

Issues and Amendments in the Senate Regulatory Restructuring Bill

[\(Link to Legislative Text of the Dodd Substitute\)](#)

Updated May 20, 2010

Issue	Dodd Bill	ABA Position	Amendments
1. Consumer Financial Protection Bureau (CFPB)	Autonomous bureau within Fed with broad oversight and enforcement powers over banks and non-banks with respect to consumer laws. Includes an ineffective process for prudential regulators to challenge CFPB rules, a new term “abusive” to acts and practices prohibited by UDAP, numerous burdensome and costly reporting and other requirements for banks and state AG enforcement of federal rules, among other issues.	Substantially modify these provisions at minimum by replacing the appeals process in the Dodd bill with an effective method for prudential regulatory agencies to provide input on CFPB proposed rules, and to have safety and soundness and other regulatory concerns addressed either through the rule-writing process itself or through appeal to an independent body. Also, the term “abusive” should be removed and the unnecessary and burdensome reporting and other requirements should be removed (deposit accounts, small business applications, request for information). There should also be no state AG enforcement authority over banks. (“Abusive” definition also addressed below in issue item #20.)	Shelby amendment #3826 : would substitute the Consumer Financial Protection Bureau (CFPB) with a Division of Consumer Protection (DCP) within the FDIC. ABA supported the amendment. Rejected, 38-61 . ABA supports amendments to narrow the scope of the CFPB’s rulemaking, examination, and enforcement authorities over banks. (See also items #20 and #21.)
2. Preemption	Adopts flawed House (Bean) language with state AG enforcement, no protection for subsidiaries and other flaws.	Drop altogether or substantially modify to bring closer to current law.	Carper amendment #3949 : would preserve the national regulation of U.S. financial institutions while maintaining the bill’s new procedural protections that ensure appropriate judicial oversight of the preemption process. Talking points in support . Carper amendment #4071 : modifies #3949 by not including the provision that would have narrowed the bill’s broad grant of enforcement power to state attorneys general. Talking points in support . APPROVED 80-18 .

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3. Accounting	“Fair Value” accounting standards exacerbated the financial crisis. The House bill requires the Systemic Risk Oversight Council to review and comment on existing and proposed accounting standards but there is no similar provision in the Dodd bill.	Modify bill to authorize review of existing and proposed accounting rules by the Oversight Council.	Corker amendment #3784 : would authorize the Financial Stability Oversight Council to review and submit comments to the SEC and FASB re an existing or proposed accounting principle, standard, or procedure. Talking points in support.
4. Thrift Charter	No new thrift charters would be approved and restrictions on existing thrifts would be imposed.	Drop these provisions and modify the bill to retain current laws and chartering authority for new thrifts.	Kerry amendment #3870 : would allow for the continued chartering of new thrifts while giving the regulation and examination of both new and existing thrifts to the OCC. Talking points in support. Kerry-Brown-Brownback letter to colleagues.
5. State Member Banks	Oversight authority transferred to FDIC.	Modify the bill to keep oversight with the Fed.	Hutchison-Klobuchar amendment #3759 . Changes Dodd bill by returning to the Fed from the FDIC authority over state member banks and by returning oversight of all holding companies regardless of size or charter to the Fed. Talking points in support. PASSED 90-9 . Pryor amendment # 3874 . Also changes the Dodd bill by returning to the Fed authority over state member banks. However, the amendment is similar to the Dodd bill in that oversight of small holding companies (those with less than \$50 billion in total consolidated assets) goes to the prudential regulatory agency of the lead institution – OCC for national banks, FDIC for state non-member banks and Fed for state member banks.
6. FHLBs – Concentration Limits	The bill prohibits institutions deemed to be systemically important from lending an amount that exceeds 25% of the capital	ABA is concerned that this potentially could reduce the lending abilities of banks, especially community banks, because it would substantially reduce the FHLB’s ability to provide liquidity. That is why the	Johnson amendment #3978 : would exempt the FHLBs from the bill’s definition of “systemically important” institutions. Joint industry letter in support.

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	<p>stock and surplus of the lending institution. This could potentially include FHLBs.</p>	<p>House bill specifically excluded the FHLBs from a similar concentration limit. The bill should be modified to exempt fully secured extensions of credit made by a FHLB to a member institution.</p> <p>Applying the concentration limit to the FHLBanks could severely impact FHLBank advances – limiting the System-wide total amount of FHLBank advances by nearly 50 percent. Based on recent data, the FHLBank System’s total advances of \$658 billion would have to decline by \$317 billion in order to meet the 25 percent concentration limit. In addition, as advances are reduced, FHLBank stock supporting these advances would be retired, leading to a reduction in the System’s total capital and a further reduction in advances. Taking away half of the System’s advances also would substantially reduce the FHLBanks’ affordable housing program. The House bill specifically excluded the FHLBanks from its concentration limit provisions.</p>	
<p>7. Risk Retention (Also covered in item #22 as it relates specifically to mortgage lending.)</p>	<p>Would require loan originators and securitizers together to retain 5 percent of the credit risk on all loans.</p>	<p>Risk retention is intended to encourage better underwriting, but imposing it across the board harms community banks and the customers they serve because it would prevent banks from removing loans from their balance sheets and this would reduce lending and make it harder to fund bank operations. The bill should be modified to require the federal regulators to review and, if necessary, issue new underwriting rules for residential mortgages before imposing risk retention requirements.</p>	<p>Corker amendment #3782: requires a study to determine the right level of “skin in the game” when mortgage loans are securitized before rules are issued. Talking points in support.</p> <p>Landrieu safe harbor #3956: would exempt mortgage loans (and securities of mortgage loans) which are underwritten to conservative standards (developed by the regulators) from risk retention. The amendment ensures that well underwritten loans can be made without forcing lenders to hold additional capital and credit risk which could reduce credit availability. ABA supports. Passed by unanimous consent.</p>

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			Crapo 2 nd degree amendment #3992 : would require the standards and regulations developed by the regulators in implementing risk retention requirements to take into consideration the unique nature of commercial mortgage backed securities(CMBS). Specifically, the regulators must consider the forms, types and amounts of risk retained in a CMBS transaction and adjust the risk retention requirements accordingly. Passed by UC.
8. SOX Exception	No provision. House bill includes permanent exception from the SOX Sec. 404(b) attestation requirements.	While Sec. 404(b) is intended to prevent accounting improprieties, implementation has resulted in substantially greater than expected compliance costs, particularly for smaller companies. ABA strongly supports inclusion of a provision that would permanently exempt smaller companies from Sec. 404(b).	Hutchison-Landrieu amendment #3785 : would permanently exempt small banks and companies with market caps of less than \$150 million from Section 404(b) of the Sarbanes-Oxley Act. Talking points in support.
9. Resolution Fund	Would create an up-front \$50 B fund for liquidations of failed and failing systemically risky banks and non-banks.	ABA is concerned that this encourages continuation of Too Big to Fail and this should be removed from the bill.	Dodd-Shelby amendment #3827 : eliminates the \$50B up-front fund. Approved, 93-5 .
10. 500 Shareholder Threshold for SEC Registration.	No provision. Current law requires companies to register when they have 500 shareholders and this has not been updated since the 1960s.	Many small banks running up against this out-of-date limit. Raise threshold to 2000 shareholders.	Hutchison amendment #3833 : Would raise to 2000 the number of shareholders a bank must have before it is required to register with the SEC. Talking points in support.
11. Bank Trust and Fiduciary Activities	The CFPB would have oversight authority instead of the bank regulators.	Remove CFPB oversight.	
12. State Bank Lending Limits	The bill applies national bank lending limits to state banks.	Remove this provision from the bill as was done in the House bill.	Conrad amendment #3919 : would allow banks with \$10 billion or less to apply state lending limits. Talking points in support (though ABA believes it should apply to state banks of all sizes).

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<p>13. Derivatives</p> <p>UPDATE</p>	<p>Senate Ag Committee bill would be inserted in the Dodd bill when it goes to the Senate floor and would require all standardized derivatives to be cleared through clearinghouses and also traded on an exchange. The bill contains very broad definitions of “swap dealers” and “major swap participants” and essentially eliminates the ability of banks of all sizes to engage in the purchase or sale of swaps.</p>	<p>ABA is concerned that the bill would negatively affect all banks, including regional and community banks that make use of derivatives, including interest rate swaps. Regional and community banks would be prohibited from using interest rate swaps to deliver fixed rate loans to commercial customers and large U.S. banks would effectively be put out of the derivatives business.</p>	<p>ABA supports amendments that strike Section 716. ABA letter to Senate re Section 716. Talking points on derivatives.</p> <p>Chambliss amendment #3816. Failed 39-59.</p> <p>Dodd amendment #4110: would address the swap push out provision by deferring the decision on whether bank swap activity should be pushed-out to the Financial Stability Oversight Council, which is to conduct a study on the issue.</p>
<p>14. Interchange</p>	<p>No provision.</p>	<p>ABA is strongly opposed to restrictions on interchange.</p>	<p>Durbin amendments #3769, 3770, and 3771. Talking points to oppose #3771. Talking points to oppose the three amendments.</p> <p>Durbin amendment #3932: combines elements of amendments #3769 and #3771. Talking points to oppose.</p> <p>Durbin amendment #3989: the latest Durbin amendment includes an ostensible \$10 billion exclusion that in reality would permit retailers to discriminate against particular cards that carry higher rates. Talking points to oppose. APPROVED 64-33.</p>
<p>15. Bankruptcy</p>	<p>No provision.</p>	<p>ABA is opposed to proposals to undermine the netting and other provisions of the 2005 bankruptcy reform law, to impose mortgage cram down, and to weaken the rights of student lenders in bankruptcy.</p>	<p>Nelson amendment #3741: would repeal certain “safe harbor” provisions of the bankruptcy code. Talking points to oppose. Joint letter opposing the amendment.</p> <p>Franken amendment #3765: would eliminate the undue hardship standard to discharge private student loans in bankruptcy proceedings. Talking points</p>

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<p>16. Interest Rate Caps</p> <p>UPDATE</p>	<p>No provision.</p>	<p>ABA is strongly opposed to interest rate caps and proposals that would undermine <u>Marquette</u>.</p>	<p>to oppose.</p> <p>Sanders-Leahy amendment #3740: would authorize the CFPB to impose a 15 percent interest rate cap on credit cards. Talking points to oppose.</p> <p>Whitehouse amendment #3746 (as modified): would limit the rate on a consumer credit transaction to a consumer’s state law. Amendment was modified to apply only to national banks. Talking points to oppose.</p>
<p>17. Bank Concentration</p>	<p>No provision.</p>	<p>ABA is opposed to bank concentration limits that would force a dramatic and highly disruptive reduction in not only the size but also the lending of the largest banks. This affects \$3.1 trillion currently being used for lending and other financial services to tens of millions of businesses and individual customers. This would make U.S. banks less competitive in global markets and result in more than 300,000 job losses.</p>	<p>Brown-Kaufman amendment #3733: would place a cap on the ability of certain large banks to use non-deposit liabilities above 2 percent of GDP to fund loans and securities. Talking points to oppose. Amendment failed by a vote of 33-61.</p>
<p>18. ATM Fees</p> <p>UPDATE</p>	<p>No provision.</p>	<p>ABA is opposed to price controls on ATM transactions, as they would make many ATMs uneconomical. This would lead to a dramatic reduction in the number and availability of these terminals and stop any production and distribution of new terminals, resulting in greater inconvenience for consumers, loss of revenue for convenience stores and small retailers.</p>	<p>Harkin amendment #3812 (modified): would require the CFPB to set ATM fees (for ATM operators other than the consumer’s own bank) that bear a “reasonable relation to the cost of processing the transaction.”</p> <p>Talking points to oppose. Updated one-page background information. One-page background information with chart showing ATM expansion. November 1999 economic analysis of ATM fees, by Robert Litan of the Brookings Institution.</p>
<p>19. Arbitration</p>	<p>Section 1028 requires the CFPB to study and report to Congress on the use of arbitration agreements in consumer financial product or</p>	<p>Pre-dispute arbitration agreements are fair to consumers and are less expensive and time consuming than going to court to resolve legitimate disputes between consumers and credit providers</p>	<p>Feingold amendment #3779: would require the CFPB’s study of consumer arbitration to be performed within 180 days after enactment.</p>

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	<p>service contracts. The CFPB may prohibit or impose conditions or limitations on these agreements.</p>	<p>and they should not be prohibited or limited by the CFPB.</p>	<p>Feingold amendment #3780: rather than allowing the CFPB to regulate arbitration as it deems necessary, the amendment would mandate regulations and would mandate that the SEC conduct a rulemaking on the use of broker, dealer, municipal securities dealer, and investor advisor arbitration agreements.</p> <p>Joint industry letter opposing amendments #3779 and #3780.</p> <p>Cornyn amendment #3894: would remove provisions that allow arbitration clauses to be banned. <u>ABA supports.</u></p>
<p>20. Definition of “Abusive” Acts or Practices</p>	<p>Section 1031 adds the new term “abusive” to the prohibition on unfair or deceptive acts and practices.</p>	<p>The definition of “abusive” is very broad and would lead to extensive litigation and potentially greater liability for banks. It is vague, subjective, and applied after the fact. In effect, the Director of the Bureau would be able to determine – retroactively – that a particular product is “abusive” based on any vague notion that the least sophisticated person cannot understand or manage the product or service. This would lead to extensive litigation and huge potential liability that would stop innovation in its tracks.</p>	<p>Corker amendment #3933: would remove the term “abusive” from Section 1031. <u>ABA supports.</u></p> <p>Talking points opposing new “abusive” definition.</p>
<p>21. Enforcement of Contracts</p>	<p>Section 1036 makes it unlawful to enforce or seek to enforce any contract for a consumer financial product or service that is not in conformity with any consumer protection law transferred to the CFPB or any new rule issued by the agency.</p>	<p>Under Section 1036, if a financial service provider does not comply with any consumer law or rule under the jurisdiction of the Bureau the contract would be unenforceable. ABA is concerned that this means the customer would not have to repay any loan or mortgage if there is a technical or other violation of any covered regulation or if the agreement includes a term or provision that is</p>	<p>ABA strongly supports amendments that would either strike or substantially modify Section 1036. Talking points.</p>

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		<p>retroactively determined to be “abusive,” “unfair,” or “deceptive.” This is <i>in addition to</i> the other penalties already imposed under the various regulations. It was this type of extreme liability that compelled Congress in 1980 to revisit the Truth in Lending Act (TILA) and substantially limit liability for violations under TILA.</p>	
<p>22. Mortgage Lending</p>	<p>Similar to the House-passed bill, the Dodd bill contains many new conditions and restrictions on mortgage lending.</p>	<p>Defeat or modify amendments that add new barriers to bank mortgage lending.</p>	<p>Merkley-Klobuchar amendment #3962: would ban mortgage brokers and loan originators from accepting payments based on the terms of the loans. It would also prohibit a loan originator from receiving compensation from any other party, and prohibit lenders from making a loan without verifying the borrowers’ ability to repay the loan from income and assets other than the home’s value. It would ban yield spread premiums, which many lenders still use to compensate brokers, and would require underwriting standards promulgated by the CFPB. ABA opposed. PASSED 63-36.</p> <p>Corker amendment #3955: would require a 5% down payment for all loans other than VA guaranteed loans, making homeownership prohibitively expensive for many borrowers (and virtually all first time borrowers). As an example, FHA now requires 3.5% down, under Corker that would rise to 5%. ABA opposed. FAILED 42-57.</p> <p>Landrieu safe harbor #3956: would exempt mortgage loans (and securities of mortgage loans) which are underwritten to conservative standards</p>

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			<p>(developed by the regulators) from risk retention. The amendment ensures that well underwritten loans can be made without forcing lenders to hold additional capital and credit risk which could reduce credit availability. ABA supports. Passed by unanimous consent.</p> <p>Crapo 2nd degree amendment #3992: would require the standards and regulations developed by the regulators in implementing risk retention requirements to take into consideration the unique nature of commercial mortgage backed securities(CMBS). Specifically, the regulators must consider the forms, types and amounts of risk retained in a CMBS transaction and adjust the risk retention requirements accordingly. Passed by unanimous consent.</p>
<p>23. Trust-Preferred Securities</p> <p>UPDATE</p>	<p>No restrictions on the use of trust-preferred securities as tier 1 capital.</p>	<p>Bank holding companies should be allowed to use trust-preferred securities as tier 1 capital.</p>	<p>Collins amendment #3879: would require the regulators to establish minimum leverage and risk-based capital requirements for all banks, bank holding companies, and non-financial firms under the Federal Reserve’s jurisdiction. Summary of the amendment.</p> <p>It limits tier 1 capital for bank holding companies to that approved for insured depository institutions – currently trust-preferred securities are not permitted tier 1 capital.</p> <p>ABA believes this amendment would reduce the ability of banks to lend to</p>

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			small businesses and impact the safety and soundness of holding companies. We also are concerned that it applies to Federal Home Loan Banks (FHLBs), which do not fit at all in a category meant for bank holding companies.
24. Reinstate Glass-Steagall Restrictions on Bank Securities and Insurance Activities UPDATE	No provisions.	Millions of customers rely on the ability of their banking organizations to offer a full range of banking, brokerage, and insurance services. Repealing the ability of these firms to offer insurance or securities products and diversify their income stream would not assist in the economic recovery or contribute to a safer financial environment.	Cantwell-McCain amendment #3884: Would amend the Gramm-Leach-Bliley Act to restrict the ability of banks to engage in securities and insurance activities. Talking points to oppose. Letter to Senate opposing.