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Clients&FriendsMemo

Orderly Liquidation of Financial Companies, Including Executive Compensation Clawback, Under the Dodd-Frank Wall Street Reform and Consumer Protection Act*

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Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Act**") represents Congress' attempt to address companies considered "too big to fail." The statute creates a new "orderly liquidation authority" ("**OLA**"), which allows the Federal Deposit Insurance Corporation ("**FDIC**") to seize control of a financial company[1] whose imminent collapse is determined to threaten the financial system as a whole. Commencement of a receivership under the OLA would preempt any proceedings under the Bankruptcy Code. Thus, lenders, rating agencies, and others seeking to transact business with a company, or an affiliate of a company, that could potentially be considered a systemic risk will have to consider the impact on creditors' rights of both the Bankruptcy Code and the OLA. Further, the OLA is solely a liquidation remedy. Rehabilitation or reorganization is not an option, and the ability of a debtor to stay in possession is eliminated. The FDIC, in nearly all cases, assumes full control.[2] Insurance companies, which remain subject to state regulation, are not covered by the OLA, but their holding companies and unregulated affiliates and subsidiaries are covered. Insured depository institutions remain subject to the FDIA. However, the ability of the FDIC to seize a bank holding company allows the FDIC to run coordinated proceedings for the bank and its affiliates.

The OLA is modeled after the FDIC's existing framework for failed insured depository institutions, although there are differences. Among other things, the OLA would maintain safe harbors for qualified financial contracts that mirror those of the Federal Deposit Insurance Act ("**FDIA**"), subject to certain modifications, such as a 1-business day stay period before counterparties can close out

* Cadwalader has prepared a short summary of the Act and a series of memoranda focused on the Act's application to specific industries, entities and transactions. To see these other memoranda please see a *Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Appendix A links to the various topic-focused memoranda) or visit our website at http://www.cadwalader.com/list_client_friend.php.

1 *See* § 204.

2 *But see* discussion, *infra* at 3, regarding SIPC's responsibility in covered broker or dealer liquidations under the OLA.

their contracts.[3] In addition, the legislation aims to preserve certain priorities of payment, rights to setoff and avoidance action protections that generally follow those established under the Bankruptcy Code.[4] The receiver is required to resolve claims on a fast track (within 180 days of commencement of receivership).[5] The OLA provides some degree of adequate protection to secured creditors by allowing a secured creditor faced with diminution of the value of its collateral to request expedited resolution of its claim (within 90 days).[6]

The law provides a mechanism for recovering the cost of the OLA from other members of the financial industry.[7] It also exposes officers and directors of liquidating financial companies to personal liability, including by creating a right to claw back incentive and other compensation paid during the two year period prior to the commencement of a receivership.[8] If found to have engaged in more serious misconduct (*e.g.,* personal dishonesty or willful disregard of company welfare), a senior executive is subject to being banned from serving any financial company for a minimum of two years.[9]

Executive Summary of Title II – Orderly Liquidation Authority

Certain key elements of the new OLA are highlighted below.

Only "Financial Companies" are Eligible

The OLA potentially applies to U.S. companies that are bank holding companies, non-bank financial companies supervised by the Federal Reserve Board ("**FRB**"), companies predominantly engaged in activities that the FRB determines are financial in nature, subsidiaries of such companies (other than insured depository institutions or regulated insurance companies), and brokers or dealers

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3 *See* § 210(c)(10)(B)(i).

4 *See* § 210(a)(11), (12); *see also* § 210(b).

5 *See* § 210(a)(3). These provisions mirror those of the FDIA. *See* 12 U.S.C. § 1821(d)(5), (8).

6 *See* § 210(a)(5).

7 *See* § 210(o)(1) and discussion, *infra* at 11.

8 *See* § 210(s)(1). Under Section 210, directors or officers may be held personally liable for monetary damages in actions by or on behalf of the FDIC. *See* § 210(f)(1). In addition, the FDIC may recover compensation from current or former senior executives or directors that are substantially responsible for the failed condition of the covered financial company. This clawback of executive compensation is limited to the two years preceding the date the FDIC was made receiver, except in the case of fraud. Additional provisions in the Act place executive compensation next to last in priority of unsecured claims and allow regulators to take action if an executive or director violates the law or engages in other explicitly forbidden acts. *See* § 210(b)(1) ; *see also* § 210(f)(2).

9 *See* § 213.

registered with the SEC and a member of SIPC.[10] With respect to insurance companies, the OLA contemplates that the insurance company itself would be liquidated under state law once federal regulators determine that it presents systemic risk, but a holding company, other affiliate or subsidiary of an insurance company is eligible for liquidation under the OLA.[11]

The liquidation of insured depository institutions will proceed under existing FDIC procedures.

OLA is Exclusive Regime for "Covered Financial Companies"

According to the Senate Banking Committee's report on the legislation, "there is a strong presumption that the bankruptcy process will continue to be used to close and unwind failing financial companies, including large, complex ones".[12] However, where a determination is made that the company's failure threatens the national economy (as described below), the Bankruptcy Code will be preempted, and an FDIC receivership under Title II of the ACT, presided over by the United States District Court for the District of Columbia, will be the exclusive remedy. Prior commencement of a case under the Bankruptcy Code will not eliminate application of Title II. Where a determination of systemic risk under Title II comes after the commencement of a case under the Bankruptcy Code, the bankruptcy case will be terminated (wherever located) and an OLA receivership in the District of Columbia will be commenced.[13]

Continuation of SIPA Protection for Customers of Covered Broker Dealers

The Securities Investor Protection Corporation ("**SIPC**") would continue to be responsible for the liquidation of a registered broker or dealer subjected to the OLA.[14] The FDIC's involvement would be limited to providing funding and exercising certain powers, including through a newly created bridge financial company.[15] In a covered broker or dealer liquidation, the FDIC would appoint SIPC (without court approval), to act as liquidation trustee under the Securities Investor Protection Act ("**SIPA**").[16] SIPC would be obligated to dispense with customer claims on the same priority basis

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[10] *See* § 201(a)(7)-(9); *see also* § 201(a)(11). For financial activity to be predominant, 85% or more of its and its affiliates' consolidated revenues must be derived from activities that are financial in nature. *See* § 201(b).

[11] *See* § 203(e). The FDIC has back up authority to commence judicial action in state court if a state regulator fails to act within 60 days after federal authorities determine that a company presents systemic risk. *See* § 203(e)(3).

[12] *See* S. Rep. No. 111-176, at 4 (2010).

[13] *See* §§ 202(a)(1)(A)(i), 208. Pending SIPA proceedings are also subject to termination.

[14] *See* § 205.

[15] *See* § 205(b)(2). With respect to a covered broker or dealer, the FDIC may transfer all customer accounts to a bridge financial company, unless the FDIC determines that the accounts likely will be transferred to another covered broker dealer or transfer would materially interfere with FDIC's ability to avoid systemic risk. See § 210(a)(1)(O)(i).

[16] *See* § 205(a).

that they now enjoy under SIPA section 8(c).[17] Non-customer claims (other than claims arising under qualified financial contracts) would be subject to the overall priority scheme of the OLA, subject to the elevation of certain administrative priority claims of SIPC.[18] Qualified financial contracts to which a covered broker or dealer is a party would be governed exclusively by the OLA's safe harbor provisions.[19]

SIPC would be entitled to exercise all of its powers under SIPA, but would not have jurisdiction over assets and liabilities transferred by the FDIC to any bridge financial company, and SIPA could not otherwise adversely impact the FDIC in exercising its powers and duties.[20] Any claims against the FDIC arising from asset transfers to a bridge bank would be treated under the OLA and subject to federal district court review.[21]

U.S. Initiates the Orderly Liquidation Process

In order for a receivership under the OLA to be commenced, there must be a formal determination of systemic risk and a recommendation that the company be placed in receivership.[22] The process begins after either a request by the Secretary of the Treasury or at the initiative of either the FRB or the FDIC (or, in the case of a broker or dealer, the SEC) for a formal recommendation that the FDIC be[23] appointed as receiver.[24] To be effective, this written recommendation requires approval by a two-thirds vote of each of the FRB and the board of the FDIC (or, in the case of a registered broker or dealer, a two-thirds vote of the SEC).[25] If the "failure of the financial company would threaten U.S. financial stability" and the foregoing thresholds for recommendation are met, the FDIC will be appointed receiver, and liquidation under the OLA will be "the only option for the company."[26]

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17 *See* § 205(g)(1).

18 *See* § 205(g)(2).

19 *See* § 205(b)(3).

20 *See* § 205(b).

21 *See* § 205(e).

22 *See* § 203(a), (b).

23 *See* § 203(a)(1).

24 *See* § 203(a).

25 *See* §§ 202(a), 203(a).

26 *See* S. Rep. No. 111-176, at 4. To protect against adverse consequences resulting from media exposure, the bill contains criminal penalties for persons who recklessly disclose that an emergency petition has been filed with the Court. *See* § 202(a)(1)(C).

Twofold Test – Default/Danger of Default and Systemic Risk.

Default or Danger of Default. A company must be in "default or danger of default." Alternative tests can be met to establish this condition: 1) a pending or threatened commencement of a case under the Bankruptcy Code; 2) the incurrence of or likely incurrence of losses that will deplete all or substantially all of a company's capital, with no reasonable prospect for the company to avoid such depletion; 3) assets that are or likely will be less than the company's obligations to creditors and others; or 4) the company is, or likely will be, unable to pay its obligations (other than those in *bona fide* dispute) in the ordinary course of business.[27]

Determination of Systemic Risk. If a company is found to be in default or in danger of default, a formal determination of systemic risk must be established by various experts. A covered financial company ("**CFC**") would implicate systemic risk if: 1) the company is in default or the danger of default; 2) the failure of the company would have serious effects on the financial stability of the U.S.; 3) no viable private sector alternative is available to prevent default; 4) any effect on creditors, counterparties, shareholders and other market participants is appropriate given the impact actions would have on U.S. financial stability; 5) action taken would avoid or mitigate such adverse effects, taking into account the mitigation of potential adverse effects on the financial system; 6) a federal regulatory agency has ordered the company to convert all its convertible debt instruments that are subject to regulatory order; and 7) a company satisfies the statutory definition of a financial company. The written recommendation voted on by the FRB and FDIC (or SEC in the case of a covered broker or dealer) must evaluate not only these factors, but also why the Bankruptcy Code is inadequate to resolve the company's condition.[28]

Federal Insurance Director Initiates OLA with respect to Eligible Insurance Entities. To initiate the process with respect to an insurance company, or a company whose largest U.S. subsidiary is an insurance company, the Director of the newly created Federal Insurance Office and the FRB, either at the request of the Treasury Secretary or on their own initiative, are to consider whether to recommend subjecting the company to the OLA.[29]

Only "Arbitrary and Capricious" Petitions are Subject to Court Dismissal. Upon a recommendation of receivership, the Treasury Secretary would ask a company's board of directors

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[27] *See* § 203(c)(4).

[28] *See* § 203(b).

[29] *See* § 203(a)(1)(C).

to consent or "acquiesce" to FDIC receivership.[30] In the absence of consent or acquiescence, the Treasury Secretary would petition the Court for authority to appoint the FDIC as receiver and provide notice to the company.[31] The company may oppose the petition, but the Court's role is limited to determining whether the company constitutes a "financial company" as defined by the statute and has appropriately been found to be in default or in danger of default.[32] The Court can reject the petition only if it finds the government's determinations to be "arbitrary and capricious".[33] If the Court disagrees with the Treasury's finding, the Treasury Secretary has the immediate opportunity to amend and refile the petition.[34] If the Court fails to rule within 24 hours, the petition is deemed granted.[35]

The company and the Treasury Secretary have the right to appeal a decision rejecting a petition to the DC Circuit within 30 days of the lower court's decision; the decision of the Court of Appeals may be appealed to the Supreme Court within 30 days of the Circuit Court decision.[36] In each case, the scope of appellate review is limited to the definition of the company as a financial company and whether the Treasury has acted arbitrarily and capriciously.[37]

Application of FDIC Receivership Powers

The ACT vests the FDIC with broad power to act as receiver by virtue of its experience in unwinding insured depository institutions. Upon the FDIC's appointment as receiver, all existing bankruptcy or other insolvency cases are dismissed and no further bankruptcy cases can be filed.[38] Company assets that vested in another entity will revest in the company.[39] However, any order entered by a bankruptcy court prior to the appointment of the OLA receiver will remain in effect.[40]

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30 *See* § 202(a)(1)(A)(i). Under Section 207 of the Act, boards of directors are not to be held liable for simply acquiescing or consenting in good faith to the appointment of the FDIC as receiver.

31 *Id.*

32 *See* § 202(a)(1)(A)(iii).

33 *See* § 202(a)(1)(A)(iv).

34 *Id.*

35 *See* § 202(a)(1)(A)(v).

36 *See* § 202(a)(2).

37 *Id.*

38 *See* § 208(a).

39 *See* § 208(b).

40 *See* § 208(c).

The FDIC's powers under the OLA mirror its existing receivership powers under the FDIA, with certain modifications intended to address perceived differences between the mandatory liquidation of a company that implicates systemic risk, as opposed to a failed insured depository institution. The scheme reflects the legislative intent that value not be preserved for existing equity, management or unsecured creditors.[41]

As receiver under the OLA, the FDIC succeeds to the rights, title, powers and privileges of the covered company and operates the entity in order to maximize net asset sale value.[42] Among other things, under the OLA the FDIC may engage in:

- creating a bridge financial company to acquire the CFC's assets;[43]
- engaging in financing activities, including funding the liquidation and receiving priority in repayment (but excluding the power to take equity in a CFC or covered subsidiary)[44], and making additional payments to claimants that are needed to maximize value or limit losses (subject to their being recaptured if the OLF is depleted as discussed below);[45]
- appointing itself as receiver of subsidiaries (other than insured depository institutions, covered broker dealers, and insurance companies) of covered financial companies;[46]
- exercising subpoena powers;[47]
- utilizing private sector services to manage and dispose of assets;[48]

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41 *See generally* § 204(a) and S. Rep. No. 111-176, at 4. (Upon being placed into receivership, "The financial company's business operations and assets will be sold off or liquidated, the culpable management of the company will be discharged, shareholders will have their investments wiped out, and unsecured creditors and counterparties will bear losses".) The FDIC may also "provide for the exercise of any function by any member or stockholder, director or officer of any covered financial company for which the FDIC has been appointed as receiver under this title." *See* § 210(a)(1)(C). Additionally, the Act states that the FDIC "shall terminate all rights and claims [stockholders or creditors] have against the assets of the covered financial company or FDIC arising out of their status as stockholders or creditors." The stockholders' or creditors' rights to payment, resolution or other satisfaction of their claims are excepted. *See* § 210(a)(1)(M).

42 *See* § 210(a)(1)(A), (B).

43 *See* § 210(a)(1)(F).

44 *See* §§ 204(d), 206(5), 210(b).

45 *See* §§ 210(b)(3), 210(d)(4), 210(h)(5)(E).

46 *See* § 210(a)(1)(E).

47 *See* § 210(a)(1)(J).

48 *See* § 210(a)(1)(L).

- terminating rights and claims of creditors (subject to the Act's priority of claims provisions);[49] and
- coordinating with appropriate foreign financial authorities regarding any covered financial company with assets or operations outside the U.S.[50]

Avoidance/Repudiation Power. The FDIC has the authority to avoid fraudulent and preferential transfers (with standards similar to those under the Bankruptcy Code; financial contracts enjoy similar carveouts), disaffirm or repudiate any burdensome contract or lease, and enforce any contract notwithstanding any provisions for termination, default , acceleration, or exercise of rights upon insolvency.[51]

Clawback of Senior Executive Compensation; Potential to be Banned from Financial Companies. Although directors are insulated from liability for consenting to the regime, the bill requires senior management to be removed[52] and causes payment of their claims to be subordinated to the payment of other creditors.[53] In addition, the FDIC, as receiver, would have the power to recapture incentive and other compensation received two years prior to receivership from current or former senior executives or directors deemed substantially responsible for the company's failure.[54] In cases of fraud, no time limit would apply.[55] Under extreme circumstances, the FDIC could seek to ban a senior executive from the industry.[56]

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49 *See* § 210(a)(1)(M). But the FDIC may fail to treat similarly situated creditors in a similar manner if such disparate treatment is deemed necessary to maximize value. *See* § 210(b)(4).

50 *See* § 210(a)(1)(N).

51 *See* §§ 210(a)(11)-(12); 210(c). Note, however, that director and officer liability insurance contracts are excepted from the prohibition against the exercise of *ipso facto* termination clauses. *See* § 210(c)(13)(C)(ii). Other notable powers of the FDIC would include the ability to prevent enforcement of provisions in standstill and confidentiality agreements that limit any person's ability to acquire all or any part of the seized company, *see* § 210(p), and to prohibit the sale of CFC assets to certain malfeasors. *See* § 210(r). This section states that the FDIC shall prescribe regulations which, at a minimum, shall prohibit the sale of assets of the covered company to certain people (for example, a person who has defaulted on one or more obligations in excess of $1 million, or who has been found to have engaged in fraudulent activity in connection with such an obligation). *See* § 210(r)(1).

52 *See* §§ 204(a)(2), 206(4), 207.

53 *See* § 210(b)(1). The Act specifies, with respect to the priority of repayment of unsecured claims, executive and director wages, salaries and commissions are seventh (in contrast to wages, salaries and commissions of other individuals, which rank third), followed only by obligations to shareholders. *See* § 210(b)(1)(G), (C).

54 *See* § 210(s)(1).

55 *Id.*

56 *See* § 213. The Act grants the Board of Governors or the FDIC authority to take action if a senior executive or a director, prior to the appointment of the FDIC as receiver, has (A) violated laws, regulations, final cease-and-desist order, or other listed items, (B) engaged or participated in unsafe or unsound practice in connection with a financial company or (C) committed or engaged in any act, omission, or practice which constitutes a breach of fiduciary duty. *See* § 213(b).

Liability of Directors and Officers. The Act also includes provisions that permit a director or officer of a covered financial company to be held personally liable for monetary damages in instances of gross negligence, similar conduct, or conduct that demonstrates a greater disregard of a duty of care than gross negligence. This standard also includes intentional tortious conduct, as defined by state law.[57] Section 210(g) of the Act speaks to damages generally: in any proceeding related to a claim against a director or officer, for example, or other parties employed by or providing services to a covered company, "damages determined to result from the improvident or otherwise improper use or investment of any assets of the covered shall include principal losses and appropriate interest."[58]

Stay Protection. Courts are precluded from taking action to restrain the FDIC as receiver, and, upon request of the FDIC, courts must grant a 90-day stay of any judicial action in which the covered company is or becomes a party (45 days in the case of a bridge financial company that becomes a party to litigation as a result of its assets or assumption of liabilities of a seized company).[59]

Safe Harbor for Qualified Financial Contracts. Counterparties to qualified financial contracts are stayed from exercising termination, close out and netting rights for one business day (during which the FDIC may transfer its obligations to a bridge financial company).[60] "Walkaway" clauses (*i.e.*, clauses that cause the contract to be void following a termination due to insolvency) are unenforceable.[61] With respect to financial contracts that are guaranteed by or otherwise receiving credit support from a seized company, the FDIC, as receiver, can enforce obligations of a primary obligor that ordinarily would be subject to termination upon the insolvency of its credit support provider, under certain conditions.[62] These conditions include that the guaranty and related assets and liabilities are transferred to a bridge financial company or other third party, within the same period of time as the FDIC is entitled to transfer the qualified financial contracts of the CFC, or the FDIC otherwise provides adequate protection with respect to the obligations.[63]

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[57] *See* § 210(f)(2).

[58] *See* § 210(f)(3).

[59] *See* §§ 210(a)(8), 210(e), 210(h)(6).

[60] *See* § 210(c)(10)(B)(i).

[61] *See* § 210(c)(8)(F).

[62] FDIC can take this action as a receiver of a seized company or its subsidiary (including a subsidiary insured depository institution). *See* § 210(c)(16).

[63] *See* § 210(c)(16).

Proceedings Have Limited Duration. The term of the FDIC's receivership of a CFC is limited to an initial period of 3 years, subject to two 1-year extensions.[64]

Mandatory Terms and Conditions For All Orderly Liquidation Actions

Senior Management Must be Removed

The legislation requires the FDIC to, *inter alia,* ensure the removal of management and directors responsible for the failure of the financial institution.[65]

Orderly Liquidation Fund

In an effort to fund the OLA, the ACT creates a segregated fund ("**OLF**") to be held at the Treasury.[66] The FDIC has authority to issue obligations to the Treasury to fund the OLA.[67] Monies may be borrowed only once the FDIC submits a plan for a CFC's orderly liquidation that is approved by the Treasury Secretary.[68] The law restricts the FDIC from incurring any obligation during the first 30 days of liquidation that would result in total obligations outstanding exceeding the sum of 10% of the total consolidated assets of the covered financial company.[69] Thereafter, the FDIC may become obligated for 90% of the fair value of the total consolidated assets of each covered financial company that are available for repayment.[70]

The law requires the FDIC, in advance of obtaining any funding from the Treasury after the initial 30-day period of the receivership, to provide a repayment plan to the Treasury and to demonstrate that proceeds generated from the liquidation of the seized entity's assets, together with assessments, will suffice to repay outstanding indebtedness over a specified time period.[71] The Treasury Secretary and the FDIC must consult with Congress with respect to such repayment plans.[72] The ACT obligates the FDIC to charge risk-based assessments if necessary to repay obligations to the Treasury within 5 years of issuance (absent an extension from the Treasury in

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64 *See* § 202(d) (need for further extension must be certified by the FDIC chairperson).

65 *See* § 206.

66 *See* § 210(n)(1).

67 *See* § 210(n)(5).

68 *See* § 210(n)(9).

69 *See* § 210(n)(6).

70 *Id.*

71 *See* § 210(n)(9) and (o).

72 *See* § 210(n)(9)(B)(ii).

order to avoid serious adverse effect on the U.S. financial system).[73] First, assessments must be imposed on those claimants who received excess payments from the FDIC (*i.e.*, the difference between (1) the aggregate value the claimant received from the FDIC and (2) the value the claimant was entitled to receive from FDIC solely from proceeds of liquidation of the covered financial company).[74] If amounts recovered from such claimants are insufficient to repay outstanding obligations to the Treasury within 5 years, the FDIC can impose special assessments on financial companies with total consolidated assets equal to at least $50 billion.[75] In imposing these special assessments, the FDIC must take into account various macro- and microeconomic risk factors to avoid further jeopardizing U.S. financial stability.[76] The ACT expressly prohibits the use of taxpayer monies to prevent the liquidation of a financial company under the Act, and mandates that all expenses of liquidation be borne by the financial sector.[77]

Congressional Risk Matrix to be Used to Quantify Assessments

The legislation requires the new Financial Stability Oversight Council[78] to recommend a risk matrix that the FDIC will use to determine how much to assess financial institutions. That matrix is to take into account the risks presented by the financial company and the extent to which it would benefit from the orderly liquidation of a financial company under Title II, including: asset and liability concentrations, both on- and off-balance sheet; market share; leverage; potential exposure to sudden liquidity calls occasioned by economic distress; the company's financial obligations to others in the financial community; the "amount, maturity, volatility, and stability of the liabilities of the company, including the reliance on short-term funding, taking into account existing systems for measuring its risk based capital", the stability and variety of a company's sources of funding; the importance of a company as a source of credit in the overall economy and liquidity in the marketplace; the extent to which the entity is an asset manager and the diversity of assets under

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73 *See* § 210(o)(1)(B).

74 *See* § 210(o)(1)(D).

75 *Id.*

76 *See* § 210(o)(4).

77 *See* § 214.

78 This council is comprised of the following voting members (each having one vote): (A) the Secretary of the Treasury (Chairperson); (B) the Chairman of the Board of Governors of the Federal Reserve; (C) the Comptroller of the Currency; (D) the Director of the Bureau of Consumer Financial Protection; (E) the Chairman of the Securities and Exchange Commission; (F) the Chairperson of the FDIC; (G) the Chairperson of the Commodity Futures Trading Commission; (H) the Director of the Federal Housing Finance Agency; (I) the Chairman of the National Credit Union Administration Board; and (J) an independent member appointed by the President, by and with the advice and consent of the Senate, having insurance expertise. In addition, the Director of the Office of Financial Research, the Director of the Federal Insurance Office, a State insurance commissioner, State banking supervisor and State securities commissioner (or similar officer), each to be designated by a special selection process, serves in an advisory capacity, as a nonvoting member. *See* § 111.

management; and whether the company to be assessed contributed to the failure of the seized company during the ten-year period preceding the seizure.[79]

Further Studies of Existing Insolvency Regimes/Treatment of Various Constituents

The final legislation commissions studies of domestic insolvency laws to determine their effectiveness with respect to the orderly resolution or reorganization of systemic financial institutions without "creating moral hazard," specifically including the treatment of qualified financial contracts.[80] Similarly, the legislation requires international insolvency law and the Bankruptcy Code to be studied in order to better coordinate the resolution of global systemic financial companies.

In addition, the Act requires the Financial Oversight Council to analyze the treatment of fully secured creditors under the OLA. Without being prejudicial to existing law regarding the treatment of secured creditors in a resolution, the Council is obligated to review resolution authority under the Bankruptcy Code, FDIA and OLA regimes, and "examine how a haircut (of various degrees) on secured creditors could improve market discipline and protect taxpayers". In addition, the Council must compare prudent consumer and small business secured lending practices to those used by depositories with respect to large, interconnected financial firms; consider whether credit differs according to different types of collateral and different terms and timing of the extension of credit; and include an examination of stakeholders who were unsecured or under-collateralized and seek collateral when a firm is failing, and the impact that such behavior has on financial stability and an orderly resolution that protects taxpayers if the firm fails. Each study is required to be completed within one year following the enactment of this legislation.

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[79] *See* § 210(o).

[80] *See* §§ 216, 217.