Financial Institutions Update

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A Summary For Community Banks of the Dodd-Frank Wall Street Reform and Consumer Protection Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act was signed into law by President Obama on July 21, 2010. Dodd-Frank will impact the financial services industry more extensively than any banking legislation since the 1930's.

Many of the Act's provisions will affect the nation's money center and large regional institutions and will not directly impact most community banks. This differentiation is the result of effective lobbying by community bank interests and may help level the playing field between smaller institutions and their larger competitors.

In this summary we will focus on those aspects of the 2,300-page legislation that will have implications for community banks in Wisconsin and the Midwest. Many areas covered by the bill – such as proprietary trading, hedge fund restrictions, swaps, derivatives and credit rating agencies – are less likely to affect community banks, and in the interest of brevity we will not address them here.

The Act requires the various federal regulatory agencies to promulgate approximately 250 new rules, and to engage in over 65 "studies" on a variety of subjects, over the next 6-18 months. Many of these studies could result in new rulemaking. The regulatory implementation stage will likely prove to be a frenetic time for both regulators and the industry, with new proposed rules being issued on a continual basis. Fortunately, not all of these new rules will affect community banks.

While community banks will certainly be challenged by the many new laws and regulations and the attendant costs and burdens of compliance, many will undoubtedly find new marketing or product opportunities which arise from the Act. In either case, all banks will be dealing with the provisions of Dodd-Frank for years to come.

Deposit Insurance

The Act contains several important changes with regard to deposit insurance.

Change in FDIC Assessment Base

FDIC insurance assessments are currently based on an insured depository institution's deposit base but, in the future, they will be based on an institution's average consolidated total assets minus its average tangible equity. This change is expected to benefit community banks because it will make larger banks, which are less dependent than community banks on deposits for funding revenue generating activities, responsible for a greater portion of the cost of federal deposit insurance. This provision will be effective upon enactment; however, compliance is not required until the FDIC amends its regulations defining "assessment base."

Permanent Increase in Deposit Insurance Limits

Effective upon enactment (July 21, 2010) the standard maximum deposit insurance amount has been permanently increased to $250,000.

Insurance on Noninterest-Bearing Transaction Accounts

Beginning December 31, 2010 (the scheduled termination date for the existing Transaction Account Guarantee Program, or TAGP) and continuing through January 1, 2013, Dodd-Frank will provide unlimited insurance for funds held in non-interest bearing transaction accounts. Currently, banks participating in TAGP pay a fee of 15 to 25 basis points of the daily average balance in excess of $250,000 held in non-interest bearing transaction accounts. However, institutions will not be separately assessed for the additional coverage, and the unlimited insurance will be included in assessments for the overall insurance program.

There is an important distinction between this new insurance for non-interest bearing transaction accounts and the existing TAGP. The permanent unlimited insurance for non-interest bearing accounts will not extend to IOLTA accounts or minimal interest-bearing NOW accounts, which are currently covered under TAGP.

Interest-Bearing Transaction Accounts Authorized
The prohibition on paying interest on demand deposits is repealed effective July 21, 2011, one year from the date of enactment. This effectively negates any remaining restrictions imposed by Regulation Q and will make many of the products and services that banks had traditionally used to circumvent Regulation Q (such as repo sweeps, Eurodollar sweeps and earnings credits) a thing of the past. The likely impact for community banks will be to increase the cost of funds, further narrow net interest margins and add an element of rate competition for commercial deposits.

Deposit Insurance Fund
The reserve ratio of the deposit insurance fund (DIF) is no longer capped at 1.5%, and the FDIC is no longer required to refund excess amounts in the DIF to its member banks. Additionally, the reserve ratio in a given year may not be less than 1.35% of estimated insured deposits, or the comparable percentage of the assessment base. The FDIC has until September 30, 2020 to raise the reserve ratio of the deposit insurance fund to 1.35%. In setting the assessments necessary to meet the 1.35% level, the FDIC is to look to larger institutions (those with more than $10 billion in consolidated assets) to fund the increase in the reserve over 1.15 percent.

Residential Mortgage Reform and Minimum Lending Standards

The Act includes a number of provisions designed to bolster the residential mortgage loan underwriting process, and increases the legal liability of banks that fail to take steps to ensure and document that the borrower has the capacity and ability to repay the loan. The new liability standards will attach only to "non-qualified" mortgage loans (as discussed below). Many of the provisions impacting the residential mortgage lending process will be implemented by regulations to be issued by the Consumer Financial Protection Bureau (CFPB) after it is established.

The Act amends the Truth-in-Lending Act (TILA) by imposing new minimum requirements on lenders when originating residential mortgage loans. The stated legislative purpose is *"to assure that consumers … receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive or abusive."*

A new federal "duty of care" requires originators to avoid "steering" a customer to a loan product for which they lack the ability to repay, or that has "predatory characteristics or effects." Regulations will be issued by the CFPB to ensure that lenders do not commit *"abusive or unfair lending practices that promote disparities among consumers of equal credit worthiness but of different race, ethnicity, gender or age."*

The new minimum standards will lead to regulations that will require lenders at time of application to make a "reasonable and good faith determination" that the consumer has a reasonable ability to repay the loan according to its terms, based on a review of "verified and documented" information. The new law specifies the factual basis for a creditor to make this determination and discusses the necessary credit review and income verification process in some detail.

Failure to follow these minimum lending standards can lead to monetary damages under the TILA against the lender, and also may be specifically raised by the borrower as a defense in a foreclosure action.

There are some safe harbor provisions included in the Act, which state that with respect to certain "qualified mortgages" there will be a presumption in favor of the originator or any assignee of the loan that the consumer has the ability to repay the loan.

"Qualified mortgages" include loans for which the regular periodic payments will not result in an increase of the principal balance, or permit the consumer to defer repayment of principal. Balloon payment mortgages (including any loan where a scheduled payment is more than twice as large as the average of previous payments) are generally not "qualified mortgages," although the CFPB may permit a balloon mortgage to be a qualified mortgage in certain cases when the creditor is operating predominantly in rural or underserved areas.

Qualified mortgages must include appropriate verifications and documentation, and must have a payment schedule which fully amortizes the loan during the loan term. Regulations will establish debt-to-income and other measures or ratios that qualified mortgages will have to meet.

In a qualified mortgage, the total points and fees (as defined) may not exceed 3 percent of the loan amount. The Act directs the CFPB to *"consider the potential impact of such rules on rural areas and other areas where home values are lower"* when writing rules to implement the 3 percent points-and-fees cap, and to adjust the criteria for lenders who make "smaller loans." In addition, the term of a qualified mortgage loan generally may not exceed 30 years.

The Act also sets new prohibitions on the manner in which mortgage brokers may be compensated in connection with loan originations, and bans "yield spread premiums" and other incentive payment formulas where the price paid to the broker varies based on loan terms (other than the amount of principal).

Finally, there are new limitations imposed in the Act on the prepayment penalties that may be charged in residential mortgage loans.

Consumer Provisions and Truth in Lending

Consumer Financial Protection Bureau
One of the Act's farthest reaching provisions is the establishment of the Consumer Financial Protection Bureau, a new independent executive

agency within the Federal Reserve System. The Federal Reserve must fund the CFPB but cannot intervene in matters before the CFPB director, interfere with the CFPB's officers or employees, or interfere with the CFPB's rulemaking authority. The CFPB director will be appointed by the President with the advice and consent of the Senate.

The CFPB was created to take over most of the consumer protection functions related to certain existing federal consumer protection laws that are currently overseen by the federal banking agencies. The consumer protection laws now within the control of the CFPB include (among others) TILA, RESPA, HMDA, the Fair Debt Collection Practices Act and the Fair Credit Reporting Act.

The CFPB will have broad rulemaking authority over federal consumer protection laws, and courts are required to give great deference to its interpretations. The CFPB also has the authority to issue rules covering unfair, deceptive or abusive practices.

The CFPB will have authority over persons engaged in offering or providing a consumer financial product or service, which includes (among other things) extending credit and servicing loans, taking deposits, providing most real estate settlement services, providing check cashing services, providing consumer credit counseling or loan modification services, collecting or providing consumer report information, and collecting debt. Notable exceptions include persons regulated by the SEC, auto dealers, and persons providing certain real estate brokerage activities.

Community banks will have far less contact with the CFPB than their larger competitors. While the CFPB has exclusive examination authority and primary enforcement authority over federal consumer financial laws for institutions with more than $10 billion in assets, it can merely "participate with the primary federal regulators" in examinations of smaller banks and will have no enforcement authority over these institutions.

Thus, community banks will be subject to the CFPB's consumer financial protection rules but will continue to be examined by their primary federal regulator.

Most provisions of the Act will become effective on the designated transfer date (the date that authority over consumer financial regulation is transferred to the CFPB). The transfer date must be specified by the federal regulatory agencies currently administering the federal consumer financial protection laws within 60 days after enactment (September 19 of this year although this date may be extended in certain cases). The designated transfer date itself can be no earlier than 6 months and no later than 18 months (including possible extensions) after enactment.

Arbitration
The CFPB was given the power to prohibit or limit mandatory predispute arbitration provisions, but only after conducting a study. If limits are imposed, they must be consistent with the study.

Expanded Truth in Lending Coverage
Prior to the Act, consumer loans in amounts greater than $25,000 were exempt from TILA, unless they were secured by real property. The Act increases the exemption threshold to $50,000, meaning that more consumer loans will fall within TILA's coverage. Moreover, starting on December 31, 2011, the CFPB must adjust the exemption amount for inflation on an annual basis.

Civil Penalties
Civil penalties for violations of CFPB regulations can be severe: up to $5,000 per day for any violation; up to $25,000 per day for reckless violations; and up to $1 million per day for knowing violations.

Minimum Leverage and Risk-Based Capital Standards

Provisions of the Act commonly referred to as the "Collins Amendment" establish new minimum leverage and risk-based capital requirements on financial institution holding companies and eliminate the inclusion of "hybrid capital" instruments in Tier 1 capital by certain institutions.

The appropriate federal bank regulators are required under the Act to establish new minimum leverage and risk-based capital requirements on financial institution holding companies and systemically important non-bank financial companies within 18 months of the effective date of the Act. The minimum thresholds to be established must not be less than those applicable to insured depository institutions as of the date of enactment of the Act under the prompt-corrective action provisions of the Federal Deposit Insurance Act. The Act also establishes certain regulatory capital deductions with respect to hybrid capital instruments such as Trust Preferred Securities that will effectively disallow the inclusion of such instruments in Tier 1 capital. However, debt and equity instruments issued to the Treasury Department (such as preferred stock and borrowings under the TARP program) are exempt from the Collins Amendment and are permanently includable in Tier 1 capital.

As originally drafted, the Collins Amendment struck fear in the hearts of many community bankers in that it would have effectively eliminated the small bank holding company exemption for bank holding companies under $500 million in total consolidated assets, which potentially could have caused a substantial number of such companies to become undercapitalized overnight. After significant debate in the conference committee, however, most community bank holding companies were excluded from the new restrictions imposed by the Act. The specific requirements vary according to the size and nature of the holding company:

- Bank holding companies with over $15 billion in assets will be subject to the new minimum risk-based and leverage capital requirements upon implementation of the regulations within 18 months of enactment of the Act. Exclusion of hybrid instruments from Tier 1 capital for such institutions will be incrementally phased-in between January 1, 2013 and January 1, 2016.
- Bank holding companies with assets between $500 million and $15 billion will also be subject to the new minimum risk-based and leverage capital requirements upon implementation of the regulations, but any hybrid instruments issued prior to May 19, 2010 will be permanently grandfathered in as Tier 1 capital at their current allowable levels.
- The Federal Reserve's Small Bank Holding Company Policy Statement will still apply to bank holding companies with assets

under $500 million, completely exempting such institutions from the new restrictions of the Collins Amendment.
- All thrift holding companies will be subject to the new minimum risk-based and leverage capital requirements 5 years after enactment of the Act and, for thrift holding companies with assets over $15 billion, the exclusion of hybrid instruments from Tier 1 capital will be phased in between January 1, 2013 and January 1, 2016.
- Mutual holding companies will be subject to the new minimum risk-based and leverage capital requirements on the same schedule as their non-mutual holding company counterparts, and any hybrid instruments issued prior to May 19, 2010 will be permanently grandfathered in as Tier 1 capital at their current allowable levels for all mutual holding companies.

De Novo Interstate Branching

One provision that has attracted very little attention or political opposition, but which nonetheless could have a significant impact on community banks, is the removal of the restrictions on interstate branching contained in the 1994 Riegle-Neal Interstate Banking and Branching Efficiency Act. Under Riegle-Neal, banks generally have been limited in their ability to establish branches outside of their home state without acquiring a whole institution. The Act removes these restrictions and allows national banks and state banks to establish branches in any state if, under the laws of the state in which the branch is to be located, a state bank chartered by that state would be permitted to establish the branch. This could result in opportunities for Wisconsin community banks to expand into states such as Iowa and Minnesota, where they are currently not allowed to, but at the cost of increased competition from out-of-state institutions.

Examination and Enforcement Authority Against Non-Banking Subsidiaries

All non-bank subsidiaries not currently regulated by a state or federal agency will now be subject to examination by the Federal Reserve in the same manner and with the same frequency as if the activities were conducted by the lead bank subsidiary. To the extent non-bank subsidiaries are engaged in activities under the CFPB's jurisdiction, the Federal Reserve's new examination authority will be subject to the CFPB's authority with regard to such activities.

The Federal Reserve is permitted to conduct examinations of non-bank subsidiaries in a joint or alternating manner with state regulators, if the Federal Reserve determines such a state examination would satisfy the requirements under the new law. If the Federal Reserve is not the federal examiner for the largest bank subsidiary (i.e., if the largest bank subsidiary is examined by the FDIC or the OCC), that federal agency may exercise so-called "back-up authority" to examine the activities of non-bank subsidiaries on behalf of the Federal Reserve.

These examinations will consider whether the activities engaged in by the non-bank subsidiary pose a material threat to the safety and soundness of its insured depository institution affiliates, are subject to appropriate monitoring and control, and comply with applicable laws. The Federal Reserve may take (or the "back-up" federal agency can recommend) enforcement action against non-bank subsidiaries and may collect a fee in connection with the examination.

Elimination of the OTS

The Office of Thrift Supervision, currently the primary federal regulator for over 750 federal and 400 state-chartered thrifts, has been effectively fired. The OTS has been subject to a firestorm of criticism over its role in some of the largest and most spectacular bank failures in history, including IndyMac Bank and Washington Mutual. Although the Act provides for the OTS to be abolished, it will not eliminate the thrift charter itself. The OTS – including most, if not all, of its staff – will be merged into the OCC, and the powers of the OTS will be divided and transferred among existing banking agencies as follows:
- The OCC will have supervisory authority over federal thrifts and rulemaking authority for federal and state thrifts, except in areas delegated to the Federal Reserve.
- The FDIC will have supervisory authority over state thrifts.
- The Federal Reserve will have supervisory and rulemaking authority for savings and loan holding companies and rulemaking authority for federal and state thrifts with respect to affiliate transactions, loans to insiders and anti-tying prohibitions.

The elimination of the OTS will significantly boost the size and power of the OCC. Following the merger, the OCC will have more employees than the Securities and Exchange Commission, and a budget in excess of $1 billion. The OTS will be abolished within 90 days after the transfer of powers to the other banking agencies, which must occur within one year after enactment of the Act (this can be extended by an additional six months by the Secretary of Treasury, in consultation with the other banking agencies).

The reorganization of the supervision and regulation of thrifts will be particularly difficult for Wisconsin state-chartered thrifts, which will be regulated by four separate banking regulators: the Wisconsin Department of Financial Institutions, the FDIC for examinations, the OCC for rulemaking, and the Federal Reserve for certain regulations (as well as the supervision of the thrift holding company, if applicable).

Limitations on Federal Preemption

In a victory for state attorneys general, the Act has halted the expansion of federal preemption for national banks and federal thrifts and enhanced the role of the states in the regulation of consumer financial laws. While there is an ongoing debate over the extent to which existing preemption standards have been substantively narrowed, states will inevitably feel emboldened to take more aggressive actions to enforce state consumer laws against federally chartered banks.

Under the Act, national banks and federal thrifts will have the same limited preemption rights, and the OCC (including in its role as successor to the OTS) and the courts may only preempt a "state consumer financial law" if (i) the application of the law would discriminate against national banks, (ii) the state law "prevents or significantly interferes" with the exercise of the national bank's powers, or (iii) the state law is preempted by other federal law. While these requirements generally are consistent with the legal standard for preemption articulated by the Supreme Court, the Act imposes a number of restrictions on preemption determinations by the OCC, including, among other things, the following requirements:

- preemption determinations must be made by the OCC on a case-by-case basis, and the agency will no longer be permitted to issue broad preemption rules for state consumer financial laws;
- the standard of legal review by a court has been modified to encourage greater judicial scrutiny of agency preemption determinations;
- the OCC must periodically review each preemption determination (no more than five years after making such determination) through notice and comment, and publish its decision regarding whether to continue or rescind the determination; and
- the OCC must publish an updated list of all preemption determinations on a quarterly basis.

Finally, the Act eliminates preemption for subsidiaries of federally chartered banks, thereby overruling recent Supreme Court precedent and existing OCC and OTS regulations.

Executive Compensation at Financial Institutions

By April 2011, all appropriate Federal regulators (including the Fed, the OCC and the FDIC) must jointly issue regulations or guidelines prohibiting incentive-based compensation arrangements that encourage inappropriate risks that could lead to material financial loss to the institution. By next April the regulators must also prescribe regulations or guidelines requiring covered financial institutions to disclose the structure of their incentive compensation arrangements to their respective federal regulators to enable the regulators to monitor compliance with the prohibition. These regulations or guidelines must be "comparable" to the existing incentive compensation standards established under Section 39(c) of the Federal Deposit Insurance Act.

Fortunately, most community banks will be exempt because "covered financial institution" is defined as a bank or bank holding company, thrift or thrift holding company, credit union or broker dealer with assets over $1 billion. The FNMA and FHLMC are also specifically included in the definition.

Small Public Company Provisions

Executive Compensation

In addition to the executive compensation rules discussed above that will apply to both public and privately-held financial institutions with assets over $1 billion, the Act has a number of provisions addressing executive compensation at public companies, both financial and non-financial. Some of these provisions apply to all SEC-registered companies while others apply only to companies listed on a national securities exchange (*i.e.*, the NYSE) or Nasdaq. All SEC-registered companies are subject to the following:

- *Say on Pay.* At least once every three years, companies must conduct a non-binding shareholder vote to approve the compensation of the CEO and the company's "named executive officers" (generally the five most highly-paid individuals). The first such vote must be taken at the first annual or special shareholders' meeting held more than 6 months after the Act's enactment (for most companies, this will be the 2011 annual meeting). At least once every 6 years, shareholders must also vote on whether to hold the non-binding vote on executive compensation every 1, 2 or 3 years.
- *Say on Golden Parachutes.* In any meeting occurring more than 6 months after enactment at which shareholders are asked to approve an M&A transaction, companies must conduct a non-binding shareholder vote to approve payments made to any named executive officer in connection with the transaction.
- *Broker Discretionary Voting Eliminated.* Brokers will now be prohibited from voting without customer instruction on the election of directors, executive compensation (including say-on-pay and say-on-golden parachute votes), or on any other "significant matter" as determined by the SEC.

The following provisions apply to all SEC-registered companies but require further SEC rulemaking:

- *Pay and Performance Disclosure.* The SEC must issue rules requiring companies to disclose the relationship between a company's executive compensation actually paid and its financial performance, including any change in the value of the company's shares, dividends and distributions.
- *Internal Pay Equity Disclosure.* The SEC must issue rules requiring companies to disclose: (i) the median annual total compensation of all employees, excluding the CEO; (ii) the annual total compensation of the CEO; and (iii) the ratio of the CEO's annual total compensation to median employee compensation.

Other executive comp-related provisions apply only to listed companies (they are not applicable to companies traded on the Over-the-Counter Bulletin Board ("OTCBB") or "Pink Sheets"). Among others, these provisions require the SEC to issue rules directing national securities exchanges and associations to (i) require that all members of a listed company's compensation committee be independent according to standards to be determined by the SEC; (ii) establish standards for hiring advisers to a listed company's compensation committee; (iii) enforce the implementation of clawback policies enabling the recovery of incentive-based compensation from current or former executive officers following a restatement of financial results arising from material noncompliance with applicable financial reporting requirements during the preceding 3-year period that led to the restatement.

Corporate Governance

The corporate governance provisions of the Act are as follows:

- *Proxy Access.* The SEC is authorized to issue rules permitting shareholders to use the company's proxy solicitation materials to nominate director candidates, using standards and procedures determined by the SEC, which also has the authority to exempt certain companies from these provisions.
- *Chairman and CEO Disclosure.* The Act requires the SEC, within 180 days after enactment, to issue rules requiring companies to disclose in the proxy statement why they have separated, or combined, the positions of chairman and CEO.

Finally, the Act requires a publicly-traded bank holding company with total consolidated assets of $10 billion or more to establish a

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risk committee and authorizes the Federal Reserve to impose this requirement on publicly traded bank holding companies with less than $10 billion in assets.

Sarbanes-Oxley Item 404 Exemption
Finally, the Act exempts a small issuer that is neither a large accelerated filer nor an accelerated filer – in other words, that has a public float of less than $75 million – from complying with the Section 404(b) attestation-of-internal-control rules of Sarbanes-Oxley, and directs the SEC to conduct a study to determine how to reduce the burden of complying with Section 404(b) for companies whose market capitalization is between $75 million and $250 million.

Accredited Investor Definition

Small bank holding companies, public or not, that seek to raise capital should be aware of changes in the standard for accredited investor status, which is important when structuring a stock or debt offering to take advantage of available exemptions from SEC registration of an offering. Currently, individuals are "accredited" if they have $200,000 in annual income (or $300,000 in joint annual income with their spouse) or $1 million in net worth. While the dollar thresholds will remain the same, the Act provides that, effective immediately upon enactment, the net worth calculation will exclude the investor's primary residence. This will reduce the number of individual accredited investors and make the registration exemptions more difficult to comply with. Any company currently conducting a securities offering that relies on some or all of its investors being "accredited" will have to take immediate steps (including revising the subscription agreement) to implement the new definition. The SEC is authorized to review and revise the definition of "accredited investor," as applied to individuals (as opposed to corporations, trusts and other entities) according to a schedule established in the Act.

Restrictions on Interchange Fees

In a hotly debated aspect of the Act, the new law directs the Federal Reserve to set interchange rates in electronic debit-card transactions involving issuers with more than $10 billion in assets. Thus, most community banks will be exempted from these interchange fee restrictions. The Federal Reserve is directed to regulate the "reasonableness" of the fees, and that agency is directed to write rules on this subject within 9 months of enactment. Institutions' losses from fraudulent activity may be factored into the "reasonableness" determination. Merchants may discriminate based on payment type (debit vs. credit) and, regardless of card association rules, may set minimum payment amounts to accept cards.

Notwithstanding the "small bank" exemption from the interchange restrictions, community banks will likely be hostage to interchange rates charged by the largest banks and processing competitors and accordingly, most predictions are that interchange fee income at community banks will spike downward as a result of these restrictions.

Conclusion

Dodd-Frank ultimately establishes a new regulatory framework for the entire financial institutions industry. Some provisions of the Act, including those summarized here, will have a direct and immediate impact on community banking organizations. While other provisions may technically not apply to community banks, they will nevertheless have a significant and long-lasting impact. The Act will significantly affect larger institutions with which community banks do business. All financial institutions, large and small, will be subject to heightened regulatory scrutiny and oversight. Finally, many of the requirements imposed by Dodd-Frank on larger organizations may eventually become "best practices" for institutions of all sizes, including community banks. While Dodd-Frank may affect each banking organization differently, it is clear that this legislation will impact the entire industry for years to come.

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