



SECURITIES INDUSTRY PRACTICE

# ALERT

## THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) was signed into law by President Obama on July 21, 2010. The official purpose of the law is to “promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail,’ to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices and for other purposes.”

The Dodd-Frank Act actually affects multiple industries and legislation, containing numerous amendments to existing laws and creating several new laws as well. Clearly, this legislation will have consequences for years given that it calls for – by one count – 355 new rules to be written by federal agencies; 47 studies to be conducted (many preceding the rulemaking); and 74 reports to be made to Congress. Essentially, while the Dodd-Frank Act has been enacted, it is still very much a “work-in-progress.”

We have summarized the areas that the Dodd-Frank Act covers below:

- **Title I (Sec. 101, et seq.): Financial Stability  
Financial Stability Act of 2010**

This law creates the Financial Stability Oversight Council (FSOC) to identify systemically significant institutions and regulate them at times more strictly than banks and bank holding companies (BHCs) currently are, regardless if the BHCs cease owning an insured depository institution so as to try to escape such regulation.

- **Title II (Sec. 201, et seq.): Orderly Liquidation  
Authority**

Addresses “too big to fail.” A new “orderly liquidation authority” (OLA) allows the Federal Deposit Insurance Corporation (FDIC) to seize control of a financial company whose imminent collapse has been found to threaten the entire U.S. financial system. In such instance, the FDIC may seize the entity and liquidate it under the new OLA, preempting any proceedings under the Bankruptcy Code. Only liquidation may occur – not reorganization. Insurance companies remain state-regulated, and, thus, may not be so seized and liquidated, but their holding companies and unregulated affiliates may. Rating agencies, lenders and other potential creditors of a financial institution will now have to consider the effect of the OLA as well as the Bankruptcy Code on an institution that may become subject to Title II when deciding whether to extend or maintain credit.

- **Title III (Sec. 300, et seq.): Transfer of Powers to  
the Comptroller of the Currency, the Corporation  
and the Board of Governors  
Enhancing Financial Institution Safety and  
Soundness Act of 2010**

Eliminates the Office of Thrift Supervision (OTS), allocating its thrift and thrift holding company oversight responsibilities among the Federal Reserve, the FDIC and the Office of the Comptroller of the Currency (OCC). Assessments for a depository

institution's Deposit Insurance Fund will now be based on total liabilities, not just deposit liabilities. FDIC coverage is now extended to \$250,000.

- **Title IV (Sec. 401, et seq.): Regulation of Advisers to Hedge Funds and Others**

- **Private Fund Investment Advisers Registration Act of 2010**

Effective one year from enactment of the Dodd-Frank Act, this title eliminates the “fewer than 15 clients” exemption that most hedge funds and investment advisers (collectively, IAs) use to avoid SEC registration as investment advisers. Further, the assets under management (AUM) minimum threshold of \$25 million that allowed IAs to register with the SEC as opposed to one or more states has been increased to \$100 million. However, new exemptions were crafted for “private funds” (with AUM over \$150 million), “venture capital funds” and “family office advisers,” among other new exempt categories. The new act also significantly increases record-keeping and reporting obligations for both registered and unregistered IAs. Finally (among many other things), this new act disallows an “accredited investor” to include the value of his/her “primary residence” in determining whether said investor meets the \$1 million net worth test, and authorizes the SEC to adjust the “accredited investor” standards every four years.

- **Title V (Sec. 501, et seq.): Insurance Federal Insurance Office Act of 2010 Nonadmitted and Reinsurance Reform Act of 2010**

Creates the “Federal Insurance Office” (FIO) within the Department of Treasury to monitor the U.S. insurance industry, especially for systemic risks, and negotiate insurance-related agreements on behalf of the United States with foreign governments. However, the states retain primary authority over U.S. insurers.

- **Title VI (Sec. 601, et seq.): Improvements to Regulation of Bank and Savings Association Holding Companies and Depository Institutions Bank and Savings Association Holding Company and Depository Institution Regulatory Improvements Act of 2010**

Provides for heightened regulation, supervision, examination and enforcement powers over depository institution holding companies and their subsidiaries, including derivatives and “repos.” Contains the often discussed “Volcker Rule,” prohibiting any “banking entity” from engaging in proprietary trading, or sponsoring or investing in a hedge fund or private equity fund. However, the Volcker Rule was watered down with late-added exceptions to its prohibitions. Systemically significant non-bank financial companies are not strictly subject to the Volcker Rule, but do incur additional capital requirements and certain limits on their activities.

- **Title VII (Sec. 701, et seq.): Wall Street Transparency and Accountability Wall Street Transparency and Accountability Act of 2010**

Gives the SEC and CFTC primary authority over the swaps markets, and requires that certain swaps be exchange-traded, centrally cleared and publicly reported. The definition of “swap” is left open to review and amendment, as are many other related aspects.

- **Title VIII (Sec. 801, et seq.): Payment, Clearing and Settlement Supervision Payment, Clearing and Settlement Supervision Act of 2010**

Grants the Federal Reserve (and SEC and CFTC) new authority and responsibility for systemically significant “financial market utilities” and various clearing entities.

- **Title IX (Sec. 901, et seq.): Investor Protections and Improvements to the Regulation of Securities Investor Protection and Securities Reform Act of 2010**

This is a wide-ranging section impacting broker-dealers, investment advisers, credit rating agencies, structured finance products and, last but not least, executive compensation and corporate governance (for all public companies, not just financial institutions). At the SEC, it establishes an “Investor Advisory Committee” and “Investor Advocate;” bolsters whistleblower awards and protections; and authorizes monetary penalties in cease-and-desist proceedings. For broker-dealers and investment advisers, the SEC is to conduct studies regarding customer issues and impose new rules (including a likely new “fiduciary duty” for brokers regarding their retail customers, instead of the current, lesser “suitability” standard). Amendments were also made to laws regarding short-selling and stock lending. Credit rating agencies will undergo significant reform to eliminate conflicts of interest, increase their accountability and increase transparency (especially regarding asset-backed securities). As for executive compensation and corporate governance, the law mandates non-binding shareholder votes on executive compensation and golden parachutes; independence of compensation committees; disclosures of executive compensation, incentive-based compensation and chairman-CEO relationships; and “clawbacks” of erroneously awarded compensation. It also limits broker voting and increases proxy access for shareholders.

- **Title X (Sec. 1001, et seq.): Bureau of Consumer Financial Protection Consumer Financial Protection Act of 2010**

Establishes the Bureau of Consumer Financial Protection (BCFP) within the Federal Reserve. The BCFP will be the consumers’ watchdog, with authority to write and enforce rules regarding mortgages, credit cards, credit scores and other consumer products. However, the examination and enforcement authority

will only extend over very large banks and non-bank financial institutions. The BCFP will not have authority over insured depository institutions and credit unions with assets of \$10 billion or less. This act also caps credit card fees. (Excluded businesses will include retailers, accountants, real estate brokers, lawyers and auto dealers.)

- **Title XI (Sec. 1101, et seq.): Federal Reserve System Provisions**

This title limits Federal Reserve emergency lending authority, and permits the GAO to audit the recent financial crisis lending as well as future emergency and discount window lending and open-market transactions.

- **Title XII (Sec. 1201, et seq.): Improving Access to Mainstream Financial Institutions Improving Access to Mainstream Financial Institutions Act of 2010**

This law authorizes the Treasury Secretary to establish certain grants and other programs to improve access to basic financial products for underserved communities.

- **Title XIII (Sec. 1301, et seq.): Pay It Back Act**

This provision reduces TARP funds from \$700 billion to \$475 billion; prohibits new TARP funding programs; requires certain repaid TARP funds to reduce the deficit; and prohibits recycling repaid funds back into the program.

- **Title XIV (Sec. 1400, et seq.): Mortgage Reform and Anti-Predatory Lending Act Mortgage Reform and Anti-Predatory Lending Act Expand and Preserve Home Ownership Through Counseling Act**

The laws require increased disclosure upon origination of residential mortgage loans, and significantly increases regulation of mortgage loan origination and servicing. Mortgage originators will have registration

requirements, and must make good faith determinations about the ability of a consumer to repay a loan. “Steering” incentives will be prohibited (e.g., “steering” a consumer to loans with higher fees). New caps will be imposed on late fees. Finally, the federal government will make \$1 billion available to borrowers to help pay their mortgages (\$50,000 cap per homeowner) and another \$1 billion to local governments to redevelop foreclosed and abandoned homes.

- **Title XV (Sec. 1501, et seq.): Miscellaneous Provisions**

This title contains miscellaneous sections regarding, among other things, IMF loan policy; disclosures regarding Congo minerals; safety reporting for coal

mines; resource extractors to disclose payments to foreign or U.S. governments; an assessment of the effectiveness of federal inspectors’ general; and a study of deposits at banks.

- **Title XVI (Sec. 1601): Section 1256 Contracts**

This title excludes interest rate swaps, currency swaps, basis swaps, interest rate caps, interest rate floors, commodity swaps, equity swaps, equity index swaps, credit default swaps, and similar agreements from Section 1256 of the Internal Revenue Code that would have inappropriately treated gains and losses in same.

Over the next several weeks, Fox Rothschild attorneys will be issuing specific Alerts on a number of issues relating to the legislation above.

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