CCH BRIEFING *Special Report*

Dodd-Frank Financial Reform Awaits Senate Vote

Highlights

- ✔ Financial Stability Oversight Council established as systemic risk regulator
- ✔ Orderly liquidation authority created to unwind large, failing financial institutions
- ✔ Office of Thrift Supervision abolished, functions transferred
- ✔ Deposit insurance reform addressed
- ✔ OTC derivatives markets brought under harmonized SEC-CFTC oversight
- ✔ Credit rating agencies reformed to eliminate conflicts of interest and increase transparency
- ✔ Hedge fund advisers subjected to registration
- ✔ Holding company and bank regulation supervision tied to financial stability
- ✔ Federal Insurance Office created
- ✔ Shareholder advisory vote on executive compensation mandated
- ✔ SEC enforcement powers expanded
- ✔ Consumer Financial Protection Bureau established
- ✔ Mortgage standards set

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On June 30, 2010, the U.S. House of Representatives passed legislation to restructure the financial services regulatory system, with the Senate poised to vote on the measure the week of July 12. As discussed in this briefing paper, the Dodd-Frank Wall Street Reform and Consumer Protection Act would institute far-reaching reforms, including the creation of an independent Consumer Financial Protection Bureau housed within the Federal Reserve Board and new federal government power to wind down large, failing financial institutions. The Act would establish a 10-member Financial Stability Oversight Council to oversee systemic risk, strengthen regulation of financial holding companies and abolish the Office of Thrift Supervision, transferring its functions to the Fed, Office of the Comptroller of the Currency and Federal Deposit Insurance Corporation.

The Act places new limits, known as the Volcker Rule, on the amount of money a bank can invest in hedge funds and private equity funds. The legislation also discourages financial institutions from excessive risk-taking by imposing tough new capital and leverage requirements. The Act effectively ends new lending under the Troubled Asset Relief Program. Further, it allows the Government Accountability Office to conduct a one-time audit of the Fed's emergency lending activities during the financial crisis and would establish the Federal Insurance Office to supervise insurance products, other than health insurance, at the federal level.

Other provisions would establish strict oversight of the over-the-counter derivatives market, including mandatory clearing and trading and real-time reporting of derivatives trades. Among other measures, the bill would institute numerous investor protections, including stricter oversight of credit rating agencies, securitization reforms and expanded SEC enforcement powers. The legislation also establishes strong mortgage protections requiring lenders to ensure that their borrowers can repay their loans by establishing a simple federal standard for all home loans. The Act also would require each federal agency to establish an Office of Minority and Women Inclusion that would be responsible for all matters of the agency relating to diversity in management, employment and business activities.

Financial Stability Oversight Council

Title I, Subtitle A, would create an independent agency charged with monitoring and responding to systemic risks posed by large, complex companies, products and activities. The new Financial Stability Oversight Council, chaired by the Treasury Secretary and composed of key regulators such as the Fed, OCC, FDIC, SEC and CFTC, would have the following enumerated purposes: (1) identifying risks to U.S. financial stability that could arise from the financial distress or failure of large, interconnected bank holding companies or nonbank financial companies; (2) promoting market discipline by eliminating expectations on the part of shareholders, creditors and counterparties of those companies that the government will shield them from losses in the event of failure; and (3) responding to emerging threats to the stability of U.S. financial markets.

Section 113 provides that the Council, by a two-thirds vote, can determine that a nonbank financial company will be supervised by the Fed and be subject to heightened prudential standards if the Council determines that material financial distress at the financial company would pose a threat to U.S. financial stability. Each determination will be based on a consideration of enumerated factors by the Council, including, among others, the degree of leverage (e.g., a typical mutual fund could be an example of a nonbank financial company with a low degree of leverage); the amount and nature of financial assets; the amount and types of liabilities, including degree of reliance on short-term funding; the extent and type of off-balance-sheet exposures; the extent to which assets are managed rather than owned; and the extent to which ownership of assets under management is diffuse.

Size alone should not be dispositive in the Council's determination. In its consideration of the enumerated factors, the Council should also consider other indicia of the overall risk posed to U.S. financial stability, including the extent of the nonbank financial company's connections with other significant financial companies and the complexity of the nonbank financial company. The Senate Committee report notes that a Council determination should not be based on the exchange functions of securities or futures exchanges regulated by the SEC and the CFTC, to the extent that as part of these functions the exchanges act as administrators of marketplaces and not as counterparties.

Further, it is not intended that the activities of securities and futures exchanges overseen by the SEC and the CFTC that consist of, or occur prior to, trade executions be considered a clearing, settlement or payment business, provided that the activities do not include functioning as a counterparty (S. Rep. No. 111-176, p. 42). This interpretation dovetails with House legislative history, which indicates that, although derivatives and securities exchanges would technically meet the definition of a "financial company" under Title I, the House intended the legislation to address the players in the marketplace rather than the administration of the marketplace (Peterson-Frank colloquy, Cong. Record, Dec. 9, 2009, H14425).

The Council would provide written notice to each nonbank financial company of its proposed determination and the company will have the opportunity for a hearing before the Council to contest the proposed determination. The Council would consult with the SEC or other primary federal regulator of each nonbank financial company before making any final determination. The Act also provides for judicial review of the Council's final determination. In the case of a foreign nonbank financial company, it is intended that the Council will consult, as appropriate, with the applicable foreign regulator for the company.

Under Section 115, the Council may make recommendations to the Fed concerning the establishment and refinement of prudential standards and reporting and disclosure requirements for: (1) nonbank financial companies supervised by the Fed under a determination that they pose a systemic risk; and (2) large, interconnected bank holding companies. The standards and requirements must be more stringent than those applicable to other nonbank financial companies and bank holding companies that do not present similar risks to financial stability, and they must increase in stringency as appropriate in relation to certain characteristics of the company, including its size and complexity. The Council may only recommend standards for bank holding companies with total consolidated assets of $50 billion or more, and the Council may recommend an asset threshold greater than $50 billion for the applicability of any particular standard.

Section 115(b) provides that the prudential standards may include risk-based capital requirements, leverage limits, liquidity requirements, a contingent capital requirement, resolution plan and credit exposure report requirements, concentration limits, enhanced public disclosures and overall risk-management requirements. Contingent capital is a special form of debt that, when a company gets into trouble, will immediately convert into equity on previously negotiated terms, thus causing the firm to be recapitalized without requiring public funds.

Under Section 117, a bank holding company that could pose a risk to U.S. financial stability if it experienced material financial distress would remain supervised by the Fed and subject to the prudential standards authorized by the legislation even if it sold or closed its bank (S. Rep. No. 111-176, p. 43).

Under Section 120, the Council may issue recommendations to the primary financial regulatory agencies to apply new or heightened prudential standards and safeguards for a financial activity or practice conducted by bank holding companies or nonbank financial companies under their jurisdiction. The Council would make this recommendation if it determines that the conduct of the activity or practice could create or increase the risk of significant liquidity, credit or other problems spreading among banks and nonbank financial companies or U.S. financial markets. The Council would consult with the primary financial regulatory agencies, provide notice and opportunity for comment on any proposed recommendations, and consider the effect of any recommendation on costs to long-term economic growth. The Council may recommend specific actions to apply to the conduct of a financial activity or practice, including limits on scope or additional capital and risk-management requirements.

Section 121 authorizes regulators to address grave threats to U.S. financial stability if the prudential standards would not otherwise do so. For example, regulators can require financial institutions to comply with conditions on the conduct of certain activities, terminate certain activities, or sell or transfer assets to unaffiliated entities, with an affirmative vote of two thirds of the Council members and after notice and the opportunity for a hearing.

Office of Financial Research

Title I, Subtitle B, would establish an executive agency to collect and standardize data on financial firms and their activities to aid and support the work of the federal financial regulators. The Office of Financial Research, headed by a director appointed by the president for a six-year term, would provide the Council and financial regulators with the data and analytic tools needed to prevent and contain future financial crises by measuring and monitoring systemic risk. The logic behind the Office is that it makes no sense to create a systemic risk regulator when there are no standardized tools for measuring systemic risk.

Comment: *The Office is patterned on an executive agency envisioned by the National Institute of Finance Act of 2010, S 3005, sponsored by Senator Jack Reed, Chair of the Securities Subcommittee.*

The Office would not only develop the metrics and tools financial regulators need to monitor systemic risk, it would also help policymakers by conducting studies and providing advice on the impact of government policies on systemic risk. Thus, the Office would have to provide independent periodic reports to Congress on the state of the financial system. This will ensure that Congress is kept apprised of the overall picture of the financial markets. Section 154(b) provides for the Office to house a data center that would collect, validate and maintain key data to perform its mission.

Orderly Liquidation Authority

Title II would establish an orderly liquidation authority for large, failing financial institutions. This authority would give the U.S. government a viable alternative to the undesirable choice it faced during the financial crisis: (1) allow a large, complex financial company to file for bankruptcy protection, disrupting markets and damaging the economy; or (2) bail out the company, exposing taxpayers to losses and undermining market discipline. The new orderly liquidation authority would allow the FDIC to safely unwind failing nonbank financial firms or bank holding companies, an option that was not available during the financial crisis. The process includes several steps intended to discourage the use of this authority. There is a strong presumption that the Bankruptcy Code will continue to apply to most failing financial companies.

Once a failing financial company is placed under this authority, liquidation is the only option; the failing company cannot be kept open or rehabilitated. The firm's business operations and assets will be sold off or liquidated, the culpable management will be discharged, shareholders will have their investments wiped out, and unsecured creditors and counterparties will bear losses.

The Dodd-Shelby Amendment, in conjunction with the Boxer Amendment, ends the idea that any firm can be too big to fail. Under the Dodd-Shelby Amendment, the legislation creates an orderly liquidation mechanism for the FDIC to unwind failing systemically significant financial companies. This mechanism represents a fundamental change in federal law that will protect taxpayers from the economic fallout of the collapse of a systemically significant financial firm (Remarks of Sen. Chris Dodd, Cong Record, May 5, 2010, S3131).

Shareholders and unsecured creditors would still bear losses and management at the failed firm would be removed. In fact, the Dodd-Shelby Amendment empowers regulators to bar culpable management and directors of failed firms from working in the financial sector. According to Senator Dodd, it makes sense that a person involved in a company's mismanagement who caused a disruption in the economy should be banned from engaging in further economic activities (Senator Chris Dodd, Cong Record, May 5, 2010, S3131).

Subject to due process protections, Section 213 authorizes regulators to ban from the financial industry senior executives and directors at failed financial firms upon determining that they: (1) violated a law, regulation, cease-and-desist order or agreement with a federal financial regulator; (2) breached their fiduciary duty; or (3) engaged in an unsafe or unsound practices. In addition, the executive or director must have benefited from the violation or breach, which must also involve personal dishonesty or a willful or continuing disregard for the firm's safety or soundness. The length of the industry ban is in the regulator's discretion, but must be at least two years.

There would also be clawbacks of excess payments to creditors, such that creditors would have to pay back the government any amounts they received above what they would have received in liquidation.

The Boxer Amendment eliminates any doubt that the legislation would end federal bailouts of financial firms. Specifically, the provision states that all financial companies put into receivership under the legislation must be liquidated and no taxpayer funds can be used to prevent their liquidation. Further, all funds expended in the liquidation must be recovered from the disposition of the firm's assets, or must be the responsibility of the financial sector through assessments (See remarks of Senator Boxer, Cong. Record, May 4, 2010, S3063).

Supervision of Depository Institutions

Title III of the Dodd-Frank Act, "The Enhancing Financial Institution Safety and Soundness Act of 2010," seeks to:

- provide for the safe and sound operation of the U.S. banking system;
- preserve the dual banking system of federal and state charters for depository institutions;
- ensure fair supervision of depository institutions, regardless of their size or type of charter; and
- streamline and rationalize the supervision of depository institutions and financial holding companies.

To accomplish these goals the Dodd-Frank Act:

- abolishes one of the many banking regulators;
- consolidates supervision of state banks into a single federal regulator; and
- consolidates supervision of bank holding companies with less than $50 billion in total consolidated assets so that the regulator for the bank and thrift will also be the regulator for the holding company.

Transfer Date

The transfer of powers and duties provisions would generally take effect one year after the date of enactment of the Act. This effective date is defined in the Act as the "transfer date." The Act allows for the transfer date to be extended up to 18 months past the date of enactment by the Treasury Secretary, in consultation with the heads of the OCC, Fed and FDIC.

OTS Abolished

The Act would abolish the Office of Thrift Supervision (OTS), transferring its regulatory and rulemaking authority to the Office of the Comptroller of the Currency (OCC), Federal Reserve Board (Fed) and Federal Deposit Insurance Corporation (FDIC). The abolition would be effective 90 days after the transfer date, pursuant to an amendment of the Senate version of financial regulatory reform sponsored by Sen. Kay Bailey Hutchison, R-Tex.

The OTS is responsible for regulating state and federal thrifts and their holding companies. Explaining the reasons for abolishing the agency, the Senate Banking Committee found that savings and loan associations suffered disproportionate losses during the financial crisis, due in part to lax supervision by the OTS. The most serious of these losses were the failures of mortgage giants Washington Mutual and Indy Mac Bank and the near-failure, but for federal assistance, of American International Group. Moreover, from the start of 2008 through the date the Act was introduced, the Committee found that 73 percent of failed institution assets were attributable to thrifts regulated by the OTS, even though the agency only supervised 12 percent of all financial institution assets at the beginning of the period.

Comment: *The House of Representatives version of financial reform also would have abolished the OTS and the position of the Director of the OTS, but it would have done so by creating a new Division of Thrift Supervision, headed by a new Senior Deputy Comptroller for Thrift Supervision, within the OCC.*

Federal Thrift Charters

Although the Senate version of financial reform would have eliminated the federal thrift charter as well, the Dodd-Frank Act followed the House version on the matter, leaving the federal thrift charter as a viable option for organization as a financial institution.

OTS Functions Transferred

All functions of the OTS would be transferred to the OCC, Fed and FDIC.

Supervision of Thrift Holding Companies. Under the Dodd-Frank Act, the Fed would acquire regulatory and rulemaking authority over savings and loan holding companies, in addition to its present oversight of national and state bank holding companies, state member banks and certain other entities.

Supervision of Thrifts. The OCC would supervise federal savings associations, adding to its present oversight of national banks and federal branches and agencies of foreign banks. The FDIC would supervise federally insured state nonmember banks, insured branches of foreign banks and state-chartered savings associations.

Federal Deposit Insurance Act Amended. Definitional provisions in the Federal Deposit Insurance Act (FDIA) would be amended to reflect the OTS powers transferred to the OCC, Fed and FDIC.

Fed Holding Company Regulatory Authority. The Senate legislation, as originally drafted by Senate Banking Committee Chairman Chris Dodd, D-Conn., called for a shift in the regulation of financial holding companies. The Dodd version called for all national bank and federal savings and loan holding companies with total consolidated assets of less than $50 billion (the threshold for being designated a "systemically significant firm") to be supervised by the OCC, rather than the Fed or OTS, respectively, and for state member banks and thrifts to be supervised by the FDIC, rather than the Fed. Thus, all bank and thrift holding companies with less than $50 billion in total consolidated assets would have experienced a change in their primary federal regulator at the holding company level. However, an amendment introduced by Sen. Kay Bailey Hutchison, R-Tex., restored the Fed's regulatory dominion over financial holding companies. The Hutchison amendment was incorporated into the Dodd-Frank Act. Thus, the major changes with respect to bank supervision in the Dodd-Frank Act, in addition to provisions for "systemically significant firms," deal with the abolition of the OTS and the transfer of its regulatory and rulemaking authority.

Transfer of OTS Rulemaking Authority. In addition, all rulemaking authority of the OTS and the Director of the OTS under Sec. 11 of the Home Owners' Loan Act (HOLA), relating to transactions with affiliates and extensions of credit to executive officers, directors and principal shareholders, and under Sec. 5(q) of HOLA, relating to tying arrangements would be transferred to the Fed. The OCC would receive all rulemaking authority of the OTS and the Director of the OTS relating to savings associations. The FDIC would pick up OTS rulemaking authority over state savings associations. None of these provisions would limit or otherwise affect the transfer of powers to the new Consumer Financial Protection Bureau under Title X.

Comment: *The House version of H.R. 4173 differed significantly in its restructuring of depository institution supervision. All powers, authorities, rights and duties that were invested in the Director of the OTS would transfer to the OCC under the House version, with three exceptions:*

1. *powers, rights, authorities and duties pertaining to savings and loan holding companies and their affiliates would transfer to the FDIC;*
2. *powers, rights, authorities and duties pertaining to savings and loan holding companies that are, on a consolidated basis, predominantly engaged in the business of insurance would transfer to the Federal Reserve Board; and*
3. *consumer financial protection functions of both the OTS and OCC would shift to the new Consumer Financial Protection Agency.*

Agency Funding

The Hutchison amendment would alter language in the original bill with regard to how each agency is funded. The Comptroller of the Currency would be authorized to collect an assessment, fee or other charge from any entity the OCC supervises as necessary to carry out its responsibilities, including with respect to holding companies, federal thrifts and non-bank affiliates (that are not functionally regulated) that engage in bank permissible activities. In establishing the amount of the assessment, fee or other charge collected from an entity, the OCC may take into account the funds transferred to the OCC, the nature and scope of the activities of the entity, the amount and types of assets held by the entity, the financial and managerial condition of the entity and any other factor that the OCC deems appropriate.

The Fed would be directed to collect assessments, fees and other charges that are equal to the expenses incurred by the Fed to carry out its responsibilities with respect to such companies from: (1) bank holding companies and savings and loan holding companies with assets equal to or greater than $50 billion; and

(2) all non-bank financial companies supervised by the Fed under sec. 113.

The FDIC also would be authorized to charge for its supervision of non-bank affiliates.

OTS Regulations Continued

All regulations promulgated by the OTS would remain in effect and be transferred to the Fed, OCC and FDIC, as appropriate. By the transfer date, the Fed, OCC and FDIC, in consultation with one another, would be required to determine the existing OTS regulations that will be enforced by each agency and publish those regulations in the *Federal Register*.

In addition, all orders, resolutions, determinations, agreements, interpretative rules, other interpretations, guidelines, procedures and other advisory materials that have been issued, made, prescribed or allowed to become effective by the OTS that would be transferred by the Act, and that are in effect on the day before the transfer date, would continue in effect according to the terms of those materials and would be enforceable by or against the Fed, OCC or FDIC, as appropriate, until modified, terminated, set aside or superseded in accordance with applicable law by the appropriate agency, by any court of competent jurisdiction or by operation of law.

Any regulation proposed but not yet published by the OTS before the transfer date would be deemed to be a proposed regulation of the OCC or Fed, as appropriate. Any interim or final OTS regulation published before the transfer date but not yet effective would become effective as a regulation of the OCC or Fed, as appropriate.

OCC Reestablished

The Dodd-Frank Act would reestablish the OCC as an independent agency housed within the Treasury Department. The OCC's directives would be modified to include assuring the safety and soundness of financial institutions under its supervision as well as those institutions' compliance with laws and regulations. In addition, the OCC would be required to assure its supervised institutions provide fair access to financial institutions and fair treatment of customers. Currently, the OCC's primary responsibilities are to execute all federal laws relating to the issue and regulation of national currency secured by U.S. bonds and, under the general supervision of the Fed, of all Federal Reserve notes, except for the cancellation and destruction, and accounting with respect to such cancellation and destruction, of Federal Reserve notes unfit for circulation. The OCC's financial institution supervisory responsibilities are presently governed by Home Owners Loan Act Sec. 3(b)(3).

The Dodd-Frank Act would require the Comptroller of the Currency to designate a Deputy Comptroller responsible for the supervision and examination of federal savings associations. The Comptroller or Deputy Comptroller would be barred from holding an interest in a federal savings association.

Deposit Insurance Reform

Subtitle C to Title III of the Dodd-Frank Act addresses deposit insurance reform and makes technical amendments to the provisions of the Federal Deposit Insurance Act (FDIA) relating to the composition of the FDIC's Board of Directors.

Risk Categories. The Dodd-Frank Act removes a provision in the FDIA, dealing with deposit insurance assessments, that states no institution may be denied the lowest-risk category solely because of its size.

Assessment Base. The FDIC is also directed to amend its regulations to define the term "assessment base."

Procyclical Assessments. The use of procyclical assessments is eliminated by allowing the FDIC, in its sole discretion, to suspend or limit a payment of dividends if the Deposit Insurance Fund (DIF) reserve ratio was in excess of 1.5 percent of estimated insured deposits.

Reserve Ratio. A transition reserve ratio requirement is also established to reflect the new risk-focused assessment base. This new minimum reserve ratio for any year may not be less than 1.35 percent of estimated insured deposits, or the comparable percentage of the assessment base. The FDIC must take "such steps as may be necessary" to increase the level of the DIF to 1.35 percent of estimated insured deposits. The FDIC is given until Sept. 30, 2020, to meet the 1.35 reserve ratio target. Finally, banks with assets under $10 billion would be exempt from the increase in the reserve ratio to 1.35 percent.

Deposit Insurance Limits

The standard maximum deposit insurance amount of $100,000, found in the FDIA is increased to $250,000. During the height of the financial crisis, the standard maximum deposit insurance amount was temporarily increased to $250,000 by the Emergency Economic Stabilization Act of 2008. This temporary increase originally was to last until Dec. 31, 2009, but was extended until Dec. 31, 2013.

The increase in the standard maximum deposit insurance amount to $250,000 is to apply to depositors in any institution for which the FDIC was appointed as receiver or conservator on or after Jan. 1, 2008, and before Oct. 3, 2008. Any payment on a deposit claim made by the FDIC to a depositor above the standard maximum deposit insurance amount in effect at the time of the FDIC's appointment as receiver or conservator is deemed to be part of the net amount due to the depositor under the FDIA.

The Dodd-Frank Act also increases the standard maximum share insurance amount to $250,000 for credit union share accounts.

Office of Minority and Women Inclusion

The Dodd-Frank Act would require each federal agency to establish an Office of Minority and Women Inclusion not later than six months after the date of enactment that will be responsible for all matters of the agency relating to diversity in management, employment and business activities. The new Consumer Financial Protection Bureau also would be required to establish an Office of Minority and Women Inclusion, but not later than six months after the designated transfer date.

Director. A Director of each Office of Minority and Women Inclusion would be appointed by, and would report to, the agency administrator. Each Director would be required to establish standards for equal employment opportunity, increased participation of minority- and women-owned businesses in the programs and contracts of the agency and assessing the diversity policies and practices of entities supervised by the agency.

Inclusion in All Levels of Business Activities. Each Director would be required to develop and implement standards and procedures to ensure the fair inclusion of minorities, women and minority- and women-owned businesses in all activities of the agency at all levels.

Applicability. The provision would apply to all contracts of an agency for services of any kind, including the services of financial institutions, investment banking firms, mortgage banking firms, asset management firms, brokers, dealers, financial services entities, underwriters, accountants, investment consultants and providers of legal services.

Reports. Each Office of Minority and Women Inclusion would be required to submit an annual report to Congress regarding the action taken by the agency and the Office.

Diversity in Agency Workforce. Each agency would be required to take affirmative steps to seek diversity at all levels in the agency's workforce.

Hedge Fund Advisers

Title IV of the legislation would subject advisers to hedge funds and other private funds to SEC registration and disclosure requirements. Section 403 would bring private fund advisers under SEC oversight by eliminating the exemption in Advisers Act Section 203(b)(3) for advisers with fewer than 15 clients. Under current law, a hedge fund is counted as a single client, allowing private fund advisers to avoid SEC registration.

Under Section 404, the SEC must require advisers to private funds to file specific reports, which the Commission must share with the Financial Stability Oversight Council. The filings must describe the amount of assets under management, use of leverage, counterparty credit risk exposure, trading and investment positions, valuation policies, types of assets held and other information that the SEC, in consultation with the Council, determines is necessary and appropriate to protect investors or assess systemic risk. Reporting requirements may be tailored to the type or size of the private fund. Frequency of reporting is at the SEC's discretion.

The SEC would have to make available to the Council any private fund records it receives that the Council considers necessary to assess the systemic risk posed by a private fund. These records must be kept confidential, and the Council must observe the same standards of confidentiality that apply to the SEC. Private fund records, including those containing proprietary information, are not subject to disclosure pursuant to the Freedom of Information Act. The SEC must also report annually to Congress on how it has used information collected from private funds to monitor markets for the protection of investors and market integrity. The Commission may require investment advisers to disclose the identity, investments or affairs of any client, if necessary to assess potential systemic risk.

Section 410 would raise the asset threshold above which advisers must register with the SEC from the $25 million set in 1996 by the National Securities Markets Improvement Act to $100 million. States would have responsibility for regulating advisers with less than $100 million in assets under management. A primary reason for raising the asset-under-management threshold is to allow the SEC to focus its examination and enforcement resources on the largest advisers and thus improve its record in uncovering major cases of investment fraud.

Exemptions and Exclusions

Section 403 would exempt foreign private advisers and provides a limited intrastate exemption. It also contains an exemption for small business investment companies licensed by the Small Business Administration. Section 407 would exempt venture capital fund advisers.

Section 409 codifies the SEC's longstanding position on family offices by excluding them from the definition of "investment adviser" under Advisers Act Section 202(a)(11). Family offices provide investment advice in the course of managing the investments and financial affairs of one or more generations of a single family. Since passage of the Advisers Act, the SEC has issued orders to family offices declaring that they are not investment advisers within the statute's intent and therefore need not register. Under Section 409, the SEC must adopt rules defining "family offices" for purposes of the exemption that are consistent with the Commission's previous policy and that consider the range of organizational and employment structures used by family offices.

Accredited Investors

A person must have accredited investor status, defined in SEC regulations, to invest in hedge funds and other private securities offerings. Accredited investors are presumed to be sophisticated and therefore not in need of the investor protections afforded by SEC registration and disclosure requirements. Section 412 would raise the net worth needed to attain accredited investor status by making the test $1 million of net worth, *excluding* the person's primary residence. The current test *includes* the primary residence in the net worth threshold and directs the SEC to adjust the figure upward for inflation, if warranted, when the SEC conducts a review in four years and every four years thereafter. For the next four years, the net worth number would remain $1 million.

The provision also directs the SEC, four years after enactment, and once every four years thereafter, to review the definition of accredited investor to determine whether the requirements of the definition should be modified for the protection of investors, in the public interest, and in light of the economy. After completing the review, the SEC may revise the definition.

Federal Insurance Office

To promote national coordination in the insurance sector, Title V of the Dodd-Frank Wall Street Reform and Consumer Protection Act creates a Federal Insurance Office (FIO) within the Treasury Department with authority over all types of insurance, other than health, long-term care and crop insurance. The Office would not be accompanied by the establishment of a national insurance charter. Its principal functions would be to:

- monitor the insurance industry, with the authority to gather information and issue reports;
- identify issues or gaps in the regulation of insurers that could contribute to a systemic crisis;
- monitor the extent to which minorities, low- and moderate-income persons and underserved communities have access to affordable insurance products, except health insurance;
- recommend which insurance companies should be designated as entities subject to regulation as non-bank financial companies supervised by the Federal Reserve Board;
- recommend which insurance companies should be subject to stricter standards;
- assist in the administration of the Terrorism Insurance Program;
- coordinate international insurance issues and assist in negotiating covered agreements;
- determine whether state insurance measures are preempted by covered agreements;
- consult with states regarding insurance matters of national and international importance; and
- conduct a study on ways to modernize insurance regulation and provide Congress with recommendations.

Subpoena Power. The FIO has the power to subpoena information from insurers that it needs to carry out its functions. Prior to issuing a subpoena, the FIO must coordinate with the relevant state insurance regulator to determine if the information is available from the regulator or publicly available sources.

International Agreements. The Dodd-Frank Act authorizes the Treasury Secretary and the United States Trade Representative to negotiate and enter into covered agreements on behalf of the United States. A "covered agreement" is a written bilateral or multilateral agreement entered into between the United States and a foreign government, authority or regulatory entity regarding prudential measures applicable to the business of insurance or reinsurance that achieves a level of protection for consumers that is substantially equivalent to the level of protection achieved under state insurance or reinsurance regulation. Covered agreement negotiations may be entered into only after consultation with Congress and after submitting to Congress the final legal text of the agreement.

Preemption. In carrying out its duties that relate to international insurance, the FIO has limited authority to declare that inconsistent state laws or regulations are preempted. A state insurance measure would be preempted if it results in less favorable treatment of a non-U.S. insurer domiciled in a foreign jurisdiction that is subject to a covered agreement than a U.S. insurer admitted in that state, and it is inconsistent with a covered agreement. Before making any determination of inconsistency, the FIO must:

- notify the state;
- notify the United States Trade Representative;
- publish a notice of the issue in the *Federal Register*; and
- provide interested parties an opportunity for comment and consider the effect of preemption.

Reports. Within 18 months of enactment, a report must be submitted to Congress containing any legislative, administrative or regulatory recommendations to modernize and improve the system of insurance regulation. Issues to be considered as part of the required study will include:

- systemic risk regulation for insurance;
- capital standards and an appropriate match between capital allocation and liabilities for risk;
- consumer protection for insurance products and practices, including gaps in state regulation;
- the degree of national uniformity of state insurance regulation;
- regulation of insurance companies and affiliates on a consolidated basis;
- international coordination of insurance regulation;
- costs and benefits of potential federal regulation across various lines of insurance; and
- consequences of subjecting insurance companies to a federal resolution authority.

State-Based Insurance Reform

The Dodd-Frank Wall Street Reform and Consumer Protection Act contains provisions that are intended to streamline the regulation of surplus lines insurance and reinsurance through state-based reforms.

Surplus Lines Insurance. The Dodd-Frank Act gives the home state of the insured (policyholder) 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.

Two years after enactment, 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 Dodd-Frank 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.

The Government Accountability Office, in consultation with the NAIC, must conduct a study, within 30 months of enactment, of the nonadmitted insurance market to determine the effect of the new law on the size and market share of the nonadmitted market.

Reinsurance. The Dodd-Frank Act prohibits nondomiciliary states from denying credit for reinsurance if the state of domicile of a ceding insurer is an NAIC-accredited state or has solvency requirements substantially similar to those required for NAIC accreditation. It 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.

The state of domicile of the reinsurer is solely responsible for regulating the financial solvency of the reinsurer. 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.

Bank and Thrift Regulatory Improvements

Title VI—The Bank and Savings Association Holding Company and Depository Institution Regulatory Improvements Act of 2010—seeks to improve the regulation and supervision of bank and savings association holding companies and depository institutions to assure these financial institutions do not pose a threat to the country's financial stability.

Moratorium. There is a three-year moratorium imposed on the approval of a deposit insurance application by the FDIC. This moratorium applies to deposit insurance applications received after Nov. 23, 2009, for an industrial bank, credit card bank or trust bank that is controlled by a "commercial firm."

The moratorium also generally provides that the OCC, Federal Reserve Board (Fed) and FDIC cannot approve a change in control of an industrial bank, credit card bank or trust bank that is controlled by a commercial firm.

BHCA Exceptions. The Government Accountability Office (GAO) is required to conduct a study to determine whether to eliminate the Bank Holding Company Act (BHCA) exceptions for six specific institutions that are not currently considered to be a bank holding company or bank. This study is to be submitted to the House Financial Services Committee and the Senate Banking Committee within 18 months after the enactment of the Dodd-Frank Act.

Examination Improvements. The Dodd-Frank Act makes a number of changes to the examination provisions of the BHCA and the holding company provisions of the Home Owners' Loan Act (HOLA). With the abolishment of the OTS, the Fed gains sole responsibility for the supervision of bank holding companies (BHCs) and savings and loan holding companies (SLHCs), as well as any non-depository institution subsidiaries.

The Fed, as the "appropriate Federal banking agency" for bank holding companies, is required to use the reports and other supervisory information that the bank holding company or any subsidiary has been required to provide to other federal or state regulatory agencies.

The examination provisions of the BHCA are amended to provide that one of the goals of an examination is to inform the Fed whether the financial, operational and other risks of the BHCs and any subsidiaries may pose to the financial stability of the United States. There is a similar examination requirement for savings and loan holding companies.

Functionally-Regulated Subsidiaries. The Dodd-Frank Act removes the "back-door" enforcement provision found in BHCA Section 10A, which limited the Fed's rulemaking and enforcement authority with respect to functionally regulated subsidiaries. The Fed was only able to take action against a functionally regulated subsidiary if its actions posed a threat to the safety and soundness of a depository institution affiliate or the domestic or international payment system.

Acquisitions. The factors to be considered for bank acquisitions under BHCA Section 3 and the nonbank acquisitions under BHCA Section 4 are amended by the Dodd-Frank Act. In the case of a Section 3 acquisition, the Fed is to consider whether the acquisition would result in greater or more concentrated risks to the stability of the U.S. banking or financial system. For Section 4 acquisitions, the general standards for reviewing the acquisition require the Fed to determine whether the acquisition poses any risk to the stability of the U.S. banking or financial system.

Oversight of Subsidiary Activities. A new Section 26 is added to the FDIA to assure consistent oversight of permissible activities of depository institution holding company subsidiaries. The Fed is required to examine the activities of a nondepository institution subsidiary of a depository institution holding company. These activities are the same type of activities that are permissible for the holding company's depository institution subsidiaries.

Enhanced Capitalization and Management. The operations of holding companies and the standards for interstate acquisitions under the BHCA are strengthened by requiring that a BHC involved in these acquisitions to be well capitalized and well managed.

Affiliates and Insiders. The Dodd-Frank Act makes several important changes to the transactions with affiliate requirements found in FRA Sections 23A and 23B and the insider lending restriction found in FRA Section 22(h). Each of the amendments made by the Dodd-Frank Act recognize the role derivatives and other credit exposures played in the financial crisis.

Lending Limits. The National Bank Act lending limits are amended by revising the definition of "loans and extensions of credit" to include credit exposure to a person arising from a derivative transaction, repurchase agreement, reverse repurchase agreement, securities lending transaction or securities borrowing transaction between a national bank and the person.

Conversions. Charter conversions by national banks, state banks and federal savings associations would be impacted by amendments made by the Dodd-Frank Act. In each instance, if the converting institution is subject to an enforcement action initiated by its primary state or federal regulator, the conversion transaction would be prohibited. This prohibition on charter conversions would end the use of regulatory arbitrage and allow the institution "no place to hide" by switching charters.

Source of Strength. An amendment to the FDIA statutorily requires a BHC or SLHC to serve as a source of financial strength for any depository institution subsidiary. The term "source of 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."

Investment and Securities Holding Companies. The Dodd-Frank Act eliminates the investment bank holding company supervisory framework found in Section 17 of the Securities Exchange Act of 1934. The creation of the investment bank holding company supervisory scheme was one of the many hallmark elements of the Gramm-Leach-Bliley Act (GLB Act). Under the GLB Act, securities firms were given the opportunity to be voluntarily supervised by the SEC as holding companies. It was envisioned that this supervisory regime would have been useful for firms seeking to engage in global financial activities. In place of the investment bank holding company supervisory framework, the Dodd-Frank Act creates a securities holding company supervisory framework. A "securities holding company" is a person, other than a natural person, that owns or controls one or more brokers or dealers registered with the SEC or a person associated with the securities holding company. There are a number of entities that are excluded under the definition, such as nonbank financial companies and certain foreign banks.

Volcker Rule. The Dodd-Frank Act prohibits or places restrictions on certain types of financial activity conducted by "banking entities" and nonbank financial companies supervised by the Fed, which are "high-risk or which create significant conflicts of interest between these institutions and their customers."

The prohibitions and restrictions are commonly referred to as the "Volcker Rule" after former Federal Reserve Board Chairman Paul Volcker who has strongly advocated that beneficiaries of the federal financial safety net—deposit insurance guarantees and discount window borrowing—should be prohibited from engaging in high-risk activities.

There are a number of exceptions to the general prohibition placed on propriety trading and activities relating to hedge funds and private equity funds. These exceptions are known as "permitted activities." The version of the Volcker Rule originally approved by the Senate in S. 3217 provided only four exceptions. The current version of the Volcker Rule expands the number of exceptions to a total of 10.

Bank Investment Activities. The appropriate federal banking agencies are required by the Dodd-Frank Act to jointly review and prepare a report on the activities that a banking entity may engage in under federal and state law, including activities authorized by statute and by order, interpretation and guidance. The agencies must complete the report within 18 months of the enactment of the Dodd-Frank Act.

Securitizations. A one year prohibition is imposed on any underwriter, placement agent, initial purchaser or sponsor of a securitization from engaging in any transaction that would involve or result in any material conflict of interest with respect to any investor in a transaction arising out of the securitization. The prohibition also applies to affiliates and subsidiaries.

Concentration Limits. The Dodd-Frank Act generally provides that a "financial company" cannot merge or consolidate with, acquire the assets of, or otherwise acquire control of, another company if the total consolidated "liabilities" of the acquiring financial company upon consummation of the transaction would exceed 10 percent of the aggregate consolidated liabilities of all financial companies at the end of the preceding calendar year. The interstate merger and acquisitions provisions of the FDIA, HOLA and BHCA are amended to reflect the concentration limits found in Section 622 of the Dodd-Frank Act.

Dividends. The Dodd-Frank Act also addresses dividends issued by federal savings associations and mutual holding companies. If a savings association fails to become or remain a qualified thrift lender (QTL), it is restricted in paying most types of dividends. In regards to mutual holding companies, the Dodd-Frank Act provides new notice requirements regarding the declaration of dividends.

Intermediate Holding Companies. To better regulate the "financial activities" of a commercial company that controls a "grandfathered unitary savings and loan holding company," the Dodd-Frank Act establishes an intermediate holding company supervisory structure. If a grandfathered unitary savings and loan holding company conducts activities other than financial activities, the Fed **may** require the grandfathered unitary savings and loan holding company to establish and conduct all or a portion of its financial activities in or through an intermediate holding company, which is to be a savings and loan holding company.

Interest on Demand Deposits. The prohibition of banks paying interest on demand deposits that applies to state member banks has been repealed by the Dodd-Frank Act.

Small Business Lending. Finally, a portion of the definition of "credit card bank" found in the BHCA is amended to allow certain credit card loans to businesses that meet the criteria to be eligible for business loans under regulations established by the Small Business Administration.

OTC Derivatives

Title VII would subject over-the-counter derivatives to greater oversight. Designed to address the systemic risk to financial markets posed by OTC derivatives, the Dodd-Frank Act would mandate their regulation under a dual SEC-CFTC regime that emphasizes transparency. The CFTC would regulate swaps and the SEC would regulate security-based swaps.

Section 712 requires the CFTC and SEC to consult with each other and with the prudential regulators on the development of rules and orders implementing the derivatives title. The commissions must, for example, consult with each other and adopt rules regarding the maintenance of records of all activities pertaining to uncleared swaps and share with each other information regarding swaps or security-based swaps under their respective jurisdictions. The CFTC or the SEC must individually, not jointly, promulgate rules required by the derivatives title within 180 days. The CFTC and SEC may use emergency and expedited procedures to implement the derivatives title if, in their discretion, they deem it necessary.

Unless specifically mentioned in legislation, The CFTC will not have jurisdiction over security-based swaps or associated entities and the SEC will not have jurisdiction over other swaps or associated entities. Similarly, no CFTC-registered futures association will have authority over any security-based swap and no SEC-registered national securities association will have jurisdiction over any swap. The SEC and the CFTC may appeal to the D.C. Circuit Court if either determines that the other has issued a rule or order that conflicts with its authority.

Under Section 714, the CFTC and SEC may investigate and report on any swap or security-based swap found to be detrimental to the stability of financial markets or their participants. The CFTC and SEC may by rule or order collect any information they find necessary to conduct these investigations.

End-User Exemption

The Dodd-Frank Act does not authorize regulators to impose margin on end users that use derivatives to hedge or mitigate commercial risk. Senator Chris Dodd (D-Conn.) and Senator Blanche Lincoln (D-Ark.) have instructed the SEC and CFTC not to make hedging so costly that it becomes prohibitively expensive for end users to manage their risks. In a letter, the senators emphasized that Congress does not intend to regulate end users as major swap participants or swap dealers just because they use swaps to hedge or manage the commercial risks associated with their business. Just as Congress has heard the end-user community, they said, regulators must carefully consider the impact of regulation and capital and margin on end users. The Dodd-Lincoln letter emphasized that Congress clearly stated in the Dodd-Frank Act that margin and capital requirements are not to be imposed on end users, nor can the regulators require clearing for end-user trades (Cong. Record, June 30, 2010, pp. H5248-5249).

Disruptive Trading

Section 747 would prohibit any person from engaging in disruptive derivatives trading practices, including violating bids or offers, recklessly disregarding the orderly execution of transactions, or spoofing. The provision also makes it unlawful to enter a swap knowing that a counterparty could use the swap as a device to defraud a third party or the public. These provisions are augmented by the Cantwell Amendment, which added a new and versatile standard for deceptive and manipulative practices under the Commodity Exchange Act, allowing the CFTC to prosecute manipulation and attempted manipulation in the swaps and commodities markets (Cong. Record, May 6, 2010, p. S3349).

Bank Trading of Derivatives

Section 716 would prohibit federal assistance, including federal deposit insurance and access to the Fed discount window to swap entities in connection with their trading in swaps or securities-based swaps. This section would effectively require most derivatives activities to be conducted outside of banks and bank holding companies.

According to Senator Lincoln, Section 716 has two goals. The first goal is getting banks back to performing the duties they were meant to perform, such as taking deposits and making loans for mortgages, small businesses and commercial enterprise. The second goal is separating out the activities that put these financial institutions in peril. Section 716 makes clear that engaging in risky derivatives dealing is not central to the business of banking (Cong. Record, May 5, 2010, p. S3140).

Senator Lincoln refuted the suggestion that this provision will push derivatives trading off into the dark without oversight. The legislation makes it abundantly clear that all swaps activity will be vigorously regulated by the SEC and CFTC. Removing these swaps desks from FDIC oversight, the Senator reasoned, does not mean they will escape strong regulation by the SEC and CFTC under Title VII. Similarly, Senator Lincoln refuted the suggestion that Section 716 would prevent banks from using swaps to hedge their risks. Banks that have been acting as banks will be able to continue doing business as they always have under the reform legislation, she assured, and banks using swaps will still be allowed to hedge their interest rate risk on their loan portfolio. Most importantly, Congress wants them to do so.

Clearing

The Dodd–Frank Act requires clearing of all swaps that are accepted for clearing by a CFTC-registered derivatives clearing organization unless one of the parties qualifies for an exemption. Similarly, the provision would require clearing of all security-based swaps that are accepted for clearing by an SEC-registered clearing agency unless one of the parties to the swap qualifies for an exemption.

Swap Data Repositories

Section 728 would prescribe requirements for swap data repositories, which must register with the CFTC and are subject to inspection and examination. The Commission will set standards for data identification, collection and maintenance. The data standards for swap data repositories must be comparable to the standards for derivatives clearing organizations that clear swaps. In addition, the swap data repository must accept data, confirm data to both counterparties, maintain that information according to standards set by the CFTC, provide direct electronic access to the CFTC in form and frequency as determined by the CFTC, establish systems for monitoring and analyzing data, maintain privacy and make data available to regulators. The swap data repository must also abide by core principles including antitrust considerations, governance arrangements, and conflict-of-interest and public-information considerations.

Each data repository must have a chief compliance officer who will report directly to the board or a senior officer of the repository. The chief compliance officer must review compliance with the core principles, resolve conflicts of interest in consultation with the board, administer policies and procedures, and establish procedures for the handling, remediation and closing of non-compliance issues identified through office review, internal or external audit, look-back, self-reported error or validated complaint.

The chief compliance officer must also annually prepare, sign and certify as accurate a report describing the swap data repository's compliance and the policies and procedures of the repository, including its code of ethics and conflict-of-interest policies. The report will accompany the financial statements that the swap data repository must file with the CFTC.

Public Reporting of Transaction Data

Section 727 authorizes and requires the CFTC to adopt rules for the public release of swap-transaction and pricing data in as close to real-time as technologically possible after execution, for swaps subject to the mandatory clearing requirement, swaps that are not subject to the mandatory clearing requirement but are cleared by a DCO, and swaps that partake of the commercial end-users exemption from mandatory clearing. In fact, the legislation defines "real-time reporting" as the reporting of data on a swap transaction as soon as technologically practicable after execution. For their part, parties to a swap transaction and their agents must timely report swap transaction information to the proper registered entity under CFTC rules.

The CFTC must include provisions in the rules to ensure that participants are not identified, and must specify criteria for determining what constitutes a large notional swap transaction for particular markets, with appropriate time delays of the reporting of such large notional swap transactions. Additionally, the CFTC must take into account when promulgating the rule whether the public disclosure would materially reduce market liquidity. For swaps that are not cleared by a derivatives clearing organization but are reported to a swap data repository or the CFTC, the Commission must make available to the public aggregate data on the trading volumes and positions, but without disclosing the business transactions or market positions of any person. The CFTC may require registered entities to publicly disseminate swap transaction and pricing data information required by this section.

Segregation and Bankruptcy Treatment

Section 724 requires any person that holds assets to guarantee swaps cleared by a derivatives clearing organization for other customers to register as a futures commission merchant. It also imposes segregation requirements for cleared and uncleared swaps, and restricts use and investment of segregated funds subject to rules, regulations or orders that the CFTC may promulgate. It deems swaps cleared by a derivatives clearing organization to be commodity contracts for bankruptcy purposes, and gives counterparties the option in the case of uncleared swaps to require segregation of customer assets with independent third parties. If the counterparty chooses not to require third-party segregation of customer assets, the swap dealer or major swap participant must report back-office procedures and collateral requirements to the counterparty.

Swap Execution Facilities

Swap execution facilities must register with the SEC for security-based swaps and with the CFTC for swaps under an oversight regime of governance and core principles. A security-based swap execution facility must register with the SEC regardless of whether it is also registered with the CFTC as a swap execution facility. However, the SEC can exempt a security-based swap execution facility from registration upon a finding that the facility is subject to comparable, comprehensive regulation on a consolidated basis by the CFTC.

Under both SEC and CFTC oversight, the swap execution facility must establish self-regulatory core operational principles addressing compliance with rules, swaps not readily susceptible to manipulation, monitoring of trading and trade processing, ability to obtain information, position limits or accountability, financial integrity of transactions, emergency authority, timely publication of trading information, recordkeeping and reporting, antitrust considerations, conflicts of interest, financial resources and system safeguards. The legislation also requires the swap execution facility to appoint a chief compliance officer and imposes duties to be carried out by that officer, including annual reporting.

International Aspects

Section 752 promotes international harmonization of standards. Congress recognized the need for global monitoring of system stability and regulation of cross-border, systemically-important institutions. For the proper regulation of cross-border institutions that can affect systemic risk, there must be strong international cooperation and clear rules. At the same time, it is also evident that sovereignty will prevent a mandatory, international regulatory regime made by treaty. Some form of international harmonization is necessary, however, if for no other reason than to prevent regulatory arbitrage.

In this spirit, the legislation seeks to promote effective and consistent global regulation of swaps and security-based swaps by directing the SEC and CFTC to consult and coordinate with foreign regulatory authorities on setting consistent international standards for regulating those swaps. The SEC and CFTC may also enter into any information-sharing arrangements with foreign regulators they deem necessary or appropriate, in the public interest or for the protection of investors and swap counterparties.

Credit Rating Agencies

Title IX, Subtitle C, would institute reforms to the governance and operations of the credit rating industry. Section 932 would establish an independent office within the SEC dedicated to improving the quality of regulation of credit rating agencies. The Office of Credit Ratings, headed by a person reporting directly to the SEC Chair, would promote accuracy in credit ratings and keep conflicts of interest from unduly influencing ratings.

The Office of Credit Ratings must also conduct annual examinations of each credit rating agency, including a review of: (1) whether the rating agency follows its policies, procedures and rating methodologies; (2) the management of conflicts of interest; (3) the implementation of ethics policies; (4) the agency's internal supervisory controls; (5) the agency's governance; (6) the activities of its compliance officers; (7) the processing of complaints; and (8) the agency's policies governing the post-employment activities of former staff.

The SEC will annually publish the essential findings of all examinations, including the responses of rating agencies to material regulatory deficiencies identified by the SEC and to recommendations made by the SEC.

Section 932 would mandate that each nationally recognized statistical rating organization must establish, enforce and document an effective internal control structure governing the implementation of policies and methodologies it uses to determine credit ratings. Further, the SEC must adopt rules requiring credit rating agencies to submit to the Commission an annual internal controls report, containing a description of the responsibility of the management of the rating agency in establishing and maintaining effective internal controls. In addition, the rating agency must assess the effectiveness of the internal controls and the CEO must attest to it.

Section 932 would eliminate the effect of the inherent conflict of interest in the much criticized "issuer pays" model in the credit rating industry. The conflict of interest arises because rating agencies want to provide the highest rating to keep the issuer's business and are less willing to publish a lower rating. The provision addresses this conflict by directing the SEC to write rules preventing sales and marketing considerations from influencing the production of ratings. Violation of these rules will lead to suspension or revocation of rating agency status if the violation affects a rating.

The legislation promotes sound corporate governance by prohibiting compliance officers at rating agencies from participating in the production of ratings, the development of ratings methodologies and the setting of compensation for agency employees.

Also, rating agencies must consider information about an issuer that they receive from a source other than the issuer and that the agency finds credible and potentially significant to a rating decision. The measure does not, however, require a rating agency to initiate a search for that information.

The Credit Rating Agency Reform Act of 2006 ordered rating agencies to name a compliance officer to ensure compliance with the securities laws and regulations. Section 932 of the Dodd-Frank Act would prohibit these compliance officers from working on ratings, methodologies or sales and marketing, as well as from establishing compensation levels except for employees working for them. The SEC may exempt a small rating agency from these limitations upon a finding that compliance with these limitations would impose an unreasonable burden on the agency.

The legislation mandates that compliance officers must establish procedures for the receipt and treatment of complaints regarding ratings and the methodologies used to set the ratings, as well as a system to deal with confidential, anonymous complaints from employees or users of credit ratings.

Further, compliance officers must submit to the rating agency an annual report on the agency's compliance with the securities laws and its own policies, including a description of any material changes to its code of ethics and conflict-of-interest policies and a certification that the report is accurate and complete. The rating agency must then file the compliance officer's report with the SEC.

The SEC must adopt rules requiring rating agencies to ensure that credit ratings are determined using procedures and methodologies that are approved by the board of directors or senior credit officer. The SEC rules must require that material changes to ratings procedures and methodologies be applied consistently and publicly disclosed. Such changes must be applied to all credit ratings to which they apply within a reasonable time period, to be determined by the SEC. The rules will also require rating agencies to notify users of credit ratings when a material change is made to a procedure or methodology, and when a significant error is identified in a procedure or methodology that may result in credit rating actions.

Section 933 provides that the enforcement and penalty provisions applicable to statements made by a credit rating agency must apply in the same manner and to the same extent as to statements made by a registered public accounting firm or a securities analyst, and those statements will not be deemed forward-looking statements. For purposes of passing the state-of-mind pleading test of the Private Securities Litigation Reform Act, a plaintiff need only plead that the rating agency knowingly or recklessly failed: (1) to conduct a reasonable investigation of the rated security with regard to factual elements relied on by its own methodology; or (2) to obtain reasonable verification of those elements. Although the legislation enables plaintiffs to survive a motion to dismiss more easily, as noted in the Senate Banking Committee Report, it does not change the ultimate standard used by a fact-finder in determining whether the basic elements of fraud claim have been met.

The Act eliminates statutory protections and references to national credit rating agencies in a number of federal acts, including the Exchange Act and Investment Company Act, thereby essentially removing the federal government's seal of approval from investment rating agencies.

Securitization

Title IX, Subtitle D, would reform the process of securitization by requiring companies that sell asset-backed securities to retain a portion of the risk. Section 941 would require companies that sell products like mortgage-backed securities to keep some "skin in the game" by retaining at least five percent of the credit risk. Thus, if the investment collapses, the company that made, packaged and sold the product would lose out right along with the buyers. Section 942 would require issuers to disclose more information about the assets underlying asset-backed securities and to analyze the quality of the underlying assets.

The federal banking agencies and the SEC must jointly prescribe regulations to require any securitizer to retain a material portion of the credit risk of any asset that the securitizer, through the issuance of an asset-backed security, transfers, sells or conveys to a third party. Although the legislation sets a baseline risk-retention amount of five percent in any securitized asset, the regulators may increase that figure at their discretion, or they may reduce it below five percent when the securitized assets meet standards of low credit risk to be established by rule for the various asset classes. The legislation allows flexibility in setting risk-retention levels to encourage the recovery of the securitization markets and to accommodate future market development and innovation.

The regulations would prohibit securitizers from hedging or otherwise transferring the credit risk they are required to retain. However, the prohibition does not extend to hedging risks other than credit risk, such as interest rate risk, associated with the retained assets or position. Originators would come under increasing market discipline because securitizers who retain risk would be unwilling to purchase poor-quality assets. Thus, the Act does not require that the regulations impose risk-retention obligations on originators. In addition, risk retention may be divided between securitizers and originators only if the regulators consider that assets being securitized do not have characteristics of low credit risk, that conditions in securitization markets are creating incentives for imprudent origination, and that allocating part of the risk-retention obligation to originators would not prevent consumers and businesses from obtaining credit on reasonable terms.

Based on a congressional belief that implementation of risk-retention obligations should recognize the differences in securitization practices for various asset classes, the legislation requires that the joint rulemaking include separate components addressing individual asset classes such as home mortgages, commercial mortgages and auto loans, and any other asset class that regulators deem appropriate. Congress expects that these regulations will recognize differences in the assets securitized, in existing risk-management practices, and in the structure of asset-backed securities, and that regulators will make appropriate adjustments to the amount of risk retention required (S. Rep. No. 111-176, p. 108).

In addition, the risk-retention rules may provide an exemption for any securitization, as may be appropriate in the public interest and for the protection of investors. Congress expects that asset-backed securities backed by the full faith and credit of the United States, or where the underlying assets were guaranteed by an agency of the United States, would qualify for such an exemption (S. Rep. No. 111-176, p. 108).

The SEC must adopt regulations under the Securities Act requiring issuers of asset-backed securities to disclose for each tranche or class of security information regarding the assets backing that security. In adopting these regulations, the SEC must set standards for the format of the data provided by issuers of an asset-backed security, which must, to the extent feasible, facilitate comparison of the data across securities in similar types of asset classes.

To help investors perform independent due diligence, the SEC regulations must require issuers of asset-backed securities, at a minimum, to disclose asset-level or loan-level data, including data having unique identifiers relating to loan brokers or originators. The issuer must also disclose the nature and extent of the compensation of the broker or originator of the assets backing the security; and the amount of risk retained by the originator or the securitizer of those assets.

Under Section 943, the SEC must also adopt regulations on the use of representations and warranties in the market for asset-backed securities. The regulations must require each credit rating agency to include in any report accompanying a credit rating a description of the representations, warranties and enforcement mechanisms available to investors and a description of how they differ from the representations, warranties and enforcement mechanisms in issuances of similar securities.

The SEC must issue regulations relating to the registration statement required to be filed by any issuer of an asset-backed security requiring them to perform a due diligence analysis of the assets underlying the asset-backed security and disclose the nature of that analysis.

Section 941 defines "asset-backed security" as a fixed-income or other security collateralized by any type of self-liquidating financial asset, including a loan, a lease, a mortgage or a secured or unsecured receivable, that allows the holder of the security to receive payments depending primarily on cash flow from the asset, including collateralized mortgage or debt obligations. The term "asset-backed security" does not include a security issued by a finance subsidiary held by the parent company or a company controlled by the parent company, if none of the securities issued by the finance subsidiary are held by an entity that is not controlled by the parent company.

Corporate Governance and Compensation

Title IX, Subtitles E and G, would institute an array of corporate governance reforms. As discussed below, the provisions would help rein in excessive compensation and shift management's focus from short-term profits to long-term growth and stability by, among other measures, giving shareholders a "say on pay" and proxy access to nominate directors, ensuring the independence of compensation committees, and requiring companies to set "clawback" policies to recover compensation payouts based on inaccurate financial statements.

Say on Pay

Section 951 would enhance corporate governance and mandate increased transparency of executive compensation. Shareholders would have the right to a nonbinding vote on executive compensation. The advisory vote is designed to give shareholders a powerful opportunity to hold executives accountable and to disapprove misguided incentive schemes that threaten individual companies and, in turn, the broader economy.

The shareholder advisory vote on executive pay will not overrule a decision by the company or the board, or create or imply any change to, or addition to, the fiduciary duties of the directors, or restrict the ability of shareholders to make inclusions in proxy materials related to executive compensation.

Dual Roles

Section 972 would encourage bifurcation of the roles of board chairman and CEO. The SEC would have to adopt rules requiring a company to disclose in the annual proxy sent to investors the reasons why it has chosen the same person to serve as chairman of the board and chief executive officer or why it has chosen different individuals to serve in those roles.

Compensation Committees

Section 952 would mandate independent board compensation committees. The SEC must adopt rules for exchange listing requiring that compensation committees include only independent directors and have authority to hire compensation consultants. This provision is designed to strengthen their independence from the executives they are rewarding or punishing. In determining the independence of compensation committee members, the SEC rules must require exchanges to consider the source of compensation and any affiliation with the company or any of its subsidiaries.

The compensation committee would have sole discretion to hire and obtain the advice of a compensation consultant and would be directly responsible for the consultant's oversight and compensation. However, the provision cannot be construed to require a compensation committee to implement or follow the consultant's recommendations, or to affect the committee's ability or the obligation to exercise its own judgment.

Further, proxy or consent solicitation materials for an annual or special shareholders meeting must disclose whether the compensation committee retained or obtained the advice of a compensation consultant. The materials must also disclose whether the committee's work has raised any conflict of interest and, if so, the nature of the conflict and how it is being addressed.

Clawbacks

Section 954 would require public companies to set policies to claw back executive compensation if it was based on inaccurate financial statements that did not comply with accounting standards. The measure also directs the SEC to clarify disclosures relating to compensation, including requiring companies to provide charts that compare their executive compensation with stock performance over a five-year period.

Compensation Disclosure

Under Section 953, the SEC must amend Regulation S-K Item 402 to mandate disclosure of: the median of the annual total compensation of all employees (except the CEO), the annual total compensation of the CEO, and the ratio of the two. The annual total compensation of an employee must be determined by reference to Item 402. This disclosure is required in annual reports and proxy statements, among other filings.

Voting by Brokers

Section 957 would require exchange rules to prohibit members that are not beneficial owners of a security from granting a proxy to vote the security in connection with a shareholder vote for the election of directors, executive compensation or any other significant matter as the SEC may determine by rule, unless the beneficial owner of the security has instructed the member to vote the proxy in accordance with the beneficial owner's instructions.

Other Securities Reforms

Title IX contains various other measures designed to improve enforcement of the securities laws, impose greater regulatory oversight and strengthen investor protections. As discussed below, these include: SEC authority to impose collateral bars; PCAOB oversight of broker-dealer auditors; greater protections for whistleblowers; senior investor protection initiatives; and the creation of a council of federal financial agency inspectors general.

Collateral Bars

Section 925 authorizes the SEC to impose collateral bars against regulated persons. The Commission would have the authority to bar a regulated person who violates the securities laws in one part of the industry, such as a broker-dealer who misappropriates customer funds, from access to customer funds in another part of the securities industry, for example, as an investment adviser. By expressly empowering the SEC to impose broad preventative relief in the first instance, this provision would enable the Commission to protect investors and the markets more effectively and efficiently.

Fair Fund

The Fair Fund provisions of the Sarbanes-Oxley Act take the civil penalties levied by the SEC as a result of an enforcement action and direct them to a disgorgement fund for harmed investors. Section 929B would increase the money available to compensate defrauded investors by revising the Fair Fund provisions to permit the SEC to use penalties to compensate victims of the fraud even if the SEC does not obtain an order requiring the defendant to disgorge ill-gotten gains. Currently, in some cases, a defendant may engage in a securities law violation that harms investors, but the SEC cannot obtain disgorgement from the defendant because the defendant did not personally benefit from the violation.

"Madoff" Reforms

Responding to problems laid bare by the Madoff fraud, the Dodd-Frank Act authorizes the PCAOB to examine the auditors of broker-dealers. In addition, the legislation increases the credit line at the U.S. Treasury from $1 billion to $2.5 billion to support the work of the Securities Investor Protection Corporation and raises the SIPC's maximum cash advance amount to $250,000 in order to bring the program in line with the protection provided by the FDIC. The Act also increases the minimum assessments paid by SIPC members from $150 per year, regardless of the size of the SIPC member, to two basis points of the member's gross revenues to ensure that the SIPC has the reserves it needs in the future to meet its obligations.

Whistleblower Protections

Section 922 would allow the SEC to reward whistleblowers who provide the Commission with information on securities law violations. The provision, found in new Exchange Act Section 21F, applies to any judicial or administrative action brought by the SEC under the securities laws that results in monetary sanctions exceeding $1 million. Whistleblowers will also enjoy more protections from retaliation.

Currently, the SEC may reward individuals for providing information leading to the recovery of civil penalties for insider trading. New Section 21F will allow the payment of rewards for information that leads to the successful enforcement of any judicial or administrative action brought by the SEC under all provisions of the securities laws. For example, whistleblowers in financial fraud and Foreign Corrupt Practices Act cases, which often generate substantial civil penalties, would be eligible for awards.

The Act expands the whistleblower protections in the Sarbanes-Oxley Act. Although the two statutes prohibit similar conduct, there are significant differences in both the scope of the measures and in the available relief.

Section 929A would amend Sarbanes-Oxley Act Section 806(a) to clarify that the whistleblower protections apply to both parent companies and their subsidiaries and affiliates if their financial information is included in the consolidated financial statements of the parent company.

The Cardin-Grassley Amendment extended whistleblower protection to employees of credit rating agencies, which are the nationally recognized statistical rating organizations that issue credit ratings that the SEC permits other financial firms to use for certain regulatory purposes.

Municipal Securities

Section 979 would establish an Office of Municipal Securities in the SEC to administer the Commission's rules with respect to municipal securities dealers, advisors, investors and issuers. The Director of the Office would report to the SEC Chair. The Office would have to coordinate with the MSRB for rulemaking and enforcement actions, and would have to be sufficiently staffed to carry out its duties. The staff would have to include individuals with knowledge and expertise in municipal finance.

Senior Investors

Section 989A would offer protections for senior investors. The North American Securities Administrators Association (NASAA) has long voiced concerns with the use of misleading professional designations that convey an expertise in advising seniors on financial matters. Many of these designations in reality reflect no such expertise but rather are conveyed to individuals who pay to attend weekend seminars and take open book, multiple choice tests. NASAA has adopted a model rule designed to curb abuses in this area.

The provision recognizes the harm to seniors posed by the use of such misleading designations and establishes a mechanism for providing grants to states as an incentive to adopt the NASAA model rule. The grants are designed to give states the flexibility to use funds for a wide variety of senior investor protection efforts, such as hiring additional staff to investigate and prosecute cases, funding new technology, equipment and training for regulators, prosecutors and law enforcement, and providing educational materials to increase awareness and understanding of designations.

Council of Inspectors General

The Act would create a council of federal financial agency inspectors general, including the IGs at the SEC, CFTC, FDIC and the Fed. The council would meet quarterly and discuss their investigations to ensure that they are not duplicating each other's work. They would also discuss collective approaches to systemic risk. Further, the council would have to submit an annual report to Congress recommending improvements to financial oversight.

The Act also requires the SEC and CFTC inspectors general to report to the full Commission rather than only to the SEC or CFTC Chair. It will additionally require that two-thirds of the Commission must vote for cause to fire the inspector general. According to Senator Grassley, the two-thirds for-cause vote ensures that any political attempt to remove an agency inspector general will be met by dissent from some Commission members (Cong. Rec., May 18, 2010, p. S3877).

The legislation also requires the SEC and other inspectors general to disclose the results of all their peer reviews to Congress, thereby making them public. Also, the SEC and other financial regulators would have to respond when inspectors general identify deficiencies in their agencies, either by taking corrective action or by explaining to Congress why they chose not to act.

Bureau of Consumer Financial Protection

Title X is the "Consumer Financial Protection Act of 2010." The title's first substantive provision creates the Bureau of Consumer Financial Protection (the BCFP or Bureau) within the Federal Reserve System. The task of the Bureau is to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."

Earlier proposals contemplated an independent office, such as the Consumer Financial Protection Agency that was described in the bill passed by the House of Representatives in December 2009 (H.R. 4173). The conference committee attempted to strike a compromise between those who objected to an independent agency (or, indeed, to any agency at all) and those who wanted complete independence. Although the BCFP is placed in the Fed, its Director is to be appointed by the President of the United States, not by the Fed Governors or Fed president. The appointment is subject to Senate confirmation. Also, the title includes specific restrictions on the ability of the Fed Governors to interfere with the BCFP's activities.

The BCFP's funding is also essentially protected from interference by the Fed. The Bureau's Director has the authority to designate periodically how much of the Federal Reserve System's earnings are to be transferred to the Bureau, subject to a statutory maximum that rises to 12 percent of the Fed's total 2009 operating expenses, adjusted for inflation. The Fed has no authority over the Bureau's budget or financial operations.

Authority of the Bureau

The bill directs the BCFP to enforce the federal consumer financial protection laws consistently so that "markets for consumer financial products and services are fair, transparent, and competitive." Enumerated goals include seeing that consumers receive timely and understandable disclosures and are protected from unfair, deceptive or abusive acts and practices and from discrimination. The Bureau also is to identify and address regulations that place an "unwarranted burden" on market participants.

Six primary functions are listed for the BCFP. The most important of these are adopting rules and guidance to implement the federal consumer financial protection laws, supervising and enforcing those laws against some financial institutions and companies, developing and publishing information on risks to consumers and to the markets, and addressing consumer complaints.

Rulemaking authority. The Bureau is given nearly exclusive authority to adopt rules implementing the federal consumer financial protection laws (nearly exclusive because the Federal Trade Commission retains some authority to adopt rules under the Federal Trade Commission Act). It also can issue orders and guidance in the same manner that the existing regulators do.

The Bureau's power to make rules is, to some degree, checked by authority granted to the Fed, Office of the Comptroller of the Currency and Federal Deposit Insurance Corporation. It must consult with other relevant federal agencies both before proposing a rule and during the public comment phase to consider whether the rule is consistent with the other agencies' prudential, market and systemic objectives. If another regulator objects to a proposed rule in writing, the BCFP must include that objection, and its response, in its formal proposal.

Additionally, the other regulators have the ability to ask the Financial Stability Oversight Council to set aside any regulation the Bureau adopts. Any Council member could make such a request if it believes the rule would put the safety and soundness of the banking system or the stability of the financial system at risk.

Supervisory Authority. The Bureau is given the authority to supervise many nonbank companies that provide financial products or services. Its authority extends to all nonbank consumer mortgage loan originators, brokers and servicers, and to mortgage loan modification and foreclosure relief service providers. Also, the BCFP has supervisory authority over any company that is "a larger participant of a market for other consumer financial products or services." This latter category is to be defined by a rule to be adopted after consultation with the FTC.

Nonbank subsidiaries of insured depository institutions would be subject to the Bureau's supervisory authority under this provision. Providers of services to supervised entities also are subject to the BCFP's supervisory authority.

The Bureau's supervisory and enforcement authority over these entities is exclusive, displacing the other federal regulators. There are two exceptions—the bill preserves the FTC's authority to enforce rules adopted under the FTC Act, which generally prohibits unfair or deceptive acts or practices, and also preserves the authority of the Farm Credit Administration.

In carrying out its supervisory tasks, the BCFP is to require periodic reports and conduct examinations. It also has a right to have access to reports of examination and other information from the other federal financial regulators (who have a reciprocal right of access to the Bureau's reports), and it is instructed to rely on that information to the extent possible in order to reduce the burden on the entities it supervises. It also is to coordinate its examinations with other federal and state regulators.

The Bureau also has supervisory authority over some insured depository institutions—banks, thrifts and credit unions. The extent of that authority is determined by the size of the institution. The Bureau has primary supervisory and enforcement authority over larger institutions—those with total assets of more than $10 billion. However, supervisory and enforcement authority over institutions that do not reach that threshold (which will be the large majority of institutions) remains with those institutions' prudential regulators.

The BCFP is to require periodic reports and conduct consumer compliance examinations of the larger institutions. In doing so, it is to coordinate with the prudential regulators' examination activities, and it is to use their reports to the extent possible.

The prudential regulators are permitted to retain a back-up consumer compliance enforcement authority. They may recommend that the Bureau begin an enforcement action against a large institution, and, if the Bureau does not act within 120 days, they may take enforcement action.

In the case of a smaller institution, the Bureau may require periodic reports and include examiners in the examinations of the prudential regulators "on a sampling basis." The prudential regulators will have exclusive enforcement authority over smaller institutions; the BCFP is not granted any back-up enforcement authority.

Exemptions and Exclusions. The bill includes limits on the authority of the Bureau that benefit a number of specific types of businesses and activities. There also is a general size-based limitation that is intended to answer concerns that small businesses and professional offices that offer credit to customers would fall under the authority of the Bureau if they were determined to be "engaged significantly in offering or providing consumer financial products or services."

To begin with, the BCFP has no authority over a merchant who sells nonfinancial goods or services except to the extent that the merchant also sells financial products or services or is otherwise subject to the consumer financial laws. Moreover, the Bureau has no authority over a merchant who extends credit to a consumer to finance the sale of a nonfinancial product or service to the consumer, collects the debt that results from such a transaction or sells such a debt that is in default. However, if the merchant is significantly engaged in offering consumer financial products or services, the latter exemption does not apply if the merchant sells debts that are not in default, extends credit that significantly exceeds the value of the product or service that was purchased, engages in credit sales to circumvent the Dodd-Frank Act or regularly extends credit that is subject to a finance charge.

Even if the merchant is significantly engaged in offering financial products and services and regularly extends credit that is subject to a finance charge, the Bureau has no authority if standards intended to protect small business are met. Such a business must extend credit only for the sale of nonfinancial products or services, keep the credit on its own books (unless there is a default) and meet relevant industry size thresholds.

A business that meets these criteria also is shielded from enforcement actions by state authorities.

Full or partial business-specific exemptions include protections for:

- real estate brokerages;
- manufactured and modular home sales;
- accountants and tax-return preparation services;
- attorneys;
- state-regulated insurance agencies;
- employee benefit and compensation plans;
- state-regulated securities brokerages;
- Securities and Exchange Commission-regulated agencies;
- Commodities and Futures Trading Commission-regulated agencies;
- Farm Credit Administration-regulated entities;
- insurance; and
- charitable contributions.

Motor vehicle dealers are protected as well, in a separate section of the bill that applies only to them.

The bill also explicitly denies the BCFP the authority to impose a national usury limit. However, the Bureau is given the power to restrict or prohibit the pre-dispute use of mandatory arbitration agreements.

Specific Powers of the Bureau

In addition to its general authority to adopt regulations and enforce the federal consumer financial protection laws, the BCFP is given a series of specific powers.

To begin with, the Bureau will share with the FTC the ability to adopt and enforce regulations against unfair or deceptive acts or practices. It also will be able to act against abusive acts or practices—those that interfere with a consumer's ability to understand a financial transaction or that take "unreasonable advantage" of a consumer's lack of understanding or belief that the financial company will act in the consumer's best interest.

The Bureau is specifically empowered to require specified disclosures and to draft model disclosure forms. Just as with the current forms created by the Fed, use of the proper model form would be deemed to satisfy the relevant regulatory disclosure requirements. The BCFP is directed to create a combined Truth in Lending/Real Estate Settlement Procedures Act form unless another agency has already done so.

The bill includes a requirement that those who sell financial products or services must provide consumers with information about the products or services they have purchased. This includes information on transactions, costs and usage. However, sellers only are required to provide information they have—there is no requirement that any specific information be maintained.

Preemption and State Enforcement

Subtitle D of the bill begins by declaring that state laws are preempted only to the extent that they are inconsistent with federal law and that state laws offering higher degrees of protection to consumers are not considered to be inconsistent. However, it also establishes that different preemption standards will apply for national banks and federal savings associations.

State attorneys general are given the power to enforce the bill and the Bureau's regulations in either federal or state court. State regulators also have enforcement authority, but only over state-chartered institutions. However, the authority of a state attorney general to act against a national bank or federal thrift is limited to enforcing the bill and its rules and obtaining the specified remedies. Civil suits to benefit the citizens of a state—referred to during the debate on the bill as "class-action-like suits"—are not permitted.

Additionally, unless an emergency exists, state authorities are required to provide advance notice to the Bureau of any planned enforcement action against any financial market participant. The notice is to include the identity of the company and the facts that underlie the enforcement action. The BCFP may intervene in any enforcement action and thereafter be treated as a party.

The bill also gives the states the ability to initiate rulemaking proceedings.

Separate sections of the bill amend the preemption provisions of the National Bank Act and the Home Owners Loan Act for national banks, federal savings associations and their subsidiaries; however, these sections provide that the same standards apply to both types of institutions. The application of a state consumer financial protection law to a national bank or federal thrift is preempted only if:

- application of the state law would discriminate against the bank or thrift in favor of a state-chartered institution;
- the preemption complies with the standards of the U.S. Supreme Court in *Barnett Bank v. Nelson*,

either by a court or by the OCC on a case-by-case basis; or

- the state law is preempted by a provision of federal law other than Title X.

The bill goes on to provide that non-bank affiliates and subsidiaries do not enjoy this protection. State laws apply to them in the same way the laws would apply to any other non-bank entity. Additionally, the bill makes explicit that it does not intend to completely "occupy the field" in any area of law, removing one of the standard bases for a preemption determination.

However, it also provides that federal law permitting national banks to charge interest at the rate allowed in any state where the bank is located is not affected.

The bill also adopts the visitorial powers decision of the Supreme Court in *Cuomo v. Clearing House Assn*. by saying the bill does not restrict the ability of state attorneys general to enforce any applicable law against national banks or federal thrifts.

Enforcement Powers

The BCFP is given standard investigative and enforcement powers. These include the ability to launch investigations, require the production of information, subpoena witnesses and enforce these demands. It can proceed through administrative hearings or, in appropriate circumstances, through litigation.

Remedies available to the Bureau include contract rescission, refunds or restitution, damages and civil money penalties. In the case of a knowing violation of a federal consumer financial protection law, the BCFP can impose a civil money penalty of as much as $1,000,000 per day. The Bureau also has the power to place limits on a person's future activities, such as excluding someone from participation in the financial services industry.

The BCFP is required to refer appropriate cases to the Attorney General for criminal prosecution. It also is to provide the Internal Revenue Service with information about potential tax law violations that it finds during the course of its examinations.

The bill provides whistleblower protections for financial market participant employees who provide it with information.

Amendments to Other Laws

Title X includes changes to some existing federal consumer financial protection laws, including the Truth in Lending Act (TILA), Electronic Fund Transfer Act (EFTA) and Fair Credit Reporting Act.

The EFTA would be amended to allow the Fed to adopt rules on interchange fees charged by debit card networks, which also are referred to as "swipe fees." The Fed would be instructed to require that these fees be "reasonable and proportional" to the cost incurred by the debit card network. Network fees could not be imposed in an effort to make up for the lost revenue. Small issuers—those with consolidated assets of less than $10 billion—will be exempt from the Fed's rule.

Title X also would seek to end what are seen as anticompetitive restrictions often imposed by debit card and credit card networks. Debit card network rules that prevent merchants from offering consumers discounts or incentives for choosing to use a card issued by a different network would be prohibited. Similarly, rules that prevent merchants from offering discounts or incentives to induce the use of a different payment method—such as using cash instead of a credit card—would be prohibited. Another provision would limit rules that prohibit merchants from setting minimum (or maximum) transaction limits.

Significant disclosure and error resolution obligations would be imposed on international remittance transfer service providers under other EFTA amendments.

The Fair Credit Reporting Act would be amended to require that an adverse action notice provide the affected consumer with any numerical credit score that was considered by the lender, insurer or employer. The amendment would not require disclosure of credit scores as part of the routine credit report disclosures to which consumers have a right.

Title X also creates a new data collection requirement intended to facilitate the enforcement of fair lending laws as they apply to loans to woman- and minority-owned small businesses.

Effective Dates

Much of Title X would take effect on the "designated transfer date." This is a date to be selected by the Secretary of the Treasury for the transfer of the consumer protection functions to the Bureau. It is to be at least 180 days, but not more than 12 months, after the date of Title X's enactment. The outside date can be extended for an additional six months, if necessary.

Some provisions have other effective dates:

- Subtitle A, which creates and describes the BCFP, would be effective one day after the bill is enacted. There also are a number of conforming amendments set out in Subtitle H that are effective one day after enactment.

- The mandated interchange fee limit rules would be due nine months after the date of enactment, and the limits would be effective one year after enactment.
- No effective date is specified for the amendments intended to prevent anti-competitive practices, making them effective one day after the bill is enacted.

Strengthening the Federal Reserve

With an increased role in supervising larger, more complex holding companies with assets over $50 billion and other systemically significant financial firms, Title XI of the Dodd-Frank—Sections 1101–1109—strengthen the Federal Reserve System, increase transparency and eliminate conflicts of interest.

Emergency Lending Authority. There are a number of new requirements on the Fed's emergency lending programs or facilities, one being that all of the Fed's emergency lending programs or facilities have a broad-based eligibility requirement so as to prohibit bailing out an individual company.

Review of Credit Facilities. The GAO's ability to review credit facilities established by the Fed or a Federal Reserve Bank (FRBank) is expanded. The review of a credit facility is to assess: the facility's operational integrity, accounting, financial reporting and internal controls; the effectiveness of the facility's collateral policies that mitigate risk to the relevant FRBank and taxpayers; whether the credit facility inappropriately favors one or more specific participants over other institutions; and the policies governing the use, selection or payment of third-party contractors by or for any credit facility.

One-Time GAO Audit. The GAO is also to conduct a one-time audit of all loans and other financial assistance provided by the Federal Reserve Board between Dec. 1, 2007, and the date of enactment of the Dodd-Frank Act. The review of the Fed programs is to assess: the programs' operational integrity, accounting, financial reporting and internal controls; the effectiveness of the programs' collateral policies that mitigate risk to the relevant FRBank and taxpayers; whether the programs inappropriately favor one or more specific participants over other institutions; the policies governing the use, selection or payment of third-party contractors by or for any of the programs; and whether any conflicts of interest existed.

Transparency. The Fed's enumerated powers found in FRA Section 11 are expanded by the Dodd-Frank Act to ensure transparency concerning the emergency credit facilities, discount window lending programs and open market operations authorized or conducted by the Fed or a FRBank.

To accomplish this transparency mandate, the Fed is to timely disclose information regarding any "credit facility" or "covered transaction."

Liquidity Event Guarantees. Sections 1104, 1105 and 1106 of the Dodd-Frank Act establish a mechanism for the FDIC to create a program to guarantee obligations of solvent insured depository institutions or solvent depository institution holding companies during times of severe economic distress.

Federal Reserve Governance. Sections 1107 and 1108 of the Dodd-Frank Act make a number of amendments to the Federal Reserve Act (FRA) relating to governance of the Federal Reserve Banks and the supervisory and regulatory policies of the Fed.

Pay It Back Act

Title XIII contains the Pay It Back Act. Offered as amendment to the Senate version of the Dodd-Frank Act by Sen. Michael Bennet, D-Colo., the purpose is to "rebuild the credibility of our financial system, save taxpayers billions of dollars, and finally move to end the [Troubled Asset Relief Program (TARP)]."

TARP Wind-Down. To accomplish winding down TARP, the Pay It Back Act reduces TARP's authority to $475 billion. Another step in ending TARP prohibits any TARP repayments to be used to fund new programs after June 25, 2010.

GSE Obligations and Fees. The Pay It Back Act amends the statutes governing the government-sponsored enterprises (GSEs)—the Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac)—and the Federal Home Loan Banks (FHLBanks) to address reduction of the public debt. The Treasury Secretary is required to deposit in the Treasury solely for debt reduction any amounts received for the sale of any obligation or security acquired from the GSEs or any FHLBank. In addition, any periodic commitment fee or any other fee or assessment paid to the Treasury by the GSEs are to be deposited in the Treasury.

Finally, the Pay It Back Act makes a number of changes to the American Recovery and Reinvestment Act of 2009 (ARRA).

Funds Sunset. One change to the ARRA is the sunset of unused funds. Any funds not obligated as of Dec. 31, 2012, are to be returned to the Treasury to pay down the public debt.

ARRA Funds. The Pay It Back Act also requires rescission of any ARRA funds offered to but not accepted by the governor or legislature of a state. These funds are to be deposited in the Treasury solely for public debt reduction. There is similar treatment for any funds withdrawn or recaptured by an executive agency head that have not been obligated by a state to a local government or for a specific project.

Mortgage Reform and Anti-Predatory Lending

Title XIV, the Mortgage Reform and Anti-Predatory Lending Act, would amend the Truth in Lending Act (TILA) with the intention of reforming consumer mortgage practices and providing accountability for those practices.

Background. In part, the financial crisis stemmed from the subprime mortgage crisis, popularly known as the "mortgage mess" or "mortgage meltdown." The subprime crisis came to the public's attention when a steep rise in home foreclosures in 2006 spiraled seemingly out of control in 2007, triggering a national financial crisis that went global within the year. In an effort to prevent reoccurrences of the types of practices that led first to the subprime mortgage crisis and then to the widespread financial crisis, the House of Representatives passed comprehensive mortgage reform legislation on Nov. 15, 2007.

The Mortgage Reform and Anti-Predatory Lending Act of 2007, H.R. 3915, passed the House by a vote of 291-127. The Senate did not take action on the bill. However, Title I of the legislation was the S.A.F.E. Mortgage Licensing Act of 2008 (S.A.F.E. Act) (12 USC. 5101-5116), which provided for national licensing and registration for all mortgage loan originators. The S.A.F.E. Act became law as part of the Housing and Economic Recovery Act of 2008 (Public Law 110-289).

On March 26, 2009, Rep. Brad Miller, D-N.C., introduced a second comprehensive mortgage reform bill. The House passed H.R. 1728, the Mortgage Reform and Anti-Predatory Lending Act, on May 7, 2009, by a vote of 300–114, and referred the measure to the Senate on May 12, 2009. The Senate did not take action on the legislation.

The Dodd-Frank Act incorporated H.R. 1728 as Title XIV by amendment.

Overview. Title XIV of the Dodd-Frank Act amends TILA to reform consumer mortgage practices and provide accountability for such practices and to set minimum standards for consumer mortgage loans, and for other purposes.

Loan originators are required to offer consumers residential mortgage loans on terms that "reasonably reflect" their ability to repay the loans. The legislation expands the protections available under federal rules on high-cost loans by lowering the interest rate and the points and fee triggers that define high-cost loans.

The Dodd-Frank Act establishes an Office of Housing Counseling within the U.S. Department of Urban Housing and Development for the purpose of boosting homeownership and rental housing counseling.

Under the Act, a creditor in a consumer credit transaction secured by a first lien on the principal dwelling of the consumer must establish an escrow or impound account for the payment of taxes and hazard insurance and any other applicable required periodic payments or premiums.

The legislation also includes provisions on appraisal activities. A creditor is prohibited from extending credit in the form of a subprime mortgage to a consumer without first obtaining a written property appraisal. In addition, the act amends TILA to provide that unfair or deceptive practices in extending credit or providing services for a consumer credit transaction secured by the consumer's principal dwelling are unlawful.

Residential Mortgage Loan Origination

The Dodd-Frank Act amends Ch. 2 of TILA by redesignating the second section of Sec. 129 as 129A and adding a new Section 129B that prescribes fiduciary standards for originators of residential mortgages. The amendments are intended to ensure that consumers are offered and receive residential mortgage loans on terms that "reasonably reflect their ability to repay."

Duty of Care. Mortgage originators must be qualified and, when required, registered and licensed as a mortgage originator under state and federal law, including the Secure and Fair Enforcement for Mortgage Licensing Act of 2008.

Mortgage originators also are required to include on all loan documents any unique identifier of the mortgage originator provided by the Nationwide Mortgage Licensing System and Registry.

Prohibition of Steering Incentives. The Dodd-Frank Act prohibits steering incentives for creditors. For any mortgage loan, the mortgage originator may not receive compensation that varies based on the terms of the loan, other than the amount of the principal. In general, a mortgage originator may not receive an origination fee or charge from any person other than the consumer except bona fide third-party charges. No person other than the consumer who knows, or has reason to know, that the consumer has directly compensated the originator may pay any origination fee or charge except bona fide third-party charges.

Minimum Standards for Mortgages

Before making a residential mortgage loan, a creditor is required to make a reasonable and good faith determination based on verified and documented information that at the time the loan is consummated the consumer has a reasonable ability to repay the loan.

If the creditor knows that one or more residential mortgage loans secured by the same dwelling will be made to the same consumer, the creditor must determine that the consumer has a reasonable ability to repay the loan using verified and documented information.

Documented information must include verification of the consumer's credit history, current income, expected income the consumer is reasonably assured of receiving, current obligations, debt-to-income ratio, employment status and other financial resources other than the consumer's equity in the dwelling. A creditor must determine the ability of the consumer to repay using a payment schedule that fully amortizes the loan over the term of the loan. If the documented income, including income from a small business, is a repayment source for the loan, a creditor may consider the seasonality and irregularity of the income in the underwriting of and scheduling of payments for the loan.

Verification of the consumer's income must be made by Internal Revenue Service transcripts of tax returns or a method that quickly and effectively verifies income documentation by a third party, subject to rules prescribed by the Federal Reserve Board.

Nonstandard loans require different methods of determining a consumer's ability to repay the loan. For variable rate loans that defer repayment of principal or interest, a creditor must use a fully amortizing repayment schedule. To determine whether a consumer is able to repay an interest-only loan, a creditor must use the payment amount required to amortize the loan by its final maturity.

When making a determination as to a consumer's ability to repay a nonstandard residential mortgage loan, a creditor also must take into consideration any balance increase that may accrue from any negative amortization provision.

The minimum standards outlined in the subsection do not apply to reverse mortgages or temporary or bridge loan with a term of 12 months or less, including any loan to purchase a new dwelling when the consumer plans to sell a different dwelling within 12 months.

Title XIV provides that the creditor or servicer of a hybrid adjustable rate mortgage must provide six month's notice before the interest rate in effect during the introductory period of the loan resets.

The term "hybrid adjustable rate mortgage means a consumer credit transaction secured by the consumer's principal residence with a fixed interest rate for an introductory period that adjusts or resets to a variable interest rate after the introductory period.

The written notice must be separate and distinct from other correspondence to the consumer and include:

- the index or formula used in the adjustment or resetting of the rate with a source of information about the index or formula;
- an explanation of how the new interest rate and payment would be determined;
- the creditor's or servicer's good faith estimate, using industry standards, of the monthly payment after adjustment or resetting of the rate;
- a list of alternatives consumers can pursue before the date of adjustment or resetting, plus descriptions of the actions consumers must take to pursue the alternatives including: refinancing, renegotiation of loan terms, payment forbearances and reforeclosure sales; and
- information such as addresses and phone numbers of counseling agencies or programs approved by the Housing and Urban Development Secretary or state housing finance authority, along with the contact information for the state housing finance authority for the state in which the consumer resides.

The Dodd-Frank Act authorizes state attorneys general to bring an action to enforce the requirements of Title XIV, Subtitle A (residential mortgage loan origination) and Subtitle B (minimum standards for residential mortgage loans).

High-Cost Mortgages

Title XIV, Subtitle C, of the Dodd-Frank Act prescribes standards for points and fees related to high-cost mortgages, open-end consumer credit plans and bona fide discount points and prepayment penalties, by amending the Truth in Lending Act (TILA).

The term "high-cost mortgage" refers to certain consumer credit transactions, other than reverse mortgages, that are secured by the consumer's principal dwelling.

The residential mortgage is high-cost if the total points and fees due in connection with the transaction, other than bona fide third-party charges not retained by the mortgage originator, creditor or an affiliate, exceed 5 percent of the total for transactions of $20,000 or more, or the lesser of 8 percent of the total or $1,000 for transactions less than $20,000. The Federal Reserve Board may prescribe by regulation a different dollar amount.

A mortgage also is considered high-cost if the credit transaction documents allow the creditor to charge or collect prepayment fees or penalties more than 36 months after the closing of the transaction or if the penalties exceed more than 2 percent of the amount prepaid.

The Dodd-Frank Act repeals the prepayment penalty provisions in Sec. 129(c)(2) of TILA. The Dodd-Frank Act also amends Sec. 129 to provide that high-cost mortgages may not contain a balloon payment—a scheduled payment that is more than twice as large as the average of earlier scheduled payments. This provision does not apply when the payment schedule is adjusted to the seasonal or irregular income of the consumer or in the case of a balance due under the terms of a reverse mortgage.

Under the Act, a creditor may not recommend or encourage default on a loan or other debt in connection with the closing of a high-cost mortgage that refinances all or part of an existing loan or debt.

A creditor may not impose a late payment charge or fee in connection with a high-cost mortgage in an amount in excess of 4 percent of the amount of the payment that is past due unless the loan documents specifically authorize the charge or fee. The creditor is not permitted to impose a charge or fee before the 15-day period following the date the payment is due or, if the interest on each installment is paid in advance, before the 30-day period following the date the payment is due.

In addition, a creditor is prohibited from imposing a late payment fee or charge more than once for a single late payment.

If a payment is a full payment for the period, paid on its due date or within a stated grace period, and the only delinquency stems from a late fee or delinquency charge assessed on an earlier payment, a creditor can not impose a late fee or delinquency charge on the payment.

If the terms of a loan provide that a payment first be applied to a past-due principal balance, and the consumer fails to make an installment payment but subsequently resumes making installment payments without paying past due installments, the creditor is permitted to impose a separate late payment charge for any principal due—without deduction due to late fees or related fees—until the default is cured.

In addition, a creditor may not:

- accelerate the debt, except when repayment has been accelerated by default in payment, pursuant to a due-on-sale provision or pursuant to a material violation of the loan unrelated to payment schedule;
- directly or indirectly finance any prepayment fee or penalty payable by the consumer in a refinancing transaction if the creditor or an affiliate holds the note being refinanced;
- finance points or fees;
- take any action in connection with a high-cost mortgage to structure a loan transaction as an open-end credit plan or another form of loan or divide a loan transaction into separate parts for the purpose of evading the provisions of Title XIV of the Dodd-Frank Act;
- charge a consumer a fee to modify, renew, extend or amend a high-cost mortgage, or to defer payment on the mortgage;
- charge a fee for providing information on the balance due to pay off an outstanding balance on a high-cost mortgage—however, if the payoff statement is delivered by courier or facsimile, the creditor or servicer is permitted to charge a processing fee to cover the cost in an amount not exceeding an amount comparable to fees for similar services in connection with mortgages that are not high-cost mortgages; or
- extend credit to a consumer under a high-cost mortgage without first receiving certification from a counselor approved by the Department of Housing and Urban Development (HUD) or, at the discretion of the HUD Secretary, a state housing finance authority stating that the consumer has received counseling as to the mortgage.

Violations. A creditor in a high-cost loan who, acting in good faith, fails to comply with the TILA Sec. 129 mortgage requirements, will not have committed a violation if the consumer is notified—or discovers—the violation within 30 days of the loan closing and restitution is made along with whatever necessary adjustments to the loan to, at the consumer's choice, either make the loan satisfy requirements or change the terms in the loan, so that it will no longer be a high-cost mortgage.

In addition, a creditor will not be in violation if within 60 days of the creditor's discovery or receipt of notification of an unintentional or bona fide error, the consumer is notified and offered the choice to make the loan satisfy the requirements of this section or change the terms, so that the loan is no longer a high-cost loan.

Office of Housing Counseling

Title XIV, Subtitle D, of the Dodd-Frank Act, may be cited as the Expand and Preserve Home Ownership Through Counseling Act (Sec. 1441 of the Dodd-Frank Wall Street Reform and Consumer Protection Act).

The legislation establishes, within the Department of Housing and Urban Development (HUD), the Office of Housing Counseling (OFC). Under Title XIV, a Director of Housing Counseling is appointed by and reports to the HUD Secretary. The director has primary responsibility for all activities and matters relating to homeownership and rental housing counseling.

The Director will establish rules necessary for, among other things:

- implementing the counseling procedures under Sec. 106(g)(1) of the Housing and Urban Development Act of 1968 (HUD Act);
- executing all other functions of the HUD Secretary under Sec. 106(g) of the HUD Act;
- contributing to the preparation and distribution of home buying information booklets under the Real Estate Settlement Procedures Act;
- implementing the assistance program under Sec. 106(a)(4) of the HUD Act; and
- executing functions concerning abusive, deceptive or unscrupulous lending practices relating to residential mortgage loans.

An advisory committee, appointed by the HUD Secretary will provide advice on the execution of functions by the director, but will have no role in reviewing or awarding housing counseling grants.

Mortgage Servicing

Title VII, Subtitle E, would amend TILA Chapter 2 (15 USC 1631) to provide that a creditor in a consumer credit transaction that is secured by a first lien on the principal dwelling of the consumer must establish an escrow or impound account 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. This provision would not apply to a consumer credit transaction under an open-end credit plan or a reverse mortgage.

A creditor would be prohibited from requiring an impound, trust or other type of account for payments as a condition of a real property sale contract or a loan secured by a first deed of trust or mortgage on the principal dwelling of the consumer. This prohibition would not apply to a consumer credit transaction under an open-end credit plan or a reverse mortgage, except in certain limited cases.

The account would have to be open for a minimum period of five years, beginning with the date of the consummation of the loan and until the borrower has sufficient equity in the home securing the consumer credit transaction so as to no longer have to maintain private mortgage insurance or any period provided in regulations.

The legislation would provide for a limited exception to the requirement of an escrow account for loans secured by shares in a cooperative and for certain condominium units.

Disclosures. A creditor must make certain disclosures to a consumer when an escrow or impound account will be established at consummation of the consumer credit transaction. Disclosure must be by written notice, and the creditor must provide the notice within three business days before consummation.

The notice must include the:

- fact that an escrow or impound account will be established;
- amount required at closing to initially fund the account;
- estimated amount of mandatory periodic payments and premiums, including taxes and insurance, plus the value of improvements on the property, for the first year following consummation;
- estimated monthly amount to be escrowed for required periodic payments or premiums; and
- the fact that if the consumer chooses to terminate the account in the future, after the required minimum of five years, the consumer will become responsible for required periodic payments or premiums unless a new account is established.

Creditors are required to provide a disclosure notice to consumers who waive escrow services if an impound, trust or escrow account for required periodic payments and premiums relating to a consumer credit transaction secured by real property is not established. Creditors also must provide a disclosure notice if a consumer chooses, by written notice to the creditor or servicer, to close the account.

Appraisal Activities

The Dodd-Frank Wall Street Reform and Consumer Protection Act adds new Truth in Lending Act (TILA) provisions that prohibit a creditor from making a higher-risk mortgage loan without first obtaining a written appraisal of the property to be mortgaged.

The appraisal must be performed by a certified and licensed appraiser who conducts a physical property visit of the interior of the mortgaged property.

The term “qualified appraiser” means a person who, at a minimum, is certified or licensed by the state in which the property to be appraised is located and who performs each appraisal in compliance with the Uniform Standards of Professional Appraisal and

Practice and Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 and its implementing regulations.

A creditor must obtain a second appraisal if the purpose of the higher-risk mortgage is to finance the purchase or acquisition of the mortgaged property from a person within 180 days of the purchase or acquisition of the property by that person at a price lower than the current sale price of the property.

The second appraisal must be done by a different certified and licensed appraiser and include an analysis of the difference in sale prices, changes in market conditions and any improvements made to the property between the previous sale and the current sale.

The creditor may not charge the cost of the second appraisal to the applicant.

Additional Provisions. A creditor must provide one copy of each appraisal of property with a higher-risk mortgage to the applicant without charge and at least three days before the closing date. In addition, a creditor must provide an applicant with a statement at the time of the initial mortgage application that any appraisal prepared for the mortgage is for the sole use of the creditor, and the applicant may have an independent appraisal conducted at the applicant's expense.

If a creditor willfully fails to obtain an appraisal, the creditor will be liable to the applicant or borrower for the sum of $2,000.

Appraisal Independence. When extending credit or providing services for a consumer credit transaction secured by the principal dwelling of a consumer, it is unlawful to engage in unfair or deceptive practices.

Unfair and deceptive practices include:

- an appraisal in which a person with an interest in the underlying transaction compensates, coerces, extorts, colludes, instructs, induces, bribes or intimidates a person or firm conducting or involved in the appraisal;
- mischaracterizing, or suborning mischaracterization of, the appraised value of the property;
- attempting to influence an appraiser or encouraging a targeted value to facilitate the transaction; and
- withholding, or threatening to withhold, timely payment for an appraisal report or appraisal services rendered.

A person with an interest in a real estate transaction may ask an appraiser to:

- consider additional, appropriate property information, including the consideration of additional comparable properties in making an appraisal;
- provide further detail, substantiation or explanation for the appraiser's conclusion; or
- correct errors in the appraisal report.

A certified or licensed appraiser conducting an appraisal may not have a direct or indirect interest, financial or otherwise, in the property or transaction involving the appraisal.

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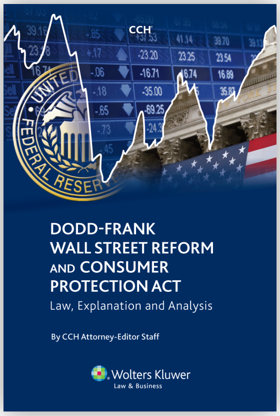

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