Regulatory Reform Alert

Are We Almost There Yet? Financial Reform Makes it to Conference

Five months after the House of Representatives passed the "Wall Street Reform and Consumer Protection Act of 2009" ("House Bill"),[1] on May 20, 2010, by a vote of 59-39, the Senate passed the "Restoring American Financial Stability Act of 2010" ("Senate Bill").[2] The House and Senate Bills now move to conference where the two chambers will seek to harmonize the most comprehensive and complex financial regulatory legislation since the 1930s. Twelve conferees have been named by the Senate, all of whom are members of either the Banking or Agriculture Committees.[3] The House plans to name its conferees after the Memorial Day break. Both House and Senate leaders have indicated their intent to have legislation on the President's desk by the July recess.

This memorandum provides a brief overview of the Senate Bill and then discusses its provisions in more detail.

Overview of the Senate Bill

The Senate Bill contains 15 titles, each of which implements sweeping changes to the regulatory landscape. The Senate Bill as approved is, in many important respects, closer to the House Bill than the earlier draft reported out of the Senate Banking Committee ("Dodd Bill"), and it incorporates virtually all of the Obama Administration's priorities as laid out in the Administration's 2009 White Paper.[4] Still, the House and Senate Bills differ in important ways, including:

- The elimination of an earlier requirement in the Senate Bill that a $50 billion resolution fund be prefunded by large financial companies (the House Bill requires a $150 billion prefunded Systemic Dissolution Fund);
- The elimination in the Senate Bill, but not in the House Bill, of new thrift charters;
- The inclusion and scope of the President's "Volcker Rule" proposals, which would prohibit banking entities from engaging in proprietary trading or investing in or sponsoring a private investment fund (the House Bill was passed before the President proposed the restrictions);
- A provision in the Senate Bill's over-the-counter ("OTC") derivatives title that would force banking entities to "push out" their derivatives operations;
- The scope of the end-user exemption from derivatives clearing and exchange-trading (the carve-out in the Senate Bill is narrower than the carve-out in the House Bill);
- The absence in the Senate Bill of a requirement that a fiduciary duty be imposed on broker-dealers (the Senate Bill requires only a study);
- The status of the Securities and Exchange Commission ("SEC") as self-funding (the Senate Bill provides for self-funding; the House Bill increases the SEC's budget);
- The status of the new consumer financial protection entity as an independent agency, as it is in the House Bill, or a bureau housed within the Board of Governors of the Federal Reserve System

("Federal Reserve"), as it is in the Senate Bill, and whether the rulemaking authority of the entity is subject to veto by the Financial Stability Oversight Council ("Council");

- The exemption in the House Bill for auto dealers from the jurisdiction of the new consumer financial protection entity;
- A provision in the Senate Bill (the so-called "Durbin amendment") that would limit merchant interchange fees on debit cards; and
- Broader authority in the House Bill for the Government Accountability Office ("GAO") to audit the Federal Reserve.

Title I (Financial Stability) establishes a new nine-member Financial Stability Oversight Council ("Council") and a new Office of Financial Research within the Department of the Treasury ("Treasury") to provide research and informational support for the Council. The Council will recommend heightened prudential standards for large, interconnected financial companies and will determine which nonbank financial institutions are important enough to the system to warrant consolidated supervision by the Federal Reserve. With the approval of the Council, the Federal Reserve will have the authority to impose restrictions on the activities or investments of, or even to order the break-up of, large financial companies that threaten U.S. financial stability.

Title II (Orderly Liquidation Authority) creates a new liquidation authority, which seeks to combine the speed and authority of the bank resolution process administered by the Federal Deposit Insurance Corporation ("FDIC") with the more creditor-friendly and due process-oriented provisions of the U.S. Bankruptcy Code, in order to allow the FDIC to unwind a failing bank holding company or nonbank financial company, but only if its failure would threaten U.S. financial stability, and even then only under strict conditions.

Title III (Transfer of Powers to the Comptroller of the Currency ("OCC"), the FDIC, and the Federal Reserve) abolishes the Office of Thrift Supervision ("OTS") and eliminates new federal thrift charters. It consolidates federal supervision of insured state-chartered thrifts in the FDIC, gives the OCC supervisory authority over all federal thrifts, and gives the Fed authority over thrift holding companies and their nondepository subsidiaries. The Federal Reserve retains authority over state member banks.

Title IV (Private Fund Investment Advisers Registration Act of 2010) requires registration of most hedge fund advisers under the Investment Advisers Act of 1940 ("Advisers Act"), but exempts advisers to venture capital funds. It also authorizes the SEC to exempt single family offices and advisers to private equity funds, although the latter will have recordkeeping and reporting obligations.

Title V (Insurance) establishes a new Office of National Insurance ("ONI") within the Treasury with the authority to perform a number of tasks, advise the Secretary, and collect information from insurers and affiliates. Title V also requires the new Director of ONI to conduct a study on how to modernize and improve the system of insurance regulation in the U.S., with a focus on systemic risk, capital standards, consumer protection, national uniformity, consolidated supervision, and international coordination.

Title VI (Improvements to Regulation of Bank and Savings Association Holding Companies and Depository Institutions) is largely devoted to improvements in the regulation of bank and thrift holding companies and depository institutions to ensure these institutions do not pose a threat to U.S. financial stability. The Senate Bill imposes a three-year moratorium, subject to some exceptions, on change of control applications as well as on approvals by the FDIC for deposit insurance on any credit card bank, industrial loan company ("ILC"), or trust bank that is owned or controlled, directly or indirectly, by a commercial firm. The GAO is required to study whether to eliminate the exceptions under the Bank Holding Company Act for credit card companies, ILCs, trust banks, thrifts, and other limited purpose entities from the definition of "bank" or "bank holding company." Most importantly, the Senate Bill adds the so-called "Volcker Rule," which prohibits banks and bank holding companies from owning, investing in, or

sponsoring a hedge fund or private equity fund and from engaging in "proprietary trading operations unrelated to serving customers for [their] own profit." The Council is required to make recommendations to banking regulators regarding statutory definitions and implementation of the required restrictions, including with respect to additional capital requirements, within six months of enactment of final legislation.

Title VII (Wall Street Transparency and Accountability) regulates over-the-counter derivatives markets, jurisdiction over which is split between the Commodity Futures Trading Commission ("CFTC") and the SEC. Under the Senate Bill, all derivatives accepted for clearing must be cleared, absent an exemption. Cleared derivatives must be traded on registered exchanges or similar trading facilities. Swap dealers and major swap participants must register with either or both the CFTC and the SEC and be subject to a myriad of new regulatory requirements, including capital and margin. Non-financial commercial end-users are exempted under the Senate Bill. Banking entities with access to federal assistance programs are required to "push out" their derivatives operations.

Title VIII (Payment, Clearing, and Settlement Supervision) authorizes the Council to identify and designate systemically important financial services "utilities" and activities and authorizes the Federal Reserve to set risk management and other standards and to examine and bring enforcement actions against designated entities and institutions engaged in designated activities.

Title IX (Investor Protections) covers a large number of securities areas, including SEC enforcement-related issues, fiduciary standards for broker-dealers, credit rating agencies, asset-backed securitization and credit risk retention, executive compensation and proxies, municipal securities, management and self-funding of the SEC, and issues relating to the Public Company Accounting Oversight Board ("PCAOB"), among others. The Senate Bill also codifies the existing Investor Advisory Committee and an Investor Advocate to represent the interests of investors to the SEC.

Title X (Bureau of Consumer Financial Protection) establishes a new Bureau of Consumer Financial Protection ("Bureau"), the Director of which will be named by the President. Unlike the House Bill's proposed independent Consumer Financial Protection Agency ("CFPA"), the Bureau will be housed within the Federal Reserve (although it will have dedicated funding). The Bureau will have the authority to "regulate the offering and provision of consumer financial products and services under the Federal consumer financial laws," subject to exemptions and exclusions. In this regard, the Bureau will be given broad authority to adopt consumer protection rules – subject to the ability of the Council to set aside any rule that threatens safety and soundness or the financial system as a whole – and to enforce federal consumer financial laws and rules and supervise and examine specified persons for compliance. The Bureau will not have jurisdiction over persons or entities regulated by the SEC or the CFTC, or the state insurance regulators. The Senate Bill allows for preemption of a state law where the latter would have a discriminatory effect on national banks or where the state law is preempted by a provision of federal law other than this title. It also allows a court or the OCC to preempt a state law where a state law prevents or significantly interferes with a national bank's exercise of its powers.[5]

Title XI (Federal Reserve and FDIC Emergency Financial Stabilization Provisions) limits the emergency powers of the Federal Reserve and the FDIC in significant ways, while bolstering them in others. This title also requires greater transparency of the Federal Reserve's emergency lending. Like the House Bill, the Senate Bill requires a one-time audit and report to Congress by the GAO of all emergency lending by the Federal Reserve during the financial crisis. Finally, this title makes statutory changes to some aspects of the corporate governance of the Federal Reserve System.

Title XII (Improving Access to Mainstream Financial Institutions) authorizes the creation of programs to assist low- and moderate-income individuals to establish accounts with mainstream financial institutions, such as banks and credit unions. It also is designed to encourage low-cost alternatives to costly and often predatory payday loans.

Titles XIII, XIV, and XV contain miscellaneous provisions including amendments to the Emergency Economic Stabilization Act of 2008 to reduce the authorization for the Troubled Asset Relief Program

("TARP") (Title XIII), and restrictions on the use of federal funds to provide loans through the International Monetary Fund ("IMF") to failing foreign countries (Title XIV).

Discussion of the Senate Bill

Title I: Financial Stability

Title I of the Senate Bill establishes a new Council, similar to that created by the House Bill, to identify risks to U.S. financial stability that could arise from the material financial distress or failure of large interconnected financial institutions, to promote market discipline by eliminating moral hazard, and to respond to emerging systemic threats. The Council will consist of nine voting members, including the Treasury Secretary (who will serve as the chair) as well as the heads of the Federal Reserve, the OCC, the Bureau, the Federal Housing Finance Agency ("FHFA"), the SEC, the FDIC, the CFTC, and an independent member (appointed by the President with the advice and consent of the Senate) with insurance expertise.

Title I also establishes a new Office of Financial Research within the Treasury, which will be charged generally with collecting information and performing research and analysis activities for the Council.

The Council's statutory duties will include, among other things: collecting information needed to assess risk and facilitating information-sharing among agencies; monitoring the financial marketplace for threats; directing the Office of Financial Research to support the Council's work; making recommendations to the various federal agencies regarding supervisory priorities and principles; identifying regulatory gaps; requiring supervision by the Federal Reserve of nonbank financial institutions that could pose risks to U.S. financial stability; making recommendations to the Federal Reserve regarding heightened prudential and risk management standards for nonbank financial companies and large interconnected bank holding companies supervised by the Federal Reserve; identifying systemically important infrastructure systems and utilities and subjecting them to prudential standards set by the Federal Reserve; and making recommendations to primary regulators with respect to heightened standards for financial activities or practices that could create or increase contagion risks in the event of significant liquidity or credit incidents.

With respect to foreign nonbank financial companies or foreign-based bank holding companies, the Council will need to consult with applicable foreign regulators before requiring reports from such companies to help the Council assess whether they or their activities may pose a systemic risk to the U.S.

The Senate Bill authorizes the Council to determine, by a two-thirds vote (including a yes vote by the Treasury Secretary), that a nonbank financial company, including a foreign nonbank financial company, must be registered with and supervised by the Federal Reserve and be subject to heightened prudential standards. The Council is authorized to recommend prudential standards for nonbank financial companies with total consolidated assets of at least $50 billion. The Council also is authorized to make recommendations concerning prudential standards for a financial activity or practice conducted by a banking company or a nonbank financial company. Covered nonbank financial companies and bank holding companies with consolidated assets of $50 billion or more are prohibited from certain acquisitions unless they provide prior written notice to the Federal Reserve. Prudential standards will be more stringent for companies presenting greater risk to the system.

In making its determination that a company should be subject to the Federal Reserve's consolidated supervision, size will not be dispositive. The Council will look at the company's leverage, amount and nature of its financial assets, its liabilities, its off-balance sheet exposures, the extent to which its assets are managed rather than owned, and the operation of or interest in any financial infrastructure business, such as clearing, settlement or payment business. The Council also will consider other indicia of risk, including the company's complexity and interconnectedness with other financial entities. The Council will be required to consult with the company's primary regulator, including, as appropriate, with foreign regulators, before making a final determination. Companies determined to need supervision by the Federal Reserve will have the opportunity for a hearing before the Council to contest the proposed

determination. Final determinations will be subject to judicial review. A successor nonbank entity of any bank holding company with consolidated assets of at least $50 billion as of January 2010 will, if the bank holding company received TARP assistance, be required to be treated as a nonbank financial company supervised by the Federal Reserve. Nonbank financial companies generally will be subject to the enforcement authority of their primary regulators but the Federal Reserve would have backup enforcement authority. The Federal Reserve also will have authority to examine these companies.

Section 121 of the Senate Bill provides that if the Federal Reserve determines that a bank holding company with consolidated assets of at least $50 billion or a nonbank financial company supervised by the Federal Reserve "poses a grave threat to the financial stability of the United States," then, upon a vote of at least two-thirds of the members of the Council, the Federal Reserve may restrict the companies activities or even force it to break up. The Federal Reserve is authorized to adopt regulations regarding the application of this section to foreign-based bank holding companies and foreign nonbank financial companies that it supervises.

Title II: Orderly Liquidation Authority

Title II of the Senate Bill provides for a process for the orderly liquidation of a covered financial company. The final version of the Senate Bill in many ways represents a compromise between the House Bill and the earlier Dodd Bill. While the Dodd Bill was modeled more closely on the Bankruptcy Code, the Senate Bill emerged at the end of the process similar to the House Bill, *i.e.*, much more closely aligned with the FDIC's existing bank resolution authority. The Senate Bill will allow the Treasury and the FDIC to respond quickly, with administrative, not judicial, action and subjects them to fewer procedural hurdles at the outset, than was the case in the earlier Dodd Bill. However, there is more of an effort in the Senate Bill than in the House Bill to close the gap between the rights afforded creditors in a covered financial company liquidation and those that would be available under the Bankruptcy Code.

Although the final Senate Bill provides for some judicial review, it is far more streamlined at the inception of a liquidation (under the Senate Bill, the Treasury Secretary must obtain an order from a D.C. District Court Judge, rather than from a bankruptcy court panel as in the Dodd Bill). There is a higher hurdle to set aside a liquidation once set in motion (arbitrary and capricious standard of review; systemic risk determinations not reviewable) than the parallel provisions in the Dodd Bill. If the D.C. District Court Judge does not rule within 24 hours, the petition of the Treasury Secretary would be approved by operation of law. Although there are limited rights of appeal, the liquidation will not be stayed during such an appeal.

To resolve failed covered financial companies quickly, the Senate Bill strictly limits the FDIC's role as receiver to a three year period, with two one-year extensions, and with a further extension only to complete litigation.

In addition to seeking to narrow the gap so that creditors' rights would be closer to those available under the Bankruptcy Code, the Senate Bill provides that creditors would receive at least what they would have received in a liquidation under Chapter 7 of the Bankruptcy Code. The Senate Bill does not contain the provision in the House Bill that would impose a haircut on secured creditors under certain circumstances.

The FDIC is directed to promulgate rules to implement this new authority so as to provide greater legal certainty and further reduce the differences between creditor rights under the two insolvency legal regimes.

The Senate Bill attempts to provide for simultaneous orderly liquidation and the Securities Investor Protection Corporation ("SIPC") customer protection processes, rather than using the SIPC processes alone, as the House Bill does. The existing insolvency regimes for banks and insurance companies would continue as in the House Bill. Although the Dodd Bill began with a $50 billion scaled-down version of the House Bill's $150 billion provision for prefunding a liquidation fund, the prefunding provision did not make it into the final Senate Bill. Instead, liquidations are to be funded after-the-fact by the issuance of debt securities by the FDIC to the Treasury. This funding must be repaid within 60 months by, if necessary, (1)

assessing claimants that receive in excess of what they would have been entitled to receive under a liquidation under Chapter 7 of the Bankruptcy Code or in a SIPC proceeding; or, if that is insufficient, (2) from assessments on any bank holding company with total consolidated assets of $50 billion or more and other financial companies designated as systemically important by the Council.

The FDIC is required to impose higher risk-based assessments, based on factors enumerated in the Senate Bill, as well as on other factors the FDIC deems appropriate.

The FDIC must submit an orderly liquidation plan acceptable to the Secretary of the Treasury before the FDIC may use any liquidation funds to resolve a covered financial company.

Additional features in the final Senate Bill not found in the House Bill include a longer automatic stay for qualified financial contracts (three days, compared to one day in the House Bill); the power for the FDIC to enforce subsidiary contracts guaranteed by a covered financial company despite cross-default provisions triggered by the guarantor's default, if the guarantee and related transactions are transferred to a bridge financial company or third party acquirers; and the requirement that the receiver use best efforts to meet obligations of a covered financial company with a clearing organization.

The Senate Bill explicitly prohibits taxpayer funds from being used to prevent liquidation and requires that expended liquidation funds be recouped through asset disposition recoveries or assessments, but in no case from the taxpayers, to put an end to taxpayer-funded bailouts.

The Senate Bill imposes financial accountability on officers and directors of covered financial companies though a combination of personal liability, compensation clawbacks, and prohibition of future employment.

As is currently the case for bank resolutions, Inspector General reviews of covered financial company resolutions would be mandated. In addition, various reports would need to be provided and studies undertaken.

Title III: Transfer of Powers to the OCC, the FDIC, and the Fed

Depository institutions in the U.S. generally are subject to a patchwork quilt of regulation. Currently there are five federal banking regulators: (1) the OCC charters national banks; (2) the OTS charters federal thrifts and regulates and supervises both state and federal thrifts and thrift holding companies; (3) the Federal Reserve regulates state chartered banks that are members of the Federal Reserve System and regulates, on a consolidated basis, bank holding companies and financial holding companies; (4) the FDIC insures the deposits of state and federal banks and thrifts and is the primary federal regulator of state-chartered banks that are not members of the Federal Reserve System; and (5) the National Credit Union Administration ("NCUA") charters and regulates federal credit unions and regulates state-chartered federally-insured credit unions.

Title III is largely devoted to the elimination of the OTS and the transfer of its authorities to the remaining federal banking regulators. Under the House Bill, the Fed Chair takes over the OTS Director's position on the FDIC's Board of Directors. Under the Senate Bill, that position transfers to the new Director of the Thrift Bureau in the OCC.

The Dodd Bill would have required that all national bank and thrift holding companies with total consolidated assets of less than $50 billion be supervised by the OCC. It also would have required state member banks and thrifts to be supervised by the FDIC. This would have stripped supervisory authority not only from the OTS but also from the Fed. As approved, however, under the Senate Bill the Fed retains authority over state member bank, a move supported both by the Fed and by community bank organizations. Federal supervision of all insured state-chartered thrifts is consolidated in the FDIC, the OCC receives supervisory authority over all federal thrifts, and the Fed is given authority over thrift holding companies and their nondepository subsidiaries. The Fed retains its authority over national and state bank holding companies. The House Bill by contrast transfers virtually all the powers now resting with the OTS to the OCC except that authority over thrift holding companies is transferred to the Fed and

authority over state thrifts is transferred to the FDIC.
The Senate Bill eliminates the authority to issue new thrift charters. Under the House Bill, the thrift charter will continue to exist. The existing authority of a thrift to operate branches interstate is preserved under both bills.

Title IV: Private Fund Investment Advisers Registration Act of 2010

Like the House Bill, the Senate Bill requires registration under the Advisers Act of most hedge fund advisers. Both bills exempt advisers to venture capital funds. Any registered adviser would be required to keep records regarding its private funds, as prescribed by SEC rule. Unlike the House Bill, the Senate Bill also provides for exemptions for managers of private equity funds and single family offices. However, it requires advisers to private equity funds to maintain such records and provide to the SEC such reports as the SEC determines are necessary or appropriate in the public interest and for the protection of investors. In addition, the SEC would have to adopt rules defining venture capital funds, private equity funds, and single family offices. Foreign private advisers that have no place of business in the U.S. and have less than $25 million in assets under management attributable to U.S. clients or investors will not be required to register.

The Senate Bill directs the SEC to adjust the net worth threshold (but not the income threshold) for accredited investor status; for the first four years following enactment, the threshold would be $1 million, excluding the value of one’s primary residence. Every four years after enactment, the SEC would have to review the accredited investor thresholds . The House Bill has no such provision. Like the House Bill, the Senate Bill generally raises the asset threshold for investment adviser registration with the SEC from $25 million to $100 million. Finally, Title IV requires studies by the GAO on creating a self regulatory organization (“SRO”) for private funds and on the appropriate criteria for accredited investor status. The provisions of Title IV are effective one year after date of enactment of final legislation.

Title V: Insurance

The Senate Bill establishes the ONI within the Treasury. The Director of the ONI is appointed by the Treasury Secretary. The authority of the ONI extends to all lines of insurance except health insurance. The ONI is authorized, among other things, to monitor all aspects of the insurance industry and to identify regulatory gaps that could contribute to systemic risk. It also is authorized to collect information from insurers and affiliates, including by subpoena if it makes a written finding that the information is required to carry out its statutorily-authorized functions. The ONI may recommend to the Council that it designate an insurer and/or its affiliates as a Title I nonbank financial company subject to regulation by the Federal Reserve.

The ONI may preempt a state insurance measure to the extent that it results in less favorable treatment to a non-U.S. insurer domiciled in a foreign country and subject to an international insurance agreement on prudential measures than a U.S. insurer domiciled, licensed, or otherwise admitted in that state. It also may preempt a state insurance measure that is inconsistent with an International Insurance Agreement of Prudential Measures. The Secretary is authorized to negotiate and enter into International Insurance Agreements on Prudential Matters on behalf of the U.S.

The ONI must submit a report annually to Congress regarding its exercise of its preemption authority, and also must submit a report to Congress 18 months after the enactment of final legislation on how to modernize and improve the system of insurance in the U.S.

Another part of this title involves state-based insurance reform of nonadmitted insurance and reinsurance, and includes authorization of a study of the nonadmitted insurance market by the GAO. It also regulates credit for reinsurance and reinsurance agreements, and reinsurer insolvency. This subtitle has an unusual savings provision, which states that nothing is intended to modify, impair, or supersede the antitrust laws, and any implied or actual conflict will be resolved in favor of the antitrust laws, as well as a severability clause.

Title VI: Bank and Savings Association Holding Company and Depository Institutions Regulatory Improvements Act

Title VI is devoted to improvements in the regulation of bank and thrift holding companies and depository institutions to ensure these institutions do not pose a threat to U.S. financial stability. This title imposes a three-year moratorium, subject to some exceptions, on change of control applications as well as on approvals by the FDIC for deposit insurance on any credit card bank, ILC, or trust bank that is owned or controlled, directly or indirectly, by a commercial firm. A “commercial firm” is any entity, including its affiliates, that derives at least 15% of its consolidated annual gross revenues from engaging in activities that are not financial in nature or incidental to activities that are financial in nature. Banking regulators must consider systemic risk when assessing a bank holding company’s proposals to engage in mergers or acquisitions. Financial holding companies are required under the Senate Bill to remain well-capitalized and well-managed.

The GAO is required to study whether to eliminate the exceptions under the Bank Holding Company Act for credit card companies, ILCs, trust banks, thrifts, and other limited purpose entities from the definition of “bank” or “bank holding company.” The House Bill, on the other hand, generally eliminates the nonbank bank exceptions for depository institutions such as thrifts, credit card banks and ILCs.

The Senate Bill removes limitations on the ability of the appropriate banking regulator to obtain reports from and to examine subsidiaries of bank and thrift holding companies. Banking regulators, however, are required to coordinate their efforts with a subsidiary’s primary functional regulator.

The Senate Bill extends the reach of the affiliated transactions statute, Section 23A of the Federal Reserve Act, to any investment fund as to which the member bank is an investment adviser, to any transaction that involves the borrowing or lending of securities where the member bank has a credit exposure to the affiliate, and to any derivative transaction where the member bank has a credit exposure to the affiliate. It causes the tests to be made at the time of the transaction and at all times. Exemptions may be granted to national banks, by order, jointly by the Federal Reserve and the OCC with notice to the FDIC, subject to the FDIC’s objection. Exemptions may be granted to state banks or thrifts, by order, jointly by the Federal Reserve and the FDIC, but the FDIC must find that the exemption does not present an unacceptable risk to the Deposit Insurance Fund. The Federal Reserve is given rulemaking authority to determine how to take into account netting arrangements. The exception from Section 23A for financial subsidiaries of a bank is eliminated.

This title extends the lending limits for national banks with respect to credit exposure on derivatives, repurchase agreements, and securities lending and borrowing transactions, and amends the Federal Deposit Insurance Act to impose the same limits on state-chartered banks. Limits on derivatives, repurchase agreements, and securities borrowing and lending to insiders are extended. Insured banks are prohibited from purchasing or selling assets to insiders unless the transaction is on market terms and is limited to 10% of capital and surplus, unless the transaction has been approved in advance by a majority of the members of the board of directors.

Troubled banks are restricted from converting from national banks to state-chartered banks and thrifts, and vice versa. However, national banks and state insured banks are permitted to engage in *de novo* branching if the law of the affected state would permit *de novo* branching for in-state banks.

The Senate Bill authorizes the imposition of capital levels for bank and thrift holding companies, and requires that those holding companies and any company that directly or indirectly controls the depository institution serve as a source of financial strength to the depository subsidiaries.

The Senate Bill, like the House Bill, eliminates the authority in the Securities Exchange Act of 1934 (“Exchange Act”) for consolidated supervision of investment bank holding companies and permits a securities holding company that does not have a U.S. bank or thrift affiliate, but is required by a foreign regulator to be subject to comprehensive consolidated supervision, to register with the Federal Reserve and be subject to its

recordkeeping and reporting requirements, including capital and risk management and examination.

The Volcker Rule. Title VI of the Senate Bill also contains the so-called "Volcker Rule." In January of this year, President Obama announced a proposal (dubbed the "Volcker Rule" after its chief proponent, former Federal Reserve Chairman Paul Volcker) that would limit the scope of depository institution activities to prohibit banks and bank holding companies from owning, investing in, or sponsoring a hedge fund or private equity fund and from engaging in "proprietary trading operations unrelated to serving customers for [their] own profit." The proposal also would limit the size of financial organizations by placing "broader limits on the excessive growth of the market share of liabilities at the largest financial firms, to supplement existing caps on the market share of deposits."[6] The Treasury submitted draft legislation to Congress in March to enact the provisions of the Volcker Rule.

The Volcker Rule was announced after the House's approval of the House Bill so it is not incorporated in the House Bill. However, the House Bill does contain provisions allowing the Federal Reserve to limit the activities of large financial institutions under certain circumstances.

Sections 619 and 620 of the Senate Bill give effect to the Volcker Rule. Section 619 of the Dodd Bill requires the federal banking agencies, subject to the recommendations of the Council, to impose restrictions on banking companies in connection with their proprietary trading activities and their sponsorship of or investment in hedge funds and private equity funds. Section 620 imposes concentration limits on large financial firms that prohibit them from acquiring or merging with another company if their resulting liabilities would exceed 10% of all financial companies' consolidated liabilities.

"Proprietary trading" is defined as "purchasing or selling, or otherwise acquiring or disposing of, stocks, bonds, options, commodities, derivatives, or other financial instruments by an insured depository institution, a company that controls, directly or indirectly, an insured depository institution or is treated as a bank holding company for purposes of the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.), and any subsidiary of such institution or company, for the trading book (or such other portfolio as the Federal banking agencies may determine) of such institution, company, or subsidiary." Subject to restrictions decided on by the banking agencies, it would not include buying or selling financial instruments on behalf of a customer, in connection with market making, or in connection with or in facilitation of customer relationships, including hedging activities (for risk mitigation).

Under Section 619, the Council will have to make recommendations to banking regulators regarding statutory definitions and implementation of the required restrictions, including with respect to additional capital requirements, within six months of enactment of final legislation. The banking agencies would have to adopt final joint regulations reflecting the recommendations within nine months of their issuance. Covered entities would have two years from that point to divest themselves of any prohibited relationship or investment. One year extensions could be granted up to a total of three years with respect to any company.

Section 620, which would amend Section 13 of the Bank Holding Company Act, provides that large financial firms (insured depository institutions and companies that control them, bank holding companies, savings and loans, nonbank financial companies supervised by the Federal Reserve, and foreign banks or companies treated as a bank holding company) would, subject to the Council's recommendations, be prohibited from merging or consolidating with, or acquiring assets or control of any other company if the total consolidated liabilities of the acquirer would exceed 10% of the aggregate consolidated liabilities of all financial companies at the end of the preceding calendar year. Liabilities would include risk weighted assets less regulatory capital. For covered foreign entities, only U.S.-based operations would count towards liabilities. The Federal Reserve would be required to make rules to adapt the definition of "liabilities" to insurance and other nonbanking firms to ensure equitable treatment.

Section 989 of the Senate Bill also requires the GAO to conduct a study of the risks and conflicts associated with proprietary trading by and with "covered entities," including an evaluation of the impact of such trading on systemic risk. For purposes of this section, covered entities includes financial holding companies as well as

banking entities. Proprietary trading also is defined more broadly than in Section 619.

Title VII: Over-the-Counter Derivatives Markets Act

Senator Dodd's original OTC derivatives title was replaced in its entirety by the "Wall Street Transparency and Accountability Act of 2010," a bill filed jointly by Senate Agriculture Committee Chair Blanche Lincoln and Senator Dodd. Substitute Title VII generally tracks the bill passed out of the Senate Agriculture Committee with some important changes. Title VII will be effective 180 days after enactment.

As with the House Bill, the Senate Bill attempts to move derivatives trading from the so-called "shadow markets" onto transparent and regulated clearing and trading centers. The CFTC will have rulemaking and primary enforcement authority over swaps and the SEC will have rulemaking and primary enforcement authority over security-based swaps. The agencies will have joint jurisdiction over most mixed swaps. The Senate Bill provides that the agencies will define which swaps will be required to be cleared, and through rulemaking will further define who will qualify as a major swap participant or a commercial end user.

Swaps are defined broadly. Unlike the House Bill, the Senate Bill includes foreign exchange swaps and forwards in the definition of swaps. The Treasury could determine that foreign exchange swaps and forwards should be excluded from the clearing requirement, but they still would be required to be reported to a central reporting repository. With some exceptions, neither the SEC nor the CFTC will have jurisdiction over most "identified bank products."

Title VII requires registration and regulation of major swap/security-based swap dealers and major swap/security-based swaps participants (as used herein, the term "major swap participant" includes "major security-based swap participant"). Both the House and Senate Bills seek to regulate participants in the derivatives markets that maintain substantial non-hedging positions in derivatives or whose derivatives positions create substantial counterparty exposure that could have systemically significant adverse effects. The Senate Bill exempts positions maintained by employee benefit plans if held for hedging or mitigating risk associated with the operation of the plan. The Senate Bill, however, includes in the major swap participant category a financial entity that is highly leveraged relative to the amount of its capital and that maintains a substantial position in outstanding swaps in any of the major swap categories determined by the regulators. The CFTC/SEC will be required to define "substantial position" at a threshold that will allow for effective systemic risk monitoring.

Both the House and Senate Bills generally require that all swaps that meet the clearing criteria determined by the regulators will have to be cleared if a registered derivatives clearing organization accepts the swap for clearing. Both bills provide a carve out designed to permit commercial end users that use swaps to hedge commercial risk to avoid the clearing and related requirements. The House Bill exempts from clearing those transactions in which one or both of the counterparties is neither a swap dealer nor a major swap participant. The Senate Bill's carve out for end users is significantly narrower. Under the Senate Bill, the swap will be exempt from clearing if one of the parties qualifies for the end user exemption provided for in the bill. Financial entities, as defined in the bill, will not be entitled to use the end user exemption, even if they are using the swap to hedge commercial risk. Certain non swap dealer affiliates of a qualified end user will be able to rely on their affiliated commercial end user's exemption. However, financial entity affiliates will not be able to rely on their affiliate's exemption.

Swaps/security-based swaps subject to the clearing requirement also will be required to be traded on a registered exchange, a designated contract market, or a registered swap execution facility, assuming the swap/security-based swap is accepted for trading. End users that elect not to clear pursuant to the end user exemption will not be required to trade their swaps on an exchange.

Like the House Bill, Title VII imposes capital and initial and variation margin requirements on swap dealers and major swap participants. The requirements generally will be set higher for swaps that are not cleared, but will not apply to end-user exempted transactions. The appropriate federal banking agency, in consultation with the CFTC and the SEC, will prescribe capital and margin levels designed to help ensure

the safety and soundness of the swap dealer or major swap participant. Margin requirements will need to be at least as strict for nonbank dealers and participants as for banks.

Swaps not cleared or traded on an exchange still will need to be reported and record-keeping requirements also will apply. If no central repository accepts the swap for reporting, it will need to be reported to the CFTC or SEC, as appropriate.

Both the House and Senate Bills also impose business conduct standards on swap dealers and major swap participants, but the standards are stricter under the Senate Bill. It more broadly provides that a swap dealer that provides swap-related advice to or enters into a swap with a pension plan, endowment, or retirement plan, a state or local government or instrumentality, or a federal agency will have a fiduciary duty to that entity in connection with the advice or the swap. Moreover, a swap dealer or major swap participant will be required to verify that any counterparty meets the eligibility standards for an eligible contract participant (only eligible contract participants will be allowed to trade otherwise than on an exchange under both bills). Swap dealers and major swap participants will be required to disclose to all non-dealer, non-major swap participant counterparties information relating, among other things, to the risks of the swap, and the fees, incentives or other remuneration associated with the transaction. Swap dealers and major swap participants will be required to communicate “in a fair and balanced manner based on principles of fair dealing and good faith,” and, with respect to certain types of governmental entity counterparties, will need to have a reasonable basis for believing that the counterparty has a qualified and knowledgeable representative.

The Senate Bill also requires the CFTC and the SEC, as appropriate and in order to mitigate systemic risk, promote competition, or mitigate conflicts of interest, to determine whether to adopt rules to establish limits on the control of any clearing agency or exchange by a bank holding company with over $50 billion in consolidated assets, a nonbank financial company supervised by the Federal Reserve, or by a swap dealer or major swap participant or associated person.

Finally, the Senate Bill contains a controversial provision that effectively requires any bank or bank holding company to spin off its derivatives operations. It provides that: “notwithstanding any other provision of law (including regulations), no Federal assistance may be provided to any swaps entity with respect to any swap, security-based swap, or other activity of the swaps entity.” This provision, sponsored by Senate Agriculture Committee Chair Blanche Lincoln, survived Senate debate but the public opposition to it by House Financial Services Chair Barney Frank, FDIC Chair Sheila Bair, and even the Administration, puts its ultimate survival in doubt.

Title VIII: Payment, Clearing, and Settlement Supervision Act

Title VIII of the Senate Bill, effective on the date of enactment of a final bill, authorizes the Council to identify systemically important financial market utilities, including important payment, clearing, and settlement activities conducted by financial institutions. This title sets forth procedures and criteria to guide the Council’s designation of entities or activities as systemically important. If such entities are designated as systemically important, they are subject to oversight by the Federal Reserve. The Federal Reserve, in consultation with the Council and the appropriate regulatory authorities, is authorized to prescribe standards for these entities in addition to those that are prescribed by existing, primary regulators. For example, a securities clearing agency registered only with the SEC, but deemed by the Council as systemically important, would be subject both to SEC and Federal Reserve requirements. The Federal Reserve is authorized under the Senate Bill to prescribe risk management requirements, while taking into account "international standards and existing prudential standards."[7] The Federal Reserve also will have enhanced enforcement and examination authority over such entities.

Title IX: Investor Protections contains several subtitles relating to the regulation of U.S. securities markets and enforcement of U.S. securities laws.

Subtitle A is quite similar to the Investor Protection Act, a subtitle of the House Bill. Like the House Bill, it would establish an Investor Advisory Committee to address the SEC’s regulatory priorities and issues

relating to securities, trading, fee structures and the effectiveness of disclosures, investor protection, and initiatives to promote investor confidence. Unlike the House Bill, however, it does not provide for a uniform standard of conduct for broker-dealers and investment advisers as to personalized investment advice to retail customers. Instead, it requires the SEC to conduct a study of the effectiveness of existing legal or regulatory standards of care and to issue a report within one year. If the study identifies any gaps or overlap in the current legal or regulatory standards, the SEC is directed to begin a rulemaking within two years to address the gaps in overlap, to the extent they can do so under its existing authority. The subtitle also directs the GAO to conduct a study on mutual fund advertising as well as a study on conflicts of interest between securities underwriting and securities analysis functions within firms. It also clarifies the SEC's authority to require written disclosures to investors before the purchase of investment company shares.

Subtitle B of Title IX of the Senate Bill, among other things, gives the SEC rulemaking authority to prohibit or limit the use of mandatory predispute arbitration agreements. Like the House Bill, it amends Section 15 of the Exchange Act and Section 205 of the Advisers Act to authorize the SEC to conduct rulemaking to prohibit or impose conditions on mandatory predispute arbitration (along the lines of the original Treasury proposal). In addition, the House bill requires a Comptroller General study of the costs of FINRA arbitration versus litigation (and some other issues). The Senate Bill does not require a study, but the Senate Bill does contain a provision that requires a periodic GAO report as, among other things, to SRO arbitration services. Both the House and Senate Bills also authorize the new consumer financial protection entity to make rules to prohibit or limit arbitration. The Senate Bill also expands the SEC's Whistleblower Program and authorizes collateral bars.

Subtitle C covers credit rating agencies. The Senate Bill, like the House Bill, proposes a number of amendments to the statutory oversight regime for credit rating agencies registered with the SEC as "Nationally Recognized Statistical Rating Organizations" ("NRSROs").[8] Three features of the Senate Bill could have the biggest impact on the ratings industry: (1) the civil liability provisions, (2) the Franken Amendment, and (3) the mandate for federal agencies to remove ratings references from their rules.

The Senate Bill, like the House Bill, proposes to expose NRSROs to increased private liability.[9] Unlike the House Bill's proposed "gross negligence" pleading and liability standard, the Senate Bill proposes a "knowing or reckless" pleading standard that is coupled with a new due diligence duty requiring that NRSROs conduct a "reasonable investigation" and obtain a "reasonable verification" of relevant factual elements. It is not clear how burdensome this diligence standard will be compared to existing "best practices." The Senate Bill also clarifies that NRSROs are subject to liability "to the same extent as such provisions apply to statements made by a registered public accounting firm or securities analyst," and states that NRSRO statements are not forward looking for purposes of Section 21E of the Exchange Act.

Another provision that would dramatically alter the ratings landscape is the so-called "Franken Amendment." Among other things, this provision establishes a Credit Rating Agency Board, administered by the SEC, which is responsible for assigning asset-backed security rating responsibility to NRSROs, establishing a qualification and evaluation process for rating agencies, and creating standards for ratings fees. The House Bill requires a study of a rotating ratings assignment system, but it creates a Credit Ratings Agency Advisory Board to advise the SEC in ratings-related issues.

The Senate Bill also requires that federal agencies remove references to ratings from their rules, unless there is no reasonable alternative. This is similar to the House Bill, but unlike the House Bill, the Senate Bill does not remove ratings references from the federal statutes.

The Senate Bill requires NRSROs to have additional internal controls over the ratings process, and to submit to the SEC annual reports on compliance with securities laws and the NRSRO's policies and procedures. In addition, the Senate Bill specifies the cycle (annual) of SEC NRSRO examinations, and mandates SEC rulemaking on qualification standards for credit ratings analysts and ratings transparency. The Senate Bill would also create within the SEC a new Office of Credit Ratings, which would be a central office responsible for the entire SEC NRSRO oversight program. Various functions currently carried out in

the Division of Trading and Markets and the Office of Compliance Inspections and Examinations would be consolidated into this new office.[10]

Subtitle D of Title IX requires that securitizers retain (and not hedge) 5% of the credit risk of certain asset-backed securities ("ABS"), subject to modification by the relevant regulators that could either increase or decrease the retention amount. The House Bill is markedly broader in that it applies the 5% risk retention requirement to "creditors" and seems to cover a broader range of products. Both bills allow the retained risk to be shared as deemed appropriate by the regulators. Both the House and Senate Bills also allow for total or partial regulatory exemptions from the risk retention requirement. The relevant regulators are required to promulgate rules tailored to address differences in asset classes and in risk management practices. The Senate Bill explicitly authorizes exemptions for certain asset classes. Both bills also require disclosures relating to ABS and their underlying loans or assets.

Subtitles E and G address compensation practices and corporate governance. Most of these provisions apply to all public reporting companies, not just financial institutions. While the language differs, the Senate Bill, like the House Bill, requires non-binding shareholder votes on executive compensation and requires the adoption of standards related to compensation committee independence. The House Bill also requires a "say on pay" vote on golden parachute packages. The Senate Bill contains a clawback provision that allows companies to recover compensation paid out erroneously or because of material noncompliance with accounting standards. The Senate Bill also mandates additional compensation disclosures, including disclosures about the relationship of pay to performance, the ratio of CEO compensation to median employee compensation, and whether employees or board members are allowed to hedge against declines in the market value of the company's stock. Essentially codifying recent SEC rules, the Senate Bill requires companies to provide disclosure about why they do or do not separate the positions of Chairman and CEO.

The Senate Bill directs the FDIC to adopt rules establishing standards prohibiting "excessive compensation" or compensation plans that "could lead to material financial loss to the bank holding company." The House Bill contains provisions allowing regulators generally to regulate compensation at many classes of financial institutions.

For corporate governance matters, both the House and Senate Bills confirm the SEC's authority to adopt "proxy access" rules. The Senate Bill also requires majority voting for directors in uncontested elections. Codifying current rules of the New York Stock Exchange, the Senate Bill prohibits brokers from casting votes on board election, executive compensation and other matters designed by the SEC, without instructions from beneficial owners. The House Bill, on the other hand, exempts small public company issuers from the Sarbanes-Oxley Act's requirement that they obtain an audit of internal control over financial reporting.

The remaining subtitles of Title IX relate to the regulation of municipal securities (Subtitle H), the PCAOB (Subtitle I), and the management of the SEC (Subtitle F). They also call for self-funding of the SEC (Subtitle J).

Title X: Bureau of Consumer Financial Protection

As with the House Bill, the Senate Bill establishes a single-mission consumer protection organization to regulate consumer financial products and services offered by covered persons. Unlike the House Bill, the Senate version creates an autonomous bureau within the Federal Reserve rather than a stand-alone agency. The President, similarly to the initial leadership structure of the House Bill, names the Director of the Bureau and the Federal Reserve is prohibited from interfering with the Bureau's rulemaking, supervisory, or enforcement activities. Under the Senate Bill, the single Director would then continue as the head of the Bureau, in contrast to the House Bill, which provides for a transition to a five-member commission to lead the agency. Also unlike the House Bill, which funded the agency through a percentage of the Federal Reserve operating budget and assessments on the companies regulated, the Senate Bill provides the Director with the authority to draw up to 12% of the Federal Reserve's operating budget but does not permit assessments.

The Senate Bill provides the Bureau with broad rulemaking, supervisory, and enforcement powers applicable to the provision of consumer financial products and services, generally similar to the House Bill.

The scope of rulemaking authority is similar in the House and Senate Bills and encompasses the ability to establish rules concerning unfair, deceptive, or abusive acts or practices, disclosures, and exemptions, relating to the enumerated consumer laws. The Senate Bill, however, imposes significant checks on the Bureau's exclusive rulemaking authority. The members of the Council may permanently overturn any Bureau rule on a two-thirds vote if the members believe the rule would present a risk to the safety and soundness of the banking system or the stability of the U.S. financial system. In addition, the Chairman of the Council can stay the effectiveness of a rule temporarily upon petition by a member agency pending consideration by the Council.

Under the Senate Bill, the Bureau would supervise and enforce the enumerated consumer laws against depository institutions with $10 billion or more in assets, with such entities' prudential regulator having backup authority. Smaller institutions, as in the House Bill, would be subject to enforcement by their primary regulator, although unlike the House Bill the Senate Bill does not provide the Bureau with back-up authority. The Bureau also has supervisory authority over non-depository financial institutions and subsidiaries of insured depository institutions.

Both the House and Senate Bills exempt persons regulated by the SEC, the CFTC, and state insurance regulators from the consumer agency's jurisdiction, although the language of these exemptions differs. The Senate Bill also omits the exemption for automobile dealers that appears in the House Bill. Other provisions in the Senate Bill exempt small businesses and merchants engaged in offering payment plans. Both Bills exempt a range of other businesses. The Senate Bill also, however, limits the Bureau's ability to supervise and examine non-depository institutions to those engaged in mortgage-related activities and companies that meet a threshold as a "large participant" in the market for financial services to be defined in a rule adopted after consultation with the Federal Trade Commission.

The House and Senate Bills are generally similar in their approach to preemption of state laws by the new consumer agency. Both Bills provide that state laws are not preempted unless they are inconsistent with the enumerated consumer laws and that state laws affording greater consumer protection are not inconsistent with federal law. Both Bills also set forth detailed provisions to preserve the enforcement powers of the states. With respect to federally-chartered depository institutions, state consumer financial laws are preempted under both House and Senate Bills only if (i) the application of the law would have a discriminatory effect on national banks or federal thrifts, (ii) the law prevents or significantly interferes with the insured depository institution's ability to engage in the business of banking (the standard articulated in *Barnett Bank of Marion County*); or (iii) other federal law preempts the otherwise applicable state law. Only the Senate Bill, however, expressly allows the courts to make the preemption determination; both Bills allow the OCC to do so by regulation or order. Under both Bills, state laws apply to subsidiaries and affiliates of national banks and thrifts and states may exercise visitorial powers in line with the Supreme Court decision in *Cuomo v. Clearing House Assn. L.L.C.*, 129 S. Ct. 2710 (2009).

The Senate Bill also incorporates several specific rules on financial services practices that are not found in the House Bill. For example, the Senate Bill prohibits certain payments to residential mortgage originators, establishes certain standards for underwriting mortgages, and prohibits prepayment penalties on mortgages unless the consumer is offered a product that does not include such a penalty.

Other important provisions in the Senate Bill not found in the House Bill concern payment network rules and adverse actions based on a consumer report. Under the Senate Bill, debit interchange fees must be reasonable and proportional to the actual cost of processing the transaction, as determined pursuant to standards to be established by agency rulemaking. Card issuers with less than $10 billion in assets are exempt from this requirement. Payment card networks are also prohibited from restricting the use of incentives or discounts for using a different payment method, provided the incentive only distinguishes between payment card networks and not issuers. Payment card networks must also allow anyone to apply a minimum or maximum dollar amount to the acceptance of a payment card. As to consumer reports, the Senate Bill requires any person taking adverse action in whole or in part based on a

consumer report to provide the person with the numerical credit score used to make the adverse decision.

Title XI: Federal Reserve System Provisions

Title XI of the Senate Bill, in a shift of emphasis from the House Bill, provides both the Federal Reserve and the FDIC with broad economic stabilization powers, but prohibits the use of these powers on behalf of individual financial firms. These powers are only allowed to be used under certain circumstances, only for market-wide actions, must be pursuant to policies, procedures,and regulations, and subject to controls and transparency.

The Senate Bill explicitly authorizes the Federal Reserve to use the powers in Section 13(3) of the Federal Reserve Act to create broad-based programs and facilities, but it cannot use these powers for any single individual, partnership or corporation. Likewise, the FDIC is empowered to create a widely available program to guarantee obligations of solvent depository institutions, depository holding companies and affiliates during economic distress, but the FDIC no longer can provide "open bank" assistance to individual banks upon a finding of systemic risk; such individual action can only be undertaken on behalf of a bank that has been placed in receivership and for the purpose of winding down the institution.

The Federal Reserve's mission is expanded to include identifying and mitigating risks to financial stability. Unlike in the Dodd Bill, the Federal Reserve is not required to obtain the prior approval of the Treasury Secretary in order to exercise the powers in Section 13(3). Likewise, the final Senate Bill does not contain the sweeping provision that was threatened, but does require an after-the-fact audit of the Federal Reserve's recent actions in the financial crisis. In this regard, the Senate approved by a vote of 96-0 a revised amendment offered by Independent Vermont Senator Bernie Sanders, which requires a one-time GAO audit of the Federal Reserve's emergency lending since December 2007. The Federal Reserve also would be required to disclose publicly detailed information about the financial institutions it has assisted through lending. The Federal Reserve and the Administration strongly opposed Senator Sanders' original measure, which would have required ongoing audits of the Federal Reserve that would have extended to monetary policy decisions. The House Bill contains a broad audit provision similar to the earlier Sanders' amendment.

The FDIC's exercise of its guarantee authority with the concurrence of the Treasury must follow a finding by two-thirds of the members of the Boards of Directors of the Federal Reserve and the FDIC that there has been a liquidity event and that a failure to take action would have serious adverse effects on financial stability or economic conditions in the U.S. Congress must approve the maximum amount of the guarantee by joint resolution. The FDIC's authority to borrow from the Treasury is affirmed but the FDIC is required to charge fees and assessments to participants to recoup costs and losses.

Governance of the Federal Reserve System is modified by requiring the appointment of the President of the Federal Reserve Bank of New York by the President of the U.S., upon the advice and consent of the Senate. Members of the Boards of Directors of the Federal Reserve Banks may no longer be voted upon by their regulated institutions, nor can current or former directors, officers or employees of those institutions serve as directors of a Federal Reserve Bank. Finally, a position of Vice Chairman of Supervision is added to the Federal Reserve's Board, to be appointed by the President of the U.S., upon the advice and consent of the Senate, to oversee the supervision and regulation of the financial firms under the Federal Reserve's jurisdiction, report semi-annually to Congress, and make policy recommendations.

The potential for sovereign bailouts is also addressed in the Senate Bill (in Title XIV). The President is required to direct the U.S. Executive Director of the IMF to vote against a loan by the IMF to a country if the Executive Director determines the loan will not be repaid.

Conclusion

The Senate and House Bills both represent a major overhaul to financial regulation. Passage of a final bill would make sweeping changes to virtually every aspect of financial institution, services, and market regulation. We expect intense negotiations in the conference process as the Senate, the House, and the Administration all seek to resolve the differences in the bill. In this regard, we also expect to see increased efforts by affected parties seeking to be heard. Conference Chairman Frank has indicated that much of the conference process will be public. Passage of final legislation in many respects will represent the beginning of the process rather than the end, as a significant number of provisions direct the regulators to begin rulemaking. We will continue to monitor developments and to provide additional analysis to our clients.

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[1] *See* "Are We Halfway There Yet? House Passes Major Financial Services Bill While Senate Expected to Defer to Early Next Year," WilmerHale Alert (Dec. 16, 2009), available at: http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=9334.

[2] Four Republican Senators (Brown (MA), Collins (ME), Grassley (IA), and Snowe (ME)) voted with the Democrats for the bill while two Democratic Senators (Cantwell (WA) and Feingold (WI)) voted against the bill. The Senate amended H.R. 4173 by substituting its version of the bill and voted to pass H.R. 4173 in that form. To avoid confusion, this memorandum refers to the Senate version throughout as the "Senate Bill" and to the House version as the "House Bill."

[3] Conferees from the Senate Banking Committee are: Senators Dodd (D), Johnson (D), Reed (D), Schumer (D), Shelby (R), Corker (R), Crapo (R), and Gregg (R). Conferees from the Senate Agriculture Committee are: Lincoln (D), Leahy (D), Harkin (D), and Chambliss (R).

[4] "Financial Regulatory Reform: A New Foundation," (June 17, 2009), available at: http://www.financialstability.gov/docs/regs/FinalReport_web.pdf. *See also* "President Obama's Regulatory Reform Proposal—Major Overhaul or Missed Opportunity?" WilmerHale Alert (June 17, 2009), available at: http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=9176.

[5] *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (S. Ct. 1996).

[6] The initial Volcker Rule proposal is available at: http://www.financialstability.gov/docs/amend.final.-3-3-10.pdf.

[7] On February 2, 2010, the Bank of International Settlements announced that its Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions launched a comprehensive review of their existing standards for financial market infrastructures such as payment systems, securities settlement systems, and central counterparties.

[8] As a threshold matter, neither the Senate Bill nor the House Bill makes NRSRO registration mandatory for credit rating agencies.

[9] In addition to private liability measures, both the Senate and House Bills increase SEC enforcement remedies with respect to NRSROs.

[10] The SEC currently has approximately 16 "offices" and five "Divisions."

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