

The Dodd-Frank Wall Street Reform and Consumer Protection Act

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First But Not The Last Look

- Regulations
- Interpretations

Charter Conversions

Financial Stability Oversight Council

- Heads of Agencies plus an individual with insurance expertise
- Purpose
 - Identify risks presented bank holding companies and non-bank financial companies
 - Promote market discipline
 - Respond to threats to stability of US financial system

Savings Associations

- OTS is abolished
- Thrift charter is retained
- All regulation of savings associations transferred to OCC
- All regulation of savings and loan holding companies is transferred to Federal Reserve
- OCC will designate a Deputy Comptroller to have responsibility over savings associations

Enhancing Financial Institution Safety and Soundness Act of 2010

- Preserves federal thrift charter
- Merges Office of Thrift Supervision out of existence
- Deposit insurance reforms



OTS Life Expectancy: 12-18 Months

- The OTS must “transfer”:
 - Employees, funds, and property → OCC
 - Rulemaking authority, powers and duties to supervise federal savings associations → OCC
 - Regulatory authority over federal savings bank and mutual holding companies → Fed
 - Regulatory authority over state chartered thrifts → FDIC

Office of the Comptroller to Charter and Regulate Federal Thrifts

- OCC – Primary federal regulatory authority over federal thrifts
- Comptroller to designate new deputy controller responsible for the examination and supervision of federal thrifts
- OCC can continue to charter new federal thrifts

Thrift charter preserved, but do the burdens now outweigh the benefits?

- The elimination of the OTS will also eliminate some of the key benefits of choosing the thrift charter, and leave the OCC enforcing two different sets of rules
- Change in supervisory culture
- Home Owners Loan Act (“HOLA”) will continue to govern the powers and regulation of thrifts and their holding companies, but each of the agencies that assumes OTS responsibilities can be expected to interpret and enforce the HOLA in a manner that will mostly rationalize and reconcile the regulatory treatment of similarly situated depository institutions

- Loss of blanket preemption
- The QTL Test retained, but Act increases the risks and consequences associated with a failure to comply

If thrift fails to meet the QTL test, it is:

- No longer *required* to convert to a national bank under the Act, but would become subject to national bank activities limitations
- Vulnerable to enforcement action for violating Section 5 the HOLA
- Prohibited from paying dividends unless (1) permissible for a national bank, (2) are necessary to meet obligations of a holding company, and (3) pre-approved by the OCC

FDIC to Regulate State Savings Associations

- All functions of the OTS relating to state savings associations will be transferred to the FDIC
- FDIC Board seat once held by the director of the OTS is given to the director of the new CPFB

Federal Reserve to Regulate Thrift Holding Companies

- Given authority over thrift holdings companies and their non-depository subsidiaries

Regulations, Rules, Guidelines and Enforcement Proceedings Remain

- The transfers will not abate or affect any:
 - OTS action or proceeding
 - Terms of any enforcement orders, agreements, determinations, regulations, interpretive rules
 - Guidelines, procedures and other advisory matters

What about OTS Employees?

- To the extent practicable, the Act directs each transferred employee, including examiners, to initially be placed in a position at the OCC responsible for the same functions and duties
- Uncertainty exists about long-term expectations

Deposit Insurance Reforms - FDIC Assessment

- FDIC assessments for most institutions will now be determined based on:

The average consolidated total assets
minus
the average tangible equity

Reserve Ratio

- Minimum reserve ratio is set at 1.35% of estimated insured deposits
- FDIC has until September 30, 2010 to grow the DIF to the new floor of 1.35%

\$250,000 Deposit Insurance

- Amends FDIA by permanently increasing the standard maximum deposit insurance from \$100,000 to \$250,000

Regulation Q Repealed

- FRA, FDIA, and HOLA amended to eliminate prohibitions against the payment of interest on demand deposits
- Authorizes interest-bearing commercial checking accounts
- Effective one year after enactment

Unlimited Deposit Insurance for Non-Interest Bearing Transaction Accounts

- FDIC will fully insure the net amount maintained in a non-interest bearing transaction account until December 12, 2012
 - Interest cannot be paid or accrued on the account
 - Must be a standard demand deposit account without any prior notice of withdrawal requirements

Bank and Savings Association Holding Company and Depository Institution Regulatory Improvements Act of 2010

3-Year Moratorium on ILCs

- 3-year moratorium on approving an application for FDIC deposit insurance by an ILC
- Also applies to any change of control application, unless the ILC is in danger of default, or the change of control results from a merger or acquisition of the commercial company

Increased Standards for Interstate Acquisitions

- Bank must now be well capitalized and well managed to to obtain Fed approval for interstate branch acquisitions
- Interstate merger acquisitions require the resulting institution be well capitalized and well managed

***De Novo* Interstate Branching**

- States no longer permitted to “opt-in” to *de novo* interstate branching
- Authorized by all national and state banks

Enhanced Restrictions on Affiliate Transactions

- Broadens the existing restrictions on affiliate and insured transactions under 23A and 23B of the Reserve Act to include financial products such as repurchase agreements and derivative transactions that involved a credit exposure to affiliate
- Effective one year after the Title III transfer date

Legal Lending Limits

- National bank's legal lending limits are expanded to consider credit exposures to counterparties arising from certain derivative transactions such as swaps, repurchase agreements, reverse repurchase agreements, and securities lending or borrowing transactions
- Maryland follows national bank legal lending limits, so absent new state regulations, this would likely also apply to Maryland state chartered banks

Limitations on Charter Conversions

- No institution that is subject to a cease and desist order, formal enforcement order, or memorandum of understanding may convert its charter, UNLESS
 - The regulatory authority that issued the order does not object to the conversion, and
 - The regulatory authority for the institution following the proposed conversion, adopts and enforces the existing order as a condition to approving the application

Collins Amendment - Tougher Capital Requirements and Leverage Ratios

- Directs the federal bank regulators to impose, over time, minimum leverage capital and risk-based capital requirements
- Newly issued “hybrid” instruments, like trust preferred securities, will be off-limits in Tier 1 capital calculations
- Regulatory capital deductions for these hybrid instruments before 5/19/2009 would be phased in from 1/1/2013 through 1/1/2016

Smaller Banks Grandfathered from Capital Deduction Requirements

- Trust preferred investments for banks and BHCs with less than \$15 billion in assets as of 12/31/2009 will be grandfathered, and not be required to make capital deductions for these instruments, but it will apply to thrift holding companies in five years

Reasonable Fees for Payment Card Transactions

- Requires that any interchange transaction fee for a debit transaction be “reasonable and proportional” to the actual costs incurred by the issuer.
- Feds directed to enact final rules within 9 months to establish the standards for assessing “reasonable and proportional”

Exemptions to Interchange Fees

- Small issuers with assets of less than \$10 billion are exempted from the price regulation provisions
- Does not apply to reloadable prepaid cards and cards provided pursuant to government administered payment programs

Truth-in-Lending Act

- TILA's coverage to include non-real estate secured consumer credit transactions and consumer leases in amounts up to \$50,000 (adjusted annually for inflation beginning in 2012)

Small Business Data Collection

- ECOA amended to require lenders to, in connection with credit applications, to inquire whether the business is a women-owned, minority-owned or small business, and to maintain a record of the responses received

Mortgage Reform and Anti-Predatory Lending Act

Creates a Duty of Care

- Act creates a federal “duty of care” which requires:
 - (1)licensing and registration of mortgage originators (under the SAFE Act)
 - (2)borrowers have a documented ability to repay the loan and are provided with a “net tangible benefit”
 - (3) Loans do not have “predatory characteristics”
 - (4)Loan documents contain full disclosures and originator’s unique identifier

Creates a New Liability

- Originators who violate the “duty of care” will be liable to a borrower for the greater of actual damages or an amount equal to three times the total direct and indirect compensation received by the originator PLUS the costs of the action

Creates New Lender Liability – continued

- Act also provides consumers with right to rescind a loan for violation of the ability to repay and/or net tangible benefit standards
- Lenders have the ability to cure (within 90 days), which is defined as a no-cost modification or refinancing of the loan that would have satisfied the minimum standards upon origination of the loan

Safe Harbor for “Qualified Mortgages”

- Act creates a safe harbor for “Qualified Mortgages”, which is defined as a loan:
 - (1) Fully documented, 30 year fixed rate with no negative amortization or I/O features
 - (2) APR does not exceed average Fed prime rate by more than 1.5% (3.5% for sub. liens)
 - (3) Underwriting based on fully-indexed rate
 - (4) Income and other financial resources of borrower are verified
 - (5) Meets debt-to-income test prescribed by federal banking agencies

New TILA Liability and Enforcement Provisions

- Lenders who violate the ability to repay or anti-steering/compensation provisions can be liable for all interest and fees paid by borrower as well as actual and statutory damages
- Statutory damages for certain violations increased to \$200 - \$2,000

Statute of Limitations

- Statute of limitations is 3 years for fixed; and 1 year after first reset for ARM or 6 years in total for ARM with longer period for resets

Escrow Accounts Required

- Escrow accounts required for certain first lien mortgage loans:
 - Guaranteed by state or federal government
 - Required by state law
 - Principal does not exceed conforming loan limit and APR exceeds the average prime offer rate by 1.5%
 - Principal exceeds conforming loan limit and APR exceeds the average prime offer rate by 2.5%

TILA and RESPA Amendments

- **Servicer may not:**
 - Force-place insurance
 - Charge a fee for responding to a qualified written request
 - Fail to take timely action to respond to borrower's request to correct errors related to payment, payoff amounts or avoiding foreclosure
 - Fail to respond within 10 business days of a request from a borrower to provide contact information about the owner or assignee of loan
 - Fail to comply with other HUD regulations
 - Fail to return (or credit) an escrow balance within 20 business days of loan being paid off

Appraisal Independence

- Amends TILA to prohibit acts or practices that violate appraisal independence:
 - Appraisal conducted by person with an interest in underlying transaction
 - Mischaracterizing the appraised value
 - Influencing or encouraging appraiser to reach a target value
 - Withholding payment for an appraisal report when performed in accordance with contract

Expands State Attorney General Enforcement Authority

- State AG enforcement actions under TILA expanded to include:
 - Duty of care
 - Anti-Steering
 - Ability to repay
 - Escrow requirements
 - Appraisal independence
 - Prompt credit requirements
 - Pay-off statements
 - Property appraisal requirements for higher-risk mortgages

Requires Additional Disclosures

- At closing:
 - Information regarding settlement charges, including the aggregate amount of such charges, and the amount included in the loan and that to be paid at the closing;
 - the approximate wholesale rate of funds in connection with the loan;
 - Mortgage originator compensation;
 - Total interest payments over the loan term as a percentage of the loan principal; and
 - Certain monthly payment information for variable rate loans with escrow accounts.

More Disclosures

- New information that must be provided on periodic statements to be provided during each billing:
 - Loan principal
 - Current interest rate
 - Date on which rate will reset or adjust
 - Prepayment fee
 - Late fee
 - Phone number and email address that borrower can use to obtain information on the loan
 - Information on credit counseling agencies

Consumer Financial Protection Act of 2010 (Title X)

- Bureau of Consumer Financial Protection (CFPB)
- Preemption

Bureau of Consumer Financial Protection

- Independent Bureau at the Federal Reserve
 - Rules & orders not subject to Federal Reserve review
 - Financial Stability Oversight Council can set aside final regulations based on safety and soundness concerns
- “Regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws”

Bureau of Consumer Financial Protection continued

- Principal office in DC, Director may establish regional offices
- Coordinate with other federal and state regulatory agencies to “promote consistent treatment of consumer financial and investment products and services”
- Victim Relief Fund

Community Banks and the Bureau of Consumer Financial Protection

- Subject to CFPB rules, orders, regulations
- Not subject to CFPB examination/supervisory or enforcement authority
- CFPB rules enforced by prudential regulator

Community Banks and the Bureau of Consumer Financial Protection continued

- CFPB Director can require certain reports
- Supervision and enforcement authority over “covered persons” over \$10 billion in assets or not an insured depository institution

Bureau of Consumer Financial Protection – Purpose

- Implement and enforce the federal consumer financial protection laws consistently “for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent and competitive”

“Financial Product or Service”

- Extending credit and servicing loans
- Providing real estate settlement services
- Engaging in deposit-taking activities
- Providing check cashing, check collection or check guarantee services
- Providing payments or other financial data processing products or services to a consumer by technological means
- Collecting debt related to any consumer financial product or service
- As the CFPB may determine

“Consumer Financial Product or Service”

- A financial product or service offered or provided for use by consumers primarily for personal, family or household purposes
- Extending credit and servicing loans, providing real estate settlement services, and collecting debt related to any consumer financial product or service delivered, offered or provided in connection with the above

“Federal Consumer Financial Law”

- Title X of Dodd-Frank
- Rule or order of the CFPB
- Existing consumer protection laws
 - Equal Credit Opportunity Act
 - Fair Credit Billing Act
 - Home Owners Protection Act of 1998
 - Fair Debt Collection Practices Act
 - Home Mortgage Disclosure Act of 1974
 - Home Ownership and Equity Protection Act of 1994
 - Truth in Lending Act
 - Truth in Savings Act

Bureau of Consumer Financial Protection Functional Units

- Research, analyze and report on
 - Market developments for consumer financial products/services
 - Consumer awareness, understanding, use of disclosure
 - Consumer behavior
 - Experience of underserved consumers
- Community affairs
- Collecting and tracking complaints

Bureau of Consumer Financial Protection Offices

- Fair Lending and Equal Opportunity
- Financial Education
- Service Member Affairs
- Financial Protection for Older Americans
- Consumer Advisory Board
 - Advise and consult with CFPB

Objectives of the Bureau of Consumer Financial Protection

- Consumers provided with timely and understandable information
- Protected from unfair, deceptive or abusive acts and practices, discrimination
- Outdated, unnecessary burdensome regulations/reduce regulatory burdens
- Consistent enforcement
- Transparent, efficient markets to facilitate access and innovation

Primary Functions of the Bureau of Consumer Financial Protection

- Financial education programs
- Consumer complaints
- Identify risks – consumers, markets
- Supervise certain financial institutions and other companies, enforcement
- Rules, orders and guidance implementing federal consumer financial law

Rulemaking Authority

- Prescribe rules, issue orders and guidance, to administer and carry out the Federal consumer financial laws and prevent evasion thereof
 - Prohibiting unfair, deceptive or abusive acts or practices
- Potential benefits and costs, impact
- Consult with prudential regulators and other federal agencies
- Exemptive authority
- Ongoing monitoring of risks to consumers
- Restrict mandatory pre-dispute arbitration

Exemptions

- Auto dealers
- Merchants, retailers, other sellers of nonfinancial goods and services
- Real estate brokerage activities
- Accountants and tax preparers, lawyers
- Regulated by state insurance regulator

Preemption After Dodd-Frank

Early Statutory Preemption

- 12 U.S.C. § 371 (1913)
 - Preemption of certain state laws – real estate lending activities
- 12 U.S.C. § 36 (1927)
 - Preemption with respect to interstate branches
 - OCC enforcement of applicable state laws – branches of national banks

Early Statutory Preemption continued

- 12 U.S.C. § 85 (1933)
 - most favored lender doctrine
- 12 U.S.C. § 1463(a)(1) and (g) (1933) (Thriffts)
 - OTS examination authority
 - Preemption of state usury laws

Preemption – National Banks

- *Marquette National Bank of Minneapolis v. First Bank of Omaha Service Corp.* (1978)
 - National bank may charge out-of-state credit card customers interest rate allowed by home state, even if in violation of usury laws in the customer's state
- Depository Institutions Deregulation and Monetary Control Act of 1980 (12 U.S.C § 1831d)
 - Allowed state banks to charge interest rates allowed in state where bank located

Preemption – National Banks continued

- Preemption expands to cover most state consumer laws
 - Cases
 - OCC opinions

Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994

- Section 36(f) of National Bank Act
- Interstate branch of national banks generally subject to state consumer laws
- Exemptions from state law where federal law preempts application of state law to national bank, or OCC determines the state law discriminates against national banks

Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 continued

- Granted OCC authority to enforce non-preempted state consumer laws

Barnett Bank of Marion County, N.A. v. Nelson (1996)

- NBA provision authorizing insurance agent activities in small towns for national banks preempts state law prohibiting national bank from selling insurance
- “Where Congress has not expressly conditioned the grant of ‘power’ [to national banks] upon a grant of state permission ... no such condition applies.”

Barnett Bank of Marion Country, N.A. v. Nelson (1996) continued

- “Barnett Standard”
 - Conflict preemption
 - Case by case basis
- Preemption continued to expand after *Barnett*

12 C.F.R. §§ 7.4000, 7.4007 - 7.4009 (2004)

- OCC rules on preemption and visitorial powers
- State laws that “obstruct, impair or condition a national bank’s” lending, deposit taking powers or other federally-granted powers not applicable to national banks
- Specific types of laws that do/do not apply to national banks

12 C.F.R. §§ 7.4000, 7.4007 - 7.4009 (2004) continued

- Exclusive supervisory/visitorial power over national banks (banking activities)
 - States have no examination or supervisory power over
 - applicable state laws can not be enforced by states

Watters and Cuomo

- *Watters v. Wachovia Bank, N.A.* (2007)
 - Subsidiaries of national banks not subject to state licensing, visitorial and reporting requirements to same extent as the bank itself
- *Cuomo v. Clearing House Association, L.L.C., Et. Al.* (2009)
 - Invalidated OCC's prohibition of state enforcement of applicable state laws - States may prosecute enforcement actions to enforce applicable state laws
 - No investigation/enforcement/subpoena power outside of lawsuit to enforce

Thrifts – OTS Regulations Addressing Preemption

- 12 C.F.R. § 545.2
 - The “exercise of the [OTS]’s authority is preemptive of any state law purporting to address ... the operations of a Federal savings association”
- 12 C.F.R. § 557.11 (1997)
 - Preempts state law with respect to deposit-related activities
- 12 C.F.R. § 560.2 (1996)
 - Preempts lending-related state laws
 - Specifies certain laws not preempted

State Farm Bank v. Reardon **(2008)**

- Applied *Watters* principles to thrifts
- State laws preempted with respect to exclusive agents exercising the lending powers of a federal savings association
- Focus on activity being regulated, not who is being regulated
- Additional cases upholding preemption

Summary

- Broad preemption prior to Dodd-Frank with respect to “core banking” activities
- OCC and OTS have expanded idea of “core banking” for more extensive preemption
- Field preemption
- OTS preemption almost universal
- Dodd-Frank will significantly narrow preemption

“State Consumer Financial Law”

- A State law that does not directly or indirectly discriminate against national banks and that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer

Preemption Under Dodd-Frank

- State consumer protection laws may be preempted:
 - Discriminatory effect on national banks/thrifts,
 - By OCC regulation/order or court:
 - On a case-by-case basis – impact of a particular State consumer protection law on any national bank

Preemption Under Dodd-Frank continued

- If the law “prevents or significantly interferes with the exercise by the national bank of its powers”
 - In accordance with the *Barnett* standard, or
- Law is preempted by another Federal law

Preemption Under Dodd-Frank, continued

- Must “consult with” CFPB
- OCC must review each preemption determination every 5 years, publish decision to continue, rescind or amend for notice & comment
- Existing contracts “grandfathered”
- Does not seem to contemplate licensing

Preemption Under Dodd-Frank Federal Thrifts

- Federal thrifts subject to same preemption standards as national banks
 - Specifically states that Sections 4 and 5 of the HOLA do “not occupy the field in any area of State law”
- HOLA Section 5(a)
 - OTS Director authorized to prescribe regulations “to provide for the organization, incorporation, examination, operation and regulation of ... Federal savings associations”

Preemption Under Dodd-Frank Federal Thrifts continued

- HOLA Sections 4 and 5
 - Provide for supervision of thrifts by OTS and provides extensive rules for their operation

State Enforcement Powers

- States may enforce Act and rules promulgated thereunder against state-chartered banks
- States may enforce CFPB rules against national banks and federal thrifts
- Codifies *Cuomo* with respect to state enforcement actions against national banks and thrifts to enforce applicable state law

Preemption for National Bank Subsidiaries after Dodd-Frank

- State laws apply to non-bank subsidiaries or affiliates of a national bank to the same extent apply to any person, corporation or other entity subject to such state laws

Interest Rates

- Right of national banks to charge interest at the maximum rate allowed by state banks in the state where located not affected.
- Ability of national banks to “export” interest rate of state they are located in to other states in which they operate unclear.
- CFPB not authorized to establish a usury limit

Corporate and Securities Provisions (Title IX)

Securities Provisions

- Regulation D Private Offerings
 - “Bad boy” restrictions for Rule 506 offerings
 - Changes to “accredited investor” standard
- Anti-Fraud Liability
 - Aiding & abetting liability extended to all provisions of the Securities Act
 - Aiding & abetting liability extended to “reckless” behavior
 - Still no private right of action for aiding & abetting
 - Study

Securities Provisions continued

- Additional enforcement tools for SEC
- SEC empowered to shorten the 10-day filing timeframe for Form 3, Schedules 13D and 13G

Private Placement/Regulation D Overview

- Every offer or sale of securities requires registration or exemption
- Regulation D provides a “safe harbor” exemption for private offerings in compliance with its provisions
- Rule 505 – up to \$5 million, up to 35 non-accredited investors and unlimited accredited investors

Private Placement/Regulation D Overview continued

- Rule 506 – up to 35 non-accredited but “sophisticated” investors, unlimited accredited investors
- Non-accredited investors must be provided certain prescribed information and audited financials

“Bad Boy” Restrictions

- Certain issuers cannot conduct an exempt private offering under Rule 505
 - Prior registration statement subject to SEC stop order (5 years)
 - Conviction or restraining order - purchase or sale of a security or the making of any false filing with the SEC
 - Certain bars for officers, directors, 10% stockholders

“Bad Boy” Restrictions, continued

- Act extends these restrictions to Rule 506 private offerings
- No time limit for convictions in connection with the purchase or sale of a security or making a false SEC filing

“Bad Boy” Restrictions, continued

- Adds additional categories of “bad actors” that cannot conduct an exempt private offering under Rule 506
 - Order of state securities, banking or similar regulator:
 - Bars person from engaging in securities, insurance, banking, savings association or credit union activities, or
 - Is a final order in connection with fraudulent, manipulative or deceptive conduct (10 years)

“Accredited Investor”

Why is this important?

- No limit on the number of accredited investors in a private offering conducted under Rules 505 and 506
- Accredited investors do not need to be provided the prescribed information about the issuer and the offering required by Rule 501 under Regulation D
 - Audited financial statements

Who is An Accredited Investor?

- Natural person with individual or joint (with spouse) net worth exceeding \$1 million
- Natural person with income exceeding \$200,000 in last 2 years (\$300,000 with spouse) and reasonable expectation of same in current year
- Director, executive officer or general partner of the issuer or the general partner of issuer

Who is An Accredited Investor? continued

- Bank, registered broker/dealer, insurance company, registered investment company, business development company or small business investment company
- Certain other entities

“Accredited Investor” Changes to the Definition

- As of July 21, value of primary residence excluded from net worth calculation
- Otherwise net worth standard remains at \$1,000,000 for four years
- SEC to review the other standards for natural persons and may modify as appropriate
- SEC to review and adjust the definition every four years after initial four-year period (natural persons)

Disclosure and Corporate Governance Provisions of the Dodd-Frank Act

- Stockholder votes on executive compensation
- Additional executive compensation disclosure
- Heightened compensation committee standards for listed companies
- Clawback policies for listed companies
- Permitted hedging

Disclosure and Corporate Governance Provisions of the Dodd-Frank Act continued

- Exemption from auditor attestation requirements of internal control over financial reporting
- Proxy access

Stockholder Votes on Executive Compensation

- Say on pay
 - Non-binding vote on executive compensation
 - Stockholders vote how often held (1, 2 or 3 years)
- Say on golden parachutes
 - “Clear and simple” disclosure of payments to named executive officers
- SEC can exempt certain issuers or classes of issuers
 - Must consider whether requirements “disproportionately burden small issuers”

Additional Compensation Disclosure

- Pay vs. performance
 - Relationship between executive compensation and financial performance
 - Stock price, dividends
 - Graphic representation permitted
- CEO pay vs. employee pay
 - Median annual compensation excluding CEO
 - Annual compensation of CEO
 - Ratio

Compensation Committees of Listed Companies

- Increased independence standards
- Authorized to retain or obtain the advice of compensation consultants, legal counsel and other advisors in its sole discretion
- All such advisors must be independent

Compensation Committees of Listed Companies continued

- Directly responsible for the appointment, compensation and oversight of such consultants or advisors
- Company must provide funding

Adoption of “Clawback” Policy (listed companies)

- Policy to recover “excess” incentive pay paid to current or former executive officers
- During three-year period
- Before an accounting restatement
- Due to material noncompliance with any financial reporting requirement under the securities laws

Adoption of “Clawback” Policy (listed companies) continued

- No misconduct on part of issuer or executive officers is required
- Disclosure of policy required

Compensation Standards for Financial Institutions, etc.

- Federal financial regulators to establish standards to prohibit incentive-based compensation arrangements that
 - Encourage inappropriate risks by providing excessive compensation, fees or benefits, or
 - Could lead to a material financial loss
- Banks with assets of less than \$1 billion exempt
- Recent Interagency Final Guidance on Incentive Compensation still applicable

Other

- Permitted hedging by employees and directors
- Disclosure of the reasons the company has chosen to have the same or different persons serve as Chairman and CEO
- Brokers and other record holders cannot vote shares without instructions – **say on pay**, compensation, other “significant matters”
- Authorizes SEC to adopt proxy access, and exempt certain issuers
 - “... disproportionately burdens small issuers”

Whistleblower Provisions

- Expanded to persons who provide original information on any securities law violation
- Leads to the successful enforcement of any judicial or administrative action by the SEC
- Resulting in monetary sanctions over \$1 million

Whistleblower Provisions continued

- 10%-30% of collected monetary sanctions
- Prohibition against retaliation

Exemption from Auditor Attestation of Internal Controls Requirement

- Section 404(a) of Sarbanes-Oxley requires SEC reporting companies to maintain, evaluate and report on “internal control over financial reporting”
- Section 404(b) requires that companies’ auditors review and attest to the company’s internal control over financial reporting
- Smaller reporting companies (public float less than \$75 million) exempted from auditor attestation requirement

“Internal Control Over Financial Reporting”

- Process designed by, or under the supervision of, the issuer's principal executive and principal financial officers, or persons performing similar functions, and effected by the issuer's board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in

“Internal Control Over Financial Reporting” continued

accordance with generally accepted accounting principles and includes those policies and procedures that:

- Pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer;

“Internal Control Over Financial Reporting,” continued

- Provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the issuer; and

“Internal Control Over Financial Reporting,” continued

- Provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the issuer's assets that could have a material effect on the financial statements.

Evaluation of Internal Control Over Financial Reporting

- Committee of Sponsoring Organizations of the Treadway Commission *Internal Control-Integrated Framework* (1992)
- Jack Anderson, Rowles & Company LLP

Improving Access to Mainstream Financial Institutions

Title XII

Purpose of Title XII

- “Encourage initiatives for financial products and services that are appropriate and accessible for millions of Americans who are not fully incorporated into the financial mainstream”
- Accomplished via two main programs to be established by Secretary of the Treasury

Expanded Access to Mainstream Financial Institutions

- Enable low- and moderate-income individuals to establish accounts at federally insured financial institutions that “are appropriate to meet the financial needs of such individuals” on terms that are “reasonable” for them
- Entities that participate may, but are not required to, provide such individuals with services related to their accounts
 - Small-dollar value loans
 - Financial education and counseling

Low-Cost Alternatives to Small Dollar Loans

- Provide low-cost, small loans as alternative to “more costly” small-dollar (i.e. payday) loans
- Such loans must be made on “terms and conditions” and “pursuant to lending practices” that are “reasonable for consumers”

Low-Cost Alternatives to Small Dollar Loans continued

- Recipients of grants for this program must take steps to promote financial literacy and education to loan recipients
 - Counseling services
 - Wealth building programs

Loan-Loss Reserve Funds Grants

- From Treasury's Community Development Financial Institutions Fund (CDFI Fund)
- To establish loan loss reserve funds to mitigate losses of small dollar loan programs
 - Cannot use to provide direct loans

Loan-Loss Reserve Funds

Grants continued

- Must provide non-Federal matching funds in an amount equal to 50% of grant
- Grants for technological assistance
 - Technology, staff support, other costs associated with establishing program