

Summary
Of
The Restoring American Financial Stability Act of 2010
(Regulatory Restructuring Legislation)

Passed by the Senate

On

May 20, 2010



Summary of the Restoring American Financial Stability Act of 2010

The Senate passed the Restoring American Financial Stability Act of 2010 (H.R. 4173) on May 20, 2010, by a vote of 59-39.¹ The basic structure of the bill as reported by the Banking Committee was not changed, although several important amendments were adopted. Since the Senate bill is different from the House-passed bill, there will be a conference to resolve the differences. The Senate has named its Conferees and the House is expected to follow suit the week of June 7. Negotiations are expected throughout June, and it is the goal of the House and Senate Chairmen to have a conference report voted on by both Chambers and sent to the President to be signed into law before the July 4 recess.

ABA supports broad regulatory reform to address the financial crisis. In particular, ABA has testified in favor of creating a systemic oversight council and a method to resolve troubled systemically important firms in a manner that would end too-big-to-fail, closing regulatory gaps relating to non-banks, and improving consumer protections with a focus on non-banks.

The bill, however, would create a regulatory structure that would have a disproportionate and detrimental impact on the banking industry and especially on traditional banking that had little to do with the fundamental causes of the crisis. The bill would:

- **Create a New Federal Consumer Bureau.** The bill would create a new and powerful Consumer Financial Protection Bureau (CFPB) with broad powers to supervise and enforce consumer protection laws. The CFPB would have broad rule-writing authority for a wide range of consumer protections laws that would apply to all banks. However, some direct and indirect competitors of banks would escape CFPB examination and enforcement, such as Farm Credit System (FCS) lenders. The CFPB would have expansive powers to dictate the way products and services could be offered in the financial services market.

Although the CFPB would be located within the Fed, it would be completely independent, with its Director appointed by the President, a separate and dedicated source of funding, and the authority to go to court on its own behalf. ABA believes the consumer function must not be separated from the prudential regulators, and that the bill does not effectively regulate non-banks that compete directly and indirectly against banks. As a result, community banks that did nothing to cause the financial crisis will be subject to heavy new and potentially conflicting regulation, while certain non-bank competitors may have little or no effective regulation.

- **Limit Interchange on Debit Cards.** The [amendment](#) by Sen. Richard Durbin (D-IL) adopted on the Senate floor would require the Federal Reserve to set reasonable and proportional interchange fees on debit cards. Retailers also would have the authority to provide discounts based on network or payment type, and would be able to set minimum and maximum payment requirements.
- **Eliminate sources of capital for holding companies.** The Collins [amendment](#) adopted on the Senate floor would require that the components of capital at the holding company level be the same as the components that are permissible at the bank level. This means that several forms of capital – including trust preferred securities and Treasury’s TARP investments in holding companies –

¹ When adopting the Dodd substitute prior to final passage of the legislation, the Senate adopted the House bill’s number. The Senate bill previously was S. 3217.

would no longer qualify as capital.

- **Prohibit New Thrift Charters.** The bill would prohibit new thrift charters, grandfathering those in existence now. ABA believes that eliminating the thrift charter going forward will relegate it to “second class” status and stifle innovations within the thrift industry.
- **Change Preemption Standards and Increase Litigation.** The bill’s provisions on preemption have been significantly improved from initial versions that would have eliminated most preemption of state law, generally preserving existing preemption doctrine. New procedural requirements, however, would impact how preemption determinations get made – such as the need for the Office of the Comptroller of the Currency (OCC) to issue such determinations on a case-by-case basis (as opposed to through a broader regulation). This would mean that state legislatures would have less guidance on what may or may not be preempted, increasing the likelihood that states would pursue new initiatives that would have to be resolved in court. Moreover, state Attorneys General have been granted significant authority to enforce federal and state law, opening the door to significant litigation risk. ABA believes federal preemption should be maintained, since requiring federally chartered institutions to comply with potentially hundreds of different state and local laws would raise costs for bank customers, confuse consumers, and stifle innovation. It also would impact banks of all sizes and charter types and have a dramatic effect on bank customers and national and regional economies.
- **Fail to Address Accounting Standards.** The bill fails to address accounting policy issues, despite the fact that pro-cyclical accounting policies exacerbated the financial crisis and that the G-20 has strongly recommended that financial regulators have input into accounting policy. ABA believes the bill should specifically require the systemic risk council to review accounting policies.
- **Impose New Regulatory Burdens.** The bill would impose a multitude of new and unnecessary regulatory requirements and costs on the banking industry, including new reporting requirements for small business lending and the Home Mortgage Disclosure Act (HMDA).
- **Other ABA Concerns.** The bill does not address several issues that are priorities for ABA, such as removing the provision that applies national bank lending limits to state banks and adding a smaller institution exemption from the Sarbanes Oxley Act’s section 404(b) attestation requirements. ABA will work to have these, and other important issues, addressed in the House-Senate negotiations on this legislation.

The Senate-passed bill represents the broadest, most complex, and most important legislation the banking industry has faced in 70 years. The following is a summary of the major provisions of the bill.²

² This summary is intended to provide ABA members with an overview of the key features of the legislation and is not meant to be a comprehensive analysis. It is subject to correction and revision as ABA’s analysis continues.

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TITLE I – FINANCIAL STABILITY[\(Back to Table of Contents\)](#)

This title creates a new systemic risk regulator that would focus on identifying, monitoring, and addressing systemic risks posed by large and complex bank and non-bank companies, as well as any systemic risks posed by certain products and services.

A new provision, added as an [amendment](#) by Sen. Susan Collins (R-ME) on the Senate floor, would impose new capital requirements on banks, bank holding companies, and non-bank financial companies that are subject to Federal Reserve Board (Fed) oversight. The provision would require the following:

- The banking agencies would have to adopt minimum leverage and risk-based capital standards that use the components of capital that are used by the agencies in the Prompt Corrective Action rules. This would mean that certain forms of capital that are popular at the holding company level – including trust preferred securities and the U.S. Treasury’s investments in holding companies under the Capital Purchase Program – would no longer count as Tier 1 capital.
- The Collins amendment would have the effect of eliminating the Fed’s Small Bank Holding Company Policy Statement, which currently provides flexibility for bank holding companies under \$500 million in consolidated assets to raise capital in ways that larger companies may not.
- It may subject foreign banks that own U.S. banks to capital standards notwithstanding current Fed policy as stated in its SR 01-01.
- The regulators would be required to develop capital standards that address the risks arising from derivatives, securitized products, financial guarantees, securities borrowing and lending, repurchase agreements and reverse repurchase agreements; concentrations in assets for which values are based on models rather than historical cost or prices deriving from deep and liquid

two-way markets; and concentrations in market share of any activity if an institution's cessation of the activity would substantially disrupt the financial markets. [Section 171]

A. Oversight Council

A new systemic risk regulator would be created called the Financial Stability Oversight Council (the "Oversight Council" or "Council"). The Council would have nine voting members, including: the Secretary of the Treasury (who would serve as Chair), the heads of the Fed, Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), Securities and Exchange Commission (SEC), Commodity Futures Trading Commission (CFTC), Federal Housing Finance Agency (FHFA), and the new Bureau of Consumer Financial Protection (CFPB), as well as an independent Presidential appointee having insurance expertise. A new Office of Financial Research would advise the Council. Council meetings would be exempt from the Federal Advisory Committee Act. [Section 111]

Purpose of the Oversight Council. The Oversight Council would identify risk to the financial stability of the country; promote market discipline by eliminating a perception that the government will shield shareholders, creditors, and counterparties from losses if a financial institution fails; and respond to emerging threats to US markets. It would gather information and report back to an institution's primary regulator and to Congress. It also would identify non-bank firms, market utilities, and payment, clearing, and settlement activities that present systemic risks that should be subject to standards set by the Fed. The Council also would resolve disputes between members. Farm Credit System (FCS) institutions would be excluded from the definition of "non-bank firm." [Sections 112 and 119]

Authority. The Council would have the authority to make recommendations:

- To any of its members regarding general supervisory priorities and standards, but it would not have the authority to mandate that the recommendations be implemented.
- To the Fed regarding prudential standards and reporting requirements for "significant" institutions, which would include any non-bank company that is subject to the Fed's supervision and for "large and interconnected" bank holding companies (BHCs). In practice, a covered BHC would be one having at least \$50 billion in total consolidated assets.
- To any of the banking agencies regarding heightened prudential safeguards that the Council views as needed to guard against liquidity, credit, or other problems that could affect multiple institutions. [Section 112]
- By definition, the Council or Fed would not have systemic risk oversight authority over Farm Credit System institutions.

Prudential Standards. The prudential standards would address capital (including contingent capital), leverage, liquidity, living wills, concentration limits, enhanced disclosures, and risk management. They would take into account differences among different companies, including whether a company owns a bank. The Oversight Council would have to conduct a study of the pros and cons of contingent capital and report to Congress on its findings.

Going forward, the Council would be able to recommend that the Fed require covered institutions to maintain a minimum amount of debt that is convertible to equity. The Council also could recommend that the Fed require covered institutions to report on credit exposures to, and from, other significant

non-bank companies and BHCs. [Section 115]

The standards for covered institutions would be more stringent than those that apply to other financial institutions and would become progressively more stringent as risk increases from a firm's size, complexity, and interconnectedness. However, they would be designed to avoid "cliff effects" (e.g., imposing significantly more stringent requirements based on a small increase in size). The Council would be able to recommend an asset threshold greater than \$50 billion for the applicability of any particular standard. [Section 115]

The Oversight Council would have the authority to recommend heightened standards for any *activity* or *practice* that the Council determines could create or increase a systemic risk. It then would be up to the agency with primary jurisdiction to adopt the standard within 90 days or explain why it did not. [Section 120]

If the Fed were to determine that a covered institution poses a "grave threat" to the financial stability of the United States, the Fed, upon a vote of at least two-thirds of the Oversight Council, could require the firm to terminate an activity, sell assets or off-balance sheet items, or comply with conditions imposed on the exercise of the activity. [Section 121]

Funding. The Oversight Council's expenses would be paid by the Office of Financial Research. Thus, as explained below, covered institutions would be assessed for the Council's costs. [Section 118]

B. Office of Financial Research (OFR)

The OFR would be established within the Treasury Department and would be headed by a Presidential appointee. It could have its own employees or borrow from the other agencies. The OFR would collect data; develop risk monitoring tools; and, share results with other agencies. Standardized data collections would be developed and imposed on all financial institutions. The OFR would have the authority to subpoena information. [Sections 151 – 154]

The OFR would be funded through a separate fund in Treasury called the "Financial Research Fund." For the OFR's first two years, the Fed would provide whatever funding is needed. Thereafter, covered institutions would have to pay an assessment at a rate set by Treasury. [Section 155]

C. Enhanced Fed Authority

Heightened Standards. The Fed would be required to establish heightened prudential standards and disclosure requirements for covered institutions. [Section 165(a)] Those standards would increase in stringency as a firm's size, complexity, or connectedness warrants, and would address capital, leverage, liquidity, resolution plans, credit exposure reporting, and concentration limits. The Fed also *could* establish a contingent capital requirement, enhanced public disclosures, and risk management requirements. The standards would have to take into account differences among institutions and avoid the cliff effect noted above. [Section 165(b)]

Living Wills. Each covered institution would have to periodically submit a living will to the Fed, the Oversight Council, and the FDIC. It also would have to submit reports on the nature and extent of its credit exposures to, and from, other significant non-bank financial companies and BHCs. If the Fed and FDIC were to jointly conclude that a resolution plan is deficient, they would notify the company of the deficiencies and the company would have to submit a revised plan. Failure to do so could result in

higher capital, leverage, and liquidity requirements, as well as restrictions on growth, activities, and operations. If the firm failed to submit an acceptable plan within two years, the Fed and FDIC could order the firm to divest assets or operations to facilitate an orderly resolution under the bankruptcy code. [Section 165(d)]

Credit Concentrations. Starting three years after enactment of the legislation, covered institutions would be prohibited from having credit exposures to any unaffiliated company in amounts that exceeded 25 percent of the institution's capital (or a lower threshold set by the Fed). "Credit exposures" would include loans, deposits, repo agreements, securities borrowing and lending transactions, guarantees, counterparty credit exposures, and similar transactions identified by the Fed. [Section 165(e)]

Risk Committees. All publicly traded non-bank financial companies supervised by the Fed, and publicly traded BHCs with assets of \$10 billion or more would be required to have risk committees responsible for enterprise-wide risk management. The Fed also could require publicly traded BHCs with assets of less than \$10 billion to have risk committees. The Fed would have 1 year to adopt rules implementing this section. [Section 165(g)]

Enhanced Disclosures and Stress Tests. The Fed may require covered institutions to make enhanced public disclosures regarding risk profile, capital adequacy, and risk management. [Section 165(f)] It also may conduct stress tests on covered institutions to determine their capital adequacy. [Section 165(h)]

Early Remediation Requirements. The Fed would have to adopt regulations that establish requirements to provide for the early remediation of covered institutions. The regulations would require these institutions to take a series of increasingly stringent steps to minimize the probability that the institutions will become insolvent. The bill explicitly states that nothing in the section in question authorizes the government to provide financial assistance. [Section 166]

Acquisition of Large Non-Bank Companies. As a general rule, covered institutions would have to give the Fed prior written notice to acquire control of any company (other than a bank) that is engaged in activities that are financial in nature and that have total assets of \$10 billion or more. The Fed could disapprove a notice if the proposed acquisition would result in more concentrated risks. [Section 163]

Additional Authority over Non-Bank Financial Companies. The Fed would be authorized to examine non-bank financial companies (and subsidiaries of these companies, including insured depository subsidiaries) and to require the firms to submit reports to the Fed. In both cases, the Fed would have to use existing disclosures and exam reports as much as possible. The Fed would have enforcement authorities over non-bank financial companies (and all of their subsidiaries except insured depository institutions) that are not functionally regulated as if the entities were BHCs. If a subsidiary of a covered non-bank financial company is an insured depository institution or otherwise functionally regulated, and if such entity did not comply with the Fed's orders or otherwise posed a systemic threat, the Fed could recommend that the primary regulator take action. If that regulator did not initiate an action within 60 days, the Fed would have the authority to take the recommended action as if the subsidiary were a bank holding company. [Sections 161 and 162]

Non-bank financial companies supervised by the Fed would be treated like BHCs for purposes of bank acquisitions (meaning they would require the Fed's permission to acquire more than 5 percent of the voting shares of any bank). [Section 163]

Non-bank financial companies supervised by the Fed would *not* be required to comply with the

activity restrictions of section 4 of the BHC Act. However, if a company engages in activities that are not financial in nature the Fed can require its financial activities to be conducted in an intermediate holding company. Internal financial activities – such as internal treasury or employee benefit activities – would not be required to be placed in an intermediate holding company unless less than 2/3 of the assets or revenues generated by activity were attributable to the company. The Fed could limit by regulation transactions between an intermediate holding company and its affiliates, other than bona fide transactions for the acquisition or lease of assets or services. [Section 167]

A non-bank financial company supervised by the Fed would be treated as a BHC for purposes of the Management Interlocks Act; the Fed would be prohibited from allowing interlocks between such a company and a covered institution. [Section 164]

Exemptive Authority. The Fed would be permitted to exempt certain types or classes of non-bank financial companies from supervision by the Fed. [Section 170]

TITLE II – ORDERLY LIQUIDATION AUTHORITY

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This title establishes a process for winding down failing companies that pose systemic risks using the FDIC as a receiver. It makes several major changes to existing law governing the FDIC's receivership authority.

A. Covered Financial Companies Subject to Orderly Liquidation Authority

Covered financial companies would be subject to the orderly liquidation authority. Covered financial companies are financial companies that *do not* include an insured depository institution for which a determination has been made by the Treasury, the Federal Reserve, and the FDIC that (among other factors) the company displays the following characteristics:

- the financial company is in default or in danger of default;
- the failure of the company and its resolution under otherwise applicable law would have serious adverse effects on financial stability in the United States;
- there is no viable private sector alternative available to prevent the default of the company;
- any effects on the claims or interests of creditors, counterparties, and shareholders and other market participants are appropriate, given the impact that any action taken would have on financial stability in the United States;
- actions taken by the FDIC as receiver would avoid or mitigate such adverse effects, taking into consideration the effectiveness of the action in mitigating potential adverse effects on the financial system, the cost to the general fund of the Treasury, and the potential to increase excessive risk taking on the part of creditors, counterparties, and shareholders in the financial company; and
- a federal regulatory agency has ordered the company to convert its convertible debt. [Sections 201 and 203(b)]

Farm Credit System (FCS) institutions are excluded from the definition of financial companies. [Section 201] The effect of this provision and the exclusion from the definition of non-bank in Title I means that FCS institutions are exempt from oversight related to systemic risk and liquidation.

Title II also does not apply to “governmental entities,” Fannie Mae, Freddie Mac, or any of the Federal Home Loan Banks.

B. Procedure

A two-thirds vote of the Fed’s Governors and of the FDIC’s directors is required to recommend that the Secretary of the Treasury place an institution into receivership. [Section 203(a)] If the Secretary concurs, the institution will be notified and, if it does not acquiesce in the receivership, the Secretary may petition the Federal District Court for an order appointing the FDIC as receiver. The standard of review will be whether the Secretary acted arbitrarily or capriciously. If the court fails to act within 24 hours, the institution is placed into receivership. [Section 202(a)]

C. Bankruptcy Code Applies to Other Companies

The provisions of the Bankruptcy Code would apply to resolutions of financial companies that are not covered financial companies where the FDIC has been appointed receiver. [Section 202(c)]

D. Studies

The Administrative Office of the United States Courts and the Comptroller General would conduct separate studies regarding the bankruptcy and orderly liquidation process for financial companies. The Comptroller General also would conduct studies regarding international coordination relating to the orderly liquidation of financial companies and the implementation of prompt corrective action by the Federal banking agencies.

E. Establishment of Orderly Liquidation Fund to Cover Resolution Costs

The bill currently does not include any pre-funding of a liquidation fund. Instead, the FDIC is to assess claimants for the amount of any payments to which they were not entitled under section 210; if this does not generate sufficient funds the FDIC is to assess BHCs over \$50 billion, non-bank financial companies brought under the Fed’s supervision, and other financial companies with at least \$50 billion in consolidated assets. [Section 210(o)(1)(D)]

The assessments are to be risk-based and counter-cyclical, and are to consider a host of factors, including payments already made to the DIF, SIPC, or state insurance fund; the condition of the assessed institution; the risk the institution poses to the financial stability of the U.S.; and the extent to which they have benefited from the orderly liquidation of another company. [Section 210(o)(4)]

The activities of the FDIC under Title II are not to affect the Deposit Insurance Fund, and the DIF may not be used to circumvent the purposes of the bill. [Section 210(n)(8)]

F. Exercise of FDIC Authority

The orderly liquidation authority would be exercised so that creditors and shareholders would bear the losses of the company, management would be replaced, and parties would bear responsibility for loss consistent with their responsibility for the financial company. [Section 204(a)] Under an [amendment](#) by

Sen. Barbara Boxer (D-CA) adopted on the Senate floor, any company for whom the FDIC is appointed receiver under Title II shall be liquidated, all funds expended by the FDIC are to be recovered from the covered institution (and, if needed, the “financial sector” more broadly), and taxpayers are to bear no losses. Claimants may not receive more than the face value of claims proven to the FDIC. [Section 210(d)] The FDIC would act with a view towards preserving the financial stability of the United States, not the stability of the covered financial company.

In its actions as receiver, the FDIC would consult with the companies’ primary or functional regulators. The FDIC would have broad authority under the bill to wind down an institution, including the authority to sell the assets or transfer the liabilities of the company, merge the company, or establish a bridge financial company. The FDIC would have priority over other claims to recover funds used in connection with the receivership. [Section 204] The FDIC could not take an equity interest in a covered institution. [Section 206]

The FDIC would be authorized to recover compensation paid during the two years preceding the appointment of the FDIC as receiver to any current or former senior executive officer or director who is “substantially responsible” for the company failing. In cases of fraud, there would be no time limit on how far back the FDIC may reach. [Section 210(s)] The Fed would be authorized to ban senior executives and directors of covered financial companies that are not otherwise supervised by the Fed from participating in the affairs of any financial company for at least two years. [Section 213]

G. Special Provisions When a Covered Financial Company is a Broker or Dealer

In the case of a covered financial company that is a broker or dealer, the determination of default would be made jointly by the SEC and the Federal Reserve, and the FDIC would appoint the Securities Investor Protection Corporation (SIPC) as trustee for liquidation with respect to customer claims.

The FDIC’s authority as a receiver would generally be preserved from interference by SIPC and insulates the FDIC from third party claims related to the resolution of a broker or dealer. However, claims would be resolved by SIPC as if the FDIC had not been appointed receiver and pursuant to the Securities Investors Protection Act of 1970. SIPC and the FDIC would issue joint rules to implement these provisions. [Section 205]

H. State Law Generally Applies When a Covered Financial Company is an Insurance Company

State law governing the resolution or winding-up of a company generally would apply when a covered financial company is an insurance company. However, subsidiaries or affiliates of insurance companies that are not themselves insurance companies would be subject to the Orderly Liquidation Authority or the Bankruptcy Code, as appropriate under Title II. [Section 203(e)]

TITLE III – TRANSFER OF POWERS TO THE COMPTROLLER OF THE CURRENCY, THE CORPORATION, AND THE BOARD OF GOVERNORS

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This title significantly changes the regulatory structure for federal and state banks and thrifts (including mutual institutions).

A. Thrift Charter

Beginning on the date of enactment no new federal thrift charters would be granted. After the transfer date,³ the OTS would be abolished, and the current functions of the OTS would be divided up among the surviving agencies as indicated below. [Sections 311, 312, 313, 341]

A thrift that becomes a bank would be able to continue to operate any branch that it operated before it became a bank. [Section 342]

The Director of the CFPB would replace the OTS on the FDIC Board. [Section 332]

B. Agency Oversight Responsibilities After Transfer Date

The Senate bill as approved by the Banking Committee would have removed Federal Reserve Board supervisory authority over state member banks and over bank holding companies with less than \$50 billion in assets. An [amendment](#) by Sen. Kay Bailey Hutchison (R-TX) adopted on the Senate floor restored the Fed's authority over all state member banks and their holding companies, regardless of size.

As modified by the Hutchison amendment, the Senate bill provides for the following division of supervisory responsibilities:

Federal Reserve Board

- Retains supervisory and regulatory authority (rule-writing authority) over all bank holding companies.
- Retains supervisory and regulatory authority over all state-member banks.
- Gains supervision and regulatory authority over all savings and loan holding companies.
- Rulemaking authority for inter-affiliate transactions and insider lending relating to savings associations.

OCC

- Retains supervision and regulation of national banks.
- Gains supervision of federal savings associations.
- Gains regulatory authority over both federal and state savings associations.

³ One year after enactment, unless extended for an additional six months. [Section 311]

FDIC

- Retains supervision and regulatory authority over state non-member banks (shared with state regulators).
- Gains supervision of state chartered savings associations of any size (shared with state regulators).

C. Examination Fees

The bill reported by the Senate Banking Committee provided that the FDIC would transfer to the OCC funds to defray the costs of bank examinations. The Hutchison amendment deleted this requirement, and instead would authorize the OCC to charge examination fees on national banks and federal thrifts, after taking into account various factors, such as the nature and scope of the institutions' activities, the institutions' condition, and any other factor the OCC determines is appropriate.

The Fed would be directed to assess bank and savings and loan holding companies with assets of \$50 billion or more and non-bank financial companies supervised by the Board for the costs of supervising the holding company.

The FDIC would be authorized (but not required) to charge the cost of conducting its examinations of any depository institution as the FDIC determines necessary or appropriate. [Section 318]

D. FDIC Insurance Assessments

The House bill amends the Federal Deposit Insurance Act to provide that the assessment base for deposit insurance is equal to consolidated assets less tangible equity. The Senate adopted an [amendment](#) by Sen. Jon Tester (D-MT) that would require the FDIC to issue regulations to define the assessment base in a similar manner. If the bank meets the criteria established by the FDIC to be considered a "custodial bank" or a "bankers' bank," the assessment base calculation is to be further modified as necessary to reflect the risks posed by such banks to the FDIC, consistent with their treatment under current law.

The Tester amendment also deleted a provision in the Senate bill that would have allowed the FDIC to return to its current assessment base definition, or make other modifications, within one year of enactment.

The Senate bill does not include other provisions that are in the House bill. For example, the Senate bill would not eliminate automatic dividend payments once the Deposit Insurance Fund reaches or exceeds 1.35 percent of insured deposits and would not give authority to the FDIC, in its sole discretion, to eliminate dividends after the current reserve ratio "cap" of 1.50 percent. [Section 331]

TITLE IV – REGULATION OF ADVISERS TO HEDGE FUNDS AND OTHERS

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This title would generally amend the Investment Advisers Act of 1940 to expand SEC oversight over hedge fund advisers and others. In general, advisers to hedge funds worth over \$100 million would be required to register with the SEC as investment advisers and to disclose financial data for systemic risk purposes.

A. Investment Adviser Custody of Client Assets

The SEC would be able to issue regulations requiring independent public accountants to perform asset verification examinations on registered investment advisers who have custody of client assets. [Section 411]

B. Adjusting the Accredited Investor Standard

The net worth standard for an accredited investor under the Securities Act of 1933 is set at \$1 million, excluding the investor's primary residence, for the first four years after enactment. After the first four years, the SEC may adjust the threshold every four years as needed for the protection of investors, in the public interest, and in light of the economy. [Section 412]

C. Registration and Regulation of Certain Advisers

Hedge fund and other advisers would be subject to SEC registration and regulation. In particular:

- The exemption from SEC registration and regulation would be removed for advisers of less than 15 clients and advisers to "private funds" (i.e., 3(c) (1) or 3(c) (7) funds) are explicitly required to register with the SEC. However, banks that advise private funds would continue to be exempt from registration, because banks are excluded from the definition of "investment advisers." [Section 403]
- Advisers to venture capital funds would be excluded from registration and regulation, and family offices would be excluded from the definition of "investment adviser." [Sections 407 and 409]
- The threshold for investment adviser registration with the SEC would be raised from \$25 million to \$100 million in assets under management. Advisers with less under management could be subject to state registration requirements. [Section 410]
- Private fund advisers would be required by the SEC to submit and maintain reports and records for the assessment of systemic risk by the Financial Stability Oversight Council. These reports would include: (1) Amount of assets under management; (2) Use of leverage; (3) Counterparty credit risk exposures; (4) Trading and investment positions; and (5) Trading practices. [Section 404]

D. Effective Date

The provisions in this title would become effective one year after the date of enactment of the Act. [Section 416]

TITLE V – INSURANCE

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This title creates the Office of National Insurance (ONI) within the Department of the Treasury⁴. The ONI would be headed by a Director, appointed by the Secretary of the Treasury.

A. Office of National Insurance

The ONI [Section 502] would:

- Monitor all aspects of the insurance industry, including identifying issues or gaps in the regulation of insurers that create systemic risk, across all lines of insurance except health insurance.
- Recommend to the Oversight Council that a particular insurer – including the affiliates of such an insurer – be subject to heightened scrutiny and regulation due to the risks they pose.
- Assist the Secretary with administering the Terrorism Insurance Program (TRIA 15 USC 6701).
- Coordinate federal policy on international insurance matters and represent the United States, as appropriate, in the negotiation of international insurance agreements.
- Advise the Secretary on major domestic and international insurance policy issues, coordinate with the states and consult the states on issues of preemption – advise on the state of Crop Insurance as established by the Federal Crop Insurance Act.

The ONI would have limited preemption powers. It could preempt state insurance laws that conflict with international insurance agreements and result in the less-favorable treatment of a non-United States domiciled insurer than a state domiciled insurer. Such preemption decisions are to be conducted through a notice and comment process.

The ONI would be authorized to receive and collect such data and information from the insurance industry and individual insurers as is reasonably required to carry out its regulatory and advisory functions. ONI would collect data from entities (insurers) defined as any person that is authorized to write insurance or reinsure risks and issue contracts or policies in one or more states. This would be done via information-sharing agreements; though, if necessary, it would have subpoena authority. The ONI would analyze and disseminate the information that is received and issue reports regarding all lines of insurance, except health insurance.

The ONI would be required to conduct a study and report on the insurance industry within eighteen months of enactment. That study would focus on ways to modernize and improve U.S. insurance regulation. The ONI would be directed to consider the following issues in its study and report:

- Systemic risk regulation in the insurance sector;
- Capital standards and the relationship between capital allocation and liabilities, including

⁴ This title closely resembles Title VI of H.R. 4173, The Wall Street Reform and Consumer Protection Act of 2009, passed by the House of Representatives December 12, 2009.

standards relating to liquidity and duration risk;

- Consumer protection for insurance products and practices, including regulatory gaps in state regulation;
- The degree of national uniformity of state insurance regulation;
- The regulation of insurance companies and affiliates on a consolidated basis; and
- International coordination of insurance regulation.

The ONI would be directed to examine additional factors pertinent to the federal regulation of insurance. Those factors are:

- The costs and benefits of potential federal regulation of insurance across various lines of insurance, excluding health insurance;
- The feasibility of regulating certain lines of insurance at the federal level, while leaving other lines of insurance to be regulated at the state level;
- The ability of any potential federal regulation or federal regulators to eliminate or minimize regulatory arbitrage;
- The impact that developments in the regulation of insurance in foreign jurisdictions might have on the potential federal regulation of insurance;
- The ability of any potential federal regulation or federal regulator to provide robust consumer protection for policyholders; and
- Any other factors the ONI deems appropriate.

B. State Based Insurance Reform

The ONI would have responsibility for implementing non-admitted insurance (also known as “surplus lines”) and reinsurance reform⁵. [Subtitle B, Sections 521-533]

Part I – Non-admitted Insurance

Any state other than the home state of an insured would be prohibited from requiring a premium tax payment for non-admitted insurance. States would be permitted to establish procedures to allocate among themselves the premium taxes paid to an insured’s home state and would require surplus lines brokers and certain insureds to file annual tax-allocation reports.

Only an insured’s home state would be allowed to require a surplus lines broker to be licensed to conduct non-admitted insurance business and to require a broker to provide certain financial information; other states would be prohibited from collecting fees relating to licensure. The three-declination requirement that currently must be met before it is permissible to access the surplus lines

⁵ Subtitle B substantially resembles H.R. 2571, the Non-Admitted and Reinsurance Reform Act of 2009, passed by the House of Representatives September 9, 2009.

market also would be eliminated.

The Government Accountability Office (GAO) would be required to conduct a study of the non-admitted insurance market to determine the effect of the enactment of these surplus lines reforms on the size and market share of the non-admitted insurance market for providing coverage typically provided by the admitted insurance market. The GAO would be directed to consult with the National Association of Insurance Commissioners (NAIC).

Part II - Reinsurance

A state would be prohibited from denying credit for reinsurance if the state of domicile of an insurer purchasing reinsurance (ceding insurer) recognizes credit for reinsurance for the insured's ceded risk, and the state is either an NAIC-accredited state or has financial solvency requirements substantially similar to NAIC accreditation requirements.

The state of domicile of a reinsurer would have sole responsibility for regulating the reinsurer's financial solvency, so long as the state is NAIC-accredited or has financial solvency requirements substantially similar to the NAIC. A non-domiciliary state would be prohibited from requiring a reinsurer to provide financial information other than that required to be filed with the insurer's NAIC-compliant domiciliary state.

TITLE VI – IMPROVEMENTS TO REGULATION OF BANK AND SAVINGS ASSOCIATION HOLDING COMPANIES AND DEPOSITORY INSTITUTIONS

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A. Moratorium Relating to Credit Card Banks, Industrial Loan Companies (ILCs), and Trust Banks

For three years after the date of enactment, the FDIC would not be able to approve an application for deposit insurance received after November 10, 2009, for a credit card bank, industrial bank, or trust bank that is controlled, directly or indirectly, by a commercial firm. [Section 603]

- The appropriate federal banking agencies must disapprove a request for a change in control if a commercial firm would have direct or indirect control of a credit card bank, industrial bank, or trust bank.
- A commercial firm is defined as a company that derives 15 percent or more of consolidated gross revenue from non-financial activities.
- The GAO is to conduct a study relating to the other depository institution exceptions in the Bank Holding Company Act, including the exception for savings associations.

B. Reports and Examinations of Holding Companies

Regulatory authority to examine and require reports from functionally regulated subsidiaries of both bank and savings and loan holding companies would be expanded. [Sections 604-607]

Financial Stability Factor. The agencies would be explicitly required to consider financial stability when reviewing proposed acquisitions, mergers, and consolidations, including acquisitions of non-banking companies.

Prior Approval for Certain Acquisitions. Prior regulatory approval would be required for the acquisition of a non-banking company that has \$25 billion or more in assets.

Lead Agency Supervision. The lead agency for a bank or savings and loan holding company would be responsible for the examination of the non-depository subsidiaries of that holding company. The lead agency would be determined by looking at the type of depository institutions holding the most assets. If the Fed is supervising the holding company, the lead agency may recommend that the Board take an enforcement action. It is not clear how this section will interact with the provisions in Title III that would authorize the Federal Reserve Board to be the supervisory agency for all bank and savings and loan holding companies.

C. Transactions with Affiliates

Section 23A of the Federal Reserve Act (FRA) is amended to include as a “covered transaction” any transaction with an affiliate that involves credit exposures arising from repurchases and reverse repurchases, borrowing or lending of securities, or derivatives transactions. Transactions with affiliates would have to be backed by sufficient capital *at all times*. Exemptions from 23A could be granted by the primary supervisor with the concurrence of the Fed, but only if the FDIC does not object. Transactions between a national bank and its financial subsidiary cannot exceed 10 percent of the bank’s capital. [Sections 608 and 610]

The treatment of derivatives would be changed for purposes of Section 23A affiliate transactions. Currently derivatives are subject to Section 23B, which means that they must be at arm’s length. Derivatives, as well as securities borrowing and lending transactions, would be treated as covered transactions under Section 23A but exempt from the numerical limits of Section 23A if they are collateralized by US government and agency securities. The Fed would also be given authority to consider netting arrangements in connection with determining the amount of the covered transaction and whether the transaction is fully secured and, thus, exempt. [Section 608]

D. Lending Limits

The national bank lending limit would be applicable to all insured institutions, including state chartered banks. The limit would be amended to include credit exposures arising from derivative transactions and securities lending. [Section 611]

E. Restrictions on Conversions

Banks that are subject to an enforcement order or Memorandum of Understanding (MOU) would not be allowed to convert their charter. [Section 612]

F. De Novo Branching

The remaining restrictions on de novo interstate branching are removed. [Section 613]

G. Capital Level for Holding Companies/Source of Strength

Specific authority would be provided to the appropriate federal regulatory agency for the bank or savings and loan holding company (or to the appropriate regulatory agency for a bank, such as an ILC, that is owned by a company that is not considered to be a bank or thrift holding company) to establish minimum capital requirements for holding companies, and for the source of strength doctrine. The source of strength doctrine would be applied to non-financial companies that control depository

institutions, such as industrial loan companies (ILCs), requiring those non-financial companies to be a “source of strength” to an ILC in financial trouble. [Section 616]

H. Securities Holding Companies

The investment bank holding company option for securities firms would be eliminated. An entity that controls a securities firm, but not a depository institution, could be regulated by the Fed as a securities holding company if the company seeks to have a comprehensive consolidated supervisor, for example, in order to engage in financial services activities abroad. [Section 618]

I. “Volcker Rule”

Proprietary Trading. Subject to the recommendations of the Oversight Council, depository institutions and their holding companies would not be able to engage in proprietary trading of securities, including bonds, equities, derivatives, options, commodities or other financial instruments. Depository institutions and their holding companies would not be able to sponsor or invest in hedge funds or private equity funds. [Section 619]

The prohibition on proprietary trading would not apply to investments in U.S. Government securities, GNMA, FNMA and FHLMC instruments, and state and municipal bonds. Investments on behalf of customers, as part of market making activities or otherwise in facilitation of customer relationships, or as risk mitigation or hedging activities, would be exempt.

Insured depository institutions and their holding companies that serve as an investment manager or investment adviser to a hedge fund or private equity fund would not be able to enter into a covered transaction (e.g. extension of credit, purchase of assets, etc.) with the fund. Any allowed transaction would have to be on an arms-length basis.

Non-Banks. Non-bank companies subject to the Federal Reserve Board’s supervision would be required to hold additional capital and would be subject to additional restrictions if they engage in proprietary trading or sponsor or invest in a hedge fund or private equity fund.

Effective Date. These provisions would not go into effect until the Oversight Council completes a study, and then recommends that implementing regulations be issued. The study would have to be completed within six months after the date of enactment, and regulations must be promulgated within nine months of the study’s recommendations. If regulations are issued, they would have to provide that all insured depository institutions and their holding companies no longer retain impermissible investments two years after the date the regulations are issued. The deadline could be extended for up to three additional years by order of the appropriate federal banking agency if the agency were to determine that it would not be detrimental to the public interest.

J. Concentration Limits

Subject to the recommendations of the Oversight Council, a financial company would not be able to acquire or merge with another company if the total consolidated liabilities would exceed 10 percent of the aggregate consolidated liabilities of all financial companies. The Fed may grant an exception for companies that are in danger of default or if the acquisition is assisted by the FDIC.

The Oversight Council would be required to conduct a study and issue recommendations that must be included in the Fed’s implementation. The recommendations may include modifications to the concentration limit. [Section 620]

TITLE VII – IMPROVEMENTS TO REGULATION OF OVER-THE-COUNTER DERIVATIVES MARKETS

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This title reflects an agreement between Banking Committee Chairman Chris Dodd (D-CT) and Agriculture Committee Chairman Blanche Lincoln (D-AR) that combines some of the strongest provisions from the Banking Committee and Agriculture Committee bills. As a result, this title contains very broad definitions of “swap dealers” and “major swap participants” and essentially eliminates the ability of banks of all sizes to regularly engage in the purchase or sale of swaps in the ordinary course of business. It also would require mandatory clearing and exchange trading for most derivatives, impose tough capital and margin requirements, and mandate significant recordkeeping and real-time trade reporting obligations.

This title also would add business conduct standards for derivatives dealers, including imposing a fiduciary duty on swap dealers in their swap dealings with municipalities, pension plans, endowments, and retirement plans. Foreign exchange swaps and foreign exchange forwards would be under CFTC’s jurisdiction unless the Treasury Department were to make a written determination to exclude such transactions from regulation as swaps. Regulators would have the authority to impose margin and/or capital requirements for an existing swap contract and even allow certain counterparties the ability to change the terms of existing contracts by calling for margin “on demand,” even if such calls would increase systemic risk. These provisions would create a more regulated, burdensome, and costly environment for participants in the other-the-counter (OTC) derivatives markets.

If enacted and broadly interpreted, this title would negatively affect all banks, including regional and community banks that make use of derivatives, including interest rate swaps. U.S. banks could effectively be put out of the derivatives business and corporate end-users will look to foreign banks or less-regulated entities to serve their hedging and risk mitigation needs.

A. Prohibition on Federal Assistance

Federal assistance (including advances from any Federal Reserve credit facility, discount window, or 13(3) lending, FDIC insurance, or guarantees) may not be provided to any “swaps entity” (which includes swap dealers, major swap participants, clearing houses and exchanges) for the purpose of making any loan or purchasing any stock, equity interest or debt obligation of a swaps entity, purchasing the assets of any swaps entity, guaranteeing any loan or debt issuance of any swaps entity or entering into any assistance arrangement (including tax breaks), loss sharing or profit sharing with any swaps entity. This provision, commonly referred to as the “swap push-out” provision would preclude all banks from engaging in derivatives activities, including entering into interest rate swaps for their small business clients. [Section 716]

B. SEC and CFTC Oversight

Depending on whether a derivative is security-based or non-security based, either the SEC or the CFTC would oversee the regulation of derivative dealers, participants, exchanges and clearinghouses.

- Foreign exchange swaps and foreign exchange forwards would be under the CFTC’s jurisdiction unless Treasury makes a written determination that such transactions should not be regulated as swaps, and are not structured to evade the bill. Cleared, exchange traded and swap execution facility traded foreign exchange swaps and foreign exchange forwards cannot be

exempt from prohibitions on fraud and manipulation. [Section 721]

- Existing exclusions and exemptions from regulation for OTC derivatives would be eliminated and the regulatory regimes of the Commodity Exchange Act and the federal securities laws would be extended to fully cover all OTC derivatives. The CFTC and SEC would be directed to consult and coordinate with each other for purposes of ensuring regulatory consistency. Either Commission can petition the United States Court of Appeals for the District of Columbia if they object to the other Commission's regulation. [Sections 712 and 762]
- The CFTC/SEC would not have authority to grant exemptions, except where expressly authorized (there are no exceptions for banks). [Sections 721 and 772]

C. **Regulation of Swap Dealers and Major Swap Participants**

- The definition of swap and security based swap dealers (collectively referred to as "swap dealers") is very broad and includes any person who "regularly engages in the purchase and sale of swaps in the ordinary course of business." This definition would cover the activities of large swap dealers as well as much smaller regional and community banks that offer interest rate or other swaps to customers in connection with the provision of loans to the customer (e.g., loan level hedging programs). [Sections 721 and 761]
- Major swap and security-based swap participants (collectively referred to as "major swap participants") also are defined very broadly as persons who maintain: i) a substantial position in outstanding swaps for any of the major swap categories as determined by the relevant Commission, excluding positions held for hedging or mitigating commercial risk and positions held by any employee benefit plan under ERISA for the primary purpose of hedging or mitigating commercial risk directly associated with the operation of the plan; ii) whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the U.S. banking system or financial markets; or iii) is a financial entity (other than, for CFTC-regulated swaps but not SEC regulated security-based swaps, an entity predominantly engaged in providing financing for the purchase of an affiliate's merchandise or manufactured goods) that is highly leveraged relative to the amount of capital it holds and maintains a substantial position in outstanding swaps in any major category as determined by the relevant Commission. [Sections 721 and 761]
- It would be unlawful for persons to act as a swap dealer or major swap participant without registering with either the CFTC/SEC. The CFTC/SEC would be able to prescribe business conduct, reporting and recordkeeping, rules (including rules that limit the activities of swap dealers and major swap participants) to protect investors but would not be able to prescribe rules imposing prudential requirements on swap dealers or major swap participants for which there is a prudential regulator e.g., the federal banking agencies. [Sections 731 and 764]

D. **Mandatory Clearing and Exchange Trading of Most OTC Derivatives**

- Clearing would be required unless no clearing organization will accept the swap, or one of the parties is a commercial end user. Financial entities are specifically excluded from the narrow definition of commercial end users. A swap that is otherwise exempt due to the commercial end user exemption must be submitted for clearing upon the request of the commercial end user. [Sections 723 and 761]

- Swap clearing organizations would be required to register with either the CFTC or SEC and submit for prior approval any group, category, type, or class of swaps that the clearing organization wants to accept for clearing. In addition, the CFTC and SEC would be required to promulgate rules identifying other groups, categories, types or classes of swaps that are required to be cleared. These rules do not require notice or comment periods. Swaps entered into before either the date of enactment or application of the clearing requirement would be exempt from clearing if the counterparties timely report the swap to a registered swap repository or the relevant Commission. [Sections 723 and 763].
- Swaps that are subject to the clearing requirement would have to be executed on an exchange, a board of trade designated as a contract market, or on a swap execution facility, unless none makes the swap available for trading. [Sections 723 and 764]
- Swaps entered into prior to enactment would be exempt from the clearing requirement. [Section 739]

E. Transparency

- Any swap or security based swap that is not cleared would have to be reported to a swap repository or, if there is no repository that would accept the swap, to the SEC or the CFTC. With respect to a swap or security based swap where one party is a dealer and the other a major swap participant, the dealer will report the transaction. With respect to a transaction in which only one party is a swap dealer or a major swap participant, the swap dealer or major swap participant will report the transaction. With respect to a transaction where neither party is a dealer or major swap participant, the counterparties will agree as to which party will report the transaction. [Sections 729 and 766]
- Swaps entered into prior to enactment of the bill that have not expired would have to be reported to a swap repository or the relevant Commission. [Sections 729 and 766]
- Information related to a swap, whether cleared or reported to a swap repository, would have to be made available to the public as soon as technologically practicable after the execution of the trade. The SEC and CFTC would be required to promulgate rules (i) to ensure that information does not identify participants; (ii) to specify the criteria for determining what constitutes a block trade for particular markets and contracts; (iii) to specify the appropriate time delay for reporting block trades to the public; and (iv) to take into account whether the public disclosure will materially reduce market liquidity. In addition, information about derivatives reported to a swap repository will be available to the public in a manner that does not disclose (i) the business transactions and market positions of any person; (ii) aggregate data on such swap or security-based swap trading volume; and (iii) positions. [Section 727]

F. Strengthening Capital and Margin Requirements

- The appropriate Federal banking agencies, and for non-depository institutions, the CFTC or SEC, would be required to impose both initial and variation margin requirements on all swaps that are not cleared with certain limited exemptions that will not include banks. The initial and variation margin requirements will apply to swaps entered into before the enactment of the legislation. Non-cash collateral with respect to swaps will be permitted only with the consent of the SEC and CFTC. [Sections 731 and 764]

- If any party to a swap that is exempt from the margin requirements requests that such swap be margined, then the exemption would not apply and the counterparty to such swap shall provide the requested margin. [Sections 731 and 764]
- For depository institutions, the appropriate Federal banking agencies, and for non-depository institutions, the CFTC and SEC would be required to adopt capital requirements for swap dealers and major swap participants that are greater than zero for cleared swaps and substantially higher for swaps that are not cleared. Capital requirements for non-bank swaps dealers and major swap participants must be at least as strict as those for banks. [Sections 731 and 764]

G. Strengthening Business Conduct Standards

- Significant new recordkeeping requirements would be imposed in the form of daily trading records, customer records, and audit trails by the CFTC/SEC. Regulations would establish standards of care with respect to eligible contract participant determinations, fair dealing and good faith communications, and disclosure of material information. [Sections 731 and 764]
- Significantly, the legislation would impose a fiduciary duty on swap dealers in their swap dealings with municipalities, other governmental entities, pension plans, endowments, and retirement funds. [Sections 731 and 764]
- Within 180 days of enactment, the CFTC/SEC would be required to determine whether to promulgate rules to establish limits on the control of any swap clearing house or swap exchange by a bank holding company with consolidated assets of \$50 billion or more, a non-bank financial company supervised by the Fed, an affiliate of such a bank holding company or non-bank financial company, a swap dealer, a major swap participant, or an associated person of a swap dealer or a major swap participant. If the Commission finds that the rules are appropriate to improve the governance, mitigate systemic risk, promote competition or mitigate conflicts of interest, it must adopt such rules. [Sections 726 and 765]

H. Segregation of Collateral

- Collateral posted with respect to cleared swaps would have to be segregated, and the use and investment of this segregated collateral will be restricted by rules to be promulgated by the SEC/CFTC.
- For uncleared swaps, swap dealers would be required to notify the counterparty that it has the right to require the segregation of collateral. At the counterparty's request, the dealer shall segregate funds posted as collateral with a third party custodian and not commingle those funds with its own funds.
- These provisions would not apply to variation margin payments.
- If the counterparty does not request segregation of funds, the swap dealer would be required to report to the counterparty on a quarterly basis that the back office procedures of the swap dealer relating to margin and collateral requirements are in compliance with the agreement of the counterparties. A swap cleared by a derivatives clearing organization will be treated for bankruptcy purposes as a commodity contract. [Sections 724 and 763]

I. Limits on Speculation

The CFTC and the SEC would be required to establish position limits, including related hedge exemption provisions, for positions in contracts based on the same underlying commodity (in the case of the CFTC) or security (in the case of the SEC). The CFTC or the SEC would have the discretion to exempt any person or class of persons from this requirement. [Sections 737 and 763]

J. Abusive Swaps and Authority to Ban Foreign Entities

- The SEC, CFTC, Oversight Council, and Treasury would be required to consult and coordinate with foreign regulators on standards and regulation related to derivatives and would allow the United States to agree to information sharing arrangements. [Sections 761 and 762]
- The CFTC and SEC would have the authority to investigate any swap or security based swap that is found to be detrimental to the stability of financial markets or their participants. The CFTC and the SEC would have the authority, in consultation with the Treasury Secretary, to ban foreign entities from participating in US markets if it is “determined that the regulation in the foreign country undermines the United States financial system.” [Sections 714 and 715]

K. International Harmonization

The SEC, CFTC, the Oversight Council, and Treasury would be required to consult and coordinate with foreign regulators on standards and regulation related to derivatives and may agree to information sharing arrangements. [Section 752]

L. Effective Date

This title would take effect 180 days after its enactment. [Section 765]

TITLE VIII – PAYMENT, CLEARING, AND SETTLEMENT SUPERVISION

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This title is intended to provide an updated risk mitigation structure to prevent the threat of a systemic failure similar to AIG from disrupting the payments system. The focus is on ensuring that companies that meet the definition of a Financial Market Utility (FMU) have enough capital to meet their obligations to avoid setting off a “chain-reaction” of failures.

A. Entities Covered

The Oversight Council would determine what companies would be included as FMUs. This could include domestic depository institutions, branches of foreign depository institutions, insurance companies, brokerage firms, commodities firms, investment companies, investment advisors, futures merchants, credit unions, or any other entity engaged in activities that are financial in nature. FMUs determined to be “systemically important” would be subject to additional oversight. [Sections 803-804]

The Board of Governors may authorize a Federal Reserve Bank to open an account for an FMU that is the same type of account that a financial institution may open allowing the FMU similar deposit and borrowing privileges. [Section 806]

B. Council of Regulators

It would require a vote of two-thirds of the Council, plus the Chairman, to include or remove a company from FMU status. The Council would draft the implementing regulations but they would be enforced by the institution's primary supervisory agency. The Fed retains back-up examination authority. [Sections 804, 805, 807, and 808]

C. Oversight of FMUs

FMUs would be required to meet risk management standards prescribed by the Council in order to promote robust risk management, promote safety and soundness, reduce systemic risks, and support the stability of the broader financial system. FMUs would be required to submit reports and data to demonstrate their compliance with the standards set by the Council. Financial institutions that are not designated as FMUs would also be required to provide information that is requested by the Council in order to determine if the financial institution should be designated as an FMU. [Section 809]

TITLE IX – INVESTOR PROTECTIONS AND IMPROVEMENTS TO THE REGULATION OF SECURITIES

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This title addresses several investor protection, securities enforcement, corporate governance, credit rating agency, securitization, and municipal securities issues that come within the jurisdiction of the SEC. It also contains provisions affecting executive compensation.

A. Investor Advocacy

A new Office of the Investor Advocate would be established in the SEC headed by the Investor Advocate who reports directly to the Chairman. The Investor Advocate would be authorized to hire counsel, research staff and service staff as he/she deems necessary, and would be required to report annually without SEC review to the relevant committees of the House and Senate. The SEC must formally respond within three months to recommendations of the Investor Advocate.

An Investor Advisory Committee would also be established in the SEC to advise on regulatory priorities of the SEC and initiatives to protect investor interests and the integrity of the markets. [Sections 911, 914]

B. Broker-Dealer Fiduciary Standard of Conduct

The SEC would conduct a study to evaluate whether brokers, dealers and investment advisers should be subject to the same fiduciary standard of care. [Section 913]

C. Mutual Funds

There would be two studies: financial literacy of investors by the SEC and mutual fund advertising by the Comptroller General. [Sections 916 and 917]

The SEC would be authorized to require point-of-sale disclosures for mutual fund investors. Banks and bank affiliates that offer customers access to mutual funds, including money market mutual funds, could be impacted by these provisions. [Section 918]

D. Financial Planners and Use of Financial Designations

GAO would be required to conduct a study of “financial planners” (including bank employees who meet its definition) and how they are regulated, as well as the use of other financial designations. [Sections 921]

E. Credit Rating Agencies

A new Office of Credit Rating Agencies, reporting directly to the SEC Chairman, would be established at the SEC. It would be authorized to issue new rules for internal controls, independence, transparency, and penalties for non-compliance. [Sections 931-937]

- The Office would have its own staff and would be required to examine Nationally Recognized Statistical Ratings Organizations (NRSROs) at least once a year. Findings would be made public.
- NRSROs would be required to disclose their methodologies, use of third parties for due diligence, and their ratings track record.
- The SEC would be required to issue rules to ensure that analysts meet educational standards necessary to produce accurate ratings and are tested for knowledge of the credit rating process.
- To deal with the conflicts of interest inherent in the issuer-paid business model, the SEC would be required to issue rules to prevent the sale and marketing considerations of NRSROs from influencing their ratings. In addition, the SEC would be required to issue rules to prohibit NRSRO compliance officers from performing ratings, participating in development of methodologies or models, performing marketing or sales functions, or participating in establishing compensation levels.
- An [amendment](#) by Sen. Al Franken (D-MN) adopted on the Senate floor is intended to address conflicts of interest with respect to asset-backed securities by establishing a Credit Rating Agency Board that would determine which qualified NRSRO would perform the *initial* rating on such transactions, thereby eliminating the ratings shopping that occurred prior to the financial crisis.
- An [amendment](#) by Sen. George LeMieux (R-FL) adopted on the Senate floor would, effective one year after enactment, eliminate references to investment grade or similar requirements in the National Banking Act, the Federal Deposit Insurance Act, the Investment Company Act, the Securities Exchange Act of 1934, and the Federal Housing Enterprises Financial Safety and Soundness Act.
- Investors would be able to bring private actions against NRSROs.

F. Securitization Process

The term “securitizer” includes the issuer or sponsor/pooler of the transaction. The term “originator” is limited to a person who sells an asset to a “securitizer,” and thus does not cover every sale of an asset that is ultimately securitized.

Credit Risk Retention. There is a general requirement that securitizers retain some portion of the credit risk for any asset that is transferred, sold, or conveyed through an asset-backed security (ABS).

The risk retention requirements apply to securitizers regardless of whether they are insured institutions or not.

The Senate adopted an [amendment](#) by Sen. Mary Landrieu (D-LA) that specifies the amounts of credit risk retention as follows:

- ABS collateralized *solely* by “qualified residential mortgages” have 0 percent credit risk retention;
- ABS that are collateralized by one or more assets that are *not* “qualified residential mortgages” still have a risk retention requirement, but it may be less than 5 percent; and
- ABS that are not collateralized by “qualified residential mortgages” have 5 percent credit risk retention.

The banking agencies, the Department of Housing and Urban Development, and FHFA would be required to define the term “qualified residential mortgages” when considering underwriting and product features that indicate a lower risk of default including verification of borrower income, debt-to-income, underwriting on fully amortized basis and no balloon payments, negative amortization, prepayment penalties, interest-only payments, etc.

The Senate adopted an [amendment](#) by Sen. Mike Crapo (R-ID) that would require the agencies to specify the form and amount of risk retention with respect to ABS collateralized by commercial mortgages.

Farm Credit System institutions and Farmer MAC would be exempt from the risk retention requirements. Their prudential regulators and the SEC would be allowed to provide for a total or partial exemption if it is in the “public interest,” which is not defined.

Allocation between Securitizer and Originator. The agencies (1) may allocate the *total* risk retention requirement between the securitizer and originator and (2) must consider:

- The underwriting quality of the underlying assets;
- Whether there are incentives for imprudent origination of such assets; and
- The impact of risk retention on access to credit on reasonable terms.

Rulemaking by Asset Class. The agencies must establish separate rules based on asset classes and must specify for each asset class the underwriting and loan characteristics that indicate reduced credit risk.

Exemptions. The agencies would be authorized to issue exemptions or adjustments for classes of institutions or assets for both risk retention and hedging. Such exemptions would have to help ensure high-quality underwriting by securitizers and originators and encourage appropriate risk management practices, improve customer access to credit, or otherwise be in the public interest or protect investors.

The three agencies (OCC, FDIC, and SEC) would be required to write rules within 270 days of enactment, but the rules would not become final for one year (for residential mortgage-backed securities) or two years (for all other asset classes) after publication in the *Federal Register*. These provisions would be enforced by the appropriate federal banking regulator for depository institutions

or the SEC for non-depository securitizers. [Section 941]

G. Executive Compensation and Corporate Governance

Say on Pay. All public companies would be required to provide shareholders with a non-binding vote regarding executive compensation. [Section 951]

- The vote would be limited to the compensation paid to the top five senior executive officers and would be applicable to all public companies whether or not they are traded on an exchange.
- The SEC would not be authorized to exempt “smaller reporting issuers.”

Compensation Committee. All companies listed on an exchange would be required to have a compensation committee composed solely of independent directors.

- The exchanges would have authority to exempt particular relationships from the “independence” requirements.
- In addition, compensation committees would have the authority to hire independent compensation consultants and legal counsel. The company would have the responsibility to disclose in the proxy whether the compensation committee had retained an independent consultant. Funding for these advisers is to be provided by the company. Certain categories of companies could be exempted from these compensation committee requirements where appropriate and in consideration of the potential impact on “smaller reporting issuers.” [Section 952]

Public Companies. Public companies would be required to disclose, through narrative and graphics, the relationship between executive compensation and company performance and whether company employees are permitted to hedge their equity holdings in the company. [Section 953]

- In addition, every public company would be required to implement a claw-back policy for certain accounting restatements. [Section 954]
- The SEC would adopt rules for all public companies to require companies to include in their proxy statements shareholder nominated directors. They would also have to disclose why the role of Chairman and CEO has or has not been separated. Listed companies would be required to adopt majority voting for uncontested elections. [Sections 971 – 973]

H. Municipal Securities

Municipal advisors to issuers of municipal securities would be required to register with the Municipal Securities Rulemaking Board (MSRB) and comply with the agency’s rules. The 15-member board of the MSRB would be reconstituted to include eight members who are not regulated by the MSRB and seven members that are, with a minimum of one bank broker representative, one non-bank broker representative, and one municipal advisor representative.

The head of the SEC’s Office of Municipal Securities would be a director and would report to the Chairman of the SEC, thus elevating the importance and visibility of this office. GAO is to study (1) the costs and benefits to issuers of requiring additional financial disclosure, and (2) study the municipal market in general and make recommendations on improvements in transparency. [Sections 975-978]

I. Securities Lending

The SEC would have jurisdiction over all securities lending activities, including those bank securities lending activities that are already supervised by the bank regulators. [Section 984]

TITLE X – BUREAU OF CONSUMER FINANCIAL PROTECTION

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This title creates a new Bureau of Consumer Financial Protection (CFPB), within the Fed dedicated to consumer financial product regulation. Similar to the Administration's original plan, the CFPB would have sweeping rulemaking, supervision, and enforcement authority over virtually all consumer financial activities by banks and certain non-bank financial institutions, except general insurance products and investment products and services regulated by the SEC, the CFTC, or state securities regulators.

A. Bureau of Consumer Financial Protection

Subtitle A establishes the CFPB within the Fed, where it would have primary rulemaking, supervisory, and enforcement authority over consumer financial products and services. Despite its placement within the Fed, the CFPB would be autonomous and would not report to the Board of Governors (Board). The scope of its jurisdiction is very broad, extending to cover all banks and non-bank financial institutions as well as other entities that offer consumer financial products and services, subject to specific exclusions as discussed below.

A Director, appointed by the President to serve a five year term, would head the CFPB. The Director may appoint a Deputy Director and may fix the number of and appoint all other employees of the CFPB. [Section 1011]

The CFPB would be an autonomous entity. The Board may not be able to intervene in any matter or proceeding before the Director. Rules or orders of the CFPB would not be subject to review or approval by the Board. [Section 1012]

The CFPB would have the following specific functional units: Research, Community Affairs, Consumer Complaints, Office of Fair Lending and Equal Opportunity, Office of Financial Literacy, and an Office of Service Member Affairs. [Section 1013] In addition, the Director of the CFPB, in consultation with the Secretary of the Treasury, would appoint a Private Education Loan Ombudsman to receive and attempt to resolve complaints from borrowers of private education student loan programs. [Section 1035]

The CFPB also would have a Consumer Advisory Board with members appointed by the Director. At least six members of the Consumer Advisory Board would be appointed based on recommendations by the Federal Reserve Bank Presidents. [Section 1014]

Rules of the CFPB would be subject to override by a 2/3 vote of the Oversight Council. This is a very high threshold to reach, especially since the Council includes the SEC, CFTC, and an insurance appointee, none of which has any jurisdictional interest in any rules issued by the CFPB. [Section 1023]

The CFPB would be funded by a transfer from the combined earnings of the Federal Reserve System.

This transfer is not to exceed 10 percent of the total operating expenses of the System in fiscal year 2011, 11 percent in 2012, and 12 percent thereafter. There are no provisions for assessments by the CFPB on covered persons. A Civil Penalty Fund also would be established. [Section 1017]

B. Covered Persons

Subject to specific exclusions similar to those in the House bill, any entity that is engaged in selling or providing a financial product or service is a “covered person.” [Section 1002]

The following entities specifically would be exempt to the extent that they are not engaging in any enumerated “financial activity” or otherwise subject to any federal consumer financial law: [Section 1027]

- Merchants, retailers, and other sellers of non-financial products.
- Real estate brokers.
- Manufactured and modular home retailers.
- Accountants and tax preparers.
- Attorneys.
- Persons regulated by a state insurance regulator, a state securities commission, or the CFTC.

The Senate adopted an [amendment](#) by Sen. Olympia Snowe (R-ME) that would limit further the CFPB’s rulemaking and supervisory authority over merchants, retailers, and other sellers of non-financial goods or services by excluding those entities that fall within the relevant [industry size threshold](#) of the Small Business Act.

Much like the House bill, the Senate bill would preserve the Farm Credit Administration’s authority and exempts Farm Credit System institutions from CFPB oversight and enforcement. [Section 1027]

Qualified retirement or eligible deferred compensation plans and arrangements are also excluded. However, bank trust operations appear to be subject to CFPB oversight. [Section 1027]

Finally, there is a new exclusion for “activities relating to charitable contributions.” [Section 1027]

C. Supervision and Regulation

Supervision. There would be three categories of supervision by the CFPB with respect to covered institutions: non-depository covered persons, very large depository institutions, and other depository institutions. [Sections 1024, 1025, 1026]

- Non-depository covered persons include (i) originators, brokers, or servicers of real estate secured loans and (ii) “larger” participants of a market for other consumer financial products as defined by the CFPB within one year and after consultation with the Federal Trade Commission (FTC). [Section 1024]
- Those not designated as “larger” participants would be left to oversight by the FTC with its limited existing authorities. There is no requirement that non-depository covered persons competing with similarly situated depository institutions should be included within the CFPB’s supervision if they are not subject to comparable supervision as that imposed on the depository institution by its prudential regulator.
- The CFPB would be required to establish a risk-based supervision program and to establish

registration requirements for non-banks. The factors for evaluating such risk focus on the “risk posed to consumers” created by products and services and do not include the examination frequency or risk-based standards imposed on similarly situated bank competitors. [Section 1024 (b) (2)]

- For institutions with assets greater than \$10 billion, the CFPB would require reports and conduct examinations on a periodic basis. [Section 1025] Coordination with both federal and state agencies in the conduct of the exam process would be required. The CFPB and the federal banking agencies would have to share “each draft” exam report and allow 30 days for review. An unwieldy appeal process would be established for conflicts between supervisory authorities. It would be initiated by a covered person by making a request for “a joint statement of coordinated supervisory action.”
- For depository institutions with assets of less than \$10 billion, the prudential regulator would have examination authority, but the CFPB could send examiners to participate in an exam “on a sampling basis,” and the prudential regulator “shall consider” the input of the Bureau concerning the scope and conduct of the exam and the contents of the examination report. Finally, “as necessary” to support its rulemaking function, the CFPB may require reports from depository institutions with less than \$10 billion in assets. [Section 1026]

Rule-making Authority. The CFPB would have rule-making authority over all covered persons and any other entities covered by the enumerated consumer laws. [Section 1022]

- Several “enumerated” consumer laws would be explicitly transferred to the CFPB, including: TILA, TISA, EFTA, HOEPA, RESPA, SAFE, ECOA, HMDA, and FDCPA⁶. Expedited Funds Availability Act regulatory authority would be shared between the Fed and the CFPB.
- The Community Reinvestment Act (CRA) would not be transferred to the CFPB.
- The CFPB would be required to consult with the prudential regulators, “as appropriate,” prior to proposing a rule regarding consistency with prudential, market, or systemic objectives. A prudential regulator may provide a written objection to the proposed rule, but the CFPB is only required to articulate in the final rule “a description of the objection and the basis for the Bureau decision, if any, regarding such objection.” [Section 1022(2)(C)]
- In order to support its rulemaking and other functions, the CFPB would be required to monitor for risks to consumers arising from the sales or provision of consumer financial products or services, “including developments in markets for such products and services.” [Section 1022(c)]
- Under its enumerated objectives, the CFPB would be directed to identify outdated, unnecessary, or unduly burdensome regulations and to ensure that federal consumer financial law is “enforced consistently, without regard to the status of a person as a depository

⁶ Enumerated laws transferred include: the Alternative Mortgage Transaction Parity Act, the Consumer Leasing Act, the Electronic Fund Transfer Act (EFTA), the Equal Credit Opportunity Act, the Fair Credit Billing Act, the Fair Credit Reporting Act (FCRA), the Home Owners Protection Act, the Fair Debt Collection Practices Act (FDCPA), the Federal Deposit Insurance Act (subsections (c) to (f) of section 43 only)(this covers disclosures to consumers regarding the risk of foregoing deposit insurance), the Gramm-Leach-Bliley Act (sections 502 to 509 only)(this covers the privacy disclosures, rulemaking, enforcement, FCRA, state law preemption, and information sharing study provisions of the GLBA), the Home Mortgage Disclosure Act, the Home Ownership and Equity Protection Act (HOEPA), the Real Estate Settlement Procedures Act (RESPA), the S.A.F.E. Mortgage Lending Act, the Truth-in-Lending Act (TILA), and the Truth-in-Savings Act.

institution, in order to promote fair competition.” [Section 1021(b)]

- Rule-making authority would extend to the new consumer protections listed in D below.

D. New Consumer Protections

The CFPB would have sweeping new consumer protection authority. [Section 1031] Although the CFPB would not have explicit authority to establish standardized or “plain vanilla” products, it would be granted broad authority to issue rules prohibiting “unfair, deceptive, or abusive acts or practices”. This is a new standard that goes beyond current UDAP rules which could effectively open the door for the CFPB to regulate market terms and pricing.

- The term “abusive” is defined so broadly that it would permit the CFPB to outlaw products or services perceived as too complicated for consumers to understand their risks, costs, or terms. Similarly, the CFPB would be able to outlaw a fee as abusive on the grounds that the lender has taken “unreasonable advantage of” the consumer’s ability to protect his interests or the consumer’s trust. This effectively adds a suitability test to the existing UDAP standard. [Sec. 1031(d)]
- The new unfair, deceptive, and abusive rules could be established under regular Administrative Procedures Act (APA) rulemaking rather than the more stringent rulemaking requirements currently followed by the FTC.
- The CFPB would be authorized to establish rules for disclosures over and above those required by TILA or other federal laws. The standard would be very broad, requiring disclosures that permit consumers to “understand the costs, benefits, and risks associated with the product or service, *in light of the facts and circumstances.*” The CFPB would also be authorized to include in any final rule requiring disclosures a model disclosure form. There would also be a process for covered persons to develop alternative disclosures. [Section 1032]
- The CFPB also would have rulemaking authority over custodians of assets.
- The CFPB would be required to promulgate new disclosure rules for remittances and the establishment of an error resolution process relating to remittance transfers [Section 1078]
- The CFPB would not be authorized to set interest (usury) rates, unless “explicitly authorized by law.” [Section 1027]
- It would be unlawful for any covered person to enforce any contract or agreement or to charge a fee in connection with a consumer financial product or service that is not in conformity with the CFPB’s rules. [Section 1036]

E. Enforcement

The CFPB and the states would have broad enforcement authority. [Subtitle E, Sections 1051-1058]

- The CFPB would have administrative enforcement authority over non-depository covered persons that it has examination authority over and for very large banks. This administrative enforcement regime goes beyond the normal banking agency administrative authorities contained in Section 8 of the FDIA.

- Unlike current banking agency enforcement, which generally limits cease and desist monetary relief to restitution and rescission, the CFPB’s enforcement authority would include orders to pay damages.
- There is also a provision for recovery of costs from covered persons by the CFPB, state Attorneys General or state regulators. [Section 1055]
- State Attorneys General would be given authority to bring civil actions in state or federal court for any violation of the Act or its regulations. Although there is a requirement for consultation with the CFPB, the state can proceed despite the CFPB’s objections.

F. Reporting Burdens and Miscellaneous

Financial institutions would be required to provide consumers with expanded access to account, transaction, fee, and other information, with exceptions for confidential commercial information and suspicious activity reporting. [Section 1033]

There also would be expanded HMDA reporting standards, and new requirements for reporting data on small business loan applications. [Sections 1072 and 1092] In addition, the CFPB would be expressly empowered to gather information from covered persons and service providers on their organization, business conduct, and practices. [Section 1022]

The CFPB would be required to study and report to Congress on the use of agreements providing for mandatory pre-dispute arbitration. The CFPB also would be authorized to restrict mandatory pre-dispute arbitration with respect to a consumer product or service. [Section 1028]

GAO would be required to conduct a study on the accuracy of various appraisal methods; their cost to consumers; the prevalence of use of various types; and whether different approaches might have contributed to price speculation. [Section 1073]

The Treasury would be required to conduct a study of and develop recommendations regarding the options for ending the conservatorship of Fannie Mae and Freddie Mac. [Section 1077]

TILA would be amended:

1. To prohibit or phase-out prepayment penalties on certain residential mortgage loans and to increase coverage for non-real estate secured credit transactions to \$50,000. [Section 1076]
2. To prohibit the payment of loan origination fees based on the terms of the loan (other than the amount of the principal). [Section 1074]
3. To prohibit the financing of a mortgage origination fee other than *bona fide* third-party settlement charges.[Section 1074]
4. To prohibit a lender from making a mortgage loan unless the lender has verified and documented the consumer’s “Ability to Repay” as defined in Section 129 of TILA, as amended by this title. This section also may have the effect of prohibiting balloon payments in which the balloon payment is “more than twice as large as the average of earlier scheduled payments.” [Section 1074]

RESPA would be amended to require the CFPB to publish a single, integrated disclosure for mortgage transactions, including the disclosures required under RESPA and TILA, and to produce a booklet jointly addressing compliance with RESPA and TILA. [Section 1096]

The next-day funds availability amount under the Expedited Funds Availability Act would be increased from \$100 to \$200 and in the future would be indexed for inflation.

The bill would amend the Fair Credit Reporting Act to require disclosure of a numerical credit score when an adverse credit decision is based in whole or in part on information contained in a consumer report. [Section 1077]

G. Preemption

The Administration proposed language that would have eliminated federal preemption for national banks and federal savings associations. The House adopted an amendment by Rep. Melissa Bean (D-IL) that would restore much of the basic framework of preemption. The Senate adopted an [amendment](#) by Sen. Thomas Carper (D-DE) that moved the bill even closer to current law with respect to the preemption standard. However, both the House and Senate bills contain language that provide additional authority for state Attorneys General to bring actions against national banks and federally chartered savings associations. [Subtitle D, Sections 1041-1048]

Barnett Standard. Specifically, the Senate bill provides that any preemption of a state consumer financial law shall be made according to the legal standard established in the Barnett Bank case, thus moving closer to preserving the standard for preemption as it stands today (and the benefits it provides to the broader economy, national banks, and state-chartered banks in states that maintain parity of regulation between national and state chartered institutions). The same standard would apply to federal savings associations.

In an important improvement, the Senate voted to eliminate a requirement, contained in the House bill, that federal law provide substantive standards for the area regulated by the state law before that state law could be preempted. This removes an ambiguous and subjective hurdle that would have led to much uncertainty regarding the applicability of state laws. While each step in the process has seen these provisions improve, problems remain:

- Like the House bill, the Senate bill expands state AGs general visitorial powers and their ability both to enforce federal and state laws, and to obtain significant monetary damages against national banks. These provisions remain a serious problem as they go far beyond the recent Supreme Court decision in the Cuomo case that permitted state AGs to go to court to enforce non-preempted state laws.
- Federal savings associations are subject to the same preemption standards as national banks. This arguably represents a change in the existing thrift preemption provisions since existing preemption rules are considered very broad, though it remains to be seen what the practical impact of this narrowing will be.
- Operating subsidiaries and agents of national banks and federal savings associations would *not* receive the same preemption protections afforded national banks and federal thrifts. This would undercut protections given to such subsidiaries under existing OCC and OTS regulations and the recent decision by the Supreme Court in the Watters case.

H. Interchange

The Senate adopted an [amendment](#) by Sen. Durbin that would authorize the Fed to set reasonable and proportional interchange fees on debit cards. In identifying what is reasonable and proportional, the Fed would be able to consider only the actual cost of a particular debit transaction, and not other operational costs associated with processing debit cards over the electronic payments network, including risk of fraud or non-payment. Issuers with assets under \$10 billion technically would be exempted from the rates set by the Fed, though it is strongly expected that marketplace pressures would result in these smaller institutions being subject to the same or similar rates. The amendment also would permit retailers to discriminate in providing discounts based on network, and serious concerns remain that they may also discriminate based on issuer. The amendment also would allow merchants to discount based on payment form, i.e., based on the use of cash, check, debit, or credit. Retailers also would be able to establish minimum and maximum purchase limits for acceptance of credit cards, but could not discriminate between issuers and networks when providing these discounts. [Section 1079]

TITLE XI – FEDERAL RESERVE SYSTEM PROVISIONS

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This title includes emergency measures that are available to the Fed and to the FDIC to deal with systemic risk. It also changes various Fed governance provisions.

A. Fed Lending

The Fed’s ability to provide credit in “unusual and exigent circumstances” would be narrowed. It could only lend as part of a program with “broad-based eligibility” and not to aid a failing institution. The Fed would have to assign a “lendable value” to all collateral securing a Fed loan, and it could not lend to borrowers that are insolvent. The Fed would have a priority status for its claim against a failed institution.

Treasury approval of the lending would be required. The Fed would have to report to Congress about any financial assistance it provided, including the identity of borrowers from the Fed and the amount borrowed (subject to limitations), and any Fed program would have to end in a “timely and orderly fashion.” [Section 1151]

The Comptroller General (GAO) would be directed to review the Fed’s credit facilities, and the Fed would have to post information on its website about its accounting, financial reporting, and internal controls. Moreover, the GAO is to conduct an audit of the Fed and Reserve Banks within a year, and the Fed would have to report on the identity of every borrower under a Fed program and details about each loan that has been made since 2007 or is made after the effective date of the legislation. [Sections 1152 and 1153]

B. FDIC Provision of Liquidity

The FDIC would be authorized to guarantee the obligations of “solvent” (defined as assets exceeding liabilities) banks and bank holding companies under certain circumstances. The process would be triggered by a request from Treasury to the FDIC and the Fed for a determination of whether there is a “liquidity event” – *i.e.*, difficulty in (a) selling a type of asset without granting an unusual and significant discount, (b) borrowing against that asset without an unusual significant increase in margin, or (c) obtaining unsecured credit. [Section 1155(g)(3)]

If two-thirds of both the FDIC members and Fed governors approve, then the FDIC would be directed to create a “widely available” guarantee program. [Section 1154]

The FDIC would establish the terms and conditions of the program but would be prohibited from providing equity to any participant. The Secretary would determine the limits on the amount that the FDIC may guarantee, but Congress would have to pass a joint resolution of approval for any debt guarantee program. [Section 1155(a)-(c)]

The program would be funded through assessments on firms whose obligations are guaranteed. The FDIC would be able to borrow from Treasury as needed but all borrowings would have to be repaid via assessments. The FDIC would be explicitly prohibited from using the Deposit Insurance Fund to pay for the guarantee program. [Section 1155(e)]

A bank that defaulted on an FDIC-guaranteed debt would be placed into receivership; a non-bank that defaulted would either be resolved under the provisions of Title II or required to file for bankruptcy. [Section 1156]

C. Fed Governance

The President of the New York Federal Reserve Bank would be appointed by the President. No entity that is supervised by the Fed would be allowed to vote for members of a Reserve Bank’s board of directors; moreover all current and past employees of an entity under Fed supervision (or an affiliate thereof) would be prohibited from serving as a Reserve Bank director. [Section 1157]

The Fed would have two vice-chairmen, with one designated as the Vice Chairman for Supervision. Financial stability would be added as an explicit function of the Fed, and the Fed would be prohibited from delegating its functions for establishing policies for supervision and regulation. [Section 1158]

TITLE XII – IMPROVING ACCESS TO MAINSTREAM FINANCIAL INSTITUTIONS

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This title is designed to encourage the provision of products and services to low- and moderate-income individuals who do not have or do not access fully banking products and services.

A. Treasury Programs to Provide Banking Products and Services to Low- and Moderate-Income Individuals

The Secretary of the Treasury would be authorized to undertake grant programs designed to enable low- and moderate-income individuals to establish bank accounts and apply for small-dollar value loans designed to be lower cost alternatives to payday loans. As a condition to receipt of a grant from Treasury, the bank or other eligible entity would be required to promote financial literacy and education. Loans would be required to be made on such terms and conditions, and pursuant to such lending practices, as are “reasonable” for the consumer. [Sections 1204, 1205]

B. Grants to CDFIs to Establish Loan Loss Reserves.

Community development financial institutions (CDFIs) and bank-CDFI partnerships would eligible for grants to establish loan-loss reserve funds to mitigate losses on small dollar loans. The CDFI would be responsible for match funding half of the amount of the grant with non-federal funds. CDFIs also would

be eligible to receive technical assistance grants to support small dollar loan programs. [Section 1206]

C. Definition of Small Dollar Loan Program

A small dollar loan would be an installment loan with no prepayment penalty in an amount that does not exceed \$2,500. The lender would be required to report payments on the loan to at least one nationwide consumer reporting agency. Other affordability requirements could be imposed on lenders.

TITLE XIII—PAY IT BACK ACT

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This title would reduce the amount of the TARP authorization to \$550 billion and remove the authority to use the funds on a rotating basis. No additional assistance under TARP would be authorized except in cases of “immediate and substantial” threats to the U.S. economy. [Section 1302]

Treasury would be obligated to use the proceeds from the sale of any debt it purchased from Fannie Mae, Freddie Mac, or the Federal Home Loan Banks under Treasury’s emergency powers for deficit reduction. [Section 1304] Similarly, any unused funds under the American Recovery and Reinvestment Act of 2009 are to be used solely for deficit reduction. [Section 1306]

TITLE XIV – MISCELLANEOUS

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Under this title, the President is to direct the U.S. Executive Director of the International Monetary Fund (IMF) to evaluate any proposed loan to a country if the public debt of that country exceeds its GDP and determine whether the loan is likely to be repaid. If the Executive Director concludes that an IMF loan will not be repaid, the President is to direct the Executive Director to oppose the loan. [Section 1301]

TITLE XV – CONGO CONFLICT MINERALS

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This title includes a Sense of the Congress statement about the conflict in Congo and requires certain securities disclosures. It provides that it is the Sense of the Congress that exploitation and trade in gold and other minerals in the Republic of Congo is helping to finance extreme levels of violence in that country and that this warrants new securities disclosures as provided in Section 1302 of the bill. [Section 1501, note the reference to Sec. 1302 in the bill actually should be Sec. 1502].

It also adds a new Section 13(o) to the Securities Exchange Act requiring the SEC to promulgate rules to require new disclosures regarding gold and other minerals (“Congo Conflict Minerals”). The new rules would apply to every issuer that is required to file annual reports with the SEC and for which any of the minerals is necessary to the functionality or production of a product by the issuer. Among other things, issuers would have to report on the measures that were taken to ensure that its activities did not directly or indirectly finance or benefit armed groups in Congo or any adjoining country. [Section 1502]