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Setting precedent.



The REGULATORY REFORM BILL: Opportunities and Risks



A Comprehensive Overview of
Dodd-Frank Wall Street Reform and Consumer Protection Act

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Title I

Financial Stability Act of 2010

- Subtitle A – Establishes the Financial Stability Oversight Council (the “Council”)
- Subtitle B – Establishes the Office of Financial Research (the “OFR”)
- Subtitle C – Expands the Supervisory Authority of the Federal Reserve (the “Board”)



The Council-Subtitle A

- Codification of the President's Working Group on Financial Markets
- Chaired by the Secretary of the Treasury and consisting of other Federal and State financial regulators plus one independent member



The Council (cont'd)

- **PURPOSE:**
 - Identify risks to the financial stability of the United States from conduct of:
 - nonbank financial companies, and
 - large interconnected bank holding companies
 - Promote market discipline
 - eliminate the notion that these companies will be shielded from failure because they are “too big to fail”



The Council (cont'd)

- DUTIES:
 - Collect financial data (through Office of Financial Research) to assess risks
 - Monitor financial market for potential threats
 - Monitor domestic and foreign financial regulatory agencies
 - Facilitate information sharing among federal and state financial regulatory agencies



The Council (cont'd)

- DUTIES: (cont'd)
 - Identify gaps in regulation that could pose a risk to financial stability
 - Require supervision by the Board for nonbank financial companies
 - Make recommendations to the Board regarding heightened standards
 - Annual reporting to and testimony before Congress



The Council (cont'd)

- Requiring Board's Supervision of Nonbank Financial Companies
 - Determination requires 2/3rds vote of Council
 - Covers domestic and foreign companies
 - Broad standard for making determination
 - Whether activities "could" pose a threat to financial stability



The Council (cont'd)

- Factors Council Will Consider:
 - Company's leverage, off-balance sheet exposures, and transactions with other significant nonbank financial companies
 - Company's importance as a source of credit and liquidity to U.S. financial system
 - Extent company's assets are managed or owned
 - Size of the company
 - Amount and types of liabilities



The Council (cont'd)

- “Antievasion”
 - Establishment of intermediate holding companies for financial activities to avoid Fed regulation of whole nonbank company
- Require reporting by financial companies to the Council—only through Treasury Office of Financial Research
- Resolution of Jurisdictional Disputes Among Member Agencies-nonbinding



The Council (cont'd)

- Enhanced Supervision and Prudential Standards for Nonbank Financial Companies and Certain Bank Holding Companies
 - Will make recommendations for the Board to establish prudential standards and reporting and disclosure requirements



The Council (cont'd)

- Recommendations may differentiate among companies subject to heightened standards
- Council may recommend that the Board set an asset threshold that is greater than \$50 billion
- Heightened standards may increase in stringency based on determination of Council



The Council (cont'd)

- Council to conduct feasibility study related to future imposition of contingent capital requirement on nonbank financial companies
- Council may also recommend establishment of resolution plans and credit exposure reporting



The Council (cont'd)

- Treatment of Certain Companies that Cease to Be Bank Holding Companies
- Additional Standards Applicable to Financial Activities or Practices
- Mitigation of Risks to Financial Stability
- Study of Financial Institutions and Capital Market Efficiency (the “Too Big to Fail” issue)



Title I

Financial Stability Act of 2010-

Subtitle B

- Establishes the Office of Financial Research



The OFR

- Part of the Department of Treasury but:
 - Director appointed by President with advice and consent of Senate
 - Director has sole discretion for carrying out duties
 - Budget supplied by the Board for first two years, but thereafter all activities funded by assessment on certain bank holding companies and nonbank financial companies supervised by the Board



The OFR (cont'd)

- Establishment of the Data Center and Research and Analysis Center within the OFR
 - Empowered to collect data from financial institutions
 - Has subpoena power
 - Responsible for standardizing reported data which will increase transparency in the marketplace



Title I

Financial Stability Act of 2010- Subtitle C

- Additional Federal Reserve Authority for Certain Nonbank Financial Companies and Bank Holding Companies



New Powers for the Board

- Supervisory Authority over Nonbank Financial Companies
- Enhanced Authority over Bank Holding Companies with Assets Greater than \$50 Billion



New Powers of the Board

- Expanded enforcement authority
- Notification for acquisitions of banks by nonbank financial companies it supervises
- Prohibition against management interlocks between certain financial companies



New Powers of the Board

- Enhanced Standards for Supervision include:
 - Risk-based capital requirements
 - Leverage limits
 - Liquidity requirements
 - Overall risk management requirement
 - Resolution plan and credit exposure report requirements
 - Concentration limits



New Powers of the Board

- Required measures include:
 - Plans for rapid resolution in the event of material distress or failure
 - Credit exposure report
 - Concentration limits
 - Establishment of risk committees
 - Stress tests
 - Leverage limitation of no more than 15 to 1
 - Computation of capital must account for off-balance sheet activities
 - Early remediation requirements



New Powers of the Board

- The Board **may** also require:
 - Contingent capital requirement (after the two-year study by the Council)
 - Enhanced public disclosures
 - Short-term debt limits



New Powers of the Board

- Leverage and Risk-Based Capital Requirements
 - Federal banking agencies are required to establish minimum leverage capital requirements
 - Also required to establish minimum risk-based capital requirements
 - Comptroller General will conduct a study of smaller institutions' access to capital



Damage Control for System Risk: Title II – Orderly Liquidation of Systemic Financial Companies

By Robin Phelan and Kendra Mayer



Financial Companies Subject to the Orderly Liquidation Authority (Covered Financial Companies)

- United States **bank holding companies**;
- A nonbank **financial company supervised by the Board of Governors** of the Federal Reserve System;
- Any company engaged in **financial activities** that are at least **85% of the total consolidated revenues** of the CFC;
- **Insurance** companies; and
- **Brokers and dealers.**

IF

- Failure of the CFC will have **serious adverse effect** on the financial stability of the United States.



Commencement of Orderly Liquidation

- **Financial Companies**
 - Recommendation by the FDIC and Board to the Secretary of the Treasury.
- **Broker Dealer**
 - Recommendation by the SEC and the Board.
- **Insurance Companies**
 - Recommendation by the Board and approved by the Director of the Federal Insurance Office after consulting with the FDIC.



Determination Regarding Orderly Liquidation

- **Default or danger of default**
 - Bankruptcy proceeding;
 - Depletion of capital;
 - Fewer assets than obligations; or
 - Inability to pay obligations.
- **Effect of a default on:**
 - Financial stability of the **United States**;
 - Financial stability of **low income, minority, or underserved communities**; and
 - **Creditors, counterparties, shareholders, and other** market participants.
- **Likelihood of a private sector alternative**
- **Bankruptcy not appropriate**
- **Consultation with the President**



Agree or Go to the Court in D.C.

- Petition is confidential.
- Court has to determine in 24 hours or automatic.
- Arbitrary and capricious.



The FDIC's Powers

- FDIC appointed as Receiver (SIPC appointed as trustee for covered broker or dealer).
- Control assets and operate the CFC.
- Merge the CFC with another company or transfer assets or liabilities without any approval, assignment, or consent.
- Organize and transfer assets to a bridge financial company.
- Liquidate and wind-up affairs of the CFC.



Liquidation Process

- Stay of lawsuits for up to 90 days.
- No attachment or execution.
- FDIC can enforce any contract, including financial accommodation contracts.
- Parties to non-qualified financial contracts cannot enforce contract rights for 90 days.
- Repudiate contracts and leases and damages are very limited.
- FDIC may bring avoidance actions and revive fraud and intentional misconduct claims.
- Sell assets free and clear of setoff rights.



Qualified Financial Contracts

- “...any securities contract, commodities contract, forward contract, repurchase agreement, swap agreement, or similar agreement...”
- Not purchase, sale or repo under a participation in a commercial mortgage loan.
- Parties to QFCs not stayed from exercising rights after one day.
- Avoidance statutes do not apply unless “actual intent to hinder, delay or defraud” exists.
- The FDIC must transfer all QFCs or none of the QFCs.
- FDIC must:
 - Disaffirm or repudiate all QFCs with a counterparty; or
 - Disaffirm or repudiate none of the QFCs with a counterparty.



Orderly Liquidation of Covered Brokers and Dealers

- FDIC appoints SIPC as Trustee.
- Protective decree under the Securities Investor Protection Act (SIPA).
- Deliver securities to customers and treat customers so the customers receive as much as they would have under SIPA.



Insurance Companies

- Liquidated or rehabilitated under state law.
- After 60 days, FDIC can commence proceeding.



Determination of Claims

- 90 days to file claim.
- Within 180 days after claim is filed FDIC must notify claimant whether it accepts or rejects claim.
- Creditor may file suit within 60 days after disallowance.
- Rights of Secured Creditors are unaffected but stayed.
- Expedited relief is possible.



Priority of Claims

- Administrative expenses of the Receiver;
- **Amounts owed to the United States;**
- Wages, salaries, or commissions up to \$11,725 for each individual;
- Contributions owed to employee benefit plans up to \$11,725;
- Any other general or senior liability;
- Any obligation subordinated to general creditors;
- **Wages, salaries, or commissions owed to senior executives and directors;**
and
- Any obligations to shareholders, members, etc. arising as a result of their status.



Recoupment of Compensation from Senior Executives and Directors

- The FDIC may recover compensation for the prior two years from senior executives or directors substantially responsible for failed CFC.
- No time limit for fraud.



Orderly Liquidation Fund

- Established by the Treasury of the United States.
- Treasury purchases “obligations” from the FDIC that can be resold.
- To use for a CFC the FDIC must first present Orderly Liquidation Plan for the CFC.
- Repaid from assets of the liquidation and recoupment of extra payments to creditors.
- FDIC must charge risk-based assessments to pay in full the debt of the FDIC to the Secretary.



Risk-Based Assessments

- Imposed on a graduated basis.
- May be imposed on:
 - Bank holding companies with assets of at least \$50 billion;
 - Nonbank financial companies supervised by the Board; and
 - Financial Companies with assets of at least \$50 billion.



Studies, Reports, and Rulemaking

- Studies must be conducted on the following:
 - **Treatment of Secured Creditors (including potential haircuts);**
 - Orderly Liquidation Authority;
 - Bankruptcy Code;
 - International Coordination; and
 - Effectiveness of Federal Banking Agencies.
- Title II gives the FDIC **broad rulemaking authority** and limited recourse to courts.



Risks

- Punitive Actions against officers and directors.
- Parties with setoff rights involving contracts that are not QFCs are subordinated to certain claims.
- Study on potential haircuts.
- Damages from rejection of leases are extremely limited.
- The FDIC can enforce contracts for financial accommodation.
- Recourse to the courts is very limited.



Opportunities

- Consultants and Academics
- International Players
- Private Contractors
- Purchasers of Assets



The End of the OTS

- Effective on the “Transfer Date”
 - 1 year from Enactment Date
 - 6 month extension possible
- S&L Holding Companies transferred to the Federal Reserve Board.
- Federal Thrifts transferred to the OCC.
- State Thrifts transferred to the FDIC.



Transitional Provisions

- Joint Transition Plans filed in 6 months.
- Existing orders, agreements, regulations, etc. remain in effect.
- 90 days after the Transfer Date, the OTS and the position of Director are abolished.
- Employees are protected for 2 years.



Assessment Changes

- Board, OCC and FDIC can collect assessments, fees and charges from entities supervised.
- Deposit Insurance Assessment Change to Average Consolidated Assets *minus* Average Tangible Equity.
- Eliminates Procyclical Assessments.
- Minimum Reserve Ratio – 1.35 by 2020.



FDIC Deposit Insurance

- Changes coverage from \$100,000 to \$250,000 – retroactive to 1/1/2008.
- Unlimited coverage for “non-interest bearing transaction accounts” extended through 12/31/2012.



Conforming Changes

- Subtitle E of Title III contains technical and conforming amendments to a laundry list of Federal laws implicated by the changes made in Title III.



Improved Regulation of Depository Institutions and their Holding Companies

- 3-year moratorium on new Credit Card Banks, Industrial Banks and Trust Banks owned by Commercial Firms.
- Concentration limits for the M&A of depository institutions.
- New factor in regulatory applications – “the risk to the stability of the US banking or financial system.”



Improved Regulation of Depository Institutions and their Holding Companies

- New Capital Standards for Interstate Acquisitions and Financial Holding Co.
- The Board's Examination Authority expanded:
 - All bank and S&L holding companies;
 - Securities holding companies;
 - Intermediate holding companies;
 - State-member banks;
 - Non-bank subsidiaries.



Improved Regulation of Depository Institutions and their Holding Companies

- Bank charter conversions restricted if under a formal enforcement order or MOU.
- De novo branching permitted if a state bank could branch at same location.
- Countercyclical capital requirements.
- Source of Financial Strength expanded.
- Affiliate Transaction revisions.
- Lending Limits revisions, including for Insiders.



Volcker Rule

- Effective the earlier of 1 year after final rules published, but not more than 2 years after the date of enactment.
 - Generally, prohibits “banking entities” from:
 - engaging in proprietary trading, and
 - investing in or sponsoring hedge funds or private equity funds.
 - Many exceptions (p. 53-54), implemented by rules.
 - Council study in 6 months and interagency final rules 9 months after completion of study.



Volcker Rule

- Permits “de minimus” investment by banking entities in private equity and hedge funds.
 - 1 year after formation, investment must be less than three percent (3%) of total ownership interest in the fund.
 - All aggregate investments must be less than three percent (3%) of Tier One Capital.
 - Extensions in time periods permitted.



Volcker Rule

- Prohibits “covered transactions” with funds (or their affiliates) where a banking entity, directly or indirectly:
 - Serves as investment manager, investment advisor or sponsor of the fund; or
 - Organizes and offers the fund.



Volcker Rule

- The Board will adopt rules applying the Volcker Rule to non-bank financial companies subject to its supervision under Title I.



Bureau of Consumer Financial Protection

- A new, independent bureau within the Federal Reserve System is created to protect consumers.
- Effective 6-12 months after date of enactment – “Designated transfer date”.
- There are many key definitions.



Bureau of Consumer Financial Protection

- “Covered Person” – any “person” engaged in offering or providing a “Consumer financial product or service”.
- Director of Bureau – appointed by the President for a 5 year term.
- The President may remove the Director only for “inefficiency, neglect of duty or malfeasance in office.”



Bureau of Consumer Financial Protection

- Bureau offices where Federal Reserve Banks (or branches) are located.
- Several units and offices established within the Bureau.
- Bureau funded by a percentage of Federal Reserve System earnings, plus Director can ask for appropriations from Congress.



Bureau of Consumer Financial Protection

- Exclusive rulemaking authority over Federal consumer financial laws.
- Required consultation with prudential regulators.
- Council may review, set aside and/or stay Bureau rules.
- Bureau given rulemaking deference.



Bureau of Consumer Financial Protection

- Bureau Supervision/Enforcement Authority:
 - Depository institutions over \$10 Billion – Exclusive authority.
 - Depository institutions under \$10 Billion – Rulemaking authority, limited backup authority.
 - Nondepository “Covered Persons” defined by rule and subject to registration with Bureau.



Bureau of Consumer Financial Protection

- Certain categories of persons excluded from Bureau authority.
- Study use of pre-dispute arbitration agreements followed by rulemaking.
- Prohibit “unfair, deceptive or abusive” acts and practices – new standard.
- Revised disclosures – model disclosures, safe harbor for use.



Bureau of Consumer Financial Protection

- State law preserved and can provide greater protection than Federal law.
- State AGs and regulators can sue to enforce Title X, implementing rules and “other law”. Bureau may intervene.
- Preemption Standard: State law “prevents or significantly interferes” with exercise of national bank powers or otherwise has a discriminatory effect on a national bank.
- Field preemption no longer exists.



Bureau of Consumer Financial Protection

- Employee Protections for Whistleblowers!
- Small Business Loan Data Collection.
- Regulation of “Remittance Transfers”.
- New Interchange Rules set by Board.
- Transfer of Employees to Bureau.
- Conforming Amendments to Federal law.



Regulation of Advisers to Hedge Funds and Others

- Elimination of Private Adviser Exemption
- New Exemptions from Registration
 - foreign private advisers
 - venture capital exemption
 - family office exemption
 - private fund exemption
 - advisers with less than \$100 AUM



Regulation of Advisers to Hedge Funds and Others

- Enhanced Recordkeeping and Reporting Requirements
- Modifications to Accredited Investor Definition
- Modifications to Qualified Client Standard
- Expansive New Rulemaking Authority for SEC



REGULATION OF SWAP MARKETS

Title VII

Wall Street Transparency and Accountability
Act of 2010



Regulatory Authority

- implementation
 - CFTC
 - swaps (e.g., non-security-based swaps)
 - SEC
 - security-based swaps
 - prudential regulators (FRB, FDIC, etc.)



Swaps Restrictions

- no “Federal assistance” to “swaps entities”
 - scope of swaps entities
 - swap dealers, certain major swap participants
 - scope of Federal assistance
 - FRB advances, discount window access
 - certain FDIC insurance or guarantees
 - certain other loan guarantees, assistance arrangements, and loss or profit sharing



Swaps Restrictions

- exceptions to prohibition on Federal assistance
 - FDIC insured institutions that limit their swap activities to:
 - risk-mitigating activities
 - effective date of prohibition
 - 2 years after the effective date of the Act



Swaps Restrictions

- Volcker Rule and Swaps
 - proprietary trading in swaps by FDIC insured institutions and other banking entities is generally prohibited



Swaps Restrictions

- exceptions to Volcker Rule for Swaps
 - swaps entered into for purpose of hedging against risks arising from individual or aggregate positions, contracts, or holdings
 - FDIC Banks may invest in private equity and hedge funds in an aggregate amount up to 3% of their Tier 1 capital



Swaps Clearing

- unlawful to engage in a swap that must be cleared without clearing through a registered or exempted derivatives clearing organization



Swaps Clearing

- CFTC or SEC determines what swaps must be cleared
 - criteria considered:
 - existence of significant notional exposures, trading liquidity, and adequate pricing data
 - ability to clear the contract on terms consistent with material terms and trading conventions on which contract is then traded
 - clearing's mitigation of systemic risk, based on market size
 - clearing's effect on competition, including fees and charges
 - insolvency ramifications to clearing
- effective date of clearing requirements
 - the CFTC and SEC are required to adopt rules within 1 year of Title VII's enactment



Swaps Clearing

- CFTC and SEC do not have authority to require a clearing organization to list swaps that threaten the organization's financial integrity



Swaps Clearing

- non-swap dealers/major swap participants
 - in swap transactions between an SD/MSP and a non-SD/MSP, the non-SD/MSP may choose the clearing organization
 - in swap transactions involving a non-SD/MSP, the non-SD/MSP may elect that the swap be cleared, even if the swap is not one required to be cleared



Swaps Clearing

- exemptions from clearing requirements
 - commercial end-user
 - if counterparty is not a “financial entity” (defined broadly), such counterparty may avoid clearing if it is using the swaps:
 - to hedge commercial risk; and
 - notifies CFTC or SEC of its way of meeting financial obligations on non-cleared OTC derivatives contracts
 - exclusion
 - small banking institutions



Swaps Restrictions

- capital and margin requirements
 - requirements are limited to the achievement of the following goals:
 - protect financial integrity of swaps
 - risk management to protect financial integrity of transactions
 - additional limitations
 - may not set specific margin amounts



Swaps Restrictions

- capital and margin requirements
 - application
 - FDIC-insured swap dealers and major swap participants:
 - » cleared swaps – clearing agency must set above zero
 - » non-cleared swaps – clearing agency must set at level appropriate for risk associated with the non-cleared swaps
 - if SD/MSP is a non-depository institution:
 - » CFTC or SEC must set requirements as strict or stricter than those applied to depository institutions



Swaps Restrictions

- position limits
 - CFTC or SEC may place limits on non-hedging swaps positions that create significant price discovery functions
 - required factors to be considered when imposing limits
 - price linkage to other contracts
 - arbitrage on other contracts
 - price references directly related to swap price
 - material effect of swap trade volume on other contracts
 - other material factors to be specified by CFTC or SEC



Swaps Reporting

- swap dealers / major swap participants
 - must report all swaps to securities data repository
 - must register with CFTC or SEC
 - officer must submit annual reports to CFTC or SEC on compliance with rules and regulations and on its swaps trading activity



Swaps Reporting

- non-reporting swap counterparty
 - must provide swap data to CFTC or SEC upon request
 - must maintain books and records open to prudential regulators, Financial Stability Oversight Council, and DOJ



Swaps Reporting

- effective date of reporting requirements
 - swaps entered prior to enactment
 - swaps entered on or after enactment



Swap Execution Facility

- activities:
 - may make available for trading any swap not readily susceptible to market manipulation
 - may facilitate trade processing of any swap not readily susceptible to market manipulation



Swap Execution Facility

- basic requirement
 - must operate in accordance with Act's core principles:
 - compliance with CFTC or SEC's rules
 - prevention of market manipulation
 - promotion of trade and pre-trade price transparencies
 - additional requirements



Penalties

- generally
 - civil and criminal penalties and private right of action available against person using manipulative or deceptive devices or contrivances in contravention of rules promulgated under the Act



Penalties

- penalties for violating the clearing requirements
 - penalties (at twice the amount normally available) for knowing/reckless violation of clearing requirements as otherwise available
 - equitable remedies may be imposed by courts for violation of Title VII



Penalties

- limitations on penalties
 - no government entity has authority to void a swap entered into in violation of Title VII's requirements
 - no counterparty has right to void, rescind, or recover payment for swap based solely on the swap's failure to be cleared



Title IX - Investor Protection and Securities Reform Act of 2010

TOPICS:

- Credit Rating Agency Reform
- Asset Backed Securities and Credit Risk Retention
- Municipal Securities Advisors and the MSRB
- Broker-Dealer: Fiduciary Duty and Proxy Voting
- Whistleblowers: Rewards and Protections
- Points for Small Issuers
- Investor Protection
- SEC: Reform and Powers
- Proxy Access and Corporate Governance



Credit Rating Agency Reform

- SEC Office of Credit Ratings
 - annual exams; public reports
 - rulemaking on disclosure and conflict prevention
 - standards for credit rating analysts
 - revise Regulation FD to apply to NRSROs
 - authority for enforcement against associated persons
- Private Rights of actions against NRSROs
- Multiple studies by SEC
 - possible independent organization for analysts
 - probable SRO for rating assignments



Asset Backed Securities and Credit Risk Retention

- Applies to any issuer of ABS and any organizer or originator
- Risk Retention Requirement -- “skin in the game”
- Rulemaking by SEC and banking agencies for standards
- Registration statements and filings
- Disclosure of assets



Municipal Securities Advisors and the MSRB

- SEC Office of Municipal Securities
- SEC regulation of Municipal Advisors
 - Fiduciary Duty
- MSRB funding from fines for MSRB rule violations
 - One-half of SEC fines; One-third of SRO fines
- Studies of Muni Market
 - Increased Disclosure



Broker-Dealer Impact

- Fiduciary Duty Standard
- SEC Study and Report within 6 months
- Rulemaking Thereafter
- Proxy voting restrictions
 - exchange rules to prohibit voting by member firms
 - specific shareholder instruction required to vote proxies



Whistleblowers: Rewards and Protections

- Investor Protection Fund Established
- Payments for providing original information that led to a successful action
 - Where money sanctions exceed \$1 million
 - Award of Ten to 30 percent of collected sanction amount
- Protection from retaliation
 - New cause of action for whistleblowers subjected to harassment, demotion, or misconduct



Points for Small Issuers

- Regulation D limitation – “Bad Actors” disqualified from using exemption
- Sarbanes-Oxley Act 404(b) amended to exempt certain small issuers
- GAO study within three years regarding costs and benefits of exemption
- SEC study and report on means for reducing burdens of S-Ox compliance for companies with market cap of \$75 million to \$250 million



Investor Protection

- Short Sale Disclosures by money managers
- Broker-dealer notice regarding securities lending
- SEC Office of Investor Advocate
- Investor Advisory Committee
- Increased SIPC Protections
- Foreign Public Accounting Firms subject to SEC and PCAOB jurisdiction
- PCAOB oversight authority of auditors for broker-dealers



Investor Protection Studies and SEC Funding

- Studies include:
 - financial literacy
 - investment banking and analyst conflicts
 - risks and conflicts of bank proprietary trading
 - mutual fund advertising
 - financial planners
 - investor access to IA and BD information
 - need for SEC exam and enforcement resources for investment advisers
- SEC budget increases with establishment of “Reserve Fund”



SEC Enforcement Reform and Powers

- Securities Act aiding and abetting liability for enforcement actions
- Impose “collateral” sanctions
- Nationwide service of process
- Civil penalties in cease-and-desist proceedings
- Filing within 180 days of Wells Notice
- Extra-territorial reach of SEC and DOJ actions under anti-fraud provisions



SEC Exam Reform and Power

- Registrant information protected as confidential
- Recordkeeping requirements extend to those with custody of fund or securities of any investment company or investment adviser
- Examiners assigned to Investment Management and Trading and Markets Divisions
- Exam conclusion letter within 180 days after completion of field work



Proxy Access and Corporate Governance

- SEC Rulemaking to require proxy solicitations by issuer include board nominees submitted by shareholders
- Disclosure regarding issuer's selection of same or separate individuals as CEO and Chairman



Executive Compensation and Related Corporate Governance:

Say on Pay, Clawback, Proxy Disclosure, and
Compensation Committee Independence and
Procedure Requirements



Say on Pay

- Effective beginning six months after enactment, shareholders must be allowed:
 - at least once every three years, a non-binding vote to approve executive compensation; and
 - at least every six years, a separate vote on how frequently the say on pay vote should be held (every 1, 2, or 3 years).



Say on Pay (cont'd)

- Effective beginning six months after enactment, any proxy statement or solicitation to approve a merger or similar transaction must:
 - disclose all golden parachute arrangements;
 - disclose total golden parachute pay and applicable conditions; and
 - provide a separate non-binding vote on such arrangements (unless already subjected to a vote).
- Institutional investment managers generally must disclose their votes.
- The SEC has authority to create exemptions.



Compensation Committees

- Compensation committee member independence will be a condition of listing on a national securities exchange.
- Committees will have to “take into account” “factors that affect the independence” of compensation consultants, legal counsel, and other advisers before retaining them.
 - Source of compensation.
 - Affiliation to company and affiliates.



Compensation Committees (cont'd)

- Compensation committees have sole discretion in retaining and overseeing advisors, and companies are required to provide funding for reasonable compensation. Factors to consider include:
 - other services provided, percentage of revenue;
 - conflict of interest policies; and
 - stock ownership and relationships to committee members.
- Proxy must disclose whether a compensation committee used a comp. consultant, and information about conflicts of interest.
- Exemptions for certain types of companies, with more possible.



Clawbacks

- SEC to issue listing rules requiring companies to develop and implement policies:
 - For disclosure of company's policy on incentive-based compensation based on financial information required to be reported under securities laws; and
 - For recovery from executive officers of incentive-based compensation if required to prepare an accounting restatement due to material non-compliance with financial reporting requirements.



Clawbacks (cont'd)

- “Clawback” applies to compensation received during the three-year period preceding the date on which the company is required to prepare restatement.
- No deadline for developing rules.



Disclosure

- SEC is also to issue rules requiring public companies:
 - To include with compensation disclosures the relationship between executive compensation actually paid and the company's financial performance (may include a graphic representation).
 - To disclose in proxy statements whether any employee or director (or designee) is permitted to purchase financial instruments designed to hedge or offset decreases in value of the company's stock.



Disclosures (cont'd)

- SEC is also to issue rules requiring public companies:
 - To disclose (in proxy statements and other filings):
 - the median of the annual total compensation of all employees other than the chief executive officer;
 - the annual total compensation of the chief executive officer; and
 - the ratio of the two.
- Act does not specifically permit the SEC to exclude companies from these requirements.



Financial Institutions

- Act requires the Federal Reserve, FDIC, and other financial regulators to develop guidance for “covered financial institutions”, which includes any depository institution (or holding company), broker-dealer, credit union, or investment advisor with assets of at least \$1 billion.



Financial Institutions (cont'd)

- Within nine months of enactment, agencies to issue guidance:
 - Requiring institutions to disclose to regulators the structure of all incentive compensation arrangements so that the regulator can determine if the arrangement provides excessive compensation, fees or benefits or could lead to a material financial loss to the financial institution; and
 - Prohibiting any types of incentive-based compensation arrangements determined to encourage a covered financial institution to take inappropriate risks.



Insurance

- Office of National Insurance (“ONI”)
 - Monitoring Insurance Industry
 - Preemption of State Insurance Law
 - International Insurance Agreements
- Regulating Non-Admitted Insurance
- Regulating Reinsurance



Monitoring the Insurance Industry

The ONI is charged with:

- Identifying gaps in regulation;
- Studying how to modernize insurance regulation;
- Reporting to Congress on the insurance industry;
- Recommending insurers for regulation by the Financial Stability Oversight Council; and
- Collecting information from insurers, affiliates and state regulators, subject to rules governing confidentiality and privilege.



Preemption of State Insurance Law

- With some exceptions, ONI may rule on preemption of state insurance law that:
 - Is inconsistent with international agreements regarding insurance or reinsurance; or
 - Results in unfavorable treatment of a foreign insurer compared with domestic insurers.



International Insurance Agreements

- Treasury Secretary authorized to negotiate international insurance agreements.
- ONI empowered to coordinate federal insurance policy in coordination with the States.



Regulation of Non-Admitted Insurance

- In most cases, only the state of the insured's residence is entitled to regulate non-admitted insurers issuing policies to the insured.
- For qualifying insured's who consent in writing, surplus lines brokers are not required to determine if a domestic alternative exists.
- ONI to study the non-admitted insurance market.



Regulation of Reinsurance

- Limits regulation of reinsurance to the State of the reinsurer's domicile.



Mitigating Payment System Risks

- Objectives:
 - Mitigate systemic risk in the financial system.
 - Financial stability through risk management.
- The Council by 2/3rds vote can name a payment system a designated financial market utility subject to examination, supervision and enforcement by the Board (in consultation with the Council, the SEC and CFTC).



Mitigating Payment System Risks

- Designation of “Systemic Importance”
- Development of risk management standards for:
 - financial market utilities; and
 - payment, clearing and settlement activities.
- Board has backup enforcement authority.
- Discount window access is possible.



Reforming the Crisis Programs of the Federal Reserve

- Federal Reserve emergency lending authority
 - Revises Section 13(3) of the Federal Reserve Act
 - provides emergency aid
 - applies to programs with “broad-based” eligibility



Reforming the Crisis Programs of the Federal Reserve

- GAO may audit:
 - Any program established under Section 13(3)
 - All pre-enactment Federal Reserve assistance
 - Limited to aid provided December 1, 2007 – date of enactment of the Act



Reforming the Crisis Programs of the FDIC

- FDIC debt guarantee program
 - Created only upon a “liquidity event”
 - Guarantees the obligations of solvent insured depository institutions or holding companies



Access to Mainstream Financial Institutions

- Grant Programs, Agreements and Contracts with:
 - 501(c)(3) Charitable Organizations;
 - Insured Depository Institutions;
 - Community Development Fin. Inst.;
 - State, Local and Tribal Governments; and
 - Partnerships or Joint Ventures with at least one of the above participating.



Access to Mainstream Financial Institutions

- Programs must promote improved access to deposit accounts, small dollar loans and financial literacy and education opportunities for low- and moderate-income individuals.
- Money is appropriated for 2010.
- Annual Report to Congress required.



Pay it Back Act

- Reduces TARP Authorization to \$475 Billion (further reduced from \$550 Billion).
- Removed “outstanding at any one time”.
- Proceeds from sales of obligations go to deficit reduction.
- Stimulus Bill funds not used by State or local governments are rescinded.



Mortgage Reform and Anti-Predatory Lending Act

- Eliminates Yield-Spread Premiums and other steering incentives.
- Compensation cannot vary with terms of the mortgage (other than the principal amount).
- Third parties generally cannot pay compensation.



Mortgage Reform and Anti-Predatory Lending Act

- Authorizes new Regulations regarding abusive or predatory lending practices.
- Mortgage Originators must be Qualified, Registered and Licensed under the S.A.F.E. Act.
- Consumers have a private right of action against Mortgage Originators for violations – class actions are possible. Can be a defense to foreclosure.



Mortgage Reform and Anti-Predatory Lending Act

- Mortgage Originators must verify consumer's ability to repay the loan.
- Safe Harbor for "Qualified Mortgages".
- Prepayment penalties eliminated for Non-qualified mortgages.
- Increased regulation of "high cost" mortgages.
 - Including on-site appraisal by independent appraiser.



Miscellaneous Provisions

- Disclosures for Certain Public Companies:
 - Do you use the following in your Manufacturing Process?
 - Columbite-tantalite (coltan), cassiterite, gold, wolframite or their derivatives.
 - Coal and other mine safety information, including reporting shutdowns and patterns of violations.
 - Payments to “resource extraction issuers”
 - Oil, natural gas or minerals.



Miscellaneous

- SEC has 270 days to issue rules related to new disclosure requirements.
- Study on independence, effectiveness and expertise of appointed inspectors general.
- Study on “core deposits” and “brokered deposits”, their role in the economy and impact on deposit insurance, among other factors.



Section 1256 Contracts

- Certain exchange traded derivative contracts are not subject to IRS rule.
- Effective for tax years beginning after the date of enactment.



SEC Wrap-Up



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