

Congress Passes Regulatory Reform for Financial Institutions

On May 22, 2018, the US Congress passed the Economic Growth, Regulatory Relief, and Consumer Protection Act, the most significant piece of legislation for financial institutions since the enactment of the Dodd-Frank Act in 2010.¹ President Trump is expected to sign the bill (currently known as S.2155; sponsored by Senator Mike Crapo (R-ID); and hereinafter, the “Crapo Act” or the “Act”) within the next few days as part of his administration’s continuing effort to reduce the regulatory burdens on financial institutions that have accumulated under the Dodd-Frank Act.² Further debate is expected within Congress regarding additional proposals developed by the House of Representatives, which, if enacted, would provide additional relief to the financial services industry.

Although the Act is generally effective upon signature by the president, many provisions of the Crapo Act will require further action by regulatory agencies to implement, such as through notice-and-comment rulemaking. However, the precise, targeted nature of the reforms in the Crapo Act should make it easier for market participants to know what to expect than was the case with the Dodd-Frank Act.

Spanning nearly 200 pages, the Crapo Act covers a broad range of consumer protection, banking and securities regulatory matters. A major theme of the Act is to provide broad exemptions for smaller institutions from the requirements of the Dodd-Frank Act, in many but not all cases raising the level of consolidated assets an

institution must have before it becomes subject to a regulatory requirement. For example, for large bank holding companies and foreign banks, the Crapo Act raises certain thresholds relating to enhanced prudential standards under section 165 of the Dodd-Frank Act (see our summary of section 401 below). In addition, the Crapo Act remedies significant shortcomings that have been identified in the Dodd-Frank Act, such as by expanding the definition of a qualified mortgage to allow smaller institutions to retain protections on otherwise ineligible home loans that will not be resold to third parties.

We have provided below a section-by-section summary of the Crapo Act.

Sec. 101 - Expanded Definition of Qualified Mortgages. The Crapo Act expands the definition of “qualified mortgage” to include any residential mortgage loan originated and retained in portfolio by an insured depository institution (“IDI”) or insured credit union that has less than \$10 billion in consolidated assets.³ However, a loan will not qualify for qualified mortgage status (and, thus, for safe harbor) if it is out of compliance with current prepayment penalty requirements, has negative amortization or interest-only features or has points and fees that exceed 3 percent of the loan amount. Further, a loan will not qualify for the safe harbor if legal title to the loan is sold, assigned or transferred to another person, except in limited circumstances such as where the loan is sold, assigned or otherwise transferred to (i) another person due to bankruptcy or failure of a

covered institution or (ii) a covered institution that retains the transferred loan in portfolio.

Sec. 102 - Appraisal Relief for Habitat for Humanity Homes. The Crapo Act amends the Truth in Lending Act (“TILA”) to specify that a fee appraiser’s voluntary donation of appraisal services to an organization eligible for tax-deductible charitable contributions (e.g., Habitat for Humanity) constitutes customary and reasonable fees as defined in TILA.

Sec. 103 - Exemption from Appraisal for Certain Real Property Located in Rural Areas. The Crapo Act exempts federally related mortgages of less than \$400,000 from appraisal requirements if the property is located in a rural area and the mortgage originator (i) is subject to oversight by a federal banking regulator or the National Credit Union Administration (“NCUA”) and (ii) has contacted at least three state-certified or state-licensed appraisers who were unable to complete the appraisal within a customary and reasonable timeframe. However, a mortgage originator who relies on this exemption to originate a loan without an appraisal may only sell, assign or transfer the loan under certain conditions, such as when the loan enters bankruptcy. The exemption does not apply to high-cost mortgages or where a federal financial institutions regulatory agency’s regulations otherwise require an appraisal.

Sec. 104 - HMDA Smaller Originator Exemption. The Crapo Act exempts IDIs and credit unions from certain Home Mortgage Disclosure Act (“HMDA”) reporting requirements (which, in general, were created under the Dodd-Frank Act), including information on length of term, points and fees, prepayment penalties and APR for originated or purchased loans, if the institutions originated fewer than 500 closed-end mortgage loans or fewer than 500 open-end lines of credit in each of the two preceding calendar years. However, any IDI must comply with the reporting requirements if it received a rating of “needs to improve record of meeting community credit

needs” during each of its two most recent examinations under the Community Reinvestment Act or a rating of “substantial noncompliance in meeting community credit needs” on its most recent examination. The Crapo Act also requires the Government Accountability Office (“GAO”) to conduct a study and submit a report to congressional oversight committees on how these changes impact the amount of HMDA data available.

Sec. 105 - Credit Union Residential Loan Relief. The Crapo Act excludes from the definition of “member business loan” an extension of credit fully secured by a lien on a one-to-four-family dwelling that is not the primary residence of a member.

Sec. 106 - Interstate MLO Licensing Relief. The Crapo Act amends the SAFE Mortgage Licensing Act to allow a registered mortgage loan originator (“MLO”) who is moving from a depository institution to a non-depository institution to temporarily act as an MLO while the state license to work at the non-depository institution is pending. (MLOs at a depository institution do not need to be state-licensed, while MLOs employed by a non-depository institution must obtain a state license.) It also allows an MLO licensed in a state to originate loans while the MLO’s license to work in another state is pending. In both instances, the MLO must satisfy certain criteria, such as not having had a license revoked or denied, to be eligible for the temporary authority. The temporary period would last from the date on which the MLO submits information for a background check to the earliest of the date on which the application is granted, denied or withdrawn or the date that is 120 days after the application is submitted if the application is listed on the Nationwide Mortgage Licensing System and Registry as incomplete.

Sec. 107 - Mortgage Originator Exclusion for Retailers of Manufactured Homes. The Crapo Act narrows TILA’s definition of “mortgage originator” to exclude certain

retailers of manufactured or modular homes. Specifically, it excludes a retailer or employee of a retailer who (i) does not receive more compensation or gain for engaging in a loan origination transaction than would be received in a comparable cash transaction (without a loan); (ii) discloses to the consumer in writing any corporate affiliations with any creditor and the name of at least one unaffiliated creditor if the retailer does have such a corporate affiliation; *and* (iii) does not directly negotiate with the consumer or lender on loan terms.

Sec. 108 - Escrow Exemption for Smaller Home Lenders. The Crapo Act exempts from TILA's escrow requirements a loan that is made by an IDI or credit union and is secured by a first lien on a principal dwelling if the IDI or credit union (i) has assets of \$10 billion or less; (ii) originated 1,000 or fewer loans secured by a first lien on a principal dwelling in the preceding year; and (iii) meets certain other requirements set out in TILA.

Sec. 109 - No Wait for Lower Mortgage Rates. The Crapo Act amends the TILA requirement that a lender must provide a borrower with a mortgage disclosure or a revised disclosure at least three business days prior to a mortgage closing. The Crapo Act eliminates this three-day waiting period in situations where a creditor extends to a borrower a second offer of credit that lowers the APR on the mortgage.

This provision also includes a "Sense of Congress," a formal expression of an opinion of Congress that both chambers of Congress approved as a joint resolution. In its "Sense of" resolution, Congress states that the Consumer Financial Protection Bureau ("CFPB") should "endeavor to provide" clearer guidance on the applicability of the TILA-RESPA Integrated Disclosure ("TRID") Rule to mortgage assumption transactions and to construction-to-permanent home loans and whether lenders can rely on CFPB model TRID Rule forms without liability if the disclosures do not reflect recent regulatory changes.

Sec. 201 - Community Bank Capital Simplification. The Crapo Act simplifies the regulatory capital rules for depository institutions and depository institution holding companies with total consolidated assets of less than \$10 billion. It does this by instructing the federal banking regulators to establish a single "Community Bank Leverage Ratio" of between 8 and 10 percent that will replace the leverage and risk-based capital ratios of the regulatory capital and will prompt corrective action rules. Regulators will retain the ability to disqualify a depository institution or depository institution holding company from this simplified approach based on its risk profile.

Sec. 202 - Reciprocal Deposits Exclusion. The Crapo Act excludes deposits received under a reciprocal deposit placement network from the scope of the brokered deposit rules if the receiving institution's reciprocal deposits do not exceed the lesser of \$5 billion or 20 percent of its total liabilities. Additionally, an institution may rely on the new exclusion even if it ceases to be well-capitalized if the amount of reciprocal deposits it holds does not exceed the average of its total reciprocal deposits over the four quarters preceding its downgrade.

Sec. 203 - Volcker Rule: Community Bank Exemption. The Crapo Act exempts IDIs and their affiliates from the Volcker Rule if they and their ultimate parent company have (i) \$10 billion or less in total consolidated assets and (ii) total trading assets and trading liabilities that are 5 percent or less of their total consolidated assets. This exemption was effected through a change to the statutory definition of "banking entity."⁴

Sec. 204 - Volcker Rule: Naming Restrictions Relief. The Crapo Act provides relief to the covered fund naming restriction of the Volcker Rule for certain covered funds that share a name or variation of a name with a banking entity that is an investment adviser. The naming restriction of the asset management exemption will no longer apply to a covered fund

that shares a name or variation of a name with an investment adviser if that investment adviser (i) is not an IDI, a parent of an IDI or a foreign banking organization (“FBO”) deemed to be a bank holding company (“BHC”); (ii) does not share a name or variation of a name with an IDI, a parent of an IDI or an FBO deemed to be a BHC; and (iii) does not have the word “bank” in its name.

Sec. 205 - Call Report Relief. The Crapo Act provides relief to community banks, defined as IDIs with less than \$5 billion in total consolidated assets, by instructing the federal banking regulators to issue regulations that provide for reduced reporting requirements for first and third quarter Call Reports filed by such community banks. Regulators have the discretion to add other qualifying criteria in addition to the \$5 billion assets threshold.

Sec. 206 - Federal Savings Association Regulatory Option. The Crapo Act provides relief to smaller federal savings associations (“FSAs”) by allowing FSAs with less than \$20 billion in assets to elect to operate under the rules for national banks without having to convert their charters. An FSA that makes an election may exercise the rights and privileges of a national bank and is subject to the same duties, restrictions, penalties, liabilities, conditions and limitations that apply to a national bank. This effectively relieves electing FSAs from the strict quantitative lending limitations contained in the Home Owners’ Loan Act.⁵ However, an FSA that makes an election under this provision remains subject to the governance and merger requirements that are applicable to federal thrifts. An FSA that has made an election may continue to rely on this provision even if it subsequently grows to have more than \$20 billion in total consolidated assets.

Sec. 207 - Small Holding Company Policy Statement Expansion. The Crapo Act expands the category of holding companies that may rely on the “*Small Bank Holding Company and Savings and Loan Holding Company Policy*

Statement” by raising the maximum amount of assets a qualifying holding company may have from \$1 billion to \$3 billion.⁶ This expansion also excludes such holding companies from the minimum capital requirements of Section 171 of the Dodd-Frank Act (commonly known as the “Collins Amendment”).⁷

Sec. 208 - Application of the Expedited Funds Availability Act. Under the Crapo Act, the Expedited Funds Availability Act would also apply to American Samoa, the Commonwealth of the Northern Mariana Islands and Guam. Previously, “State” and the “United States” were defined to include only the fifty states, the District of Columbia, the Commonwealth of Puerto Rico and the Virgin Islands.⁸

Sec. 209 - Relief for Small Public Housing Agencies. The Crapo Act adds a section to the Housing Act of 1937 on small public housing agencies (“SPHAs”). An SPHA is a public housing agency that administers 550 or fewer public housing dwelling units and Section 8 vouchers combined and that operates predominately in a rural area. Under the Crapo Act, SPHAs are subject to less frequent inspections than public housing agencies (only once every three years versus annually) and to reduced environmental review requirements.

Also under the Act, the Department of Housing and Urban Development (“HUD”) may designate an SPHA as “troubled” with respect to its public housing program if an inspection reveals housing units in poor physical condition or with respect to its housing voucher program if the SPHA does not comply with the inspection requirement and provides for the troubled SPHA to enter into a corrective action agreement with HUD to rectify the deficiencies. An SPHA may dispute the “troubled” designation through an appeals process established in the Act.

Sec. 210 - Extended Examination Cycle Eligibility Expansion. The Crapo Act expands the category of IDIs that are eligible for an extended 18-month examination cycle by raising

the maximum amount of assets an eligible IDI may have from \$1 billion to \$3 billion.

Sec. 211 - International Insurance Capital Standards Transparency. The Crapo Act requires the Secretary of the Treasury and the Chair of the Board of Governors of the Federal Reserve System (the “Federal Reserve”) to submit an annual report to the congressional oversight committees and provide annual testimony to them on developments and positions taken at global insurance regulatory and supervisory forums until 2024, as well as to make a one-time report and provide one-time testimony to Congress regarding efforts to increase transparency at meetings of the International Association of Insurance Supervisors. Also, the Secretary, Chair and director of the Federal Insurance Office, in consultation with the National Association of Insurance Commissioners, must study and submit a report to Congress prior to any plan to support or consent to the adoption of final international insurance capital standards. This report must be subject to public notice and comment and to review by the comptroller general.

Further, the Federal Reserve must establish an Insurance Policy Advisory Committee for international capital standards and other insurance issues, which will be comprised of experts from the various sectors of the US insurance industry.

The Crapo Act also contains a “finding” of Congress that the Federal Reserve and director of the Federal Insurance Office should work with the Treasury Secretary and the National Association of Insurance Commissioners to achieve consensus positions prior to taking a position with respect to an insurance proposal by a global insurance regulatory or supervisory forum and support transparency in the operation of such forums.

Sec. 212 - Regulatory Budget Transparency. The Crapo Act provides for increased transparency of the NCUA’s annual business-type budget by

requiring the agency to publish a draft of the budget in the Federal Register and hold a public hearing on the draft budget that is subject to a public comment period.

Sec. 213 - Online Banking KYC Clarity. The Crapo Act clarifies the identity due diligence and verification requirements of the Bank Secrecy Act that are applicable to online banking services by allowing IDIs, credit unions and affiliates of IDIs and credit unions to rely on scans of drivers licenses and other government-issued personal identification cards for account and financial product requests submitted through an online banking service. An institution is allowed to use a scan, however, only for authentication, verification and BSA record retention purposes and must permanently delete the scan after using it for its authorized purpose.

Sec. 214 - ADC Lending Capital Relief. The Crapo Act provides relief to depository institutions with acquisition, development or construction (“ADC”) lending exposure by narrowing the kinds of exposure that is treated as a high volatility commercial real estate (“HVCRE”) exposure under the regulatory capital rules. Specifically, the Crapo Act provides that an ADC lending exposure would be subject to the risk weight applied to HVCRE exposures if it comes within the narrower definition of a HVCRE ADC loan in the Crapo Act, paraphrased as follows: Real estate-secured credit facilities that (i) primarily finance, have financed or refinance the acquisition, development or construction of real property; (ii) have the purpose of providing financing to acquire, develop or improve such real property into income-producing real property; and (iii) are dependent on future income or sales proceeds from, or refinancing of, such real property for the repayment of the credit facility.

Furthermore, the change allows an institution to re-classify ADC lending exposures out from treatment as HVCRE ADC loans in certain circumstances and exempts all ADC lending exposures that were made prior to January 1, 2015.

Sec. 215 - Identity Fraud Protection

Database. The Crapo Act attempts to fight identity fraud by instructing the Social Security Administration to establish a database facility to allow permitted financial institutions and service providers to electronically verify an individual's name, social security number and date of birth. An individual must provide written (including electronic) consent prior to verification, and verification may only be obtained in connection with a credit transaction or other circumstance in which a consumer reporting agency would be authorized to furnish a consumer report under the Fair Credit Reporting Act ("FCRA").

Sec. 216 - Cyber Threats Report. The Crapo Act requires the Secretary of the Treasury to submit a report to Congress on the risks of cyber threats to US financial institutions and capital markets no later than one year after the date of enactment. Among other requirements, the Secretary must analyze how the federal banking agencies and Securities and Exchange Commission ("SEC") are addressing material risks of cyber threats.

Sec. 217 - Federal Reserve Bank Surplus Reduction. The Crapo Act reduces the capital surplus account maintained by the Federal Reserve Banks from \$10 billion to \$7.5 billion. Congress previously reduced the surplus account in 2015 and 2018 to fund other government activities.⁹

Sec. 301 - Credit Report Freeze Expansion. The Crapo Act amends the FCRA to require credit reporting agencies to (i) allow consumers (including minors and incapacitated persons acting through their representatives) to place or remove a security freeze on their credit report free of charge and (ii) notify consumers of their right to a security freeze. The Act also extends the time for an initial fraud alert from 90 days to one year. Further, the Federal Trade Commission ("FTC") must maintain a central web page linking to each credit bureau's webpage for requesting a freeze or fraud alert or to opt out of information sharing for marketing purposes.

Sec. 302 - Veteran Medical Debt

Exclusion from Credit Reports. The Crapo Act amends the FCRA by requiring the exclusion from credit reports of certain medical debt incurred by a veteran. The Act defines "veteran's medical debt" as medical collection debt of a veteran owed to a health care provider other than the Department of Veterans Affairs ("VA") and submitted to the VA for health care payments authorized by the VA and includes medical collection debt that the VA has wrongfully charged a veteran. The Act prohibits the inclusion of a veteran's medical debt on credit reports for one year after the provision of medical services and also requires that any debt previously characterized as delinquent, charged off or in collection be removed when the debt has been fully paid or settled. The Act requires the VA Secretary to create a verification database to allow consumer reporting agencies to confirm whether a debt furnished to them is a veteran's medical debt and that consumer reporting agencies must thereafter use to verify a veteran's medical debt. The Act would also require consumer reporting agencies to provide free electronic credit monitoring to active duty members of the military and members of the National Guard.

Sec. 303 - Financial Institution Employee Immunity for Certain Acts.

The Crapo Act provides immunity from suit for certain employees, affiliates or associates of a covered financial institution who disclose suspected financial exploitation of a senior citizen to a state or federal financial agency, a law enforcement agency, the SEC or a state or local agency that administers adult protective service laws so long as the individual has undergone training on identifying and reporting suspected exploitation of seniors. A "covered financial institution" includes a depository institution, credit union, investment adviser, broker-dealer, insurance company, insurance agency and transfer agent.

A covered financial institution will also be immune from suit from a whistleblower allegation

regarding suspected exploitation of seniors so long as certain required persons (including certain employees and individuals who may communicate regularly with a senior citizen or may review financial documents or transactions of a senior in connection with providing financial services) have received training on identifying financial exploitation of seniors.

Sec. 304 - Restoration of the PTFA. The Crapo Act repeals the sunset provision of the Protecting Tenants at Foreclosure Act of 2009 (“PTFA”) and restores PTFA as it was in effect prior to its expiration on December 30, 2014.¹⁰

Sec. 305 - Expanded TARP Loan Modification Authority. The Crapo Act expands a provision of the Troubled Assets Relief Program (“TARP”) that allows the Treasury Department to use loan guarantees and credit enhancements to facilitate loan modifications to prevent foreclosures of residential properties backing mortgages it acquired. The Crapo Act expands Treasury’s authority under TARP by allowing it to use loan guarantees and credit enhancements to ameliorate lead and asbestos hazards in residential properties that secure assets it has acquired.

Sec. 306 - Family Self-Sufficiency Program Reform. The Crapo Act makes changes to the HUD Family Self-Sufficiency (“FSS”) program, including consolidating the different FSS programs into a single program, allowing the owner of a privately owned property to voluntarily make available an FSS program to its tenants, and broadening the types of services that can be provided to FSS participants.

Sec. 307 - Property Assessed Clean Energy Financing. The Crapo Act requires the CFPB to issue regulations that require property assessed clean energy (“PACE”) creditors to assess a borrower’s ability to repay a home improvement loan that results in a tax assessment on a borrower’s real property. The CFPB may collect any data or information

necessary to develop the regulations and must consult with state and local governments and bond-issuing authorities to assist in developing the regulations.

Sec. 308 - Report on Consumer Reporting Agencies. The Crapo Act requires the GAO to submit a report on consumer reporting agencies to congressional oversight committees within one year of the date of enactment. The report must include, among other items, a review of the current legal and regulatory structure for consumer reporting agencies and any structural gaps, including the rulemaking, supervisory and enforcement authority of state and federal agencies under the FCRA, the Gramm-Leach-Bliley Act and other relevant statutes; data security relating to consumer reporting agencies and the data security laws applicable to consumer reporting agencies; the process by which consumers can appeal errors on their consumer reports and the causes of consumer reporting errors; and recommendations on how to improve the consumer reporting system.

Sec. 309 - Veteran Home Loan Refinancing Reform. The Crapo Act adds protections for veterans who refinance their purchase or construction home loans. Under the Act, the VA will not guarantee or insure the refinancing of a loan to purchase or construct a home unless the insurer provides a certification of the recoupment period for expenses incurred by the borrower in refinancing the loan. Further, all costs and fees must be recouped within 36 days of the loan issuance, and the recoupment must occur through lower monthly payments due to the refinancing. Furthermore, the insurer must provide the veteran with a net tangible benefit test and abide by certain rules regarding the required minimum reduction in the interest rate on the refinanced loan. The Act also requires the VA to issue a report on cash-out refinances within a year of the date of enactment.

Sec. 310 - New Conforming Loan Credit Score Approval Process. The Crapo Act requires Fannie Mae and Freddie Mac (“GSEs”) to create a validation and approval process for a

new credit score model that takes into consideration factors such as ensuring that the model has a record of measuring and predicting default rates. Under the Act, the GSEs may only condition the purchase of a residential mortgage on the provision of a borrower's credit score if the score is derived from a scoring model that has been validated and approved by the GSEs and allows all of the automated underwriting systems to use that credit score.

Sec. 311 - Report on Puerto Rico

Foreclosures. The Crapo Act requires the GAO to submit a report to Congress on foreclosures in Puerto Rico in the aftermath of Hurricane Maria not earlier than one year after the date of enactment. The report must include information on the rate of foreclosures, the rate of return for housing developers, the rate of delinquency, the rate of homeownership, and the rate of defaults on federally insured mortgages in Puerto Rico before and after Hurricane Maria.

Sec. 312 - Children's Lead-Based Paint

Remediation Reform. Under the Crapo Act, HUD must submit to Congress, within a year of the date of enactment, a report that describes HUD's current policies related to lead-based paint hazard prevention and abatement. The report must provide recommendations and best practices for HUD, public housing agencies and landlords to take to improve lead-based paint hazard prevention standards and policies and must provide suggestions for legislation to improve prevention and abatement.

Sec. 313 - Foreclosure Relief for

Servicemembers. The Crapo Act makes permanent an amendment to the Servicemembers Civil Relief Act that allowed for a stay of foreclosure, sale or seizure proceedings for a servicemember for any action filed during or within one year of the servicemember's period of service.

Sec. 401 - Enhanced Prudential Standards

Relief. The Crapo Act amends Section 165 of the Dodd-Frank Act to recalibrate the

application of enhanced prudential standards to larger US BHCs.¹¹ It does this in part by raising the general threshold for the application of enhanced prudential standards from \$50 billion or more in total consolidated assets to \$250 billion or more in total consolidated assets while retaining an option for the Federal Reserve to apply enhanced prudential standards on a case-by-case basis to BHCs with between \$100 billion and \$250 billion in total consolidated assets.

Additionally, the Crapo Act revises the requirements that (i) larger publicly traded BHCs establish a risk committee by raising the triggering threshold from \$10 billion in total consolidated assets to \$50 billion and (ii) larger BHCs comply with maximum debt-to-equity ratios and reporting requirements of the Office of Financial Research by raising the triggering thresholds from \$50 billion to \$250 billion. It also narrows the authority of the Federal Reserve to restrict the activities of a BHC that pose a grave threat to US financial stability by raising the jurisdictional thresholds from \$50 billion in total consolidated assets to \$250 billion.

With respect to stress testing, the Crapo Act raises the thresholds for company-run and supervisory stress tests from \$10 billion and \$50 billion in total consolidated assets, respectively, to \$250 billion. Additionally, it grants the federal banking regulators the discretion to require stress testing on a less frequent basis by replacing references to mandatory semiannual and annual stress testing with periodic testing and eliminates the requirement to use an adverse scenario in company-run and supervisory stress testing.

With respect to assessments, the Crapo Act narrows the Financial Stability Oversight Council's authority by raising the threshold at which a BHC must pay assessments from \$50 billion in total consolidated assets to \$250 billion. It also narrows the Federal Reserve's authority by (i) raising the threshold at which a BHC or savings and loan holding company ("SLHC") must pay assessments related to being

supervised as a larger institution from \$50 billion in total consolidated assets to \$250 billion and (ii) authorizing tailored additional assessments for a BHC or SLHC with between \$100 billion and \$250 billion in total consolidated assets.

Under the Crapo Act, FBOs with more than \$100 billion in global total consolidated assets remain subject to all previously applicable enhanced prudential standards, including, as applicable, the intermediate holding company requirement. Other than this provision, the Crapo Act does not differentiate between US BHCs and FBOs that are deemed to be BHCs as a result of their US operations. Therefore, an FBO with less than \$100 billion in global assets may receive relief under the Crapo Act to the extent that one of the threshold increases described above raises the triggering threshold above the FBO's global total consolidated assets amount. However, even smaller FBOs with comparatively small US operations (e.g., an FBO with \$110 billion in global assets and \$5 billion in combined US assets) may remain subject to the enhanced prudential standards, as the Crapo Act retains the approach from the Dodd-Frank Act of measuring most regulatory thresholds with respect to global assets instead of another measure, such as combined US operations.

The threshold changes are immediately effective for any BHC with total consolidated assets of less than \$100 billion. The threshold changes do not become effective for a BHC or SLHC with between \$100 billion and \$250 billion in total consolidated assets for 18 months, unless the Federal Reserve acts to accelerate the phase-in period. However, the eight existing US global systemically important BHCs remain subject to the full enhanced prudential standards even if they have less than \$250 billion in total consolidated assets.

Sec. 402 - Supplementary Leverage Ratio Relief for Custodial Banks. The Crapo Act instructs the federal banking regulators to amend the regulatory capital rules to allow

depository institution holding companies that are predominately engaged in custody, safekeeping and asset servicing activities, and their subsidiary IDIs, to exclude certain funds that are deposited with the Federal Reserve, European Central Bank or a low-risk non-US central bank when calculating the supplementary leverage ratio. However, funds deposited with a qualifying central bank that exceed the amount held in the institution's related fiduciary, custodial and safekeeping accounts are not eligible for the relief.

Sec. 403 - Improved Leverage Ratio Treatment for Certain Municipal Obligations. The Crapo Act instructs the federal banking regulators to amend their liquidity requirements to allow US municipal obligations to qualify as high-quality liquid assets (Level 2B) if they are: (i) liquid and readily marketable under the Liquidity Coverage Ratio regulation and (ii) investment grade under the OCC's investment securities regulation.

Sec. 501 - National Securities Exchange Regulatory Parity. The Crapo Act removes the distinction between (i) national securities exchanges whose securities are automatically eligible for exemption from state regulation of securities offerings and (ii) national securities exchanges whose securities are eligible for exemption because the SEC has determined that the exchange's listing standards are substantially similar to an exchange automatically eligible under the Securities Act of 1933. It does this by making eligible for the exemption from state law all securities that have been designated as qualified for trading in the national market system and are listed on a national securities exchange.

Sec. 502 - SEC Algorithmic Trading Study. The Crapo Act requires the SEC to conduct a study on algorithmic trading that addresses its effects, benefits, risks and regulation and, if appropriate, to recommend changes regarding the regulation of such trading.

Sec. 503 - Annual Review of Capital Formation Forum. The Crapo Act requires the SEC to review the findings and recommendations of the annual government-business forum on capital formation and issue a public statement assessing the findings and recommendations and disclosing the action the agency intends to take with respect to such findings and recommendations.

Sec. 504 - Larger Venture Capital Fund Investment Company Exemption. The Crapo Act expands an exception from the definition of “investment company” in the Investment Company Act of 1940 (“Investment Company Act”) by expanding the scope of the exception under Section 3(c)(1) (which provides an exception for investment companies with not more than 100 beneficial owners that do not make public offerings) to also include “venture capital funds” (as defined for purposes of the venture capital fund adviser exemption under the Investment Advisers Act of 1940) that have up to 250 investors and \$10 million in aggregate capital contributions and uncalled committed capital.¹²

Sec. 505 - Overpayment Credit. The Crapo Act authorizes the SEC to give relief to a national securities exchange or national securities association (i.e., the Financial Industry Regulatory Authority) that has overpaid a regulatory fee or assessment in the last 10 years by crediting the amount of the overpayment to a future fee or assessment. This relief is only available for overpayments made prior to the date of enactment.

Sec. 506 - US Territories Investor Protection Expansion. The Crapo Act expands investor protections by removing an exemption in the Investment Company Act for putative investment companies that are organized under US territorial law and offered solely to residents of the territory of organization. There is a three-year phase-in period for this removal, which may be extended another three years by the SEC.

Sec. 507 - Employee Ownership Exemption Expansion. The Crapo Act expands the exemption from registration for certain sales of securities by non-reporting companies. It does this by expanding the maximum amount of securities that a company may sell to employees, consultants and advisors under Rule 701 from \$5 million to \$10 million and indexing the threshold going forward to the inflation rate.¹³

Sec. 508 - Regulation A Expansion. The Crapo Act expands the exemption from registration under Regulation A by (i) removing the requirement that an issuer not be a reporting company under Sections 13 or 15(d) of the Securities Exchange Act of 1934 (“Exchange Act”) prior to relying on the exemption and (ii) providing that an issuer be deemed to have satisfied the periodic and current reporting requirements of Regulation A if it is a reporting company under Sections 13 or 15(d) the Exchange Act that satisfies the reporting requirements of Section 13.¹⁴

Sec. 509 - Parity for Closed-End Investment Companies. The Crapo Act provides relief for closed-end investment companies by instructing the SEC to adopt rules that allow an SEC-registered closed-end fund that is either (i) listed on a national securities exchange or (ii) an “interval fund” that makes periodic repurchase offers pursuant to Investment Company Act Rule 23c-3 to use the securities offering and proxy rules that are available to operating companies under Sections 13 or 14(d) of the Exchange Act. If the SEC fails to take action within two years of the date of enactment, qualifying registered closed-end funds will automatically be deemed to be eligible issuers under the SEC’s 2005 offering reforms.¹⁵

Sec. 601 – Private Education Loan Discharge Reform. The Crapo Act amends TILA to add additional protections for a borrower or cosigner of a private education loan. The Act prohibits a creditor from declaring default or accelerating the debt against a student

due to the bankruptcy or death of a cosigner. The Act also provides that the holder of a private education loan must release a cosigner from his or her obligations upon the death of the student obligor and provide notification to the cosigner within a reasonable time of the release. The Act also requires a lender to provide a student borrower with the option to designate a person to have the legal authority to act on the student's behalf with respect to the loan in case of his or her death. The amendments would apply to private education loans entered into on or after 180 days following the date of enactment.

Sec. 602 - Private Education Loan Credit Reporting Reform. The Crapo Act amends the FCRA by allowing a borrower to request that a financial institution remove a reported default on a private educational loan from his or her credit report if the institution offers and the borrower successfully completes a loan rehabilitation program designed by the institution (and approved by federal banking regulators). The borrower may request the removal of a reported default only once per loan. The GAO must also, in consultation with the federal banking regulators, conduct and submit a study to Congress regarding the costs associated with implementing this new provision and the effects of the provision on the accuracy of credit reporting.

Sec. 603 - Best Practices for Higher Education Financial Literacy. The Crapo Act requires Treasury's Financial Literacy and Education Commission to, within a year of the date of enactment, establish best practices for higher education institutions regarding teaching financial literacy skills and providing students with information to help them make decisions related to student borrowing. These best practices must include ways to communicate to students the importance of graduating on their ability to repay student loans and methods to ensure that they understand their borrowing obligations. However, institutions would not be required to adopt these best practices.

For more information about the topics raised in this Legal Update, please consult your regular Mayer Brown lawyer or any of the following contacts in the Financial Services Regulatory and Enforcement practice.

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Endnotes

- ¹ The Economic Growth, Regulatory Relief, and Consumer Protection Act, S.2155, 115th Cong. (2018), *available at* <https://www.congress.gov/bill/115th-congress/senate-bill/2155>.
- ² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [*hereinafter* Dodd-Frank Act].
- ³ See our recent Legal Update discussing the state of play of qualified and non-qualified mortgages: <https://www.mayerbrown.com/The-State-of-Play-of-Qualified-and-Non-Qualified-Mortgages-05-14-2018/>.
- ⁴ See Dodd-Frank Act § 619, 124 Stat. at 1620-31 (*codified at* 12 U.S.C. § 1851).
- ⁵ See Home Owners' Loan Act § 5(c), 12 U.S.C. § 1464(c).
- ⁶ See 12 C.F.R. pt. 225, app. C.
- ⁷ See Dodd-Frank Act § 171, 124 Stat. at 1435-38 (*codified at* 12 U.S.C. § 5371).
- ⁸ See Expedited Funds Availability Act § 602, 12 U.S.C. § 4001.
- ⁹ See Bipartisan Budget Act of 2018, Pub. L. 115-123 § 30,205, 132 Stat. 64, 127 (2018); Fixing Americas Surface Transportation Act, Pub. L. 114-94 § 32,203, 129 Stat. 1312, 1739 (2015).
- ¹⁰ See Protecting Tenants at Foreclosure Act of 2009, Pub. L. 111-22, tit. VII, 123 Stat. 1633 (2009).
- ¹¹ See Dodd-Frank Act § 165, 124 Stat. at 1423-32 (*codified at* 12 U.S.C. § 5365).
- ¹² See Investment Company Act § 3(c)(1), 15 U.S.C. § 80a-3(c)(1).
- ¹³ See Securities Act Rule 701, 17 C.F.R. § 230.701.
- ¹⁴ See Securities Act Rules 251, 257, 17 C.F.R. §§ 230.251, 230.257.
- ¹⁵ See Securities Offering Reform, 70 Fed. Reg. 44,722 (Aug. 3, 2005).

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