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The Dodd-Frank Wall Street Reform and Consumer Protection Act: Potential Impact on Registered Investment Companies

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The Dodd-Frank Wall Street Reform and Consumer Protection Act (Act) is an historic and wide-ranging piece of legislation that will result in significant changes to the regulatory framework, operations and supervision of the financial services industry. While primarily focused on financial institutions such as banks, major players in the derivatives marketplace, or those involved in subprime lending and securitization, there are a number of statutory provisions, rulemaking directives and required studies that could directly and indirectly impact registered investment companies (funds). These fall into five categories: (I) provisions directly impacting the regulatory framework governing funds; (II) provisions indirectly impacting funds as institutional investors; (III) enhancements to the enforcement authority of the

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Securities and Exchange Commission (SEC) and other organizational changes; (IV) risk regulation of "systemically important" financial institutions; and (V) mandated studies that may have additional effects on funds.

Direct Impact to Regulatory Framework Governing Funds

The Act includes certain concrete changes to the regulatory framework for funds.

Eventual Removal of Statutory References to Credit Ratings and Review of Reliance on Ratings

The Act requires specific statutes including the Investment Company Act of 1940 (1940 Act) and Securities Exchange Act of 1934 (Exchange Act) to be amended within two years to remove references to credit ratings. Within one year, each federal agency, including the SEC, is required to review any regulation that requires an assessment of the creditworthiness of a security or money market instrument and refers to credit ratings. Regulatory agencies would be required to develop standards of creditworthiness rather than relying on credit ratings previously provided by Nationally Recognized Statistical Rating Organizations (NRSROs).

Section 939 of the Act provides that each federal agency (i) is required to modify their regulations to remove any reference to credit ratings; and (ii) *must* substitute an appropriate standard of creditworthiness, seeking to establish uniform "standards of creditworthiness" for use by the agency. Each agency is required to submit a report to Congress detailing any such modifications. The Act also requires the SEC to establish an Office of Credit Ratings to administer rules regarding credit rating agencies.[1]

This directive is likely to affect many funds. For example, the SEC will be required to substantially amend Rule 2a-7 under the 1940 Act to replace references to NRSROs with standards of creditworthiness deemed appropriate for use by money market funds. Future amendments to Rule 2a-7 (and other regulations that rely on NRSRO ratings) will require fund complexes to revise their compliance procedures and portfolio management processes. In addition, the scheduled imposition of the December 2010 requirement that money market fund boards designate four NRSROs seems to be an unnecessary burden on funds and their boards given the impending removal of NRSRO references. Finally, while NRSROs have received abundant criticism in recent years, removing NRSRO ratings from Rule 2a-7 may not enhance the safety and soundness of money market funds. In fact, this change could open the door to lesser quality investments.[2]

Point-of-Sale Disclosure

Section 919 of the Act specifically authorizes the SEC to issue rules designating information that must be provided by a broker-dealer to a retail investor before the purchase of an investment product or service (including, for example, funds).[3] The SEC could bifurcate the responsibility for this disclosure between sponsors of investment products and the broker-dealers, where (i) sponsors would be responsible for furnishing a summary of the investment objectives and risks of a product to broker-dealers for delivery to customers; and (ii) broker-dealers would separately provide the investor with a summary of its compensation. The current summary prospectus regime would accommodate this approach, but future rulemaking or amendments to registration statement forms could also result from this new authority. The Financial Industry Regulatory Authority, Inc. (FINRA) could also be involved in requiring broker-dealers to (i) provide compensation information prior to executing customer orders; (ii) inform customers annually of compensation arrangements; and/or (iii) inform customers of compensation arrangements prior to the opening of a brokerage account.

Recordkeeping Requirements for Fund Custodians

Section 929Q of the Act amends the recordkeeping rules in Section 31 of the 1940 Act to require fund custodians to keep all records relating to the custody of a fund's securities, deposits or credits, for a period of time that the SEC must designate by rule. Fund custodians are also subject to periodic SEC examinations, information requests or document requests under this provision. However, banks subject to existing banking regulations that serve as fund custodians are permitted to satisfy this requirement by providing to the SEC, in response to an examination, information request or document request, a detailed list of the securities, deposits or credits of a fund that are held in custody by the bank.

Corporate Governance Changes

A number of provisions of Title IX of the Act impose new corporate governance obligations on public companies that will impact funds. Some changes are intended to enhance shareholder understanding of, and involvement in, executive compensation, while others are part of the general trend towards enhancing shareholder participation in the proxy process. As discussed further below, some of the changes will impact only listed companies, such as exchange-traded funds (ETFs), closed-end funds and business development companies (BDCs); others will affect any fund or BDC that engages in regular or occasional proxy solicitations.

Compensation Committee Independence

Section 952 of the Act mandates that listing standards of national securities exchanges and rules of national securities associations require that if a listed company has a compensation committee, the committee must consist entirely of independent directors.[4] While the Act does not specify the meaning of the term "independent" for the purpose of this provision, it is likely that the national securities exchanges and associations will define this term through subsequent rulemaking. National securities exchanges could apply a definition consistent with the term "interested person" in the 1940 Act as many exchanges currently do with respect to the audit committee composition. However, how "independent" will be defined for this purpose remains to be seen.

Section 952 does not require a public company to *have* a compensation committee, only that those with compensation committees observe these requirements. In fact, it is hard to see why an externally managed fund would have such a committee.

With respect to applicability, open-end funds are specifically excluded from this requirement. These provisions, however, could apply to listed companies such as closed-end funds and BDCs that have compensation committees.

Broker Discretionary Voting

Section 957 of the Act prohibits brokers from voting shares held in street name on behalf of their beneficial owner clients without receiving specific voting instructions, for certain "significant matters" such as election of directors, executive compensation, or any other matter determined to be "significant" by the SEC. This provision specifically does *not* apply to uncontested director elections held by funds, but will apply to many other matters considered to be "significant." This provision is similar in many respects to existing rules of several of the national securities exchanges and securities associations.[5] While the Act and related SEC rulemaking would likely harmonize the treatment of discretionary broker voting across national securities exchanges and national securities associations, it could also broaden the types of matters to which the prohibition would apply. Such a change would accelerate the recent trend towards higher expenses and more difficult proxy solicitations for funds.

Proxy Access

Section 971 of the Act provides specific authority to the SEC to adopt rules requiring public companies to include shareholder nominees for director in their proxy materials. The SEC is permitted to exempt certain companies (for example, small issuers) or classes of companies from this requirement. The SEC could, in its rulemaking, exempt funds from this requirement; but the legislation does not specifically mention funds, which may make it less likely that funds will be exempt.

The SEC has sought to increase shareholder access to proxy ballots in recent years (including a rule proposal to require the inclusion of shareholder nominees in company proxy materials), and the SEC's new authority to adopt rules in this area will continue to encourage this trend. If funds are not exempted from this requirement, this change could also result in higher expenses and an increased likelihood of changes in the composition of fund boards.

Disclosure Regarding Roles of Chairman and CEO

Within 180 days of enactment of the Act, the SEC must adopt rules requiring public companies to disclose in their annual proxy statement why the company has determined to combine or not to combine the roles of chairman of the board and chief executive officer. Closed-end funds, BDCs and other exchange listed companies that mail an annual proxy statement are subject to this additional reporting requirement.

Currently, the enhanced disclosure requirements adopted by the SEC in December 2009 already require that a public company disclose "whether the same person serves as both principal executive officer and chairman of the board" and "why [the company] has determined that its leadership structure is appropriate given the specific characteristics or circumstances of [the company]." It remains to be seen whether any SEC rulemaking will impose additional requirements or further modify this disclosure obligation.

Disclosure of Employee and Director Hedging

Section 955 of the Act requires the SEC to adopt rules requiring public companies to disclose, in proxy materials for an annual shareholders meeting, whether any employee or director of the company (or his or her designee) is allowed to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars and exchange funds) designed to hedge or offset any decrease in the market value of equity securities (1) granted to the employee or director as part of his or her compensation; or (2) held, directly or indirectly, by the employee or director. While the language of this section is unclear (for example, it does not specify whether an open-end fund without an annual meeting requirement would be subject to the requirement), fund directors could be subject to this requirement. While an officer of a fund that is compensated by a service provider would not appear to be an "employee," this is another question that will need to be answered during the rulemaking process.

Indirect Impact on Funds as Institutional Investors

Funds are also impacted indirectly by the Act, as many of the Act's provisions relate to financial instruments that a fund may hold. These types of indirect effects are discussed below.

Derivatives Regulation

Title VII of the Act requires, among other things, clearing and exchange trading for most over-the-counter (OTC) derivatives,[6] new capital and margin requirements, and various reporting and record-keeping obligations on "major swap participants" (MSPs), including OTC swap dealers (Swap Dealers).[7] The Act will also require Swap Dealers and most MSPs to register with either the SEC or CFTC (depending on the nature of their business).

Determining Who is an MSP

MSPs are defined as persons (1) who maintain a "substantial position" in swap transactions, excluding positions held for hedging or mitigating the MSP's commercial risk (commonly referred to as "commercial end users") and positions held by employee benefit plans; (2) whose outstanding swaps create "substantial counterparty exposure" that could have serious adverse effects on the financial stability of the US banking system or financial markets; or (3) who is a financial entity that (A) is "highly leveraged relative to the amount of capital it holds" and "is not subject to capital requirements established by an appropriate federal banking agency" and (B) maintains a substantial position in outstanding swaps transactions.[8]

The SEC and CFTC are required to define "substantial position" as the amount determined to be prudent for the effective monitoring, management and oversight of market participants that are systemically important or can significantly impact the financial system of the United States. There is no indication as to whether the "substantial position" will be determined across affiliated entities (such as multiple funds advised by a single advisory firm) or whether it will be determined on a person-by-person basis (for example, long positions against short positions within a single portfolio). It is also unknown whether posted margin will be relevant in determining whether a large swap position constitutes a "substantial position." The determination of what will constitute "substantial counterparty exposure" is also unclear. Notably, the counterparty exposure of a fund (or group of affiliated funds) to an individual swap dealer may or may not be considered "substantial" as a percentage of the dealer's overall balance sheet.

While the plain language of the statute suggests that a fund would not be classified as an MSP because (i) it is unlikely to have sufficient counterparty exposure to cause serious adverse effects on the US banking system or financial markets and (ii) the Section 18 limitations on funds' use of swaps would prevent the type of leverage component described above, as investors in derivatives, fund management and boards should nonetheless closely monitor and participate in this rulemaking process.

Clearing and Exchange Trading of OTC Derivatives

Title VII of the Act requires (1) for most swaps, the clearing of swap transactions by a "derivatives clearing organization" (DCO-cleared swaps) or (2) the reporting of swaps to a "swap data repository."[9] DCO-cleared swaps must be traded on either a "contract market" (that is, a futures exchange) or through a "swap execution facility."[10] Requiring nearly all swaps to be exchange-traded could result in fairly low liquidity for these instruments, which is already a challenge for existing exchange-traded swaps. If MSPs are permitted to initiate a transaction with a counterparty off an exchange (provided that the execution of the swap prints on the relevant exchange), this difficulty could be alleviated. It remains to be seen whether MSPs will be allowed this flexibility.

All monies, securities or property to margin, guarantee or secure a DCO-cleared swap must be custodied with a futures commission merchant (FCM). Monies, securities or property to margin, guarantee or secure a security-based swap cleared by a clearing agency must be custodied with a broker, dealer or security-based swap dealer. The FCM, broker, dealer or security-based swap dealer must separately account for, and not commingle, customer property with its own funds. However, any customer property may be commingled and deposited in the same account with any bank, trust company or DCO/clearing agency. For swaps not cleared by a DCO, an MSP must notify a counterparty at the beginning of a swap transaction that the counterparty has the right to require segregation of the funds or other property supplied to margin, guarantee or secure its obligations. At the request of the counterparty, the MSP must segregate the funds or other property and maintain them in a segregated account separate from the MSP's assets. The segregated account must be carried by an independent third-party custodian and designated as a segregated account for and on behalf of the counterparty.[11] Depending on the type of entity that is maintaining custody, there could be implications under Section 17(f) of the 1940 Act and the related rules regarding custody. It is also possible that certain rules such as Rules 17f-1 and 17f-6 may need to be revised, or exemptive or no-action relief be provided by the SEC to permit funds to utilize these arrangements.

The clearing and exchange-trading requirements for OTC derivatives are expected to mitigate risk exposure for funds that regularly enter into derivatives contracts. At the same time, they may also limit some of the flexibility funds have to individually negotiate derivative trades.

Regulation of Securities Lending

Section 984 of the Act amends Section 10 of the Exchange Act to make it unlawful to effect, accept or facilitate a transaction involving securities lending or borrowing in contravention of SEC rules. The SEC must promulgate rules, within two years, to increase the transparency of information available to broker-dealers and investors regarding securities lending or borrowing.

Securities lending is an area that has been subject to more SEC scrutiny in recent years, particularly following losses experienced by certain cash collateral funds. Given the current lack of recent SEC guidance in this area, this provision may encourage additional guidance to funds and other participants in this market.

Efforts to Strengthen the Enforcement Capabilities of the SEC

Several subtitles of the Act (Subtitles A, B, C and F of Title IX) are intended to implement changes to the SEC's functions, authority and enforcement capability. These changes reflect Congressional concerns regarding the SEC's ability to effectively discharge its role of protecting investors, and are intended to make the SEC a more aggressive and high profile agency. They are likely to have a significant impact on enforcement as it relates to funds.

Establishment of Investor Advisory Committee, Investor Advocate and Ombudsman

The Act establishes an Investor Advisory Committee within the SEC, the members of which are (i) the Investor Advocate (as described below); (ii) a representative from the various state securities commissions; (iii) a representative of the interests of senior citizens; and (iv) between 10 and 20 members appointed by the SEC representing the interests of individual or institutional investors, including funds. The purpose of the Investor Advisory Committee is to advise and consult with the SEC on (i) regulatory priorities; (ii) issues relating to the regulation of securities products, trading strategies, fee structures, and disclosure effectiveness; (iii) initiatives to protect investor interests; and (iv) initiatives to promote investor confidence and the integrity of the securities marketplace. The Act directs the Committee to study and submit its findings and recommendations to the SEC, including recommendations for proposed legislative changes.[12]

The Act also creates a new position of Investor Advocate within the SEC who is appointed by, and reports to, the SEC Chairman. The Investor Advocate will assist retail investors in resolving significant problems with the SEC or self-regulatory organizations (SROs); identify areas in which investors would benefit from changes in SEC regulations or SRO rules; identify problems of investors with financial service providers and investment products; analyze the impact of proposed rules and regulations on investors; and propose changes to the SEC and Congress. The Investor Advocate is required to report to Congress regarding objectives for the following year and activities during the preceding year. The SEC must establish, by regulation, procedures requiring a formal response to these reports.

Within 180 days of his or her appointment, the Investor Advocate must appoint an Ombudsman, who will report directly to the Investor Advocate. The Ombudsman must (i) liase between the SEC and any retail investor in resolving problems the retail investor may have with the SEC or an SRO; (ii) review and make recommendations regarding policies and procedures to encourage persons to present questions to the Investor Advocate regarding compliance with the securities laws; and (iii) establish safeguards to maintain confidentiality between retail investors and the Ombudsman. The Ombudsman must submit a semi-annual report on his or her activities and their effectiveness, which the Investor Advocate is required to include in reports to Congress.

It is not clear whether the creation of the Investor Advisory Committee and the positions of Investor Advocate and Ombudsman will streamline or hamper the work of the SEC's existing offices and staff. The new SEC functions could compliment or be at odds with the SEC's existing regulations, functions or vision. At the very least, funds should expect to see a more aggressive and investor-oriented regulatory agenda in the coming years.

Changes to the Management and Organization of the SEC

The Act also mandates a number of internal organizational SEC reforms, including certified reports of internal supervisory controls, reports on personnel management, annual audits of financial controls, reports on oversight of national securities associations, a "suggestion program" for SEC employees and further organizational studies and reforms.

The Act includes a number of other provisions intended to give the SEC additional enforcement tools. These include the following:

- *Increased aiding and abetting liability under the 1940 Act*—the Act provides explicit authority for the SEC to bring actions for aiding and abetting violations of the 1940 Act for "knowing" or "reckless" conduct; changes the aiding and abetting standard under the Exchange Act to add a recklessness standard; and requires the conduct of a study regarding the advisability of providing a private right of action for aiding and abetting violations of the securities laws.
- *Stronger whistleblower protections*—the Act contains a number of provisions to increase whistleblower protections and rewards and to provide an express private right of action to whistleblowers.
- *Other enforcement tools*—the Act provides the SEC with broader subpoena authority; extraterritorial authority; authority with respect to collateral bars and over formerly associated persons; and broader information-sharing among governmental and law enforcement authorities without creating a waiver of privilege.

Dedicated Examiners Within the Division of Investment Management

The Act mandates that each of the SEC's Division of Investment Management and Division of Trading and Markets have their own separate examination Staff, who would report directly to the Director of the relevant Division, and would be responsible for examining entities under the jurisdiction of that Division. This is likely to result in a restructuring and/or refocusing of activities of the SEC's Office of Compliance, Inspections and Examinations (OCIE). The likely result is more examinations supported by the expertise of the Divisions, compared with the current structure where OCIE has sole responsibility.

Systemic Risk Regulation

In addition to the consequences arising from their activities as institutional investors, funds may also be indirectly affected by the Act as a result of their position in the financial landscape: often, as affiliates of other financial institutions believed to be (or treated in the Act as) contributors to the financial crisis of 2008. These types of indirect impacts are discussed below.

Financial Stability Oversight Council

Title I of the Act establishes a new Oversight Council, consisting of the heads of various federal financial regulatory agencies, in order to (i) identify risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected bank holding companies or non-bank financial companies, or that could arise outside the financial services marketplace; (ii) promote market discipline, by eliminating expectations on the part of investors, creditors, and counterparties of such companies that the US government will shield them from losses in the event of failure; and (iii) respond to emerging threats to the stability of the US financial system.

The Oversight Council is empowered to determine that a US non-bank financial company is "systemically important" and thus should be subject to the Federal Reserve Board's supervision and prudential standards if the Oversight Council determines that "material financial distress" at the company or the "nature, scope, size, scale, concentration, interconnectedness, or mix of the activities" of the company could pose a threat to US financial stability.[13]

The Oversight Council will play an important role as the primary systemic risk regulator of financial institutions. Its existence and regulations could have an impact on fund complexes that are so large, interconnected or highly leveraged as to be classified as "systemically important" and thus subject to the Oversight Council's oversight and regulation. However, it may be premature to conclude that any funds would be subject to the Council in light of the substantial regulatory oversight of the SEC and the risk limiting provisions of the 1940 Act.

Studies that Could Impact Funds

Finally, the Act mandates that certain regulatory agencies conduct studies potentially resulting in further legislation and/or rulemaking. We briefly summarize the studies that could impact funds:

- *Mutual fund advertising*—the General Accounting Office (GAO) must report to Congress within 18 months regarding existing and proposed requirements in this area, current marketing practices (including the use of past performance, generally and with respect to merged funds and incubator funds), the impact of advertising on consumers and any statutory or regulatory recommendations.
- *Investor financial literacy*—the SEC must report to Congress within two years regarding financial literacy among retail investors, methods to improve disclosure, the information retail investors' need to make informed financial decisions, methods to increase transparency of expenses and conflicts of interest, the most effective means to educate investors, and a strategy to increase investor financial literacy. Any findings could result in amendments to forms governing fund registration statements (notwithstanding existing summary prospectus and other "plain English" disclosure initiatives).
- *SEC employee "revolving door"*—the GAO is directed to report to Congress within one year regarding former SEC employees employed by SEC-regulated financial institutions, the necessity of related internal controls, the necessity of post-employment restrictions on such employees, and any related impact on the SEC's effectiveness. Any additional restrictions on post-employment opportunities for SEC employees will naturally have a detrimental effect on the ability of the SEC to hire qualified individuals.
- *Short selling*—The SEC's Division of Risk, Strategy and Financial Innovation is directed to (i) report to Congress within two years regarding short selling, with particular attention to the impact of recent rulemaking and the incidence of the failure to deliver shares sold short or delivery on the fourth day following the short sale transaction and (ii) report to Congress within three years regarding the feasibility and costs/benefits of (a) requiring real-time reporting of short sale positions of publicly listed securities, either publicly or to the SEC and FINRA, and (b) a voluntary pilot program where public companies would agree to have all trades of their shares marked "short," "market maker short," "buy," "buy-to-cover," or "long," and reported real-time through the Consolidated Tape.
- *Bankruptcy*—the Federal Reserve, in consultation with the Administrative Office of the US Courts, must report to Congress within one year regarding the resolution of financial companies under chapters 7 and 11 of the US Bankruptcy Code, including the effectiveness of chapters 7 and 11 of the US Bankruptcy Code in facilitating the orderly resolution or reorganization of systemically important financial companies. Fund management and boards should remain apprised of developments and consider how future changes to bankruptcy law could have an impact in managing counterparty risk in areas such as vendor agreements, securities lending arrangements, repurchase agreements and other areas.

Conclusion

As the above discussion makes clear, the Act will have significant and far-reaching consequences for a wide variety of financial institutions. Funds, while not the focus of the Act, are no exception. Rulemaking by the SEC and other regulatory agencies will, it is hoped, fill in the details not only where required by the Act, but also where the Act may have inconsistent, undesirable or unintended consequences. In addition, given the substantial regulatory oversight of the fund industry, it would seem preferable to focus on properly enforcing existing requirements, which are largely intended to reduce the risks to shareholders investing in funds, rather than to graft onto funds additional regulatory burdens that may not necessarily benefit fund investors. In any case, it remains to be seen whether the agencies can deliver on the extensive mandate they have been given by Congress.

Notes

1. The Office will conduct annual compliance examinations of each NRSRO and will publish the results of those examinations. Each NRSRO is required to include attestations to its credit ratings and the SEC is directed to prescribe rules regarding procedures and methodologies to be used by NRSROs, including qualitative and quantitative data and models for ratings.

2. An earlier SEC proposal to remove references to NRSRO ratings was deferred due in part to this objection from the industry. *References to Ratings of National Statistical Ratings Organizations*, Release No. IC-28327 (July 1, 2008).

3. Many would argue that the SEC already has this authority. However, the specificity of this provision increases the pressure on the SEC to exercise this authority.

4. A compensation committee of a listed company is also permitted to retain compensation consultants only after it has considered their independence (including other services provided to the company, fees received from the company, stock ownership of these individuals and other business and professional relationships between these individuals relating to the company). If a compensation consultant is retained, the company must disclose this fact in any proxy statement (commencing one year from the enactment of the Act), and must disclose whether the work of the consultant raised any conflicts of interest.

5. *See, e.g.,* New York Stock Exchange (NYSE) Rule 452 and American Stock Exchange (AMEX) Rule 577. Unlike NYSE Rule 452, AMEX Rule 577 does not prohibit broker discretionary voting with respect to the uncontested election of directors for listed companies *except* for closed-end funds. FINRA Rule 2251 does not permit discretionary broker voting except in accordance with the rules of an exchange of which a broker is a member, such as the NYSE or the AMEX.

6. These include forwards and options on interest rates, currencies, commodities, securities, indices and various other financial or economic interests or property; contracts in which payments and deliveries are dependent on the occurrence or non-occurrence of certain contingencies (*e.g.*, a credit default swap); and swaps on rates and currencies, total return swaps and various other common swap transactions.

7. A "Swap Dealer" is defined as any person who: (i) holds itself out as a dealer in swaps; (ii) makes a market in swaps; (iii) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or (iv) engages in activity causing the person to be commonly known in the trade as a dealer or market maker in swaps. However, an insured depository institution will not be considered to be a Swap Dealer to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer.

8. Title VII excludes from the MSP definition any entity whose primary business is providing financing, and uses derivatives for the purpose of hedging underlying commercial risks related to interest rate and foreign currency exposures, 90% or more of which arise from financing that facilitates the purchase or lease of products, 90% or more of which are manufactured by the parent company or another subsidiary of the parent company.

9. A "swap data repository" is defined as any person that collects, calculates and prepares information or records related to transactions or positions in, or the terms and conditions of, swaps entered into with third parties.

10. A "swap execution facility" is defined as a facility in which multiple participants have the ability to execute or trade swaps through any means of interstate commerce, by accepting bids and offers made by other participants.

11. These segregation requirements, however, do not apply to variation margin payments.

12. Separately, the Act clarifies the SEC's authority to engage in temporary investor testing programs and to consult with investors, the public, academics and consultants for the purpose of developing new programs and rulemaking initiatives.

13. In making this determination, the Oversight Council is directed to consider the following factors as they relate to the company's assets under management in the United States, activities, operations and exposure: (i) the extent of leverage; (ii) the extent and nature of the company's off balance sheet exposures; (iii) the extent and nature of the transactions and relationships of the company with other significant non-bank financial companies and bank holding companies; (iv) the importance of the company as a source of credit for households, businesses, and State and local governments and as a source of liquidity for the US financial system; (v) the importance of the company as a source of credit for low income, minority, or underserved communities, and the impact that the failure of such company would have on the availability of credit in such communities; (vi) the extent to which

(a) assets are managed rather than owned by the company; and (b) ownership of assets under management is diffuse; (vii) the nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the company; (viii) the degree to which the company is already regulated by one or more primary financial regulatory agencies, such as the SEC; (ix) the amount and nature of the financial assets of the company; (x) the amount and types of the liabilities of the company, including the degree of reliance on short-term funding; and (xi) any other risk-related factors that the Oversight Council deems appropriate.

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