2011, the SEC is to issue rules requiring an issuer of an asset-backed security to perform a review of the assets underlying the asset-backed security and disclose the nature of the review in the issuer's registration statement. [Section 945]

The SEC is to prescribe regulations by January, 2011 on the use of representations and warranties in the market for asset-backed securities, including a requirement that reports accompanying a credit rating describe the representations, warranties and enforcement mechanisms available to investors, and how they differ from those of similar securities. The regulations must also require a securitizer to disclose fulfilled and unfulfilled repurchase requests across all trusts aggregated by the securitizer. [Section 943]

The exemption from registration for certain categories of mortgage-backed securities provided by Section 4(5) of the Securities Act is eliminated. [Section 944]

8. Executive Compensation and Corporate Governance

Say-On-Pay

At least once every three years, at any annual or special meeting of shareholders, companies must provide shareholders with a non-binding resolution to approve the compensation of executives. At least once every six years, at any annual or special meeting of shareholders, companies must provide shareholders with a non-binding resolution to determine whether the

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say-on-pay vote should be held every one, two or three years. Companies are not required to include the non-binding resolution regarding executive compensation until the first annual or other meeting of shareholders that occurs more than six months after the date of enactment of the Act. [Section 951]

Golden Parachute

Beginning no earlier than January, 2011, in any proxy material for a meeting of shareholders at which shareholders are being asked to approve an acquisition, merger, or sale of all or substantially all the assets of an issuer, the person making the solicitation must disclose any agreements with any named executive officer of the issuer concerning any type of compensation that relates to the transaction, and must include a separate non-binding shareholder resolution to approve the agreements or compensation as disclosed. [Section 951]

Disclosure of Votes

Every institutional investment manager must report annually how it voted on any say-on-pay resolution or golden parachute payment. [Section 951]

Compensation Committee

By July, 2011, the SEC will direct the national securities exchanges and national securities associations to prohibit the listing of any equity security of an issuer that does not have an independent compensation committee. In determining the definition of independent, the national securities exchanges and national securities associations must consider all relevant factors, including the source of compensation of a board member and whether a member of the board of directors is affiliated with the issuer, or a subsidiary or affiliate of the issuer. [Section 952]

The SEC will identify factors that affect the independence of a compensation consultant, legal counsel or other adviser to a compensation committee, and the compensation committee must take into account these factors in selecting an adviser. Compensation committees, in their sole discretion, are authorized to engage compensation consultants, legal counsel and other advisers, and are directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, legal counsel or other adviser. In any shareholder solicitation for a meeting occurring after July, 2011 (at the earliest), an issuer must disclose whether the compensation committee retained or obtained the advice of a compensation consultant, whether the work of the compensation consultant raised any conflict of interest and, if so, how the conflict is being addressed. By July, 2011, the SEC will direct the national securities exchanges and national securities associations to prohibit the listing of an issuer who does not comply with the requirement that the compensation committee consider independence of compensation consultants and other advisers, subject to an issuer's right to cure such deficiency. These SEC rules will permit exemptions for certain categories of issuers from the compensation consultant requirements (likely to be smaller reporting issuers). [Section 952]

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Executive Compensation Disclosures

The SEC will issue a rule requiring a company to disclose in any shareholder solicitation material for any annual meeting the relationship between the executive compensation it actually paid and its financial performance. The disclosure must take into account any change in the value of the company's stock, dividends or distributions. Additionally, the SEC will expand its current disclosure requirements to require disclosure of the annual median compensation paid to all employees of the company, except the CEO, the annual total compensation of the CEO and the ratio of the median employee compensation to the annual compensation of the CEO. [Section 953]

Claw-Back

The SEC will issue a rule directing the national securities exchanges and associations to require each listed company to develop and implement a policy providing for disclosure of the company's policy on incentive compensation and the recovery of incentive compensation from an executive or former executive following an accounting restatement. The policy must provide that the company can recover any amount that was erroneously paid to the executive or former executive due to material noncompliance with any financial reporting requirement under the securities laws within the three-year period preceding the accounting restatement. [Section 954]

Employee and Director Hedging

The SEC will issue a rule requiring companies to disclose in their shareholder solicitation materials for an annual meeting whether any employee or member of the board of directors is permitted to purchase financial instruments for the company that are designed to hedge against a decrease in the market value of equity securities held by the employee or director. [Section 955]

Compensation at Financial Institutions

By April, 2011, certain Federal regulators will jointly establish regulations that require covered financial institutions to disclose to the appropriate federal regulator the structure of all incentive-based compensation arrangements. The regulations will prohibit any incentive-based payment arrangement that encourages inappropriate risks by providing employees, directors or principal shareholders with excessive compensation, fees or benefits or that could lead to material financial loss. The standards for compensation will be comparable to the standards established under the Federal Deposit Insurance Act for insured depository institutions. [Section 956]

Covered financial institutions include depository institutions and depository institution holding companies, broker-dealers, credit unions, investment advisors, Fannie Mae and Freddie Mac, and other financial institutions that the appropriate federal regulators determine should be covered. Certain small institutions are exempt. [Section 956]

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Voting by Brokers

Brokers may not vote without customer instruction with respect to the election of directors, executive compensation, or any other significant matter, as determined by the SEC. This does not apply to a vote with respect to an uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act. [Section 957]

Proxy Access

The Act gives the SEC authority to issue rules requiring that companies include nominees for the board of directors submitted by shareholders in the company's proxy materials and requiring that companies follow certain procedures regarding the inclusion of a shareholder's nominees. [Section 971]

Disclosure Regarding Chairman and CEO Structures

The SEC will issues rules requiring an issuer to disclose in its annual proxy why the issuer chose to have the same person serve as chairman of the board and CEO, or why it chose to have different individuals serve as chairman and CEO. [Section 972]

9. Municipal Securities

Registration and Oversight of Municipal Advisors

The Act requires municipal advisors to be registered in order to provide advice to or on behalf of a municipal entity or "obligated person" (as defined below) with respect to municipal financial products or the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person. [Section 975(a)] Municipal advisors and persons associated with municipal advisors are deemed to have a fiduciary duty in advising a municipal entity. [Section 975(c)]

A "municipal advisor" includes 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 or undertakes a solicitation of a municipal entity. "Municipal advisor" does not include an underwriter, investment adviser, commodity trading adviser advising on swaps, or an attorney or engineer. The term "obligated person" means any person who is either generally or through an enterprise, fund or account of such person, committed by contract or other arrangement to pay all or part of the obligations on the municipal securities to be sold in an offering. [Section 975(e)]

The provisions and amendments in this section regarding the registration and oversight of municipal securities are effective October 1, 2010. [Section 975(i)]

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Municipal Securities Rulemaking Board

The Act expands the power of the Municipal Securities Rulemaking Board to regulate municipal advisors, brokers and dealers. The MSRB is granted the authority to issue rules designed to prevent actions by a municipal advisor that are not consistent with a municipal advisor's fiduciary duty, to provide continuing education requirements for municipal advisors, and to establish professional standards for municipal advisors. [Section 975(b)] In addition, the MSRB is authorized to assist the SEC and other regulatory agencies in enforcement actions and examinations. [Section 975(c)]

The provisions and amendments in this section regarding the MSRB are effective October 1, 2010. [Section 975(i)]

Office of Municipal Securities

An Office of Municipal Securities is created within the SEC. The Office of Municipal Securities will administer the SEC's rules regarding brokers and dealers of municipal securities, municipal securities advisors, municipal securities investors, and municipal securities issuers and will coordinate with the MSRB. [Section 979]

10. Inspectors General

Council of Inspectors General on Financial Oversight

A Council on Inspectors General on Financial Oversight is established, which will meet quarterly to facilitate the sharing of information among inspectors general and which will submit a report to Congress each year, including a section written by each Inspector General regarding his or her specific concerns and a summary of the general observations of the Council with a focus on measures that should be taken to improve financial oversight. [Section 989E]

Endowment Policies, Annuity Contracts and Optional Annuity Contracts as Exempt Securities

Insurance and endowment policies, annuity contracts and optional annuity contracts are treated as exempt securities under the Securities Act. In order to be considered exempt, the value of the policy or contract cannot vary according to the performance of a separate account, the policy or contract must satisfy standard nonforfeiture laws of the state where the contract or policy is issued or, if there are no applicable standard nonforfeiture laws, the Model Standard Nonforfeiture Law for Life Insurance or Model Standard Nonforfeiture Law for Individual Deferred Annuities. Additionally, the exemption only applies to contracts and policies issued on or after June 16, 2013 in a state or by an insurance company that has adopted requirements that exceed certain minimum requirements established by the National Association of Insurance Commissioners. [Section 989J]

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11. Beneficial Ownership and Short-Swing Reporting; Section 404(b) of Sarbanes-Oxley; Other Matters

Beneficial Ownership and Short-Swing Profit Reporting

The Act permits the SEC to issue a rule shortening the length of the reporting period on Schedule 13D or 13G for a person who acquires more than five percent of any class of equity securities of an issuer, or for a person who becomes a director, officer or beneficial owner of more than 10 percent of any class of equity securities of an issuer under Section 16. [Section 929R]

Nutter Notes: Currently, an individual who acquires more than five percent of a stock has 10 days to file a report under Section 13 of the Exchange Act. A person who becomes an officer, director or 10 percent owner has 10 days to file a report under Section 16 of the Exchange Act. The Act would allow the SEC by rule to decrease each time period to less than 10 days.

The Act also eliminates the requirement to deliver Schedule 13D and 13G reports to the exchange on which the security is listed or to the issuer. Section 16 reports are no longer required to be filed with the exchange on which the security is listed. [Section 929R]

Exemption of Non-Accelerated Filers

The Act exempts small issuers that are neither large accelerated filers nor accelerated filers from Section 404(b) of Sarbanes-Oxley, which otherwise requires registered public accounting firms to attest to and report on the assessment of internal controls made by the management of the issuer. Additionally, the SEC will conduct a study to determine how the SEC can reduce the burden of complying with Section 404(b) of Sarbanes-Oxley for companies whose market capitalization is between $75 million and $250 million. [Section 989G]

Loan or Borrowing of Securities

Within two years after the date of enactment of the Act, the SEC will issue rules designed to increase the transparency of information available to brokers, dealers and investors, with respect to the loan or borrowing of securities. The Act makes it unlawful to effect, accept or facilitate a transaction involving the loan or borrowing of securities in violation of rules established by the SEC. [Section 984]

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TITLE X: BUREAU OF CONSUMER FINANCIAL PROTECTION

1. Bureau of Consumer Financial Protection

Establishment

The Act establishes the Bureau of Consumer Financial Protection as an independent bureau in the Federal Reserve System to regulate the offering and provision of "consumer financial products or services" under the "federal consumer financial laws." The Bureau is considered an executive agency. In general, all federal laws dealing with public or federal contracts, property, works, officers, employees, budgets, or funds, apply to the exercise of the powers of the Bureau. [Section 1011]

Timing and Effective Dates

The provisions of the Act establishing the Bureau take effect on the date of enactment of the Act. The provisions of the Act granting regulatory, supervisory, examination and other authority take effect on a date that the Secretary of the Treasury will publish no later than 60 days after the date of enactment of the Act. The effective date, once published, is required to be no earlier than six months, and no later than 12 months, after the date of enactment of the Act. It may be extended to a date that is no more than 18 months after the date of enactment if the Secretary of the Treasury determines it is necessary and informs Congress. [Sections 1018, 1029A, 1062]

Meaning of "Consumer Financial Products or Services"

The term "consumer financial product or service" includes a wide range of financial products and services offered to consumers primarily for personal, family, or household purposes, and includes, among others, extending credit and servicing loans; leasing personal or real property with specified exceptions; providing real estate settlement services, with specified exceptions that include appraisal services; deposit-taking activities; transmitting or exchanging funds; selling or issuing stored value or payment instruments, with specified exceptions; providing check cashing, check collection, or check guaranty services; providing financial data processing services, with specified exceptions; providing financial advisory services, with specified exceptions; collecting, analyzing, or providing consumer reports or other account information, with specified exceptions; collecting debt; and other financial products or services defined by the Bureau. The term "financial product or service" does not include the business of insurance or electronic conduit services. [Section 1002]

Meaning of "Federal Consumer Financial Laws"

The federal consumer financial laws include, among others, the Alternative Mortgage Transaction Parity Act, the Consumer Leasing Act, the Electronic Fund Transfer Act (except Section 920 of that law), the Equal Credit Opportunity Act, the Fair Credit Billing Act, the Fair Credit Reporting Act (except Sections 615(e) and 628 of that law), the Home Owners Protection Act, the Fair Debt Collection Practices Act, Section 43(b) – (f) of the Federal

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Deposit Insurance Act, Sections 502 through 509 of the Gramm-Leach-Bliley Act (except Section 505 as it applies to section 501(b)), the Home Mortgage Disclosure Act, the Home Ownership and Equity Protection Act, the Real Estate Settlement Procedures Act, the S.A.F.E. Mortgage Licensing Act, the Truth in Lending Act, the Truth in Savings Act, Section 626 of the Omnibus Appropriations Act, and the Interstate Land Sales Full Disclosure Act. [Section 1002]

Director

The Act establishes the position of the Director, who serves as the head of the Bureau. The Director is appointed by the President, by and with the advice and consent of the Senate. The Director serves for a five-year term. While the principal office of the Bureau is in the District of Columbia, the Director may establish regional offices of the Bureau, including in cities in which the Federal Reserve Banks are located. [Section 1011]

Powers

The Bureau is authorized, among other powers, to implement the Federal consumer financial laws through rules, orders, guidance, interpretations, statements of policy, examinations, and enforcement actions and to perform such other functions as may be authorized or required by law. [Section 1012]

Functions

The primary functions of the Bureau are supervising "covered persons" for compliance with federal consumer financial laws, and taking appropriate enforcement action; issuing rules, orders, and guidance implementing federal consumer financial laws; collecting, investigating, and responding to consumer complaints; collecting, researching, monitoring, and publishing information relevant to the functioning of markets for consumer financial products or services to identify risks to consumers; conducting financial education programs; and performing other activities as may be useful to facilitate the functions of the Bureau. A "covered person" is, in general, a person that offers consumer financial products or services. [Sections 1002, 1021]

Rulemaking, Orders and Guidance

The Director is authorized to issue rules, orders and guidance as may be necessary or appropriate to enable the Bureau to carry out the objectives of the federal consumer financial laws, and prevent evasions. In issuing a rule, the Bureau is required to consider the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from the rule and the impact of proposed rules on covered persons and on consumers in rural areas. [Section 1022]

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Council May Veto a Regulation

The Financial Stability Oversight Council may set aside a final regulation of the Bureau on the petition of a member agency if the Council decides that the regulation would put the safety and soundness of the U.S. banking system or the stability of the U.S. financial system at risk. [Section 1023]

Consultation with Prudential Regulators and Other Agencies

The Bureau is required to consult with the appropriate prudential regulators or other federal agencies prior to proposing a rule, as well as during the comment process, regarding consistency with prudential, market, or systemic objectives administered by those agencies. If, during the consultation process, a prudential regulator provides the Bureau with a written objection to a proposed rule of the Bureau or a portion of it, the Bureau is required to include in the adopting release a description of the objection and the basis for the Bureau decision, if any, regarding the objection. [Section 1022]

Federal Reserve's Examination Powers May Be Delegated to Bureau

Notwithstanding any other provision of law applicable to the supervision or examination of persons with respect to federal consumer financial laws, the Federal Reserve may delegate to the Bureau the authorities to examine persons subject to the jurisdiction of the Federal Reserve for compliance with the Federal consumer financial laws. [Section 1012]

Nutter Notes: Although Section 1026, summarized below, appears to give exclusive consumer compliance examination authority over depository institutions with assets of $10 billion or less to the institutions' safety and soundness regulators, that authority is trumped by the language of Section 1012, which provides that it applies "notwithstanding any other provision of law." As a result, the Federal Reserve appears to be able to delegate to the Bureau consumer compliance examination authority over bank holding companies and state member banks.

Autonomy

The Federal Reserve may not intervene in any matter before the Director, including examinations or enforcement actions, unless otherwise specifically provided by law. No rule or order of the Bureau is subject to approval or review by the Federal Reserve, and the Federal Reserve may not delay or prevent the issuance of any rule or order of the Bureau. [Section 1012]

Offices and Units Within the Bureau

The Director is required to establish the Office of Fair Lending and Equal Opportunity within the Bureau, as well as an Office of Financial Education, an Office of Service Member Affairs, and the Office of Financial Protection for Older Americans. Required units of the Bureau include a research unit, a community affairs unit, and a unit to collect and track consumer complaints. [Section 1013]

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Funding

The Federal Reserve is required to transfer periodically to the Bureau from the combined earnings of the Federal Reserve System an amount determined by the Director to be reasonably necessary to carry out the powers and functions of the Bureau. However, the amount cannot exceed a fixed percentage of the total operating expenses of the Federal Reserve System, specifically, 10 percent of expenses in fiscal year 2011; 11 percent of expenses in fiscal year 2012; and 12 percent of expenses in fiscal year 2013, and in each year thereafter. The dollar amount is required to be adjusted annually based on increases, if any, in an employment cost index. Bureau funding is not subject to review by the Committees on Appropriations of the House or Senate. [Section 1017]

Civil Penalty Fund

The Act establishes a separate fund to be known as the "Consumer Financial Civil Penalty Fund." If the Bureau obtains a civil penalty against any person in any judicial or administrative action under the federal consumer financial laws, the Bureau is required to deposit into the Civil Penalty Fund the amount of the penalty collected. Amounts in the Civil Penalty Fund are available to the Bureau for payments to victims of activities for which civil penalties have been imposed under the federal consumer financial laws. To the extent that victims cannot be located or payments are otherwise not practicable, the Bureau may use funds for the purpose of consumer education and financial literacy programs. These provisions take effect on the date of enactment of the Act. [Section 1017]

Supervision of Large Banks and Credit Unions

The Bureau has exclusive authority to require reports and conduct examinations on a periodic basis of any insured depository institution with total assets of more than $10 billion and any affiliate, and any insured credit union with total assets of more than $10 billion and any affiliate. The Bureau is required to coordinate its supervisory activities with the supervisory activities conducted by prudential regulators and state bank regulatory authorities, including scheduling examinations. To the extent that the Bureau and another federal agency are authorized to enforce a federal consumer financial law, the Act gives the Bureau primary authority to enforce that federal consumer financial law. [Section 1025]

Supervision of Smaller Banks and Credit Unions

The Director may require reports from an insured depository institution with total assets of $10 billion or less, or an insured credit union with total assets of $10 billion or less to support the role of the Bureau in implementing federal consumer financial law and to detect and assess risks to consumers and consumer financial markets. The Bureau is required to use otherwise available reports to the extent possible. The safety and soundness regulators have exclusive examination and enforcement authority over insured depository institutions with total assets of $10 billion or less. [Section 1026]

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Nutter Notes: Although Section 1026 appears to give exclusive consumer compliance examination authority over depository institutions with assets of $10 billion or less to the institutions' safety and soundness regulators, that authority is trumped by the language of Section 1012, summarized above, which provides that it applies "notwithstanding any other provision of law." As a result, the Federal Reserve appears to be able to delegate to the Bureau consumer compliance examination authority over bank holding companies and state member banks.

Supervision of Non-Depository Covered Persons

The Bureau is required to obtain reports and conduct examinations on a periodic basis of covered persons other than depository institutions for purposes of assessing compliance with federal consumer financial laws, obtaining information about the activities and compliance systems or procedures of the covered persons, and assessing risks to consumers and to markets for consumer financial products and services, all as set forth in regulations to be issued by the Bureau. The Bureau will supervise, among other covered persons, residential mortgage lenders and brokers, persons offering loan modification or foreclosure relief services, persons offering education loans, and payday lenders. [Section 1024]

Exclusions

The Bureau may not exercise any rulemaking, supervisory, enforcement or other authority over a person who is a merchant or retailer of any non-financial good or service except to the extent that the person is engaged in offering or providing any consumer financial product or service, or is otherwise subject to any consumer law. In any case, subject to specified conditions and exceptions, the following persons, among others, are excluded from the jurisdiction of the Bureau: automobile dealers, real estate agents brokers, manufactured and modular home retailers, accountants and tax preparers, attorneys, insurance companies, agents and brokers, securities brokers and other persons regulated by the SEC, persons regulated by state securities authorities, persons regulated by the CFTC, and persons regulated by the Farm Credit Administration. [Sections 1027, 1029]

Usury Limits

The Bureau is prohibited from imposing any usury limit on extensions of credit by covered persons to consumers unless explicitly authorized by law. [Section 1027]

Mandatory Pre-Dispute Arbitration

The Bureau, after conducting a study, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers. The regulation, if issued, could apply to any agreement between a consumer and a covered person entered into after the end of the 180-day period beginning on the effective date of the regulation. [Section 1028]

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2. Specific Bureau Powers

Prohibiting Unfair and Deceptive Acts and Practices

The Bureau may take any action to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. In issuing rules, the Bureau is required to consult with the federal banking agencies, or other federal agencies, as appropriate, concerning the consistency of the proposed rule with prudential, market, or systemic objectives administered by those agencies. [Section 1031]

Disclosures

The Bureau may prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service. Not later than one year after the designated transfer date, the Bureau is required to propose for public comment rules and model disclosures that combine the disclosures required under the Truth in Lending Act and Sections 4 and 5 of the Real Estate Settlement Procedures Act into a single, integrated disclosure for mortgage loan transactions, unless the Bureau determines that any proposal issued by the Federal Reserve and HUD carries out the same purpose. [Section 1032]

Consumer Rights to Information

Under rules the Bureau is required to issue, and with certain exceptions, a covered person is required to make available to a consumer, upon request, information in the control or possession of the covered person concerning the consumer financial product or service that the consumer obtained from the covered person, including information relating to any transaction or to the account including costs, charges and usage data. The information must be made available in an electronic form usable by consumers. The Bureau is required to consult with the federal banking agencies and the Federal Trade Commission. [Section 1033]

Responses to Consumer Complaints

The Bureau is required to establish, in consultation with the appropriate federal regulatory agencies, reasonable procedures to provide a timely response to consumers, in writing where appropriate, to complaints against, or inquiries concerning, a covered person, including steps that have been taken by the regulator in response to the complaint or inquiry of the consumer; any responses received by the regulator from the covered person; and any follow-up actions or planned follow-up actions by the regulator in response to the complaint or inquiry of the consumer. [Section 1034]

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3. State Law, Its Relation to Federal Law and Preemption Determinations

State Law Preserved

The Act provides that it does alter or affect the statutes, regulations, orders, or interpretations in effect in any State, except to the extent that any provision of state law is inconsistent with the provisions of the Act, and then only to the extent of the inconsistency. A state statute, regulation, order, or interpretation in effect in any state is not considered inconsistent with the Act if the protection that the state statute, regulation, order, or interpretation affords to consumers is greater than the protection provided by the Act. [Section 1041]

State Power to Enforce State Law Preserved

The Act does not alter or affect the authority of a state attorney general or any other regulatory or enforcement agency or authority to bring an action or other regulatory proceeding arising solely under the law in effect in that state. [Section 1042]

State Power to Enforce Federal Law Preserved

In general, a state attorney general may bring a civil action in the name of the state in any district court of the United States in that state or in state court located in the state that has jurisdiction over the defendant, to enforce provisions of the Act or regulations issued under the Act, and to secure remedies under provisions of the Act or remedies otherwise provided under other law. [Section 1042]

State Actions Against National Banks and Federal Thrifts

A state regulator may bring a civil action or other appropriate proceeding to enforce the provisions of the Act or regulations issued under the Act with respect to any entity that is state-chartered, incorporated, licensed, or otherwise authorized to do business under state law. A state attorney general of any state may bring a civil action in the name of the state against a national bank or federal savings association in any district court of the United States in the state or in state court located in the state that has jurisdiction over the defendant to enforce a regulation prescribed by the Bureau. [Section 1042]

Consultation Required; Bureau Intervention

Before initiating any action in a court or other administrative or regulatory proceeding against any covered person to enforce any provision of the Act, including any regulation prescribed by the Bureau, a state attorney general or state regulator, if practicable, must timely provide a copy of the complete complaint to be filed and written notice describing the action or proceeding to the Bureau and the defendant's prudential regulator, if any. The Bureau may intervene in the action as a party and remove the action to federal court if the action was brought in state court [Section 1042]

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Preemption Standard

State consumer financial laws are preempted by federal law only if application of a state consumer financial law would have a discriminatory effect on national banks; the state consumer financial law "prevents or significantly interferes with" the exercise by the national bank of its powers; or the state consumer financial law is preempted by a provision of federal law other than the Act. [Section 1044]

Preemption Determinations By Courts or the OCC

Preemption determinations may be made by a court or by the Comptroller on a case-by-case basis. The Comptroller may not delegate to anyone the power to make the determination. When making a determination on a case-by-case basis that a state consumer financial law of another state has substantively equivalent terms as one that the OCC is preempting, the OCC must first consult with the Bureau and must take the views of the Bureau into account when making the determination. [Section 1044]

Judicial Review of Comptroller's Preemption Determinations

A court reviewing any preemption determination made by the Comptroller is required to assess the validity of the determination, depending on the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision. However, the Act does not alter the deference that a court is required to show the agency when administering a law within its jurisdiction. [Section 1044]

Periodic Reviews of Preemption Determinations

The Comptroller of the Currency is required to periodically conduct a review, through notice and public comment, of each determination that a provision of federal law preempts a state consumer financial law. The agency must conduct the review within the five-year period after prescribing or otherwise issuing the preemption determination, and at least once during each five-year period thereafter. [Section 1044]

Application of State Law to National Bank Subsidiaries and Affiliates

The Act provides that a state consumer financial law will apply to a subsidiary or affiliate of a national bank to the same extent that the state consumer financial law applies to any person, corporation, or other entity subject to the state law. [Section 1044]

National Banks' Rate Exportation Powers Unaffected

The Act does not alter or otherwise affect the authority of a national bank under Section 85 of the National Bank Act to charge interest at the highest rate allowed by the law of the state, territory, or district where the bank is located, including with respect to the meaning of "interest" under that law. [Section 1044]

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Preemption Rules for Federal Thrifts Clarified

Any preemption determination by a court or the OCC involving federal savings associations is required to be made in accordance with same legal standards applicable to national banks regarding the preemption of state law. [Section 1046]

Visitorial Powers

The Act amends the National Bank Act to provide that no provision relating to visitorial powers may be construed as limiting or restricting the authority of any state attorney general to bring an action against a national bank in a court of appropriate jurisdiction to enforce an applicable law and to seek relief as authorized by such law. Comparable changes are made to the laws governing federal savings associations. [Section 1047]

Effective Date of Preemption Rules

The amendments relating to the relation of state law to federal law, and preemption, take effect on a date that the Secretary of the Treasury will publish no later than 60 days after the date of enactment of the Act. The effective date, once published, is required to be no earlier than six months, and no later than 12 months, after the date of enactment of the Act. It may be extended to a date that is no more than 18 months after the date of enactment if the Secretary of the Treasury determines it is necessary and informs Congress. [Sections 1048, 1062]

4. Other Regulatory Changes Including Regulation of Interchange Fees

Small Business Data Collection

The Act amends the Equal Credit Opportunity Act to require that, in the case of any application to a financial institution for credit for women-owned, minority-owned, or small business, a financial institution must inquire whether the business is a women-owned, minority-owned, or small business, without regard to whether the application is received in person, by mail, by telephone, by electronic mail or other form of electronic transmission, or by any other means, and whether or not such application is in response to a solicitation by the financial institution, and maintain related records. [Section 1071]

Remittance Transfers

The Act amends the Electronic Funds Transfer Act to impose new requirements including disclosure and error resolution requirements on financial institutions and other persons that facilitate "remittance transfers." The Federal Reserve is authorized to write regulations implementing the new requirements. [Section 1073]

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Interchange Fees

The Act amends the Electronic Fund Transfer Act to provide that the amount of any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction must be "reasonable and proportional to the cost incurred by the issuer with respect to the transaction." The Federal Reserve is required to issue regulations in final form not later than nine months after the date of enactment of the Act to establish standards for assessing whether the amount of any interchange transaction fee is reasonable and proportional to the cost incurred by the issuer with respect to the transaction. The requirements do not apply to any issuer that, together with its affiliates, has assets of less than $10 billion, and the Federal Reserve is required to exempt those issuers from its regulations. The term "issuer" means the person holding the asset account that is debited through an electronic debit transaction. These amendments take effect 12 months after the date of enactment of the Act. [Section 1075]

Prohibition on Exclusivity Arrangements

The Federal Reserve is required, before the end of the one-year period beginning on the date of the enactment of the Act, to issue regulations prohibiting an issuer or payment card network from directly or indirectly restricting the number of payment card networks on which an electronic debit transaction may be processed. The regulations are required to prohibit an issuer or payment card network from directly or indirectly inhibiting the ability of any person who accepts debit cards for payments to direct the routing of electronic debit transactions for processing over any payment card network that may process the transactions. [Section 1075]

Limitations on Network Restrictions on Discounts

The Act amends the Electronic Fund Transfer Act to prohibit a payment card network from directly or indirectly inhibiting the ability of any person to provide a discount or in-kind incentive for payment by the use of cash, checks, debit cards, or credit cards under certain circumstances. [Section 1075]

Truth in Lending and Leasing Exemptions for Small Transactions

The Act raises the thresholds for small credit transactions exempt from the Truth in Lending Act and for small lease transactions exempt from the consumer leasing provisions of the Truth in Lending Act from $25,000 to $50,000, and the Bureau is required to make an annual adjustment for inflation on and after December 31, 2011. [Section 1100E]

Nutter Notes: As a result, a credit transaction that formerly was exempt from Truth in Lending because the amount of the transaction exceeded $25,000 will now be subject to the Truth in Lending Act unless the transaction exceeds $50,000 (other than home loans and education loans which are covered regardless of the amount), and a consumer lease transaction that formerly was exempt from the consumer leasing provisions of the Truth in Lending Act because the amount of the transaction exceeded $25,000 will now be subject to the consumer leasing provisions of the Truth in Lending Act unless the transaction exceeds $50,000.

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Credit Scores Required to Be Provided in Connection with Adverse Action

The Act amends the Fair Credit Reporting Act to require a person that takes adverse action on the basis of information in a consumer report to provide written or electronic disclosure to the consumer of a numerical credit score used by the person in taking adverse action, and certain specified related information. [Section 1100F]

Effective Dates

Unless other wise provided, the provisions summarized above take effect on a date that the Secretary of the Treasury will publish no later than 60 days after the date of enactment of the Act. The effective date, once published, is required to be no earlier than six months, and no later than 12 months, after the date of enactment of the Act. It may be extended to a date that is no more than 18 months after the date of enactment if the Secretary of the Treasury determines it is necessary and informs Congress. [Section 1100H]

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TITLE XI: FEDERAL RESERVE SYSTEM PROVISIONS

1. Federal Reserve's Emergency Lending Authority

Liquidity Across the System

The Act amends the Federal Reserve Act to require the Federal Reserve Board to establish, by regulation, in consultation with the Secretary of the Treasury, policies and procedures governing emergency lending. The policies and procedures are intended to ensure that any emergency lending program or facility is for the purpose of providing liquidity to the broader financial system as a whole, and not to aid a particular failing financial company. The policies and procedures are also required to ensure that the collateral for emergency loans is sufficient to protect taxpayers from losses, and that any such emergency lending program is terminated in a timely and orderly fashion. [Section 1101]

Collateral for Emergency Loans

The policies and procedures must require that a Federal Reserve Bank assign, consistent with sound risk management practices and to ensure protection for the taxpayer, a lendable value to all collateral securing a loan by a Federal Reserve Bank under any emergency lending program to ensure that the loan is satisfactorily secured. [Section 1101]

Prohibition on Borrowing by Insolvent Companies

The Federal Reserve Board is required to establish procedures to prohibit borrowing from programs and facilities by borrowers that are insolvent. These procedures may include a certification from the chief executive officer or other authorized officer of the borrower, at the time the borrower initially borrows under the program or facility (with a duty by the borrower to update the certification if the information in the certification materially changes), that the borrower is not insolvent. A borrower will be considered insolvent if the borrower is in bankruptcy, in receivership under Title II of the Act, or any other federal or state insolvency proceeding. [Section 1101]

Rescuing Individual Companies

The Act provides that a program or facility that is structured to remove assets from the balance sheet of a specific company, or that is established for the purpose of assisting a specific company avoid bankruptcy, resolution under Title II of the Act, or any other federal or state insolvency proceeding, is not considered a program or facility with broad-based eligibility. The Federal Reserve may not establish any program or facility of this kind without the prior approval of the Secretary of the Treasury. [Section 1101]

Reports to Congress

The Federal Reserve is required to provide Congress not later than 7 days after the Federal Reserve authorizes any loan or other financial assistance under this provision, a report that

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includes the justification for the assistance, the identity of the recipients, the date and amount of the assistance, the form in which the assistance was provided, and the material terms of the assistance, including duration, collateral pledged (and value), all interest, fees, and other revenue or value to be received in exchange for the assistance, any requirements imposed on the recipient with respect to employee compensation, dividends, or any other corporate action in exchange for the assistance, and the expected costs to the taxpayers. [Section 1101]

Periodic Updates to Congress

The Federal Reserve is required to provide Congress once every 30 days with respect to any outstanding loan or other financial assistance under this provision, written updates on the value of collateral, the amount of interest, fees, and other revenue or value received in exchange for the assistance, and the expected or final cost to the taxpayers. [Section 1101]

Losses in Priority Position

If an entity to which a Federal Reserve Bank has provided a loan under this provision becomes a covered financial company in receivership under Title II of the Act, at any time while the loan is outstanding, and the Federal Reserve Bank incurs a realized net loss on the loan, then the Federal Reserve Bank has a claim equal to the amount of the net realized loss against the entity, with the same priority as an obligation to the Secretary of the Treasury under section 210(b) of the Act. [Section 1101]

2. GAO Audits of Federal Reserve Credit Facilities

Purposes

The GAO may conduct audits, including onsite examinations, of the Federal Reserve, a Federal reserve bank, or a credit facility, if the GAO determines that the audits are appropriate, solely for the purposes of assessing, with respect to a credit facility or a covered transaction the operational integrity, accounting, financial reporting, and internal controls governing the credit facility or covered transaction; the effectiveness of the security and collateral policies established for the facility or covered transaction in mitigating risk to the Federal Reserve Bank and taxpayers; whether the credit facility or the conduct of a covered transaction inappropriately favors one or more specific participants over other institutions eligible to utilize the facility; and the policies governing the use, selection, or payment of third-party contractors by or for any credit facility or to conduct any covered transaction. [Section 1102]

Audit Reports

A report of each audit conducted is required to be submitted by the GAO to Congress before the end of the 90-day period beginning on the date on which the audit is completed. The report must include a detailed description of the findings and conclusions of the GAO with respect to the matters that were the focus of the audit, together with recommendations for

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legislative or administrative action relating to such matters as the GAO may determine to be appropriate. [Section 1102]

Names of Participants To Remain Confidential

With certain exceptions, the GAO may not disclose to any person including to Congress, the names or identifying details of specific participants in any credit facility or covered transaction, the amounts borrowed by or transferred by or to specific participants in any credit facility or covered transaction, or identifying details regarding assets or collateral held or transferred by, under, or in connection with any credit facility or covered transaction, and any report provided must be redacted to ensure that the names and details are not disclosed. [Section 1102]

Report, Not Redacted, To Be Released One Year Later

The GAO is required to release an un-redacted version of any report on a credit facility one year after the effective date of the termination by the Federal Reserve of the authorization for the credit facility. For these purposes, a credit facility will be deemed to have terminated 24 months after the date on which the credit facility ceases to make extensions of credit and loans, unless the credit facility is otherwise terminated by the Federal Reserve.

3. Public Access to Information

Internet

The Federal Reserve is required to place on its home Internet website a link entitled "Audit" which links to a webpage that serves as a repository of information made available to the public for a reasonable period of time, not less than six months following the date of release of the relevant information, including the reports prepared by the GAO, the annual financial statements prepared by an independent auditor for the Federal Reserve, the reports to the Congress relating to emergency lending authority; and such other information as the Federal Reserve reasonably believes is necessary or helpful to the public in understanding the accounting, financial reporting, and internal controls of the Federal Reserve and the Federal Reserve Banks. [Section 1103]

Mandatory Disclosure

In order to ensure that information is disclosed in a timely manner concerning the borrowers and counterparties participating in emergency credit facilities, discount window lending programs, and open market operations authorized or conducted by the Federal Reserve or a Federal Reserve Bank, the Federal Reserve is required to disclose, the names and identifying details of each borrower, participant, or counterparty in any credit facility or covered transaction; the amount borrowed by or transferred by or to a specific borrower, participant, or counterparty in any credit facility or covered transaction; the interest rate or discount paid by each borrower, participant, or counterparty in any credit facility or covered transaction; and information identifying the types and amounts of collateral pledged or assets transferred in connection with participation in any credit facility or covered transaction. [Section 1103]

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Mandatory Release Date

In the case of a credit facility, the Federal Reserve must disclose the information described above one year after the effective date of the termination of the credit facility, and in the case of a covered transaction, the Federal Reserve must disclose the information described above on the last day of the eighth calendar quarter following the calendar quarter in which the covered transaction was conducted. Under certain circumstances, the Chairman of the Federal Reserve may publicly release the information before the relevant date if the Chairman determines that disclosure would be in the public interest and would not harm the effectiveness of the relevant credit facility or the purpose or conduct of covered transactions. [Section 1103]

4. Emergency Financial Stabilization

Liquidity Events

The Secretary of the Treasury may request that the Federal Reserve and the FDIC determine whether a "liquidity event" exists that warrants use of the guarantee program authorized under Section 1105 of the Act (summarized below). Any determination of that kind must be written, and contain an evaluation of the evidence that a liquidity event exists; that failure to take action would have serious adverse effects on financial stability or economic conditions in the United States; and that actions authorized under Section 1105 are needed to avoid or mitigate potential adverse effects on the United States financial system or economic conditions. [Section 1104]

Determination Required

On a determination of both the Federal Reserve and the FDIC that a liquidity event exists that warrants use of the guarantee program authorized under Section 1105, and with the written consent of the Secretary of the Treasury, the FDIC is required to take action in accordance with Section 1105(a) [see below]; and the Secretary of the Treasury (in consultation with the President) is required to take action in accordance with Section 1105(c) [see below]. The Secretary of the Treasury is required to provide written notice of the determination to Congress that includes a description of the basis for the determination. The GAO is also required to review the determination and report to Congress. [Section 1104]

FDIC's Guarantee Program

On a written determination of both the Federal Reserve and the FDIC that a liquidity event exists that warrants use of an emergency guarantee program, the FDIC is required to create a widely available program to guarantee obligations of solvent insured depository institutions or solvent depository institution holding companies (including affiliates) during times of severe economic distress, except that a guarantee of obligations under this section may not include the provision of equity in any form. [Section 1105(a)]

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Maximum Amount Must Be Approved by Congress

The Secretary of the Treasury (in consultation with the President) is required to determine the maximum amount of debt outstanding that the FDIC may guarantee. The FDIC is required to establish by regulation, in consultation with the Secretary of the Treasury, policies and procedures governing the issuance of guarantees under an emergency guarantee program. The FDIC may not issue any guarantees under the program unless Congress approves the specified maximum amount under the program. Special procedural rules are established to enable Congress to fast-track its deliberation on the plan. [Section 1105(c)]

Funding

The FDIC is required to charge fees and other assessments to all participants in any emergency guarantee program in amounts necessary to offset projected losses and administrative expenses, including any amounts borrowed from the Treasury. The FDIC may borrow funds from the Secretary of the Treasury and issue obligations to the Secretary for amounts borrowed. The FDIC may not borrow funds from the Deposit Insurance Fund. To the extent that fees and assessments charged to participants are insufficient to cover losses or expenses, including amounts borrowed from the Treasury, the FDIC is required to impose a special assessment solely on participants in the program. [Section 1105]

5. Federal Reserve Bank Governance

Elections of Federal Reserve Bank Presidents

The Act amends the Federal Reserve Act to require that the President of each Federal Reserve Bank be appointed by the Class B and Class C directors of the bank, with the approval of the Board of Governors of the Federal Reserve System, for a term of 5 years. Class A directors are representatives of member banks, and Class B and Class C directors are representatives of the public. [Section 1108]

Vice Chairman for Supervision

The Act amends the Federal Reserve Act to require that one member of the Board of Governors of the Federal Reserve System be designated as Vice Chairman for Supervision, who is required to develop policy recommendations for the Board regarding supervision and regulation of depository institution holding companies and other financial firms supervised by the Federal Reserve, and to oversee the supervision and regulation of those firms. The Vice Chairman of Supervision must make semi-annual appearances before Congress. [Section 1108]

Board of Governors May Not Delegate Policy-Making Function

The Act amends the Federal Reserve Act to prohibit the Board of Governors of the Federal Reserve System from delegating to a Federal Reserve Bank the Board of Governors' functions for the establishment of policies for the supervision and regulation of depository institution

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holding companies and other financial firms supervised by the Federal Reserve. [Section 1108]

6. Audit of Federal Reserve, and Public Disclosure of Emergency Assistance

GAO Audit of Emergency Programs

The GAO is required to conduct a one-time audit of all loans and other financial assistance provided during the period beginning on December 1, 2007 and ending on the date of enactment of the Act by the Federal Reserve or a Federal Reserve Bank under the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility, the Term Asset-Backed Securities Loan Facility, the Primary Dealer Credit Facility, the Commercial Paper Funding Facility, the Term Securities Lending Facility, the Term Auction Facility, Maiden Lane, Maiden Lane II, Maiden Lane III, the agency Mortgage-Backed Securities program, foreign currency liquidity swap lines, and any other program under Section 13(3) of the Federal Reserve Act. A report to Congress is due within one year. [Section 1109]

Governance Audit

The GAO is required to audit the governance of the Federal Reserve Bank system, and examine the extent to which the current system of appointing Federal Reserve Bank directors effectively represents the public, and whether there are actual or potential conflicts of interest created when the directors of Federal Reserve Banks, which execute the supervisory functions of the Board of Governors of the Federal Reserve System, are elected by member banks. The audit must be completed within one year. [Section 1109]

Public Disclosure Required of Assistance Provided Since December 2007

The Act requires the Federal Reserve to publish information on its website, not later than December 1, 2010, with respect to all loans and other financial assistance provided during the period beginning on December 1, 2007 and ending on the date of enactment of the Act under the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility, the Term Asset-Backed Securities Loan Facility, the Primary Dealer Credit Facility, the Commercial Paper Funding Facility, the Term Securities Lending Facility, the Term Auction Facility, Maiden Lane, Maiden Lane II, Maiden Lane III, the agency Mortgage-Backed Securities program, foreign currency liquidity swap lines, and any other program created under Section 13(3) of the Federal Reserve Act. [Section 1109]

Nature of Information to Be Published

The information to be published on the Federal Reserve's website must include the identity of each business, individual, entity, or foreign central bank to which the Federal Reserve provided assistance, the type of financial assistance, the value or amount of the financial assistance, the date on which the assistance was provided, the specific terms of any repayment expected, including the time period, interest charges, collateral, limitations on executive

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compensation or dividends, and other material terms, and the specific rationale for each such facility or program. [Section 1109]

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TITLE XII: IMPROVING ACCESS TO MAINSTREAM INSTITUTIONS

1. Improving Access to Mainstream Financial Institutions

The Act authorizes the Secretary of the Treasury to establish a multiyear program of grants, cooperative agreements, financial agency agreements, and similar contracts or undertakings to promote initiatives designed to enable low- and moderate-income individuals to establish one or more accounts in a federally insured depository institution that are appropriate to meet their financial needs and to improve access to those types of accounts, on reasonable terms, for low- and moderate-income individuals. [Section 1204]

Eligible entities may, in any program established by the Secretary of the Treasury, offer or provide to low- and moderate-income individuals products and services relating to accounts, including small-dollar value loans and financial education and counseling relating to conducting transactions in and managing accounts. Funds would be provided to community development financial institutions and to partnerships between community development financial institutions and insured depository institutions to establish loan loss reserves. [Sections 1204, 1206]

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TITLE XIII: PAY IT BACK ACT

1. Emergency Economic Stabilization Act Amendments

TARP Authorization Reduced

The Act amends Section 115(a) of the Emergency Economic Stabilization Act of 2008 to reduce the maximum amount authorized under the program from $700 billion to $475 billion. [Section 1302]

No New Programs

The Act amends Section 115(a) of the Emergency Economic Stabilization Act of 2008 to provide that no authority under the Emergency Economic Stabilization Act of 2008 may be used to incur any obligation for a program or initiative that was not initiated prior to June 25, 2010. [Section 1302]

Semi-Annual Reporting

The Act amends Section 106 of the Emergency Economic Stabilization Act of 2008 to require the Secretary of the Treasury to report to Congress every six months on amounts received and transferred to the general fund. [Section 1303]

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TITLE XIV: MORTGAGE REFORM AND ANTI-PREDATORY LENDING ACT

1. Prohibitions Against Incentives to Steer Consumers to Higher Priced Loans

Escalating Yield Spread Premiums Banned

The Act prohibits certain financial incentives that may encourage mortgage originators, a defined term under the Act that includes both licensed mortgage brokers and loan officers of depository institutions, to steer consumers to higher-cost mortgages.

The Act prohibits any compensation to a mortgage originator that varies based on the terms of the loan (other than the principal amount of the loan), which generally bans yield spread premiums that escalate upward as the loan interest rate increases. The amendments to the Truth in Lending Act also prohibit mortgage originators from receiving compensation from both the borrower and the lender. The act forbids the payment of any origination fee or charge by any person other than the consumer, unless the consumer does not pay the mortgage originator directly and the consumer does not make an upfront payment of discount points, origination points, or fees (other than bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or originator). The Act authorizes the Federal Reserve to waive or provide exemptions to the foregoing restrictions on origination fees. [Section 1403]

Definition of a Mortgage Originator

The term "mortgage originator" is defined in the Act to mean any person who, for compensation, takes a residential mortgage loan application, assists a consumer in obtaining or applying for a residential mortgage loan, or offers or negotiates terms of a residential mortgage loan. The term includes anyone who holds himself or herself out to the public as a person who can or will provide any of the foregoing services. The Act provides certain exclusions from the definition of mortgage originator for those who only perform purely administrative or clerical tasks, real estate brokers, servicers and their employees, and others not engaged in mortgage brokerage activities. [Section 1401]

Regulations to Prohibit Steering

The Act requires the Federal Reserve to write new regulations to prohibit mortgage originators from steering any consumer to a residential mortgage loan that the consumer lacks a reasonable ability to repay or has predatory characteristics (such as equity stripping, excessive fees, or abusive terms), or from a qualified mortgage (as defined below) to a residential mortgage loan that is not a qualified mortgage. The Federal Reserve is also required to write new regulations to prohibit abusive or unfair lending practices that promote disparities among consumers of equal credit worthiness but of different race, ethnicity, gender or age, and to prohibit mortgage originators from mischaracterizing a consumer's credit history, the residential mortgage loans available to a consumer, or the appraised value of the property. If a mortgage originator is unable to offer to a consumer a loan that is not more expensive than a loan for which the

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consumer qualifies, the regulations will prohibit the mortgage originator from discouraging the consumer from seeking a loan through another mortgage originator.

While any compensation that would cause the total amount of compensation paid to a mortgage originator to vary based on the terms of the loan (other than the amount of the principal) is strictly prohibited, the Act does not prohibit incentive payments to a mortgage originator based on the number of loans originated within a specified period of time, or limit the amount of compensation a creditor may receive upon the sale of a loan to a subsequent purchaser. The Act does not restrict the financing of origination fees or costs at the option of the consumer, as long as the fees or costs do not vary based on the terms of the loan (other than the amount of the principal) or the consumer's decision about whether to finance the fees or costs. [Section 1403]

Timing and Effective Dates of New Regulations

In general, new regulations or amendments to existing regulations required under Title XIV of the Act must be finalized no later than 18 months after the date designated by the Treasury Secretary under Section 1062 of the Act for the transfer of functions to the Bureau of Consumer Financial Protection (the "transfer date"). The final regulations or amendments must become effective no later than 12 months after they are issued. Any section of Title XIV for which regulations have not been issued within 18 months after the transfer date will take effect on the date that is 18 months after the transfer date. [Section 1400]

2. Changes to Civil Liability Provisions of the Truth in Lending Act

Private Right of Action against Mortgage Originators

The Act amends the Truth in Lending Act to provide a cause of action for consumers against mortgage originators comparable to the private right of action currently available against creditors. Mortgage originators will be liable to consumers for any violation of the new Truth in Lending requirements applicable to mortgage originators under the Act, such as the anti-steering regulations to be issued by the Federal Reserve.

The maximum amount of any liability of a mortgage originator to a consumer under the new provision is limited to the greater of actual damages or an amount equal to three times the total amount of direct and indirect compensation or gain received by the mortgage originator in connection with the residential mortgage loan, plus costs including attorneys' fees. [Section 1404]

Changes to Private Right of Action against Creditors

The Act also increases the amount of civil money penalties that may be imposed for certain violations of the Truth in Lending Act and extends the statute of limitations for private claims made in connection with violations of certain Truth in Lending Act requirements applicable to higher priced residential mortgage loans. [Section 1416]

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The Act provides that no creditor or assignee may be liable to an obligor under the Truth in Lending Act's civil liability provisions if the obligor or co-obligor has been convicted of obtaining by actual fraud the residential mortgage loan. [Section 1417]

Truth in Lending Violations as a Defense to Foreclosure

The Act amends the civil liability provisions of the Truth in Lending Act to permit a consumer to assert a violation by a creditor of the prohibitions on steering incentives or the requirement that a creditor determine a consumer's ability to repay as a defense by recoupment or set off in any foreclosure proceeding without regard for the time limit on a private action for damages under the Truth in Lending Act. The amount of any such recoupment or set-off is equal to the amount to which the consumer would be entitled for damages for a valid claim brought in an original action against the creditor, plus costs and reasonable attorneys' fees. If a judgment is rendered after the expiration of the applicable time limit on a private action for damages, the amount of recoupment or set-off derived from damages related to certain disclosure violations may not exceed the amount to which the consumer would have been entitled computed up to the day preceding the expiration of the applicable time limit. [Section 1413]

3. Federal Reserve to Define Unfair and Deceptive Mortgage Lending Practices

The Act requires the Federal Reserve to issue regulations that define and prohibit abusive, unfair, deceptive or predatory acts or practices relating to residential mortgage loans, and to address conditions or terms for necessary or proper acts or practices, and to effect the other amendments of the Truth in Lending Act made by the Act. The regulations may apply to all residential mortgage loans other than to an extension of credit relating to a timeshare plan (as defined in 11 U.S.C. § 101(53D)). [Section 1405]

4. New Standards Require Assessment of Ability to Repay Residential Mortgage Loans

The Act amends the Truth in Lending Act to prohibit any creditor from making a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is made, the consumer has a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments, and otherwise in accordance with regulations to be written by the Federal Reserve. If the creditor knows, or has reason to know, that one or more residential mortgage loans secured by the same residence will be made to the same consumer, the creditor's determination of the consumer's ability to repay must take into account the combined payments of all loans on the same residence. [Section 1411]

Basis for Determination of Ability to Repay

A determination of a consumer's ability to repay a residential mortgage loan must consider the consumer's credit history, current income, reasonably expected income, current obligations, debt-to-income ratio or the residual income the consumer will have after paying non-mortgage debt and mortgage-related obligations, employment status, and other financial resources other than the consumer's equity in the dwelling or real property that secures repayment of the loan.

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The creditor must use a payment schedule that fully amortizes the loan over the term of the loan to make the determination. For a variable rate residential mortgage loan that allows or requires the consumer to defer the repayment of any principal or interest, the creditor must use a fully amortizing repayment schedule. For a residential mortgage loan that permits or requires the payment of interest only, the creditor must use the payment amount required to amortize the loan by its final maturity.

In determining repayment ability, a creditor must also consider any balance increase that may accrue from any negative amortization provision. Creditors must calculate the monthly payment amount for principal and interest on any residential mortgage loan to determine repayment ability based on a number of assumptions set forth in the Act. [Section 1411]

Income Verification

The creditor must verify amounts of income or assets that it relies on to determine repayment ability, including expected income or assets, by reviewing the consumer's IRS Form W–2, tax returns, payroll receipts, financial institution records, or other third-party documents that provide reasonably reliable evidence of the consumer's income or assets. In order to safeguard against fraudulent reporting, any consideration of a consumer's income history must include the verification of such income by the use of IRS transcripts of tax returns or a method that quickly and effectively verifies income documentation by a third party subject to Federal Reserve rules. [Section 1411]

Exemption for Certain Federally Guaranteed Loans

With respect to loans made, guaranteed, or insured by HUD, the Department of Veterans Affairs, the Department of Agriculture or the Rural Housing Service, such departments or agencies may exempt refinancings from this income verification requirement under certain conditions. [Section 1411]

Presumption of Ability to Repay—Safe Harbor for Qualified Mortgages

Any residential mortgage creditor, and any assignee of such a loan, may presume that the consumer has a reasonable ability to repay the residential mortgage loan if the loan is a qualified mortgage. A "qualified mortgage" is any residential mortgage loan for which each of the following criteria are satisfied:

- the regular periodic payments may not result in an increase of the principal balance or may not allow the consumer to defer repayment of principal;
- the terms of the loan do not result in a balloon payment (a scheduled payment that is more than twice as large as the average of earlier scheduled payments);
- the income and financial resources relied upon to qualify the consumer are verified and documented;

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- for a fixed rate loan, the underwriting process is based on a payment schedule that fully amortizes the loan over its term and takes into account all applicable taxes, insurance, and assessments;
- for an adjustable rate loan, the underwriting is based on the maximum rate permitted under the loan during the first five years, and a payment schedule that fully amortizes the loan over the loan term and takes into account all applicable taxes, insurance, and assessments;
- the loan complies with any guidelines or regulations established by the Federal Reserve relating to ratios of total monthly debt to monthly income or alternative measures of ability to pay regular expenses after payment of total monthly debt;
- the total points and fees payable in connection with the loan do not exceed three percent of the total loan amount;
- the term of the loan does not exceed 30 years; and
- for a reverse mortgage, the reverse mortgage meets the standards for a qualified mortgage set by the Federal Reserve.

The Act authorizes the Federal Reserve to modify the foregoing criteria that define a qualified mortgage by rule. [Section 1412]

Qualified and Registered Mortgage Originators

The Act requires that each mortgage originator be qualified, registered or licensed as required by applicable state or federal law, including the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act). The Act authorizes the Federal Reserve to issue regulations addressing the qualifications of mortgage originators, and registration and licensing of mortgage originators under the SAFE Act.

The Act also requires that all loan documents include the unique identification number of the mortgage originator provided by the Nationwide Mortgage Licensing System and Registry. The identification of the loan originator responsible for loan documents will provide a basis for civil liability of mortgage originators under the amendments to the Truth in Lending Act. The Federal Reserve must issue regulations that require depository institutions to establish and maintain procedures reasonably designed to assure and monitor compliance with the foregoing requirements. [Section 1402]

5. Limitations on Prepayment Penalties and Other Lending Standards

The Act amends the Truth in Lending Act to limit or prohibit prepayment penalties for certain residential mortgage loans. The amendments prohibit a prepayment penalty in any residential mortgage loan that is not a qualified mortgage (as described above). For purposes of the prohibition on prepayment penalties, a qualified mortgage does not include a loan with an adjustable rate or an annual percentage rate that exceeds the average prime offer rate for a comparable transaction by a benchmark that varies from 1.5 to 3.5 percentage points depending upon whether the loan is a conforming or nonconforming first lien mortgage loan or

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a subordinate lien mortgage loan. The average prime offer rate will be published by the Federal Reserve. [Section 1414]

Phased-Out Prepayment Penalties on Qualified Mortgages

The amendments also prohibit a prepayment penalty for a qualified mortgage in excess of three percent, two percent and one percent of the outstanding balance on the loan during the first, second and third years, respectively, following consummation of the loan. After the end of the third year, no prepayment penalty may be imposed on a qualified mortgage. [Section 1414]

No Prepayment Penalty Option Required

A creditor may not offer a consumer a residential mortgage loan product that has a prepayment penalty without offering the consumer a residential mortgage loan product that does not have a prepayment penalty. [Section 1414]

Single Premium Credit Insurance Prohibited

The Act prohibits a creditor from financing certain types of insurance in connection with any residential mortgage loan or home equity line of credit. Insurance premiums calculated and paid on a monthly basis are not considered to be financed by the creditor. The prohibition does not apply to credit unemployment insurance for which the unemployment insurance premiums are reasonable, the creditor receives no compensation in connection with the unemployment insurance premiums, and the unemployment insurance premiums are paid pursuant to another insurance contract and not paid to an affiliate of the creditor. [Section 1414]

Restrictions on Alternative Dispute Resolution—Mandatory Arbitration Prohibited

In general, the Act prohibits a residential mortgage loan or home equity line of credit from including mandatory arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction. The consumer and the creditor may agree to any nonjudicial dispute resolution procedure as the method for resolving any controversy at any time after a dispute or claim under the transaction arises. No provision of any residential mortgage loan or home equity line of credit, and no other agreement between the consumer and the creditor relating to the residential mortgage loan or line of credit may bar a consumer from bringing an action in an appropriate district court of the United States, or any other court of competent jurisdiction for damages or other relief in connection with any alleged violation of the Truth in Lending Act or any other Federal law. [Section 1414]

Pre-Closing Disclosure and Counseling Requirements for Mortgages with Negative Amortization

The Act amends the Truth in Lending Act to require any creditor that makes a residential mortgage loan (other than a reverse mortgage) or home equity line of credit that provides or permits a negative to first provides the consumer with a statement that:

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- The transaction will or may, as the case may be, result in negative amortization;
- Describes negative amortization in a manner to be determined by the Federal Reserve;
- Explains that negative amortization increases the outstanding principal balance of the account; and
- Explains that negative amortization reduces the consumer's equity.

In the case of a first-time borrower with a residential mortgage loan that is not a qualified mortgage, the creditor must collect from the consumer sufficient documentation to demonstrate that the consumer received homeownership counseling from organizations or counselors certified by HUD. [Section 1414]

Disclosure Regarding Anti-Deficiency Protection

The Act amends the Truth in Lending Act to require any creditor that makes a residential mortgage loan that is will be subject to protection under an anti-deficiency law to provide a written notice to the consumer describing the protection provided by the anti-deficiency law and the significance for the consumer of the loss of such protection before the loan is consummated.

If a creditor or mortgage originator provides an application to a consumer, or receives an application from a consumer, for any type of refinancing for a residential mortgage loan that would cause the loan to lose the protection of an anti-deficiency law, the creditor or mortgage originator must provide a similar written notice to the consumer before any agreement for any the refinancing is consummated

The term "anti-deficiency law" means the law of any state which provides that, in the event of foreclosure on the residential property of a consumer securing a mortgage, the consumer is not liable for any deficiency between the sale price obtained on such property through foreclosure and the outstanding balance of the mortgage. [Section 1414]

Disclosure of Partial Payment Policy

The Act amends the Truth in Lending Act to require any creditor to disclose, prior to settlement of a residential mortgage loan or, in the case of a person becoming a creditor with respect to an existing residential mortgage loan, at the time such person becomes a creditor, the creditor's policy regarding the acceptance of partial payments. If the creditor accepts partial payments, the disclosure must state how partial payments will be applied to the mortgage and whether partial payments will be placed in escrow. The foregoing lending standards and disclosure requirements, and any implementing regulations, generally do not apply to timeshare plans. [Section 1414]

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6. Additional Truth in Lending Disclosure Changes

Notice Required before Reset of Hybrid ARMs

The Act amends the Truth in Lending Act to require the creditor or servicer of a hybrid adjustable rate mortgage (ARM) loan to deliver a written notice to the consumer six months before the introductory interest rate resets or, if the rate resets during the first six months, at the closing. A hybrid ARM is a consumer credit transaction secured by the consumer's principal residence with a fixed introductory interest rate that adjusts or resets to a variable interest rate after the introductory period. The written notice must be separate and distinct from all other correspondence to the consumer and must include the following:

- Any index or formula used in resetting the interest rate and a source of information about the index or formula;
- An explanation of how the new interest rate and payment would be determined, including an explanation of how the index was adjusted;
- A good faith estimate, based on accepted industry standards, of the amount of the monthly payment that will apply after the date of the reset, and the assumptions on which the estimate is based;
- A list of alternatives that consumers may pursue before the date of adjustment or reset, and descriptions of the actions consumers must take to pursue these alternatives, including refinancing, renegotiation of loan terms, payment forbearances, and pre-foreclosure sales;
- The names, addresses, telephone numbers, and Internet addresses of counseling agencies or programs reasonably available to the consumer that have been certified or approved and made publicly available by HUD or a state housing finance authority; and
- The address, telephone number, and Internet address for the state housing finance authority.

The Federal Reserve is authorized to require similar notices for other ARM loans that are not hybrid ARM loans. [Section 1418]

Additional Mandatory Truth in Lending Disclosures for Closed End Credit

The Act amends the Truth in Lending Act to require the creditor to disclose each of the following items, to the extent applicable, for each consumer credit transaction other than under an open end credit plan:

- For a variable rate residential mortgage loan for which an escrow account will be established to pay taxes, the amount of the initial and fully indexed monthly payments due for the payment of principal and interest, the amount of such monthly payments including amounts deposited in the escrow account;
- For a residential mortgage loan, the aggregate amount of settlement charges for all settlement services, the amount of charges that are included in the loan and the amount of such charges the borrower must pay at closing, the approximate amount of the

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wholesale rate of funds in connection with the loan, and the aggregate amount of other fees or required payments in connection with the loan;

- For a residential mortgage loan, the aggregate amount of fees paid to the mortgage originator, the amount of such fees paid directly by the consumer, and any additional amount received by the originator from the creditor; and
- For a residential mortgage loan, the total amount of interest that the consumer will pay over the life of the loan as a percentage of the principal of the loan, computed assuming the consumer makes timely monthly payments and does not make any over-payments. [Section 1419]

Additional Periodic Disclosures

The Act amends the Truth in Lending Act to require the creditor, assignee, or servicer of any residential mortgage loan to deliver to the obligor a statement each billing cycle that sets forth each of the following items, to the extent applicable:

- The amount of the principal obligation under the mortgage;
- The current interest rate in effect;
- The date on which the interest rate may next reset or adjust;
- The amount of any prepayment fee to be charged, if any;
- A description of any late payment fees;
- A telephone number and electronic mail address that may be used by the obligor to obtain information about the mortgage;
- The names, addresses, telephone numbers, and Internet addresses of counseling agencies or programs reasonably available to the consumer that have been certified or approved and made publicly available by HUD or a State housing finance authority; and
- Any other information the Federal Reserve requires by rule.

The Federal Reserve is required to develop a standard form for the required disclosures, taking into account that the statements required may be transmitted in writing or electronically. The periodic disclosure requirements do not apply to a fixed rate residential mortgage loan where the obligor receives a coupon book that provides substantially the same information. [Section 1420]

7. New Truth in Lending Requirements for High-Cost Mortgages

The Act expands the scope of consumer protections for certain higher priced residential mortgage loans originally established under amendments to the Truth in Lending Act by the Home Ownership and Equity Protection Act (HOEPA) and requires additional disclosures to consumers. This title revises the benchmarks for determining loans subject to the heightened HOEPA standards and defines such loans as high-cost mortgages.

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High-Cost Mortgages Defined

A "high-cost mortgage" is a consumer credit transaction that is secured by the consumer's principal dwelling, other than a reverse mortgage transaction, if:

- for a credit transaction secured
  - by a first mortgage, the annual percentage rate at consummation will exceed by more than 6.5 percentage points (8.5 percentage points, if the dwelling is personal property and the transaction is for less than $50,000) the average prime offer rate for a comparable transaction; or
  - by a subordinate or junior mortgage, the annual percentage rate at consummation will exceed by more than 8.5 percentage points the average prime offer rate for a comparable transaction;

- the total points and fees, other than bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or mortgage originator, exceed
  - for a transaction for $20,000 or more, five percent of the total transaction amount; or
  - for a transaction for less than $20,000, the lesser of eight percent of the total transaction amount or $1,000 (or such other dollar amount established by the Federal Reserve); or
  - the transaction documents permit the creditor to charge or collect prepayment penalties more than 36 months after the closing or such penalties exceed, in the aggregate, more than two percent of the amount prepaid.

The definition of high-cost mortgage includes guidelines on how the annual percentage rate must be determined in certain circumstances, and specifies certain insurance premiums and other charges that may be excluded from the calculation of total points and fees. [Section 1431]

Nutter Notes: The definition of high-cost mortgage includes residential mortgage loans made to finance the acquisition or initial construction of the mortgaged residence and to home equity lines of credit.

Changes to Restrictions Related to High-Cost Mortgages

The Act repeals a limited exception to the Truth in Lending Act's prohibition against charging a prepayment penalty in a high-cost mortgage. The Act also prohibits for high-cost mortgages any balloon payment—a scheduled payment that is more than twice as large as the average of earlier scheduled payments. The prohibition against balloon payments does not apply when the payment schedule is adjusted to the seasonal or irregular income of the consumer. [Section 1432]

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The Act amends the Truth in Lending Act to prohibit any creditor from recommending or encouraging a consumer to default on an existing loan or other debt in connection with the closing of a high-cost mortgage that refinances all or any portion of the existing loan or debt. Creditors are also prohibited from imposing a late payment charge or fee in connection with a high-cost mortgage:

- if the amount of the late payment charge or fee exceeds of four percent of the past due payment;
- if the loan documents do not specifically authorize the charge or fee;
- before the end of the 15-day period beginning on the date the payment is due, or in the case of a loan on which interest on each installment is paid in advance, before the end of the 30-day period beginning on the date the payment is due; or
- more than once with respect to a single late payment.

No late fee or delinquency charge may be imposed on a high-cost mortgage payment that is otherwise a full and timely payment if any delinquency or insufficiency of payment is attributable only to a late fee or delinquency charge assessed on any earlier payment. [Section 1433]

The Act also amends the Truth in Lending Act to provide additional restrictions on late fees, acceleration, financing of fees and points, structuring transactions to evade restrictions, modification and deferral fees and fees related to a payoff statement for high-cost home loans. [Section 1433]

Counseling Requirement

The Act amends the Truth in Lending Act to prohibit a creditor from making a high-cost mortgage without first receiving certification from a counselor that is approved by the Secretary of HUD, or at the discretion of the Secretary, a state housing finance authority, that the consumer has received counseling on the advisability of the mortgage.

No counselor may certify that a consumer has received counseling on the advisability of the high-cost mortgage unless the counselor can verify that the consumer has received the appropriate disclosures.

The Federal Reserve is authorized to make regulations implementing the high-cost mortgage counseling requirements. The Act also provides a remedy for unintentional violations of requirements applicable to a high-cost mortgage. [Section 1433]

8. New Mortgage Servicing Requirements

Escrow Accounts Required for Certain Higher Cost Loans

The Act amends the Truth in Lending Act to require any creditor, in connection with making a certain type of higher cost first-lien residential mortgage loan, to establish an escrow account

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for the payment of taxes and hazard insurance, and, if applicable, flood insurance, mortgage insurance, ground rents, and any other required periodic payments or premiums. The requirement does not apply to home equity lines of credit or reverse mortgages. Escrow accounts are also required for any state or federal guaranteed residential mortgage loan and as otherwise required by state or federal law. [Section 1461]

Escrow Disclosure Requirements

The Act amends the Truth in Lending Act to require a creditor or servicer to provide disclosures about the consumer's responsibilities and implications for the consumer in the event that an escrow account is not established in connection with a residential mortgage loan or the consumer chooses to close such an account. [Section 1462]

New RESPA Consumer Protections

The Act amends the Real Estate Settlement Procedures Act of 1974 ("RESPA") to prohibit most servicers of residential mortgage loans from obtaining force-placed hazard insurance unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirements to maintain property insurance. Force-placed insurance is hazard insurance coverage obtained by a servicer when the borrower has failed to maintain coverage as required under the terms of the mortgage. The Act provides certain criteria that must be met before a servicer has a reasonable basis for obtaining force-placed insurance.

The amendments also prohibit servicers from charging fees for responding to certain requests from borrowers that will be defined in Bureau of Consumer Financial Protection regulations, failing to respond to a borrower's requests to correct certain errors in a timely fashion, and failing to respond within 10 business days to a request from a borrower to provide contact information about the owner or assignee of the loan. The Act authorizes the Bureau of Consumer Financial Protection to issue additional consumer protect regulations that address servicer requirements.

The Act also amends RESPA to increase required response times to certain borrower inquiries by servicers, and to increase the amounts of certain penalties payable to borrowers for violations of RESPA servicing requirements. [Section 1463]

Prompt Crediting of Home Loan Payments

The Act amends the Truth in Lending Act to require servicers to credit a payment to a consumer's residential mortgage loan account as of the date of receipt, except when a delay in crediting does not result in any charge to the consumer or in the reporting of negative information to a credit bureau. If a servicer specifies in writing requirements for the consumer to follow in making payments and accepts a payment that does not conform to the requirements, the servicer must credit the payment within five days after receipt.

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The Act also amends the Truth in Lending Act to require creditors and servicers to send accurate payoff balances no more than seven business days after the receipt of a written request from or on behalf of a borrower. [Section 1464]

Escrows Included in Repayment Analysis

The Act amends the Truth in Lending Act to require that disclosures to consumers about the number, amount, and due dates or repayment schedule for a residential mortgage loan take into account the amount of any monthly payment to an escrow account. [Section 1465]

9. Appraisal Practices and Appraiser Independence Requirements

Appraisals Required for Higher-Risk Mortgages

The Act amends the Truth in Lending Act to prohibit a creditor from making higher-risk mortgage loan to any consumer without first obtaining a written appraisal of the mortgaged property that meets certain requirements. A higher-risk mortgage is a residential mortgage loan, other than a reverse mortgage loan that is a qualified mortgage, that is not a qualified mortgage and has an annual percentage rate that exceeds the average prime offer rate for a comparable transaction by a benchmark that varies from 1.5 to 3.5 percentage points depending upon whether the loan is a conforming or nonconforming first lien mortgage loan or a subordinate lien mortgage loan. [Section 1471]

Copies of Appraisal Reports Must Be Provided to Consumers

The Act requires creditors to provide each applicant with a free copy of any written appraisal report developed in connection with an application for a first lien residential mortgage loan or a higher-risk mortgage no later than 3 days prior to the closing of the loan. The applicant may waive the 3-day requirement under certain circumstances. Creditors must notify applicants in writing of the right to receive a copy of each appraisal. [Sections 1471 and 1474]

Appraisal Independence Standards

The Act amends the Truth in Lending Act to create appraisal independence standards with civil money penalties that may be imposed for violations of the independence standards. The standards prohibit the parties involved in a real estate transaction from influencing the independent judgment of an appraiser through collusion, coercion, and bribery, among other activities. The Act also requires certain federal agencies to jointly establish minimum requirements for state registration of appraisal management companies. [Sections 1472 and 1473]

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TITLE XV: MISCELLANEOUS

1. Miscellaneous Provisions

GAO Study of Inspectors General

The GAO is required to issue a report assessing the relative independence, effectiveness, and expertise of presidentially appointed inspectors general and inspectors general of designated federal entities. The report must be issued to the Committees on Financial Services and Oversight and Government Reform of the House of Representatives and the Committees on Banking, Housing, and Urban Affairs and Homeland Security and Governmental Affairs of the Senate no later than one year after the date of enactment of the Act. [Section 1505]

FDIC Study of Core Deposits

The FDIC is required to conduct a study to evaluate the definition of core deposits for the purpose of calculating the insurance premiums of banks, the potential impact on the Deposit Insurance Fund of revising the definitions of brokered deposits and core deposits to better distinguish between them, an assessment of the differences between core deposits and brokered deposits and their role in the economy, the potential effect on local economies of re-defining core deposits, and the competitive parity between large institutions and community banks that could result from re-defining core deposits. A report is due to Congress within one year that includes legislative recommendations to address any concerns arising as a result of the study. [Section 1506]

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TITLE XVI: SECTION 1256 CONTRACTS

1. Section 1256 Contracts

The Act amends Section 1256 of the Internal Revenue Code of 1986 to provide that the term "Section 1256 contract" does not include any securities futures contract or option on such a contract unless the contract or option is a dealer securities futures contract, or any interest rate swap, currency swap, basis swap, interest rate cap, interest rate floor, commodity swap, equity swap, equity index swap, credit default swap, or similar agreement. These amendments apply to taxable years beginning after the date of the enactment of the Act. [Section 1601]

Nutter Notes: Section 1256 of the Internal Revenue Code of 1986 generally provides that each Section 1256 contract held by the taxpayer at the close of the taxable year is treated as sold for its fair market value on the last business day of the taxable year (and any gain or loss is required to be taken into account).

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