Whistleblowing – Korruptionsbekämpfung durch Geheimnisverrat?

Bachelorarbeit

Zur Erlangung des Grades eines Bachelor of Arts (B.A.)
im Studiengang gehobener Verwaltungsdienst – Public Management

vorgelegt von

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Studienjahr 2018/2019

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A. Einleitung

„Die das Nest schmutzig machen, zeigen empört auf einen, der ihren Schmutz bemerkt und nennen ihn den Nestbeschmutzer.“

~ Max Frisch (1971)


Whistleblower. Zum Schluss wird die Strafbarkeit der Whistleblower nach deutschem Recht beurteilt.


In diesem Sinne beginnt die Arbeit mit der Untersuchung des Whistleblowing-Phänomens.
B. Whistleblowing – Das Phänomen

Die Ursprünge des Whistleblowings reichen bis in die vorchristliche Antike zurück.\(^1\) Dennoch wird das Thema Whistleblowing gerade in Zeiten der Digitalisierung weltweit aktuell und kontrovers diskutiert. Die Zulässigkeits- und Schutzdebatte rund um Whistleblowing erfolgten zunehmend seit den 1970er Jahren, als eine Reihe von Whistleblower-Fällen der Öffentlichkeit bekannt wurde.\(^2\)

Beispielsweise hat Stanley Adams im Jahr 1972 illegale Preisabsprachen der schweizerischen Firma Hoffmann-La Roche den EG Behörden gemeldet.\(^3\) Daraufhin wurde er wegen Verletzung von Geschäftsgeheimnissen nach schweizerischem Recht zu einer 12-monatigen Freiheitsstrafe verurteilt und erlitt zusätzlich diverse persönliche Konsequenzen.\(^4\)


In Deutschland hat die Fleischhygienetierärztin Margit Herbst 1994 in einem Fernsehinterview darauf aufmerksam gemacht, dass sie bei der Untersuchung von Schlachtrindern mehrere Fälle mit Verdacht auf BSE (Rinderwahn) entdeckte. Daraufhin wurde sie fristlos entlassen und verlor jegliche Versuche sich vor den Arbeitsgerichten durchzusetzen.\(^7\)

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2 Vgl. Imbach Haumüller, 2011, Rn. 1 f.
4 Vgl. Imbach Haumüller, 2011, Rn. 7 f.
Aufgrund solcher Fälle und anderer aufgedeckter Skandale gingen die Meinungen in den Diskussionen über den Schutz von Whistleblowern weit auseinander. In den USA, die schon seit Jahrzehnten rechtliche Schutzbestimmungen für Whistleblower erlassen haben, führten die Skandale zur Sensibilisierung der Bevölkerung in Bezug auf die Notwendigkeit und Nutzlichkeit von Whistleblowing.\textsuperscript{8} Die Assoziationen eines Whistleblowers mit einer pflichtbewussten und mutigen Arbeitskraft spiegeln sich nicht nur im juristischen Bereich wieder: Im Jahr 2002 wurden mehrere US-amerikanische Whistleblower zu „Persons of the Year“ von der Presse ernannt. Im Gegensatz dazu wird Whistleblowing in Kontinentaleuropa eher kritisch begegnet, was sich deutlich in der prekären Rechtslage zu dieser Thematik zeigt.\textsuperscript{9}

Die Angst vor der Förderung einer Bespitzelungsmentalität und der Vergiftung des Betriebsklimas ist der Grund, dass Whistleblower Diskriminierung und Ablehnung erfahren und mit weiteren persönlichen Konsequenzen konfrontiert werden.\textsuperscript{10} Mittlerweile ist ein kultureller und rechtlicher Änderungsprozess festzustellen. Das liegt vor allem daran, dass in Europa der Kampf gegen Korruption zunimmt und Whistleblowing dabei einen wichtigen Beitrag zur Aufdeckung von Missständen leisten kann.\textsuperscript{11} Laut einer Studie von PWC zur Wirtschaftskriminalität in Deutschland haben im Jahr 2017 86% der Befragten Unternehmen ein Whistleblowing-System eingerichtet und sind in den meisten Fällen von dem Nutzen überzeugt.\textsuperscript{12} Immer mehr Unternehmen entscheiden sich gemäß dem „Corporate Governance“-Prinzips zu einer besseren Führung und erkennen, dass Whistleblowing geschützt werden muss, um Missstände frühzeitig zu enttarnen.\textsuperscript{13}

\textsuperscript{8} Vgl. Imbach Haumüller, 2011, Rn. 43 f.
\textsuperscript{9} Vgl. Groneberg, 2011, S. 42 f.
\textsuperscript{10} Vgl. Imbach Haumüller, 2011, Rn. 44; Ledergerber, 2005, Rn. 13 f.
\textsuperscript{12} Vgl. Bussmann/Nestler et al., PWC, 2018, S. 44 f.
\textsuperscript{13} Vgl. Groneberg, 2011, S. 41.
Whistleblowing ist somit nicht mehr nur ein Phänomen, sondern eine aktuelle und relevante Praxis. Dennoch ist die Debatte um die Schutzwürdigkeit von Whistleblowern ein Thema, das dem entgegensteht. Zur Untersuchung der Schutzwürdigkeit wird deshalb nachfolgend der Begriff Whistleblowing näher erörtert.

I. Begriff und Definition

Der Begriff Whistleblowing kommt ursprünglich aus den USA und wird von „to blow the whistle“ abgeleitet.\(^\text{14}\) Auf Deutsch übersetzt heißt es „in die Pfeife blasen“ und soll an eine Schiedsrichterin oder ein Schiedsrichter, die bzw. der bei unfaires Spiel abpfeift oder an eine Polizeikraft, die einen Alarmpfiff auslöst, erinnern.\(^\text{15}\) Ein Whistleblower wird im Deutschen auch als „Nestbeschmutzerin“ bzw. „Nestbeschmutzer“, „Denunziantin“ bzw. „Denunziant“ oder „Verpfeiferin“ bzw. „Verpfeifer“ übersetzt.\(^\text{16}\) Diese Begriffe sind jedoch negativ besetzt und stellen Whistleblowing als moralisch fragwürdig dar.\(^\text{17}\) Wertneutrale Begriffe wie „Rauchmelderin“ bzw. „Rauchmelder“, „Informantin“ bzw. „Informant“ oder „Hinweisgeberin“ bzw. „Hinweisgeber“ haben nicht die Prägnanz, um Whistleblowern gerecht zu werden, wobei letzterer in der ein oder anderen Literatur verwendet wird.\(^\text{18}\) Auch in der deutschen Rechtssprache findet sich keine äquivalente Übersetzung oder gar eine Legaldefinition.\(^\text{19}\) Während die Rechtsprechung meist im Zusammenhang mit „Arbeitnehmeranzeigen“ von Whistleblowing spricht, wird in der deutschen Rechtsliteratur der englische Begriff als „Terminus technicus“ anerkannt.\(^\text{20}\)

Whistleblowing stellt eine komplexe Sachlage dar, weshalb es keine eindeutige Definition in der Literatur gibt.\(^\text{21}\) Oftmals wird auf die Definition von Miceli/Near (1980) als Basis zurückgegriffen und für eine deutsche

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\(^\text{15}\) Vgl. Ledergerber, 2005, Rn. 8; Leisinger, 2003, S. 20 f.

1. Gegenstand des Whistleblowings


Während illegale Praktiken einfach zu beurteilen sind, liegt die Beurteilung, ob bestimmte Verhaltensweisen als illegitim oder unmoralisch einzustufen sind, bei der Betrachterin und dem Betrachter. In der Debatte um die allgemeine Zulässigkeit von Whistleblowing wird die Beschränkung des Missstands begriff diskutiert, da „ [...] eine zu weite Auslegung [...] [...] die Gefahr der unkontrollierbaren Ausweitung und des Missbrauchs [...]“ hervorrufen könnte. Außerdem regeln Rechtsnormen das Zusammenleben innerhalb einer Gesellschaft ausgiebig und enthalten auch moralische Begriffe wie Treu und Glauben und gute Sitten. „Diese moralische

Treuänderfunktion des Gesetzgebers wird [...] durch höchstrichterliche Interpretationen [...] verstärkt²⁹ und führt somit zu einer handlungsleitenden Wirkung für die Gesellschaft und auch für alle, die an der Wirtschaft teilnehmen.

Jedoch kann die Aufdeckung von illegitimen und unморalischen Praktiken auf Gesetzeslücken hinweisen bzw. Gesetzesinitiativen fördern.³⁰ Dies könnte nicht nur im Interesse der Öffentlichkeit liegen, worauf in dieser Arbeit noch näher eingegangen wird. Wichtig ist auch, an wen sich Whistleblower wenden, was nachstehend thematisiert wird.

2. Adressatin und Adressat des Whistleblowings
Das Ziel der Meldung eines Missstandes in einer Organisation ist die Beseitigung dessen zu veranlassen.³¹ Deshalb wird unterschieden, gegenüber wem die Meldung erfolgt.
Beim internen Whistleblowing wird eine Stelle innerhalb des Unternehmens, wie zum Beispiel Führungskräfte, Betriebsräte oder andere innerbetriebliche Stellen, über den Missstand informiert.³² Der Hinweis wird somit außerhalb der üblichen Autoritäts- und Dienstwege bekannt gegeben.³³ Externes Whistleblowing bezeichnet hingegen die Meldung des Missstandes gegenüber Stellen außerhalb der Organisation, wie zum Beispiel Behörden, Strafverfolgungsorganen, Medien, Interessensverbänden und der Öffentlichkeit.³⁴ Während beim internen Whistleblowing das Unternehmen selbst die Möglichkeit besitzt, den Missstand zu beseitigen, wird bei externem Whistleblowing der Missstand einer breiten Öffentlichkeit bekannt und kann dazu beitragen ein gesellschaftliches Problembewusstsein zu schaffen.³⁵

²⁹ Leisinger, 2003, S. 46 f.
Schon hier zeigt sich der herrschende Interessenskonflikt, der bei der Diskussion über die Schutzwürdigkeit von Whistleblowern ausschlaggebend ist und deshalb im Laufe der Arbeit noch näher erörtert wird. Für die Auswahl der Person, an die die Meldung adressiert ist, könnte das Motiv von Whistleblowern einschlägig sein und wird somit im Anschluss untersucht.

3. Whistleblower und ihre Motive

wird.\textsuperscript{43} Deshalb wird auf das Merkmal des Motivs in der Definition von Whistleblowing verzichtet.\textsuperscript{44} Die genauere Untersuchung der Definitionsmerkmale hat aufgezeigt, dass Whistleblower sich in einem Interessenskonflikt befinden. Um diesen genauer zu betrachten, werden die einzelnen Interessen darauffolgend erörtert.

\section*{II. Interessenkonflikt}

Beim Aufdecken von Missständen treffen verschiedene Interessen aufeinander. Der dabei entstehende Konflikt führt zu einem Dilemma für Whistleblower.\textsuperscript{45} Einerseits befinden sich Whistleblower in einem Loyalitätskonflikt gegenüber ihrer Arbeitgeberin bzw. ihrem Arbeitgeber, wenn sie innerbetriebliche Missstände öffentlich machen. Andererseits können Whistleblower, mit ihrer Mitteilung von unhaltbaren Zuständen, die Gesellschaft vor erheblichen Schäden bewahren.\textsuperscript{46} Die Abwägung der Interessen findet sich auch in der Entscheidung wieder, an welche Person sich Whistleblower wenden. Im Folgenden werden somit die einzelnen Interessen näher betrachtet.

\subsection*{1. Interessen der Organisation}

Eine Organisation, unerheblich, ob sie dem privaten oder dem öffentlichen Sektor angehört, hat das Interesse an einem ordnungsgemäßen Betriebsablauf und einem guten Ruf in der Öffentlichkeit. Deshalb verlangt sie Vertrauen und Loyalität von ihren Arbeitskräften und fordert die Geheimhaltung von Geschäftsgeheimnissen.\textsuperscript{47} Wenn im Betrieb Missstände bestehen und Whistleblower sich dazu entscheiden, diese im Sinne des externen Whistleblowings an die Öffentlichkeit zu melden, hat das erhebliche negative Folgen für die Organisation.

\textsuperscript{44} Vgl. Kreis, 2016, S. 16.
\textsuperscript{46} Vgl. Ledergerber, 2005, Rn. 9.
\textsuperscript{47} Vgl. Schulz, 2008, S. 49.
Zum einen folgt ein hoher Reputationsschaden, der dazu führt, dass die Kundschaft und die Bevölkerung das Vertrauen in den ordnungsgemäßen Betrieb der Organisation verlieren.\textsuperscript{48} Sollten Behörden wegen Straftaten oder anderen Normverstößen im Betrieb ermitteln, schreckt das zum anderen auch Lieferfirmen und Vertragspartnerinnen und Vertragspartner ab und führt zusätzlich zum Entzug von Konzessionen und Genehmigungen.

Außerdem folgt beispielsweise durch Schadensersatzforderungen und Rückrufaktionen ein immenser finanzieller Schaden, der die Existenz des Unternehmens in Gefahr bringen könnte.\textsuperscript{49} Innerhalb der Organisation ist die erforderliche Vertrauensbasis zerstört und führt zu einem schlechten Betriebsklima.\textsuperscript{50} Arbeitskräfte wandern ab oder erledigen nur noch Dienst nach Vorschrift.\textsuperscript{51} Organisationen sind in Anbetracht dessen vorwiegend an internem Whistleblowing interessiert. Denn dann kann die Organisation unter Ausschluss der Öffentlichkeit frühzeitig Abhilfe leisten und zukünftige Verstöße vermeiden. Whistleblower halten damit auch ihre Treue- und Loyalitätspflicht ein und fördern die Arbeitszufriedenheit innerhalb der Organisation.\textsuperscript{52}

Außerdem ist der Ruf einer legitim handelnden Institution in der Öffentlichkeit von großem Vorteil.\textsuperscript{53} Die Implementierung von internen Whistleblowing-Systemen steht im Rahmen von Compliance-Programmen, die die Einhaltung von Regelkonformität verlangen, auch in deutschen Institutionen immer mehr auf der Tagesordnung.\textsuperscript{54} Dennoch bleibt die Frage, inwieweit die Interessen von Whistleblowern und der Öffentlichkeit dabei Anklang finden.

\textsuperscript{50} Vgl. Sprafke, 2010, S. 259.
\textsuperscript{52} Vgl. Leisinger, 2003, S. 24 f.
\textsuperscript{53} Vgl. Schulz, 2008, S. 50.
2. Interessen von Whistleblower

Die Interessen von Whistleblower sind in vielerlei Hinsicht kongruent zu denen der Organisation. Wenn ein Missstand entdeckt wird, liegt es auch vorwiegend im Interesse der Whistleblower, diesen ohne Schaden für das Unternehmen zu ahnden.\(^{55}\) Denn der Reputationsverlust als Folge von externem Whistleblowing führt auf längerer Sicht zum Stellenabbau und betrifft somit auch Whistleblower als Arbeitskräfte der Organisation.\(^{56}\) Dennoch möchten Whistleblower „[…] in einem harmonischen Umfeld […] arbeiten, in dem […] Regeln eingehalten werden“\(^{57}\). Zusätzlich liegt es im Eigeninteresse der Whistleblower sich vor Sicherheits- und Gesundheitsgefahren am Arbeitsplatz zu schützen.\(^{58}\) Dieses Eigeninteresse kann Drittbezug haben, da auch die Öffentlichkeit ein Informationsinteresse an potenziellen Gefährdungen von Leben, Gesundheit und Umwelt hat.\(^{59}\)

Das Motiv der Whistleblower spielt hier sicherlich eine Rolle. Bei altruistischen Interessen setzen sich Whistleblower für die Rechtsgüter der Allgemeinheit ein und zeigen damit ihre gesellschaftliche Verantwortung.\(^{60}\) Ungeachtet welche Motivation Whistleblower verfolgen, müssen sie eine Abwägung der Interessen durchführen. Im Ergebnis hat die Entscheidung für internes oder externes Whistleblowing ähnliche Konsequenzen für Whistleblower, die deshalb in der Diskussion um deren Schutzwürdigkeit nicht außer Acht gelassen werden dürfen. Die Gesetzgebung hat demnach auch die Wichtigkeit der Interessen der Öffentlichkeit zu erörtern, was nachfolgend thematisiert wird.

3. Interessen der Öffentlichkeit

Externes Whistleblowing besitzt diverse Funktionen, die im Interesse der Öffentlichkeit liegen. Zum einen besteht eine Transparenzfunktion, da

\(^{57}\) Groneberg, 2011, S. 45.
\(^{60}\) Vgl. Groneberg, 2011, S. 45.
Whistleblowing die Öffentlichkeit über die Abläufe in der Wirtschaft in Kenntnis setzt. „Externes Whistleblowing fördert diese Transparenz und unterstützt dadurch den demokratisch gewählten Staat bei der Erfüllung seiner Aufgaben.“

Denn wird ein Missstand offengelegt, der ein Missverhältnis zur Rechtsordnung darstellt, können staatliche Behörden ihre Sanktionshoheit ausüben und somit die Rechtsgüter der Allgemeinheit schützen.

Um zu ermitteln bzw. aktiv zu werden, sind Strafverfolgungsbehörden oftmals auf Hinweise von Insidern angewiesen, da Praktiken, wie beispielsweise Korruption, keine anzeigebereiten Opfer aufweisen. Somit ist Whistleblowing ein taugliches Instrument, um das öffentliche Interesse an einer funktionstüchtigen Strafrechtspflege und einer wirksamen Strafverfolgung Folge zu leisten.


Whistleblowing nimmt damit nicht nur eine Korrektivfunktion ein, die dazu führt, Druck auf Wirtschaftsteilnehmerinnen und Wirtschaftsteilnehmer auszuüben, um Missstände zu beseitigen. Auch die Kontrollfunktion ist bei der Überwachung von Standards, die die Gesetzgebung vorgeschrieben hat, von großer Bedeutung. Besonders das Allgemeininteresse am

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Gesundheits- und Umweltschutz sowie am Verbraucherschutz kann durch den Kontrollmechanismus von externem Whistleblowing geschützt werden. Im Gegensatz dazu wird bei internem Whistleblowing nicht nur das Informationsinteresse der Öffentlichkeit missachtet, sondern die Möglichkeit geschaffen, dass betroffene Organisationen strafvereitelnde Maßnahmen vornehmen und deshalb eine Strafverfolgung durch die zuständigen Behörden nicht mehr gewährleistet werden kann.

Im Ergebnis liegt externes Whistleblowing im Interesse der Allgemeinheit, um eine Kultur der Verantwortlichkeit zu schaffen und um eine effiziente Strafverfolgung zu ermöglichen. Deutlich wird dies vor allem beim Thema Korruptionsbekämpfung, welches im nächsten Punkt näher betrachtet wird.

III. Korruptionsbekämpfung durch Whistleblowing


aufgeteilt in die Abgeordnetenbestechung nach § 108e StGB, die Angestelltenbestechung nach § 299 StGB und die Amtsträgerkorrumpation gemäß §§ 331 bis 335 StGB. In allen Tatbeständen wirkt der Vorteilsgeber darauf hin, dass der Vorteilsnehmer für rechtswidrige Handlungen seine Macht zur Verschaffung unzulässiger Vorteile missbraucht und somit eine Erschwernis der sachgerechten Aufgabendurchführung hervorruft.76

Den Schaden solcher Taten trägt regelmäßig die Allgemeinheit, da durch Korruption vor allem der lautere und faire Wettbewerb sowie die Lauterkeit der öffentlichen Verwaltung gestört wird.77 „Die Bekämpfung der Korruption ist daher [...] eine zentrale gesellschaftspolitische Aufgabe.“78

Das größte Problem dabei ist, dass Korruption durch Heimlichkeit und Intransparenz geprägt ist und die Aufdeckung solcher Delikte deshalb Schwierigkeiten bereitet.79 Korruptionsfahnder nehmen infolgedessen ein Dunkelfeld von mindestens 95% an, was bedeutet, dass von 100 Fällen nur fünf aufgedeckt werden.80 Der Umstand, dass Korruptionsdelikte in Ausnahmefällen durch Zufall oder systematische Kontrollen entdeckt wurden, zeigt, dass die Strafverfolgungsorgane auf Aufdeckungsressourcen angewiesen sind.81

„Eine effektive Anti-Korrumpationsstrategie muss deshalb jeden Wert auf jene Massnahmen [sic!] legen, die zu einer Aufdeckung von Korruptionsdelikten führen.“82 Hier kommt Whistleblowing als primäre Komponente zum Ausgleich dieser Ermittlungsdefizite ins Spiel.83 Gerade weil bei Korruptionsdelikten direkt Geschädigte fehlen, die eventuell sonst zur Anzeige bereit wären, können Whistleblower am besten zur Entdeckung von Korruption beitragen.84

78 Schulz, 2008, S. 250.
82 Ledergerber, 2005, Rn. 17.
83 Vgl. Herold, 2016, S. 52.
Dabei wird Whistleblowing auch eine präventive Wirkung zugeschrieben. Im Rahmen von den schon angesprochenen Compliance-Programmen, die die Durchsetzung von innerhalb einer Corporate Governance vorgeschriebenen Richtlinien überwacht, können effektiv implementierte Whistleblowing-Systeme die Anzeigebereitschaft von korrupten Handlungen erhöhen.\textsuperscript{85}


IV. Wertung des Phänomens Whistleblowing

Obwohl Whistleblowing als effektives Instrument zur Aufdeckung von Missständen eingesetzt werden kann, gibt es in Deutschland noch einige Vorbehalte zu dieser Thematik.\textsuperscript{87}

Die Meldung über innerbetriebliche Missstände an die Öffentlichkeit kann unangenehme Folgen für eine Organisation haben, was sich jedoch durch den effektiven Einsatz von internem Whistleblowing größtenteils vermeiden lässt.\textsuperscript{88} Deshalb ist die Angst über bösgläubige Anzeigen von unwahren Tatsachen gegenüber der Öffentlichkeit der größte Vorbehalt gegenüber Whistleblowing.\textsuperscript{89} Dieser Missbrauch könnte eine übertriebene Misstrauenskultur schaffen und somit der Effizienz der Organisation schaden.

\textsuperscript{88} Vgl. Imbach Haumüller, 2011, Rn. 161; Leisinger, 2003, S. 73.
\textsuperscript{89} Vgl. Imbach Haumüller, 2011, Rn. 158.
Jedoch würde eine solche vorsätzliche Verbreitung unwahrer Tatsachen dem Ziel des Whistleblowings widersprechen. „Dem Whistleblower geht es darum, auf Missstände aufmerksam zu machen, damit diese behoben werden können und auf lange Sicht Schaden abgewendet werden kann, sei es für die Organisation selbst, für deren Mitarbeitende oder für Dritte, welche durch die illegalen, unmorralischen oder illegitimen Geschäftspraktiken gefährdet sind.“


Gerade bei der Aufdeckung von Korruptionsdelikten ist Whistleblowing geeignet, Schäden für die Allgemeinheit zu vermindern oder gar abzuwenden. Whistleblowing liegt somit im Interesse von Organisationen und der Öffentlichkeit und sollte deshalb gefördert werden.

Damit der Nutzen von Whistleblowing ausgeschöpft werden kann, müssen Whistleblower vor diversen negativen Konsequenzen, die sie bis dato in Deutschland erleiden, geschützt werden. Neben den persönlichen Risiken, wie beispielsweise Mobbing, Diskreditierung und Treulosigkeitsgefühlen, werden in diesem Zusammenhang die arbeitsrechtlichen Risiken, wie zum Beispiel Kündigung, erwähnt.

Jedoch könnten Whistleblower zusätzlich strafrechtliche Risiken eingehen, wie sich am Fall Stanley Adams zeigt. Er wurde gemäß Art. 162 StGB nach schweizerischem Recht zu einer vollziehbaren Gefängnisstrafe wegen Verletzung von Geschäftsgeheimnissen verurteilt.

Da Whistleblower innerbetriebliche Zustände preisgeben, könnten sie sich demnach auch in Deutschland dem Geheimnisverrat strafbar machen. In

90 dies., 2011, Rn. 160.
95 Vgl. Imbach Haumüller, 2011, Rn. 58.
der deutschen Literatur gehen die Ansichten darüber weit auseinander, weshalb anschließend Whistleblowing im Sinne des Geheimnisverrats untersucht wird.

C. Whistleblowing als Geheimnisverrat


In der deutschen Literatur haben sich einige wenige mit dieser Frage beschäftigt und sind zu keinem einheitlichen Ergebnis gekommen. Um sich die verschiedenen Ansichten anzusehen, müssen die Tatbestände der relevanten Normen näher betrachtet werden.

I. Straftatbestände des Geheimnisverrats

In Deutschland gibt es eine Reihe von Regelungen zum Schutz von Geheimnissen. Staatsgeheimnisse (§§ 93 ff. StGB), Briefgeheimnisse (§§ 201 f. StGB), Privatgeheimnisse (§§ 203 f. StGB), Post- und Fernmeldegeheimnisse (§ 206 StGB), Dienstgeheimnisse (§ 353b StGB)


1. Verletzung von Privatgeheimnissen § 203 StGB
Diese Berufsgruppen zeichnen sich dadurch aus, dass sie Informationen aufgrund einer Vertrauensbasis erhalten, die dem Einzelnen die Geheimhaltung gewährleistet.100 Ein solches Geheimhaltungsinteresse besteht vor allem auch bei Informationen, die einen illegalen Inhalt aufweisen.101 Sollten also Whistleblower solch ein Privat-, Betriebs- oder Geschäftsgeheimnis offenbaren, machen sie sich nach § 203 StGB strafbar.

2. Verletzung des Dienstgeheimnisses und einer besonderen Geheimhaltungspflicht § 353b StGB
Gemäß § 353b StGB können sich nicht nur Amtsträger oder dem öffentlichen Dienst besonders Verpflichtete strafbar machen, sondern auch eine Person, die „[…] eine Tätigkeit für eine Behörde ausübt und förmlich zur Geheimhaltung verpflichtet wurde“102. Sollten solche Personen

Geheimnisse preisgeben, die ihnen während ihrer dienstlichen Tätigkeit bekannt geworden sind, verhalten sie sich rechtswidrig, wenn sie wichtige öffentliche Interessen damit gefährden. Demnach schützt die Norm primär die öffentlichen Interessen, deckt damit aber auch den Schutz des öffentlichen Dienstes vor Vertrauensverlusten.\textsuperscript{103} Whistleblower könnten demnach durch die Aufdeckung von relevanten Missständen diesen Tatbestand erfüllen.

3. Verrat von Betriebs- und Geschäftsgeheimnissen § 17 UWG
In Bezug auf die Strafbarkeit von Whistleblowing wird § 17 UWG am meisten diskutiert, da die arbeitsrechtliche Verschwiegenheitspflicht durch diese Norm begleitet wird.\textsuperscript{104} Durch das Offenbaren von Missständen könnte somit der Tatbestand des Absatzes 1, der unternehmensangehörige Personen unter Strafe stellt, die Betriebs- oder Geschäftsgeheimnisse weitergeben, erfüllt werden. Auch gemäß Absatz 2 könnten sich Whistleblower strafbar machen, wenn sie Geschäftsunterlagen oder elektronische Daten an einen Dritten übergeben.\textsuperscript{105}
Der Schutzzweck der Norm ist in der Literatur viel diskutiert und nimmt auch bei der Frage nach der Strafbarkeit von Whistleblowern eine große Rolle ein. Zum einen wird das vermögensrechtliche Individualinteresse des Unternehmens an der Geheimhaltung von Betriebsinterna und zum anderen das Interesse der Allgemeinheit an einem lauteren Wettbewerb in diesem Zusammenhang genannt.\textsuperscript{106} Inwieweit Geheimsnisse mit illegalem Inhalt unter den Schutz der Norm fallen, ist die Frage, die sich in Bezug auf Whistleblowing bei allen Geheimnisschutzvorschriften stellt. Deshalb werden im Anschluss anhand des Geheimnisschutzes von § 17 Abs. 1 UWG Tatbestandslösungen zu einer möglichen Straflosigkeit von Whistleblowing näher erörtert.

\textsuperscript{103} Vgl. Graf, MüKo StGB, 2014, § 353b, Rn. 2.
\textsuperscript{104} Vgl. Kreis, 2016, S. 53.
\textsuperscript{106} Vgl. Fezer/Büschter et al., UWG, 2016, § 17, Rn. 4.
II. Tatbestandslösung

Eine Straflosigkeit von Whistleblowern könnte bestehen, wenn die aufgedeckten Missstände nicht unter dem Geheimnissbegriff fallen und so der Tatbestand nicht erfüllt wird. „Nach allgemeinem Verständnis ist ein Geheimnis eine Information, die nur einem bestimmten und begrenzten Personenkreis bekannt ist und bekannt sein soll.“\(^{107}\) Wie schon vorher angedeutet, muss demnach untersucht werden, ob illegale Geheimnisse dem Geheimnisschutz unterliegen.

Gegen den Schutz von illegalen Geheimnissen spricht, dass die vom Staat entwickelte Rechtsordnung sonst in einem Selbstwiderspruch steht.\(^{108}\) Verdeutlicht wird dies vor allem bei Staatsgeheimnissen. Denn „werden Verstöße durch Geheimhaltung geschützt, agiere der Staat gegen seine Verfassung und damit gegen sich“\(^{109}\). Deshalb sind gemäß § 93 Abs. 2 StGB Tatsachen, die gegen die freiheitliche demokratische Grundordnung verstoßen, aus dem Staatsgeheimnissbegriff ausgenommen.

Jedoch kann es auch an illegalen Geheimnissen ein schützenwertes Interesse bestehen, wenn beispielsweise eine Rechtsgutsverletzung durch das Geheimhalten umgehen werden kann.\(^{110}\) Auch die Gesetzgebung hat dies erkannt und bei Staatsgeheimnissen durch § 97a StGB sogar einen eigenen Tatbestand für den Schutz illegaler Staatsgeheimnisse geschaffen. Außerdem hat das Strafgesetz daneben andere Normen, die „[…] trotz der Rechtswidrigkeit eines Zustands seinen Schutz […] gewähren“\(^{111}\).

Als Beispiel könnte § 242 StGB dienen, in dem ein Dieb davor geschützt wird, dass ihm das Diebesgut wiederum gestohlen wird. Aus dem sogenannten Diebes-Dieb einen Schutz für illegale Geheimnisse abzuleiten, ist aber aufgrund des Schutzzwecks der Norm nicht

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\(^{107}\) Edwards, 2017, S. 86.
\(^{111}\) Kreis, 2016, S. 60.
anzunehmen. Diese soll nämlich die Rechte des tatsächlichen Eigentümers schützen, „nicht aber den rechtswidrigen Gewahrsam des Diebes“\textsuperscript{112}. Eine passendere Norm wäre § 139 Abs. 2 StGB, in der ein Seelsorger nicht zur Offenbarung von ihm anvertrauten Straftaten verpflichtet ist.\textsuperscript{113} Hieran kann vor allem der Schutz von Privatgeheimnissen nach § 203 StGB anknüpfen. Denn wie schon beschrieben, wird die Vertrauensbeziehung geschützt, ohne die bestimmte Berufsgruppen ihre Arbeit nicht ordnungsgemäß durchführen können.\textsuperscript{114} Dies zeigt zwar, dass illegale Geheimnisse von der Rechtsordnung geschützt werden können, jedoch ist das Geheimhaltungsinteresse von dem konkreten Schutzzweck der einzelnen Normen abhängig.\textsuperscript{115} Hier soll deshalb § 17 Abs. 1 UWG näher betrachtet werden.

Der Schutzzweck des § 17 UWG wird, wie schon beschrieben, in ein Allgemeininteresse und ein Individualinteresse des Unternehmens geteilt. Eine Ansicht sieht das Allgemeininteresse am lautenen Wettbewerb gemäß § 1 S. 2 UWG gleichberechtigt neben dem Interesse des Unternehmens als Normzweck im Sinne einer doppelten Schutztendenz.\textsuperscript{116} Dies würde dazu führen, dass Geheimnisse mit illegalem Inhalt zumindest in Bezug auf wettbewerbsrechtliche Normen nicht unter den Schutz des § 17 Abs. 1 UWG fallen. So wären demnach Kartellabsprachen (§ 81 Abs. 2 GWB) oder Bestechung im öffentlichen Verkehr (§ 299 StGB) nicht geschützt, Steuerhinterziehung, Umweltdelikte und Kapitalanlagenbetrug hingegen schon.

Oft wird dagegen die Antragserfordernis gemäß § 17 Abs. 5 UWG als Hindernis dafür genannt, dass die Norm Allgemeininteressen schützt.\textsuperscript{117} Die herrschende Meinung geht deshalb davon aus, dass § 17 UWG primär das Geheimhaltungsinteresse eines Unternehmens schützt. Dieses wird regelmäßig am wirtschaftlichen Wert der Information festgemacht.

\textsuperscript{112} Engländer/Zimmermann, in: NZWiSt 2012, S. 328 (331).
\textsuperscript{113} Vgl. Rotsch, 2015, Rn. 35.
\textsuperscript{115} Vgl. Engländer/Zimmermann, in: NZWiSt 2012, S. 328 (332).
\textsuperscript{117} Vgl. Engländer/Zimmermann, in: NZWiSt 2012, S. 328 (332).
Eine Ansicht besagt, dass sich dieser Wert nur auf das Unternehmensvermögen beziehen kann.\textsuperscript{118} Aus einer rein ökonomischen Sicht würden somit auch illegale Geheimnisse einen wirtschaftlichen Wert darstellen.\textsuperscript{119} „Legt man [jedoch] im Lichte einer systemkonsequenten Rechtsordnung einen juristisch-ökonomischen Vermögensbegriff zugrunde, werden illegale Geheimnisse nicht geschützt, da sie insgesamt nicht dem Schutz der Rechtsordnung unterliegen (vgl. etwa § 100a Abs. 4 S. 3 StPO).“\textsuperscript{120} In dieser Hinsicht würden Whistleblower sich beim Aufdecken von Missständen nicht des Geheimnisverrats strafbar machen. Andererseits ist die herrschende Meinung der Ansicht, dass sich der wirtschaftliche Wert auf die Integrität des Unternehmens bezieht.\textsuperscript{121} Somit sind auch illegale Geheimnisse dem Unternehmen wettbewerbsrechtlich zurechenbar, da die Offenlegung dieser geeignet ist, die Wettbewerbsfähigkeit zu beeinträchtigen.\textsuperscript{122} In diesem Sinne machen sich Whistleblower durch das Aufdecken betriebsinterner Missstände gemäß § 17 Abs. 1 UWG strafbar.

Im Ergebnis ist eine allgemeingültige Aussage über den Schutz von illegalen Geheimnissen nicht eindeutig zu treffen. Demnach greift auch die Tatbestandslösung nicht generell für Whistleblower ein. Infolgedessen werden im nächsten Punkt Rechtfertigungsmöglichkeiten vorgestellt, die möglicherweise vielmehr zu einer Straflosigkeit von Whistleblower führen.

\textbf{III. Rechtfertigungslösung}

Whistleblower, die durch das Offenbaren von Missständen den Tatbestand des Geheimnisverrats erfüllen, könnten gerechtfertigt handeln.\textsuperscript{123} Bei einer Rechtfertigungslösung werden die verschiedenen betroffenen Interessen

\textsuperscript{118} Vgl. Herold, 2016, S. 79.
\textsuperscript{119} Vgl. Engländer/Zimmermann, in: NZWiSt 2012, S. 328 (333).
\textsuperscript{120} Rotsch, 2015, Rn. 53.
\textsuperscript{121} Vgl. Herold, 2016, S. 79.
\textsuperscript{123} Vgl. Kreis, 2016, S. 58.
abgewogen.\textsuperscript{124} Dafür gibt es mehrere Möglichkeiten, von denen die relevantesten nachfolgend näher betrachtet werden.

1. \textbf{Notwehr und Nothilfe § 32 StGB}

Nach § 32 StGB handelt jemand nicht rechtswidrig, der eine Tat begeht, die durch Notwehr gerechtfertigt ist. Dafür ist zum einen ein notwehrfähiges Rechtsgut vorliegen. Die herrschende Meinung besagt, dass nur Individualrechtsgüter nothilfefähig sind.\textsuperscript{125} Denn gemäß Absatz 2 ist nur die Verteidigungs Handlung zugunsten eines selbst oder eines anderen und nicht der Allgemeinheit als Notwehr berücksichtigt. Außerdem könnte eine zu weite Anwendbarkeit die Schärfe des Notwehrrechts beeinträchtigt werden.

Beim Whistleblowing werden in der Regel vor allem Rechtsgüter der Allgemeinheit betroffen sein, weshalb Notwehr oder Nothilfe gem. § 32 StGB keinen Rechtfertigungsgrund für Whistleblower darstellt.\textsuperscript{126}

2. \textbf{Rechtfertigender Notstand § 34 StGB}

Eventuell könnte der Notstand nach § 34 StGB für Whistleblower einen Rechtfertigungsgrund darstellen. Demzufolge muss für ein höherrangiges Rechtsgut eine gegenwärtige Gefahr bestehen, die durch kein milderes Mittel abgewendet werden kann, als durch Whistleblowing. Seitens des Aufdeckens von Gesetzesverstößen ist die Notstands lag in der Regel gegeben, da die geschützten Rechtsgüter aus den Normen, die die Illegalität vorschreiben, durch den Verstoß gefährdet sind.\textsuperscript{127}

Problematisch ist die Frage, ob Whistleblowing als milderes Mittel eingesetzt wurde. In der Literatur wird an dieser Stelle angeführt, dass internes Whistleblowing gegenüber externem Whistleblowing ein milderes Mittel darstellt, da interne Abhilfe möglicherweise keinen Geheimnisverrat

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\textsuperscript{125} Vgl. Engländer/Zimmermann, in: NZWiSt 2012, S. 328 (330).
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erfordern. Jedoch ist dazu anzumerken, dass internes Whistleblowing nicht immer das Ziel der Missstandsbeseitigung erreichen kann, beispielsweise wenn die Organisation in dem Missstand verstrickt ist.

„War die Gefahr im Einzelfall nur durch einen Geheimnisverrat abzuwenden, so findet gem. § 34 StGB eine Interessensabwägung statt.“

Dabei können zwei Abwägungsmaßstäbe von Bedeutung sein.

Die nach dem Wortlaut notstandstypische Abwägung erfordert, dass das durch die Illegalität des Missstandes betroffene Interesse das Geheimhaltungsinteresse der Organisation wesentlich überwiegt. Dieser Maßstab des Aggressivnotstands ist anzuwenden, wenn „[...] dem der Notstandstäter die Gefahr auf die Kosten eines für das Entstehen der Notstandsloge nicht verantwortlichen Dritten abwendet“.

Beim Abwägungsmaßstab des Defensivnotstands wird gewürdigt, dass in die Gütersphäre der Organisation eingegriffen wird, die die abzuwendende Gefahr zu verantworten hat. „Diese Konstellation passt ebenso zum [...] Whistleblowing, bei dem gerade die Geheimhaltungsinteressen desjenigen beeinträchtigt werden, der für den Missstand verantwortlich ist.“ Nach diesem Abwägungsmaßstab muss das durch die Illegalität des Missstandes betroffene Interesse das Geheimhaltungsinteresse der Organisation nicht wesentlich weniger wiegen.

Die Abwägung fällt je nach Einzelfall des Whistleblowings anders aus, weshalb eine generelle Rechtfertigung nicht ausgesprochen werden kann. Dennoch ist § 34 StGB ein möglicher Rechtfertigungsgrund für Whistleblower.

129 Vgl. Rotsch, 2015, Rn. 36.
131 Vgl. Edwards, in: NZWiSt 2012, S. 328 (330 f.).
3. Gesetzliche Anzeigepflichten


IV. Wertung der Strafbarkeit von Whistleblowing als Geheimnisverrat

Whistleblowing kann durch das Weitergeben von betriebsinternen Missständen die Straftatbestände des Geheimnisverrats erfüllen. Oftmals betrifft dies vor allem externes Whistleblowing. Jedoch kann auch internes Whistleblowing die Tatbestände erfüllen, wenn der Missstand an eine Person gemeldet wird, die von der Organisation nicht zur Annahme betriebsinterner Informationen beauftragt wurde. Unabhängig davon, könnte eine Tatbestandslösung die Straflosigkeit von Whistleblowern herbeiführen. Dies hätte eine Signalwirkung, dass das Verhalten des Whistleblowers strafrechtlich generell als nicht verwerflich angesehen wird.

Problematisch ist jedoch, dass das Geheimhaltungsinteresse an einer Information von dem Schutzzweck der einzelnen Normen abhängig ist.\textsuperscript{142} An § 17 UWG kann man feststellen, dass sich die Rechtsliteratur nicht eindeutig auf einen Schutzzweck einigen kann und somit die Straflosigkeit je nach Ansicht bestätigt oder verneint wird. Deshalb wird eine Rechtfertigungslösung eher in Betracht gezogen, die zeigt, dass Whistleblower nur im Ausnahmefall nicht strafrechtlich verwerflich handeln.\textsuperscript{143} Verschiedene Rechtfertigungsmöglichkeiten könnten demnach Whistleblower von ihrer Strafbarkeit befreien. In Bezug auf die immer wichtiger werdende Korruptionsbekämpfung können sich zumindest Beamten und Beamte nach dem BBG und dem BeamStG rechtfertigen. Bei anderen Rechtfertigungsmöglichkeiten hängt eine Straflosigkeit von unvorhersehbaren Abwägungsprozessen ab.\textsuperscript{144} Whistleblower, die oftmals nicht das nötige Rechtswissen aufweisen, sind damit einer großen Rechtsunsicherheit ausgesetzt, die zu erheblichen strafrechtlichen Risiken führen kann.\textsuperscript{145} Wichtig ist dabei anzumerken, dass eine mögliche Straflosigkeit nur bei der Aufdeckung von Missständen in Frage kommt, die illegale Handlungen darstellen. Wenn es sich um illegitime oder unmoralische Praktiken handelt, kann eine Straflosigkeit kaum gerechtfertigt werden. Dieser Aspekt spielt auch bei Whistleblowing als Instrument der Korruptionsbekämpfung eine Rolle, da es neben den gesetzlich geregelten Korruptionsstraftaten auch ethisch verwerfliche Handlungen im Sinne von Korruption gibt, die nicht im Gesetz verankert sind.\textsuperscript{146} Im Endeffekt kann eine Strafbarkeit wegen Geheimnisverrats von Whistleblowern nicht ausgeschlossen werden. „Es ergibt sich damit ein veritabler Widerspruch zwischen kriminalpolitischer Befürwortung und Forcierung von Whistleblowing und der abschreckenden

\textsuperscript{142} Vgl. Engländer/Zimmermann, in: NZWiSt 2012, S. 328 (332).
\textsuperscript{143} Vgl. Edwards, 2017, S. 85.
\textsuperscript{145} Vgl. Herold, 2016, S. 81.
\textsuperscript{146} Vgl. Pfefferle/Pfefferle, 2011, S. 1; Schulz, 2008, S. 250.
(rechts)praktischen Unkalkulierbarkeit für den Whistleblower im Einzelfall."\textsuperscript{147}

Deshalb werden im nächsten Abschnitt diverse Gesetzesvorschläge und andere Möglichkeiten diskutiert, die einen Schutz von Whistleblower ermöglichen.

D. Rechtlicher Schutz von Whistleblowing


\textsuperscript{147} Herold, 2016, S. 84.
\textsuperscript{149} Forst, in: EuZA 2013, S. 37 (42).
I. Whistleblowing international


1. Schutzregelungen der EU

Die EU zeigt durch verschiedene Verordnungen, Richtlinien und Vorstöße ihre Aufgeschlossenheit zum Whistleblower-Schutz. Eine allgemeine Schutzregelung gibt es zwar nicht, jedoch viele sektorspezifische Bestimmungen, die zum Teil auch in Deutschland rechtsverbindlich sind.\textsuperscript{152} Im Bereich der Korruptionsbekämpfung gibt es das Zivilrechtsübereinkommen über Korruption des Europarates aus dem Jahr 2003\textsuperscript{153}, das in Artikel 9 eine Regelung zum Schutz von Whistleblowern enthält. Demnach sind Arbeitskräfte vor ungerechtfertigten Repressalien zu schützen, wenn sie in redlicher Absicht einen begründeten

\textsuperscript{150} Vgl. Groneberg, 2011, S. 37.
\textsuperscript{151} Ledergerber, 2005, Rn. 1.
\textsuperscript{152} Vgl. Kreis, 2016, S. 216.
\textsuperscript{153} Europarat, 1999, SEV Nr. 174.

Im April 2018 hat die EU-Kommission einen Vorschlag zu einer Richtlinie158 zum Schutz von Whistleblowern veröffentlicht. Um die Durchsetzung des Unionsrechts zu verbessern und um Einheitlichkeit in den Mitgliedsstaaten zum Whistleblower-Schutz herzustellen, wurden Mindeststandards dazu aufgestellt. Der Richtlinienvorschlag hat in Artikel 1 abschließend


2. Schutzregelungen der USA
Die gesellschaftliche Akzeptanz von Whistleblowern ist in den USA sehr hoch, sodass diese einen Heldenstatus einnehmen.\footnote{Vgl. Herold, 2016, S. 67; Ledergerber, 2005, Rn. 71.} Die Würdigung, dass jede und jeder Einzelne einen Beitrag zur Beseitigung von Missständen...
leisten kann, findet sich in den zahlreichen Schutzregelungen für Whistleblower wieder. Angesichts dessen, dass es kaum allgemeine Schutzgesetze gibt, streuen sich die Bestimmungen, was zur Uneinheitlichkeit und Unübersichtlichkeit führt.\textsuperscript{160} Außerdem beziehen sich die Gesetze entweder auf den privaten oder auf den öffentlichen Sektor, wobei Whistleblower aus letzterem besser geschützt sind.\textsuperscript{161} Interessanterweise wird externes Whistleblowing in den meisten Gesetzen privilegiert. Dies kann daran liegen, dass in den USA die Missstandsbeseitigung im Vordergrund steht und diese am effektivsten durchgeführt werden kann, wenn die zuständigen Behörden Hinweise bekommen.\textsuperscript{162} Eine der Kernvorschriften ist der Whistleblowing Protection Act von 1989\textsuperscript{163}. Dieser schützt Arbeitskräfte aus dem öffentlichen Dienst vor arbeitsrechtlichen Sanktionen, wenn sie die im Gesetz bestimmten illegalen Handlungen der Bundesverwaltung an eine speziell dafür eingerichtete Stelle melden.\textsuperscript{164} Interessant sind dabei die Rechtsfolgen von der verbotenen Sanktionierung der Whistleblower seitens der Verwaltung. Im Endeffekt muss die Bundesverwaltung beweisen, dass die erlassene Sanktion nicht aufgrund des Whistleblowings ergangen ist. Ansonsten stehen diesem Auslagen und Anwaltskosten zu, sowie das Recht, sich an eine andere Dienststelle versetzen zu lassen.\textsuperscript{165} Im Jahr 1994 wurde das Gesetz revidiert\textsuperscript{166}. Demzufolge wurde der Missstands begriff nicht mehr nur auf illegale Handlungen begrenzt.\textsuperscript{167} Nach verheerenden Bilanzskandalen der US-amerikanischen Firmen Enron und WorldCom im Jahr 2002 wurde der Sarbanes-Oxley Act\textsuperscript{168} erlassen.\textsuperscript{169} Dadurch, dass sich das Gesetz auf alle Unternehmen bezieht, die an einer US-amerikanischen Börse kotiert sind, wirkt es sich auch auf deutsche

\begin{itemize}
  \item \textsuperscript{160} Vgl. Herold, 2016, S. 68; Groneberg, 2011, S. 78.
  \item \textsuperscript{161} Vgl. Groneberg, 2011, S. 80; Ledergerber, 2005, Rn. 111.
  \item \textsuperscript{162} Vgl. Ledergerber, 2005, Rn. 109.
  \item \textsuperscript{163} WPA 1989: Pub. L. 101-12, 103 Stat. 16.
  \item \textsuperscript{164} Vgl. Herold, 2016, S. 70 f.; Ledergerber, 2005, Rn. 119 f.
  \item \textsuperscript{165} Vgl. Ledergerber, 2005, Rn. 121 f.
  \item \textsuperscript{167} Vgl. Imbach Haumüller, 2011, Rn. 190.
  \item \textsuperscript{169} Vgl. Groneberg, 2011, S. 85.
\end{itemize}


3. Schutzregelungen im Vereinigten Königreich

Im Gegensatz zur USA hat das Vereinigte Königreich nur eine allgemeine gesetzliche Regelung zum Whistleblower-Schutz. Der Public Interest Disclosure Act wurde 1998 als Erweiterung des Employment Rights Act
von 1996\textsuperscript{178}, nach einer Reihe von Skandalen mit Todesopfern, erlassen.\textsuperscript{179} Das Gesetz schützt alle Arbeitskräfte mit Ausnahme von Selbstständigen, Freiwilligen und Mitarbeiter des Geheimdienstes und des Militärs und erfasst alle Missstände, auch solche, die sich nicht nur auf illegale Praktiken beziehen.\textsuperscript{180} Jedoch ist im Vergleich zur USA ein strenges Stufenverhältnis zwischen internem und externem Whistleblowing vorgeschrieben.\textsuperscript{181} Whistleblower müssen den Missstand demzufolge zuerst direkt an ihre/n Arbeitgeber/in melden und nur dann an eine externe Stelle, wenn dem Missstand nicht abgeholfen wird. Im Ausnahmefall können sich Whistleblower auch direkt an externe Stellen wenden, beispielsweise wenn sie Diskriminierungen der Organisation befürchten müssen, die Organisation selbst im Missstand verstrickt ist oder der Missstand ein außerordentlich schwerwiegendes Fehlverhalten darstellt.\textsuperscript{182} Durch diese Kriterien würdigt das Gesetz zum einen das Interesse der Organisationen befürchten müssen, die Organisation selbst im Missstand verstrickt ist oder der Missstand ein außerordentlich schwerwiegendes Fehlverhalten darstellt.\textsuperscript{182} Durch diese Kriterien würdigt das Gesetz zum einen das Interesse der Organisationen an internen Whistleblowing und verdeutlicht zum anderen, dass dieses nicht immer möglich bzw. effektiv ist und somit die Meldung an Behörden und die Öffentlichkeit erfolgen kann.\textsuperscript{183} Um dem Missbrauch vorzubeugen, sind bloße Behauptungen nicht vom Gesetz geschützt.\textsuperscript{184} Sollten Whistleblower Diskriminierungen erleiden müssen, können sie an einem Arbeitsgericht Klage erheben und Schadensersatz erstreiten.\textsuperscript{185} Da dieses britische Gesetz ein großer Erfolg im Whistleblower-Schutz verzeichnet, wird es oft als Muster für Gesetze in anderen Ländern verwendet.\textsuperscript{186} Ob dies auch für Deutschland in Betracht kommt, wird anschließend thematisiert.

\textsuperscript{178} ERA 1996: Chapter 18. 
\textsuperscript{179} Vgl. Forst, in: EuZA 2013, S. 37 (54); Ledergerber, 2005, Rn. 85 ff. 
\textsuperscript{180} Vgl. Imbach Haumüller, 2011, Rn. 250; Ledergerber, 2005, Rn. 89 f. 
\textsuperscript{181} Vgl. Herold, 2016, S. 71. 
\textsuperscript{182} Vgl. Forst, in: EuZA 2013, S. 37 (55); Imbach Haumüller, 2011, Rn. 255. 
\textsuperscript{183} Vgl. Ledergerber, 2005, Rn. 97. 
\textsuperscript{185} Vgl. Imbach Haumüller, 2011, Rn. 256; Ledergerber, 2005, Rn. 94. 
\textsuperscript{186} Vgl. Ledergerber, 2005, Rn. 88.
II. Whistleblowing im deutschen Rechtssystem


Der Fall untermauert die Ergebnisse aus einem vom DGB beauftragten juristischen Kurzgutachten von 2015: Deutschlands gesetzliche Schutzregelungen für Whistleblower sind unzureichend.\footnote{Vgl. Fischer-Lescano, DGB Kurzgutachten, 2015, S. 36.}


Oftmals sind in diesen Regelungen “Beschwerden, die primär die Interessen außenstehender Dritter oder die Allgemeinheit betreffen, […] nicht geschützt“\footnote{Ax/Scheffen et al., 2010, Rn. 134.}. Außerdem gibt es keine gesetzlichen Bestimmungen zu den prozeduralen Fragen oder Kriterien, an denen sich Whistleblower orientieren können, um sich vor Sanktionen zu schützen.\footnote{Vgl. Fischer-Lescano, DGB Kurzgutachten, 2015, S. 6.}

Zwar enthält § 612a BGB ein Maßregelungsverbot, das besagt, dass keine arbeitsrechtlichen Sanktionen gegen Arbeitskräfte verhängt werden dürfen, wenn sie in zulässiger Weise ihre Rechte ausüben. Aber ein Recht zum Whistleblowing ist nicht im Gesetz verankert.\footnote{Vgl. Fischer-Lescano, DGB Kurzgutachten, 2015, S. 7; Ax/Scheffen et al., 2010, Rn. 135.}

Durch das Fehlen eines gesetzlichen systematischen Konzepts, sind Kriterien und Mindestbedingungen zu Whistleblowing überwiegend von der
Rechtsprechung entwickelt worden. Die deutsche Rechtsprechung befasst sich bei Whistleblowing-Fällen vorwiegend mit außerordentlichen Kündigungen durch den Arbeitgeber bzw. die Arbeitgeberin und verwendet dabei den Begriff Arbeitnehmeranzeigen.

Die erste wichtige Entscheidung für Whistleblower enthält das Urteil des Bundesverfassungsgerichts vom 25.02.1987\(^\text{193}\), in dem es würdigt, dass die gutgläubige Strafanzeige eines Bürgers im Interesse an der Erhaltung des Rechtsfriedens und an der Aufklärung von Straftaten liege und somit der Rechtsstaat auf solche Anzeigen bei der Strafverfolgung nicht verzichten könne.\(^\text{194}\)

Das Bundesverfassungsgericht sehe in seinem Urteil vom 02.07.2001\(^\text{195}\) das Grundrecht aus Art. 2 Abs. 1 i.V.m. Art. 20 Abs. 3 GG (Rechtsstaatsprinzip) verletzt, wenn der gutgläubige Anzeigeerstatter zivilrechtliche Nachteile erfährt.\(^\text{196}\) Somit dürfen Arbeitnehmeranzeigen im Regelfall nicht zu einer Kündigung führen, wenn diese nicht auf wissentlich unwahre oder leichtfertig falsche Angaben basieren.\(^\text{197}\)

Das Bundesarbeitsgericht hat darauf in einem Urteil vom 03.07.2003\(^\text{198}\) entschieden, dass aufgrund des Wortlauts „im Regelfall“ auch Ausnahmen von dem Grundsatz des Bundesverfassungsgerichts auftreten können und somit eine einzelfallbezogene Abwägung zwischen dem Recht auf Anzeige (Art. 2 GG) und der Unternehmerfreiheit (Art. 12 GG) durchgeführt werden müsse.\(^\text{199}\) Die Anzeige dürfe insofern keine unverhältnismäßige Reaktion auf ein Verhalten des Arbeitgebers darstellen. Indizien für eine solche unverhältnismäßige Reaktion wären die Berechtigung der Anzeige, die Motivation des Anzeigenden oder ein fehlender innerbetrieblicher Hinweis.\(^\text{200}\) Das bedeutet schließlich, dass eine Kündigung trotzdem gerechtfertigt ist, wenn beispielsweise die Arbeitskraft aus einer

\(^{193}\) BVerfG v. 25.02.1987 – 1 BvR 1086/85 (juris Rn. 1-12).
\(^{194}\) BVerfG v. 25.02.1987 – 1 BvR 1086/85 (juris Rn. 11).
\(^{195}\) BVerfG v. 02.07.2001 – 1 BvR 2049/00 (juris Rn. 1-24).
\(^{196}\) BVerfG v. 02.07.2001 – 1 BvR 2049/00 (juris Rn. 7).
\(^{197}\) BVerfG v. 02.07.2001 – 1 BvR 2049/00 (juris Rn. 20).
\(^{198}\) BAG v. 03.07.2001 – 2 AZR 35/02 (juris Rn. 1-56).
\(^{199}\) BAG v. 03.07.2001 – 2 AZR 35/02 (juris Rn. 29 ff.).
\(^{200}\) BAG v. 03.07.2001 – 2 AZR 35/02 (juris Rn. 38).
Schädigungsabsicht heraus handelt. Das Bundesarbeitsgericht stellt jedoch klar, dass der innerbetrieblichen Meldung nicht generell der Vorrang gelte, sondern dies von der Zumutbarkeit abhänge. Die Unzumutbarkeit der innerbetrieblichen Anzeige wäre zum Beispiel gegeben, wenn der Betroffene sich durch die Nichtanzeige selbst strafbar mache, es sich um schwerwiegende Straftaten handele oder durch die Mitwirkung des Arbeitgebers am Missstand keine interne Abhilfe zu erwarten sei.201 „Whistleblowing ist [somit] nur dann zulässig, wenn es sich als verhältnismäßige Reaktion darstellt.“202

In einem weiteren Urteil vom 07.12.2006203 bestätigte das Bundesarbeitsgericht seine damaligen Auffassungen und fügte hinzu, dass eine Anzeige nicht nur berechtigt sei, wenn sie zu einer Verurteilung im Strafverfahren führt.204 Somit haben das Bundesverfassungsgericht und das Bundesarbeitsgericht Grundsätze für die arbeitsrechtliche Zulässigkeit von Whistleblowing aufgestellt. Dabei würdigen die Gerichte das öffentliche Interesse an einer wirksamen Strafverfolgung und betonen somit die Schutzwürdigkeit von Whistleblower.

Das Kriterium des öffentlichen Interesses an einer Information findet sich auch in der Rechtsprechung des EGMR vom 21.07.2011205 wieder. Eine deutsche Arbeitnehmerin hatte Missstände in der Altenpflege nach mehreren innerbetrieblichen Meldungen an die Öffentlichkeit gegeben und wurde daraufhin gekündigt. Das EGMR entschied, dass dies gegen Art. 10 EMRK verstoße, in dem das Recht auf Freiheit der Meinungsäußerung gefestigt ist. Durch die Verwundbarkeit der Pflegebedürftigen liege die Aufdeckung von Mängeln in der Altenpflege im öffentlichen Interesse und überwiege das Interesse der Organisationen am Schutz der Geschäftsinteressen, weshalb die Mitteilung an die Öffentlichkeit

201 BAG v. 03.07.2001 – 2 AZR 35/02 (juris Rn. 41).
202 Kreis, 2016, S. 35.
203 BAG v. 07.12.2006 – 2 AZR 400/05 (juris Rn. 1-25).
204 BAG v. 07.12.2006 – 2 AZR 400/05 (juris Rn. 17).

1. Gesetzesvorschlag der Bundesministerien: § 612a BGB

208 EGMR v. 21.07.2011 – 28274/08 (juris Nr. 31).
209 Vgl. Ax/Scheffen et al., 2010, Rn. 136.
210 BMAS/BMELV/BMJ, 2008, Vorschlag § 612a BGB.

2. Gesetzesentwurf der SPD: HinwGebSchG

213 Vgl. Ax/Scheffen et al., 2010, Rn. 137 f.
216 BT-Drs. 17/8567, S. 1-9.
218 BT-Drs. 17/8567, S. 2.
aufdecken. Auf Arbeitskräfte des öffentlichen Dienstes wird nicht eingegangen. In § 3 sind Begriffsbestimmungen zu finden. Der Missstands-begriff ist sehr weit ausgelegt, da jede Rechts- und Pflichtverletzung der Organisation beinhaltet ist. Diese müssen jedoch im Umfeld einer unternehmerischen oder betrieblichen Tätigkeit erfolgt sein, was zu Abgrenzungsproblemen für Arbeitskräfte und Organisationen führt.219 Die Rechtsfolgen für Whistleblower, die aufgrund ihrer Missstandsmeldung benachteiligt werden, sind in §§ 4, 8 und 9 geregelt und wiederholen lediglich Regelungen aus dem Kündigungsschutzrecht. In § 6 wird das Anzeigerecht normiert. Interessant ist, dass der Entwurf Whistleblowing an zuständige externe Stellen direkt zulässt ohne vorher eine innerbetriebliche Abhilfe vorzuschreiben. Zuständige externe Stellen sind gemäß § 3 Abs. 5 Behörden, die für die Entgegennahme der Anzeige oder der Beseitigung des Missstands zuständig sind und im Zweifel die Polizei oder die Staatsanwaltschaft.220 Problematisch ist, dass die Polizei und die Staatsanwaltschaft auch für zivilrechtliche und arbeitsrechtliche Pflicht-verletzungen zuständig wären.221 Außerdem kommt die Interessens-abwägung zu kurz, da Whistleblower sich direkt an externe Stellen wenden dürfen und somit beispielsweise Reputationsschäden der Organisationen in Kauf nehmen. Zwar wird in § 6 Abs. 2 eine Meldung an die Öffentlichkeit nur unter bestimmten Voraussetzungen erlaubt, jedoch sind diese wie beispielsweise die Untätigkeit der zuständigen Behörden zu unbestimmt definiert. In § 11 wird die Einrichtung eines internen Whistleblower-Schutzsystem geregelt, wobei es den Organisationen freistehet, ob und in welchem Ausmaß ein System implementiert wird.222 Die Frage ist, inwieweit Organisationen sich für die Implementierung solcher Systeme entscheiden, wenn Whistleblower sich direkt an externe Stellen wenden dürfen.

Die Regelungen des Gesetzesentwurfs sind sehr ungenau bestimmt, führen nicht zu der gewollten Rechtssicherheit und schenken den verschiedenen

220 BT-Drs. 17/8567, S. 2.
222 BT-Drs. 17/8567, S. 4.
Interessen der Organisationen, der Whistleblower und der Öffentlichkeit zu wenig Beachtung. Der Bundestag setzte den Entwurf nicht um.\footnote{Vgl. Kreis, 2016, S. 197.}

3. Gesetzesentwurf Bündnis 90/DIE GRÜNEN: Whistleblower-Schutzgesetz

Auch die Fraktion Bündnis 90/DIE GRÜNEN haben sich dem Whistleblowing-Schutz angenommen und zwei Entwürfe erstellt. Der erste Gesetzesentwurf vom 23.05.2012 orientierte sich am Vorschlag der Bundesministerien zur Änderung des § 612a BGB, wurde im Juni jedoch mit dem Entwurf der SPD, sowie einem Antrag der Fraktion Die Linke auf die Erstellung eines Gesetzesentwurfs für den Whistleblower-Schutz vom Bundestag abgelehnt. Deshalb folgte der zweite Entwurf am 04.11.2014\footnote{BT-Drs. 18/3039.}, der eine überarbeitete Version des ersten Entwurfs darstellt. Im Gegensatz zum Entwurf der SPD verkörpert das vorgestellte Whistleblower-Schutzgesetz keine allgemeine Regelung. Die Fraktion hat für die Arbeitskräfte aus dem privaten Sektor und für solche aus dem öffentlichen Dienst getrennte Regelungen aufgestellt.

Als § 612b BGB hat die Fraktion ein Anzeigerecht für Arbeitskräfte aus dem privaten Sektor eingerichtet, das sich an dem Vorschlag der Bundesministerien orientiert. Internem Whistleblowing wird diesmal jedoch den Vorrang gegeben.\footnote{BT-Drs. 18/3039, S. 3.} Das entworfene Stufenverhältnis der Rechtsprechung wird somit gewürdigt, genauso wie dem Kriterium der Zumutbarkeit ein er internen Meldung. Interessant ist, dass Whistleblower sich direkt an eine außerbetriebliche Stelle wenden können, wenn keine innerbetriebliche Stelle vorhanden ist. Es besteht damit keine Pflicht für die Organisationen eine interne Stelle einzurichten, allerdings schreibt der Entwurf vor, dass die Bundesregierung nach einer Evaluierung des Gesetzes Leitlinien für interne Whistleblowing-Systeme erstellen soll.\footnote{BT-Drs. 18/3039, S. 7.} Zusätzlich wird das unmittelbare Melden von Missständen an die Öffentlichkeit unter der Voraussetzung
erlaubt, dass das öffentliche Interesse am Bekanntwerden der Information das betriebliche Geheimhaltungsinteresse erheblich überwiegt.\textsuperscript{227} Dies könnte für Whistleblower problematisch sein, da eine Interessensabwägung oft erst durch eine Gerichtsentscheidung erfolgen kann. Da auf Begriffsbestimmungen und Definitionen verzichtet wird, ist ungeklärt, was beispielsweise unter „zuständige außerbetriebliche Stellen“ verstanden wird.

Für Arbeitskräfte des öffentlichen Dienstes sind Anzeigerechte als § 67a BBG und § 37a BeamtStG vorgesehen. Auch Beamtinnen und Beamte müssen sich zuerst an Vorgesetzte oder innerdienstliche Stellen wenden. Dabei sind nur bestimmte Missstände meldefähig.\textsuperscript{228} Ist keine innerdienstliche Abhilfe erfolgt, dürfen Whistleblower andere zuständige Behörden oder außerdiensliche Stellen kontaktieren, wobei auch hier keine Definition besteht. Auf das Zumutbarkeitskriterium wird bei Arbeitskräften des öffentlichen Dienstes verzichtet. Die Meldung an die Öffentlichkeit hingegen, soll fast genauso ablaufen, wie bei Arbeitskräften des privaten Sektors. Bevor Beamtinnen und Beamte an die Öffentlichkeit gehen, muss eine rechtzeitige Abhilfe, durch innerdienstliche oder andere zuständige außerdiensliche Stellen, nicht zu erwarten sein.\textsuperscript{229} Des Weiteren sind der Schutz der Whistleblower vor rechtlichen und tatsächlichen Nachteilen im Dienst und die Beweislast bezüglich einer möglichen ungerechtfertigten Sanktion geregelt.

Zum Schluss sieht der Entwurf vor, Regelungen zum Schutz der Whistleblower in Bezug auf die Strafbarkeit durch Geheimnisverrat einzupflügen, jedoch ausschließlich in Bezug auf Staats- und Dienstgeheimnissen. Die Regelungen stellen Rechtfertigungsgründe dar, wobei diese hohe Anforderungen an Whistleblower stellen. Demnach handeln Whistleblower nicht rechtswidrig, wenn sie Staats- oder Dienstgeheimnisse zum Zweck der Aufklärung, Verhinderung oder Beendigung einer Grundrechtsverletzung oder schweren sonstigen Rechtsverletzung oder

\textsuperscript{227} BT-Drs. 18/3039, S. 4.
\textsuperscript{228} BT-Drs. 18/3039, S. 5.
\textsuperscript{229} BT-Drs. 18/3039, S. 5.

Im Entwurf werden im Gegensatz zu dem der SPD nicht nur Arbeitskräfte des privaten Sektors berücksichtigt. Dagegen ist der Missstandsbevorruff lediglich auf illegale Praktiken begrenzt. Darüber hinaus würden keine Rechtfertigungsgründe für die Strafbarkeit von Whistleblower beispielsweise beim Offenbaren von Betriebs- und Geschäftsgeheimnissen bestehen. Der Gesetzesentwurf sowie einem erneuten Antrag der Fraktion Die Linke wurden im Juni 2015 abgelehnt.\textsuperscript{231}

4. Gesetzentwurf der Bundesregierung: GeschGehG


\textsuperscript{230} BT-Drs. 18/3039, S. 7.
\textsuperscript{231} Vgl. Kreis, 2016, S. 198.
\textsuperscript{232} Bundesregierung, 2018, Entwurf GeschGehG.

\textsuperscript{234} dass., 2018, Entwurf GeschGehG, S. 27.

III. Empfehlung zum gesetzlichen Whistleblower-Schutz in Deutschland


235 BT-Drs. 19/3546, S. 1.
236 BT-Drs. 19/3546, S. 4.
Bevor weitere Überlegungen angestellt werden, sei angemerkt, dass diese Arbeit sich hauptsächlich mit der strafrechtlichen Problematik von Whistleblower in Bezug auf Geheimnisschutzvorschriften konzentriert und somit arbeitsrechtliche Angelegenheiten nur indirekt in die Empfehlungsüberlegungen mit einfließen sollen.

Die Grundfrage einer möglichen Regelung zum Whistleblower-Schutz ist, ob ein eigenes Gesetz, wie es die SPD vorgeschlagen hatte oder die Erweiterung von den schon einzelnen bestehenden Schutzvorschriften, wie die Fraktion Bündnis 90/DIE GRÜNEN vorgesehen hatte, entwickelt werden soll.\textsuperscript{238} Dies hängt einerseits vom gültigen Arbeitsrecht ab. In Deutschland ist dieses aufgeteilt in Vorschriften für den privaten Sektor und solche für den öffentlichen Dienst. Für beide Sektoren sind die einzelnen Vorschriften nicht in einheitlichen Gesetzen festgeschrieben, sondern verteilen sich auf verschiedene Gesetze. Dies führte zur Fragmentierung der schon bestehenden Schutzvorschriften für Whistleblower. Um eine effektive Strafverfolgung zu gewährleisten, sollte die Missstandsbeseitigung in beiden Sektoren in gleichem Maße gefördert werden, weshalb ein eigenes Gesetz vorzuziehen wäre.\textsuperscript{239} Dadurch könnten die einzelnen Schutzvorschriften rausgenommen und so eine Übersichtlichkeit herbeigeführt werden. Das Gesetz müsste sich somit an alle Beschäftigten im privaten und öffentlichen Sektor richten, wie es auch im Vereinigten Königreich der Fall ist.


\textsuperscript{238} Vgl. ders., in: EuZA 2013, S. 37 (63).
\textsuperscript{239} Vgl. Herold, 2016, S. 340 f.
Dabei hat auch das von der Rechtsprechung entwickelte Stufenverhältnis zwischen internen und externen Meldungen große Bedeutung.
Um eine effektive Strafverfolgung zu ermöglichen, sollte das Anzeigerecht bei illegalen Praktiken die direkte Meldung auch ohne internen Abhilfeversuch an die Strafverfolgungsbehörden zulassen. Somit würde der Gefahr der möglichen Strafvereitelung keinen Raum gegeben werden. Whistleblower würde es trotzdem offenstehen, ob sie sich um einen internen Abhilfeversuch bemühen.
Wenn illegitime und unmoralische Praktiken gemeldet werden, soll dies vorrangig an innerbetriebliche Stellen geschehen. Damit wird der Organisation Gelegenheit gegeben, diese Missstände selbst zu beseitigen. Sollte die Organisation am Missstand beteiligt sein, kann sich der Whistleblower direkt an die Öffentlichkeit wenden. Eine Meldung an die Strafverfolgungsbehörden ist entbehrlich, da diese bei ungesetzlichen Verstößen keine Handlungsmacht haben.
Natürlich sind diese Überlegungen sehr vereinfacht dargestellt und bedürfen noch tiefere Auseinandersetzung mit den jeweiligen Folgen für die betroffenen Organisationen und der Öffentlichkeit. Wichtig ist lediglich, dass die Verfahren sich an den Missstand, der aufgedeckt wird, orientieren sollte. Wenn ein Anzeigerecht ausformuliert ist, bedarf es noch Überlegungen dazu, vor welchen arbeitsrechtlichen Sanktionen rechtmäßiges Whistleblowing geschützt ist, welche Rechtsfolgen der Organisationen bei Nichteinhaltung bevorstehen und zum Beispiel Regelungen zu möglichen finanziellen Anreizen, wie es sie in den USA gibt. Auch die Implementierung von internen Whistleblowing-Systemen sollte gesetzlich verankert sein. Denn gerade hier sollten zum Schutz der Organisationen wichtige Mindestanforderungen vorgegeben werden.\textsuperscript{240} Damit werden die Corporate Governance-Prinzipien berücksichtigt und die Unternehmen zur besseren Selbstkontrolle durch Einrichtung von Compliance Maßnahmen aufgefordert.\textsuperscript{241}

\textsuperscript{240} Vgl. Forst, in: EuZA 2013, S. 37 (42).
\textsuperscript{241} Vgl. Herold, 2016, S. 23.

Diese Überlegungen sollen lediglich Denkanstöße für ein mögliches Whistleblower-Schutzgesetz geben, vor allem in Bezug auf strafrechtliche Auswirkungen. Die aktuellen Vorschläge und Richtlinien der EU sind dabei zu beachten.

In jedem Fall muss die deutsche Gesetzgebung den Schutz für Whistleblower gesetzlich verankern.

E. Fazit

„Whistleblowing – Korruptionsbekämpfung durch Geheimnisverrat?“


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**Erklärung zur selbstständigen Arbeit**

„Ich versichere, dass ich diese Bachelorarbeit selbstständig und nur unter Verwendung der angegebenen Quellen und Hilfsmittel angefertigt habe. Die aus anderen Quellen direkt oder indirekt übernommenen Daten und Konzepte sind unter Angabe der Quelle gekennzeichnet.“

______________________________   ________________________________
Datum    Unterschrift
Vorschlag
für eine gesetzliche Verankerung des Informantenschutzes
für Arbeitnehmer
im Bürgerlichen Gesetzbuch


1. Die Inhaltsübersicht wird wie folgt geändert:

   a) Nach der Angabe zu § 612 wird folgende Angabe eingefügt:

      „§ 612a Anzeigerecht“.

   b) Die bisherige Angabe zu § 612a wird die Angabe zu § 612b.

2. Nach § 612 wird folgender § 612a eingefügt:

      „§ 612a
      Anzeigerecht

      (1) Ist ein Arbeitnehmer auf Grund konkreter Anhaltspunkte der Auffassung, dass im Betrieb oder bei einer betrieblichen Tätigkeit gesetzliche Pflichten verletzt werden, kann er sich an den Arbeitgeber oder eine zur innerbetrieblichen Klärung zuständige Stelle wenden und Abhilfe verlangen. Kommt der Arbeitgeber dem Verlangen nach Abhilfe nicht oder nicht ausreichend nach, hat der Arbeitnehmer das Recht, sich an eine zuständige außerbetriebliche Stelle zu wenden.

      (2) Ein vorheriges Verlangen nach Abhilfe ist nicht erforderlich, wenn dies dem Arbeitnehmer nicht zumutbar ist. Unzumutbar ist ein solches Verlangen stets, wenn der Arbeitnehmer aufgrund konkreter Anhaltspunkte der Auffassung ist, dass

      1. aus dem Betrieb eine unmittelbare Gefahr für Leben oder Gesundheit von Menschen oder für die Umwelt droht,

      2. der Arbeitgeber oder ein anderer Arbeitnehmer eine Straftat begangen hat,
3. eine Straftat geplant ist, durch deren Nichtanzeige er sich selbst der Strafverfolgung aussetzen würde,

4. eine innerbetriebliche Abhilfe nicht oder nicht ausreichend erfolgen wird.

(3) Von den Absätzen 1 und 2 kann nicht zuungunsten des Arbeitnehmers abgewichen werden.

(4) Beschwerderechte des Arbeitnehmers nach anderen Rechtsvorschriften und die Rechte der Arbeitnehmervertretungen bleiben unberührt.“

3. Der bisherige § 612a wird § 612b.

**Begründung**

Ziel der Einfügung eines neuen § 612a in das Bürgerliche Gesetzbuch (BGB) ist, eine klare und eindeutige Regelung im Bereich des Informantenschutzes zu schaffen, und damit die Rechtssicherheit für Arbeitnehmer, die über gesetzwidrige Praktiken in ihrem Betrieb informieren, deutlich zu verbessern.


Auch staatliche Stellen sind häufig auf Hinweise aus den Betrieben angewiesen, um Straftaten rechtzeitig zu verhindern und wirksam bekämpfen oder unmittelbare Gefahren für die Allge
meinheit, die aus dem Betrieb drohen, abwenden zu können. Dies haben die verschiedenen Vorfälle seit November 2005 in Zusammenhang mit überlagertem Fleisch deutlich gemacht.

Arbeitnehmer, die von solchen Missständen im Betrieb oder bei einer betrieblichen Tätigkeit erfahren, können jedoch bei einer beabsichtigten Wahrnehmung ihrer staatsbürgerlichen Rechte, insbesondere im Strafverfahren, in einen Konflikt mit der Loyalitätspflicht gegenüber ihrem Arbeitgeber geraten.


Zu Absatz 1

Arbeitnehmer erhalten nach Absatz 1 das Recht, dem Arbeitgeber oder einer zur innerbetrieblichen Klärung zuständigen Stelle die Verletzung gesetzlicher Pflichten im Betrieb anzuzeigen, wenn konkrete Anhaltspunkte für ein solches Fehlverhalten vorliegen. Das gilt sowohl bei einer Pflichtverletzung im Betrieb wie bei einer betrieblichen Tätigkeit außerhalb des räumlich-organisatorischen Betriebsbereichs, z. B. bei Außendienstarbeiten. Die Regelung schließt damit an die Rechtsprechung des Bundesarbeitsgerichtes an, nach der Arbeitnehmer, die z. B. Kenntnis davon erhalten, dass andere Mitarbeiter ihre Pflichten verletzen, zunächst den Arbeitgeber informieren müssen, bevor sie sich an Stellen außerhalb ihres Betriebes wenden dürfen. Wenn die innerbetriebliche Klärung erfolglos bleibt, hat der Arbeitnehmer das Recht, sich an eine externe Stelle zu wenden. Das Anzeigerecht trägt damit dem Gedanken der vertrauensvollen Zusammenarbeit im Betrieb Rechnung.

Darüber hinaus setzt das Anzeigerecht durchgängig voraus, dass der Arbeitnehmer auf Grund konkreter Anhaltspunkte der Auffassung ist, dass ein in der Regelung näher bezeichnetes gesetzwidriges Verhalten im Betrieb vorliegt. Dem Arbeitnehmer müssen konkrete Umstände bekannt sein, die objektiv eine Wahrscheinlichkeit für das Vorliegen eines Missstands ergeben; bloße Mutmaßungen oder theoretische Überlegungen reichen nicht aus.

Zu Absatz 2

Ein innerbetrieblicher Klärungsversuch ist nach Absatz 2 Satz 1 nicht erforderlich, wenn dem Arbeitnehmer ein Abhilfeverlangen nicht zumutbar ist. Die Regelung setzt damit die Rechtsprechung des Bundesarbeitsgerichtes um, nach der dem Arbeitnehmer eine innerbetriebliche Meldung in bestimmten Fällen unzumutbar ist. Entsprechend ist nach Absatz 2 Satz 2 ein innerbetrieblicher Klärungsversuch stets unzumutbar, wenn der Arbeitnehmer aufgrund konkreter Anhaltspunkte der Auffassung ist, dass

- aus dem Betrieb unmittelbare Gefahren für Leben und Gesundheit von Menschen oder die Umwelt drohen (Nr. 1), wie z. B gravierende Gefahren durch Sicherheitsmängel in technischen Anlagen oder Bauwerken oder von Sicherheitsmängeln in der Zivilluftfahrt, Gefahren durch verheimlichte Seuchenfälle oder eine unmittelbare Gefahr für die menschliche Gesundheit durch das Überkleben oder die Umetikettierung des abgelaufenen Verbrauchsdatum bei in mikrobiologischer Hinsicht sehr leicht verderblichen Lebensmitteln mit der Gefahr der Erkrankung an Salmonellose durch den Verzehr solcher Lebensmittel (z.B. Hackfleisch),

• Straftaten bevorstehen, durch deren Nichtanzeige der Arbeitnehmer sich selbst einer Strafverfolgung aussetzen würde (Nr. 3); hierzu gehören alle in § 138 StGB aufgeführten Straftaten wie z. B. Kreditkartenfälschung oder

• eine interne Klärung nicht oder nicht ausreichend erfolgt (Nr. 4), z. B. wenn der Arbeitgeber in der Vergangenheit nicht auf vergleichbare schwerwiegende Vorfälle reagierte hat.


Der Arbeitnehmer, der diese Rechte wahrnimmt, ist vor einer Benachteiligung durch den Arbeitgeber geschützt (§ 612b n. F. BGB).

Zu Absatz 3

Absatz 3 bestimmt, dass von den Regelungen der Absätze 1 und 2 in Tarifverträgen, Betriebsvereinbarungen und Arbeitsverträgen nicht zuungunsten der Arbeitnehmer abgewichen werden darf.

Zu Absatz 4

Absatz 4 stellt klar, dass das in den Absätzen 1 und 2 geregelter Anzeigerecht besondere Beschwerderechte der Arbeitnehmer (z. B. § 84 Abs. 1 BetrVG, § 13 Abs. 1 AGG) und die Rechte der Arbeitnehmervertretungen nicht berührt.


Gesetzentwurf
der Bundesregierung

Entwurf eines Gesetzes zur Umsetzung der Richtlinie (EU) 2016/943 zum Schutz von Geschäftsgeheimnissen vor rechtswidrigem Erwerb sowie rechtswidriger Nutzung und Offenlegung

A. Problem und Ziel


Der Schutz von Geschäftsgeheimnissen wird im deutschen Recht bislang über die Strafvorschriften der §§ 17 bis 19 des Gesetzes gegen den unlauteren Wettbewerb (UWG) sowie über die §§ 823 und 826 des Bürgerlichen Gesetzbuchs (BGB) gegebenenfalls in Verbindung mit § 1004 BGB analog gewährlieistet. Dies ist für eine Umsetzung der Vorgaben der Richtlinie (EU) 2016/943 nicht ausreichend.

B. Lösung


Abschnitt 4 enthält die zuvor in den §§ 17 bis 19 UWG geregelten Strafvorschriften zum Schutz von Geschäftsgeheimnissen.

Die Artikel 2 bis 4 nehmen die erforderlichen Folgeänderungen im Gerichtsverfassungsgesetz, der Strafprozessordnung, dem Gerichtskostengesetz und dem UWG vor.

C. Alternativen

Keine.

D. Haushaltssausgaben ohne Erfüllungsaufwand

Keine.

E. Erfüllungsaufwand

E.1 Erfüllungsaufwand für Bürgerinnen und Bürger

Keiner.

E.2 Erfüllungsaufwand für die Wirtschaft


Davon Bürokratiekosten aus Informationspflichten

Keine.

E.3 Erfüllungsaufwand der Verwaltung

Keiner.

F. Weitere Kosten

Ausgehend von geschätzten 20 Verfahren wegen der Verletzung von Geschäftsgeheimnissen, wird durch die Verbesserung des Rechtsschutzes durch den Entwurf eine Zunahme um 80 Verfahren jährlich geschätzt. Die Länder können die Mehrbelastung steuern, indem sie nach § 15 Absatz 3 GeschGehG die Möglichkeit erhalten, die gerichtliche Zuständigkeit zu konzentrieren.

Kosten für die Wirtschaft und für soziale Sicherungssysteme werden nicht erwartet. Auch sind keine Auswirkungen auf das Preisniveau, insbesondere auf das Verbraucherpreisniveau, ersichtlich.
Der Bundestag hat das folgende Gesetz beschlossen:

**Artikel 1**

Gesetz zum Schutz von Geschäftsgeheimnissen (GeschGehG)

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Abschnitt 4

Strafvorschriften

§ 23 Verletzung von Geschäftsgeheimnissen

Abschnitt 1

Allgemeines

§ 1

Anwendungsbereich

(1) Dieses Gesetz dient dem Schutz von Geschäftsgeheimnissen vor unerlaubter Erlangung, Nutzung und Offenlegung.

(2) Öffentlich-rechtliche Vorschriften zur Geheimhaltung, Erlangung, Nutzung oder Offenlegung von Geschäftsgeheimnissen gehen vor.

(3) Es bleiben unberührt:

1. Der berufs- und strafrechtliche Schutz von Geschäftsgeheimnissen, deren unbefugte Offenbarung von § 203 des Strafgesetzbuches erfasst wird,

2. die Ausübung des Rechts der freien Meinungsäußerung und der Informationsfreiheit nach der Charta der Grundrechte der Europäischen Union (ABl. C 202 vom 7.6.2016, S. 389), einschließlich der Achtung der Freiheit und der Pluralität der Medien,

3. die Autonomie der Sozialpartner und ihr Recht, Kollektivverträge nach den bestehenden europäischen und nationalen Vorschriften abzuschließen.

§ 2

Begriffsbestimmungen

Im Sinne dieses Gesetzes ist
1. Geschäftsgeheimnis

eine Information, die

a) weder insgesamt noch in der genauen Anordnung und Zusammensetzung ihrer Bestandteile den Personen in den Kreisen, die üblicherweise mit dieser Art von Informationen umgehen, allgemein bekannt oder ohne weiteres zugänglich ist und daher von wirtschaftlichem Wert ist und

b) Gegenstand von den Umständen nach angemessenen Geheimhaltungsmaßnahmen durch ihren rechtmäßigen Inhaber ist;

2. Inhaber eines Geschäftsgeheimnisses

ejede natürliche oder juristische Person, die die rechtmäßige Kontrolle über ein Geschäftsgeheimnis hat;

3. Rechtsverletzer

ejede natürliche oder juristische Person, die entgegen § 4 ein Geschäftsgeheimnis rechtswidrig erlangt, nutzt oder offenlegt;

4. rechtsverletzendes Produkt

ein Produkt, dessen Konzeption, Merkmale, Funktionsweise, Herstellungsprozess oder Marketing in erheblichem Umfang auf einem rechtswidrig erlangten, genutzten oder offengelegten Geschäftsgeheimnis beruht.

§ 3

Erlaubte Handlungen

(1) Ein Geschäftsgeheimnis darf insbesondere erlangt werden durch

1. eine eigenständige Entdeckung oder Schöpfung;

2. ein Beobachten, Untersuchen, Rückbauen oder Testen eines Produkts oder Gegenstands, das oder der

a) öffentlich verfügbar gemacht wurde oder

b) sich im rechtmäßigen Besitz des Beobachtenden, Untersuchenden, Rückbauen- den oder Testenden befindet und dieser keiner Pflicht zur Beschränkung der Erlangung des Geschäftsgeheimnisses unterliegt;


(2) Ein Geschäftsgeheimnis darf erlangt, genutzt oder offengelegt werden, wenn dies durch Gesetz, auf Grund eines Gesetzes oder durch Rechtsgeschäft gestattet ist.
§ 4

Handlungsverbote

(1) Ein Geschäftsgeheimnis darf nicht erlangt werden durch

1. unbefugten Zugang zu, unbefugte Aneignung oder unbefugtes Kopieren von Dokumenten, Gegenständen, Materialien, Stoffen oder elektronischen Dateien, die der rechtmäßigen Kontrolle des Inhabers des Geschäftsgeheimnisses unterliegen und die das Geschäftsgeheimnis enthalten oder aus denen sich das Geschäftsgeheimnis ableiten lässt, oder

2. jedes sonstige Verhalten, das unter den jeweiligen Umständen nicht dem Grundsatz von Treu und Glauben unter Berücksichtigung der anständigen Marktgepflogenheit entspricht.

(2) Ein Geschäftsgeheimnis darf nicht nutzen oder offenlegen, wer

1. das Geschäftsgeheimnis durch eine eigene Handlung nach Absatz 1
   a) Nummer 1 oder
   b) Nummer 2
   erlangt hat,

2. gegen eine Verpflichtung zur Beschränkung der Nutzung des Geschäftsgeheimnisses verstößt oder

3. gegen eine Verpflichtung verstößt, das Geschäftsgeheimnis nicht offenzulegen.

(3) Ein Geschäftsgeheimnis darf nicht erlangen, nutzen oder offenlegen, wer das Geschäftsgeheimnis über eine andere Person erlangt hat und zum Zeitpunkt der Erlangung, Nutzung oder Offenlegung weiß oder wissen müsste, dass diese das Geschäftsgeheimnis entgegen Absatz 2 genutzt oder offengelegt hat. Das gilt insbesondere, wenn die Nutzung in der Herstellung, dem Anbieten, dem Inverkehrbringen oder der Einfuhr, der Ausfuhr oder der Lagerung für diese Zwecke von rechtsverletzenden Produkten besteht.

§ 5

Rechtfertigungsgründe

Die Erlangung, die Nutzung oder die Offenlegung eines Geschäftsgeheimnisses ist gerechtfertigt, wenn dies zum Schutz eines berechtigten Interesses erfolgt, insbesondere

1. zur Ausübung des Rechts der freien Meinungsäußerung und der Informationsfreiheit nach der Charta der Grundrechte der Europäischen Union, einschließlich der Achtung der Freiheit und der Pluralität der Medien;

2. zur Aufdeckung einer rechtswidrigen Handlung oder eines beruflichen oder sonstigen Fehlverhaltens, wenn die das Geschäftsgeheimnis erlangende, nutzende oder offenlegende Person in der Absicht handelt, das allgemeine öffentliche Interesse zu schützen;

3. im Rahmen der Offenlegung durch Arbeitnehmer gegenüber der Arbeitnehmervertretung, wenn dies erforderlich ist, damit die Arbeitnehmervertretung ihre Aufgaben erfüllen kann.
Abschnitt 2
Ansprüche bei Rechtsverletzungen

§ 6
Beseitigung und Unterlassung
Der Inhaber des Geschäftsgeheimnisses kann den Rechtsverletzer auf Beseitigung der Beeinträchtigung und bei Wiederholungsgefahr auch auf Unterlassung in Anspruch nehmen. Der Anspruch auf Unterlassung besteht auch dann, wenn eine Rechtsverletzung erstmalig droht.

§ 7
Vernichtung; Herausgabe; Rückruf; Entfernung und Rücknahme vom Markt
Der Inhaber des Geschäftsgeheimnisses kann den Rechtsverletzer auch in Anspruch nehmen auf
1. Vernichtung oder Herausgabe der im Besitz oder Eigentum des Rechtsverletzers stehenden Dokumente, Gegenstände, Materialien, Stoffe oder elektronischen Dateien, die das Geschäftsgeheimnis enthalten oder verkörpern,
2. Rückruf des rechtsverletzenden Produkts,
3. dauerhafte Entfernung der rechtsverletzenden Produkte aus den Vertriebswegen,
4. Vernichtung der rechtsverletzenden Produkte oder
5. Rücknahme der rechtsverletzenden Produkte vom Markt, wenn der Schutz des Geschäftsgeheimnisses hierdurch nicht beeinträchtigt wird.

§ 8
Auskunft über rechtsverletzende Produkte; Schadensersatz bei Verletzung der Auskunftspflicht
(1) Der Inhaber des Geschäftsgeheimnisses kann vom Rechtsverletzer Auskunft über Folgendes verlangen:
1. Name und Anschrift der Hersteller, Lieferanten und anderer Vorbesitzer der rechtsverletzenden Produkte sowie der gewerblichen Abnehmer und Verkaufsstellen, für die sie bestimmt waren,
2. die Menge der hergestellten, bestellten, ausgelieferten oder erhaltenen rechtsverletzenden Produkte sowie über die Kaufpreise,
3. diejenigen im Besitz oder Eigentum des Rechtsverletzers stehenden Dokumente, Gegenstände, Materialien, Stoffe oder elektronische Dateien, die das Geschäftsgeheimnis enthalten oder verkörpern, und
4. die Person, von der sie das Geschäftsgeheimnis erlangt haben und der gegenüber sie es offenbart haben.

(2) Erteilt der Rechtsverletzer vorsätzlich oder grob fahrlässig die Auskunft nicht, verspätet, falsch oder unvollständig, ist er dem Inhaber des Geschäftsgeheimnisses zum Ersatz des daraus entstehenden Schadens verpflichtet.

§ 9

Anspruchsausschluss bei Unverhältnismäßigkeit

Die Ansprüche nach den §§ 6 bis 8 Absatz 1 sind ausgeschlossen, wenn die Erfüllung im Einzelfall unverhältnismäßig wäre unter Berücksichtigung insbesondere

1. des Wertes oder eines anderen spezifischen Merkmals des Geschäftsgeheimnisses,

2. der getroffenen Geheimhaltungsmaßnahmen,

3. des Verhaltens des Rechtsverletzers bei Erlangung, Nutzung oder Offenlegung des Geschäftsgeheimnisses,

4. der Folgen der rechtswidrigen Nutzung oder Offenlegung des Geschäftsgeheimnisses,

5. der berechtigten Interessen des Inhabers des Geschäftsgeheimnisses und des Rechtsverletzers sowie der Auswirkungen, die die Erfüllung der Ansprüche für beide haben könnte,

6. der berechtigten Interessen Dritter oder

7. des öffentlichen Interesses.

§ 10

Haftung des Rechtsverletzers

(1) Ein Rechtsverletzer, der vorsätzlich oder fahrlässig handelt, ist dem Inhaber des Geschäftsgeheimnisses zum Ersatz des daraus entstehenden Schadens verpflichtet. § 619a des Bürgerlichen Gesetzbuchs bleibt unberührt.

(2) Bei der Bemessung des Schadensersatzes kann auch der Gewinn, den der Rechtsverletzer durch die Verletzung des Rechts erzielt hat, berücksichtigt werden. Der Schadensersatzanspruch kann auch auf der Grundlage des Betrages bestimmt werden, den der Rechtsverletzer als angemessene Vergütung hätte entrichten müssen, wenn er die Zustimmung zu Erlangung, Nutzung oder Offenlegung des Geschäftsgeheimnisses eingeholt hätte.

(3) Der Inhaber des Geschäftsgeheimnisses kann auch wegen des Schadens, der nicht Vermögensschaden ist, von dem Rechtsverletzer eine Entschädigung in Geld verlangen, soweit dies der Billigkeit entspricht.
§ 11
Abfindung in Geld

(1) Ein Rechtsverletzer, der weder vorsätzlich noch fahrlässig gehandelt hat, kann zur Abwendung der Ansprüche nach den §§ 6 oder 7 den Inhaber des Geschäftsgeheimnisses in Geld abfinden, wenn dem Rechtsverletzer durch die Erfüllung der Ansprüche ein unverhältnismäßig großer Nachteil entstehen würde und wenn die Abfindung in Geld als angemessen erscheint.

(2) Die Höhe der Abfindung in Geld bemisst sich nach der Vergütung, die im Falle einer vertraglichen Einräumung des Nutzungsrechts angemessen wäre. Sie darf den Betrag nicht übersteigen, der einer Vergütung im Sinne von Satz 1 für die Länge des Zeitraums entspricht, in dem dem Inhaber des Geschäftsgeheimnisses ein Unterlassungsanspruch zusteht.

§ 12
Haftung des Inhabers eines Unternehmens

Ist der Rechtsverletzer Beschäftigter oder Beauftragter eines Unternehmens, so hat der Inhaber des Geschäftsgeheimnisses die Ansprüche nach den §§ 6 bis 8 auch gegen den Inhaber des Unternehmens. Für den Anspruch nach § 8 Absatz 2 gilt dies nur, wenn der Inhaber des Unternehmens vorsätzlich oder grob fahrlässig die Auskunft nicht, verspätet, falsch oder unvollständig erteilt hat.

§ 13
Herausgabeanspruch nach Eintritt der Verjährung


§ 14
Missbrauchsverbot

Abschnitt 3
Verfahren in Geschäftsgeheimnisstreitsachen

§ 15
Sachliche und örtliche Zuständigkeit; Verordnungsermächtigung

(1) Für Klagen vor den ordentlichen Gerichten, durch die Ansprüche nach diesem Gesetz geltend gemacht werden, sind die Landgerichte ohne Rücksicht auf den Streitwert ausschließlich zuständig.

(2) Für Klagen nach Absatz 1 ist das Gericht ausschließlich zuständig, in dessen Bezirk der Beklagte seinen allgemeinen Gerichtsstand hat. Hat der Beklagte im Inland keinen allgemeinen Gerichtsstand, ist nur das Gericht zuständig, in dessen Bezirk die Handlung begangen worden ist.


§ 16
Geheimhaltung

(1) Bei Klagen, durch die Ansprüche nach diesem Gesetz geltend gemacht werden (Geschäftsgeheimnisstreitsachen) kann das Gericht der Hauptsache auf Antrag einer Partei streitgegenständliche Informationen ganz oder teilweise als geheimhaltungsbedürftig einstufen, wenn diese ein Geschäftsgeheimnis sein können.

(2) Die Parteien, ihre Prozessvertreter, Zeugen, Sachverständige, sonstige Vertreter und alle sonstigen Personen, die an Geschäftsgeheimnisstreitsachen beteiligt sind oder die Zugang zu Dokumenten eines solchen Verfahrens haben, müssen als geheimhaltungsbedürftig eingestufte Informationen vertraulich behandeln und dürfen diese außerhalb eines gerichtlichen Verfahrens nicht nutzen oder offenlegen, es sei denn, dass sie von diesen außerhalb des Verfahrens Kenntnis erlangt haben.

(3) Wenn das Gericht eine Entscheidung nach Absatz 1 trifft, darf Dritten, die ein Recht auf Akteneinsicht haben, nur ein Akteninhalt zur Verfügung werden, in dem die Geschäftsgeheimnisse enthaltenden Ausführungen unkenntlich gemacht wurden.

§ 17
Ordnungsmittel

Das Gericht der Hauptsache kann auf Antrag einer Partei bei Zuwiderhandlungen gegen die Verpflichtungen nach § 16 Absatz 2 ein Ordnungsgeld bis zu 100 000 Euro oder Ordnungshaft bis zu sechs Monaten festsetzen und sofort vollstrecken. Bei der Festsetzung von Ordnungsgeld ist zugleich für den Fall, dass dieses nicht beigetrieben werden kann, zu bestimmen, in welchem Maße Ordnungshaft an seine Stelle tritt.
§ 18

Geheimhaltung nach Abschluss des Verfahrens

Die Verpflichtungen nach § 16 Absatz 2 bestehen auch nach Abschluss des gerichtlichen Verfahrens fort. Dies gilt nicht, wenn das Gericht der Hauptsache das Vorliegen des streitgegenständlichen Geschäftsgeheimnisses durch rechtskräftiges Urteil verneint hat oder sobald die streitgegenständlichen Informationen für Personen in den Kreisen, die üblicherweise mit solchen Informationen umgehen, bekannt oder ohne weiteres zugänglich werden.

§ 19

Weitere gerichtliche Beschränkungen

(1) Zusätzlich zu § 16 Absatz 1 beschränkt das Gericht der Hauptsache zur Wahrung von Geschäftsgeheimnissen auf Antrag einer Partei den Zugang ganz oder teilweise auf eine bestimmte Anzahl von Personen

1. zu von den Parteien oder Dritten eingereichten oder vorgelegten Dokumenten, die Geschäftsgeheimnisse enthalten können, oder

2. zur mündlichen Verhandlung, bei der Geschäftsgeheimnisse offengelegt werden könnten, und zu der Aufzeichnung oder dem Protokoll der mündlichen Verhandlung.


(2) Wenn das Gericht Beschränkungen nach Absatz 1 Satz 1 trifft,

1. kann die Öffentlichkeit auf Antrag von der mündlichen Verhandlung ausgeschlossen werden und

2. gilt § 16 Absatz 3 für nicht zugelassene Personen.

(3) Die §§ 16 bis 19 Absatz 1 und 2 gelten entsprechend im Verfahren der Zwangsvollstreckung, wenn das Gericht der Hauptsache Informationen nach § 16 Absatz 1 als geheimhaltungsbedürftig eingestuft oder zusätzliche Beschränkungen nach Absatz 1 Satz 1 getroffen hat.

§ 20

Verfahren bei Maßnahmen nach den §§ 16 bis 19

(1) Das Gericht der Hauptsache kann eine Beschränkung nach § 16 Absatz 1 und § 19 Absatz 1 ab Anhängigkeit des Rechtsstreits anordnen.

(2) Die andere Partei ist spätestens nach Anordnung der Maßnahme vom Gericht zu hören. Das Gericht kann die Maßnahmen nach Anhörung der Parteien aufheben oder abändern.
(3) Die den Antrag nach § 16 Absatz 1 oder § 19 Absatz 1 stellende Partei muss glaubhaft machen, dass es sich bei der streitgegenständlichen Information um ein Geschäftsgeheimnis handelt.

(4) Werden mit dem Antrag oder nach einer Anordnung nach § 16 Absatz 1 oder einer Anordnung nach § 19 Absatz 1 Nummer 1 Schriftstücke und sonstige Unterlagen eingereicht oder vorgelegt, muss die den Antrag stellende Partei diejenigen Ausführungen kennzeichnen, die nach ihrem Vorbringen Geschäftsgeheimnisse enthalten. Im Fall des § 19 Absatz 1 Nummer 1 muss sie zusätzlich eine Fassung ohne Preisgabe von Geschäftsgeheimnissen vorlegen, die eingesehen werden kann. Wird keine solche um die Geschäftsgeheimnisse reduzierte Fassung vorgelegt, kann das Gericht von der Zustimmung zur Einsichtnahme ausgehen, es sei denn, ihm sind besondere Umstände bekannt, die eine solche Vermutung nicht rechtfertigen.


(6) Gericht der Hauptsache im Sinne dieses Abschnitts ist
1. das Gericht des ersten Rechtszuges oder
2. das Berufungsgericht, wenn die Hauptsache in der Berufungsinstanz anhängig ist.

§ 21
Bekanntmachung des Urteils

(1) Der obsiegenden Partei einer Geschäftsgeheimnisstreitsache kann auf Antrag in der Urteilsformel die Befugnis zugesprochen werden, das Urteil oder Informationen über das Urteil auf Kosten der unterliegenden Partei öffentlich bekannt machen, wenn die obsiegende Partei hierfür ein berechtigtes Interesse darlegt. Form und Umfang der öffentlichen Bekanntmachung werden unter Berücksichtigung der berechtigten Interessen der im Urteil genannten Personen in der Urteilsformel bestimmt.

(2) Bei den Entscheidungen über die öffentliche Bekanntmachung nach Absatz 1 Satz 1 ist insbesondere zu berücksichtigen:
1. der Wert des Geschäftsgeheimnisses,
2. das Verhalten des Rechtsverletzers bei Erlangung, Nutzung oder Offenlegung des Geschäftsgeheimnisses,
3. die Folgen der rechtswidrigen Nutzung oder Offenlegung des Geschäftsgeheimnisses und
4. die Wahrscheinlichkeit einer weiteren rechtswidrigen Nutzung oder Offenlegung des Geschäftsgeheimnisses durch den Rechtsverletzer.
Das Urteil darf erst nach Rechtskraft bekannt gemacht werden, es sei denn, das Gericht bestimmt etwas anderes.

§ 22

Streitwertbegünstigung

(1) Macht bei Geschäftsgeschäftsstreitigkeiten eine Partei glaubhaft, dass die Belastung mit den Prozesskosten nach dem vollen Streitwert ihre wirtschaftliche Lage erheblich gefährden würde, so kann das Gericht auf ihren Antrag anordnen, dass die Verpflichtung dieser Partei zur Zahlung von Gerichtskosten sich nach dem ihrer Wirtschaftslage angepassten Teil des Streitwerts bemisst.

(2) Die Anordnung nach Absatz 1 bewirkt auch, dass

1. die begünstigte Partei die Gebühren ihres Rechtsanwalts ebenfalls nur nach diesem Teil des Streitwerts zu entrichten hat,
2. die begünstigte Partei, soweit ihr Kosten des Rechtsstreits auferlegt werden oder soweit sie diese übernimmt, die von dem Gegner entrichteten Gerichtsgebühren und die Gebühren seines Rechtsanwalts nur nach diesem Teil des Streitwerts zu erstatten hat und

(3) Der Antrag nach Absatz 1 ist vor der Verhandlung zur Hauptsache zu stellen. Danach ist er nur zulässig, wenn der angenommene oder festgesetzte Streitwert durch das Gericht heraufgesetzt wird. Der Antrag kann vor der Geschäftsstelle des Gerichts zur Niederschrift erklärt werden. Vor der Entscheidung über den Antrag ist der Gegner zu hören.

Abschnitt 4

Strafvorschriften

§ 23

Verletzung von Geschäftsgeschäften

(1) Mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe wird bestraft, wer zur Förderung des eigenen oder fremden Wettbewerbs, aus Eigennutz, zugunsten eines Dritten oder in der Absicht, dem Inhaber eines Unternehmens Schaden zuzufügen,

1. entgegen § 4 Absatz 1 Nummer 1 ein Geschäftsgeheimnis erlangt,
2. entgegen § 4 Absatz 2 Nummer 1 Buchstabe a ein Geschäftsgeheimnis nutzt oder offenlegt oder
3. entgegen § 4 Absatz 2 Nummer 3 als eine bei einem Unternehmen beschäftigte Person ein Geschäftsgeheimnis, das ihr im Rahmen des Beschäftigungsverhältnisses
anvertraut worden oder zugänglich geworden ist, während der Geltungsdauer des Beschäftigungsverhältnisses offenlegt.

(2) Ebenso wird bestraft, wer zur Förderung des eigenen oder fremden Wettbewerbs, aus Eigennutz, zugunsten eines Dritten oder in der Absicht, dem Inhaber eines Unternehmens Schaden zuzufügen, ein Geschäftsgeheimnis nutzt oder offenlegt, das er durch eine fremde Handlung nach Absatz 1 Nummer 2 oder Nummer 3 erlangt hat.

(3) Mit Freiheitsstrafe bis zu zwei Jahren oder mit Geldstrafe wird bestraft, wer zur Förderung des eigenen oder fremden Wettbewerbs oder aus Eigennutz entgegen § 4 Absatz 2 Nummer 2 oder Nummer 3 ein Geschäftsgeheimnis nutzt oder offenlegt, das er durch eine fremde Handlung nach Absatz 1 Nummer 2 oder Nummer 3 erlangt hat.

(4) Mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe wird bestraft, wer
1. in den Fällen des Absatzes 1 oder des Absatzes 2 gewerbsmäßig handelt,
2. in den Fällen des Absatzes 1 Nummer 2 oder Nummer 3 oder des Absatzes 2 bei der Offenlegung weiß, dass das Geschäftsgeheimnis im Ausland genutzt werden soll, oder
3. in den Fällen des Absatzes 1 Nummer 2 oder des Absatzes 2 das Geschäftsgeheimnis im Ausland nutzt.

(5) Der Versuch ist strafbar.

(6) § 5 Nummer 7 des Strafgesetzbuches gilt entsprechend. Die §§ 30 und 31 des Strafgesetzbuches gelten entsprechend, wenn der Täter zur Förderung des eigenen oder fremden Wettbewerbs oder aus Eigennutz handelt.

(7) Die Tat wird nur auf Antrag verfolgt, es sei denn, dass die Strafverfolgungsbehörde wegen des besonderen öffentlichen Interesses an der Strafverfolgung ein Einschreiten von Amts wegen für geboten hält.

**Artikel 2**

**Änderung des Gerichtsverfassungsgesetzes**


**Artikel 3**

**Änderung der Strafprozessordnung**

Die Strafprozessordnung in der Fassung der Bekanntmachung vom 7. April 1987 (BGBl. I S. 1074, 1319), die zuletzt durch Artikel 2 des Gesetzes vom 30. Oktober 2017 (BGBl. I S. 3618) geändert worden ist, wird wie folgt geändert:


**Artikel 4**

**Änderung des Gerichtskostengesetzes**

§ 51 des Gerichtskostengesetzes in der Fassung der Bekanntmachung vom 27. Februar 2014 (BGBl. I S. 154), das zuletzt durch Artikel 2 Absatz 7 des Gesetzes vom 18. Juli 2017 (BGBl. I S. 2739) geändert worden ist, wird wie folgt geändert:


**Artikel 5**

**Änderung des Gesetzes gegen den unlauteren Wettbewerb**


**Artikel 6**

**Inkrafttreten**

Dieses Gesetz tritt am Tag nach der Verkündung in Kraft.
Begründung

A. Allgemeiner Teil

Mit dem vorliegenden Entwurf wird der Schutz von Geschäftsgeheimnissen entsprechend unionsrechtlichen Vorgaben verbessert.

I. Zielsetzung und Notwendigkeit der Regelungen


II. Wesentlicher Inhalt des Entwurfs


gelung wurde nur für den Herausgabeanspruch nach Eintritt der Verjährung (§ 13) getroffen.

In Abschnitt 3 werden Regelungen zum gerichtlichen Verfahren bei der Verletzung von Geschäftsgeheimnissen getroffen. Der Rechtsschutz der Betroffenen wird durch Regelungen zur Geheimhaltung im gerichtlichen Verfahren in den §§ 16 bis 19 dauerhaft verbessert.

Abschnitt 4 enthält die zuvor in den §§ 17 bis 19 UWG enthaltenen Strafvorschriften zum Schutz von Geschäftsgeheimnissen.

Die Artikel 2 bis 5 nehmen die erforderlichen Folgeänderungen in dem Gerichtsverfassungsgesetz (GVG), der Strafprozessordnung (StPO), dem Gerichtskostengesetz (GKG) und dem UWG vor.

III. Alternativen

Keine.


IV. Gesetzgebungskompetenz

Die Gesetzgebungskompetenz des Bundes für die in Artikel 1 enthaltenen Regelungen ergibt sich überwiegend aus Artikel 73 Absatz 1 Nummer 9 des Grundgesetzes (GG – gewerblicher Rechtsschutz). Für die Regelungen in Artikel 1 §§ 15 bis 22 sowie Artikel 2 bis 4 beruht die Gesetzgebungskompetenz des Bundes auf Artikel 74 Absatz 1 Nummer 1 GG (Gerichtsverfassung, gerichtliches Verfahren). Für Artikel 1 § 23 sowie Artikel 5 ergibt sich die Gesetzgebungskompetenz aus Artikel 74 Absatz 1 Nummer 1 GG (Strafrecht).

V. Vereinbarkeit mit dem Recht der Europäischen Union und völkerrechtlichen Verträgen

Der Entwurf ist mit dem Recht der Europäischen Union und völkerrechtlichen Verträgen vereinbar, die die Bundesrepublik Deutschland abgeschlossen hat. Er setzt die Vorgaben der Richtlinie (EU) 2016/943 und damit Recht der Europäischen Union in nationales Recht um. Der Entwurf enthält in dem neuen Stammgesetz in Artikel 1 einige Regelungen, die nicht unmittelbar aus der Richtlinie (EU) 2016/943 hervorgehen. Hierzu zählen der Anspruch auf Auskunft (§ 8), die Haftung des Inhabers eines Unternehmens (§ 12) sowie

Der Entwurf entspricht auch den Verpflichtungen, die die Bundesrepublik Deutschland auf Grund von internationalen Verträgen übernommen hat. Nach Artikel 39 Absatz 2 des Übereinkommens über handelsbezogene Aspekte der Rechte des geistigen Eigentums (BGBl. 1994 II S. 1438, 1730 – TRIPS) müssen die Mitgliedstaaten zur Sicherung eines wirksamen Schutzes gegen den unlauteren Wettbewerb „nicht offenbare Informationen“ insofern schützen, als juristische und natürliche Personen verhindern können, dass Informationen, die rechtmäßig unter ihrer Kontrolle stehen, ohne ihre Zustimmung auf eine Art und Weise erworben oder benutzt werden, die den anständigen Gepflogenheiten in Handel und Gewerbe widersprechen.

VI. Gesetzesfolgen

1. Rechts- und Verwaltungsvereinfachung

Verwaltungsverfahren werden von diesem Entwurf nicht berührt, da die Durchsetzung des Schutzes von Geschäftsgeheimnissen zivilrechtlich ausgestaltet ist. Die Regelungen zum Strafverfahren in Abschnitt 4 entsprechen den bisherigen Regelungen in den §§ 17 bis 19 UWG.

2. Nachhaltigkeitsaspekte


3. Haushaltsausgaben ohne Erfüllungsaufwand

Die Gesetzesänderungen und ihr Vollzug führen weder bei Bund und Ländern noch bei den Gemeinden zu Mehrausgaben oder Mindereinnahmen.

4. Erfüllungsaufwand

a) Bürgerinnen und Bürger

Für Bürgerinnen und Bürger entsteht kein Erfüllungsaufwand.

b) Wirtschaft

Die durch die Definition des Geschäftsgeheimnisses neu eingefügte Schutzzusage wird voraussichtlich bei einem Teil der Kleinstunternehmen dazu führen, dass diese bisher nicht praktizierte angemessene Geheimhaltungsmaßnahmen treffen, um in den Schutzbereich des Gesetzes einbezogen zu werden. Ein Großteil der Unternehmen trifft diese Maßnahmen im wohlverstandenen eigenen Interesse schon jetzt. Insbesondere größere und mittlere Betriebe schützen bereits ihre Geschäftsgeheimnisse, zum Beispiel durch eine Zugangskontrolle oder durch vertragliche Geheimhaltungsverpflichtungen, um zu verhindern dass die betreffenden Infor-


Ausgehend von 100 000 relevanten KMU in Deutschland ist bei einem Aufwand von zwei Stunden für Prüfung und Umstellung bei mittlerem Qualifikationsniveau (32,20 Euro pro Stunde) von einem einmaligen Umstellungsaufwand von 6 440 000 Euro auszugehen.


c) Erfüllungsaufwand der Verwaltung

Keiner.

5. Weitere Kosten

Der Entwurf verbessert den Schutz von Geschäftsgeheimnissen, indem zivilrechtliche Ansprüche ausgebaut werden und besondere Geheimhaltungsregelungen im gerichtlichen Verfahren bei der Verletzung von Geschäftsgeheimnissen vorgesehen werden. Unter der Annahme, dass angesichts von derzeit jährlich vier bei juris veröffentlichten Entscheidungen zu den §§ 17, 18 UWG von 20 Verfahren jährlich auszugehen ist, wird durch die Verbesserung des Rechtsschutzes durch Inkrafttreten des Entwurfs von 80 zusätzlichen Verfahren pro Jahr ausgegangen. Die Länder erhalten die Möglichkeit, die Mehrbe-
lastung besser aufzufangen, indem sie nach Artikel 1 § 15 Absatz 3 gegebenenfalls die gerichtliche Zuständigkeit konzentrieren.

Kosten für soziale Sicherungssysteme werden nicht erwartet. Auch sind keine Auswirkungen auf das Preisniveau, insbesondere auf das Verbraucherpreisniveau, ersichtlich.

6. Weitere Gesetzesfolgen

Weitere Gesetzesfolgen, insbesondere verbraucherpolitische, gleichstellungspolitische und demografische Auswirkungen, sind nicht zu erwarten.

VII. Befristung; Evaluierung


B. Besonderer Teil

Zu Artikel 1 (Gesetz zum Schutz von Geschäftsgeheimnissen - GeschGehG)

Zu Abschnitt 1 (Allgemeines)

Zu § 1 (Anwendungsbereich)

Zu Absatz 1

Absatz 1 enthält den Gesetzeszweck.

Zu Absatz 2

öffentlich-rechtlichen Vorschriften. Es gilt zudem nicht für die Verschwiegenheitspflichten der Notare, da diese Träger eines öffentlichen Amtes sind.


Zu Absatz 3

Zu Nummer 1

Absatz 3 Nummer 1 macht deutlich, dass der berufs- und strafrechtliche Schutz von Geschäftsgeheimnissen, deren unbefugte Offenbarung von § 203 des Strafgesetzbuches (StGB) erfasst wird, unberührt bleibt. Das GeschGehG regelt den Schutz von Geschäftsgeheimnissen, lässt jedoch anderweitige Verpflichtungen unberührt, die sich zum Beispiel aus dem Schutz der Geheimsphäre des Einzelnen sowie dem Allgemeininteresse an der Verschwiegenheit der in Krankheit und Rechtsfragen helfenden Berufe ergeben.

Zu Nummer 2

Absatz 3 Nummer 2 stellt klar, dass die Ausübung des Rechts der freien Meinungsäußerung und der Informationsfreiheit nach der Charta der Grundrechte der Europäischen Union einschließlich der Achtung der Freiheit und der Pluralität der Medien, unberührt bleibt. Die Regelung setzt Artikel 1 Absatz 2 Buchstabe a der Richtlinie (EU) 2016/943 um.

Zu Nummer 3

Ebenfalls unberührt durch das GeschGehG bleiben die Autonomie der Sozialpartner und ihr Recht, Kollektivverträge nach den bestehenden europäischen und nationalen Vorschriften abzuschließen. Die Regelung setzt Artikel 1 Absatz 2 Buchstabe d der Richtlinie (EU) 2016/943 um.

Zu § 2 (Begriffsbestimmungen)

§ 2 setzt die Begriffsbestimmungen aus Artikel 2 der Richtlinie (EU) 2016/943 um. Die Definitionen gelten lediglich für dieses Gesetz.

Zu Nummer 1

besteht als auch die legitime Erwartung, dass diese Vertraulichkeit gewahrt wird. Dies steht im Einklang mit der bisherigen Rechtsprechung zum Begriff des Geschäftsgeheimnisses, wonach solche Informationen geschützt sind, an deren Nichtverbreitung der Rechtsträger ein berechtigtes Interesse hat.


Die in den Buchstaben a und b genannten Voraussetzungen müssen kumulativ vorliegen, um die Definition des Geschäftsgeheimnisses zu erfüllen.

**Zu Buchstabe a**


**Zu Buchstabe b**


Pflicht zu den Umständen angemessenen Geheimhaltungsmaßnahmen trifft auch Lizenznehmer, die ebenfalls Inhaber eines Geschäftsgeheimnisses sein können.

Zu Nummer 2


Zu Nummer 3


Zu Nummer 4


Zu § 3 (Erlaubte Handlungen)


Zu Absatz 1

Zu Nummer 1

Nach § 3 Absatz 1 Nummer 1 darf ein Geschäftsgeheimnis durch eine eigenständige Entdeckung oder Schöpfung erlangt werden. Somit kann es im Fall der parallelen Entdeckung oder Schöpfung mehrere Inhaber ein und desselben Geschäftsgeheimnisses geben. Die Regelung drückt aus, dass keine Exklusivrechte an als Geschäftsgeheimnis geschützten Informationen begründet werden sollen. Auch im Urheberrecht existiert die Möglichkeit der Doppelschöpfung.

Zu Nummer 2

Nach § 3 Absatz 1 Nummer 2 darf ein Geschäftsgeheimnis ebenfalls erlangt werden durch Beobachtung, Untersuchung, Rückbau oder Testen eines Produkts oder Gegenstandes in zwei Fällen: Entweder wenn dieses öffentlich verfügbar gemacht wurde (Buchstabe a) oder wenn das Produkt oder der Gegenstand sich im rechtmäßigen Besitz desjenigen befindet, der es beobachtet, testet, untersucht oder rückbaut und dieser der Pflicht zur Beschränkung der Erlangung des Geschäftsgeheimnisses unterliegt (Buchstabe b).

Damit wird die Entschlüsselung von Geschäftsgeheimnissen aus Produkten selbst (das so genannte „Reverse Engineering“) grundsätzlich zulässig. Der Vorschrift liegt wie Nummer 1 die Wertung zugrunde, dass keine Exklusivrechte an als Geschäftsgeheimnis ge-

Zu Buchstabe a

Unbeschränkt zulässig ist ein Reverse Engineering bei Produkten, die öffentlich verfügbar gemacht wurden. Dies umfasst frei auf dem Markt erhaltbare Produkte. Unabhängig vom GeschGehG besteht jedoch weiterhin ein lauterkeitsrechtlicher Schutz, zum Beispiel vor Herkunftstäuschung und Rufausbeutung nach § 4 Nummer 3 UWG.

Zu Buchstabe b

Buchstabe b betrifft Fälle, in denen die Produkte oder Gegenstände, die einem Reverse Engineering unterzogen wurden, nicht öffentlich verfügbar gemacht wurden, sondern zum Beispiel einem Vertragspartner zur Nutzung zur Verfügung gestellt wurden. In diesem Fall ist ein Reverse Engineering nur zulässig, wenn der Inhaber des Geschäftsgeheimnisses dem Vertragspartner nicht vertraglich untersagt hat, das Geschäftsgeheimnis durch Reverse Engineering zu erlangen. Dem Inhaber des Geschäftsgeheimnisses wird in solchen Fällen damit anheimgestellt, die Möglichkeit zum Reverse Engineering vertraglich auszuschließen und so eine rechtmäßige Erlangung des Geschäftsgeheimnisses zu verhindern. Die vertragliche Vereinbarung muss wirksam sein.

Zu Nummer 3


Zu Absatz 2


Zu § 4 (Handlungsverbote)

§ 4 enthält einen Katalog von Handlungsverboten, bei deren Missachtung eine rechtswidrige Erlangung oder eine rechtswidrige Nutzung oder Offenlegung vorliegt, soweit die Handlungen nicht nach § 3 erlaubt sind. Die Vorschrift setzt Artikel 4 Absatz 1 bis 5 der Richtlinie (EU) 2016/943 um.

Zu Absatz 1

Absatz 1 legt Fälle fest, in denen die Erlangung eines Geschäftsgeheimnisses unzulässig ist.

Zu Nummer 1

Nach Nummer 1 ist die Erlangung eines Geschäftsgeheimnisses durch bestimmte Verhaltensweisen unzulässig. Hierbei handelt es sich um den unbefugten Zugang zu Dokumenten, Gegenständen, Materialien, Stoffen oder elektronischen Dateien, die das Geschäftsgeheimnis enthalten oder aus denen sich das Geschäftsgeheimnis ableiten lässt, oder um die unbefugte Aneignung oder das unbefugte Kopieren von derartigen Dokumenten, Gegenständen, Materialien, Stoffen oder elektronischen Dateien. Die Dokumente, Gegenstände, Materialien, Stoffe oder elektronischen Dateien müssen sich außerdem unter der rechtmäßigen Kontrolle des Inhabers des Geschäftsgeheimnisses befinden. Die Erlangung selbst ist nicht unzulässig, wenn der Handelnde befugten Zugang zum Geschäftsgeheimnis hatte oder dieses kopieren oder sich aneignen durfte, zum Beispiel weil er im Rahmen eines Geschäftsverhältnisses Zugriff auf das Geschäftsgeheimnis hat. Bei einem Gebrauch oder einer Weitergabe eines derart erworbenen Geschäftsgeheimnisses kann jedoch eine unzulässige Nutzung oder Offenlegung nach Absatz 2 vorliegen.

Zu Nummer 2


Zur Auslegung herangezogen werden kann Fußnote 10 zu Artikel 39 Absatz 2 TRIPS. Diese definiert den Erwerb, die Nutzung oder die Offenbarung von geschützten Informationen an Dritte auf „eine Weise, die den anständigen Gepflogenheiten in Handel und Gewerbe zuwiderläuft“ derart, dass sie zumindest Handlungen wie Vertragsbruch, Vertrauensbruch und Verleugnung umfasst und den Erwerb nicht offenbarter Informationen durch Dritte einschließt, die wussten oder grob fahrlässig nicht wussten, dass solche Handlungen beim Erwerb eine Rolle spielten.

Zu Absatz 2

Absatz 2 legt Fälle fest, in denen die Nutzung oder Offenlegung eines Geschäftsgeheimnisses unzulässig ist.
Nutzung ist jede Verwendung des Geschäftsgeheimnisses, solange es sich nicht um Offenlegung handelt. Offenlegung bedeutet die Eröffnung des Geschäftsgeheimnisses gegenüber Dritten, nicht notwendigerweise der Öffentlichkeit.

Zu Nummer 1

Nach Nummer 1 ist die Nutzung oder die Offenlegung eines Geschäftsgeheimnisses unzulässig, wenn bereits die Erlangung des Geschäftsgeheimnisses wegen eines Verstoßes gegen Absatz 1 Nummer 1 (Buchstabe a) oder Absatz 1 Nummer 2 (Buchstabe b) rechtswidrig ist.

Zu Nummer 2

Die Nutzung ist nach Nummer 2 unzulässig, wenn die das Geschäftsgeheimnis nutzende oder offenlegende Person gegen eine vertragliche oder sonstige Verpflichtung zur Beschränkung der Nutzung des Geschäftsgeheimnisses verstoßt. Das betrifft insbesondere Fälle, in denen der Zugang zu den Geschäftsgeheimnissen nach Absatz 1 Nummer 1 befugt erfolgt war und somit keine rechtswidrige Erlangung vorliegt.


Zu Nummer 3

Die Offenlegung ist nach Nummer 3 ebenfalls unzulässig, wenn die das Geschäftsgeheimnis nutzende oder offenlegende Person gegen eine Vertraulichkeitsvereinbarung oder eine sonstige Verpflichtung verstoßt, das Geschäftsgeheimnis nicht offenzulegen. Das betrifft insbesondere Fälle, in denen eine Person befugt war, Zugang zu den Geschäftsgeheimnissen nach Absatz 1 Nummer 1 zu haben und somit keine rechtswidrige Erlangung vorliegt. Unter eine Vertraulichkeitsvereinbarung fällt auch die Verpflichtung von Arbeitnehmern im Arbeitsverhältnis zu Geheimhaltung und Loyalität.

Zu Absatz 3

Absatz 3 zielt auf Situationen, in denen die Person, die das Geschäftsgeheimnis erlangt, nutzt oder offenlegt, selbst keinen Verstoß gegen Absatz 2 begangen hat, zum Beispiel weil sie das Geschäftsgeheimnis von einem Dritten erhalten hat. In diesen Fällen kommt es darauf an, ob sie wusste oder fahrlässig nicht wusste, dass sie das Geschäftsgeheimnis über eine andere Person oder mehrere andere Personen erlangt hat, die das Geschäftsgeheimnis rechtswidrig erlangt oder rechtswidrig genutzt oder es offengelegt haben. Es reicht aus, dass bei einer Weitergabe des Geschäftsgeheimnisses über mehrere Personen eine andere Person in der Kette gegen Absatz 2 verstoßen hat und der oder die Handelnde das wusste oder hätte wissen können. Satz 2 stellt klar, dass die Herstellung, das Anbieten, das Inverkehrbringen sowie die Einfuhr, die Ausfuhr und die Lagerung rechtsverletzender Produkte für diese Zwecke Formen der Nutzung darstellen.
Zu § 5 (Rechtfertigungsgründe)


Zu Nummer 1


Durch die Verweisung auf die Vorschriften der Charta der Grundrechte der Europäischen Union wird diese insgesamt und nicht nur dessen Artikel 11 in Bezug genommen. Das bedeutet, dass neben dem Grundrecht auch die in der Charta geregelten Schrankenbestimmungen zur Anwendung kommen. Es reicht daher nicht aus, sich auf das Grundrecht lediglich zu berufen, sondern dessen Ausübung muss im Einzelfall in Übereinstimmung mit den Vorgaben der Charta erfolgen.


Zu Nummer 2

Die Erlangung, die Nutzung oder die Offenlegung eines Geschäftsgeheimnisses ist nach Nummer 2 ebenfalls gerechtfertigt, um eine rechtswidrige Handlung oder ein berufliches oder sonstiges Fehlverhalten aufzudecken. Voraussetzung ist, dass die das Geschäftsgeheimnis aufdeckende Person in der Absicht gehandelt hat, das allgemeine öffentliche In-


Die Rechtfertigung nach Nummer 2 erfordert subjektiv, dass die das Geschäftsgeheimnis offenlegende Person in der Absicht handelt, das allgemeine öffentliche Interesse zu schützen. Die offenlegende Person muss hierbei mit dem Motiv handeln, auf einen Missstand hinzuweisen, um zu einer gesellschaftlichen Veränderung beizutragen. Ausgeschlossen sind damit zum Beispiel die Nutzung des Geschäftsgeheimnisses als Druckmittel oder eine Offenbarung des Geschäftsgeheimnisses aus Rache. Auch die Offenlegung gegenüber dem Geschädigten kann dem öffentlichen Interesse dienen, wenn dieser hierdurch in die Lage versetzt wird, einen Rechtsverstoß zu beenden und die Geltungskraft der Rechtsordnung durchzusetzen. Die Absicht, das allgemeine öffentliche Interesse zu schützen, muss dabei das dominierende, nicht jedoch das ausschließliche Motiv sein. Es handelt sich um ein subjektives Motiv, das aber im Rahmen eines gerichtlichen Verfahrens einer Plausibilitätskontrolle unterzogen werden kann.

Zu Nummer 3

Arbeitnehmer haben das Recht, ihre Arbeitnehmervertretung zu kontaktieren. Es ist möglich, dass sie in diesem Zusammenhang Geschäftsgeheimnisse offenlegen bzw. nutzen. Gleichzeitig kann die Arbeitnehmervertretung durch diesen Vorgang ein Geschäftsgeheimnis erlangen.

Daher privilegiert Nummer 3 die Erlangung, die Nutzung oder die Offenlegung eines Geschäftsgeheimnisses im Rahmen der Offenlegung gegenüber der Arbeitnehmervertretung, soweit die Offenlegung aus Sicht des Arbeitnehmers erforderlich ist, damit die Arbeitnehmervertretung ihre Aufgaben erfüllen kann. Die Regelung dient dem Schutz von Arbeitnehmern, die sich mit einem Geschäftsgeheimnis an die Arbeitnehmervertretung wenden. Gleichzeitig dient sie dem Schutz der Arbeitnehmervertretung, die auf diesem Weg ein Geschäftsgeheimnis erlangt.

Zu Abschnitt 2 (Ansprüche bei Rechtsverletzungen)

Zu § 6 (Beseitigung und Unterlassung)

und Umfang des Anspruchs kann unter Berücksichtigung der Unterschiede der jeweiligen Schutzrechte auf Rechtsprechung und Literatur zu diesen Vorschriften zurückgegriffen werden.

Ein Verschulden ist nicht erforderlich. Allerdings ist hierbei zu berücksichtigen, dass bei der Frage, ob eine rechtswidrige Handlung wegen eines Verstoßes gegen § 4 Absatz 3 vorliegt, subjektive Elemente berücksichtigt werden.


Zu § 7 (Vernichtung; Herausgabe; Rückruf; Entfernung und Rücknahme vom Markt)


Zu Nummer 1

Nummer 1 enthält den Anspruch des Inhabers eines Geschäftsgeheimnisses gegen den Rechtsverletzer auf Vernichtung oder Herausgabe der im Besitz oder Eigentum des Rechtsverletzers befindlichen Dokumente, Gegenstände, Materialien, Stoffe oder elektronischen Dateien, die das Geschäftsgeheimnis enthalten oder verkörpern. Er setzt Artikel 12 Absatz 1 Buchstabe d der Richtlinie (EU) 2016/943 um.

Der Anspruch richtet sich damit auf die Gegenstände, in denen das Geschäftsgeheimnis selbst enthalten oder verkörpert ist. Der Anspruch setzt kein Verschulden voraus. Voraussetzung ist allerdings, dass sich die Gegenstände im Besitz oder Eigentum des Rechtsverletzers befinden. Unter die Vernichtung fällt bei elektronischen Dateien die Vernichtung sämtlicher eventuell vorhandener Kopien.

Zu Nummer 2


Rechtsverletzende Produkte sind nach § 2 Nummer 4 Produkte, deren Konzeption, Merkmale, Funktionsweise, Herstellungsprozess oder Marketing in erheblichem Umfang auf rechtswidrig erworbenen, genutzten oder offengelegten Geschäftsgeheimnissen beruhen. Der Anspruch auf Entfernung umfasst alle rechtlich zulässigen Methoden. Für die
Ansprüche auf Entfernung und Vernichtung reicht aus, dass der Rechtsverletzer eine faktische Verfügungsgewalt über die rechtsverletzenden Produkte besitzt.

Zu Nummer 3


Zu Nummer 4


Zu Nummer 5

Mit dem Anspruch auf Marktrücknahme nach Nummer 5 wird Artikel 12 Absatz 2 Buchstabe c der Richtlinie (EU) 2016/943 umgesetzt. Der Anspruch besteht nur unter der Voraussetzung, dass der Schutz des in Frage stehenden Geschäftsgeheimnisses durch das im Vergleich zur Vernichtung mildere Mittel der Marktrücknahme nicht beeinträchtigt wird.

Zu § 8 (Auskunft über rechtsverletzende Produkte; Schadensersatz bei Verletzung der Auskunftspflicht)


Zu Absatz 1


Zu Absatz 2

Absatz 2 sieht mit der Schadensersatzpflicht des Rechtsverletzers Sanktionen bei falscher oder unvollständiger Auskunftserteilung vor. Eine vergleichbare Vorschrift enthalten § 101 Absatz 5 UrhG und § 19 Absatz 5 MarkenG.

Zu § 9 (Anspruchsausschluss bei Unverhältnismäßigkeit)

§ 9 schließt Ansprüche nach den §§ 6 bis 8 Absatz 1 aus, wenn die Rechtsfolge im Einzelfall unverhältnismäßig ist. Die Regelung setzt Artikel 13 Absatz 1 der Richtlinie (EU) 2016/943 um. Eine vergleichbare Regelung enthält § 98 Absatz 4 UrhG.

Zu Nummer 1

Besitzt das Geschäftsgeheimnis nur einen geringen Wert, kann dies im Einzelfall dazu führen, dass umfangreiche oder kostspielige Rückrufmaßnahmen als unverhältnismäßig beurteilt werden.

Zu Nummer 2

Trifft der Inhaber des Geschäftsgeheimnisses nur geringfügige Maßnahmen zum Schutz des Geschäftsgeheimnisses, kann dies im Einzelfall ebenfalls zur Unverhältnismäßigkeit der Ansprüche nach den §§ 6 bis 8 Absatz 1 führen.

Zu Nummer 3

Nummer 3 ermöglicht eine Berücksichtigung subjektiver Komponenten beim Rechtsverletzer. So kann zum Beispiel eine fahrlässige Unkenntnis der rechtswidrigen Nutzung des Geschäftsgeheimnisses dazu führen, dass umfangreiche oder kostspielige Rückrufmaßnahmen als unangemessen beurteilt werden können.

Zu Nummer 4

Nach Nummer 4 können auch die Folgen der rechtswidrigen Nutzung oder Offenlegung des Geschäftsgeheimnisses berücksichtigt werden.

Zu Nummer 5


Zu Nummer 6

Nummer 6 verweist auf die berechtigten Interessen Dritter. Bei der Verhältnismäßigkeitsprüfung des Umfangs der Ansprüche aus den §§ 6 bis 8 Absatz 1 kann zum Beispiel berücksichtigt werden, wenn Dritte auf die rechtsverletzenden Produkte angewiesen sind oder dass ein Dritter Besitzer der im Eigentum des Rechtsverletzers stehenden Ware ist.

Zu Nummer 7

Das öffentliche Interesse umfasst neben dem grundsätzlichen Interesse an der Herstellung eines rechtskonformen Zustandes auch Interessen des Staates zum Beispiel im Bereich der öffentlichen Sicherheit.
Zu § 10 (Haftung des Rechtsverletzers)

Zu Absatz 1


Für Arbeitnehmerinnen und Arbeitnehmer stellt § 10 Absatz 1 Satz 2 ausdrücklich klar, dass § 619a BGB unberührt bleibt. Damit haben Arbeitnehmerinnen und Arbeitnehmer dem Arbeitgeber nur dann Ersatz für den aus der Verletzung einer Pflicht aus dem Arbeitsverhältnis entstehenden Schaden zu leisten, wenn sie die Pflichtverletzung zu vertreten haben. Wird ein Schadenersatzanspruch nach § 10 Absatz 1 Satz 1 gegenüber einer Arbeitnehmerin oder einem Arbeitnehmer geltend gemacht, so hat der Arbeitgeber die Vorwerfbarkeit darzulegen und zu beweisen. Im Übrigen sind auch für Schadenersatzansprüche nach § 10 die von der Rechtsprechung entwickelten Grundsätze über die beschränkte Arbeitnehmerhaftung zu beachten (vgl. grundlegend Bundesarbeitsgericht, Beschluss vom 27. September 1994 – GS 1/89 (A)).

Zu Absatz 2


Zu Absatz 3


Der Anspruch kann neben oder gesondert von einem Ersatz des Vermögensschadens geltend gemacht werden. Die Voraussetzung der Billigkeit betrifft sowohl das Bestehen des Anspruchs wie auch dessen Höhe.

Zu § 11 (Abfindung in Geld)

Zu Absatz 1

Die Regelung privilegiert den Rechtsverletzer, der nicht schuldhaft gehandelt hat, also weder vorsätzlich noch fahrlässig. Er kann zur Abwendung eines Anspruches nach den §§ 6 oder 7 den Inhaber des Geschäftsgeheimnisses in Geld abfinden, wenn ihm durch die Erfüllung der Ansprüche ein unverhältnismäßig großer Nachteil entstehen würde und wenn die Abfindung für den Inhaber des Geschäftsgeheimnisses in Geld als angemessen erscheint.

Der Rechtsverletzer wird nur dann nach § 11 befreit, wenn er eine Abfindung anbietet. Voraussetzung für die Abfindung ist, dass dem Rechtsverletzer durch die Erfüllung der Ansprüche aus den §§ 6 und 7 ein unverhältnismäßig großer Nachteil entstehen würde. Das kann dann vorliegen, wenn lediglich ein geringer rechtsverletzender Teil in einem Produkt enthalten ist und dieser nur über eine sehr kostspielige Änderung entfernt werden könnte, insbesondere wenn die Kosten der Änderung weit über der üblicherweise für die Nutzung des Geschäftsgeheimnisses zu zahlenden Lizenzgebühr liegen würden.

Zuletzt muss die Abfindung in Geld dem Inhaber des Geschäftsgeheimnisses als ange- messen erscheinen. Hierfür ist eine Einzelabwägung der Interessen beider Seiten vorzu- nehmen.

Zu Absatz 2

Absatz 2 regelt die Bedingungen des Rechts auf Zahlung einer Abfindung nach Absatz 1. Für die Höhe des zu zahlenden Betrages ist nach Satz 1 maßgeblich, was üblicherweise im Rahmen einer Lizenz zu zahlen wäre. Nach Satz 2 ist höchstens der Betrag zu zahlen, den der Inhaber in derselben Dauer des Zeitraumes in dem er dem Rechtsverletzer die Nutzung des Geschäftsgeheimnisses hätte untersagen können, im Rahmen einer Lizenzvereinbarung erlangt hätte.

Zu § 12 (Haftung des Inhabers eines Unternehmens)

§ 12 sieht die Haftung des Inhabers eines Unternehmens für Ansprüche nach den §§ 6 bis 8 vor, wenn das Geschäftsgeheimnis im Unternehmen von einem Beschäftigten oder Beauftragten rechtswidrig verletzt worden ist. Vergleichbare Regelungen bestehen mit § 8 Absatz 2 UWG, § 44 DesignG und § 14 Absatz 7 MarkenG.

Die Regelung soll verhindern, dass sich der Inhaber eines Unternehmens bei Verletzungen von Geschäftsgeheimnissen den Ansprüchen des Verletzten deswegen entziehen kann, weil er an der Rechtsverletzung nicht selbst beteiligt war, sondern seine Mitarbeiter tätig geworden sind. Das wäre grundsätzlich möglich, da § 4 Absatz 3 das Verbot einer Erlangung, Nutzung oder Offenlegung bei einem Erhalt des Geschäftsgeheimnisses über Dritte davon abhängig macht, dass der Handelnde entweder vorsätzlich handelt oder fahrlässig nicht weiß, dass ein Verstoß gegen § 4 Absatz 1 oder 2 vorliegt.


Nach Satz 2 gilt die Zurechnung zu dem Inhaber des Unternehmens für den Anspruch aus § 8 Absatz 2 nur, wenn der Inhaber des Unternehmens vorsätzlich oder grob fahrlässig die Auskunft falsch oder unvollständig erteilt hat. Das trägt der Tatsache Rechnung, dass der Schadensersatzanspruch nach § 8 Absatz 2 anders als die Ansprüche nach den §§ 6 bis 8 Absatz 1 ein Verschulden voraussetzt. Um den Schadensersatzanspruch nach § 8 Absatz 2 auch gegen den Inhaber des Unternehmens ausüben zu können, muss ein Organ, ein Beschäftigter oder Beauftragter die Auskunft vorsätzlich oder grob fahrlässig erteilt haben und diese Art der Auskunftserteilung muss dem Inhaber des Unternehmens zugerechnet werden können.

Auf den Anspruch aus § 10 wird nicht verwiesen, weil dieser anders als die Ansprüche nach den §§ 6 bis 8 Verschulden voraussetzen. Der Anspruch auf Schadensersatz ist
jedoch durch § 12 nicht ausgeschlossen, sondern kann sich über die allgemeinen gesetzlichen Regelungen ergeben, zum Beispiel wenn dem Inhaber des Unternehmens die Verletzung des Geschäftsgeheimnisses zuzurechnen ist und dieser schuldhaft gehandelt hat. Von der Haftung des Unternehmensinhabers bleibt eine Haftung des Beschäftigten oder Beauftragten oder Angestellten selbst unberührt.

Zu § 13 (Herausgabeanspruch nach Eintritt der Verjährung)


Zu § 14 (Missbrauchsverbot)


Zu Abschnitt 3 (Verfahren in Geschäftsgeheimnisstreitsachen)

Zu § 15 (Sachliche und örtliche Zuständigkeit; Verordnungsermächtigung)

§ 15 regelt die sachliche und örtliche Zuständigkeit und betrifft den Fall, dass der Rechtsweg zu den ordentlichen Gerichten eröffnet ist. Der Rechtsweg zu den Arbeitsgerichten bleibt unberührt, so dass die Regelungen zu Verfahren in Geschäftsgeheimnisstreitsachen auch dort Anwendung finden.

Zu Absatz 1


Zu Absatz 2

Absatz 2 regelt die örtliche Zuständigkeit für die ordentlichen Gerichte ausschließlich anhand des allgemeinen Gerichtsstands des Beklagten. Der allgemeine Gerichtsstand einer Person bestimmt sich nach den §§ 13 ff. der Zivilprozessordnung (ZPO) grundsätzlich nach seinem Wohnsitz oder Sitz. Hat der Beklagte keinen allgemeinen Gerichtsstand, ist nach Satz 2 nur das Gericht zuständig, in dessen Bezirk die Handlung begangen worden ist.

Zu Absatz 3

Absatz 3 enthält eine Konzentrationsermächtigung für die Landesregierungen, durch Rechtsverordnung die Klagen für die Bezirke mehrerer Landgerichte einem von ihnen zuzuweisen. Die Regelung entspricht § 143 Absatz 2 PatG.


Zu § 16 (Geheimhaltung)

Zu Absatz 1

Absatz 1 enthält die Möglichkeit, streitgegenständliche Informationen ganz oder teilweise als geheimhaltungsbedürftig einzustufen, wenn diese ein Geschäftsgeheimnis darstellen können.


Zu Absatz 2


Die Verpflichtungen bestehen allerdings nur, wenn die genannten Personen Kenntnis von den streitgegenständlichen Informationen über das Verfahren erhalten haben. Entsprechend bestehen die Verpflichtungen nicht, wenn die genannten Personen anderweitig von dem Inhalt eines Geschäftsgeheimnisses erfahren haben. In diesem Fall gelten lediglich die Vorschriften des Abschnittes 1 des GeschGehG.

Zu Absatz 3

Absatz 3 ergänzt das Akteneinsichtsrecht von Dritten bei einer Einstufung nach Absatz 1.

Zu § 17 (Ordnungsmittel)

§ 17 schafft unabhängig von einem bestehenden Titel eine eigenständige prozessuale Grundlage für das Gericht, um auf Antrag sofortige Ordnungsmaßnahmen bei Verstößen gegen die Verpflichtungen nach § 16 Absatz 2 ergreifen zu können. Die Regelungen setzen Artikel 16 der Richtlinie (EU) 2016/943 um, wonach bei einer Zuwiderhandlung gegen die Pflichten zur Wahrung der Vertraulichkeit im Verfahren aus Artikel 9 die Möglichkeit zur Auferlegung von Sanktionen bestehen muss. Auf Grund der teilweise erheblichen wirtschaftlichen Bedeutung von Geschäftsgeheimnissen soll die Höhe des Ordnungsgeldes von bis zu 100 000 Euro als Abschreckung wirken. Die Sanktion ist nicht abschließend, der Inhaber eines Geschäftsgeheimnisses kann bei einem Verstoß gegen die Verpflichtungen aus § 16 Absatz 2 ein weiteres Verfahren wegen der Verletzung eines Geschäftsgeheimnisses einleiten. Festsetzung und Vollstreckungen schließen strafrechtliche Sanktionen nach § 23 nicht aus.

Zu § 18 (Geheimhaltung nach Abschluss des Verfahrens)

§ 18 Satz 1 erstreckt die Verpflichtung zur vertraulichen Behandlung auch über den Abschluss des Verfahrens hinaus. Die Vorschrift setzt Artikel 9 Absatz 1 Satz 3 der Richtlinie (EU) 2016/943 um

§ 18 Satz 2 lässt die Verpflichtung zur Geheimhaltung und das Verbot der Nutzung und Offenlegung entfallen, wenn das Gericht das Vorliegen eines Geschäftsgeheimnisses
durch rechtskräftiges Urteil verneint oder wenn die in Frage stehenden Informationen für Personen in den Kreisen, die üblicherweise mit der betreffenden Art von Informationen umgehen, bekannt oder ohne weiteres zugänglich werden. In allen übrigen Fällen (stattgebendes Urteil, Vergleich) gilt die Verpflichtung weiter fort, es sei denn die Parteien treffen bei einem Vergleich eine abweichende Regelung.

Zu § 19 (Weitere gerichtliche Beschränkungen)

Zu Absatz 1


§ 19 Absatz 1 ist entsprechend auf Streitgenossen anzuwenden, nicht jedoch auf Nebenintervenienten, weil dies mit dem Ansatz des Geheimnisschutzes kollidiert. Im Verfahren ist der Anspruch auf rechtliches Gehör auch der Nebenintervenienten durch geeignete Maßnahmen zu wahren.

Zu Nummer 1


Zu Nummer 2

Nach Nummer 2 kann der Personenkreis beschränkt werden, der an mündlichen Verhandlungen teilnehmen kann, die den Schutz von Geschäftsgeheimnissen betreffen, und der Zugang zu den die Verhandlung betreffenden Aufzeichnungen oder Protokollen erhält.

Nummer 2 GVG steht zudem im Ermessen des Gerichts. Dies gilt auch für § 52 Satz 2 ArbGG. Beide Regelungen erlauben außerdem nur den Ausschluss der Öffentlichkeit, nicht jedoch eine Begrenzung des Personenkreises bezüglich der Parteien.

Zu Absatz 2

Zu Nummer 1

Nummer 1 regelt die Möglichkeit, auf Antrag die Öffentlichkeit bei Beschränkungen nach Absatz 1 Satz 1 auszuschließen. Anders als § 172 Nummer 2 GVG muss es sich nicht um ein wichtiges Geschäftsgeheimnis handeln.

Zu Nummer 2

Absatz 2 Nummer 2 setzt Artikel 9 Absatz 2 Unterabsatz 2 Buchstabe c der Richtlinie (EU) 2016/943 um.

Zu Absatz 3

Da die Geheimhaltung eines Geschäftsgeheimnisses auch in der Zwangsvollstreckung erforderlich sein kann, ordnet Absatz 3 die Anwendbarkeit der §§ 16 bis 19 Absatz 1 und 2 hierauf an. Hierdurch wird geregelt, dass eine in einem Erkenntnisverfahren durch das Gericht der Hauptsache angeordnete Einstufung nach § 16 Absatz 1 oder eine nach § 19 Absatz 1 ausgesprochene Beschränkung auch im Verfahren der Zwangsvollstreckung auf der Grundlage eines in diesem Verfahren erlassenen vollstreckbaren Titels weiterhin gilt. Während § 18 Satz 1 die Fortwirkung der Pflichten zur Wahrung des Geschäftsgeheimnisses bei solchen Personen anordnet, die bereits im Erkenntnisverfahren mit dem Geschäftsgeheimnis in Berührung gekommen sind, wird durch § 19 Absatz 3 angeordnet, dass auch solche Parteien, Prozessvertreter, Zeugen, Sachverständige, sonstige Vertreter und alle sonstigen Personen, die erstmals in dem Verfahren der Zwangsvollstreckung von dem Geschäftsgeheimnis, dessen Schutz in dem Erkenntnisverfahren nach § 16 Absatz 1 oder § 19 Absatz 1 angeordnet wurde, in Berührung kommen, die entsprechenden Pflichten zur Wahrung des Geschäftsgeheimnisses zu erfüllen haben.

Der Umstand, dass die dem Schuldner nach § 750 Absatz 1 Satz 1 ZPO vor oder bei Beginn der Zwangsvollstreckung zustehende vollstreckbare Ausfertigung des Urteils hinsichtlich der Geschäftsgeheimnisse, deren Schutz angeordnet wurde, nach Absatz 2 geschwärzt wurde, steht der Zwangsvollstreckung auf der Grundlage ihrer Zustellung nicht entgegen. Das Gesetz erlaubt bereits jetzt in bestimmten Fällen die Zwangsvollstreckung auf der Grundlage der Zustellung einer vollständig ohne Tatbestand und Entscheidungsgründe gefassten vollstreckbaren Ausfertigung eines Urteils (§ 750 Absatz 1 Satz 2, 2. Halbsatz ZPO). Die vollstreckbare Ausfertigung des Urteils, auf deren Grundlage das Vollstreckungsorgan tätig wird und die dem Schuldner zuzustellen ist, muss jedoch in jedem Fall die Urteilsformel, soweit deren Inhalt vollstreckt werden soll, enthalten.

Zu § 20 (Verfahren bei Maßnahmen nach den §§ 16 bis 19)

Zu Absatz 1

Absatz 1 legt den Zeitpunkt fest, ab dem das Gericht der Hauptsache eine Maßnahme nach § 16 Absatz 1 und § 19 Absatz 1 treffen kann.

Zu Absatz 2


Zu Absatz 3

Absatz 3 sieht vor, dass die den Antrag stellende Partei für eine Maßnahme nach § 16 Absatz 1 oder § 19 Absatz 1 lediglich glaubhaft machen muss, dass es sich bei den streitgegenständlichen Informationen um ein Geschäftsgeheimnis handeln kann.

Zu Absatz 4

Die Pflichten der antragstellenden Partei werden in Absatz 4 bestimmt. Diese muss bei der Einreichung von Anträgen nach § 16 Absatz 1 diejenigen Ausführungen in Schriftstücke und sonstigen Unterlagen kennzeichnen, die Geschäftsgeheimnisse enthalten. Im Fall des § 19 Absatz 1 Satz 1 Nummer 1 muss sie zusätzlich eine Fassung ohne Preisgabe von Geschäftsgeheimnissen vorlegen, die eingesehen werden kann. Erfolgt dies nicht, kann das Gericht von der Zustimmung zur Einsicht ausgehen, es sei denn, ihm sind besondere Umstände bekannt, die eine solche Vermutung nicht rechtfertigen.

Zu Absatz 5

der Schutz des Geschäftsgeheimnisses gewährleistet ist, kann die Beeinträchtigung des Beklagten insofern hingenommen werden. Lehnt das erstinstanzliche Gericht hingegen Maßnahmen nach § 16, § 17 oder § 19 ab, gerät das Geschäftsgeheimnis in Gefahr. In diesem Fall soll die ablehnende Entscheidung zunächst durch sofortige Beschwerde überprüft werden können. Eine sofortige Beschwerde ist nur gegen Entscheidungen im ersten Rechtszug möglich.

Zu Absatz 6

Absatz 6 regelt, dass als Gericht der Hauptsache im Sinne der Vorschriften dieses Abschnitts das Gericht des ersten Rechtszuges (Nummer 1) und, wenn die Hauptsache in der Berufungsinstanz anhängig ist, das Berufungsgericht (Nummer 2) anzusehen ist. Die Regelung soll sicherstellen, dass das jeweils mit der Sache befasste Gericht über die Maßnahmen nach § 16 oder § 19 entscheiden kann.

Zu § 21 (Bekanntmachung des Urteils)


Zu Absatz 1


Voraussetzung für die Bekanntmachung ist die Darlegung eines berechtigten Interesses. Die Kriterien, die hierfür im Rahmen der Verhältnismäßigkeit maßgeblich sein können, werden in Absatz 2 aufgezählt. Die Bekanntmachung erfolgt auf Kosten der unterliegenden Partei. Das Gericht bestimmt Art und Umfang der Bekanntmachung im Urteil unter der Berücksichtigung der in der Entscheidung genannten Personen. Berücksichtigt werden können damit auch die Interessen Dritter.

Zu Absatz 2

Absatz 2 zählt Kriterien auf, die bei der Beurteilung durch das Gericht, ob die obsiegende Partei ein berechtigtes Interesse an der öffentlichen Bekanntmachung des Urteils oder Informationen über das Urteil hat, berücksichtigt werden müssen. Berücksichtigt werden kann auch der immaterielle Wert. Die Aufzählung ist nicht abschließend, das Gericht kann weitere sachdienliche Kriterien bei der Prüfung der Verhältnismäßigkeit berücksichtigen.

Zu Absatz 3

Die Bekanntmachung setzt Rechtskraft voraus. Das Gericht kann hiervon jedoch abweichen, wenn ein dringendes Bedürfnis für die Veröffentlichung vor der Rechtskraft besteht.

Zu § 22 (Streitwertbegünstigung)

Zu Absatz 1

Absatz 1 sieht die Möglichkeit zu einer Streitwertbegünstigung vor, wenn bei Geschäftsgeheimnisstreitsachen eine Partei glaubhaft macht, dass die Belastung mit den Prozskosten nach dem vollen Streitwert ihre wirtschaftliche Lage erheblich gefährden würde.
Entsprechende Regelungen finden sich in § 12 Absatz 4 UWG, § 144 PatG, § 142 MarkenG und § 54 DesignG.

Die Regelung soll verhindern, dass die Bereitschaft einer wirtschaftlich schwachen Partei zur Rechtsdurchsetzung oder -verteidigung durch die im Regelfall voraussichtlich hohen Streitwerte bei der Verletzung von Geschäftsgeheimnissen beeinträchtigt wird. Im Sinne einer Härtefallregelung ist in diesem Fall eine einseitige Streitwertbegünstigung der wirtschaftlich schwächeren Partei möglich. Die Regelung ist neben § 51 Absatz 3 GKG anwendbar, da es vorkommen kann, dass ein Streitwert unter Berücksichtigung beiderseitiger Interessen hoch ausfallen kann. § 12a ArbGG bleibt ebenfalls unberührt.


Zu Absatz 2

Absatz 2 regelt die weiteren Folgen bei Anordnung einer Streitwertbegünstigung nach Absatz 1.

Zu Absatz 3

Zu einem späteren Zeitpunkt als vor der Verhandlung zur Hauptsache ist der Antrag nur dann zulässig, wenn der angenommene oder festgesetzte Streitwert durch das Gericht heraufgesetzt wird. Der Antrag auf Streitwertbegünstigung kann gemäß Satz 3 vor der Geschäftsstelle des Gerichts zur Niederschrift erklärt werden. Er kann aber auch schriftsätzlich beantragt werden.

Zu Abschnitt 4 (Strafvorschriften)

Zu § 23 (Verletzung von Geschäftsgeheimnissen)


Zu Absatz 1

Absatz 1 enthält die Straftatbestände aus § 17 Absatz 1 und Absatz 2 Nummer 2 UWG alte Fassung. Bei dem subjektiven Tatbestandsmerkmal zugunsten eines Dritten ergibt sich durch die Richtlinie (EU) 2016/943 und ihre Umsetzung in diesem Gesetz im Vergleich zu der bisherigen Rechtslage die Änderung, dass dieses bei Vorliegen der Rechtfertigunggründe aus § 5 ausgeschlossen ist. Hierdurch wird die Möglichkeit eines rechtlich zulässigen Whistleblowings erweitert. Nach bisheriger Rechtslage konnten sich Beschäftigte nach § 17 Absatz 1 UWG alte Fassung strafbar machen, wenn sie Informationen über rechtswidrige Verhaltensweisen des Arbeitgebers an die Strafverfolgungsbehörden oder die Presse weitergaben, weil dies das Merkmal der Mitteilung eines Geschäftsgeheimnisses zugunsten eines Dritten darstellen konnte.
Zu Nummer 1


Zu Nummer 2


Zu Nummer 3


Zu Absatz 2

Absatz 2 bildet zum Teil § 17 Absatz 2 Nummer 2 UWG alte Fassung ab und stellt die Nutzung oder Offenlegung von Geschäftsgeheimnissen unter Strafe, die durch fremde Handlungen nach Absatz 1 Nummer 2 oder Nummer 3 erlangt wurden.

Zu Absatz 3

Absatz 2 entspricht § 18 UWG alte Fassung und schützt mit Vorlagen oder Vorschriften technischer Art lediglich eine bestimmte Kategorie von Geschäftsgeheimnissen. Im Vergleich zum bisherigen Wortlaut wurde ergänzt, dass die anvertrauten Vorlagen oder Vorschriften technischer Art geheim sein müssen. Damit geht die bisherige Auslegung der Norm durch Rechtsprechung und Literatur, dass ein Anvertrauen eine fehlende Offenkundigkeit voraussetzt, auch deutlich aus dem Wortlaut der Norm hervor.

Zu Absatz 4

Absatz 3 entspricht § 17 Absatz 4 UWG alte Fassung, enthält aber nun eine Qualifikation statt wie bisher ein Regelbeispiel.

Zu Absatz 5

Zu Absatz 6

Absatz 6 Satz 1 verweist auf § 5 Nummer 7 StGB. Dies entspricht § 17 Absatz 6, § 18 Absatz 4 und § 19 Absatz 5 UWG alte Fassung. Im Vergleich zur bisherigen Fassung verweist Absatz 6 Satz 2 anstatt auf eine konkrete Strafandrohung nun auf die §§ 30 und 31 StGB. Dies beseitigt das Ungleichgewicht, dass ansonsten im Fall des § 22 Absatz 2 eine Anstiftung oder versuchte Anstiftung mit der gleichen Strafandrohung belegt wäre wie die Verwirklichung als Haupttäter. Nach § 30 Absatz 1 Satz 2 StGB ist die Strafe nun für die Absätze 1 bis 4 nach § 49 Absatz 1 StGB zu mildern.

Zu Absatz 7

Das Strafantragserfordernis entspricht § 17 Absatz 5, § 18 Absatz 3 und § 19 Absatz 4 UWG alte Fassung.

Zu Artikel 2 (Änderung des GVG)

Auf Grund der Aufhebung der §§ 17 bis 19 UWG und der Übernahme der Regelungen in § 23 wird die Zuständigkeit der Wirtschaftsstrafkammern durch einen Bezug auf das GeschGehG ergänzt.

Zu Artikel 3 (Änderung der StPO)

Auf Grund der Aufhebung der §§ 17 bis 19 UWG und der Übernahme der Regelungen in § 23 müssen die Verweise in § 374 Absatz 1 Nummer 7 StPO zur Zulässigkeit der Privatklage und in § 395 Absatz 1 Nummer 6 StPO zur Befugnis zum Anschluss als Nebenkläger angepasst werden und auf das neue Stammgesetz Bezug nehmen.

Zu Artikel 4 (Änderung des GKG)

Zu Nummer 1

Bei Verfahren über Ansprüche nach dem GeschGehG soll – wie beim UWG – der Streitwert grundsätzlich nach der sich aus dem Antrag des Klägers für ihn ergebenden Bedeutung der Sache bestimmt werden. § 51 Absatz 2 GKG wird daher um einen Bezug auf das GeschGehG ergänzt.

Zu Nummer 2

Auch für die Streitwertbegünstigung nach § 22 GeschGehG soll in § 51 Absatz 5 GKG klargestellt werden, dass diese bei der Bestimmung des Streitwertes zu berücksichtigen ist.

Zu Artikel 5 (Änderung des UWG)

Die §§ 17 bis 19 UWG werden auf Grund des Sachzusammenhangs in das GeschGehG übernommen. Das erfordert die Aufhebung der entsprechenden Vorschriften im UWG.

Zu Artikel 6 (Inkrafttreten)

Das Gesetz nach der Verkündung in Kraft.
In unserer Studie erfahren sie, wie deutsche Unternehmen mit Wirtschaftskriminalität in der analogen und digitalen Welt umgehen und wie Compliance-Programme sich haftungsrechtlich auswirken.

Wirtschaftskriminalität 2018
Mehrwert von Compliance – forensische Erfahrungen

**IT-Sicherheit wird zum existenziellen Thema.** Wie können sich Unternehmen gegen digitale Angriffe wappnen? Cyberrisiken dürfen nicht zum Hemmschuh für die Industrie 4.0 werden.
Mehrwert von Compliance – forensische Erfahrungen

Unsere neunte Studie zur Entwicklung der Wirtschaftskriminalität setzt ihre Schwerpunkte auf die weitere Entwicklung von Compliance-Programmen und der forensischen Praxis der von Wirtschaftskriminalität betroffenen Unternehmen.

Rasanter Anstieg der Fälle von Cybercrime
Im Unterschied zur rückläufigen Entwicklung der analogen Wirtschaftskriminalität (Abnahme um sechs Prozentpunkte) stellen wir einen rasanten Anstieg im Bereich Cybercrime fest. Fast jedes zweite Unternehmen (46 %) berichtete über mindestens einen Fall. Dies bedeutet gegenüber 2015 einen Anstieg um zwölf Prozentpunkte. Der Abstand zwischen analoger (49 %) und digitaler Kriminalität (46 %) ist somit weitgehend verschwunden.

Allerdings verursachten analoge Formen der Wirtschaftskriminalität im Durchschnitt gesehen weiterhin deutlich höhere Schäden als Cybercrime. Die durchschnittlichen Kosten infolge eines schweren Wirtschaftsdelikts bezifferten die betroffenen Unternehmen auf 7,23 Millionen Euro, während Fälle von Cybercrime durchschnittlich Schäden in Höhe von 183.000 Euro verursachten.

Risiko CEO-Fraud
Hohe Schäden entstanden auch durch CEO-Fraud. 40 % der befragten Unternehmen berichteten zwar nur über einen Versuch, aber bei 5 % der Unternehmen war der CEO-Fraud erfolgreich und verursachte in den schweren Fällen einen durchschnittlichen Schaden in Höhe von 4,4 Millionen Euro. Alarmierend sind auch Berichte über Angriffe in Form von Distributed Denial of Service (DDoS) und Verschlüsselungs- bzw. Erpressungstrojanern. 8 % der Unternehmen berichteten über leichte bis schwere DDoS-Fälle und 18 % über Trojaner. Einige Unternehmen berichteten sogar, das geforderte Lösegeld gezahlt zu haben.

Compliance-Programme weiterhin im Aufwind
Drei Viertel der mittelständischen Unternehmen und Großunternehmen verfügen über ein Compliance-Management-System (CMS) und bei weiteren 10 % befindet es sich in der Planung. Auch bei kleineren Mittelständlern mit 500 bis 999 Mitarbeitern ist ein CMS überwiegend selbstverständlich (60 %). Der Trend, Compliance-Programme auf zusätzliche Deliktsfelder auszuweiten, hält unvermindert an, wobei der Fokus auf der Prävention gegen Korruption (CMS 83 %), Karrellrechtsverletzungen (CMS 62 %) und Geldwäsche (CMS 65 %) liegt.

In unseren vertieften Interviews berichteten Unternehmen über noch bestehende Schwächen in der Umsetzung ihres CMS, denen sie sich verstärkt widmen wollen. Genannt wurden Kommunikationsprobleme, mangelnde Awareness und eine zu formale Ausgestaltung des CMS, eine mangelnde Konsistenz der Regelungen sowie eine unzureichende Integration in den Geschäftsprozessen, insbesondere bei global agierenden Unternehmen.

Klarer Trend: Aufstockung der Budgets für Personal- und Sachmittel des CMS
In den vergangenen fünf Jahren beobachteten nahezu alle Unternehmen eine leichte (34 %) oder starke Zunahme (59 %) der Anforderungen an ihr CMS, sodass jedes zweite die Personal- und Sachmittelausstattung hierfür leicht (33 %) oder deutlich (22 %) aufgestockt hat. Über eine allenfalls leichte Reduzierung berichteten nur 2 % der Unternehmen, bei 43 % der Unternehmen blieb das Budget unverändert.

Konkret zeigt sich dieser klare Trend bei der personellen Aufstockung des Compliance-Managements. Im Durchschnitt kommen heute rund 1.500 Mitarbeiter auf eine Compliance-Officer-Stelle, während es vor vier Jahren noch rund 2.400 waren. Die Relation ist bei fast zwei Dritteln der Unternehmen sogar deutlich besser. Bei einem Drittel (33 %) kommen sogar auf 500 Mitarbeiter bzw. bei 29 % der Unternehmen auf 500 bis 1.000 Mitarbeiter eine Compliance-Officer-Stelle.

Auch sie nutzen zunehmend ihren vertraglichen Gestaltungsspielraum. Verbreitet sind Compliance-Verpflichtungserklärungen, die Zusicherung eines Rechts auf anlassbezogene Prüfung und Compliance-Haftungsklauseln. Allerdings nehmen hierdurch auch Konflikte zwischen verschiedenen Compliance-Standards zu, die sich jedoch weitgehend vermeiden ließen, wenn Zertifizierungen selbstverständlicher werden würden. Nur knapp die Hälfte der befragten Unternehmen hat eine unabhängige Prüfung nach dem IDW PS 980 oder eine Zertifizierung gemäß ISO 19600 durchführen lassen (Abschnitt D6, 47%), sodass in der Praxis eine Vielfalt an CMS herrscht, die eine gegenseitige Anerkennung erschwert.

Das Eis scheint gebrochen, alle von uns erhobenen Kennwerte deuten auf eine sinkende Korruptionsbelastung der deutschen Wirtschaft hin. Durch Korruption wurden nur 6 % der Unternehmen betroffen und gegenüber 2015 nahmen die Verdachtsfälle von 19 % auf 11 % ab. Auch der Anteil der Unternehmen, denen Geschäfte vermutlich infolge von Korruption eines Wettbewerbers entgangen sind, sinkt von 21 % auf 9 %. Diese Entwicklung dürfte vor allem auf die wachsende Zahl von Anti-Korruptionsprogrammen zurückzuführen sein, die zunehmend auch in mittelständischen Unternehmen implementiert wurden.² Über drei Viertel (77 %) der Unternehmen mit 1.000 bis 4.999 Mitarbeitern und fast zwei Drittel (60 %) der Unternehmen mit 500 bis 999 Mitarbeitern verfügen über ein entsprechendes CMS. Rechtlich wurde diese Entwicklung vermutlich auch durch die Erweiterung der strafrechtlichen Haftung nach § 299 StGB unterstützt, da nunmehr Bestechung und Bestechlichkeit auch außerhalb einer Wettbewerbssituation strafbar sind.

Für die meisten Unternehmen sind im Rahmen ihres korruptionsrechtlichen CMS Classroom-Schulungsmaßnahmen (70 %) ein wesentlicher Bestandteil. Zunehmend werden jedoch auch digitale Trainingsformate eingesetzt, fast zwei Drittel der Schulungsmaßnahmen erfolgen durch webbasierte Lernprogramme und Schulungsfilme (61 %).

¹ Bei Großunternehmen sind Anti-Korruptionsprogramme selbstverständlich (97 %).

² Hinweisgebersysteme waren lange Zeit umstritten, mittlerweile entwickelten sie sich zum CMS-Standard.
**Erste Erfolge im Kampf gegen Kartellrechtsverstöße**

Nicht nur in der Bekämpfung der Korruption zeigt sich eine präventive Wirkung der Compliance-Programme, sondern auch bei den Kartellrechtsverstößen gibt es Anzeichen für einen Rückgang. Der Anteil der Unternehmen, die über einen Verdacht auf einen kartellrechtlichen Verstoß berichteten, sinkt auf 8 %. Gleichzeitig halten es Unternehmen seltener für wahrscheinlich, ein Angebot zu einer wettbewerbswidrigen Absprache zu erhalten (4 %). Allerdings sank nach den Angaben der befragten Unternehmen der Marktanteil (8 %), der auf wettbewerbswidrigen Absprachen beruht, nur leicht. Wir führen diese Entwicklung auf die wachsende Verbreitung von Compliance-Programmen zurück (62 %), und zwar auch im Mittelstand.

**Marktwirtschaftlicher und rechtlicher Mehrwert von Compliance**

Unsere Studie zeigt, dass sich aus Sicht der allermeisten Unternehmen ein CMS sowohl auf inländischen als auch ausländischen Märkten vorteilhaft auswirkt. Über ein Drittel (36 %) beurteilt das eigene Compliance-Programm im Wettbewerb überwiegend als vorteilhaft und ein Viertel (24 %) erkennt hierin sogar einen klaren Vorteil. Nur 9 % berichteten über Wettbewerbsnachteile im deutschen Markt, davon nur 1 % über klare Wettbewerbsnachteile.

Überdies können wir mit unserer Studie als Erste in Deutschland aufzeigen, dass sich ein CMS nicht nur in wirtschaftlicher Hinsicht als vorteilhaft erweist, sondern auch in haftungsrechtlicher. 21 Unternehmen berichteten über ihre Erfahrungen mit den Strafverfolgungsbehörden bei Verfahren nach § 130 Abs. 1 OWiG. Über ein Drittel (37 %) der betroffenen Unternehmen gab an, dass die Tatsache, dass sie über ein CMS verfügten, die Höhe der Geldbuße positiv beeinflusst habe. Bei 43 % der Unternehmen, die ein CMS implementiert hatten, beförderte dies die Einstellung des Verfahrens. Bei jedem dritten Unternehmen hat sich zudem die nachträgliche Zusage, ein CMS einzuführen bzw. Verbesserungen vorzunehmen, auf die Höhe der Geldbuße positiv ausgewirkt; bei fast jedem zweiten Unternehmen beförderte dies die Einstellung des Verfahrens.

**Hoher Anteil statushoher interner Täter sowie der organisierten Kriminalität (OK)**

Rund die Hälfte der gegen Unternehmen gerichteten Wirtschaftsstraftaten wird von Personen aus dem eigenen Unternehmen begangen. Dabei handelte es sich in jedem vierten Fall (25 %) um eine Person aus der obersten Führungs­ebene. Empirisch gesehen sind folglich besondere Vorsicht und Sorgfalt bei der Auswahl und Überwachung von Personen in Führungs- und Vertrauenspositionen geboten. Betrachtet man die Gruppe der externen Täter, beansprucht der relativ hohe Anteil derjenigen, die vermutlich aus dem Kreis der OK stammen (19 %).

**Interne Untersuchungen sind die Regel**

In dieser Studie haben wir einen Schwerpunkt auf die forensische Praxis betroffener Unternehmen gelegt. Die Aufklärung bzw. Aufdeckung etwaiger Straftaten durch interne oder hiermit beauftragte externe Spezialisten ist für eine große Mehrheit der Unternehmen selbstverständlich (85 %). Die Leitung oblag zumeist entweder der Internen Revision (38 %) oder der Rechtsabteilung (31 %) und aufgrund des häufig anderen Aufgabenprofils seltener der Compliance-Abteilung (24 %).

Interne Untersuchungen haben vielfältige Gründe. Sie erfolgten, um arbeitsrechtliche (54 %) und strafrechtliche (64 %) Maßnahmen vorzubereiten sowie Schadensersatzforderungen durchzusetzen (63 %) und gesellschaftsrechtliche Verpflichtungen zu erfüllen (61 %). Oft wollen die betroffenen Unternehmen aus den Fällen lernen und nutzen interne Untersuchungen zur Verbesserung des internen Kontrollsystems (IKS 69 %) und zur Optimierung des CMS (55 %). Immerhin sehen fast zwei Drittel der Compliance-Programme spezielle Case Reports zur Evaluation des CMS vor (61 %).
**Bedeutung externer Ermittler**

In der Praxis wurden in über der Hälfte der Fälle zusätzlich externe Ermittler mit den Untersuchungen beauftragt (57 %). Ein Grund ist sicherlich, dass im Vergleich zur Ermittlungstätigkeit der Strafverfolgungsbehörden (sehr zufrieden: 24 %) die Unternehmen mit der hauseigenen Aufklärungsarbeit (51 %) und auch der Arbeit der hinzugezogenen externen Ermittler (46 %) häufig sehr zufrieden waren.

Die Beauftragung externer Ermittler dürfte auf die sachliche und rechtliche Komplexität vieler Fälle zurückzuführen sein, sodass sie bereits beim ersten Verdacht (41 %) oder im Laufe der internen Ermittlungen (43 %) hinzugezogen werden. Aus diesem Grund gaben die betroffenen Unternehmen am häufigsten das Erfordernis entsprechender Qualifikation an (84 %).

Als weitere Gründe nannten die betroffenen Unternehmen die höhere Objektivität externer Ermittler (56 %) und Kapazitätsgründe (35 %). Die Beauftragung externer Ermittler wurde seltener mit dem Druck von Stakeholdern (20 %) oder der Presse (5 %) begründet. Vermutlich wurden die wenigsten Fälle öffentlich bekannt.

Anders wird die Lage im Falle einer skandalisierenden Presseberichterstattung zu beurteilen sein, hier dürfte sich die Beauftragung externer Ermittler empfehlen.

**Sanktionspraxis bei Compliance-Verstößen**

Die Sanktionspraxis vieler Unternehmen ist in den vergangenen Jahren konsequenter geworden. In aller Regel erfolgt bei gravierenden Compliance-Verstößen eine Kündigung (87 %) und deutlich häufiger als vor sechs Jahren wurden zivilrechtliche Schritte eingeleitet (65 %) und eine Strafanzeige erstattet (65 %).

Die Strafanzeige erfolgte in jedem zweiten Fall nicht beim ersten Verdacht, sondern erst im Laufe (23 %) oder nach Abschluss des Verfahrens (23 %). Die Unternehmen begründeten dies mit der schnelleren Aufklärung durch interne Untersuchungen (64 %), aber nur selten mit einer mangelnden fachlichen Kompetenz der staatlichen Ermittler (8 %). Kritik an Polizei und Staatsanwaltschaft äußerten jedoch mehr als ein Viertel der Unternehmen aufgrund deren zu geringer Kenntnis über betriebswirtschaftliche Abläufe (29 %).

An dieser Stelle möchten wir uns bei den befragten Unternehmen für ihre Bereitschaft zur Teilnahme an der vorliegenden Studie bedanken. Auch diesmal haben wir uns neuen Themen gewidmet, um über die Sicht der Wirtschaft auf zentrale Fragen der Compliance- und Haftungsentwicklung zu berichten und diese zu kommentieren.

Frankfurt am Main und Halle an der Saale im Februar 2018

Claudia Nestler

Steffen Salvenmoser

Prof. Dr. jur. Kai-D. Bussmann

**Compliance-Verstöße werden zunehmend konsequenter von den Unternehmen sanktioniert. In 87 % aller Fälle erfolgte bei schwerwiegenden Verstößen eine Kündigung. In zwei Drittel der schwerwiegenden Verstöße wurde eine Strafanzeige gestellt.**
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Die Befragten stammten zu etwa einem Drittel (31%) aus dem Bereich Compliance, 27% der Befragten gehörten der Finanzabteilung an und 21% der Rechtsabteilung.

Abb. 1  Funktion der Interviewperson im Unternehmen

Mehrfachnennungen waren möglich.

Fast jedes zweite Unternehmen (46%) verfügt über Auslandsvertretungen, mehr als jedes fünfte (19%) ist weltweit vertreten. Die folgende Abbildung zeigt die Größe der befragten Unternehmen nach Anzahl der weltweit beschäftigten Mitarbeiter.


In unseren zweijährigen Studien berichten wir seit 2001 kontinuierlich über die Erfahrungen von mittelständischen und Großunternehmen rund um das Risikofeld Wirtschaftskriminalität.
Wachsende Risiken in der digitalen Wirtschaft
Während die Belastung der Unternehmen durch die Risiken klassischer Wirtschaftskriminalität abnimmt, ist ein dramatischer Anstieg von Cybercrime-Fällen zu verzeichnen.
Leichter Rückgang in der analogen Wirtschaft


Beim Diebstahl vertraulicher Kunden- und Unternehmensdaten beobachten wir langfristig ebenfalls eine positive Entwicklung (2009: 21%); der geringe Anstieg auf 7% gegenüber 2015 (5%) sollte dabei nicht überinterpretiert werden.

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3 Vgl. ebenda, S. 34 f.

<table>
<thead>
<tr>
<th>Mehrfachnennungen waren möglich.</th>
<th>2009</th>
<th>2011</th>
<th>2013</th>
<th>2015</th>
<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>alle Deliktsarten</td>
<td>61%</td>
<td>52%</td>
<td>45%</td>
<td>51%</td>
<td>45%</td>
</tr>
<tr>
<td>Vermögensdelikt</td>
<td>42%</td>
<td>32%</td>
<td>34%</td>
<td>37%</td>
<td>32%</td>
</tr>
<tr>
<td>Falschbilanzierung</td>
<td>2%</td>
<td>2%</td>
<td>2%</td>
<td>2%</td>
<td>2%</td>
</tr>
<tr>
<td>Geldwäsche</td>
<td>3%</td>
<td>5%</td>
<td>4%</td>
<td>5%</td>
<td>4%</td>
</tr>
<tr>
<td>Verstoß gegen Patent- und Markenrechte</td>
<td>23%</td>
<td>17%</td>
<td>13%</td>
<td>13%</td>
<td>13%</td>
</tr>
<tr>
<td>Industrie- und Wirtschaftsspionage</td>
<td>7%</td>
<td>5%</td>
<td>3%</td>
<td>3%</td>
<td>5%</td>
</tr>
<tr>
<td>Diebstahl vertraulicher Kunden- und Unternehmensdaten</td>
<td>21%</td>
<td>12%</td>
<td>5%</td>
<td>5%</td>
<td>7%</td>
</tr>
</tbody>
</table>

*Abb. 3  Entwicklung der Wirtschaftskriminalität 2009–2017*
Durch den Begriff „konkreter Verdacht“ sollen vage Vermutungen ausgeschlossen werden. Eine Strafanzeige war jedoch nicht Voraussetzung.

Rückgang der Verdachtsfälle


Abb. 4 Entwicklung der Verdachtsfälle 2011–2017

Mehrfachnennungen waren möglich.

Im Vergleich zu den eindeutigen Fällen berichteten die Unternehmen mit Ausnahme der Falschbilanzierung häufiger über einen Verdacht auf Geldwäsche (8%), Verstöße gegen Patent- und Markenrechte (16%), Wirtschafts- und Industrispionage (7%) und Diebstahl vertraulicher Kunden- und Unternehmensdaten (12%). Das Dunkelfeld der Wirtschaftskriminalität bleibt somit groß.

⁴ Durch den Begriff „konkreter Verdacht“ sollen vage Vermutungen ausgeschlossen werden. Eine Strafanzeige war jedoch nicht Voraussetzung.
Wachsende Bedrohung der Wirtschaft durch Cybercrime

Deutliche Zunahme der Cybercrime-Attacken
Auch diesmal haben wir untersucht, inwieweit die Unternehmen von Cybercrime betroffen waren. Deutlich zugenommen haben vor allem Computerbetrug (21%), Computersabotage und Datenveränderung (13%) sowie das Ausspähen und Abfangen von Daten (14%).

Abb. 5 Von Cybercrime betroffene Unternehmen – eindeutige Fälle 2015–2017

Stagnation bei Cybercrime-Verdachtsfällen
Bei den berichteten konkreten Verdachtsfällen (38%; 2015: 39%) ist keine vergleichbare Entwicklung zu beobachten. Hier stagniert die Betroffenheit der Unternehmen. Auch bei den einzelnen Formen von Cybercrime zeigt sich keine signifikante Entwicklung.

Der starke Anstieg bei den eindeutigen Cybercrime-Fällen kann daher auch auf einer erhöhten Awareness und verbesserten IT-Sicherheitstechnik beruhen, sodass immer mehr Cybercrime-Attacken entdeckt werden. Die Cybercrime-Fälle aus dem Dunkelfeld gelangen möglicherweise verstärkt in das Hellfeld der Unternehmen. Dies beruhigt nur bedingt, denn die Cybercrime-Bedrohungslage ist somit erwiesenermaßen sehr viel ernster, als in Unternehmen angenommen wird.

40% der Unternehmen waren vom sogenannten CEO-Fraud betroffen. Bei 5% der Unternehmen war der Angriff erfolgreich.

5 Bei Cybercrime handelt es sich um Delikte, die nicht nur durch bloße Nutzung, sondern durch gezielte Ausnutzung elektronischer Systeme und Kommunikationsmittel begangen wurden (auch: cyber-dependent crimes). Ausgeschlossen wurden Delikte, bei denen der Computer oder das Internet nur gewählt wurden, um beispielsweise einen Betrug einfacher begehen zu können.

Spezial: CEO-Fraud und Erpressungsfälle keine Seltenheit


Die Täter, die überwiegend der OK zuzurechnen sind, sammeln zunächst Informationen aus Wirtschaftsberichten der Unternehmen, aus dem Handelsregister, von der Website und aus Werbebrochüren der Unternehmen oder durch direkte Anrufe, um die sich anschließende Kommunikation mit dem Mitarbeiter aus der Finanzabteilung glaubwürdig zu gestalten. Die Täter, die überwiegend der OK zuzurechnen sind, sammeln zunächst Informationen aus Wirtschaftsberichten der Unternehmen, aus dem Handelsregister, von der Website und aus Werbebrochüren der Unternehmen oder durch direkte Anrufe, um die sich anschließende Kommunikation mit dem Mitarbeiter aus der Finanzabteilung glaubwürdig zu gestalten. 

BSI: „Social Engineering ist weiterhin eine vielfach genutzte Methode, um Cyber-Angriffe erfolgreich auszuführen oder zu unterstützen. Für Angreifer ist es einfacher, die Schwachstelle Mensch als oftmals schwächstes Glied der IT-Sicherheitskette zu überwinden, anstatt komplexe technische Sicherheitsmaßnahmen mit viel Aufwand zu umgehen.“

11 Vgl. BSI, Die Lage der IT-Sicherheit in Deutschland 2016, S. 22.
Die Zahl der Fälle hat dem Bundeskriminalamt (BKA) zufolge seit 2013 kontinuierlich zugenommen. Im Jahr 2013 wurden zwei versuchte und zwei vollendete Fälle von CEO-Fraud erfasst. Drei Jahre später registrierte das BKA dagegen bereits 51 vollendete und 291 versuchte Fälle und gelangte zu folgender Einschätzung der Sicherheitslage:


Unsere Studie zeigt das Bedrohungspotenzial des CEO-Fraud: 40% der befragten Unternehmen berichteten über einen derartigen Versuch, davon waren 5% sogar erfolgreich. Der hohe Verbreitungsgrad, aber auch die Schadensrisiken sind beunruhigend. Als gravierendstes Wirtschaftsdelikt in den letzten Jahren nannten sieben Unternehmen einen CEO-Fraud, der im Durchschnitt einen Schaden in Höhe von 4,4 Millionen Euro verursachte. Im Bereich Cybercrime sind Fälle von CEO-Fraud daher die schadensträchtigsten Delikte.


Als schwerer Fall mit erheblichen Schäden wird dagegen ein längerfristiger Systemausfall verstanden, der das Tagesgeschäft beeinträchtigt und mehrere Rechner oder sogar das gesamte Netzwerk betrifft. Ein schwerer Fall liegt auch dann vor, wenn Lösegeld gezahlt wird.

In unserer Studie berichteten insgesamt 8% der Unternehmen über leichte und schwere DDoS-Fälle und 18% über Trojaner. Zwar waren die Schäden zumeist eher geringer, aber jeweils 2% wurden schwer geschädigt. In unserer Stichprobe von 500 Unternehmen berichteten sogar vier, sie hätten das geforderte Lösegeld gezahlt.

Abb. 7 Von CEO-Fraud und Erpressungsfällen betroffene Unternehmen in den letzten zwei Jahren

Mehrfachnennungen waren möglich.

- mindestens einmal schwere Schäden durch Trojaner: 2%  
- mindestens einmal leichte Schäden durch Trojaner: 16% 
- mindestens einmal schwere Schäden aufgrund DDoS: 2% 
- mindestens einmal leichte Schäden aufgrund DDoS: 6% 
- erfolgreiche Fälle von CEO-Fraud: 5% 
- Versuche von CEO-Fraud: 40%

13 Vgl. BSI, Die Lage der IT-Sicherheit in Deutschland 2016, S. 20 und 29.  
14 Vgl. ebenda, S. 29.
Hohe Einzelschäden durch Wirtschaftskriminalität


Die von den Unternehmen bezifferten Schäden aufgrund von Cybercrime fallen im Vergleich zu denen aufgrund analoger Kriminalität auch 2017 deutlich geringer aus. Die betroffenen Unternehmen schätzten die durch Cybercrime verursachten Schäden auf durchschnittlich 183.000 Euro. Allerdings waren sie auch hier in Einzelfällen deutlich höher. 6% berichteten über Schadensfolgen in Höhe von 500.000 bis 2 Millionen Euro. In einem Fall stieg die Schadensbilanz auf beachtliche 10 bis 50 Millionen Euro. Auch kann es durch CEO-Fraud zu erheblichen Verlusten kommen, wie wir bereits berichtet haben (siehe Seite 19 f.).

15 Bei 49% der schwersten Fälle handelte es sich um ein Vermögensdelikt, bei 16% um wettbewerbswidrige Absprachen und bei 9% um Korruption.
Compliance-Programme weiterhin im Aufwind
Compliance und Compliance-Management-Systeme sind zur Selbstverständlichkeit geworden. Compliance wird als klarer Wettbewerbsvorteil empfunden und nicht mehr als „Geschäftsverhinderung“.
Ausweitung des Anwendungsbereichs von CMS

Compliance-Programme haben sich in der deutschen Wirtschaft etabliert. Drei Viertel der Unternehmen (75%) mit mehr als 500 Mitarbeitern verfügen über ein CMS und bei weiteren 10% befindet sich eines in der Planung. Nahezu alle Großunternehmen mit mehr als 10.000 Mitarbeitern verfügen über ein CMS (97%), während von den Unternehmen mit 500 bis 999 Mitarbeitern nur knapp zwei Drittel (60%) Compliance-Programme implementiert haben. Wir beobachten weiterhin eine Top-down-Entwicklung, die insbesondere auf den höheren rechtlichen und öffentlichen Druck auf größere Unternehmen zurückzuführen ist.16 Größere Unternehmen operieren häufiger international, unterliegen daher vermehrt der Aufsicht der US-amerikanischen Behörden und dem strikten Reglement des FCPA.17 Diesen Druck geben die Unternehmen an wirtschaftlich mit ihnen verbundene kleinere Unternehmen weiter.18

Ferner setzt sich der Trend zu einer Ausweitung der Compliance-Programme auf zusätzliche Deliktsfelder fort. Unternehmen richten ihren Compliance-Fokus verstärkt auf die Zurückdrängung von Korruption (83%) und Kartellrechtsverletzungen (62%). Auch den Risiken der Geldwäsche widmet sich eine wachsende Zahl von Compliance-Programmen, zwei Drittel (65%) erstrecken sich hierauf. Dies könnte insbesondere auf die Ausweitung des Geltungsbereichs des Geldwäschege setzes (GwG) im Zuge der Umsetzung der 4. EU-Geldwäschereichtlinie zurückzuführen sein. Bei börsennotierten Unternehmen19 erhält die Prävention gegen Insidertransaktionen (§ 38 WpHG) einen höheren Stellenwert, drei Viertel verfügen über ein derart ausgerichtetes CMS (76%).

Nahezu alle Großunternehmen mit mehr als 10.000 Mitarbeitern verfügen über ein CMS (97%).

17 28 % der befragten Unternehmen unterliegen dem US-amerikanischen FCPA.
19 Die entsprechende Frage wurde nach der Börsennotierung gefiltert. In der Stichprobe sind 21 % der Unternehmen börsennotiert.
In die diesjährige Studie haben wir auch die Prävention gegen Betrug und andere Vermögensdelikte sowie gegen Cybercrime aufgenommen. Gegen Vermögenskriminalität wappnen sich drei Viertel der Unternehmen durch ein entsprechendes CMS (74 %). Demgegenüber ist der Schutz vor Cybercrime weiterhin eher unterentwickelt (58 %), wie auch unsere vorangegangene Studie ergab.\footnote{Vgl. PwC, Wirtschaftskriminalität in der analogen und digitalen Wirtschaft, 2016, S. 32 ff.}

Auch zur Vermeidung von Verstößen gegen internationale Finanz- und Wirtschaftssanktionen besteht weiterhin Handlungsbedarf bei der Compliance-Entwicklung, 49 % der befragten Unternehmen verfügen über ein entsprechendes CMS, obwohl von diesen internationalen Sanktionen nicht nur Unternehmen des Finanzsektors tangiert sind, sondern Unternehmen fast aller Branchen.

### Abb. 9 Status des CMS nach Deliktsgruppen

<table>
<thead>
<tr>
<th>Deliktsgruppe</th>
<th>2015</th>
<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Korruption</td>
<td>79 %</td>
<td>83 %</td>
</tr>
<tr>
<td>Kartellrechtsverletzungen</td>
<td>56 %</td>
<td>62 %</td>
</tr>
<tr>
<td>Geldwäsche</td>
<td>58 %</td>
<td>65 %</td>
</tr>
<tr>
<td>strafbarer Insiderhandel (börsennotierte Unternehmen)</td>
<td>67 %</td>
<td>76 %</td>
</tr>
<tr>
<td>Datenschutzverletzungen</td>
<td>89 %</td>
<td>87 %</td>
</tr>
<tr>
<td>Verstöße gegen internationale Finanz- und Wirtschaftssanktionen</td>
<td>54 %</td>
<td>49 %</td>
</tr>
<tr>
<td>Vermögensdelikte\footnote{1}</td>
<td>74 %</td>
<td></td>
</tr>
<tr>
<td>Cybercrime</td>
<td>58 %</td>
<td></td>
</tr>
</tbody>
</table>

Basis: Unternehmen mit CMS

\footnote{1} Keine Daten für 2015.
Wahrgenommene Schwächen im Compliance-Management

Viele Unternehmen dehnen ihr CMS nicht nur auf weitere Rechtsgebiete aus, sondern arbeiten auch an ihren Schwachpunkten, wie wir anhand einiger Statements aus unseren vertieften Interviews zeigen können:

### Kommunikationsprobleme

„Kommunikation ist definitiv der Schwachpunkt – dass nicht immer alles da ankommt, wo es ankommen soll, und vielleicht auch nicht in der Form ankommt, wie es ankommen soll.“

**Strategie:** „An der Art der Vermittlung müssen wir ganz stark arbeiten, also daran, wie wir es besser in den Arbeitsalltag integriert bekommen, ohne immer Tausende von Checklisten ausfüllen zu müssen, sondern dass wir auch wirklich sicher gehen können, dass verstanden wurde, was in welchem Arbeitsumfeld wichtig ist zu wissen.“ (Pharma und Gesundheitswesen, mehr als 10.000 Mitarbeiter weltweit)

„Informationsdurchlässigkeit. Das heißt, wir sind ein stark diversifiziertes Unternehmen und haben das Problem, dass Informationen, die in einem Unternehmensteil gut verbreitet sind, in einem anderen Unternehmensteil eher noch nicht verankert sind. Also es ist im Prinzip ein Kommunikationsproblem.“

### Mangelnde Konsistenz der Regelungen


**Strategie:** „Wir sind dabei, eine integrierte Software einzuführen, die ebendiese Querbezüge zwischen den Teilinstrumenten überwacht bzw. erlaubt zu überwachen und uns aktiv auf Inkonistenzen hinweist.“ (Versicherungswirtschaft, mehr als 10.000 Mitarbeiter weltweit)

### Mangelnde Integration in Geschäftsprozesse

„Also ich glaube, das Problem bei Compliance-Systemen insgesamt ist immer, sie am Ende in die letzte Verästelung des Konzerns zu tragen. Und das kann man nicht dadurch machen, dass man irgendwelche Themen wiederholt.“

**Strategie:** „Schulungen sind natürlich auch Mittel, aber im Grunde funktioniert das am Ende nur, wenn man in die Geschäftsprozesse geht. Je besser die Prozesse sind und je besser die Prozesse selbst Kontrollen beinhalten, umso besser wird man auch Compliance in den Alltag integrieren können. Wenn man es immer nur auf der „Ich-denke-mal-dr-an-da-war-doch-noch-Compliance“-Ebene belässt, dann wird das immer dazu führen, dass im Zweifel jemand nicht daran denkt. “ (Handel und Konsum, mehr als 10.000 Mitarbeiter weltweit)

Die qualitativen Interviews zeigen, dass die Umsetzung des CMS im Alltag häufig noch auf Hindernisse stößt.
Umsetzung in einem global agierenden Unternehmen

„Wenn Sie im Dax oder MDax gelistet sind und global operieren, ist es schwierig, in jeder letzten Einheit in Timbuktu ein Compliance-Management-System zu haben, insbesondere was das Berichtswesen angeht, das genauso gut funktioniert wie in Deutschland – weil die Wege einfach weiter sind.“

Strategie: „Ich glaube, alles, was global ist, lässt sich nur IT-basiert heben, indem man sagt, man braucht IT-basierte Lösungen für das Berichtswesen beispielsweise und IT-basierte Lösungen für die Information von Mitarbeitern, und das personenunabhängig gestaltet.“ (Automobilindustrie, mehr als 10.000 Mitarbeiter weltweit)

„Ich glaube, das Wichtigste, was uns noch ein bisschen fehlt, ist die Compliance aus einem Guss, also als ein multinationales Unternehmen mit Produktions- und Vertriebsstandorten in so ziemlich jedem Land der Erde – ich glaube, in über 170 Ländern. Weil die Compliance-Organisation in dieser jetzigen Form noch nicht sehr alt ist und auch noch keine absolute Homogenität im Wissensstand der Kollegen, die Compliance in den Ländern oder an den Standorten betreiben, vorhanden ist, fehlt es noch ein bisschen an dem einheitlichen Guss, an der gemeinsamen Schlagkraft.“

Strategie: „Es soll jetzt nicht bedeuten, dass die Kollegen deswegen nicht motiviert oder nicht kompetent sind, aber es fehlt so ein bisschen dieser einheitliche Auftritt und auch die einheitliche Sprache, weil doch für viele Themen, die wir lokal lösen, da nicht immer eine Einheitlichkeit gewährt ist […]“ (Technologiewirtschaft, 5.000 bis 10.000 Mitarbeiter weltweit)


Strategie: „Es bleibt nichts anderes übrig, als noch intensiver die Zahlen zu hinterfragen, vielleicht auch mit Revisionsarbeit – und das ist natürlich auch aufwendig, zu hinterfragen und die Dinge abzufragen. Das ist ein großes Problem.“ (Industrielle Produktion, mehr als 10.000 Mitarbeiter weltweit)

Mangelnde Awareness

„[…] und überhaupt ein Gefühl dafür zu bekommen, dass Handlungsbedarf vorhanden ist und dass man da was tun muss und dass es, wie es in mancher Beziehung bisher gelaufen ist, so nicht weitergehen kann.“

Strategie: „Wir haben jetzt ein Vormittagsseminar in Planung, das wir gemeinsam mit einem Juristen, also hausintern, organisieren, an dem sich Führungskräfte beteiligen können, aber auch Mitarbeiter, und wir werden Kurzschulungen anbieten und das Ganze noch mal ein bisschen auf die Agenda packen.“ (Industrielle Produktion, 1.000 bis 4.999 Mitarbeiter weltweit)

„[…] und manche Situationen sind noch nicht hundertprozentig in den Köpfen.“

Strategie: „Wir machen im Gegensatz zu früher in dem Bereich wesentlich mehr webbasierte Schulungen, webbasierte Anwendungen, webbasierte Geschichten, zum Teil mit Verpflichtungskarakter.“ (Technologiewirtschaft, 1.000 bis 4.999 Mitarbeiter weltweit)
Gestiegene Anforderungen an Compliance-Programme

Auch im deutschen (Neben-)Strafrecht sind die Anforderungen an ein CMS höher geworden. So hat die Rechtsprechung entschieden, dass Aufsichtsmaßnahmen im Sinne des § 130 Abs. 1 OWiG nicht nur innerhalb eines Unternehmens sicherzustellen sind, sondern sogar im Einzelfall konzernweite Aufsichtspflichten bestehen. Für viele Muttersgesellschaften dürfte die konzernweite Sicherstellung der Einhaltung strafrechtlicher Vorschriften eine große Herausforderung darstellen.


Das rechtliche Umfeld hat sich vor allem durch die hochstrichterliche Rechtsprechung mittlerweile stark verändert. Ein Drittel der befragten Unternehmen (34%) stellt daher zu Recht eine Zunahme der Anforderungen in den vergangenen fünf Jahren fest, 59% gehen sogar von einer starken Zunahme aus. Nur 6% können keine Veränderungen erkennen.

Compliance-Budgets

Viele Unternehmen statten mittlerweile ihre Compliance-Programme mit einem beachtlichen Budget aus.

Das durchschnittliche Budget für die Personal- und Sachmittel einer Compliance-Abteilung beläuft sich unabhängig von der organisatorischen Zuordnung auf 1,9 Millionen Euro, allerdings hängt der Durchschnittswert wesentlich von der Größe des Unternehmens ab. Die Spannbreite der durchschnittlichen Budgets reicht von 380.000 Euro bei Unternehmen mit 500 bis 999 Mitarbeitern bis zu 7,41 Millionen Euro bei Großunternehmen mit mehr als 10.000 Mitarbeitern.
Erhöhung der Budgets für Personal- und Sachmittel

Die Einschätzung, dass die Anforderungen an CMS stetig wachsen, spiegelt sich auch in der verbesserten Personal- und Sachmittelausstattung des CMS vieler Unternehmen wider. Mehr als jedes zweite Unternehmen hat sein Budget hierfür in den letzten zwei Jahren leicht (33 %) oder gar deutlich aufgestockt (22 %). Bei 43 % der Unternehmen blieb das Budget unverändert, nur 2 % berichteten über eine leichte Reduzierung.

Eine Tendenz zur deutlichen Aufstockung des Budgets für die Personal- und Sachmittelausstattung des CMS besteht in Unternehmen aller Größen, am deutlichsten jedoch bei Großunternehmen mit mehr als 10.000 Mitarbeitern (29 %), am schwächsten bei mittelständischen Unternehmen mit 500 bis 999 Mitarbeitern (15 %). Über eine leichte Erhöhung des Etats berichteten jedoch beide Unternehmensgrößen nahezu gleichermaßen (44 % bzw. 38 %).
Die Ergebnisse unserer Studie lassen vermuten, dass die Budgets für den Ausbau der Compliance-Organisation in den nächsten Jahren sowohl bei Großunternehmen als auch mittelständischen Unternehmen weiter steigen werden. Zwar wurde in unseren vertieften Interviews vereinzelt vermutet, dass der große Compliance-Hype vorbei ist:

„Ich glaube, dass ein gewisses Verständnis und auch eine gewisse Sättigung dafür inzwischen am Markt ist [...]. Und der große Hype oder die große Umsetzungsphase ist, glaube ich, schon vorbei.“ (Automobilindustrie, 1.000 bis 4.999 Mitarbeiter weltweit)

Gegen diese Einschätzung spricht zurzeit jedoch, dass über 90% der Unternehmen eine (starke) Zunahme der Anforderungen an CMS in den vergangenen fünf Jahren beobachteten (siehe Seite 28), die vielfach einen weiteren Ausbau des Compliance-Bereichs erfordern. Auch führt die Implementierung eines CMS in den Unternehmen weiterhin zu einer Sensibilisierung für Compliance-Risiken und organisatorische Schwachstellen, auf die Unternehmen zu reagieren haben. Zudem dürfte die Entwicklung auch aufgrund des Generationswechsels auf der Führungsebene kaum an Schwung verlieren; Manager der nachfolgenden Generation dürften im Allgemeinen offener für den „Compliance-Wandel“ sein und diesen eher forciert.

Jedenfalls fanden sich auch in unseren vertieften Interviews noch keine Hinweise auf eine überwiegende Stagnation oder gar rückläufige Entwicklung der Budgetierung (siehe auch Seite 31). Vielmehr bestehen bei vielen Unternehmen Überlegungen, das Budget für die Personal- und Sachmittel- ausstattung des CMS eher aufzustocken. Hierzu einige Statements:

„Es wird immer wichtiger. Und es wird ein höherer Kostenblock werden. Wir sitzen jetzt in Budgetgesprächen und wir stocken die Budgets enorm auf, was Compliance betrifft.“ (sonstige Branche, mehr als 10.000 Mitarbeiter weltweit)

„Ich glaube, dass man langfristig ohne nicht mehr überleben kann als Unternehmen, insbesondere in unserer Branche. Ich sehe da eher einen weiteren Ausbau, also ich sehe da noch keine Stagnation.“ (Automobilindustrie, mehr als 10.000 Mitarbeiter weltweit)

„Compliance wird weiter an Bedeutung gewinnen und auch mehr an Akzeptanz. Das merkt man auch – also gerade jetzt. Wir haben ein neues Management bekommen und die ersten Rückfragen an Legal oder Compliance sind immer: Was haben wir? Wie arbeitet ihr?“ (Industrielle Produktion, 1.000 bis 4.999 Mitarbeiter weltweit)

Allerdings suchen alle Unternehmen nach einer angemessenen Balance zwischen Aufwand und Nutzen, hierzu ein Statement eines mittelständischen Unternehmens:

„Insbesamt, denke ich, wird man da den Kompromiss finden müssen zwischen Bürokratie und dem damit verbundenen Aufwand und der Sinnhaftigkeit der Regelungen. Natürlich muss Compliance sein, und je sensibler die Bereiche sind, in denen Compliance-Raum greift und angewendet werden will, umso dringender ist es [...]. Aber man muss auch immer den Aufwand für die Wirtschaft im Kopf behalten.“ (Maschinenbau und Metallindustrie, 500 bis 999 Mitarbeiter weltweit)

Die eigentlich kritische Frage ist jedoch, ob eine schlechtere unternehmerische oder volkswirtschaftliche Lage zu einer Reduzierung des CMS-Budgets führen würde. Hierauf fanden wir in unseren vertieften Interviews keine belastbare Antwort und es gab nur wenige kritische Einschätzungen:

„Compliance-Organisationen sind sehr viel selbstverständlicher geworden. Sie unterliegen in vielen Unternehmen mittlerweile den gleichen Mechanismen wie andere Organisationen. Das heißt, wenn Sie Budget oder Personal annehmen, dann unterliegen sie prinzipiell den gleichen Entwicklungen – geht es dem Unternehmen schlecht, wird auch überlegt werden müssen, bei Compliance einzusparen. Das ist kein per se ausgeschlossener Bereich mehr.“ (Handel und Konsum, mehr als 10.000 Mitarbeiter weltweit)

„Sollte der internationale Wettbewerb mal wieder härter werden und Deutschland vielleicht nicht mehr so weit vorn liegen, dann wird auch an entsprechenden Stellen mehr auf Kosten geachtet werden müssen und dann muss man, glaube ich, schon besser darauf aufpassen, dass man nicht zu ausfernd Compliance betreibt, also nicht mit Kanonen auf Spatzen schießt.“ (Maschinenbau und Metallindustrie, 500 bis 999 Mitarbeiter weltweit)

Personelle Aufstockung des CMS

Konkret zeigt sich dieser positive Trend auch bei der Personalausstattung der Compliance-Programme. Zwar haben einige Großunternehmen die Personalausstattung nach dem Abschluss nationaler und internationaler Strafverfahren zurückgefahren, aber dies lässt sich nicht verallgemeinern. Unsere Studie zeigt vielmehr im Vergleich zu den Ergebnissen von 2013 eine klare Tendenz zur personellen Aufstockung.\(^{24}\)

Im Durchschnitt kommen heute rund 1.500 Mitarbeiter auf eine volle bzw. zwei halbe Compliance-Officer-Stellen,\(^{25}\) während es in Deutschland vor vier Jahren noch rund 2.400 Mitarbeiter waren.\(^{26}\) Als neuer Orientierungswert für eine personelle Good Practice kann daher gelten, im Durchschnitt eine Compliance-Officer-Stelle für etwa 1.500 Mitarbeiter vorzusehen.

Die Mehrheit der Unternehmen sieht zudem eine deutlich bessere Relation vor. So kommt bei einem Drittel der Unternehmen (33%) auf 500 Mitarbeiter und bei weiteren 29% auf 500 bis 1.000 Mitarbeiter eine Compliance-Officer-Stelle.

Im Durchschnitt kommen heute rund 1.500 Mitarbeiter auf eine volle bzw. zwei halbe Compliance-Officer-Stellen, während es vor vier Jahren noch rund 2.400 Mitarbeiter waren.

\(^{25}\) In unsere Berechnung sind Teilzeitstellen mit 0,5 eingegangen.
\(^{26}\) In international operierenden Unternehmen kommen auf eine Compliance-Officer-Stelle weltweit 2.100 Mitarbeiter (2013: 2.200 Mitarbeiter weltweit).
Trend: Compliance in der Lieferkette
Einer deutlichen Mehrheit der Unternehmen (82 %) ist mittlerweile wichtig bzw. sehr wichtig, dass ihre Lieferanten und Dienstleister über ein CMS verfügen oder eines einführen.

Viele Unternehmen berichteten, dass es inzwischen zur Routine gehöre, Compliance-Standards von ihren Lieferanten und Dienstleistern einzufordern.
Bereits in unserer vorangegangenen Studie zeigte sich, dass Compliance auch durch den Markt vorangetrieben wird.  
Die meisten Unternehmen versuchen den Compliance-Risiken auch in ihrem geschäftlichen Umfeld konsequent zu begegnen. In unseren vertieften Interviews wurde dies vor allem mit der wachsenden Erwartung im Markt und etwaigen Reputations- und Haftungsrisiken begründet:

„[…] die Verantwortung geht heute eben ein bisschen weiter als nur bis zum nächsten, sondern sie sind schon in der Kette für uns verantwortlich. Verantwortung greift eben heute tiefer.“ (Industrielle Produktion, mehr als 10.000 Mitarbeiter weltweit)

„Das ist zum einen ja ein Reputationsanspruch, den man verfolgt. Zum anderen hat das natürlich auch massive rechtliche Aspekte. Sie haften eben auch für alle Handlungen Ihrer Geschäfts- partner. – Ja, das sind die Hauptaspekte.“ (Automobilindustrie, mehr als 10.000 Mitarbeiter weltweit)

„Und das andere Thema ist, dass natürlich auch viele Kunden wiederum von uns erwarten, dass wir die Zusagen, die wir unseren Kunden machen, an unsere Lieferanten entsprechend weitergeben.“ (Automobilindustrie, 1.000 bis 4.999 Mitarbeiter weltweit)

Diese Statements spiegeln die Ergebnisse unserer repräsentativen Befragung wider, 82% der Unternehmen gaben an, ihnen sei sehr wichtig bzw. wichtig, dass ihre Lieferanten und Dienstleister über ein CMS verfügen oder eines einführen wollen. Dies bedeutet gegenüber unserer Studie von 2015 (72%) eine Zunahme um zehn Prozentpunkte. Viele Unternehmen berichteten in unseren vertieften Interviews darüber, dass es mittlerweile Routine sei, Compliance-Standards von ihren Lieferanten und Dienstleistern einzufordern.

„Die Unternehmen haben natürlich verschiedene Levels eines Compliance-Managements, aber mir sind keine Probleme dahin gehend bekannt, dass sich jemand dem komplett verweigern würde.“ (Industrielle Produktion, 1.000 bis 4.999 Mitarbeiter weltweit)

„Ein oder zwei Lieferanten sind mir jetzt in der Vergangenheit bekannt gewesen, die sich etwas dagegen gewehrt haben, aber mittlerweile auch darauf eingestiegen sind.“ (Pharma und Gesundheitswesen, mehr als 10.000 Mitarbeiter weltweit)

„Viele Lieferanten, die wir haben, sehen das Thema auch positiv und sind offen für die Diskussion.“ (Handel und Konsum, mehr als 10.000 Mitarbeiter weltweit)

Über die Hälfte der Großunternehmen mit mehr als 10.000 Mitarbeitern erwartet von ihren Lieferanten und Dienstleistern, dass sie über ein CMS verfügen (55%). Dieser Druck geht zunehmend auch von mittelständischen Unternehmen aus. Als sehr wichtig bezeichneten dies über ein Drittel der Unternehmen mit 1.000 bis 4.999 Mitarbeitern (36%) und über ein Viertel der Unternehmen mit 500 bis 999 Mitarbeitern (28%).

In unseren vertieften Interviews berichteten einige Unternehmen allerdings über gelegentlich noch auftretende Probleme mit kleineren und mittelständischen Unternehmen:

„Das Problem, das wir häufig antreffen, ist die Größe des Lieferanten – dass Sie besonders kleine Betriebe haben, die sich mit der Umsetzung eines Compliance-Management-Systems verständlicherweise schwer tun [...]“ (Maschinenbau und Metallindustrie, 500 bis 999 Mitarbeiter weltweit)

„Ich glaube, das kommt natürlich auf die Größe des Zulieferers oder des Vertragspartners an. Die Größeren, die sich auch in einer Konzernstruktur befinden, haben damit weniger ein Problem, die kennen das, die haben ähnliche Systeme. Kleinere, insbesondere Mittelständler und Einzelkämpfer, haben natürlich ganz erhebliche Probleme – das ist auch zu verstehen.“ (sonstige Branche, mehr als 10.000 Mitarbeiter weltweit)

„Also ich habe auch das Gefühl, dass bei kleineren Unternehmen, insbesondere Mittelständlern und Einzelkämpfern, das Verständnis nicht da ist – man unterzeichnet die Dokumente, aber hält sich oft nicht daran.“ (sonstige Branche, mehr als 10.000 Mitarbeiter weltweit)

Compliance-Vertragskonditionen

Für ein Drittel der Unternehmen gehört es mittlerweile zur alltäglichen Gestaltung ihrer Geschäftsbeziehung mit Lieferanten und Dienstleistern, sich die Einhaltung eines Code of Conduct vertraglich zusichern zu lassen (allgemeine Verpflichtungserklärung, 33%):

Im Vergleich zu unserer Studie 2015 zeigt sich allerdings eine Tendenz, nunmehr auch über Haftungsklauseln die Umsetzung eines CMS bei Lieferanten und Dienstleistern durchzusetzen (37%). Darüber hinaus lassen sich Unternehmen in ihren Verträgen häufiger ein Recht auf anlassbezogene Prüfungen zusichern, bei einem Viertel der Unternehmen gehört diese sogenannte Audit Clause zur gängigen Praxis (26%). Ferner werden Nachweise über Compliance-Richtlinien und entsprechende Schulungen verlangt (17%). Mehr als jedes zehnte Unternehmen sieht in seinen Verträgen des Weiteren einen Nachweis bestimmter CMS-Zertifizierungen (14%) und Risikoanalysen auch aufseiten des Auftragnehmers vor (13%).
Für ein Drittel der Unternehmen gehört es mittlerweile zur alltäglichen Gestaltung ihrer Geschäftsbeziehung mit Lieferanten und Dienstleistern, sich die Einhaltung eines Code of Conduct vertraglich zusichern zu lassen.

Abb. 17  Verbreitung von Compliance-Vertragskonditionen

<table>
<thead>
<tr>
<th>Einschätzung der Verbreitung: regelmäßig</th>
<th>2015</th>
<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>allgemeine Verpflichtungs-erklärung zur Compliance</td>
<td>31 %</td>
<td>33 %</td>
</tr>
<tr>
<td>Nachweis geeigneter Compliance-Richtlinien und -Schulungen</td>
<td>15 %</td>
<td>17 %</td>
</tr>
<tr>
<td>Risikoanalysen auch aufseiten des Auftragnehmers</td>
<td>13 %</td>
<td>13 %</td>
</tr>
<tr>
<td>Nachweis eines Hinweisgebersystems</td>
<td>6 %</td>
<td>9 %</td>
</tr>
<tr>
<td>Nachweis bestmter Zertifizierungen des CMS</td>
<td>16 %</td>
<td>14 %</td>
</tr>
<tr>
<td>Recht auf anlassbezogene Prüfung</td>
<td>20 %</td>
<td>26 %</td>
</tr>
<tr>
<td>Haftungsklauseln bei Compliance-Verstößen</td>
<td>28 %</td>
<td>37 %</td>
</tr>
</tbody>
</table>

Basis: Unternehmen mit CMS

Insbesondere Großunternehmen mit mindestens 5.000 Mitarbeitern nutzen ihren vertraglichen Gestaltungsspielraum. Deutlich häufiger als noch in unserer vorangegangenen Befragung sehen Verträge von Großunternehmen mit über 10.000 Mitarbeitern eine Compliance-Verpflichtungserklärung vor, bei mehr als der Hälfte ist dies üblich (59 %). Auch Klauseln, die eine anlassbezogene Prüfung ermöglichen, werden bei Großunternehmen mit über 5.000 Mitarbeitern immer gebräuchlicher (45 % bzw. 39 %). Außerdem sehen vor allem Großunternehmen bei ihren Lieferanten und Dienstleistern entsprechende Compliance-Haftungsklauseln vor (60 % bzw. 41 %).

In den letzten zwei Jahren ist auch bei mittelständischen Unternehmen eine ähnliche Entwicklung festzustellen. So enthalten ihre Verträge mit Lieferanten und Dienstleistern gegenüber 2015 sehr viel häufiger Compliance-Haftungsklauseln, ein Anstieg um 16 Prozentpunkte (37 % bzw. 39 %). Über die Vertragsgestaltung üben somit nicht nur Großunternehmen einen Compliance-Druck auf Lieferanten und Dienstleister aus, sondern auch mittelständische Unternehmen.

Im Zuge des allgemeinen Trends, sich in Verträgen Compliance zusichern zu lassen, zeichnen sich allerdings nunmehr Konflikte zwischen verschiedenen Compliance-Standards ab. Hier einige Statements aus unseren vertieften Interviews:

**Konflikte zwischen CMS-Standards**

„Wir haben die meisten Probleme und Widerstände dort, wo wir natürlich unsere Vorgaben vereinbart haben wollen, wie zum Beispiel Code of Conduct oder Mindestlohnzusagen, und die Lieferanten dann immer das gleiche Problem haben – die haben einen eigenen Code of Conduct, und wir kommen dann an das Thema: Ja, grundsätzlich sind wir mit dem einverstanden, aber wir können das jetzt nicht genauso zusagen, wie ihr das wollt, weil wir das sonst für jeden Kunden separat machen müssen.“ (Automobilindustrie, 1.000 bis 4.999 Mitarbeiter weltweit)
Diese Probleme ließen sich weitgehend vermeiden, wenn die Unternehmen ihr CMS unabhängig überprüfen und/oder zertifizieren lassen würden, um eine gemeinsame Verständnisgrundlage zu fördern und die gegenseitige Anerkennung der vorhandenen Compliance-Programme zu erleichtern. Allerdings hat bislang nur knapp die Hälfte der befragten Unternehmen eine unabhängige Prüfung nach dem IDW Prüfungsstandard 980 oder eine Zertifizierung gemäß ISO 19600 durchführen lassen (siehe Seite 46 f., 47%).

Der Verzicht darauf führt zwangsläufig zu einem Wildwuchs von Compliance-Standards und entsprechender Vertragskonditionen. Auch setzen sich Unternehmen der Marktmacht größerer Kunden aus, wie folgende Aussage illustriert:

„Wir versuchen jetzt eher auf Themen wie gegenseitige Anerkennung zu gehen, dass wir sagen: Ihr erkennt unseren Code of Conduct an, wir erkennen euren Code of Conduct an – und müssen dann nicht immer wieder Details aus diesen Regelungen bei unseren Lieferanten neu verhandeln. Das wäre die beste Vorgehensweise. Aber das klappt leider nicht immer. Vor allem große Kunden mit entsprechender Verhandlungsmacht bestehen einfach darauf, dass ihre Sachen so akzeptiert werden, wie sie sind.“ (Automobilindustrie, 1.000 bis 4.999 Mitarbeiter weltweit)

Darüber hinaus sehen sich Unternehmen mit der zunehmenden Verbreitung von Compliance-Vertragskonditionen einer wachsenden Regelungsunübersichtlichkeit ausgesetzt:

**Abb. 18 Regelmäßige Compliance-Vertragskonditionen, nach Unternehmensgröße**

<table>
<thead>
<tr>
<th>Basis: Unternehmen mit CMS</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>2015</th>
<th>1.000–4.999 Mitarbeiter weltweit</th>
<th>&gt;10.000 Mitarbeiter weltweit</th>
<th>500–999</th>
</tr>
</thead>
<tbody>
<tr>
<td>allgemeine Verpflichtungs-erklärung zur Compliance</td>
<td>51%</td>
<td>46%</td>
<td>17%</td>
</tr>
<tr>
<td>Recht auf anlassbezogene Ad-hoc-Prüfung</td>
<td>31%</td>
<td>31%</td>
<td>24%</td>
</tr>
<tr>
<td>Haftungsklauseln bei Compliance-Verstößen</td>
<td>43%</td>
<td>23%</td>
<td>21%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2017</th>
<th>1.000–4.999 Mitarbeiter weltweit</th>
<th>&gt;10.000 Mitarbeiter weltweit</th>
<th>500–999</th>
</tr>
</thead>
<tbody>
<tr>
<td>allgemeine Verpflichtungs-erklärung zur Compliance</td>
<td>59%</td>
<td>38%</td>
<td>25%</td>
</tr>
<tr>
<td>Recht auf anlassbezogene Ad-hoc-Prüfung</td>
<td>39%</td>
<td>45%</td>
<td>28%</td>
</tr>
<tr>
<td>Haftungsklauseln bei Compliance-Verstößen</td>
<td>41%</td>
<td>60%</td>
<td>37%</td>
</tr>
</tbody>
</table>

„Was wir heute erleben, ist, dass Kunden, aber auch Lieferanten versuchen, uns ihre jeweiligen Verhaltenskodizes quasi unterzujubeln, indem sie uns bitten, diese schriftlich anzuerkennen. Und wir versuchen, das in der Regel abzuwenden, indem wir auf unsere eigenen Compliance-Richtlinien verweisen, weil wir sonst anfangen, Tausende von Verhaltenskodizes anderer Firmen zu unterschreiben [...]“ (Technologie wirtschaft, 5.000 bis 10.000 Mitarbeiter weltweit)

„Also mittlerweile ist es so, dass es meiner Meinung nach auch ein bisschen überhandnimmt, dass beispielsweise große Kunden ihren Lieferanten vorschreiben, ihren Verhaltenskodex zu übernehmen. Und das kann natürlich niemand machen – dann hat man sich nachher einverstanden erklärt mit hundert verschiedenen Verhaltenskodexen. Also das sehe ich grundsätzlich schon als Problem an.“ (Industrielle Produktion, 1.000 bis 4.999 Mitarbeiter weltweit)
Compliance beats Corruption
Das Eis scheint gebrochen, alle von uns erhobenen Kennwerte deuten auf eine sinkende Korruptionsbelastung der deutschen Wirtschaft hin.

Durch Korruption wurden nur 6% der Unternehmen betroffen und gegenüber 2015 nahmen die Verdachtsfälle von 19% auf 11% ab.
Entwicklung der Korruptionsrisiken


<table>
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<tr>
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<tbody>
<tr>
<td>Keine Daten für 2005.</td>
<td>23 %</td>
<td>29 %</td>
<td>26 %</td>
<td>26 %</td>
<td>21 %</td>
<td>9 %</td>
<td>7 %</td>
</tr>
<tr>
<td>Keine Daten für 2007 und 2009.</td>
<td>15 %</td>
<td>16 %</td>
<td>17 %</td>
<td>11 %</td>
<td>14 %</td>
<td>8 %</td>
<td>6 %</td>
</tr>
</tbody>
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<table>
<thead>
<tr>
<th>Korruptionssituation (mindestens einmal)</th>
<th>2005</th>
<th>2007</th>
<th>2009</th>
<th>2011</th>
<th>2013</th>
<th>2015</th>
<th>2017</th>
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<tbody>
<tr>
<td>26 %</td>
<td>15 %</td>
<td>19 %</td>
<td>11 %</td>
<td>11 %</td>
<td>12 %</td>
<td>13 %</td>
<td>6 %</td>
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<tr>
<td>7 %</td>
<td>7 %</td>
<td>6 %</td>
<td>6 %</td>
<td>5 %</td>
<td>6 %</td>
<td>5 %</td>
<td>6 %</td>
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<tr>
<td>26 %</td>
<td>15 %</td>
<td>19 %</td>
<td>11 %</td>
<td>11 %</td>
<td>12 %</td>
<td>13 %</td>
<td>6 %</td>
</tr>
<tr>
<td>7 %</td>
<td>7 %</td>
<td>6 %</td>
<td>6 %</td>
<td>5 %</td>
<td>6 %</td>
<td>5 %</td>
<td>6 %</td>
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</tbody>
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</tr>
</thead>
<tbody>
<tr>
<td>23 %</td>
<td>29 %</td>
<td>26 %</td>
<td>26 %</td>
<td>21 %</td>
<td>9 %</td>
<td>7 %</td>
<td></td>
</tr>
<tr>
<td>15 %</td>
<td>16 %</td>
<td>17 %</td>
<td>11 %</td>
<td>14 %</td>
<td>8 %</td>
<td>6 %</td>
<td></td>
</tr>
</tbody>
</table>

1 Keine Daten für 2005.
Der Mittelstand holt auf

Compliance-Programme erstrecken sich heute in der Regel auch auf Korruptionsprävention (83%). Bei weiteren 10% der Unternehmen befindet sich dies gerade im Aufbau bzw. in der Planung. Unabhängig von der Größe der Unternehmen wurde der Ausbau eines CMS zur Korruptionsprävention vorangetrieben.

Bei Großunternehmen sind Anti-Korruptionsprogramme selbstverständlich (97%), aber auch mittelständische Unternehmen haben erheblich nachgezogen. 2015 verfügte nur ein gutes Drittel der Unternehmen mit 500 bis 999 Mitarbeitern über ein entsprechendes CMS, 2017 sind es bereits fast zwei Drittel (60%). Deutlich aufgeholt haben auch Unternehmen mit 1.000 bis 4.999 Mitarbeitern, über drei Viertel (77%) verfügen über ein Anti-Korruptionsprogramm; die größenabhängigen Unterschiede schwinden.

Bei Großunternehmen sind Anti-Korruptionsprogramme selbstverständlich (97%), aber auch mittelständische Unternehmen haben erheblich nachgezogen.
Verbreitung von Anti-Korruptionsmaßnahmen

Für ein wirksames korruptionsrechtliches CMS sind ein von der Führungsebene klar kommuniziertes Commitment und ein entsprechender Verhaltenskodex unerlässlich, fast alle Compliance-Programme sehen dies vor (94 % bzw. 96 %). Konsequenterweise werden Compliance-Verstöße innerer Mitarbeiter zeitnah sanktioniert (89 %). Selbstverständlich ist ebenfalls die Funktion eines Compliance-Officers (87 %).

Unsere aktuelle Studie zeigt, dass Unternehmen ihr CMS weiter ausbauen und optimieren. Eine systematische Risikoanalyse und regelmäßige Überprüfung der Einhaltung der Compliance-Regeln sind mittlerweile Bestandteil von rund drei Vierteln der Anti-Korruptionsprogramme (72 % bzw. 77 %). Bei einer wachsenden Zahl der Unternehmen richtet sich der Blick auf Geschäftspartner, Zulieferer und Subunternehmen. Ein Viertel verlangt einen Code of Conduct (76 %). Im Rahmen von Unternehmenstransaktionen haben allerdings entsprechende Compliance-Due-Diligence-Prüfungen leicht an Bedeutung verloren (69 %). Dies sehen wir kritisch. Zwar sind Compliance-Programme zur Korruptionsprävention zunehmend selbstverständlich geworden, dennoch empfiehlt sich bei Mergers & Acquisitions weiterhin eine gewissenhafte Prüfung des jeweiligen CMS.

Schulungen zunehmend auch digital

Schulungs- und Informationsangebote zum Umgang mit Korruptions-situationen sind das Herzstück eines CMS. Gemessen hieran sind sie noch nicht so selbstverständlich, wie sie sein sollten. Nur 79 % der Compliance-Programme sehen Schulungsmaßnahmen vor, etwas weniger als im Vergleich zu unserer Studie vor vier Jahren (82 %). Wesentlicher Bestandteil sind weiterhin Face-to-Face- und Classroom-Schulungsmaßnahmen (70 %). Den persönlichen Kontakt zu ihren Mitarbeitern hält somit die Mehrheit der Unternehmen für sehr wertvoll. Ergänzend werden zunehmend auch digitale Trainingsformate eingesetzt. Fast zwei Drittel der Schulungsmaßnahmen erfolgen auch durch webbasierte Lernprogramme und Schulungsfilme (61 %), ein Format, das im Jahr 2013 noch deutlich weniger verbreitet war (39 %). Zur Vertiefung der Inhalte dienen Workshops mit fallpraktischen Übungen, Dilemmaszenarien und Verhaltenstraining (49 %).

Abb. 21 Verbreitung der Anti-Korruptionsmaßnahmen 2013–2017

<table>
<thead>
<tr>
<th>Mehrfachnennungen waren möglich.</th>
<th>2013</th>
<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>klares Commitment und Kommunikation der Anti-Corruption Policy durch die Führungsebene</td>
<td>95 %</td>
<td>94 %</td>
</tr>
<tr>
<td>transparente Richtlinien mit Verhaltenskodex</td>
<td>97 %</td>
<td>96 %</td>
</tr>
<tr>
<td>systematische Risikoanalyse</td>
<td>64 %</td>
<td>72 %</td>
</tr>
<tr>
<td>regelmäßige Überprüfung der Einhaltung der Anti-Corruption Policy</td>
<td>70 %</td>
<td>77 %</td>
</tr>
<tr>
<td>Compliance-Officer (Anti-Korruptionsbeauftragter)</td>
<td>87 %</td>
<td>87 %</td>
</tr>
<tr>
<td>Code of Conduct für Anti-Corruption Policy bei Geschäftspartnern, Zulieferern, Subunternehmen</td>
<td>69 %</td>
<td>76 %</td>
</tr>
<tr>
<td>Zuverlässige und zeitnahe Sanktionierung von Verstößen innerer Mitarbeiter gegen Anti-Corruption Policy</td>
<td>89 %</td>
<td>89 %</td>
</tr>
<tr>
<td>Due-Diligence-Prüfungen bei Unternehmenstransaktionen</td>
<td>78 %</td>
<td>69 %</td>
</tr>
</tbody>
</table>

Basis: Unternehmen mit CMS

Fast zwei Drittel (64 %) der Compliance-Programme erreichten mit ihren Schulungen alle relevanten Funktionsträger (100 %). Im Durchschnitt betrug der Schulungsgrad in Unternehmen mit einem CMS mittlerweile 88 %. Trotz Personalführung wurden die meisten korruptionsgefährdeten Funktionsträger erreicht (2017: 78 %; 2013: 60 %).20

Unternehmen haben die Qualität ihrer Schulungsmaßnahmen seit 2013 insgesamt gesehen weiter verbessert. Nach Einschätzung von 90 % der befragten Unternehmen fühlen sich die Teilnehmer durch ihre Schulungen ausreichend über die rechtlichen Aspekte von Korruption informiert und 81 % der Unternehmen meinen, dass ihre Schulteilnehmer sich hiernach auch ausreichend auf den Umgang mit Dilemmasituationen vorbereitet sehen. Allerdings stieg der Anteil der Unternehmen, deren Teilnehmer beklagten, dass die Informationen aus den Schulungen in der täglichen Praxis wieder verloren gehen, um fünf Prozentpunkte (20 %).

Abb. 22 Praxis der Schulungen 2013–2017

<table>
<thead>
<tr>
<th>Schulungsmaßnahmen</th>
<th>2013</th>
<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>insgesamt</td>
<td>82 %</td>
<td>79 %</td>
</tr>
<tr>
<td>unternehmenseigene Face-to-Face-, Classroom-Training</td>
<td>69 %</td>
<td>70 %</td>
</tr>
<tr>
<td>Workshops</td>
<td>48 %</td>
<td>49 %</td>
</tr>
<tr>
<td>webbasierte Lernprogramme, Schulungsfilme</td>
<td>39 %</td>
<td>61 %</td>
</tr>
<tr>
<td>81–100 %</td>
<td>60 %</td>
<td>78 %</td>
</tr>
<tr>
<td>61–80 %</td>
<td>18 %</td>
<td>10 %</td>
</tr>
<tr>
<td>41–60 %</td>
<td>11 %</td>
<td>5 %</td>
</tr>
<tr>
<td>21–40 %</td>
<td>5 %</td>
<td>3 %</td>
</tr>
<tr>
<td>0–20 %</td>
<td>6 %</td>
<td>4 %</td>
</tr>
</tbody>
</table>

Abb. 23 Bewertung der Schulungen 2013–2017

„Trifft zu“: Die meisten Kollegen ...

... fühlen sich ausreichend über die rechtlichen Aspekte von Korruption informiert. 83 % 90 %

... beklagen, dass die Informationen aus den Schulungen in der täglichen Praxis wieder verloren gehen. 15 % 20 %

... fühlen sich durch die Schulungen ausreichend auf den Umgang mit Dilemmasituationen vorbereitet. 71 % 81 %

20 Vgl. ebenda S. 41.
Trend: Hinweisgebersysteme

Hinweisgebersysteme sind zunehmend Normalität. Am verbreitetsten ist mit 79 % ein interner Ansprechpartner, zum Beispiel in der Rechtsabteilung. Allerdings bietet diese Form zumeist nur eine eingeschränkte Anonymität, sodass wir sie nicht als Hinweisgebersystem im engeren Sinne ansehen. Über eine telefonische Hotline (57 %), ein webbasiertes System (35 %) oder eine Ombudsperson (29 %) verfügen jedoch mittlerweile insgesamt 86 % der Unternehmen mit einem Anti-Korruptionsprogramm, somit deutlich mehr als 2013 (72 %).


Handlungsbedarf besteht derzeit noch hinsichtlich der Öffnung von Hinweisgebersystemen, sie sollten nicht auf interne Tipper beschränkt sein, wie auch die Richtlinien des FCPA fordern. Auch unsere Studien zeigen, dass rund ein Fünftel der Hinweise von externen Tippgebern kommen. Nur knapp jedes dritte Hinweisgebersystem ist auch Geschäftspartnern und Subunternehmen zugänglich (31 %) und jedes vierte allgemein der Öffentlichkeit (23 %). In dieser Hinsicht ist daher die Effizienz vieler Hinweisgebersysteme verbessungswürdig.

Abb. 24: Hinweisgebersysteme 2013–2017

<table>
<thead>
<tr>
<th>Varianten</th>
<th>2013</th>
<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>interner Ansprechpartner (Rechtsabteilung)</td>
<td>72 %</td>
<td>86 %</td>
</tr>
<tr>
<td>Telefonhotline</td>
<td>79 %</td>
<td></td>
</tr>
<tr>
<td>externer Ansprechpartner (Ombudsperson)</td>
<td>57 %</td>
<td></td>
</tr>
<tr>
<td>Kunden, Subunternehmer, Third Parties zugänglich</td>
<td>35 %</td>
<td></td>
</tr>
<tr>
<td>öffentlich zugänglich</td>
<td>29 %</td>
<td></td>
</tr>
<tr>
<td>Basis: Unternehmen mit CMS</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

1 Keine differenzierten Daten für 2013.
Unsere vertieften Interviews ergaben, dass in einzelnen Fällen die Geschäftsleitung erst von den Vorteilen eines Hinweisgebersystems überzeugt werden musste:

„Es hat ein bisschen gedauert, auch die Geschäftsführung zu überzeugen, dass das etwas Gutes ist, was uns nützt, was die Fehlerkultur im Unternehmen verbessern kann.“ (Pharma und Gesundheitswesen, mehr als 10.000 Mitarbeiter weltweit)

Die meisten Unternehmen zeigten sich jedoch vom Nutzen ihres Hinweisgebersystems überzeugt und wollen hierauf nicht mehr verzichten:

„Es sind Themen aufgekommen, die mit Sicherheit so nicht gekommen wären, weil natürlich jeder Mitarbeiter Angst hat, seinen Chef oder Vorgesetzten anzuschwärzen‘, und dann nicht genau weiß, an wen er sich wenden soll, wom er vertrauen kann. Da ist ein anonymes Postfach oder eine Eingabemaske im Internet doch deutlich einfacher und zielführender.“ (Automobilindustrie, 1.000 bis 4.999 Mitarbeiter weltweit)

„Es bringt auf jeden Fall zusätzliche Erkenntnisse über Fälle, die sonst nicht an uns herangetragen würden. Und zwar auch für durchaus wichtige Fälle, nicht nur für Beschwerden übers Kantinenessen.“ (Technologiewirtschaft, 5.000 bis 10.000 Mitarbeiter weltweit)

Wie auch in einer unserer früheren Studien bestätigen die Interviews, dass sich Hinweise zum Teil als unzutreffend oder nicht nachweisbar herausstellen, aber nicht offensichtlich missbräuchlich gegeben wurden:37

„Jede Meldung ist wichtig und ernst zu nehmen – die Relevanz oder Irrelevanz der Meldung stellt sich erst im Nachhinein heraus.“ (Maschinenbau und Metallindustrie, 5.000 bis 10.000 Mitarbeiter weltweit)

„Es ist das etablierte Medium, wie Kontakt über Compliance-Verstöße aufgenommen wird. Wir haben keine Hinweise auf Denunziation – das ist ein ganz großer Vorteil, den wir darin sehen. Wir haben eine permanente Erreichbarkeit über das System.“ (Pharma und Gesundheitswesen, 1.000 bis 4.999 Mitarbeiter weltweit)

„Das Wichtigste dabei ist, dass es genutzt wird und dabei bisher kein einziges Mal ein Missbrauch stattgefunden hat.“ (Handel und Konsum, 5.000 bis 10.000 Mitarbeiter weltweit)

Zudem trägt ein Hinweisgebersystem nicht allein zur Aufdeckung von Compliance-Verstößen bei, sondern auch zur weiteren Verbesserung des CMS, wie einige Unternehmen betonen:

„Ein gut vermarktetes Hinweisgebersystem gibt immer Hinweise auf konkrete Fälle, aber auch Anhaltspunkte für die Verbesserung eines Systems insgesamt.“ (Handel und Konsum, mehr als 10.000 Mitarbeiter weltweit)

Allerdings zeigt unsere Studie auch, dass der Nutzen der Hinweisgebersysteme sehr von ihrer Anonymität und Zugänglichkeit abhängt:

„Null – es kommt nichts rein. [...] Vielleicht ist es nicht gut installiert – es ist eine reine E-Mail-Adresse, die man erst einmal suchen muss.“ (Transport und Logistik, mehr als 10.000 Mitarbeiter weltweit)

Hinweisgebersysteme sind inzwischen die Regel (86 %).

Evaluation des Compliance-Managements


Fast zwei Drittel der Compliance-Programme sehen Case Reports vor (61%), die eine ungetrübte Fallanalyse ermöglichen und daher unverzichtbar sind. Ihr Nachteil ist allerdings, dass sie sich auf die entdeckten Fälle beschränken, somit auf das sogenannte Hellsfeld. Demgegenüber erlauben Mitarbeiterbefragungen einen tiefen Blick in das sogenannte Dunkelfeld. Fast drei Viertel der Unternehmen wählen für die Evaluation die Methode einer qualitativen Befragung von Mitarbeitern (71%). Im Unterschied zu einer quantitativen Befragung kann jedoch mit persönlichen Interviews die Anonymität kaum gewährleistet werden. Auch können nur kleine Fallzahlen erreicht werden, sodass eine repräsentative Aussage nur bedingt möglich ist. Qualitative Befragungen vermitteln somit einen guten ersten Eindruck, der anhand einer quantitativen Befragung repräsentativ abgesichert werden sollte. Eine solche gehört jedoch nur bei 42% der Compliance-Programme zur Evaluation.

Abb. 25 Art der Evaluation des CMS

<table>
<thead>
<tr>
<th>Evaluationstyp</th>
<th>2013</th>
<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prüfung nach IDW PS 980</td>
<td>39%</td>
<td>39%</td>
</tr>
<tr>
<td>Zertifizierung nach ISO 19600</td>
<td>20%</td>
<td>31%</td>
</tr>
<tr>
<td>qualitative Befragung von Mitarbeitern</td>
<td>71%</td>
<td></td>
</tr>
<tr>
<td>quantitative Umfrage bei den Mitarbeitern</td>
<td>42%</td>
<td></td>
</tr>
<tr>
<td>Case Reports</td>
<td>61%</td>
<td></td>
</tr>
</tbody>
</table>

Basis: alle befragten Unternehmen

1 Keine Daten für 2013.

---

38 Eine Prüfung nach IDW Prüfungsstandard 980 oder Zertifizierung nach ISO 19600 erfolgte bei 53% der befragten Unternehmen.
Wir meinen, dass eine Evaluation aus verschiedenen Blickwinkeln erfolgen und daher neben Case Reports auch unabhängige Prüfungen und Mitarbeiterbefragungen umfassen sollte. In unseren vertieften Interviews zeigte sich, dass die meisten Unternehmen in ihren Evaluationsmaßnahmen einen Mehrwert zur weiteren Optimierung ihres CMS sehen. Hier einige Stimmen:

**Mehrwert zur weiteren CMS-Optimierung**

„Wir haben ein aus meiner Sicht sehr gutes Reportingssystem zum Thema Compliance installiert, auch eine regelmäßige Berichterstattung dazu aufgesetzt, sodass wir eigentlich einen fachlich guten, regelmäßigen Überblick über Compliance-relevante Sachverhalte haben.“ (Technologiewirtschaft, 5.000 bis 10.000 Mitarbeiter weltweit)

„Es ist nicht so, dass wir Richtlinien und Regeln nur ausgeben, sondern wir hinterfragen mit diesem System natürlich, wie das in Gesellschaften gelebt wird. Und ich glaube, der Kern ist eigentlich die Information und Kommunikation und letztendlich der Dialog.“ (Industrielle Produktion, mehr als 10.000 Mitarbeiter weltweit)

Einige Unternehmen sehen jedoch Herausforderungen in der Entwicklung von Benchmarks und Key Performance Indicators (KPIs) zur Messung der Wirksamkeit ihrer Compliance-Programme:

**Benchmarks und KPIs**

„Das grundsätzliche Problem ist, dass es keine vernünftigen Benchmarks für Compliance gibt. Solange Sie keine Kennzahlen haben und keine vernünftigen Kennzahlen entwickeln können, können die auch nichts aussagen über die Frage: Wie misst man Compliance?“ (Pharma und Gesundheitswesen, mehr als 10.000 Mitarbeiter weltweit)

„Wenn man sich eine externe Prüfung anguckt, dann kann die aussagekräftig sein; wenn man intern KPIs benutzt, können die auch sehr aussagekräftig sein – wenn man sie stringent verwendet und daraus auch Maßnahmen ableitet.“ (Handel und Konsum, mehr als 10.000 Mitarbeiter weltweit)

Unternehmen versuchen zunehmend, die Wirksamkeit ihres CMS anhand von Benchmarks und KPIs zu messen.
Erste Erfolge im Kampf gegen Kartellrechtsverstöße
Der Anteil der Unternehmen, die über einen Verdacht auf einen kartellrechtlichen Verstoß berichteten, sinkt auf 8%.
Abnahme der Kartellrechtsverstöße

In dieser Studie finden sich die ersten Hinweise auf einen Rückgang wettbewerbsrechtlicher Verstöße. Gegenüber den vorangegangenen Studien sinkt der Anteil der Unternehmen, die über einen Verdacht auf einen kartellrechtlichen Verstoß berichteten, um drei bis fünf Prozentpunkte auf 8%. Gleichzeitig halten es Unternehmen seltener für wahrscheinlich, ein Angebot zu einer wettbewerbswidrigen Absprache zu erhalten (4%).

Wir führen diese sich abzeichnende positive Entwicklung auch auf die wachsende Zahl der kartellrechtlichen Compliance-Programme zurück, ihr Anteil stieg im gleichen Zeitraum um sieben Prozentpunkte auf 62% (2013: 55%; siehe Seite 24 f.).


Die befragten Unternehmen gehen allerdings weiterhin von einem nahezu unveränderten Anteil wettbewerbswidriger Absprachen aus. So sank nach den Angaben der befragten Unternehmen der Umsatzanteil, der auf wettbewerbswidrigen Absprachen beruht, nur leicht um einen Prozentpunkt auf 8%. Der am häufigsten genannte Umsatzanteil (Median) lag unverändert bei 5%. Auch schätzten 27% der Unternehmen den Anteil des Umsatzes, der auf wettbewerbswidrigen Absprachen basiert, auf über 29%, deutlich mehr als noch 2015 (7%).

Trotz einer sinkenden Zahl von Unternehmen, die in den letzten zwei Jahren von wettbewerbswidrigen Absprachen betroffen wurden (Abb. 26), gehen die befragten Unternehmen folglich von einem gleichbleibenden oder teilweise sogar höheren Anteil von Kartellrechtsverletzungen aus. Letzteres dürfte jedoch bei einem Teil der Unternehmen auf eine wachsende Awareness zurückzuführen sein, für einen tatsächlichen Anstieg im Dunkelfeld finden sich keine Belege; eher haben wir von einer rückläufigen Tendenz auszugehen.

---

**Abb. 26 Entwicklung des Risikos wettbewerbswidriger Absprachen 2011–2017**

<table>
<thead>
<tr>
<th>Angebot wettbewerbswidriger Absprache (sehr wahrscheinlich)</th>
<th>13 %</th>
<th>8 %</th>
<th>4 %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Verdachtsfälle</td>
<td>13 %</td>
<td>11 %</td>
<td>12 %</td>
</tr>
<tr>
<td>betroffene Unternehmen</td>
<td>6 %</td>
<td>6 %</td>
<td>5 %</td>
</tr>
</tbody>
</table>

1 Keine Daten für 2011.

---


42 Auskunft des Bundeskartellamts, online abrufbar unter: www.bundeskartellamt.de/DE/Kartellverbot/kartellverbot_node.html.
Abb. 27  Durch wettbewerbswidrige Absprachen erzielter Umsatzanteil in der eigenen Branche 2013–2017

<table>
<thead>
<tr>
<th>Umsatzanteil in der Branche aufgrund wettbewerbswidriger Absprachen</th>
<th>Median 2013</th>
<th>Median 2015</th>
<th>Median 2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>&gt;29 %</td>
<td>7 %</td>
<td>7 %</td>
<td>7 %</td>
</tr>
<tr>
<td>20–29 %</td>
<td>12 %</td>
<td>9 %</td>
<td>7 %</td>
</tr>
<tr>
<td>10–19 %</td>
<td>22 %</td>
<td>27 %</td>
<td>16 %</td>
</tr>
<tr>
<td>5–9 %</td>
<td>24 %</td>
<td>28 %</td>
<td>15 %</td>
</tr>
<tr>
<td>&lt;5 %</td>
<td>35 %</td>
<td>29 %</td>
<td>35 %</td>
</tr>
</tbody>
</table>

Kartellrechtliche Compliance zunehmend im Mittelstand

Insgesamt stieg der Anteil der Compliance-Programme, die auch kartellrechtliche Risiken berücksichtigen, auf 62 % (siehe Seite 24 f.). Bei Großunternehmen mit über 10.000 Mitarbeitern verharrt der Anteil auf dem Niveau von 2015.\(^{43}\)

Hingegen zeigt sich bei den Unternehmen mit 500 bis 10.000 Mitarbeitern eine eindrucksvolle Entwicklung. Rund zwei Drittel (64%) der Unternehmen mit 5.000 bis 10.000 Mitarbeitern haben ein kartellrechtliches CMS implementiert. Stark aufgeholt haben auch Unternehmen mit 1.000 bis 4.999 bzw. 500 bis 999 Mitarbeitern, über eine Kartellrechts-Compliance verfügen 44 % bzw. 30 %. Gegenüber 2013 bedeutet dies einen Anstieg um 22 bzw. 17 Prozentpunkte. Compliance wird zunehmend unabhängig von der Unternehmensgröße, der Top-down-Prozess erreicht verstärkt auch mittelständische Unternehmen.

Abb. 28  Verbreitung kartellrechtlicher Compliance-Maßnahmen, nach Unternehmensgröße

<table>
<thead>
<tr>
<th>Mitarbeiter weltweit</th>
<th>2013</th>
<th>2015</th>
<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>&gt;10.000</td>
<td>60 %</td>
<td>68 %</td>
<td>71 %</td>
</tr>
<tr>
<td>5.000–10.000</td>
<td>31 %</td>
<td>56 %</td>
<td>64 %</td>
</tr>
<tr>
<td>1.000–4.999</td>
<td>22 %</td>
<td>37 %</td>
<td>44 %</td>
</tr>
<tr>
<td>500–999</td>
<td>13 %</td>
<td>21 %</td>
<td>30 %</td>
</tr>
</tbody>
</table>

Basis: alle befragten Unternehmen

\(^{43}\) Bei Großunternehmen ist der leichte Rückgang um 3 % gegenüber 2015 aufgrund der zu geringen Fallzahl nicht interpretierbar.
Mehrwert von Compliance
Über ein Drittel (37%) der betroffenen Unternehmen gab an, dass die Tatsache, dass sie über ein CMS verfügten, die Höhe der Geldbuße positiv beeinflusst habe. Bei 43% der Unternehmen, die ein CMS implementiert hatten, beförderte dies die Einstellung des Verfahrens.
Compliance als Wettbewerbsvorteil

Die meisten Unternehmen verfügen nunmehr über mehrjährige Erfahrungen mit ihrem CMS und dessen Auswirkungen auf ihre Wettbewerbschancen. Das überwiegende Ergebnis ist positiv. Nur 9% der befragten Unternehmen berichteten über Wettbewerbsnachteile im deutschen Markt, davon nur 1% über einen klaren Wettbewerbsnachteil. Demgegenüber beurteilt über ein Drittel (36%) das eigene Compliance-Programm im Wettbewerb überwiegend als vorteilhaft und ein Viertel (24%) erkennt hierin sogar einen klaren Vorteil.

Im Vergleich zu den Einschätzungen vor sechs Jahren hat der Anteil der Unternehmen, die über klare Wettbewerbsvorteile im deutschen Markt berichteten (24%), sogar um acht Prozentpunkte zugenommen (2011: 16%). Immer mehr Unternehmen scheint es zu gelingen, ihr CMS im Wettbewerb vorteilhaft zu vermarkten. Allerdings hat sich auch die Gruppe der Skeptiker etwas vergrößert, und zwar um vier Prozentpunkte auf nunmehr 9%.

Bemerkenswert ist, dass die befragten Unternehmen auch in ihren Auslandsvertretungen über überwiegend gute Erfahrungen berichteten, wenn auch in etwas geringerem Maße. 20% sehen in ihrem CMS auf ausländischen Märkten klare und 42% überwiegende Wettbewerbsvorteile. Das ist für eine Wirtschaft, die im besonderen Maße vom Export abhängt und international erfolgreich operiert, ein wichtiges Ergebnis. Auch internationale Märkte belohnen zunehmend Compliance.

Es überrascht allerdings nicht, dass es größeren Unternehmen leichterfällt, mit einem CMS erfolgreich im Wettbewerb zu operieren. 37% der Großunternehmen mit mehr als 10.000 Mitarbeitern berichteten über klare Wettbewerbsvorteile, während diese positive Erfahrung mit sinkender Unternehmensgröße kontinuierlich abnimmt, vermutlich aufgrund ihrer geringeren Marktmacht. Die Vorteile überwiegen jedoch weiterhin. So berichteten nur 18% der Unternehmen mit 1.000 bis 4.999 Mitarbeitern über klare und 55% über leichte Wettbewerbsvorteile.

Am schwersten fällt es Unternehmen mit 500 bis 999 Mitarbeitern, ihr CMS als Wettbewerbsvorteil zu nutzen. 16% von ihnen berichteten über klare und 35% über eher vorteilhafte Auswirkungen. Dies bedeutet aber auch, dass zusammengenommen die Hälfte dieser kleineren Unternehmen ihr CMS eher als Wettbewerbsvorteil wahrnimmt, während 44% andere Erfahrungen gemacht haben und nur 5% ihr CMS als leichten Wettbewerbsnachteil einstufen.\textsuperscript{45}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{Abb.30.png}
\caption{Compliance im Wettbewerb, nach Unternehmensgrößen}
\end{figure}

\textsuperscript{45} Negative Ausprägungen sind in der Abbildung nicht enthalten.
Ein CMS bringt nicht nur Vorteile im Wettbewerb mit sich, sondern kann sich auch positiv auf Verfahren gegen das Unternehmen nach § 130 OWiG auswirken.

Bonus für CMS in Verfahren nach § 130 OWiG

Ein Verfahren nach § 130 Abs. 1 OWiG kommt in Betracht, wenn einem Unternehmensmitarbeiter eine betriebsbezogene Straftat nachgewiesen werden kann und diese durch Ausübung der gehörigen Aufsicht verhindert oder wesentlich erschwert worden wäre. Die Entscheidungen in den Verfahren nach dem Ordnungswidrigkeitenrecht werden anders als diejenigen nach dem allgemeinen Strafgesetzbuch (StGB) kaum publiziert, sodass weitgehend Unklarheit über die Auswirkungen eines CMS auf den Ausgang des Verfahrens besteht.46

Das Gesetz nennt zwar in § 130 Abs. 1 Satz 2 OWiG die Bestellung, sorgfältige Auswahl und Überwachung von Aufsichtspersonen als erforderliche Aufsichtsmaßnahmen, lässt aber eine ausdrückliche Berücksichtigung von Compliance-Programmen auf der Rechtsfolgen-Seite offen.47 Zwar hat die höchstrichterliche Rechtsprechung jüngst entschieden, dass Compliance-Maßnahmen bei der Strafzumessung des Verbands nach § 30 OWiG berücksichtigt werden können, jedoch ohne Leitlinien für solche Compliance-Maßnahmen zu formulieren.48

In unseren vertieften Interviews wurde daher teilweise die Ansicht vertreten, dass anders als bei US-Behörden „das [CMS in Deutschland] nicht strafmildernd berücksichtigt wird, weil das als selbstverständlich vorausgesetzt wird“ (Automobilindustrie, mehr als 10.000 Mitarbeiter weltweit).


48 Vgl. BGH, Urteil vom 09.05.2017 – 1 StR 265/16.

In unseren zusätzlich durchgeführten vertieften Interviews nannten einige Unternehmen die Gründe für die positiven Auswirkungen ihres CMS auf ihr Verfahren:

„ [...] positives Feedback der Staatsanwaltschaft, weil sie einen professionellen Ansprechpartner haben [...].“ (Pharma und Gesundheitswesen, mehr als 10.000 Mitarbeiter weltweit)

„ [...] dass das Compliance-System auch in den Fällen, wo es letztlich zu Sanktionen gekommen ist, positive Auswirkungen hatte, zumindest in der Aufarbeitung des Vorfalls und vielleicht auch als Beitrag dafür, dass nicht alles noch viel schlimmer war.“ (Handel und Konsum, mehr als 10.000 Mitarbeiter weltweit)

(Schb genanntes Unternehmen, 1.000 bis 4.999 Mitarbeiter weltweit)
Forensische Praxis betroffener Unternehmen
Die Aufklärung bzw. Aufdeckung etwaiger Straftaten durch interne oder hiermit beauftragte externe Spezialisten ist für eine große Mehrheit der Unternehmen selbstverständlich (85%).
Tätermerkmale – Risiko OK

Es handelt sich mittlerweile um Basiswissen unserer wirtschaftskriminologischen Studien: Rund die Hälfte der Wirtschaftsstraftaten gegen Unternehmen begeben Täter aus dem eigenen Unternehmen. 46% der Fälle wurden von internen Tätern begangen und bei 12% handelten die internen Täter zusammen mit externen.

Auch die externen Täter waren den betroffenen Unternehmen vielfach bekannt. Rund ein Drittel (34%) der Wirtschaftsdelikte begingen Geschäftspartner und Dienstleister und weitere 10% wurden von Kunden verübt. Hoch ist weiterhin der Anteil der Täter, die vermutlich aus dem Kreis der OK stammen. Bei etwa jeder fünften Wirtschaftsstraftat (19%) gehen die betroffenen Unternehmen hiervon aus.

Wirtschaftsdelikte, die von außen begangen werden, sind in jedem zweiten Fall (49%) von einem Täter auf der Führungsebene des schädigenden Unternehmens zu verantworten. Dies überrascht nicht.

Beunruhigend ist, dass es sich in jedem vierten Fall (25%), der von internen Tätern begangen wurde, beim Haupttäter um eine Person aus der obersten Führungsebene handelte; das ist gemessen am geringen Anteil der obersten Führungskräfte an der gesamten Mitarbeiterschaft ein überdurchschnittlicher Wert. Je höher die Position, desto leichter und attraktiver sind die Möglichkeiten, eine Wirtschaftsstraftat zu begehen. Empirisch gesehen sind folglich besondere Vorsicht und Sorgfalt bei der Auswahl und Überwachung von Personen in Führungs- und Vertrauenspositionen geboten, wie auch unsere früheren Studien belegen.49

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**Abb. 32 Beziehung der Täter zum geschädigten Unternehmen**

Mehrfachnennungen innerhalb externer Tätergruppen möglich.

<table>
<thead>
<tr>
<th>Tätergruppe</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>interne Täter</td>
<td>46%</td>
</tr>
<tr>
<td>in- und extern gleichermaßen (haupt)verantwortlich</td>
<td>12%</td>
</tr>
<tr>
<td>externe Täter</td>
<td>42%</td>
</tr>
<tr>
<td>Kunden/Mandanten</td>
<td>10%</td>
</tr>
<tr>
<td>Geschäftspartner/Dienstleister</td>
<td>34%</td>
</tr>
<tr>
<td>davon</td>
<td></td>
</tr>
<tr>
<td>externe Täter ohne Geschäftsbeziehung</td>
<td>37%</td>
</tr>
<tr>
<td>Täter aus der organisierten Kriminalität</td>
<td>19%</td>
</tr>
</tbody>
</table>

Basis: Anteil an den berichteten Fällen mit internen und externen Tätern

**Abb. 33 Position des internen/externen Haupttäters**

<table>
<thead>
<tr>
<th>Position</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Senior- oder Topmanagement</td>
<td>25%</td>
</tr>
<tr>
<td>mittleres Management</td>
<td>31%</td>
</tr>
<tr>
<td>Junior-management</td>
<td>4%</td>
</tr>
<tr>
<td>andere Beschäftigte</td>
<td>40%</td>
</tr>
<tr>
<td>Beschäftigte</td>
<td>31%</td>
</tr>
</tbody>
</table>

---

Praxis interner Untersuchungen

Für die Mehrheit der Unternehmen ist es im Falle eines Compliance-Verstoßes selbstverständlich, sich um Aufklärung zu bemühen und hiermit entweder interne oder externe Spezialisten zu beauftragen. 85% der Unternehmen, die in unserer Studie über ein gravierendes Wirtschaftsdelikt berichteten, leiteten eigene interne Untersuchungen ein. In der Gruppe der nicht betroffenen Unternehmen würden ebenfalls 86% entsprechende Ermittlungen aufnehmen (ohne Abbildung).

Die Untersuchungen wurden zu 38% von der Internen Revision und nahezu ebenso häufig von der Rechtsabteilung geleitet (31%). Der Schwerpunkt der Compliance-Abteilung liegt typischerweise eher auf dem Aspekt der Prävention, sodass nur in rund einem Viertel der Fälle (24%) die internen Ermittlungen von der Compliance-Abteilung geleitet wurden.

Auch unsere hypothetische Frage an die Gruppe der nicht betroffenen Unternehmen ergab keine nennenswert größere Bedeutung der Compliance-Abteilung (26%). Allerdings meinten die nicht betroffenen Unternehmen, sie würden eher der Internen Revision (45%) die Leitung der internen Untersuchungen übertragen und seltener der Rechtsabteilung (19%). Vermutlich bedarf es in der forensischen Praxis häufiger der Prüfung rechtlicher Fragen, sodass die tatsächliche forensische Bedeutung der Rechtsabteilung eher unterschätzt wird.

85% der Unternehmen, die in unserer Studie über ein gravierendes Wirtschaftsdelikt berichteten, leiteten eigene interne Untersuchungen ein.

---

50 59% der Unternehmen berichteten über einen gravierenden Fall in den letzten Jahren (n = 212).
Gründe interner Untersuchungen

Die Einleitung interner Untersuchungen kann verschiedene Gründe haben. Im Vergleich zwischen den Gründen in einem tatsächlichen Fall und den von den befragten Unternehmen genannten hypothetischen Gründen zeigen sich gravierende Unterschiede. In der Realität erfolgen interne Untersuchungen sehr viel häufiger als angenommen auch zur Vorbereitung arbeitsrechtlicher Maßnahmen (54 %) und eines strafrechtlichen Verfahrens (64 %), wobei gegenüber internen Tätern diese Gründe noch häufiger eine Rolle gespielt haben (Abb. 36). Hypothetisch gefragt, geben nur 6 % bzw. 10 % an, aus diesen Gründen interne Untersuchungen einzuleiten. Offenbar rückt in den tatsächlichen Fällen der Aspekt der Sanktionierung des Täters in den Vordergrund.

Unsere Studie zeigt die Vielfalt der Gründe, aus denen tatsächlich in der forensischen Praxis der betroffenen Unternehmen interne Untersuchungen erfolgten. In knapp zwei Dritteln der Fälle sollten sie der Durchsetzung von Schadensersatzansprüchen (63 %) und der Verbesserung des IKS (69 %) dienen, etwas seltener der Optimierung des CMS (55 %). Immerhin sehen fast zwei Drittel der Compliance-Programme spezielle Case Reports zur Evaluation des CMS vor (61 %; Seite 46 f.).

Auch spielten in knapp zwei Dritteln der Fälle gesellschaftsrechtliche Verpflichtungen eine Rolle (61 %). Mehrheitlich wird für den Vorstand einer Aktiengesellschaft aus §§ 76 Abs. 1, 93 Abs. 1 AktG eine Pflicht zu internen Untersuchungen angenommen, wenn ein Verdacht auf Gesetzesverstöße besteht.31 Das Gleiche gilt für die Geschäftsführung einer GmbH, das heißt, die Geschäftsführer müssen gemäß § 43 Abs. 1 GmbHG bei Verdacht auf einen Gesetzesverstoß Untersuchungen zur Aufklärung des Sachverhalts durchführen.

Unternehmen, die nur für den hypothetischen Fall antworteten, verbinden im Vergleich zur Gruppe der tatsächlich Betroffenen die Aufnahme interner Ermittlungen mit deutlich anders gewichteten Erwartungen. 79 % gaben an, sie würden zur Durchsetzung von Schadensersatzansprüchen (89 %), wegen gesellschaftsrechtlicher Verpflichtungen und zur Verbesserung des IKS (86 %) und des CMS (89 %) interne Untersuchungen einleiten. Offenbar sieht die Realität viel nüchterner aus.

Abb. 35 Gründe interner Ermittlungen

Mehrfachnennungen waren möglich.

<table>
<thead>
<tr>
<th>Schadensersatzdurchsetzung</th>
<th>89 %</th>
<th>63 %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vorbereitung arbeitsrechtlicher Maßnahmen</td>
<td>6 %</td>
<td>54 %</td>
</tr>
<tr>
<td>Vorbereitung eines strafrechtlichen Verfahrens</td>
<td>10 %</td>
<td>64 %</td>
</tr>
<tr>
<td>gesellschaftsrechtliche Verpflichtung zur Aufklärung</td>
<td>79 %</td>
<td>61 %</td>
</tr>
<tr>
<td>Verbesserung des IKS</td>
<td>86 %</td>
<td>69 %</td>
</tr>
<tr>
<td>Verbesserung des CMS (Basis: Unternehmen mit CMS)</td>
<td>89 %</td>
<td>55 %</td>
</tr>
<tr>
<td>weiß nicht</td>
<td>2 %</td>
<td>3 %</td>
</tr>
</tbody>
</table>

Differenzieren wir bei den genannten gravierenden Wirtschaftsdelikten zwischen internen und externen Tätern, so stellt sich heraus, dass interne Untersuchungen in beiden Fällen gleichermaßen der Durchsetzung von Schadensersatzansprüchen dienen (65 % versus 62 %). Hingegen erfolgen sie bei internen Tätern seltener zur Vorbereitung eines strafrechtlichen Verfahrens (60 %; externe Täter: 74 %), aber in über drei Vierteln der Fälle zur Vorbereitung arbeitsrechtlicher Schritte (77 %).

Eigene Ermittlungen werden bei internen Tätern auch häufiger mit der Verbesserung des IKS (74 %; externe Täter: 61 %) und des CMS begründet (57 %; externe Täter: 53 %). Ebenfalls häufiger erfolgen bei internen Tätern interne Untersuchungen aufgrund gesellschaftsrechtlicher Verpflichtungen (65 %; externe Täter 51 %).

**Abb. 36 Gründe interner Ermittlungen – Vergleich interne versus externe Täter**

<table>
<thead>
<tr>
<th>Mehrfachnennungen waren möglich.</th>
<th>interner Täter</th>
<th>externer Täter</th>
</tr>
</thead>
<tbody>
<tr>
<td>Schadensersatzdurchsetzung</td>
<td>65 %</td>
<td>62 %</td>
</tr>
<tr>
<td>Vorbereitung arbeitsrechtlicher Maßnahmen</td>
<td>77 %</td>
<td>74 %</td>
</tr>
<tr>
<td>Vorbereitung eines strafrechtlichen Verfahrens</td>
<td>60 %</td>
<td>74 %</td>
</tr>
<tr>
<td>gesellschaftsrechtliche Verpflichtung zur Aufklärung</td>
<td>65 %</td>
<td>51 %</td>
</tr>
<tr>
<td>Verbesserung des IKS</td>
<td>74 %</td>
<td>61 %</td>
</tr>
<tr>
<td>Verbesserung des CMS (Basis: Unternehmen mit CMS)</td>
<td>57 %</td>
<td>53 %</td>
</tr>
<tr>
<td>weiß nicht</td>
<td>3 %</td>
<td>4 %</td>
</tr>
</tbody>
</table>

**Abb. 37 Tatsächliche oder hypothetische Beauftragung externer Ermittler**

<table>
<thead>
<tr>
<th>Mehrfachnennungen waren möglich.</th>
<th>hypothetischer Fall</th>
<th>tatsächlicher Fall</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gesamtanteil</td>
<td>84 %</td>
<td>57 %</td>
</tr>
<tr>
<td>Wirtschaftsprüfungs-gesellschaft</td>
<td>60 %</td>
<td>17 %</td>
</tr>
<tr>
<td>davon</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Anwaltskanzlei</td>
<td>48 %</td>
<td>40 %</td>
</tr>
<tr>
<td>andere forensische Ermittler</td>
<td>23 %</td>
<td>18 %</td>
</tr>
</tbody>
</table>

**Bedeutung externer Ermittler in der Praxis**

Die Mehrheit der befragten Unternehmen gab an, dass sie ihre Untersuchungen auch mit Unterstützung externer Ermittler durchführen würden (die Gruppe der nicht betroffenen Unternehmen sogar zu 84 %). Tatsächlich wurden nur in 57 % der Fälle zusätzlich externe Ermittler mit den Untersuchungen beauftragt. Am häufigsten handelte es sich um Anwaltskanzleien (40 %). Die forensische Expertise von Wirtschaftsprüfungsgesellschaften (17 %) und anderen privaten Ermittlern (18 %) wurde deutlich seltener in Anspruch genommen. Allerdings meinten fast zwei Drittel der Unternehmen, die nur hypothetisch gefragt werden konnten, dass sie die forensischen Dienste einer Wirtschaftsprüfungsgesellschaft bevorzugen würden (60 %).
Phase der Beauftragung externer Ermittler

Es empfiehlt sich, möglichst bereits beim ersten Verdacht externe Ermittler zu beauftragen. Hingegen meinten drei Viertel der hypothetisch befragten Unternehmen, dass sie erst im Laufe der internen Ermittlungen externe Spezialisten hinzuziehen würden (75%). Die Praxis zeigt jedoch, dass tatsächlich häufiger bereits beim ersten Verdacht externe Ermittler beauftragt wurden (41%) und im Laufe der internen Ermittlungen nur 43% der Unternehmen diesen Schritt vollzogen. Wir führen die häufige frühe Beauftragung externer Ermittler auf die sachliche und rechtliche Komplexität vieler Fälle zurück, die sich bereits in der sehr frühen Phase (beim ersten Verdacht) zeigt. So erfolgte die Beauftragung externer Ermittler aus Sicht von 84% der betroffenen Unternehmen vor allem aufgrund der erforderlichen zusätzlichen Qualifikation (siehe Abb. 39).

Gründe für die Beauftragung externer Ermittler

Externe Ermittlungskompetenz wird überwiegend aufgrund der erforderlichen Qualifikation hinzugezogen (84%). Die höhere Objektivität spielt hingegen eine geringere Rolle als vielfach angenommen (83%), nur in etwa jedem zweiten Fall war dies tatsächlich ein Grund (56%). In jedem dritten Fall waren Kapazitätsgründe von Bedeutung (35%). Dem Druck der Stakeholder kommt in der forensischen Praxis ein geringeres Gewicht zu (20%) als vermutet (44%).

Eine relativ große Relevanz wird der Presse zugemessen (43%), aber in der Realität wurde in der Presse vermutlich über die wenigsten Fälle berichtet, sodass diese kaum als Grund für die Beauftragung externer Ermittler genannt wurde (5%). Insbesondere im Falle einer skandalisierenden Presseberichterstattung empfiehlt sich die Beauftragung externer Ermittler.
Zufriedenheit mit der Arbeit externer und staatlicher Ermittler

In unserem Vergleich zeigt sich, dass Unternehmen, soweit sie externe Ermittler hinzugezogen haben, mit nur geringen Abstrichen mit der Arbeit der Externen genauso zufrieden waren wie mit der hauseigenen Aufklärungsarbeit. Mit der internen Untersuchung waren 51% der befragten Unternehmen sehr zufrieden, mit der Arbeit der externen Ermittler 46%.

Deutlich kritischer wurde jedoch die Ermittlungstätigkeit der Strafverfolgungsbehörden gesehen. Nur jedes vierte Unternehmen beurteilte die Arbeit der behördlichen Ermittler als sehr zufriedenstellend (24%). Eher ambivalent („teils/teils“) wurde ihre Arbeit von 16% der Unternehmen bewertet und 15% waren (sehr) unzufrieden. Im Vergleich hierzu wurden die forensischen Dienste der beauftragten externen Ermittler allein von 11% als gemischt beurteilt („teils/teils“) und nur 6% waren (sehr) unzufrieden.

*Abb. 40 Zufriedenheit mit der Arbeit der Ermittler*

<table>
<thead>
<tr>
<th></th>
<th>sehr zufrieden</th>
<th>eher zufrieden</th>
<th>eher unzufrieden</th>
<th>sehr unzufrieden</th>
<th>teils/teils</th>
</tr>
</thead>
<tbody>
<tr>
<td>interne Ermittler</td>
<td>51%</td>
<td>39%</td>
<td>9%</td>
<td>1%</td>
<td>0%</td>
</tr>
<tr>
<td>beauftragte Ermittler</td>
<td>46%</td>
<td>37%</td>
<td>11%</td>
<td>2%</td>
<td>4%</td>
</tr>
<tr>
<td>Polizei/Staatsanwaltschaft</td>
<td>24%</td>
<td>45%</td>
<td>16%</td>
<td>8%</td>
<td>7%</td>
</tr>
</tbody>
</table>

Nur jedes vierte Unternehmen beurteilte die Arbeit der behördlichen Ermittler als sehr zufriedenstellend (24%). Deutlich weniger (schlechter) als bei internen oder externen Ermittlern.
Sanktionspraxis bei Compliance-Verstößen
Die Sanktionspraxis vieler Unternehmen ist in den vergangenen Jahren konsequenter geworden.

In aller Regel erfolgt bei gravierenden Compliance-Verstößen eine Kündigung (87%) und deutlich häufiger als vor sechs Jahren wurden zivilrechtliche Schritte eingeleitet (65%) und eine Strafanzeige erstattet (65%).
Folgen für interne Täter


Gemäß den Angaben der von uns befragten Unternehmen erfolgt in aller Regel bei gravierenden Compliance-Verstößen eine Kündigung (87%). Diese wird heute kaum häufiger als vor sechs Jahren ausgesprochen, wie unser Vergleich zeigt (83%). Allerdings werden heute deutlich häufiger als vor sechs Jahren zivilrechtliche Schritte eingeleitet (65%; 2011: 51%) und eine Strafanzeige gestellt (65%; 2011: 53%). Compliance-Verstöße werden somit konsequenter geahndet, sowohl zivilrechtlich als auch strafrechtlich.

Praxis der Strafanzeige

Die Erfahrungen der betroffenen Unternehmen mit der Ermittlungs- tätigkeit von Polizei und Staatsanwaltschaft fallen gemischter aus als die Erfahrungen mit internen Untersuchungen (siehe Seite 64). Hierdurch erklärt sich vermutlich auch, dass in der forensischen Praxis jedes dritte (35%) Unternehmen keine Strafanzeige erstattet hat und nur in jedem fünften Fall (19%) bereits beim ersten Verdacht. Fast die Hälfte der Unternehmen erstattete Strafanzeige erst nach Abschluss (23%) oder im Laufe der internen Ermittlungen (23%).

Im Vergleich hierzu ist die Bereitschaft zur Strafanzeige bei Unternehmen, die diese Frage hypothetisch beantwortet haben, deutlich höher: 98% würden eine Strafanzeige erstatten. In der forensischen Praxis reagieren die betroffenen Unternehmen somit sehr viel zurückhaltender. Allerdings würde jedes zweite Unternehmen vor der Erstattung einer Anzeige erst den Abschluss der internen Ermittlungen abwarten (54%).
Pro und Kontra einer Strafanzeige

Die meisten Unternehmen erstatten eine Strafanzeige nicht beim ersten Verdacht, sondern erst im Laufe oder nach Abschluss des Verfahrens. Die Gründe hierfür sind vielfältig. Am häufigsten äußerten die betroffenen Unternehmen, dass sie sich von der eigenen internen Untersuchung eine schnellere Aufklärung versprechen (64%) und Unruhe im Unternehmen vermeiden wollen (55%). Eher nachrangig sind andere Gründe wie der Verlust der Kontrolle über die eigene Ermittlungstätigkeit (32%) und die Sorge vor Publizitätsrisiken (36%).

Grundsätzliche Zweifel an der fachlichen Kompetenz der staatlichen Ermittlungsbehörden nannten nur 8% der betroffenen Unternehmen als Grund für eine erst nachgeordnet erfolgte Strafanzeige. Auch äußerten nur wenige Unternehmen ein geringes gegenseitiges Vertrauen (14%). Allerdings lag für über ein Viertel (29%) der Unternehmen ein Grund in der geringen Kenntnis der Polizei und Staatsanwaltschaft über betriebswirtschaftliche Abläufe. Es fehlt den Ermittlungsbehörden somit aus Sicht einiger Unternehmen durchaus am betriebswirtschaftlichen Fachwissen, sodass diese nicht beim ersten Verdacht eine Strafanzeige erstatten.

Der Verzicht auf eine Strafanzeige wurde ebenfalls kaum mit unzureichenden fachlichen Kompetenzen der staatlichen Ermittler (2%) oder zu geringen betriebswirtschaftlichen Kompetenzen begründet (4%). Es fehlt auch nur sehr selten am gegenseitigen Vertrauen (5%). Die Sorge vor einem Gegenschlag des Beschuldigten kann durchaus ein Grund für das Unterlassen einer Strafanzeige sein, allerdings nur selten (8%). Auch ein Verlust der Kontrolle über die eigene Ermittlungstätigkeit wurde selten angeführt (15%).

Hingegen wurden als Gründe, die gegen eine Strafanzeige sprachen, am häufigsten genannt: eine schnellere Aufklärung im Rahmen einer internen Untersuchung durch eigene bzw. externe Ermittler (37%), Publizitätsrisiken aufgrund mangelnder Vertraulichkeit (32%) und die Vermeidung von Unruhe im Unternehmen (27%).

Abb. 43 Pro und Contra Strafanzeige

Einschätzung der Unternehmen: „völlig“ bis „eher zutreffend“

<table>
<thead>
<tr>
<th>Grundeinteilung</th>
<th>Prozent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vermeidung eines Gegenschlags des Beschuldigten</td>
<td>0%</td>
</tr>
<tr>
<td>schnellere Aufklärung durch eigene bzw. externe Ermittler</td>
<td>64%</td>
</tr>
<tr>
<td>mangelndes Vertrauen in fachliche Kompetenz der Polizei/Staatsanwaltschaft</td>
<td>8%</td>
</tr>
<tr>
<td>geringe Kenntnis betrieblicher Abläufe seitens Polizei/Staatsanwaltschaft</td>
<td>29%</td>
</tr>
<tr>
<td>Vermeidung von Unruhe im Unternehmen</td>
<td>55%</td>
</tr>
<tr>
<td>Verlust der Kontrolle über Ermittlungstätigkeit im Unternehmen</td>
<td>32%</td>
</tr>
<tr>
<td>geringes gegenseitiges Vertrauen</td>
<td>14%</td>
</tr>
</tbody>
</table>

[1] Entfällt bei „Strafanzeige im Laufe oder nach Abschluss des Verfahrens gestellt“. 
Über uns

Unsere Mandanten stehen tagtäglich vor vielfältigen Aufgaben, möchten neue Ideen umsetzen und suchen Rat. Sie erwarten, dass wir sie ganzheitlich betreuen und praxisorientierte Lösungen mit größtmöglichem Nutzen entwickeln. Deshalb setzen wir für jeden Mandanten, ob Global Player, Familienunternehmen oder kommunaler Träger, unser gesamtes Potenzial ein: Erfahrung, Branchenkenntnis, Fachwissen, Qualitätsanspruch, Innovationskraft und die Ressourcen unseres Expertennetzwerks in 158 Ländern. Besonders wichtig ist uns die vertrauensvolle Zusammenarbeit mit unseren Mandanten, denn je besser wir sie kennen und verstehen, umso gezielter können wir sie unterstützen.


Forensic Services

Public Law 111–203
111th Congress

An Act

To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end “too big to fail”, to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the “Dodd-Frank Wall Street Reform and Consumer Protection Act”.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Definitions.
Sec. 3. Severability.
Sec. 4. Effective date.
Sec. 5. Budgetary effects.
Sec. 6. Antitrust savings clause.

TITLE I—FINANCIAL STABILITY

Sec. 101. Short title.
Sec. 102. Definitions.

Subtitle A—Financial Stability Oversight Council

Sec. 111. Financial Stability Oversight Council established.
Sec. 112. Council authority.
Sec. 113. Authority to require supervision and regulation of certain nonbank financial companies.
Sec. 114. Registration of nonbank financial companies supervised by the Board of Governors.
Sec. 115. Enhanced supervision and prudential standards for nonbank financial companies supervised by the Board of Governors and certain bank holding companies.

Sec. 116. Reports.
Sec. 117. Treatment of certain companies that cease to be bank holding companies.
Sec. 118. Council funding.
Sec. 119. Resolution of supervisory jurisdictional disputes among member agencies.
Sec. 120. Additional standards applicable to activities or practices for financial stability purposes.
Sec. 121. Mitigation of risks to financial stability.
Sec. 122. GAO Audit of Council.
Sec. 123. Study of the effects of size and complexity of financial institutions on capital market efficiency and economic growth.

Subtitle B—Office of Financial Research

Sec. 151. Definitions.
Sec. 153. Purpose and duties of the Office.
Sec. 154. Organizational structure; responsibilities of primary programmatic units.
Sec. 155. Funding.
Sec. 156. Transition oversight.
Subtitle C—Additional Board of Governors Authority for Certain Nonbank Financial Companies and Bank Holding Companies

Sec. 161. Reports by and examinations of nonbank financial companies by the Board of Governors.
Sec. 162. Enforcement.
Sec. 163. Acquisitions.
Sec. 164. Prohibition against management interlocks between certain financial companies.
Sec. 165. Enhanced supervision and prudential standards for nonbank financial companies supervised by the Board of Governors and certain bank holding companies.
Sec. 166. Early remediation requirements.
Sec. 167. Affiliations.
Sec. 168. Regulations.
Sec. 169. Avoiding duplication.
Sec. 170. Safe harbor.
Sec. 171. Leverage and risk-based capital requirements.
Sec. 172. Examination and enforcement actions for insurance and orderly liquidation purposes.
Sec. 173. Access to United States financial market by foreign institutions.
Sec. 174. Studies and reports on holding company capital requirements.
Sec. 175. International policy coordination.
Sec. 176. Rule of construction.

TITLE II—ORDERLY LIQUIDATION AUTHORITY

Sec. 201. Definitions.
Sec. 203. Systemic risk determination.
Sec. 204. Orderly liquidation of covered financial companies.
Sec. 205. Orderly liquidation of covered brokers and dealers.
Sec. 206. Mandatory terms and conditions for all orderly liquidation actions.
Sec. 207. Directors not liable for acquiescing in appointment of receiver.
Sec. 208. Dismissal and exclusion of other actions.
Sec. 209. Rulemaking; non-conflicting law.
Sec. 211. Miscellaneous provisions.
Sec. 212. Prohibition of circumvention and prevention of conflicts of interest.
Sec. 213. Ban on certain activities by senior executives and directors.
Sec. 214. Prohibition on taxpayer funding.
Sec. 215. Study on secured creditor haircuts.
Sec. 216. Study on bankruptcy process for financial and nonbank financial institutions
Sec. 217. Study on international coordination relating to bankruptcy process for nonbank financial institutions


Sec. 300. Short title.
Sec. 301. Purposes.
Sec. 302. Definition.

Subtitle A—Transfer of Powers and Duties

Sec. 311. Transfer date.
Sec. 312. Powers and duties transferred.
Sec. 313. Abolishment.
Sec. 314. Amendments to the Revised Statutes.
Sec. 315. Federal information policy.
Sec. 316. Savings provisions.
Sec. 317. References in Federal law to Federal banking agencies.
Sec. 318. Funding.
Sec. 319. Contracting and leasing authority.

Subtitle B—Transitional Provisions

Sec. 321. Interim use of funds, personnel, and property of the Office of Thrift Supervision.
Sec. 322. Transfer of employees.
Sec. 323. Property transferred.
Sec. 324. Funds transferred.
Sec. 325. Disposition of affairs.
Sec. 326. Continuation of services.
Sec. 327. Implementation plan and reports.
Subtitle C—Federal Deposit Insurance Corporation
Sec. 331. Deposit insurance reforms.
Sec. 332. Elimination of procyclical assessments.
Sec. 333. Enhanced access to information for deposit insurance purposes.
Sec. 334. Transition reserve ratio requirements to reflect new assessment base.
Sec. 335. Permanent increase in deposit and share insurance.
Sec. 336. Management of the Federal Deposit Insurance Corporation.
Subtitle D—Other Matters
Sec. 341. Branching.
Sec. 342. Office of Minority and Women Inclusion.
Sec. 343. Insurance of transaction accounts.
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SEC. 2. DEFINITIONS.

As used in this Act, the following definitions shall apply, except as the context otherwise requires or as otherwise specifically provided in this Act:

(1) AFFILIATE.—The term “affiliate” has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(2) APPROPRIATE FEDERAL BANKING AGENCY.—On and after the transfer date, the term “appropriate Federal banking agency” has the same meaning as in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), as amended by title III.
(3) Board of Governors.—The term "Board of Governors" means the Board of Governors of the Federal Reserve System.

(4) Bureau.—The term "Bureau" means the Bureau of Consumer Financial Protection established under title X.


(6) Commodity Futures Terms.—The terms "futures commission merchant", "swap", "swap dealer", "swap execution facility", "derivatives clearing organization", "board of trade", "commodity trading advisor", "commodity pool", and "commodity pool operator" have the same meanings as given the terms in section 1a of the Commodity Exchange Act (7 U.S.C. 1 et seq.).

(7) Corporation.—The term "Corporation" means the Federal Deposit Insurance Corporation.

(8) Council.—The term "Council" means the Financial Stability Oversight Council established under title I.

(9) Credit Union.—The term "credit union" means a Federal credit union, State credit union, or State-chartered credit union, as those terms are defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752).

(10) Federal Banking Agency.—The term—

(A) "Federal banking agency" means, individually, the Board of Governors, the Office of the Comptroller of the Currency, and the Corporation; and

(B) "Federal banking agencies" means all of the agencies referred to in subparagraph (A), collectively.

(11) Functionally Regulated Subsidiary.—The term "functionally regulated subsidiary" has the same meaning as in section 5(c)(5) of the Bank Holding Company Act of 1956 (12 U.S.C. 1844(c)(5)).

(12) Primary Financial Regulatory Agency.—The term "primary financial regulatory agency" means—

(A) the appropriate Federal banking agency, with respect to institutions described in section 3(q) of the Federal Deposit Insurance Act, except to the extent that an institution is or the activities of an institution are otherwise described in subparagraph (B), (C), (D), or (E);

(B) the Securities and Exchange Commission, with respect to—

(i) any broker or dealer that is registered with the Commission under the Securities Exchange Act of 1934, with respect to the activities of the broker or dealer that require the broker or dealer to be registered under that Act;

(ii) any investment company that is registered with the Commission under the Investment Company Act of 1940, with respect to the activities of the investment company that require the investment company to be registered under that Act;

(iii) any investment adviser that is registered with the Commission under the Investment Advisers Act of 1940, with respect to the investment advisory activities of such company and activities that are incidental to such advisory activities;
(iv) any clearing agency registered with the Commission under the Securities Exchange Act of 1934, with respect to the activities of the clearing agency that require the agency to be registered under such Act;

(v) any nationally recognized statistical rating organization registered with the Commission under the Securities Exchange Act of 1934;

(vi) any transfer agent registered with the Commission under the Securities Exchange Act of 1934;

(vii) any exchange registered as a national securities exchange with the Commission under the Securities Exchange Act of 1934;

(viii) any national securities association registered with the Commission under the Securities Exchange Act of 1934;

(ix) any securities information processor registered with the Commission under the Securities Exchange Act of 1934;

(x) the Municipal Securities Rulemaking Board established under the Securities Exchange Act of 1934;

(xi) the Public Company Accounting Oversight Board established under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7211 et seq.);

(xii) the Securities Investor Protection Corporation established under the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.); and

(xiii) any security-based swap execution facility, security-based swap data repository, security-based swap dealer or major security-based swap participant registered with the Commission under the Securities Exchange Act of 1934, with respect to the security-based swap activities of the person that require such person to be registered under such Act;

(C) the Commodity Futures Trading Commission, with respect to—

(i) any futures commission merchant registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.), with respect to the activities of the futures commission merchant that require the futures commission merchant to be registered under that Act;

(ii) any commodity pool operator registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.), with respect to the activities of the commodity pool operator that require the commodity pool operator to be registered under that Act, or a commodity pool, as defined in that Act;

(iii) any commodity trading advisor or introducing broker registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.), with respect to the activities of the commodity trading advisor or introducing broker that require the commodity trading adviser or introducing broker to be registered under that Act;
(iv) any derivatives clearing organization registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.), with respect to the activities of the derivatives clearing organization that require the derivatives clearing organization to be registered under that Act;

(v) any board of trade designated as a contract market by the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.);

(vi) any futures association registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.);

(vii) any retail foreign exchange dealer registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.), with respect to the activities of the retail foreign exchange dealer that require the retail foreign exchange dealer to be registered under that Act;

(viii) any swap execution facility, swap data repository, swap dealer, or major swap participant registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.) with respect to the swap activities of the person that require such person to be registered under that Act; and

(ix) any registered entity under the Commodity Exchange Act (7 U.S.C. 1 et seq.), with respect to the activities of the registered entity that require the registered entity to be registered under that Act;

(D) the State insurance authority of the State in which an insurance company is domiciled, with respect to the insurance activities and activities that are incidental to such insurance activities of an insurance company that is subject to supervision by the State insurance authority under State insurance law; and

(E) the Federal Housing Finance Agency, with respect to Federal Home Loan Banks or the Federal Home Loan Bank System, and with respect to the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation.

(13) PRUDENTIAL STANDARDS.—The term "prudential standards" means enhanced supervision and regulatory standards developed by the Board of Governors under section 165.

(14) SECRETARY.—The term "Secretary" means the Secretary of the Treasury.

(15) SECURITIES TERMS.—The—

(A) terms "broker", "dealer", "issuer", "nationally recognized statistical rating organization", "security", and "securities laws" have the same meanings as in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c);

(B) term "investment adviser" has the same meaning as in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2); and

(C) term "investment company" has the same meaning as in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3).
(16) **STATE.**—The term “State” means any State, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, or the United States Virgin Islands.

(17) **TRANSFER DATE.**—The term “transfer date” means the date established under section 311.

(18) **OTHER INCORPORATED DEFINITIONS.**—


(B) **HOLDING COMPANIES.**—The term—

(i) “bank holding company” has the same meaning as in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841);

(ii) “financial holding company” has the same meaning as in section 2(p) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(p)); and

(iii) “savings and loan holding company” has the same meaning as in section 10 of the Home Owners’ Loan Act (12 U.S.C. 1467a(a)).

**SEC. 3. SEVERABILITY.**

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby.

**SEC. 4. EFFECTIVE DATE.**

Except as otherwise specifically provided in this Act or the amendments made by this Act, this Act and such amendments shall take effect 1 day after the date of enactment of this Act.

**SEC. 5. BUDGETARY EFFECTS.**

The budgetary effects of this Act, for the purpose of complying with the Statutory Pay-As-You-Go-Act of 2010, shall be determined by reference to the latest statement titled “Budgetary Effects of PAYGO Legislation” for this Act, jointly submitted for printing in the Congressional Record by the Chairmen of the House and Senate Budget Committees, provided that such statement has been submitted prior to the vote on passage in the House acting first on this conference report or amendment between the Houses.

**SEC. 6. ANTITRUST SAVINGS CLAUSE.**

Nothing in this Act, or any amendment made by this Act, shall be construed to modify, impair, or supersede the operation of any of the antitrust laws, unless otherwise specified. For purposes of this section, the term “antitrust laws” has the same meaning.
as in subsection (a) of the first section of the Clayton Act, except that such term includes section 5 of the Federal Trade Commission Act, to the extent that such section 5 applies to unfair methods of competition.

**TITLE I—FINANCIAL STABILITY**

**SEC. 101. SHORT TITLE.**

This title may be cited as the “Financial Stability Act of 2010”.

**SEC. 102. DEFINITIONS.**

(a) **IN GENERAL.**—For purposes of this title, unless the context otherwise requires, the following definitions shall apply:

1. **BANK HOLDING COMPANY.**—The term “bank holding company” has the same meaning as in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841). A foreign bank or company that is treated as a bank holding company for purposes of the Bank Holding Company Act of 1956, pursuant to section 8(a) of the International Banking Act of 1978 (12 U.S.C. 3106(a)), shall be treated as a bank holding company for purposes of this title.

2. **CHAIRPERSON.**—The term “Chairperson” means the Chairperson of the Council.

3. **MEMBER AGENCY.**—The term “member agency” means an agency represented by a voting member of the Council.

4. **NONBANK FINANCIAL COMPANY DEFINITIONS.**—

   a. **FOREIGN NONBANK FINANCIAL COMPANY.**—The term “foreign nonbank financial company” means a company (other than a company that is, or is treated in the United States as, a bank holding company) that is—

   i. incorporated or organized in a country other than the United States; and

   ii. predominantly engaged in, including through a branch in the United States, financial activities, as defined in paragraph (6).

   b. **U.S. NONBANK FINANCIAL COMPANY.**—The term “U.S. nonbank financial company” means a company (other than a bank holding company, a Farm Credit System institution chartered and subject to the provisions of the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.), or a national securities exchange (or parent thereof), clearing agency (or parent thereof, unless the parent is a bank holding company), security-based swap execution facility, or security-based swap data repository registered with the Commission, or a board of trade designated as a contract market (or parent thereof), or a derivatives clearing organization (or parent thereof, unless the parent is a bank holding company), swap execution facility or a swap data repository registered with the Commodity Futures Trading Commission), that is—

   i. incorporated or organized under the laws of the United States or any State; and

   ii. predominantly engaged in financial activities, as defined in paragraph (6).
(C) **Nonbank Financial Company.**—The term “nonbank financial company” means a U.S. nonbank financial company and a foreign nonbank financial company.

(D) **Nonbank Financial Company Supervised by the Board of Governors.**—The term “nonbank financial company supervised by the Board of Governors” means a nonbank financial company that the Council has determined under section 113 shall be supervised by the Board of Governors.


(6) **Predominantly Engaged.**—A company is “predominantly engaged in financial activities” if—

(A) the annual gross revenues derived by the company and all of its subsidiaries from activities that are financial in nature (as defined in section 4(k) of the Bank Holding Company Act of 1956) and, if applicable, from the ownership or control of one or more insured depository institutions, represents 85 percent or more of the consolidated annual gross revenues of the company; or

(B) the consolidated assets of the company and all of its subsidiaries related to activities that are financial in nature (as defined in section 4(k) of the Bank Holding Company Act of 1956) and, if applicable, related to the ownership or control of one or more insured depository institutions, represents 85 percent or more of the consolidated assets of the company.

(7) **Significant Institutions.**—The terms “significant nonbank financial company” and “significant bank holding company” have the meanings given those terms by rule of the Board of Governors, but in no instance shall the term “significant nonbank financial company” include those entities that are excluded under paragraph (4)(B).

(b) **Definitional Criteria.**—The Board of Governors shall establish, by regulation, the requirements for determining if a company is predominantly engaged in financial activities, as defined in subsection (a)(6).

(c) **Foreign Nonbank Financial Companies.**—For purposes of the application of subtitles A and C (other than section 113(b)) with respect to a foreign nonbank financial company, references in this title to “company” or “subsidiary” include only the United States activities and subsidiaries of such foreign company, except as otherwise provided.

### Subtitle A—Financial Stability Oversight Council

**SEC. 111. FINANCIAL STABILITY OVERSIGHT COUNCIL ESTABLISHED.**

(a) **Establishment.**—Effective on the date of enactment of this Act, there is established the Financial Stability Oversight Council.

(b) **Membership.**—The Council shall consist of the following members:

(1) **Voting Members.**—The voting members, who shall each have 1 vote on the Council shall be—
(A) the Secretary of the Treasury, who shall serve as Chairperson of the Council;
(B) the Chairman of the Board of Governors;
(C) the Comptroller of the Currency;
(D) the Director of the Bureau;
(E) the Chairman of the Commission;
(F) the Chairperson of the Corporation;
(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.

(2) NONVOTING MEMBERS.—The nonvoting members, who shall serve in an advisory capacity as a nonvoting member of the Council, shall be—
(A) the Director of the Office of Financial Research;
(B) the Director of the Federal Insurance Office;
(C) a State insurance commissioner, to be designated by a selection process determined by the State insurance commissioners;
(D) a State banking supervisor, to be designated by a selection process determined by the State banking supervisors; and
(E) a State securities commissioner (or an officer performing like functions), to be designated by a selection process determined by such State securities commissioners.

(3) NONVOTING MEMBER PARTICIPATION.—The nonvoting members of the Council shall not be excluded from any of the proceedings, meetings, discussions, or deliberations of the Council, except that the Chairperson may, upon an affirmative vote of the member agencies, exclude the nonvoting members from any of the proceedings, meetings, discussions, or deliberations of the Council when necessary to safeguard and promote the free exchange of confidential supervisory information.

(c) TERMS; VACANCY.—
(1) TERMS.—The independent member of the Council shall serve for a term of 6 years, and each nonvoting member described in subparagraphs (C), (D), and (E) of subsection (b)(2) shall serve for a term of 2 years.
(2) VACANCY.—Any vacancy on the Council shall be filled in the manner in which the original appointment was made.
(3) ACTING OFFICIALS MAY SERVE.—In the event of a vacancy in the office of the head of a member agency or department, and pending the appointment of a successor, or during the absence or disability of the head of a member agency or department, the acting head of the member agency or department shall serve as a member of the Council in the place of that agency or department head.

(d) TECHNICAL AND PROFESSIONAL ADVISORY COMMITTEES.—The Council may appoint such special advisory, technical, or professional committees as may be useful in carrying out the functions of the Council, including an advisory committee consisting of State
regulators, and the members of such committees may be members of the Council, or other persons, or both.

(e) **Meetings.**—

(1) **Timing.**—The Council shall meet at the call of the Chairperson or a majority of the members then serving, but not less frequently than quarterly.

(2) **Rules for Conducting Business.**—The Council shall adopt such rules as may be necessary for the conduct of the business of the Council. Such rules shall be rules of agency organization, procedure, or practice for purposes of section 553 of title 5, United States Code.

(f) **Voting.**—Unless otherwise specified, the Council shall make all decisions that it is authorized or required to make by a majority vote of the voting members then serving.

(g) **Nonapplicability of FACA.**—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Council, or to any special advisory, technical, or professional committee appointed by the Council, except that, if an advisory, technical, or professional committee has one or more members who are not employees of or affiliated with the United States Government, the Council shall publish a list of the names of the members of such committee.

(h) **Assistance from Federal Agencies.**—Any department or agency of the United States may provide to the Council and any special advisory, technical, or professional committee appointed by the Council, such services, funds, facilities, staff, and other support services as the Council may determine advisable.

(i) **Compensation of Members.**—

(1) **Federal Employee Members.**—All members of the Council who are officers or employees of the United States shall serve without compensation in addition to that received for their services as officers or employees of the United States.

(2) **Compensation for Non-Federal Member.**—Section 5314 of title 5, United States Code, is amended by adding at the end the following:

“Independent Member of the Financial Stability Oversight Council (1).”

(j) **Detail of Government Employees.**—Any employee of the Federal Government may be detailed to the Council without reimbursement, and such detail shall be without interruption or loss of civil service status or privilege. An employee of the Federal Government detailed to the Council shall report to and be subject to oversight by the Council during the assignment to the Council, and shall be compensated by the department or agency from which the employee was detailed.

**SEC. 112. COUNCIL AUTHORITY.**

(a) **Purposes and Duties of the Council.**—

(1) **In General.**—The purposes of the Council are—

(A) to identify risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected bank holding companies or nonbank financial companies, or that could arise outside the financial services marketplace;

(B) to promote market discipline, by eliminating expectations on the part of shareholders, creditors, and
counterparties of such companies that the Government will shield them from losses in the event of failure; and
(C) to respond to emerging threats to the stability of the United States financial system.

(2) DUTIES.—The Council shall, in accordance with this title—

(A) collect information from member agencies, other Federal and State financial regulatory agencies, the Federal Insurance Office and, if necessary to assess risks to the United States financial system, direct the Office of Financial Research to collect information from bank holding companies and nonbank financial companies;

(B) provide direction to, and request data and analyses from, the Office of Financial Research to support the work of the Council;

(C) monitor the financial services marketplace in order to identify potential threats to the financial stability of the United States;

(D) to monitor domestic and international financial regulatory proposals and developments, including insurance and accounting issues, and to advise Congress and make recommendations in such areas that will enhance the integrity, efficiency, competitiveness, and stability of the U.S. financial markets;

(E) facilitate information sharing and coordination among the member agencies and other Federal and State agencies regarding domestic financial services policy development, rulemaking, examinations, reporting requirements, and enforcement actions;

(F) recommend to the member agencies general supervisory priorities and principles reflecting the outcome of discussions among the member agencies;

(G) identify gaps in regulation that could pose risks to the financial stability of the United States;

(H) require supervision by the Board of Governors for nonbank financial companies that may pose risks to the financial stability of the United States in the event of their material financial distress or failure, or because of their activities pursuant to section 113;

(I) make recommendations to the Board of Governors concerning the establishment of heightened prudential standards for risk-based capital, leverage, liquidity, contingent capital, resolution plans and credit exposure reports, concentration limits, enhanced public disclosures, and overall risk management for nonbank financial companies and large, interconnected bank holding companies supervised by the Board of Governors;

(J) identify systemically important financial market utilities and payment, clearing, and settlement activities (as that term is defined in title VIII);

(K) make recommendations to primary financial regulatory agencies to apply new or heightened standards and safeguards for financial activities or practices that could create or increase risks of significant liquidity, credit, or other problems spreading among bank holding companies, nonbank financial companies, and United States financial markets;
(L) review and, as appropriate, may submit comments to the Commission and any standard-setting body with respect to an existing or proposed accounting principle, standard, or procedure;
(M) provide a forum for—
   (i) discussion and analysis of emerging market developments and financial regulatory issues; and
   (ii) resolution of jurisdictional disputes among the members of the Council; and
(N) annually report to and testify before Congress on—
   (i) the activities of the Council;
   (ii) significant financial market and regulatory developments, including insurance and accounting regulations and standards, along with an assessment of those developments on the stability of the financial system;
   (iii) potential emerging threats to the financial stability of the United States;
   (iv) all determinations made under section 113 or title VIII, and the basis for such determinations;
   (v) all recommendations made under section 119 and the result of such recommendations; and
   (vi) recommendations—
      (I) to enhance the integrity, efficiency, competitiveness, and stability of United States financial markets;
      (II) to promote market discipline; and
      (III) to maintain investor confidence.

(b) Statements by Voting Members of the Council.—At the time at which each report is submitted under subsection (a), each voting member of the Council shall—
   (1) if such member believes that the Council, the Government, and the private sector are taking all reasonable steps to ensure financial stability and to mitigate systemic risk that would negatively affect the economy, submit a signed statement to Congress stating such belief; or
   (2) if such member does not believe that all reasonable steps described under paragraph (1) are being taken, submit a signed statement to Congress stating what actions such member believes need to be taken in order to ensure that all reasonable steps described under paragraph (1) are taken.

(c) Testimony by the Chairperson.—The Chairperson shall appear before the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate at an annual hearing, after the report is submitted under subsection (a)—
   (1) to discuss the efforts, activities, objectives, and plans of the Council; and
   (2) to discuss and answer questions concerning such report.

(d) Authority To Obtain Information.—
   (1) In General.—The Council may receive, and may request the submission of, any data or information from the Office of Financial Research, member agencies, and the Federal Insurance Office, as necessary—
      (A) to monitor the financial services marketplace to identify potential risks to the financial stability of the United States; or
(B) to otherwise carry out any of the provisions of this title.

(2) Submissions by the Office and Member Agencies.—Notwithstanding any other provision of law, the Office of Financial Research, any member agency, and the Federal Insurance Office, are authorized to submit information to the Council.

(3) Financial Data Collection.—
   (A) In General.—The Council, acting through the Office of Financial Research, may require the submission of periodic and other reports from any nonbank financial company or bank holding company for the purpose of assessing the extent to which a financial activity or financial market in which the nonbank financial company or bank holding company participates, or the nonbank financial company or bank holding company itself, poses a threat to the financial stability of the United States.
   (B) Mitigation of Report Burden.—Before requiring the submission of reports from any nonbank financial company or bank holding company that is regulated by a member agency or any primary financial regulatory agency, the Council, acting through the Office of Financial Research, shall coordinate with such agencies and shall, whenever possible, rely on information available from the Office of Financial Research or such agencies.
   (C) Mitigation in Case of Foreign Financial Companies.—Before requiring the submission of reports from a company that is a foreign nonbank financial company or foreign-based bank holding company, the Council shall, acting through the Office of Financial Research, to the extent appropriate, consult with the appropriate foreign regulator of such company and, whenever possible, rely on information already being collected by such foreign regulator, with English translation.

(4) Back-Up Examination by the Board of Governors.—If the Council is unable to determine whether the financial activities of a U.S. nonbank financial company pose a threat to the financial stability of the United States, based on information or reports obtained under paragraphs (1) and (3), discussions with management, and publicly available information, the Council may request the Board of Governors, and the Board of Governors is authorized, to conduct an examination of the U.S. nonbank financial company for the sole purpose of determining whether the nonbank financial company should be supervised by the Board of Governors for purposes of this title.

(5) Confidentiality.—
   (A) In General.—The Council, the Office of Financial Research, and the other member agencies shall maintain the confidentiality of any data, information, and reports submitted under this title.
   (B) Retention of Privilege.—The submission of any nonpublicly available data or information under this subsection to the extent available in Subtitle B shall not constitute a waiver of, or otherwise affect, any privilege arising under Federal or State law (including the rules of any Federal or State court) to which the data or information is otherwise subject.
SEC. 112. FREEDOM OF INFORMATION ACT.  

(C) FREEDOM OF INFORMATION ACT.—Section 552 of title 5, United States Code, including the exceptions thereunder, shall apply to any data or information submitted under this subsection and subtitle B.

12 USC 5323.  

SEC. 113. AUTHORITY TO REQUIRE SUPERVISION AND REGULATION OF CERTAIN NONBANK FINANCIAL COMPANIES.  

(a) U.S. NONBANK FINANCIAL COMPANIES SUPERVISED BY THE BOARD OF GOVERNORS.—  

(1) DETERMINATION.—The Council, on a nondelegable basis and by a vote of not fewer than 2/3 of the voting members then serving, including an affirmative vote by the Chairperson, may determine that a U.S. nonbank financial company shall be supervised by the Board of Governors and shall be subject to prudential standards, in accordance with this title, if the Council determines that material financial distress at the U.S. nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the U.S. nonbank financial company, could pose a threat to the financial stability of the United States.  

(2) CONSIDERATIONS.—In making a determination under paragraph (1), the Council shall consider—  

(A) the extent of the leverage of the company;  
(B) the extent and nature of the off-balance-sheet exposures of the company;  
(C) the extent and nature of the transactions and relationships of the company with other significant nonbank financial companies and significant bank holding companies;  
(D) the importance of the company as a source of credit for households, businesses, and State and local governments and as a source of liquidity for the United States financial system;  
(E) the importance of the company as a source of credit for low-income, minority, or underserved communities, and the impact that the failure of such company would have on the availability of credit in such communities;  
(F) the extent to which assets are managed rather than owned by the company, and the extent to which ownership of assets under management is diffuse;  
(G) the nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the company;  
(H) the degree to which the company is already regulated by 1 or more primary financial regulatory agencies;  
(I) the amount and nature of the financial assets of the company;  
(J) the amount and types of the liabilities of the company, including the degree of reliance on short-term funding; and  
(K) any other risk-related factors that the Council deems appropriate.  

(b) FOREIGN NONBANK FINANCIAL COMPANIES SUPERVISED BY THE BOARD OF GOVERNORS.—  

(1) DETERMINATION.—The Council, on a nondelegable basis and by a vote of not fewer than 2/3 of the voting members then serving, including an affirmative vote by the Chairperson,
may determine that a foreign nonbank financial company shall be supervised by the Board of Governors and shall be subject to prudential standards, in accordance with this title, if the Council determines that material financial distress at the foreign nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the foreign nonbank financial company, could pose a threat to the financial stability of the United States.

(2) CONSIDERATIONS.—In making a determination under paragraph (1), the Council shall consider—

(A) the extent of the leverage of the company;
(B) the extent and nature of the United States related off-balance-sheet exposures of the company;
(C) the extent and nature of the transactions and relationships of the company with other significant nonbank financial companies and significant bank holding companies;
(D) the importance of the company as a source of credit for United States households, businesses, and State and local governments and as a source of liquidity for the United States financial system;
(E) the importance of the company as a source of credit for low-income, minority, or underserved communities in the United States, and the impact that the failure of such company would have on the availability of credit in such communities;
(F) the extent to which assets are managed rather than owned by the company and the extent to which ownership of assets under management is diffuse;
(G) the nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the company;
(H) the extent to which the company is subject to prudential standards on a consolidated basis in its home country that are administered and enforced by a comparable foreign supervisory authority;
(I) the amount and nature of the United States financial assets of the company;
(J) the amount and nature of the liabilities of the company used to fund activities and operations in the United States, including the degree of reliance on short-term funding; and
(K) any other risk-related factors that the Council deems appropriate.

(c) ANTIEVASION.—

(1) DETERMINATIONS.—In order to avoid evasion of this title, the Council, on its own initiative or at the request of the Board of Governors, may determine, on a nondelegable basis and by a vote of not fewer than 2/3 of the voting members then serving, including an affirmative vote by the Chairperson, that—

(A) material financial distress related to, or the nature, scope, size, scale, concentration, interconnectedness, or mix of, the financial activities conducted directly or indirectly by a company incorporated or organized under the laws of the United States or any State or the financial activities in the United States of a company incorporated or organized in a country other than the United States would
pose a threat to the financial stability of the United States, based on consideration of the factors in subsection (a)(2) or (b)(2), as applicable;

(B) the company is organized or operates in such a manner as to evade the application of this title; and

(C) such financial activities of the company shall be supervised by the Board of Governors and subject to prudential standards in accordance with this title, consistent with paragraph (3).

(2) REPORT.—Upon making a determination under paragraph (1), the Council shall submit a report to the appropriate committees of Congress detailing the reasons for making such determination.

(3) CONSOLIDATED SUPERVISION OF ONLY FINANCIAL ACTIVITIES; ESTABLISHMENT OF AN INTERMEDIATE HOLDING COMPANY.—

(A) ESTABLISHMENT OF AN INTERMEDIATE HOLDING COMPANY.—Upon a determination under paragraph (1), the company that is the subject of the determination may establish an intermediate holding company in which the financial activities of such company and its subsidiaries shall be conducted (other than the activities described in section 167(b)(2)) in compliance with any regulations or guidance provided by the Board of Governors. Such intermediate holding company shall be subject to the supervision of the Board of Governors and to prudential standards under this title as if the intermediate holding company were a nonbank financial company supervised by the Board of Governors.

(B) ACTION OF THE BOARD OF GOVERNORS.—To facilitate the supervision of the financial activities subject to the determination in paragraph (1), the Board of Governors may require a company to establish an intermediate holding company, as provided for in section 167, which would be subject to the supervision of the Board of Governors and to prudential standards under this title, as if the intermediate holding company were a nonbank financial company supervised by the Board of Governors.

(4) NOTICE AND OPPORTUNITY FOR HEARING AND FINAL DETERMINATION; JUDICIAL REVIEW.—Subsections (d) through (h) shall apply to determinations made by the Council pursuant to paragraph (1) in the same manner as such subsections apply to nonbank financial companies.

(5) COVERED FINANCIAL ACTIVITIES.—For purposes of this subsection, the term “financial activities”—

(A) means activities that are financial in nature (as defined in section 4(k) of the Bank Holding Company Act of 1956);

(B) includes the ownership or control of one or more insured depository institutions; and

(C) does not include internal financial activities conducted for the company or any affiliate thereof, including internal treasury, investment, and employee benefit functions.

(6) ONLY FINANCIAL ACTIVITIES SUBJECT TO PRUDENTIAL SUPERVISION.—Nonfinancial activities of the company shall not
be subject to supervision by the Board of Governors and prudential standards of the Board. For purposes of this Act, the financial activities that are the subject of the determination in paragraph (1) shall be subject to the same requirements as a nonbank financial company supervised by the Board of Governors. Nothing in this paragraph shall prohibit or limit the authority of the Board of Governors to apply prudential standards under this title to the financial activities that are subject to the determination in paragraph (1).

(d) Reevaluation and Rescission.—The Council shall—

(1) not less frequently than annually, reevaluate each determination made under subsections (a) and (b) with respect to such nonbank financial company supervised by the Board of Governors; and

(2) rescind any such determination, if the Council, by a vote of not fewer than 2/3 of the voting members then serving, including an affirmative vote by the Chairperson, determines that the nonbank financial company no longer meets the standards under subsection (a) or (b), as applicable.

(e) Notice and Opportunity for Hearing and Final Determination.—

(1) In General.—The Council shall provide to a nonbank financial company written notice of a proposed determination of the Council, including an explanation of the basis of the proposed determination of the Council, that a nonbank financial company shall be supervised by the Board of Governors and shall be subject to prudential standards in accordance with this title.

(2) Hearing.—Not later than 30 days after the date of receipt of any notice of a proposed determination under paragraph (1), the nonbank financial company may request, in writing, an opportunity for a written or oral hearing before the Council to contest the proposed determination. Upon receipt of a timely request, the Council shall fix a time (not later than 30 days after the date of receipt of the request) and place at which such company may appear, personally or through counsel, to submit written materials (or, at the sole discretion of the Council, oral testimony and oral argument).

(3) Final Determination.—Not later than 60 days after the date of a hearing under paragraph (2), the Council shall notify the nonbank financial company of the final determination of the Council, which shall contain a statement of the basis for the decision of the Council.

(4) No Hearing Requested.—If a nonbank financial company does not make a timely request for a hearing, the Council shall notify the nonbank financial company, in writing, of the final determination of the Council under subsection (a) or (b), as applicable, not later than 10 days after the date by which the company may request a hearing under paragraph (2).

(f) Emergency Exception.—

(1) In General.—The Council may waive or modify the requirements of subsection (e) with respect to a nonbank financial company, if the Council determines, by a vote of not fewer than 2/3 of the voting members then serving, including an affirmative vote by the Chairperson, that such waiver or modification is necessary or appropriate to prevent or mitigate
threats posed by the nonbank financial company to the financial stability of the United States.

(2) NOTICE.—The Council shall provide notice of a waiver or modification under this subsection to the nonbank financial company concerned as soon as practicable, but not later than 24 hours after the waiver or modification is granted.

(3) INTERNATIONAL COORDINATION.—In making a determination under paragraph (1), the Council shall consult with the appropriate home country supervisor, if any, of the foreign nonbank financial company that is being considered for such a determination.

(4) OPPORTUNITY FOR HEARING.—The Council shall allow a nonbank financial company to request, in writing, an opportunity for a written or oral hearing before the Council to contest a waiver or modification under this subsection, not later than 10 days after the date of receipt of notice of the waiver or modification by the company. Upon receipt of a timely request, the Council shall fix a time (not later than 15 days after the date of receipt of the request) and place at which the nonbank financial company may appear, personally or through counsel, to submit written materials (or, at the sole discretion of the Council, oral testimony and oral argument).

(5) NOTICE OF FINAL DETERMINATION.—Not later than 30 days after the date of any hearing under paragraph (4), the Council shall notify the subject nonbank financial company of the final determination of the Council under this subsection, which shall contain a statement of the basis for the decision of the Council.

(g) CONSULTATION.—The Council shall consult with the primary financial regulatory agency, if any, for each nonbank financial company or subsidiary of a nonbank financial company that is being considered for supervision by the Board of Governors under this section before the Council makes any final determination with respect to such nonbank financial company under subsection (a), (b), or (c).

(h) JUDICIAL REVIEW.—If the Council makes a final determination under this section with respect to a nonbank financial company, such nonbank financial company may, not later than 30 days after the date of receipt of the notice of final determination under subsection (d)(2), (e)(3), or (f)(5), bring an action in the United States district court for the judicial district in which the home office of such nonbank financial company is located, or in the United States District Court for the District of Columbia, for an order requiring that the final determination be rescinded, and the court shall, upon review, dismiss such action or direct the final determination to be rescinded. Review of such an action shall be limited to whether the final determination made under this section was arbitrary and capricious.

(i) INTERNATIONAL COORDINATION.—In exercising its duties under this title with respect to foreign nonbank financial companies, foreign-based bank holding companies, and cross-border activities and markets, the Council shall consult with appropriate foreign regulatory authorities, to the extent appropriate.
SEC. 114. REGISTRATION OF NONBANK FINANCIAL COMPANIES SUPERVISED BY THE BOARD OF GOVERNORS.

Not later than 180 days after the date of a final Council determination under section 113 that a nonbank financial company is to be supervised by the Board of Governors, such company shall register with the Board of Governors, on forms prescribed by the Board of Governors, which shall include such information as the Board of Governors, in consultation with the Council, may deem necessary or appropriate to carry out this title.

SEC. 115. ENHANCED SUPERVISION AND PRUDENTIAL STANDARDS FOR NONBANK FINANCIAL COMPANIES SUPERVISED BY THE BOARD OF GOVERNORS AND CERTAIN BANK HOLDING COMPANIES.

(a) IN GENERAL.—

(1) PURPOSE.—In order to prevent or mitigate risks to the financial stability of the United States that could arise from the material financial distress, failure, or ongoing activities of large, interconnected financial institutions, the Council may make recommendations to the Board of Governors concerning the establishment and refinement of prudential standards and reporting and disclosure requirements applicable to nonbank financial companies supervised by the Board of Governors and large, interconnected bank holding companies, that—

(A) are more stringent than those applicable to other nonbank financial companies and bank holding companies that do not present similar risks to the financial stability of the United States; and

(B) increase in stringency, based on the considerations identified in subsection (b)(3).

(2) RECOMMENDED APPLICATION OF REQUIRED STANDARDS.—

In making recommendations under this section, the Council may—

(A) differentiate among companies that are subject to heightened standards on an individual basis or by category, taking into consideration their capital structure, riskiness, complexity, financial activities (including the financial activities of their subsidiaries), size, and any other risk-related factors that the Council deems appropriate; or

(B) recommend an asset threshold that is higher than $50,000,000,000 for the application of any standard described in subsections (c) through (g).

(b) DEVELOPMENT OF PRUDENTIAL STANDARDS.—

(1) IN GENERAL.—The recommendations of the Council under subsection (a) may include—

(A) risk-based capital requirements;

(B) leverage limits;

(C) liquidity requirements;

(D) resolution plan and credit exposure report requirements;

(E) concentration limits;

(F) a contingent capital requirement;

(G) enhanced public disclosures;

(H) short-term debt limits; and

(I) overall risk management requirements.
(2) Prudential Standards for Foreign Financial Companies.—In making recommendations concerning the standards set forth in paragraph (1) that would apply to foreign nonbank financial companies supervised by the Board of Governors or foreign-based bank holding companies, the Council shall—
   (A) give due regard to the principle of national treatment and equality of competitive opportunity; and
   (B) take into account the extent to which the foreign nonbank financial company or foreign-based bank holding company is subject on a consolidated basis to home country standards that are comparable to those applied to financial companies in the United States.

(3) Considerations.—In making recommendations concerning prudential standards under paragraph (1), the Council shall—
   (A) take into account differences among nonbank financial companies supervised by the Board of Governors and bank holding companies described in subsection (a), based on—
      (i) the factors described in subsections (a) and (b) of section 113;
      (ii) whether the company owns an insured depository institution;
      (iii) nonfinancial activities and affiliations of the company; and
      (iv) any other factors that the Council determines appropriate;
   (B) to the extent possible, ensure that small changes in the factors listed in subsections (a) and (b) of section 113 would not result in sharp, discontinuous changes in the prudential standards established under section 165; and
   (C) adapt its recommendations as appropriate in light of any predominant line of business of such company, including assets under management or other activities for which particular standards may not be appropriate.

(c) Contingent Capital.—
   (1) Study Required.—The Council shall conduct a study of the feasibility, benefits, costs, and structure of a contingent capital requirement for nonbank financial companies supervised by the Board of Governors and bank holding companies described in subsection (a), which study shall include—
      (A) an evaluation of the degree to which such requirement would enhance the safety and soundness of companies subject to the requirement, promote the financial stability of the United States, and reduce risks to United States taxpayers;
      (B) an evaluation of the characteristics and amounts of contingent capital that should be required;
      (C) an analysis of potential prudential standards that should be used to determine whether the contingent capital of a company would be converted to equity in times of financial stress;
      (D) an evaluation of the costs to companies, the effects on the structure and operation of credit and other financial markets, and other economic effects of requiring contingent capital;
(E) an evaluation of the effects of such requirement on the international competitiveness of companies subject to the requirement and the prospects for international coordination in establishing such requirement; and

(F) recommendations for implementing regulations.

(2) REPORT.—The Council shall submit a report to Congress regarding the study required by paragraph (1) not later than 2 years after the date of enactment of this Act.

(3) RECOMMENDATIONS.—

(A) IN GENERAL.—Subsequent to submitting a report to Congress under paragraph (2), the Council may make recommendations to the Board of Governors to require any nonbank financial company supervised by the Board of Governors and any bank holding company described in subsection (a) to maintain a minimum amount of contingent capital that is convertible to equity in times of financial stress.

(B) FACTORS TO CONSIDER.—In making recommendations under this subsection, the Council shall consider—

(i) an appropriate transition period for implementation of a conversion under this subsection;

(ii) the factors described in subsection (b)(3);

(iii) capital requirements applicable to a nonbank financial company supervised by the Board of Governors or a bank holding company described in subsection (a), and subsidiaries thereof;

(iv) results of the study required by paragraph (1); and

(v) any other factor that the Council deems appropriate.

(d) RESOLUTION PLAN AND CREDIT EXPOSURE REPORTS.—

(1) RESOLUTION PLAN.—The Council may make recommendations to the Board of Governors concerning the requirement that each nonbank financial company supervised by the Board of Governors and each bank holding company described in subsection (a) report periodically to the Council, the Board of Governors, and the Corporation, the plan of such company for rapid and orderly resolution in the event of material financial distress or failure.

(2) CREDIT EXPOSURE REPORT.—The Council may make recommendations to the Board of Governors concerning the advisability of requiring each nonbank financial company supervised by the Board of Governors and bank holding company described in subsection (a) to report periodically to the Council, the Board of Governors, and the Corporation on—

(A) the nature and extent to which the company has credit exposure to other significant nonbank financial companies and significant bank holding companies; and

(B) the nature and extent to which other such significant nonbank financial companies and significant bank holding companies have credit exposure to that company.

(e) CONCENTRATION LIMITS.—In order to limit the risks that the failure of any individual company could pose to nonbank financial companies supervised by the Board of Governors or bank holding companies described in subsection (a), the Council may make recommendations to the Board of Governors to prescribe standards to limit such risks, as set forth in section 165.
(f) ENHANCED PUBLIC DISCLOSURES.—The Council may make recommendations to the Board of Governors to require periodic public disclosures by bank holding companies described in subsection (a) and by nonbank financial companies supervised by the Board of Governors, in order to support market evaluation of the risk profile, capital adequacy, and risk management capabilities thereof.

(g) SHORT-TERM DEBT LIMITS.—The Council may make recommendations to the Board of Governors to require short-term debt limits to mitigate the risks that an over-accumulation of such debt could pose to bank holding companies described in subsection (a), nonbank financial companies supervised by the Board of Governors, or the financial system.

SEC. 116. REPORTS.

(a) IN GENERAL.—Subject to subsection (b), the Council, acting through the Office of Financial Research, may require a bank holding company with total consolidated assets of $50,000,000,000 or greater or a nonbank financial company supervised by the Board of Governors, and any subsidiary thereof, to submit certified reports to keep the Council informed as to—

(1) the financial condition of the company;
(2) systems for monitoring and controlling financial, operating, and other risks;
(3) transactions with any subsidiary that is a depository institution; and
(4) the extent to which the activities and operations of the company and any subsidiary thereof, could, under adverse circumstances, have the potential to disrupt financial markets or affect the overall financial stability of the United States.

(b) USE OF EXISTING REPORTS.—

(1) IN GENERAL.—For purposes of compliance with subsection (a), the Council, acting through the Office of Financial Research, shall, to the fullest extent possible, use—

(A) reports that a bank holding company, nonbank financial company supervised by the Board of Governors, or any functionally regulated subsidiary of such company has been required to provide to other Federal or State regulatory agencies or to a relevant foreign supervisory authority;
(B) information that is otherwise required to be reported publicly; and
(C) externally audited financial statements.

(2) AVAILABILITY.—Each bank holding company described in subsection (a) and nonbank financial company supervised by the Board of Governors, and any subsidiary thereof, shall provide to the Council, at the request of the Council, copies of all reports referred to in paragraph (1).

(3) CONFIDENTIALITY.—The Council shall maintain the confidentiality of the reports obtained under subsection (a) and paragraph (1)(A) of this subsection.

SEC. 117. TREATMENT OF CERTAIN COMPANIES THAT CEASE TO BE BANK HOLDING COMPANIES.

(a) APPLICABILITY.—This section shall apply to—

(1) any entity that—
(A) was a bank holding company having total consolidated assets equal to or greater than $50,000,000,000 as of January 1, 2010; and

(B) received financial assistance under or participated in the Capital Purchase Program established under the Troubled Asset Relief Program authorized by the Emergency Economic Stabilization Act of 2008; and

(2) any successor entity (as defined by the Board of Governors, in consultation with the Council) to an entity described in paragraph (1).

(b) TREATMENT.—If an entity described in subsection (a) ceases to be a bank holding company at any time after January 1, 2010, then such entity shall be treated as a nonbank financial company supervised by the Board of Governors, as if the Council had made a determination under section 113 with respect to that entity.

(c) APPEAL.—

(1) REQUEST FOR HEARING.—An entity may request, in writing, an opportunity for a written or oral hearing before the Council to appeal its treatment as a nonbank financial company supervised by the Board of Governors in accordance with this section. Upon receipt of the request, the Council shall fix a time (not later than 30 days after the date of receipt of the request) and place at which such entity may appear, personally or through counsel, to submit written materials (or, at the sole discretion of the Council, oral testimony and oral argument).

(2) DECISION.—

(A) PROPOSED DECISION.—A Council decision to grant an appeal under this subsection shall be made by a vote of not fewer than 2/3 of the voting members then serving, including an affirmative vote by the Chairperson. Not later than 60 days after the date of a hearing under paragraph (1), the Council shall submit a report to, and may testify before, the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives on the proposed decision of the Council regarding an appeal under paragraph (1), which report shall include a statement of the basis for the proposed decision of the Council.

(B) NOTICE OF FINAL DECISION.—The Council shall notify the subject entity of the final decision of the Council regarding an appeal under paragraph (1), which notice shall contain a statement of the basis for the final decision of the Council, not later than 60 days after the later of—

(i) the date of the submission of the report under subparagraph (A); or

(ii) if, not later than 1 year after the date of submission of the report under subparagraph (A), the Committee on Banking, Housing, and Urban Affairs of the Senate or the Committee on Financial Services of the House of Representatives holds one or more hearings regarding such report, the date of the last such hearing.

(C) CONSIDERATIONS.—In making a decision regarding an appeal under paragraph (1), the Council shall consider whether the company meets the standards under section 113(a) or 113(b), as applicable, and the definition of the
term “nonbank financial company” under section 102. The
decision of the Council shall be final, subject to the review
under paragraph (3).

(3) Review.—If the Council denies an appeal under this
subsection, the Council shall, not less frequently than annually,
review and reevaluate the decision.

12 USC 5328.

SEC. 118. COUNCIL FUNDING.

Any expenses of the Council shall be treated as expenses of,
and paid by, the Office of Financial Research.

12 USC 5329.

SEC. 119. RESOLUTION OF SUPERVISORY JURISDICTIONAL DISPUTES
AMONG MEMBER AGENCIES.

(a) Request for Council Recommendation.—The Council
shall seek to resolve a dispute among 2 or more member agencies,
if—

(1) a member agency has a dispute with another member
agency about the respective jurisdiction over a particular bank
holding company, nonbank financial company, or financial
activity or product (excluding matters for which another dispute
mechanism specifically has been provided under title X);

(2) the Council determines that the disputing agencies
cannot, after a demonstrated good faith effort, resolve the dis-
pute without the intervention of the Council; and

(3) any of the member agencies involved in the dispute—

(A) provides all other disputants prior notice of the
intent to request dispute resolution by the Council; and

(B) requests in writing, not earlier than 14 days after
providing the notice described in subparagraph (A), that
the Council seek to resolve the dispute.

(b) Council Recommendation.—The Council shall seek to
resolve each dispute described in subsection (a)—

(1) within a reasonable time after receiving the dispute
resolution request;

(2) after consideration of relevant information provided by
each agency party to the dispute; and

(3) by agreeing with 1 of the disputants regarding the
entirety of the matter, or by determining a compromise position.

(c) Form of Recommendation.—Any Council recommendation
under this section shall—

(1) be in writing;

(2) include an explanation of the reasons therefor; and

(3) be approved by the affirmative vote of 2/3 of the voting
members of the Council then serving.

(d) Nonbinding Effect.—Any recommendation made by the
Council under subsection (c) shall not be binding on the Federal
agencies that are parties to the dispute.

12 USC 5330.

SEC. 120. ADDITIONAL STANDARDS APPLICABLE TO ACTIVITIES OR
PRACTICES FOR FINANCIAL STABILITY PURPOSES.

(a) In General.—The Council may provide for more stringent
regulation of a financial activity by issuing recommendations to
the primary financial regulatory agencies to apply new or height-
ened standards and safeguards, including standards enumerated
in section 115, for a financial activity or practice conducted by
bank holding companies or nonbank financial companies under
their respective jurisdictions, if the Council determines that the
conduct, scope, nature, size, scale, concentration, or interconnectedness of such activity or practice could create or increase the risk of significant liquidity, credit, or other problems spreading among bank holding companies and nonbank financial companies, financial markets of the United States, or low-income, minority, or underserved communities.

(b) Procedure for Recommendations to Regulators.—

(1) Notice and opportunity for comment.—The Council shall consult with the primary financial regulatory agencies and provide notice to the public and opportunity for comment for any proposed recommendation that the primary financial regulatory agencies apply new or heightened standards and safeguards for a financial activity or practice.

(2) Criteria.—The new or heightened standards and safeguards for a financial activity or practice recommended under paragraph (1)—

(A) shall take costs to long-term economic growth into account; and

(B) may include prescribing the conduct of the activity or practice in specific ways (such as by limiting its scope, or applying particular capital or risk management requirements to the conduct of the activity) or prohibiting the activity or practice.

(c) Implementation of Recommended Standards.—

(1) Role of Primary Financial Regulatory Agency.—

(A) In general.—Each primary financial regulatory agency may impose, require reports regarding, examine for compliance with, and enforce standards in accordance with this section with respect to those entities for which it is the primary financial regulatory agency.

(B) Rule of construction.—The authority under this paragraph is in addition to, and does not limit, any other authority of a primary financial regulatory agency. Compliance by an entity with actions taken by a primary financial regulatory agency under this section shall be enforceable in accordance with the statutes governing the respective jurisdiction of the primary financial regulatory agency over the entity, as if the agency action were taken under those statutes.

(2) Imposition of Standards.—The primary financial regulatory agency shall impose the standards recommended by the Council in accordance with subsection (a), or similar standards that the Council deems acceptable, or shall explain in writing to the Council, not later than 90 days after the date on which the Council issues the recommendation, why the agency has determined not to follow the recommendation of the Council.

(d) Report to Congress.—The Council shall report to Congress on—

(1) any recommendations issued by the Council under this section;

(2) the implementation of, or failure to implement, such recommendation on the part of a primary financial regulatory agency; and

(3) in any case in which no primary financial regulatory agency exists for the nonbank financial company conducting financial activities or practices referred to in subsection (a),
recommendations for legislation that would prevent such activities or practices from threatening the stability of the financial system of the United States.

(e) Effect of Rescission of Identification.—

(1) Notice.—The Council may recommend to the relevant primary financial regulatory agency that a financial activity or practice no longer requires any standards or safeguards implemented under this section.

(2) Determination of Primary Financial Regulatory Agency to Continue.—

(A) In General.—Upon receipt of a recommendation under paragraph (1), a primary financial regulatory agency that has imposed standards under this section shall determine whether such standards should remain in effect.

(B) Appeal Process.—Each primary financial regulatory agency that has imposed standards under this section shall promulgate regulations to establish a procedure under which entities under its jurisdiction may appeal a determination by such agency under this paragraph that standards imposed under this section should remain in effect.

12 USC 5331. SEC. 121. MITIGATION OF RISKS TO FINANCIAL STABILITY.

(a) Mitigatory Actions.—If the Board of Governors determines that a bank holding company with total consolidated assets of $50,000,000,000 or more, or a nonbank financial company supervised by the Board of Governors, poses a grave threat to the financial stability of the United States, the Board of Governors, upon an affirmative vote of not fewer than \( \frac{2}{3} \) of the voting members of the Council then serving, shall—

(1) limit the ability of the company to merge with, acquire, consolidate with, or otherwise become affiliated with another company;

(2) restrict the ability of the company to offer a financial product or products;

(3) require the company to terminate one or more activities;

(4) impose conditions on the manner in which the company conducts 1 or more activities; or

(5) if the Board of Governors determines that the actions described in paragraphs (1) through (4) are inadequate to mitigate a threat to the financial stability of the United States in its recommendation, require the company to sell or otherwise transfer assets or off-balance-sheet items to unaffiliated entities.

(b) Notice and Hearing.—

(1) In General.—The Board of Governors, in consultation with the Council, shall provide to a company described in subsection (a) written notice that such company is being considered for mitigatory action pursuant to this section, including an explanation of the basis for, and description of, the proposed mitigatory action.

(2) Hearing.—Not later than 30 days after the date of receipt of notice under paragraph (1), the company may request, in writing, an opportunity for a written or oral hearing before the Board of Governors to contest the proposed mitigatory action. Upon receipt of a timely request, the Board of Governors shall fix a time (not later than 30 days after the date of
receipt of the request) and place at which such company may appear, personally or through counsel, to submit written materials (or, at the discretion of the Board of Governors, in consultation with the Council, oral testimony and oral argument).

(3) DECISION.—Not later than 60 days after the date of a hearing under paragraph (2), or not later than 60 days after the provision of a notice under paragraph (1) if no hearing was held, the Board of Governors shall notify the company of the final decision of the Board of Governors, including the results of the vote of the Council, as described in subsection (a).

(c) FACTORS FOR CONSIDERATION.—The Board of Governors and the Council shall take into consideration the factors set forth in subsection (a) or (b) of section 113, as applicable, in making any determination under subsection (a).

(d) APPLICATION TO FOREIGN FINANCIAL COMPANIES.—The Board of Governors may prescribe regulations regarding the application of this section to foreign nonbank financial companies supervised by the Board of Governors and foreign-based bank holding companies—

(1) giving due regard to the principle of national treatment and equality of competitive opportunity; and

(2) taking into account the extent to which the foreign nonbank financial company or foreign-based bank holding company is subject on a consolidated basis to home country standards that are comparable to those applied to financial companies in the United States.

SEC. 122. GAO AUDIT OF COUNCIL.

(a) AUTHORITY TO AUDIT.—The Comptroller General of the United States may audit the activities of—

(1) the Council; and

(2) any person or entity acting on behalf of or under the authority of the Council, to the extent that such activities relate to work for the Council by such person or entity.

(b) ACCESS TO INFORMATION.—

(1) IN GENERAL.—Notwithstanding any other provision of law, the Comptroller General shall, upon request and at such reasonable time and in such reasonable form as the Comptroller General may request, have access to—

(A) any records or other information under the control of or used by the Council;

(B) any records or other information under the control of a person or entity acting on behalf of or under the authority of the Council, to the extent that such records or other information is relevant to an audit under subsection (a); and

(C) the officers, directors, employees, financial advisors, staff, working groups, and agents and representatives of the Council (as related to the activities on behalf of the Council of such agent or representative), at such reasonable times as the Comptroller General may request.

(2) COPIES.—The Comptroller General may make and retain copies of such books, accounts, and other records, access to which is granted under this section, as the Comptroller General considers appropriate.
SEC. 123. STUDY OF THE EFFECTS OF SIZE AND COMPLEXITY OF FINANCIAL INSTITUTIONS ON CAPITAL MARKET EFFICIENCY AND ECONOMIC GROWTH.

(a) Study Required.—

(1) In General.—The Chairperson of the Council shall carry out a study of the economic impact of possible financial services regulatory limitations intended to reduce systemic risk. Such study shall estimate the benefits and costs on the efficiency of capital markets, on the financial sector, and on national economic growth, of—

(A) explicit or implicit limits on the maximum size of banks, bank holding companies, and other large financial institutions;

(B) limits on the organizational complexity and diversification of large financial institutions;

(C) requirements for operational separation between business units of large financial institutions in order to expedite resolution in case of failure;

(D) limits on risk transfer between business units of large financial institutions;

(E) requirements to carry contingent capital or similar mechanisms;

(F) limits on commingling of commercial and financial activities by large financial institutions;

(G) segregation requirements between traditional financial activities and trading or other high-risk operations in large financial institutions; and

(H) other limitations on the activities or structure of large financial institutions that may be useful to limit systemic risk.

(2) Recommendations.—The study required by this section shall include recommendations for the optimal structure of any limits considered in subparagraphs (A) through (E), in order to maximize their effectiveness and minimize their economic impact.

(b) Report.—Not later than the end of the 180-day period beginning on the date of enactment of this title, and not later than every 5 years thereafter, the Chairperson shall issue a report to the Congress containing any findings and determinations made in carrying out the study required under subsection (a).

Subtitle B—Office of Financial Research

SEC. 151. DEFINITIONS.

For purposes of this subtitle—

(1) the terms “Office” and “Director” mean the Office of Financial Research established under this subtitle and the Director thereof, respectively;

(2) the term “financial company” has the same meaning as in title II, and includes an insured depository institution and an insurance company;

(3) the term “Data Center” means the data center established under section 154;

(4) the term “Research and Analysis Center” means the research and analysis center established under section 154;
(5) the term "financial transaction data" means the structure and legal description of a financial contract, with sufficient detail to describe the rights and obligations between counterparties and make possible an independent valuation;

(6) the term "position data"—
   (A) means data on financial assets or liabilities held on the balance sheet of a financial company, where positions are created or changed by the execution of a financial transaction; and
   (B) includes information that identifies counterparties, the valuation by the financial company of the position, and information that makes possible an independent valuation of the position;

(7) the term "financial contract" means a legally binding agreement between 2 or more counterparties, describing rights and obligations relating to the future delivery of items of intrinsic or extrinsic value among the counterparties; and

(8) the term "financial instrument" means a financial contract in which the terms and conditions are publicly available, and the roles of one or more of the counterparties are assignable without the consent of any of the other counterparties (including common stock of a publicly traded company, government bonds, or exchange traded futures and options contracts).

SEC. 152. OFFICE OF FINANCIAL RESEARCH ESTABLISHED.

(a) Establishment.—There is established within the Department of the Treasury the Office of Financial Research.

(b) Director.—
   (1) In general.—The Office shall be headed by a Director, who shall be appointed by the President, by and with the advice and consent of the Senate.
   (2) Term of service.—The Director shall serve for a term of 6 years, except that, in the event that a successor is not nominated and confirmed by the end of the term of service of a Director, the Director may continue to serve until such time as the next Director is appointed and confirmed.
   (3) Executive level.—The Director shall be compensated at Level III of the Executive Schedule.
   (4) Prohibition on dual service.—The individual serving in the position of Director may not, during such service, also serve as the head of any financial regulatory agency.
   (5) Responsibilities, duties, and authority.—The Director shall have sole discretion in the manner in which the Director fulfills the responsibilities and duties and exercises the authorities described in this subtitle.

(c) Budget.—The Director, in consultation with the Chairperson, shall establish the annual budget of the Office.

(d) Office Personnel.—
   (1) In general.—The Director, in consultation with the Chairperson, may fix the number of, and appoint and direct, all employees of the Office.
   (2) Compensation.—The Director, in consultation with the Chairperson, shall fix, adjust, and administer the pay for all employees of the Office, without regard to chapter 51 or subchapter III of chapter 53 of title 5, United States Code, relating to classification of positions and General Schedule pay rates.
(3) **COMPARABILITY.**—Section 1206(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 1833b(a)) is amended—

(A) by striking “Finance Board,” and inserting “Finance Board, the Office of Financial Research, and the Bureau of Consumer Financial Protection”; and

(B) by striking “and the Office of Thrift Supervision.”.

(4) **SENIOR EXECUTIVES.**—Section 3132(a)(1)(D) of title 5, United States Code, is amended by striking “and the National Credit Union Administration;” and inserting “the National Credit Union Administration, the Bureau of Consumer Financial Protection, and the Office of Financial Research;”.

(e) **ASSISTANCE FROM FEDERAL AGENCIES.**—Any department or agency of the United States may provide to the Office and any special advisory, technical, or professional committees appointed by the Office, such services, funds, facilities, staff, and other support services as the Office may determine advisable. Any Federal Government employee may be detailed to the Office without reimbursement, and such detail shall be without interruption or loss of civil service status or privilege.

(f) **PROCUREMENT OF TEMPORARY AND INTERMITTENT SERVICES.**—The Director may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, at rates for individuals which do not exceed the daily equivalent of the annual rate of basic pay prescribed for Level V of the Executive Schedule under section 5316 of such title.

(g) **POST-EMPLOYMENT PROHIBITIONS.**—The Secretary, with the concurrence of the Director of the Office of Government Ethics, shall issue regulations prohibiting the Director and any employee of the Office who has had access to the transaction or position data maintained by the Data Center or other business confidential information about financial entities required to report to the Office from being employed by or providing advice or consulting services to a financial company, for a period of 1 year after last having had access in the course of official duties to such transaction or position data or business confidential information, regardless of whether that entity is required to report to the Office. For employees whose access to business confidential information was limited, the regulations may provide, on a case-by-case basis, for a shorter period of post-employment prohibition, provided that the shorter period does not compromise business confidential information.

(h) **TECHNICAL AND PROFESSIONAL ADVISORY COMMITTEES.**—The Office, in consultation with the Chairperson, may appoint such special advisory, technical, or professional committees as may be useful in carrying out the functions of the Office, and the members of such committees may be staff of the Office, or other persons, or both.

(i) **FELLOWSHIP PROGRAM.**—The Office, in consultation with the Chairperson, may establish and maintain an academic and professional fellowship program, under which qualified academics and professionals shall be invited to spend not longer than 2 years at the Office, to perform research and to provide advanced training for Office personnel.

(j) **EXECUTIVE SCHEDULE COMPENSATION.**—Section 5314 of title 5, United States Code, is amended by adding at the end the following new item:

“Director of the Office of Financial Research.”.
SEC. 153. PURPOSE AND DUTIES OF THE OFFICE.

(a) Purpose and Duties.—The purpose of the Office is to support the Council in fulfilling the purposes and duties of the Council, as set forth in subtitle A, and to support member agencies, by—

(1) collecting data on behalf of the Council, and providing such data to the Council and member agencies;
(2) standardizing the types and formats of data reported and collected;
(3) performing applied research and essential long-term research;
(4) developing tools for risk measurement and monitoring;
(5) performing other related services;
(6) making the results of the activities of the Office available to financial regulatory agencies; and
(7) assisting such member agencies in determining the types and formats of data authorized by this Act to be collected by such member agencies.

(b) Administrative Authority.—The Office may—

(1) share data and information, including software developed by the Office, with the Council, member agencies, and the Bureau of Economic Analysis, which shared data, information, and software—

(A) shall be maintained with at least the same level of security as is used by the Office; and
(B) may not be shared with any individual or entity without the permission of the Council;

(2) sponsor and conduct research projects; and

(3) assist, on a reimbursable basis, with financial analyses undertaken at the request of other Federal agencies that are not member agencies.

(c) Rulemaking Authority.—

(1) Scope.—The Office, in consultation with the Chairperson, shall issue rules, regulations, and orders only to the extent necessary to carry out the purposes and duties described in paragraphs (1), (2), and (7) of subsection (a).

(2) Standardization.—Member agencies, in consultation with the Office, shall implement regulations promulgated by the Office under paragraph (1) to standardize the types and formats of data reported and collected on behalf of the Council, as described in subsection (a)(2). If a member agency fails to implement such regulations prior to the expiration of the 3-year period following the date of publication of final regulations, the Office, in consultation with the Chairperson, may implement such regulations with respect to the financial entities under the jurisdiction of the member agency. This paragraph shall not supersede or interfere with the independent authority of a member agency under other law to collect data, in such format and manner as the member agency requires.

(d) Testimony.—

(1) In general.—The Director of the Office shall report to and testify before the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives annually on the activities of the Office, including the work of the Data Center and the Research and Analysis Center, and the assessment of the...
Office of significant financial market developments and potential emerging threats to the financial stability of the United States.

(2) No prior review.—No officer or agency of the United States shall have any authority to require the Director to submit the testimony required under paragraph (1) or other congressional testimony to any officer or agency of the United States for approval, comment, or review prior to the submission of such testimony. Any such testimony to Congress shall include a statement that the views expressed therein are those of the Director and do not necessarily represent the views of the President.

(e) Additional reports.—The Director may provide additional reports to Congress concerning the financial stability of the United States. The Director shall notify the Council of any such additional reports provided to Congress.

(f) Subpoena.—

(1) In general.—The Director may require from a financial company, by subpoena, the production of the data requested under subsection (a)(1) and section 154(b)(1), but only upon a written finding by the Director that—

(A) such data is required to carry out the functions described under this subtitle; and

(B) the Office has coordinated with the relevant primary financial regulatory agency, as required under section 154(b)(1)(B)(ii).

(2) Format.—Subpoenas under paragraph (1) shall bear the signature of the Director, and shall be served by any person or class of persons designated by the Director for that purpose.

(3) Enforcement.—In the case of contumacy or failure to obey a subpoena, the subpoena shall be enforceable by order of any appropriate district court of the United States. Any failure to obey the order of the court may be punished by the court as a contempt of court.

SEC. 154. ORGANIZATIONAL STRUCTURE; RESPONSIBILITIES OF PRIMARY PROGRAMMATIC UNITS.

(a) In general.—There are established within the Office, to carry out the programmatic responsibilities of the Office—

(1) the Data Center; and

(2) the Research and Analysis Center.

(b) Data center.—

(1) General duties.—

(A) Data collection.—The Data Center, on behalf of the Council, shall collect, validate, and maintain all data necessary to carry out the duties of the Data Center, as described in this subtitle. The data assembled shall be obtained from member agencies, commercial data providers, publicly available data sources, and financial entities under subparagraph (B).

(B) Authority.—

(i) In general.—The Office may, as determined by the Council or by the Director in consultation with the Council, require the submission of periodic and other reports from any financial company for the purpose of assessing the extent to which a financial
activity or financial market in which the financial company participates, or the financial company itself, poses a threat to the financial stability of the United States.

(ii) Mitigation of Report Burden.—Before requiring the submission of a report from any financial company that is regulated by a member agency, any primary financial regulatory agency, a foreign supervisory authority, or the Office shall coordinate with such agencies or authority, and shall, whenever possible, rely on information available from such agencies or authority.

(iii) Collection of Financial Transaction and Position Data.—The Office shall collect, on a schedule determined by the Director, in consultation with the Council, financial transaction data and position data from financial companies.

(C) Rulemaking.—The Office shall promulgate regulations pursuant to subsections (a)(1), (a)(2), (a)(7), and (c)(1) of section 153 regarding the type and scope of the data to be collected by the Data Center under this paragraph.

(2) Responsibilities.—
(A) Publication.—The Data Center shall prepare and publish, in a manner that is easily accessible to the public—
(i) a financial company reference database;
(ii) a financial instrument reference database; and
(iii) formats and standards for Office data, including standards for reporting financial transaction and position data to the Office.

(B) Confidentiality.—The Data Center shall not publish any confidential data under subparagraph (A).

(3) Information Security.—The Director shall ensure that data collected and maintained by the Data Center are kept secure and protected against unauthorized disclosure.

(4) Catalog of Financial Entities and Instruments.—The Data Center shall maintain a catalog of the financial entities and instruments reported to the Office.

(5) Availability to the Council and Member Agencies.—The Data Center shall make data collected and maintained by the Data Center available to the Council and member agencies, as necessary to support their regulatory responsibilities.

(6) Other Authority.—The Office shall, after consultation with the member agencies, provide certain data to financial industry participants and to the general public to increase market transparency and facilitate research on the financial system, to the extent that intellectual property rights are not violated, business confidential information is properly protected, and the sharing of such information poses no significant threats to the financial system of the United States.

(c) Research and Analysis Center.—
(1) General Duties.—The Research and Analysis Center, on behalf of the Council, shall develop and maintain independent analytical capabilities and computing resources—
(A) to develop and maintain metrics and reporting systems for risks to the financial stability of the United States;
(B) to monitor, investigate, and report on changes in systemwide risk levels and patterns to the Council and Congress;

(C) to conduct, coordinate, and sponsor research to support and improve regulation of financial entities and markets;

(D) to evaluate and report on stress tests or other stability-related evaluations of financial entities overseen by the member agencies;

(E) to maintain expertise in such areas as may be necessary to support specific requests for advice and assistance from financial regulators;

(F) to investigate disruptions and failures in the financial markets, report findings, and make recommendations to the Council based on those findings;

(G) to conduct studies and provide advice on the impact of policies related to systemic risk; and

(H) to promote best practices for financial risk management.

(d) Reporting Responsibilities.—

(1) Required Reports.—Not later than 2 years after the date of enactment of this Act, and not later than 120 days after the end of each fiscal year thereafter, the Office shall prepare and submit a report to Congress.

(2) Content.—Each report required by this subsection shall assess the state of the United States financial system, including—

(A) an analysis of any threats to the financial stability of the United States;

(B) the status of the efforts of the Office in meeting the mission of the Office; and

(C) key findings from the research and analysis of the financial system by the Office.

SEC. 155. FUNDING.

(a) Financial Research Fund.—

(1) Fund established.—There is established in the Treasury of the United States a separate fund to be known as the “Financial Research Fund”.

(2) Fund receipts.—All amounts provided to the Office under subsection (c), and all assessments that the Office receives under subsection (d) shall be deposited into the Financial Research Fund.

(3) Investments authorized.—

(A) amounts in fund may be invested.—The Director may request the Secretary to invest the portion of the Financial Research Fund that is not, in the judgment of the Director, required to meet the needs of the Office.

(B) eligible investments.—Investments shall be made by the Secretary in obligations of the United States or obligations that are guaranteed as to principal and interest by the United States, with maturities suitable to the needs of the Financial Research Fund, as determined by the Director.

(4) Interest and proceeds credited.—The interest on, and the proceeds from the sale or redemption of, any obligations
held in the Financial Research Fund shall be credited to and form a part of the Financial Research Fund.

(b) USE OF FUNDS.—

(1) IN GENERAL.—Funds obtained by, transferred to, or credited to the Financial Research Fund shall be immediately available to the Office, and shall remain available until expended, to pay the expenses of the Office in carrying out the duties and responsibilities of the Office.

(2) FEES, ASSESSMENTS, AND OTHER FUNDS NOT GOVERNMENT FUNDS.—Funds obtained by, transferred to, or credited to the Financial Research Fund shall not be construed to be Government funds or appropriated moneys.

(3) AMOUNTS NOT SUBJECT TO APPORTIONMENT.—Notwithstanding any other provision of law, amounts in the Financial Research Fund shall not be subject to apportionment for purposes of chapter 15 of title 31, United States Code, or under any other authority, or for any other purpose.

(c) INTERIM FUNDING.—During the 2-year period following the date of enactment of this Act, the Board of Governors shall provide to the Office an amount sufficient to cover the expenses of the Office.

(d) PERMANENT SELF-FUNDING.—Beginning 2 years after the date of enactment of this Act, the Secretary shall establish, by regulation, and with the approval of the Council, an assessment schedule, including the assessment base and rates, applicable to bank holding companies with total consolidated assets of 50,000,000,000 or greater and nonbank financial companies supervised by the Board of Governors, that takes into account differences among such companies, based on the considerations for establishing the prudential standards under section 115, to collect assessments equal to the total expenses of the Office.

SEC. 156. TRANSITION OVERSIGHT.

(a) PURPOSE.—The purpose of this section is to ensure that the Office—

(1) has an orderly and organized startup;

(2) attracts and retains a qualified workforce; and

(3) establishes comprehensive employee training and benefits programs.

(b) REPORTING REQUIREMENT.—

(1) IN GENERAL.—The Office shall submit an annual report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives that includes the plans described in paragraph (2).

(2) PLANS.—The plans described in this paragraph are as follows:

(A) TRAINING AND WORKFORCE DEVELOPMENT PLAN.—The Office shall submit a training and workforce development plan that includes, to the extent practicable—

(i) identification of skill and technical expertise needs and actions taken to meet those requirements;

(ii) steps taken to foster innovation and creativity;

(iii) leadership development and succession planning; and

(iv) effective use of technology by employees.

12 USC 5346.
(B) **WORKPLACE FLEXIBILITY PLAN.**—The Office shall submit a workforce flexibility plan that includes, to the extent practicable—

(i) telework;
(ii) flexible work schedules;
(iii) phased retirement;
(iv) reemployed annuitants;
(v) part-time work;
(vi) job sharing;
(vii) parental leave benefits and childcare assistance;
(viii) domestic partner benefits;
(ix) other workplace flexibilities; or
(x) any combination of the items described in clauses (i) through (ix).

(C) **RECRUITMENT AND RETENTION PLAN.**—The Office shall submit a recruitment and retention plan that includes, to the extent practicable, provisions relating to—

(i) the steps necessary to target highly qualified applicant pools with diverse backgrounds;
(ii) streamlined employment application processes;
(iii) the provision of timely notification of the status of employment applications to applicants; and
(iv) the collection of information to measure indicators of hiring effectiveness.

(c) **EXPIRATION.**—The reporting requirement under subsection (b) shall terminate 5 years after the date of enactment of this Act.

(d) **RULE OF CONSTRUCTION.**—Nothing in this section may be construed to affect—

(1) a collective bargaining agreement, as that term is defined in section 7103(a)(8) of title 5, United States Code, that is in effect on the date of enactment of this Act; or
(2) the rights of employees under chapter 71 of title 5, United States Code.

**Subtitle C—Additional Board of Governors Authority for Certain Nonbank Financial Companies and Bank Holding Companies**

SEC. 161. REPORTS BY AND EXAMINATIONS OF NONBANK FINANCIAL COMPANIES BY THE BOARD OF GOVERNORS.

(a) **REPORTS.**—

(1) **IN GENERAL.**—The Board of Governors may require each nonbank financial company supervised by the Board of Governors, and any subsidiary thereof, to submit reports under oath, to keep the Board of Governors informed as to—

(A) the financial condition of the company or subsidiary, systems of the company or subsidiary for monitoring and controlling financial, operating, and other risks, and the extent to which the activities and operations of the company or subsidiary pose a threat to the financial stability of the United States; and
(B) compliance by the company or subsidiary with the requirements of this title.
(2) Use of Existing Reports and Information.—In carrying out subsection (a), the Board of Governors shall, to the fullest extent possible, use—

(A) reports and supervisory information that a nonbank financial company or subsidiary thereof has been required to provide to other Federal or State regulatory agencies;
(B) information otherwise obtainable from Federal or State regulatory agencies;
(C) information that is otherwise required to be reported publicly; and
(D) externally audited financial statements of such company or subsidiary.

(3) Availability.—Upon the request of the Board of Governors, a nonbank financial company supervised by the Board of Governors, or a subsidiary thereof, shall promptly provide to the Board of Governors any information described in paragraph (2).

(b) Examinations.—

(1) In General.—Subject to paragraph (2), the Board of Governors may examine any nonbank financial company supervised by the Board of Governors and any subsidiary of such company, to inform the Board of Governors of—

(A) the nature of the operations and financial condition of the company and such subsidiary;
(B) the financial, operational, and other risks of the company or such subsidiary that may pose a threat to the safety and soundness of such company or subsidiary or to the financial stability of the United States;
(C) the systems for monitoring and controlling such risks; and
(D) compliance by the company or such subsidiary with the requirements of this title.

(2) Use of Examination Reports and Information.—For purposes of this subsection, the Board of Governors shall, to the fullest extent possible, rely on reports of examination of any subsidiary depository institution or functionally regulated subsidiary made by the primary financial regulatory agency for that subsidiary, and on information described in subsection (a)(2).

(c) Coordination With Primary Financial Regulatory Agency.—The Board of Governors shall—

(1) provide reasonable notice to, and consult with, the primary financial regulatory agency for any subsidiary before requiring a report or commencing an examination of such subsidiary under this section; and
(2) avoid duplication of examination activities, reporting requirements, and requests for information, to the fullest extent possible.

SEC. 162. Enforcement.

(a) In General.—Except as provided in subsection (b), a nonbank financial company supervised by the Board of Governors and any subsidiaries of such company (other than any depository institution subsidiary) shall be subject to the provisions of subsections (b) through (n) of section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), in the same manner and to the same extent as if the company were a bank holding company, as provided
in section 8(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1818(b)(3)).

(b) **ENFORCEMENT AUTHORITY FOR FUNCTIONALLY REGULATED SUBSIDIARIES.**

(1) **REFERRAL.**—If the Board of Governors determines that a condition, practice, or activity of a depository institution subsidiary or functionally regulated subsidiary of a nonbank financial company supervised by the Board of Governors does not comply with the regulations or orders prescribed by the Board of Governors under this Act, or otherwise poses a threat to the financial stability of the United States, the Board of Governors may recommend, in writing, to the primary financial regulatory agency for the subsidiary that such agency initiate a supervisory action or enforcement proceeding. The recommendation shall be accompanied by a written explanation of the concerns giving rise to the recommendation.

(2) **BACK-UP AUTHORITY OF THE BOARD OF GOVERNORS.**—If, during the 60-day period beginning on the date on which the primary financial regulatory agency receives a recommendation under paragraph (1), the primary financial regulatory agency does not take supervisory or enforcement action against a subsidiary that is acceptable to the Board of Governors, the Board of Governors (upon a vote of its members) may take the recommended supervisory or enforcement action, as if the subsidiary were a bank holding company subject to supervision by the Board of Governors.

**SEC. 163. ACQUISITIONS.**

(a) **ACQUISITIONS OF BANKS; TREATMENT AS A BANK HOLDING COMPANY.**—For purposes of section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842), a nonbank financial company supervised by the Board of Governors shall be deemed to be, and shall be treated as, a bank holding company.

(b) **ACQUISITION OF NONBANK COMPANIES.**

(1) **PRIOR NOTICE FOR LARGE ACQUISITIONS.**—Notwithstanding section 4(k)(6)(B) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)(6)(B)), a bank holding company with total consolidated assets equal to or greater than $50,000,000,000 or a nonbank financial company supervised by the Board of Governors shall not acquire direct or indirect ownership or control of any voting shares of any company (other than an insured depository institution) that is engaged in activities described in section 4(k) of the Bank Holding Company Act of 1956 having total consolidated assets of $10,000,000,000 or more, without providing written notice to the Board of Governors in advance of the transaction.

(2) **EXEMPTIONS.**—The prior notice requirement in paragraph (1) shall not apply with regard to the acquisition of shares that would qualify for the exemptions in section 4(c) or section 4(k)(4)(E) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(c) and (k)(4)(E)).

(3) **NOTICE PROCEDURES.**—The notice procedures set forth in section 4(j)(1) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(j)(1)), without regard to section 4(j)(3) of that Act, shall apply to an acquisition of any company (other than an insured depository institution) by a bank holding company with total consolidated assets equal to or greater than...
$50,000,000,000 or a nonbank financial company supervised by the Board of Governors, as described in paragraph (1), including any such company engaged in activities described in section 4(k) of that Act.

(4) Standards for review.—In addition to the standards provided in section 4(j)(2) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(j)(2)), the Board of Governors shall consider the extent to which the proposed acquisition would result in greater or more concentrated risks to global or United States financial stability or the United States economy.

(5) Hart-Scott-Rodino filing requirement.—Solely for purposes of section 7A(c)(8) of the Clayton Act (15 U.S.C. 18a(c)(8)), the transactions subject to the requirements of paragraph (1) shall be treated as if Board of Governors approval is not required.

SEC. 164. PROHIBITION AGAINST MANAGEMENT INTERLOCKS BETWEEN CERTAIN FINANCIAL COMPANIES.

A nonbank financial company supervised by the Board of Governors shall be treated as a bank holding company for purposes of the Depository Institutions Management Interlocks Act (12 U.S.C. 3201 et seq.), except that the Board of Governors shall not exercise the authority provided in section 7 of that Act (12 U.S.C. 3207) to permit service by a management official of a nonbank financial company supervised by the Board of Governors as a management official of any bank holding company with total consolidated assets equal to or greater than $50,000,000,000, or other nonaffiliated nonbank financial company supervised by the Board of Governors (other than to provide a temporary exemption for interlocks resulting from a merger, acquisition, or consolidation).

SEC. 165. ENHANCED SUPERVISION AND PRUDENTIAL STANDARDS FOR NONBANK FINANCIAL COMPANIES SUPERVISED BY THE BOARD OF GOVERNORS AND CERTAIN BANK HOLDING COMPANIES.

(a) In General.—

(1) Purpose.—In order to prevent or mitigate risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected financial institutions, the Board of Governors shall, on its own or pursuant to recommendations by the Council under section 115, establish prudential standards for nonbank financial companies supervised by the Board of Governors and bank holding companies with total consolidated assets equal to or greater than $50,000,000,000 that—

(A) are more stringent than the standards and requirements applicable to nonbank financial companies and bank holding companies that do not present similar risks to the financial stability of the United States; and

(B) increase in stringency, based on the considerations identified in subsection (b)(3).

(2) Tailored application.—

(A) In general.—In prescribing more stringent prudential standards under this section, the Board of Governors may, on its own or pursuant to a recommendation by the Council in accordance with section 115, differentiate among companies on an individual basis or by category, taking into consideration their capital structure, riskiness,
complexity, financial activities (including the financial activities of their subsidiaries), size, and any other risk-related factors that the Board of Governors deems appropriate.

(B) ADJUSTMENT OF THRESHOLD FOR APPLICATION OF CERTAIN STANDARDS.—The Board of Governors may, pursuant to a recommendation by the Council in accordance with section 115, establish an asset threshold above $50,000,000,000 for the application of any standard established under subsections (c) through (g).

(b) DEVELOPMENT OF PRUDENTIAL STANDARDS.—

(1) IN GENERAL.—

(A) REQUIRED STANDARDS.—The Board of Governors shall establish prudential standards for nonbank financial companies supervised by the Board of Governors and bank holding companies described in subsection (a), that shall include—

(i) risk-based capital requirements and leverage limits, unless the Board of Governors, in consultation with the Council, determines that such requirements are not appropriate for a company subject to more stringent prudential standards because of the activities of such company (such as investment company activities or assets under management) or structure, in which case, the Board of Governors shall apply other standards that result in similarly stringent risk controls;

(ii) liquidity requirements;

(iii) overall risk management requirements;

(iv) resolution plan and credit exposure report requirements; and

(v) concentration limits.

(B) ADDITIONAL STANDARDS AUTHORIZED.—The Board of Governors may establish additional prudential standards for nonbank financial companies supervised by the Board of Governors and bank holding companies described in subsection (a), that include—

(i) a contingent capital requirement;

(ii) enhanced public disclosures;

(iii) short-term debt limits; and

(iv) such other prudential standards as the Board of Governors, on its own or pursuant to a recommendation made by the Council in accordance with section 115, determines are appropriate.

(2) STANDARDS FOR FOREIGN FINANCIAL COMPANIES.—In applying the standards set forth in paragraph (1) to any foreign nonbank financial company supervised by the Board of Governors or foreign-based bank holding company, the Board of Governors shall—

(A) give due regard to the principle of national treatment and equality of competitive opportunity; and

(B) take into account the extent to which the foreign financial company is subject on a consolidated basis to home country standards that are comparable to those applied to financial companies in the United States.

(3) CONSIDERATIONS.—In prescribing prudential standards under paragraph (1), the Board of Governors shall—
(A) take into account differences among nonbank financial companies supervised by the Board of Governors and bank holding companies described in subsection (a), based on—

(i) the factors described in subsections (a) and (b) of section 113;
(ii) whether the company owns an insured depository institution;
(iii) nonfinancial activities and affiliations of the company; and
(iv) any other risk-related factors that the Board of Governors determines appropriate;

(B) to the extent possible, ensure that small changes in the factors listed in subsections (a) and (b) of section 113 would not result in sharp, discontinuous changes in the prudential standards established under paragraph (1) of this subsection;

(C) take into account any recommendations of the Council under section 115; and

(D) adapt the required standards as appropriate in light of any predominant line of business of such company, including assets under management or other activities for which particular standards may not be appropriate.

(4) CONSULTATION.—Before imposing prudential standards or any other requirements pursuant to this section, including notices of deficiencies in resolution plans and more stringent requirements or divestiture orders resulting from such notices, that are likely to have a significant impact on a functionally regulated subsidiary or depository institution subsidiary of a nonbank financial company supervised by the Board of Governors or a bank holding company described in subsection (a), the Board of Governors shall consult with each Council member that primarily supervises any such subsidiary with respect to any such standard or requirement.

(5) REPORT.—The Board of Governors shall submit an annual report to Congress regarding the implementation of the prudential standards required pursuant to paragraph (1), including the use of such standards to mitigate risks to the financial stability of the United States.

(c) CONTINGENT CAPITAL.—

(1) IN GENERAL.—Subsequent to submission by the Council of a report to Congress under section 115(c), the Board of Governors may issue regulations that require each nonbank financial company supervised by the Board of Governors and bank holding companies described in subsection (a) to maintain a minimum amount of contingent capital that is convertible to equity in times of financial stress.

(2) FACTORS TO CONSIDER.—In issuing regulations under this subsection, the Board of Governors shall consider—

(A) the results of the study undertaken by the Council, and any recommendations of the Council, under section 115(c);
(B) an appropriate transition period for implementation of contingent capital under this subsection;
(C) the factors described in subsection (b)(3)(A);
(D) capital requirements applicable to the nonbank financial company supervised by the Board of Governors.
or a bank holding company described in subsection (a), and
and subsidiaries thereof; and
(E) any other factor that the Board of Governors deems
appropriate.

(d) Resolution Plan and Credit Exposure Reports.—
(1) Resolution Plan.—The Board of Governors shall
require each nonbank financial company supervised by the
Board of Governors and bank holding companies described in
subsection (a) to report periodically to the Board of Governors,
the Council, and the Corporation the plan of such company
for rapid and orderly resolution in the event of material financial
distress or failure, which shall include—
(A) information regarding the manner and extent to
which any insured depository institution affiliated with
the company is adequately protected from risks arising
from the activities of any nonbank subsidiaries of the com-
pany;
(B) full descriptions of the ownership structure, assets,
liabilities, and contractual obligations of the company;
(C) identification of the cross-guarantees tied to dif-
ferent securities, identification of major counterparties, and
a process for determining to whom the collateral of the
company is pledged; and
(D) any other information that the Board of Governors
and the Corporation jointly require by rule or order.

(2) Credit Exposure Report.—The Board of Governors
shall require each nonbank financial company supervised by
the Board of Governors and bank holding companies described
in subsection (a) to report periodically to the Board of Gov-
ernors, the Council, and the Corporation on—
(A) the nature and extent to which the company has
credit exposure to other significant nonbank financial
companies and significant bank holding companies; and
(B) the nature and extent to which other significant
nonbank financial companies and significant bank holding
companies have credit exposure to that company.

(3) Review.—The Board of Governors and the Corporation
shall review the information provided in accordance with this
subsection by each nonbank financial company supervised by
the Board of Governors and bank holding company described
in subsection (a).

(4) Notice of Deficiencies.—If the Board of Governors
and the Corporation jointly determine, based on their review
under paragraph (3), that the resolution plan of a nonbank
financial company supervised by the Board of Governors or
a bank holding company described in subsection (a) is not
credible or would not facilitate an orderly resolution of the
company under title 11, United States Code—
(A) the Board of Governors and the Corporation shall
notify the company of the deficiencies in the resolution
plan; and
(B) the company shall resubmit the resolution plan
within a timeframe determined by the Board of Governors
and the Corporation, with revisions demonstrating that
the plan is credible and would result in an orderly resolu-
tion under title 11, United States Code, including any
proposed changes in business operations and corporate structure to facilitate implementation of the plan.

(5) Failure to resubmit credible plan.—

(A) In general.—If a nonbank financial company supervised by the Board of Governors or a bank holding company described in subsection (a) fails to timely resubmit the resolution plan as required under paragraph (4), with such revisions as are required under subparagraph (B), the Board of Governors and the Corporation may jointly impose more stringent capital, leverage, or liquidity requirements, or restrictions on the growth, activities, or operations of the company, or any subsidiary thereof, until such time as the company resubmits a plan that remedies the deficiencies.

(B) Divestiture.—The Board of Governors and the Corporation, in consultation with the Council, may jointly direct a nonbank financial company supervised by the Board of Governors or a bank holding company described in subsection (a), by order, to divest certain assets or operations identified by the Board of Governors and the Corporation, to facilitate an orderly resolution of such company under title 11, United States Code, in the event of the failure of such company, in any case in which—

(i) the Board of Governors and the Corporation have jointly imposed more stringent requirements on the company pursuant to subparagraph (A); and

(ii) the company has failed, within the 2-year period beginning on the date of the imposition of such requirements under subparagraph (A), to resubmit the resolution plan with such revisions as were required under paragraph (4)(B).

(6) No limiting effect.—A resolution plan submitted in accordance with this subsection shall not be binding on a bankruptcy court, a receiver appointed under title II, or any other authority that is authorized or required to resolve the nonbank financial company supervised by the Board, any bank holding company, or any subsidiary or affiliate of the foregoing.

(7) No private right of action.—No private right of action may be based on any resolution plan submitted in accordance with this subsection.

(8) Rules.—Not later than 18 months after the date of enactment of this Act, the Board of Governors and the Corporation shall jointly issue final rules implementing this subsection.

(e) Concentration limits.—

(1) Standards.—In order to limit the risks that the failure of any individual company could pose to a nonbank financial company supervised by the Board of Governors or a bank holding company described in subsection (a), the Board of Governors, by regulation, shall prescribe standards that limit such risks.

(2) Limitation on credit exposure.—The regulations prescribed by the Board of Governors under paragraph (1) shall prohibit each nonbank financial company supervised by the Board of Governors and bank holding company described in subsection (a) from having credit exposure to any unaffiliated company that exceeds 25 percent of the capital stock and surplus (or such lower amount as the Board of Governors may
determine by regulation to be necessary to mitigate risks to the financial stability of the United States) of the company.

(3) **Credit Exposure.**—For purposes of paragraph (2), “credit exposure” to a company means—

(A) all extensions of credit to the company, including loans, deposits, and lines of credit;

(B) all repurchase agreements and reverse repurchase agreements with the company, and all securities borrowing and lending transactions with the company, to the extent that such transactions create credit exposure for the nonbank financial company supervised by the Board of Governors or a bank holding company described in subsection (a);

(C) all guarantees, acceptances, or letters of credit (including endorsement or standby letters of credit) issued on behalf of the company;

(D) all purchases of or investment in securities issued by the company;

(E) counterparty credit exposure to the company in connection with a derivative transaction between the nonbank financial company supervised by the Board of Governors or a bank holding company described in subsection (a) and the company; and

(F) any other similar transactions that the Board of Governors, by regulation, determines to be a credit exposure for purposes of this section.

(4) **Attribution Rule.**—For purposes of this subsection, any transaction by a nonbank financial company supervised by the Board of Governors or a bank holding company described in subsection (a) with any person is a transaction with a company, to the extent that the proceeds of the transaction are used for the benefit of, or transferred to, that company.

(5) **Rulemaking.**—The Board of Governors may issue such regulations and orders, including definitions consistent with this section, as may be necessary to administer and carry out this subsection.

(6) **Exemptions.**—This subsection shall not apply to any Federal home loan bank. The Board of Governors may, by regulation or order, exempt transactions, in whole or in part, from the definition of the term “credit exposure” for purposes of this subsection, if the Board of Governors finds that the exemption is in the public interest and is consistent with the purpose of this subsection.

(7) **Transition Period.**—

(A) **In General.**—This subsection and any regulations and orders of the Board of Governors under this subsection shall not be effective until 3 years after the date of enactment of this Act.

(B) **Extension Authorized.**—The Board of Governors may extend the period specified in subparagraph (A) for not longer than an additional 2 years.

(f) **Enhanced Public Disclosures.**—The Board of Governors may prescribe, by regulation, periodic public disclosures by nonbank financial companies supervised by the Board of Governors and bank holding companies described in subsection (a) in order to support market evaluation of the risk profile, capital adequacy, and risk management capabilities thereof.
(g) **SHORT-TERM DEBT LIMITS.**—

(1) **IN GENERAL.**—In order to mitigate the risks that an over-accumulation of short-term debt could pose to financial companies and to the stability of the United States financial system, the Board of Governors may, by regulation, prescribe a limit on the amount of short-term debt, including off-balance sheet exposures, that may be accumulated by any bank holding company described in subsection (a) and any nonbank financial company supervised by the Board of Governors.

(2) **BASIS OF LIMIT.**—Any limit prescribed under paragraph (1) shall be based on the short-term debt of the company described in paragraph (1) as a percentage of capital stock and surplus of the company or on such other measure as the Board of Governors considers appropriate.

(3) **SHORT-TERM DEBT DEFINED.**—For purposes of this subsection, the term “short-term debt” means such liabilities with short-dated maturity that the Board of Governors identifies, by regulation, except that such term does not include insured deposits.

(4) **RULEMAKING AUTHORITY.**—In addition to prescribing regulations under paragraphs (1) and (3), the Board of Governors may prescribe such regulations, including definitions consistent with this subsection, and issue such orders, as may be necessary to carry out this subsection.

(5) **AUTHORITY TO ISSUE EXEMPTIONS AND ADJUSTMENTS.**—Notwithstanding the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.), the Board of Governors may, if it determines such action is necessary to ensure appropriate heightened prudential supervision, with respect to a company described in paragraph (1) that does not control an insured depository institution, issue to such company an exemption from or adjustment to the limit prescribed under paragraph (1).

(h) **RISK COMMITTEE.**—

(1) **NONBANK FINANCIAL COMPANIES SUPERVISED BY THE BOARD OF GOVERNORS.**—The Board of Governors shall require each nonbank financial company supervised by the Board of Governors that is a publicly traded company to establish a risk committee, as set forth in paragraph (3), not later than 1 year after the date of receipt of a notice of final determination under section 113(e)(3) with respect to such nonbank financial company supervised by the Board of Governors.

(2) **CERTAIN BANK HOLDING COMPANIES.**—

(A) **MANDATORY REGULATIONS.**—The Board of Governors shall issue regulations requiring each bank holding company that is a publicly traded company and that has total consolidated assets of not less than $10,000,000,000 to establish a risk committee, as set forth in paragraph (3).

(B) **PERMISSIVE REGULATIONS.**—The Board of Governors may require each bank holding company that is a publicly traded company and that has total consolidated assets of less than $10,000,000,000 to establish a risk committee, as set forth in paragraph (3), as determined necessary or appropriate by the Board of Governors to promote sound risk management practices.

(3) **RISK COMMITTEE.**—A risk committee required by this subsection shall—
(A) be responsible for the oversight of the enterprise-wide risk management practices of the nonbank financial company supervised by the Board of Governors or bank holding company described in subsection (a), as applicable;

(B) include such number of independent directors as the Board of Governors may determine appropriate, based on the nature of operations, size of assets, and other appropriate criteria related to the nonbank financial company supervised by the Board of Governors or a bank holding company described in subsection (a), as applicable; and

(C) include at least 1 risk management expert having experience in identifying, assessing, and managing risk exposures of large, complex firms.

(4) RULEMAKING.—The Board of Governors shall issue final rules to carry out this subsection, not later than 1 year after the transfer date, to take effect not later than 15 months after the transfer date.

(i) STRESS TESTS.—

(1) BY THE BOARD OF GOVERNORS.—

(A) ANNUAL TESTS REQUIRED.—The Board of Governors, in coordination with the appropriate primary financial regulatory agencies and the Federal Insurance Office, shall conduct annual analyses in which nonbank financial companies supervised by the Board of Governors and bank holding companies described in subsection (a) are subject to evaluation of whether such companies have the capital, on a total consolidated basis, necessary to absorb losses as a result of adverse economic conditions.

(B) TEST PARAMETERS AND CONSEQUENCES.—The Board of Governors—

(i) shall provide for at least 3 different sets of conditions under which the evaluation required by this subsection shall be conducted, including baseline, adverse, and severely adverse;

(ii) may require the tests described in subparagraph (A) at bank holding companies and nonbank financial companies, in addition to those for which annual tests are required under subparagraph (A);

(iii) may develop and apply such other analytic techniques as are necessary to identify, measure, and monitor risks to the financial stability of the United States;

(iv) shall require the companies described in subparagraph (A) to update their resolution plans required under subsection (d)(1), as the Board of Governors determines appropriate, based on the results of the analyses; and

(v) shall publish a summary of the results of the tests required under subparagraph (A) or clause (ii) of this subparagraph.

(2) BY THE COMPANY.—

(A) REQUIREMENT.—A nonbank financial company supervised by the Board of Governors and a bank holding company described in subsection (a) shall conduct semi-annual stress tests. All other financial companies that have total consolidated assets of more than $10,000,000,000 and are regulated by a primary Federal financial regulatory
agency shall conduct annual stress tests. The tests required under this subparagraph shall be conducted in accordance with the regulations prescribed under subparagraph (C).

(B) REPORT.—A company required to conduct stress tests under subparagraph (A) shall submit a report to the Board of Governors and to its primary financial regulatory agency at such time, in such form, and containing such information as the primary financial regulatory agency shall require.

(C) REGULATIONS.—Each Federal primary financial regulatory agency, in coordination with the Board of Governors and the Federal Insurance Office, shall issue consistent and comparable regulations to implement this paragraph that shall—

(i) define the term “stress test” for purposes of this paragraph;
(ii) establish methodologies for the conduct of stress tests required by this paragraph that shall provide for at least 3 different sets of conditions, including baseline, adverse, and severely adverse;
(iii) establish the form and content of the report required by subparagraph (B); and
(iv) require companies subject to this paragraph to publish a summary of the results of the required stress tests.

(j) LEVERAGE LIMITATION.—

(1) REQUIREMENT.—The Board of Governors shall require a bank holding company with total consolidated assets equal to or greater than $50,000,000,000 or a nonbank financial company supervised by the Board of Governors to maintain a debt to equity ratio of no more than 15 to 1, upon a determination by the Council that such company poses a grave threat to the financial stability of the United States and that the imposition of such requirement is necessary to mitigate the risk that such company poses to the financial stability of the United States. Nothing in this paragraph shall apply to a Federal home loan bank.

(2) CONSIDERATIONS.—In making a determination under this subsection, the Council shall consider the factors described in subsections (a) and (b) of section 113 and any other risk-related factors that the Council deems appropriate.

(3) REGULATIONS.—The Board of Governors shall promulgate regulations to establish procedures and timelines for complying with the requirements of this subsection.

(k) INCLUSION OF OFF-BALANCE-SHEET ACTIVITIES IN COMPUTING CAPITAL REQUIREMENTS.—

(1) IN GENERAL.—In the case of any bank holding company described in subsection (a) or nonbank financial company supervised by the Board of Governors, the computation of capital for purposes of meeting capital requirements shall take into account any off-balance-sheet activities of the company.

(2) EXEMPTIONS.—If the Board of Governors determines that an exemption from the requirement under paragraph (1) is appropriate, the Board of Governors may exempt a company, or any transaction or transactions engaged in by such company, from the requirements of paragraph (1).
(3) **Off-balance-sheet activities defined.**—For purposes of this subsection, the term “off-balance-sheet activities” means an existing liability of a company that is not currently a balance sheet liability, but may become one upon the happening of some future event, including the following transactions, to the extent that they may create a liability:

(A) Direct credit substitutes in which a bank substitutes its own credit for a third party, including standby letters of credit.

(B) Irrevocable letters of credit that guarantee repayment of commercial paper or tax-exempt securities.

(C) Risk participations in bankers' acceptances.

(D) Sale and repurchase agreements.

(E) Asset sales with recourse against the seller.

(F) Interest rate swaps.

(G) Credit swaps.

(H) Commodities contracts.

(I) Forward contracts.

(J) Securities contracts.

(K) Such other activities or transactions as the Board of Governors may, by rule, define.

SEC. 166. **Early remediation requirements.**

(a) **In general.**—The Board of Governors, in consultation with the Council and the Corporation, shall prescribe regulations establishing requirements to provide for the early remediation of financial distress of a nonbank financial company supervised by the Board of Governors or a bank holding company described in section 165(a), except that nothing in this subsection authorizes the provision of financial assistance from the Federal Government.

(b) **Purpose of the early remediation requirements.**—The purpose of the early remediation requirements under subsection (a) shall be to establish a series of specific remedial actions to be taken by a nonbank financial company supervised by the Board of Governors or a bank holding company described in section 165(a) that is experiencing increasing financial distress, in order to minimize the probability that the company will become insolvent and the potential harm of such insolvency to the financial stability of the United States.

(c) **Remediation requirements.**—The regulations prescribed by the Board of Governors under subsection (a) shall—

1. define measures of the financial condition of the company, including regulatory capital, liquidity measures, and other forward-looking indicators; and

2. establish requirements that increase in stringency as the financial condition of the company declines, including—

   (A) requirements in the initial stages of financial decline, including limits on capital distributions, acquisitions, and asset growth; and

   (B) requirements at later stages of financial decline, including a capital restoration plan and capital-raising requirements, limits on transactions with affiliates, management changes, and asset sales.

SEC. 167. **Affiliations.**

(a) **Affiliations.**—Nothing in this subtitle shall be construed to require a nonbank financial company supervised by the Board
of Governors, or a company that controls a nonbank financial company supervised by the Board of Governors, to conform the activities thereof to the requirements of section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843).

(b) Requirement.—

(1) IN GENERAL.—

   (A) BOARD AUTHORITY.—If a nonbank financial company supervised by the Board of Governors conducts activities other than those that are determined to be financial in nature or incidental thereto under section 4(k) of the Bank Holding Company Act of 1956, the Board of Governors may require such company to establish and conduct all or a portion of such activities that are determined to be financial in nature or incidental thereto in or through an intermediate holding company established pursuant to regulation of the Board of Governors, not later than 90 days (or such longer period as the Board of Governors may deem appropriate) after the date on which the nonbank financial company supervised by the Board of Governors is notified of the determination of the Board of Governors under this section.

   (B) NECESSARY ACTIONS.—Notwithstanding subparagraph (A), the Board of Governors shall require a nonbank financial company supervised by the Board of Governors to establish an intermediate holding company if the Board of Governors makes a determination that the establishment of such intermediate holding company is necessary to—

   (i) appropriately supervise activities that are determined to be financial in nature or incidental thereto; or

   (ii) to ensure that supervision by the Board of Governors does not extend to the commercial activities of such nonbank financial company.

(2) INTERNAL FINANCIAL ACTIVITIES.—For purposes of this subsection, activities that are determined to be financial in nature or incidental thereto under section 4(k) of the Bank Holding Company Act of 1956, as described in paragraph (1), shall not include internal financial activities, including internal treasury, investment, and employee benefit functions. With respect to any internal financial activity engaged in for the company or an affiliate and a non-affiliate of such company during the year prior to the date of enactment of this Act, such company (or an affiliate that is not an intermediate holding company or subsidiary of an intermediate holding company) may continue to engage in such activity, as long as not less than 2/3 of the assets or 2/3 of the revenues generated from the activity are from or attributable to such company or an affiliate, subject to review by the Board of Governors, to determine whether engaging in such activity presents undue risk to such company or to the financial stability of the United States.

(3) SOURCE OF STRENGTH.—A company that directly or indirectly controls an intermediate holding company established under this section shall serve as a source of strength to its subsidiary intermediate holding company.

(4) PARENT COMPANY REPORTS.—The Board of Governors may, from time to time, require reports under oath from a
company that controls an intermediate holding company, and from the appropriate officers or directors of such company, solely for purposes of ensuring compliance with the provisions of this section, including assessing the ability of the company to serve as a source of strength to its subsidiary intermediate holding company pursuant to paragraph (3) and enforcing such compliance.

(5) LIMITED PARENT COMPANY ENFORCEMENT.—

(A) IN GENERAL.—In addition to any other authority of the Board of Governors, the Board of Governors may enforce compliance with the provisions of this subsection that are applicable to any company described in paragraph (1) that controls an intermediate holding company under section 8 of the Federal Deposit Insurance Act, and such company shall be subject to such section (solely for such purposes) in the same manner and to the same extent as if such company were a bank holding company.

(B) APPLICATION OF OTHER ACT.—Any violation of this subsection by any company that controls an intermediate holding company may also be treated as a violation of the Federal Deposit Insurance Act for purposes of subparagraph (A).

(C) NO EFFECT ON OTHER AUTHORITY.—No provision of this paragraph shall be construed as limiting any authority of the Board of Governors or any other Federal agency under any other provision of law.

(c) REGULATIONS.—The Board of Governors—

(1) shall promulgate regulations to establish the criteria for determining whether to require a nonbank financial company supervised by the Board of Governors to establish an intermediate holding company under subsection (b); and

(2) may promulgate regulations to establish any restrictions or limitations on transactions between an intermediate holding company or a nonbank financial company supervised by the Board of Governors and its affiliates, as necessary to prevent unsafe and unsound practices in connection with transactions between such company, or any subsidiary thereof, and its parent company or affiliates that are not subsidiaries of such company, except that such regulations shall not restrict or limit any transaction in connection with the bona fide acquisition or lease by an unaffiliated person of assets, goods, or services.

SEC. 168. REGULATIONS.

The Board of Governors shall have authority to issue regulations to implement subtitles A and C and the amendments made thereunder. Except as otherwise specified in subtitle A or C, not later than 18 months after the effective date of this Act, the Board of Governors shall issue final regulations to implement subtitles A and C, and the amendments made thereunder.

SEC. 169. AVOIDING DUPLICATION.

The Board of Governors shall take any action that the Board of Governors deems appropriate to avoid imposing requirements under this subtitle that are duplicative of requirements applicable to bank holding companies and nonbank financial companies under other provisions of law.
SEC. 170. SAFE HARBOR.

(a) REGULATIONS.—The Board of Governors shall promulgate regulations on behalf of, and in consultation with, the Council setting forth the criteria for exempting certain types or classes of U.S. nonbank financial companies or foreign nonbank financial companies from supervision by the Board of Governors.

(b) CONSIDERATIONS.—In developing the criteria under subsection (a), the Board of Governors shall take into account the factors for consideration described in subsections (a) and (b) of section 113 in determining whether a U.S. nonbank financial company or foreign nonbank financial company shall be supervised by the Board of Governors.

(c) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to require supervision by the Board of Governors of a U.S. nonbank financial company or foreign nonbank financial company, if such company does not meet the criteria for exemption established under subsection (a).

(d) REVISIONS.—

(1) IN GENERAL.—The Board of Governors shall, in consultation with the Council, review the regulations promulgated under subsection (a), not less frequently than every 5 years, and based upon the review, the Board of Governors may revise such regulations on behalf of, and in consultation with, the Council to update as necessary the criteria set forth in such regulations.

(2) TRANSITION PERIOD.—No revisions under paragraph (1) shall take effect before the end of the 2-year period after the date of publication of such revisions in final form.

(e) REPORT.—The Chairman of the Board of Governors and the Chairperson of the Council shall submit a joint report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives not later than 30 days after the date of the issuance in final form of regulations under subsection (a), or any subsequent revision to such regulations under subsection (d), as applicable. Such report shall include, at a minimum, the rationale for exemption and empirical evidence to support the criteria for exemption.

SEC. 171. LEVERAGE AND RISK-BASED CAPITAL REQUIREMENTS.

(a) DEFINITIONS.—For purposes of this section, the following definitions shall apply:

(1) GENERALLY APPLICABLE LEVERAGE CAPITAL REQUIREMENTS.—The term "generally applicable leverage capital requirements" means—

(A) the minimum ratios of tier 1 capital to average total assets, as established by the appropriate Federal banking agencies to apply to insured depository institutions under the prompt corrective action regulations implementing section 38 of the Federal Deposit Insurance Act, regardless of total consolidated asset size or foreign financial exposure; and

(B) includes the regulatory capital components in the numerator of that capital requirement, average total assets in the denominator of that capital requirement, and the required ratio of the numerator to the denominator.
(2) Generally Applicable Risk-Based Capital Requirements.—The term “generally applicable risk-based capital requirements” means—

(A) the risk-based capital requirements, as established by the appropriate Federal banking agencies to apply to insured depository institutions under the prompt corrective action regulations implementing section 38 of the Federal Deposit Insurance Act, regardless of total consolidated asset size or foreign financial exposure; and

(B) includes the regulatory capital components in the numerator of those capital requirements, the risk-weighted assets in the denominator of those capital requirements, and the required ratio of the numerator to the denominator.

(3) Definition of Depository Institution Holding Company.—The term “depository institution holding company” means a bank holding company or a savings and loan holding company (as those terms are defined in section 3 of the Federal Deposit Insurance Act) that is organized in the United States, including any bank or savings and loan holding company that is owned or controlled by a foreign organization, but does not include the foreign organization.

(b) Minimum Capital Requirements.—

(1) Minimum Leverage Capital Requirements.—The appropriate Federal banking agencies shall establish minimum leverage capital requirements on a consolidated basis for insured depository institutions, depository institution holding companies, and nonbank financial companies supervised by the Board of Governors. The minimum leverage capital requirements established under this paragraph shall not be less than the generally applicable leverage capital requirements, which shall serve as a floor for any capital requirements that the agency may require, nor quantitatively lower than the generally applicable leverage capital requirements that were in effect for insured depository institutions as of the date of enactment of this Act.

(2) Minimum Risk-Based Capital Requirements.—The appropriate Federal banking agencies shall establish minimum risk-based capital requirements on a consolidated basis for insured depository institutions, depository institution holding companies, and nonbank financial companies supervised by the Board of Governors. The minimum risk-based capital requirements established under this paragraph shall not be less than the generally applicable risk-based capital requirements, which shall serve as a floor for any capital requirements that the agency may require, nor quantitatively lower than the generally applicable risk-based capital requirements that were in effect for insured depository institutions as of the date of enactment of this Act.

(3) Investments in Financial Subsidiaries.—For purposes of this section, investments in financial subsidiaries that insured depository institutions are required to deduct from regulatory capital under section 5136A of the Revised Statutes of the United States or section 46(a)(2) of the Federal Deposit Insurance Act need not be deducted from regulatory capital by depository institution holding companies or nonbank financial companies supervised by the Board of Governors, unless such capital deduction is required by the Board of Governors.
or the primary financial regulatory agency in the case of nonbank financial companies supervised by the Board of Governors.

(4) **Effective dates and phase-in periods.**—

(A) **Debt or equity instruments on or after May 19, 2010.**—For debt or equity instruments issued on or after May 19, 2010, by depository institution holding companies or by nonbank financial companies supervised by the Board of Governors, this section shall be deemed to have become effective as of May 19, 2010.

(B) **Debt or equity instruments issued before May 19, 2010.**—For debt or equity instruments issued before May 19, 2010, by depository institution holding companies or by nonbank financial companies supervised by the Board of Governors, any regulatory capital deductions required under this section shall be phased in incrementally over a period of 3 years, with the phase-in period to begin on January 1, 2013, except as set forth in subparagraph (C).

(C) **Debt or equity instruments of smaller institutions.**—For debt or equity instruments issued before May 19, 2010, by depository institution holding companies with total consolidated assets of less than $15,000,000,000 as of December 31, 2009, and by organizations that were mutual holding companies on May 19, 2010, the capital deductions that would be required for other institutions under this section are not required as a result of this section.

(D) **Depository institution holding companies not previously supervised by the Board of Governors.**—For any depository institution holding company that was not supervised by the Board of Governors as of May 19, 2010, the requirements of this section, except as set forth in subparagraphs (A) and (B), shall be effective 5 years after the date of enactment of this Act.

(E) **Certain bank holding company subsidiaries of foreign banking organizations.**—For bank holding company subsidiaries of foreign banking organizations that have relied on Supervision and Regulation Letter SR-01-1 issued by the Board of Governors (as in effect on May 19, 2010), the requirements of this section, except as set forth in subparagraph (A), shall be effective 5 years after the date of enactment of this Act.

(5) **Exceptions.**—This section shall not apply to—

(A) debt or equity instruments issued to the United States or any agency or instrumentality thereof pursuant to the Emergency Economic Stabilization Act of 2008, and prior to October 4, 2010;

(B) any Federal home loan bank; or

(C) any small bank holding company that is subject to the Small Bank Holding Company Policy Statement of the Board of Governors, as in effect on May 19, 2010.

(6) **Study and report on small institution access to capital.**—

(A) **Study required.**—The Comptroller General of the United States, after consultation with the Federal banking
agencies, shall conduct a study of access to capital by smaller insured depository institutions.

(B) Scope.—For purposes of this study required by subparagraph (A), the term “smaller insured depository institution” means an insured depository institution with total consolidated assets of $5,000,000,000 or less.

(C) Report to Congress.—Not later than 18 months after the date of enactment of this Act, the Comptroller General of the United States shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report summarizing the results of the study conducted under subparagraph (A), together with any recommendations for legislative or regulatory action that would enhance the access to capital of smaller insured depository institutions, in a manner that is consistent with safe and sound banking operations.

(7) Capital requirements to address activities that pose risks to the financial system.—

(A) In general.—Subject to the recommendations of the Council, in accordance with section 120, the Federal banking agencies shall develop capital requirements applicable to insured depository institutions, depository institution holding companies, and nonbank financial companies supervised by the Board of Governors that address the risks that the activities of such institutions pose, not only to the institution engaging in the activity, but to other public and private stakeholders in the event of adverse performance, disruption, or failure of the institution or the activity.

(B) Content.—Such rules shall address, at a minimum, the risks arising from—

(i) significant volumes of activity in derivatives, securitized products purchased and sold, financial guarantees purchased and sold, securities borrowing and lending, and repurchase agreements and reverse repurchase agreements;

(ii) concentrations in assets for which the values presented in financial reports are based on models rather than historical cost or prices deriving from deep and liquid 2-way markets; and

(iii) concentrations in market share for any activity that would substantially disrupt financial markets if the institution is forced to unexpectedly cease the activity.

SEC. 172. EXAMINATION AND ENFORCEMENT ACTIONS FOR INSURANCE AND ORDERLY LIQUIDATION PURPOSES.

(a) Examinations for Insurance and Resolution Purposes.—Section 10(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1820(b)(3)) is amended—

(1) by striking “In addition” and inserting the following: “(A) IN GENERAL.—In addition”; and

(2) by striking “whenever the board of directors determines” and all that follows through the period and inserting the following: “or nonbank financial company supervised by the Board of Governors or a bank holding company described in section
165(a) of the Financial Stability Act of 2010, whenever the Board of Directors determines that a special examination of any such depository institution is necessary to determine the condition of such depository institution for insurance purposes, or of such nonbank financial company supervised by the Board of Governors or bank holding company described in section 165(a) of the Financial Stability Act of 2010, for the purpose of implementing its authority to provide for orderly liquidation of any such company under title II of that Act, provided that such authority may not be used with respect to any such company that is in a generally sound condition.

“(B) LIMITATION.—Before conducting a special examination of a nonbank financial company supervised by the Board of Governors or a bank holding company described in section 165(a) of the Financial Stability Act of 2010, the Corporation shall review any available and acceptable resolution plan that the company has submitted in accordance with section 165(d) of that Act, consistent with the nonbinding effect of such plan, and available reports of examination, and shall coordinate to the maximum extent practicable with the Board of Governors, in order to minimize duplicative or conflicting examinations.”.

(b) ENFORCEMENT AUTHORITY.—Section 8(t) of the Federal Deposit Insurance Act (12 U.S.C. 1818(t)) is amended—

(1) in paragraph (1), by inserting “, any depository institution holding company,” before “or any institution-affiliated party”;

(2) in paragraph (2)—

(A) by striking “or” at the end of subparagraph (B);

(B) at the end of subparagraph (C), by striking the period and inserting “or”; and

(C) by inserting at the end the following new subparagraph:

“(D) the conduct or threatened conduct (including any acts or omissions) of the depository institution holding company poses a risk to the Deposit Insurance Fund, provided that such authority may not be used with respect to a depository institution holding company that is in generally sound condition and whose conduct does not pose a foreseeable and material risk of loss to the Deposit Insurance Fund;”;

and

(3) by adding at the end the following:

“(6) POWERS AND DUTIES WITH RESPECT TO DEPOSITORY INSTITUTION HOLDING COMPANIES.—For purposes of exercising the backup authority provided in this subsection—

“(A) the Corporation shall have the same powers with respect to a depository institution holding company and its affiliates as the appropriate Federal banking agency has with respect to the holding company and its affiliates; and

“(B) the holding company and its affiliates shall have the same duties and obligations with respect to the Corporation as the holding company and its affiliates have with respect to the appropriate Federal banking agency.”.

(c) RULE OF CONSTRUCTION.—Nothing in this Act shall be construed to limit or curtail the Corporation’s current authority to
SEC. 173. ACCESS TO UNITED STATES FINANCIAL MARKET BY FOREIGN INSTITUTIONS.


(1) in subparagraph (C), by striking “and” at the end;
(2) in subparagraph (D), by striking the period at the end of and inserting “; and”;

(3) by adding at the end the following new subparagraph:

“(E) for a foreign bank that presents a risk to the stability of United States financial system, whether the home country of the foreign bank has adopted, or is making demonstrable progress toward adopting, an appropriate system of financial regulation for the financial system of such home country to mitigate such risk.”.

(b) Termination of Foreign Bank Offices in the United States.—Section 7(e)(1) of the International Banking Act of 1978 (12 U.S.C. 3105(e)(1)) is amended—

(1) in subparagraph (A), by striking “or” at the end;
(2) in subparagraph (B), by striking the period at the end of and inserting “; or”;

(3) by inserting after subparagraph (B), the following new subparagraph:

“(C) for a foreign bank that presents a risk to the stability of the United States financial system, the home country of the foreign bank has not adopted, or made demonstrable progress toward adopting, an appropriate system of financial regulation to mitigate such risk.”.

(c) Registration or Succession to a United States Broker or Dealer and Termination of Such Registration.—Section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o) is amended by adding at the end the following new subsections:

“(k) Registration or Succession to a United States Broker or Dealer.—In determining whether to permit a foreign person or an affiliate of a foreign person to register as a United States broker or dealer, or succeed to the registration of a United States broker or dealer, the Commission may consider whether, for a foreign person, or an affiliate of a foreign person that presents a risk to the stability of the United States financial system, the home country of the foreign person has adopted, or made demonstrable progress toward adopting, an appropriate system of financial regulation to mitigate such risk.

“(l) Termination of a United States Broker or Dealer.—For a foreign person or an affiliate of a foreign person that presents such a risk to the stability of the United States financial system, the Commission may determine to terminate the registration of such foreign person or an affiliate of such foreign person as a broker or dealer in the United States, if the Commission determines that the home country of the foreign person has not adopted, or made demonstrable progress toward adopting, an appropriate system of financial regulation to mitigate such risk.”.
SEC. 174. STUDIES AND REPORTS ON HOLDING COMPANY CAPITAL REQUIREMENTS.

(a) Study of Hybrid Capital Instruments.—The Comptroller General of the United States, in consultation with the Board of Governors, the Comptroller of the Currency, and the Corporation, shall conduct a study of the use of hybrid capital instruments as a component of Tier 1 capital for banking institutions and bank holding companies. The study shall consider—

(1) the current use of hybrid capital instruments, such as trust preferred shares, as a component of Tier 1 capital;
(2) the differences between the components of capital permitted for insured depository institutions and those permitted for companies that control insured depository institutions;
(3) the benefits and risks of allowing such instruments to be used to comply with Tier 1 capital requirements;
(4) the economic impact of prohibiting the use of such capital instruments for Tier 1;
(5) a review of the consequences of disqualifying trust preferred instruments, and whether it could lead to the failure or undercapitalization of existing banking organizations;
(6) the international competitive implications prohibiting hybrid capital instruments for Tier 1;
(7) the impact on the cost and availability of credit in the United States from such a prohibition;
(8) the availability of capital for financial institutions with less than $10,000,000,000 in total assets; and
(9) any other relevant factors relating to the safety and soundness of our financial system and potential economic impact of such a prohibition.

(b) Study of Foreign Bank Intermediate Holding Company Capital Requirements.—The Comptroller General of the United States, in consultation with the Secretary, the Board of Governors, the Comptroller of the Currency, and the Corporation, shall conduct a study of capital requirements applicable to United States intermediate holding companies of foreign banks that are bank holding companies or savings and loan holding companies. The study shall consider—

(1) current Board of Governors policy regarding the treatment of intermediate holding companies;
(2) the principle of national treatment and equality of competitive opportunity for foreign banks operating in the United States;
(3) the extent to which foreign banks are subject on a consolidated basis to home country capital standards comparable to United States capital standards;
(4) potential effects on United States banking organizations operating abroad of changes to United States policy regarding intermediate holding companies;
(5) the impact on the cost and availability of credit in the United States from a change in United States policy regarding intermediate holding companies; and
(6) any other relevant factors relating to the safety and soundness of our financial system and potential economic impact of such a prohibition.

(c) Report.—Not later than 18 months after the date of enactment of this Act, the Comptroller General of the United States shall submit reports to the Committee on Banking, Housing, and
Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives summarizing the results of the studies required under subsection (a). The reports shall include specific recommendations for legislative or regulatory action regarding the treatment of hybrid capital instruments, including trust preferred shares, and shall explain the basis for such recommendations.

SEC. 175. INTERNATIONAL POLICY COORDINATION.

(a) By the President.—The President, or a designee of the President, may coordinate through all available international policy channels, similar policies as those found in United States law relating to limiting the scope, nature, size, scale, concentration, and interconnectedness of financial companies, in order to protect financial stability and the global economy.

(b) By the Council.—The Chairperson of the Council, in consultation with the other members of the Council, shall regularly consult with the financial regulatory entities and other appropriate organizations of foreign governments or international organizations on matters relating to systemic risk to the international financial system.

(c) By the Board of Governors and the Secretary.—The Board of Governors and the Secretary shall consult with their foreign counterparts and through appropriate multilateral organizations to encourage comprehensive and robust prudential supervision and regulation for all highly leveraged and interconnected financial companies.

SEC. 176. RULE OF CONSTRUCTION.

No regulation or standard imposed under this title may be construed in a manner that would lessen the stringency of the requirements of any applicable primary financial regulatory agency or any other Federal or State agency that are otherwise applicable. This title, and the rules and regulations or orders prescribed pursuant to this title, do not divest any such agency of any authority derived from any other applicable law.

TITLE II—ORDERLY LIQUIDATION AUTHORITY

SEC. 201. DEFINITIONS.

(a) In General.—In this title, the following definitions shall apply:

(1) Administrative expenses of the receiver.—The term “administrative expenses of the receiver” includes—

(A) the actual, necessary costs and expenses incurred by the Corporation as receiver for a covered financial company in liquidating a covered financial company; and

(B) any obligations that the Corporation as receiver for a covered financial company determines are necessary and appropriate to facilitate the smooth and orderly liquidation of the covered financial company.


(3) Bridge financial company.—The term “bridge financial company” means a new financial company organized by
the Corporation in accordance with section 210(h) for the purpose of resolving a covered financial company.

(4) Claim.—The term "claim" means any right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(5) Company.—The term "company" has the same meaning as in section 2(b) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(b)), except that such term includes any company described in paragraph (11), the majority of the securities of which are owned by the United States or any State.

(6) Court.—The term "Court" means the United States District Court for the District of Columbia, unless the context otherwise requires.

(7) Covered broker or dealer.—The term "covered broker or dealer" means a covered financial company that is a broker or dealer that—

(A) is registered with the Commission under section 15(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)); and

(B) is a member of SIPC.

(8) Covered financial company.—The term "covered financial company"—

(A) means a financial company for which a determination has been made under section 203(b); and

(B) does not include an insured depository institution.

(9) Covered subsidiary.—The term "covered subsidiary" means a subsidiary of a covered financial company, other than—

(A) an insured depository institution;

(B) an insurance company; or

(C) a covered broker or dealer.

(10) Definitions relating to covered brokers and dealers.—The terms “customer”, “customer name securities”, “customer property”, and “net equity” in the context of a covered broker or dealer, have the same meanings as in section 16 of the Securities Investor Protection Act of 1970 (15 U.S.C. 78lll).

(11) Financial company.—The term "financial company" means any company that—

(A) is incorporated or organized under any provision of Federal law or the laws of any State;

(B) is—

(i) a bank holding company, as defined in section 2(a) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(a));

(ii) a nonbank financial company supervised by the Board of Governors;

(iii) any company that is predominantly engaged in activities that the Board of Governors has determined are financial in nature or incidental thereto for purposes of section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)) other than a company described in clause (i) or (ii); or

(iv) any subsidiary of any company described in any of clauses (i) through (iii) that is predominantly engaged in activities that the Board of Governors has
determined are financial in nature or incidental thereto for purposes of section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)) (other than a subsidiary that is an insured depository institution or an insurance company); and

(C) is not a Farm Credit System institution chartered under and subject to the provisions of the Farm Credit Act of 1971, as amended (12 U.S.C. 2001 et seq.), a governmental entity, or a regulated entity, as defined under section 1303(20) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4502(20)).

(12) Fund.—The term “Fund” means the Orderly Liquidation Fund established under section 210(n).

(13) Insurance Company.—The term “insurance company” means any entity that is—

(A) engaged in the business of insurance;

(B) subject to regulation by a State insurance regulator; and

(C) covered by a State law that is designed to specifically deal with the rehabilitation, liquidation, or insolvency of an insurance company.

(14) Nonbank Financial Company.—The term “nonbank financial company” has the same meaning as in section 102(a)(4)(C).

(15) Nonbank Financial Company Supervised by the Board of Governors.—The term “nonbank financial company supervised by the Board of Governors” has the same meaning as in section 102(a)(4)(D).

(16) SIPC.—The term “SIPC” means the Securities Investor Protection Corporation.

(b) DEFINITIONAL CRITERIA.—For purpose of the definition of the term “financial company” under subsection (a)(11), no company shall be deemed to be predominantly engaged in activities that the Board of Governors has determined are financial in nature or incidental thereto for purposes of section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)), if the consolidated revenues of such company from such activities constitute less than 85 percent of the total consolidated revenues of such company, as the Corporation, in consultation with the Secretary, shall establish by regulation. In determining whether a company is a financial company under this title, the consolidated revenues derived from the ownership or control of a depository institution shall be included.

SEC. 202. JUDICIAL REVIEW.

(a) Commencement of Orderly Liquidation.—

(1) Petition to district court.—

(A) District court review.—

(i) Petition to district court.—Subsequent to a determination by the Secretary under section 203 that a financial company satisfies the criteria in section 203(b), the Secretary shall notify the Corporation and the covered financial company. If the board of directors (or body performing similar functions) of the covered financial company acquiesces or consents to the appointment of the Corporation as receiver, the Secretary shall appoint the Corporation as receiver. If
the board of directors (or body performing similar functions) of the covered financial company does not acquiesce or consent to the appointment of the Corporation as receiver, the Secretary shall petition the United States District Court for the District of Columbia for an order authorizing the Secretary to appoint the Corporation as receiver.

(ii) Form and Content of Order.—The Secretary shall present all relevant findings and the recommendation made pursuant to section 203(a) to the Court. The petition shall be filed under seal.

(iii) Determination.—On a strictly confidential basis, and without any prior public disclosure, the Court, after notice to the covered financial company and a hearing in which the covered financial company may oppose the petition, shall determine whether the determination of the Secretary that the covered financial company is in default or in danger of default and satisfies the definition of a financial company under section 201(a)(11) is arbitrary and capricious.

(iv) Issuance of Order.—If the Court determines that the determination of the Secretary that the covered financial company is in default or in danger of default and satisfies the definition of a financial company under section 201(a)(11)—

(I) is not arbitrary and capricious, the Court shall issue an order immediately authorizing the Secretary to appoint the Corporation as receiver of the covered financial company; or

(II) is arbitrary and capricious, the Court shall immediately provide to the Secretary a written statement of each reason supporting its determination, and afford the Secretary an immediate opportunity to amend and refile the petition under clause (i).

(v) Petition Granted by Operation of Law.—If the Court does not make a determination within 24 hours of receipt of the petition—

(I) the petition shall be granted by operation of law;

(II) the Secretary shall appoint the Corporation as receiver; and

(III) liquidation under this title shall automatically and without further notice or action be commenced and the Corporation may immediately take all actions authorized under this title.

(B) Effect of Determination.—The determination of the Court under subparagraph (A) shall be final, and shall be subject to appeal only in accordance with paragraph (2). The decision shall not be subject to any stay or injunction pending appeal. Upon conclusion of its proceedings under subparagraph (A), the Court shall provide immediately for the record a written statement of each reason supporting the decision of the Court, and shall provide copies thereof to the Secretary and the covered financial company.
(C) CRIMINAL PENALTIES.—A person who recklessly discloses a determination of the Secretary under section 203(b) or a petition of the Secretary under subparagraph (A), or the pendency of court proceedings as provided for under subparagraph (A), shall be fined not more than 250,000, or imprisoned for not more than 5 years, or both.

(2) APPEAL OF DECISIONS OF THE DISTRICT COURT.—

(A) APPEAL TO COURT OF APPEALS.—

(i) IN GENERAL.—Subject to clause (ii), the United States Court of Appeals for the District of Columbia Circuit shall have jurisdiction of an appeal of a final decision of the Court filed by the Secretary or a covered financial company, through its board of directors, notwithstanding section 210(a)(1)(A)(i), not later than 30 days after the date on which the decision of the Court is rendered or deemed rendered under this subsection.

(ii) CONDITION OF JURISDICTION.—The Court of Appeals shall have jurisdiction of an appeal by a covered financial company only if the covered financial company did not acquiesce or consent to the appointment of a receiver by the Secretary under paragraph (1)(A).

(iii) EXPEDITION.—The Court of Appeals shall consider any appeal under this subparagraph on an expedited basis.

(iv) SCOPE OF REVIEW.—For an appeal taken under this subparagraph, review shall be limited to whether the determination of the Secretary that a covered financial company is in default or in danger of default and satisfies the definition of a financial company under section 201(a)(11) is arbitrary and capricious.

(B) APPEAL TO THE SUPREME COURT.—

(i) IN GENERAL.—A petition for a writ of certiorari to review a decision of the Court of Appeals under subparagraph (A) may be filed by the Secretary or the covered financial company, through its board of directors, notwithstanding section 210(a)(1)(A)(i), with the Supreme Court of the United States, not later than 30 days after the date of the final decision of the Court of Appeals, and the Supreme Court shall have discretionary jurisdiction to review such decision.

(ii) WRITTEN STATEMENT.—In the event of a petition under clause (i), the Court of Appeals shall immediately provide for the record a written statement of each reason for its decision.

(iii) EXPEDITION.—The Supreme Court shall consider any petition under this subparagraph on an expedited basis.

(iv) SCOPE OF REVIEW.—Review by the Supreme Court under this subparagraph shall be limited to whether the determination of the Secretary that the covered financial company is in default or in danger of default and satisfies the definition of a financial company under section 201(a)(11) is arbitrary and capricious.

(b) ESTABLISHMENT AND TRANSMITTAL OF RULES AND PROCEDURES.—
(1) IN GENERAL.—Not later than 6 months after the date of enactment of this Act, the Court shall establish such rules and procedures as may be necessary to ensure the orderly conduct of proceedings, including rules and procedures to ensure that the 24-hour deadline is met and that the Secretary shall have an ongoing opportunity to amend and refile petitions under subsection (a)(1).

(2) PUBLICATION OF RULES.—The rules and procedures established under paragraph (1), and any modifications of such rules and procedures, shall be recorded and shall be transmitted to—

(A) the Committee on the Judiciary of the Senate;
(B) the Committee on Banking, Housing, and Urban Affairs of the Senate;
(C) the Committee on the Judiciary of the House of Representatives; and
(D) the Committee on Financial Services of the House of Representatives.

(c) PROVISIONS APPLICABLE TO FINANCIAL COMPANIES.—

(1) BANKRUPTCY CODE.—Except as provided in this subsection, the provisions of the Bankruptcy Code and rules issued thereunder or otherwise applicable insolvency law, and not the provisions of this title, shall apply to financial companies that are not covered financial companies for which the Corporation has been appointed as receiver.

(2) THIS TITLE.—The provisions of this title shall exclusively apply to and govern all matters relating to covered financial companies for which the Corporation is appointed as receiver, and no provisions of the Bankruptcy Code or the rules issued thereunder shall apply in such cases, except as expressly provided in this title.

(d) TIME LIMIT ON RECEIVERSHIP AUTHORITY.—

(1) BASELINE PERIOD.—Any appointment of the Corporation as receiver under this section shall terminate at the end of the 3-year period beginning on the date on which such appointment is made.

(2) EXTENSION OF TIME LIMIT.—The time limit established in paragraph (1) may be extended by the Corporation for up to 1 additional year, if the Chairperson of the Corporation determines and certifies in writing to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives that continuation of the receivership is necessary—

(A) to—

(i) maximize the net present value return from the sale or other disposition of the assets of the covered financial company; or

(ii) minimize the amount of loss realized upon the sale or other disposition of the assets of the covered financial company; and

(B) to protect the stability of the financial system of the United States.

(3) SECOND EXTENSION OF TIME LIMIT.—

(A) IN GENERAL.—The time limit under this subsection, as extended under paragraph (2), may be extended for
up to 1 additional year, if the Chairperson of the Corporation, with the concurrence of the Secretary, submits the certifications described in paragraph (2).

(B) ADDITIONAL REPORT REQUIRED.—Not later than 30 days after the date of commencement of the extension under subparagraph (A), the Corporation shall submit a report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives describing the need for the extension and the specific plan of the Corporation to conclude the receivership before the end of the second extension.

(4) ONGOING LITIGATION.—The time limit under this subsection, as extended under paragraph (3), may be further extended solely for the purpose of completing ongoing litigation in which the Corporation as receiver is a party, provided that the appointment of the Corporation as receiver shall terminate not later than 90 days after the date of completion of such litigation, if—

(A) the Council determines that the Corporation used its best efforts to conclude the receivership in accordance with its plan before the end of the time limit described in paragraph (3);
(B) the Council determines that the completion of longer-term responsibilities in the form of ongoing litigation justifies the need for an extension; and
(C) the Corporation submits a report approved by the Council not later than 30 days after the date of determinations by the Council under subparagraphs (A) and (B) to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives, describing—
(i) the ongoing litigation justifying the need for an extension; and
(ii) the specific plan of the Corporation to complete the litigation and conclude the receivership.

(5) REGULATIONS.—The Corporation may issue regulations governing the termination of receiverships under this title.

(6) NO LIABILITY.—The Corporation and the Deposit Insurance Fund shall not be liable for unresolved claims arising from the receivership after the termination of the receivership.

(e) STUDY OF BANKRUPTCY AND ORDERLY LIQUIDATION PROCESS FOR FINANCIAL COMPANIES.—

(1) STUDY.—

(A) IN GENERAL.—The Administrative Office of the United States Courts and the Comptroller General of the United States shall each monitor the activities of the Court, and each such Office shall conduct separate studies regarding the bankruptcy and orderly liquidation process for financial companies under the Bankruptcy Code.

(B) ISSUES TO BE STUDIED.—In conducting the study under subparagraph (A), the Administrative Office of the United States Courts and the Comptroller General of the United States each shall evaluate—
(i) the effectiveness of chapter 7 or chapter 11 of the Bankruptcy Code in facilitating the orderly liquidation or reorganization of financial companies;
(ii) ways to maximize the efficiency and effectiveness of the Court; and
(iii) ways to make the orderly liquidation process under the Bankruptcy Code for financial companies more effective.

(2) Reports.—Not later than 1 year after the date of enactment of this Act, in each successive year until the third year, and every fifth year after that date of enactment, the Administrative Office of the United States Courts and the Comptroller General of the United States shall submit to the Committee on Banking, Housing, and Urban Affairs and the Committee on the Judiciary of the Senate and the Committee on Financial Services and the Committee on the Judiciary of the House of Representatives separate reports summarizing the results of the studies conducted under paragraph (1).

(f) Study of International Coordination Relating to Bankruptcy Process for Financial Companies.—

(1) Study.—

(A) In general.—The Comptroller General of the United States shall conduct a study regarding international coordination relating to the orderly liquidation of financial companies under the Bankruptcy Code.

(B) Issues to be studied.—In conducting the study under subparagraph (A), the Comptroller General of the United States shall evaluate, with respect to the bankruptcy process for financial companies—

(i) the extent to which international coordination currently exists;

(ii) current mechanisms and structures for facilitating international cooperation;

(iii) barriers to effective international coordination; and

(iv) ways to increase and make more effective international coordination.

(2) Report.—Not later than 1 year after the date of enactment of this Act, the Comptroller General of the United States shall submit to the Committee on Banking, Housing, and Urban Affairs and the Committee on the Judiciary of the Senate and the Committee on Financial Services and the Committee on the Judiciary of the House of Representatives and the Secretary a report summarizing the results of the study conducted under paragraph (1).

(g) Study of Prompt Corrective Action Implementation by the Appropriate Federal Agencies.—

(1) Study.—The Comptroller General of the United States shall conduct a study regarding the implementation of prompt corrective action by the appropriate Federal banking agencies.

(2) Issues to be studied.—In conducting the study under paragraph (1), the Comptroller General shall evaluate—

(A) the effectiveness of implementation of prompt corrective action by the appropriate Federal banking agencies and the resolution of insured depository institutions by the Corporation; and

(B) ways to make prompt corrective action a more effective tool to resolve the insured depository institutions at the least possible long-term cost to the Deposit Insurance Fund.
(3) **Report to Council.**—Not later than 1 year after the date of enactment of this Act, the Comptroller General shall submit a report to the Council on the results of the study conducted under this subsection.

(4) **Council Report of Action.**—Not later than 6 months after the date of receipt of the report from the Comptroller General under paragraph (3), the Council shall submit a report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives on actions taken in response to the report, including any recommendations made to the Federal primary financial regulatory agencies under section 120.

SEC. 203. SYSTEMIC RISK DETERMINATION.

(a) **Written Recommendation and Determination.**—

(1) **Vote Required.**—

(A) **In General.**—On their own initiative, or at the request of the Secretary, the Corporation and the Board of Governors shall consider whether to make a written recommendation described in paragraph (2) with respect to whether the Secretary should appoint the Corporation as receiver for a financial company. Such recommendation shall be made upon a vote of not fewer than 2/3 of the members of the Board of Governors then serving and 2/3 of the members of the board of directors of the Corporation then serving.

(B) **Cases Involving Brokers or Dealers.**—In the case of a broker or dealer, or in which the largest United States subsidiary (as measured by total assets as of the end of the previous calendar quarter) of a financial company is a broker or dealer, the Commission and the Board of Governors, at the request of the Secretary, or on their own initiative, shall consider whether to make the written recommendation described in paragraph (2) with respect to the financial company. Subject to the requirements in paragraph (2), such recommendation shall be made upon a vote of not fewer than 2/3 of the members of the Board of Governors then serving and 2/3 of the members of the board of directors of the Corporation then serving, and in consultation with the Corporation.

(C) **Cases Involving Insurance Companies.**—In the case of an insurance company, or in which the largest United States subsidiary (as measured by total assets as of the end of the previous calendar quarter) of a financial company is an insurance company, the Director of the Federal Insurance Office and the Board of Governors, at the request of the Secretary or on their own initiative, shall consider whether to make the written recommendation described in paragraph (2) with respect to the financial company. Subject to the requirements in paragraph (2), such recommendation shall be made upon a vote of not fewer than 2/3 of the Board of Governors then serving and the affirmative approval of the Director of the Federal Insurance Office, and in consultation with the Corporation.

(2) **Recommendation Required.**—Any written recommendation pursuant to paragraph (1) shall contain—
(A) an evaluation of whether the financial company is in default or in danger of default;

(B) a description of the effect that the default of the financial company would have on financial stability in the United States;

(C) a description of the effect that the default of the financial company would have on economic conditions or financial stability for low income, minority, or underserved communities;

(D) a recommendation regarding the nature and the extent of actions to be taken under this title regarding the financial company;

(E) an evaluation of the likelihood of a private sector alternative to prevent the default of the financial company;

(F) an evaluation of why a case under the Bankruptcy Code is not appropriate for the financial company;

(G) an evaluation of the effects on creditors, counterparties, and shareholders of the financial company and other market participants; and

(H) an evaluation of whether the company satisfies the definition of a financial company under section 201.

(b) DETERMINATION BY THE SECRETARY.—Notwithstanding any other provision of Federal or State law, the Secretary shall take action in accordance with section 202(a)(1)(A), if, upon the written recommendation under subsection (a), the Secretary (in consultation with the President) determines that—

(1) the financial company is in default or in danger of default;

(2) the failure of the financial company and its resolution under otherwise applicable Federal or State law would have serious adverse effects on financial stability in the United States;

(3) no viable private sector alternative is available to prevent the default of the financial company;

(4) any effect on the claims or interests of creditors, counterparties, and shareholders of the financial company and other market participants as a result of actions to be taken under this title is appropriate, given the impact that any action taken under this title would have on financial stability in the United States;

(5) any action under section 204 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;

(6) a Federal regulatory agency has ordered the financial company to convert all of its convertible debt instruments that are subject to the regulatory order; and

(7) the company satisfies the definition of a financial company under section 201.

(c) DOCUMENTATION AND REVIEW.—

(1) IN GENERAL.—The Secretary shall—

(A) document any determination under subsection (b);

(B) retain the documentation for review under paragraph (2); and
(C) notify the covered financial company and the Corporation of such determination.

(2) REPORT TO CONGRESS.—Not later than 24 hours after the date of appointment of the Corporation as receiver for a covered financial company, the Secretary shall provide written notice of the recommendations and determinations reached in accordance with subsections (a) and (b) to the Majority Leader and the Minority Leader of the Senate and the Speaker and the Minority Leader of the House of Representatives, the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives, which shall consist of a summary of the basis for the determination, including, to the extent available at the time of the determination—

(A) the size and financial condition of the covered financial company;
(B) the sources of capital and credit support that were available to the covered financial company;
(C) the operations of the covered financial company that could have had a significant impact on financial stability, markets, or both;
(D) identification of the banks and financial companies which may be able to provide the services offered by the covered financial company;
(E) any potential international ramifications of resolution of the covered financial company under other applicable insolvency law;
(F) an estimate of the potential effect of the resolution of the covered financial company under other applicable insolvency law on the financial stability of the United States;
(G) the potential effect of the appointment of a receiver by the Secretary on consumers;
(H) the potential effect of the appointment of a receiver by the Secretary on the financial system, financial markets, and banks and other financial companies; and
(I) whether resolution of the covered financial company under other applicable insolvency law would cause banks or other financial companies to experience severe liquidity distress.

(3) REPORTS TO CONGRESS AND THE PUBLIC.—

(A) IN GENERAL.—Not later than 60 days after the date of appointment of the Corporation as receiver for a covered financial company, the Corporation shall file a report with the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives—

(i) setting forth information on the financial condition of the covered financial company as of the date of the appointment, including a description of its assets and liabilities;
(ii) describing the plan of, and actions taken by, the Corporation to wind down the covered financial company;
(iii) explaining each instance in which the Corporation waived any applicable requirements of part 366 Notification.
of title 12, Code of Federal Regulations (or any successor thereto) with respect to conflicts of interest by any person in the private sector who was retained to provide services to the Corporation in connection with such receivership;

(iv) describing the reasons for the provision of any funding to the receivership out of the Fund;

(v) setting forth the expected costs of the orderly liquidation of the covered financial company;

(vi) setting forth the identity of any claimant that is treated in a manner different from other similarly situated claimants under subsection (b)(4), (d)(4), or (h)(5)(E), the amount of any additional payment to such claimant under subsection (d)(4), and the reason for any such action; and

(vii) which report the Corporation shall publish on an online website maintained by the Corporation, subject to maintaining appropriate confidentiality.

(B) AMENDMENTS.—The Corporation shall, on a timely basis, not less frequently than quarterly, amend or revise and resubmit the reports prepared under this paragraph, as necessary.

(C) CONGRESSIONAL TESTIMONY.—The Corporation and the primary financial regulatory agency, if any, of the financial company for which the Corporation was appointed receiver under this title shall appear before Congress, if requested, not later than 30 days after the date on which the Corporation first files the reports required under subparagraph (A).

4) DEFAULT OR IN DANGER OF DEFAULT.—For purposes of this title, a financial company shall be considered to be in default or in danger of default if, as determined in accordance with subsection (b)—

(A) a case has been, or likely will promptly be, commenced with respect to the financial company under the Bankruptcy Code;

(B) the financial company has incurred, or is likely to incur, losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the company to avoid such depletion;

(C) the assets of the financial company are, or are likely to be, less than its obligations to creditors and others;

or

(D) the financial company is, or is likely to be, unable to pay its obligations (other than those subject to a bona fide dispute) in the normal course of business.

5) GAO REVIEW.—The Comptroller General of the United States shall review and report to Congress on any determination under subsection (b), that results in the appointment of the Corporation as receiver, including—

(A) the basis for the determination;

(B) the purpose for which any action was taken pursuant thereto;

(C) the likely effect of the determination and such action on the incentives and conduct of financial companies and their creditors, counterparties, and shareholders; and
(D) the likely disruptive effect of the determination and such action on the reasonable expectations of creditors, counterparties, and shareholders, taking into account the impact any action under this title would have on financial stability in the United States, including whether the rights of such parties will be disrupted.

(d) Corporation Policies and Procedures.—As soon as is practicable after the date of enactment of this Act, the Corporation shall establish policies and procedures that are acceptable to the Secretary governing the use of funds available to the Corporation to carry out this title, including the terms and conditions for the provision and use of funds under sections 204(d), 210(h)(2)(G)(iv), and 210(h)(9).

(e) Treatment of Insurance Companies and Insurance Company Subsidiaries.—

(1) In general.—Notwithstanding subsection (b), if an insurance company is a covered financial company or a subsidiary or affiliate of a covered financial company, the liquidation or rehabilitation of such insurance company, and any subsidiary or affiliate of such company that is not excepted under paragraph (2), shall be conducted as provided under applicable State law.

(2) Exception for Subsidiaries and Affiliates.—The requirement of paragraph (1) shall not apply with respect to any subsidiary or affiliate of an insurance company that is not itself an insurance company.

(3) Backup Authority.—Notwithstanding paragraph (1), with respect to a covered financial company described in paragraph (1), if, after the end of the 60-day period beginning on the date on which a determination is made under section 202(a) with respect to such company, the appropriate regulatory agency has not filed the appropriate judicial action in the appropriate State court to place such company into orderly liquidation under the laws and requirements of the State, the Corporation shall have the authority to stand in the place of the appropriate regulatory agency and file the appropriate judicial action in the appropriate State court to place such company into orderly liquidation under the laws and requirements of the State.

SEC. 204. ORDERLY LIQUIDATION OF COVERED FINANCIAL COMPANIES.

(a) Purpose of Orderly Liquidation Authority.—It is the purpose of this title to provide the necessary authority to liquidate failing financial companies that pose a significant risk to the financial stability of the United States in a manner that mitigates such risk and minimizes moral hazard. The authority provided in this title shall be exercised in the manner that best fulfills such purpose, so that—

(1) creditors and shareholders will bear the losses of the financial company;

(2) management responsible for the condition of the financial company will not be retained; and

(3) the Corporation and other appropriate agencies will take all steps necessary and appropriate to assure that all parties, including management, directors, and third parties, having responsibility for the condition of the financial company
bear losses consistent with their responsibility, including actions for damages, restitution, and recoupment of compensation and other gains not compatible with such responsibility.

(b) CORPORATION AS RECEIVER.—Upon the appointment of the Corporation under section 202, the Corporation shall act as the receiver for the covered financial company, with all of the rights and obligations set forth in this title.

(c) CONSULTATION.—The Corporation, as receiver—

(1) shall consult with the primary financial regulatory agency or agencies of the covered financial company and its covered subsidiaries for purposes of ensuring an orderly liquidation of the covered financial company;

(2) may consult with, or under subsection (a)(1)(B)(v) or (a)(1)(L) of section 210, acquire the services of, any outside experts, as appropriate to inform and aid the Corporation in the orderly liquidation process;

(3) shall consult with the primary financial regulatory agency or agencies of any subsidiaries of the covered financial company that are not covered subsidiaries, and coordinate with such regulators regarding the treatment of such solvent subsidiaries and the separate resolution of any such insolvent subsidiaries under other governmental authority, as appropriate; and

(4) shall consult with the Commission and the Securities Investor Protection Corporation in the case of any covered financial company for which the Corporation has been appointed as receiver that is a broker or dealer registered with the Commission under section 15(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)) and is a member of the Securities Investor Protection Corporation, for the purpose of determining whether to transfer to a bridge financial company organized by the Corporation as receiver, without consent of any customer, customer accounts of the covered financial company.

(d) FUNDING FOR ORDERLY LIQUIDATION.—Upon its appointment as receiver for a covered financial company, and thereafter as the Corporation may, in its discretion, determine to be necessary or appropriate, the Corporation may make available to the receivership, subject to the conditions set forth in section 206 and subject to the plan described in section 210(n)(9), funds for the orderly liquidation of the covered financial company. All funds provided by the Corporation under this subsection shall have a priority of claims under subparagraph (A) or (B) of section 210(b)(1), as applicable, including funds used for—

(1) making loans to, or purchasing any debt obligation of, the covered financial company or any covered subsidiary;

(2) purchasing or guaranteeing against loss the assets of the covered financial company or any covered subsidiary, directly or through an entity established by the Corporation for such purpose;

(3) assuming or guaranteeing the obligations of the covered financial company or any covered subsidiary to 1 or more third parties;

(4) taking a lien on any or all assets of the covered financial company or any covered subsidiary, including a first priority lien on all unencumbered assets of the covered financial company or any covered subsidiary to secure repayment of any transactions conducted under this subsection;
SEC. 205. ORDERLY LIQUIDATION OF COVERED BROKERS AND DEALERS.

(a) APPOINTMENT OF SIPC AS TRUSTEE.—

(1) APPOINTMENT.—Upon the appointment of the Corporation as receiver for any covered broker or dealer, the Corporation shall appoint, without any need for court approval, the Securities Investor Protection Corporation to act as trustee for the liquidation under the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.) of the covered broker or dealer.

(2) ACTIONS BY SIPC.—

(A) FILING.—Upon appointment of SIPC under paragraph (1), SIPC shall promptly file with any Federal district court of competent jurisdiction specified in section 21 or 27 of the Securities Exchange Act of 1934 (15 U.S.C. 78u, 78aa), an application for a protective decree under the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.) as to the covered broker or dealer. The Federal district court shall accept and approve the filing, including outside of normal business hours, and shall immediately issue the protective decree as to the covered broker or dealer.

(B) ADMINISTRATION BY SIPC.—Following entry of the protective decree, and except as otherwise provided in this section, the determination of claims and the liquidation of assets retained in the receivership of the covered broker or dealer and not transferred to the bridge financial company shall be administered under the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.) by SIPC, as trustee for the covered broker or dealer.

(C) DEFINITION OF FILING DATE.—For purposes of the liquidation proceeding, the term “filing date” means the date on which the Corporation is appointed as receiver of the covered broker or dealer.

(D) DETERMINATION OF CLAIMS.—As trustee for the covered broker or dealer, SIPC shall determine and satisfy, consistent with this title and with the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.), all claims against the covered broker or dealer arising on or before the filing date.

(b) POWERS AND DUTIES OF SIPC.—

(1) IN GENERAL.—Except as provided in this section, upon its appointment as trustee for the liquidation of a covered broker or dealer, SIPC shall have all of the powers and duties provided by the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.), including, without limitation, all rights of action against third parties, and shall conduct such liquidation in accordance with the terms of the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.), except that SIPC shall have no powers or duties with respect to assets and liabilities transferred by the Corporation from the covered
broker or dealer to any bridge financial company established in accordance with this title.

(2) LIMITATION OF POWERS.—The exercise by SIPC of powers and functions as trustee under subsection (a) shall not impair or impede the exercise of the powers and duties of the Corporation with regard to—

(A) any action, except as otherwise provided in this title—

(i) to make funds available under section 204(d);
(ii) to organize, establish, operate, or terminate any bridge financial company;
(iii) to transfer assets and liabilities;
(iv) to enforce or repudiate contracts; or
(v) to take any other action relating to such bridge financial company under section 210; or

(B) determining claims under subsection (e).

(3) PROTECTIVE DECREES.—SIPC and the Corporation, in consultation with the Commission, shall jointly determine the terms of the protective decree to be filed by SIPC with any court of competent jurisdiction under section 21 or 27 of the Securities Exchange Act of 1934 (15 U.S.C. 78u, 78aa), as required by subsection (a).

(4) QUALIFIED FINANCIAL CONTRACTS.—Notwithstanding any provision of the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.) to the contrary (including section 5(b)(2)(C) of that Act (15 U.S.C. 78eee(b)(2)(C))), the rights and obligations of any party to a qualified financial contract (as that term is defined in section 210(c)(8)) to which a covered broker or dealer for which the Corporation has been appointed receiver is a party shall be governed exclusively by section 210, including the limitations and restrictions contained in section 210(c)(10)(B).

(c) LIMITATION ON COURT ACTION.—Except as otherwise provided in this title, no court may take any action, including any action pursuant to the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.) or the Bankruptcy Code, to restrain or affect the exercise of powers or functions of the Corporation as receiver for a covered broker or dealer and any claims against the Corporation as such receiver shall be determined in accordance with subsection (e) and such claims shall be limited to money damages.

(d) ACTIONS BY CORPORATION AS RECEIVER.—

(1) IN GENERAL.—Notwithstanding any other provision of this title, no action taken by the Corporation as receiver with respect to a covered broker or dealer shall—

(A) adversely affect the rights of a customer to customer property or customer name securities;

(B) diminish the amount or timely payment of net equity claims of customers; or

(C) otherwise impair the recoveries provided to a customer under the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.).

(2) NET PROCEEDS.—The net proceeds from any transfer, sale, or disposition of assets of the covered broker or dealer, or proceeds thereof by the Corporation as receiver for the covered broker or dealer shall be for the benefit of the estate of the covered broker or dealer, as provided in this title.
(e) **Claims Against the Corporation as Receiver.**—Any claim against the Corporation as receiver for a covered broker or dealer for assets transferred to a bridge financial company established with respect to such covered broker or dealer—

1. shall be determined in accordance with section 210(a)(2); and

2. may be reviewed by the appropriate district or territorial court of the United States in accordance with section 210(a)(5).

(f) **Satisfaction of Customer Claims.**—

1. **Obligations to Customers.**—Notwithstanding any other provision of this title, all obligations of a covered broker or dealer or of any bridge financial company established with respect to such covered broker or dealer to a customer relating to, or net equity claims based upon, customer property or customer name securities shall be promptly discharged by SIPC, the Corporation, or the bridge financial company, as applicable, by the delivery of securities or the making of payments to or for the account of such customer, in a manner and in an amount at least as beneficial to the customer as would have been the case had the actual proceeds realized from the liquidation of the covered broker or dealer under this title been distributed in a proceeding under the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.) without the appointment of the Corporation as receiver and without any transfer of assets or liabilities to a bridge financial company, and with a filing date as of the date on which the Corporation is appointed as receiver.

2. **Satisfaction of Claims by SIPC.**—SIPC, as trustee for a covered broker or dealer, shall satisfy customer claims in the manner and amount provided under the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.), as if the appointment of the Corporation as receiver had not occurred, and with a filing date as of the date on which the Corporation is appointed as receiver. The Corporation shall satisfy customer claims, to the extent that a customer would have received more securities or cash with respect to the allocation of customer property had the covered financial company been subject to a proceeding under the Securities Investor Protection Act (15 U.S.C. 78aaa et seq.) without the appointment of the Corporation as receiver, and with a filing date as of the date on which the Corporation is appointed as receiver.

(g) **Priorities.**—

1. **Customer Property.**—As trustee for a covered broker or dealer, SIPC shall allocate customer property and deliver customer name securities in accordance with section 8(c) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78fff–2(c)).

2. **Other Claims.**—All claims other than those described in paragraph (1) (including any unpaid claim by a customer for the allowed net equity claim of such customer from customer property) shall be paid in accordance with the priorities in section 210(b).

(h) **Rulemaking.**—The Commission and the Corporation, after consultation with SIPC, shall jointly issue rules to implement this section.
SEC. 206. MANDATORY TERMS AND CONDITIONS FOR ALL ORDERLY LIQUIDATION ACTIONS.

In taking action under this title, the Corporation shall—

(1) determine that such action is necessary for purposes of the financial stability of the United States, and not for the purpose of preserving the covered financial company;

(2) ensure that the shareholders of a covered financial company do not receive payment until after all other claims and the Fund are fully paid;

(3) ensure that unsecured creditors bear losses in accordance with the priority of claim provisions in section 210;

(4) ensure that management responsible for the failed condition of the covered financial company is removed (if such management has not already been removed at the time at which the Corporation is appointed receiver);

(5) ensure that the members of the board of directors (or body performing similar functions) responsible for the failed condition of the covered financial company are removed, if such members have not already been removed at the time the Corporation is appointed as receiver; and

(6) not take an equity interest in or become a shareholder of any covered financial company or any covered subsidiary.

SEC. 207. DIRECTORS NOT LIABLE FOR ACQUIESCING IN APPOINTMENT OF RECEIVER.

The members of the board of directors (or body performing similar functions) of a covered financial company shall not be liable to the shareholders or creditors thereof for acquiescing in or consenting in good faith to the appointment of the Corporation as receiver for the covered financial company under section 203.

SEC. 208. DISMISSAL AND EXCLUSION OF OTHER ACTIONS.

(a) IN GENERAL.—Effective as of the date of the appointment of the Corporation as receiver for the covered financial company under section 202 or the appointment of SIPC as trustee for a covered broker or dealer under section 205, as applicable, any case or proceeding commenced with respect to the covered financial company under the Bankruptcy Code or the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.) shall be dismissed, upon notice to the bankruptcy court (with respect to a case commenced under the Bankruptcy Code), and upon notice to SIPC (with respect to a covered broker or dealer) and no such case or proceeding may be commenced with respect to a covered financial company at any time while the orderly liquidation is pending.

(b) REVESTING OF ASSETS.—Effective as of the date of appointment of the Corporation as receiver, the assets of a covered financial company shall, to the extent they have vested in any entity other than the covered financial company as a result of any case or proceeding commenced with respect to the covered financial company under the Bankruptcy Code, the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.), or any similar provision of State liquidation or insolvency law applicable to the covered financial company, vest in the covered financial company.

(c) LIMITATION.—Notwithstanding subsections (a) and (b), any order entered or other relief granted by a bankruptcy court prior to the date of appointment of the Corporation as receiver shall...
continue with the same validity as if an orderly liquidation had not been commenced.

SEC. 209. RULEMAKING; NON-CONFLICTING LAW.

The Corporation shall, in consultation with the Council, prescribe such rules or regulations as the Corporation considers necessary or appropriate to implement this title, including rules and regulations with respect to the rights, interests, and priorities of creditors, counterparties, security entitlement holders, or other persons with respect to any covered financial company or any assets or other property of or held by such covered financial company, and address the potential for conflicts of interest between or among individual receiverships established under this title or under the Federal Deposit Insurance Act. To the extent possible, the Corporation shall seek to harmonize applicable rules and regulations promulgated under this section with the insolvency laws that would otherwise apply to a covered financial company.

SEC. 210. POWERS AND DUTIES OF THE CORPORATION.

(a) POWERS AND AUTHORITIES.—

(1) GENERAL POWERS.—

(A) SUCCESSOR TO COVERED FINANCIAL COMPANY.—The Corporation shall, upon appointment as receiver for a covered financial company under this title, succeed to—

(i) all rights, titles, powers, and privileges of the covered financial company and its assets, and of any stockholder, member, officer, or director of such company; and

(ii) title to the books, records, and assets of any previous receiver or other legal custodian of such covered financial company.

(B) OPERATION OF THE COVERED FINANCIAL COMPANY DURING THE PERIOD OF ORDERLY LIQUIDATION.—The Corporation, as receiver for a covered financial company, may—

(i) take over the assets of and operate the covered financial company with all of the powers of the members or shareholders, the directors, and the officers of the covered financial company, and conduct all business of the covered financial company;

(ii) collect all obligations and money owed to the covered financial company;

(iii) perform all functions of the covered financial company, in the name of the covered financial company;

(iv) manage the assets and property of the covered financial company, consistent with maximization of the value of the assets in the context of the orderly liquidation; and

(v) provide by contract for assistance in fulfilling any function, activity, action, or duty of the Corporation as receiver.

(C) FUNCTIONS OF COVERED FINANCIAL COMPANY OFFICERS, DIRECTORS, AND SHAREHOLDERS.—The Corporation may provide for the exercise of any function by any member or stockholder, director, or officer of any covered financial company for which the Corporation has been appointed as receiver under this title.
(D) **Additional powers as receiver.**—The Corporation shall, as receiver for a covered financial company, and subject to all legally enforceable and perfected security interests and all legally enforceable security entitlements in respect of assets held by the covered financial company, liquidate, and wind-up the affairs of a covered financial company, including taking steps to realize upon the assets of the covered financial company, in such manner as the Corporation deems appropriate, including through the sale of assets, the transfer of assets to a bridge financial company established under subsection (h), or the exercise of any other rights or privileges granted to the receiver under this section.

(E) **Additional powers with respect to failing subsidiaries of a covered financial company.**—

(i) **In general.**—In any case in which a receiver is appointed for a covered financial company under section 202, the Corporation may appoint itself as receiver of any covered subsidiary of the covered financial company that is organized under Federal law or the laws of any State, if the Corporation and the Secretary jointly determine that—

(I) the covered subsidiary is in default or in danger of default;

(II) such action would avoid or mitigate serious adverse effects on the financial stability or economic conditions of the United States; and

(III) such action would facilitate the orderly liquidation of the covered financial company.

(ii) **Treatment as covered financial company.**—If the Corporation is appointed as receiver of a covered subsidiary of a covered financial company under clause (i), the covered subsidiary shall thereafter be considered a covered financial company under this title, and the Corporation shall thereafter have all the powers and rights with respect to that covered subsidiary as it has with respect to a covered financial company under this title.

(F) **Organization of bridge companies.**—The Corporation, as receiver for a covered financial company, may organize a bridge financial company under subsection (h).

(G) **Merger; transfer of assets and liabilities.**—

(i) **In general.**—Subject to clauses (ii) and (iii), the Corporation, as receiver for a covered financial company, may—

(I) merge the covered financial company with another company; or

(II) transfer any asset or liability of the covered financial company (including any assets and liabilities held by the covered financial company for security entitlement holders, any customer property, or any assets and liabilities associated with any trust or custody business) without obtaining any approval, assignment, or consent with respect to such transfer.

(ii) **Federal agency approval; antitrust review.**—With respect to a transaction described in
clause (i)(I) that requires approval by a Federal agency—

(I) the transaction may not be consummated before the 5th calendar day after the date of approval by the Federal agency responsible for such approval;

(II) if, in connection with any such approval, a report on competitive factors is required, the Federal agency responsible for such approval shall promptly notify the Attorney General of the United States of the proposed transaction, and the Attorney General shall provide the required report not later than 10 days after the date of the request; and

(III) if notification under section 7A of the Clayton Act is required with respect to such transaction, then the required waiting period shall end on the 15th day after the date on which the Attorney General and the Federal Trade Commission receive such notification, unless the waiting period is terminated earlier under subsection (b)(2) of such section 7A, or is extended pursuant to subsection (e)(2) of such section 7A.

(iii) Setoff.—Subject to the other provisions of this title, any transferee of assets from a receiver, including a bridge financial company, shall be subject to such claims or rights as would prevail over the rights of such transferee in such assets under applicable noninsolvency law.

(H) Payment of Valid Obligations.—The Corporation, as receiver for a covered financial company, shall, to the extent that funds are available, pay all valid obligations of the covered financial company that are due and payable at the time of the appointment of the Corporation as receiver, in accordance with the prescriptions and limitations of this title.

(I) Applicable Noninsolvency Law.—Except as may otherwise be provided in this title, the applicable noninsolvency law shall be determined by the noninsolvency choice of law rules otherwise applicable to the claims, rights, titles, persons, or entities at issue.

(J) Subpoena Authority.—

(i) In general.—The Corporation, as receiver for a covered financial company, may, for purposes of carrying out any power, authority, or duty with respect to the covered financial company (including determining any claim against the covered financial company and determining and realizing upon any asset of any person in the course of collecting money due the covered financial company), exercise any power established under section 8(n) of the Federal Deposit Insurance Act, as if the Corporation were the appropriate Federal banking agency for the covered financial company, and the covered financial company were an insured depository institution.

(ii) Rule of Construction.—This subparagraph may not be construed as limiting any rights that the
Corporation, in any capacity, might otherwise have to exercise any powers described in clause (i) or under any other provision of law.

(K) INCIDENTAL POWERS.—The Corporation, as receiver for a covered financial company, may exercise all powers and authorities specifically granted to receivers under this title, and such incidental powers as shall be necessary to carry out such powers under this title.

(L) UTILIZATION OF PRIVATE SECTOR.—In carrying out its responsibilities in the management and disposition of assets from the covered financial company, the Corporation, as receiver for a covered financial company, may utilize the services of private persons, including real estate and loan portfolio asset management, property management, auction marketing, legal, and brokerage services, if such services are available in the private sector, and the Corporation determines that utilization of such services is practicable, efficient, and cost effective.

(M) SHAREHOLDERS AND CREDITORS OF COVERED FINANCIAL COMPANY.—Notwithstanding any other provision of law, the Corporation, as receiver for a covered financial company, shall succeed by operation of law to the rights, titles, powers, and privileges described in subparagraph (A), and shall terminate all rights and claims that the stockholders and creditors of the covered financial company may have against the assets of the covered financial company or the Corporation arising out of their status as stockholders or creditors, except for their right to payment, resolution, or other satisfaction of their claims, as permitted under this section. The Corporation shall ensure that shareholders and unsecured creditors bear losses, consistent with the priority of claims provisions under this section.

(N) COORDINATION WITH FOREIGN FINANCIAL AUTHORITIES.—The Corporation, as receiver for a covered financial company, shall coordinate, to the maximum extent possible, with the appropriate foreign financial authorities regarding the orderly liquidation of any covered financial company that has assets or operations in a country other than the United States.

(O) RESTRICTION ON TRANSFERS.—

(i) SELECTION OF ACCOUNTS FOR TRANSFER.—If the Corporation establishes one or more bridge financial companies with respect to a covered broker or dealer, the Corporation shall transfer to one of such bridge financial companies, all customer accounts of the covered broker or dealer, and all associated customer name securities and customer property, unless the Corporation, after consulting with the Commission and SIPC, determines that—

(I) the customer accounts, customer name securities, and customer property are likely to be promptly transferred to another broker or dealer that is registered with the Commission under section 15(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)) and is a member of SIPC; or

(II) the transfer of the accounts to a bridge financial company would materially interfere with
the ability of the Corporation to avoid or mitigate serious adverse effects on financial stability or economic conditions in the United States.

(ii) **TRANSFER OF PROPERTY.**—SIPC, as trustee for the liquidation of the covered broker or dealer, and the Commission shall provide any and all reasonable assistance necessary to complete such transfers by the Corporation.

(iii) **CUSTOMER CONSENT AND COURT APPROVAL NOT REQUIRED.**—Neither customer consent nor court approval shall be required to transfer any customer accounts or associated customer name securities or customer property to a bridge financial company in accordance with this section.

(iv) **NOTIFICATION OF SIPC AND SHARING OF INFORMATION.**—The Corporation shall identify to SIPC the customer accounts and associated customer name securities and customer property transferred to the bridge financial company. The Corporation and SIPC shall cooperate in the sharing of any information necessary for each entity to discharge its obligations under this title and under the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.) including by providing access to the books and records of the covered financial company and any bridge financial company established in accordance with this title.

(2) **DETERMINATION OF CLAIMS.**

(A) **IN GENERAL.**—The Corporation, as receiver for a covered financial company, shall report on claims, as set forth in section 203(c)(3). Subject to paragraph (4) of this subsection, the Corporation, as receiver for a covered financial company, shall determine claims in accordance with the requirements of this subsection and regulations prescribed under section 209.

(B) **NOTICE REQUIREMENTS.**—The Corporation, as receiver for a covered financial company, in any case involving the liquidation or winding up of the affairs of a covered financial company, shall—

(i) promptly publish a notice to the creditors of the covered financial company to present their claims, together with proof, to the receiver by a date specified in the notice, which shall be not earlier than 90 days after the date of publication of such notice; and

(ii) republish such notice 1 month and 2 months, respectively, after the date of publication under clause (i).

(C) **MAILING REQUIRED.**—The Corporation as receiver shall mail a notice similar to the notice published under clause (i) or (ii) of subparagraph (B), at the time of such publication, to any creditor shown on the books and records of the covered financial company—

(i) at the last address of the creditor appearing in such books;

(ii) in any claim filed by the claimant; or

(iii) upon discovery of the name and address of a claimant not appearing on the books and records of the covered financial company, not later than 30
days after the date of the discovery of such name and address.

(3) **PROCEDURES FOR RESOLUTION OF CLAIMS.**—

(A) **DEcision PERIOD.**—

(i) **IN GENERAL.**—Prior to the 180th day after the date on which a claim against a covered financial company is filed with the Corporation as receiver, or such later date as may be agreed as provided in clause (ii), the Corporation shall notify the claimant whether it allows or disallows the claim, in accordance with subparagraphs (B), (C), and (D).

(ii) **EXTENSION OF TIME.**—By written agreement executed not later than 180 days after the date on which a claim against a covered financial company is filed with the Corporation, the period described in clause (i) may be extended by written agreement between the claimant and the Corporation. Failure to notify the claimant of any disallowance within the time period set forth in clause (i), as it may be extended by agreement under this clause, shall be deemed to be a disallowance of such claim, and the claimant may file or continue an action in court, as provided in paragraph (4).

(iii) **MAILING OF NOTICE SUFFICIENT.**—The requirements of clause (i) shall be deemed to be satisfied if the notice of any decision with respect to any claim is mailed to the last address of the claimant which appears—

(I) on the books, records, or both of the covered financial company;

(II) in the claim filed by the claimant; or

(III) in documents submitted in proof of the claim.

(iv) **CONTENTS OF NOTICE OF DISALLOWANCE.**—If the Corporation as receiver disallows any claim filed under clause (i), the notice to the claimant shall contain—

(I) a statement of each reason for the disallowance; and

(II) the procedures required to file or continue an action in court, as provided in paragraph (4).

(B) **ALLOWANCE OF PROVEN CLAIM.**—The receiver shall allow any claim received by the receiver on or before the date specified in the notice published under paragraph (2)(B)(i), which is proved to the satisfaction of the receiver.

(C) **DISALLOWANCE OF CLAIMS FILED AFTER END OF FILING PERIOD.**—

(i) **IN GENERAL.**—Except as provided in clause (ii), claims filed after the date specified in the notice published under paragraph (2)(B)(i) shall be disallowed, and such disallowance shall be final.

(ii) **CERTAIN EXCEPTIONS.**—Clause (i) shall not apply with respect to any claim filed by a claimant after the date specified in the notice published under paragraph (2)(B)(i), and such claim may be considered by the receiver under subparagraph (B), if—
(I) the claimant did not receive notice of the appointment of the receiver in time to file such claim before such date; and

(II) such claim is filed in time to permit payment of such claim.

(D) AUTHORITY TO DISALLOW CLAIMS.—

(i) IN GENERAL.—The Corporation may disallow any portion of any claim by a creditor or claim of a security, preference, setoff, or priority which is not proved to the satisfaction of the Corporation.

(ii) PAYMENTS TO UNDERSECURED CREDITORS.—In the case of a claim against a covered financial company that is secured by any property or other asset of such covered financial company, the receiver—

(I) may treat the portion of such claim which exceeds an amount equal to the fair market value of such property or other asset as an unsecured claim; and

(II) may not make any payment with respect to such unsecured portion of the claim, other than in connection with the disposition of all claims of unsecured creditors of the covered financial company.

(iii) EXCEPTIONS.—No provision of this paragraph shall apply with respect to—

(I) any extension of credit from any Federal reserve bank, or the Corporation, to any covered financial company; or

(II) subject to clause (ii), any legally enforceable and perfected security interest in the assets of the covered financial company securing any such extension of credit.

(E) LEGAL EFFECT OF FILING.—

(i) STATUTE OF LIMITATIONS TOLLED.—For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) NO PREJUDICE TO OTHER ACTIONS.—Subject to paragraph (8), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the date of appointment of the receiver for the covered financial company.

(4) JUDICIAL DETERMINATION OF CLAIMS.—

(A) IN GENERAL.—Subject to subparagraph (B), a claimant may file suit on a claim (or continue an action commenced before the date of appointment of the Corporation as receiver) in the district or territorial court of the United States for the district within which the principal place of business of the covered financial company is located (and such court shall have jurisdiction to hear such claim).

(B) TIMING.—A claim under subparagraph (A) may be filed before the end of the 60-day period beginning on the earlier of—

(i) the end of the period described in paragraph (3)(A)(i) (or, if extended by agreement of the Corporation and the claimant, the period described in paragraph (3)(A)(ii)) with respect to any claim against a
covered financial company for which the Corporation is receiver; or

(ii) the date of any notice of disallowance of such claim pursuant to paragraph (3)(A)(i).

(C) STATUTE OF LIMITATIONS.—If any claimant fails to file suit on such claim (or to continue an action on such claim commenced before the date of appointment of the Corporation as receiver) prior to the end of the 60-day period described in subparagraph (B), the claim shall be deemed to be disallowed (other than any portion of such claim which was allowed by the receiver) as of the end of such period, such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(5) EXPEDITED DETERMINATION OF CLAIMS.—

(A) PROCEDURE REQUIRED.—The Corporation shall establish a procedure for expedited relief outside of the claims process established under paragraph (3), for any claimant that alleges—

(i) having a legally valid and enforceable or perfected security interest in property of a covered financial company or control of any legally valid and enforceable security entitlement in respect of any asset held by the covered financial company for which the Corporation has been appointed receiver; and

(ii) that irreparable injury will occur if the claims procedure established under paragraph (3) is followed.

(B) DETERMINATION PERIOD.—Prior to the end of the 90-day period beginning on the date on which a claim is filed in accordance with the procedures established pursuant to subparagraph (A), the Corporation shall—

(i) determine—

(I) whether to allow or disallow such claim, or any portion thereof; or

(II) whether such claim should be determined pursuant to the procedures established pursuant to paragraph (3);

(ii) notify the claimant of the determination; and

(iii) if the claim is disallowed, provide a statement of each reason for the disallowance and the procedure for obtaining a judicial determination.

(C) PERIOD FOR FILING OR RENEWING SUIT.—Any claimant who files a request for expedited relief shall be permitted to file suit (or continue a suit filed before the date of appointment of the Corporation as receiver seeking a determination of the rights of the claimant with respect to such security interest (or such security entitlement) after the earlier of—

(i) the end of the 90-day period beginning on the date of the filing of a request for expedited relief; or

(ii) the date on which the Corporation denies the claim or a portion thereof.

(D) STATUTE OF LIMITATIONS.—If an action described in subparagraph (C) is not filed, or the motion to renew a previously filed suit is not made, before the end of the 30-day period beginning on the date on which such action

Notification.

Time period.
or motion may be filed in accordance with subparagraph (C), the claim shall be deemed to be disallowed as of the end of such period (other than any portion of such claim which was allowed by the receiver), such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(E) LEGAL EFFECT OF FILING.—

(i) STATUTE OF LIMITATIONS TOLLED.—For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) NO PREJUDICE TO OTHER ACTIONS.—Subject to paragraph (8), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the Corporation as receiver for the covered financial company.

(6) AGREEMENTS AGAINST INTEREST OF THE RECEIVER.—No agreement that tends to diminish or defeat the interest of the Corporation as receiver in any asset acquired by the receiver under this section shall be valid against the receiver, unless such agreement—

(A) is in writing;
(B) was executed by an authorized officer or representative of the covered financial company, or confirmed in the ordinary course of business by the covered financial company; and
(C) has been, since the time of its execution, an official record of the company or the party claiming under the agreement provides documentation, acceptable to the receiver, of such agreement and its authorized execution or confirmation by the covered financial company.

(7) PAYMENT OF CLAIMS.—

(A) IN GENERAL.—Subject to subparagraph (B), the Corporation as receiver may, in its discretion and to the extent that funds are available, pay creditor claims, in such manner and amounts as are authorized under this section, which are—

(i) allowed by the receiver;
(ii) approved by the receiver pursuant to a final determination pursuant to paragraph (3) or (5), as applicable; or
(iii) determined by the final judgment of a court of competent jurisdiction.

(B) LIMITATION.—A creditor shall, in no event, receive less than the amount that the creditor is entitled to receive under paragraphs (2) and (3) of subsection (d), as applicable.

(C) PAYMENT OF DIVIDENDS ON CLAIMS.—The Corporation as receiver may, in its sole discretion, and to the extent otherwise permitted by this section, pay dividends on proven claims at any time, and no liability shall attach to the Corporation as receiver, by reason of any such payment or for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment.

(D) RULEMAKING BY THE CORPORATION.—The Corporation may prescribe such rules, including definitions of
terms, as the Corporation deems appropriate to establish an interest rate for or to make payments of post-insolvency interest to creditors holding proven claims against the receivership estate of a covered financial company, except that no such interest shall be paid until the Corporation as receiver has satisfied the principal amount of all creditor claims.

(8) **Suspension of legal actions.**—

(A) **In general.**—After the appointment of the Corporation as receiver for a covered financial company, the Corporation may request a stay in any judicial action or proceeding in which such covered financial company is or becomes a party, for a period of not to exceed 90 days.

(B) **Grant of stay by all courts required.**—Upon receipt of a request by the Corporation pursuant to subparagraph (A), the court shall grant such stay as to all parties.

(9) **Additional rights and duties.**—

(A) **Prior final adjudication.**—The Corporation shall abide by any final, non-appealable judgment of any court of competent jurisdiction that was rendered before the appointment of the Corporation as receiver.

(B) **Rights and remedies of receiver.**—In the event of any appealable judgment, the Corporation as receiver shall—

(i) have all the rights and remedies available to the covered financial company (before the date of appointment of the Corporation as receiver under section 202) and the Corporation, including removal to Federal court and all appellate rights; and

(ii) not be required to post any bond in order to pursue such remedies.

(C) **No attachment or execution.**—No attachment or execution may be issued by any court upon assets in the possession of the Corporation as receiver for a covered financial company.

(D) **Limitation on judicial review.**—Except as otherwise provided in this title, no court shall have jurisdiction over—

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any covered financial company for which the Corporation has been appointed receiver, including any assets which the Corporation may acquire from itself as such receiver; or

(ii) any claim relating to any act or omission of such covered financial company or the Corporation as receiver.

(E) **Disposition of assets.**—In exercising any right, power, privilege, or authority as receiver in connection with any covered financial company for which the Corporation is acting as receiver under this section, the Corporation shall, to the greatest extent practicable, conduct its operations in a manner that—

(i) maximizes the net present value return from the sale or disposition of such assets;
(ii) minimizes the amount of any loss realized in the resolution of cases;
(iii) mitigates the potential for serious adverse effects to the financial system;
(iv) ensures timely and adequate competition and fair and consistent treatment of offerors; and
(v) prohibits discrimination on the basis of race, sex, or ethnic group in the solicitation and consideration of offers.

(10) **Statute of Limitations for Actions Brought by Receiver.**—

(A) **In General.**—Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as receiver for a covered financial company shall be—

(i) in the case of any contract claim, the longer of—

(I) the 6-year period beginning on the date on which the claim accrues; or
(II) the period applicable under State law; and

(ii) in the case of any tort claim, the longer of—

(I) the 3-year period beginning on the date on which the claim accrues; or
(II) the period applicable under State law.

(B) **Date on Which a Claim Accrues.**—For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in subparagraph (A) shall be the later of—

(i) the date of the appointment of the Corporation as receiver under this title; or

(ii) the date on which the cause of action accrues.

(C) **Revival of Expired State Causes of Action.**—

(i) **In General.**—In the case of any tort claim described in clause (ii) for which the applicable statute of limitations under State law has expired not more than 5 years before the date of appointment of the Corporation as receiver for a covered financial company, the Corporation may bring an action as receiver on such claim without regard to the expiration of the statute of limitations.

(ii) **Claims Described.**—A tort claim referred to in clause (i) is a claim arising from fraud, intentional misconduct resulting in unjust enrichment, or intentional misconduct resulting in substantial loss to the covered financial company.

(11) **Avoidable Transfers.**—

(A) **Fraudulent Transfers.**—The Corporation, as receiver for any covered financial company, may avoid a transfer of any interest of the covered financial company in property, or any obligation incurred by the covered financial company, that was made or incurred at or within 2 years before the date on which the Corporation was appointed receiver, if—

(i) the covered financial company voluntarily or involuntarily—

(I) made such transfer or incured such obligation with actual intent to hinder, delay, or defraud
any entity to which the covered financial company was or became, on or after the date on which such transfer was made or such obligation was incurred, indebted; or

(II) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii) the covered financial company voluntarily or involuntarily—

(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the covered financial company was an unreasonably small capital;

(III) intended to incur, or believed that the covered financial company would incur, debts that would be beyond the ability of the covered financial company to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

(B) Preferential Transfers.—The Corporation as receiver for any covered financial company may avoid a transfer of an interest of the covered financial company in property—

(i) to or for the benefit of a creditor;

(ii) for or on account of an antecedent debt that was owed by the covered financial company before the transfer was made;

(iii) that was made while the covered financial company was insolvent;

(iv) that was made—

(I) 90 days or less before the date on which the Corporation was appointed receiver; or

(II) more than 90 days, but less than 1 year before the date on which the Corporation was appointed receiver, if such creditor at the time of the transfer was an insider; and

(v) that enables the creditor to receive more than the creditor would receive if—

(I) the covered financial company had been liquidated under chapter 7 of the Bankruptcy Code;

(II) the transfer had not been made; and

(III) the creditor received payment of such debt to the extent provided by the provisions of chapter 7 of the Bankruptcy Code.

(C) Post-Receivership Transactions.—The Corporation as receiver for any covered financial company may avoid a transfer of property of the receivership that occurred after the Corporation was appointed receiver that
was not authorized under this title by the Corporation as receiver.

(D) RIGHT OF RECOVERY.—To the extent that a transfer is avoided under subparagraph (A), (B), or (C), the Corporation may recover, for the benefit of the covered financial company, the property transferred or, if a court so orders, the value of such property (at the time of such transfer) from—

(i) the initial transferee of such transfer or the person for whose benefit such transfer was made; or

(ii) any immediate or mediate transferee of any such initial transferee.

(E) RIGHTS OF TRANSFEE or OBLIGEE.—The Corporation may not recover under subparagraph (D)(ii) from—

(i) any transferee that takes for value, including in satisfaction of or to secure a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(ii) any immediate or mediate good faith transferee of such transferee.

(F) DEFENSES.—Subject to the other provisions of this title—

(i) a transferee or obligee from which the Corporation seeks to recover a transfer or to avoid an obligation under subparagraph (A), (B), (C), or (D) shall have the same defenses available to a transferee or obligee from which a trustee seeks to recover a transfer or avoid an obligation under sections 547, 548, and 549 of the Bankruptcy Code; and

(ii) the authority of the Corporation to recover a transfer or avoid an obligation shall be subject to subsections (b) and (c) of section 546, section 547(c), and section 548(c) of the Bankruptcy Code.

(G) RIGHTS UNDER THIS SECTION.—The rights of the Corporation as receiver under this section shall be superior to any rights of a trustee or any other party (other than a Federal agency) under the Bankruptcy Code.

(H) RULES OF CONSTRUCTION; DEFINITIONS.—For purposes of—

(i) subparagraphs (A) and (B)—

(I) the term “insider” has the same meaning as in section 101(31) of the Bankruptcy Code;

(II) a transfer is made when such transfer is so perfected that a bona fide purchaser from the covered financial company against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the date on which the Corporation is appointed as receiver for the covered financial company, such transfer is made immediately before the date of such appointment; and

(III) the term “value” means property, or satisfaction or securing of a present or antecedent debt of the covered financial company, but does not
include an unperformed promise to furnish support
to the covered financial company; and
(ii) subparagraph (B)—
(I) the covered financial company is presumed
to have been insolvent on and during the 90-day
period immediately preceding the date of appoint-
ment of the Corporation as receiver; and
(II) the term “insolvent” has the same meaning
as in section 101(32) of the Bankruptcy Code.

(12) SETOFF.—
(A) GENERALLY.—Except as otherwise provided in this
title, any right of a creditor to offset a mutual debt owed
by the creditor to any covered financial company that arose
before the Corporation was appointed as receiver for the
covered financial company against a claim of such creditor
may be asserted if enforceable under applicable noninsol-
veny law, except to the extent that—
(i) the claim of the creditor against the covered
financial company is disallowed;
(ii) the claim was transferred, by an entity other
than the covered financial company, to the creditor—
(I) after the Corporation was appointed as
receiver of the covered financial company; or
(II) (aa) after the 90-day period preceding the
date on which the Corporation was appointed as
receiver for the covered financial company; and
(bb) while the covered financial company was
insolvent (except for a setoff in connection with
a qualified financial contract); or
(iii) the debt owed to the covered financial company
was incurred by the covered financial company—
(I) after the 90-day period preceding the date
on which the Corporation was appointed as
receiver for the covered financial company;
(II) while the covered financial company was
insolvent; and
(III) for the purpose of obtaining a right of
setoff against the covered financial company
(except for a setoff in connection with a qualified
financial contract).

(B) INSUFFICIENCY.—
(i) IN GENERAL.—Except with respect to a setoff
in connection with a qualified financial contract, if a
creditor offsets a mutual debt owed to the covered
financial company against a claim of the covered finan-
cial company on or within the 90-day period preceding
the date on which the Corporation is appointed as
receiver for the covered financial company, the Cor-
poration may recover from the creditor the amount
so offset, to the extent that any insufficiency on the
date of such setoff is less than the insufficiency on
the later of—
(I) the date that is 90 days before the date
on which the Corporation is appointed as receiver
for the covered financial company; or
(II) the first day on which there is an insuffi-
ciency during the 90-day period preceding the date
on which the Corporation is appointed as receiver for the covered financial company.

(ii) DEFINITION OF INSUFFICIENCY.—In this subparagraph, the term “insufficiency” means the amount, if any, by which a claim against the covered financial company exceeds a mutual debt owed to the covered financial company by the holder of such claim.

(C) INSOLVENCY.—The term “insolvent” has the same meaning as in section 101(32) of the Bankruptcy Code.

(D) PRESUMPTION OF INSOLVENCY.—For purposes of this paragraph, the covered financial company is presumed to have been insolvent on and during the 90-day period preceding the date of appointment of the Corporation as receiver.

(E) LIMITATION.—Nothing in this paragraph (12) shall be the basis for any right of setoff where no such right exists under applicable noninsolvency law.

(F) PRIORITY CLAIM.—Except as otherwise provided in this title, the Corporation as receiver for the covered financial company may sell or transfer any assets free and clear of the setoff rights of any party, except that such party shall be entitled to a claim, subordinate to the claims payable under subparagraphs (A), (B), (C), and (D) of subsection (b)(1), but senior to all other unsecured liabilities defined in subsection (b)(1)(E), in an amount equal to the value of such setoff rights.

(13) ATTACHMENT OF ASSETS AND OTHER INJUNCTIVE RELIEF.—Subject to paragraph (14), any court of competent jurisdiction may, at the request of the Corporation as receiver for a covered financial company, issue an order in accordance with Rule 65 of the Federal Rules of Civil Procedure, including an order placing the assets of any person designated by the Corporation under the control of the court and appointing a trustee to hold such assets.

(A) SHOWING.—Rule 65 of the Federal Rules of Civil Procedure shall apply with respect to any proceeding under paragraph (13), without regard to the requirement that the applicant show that the injury, loss, or damage is irreparable and immediate.

(B) STATE PROCEEDING.—If, in the case of any proceeding in a State court, the court determines that rules of civil procedure available under the laws of the State provide substantially similar protections of the right of the parties to due process as provided under Rule 65 (as modified with respect to such proceeding by subparagraph (A)), the relief sought by the Corporation pursuant to paragraph (14) may be requested under the laws of such State.

(15) TREATMENT OF CLAIMS ARISING FROM BREACH OF CONTRACTS EXECUTED BY THE CORPORATION AS RECEIVER.—Notwithstanding any other provision of this title, any final and nonappealable judgment for monetary damages entered against the Corporation as receiver for a covered financial company for the breach of an agreement executed or approved by the Corporation after the date of its appointment shall be paid as an administrative expense of the receiver. Nothing in this paragraph shall be construed to limit the power of a receiver...
to exercise any rights under contract or law, including to terminate, breach, cancel, or otherwise discontinue such agreement.

(16) ACCOUNTING AND RECORDKEEPING REQUIREMENTS.—

(A) IN GENERAL.—The Corporation as receiver for a covered financial company shall, consistent with the accounting and reporting practices and procedures established by the Corporation, maintain a full accounting of each receivership or other disposition of any covered financial company.

(B) ANNUAL ACCOUNTING OR REPORT.—With respect to each receivership to which the Corporation is appointed, the Corporation shall make an annual accounting or report, as appropriate, available to the Secretary and the Comptroller General of the United States.

(C) AVAILABILITY OF REPORTS.—Any report prepared pursuant to subparagraph (B) and section 203(c)(3) shall be made available to the public by the Corporation.

(D) RECORDKEEPING REQUIREMENT.—

(i) IN GENERAL.—The Corporation shall prescribe such regulations and establish such retention schedules as are necessary to maintain the documents and records of the Corporation generated in exercising the authorities of this title and the records of a covered financial company for which the Corporation is appointed receiver, with due regard for—

(I) the avoidance of duplicative record retention; and

(II) the expected evidentiary needs of the Corporation as receiver for a covered financial company and the public regarding the records of covered financial companies.

(ii) RETENTION OF RECORDS.—Unless otherwise required by applicable Federal law or court order, the Corporation may not, at any time, destroy any records that are subject to clause (i).

(iii) RECORDS DEFINED.—As used in this subparagraph, the terms “records” and “records of a covered financial company” mean any document, book, paper, map, photograph, microfiche, microfilm, computer or electronically-created record generated or maintained by the covered financial company in the course of and necessary to its transaction of business.

(b) PRIORITY OF EXPENSES AND UNSECURED CLAIMS.—

(1) IN GENERAL.—Unsecured claims against a covered financial company, or the Corporation as receiver for such covered financial company under this section, that are proven to the satisfaction of the receiver shall have priority in the following order:

(A) Administrative expenses of the receiver.

(B) Any amounts owed to the United States, unless the United States agrees or consents otherwise.

(C) Wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual (other than an individual described in subparagraph (G)), but only to the extent of 11,725 for each individual (as indexed for inflation, by regulation of the Corporation)
earned not later than 180 days before the date of appointment of the Corporation as receiver.

(D) Contributions owed to employee benefit plans arising from services rendered not later than 180 days before the date of appointment of the Corporation as receiver, to the extent of the number of employees covered by each such plan, multiplied by 11,725 (as indexed for inflation, by regulation of the Corporation), less the aggregate amount paid to such employees under subparagraph (C), plus the aggregate amount paid by the receivership on behalf of such employees to any other employee benefit plan.

(E) Any other general or senior liability of the covered financial company (which is not a liability described under subparagraph (F), (G), or (H)).

(F) Any obligation subordinated to general creditors (which is not an obligation described under subparagraph (G) or (H)).

(G) Any wages, salaries, or commissions, including vacation, severance, and sick leave pay earned, owed to senior executives and directors of the covered financial company.

(H) Any obligation to shareholders, members, general partners, limited partners, or other persons, with interests in the equity of the covered financial company arising as a result of their status as shareholders, members, general partners, limited partners, or other persons with interests in the equity of the covered financial company.

(2) POST-RECEIVERSHIP FINANCING PRIORITY.—In the event that the Corporation, as receiver for a covered financial company, is unable to obtain unsecured credit for the covered financial company from commercial sources, the Corporation as receiver may obtain credit or incur debt on the part of the covered financial company, which shall have priority over any or all administrative expenses of the receiver under paragraph (1)(A).

(3) CLAIMS OF THE UNITED STATES.—Unsecured claims of the United States shall, at a minimum, have a higher priority than liabilities of the covered financial company that count as regulatory capital.

(4) CREDITORS SIMILARLY SITUATED.—All claimants of a covered financial company that are similarly situated under paragraph (1) shall be treated in a similar manner, except that the Corporation may take any action (including making payments, subject to subsection (o)(1)(D)(i)) that does not comply with this subsection, if—

(A) the Corporation determines that such action is necessary—

(i) to maximize the value of the assets of the covered financial company;

(ii) to initiate and continue operations essential to implementation of the receivership or any bridge financial company;

(iii) to maximize the present value return from the sale or other disposition of the assets of the covered financial company; or
to minimize the amount of any loss realized upon the sale or other disposition of the assets of the covered financial company; and

(B) all claimants that are similarly situated under paragraph (1) receive not less than the amount provided in paragraphs (2) and (3) of subsection (d).

(5) SECURED CLAIMS UNAFFECTED.—This section shall not affect secured claims or security entitlements in respect of assets or property held by the covered financial company, except to the extent that the security is insufficient to satisfy the claim, and then only with regard to the difference between the claim and the amount realized from the security.

(6) PRIORITY OF EXPENSES AND UNSECURED CLAIMS IN THE ORDERLY LIQUIDATION OF SIPC MEMBER.—Where the Corporation is appointed as receiver for a covered broker or dealer, unsecured claims against such covered broker or dealer, or the Corporation as receiver for such covered broker or dealer under this section, that are proven to the satisfaction of the receiver under section 205(e), shall have the priority prescribed in paragraph (1), except that—

(A) SIPC shall be entitled to recover administrative expenses incurred in performing its responsibilities under section 205 on an equal basis with the Corporation, in accordance with paragraph (1)(A);

(B) the Corporation shall be entitled to recover any amounts paid to customers or to SIPC pursuant to section 205(f), in accordance with paragraph (1)(B);

(C) SIPC shall be entitled to recover any amounts paid out of the SIPC Fund to meet its obligations under section 205 and under the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.), which claim shall be subordinate to the claims payable under subparagraphs (A) and (B) of paragraph (1), but senior to all other claims; and

(D) the Corporation may, after paying any proven claims to customers under section 205 and the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.), and as provided above, pay dividends on other proven claims, in its discretion, and to the extent that funds are available, in accordance with the priorities set forth in paragraph (1).

(c) PROVISIONS RELATING TO CONTRACTS ENTERED INTO BEFORE APPOINTMENT OF RECEIVER.—

(1) AUTHORITY TO REPUDIATE CONTRACTS.—In addition to any other rights that a receiver may have, the Corporation as receiver for any covered financial company may disaffirm or repudiate any contract or lease—

(A) to which the covered financial company is a party;

(B) the performance of which the Corporation as receiver, in the discretion of the Corporation, determines to be burdensome; and

(C) the disaffirmance or repudiation of which the Corporation as receiver determines, in the discretion of the Corporation, will promote the orderly administration of the affairs of the covered financial company.

(2) TIMING OF REPUDIATION.—The Corporation, as receiver for any covered financial company, shall determine whether
(3) CLAIMS FOR DAMAGES FOR REPUDIATION.—

(A) IN GENERAL.—Except as provided in paragraphs (4), (5), and (6) and in subparagraphs (C), (D), and (E) of this paragraph, the liability of the Corporation as receiver for a covered financial company for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be—

(i) limited to actual direct compensatory damages; and

(ii) determined as of—

(I) the date of the appointment of the Corporation as receiver; or

(II) in the case of any contract or agreement referred to in paragraph (8), the date of the disaffirmance or repudiation of such contract or agreement.

(B) NO LIABILITY FOR OTHER DAMAGES.—For purposes of subparagraph (A), the term "actual direct compensatory damages" does not include—

(i) punitive or exemplary damages;

(ii) damages for lost profits or opportunity; or

(iii) damages for pain and suffering.

(C) MEASURE OF DAMAGES FOR REPUDIATION OF QUALIFIED FINANCIAL CONTRACTS.—In the case of any qualified financial contract or agreement to which paragraph (8) applies, compensatory damages shall be—

(i) deemed to include normal and reasonable costs of cover or other reasonable measures of damages utilized in the industries for such contract and agreement claims; and

(ii) paid in accordance with this paragraph and subsection (d), except as otherwise specifically provided in this subsection.

(D) MEASURE OF DAMAGES FOR REPUDIATION OR DISAFFIRMANCE OF DEBT OBLIGATION.—In the case of any debt for borrowed money or evidenced by a security, actual direct compensatory damages shall be no less than the amount lent plus accrued interest plus any accreted original issue discount as of the date the Corporation was appointed receiver of the covered financial company and, to the extent that an allowed secured claim is secured by property the value of which is greater than the amount of such claim and any accrued interest through the date of repudiation or disaffirmance, such accrued interest pursuant to paragraph (1).

(E) MEASURE OF DAMAGES FOR REPUDIATION OR DISAFFIRMANCE OF CONTINGENT OBLIGATION.—In the case of any contingent obligation of a covered financial company consisting of any obligation under a guarantee, letter of credit, loan commitment, or similar credit obligation, the Corporation may, by rule or regulation, prescribe that actual direct compensatory damages shall be no less than the estimated value of the claim as of the date the Corporation was appointed receiver of the covered financial company, as such value is measured based on the likelihood
that such contingent claim would become fixed and the probable magnitude thereof.

(4) LEASES UNDER WHICH THE COVERED FINANCIAL COMPANY IS THE LESSEE.—

(A) IN GENERAL.—If the Corporation as receiver disaffirms or repudiates a lease under which the covered financial company is the lessee, the receiver shall not be liable for any damages (other than damages determined pursuant to subparagraph (B)) for the disaffirmance or repudiation of such lease.

(B) PAYMENTS OF RENT.—Notwithstanding subparagraph (A), the lessor under a lease to which subparagraph (A) would otherwise apply shall—

(i) be entitled to the contractual rent accruing before the later of the date on which—

(I) the notice of disaffirmance or repudiation is mailed; or

(II) the disaffirmance or repudiation becomes effective, unless the lessor is in default or breach of the terms of the lease;

(ii) have no claim for damages under any acceleration clause or other penalty provision in the lease; and

(iii) have a claim for any unpaid rent, subject to all appropriate offsets and defenses, due as of the date of the appointment which shall be paid in accordance with this paragraph and subsection (d).

(5) LEASES UNDER WHICH THE COVERED FINANCIAL COMPANY IS THE LESSOR.—

(A) IN GENERAL.—If the Corporation as receiver for a covered financial company repudiates an unexpired written lease of real property of the covered financial company under which the covered financial company is the lessor and the lessee is not, as of the date of such repudiation, in default, the lessee under such lease may either—

(i) treat the lease as terminated by such repudiation; or

(ii) remain in possession of the leasehold interest for the balance of the term of the lease, unless the lessee defaults under the terms of the lease after the date of such repudiation.

(B) PROVISIONS APPLICABLE TO LESSEE REMAINING IN POSSESSION.—If any lessee under a lease described in subparagraph (A) remains in possession of a leasehold interest pursuant to clause (ii) of subparagraph (A)—

(i) the lessee—

(I) shall continue to pay the contractual rent pursuant to the terms of the lease after the date of the repudiation of such lease; and

(II) may offset against any rent payment which accrues after the date of the repudiation of the lease, any damages which accrue after such date due to the nonperformance of any obligation of the covered financial company under the lease after such date; and

(ii) the Corporation as receiver shall not be liable to the lessee for any damages arising after such date.
as a result of the repudiation, other than the amount of any offset allowed under clause (i)(II).

(6) **Contracts for the Sale of Real Property.**—

(A) **In General.**—If the receiver repudiates any contract (which meets the requirements of subsection (a)(6)) for the sale of real property, and the purchaser of such real property under such contract is in possession and is not, as of the date of such repudiation, in default, such purchaser may either—

(i) treat the contract as terminated by such repudiation; or

(ii) remain in possession of such real property.

(B) **Provisions Applicable to Purchaser Remaining in Possession.**—If any purchaser of real property under any contract described in subparagraph (A) remains in possession of such property pursuant to clause (ii) of subparagraph (A)—

(i) the purchaser—

(I) shall continue to make all payments due under the contract after the date of the repudiation of the contract; and

(II) may offset against any such payments any damages which accrue after such date due to the nonperformance (after such date) of any obligation of the covered financial company under the contract; and

(ii) the Corporation as receiver shall—

(I) not be liable to the purchaser for any damages arising after such date as a result of the repudiation, other than the amount of any offset allowed under clause (i)(II); and

(II) deliver title to the purchaser in accordance with the provisions of the contract; and

(III) have no obligation under the contract other than the performance required under subclause (II).

(C) **Assignment and Sale Allowed.**—

(i) **In General.**—No provision of this paragraph shall be construed as limiting the right of the Corporation as receiver to assign the contract described in subparagraph (A) and sell the property, subject to the contract and the provisions of this paragraph.

(ii) **No Liability After Assignment and Sale.**—If an assignment and sale described in clause (i) is consummated, the Corporation as receiver shall have no further liability under the contract described in subparagraph (A) or with respect to the real property which was the subject of such contract.

(7) **Provisions Applicable to Service Contracts.**—

(A) **Services Performed Before Appointment.**—In the case of any contract for services between any person and any covered financial company for which the Corporation has been appointed receiver, any claim of such person for services performed before the date of appointment shall be—

(i) a claim to be paid in accordance with subsections (a), (b), and (d); and
(ii) deemed to have arisen as of the date on which
the receiver was appointed.
(B) SERVICES PERFORMED AFTER APPOINTMENT AND
PRIOR TO REPUDIATION.—If, in the case of any contract
for services described in subparagraph (A), the Corporation
as receiver accepts performance by the other person before
making any determination to exercise the right of repudi-
ation of such contract under this section—
(i) the other party shall be paid under the terms
of the contract for the services performed; and
(ii) the amount of such payment shall be treated
as an administrative expense of the receivership.
(C) ACCEPTANCE OF PERFORMANCE NO BAR TO SUBSE-
QUENT REPUDIATION.—The acceptance by the Corporation
as receiver for services referred to in subparagraph (B)
in connection with a contract described in subparagraph
(B) shall not affect the right of the Corporation as receiver
to repudiate such contract under this section at any time
after such performance.
(8) CERTAIN QUALIFIED FINANCIAL CONTRACTS.—
(A) RIGHTS OF PARTIES TO CONTRACTS.—Subject to sub-
section (a)(8) and paragraphs (9) and (10) of this subsection,
and notwithstanding any other provision of this section,
any other provision of Federal law, or the law of any
State, no person shall be stayed or prohibited from exer-
cising—
(i) any right that such person has to cause the
termination, liquidation, or acceleration of any qual-
ified financial contract with a covered financial company
which arises upon the date of appointment of the Cor-
poration as receiver for such covered financial company
or at any time after such appointment;
(ii) any right under any security agreement or
arrangement or other credit enhancement related to
one or more qualified financial contracts described in
clause (i); or
(iii) any right to offset or net out any termination
value, payment amount, or other transfer obligation
arising under or in connection with 1 or more contracts
or agreements described in clause (i), including any
master agreement for such contracts or agreements.
(B) APPLICABILITY OF OTHER PROVISIONS.—Subsection
(a)(8) shall apply in the case of any judicial action or
proceeding brought against the Corporation as receiver
referred to in subparagraph (A), or the subject covered
financial company, by any party to a contract or agreement
described in subparagraph (A)(i) with such covered financial
company.
(C) CERTAIN TRANSFERS NOT AVOIDABLE.—
(i) IN GENERAL.—Notwithstanding subsection
(a)(11), (a)(12), or (c)(12), section 5242 of the Revised
Statutes of the United States, or any other provision
of Federal or State law relating to the avoidance of
preferential or fraudulent transfers, the Corporation,
whether acting as the Corporation or as receiver for
a covered financial company, may not avoid any
transfer of money or other property in connection with
any qualified financial contract with a covered financial company.

(ii) EXCEPTION FOR CERTAIN TRANSFERS.—Clause (i) shall not apply to any transfer of money or other property in connection with any qualified financial contract with a covered financial company if the transferee had actual intent to hinder, delay, or defraud such company, the creditors of such company, or the Corporation as receiver appointed for such company.

(D) CERTAIN CONTRACTS AND AGREEMENTS DEFINED.—For purposes of this subsection, the following definitions shall apply:

(i) QUALIFIED FINANCIAL CONTRACT.—The term “qualified financial contract” means any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, and any similar agreement that the Corporation determines by regulation, resolution, or order to be a qualified financial contract for purposes of this paragraph.

(ii) SECURITIES CONTRACT.—The term “securities contract”—

(I) means a contract for the purchase, sale, or loan of a security, a certificate of deposit, a mortgage loan, any interest in a mortgage loan, a group or index of securities, certificates of deposit, or mortgage loans or interests therein (including any interest therein or based on the value thereof), or any option on any of the foregoing, including any option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option, and including any repurchase or reverse repurchase transaction on any such security, certificate of deposit, mortgage loan, interest, group or index, or option (whether or not such repurchase or reverse repurchase transaction is a “repurchase agreement”, as defined in clause (v));

(II) does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to include any such agreement within the meaning of such term;

(III) means any option entered into on a national securities exchange relating to foreign currencies;

(IV) means the guarantee (including by novation) by or to any securities clearing agency of any settlement of cash, securities, certificates of deposit, mortgage loans or interests therein, group or index of securities, certificates of deposit or mortgage loans or interests therein (including any interest therein or based on the value thereof) or an option on any of the foregoing, including any option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option (whether or not such
settlement is in connection with any agreement or transaction referred to in subclauses (I) through (XII) (other than subclause (II));

(V) means any margin loan;

(VI) means any extension of credit for the clearance or settlement of securities transactions;

(VII) means any loan transaction coupled with a securities collar transaction, any prepaid securities forward transaction, or any total return swap transaction coupled with a securities sale transaction;

(VIII) means any other agreement or transaction that is similar to any agreement or transaction referred to in this clause;

(IX) means any combination of the agreements or transactions referred to in this clause;

(X) means any option to enter into any agreement or transaction referred to in this clause;

(XI) means a master agreement that provides for an agreement or transaction referred to in any of subclauses (I) through (X), other than subclause (II), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a securities contract under this clause, except that the master agreement shall be considered to be a securities contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in any of subclauses (I) through (X), other than subclause (II); and

(XII) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause, including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in this clause.

(iii) Commodity Contract.—The term "commodity contract" means—

(I) with respect to a futures commission merchant, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade;

(II) with respect to a foreign futures commission merchant, a foreign future;

(III) with respect to a leverage transaction merchant, a leverage transaction;

(IV) with respect to a clearing organization, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization;

(V) with respect to a commodity options dealer, a commodity option;
(VI) any other agreement or transaction that
is similar to any agreement or transaction referred
in this clause;

(VII) any combination of the agreements or
transactions referred to in this clause;

(VIII) any option to enter into any agreement
or transaction referred to in this clause;

(IX) a master agreement that provides for an
agreement or transaction referred to in any of
subclauses (I) through (VIII), together with all
supplements to any such master agreement, with-
out regard to whether the master agreement pro-
vides for an agreement or transaction that is not
a commodity contract under this clause, except
that the master agreement shall be considered
to be a commodity contract under this clause only
with respect to each agreement or transaction
under the master agreement that is referred to
in any of subclauses (I) through (VIII); or

(X) any security agreement or arrangement
or other credit enhancement related to any agree-
ment or transaction referred to in this clause,
including any guarantee or reimbursement obliga-
tion in connection with any agreement or trans-
action referred to in this clause.

(iv) FORWARD CONTRACT.—The term “forward con-
tract” means—

(I) a contract (other than a commodity con-
tract) for the purchase, sale, or transfer of a com-
modity or any similar good, article, service, right,
or interest which is presently or in the future
becomes the subject of dealing in the forward con-
tract trade, or product or byproduct thereof, with
a maturity date that is more than 2 days after
the date on which the contract is entered into,
including a repurchase or reverse repurchase
transaction (whether or not such repurchase or
reverse repurchase transaction is a “repurchase
agreement”, as defined in clause (v)), consignment,
lease, swap, hedge transaction, deposit, loan,
option, allocated transaction, unallocated trans-
action, or any other similar agreement;

(II) any combination of agreements or trans-
actions referred to in subclauses (I) and (III);

(III) any option to enter into any agreement
or transaction referred to in subclause (I) or (II);

(IV) a master agreement that provides for an
agreement or transaction referred to in subclause
(I), (II), or (III), together with all supplements
to any such master agreement, without regard to
whether the master agreement provides for an
agreement or transaction that is not a forward
contract under this clause, except that the master
agreement shall be considered to be a forward
contract under this clause only with respect to
each agreement or transaction under the master
agreement that is referred to in subclause (I), (II), or (III); or

(V) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (II), (III), or (IV), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.

(v) Repurchase Agreement.—The term “repurchase agreement” (which definition also applies to a reverse repurchase agreement)—

(I) means an agreement, including related terms, which provides for the transfer of one or more certificates of deposit, mortgage related securities (as such term is defined in section 3 of the Securities Exchange Act of 1934), mortgage loans, interests in mortgage-related securities or mortgage loans, eligible bankers’ acceptances, qualified foreign government securities (which, for purposes of this clause, means a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development, as determined by regulation or order adopted by the Board of Governors), or securities that are direct obligations of, or that are fully guaranteed by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers’ acceptances, securities, mortgage loans, or interests with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers’ acceptances, securities, mortgage loans, or interests as described above, at a date certain not later than 1 year after such transfers or on demand, against the transfer of funds, or any other similar agreement;

(II) does not include any repurchase obligation under a participation in a commercial mortgage loan, unless the Corporation determines, by regulation, resolution, or order to include any such participation within the meaning of such term;

(III) means any combination of agreements or transactions referred to in subclauses (I) and (IV);

(IV) means any option to enter into any agreement or transaction referred to in subclause (I) or (II);

(V) means a master agreement that provides for an agreement or transaction referred to in subclause (I), (III), or (IV), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a repurchase agreement under this clause, except
that the master agreement shall be considered to be a repurchase agreement under this subclause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (III), or (IV); and

(VI) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (III), (IV), or (V), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.

(vi) Swap Agreement.—The term “swap agreement” means—

(I) any agreement, including the terms and conditions incorporated by reference in any such agreement, which is an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange, precious metals, or other commodity agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a total return, credit spread or credit swap, option, future, or forward agreement; a commodity index or commodity swap, option, future, or forward agreement; weather swap, option, future, or forward agreement; an emissions swap, option, future, or forward agreement; or an inflation swap, option, future, or forward agreement;

(II) any agreement or transaction that is similar to any other agreement or transaction referred to in this clause and that is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap or other derivatives markets (including terms and conditions incorporated by reference in such agreement) and that is a forward, swap, future, option, or spot transaction on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value;

(III) any combination of agreements or transactions referred to in this clause;

(IV) any option to enter into any agreement or transaction referred to in this clause;

(V) a master agreement that provides for an agreement or transaction referred to in subclause (I), (II), (III), or (IV), together with all supplements
to any such master agreement, without regard to whether the master agreement contains an agreement or transaction that is not a swap agreement under this clause, except that the master agreement shall be considered to be a swap agreement under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), (III), or (IV); and

(VI) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in any of subclauses (I) through (V), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such clause.

(vii) **Definitions relating to default.**—When used in this paragraph and paragraphs (9) and (10)—

(I) the term “default” means, with respect to a covered financial company, any adjudication or other official decision by any court of competent jurisdiction, or other public authority pursuant to which the Corporation has been appointed receiver; and

(II) the term “in danger of default” means a covered financial company with respect to which the Corporation or appropriate State authority has determined that—

(a) in the opinion of the Corporation or such authority—

(A) the covered financial company is not likely to be able to pay its obligations in the normal course of business; and

(B) there is no reasonable prospect that the covered financial company will be able to pay such obligations without Federal assistance; or

(b) in the opinion of the Corporation or such authority—

(A) the covered financial company has incurred or is likely to incur losses that will deplete all or substantially all of its capital; and

(B) there is no reasonable prospect that the capital will be replenished without Federal assistance.

(viii) **Treatment of master agreement as one agreement.**—Any master agreement for any contract or agreement described in any of clauses (i) through (vi) (or any master agreement for such master agreement or agreements), together with all supplements to such master agreement, shall be treated as a single agreement and a single qualified financial contact. If a master agreement contains provisions relating to agreements or transactions that are not themselves qualified financial contracts, the master agreement
shall be deemed to be a qualified financial contract only with respect to those transactions that are themselves qualified financial contracts.

(ix) Transfer.—The term “transfer” means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the equity of redemption of the covered financial company.

(x) Person.—The term “person” includes any governmental entity in addition to any entity included in the definition of such term in section 1, title 1, United States Code.

(E) Clarification.—No provision of law shall be construed as limiting the right or power of the Corporation, or authorizing any court or agency to limit or delay, in any manner, the right or power of the Corporation to transfer any qualified financial contract or to disaffirm or repudiate any such contract in accordance with this subsection.

(F) Walkaway clauses not effective.—

(i) In general.—Notwithstanding the provisions of subparagraph (A) of this paragraph and sections 403 and 404 of the Federal Deposit Insurance Corporation Improvement Act of 1991, no walkaway clause shall be enforceable in a qualified financial contract of a covered financial company in default.

(ii) Limited suspension of certain obligations.—In the case of a qualified financial contract referred to in clause (i), any payment or delivery obligations otherwise due from a party pursuant to the qualified financial contract shall be suspended from the time at which the Corporation is appointed as receiver until the earlier of—

(I) the time at which such party receives notice that such contract has been transferred pursuant to paragraph (10)(A); or

(II) 5:00 p.m. (eastern time) on the business day following the date of the appointment of the Corporation as receiver.

(iii) Walkaway clause defined.—For purposes of this subparagraph, the term “walkaway clause” means any provision in a qualified financial contract that suspends, conditions, or extinguishes a payment obligation of a party, in whole or in part, or does not create a payment obligation of a party that would otherwise exist, solely because of the status of such party as a nondefaulting party in connection with the insolvency of a covered financial company that is a party to the contract or the appointment of or the exercise of rights or powers by the Corporation as receiver for such covered financial company, and not as a result of the exercise by a party of any right to offset, setoff, or net obligations that exist under the contract, any other contract between those parties, or applicable law.
(G) **CERTAIN OBLIGATIONS TO CLEARING ORGANIZATIONS.**—In the event that the Corporation has been appointed as receiver for a covered financial company which is a party to any qualified financial contract cleared by or subject to the rules of a clearing organization (as defined in paragraph (9)(D)), the receiver shall use its best efforts to meet all margin, collateral, and settlement obligations of the covered financial company that arise under qualified financial contracts (other than any margin, collateral, or settlement obligation that is not enforceable against the receiver under paragraph (8)(F)(i) or paragraph (10)(B)), as required by the rules of the clearing organization when due. Notwithstanding any other provision of this title, if the receiver fails to satisfy any such margin, collateral, or settlement obligations under the rules of the clearing organization, the clearing organization shall have the immediate right to exercise, and shall not be stayed from exercising, all of its rights and remedies under its rules and applicable law with respect to any qualified financial contract of the covered financial company, including, without limitation, the right to liquidate all positions and collateral of such covered financial company under the company’s qualified financial contracts, and suspend or cease to act for such covered financial company, all in accordance with the rules of the clearing organization.

(H) **RECORDKEEPING.**—

(i) **JOINT RULEMAKING.**—The Federal primary financial regulatory agencies shall jointly prescribe regulations requiring that financial companies maintain such records with respect to qualified financial contracts (including market valuations) that the Federal primary financial regulatory agencies determine to be necessary or appropriate in order to assist the Corporation as receiver for a covered financial company in being able to exercise its rights and fulfill its obligations under this paragraph or paragraph (9) or (10).

(ii) **TIME FRAME.**—The Federal primary financial regulatory agencies shall prescribe joint final or interim final regulations not later than 24 months after the date of enactment of this Act.

(iii) **BACK-UP RULEMAKING AUTHORITY.**—If the Federal primary financial regulatory agencies do not prescribe joint final or interim final regulations within the time frame in clause (ii), the Chairperson of the Council shall prescribe, in consultation with the Corporation, the regulations required by clause (i).

(iv) **CATEGORIZATION AND TIERING.**—The joint regulations prescribed under clause (i) shall, as appropriate, differentiate among financial companies by taking into consideration their size, risk, complexity, leverage, frequency and dollar amount of qualified financial contracts, interconnectedness to the financial system, and any other factors deemed appropriate.

(9) **TRANSFER OF QUALIFIED FINANCIAL CONTRACTS.**—

(A) **IN GENERAL.**—In making any transfer of assets or liabilities of a covered financial company in default,
which includes any qualified financial contract, the Corporation as receiver for such covered financial company shall either—

(i) transfer to one financial institution, other than a financial institution for which a conservator, receiver, trustee in bankruptcy, or other legal custodian has been appointed or which is otherwise the subject of a bankruptcy or insolvency proceeding—

(I) all qualified financial contracts between any person or any affiliate of such person and the covered financial company in default;

(II) all claims of such person or any affiliate of such person against such covered financial company under any such contract (other than any claim which, under the terms of any such contract, is subordinated to the claims of general unsecured creditors of such company);

(III) all claims of such covered financial company against such person or any affiliate of such person under any such contract; and

(IV) all property securing or any other credit enhancement for any contract described in subclause (I) or any claim described in subclause (II) or (III) under any such contract; or

(ii) transfer none of the qualified financial contracts, claims, property or other credit enhancement referred to in clause (i) (with respect to such person and any affiliate of such person).

(B) TRANSFER TO FOREIGN BANK, FINANCIAL INSTITUTION, OR BRANCH OR AGENCY THEREOF.—In transferring any qualified financial contracts and related claims and property under subparagraph (A)(i), the Corporation as receiver for the covered financial company shall not make such transfer to a foreign bank, financial institution organized under the laws of a foreign country, or a branch or agency of a foreign bank or financial institution unless, under the law applicable to such bank, financial institution, branch or agency, to the qualified financial contracts, and to any netting contract, any security agreement or arrangement or other credit enhancement related to one or more qualified financial contracts, the contractual rights of the parties to such qualified financial contracts, netting contracts, security agreements or arrangements, or other credit enhancements are enforceable substantially to the same extent as permitted under this section.

(C) TRANSFER OF CONTRACTS SUBJECT TO THE RULES OF A CLEARING ORGANIZATION.—In the event that the Corporation as receiver for a financial institution transfers any qualified financial contract and related claims, property, or credit enhancement pursuant to subparagraph (A)(i) and such contract is cleared by or subject to the rules of a clearing organization, the clearing organization shall not be required to accept the transferee as a member by virtue of the transfer.

(D) DEFINITIONS.—For purposes of this paragraph—
(i) the term "financial institution" means a broker or dealer, a depository institution, a futures commission merchant, a bridge financial company, or any other institution determined by the Corporation, by regulation, to be a financial institution; and

(ii) the term "clearing organization" has the same meaning as in section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991.

(10) NOTIFICATION OF TRANSFER.—

(A) IN GENERAL.—

(i) NOTICE.—The Corporation shall provide notice in accordance with clause (ii), if—

(I) the Corporation as receiver for a covered financial company in default or in danger of default transfers any assets or liabilities of the covered financial company; and

(II) the transfer includes any qualified financial contract.

(ii) Timing.—The Corporation as receiver for a covered financial company shall notify any person who is a party to any contract described in clause (i) of such transfer not later than 5:00 p.m. (eastern time) on the business day following the date of the appointment of the Corporation as receiver.

(B) CERTAIN RIGHTS NOT ENFORCEABLE.—

(i) RECEIVERSHIP.—A person who is a party to a qualified financial contract with a covered financial company may not exercise any right that such person has to terminate, liquidate, or net such contract under paragraph (8)(A) solely by reason of or incidental to the appointment under this section of the Corporation as receiver for the covered financial company (or the insolvency or financial condition of the covered financial company for which the Corporation has been appointed as receiver)—

(I) until 5:00 p.m. (eastern time) on the business day following the date of the appointment; or

(II) after the person has received notice that the contract has been transferred pursuant to paragraph (9)(A).

(ii) NOTICE.—For purposes of this paragraph, the Corporation as receiver for a covered financial company shall be deemed to have notified a person who is a party to a qualified financial contract with such covered financial company, if the Corporation has taken steps reasonably calculated to provide notice to such person by the time specified in subparagraph (A).

(C) TREATMENT OF BRIDGE FINANCIAL COMPANY.—For purposes of paragraph (9), a bridge financial company shall not be considered to be a financial institution for which a conservator, receiver, trustee in bankruptcy, or other legal custodian has been appointed, or which is otherwise the subject of a bankruptcy or insolvency proceeding.

(D) BUSINESS DAY DEFINED.—For purposes of this paragraph, the term "business day" means any day other than any Saturday, Sunday, or any day on which either the...
New York Stock Exchange or the Federal Reserve Bank of New York is closed.

(11) DISAFFIRMANCE OR REPUDIATION OF QUALIFIED FINANCIAL CONTRACTS.—In exercising the rights of disaffirmance or repudiation of the Corporation as receiver with respect to any qualified financial contract to which a covered financial company is a party, the Corporation shall either—

(A) disaffirm or repudiate all qualified financial contracts between—

(i) any person or any affiliate of such person; and

(ii) the covered financial company in default; or

(B) disaffirm or repudiate none of the qualified financial contracts referred to in subparagraph (A) (with respect to such person or any affiliate of such person).

(12) CERTAIN SECURITY AND CUSTOMER INTERESTS NOT AVOIDABLE.—No provision of this subsection shall be construed as permitting the avoidance of any—

(A) legally enforceable or perfected security interest in any of the assets of any covered financial company, except in accordance with subsection (a)(11); or

(B) legally enforceable interest in customer property, security entitlements in respect of assets or property held by the covered financial company for any security entitlement holder.

(13) AUTHORITY TO ENFORCE CONTRACTS.—

(A) IN GENERAL.—The Corporation, as receiver for a covered financial company, may enforce any contract, other than a liability insurance contract of a director or officer, a financial institution bond entered into by the covered financial company, notwithstanding any provision of the contract providing for termination, default, acceleration, or exercise of rights upon, or solely by reason of, insolvency, the appointment of or the exercise of rights or powers by the Corporation as receiver, the filing of the petition pursuant to section 202(a)(1), or the issuance of the recommendations or determination, or any actions or events occurring in connection therewith or as a result thereof, pursuant to section 203.

(B) CERTAIN RIGHTS NOT AFFECTED.—No provision of this paragraph may be construed as impairing or affecting any right of the Corporation as receiver to enforce or recover under a liability insurance contract of a director or officer or financial institution bond under other applicable law.

(C) CONSENT REQUIREMENT AND IPSO FACTO CLAUSES.—

(i) IN GENERAL.—Except as otherwise provided by this section, no person may exercise any right or power to terminate, accelerate, or declare a default under any contract to which the covered financial company is a party (and no provision in any such contract providing for such default, termination, or acceleration shall be enforceable), or to obtain possession of or exercise control over any property of the covered financial company or affect any contractual rights of the covered financial company, without the consent of the
Corporation as receiver for the covered financial company during the 90 day period beginning from the appointment of the Corporation as receiver.

(ii) Exceptions.—No provision of this subparagraph shall apply to a director or officer liability insurance contract or a financial institution bond, to the rights of parties to certain qualified financial contracts pursuant to paragraph (8), or to the rights of parties to netting contracts pursuant to subtitle A of title IV of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401 et seq.), or shall be construed as permitting the Corporation as receiver to fail to comply with otherwise enforceable provisions of such contract.

(D) Contracts to Extend Credit.—Notwithstanding any other provision in this title, if the Corporation as receiver enforces any contract to extend credit to the covered financial company or bridge financial company, any valid and enforceable obligation to repay such debt shall be paid by the Corporation as receiver, as an administrative expense of the receivership.

(14) Exception for Federal Reserve Banks and Corporation Security Interest.—No provision of this subsection shall apply with respect to—

(A) any extension of credit from any Federal reserve bank to any covered financial company; or

(B) any security interest in the assets of the covered financial company securing any such extension of credit.

(15) Savings Clause.—The meanings of terms used in this subsection are applicable for purposes of this subsection only, and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any similar terms under any other statute, regulation, or rule, including the Gramm-Leach-Bliley Act, the Legal Certainty for Bank Products Act of 2000, the securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), and the Commodity Exchange Act.

(16) Enforcement of Contracts Guaranteed by the Covered Financial Company.—

(A) In General.—The Corporation, as receiver for a covered financial company or as receiver for a subsidiary of a covered financial company (including an insured depository institution) shall have the power to enforce contracts of subsidiaries or affiliates of the covered financial company, the obligations under which are guaranteed or otherwise supported by or linked to the covered financial company, notwithstanding any contractual right to cause the termination, liquidation, or acceleration of such contracts based solely on the insolvency, financial condition, or receivership of the covered financial company, if—

(i) such guaranty or other support and all related assets and liabilities are transferred to and assumed by a bridge financial company or a third party (other than a third party for which a conservator, receiver, trustee in bankruptcy, or other legal custodian has been appointed, or which is otherwise the subject of
a bankruptcy or insolvency proceeding) within the
same period of time as the Corporation is entitled
to transfer the qualified financial contracts of such
covered financial company; or
(ii) the Corporation, as receiver, otherwise provides
adequate protection with respect to such obligations.
(B) RULE OF CONSTRUCTION.—For purposes of this
paragraph, a bridge financial company shall not be consid-
ered to be a third party for which a conservator, receiver,
trustee in bankruptcy, or other legal custodian has been
appointed, or which is otherwise the subject of a bankruptcy
or insolvency proceeding.

(d) VALUATION OF CLAIMS IN DEFAULT.—
(1) IN GENERAL.—Notwithstanding any other provision of
Federal law or the law of any State, and regardless of the
method utilized by the Corporation for a covered financial com-
pany, including transactions authorized under subsection (h),
this subsection shall govern the rights of the creditors of any
such covered financial company.
(2) MAXIMUM LIABILITY.—The maximum liability of the Cor-
poration, acting as receiver for a covered financial company
or in any other capacity, to any person having a claim against
the Corporation as receiver or the covered financial company
for which the Corporation is appointed shall equal the amount
that such claimant would have received if—
(A) the Corporation had not been appointed receiver
with respect to the covered financial company; and
(B) the covered financial company had been liquidated
under chapter 7 of the Bankruptcy Code, or any similar
 provision of State insolvency law applicable to the covered
financial company.
(3) SPECIAL PROVISION FOR ORDERLY LIQUIDATION BY SIPC.—
The maximum liability of the Corporation, acting as receiver
or in its corporate capacity for any covered broker or dealer
to any customer of such covered broker or dealer, with respect
to customer property of such customer, shall be—
(A) equal to the amount that such customer would
have received with respect to such customer property in a
case initiated by SIPC under the Securities Investor
Protection Act of 1970 (15 U.S.C. 78aaa et seq.); and
(B) determined as of the close of business on the date
on which the Corporation is appointed as receiver.
(4) ADDITIONAL PAYMENTS AUTHORIZED.—
(A) IN GENERAL.—Subject to subsection (o)(1)(D)(i), the
Corporation, with the approval of the Secretary, may make
additional payments or credit additional amounts to or
with respect to or for the account of any claimant or cat-
egory of claimants of the covered financial company, if
the Corporation determines that such payments or credits
are necessary or appropriate to minimize losses to the
Corporation as receiver from the orderly liquidation of the
covered financial company under this section.
(B) LIMITATIONS.—
(i) PROHIBITION.—The Corporation shall not make
any payments or credit amounts to any claimant or
category of claimants that would result in any claimant
receiving more than the face value amount of any
claim that is proven to the satisfaction of the Corporation.

(ii) No Obligation.—Notwithstanding any other provision of Federal or State law, or the Constitution of any State, the Corporation shall not be obligated, as a result of having made any payment under subparagraph (A) or credited any amount described in subparagraph (A) to or with respect to, or for the account, of any claimant or category of claimants, to make payments to any other claimant or category of claimants.

(C) Manner of Payment.—The Corporation may make payments or credit amounts under subparagraph (A) directly to the claimants or may make such payments or credit such amounts to a company other than a covered financial company or a bridge financial company established with respect thereto in order to induce such other company to accept liability for such claims.

(e) Limitation on Court Action.—Except as provided in this title, no court may take any action to restrain or affect the exercise of powers or functions of the receiver hereunder, and any remedy against the Corporation or receiver shall be limited to money damages determined in accordance with this title.

(f) Liability of Directors and Officers.—

(1) In General.—A director or officer of a covered financial company may be held personally liable for monetary damages in any civil action described in paragraph (2) by, on behalf of, or at the request or direction of the Corporation, which action is prosecuted wholly or partially for the benefit of the Corporation—

(A) acting as receiver for such covered financial company;

(B) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed by the Corporation as receiver; or

(C) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed in whole or in part by a covered financial company or its affiliate in connection with assistance provided under this title.

(2) Actions Covered.—Paragraph (1) shall apply with respect to actions for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law.

(3) Savings Clause.—Nothing in this subsection shall impair or affect any right of the Corporation under other applicable law.

(g) Damages.—In any proceeding related to any claim against a director, officer, employee, agent, attorney, accountant, or appraiser of a covered financial company, or any other party employed by or providing services to a covered financial company, recoverable damages determined to result from the improvident or otherwise improper use or investment of any assets of the covered financial company shall include principal losses and appropriate interest.
(h) Bridge Financial Companies.—

(1) Organization.—

(A) Purpose.—The Corporation, as receiver for one or more covered financial companies or in anticipation of being appointed receiver for one or more covered financial companies, may organize one or more bridge financial companies in accordance with this subsection.

(B) Authorities.—Upon the creation of a bridge financial company under subparagraph (A) with respect to a covered financial company, such bridge financial company may—

(i) assume such liabilities (including liabilities associated with any trust or custody business, but excluding any liabilities that count as regulatory capital) of such covered financial company as the Corporation may, in its discretion, determine to be appropriate;

(ii) purchase such assets (including assets associated with any trust or custody business) of such covered financial company as the Corporation may, in its discretion, determine to be appropriate; and

(iii) perform any other temporary function which the Corporation may, in its discretion, prescribe in accordance with this section.

(2) Charter and Establishment.—

(A) Establishment.—Except as provided in subparagraph (H), where the covered financial company is a covered broker or dealer, the Corporation, as receiver for a covered financial company, may grant a Federal charter to and approve articles of association for one or more bridge financial company or companies, with respect to such covered financial company which shall, by operation of law and immediately upon issuance of its charter and approval of its articles of association, be established and operate in accordance with, and subject to, such charter, articles, and this section.

(B) Management.—Upon its establishment, a bridge financial company shall be under the management of a board of directors appointed by the Corporation.

(C) Articles of Association.—The articles of association and organization certificate of a bridge financial company shall have such terms as the Corporation may provide, and shall be executed by such representatives as the Corporation may designate.

(D) Terms of Charter; Rights and Privileges.—Subject to and in accordance with the provisions of this subsection, the Corporation shall—

(i) establish the terms of the charter of a bridge financial company and the rights, powers, authorities, and privileges of a bridge financial company granted by the charter or as an incident thereto; and

(ii) provide for, and establish the terms and conditions governing, the management (including the bylaws and the number of directors of the board of directors) and operations of the bridge financial company.

(E) Transfer of Rights and Privileges of Covered Financial Company.—
(i) IN GENERAL.—Notwithstanding any other provision of Federal or State law, the Corporation may provide for a bridge financial company to succeed to and assume any rights, powers, authorities, or privileges of the covered financial company with respect to which the bridge financial company was established and, upon such determination by the Corporation, the bridge financial company shall immediately and by operation of law succeed to and assume such rights, powers, authorities, and privileges.

(ii) EFFECTIVE WITHOUT APPROVAL.—Any succession to or assumption by a bridge financial company of rights, powers, authorities, or privileges of a covered financial company under clause (i) or otherwise shall be effective without any further approval under Federal or State law, assignment, or consent with respect thereto.

(F) CORPORATE GOVERNANCE AND ELECTION AND DESIGNATION OF BODY OF LAW.—To the extent permitted by the Corporation and consistent with this section and any rules, regulations, or directives issued by the Corporation under this section, a bridge financial company may elect to follow the corporate governance practices and procedures that are applicable to a corporation incorporated under the general corporation law of the State of Delaware, or the State of incorporation or organization of the covered financial company with respect to which the bridge financial company was established, as such law may be amended from time to time.

(G) CAPITAL.—

(i) CAPITAL NOT REQUIRED.—Notwithstanding any other provision of Federal or State law, a bridge financial company may, if permitted by the Corporation, operate without any capital or surplus, or with such capital or surplus as the Corporation may in its discretion determine to be appropriate.

(ii) NO CONTRIBUTION BY THE CORPORATION REQUIRED.—The Corporation is not required to pay capital into a bridge financial company or to issue any capital stock on behalf of a bridge financial company established under this subsection.

(iii) AUTHORITY.—If the Corporation determines that such action is advisable, the Corporation may cause capital stock or other securities of a bridge financial company established with respect to a covered financial company to be issued and offered for sale in such amounts and on such terms and conditions as the Corporation may, in its discretion, determine.

(iv) OPERATING FUNDS IN LIEU OF CAPITAL AND IMPLEMENTATION PLAN.—Upon the organization of a bridge financial company, and thereafter as the Corporation may, in its discretion, determine to be necessary or advisable, the Corporation may make available to the bridge financial company, subject to the plan described in subsection (n)(9), funds for the operation of the bridge financial company in lieu of capital.

(H) BRIDGE BROKERS OR DEALERS.—
(i) In General.—The Corporation, as receiver for a covered broker or dealer, may approve articles of association for one or more bridge financial companies with respect to such covered broker or dealer, which bridge financial company or companies shall, by operation of law and immediately upon approval of its articles of association—

(I) be established and deemed registered with the Commission under the Securities Exchange Act of 1934 and a member of SIPC;

(II) operate in accordance with such articles and this section; and

(III) succeed to any and all registrations and memberships of the covered financial company with or in any self-regulatory organizations.

(ii) Other Requirements.—Except as provided in clause (i), and notwithstanding any other provision of this section, the bridge financial company shall be subject to the Federal securities laws and all requirements with respect to being a member of a self-regulatory organization, unless exempted from any such requirements by the Commission, as is necessary or appropriate in the public interest or for the protection of investors.

(iii) Treatment of Customers.—Except as otherwise provided by this title, any customer of the covered broker or dealer whose account is transferred to a bridge financial company shall have all the rights, privileges, and protections under section 205(f) and under the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.), that such customer would have had if the account were not transferred from the covered financial company under this subparagraph.

(iv) Operation of Bridge Brokers or Dealers.—Notwithstanding any other provision of this title, the Corporation shall not operate any bridge financial company created by the Corporation under this title with respect to a covered broker or dealer in such a manner as to adversely affect the ability of customers to promptly access their customer property in accordance with applicable law.

(3) Interests in and Assets and Obligations of Covered Financial Company.—Notwithstanding paragraph (1) or (2) or any other provision of law—

(A) a bridge financial company shall assume, acquire, or succeed to the assets or liabilities of a covered financial company (including the assets or liabilities associated with any trust or custody business) only to the extent that such assets or liabilities are transferred by the Corporation to the bridge financial company in accordance with, and subject to the restrictions set forth in, paragraph (1)(B); and

(B) a bridge financial company shall not assume, acquire, or succeed to any obligation that a covered financial company for which the Corporation has been appointed receiver may have to any shareholder, member, general
partner, limited partner, or other person with an interest in the equity of the covered financial company that arises as a result of the status of that person having an equity claim in the covered financial company.

(4) Bridge Financial Company Treated as Being in Default for Certain Purposes.—A bridge financial company shall be treated as a covered financial company in default at such times and for such purposes as the Corporation may, in its discretion, determine.

(5) Transfer of Assets and Liabilities.—

(A) Authority of Corporation.—The Corporation, as receiver for a covered financial company, may transfer any assets and liabilities of a covered financial company (including any assets or liabilities associated with any trust or custody business) to one or more bridge financial companies, in accordance with and subject to the restrictions of paragraph (1).

(B) Subsequent Transfers.—At any time after the establishment of a bridge financial company with respect to a covered financial company, the Corporation, as receiver, may transfer any assets and liabilities of such covered financial company as the Corporation may, in its discretion, determine to be appropriate in accordance with and subject to the restrictions of paragraph (1).

(C) Treatment of Trust or Custody Business.—For purposes of this paragraph, the trust or custody business, including fiduciary appointments, held by any covered financial company is included among its assets and liabilities.

(D) Effective Without Approval.—The transfer of any assets or liabilities, including those associated with any trust or custody business of a covered financial company, to a bridge financial company shall be effective without any further approval under Federal or State law, assignment, or consent with respect thereto.

(E) Equitable Treatment of Similarly Situated Creditors.—The Corporation shall treat all creditors of a covered financial company that are similarly situated under subsection (b)(1), in a similar manner in exercising the authority of the Corporation under this subsection to transfer any assets or liabilities of the covered financial company to one or more bridge financial companies established with respect to such covered financial company, except that the Corporation may take any action (including making payments, subject to subsection (o)(1)(D)(i)) that does not comply with this subparagraph, if—

(i) the Corporation determines that such action is necessary—

(I) to maximize the value of the assets of the covered financial company;

(II) to maximize the present value return from the sale or other disposition of the assets of the covered financial company; or

(III) to minimize the amount of any loss realized upon the sale or other disposition of the assets of the covered financial company; and
(ii) all creditors that are similarly situated under subsection (b)(1) receive not less than the amount provided under paragraphs (2) and (3) of subsection (d).

(F) LIMITATION ON TRANSFER OF LIABILITIES.—Notwithstanding any other provision of law, the aggregate amount of liabilities of a covered financial company that are transferred to, or assumed by, a bridge financial company from a covered financial company may not exceed the aggregate amount of the assets of the covered financial company that are transferred to, or purchased by, the bridge financial company from the covered financial company.

(6) STAY OF JUDICIAL ACTION.—Any judicial action to which a bridge financial company becomes a party by virtue of its acquisition of any assets or assumption of any liabilities of a covered financial company shall be stayed from further proceedings for a period of not longer than 45 days (or such longer period as may be agreed to upon the consent of all parties) at the request of the bridge financial company.

(7) AGREEMENTS AGAINST INTEREST OF THE BRIDGE FINANCIAL COMPANY.—No agreement that tends to diminish or defeat the interest of the bridge financial company in any asset of a covered financial company acquired by the bridge financial company shall be valid against the bridge financial company, unless such agreement—

(A) is in writing;

(B) was executed by an authorized officer or representative of the covered financial company or confirmed in the ordinary course of business by the covered financial company; and

(C) has been on the official record of the company, since the time of its execution, or with which, the party claiming under the agreement provides documentation of such agreement and its authorized execution or confirmation by the covered financial company that is acceptable to the receiver.

(8) NO FEDERAL STATUS.—

(A) AGENCY STATUS.—A bridge financial company is not an agency, establishment, or instrumentality of the United States.

(B) EMPLOYEE STATUS.—Representatives for purposes of paragraph (1)(B), directors, officers, employees, or agents of a bridge financial company are not, solely by virtue of service in any such capacity, officers or employees of the United States. Any employee of the Corporation or of any Federal instrumentality who serves at the request of the Corporation as a representative for purposes of paragraph (1)(B), director, officer, employee, or agent of a bridge financial company shall not—

(i) solely by virtue of service in any such capacity lose any existing status as an officer or employee of the United States for purposes of title 5, United States Code, or any other provision of law; or

(ii) receive any salary or benefits for service in any such capacity with respect to a bridge financial company in addition to such salary or benefits as are obtained through employment with the Corporation or such Federal instrumentality.
(9) **FUNDING AUTHORIZED.**—The Corporation may, subject to the plan described in subsection (n)(9), provide funding to facilitate any transaction described in subparagraph (A), (B), (C), or (D) of paragraph (13) with respect to any bridge financial company, or facilitate the acquisition by a bridge financial company of any assets, or the assumption of any liabilities, of a covered financial company for which the Corporation has been appointed receiver.

(10) **EXEMPT TAX STATUS.**—Notwithstanding any other provision of Federal or State law, a bridge financial company, its franchise, property, and income shall be exempt from all taxation now or hereafter imposed by the United States, by any territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority.

(11) **FEDERAL AGENCY APPROVAL; ANTITRUST REVIEW.**—If a transaction involving the merger or sale of a bridge financial company requires approval by a Federal agency, the transaction may not be consummated before the 5th calendar day after the date of approval by the Federal agency responsible for such approval with respect thereto. If, in connection with any such approval a report on competitive factors from the Attorney General is required, the Federal agency responsible for such approval shall promptly notify the Attorney General of the proposed transaction and the Attorney General shall provide the required report within 10 days of the request. If a notification is required under section 7A of the Clayton Act with respect to such transaction, the required waiting period shall end on the 15th day after the date on which the Attorney General and the Federal Trade Commission receive such notification, unless the waiting period is terminated earlier under section 7A(b)(2) of the Clayton Act, or extended under section 7A(e)(2) of that Act.

(12) **DURATION OF BRIDGE FINANCIAL COMPANY.**—Subject to paragraphs (13) and (14), the status of a bridge financial company as such shall terminate at the end of the 2-year period following the date on which it was granted a charter. The Corporation may, in its discretion, extend the status of the bridge financial company as such for no more than 3 additional 1-year periods.

(13) **TERMINATION OF BRIDGE FINANCIAL COMPANY STATUS.**—The status of any bridge financial company as such shall terminate upon the earliest of—

(A) the date of the merger or consolidation of the bridge financial company with a company that is not a bridge financial company;

(B) at the election of the Corporation, the sale of a majority of the capital stock of the bridge financial company to a company other than the Corporation and other than another bridge financial company;

(C) the sale of 80 percent, or more, of the capital stock of the bridge financial company to a person other than the Corporation and other than another bridge financial company;

(D) at the election of the Corporation, either the assumption of all or substantially all of the liabilities of the bridge financial company by a company that is not a bridge financial company, or the acquisition of all or
substantially all of the assets of the bridge financial company by a company that is not a bridge financial company, or other entity as permitted under applicable law; and

(E) the expiration of the period provided in paragraph (12), or the earlier dissolution of the bridge financial company, as provided in paragraph (15).

(14) EFFECT OF TERMINATION EVENTS.—

(A) MERGER OR CONSOLIDATION.—A merger or consolidation, described in paragraph (13)(A) shall be conducted in accordance with, and shall have the effect provided in, the provisions of applicable law. For the purpose of effecting such a merger or consolidation, the bridge financial company shall be treated as a corporation organized under the laws of the State of Delaware (unless the law of another State has been selected by the bridge financial company in accordance with paragraph (2)(F)), and the Corporation shall be treated as the sole shareholder thereof, notwithstanding any other provision of State or Federal law.

(B) CHARTER CONVERSION.—Following the sale of a majority of the capital stock of the bridge financial company, as provided in paragraph (13)(B), the Corporation may amend the charter of the bridge financial company to reflect the termination of the status of the bridge financial company as such, whereupon the company shall have all of the rights, powers, and privileges under its constituent documents and applicable Federal or State law. In connection therewith, the Corporation may take such steps as may be necessary or convenient to reincorporate the bridge financial company under the laws of a State and, notwithstanding any provisions of Federal or State law, such State-chartered corporation shall be deemed to succeed by operation of law to such rights, titles, powers, and interests of the bridge financial company as the Corporation may provide, with the same effect as if the bridge financial company had merged with the State-chartered corporation under provisions of the corporate laws of such State.

(C) SALE OF STOCK.—Following the sale of 80 percent or more of the capital stock of a bridge financial company, as provided in paragraph (13)(C), the company shall have all of the rights, powers, and privileges under its constituent documents and applicable Federal or State law. In connection therewith, the Corporation may take such steps as may be necessary or convenient to reincorporate the bridge financial company under the laws of a State and, notwithstanding any provisions of Federal or State law, the State-chartered corporation shall be deemed to succeed by operation of law to such rights, titles, powers and interests of the bridge financial company as the Corporation may provide, with the same effect as if the bridge financial company had merged with the State-chartered corporation under provisions of the corporate laws of such State.

(D) ASSUMPTION OF LIABILITIES AND SALE OF ASSETS.—Following the assumption of all or substantially all of the liabilities of the bridge financial company, or the sale of...
all or substantially all of the assets of the bridge financial company, as provided in paragraph (13)(D), at the election of the Corporation, the bridge financial company may retain its status as such for the period provided in paragraph (12) or may be dissolved at the election of the Corporation.

(E) AMENDMENTS TO CHARTER.—Following the consummation of a transaction described in subparagraph (A), (B), (C), or (D) of paragraph (13), the charter of the resulting company shall be amended to reflect the termination of bridge financial company status, if appropriate.

(15) DISSOLUTION OF BRIDGE FINANCIAL COMPANY.—

(A) IN GENERAL.—Notwithstanding any other provision of Federal or State law, if the status of a bridge financial company as such has not previously been terminated by the occurrence of an event specified in subparagraph (A), (B), (C), or (D) of paragraph (13)—

(i) the Corporation may, in its discretion, dissolve the bridge financial company in accordance with this paragraph at any time; and

(ii) the Corporation shall promptly commence dissolution proceedings in accordance with this paragraph upon the expiration of the 2-year period following the date on which the bridge financial company was chartered, or any extension thereof, as provided in paragraph (12).

(B) PROCEDURES.—The Corporation shall remain the receiver for a bridge financial company for the purpose of dissolving the bridge financial company. The Corporation as receiver for a bridge financial company shall wind up the affairs of the bridge financial company in conformity with the provisions of law relating to the liquidation of covered financial companies under this title. With respect to any such bridge financial company, the Corporation as receiver shall have all the rights, powers, and privileges and shall perform the duties related to the exercise of such rights, powers, or privileges granted by law to the Corporation as receiver for a covered financial company under this title and, notwithstanding any other provision of law, the exercise of such rights, powers, and privileges, the Corporation shall not be subject to the direction or supervision of any State agency or other Federal agency.

(16) AUTHORITY TO OBTAIN CREDIT.—

(A) IN GENERAL.—A bridge financial company may obtain unsecured credit and issue unsecured debt.

(B) INABILITY TO OBTAIN CREDIT.—If a bridge financial company is unable to obtain unsecured credit or issue unsecured debt, the Corporation may authorize the obtaining of credit or the issuance of debt by the bridge financial company—

(i) with priority over any or all of the obligations of the bridge financial company;

(ii) secured by a lien on property of the bridge financial company that is not otherwise subject to a lien; or

(iii) secured by a junior lien on property of the bridge financial company that is subject to a lien.

(C) LIMITATIONS.—
(i) IN GENERAL.—The Corporation, after notice and a hearing, may authorize the obtaining of credit or the issuance of debt by a bridge financial company that is secured by a senior or equal lien on property of the bridge financial company that is subject to a lien, only if—

(I) the bridge financial company is unable to otherwise obtain such credit or issue such debt; and

(II) there is adequate protection of the interest of the holder of the lien on the property with respect to which such senior or equal lien is proposed to be granted.

(ii) HEARING.—The hearing required pursuant to this subparagraph shall be before a court of the United States, which shall have jurisdiction to conduct such hearing and to authorize a bridge financial company to obtain secured credit under clause (i).

(D) BURDEN OF PROOF.—In any hearing under this paragraph, the Corporation has the burden of proof on the issue of adequate protection.

(E) QUALIFIED FINANCIAL CONTRACTS.—No credit or debt obtained or issued by a bridge financial company may contain terms that impair the rights of a counterparty to a qualified financial contract upon a default by the bridge financial company, other than the priority of such counterparty's unsecured claim (after the exercise of rights) relative to the priority of the bridge financial company's obligations in respect of such credit or debt, unless such counterparty consents in writing to any such impairment.

(17) EFFECT ON DEBTS AND LIENS.—The reversal or modification on appeal of an authorization under this subsection to obtain credit or issue debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so issued, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the issuance of such debt, or the granting of such priority or lien, were stayed pending appeal.

(i) SHARING RECORDS.—If the Corporation has been appointed as receiver for a covered financial company, other Federal regulators shall make all records relating to the covered financial company available to the Corporation, which may be used by the Corporation in any manner that the Corporation determines to be appropriate.

(j) EXPEDITED PROCEDURES FOR CERTAIN CLAIMS.—

(1) TIME FOR FILING NOTICE OF APPEAL.—The notice of appeal of any order, whether interlocutory or final, entered in any case brought by the Corporation against a director, officer, employee, agent, attorney, accountant, or appraiser of the covered financial company, or any other person employed by or providing services to a covered financial company, shall be filed not later than 30 days after the date of entry of the order. The hearing of the appeal shall be held not later than 120 days after the date of the notice of appeal. The appeal shall be decided not later than 180 days after the date of the notice of appeal.
(2) SCHEDULING.—The court shall expedite the consideration of any case brought by the Corporation against a director, officer, employee, agent, attorney, accountant, or appraiser of a covered financial company or any other person employed by or providing services to a covered financial company. As far as practicable, the court shall give such case priority on its docket.

(3) JUDICIAL DISCRETION.—The court may modify the schedule and limitations stated in paragraphs (1) and (2) in a particular case, based on a specific finding that the ends of justice that would be served by making such a modification would outweigh the best interest of the public in having the case resolved expeditiously.

(k) FOREIGN INVESTIGATIONS.—The Corporation, as receiver for any covered financial company, and for purposes of carrying out any power, authority, or duty with respect to a covered financial company—

(1) may request the assistance of any foreign financial authority and provide assistance to any foreign financial authority in accordance with section 8(v) of the Federal Deposit Insurance Act, as if the covered financial company were an insured depository institution, the Corporation were the appropriate Federal banking agency for the company, and any foreign financial authority were the foreign banking authority; and

(2) may maintain an office to coordinate foreign investigations or investigations on behalf of foreign financial authorities.

(l) PROHIBITION ON ENTERING SECRECY AGREEMENTS AND PROTECTIVE ORDERS.—The Corporation may not enter into any agreement or approve any protective order which prohibits the Corporation from disclosing the terms of any settlement of an administrative or other action for damages or restitution brought by the Corporation in its capacity as receiver for a covered financial company.

(m) LIQUIDATION OF CERTAIN COVERED FINANCIAL COMPANIES OR BRIDGE FINANCIAL COMPANIES.—

(1) IN GENERAL.—Except as specifically provided in this section, and notwithstanding any other provision of law, the Corporation, in connection with the liquidation of any covered financial company or bridge financial company with respect to which the Corporation has been appointed as receiver, shall—

(A) in the case of any covered financial company or bridge financial company that is a stockbroker, but is not a member of the Securities Investor Protection Corporation, apply the provisions of subchapter III of chapter 7 of the Bankruptcy Code, in respect of the distribution to any customer of all customer name security and customer property and member property, as if such covered financial company or bridge financial company were a debtor for purposes of such subchapter; or

(B) in the case of any covered financial company or bridge financial company that is a commodity broker, apply the provisions of subchapter IV of chapter 7 the Bankruptcy Code, in respect of the distribution to any customer of all customer property and member property, as if such covered financial company or bridge financial company were a debtor for purposes of such subchapter.

(2) DEFINITIONS.—For purposes of this subsection—
(A) the terms “customer”, “customer name security”, and “customer property and member property” have the same meanings as in sections 741 and 761 of title 11, United States Code; and

(B) the terms “commodity broker” and “stockbroker” have the same meanings as in section 101 of the Bankruptcy Code.

(n) ORDERLY LIQUIDATION FUND.—

(1) ESTABLISHMENT.—There is established in the Treasury of the United States a separate fund to be known as the “Orderly Liquidation Fund”, which shall be available to the Corporation to carry out the authorities contained in this title, for the cost of actions authorized by this title, including the orderly liquidation of covered financial companies, payment of administrative expenses, the payment of principal and interest by the Corporation on obligations issued under paragraph (5), and the exercise of the authorities of the Corporation under this title.

(2) PROCEEDS.—Amounts received by the Corporation, including assessments received under subsection (o), proceeds of obligations issued under paragraph (5), interest and other earnings from investments, and repayments to the Corporation by covered financial companies, shall be deposited into the Fund.

(3) MANAGEMENT.—The Corporation shall manage the Fund in accordance with this subsection and the policies and procedures established under section 203(d).

(4) INVESTMENTS.—At the request of the Corporation, the Secretary may invest such portion of amounts held in the Fund that are not, in the judgment of the Corporation, required to meet the current needs of the Corporation, in obligations of the United States having suitable maturities, as determined by the Corporation. The interest on and the proceeds from the sale or redemption of such obligations shall be credited to the Fund.

(5) AUTHORITY TO ISSUE OBLIGATIONS.—

(A) CORPORATION AUTHORIZED TO ISSUE OBLIGATIONS.—

Upon appointment by the Secretary of the Corporation as receiver for a covered financial company, the Corporation is authorized to issue obligations to the Secretary.

(B) SECRETARY AUTHORIZED TO PURCHASE OBLIGATIONS.—The Secretary may, under such terms and conditions as the Secretary may require, purchase or agree to purchase any obligations issued under subparagraph (A), and for such purpose, the Secretary is authorized to use as a public debt transaction the proceeds of the sale of any securities issued under chapter 31 of title 31, United States Code, and the purposes for which securities may be issued under chapter 31 of title 31, United States Code, are extended to include such purchases.

(C) INTEREST RATE.—Each purchase of obligations by the Secretary under this paragraph shall be upon such terms and conditions as to yield a return at a rate determined by the Secretary, taking into consideration the current average yield on outstanding marketable obligations of the United States of comparable maturity, plus an
interest rate surcharge to be determined by the Secretary, which shall be greater than the difference between—

(i) the current average rate on an index of corporate obligations of comparable maturity; and

(ii) the current average rate on outstanding marketable obligations of the United States of comparable maturity.

(D) SECRETARY AUTHORIZED TO SELL OBLIGATIONS.—
The Secretary may sell, upon such terms and conditions as the Secretary shall determine, any of the obligations acquired under this paragraph.

(E) PUBLIC DEBT TRANSACTIONS.—All purchases and sales by the Secretary of such obligations under this paragraph shall be treated as public debt transactions of the United States, and the proceeds from the sale of any obligations acquired by the Secretary under this paragraph shall be deposited into the Treasury of the United States as miscellaneous receipts.

(6) MAXIMUM OBLIGATION LIMITATION.—The Corporation may not, in connection with the orderly liquidation of a covered financial company, issue or incur any obligation, if, after issuing or incurring the obligation, the aggregate amount of such obligations outstanding under this subsection for each covered financial company would exceed—

(A) an amount that is equal to 10 percent of the total consolidated assets of the covered financial company, based on the most recent financial statement available, during the 30-day period immediately following the date of appointment of the Corporation as receiver (or a shorter time period if the Corporation has calculated the amount described under subparagraph (B)); and

(B) the amount that is equal to 90 percent of the fair value of the total consolidated assets of each covered financial company that are available for repayment, after the time period described in subparagraph (A).

(7) RULEMAKING.—The Corporation and the Secretary shall jointly, in consultation with the Council, prescribe regulations governing the calculation of the maximum obligation limitation defined in this paragraph.

(8) RULE OF CONSTRUCTION.—

(A) IN GENERAL.—Nothing in this section shall be construed to affect the authority of the Corporation under subsection (a) or (b) of section 14 or section 15(c)(5) of the Federal Deposit Insurance Act (12 U.S.C. 1824, 1825(c)(5)), the management of the Deposit Insurance Fund by the Corporation, or the resolution of insured depository institutions, provided that—

(i) the authorities of the Corporation contained in this title shall not be used to assist the Deposit Insurance Fund or to assist any financial company under applicable law other than this Act;

(ii) the authorities of the Corporation relating to the Deposit Insurance Fund, or any other responsibilities of the Corporation under applicable law other than this title, shall not be used to assist a covered financial company pursuant to this title; and
(iii) the Deposit Insurance Fund may not be used in any manner to otherwise circumvent the purposes of this title.

(B) VALUATION.—For purposes of determining the amount of obligations under this subsection—

(i) the Corporation shall include as an obligation any contingent liability of the Corporation pursuant to this title; and

(ii) the Corporation shall value any contingent liability at its expected cost to the Corporation.

(9) ORDERLY LIQUIDATION AND REPAYMENT PLANS.—

(A) ORDERLY LIQUIDATION PLAN.—Amounts in the Fund shall be available to the Corporation with regard to a covered financial company for which the Corporation is appointed receiver after the Corporation has developed an orderly liquidation plan that is acceptable to the Secretary with regard to such covered financial company, including the provision and use of funds, including taking any actions specified under section 204(d) and subsection (h)(2)(G)(iv) and (h)(9) of this section, and payments to third parties. The orderly liquidation plan shall take into account actions to avoid or mitigate potential adverse effects on low income, minority, or underserved communities affected by the failure of the covered financial company, and shall provide for coordination with the primary financial regulatory agencies, as appropriate, to ensure that such actions are taken. The Corporation may, at any time, amend any orderly liquidation plan approved by the Secretary with the concurrence of the Secretary.

(B) MANDATORY REPAYMENT PLAN.—

(i) IN GENERAL.—No amount authorized under paragraph (6)(B) may be provided by the Secretary to the Corporation under paragraph (5), unless an agreement is in effect between the Secretary and the Corporation that—

(I) provides a specific plan and schedule to achieve the repayment of the outstanding amount of any borrowing under paragraph (5); and

(II) demonstrates that income to the Corporation from the liquidated assets of the covered financial company and assessments under subsection (o) will be sufficient to amortize the outstanding balance within the period established in the repayment schedule and pay the interest accruing on such balance within the time provided in subsection (o)(1)(B).

(ii) CONSULTATION WITH AND REPORT TO CONGRESS.—The Secretary and the Corporation shall—

(I) consult with the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives on the terms of any repayment schedule agreement; and

(II) submit a copy of the repayment schedule agreement to the Committees described in subclause (I) before the end of the 30-day period beginning on the date on which any amount is provided.
by the Secretary to the Corporation under paragraph (5).

(10) IMPLEMENTATION EXPENSES.—

(A) IN GENERAL.—Reasonable implementation expenses of the Corporation incurred after the date of enactment of this Act shall be treated as expenses of the Council.

(B) REQUESTS FOR REIMBURSEMENT.—The Corporation shall periodically submit a request for reimbursement for implementation expenses to the Chairperson of the Council, who shall arrange for prompt reimbursement to the Corporation of reasonable implementation expenses.

(C) DEFINITION.—As used in this paragraph, the term “implementation expenses”—

(i) means costs incurred by the Corporation beginning on the date of enactment of this Act, as part of its efforts to implement this title that do not relate to a particular covered financial company; and

(ii) includes the costs incurred in connection with the development of policies, procedures, rules, and regulations and other planning activities of the Corporation consistent with carrying out this title.

(o) ASSESSMENTS.—

(1) RISK-BASED ASSESSMENTS.—

(A) ELIGIBLE FINANCIAL COMPANIES DEFINED.—For purposes of this subsection, the term “eligible financial company” means any bank holding company with total consolidated assets equal to or greater than $50,000,000,000 and any nonbank financial company supervised by the Board of Governors.

(B) ASSESSMENTS.—The Corporation shall charge one or more risk-based assessments in accordance with the provisions of subparagraph (D), if such assessments are necessary to pay in full the obligations issued by the Corporation to the Secretary under this title within 60 months of the date of issuance of such obligations.

(C) EXTENSIONS AUTHORIZED.—The Corporation may, with the approval of the Secretary, extend the time period under subparagraph (B), if the Corporation determines that an extension is necessary to avoid a serious adverse effect on the financial system of the United States.

(D) APPLICATION OF ASSESSMENTS.—To meet the requirements of subparagraph (B), the Corporation shall—

(i) impose assessments, as soon as practicable, on any claimant that received additional payments or amounts from the Corporation pursuant to subsection (b)(4), (d)(4), or (h)(5)(E), except for payments or amounts necessary to initiate and continue operations essential to implementation of the receivership or any bridge financial company, to recover on a cumulative basis, the entire difference between—

(I) the aggregate value the claimant received from the Corporation on a claim pursuant to this title (including pursuant to subsection (b)(4), (d)(4), and (h)(5)(E)), as of the date on which such value was received; and

(II) the value the claimant was entitled to receive from the Corporation on such claim solely
from the proceeds of the liquidation of the covered financial company under this title; and
(ii) if the amounts to be recovered on a cumulative basis under clause (i) are insufficient to meet the requirements of subparagraph (B), after taking into account the considerations set forth in paragraph (4), impose assessments on—
(I) eligible financial companies; and
(II) financial companies with total consolidated assets equal to or greater than $50,000,000,000 that are not eligible financial companies.

(E) PROVISION OF FINANCING.—Payments or amounts necessary to initiate and continue operations essential to implementation of the receivership or any bridge financial company described in subparagraph (D)(i) shall not include the provision of financing, as defined by rule of the Corporation, to third parties.

(2) GRADUATED ASSESSMENT RATE.—The Corporation shall impose assessments on a graduated basis, with financial companies having greater assets and risk being assessed at a higher rate.

(3) NOTIFICATION AND PAYMENT.—The Corporation shall notify each financial company of that company's assessment under this subsection. Any financial company subject to assessment under this subsection shall pay such assessment in accordance with the regulations prescribed pursuant to paragraph (6).

(4) RISK-BASED ASSESSMENT CONSIDERATIONS.—In imposing assessments under paragraph (1)(D)(ii), the Corporation shall use a risk matrix. The Council shall make a recommendation to the Corporation on the risk matrix to be used in imposing such assessments, and the Corporation shall take into account any such recommendation in the establishment of the risk matrix to be used to impose such assessments. In recommending or establishing such risk matrix, the Council and the Corporation, respectively, shall take into account—
(A) economic conditions generally affecting financial companies so as to allow assessments to increase during more favorable economic conditions and to decrease during less favorable economic conditions;
(B) any assessments imposed on a financial company or an affiliate of a financial company that—
(i) is an insured depository institution, assessed pursuant to section 7 or 13(c)(4)(G) of the Federal Deposit Insurance Act;
(ii) is a member of the Securities Investor Protection Corporation, assessed pursuant to section 4 of the Securities Investor Protection Act of 1970 (15 U.S.C. 78ddd);
(iii) is an insured credit union, assessed pursuant to section 202(c)(1)(A)(i) of the Federal Credit Union Act (12 U.S.C. 1782(c)(1)(A)(i)); or
(iv) is an insurance company, assessed pursuant to applicable State law to cover (or reimburse payments made to cover) the costs of the rehabilitation, liquidation, or other State insolvency proceeding with respect to 1 or more insurance companies;
(C) the risks presented by the financial company to the financial system and the extent to which the financial company has benefitted, or likely would benefit, from the orderly liquidation of a financial company under this title, including—

(i) the amount, different categories, and concentrations of assets of the financial company and its affiliates, including both on-balance sheet and off-balance sheet assets;

(ii) the activities of the financial company and its affiliates;

(iii) the relevant market share of the financial company and its affiliates;

(iv) the extent to which the financial company is leveraged;

(v) the potential exposure to sudden calls on liquidity precipitated by economic distress;

(vi) the amount, maturity, volatility, and stability of the company's financial obligations to, and relationship with, other financial companies;

(vii) the amount, maturity, volatility, and stability of the liabilities of the company, including the degree of reliance on short-term funding, taking into consideration existing systems for measuring a company's risk-based capital;

(viii) the stability and variety of the company's sources of funding;

(ix) the company's importance as a source of credit for households, businesses, and State and local governments and as a source of liquidity for the financial system;

(x) the extent to which assets are simply managed and not owned by the financial company and the extent to which ownership of assets under management is diffuse; and

(xi) the amount, different categories, and concentrations of liabilities, both insured and uninsured, contingent and noncontingent, including both on-balance sheet and off-balance sheet liabilities, of the financial company and its affiliates;

(D) any risks presented by the financial company during the 10-year period immediately prior to the appointment of the Corporation as receiver for the covered financial company that contributed to the failure of the covered financial company; and

(E) such other risk-related factors as the Corporation, or the Council, as applicable, may determine to be appropriate.

(5) COLLECTION OF INFORMATION.—The Corporation may impose on covered financial companies such collection of information requirements as the Corporation deems necessary to carry out this subsection after the appointment of the Corporation as receiver under this title.

(6) RULEMAKING.—

(A) IN GENERAL.—The Corporation shall prescribe regulations to carry out this subsection. The Corporation shall
consult with the Secretary in the development and finalization of such regulations.

(B) EQUITABLE TREATMENT.—The regulations prescribed under subparagraph (A) shall take into account the differences in risks posed to the financial stability of the United States by financial companies, the differences in the liability structures of financial companies, and the different bases for other assessments that such financial companies may be required to pay, to ensure that assessed financial companies are treated equitably and that assessments under this subsection reflect such differences.

(p) UNENFORCEABILITY OF CERTAIN AGREEMENTS.—

(1) IN GENERAL.—No provision described in paragraph (2) shall be enforceable against or impose any liability on any person, as such enforcement or liability shall be contrary to public policy.

(2) PROHIBITED PROVISIONS.—A provision described in this paragraph is any term contained in any existing or future standstill, confidentiality, or other agreement that, directly or indirectly—

(A) affects, restricts, or limits the ability of any person to offer to acquire or acquire;

(B) prohibits any person from offering to acquire or acquiring; or

(C) prohibits any person from using any previously disclosed information in connection with any such offer to acquire or acquisition of,

all or part of any covered financial company, including any liabilities, assets, or interest therein, in connection with any transaction in which the Corporation exercises its authority under this title.

(q) OTHER EXEMPTIONS.—

(1) IN GENERAL.—When acting as a receiver under this title—

(A) the Corporation, including its franchise, its capital, reserves and surplus, and its income, shall be exempt from all taxation imposed by any State, county, municipality, or local taxing authority, except that any real property of the Corporation shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed, except that, notwithstanding the failure of any person to challenge an assessment under State law of the value of such property, such value, and the tax thereon, shall be determined as of the period for which such tax is imposed;

(B) no property of the Corporation shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Corporation, nor shall any involuntary lien attach to the property of the Corporation; and

(C) the Corporation shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due; and

(D) the Corporation shall be exempt from all prosecution by the United States or any State, county, municipality, or local authority for any criminal offense arising
under Federal, State, county, municipal, or local law, which was allegedly committed by the covered financial company, or persons acting on behalf of the covered financial company, prior to the appointment of the Corporation as receiver.

(2) LIMITATION.—Paragraph (1) shall not apply with respect to any tax imposed (or other amount arising) under the Internal Revenue Code of 1986.

(1) CERTAIN SALES OF ASSETS PROHIBITED.—

(1) PERSONS WHO ENGAGED IN IMPROPER CONDUCT WITH, OR CAUSED LOSSES TO, COVERED FINANCIAL COMPANIES.—The Corporation shall prescribe regulations which, at a minimum, shall prohibit the sale of assets of a covered financial company by the Corporation to—

(A) any person who—
(i) has defaulted, or was a member of a partnership or an officer or director of a corporation that has defaulted, on 1 or more obligations, the aggregate amount of which exceeds $1,000,000, to such covered financial company;
(ii) has been found to have engaged in fraudulent activity in connection with any obligation referred to in clause (i); and
(iii) proposes to purchase any such asset in whole or in part through the use of the proceeds of a loan or advance of credit from the Corporation or from any covered financial company;

(B) any person who participated, as an officer or director of such covered financial company or of any affiliate of such company, in a material way in any transaction that resulted in a substantial loss to such covered financial company; or

(C) any person who has demonstrated a pattern or practice of defalcation regarding obligations to such covered financial company.

(2) CONVICTED DEBTORS.—Except as provided in paragraph (3), a person may not purchase any asset of such institution from the receiver, if that person—

(A) has been convicted of an offense under section 215, 656, 657, 1005, 1006, 1007, 1008, 1014, 1032, 1341, 1343, or 1344 of title 18, United States Code, or of conspiring to commit such an offense, affecting any covered financial company; and

(B) is in default on any loan or other extension of credit from such covered financial company which, if not paid, will cause substantial loss to the Fund or the Corporation.

(3) SETTLEMENT OF CLAIMS.—Paragraphs (1) and (2) shall not apply to the sale or transfer by the Corporation of any asset of any covered financial company to any person, if the sale or transfer of the asset resolves or settles, or is part of the resolution or settlement, of 1 or more claims that have been, or could have been, asserted by the Corporation against the person.

(4) DEFINITION OF DEFAULT.—For purposes of this subsection, the term “default” means a failure to comply with
the terms of a loan or other obligation to such an extent that the property securing the obligation is foreclosed upon.

(s) Recoupment of Compensation From Senior Executives and Directors.—

(1) In General.—The Corporation, as receiver of a covered financial company, may recover from any current or former senior executive or director substantially responsible for the failed condition of the covered financial company any compensation received during the 2-year period preceding the date on which the Corporation was appointed as the receiver of the covered financial company, except that, in the case of fraud, no time limit shall apply.

(2) Cost Considerations.—In seeking to recover any such compensation, the Corporation shall weigh the financial and deterrent benefits of such recovery against the cost of executing the recovery.

(3) Rulemaking.—The Corporation shall promulgate regulations to implement the requirements of this subsection, including defining the term “compensation” to mean any financial remuneration, including salary, bonuses, incentives, benefits, severance, deferred compensation, or golden parachute benefits, and any profits realized from the sale of the securities of the covered financial company.

SEC. 211. MISCELLANEOUS PROVISIONS.

(a) Clarification of Prohibition Regarding Concealment of Assets From Receiver or Liquidating Agent.—Section 1032(1) of title 18, United States Code, is amended by inserting “the Federal Deposit Insurance Corporation acting as receiver for a covered financial company, in accordance with title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act,” before “or the National Credit”.

(b) Conforming Amendment.—Section 1032 of title 18, United States Code, is amended in the section heading, by striking “of financial institution”.

(c) Federal Deposit Insurance Corporation Improvement Act of 1991.—Section 403(a) of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4403(a)) is amended by inserting “section 210(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, section 1367 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617(d)),” after “section 11(e) of the Federal Deposit Insurance Act,”.

(d) FDIC Inspector General Reviews.—

(1) Scope.—The Inspector General of the Corporation shall conduct, supervise, and coordinate audits and investigations of the liquidation of any covered financial company by the Corporation as receiver under this title, including collecting and summarizing—

(A) a description of actions taken by the Corporation as receiver;

(B) a description of any material sales, transfers, mergers, obligations, purchases, and other material transactions entered into by the Corporation;

(C) an evaluation of the adequacy of the policies and procedures of the Corporation under section 203(d) and orderly liquidation plan under section 210(n)(14);
(D) an evaluation of the utilization by the Corporation of the private sector in carrying out its functions, including the adequacy of any conflict-of-interest reviews; and

(E) an evaluation of the overall performance of the Corporation in liquidating the covered financial company, including administrative costs, timeliness of liquidation process, and impact on the financial system.

(2) **FREQUENCY.**—Not later than 6 months after the date of appointment of the Corporation as receiver under this title and every 6 months thereafter, the Inspector General of the Corporation shall conduct the audit and investigation described in paragraph (1).

(3) **REPORTS AND TESTIMONY.**—The Inspector General of the Corporation shall include in the semiannual reports required by section 5(a) of the Inspector General Act of 1978 (5 U.S.C. App.), a summary of the findings and evaluations under paragraph (1), and shall appear before the appropriate committees of Congress, if requested, to present each such report.

(4) **FUNDING.**—

(A) **INITIAL FUNDING.**—The expenses of the Inspector General of the Corporation in carrying out this subsection shall be considered administrative expenses of the receivership.

(B) **ADDITIONAL FUNDING.**—If the maximum amount available to the Corporation as receiver under this title is insufficient to enable the Inspector General of the Corporation to carry out the duties under this subsection, the Corporation shall pay such additional amounts from assessments imposed under section 210.

(5) **TERMINATION OF RESPONSIBILITIES.**—The duties and responsibilities of the Inspector General of the Corporation under this subsection shall terminate 1 year after the date of termination of the receivership under this title.

(e) **TREASURY INSPECTOR GENERAL REVIEWS.**—

(1) **SCOPE.**—The Inspector General of the Department of the Treasury shall conduct, supervise, and coordinate audits and investigations of actions taken by the Secretary related to the liquidation of any covered financial company under this title, including collecting and summarizing—

(A) a description of actions taken by the Secretary under this title;

(B) an analysis of the approval by the Secretary of the policies and procedures of the Corporation under section 203 and acceptance of the orderly liquidation plan of the Corporation under section 210; and

(C) an assessment of the terms and conditions underlying the purchase by the Secretary of obligations of the Corporation under section 210.

(2) **FREQUENCY.**—Not later than 6 months after the date of appointment of the Corporation as receiver under this title and every 6 months thereafter, the Inspector General of the Department of the Treasury shall conduct the audit and investigation described in paragraph (1).

(3) **REPORTS AND TESTIMONY.**—The Inspector General of the Department of the Treasury shall include in the semiannual reports required by section 5(a) of the Inspector General Act
of 1978 (5 U.S.C. App.), a summary of the findings and assessments under paragraph (1), and shall appear before the appropriate committees of Congress, if requested, to present each such report.

(4) TERMINATION OF RESPONSIBILITIES.—The duties and responsibilities of the Inspector General of the Department of the Treasury under this subsection shall terminate 1 year after the date on which the obligations purchased by the Secretary from the Corporation under section 210 are fully redeemed.

(f) PRIMARY FINANCIAL REGULATORY AGENCY INSPECTOR GENERAL REVIEWS.—

(1) SCOPE.—Upon the appointment of the Corporation as receiver for a covered financial company supervised by a Federal primary financial regulatory agency or the Board of Governors under section 165, the Inspector General of the agency or the Board of Governors shall make a written report reviewing the supervision by the agency or the Board of Governors of the covered financial company, which shall—

(A) evaluate the effectiveness of the agency or the Board of Governors in carrying out its supervisory responsibilities with respect to the covered financial company;

(B) identify any acts or omissions on the part of agency or Board of Governors officials that contributed to the covered financial company being in default or in danger of default;

(C) identify any actions that could have been taken by the agency or the Board of Governors that would have prevented the company from being in default or in danger of default; and

(D) recommend appropriate administrative or legislative action.

(2) REPORTS AND TESTIMONY.—Not later than 1 year after the date of appointment of the Corporation as receiver under this title, the Inspector General of the Federal primary financial regulatory agency or the Board of Governors shall provide the report required by paragraph (1) to such agency or the Board of Governors, and along with such agency or the Board of Governors, as applicable, shall appear before the appropriate committees of Congress, if requested, to present the report required by paragraph (1). Not later than 90 days after the date of receipt of the report required by paragraph (1), such agency or the Board of Governors, as applicable, shall provide a written report to Congress describing any actions taken in response to the recommendations in the report, and if no such actions were taken, describing the reasons why no actions were taken.

SEC. 212. PROHIBITION OF CIRCUMVENTION AND PREVENTION OF CONFLICTS OF INTEREST.

(a) NO OTHER FUNDING.—Funds for the orderly liquidation of any covered financial company under this title shall only be provided as specified under this title.

(b) LIMIT ON GOVERNMENTAL ACTIONS.—No governmental entity may take any action to circumvent the purposes of this title.
(c) **CONFLICT OF INTEREST.**—In the event that the Corporation is appointed receiver for more than 1 covered financial company or is appointed receiver for a covered financial company and receiver for any insured depository institution that is an affiliate of such covered financial company, the Corporation shall take appropriate action, as necessary to avoid any conflicts of interest that may arise in connection with multiple receiverships.

**SEC. 213. BAN ON CERTAIN ACTIVITIES BY SENIOR EXECUTIVES AND DIRECTORS.**

(a) **PROHIBITION AUTHORITY.**—The Board of Governors or, if the covered financial company was not supervised by the Board of Governors, the Corporation, may exercise the authority provided by this section.

(b) **AUTHORITY TO ISSUE ORDER.**—The appropriate agency described in subsection (a) may take any action authorized by subsection (c), if the agency determines that—

(1) a senior executive or a director of the covered financial company, prior to the appointment of the Corporation as receiver, has, directly or indirectly—

(A) violated—

(i) any law or regulation;

(ii) any cease-and-desist order which has become final;

(iii) any condition imposed in writing by a Federal agency in connection with any action on any application, notice, or request by such company or senior executive; or

(iv) any written agreement between such company and such agency;

(B) engaged or participated in any unsafe or unsound practice in connection with any financial company; or

(C) committed or engaged in any act, omission, or practice which constitutes a breach of the fiduciary duty of such senior executive or director;

(2) by reason of the violation, practice, or breach described in any subparagraph of paragraph (1), such senior executive or director has received financial gain or other benefit by reason of such violation, practice, or breach contributed to the failure of the company; and

(3) such violation, practice, or breach—

(A) involves personal dishonesty on the part of such senior executive or director; or

(B) demonstrates willful or continuing disregard by such senior executive or director for the safety or soundness of such company.

(c) **AUTHORIZED ACTIONS.**—

(1) **IN GENERAL.**—The appropriate agency for a financial company, as described in subsection (a), may serve upon a senior executive or director described in subsection (b) a written notice of the intention of the agency to prohibit any further participation by such person, in any manner, in the conduct of the affairs of any financial company for a period of time determined by the appropriate agency to be commensurate with such violation, practice, or breach, provided such period shall be not less than 2 years.
Applicability.

(2) PROCEDURES.—The due process requirements and other procedures under section 8(e) of the Federal Deposit Insurance Act (12 U.S.C. 1818(e)) shall apply to actions under this section as if the covered financial company were an insured depository institution and the senior executive or director were an institution-affiliated party, as those terms are defined in that Act.

(d) REGULATIONS.—The Corporation and the Board of Governors, in consultation with the Council, shall jointly prescribe rules or regulations to administer and carry out this section, including rules, regulations, or guidelines to further define the term senior executive for the purposes of this section.

SEC. 214. PROHIBITION ON TAXPAYER FUNDING.

(a) LIQUIDATION REQUIRED.—All financial companies put into receivership under this title shall be liquidated. No taxpayer funds shall be used to prevent the liquidation of any financial company under this title.

(b) RECOVERY OF FUNDS.—All funds expended in the liquidation of a financial company under this title shall be recovered from the disposition of assets of such financial company, or shall be the responsibility of the financial sector, through assessments.

(c) NO LOSSES TO TAXPAYERS.—Taxpayers shall bear no losses from the exercise of any authority under this title.

SEC. 215. STUDY ON SECURED CREDITOR HAIRCUTS.

(a) STUDY REQUIRED.—The Council shall conduct a study evaluating the importance of maximizing United States taxpayer protections and promoting market discipline with respect to the treatment of fully secured creditors in the utilization of the orderly liquidation authority authorized by this Act. In carrying out such study, the Council shall—

(1) not be prejudicial to current or past laws or regulations with respect to secured creditor treatment in a resolution process;

(2) study the similarities and differences between the resolution mechanisms authorized by the Bankruptcy Code, the Federal Deposit Insurance Corporation Improvement Act of 1991, and the orderly liquidation authority authorized by this Act;

(3) determine how various secured creditors are treated in such resolution mechanisms and examine how a haircut (of various degrees) on secured creditors could improve market discipline and protect taxpayers;

(4) compare the benefits and dynamics of prudent lending practices by depository institutions in secured loans for consumers and small businesses to the lending practices of secured creditors to large, interconnected financial firms;

(5) consider whether credit differs according to different types of collateral and different terms and timing of the extension of credit; and

(6) 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.

(b) REPORT.—Not later than the end of the 1-year period beginning on the date of enactment of this Act, the Council shall issue a report to the Congress containing all findings and conclusions.
SEC. 216. STUDY ON BANKRUPTCY PROCESS FOR FINANCIAL AND NONBANK FINANCIAL INSTITUTIONS.

(a) STUDY.—

(1) IN GENERAL.—Upon enactment of this Act, the Board of Governors, in consultation with the Administrative Office of the United States Courts, shall conduct a study regarding the resolution of financial companies under the Bankruptcy Code, under chapter 7 or 11 thereof.

(2) ISSUES TO BE STUDIED.—Issues to be studied under this section include—

(A) the effectiveness of chapter 7 and chapter 11 of the Bankruptcy Code in facilitating the orderly resolution or reorganization of systemic financial companies;

(B) whether a special financial resolution court or panel of special masters or judges should be established to oversee cases involving financial companies to provide for the resolution of such companies under the Bankruptcy Code, in a manner that minimizes adverse impacts on financial markets without creating moral hazard;

(C) whether amendments to the Bankruptcy Code should be adopted to enhance the ability of the Code to resolve financial companies in a manner that minimizes adverse impacts on financial markets without creating moral hazard;

(D) whether amendments should be made to the Bankruptcy Code, the Federal Deposit Insurance Act, and other insolvency laws to address the manner in which qualified financial contracts of financial companies are treated; and

(E) the implications, challenges, and benefits to creating a new chapter or subchapter of the Bankruptcy Code to deal with financial companies.

(b) REPORTS TO CONGRESS.—Not later than 1 year after the date of enactment of this Act, and in each successive year until the fifth year after the date of enactment of this Act, the Administrative Office of the United States courts shall submit to the Committees on Banking, Housing, and Urban Affairs and the Judiciary of the Senate and the Committees on Financial Services and the Judiciary of the House of Representatives a report summarizing the results of the study conducted under subsection (a).

SEC. 217. STUDY ON INTERNATIONAL COORDINATION RELATING TO BANKRUPTCY PROCESS FOR NONBANK FINANCIAL INSTITUTIONS.

(a) STUDY.—

(1) IN GENERAL.—The Board of Governors, in consultation with the Administrative Office of the United States Courts, shall conduct a study regarding international coordination relating to the resolution of systemic financial companies under the United States Bankruptcy Code and applicable foreign law.

(2) ISSUES TO BE STUDIED.—With respect to the bankruptcy process for financial companies, issues to be studied under this section include—

(A) the extent to which international coordination currently exists;
(B) current mechanisms and structures for facilitating international cooperation;
(C) barriers to effective international coordination; and
(D) ways to increase and make more effective international coordination of the resolution of financial companies, so as to minimize the impact on the financial system without creating moral hazard.

(b) REPORT TO CONGRESS.—Not later than 1 year after the date of enactment of this Act, the Administrative office of the United States Courts shall submit to the Committees on Banking, Housing, and Urban Affairs and the Judiciary of the Senate and the Committees on Financial Services and the Judiciary of the House of Representatives a report summarizing the results of the study conducted under subsection (a).


SEC. 300. SHORT TITLE.

This title may be cited as the “Enhancing Financial Institution Safety and Soundness Act of 2010”.

SEC. 301. PURPOSES.

The purposes of this title are—
(1) to provide for the safe and sound operation of the banking system of the United States;
(2) to preserve and protect the dual system of Federal and State-chartered depository institutions;
(3) to ensure the fair and appropriate supervision of each depository institution, regardless of the size or type of charter of the depository institution; and
(4) to streamline and rationalize the supervision of depository institutions and the holding companies of depository institutions.

SEC. 302. DEFINITION.

In this title, the term “transferred employee” means, as the context requires, an employee transferred to the Office of the Comptroller of the Currency or the Corporation under section 322.

Subtitle A—Transfer of Powers and Duties

SEC. 311. TRANSFER DATE.

(a) TRANSFER DATE.—Except as provided in subsection (b), the term “transfer date” means the date that is 1 year after the date of enactment of this Act.

(b) EXTENSION PERMITTED.—
(1) NOTICE REQUIRED.—The Secretary, in consultation with the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Chairman of the Board of Governors, and the Chairperson of the Corporation, may extend the period under subsection (a) and designate a transfer date that is
not later than 18 months after the date of enactment of this Act, if the Secretary transmits to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives—

(A) a written determination that commencement of the orderly process to implement this title is not feasible by the date that is 1 year after the date of enactment of this Act;

(B) an explanation of why an extension is necessary to commence the process of orderly implementation of this title;

(C) the transfer date designated under this subsection; and

(D) a description of the steps that will be taken to initiate the process of an orderly and timely implementation of this title within the extended time period.

(2) PUBLICATION OF NOTICE.—Not later than 270 days after the date of enactment of this Act, the Secretary shall publish in the Federal Register notice of any transfer date designated under paragraph (1).

SEC. 312. POWERS AND DUTIES TRANSFERRED.

(a) EFFECTIVE DATE.—This section, and the amendments made by this section, shall take effect on the transfer date.

(b) FUNCTIONS OF THE OFFICE OF THRIFT SUPERVISION.—

(1) SAVINGS AND LOAN HOLDING COMPANY FUNCTIONS TRANSFERRED.—

(A) TRANSFER OF FUNCTIONS.—There are transferred to the Board of Governors all functions of the Office of Thrift Supervision and the Director of the Office of Thrift Supervision (including the authority to issue orders) relating to—

(i) the supervision of—

(II) any subsidiary (other than a depository institution) of a savings and loan holding company;

and

(ii) all rulemaking authority of the Office of Thrift Supervision and the Director of the Office of Thrift Supervision relating to savings and loan holding companies.

(B) POWERS, AUTHORITIES, RIGHTS, AND DUTIES.—The Board of Governors shall succeed to all powers, authorities, rights, and duties that were vested in the Office of Thrift Supervision and the Director of the Office of Thrift Supervision on the day before the transfer date relating to the functions and authority transferred under subparagraph (A).

(2) ALL OTHER FUNCTIONS TRANSFERRED.—

(A) BOARD OF GOVERNORS.—All rulemaking authority of the Office of Thrift Supervision and the Director of the Office of Thrift Supervision under section 11 of the Home Owners’ Loan Act (12 U.S.C. 1468) relating to transactions with affiliates and extensions of credit to executive officers, directors, and principal shareholders and under section 5(q) of such Act relating to tying arrangements is transferred to the Board of Governors.
(B) COMPTROLLER OF THE CURRENCY.—Except as provided in paragraph (1) and subparagraph (A)—
   (i) there are transferred to the Office of the Comptroller of the Currency and the Comptroller of the Currency—
      (I) all functions of the Office of Thrift Supervision and the Director of the Office of Thrift Supervision, respectively, relating to Federal savings associations; and
      (II) all rulemaking authority of the Office of Thrift Supervision and the Director of the Office of Thrift Supervision, respectively, relating to savings associations; and
   (ii) the Office of the Comptroller of the Currency and the Comptroller of the Currency shall succeed to all powers, authorities, rights, and duties that were vested in the Office of Thrift Supervision and the Director of the Office of Thrift Supervision, respectively, on the day before the transfer date relating to the functions and authority transferred under clause (i).
   (C) CORPORATION.—Except as provided in paragraph (1) and subparagraphs (A) and (B)—
   (i) all functions of the Office of Thrift Supervision and the Director of the Office of Thrift Supervision relating to State savings associations are transferred to the Corporation; and
   (ii) the Corporation shall succeed to all powers, authorities, rights, and duties that were vested in the Office of Thrift Supervision and the Director of the Office of Thrift Supervision on the day before the transfer date relating to the functions transferred under clause (i).

(c) CONFORMING AMENDMENTS.—Section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) is amended—
    (1) in subsection (q), by striking paragraphs (1) through (4) and inserting the following:
      “(1) the Office of the Comptroller of the Currency, in the case of—
        “(A) any national banking association;
        “(B) any Federal branch or agency of a foreign bank; and
        “(C) any Federal savings association;
      “(2) the Federal Deposit Insurance Corporation, in the case of—
        “(A) any State nonmember insured bank;
        “(B) any foreign bank having an insured branch; and
        “(C) any State savings association;
      “(3) the Board of Governors of the Federal Reserve System, in the case of—
        “(A) any State member bank;
        “(B) any branch or agency of a foreign bank with respect to any provision of the Federal Reserve Act which is made applicable under the International Banking Act of 1978;
        “(C) any foreign bank which does not operate an insured branch;
“(D) any agency or commercial lending company other than a Federal agency;
“(E) supervisory or regulatory proceedings arising from the authority given to the Board of Governors under section 7(c)(1) of the International Banking Act of 1978, including such proceedings under the Financial Institutions Supervisory Act of 1966;
“(F) any bank holding company and any subsidiary (other than a depository institution) of a bank holding company; and
“(G) any savings and loan holding company and any subsidiary (other than a depository institution) of a savings and loan holding company.”; and
(2) in paragraphs (1) and (3) of subsection (u), by striking “other than a bank holding company” and inserting “other than a bank holding company or savings and loan holding company”.

(d) CONSUMER PROTECTION.—Nothing in this section may be construed to limit or otherwise affect the transfer of powers under title X.

SEC. 313. ABOLISHMENT.

Effective 90 days after the transfer date, the Office of Thrift Supervision and the position of Director of the Office of Thrift Supervision are abolished.

SEC. 314. AMENDMENTS TO THE REVISED STATUTES.

(a) AMENDMENT TO SECTION 324.—Section 324 of the Revised Statutes of the United States (12 U.S.C. 1) is amended to read as follows:

“SEC. 324. COMPTROLLER OF THE CURRENCY.

“(a) OFFICE OF THE COMPTROLLER OF THE CURRENCY ESTABLISHED.—There is established in the Department of the Treasury a bureau to be known as the ‘Office of the Comptroller of the Currency’ which is charged with assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction.

“(b) COMPTROLLER OF THE CURRENCY.—

“(1) IN GENERAL.—The chief officer of the Office of the Comptroller of the Currency shall be known as the Comptroller of the Currency. The Comptroller of the Currency shall perform the duties of the Comptroller of the Currency under the general direction of the Secretary of the Treasury. The Secretary of the Treasury may not delay or prevent the issuance of any rule or the promulgation of any regulation by the Comptroller of the Currency, and may not intervene in any matter or proceeding before the Comptroller of the Currency (including agency enforcement actions), unless otherwise specifically provided by law.

“(2) ADDITIONAL AUTHORITY.—The Comptroller of the Currency shall have the same authority with respect to functions transferred to the Comptroller of the Currency under the Enhancing Financial Institution Safety and Soundness Act of 2010 as was vested in the Director of the Office of Thrift Supervision on the transfer date, as defined in section 311 of that Act.”.
(b) Supervision of Federal Savings Associations.—Chapter 9 of title VII of the Revised Statutes of the United States (12 U.S.C. 1 et seq.) is amended by inserting after section 327A (12 U.S.C. 4a) the following:

12 USC 4b.
``SEC. 327B. DEPUTY COMPTROLLER FOR THE SUPERVISION AND EXAMINATION OF FEDERAL SAVINGS ASSOCIATIONS.

Designation. “The Comptroller of the Currency shall designate a Deputy Comptroller, who shall be responsible for the supervision and examination of Federal savings associations.”

(c) Amendment to Section 329.—Section 329 of the Revised Statutes of the United States (12 U.S.C. 11) is amended by inserting before the period at the end the following: “or any Federal savings association”.

12 USC 1 note.

(d) Effective Date.—This section, and the amendments made by this section, shall take effect on the transfer date.

SEC. 315. FEDERAL INFORMATION POLICY.

Section 3502(5) of title 44, United States Code, is amended by inserting “Office of the Comptroller of the Currency,” after “the Securities and Exchange Commission,”.

12 USC 5414.

SEC. 316. SAVINGS PROVISIONS.

(a) Office of Thrift Supervision.—

1. Existing rights, duties, and obligations not affected.—Sections 312(b) and 313 shall not affect the validity of any right, duty, or obligation of the United States, the Director of the Office of Thrift Supervision, the Office of Thrift Supervision, or any other person, that existed on the day before the transfer date.

2. Continuation of suits.—This title shall not abate any action or proceeding commenced by or against the Director of the Office of Thrift Supervision or the Office of Thrift Supervision before the transfer date, except that—

(A) for any action or proceeding arising out of a function of the Office of Thrift Supervision or the Director of the Office of Thrift Supervision transferred to the Board of Governors by this title, the Board of Governors shall be substituted for the Office of Thrift Supervision or the Director of the Office of Thrift Supervision as a party to the action or proceeding on and after the transfer date;

(B) for any action or proceeding arising out of a function of the Office of Thrift Supervision or the Director of the Office of Thrift Supervision transferred to the Office of the Comptroller of the Currency or the Comptroller of the Currency by this title, the Office of the Comptroller of the Currency or the Comptroller of the Currency shall be substituted for the Office of Thrift Supervision or the Director of the Office of Thrift Supervision, as the case may be, as a party to the action or proceeding on and after the transfer date; and

(C) for any action or proceeding arising out of a function of the Office of Thrift Supervision or the Director of the Office of Thrift Supervision transferred to the Corporation by this title, the Corporation shall be substituted for the Office of Thrift Supervision or the Director of the Office of Thrift Supervision as a party to the action or proceeding on and after the transfer date.
(b) Continuation of Existing OTS Orders, Resolutions, Determinations, Agreements, Regulations, etc.—All orders, resolutions, determinations, agreements, and regulations, interpretative rules, other interpretations, guidelines, procedures, and other advisory materials, that have been issued, made, prescribed, or allowed to become effective by the Office of Thrift Supervision or the Director of the Office of Thrift Supervision, or by a court of competent jurisdiction, in the performance of functions that are transferred by this title and that are in effect on the day before the transfer date, shall continue in effect according to the terms of such orders, resolutions, determinations, agreements, and regulations, interpretative rules, other interpretations, guidelines, procedures, and other advisory materials, and shall be enforceable by or against—

(1) the Board of Governors, in the case of a function of the Office of Thrift Supervision or the Director of the Office of Thrift Supervision transferred to the Board of Governors, until modified, terminated, set aside, or superseded in accordance with applicable law by the Board of Governors, by any court of competent jurisdiction, or by operation of law; and

(2) the Office of the Comptroller of the Currency or the Comptroller of the Currency, in the case of a function of the Office of Thrift Supervision or the Director of the Office of Thrift Supervision transferred to the Office of the Comptroller of the Currency or the Comptroller of the Currency, respectively, until modified, terminated, set aside, or superseded in accordance with applicable law by the Office of the Comptroller of the Currency or the Comptroller of the Currency, by any court of competent jurisdiction, or by operation of law; and

(3) the Corporation, in the case of a function of the Office of Thrift Supervision or the Director of the Office of Thrift Supervision transferred to the Corporation, until modified, terminated, set aside, or superseded in accordance with applicable law by the Corporation, by any court of competent jurisdiction, or by operation of law.

(c) Identification of Regulations Continued.—

(1) By the Board of Governors.—Not later than the transfer date, the Board of Governors shall—

(A) identify the regulations continued under subsection (b) that will be enforced by the Board of Governors; and

(B) publish a list of the regulations identified under subparagraph (A) in the Federal Register.

(2) By the Office of the Comptroller of the Currency.—

Not later than the transfer date, the Office of the Comptroller of the Currency shall—

(A) after consultation with the Corporation, identify the regulations continued under subsection (b) that will be enforced by the Office of the Comptroller of the Currency; and

(B) publish a list of the regulations identified under subparagraph (A) in the Federal Register.

(3) By the Corporation.—Not later than the transfer date, the Corporation shall—

(A) after consultation with the Office of the Comptroller of the Currency, identify the regulations continued under subsection (b) that will be enforced by the Corporation; and
(B) publish a list of the regulations identified under subparagraph (A) in the Federal Register.

d) **Status of Regulations Proposed or Not Yet Effective.**—

  (1) **Proposed Regulations.**—Any proposed regulation of the Office of Thrift Supervision, which the Office of Thrift Supervision in performing functions transferred by this title, has proposed before the transfer date but has not published as a final regulation before such date, shall be deemed to be a proposed regulation of the Office of the Comptroller of the Currency or the Board of Governors, as appropriate, according to the terms of the proposed regulation.

  (2) **Regulations Not Yet Effective.**—Any interim or final regulation of the Office of Thrift Supervision, which the Office of Thrift Supervision, in performing functions transferred by this title, has published before the transfer date but which has not become effective before that date, shall become effective as a regulation of the Office of the Comptroller of the Currency or the Board of Governors, as appropriate, according to the terms of the interim or final regulation, unless modified, terminated, set aside, or superseded in accordance with applicable law by the Office of the Comptroller of the Currency or the Board of Governors, as appropriate, by any court of competent jurisdiction, or by operation of law.

**SEC. 317. References in Federal Law to Federal Banking Agencies.**

On and after the transfer date, any reference in Federal law to the Director of the Office of Thrift Supervision or the Office of Thrift Supervision, in connection with any function of the Director of the Office of Thrift Supervision or the Office of Thrift Supervision transferred under section 312(b) or any other provision of this subtitle, shall be deemed to be a reference to the Comptroller of the Currency, the Office of the Comptroller of the Currency, the Chairperson of the Corporation, the Corporation, the Chairman of the Board of Governors, or the Board of Governors, as appropriate and consistent with the amendments made in subtitle E.

**SEC. 318. Funding.**

(a) **Compensation of Examiners.**—Section 5240 of the Revised Statutes of the United States (12 U.S.C. 481 et seq.) is amended—

  (1) in the second undesignated paragraph (12 U.S.C. 481), in the fourth sentence, by striking “without regard to the provisions of other laws applicable to officers or employees of the United States” and inserting the following: “set and adjusted subject to chapter 71 of title 5, United States Code, and without regard to the provisions of other laws applicable to officers or employees of the United States”; and

  (2) in the third undesignated paragraph (12 U.S.C. 482), in the first sentence, by striking “shall fix” and inserting “shall, subject to chapter 71 of title 5, United States Code, fix”.

(b) **Funding of Office of the Comptroller of the Currency.**—Chapter 4 of title LXII of the Revised Statutes is amended by inserting after section 5240 (12 U.S.C. 481, 482) the following:

“Sec. 5240A. The Comptroller of the Currency may collect an assessment, fee, or other charge from any entity described in section 3(q)(1) of the Federal Deposit Insurance Act (12 U.S.C.
1813(q)(1)), as the Comptroller determines is necessary or appropriate to carry out the responsibilities of the Office of the Comptroller of the Currency. In establishing the amount of an assessment, fee, or charge collected from an entity under this section, the Comptroller of the Currency may take into account the nature and scope of the activities of the entity, the amount and type of assets that the entity holds, the financial and managerial condition of the entity, and any other factor, as the Comptroller of the Currency determines is appropriate. Funds derived from any assessment, fee, or charge collected or payment made pursuant to this section may be deposited by the Comptroller of the Currency in accordance with the provisions of section 5234. Such funds shall not be construed to be Government funds or appropriated monies, and shall not be subject to apportionment for purposes of chapter 15 of title 31, United States Code, or any other provision of law. The authority of the Comptroller of the Currency under this section shall be in addition to the authority under section 5240.

“The Comptroller of the Currency shall have sole authority to determine the manner in which the obligations of the Office of the Comptroller of the Currency shall be incurred and its disbursements and expenses allowed and paid, in accordance with this section, except as provided in chapter 71 of title 5, United States Code (with respect to compensation).”.

(c) FUNDING OF BOARD OF GOVERNORS.—Section 11 of the Federal Reserve Act (12 U.S.C. 248) is amended by adding at the end the following:

“(s) ASSESSMENTS, FEES, AND OTHER CHARGES FOR CERTAIN COMPANIES.—

“(1) IN GENERAL.—The Board shall collect a total amount of assessments, fees, or other charges from the companies described in paragraph (2) that is equal to the total expenses the Board estimates are necessary or appropriate to carry out the supervisory and regulatory responsibilities of the Board with respect to such companies.

“(2) COMPANIES.—The companies described in this paragraph are—

“(A) all bank holding companies having total consolidated assets of $50,000,000,000 or more;

“(B) all savings and loan holding companies having total consolidated assets of $50,000,000,000 or more; and

“(C) all nonbank financial companies supervised by the Board under section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.”.

(d) CORPORATION EXAMINATION FEES.—Section 10(e) of the Federal Deposit Insurance Act (12 U.S.C. 1820(e)) is amended by striking paragraph (1) and inserting the following:

“(1) REGULAR AND SPECIAL EXAMINATIONS OF DEPOSITORY INSTITUTIONS.—The cost of conducting any regular examination or special examination of any depository institution under subsection (b)(2), (b)(3), or (d) or of any entity described in section 3(q)(2) may be assessed by the Corporation against the institution or entity to meet the expenses of the Corporation in carrying out such examinations.”.

(e) EFFECTIVE DATE.—This section, and the amendments made by this section, shall take effect on the transfer date.
SEC. 319. CONTRACTING AND LEASING AUTHORITY.

Notwithstanding the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) or any other provision of law (except the full and open competition requirements of the Competition in Contracting Act), the Office of the Comptroller of the Currency may—

(1) enter into and perform contracts, execute instruments, and acquire real property (or property interest) as the Comptroller deems necessary to carry out the duties and responsibilities of the Office of the Comptroller of the Currency; and

(2) hold, maintain, sell, lease, or otherwise dispose of the property (or property interest) acquired under paragraph (1).

Subtitle B—Transitional Provisions

SEC. 321. INTERIM USE OF FUNDS, PERSONNEL, AND PROPERTY OF THE OFFICE OF THRIFT SUPERVISION.

(a) In General.—Before the transfer date, the Office of the Comptroller of the Currency, the Corporation, and the Board of Governors shall—

Consultation.

(1) consult and cooperate with the Office of Thrift Supervision to facilitate the orderly transfer of functions to the Office of the Comptroller of the Currency, the Corporation, and the Board of Governors in accordance with this title;

Determination.

(2) determine jointly, from time to time—

(A) the amount of funds necessary to pay any expenses associated with the transfer of functions (including expenses for personnel, property, and administrative services) during the period beginning on the date of enactment of this Act and ending on the transfer date;

(B) which personnel are appropriate to facilitate the orderly transfer of functions by this title; and

(C) what property and administrative services are necessary to support the Office of the Comptroller of the Currency, the Corporation, and the Board of Governors during the period beginning on the date of enactment of this Act and ending on the transfer date; and

(3) take such actions as may be necessary to provide for the orderly implementation of this title.

(b) Agency Consultation.—When requested jointly by the Office of the Comptroller of the Currency, the Corporation, and the Board of Governors to do so before the transfer date, the Office of Thrift Supervision shall—

Payment.

(1) pay to the Office of the Comptroller of the Currency, the Corporation, or the Board of Governors, as applicable, from funds obtained by the Office of Thrift Supervision through assessments, fees, or other charges that the Office of Thrift Supervision is authorized by law to impose, such amounts as the Office of the Comptroller of the Currency, the Corporation, and the Board of Governors jointly determine to be necessary under subsection (a);

(2) detail to the Office of the Comptroller of the Currency, the Corporation, or the Board of Governors, as applicable, such personnel as the Office of the Comptroller of the Currency, the Corporation, and the Board of Governors jointly determine to be appropriate under subsection (a); and
(3) make available to the Office of the Comptroller of the Currency, the Corporation, or the Board of Governors, as applicable, such property and provide to the Office of the Comptroller of the Currency, the Corporation, or the Board of Governors, as applicable, such administrative services as the Office of the Comptroller of the Currency, the Corporation, and the Board of Governors jointly determine to be necessary under subsection (a).

(c) NOTICE REQUIRED.—The Office of the Comptroller of the Currency, the Corporation, and the Board of Governors shall jointly give the Office of Thrift Supervision reasonable prior notice of any request that the Office of the Comptroller of the Currency, the Corporation, and the Board of Governors jointly intend to make under subsection (b).

SEC. 322. TRANSFER OF EMPLOYEES.

(a) IN GENERAL.—

(1) OFFICE OF THRIFT SUPERVISION EMPLOYEES.—

(A) IN GENERAL.—Except as provided in section 1064, all employees of the Office of Thrift Supervision shall be transferred to the Office of the Comptroller of the Currency or the Corporation for employment in accordance with this section.

(B) ALLOCATING EMPLOYEES FOR TRANSFER TO RECEIVING AGENCIES.—The Director of the Office of Thrift Supervision, the Comptroller of the Currency, and the Chairperson of the Corporation shall—

(i) jointly determine the number of employees of the Office of Thrift Supervision necessary to perform or support the functions that are transferred to the Office of the Comptroller of the Currency or the Corporation by this title; and

(ii) consistent with the determination under clause (i), jointly identify employees of the Office of Thrift Supervision for transfer to the Office of the Comptroller of the Currency or the Corporation.

(2) EMPLOYEES TRANSFERRED; SERVICE PERIODS CREDITED.—For purposes of this section, periods of service with a Federal home loan bank, a joint office of Federal home loan banks, or a Federal reserve bank shall be credited as periods of service with a Federal agency.

(3) APPOINTMENT AUTHORITY FOR EXCEPTED SERVICE TRANSFERRED.—

(A) IN GENERAL.—Except as provided in subparagraph (B), any appointment authority of the Office of Thrift Supervision under Federal law that relates to the functions transferred under section 312, including the regulations of the Office of Personnel Management, for filling the positions of employees in the excepted service shall be transferred to the Comptroller of the Currency or the Chairperson of the Corporation, as appropriate.

(B) DECLINING TRANSFERS ALLOWED.—The Comptroller of the Currency or the Chairperson of the Corporation may decline to accept a transfer of authority under subparagraph (A) (and the employees appointed under that authority) to the extent that such authority relates to positions excepted from the competitive service because of their determinations.
confidential, policy-making, policy-determining, or policy-advocating character.

(4) **ADDITIONAL APPOINTMENT AUTHORITY.**—Notwithstanding any other provision of law, the Office of the Comptroller of the Currency and the Corporation may appoint transferred employees to positions in the Office of the Comptroller of the Currency or the Corporation, respectively.

**Deadlines.**

(b) **TIMING OF TRANSFERS AND POSITION ASSIGNMENTS.**—Each employee to be transferred under subsection (a)(1) shall—

(1) be transferred not later than 90 days after the transfer date; and

(2) receive notice of the position assignment of the employee not later than 120 days after the effective date of the transfer of the employee.

(c) **TRANSFER OF FUNCTIONS.**—

(1) **IN GENERAL.**—Notwithstanding any other provision of law, the transfer of employees under this subtitle shall be deemed a transfer of functions for the purpose of section 3503 of title 5, United States Code.

(2) **PRIORITY.**—If any provision of this subtitle conflicts with any protection provided to a transferred employee under section 3503 of title 5, United States Code, the provisions of this subtitle shall control.

(d) **EMPLOYEE STATUS AND ELIGIBILITY.**—The transfer of functions and employees under this subtitle, and the abolition of the Office of Thrift Supervision under section 313, shall not affect the status of the transferred employees as employees of an agency of the United States under any provision of law.

(e) **EQUAL STATUS AND TENURE POSITIONS.**—

(1) **STATUS AND TENURE.**—Each transferred employee from the Office of Thrift Supervision shall be placed in a position at the Office of the Comptroller of the Currency or the Corporation with the same status and tenure as the transferred employee held on the day before the date on which the employee was transferred.

(2) **FUNCTIONS.**—To the extent practicable, each transferred employee shall be placed in a position at the Office of the Comptroller of the Currency or the Corporation, as applicable, responsible for the same functions and duties as the transferred employee had on the day before the date on which the employee was transferred, in accordance with the expertise and preferences of the transferred employee.

(f) **NO ADDITIONAL CERTIFICATION REQUIREMENTS.**—An examiner who is a transferred employee shall not be subject to any additional certification requirements before being placed in a comparable position at the Office of the Comptroller of the Currency or the Corporation, if the examiner carries out examinations of the same type of institutions as an employee of the Office of the Comptroller of the Currency or the Corporation as the employee was responsible for carrying out before the date on which the employee was transferred.

(g) **PERSONNEL ACTIONS LIMITED.**—

(1) **PROTECTION.**—

(A) **IN GENERAL.**—Except as provided in paragraph (2), each affected employee shall not, during the 30-month period beginning on the transfer date, be involuntarily
separated, or involuntarily reassigned outside his or her locality pay area.

(B) **AFFECTED EMPLOYEES.**—For purposes of this paragraph, the term “affected employee” means—

(i) an employee transferred from the Office of Thrift Supervision holding a permanent position on the day before the transfer date; and

(ii) an employee of the Office of the Comptroller of the Currency or the Corporation holding a permanent position on the day before the transfer date.

(2) **EXCEPTIONS.**—Paragraph (1) does not limit the right of the Office of the Comptroller of the Currency or the Corporation to—

(A) separate an employee for cause or for unacceptable performance;

(B) terminate an appointment to a position excepted from the competitive service because of its confidential policy-making, policy-determining, or policy-advocating character; or

(C) reassign an employee outside such employee’s locality pay area when the Office of the Comptroller of the Currency or the Corporation determines that the reassignment is necessary for the efficient operation of the agency.

(h) **PAY.**—

(1) **30-MONTH PROTECTION.**—Except as provided in paragraph (2), during the 30-month period beginning on the date on which the employee was transferred under this subtitle, a transferred employee shall be paid at a rate that is not less than the basic rate of pay, including any geographic differential, that the transferred employee received during the pay period immediately preceding the date on which the employee was transferred. Notwithstanding the preceding sentence, if the employee was receiving a higher rate of basic pay on a temporary basis (because of a temporary assignment, temporary promotion, or other temporary action) immediately before the transfer, the Agency may reduce the rate of basic pay on the date the rate would have been reduced but for the transfer, and the protected rate for the remainder of the 30-month period will be the reduced rate that would have applied but for the transfer.

(2) **EXCEPTIONS.**—The Comptroller of the Currency or the Corporation may reduce the rate of basic pay of a transferred employee—

(A) for cause, including for unacceptable performance;

or

(B) with the consent of the transferred employee.

(3) **PROTECTION ONLY WHILE EMPLOYED.**—This subsection shall apply to a transferred employee only during the period that the transferred employee remains employed by Office of the Comptroller of the Currency or the Corporation.

(4) **PAY INCREASES PERMITTED.**—Nothing in this subsection shall limit the authority of the Comptroller of the Currency or the Chairperson of the Corporation to increase the pay of a transferred employee.

(i) **BENEFITS.**—

(1) **RETIREMENT BENEFITS FOR TRANSFERRED EMPLOYEES.**—
Each transferred employee shall remain enrolled in the retirement plan of the transferred employee, for as long as the transferred employee is employed by the Office of the Comptroller of the Currency or the Corporation.

(ii) Employer’s contribution.—The Comptroller of the Currency or the Chairperson of the Corporation, as appropriate, shall pay any employer contributions to the existing retirement plan of each transferred employee, as required under each such existing retirement plan.

(B) Definition.—In this paragraph, the term “existing retirement plan” means, with respect to a transferred employee, the retirement plan (including the Financial Institutions Retirement Fund), and any associated thrift savings plan, of the agency from which the employee was transferred in which the employee was enrolled on the day before the date on which the employee was transferred.

(2) Benefits other than retirement benefits.—

(A) During first year.—

(i) Existing plans continue.—During the 1-year period following the transfer date, each transferred employee may retain membership in any employee benefit program (other than a retirement benefit program) of the agency from which the employee was transferred under this title, including any dental, vision, long term care, or life insurance program to which the employee belonged on the day before the transfer date.

(ii) Employer’s contribution.—The Office of the Comptroller of the Currency or the Corporation, as appropriate, shall pay any employer cost required to extend coverage in the benefit program to the transferred employee as required under that program or negotiated agreements.

(B) Dental, vision, or life insurance after first year.—If, after the 1-year period beginning on the transfer date, the Office of the Comptroller of the Currency or the Corporation determines that the Office of the Comptroller of the Currency or the Corporation, as the case may be, will not continue to participate in any dental, vision, or life insurance program of an agency from which an employee was transferred, a transferred employee who is a member of the program may, before the decision takes effect and without regard to any regularly scheduled open season, elect to enroll in—

(i) the enhanced dental benefits program established under chapter 89A of title 5, United States Code;

(ii) the enhanced vision benefits established under chapter 89B of title 5, United States Code; and

(iii) the Federal Employees’ Group Life Insurance Program established under chapter 87 of title 5, United States Code, without regard to any requirement of insurability.
(C) Long Term Care Insurance After 1st Year.—If, after the 1-year period beginning on the transfer date, the Office of the Comptroller of the Currency or the Corporation determines that the Office of the Comptroller of the Currency or the Corporation, as appropriate, will not continue to participate in any long term care insurance program of an agency from which an employee transferred, a transferred employee who is a member of such a program may, before the decision takes effect, elect to apply for coverage under the Federal Long Term Care Insurance Program established under chapter 90 of title 5, United States Code, under the underwriting requirements applicable to a new active workforce member, as described in part 875 of title 5, Code of Federal Regulations (or any successor thereto).

(D) Contribution of Transferred Employee.—
   (i) In General.—Subject to clause (ii), a transferred employee who is enrolled in a plan under the Federal Employees Health Benefits Program shall pay any employee contribution required under the plan.
   (ii) Cost Differential.—The Office of the Comptroller of the Currency or the Corporation, as applicable, shall pay any difference in cost between the employee contribution required under the plan provided to transferred employees by the agency from which the employee transferred on the date of enactment of this Act and the plan provided by the Office of the Comptroller of the Currency or the Corporation, as applicable, as the case may be, under this section.
   (iii) Funds Transfer.—The Office of the Comptroller of the Currency or the Corporation, as the case may be, shall transfer to the Employees Health Benefits Fund established under section 8909 of title 5, United States Code, an amount determined by the Director of the Office of Personnel Management, after consultation with the Comptroller of the Currency or the Chairperson of the Corporation, as the case may be, and the Office of Management and Budget, to be necessary to reimburse the Fund for the cost to the Fund of providing any benefits under this subparagraph that are not otherwise paid for by a transferred employee under clause (i).

(E) Special Provisions to Ensure Continuation of Life Insurance Benefits.—
   (i) In General.—An annuitant, as defined in section 8901 of title 5, United States Code, who is enrolled in a life insurance plan administered by an agency from which employees are transferred under this title on the day before the transfer date shall be eligible for coverage by a life insurance plan under sections 8706(b), 8714a, 8714b, or 8714c of title 5, United States Code, or by a life insurance plan established by the Office of the Comptroller of the Currency or the Corporation, as applicable, without regard to any regularly scheduled open season or any requirement of insurability.
   (ii) Contribution of Transferred Employee.—
(I) IN GENERAL.—Subject to subclause (II), a transferred employee enrolled in a life insurance plan under this subparagraph shall pay any employee contribution required by the plan.

(II) COST DIFFERENTIAL.—The Office of the Comptroller of the Currency or the Corporation, as the case may be, shall pay any difference in cost between the benefits provided by the agency from which the employee transferred on the date of enactment of this Act and the benefits provided under this section.

(III) FUNDS TRANSFER.—The Office of the Comptroller of the Currency or the Corporation, as the case may be, shall transfer to the Federal Employees’ Group Life Insurance Fund established under section 8714 of title 5, United States Code, an amount determined by the Director of the Office of Personnel Management, after consultation with the Comptroller of the Currency or the Chairperson of the Corporation, as the case may be, and the Office of Management and Budget, to be necessary to reimburse the Federal Employees’ Group Life Insurance Fund for the cost to the Federal Employees’ Group Life Insurance Fund of providing benefits under this subparagraph not otherwise paid for by a transferred employee under subclause (I).

(IV) CREDIT FOR TIME ENROLLED IN OTHER PLANS.—For any transferred employee, enrollment in a life insurance plan administered by the agency from which the employee transferred, immediately before enrollment in a life insurance plan under chapter 87 of title 5, United States Code, shall be considered as enrollment in a life insurance plan under that chapter for purposes of section 8706(b)(1)(A) of title 5, United States Code.

(j) INCORPORATION INTO AGENCY PAY SYSTEM.—Not later than 30 months after the transfer date, the Comptroller of the Currency and the Chairperson of the Corporation shall place each transferred employee into the established pay system and structure of the appropriate employing agency.

(k) EQUITABLE TREATMENT.—In administering the provisions of this section, the Comptroller of the Currency and the Chairperson of the Corporation—

(1) may not take any action that would unfairly disadvantage a transferred employee relative to any other employee of the Office of the Comptroller of the Currency or the Corporation on the basis of prior employment by the Office of Thrift Supervision;

(2) may take such action as is appropriate in an individual case to ensure that a transferred employee receives equitable treatment, with respect to the status, tenure, pay, benefits (other than benefits under programs administered by the Office of Personnel Management), and accrued leave or vacation time for prior periods of service with any Federal agency of the transferred employee;
(3) shall, jointly with the Director of the Office of Thrift Supervision, develop and adopt procedures and safeguards designed to ensure that the requirements of this subsection are met; and

(4) shall conduct a study detailing the position assignments of all employees transferred pursuant to subsection (a), describing the procedures and safeguards adopted pursuant to paragraph (3), and demonstrating that the requirements of this subsection have been met; and shall, not later than 365 days after the transfer date, submit a copy of such study to Congress.

(l) REORGANIZATION.—

(1) IN GENERAL.—If the Comptroller of the Currency or the Chairperson of the Corporation determines, during the 2-year period beginning 1 year after the transfer date, that a reorganization of the staff of the Office of the Comptroller of the Currency or the Corporation, respectively, is required, the reorganization shall be deemed a “major reorganization” for purposes of affording affected employees retirement under section 8336(d)(2) or 8414(b)(1)(B) of title 5, United States Code.

(2) SERVICE CREDIT.—For purposes of this subsection, periods of service with a Federal home loan bank or a joint office of Federal home loan banks shall be credited as periods of service with a Federal agency.

SEC. 323. PROPERTY TRANSFERRED.

(a) PROPERTY DEFINED.—For purposes of this section, the term “property” includes all real property (including leaseholds) and all personal property, including computers, furniture, fixtures, equipment, books, accounts, records, reports, files, memoranda, paper, reports of examination, work papers, and correspondence related to such reports, and any other information or materials.

(b) PROPERTY OF THE OFFICE OF THRIFT SUPERVISION.—

(1) IN GENERAL.—No later than 90 days after the transfer date, all property of the Office of Thrift Supervision (other than property described under paragraph (b)(2)) that the Comptroller of the Currency and the Chairperson of the Corporation jointly determine is used, on the day before the transfer date, to perform or support the functions of the Office of Thrift Supervision transferred to the Office of the Comptroller of the Currency or the Corporation under this title, shall be transferred to the Office of the Comptroller of the Currency or the Corporation in a manner consistent with the transfer of employees under this subtitle.

(2) PERSONAL PROPERTY.—All books, accounts, records, reports, files, memoranda, papers, documents, reports of examination, work papers, and correspondence of the Office of Thrift Supervision that the Comptroller of the Currency, the Chairperson of the Corporation, and the Chairman of the Board of Governors jointly determine is used, on the day before the transfer date, to perform or support the functions of the Office of Thrift Supervision transferred to the Board of Governors under this title shall be transferred to the Board of Governors in a manner consistent with the purposes of this title.

(c) CONTRACTS RELATED TO PROPERTY TRANSFERRED.—Each contract, agreement, lease, license, permit, and similar arrangement
relating to property transferred to the Office of the Comptroller of the Currency or the Corporation by this section shall be transferred to the Office of the Comptroller of the Currency or the Corporation, as appropriate, together with the property to which it relates.

(d) Preservation of Property.—Property identified for transfer under this section shall not be altered, destroyed, or deleted before transfer under this section.

SEC. 324. FUNDS TRANSFERRED.

The funds that, on the day before the transfer date, the Director of the Office of Thrift Supervision (in consultation with the Comptroller of the Currency, the Chairperson of the Corporation, and the Chairman of the Board of Governors) determines are not necessary to dispose of the affairs of the Office of Thrift Supervision under section 325 and are available to the Office of Thrift Supervision to pay the expenses of the Office of Thrift Supervision—

(1) relating to the functions of the Office of Thrift Supervision transferred under section 312(b)(2)(B), shall be transferred to the Office of the Comptroller of the Currency on the transfer date;

(2) relating to the functions of the Office of Thrift Supervision transferred under section 312(b)(2)(C), shall be transferred to the Corporation on the transfer date; and

(3) relating to the functions of the Office of Thrift Supervision transferred under section 312(b)(1)(A), shall be transferred to the Board of Governors on the transfer date.

SEC. 325. DISPOSITION OF AFFAIRS.

(a) Authority of Director.—During the 90-day period beginning on the transfer date, the Director of the Office of Thrift Supervision—

(1) shall, solely for the purpose of winding up the affairs of the Office of Thrift Supervision relating to any function transferred to the Office of the Comptroller of the Currency, the Corporation, or the Board of Governors under this title—

(A) manage the employees of the Office of Thrift Supervision who have not yet been transferred and provide for the payment of the compensation and benefits of the employees that accrue before the date on which the employees are transferred under this title; and

(B) manage any property of the Office of Thrift Supervision, until the date on which the property is transferred under section 323; and

(2) may take any other action necessary to wind up the affairs of the Office of Thrift Supervision.

(b) Status of Director.—

(1) In general.—Notwithstanding the transfer of functions under this subtitle, during the 90-day period beginning on the transfer date, the Director of the Office of Thrift Supervision shall retain and may exercise any authority vested in the Director of the Office of Thrift Supervision on the day before the transfer date, only to the extent necessary—

(A) to wind up the Office of Thrift Supervision; and

(B) to carry out the transfer under this subtitle during such 90-day period.
(2) OTHER PROVISIONS.—For purposes of paragraph (1), the Director of the Office of Thrift Supervision shall, during the 90-day period beginning on the transfer date, continue to be—

(A) treated as an officer of the United States; and

(B) entitled to receive compensation at the same annual rate of basic pay that the Director of the Office of Thrift Supervision received on the day before the transfer date.

SEC. 326. CONTINUATION OF SERVICES.

Any agency, department, or other instrumentality of the United States, and any successor to any such agency, department, or instrumentality, that was, before the transfer date, providing support services to the Office of Thrift Supervision in connection with functions transferred to the Office of the Comptroller of the Currency, the Corporation or the Board of Governors under this title, shall—

(1) continue to provide such services, subject to reimbursement by the Office of the Comptroller of the Currency, the Corporation, or the Board of Governors, until the transfer of functions under this title is complete; and

(2) consult with the Comptroller of the Currency, the Chairman of the Corporation, or the Chairman of the Board of Governors, as appropriate, to coordinate and facilitate a prompt and orderly transition.

SEC. 327. IMPLEMENTATION PLAN AND REPORTS.

(a) PLAN SUBMISSION.—Within 180 days of the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Board of Governors, the Corporation, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision, shall jointly submit a plan to the Committee on Banking, Housing, and Urban Affairs of the Senate, the Committee on Financial Services of the House of Representatives, and the Inspectors General of the Department of the Treasury, the Corporation, and the Board of Governors detailing the steps the Board of Governors, the Corporation, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision will take to implement the provisions of sections 301 through 326, and the provisions of the amendments made by such sections.

(b) INSPECTORS GENERAL REVIEW OF THE PLAN.—Within 60 days of receiving the plan required under subsection (a), the Inspectors General of the Department of the Treasury, the Corporation, and the Board of Governors shall jointly provide a written report to the Board of Governors, the Corporation, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision and shall submit a copy to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives detailing whether the plan conforms with the provisions of sections 301 through 326, and the provisions of the amendments made by such sections, including—

(1) whether the plan sufficiently takes into consideration the orderly transfer of personnel;

(2) whether the plan describes procedures and safeguards to ensure that the Office of Thrift Supervision employees are not unfairly disadvantaged relative to employees of the Office of the Comptroller of the Currency and the Corporation;
Whether the plan sufficiently takes into consideration the orderly transfer of authority and responsibilities; whether the plan sufficiently takes into consideration the effective transfer of funds; whether the plan sufficiently takes into consideration the orderly transfer of property; and any additional recommendations for an orderly and effective process.

(c) Implementation Reports.—Not later than 6 months after the date on which the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives receives the report required under subsection (b), and every 6 months thereafter until all aspects of the plan have been implemented, the Inspectors General of the Department of the Treasury, the Corporation, and the Board of Governors shall jointly provide a written report on the status of the implementation of the plan to the Board of Governors, the Corporation, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision and shall submit a copy to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.

Subtitle C—Federal Deposit Insurance Corporation

SEC. 331. DEPOSIT INSURANCE REFORMS.

(a) Size Distinctions.—Section 7(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1817(b)(2)) is amended—

(1) by striking subparagraph (D); and

(2) by redesignating subparagraph (C) as subparagraph (D).

(b) Assessment Base.—The Corporation shall amend the regulations issued by the Corporation under section 7(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1817(b)(2)) to define the term “assessment base” with respect to an insured depository institution for purposes of that section 7(b)(2), as an amount equal to—

(1) the average consolidated total assets of the insured depository institution during the assessment period; minus

(2) the sum of—

(A) the average tangible equity of the insured depository institution during the assessment period; and

(B) in the case of an insured depository institution that is a custodial bank (as defined by the Corporation, based on factors including the percentage of total revenues generated by custodial businesses and the level of assets under custody) or a banker’s bank (as that term is used in section 5136 of the Revised Statutes (12 U.S.C. 24)), an amount that the Corporation determines is necessary to establish assessments consistent with the definition under section 7(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1817(b)(1)) for a custodial bank or a banker’s bank.
SEC. 332. ELIMINATION OF PROCYCLICAL ASSESSMENTS.

Section 7(e) of the Federal Deposit Insurance Act is amended—
(1) in paragraph (2)—
   (A) by amending subparagraph (B) to read as follows:
      “(B) LIMITATION.—The Board of Directors may, in its sole discretion, suspend or limit the declaration of payment of dividends under subparagraph (A).”;
   (B) by amending subparagraph (C) to read as follows:
      “(C) NOTICE AND OPPORTUNITY FOR COMMENT.—The Corporation shall prescribe, by regulation, after notice and opportunity for comment, the method for the declaration, calculation, distribution, and payment of dividends under this paragraph”; and
   (C) by striking subparagraphs (D) through (G); and
(2) in paragraph (4)(A) by striking “paragraphs (2)(D) and” and inserting “paragraphs (2) and”.

SEC. 333. ENHANCED ACCESS TO INFORMATION FOR DEPOSIT INSURANCE PURPOSES.

(a) Section 7(a)(2)(B) of the Federal Deposit Insurance Act is amended by striking “agreement” and inserting “consultation”.
(b) Section 7(b)(1)(E) of the Federal Deposit Insurance Act is amended—
   (1) in clause (i), by striking “such as” and inserting “including”;
   and
   (2) in clause (iii), by striking “Corporation” and inserting “Corporation, except as provided in section 7(a)(2)(B)”.

SEC. 334. TRANSITION RESERVE RATIO REQUIREMENTS TO REFLECT NEW ASSESSMENT BASE.

(a) Section 7(b)(3)(B) of the Federal Deposit Insurance Act is amended to read as follows:
   “(B) MINIMUM RESERVE RATIO.—The reserve ratio designated by the Board of Directors for any year may not be less than 1.35 percent of estimated insured deposits, or the comparable percentage of the assessment base set forth in paragraph (2)(C).”.
(b) Section 3(y)(3) of the Federal Deposit Insurance Act is amended by inserting “, or such comparable percentage of the assessment base set forth in section 7(b)(2)(C)” before the period.
(c) For a period of not less than 5 years after the date of the enactment of this title, the Federal Deposit Insurance Corporation shall make available to the public the reserve ratio and the designated reserve ratio using both estimated insured deposits and the assessment base under section 7(b)(2)(C) of the Federal Deposit Insurance Act.
(d) RESERVE RATIO.—Notwithstanding the timing requirements of section 7(b)(3)(E)(ii) of the Federal Deposit Insurance Act, the Corporation shall take such steps as may be necessary for the reserve ratio of the Deposit Insurance Fund to reach 1.35 percent of estimated insured deposits by September 30, 2020.
(e) OFFSET.—In setting the assessments necessary to meet the requirements of subsection (d), the Corporation shall offset the effect of subsection (d) on insured depository institutions with total consolidated assets of less than $10,000,000,000.
SEC. 335. PERMANENT INCREASE IN DEPOSIT AND SHARE INSURANCE.

(a) PERMANENT INCREASE IN DEPOSIT INSURANCE.—Section 11(a)(1)(E) of the Federal Deposit Insurance Act (12 U.S.C. 1821(a)(1)(E)) is amended—

(1) by striking “$100,000” and inserting “$250,000”; and

(2) by adding at the end the following new sentences: “Notwithstanding any other provision of law, the increase in the standard maximum deposit insurance amount to $250,000 shall apply to depositors in any institution for which the Corporation was appointed as receiver or conservator on or after January 1, 2008, and before October 3, 2008. The Corporation shall take such actions as are necessary to carry out the requirements of this section with respect to such depositors, without regard to any time limitations under this Act. In implementing this and the preceding 2 sentences, any payment on a deposit claim made by the Corporation as receiver or conservator to a depositor above the standard maximum deposit insurance amount in effect at the time of the appointment of the Corporation as receiver or conservator shall be deemed to be part of the net amount due to the depositor under subparagraph (B).”

(b) PERMANENT INCREASE IN SHARE INSURANCE.—Section 207(k)(5) of the Federal Credit Union Act (12 U.S.C. 1787(k)(5)) is amended by striking “$100,000” and inserting “$250,000”.

SEC. 336. MANAGEMENT OF THE FEDERAL DEPOSIT INSURANCE CORPORATION.

(a) IN GENERAL.—Section 2 of the Federal Deposit Insurance Act (12 U.S.C. 1812) is amended—

(1) in subsection (a)(1)(B), by striking “Director of the Office of Thrift Supervision” and inserting “Director of the Consumer Financial Protection Bureau”;

(2) by amending subsection (d)(2) to read as follows: “(2) ACTING OFFICIALS MAY SERVE.—In the event of a vacancy in the office of the Comptroller of the Currency or the office of Director of the Consumer Financial Protection Bureau and pending the appointment of a successor, or during the absence or disability of the Comptroller of the Currency or the Director of the Consumer Financial Protection Bureau, the acting Comptroller of the Currency or the acting Director of the Consumer Financial Protection Bureau, as the case may be, shall be a member of the Board of Directors in the place of the Comptroller or Director.”; and

(3) in subsection (f)(2), by striking “Office of Thrift Supervision” and inserting “Consumer Financial Protection Bureau”.

(b) EFFECTIVE DATE.—This section, and the amendments made by this section, shall take effect on the transfer date.

Subtitle D—Other Matters

SEC. 341. BRANCHING.

Notwithstanding the Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.), the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.), or any other provision of Federal or State law, a savings association that becomes a bank may—
(1) continue to operate any branch or agency that the savings association operated immediately before the savings association became a bank; and

(2) establish, acquire, and operate additional branches and agencies at any location within any State in which the savings association operated a branch immediately before the savings association became a bank, if the law of the State in which the branch is located, or is to be located, would permit establishment of the branch if the bank were a State bank chartered by such State.

SEC. 342. OFFICE OF MINORITY AND WOMEN INCLUSION.

(a) Office of Minority and Women Inclusion.—

(1) Establishment.—

(A) In general.—Except as provided in subparagraph (B), not later than 6 months after the date of enactment of this Act, each agency shall establish an Office of Minority and Women Inclusion that shall be responsible for all matters of the agency relating to diversity in management, employment, and business activities.

(B) Bureau.—The Bureau shall establish an Office of Minority and Women Inclusion not later than 6 months after the designated transfer date established under section 1062.

(2) Transfer of Responsibilities.—Each agency that, on the day before the date of enactment of this Act, assigned the responsibilities described in paragraph (1) (or comparable responsibilities) to another office of the agency shall ensure that such responsibilities are transferred to the Office.

(3) Duties with Respect to Civil Rights Laws.—The responsibilities described in paragraph (1) do not include enforcement of statutes, regulations, or executive orders pertaining to civil rights, except each Director shall coordinate with the agency administrator, or the designee of the agency administrator, regarding the design and implementation of any remedies resulting from violations of such statutes, regulations, or executive orders.

(b) Director.—

(1) In general.—The Director of each Office shall be appointed by, and shall report to, the agency administrator. The position of Director shall be a career reserved position in the Senior Executive Service, as that position is defined in section 3132 of title 5, United States Code, or an equivalent designation.

(2) Duties.—Each Director shall develop standards for—

(A) equal employment opportunity and the racial, ethnic, and gender diversity of the workforce and senior management of the agency;

(B) increased participation of minority-owned and women-owned businesses in the programs and contracts of the agency, including standards for coordinating technical assistance to such businesses; and

(C) assessing the diversity policies and practices of entities regulated by the agency.

(3) Other Duties.—Each Director shall advise the agency administrator on the impact of the policies and regulations of the agency on minority-owned and women-owned businesses.
(4) Rule of construction.—Nothing in paragraph (2)(C) may be construed to mandate any requirement on or otherwise affect the lending policies and practices of any regulated entity, or to require any specific action based on the findings of the assessment.

(c) Inclusion in all levels of business activities.—

(1) In general.—The Director of each Office shall develop and implement standards and procedures to ensure, to the maximum extent possible, the fair inclusion and utilization of minorities, women, and minority-owned and women-owned businesses in all business and activities of the agency at all levels, including in procurement, insurance, and all types of contracts.

(2) Contracts.—The procedures established by each agency for review and evaluation of contract proposals and for hiring service providers shall include, to the extent consistent with applicable law, a component that gives consideration to the diversity of the applicant. Such procedure shall include a written statement, in a form and with such content as the Director shall prescribe, that a contractor shall ensure, to the maximum extent possible, the fair inclusion of women and minorities in the workforce of the contractor and, as applicable, subcontractors.

(3) Termination.—

(A) Determination.—The standards and procedures developed and implemented under this subsection shall include a procedure for the Director to make a determination whether an agency contractor, and, as applicable, a subcontractor has failed to make a good faith effort to include minorities and women in their workforce.

(B) Effect of determination.—

(i) Recommendation to agency administrator.—Upon a determination described in subparagraph (A), the Director shall make a recommendation to the agency administrator that the contract be terminated.

(ii) Action by agency administrator.—Upon receipt of a recommendation under clause (i), the agency administrator may—

(I) terminate the contract;

(II) make a referral to the Office of Federal Contract Compliance Programs of the Department of Labor; or

(III) take other appropriate action.

(d) Applicability.—This section shall apply to all contracts of an agency for services of any kind, including the services of financial institutions, investment banking firms, mortgage banking firms, asset management firms, brokers, dealers, financial services entities, underwriters, accountants, investment consultants, and providers of legal services. The contracts referred to in this subsection include all contracts for all business and activities of an agency, at all levels, including contracts for the issuance or guarantee of any debt, equity, or security, the sale of assets, the management of the assets of the agency, the making of equity investments by the agency, and the implementation by the agency of programs to address economic recovery.
(e) **REPORTS.**—Each Office shall submit to Congress an annual report regarding the actions taken by the agency and the Office pursuant to this section, which shall include—

1. a statement of the total amounts paid by the agency to contractors since the previous report;
2. the percentage of the amounts described in paragraph (1) that were paid to contractors described in subsection (c)(1);
3. the successes achieved and challenges faced by the agency in operating minority and women outreach programs;
4. the challenges the agency may face in hiring qualified minority and women employees and contracting with qualified minority-owned and women-owned businesses; and
5. any other information, findings, conclusions, and recommendations for legislative or agency action, as the Director determines appropriate.

(f) **DIVERSITY IN AGENCY WORKFORCE.**—Each agency shall take affirmative steps to seek diversity in the workforce of the agency at all levels of the agency in a manner consistent with applicable law. Such steps shall include—

1. recruiting at historically black colleges and universities, Hispanic-serving institutions, women’s colleges, and colleges that typically serve majority minority populations;
2. sponsoring and recruiting at job fairs in urban communities;
3. placing employment advertisements in newspapers and magazines oriented toward minorities and women;
4. partnering with organizations that are focused on developing opportunities for minorities and women to place talented young minorities and women in industry internships, summer employment, and full-time positions;
5. where feasible, partnering with inner-city high schools, girls’ high schools, and high schools with majority minority populations to establish or enhance financial literacy programs and provide mentoring; and
6. any other mass media communications that the Office determines necessary.

(g) **DEFINITIONS.**—For purposes of this section, the following definitions shall apply:

1. **AGENCY.**—The term “agency” means—
   A. the Departmental Offices of the Department of the Treasury;
   B. the Corporation;
   C. the Federal Housing Finance Agency;
   D. each of the Federal reserve banks;
   E. the Board;
   F. the National Credit Union Administration;
   G. the Office of the Comptroller of the Currency;
   H. the Commission; and
   I. the Bureau.

2. **AGENCY ADMINISTRATOR.**—The term “agency administrator” means the head of an agency.

3. **MINORITY.**—The term “minority” has the same meaning as in section 1204(c) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 1811 note).

4. **MINORITY-OWNED BUSINESS.**—The term “minority-owned business” has the same meaning as in section 21A(r)(4)(A) Applicability.
SEC. 343. INSURANCE OF TRANSACTION ACCOUNTS.

(a) BANKS AND SAVINGS ASSOCIATIONS.—

(1) AMENDMENTS.—Section 11(a)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1821(a)(1)) is amended—

(A) in subparagraph (B)—

(i) by striking “The net amount” and inserting the following:

“(i) IN GENERAL.—Subject to clause (ii), the net amount”; and

(ii) by adding at the end the following new clauses:

“(ii) INSURANCE FOR NONINTEREST-BEARING TRANSACTION ACCOUNTS.—Notwithstanding clause (i), the Corporation shall fully insure the net amount that any depositor at an insured depository institution maintains in a noninterest-bearing transaction account. Such amount shall not be taken into account when computing the net amount due to such depositor under clause (i).

“(iii) NONINTEREST-BEARING TRANSACTION ACCOUNT DEFINED.—For purposes of this subparagraph, the term ‘noninterest-bearing transaction account’ means a deposit or account maintained at an insured depository institution—

“(I) with respect to which interest is neither accrued nor paid;

“(II) on which the depositor or account holder is permitted to make withdrawals by negotiable or transferable instrument, payment orders of withdrawal, telephone or other electronic media transfers, or other similar items for the purpose of making payments or transfers to third parties or others; and

“(III) on which the insured depository institution does not reserve the right to require advance notice of an intended withdrawal.”; and

(B) in subparagraph (C), by striking “subparagraph (B)” and inserting “subparagraph (B)(i)”.

(2) EFFECTIVE DATE.—The amendments made by paragraph (1) shall take effect on December 31, 2010.

(3) PROSPECTIVE REPEAL.—Effective January 1, 2013, section 11(a)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1821(a)(1)), as amended by paragraph (1), is amended—

(A) in subparagraph (B)—

(i) by striking “DEPOSIT.—” and all that follows through “clause (ii), the net amount” and insert “DEPOSIT.—The net amount”; and
(ii) by striking clauses (ii) and (iii); and
(B) in subparagraph (C), by striking “subparagraph (B)(i)” and inserting “subparagraph (B)”.

(b) CREDIT UNIONS.—

(1) AMENDMENTS.—Section 207(k)(1) of the Federal Credit Union Act (12 U.S.C. 1787(k)(1)) is amended—

(A) in subparagraph (A)—

(i) by striking “Subject to the provisions of paragraph (2), the net amount” and inserting the following:

“(i) NET AMOUNT OF INSURANCE PAYABLE.—Subject to clause (ii) and the provisions of paragraph (2), the net amount”; and

(ii) by adding at the end the following new clauses:

“(ii) INSURANCE FOR NONINTEREST-BEARING TRANSACTION ACCOUNTS.—Notwithstanding clause (i), the Board shall fully insure the net amount that any member or depositor at an insured credit union maintains in a noninterest-bearing transaction account. Such amount shall not be taken into account when computing the net amount due to such member or depositor under clause (i).

“(iii) NONINTEREST-BEARING TRANSACTION ACCOUNT DEFINED.—For purposes of this subparagraph, the term ‘noninterest-bearing transaction account’ means an account or deposit maintained at an insured credit union—

“(I) with respect to which interest is neither accrued nor paid;

“(II) on which the account holder or depositor is permitted to make withdrawals by negotiable or transferable instrument, payment orders of withdrawal, telephone or other electronic media transfers, or other similar items for the purpose of making payments or transfers to third parties or others; and

“(III) on which the insured credit union does not reserve the right to require advance notice of an intended withdrawal.”; and

(B) in subparagraph (B), by striking “subparagraph (A)’ and inserting “subparagraph (A)(i)”.

(2) EFFECTIVE DATE.—The amendments made by paragraph (1) shall take effect upon the date of the enactment of this Act.

(3) PROSPECTIVE REPEAL.—Effective January 1, 2013, section 207(k)(1) of the Federal Credit Union Act (12 U.S.C. 1787(k)(1)), as amended by paragraph (1), is amended—

(A) in subparagraph (A)—

(i) by striking “(i) NET AMOUNT OF INSURANCE PAYABLE.—” and all that follows through “paragraph (2), the net amount” and inserting “Subject to the provisions of paragraph (2), the net amount”; and

(ii) by striking clauses (ii) and (iii); and

(B) in subparagraph (B), by striking “subparagraph (A)(i)” and inserting “subparagraph (A)”.

12 USC 1787 note.

Effective date.

12 USC 1787 note.
Subtitle E—Technical and Conforming Amendments

SEC. 351. EFFECTIVE DATE.

Except as provided in section 364(a), the amendments made by this subtitle shall take effect on the transfer date.


Section 256(h) of the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. 906(h)) is amended—
(1) in paragraph (4), by striking subparagraphs (C) and (G); and
(2) by redesignating subparagraphs (D), (E), (F), and (H) as subparagraphs (C), (D), (E), and (F), respectively.


Section 232(a) of the Bank Enterprise Act of 1991 (12 U.S.C. 1834(a)) is amended—
(1) in the subsection heading, by striking “by Federal Reserve Board”;
(2) in paragraph (1)—
(A) by striking “The Board of Governors of the Federal Reserve System,” and inserting “The Comptroller of the Currency”;
(B) by striking “section 7(b)(2)(H)” and inserting “section 7(b)(2)(E)”;
(3) in paragraph (2)(A), by striking “Board” and inserting “Comptroller”;
(4) in paragraph (3)—
(A) by redesignating subparagraphs (A) through (C) as subparagraphs (B) through (D), respectively;
(B) by inserting before subparagraph (B) the following:
“(A) COMPTROLLER.—The term ‘Comptroller’ means the Comptroller of the Currency.”.

SEC. 354. BANK HOLDING COMPANY ACT OF 1956.

The Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.) is amended—
(1) in section 2(j)(3) (12 U.S.C. 1841(j)(3)), strike “Director of the Office of Thrift Supervision” and inserting “appropriate Federal banking agency”;
(2) in section 4 (12 U.S.C. 1843)—
(A) in subsection (i)—
(I) in paragraph (4)—
(aa) in the subparagraph heading, by striking “to Director”;
(bb) by striking “Board” and all that follows through the end of the subparagraph and inserting “Board shall solicit comments and recommendations from—
“(i) the Comptroller of the Currency, with respect to the acquisition of a Federal savings association; and

Definition.

12 USC 906 note.
“(ii) the Federal Deposit Insurance Corporation, with respect to the acquisition of a State savings association.”;

(II) in subparagraph (B), by striking “Director” each place that term appears and inserting “Comptroller of the Currency or the Federal Deposit Insurance Corporation, as applicable,”;

(ii) in paragraph (5)—

(I) in subparagraph (B), by striking “Director with” and inserting “Comptroller of the Currency or the Federal Deposit Insurance Corporation, as applicable, with”;

and

(II) by striking “Director” each place that term appears and inserting “Comptroller of the Currency or the Federal Deposit Insurance Corporation”;

(iii) in paragraph (6), by striking “Director” and inserting “Comptroller of the Currency or the Federal Deposit Insurance Corporation, as applicable,”;

and

(iv) by striking paragraph (7); and

(3) in section 5(f) (12 U.S.C. 1844(f))—

(A) by striking “subpena” each place that term appears and inserting “subpoena”;

(B) by striking “subpenas” each place that term appears and inserting “subpoenas”; and

(C) by striking “subpenaed” and inserting “subpoenaed”.


Section 106(b)(1) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1972(1)) is amended in the undesignated matter following subparagraph (E) by inserting “issue such regulations as are necessary to carry out this section, and, in consultation with the Comptroller of the Currency and the Federal Deposit Insurance Company, may” after “The Board may”.

SEC. 356. BANK PROTECTION ACT OF 1968.

The Bank Protection Act of 1968 (12 U.S.C. 1881 et seq.) is amended—

(1) in section 2 (12 U.S.C. 1881), by striking “the term” and all that follows through the end of the section and inserting “the term ‘Federal supervisory agency’ means the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q))”;

(2) in section 3 (12 U.S.C. 1882), by striking “and loan” each place that term appears; and

(3) in section 5 (12 U.S.C. 1884), by striking “and loan”.

SEC. 357. BANK SERVICE COMPANY ACT.

The Bank Service Company Act (12 U.S.C. 1861 et seq.) is amended—

(1) in section 1(b)(4) (12 U.S.C. 1861(b)(4))—

(A) by inserting after “an insured bank,” the following: “a savings association”;

(B) by striking “Director of the Office of Thrift Supervision” and inserting “appropriate Federal banking agency”; and

Definition.
(C) by striking "the Federal Savings and Loan Insurance Corporation,  
(2) in section 1(b)(5), by striking "term 'insured depository 
institution' has the same meaning as in section 3(c)" and inserting "terms 'depository institution' and 'savings association' have the same meanings as in section 3"; and  
(3) in section 7(c)(2) (12 U.S.C. 1867(c)(2)), by inserting "each" after "notify".

SEC. 358. COMMUNITY REINVESTMENT ACT OF 1977.

(1) in section 803 (12 U.S.C. 2902)—  
(A) in paragraph (1)—  
(i) in subparagraph (A), by inserting "and Federal savings associations (the deposits of which are insured by the Federal Deposit Insurance Corporation)" after "banks";  
(ii) in subparagraph (B), by striking "and bank holding companies" and inserting "and bank holding companies, and savings and loan holding companies"; and  
(iii) in subparagraph (C), by striking "; and" and inserting "and State savings associations (the deposits of which are insured by the Federal Deposit Insurance Corporation)."; and  
(B) by striking paragraph (2) (relating to the Office of Thrift Supervision), as added by section 744(q) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (Public Law 101–73; 103 Stat. 440); and  
(2) in section 806 (12 U.S.C. 2905), by inserting "each" after "the Federal" except that the Comptroller of the Currency shall prescribe regulations applicable to savings associations and the Board of Governors shall prescribe regulations applicable to insured State member banks, bank holding companies and savings and loan holding companies," after "supervisory agency".

SEC. 359. CRIME CONTROL ACT OF 1990.

The Crime Control Act of 1990 is amended—  
(1) in section 2539(c)(2) (28 U.S.C. 509 note)—  
(A) by striking subparagraphs (C) and (D); and  
(B) by redesignating subparagraphs (E) through (H) as subparagraphs (C) through (G), respectively; and  
(2) in section 2554(b)(2) (Public Law 101–647; 104 Stat. 4890)—  
(A) in subparagraph (A), by striking "the Director of the Office of Thrift Supervision," and inserting "the Comptroller of the Currency"; and  
(B) in subparagraph (B), by striking "the Director" and all that follows through "Trust Corporation" and inserting "or the Federal Deposit Insurance Corporation".

SEC. 360. DEPOSITORY INSTITUTION MANAGEMENT INTERLOCKS ACT.

The Depository Institution Management Interlocks Act (12 U.S.C. 3201 et seq.) is amended—  
(1) in section 207 (12 U.S.C. 3206)—  
(A) in paragraph (1), by inserting before the comma at the end the following: "and Federal savings associations
(the deposits of which are insured by the Federal Deposit Insurance Corporation);"
(B) in paragraph (2), by striking “, and bank holding companies” and inserting “, bank holding companies, and savings and loan holding companies”;
(C) in paragraph (3), by striking “Corporation,” and inserting “Corporation and State savings associations (the deposits of which are insured by the Federal Deposit Insurance Corporation),”;
(D) by striking paragraph (4);
(E) by redesigning paragraphs (5) and (6) as paragraphs (4) and (5), respectively; and
(F) in paragraph (5), as so redesignated, by striking “through (5)” and inserting “through (4)”;
(2) in section 209 (12 U.S.C. 3207)—
(A) in paragraph (1), by inserting before the comma at the end the following: “and Federal savings associations (the deposits of which are insured by the Federal Deposit Insurance Corporation);”;
(B) in paragraph (2), by striking “, and bank holding companies” and inserting “, bank holding companies, and savings and loan holding companies”;
(C) in paragraph (3), by striking “Corporation,” and inserting “Corporation and State savings associations (the deposits of which are insured by the Federal Deposit Insurance Corporation),”;
(D) by striking paragraph (4); and
(E) by redesignating paragraph (5) as paragraph (4); and
(3) in section 210(a) (12 U.S.C. 3208(a))—
(A) by striking “his” and inserting “the”; and
(B) by inserting “of the Attorney General” after “enforcement functions”.

SEC. 361. EMERGENCY HOMEOWNERS’ RELIEF ACT.
Section 110 of the Emergency Homeowners’ Relief Act (12 U.S.C. 2709) is amended in the second sentence, by striking “Home Loan Bank Board, the Federal Savings and Loan Insurance Corporation” and inserting “Housing Finance Agency”.

SEC. 362. FEDERAL CREDIT UNION ACT.
The Federal Credit Union Act (12 U.S.C. 1751 et seq.) is amended—
(1) in section 107(8) (12 U.S.C. 1757(8)), by striking “or the Federal Savings and Loan Insurance Corporation”;
(2) in section 205 (12 U.S.C. 1785)—
(A) in subsection (b)(2)(G)(i), by striking “the Office of Thrift Supervision and”;
and
(B) in subsection (i)(1), by striking “or the Federal Savings and Loan Insurance Corporation”;
and
(3) in section 206(g)(7) (12 U.S.C. 1786(g)(7))—
(A) in subparagraph (A)—
(i) in clause (ii), by striking “(b)(8)” and inserting “(b)(9)”;

(ii) in clause (v)—
(I) by striking “depository” and inserting “financial”; and
(II) by adding “and” at the end;
SEC. 363. FEDERAL DEPOSIT INSURANCE ACT.

The Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.) is amended—

(1) in section 3 (12 U.S.C. 1813)—

(A) in subsection (b)(1)(C), by striking “Director of the Office of Thrift Supervision” and inserting “Comptroller of the Currency’’;

(B) in subsection (l)(5), in the matter preceding subparagraph (A), by striking “Director of the Office of Thrift Supervision’,’;

(C) in subsection (z), by striking “the Director of the Office of Thrift Supervision,’;

(2) in section 7 (12 U.S.C. 1817)—

(A) in subsection (a)—

(i) in paragraph (2)—

(II) in subparagraph (A)—

(aa) in the first sentence, by striking “the Director of the Office of Thrift Supervision,’’;

(bb) in the second sentence—

(AA) by striking “the Director of the Office of Thrift Supervision,’’ and inserting “to’’; and

(BB) by inserting “to” before “any Federal home’’; and

(cc) by striking “Finance Board” each place that term appears and inserting “Finance Agency’’; and

(ii) in paragraph (3), in the first sentence, by striking “the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Director of the Office of Thrift Supervision,’’ and inserting “the Comptroller of the Currency and the Board of Governors of the Federal Reserve System,’’;

(iii) in paragraph (6), in the first sentence, by striking “section 232(a)(3)(C)” and inserting “section 232(a)(3)(D)’’; and
(iv) in paragraph (7), by striking “, the Director of the Office of Thrift Supervision,”; and
(B) in subsection (n)—
   (i) in the heading, by striking “DIRECTOR OF THE OFFICE OF THRIFT SUPERVISION” and inserting “COMPTROLLER OF THE CURRENCY”;
   (ii) in the first sentence—
      (I) by striking “the Director of the Office of Thrift Supervision” and inserting “the Comptroller of the Currency”; and
      (II) by inserting “Federal” before “savings associations”;
   (iii) in the third sentence, by striking “, the Financing Corporation, and the Resolution Funding Corporation”; and
   (iv) by striking “the Director” each place that term appears and inserting “the Comptroller”; 

(3) in section 8 (12 U.S.C. 1818)—
   (A) in subsection (a)(8)(B)(ii), in the last sentence, by striking “Director of the Office of Thrift Supervision” each place that term appears and inserting “Comptroller of the Currency”;
   (B) in subsection (b)(3)—
      (i) by inserting “any savings and loan holding company and any subsidiary (other than a depository institution) of a savings and loan holding company (as such terms are defined in section 10 of Home Owners’ Loan Act), any noninsured State member bank” after “Bank Holding Company Act of 1956,”; and
      (ii) by inserting “or against a savings and loan holding company or any subsidiary thereof (other than a depository institution or a subsidiary of such depository institution)” before the period at the end;
   (C) by striking paragraph (9) of subsection (b) and inserting the following new paragraph:
   “(9) [Repealed]”;
   (D) in subsection (j)—
      (i) in subparagraph (A)—
         (I) in clause (v), by inserting “and” after the semicolon;
         (II) in clause (vi)—
            (aa) by striking “Board” and inserting “Agency”; and
            (bb) by striking “; and” and inserting a period; and
         (III) by striking clause (vii); and
      (ii) in subparagraph (D)—
         (I) in clause (iii), by inserting “and” after the semicolon;
         (II) in clause (iv)—
            (aa) by striking “Board” and inserting “Agency”; and
            (bb) by striking “; and” and inserting a period; and
         (III) by striking clause (v);

(E) in subsection (j)—
(i) in paragraph (2), by striking “, or as a savings association under subsection (b)(9) of this section”;
(ii) in paragraph (3), by inserting “or” after the semicolon;
(iii) in paragraph (4), by striking “; or” and inserting a comma; and
(iv) by striking paragraph (5);
(F) in subsection (o), by striking “Director of the Office of Thrift Supervision” and inserting “Comptroller of the Currency”; and
(G) in subsection (w)(3)(A), by striking “and the Office of Thrift Supervision”;
(4) in section 10 (12 U.S.C. 1820)—
(A) in subsection (d)(5), by striking “or the Resolution Trust Corporation” each place that term appears; and
(B) in subsection (k)(5)(B)—
(i) in clause (ii), by inserting “and” after the semicolon;
(ii) in clause (iii), by striking “; and” and inserting a period; and
(iii) by striking clause (iv);
(5) in section 11 (12 U.S.C. 1821)—
(A) in subsection (c)—
(i) in paragraph (2)(A)(ii), by striking “(other than section 21A of the Federal Home Loan Bank Act)”;
(ii) in paragraph (4), by striking “Except as otherwise provided in section 21A of the Federal Home Loan Bank Act and notwithstanding” and inserting “Notwithstanding”;
(iii) in paragraph (6)—
(I) in the heading, by striking “DIRECTOR OF THE OFFICE OF THRIFT SUPERVISION” and inserting “COMPTROLLER OF THE CURRENCY”;
(II) in subparagraph (A)—
(aa) by striking “or the Resolution Trust Corporation”; and
(bb) by striking “Director of the Office of Thrift Supervision” and inserting “Comptroller of the Currency”; and
(III) by amending subparagraph (B) to read as follows:
“(B) RECEIVER.—The Corporation may, at the discretion of the Comptroller of the Currency, be appointed receiver and the Corporation may accept any such appointment.”;
(iv) in paragraph (12)(A), by striking “or the Resolution Trust Corporation”;
(B) in subsection (d)—
(i) in paragraph (17)(A), by striking “or the Director of the Office of Thrift Supervision”; and
(ii) in paragraph (18)(B), by striking “or the Director of the Office of Thrift Supervision”;
(C) in subsection (m)—
(i) in paragraph (9), by striking “or the Director of the Office of Thrift Supervision, as appropriate”;
(ii) in paragraph (16), by striking “or the Director of the Office of Thrift Supervision, as appropriate” each place that term appears; and
(iii) in paragraph (18), by striking “or the Director of the Office of Thrift Supervision, as appropriate” each place that term appears;
(D) in subsection (n)—
(i) in paragraph (1)(A)—
(I) by striking “, or the Director of the Office of Thrift Supervision, with respect to” and inserting “or”; and
(II) by striking “applicable,,” and inserting “applicable,”;
(ii) in paragraph (2)(A), by striking “or the Director of the Office of Thrift Supervision”;
(iii) in paragraph (4)(D), by striking “and the Director of the Office of Thrift Supervision, as appropriate,”;
(iv) in paragraph (4)(G), by striking “and the Director of the Office of Thrift Supervision, as appropriate,”; and
(v) in paragraph (12)(B)—
(I) by inserting “as” after “shall appoint the Corporation”;
(II) by striking “or the Director of the Office of Thrift Supervision, as appropriate,” each place such term appears;
(E) in subsection (p)—
(i) in paragraph (2)(B), by striking “the Corporation, the FSLIC Resolution Fund, or the Resolution Trust Corporation,” and inserting “or the Corporation,”; and
(ii) in paragraph (3)(B), by striking “, the FSLIC Resolution Fund, the Resolution Trust Corporation,”;
and
(F) in subsection (r), by striking “and the Resolution Trust Corporation”;
(7) in section 18 (12 U.S.C. 1828)—
(A) in subsection (c)(2)—
(i) in subparagraph (A), by inserting “or a Federal savings association” before the semicolon;
(ii) in subparagraph (B), by adding “and” at the end;
(iii) in subparagraph (C), by striking “(except” and all that follows through “;” and inserting “or a State savings association.”; and
(iv) by striking subparagraph (D);
(B) in subsection (g)(1), by striking “the Director of the Office of Thrift Supervision” and inserting “the Comptroller of the Currency”;
(C) in subsection (i)(2)(C), by striking “Director of the Office of Thrift Supervision” and inserting “Corporation”; and
(D) in subsection (m)—
(i) in paragraph (1)—

(1) in subparagraph (A), by striking “and the Director of the Office of Thrift Supervision” and inserting “or the Comptroller of the Currency, as appropriate.”; and

(2) in subparagraph (B), by striking “and orders of the Director of the Office of Thrift Supervision” and inserting “of the Comptroller of the Currency and orders of the Corporation and the Comptroller of the Currency”;

(ii) in paragraph (2)—

(1) in subparagraph (A), by striking “Director of the Office of Thrift Supervision” and inserting “Comptroller of the Currency, as appropriate.”; and

(2) in subparagraph (B)—

(aa) in the matter before clause (i), by striking “Director of the Office of Thrift Supervision” and inserting “Corporation or the Comptroller of the Currency, as appropriate.”;

(bb) in the matter following clause (ii)—

(AA) in the first sentence, by striking “Director of the Office of Thrift Supervision” and inserting “Office of the Comptroller of the Currency, as appropriate.”;

and

(bb) by striking the second sentence and inserting the following: “The Corporation or the Comptroller of the Currency, as appropriate, may take any other corrective measures with respect to the subsidiary, including the authority to require the subsidiary to terminate the activities or operations posing such risks, as the Corporation or the Comptroller of the Currency, respectively, may deem appropriate.”; and

(iii) in paragraph (3)—

(1) in subparagraph (A), in the second sentence—

(aa) by inserting “, in the case of a Federal savings association,” before “consult with”; and

(bb) by striking “Director of the Office of Thrift Supervision” and inserting “Comptroller of the Currency”; and

(II) in subparagraph (B)—

(aa) in the subparagraph heading, by striking “DIRECTOR” and inserting “COMP-TROLLER OF THE CURRENCY”;

(bb) by striking “Office of Thrift Supervision” and inserting “Comptroller of the Currency”;

(cc) by inserting a comma after “sound-

ness”; and

(dd) by inserting “as to Federal savings associations” after “compliance”;

(8) in section 19(e) (12 U.S.C. 1829(e))—
(A) in paragraph (1), by striking “Director of the Office of Thrift Supervision” and inserting “Board of Governors of the Federal Reserve System”; and
(B) in paragraph (2), by striking “Director of the Office of Thrift Supervision” and inserting “Board of Governors of the Federal Reserve System”;
(9) in section 28 (12 U.S.C. 1831e)—
(A) in subsection (e)—
(i) in paragraph (2)—
(1) in subparagraph (A)(ii), by striking “Director of the Office of Thrift Supervision” and inserting “Comptroller of the Currency or the Corporation, as appropriate”;
(II) in subparagraph (C), by striking “Director of the Office of Thrift Supervision” and inserting “Comptroller of the Currency or the Corporation, as appropriate,”; and
(III) in subparagraph (F), by striking “Director of the Office of Thrift Supervision” and inserting “Comptroller of the Currency or the Corporation, as appropriate”; and
(ii) in paragraph (3)—
(1) in subparagraph (A), by striking “Director of the Office of Thrift Supervision” and inserting “Comptroller of the Currency or the Corporation, as appropriate”; and
(II) in subparagraph (B), by striking “Director of the Office of Thrift Supervision” and inserting “Comptroller of the Currency or the Corporation, as appropriate,”; and
(B) in subsection (h)(2), by striking “Director of the Office of Thrift Supervision” and inserting “Comptroller of the Currency, of the Corporation,”; and
(10) in section 33(e) (12 U.S.C. 1831j(e)), by striking “Federal Housing Finance Board, the Comptroller of the Currency, and the Director of the Office of Thrift Supervision” and inserting “Federal Housing Finance Agency and the Comptroller of the Currency”.

SEC. 364. FEDERAL HOME LOAN BANK ACT.

(a) REPEAL OF SECTION 18(c).—Effective 90 days after the transfer date, section 18(c) of the Federal Home Loan Bank Act (12 U.S.C. 1438(c)) is repealed.
(b) REPEAL OF SECTION 21A.—Section 21A of the Federal Home Loan Bank Act (12 U.S.C. 1441a) is repealed.


(1) in section 1315(b) (12 U.S.C. 4515(b)), by striking “the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision,” and inserting “and the Federal Deposit Insurance Corporation;”; and
(2) in section 1317(c) (12 U.S.C. 4517(c)), by striking “the Federal Deposit Insurance Corporation, or the Director of the Office of Thrift Supervision” and inserting “or the Federal Deposit Insurance Corporation”.

12 USC 1438 note. Effective date.
SEC. 366. FEDERAL RESERVE ACT.

The Federal Reserve Act (12 U.S.C. 221 et seq.) is amended—
(1) in section 11(a)(2) (12 U.S.C. 248(a)(2))—
(A) by inserting “State savings associations that are
insured depository institutions (as defined in section 3 of
the Federal Deposit Insurance Act),” after “case of insured”;
(B) by striking “Director of the Office of Thrift Super-
vision” and inserting “Comptroller of the Currency”;
(C) by inserting “Federal” before “savings association
which”; and
(D) by striking “savings and loan association” and
inserting “savings association”;
(2) in section 19(b) (12 U.S.C. 461(b))—
(A) in paragraph (1)(F), by striking “Director of the
Office of Thrift Supervision” and inserting “Comptroller
of the Currency”; and
(B) in paragraph (4)(B), by striking “Director of the
Office of Thrift Supervision” and inserting “Comptroller
of the Currency”.

SEC. 367. FINANCIAL INSTITUTIONS REFORM, RECOVERY, AND
ENFORCEMENT ACT OF 1989.

The Financial Institutions Reform, Recovery, and Enforcement
Act of 1989 is amended—
(1) in section 203 (12 U.S.C. 1812 note), by striking sub-
section (b);
(2) in section 302(1) (12 U.S.C. 1467a note), by striking
“Director of the Office of Thrift Supervision” and inserting
“Comptroller of the Currency”;
(3) in section 305(12 U.S.C. 1464 note), by striking sub-
section (b);
(4) in section 308 (12 U.S.C. 1463 note)—
(A) in subsection (a), by striking “Director of the Office
of Thrift Supervision” and inserting “Chairman of the
Board of Governors of the Federal Reserve System, the
Comptroller of the Currency, the Chairman of the National
Credit Union Administration,”; and
(B) by adding at the end the following new subsection:
“(c) REPORTS.—The Secretary of the Treasury, the Chairman
of the Board of Governors of the Federal Reserve System, the
Comptroller of the Currency, the Chairman of the National Credit
Union Administration, and the Chairperson of Board of Directors
of the Federal Deposit Insurance Corporation shall each submit
an annual report to the Congress containing a description of actions
taken to carry out this section.”;
(5) in section 402 (12 U.S.C. 1437 note)—
(A) in subsection (a), by striking “Director of the Office
of Thrift Supervision” and inserting “Comptroller of the
Currency”;
(B) by striking subsection (b);
(C) in subsection (c)—
(i) in paragraph (1), by striking “Office of Thrift Supervision” and inserting “Comptroller of the Currency”; and
(ii) in each of paragraphs (2), (3), and (4), by striking “Director of the Office of Thrift Supervision”
each place that term appears and inserting “Comptroller of the Currency”; and
(D) by striking “Federal Housing Finance Board” each place that term appears and inserting “Federal Housing Finance Agency”;
(6) in section 1103(a) (12 U.S.C. 3332(a)), by striking “and the Resolution Trust Corporation”; 
(7) in section 1205(b) (12 U.S.C. 1818 note)—
(A) in paragraph (1)—
(i) by striking subparagraph (B); and
(ii) by redesignating subparagraphs (C) through (F) as subparagraphs (B) through (E), respectively; and
(B) in paragraph (2), by striking “paragraph (1)(F)” and inserting “paragraph (1)(E)”;
(8) in section 1206 (12 U.S.C. 1833b)—
(A) by striking “Board, the Oversight Board of the Resolution Trust Corporation” and inserting “Agency, and”; and
(B) by striking “, and the Office of Thrift Supervision”; 
(9) in section 1216 (12 U.S.C. 1833e)—
(A) in subsection (a)—
(i) in paragraph (3), by adding “and” at the end; 
(ii) in paragraph (4), by striking the semicolon at the end and inserting a period; 
(iii) by striking paragraphs (2), (5), and (6); and
(iv) by redesignating paragraphs (3) and (4), as paragraphs (2) and (3), respectively; 
(B) in subsection (c)—
(i) by striking “the Director of the Office of Thrift Supervision,” and inserting “and”; and
(ii) by striking “the Thrift Depositor Protection Oversight Board of the Resolution Trust Corporation, and the Resolution Trust Corporation”; and 
(C) in subsection (d)—
(i) by striking paragraphs (3), (5), and (6); and
(ii) by redesignating paragraphs (4), (7), and (8) as paragraphs (3), (4), and (5), respectively.


Section 3(a)(5) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4003(a)(5)) is amended by striking “, the Office of Thrift Supervision”.

SEC. 369. HOME OWNERS’ LOAN ACT.

The Home Owners’ Loan Act (12 U.S.C. 1461 et seq.) is amended—
(1) in section 1 (12 U.S.C. 1461), by striking the table of contents;
(2) in section 2 (12 U.S.C. 1462), as amended by this Act—
(A) by striking paragraphs (1) and (3); 
(B) by redesignating paragraph (2) as paragraph (1); 
(C) by redesignating paragraphs (4) through (9) as paragraphs (2) through (7), respectively; and
(D) by adding at the end the following:
Definitions.
“(8) BOARD.—The term ‘Board’, other than in the context of the Board of Directors of the Corporation, means the Board of Governors of the Federal Reserve System.

“(9) COMPTROLLER.—The term ‘Comptroller’ means the Comptroller of the Currency.”;

(3) in section 3 (12 U.S.C. 1462a)—

(A) by striking the section heading and inserting the following:

“SEC. 3. ADMINISTRATIVE PROVISIONS.”;

(B) by striking subsections (a), (b), (c), (d), (g), (h), (i), and (j);

(C) by redesignating subsections (e) and (f) as subsections (a) and (b), respectively;

(D) in subsection (a), as so redesignated—

(i) in the heading by striking “OF THE DIRECTOR”;

and

(ii) in the matter preceding paragraph (1), by striking “The Director” and inserting “In accordance with subtitle A of title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the appropriate Federal banking agency”; and

(E) in subsection (b), as so redesignated, by striking “Director” and inserting “appropriate Federal banking agency”;

(4) in section 4 (12 U.S.C. 1463)—

(A) in subsection (a)—

(i) in the subsection heading, by striking “FEDERAL”;

(ii) by striking paragraphs (1) and (2) and inserting the following:

“(1) EXAMINATION AND SAFE AND SOUND OPERATION.—

“(A) FEDERAL SAVINGS ASSOCIATIONS.—The Comptroller shall provide for the examination and safe and sound operation of Federal savings associations.

“(B) STATE SAVINGS ASSOCIATIONS.—The Corporation shall provide for the examination and safe and sound operation of State savings associations.

“(2) REGULATIONS FOR SAVINGS ASSOCIATIONS.—The Comptroller may prescribe regulations with respect to savings associations, as the Comptroller determines to be appropriate to carry out the purposes of this Act.”; and

(iii) in paragraph (3), by striking “Director” each place that term appears and inserting “Comptroller and the Corporation”;

(B) in subsection (b)—

(i) in paragraph (2)—

(I) in subparagraph (A), by adding “and” at the end;

(II) in subparagraph (B), by striking “; and” and inserting a period; and

(III) by striking subparagraph (C); and

(ii) by striking “Director” each place that term appears and inserting “Comptroller”;

(C) in subsection (c)—
(i) by striking “All regulations and policies of the Director” and inserting “The regulations of the Comptroller and the policies of the Comptroller and the Corporation”; and
(ii) by striking “of the Currency”;
(D) in subsection (e)(5), by striking “Director” and inserting “Comptroller”;
(E) in subsection (f), by striking “Director” each place that term appears and inserting “appropriate Federal banking agency”; and
(F) in subsection (h), by striking “Director” each place that term appears and inserting “appropriate Federal banking agency”;
(5) in section 5 (12 U.S.C. 1464)—
(A) in subsection (a), by striking “Director”, each place such term appears and inserting “Comptroller of the Currency”;
(B) in subsection (b), by striking “Director”, each place such term appears and inserting “Comptroller of the Currency”;
(C) in subsection (c)—
(i) in paragraph (5)—
(I) in subparagraph (A), by striking “Director” and inserting “appropriate Federal banking agency”; and
(II) in subparagraph (B)—
(aa) by striking “The Director” and inserting “The appropriate Federal banking agency”; and
(bb) by striking “the Director” and inserting “the appropriate Federal banking agency”;
(D) in subsection (d)—
(i) in paragraph (1)—
(I) in subparagraph (A)—
(aa) in the first sentence, by striking “Director” and inserting “appropriate Federal banking agency”; and
(bb) in the second sentence—
(AA) by striking “Director’s own name and through the Director’s own attorneys” and inserting “name of the appropriate Federal banking agency and through the attorneys of the appropriate Federal banking agency”; and
(BB) by striking “Director” each place that term appears and inserting “appropriate Federal banking agency”; and
(cc) in the third sentence, by striking “Director” each place that term appears and inserting “Comptroller”;
(II) in subparagraph (B)—
(aa) in clauses (i) through (iv), by striking “Director” each place that term appears and inserting “appropriate Federal banking agency”;
(III) in clause (v)—
(aa) in the matter preceding subclause (I), by striking “Director” and inserting “appropriate Federal banking agency”; 
(bb) in subclause (II), by striking “subpenas” and inserting “subpoenas”; and 
(cc) in the matter following subclause (II), by striking “subpena” and inserting “subpoena”; 
(IV) in clause (vi)— 
(aa) in the first sentence, by striking “Director” and inserting “appropriate Federal banking agency”; and 
(bb) in the second sentence, by striking “Director” and inserting “Comptroller”; 
(V) in clause (vii)— 
(aa) in the first sentence, by striking “subpena” and inserting “subpoena”; 
(bb) in the second sentence, by striking “subpenaeed” and inserting “subpoenaed”; and 
(cc) in the third sentence, by striking “Director” and inserting “appropriate Federal banking agency”; 
(ii) in paragraph (2)— 
(I) in subparagraph (A)— 
(aa) by striking “Director of the Office of Thrift Supervision” and inserting “appropriate Federal banking agency”; 
(bb) by striking “any insured savings association” and inserting “an insured savings association”; and 
(cc) by striking “Director determines, in the Director’s discretion” and inserting “appropriate Federal banking agency determines, in the discretion of the appropriate Federal banking agency”; 
(II) in subparagraph (B), by striking “Director” each place that term appears and inserting “appropriate Federal banking agency”; 
(III) in subparagraphs (C) and (D), by striking “Director” and inserting “appropriate Federal banking agency”; 
(IV) in subparagraph (E)— 
(aa) in clause (ii)— 
(AA) in the clause heading, by striking “OR RTC”; and 
(BB) by striking “or the Resolution Trust Corporation, as appropriate,” each place that term appears; and 
(bb) by striking “Director” each place that term appears and inserting “appropriate Federal banking agency”; and 
(iii) in paragraph (3)— 
(I) in subparagraph (A), by striking “Director” each place that term appears and inserting “Comptroller”; and 
(II) in subparagraph (B)—
(aa) in the subparagraph heading, by striking “OR RTC”;  
(bb) by striking “Corporation or the Resolution Trust”; and  
(cc) by striking “Director” and inserting “Comptroller”;  
(iv) in paragraph (4), by striking “Director” and inserting “appropriate Federal banking agency”;  
(v) in paragraph (6)—  
(I) in subparagraph (A), by striking “Director” and inserting “Comptroller”; and  
(II) in subparagraphs (B) and (C), by striking “Director” each place that term appears and inserting “appropriate Federal banking agency”;  
(vi) in paragraph (7)—  
(I) in subparagraphs (A), (B), and (D), by striking “Director” each place that term appears and inserting “appropriate Federal banking agency”;  
(II) in subparagraph (C), by striking “Director” and inserting “Federal Deposit Insurance Corporation or the Comptroller, as appropriate,”; and  
(III) by striking subparagraph (E) and inserting the following:  
“(E) ADMINISTRATION BY THE COMPTROLLER AND THE CORPORATION.—The Comptroller may issue such regulations, and the appropriate Federal banking agency may issue such orders, including those issued pursuant to section 8 of the Federal Deposit Insurance Act, as may be necessary to administer and carry out this paragraph and to prevent evasion of this paragraph.”;  
(E) in subsection (e)(2), strike “Director” and insert “Comptroller”;  
(F) in subsection (i)—  
(i) by striking “Director”, each place such term appears, and inserting “Comptroller”;  
(ii) in paragraph (2), in the heading, by striking “DIRECTOR” and inserting “COMPTROLLER”;  
(iii) in paragraph (3)(A), by striking “of the Currency”; and  
(iv) except as provided in clauses (i) through (iii), by striking “Director” each place such term appears and inserting “Comptroller”;  
(G) in subsection (o)—  
(i) in paragraph (1), by striking “Director” and inserting “Comptroller”; and  
(ii) in paragraph (2)(B), by striking “Director’s determination” and inserting “determination of the Comptroller”;  
(H) in subsections (m), (n), (o), and (p), by striking “Director”, each place such term appears, and inserting “Comptroller”;  
(I) in subsection (q)—  
(i) in paragraph (6), by striking “of Governors of the Federal Reserve System”;  
(ii) by striking “Director” each place that term appears and inserting “Board”; and
(iii) by inserting “in consultation with the Comptroller and the Corporation,” before “considers”;
(J) in subsection (r)(3), by striking “Director” and inserting “Comptroller of the Currency”;
(K) in subsection (s)—
   (i) in paragraph (1), strike “Director” and insert “Comptroller of the Currency”;
   (ii) in paragraph (2), strike “Director” and insert “Comptroller of the Currency”;
   (iii) in paragraph (3), by striking “Director’s discretion, the Director” and inserting “discretion of the appropriate Federal banking agency, the appropriate Federal banking agency.”;
   (iv) in paragraph (4), by striking “Director” each place that term appears and inserting “appropriate Federal banking agency”;
   (v) in paragraph (5)—
      (I) by striking “Director”, each place such term appears, and inserting “appropriate Federal banking agency”;
      (II) by striking “Director’s approval” and inserting “approval of the appropriate Federal banking agency”;
(L) in subsection (t)—
   (i) in paragraph (1), by striking subparagraph (D);
   (ii) by striking paragraph (3) and inserting the following:
      “(3) [Repealed].”;
   (iii) in paragraph (5)—
      (I) in subparagraph (B), by striking “Corporation, in its sole discretion” and inserting “appropriate Federal banking agency, in the sole discretion of the appropriate Federal banking agency”;
      (II) by striking “Director’s approval” and inserting “approval of the appropriate Federal banking agency”;
   (iv) in paragraph (6)—
      (I) by striking subparagraph (A) and inserting “(A) [Reserved].”;
      (II) in subparagraph (B), by striking “Director” each place that term appears and inserting “appropriate Federal banking agency”;
      (III) in subparagraph (C)—
         (aa) in clause (i), by striking “Director’s prior approval” and inserting “prior approval of the appropriate Federal banking agency”;
         (bb) in clause (ii), by striking “Director’s discretion” and inserting “discretion of the appropriate Federal banking agency”;
         (cc) by striking “Director” each place that term appears and inserting “appropriate Federal banking agency”;
      (IV) in subparagraph (E), by striking “Director shall” and inserting “appropriate Federal banking agency may”; and
      (V) in subparagraph (F), by striking “Director” and all that follows through the end of the
subparagraph and inserting “appropriate Federal banking agency under this Act or any other provision of law.”;
(v) in paragraph (7), by striking “Director” each place that term appears and inserting “appropriate Federal banking agency”;
(vi) by striking paragraph (8) and inserting the following:
“(8) [Repealed].”;
(vii) in paragraph (9)—
(I) in subparagraph (A), by striking “Director” and inserting “Comptroller”;
(II) in subparagraph (C), by striking “of the Currency”;
(III) by striking subparagraph (B) and designating subparagraphs (C) and (D) as subparagraphs (B) and (C), respectively; and
(viii) except as provided in clauses (i) through (vii), by striking “Director” each place that term appears and inserting “appropriate Federal banking agency”;
(M) in subsection (u), by striking “Director” each place that term appears and inserting “appropriate Federal banking agency”;
(N) in subsection (v)—
(i) in paragraph (2), by striking “Director’s determinations” and inserting “determinations of the appropriate Federal banking agency”;
(ii) in subparagraph (B), by striking “Director” each place that term appears and inserting “appropriate Federal banking agency”;
(O) in subsection (w)(1)—
(i) in subparagraph (A)(II), by striking “Director’s intention” and inserting “intention of the Comptroller”; and
(ii) in subparagraph (B), by striking “Director’s intention” and inserting “intention of the Comptroller”;
(P) except as provided in subparagraphs (A) through (J), by striking “Director” each place that term appears and inserting “Comptroller”;
(6) in section 8 (12 U.S.C. 1466a), by striking “Director” each place that term appears and inserting “Comptroller”;
(7) in section 9 (12 U.S.C. 1467)—
(A) in subsection (a), by striking “assessed by the Director” and all that follows through the end of the subsection and inserting the following: “assessed by—
“(1) the Comptroller, against each such Federal savings association, as the Comptroller deems necessary or appropriate; and
“(2) the Corporation, against each such State savings association, as the Corporation deems necessary or appropriate.”;
(B) in subsection (b), by striking “Director”, each place such term appears, and inserting “Comptroller or Corporation, as appropriate”;
(C) in subsection (e)—
(i) by striking “Only the Director” and inserting “The Comptroller”; and
(ii) by striking “Director’s designee” and inserting “designee of the Comptroller”;
(D) by striking subsection (f) and inserting the following:
“(f) [Reserved].”;
(E) in subsection (g)—
(i) in paragraph (1), by striking “Director” and inserting “appropriate Federal banking agency”; and
(ii) in paragraph (2), by striking “Director, or the Corporation, as the case may be,” and inserting “appropriate Federal banking agency for the savings association”;
(F) in subsection (i), by striking “Director” each place that term appears and inserting “appropriate Federal banking agency”;
(G) in subsection (j), by striking “Director’s sole discretion” and inserting “sole discretion of the appropriate Federal banking agency”;
(H) in subsection (k), by striking “Director may assess against institutions for which the Director is the appropriate Federal banking agency, as defined in section 3 of the Federal Deposit Insurance Act,” and inserting “appropriate Federal banking agency may assess against an institution”; and
(I) except as provided in subparagraphs (A) through (G), by striking “Director” each place that term appears and inserting “appropriate Federal banking agency”;
(D) in subsection (g)(5)(B), by striking “the Director’s discretion” and inserting “the discretion of the Board”;
(E) in subsection (l), by striking “Director” each place that term appears and inserting “appropriate Federal banking agency”;
(F) in subsection (m), by striking “Director” and inserting “appropriate Federal banking agency”;
(G) in subsection (n), by striking “Director’s sole discretion” and inserting “sole discretion of the appropriate Federal banking agency”;
(H) in subsection (o), by striking “Director, or the Corporation, as the case may be,” and inserting “appropriate Federal banking agency for the savings association”; and
(I) in subsection (p), by striking “Director” each place that term appears and inserting “appropriate Federal banking agency”;
(8) in section 10 (12 U.S.C. 1467a)—
(A) in subsection (a)(1), by striking “Director” each place that term appears and inserting “appropriate Federal banking agency”;
(G) in subsection (p)—
   (i) in paragraph (1)—
      (I) by striking “Director determines” the 1st place such term appears and inserting “Board or the appropriate Federal banking agency for the savings association determines”;
      (II) by striking “Director may” and inserting “Board may”; and
      (III) by striking “Director determines” the 2nd place such term appears and inserting “Board, in consultation with the appropriate Federal banking agency for the savings association determines”; and
   (ii) in paragraph (2), by striking “Director”, each place such term appears, and inserting “Board”;
(H) in subsection (q), by striking “Director”, each place such term appears, and inserting “Board”;
(I) in subsection (r), by striking “Director”, each place such term appears, and inserting “Board or appropriate Federal banking agency”;
(J) in subsection (s)—
   (i) in paragraph (2)—
      (I) in subparagraph (B)(ii), by striking “Director’s judgment” and inserting “judgment of the appropriate Federal banking agency for the savings association”; and
      (II) by striking “Director” each place that term appears and inserting “appropriate Federal banking agency for the savings association”; and
   (ii) in paragraph (4), by striking “Director” and inserting “Comptroller”; and
(K) except as provided in subparagraphs (A) through (J), by striking “Director” each place that term appears and inserting “Board”;
(9) in section 11 (12 U.S.C. 1468), by striking “Director” each place that term appears and inserting “appropriate Federal banking agency”;
(10) in section 12 (12 U.S.C. 1468a), by striking “the Director” and inserting “a Federal banking agency”; and
(11) in section 13 (12 U.S.C. 1468a) is amended by striking “Director” and inserting “a Federal banking agency”.

SEC. 370. HOUSING ACT OF 1948.

Section 502(c) of the Housing Act of 1948 (12 U.S.C. 1701c(c)) is amended—
   (1) in the matter preceding paragraph (1), by striking “and the Director of the Office of Thrift Supervision” and inserting “, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation”; and
   (2) in paragraph (3), by striking “Board” and inserting “Agency”.


Section 543 of the Housing and Community Development Act of 1992 (Public Law 102–550; 106 Stat. 3798) is amended—
   (1) in subsection (c)(1)—
      (A) by striking subparagraphs (D) through (F); and
(B) by redesignating subparagraphs (G) and (H) as subparagraphs (D) and (E), respectively; and
(2) in subsection (f)—
(A) in paragraph (2), by striking “the Office of Thrift Supervision,” each place that term appears; and
(B) in paragraph (3)—
(i) in the matter preceding subparagraph (A), by striking “the Office of Thrift Supervision,”; and
(ii) in subparagraph (D), by striking “Office of Thrift Supervision,”.

SEC. 372. HOUSING AND URBAN-RURAL RECOVERY ACT OF 1983.


SEC. 373. NATIONAL HOUSING ACT.

Section 202(f) of the National Housing Act (12 U.S.C. 1708(f)) is amended—

(1) by striking paragraph (5) and inserting the following:
“(5) if the mortgagee is a national bank, a subsidiary or affiliate of such bank, a Federal savings association or a subsidiary or affiliate of a savings association, the Comptroller of the Currency;”;
(2) in paragraph (6), by adding “and” at the end;
(3) in paragraph (7)—
(A) by inserting “or State savings association” after “State bank”; and
(B) by striking “; and” and inserting a period; and
(4) by striking paragraph (8).

SEC. 374. NEIGHBORHOOD REINVESTMENT CORPORATION ACT.

Section 606(c)(3) of the Neighborhood Reinvestment Corporation Act (42 U.S.C. 8105(c)(3)) is amended by striking “Federal Home Loan Bank Board” and inserting “Federal Housing Finance Agency”.

SEC. 375. PUBLIC LAW 93–100.

Section 5(d) of Public Law 93–100 (12 U.S.C. 1470(a)) is amended—

(1) in paragraph (1), by striking “Federal Savings and Loan Insurance Corporation with respect to insured institutions, the Board of Governors of the Federal Reserve System with respect to State member insured banks, and the Federal Deposit Insurance Corporation with respect to State nonmember insured banks” and inserting “appropriate Federal banking agency, with respect to the institutions subject to the jurisdiction of each such agency;”; and
(2) in paragraph (2), by striking “supervisory” and inserting “banking”.

SEC. 376. SECURITIES EXCHANGE ACT OF 1934.


(1) in section 3(a)(34) (15 U.S.C. 78c(a)(34))—
(A) in subparagraph (A)—
(i) in clause (i), by striking “or a subsidiary or a department or division of any such bank” and inserting “a subsidiary or a department or division of any such bank, a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2))), the deposits of which are insured by the Federal Deposit Insurance Corporation, or a subsidiary or department or division of any such Federal savings association”;

(ii) in clause (ii), by striking “or a subsidiary or a department or division of such subsidiary” and inserting “a subsidiary or a department or division of such subsidiary, or a savings and loan holding company”;

(iii) in clause (iii), by striking “or a subsidiary or department or division thereof;” and inserting “a subsidiary or department or division of any such bank, a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))), the deposits of which are insured by the Federal Deposit Insurance Corporation, or a subsidiary or a department or division of any such State savings association; and”;

(iv) by striking clause (iv); and

(v) by redesigning clause (v) as clause (iv);

(B) in subparagraph (B)—

(i) in clause (i), by striking “or a subsidiary of any such bank” and inserting “a subsidiary of any such bank, a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2))), the deposits of which are insured by the Federal Deposit Insurance Corporation, or a subsidiary of any such Federal savings association”;

(ii) in clause (ii), by striking “or a subsidiary of a bank holding company which is a bank other than a bank specified in clause (i), (iii), or (iv) of this subparagraph” and inserting “a subsidiary of a bank holding company that is a bank other than a bank specified in clause (i) or (iii) of this subparagraph, or a savings and loan holding company”;

(iii) in clause (iii), by striking “or a subsidiary thereof;” and inserting “a subsidiary of any such bank, a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))), the deposits of which are insured by the Federal Deposit Insurance Corporation, or a subsidiary of any such State savings association; and”;

(iv) by striking clause (iv); and

(v) by redesigning clause (v) as clause (iv);

(C) in subparagraph (C)—

(i) in clause (i), by striking “bank” and inserting “bank or a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2))), the deposits of which are insured by the Federal Deposit Insurance Corporation”;

(ii) in clause (ii), by striking “or a subsidiary of any such bank, a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2))), the deposits of which are insured by the Federal Deposit Insurance Corporation, or a subsidiary or department or division of any such Federal savings association”;

(iii) in clause (iii), by striking “or a subsidiary or department or division of such subsidiary” and inserting “a subsidiary or a department or division of such subsidiary, or a savings and loan holding company”;

(iv) by striking clause (iv); and

(v) by redesigning clause (v) as clause (iv);
(ii) in clause (ii), by striking “or a subsidiary of a bank holding company which is a bank other than a bank specified in clause (i), (iii), or (iv) of this subparagraph” and inserting “a subsidiary of a bank holding company that is a bank other than a bank specified in clause (i) or (iii) of this subparagraph, or a savings and loan holding company”;

(iii) in clause (iii), by striking “System)” and inserting, “System) or a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))), the deposits of which are insured by the Federal Deposit Insurance Corporation; and”;

(iv) by striking clause (iv); and

(v) by redesigning clause (v) as clause (iv);

(D) in subparagraph (D)—

(i) in clause (i), by inserting after “bank” the following: “or a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2))), the deposits of which are insured by the Federal Deposit Insurance Corporation”;

(ii) in clause (ii), by adding “and” at the end;

(iii) by striking clause (iii);

(iv) by redesigning clause (iv) as clause (iii); and

(v) in clause (iii), as so redesignated, by inserting after “bank” the following: “or a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))), the deposits of which are insured by the Federal Deposit Insurance Corporation”;

(E) in subparagraph (F)—

(i) in clause (i), by inserting after “bank” the following: “or a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2))), the deposits of which are insured by the Federal Deposit Insurance Corporation”;

(ii) by striking clause (ii);

(iii) by redesigning clauses (iii), (iv), and (v) as clauses (ii), (iii), and (iv), respectively; and

(iv) in clause (iii), as so redesignated, by inserting before the semicolon the following: “or a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))), the deposits of which are insured by the Federal Deposit Insurance Corporation”;

(F) in subparagraph (G)—

(i) in clause (i), by inserting after “national bank” the following: “, a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act), the deposits of which are insured by the Federal Deposit Insurance Corporation,”;

(ii) in clause (iii)—

(I) by inserting after “bank)’ the following:

“, a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act), the deposits of which are insured by the Federal Deposit Insurance Corporation,”; and
(II) by adding “and” at the end;
(iii) by striking clause (iv); and
(iv) by redesignating clause (v) as clause (iv); and
(G) in the undesignated matter following subparagraph (H), by striking “, and the term ‘District of Columbia savings and loan association’ means any association subject to examination and supervision by the Office of Thrift Supervision under section 8 of the Home Owners’ Loan Act of 1933”;
(2) in section 12(i) (15 U.S.C. 78l(i))—
(A) in paragraph (1), by inserting after “national banks” the following: “and Federal savings associations, the accounts of which are insured by the Federal Deposit Insurance Corporation”;
(B) by striking “(3)” and all that follows through “vested in the Office of Thrift Supervision” and inserting “and with respect to all other insured banks and State savings associations, the accounts of which are insured by the Federal Deposit Insurance Corporation, are vested in the Federal Deposit Insurance Corporation”; and
(C) in the second sentence, by striking “the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision” and inserting “and the Federal Deposit Insurance Corporation”;
(3) in section 15C(g)(1) (15 U.S.C. 78o–5(g)(1)), by striking “the Director of the Office of Thrift Supervision, the Federal Savings and Loan Insurance Corporation,”; and
(4) in section 23(b)(1) (15 U.S.C. 78w(b)(1)), by striking “, other than the Office of Thrift Supervision,”.

SEC. 377. TITLE 18, UNITED STATES CODE.
Title 18, United States Code, is amended—
(1) in section 212(c)(2)—
(A) by striking subparagraph (C); and
(B) by redesignating subparagraphs (D) through (H) as subparagraphs (C) through (G), respectively;
(2) in section 657, by striking “Office of Thrift Supervision, the Resolution Trust Corporation,”;
(3) in section 981(a)(1)(D)—
(A) by striking “Resolution Trust Corporation,”; and
(B) by striking “or the Office of Thrift Supervision”;
(4) in section 982(a)(3)—
(A) by striking “Resolution Trust Corporation,”; and
(B) by striking “or the Office of Thrift Supervision”;
(5) in section 1006—
(A) by striking “Office of Thrift Supervision,”; and
(B) by striking “the Resolution Trust Corporation,”;
(6) in section 1014—
(A) by striking “the Office of Thrift Supervision”; and
(B) by striking “the Resolution Trust Corporation,”;
and
(7) in section 1032(1)—
(A) by striking “the Resolution Trust Corporation,”; and
(B) by striking “or the Director of the Office of Thrift Supervision”.

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SEC. 378. TITLE 31, UNITED STATES CODE.

Title 31, United States Code, is amended—

(1) in section 321—

(A) in subsection (c)—

(i) in paragraph (1), by adding “and” at the end;

(ii) in paragraph (2), by striking “; and” and inserting a period; and

(iii) by striking paragraph (3); and

(B) by striking subsection (e); and

(2) in section 714(a), by striking “the Office of the Comptroller of the Currency, and the Office of Thrift Supervision.” and inserting “and the Office of the Comptroller of the Currency.”.

TITLE IV—REGULATION OF ADVISERS TO HEDGE FUNDS AND OTHERS

SEC. 401. SHORT TITLE.

This title may be cited as the “Private Fund Investment Advisers Registration Act of 2010”.

SEC. 402. DEFINITIONS.

(a) INVESTMENT ADVISERS ACT OF 1940 DEFINITIONS.—Section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)) is amended by adding at the end the following:

“(29) The term ‘private fund’ means an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), but for section 3(c)(1) or 3(c)(7) of that Act.

“(30) The term ‘foreign private adviser’ means any investment adviser who—

“(A) has no place of business in the United States;

“(B) has, in total, fewer than 15 clients and investors in the United States in private funds advised by the investment adviser;

“(C) has aggregate assets under management attributable to clients in the United States and investors in the United States in private funds advised by the investment adviser of less than $25,000,000, or such higher amount as the Commission may, by rule, deem appropriate in accordance with the purposes of this title; and

“(D) neither—

“(i) holds itself out generally to the public in the United States as an investment adviser; nor

“(ii) acts as—

“(I) an investment adviser to any investment company registered under the Investment Company Act of 1940; or

“(II) a company that has elected to be a business development company pursuant to section 54 of the Investment Company Act of 1940 (15 U.S.C. 80a–53), and has not withdrawn its election.”.

(b) OTHER DEFINITIONS.—As used in this title, the terms “investment adviser” and “private fund” have the same meanings as in section 202 of the Investment Advisers Act of 1940, as amended by this title.
SEC. 403. ELIMINATION OF PRIVATE ADVISER EXEMPTION; LIMITED EXEMPTION FOR FOREIGN PRIVATE ADVISERS; LIMITED INTRASTATE EXEMPTION.

Section 203(b) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(b)) is amended—

(1) in paragraph (1), by inserting “, other than an investment adviser who acts as an investment adviser to any private fund,” before “all of whose”;

(2) by striking paragraph (3) and inserting the following:

“(3) any investment adviser that is a foreign private adviser”;

and

(3) in paragraph (5), by striking “or” at the end;

(4) in paragraph (6)—

(A) by striking “any investment adviser” and inserting “(A) any investment adviser”;

(B) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively; and

(C) in clause (ii) (as so redesignated), by striking the period at the end and inserting “; or”;

and

(D) by adding at the end the following:

“(B) any investment adviser that is registered with the Commodity Futures Trading Commission as a commodity trading advisor and advises a private fund, provided that, if after the date of enactment of the Private Fund Investment Advisers Registration Act of 2010, the business of the advisor should become predominately the provision of securities-related advice, then such adviser shall register with the Commission.”.

(5) by adding at the end the following:

“(7) any investment adviser, other than any entity that has elected to be regulated or is regulated as a business development company pursuant to section 54 of the Investment Company Act of 1940 (15 U.S.C. 80a–54), who solely advises—

“(A) small business investment companies that are licensees under the Small Business Investment Act of 1958;

“(B) entities that have received from the Small Business Administration notice to proceed to qualify for a license as a small business investment company under the Small Business Investment Act of 1958, which notice or license has not been revoked; or

“(C) applicants that are affiliated with 1 or more licensed small business investment companies described in subparagraph (A) and that have applied for another license under the Small Business Investment Act of 1958, which application remains pending.”.

SEC. 404. COLLECTION OF SYSTEMIC RISK DATA; REPORTS; EXAMINATIONS; DISCLOSURES.

Section 204 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–4) is amended—

(1) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(2) by inserting after subsection (a) the following:

“(b) RECORDS AND REPORTS OF PRIVATE FUNDS.—

“(1) IN GENERAL.—The Commission may require any investment adviser registered under this title—

“(A) to maintain such records of, and file with the Commission such reports regarding, private funds advised
by the investment adviser, as necessary and appropriate in the public interest and for the protection of investors, or for the assessment of systemic risk by the Financial Stability Oversight Council (in this subsection referred to as the ‘Council’); and

“(B) to provide or make available to the Council those reports or records or the information contained therein.

“(2) TREATMENT OF RECORDS.—The records and reports of any private fund to which an investment adviser registered under this title provides investment advice shall be deemed to be the records and reports of the investment adviser.

“(3) REQUIRED INFORMATION.—The records and reports required to be maintained by an investment adviser and subject to inspection by the Commission under this subsection shall include, for each private fund advised by the investment adviser, a description of—

“(A) the amount of assets under management and use of leverage, including off-balance-sheet leverage;
“(B) counterparty credit risk exposure;
“(C) trading and investment positions;
“(D) valuation policies and practices of the fund;
“(E) types of assets held;
“(F) side arrangements or side letters, whereby certain investors in a fund obtain more favorable rights or entitlements than other investors;
“(G) trading practices; and
“(H) such other information as the Commission, in consultation with the Council, determines is necessary and appropriate in the public interest and for the protection of investors or for the assessment of systemic risk, which may include the establishment of different reporting requirements for different classes of fund advisers, based on the type or size of private fund being advised.

“(4) MAINTENANCE OF RECORDS.—An investment adviser registered under this title shall maintain such records of private funds advised by the investment adviser for such period or periods as the Commission, by rule, may prescribe as necessary and appropriate in the public interest and for the protection of investors, or for the assessment of systemic risk.

“(5) FILING OF RECORDS.—The Commission shall issue rules requiring each investment adviser to a private fund to file reports containing such information as the Commission deems necessary and appropriate in the public interest and for the protection of investors or for the assessment of systemic risk.

“(6) EXAMINATION OF RECORDS.—

“(A) PERIODIC AND SPECIAL EXAMINATIONS.—The Commission—

“(i) shall conduct periodic inspections of the records of private funds maintained by an investment adviser registered under this title in accordance with a schedule established by the Commission; and
“(ii) may conduct at any time and from time to time such additional, special, and other examinations as the Commission may prescribe as necessary and appropriate in the public interest and for the protection of investors, or for the assessment of systemic risk.
“(B) AVAILABILITY OF RECORDS.—An investment adviser registered under this title shall make available to the Commission any copies or extracts from such records as may be prepared without undue effort, expense, or delay, as the Commission or its representatives may reasonably request.

“(7) INFORMATION SHARING.—

“(A) IN GENERAL.—The Commission shall make available to the Council copies of all reports, documents, records, and information filed with or provided to the Commission by an investment adviser under this subsection as the Council may consider necessary for the purpose of assessing the systemic risk posed by a private fund.

“(B) CONFIDENTIALITY.—The Council shall maintain the confidentiality of information received under this paragraph in all such reports, documents, records, and information, in a manner consistent with the level of confidentiality established for the Commission pursuant to paragraph (8). The Council shall be exempt from section 552 of title 5, United States Code, with respect to any information in any report, document, record, or information made available, to the Council under this subsection.”.

“(8) COMMISSION CONFIDENTIALITY OF REPORTS.—Notwithstanding any other provision of law, the Commission may not be compelled to disclose any report or information contained therein required to be filed with the Commission under this subsection, except that nothing in this subsection authorizes the Commission—

“(A) to withhold information from Congress, upon an agreement of confidentiality; or

“(B) prevent the Commission from complying with—

“(i) a request for information from any other Federal department or agency or any self-regulatory organization requesting the report or information for purposes within the scope of its jurisdiction; or

“(ii) an order of a court of the United States in an action brought by the United States or the Commission.

“(9) OTHER RECIPIENTS CONFIDENTIALITY.—Any department, agency, or self-regulatory organization that receives reports or information from the Commission under this subsection shall maintain the confidentiality of such reports, documents, records, and information in a manner consistent with the level of confidentiality established for the Commission under paragraph (8).

“(10) PUBLIC INFORMATION EXCEPTION.—

“(A) IN GENERAL.—The Commission, the Council, and any other department, agency, or self-regulatory organization that receives information, reports, documents, records, or information from the Commission under this subsection, shall be exempt from the provisions of section 552 of title 5, United States Code, with respect to any such report, document, record, or information. Any proprietary information of an investment adviser ascertained by the Commission from any report required to be filed with the Commission pursuant to this subsection shall be subject to the same limitations on public disclosure as any facts
ascertained during an examination, as provided by section 210(b) of this title.

“(B) PROPRIETARY INFORMATION.—For purposes of this paragraph, proprietary information includes sensitive, non-public information regarding—

“(i) the investment or trading strategies of the investment adviser;
“(ii) analytical or research methodologies;
“(iii) trading data;
“(iv) computer hardware or software containing intellectual property; and
“(v) any additional information that the Commission determines to be proprietary.

“(11) ANNUAL REPORT TO CONGRESS.—The Commission shall report annually to Congress on how the Commission has used the data collected pursuant to this subsection to monitor the markets for the protection of investors and the integrity of the markets.”.

SEC. 405. DISCLOSURE PROVISION AMENDMENT.

Section 210(c) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–10(c)) is amended by inserting before the period at the end the following: “or for purposes of assessment of potential systemic risk”.

SEC. 406. CLARIFICATION OF RULEMAKING AUTHORITY.

Section 211 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–11) is amended—

(1) in subsection (a), by inserting before the period at the end of the first sentence the following: “, including rules and regulations defining technical, trade, and other terms used in this title, except that the Commission may not define the term ‘client’ for purposes of paragraphs (1) and (2) of section 206 to include an investor in a private fund managed by an investment adviser, if such private fund has entered into an advisory contract with such adviser”; and

(2) by adding at the end the following:

“(e) DISCLOSURE RULES ON PRIVATE FUNDS.—The Commission and the Commodity Futures Trading Commission shall, after consultation with the Council but not later than 12 months after the date of enactment of the Private Fund Investment Advisers Registration Act of 2010, jointly promulgate rules to establish the form and content of the reports required to be filed with the Commission under subsection 204(b) and with the Commodity Futures Trading Commission by investment advisers that are registered both under this title and the Commodity Exchange Act (7 U.S.C. 1a et seq.).”.

SEC. 407. EXEMPTION OF AND REPORTING BY VENTURE CAPITAL FUND ADVISERS.

Section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3) is amended by adding at the end the following:

“(l) EXEMPTION OF VENTURE CAPITAL FUND ADVISERS.—No investment adviser that acts as an investment adviser solely to 1 or more venture capital funds shall be subject to the registration requirements of this title with respect to the provision of investment advice relating to a venture capital fund. Not later than 1 year after the date of enactment of this subsection, the Commission...
shall issue final rules to define the term ‘venture capital fund’ for purposes of this subsection. The Commission shall require such advisers to maintain such records and provide to the Commission such annual or other reports as the Commission determines necessary or appropriate in the public interest or for the protection of investors.

SEC. 408. EXEMPTION OF AND REPORTING BY CERTAIN PRIVATE FUND ADVISERS.

Section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3) is amended by adding at the end the following:

“(m) EXEMPTION OF AND REPORTING BY CERTAIN PRIVATE FUND ADVISERS.—

“(1) IN GENERAL.—The Commission shall provide an exemption from the registration requirements under this section to any investment adviser of private funds, if each of such investment adviser acts solely as an adviser to private funds and has assets under management in the United States of less than $150,000,000.

“(2) REPORTING.—The Commission shall require investment advisers exempted by reason of this subsection to maintain such records and provide to the Commission such annual or other reports as the Commission determines necessary or appropriate in the public interest or for the protection of investors.

“(n) REGISTRATION AND EXAMINATION OF MID-SIZED PRIVATE FUND ADVISERS.—In prescribing regulations to carry out the requirements of this section with respect to investment advisers acting as investment advisers to mid-sized private funds, the Commission shall take into account the size, governance, and investment strategy of such funds to determine whether they pose systemic risk, and shall provide for registration and examination procedures with respect to the investment advisers of such funds which reflect the level of systemic risk posed by such funds.”.

SEC. 409. FAMILY OFFICES.

(a) IN GENERAL.—Section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(11)) is amended by striking “or (G)” and inserting the following: “; (G) any family office, as defined by rule, regulation, or order of the Commission, in accordance with the purposes of this title; or (H)”.

(b) RULEMAKING.—The rules, regulations, or orders issued by the Commission pursuant to section 202(a)(11)(G) of the Investment Advisers Act of 1940, as added by this section, regarding the definition of the term “family office” shall provide for an exemption that—

(1) is consistent with the previous exemptive policy of the Commission, as reflected in exemptive orders for family offices in effect on the date of enactment of this Act, and the grandfathering provisions in paragraph (3);

(2) recognizes the range of organizational, management, and employment structures and arrangements employed by family offices; and

(3) does not exclude any person who was not registered or required to be registered under the Investment Advisers Act of 1940 on January 1, 2010 from the definition of the term “family office”, solely because such person provides investment advice to, and was engaged before January 1, 2010 in providing investment advice to—
(A) natural persons who, at the time of their applicable investment, are officers, directors, or employees of the family office who—

(i) have invested with the family office before January 1, 2010; and

(ii) are accredited investors, as defined in Regulation D of the Commission (or any successor thereto) under the Securities Act of 1933, or, as the Commission may prescribe by rule, the successors-in-interest thereto;

(B) any company owned exclusively and controlled by members of the family of the family office, or as the Commission may prescribe by rule;

(C) any investment adviser registered under the Investment Adviser Act of 1940 that provides investment advice to the family office and who identifies investment opportunities to the family office, and invests in such transactions on substantially the same terms as the family office invests, but does not invest in other funds advised by the family office, and whose assets as to which the family office directly or indirectly provides investment advice represent, in the aggregate, not more than 5 percent of the value of the total assets as to which the family office provides investment advice.

(c) ANTIFRAUD AUTHORITY.—A family office that would not be a family office, but for subsection (b)(3), shall be deemed to be an investment adviser for the purposes of paragraphs (1), (2) and (4) of section 206 of the Investment Advisers Act of 1940.

SEC. 410. STATE AND FEDERAL RESPONSIBILITIES; ASSET THRESHOLD FOR FEDERAL REGISTRATION OF INVESTMENT ADVISERS.

Section 203A(a) of the of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3a(a)) is amended—

(1) by redesignating paragraph (2) as paragraph (3); and

(2) by inserting after paragraph (1) the following:

“(2) TREATMENT OF MID-SIZED INVESTMENT ADVISERS.—

“(A) IN GENERAL.—No investment adviser described in subparagraph (B) shall register under section 203, unless the investment adviser is an adviser to an investment company registered under the Investment Company Act of 1940, or a company which has elected to be a business development company pursuant to section 54 of the Investment Company Act of 1940, and has not withdrawn the election, except that, if by effect of this paragraph an investment adviser would be required to register with 15 or more States, then the adviser may register under section 203.

“(B) COVERED PERSONS.—An investment adviser described in this subparagraph is an investment adviser that—

“(i) is required to be registered as an investment adviser with the securities commissioner (or any agency or office performing like functions) of the State in which it maintains its principal office and place of business and, if registered, would be subject to examination as an investment adviser by any such commissioner, agency, or office; and
"(ii) has assets under management between—
   "(I) the amount specified under subparagraph
   (A) of paragraph (1), as such amount may have
   been adjusted by the Commission pursuant to that
   subparagraph; and
   "(II) $100,000,000, or such higher amount as
   the Commission may, by rule, deem appropriate
   in accordance with the purposes of this title.”.

SEC. 411. CUSTODY OF CLIENT ASSETS.

The Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.)
is amended by adding at the end the following new section:

"SEC. 223. CUSTODY OF CLIENT ACCOUNTS.

"An investment adviser registered under this title shall take
such steps to safeguard client assets over which such adviser has
custody, including, without limitation, verification of such assets
by an independent public accountant, as the Commission may,
by rule, prescribe.”.

SEC. 412. COMPTROLLER GENERAL STUDY ON CUSTODY RULE COSTS.

The Comptroller General of the United States shall—
(1) conduct a study of—
   (A) the compliance costs associated with the current
   Securities and Exchange Commission rules 204–2 (17
   C.F.R. Parts 275.204–2) and rule 206(4)–2 (17 C.F.R.
   275.206(4)–2) under the Investment Advisers Act of 1940
   regarding custody of funds or securities of clients by invest-
   ment advisers; and
   (B) the additional costs if subsection (b)(6) of rule
   206(4)–2 (17 C.F.R. 275.206(4)–2(b)(6)) relating to oper-
   ational independence were eliminated; and
   (2) submit a report to the Committee on Banking, Housing,
and Urban Affairs of the Senate and the Committee on Finan-
cial Services of the House of Representatives on the results
of such study, not later than 3 years after the date of enactment
of this Act.

SEC. 413. ADJUSTING THE ACCREDITED INVESTOR STANDARD.

(a) IN GENERAL.—The Commission shall adjust any net worth
standard for an accredited investor, as set forth in the rules of
the Commission under the Securities Act of 1933, so that the
individual net worth of any natural person, or joint net worth
with the spouse of that person, at the time of purchase, is more
than $1,000,000 (as such amount is adjusted periodically by rule
of the Commission), excluding the value of the primary residence
of such natural person, except that during the 4-year period that
begins on the date of enactment of this Act, any net worth standard
shall be $1,000,000, excluding the value of the primary residence
of such natural person.

(b) REVIEW AND ADJUSTMENT.—
   (1) INITIAL REVIEW AND ADJUSTMENT.—
       (A) INITIAL REVIEW.—The Commission may undertake
       a review of the definition of the term “accredited investor”,
as such term applies to natural persons, to determine
whether the requirements of the definition, excluding the
requirement relating to the net worth standard described
in subsection (a), should be adjusted or modified for the
protection of investors, in the public interest, and in light of the economy.

(B) ADJUSTMENT OR MODIFICATION.—Upon completion of a review under subparagraph (A), the Commission may, by notice and comment rulemaking, make such adjustments to the definition of the term “accredited investor”, excluding adjusting or modifying the requirement relating to the net worth standard described in subsection (a), as such term applies to natural persons, as the Commission may deem appropriate for the protection of investors, in the public interest, and in light of the economy.

(2) SUBSEQUENT REVIEWS AND ADJUSTMENT.—

(A) SUBSEQUENT REVIEWS.—Not earlier than 4 years after the date of enactment of this Act, and not less frequently than once every 4 years thereafter, the Commission shall undertake a review of the definition, in its entirety, of the term “accredited investor”, as defined in section 230.215 of title 17, Code of Federal Regulations, or any successor thereto, as such term applies to natural persons, to determine whether the requirements of the definition should be adjusted or modified for the protection of investors, in the public interest, and in light of the economy.

(B) ADJUSTMENT OR MODIFICATION.—Upon completion of a review under subparagraph (A), the Commission may, by notice and comment rulemaking, make such adjustments to the definition of the term “accredited investor”, as defined in section 230.215 of title 17, Code of Federal Regulations, or any successor thereto, as such term applies to natural persons, as the Commission may deem appropriate for the protection of investors, in the public interest, and in light of the economy.

SEC. 414. RULE OF CONSTRUCTION RELATING TO THE COMMODITIES EXCHANGE ACT.

The Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) is further amended by adding at the end the following new section:

15 USC 80b–18e.

“SEC. 224. RULE OF CONSTRUCTION RELATING TO THE COMMODITIES EXCHANGE ACT.

“Nothing in this title shall relieve any person of any obligation or duty, or affect the availability of any right or remedy available to the Commodity Futures Trading Commission or any private party, arising under the Commodity Exchange Act (7 U.S.C. 1 et seq.) governing commodity pools, commodity pool operators, or commodity trading advisors.”.

SEC. 415. GAO STUDY AND REPORT ON ACCREDITED INVESTORS.

The Comptroller General of the United States shall conduct a study on the appropriate criteria for determining the financial thresholds or other criteria needed to qualify for accredited investor status and eligibility to invest in private funds, and shall submit a report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives on the results of such study not later than 3 years after the date of enactment of this Act.
SEC. 416. GAO STUDY ON SELF-REGULATORY ORGANIZATION FOR PRIVATE FUNDS.

The Comptroller General of the United States shall—

(1) conduct a study of the feasibility of forming a self-regulatory organization to oversee private funds; and

(2) submit a report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives on the results of such study, not later than 1 year after the date of enactment of this Act.

SEC. 417. COMMISSION STUDY AND REPORT ON SHORT SELLING.

(a) Studies.—The Division of Risk, Strategy, and Financial Innovation of the Commission shall conduct—

(1) a study, taking into account current scholarship, on the state of short selling on national securities exchanges and in the over-the-counter markets, with particular attention to the impact of recent rule changes and the incidence of—

(A) the failure to deliver shares sold short; or

(B) delivery of shares on the fourth day following the short sale transaction; and

(2) a study of—

(A) the feasibility, benefits, and costs of requiring reporting publicly, in real time short sale positions of publicly listed securities, or, in the alternative, reporting such short positions in real time only to the Commission and the Financial Industry Regulatory Authority; and

(B) the feasibility, benefits, and costs of conducting a voluntary pilot program in which public companies will agree to have all trades of their shares marked “short”, “market maker short”, “buy”, “buy-to-cover”, or “long”, and reported in real time through the Consolidated Tape.

(b) Reports.—The Commission shall submit a report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives—

(1) on the results of the study required under subsection (a)(1), including recommendations for market improvements, not later than 2 years after the date of enactment of this Act; and

(2) on the results of the study required under subsection (a)(2), not later than 1 year after the date of enactment of this Act.

SEC. 418. QUALIFIED CLIENT STANDARD.

Section 205(e) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–5(e)) is amended by adding at the end the following: “With respect to any factor used in any rule or regulation by the Commission in making a determination under this subsection, if the Commission uses a dollar amount test in connection with such factor, such as a net asset threshold, the Commission shall, by order, not later than 1 year after the date of enactment of the Private Fund Investment Advisers Registration Act of 2010, and every 5 years thereafter, adjust for the effects of inflation on such test. Any such adjustment that is not a multiple of $100,000 shall be rounded to the nearest multiple of $100,000.”
SEC. 419. TRANSITION PERIOD.

Except as otherwise provided in this title, this title and the amendments made by this title shall become effective 1 year after the date of enactment of this Act, except that any investment adviser may, at the discretion of the investment adviser, register with the Commission under the Investment Advisers Act of 1940 during that 1-year period, subject to the rules of the Commission.

TITLE V—INSURANCE

Subtitle A—Federal Insurance Office

SEC. 501. SHORT TITLE.

This subtitle may be cited as the “Federal Insurance Office Act of 2010”.

SEC. 502. FEDERAL INSURANCE OFFICE.

(a) ESTABLISHMENT OF OFFICE.—Subchapter I of chapter 3 of subtitle I of title 31, United States Code, is amended—

(1) by redesignating section 312 as section 315;

(2) by redesignating section 313 as section 312; and

(3) by inserting after section 312 (as so redesignated) the following new sections:

SEC. 313. FEDERAL INSURANCE OFFICE.

(a) ESTABLISHMENT.—There is established within the Department of the Treasury the Federal Insurance Office.

(b) LEADERSHIP.—The Office shall be headed by a Director, who shall be appointed by the Secretary of the Treasury. The position of Director shall be a career reserved position in the Senior Executive Service, as that position is defined under section 3132 of title 5, United States Code.

(c) FUNCTIONS.—

(1) AUTHORITY PURSUANT TO DIRECTION OF SECRETARY.—The Office, pursuant to the direction of the Secretary, shall have the authority—

(A) to monitor all aspects of the insurance industry, including identifying issues or gaps in the regulation of insurers that could contribute to a systemic crisis in the insurance industry or the United States financial system;

(B) to monitor the extent to which traditionally underserved communities and consumers, minorities (as such term is defined in section 1204(c) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 1811 note)), and low- and moderate-income persons have access to affordable insurance products regarding all lines of insurance, except health insurance;

(C) to recommend to the Financial Stability Oversight Council that it designate an insurer, including the affiliates of such insurer, as an entity subject to regulation as a nonbank financial company supervised by the Board of Governors pursuant to title I of the Dodd-Frank Wall Street Reform and Consumer Protection Act;

(D) to assist the Secretary in administering the Terrorism Insurance Program established in the Department
of the Treasury under the Terrorism Risk Insurance Act of 2002 (15 U.S.C. 6701 note);

“(E) to coordinate Federal efforts and develop Federal policy on prudential aspects of international insurance matters, including representing the United States, as appropriate, in the International Association of Insurance Supervisors (or a successor entity) and assisting the Secretary in negotiating covered agreements (as such term is defined in subsection (r));

“(F) to determine, in accordance with subsection (f), whether State insurance measures are preempted by covered agreements;

“(G) to consult with the States (including State insurance regulators) regarding insurance matters of national importance and prudential insurance matters of international importance; and

“(H) to perform such other related duties and authorities as may be assigned to the Office by the Secretary.

“(2) ADVISORY FUNCTIONS.—The Office shall advise the Secretary on major domestic and prudential international insurance policy issues.

“(3) ADVISORY CAPACITY ON COUNCIL.—The Director shall serve in an advisory capacity on the Financial Stability Oversight Council established under the Financial Stability Act of 2010.

“(d) SCOPE.—The authority of the Office shall extend to all lines of insurance except—

“(1) health insurance, as determined by the Secretary in coordination with the Secretary of Health and Human Services based on section 2791 of the Public Health Service Act (42 U.S.C. 300gg–91);

“(2) long-term care insurance, except long-term care insurance that is included with life or annuity insurance components, as determined by the Secretary in coordination with the Secretary of Health and Human Services, and in the case of long-term care insurance that is included with such components, the Secretary shall coordinate with the Secretary of Health and Human Services in performing the functions of the Office; and

“(3) crop insurance, as established by the Federal Crop Insurance Act (7 U.S.C. 1501 et seq.).

“(e) GATHERING OF INFORMATION.—

“(1) IN GENERAL.—In carrying out the functions required under subsection (c), the Office may—

“(A) receive and collect data and information on and from the insurance industry and insurers;

“(B) enter into information-sharing agreements;

“(C) analyze and disseminate data and information; and

“(D) issue reports regarding all lines of insurance except health insurance.

“(2) COLLECTION OF INFORMATION FROM INSURERS AND AFFILIATES.—

“(A) IN GENERAL.—Except as provided in paragraph (3), the Office may require an insurer, or any affiliate of an insurer, to submit such data or information as the
Office may reasonably require in carrying out the functions described under subsection (c).

"(B) Rule of construction.—Notwithstanding any other provision of this section, for purposes of subparagraph (A), the term 'insurer' means any entity that writes insurance or reinsures risks and issues contracts or policies in 1 or more States.

"(3) Exception for small insurers.—Paragraph (2) shall not apply with respect to any insurer or affiliate thereof that meets a minimum size threshold that the Office may establish, whether by order or rule.

"(4) Advance coordination.—Before collecting any data or information under paragraph (2) from an insurer, or affiliate of an insurer, the Office shall coordinate with each relevant Federal agency and State insurance regulator (or other relevant Federal or State regulatory agency, if any, in the case of an affiliate of an insurer) and any publicly available sources to determine if the information to be collected is available from, and may be obtained in a timely manner by, such Federal agency or State insurance regulator, individually or collectively, other regulatory agency, or publicly available sources. If the Director determines that such data or information is available, and may be obtained in a timely manner, from such an agency, regulator, regulatory agency, or source, the Director shall obtain the data or information from such agency, regulator, regulatory agency, or source. If the Director determines that such data or information is not so available, the Director may collect such data or information from an insurer (or affiliate) only if the Director complies with the requirements of subchapter I of chapter 35 of title 44, United States Code (relating to Federal information policy; commonly known as the Paperwork Reduction Act), in collecting such data or information. Notwithstanding any other provision of law, each such relevant Federal agency and State insurance regulator or other Federal or State regulatory agency is authorized to provide to the Office such data or information.

"(5) Confidentiality.—

"(A) Retention of privilege.—The submission of any nonpublicly available data and information to the Office under this subsection shall not constitute a waiver of, or otherwise affect, any privilege arising under Federal or State law (including the rules of any Federal or State court) to which the data or information is otherwise subject.

"(B) Continued application of prior confidentiality agreements.—Any requirement under Federal or State law to the extent otherwise applicable, or any requirement pursuant to a written agreement in effect between the original source of any nonpublicly available data or information and the source of such data or information to the Office, regarding the privacy or confidentiality of any data or information in the possession of the source to the Office, shall continue to apply to such data or information after the data or information has been provided pursuant to this subsection to the Office.

"(C) Information-sharing agreement.—Any data or information obtained by the Office may be made available
to State insurance regulators, individually or collectively, through an information-sharing agreement that—

“(i) shall comply with applicable Federal law; and

“(ii) shall not constitute a waiver of, or otherwise affect, any privilege under Federal or State law (including the rules of any Federal or State court) to which the data or information is otherwise subject.

“(D) AGENCY DISCLOSURE REQUIREMENTS.—Section 552 of title 5, United States Code, shall apply to any data or information submitted to the Office by an insurer or an affiliate of an insurer.

“(6) SUBPOENAS AND ENFORCEMENT.—The Director shall have the power to require by subpoena the production of the data or information requested under paragraph (2), but only upon a written finding by the Director that such data or information is required to carry out the functions described under subsection (c) and that the Office has coordinated with such regulator or agency as required under paragraph (4). Subpoenas shall bear the signature of the Director and shall be served by any person or class of persons designated by the Director for that purpose. In the case of contumacy or failure to obey a subpoena, the subpoena shall be enforceable by order of any appropriate district court of the United States. Any failure to obey the order of the court may be punished by the court as a contempt of court.

“(f) PREEMPTION OF STATE INSURANCE MEASURES.—

“(1) STANDARD.—A State insurance measure shall be preempted pursuant to this section or section 314 if, and only to the extent that the Director determines, in accordance with this subsection, that the measure—

“(A) results in less favorable treatment of a non-United States insurer domiciled in a foreign jurisdiction that is subject to a covered agreement than a United States insurer domiciled, licensed, or otherwise admitted in that State; and

“(B) is inconsistent with a covered agreement.

“(2) DETERMINATION.—

“(A) NOTICE OF POTENTIAL INCONSISTENCY.—Before making any determination under paragraph (1), the Director shall—

“(i) notify and consult with the appropriate State regarding any potential inconsistency or preemption;

“(ii) notify and consult with the United States Trade Representative regarding any potential inconsistency or preemption;

“(iii) cause to be published in the Federal Register notice of the issue regarding the potential inconsistency or preemption, including a description of each State insurance measure at issue and any applicable covered agreement;

“(iv) provide interested parties a reasonable opportunity to submit written comments to the Office; and

“(v) consider any comments received.

“(B) SCOPE OF REVIEW.—For purposes of this subsection, any determination of the Director regarding State insurance measures, and any preemption under paragraph (1) as a result of such determination, shall be limited
to the subject matter contained within the covered agree-
ment involved and shall achieve a level of protection for
insurance or reinsurance consumers that is substantially
equivalent to the level of protection achieved under State
insurance or reinsurance regulation.

"(C) NOTICE OF DETERMINATION OF INCONSISTENCY.—
Upon making any determination under paragraph (1), the
Director shall—

"(i) notify the appropriate State of the determina-
tion and the extent of the inconsistency;
"(ii) establish a reasonable period of time, which
shall not be less than 30 days, before the determination
shall become effective; and
"(iii) notify the Committees on Financial Services
and Ways and Means of the House of Representatives
and the Committees on Banking, Housing, and Urban
Affairs and Finance of the Senate.

"(3) NOTICE OF EFFECTIVENESS.—Upon the conclusion of
the period referred to in paragraph (2)(C)(ii), if the basis for
such determination still exists, the determination shall become
effective and the Director shall—

"(A) cause to be published a notice in the Federal
Register that the preemption has become effective, as well
as the effective date; and
"(B) notify the appropriate State.

"(4) LIMITATION.—No State may enforce a State insurance
measure to the extent that such measure has been preempted
under this subsection.

"(g) APPLICABILITY OF ADMINISTRATIVE PROCEDURES ACT.—
Determinations of inconsistency made pursuant to subsection (f)(2)
shall be subject to the applicable provisions of subchapter II of
chapter 5 of title 5, United States Code (relating to administrative
procedure), and chapter 7 of such title (relating to judicial review),
except that in any action for judicial review of a determination
of inconsistency, the court shall determine the matter de novo.

"(h) REGULATIONS, POLICIES, AND PROCEDURES.—The Secretary
may issue orders, regulations, policies, and procedures to implement
this section.

"(i) CONSULTATION.—The Director shall consult with State
insurance regulators, individually or collectively, to the extent the
Director determines appropriate, in carrying out the functions of
the Office.

"(j) SAVINGS PROVISIONS.—Nothing in this section shall—

"(1) preempt—

"(A) any State insurance measure that governs any
insurer’s rates, premiums, underwriting, or sales practices;
"(B) any State coverage requirements for insurance;
"(C) the application of the antitrust laws of any State
to the business of insurance; or
"(D) any State insurance measure governing the capital
or solvency of an insurer, except to the extent that such
State insurance measure results in less favorable treatment
of a non-United State insurer than a United States insurer;
"(2) be construed to alter, amend, or limit any provision
of the Consumer Financial Protection Agency Act of 2010; or
"(3) affect the preemption of any State insurance measure
otherwise inconsistent with and preempted by Federal law.
“(k) Retention of Existing State Regulatory Authority.—Nothing in this section or section 314 shall be construed to establish or provide the Office or the Department of the Treasury with general supervisory or regulatory authority over the business of insurance.

“(l) Retention of Authority of Federal Financial Regulatory Agencies.—Nothing in this section or section 314 shall be construed to limit the authority of any Federal financial regulatory agency, including the authority to develop and coordinate policy, negotiate, and enter into agreements with foreign governments, authorities, regulators, and multinational regulatory committees and to preempt State measures to affect uniformity with international regulatory agreements.

“(m) Retention of Authority of United States Trade Representative.—Nothing in this section or section 314 shall be construed to affect the authority of the Office of the United States Trade Representative pursuant to section 141 of the Trade Act of 1974 (19 U.S.C. 2171) or any other provision of law, including authority over the development and coordination of United States international trade policy and the administration of the United States trade agreements program.

“(n) Annual Reports to Congress.—

“(1) Section 313(f) Reports.—Beginning September 30, 2011, the Director shall submit a report on or before September 30 of each calendar year to the President and to the Committees on Financial Services and Ways and Means of the House of Representatives and the Committees on Banking, Housing, and Urban Affairs and Finance of the Senate on any actions taken by the Office pursuant to subsection (f) (regarding preemption of inconsistent State insurance measures).

“(2) Insurance Industry.—Beginning September 30, 2011, the Director shall submit a report on or before September 30 of each calendar year to the President and to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate on the insurance industry and any other information as deemed relevant by the Director or requested by such Committees.

“(o) Reports on U.S. and Global Reinsurance Market.—The Director shall submit to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate—

“(1) a report received not later than September 30, 2012, describing the breadth and scope of the global reinsurance market and the critical role such market plays in supporting insurance in the United States; and

“(2) a report received not later than January 1, 2013, and updated not later than January 1, 2015, describing the impact of part II of the Nonadmitted and Reinsurance Reform Act of 2010 on the ability of State regulators to access reinsurance information for regulated companies in their jurisdictions.

“(p) Study and Report on Regulation of Insurance.—

“(1) In General.—Not later than 18 months after the date of enactment of this section, the Director shall conduct a study and submit a report to Congress on how to modernize and improve the system of insurance regulation in the United States.
“(2) CONSIDERATIONS.—The study and report required under paragraph (1) shall be based on and guided by the following considerations:

“(A) Systemic risk regulation with respect to insurance.

“(B) Capital standards and the relationship between capital allocation and liabilities, including standards relating to liquidity and duration risk.

“(C) Consumer protection for insurance products and practices, including gaps in State regulation.

“(D) The degree of national uniformity of State insurance regulation.

“(E) The regulation of insurance companies and affiliates on a consolidated basis.

“(F) International coordination of insurance regulation.

“(3) ADDITIONAL FACTORS.—The study and report required under paragraph (1) shall also examine the following factors:

“(A) The costs and benefits of potential Federal regulation of insurance across various lines of insurance (except health insurance).

“(B) The feasibility of regulating only certain lines of insurance at the Federal level, while leaving other lines of insurance to be regulated at the State level.

“(C) The ability of any potential Federal regulation or Federal regulators to eliminate or minimize regulatory arbitrage.

“(D) The impact that developments in the regulation of insurance in foreign jurisdictions might have on the potential Federal regulation of insurance.

“(E) The ability of any potential Federal regulation or Federal regulator to provide robust consumer protection for policyholders.

“(F) The potential consequences of subjecting insurance companies to a Federal resolution authority, including the effects of any Federal resolution authority—

“(i) on the operation of State insurance guaranty fund systems, including the loss of guaranty fund coverage if an insurance company is subject to a Federal resolution authority;

“(ii) on policyholder protection, including the loss of the priority status of policyholder claims over other unsecured general creditor claims;

“(iii) in the case of life insurance companies, on the loss of the special status of separate account assets and separate account liabilities; and

“(iv) on the international competitiveness of insurance companies.

“(G) Such other factors as the Director determines necessary or appropriate, consistent with the principles set forth in paragraph (2).

“(4) REQUIRED RECOMMENDATIONS.—The study and report required under paragraph (1) shall also contain any legislative, administrative, or regulatory recommendations, as the Director determines appropriate, to carry out or effectuate the findings set forth in such report.

“(5) CONSULTATION.—With respect to the study and report required under paragraph (1), the Director shall consult with
the State insurance regulators, consumer organizations, representatives of the insurance industry and policyholders, and other organizations and experts, as appropriate.

(q) USE OF EXISTING RESOURCES.—To carry out this section, the Office may employ personnel, facilities, and any other resource of the Department of the Treasury available to the Secretary and the Secretary shall dedicate specific personnel to the Office.

(r) DEFINITIONS.—In this section and section 314, the following definitions shall apply:

(1) AFFILIATE.—The term ‘affiliate’ means, with respect to an insurer, any person who controls, is controlled by, or is under common control with the insurer.

(2) COVERED AGREEMENT.—The term ‘covered agreement’ means a written bilateral or multilateral agreement regarding prudential measures with respect to the business of insurance or reinsurance that—

(A) is entered into between the United States and one or more foreign governments, authorities, or regulatory entities; and

(B) relates to the recognition of prudential measures with respect to the business of insurance or reinsurance that achieves a level of protection for insurance or reinsurance consumers that is substantially equivalent to the level of protection achieved under State insurance or reinsurance regulation.

(3) INSURER.—The term ‘insurer’ means any person engaged in the business of insurance, including reinsurance.

(4) FEDERAL FINANCIAL REGULATORY AGENCY.—The term ‘Federal financial regulatory agency’ means the Department of the Treasury, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, or the National Credit Union Administration.

(5) NON-UNITED STATES INSURER.—The term ‘non-United States insurer’ means an insurer that is organized under the laws of a jurisdiction other than a State, but does not include any United States branch of such an insurer.

(6) OFFICE.—The term ‘Office’ means the Federal Insurance Office established by this section.

(7) STATE INSURANCE MEASURE.—The term ‘State insurance measure’ means any State law, regulation, administrative ruling, bulletin, guideline, or practice relating to or affecting prudential measures applicable to insurance or reinsurance.

(8) STATE INSURANCE REGULATOR.—The term ‘State insurance regulator’ means any State regulatory authority responsible for the supervision of insurers.

(9) SUBSTANTIALLY EQUIVALENT TO THE LEVEL OF PROTECTION ACHIEVED.—The term ‘substantially equivalent to the level of protection achieved’ means the prudential measures of a foreign government, authority, or regulatory entity achieve a similar outcome in consumer protection as the outcome achieved under State insurance or reinsurance regulation.

(10) UNITED STATES INSURER.—The term ‘United States insurer’ means—
“(A) an insurer that is organized under the laws of a State; or
“(B) a United States branch of a non-United States insurer.

“(s) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated for the Office for each fiscal year such sums as may be necessary.

“SEC. 314. COVERED AGREEMENTS.
“(a) AUTHORITY.—The Secretary and the United States Trade Representative are authorized, jointly, to negotiate and enter into covered agreements on behalf of the United States.

“(b) REQUIREMENTS FOR CONSULTATION WITH CONGRESS.—
“(1) IN GENERAL.—Before initiating negotiations to enter into a covered agreement under subsection (a), during such negotiations, and before entering into any such agreement, the Secretary and the United States Trade Representative shall jointly consult with the Committee on Financial Services and the Committee on Ways and Means of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs and the Committee on Finance of the Senate.

“(2) SCOPE.—The consultation described in paragraph (1) shall include consultation with respect to—
“(A) the nature of the agreement;
“(B) how and to what extent the agreement will achieve the applicable purposes, policies, priorities, and objectives of section 313 and this section; and
“(C) the implementation of the agreement, including the general effect of the agreement on existing State laws.

“(c) SUBMISSION AND LAYOVER PROVISIONS.—A covered agreement under subsection (a) may enter into force with respect to the United States only if—
“(1) the Secretary and the United States Trade Representative jointly submit to the congressional committees specified in subsection (b)(1), on a day on which both Houses of Congress are in session, a copy of the final legal text of the agreement; and

“(2) a period of 90 calendar days beginning on the date on which the copy of the final legal text of the agreement is submitted to the congressional committees under paragraph (1) has expired.”.

(b) DUTIES OF SECRETARY.—Section 321(a) of title 31, United States Code, is amended—
“(1) in paragraph (7), by striking “; and” and inserting a semicolon;
“(2) in paragraph (8)(C), by striking the period at the end and inserting “; and”;
and
“(3) by adding at the end the following new paragraph:
“(9) advise the President on major domestic and international prudential policy issues in connection with all lines of insurance except health insurance.”.

(c) CLERICAL AMENDMENT.—The table of sections for subchapter I of chapter 3 of title 31, United States Code, is amended by striking the item relating to section 312 and inserting the following new items:

“Sec. 312. Terrorism and financial intelligence.

“Sec. 313. Federal Insurance Office.”
Subtitle B—State-Based Insurance Reform

SEC. 511. SHORT TITLE.

This subtitle may be cited as the “Nonadmitted and Reinsurance Reform Act of 2010”.

SEC. 512. EFFECTIVE DATE.

Except as otherwise specifically provided in this subtitle, this subtitle shall take effect upon the expiration of the 12-month period beginning on the date of the enactment of this subtitle.

PART I—NONADMITTED INSURANCE

SEC. 521. REPORTING, PAYMENT, AND ALLOCATION OF PREMIUM TAXES.

(a) Home State’s Exclusive Authority.—No State other than the home State of an insured may require any premium tax payment for nonadmitted insurance.

(b) Allocation of Nonadmitted Premium Taxes.—

(1) In general.—The States may enter into a compact or otherwise establish procedures to allocate among the States the premium taxes paid to an insured’s home State described in subsection (a).

(2) Effective date.—Except as expressly otherwise provided in such compact or other procedures, any such compact or other procedures—

(A) if adopted on or before the expiration of the 330-day period that begins on the date of the enactment of this subtitle, shall apply to any premium taxes that, on or after such date of enactment, are required to be paid to any State that is subject to such compact or procedures; and

(B) if adopted after the expiration of such 330-day period, shall apply to any premium taxes that, on or after January 1 of the first calendar year that begins after the expiration of such 330-day period, are required to be paid to any State that is subject to such compact or procedures.

(3) Report.—Upon the expiration of the 330-day period referred to in paragraph (2), the NAIC may submit a report to the Committee on Financial Services and the Committee on the Judiciary of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate identifying and describing any compact or other procedures for allocation among the States of premium taxes that have been adopted during such period by any States.

(4) Nationwide System.—The Congress intends that each State adopt nationwide uniform requirements, forms, and procedures, such as an interstate compact, that provide for the reporting, payment, collection, and allocation of premium taxes for nonadmitted insurance consistent with this section.

(c) Allocation Based on Tax Allocation Report.—To facilitate the payment of premium taxes among the States, an insured’s home State may require surplus lines brokers and insureds who...
have independently procured insurance to annually file tax allocation reports with the insured's home State detailing the portion of the nonadmitted insurance policy premium or premiums attributable to properties, risks, or exposures located in each State. The filing of a nonadmitted insurance tax allocation report and the payment of tax may be made by a person authorized by the insured to act as its agent.

SEC. 522. REGULATION OF NONADMITTED INSURANCE BY INSURED'S HOME STATE.

(a) HOME STATE AUTHORITY.—Except as otherwise provided in this section, the placement of nonadmitted insurance shall be subject to the statutory and regulatory requirements solely of the insured's home State.

(b) BROKER LICENSING.—No State other than an insured's home State may require a surplus lines broker to be licensed in order to sell, solicit, or negotiate nonadmitted insurance with respect to such insured.

(c) ENFORCEMENT PROVISION.—With respect to section 521 and subsections (a) and (b) of this section, any law, regulation, provision, or action of any State that applies or purports to apply to nonadmitted insurance sold to, solicited by, or negotiated with an insured whose home State is another State shall be preempted with respect to such application.

(d) WORKERS' COMPENSATION EXCEPTION.—This section may not be construed to preempt any State law, rule, or regulation that restricts the placement of workers' compensation insurance or excess insurance for self-funded workers' compensation plans with a nonadmitted insurer.

SEC. 523. PARTICIPATION IN NATIONAL PRODUCER DATABASE.

After the expiration of the 2-year period beginning on the date of the enactment of this subtitle, a State may not collect any fees relating to licensing of an individual or entity as a surplus lines broker in the State unless the State has in effect at such time laws or regulations that provide for participation by the State in the national insurance producer database of the NAIC, or any other equivalent uniform national database, for the licensure of surplus lines brokers and the renewal of such licenses.

SEC. 524. UNIFORM STANDARDS FOR SURPLUS LINES ELIGIBILITY.

A State may not—

1. impose eligibility requirements on, or otherwise establish eligibility criteria for, nonadmitted insurers domiciled in a United States jurisdiction, except in conformance with such requirements and criteria in sections 5A(2) and 5C(2)(a) of the Non-Admitted Insurance Model Act, unless the State has adopted nationwide uniform requirements, forms, and procedures developed in accordance with section 521(b) of this subtitle that include alternative nationwide uniform eligibility requirements; or

2. prohibit a surplus lines broker from placing nonadmitted insurance with, or procuring nonadmitted insurance from, a nonadmitted insurer domiciled outside the United States that is listed on the Quarterly Listing of Alien Insurers maintained by the International Insurers Department of the NAIC.
SEC. 525. STREAMLINED APPLICATION FOR COMMERCIAL PURCHASERS.

A surplus lines broker seeking to procure or place nonadmitted insurance in a State for an exempt commercial purchaser shall not be required to satisfy any State requirement to make a due diligence search to determine whether the full amount or type of insurance sought by such exempt commercial purchaser can be obtained from admitted insurers if—

(1) the broker procuring or placing the surplus lines insurance has disclosed to the exempt commercial purchaser that such insurance may or may not be available from the admitted market that may provide greater protection with more regulatory oversight; and

(2) the exempt commercial purchaser has subsequently requested in writing the broker to procure or place such insurance from a nonadmitted insurer.

SEC. 526. GAO STUDY OF NONADMITTED INSURANCE MARKET.

(a) IN GENERAL.—The Comptroller General of the United States shall conduct a study of the nonadmitted insurance market to determine the effect of the enactment of this part on the size and market share of the nonadmitted insurance market for providing coverage typically provided by the admitted insurance market.

(b) CONTENTS.—The study shall determine and analyze—

(1) the change in the size and market share of the nonadmitted insurance market and in the number of insurance companies and insurance holding companies providing such business in the 18-month period that begins upon the effective date of this subtitle;

(2) the extent to which insurance coverage typically provided by the admitted insurance market has shifted to the nonadmitted insurance market;

(3) the consequences of any change in the size and market share of the nonadmitted insurance market, including differences in the price and availability of coverage available in both the admitted and nonadmitted insurance markets;

(4) the extent to which insurance companies and insurance holding companies that provide both admitted and nonadmitted insurance have experienced shifts in the volume of business between admitted and nonadmitted insurance; and

(5) the extent to which there has been a change in the number of individuals who have nonadmitted insurance policies, the type of coverage provided under such policies, and whether such coverage is available in the admitted insurance market.

(c) CONSULTATION WITH NAIC.—In conducting the study under this section, the Comptroller General shall consult with the NAIC.

(d) REPORT.—The Comptroller General shall complete the study under this section and submit a report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives regarding the findings of the study not later than 30 months after the effective date of this subtitle.

SEC. 527. DEFINITIONS.

For purposes of this part, the following definitions shall apply:
(1) **Admitted Insurer.**—The term “admitted insurer” means, with respect to a State, an insurer licensed to engage in the business of insurance in such State.

(2) **Affiliate.**—The term “affiliate” means, with respect to an insured, any entity that controls, is controlled by, or is under common control with the insured.

(3) **Affiliated Group.**—The term “affiliated group” means any group of entities that are all affiliated.

(4) **Control.**—An entity has “control” over another entity if—

   (A) the entity directly or indirectly or acting through 1 or more other persons owns, controls, or has the power to vote 25 percent or more of any class of voting securities of the other entity; or
   
   (B) the entity controls in any manner the election of a majority of the directors or trustees of the other entity.

(5) **Exempt Commercial Purchaser.**—The term “exempt commercial purchaser” means any person purchasing commercial insurance that, at the time of placement, meets the following requirements:

   (A) The person employs or retains a qualified risk manager to negotiate insurance coverage.
   
   (B) The person has paid aggregate nationwide commercial property and casualty insurance premiums in excess of $100,000 in the immediately preceding 12 months.
   
   (C) (i) The person meets at least 1 of the following criteria:

   (I) The person possesses a net worth in excess of $20,000,000, as such amount is adjusted pursuant to clause (ii).
   
   (II) The person generates annual revenues in excess of $50,000,000, as such amount is adjusted pursuant to clause (ii).
   
   (III) The person employs more than 500 full-time or full-time equivalent employees per individual insured or is a member of an affiliated group employing more than 1,000 employees in the aggregate.
   
   (IV) The person is a not-for-profit organization or public entity generating annual budgeted expenditures of at least $30,000,000, as such amount is adjusted pursuant to clause (ii).
   
   (V) The person is a municipality with a population in excess of 50,000 persons.

   (ii) Effective on the fifth January 1 occurring after the date of the enactment of this subtitle and each fifth January 1 occurring thereafter, the amounts in subclauses (I), (II), and (IV) of clause (i) shall be adjusted to reflect the percentage change for such 5-year period in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics of the Department of Labor.

(6) **Home State.**—

   (A) **In General.**—Except as provided in subparagraph (B), the term “home State” means, with respect to an insured—
(i) the State in which an insured maintains its principal place of business or, in the case of an individual, the individual's principal residence; or
(ii) if 100 percent of the insured risk is located out of the State referred to in clause (i), the State to which the greatest percentage of the insured's taxable premium for that insurance contract is allocated.
(B) AFFILIATED GROUPS.—If more than 1 insured from an affiliated group are named insureds on a single non-admitted insurance contract, the term “home State” means the home State, as determined pursuant to subparagraph (A), of the member of the affiliated group that has the largest percentage of premium attributed to it under such insurance contract.
(7) INDEPENDENTLY PROCURED INSURANCE.—The term “independently procured insurance” means insurance procured directly by an insured from a nonadmitted insurer.
(8) NAIC.—The term “NAIC” means the National Association of Insurance Commissioners or any successor entity.
(9) NONADMITTED INSURANCE.—The term “nonadmitted insurance” means any property and casualty insurance permitted to be placed directly or through a surplus lines broker with a nonadmitted insurer eligible to accept such insurance.
(11) NONADMITTED INSURER.—The term “nonadmitted insurer”—
(A) means, with respect to a State, an insurer not licensed to engage in the business of insurance in such State; but
(B) does not include a risk retention group, as that term is defined in section 2(a)(4) of the Liability Risk Retention Act of 1986 (15 U.S.C. 3901(a)(4)).
(12) PREMIUM TAX.—The term “premium tax” means, with respect to surplus lines or independently procured insurance coverage, any tax, fee, assessment, or other charge imposed by a government entity directly or indirectly based on any payment made as consideration for an insurance contract for such insurance, including premium deposits, assessments, registration fees, and any other compensation given in consideration for a contract of insurance.
(13) QUALIFIED RISK MANAGER.—The term “qualified risk manager” means, with respect to a policyholder of commercial insurance, a person who meets all of the following requirements:
(A) The person is an employee of, or third-party consultant retained by, the commercial policyholder.
(B) The person provides skilled services in loss prevention, loss reduction, or risk and insurance coverage analysis, and purchase of insurance.
(C) The person—
(i) has a bachelor’s degree or higher from an accredited college or university in risk management, business administration, finance, economics, or any
other field determined by a State insurance commissioner or other State regulatory official or entity to demonstrate minimum competence in risk management; and

(II)(aa) has 3 years of experience in risk financing, claims administration, loss prevention, risk and insurance analysis, or purchasing commercial lines of insurance; or

(bb) has—

(AA) a designation as a Chartered Property and Casualty Underwriter (in this subparagraph referred to as “CPCU”) issued by the American Institute for CPCU/Insurance Institute of America;

(BB) a designation as an Associate in Risk Management (ARM) issued by the American Institute for CPCU/Insurance Institute of America;

(CC) a designation as Certified Risk Manager (CRM) issued by the National Alliance for Insurance Education & Research;

(DD) a designation as a RIMS Fellow (RF) issued by the Global Risk Management Institute; or

(EE) any other designation, certification, or license determined by a State insurance commissioner or other State regulatory official or entity to demonstrate minimum competency in risk management;

(ii)(I) has at least 7 years of experience in risk financing, claims administration, loss prevention, risk and insurance coverage analysis, or purchasing commercial lines of insurance; and

(II) has any 1 of the designations specified in subitems (AA) through (EE) of clause (i)(II)(bb);

(iii) has at least 10 years of experience in risk financing, claims administration, loss prevention, risk and insurance coverage analysis, or purchasing commercial lines of insurance; or

(iv) has a graduate degree from an accredited college or university in risk management, business administration, finance, economics, or any other field determined by a State insurance commissioner or other State regulatory official or entity to demonstrate minimum competence in risk management.

(14) Reinsurance.—The term “reinsurance” means the assumption by an insurer of all or part of a risk undertaken originally by another insurer.

(15) Surplus Lines Broker.—The term “surplus lines broker” means an individual, firm, or corporation which is licensed in a State to sell, solicit, or negotiate insurance on properties, risks, or exposures located or to be performed in a State with nonadmitted insurers.

(16) State.—The term “State” includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Northern Mariana Islands, the Virgin Islands, and American Samoa.
PART II—REINSURANCE

SEC. 531. REGULATION OF CREDIT FOR REINSURANCE AND REINSURANCE AGREEMENTS.

(a) Credit for Reinsurance.—If the State of domicile of a ceding insurer is an NAIC-accredited State, or has financial solvency requirements substantially similar to the requirements necessary for NAIC accreditation, and recognizes credit for reinsurance for the insurer’s ceded risk, then no other State may deny such credit for reinsurance.

(b) Additional Preemption of Extraterritorial Application of State Law.—In addition to the application of subsection (a), all laws, regulations, provisions, or other actions of a State that is not the domiciliary State of the ceding insurer, except those with respect to taxes and assessments on insurance companies or insurance income, are preempted to the extent that they—

(1) restrict or eliminate the rights of the ceding insurer or the assuming insurer to resolve disputes pursuant to contractual arbitration to the extent such contractual provision is not inconsistent with the provisions of title 9, United States Code;

(2) require that a certain State’s law shall govern the reinsurance contract, disputes arising from the reinsurance contract, or requirements of the reinsurance contract;

(3) attempt to enforce a reinsurance contract on terms different than those set forth in the reinsurance contract, to the extent that the terms are not inconsistent with this part; or

(4) otherwise apply the laws of the State to reinsurance agreements of ceding insurers not domiciled in that State.

SEC. 532. REGULATION OF REINSURER SOLVENCY.

(a) Domiciliary State Regulation.—If the State of domicile of a reinsurer is an NAIC-accredited State or has financial solvency requirements substantially similar to the requirements necessary for NAIC accreditation, such State shall be solely responsible for regulating the financial solvency of the reinsurer.

(b) Non-Domiciliary States.—

(1) Limitation on Financial Information Requirements.—If the State of domicile of a reinsurer is an NAIC-accredited State or has financial solvency requirements substantially similar to the requirements necessary for NAIC accreditation, no other State may require the reinsurer to provide any additional financial information other than the information the reinsurer is required to file with its domiciliary State.

(2) Receipt of Information.—No provision of this section shall be construed as preventing or prohibiting a State that is not the State of domicile of a reinsurer from receiving a copy of any financial statement filed with its domiciliary State.

SEC. 533. DEFINITIONS.

For purposes of this part, the following definitions shall apply:

(1) Ceding Insurer.—The term “ceding insurer” means an insurer that purchases reinsurance.

(2) Domiciliary State.—The terms “State of domicile” and “domiciliary State” mean, with respect to an insurer or
reinsurer, the State in which the insurer or reinsurer is incorporated or entered through, and licensed.

(3) NAIC.—The term “NAIC” means the National Association of Insurance Commissioners or any successor entity.

(4) REINSURANCE.—The term “reinsurance” means the assumption by an insurer of all or part of a risk undertaken originally by another insurer.

(5) REINSURER.—

(A) IN GENERAL.—The term “reinsurer” means an insurer to the extent that the insurer—

(i) is principally engaged in the business of reinsurance;

(ii) does not conduct significant amounts of direct insurance as a percentage of its net premiums; and

(iii) is not engaged in an ongoing basis in the business of soliciting direct insurance.

(B) DETERMINATION.—A determination of whether an insurer is a reinsurer shall be made under the laws of the State of domicile in accordance with this paragraph.

(6) STATE.—The term “State” includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Northern Mariana Islands, the Virgin Islands, and American Samoa.

PART III—RULE OF CONSTRUCTION

SEC. 541. RULE OF CONSTRUCTION.

Nothing in this subtitle or the amendments made by this subtitle shall be construed to modify, impair, or supersede the application of the antitrust laws. Any implied or actual conflict between this subtitle and any amendments to this subtitle and the antitrust laws shall be resolved in favor of the operation of the antitrust laws.

SEC. 542. SEVERABILITY.

If any section or subsection of this subtitle, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this subtitle, and the application of the provision to any other person or circumstance, shall not be affected.

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

SEC. 601. SHORT TITLE.

This title may be cited as the “Bank and Savings Association Holding Company and Depository Institution Regulatory Improvements Act of 2010”.

SEC. 602. DEFINITION.

For purposes of this title, a company is a “commercial firm” if the annual gross revenues derived by the company and all of its affiliates from activities that are financial in nature (as defined
in section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k))) and, if applicable, from the ownership or control of one or more insured depository institutions, represent less than 15 percent of the consolidated annual gross revenues of the company.

SEC. 603. MORATORIUM AND STUDY ON TREATMENT OF CREDIT CARD BANKS, INDUSTRIAL LOAN COMPANIES, AND CERTAIN OTHER COMPANIES UNDER THE BANK HOLDING COMPANY ACT OF 1956.

(a) Moratorium.—

(1) Definitions.—In this subsection—

(A) the term “credit card bank” means an institution described in section 2(c)(2)(F) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)(2)(F));

(B) the term “industrial bank” means an institution described in section 2(c)(2)(H) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)(2)(H)); and

(C) the term “trust bank” means an institution described in section 2(c)(2)(D) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)(2)(D)).

(2) Moratorium on Provision of Deposit Insurance.—The Corporation may not approve an application for deposit insurance under section 5 of the Federal Deposit Insurance Act (12 U.S.C. 1815) that is received after November 23, 2009, for an industrial bank, a credit card bank, or a trust bank that is directly or indirectly owned or controlled by a commercial firm.

(3) Change in Control.—

(A) In General.—Except as provided in subparagraph (B), the appropriate Federal banking agency shall disapprove a change in control, as provided in section 7(j) of the Federal Deposit Insurance Act (12 U.S.C. 1817(j)), of an industrial bank, a credit card bank, or a trust bank if the change in control would result in direct or indirect control of the industrial bank, credit card bank, or trust bank by a commercial firm.

(B) Exceptions.—Subparagraph (A) shall not apply to a change in control of an industrial bank, credit card bank, or trust bank—

(i) that—

(I) is in danger of default, as determined by the appropriate Federal banking agency;

(II) results from the merger or whole acquisition of a commercial firm that directly or indirectly controls the industrial bank, credit card bank, or trust bank in a bona fide merger with or acquisition by another commercial firm, as determined by the appropriate Federal banking agency; or

(III) results from an acquisition of voting shares of a publicly traded company that controls an industrial bank, credit card bank, or trust bank, if, after the acquisition, the acquiring shareholder (or group of shareholders acting in concert) holds less than 25 percent of any class of the voting shares of the company; and
(ii) that has obtained all regulatory approvals otherwise required for such change of control under any applicable Federal or State law, including section 7(j) of the Federal Deposit Insurance Act (12 U.S.C. 1817(j)).

(4) SUNSET.—This subsection shall cease to have effect 3 years after the date of enactment of this Act.

(b) GOVERNMENT ACCOUNTABILITY OFFICE STUDY OF EXCEPTIONS UNDER THE BANK HOLDING COMPANY ACT OF 1956.

(1) STUDY REQUIRED.—The Comptroller General of the United States shall carry out a study to determine whether it is necessary, in order to strengthen the safety and soundness of institutions or the stability of the financial system, to eliminate the exceptions under section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841) for institutions described in—

(B) section 2(a)(5)(F) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(a)(5)(F));
(C) section 2(c)(2)(D) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)(2)(D));
(D) section 2(c)(2)(F) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)(2)(F));
(E) section 2(c)(2)(H) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)(2)(H)); and
(F) section 2(c)(2)(B) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)(2)(B)).

(2) CONTENT OF STUDY.—

(A) IN GENERAL.—The study required under paragraph (1), with respect to the institutions referenced in each of subparagraphs (A) through (E) of paragraph (1), shall, to the extent feasible be based on information provided to the Comptroller General by the appropriate Federal or State regulator, and shall—

(i) identify the types and number of institutions excepted from section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841) under each of the subparagraphs described in subparagraphs (A) through (E) of paragraph (1);
(ii) generally describe the size and geographic locations of the institutions described in clause (i);
(iii) determine the extent to which the institutions described in clause (i) are held by holding companies that are commercial firms;
(iv) determine whether the institutions described in clause (i) have any affiliates that are commercial firms;
(v) identify the Federal banking agency responsible for the supervision of the institutions described in clause (i) on and after the transfer date;
(vi) determine the adequacy of the Federal bank regulatory framework applicable to each category of institution described in clause (i), including any restrictions (including limitations on affiliate transactions or cross-marketing) that apply to transactions between
an institution, the holding company of the institution, and any other affiliate of the institution; and

(vii) evaluate the potential consequences of subjecting the institutions described in clause (i) to the requirements of the Bank Holding Company Act of 1956, including with respect to the availability and allocation of credit, the stability of the financial system and the economy, the safe and sound operation of each category of institution, and the impact on the types of activities in which such institutions, and the holding companies of such institutions, may engage.

(B) SAVINGS ASSOCIATIONS.—With respect to institutions described in paragraph (1)(F), the study required under paragraph (1) shall—

(i) determine the adequacy of the Federal bank regulatory framework applicable to such institutions, including any restrictions (including limitations on affiliate transactions or cross-marketing) that apply to transactions between an institution, the holding company of the institution, and any other affiliate of the institution; and

(ii) evaluate the potential consequences of subjecting the institutions described in paragraph (1)(F) to the requirements of the Bank Holding Company Act of 1956, including with respect to the availability and allocation of credit, the stability of the financial system and the economy, the safe and sound operation of such institutions, and the impact on the types of activities in which such institutions, and the holding companies of such institutions, may engage.

(3) REPORT.—Not later than 18 months after the date of enactment of this Act, the Comptroller General shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report on the study required under paragraph (1).

SEC. 604. REPORTS AND EXAMINATIONS OF HOLDING COMPANIES; REGULATION OF FUNCTIONALLY REGULATED SUBSIDIARIES.

(a) REPORTS BY BANK HOLDING COMPANIES.—Sections 5(c)(1) of the Bank Holding Company Act of 1956 (12 U.S.C. 1844(c)(1)) is amended—

(1) by striking subclause (A)(ii) and inserting the following:

“(ii) compliance by the bank holding company or subsidiary with—

“(I) this Act;

“(II) Federal laws that the Board has specific jurisdiction to enforce against the company or subsidiary; and

“(III) other than in the case of an insured depository institution or functionally regulated subsidiary, any other applicable provision of Federal law.”;

(2) by striking subparagraph (B) and inserting the following:
“(B) USE OF EXISTING REPORTS AND OTHER SUPERVISORY INFORMATION.—The Board shall, to the fullest extent possible, use—

“(i) reports and other supervisory information that the bank holding company or any subsidiary thereof has been required to provide to other Federal or State regulatory agencies;
“(ii) externally audited financial statements of the bank holding company or subsidiary;
“(iii) information otherwise available from Federal or State regulatory agencies; and
“(iv) information that is otherwise required to be reported publicly.”; and

(3) by adding at the end the following:

“(C) AVAILABILITY.—Upon the request of the Board, the bank holding company or a subsidiary of the bank holding company shall promptly provide to the Board any information described in clauses (i) through (iii) of subparagraph (B).”.

(b) EXAMINATIONS OF BANK HOLDING COMPANIES.—Section 5(c)(2) of the Bank Holding Company Act of 1956 (12 U.S.C. 1844(c)(2)) is amended to read as follows:

“(2) EXAMINATIONS.—

“(A) IN GENERAL.—Subject to subtitle B of the Consumer Financial Protection Act of 2010, the Board may make examinations of a bank holding company and each subsidiary of a bank holding company in order to—

“(i) inform the Board of—

“(I) the nature of the operations and financial condition of the bank holding company and the subsidiary;
“(II) the financial, operational, and other risks within the bank holding company system that may pose a threat to—

“(aa) the safety and soundness of the bank holding company or of any depository institution subsidiary of the bank holding company; or
“(bb) the stability of the financial system of the United States; and
“(III) the systems of the bank holding company for monitoring and controlling the risks described in subclause (II); and

“(ii) monitor the compliance of the bank holding company and the subsidiary with—

“(I) this Act;
“(II) Federal laws that the Board has specific jurisdiction to enforce against the company or subsidiary; and
“(III) other than in the case of an insured depository institution or functionally regulated subsidiary, any other applicable provisions of Federal law.

“(B) USE OF REPORTS TO REDUCE EXAMINATIONS.—For purposes of this paragraph, the Board shall, to the fullest extent possible, rely on—
“(i) examination reports made by other Federal or State regulatory agencies relating to a bank holding company and any subsidiary of a bank holding company; and
“(ii) the reports and other information required under paragraph (1).

(C) COORDINATION WITH OTHER REGULATORS.—The Board shall—
“(i) provide reasonable notice to, and consult with, the appropriate Federal banking agency, the Securities and Exchange Commission, the Commodity Futures Trading Commission, or State regulatory agency, as appropriate, for a subsidiary that is a depository institution or a functionally regulated subsidiary of a bank holding company before commencing an examination of the subsidiary under this section; and
“(ii) to the fullest extent possible, avoid duplication of examination activities, reporting requirements, and requests for information.”.

(c) AUTHORITY TO REGULATE FUNCTIONALLY REGULATED SUBSIDIARIES OF BANK HOLDING COMPANIES.—The Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.) is amended—

(1) in section 5(c)(5)(B) (12 U.S.C. 1844(c)(5)(B)), by striking clause (v) and inserting the following:
“(v) an entity that is subject to regulation by, or registration with, the Commodity Futures Trading Commission, with respect to activities conducted as a futures commission merchant, commodity trading adviser, commodity pool, commodity pool operator, swap execution facility, swap data repository, swap dealer, major swap participant, and activities that are incidental to such commodities and swaps activities.”;

and

(2) by striking section 10A (12 U.S.C. 1848a).

(d) ACQUISITIONS OF BANKS.—Section 3(c) of the Bank Holding Company Act of 1956 (12 U.S.C. 1842(c)) is amended by adding at the end the following:
“(7) FINANCIAL STABILITY.—In every case, the Board shall take into consideration the extent to which a proposed acquisition, merger, or consolidation would result in greater or more concentrated risks to the stability of the United States banking or financial system.”.

(e) ACQUISITIONS OF NONBANKS.—

(1) NOTICE PROCEDURES.—Section 4(j)(2)(A) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(j)(2)(A)) is amended by striking “or unsound banking practices” and inserting “unsound banking practices, or risk to the stability of the United States banking or financial system”.

(2) ACTIVITIES THAT ARE FINANCIAL IN NATURE.—Section 4(k)(6)(B) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)(6)(B)) is amended to read as follows:
“(B) APPROVAL NOT REQUIRED FOR CERTAIN FINANCIAL ACTIVITIES.—
“(i) IN GENERAL.—Except as provided in subsection (j) with regard to the acquisition of a savings association and clause (ii), a financial holding company may

Notice.
Consultation.
commence any activity, or acquire any company, pursuant to paragraph (4) or any regulation prescribed or order issued under paragraph (5), without prior approval of the Board.

“(ii) Exception.—A financial holding company may not acquire a company, without the prior approval of the Board, in a transaction in which the total consolidated assets to be acquired by the financial holding company exceed $10,000,000,000.

“(iii) Hart-Scott-Rodino filing requirement.—Solely for purposes of section 7A(c)(8) of the Clayton Act (15 U.S.C. 18a(c)(8)), the transactions subject to the requirements of this paragraph shall be treated as if the approval of the Board is not required.”.

(f) Bank Merger Act Transactions.—Section 18(c)(5) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)(5)) is amended, in the matter immediately following subparagraph (B), by striking “and the convenience and needs of the community to be served” and inserting “the convenience and needs of the community to be served, and the risk to the stability of the United States banking or financial system”.

(g) Reports by Savings and Loan Holding Companies.—Section 10(b)(2) of the Home Owners’ Loan Act (12 U.S.C. 1467a(b)(2)) is amended—

(1) by striking “Each savings” and inserting the following:

“(A) In general.—Each savings”;

and

(2) by adding at the end the following:

“(B) Use of existing reports and other supervisory information.—The Board shall, to the fullest extent possible, use—

“(i) reports and other supervisory information that the savings and loan holding company or any subsidiary thereof has been required to provide to other Federal or State regulatory agencies;

“(ii) externally audited financial statements of the savings and loan holding company or subsidiary;

“(iii) information that is otherwise available from Federal or State regulatory agencies; and

“(iv) information that is otherwise required to be reported publicly.

“(C) Availability.—Upon the request of the Board, a savings and loan holding company or a subsidiary of a savings and loan holding company shall promptly provide to the Board any information described in clauses (i) through (iii) of subparagraph (B).”.

(h) Examination of Savings and Loan Holding Companies.—

(1) Definitions.—Section 2 of the Home Owners’ Loan Act (12 U.S.C. 1462) is amended by adding at the end the following:

“(10) Appropriate Federal banking agency.—The term ‘appropriate Federal banking agency’ has the same meaning as in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)).

“(11) Functionally regulated subsidiary.—The term ‘functionally regulated subsidiary’ has the same meaning as in section 5(c)(5) of the Bank Holding Company Act of 1956 (12 U.S.C. 1844(c)(5)).”.
(2) EXAMINATION.—Section 10(b) of the Home Owners’ Loan Act (12 U.S.C. 1467a(b)) is amended by striking paragraph (4) and inserting the following:

"(4) EXAMINATIONS.—

"(A) IN GENERAL.—Subject to subtitle B of the Consumer Financial Protection Act of 2010, the Board may make examinations of a savings and loan holding company and each subsidiary of a savings and loan holding company system, in order to—

"(i) inform the Board of—

"(I) the nature of the operations and financial condition of the savings and loan holding company and the subsidiary;

"(II) the financial, operational, and other risks within the savings and loan holding company system that may pose a threat to—

"(aa) the safety and soundness of the savings and loan holding company or of any depository institution subsidiary of the savings and loan holding company; or

"(bb) the stability of the financial system of the United States; and

"(III) the systems of the savings and loan holding company for monitoring and controlling the risks described in subclause (II); and

"(ii) monitor the compliance of the savings and loan holding company and the subsidiary with—

"(I) this Act;

"(II) Federal laws that the Board has specific jurisdiction to enforce against the company or subsidiary; and

"(III) other than in the case of an insured depository institution or functionally regulated subsidiary, any other applicable provisions of Federal law.

"(B) USE OF REPORTS TO REDUCE EXAMINATIONS.—For purposes of this subsection, the Board shall, to the fullest extent possible, rely on—

"(i) the examination reports made by other Federal or State regulatory agencies relating to a savings and loan holding company and any subsidiary; and

"(ii) the reports and other information required under paragraph (2).

"(C) COORDINATION WITH OTHER REGULATORS.—The Board shall—

"(i) provide reasonable notice to, and consult with, the appropriate Federal banking agency, the Securities and Exchange Commission, the Commodity Futures Trading Commission, or State regulatory agency, as appropriate, for a subsidiary that is a depository institution or a functionally regulated subsidiary of a savings and loan holding company before commencing an examination of the subsidiary under this section; and

"(ii) to the fullest extent possible, avoid duplication of examination activities, reporting requirements, and requests for information.".
(i) Definition of the Term “Savings and Loan Holding Company”.—Section 10(a)(1)(D)(ii) of the Home Owners’ Loan Act (12 U.S.C. 1467a(a)(1)(D)(ii)) is amended to read as follows:

“(ii) Exclusion.—The term ‘savings and loan holding company’ does not include—

“(I) a bank holding company that is registered under, and subject to, the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.), or to any company directly or indirectly controlled by such company (other than a savings association);

“(II) a company that controls a savings association that functions solely in a trust or fiduciary capacity as described in section 2(c)(2)(D) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)(2)(D)); or

“(III) a company described in subsection (c)(9)(C) solely by virtue of such company’s control of an intermediate holding company established pursuant to section 10A.”.

(j) Effective Date.—The amendments made by this section shall take effect on the transfer date.

SEC. 605. ASSURING CONSISTENT OVERSIGHT OF PERMISSIBLE ACTIVITIES OF DEPOSITORY INSTITUTION SUBSIDIARIES OF HOLDING COMPANIES.

(a) In General.—The Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.) is amended by inserting after section 25 the following new section:

“SEC. 26. ASSURING CONSISTENT OVERSIGHT OF SUBSIDIARIES OF HOLDING COMPANIES.

“(a) Definitions.—For purposes of this section:

“(1) Board.—The term ‘Board’ means the Board of Governors of the Federal Reserve System.

“(2) Functionally regulated subsidiary.—The term ‘functionally regulated subsidiary’ has the same meaning as in section 5(c)(5) of the Bank Holding Company Act.

“(3) Lead insured depository institution.—The term ‘lead insured depository institution’ has the same meaning as in section 2(o)(8) of the Bank Holding Company Act.

“(b) Examination Requirements.—Subject to subtitle B of the Consumer Financial Protection Act of 2010, the Board shall examine the activities of a nondepository institution subsidiary (other than a functionally regulated subsidiary or a subsidiary of a depository institution) of a depository institution holding company that are permissible for the insured depository institution subsidiaries of the depository institution holding company in the same manner, subject to the same standards, and with the same frequency as would be required if such activities were conducted in the lead insured depository institution of the depository institution holding company.

“(c) State Coordination.—

“(1) Consultation and coordination.—If a nondepository institution subsidiary is supervised by a State bank supervisor or other State regulatory authority, the Board, in conducting the examinations required in subsection (b), shall consult and coordinate with such State regulator.
“(2) ALTERNATING EXAMINATIONS PERMITTED.—The examinations required under subsection (b) may be conducted in joint or alternating manner with a State regulator, if the Board determines that an examination of a nondepository institution subsidiary conducted by the State carries out the purposes of this section.

“(d) APPROPRIATE FEDERAL BANKING AGENCY BACKUP EXAMINATION AUTHORITY.—

“(1) IN GENERAL.—In the event that the Board does not conduct examinations required under subsection (b) in the same manner, subject to the same standards, and with the same frequency as would be required if such activities were conducted by the lead insured depository institution subsidiary of the depository institution holding company, the appropriate Federal banking agency for the lead insured depository institution may recommend in writing (which shall include a written explanation of the concerns giving rise to the recommendation) that the Board perform the examination required under subsection (b).

“(2) EXAMINATION BY AN APPROPRIATE FEDERAL BANKING AGENCY.—If the Board does not, before the end of the 60-day period beginning on the date on which the Board receives a recommendation under paragraph (1), begin an examination as required under subsection (b) or provide a written explanation or plan to the appropriate Federal banking agency making such recommendation responding to the concerns raised by the appropriate Federal banking agency for the lead insured depository institution, the appropriate Federal banking agency for the lead insured depository institution may, subject to the Consumer Financial Protection Act of 2010, examine the activities that are permissible for a depository institution subsidiary conducted by such nondepository institution subsidiary (other than a functionally regulated subsidiary or a subsidiary of a depository institution) of the depository institution holding company as if the nondepository institution subsidiary were an insured depository institution for which the appropriate Federal banking agency of the lead insured depository institution was the appropriate Federal banking agency, to determine whether the activities—

“(A) pose a material threat to the safety and soundness of any insured depository institution subsidiary of the depository institution holding company;

“(B) are conducted in accordance with applicable Federal law; and

“(C) are subject to appropriate systems for monitoring and controlling the financial, operating, and other material risks of the activities that may pose a material threat to the safety and soundness of the insured depository institution subsidiaries of the holding company.

“(3) AGENCY COORDINATION WITH THE BOARD.—An appropriate Federal banking agency that conducts an examination pursuant to paragraph (2) shall coordinate examination of the activities of nondepository institution subsidiaries described in subsection (b) with the Board in a manner that—

“(A) avoids duplication;

“(B) shares information relevant to the supervision of the depository institution holding company;
“(C) achieves the objectives of subsection (b); and
“(D) ensures that the depository institution holding company and the subsidiaries of the depository institution holding company are not subject to conflicting supervisory demands by such agency and the Board.

“(4) Fee permitted for examination costs.—An appropriate Federal banking agency that conducts an examination or enforcement action pursuant to this section may collect an assessment, fee, or such other charge from the subsidiary as the appropriate Federal banking agency determines necessary or appropriate to carry out the responsibilities of the appropriate Federal banking agency in connection with such examination.

“(e) Referrals for enforcement by appropriate Federal banking agency.—

“(1) Recommendation of enforcement action.—The appropriate Federal banking agency for the lead insured depository institution, based upon its examination of a nondepository institution subsidiary conducted pursuant to subsection (d), or other relevant information, may submit to the Board, in writing, a recommendation that the Board take enforcement action against such nondepository institution subsidiary, together with an explanation of the concerns giving rise to the recommendation, if the appropriate Federal banking agency determines (by a vote of its members, if applicable) that the activities of the nondepository institution subsidiary pose a material threat to the safety and soundness of any insured depository institution subsidiary of the depository institution holding company.

“(2) Back-up authority of the appropriate Federal banking agency.—If, within the 60-day period beginning on the date on which the Board receives a recommendation under paragraph (1), the Board does not take enforcement action against the nondepository institution subsidiary or provide a plan for supervisory or enforcement action that is acceptable to the appropriate Federal banking agency that made the recommendation pursuant to paragraph (1), such agency may take the recommended enforcement action against the nondepository institution subsidiary, in the same manner as if the nondepository institution subsidiary were an insured depository institution subsidiary of the depository institution holding company.

“(f) Coordination among appropriate Federal banking agencies.—Each Federal banking agency, prior to or when exercising authority under subsection (d) or (e) shall—

“(1) provide reasonable notice to, and consult with, the appropriate Federal banking agency or State bank supervisor (or other State regulatory agency) of the nondepository institution subsidiary of a depository institution holding company that is described in subsection (d) before commencing any examination of the subsidiary;

“(2) to the fullest extent possible—

“(A) rely on the examinations, inspections, and reports of the appropriate Federal banking agency or the State bank supervisor (or other State regulatory agency) of the subsidiary;
“(B) avoid duplication of examination activities, reporting requirements, and requests for information; and
“(C) ensure that the depository institution holding company and the subsidiaries of the depository institution holding company are not subject to conflicting supervisory demands by the appropriate Federal banking agencies.
“(g) RULE OF CONSTRUCTION.—No provision of this section shall be construed as limiting any authority of the Board, the Corporation, or the Comptroller of the Currency under any other provision of law.”.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the transfer date.

SEC. 606. REQUIREMENTS FOR FINANCIAL HOLDING COMPANIES TO REMAIN WELL CAPITALIZED AND WELL MANAGED.

(a) AMENDMENT.—Section 4(l)(1) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(l)(1)) is amended—
(1) in subparagraph (B), by striking “and” at the end;
(2) by redesignating subparagraph (C) as subparagraph (D);
(3) by inserting after subparagraph (B) the following: “(C) the bank holding company is well capitalized and well managed; and”;
(4) in subparagraph (D)(ii), as so redesignated, by striking “subparagraphs (A) and (B)” and inserting “subparagraphs (A), (B), and (C)”.

(b) HOME OWNERS’ LOAN ACT AMENDMENT.—Section 10(c)(2) of the Home Owners’ Loan Act (12 U.S.C. 1467a(c)(2)) is amended by adding at the end the following new subparagraph:
“(H) Any activity that is permissible for a financial holding company (as such term is defined under section 2(p) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(p)) to conduct under section 4(k) of the Bank Holding Company Act of 1956 if—
“(i) the savings and loan holding company meets all of the criteria to qualify as a financial holding company, and complies with all of the requirements applicable to a financial holding company, under sections 4(l) and 4(m) of the Bank Holding Company Act and section 804(c) of the Community Reinvestment Act of 1977 (12 U.S.C. 2903(c)) as if the savings and loan holding company was a bank holding company; and
“(ii) the savings and loan holding company conducts the activity in accordance with the same terms, conditions, and requirements that apply to the conduct of such activity by a bank holding company under the Bank Holding Company Act of 1956 and the Board’s regulations and interpretations under such Act.”.

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the transfer date.

SEC. 607. STANDARDS FOR INTERSTATE ACQUISITIONS.

(a) ACQUISITION OF BANKS.—Section 3(d)(1)(A) of the Bank Holding Company Act of 1956 (12 U.S.C. 1842(d)(1)(A)) is amended by striking “adequately capitalized and adequately managed” and inserting “well capitalized and well managed”.

12 USC 1831c note.

12 USC 1467a note.
(b) Interstate Bank Mergers.—Section 44(b)(4)(B) of the Federal Deposit Insurance Act (12 U.S.C. 1831u(b)(4)(B)) is amended by striking “will continue to be adequately capitalized and adequately managed” and inserting “will be well capitalized and well managed”.

(c) Effective Date.—The amendments made by this section shall take effect on the transfer date.

SEC. 608. ENHANCING EXISTING RESTRICTIONS ON BANK TRANSACTIONS WITH AFFILIATES.

(a) Affiliate Transactions.—Section 23A of the Federal Reserve Act (12 U.S.C. 371c) is amended—

(1) in subsection (b)—

(A) in paragraph (1), by striking subparagraph (D) and inserting the following:

“(D) any investment fund with respect to which a member bank or affiliate thereof is an investment adviser; and”;

(B) in paragraph (7)—

(i) in subparagraph (A), by inserting before the semicolon at the end the following: “; including a purchase of assets subject to an agreement to repurchase”;

(ii) in subparagraph (C), by striking “; including assets subject to an agreement to repurchase”;

(iii) in subparagraph (D)—

(I) by inserting “or other debt obligations” after “acceptance of securities”; and

(II) by striking “or” at the end;

(iv) by adding at the end the following:

“(F) a transaction with an affiliate that involves the borrowing or lending of securities, to the extent that the transaction causes a member bank or a subsidiary to have credit exposure to the affiliate; or

“(G) a derivative transaction, as defined in paragraph (3) of section 5200(b) of the Revised Statutes of the United States (12 U.S.C. 84(b)), with an affiliate, to the extent that the transaction causes a member bank or a subsidiary to have credit exposure to the affiliate;”;

(2) in subsection (c)—

(A) in paragraph (1)—

(i) in the matter preceding subparagraph (A), by striking “subsidiary” and all that follows through “time of the transaction” and inserting “subsidiary, and any credit exposure of a member bank or a subsidiary to an affiliate resulting from a securities borrowing or lending transaction, or a derivative transaction, shall be secured at all times”; and

(ii) in each of subparagraphs (A) through (D), by striking “or letter of credit” and inserting “letter of credit, or credit exposure”;

(B) by striking paragraph (2);

(C) by redesignating paragraphs (3) through (5) as paragraphs (2) through (4), respectively;

(D) in paragraph (2), as so redesignated, by inserting before the period at the end “, or credit exposure to an affiliate resulting from a securities borrowing or lending transaction, or derivative transaction”; and
(E) in paragraph (3), as so redesignated—
   (i) by inserting “or other debt obligations” after
      “securities”; and
   (ii) by striking “or guarantee” and all that follows
      through “behalf of,” and inserting “guarantee, accept-
      ance, or letter of credit issued on behalf of, or credit
      exposure from a securities borrowing or lending trans-
      action, or derivative transaction to,”;
(3) in subsection (d)(4), in the matter preceding subpara-
   graph (A), by striking “or issuing” and all that follows through “behalf of,” and inserting “issuing a guarantee, acceptance, or letter of credit on behalf of, or having credit exposure resulting from a securities borrowing or lending transaction, or derivative transaction to,”; and
(4) in subsection (f)—
   (A) in paragraph (2)—
      (i) by striking “or order”;
      (ii) by striking “if it finds” and all that follows
          through the end of the paragraph and inserting the
          following: “if—
              “(i) the Board finds the exemption to be in the
                  public interest and consistent with the purposes
                  of this section, and notifies the Federal Deposit Insurance
                  Corporation of such finding; and
              “(ii) before the end of the 60-day period beginning
                  on the date on which the Federal Deposit Insurance
                  Corporation receives notice of the finding under clause
                  (i), the Federal Deposit Insurance Corporation does
                  not object, in writing, to the finding, based on a deter-
                  mination that the exemption presents an unacceptable
                  risk to the Deposit Insurance Fund.”;
      (iii) by striking the Board and inserting the fol-
          lowing:
              “(A) IN GENERAL.—The Board”; and
      (iv) by adding at the end the following:
              “(B) ADDITIONAL EXEMPTIONS.—
                  “(i) NATIONAL BANKS.—The Comptroller of the Cur-
                      rency may, by order, exempt a transaction of a national
                      bank from the requirements of this section if—
                      “(I) the Board and the Office of the Com-
                          troller of the Currency jointly find the exemption
                          to be in the public interest and consistent with
                          the purposes of this section and notify the Federal
                          Deposit Insurance Corporation of such finding; and
                      “(II) before the end of the 60-day period begin-
                          ning on the date on which the Federal Deposit
                          Insurance Corporation receives notice of the finding under subclause (I), the Federal Deposit
                          Insurance Corporation does not object, in writing,
                          to the finding, based on a determination that the
                          exemption presents an unacceptable risk to the
                          Deposit Insurance Fund.
                  “(ii) STATE BANKS.—The Federal Deposit Insurance
                      Corporation may, by order, exempt a transaction of
                      a State nonmember bank, and the Board may, by order,
                      exempt a transaction of a State member bank, from
                      the requirements of this section if—

“(I) the Board and the Federal Deposit Insurance Corporation jointly find that the exemption is in the public interest and consistent with the purposes of this section; and
“(II) the Federal Deposit Insurance Corporation finds that the exemption does not present an unacceptable risk to the Deposit Insurance Fund.”; and
(B) by adding at the end the following:
“(4) AMOUNTS OF COVERED TRANSACTIONS.—The Board may issue such regulations or interpretations as the Board determines are necessary or appropriate with respect to the manner in which a netting agreement may be taken into account in determining the amount of a covered transaction between a member bank or a subsidiary and an affiliate, including the extent to which netting agreements between a member bank or a subsidiary and an affiliate may be taken into account in determining whether a covered transaction is fully secured for purposes of subsection (d)(4). An interpretation under this paragraph with respect to a specific member bank, subsidiary, or affiliate shall be issued jointly with the appropriate Federal banking agency for such member bank, subsidiary, or affiliate.”.
(b) TRANSACTIONS WITH AFFILIATES.—Section 23B(e) of the Federal Reserve Act (12 U.S.C. 371c–1(e)) is amended—
(1) by striking the undesignated matter following subparagraph (B);
(2) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively, and adjusting the clause margins accordingly;
(3) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively, and adjusting the subparagraph margins accordingly;
(4) by striking “The Board” and inserting the following: “(1) IN GENERAL.—The Board”;
(5) in paragraph (1)(B), as so redesignated—
(A) in the matter preceding clause (i), by inserting before “regulations” the following: “subject to paragraph (2), if the Board finds that an exemption or exclusion is in the public interest and is consistent with the purposes of this section, and notifies the Federal Deposit Insurance Corporation of such finding.”; and
(B) in clause (ii), by striking the comma at the end and inserting a period; and
(6) by adding at the end the following:
“(2) EXCEPTION.—The Board may grant an exemption or exclusion under this subsection only if, during the 60-day period beginning on the date of receipt of notice of the finding from the Board under paragraph (1)(B), the Federal Deposit Insurance Corporation does not object, in writing, to such exemption or exclusion, based on a determination that the exemption presents an unacceptable risk to the Deposit Insurance Fund.”.
(c) HOME OWNERS’ LOAN ACT.—Section 11 of the Home Owners’ Loan Act (12 U.S.C. 1468) is amended by adding at the end the following:
“(d) EXEMPTIONS.—
“(1) **Federal Savings Associations.**—The Comptroller of the Currency may, by order, exempt a transaction of a Federal savings association from the requirements of this section if—

(A) the Board and the Office of the Comptroller of the Currency jointly find the exemption to be in the public interest and consistent with the purposes of this section and notify the Federal Deposit Insurance Corporation of such finding; and

(B) before the end of the 60-day period beginning on the date on which the Federal Deposit Insurance Corporation receives notice of the finding under subparagraph (A), the Federal Deposit Insurance Corporation does not object, in writing, to the finding, based on a determination that the exemption presents an unacceptable risk to the Deposit Insurance Fund.

“(2) **State Savings Association.**—The Federal Deposit Insurance Corporation may, by order, exempt a transaction of a State savings association from the requirements of this section if the Board and the Federal Deposit Insurance Corporation jointly find that—

(A) the exemption is in the public interest and consistent with the purposes of this section; and

(B) the exemption does not present an unacceptable risk to the Deposit Insurance Fund.

(d) **Effective Date.**—The amendments made by this section shall take effect 1 year after the transfer date.

SEC. 609. ELIMINATING EXCEPTIONS FOR TRANSACTIONS WITH FINANCIAL SUBSIDIARIES.

(a) **Amendment.**—Section 23A(e) of the Federal Reserve Act (12 U.S.C. 371c(e)) is amended—

(1) by striking paragraph (3); and

(2) by redesignating paragraph (4) as paragraph (3).

(b) **Prospective Application of Amendment.**—The amendments made by this section shall apply with respect to any covered transaction between a bank and a subsidiary of the bank, as those terms are defined in section 23A of the Federal Reserve Act (12 U.S.C. 371c), that is entered into on or after the date of enactment of this Act.

(c) **Effective Date.**—The amendments made by this section shall take effect 1 year after the transfer date.

SEC. 610. LENDING LIMITS APPLICABLE TO CREDIT EXPOSURE ON DERIVATIVE TRANSACTIONS, REPURCHASE AGREEMENTS, REVERSE REPURCHASE AGREEMENTS, AND SECURITIES LENDING AND BORROWING TRANSACTIONS.

(a) **National Banks.**—Section 5200(b) of the Revised Statutes of the United States (12 U.S.C. 84(b)) is amended—

(1) in paragraph (1), by striking “shall include” and all that follows through the end of the paragraph and inserting the following: “shall include—

(A) all direct or indirect advances of funds to a person made on the basis of any obligation of that person to repay the funds or repayable from specific property pledged by or on behalf of the person;

(B) to the extent specified by the Comptroller of the Currency, any liability of a national banking association
to advance funds to or on behalf of a person pursuant to a contractual commitment; and

"(C) any credit exposure to a person arising from a derivative transaction, repurchase agreement, reverse repurchase agreement, securities lending transaction, or securities borrowing transaction between the national banking association and the person;"

(2) in paragraph (2), by striking the period at the end and inserting "; and"

(3) by adding at the end the following:

"(3) the term ‘derivative transaction’ includes any transaction that is a contract, agreement, swap, warrant, note, or option that is based, in whole or in part, on the value of, any interest in, or any quantitative measure or the occurrence of any event relating to, one or more commodities, securities, currencies, interest or other rates, indices, or other assets.”.

(b) SAVINGS ASSOCIATIONS.—Section 5(u)(3) of the Home Owners’ Loan Act (12 U.S.C. 1464(u)(3)) is amended by striking “Director” each place that term appears and inserting “Comptroller of the Currency”.

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect 1 year after the transfer date.

SEC. 611. CONSISTENT TREATMENT OF DERIVATIVE TRANSACTIONS IN LENDING LIMITS.

(a) AMENDMENT.—Section 18 of the Federal Deposit Insurance Act (12 U.S.C. 1828) is amended by adding at the end the following:

"(y) STATE LENDING LIMIT TREATMENT OF DERIVATIVES TRANSACTIONS.—An insured State bank may engage in a derivative transaction, as defined in section 5200(b)(3) of the Revised Statutes of the United States (12 U.S.C. 84(b)(3)), only if the law with respect to lending limits of the State in which the insured State bank is chartered takes into consideration credit exposure to derivative transactions.”.

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect 18 months after the transfer date.

SEC. 612. RESTRICTION ON CONVERSIONS OF TROUBLED BANKS.

(a) CONVERSION OF A NATIONAL BANKING ASSOCIATION.—The Act entitled “An Act to provide for the conversion of national banking associations into and their merger or consolidation with State banks, and for other purposes.” (12 U.S.C. 214 et seq.) is amended by adding at the end the following:

“SEC. 10. PROHIBITION ON CONVERSION.

“A national banking association may not convert to a State bank or State savings association during any period in which the national banking association is subject to a cease and desist order (or other formal enforcement order) issued by, or a memorandum of understanding entered into with, the Comptroller of the Currency with respect to a significant supervisory matter.”.

(b) CONVERSION OF A STATE BANK OR SAVINGS ASSOCIATION.—Section 5154 of the Revised Statutes of the United States (12 U.S.C. 35) is amended by adding at the end the following: “The Comptroller of the Currency may not approve the conversion of a State bank or State savings association to a national banking association or Federal savings association during any period in which the State bank or State savings association is subject to
a cease and desist order (or other formal enforcement order) issued by, or a memorandum of understanding entered into with, a State bank supervisor or the appropriate Federal banking agency with respect to a significant supervisory matter or a final enforcement action by a State Attorney General.”.

(c) Conversion of a Federal Savings Association.—Section 5(i) of the Home Owners’ Loan Act (12 U.S.C. 1464(i)) is amended by adding at the end the following:

“(6) Limitation on certain conversions by Federal savings associations.—A Federal savings association may not convert to a State bank or State savings association during any period in which the Federal savings association is subject to a cease and desist order (or other formal enforcement order) issued by, or a memorandum of understanding entered into with, the Office of Thrift Supervision or the Comptroller of the Currency with respect to a significant supervisory matter.”.

(d) Exception.—The prohibition on the approval of conversions under the amendments made by subsections (a), (b), and (c) shall not apply, if—

(1) the Federal banking agency that would be the appropriate Federal banking agency after the proposed conversion gives the appropriate Federal banking agency or State bank supervisor that issued the cease and desist order (or other formal enforcement order) or memorandum of understanding, as appropriate, written notice of the proposed conversion including a plan to address the significant supervisory matter in a manner that is consistent with the safe and sound operation of the institution;

(2) within 30 days of receipt of the written notice required under paragraph (1), the appropriate Federal banking agency or State bank supervisor that issued the cease and desist order (or other formal enforcement order) or memorandum of understanding, as appropriate, does not object to the conversion or the plan to address the significant supervisory matter;

(3) after conversion of the insured depository institution, the appropriate Federal banking agency after the conversion implements such plan; and

(4) in the case of a final enforcement action by a State Attorney General, approval of the conversion is conditioned on compliance by the insured depository institution with the terms of such final enforcement action.

(e) Notification of pending enforcement actions.—

(1) Copy of conversion application.—At the time an insured depository institution files a conversion application, the insured depository institution shall transmit a copy of the conversion application to—

(A) the appropriate Federal banking agency for the insured depository institution; and

(B) the Federal banking agency that would be the appropriate Federal banking agency of the insured depository institution after the proposed conversion.

(2) Notification and access to information.—Upon receipt of a copy of the application described in paragraph (1), the appropriate Federal banking agency for the insured depository institution proposing the conversion shall—

(A) notify the Federal banking agency that would be the appropriate Federal banking agency for the institution
after the proposed conversion in writing of any ongoing supervisory or investigative proceedings that the appropriate Federal banking agency for the institution proposing to convert believes is likely to result, in the near term and absent the proposed conversion, in a cease and desist order (or other formal enforcement order) or memorandum of understanding with respect to a significant supervisory matter; and

(B) provide the Federal banking agency that would be the appropriate Federal banking agency for the institution after the proposed conversion access to all investigative and supervisory information relating to the proceedings described in subparagraph (A).

SEC. 613. DE NOVO BRANCHING INTO STATES.

(a) NATIONAL BANKS.—Section 5155(g)(1)(A) of the Revised Statutes of the United States (12 U.S.C. 36(g)(1)(A)) is amended to read as follows:

"(A) the law of the State in which the branch is located, or is to be located, would permit establishment of the branch, if the national bank were a State bank chartered by such State; and".

(b) STATE INSURED BANKS.—Section 18(d)(4)(A)(i) of the Federal Deposit Insurance Act (12 U.S.C. 1828(d)(4)(A)(i)) is amended to read as follows:

"(i) the law of the State in which the branch is located, or is to be located, would permit establishment of the branch, if the bank were a State bank chartered by such State; and".

SEC. 614. LENDING LIMITS TO INSIDERS.

(a) EXTENSIONS OF CREDIT.—Section 22(h)(9)(D)(i) of the Federal Reserve Act (12 U.S.C. 375b(9)(D)(i)) is amended—

(1) by striking the period at the end and inserting "; or";

(2) by striking "a person" and inserting "the person";

(3) by striking "extends credit by making" and inserting the following: "extends credit to a person by—"

"(I) making"; and

(4) by adding at the end the following:

"(II) having credit exposure to the person arising from a derivative transaction (as defined in section 5200(b) of the Revised Statutes of the United States (12 U.S.C. 84(b))), repurchase agreement, reverse repurchase agreement, securities lending transaction, or securities borrowing transaction between the member bank and the person.".

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect 1 year after the transfer date.

SEC. 615. LIMITATIONS ON PURCHASES OF ASSETS FROM INSIDERS.

(a) AMENDMENT TO THE FEDERAL DEPOSIT INSURANCE ACT.—Section 18 of the Federal Deposit Insurance Act (12 U.S.C. 1828) is amended by adding at the end the following:

"(z) GENERAL PROHIBITION ON SALE OF ASSETS.—"

"(1) IN GENERAL.—An insured depository institution may not purchase an asset from, or sell an asset to, an executive officer, director, or principal shareholder of the insured depository institution, or any related interest of such person (as

12 USC 375b note.
such terms are defined in section 22(h) of Federal Reserve Act), unless—

“A) the transaction is on market terms; and
“B) if the transaction represents more than 10 percent of the capital stock and surplus of the insured depository institution, the transaction has been approved in advance by a majority of the members of the board of directors of the insured depository institution who do not have an interest in the transaction.

“(2) RULEMAKING.—The Board of Governors of the Federal Reserve System may issue such rules as may be necessary to define terms and to carry out the purposes this subsection. Before proposing or adopting a rule under this paragraph, the Board of Governors of the Federal Reserve System shall consult with the Comptroller of the Currency and the Corporation as to the terms of the rule.”.

(b) AMENDMENTS TO THE FEDERAL RESERVE ACT.—Section 22(d) of the Federal Reserve Act (12 U.S.C. 375) is amended to read as follows:

“(d) [Reserved]”.

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the transfer date.

SEC. 616. REGULATIONS REGARDING CAPITAL LEVELS.

(a) CAPITAL LEVELS OF BANK HOLDING COMPANIES.—Section 5(b) of the Bank Holding Company Act of 1956 (12 U.S.C. 1844(b)) is amended—

(1) by inserting after “orders” the following: “, including regulations and orders relating to the capital requirements for bank holding companies,”; and

(2) by adding at the end the following: “In establishing capital regulations pursuant to this subsection, the Board shall seek to make such requirements countercyclical, so that the amount of capital required to be maintained by a company increases in times of economic expansion and decreases in times of economic contraction, consistent with the safety and soundness of the company.”.

(b) CAPITAL LEVELS OF SAVINGS AND LOAN HOLDING COMPANIES.—Section 10(g)(1) of the Home Owners’ Loan Act (12 U.S.C. 1467a(g)(1)) is amended—

(1) by inserting after “orders” the following: “, including regulations and orders relating to capital requirements for savings and loan holding companies,”; and

(2) by inserting at the end the following: “In establishing capital regulations pursuant to this subsection, the appropriate Federal banking agency shall seek to make such requirements countercyclical so that the amount of capital required to be maintained by a company increases in times of economic expansion and decreases in times of economic contraction, consistent with the safety and soundness of the company.”.

(c) CAPITAL LEVELS OF INSURED DEPOSITORY INSTITUTIONS.—Section 908(a)(1) of the International Lending Supervision Act of 1983 (12 U.S.C. 3907(a)(1)) is amended by adding at the end the following: “Each appropriate Federal banking agency shall seek to make the capital standards required under this section or other provisions of Federal law for insured depository institutions countercyclical so that the amount of capital required to be maintained
by an insured depository institution increases in times of economic expansion and decreases in times of economic contraction, consistent with the safety and soundness of the insured depository institution.”

(d) **SOURCE OF STRENGTH.**—The Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.) is amended by inserting after section 38 (12 U.S.C. 1831o) the following:

12 USC 1831o–1.  **“SEC. 38A. SOURCE OF STRENGTH.”**

“(a) **HOLDING COMPANIES.**—The appropriate Federal banking agency for a bank holding company or savings and loan holding company shall require the bank holding company or savings and loan holding company to serve as a source of financial strength for any subsidiary of the bank holding company or savings and loan holding company that is a depository institution.

“(b) **OTHER COMPANIES.**—If an insured depository institution is not the subsidiary of a bank holding company or savings and loan holding company, the appropriate Federal banking agency for the insured depository institution shall require any company that directly or indirectly controls the insured depository institution to serve as a source of financial strength for such institution.

“(c) **REPORTS.**—The appropriate Federal banking agency for an insured depository institution described in subsection (b) may, from time to time, require the company, or a company that directly or indirectly controls the insured depository institution, to submit a report, under oath, for the purposes of—

“(1) assessing the ability of such company to comply with the requirement under subsection (b); and

“(2) enforcing the compliance of such company with the requirement under subsection (b).

“(d) **RULES.**—Not later than 1 year after the transfer date, as defined in section 311 of the Enhancing Financial Institution Safety and Soundness Act of 2010, the appropriate Federal banking agencies shall jointly issue final rules to carry out this section.

“(e) **DEFINITION.**—In this section, the term ‘source of financial strength’ means the ability of a company that directly or indirectly owns or controls an insured depository institution to provide financial assistance to such insured depository institution in the event of the financial distress of the insured depository institution.”

(e) **EFFECTIVE DATE.**—The amendments made by this section shall take effect on the transfer date.

SEC. 617. ELIMINATION OF ELECTIVE INVESTMENT BANK HOLDING COMPANY FRAMEWORK.

(a) **AMENDMENT.**—Section 17 of the Securities Exchange Act of 1934 (15 U.S.C. 78q) is amended—

(1) by striking subsection (i); and

(2) by redesignating subsections (j) and (k) as subsections (i) and (j), respectively.

(b) **EFFECTIVE DATE.**—The amendments made by this section shall take effect on the transfer date.

SEC. 618. SECURITIES HOLDING COMPANIES.

(a) **DEFINITIONS.**—In this section—

(1) the term “associated person of a securities holding company” means a person directly or indirectly controlling, controlled by, or under common control with, a securities holding company;
(2) the term "foreign bank" has the same meaning as in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(7));

(3) the term "insured bank" has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813);

(4) the term "securities holding company"—
   (A) means—
      (i) a person (other than a natural person) that owns or controls 1 or more brokers or dealers registered with the Commission; and
      (ii) the associated persons of a person described in clause (i); and
   (B) does not include a person that is—
      (i) a nonbank financial company supervised by the Board under title I;
      (ii) an insured bank (other than an institution described in subparagraphs (D), (F), or (H) of section 2(c)(2) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)(2)) or a savings association;
      (iii) an affiliate of an insured bank (other than an institution described in subparagraphs (D), (F), or (H) of section 2(c)(2) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)(2)) or an affiliate of a savings association;
      (iv) a foreign bank, foreign company, or company that is described in section 8(a) of the International Banking Act of 1978 (12 U.S.C. 3106(a));
      (v) a foreign bank that controls, directly or indirectly, a corporation chartered under section 25A of the Federal Reserve Act (12 U.S.C. 611 et seq.); or
      (vi) subject to comprehensive consolidated supervision by a foreign regulator;

(5) the term "supervised securities holding company" means a securities holding company that is supervised by the Board of Governors under this section; and

(6) the terms "affiliate", "bank", "bank holding company", "company", "control", "savings association", and "subsidiary" have the same meanings as in section 2 of the Bank Holding Company Act of 1956.

(b) SUPERVISION OF A SECURITIES HOLDING COMPANY NOT HAVING A BANK OR SAVINGS ASSOCIATION AFFILIATE.—

(1) IN GENERAL.—A securities holding company that is required by a foreign regulator or provision of foreign law to be subject to comprehensive consolidated supervision may register with the Board of Governors under paragraph (2) to become a supervised securities holding company. Any securities holding company filing such a registration shall be supervised in accordance with this section, and shall comply with the rules and orders prescribed by the Board of Governors applicable to supervised securities holding companies.

(2) REGISTRATION AS A SUPERVISED SECURITIES HOLDING COMPANY.—
   (A) REGISTRATION.—A securities holding company that elects to be subject to comprehensive consolidated supervision shall register by filing with the Board of Governors
such information and documents as the Board of Governors, by regulation, may prescribe as necessary or appropriate in furtherance of the purposes of this section.

(B) EFFECTIVE DATE.—A securities holding company that registers under subparagraph (A) shall be deemed to be a supervised securities holding company, effective on the date that is 45 days after the date of receipt of the registration information and documents under subparagraph (A) by the Board of Governors, or within such shorter period as the Board of Governors, by rule or order, may determine.

c) SUPERVISION OF SECURITIES HOLDING COMPANIES.—

(1) RECORDKEEPING AND REPORTING.—

(A) RECORDKEEPING AND REPORTING REQUIRED.—Each supervised securities holding company and each affiliate of a supervised securities holding company shall make and keep for periods determined by the Board of Governors such records, furnish copies of such records, and make such reports, as the Board of Governors determines to be necessary or appropriate to carry out this section, to prevent evasions thereof, and to monitor compliance by the supervised securities holding company or affiliate with applicable provisions of law.

(B) FORM AND CONTENTS.—

(i) IN GENERAL.—Any record or report required to be made, furnished, or kept under this paragraph shall—

(I) be prepared in such form and according to such specifications (including certification by a registered public accounting firm), as the Board of Governors may require; and

(II) be provided promptly to the Board of Governors at any time, upon request by the Board of Governors.

(ii) CONTENTS.—Records and reports required to be made, furnished, or kept under this paragraph may include—

(I) a balance sheet or income statement of the supervised securities holding company or an affiliate of a supervised securities holding company;

(II) an assessment of the consolidated capital and liquidity of the supervised securities holding company;

(III) a report by an independent auditor attesting to the compliance of the supervised securities holding company with the internal risk management and internal control objectives of the supervised securities holding company; and

(IV) a report concerning the extent to which the supervised securities holding company or affiliate has complied with the provisions of this section and any regulations prescribed and orders issued under this section.

(2) USE OF EXISTING REPORTS.—

(A) IN GENERAL.—The Board of Governors shall, to the fullest extent possible, accept reports in fulfillment
of the requirements of this paragraph that a supervised securities holding company or an affiliate of a supervised securities holding company has been required to provide to another regulatory agency or a self-regulatory organization.

(B) Availability.—A supervised securities holding company or an affiliate of a supervised securities holding company shall promptly provide to the Board of Governors, at the request of the Board of Governors, any report described in subparagraph (A), as permitted by law.

(3) Examination Authority.—

(A) Focus of Examination Authority.—The Board of Governors may make examinations of any supervised securities holding company and any affiliate of a supervised securities holding company to carry out this subsection, to prevent evasions thereof, and to monitor compliance by the supervised securities holding company or affiliate with applicable provisions of law.

(B) Deference to Other Examinations.—For purposes of this subparagraph, the Board of Governors shall, to the fullest extent possible, use the reports of examination made by other appropriate Federal or State regulatory authorities with respect to any functionally regulated subsidiary or any institution described in subparagraph (D), (F), or (H) of section 2(c)(2) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)(2)).

(d) Capital and Risk Management.—

(1) In General.—The Board of Governors shall, by regulation or order, prescribe capital adequacy and other risk management standards for supervised securities holding companies that are appropriate to protect the safety and soundness of the supervised securities holding companies and address the risks posed to financial stability by supervised securities holding companies.

(2) Differentiation.—In imposing standards under this subsection, the Board of Governors may differentiate among supervised securities holding companies on an individual basis, or by category, taking into consideration the requirements under paragraph (3).

(3) Content.—Any standards imposed on a supervised securities holding company under this subsection shall take into account—

(A) the differences among types of business activities carried out by the supervised securities holding company;

(B) the amount and nature of the financial assets of the supervised securities holding company;

(C) the amount and nature of the liabilities of the supervised securities holding company, including the degree of reliance on short-term funding;

(D) the extent and nature of the off-balance sheet exposures of the supervised securities holding company;

(E) the extent and nature of the transactions and relationships of the supervised securities holding company with other financial companies;

(F) the importance of the supervised securities holding company as a source of credit for households, businesses,
and State and local governments, and as a source of liquidity for the financial system; and
(G) the nature, scope, and mix of the activities of the supervised securities holding company.

(4) NOTICE.—A capital requirement imposed under this subsection may not take effect earlier than 180 days after the date on which a supervised securities holding company is provided notice of the capital requirement.

(e) OTHER PROVISIONS OF LAW APPLICABLE TO SUPERVISED SECURITIES HOLDING COMPANIES.—

(1) FEDERAL DEPOSIT INSURANCE ACT.—Subsections (b), (c) through (s), and (u) of section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818) shall apply to any supervised securities holding company, and to any subsidiary (other than a bank or an institution described in subparagraph (D), (F), or (H) of section 2(c)(2) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)(2)) of a supervised securities holding company, in the same manner as such subsections apply to a bank holding company for which the Board of Governors is the appropriate Federal banking agency. For purposes of applying such subsections to a supervised securities holding company or a subsidiary (other than a bank or an institution described in subparagraph (D), (F), or (H) of section 2(c)(2) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)(2)) of a supervised securities holding company, the Board of Governors shall be deemed the appropriate Federal banking agency for the supervised securities holding company or subsidiary.

(2) BANK HOLDING COMPANY ACT OF 1956.—Except as the Board of Governors may otherwise provide by regulation or order, a supervised securities holding company shall be subject to the provisions of the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.) in the same manner and to the same extent a bank holding company is subject to such provisions, except that a supervised securities holding company may not, by reason of this paragraph, be deemed to be a bank holding company for purposes of section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843).

SEC. 619. PROHIBITIONS ON PROPRIETARY TRADING AND CERTAIN RELATIONSHIPS WITH HEDGE FUNDS AND PRIVATE EQUITY FUNDS.

The Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.) is amended by adding at the end the following:

"SEC. 13. PROHIBITIONS ON PROPRIETARY TRADING AND CERTAIN RELATIONSHIPS WITH HEDGE FUNDS AND PRIVATE EQUITY FUNDS.

"(a) IN GENERAL.—
"(1) PROHIBITION.—Unless otherwise provided in this section, a banking entity shall not—
"(A) engage in proprietary trading; or
"(B) acquire or retain any equity, partnership, or other ownership interest in or sponsor a hedge fund or a private equity fund.

"(2) NONBANK FINANCIAL COMPANIES SUPERVISED BY THE BOARD.—Any nonbank financial company supervised by the Board that engages in proprietary trading or takes or retains
any equity, partnership, or other ownership interest in or sponsors a hedge fund or a private equity fund shall be subject, by rule, as provided in subsection (b)(2), to additional capital requirements for and additional quantitative limits with regards to such proprietary trading and taking or retaining any equity, partnership, or other ownership interest in or sponsorship of a hedge fund or a private equity fund, except that permitted activities as described in subsection (d) shall not be subject to the additional capital and additional quantitative limits except as provided in subsection (d)(3), as if the nonbank financial company supervised by the Board were a banking entity.

(b) STUDY AND RULEMAKING.—

(1) STUDY.—Not later than 6 months after the date of enactment of this section, the Financial Stability Oversight Council shall study and make recommendations on implementing the provisions of this section so as to—

(A) promote and enhance the safety and soundness of banking entities;

(B) protect taxpayers and consumers and enhance financial stability by minimizing the risk that insured depository institutions and the affiliates of insured depository institutions will engage in unsafe and unsound activities;

(C) limit the inappropriate transfer of Federal subsidies from institutions that benefit from deposit insurance and liquidity facilities of the Federal Government to unregulated entities;

(D) reduce conflicts of interest between the self-interest of banking entities and nonbank financial companies supervised by the Board, and the interests of the customers of such entities and companies;

(E) limit activities that have caused undue risk or loss in banking entities and nonbank financial companies supervised by the Board, or that might reasonably be expected to create undue risk or loss in such banking entities and nonbank financial companies supervised by the Board;

(F) appropriately accommodate the business of insurance within an insurance company, subject to regulation in accordance with the relevant insurance company investment laws, while protecting the safety and soundness of any banking entity with which such insurance company is affiliated and of the United States financial system; and

(G) appropriately time the divestiture of illiquid assets that are affected by the implementation of the prohibitions under subsection (a).

(2) RULEMAKING.—

(A) IN GENERAL.—Unless otherwise provided in this section, not later than 9 months after the completion of the study under paragraph (1), the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission, shall consider the findings of the study under paragraph (1) and adopt rules to carry out this section, as provided in subparagraph (B).
“(B) Coordinated rulemaking.—
“(i) Regulatory authority.—The regulations issued under this paragraph shall be issued by—
“(I) the appropriate Federal banking agencies, jointly, with respect to insured depository institutions;
“(II) the Board, with respect to any company that controls an insured depository institution, or that is treated as a bank holding company for purposes of section 8 of the International Banking Act, any nonbank financial company supervised by the Board, and any subsidiary of any of the foregoing (other than a subsidiary for which an agency described in subclause (I), (III), or (IV) is the primary financial regulatory agency);
“(III) the Commodity Futures Trading Commission, with respect to any entity for which the Commodity Futures Trading Commission is the primary financial regulatory agency, as defined in section 2 of the Dodd-Frank Wall Street Reform and Consumer Protection Act; and
“(IV) the Securities and Exchange Commission, with respect to any entity for which the Securities and Exchange Commission is the primary financial regulatory agency, as defined in section 2 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.
“(ii) Coordination, consistency, and comparability.—In developing and issuing regulations pursuant to this section, the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission shall consult and coordinate with each other, as appropriate, for the purposes of assuring, to the extent possible, that such regulations are comparable and provide for consistent application and implementation of the applicable provisions of this section to avoid providing advantages or imposing disadvantages to the companies affected by this subsection and to protect the safety and soundness of banking entities and nonbank financial companies supervised by the Board.
“(iii) Council role.—The Chairperson of the Financial Stability Oversight Council shall be responsible for coordination of the regulations issued under this section.
“(c) Effective date.—
“(1) In general.—Except as provided in paragraphs (2) and (3), this section shall take effect on the earlier of—
“(A) 12 months after the date of the issuance of final rules under subsection (b); or
“(B) 2 years after the date of enactment of this section.
“(2) Conformance period for divestiture.—A banking entity or nonbank financial company supervised by the Board shall bring its activities and investments into compliance with the requirements of this section not later than 2 years after the date on which the requirements become effective pursuant
to this section or 2 years after the date on which the entity or company becomes a nonbank financial company supervised by the Board. The Board may, by rule or order, extend this two-year period for not more than one year at a time, if, in the judgment of the Board, such an extension is consistent with the purposes of this section and would not be detrimental to the public interest. The extensions made by the Board under the preceding sentence may not exceed an aggregate of 3 years.

(3) EXTENDED TRANSITION FOR ILLIQUID FUNDS.—

(A) APPLICATION.—The Board may, upon the application of a banking entity, extend the period during which the banking entity, to the extent necessary to fulfill a contractual obligation that was in effect on May 1, 2010, may take or retain its equity, partnership, or other ownership interest in, or otherwise provide additional capital to, an illiquid fund.

(B) TIME LIMIT ON APPROVAL.—The Board may grant 1 extension under subparagraph (A), which may not exceed 5 years.

(4) DIVESTITURE REQUIRED.—Except as otherwise provided in subsection (d)(1)(G), a banking entity may not engage in any activity prohibited under subsection (a)(1)(B) after the earlier of—

(A) the date on which the contractual obligation to invest in the illiquid fund terminates; and

(B) the date on which any extensions granted by the Board under paragraph (3) expire.

(5) ADDITIONAL CAPITAL DURING TRANSITION PERIOD.—Notwithstanding paragraph (2), on the date on which the rules are issued under subsection (b)(2), the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission shall issue rules, as provided in subsection (b)(2), to impose additional capital requirements, and any other restrictions, as appropriate, on any equity, partnership, or ownership interest in or sponsorship of a hedge fund or private equity fund by a banking entity.

(6) SPECIAL RULEMAKING.—Not later than 6 months after the date of enactment of this section, the Board shall issues rules to implement paragraphs (2) and (3).

(d) PERMITTED ACTIVITIES.—

(1) IN GENERAL.—Notwithstanding the restrictions under subsection (a), to the extent permitted by any other provision of Federal or State law, and subject to the limitations under paragraph (2) and any restrictions or limitations that the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission, may determine, the following activities (in this section referred to as ‘permitted activities’) are permitted:

(A) The purchase, sale, acquisition, or disposition of obligations of the United States or any agency thereof, obligations, participations, or other instruments of or issued by the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, a Federal Home Loan Bank, the Federal Agricultural Mortgage Corporation, or a Farm Credit System institution chartered under and subject to
the provisions of the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.), and obligations of any State or of any political subdivision thereof.

"(B) The purchase, sale, acquisition, or disposition of securities and other instruments described in subsection (h)(4) in connection with underwriting or market-making-related activities, to the extent that any such activities permitted by this subparagraph are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties.

"(C) Risk-mitigating hedging activities in connection with and related to individual or aggregated positions, contracts, or other holdings of a banking entity that are designed to reduce the specific risks to the banking entity in connection with and related to such positions, contracts, or other holdings.

"(D) The purchase, sale, acquisition, or disposition of securities and other instruments described in subsection (h)(4) on behalf of customers.

"(E) Investments in one or more small business investment companies, as defined in section 102 of the Small Business Investment Act of 1958 (15 U.S.C. 662), investments designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), or investments that are qualified rehabilitation expenditures with respect to a qualified rehabilitated building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program.

"(F) The purchase, sale, acquisition, or disposition of securities and other instruments described in subsection (h)(4) by a regulated insurance company directly engaged in the business of insurance for the general account of the company and by any affiliate of such regulated insurance company, provided that such activities by any affiliate are solely for the general account of the regulated insurance company, if—

"(i) the purchase, sale, acquisition, or disposition is conducted in compliance with, and subject to, the insurance company investment laws, regulations, and written guidance of the State or jurisdiction in which each such insurance company is domiciled; and

"(ii) the appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and territories of the United States, have not jointly determined, after notice and comment, that a particular law, regulation, or written guidance described in clause (i) is insufficient to protect the safety and soundness of the banking entity, or of the financial stability of the United States.

"(G) Organizing and offering a private equity or hedge fund, including serving as a general partner, managing member, or trustee of the fund and in any manner selecting or controlling (or having employees, officers, directors, or agents who constitute) a majority of the directors, trustees,
or management of the fund, including any necessary expenses for the foregoing, only if—

(i) the banking entity provides bona fide trust, fiduciary, or investment advisory services;

(ii) the fund is organized and offered only in connection with the provision of bona fide trust, fiduciary, or investment advisory services and only to persons that are customers of such services of the banking entity;

(iii) the banking entity does not acquire or retain an equity interest, partnership interest, or other ownership interest in the funds except for a de minimis investment subject to and in compliance with paragraph (4);

(iv) the banking entity complies with the restrictions under paragraphs (1) and (2) of subparagraph (f);

(v) the banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the hedge fund or private equity fund or of any hedge fund or private equity fund in which such hedge fund or private equity fund invests;

(vi) the banking entity does not share with the hedge fund or private equity fund, for corporate, marketing, promotional, or other purposes, the same name or a variation of the same name;

(vii) no director or employee of the banking entity takes or retains an equity interest, partnership interest, or other ownership interest in the hedge fund or private equity fund, except for any director or employee of the banking entity who is directly engaged in providing investment advisory or other services to the hedge fund or private equity fund; and

(viii) the banking entity discloses to prospective and actual investors in the fund, in writing, that any losses in such hedge fund or private equity fund are borne solely by investors in the fund and not by the banking entity, and otherwise complies with any additional rules of the appropriate Federal banking agencies, the Securities and Exchange Commission, or the Commodity Futures Trading Commission, as provided in subsection (b)(2), designed to ensure that losses in such hedge fund or private equity fund are borne solely by investors in the fund and not by the banking entity.

(H) Proprietary trading conducted by a banking entity pursuant to paragraph (9) or (13) of section 4(c), provided that the trading occurs solely outside of the United States and that the banking entity is not directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States.

(I) The acquisition or retention of any equity, partnership, or other ownership interest in, or the sponsorship of, a hedge fund or a private equity fund by a banking entity pursuant to paragraph (9) or (13) of section 4(c)
solely outside of the United States, provided that no ownership interest in such hedge fund or private equity fund is offered for sale or sold to a resident of the United States and that the banking entity is not directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States.

"(J) Such other activity as the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission determine, by rule, as provided in subsection (b)(2), would promote and protect the safety and soundness of the banking entity and the financial stability of the United States.

"(2) LIMITATION ON PERMITTED ACTIVITIES.—

"(A) IN GENERAL.—No transaction, class of transactions, or activity may be deemed a permitted activity under paragraph (1) if the transaction, class of transactions, or activity—

"(i) would involve or result in a material conflict of interest (as such term shall be defined by rule as provided in subsection (b)(2)) between the banking entity and its clients, customers, or counterparties;

"(ii) would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies (as such terms shall be defined by rule as provided in subsection (b)(2));

"(iii) would pose a threat to the safety and soundness of such banking entity; or

"(iv) would pose a threat to the financial stability of the United States.

"(B) RULEMAKING.—The appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission shall issue regulations to implement subparagraph (A), as part of the regulations issued under subsection (b)(2).

"(3) CAPITAL AND QUANTITATIVE LIMITATIONS.—The appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission shall, as provided in subsection (b)(2), adopt rules imposing additional capital requirements and quantitative limitations, including diversification requirements, regarding the activities permitted under this section if the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission determine that additional capital and quantitative limitations are appropriate to protect the safety and soundness of banking entities engaged in such activities.

"(4) DE MINIMIS INVESTMENT.—

"(A) IN GENERAL.—A banking entity may make and retain an investment in a hedge fund or private equity fund that the banking entity organizes and offers, subject to the limitations and restrictions in subparagraph (B) for the purposes of—

"(i) establishing the fund and providing the fund with sufficient initial equity for investment to permit the fund to attract unaffiliated investors; or
“(ii) making a de minimis investment.

“(B) LIMITATIONS AND RESTRICTIONS ON INVESTMENTS.—

“(i) REQUIREMENT TO SEEK OTHER INVESTORS.—
A banking entity shall actively seek unaffiliated investors to reduce or dilute the investment of the banking entity to the amount permitted under clause (ii).

“(ii) LIMITATIONS ON SIZE OF INVESTMENTS.—Notwithstanding any other provision of law, investments by a banking entity in a hedge fund or private equity fund shall—

“(I) not later than 1 year after the date of establishment of the fund, be reduced through redemption, sale, or dilution to an amount that is not more than 3 percent of the total ownership interests of the fund;

“(II) be immaterial to the banking entity, as defined, by rule, pursuant to subsection (b)(2), but in no case may the aggregate of all of the interests of the banking entity in all such funds exceed 3 percent of the Tier 1 capital of the banking entity.

“(iii) CAPITAL.—For purposes of determining compliance with applicable capital standards under paragraph (3), the aggregate amount of the outstanding investments by a banking entity under this paragraph, including retained earnings, shall be deducted from the assets and tangible equity of the banking entity, and the amount of the deduction shall increase commensurate with the leverage of the hedge fund or private equity fund.

“(C) EXTENSION.—Upon an application by a banking entity, the Board may extend the period of time to meet the requirements under subparagraph (B)(ii)(I) for 2 additional years, if the Board finds that an extension would be consistent with safety and soundness and in the public interest.

“(e) ANTI-EVASION.—

“(1) RULEMAKING.—The appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission shall issue regulations, as part of the rulemaking provided for in subsection (b)(2), regarding internal controls and recordkeeping, in order to insure compliance with this section.

“(2) TERMINATION OF ACTIVITIES OR INVESTMENT.—Notwithstanding any other provision of law, whenever an appropriate Federal banking agency, the Securities and Exchange Commission, or the Commodity Futures Trading Commission, as appropriate, has reasonable cause to believe that a banking entity or nonbank financial company supervised by the Board under the respective agency’s jurisdiction has made an investment or engaged in an activity in a manner that functions as an evasion of the requirements of this section (including through an abuse of any permitted activity) or otherwise violates the restrictions under this section, the appropriate Federal banking agency, the Securities and Exchange Commission, or the Commodity Futures Trading Commission, as appropriate, shall
order, after due notice and opportunity for hearing, the banking entity or nonbank financial company supervised by the Board to terminate the activity and, as relevant, dispose of the investment. Nothing in this paragraph shall be construed to limit the inherent authority of any Federal agency or State regulatory authority to further restrict any investments or activities under otherwise applicable provisions of law.

“(f) LIMITATIONS ON RELATIONSHIPS WITH HEDGE FUNDS AND PRIVATE EQUITY FUNDS.—

“(1) IN GENERAL.—No banking entity that serves, directly or indirectly, as the investment manager, investment adviser, or sponsor to a hedge fund or private equity fund, or that organizes and offers a hedge fund or private equity fund pursuant to paragraph (d)(1)(G), and no affiliate of such entity, may enter into a transaction with the fund, or with any other hedge fund or private equity fund that is controlled by such fund, that would be a covered transaction, as defined in section 23A of the Federal Reserve Act (12 U.S.C. 371c), with the hedge fund or private equity fund, as if such banking entity and the affiliate thereof were a member bank and the hedge fund or private equity fund were an affiliate thereof.

“(2) TREATMENT AS MEMBER BANK.—A banking entity that serves, directly or indirectly, as the investment manager, investment adviser, or sponsor to a hedge fund or private equity fund, or that organizes and offers a hedge fund or private equity fund pursuant to paragraph (d)(1)(G), shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1), as if such banking entity were a member bank and such hedge fund or private equity fund were an affiliate thereof.

“(3) PERMITTED SERVICES.—

“(A) IN GENERAL.—Notwithstanding paragraph (1), the Board may permit a banking entity to enter into any prime brokerage transaction with any hedge fund or private equity fund in which a hedge fund or private equity fund managed, sponsored, or advised by such banking entity has taken an equity, partnership, or other ownership interest, if—

“(i) the banking entity is in compliance with each of the limitations set forth in subsection (d)(1)(G) with regard to a hedge fund or private equity fund organized and offered by such banking entity;

“(ii) the chief executive officer (or equivalent officer) of the banking entity certifies in writing annually (with a duty to update the certification if the information in the certification materially changes) that the conditions specified in subsection (d)(1)(G)(v) are satisfied; and

“(iii) the Board has determined that such transaction is consistent with the safe and sound operation and condition of the banking entity.

“(B) TREATMENT OF PRIME BROKERAGE TRANSACTIONS.—For purposes of subparagraph (A), a prime brokerage transaction described in subparagraph (A) shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1) as if the counterparty were an affiliate of the banking entity.
“(4) Application to nonbank financial companies supervised by the Board.—The appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission shall adopt rules, as provided in subsection (b)(2), imposing additional capital charges or other restrictions for nonbank financial companies supervised by the Board to address the risks to and conflicts of interest of banking entities described in paragraphs (1), (2), and (3) of this subsection.

“(g) Rules of Construction.—

“(1) Limitation on contrary authority.—Except as provided in this section, notwithstanding any other provision of law, the prohibitions and restrictions under this section shall apply to activities of a banking entity or nonbank financial company supervised by the Board, even if such activities are authorized for a banking entity or nonbank financial company supervised by the Board.

“(2) Sale or securitization of loans.—Nothing in this section shall be construed to limit or restrict the ability of a banking entity or nonbank financial company supervised by the Board to sell or securitize loans in a manner otherwise permitted by law.

“(3) Authority of Federal agencies and State regulatory authorities.—Nothing in this section shall be construed to limit the inherent authority of any Federal agency or State regulatory authority under otherwise applicable provisions of law.

“(h) Definitions.—In this section, the following definitions shall apply:

“(1) Banking entity.—The term ‘banking entity’ means any insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), any company that controls an insured depository institution, or that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978, and any affiliate or subsidiary of any such entity. For purposes of this paragraph, the term ‘insured depository institution’ does not include an institution that functions solely in a trust or fiduciary capacity, if—

“(A) all or substantially all of the deposits of such institution are in trust funds and are received in a bona fide fiduciary capacity;

“(B) no deposits of such institution which are insured by the Federal Deposit Insurance Corporation are offered or marketed by or through an affiliate of such institution;

“(C) such institution does not accept demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others or make commercial loans; and

“(D) such institution does not—

“(i) obtain payment or payment related services from any Federal Reserve bank, including any service referred to in section 11A of the Federal Reserve Act (12 U.S.C. 248a); or

“(ii) exercise discount or borrowing privileges pursuant to section 19(b)(7) of the Federal Reserve Act (12 U.S.C. 461(b)(7)).
“(2) HEDGE FUND; PRIVATE EQUITY FUND.—The terms ‘hedge fund’ and ‘private equity fund’ mean an issuer that would be an investment company, as defined in the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), but for section 3(c)(1) or 3(c)(7) of that Act, or such similar funds as the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission may, by rule, as provided in subsection (b)(2), determine.

“(3) NONBANK FINANCIAL COMPANY SUPERVISED BY THE BOARD.—The term ‘nonbank financial company supervised by the Board’ means a nonbank financial company supervised by the Board of Governors, as defined in section 102 of the Financial Stability Act of 2010.

“(4) PROPRIETARY TRADING.—The term ‘proprietary trading’, when used with respect to a banking entity or nonbank financial company supervised by the Board, means engaging as a principal for the trading account of the banking entity or nonbank financial company supervised by the Board in any transaction to purchase or sell, or otherwise acquire or dispose of, any security, any derivative, any contract of sale of a commodity for future delivery, any option on any such security, derivative, or contract, or any other security or financial instrument that the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission may, by rule as provided in subsection (b)(2), determine.

“(5) SPONSOR.—The term to ‘sponsor’ a fund means—

“(A) to serve as a general partner, managing member, or trustee of a fund;

“(B) in any manner to select or to control (or to have employees, officers, or directors, or agents who constitute) a majority of the directors, trustees, or management of a fund; or

“(C) to share with a fund, for corporate, marketing, promotional, or other purposes, the same name or a variation of the same name.

“(6) TRADING ACCOUNT.—The term ‘trading account’ means any account used for acquiring or taking positions in the securities and instruments described in paragraph (4) principally for the purpose of selling in the near term (or otherwise with the intent to resell in order to profit from short-term price movements), and any such other accounts as the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission may, by rule as provided in subsection (b)(2), determine.

“(7) ILLIQUID FUND.—

“(A) IN GENERAL.—The term ‘illiquid fund’ means a hedge fund or private equity fund that—

“(i) as of May 1, 2010, was principally invested in, or was invested and contractually committed to principally invest in, illiquid assets, such as portfolio companies, real estate investments, and venture capital investments; and

“(ii) makes all investments pursuant to, and consistent with, an investment strategy to principally invest in illiquid assets. In issuing rules regarding
this subparagraph, the Board shall take into consider-
ation the terms of investment for the hedge fund or private equity fund, including contractual obligations, the ability of the fund to divest of assets held by the fund, and any other factors that the Board deter-
mines are appropriate.

"(B) Hedge Fund.—For the purposes of this paragraph, the term 'hedge fund' means any fund identified under subsection (b)(2), and does not include a private equity fund, as such term is used in section 203(m) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(m))."

SEC. 620. STUDY OF BANK INVESTMENT ACTIVITIES.

(a) Study.—

(1) In General.—Not later than 18 months after the date of enactment of this Act, the appropriate Federal banking agen-
cies shall jointly review and prepare a report on the activities that a banking entity, as such term is defined in the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et. seq.), may engage in under Federal and State law, including activities authorized by statute and by order, interpretation and guid-
ance.

(2) Content.—In carrying out the study under paragraph (1), the appropriate Federal banking agencies shall review and consider—

(A) the type of activities or investments;

(B) any financial, operational, managerial, or reputa-
tion risks associated with or presented as a result of the banking entity engaged in the activity or making the investment; and

(C) risk mitigation activities undertaken by the banking entity with regard to the risks.

(b) Report and Recommendations to the Council and to Congress.—The appropriate Federal banking agencies shall submit to the Council, the Committee on Financial Services of the House of Representatives, and the Committee on Banking, Housing, and Urban Affairs of the Senate the study conducted pursuant to subsection (a) no later than 2 months after its completion. In addition to the information described in subsection (a), the report shall include recommendations regarding—

(1) whether each activity or investment has or could have a negative effect on the safety and soundness of the banking entity or the United States financial system;

(2) the appropriateness of the conduct of each activity or type of investment by banking entities; and

(3) additional restrictions as may be necessary to address risks to safety and soundness arising from the activities or types of investments described in subsection (a).

SEC. 621. CONFLICTS OF INTEREST.

(a) In General.—The Securities Act of 1933 (15 U.S.C. 77a et seq.) is amended by inserting after section 27A the following:

"SEC. 27B. CONFLICTS OF INTEREST RELATING TO CERTAIN SECURITIZATIONS.

"(a) In General.—An underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of any such entity, of an asset-backed security (as such term is defined in 15 USC 77z-2a."

Deadline.
section 3 of the Securities and Exchange Act of 1934 (15 U.S.C. 78c), which for the purposes of this section shall include a synthetic asset-backed security), shall not, at any time for a period ending on the date that is one year after the date of the first closing of the sale of the asset-backed security, engage in any transaction that would involve or result in any material conflict of interest with respect to any investor in a transaction arising out of such activity.

“(b) Rulemaking.—Not later than 270 days after the date of enactment of this section, the Commission shall issue rules for the purpose of implementing subsection (a).

“(c) Exception.—The prohibitions of subsection (a) shall not apply to—

“(1) risk-mitigating hedging activities in connection with positions or holdings arising out of the underwriting, placement, initial purchase, or sponsorship of an asset-backed security, provided that such activities are designed to reduce the specific risks to the underwriter, placement agent, initial purchaser, or sponsor associated with positions or holdings arising out of such underwriting, placement, initial purchase, or sponsorship; or

“(2) purchases or sales of asset-backed securities made pursuant to and consistent with—

“(A) commitments of the underwriter, placement agent, initial purchaser, or sponsor, or any affiliate or subsidiary of any such entity, to provide liquidity for the asset-backed security, or

“(B) bona fide market-making in the asset backed security.

“(d) Rule of Construction.—This subsection shall not otherwise limit the application of section 15G of the Securities Exchange Act of 1934.”.

(b) Effective Date.—Section 27B of the Securities Act of 1933, as added by this section, shall take effect on the effective date of final rules issued by the Commission under subsection (b) of such section 27B, except that subsections (b) and (d) of such section 27B shall take effect on the date of enactment of this Act.

SEC. 622. CONCENTRATION LIMITS ON LARGE FINANCIAL FIRMS.

The Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.) is amended by adding at the end the following:

“SEC. 14. CONCENTRATION LIMITS ON LARGE FINANCIAL FIRMS.

“(a) Definitions.—In this section—

“(1) the term ‘Council’ means the Financial Stability Oversight Council;

“(2) the term ‘financial company’ means—

“(A) an insured depository institution;

“(B) a bank holding company;

“(C) a savings and loan holding company;

“(D) a company that controls an insured depository institution;

“(E) a nonbank financial company supervised by the Board under title I of the Dodd-Frank Wall Street Reform and Consumer Protection Act; and

“(F) a foreign bank or company that is treated as a bank holding company for purposes of this Act; and

“(3) the term ‘liabilities’ means—
“(A) with respect to a United States financial company—

“(i) the total risk-weighted assets of the financial company, as determined under the risk-based capital rules applicable to bank holding companies, as adjusted to reflect exposures that are deducted from regulatory capital; less

“(ii) the total regulatory capital of the financial company under the risk-based capital rules applicable to bank holding companies;

“(B) with respect to a foreign-based financial company—

“(i) the total risk-weighted assets of the United States operations of the financial company, as determined under the applicable risk-based capital rules, as adjusted to reflect exposures that are deducted from regulatory capital; less

“(ii) the total regulatory capital of the United States operations of the financial company, as determined under the applicable risk-based capital rules; and

“(C) with respect to an insurance company or other nonbank financial company supervised by the Board, such assets of the company as the Board shall specify by rule, in order to provide for consistent and equitable treatment of such companies.

“(b) CONCENTRATION LIMIT.—Subject to the recommendations by the Council under subsection (e), a financial company may not merge or consolidate with, acquire all or substantially all of the assets of, or otherwise acquire control of, another company, if the total consolidated liabilities of the acquiring financial company upon consummation of the transaction would exceed 10 percent of the aggregate consolidated liabilities of all financial companies at the end of the calendar year preceding the transaction.

“(c) EXCEPTION TO CONCENTRATION LIMIT.—With the prior written consent of the Board, the concentration limit under subsection (b) shall not apply to an acquisition—

“(1) of a bank in default or in danger of default;

“(2) with respect to which assistance is provided by the Federal Deposit Insurance Corporation under section 13(c) of the Federal Deposit Insurance Act (12 U.S.C. 1823(c)); or

“(3) that would result only in a de minimis increase in the liabilities of the financial company.

“(d) RULEMAKING AND GUIDANCE.—The Board shall issue regulations implementing this section in accordance with the recommendations of the Council under subsection (e), including the definition of terms, as necessary. The Board may issue interpretations or guidance regarding the application of this section to an individual financial company or to financial companies in general.

“(e) COUNCIL STUDY AND RULEMAKING.—

“(1) STUDY AND RECOMMENDATIONS.—Not later than 6 months after the date of enactment of this section, the Council shall—

“(A) complete a study of the extent to which the concentration limit under this section would affect financial stability, moral hazard in the financial system, the efficiency and competitiveness of United States financial firms
and financial markets, and the cost and availability of credit and other financial services to households and businesses in the United States; and

“(B) make recommendations regarding any modifications to the concentration limit that the Council determines would more effectively implement this section.

“(2) RULEMAKING.—Not later than 9 months after the date of completion of the study under paragraph (1), and notwithstanding subsections (b) and (d), the Board shall issue final regulations implementing this section, which shall reflect any recommendations by the Council under paragraph (1)(B).”.

SEC. 623. INTERSTATE MERGER TRANSACTIONS.

(a) INTERSTATE MERGER TRANSACTIONS.—Section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)) is amended by adding at the end the following:

“(13)(A) Except as provided in subparagraph (B), the responsible agency may not approve an application for an interstate merger transaction if the resulting insured depository institution (including all insured depository institutions which are affiliates of the resulting insured depository institution), upon consummation of the transaction, would control more than 10 percent of the total amount of deposits of insured depository institutions in the United States.

“(B) Subparagraph (A) shall not apply to an interstate merger transaction that involves 1 or more insured depository institutions in default or in danger of default, or with respect to which the Corporation provides assistance under section 13.

“(C) In this paragraph—

“(i) the term 'interstate merger transaction' means a merger transaction involving 2 or more insured depository institutions that have different home States and that are not affiliates; and

“(ii) the term ‘home State’ means—

“(I) with respect to a national bank, the State in which the main office of the bank is located;

“(II) with respect to a State bank or State savings association, the State by which the State bank or State savings association is chartered; and

“(III) with respect to a Federal savings association, the State in which the home office (as defined by the regulations of the Director of the Office of Thrift Supervision, or, on and after the transfer date, the Comptroller of the Currency) of the Federal savings association is located.”.

(b) ACQUISITIONS BY BANK HOLDING COMPANIES.—

(1) IN GENERAL.—Section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843) is amended—

(A) in subsection (i), by adding at the end the following:

“(8) INTERSTATE ACQUISITIONS.—

“(A) IN GENERAL.—The Board may not approve an application by a bank holding company to acquire an insured depository institution under subsection (c)(8) or any other provision of this Act if—

“(i) the home State of such insured depository institution is a State other than the home State of the bank holding company; and
“(ii) the applicant (including all insured depository institutions which are affiliates of the applicant) controls, or upon consummation of the transaction would control, more than 10 percent of the total amount of deposits of insured depository institutions in the United States.

(B) EXCEPTION.—Subparagraph (A) shall not apply to an acquisition that involves an insured depository institution in default or in danger of default, or with respect to which the Federal Deposit Insurance Corporation provides assistance under section 13 of the Federal Deposit Insurance Act (12 U.S.C. 1823).”; and

(B) in subsection (k)(6)(B), by striking “savings association” and inserting “insured depository institution”.

(2) DEFINITIONS.—Section 2(o)(4) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(o)(4)) is amended—

(A) in subparagraph (B), by striking “and” at the end;

(B) in subparagraph (C)(ii), by striking the period at the end and inserting a semicolon; and

(C) by adding at the end the following:

“(D) with respect to a State savings association, the State by which the savings association is chartered; and

“(E) with respect to a Federal savings association, the State in which the home office (as defined by the regulations of the Director of the Office of Thrift Supervision, or, on and after the transfer date, the Comptroller of the Currency) of the Federal savings association is located.”.

(c) ACQUISITIONS BY SAVINGS AND LOAN HOLDING COMPANIES.—Section 10(e)(2) of the Home Owners’ Loan Act (12 U.S.C. 1467a(e)(2)) is amended—

(1) in paragraph (2)—

(A) in subparagraph (C), by striking “or” at the end;

(B) in subparagraph (D), by striking the period at the end and inserting “, or”;

and

(C) by adding at the end the following:

“(E) in the case of an application by a savings and loan holding company to acquire an insured depository institution, if—

“(i) the home State of the insured depository institution is a State other than the home State of the savings and loan holding company;

“(ii) the applicant (including all insured depository institutions which are affiliates of the applicant) controls, or upon consummation of the transaction would control, more than 10 percent of the total amount of deposits of insured depository institutions in the United States; and

“(iii) the acquisition does not involve an insured depository institution in default or in danger of default, or with respect to which the Federal Deposit Insurance Corporation provides assistance under section 13 of the Federal Deposit Insurance Act (12 U.S.C. 1823).”;

and

(2) by adding at the end the following:

“(7) DEFINITIONS.—For purposes of paragraph (2)(E)—

“(A) the terms ‘default’, ‘in danger of default’, and ‘insured depository institution’ have the same meanings
as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813); and

“(B) the term ‘home State’ means—

“(i) with respect to a national bank, the State in which the main office of the bank is located;

“(ii) with respect to a State bank or State savings association, the State by which the savings association is chartered;

“(iii) with respect to a Federal savings association, the State in which the home office (as defined by the regulations of the Director of the Office of Thrift Supervision, or, on and after the transfer date, the Comptroller of the Currency) of the Federal savings association is located; and

“(iv) with respect to a savings and loan holding company, the State in which the amount of total deposits of all insured depository institution subsidiaries of such company was the greatest on the date on which the company became a savings and loan holding company.”.

SEC. 624. QUALIFIED THRIFT LENDERS.

Section 10(m)(3) of the Home Owners’ Loan Act (12 U.S.C. 1467a(m)(3)) is amended—

(1) by striking subparagraph (A) and inserting the following:

“(A) IN GENERAL.—A savings association that fails to become or remain a qualified thrift lender shall immediately be subject to the restrictions under subparagraph (B).”;

and

(2) in subparagraph (B)(i), by striking subclause (III) and inserting the following:

“(III) DIVIDENDS.—The savings association may not pay dividends, except for dividends that—

“(aa) would be permissible for a national bank;

“(bb) are necessary to meet obligations of a company that controls such savings association; and

“(cc) are specifically approved by the Comptroller of the Currency and the Board after a written request submitted to the Comptroller of the Currency and the Board by the savings association not later than 30 days before the date of the proposed payment.

“(IV) REGULATORY AUTHORITY.—A savings association that fails to become or remain a qualified thrift lender shall be deemed to have violated section 5 of the Home Owners’ Loan Act (12 U.S.C. 1464) and subject to actions authorized by section 5(d) of the Home Owners’ Loan Act (12 U.S.C. 1464(d)).”.

SEC. 625. TREATMENT OF DIVIDENDS BY CERTAIN MUTUAL HOLDING COMPANIES.

(a) IN GENERAL.—Section 10(o) of the Home Owners’ Loan Act (12 U.S.C. 1467a(o)) is amended by adding at the end the following:
“(11) DIVIDENDS.—

(A) DECLARATION OF DIVIDENDS.—

(i) ADVANCE NOTICE REQUIRED.—Each subsidiary of a mutual holding company that is a savings association shall give the appropriate Federal banking agency and the Board notice not later than 30 days before the date of a proposed declaration by the board of directors of the savings association of any dividend on the guaranty, permanent, or other nonwithdrawable stock of the savings association.

(ii) INVALID DIVIDENDS.—Any dividend described in clause (i) that is declared without giving notice to the appropriate Federal banking agency and the Board under clause (i), or that is declared during the 30-day period preceding the date of a proposed declaration for which notice is given to the appropriate Federal banking agency and the Board under clause (i), shall be invalid and shall confer no rights or benefits upon the holder of any such stock.

(B) WAIVER OF DIVIDENDS.—A mutual holding company may waive the right to receive any dividend declared by a subsidiary of the mutual holding company, if—

(i) no insider of the mutual holding company, associate of an insider, or tax-qualified or non-tax-qualified employee stock benefit plan of the mutual holding company holds any share of the stock in the class of stock to which the waiver would apply; or

(ii) the mutual holding company gives written notice to the Board of the intent of the mutual holding company to waive the right to receive dividends, not later than 30 days before the date of the proposed date of payment of the dividend, and the Board does not object to the waiver.

(C) RESOLUTION INCLUDED IN WAIVER NOTICE.—A notice of a waiver under subparagraph (B) shall include a copy of the resolution of the board of directors of the mutual holding company, in such form and substance as the Board may determine, together with any supporting materials relied upon by the board of directors of the mutual holding company, concluding that the proposed dividend waiver is consistent with the fiduciary duties of the board of directors to the mutual members of the mutual holding company.

(D) STANDARDS FOR WAIVER OF DIVIDEND.—The Board may not object to a waiver of dividends under subparagraph (B) if—

(i) the waiver would not be detrimental to the safe and sound operation of the savings association;

(ii) the board of directors of the mutual holding company expressly determines that a waiver of the dividend by the mutual holding company is consistent with the fiduciary duties of the board of directors to the mutual members of the mutual holding company; and

(iii) the mutual holding company has, prior to December 1, 2009—
“(I) reorganized into a mutual holding company under subsection (o); 
“(II) issued minority stock either from its mid-tier stock holding company or its subsidiary stock savings association; and 
“(III) waived dividends it had a right to receive from the subsidiary stock savings association.

“(E) VALUATION.—
“(i) IN GENERAL.—The appropriate Federal banking agency shall consider waived dividends in determining an appropriate exchange ratio in the event of a full conversion to stock form.
“(ii) EXCEPTION.—In the case of a savings association that has reorganized into a mutual holding company, has issued minority stock from a mid-tier stock holding company or a subsidiary stock savings association of the mutual holding company, and has waived dividends it had a right to receive from a subsidiary savings association before December 1, 2009, the appropriate Federal banking agency shall not consider waived dividends in determining an appropriate exchange ratio in the event of a full conversion to stock form.”

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the transfer date.

SEC. 626. INTERMEDIATE HOLDING COMPANIES.

The Home Owners’ Loan Act (12 U.S.C. 1461 et seq.) is amended by inserting after section 10 (12 U.S.C. 1467a) the following new section:

“SEC. 10A. INTERMEDIATE HOLDING COMPANIES.

“(a) DEFINITION.—For purposes of this section:
“(1) FINANCIAL ACTIVITIES.—The term ‘financial activities’ means activities described in clauses (i) and (ii) of section 10(c)(9)(A).
“(2) GRANDFATHERED UNITARY SAVINGS AND LOAN HOLDING COMPANY.—The term ‘grandfathered unitary savings and loan holding company’ means a company described in section 10(c)(9)(C).
“(3) INTERNAL FINANCIAL ACTIVITIES.—The term ‘internal financial activities’ includes—
“(A) internal financial activities conducted by a grandfathered savings and loan holding company or any affiliate; and
“(B) internal treasury, investment, and employee benefit functions.

“(b) REQUIREMENT.—
“(1) IN GENERAL.—
“(A) ACTIVITIES OTHER THAN FINANCIAL ACTIVITIES.—
If a grandfathered unitary savings and loan holding company conducts activities other than financial activities, the Board may require such company to establish and conduct all or a portion of such financial activities in or through an intermediate holding company, which shall be a savings and loan holding company, established pursuant to regulations of the Board, not later than 90 days (or such longer
period as the Board may deem appropriate) after the
transfer date.

“(B) OTHER ACTIVITIES.—Notwithstanding subpara-
graph (A), the Board shall require a grandfathered unitary
savings and loan holding company to establish an inter-
mediate holding company if the Board makes a determina-
tion that the establishment of such intermediate holding
company is necessary—

“(i) to appropriately supervise activities that are
determined to be financial activities; or
“(ii) to ensure that supervision by the Board does
not extend to the activities of such company that are
not financial activities.

“(2) INTERNAL FINANCIAL ACTIVITIES.—

“(A) TREATMENT OF INTERNAL FINANCIAL ACTIVITIES.—
For purposes of this subsection, the internal financial
activities of a grandfathered unitary savings and loan
holding company shall not be required to be placed in
an intermediate holding company.

“(B) GRANDFATHERED ACTIVITIES.—A grandfathered
unitary savings and loan holding company may continue
to engage in an internal financial activity, subject to review
by the Board to determine whether engaging in such
activity presents undue risk to the grandfathered unitary
savings and loan holding company or to the financial sta-
bility of the United States, if—

“(i) the grandfathered unitary savings and loan
holding company engaged in the activity during the
year before the date of enactment of this section; and
“(ii) at least \( \frac{2}{3} \) of the assets or \( \frac{2}{3} \) of the revenues
generated from the activity are from or attributable
to the grandfathered unitary savings and loan holding
company.

“(3) SOURCE OF STRENGTH.—A grandfathered unitary
savings and loan holding company that directly or indirectly
controls an intermediate holding company established under
this section shall serve as a source of strength to its subsidiary
intermediate holding company.

“(4) PARENT COMPANY REPORTS.—The Board, may from time
to time, examine and require reports under oath from a grand-
fathered unitary savings and loan holding company that con-
trols an intermediate holding company, and from the appro-
priate officers or directors of such company, solely for purposes
of ensuring compliance with the provisions of this section,
including assessing the ability of the company to serve as
a source of strength to its subsidiary intermediate holding
company as required under paragraph (3) and enforcing compli-
ance with such requirement.

“(5) LIMITED PARENT COMPANY ENFORCEMENT.—

“(A) IN GENERAL.—In addition to any other authority
of the Board, the Board may enforce compliance with the
provisions of this subsection that are applicable to any
company described in paragraph (1)(A) that controls an
intermediate holding company under section 8 of the Fed-
eral Deposit Insurance Act, and a company described in
paragraph (1)(A) shall be subject to such section (solely
for purposes of this subparagraph) in the same manner
and to the same extent as if the company described in paragraph (1)(A) were a savings and loan holding company.

(B) APPLICATION OF OTHER ACT.—Any violation of this subsection by a grandfathered unitary savings and loan holding company that controls an intermediate holding company may also be treated as a violation of the Federal Deposit Insurance Act for purposes of subparagraph (A).

(C) NO EFFECT ON OTHER AUTHORITY.—No provision of this paragraph shall be construed as limiting any authority of the Board or any other Federal agency under any other provision of law.

(c) REGULATIONS.—The Board—

(1) shall promulgate regulations to establish the criteria for determining whether to require a grandfathered unitary savings and loan holding company to establish an intermediate holding company under subsection (b); and

(2) may promulgate regulations to establish any restrictions or limitations on transactions between an intermediate holding company or a parent of such company and its affiliates, as necessary to prevent unsafe and unsound practices in connection with transactions between the intermediate holding company, or any subsidiary thereof, and its parent company or affiliates that are not subsidiaries of the intermediate holding company, except that such regulations shall not restrict or limit any transaction in connection with the bona fide acquisition or lease by an unaffiliated person of assets, goods, or services.

(d) RULES OF CONSTRUCTION.—

(1) ACTIVITIES.—Nothing in this section shall be construed to require a grandfathered unitary savings and loan holding company to conform its activities to permissible activities.

(2) PERMISSIBLE CORPORATE REORGANIZATION.—The formation of an intermediate holding company as required in subsection (b) shall be presumed to be a permissible corporate reorganization as described in section 10(c)(9)(D)."

SEC. 627. INTEREST-BEARING TRANSACTION ACCOUNTS AUTHORIZED.

(a) REPEAL OF PROHIBITION ON PAYMENT OF INTEREST ON DEMAND DEPOSITS.—

(1) FEDERAL RESERVE ACT.—Section 19(i) of the Federal Reserve Act (12 U.S.C. 371a) is amended to read as follows: "(i) [Repealed]."

(2) HOME OWNERS’ LOAN ACT.—The first sentence of section 5(b)(1)(B) of the Home Owners’ Loan Act (12 U.S.C. 1464(b)(1)(B)) is amended by striking "savings association may not—" and all that follows through "(ii) permit any" and inserting "savings association may not permit any".

(3) FEDERAL DEPOSIT INSURANCE ACT.—Section 18(g) of the Federal Deposit Insurance Act (12 U.S.C. 1828(g)) is amended to read as follows:

"(g) [Repealed]."

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall take effect 1 year after the date of the enactment of this Act.

SEC. 628. CREDIT CARD BANK SMALL BUSINESS LENDING.

Section 2(c)(2)(F)(v) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)(2)(F)(v)) is amended by inserting before the
period the following: "other than credit card loans that are made
to businesses that meet the criteria for a small business concern
to be eligible for business loans under regulations established by
the Small Business Administration under part 121 of title 13,
Code of Federal Regulations".

TITLE VII—WALL STREET
TRANSPARENCY AND ACCOUNTABILITY

SEC. 701. SHORT TITLE.
This title may be cited as the “Wall Street Transparency and
Accountability Act of 2010”.

Subtitle A—Regulation of Over-the-
Counter Swaps Markets

PART I—REGULATORY AUTHORITY

SEC. 711. DEFINITIONS.
In this subtitle, the terms “prudential regulator”, “swap”, “swap
dealer”, “major swap participant”, “swap data repository”, “associated
person of a swap dealer or major swap participant”, “eligible
contract participant”, “swap execution facility”, “security-based
swap”, “security-based swap dealer”, “major security-based swap
participant”, and “associated person of a security-based swap dealer
or major security-based swap participant” have the meanings given
the terms in section 1a of the Commodity Exchange Act (7 U.S.C.
1a), including any modification of the meanings under section 721(b)
of this Act.

SEC. 712. REVIEW OF REGULATORY AUTHORITY.
(a) Consultation.—
(1) Commodity Futures Trading Commission.—Before
commencing any rulemaking or issuing an order regarding swaps, swap
dealers, major swap participants, swap data repositories, derivative clearing organizations with regard to
swaps, persons associated with a swap dealer or major swap
participant, eligible contract participants, or swap execution
facilities pursuant to this subtitle, the Commodity Futures
Trading Commission shall consult and coordinate to the extent
possible with the Securities and Exchange Commission and
the prudential regulators for the purposes of assuring regu-
latory consistency and comparability, to the extent possible.

(2) Securities and Exchange Commission.—Before com-
 mencing any rulemaking or issuing an order regarding security-
based swaps, security-based swap dealers, major security-based
swap participants, security-based swap data repositories,
clearing agencies with regard to security-based swaps, persons
associated with a security-based swap dealer or major security-
based swap participant, eligible contract participants with
regard to security-based swaps, or security-based swap execu-
tion facilities pursuant to subtitle B, the Securities and
Exchange Commission shall consult and coordinate to the
extent possible with the Commodity Futures Trading Commission and the prudential regulators for the purposes of assuring regulatory consistency and comparability, to the extent possible.

(3) Procedures and Deadline.—Such regulations shall be prescribed in accordance with applicable requirements of title 5, United States Code, and shall be issued in final form not later than 360 days after the date of enactment of this Act.

(4) Applicability.—The requirements of paragraphs (1) and (2) shall not apply to an order issued—

(A) in connection with or arising from a violation or potential violation of any provision of the Commodity Exchange Act (7 U.S.C. 1 et seq.);

(B) in connection with or arising from a violation or potential violation of any provision of the securities laws; or

(C) in any proceeding that is conducted on the record in accordance with sections 556 and 557 of title 5, United States Code.

(5) Effect.—Nothing in this subsection authorizes any consultation or procedure for consultation that is not consistent with the requirements of subchapter II of chapter 5, and chapter 7, of title 5, United States Code (commonly known as the “Administrative Procedure Act”).

(6) Rules; Orders.—In developing and promulgating rules or orders pursuant to this subsection, each Commission shall consider the views of the prudential regulators.

(7) Treatment of Similar Products and Entities.—

(A) In General.—In adopting rules and orders under this subsection, the Commodity Futures Trading Commission and the Securities and Exchange Commission shall treat functionally or economically similar products or entities described in paragraphs (1) and (2) in a similar manner.

(B) Effect.—Nothing in this subtitle requires the Commodity Futures Trading Commission or the Securities and Exchange Commission to adopt joint rules or orders that treat functionally or economically similar products or entities described in paragraphs (1) and (2) in an identical manner.

(8) Mixed Swaps.—The Commodity Futures Trading Commission and the Securities and Exchange Commission, after consultation with the Board of Governors, shall jointly prescribe such regulations regarding mixed swaps, as described in section 1a(47)(D) of the Commodity Exchange Act (7 U.S.C. 1a(47)(D)) and in section 3(a)(68)(D) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)(D)), as may be necessary to carry out the purposes of this title.

(b) Limitation.—

(1) Commodity Futures Trading Commission.—Nothing in this title, unless specifically provided, confers jurisdiction on the Commodity Futures Trading Commission to issue a rule, regulation, or order providing for oversight or regulation of—

(A) security-based swaps; or

(B) with regard to its activities or functions concerning security-based swaps—
(i) security-based swap dealers;
(ii) major security-based swap participants;
(iii) security-based swap data repositories;
(iv) associated persons of a security-based swap
dealer or major security-based swap participant;
(v) eligible contract participants with respect to
security-based swaps; or
(vi) swap execution facilities with respect to security-based swaps.

(2) Securities and Exchange Commission.—Nothing in
this title, unless specifically provided, confers jurisdiction on
the Securities and Exchange Commission or State securities
regulators to issue a rule, regulation, or order providing for
oversight or regulation of—
(A) swaps; or
(B) with regard to its activities or functions concerning
swaps—
(i) swap dealers;
(ii) major swap participants;
(iii) swap data repositories;
(iv) persons associated with a swap dealer or major
swap participant;
(v) eligible contract participants with respect to
swaps; or
(vi) swap execution facilities with respect to swaps.

(3) Prohibition on Certain Futures Associations and
National Securities Associations.—
(A) Futures Associations.—Notwithstanding any
other provision of law (including regulations), unless otherwise
authorized by this title, no futures association reg-
istered under section 17 of the Commodity Exchange Act
(7 U.S.C. 21) may issue a rule, regulation, or order for
the oversight or regulation of, or otherwise assert jurisdic-
tion over, for any purpose, any security-based swap, except
that this subparagraph shall not limit the authority of
a registered futures association to examine for compliance
with, and enforce, its rules on capital adequacy.
(B) National Securities Associations.—Notwith-
standing any other provision of law (including regulations),
unless otherwise authorized by this title, no national securi-
ties association registered under section 15A of the Securi-
a rule, regulation, or order for the oversight or regulation of,
or otherwise assert jurisdiction over, for any purpose,
any swap, except that this subparagraph shall not limit
the authority of a national securities association to examine
for compliance with, and enforce, its rules on capital ade-
quacy.

(c) Objection to Commission Regulation.—
(1) Filing of Petition for Review.—
(A) In General.—If either Commission referred to in
this section determines that a final rule, regulation, or
order of the other Commission conflicts with subsection
(a)(7) or (b), then the complaining Commission may obtain
review of the final rule, regulation, or order in the United
States Court of Appeals for the District of Columbia Circuit
by filing in the court, not later than 60 days after the
Deadline.
Deadline.

date of publication of the final rule, regulation, or order, a written petition requesting that the rule, regulation, or order be set aside.

(B) EXPEDITED PROCEEDING.—A proceeding described in subparagraph (A) shall be expedited by the United States Court of Appeals for the District of Columbia Circuit.

(2) TRANSMITTAL OF PETITION AND RECORD.—

(A) IN GENERAL.—A copy of a petition described in paragraph (1) shall be transmitted not later than 1 business day after the date of filing by the complaining Commission to the Secretary of the responding Commission.

(B) DUTY OF RESPONDING COMMISSION.—On receipt of the copy of a petition described in paragraph (1), the responding Commission shall file with the United States Court of Appeals for the District of Columbia Circuit—

(i) a copy of the rule, regulation, or order under review (including any documents referred to therein); and

(ii) any other materials prescribed by the United States Court of Appeals for the District of Columbia Circuit.

(3) STANDARD OF REVIEW.—The United States Court of Appeals for the District of Columbia Circuit shall—

(A) give deference to the views of neither Commission; and

(B) determine to affirm or set aside a rule, regulation, or order of the responding Commission under this subsection, based on the determination of the court as to whether the rule, regulation, or order is in conflict with subsection (a)(7) or (b), as applicable.

(4) JUDICIAL STAY.—The filing of a petition by the complaining Commission pursuant to paragraph (1) shall operate as a stay of the rule, regulation, or order until the date on which the determination of the United States Court of Appeals for the District of Columbia Circuit is final (including any appeal of the determination).

(d) JOINT RULEMAKING.—

(1) IN GENERAL.—Notwithstanding any other provision of this title and subsections (b) and (c), the Commodity Futures Trading Commission and the Securities and Exchange Commission, in consultation with the Board of Governors, shall further define the terms “swap”, “security-based swap”, “swap dealer”, “security-based swap dealer”, “major swap participant”, “major security-based swap participant”, “eligible contract participant”, and “security-based swap agreement” in section 1a(47)(A)(v) of the Commodity Exchange Act (7 U.S.C. 1a(47)(A)(v)) and section 3(a)(78) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(78)).

(2) AUTHORITY OF THE COMMISSIONS.—

(A) IN GENERAL.—Notwithstanding any other provision of this title, the Commodity Futures Trading Commission and the Securities and Exchange Commission, in consultation with the Board of Governors, shall jointly adopt such other rules regarding such definitions as the Commodity Futures Trading Commission and the Securities and
Exchange Commission determine are necessary and appropriate, in the public interest, and for the protection of investors.

(B) TRADE REPOSITORY RECORDKEEPING.—Notwithstanding any other provision of this title, the Commodity Futures Trading Commission and the Securities and Exchange Commission, in consultation with the Board of Governors, shall engage in joint rulemaking to jointly adopt a rule or rules governing the books and records that are required to be kept and maintained regarding security-based swap agreements by persons that are registered as swap data repositories under the Commodity Exchange Act, including uniform rules that specify the data elements that shall be collected and maintained by each repository.

(C) BOOKS AND RECORDS.—Notwithstanding any other provision of this title, the Commodity Futures Trading Commission and the Securities and Exchange Commission, in consultation with the Board of Governors, shall engage in joint rulemaking to jointly adopt a rule or rules governing books and records regarding security-based swap agreements, including daily trading records, for swap dealers, major swap participants, security-based swap dealers, and security-based swap participants.

(D) COMPARABLE RULES.—Rules and regulations prescribed jointly under this title by the Commodity Futures Trading Commission and the Securities and Exchange Commission shall be comparable to the maximum extent possible, taking into consideration differences in instruments and in the applicable statutory requirements.

(E) TRACKING UNCLEARED TRANSACTIONS.—Any rules prescribed under subparagraph (A) shall require the maintenance of records of all activities relating to security-based swap agreement transactions defined under subparagraph (A) that are not cleared.

(F) SHARING OF INFORMATION.—The Commodity Futures Trading Commission shall make available to the Securities and Exchange Commission information relating to security-based swap agreement transactions defined in subparagraph (A) that are not cleared.

(3) FINANCIAL STABILITY OVERSIGHT COUNCIL.—In the event that the Commodity Futures Trading Commission and the Securities and Exchange Commission fail to jointly prescribe rules pursuant to paragraph (1) or (2) in a timely manner, at the request of either Commission, the Financial Stability Oversight Council shall resolve the dispute—

(A) within a reasonable time after receiving the request;

(B) after consideration of relevant information provided by each Commission; and

(C) by agreeing with 1 of the Commissions regarding the entirety of the matter or by determining a compromise position.

(4) JOINT INTERPRETATION.—Any interpretation of, or guidance by either Commission regarding, a provision of this title, shall be effective only if issued jointly by the Commodity Futures Trading Commission and the Securities and Exchange Commission, after consultation with the Board of Governors,
if this title requires the Commodity Futures Trading Commission and the Securities and Exchange Commission to issue joint regulations to implement the provision.

Deadline.

(e) **GLOBAL RULEMAKING TIMEFRAME.**—Unless otherwise provided in this title, or an amendment made by this title, the Commodity Futures Trading Commission or the Securities and Exchange Commission, or both, shall individually, and not jointly, promulgate rules and regulations required of each Commission under this title or an amendment made by this title not later than 360 days after the date of enactment of this Act.

(f) **RULES AND REGISTRATION BEFORE FINAL EFFECTIVE DATES.**—Beginning on the date of enactment of this Act and notwithstanding the effective date of any provision of this Act, the Commodity Futures Trading Commission and the Securities and Exchange Commission may, in order to prepare for the effective dates of the provisions of this Act—

1. promulgate rules, regulations, or orders permitted or required by this Act;
2. conduct studies and prepare reports and recommendations required by this Act;
3. register persons under the provisions of this Act; and
4. exempt persons, agreements, contracts, or transactions from provisions of this Act, under the terms contained in this Act, provided, however, that no action by the Commodity Futures Trading Commission or the Securities and Exchange Commission described in paragraphs (1) through (4) shall become effective prior to the effective date applicable to such action under the provisions of this Act.

**SEC. 713. PORTFOLIO MARGINING CONFORMING CHANGES.**

(a) **SECURITIES EXCHANGE ACT OF 1934.**—Section 15(c)(3) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(c)(3)) is amended by adding at the end the following:

1. Notwithstanding any provision of sections 2(a)(1)(C)(i) or 4d(a)(2) of the Commodity Exchange Act and the rules and regulations thereunder, and pursuant to an exemption granted by the Commission under section 36 of this title or pursuant to a rule or regulation, cash and securities may be held by a broker or dealer registered pursuant to subsection (b)(1) and also registered as a futures commission merchant pursuant to section 4f(a)(1) of the Commodity Exchange Act, in a portfolio margining account carried as a futures account subject to section 4d of the Commodity Exchange Act and the rules and regulations thereunder, pursuant to a portfolio margining program approved by the Commodity Futures Trading Commission, and subject to subchapter IV of chapter 7 of title 11 of the United States Code and the rules and regulations thereunder. The Commission shall consult with the Commodity Futures Trading Commission to adopt rules to ensure that such transactions and accounts are subject to comparable requirements to the extent practicable for similar products.

(b) **COMMODITY EXCHANGE ACT.**—Section 4d of the Commodity Exchange Act (7 U.S.C. 6d) is amended by adding at the end the following:
“(h) Notwithstanding subsection (a)(2) or the rules and regulations thereunder, and pursuant to an exemption granted by the Commission under section 4(c) of this Act or pursuant to a rule or regulation, a futures commission merchant that is registered pursuant to section 4f(a)(1) of this Act and also registered as a broker or dealer pursuant to section 15(b)(1) of the Securities Exchange Act of 1934 may, pursuant to a portfolio margining program approved by the Securities and Exchange Commission pursuant to section 19(b) of the Securities Exchange Act of 1934, hold in a portfolio margining account carried as a securities account subject to section 15(c)(3) of the Securities Exchange Act of 1934 and the rules and regulations thereunder, a contract for the purchase or sale of a commodity for future delivery or an option on such a contract, and any money, securities or other property received from a customer to margin, guarantee or secure such a contract, or accruing to a customer as the result of such a contract. The Commission shall consult with the Securities and Exchange Commission to adopt rules to ensure that such transactions and accounts are subject to comparable requirements to the extent practical for similar products.”.

(c) DUTY OF COMMODITY FUTURES TRADING COMMISSION.—Section 20 of the Commodity Exchange Act (7 U.S.C. 24) is amended by adding at the end the following:

“(c) The Commission shall exercise its authority to ensure that securities held in a portfolio margining account carried as a futures account are customer property and the owners of those accounts are customers for the purposes of subchapter IV of chapter 7 of title 11 of the United States Code.”.

SEC. 714. ABUSIVE SWAPS.

The Commodity Futures Trading Commission or the Securities and Exchange Commission, or both, individually may, by rule or order—

(1) collect information as may be necessary concerning the markets for any types of—

(A) swap (as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a)); or

(B) security-based swap (as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a)); and

(2) issue a report with respect to any types of swaps or security-based swaps that the Commodity Futures Trading Commission or the Securities and Exchange Commission determines to be detrimental to—

(A) the stability of a financial market; or

(B) participants in a financial market.

SEC. 715. AUTHORITY TO PROHIBIT PARTICIPATION IN SWAP ACTIVITIES.

Except as provided in section 4 of the Commodity Exchange Act (7 U.S.C. 6), if the Commodity Futures Trading Commission or the Securities and Exchange Commission determines that the regulation of swaps or security-based swaps markets in a foreign country undermines the stability of the United States financial system, either Commission, in consultation with the Secretary of the Treasury, may prohibit an entity domiciled in the foreign country from participating in the United States in any swap or security-based swap activities.
SEC. 716. PROHIBITION AGAINST FEDERAL GOVERNMENT BAILOUTS OF SWAPS ENTITIES.

(a) Prohibition on Federal Assistance.—Notwithstanding any other provision of law (including regulations), no Federal assistance may be provided to any swaps entity with respect to any swap, security-based swap, or other activity of the swaps entity.

(b) Definitions.—In this section:

(1) Federal Assistance.—The term “Federal assistance” means the use of any advances from any Federal Reserve credit facility or discount window that is not part of a program or facility with broad-based eligibility under section 13(3)(A) of the Federal Reserve Act, Federal Deposit Insurance Corporation insurance or guarantees for the purpose of—

(A) making any loan to, or purchasing any stock, equity interest, or debt obligation of, any swaps entity;

(B) purchasing the assets of any swaps entity;

(C) guaranteeing any loan or debt issuance of any swaps entity; or

(D) entering into any assistance arrangement (including tax breaks), loss sharing, or profit sharing with any swaps entity.

(2) Swaps Entity.—

(A) In General.—The term “swaps entity” means any swap dealer, security-based swap dealer, major swap participant, major security-based swap participant, that is registered under—

(i) the Commodity Exchange Act (7 U.S.C. 1 et seq.); or


(B) Exclusion.—The term “swaps entity” does not include any major swap participant or major security-based swap participant that is an insured depository institution.

(c) Affiliates of Insured Depository Institutions.—The prohibition on Federal assistance contained in subsection (a) does not apply to and shall not prevent an insured depository institution from having or establishing an affiliate which is a swaps entity, as long as such insured depository institution is part of a bank holding company, or savings and loan holding company, that is supervised by the Federal Reserve and such swaps entity affiliate complies with sections 23A and 23B of the Federal Reserve Act and such other requirements as the Commodity Futures Trading Commission or the Securities Exchange Commission, as appropriate, and the Board of Governors of the Federal Reserve System, may determine to be necessary and appropriate.

(d) Only Bona Fide Hedging and Traditional Bank Activities Permitted.—The prohibition in subsection (a) shall apply to any insured depository institution unless the insured depository institution limits its swap or security-based swap activities to:

(1) Hedging and other similar risk mitigating activities directly related to the insured depository institution’s activities.

(2) Acting as a swaps entity for swaps or security-based swaps involving rates or reference assets that are permissible for investment by a national bank under the paragraph designated as “Seventh.” of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), other than as described in paragraph (3).
(3) LIMITATION ON CREDIT DEFAULT SWAPS.—Acting as a
swaps entity for credit default swaps, including swaps or secur-
ity-based swaps referencing the credit risk of asset-backed
securities as defined in section 3(a)(77) of the Securities
Exchange Act of 1934 (15 U.S.C. 78c(a)(77)) (as amended by
this Act) shall not be considered a bank permissible activity
for purposes of subsection (d)(2) unless such swaps or security-
based swaps are cleared by a derivatives clearing organization
(as such term is defined in section 1a of the Commodity
Exchange Act (7 U.S.C. 1a)) or a clearing agency (as such
term is defined in section 3 of the Securities Exchange Act
(15 U.S.C. 78c)) that is registered, or exempt from registration,
as a derivatives clearing organization under the Commodity
Exchange Act or as a clearing agency under the Securities
Exchange Act, respectively.

(e) EXISTING SWAPS AND SECURITY-BASED SWAPS.—The prohibi-
tion in subsection (a) shall only apply to swaps or security-based
swaps entered into by an insured depository institution after the
end of the transition period described in subsection (f).

(f) TRANSITION PERIOD.—To the extent an insured depository
institution qualifies as a “swaps entity” and would be subject to
the Federal assistance prohibition in subsection (a), the appropriate
Federal banking agency, after consulting with and considering the
views of the Commodity Futures Trading Commission or the Securi-
ties Exchange Commission, as appropriate, shall permit the insured
depository institution up to 24 months to divest the swaps entity
or cease the activities that require registration as a swaps entity.
In establishing the appropriate transition period to effect such
divestiture or cessation of activities, which may include making
the swaps entity an affiliate of the insured depository institution,
the appropriate Federal banking agency shall take into account
and make written findings regarding the potential impact of such
divestiture or cessation of activities on the insured depository
institution’s (1) mortgage lending, (2) small business lending, (3)
job creation, and (4) capital formation versus the potential negative
impact on insured depositors and the Deposit Insurance Fund of
the Federal Deposit Insurance Corporation. The appropriate Federal
banking agency may consider such other factors as may be appro-
rate. The appropriate Federal banking agency may place such
conditions on the insured depository institution’s divestiture or
ceasing of activities of the swaps entity as it deems necessary
and appropriate. The transition period under this subsection may
be extended by the appropriate Federal banking agency, after con-
sultation with the Commodity Futures Trading Commission and
the Securities and Exchange Commission, for a period of up to
1 additional year.

(g) EXCLUDED ENTITIES.—For purposes of this section, the term
“swaps entity” shall not include any insured depository institution
under the Federal Deposit Insurance Act or a covered financial
company under title II which is in a conservatorship, receivership,
or a bridge bank operated by the Federal Deposit Insurance Cor-
poration.

(h) EFFECTIVE DATE.—The prohibition in subsection (a) shall
be effective 2 years following the date on which this Act is effective.

(i) LIQUIDATION REQUIRED.—

(1) IN GENERAL.—
(A) FDIC INSURED INSTITUTIONS.—All swaps entities that are FDIC insured institutions that are put into receivership or declared insolvent as a result of swap or security-based swap activity of the swaps entities shall be subject to the termination or transfer of that swap or security-based swap activity in accordance with applicable law prescribing the treatment of those contracts. No taxpayer funds shall be used to prevent the receivership of any swap entity resulting from swap or security-based swap activity of the swaps entity.

(B) INSTITUTIONS THAT POSE A SYSTEMIC RISK AND ARE SUBJECT TO HEIGHTENED PRUDENTIAL SUPERVISION AS REGULATED UNDER SECTION 113.—All swaps entities that are institutions that pose a systemic risk and are subject to heightened prudential supervision as regulated under section 113, that are put into receivership or declared insolvent as a result of swap or security-based swap activity of the swaps entities shall be subject to the termination or transfer of that swap or security-based swap activity in accordance with applicable law prescribing the treatment of those contracts. No taxpayer funds shall be used to prevent the receivership of any swap entity resulting from swap or security-based swap activity of the swaps entity.

(C) NON-FDIC INSURED, NON-SYSTEMICALLY SIGNIFICANT INSTITUTIONS NOT SUBJECT TO HEIGHTENED PRUDENTIAL SUPERVISION AS REGULATED UNDER SECTION 113.—No taxpayer resources shall be used for the orderly liquidation of any swaps entities that are non-FDIC insured, non-systemically significant institutions not subject to heightened prudential supervision as regulated under section 113.

(2) RECOVERY OF FUNDS.—All funds expended on the termination or transfer of the swap or security-based swap activity of the swaps entity shall be recovered in accordance with applicable law from the disposition of assets of such swap entity or through assessments, including on the financial sector as provided under applicable law.

(3) NO LOSSES TO TAXPAYERS.—Taxpayers shall bear no losses from the exercise of any authority under this title.

(j) PROHIBITION ON UNREGULATED COMBINATION OF SWAPS ENTITIES AND BANKING.—At no time following adoption of the rules in subsection (k) may a bank or bank holding company be permitted to be or become a swap entity unless it conducts its swap or security-based swap activity in compliance with such minimum standards set by its prudential regulator as are reasonably calculated to permit the swaps entity to conduct its swap or security-based swap activities in a safe and sound manner and mitigate systemic risk.

(k) RULES.—In prescribing rules, the prudential regulator for a swaps entity shall consider the following factors:

1. The expertise and managerial strength of the swaps entity, including systems for effective oversight.
2. The financial strength of the swaps entity.
3. Systems for identifying, measuring and controlling risks arising from the swaps entity’s operations.
4. Systems for identifying, measuring and controlling the swaps entity’s participation in existing markets.
(5) Systems for controlling the swaps entity’s participation or entry into in new markets and products.

(l) AUTHORITY OF THE FINANCIAL STABILITY OVERSIGHT COUNCIL.—The Financial Stability Oversight Council may determine that, when other provisions established by this Act are insufficient to effectively mitigate systemic risk and protect taxpayers, that swaps entities may no longer access Federal assistance with respect to any swap, security-based swap, or other activity of the swaps entity. Any such determination by the Financial Stability Oversight Council of a prohibition of federal assistance shall be made on an institution-by-institution basis, and shall require the vote of not fewer than two-thirds of the members of the Financial Stability Oversight Council, which must include the vote by the Chairman of the Council, the Chairman of the Board of Governors of the Federal Reserve System, and the Chairperson of the Federal Deposit Insurance Corporation. Notice and hearing requirements for such determinations shall be consistent with the standards provided in title I.

(m) BAN ON PROPRIETARY TRADING IN DERIVATIVES.—An insured depository institution shall comply with the prohibition on proprietary trading in derivatives as required by section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

SEC. 717. NEW PRODUCT APPROVAL CFTC—SEC PROCESS.

(a) AMENDMENTS TO THE COMMODITY EXCHANGE ACT.—Section 2(a)(1)(C) of the Commodity Exchange Act (7 U.S.C. 2(a)(1)(C)) is amended—

(1) in clause (i) by striking “This” and inserting “(I) Except as provided in subclause (II), this”; and

(2) by adding at the end of clause (i) the following: 

“(II) This Act shall apply to and the Commission shall have jurisdiction with respect to accounts, agreements, and transactions involving, and may permit the listing for trading pursuant to section 5c(c) of, a put, call, or other option on 1 or more securities (as defined in section 2(a)(1) of the Securities Act of 1933 or section 3(a)(10) of the Securities Exchange Act of 1934 on the date of enactment of the Futures Trading Act of 1982), including any group or index of such securities, or any interest therein or based on the value thereof, that is exempted by the Securities and Exchange Commission pursuant to section 36(a)(1) of the Securities Exchange Act of 1934 with the condition that the Commission exercise concurrent jurisdiction over such put, call, or other option; provided, however, that nothing in this paragraph shall be construed to affect the jurisdiction and authority of the Securities and Exchange Commission over such put, call, or other option.”.

(b) AMENDMENTS TO THE SECURITIES EXCHANGE ACT OF 1934.—The Securities Exchange Act of 1934 is amended by adding the following section after section 3A (15 U.S.C. 78c–1):

“SEC. 3B. SECURITIES-RELATED DERIVATIVES.

“(a) Any agreement, contract, or transaction (or class thereof) that is exempted by the Commodity Futures Trading Commission
pursuant to section 4(c)(1) of the Commodity Exchange Act (7 U.S.C. 6(c)(1)) with the condition that the Commission exercise concurrent jurisdiction over such agreement, contract, or transaction (or class thereof) shall be deemed a security for purposes of the securities laws.

“(b) With respect to any agreement, contract, or transaction (or class thereof) that is exempted by the Commodity Futures Trading Commission pursuant to section 4(c)(1) of the Commodity Exchange Act (7 U.S.C. 6(c)(1)) with the condition that the Commission exercise concurrent jurisdiction over such agreement, contract, or transaction (or class thereof), references in the securities laws to the ‘purchase’ or ‘sale’ of a security shall be deemed to include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under such agreement, contract, or transaction, as the context may require.”.

(c) Amendment to Securities Exchange Act of 1934.—Section 19(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78s(b)) is amended by adding at the end the following:

“(10) Notwithstanding paragraph (2), the time period within which the Commission is required by order to approve a proposed rule change or institute proceedings to determine whether the proposed rule change should be disapproved is stayed pending a determination by the Commission upon the request of the Commodity Futures Trading Commission or its Chairman that the Commission issue a determination as to whether a product that is the subject of such proposed rule change is a security pursuant to section 718 of the Wall Street Transparency and Accountability Act of 2010.”.

(d) Amendment to Commodity Exchange Act.—Section 5c(c)(1) of the Commodity Exchange Act (7 U.S.C. 7a–2(c)(1)) is amended—

(1) by striking “Subject to paragraph (2)” and inserting the following:

“(A) Election.—Subject to paragraph (2)”;

(2) by adding at the end the following:

“(B) Certification.—The certification of a product pursuant to this paragraph shall be stayed pending a determination by the Commission upon the request of the Securities and Exchange Commission or its Chairman that the Commission issue a determination as to whether the product that is the subject of such certification is a contract of sale of a commodity for future delivery, an option on such a contract, or an option on a commodity pursuant to section 718 of the Wall Street Transparency and Accountability Act of 2010.”.

SEC. 718. Determining Status of Novel Derivative Products.

(a) Process for Determining the Status of a Novel Derivative Product.—

(1) Notice.—

(A) In General.—Any person filing a proposal to list or trade a novel derivative product that may have elements of both securities and contracts of sale of a commodity for future delivery (or options on such contracts or options on commodities) may concurrently provide notice and furnish a copy of such filing with the Securities and Exchange
Commission and the Commodity Futures Trading Commission. Any such notice shall state that notice has been made with both Commissions.

(B) Notification.—If no concurrent notice is made pursuant to subparagraph (A), within 5 business days after determining that a proposal that seeks to list or trade a novel derivative product may have elements of both securities and contracts of sale of a commodity for future delivery (or options on such contracts or options on commodities), the Securities and Exchange Commission or the Commodity Futures Trading Commission, as applicable, shall notify the other Commission and provide a copy of such filing to the other Commission.

(2) Request for determination.—

(A) In general.—No later than 21 days after receipt of a notice under paragraph (1), or upon its own initiative if no such notice is received, the Commodity Futures Trading Commission may request that the Securities and Exchange Commission issue a determination as to whether a product is a security, as defined in section 3(a)(10) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(10)).

(B) Request.—No later than 21 days after receipt of a notice under paragraph (1), or upon its own initiative if no such notice is received, the Securities and Exchange Commission may request that the Commodity Futures Trading Commission issue a determination as to whether a product is a contract of sale of a commodity for future delivery, an option on such a contract, or an option on a commodity subject to the Commodity Futures Trading Commission’s exclusive jurisdiction under section 2(a)(1)(A) of the Commodity Exchange Act (7 U.S.C. 2(a)(1)(A)).

(C) Requirement relating to request.—A request under subparagraph (A) or (B) shall be made by submitting such request, in writing, to the Securities and Exchange Commission or the Commodity Futures Trading Commission, as applicable.

(D) Effect.—Nothing in this paragraph shall be construed to prevent—

(i) the Commodity Futures Trading Commission from requesting that the Securities and Exchange Commission grant an exemption pursuant to section 36(a)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78mm(a)(1)) with respect to a product that is the subject of a filing under paragraph (1); or

(ii) the Securities and Exchange Commission from requesting that the Commodity Futures Trading Commission grant an exemption pursuant to section 4(c)(1) of the Commodity Exchange Act (7 U.S.C. 6(c)(1)) with respect to a product that is the subject of a filing under paragraph (1),

Provided, however, that nothing in this subparagraph shall be construed to require the Commodity Futures Trading Commission or the Securities and Exchange Commission to issue an exemption requested pursuant to this subparagraph; provided further, That an order granting or denying an exemption described in this subparagraph and issued
under paragraph (3)(B) shall not be subject to judicial review pursuant to subsection (b).

(E) **Withdrawal of Request.**—A request under subparagraph (A) or (B) may be withdrawn by the Commission making the request at any time prior to a determination being made pursuant to paragraph (3) for any reason by providing written notice to the head of the other Commission.

**Deadline.**

(3) **Determination.**—Notwithstanding any other provision of law, no later than 120 days after the date of receipt of a request—

(A) under subparagraph (A) or (B) of paragraph (2), unless such request has been withdrawn pursuant to paragraph (2)(E), the Securities and Exchange Commission or the Commodity Futures Trading Commission, as applicable, shall, by order, issue the determination requested in subparagraph (A) or (B) of paragraph (2), as applicable, and the reasons therefor; or

(B) under paragraph (2)(D), unless such request has been withdrawn, the Securities and Exchange Commission or the Commodity Futures Trading Commission, as applicable, shall grant an exemption or provide reasons for not granting such exemption, provided that any decision by the Securities and Exchange Commission not to grant such exemption shall not be reviewable under section 25 of the Securities Exchange Act of 1934 (15 U.S.C. 78y).

**Deadline.**

(b) **Judicial Resolution.**—

(1) **In General.**—The Commodity Futures Trading Commission or the Securities and Exchange Commission may petition the United States Court of Appeals for the District of Columbia Circuit for review of a final order of the other Commission issued pursuant to subsection (a)(3)(A), with respect to a novel derivative product that may have elements of both securities and contracts of sale of a commodity for future delivery (or options on such contracts or options on commodities) that it believes affects its statutory jurisdiction within 60 days after the date of entry of such order, a written petition requesting a review of the order. Any such proceeding shall be expedited by the Court of Appeals.

Deadline.

(2) **Transmittal of Petition and Record.**—A copy of a petition described in paragraph (1) shall be transmitted not later than 1 business day after filing by the complaining Commission to the responding Commission. On receipt of the petition, the responding Commission shall file with the court a copy of the order under review and any documents referred to therein, and any other materials prescribed by the court.

(3) **Standard of Review.**—The court, in considering a petition filed pursuant to paragraph (1), shall give no deference to, or presumption in favor of, the views of either Commission.

(4) **Judicial Stay.**—The filing of a petition by the complaining Commission pursuant to paragraph (1) shall operate as a stay of the order, until the date on which the determination of the court is final (including any appeal of the determination).

**SEC. 719. STUDIES.**

(a) **Study on Effects of Position Limits on Trading on Exchanges in the United States.**—

15 USC 8307.
(1) STUDY.—The Commodity Futures Trading Commission, in consultation with each entity that is a designated contract market under the Commodity Exchange Act, shall conduct a study of the effects (if any) of the position limits imposed pursuant to the other provisions of this title on excessive speculation and on the movement of transactions from exchanges in the United States to trading venues outside the United States.

(2) REPORT TO THE CONGRESS.—Within 12 months after the imposition of position limits pursuant to the other provisions of this title, the Commodity Futures Trading Commission, in consultation with each entity that is a designated contract market under the Commodity Exchange Act, shall submit to the Congress a report on the matters described in paragraph (1).

(3) REQUIRED HEARING.—Within 30 legislative days after the submission to the Congress of the report described in paragraph (2), the Committee on Agriculture of the House of Representatives shall hold a hearing examining the findings of the report.

(4) BIENNIAL REPORTING.—In addition to the study required in paragraph (1), the Chairman of the Commodity Futures Trading Commission shall prepare and submit to the Congress biennial reports on the growth or decline of the derivatives markets in the United States and abroad, which shall include assessments of the causes of any such growth or decline, the effectiveness of regulatory regimes in managing systemic risk, a comparison of the costs of compliance at the time of the report for market participants subject to regulation by the United States with the costs of compliance in December 2008 for the market participants, and the quality of the available data. In preparing the report, the Chairman shall solicit the views of, consult with, and address the concerns raised by, market participants, regulators, legislators, and other interested parties.

(b) STUDY ON FEASIBILITY OF REQUIRING USE OF STANDARDIZED ALGORITHMIC DESCRIPTIONS FOR FINANCIAL DERIVATIVES.—

(1) IN GENERAL.—The Securities and Exchange Commission and the Commodity Futures Trading Commission shall conduct a joint study of the feasibility of requiring the derivatives industry to adopt standardized computer-readable algorithmic descriptions which may be used to describe complex and standardized financial derivatives.

(2) GOALS.—The algorithmic descriptions defined in the study shall be designed to facilitate computerized analysis of individual derivative contracts and to calculate net exposures to complex derivatives. The algorithmic descriptions shall be optimized for simultaneous use by—

(A) commercial users and traders of derivatives;
(B) derivative clearing houses, exchanges and electronic trading platforms;
(C) trade repositories and regulator investigations of market activities; and
(D) systemic risk regulators.

The study will also examine the extent to which the algorithmic description, together with standardized and extensible legal
definitions, may serve as the binding legal definition of derivative contracts. The study will examine the logistics of possible implementations of standardized algorithmic descriptions for derivatives contracts. The study shall be limited to electronic formats for exchange of derivative contract descriptions and will not contemplate disclosure of proprietary valuation models.

(3) **INTERNATIONAL COORDINATION.**—In conducting the study, the Securities and Exchange Commission and the Commodity Futures Trading Commission shall coordinate the study with international financial institutions and regulators as appropriate and practical.

(4) **REPORT.**—Within 8 months after the date of the enactment of this Act, the Securities and Exchange Commission and the Commodity Futures Trading Commission shall jointly submit to the Committees on Agriculture and on Financial Services of the House of Representatives and the Committees on Agriculture, Nutrition, and Forestry and on Banking, Housing, and Urban Affairs of the Senate a written report which contains the results of the study required by paragraphs (1) through (3).

(c) **INTERNATIONAL SWAP REGULATION.**—

(1) **IN GENERAL.**—The Commodity Futures Trading Commission and the Securities and Exchange Commission shall jointly conduct a study—

(A) relating to—

(i) swap regulation in the United States, Asia, and Europe; and

(ii) clearing house and clearing agency regulation in the United States, Asia, and Europe; and

(B) that identifies areas of regulation that are similar in the United States, Asia and Europe and other areas of regulation that could be harmonized

(2) **REPORT.**—Not later than 18 months after the date of enactment of this Act, the Commodity Futures Trading Commission and the Securities and Exchange Commission shall submit to the Committee on Agriculture, Nutrition, and Forestry and the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Agriculture and the Committee on Financial Services of the House of Representatives a report that includes a description of the results of the study under subsection (a), including—

(A) identification of the major exchanges and their regulator in each geographic area for the trading of swaps and security-based swaps including a listing of the major contracts and their trading volumes and notional values as well as identification of the major swap dealers participating in such markets;

(B) identification of the major clearing houses and clearing agencies and their regulator in each geographic area for the clearing of swaps and security-based swaps, including a listing of the major contracts and the clearing volumes and notional values as well as identification of the major clearing members of such clearing houses and clearing agencies in such markets;

(C) a description of the comparative methods of clearing swaps in the United States, Asia, and Europe; and
(D) a description of the various systems used for establishing margin on individual swaps, security-based swaps, and swap portfolios.

(d) STABLE VALUE CONTRACTS.—

(1) Determination.—

(A) Status.—Not later than 15 months after the date of the enactment of this Act, the Securities and Exchange Commission and the Commodity Futures Trading Commission shall, jointly, conduct a study to determine whether stable value contracts fall within the definition of a swap. In making the determination required under this subparagraph, the Commissions jointly shall consult with the Department of Labor, the Department of the Treasury, and the State entities that regulate the issuers of stable value contracts.

(B) Regulations.—If the Commissions determine that stable value contracts fall within the definition of a swap, the Commissions jointly shall determine if an exemption for stable value contracts from the definition of swap is appropriate and in the public interest. The Commissions shall issue regulations implementing the determinations required under this paragraph. Until the effective date of such regulations, and notwithstanding any other provision of this title, the requirements of this title shall not apply to stable value contracts.

(C) Legal Certainty.—Stable value contracts in effect prior to the effective date of the regulations described in subparagraph (B) shall not be considered swaps.

(2) Definition.—For purposes of this subsection, the term “stable value contract” means any contract, agreement, or transaction that provides a crediting interest rate and guaranty or financial assurance of liquidity at contract or book value prior to maturity offered by a bank, insurance company, or other State or federally regulated financial institution for the benefit of any individual or commingled fund available as an investment in an employee benefit plan (as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, including plans described in section 3(32) of such Act) subject to participant direction, an eligible deferred compensation plan (as defined in section 457(b) of the Internal Revenue Code of 1986) that is maintained by an eligible employer described in section 457(e)(1)(A) of such Code, an arrangement described in section 403(b) of such Code, or a qualified tuition program (as defined in section 529 of such Code).

SEC. 720. MEMORANDUM.

(a)(1) The Commodity Futures Trading Commission and the Federal Energy Regulatory Commission shall, not later than 180 days after the date of the enactment of this Act, negotiate a memorandum of understanding to establish procedures for—

(A) applying their respective authorities in a manner so as to ensure effective and efficient regulation in the public interest;

(B) resolving conflicts concerning overlapping jurisdiction between the 2 agencies; and

(C) avoiding, to the extent possible, conflicting or duplicative regulation.
(2) Such memorandum and any subsequent amendments to the memorandum shall be promptly submitted to the appropriate committees of Congress.

Deadline.

(b) The Commodity Futures Trading Commission and the Federal Energy Regulatory Commission shall, not later than 180 days after the date of the enactment of this section, negotiate a memorandum of understanding to share information that may be requested where either Commission is conducting an investigation into potential manipulation, fraud, or market power abuse in markets subject to such Commission's regulation or oversight. Shared information shall remain subject to the same restrictions on disclosure applicable to the Commission initially holding the information.

PART II—REGULATION OF SWAP MARKETS

SEC. 721. DEFINITIONS.

(a) In General.—Section 1a of the Commodity Exchange Act (7 U.S.C. 1a) is amended—

(1) by redesignating paragraphs (2), (3) and (4), (5) through (17), (18) through (23), (24) through (28), (29), (30), (31) through (33), and (34) as paragraphs (6), (8) and (9), (11) through (23), (26) through (31), (34) through (38), (40), (41), (44) through (46), and (51), respectively;

(2) by inserting after paragraph (1) the following:

“(2) APPROPRIATE FEDERAL BANKING AGENCY.—The term ‘appropriate Federal banking agency’—

“(A) has the meaning given the term in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813);

“(B) means the Board in the case of a noninsured State bank; and

“(C) is the Farm Credit Administration for farm credit system institutions.

“(3) ASSOCIATED PERSON OF A SECURITY-BASED SWAP DEALER OR MAJOR SECURITY-BASED SWAP PARTICIPANT.—The term ‘associated person of a security-based swap dealer or major security-based swap participant’ has the meaning given the term in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)).

“(4) ASSOCIATED PERSON OF A SWAP DEALER OR MAJOR SWAP PARTICIPANT.—

“(A) IN GENERAL.—The term ‘associated person of a swap dealer or major swap participant’ means a person who is associated with a swap dealer or major swap participant as a partner, officer, employee, or agent (or any person occupying a similar status or performing similar functions), in any capacity that involves—

“(i) the solicitation or acceptance of swaps; or

“(ii) the supervision of any person or persons so engaged.

“(B) EXCLUSION.—Other than for purposes of section 4s(b)(6), the term ‘associated person of a swap dealer or major swap participant’ does not include any person associated with a swap dealer or major swap participant the functions of which are solely clerical or ministerial.

“(5) BOARD.—The term ‘Board’ means the Board of Governors of the Federal Reserve System.”;
(3) by inserting after paragraph (6) (as redesignated by paragraph (1)) the following:

“(7) CLEARED SWAP.—The term ‘cleared swap’ means any swap that is, directly or indirectly, submitted to and cleared by a derivatives clearing organization registered with the Commission.”;

(4) in paragraph (9) (as redesignated by paragraph (1)), by striking “except onions” and all that follows through the period at the end and inserting the following: “except onions (as provided by the first section of Public Law 85–839 (7 U.S.C. 13–1)) and motion picture box office receipts (or any index, measure, value, or data related to such receipts), and all services, rights, and interests (except motion picture box office receipts, or any index, measure, value or data related to such receipts) in which contracts for future delivery are presently or in the future dealt in.”;

(5) by inserting after paragraph (9) (as redesignated by paragraph (1)) the following:

“(10) COMMODITY POOL.—

(A) IN GENERAL.—The term ‘commodity pool’ means any investment trust, syndicate, or similar form of enterprise operated for the purpose of trading in commodity interests, including any—

“(i) commodity for future delivery, security futures product, or swap;

“(ii) agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i);

“(iii) commodity option authorized under section 4c; or

“(iv) leverage transaction authorized under section 19.

(B) FURTHER DEFINITION.—The Commission, by rule or regulation, may include within, or exclude from, the term ‘commodity pool’ any investment trust, syndicate, or similar form of enterprise if the Commission determines that the rule or regulation will effectuate the purposes of this Act.”;

(6) by striking paragraph (11) (as redesignated by paragraph (1)) and inserting the following:

“(11) COMMODITY POOL OPERATOR.—

(A) IN GENERAL.—The term ‘commodity pool operator’ means any person—

“(i) engaged in a business that is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in commodity interests, including any—

“(I) commodity for future delivery, security futures product, or swap;

“(II) agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i);

“(III) commodity option authorized under section 4c; or
“(IV) leverage transaction authorized under section 19; or
“(ii) who is registered with the Commission as a commodity pool operator.

“(B) FURTHER DEFINITION.—The Commission, by rule or regulation, may include within, or exclude from, the term ‘commodity pool operator’ any person engaged in a business that is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise if the Commission determines that the rule or regulation will effectuate the purposes of this Act.”;

(7) in paragraph (12) (as redesignated by paragraph (1)), in subparagraph (A)—
(A) in clause (i)—
(i) in subclause (I), by striking “made or to be made on or subject to the rules of a contract market or derivatives transaction execution facility” and inserting “, security futures product, or swap”;
(ii) by redesignating subclauses (II) and (III) as subclauses (III) and (IV);
(iii) by inserting after subclause (I) the following: “(II) any agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i);” and
(iv) in subclause (IV) (as so redesignated), by striking “or”;
(B) in clause (ii), by striking the period at the end and inserting a semicolon; and
(C) by adding at the end the following:
“(iii) is registered with the Commission as a commodity trading advisor; or
“(iv) the Commission, by rule or regulation, may include if the Commission determines that the rule or regulation will effectuate the purposes of this Act.”;

(8) in paragraph (17) (as redesignated by paragraph (1)), in subparagraph (A), in the matter preceding clause (i), by striking “paragraph (12)(A)” and inserting “paragraph (18)(A)”;

(9) in paragraph (18) (as redesignated by paragraph (1))—
(A) in subparagraph (A)—
(i) in the matter following clause (vii)(III)—
(I) by striking “section 1a (11)(A)” and inserting “paragraph (17)(A)”;
and
(II) by striking “$25,000,000” and inserting “$50,000,000”; and
(ii) in clause (xi), in the matter preceding subclause (I), by striking “total assets in an amount” and inserting “amounts invested on a discretionary basis, the aggregate of which is”;

(10) by striking paragraph (22) (as redesignated by paragraph (1)) and inserting the following:
“(22) FLOOR BROKER.—
“(A) IN GENERAL.—The term ‘floor broker’ means any person—
“(i) who, in or surrounding any pit, ring, post, or other place provided by a contract market for the meeting of persons similarly engaged, shall purchase or sell for any other person—

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“(I) any commodity for future delivery, security futures product, or swap; or
“(II) any commodity option authorized under section 4c; or
“(ii) who is registered with the Commission as a floor broker.
“(B) FURTHER DEFINITION.—The Commission, by rule or regulation, may include within, or exclude from, the term ‘floor broker’ any person in or surrounding any pit, ring, post, or other place provided by a contract market for the meeting of persons similarly engaged who trades for any other person if the Commission determines that the rule or regulation will effectuate the purposes of this Act.”;
(11) by striking paragraph (23) (as redesignated by paragraph (1)) and inserting the following:
“(23) FLOOR TRADER.—
“(A) IN GENERAL.—The term ‘floor trader’ means any person—
“(i) who, in or surrounding any pit, ring, post, or other place provided by a contract market for the meeting of persons similarly engaged, purchases, or sells solely for such person’s own account—
“(I) any commodity for future delivery, security futures product, or swap; or
“(II) any commodity option authorized under section 4c; or
“(ii) who is registered with the Commission as a floor trader.
“(B) FURTHER DEFINITION.—The Commission, by rule or regulation, may include within, or exclude from, the term ‘floor trader’ any person in or surrounding any pit, ring, post, or other place provided by a contract market for the meeting of persons similarly engaged who trades solely for such person’s own account if the Commission determines that the rule or regulation will effectuate the purposes of this Act.”;
(12) by inserting after paragraph (23) (as redesignated by paragraph (1)) the following:
“(24) FOREIGN EXCHANGE FORWARD.—The term ‘foreign exchange forward’ means a transaction that solely involves the exchange of 2 different currencies on a specific future date at a fixed rate agreed upon on the inception of the contract covering the exchange.
“(25) FOREIGN EXCHANGE SWAP.—The term ‘foreign exchange swap’ means a transaction that solely involves—
“(A) an exchange of 2 different currencies on a specific date at a fixed rate that is agreed upon on the inception of the contract covering the exchange; and
“(B) a reverse exchange of the 2 currencies described in subparagraph (A) at a later date and at a fixed rate that is agreed upon on the inception of the contract covering the exchange.”;
(13) by striking paragraph (28) (as redesignated by paragraph (1)) and inserting the following:
“(28) FUTURES COMMISSION MERCHANT.—
“(A) IN GENERAL.—The term ‘futures commission merchant’ means an individual, association, partnership, corporation, or trust—
“(i) that—
“(I) is—
“(aa) engaged in soliciting or in accepting orders for—
“(AA) the purchase or sale of a commodity for future delivery;
“(BB) a security futures product;
“(CC) a swap;
“(DD) any agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i);
“(EE) any commodity option authorized under section 4c; or
“(FF) any leverage transaction authorized under section 19; or
“(bb) acting as a counterparty in any agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i); and
“(II) in or in connection with the activities described in items (aa) or (bb) of subclause (I), accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom; or
“(ii) that is registered with the Commission as a futures commission merchant.
“(B) FURTHER DEFINITION.—The Commission, by rule or regulation, may include within, or exclude from, the term ‘futures commission merchant’ any person who engages in soliciting or accepting orders for, or acting as a counterparty in, any agreement, contract, or transaction subject to this Act, and who accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom, if the Commission determines that the rule or regulation will effectuate the purposes of this Act.”;
“(14) in paragraph (30) (as redesignated by paragraph (1)), in subparagraph (B), by striking “state” and inserting “State”;
“(15) by striking paragraph (31) (as redesignated by paragraph (1)) and inserting the following:
“(31) INTRODUCING BROKER.—
“(A) IN GENERAL.—The term ‘introducing broker’ means any person (except an individual who elects to be and is registered as an associated person of a futures commission merchant)—
“(i) who—
“(I) is engaged in soliciting or in accepting orders for—
“(aa) the purchase or sale of any commodity for future delivery, security futures product, or swap;
“(bb) any agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i);
“(cc) any commodity option authorized under section 4c; or
“(dd) any leverage transaction authorized under section 19; and
“(II) does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom; or
“(ii) who is registered with the Commission as an introducing broker.
“(B) FURTHER DEFINITION.—The Commission, by rule or regulation, may include within, or exclude from, the term ‘introducing broker’ any person who engages in soliciting or accepting orders for any agreement, contract, or transaction subject to this Act, and who does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom, if the Commission determines that the rule or regulation will effectuate the purposes of this Act.”;

(16) by inserting after paragraph (31) (as redesignated by paragraph (1)) the following:
“(32) MAJOR SECURITY-BASED SWAP PARTICIPANT.—The term ‘major security-based swap participant’ has the meaning given the term in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)).
“(33) MAJOR SWAP PARTICIPANT.—
“(A) IN GENERAL.—The term ‘major swap participant’ means any person who is not a swap dealer, and—
“(i) maintains a substantial position in swaps for any of the major swap categories as determined by the Commission, excluding—
“(I) positions held for hedging or mitigating commercial risk; and
“(II) positions maintained by any employee benefit plan (or any contract held by such a plan) as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) for the primary purpose of hedging or mitigating any 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 United States banking system or financial markets; or
“(iii)(I) is a financial entity that is highly leveraged relative to the amount of capital it holds and that is not subject to capital requirements established by an appropriate Federal banking agency; and
“(II) maintains a substantial position in outstanding swaps in any major swap category as determined by the Commission.
“(B) DEFINITION OF SUBSTANTIAL POSITION.—For purposes of subparagraph (A), the Commission shall define...
by rule or regulation the term ‘substantial position’ at the threshold that the Commission determines to be prudent for the effective monitoring, management, and oversight of entities that are systemically important or can significantly impact the financial system of the United States. In setting the definition under this subparagraph, the Commission shall consider the person’s relative position in uncleared as opposed to cleared swaps and may take into consideration the value and quality of collateral held against counterparty exposures.

“(C) Scope of designation.—For purposes of subparagraph (A), a person may be designated as a major swap participant for 1 or more categories of swaps without being classified as a major swap participant for all classes of swaps.

“(D) Exclusions.—The definition under this paragraph shall not include an entity whose primary business is providing financing, and uses derivatives for the purpose of hedging underlying commercial risks related to interest rate and foreign currency exposures, 90 percent or more of which arise from financing that facilitates the purchase or lease of products, 90 percent or more of which are manufactured by the parent company or another subsidiary of the parent company.”;

(17) by inserting after paragraph (38) (as redesignated by paragraph (1)) the following:

“(39) Prudential regulator.—The term ‘prudential regulator’ means—

“(A) the Board in the case of a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant that is—

“(i) a State-chartered bank that is a member of the Federal Reserve System;

“(ii) a State-chartered branch or agency of a foreign bank;

“(iii) any foreign bank which does not operate an insured branch;

“(iv) any organization operating under section 25A of the Federal Reserve Act or having an agreement with the Board under section 225 of the Federal Reserve Act;

“(v) any bank holding company (as defined in section 2 of the Bank Holding Company Act of 1965 (12 U.S.C. 1841)), any foreign bank (as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(b)(7)) that is treated as a bank holding company under section 8(a) of the International Banking Act of 1978 (12 U.S.C. 3106(a)), and any subsidiary of such a company or foreign bank (other than a subsidiary that is described in subparagraph (A) or (B) or that is required to be registered with the Commission as a swap dealer or major swap participant under this Act or with the Securities and Exchange Commission as a security-based swap dealer or major security-based swap participant);
“(vi) after the transfer date (as defined in section 311 of the Dodd-Frank Wall Street Reform and Consumer Protection Act), any savings and loan holding company (as defined in section 10 of the Home Owners’ Loan Act (12 U.S.C. 1467a)) and any subsidiary of such company (other than a subsidiary that is described in subparagraph (A) or (B) or that is required to be registered as a swap dealer or major swap participant with the Commission under this Act or with the Securities and Exchange Commission as a security-based swap dealer or major security-based swap participant); or

“(vii) any organization operating under section 25A of the Federal Reserve Act (12 U.S.C. 611 et seq.) or having an agreement with the Board under section 25 of the Federal Reserve Act (12 U.S.C. 601 et seq.);

“(B) the Office of the Comptroller of the Currency in the case of a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant that is—

“(i) a national bank;

“(ii) a federally chartered branch or agency of a foreign bank; or

“(iii) any Federal savings association;

“(C) the Federal Deposit Insurance Corporation in the case of a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant that is—

“(i) a State-chartered bank that is not a member of the Federal Reserve System; or

“(ii) any State savings association;

“(D) the Farm Credit Administration, in the case of a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant that is an institution chartered under the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.); and

“(E) the Federal Housing Finance Agency in the case of a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant that is a regulated entity (as such term is defined in section 1303 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992).”;

(18) in paragraph (40) (as redesignated by paragraph (1))—

(A) by striking subparagraph (B);

(B) by redesignating subparagraphs (C), (D), and (E) as subparagraphs (B), (C), and (F), respectively;

(C) in subparagraph (C) (as so redesignated), by striking “and”; and

(D) by inserting after subparagraph (C) (as so redesignated) the following:

“(D) a swap execution facility registered under section 5h;

“(E) a swap data repository registered under section 21; and”;

(19) by inserting after paragraph (41) (as redesignated by paragraph (1)) the following:
“(42) SECURITY-BASED SWAP.—The term ‘security-based swap’ has the meaning given the term in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)).

“(43) SECURITY-BASED SWAP DEALER.—The term ‘security-based swap dealer’ has the meaning given the term in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)).”;

(20) in paragraph (46) (as redesignated by paragraph (1)), by striking “subject to section 2(h)(7)” and inserting “subject to section 2(h)(5)”;

(21) by inserting after paragraph (46) (as redesignated by paragraph (1)) the following:

“(47) SWAP.—

“(A) IN GENERAL.—Except as provided in subparagraph (B), the term ‘swap’ means any agreement, contract, or transaction—

“(i) that is a put, call, cap, floor, collar, or similar option of any kind that is for the purchase or sale, or based on the value, of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind;

“(ii) that provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence;

“(iii) that provides on an executory basis for the exchange, on a fixed or contingent basis, of 1 or more payments based on the value or level of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind, or any interest therein or based on the value thereof, and that transfers, as between the parties to the transaction, in whole or in part, the financial risk associated with a future change in any such value or level without also conveying a current or future direct or indirect ownership interest in an asset (including any enterprise or investment pool) or liability that incorporates the financial risk so transferred, including any agreement, contract, or transaction commonly known as—

“(I) an interest rate swap;

“(II) a rate floor;

“(III) a rate cap;

“(IV) a rate collar;

“(V) a cross-currency rate swap;

“(VI) a basis swap;

“(VII) a currency swap;

“(VIII) a foreign exchange swap;

“(IX) a total return swap;

“(X) an equity index swap;

“(XI) an equity swap;

“(XII) a debt index swap;

“(XIII) a debt swap;
“(XIV) a credit spread;
“(XV) a credit default swap;
“(XVI) a credit swap;
“(XVII) a weather swap;
“(XVIII) an energy swap;
“(XIX) a metal swap;
“(XX) an agricultural swap;
“(XXI) an emissions swap; and
“(XXII) a commodity swap;
“(iv) that is an agreement, contract, or transaction
that is, or in the future becomes, commonly known
to the trade as a swap;
“(v) including any security-based swap agreement
which meets the definition of ‘swap agreement’ as
defined in section 206A of the Gramm-Leach-Bliley
Act (15 U.S.C. 78c note) of which a material term
is based on the price, yield, value, or volatility of any
security or any group or index of securities, or any
interest therein; or
“(vi) that is any combination or permutation of,
or option on, any agreement, contract, or transaction
described in any of clauses (i) through (v).
“(B) EXCLUSIONS.—The term ‘swap’ does not include—
“(i) any contract of sale of a commodity for future
delivery (or option on such a contract), leverage con-
tract authorized under section 19, security futures
product, or agreement, contract, or transaction
described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i);
“(ii) any sale of a nonfinancial commodity or secu-
rrity for deferred shipment or delivery, so long as the
transaction is intended to be physically settled;
“(iii) any put, call, straddle, option, or privilege
on any security, certificate of deposit, or group or index
of securities, including any interest therein or based
on the value thereof, that is subject to—
“(I) the Securities Act of 1933 (15 U.S.C. 77a
et seq.); and
“(II) the Securities Exchange Act of 1934 (15
U.S.C. 78a et seq.);
“(iv) any put, call, straddle, option, or privilege
relating to a foreign currency entered into on a national
securities exchange registered pursuant to section 6(a)
78f(a));
“(v) any agreement, contract, or transaction pro-
viding for the purchase or sale of 1 or more securities
on a fixed basis that is subject to—
“(I) the Securities Act of 1933 (15 U.S.C. 77a
et seq.); and
“(II) the Securities Exchange Act of 1934 (15
U.S.C. 78a et seq.);
“(vi) any agreement, contract, or transaction pro-
viding for the purchase or sale of 1 or more securities
on a contingent basis that is subject to the Securities
Act of 1933 (15 U.S.C. 77a et seq.) and the Securities
the agreement, contract, or transaction predates the
purchase or sale on the occurrence of a bona fide contingency that might reasonably be expected to affect or be affected by the creditworthiness of a party other than a party to the agreement, contract, or transaction;

"(vii) any note, bond, or evidence of indebtedness that is a security, as defined in section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1));

"(viii) any agreement, contract, or transaction that is—

"(I) based on a security; and

"(II) entered into directly or through an underwriter (as defined in section 2(a)(11) of the Securities Act of 1933 (15 U.S.C. 77b(a)(11)) by the issuer of such security for the purposes of raising capital, unless the agreement, contract, or transaction is entered into to manage a risk associated with capital raising;

"(ix) any agreement, contract, or transaction a counterparty of which is a Federal Reserve bank, the Federal Government, or a Federal agency that is expressly backed by the full faith and credit of the United States; and

"(x) any security-based swap, other than a security-based swap as described in subparagraph (D).

"(C) RULE OF CONSTRUCTION REGARDING MASTER AGREEMENTS.—

"(i) IN GENERAL.—Except as provided in clause (ii), the term ‘swap’ includes a master agreement that provides for an agreement, contract, or transaction that is a swap under subparagraph (A), together with each supplement to any master agreement, without regard to whether the master agreement contains an agreement, contract, or transaction that is not a swap pursuant to subparagraph (A).

"(ii) EXCEPTION.—For purposes of clause (i), the master agreement shall be considered to be a swap only with respect to each agreement, contract, or transaction covered by the master agreement that is a swap pursuant to subparagraph (A).

"(D) MIXED SWAP.—The term ‘security-based swap’ includes any agreement, contract, or transaction that is as described in section 3(a)(68)(A) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)(A)) and also is based on the value of 1 or more interest or other rates, currencies, commodities, instruments of indebtedness, indices, quantitative measures, other financial or economic interest or property of any kind (other than a single security or a narrow-based security index), or the occurrence, non-occurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence (other than an event described in subparagraph (A)(iii)).

"(E) TREATMENT OF FOREIGN EXCHANGE SWAPS AND FORWARDS.—

"(i) IN GENERAL.—Foreign exchange swaps and foreign exchange forwards shall be considered swaps under this paragraph unless the Secretary makes a
written determination under section 1b that either foreign exchange swaps or foreign exchange forwards or both—

“(I) should be not be regulated as swaps under this Act; and

“(II) are not structured to evade the Dodd-Frank Wall Street Reform and Consumer Protection Act in violation of any rule promulgated by the Commission pursuant to section 721(c) of that Act.

“(ii) CONGRESSIONAL NOTICE; EFFECTIVENESS.—The Secretary shall submit any written determination under clause (i) to the appropriate committees of Congress, including the Committee on Agriculture, Nutrition, and Forestry of the Senate and the Committee on Agriculture of the House of Representatives. Any such written determination by the Secretary shall not be effective until it is submitted to the appropriate committees of Congress.

“(iii) REPORTING.—Notwithstanding a written determination by the Secretary under clause (i), all foreign exchange swaps and foreign exchange forwards shall be reported to either a swap data repository, or, if there is no swap data repository that would accept such swaps or forwards, to the Commission pursuant to section 4r within such time period as the Commission may by rule or regulation prescribe.

“(iv) BUSINESS STANDARDS.—Notwithstanding a written determination by the Secretary pursuant to clause (i), any party to a foreign exchange swap or forward that is a swap dealer or major swap participant shall conform to the business conduct standards contained in section 4s(h).

“(v) SECRETARY.—For purposes of this subparagraph, the term ‘Secretary’ means the Secretary of the Treasury.

“(F) EXCEPTION FOR CERTAIN FOREIGN EXCHANGE SWAPS AND FORWARDS.—

“(i) REGISTERED ENTITIES.—Any foreign exchange swap and any foreign exchange forward that is listed and traded on or subject to the rules of a designated contract market or a swap execution facility, or that is cleared by a derivatives clearing organization, shall not be exempt from any provision of this Act or amendments made by the Wall Street Transparency and Accountability Act of 2010 prohibiting fraud or manipulation.

“(ii) RETAIL TRANSACTIONS.—Nothing in subparagraph (E) shall affect, or be construed to affect, the applicability of this Act or the jurisdiction of the Commission with respect to agreements, contracts, or transactions in foreign currency pursuant to section 2(c)(2).

“(48) SWAP DATA REPOSITORY.—The term ‘swap data repository’ means any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties
for the purpose of providing a centralized recordkeeping facility for swaps.

“(49) Swap dealer.—

“(A) In general.—The term ‘swap dealer’ means any person who—

“(i) holds itself out as a dealer in swaps;
“(ii) makes a market in swaps;
“(iii) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or
“(iv) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps,

provided however, in no event shall an insured depository institution be considered to be a swap dealer to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer.

“(B) Inclusion.—A person may be designated as a swap dealer for a single type or single class or category of swap or activities and considered not to be a swap dealer for other types, classes, or categories of swaps or activities.

“(C) Exception.—The term ‘swap dealer’ does not include a person that enters into swaps for such person’s own account, either individually or in a fiduciary capacity, but not as a part of a regular business.

“(D) De minimis exception.—The Commission shall exempt from designation as a swap dealer an entity that engages in a de minimis quantity of swap dealing in connection with transactions with or on behalf of its customers. The Commission shall promulgate regulations to establish factors with respect to the making of this determination to exempt.

“(50) Swap execution facility.—The term ‘swap execution facility’ means a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that—

“(A) facilitates the execution of swaps between persons; and

“(B) is not a designated contract market.”.

(22) in paragraph (51) (as redesignated by paragraph (1)), in subparagraph (A)(i), by striking “partipants” and inserting “participants”.

15 USC 8321.

(b) Authority to define terms.—The Commodity Futures Trading Commission may adopt a rule to define—

(1) the term “commercial risk”; and

(2) any other term included in an amendment to the Commodity Exchange Act (7 U.S.C. 1 et seq.) made by this subtitle.

15 USC 8321.

(c) Modification of definitions.—To include transactions and entities that have been structured to evade this subtitle (or an amendment made by this subtitle), the Commodity Futures Trading Commission shall adopt a rule to further define the terms “swap”, “swap dealer”, “major swap participant”, and “eligible contract participant”.

15 USC 8321.
(d) Exemptions.—Section 4(c)(1) of the Commodity Exchange Act (7 U.S.C. 6(c)(1)) is amended by striking “except that” and all that follows through the period at the end and inserting the following: “except that—

(A) unless the Commission is expressly authorized by any provision described in this subparagraph to grant exemptions, with respect to amendments made by subtitle A of the Wall Street Transparency and Accountability Act of 2010—

(1) with respect to—

(I) paragraphs (2), (3), (4), (5), and (7), paragraph (18)(A)(vii)(III), paragraphs (23), (24), (31), (32), (38), (39), (41), (42), (46), (47), (48), and (49) of section 1a, and sections 2(a)(13), 2(c)(1)(D), 4(a(a), 4(a(b), 4(d(c), 4(d(d), 4r, 4s, 5b(a), 5b(b), 5(d), 5(g), 5(h), 5b(c), 5b(i), 8e, and 21; and

(II) section 206(e) of the Gramm-Leach-Bliley Act (Public Law 106–102; 15 U.S.C. 78c note); and

(ii) in sections 721(c) and 742 of the Dodd-Frank Wall Street Reform and Consumer Protection Act; and

(B) the Commission and the Securities and Exchange Commission may by rule, regulation, or order jointly exclude any agreement, contract, or transaction from section 2(a)(1)(D)) if the Commissions determine that the exemption would be consistent with the public interest.”.

(e) Conforming Amendments.—

(1) Section 2(c)(2)(B)(i)(II) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(B)(i)(II)) is amended—

(A) in item (cc)—

(i) in subitem (AA), by striking “section 1a(20)” and inserting “section 1a”; and

(ii) in subitem (BB), by striking “section 1a(20)” and inserting “section 1a”;

(B) in item (dd), by striking “section 1a(12)(A)(ii)” and inserting “section 1a(18)(A)(ii)”.

(2) Section 4m(3) of the Commodity Exchange Act (7 U.S.C. 6m(3)) is amended by striking “section 1a(6)" and inserting “section 1a(9)".

(3) Section 4q(a)(1) of the Commodity Exchange Act (7 U.S.C. 6o–1(a)(1)) is amended by striking “section 1a(4)” and inserting “section 1a(9)".

(4) Section 5(e)(1) of the Commodity Exchange Act (7 U.S.C. 7(e)(1)) is amended by striking “section 1a(4)” and inserting “section 1a(9)".

(5) Section 5a(b)(2)(F) of the Commodity Exchange Act (7 U.S.C. 7a(b)(2)(F)) is amended by striking “section 1a(4)” and inserting “section 1a(9)".

(6) Section 5b(a) of the Commodity Exchange Act (7 U.S.C. 7a–1(a)) is amended, in the matter preceding paragraph (1), by striking “section 1a(9)” and inserting “section 1a”.

(7) Section 5c(c)(2)(B) of the Commodity Exchange Act (7 U.S.C. 7a–2(c)(2)(B)) is amended by striking “section 1a(4)” and inserting “section 1a(9)".


(A) in subclause (I), by striking “section 1a(12)(B)(ii)” and inserting “section 1a(18)(B)(ii)”; and
(B) in subclause (II), by striking “section 1a(12)” and inserting “section 1a(18)”.  

(9) Section 402 of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27 et seq.) is amended—  
(A) in subsection (a)(20), by striking “section 1a(20)” and inserting “section 1a”;  
(B) in subsection (b)(2), by striking “section 1a(12)” and inserting “section 1a”; and  
(C) in subsection (c), by striking “section 1a(4)” and inserting “section 1a”.

(10) The first section of Public Law 85–839 (7 U.S.C. 13–1) is amended in subsection (a), in the first sentence, by inserting “motion picture box office receipts (or any index, measure, value, or data related to such receipts) or” after “sale of”.

(f) EFFECTIVE DATE.—Notwithstanding any other provision of this Act, the amendments made by subsection (a)(4) shall take effect on June 1, 2010.

SEC. 722. JURISDICTION.

(a) EXCLUSIVE JURISDICTION.—Section 2(a)(1) of the Commodity Exchange Act (7 U.S.C. 2(a)(1)) is amended—  
(1) in subparagraph (A), in the first sentence—  
(A) by inserting “the Wall Street Transparency and Accountability Act of 2010 (including an amendment made by that Act) and” after “otherwise provided in”;  
(B) by striking “(C) and (D)” and inserting “(C), (D), and (I)”;

(C) by striking “(c) through (i) of this section” and inserting “(c) and (f)”;

(D) by striking “contracts of sale” and inserting “swaps or contracts of sale”; and

(E) by striking “or derivatives transaction execution facility registered pursuant to section 5 or 5a” and inserting “pursuant to section 5 or a swap execution facility pursuant to section 5h”; and  

(2) by adding at the end the following:  

“(ii) In addition to the authority of the Securities and Exchange Commission described in clause (i), nothing in this subparagraph shall limit or affect any statutory authority of the Commission with respect to an agreement, contract, or transaction described in clause (i).

“(H) Notwithstanding any other provision of law, the Wall Street Transparency and Accountability Act of 2010 shall not apply to, and the Commodity Futures Trading Commission shall have no jurisdiction under such Act (or any amendments to the Commodity Exchange Act made by such Act) with respect to, any security other than a security-based swap.”.
(b) Regulation of Swaps Under Federal and State Law.—Section 12 of the Commodity Exchange Act (7 U.S.C. 16) is amended by adding at the end the following:

"(h) Regulation of Swaps as Insurance Under State Law.—A swap—

1. shall not be considered to be insurance; and
2. may not be regulated as an insurance contract under the law of any State."

(c) Agreements, Contracts, and Transactions Traded on an Organized Exchange.—Section 2(c)(2)(A) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(A)) is amended—

1. in clause (i), by striking “or” at the end;
2. by redesignating clause (ii) as clause (iii); and
3. by inserting after clause (i) the following:

"(ii) a swap; or".

(d) Applicability.—Section 2 of the Commodity Exchange Act (7 U.S.C. 2) (as amended by section 723(a)(3)) is amended by adding at the end the following:

"(i) Applicability.—The provisions of this Act relating to swaps that were enacted by the Wall Street Transparency and Accountability Act of 2010 (including any rule prescribed or regulation promulgated under that Act), shall not apply to activities outside the United States unless those activities—

1. have a direct and significant connection with activities in, or effect on, commerce of the United States; or
2. contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of this Act that was enacted by the Wall Street Transparency and Accountability Act of 2010."

(e) Federal Energy Regulatory Commission.—Section 2(a)(1) of the Commodity Exchange Act (7 U.S.C. 2(a)(1)) is amended by adding at the end the following:

"(I) nothing in this Act shall limit or affect any statutory authority of the Federal Energy Regulatory Commission or a State regulatory authority (as defined in section 3(21) of the Federal Power Act (16 U.S.C. 796(21)) with respect to an agreement, contract, or transaction that is entered into pursuant to a tariff or rate schedule approved by the Federal Energy Regulatory Commission or a State regulatory authority and is—

1. not executed, traded, or cleared on a registered entity or trading facility; or
2. executed, traded, or cleared on a registered entity or trading facility owned or operated by a regional transmission organization or independent system operator.

"(ii) In addition to the authority of the Federal Energy Regulatory Commission or a State regulatory authority described in clause (i), nothing in this subparagraph shall limit or affect—

1. any statutory authority of the Commission with respect to an agreement, contract, or transaction described in clause (i); or
2. the jurisdiction of the Commission under subparagraph (A) with respect to an agreement, contract, or transaction that is executed, traded, or cleared
on a registered entity or trading facility that is not owned or operated by a regional transmission organization or independent system operator (as defined by sections 3(27) and (28) of the Federal Power Act (16 U.S.C. 796(27), 796(28)))."

(f) Public Interest Waiver.—Section 4(c) of the Commodity Exchange Act (7 U.S.C. 6(c)) (as amended by section 721(d)) is amended by adding at the end the following:

"(6) If the Commission determines that the exemption would be consistent with the public interest and the purposes of this Act, the Commission shall, in accordance with paragraphs (1) and (2), exempt from the requirements of this Act an agreement, contract, or transaction that is entered into—

"(A) pursuant to a tariff or rate schedule approved or permitted to take effect by the Federal Energy Regulatory Commission;

"(B) pursuant to a tariff or rate schedule establishing rates or charges for, or protocols governing, the sale of electric energy approved or permitted to take effect by the regulatory authority of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy within the State or municipality; or

"(C) between entities described in section 201(f) of the Federal Power Act (16 U.S.C. 824(f))."

(g) Authority of FERC.—Nothing in the Wall Street Transparency and Accountability Act of 2010 or the amendments to the Commodity Exchange Act made by such Act shall limit or affect any statutory enforcement authority of the Federal Energy Regulatory Commission pursuant to section 222 of the Federal Power Act and section 4A of the Natural Gas Act that existed prior to the date of enactment of the Wall Street Transparency and Accountability Act of 2010.

(h) Determination.—The Commodity Exchange Act is amended by inserting after section 1a (7 U.S.C. 1a) the following:

"SEC. 1b. REQUIREMENTS OF SECRETARY OF THE TREASURY REGARDING EXEMPTION OF FOREIGN EXCHANGE SWAPS AND FOREIGN EXCHANGE FORWARDS FROM DEFINITION OF THE TERM 'SWAP'.

"(a) Required Considerations.—In determining whether to exempt foreign exchange swaps and foreign exchange forwards from the definition of the term 'swap', the Secretary of the Treasury (referred to in this section as the 'Secretary') shall consider—

"(1) whether the required trading and clearing of foreign exchange swaps and foreign exchange forwards would create systemic risk, lower transparency, or threaten the financial stability of the United States;

"(2) whether foreign exchange swaps and foreign exchange forwards are already subject to a regulatory scheme that is materially comparable to that established by this Act for other classes of swaps;

"(3) the extent to which bank regulators of participants in the foreign exchange market provide adequate supervision, including capital and margin requirements;

"(4) the extent of adequate payment and settlement systems; and
“(5) the use of a potential exemption of foreign exchange swaps and foreign exchange forwards to evade otherwise applicable regulatory requirements.

“(b) **Determination.**—If the Secretary makes a determination to exempt foreign exchange swaps and foreign exchange forwards from the definition of the term ‘swap’, the Secretary shall submit to the appropriate committees of Congress a determination that contains—

“(1) an explanation regarding why foreign exchange swaps and foreign exchange forwards are qualitatively different from other classes of swaps in a way that would make the foreign exchange swaps and foreign exchange forwards ill-suited for regulation as swaps; and

“(2) an identification of the objective differences of foreign exchange swaps and foreign exchange forwards with respect to standard swaps that warrant an exempted status.

“(c) **Effect of Determination.**—A determination by the Secretary under subsection (b) shall not exempt any foreign exchange swaps and foreign exchange forwards traded on a designated contract market or swap execution facility from any applicable anti-fraud and antimanipulation provision under this title.”

**SEC. 723. CLEARING.**

(a) **Clearing Requirement.**—

(1) **In general.**—Section 2 of the Commodity Exchange Act (7 U.S.C. 2) is amended—

(A) by striking subsections (d), (e), (g), and (h); and

(B) by redesignating subsection (i) as subsection (g).

(2) **Swaps; Limitation on participation.**—Section 2 of the Commodity Exchange Act (7 U.S.C. 2) (as amended by paragraph (1)) is amended by inserting after subsection (c) the following:

“(d) **Swaps.**—Nothing in this Act (other than subparagraphs (A), (B), (C), (G), and (H) of subsection (a)(1), subsections (f) and (g), sections 1a, 2(a)(13), 2(c)(2)(A)(ii), 2(e), 2(h), 4(c), 4a, 4b, and 4h–1, subsections (a), (b), and (g) of section 4c, sections 4d, 4e, 4f, 4g, 4h, 4i, 4j, 4k, 4l, 4m, 4n, 4o, 4p, 4r, 4s, 4t, 5, 5b, 5c, 5e, and 5h, subsections (c) and (d) of section 6, sections 6c, 6d, 8, 8a, and 9, subsections (e)(2), (f), and (h) of section 12, subsections (a) and (b) of section 13, sections 17, 20, 21, and 22(a)(4), and any other provision of this Act that is applicable to registered entities or Commission registrants) governs or applies to a swap.

“(e) **Limitation on participation.**—It shall be unlawful for any person, other than an eligible contract participant, to enter into a swap unless the swap is entered into on, or subject to the rules of, a board of trade designated as a contract market under section 5.”

(3) **Mandatory clearing of swaps.**—Section 2 of the Commodity Exchange Act (7 U.S.C. 2) is amended by inserting after subsection (g) (as redesignated by paragraph (1)(B)) the following:

“(h) **Clearing requirement.**—

(1) **In general.**—

“(A) **Standard for clearing.**—It shall be unlawful for any person to engage in a swap unless that person submits such swap for clearing to a derivatives clearing
(B) OPEN ACCESS.—The rules of a derivatives clearing organization described in subparagraph (A) shall—

"(i) prescribe that all swaps (but not contracts of sale of a commodity for future delivery or options on such contracts) submitted to the derivatives clearing organization with the same terms and conditions are economically equivalent within the derivatives clearing organization and may be offset with each other within the derivatives clearing organization; and

"(ii) provide for non-discriminatory clearing of a swap (but not a contract of sale of a commodity for future delivery or option on such contract) executed bilaterally or on or through the rules of an unaffiliated designated contract market or swap execution facility.

"(2) COMMISSION REVIEW.—

"(A) COMMISSION-INITIATED REVIEW.—

"(i) The Commission on an ongoing basis shall review each swap, or any group, category, type, or class of swaps to make a determination as to whether the swap or group, category, type, or class of swaps should be required to be cleared.

"(ii) The Commission shall provide at least a 30-day public comment period regarding any determination made under clause (i).

"(B) SWAP SUBMISSIONS.—

"(i) A derivatives clearing organization shall submit to the Commission each swap, or any group, category, type, or class of swaps that it plans to accept for clearing, and provide notice to its members (in a manner to be determined by the Commission) of the submission.

"(ii) Any swap or group, category, type, or class of swaps listed for clearing by a derivative clearing organization as of the date of enactment of this subsection shall be considered submitted to the Commission.

"(iii) The Commission shall—

"(I) make available to the public submissions received under clauses (i) and (ii);

"(II) review each submission made under clauses (i) and (ii), and determine whether the swap, or group, category, type, or class of swaps described in the submission is required to be cleared; and

"(III) provide at least a 30-day public comment period regarding its determination as to whether the clearing requirement under paragraph (1)(A) shall apply to the submission.

"(C) DEADLINE.—The Commission shall make its determination under subparagraph (B)(iii) not later than 90 days after receiving a submission made under subparagraphs (B)(i) and (B)(ii), unless the submitting derivatives clearing organization agrees to an extension for the time limitation established under this subparagraph.
“(D) Determination.—

“(i) In reviewing a submission made under subparagraph (B), the Commission shall review whether the submission is consistent with section 5b(c)(2).

“(ii) In reviewing a swap, group of swaps, or class of swaps pursuant to subparagraph (A) or a submission made under subparagraph (B), the Commission shall take into account the following factors:

“(I) The existence of significant outstanding notional exposures, trading liquidity, and adequate pricing data.

“(II) The availability of rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded.

“(III) The effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the derivatives clearing organization available to clear the contract.

“(IV) The effect on competition, including appropriate fees and charges applied to clearing.

“(V) The existence of reasonable legal certainty in the event of the insolvency of the relevant derivatives clearing organization or 1 or more of its clearing members with regard to the treatment of customer and swap counterparty positions, funds, and property.

“(iii) In making a determination under subparagraph (A) or (B)(iii) that the clearing requirement shall apply, the Commission may require such terms and conditions to the requirement as the Commission determines to be appropriate.

“(E) Rules.—Not later than 1 year after the date of the enactment of this subsection, the Commission shall adopt rules for a derivatives clearing organization’s submission for review, pursuant to this paragraph, of a swap, or a group, category, type, or class of swaps, that it seeks to accept for clearing. Nothing in this subparagraph limits the Commission from making a determination under subparagraph (B)(ii) for swaps described in subparagraph (B)(ii).

“(3) Stay of Clearing Requirement.—

“(A) In General.—After making a determination pursuant to paragraph (2)(B), the Commission, on application of a counterparty to a swap or on its own initiative, may stay the clearing requirement of paragraph (1) until the Commission completes a review of the terms of the swap (or the group, category, type, or class of swaps) and the clearing arrangement.

“(B) Deadline.—The Commission shall complete a review undertaken pursuant to subparagraph (A) not later than 90 days after issuance of the stay, unless the derivatives clearing organization that clears the swap, or group,
category, type, or class of swaps agrees to an extension of the time limitation established under this subparagraph.

“(C) DETERMINATION.—Upon completion of the review undertaken pursuant to subparagraph (A), the Commission may—

“(i) determine, unconditionally or subject to such terms and conditions as the Commission determines to be appropriate, that the swap, or group, category, type, or class of swaps must be cleared pursuant to this subsection if it finds that such clearing is consistent with paragraph (2)(D); or

“(ii) determine that the clearing requirement of paragraph (1) shall not apply to the swap, or group, category, type, or class of swaps.

“(D) RULES.—Not later than 1 year after the date of the enactment of the Wall Street Transparency and Accountability Act of 2010, the Commission shall adopt rules for reviewing, pursuant to this paragraph, a derivatives clearing organization’s clearing of a swap, or a group, category, type, or class of swaps, that it has accepted for clearing.

“(4) PREVENTION OF EVASION.—

“(A) IN GENERAL.—The Commission shall prescribe rules under this subsection (and issue interpretations of rules prescribed under this subsection) as determined by the Commission to be necessary to prevent evasions of the mandatory clearing requirements under this Act.

“(B) DUTY OF COMMISSION TO INVESTIGATE AND TAKE CERTAIN ACTIONS.—To the extent the Commission finds that a particular swap, group, category, type, or class of swaps would otherwise be subject to mandatory clearing but no derivatives clearing organization has listed the swap, group, category, type, or class of swaps for clearing, the Commission shall—

“(i) investigate the relevant facts and circumstances;

“(ii) within 30 days issue a public report containing the results of the investigation; and

“(iii) take such actions as the Commission determines to be necessary and in the public interest, which may include requiring the retaining of adequate margin or capital by parties to the swap, group, category, type, or class of swaps.

“(C) EFFECT ON AUTHORITY.—Nothing in this paragraph—

“(i) authorizes the Commission to adopt rules requiring a derivatives clearing organization to list for clearing a swap, group, category, type, or class of swaps if the clearing of the swap, group, category, type, or class of swaps would threaten the financial integrity of the derivatives clearing organization; and

“(ii) affects the authority of the Commission to enforce the open access provisions of paragraph (1)(B) with respect to a swap, group, category, type, or class of swaps that is listed for clearing by a derivatives clearing organization.
"(5) REPORTING TRANSITION RULES.—Rules adopted by the Commission under this section shall provide for the reporting of data, as follows:

"(A) Swaps entered into before the date of the enactment of this subsection shall be reported to a registered swap data repository or the Commission no later than 180 days after the effective date of this subsection.

"(B) Swaps entered into on or after such date of enactment shall be reported to a registered swap data repository or the Commission no later than the later of—

"(i) 90 days after such effective date; or

"(ii) such other time after entering into the swap as the Commission may prescribe by rule or regulation.

"(6) CLEARING TRANSITION RULES.—

"(A) Swaps entered into before the date of the enactment of this subsection are exempt from the clearing requirements of this subsection if reported pursuant to paragraph (5)(A).

"(B) Swaps entered into before application of the clearing requirement pursuant to this subsection are exempt from the clearing requirements of this subsection if reported pursuant to paragraph (5)(B).

"(7) EXCEPTIONS.—

"(A) IN GENERAL.—The requirements of paragraph (1)(A) shall not apply to a swap if 1 of the counterparties to the swap—

"(i) is not a financial entity;

"(ii) is using swaps to hedge or mitigate commercial risk; and

"(iii) notifies the Commission, in a manner set forth by the Commission, how it generally meets its financial obligations associated with entering into non-cleared swaps.

"(B) OPTION TO CLEAR.—The application of the clearing exception in subparagraph (A) is solely at the discretion of the counterparty to the swap that meets the conditions of clauses (i) through (iii) of subparagraph (A).

"(C) FINANCIAL ENTITY DEFINITION.—

"(i) IN GENERAL.—For the purposes of this paragraph, the term 'financial entity' means—

"(I) a swap dealer;

"(II) a security-based swap dealer;

"(III) a major swap participant;

"(IV) a major security-based swap participant;

"(V) a commodity pool;

"(VI) a private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80-b-2(a));

"(VII) an employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);

"(VIII) a person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature, as defined in section 4(k) of the Bank Holding Company Act of 1956.
“(ii) Exclusion.—The Commission shall consider whether to exempt small banks, savings associations, farm credit system institutions, and credit unions, including—

(I) depository institutions with total assets of $10,000,000,000 or less;

(II) farm credit system institutions with total assets of $10,000,000,000 or less;

(III) credit unions with total assets of $10,000,000,000 or less.

“(iii) Limitation.—Such definition shall not include an entity whose primary business is providing financing, and uses derivatives for the purpose of hedging underlying commercial risks related to interest rate and foreign currency exposures, 90 percent or more of which arise from financing that facilitates the purchase or lease of products, 90 percent or more of which are manufactured by the parent company or another subsidiary of the parent company.

“(D) Treatment of Affiliates.—

“(i) In general.—An affiliate of a person that qualifies for an exception under subparagraph (A) (including affiliate entities predominantly engaged in providing financing for the purchase of merchandise or manufactured goods of the person) may qualify for the exception only if the affiliate, acting on behalf of the person and as an agent, uses the swap to hedge or mitigate the commercial risk of the person or other affiliate of the person that is not a financial entity.

“(ii) Prohibition relating to certain affiliates.—The exception in clause (i) shall not apply if the affiliate is—

(I) a swap dealer;

(II) a security-based swap dealer;

(III) a major swap participant;

(IV) a major security-based swap participant;

(V) an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), but for paragraph (1) or (7) of subsection (c) of that Act (15 U.S.C. 80a–3(c));

(VI) a commodity pool; or

(VII) a bank holding company with over $50,000,000,000 in consolidated assets.

“(iii) Transition rule for affiliates.—An affiliate, subsidiary, or a wholly owned entity of a person that qualifies for an exception under subparagraph (A) and is predominantly engaged in providing financing for the purchase or lease of merchandise or manufactured goods of the person shall be exempt from the margin requirement described in section 4s(e) and the clearing requirement described in paragraph (1) with regard to swaps entered into to mitigate the risk of the financing activities for not less than a 2-year period beginning on the date of enactment of this clause.

“(E) Election of Counterparty.—
“(i) Swaps required to be cleared.—With respect to any swap that is subject to the mandatory clearing requirement under this subsection and entered into by a swap dealer or a major swap participant with a counterparty that is not a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant, the counterparty shall have the sole right to select the derivatives clearing organization at which the swap will be cleared.

“(ii) Swaps not required to be cleared.—With respect to any swap that is not subject to the mandatory clearing requirement under this subsection and entered into by a swap dealer or a major swap participant with a counterparty that is not a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant, the counterparty—

“(I) may elect to require clearing of the swap; and

“(II) shall have the sole right to select the derivatives clearing organization at which the swap will be cleared.

“(F) Abuse of exception.—The Commission may prescribe such rules or issue interpretations of the rules as the Commission determines to be necessary to prevent abuse of the exceptions described in this paragraph. The Commission may also request information from those persons claiming the clearing exception as necessary to prevent abuse of the exceptions described in this paragraph.

“(8) Trade execution.—

“(A) In general.—With respect to transactions involving swaps subject to the clearing requirement of paragraph (1), counterparties shall—

“(i) execute the transaction on a board of trade designated as a contract market under section 5; or

“(ii) execute the transaction on a swap execution facility registered under 5h or a swap execution facility that is exempt from registration under section 5h(f) of this Act.

“(B) Exception.—The requirements of clauses (i) and (ii) of subparagraph (A) shall not apply if no board of trade or swap execution facility makes the swap available to trade or for swap transactions subject to the clearing exception under paragraph (7).”.

(b) Commodity Exchange Act.—Section 2 of the Commodity Exchange Act (7 U.S.C. 2) is amended by adding at the end the following:

“(j) Committee approval by board.—Exemptions from the requirements of subsection (h)(1) to clear a swap and subsection (h)(8) to execute a swap through a board of trade or swap execution facility shall be available to a counterparty that is an issuer of securities that are registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports pursuant to section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o) only if an appropriate committee of the issuer’s board or governing body has reviewed and approved its decision to enter into swaps that are subject to such exemptions.”.
7 USC 2 note.

(c) GRANDFATHER PROVISIONS.—

(1) LEGAL CERTAINTY FOR CERTAIN TRANSACTIONS IN EXEMPT COMMODITIES.—Not later than 60 days after the date of enactment of this Act, a person may submit to the Commodity Futures Trading Commission a petition to remain subject to section 2(h) of the Commodity Exchange Act (7 U.S.C. 2(h)) (as in effect on the day before the date of enactment of this Act).

(2) CONSIDERATION; AUTHORITY OF COMMODITY FUTURES TRADING COMMISSION.—The Commodity Futures Trading Commission—

(A) shall consider any petition submitted under subparagraph (A) in a prompt manner; and

(B) may allow a person to continue operating subject to section 2(h) of the Commodity Exchange Act (7 U.S.C. 2(h)) (as in effect on the day before the date of enactment of this Act) for not longer than a 1-year period.

(3) AGRICULTURAL SWAPS.—

(A) IN GENERAL.—Except as provided in subparagraph (B), no person shall offer to enter into, enter into, or confirm the execution of, any swap in an agricultural commodity (as defined by the Commodity Futures Trading Commission).

(B) EXCEPTION.—Notwithstanding subparagraph (A), a person may offer to enter into, enter into, or confirm the execution of, any swap in an agricultural commodity pursuant to section 4(c) of the Commodity Exchange Act (7 U.S.C. 6(c)) or any rule, regulation, or order issued thereunder (including any rule, regulation, or order in effect as of the date of enactment of this Act) by the Commodity Futures Trading Commission to allow swaps under such terms and conditions as the Commission shall prescribe.

(4) REQUIRED REPORTING.—If the exception described in section 2(h)(8)(B) of the Commodity Exchange Act applies, the counterparties shall comply with any recordkeeping and transaction reporting requirements that may be prescribed by the Commission with respect to swaps subject to section 2(h)(8)(B) of the Commodity Exchange Act.

SEC. 724. SWAPS; SEGREGATION AND BANKRUPTCY TREATMENT.

(a) SEGREGATION REQUIREMENTS FOR CLEARED SWAPS.—Section 4d of the Commodity Exchange Act (7 U.S.C. 6d) (as amended by section 732) is amended by adding at the end the following:

“(f) SWAPS.—

“(1) REGISTRATION REQUIREMENT.—It shall be unlawful for any person to accept any money, securities, or property (or to extend any credit in lieu of money, securities, or property) from, for, or on behalf of a swaps customer to margin, guarantee, or secure a swap cleared by or through a derivatives clearing organization (including money, securities, or property accruing to the customer as the result of such a swap), unless the person shall have registered under this Act with the Commission as a futures commission merchant, and the registration shall not have expired nor been suspended nor revoked.

“(2) CLEARED SWAPS.—
“(A) Segregation required.—A futures commission merchant shall treat and deal with all money, securities, and property of any swaps customer received to margin, guarantee, or secure a swap cleared by or though a derivatives clearing organization (including money, securities, or property accruing to the swaps customer as the result of such a swap) as belonging to the swaps customer.

“(B) Commingling prohibited.—Money, securities, and property of a swaps customer described in subparagraph (A) shall be separately accounted for and shall not be commingled with the funds of the futures commission merchant or be used to margin, secure, or guarantee any trades or contracts of any swaps customer or person other than the person for whom the same are held.

“(3) Exceptions.—

“(A) Use of funds.—

“(i) In general.—Notwithstanding paragraph (2), money, securities, and property of swap customers of a futures commission merchant described in paragraph (2) may, for convenience, be commingled and deposited in the same account or accounts with any bank or trust company or with a derivatives clearing organization.

“(ii) Withdrawal.—Notwithstanding paragraph (2), such share of the money, securities, and property described in clause (i) as in the normal course of business shall be necessary to margin, guarantee, secure, transfer, adjust, or settle a cleared swap with a derivatives clearing organization, or with any member of the derivatives clearing organization, may be withdrawn and applied to such purposes, including the payment of commissions, brokerage, interest, taxes, storage, and other charges, lawfully accruing in connection with the cleared swap.

“(B) Commission action.—Notwithstanding paragraph (2), in accordance with such terms and conditions as the Commission may prescribe by rule, regulation, or order, any money, securities, or property of the swaps customers of a futures commission merchant described in paragraph (2) may be commingled and deposited in customer accounts with any other money, securities, or property received by the futures commission merchant and required by the Commission to be separately accounted for and treated and dealt with as belonging to the swaps customer of the futures commission merchant.

“(4) Permitted investments.—Money described in paragraph (2) may be invested in obligations of the United States, in general obligations of any State or of any political subdivision of a State, and in obligations fully guaranteed as to principal and interest by the United States, or in any other investment that the Commission may by rule or regulation prescribe, and such investments shall be made in accordance with such rules and regulations and subject to such conditions as the Commission may prescribe.

“(5) Commodity contract.—A swap cleared by or through a derivatives clearing organization shall be considered to be a commodity contract as such term is defined in section 761
of title 11, United States Code, with regard to all money, securities, and property of any swaps customer received by a futures commission merchant or a derivatives clearing organization to margin, guarantee, or secure the swap (including money, securities, or property accruing to the customer as the result of the swap).

“(6) PROHIBITION.—It shall be unlawful for any person, including any derivatives clearing organization and any depository institution, that has received any money, securities, or property for deposit in a separate account or accounts as provided in paragraph (2) to hold, dispose of, or use any such money, securities, or property as belonging to the depositing futures commission merchant or any person other than the swaps customer of the futures commission merchant.”.

(b) Bankruptcy Treatment of Cleared Swaps.—Section 761 of title 11, United States Code, is amended—

(1) in paragraph (4), by striking subparagraph (F) and inserting the following:

“(F)(i) any other contract, option, agreement, or transaction that is similar to a contract, option, agreement, or transaction referred to in this paragraph; and

“(ii) with respect to a futures commission merchant or a clearing organization, any other contract, option, agreement, or transaction, in each case, that is cleared by a clearing organization;”;

(2) in paragraph (9)(A)(i), by striking “the commodity futures account” and inserting “a commodity contract account”.

(c) Segregation Requirements for Uncleared Swaps.—Section 4s of the Commodity Exchange Act (as added by section 731) is amended by adding at the end the following:

“(l) Segregation Requirements.—

“(1) Segregation of Assets Held as Collateral in Uncleared Swap Transactions.—

“(A) Notification.—A swap dealer or major swap participant shall be required to notify the counterparty of the swap dealer or major swap participant at the beginning of a swap transaction that the counterparty has the right to require segregation of the funds or other property supplied to margin, guarantee, or secure the obligations of the counterparty.

“(B) Segregation and Maintenance of Funds.—At the request of a counterparty to a swap that provides funds or other property to a swap dealer or major swap participant to margin, guarantee, or secure the obligations of the counterparty, the swap dealer or major swap participant shall—

“(i) segregate the funds or other property for the benefit of the counterparty; and

“(ii) in accordance with such rules and regulations as the Commission may promulgate, maintain the funds or other property in a segregated account separate from the assets and other interests of the swap dealer or major swap participant.

“(2) Applicability.—The requirements described in paragraph (1) shall—
“(A) apply only to a swap between a counterparty and a swap dealer or major swap participant that is not submitted for clearing to a derivatives clearing organization; and
“(B)(i) not apply to variation margin payments; or
“(ii) not preclude any commercial arrangement regarding—
“(I) the investment of segregated funds or other property that may only be invested in such investments as the Commission may permit by rule or regulation; and
“(II) the related allocation of gains and losses resulting from any investment of the segregated funds or other property.

“(3) USE OF INDEPENDENT THIRD-PARTY CUSTODIANS.—The segregated account described in paragraph (1) shall be—
“(A) carried by an independent third-party custodian; and
“(B) designated as a segregated account for and on behalf of the counterparty.

“(4) REPORTING REQUIREMENT.—If the counterparty does not choose to require segregation of the funds or other property supplied to margin, guarantee, or secure the obligations of the counterparty, the swap dealer or major swap participant shall report to the counterparty of the swap dealer or major swap participant on a quarterly basis that the back office procedures of the swap dealer or major swap participant relating to margin and collateral requirements are in compliance with the agreement of the counterparties.”.

SEC. 725. DERIVATIVES CLEARING ORGANIZATIONS.

(a) REGISTRATION REQUIREMENT.—Section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1) is amended by striking subsections (a) and (b) and inserting the following:

“(a) REGISTRATION REQUIREMENT.—
“(1) IN GENERAL.—Except as provided in paragraph (2), it shall be unlawful for a derivatives clearing organization, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a derivatives clearing organization with respect to—
“(A) a contract of sale of a commodity for future delivery (or an option on the contract of sale) or option on a commodity, in each case, unless the contract or option is—
“(i) excluded from this Act by subsection (a)(1)(C)(i), (c), or (f) of section 2; or
“(ii) a security futures product cleared by a clearing agency registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.); or
“(B) a swap.
“(2) EXCEPTION.—Paragraph (1) shall not apply to a derivatives clearing organization that is registered with the Commission.
“(b) VOLUNTARY REGISTRATION.—A person that clears 1 or more agreements, contracts, or transactions that are not required to
be cleared under this Act may register with the Commission as a derivatives clearing organization.’’.

(b) **Registration for Depository Institutions and Clearing Agencies; Exemptions; Compliance Officer; Annual Reports.**—Section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1) is amended by adding at the end the following:

‘‘(g) **Existing Depository Institutions and Clearing Agencies.**—

‘‘(1) **In General.**—A depository institution or clearing agency registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) that is required to be registered as a derivatives clearing organization under this section is deemed to be registered under this section to the extent that, before the date of enactment of this subsection—

‘‘(A) the depository institution cleared swaps as a multilateral clearing organization; or

‘‘(B) the clearing agency cleared swaps.

‘‘(2) **Conversion of Depository Institutions.**—A depository institution to which this subsection applies may, by the vote of the shareholders owning not less than 51 percent of the voting interests of the depository institution, be converted into a State corporation, partnership, limited liability company, or similar legal form pursuant to a plan of conversion, if the conversion is not in contravention of applicable State law.

‘‘(3) **Sharing of Information.**—The Securities and Exchange Commission shall make available to the Commission, upon request, all information determined to be relevant by the Securities and Exchange Commission regarding a clearing agency deemed to be registered with the Commission under paragraph (1).

‘‘(h) **Exemptions.**—The Commission may exempt, conditionally or unconditionally, a derivatives clearing organization from registration under this section for the clearing of swaps if the Commission determines that the derivatives clearing organization is subject to comparable, comprehensive supervision and regulation by the Securities and Exchange Commission or the appropriate government authorities in the home country of the organization. Such conditions may include, but are not limited to, requiring that the derivatives clearing organization be available for inspection by the Commission and make available all information requested by the Commission.

‘‘(i) **Designation of Chief Compliance Officer.**—

‘‘(1) **In General.**—Each derivatives clearing organization shall designate an individual to serve as a chief compliance officer.

‘‘(2) **Duties.**—The chief compliance officer shall—

‘‘(A) report directly to the board or to the senior officer of the derivatives clearing organization;

‘‘(B) review the compliance of the derivatives clearing organization with respect to the core principles described in subsection (c)(2);

‘‘(C) in consultation with the board of the derivatives clearing organization, a body performing a function similar to the board of the derivatives clearing organization, or the senior officer of the derivatives clearing organization, resolve any conflicts of interest that may arise;
“(D) be responsible for administering each policy and procedure that is required to be established pursuant to this section;

“(E) ensure compliance with this Act (including regulations) relating to agreements, contracts, or transactions, including each rule prescribed by the Commission under this section;

“(F) establish procedures for the remediation of noncompliance issues identified by the compliance officer through any—

““(i) compliance office review;
““(ii) look-back;
““(iii) internal or external audit finding;
““(iv) self-reported error; or
““(v) validated complaint; and

“(G) establish and follow appropriate procedures for the handling, management response, remediation, re-testing, and closing of noncompliance issues.

“(3) ANNUAL REPORTS.—

“(A) IN GENERAL.—In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—

“(i) the compliance of the derivatives clearing organization of the compliance officer with respect to this Act (including regulations); and

“(ii) each policy and procedure of the derivatives clearing organization of the compliance officer (including the code of ethics and conflict of interest policies of the derivatives clearing organization).

“(B) REQUIREMENTS.—A compliance report under subparagraph (A) shall—

“(i) accompany each appropriate financial report of the derivatives clearing organization that is required to be furnished to the Commission pursuant to this section; and

“(ii) include a certification that, under penalty of law, the compliance report is accurate and complete.”.

(c) CORE PRINCIPLES FOR DERIVATIVES CLEARING ORGANIZATIONS.—Section 5b(c) of the Commodity Exchange Act (7 U.S.C. 7a–1(c)) is amended by striking paragraph (2) and inserting the following:

“(2) CORE PRINCIPLES FOR DERIVATIVES CLEARING ORGANIZATIONS.—

“(A) COMPLIANCE.—

“(i) IN GENERAL.—To be registered and to maintain registration as a derivatives clearing organization, a derivatives clearing organization shall comply with each core principle described in this paragraph and any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5).

“(ii) DISCRETION OF DERIVATIVES CLEARING ORGANIZATION.—Subject to any rule or regulation prescribed by the Commission, a derivatives clearing organization shall have reasonable discretion in establishing the manner by which the derivatives clearing organization
organization complies with each core principle described in this paragraph.

"(B) FINANCIAL RESOURCES.—

"(i) IN GENERAL.—Each derivatives clearing organization shall have adequate financial, operational, and managerial resources, as determined by the Commission, to discharge each responsibility of the derivatives clearing organization.

"(ii) MINIMUM AMOUNT OF FINANCIAL RESOURCES.—Each derivatives clearing organization shall possess financial resources that, at a minimum, exceed the total amount that would—

"(I) enable the organization to meet its financial obligations to its members and participants notwithstanding a default by the member or participant creating the largest financial exposure for that organization in extreme but plausible market conditions; and

"(II) enable the derivatives clearing organization to cover the operating costs of the derivatives clearing organization for a period of 1 year (as calculated on a rolling basis).

"(C) PARTICIPANT AND PRODUCT ELIGIBILITY.—

"(i) IN GENERAL.—Each derivatives clearing organization shall establish—

"(I) appropriate admission and continuing eligibility standards (including sufficient financial resources and operational capacity to meet obligations arising from participation in the derivatives clearing organization) for members of, and participants in, the derivatives clearing organization; and

"(II) appropriate standards for determining the eligibility of agreements, contracts, or transactions submitted to the derivatives clearing organization for clearing.

"(ii) REQUIRED PROCEDURES.—Each derivatives clearing organization shall establish and implement procedures to verify, on an ongoing basis, the compliance of each participation and membership requirement of the derivatives clearing organization.

"(iii) REQUIREMENTS.—The participation and membership requirements of each derivatives clearing organization shall—

"(I) be objective;

"(II) be publicly disclosed; and

"(III) permit fair and open access.

"(D) RISK MANAGEMENT.—

"(i) IN GENERAL.—Each derivatives clearing organization shall ensure that the derivatives clearing organization possesses the ability to manage the risks associated with discharging the responsibilities of the derivatives clearing organization through the use of appropriate tools and procedures.

"(ii) MEASUREMENT OF CREDIT EXPOSURE.—Each derivatives clearing organization shall—

"(I) not less than once during each business day of the derivatives clearing organization,
measure the credit exposures of the derivatives clearing organization to each member and participant of the derivatives clearing organization; and

“(II) monitor each exposure described in subclause (I) periodically during the business day of the derivatives clearing organization.

“(iii) LIMITATION OF EXPOSURE TO POTENTIAL LOSSES FROM DEFAULTS.—Each derivatives clearing organization, through margin requirements and other risk control mechanisms, shall limit the exposure of the derivatives clearing organization to potential losses from defaults by members and participants of the derivatives clearing organization to ensure that—

“(I) the operations of the derivatives clearing organization would not be disrupted; and

“(II) nondefaulting members or participants would not be exposed to losses that nondefaulting members or participants cannot anticipate or control.

“(iv) MARGIN REQUIREMENTS.—The margin required from each member and participant of a derivatives clearing organization shall be sufficient to cover potential exposures in normal market conditions.

“(v) REQUIREMENTS REGARDING MODELS AND PARAMETERS.—Each model and parameter used in setting margin requirements under clause (iv) shall be—

“(I) risk-based; and

“(II) reviewed on a regular basis.

“(E) SETTLEMENT PROCEDURES.—Each derivatives clearing organization shall—

“(i) complete money settlements on a timely basis (but not less frequently than once each business day);

“(ii) employ money settlement arrangements to eliminate or strictly limit the exposure of the derivatives clearing organization to settlement bank risks (including credit and liquidity risks from the use of banks to effect money settlements);

“(iii) ensure that money settlements are final when effected;

“(iv) maintain an accurate record of the flow of funds associated with each money settlement;

“(v) possess the ability to comply with each term and condition of any permitted netting or offset arrangement with any other clearing organization;

“(vi) regarding physical settlements, establish rules that clearly state each obligation of the derivatives clearing organization with respect to physical deliveries; and

“(vii) ensure that each risk arising from an obligation described in clause (vi) is identified and managed.

“(F) TREATMENT OF FUNDS.—

“(i) REQUIRED STANDARDS AND PROCEDURES.—Each derivatives clearing organization shall establish standards and procedures that are designed to protect and ensure the safety of member and participant funds and assets.
“(ii) HOLDING OF FUNDS AND ASSETS.—Each derivatives clearing organization shall hold member and participant funds and assets in a manner by which to minimize the risk of loss or of delay in the access by the derivatives clearing organization to the assets and funds.

“(iii) PERMISSIBLE INVESTMENTS.—Funds and assets invested by a derivatives clearing organization shall be held in instruments with minimal credit, market, and liquidity risks.

“(G) DEFAULT RULES AND PROCEDURES.—

“(i) IN GENERAL.—Each derivatives clearing organization shall have rules and procedures designed to allow for the efficient, fair, and safe management of events during which members or participants—

“(I) become insolvent; or

“(II) otherwise default on the obligations of the members or participants to the derivatives clearing organization.

“(ii) DEFAULT PROCEDURES.—Each derivatives clearing organization shall—

“(I) clearly state the default procedures of the derivatives clearing organization;

“(II) make publicly available the default rules of the derivatives clearing organization; and

“(III) ensure that the derivatives clearing organization may take timely action—

“(aa) to contain losses and liquidity pressures; and

“(bb) to continue meeting each obligation of the derivatives clearing organization.

“(H) RULE ENFORCEMENT.—Each derivatives clearing organization shall—

“(i) maintain adequate arrangements and resources for—

“(I) the effective monitoring and enforcement of compliance with the rules of the derivatives clearing organization; and

“(II) the resolution of disputes;

“(ii) have the authority and ability to discipline, limit, suspend, or terminate the activities of a member or participant due to a violation by the member or participant of any rule of the derivatives clearing organization; and

“(iii) report to the Commission regarding rule enforcement activities and sanctions imposed against members and participants as provided in clause (ii).

“(I) SYSTEM SAFEGUARDS.—Each derivatives clearing organization shall—

“(i) establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk through the development of appropriate controls and procedures, and automated systems, that are reliable, secure, and have adequate scalable capacity;
“(ii) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allows for—

“(I) the timely recovery and resumption of operations of the derivatives clearing organization; and

“(II) the fulfillment of each obligation and responsibility of the derivatives clearing organization; and

“(iii) periodically conduct tests to verify that the backup resources of the derivatives clearing organization are sufficient to ensure daily processing, clearing, and settlement.

“(J) REPORTING.—Each derivatives clearing organization shall provide to the Commission all information that the Commission determines to be necessary to conduct oversight of the derivatives clearing organization.

“(K) RECORDKEEPING.—Each derivatives clearing organization shall maintain records of all activities related to the business of the derivatives clearing organization as a derivatives clearing organization—

“(i) in a form and manner that is acceptable to the Commission; and

“(ii) for a period of not less than 5 years.

“(L) PUBLIC INFORMATION.—

“(i) IN GENERAL.—Each derivatives clearing organization shall provide to market participants sufficient information to enable the market participants to identify and evaluate accurately the risks and costs associated with using the services of the derivatives clearing organization.

“(ii) AVAILABILITY OF INFORMATION.—Each derivatives clearing organization shall make information concerning the rules and operating and default procedures governing the clearing and settlement systems of the derivatives clearing organization available to market participants.

“(iii) PUBLIC DISCLOSURE.—Each derivatives clearing organization shall disclose publicly and to the Commission information concerning—

“(I) the terms and conditions of each contract, agreement, and transaction cleared and settled by the derivatives clearing organization;

“(II) each clearing and other fee that the derivatives clearing organization charges the members and participants of the derivatives clearing organization;

“(III) the margin-setting methodology, and the size and composition, of the financial resource package of the derivatives clearing organization;

“(IV) daily settlement prices, volume, and open interest for each contract settled or cleared by the derivatives clearing organization; and

“(V) any other matter relevant to participation in the settlement and clearing activities of the derivatives clearing organization.
“(M) **Information-Sharing.**—Each derivatives clearing organization shall—

“(i) enter into, and abide by the terms of, each appropriate and applicable domestic and international information-sharing agreement; and

“(ii) use relevant information obtained from each agreement described in clause (i) in carrying out the risk management program of the derivatives clearing organization.

“(N) **Antitrust Considerations.**—Unless necessary or appropriate to achieve the purposes of this Act, a derivatives clearing organization shall not—

“(i) adopt any rule or take any action that results in any unreasonable restraint of trade; or

“(ii) impose any material anticompetitive burden.

“(O) **Governance Fitness Standards.**—

“(i) **Governance Arrangements.**—Each derivatives clearing organization shall establish governance arrangements that are transparent—

“(I) to fulfill public interest requirements; and

“(II) to permit the consideration of the views of owners and participants.

“(ii) **Fitness Standards.**—Each derivatives clearing organization shall establish and enforce appropriate fitness standards for—

“(I) directors;

“(II) members of any disciplinary committee;

“(III) members of the derivatives clearing organization;

“(IV) any other individual or entity with direct access to the settlement or clearing activities of the derivatives clearing organization; and

“(V) any party affiliated with any individual or entity described in this clause.

“(P) **Conflicts of Interest.**—Each derivatives clearing organization shall—

“(i) establish and enforce rules to minimize conflicts of interest in the decision-making process of the derivatives clearing organization; and

“(ii) establish a process for resolving conflicts of interest described in clause (i).

“(Q) **Composition of Governing Boards.**—Each derivatives clearing organization shall ensure that the composition of the governing board or committee of the derivatives clearing organization includes market participants.

“(R) **Legal Risk.**—Each derivatives clearing organization shall have a well-founded, transparent, and enforceable legal framework for each aspect of the activities of the derivatives clearing organization.”.

(d) **Conflicts of Interest.**—The Commodity Futures Trading Commission shall adopt rules mitigating conflicts of interest in connection with the conduct of business by a swap dealer or a major swap participant with a derivatives clearing organization, board of trade, or a swap execution facility that clears or trades swaps in which the swap dealer or major swap participant has a material debt or material equity investment.
(e) Reporting Requirements.—Section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1) (as amended by subsection (b)) is amended by adding at the end the following:

"(k) Reporting Requirements.—

"(1) Duty of Derivatives Clearing Organizations.—Each derivatives clearing organization that clears swaps shall provide to the Commission all information that is determined by the Commission to be necessary to perform each responsibility of the Commission under this Act.

"(2) Data Collection and Maintenance Requirements.—The Commission shall adopt data collection and maintenance requirements for swaps cleared by derivatives clearing organizations that are comparable to the corresponding requirements for—

"(A) swaps data reported to swap data repositories; and

"(B) swaps traded on swap execution facilities.

"(3) Reports on Security-Based Swap Agreements to Be Shared with the Securities and Exchange Commission.—

"(A) In General.—A derivatives clearing organization that clears security-based swap agreements (as defined in section 1a(47)(A)(v)) shall, upon request, open to inspection and examination to the Securities and Exchange Commission all books and records relating to such security-based swap agreements, consistent with the confidentiality and disclosure requirements of section 8.

"(B) Jurisdiction.—Nothing in this paragraph shall affect the exclusive jurisdiction of the Commission to prescribe recordkeeping and reporting requirements for a derivatives clearing organization that is registered with the Commission.

"(4) Information Sharing.—Subject to section 8, and upon request, the Commission shall share information collected under paragraph (2) with—

"(A) the Board;

"(B) the Securities and Exchange Commission;

"(C) each appropriate prudential regulator;

"(D) the Financial Stability Oversight Council;

"(E) the Department of Justice; and

"(F) any other person that the Commission determines to be appropriate, including—

"(i) foreign financial supervisors (including foreign futures authorities);

"(ii) foreign central banks; and

"(iii) foreign ministries.

"(5) Confidentiality and Indemnification Agreement.—Before the Commission may share information with any entity described in paragraph (4)—

"(A) the Commission shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 8 relating to the information on swap transactions that is provided; and

"(B) each entity shall agree to indemnify the Commission for any expenses arising from litigation relating to the information provided under section 8.
“(6) PUBLIC INFORMATION.—Each derivatives clearing organization that clears swaps shall provide to the Commission (including any designee of the Commission) information under paragraph (2) in such form and at such frequency as is required by the Commission to comply with the public reporting requirements contained in section 2(a)(13).”.

(f) PUBLIC DISCLOSURE.—Section 8(e) of the Commodity Exchange Act (7 U.S.C. 12(e)) is amended in the last sentence—

(1) by inserting “, central bank and ministries,” after “department” each place it appears; and

(2) by striking “. is a party,” and inserting “. is a party.”.

(g) LEGAL CERTAINTY FOR IDENTIFIED BANKING PRODUCTS.—

(1) REPEALS.—The Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27 et seq.) is amended—

(A) by striking sections 404 and 407 (7 U.S.C. 27b, 27e);

(B) in section 402 (7 U.S.C. 27), by striking subsection (d); and

(C) in section 408 (7 U.S.C. 27f)—

(i) in subsection (c)—

(I) by striking “in the case” and all that follows through “a hybrid” and inserting “in the case of a hybrid”;

(II) by striking “, or” and inserting a period; and

(III) by striking paragraph (2);

(ii) by striking subsection (b); and

(iii) by redesignating subsection (c) as subsection (b).

(2) LEGAL CERTAINTY FOR BANK PRODUCTS ACT OF 2000.—

Section 403 of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27a) is amended to read as follows:

“SEC. 403. EXCLUSION OF IDENTIFIED BANKING PRODUCT.

“(a) EXCLUSION.—Except as provided in subsection (b) or (c)—

“(1) the Commodity Exchange Act (7 U.S.C. 1 et seq.) shall not apply to, and the Commodity Futures Trading Commission shall not exercise regulatory authority under the Commodity Exchange Act (7 U.S.C. 1 et seq.) with respect to, an identified banking product; and


“(b) EXCEPTION.—An appropriate Federal banking agency may except an identified banking product of a bank under its regulatory jurisdiction from the exclusion in subsection (a) if the agency determines, in consultation with the Commodity Futures Trading Commission and the Securities and Exchange Commission, that the product—

“(1) would meet the definition of a ‘swap’ under section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a) or a ‘security-based swap’ under that section 3(a)(68) of the Securities Exchange Act of 1934; and

“(2) has become known to the trade as a swap or security-based swap, or otherwise has been structured as an identified

(c) EXCEPTION.—The exclusions in subsection (a) shall not apply to an identified bank product that—

"(1) is a product of a bank that is not under the regulatory jurisdiction of an appropriate Federal banking agency;

"(2) meets the definition of swap in section 1a(47) of the Commodity Exchange Act or security-based swap in section 3(a)(68) of the Securities Exchange Act of 1934; and

"(3) has become known to the trade as a swap or security-based swap, or otherwise has been structured as an identified banking product for the purpose of evading the provisions of the Commodity Exchange Act (7 U.S.C. 1 et seq.), the Securities Act of 1933 (15 U.S.C. 77a et seq.), or the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.)."

(h) REDUCING CLEARING SYSTEMIC RISK.—Section 5b(f)(1) of the Commodity Exchange Act (7 U.S.C. 7a-1(F)(i)) is amended by adding at the end the following: “In order to minimize systemic risk, under no circumstances shall a derivatives clearing organization be compelled to accept the counterparty credit risk of another clearing organization.”

SEC. 726. RULEMAKING ON CONFLICT OF INTEREST.

(a) IN GENERAL.—In order to mitigate conflicts of interest, not later than 180 days after the date of enactment of the Wall Street Transparency and Accountability Act of 2010, the Commodity Futures Trading Commission shall adopt rules which may include numerical limits on the control of, or the voting rights with respect to, any derivatives clearing organization that clears swaps, or swap execution facility or board of trade designated as a contract market that posts swaps or makes swaps available for trading, by a bank holding company (as defined in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841)) with total consolidated assets of $50,000,000,000 or more, a nonbank financial company (as defined in section 102) supervised by the Board, an affiliate of such a bank holding company or nonbank financial company, a swap dealer, major swap participant, or associated person of a swap dealer or major swap participant.

(b) PURPOSES.—The Commission shall adopt rules if it determines, after the review described in subsection (a), that such rules are necessary or appropriate to improve the governance of, or to mitigate systemic risk, promote competition, or mitigate conflicts of interest in connection with a swap dealer or major swap participant’s conduct of business with, a derivatives clearing organization, contract market, or swap execution facility that clears or posts swaps or makes swaps available for trading and in which such swap dealer or major swap participant has a material debt or equity investment.

(c) CONSIDERATIONS.—In adopting rules pursuant to this section, the Commodity Futures Trading Commission shall consider any conflicts of interest arising from the amount of equity owned by a single investor, the ability to vote, cause the vote of, or withhold votes entitled to be cast on any matters by the holders of the ownership interest, and the governance arrangements of any derivatives clearing organization that clears swaps, or swap
execution facility or board of trade designated as a contract market that posts swaps or makes swaps available for trading.

SEC. 727. PUBLIC REPORTING OF SWAP TRANSACTION DATA.

Section 2(a) of the Commodity Exchange Act (7 U.S.C. 2(a)) is amended by adding at the end the following:

“(13) PUBLIC AVAILABILITY OF SWAP TRANSACTION DATA.—

“(A) DEFINITION OF REAL-TIME PUBLIC REPORTING.—In this paragraph, the term ‘real-time public reporting’ means to report data relating to a swap transaction, including price and volume, as soon as technologically practicable after the time at which the swap transaction has been executed.

“(B) PURPOSE.—The purpose of this section is to authorize the Commission to make swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery.

“(C) GENERAL RULE.—The Commission is authorized and required to provide by rule for the public availability of swap transaction and pricing data as follows:

“(i) With respect to those swaps that are subject to the mandatory clearing requirement described in subsection (h)(1) (including those swaps that are excepted from the requirement pursuant to subsection (h)(7)), the Commission shall require real-time public reporting for such transactions.

“(ii) With respect to those swaps that are not subject to the mandatory clearing requirement described in subsection (h)(1), but are cleared at a registered derivatives clearing organization, the Commission shall require real-time public reporting for such transactions.

“(iii) With respect to swaps that are not cleared at a registered derivatives clearing organization and which are reported to a swap data repository or the Commission under subsection (h)(6), the Commission shall require real-time public reporting for such transactions, in a manner that does not disclose the business transactions and market positions of any person.

“(iv) With respect to swaps that are determined to be required to be cleared under subsection (h)(2) but are not cleared, the Commission shall require real-time public reporting for such transactions.

“(D) REGISTERED ENTITIES AND PUBLIC REPORTING.—The Commission may require registered entities to publicly disseminate the swap transaction and pricing data required to be reported under this paragraph.

“(E) RULEMAKING REQUIRED.—With respect to the rule providing for the public availability of transaction and pricing data for swaps described in clauses (i) and (ii) of subparagraph (C), the rule promulgated by the Commission shall contain provisions—

“(i) to ensure such information does not identify the participants;
“(ii) to specify the criteria for determining what constitutes a large notional swap transaction (block trade) for particular markets and contracts;
“(iii) to specify the appropriate time delay for reporting large notional swap transactions (block trades) to the public; and
“(iv) that take into account whether the public disclosure will materially reduce market liquidity.
“(F) Timeliness of Reporting.—Parties to a swap (including agents of the parties to a swap) shall be responsible for reporting swap transaction information to the appropriate registered entity in a timely manner as may be prescribed by the Commission.
“(G) Reporting of Swaps to Registered Swap Data Repositories.—Each swap (whether cleared or uncleared) shall be reported to a registered swap data repository.
“(14) Semiannual and Annual Public Reporting of Aggregate Swap Data.—
“(A) In General.—In accordance with subparagraph (B), the Commission shall issue a written report on a semiannual and annual basis to make available to the public information relating to—
“(i) the trading and clearing in the major swap categories; and
“(ii) the market participants and developments in new products.
“(B) Use; Consultation.—In preparing a report under subparagraph (A), the Commission shall—
“(i) use information from swap data repositories and derivatives clearing organizations; and
“(ii) consult with the Office of the Comptroller of the Currency, the Bank for International Settlements, and such other regulatory bodies as may be necessary.
“(C) Authority of the Commission.—The Commission may, by rule, regulation, or order, delegate the public reporting responsibilities of the Commission under this paragraph in accordance with such terms and conditions as the Commission determines to be appropriate and in the public interest.”.

SEC. 728. SWAP DATA REPOSITORIES.

The Commodity Exchange Act is amended by inserting after section 20 (7 U.S.C. 24) the following:

“SEC. 21. SWAP DATA REPOSITORIES.

“(a) Registration Requirement.—
“(1) Requirement; Authority of Derivatives Clearing Organization.—
“(A) In General.—It shall be unlawful for any person, unless registered with the Commission, directly or indirectly to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a swap data repository.
“(B) Registration of Derivatives Clearing Organizations.—A derivatives clearing organization may register as a swap data repository.
“(2) **INSPECTION AND EXAMINATION.**—Each registered swap data repository shall be subject to inspection and examination by any representative of the Commission.

“(3) **COMPLIANCE WITH CORE PRINCIPLES.**—

“(A) **IN GENERAL.**—To be registered, and maintain registration, as a swap data repository, the swap data repository shall comply with—

“(i) the requirements and core principles described in this section; and

“(ii) any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5).

“(B) **REASONABLE DISCRETION OF SWAP DATA REPOSITORY.**—Unless otherwise determined by the Commission by rule or regulation, a swap data repository described in subparagraph (A) shall have reasonable discretion in establishing the manner in which the swap data repository complies with the core principles described in this section.

“(b) **STANDARD SETTING.**—

“(1) **DATA IDENTIFICATION.**—

“(A) **IN GENERAL.**—In accordance with subparagraph (B), the Commission shall prescribe standards that specify the data elements for each swap that shall be collected and maintained by each registered swap data repository.

“(B) **REQUIREMENT.**—In carrying out subparagraph (A), the Commission shall prescribe consistent data element standards applicable to registered entities and reporting counterparties.

“(2) **DATA COLLECTION AND MAINTENANCE.**—The Commission shall prescribe data collection and data maintenance standards for swap data repositories.

“(3) **COMPARABILITY.**—The standards prescribed by the Commission under this subsection shall be comparable to the data standards imposed by the Commission on derivatives clearing organizations in connection with their clearing of swaps.

“(c) **DUTIES.**—A swap data repository shall—

“(1) accept data prescribed by the Commission for each swap under subsection (b);

“(2) confirm with both counterparties to the swap the accuracy of the data that was submitted;

“(3) maintain the data described in paragraph (1) in such form, in such manner, and for such period as may be required by the Commission;

“(4)(A) provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity); and

“(B) provide the information described in paragraph (1) in such form and at such frequency as the Commission may require to comply with the public reporting requirements contained in section 2(a)(13);

“(5) at the direction of the Commission, establish automated systems for monitoring, screening, and analyzing swap data, including compliance and frequency of end user clearing exemption claims by individual and affiliated entities;

“(6) maintain the privacy of any and all swap transaction information that the swap data repository receives from a swap dealer, counterparty, or any other registered entity; and
“(7) on a confidential basis pursuant to section 8, upon request, and after notifying the Commission of the request, make available all data obtained by the swap data repository, including individual counterparty trade and position data, to—

(A) each appropriate prudential regulator;
(B) the Financial Stability Oversight Council;
(C) the Securities and Exchange Commission;
(D) the Department of Justice; and
(E) any other person that the Commission determines to be appropriate, including—

(i) foreign financial supervisors (including foreign futures authorities);
(ii) foreign central banks; and
(iii) foreign ministries; and

(8) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allows for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the organization.

(d) CONFIDENTIALITY AND INDEMNIFICATION AGREEMENT.—Before the swap data repository may share information with any entity described in subsection (c)(7)—

(1) the swap data repository shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 8 relating to the information on swap transactions that is provided; and

(2) each entity shall agree to indemnify the swap data repository and the Commission for any expenses arising from litigation relating to the information provided under section 8.

(e) DESIGNATION OF CHIEF COMPLIANCE OFFICER.—

(1) IN GENERAL.—Each swap data repository shall designate an individual to serve as a chief compliance officer.

(2) DUTIES.—The chief compliance officer shall—

(A) report directly to the board or to the senior officer of the swap data repository;
(B) review the compliance of the swap data repository with respect to the requirements and core principles described in this section; 
(C) in consultation with the board of the swap data repository, a body performing a function similar to the board of the swap data repository, or the senior officer of the swap data repository, resolve any conflicts of interest that may arise;
(D) be responsible for administering each policy and procedure that is required to be established pursuant to this section;
(E) ensure compliance with this Act (including regulations) relating to agreements, contracts, or transactions, including each rule prescribed by the Commission under this section;
(F) establish procedures for the remediation of non-compliance issues identified by the chief compliance officer through any—

(i) compliance office review;
(ii) look-back;
(iii) internal or external audit finding;
(iv) self-reported error; or
“(v) validated complaint; and
“(G) establish and follow appropriate procedures for the handling, management response, remediation, re-testing, and closing of noncompliance issues.
“(3) ANNUAL REPORTS.—
“(A) IN GENERAL.—In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—
“(i) the compliance of the swap data repository of the chief compliance officer with respect to this Act (including regulations); and
“(ii) each policy and procedure of the swap data repository of the chief compliance officer (including the code of ethics and conflict of interest policies of the swap data repository).
“(B) REQUIREMENTS.—A compliance report under subparagraph (A) shall—
“(i) accompany each appropriate financial report of the swap data repository that is required to be furnished to the Commission pursuant to this section; and
“(ii) include a certification that, under penalty of law, the compliance report is accurate and complete.

“(f) CORE PRINCIPLES APPLICABLE TO SWAP DATA REPOSITORIES.—
“(1) ANTITRUST CONSIDERATIONS.— Unless necessary or appropriate to achieve the purposes of this Act, a swap data repository shall not—
“(A) adopt any rule or take any action that results in any unreasonable restraint of trade; or
“(B) impose any material anticompetitive burden on the trading, clearing, or reporting of transactions.
“(2) GOVERNANCE ARRANGEMENTS.— Each swap data repository shall establish governance arrangements that are transparent—
“(A) to fulfill public interest requirements; and
“(B) to support the objectives of the Federal Government, owners, and participants.
“(3) CONFLICTS OF INTEREST.— Each swap data repository shall—
“(A) establish and enforce rules to minimize conflicts of interest in the decision-making process of the swap data repository; and
“(B) establish a process for resolving conflicts of interest described in subparagraph (A).
“(4) ADDITIONAL DUTIES DEVELOPED BY COMMISSION.—
“(A) IN GENERAL.— The Commission may develop 1 or more additional duties applicable to swap data repositories.
“(B) CONSIDERATION OF EVOLVING STANDARDS.— In developing additional duties under subparagraph (A), the Commission may take into consideration any evolving standard of the United States or the international community.
“(C) ADDITIONAL DUTIES FOR COMMISSION DESIGNEES.— The Commission shall establish additional duties for any registrant described in section 1a(48) in order to minimize...
conflicts of interest, protect data, ensure compliance, and
guarantee the safety and security of the swap data reposi-
tory.

“(g) Required Registration for Swap Data Repositories.—
Any person that is required to be registered as a swap data reposi-
tory under this section shall register with the Commission regard-
less of whether that person is also licensed as a bank or registered
with the Securities and Exchange Commission as a swap data
repository.

“(h) Rules.—The Commission shall adopt rules governing per-
sons that are registered under this section.”.

SEC. 729. REPORTING AND RECORDKEEPING.

The Commodity Exchange Act is amended by inserting after
section 4q (7 U.S.C. 6q–1) the following:

“SEC. 4r. REPORTING AND RECORDKEEPING FOR UNCLEARED SWAPS.

“(a) Required Reporting of Swaps Not Accepted by Any
Derivatives Clearing Organization.—

“(1) In General.—Each swap that is not accepted for
clearing by any derivatives clearing organization shall be
reported to—

“(A) a swap data repository described in section 21;

or

“(B) in the case in which there is no swap data reposi-
tory that would accept the swap, to the Commission pursuant
to this section within such time period as the Commis-
sion may by rule or regulation prescribe.

“(2) Transition Rule for Pre-Enactment Swaps.—

“(A) Swaps Entered into Before the Date of Enact-
ment of the Wall Street Transparency and Account-
ability Act of 2010.—Each swap entered into before the
date of enactment of the Wall Street Transparency and
Accountability Act of 2010, the terms of which have not
expired as of the date of enactment of that Act, shall
be reported to a registered swap data repository or the
Commission by a date that is not later than—

“(i) 30 days after issuance of the interim final
rule; or

“(ii) such other period as the Commission deter-
mines to be appropriate.

“(B) Commission Rulemaking.—The Commission shall
promulgate an interim final rule within 90 days of the
date of enactment of this section providing for the reporting
of each swap entered into before the date of enactment
as referenced in subparagraph (A).

“(C) Effective Date.—The reporting provisions
described in this section shall be effective upon the enact-
ment of this section.

“(3) Reporting Obligations.—

“(A) Swaps in Which Only 1 Counterparty Is a Swap
Dealer or Major Swap Participant.—With respect to a
swap in which only 1 counterparty is a swap dealer or
major swap participant, the swap dealer or major swap par-
participant shall report the swap as required under para-
graphs (1) and (2).

“(B) Swaps in Which 1 Counterparty Is a Swap
Dealer and the Other a Major Swap Participant.—With
respect to a swap in which 1 counterparty is a swap dealer and the other a major swap participant, the swap dealer shall report the swap as required under paragraphs (1) and (2).

“(C) OTHER SWAPS.—With respect to any other swap not described in subparagraph (A) or (B), the counterparties to the swap shall select a counterparty to report the swap as required under paragraphs (1) and (2).

“(b) DUTIES OF CERTAIN INDIVIDUALS.—Any individual or entity that enters into a swap shall meet each requirement described in subsection (c) if the individual or entity did not—

“(1) clear the swap in accordance with section 2(h)(1); or

“(2) have the data regarding the swap accepted by a swap data repository in accordance with rules (including timeframes) adopted by the Commission under section 21.

“(c) REQUIREMENTS.—An individual or entity described in subsection (b) shall—

“(1) upon written request from the Commission, provide reports regarding the swaps held by the individual or entity to the Commission in such form and in such manner as the Commission may request; and

“(2) maintain books and records pertaining to the swaps held by the individual or entity in such form, in such manner, and for such period as the Commission may require, which shall be open to inspection by—

“(A) any representative of the Commission;

“(B) an appropriate prudential regulator;

“(C) the Securities and Exchange Commission;

“(D) the Financial Stability Oversight Council; and

“(E) the Department of Justice.

“(d) IDENTICAL DATA.—In prescribing rules under this section, the Commission shall require individuals and entities described in subsection (b) to submit to the Commission a report that contains data that is not less comprehensive than the data required to be collected by swap data repositories under section 21.”.

SEC. 730. LARGE SWAP TRADER REPORTING.

The Commodity Exchange Act (7 U.S.C. 1 et seq.) is amended by adding after section 4s (as added by section 731) the following:

“SEC. 4t. LARGE SWAP TRADER REPORTING.

“(a) PROHIBITION.—

“(1) IN GENERAL.—Except as provided in paragraph (2), it shall be unlawful for any person to enter into any swap that the Commission determines to perform a significant price discovery function with respect to registered entities if—

“(A) the person directly or indirectly enters into the swap during any 1 day in an amount equal to or in excess of such amount as shall be established periodically by the Commission; and

“(B) the person directly or indirectly has or obtains a position in the swap equal to or in excess of such amount as shall be established periodically by the Commission.

“(2) EXCEPTION.—Paragraph (1) shall not apply if—

“(A) the person files or causes to be filed with the properly designated officer of the Commission such reports
regarding any transactions or positions described in sub-
paragraphs (A) and (B) of paragraph (1) as the Commission
may require by rule or regulation; and
``(B) in accordance with the rules and regulations of
the Commission, the person keeps books and records of
all such swaps and any transactions and positions in any
related commodity traded on or subject to the rules of
any designated contract market or swap execution facility,
and of cash or spot transactions in, inventories of, and
purchase and sale commitments of, such a commodity.
``(b) REQUIREMENTS.—
``(1) IN GENERAL.—Books and records described in sub-
section (a)(2)(B) shall—
``(A) show such complete details concerning all trans-
actions and positions as the Commission may prescribe
by rule or regulation;
``(B) be open at all times to inspection and examination
by any representative of the Commission; and
``(C) be open at all times to inspection and examination
by the Securities and Exchange Commission, to the extent
such books and records relate to transactions in swaps
(as that term is defined in section 1a(47)(A)(v)), and consis-
tent with the confidentiality and disclosure requirements
of section 8.
``(2) JURISDICTION.—Nothing in paragraph (1) shall affect
the exclusive jurisdiction of the Commission to prescribe record-
keeping and reporting requirements for large swap traders
under this section.
``(c) APPLICABILITY.—For purposes of this section, the swaps,
futures, and cash or spot transactions and positions of any person
shall include the swaps, futures, and cash or spot transactions
and positions of any persons directly or indirectly controlled by
the person.
``(d) SIGNIFICANT PRICE DISCOVERY FUNCTION.—In making a
determination as to whether a swap performs or affects a significant
price discovery function with respect to registered entities, the
Commission shall consider the factors described in section 4a(a)(3).’’.

SEC. 731. REGISTRATION AND REGULATION OF SWAP DEALERS AND
MAJOR SWAP PARTICIPANTS.

The Commodity Exchange Act (7 U.S.C. 1 et seq.) is amended
by inserting after section 4r (as added by section 729) the following:

``SEC. 4s. REGISTRATION AND REGULATION OF SWAP DEALERS AND
MAJOR SWAP PARTICIPANTS.

7 USC 6a.

``(a) Registration.—
``(1) SWAP DEALERS.—It shall be unlawful for any person
to act as a swap dealer unless the person is registered as
a swap dealer with the Commission.
``(2) MAJOR SWAP PARTICIPANTS.—It shall be unlawful for
any person to act as a major swap participant unless the
person is registered as a major swap participant with the
Commission.
``(b) REQUIREMENTS.—
``(1) IN GENERAL.—A person shall register as a swap dealer
or major swap participant by filing a registration application
with the Commission.
``(2) CONTENTS.—
“(A) IN GENERAL.—The application shall be made in such form and manner as prescribed by the Commission, and shall contain such information, as the Commission considers necessary concerning the business in which the applicant is or will be engaged.

“(B) CONTINUAL REPORTING.—A person that is registered as a swap dealer or major swap participant shall continue to submit to the Commission reports that contain such information pertaining to the business of the person as the Commission may require.

“(3) EXPIRATION.—Each registration under this section shall expire at such time as the Commission may prescribe by rule or regulation.

“(4) RULES.—Except as provided in subsections (d) and (e), the Commission may prescribe rules applicable to swap dealers and major swap participants, including rules that limit the activities of swap dealers and major swap participants.

“(5) TRANSITION.—Rules under this section shall provide for the registration of swap dealers and major swap participants not later than 1 year after the date of enactment of the Wall Street Transparency and Accountability Act of 2010.

“(6) STATUTORY DISQUALIFICATION.—Except to the extent otherwise specifically provided by rule, regulation, or order, it shall be unlawful for a swap dealer or a major swap participant to permit any person associated with a swap dealer or a major swap participant who is subject to a statutory disqualification to effect or be involved in effecting swaps on behalf of the swap dealer or major swap participant, if the swap dealer or major swap participant knew, or in the exercise of reasonable care should have known, of the statutory disqualification.

“(c) DUAL REGISTRATION.—

“(1) SWAP DEALER.—Any person that is required to be registered as a swap dealer under this section shall register with the Commission regardless of whether the person also is a depository institution or is registered with the Securities and Exchange Commission as a security-based swap dealer.

“(2) MAJOR SWAP PARTICIPANT.—Any person that is required to be registered as a major swap participant under this section shall register with the Commission regardless of whether the person also is a depository institution or is registered with the Securities and Exchange Commission as a major security-based swap participant.

“(d) RULEMAKINGS.—

“(1) IN GENERAL.—The Commission shall adopt rules for persons that are registered as swap dealers or major swap participants under this section.

“(2) EXCEPTION FOR PRUDENTIAL REQUIREMENTS.—

“(A) IN GENERAL.—The Commission may not prescribe rules imposing prudential requirements on swap dealers or major swap participants for which there is a prudential regulator.

“(B) APPLICABILITY.—Subparagraph (A) does not limit the authority of the Commission to prescribe rules as directed under this section.

“(e) CAPITAL AND MARGIN REQUIREMENTS.—

“(1) IN GENERAL.—
“(A) **Swap dealers and major swap participants that are banks.**—Each registered swap dealer and major swap participant for which there is a prudential regulator shall meet such minimum capital requirements and minimum initial and variation margin requirements as the prudential regulator shall by rule or regulation prescribe under paragraph (2)(A).

“(B) **Swap dealers and major swap participants that are not banks.**—Each registered swap dealer and major swap participant for which there is not a prudential regulator shall meet such minimum capital requirements and minimum initial and variation margin requirements as the Commission shall by rule or regulation prescribe under paragraph (2)(B).

“(2) **Rules.**—

“(A) **Swap dealers and major swap participants that are banks.**—The prudential regulators, in consultation with the Commission and the Securities and Exchange Commission, shall jointly adopt rules for swap dealers and major swap participants, with respect to their activities as a swap dealer or major swap participant, for which there is a prudential regulator imposing—

“(i) capital requirements; and

“(ii) both initial and variation margin requirements on all swaps that are not cleared by a registered derivatives clearing organization.

“(B) **Swap dealers and major swap participants that are not banks.**—The Commission shall adopt rules for swap dealers and major swap participants, with respect to their activities as a swap dealer or major swap participant, for which there is not a prudential regulator imposing—

“(i) capital requirements; and

“(ii) both initial and variation margin requirements on all swaps that are not cleared by a registered derivatives clearing organization.

“(C) **Capital.**—In setting capital requirements for a person that is designated as a swap dealer or a major swap participant for a single type or single class or category of swap or activities, the prudential regulator and the Commission shall take into account the risks associated with other types of swaps or classes of swaps or categories of swaps engaged in and the other activities conducted by that person that are not otherwise subject to regulation applicable to that person by virtue of the status of the person as a swap dealer or a major swap participant.

“(3) **Standards for capital and margin.**—

“(A) **In general.**—To offset the greater risk to the swap dealer or major swap participant and the financial system arising from the use of swaps that are not cleared, the requirements imposed under paragraph (2) shall—

“(i) help ensure the safety and soundness of the swap dealer or major swap participant; and

“(ii) be appropriate for the risk associated with the non-cleared swaps held as a swap dealer or major swap participant.

“(B) **Rule of construction.**—
“(i) IN GENERAL.—Nothing in this section shall limit, or be construed to limit, the authority—

“(I) of the Commission to set financial responsibility rules for a futures commission merchant or introducing broker registered pursuant to section 4f(a) (except for section 4f(a)(3)) in accordance with section 4f(b); or


“(ii) FUTURES COMMISSION MERCHANTS AND OTHER DEALERS.—A futures commission merchant, introducing broker, broker, or dealer shall maintain sufficient capital to comply with the stricter of any applicable capital requirements to which such futures commission merchant, introducing broker, broker, or dealer is subject to under this Act or the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.).

“(C) MARGIN REQUIREMENTS.—In prescribing margin requirements under this subsection, the prudential regulator with respect to swap dealers and major swap participants for which it is the prudential regulator and the Commission with respect to swap dealers and major swap participants for which there is no prudential regulator shall permit the use of noncash collateral, as the regulator or the Commission determines to be consistent with—

“(i) preserving the financial integrity of markets trading swaps; and

“(ii) preserving the stability of the United States financial system.

“(D) COMPARABILITY OF CAPITAL AND MARGIN REQUIREMENTS.—

“(i) IN GENERAL.—The prudential regulators, the Commission, and the Securities and Exchange Commission shall periodically (but not less frequently than annually) consult on minimum capital requirements and minimum initial and variation margin requirements.

“(ii) COMPARABILITY.—The entities described in clause (i) shall, to the maximum extent practicable, establish and maintain comparable minimum capital requirements and minimum initial and variation margin requirements, including the use of non cash collateral, for—

“(I) swap dealers; and

“(II) major swap participants.

“(f) REPORTING AND RECORDKEEPING.—

“(1) IN GENERAL.—Each registered swap dealer and major swap participant—
“(A) shall make such reports as are required by the Commission by rule or regulation regarding the transactions and positions and financial condition of the registered swap dealer or major swap participant;

“(B)(i) for which there is a prudential regulator, shall keep books and records of all activities related to the business as a swap dealer or major swap participant in such form and manner and for such period as may be prescribed by the Commission by rule or regulation; and

“(ii) for which there is no prudential regulator, shall keep books and records in such form and manner and for such period as may be prescribed by the Commission by rule or regulation;

“(C) shall keep books and records described in subparagraph (B) open to inspection and examination by any representative of the Commission; and

“(D) shall keep any such books and records relating to swaps defined in section 1a(47)(A)(v) open to inspection and examination by the Securities and Exchange Commission.

“(2) RULES.—The Commission shall adopt rules governing reporting and recordkeeping for swap dealers and major swap participants.

“(g) DAILY TRADING RECORDS.—

“(1) IN GENERAL.—Each registered swap dealer and major swap participant shall maintain daily trading records of the swaps of the registered swap dealer and major swap participant and all related records (including related cash or forward transactions) and recorded communications, including electronic mail, instant messages, and recordings of telephone calls, for such period as may be required by the Commission by rule or regulation.

“(2) INFORMATION REQUIREMENTS.—The daily trading records shall include such information as the Commission shall require by rule or regulation.

“(3) COUNTERPARTY RECORDS.—Each registered swap dealer and major swap participant shall maintain daily trading records for each counterparty in a manner and form that is identifiable with each swap transaction.

“(4) AUDIT TRAIL.—Each registered swap dealer and major swap participant shall maintain a complete audit trail for conducting comprehensive and accurate trade reconstructions.

“(5) RULES.—The Commission shall adopt rules governing daily trading records for swap dealers and major swap participants.

“(h) BUSINESS CONDUCT STANDARDS.—

“(1) IN GENERAL.—Each registered swap dealer and major swap participant shall conform with such business conduct standards as prescribed in paragraph (3) and as may be prescribed by the Commission by rule or regulation that relate to—

“(A) fraud, manipulation, and other abusive practices involving swaps (including swaps that are offered but not entered into);

“(B) diligent supervision of the business of the registered swap dealer and major swap participant;

“(C) adherence to all applicable position limits; and
“(D) such other matters as the Commission determines to be appropriate.

“(2) RESPONSIBILITIES WITH RESPECT TO SPECIAL ENTITIES.—

“(A) ADVISING SPECIAL ENTITIES.—A swap dealer or major swap participant that acts as an advisor to a special entity regarding a swap shall comply with the requirements of subparagraph (4) with respect to such Special Entity.

“(B) ENTERING OF SWAPS WITH RESPECT TO SPECIAL ENTITIES.—A swap dealer that enters into or offers to enter into swap with a Special Entity shall comply with the requirements of subparagraph (5) with respect to such Special Entity.

“(C) SPECIAL ENTITY DEFINED.—For purposes of this subsection, the term ‘special entity’ means—

“(i) a Federal agency;

“(ii) a State, State agency, city, county, municipality, or other political subdivision of a State;

“(iii) any employee benefit plan, as defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);

“(iv) any governmental plan, as defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002); or

“(v) any endowment, including an endowment that is an organization described in section 501(c)(3) of the Internal Revenue Code of 1986.

“(3) BUSINESS CONDUCT REQUIREMENTS.—Business conduct requirements adopted by the Commission shall—

“(A) establish a duty for a swap dealer or major swap participant to verify that any counterparty meets the eligibility standards for an eligible contract participant;

“(B) require disclosure by the swap dealer or major swap participant to any counterparty to the transaction (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) of—

“(i) information about the material risks and characteristics of the swap;

“(ii) any material incentives or conflicts of interest that the swap dealer or major swap participant may have in connection with the swap; and

“(iii)(I) for cleared swaps, upon the request of the counterparty, receipt of the daily mark of the transaction from the appropriate derivatives clearing organization; and

“(II) for uncleared swaps, receipt of the daily mark of the transaction from the swap dealer or the major swap participant;

“(C) establish a duty for a swap dealer or major swap participant to communicate in a fair and balanced manner based on principles of fair dealing and good faith; and

“(D) establish such other standards and requirements as the Commission may determine are appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act.

“(4) SPECIAL REQUIREMENTS FOR SWAP DEALERS ACTING AS ADVISORS.—
“(A) In general.—It shall be unlawful for a swap dealer or major swap participant—

“(i) to employ any device, scheme, or artifice to defraud any Special Entity or prospective customer who is a Special Entity;

“(ii) to engage in any transaction, practice, or course of business that operates as a fraud or deceit on any Special Entity or prospective customer who is a Special Entity; or

“(iii) to engage in any act, practice, or course of business that is fraudulent, deceptive or manipulative.

“(B) Duty.—Any swap dealer that acts as an advisor to a Special Entity shall have a duty to act in the best interests of the Special Entity.

“(C) Reasonable efforts.—Any swap dealer that acts as an advisor to a Special Entity shall make reasonable efforts to obtain such information as is necessary to make a reasonable determination that any swap recommended by the swap dealer is in the best interests of the Special Entity, including information relating to—

“(i) the financial status of the Special Entity;

“(ii) the tax status of the Special Entity;

“(iii) the investment or financing objectives of the Special Entity; and

“(iv) any other information that the Commission may prescribe by rule or regulation.

“(5) Special requirements for swap dealers as counterparties to special entities.—

“(A) Any swap dealer or major swap participant that offers to enter or enters into a swap with a Special Entity shall—

“(i) comply with any duty established by the Commission for a swap dealer or major swap participant, with respect to a counterparty that is an eligible contract participant within the meaning of subclause (I) or (II) of clause (vii) of section 1a(18) of this Act, that requires the swap dealer or major swap participant to have a reasonable basis to believe that the counterparty that is a Special Entity has an independent representative that—

“(I) has sufficient knowledge to evaluate the transaction and risks;

“(II) is not subject to a statutory disqualification;

“(III) is independent of the swap dealer or major swap participant;

“(IV) undertakes a duty to act in the best interests of the counterparty it represents;

“(V) makes appropriate disclosures;

“(VI) will provide written representations to the Special Entity regarding fair pricing and the appropriateness of the transaction; and

“(VII) in the case of employee benefit plans subject to the Employee Retirement Income Security act of 1974, is a fiduciary as defined in section 3 of that Act (29 U.S.C. 1002); and
“(iii) before the initiation of the transaction, disclose to the Special Entity in writing the capacity in which the swap dealer is acting; and

“(B) the Commission may establish such other standards and requirements as the Commission may determine are appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act.

“(6) RULES.—The Commission shall prescribe rules under this subsection governing business conduct standards for swap dealers and major swap participants.

“(7) APPLICABILITY.—This section shall not apply with respect to a transaction that is—

“(A) initiated by a Special Entity on an exchange or swap execution facility; and

“(B) one in which the swap dealer or major swap participant does not know the identity of the counterparty to the transaction.

“(i) DOCUMENTATION STANDARDS.—

“(1) IN GENERAL.—Each registered swap dealer and major swap participant shall conform with such standards as may be prescribed by the Commission by rule or regulation that relate to timely and accurate confirmation, processing, netting, documentation, and valuation of all swaps.

“(2) RULES.—The Commission shall adopt rules governing documentation standards for swap dealers and major swap participants.

“(j) DUTIES.—Each registered swap dealer and major swap participant at all times shall comply with the following requirements:

“(1) MONITORING OF TRADING.—The swap dealer or major swap participant shall monitor its trading in swaps to prevent violations of applicable position limits.

“(2) RISK MANAGEMENT PROCEDURES.—The swap dealer or major swap participant shall establish robust and professional risk management systems adequate for managing the day-to-day business of the swap dealer or major swap participant.

“(3) DISCLOSURE OF GENERAL INFORMATION.—The swap dealer or major swap participant shall disclose to the Commission and to the prudential regulator for the swap dealer or major swap participant, as applicable, information concerning—

“(A) terms and conditions of its swaps;

“(B) swap trading operations, mechanisms, and practices;

“(C) financial integrity protections relating to swaps; and

“(D) other information relevant to its trading in swaps.

“(4) ABILITY TO OBTAIN INFORMATION.—The swap dealer or major swap participant shall—

“(A) establish and enforce internal systems and procedures to obtain any necessary information to perform any of the functions described in this section; and

“(B) provide the information to the Commission and to the prudential regulator for the swap dealer or major swap participant, as applicable, on request.
“(5) CONFLICTS OF INTEREST.—The swap dealer and major
swap participant shall implement conflict-of-interest systems
and procedures that—

“(A) establish structural and institutional safeguards
to ensure that the activities of any person within the firm
relating to research or analysis of the price or market
for any commodity or swap or acting in a role of providing
clearing activities or making determinations as to accepting
clearing customers are separated by appropriate informa-
tional partitions within the firm from the review, pressure,
or oversight of persons whose involvement in pricing,
trading, or clearing activities might potentially bias their
judgment or supervision and contravene the core principles
of open access and the business conduct standards
described in this Act; and

“(B) address such other issues as the Commission
determines to be appropriate.

“(6) ANTITRUST CONSIDERATIONS.—Unless necessary or
appropriate to achieve the purposes of this Act, a swap dealer
or major swap participant shall not—

“(A) adopt any process or take any action that results
in any unreasonable restraint of trade; or

“(B) impose any material anticompetitive burden on
trading or clearing.

“(7) RULES.—The Commission shall prescribe rules under
this subsection governing duties of swap dealers and major
swap participants.

“(k) DESIGNATION OF CHIEF COMPLIANCE OFFICER.—

“(1) IN GENERAL.—Each swap dealer and major swap
participant shall designate an individual to serve as a chief
compliance officer.

“(2) DUTIES.—The chief compliance officer shall—

“(A) report directly to the board or to the senior officer
of the swap dealer or major swap participant;

“(B) review the compliance of the swap dealer or major
swap participant with respect to the swap dealer and major
swap participant requirements described in this section;

“(C) in consultation with the board of directors, a body
performing a function similar to the board, or the senior
officer of the organization, resolve any conflicts of interest
that may arise;

“(D) be responsible for administering each policy and
procedure that is required to be established pursuant to
this section;

“(E) ensure compliance with this Act (including regula-
tions) relating to swaps, including each rule prescribed
by the Commission under this section;

“(F) establish procedures for the remediation of non-
compliance issues identified by the chief compliance officer
through any—

“(i) compliance office review;

“(ii) look-back;

“(iii) internal or external audit finding;

“(iv) self-reported error; or

“(v) validated complaint; and
“(G) establish and follow appropriate procedures for the handling, management response, remediation, re-testing, and closing of noncompliance issues.

“(3) ANNUAL REPORTS.—

“(A) IN GENERAL.—In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—

“(i) the compliance of the swap dealer or major swap participant with respect to this Act (including regulations); and

“(ii) each policy and procedure of the swap dealer or major swap participant of the chief compliance officer (including the code of ethics and conflict of interest policies).

“(B) REQUIREMENTS.—A compliance report under subparagraph (A) shall—

“(i) accompany each appropriate financial report of the swap dealer or major swap participant that is required to be furnished to the Commission pursuant to this section; and

“(ii) include a certification that, under penalty of law, the compliance report is accurate and complete.”.

 SEC. 732. CONFLICTS OF INTEREST.

Section 4d of the Commodity Exchange Act (7 U.S.C. 6d) is amended—

(1) by redesignating subsection (c) as subsection (e); and

(2) by inserting after subsection (b) the following:

“(c) CONFLICTS OF INTEREST.—The Commission shall require that futures commission merchants and introducing brokers implement conflict-of-interest systems and procedures that—

“(1) establish structural and institutional safeguards to ensure that the activities of any person within the firm relating to research or analysis of the price or market for any commodity are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of persons whose involvement in trading or clearing activities might potentially bias the judgment or supervision of the persons; and

“(2) address such other issues as the Commission determines to be appropriate.

“(d) DESIGNATION OF CHIEF COMPLIANCE OFFICER.—Each futures commission merchant shall designate an individual to serve as its Chief Compliance Officer and perform such duties and responsibilities as shall be set forth in regulations to be adopted by the Commission or rules to be adopted by a futures association registered under section 17.”.

SEC. 733. SWAP EXECUTION FACILITIES.

The Commodity Exchange Act is amended by inserting after section 5g (7 U.S.C. 7b–2) the following:

“SEC. 5h. SWAP EXECUTION FACILITIES.

“(a) REGISTRATION.—

“(1) IN GENERAL.—No person may operate a facility for the trading or processing of swaps unless the facility is registered as a swap execution facility or as a designated contract market under this section.
“(2) DUAL REGISTRATION.—Any person that is registered as a swap execution facility under this section shall register with the Commission regardless of whether the person also is registered with the Securities and Exchange Commission as a swap execution facility.

“(b) TRADING AND TRADE PROCESSING.—

“(1) IN GENERAL.—Except as specified in paragraph (2), a swap execution facility that is registered under subsection (a) may—

“(A) make available for trading any swap; and

“(B) facilitate trade processing of any swap.

“(2) AGRICULTURAL SWAPS.—A swap execution facility may not list for trading or confirm the execution of any swap in an agricultural commodity (as defined by the Commission) except pursuant to a rule or regulation of the Commission allowing the swap under such terms and conditions as the Commission shall prescribe.

“(c) IDENTIFICATION OF FACILITY USED TO TRADE SWAPS BY CONTRACT MARKETS.—A board of trade that operates a contract market shall, to the extent that the board of trade also operates a swap execution facility and uses the same electronic trade execution system for listing and executing trades of swaps on or through the contract market and the swap execution facility, identify whether the electronic trading of such swaps is taking place on or through the contract market or the swap execution facility.

“(d) RULE-WRITING.—

“(1) The Securities and Exchange Commission and Commodity Futures Trading Commission may promulgate rules defining the universe of swaps that can be executed on a swap execution facility. These rules shall take into account the price and nonprice requirements of the counterparties to a swap and the goal of this section as set forth in subsection (e).

“(2) For all swaps that are not required to be executed through a swap execution facility as defined in paragraph (1), such trades may be executed through any other available means of interstate commerce.

“(3) The Securities and Exchange Commission and Commodity Futures Trading Commission shall update these rules as necessary to account for technological and other innovation.

“(e) RULE OF CONSTRUCTION.—The goal of this section is to promote the trading of swaps on swap execution facilities and to promote pre-trade price transparency in the swaps market.

“(f) CORE PRINCIPLES FOR SWAP EXECUTION FACILITIES.—

“(1) COMPLIANCE WITH CORE PRINCIPLES.—

“(A) IN GENERAL.—To be registered, and maintain registration, as a swap execution facility, the swap execution facility shall comply with—

“(i) the core principles described in this subsection; and

“(ii) any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5).

“(B) REASONABLE DISCRETION OF SWAP EXECUTION FACILITY.—Unless otherwise determined by the Commission by rule or regulation, a swap execution facility...
described in subparagraph (A) shall have reasonable discretion in establishing the manner in which the swap execution facility complies with the core principles described in this subsection.

(2) Compliance with rules.—A swap execution facility shall—

(A) establish and enforce compliance with any rule of the swap execution facility, including—

(i) the terms and conditions of the swaps traded or processed on or through the swap execution facility; and

(ii) any limitation on access to the swap execution facility;

(B) establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules, including means—

(i) to provide market participants with impartial access to the market; and

(ii) to capture information that may be used in establishing whether rule violations have occurred;

(C) establish rules governing the operation of the facility, including rules specifying trading procedures to be used in entering and executing orders traded or posted on the facility, including block trades; and

(D) provide by its rules that when a swap dealer or major swap participant enters into or facilitates a swap that is subject to the mandatory clearing requirement of section 2(h), the swap dealer or major swap participant shall be responsible for compliance with the mandatory trading requirement under section 2(h)(8).

(3) Swaps not readily susceptible to manipulation.—The swap execution facility shall permit trading only in swaps that are not readily susceptible to manipulation.

(4) Monitoring of trading and trade processing.—The swap execution facility shall—

(A) establish and enforce rules or terms and conditions defining, or specifications detailing—

(i) trading procedures to be used in entering and executing orders traded on or through the facilities of the swap execution facility; and

(ii) procedures for trade processing of swaps on or through the facilities of the swap execution facility; and

(B) monitor trading in swaps to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process through surveillance, compliance, and disciplinary practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.

(5) Ability to obtain information.—The swap execution facility shall—

(A) establish and enforce rules that will allow the facility to obtain any necessary information to perform any of the functions described in this section;

(B) provide the information to the Commission on request; and
“(C) have the capacity to carry out such international information-sharing agreements as the Commission may require.

“(6) POSITION LIMITS OR ACCOUNTABILITY.—

“(A) IN GENERAL.—To reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month, a swap execution facility that is a trading facility shall adopt for each of the contracts of the facility, as is necessary and appropriate, position limitations or position accountability for speculators.

“(B) POSITION LIMITS.—For any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a), the swap execution facility shall—

“(i) set its position limitation at a level no higher than the Commission limitation; and

“(ii) monitor positions established on or through the swap execution facility for compliance with the limit set by the Commission and the limit, if any, set by the swap execution facility.

“(7) FINANCIAL INTEGRITY OF TRANSACTIONS.—The swap execution facility shall establish and enforce rules and procedures for ensuring the financial integrity of swaps entered on or through the facilities of the swap execution facility, including the clearance and settlement of the swaps pursuant to section 2(h)(1).

“(8) EMERGENCY AUTHORITY.—The swap execution facility shall adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, as is necessary and appropriate, including the authority to liquidate or transfer open positions in any swap or to suspend or curtail trading in a swap.

“(9) TIMELY PUBLICATION OF TRADING INFORMATION.—

“(A) IN GENERAL.—The swap execution facility shall make public timely information on price, trading volume, and other trading data on swaps to the extent prescribed by the Commission.

“(B) CAPACITY OF SWAP EXECUTION FACILITY.—The swap execution facility shall be required to have the capacity to electronically capture and transmit trade information with respect to transactions executed on the facility.

“(10) RECORDKEEPING AND REPORTING.—

“(A) IN GENERAL.—A swap execution facility shall—

“(i) maintain records of all activities relating to the business of the facility, including a complete audit trail, in a form and manner acceptable to the Commission for a period of 5 years;

“(ii) report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under this Act; and

“(iii) shall keep any such records relating to swaps defined in section 1a(47)(A)(v) open to inspection and examination by the Securities and Exchange Commission.”
“(B) REQUIREMENTS.—The Commission shall adopt data collection and reporting requirements for swap execution facilities that are comparable to corresponding requirements for derivatives clearing organizations and swap data repositories.

“(11) ANTITRUST CONSIDERATIONS.—Unless necessary or appropriate to achieve the purposes of this Act, the swap execution facility shall not—

“(A) adopt any rules or taking any actions that result in any unreasonable restraint of trade; or

“(B) impose any material anticompetitive burden on trading or clearing.

“(12) CONFLICTS OF INTEREST.—The swap execution facility shall—

“(A) establish and enforce rules to minimize conflicts of interest in its decision-making process; and

“(B) establish a process for resolving the conflicts of interest.

“(13) FINANCIAL RESOURCES.—

“(A) IN GENERAL.—The swap execution facility shall have adequate financial, operational, and managerial resources to discharge each responsibility of the swap execution facility.

“(B) DETERMINATION OF RESOURCE ADEQUACY.—The financial resources of a swap execution facility shall be considered to be adequate if the value of the financial resources exceeds the total amount that would enable the swap execution facility to cover the operating costs of the swap execution facility for a 1-year period, as calculated on a rolling basis.

“(14) SYSTEM SAFEGUARDS.—The swap execution facility shall—

“(A) establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and automated systems, that—

“(i) are reliable and secure; and

“(ii) have adequate scalable capacity;

“(B) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for—

“(i) the timely recovery and resumption of operations; and

“(ii) the fulfillment of the responsibilities and obligations of the swap execution facility; and

“(C) periodically conduct tests to verify that the backup resources of the swap execution facility are sufficient to ensure continued—

“(i) order processing and trade matching;

“(ii) price reporting;

“(iii) market surveillance and

“(iv) maintenance of a comprehensive and accurate audit trail.

“(15) DESIGNATION OF CHIEF COMPLIANCE OFFICER.—

“(A) IN GENERAL.—Each swap execution facility shall designate an individual to serve as a chief compliance officer.
“(B) Duties.—The chief compliance officer shall—

“(i) report directly to the board or to the senior officer of the facility;
“(ii) review compliance with the core principles in this subsection;
“(iii) in consultation with the board of the facility, resolve any conflicts of interest that may arise;
“(iv) be responsible for establishing and administering the policies and procedures required to be established pursuant to this section;
“(v) ensure compliance with this Act and the rules and regulations issued under this Act, including rules prescribed by the Commission pursuant to this section;

“(vi) establish procedures for the remediation of noncompliance issues found during compliance office reviews, look backs, internal or external audit findings, self-reported errors, or through validated complaints.

“(C) Requirements for Procedures.—In establishing procedures under subparagraph (B)(vi), the chief compliance officer shall design the procedures to establish the handling, management response, remediation, retesting, and closing of noncompliance issues.

“(D) Annual Reports.—

“(i) In General.—In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—

“(I) the compliance of the swap execution facility with this Act; and
“(II) the policies and procedures, including the code of ethics and conflict of interest policies, of the swap execution facility.

“(ii) Requirements.—The chief compliance officer shall—

“(I) submit each report described in clause (i) with the appropriate financial report of the swap execution facility that is required to be submitted to the Commission pursuant to this section; and

“(II) include in the report a certification that, under penalty of law, the report is accurate and complete.

“(g) Exemptions.—The Commission may exempt, conditionally or unconditionally, a swap execution facility from registration under this section if the Commission finds that the facility is subject to comparable, comprehensive supervision and regulation on a consolidated basis by the Securities and Exchange Commission, a prudential regulator, or the appropriate governmental authorities in the home country of the facility.

“(h) Rules.—The Commission shall prescribe rules governing the regulation of alternative swap execution facilities under this section.”.
SEC. 734. DERIVATIVES TRANSACTION EXECUTION FACILITIES AND EXEMPT BOARDS OF TRADE.

Repeal. (a) In General.—Sections 5a and 5d of the Commodity Exchange Act (7 U.S.C. 7a, 7a–3) are repealed.

(b) Conforming Amendments.—

(1) Section 2 of the Commodity Exchange Act (7 U.S.C. 2) is amended—

(A) in subsection (a)(1)(A), in the first sentence, by striking "or 5a"; and

(B) in paragraph (2) of subsection (g) (as redesignated by section 723(a)(1)(B)), by striking "section 5a of this Act" and all that follows through "5d of this Act" and inserting "section 5b of this Act".


(A) by striking "that—" and all that follows through "(i) has been designated" and inserting "that has been designated";

(B) by striking "; or" and inserting "; and" and

(C) by striking clause (ii).

7 USC 7a–3 note.

(c) Ability to Petition Commission.—

(1) In General.—Prior to the final effective dates in this title, a person may petition the Commodity Futures Trading Commission to remain subject to the provisions of section 5d of the Commodity Exchange Act, as such provisions existed prior to the effective date of this subtitle.

(2) Consideration of Petition.—The Commodity Futures Trading Commission shall consider any petition submitted under paragraph (1) in a prompt manner and may allow a person to continue operating subject to the provisions of section 5d of the Commodity Exchange Act for up to 1 year after the effective date of this subtitle.

SEC. 735. DESIGNATED CONTRACT MARKETS.

(a) Criteria for Designation.—Section 5 of the Commodity Exchange Act (7 U.S.C. 7) is amended by striking subsection (b).

(b) Core Principles for Contract Markets.—Section 5 of the Commodity Exchange Act (7 U.S.C. 7) is amended by striking subsection (d) and inserting the following:

"(d) Core Principles for Contract Markets.—

"(1) Designation as contract market.—

"(A) In general.—To be designated, and maintain a designation, as a contract market, a board of trade shall comply with—

"(i) any core principle described in this subsection; and

"(ii) any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5).

"(B) Reasonable Discretion of Contract Market.—

Unless otherwise determined by the Commission by rule or regulation, a board of trade described in subparagraph (A) shall have reasonable discretion in establishing the manner in which the board of trade complies with the core principles described in this subsection.

"(2) Compliance with Rules.—
“A) IN GENERAL.—The board of trade shall establish, monitor, and enforce compliance with the rules of the contract market, including—

“(i) access requirements;
“(ii) the terms and conditions of any contracts to be traded on the contract market; and
“(iii) rules prohibiting abusive trade practices on the contract market.

“B) CAPACITY OF CONTRACT MARKET.—The board of trade shall have the capacity to detect, investigate, and apply appropriate sanctions to any person that violates any rule of the contract market.

“C) REQUIREMENT OF RULES.—The rules of the contract market shall provide the board of trade with the ability and authority to obtain any necessary information to perform any function described in this subsection, including the capacity to carry out such international information-sharing agreements as the Commission may require.

“3) CONTRACTS NOT READILY SUBJECT TO MANIPULATION.—The board of trade shall list on the contract market only contracts that are not readily susceptible to manipulation.

“4) PREVENTION OF MARKET DISRUPTION.—The board of trade shall have the capacity and responsibility to prevent manipulation, price distortion, and disruptions of the delivery or cash-settlement process through market surveillance, compliance, and enforcement practices and procedures, including—

“(A) methods for conducting real-time monitoring of trading; and
“(B) comprehensive and accurate trade reconstructions.

“5) POSITION LIMITATIONS OR ACCOUNTABILITY.—

“(A) IN GENERAL.—To reduce the potential threat of market manipulation or congestion (especially during trading in the delivery month), the board of trade shall adopt for each contract of the board of trade, as is necessary and appropriate, position limitations or position accountability for speculators.

“(B) MAXIMUM ALLOWABLE POSITION LIMITATION.—For any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a), the board of trade shall set the position limitation of the board of trade at a level not higher than the position limitation established by the Commission.

“6) EMERGENCY AUTHORITY.—The board of trade, in consultation or cooperation with the Commission, shall adopt rules to provide for the exercise of emergency authority, as is necessary and appropriate, including the authority—

“(A) to liquidate or transfer open positions in any contract;
“(B) to suspend or curtail trading in any contract; and
“(C) to require market participants in any contract to meet special margin requirements.

“7) AVAILABILITY OF GENERAL INFORMATION.—The board of trade shall make available to market authorities, market participants, and the public accurate information concerning—

“(A) the terms and conditions of the contracts of the contract market; and
“(B)(i) the rules, regulations, and mechanisms for executing transactions on or through the facilities of the contract market; and

“(ii) the rules and specifications describing the operation of the contract market’s—

“(I) electronic matching platform; or

“(II) trade execution facility.

“(8) Daily publication of trading information.—The board of trade shall make public daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the contract market.

“(9) Execution of transactions.—

“(A) In general.—The board of trade shall provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade.

“(B) Rules.—The rules of the board of trade may authorize, for bona fide business purposes—

“(i) transfer trades or office trades;

“(ii) an exchange of—

“(I) futures in connection with a cash commodity transaction;

“(II) futures for cash commodities; or

“(III) futures for swaps; or

“(iii) a futures commission merchant, acting as principal or agent, to enter into or confirm the execution of a contract for the purchase or sale of a commodity for future delivery if the contract is reported, recorded, or cleared in accordance with the rules of the contract market or a derivatives clearing organization.

“(10) Trade information.—The board of trade shall maintain rules and procedures to provide for the recording and safe storage of all identifying trade information in a manner that enables the contract market to use the information—

“(A) to assist in the prevention of customer and market abuses; and

“(B) to provide evidence of any violations of the rules of the contract market.

“(11) Financial integrity of transactions.—The board of trade shall establish and enforce—

“(A) rules and procedures for ensuring the financial integrity of transactions entered into on or through the facilities of the contract market (including the clearance and settlement of the transactions with a derivatives clearing organization); and

“(B) rules to ensure—

“(i) the financial integrity of any—

“(I) futures commission merchant; and

“(II) introducing broker; and

“(ii) the protection of customer funds.

“(12) Protection of markets and market participants.—The board of trade shall establish and enforce rules—
“(A) to protect markets and market participants from abusive practices committed by any party, including abusive practices committed by a party acting as an agent for a participant; and

“(B) to promote fair and equitable trading on the contract market.

“(13) DISCIPLINARY PROCEDURES.—The board of trade shall establish and enforce disciplinary procedures that authorize the board of trade to discipline, suspend, or expel members or market participants that violate the rules of the board of trade, or similar methods for performing the same functions, including delegation of the functions to third parties.

“(14) DISPUTE RESOLUTION.—The board of trade shall establish and enforce rules regarding, and provide facilities for alternative dispute resolution as appropriate for, market participants and any market intermediaries.

“(15) GOVERNANCE FITNESS STANDARDS.—The board of trade shall establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members of the contract market, and any other person with direct access to the facility (including any party affiliated with any person described in this paragraph).

“(16) CONFLICTS OF INTEREST.—The board of trade shall establish and enforce rules—

“(A) to minimize conflicts of interest in the decision-making process of the contract market; and

“(B) to establish a process for resolving conflicts of interest described in subparagraph (A).

“(17) COMPOSITION OF GOVERNING BOARDS OF CONTRACT MARKETS.—The governance arrangements of the board of trade shall be designed to permit consideration of the views of market participants.

“(18) RECORDKEEPING.—The board of trade shall maintain records of all activities relating to the business of the contract market—

“(A) in a form and manner that is acceptable to the Commission; and

“(B) for a period of at least 5 years.

“(19) ANTITRUST CONSIDERATIONS.—Unless necessary or appropriate to achieve the purposes of this Act, the board of trade shall not—

“(A) adopt any rule or taking any action that results in any unreasonable restraint of trade; or

“(B) impose any material anticompetitive burden on trading on the contract market.

“(20) SYSTEM SAFEGUARDS.—The board of trade shall—

“(A) establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and the development of automated systems, that are reliable, secure, and have adequate scalable capacity;

“(B) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the board of trade; and
“(C) periodically conduct tests to verify that backup resources are sufficient to ensure continued order processing and trade matching, price reporting, market surveillance, and maintenance of a comprehensive and accurate audit trail.

“(21) FINANCIAL RESOURCES.—

“(A) IN GENERAL.—The board of trade shall have adequate financial, operational, and managerial resources to discharge each responsibility of the board of trade.

“(B) DETERMINATION OF ADEQUACY.—The financial resources of the board of trade shall be considered to be adequate if the value of the financial resources exceeds the total amount that would enable the contract market to cover the operating costs of the contract market for a 1-year period, as calculated on a rolling basis.

“(22) DIVERSITY OF BOARD OF DIRECTORS.—The board of trade, if a publicly traded company, shall endeavor to recruit individuals to serve on the board of directors and the other decision-making bodies (as determined by the Commission) of the board of trade from among, and to have the composition of the bodies reflect, a broad and culturally diverse pool of qualified candidates.

“(23) SECURITIES AND EXCHANGE COMMISSION.—The board of trade shall keep any such records relating to swaps defined in section 1a(47)(A)(v) open to inspection and examination by the Securities and Exchange Commission.”.

SEC. 736. MARGIN.

Section 8a(7) of the Commodity Exchange Act (7 U.S.C. 12a(7)) is amended—

(1) in subparagraph (C), by striking “, excepting the setting of levels of margin”;

(2) by redesignating subparagraphs (D) through (F) as subparagraphs (E) through (G), respectively; and

(3) by inserting after subparagraph (C) the following:

“(D) margin requirements, provided that the rules, regulations, or orders shall—

“(i) be limited to protecting the financial integrity of the derivatives clearing organization;

“(ii) be designed for risk management purposes to protect the financial integrity of transactions; and

“(iii) not set specific margin amounts;”.

SEC. 737. POSITION LIMITS.

(a) AGGREGATE POSITION LIMITS.—Section 4a(a) of the Commodity Exchange Act (7 U.S.C. 6a(a)) is amended—

(1) by inserting after “(a)” the following:

“(1) IN GENERAL.—”;

(2) in the first sentence, by striking “on electronic trading facilities with respect to a significant price discovery contract” and inserting “swaps that perform or affect a significant price discovery function with respect to registered entities”;

(3) in the second sentence—

(A) by inserting “, including any group or class of traders,” after “held by any person”; and

(B) by striking “on an electronic trading facility with respect to a significant price discovery contract,” and inserting “swaps traded on or subject to the rules of a
designated contract market or a swap execution facility, or swaps not traded on or subject to the rules of a designated contract market or a swap execution facility that performs a significant price discovery function with respect to a registered entity,”; and

(4) by adding at the end the following:

“(2) Establishment of Limitations.—

“(A) In General.—In accordance with the standards set forth in paragraph (1) of this subsection and consistent with the good faith exception cited in subsection (b)(2), with respect to physical commodities other than excluded commodities as defined by the Commission, the Commission shall by rule, regulation, or order establish limits on the amount of positions, as appropriate, other than bona fide hedge positions, that may be held by any person with respect to contracts of sale for future delivery or with respect to options on the contracts or commodities traded on or subject to the rules of a designated contract market.

“(B) Timing.—

“(i) Exempt Commodities.—For exempt commodities, the limits required under subparagraph (A) shall be established within 180 days after the date of the enactment of this paragraph.

“(ii) Agricultural Commodities.—For agricultural commodities, the limits required under subparagraph (A) shall be established within 270 days after the date of the enactment of this paragraph.

“(C) Goal.—In establishing the limits required under subparagraph (A), the Commission shall strive to ensure that trading on foreign boards of trade in the same commodity will be subject to comparable limits and that any limits to be imposed by the Commission will not cause price discovery in the commodity to shift to trading on the foreign boards of trade.

“(3) Specific Limitations.—In establishing the limits required in paragraph (2), the Commission, as appropriate, shall set limits—

“(A) on the number of positions that may be held by any person for the spot month, each other month, and the aggregate number of positions that may be held by any person for all months; and

“(B) to the maximum extent practicable, in its discretion—

“(i) to diminish, eliminate, or prevent excessive speculation as described under this section;

“(ii) to deter and prevent market manipulation, squeezes, and corners;

“(iii) to ensure sufficient market liquidity for bona fide hedgers; and

“(iv) to ensure that the price discovery function of the underlying market is not disrupted.

“(4) Significant Price Discovery Function.—In making a determination whether a swap performs or affects a significant price discovery function with respect to regulated markets, the Commission shall consider, as appropriate:
“(A) **PRICE LINKAGE.**—The extent to which the swap uses or otherwise relies on a daily or final settlement price, or other major price parameter, of another contract traded on a regulated market based upon the same underlying commodity, to value a position, transfer or convert a position, financially settle a position, or close out a position.

“(B) **ARBITRAGE.**—The extent to which the price for the swap is sufficiently related to the price of another contract traded on a regulated market based upon the same underlying commodity so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the swaps on a frequent and recurring basis.

“(C) **MATERIAL PRICE REFERENCE.**—The extent to which, on a frequent and recurring basis, bids, offers, or transactions in a contract traded on a regulated market are directly based on, or are determined by referencing, the price generated by the swap.

“(D) **MATERIAL LIQUIDITY.**—The extent to which the volume of swaps being traded in the commodity is sufficient to have a material effect on another contract traded on a regulated market.

“(E) **OTHER MATERIAL FACTORS.**—Such other material factors as the Commission specifies by rule or regulation as relevant to determine whether a swap serves a significant price discovery function with respect to a regulated market.

“(5) **ECONOMICALLY EQUIVALENT CONTRACTS.**—

“(A) Notwithstanding any other provision of this section, the Commission shall establish limits on the amount of positions, including aggregate position limits, as appropriate, other than bona fide hedge positions, that may be held by any person with respect to swaps that are economically equivalent to contracts of sale for future delivery or to options on the contracts or commodities traded on or subject to the rules of a designated contract market subject to paragraph (2).

“(B) In establishing limits pursuant to subparagraph (A), the Commission shall—

“(i) develop the limits concurrently with limits established under paragraph (2), and the limits shall have similar requirements as under paragraph (3)(B); and

“(ii) establish the limits simultaneously with limits established under paragraph (2).

“(6) **AGGREGATE POSITION LIMITS.**—The Commission shall, by rule or regulation, establish limits (including related hedge exemption provisions) on the aggregate number or amount of positions in contracts based upon the same underlying commodity (as defined by the Commission) that may be held by any person, including any group or class of traders, for each month across—

“(A) contracts listed by designated contract markets;

“(B) with respect to an agreement contract, or transaction that settles against any price (including the daily or final settlement price) of 1 or more contracts listed
for trading on a registered entity, contracts traded on a foreign board of trade that provides members or other participants located in the United States with direct access to its electronic trading and order matching system; and

“(C) swap contracts that perform or affect a significant price discovery function with respect to regulated entities.

“(7) EXEMPTIONS.—The Commission, by rule, regulation, or order, may exempt, conditionally or unconditionally, any person or class of persons, any swap or class of swaps, any contract of sale of a commodity for future delivery or class of such contracts, any option or class of options, or any transaction or class of transactions from any requirement it may establish under this section with respect to position limits.”

(b) CONFORMING AMENDMENTS.—Section 4a(b) of the Commodity Exchange Act (7 U.S.C. 6a(b)) is amended—

1) in paragraph (1), by striking “or derivatives transaction execution facility or facilities or electronic trading facility” and inserting “or swap execution facility or facilities”; and

2) in paragraph (2), by striking “or derivatives transaction execution facility or facilities electronic trading facility” and inserting “or swap execution facility”.

(c) BONA FIDE HEDGING TRANSACTION.—Section 4a(c) of the Commodity Exchange Act is amended—

1) by inserting “(1)” after “(c)”; and

2) by adding at the end the following:

“(2) For the purposes of implementation of subsection (a)(2) for contracts of sale for future delivery or options on the contracts or commodities, the Commission shall define what constitutes a bona fide hedging transaction or position as a transaction or position that—

“(A)(i) represents a substitute for transactions made or to be made or positions taken or to be taken at a later time in a physical marketing channel;

“(ii) is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise; and

“(iii) arises from the potential change in the value of—

“(I) assets that a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising;

“(II) liabilities that a person owns or anticipates incurring; or

“(III) services that a person provides, purchases, or anticipates providing or purchasing; or

“(B) reduces risks attendant to a position resulting from a swap that—

“(i) was executed opposite a counterparty for which the transaction would qualify as a bona fide hedging transaction pursuant to subparagraph (A); or

“(ii) meets the requirements of subparagraph (A).”.

(d) EFFECTIVE DATE.—This section and the amendments made by this section shall become effective on the date of the enactment of this section.

7 USC 6a note.
SEC. 738. FOREIGN BOARDS OF TRADE.

(a) In General.—Section 4(b) of the Commodity Exchange Act (7 U.S.C. 6(b)) is amended—

(1) in the first sentence, by striking “The Commission” and inserting the following:

“(2) PERSONS LOCATED IN THE UNITED STATES.—

“(A) IN GENERAL.—The Commission”;

(2) in the second sentence, by striking “Such rules and regulations” and inserting the following:

“(B) DIFFERENT REQUIREMENTS.—Rules and regulations described in subparagraph (A)”;

(3) in the third sentence—

(A) by striking “No rule or regulation” and inserting the following:

“(C) PROHIBITION.—Except as provided in paragraphs (1) and (2), no rule or regulation”;

(B) by striking “that (1) requires” and inserting the following: “that—

“(i) requires”; and

(C) by striking “market, or (2) governs” and inserting the following: “market; or

“(ii) governs”; and

(4) by inserting before paragraph (2) (as designated by paragraph (1)) the following:

“(1) FOREIGN BOARDS OF TRADE.—

“(A) REGISTRATION.—The Commission may adopt rules and regulations requiring registration with the Commission for a foreign board of trade that provides the members of the foreign board of trade or other participants located in the United States with direct access to the electronic trading and order matching system of the foreign board of trade, including rules and regulations prescribing procedures and requirements applicable to the registration of such foreign boards of trade. For purposes of this paragraph, ‘direct access’ refers to an explicit grant of authority by a foreign board of trade to an identified member or other participant located in the United States to enter trades directly into the trade matching system of the foreign board of trade. In adopting such rules and regulations, the commission shall consider—

“(i) whether any such foreign board of trade is subject to comparable, comprehensive supervision and regulation by the appropriate governmental authorities in the foreign board of trade’s home country; and

“(ii) any previous commission findings that the foreign board of trade is subject to comparable comprehensive supervision and regulation by the appropriate government authorities in the foreign board of trade’s home country.

“(B) LINKED CONTRACTS.—The Commission may not permit a foreign board of trade to provide to the members of the foreign board of trade or other participants located in the United States direct access to the electronic trading and order-matching system of the foreign board of trade with respect to an agreement, contract, or transaction that settles against any price (including the daily or final settlement price) of 1 or more contracts listed for trading on
a registered entity, unless the Commission determines that—

“(i) the foreign board of trade makes public daily trading information regarding the agreement, contract, or transaction that is comparable to the daily trading information published by the registered entity for the 1 or more contracts against which the agreement, contract, or transaction traded on the foreign board of trade settles; and

“(ii) the foreign board of trade (or the foreign futures authority that oversees the foreign board of trade)—

“(I) adopts position limits (including related hedge exemption provisions) for the agreement, contract, or transaction that are comparable to the position limits (including related hedge exemption provisions) adopted by the registered entity for the 1 or more contracts against which the agreement, contract, or transaction traded on the foreign board of trade settles;

“(II) has the authority to require or direct market participants to limit, reduce, or liquidate any position the foreign board of trade (or the foreign futures authority that oversees the foreign board of trade) determines to be necessary to prevent or reduce the threat of price manipulation, excessive speculation as described in section 4a, price distortion, or disruption of delivery or the cash settlement process;

“(III) agrees to promptly notify the Commission, with regard to the agreement, contract, or transaction that settles against any price (including the daily or final settlement price) of 1 or more contracts listed for trading on a registered entity, of any change regarding—

“(aa) the information that the foreign board of trade will make publicly available;

“(bb) the position limits that the foreign board of trade or foreign futures authority will adopt and enforce;

“(cc) the position reductions required to prevent manipulation, excessive speculation as described in section 4a, price distortion, or disruption of delivery or the cash settlement process; and

“(dd) any other area of interest expressed by the Commission to the foreign board of trade or foreign futures authority;

“(IV) provides information to the Commission regarding large trader positions in the agreement, contract, or transaction that is comparable to the large trader position information collected by the Commission for the 1 or more contracts against which the agreement, contract, or transaction traded on the foreign board of trade settles; and

“(V) provides the Commission such information as is necessary to publish reports on aggregate

Reports.
trader positions for the agreement, contract, or
transaction traded on the foreign board of trade
that are comparable to such reports on aggregate
trader positions for the 1 or more contracts against
which the agreement, contract, or transaction
traded on the foreign board of trade settles.

“(C) EXISTING FOREIGN BOARDS OF TRADE.—Subpara-
graphs (A) and (B) shall not be effective with respect to
any foreign board of trade to which, prior to the date
of enactment of this paragraph, the Commission granted
direct access permission until the date that is 180 days
after that date of enactment.”.

(b) LIABILITY OF REGISTERED PERSONS TRADING ON A FOREIGN
BOARD OF TRADE.—Section 4 of the Commodity Exchange Act (7
U.S.C. 6) is amended—
(1) in subsection (a), in the matter preceding paragraph
(1), by inserting “or by subsection (e)” after “Unless exempted
by the Commission pursuant to subsection (c)”;
and
(2) by adding at the end the following:
“(e) LIABILITY OF REGISTERED PERSONS TRADING ON A FOREIGN
BOARD OF TRADE.—
“(1) IN GENERAL.—A person registered with the Commis-
sion, or exempt from registration by the Commission, under
this Act may not be found to have violated subsection (a)
with respect to a transaction in, or in connection with, a con-
tact of sale of a commodity for future delivery if the person—
“(A) has reason to believe that the transaction and
the contract is made on or subject to the rules of a foreign
board of trade that is—
“(i) legally organized under the laws of a foreign
country;
“(ii) authorized to act as a board of trade by a
foreign futures authority; and
“(iii) subject to regulation by the foreign futures
authority; and
“(B) has not been determined by the Commission to
be operating in violation of subsection (a).
“(2) RULE OF CONSTRUCTION.—Nothing in this subsection
shall be construed as implying or creating any presumption
that a board of trade, exchange, or market is located outside
the United States, or its territories or possessions, for purposes
of subsection (a).”.

(c) CONTRACT ENFORCEMENT FOR FOREIGN FUTURES CON-
TRACTS.—Section 22(a) of the Commodity Exchange Act (7 U.S.C.
25(a)) (as amended by section 739) is amended by adding at the end the following:
“(6) CONTRACT ENFORCEMENT FOR FOREIGN FUTURES CON-
TRACTS.—A contract of sale of a commodity for future delivery
traded or executed on or through the facilities of a board of trade,
exchange, or market located outside the United States for purposes
of section 4(a) shall not be void, voidable, or unenforceable, and
a party to such a contract shall not be entitled to rescind or
recover any payment made with respect to the contract, based
on the failure of the foreign board of trade to comply with any
provision of this Act.”.

Effective date.
SEC. 739. LEGAL CERTAINTY FOR SWAPS.

Section 22(a) of the Commodity Exchange Act (7 U.S.C. 25(a)) is amended by striking paragraph (4) and inserting the following:

"(4) CONTRACT ENFORCEMENT BETWEEN ELIGIBLE COUNTERPARTIES.—

(A) IN GENERAL.—No hybrid instrument sold to any investor shall be void, voidable, or unenforceable, and no party to a hybrid instrument shall be entitled to rescind, or recover any payment made with respect to, the hybrid instrument under this section or any other provision of Federal or State law, based solely on the failure of the hybrid instrument to comply with the terms or conditions of section 2(f) or regulations of the Commission.

(B) SWAPS.—No agreement, contract, or transaction between eligible contract participants or persons reasonably believed to be eligible contract participants shall be void, voidable, or unenforceable, and no party to such agreement, contract, or transaction shall be entitled to rescind, or recover any payment made with respect to, the agreement, contract, or transaction under this section or any other provision of Federal or State law, based solely on the failure of the agreement, contract, or transaction—

"(i) to meet the definition of a swap under section 1a; or

"(ii) to be cleared in accordance with section 2(h)(1).

(5) LEGAL CERTAINTY FOR LONG-TERM SWAPS ENTERED INTO BEFORE THE DATE OF ENACTMENT OF THE WALL STREET TRANSPARENCY AND ACCOUNTABILITY ACT OF 2010.—

(A) EFFECT ON SWAPS.—Unless specifically reserved in the applicable swap, neither the enactment of the Wall Street Transparency and Accountability Act of 2010, nor any requirement under that Act or an amendment made by that Act, shall constitute a termination event, force majeure, illegality, increased costs, regulatory change, or similar event under a swap (including any related credit support arrangement) that would permit a party to terminate, renegotiate, modify, amend, or supplement 1 or more transactions under the swap.

(B) POSITION LIMITS.—Any position limit established under the Wall Street Transparency and Accountability Act of 2010 shall not apply to a position acquired in good faith prior to the effective date of any rule, regulation, or order under the Act that establishes the position limit; provided, however, that such positions shall be attributed to the trader if the trader’s position is increased after the effective date of such position limit rule, regulation, or order.”.

SEC. 740. MULTILATERAL CLEARING ORGANIZATIONS.

Sections 408 and 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4421, 4422) are repealed.

SEC. 741. ENFORCEMENT.

(a) ENFORCEMENT AUTHORITY.—The Commodity Exchange Act is amended by inserting after section 4b (7 U.S.C. 6b) the following:

“SEC. 4b–1. ENFORCEMENT AUTHORITY.

“(a) COMMODITY FUTURES TRADING COMMISSION.—Except as provided in subsections (b), (c), and (d), the Commission shall have exclusive authority to enforce the provisions of subtitle A of the

Repeal.
Wall Street Transparency and Accountability Act of 2010 with respect to any person.

“(b) PRUDENTIAL REGULATORS.—The prudential regulators shall have exclusive authority to enforce the provisions of section 4s(e) with respect to swap dealers or major swap participants for which they are the prudential regulator.

“(c) REFERRALS.—

“(1) PRUDENTIAL REGULATORS.—If the prudential regulator for a swap dealer or major swap participant has cause to believe that the swap dealer or major swap participant, or any affiliate or division of the swap dealer or major swap participant, may have engaged in conduct that constitutes a violation of the nonprudential requirements of this Act (including section 4s or rules adopted by the Commission under that section), the prudential regulator may promptly notify the Commission in a written report that includes—

“(A) a request that the Commission initiate an enforcement proceeding under this Act; and

“(B) an explanation of the facts and circumstances that led to the preparation of the written report.

“(2) COMMISSION.—If the Commission has cause to believe that a swap dealer or major swap participant that has a prudential regulator may have engaged in conduct that constitutes a violation of any prudential requirement of section 4s or rules adopted by the Commission under that section, the Commission may notify the prudential regulator of the conduct in a written report that includes—

“(A) a request that the prudential regulator initiate an enforcement proceeding under this Act or any other Federal law (including regulations); and

“(B) an explanation of the concerns of the Commission, and a description of the facts and circumstances, that led to the preparation of the written report.

“(d) BACKSTOP ENFORCEMENT AUTHORITY.—

“(1) INITIATION OF ENFORCEMENT PROCEEDING BY PRUDENTIAL REGULATOR.—If the Commission does not initiate an enforcement proceeding before the end of the 90-day period beginning on the date on which the Commission receives a written report under subsection (c)(1), the prudential regulator may initiate an enforcement proceeding.

“(2) INITIATION OF ENFORCEMENT PROCEEDING BY COMMISSION.—If the prudential regulator does not initiate an enforcement proceeding before the end of the 90-day period beginning on the date on which the prudential regulator receives a written report under subsection (c)(2), the Commission may initiate an enforcement proceeding.”.

(b) CONFORMING AMENDMENTS.—

(1) Section 4b of the Commodity Exchange Act (7 U.S.C. 6b) is amended—

(A) in subsection (a)(2), by striking “or other agreement, contract, or transaction subject to paragraphs (1) and (2) of section 5a(g),” and inserting “or swap,”;

(B) in subsection (b), by striking “or other agreement, contract or transaction subject to paragraphs (1) and (2) of section 5a(g),” and inserting “or swap,”; and

(C) by adding at the end the following:
“(e) It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any registered entity, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery (or option on such a contract), or any swap, on a group or index of securities (or any interest therein or based on the value thereof)—
   “(1) to employ any device, scheme, or artifice to defraud;
   “(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
   “(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.”.

(2) Section 4c(a)(1) of the Commodity Exchange Act (7 U.S.C. 6c(a)(1)) is amended by inserting “or swap” before “if the transaction is used or may be used”.

(3) Section 6(c) of the Commodity Exchange Act (7 U.S.C. 9) is amended in the first sentence by inserting “or of any swap,” before “or has willfully made”.

(4) Section 6(d) of the Commodity Exchange Act (7 U.S.C. 13b) is amended in the first sentence, in the matter preceding the proviso, by inserting “or of any swap,” before “or otherwise is violating”.

(5) Section 6c(a) of the Commodity Exchange Act (7 U.S.C. 13a–1(a)) is amended in the matter preceding the proviso by inserting “or any swap” after “commodity for future delivery”.

(6) Section 9 of the Commodity Exchange Act (7 U.S.C. 13) is amended—
   (A) in subsection (a)—
      (i) in paragraph (2), by inserting “or of any swap,” before “or to corner”; and
      (ii) in paragraph (4), by inserting “swap data repository,” before “or futures association” and
   (B) in subsection (e)(1)—
      (i) by inserting “swap data repository,” before “or registered futures association”; and
      (ii) by inserting “…, or swaps,” before “on the basis”.

(7) Section 9(a) of the Commodity Exchange Act (7 U.S.C. 13a) is amended by adding at the end the following:
   “(6) Any person to abuse the end user clearing exemption under section 2(h)(4), as determined by the Commission.”.

(8) Section 2(c)(2)(B) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(B)) is amended—
   (A) by striking “(dd),” each place it appears;
   (B) in clause (iii), by inserting “…, and accounts or pooled investment vehicles described in clause (vi),” before “shall be subject to”; and
   (C) by adding at the end the following:
      “(vi) This Act applies to, and the Commission shall have jurisdiction over, an account or pooled investment vehicle that is offered for the purpose of trading, or that trades, any agreement, contract, or transaction in foreign currency described in clause (i).”.

(9) Section 2(c)(2)(C) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(C)) is amended—
(A) by striking “(dd),” each place it appears;
(B) in clause (ii)(I), by inserting “, and accounts or pooled investment vehicles described in clause (vii),” before “shall be subject to”; and
(C) by adding at the end the following:

“(vii) This Act applies to, and the Commission shall have jurisdiction over, an account or pooled investment vehicle that is offered for the purpose of trading, or that trades, any agreement, contract, or transaction in foreign currency described in clause (i).”.

(10) Section 1a(19)(A)(iv)(II) of the Commodity Exchange Act (7 U.S.C. 1a(19)(A)(iv)(II)) (as redesignated by section 721(a)(1)) is amended by inserting before the semicolon at the end the following: “provided, however, that for purposes of section 2(c)(2)(B)(vi) and section 2(c)(2)(C)(vii), the term ‘eligible contract participant’ shall not include a commodity pool in which any participant is not otherwise an eligible contract participant”.

(11) Section 6(e) of the Commodity Exchange Act (7 U.S.C. 9a) is amended by adding at the end the following:

“(4) Any designated clearing organization that knowingly or recklessly evades or participates in or facilitates an evasion of the requirements of section 2(h) shall be liable for a civil money penalty in twice the amount otherwise available for a violation of section 2(h).

“(5) Any swap dealer or major swap participant that knowingly or recklessly evades or participates in or facilitates an evasion of the requirements of section 2(h) shall be liable for a civil money penalty in twice the amount otherwise available for a violation of section 2(h).”.

15 USC 8324.

(c) SAVINGS CLAUSE.—Notwithstanding any other provision of this title, nothing in this subtitle shall be construed as divesting any appropriate Federal banking agency of any authority it may have to establish or enforce, with respect to a person for which such agency is the appropriate Federal banking agency, prudential or other standards pursuant to authority granted by Federal law other than this title.

SEC. 742. RETAIL COMMODITY TRANSACTIONS.

(a) IN GENERAL.—Section 2(c) of the Commodity Exchange Act (7 U.S.C. 2(c)) is amended—

(1) in paragraph (1), by striking “5a (to the extent provided in section 5a(g)), 5b, 5d, or 12(e)(2)(B)” and inserting “, 5b, or 12(e)(2)(B)”;

(2) in paragraph (2), by adding at the end the following:

“(I) RETAIL COMMODITY TRANSACTIONS.—

“(i) APPLICABILITY.—Except as provided in clause (ii), this subparagraph shall apply to any agreement, contract, or transaction in any commodity that is—

“(I) entered into with, or offered to (even if not entered into with), a person that is not an eligible contract participant or eligible commercial entity; and

“(II) entered into, or offered (even if not entered into), on a leveraged or margined basis, or financed by the offeror, the counterparty, or
a person acting in concert with the offeror or
counterparty on a similar basis.

“(ii) EXCEPTIONS.—This subparagraph shall not apply to—

“(I) an agreement, contract, or transaction
described in paragraph (1) or subparagraphs (A),
(B), or (C), including any agreement, contract, or
transaction specifically excluded from subpara-
graph (A), (B), or (C);

“(II) any security;

“(III) a contract of sale that—

“(aa) results in actual delivery within 28
days or such other longer period as the
Commission may determine by rule or regula-
tion based upon the typical commercial prac-
tice in cash or spot markets for the commodity
involved; or

“(bb) creates an enforceable obligation to
deliver between a seller and a buyer that have
the ability to deliver and accept delivery,
respectively, in connection with the line of
business of the seller and buyer; or

“(IV) an agreement, contract, or transaction
that is listed on a national securities exchange
registered under section 6(a) of the Securities
Exchange Act of 1934 (15 U.S.C. 78f(a)); or

“(V) an identified banking product, as defined
in section 402(b) of the Legal Certainty for Bank
Products Act of 2000 (7 U.S.C.27(b)).

“(iii) ENFORCEMENT.—Sections 4(a), 4(b), and 4b
apply to any agreement, contract, or transaction
described in clause (i), as if the agreement, contract,
or transaction was a contract of sale of a commodity
for future delivery.

“(iv) ELIGIBLE COMMERCIAL ENTITY.—For purposes
of this subparagraph, an agricultural producer, packer,
or handler shall be considered to be an eligible commer-
cial entity for any agreement, contract, or transaction
for a commodity in connection with the line of business
of the agricultural producer, packer, or handler.”.

(b) GRAMM-LEACH-BLILEY ACT.—Section 206(a) of the Gramm-
Leach-Bliley Act (Public Law 106–102; 15 U.S.C. 78c note) is
amended, in the matter preceding paragraph (1), by striking “For
purposes of” and inserting “Except as provided in subsection (e),
for purposes of”.

(c) CONFORMING AMENDMENTS RELATING TO RETAIL FOREIGN
EXCHANGE TRANSACTIONS.—

(1) Section 2(c)(2)(B)(i)(II) of the Commodity Exchange Act
(7 U.S.C. 2(c)(2)(B)(i)(II)) is amended—

(A) in item (aa), by inserting “United States” before
“financial institution”;

(B) by striking items (dd) and (ff);

(C) by redesignating items (ee) and (gg) as items (dd)
and (ff), respectively; and

(D) in item (dd) (as so redesignated), by striking the
semicolon and inserting “; or”.

Applicability.
(2) Section 2(c)(2) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)) (as amended by subsection (a)(2)) is amended by adding at the end the following:

"(E) Prohibition.—
"

"(i) Definition of Federal Regulatory Agency.—In this subparagraph, the term 'Federal regulatory agency' means—
"

"(I) the Commission;
"

"(II) the Securities and Exchange Commission;
"

"(III) an appropriate Federal banking agency;
"

"(IV) the National Credit Union Association; and
"

"(V) the Farm Credit Administration.
"

"(ii) Prohibition.—
"

"(I) In general.—Except as provided in subclause (II), a person described in subparagraph (B)(i)(II) for which there is a Federal regulatory agency shall not offer to, or enter into with, a person that is not an eligible contract participant, any agreement, contract, or transaction in foreign currency described in subparagraph (B)(i)(I) except pursuant to a rule or regulation of a Federal regulatory agency allowing the agreement, contract, or transaction under such terms and conditions as the Federal regulatory agency shall prescribe.
"

"(II) Effective date.—With regard to persons described in subparagraph (B)(i)(II) for which a Federal regulatory agency has issued a proposed rule concerning agreements, contracts, or transactions in foreign currency described in subparagraph (B)(i)(I) prior to the date of enactment of this subclause, subclause (I) shall take effect 90 days after the date of enactment of this subclause.
"

"(iii) Requirements of Rules and Regulations.—
"

"(I) In general.—The rules and regulations described in clause (ii) shall prescribe appropriate requirements with respect to—
"

"(aa) disclosure;
"

"(bb) recordkeeping;
"

"(cc) capital and margin;
"

"(dd) reporting;
"

"(ee) business conduct;
"

"(ff) documentation; and
"

"(gg) such other standards or requirements as the Federal regulatory agency shall determine to be necessary.
"

"(II) Treatment.—The rules or regulations described in clause (ii) shall treat all agreements, contracts, and transactions in foreign currency described in subparagraph (B)(i)(I), and all agreements, contracts, and transactions in foreign currency that are functionally or economically similar to agreements, contracts, or transactions described in subparagraph (B)(i)(I), similarly.".

SEC. 743. OTHER AUTHORITY.

Unless otherwise provided by the amendments made by this subtitle, the amendments made by this subtitle do not divest any appropriate Federal banking agency, the Commodity Futures Trading Commission, the Securities and Exchange Commission, or other Federal or State agency of any authority derived from any other applicable law.

SEC. 744. RESTITUTION REMEDIES.

Section 6c(d) of the Commodity Exchange Act (7 U.S.C. 13a–1(d)) is amended by adding at the end the following:

“(3) EQUITABLE REMEDIES.—In any action brought under this section, the Commission may seek, and the court may impose, on a proper showing, on any person found in the action to have committed any violation, equitable remedies including—

“(A) restitution to persons who have sustained losses proximately caused by such violation (in the amount of such losses); and

“(B) disgorgement of gains received in connection with such violation.”.

SEC. 745. ENHANCED COMPLIANCE BY REGISTERED ENTITIES.

(a) EFFECT OF INTERPRETATION.—Section 5c(a) of the Commodity Exchange Act (7 U.S.C. 7a–2(a)) is amended by striking paragraph (2) and inserting the following:

“(2) EFFECT OF INTERPRETATION.—An interpretation issued under paragraph (1) may provide the exclusive means for complying with each section described in paragraph (1).”.

(b) NEW CONTRACTS, NEW RULES, AND RULE AMENDMENTS.—Section 5c of the Commodity Exchange Act (7 U.S.C. 7a–2) is amended by striking subsection (c) and inserting the following:

“(c) NEW CONTRACTS, NEW RULES, AND RULE AMENDMENTS.—

“(1) IN GENERAL.—A registered entity may elect to list for trading or accept for clearing any new contract, or other instrument, or may elect to approve and implement any new rule or rule amendment, by providing to the Commission (and the Secretary of the Treasury, in the case of a contract of sale of a government security for future delivery (or option on such a contract) or a rule or rule amendment specifically related to such a contract) a written certification that the new contract or instrument or clearing of the new contract or instrument, new rule, or rule amendment complies with this Act (including regulations under this Act).

“(2) RULE REVIEW.—The new rule or rule amendment described in paragraph (1) shall become effective, pursuant to the certification of the registered entity and notice of such certification to its members (in a manner to be determined by the Commission), on the date that is 10 business days after the date on which the Commission receives the certification (or such shorter period as determined by the Commission by rule or regulation) unless the Commission notifies the registered entity within such time that it is staying the certification because there exist novel or complex issues that require additional time to analyze, an inadequate explanation by the submitting registered entity, or a potential inconsistency with this Act (including regulations under this Act).
“(3) Stay of certification for rules.—

“(A) A notification by the Commission pursuant to paragraph (2) shall stay the certification of the new rule or rule amendment for up to an additional 90 days from the date of the notification.

“(B) A rule or rule amendment subject to a stay pursuant to subparagraph (A) shall become effective, pursuant to the certification of the registered entity, at the expiration of the period described in subparagraph (A) unless the Commission—

“(i) withdraws the stay prior to that time; or

“(ii) notifies the registered entity during such period that it objects to the proposed certification on the grounds that it is inconsistent with this Act (including regulations under this Act).

“(C) The Commission shall provide a not less than 30-day public comment period, within the 90-day period in which the stay is in effect as described in subparagraph (A), whenever the Commission reviews a rule or rule amendment pursuant to a notification by the Commission under this paragraph.

“(4) Prior approval.—

“(A) In general.—A registered entity may request that the Commission grant prior approval to any new contract or other instrument, new rule, or rule amendment.

“(B) Prior approval required.—Notwithstanding any other provision of this section, a designated contract market shall submit to the Commission for prior approval each rule amendment that materially changes the terms and conditions, as determined by the Commission, in any contract of sale for future delivery of a commodity specifically enumerated in section 1a(10) (or any option thereon) traded through its facilities if the rule amendment applies to contracts and delivery months which have already been listed for trading and have open interest.

“(C) Deadline.—If prior approval is requested under subparagraph (A), the Commission shall take final action on the request not later than 90 days after submission of the request, unless the person submitting the request agrees to an extension of the time limitation established under this subparagraph.

“(5) Approval.—

“(A) Rules.—The Commission shall approve a new rule, or rule amendment, of a registered entity unless the Commission finds that the new rule, or rule amendment, is inconsistent with this subtitle (including regulations).

“(B) Contracts and instruments.—The Commission shall approve a new contract or other instrument unless the Commission finds that the new contract or other instrument would violate this Act (including regulations).

“(C) Special rule for review and approval of event contracts and swaps contracts.—

“(i) Event contracts.—In connection with the listing of agreements, contracts, transactions, or swaps in excluded commodities that are based upon the occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or levels of
a commodity described in section 1a(2)(i)), by a designated contract market or swap execution facility, the Commission may determine that such agreements, contracts, or transactions are contrary to the public interest if the agreements, contracts, or transactions involve—

“(I) activity that is unlawful under any Federal or State law;
“(II) terrorism;
“(III) assassination;
“(IV) war;
“(V) gaming; or
“(VI) other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest.

“(ii) Prohibition.—No agreement, contract, or transaction determined by the Commission to be contrary to the public interest under clause (i) may be listed or made available for clearing or trading on or through a registered entity.

“(iii) Swaps Contracts.—

“(I) In General.—In connection with the listing of a swap for clearing by a derivatives clearing organization, the Commission shall determine, upon request or on its own motion, the initial eligibility, or the continuing qualification, of a derivatives clearing organization to clear such a swap under those criteria, conditions, or rules that the Commission, in its discretion, determines.

“(II) Requirements.—Any such criteria, conditions, or rules shall consider—

“(aa) the financial integrity of the derivatives clearing organization; and
“(bb) any other factors which the Commission determines may be appropriate.

“(iv) Deadline.—The Commission shall take final action under clauses (i) and (ii) in not later than 90 days from the commencement of its review unless the party seeking to offer the contract or swap agrees to an extension of this time limitation.”.

(c) Violation of Core Principles.—Section 5c of the Commodity Exchange Act (7 U.S.C. 7a–2) is amended by striking subsection (d).

SEC. 746. INSIDER TRADING.

Section 4c(a) of the Commodity Exchange Act (7 U.S.C. 6c(a)) is amended by adding at the end the following:

“(3) Contract of Sale.—It shall be unlawful for any employee or agent of any department or agency of the Federal Government who, by virtue of the employment or position of the employee or agent, acquires information that may affect or tend to affect the price of any commodity in interstate commerce, or for future delivery, or any swap, and which information has not been disseminated by the department or agency of the Federal Government holding or creating the information in a manner which makes it generally available to the trading public, or disclosed in a criminal, civil, or
ADMINISTRATIVE HEARING, OR IN A CONGRESSIONAL, ADMINISTRATIVE, OR GOVERNMENT ACCOUNTABILITY OFFICE REPORT, HEARING, AUDIT, OR INVESTIGATION, TO USE THE INFORMATION IN HIS PERSONAL CAPACITY AND FOR PERSONAL GAIN TO ENTER INTO, OR OFFER TO ENTER INTO—

"(A) A CONTRACT OF SALE OF A COMMODITY FOR FUTURE DELIVERY (OR OPTION ON SUCH A CONTRACT);"

"(B) AN OPTION (OTHER THAN AN OPTION EXECUTED OR TRADED ON A NATIONAL SECURITIES EXCHANGE REGISTERED PURSUANT TO SECTION 6(A) OF THE SECURITIES EXCHANGE ACT OF 1934 (15 U.S.C. 78f(a))); OR"

"(C) A SWAP.

"(4) NONPUBLIC INFORMATION.—

"(A) IMPARTING OF NONPUBLIC INFORMATION.—It shall be unlawful for any employee or agent of any department or agency of the Federal Government who, by virtue of the employment or position of the employee or agent, acquires information that may affect or tend to affect the price of any commodity in interstate commerce, or for future delivery, or any swap, and which information has not been disseminated by the department or agency of the Federal Government holding or creating the information in a manner which makes it generally available to the trading public, or disclosed in a criminal, civil, or administrative hearing, or in a congressional, administrative, or Government Accountability Office report, hearing, audit, or investigation, to impart the information in his personal capacity and for personal gain with intent to assist another person, directly or indirectly, to use the information to enter into, or offer to enter into—

"(i) a contract of sale of a commodity for future delivery (or option on such a contract);"

"(ii) an option (other than an option executed or traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a))); or"

"(iii) a swap.

"(B) KNOWING USE.—It shall be unlawful for any person who receives information imparted by any employee or agent of any department or agency of the Federal Government as described in subparagraph (A) to knowingly use such information to enter into, or offer to enter into—

"(i) a contract of sale of a commodity for future delivery (or option on such a contract);"

"(ii) an option (other than an option executed or traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a))); or"

"(iii) a swap.

"(C) THEFT OF NONPUBLIC INFORMATION.—It shall be unlawful for any person to steal, convert, or misappropriate, by any means whatsoever, information held or created by any department or agency of the Federal Government that may affect or tend to affect the price of any commodity in interstate commerce, or for future delivery, or any swap, where such person knows, or acts in reckless disregard of the fact, that such information has not been disseminated by the department or agency of the Federal Government..."
holding or creating the information in a manner which makes it generally available to the trading public, or disclosed in a criminal, civil, or administrative hearing, or in a congressional, administrative, or Government Accountability Office report, hearing, audit, or investigation, and to use such information, or to impart such information with the intent to assist another person, directly or indirectly, to use such information to enter into, or offer to enter into—

“(i) a contract of sale of a commodity for future delivery (or option on such a contract);

“(ii) an option (other than an option executed or traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a))); or

“(iii) a swap, provided, however, that nothing in this subparagraph shall preclude a person that has provided information concerning, or generated by, the person, its operations or activities, to any employee or agent of any department or agency of the Federal Government, voluntarily or as required by law, from using such information to enter into, or offer to enter into, a contract of sale, option, or swap described in clauses (i), (ii), or (iii).”.

SEC. 747. ANTIDISRUPTIVE PRACTICES AUTHORITY.

Section 4c(a) of the Commodity Exchange Act (7 U.S.C. 6c(a)) (as amended by section 746) is amended by adding at the end the following:

“(5) DISRUPTIVE PRACTICES.—It shall be unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that—

“(A) violates bids or offers;

“(B) demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period; or

“(C) is, is of the character of, or is commonly known to the trade as, ‘spoofing’ (bidding or offering with the intent to cancel the bid or offer before execution).

“(6) RULEMAKING AUTHORITY.—The Commission may make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to prohibit the trading practices described in paragraph (5) and any other trading practice that is disruptive of fair and equitable trading.

“(7) USE OF SWAPS TO DEFRAUD.—It shall be unlawful for any person to enter into a swap knowing, or acting in reckless disregard of the fact, that its counterparty will use the swap as part of a device, scheme, or artifice to defraud any third party.”.

SEC. 748. COMMODITY WHISTLEBLOWER INCENTIVES AND PROTECTION.

The Commodity Exchange Act (7 U.S.C. 1 et seq.) is amended by adding at the end the following:

“SEC. 23. COMMODITY WHISTLEBLOWER INCENTIVES AND PROTECTION.

“(a) DEFINITIONS.—In this section:
“(1) Covered judicial or administrative action.—The term ‘covered judicial or administrative action’ means any judicial or administrative action brought by the Commission under this Act that results in monetary sanctions exceeding $1,000,000.

“(2) Fund.—The term ‘Fund’ means the Commodity Futures Trading Commission Customer Protection Fund established under subsection (g).

“(3) Monetary sanctions.—The term ‘monetary sanctions’, when used with respect to any judicial or administrative action means—

“(A) any monies, including penalties, disgorgement, restitution, and interest ordered to be paid; and

“(B) any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action.

“(4) Original information.—The term ‘original information’ means information that—

“(A) is derived from the independent knowledge or analysis of a whistleblower;

“(B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and

“(C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

“(5) Related action.—The term ‘related action’, when used with respect to any judicial or administrative action brought by the Commission under this Act, means any judicial or administrative action brought by an entity described in subclauses (I) through (VI) of subsection (h)(2)(C) that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.

“(6) Successful resolution.—The term ‘successful resolution’, when used with respect to any judicial or administrative action brought by the Commission under this Act, includes any settlement of such action.

“(7) Whistleblower.—The term ‘whistleblower’ means any individual, or 2 or more individuals acting jointly, who provides information relating to a violation of this Act to the Commission, in a manner established by rule or regulation by the Commission.

“(b) Awards.—

“(1) In general.—In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—
“(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and
“(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

“(2) PAYMENT OF AWARDS.—Any amount paid under paragraph (1) shall be paid from the Fund.

“(c) DETERMINATION OF AMOUNT OF AWARD; DENIAL OF AWARD.—

“(1) DETERMINATION OF AMOUNT OF AWARD.—
“(A) DISCRETION.—The determination of the amount of an award made under subsection (b) shall be in the discretion of the Commission.
“(B) CRITERIA.—In determining the amount of an award made under subsection (b), the Commission—

“(i) shall take into consideration—
“(I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;
“(II) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;
“(III) the programmatic interest of the Commission in deterring violations of the Act (including regulations under the Act) by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws; and
“(IV) such additional relevant factors as the Commission may establish by rule or regulation; and

“(ii) shall not take into consideration the balance of the Fund.

“(2) DENIAL OF AWARD.—No award under subsection (b) shall be made—

“(A) to any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of—

“(i) a appropriate regulatory agency;
“(ii) the Department of Justice;
“(iii) a registered entity;
“(iv) a registered futures association;
“(v) a self-regulatory organization as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)); or
“(vi) a law enforcement organization;

“(B) to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section; and

“(C) to any whistleblower who submits information to the Commission that is based on the facts underlying the covered action submitted previously by another whistleblower;
“(D) to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule or regulation, require.

“(d) REPRESENTATION.—

“(1) PERMITTED REPRESENTATION.—Any whistleblower who makes a claim for an award under subsection (b) may be represented by counsel.

“(2) REQUIRED REPRESENTATION.—

“(A) IN GENERAL.—Any whistleblower who anonymously makes a claim for an award under subsection (b) shall be represented by counsel if the whistleblower submits the information upon which the claim is based.

“(B) DISCLOSURE OF IDENTITY.—Prior to the payment of an award, a whistleblower shall disclose the identity of the whistleblower and provide such other information as the Commission may require, directly or through counsel for the whistleblower.

“(e) NO CONTRACT NECESSARY.—No contract with the Commission is necessary for any whistleblower to receive an award under subsection (b), unless otherwise required by the Commission, by rule or regulation.

“(f) APPEALS.—

“(1) IN GENERAL.—Any determination made under this section, including whether, to whom, or in what amount to make awards, shall be in the discretion of the Commission.

“(2) APPEALS.—Any determination described in paragraph (1) may be appealed to the appropriate court of appeals of the United States not more than 30 days after the determination is issued by the Commission.

“(3) REVIEW.—The court shall review the determination made by the Commission in accordance with section 7064 of title 5, United States Code.

“(g) COMMODITY FUTURES TRADING COMMISSION CUSTOMER PROTECTION FUND.—

“(1) ESTABLISHMENT.—There is established in the Treasury of the United States a revolving fund to be known as the ‘Commodity Futures Trading Commission Customer Protection Fund’.

“(2) USE OF FUND.—The Fund shall be available to the Commission, without further appropriation or fiscal year limitation, for—

“(A) the payment of awards to whistleblowers as provided in subsection (a); and

“(B) the funding of customer education initiatives designed to help customers protect themselves against fraud or other violations of this Act, or the rules and regulations thereunder.

“(3) DEPOSITS AND CREDITS.—There shall be deposited into or credited to the Fund:

“(A) MONETARY SANCTIONS.—Any monetary sanctions collected by the Commission in any covered judicial or administrative action that is not otherwise distributed to victims of a violation of this Act or the rules and regulations thereunder underlying such action, unless the balance of the Fund at the time the monetary judgment is collected exceeds $100,000,000.
“(B) ADDITIONAL AMOUNTS.—If the amounts deposited into or credited to the Fund under subparagraph (A) are not sufficient to satisfy an award made under subsection (b), there shall be deposited into or credited to the Fund an amount equal to the unsatisfied portion of the award from any monetary sanction collected by the Commission in any judicial or administrative action brought by the Commission under this Act that is based on information provided by a whistleblower.

“(C) INVESTMENT INCOME.—All income from investments made under paragraph (4).

“(4) INVESTMENTS.—

“(A) AMOUNTS IN FUND MAY BE INVESTED.—The Commission may request the Secretary of the Treasury to invest the portion of the Fund that is not, in the Commission’s judgment, required to meet the current needs of the Fund.

“(B) ELIGIBLE INVESTMENTS.—Investments shall be made by the Secretary of the Treasury in obligations of the United States or obligations that are guaranteed as to principal and interest by the United States, with maturities suitable to the needs of the Fund as determined by the Commission.

“(C) INTEREST AND PROCEEDS CREDITED.—The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to, and form a part of, the Fund.

“(5) REPORTS TO CONGRESS.—Not later than October 30 of each year, the Commission shall transmit to the Committee on Agriculture, Nutrition, and Forestry of the Senate, and the Committee on Agriculture of the House of Representatives a report on—

“(A) the Commission’s whistleblower award program under this section, including a description of the number of awards granted and the types of cases in which awards were granted during the preceding fiscal year;

“(B) customer education initiatives described in paragraph (2)(B) that were funded by the Fund during the preceding fiscal year;

“(C) the balance of the Fund at the beginning of the preceding fiscal year;

“(D) the amounts deposited into or credited to the Fund during the preceding fiscal year;

“(E) the amount of earnings on investments of amounts in the Fund during the preceding fiscal year;

“(F) the amount paid from the Fund during the preceding fiscal year to whistleblowers pursuant to subsection (b);

“(G) the amount paid from the Fund during the preceding fiscal year for customer education initiatives described in paragraph (2)(B);

“(H) the balance of the Fund at the end of the preceding fiscal year; and

“(I) a complete set of audited financial statements, including a balance sheet, income statement, and cash flow analysis.

“(h) PROTECTION OF WHISTLEBLOWERS.—
“(1) Prohibition against retaliation.—
   “(A) In general.—No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
      “(i) in providing information to the Commission in accordance with subsection (b); or
      “(ii) in assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information.
   “(B) Enforcement.—
      “(i) Cause of action.—An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C), unless the individual who is alleging discharge or other discrimination in violation of subparagraph (A) is an employee of the Federal Government, in which case the individual shall only bring an action under section 1221 of title 5, United States Code.
      “(ii) Subpoenas.—A subpoena requiring the attendance of a witness at a trial or hearing conducted under this subsection may be served at any place in the United States.
      “(iii) Statute of limitations.—An action under this subsection may not be brought more than 2 years after the date on which the violation reported in subparagraph (A) is committed.
   “(C) Relief.—Relief for an individual prevailing in an action brought under subparagraph (B) shall include—
      “(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;
      “(ii) the amount of back pay otherwise owed to the individual, with interest; and
      “(iii) compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney’s fees.

“(2) Confidentiality.—
   “(A) In general.—Except as provided in subparagraphs (B) and (C), the Commission, and any officer or employee of the Commission, shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of title 5, United States Code, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or any entity described in subparagraph (C). For purposes of section 552 of title 5, United States Code, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section 552.
“(B) Effect.—Nothing in this paragraph is intended to limit the ability of the Attorney General to present such evidence to a grand jury or to share such evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

“(C) Availability to government agencies.—

“(i) In general.—Without the loss of its status as confidential in the hands of the Commission, all information referred to in subparagraph (A) may, in the discretion of the Commission, when determined by the Commission to be necessary or appropriate to accomplish the purposes of this Act and protect customers and in accordance with clause (ii), be made available to—

“(I) the Department of Justice;

“(II) an appropriate department or agency of the Federal Government, acting within the scope of its jurisdiction;

“(III) a registered entity, registered futures association, or self-regulatory organization as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a));

“(IV) a State attorney general in connection with any criminal investigation;

“(V) an appropriate department or agency of any State, acting within the scope of its jurisdiction; and

“(VI) a foreign futures authority.

“(ii) Maintenance of information.—Each of the entities, agencies, or persons described in clause (i) shall maintain information described in that clause as confidential, in accordance with the requirements in subparagraph (A).

“(iii) Study on impact of FOIA exemption on commodity futures trading commission.—

“(I) Study.—The Inspector General of the Commission shall conduct a study—

“(aa) on whether the exemption under section 552(b)(3) of title 5, United States Code (known as the Freedom of Information Act) established in paragraph (2)(A) aids whistleblowers in disclosing information to the Commission;

“(bb) on what impact the exemption has had on the public’s ability to access information about the Commission’s regulation of commodity futures and option markets; and

“(cc) to make any recommendations on whether the Commission should continue to use the exemption.

“(II) Report.—Not later than 30 months after the date of enactment of this clause, the Inspector General shall—

“(aa) submit a report on the findings of the study required under this clause to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on
Financial Services of the House of Representatives; and

“(bb) make the report available to the public through publication of a report on the website of the Commission.

“(3) RIGHTS RETAINED.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any whistleblower under any Federal or State law, or under any collective bargaining agreement.

“(i) RULEMAKING AUTHORITY.—The Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.

“(j) IMPLEMENTING RULES.—The Commission shall issue final rules or regulations implementing the provisions of this section not later than 270 days after the date of enactment of the Wall Street Transparency and Accountability Act of 2010.

“(k) ORIGINAL INFORMATION.—Information submitted to the Commission by a whistleblower in accordance with rules or regulations implementing this section shall not lose its status as original information solely because the whistleblower submitted such information prior to the effective date of such rules or regulations, provided such information was submitted after the date of enactment of the Wall Street Transparency and Accountability Act of 2010.

“(l) AWARDS.—A whistleblower may receive an award pursuant to this section regardless of whether any violation of a provision of this Act, or a rule or regulation thereunder, underlying the judicial or administrative action upon which the award is based occurred prior to the date of enactment of the Wall Street Transparency and Accountability Act of 2010.

“(m) PROVISION OF FALSE INFORMATION.—A whistleblower who knowingly and willfully makes any false, fictitious, or fraudulent statement or representation, or who makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall not be entitled to an award under this section and shall be subject to prosecution under section 1001 of title 18, United States Code.

“(n) NONENFORCEABILITY OF CERTAIN PROVISIONS WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBITRATION OF DISPUTES.—

“(1) WAIVER OF RIGHTS AND REMEDIES.—The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment including by a predispute arbitration agreement.

“(2) PREDISPUTE ARBITRATION AGREEMENTS.—No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.”.

SEC. 749. CONFORMING AMENDMENTS.

(a) Section 4d of the Commodity Exchange Act (7 U.S.C. 6d) (as amended by section 724) is amended—

(1) in subsection (a)—

(A) in the matter preceding paragraph (1)—

(i) by striking “engage as” and inserting “be a”,

and
(ii) by striking "or introducing broker" and all that follows through "or derivatives transaction execution facility";

(B) in paragraph (1), by striking "or introducing broker"; and

(C) in paragraph (2), by striking "if a futures commission merchant,"; and

(2) by adding at the end the following:

"(g) It shall be unlawful for any person to be an introducing broker unless such person shall have registered under this Act with the Commission as an introducing broker and such registration shall not have expired nor been suspended nor revoked."

(b) Section 4m(3) of the Commodity Exchange Act (7 U.S.C. 6m(3)) is amended—

(1) by striking "(3) Subsection (1) of this section" and inserting the following:

"(3) Exception.—"

(A) IN GENERAL.—Paragraph (1)"; and

(2) by striking "to any investment trust" and all that follows through the period at the end and inserting the following: "to any commodity pool that is engaged primarily in trading commodity interests.

"(B) ENGAGED PRIMARILY.—For purposes of subparagraph (A), a commodity trading advisor or a commodity pool shall be considered to be 'engaged primarily' in the business of being a commodity trading advisor or commodity pool if it is or holds itself out to the public as being engaged primarily, or proposes to engage primarily, in the business of advising on commodity interests or investing, reinvesting, owning, holding, or trading in commodity interests, respectively.

"(C) COMMODITY INTERESTS.—For purposes of this paragraph, commodity interests shall include contracts of sale of a commodity for future delivery, options on such contracts, security futures, swaps, leverage contracts, foreign exchange, spot and forward contracts on physical commodities, and any monies held in an account used for trading commodity interests."

(c) Section 5c of the Commodity Exchange Act (7 U.S.C. 7a–2) is amended—

(1) in subsection (a)(1)—

(A) by striking "5a(d),"; and

(B) by striking "and section (2)(h)(7) with respect to significant price discovery contracts,"; and

(2) in subsection (f)(1), by striking "section 4d(c) of this Act" and inserting "section 4d(e)".

(d) Section 5e of the Commodity Exchange Act (7 U.S.C. 7b) is amended by striking "or revocation of the right of an electronic trading facility to rely on the exemption set forth in section 2(h)(3) with respect to a significant price discovery contract."

(e) Section 6(b) of the Commodity Exchange Act (7 U.S.C. 8(b)) is amended in the first sentence by striking "or to revoke the right of an electronic trading facility to rely on the exemption set forth in section 2(h)(3) with respect to a significant price discovery contract."

(f) Section 12(e)(2)(B) of the Commodity Exchange Act (7 U.S.C. 16(e)(2)(B)) is amended—
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(1) by striking “section 2(c), 2(d), 2(f), or 2(g) of this Act” and inserting “section 2(c) or 2(f) of this Act”; and

(2) by striking “2(h) or”.

(g) Section 17(r)(1) of the Commodity Exchange Act (7 U.S.C. 21(r)(1)) is amended by striking “section 4d(c) of this Act” and inserting “section 4d(e)”; 7 USC 25.

(h) Section 22 of the Commodity Exchange Act is amended—

(1) in subsection (a)(1)(B), by—

(A) inserting “or any swap” after “commodity”); and

(B) inserting “or any swap” after “such contract”;

(2) in subsection (a)(1)(C), by adding at the end the following:

“(iv) a swap; or”; and

(3) in subsection (b)(1)(A), by striking “section 2(h)(7) or sections 5 through 5c” and inserting “section 5, 5b, 5c, 5h, or 21”.

(i) Section 408(2)(C) of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4421(2)(C)) is amended—

(1) by striking “section 2(c), 2(d), 2(f), or (2)(g) of such Act” and inserting “section 2(c), 2(f), or 2(i) of that Act”; and

(2) by striking “2(h) or”.

SEC. 750. STUDY ON OVERSIGHT OF CARBON MARKETS.

(a) INTERAGENCY WORKING GROUP.—There is established to carry out this section an interagency working group (referred to in this section as the “interagency group”) composed of the following members or designees:

(1) The Chairman of the Commodity Futures Trading Commission (referred to in this section as the “Commission”), who shall serve as Chairman of the interagency group.

(2) The Secretary of Agriculture.

(3) The Secretary of the Treasury.

(4) The Chairman of the Securities and Exchange Commission.

(5) The Administrator of the Environmental Protection Agency.


(8) The Administrator of the Energy Information Administration.

(b) ADMINISTRATIVE SUPPORT.—The Commission shall provide the interagency group such administrative support services as are necessary to enable the interagency group to carry out the functions of the interagency group under this section.

(c) CONSULTATION.—In carrying out this section, the interagency group shall consult with representatives of exchanges, clearinghouses, self-regulatory bodies, major carbon market participants, consumers, and the general public, as the interagency group determines to be appropriate.

(d) STUDY.—The interagency group shall conduct a study on the oversight of existing and prospective carbon markets to ensure an efficient, secure, and transparent carbon market, including oversight of spot markets and derivative markets.

(e) REPORT.—Not later than 180 days after the date of enactment of this Act, the interagency group shall submit to Congress a report on the results of the study conducted under subsection Establishment.
(b), including recommendations for the oversight of existing and prospective carbon markets to ensure an efficient, secure, and transparent carbon market, including oversight of spot markets and derivative markets.

SEC. 751. ENERGY AND ENVIRONMENTAL MARKETS ADVISORY COMMITTEE.

Section 2(a) of the Commodity Exchange Act (7 U.S.C. 2(a)) (as amended by section 727) is amended by adding at the end the following:

“(15) ENERGY AND ENVIRONMENTAL MARKETS ADVISORY COMMITTEE.—

“(A) ESTABLISHMENT.—

“(i) IN GENERAL.—An Energy and Environmental Markets Advisory Committee is hereby established.

“(ii) MEMBERSHIP.—The Committee shall have 9 members.

“(iii) ACTIVITIES.—The Committee’s objectives and scope of activities shall be—

“(I) to conduct public meetings;

“(II) to submit reports and recommendations to the Commission (including dissenting or minority views, if any); and

“(III) otherwise to serve as a vehicle for discussion and communication on matters of concern to exchanges, firms, end users, and regulators regarding energy and environmental markets and their regulation by the Commission.

“(B) REQUIREMENTS.—

“(i) IN GENERAL.—The Committee shall hold public meetings at such intervals as are necessary to carry out the functions of the Committee, but not less frequently than 2 times per year.

“(ii) MEMBERS.—Members shall be appointed to 3-year terms, but may be removed for cause by vote of the Commission.

“(C) APPOINTMENT.—The Commission shall appoint members with a wide diversity of opinion and who represent a broad spectrum of interests, including hedgers and consumers.

“(D) REIMBURSEMENT.—Members shall be entitled to per diem and travel expense reimbursement by the Commission.

“(E) FACA.—The Committee shall not be subject to the Federal Advisory Committee Act (5 U.S.C. App.).”.

SEC. 752. INTERNATIONAL HARMONIZATION.

(a) In order to promote effective and consistent global regulation of swaps and security-based swaps, the Commodity Futures Trading Commission, the Securities and Exchange Commission, and the prudential regulators (as that term is defined in section 1a(39) of the Commodity Exchange Act), as appropriate, shall consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation (including fees) of swaps, security-based swaps, swap entities, and security-based swap entities and may agree to such information-sharing arrangements as may be deemed to be necessary or
appropriate in the public interest or for the protection of investors, swap counterparties, and security-based swap counterparties.

(b) In order to promote effective and consistent global regulation of contracts of sale of a commodity for future delivery and options on such contracts, the Commodity Futures Trading Commission shall consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation of contracts of sale of a commodity for future delivery and options on such contracts, and may agree to such information-sharing arrangements as may be deemed necessary or appropriate in the public interest for the protection of users of contracts of sale of a commodity for future delivery.

SEC. 753. ANTI-MANIPULATION AUTHORITY.

(a) Prohibition Regarding Manipulation and False Information.—Subsection (c) of section 6 of the Commodity Exchange Act (7 U.S.C. 9, 15) is amended to read as follows:

"(c) Prohibition Regarding Manipulation and False Information.—"

"(1) Prohibition Against Manipulation.—It shall be unlawful for any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Commission shall promulgate by not later than 1 year after the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, provided no rule or regulation promulgated by the Commission shall require any person to disclose to another person nonpublic information that may be material to the market price, rate, or level of the commodity transaction, except as necessary to make any statement made to the other person in or in connection with the transaction not misleading in any material respect.

"(A) Special Provision for Manipulation by False Reporting.—Unlawful manipulation for purposes of this paragraph shall include, but not be limited to, delivering, or causing to be delivered for transmission through the mails or interstate commerce, by any means of communication whatsoever, a false or misleading or inaccurate report concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, knowing, or acting in reckless disregard of the fact that such report is false, misleading or inaccurate.

"(B) Effect on Other Law.—Nothing in this paragraph shall affect, or be construed to affect, the applicability of section 9(a)(2).

"(C) Good Faith Mistakes.—Mistakenly transmitting, in good faith, false or misleading or inaccurate information to a price reporting service would not be sufficient to violate subsection (c)(1)(A).

"(2) Prohibition Regarding False Information.—It shall be unlawful for any person to make any false or misleading statement of a material fact to the Commission, including in any registration application or any report filed with the
Commission under this Act, or any other information relating to a swap, or a contract of sale of a commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or to omit to state in any such statement any material fact that is necessary to make any statement of a material fact made not misleading in any material respect, if the person knew, or reasonably should have known, the statement to be false or misleading.

(3) OTHER MANIPULATION.—In addition to the prohibition in paragraph (1), it shall be unlawful for any person, directly or indirectly, to manipulate or attempt to manipulate the price of any swap, or of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity.

(4) ENFORCEMENT.—

(A) AUTHORITY OF COMMISSION.—If the Commission has reason to believe that any person (other than a registered entity) is violating or has violated this subsection, or any other provision of this Act (including any rule, regulation, or order of the Commission promulgated in accordance with this subsection or any other provision of this Act), the Commission may serve upon the person a complaint.

(B) CONTENTS OF COMPLAINT.—A complaint under subparagraph (A) shall—

(i) contain a description of the charges against the person that is the subject of the complaint; and

(ii) have attached or contain a notice of hearing that specifies the date and location of the hearing regarding the complaint.

(C) HEARING.—A hearing described in subparagraph (B)(ii) may be—

(i) shall be held not later than 3 days after service of the complaint described in subparagraph (A); and

(ii) shall require the person to show cause regarding why—

(I) an order should not be made—

(aa) to prohibit the person from trading on, or subject to the rules of, any registered entity; and

(bb) to direct all registered entities to refuse all privileges to the person until further notice of the Commission; and

(II) the registration of the person, if registered with the Commission in any capacity, should not be suspended or revoked; and

(iii) may be held before—

(I) the Commission; or

(II) an administrative law judge designated by the Commission, under which the administrative law judge shall ensure that all evidence is recorded in written form and submitted to the Commission.

(5) SUBPOENA.—For the purpose of securing effective enforcement of the provisions of this Act, for the purpose of any investigation or proceeding under this Act, and for the purpose of any action taken under section 12(f), any member
of the Commission or any Administrative Law Judge or other officer designated by the Commission (except as provided in paragraph (7)) may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records that the Commission deems relevant or material to the inquiry.

“(6) Witnesses.—The attendance of witnesses and the production of any such records may be required from any place in the United States, any State, or any foreign country or jurisdiction at any designated place of hearing.

“(7) Service.—A subpoena issued under this section may be served upon any person who is not to be found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service of process in a foreign country, except that a subpoena to be served on a person who is not to be found within the territorial jurisdiction of any court of the United States may be issued only on the prior approval of the Commission.

“(8) Refusal to obey.—In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction in which the investigation or proceeding is conducted, or where such person resides or transacts business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. Such court may issue an order requiring such person to appear before the Commission or member or Administrative Law Judge or other officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question.

“(9) Failure to obey.—Any failure to obey such order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in the judicial district wherein such person is an inhabitant or transacts business or wherever such person may be found.

“(10) Evidence.—On the receipt of evidence under paragraph (4)(C)(iii), the Commission may—

“(A) prohibit the person that is the subject of the hearing from trading on, or subject to the rules of, any registered entity and require all registered entities to refuse the person all privileges on the registered entities for such period as the Commission may require in the order;

“(B) if the person is registered with the Commission in any capacity, suspend, for a period not to exceed 180 days, or revoke, the registration of the person;

“(C) assess such person—

“(i) a civil penalty of not more than an amount equal to the greater of—

“(I) $140,000; or

“(II) triple the monetary gain to such person for each such violation; or

“(ii) in any case of manipulation or attempted manipulation in violation of this subsection or section...
9(a)(2), a civil penalty of not more than an amount equal to the greater of—
  “(I) $1,000,000; or
  “(II) triple the monetary gain to the person for each such violation; and
“(D) require restitution to customers of damages proximately caused by violations of the person.
“(11) ORDERS.—
“(A) NOTICE.—The Commission shall provide to a person described in paragraph (10) and the appropriate governing board of the registered entity notice of the order described in paragraph (10) by—
  “(i) registered mail;
  “(ii) certified mail; or
  “(iii) personal delivery.
“(B) REVIEW.—
  “(i) IN GENERAL.—A person described in paragraph (10) may obtain a review of the order or such other equitable relief as determined to be appropriate by a court described in clause (ii).
  “(ii) PETITION.—To obtain a review or other relief under clause (i), a person may, not later than 15 days after notice is given to the person under clause (i), file a written petition to set aside the order with the United States Court of Appeals—
    “(I) for the circuit in which the petitioner carries out the business of the petitioner; or
    “(II) in the case of an order denying registration, the circuit in which the principal place of business of the petitioner is located, as listed on the application for registration of the petitioner.
“(C) PROCEDURE.—
  “(i) DUTY OF CLERK OF APPROPRIATE COURT.—The clerk of the appropriate court under subparagraph (B)(ii) shall transmit to the Commission a copy of a petition filed under subparagraph (B)(ii).
  “(ii) DUTY OF COMMISSION.—In accordance with section 2112 of title 28, United States Code, the Commission shall file in the appropriate court described in subparagraph (B)(ii) the record theretofore made.
  “(iii) JURISDICTION OF APPROPRIATE COURT.—Upon the filing of a petition under subparagraph (B)(ii), the appropriate court described in subparagraph (B)(ii) may affirm, set aside, or modify the order of the Commission.”.

(b) CEASE AND DESIST ORDERS, FINES.—Section 6(d) of the Commodity Exchange Act (7 U.S.C. 13b) is amended to read as follows:
 “(d) If any person (other than a registered entity), is violating or has violated subsection (c) or any other provisions of this Act or of the rules, regulations, or orders of the Commission thereunder, the Commission may, upon notice and hearing, and subject to appeal as in other cases provided for in subsection (c), make and enter an order directing that such person shall cease and desist therefrom and, if such person thereafter and after the lapse of the period allowed for appeal of such order or after the affirmance

Penalty.
of such order, shall knowingly fail or refuse to obey or comply with such order, such person, upon conviction thereof, shall be fined not more than the higher of $140,000 or triple the monetary gain to such person, or imprisoned for not more than 1 year, or both, except that if such knowing failure or refusal to obey or comply with such order involves any offense within subsection (a) or (b) of section 9, such person, upon conviction thereof, shall be subject to the penalties of said subsection (a) or (b): Provided, That any such cease and desist order under this subsection against any respondent in any case of manipulation shall be issued only in conjunction with an order issued against such respondent under subsection (c)."

(c) Manipulations; Private Rights of Action.—Section 22(a)(1) of the Commodity Exchange Act (7 U.S.C. 25(a)(1)) is amended by striking subparagraph (D) and inserting the following:

“(D) who purchased or sold a contract referred to in subparagraph (B) hereof or swap if the violation constitutes—

“(i) the use or employment of, or an attempt to use or employ, in connection with a swap, or a contract of sale of a commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative device or contrivance in contravention of such rules and regulations as the Commission shall promulgate by not later than 1 year after the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act; or

“(ii) a manipulation of the price of any such contract or swap or the price of the commodity underlying such contract or swap.”.

(d) Effective Date.—

(1) The amendments made by this section shall take effect on the date on which the final rule promulgated by the Commodity Futures Trading Commission pursuant to this Act takes effect.

(2) Paragraph (1) shall not preclude the Commission from undertaking prior to the effective date any rulemaking necessary to implement the amendments contained in this section.

Subtitle B—Regulation of Security-Based Swap Markets


(a) Definitions.—Section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)) is amended—
(1) in subparagraphs (A) and (B) of paragraph (5), by inserting “(not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants)” after “securities” each place that term appears;

(2) in paragraph (10), by inserting “security-based swap,” after “security future,”;

(3) in paragraph (13), by adding at the end the following: “For security-based swaps, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require.”;

(4) in paragraph (14), by adding at the end the following: “For security-based swaps, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require.”;

(5) in paragraph (39)—
  (A) in subparagraph (B)(i)—
    (i) in subclause (I), by striking “or government securities dealer” and inserting “government securities dealer, security-based swap dealer, or major security-based swap participant”; and
    (ii) in subclause (II), by inserting “security-based swap dealer, major security-based swap participant,” after “government securities dealer,”;
  (B) in subparagraph (C), by striking “or government securities dealer” and inserting “government securities dealer, security-based swap dealer, or major security-based swap participant”;
  (C) in subparagraph (D), by inserting “security-based swap dealer, major security-based swap participant,” after “government securities dealer,”; and

(6) by adding at the end the following:

“(65) ELIGIBLE CONTRACT PARTICIPANT.—The term ‘eligible contract participant’ has the same meaning as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

“(66) MAJOR SWAP PARTICIPANT.—The term ‘major swap participant’ has the same meaning as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

“(67) MAJOR SECURITY-BASED SWAP PARTICIPANT.—
  “(A) IN GENERAL.—The term ‘major security-based swap participant’ means any person—
    “(i) who is not a security-based swap dealer; and
    “(ii)(I) who maintains a substantial position in security-based swaps for any of the major security-based swap categories, as such categories are determined by the Commission, excluding both positions held for hedging or mitigating commercial risk and positions maintained by any employee benefit plan (or any contract held by such a plan) as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan;
“(II) whose outstanding security-based swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets; or

“(III) that is a financial entity that—

“(aa) is highly leveraged relative to the amount of capital such entity holds and that is not subject to capital requirements established by an appropriate Federal banking agency; and

“(bb) maintains a substantial position in outstanding security-based swaps in any major security-based swap category, as such categories are determined by the Commission.

“(B) DEFINITION OF SUBSTANTIAL POSITION.—For purposes of subparagraph (A), the Commission shall define, by rule or regulation, the term ‘substantial position’ at the threshold that the Commission determines to be prudent for the effective monitoring, management, and oversight of entities that are systemically important or can significantly impact the financial system of the United States. In setting the definition under this subparagraph, the Commission shall consider the person’s relative position in uncleared as opposed to cleared security-based swaps and may take into consideration the value and quality of collateral held against counterparty exposures.

“(C) SCOPE OF DESIGNATION.—For purposes of subparagraph (A), a person may be designated as a major security-based swap participant for 1 or more categories of security-based swaps without being classified as a major security-based swap participant for all classes of security-based swaps.

“(68) SECURITY-BASED SWAP.—

“(A) IN GENERAL.—Except as provided in subparagraph (B), the term ‘security-based swap’ means any agreement, contract, or transaction that—

“(i) is a swap, as that term is defined under section 1a of the Commodity Exchange Act (without regard to paragraph (47)(B)(x) of such section); and

“(ii) is based on—

“(I) an index that is a narrow-based security index, including any interest therein or on the value thereof;

“(II) a single security or loan, including any interest therein or on the value thereof; or

“(III) the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer.

“(B) RULE OF CONSTRUCTION REGARDING MASTER AGREEMENTS.—The term ‘security-based swap’ shall be construed to include a master agreement that provides for an agreement, contract, or transaction that is a security-based swap pursuant to subparagraph (A), together with
all supplements to any such master agreement, without
regard to whether the master agreement contains an agree-
ment, contract, or transaction that is not a security-based
swap pursuant to subparagraph (A), except that the master
agreement shall be considered to be a security-based swap
only with respect to each agreement, contract, or trans-
action under the master agreement that is a security-
based swap pursuant to subparagraph (A).

(C) Exclusions.—The term ‘security-based swap’ does
not include any agreement, contract, or transaction that
meets the definition of a security-based swap only because
such agreement, contract, or transaction references, is
based upon, or settles through the transfer, delivery, or
receipt of an exempted security under paragraph (12), as
in effect on the date of enactment of the Futures Trading
Act of 1982 (other than any municipal security as defined
in paragraph (29) as in effect on the date of enactment
of the Futures Trading Act of 1982), unless such agreement,
contract, or transaction is of the character of, or is com-
monly known in the trade as, a put, call, or other option.

(D) Mixed Swap.—The term ‘security-based swap’
includes any agreement, contract, or transaction that is
as described in subparagraph (A) and also is based on
the value of 1 or more interest or other rates, currencies,
commodities, instruments of indebtedness, indices, quan-
titative measures, other financial or economic interest or
property of any kind (other than a single security or a
narrow-based security index), or the occurrence, non-occur-
rence, or the extent of the occurrence of an event or contin-
gency associated with a potential financial, economic, or
commercial consequence (other than an event described
in subparagraph (A)(ii)(III)).

(E) Rule of Construction Regarding Use of the
Term Index.—The term ‘index’ means an index or group
of securities, including any interest therein or based on
the value thereof.

(69) Swap.—The term ‘swap’ has the same meaning as
in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

(70) Person Associated with a Security-Based Swap
Dealer or Major Security-Based Swap Participant.—

(A) In General.—The term ‘person associated with a
security-based swap dealer or major security-based swap
participant’ or ‘associated person of a security-based swap
dealer or major security-based swap participant’ means—

(i) any partner, officer, director, or branch man-
ger of such security-based swap dealer or major secu-
rity-based swap participant (or any person occupying
a similar status or performing similar functions);

(ii) any person directly or indirectly controlling,
controlled by, or under common control with such secu-
rity-based swap dealer or major security-based swap
participant; or

(iii) any employee of such security-based swap
dealer or major security-based swap participant.

(B) Exclusion.—Other than for purposes of section
15F(1)(2), the term ‘person associated with a security-based
swap dealer or major security-based swap participant’ or
‘associated person of a security-based swap dealer or major security-based swap participant’ does not include any person associated with a security-based swap dealer or major security-based swap participant whose functions are solely clerical or ministerial.

“(71) SECURITY-BASED SWAP DEALER.—

“(A) IN GENERAL.—The term ‘security-based swap dealer’ means any person who—

“(i) holds themself out as a dealer in security-based swaps;

“(ii) makes a market in security-based swaps;

“(iii) regularly enters into security-based swaps with counterparties as an ordinary course of business for its own account; or

“(iv) engages in any activity causing it to be commonly known in the trade as a dealer or market maker in security-based swaps.

“(B) DESIGNATION BY TYPE OR CLASS.—A person may be designated as a security-based swap dealer for a single type or single class or category of security-based swap or activities and considered not to be a security-based swap dealer for other types, classes, or categories of security-based swaps or activities.

“(C) EXCEPTION.—The term ‘security-based swap dealer’ does not include a person that enters into security-based swaps for such person’s own account, either individually or in a fiduciary capacity, but not as a part of regular business.

“(D) DE MINIMIS EXCEPTION.—The Commission shall exempt from designation as a security-based swap dealer an entity that engages in a de minimis quantity of security-based swap dealing in connection with transactions with or on behalf of its customers. The Commission shall promulgate regulations to establish factors with respect to the making of any determination to exempt.

“(72) APPROPRIATE FEDERAL BANKING AGENCY.—The term ‘appropriate Federal banking agency’ has the same meaning as in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)).

“(73) BOARD.—The term ‘Board’ means the Board of Governors of the Federal Reserve System.

“(74) PRUDENTIAL REGULATOR.—The term ‘prudential regulator’ has the same meaning as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

“(75) SECURITY-BASED SWAP DATA REPOSITORY.—The term ‘security-based swap data repository’ means any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, security-based swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for security-based swaps.

“(76) SWAP DEALER.—The term ‘swap dealer’ has the same meaning as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

“(77) SECURITY-BASED SWAP EXECUTION FACILITY.—The term ‘security-based swap execution facility’ means a trading system or platform in which multiple participants have the
ability to execute or trade security-based swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that—

(A) facilitates the execution of security-based swaps between persons; and

(B) is not a national securities exchange.

(78) SECURITY-BASED SWAP AGREEMENT.—

(A) IN GENERAL.—For purposes of sections 9, 10, 16, 20, and 21A of this Act, and section 17 of the Securities Act of 1933 (15 U.S.C. 77q), the term ‘security-based swap agreement’ means a swap agreement as defined in section 206A of the Gramm-Leach-Bliley Act (15 U.S.C. 78c note) of which a material term is based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein.

(B) EXCLUSIONS.—The term ‘security-based swap agreement’ does not include any security-based swap.

(b) AUTHORITY TO FURTHER DEFINE TERMS.—The Securities and Exchange Commission may, by rule, further define—

(1) the term “commercial risk”;

(2) any other term included in an amendment to the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)) made by this subtitle; and

(3) the terms “security-based swap”, “security-based swap dealer”, “major security-based swap participant”, and “eligible contract participant”, with regard to security-based swaps (as such terms are defined in the amendments made by subsection (a)) for the purpose of including transactions and entities that have been structured to evade this subtitle or the amendments made by this subtitle.

SEC. 762. REPEAL OF PROHIBITION ON REGULATION OF SECURITY-BASED SWAP AGREEMENTS.


(b) CONFORMING AMENDMENTS TO GRAMM-LEACH-BLILEY.—Section 206A(a) of the Gramm-Leach-Bliley Act (15 U.S.C. 78c note) is amended in the material preceding paragraph (1), by striking “Except as” and all that follows through “that—” and inserting the following: “Except as provided in subsection (b), as used in this section, the term ‘swap agreement’ means any agreement, contract, or transaction that—”.

(c) CONFORMING AMENDMENTS TO THE SECURITIES ACT OF 1933.—

(1) Section 2A of the Securities Act of 1933 (15 U.S.C. 77b–1) is amended—

(A) by striking subsection (a) and reserving that subsection; and

(B) by striking “(as defined in section 206B of the Gramm-Leach-Bliley Act)” each place that such term appears and inserting “(as defined in section 3(a)(78) of the Securities Exchange Act of 1934)”.

(2) Section 17 of the Securities Act of 1933 (15 U.S.C. 77q) is amended—

(A) in subsection (a)—
(i) by inserting “(including security-based swaps)” after “securities”; and
(ii) by striking “(as defined in section 206B of the Gramm-Leach-Bliley Act)” and inserting “(as defined in section 3(a)(78) of the Securities Exchange Act)”; and
(B) in subsection (d), by striking “206B of the Gramm-Leach-Bliley Act” and inserting “3(a)(78) of the Securities Exchange Act of 1934”.

(1) in section 3A (15 U.S.C. 78c–1)—
(A) by striking subsection (a) and reserving that subsection; and
(B) by striking “(as defined in section 206B of the Gramm-Leach-Bliley Act)” each place that the term appears;
(2) in section 9 (15 U.S.C. 78i)—
(A) by striking paragraphs (2) through (5) and inserting the following:
“(2) To effect, alone or with 1 or more other persons, a series of transactions in any security registered on a national securities exchange, any security not so registered, or in connection with any security-based swap or security-based swap agreement with respect to such security creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.
“(3) If a dealer, broker, security-based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the security, a security-based swap, or a security-based swap agreement with respect to such security, to induce the purchase or sale of any security registered on a national securities exchange, any security not so registered, any security-based swap, or any security-based swap agreement with respect to such security by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any 1 or more persons conducted for the purpose of raising or depressing the price of such security.
“(4) If a dealer, broker, security-based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the security, a security-based swap, or a security-based swap agreement with respect to such security, to make, regarding any security registered on a national securities exchange, any security not so registered, any security-based swap, or any security-based swap agreement with respect to such security, for the purpose of inducing the purchase or sale of such security, such security-based swap, or such security-based swap agreement any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which that person knew or had reasonable ground to believe was so false or misleading.
“(5) For a consideration, received directly or indirectly from a broker, dealer, security-based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the security, a security-based swap, or security-based swap agreement with respect to such security, to induce the purchase of any security registered on a national securities exchange, any security not so registered, any security-based swap, or any security-based swap agreement with respect to such security by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of the market operations of any 1 or more persons conducted for the purpose of raising or depressing the price of such security;” and

(B) in subsection (i), by striking “(as defined in section 206B of the Gramm-Leach-Bliley Act)”;

(3) in section 10 (15 U.S.C. 78j)—

(A) in subsection (b), by striking “(as defined in section 206B of the Gramm-Leach-Bliley Act),” each place that term appears; and

(B) in the matter following subsection (b), by striking “(as defined in section 206B of the Gramm-Leach-Bliley Act),” in each place that such terms appear;”;

(4) in section 15 (15 U.S.C. 78o)—

(A) in subsection (c)(1)(A), by striking “(as defined in section 206B of the Gramm-Leach-Bliley Act),”;

(B) in subparagraphs (B) and (C) of subsection (c)(1), by striking “(as defined in section 206B of the Gramm-Leach-Bliley Act)” each place that term appears;

(C) by redesignating subsection (i), as added by section 303(f) of the Commodity Futures Modernization Act of 2000 (Public Law 106–554; 114 Stat. 2763A–455), as subsection (j); and

(D) in subsection (j), as redesignated by subparagraph (C), by striking “(as defined in section 206B of the Gramm-Leach-Bliley Act)”;

(5) in section 16 (15 U.S.C. 78p)—

(A) in subsection (a)(2)(C), by striking “(as defined in section 206(b) of the Gramm-Leach-Bliley Act (15 U.S.C. 78c note))”;

(B) in subsection (a)(3)(B), by inserting “or security-based swaps” after “security-based swap agreement”;

(C) in the first sentence of subsection (b), by striking “(as defined in section 206B of the Gramm-Leach-Bliley Act)”;

(D) in the third sentence of subsection (b), by striking “(as defined in section 206B of the Gramm-Leach-Bliley Act)” and inserting “or a security-based swap”; and

(E) in subsection (g), by striking “(as defined in section 206B of the Gramm-Leach-Bliley Act)”;

(6) in section 20 (15 U.S.C. 78t),

(A) in subsection (d), by striking “(as defined in section 206B of the Gramm-Leach-Bliley Act);” and

(B) in subsection (f), by striking “(as defined in section 206B of the Gramm-Leach-Bliley Act);” and

(7) in section 21A (15 U.S.C. 78u–1)—

(A) in subsection (a)(1), by striking “(as defined in section 206B of the Gramm-Leach-Bliley Act)”;}
SEC. 763. AMENDMENTS TO THE SECURITIES EXCHANGE ACT OF 1934.

(a) CLEARING FOR SECURITY-BASED SWAPS.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by inserting after section 3B (as added by section 717 of this Act):

"SEC. 3C. CLEARING FOR SECURITY-BASED SWAPS.

“(a) IN GENERAL.—
“(1) STANDARD FOR CLEARING.—It shall be unlawful for any person to engage in a security-based swap unless that person submits such security-based swap for clearing to a clearing agency that is registered under this Act or a clearing agency that is exempt from registration under this Act if the security-based swap is required to be cleared.

“(2) OPEN ACCESS.—The rules of a clearing agency described in paragraph (1) shall—
“(A) prescribe that all security-based swaps submitted to the clearing agency with the same terms and conditions are economically equivalent within the clearing agency and may be offset with each other within the clearing agency; and

“(B) provide for non-discriminatory clearing of a security-based swap executed bilaterally or on or through the rules of an unaffiliated national securities exchange or security-based swap execution facility.

“(b) COMMISSION REVIEW.—
“(1) COMMISSION-INITIATED REVIEW.—
“(A) The Commission on an ongoing basis shall review each security-based swap, or any group, category, type, or class of security-based swaps to make a determination that such security-based swap, or group, category, type, or class of security-based swaps should be required to be cleared.

“(B) The Commission shall provide at least a 30-day public comment period regarding any determination under subparagraph (A).

“(2) SWAP SUBMISSIONS.—
“(A) A clearing agency shall submit to the Commission each security-based swap, or any group, category, type, or class of security-based swaps that it plans to accept for clearing and provide notice to its members (in a manner to be determined by the Commission) of such submission.

“(B) Any security-based swap or group, category, type, or class of security-based swaps listed for clearing by a clearing agency as of the date of enactment of this subsection shall be considered submitted to the Commission.

“(C) The Commission shall—
“(i) make available to the public any submission received under subparagraphs (A) and (B);
“(ii) review each submission made under subparagraphs (A) and (B), and determine whether the security-based swap, or group, category, type, or class of security-based swaps, described in the submission is required to be cleared; and

“(iii) provide at least a 30-day public comment period regarding its determination whether the
clearing requirement under subsection (a)(1) shall apply to the submission.

“(3) DEADLINE.—The Commission shall make its determination under paragraph (2)(C) not later than 90 days after receiving a submission made under paragraphs (2)(A) and (2)(B), unless the submitting clearing agency agrees to an extension for the time limitation established under this paragraph.

“(4) DETERMINATION.—

“(A) In reviewing a submission made under paragraph (2), the Commission shall review whether the submission is consistent with section 17A.

“(B) In reviewing a security-based swap, group of security-based swaps or class of security-based swaps pursuant to paragraph (1) or a submission made under paragraph (2), the Commission shall take into account the following factors:

“(i) The existence of significant outstanding notional exposures, trading liquidity and adequate pricing data.

“(ii) The availability of rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded.

“(iii) The effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the clearing agency available to clear the contract.

“(iv) The effect on competition, including appropriate fees and charges applied to clearing.

“(v) The existence of reasonable legal certainty in the event of the insolvency of the relevant clearing agency or 1 or more of its clearing members with regard to the treatment of customer and security-based swap counterparty positions, funds, and property.

“(C) In making a determination under subsection (b)(1) or paragraph (2)(C) that the clearing requirement shall apply, the Commission may require such terms and conditions to the requirement as the Commission determines to be appropriate.

“(5) RULES.—Not later than 1 year after the date of the enactment of this section, the Commission shall adopt rules for a clearing agency’s submission for review, pursuant to this subsection, of a security-based swap, or a group, category, type, or class of security-based swaps, that it seeks to accept for clearing. Nothing in this paragraph limits the Commission from making a determination under paragraph (2)(C) for security-based swaps described in paragraph (2)(B).

“(c) STAY OF CLEARING REQUIREMENT.—

“(1) IN GENERAL.—After making a determination pursuant to subsection (b)(2), the Commission, on application of a counterparty to a security-based swap or on its own initiative, may stay the clearing requirement of subsection (a)(1) until the Commission completes a review of the terms of the security-based swap (or the group, category, type, or class of security-based swaps) and the clearing arrangement.
“(2) DEADLINE.—The Commission shall complete a review undertaken pursuant to paragraph (1) not later than 90 days after issuance of the stay, unless the clearing agency that clears the security-based swap, or group, category, type, or class of security-based swaps, agrees to an extension of the time limitation established under this paragraph.

“(3) DETERMINATION.—Upon completion of the review undertaken pursuant to paragraph (1), the Commission may—

“(A) determine, unconditionally or subject to such terms and conditions as the Commission determines to be appropriate, that the security-based swap, or group, category, type, or class of security-based swaps, must be cleared pursuant to this subsection if it finds that such clearing is consistent with subsection (b)(4); or

“(B) determine that the clearing requirement of subsection (a)(1) shall not apply to the security-based swap, or group, category, type, or class of security-based swaps.

“(4) RULES.—Not later than 1 year after the date of the enactment of this section, the Commission shall adopt rules for reviewing, pursuant to this subsection, a clearing agency’s clearing of a security-based swap, or a group, category, type, or class of security-based swaps, that it has accepted for clearing.

“(d) PREVENTION OF EVASION.—

“(1) IN GENERAL.—The Commission shall prescribe rules under this section (and issue interpretations of rules prescribed under this section), as determined by the Commission to be necessary to prevent evasions of the mandatory clearing requirements under this Act.

“(2) DUTY OF COMMISSION TO INVESTIGATE AND TAKE CERTAIN ACTIONS.—To the extent the Commission finds that a particular security-based swap or any group, category, type, or class of security-based swaps that would otherwise be subject to mandatory clearing but no clearing agency has listed the security-based swap or the group, category, type, or class of security-based swaps for clearing, the Commission shall—

“(A) investigate the relevant facts and circumstances;

“(B) within 30 days issue a public report containing the results of the investigation; and

“(C) take such actions as the Commission determines to be necessary and in the public interest, which may include requiring the retaining of adequate margin or capital by parties to the security-based swap or the group, category, type, or class of security-based swaps.

“(3) EFFECT ON AUTHORITY.—Nothing in this subsection—

“(A) authorizes the Commission to adopt rules requiring a clearing agency to list for clearing a security-based swap or any group, category, type, or class of security-based swaps if the clearing of the security-based swap or the group, category, type, or class of security-based swaps would threaten the financial integrity of the clearing agency; and

“(B) affects the authority of the Commission to enforce the open access provisions of subsection (a)(2) with respect to a security-based swap or the group, category, type, or class of security-based swaps that is listed for clearing by a clearing agency.
“(e) REPORTING TRANSITION RULES.—Rules adopted by the Commission under this section shall provide for the reporting of data, as follows:

“(1) Security-based swaps entered into before the date of enactment of this section shall be reported to a registered security-based swap data repository or the Commission no later than 180 days after the effective date of this section.

“(2) Security-based swaps entered into on or after such date of enactment shall be reported to a registered security-based swap data repository or the Commission no later than the later of—

“(A) 90 days after such effective date; or

“(B) such other time after entering into the security-based swap as the Commission may prescribe by rule or regulation.

“(f) CLEARING TRANSITION RULES.—

“(1) Security-based swaps entered into before the date of enactment of this section are exempt from the clearing requirements of this subsection if reported pursuant to subsection (e)(1).

“(2) Security-based swaps entered into before application of the clearing requirement pursuant to this section are exempt from the clearing requirements of this section if reported pursuant to subsection (e)(2).

“(g) EXCEPTIONS.—

“(1) IN GENERAL.—The requirements of subsection (a)(1) shall not apply to a security-based swap if 1 of the counterparties to the security-based swap—

“(A) is not a financial entity;

“(B) is using security-based swaps to hedge or mitigate commercial risk; and

“(C) notifies the Commission, in a manner set forth by the Commission, how it generally meets its financial obligations associated with entering into non-cleared security-based swaps.

“(2) OPTION TO CLEAR.—The application of the clearing exception in paragraph (1) is solely at the discretion of the counterparty to the security-based swap that meets the conditions of subparagraphs (A) through (C) of paragraph (1).

“(3) FINANCIAL ENTITY DEFINITION.—

“(A) IN GENERAL.—For the purposes of this subsection, the term ‘financial entity’ means—

“(i) a swap dealer;

“(ii) a security-based swap dealer;

“(iii) a major swap participant;

“(iv) a major security-based swap participant;

“(v) a commodity pool as defined in section 1a(10) of the Commodity Exchange Act;

“(vi) a private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80–b–2(a));

“(vii) an employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);

“(viii) a person predominantly engaged in activities that are in the business of banking or financial in
nature, as defined in section 4(k) of the Bank Holding Company Act of 1956.

“(B) EXCLUSION.—The Commission shall consider whether to exempt small banks, savings associations, farm credit system institutions, and credit unions, including—

“(i) depository institutions with total assets of $10,000,000,000 or less;
“(ii) farm credit system institutions with total assets of $10,000,000,000 or less; or
“(iii) credit unions with total assets of $10,000,000,000 or less.

“(4) TREATMENT OF AFFILIATES.—

“(A) IN GENERAL.—An affiliate of a person that qualifies for an exception under this subsection (including affiliate entities predominantly engaged in providing financing for the purchase of the merchandise or manufactured goods of the person) may qualify for the exception only if the affiliate, acting on behalf of the person and as an agent, uses the security-based swap to hedge or mitigate the commercial risk of the person or other affiliate of the person that is not a financial entity.

“(B) PROHIBITION RELATING TO CERTAIN AFFILIATES.—The exception in subparagraph (A) shall not apply if the affiliate is—

“(i) a swap dealer;
“(ii) a security-based swap dealer;
“(iii) a major swap participant;
“(iv) a major security-based swap participant;
“(v) an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), but for paragraph (1) or (7) of subsection (c) of that Act (15 U.S.C. 80a–3(c));
“(vi) a commodity pool; or
“(vii) a bank holding company with over $50,000,000,000 in consolidated assets.

“(C) TRANSITION RULE FOR AFFILIATES.—An affiliate, subsidiary, or a wholly owned entity of a person that qualifies for an exception under subparagraph (A) and is predominantly engaged in providing financing for the purchase or lease of merchandise or manufactured goods of the person shall be exempt from the margin requirement described in section 15F(e) and the clearing requirement described in subsection (a) with regard to security-based swaps entered into to mitigate the risk of the financing activities for not less than a 2-year period beginning on the date of enactment of this subparagraph.

“(5) SELECTION OF COUNTERPARTY.—

“(A) SECURITY-BASED SWAPS REQUIRED TO BE CLEARED.—With respect to any security-based swap that is subject to the mandatory clearing requirement under subsection (a) and entered into by a security-based swap dealer or a major security-based swap participant with a counterparty that is not a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant, the counterparty shall have the
sole right to select the clearing agency at which the security-based swap will be cleared.

“(B) SECURITY-BASED SWAPS NOT REQUIRED TO BE CLEARED.—With respect to any security-based swap that is not subject to the mandatory clearing requirement under subsection (a) and entered into by a security-based swap dealer or a major security-based swap participant with a counterparty that is not a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant, the counterparty—

“(i) may elect to require clearing of the security-based swap; and

“(ii) shall have the sole right to select the clearing agency at which the security-based swap will be cleared.

“(6) ABUSE OF EXCEPTION.—The Commission may prescribe such rules or issue interpretations of the rules as the Commission determines to be necessary to prevent abuse of the exceptions described in this subsection. The Commission may also request information from those persons claiming the clearing exception as necessary to prevent abuse of the exceptions described in this subsection.

“(h) TRADE EXECUTION.—

“(1) IN GENERAL.—With respect to transactions involving security-based swaps subject to the clearing requirement of subsection (a)(1), counterparties shall—

“(A) execute the transaction on an exchange; or

“(B) execute the transaction on a security-based swap execution facility registered under section 3D or a security-based swap execution facility that is exempt from registration under section 3D(e).

“(2) EXCEPTION.—The requirements of subparagraphs (A) and (B) of paragraph (1) shall not apply if no exchange or security-based swap execution facility makes the security-based swap available to trade or for security-based swap transactions subject to the clearing exception under subsection (g).

“(i) BOARD APPROVAL.—Exemptions from the requirements of this section to clear a security-based swap or execute a security-based swap through a national securities exchange or security-based swap execution facility shall be available to a counterparty that is an issuer of securities that are registered under section 12 or that is required to file reports pursuant to section 15(d), only if an appropriate committee of the issuer's board or governing body has reviewed and approved the issuer's decision to enter into security-based swaps that are subject to such exemptions.

“(j) DESIGNATION OF CHIEF COMPLIANCE OFFICER.—

“(1) IN GENERAL.—Each registered clearing agency shall designate an individual to serve as a chief compliance officer.

“(2) DUTIES.—The chief compliance officer shall—

“(A) report directly to the board or to the senior officer of the clearing agency;

“(B) in consultation with its board, a body performing a function similar thereto, or the senior officer of the registered clearing agency, resolve any conflicts of interest that may arise;
“(C) be responsible for administering each policy and procedure that is required to be established pursuant to this section;
“(D) ensure compliance with this title (including regulations issued under this title) relating to agreements, contracts, or transactions, including each rule prescribed by the Commission under this section;
“(E) establish procedures for the remediation of noncompliance issues identified by the compliance officer through any—
“(i) compliance office review;
“(ii) look-back;
“(iii) internal or external audit finding;
“(iv) self-reported error; or
“(v) validated complaint; and
“(F) establish and follow appropriate procedures for the handling, management response, remediation, re-testing, and closing of noncompliance issues.
“(3) ANNUAL REPORTS—
“(A) IN GENERAL.—In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—
“(i) the compliance of the registered clearing agency or security-based swap execution facility of the compliance officer with respect to this title (including regulations under this title); and
“(ii) each policy and procedure of the registered clearing agency of the compliance officer (including the code of ethics and conflict of interest policies of the registered clearing agency).
“(B) REQUIREMENTS.—A compliance report under subparagraph (A) shall—
“(i) accompany each appropriate financial report of the registered clearing agency that is required to be furnished to the Commission pursuant to this section; and
“(ii) include a certification that, under penalty of law, the compliance report is accurate and complete.”.

(b) CLEARING AGENCY REQUIREMENTS.—Section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1) is amended by adding at the end the following:
“(g) REGISTRATION REQUIREMENT.—It shall be unlawful for a clearing agency, unless registered with the Commission, directly or indirectly to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a clearing agency with respect to a security-based swap.
“(h) VOLUNTARY REGISTRATION.—A person that clears agreements, contracts, or transactions that are not required to be cleared under this title may register with the Commission as a clearing agency.
“(i) STANDARDS FOR CLEARING AGENCIES CLEARING SECURITY-BASED SWAP TRANSACTIONS.—To be registered and to maintain registration as a clearing agency that clears security-based swap transactions, a clearing agency shall comply with such standards as the Commission may establish by rule. In establishing any such standards, and in the exercise of its oversight of such a
clearing agency pursuant to this title, the Commission may conform such standards or oversight to reflect evolving United States and international standards. Except where the Commission determines otherwise by rule or regulation, a clearing agency shall have reasonable discretion in establishing the manner in which it complies with any such standards.

“(j) Rules.—The Commission shall adopt rules governing persons that are registered as clearing agencies for security-based swaps under this title.

“(k) Exemptions.—The Commission may exempt, conditionally or unconditionally, a clearing agency from registration under this section for the clearing of security-based swaps if the Commission determines that the clearing agency is subject to comparable, comprehensive supervision and regulation by the Commodity Futures Trading Commission or the appropriate government authorities in the home country of the agency. Such conditions may include, but are not limited to, requiring that the clearing agency be available for inspection by the Commission and make available all information requested by the Commission.

“(l) Existing Depository Institutions and Derivative Clearing Organizations.—

“(1) In general.—A depository institution or derivative clearing organization registered with the Commodity Futures Trading Commission under the Commodity Exchange Act that is required to be registered as a clearing agency under this section is deemed to be registered under this section solely for the purpose of clearing security-based swaps to the extent that, before the date of enactment of this subsection—

“(A) the depository institution cleared swaps as a multilateral clearing organization; or

“(B) the derivative clearing organization cleared swaps pursuant to an exemption from registration as a clearing agency.

“(2) Conversion of Depository Institutions.—A depository institution to which this subsection applies may, by the vote of the shareholders owning not less than 51 percent of the voting interests of the depository institution, be converted into a State corporation, partnership, limited liability company, or similar legal form pursuant to a plan of conversion, if the conversion is not in contravention of applicable State law.

“(3) Sharing of Information.—The Commodity Futures Trading Commission shall make available to the Commission, upon request, all information determined to be relevant by the Commodity Futures Trading Commission regarding a derivatives clearing organization deemed to be registered with the Commission under paragraph (1).

“(m) Modification of Core Principles.—The Commission may conform the core principles established in this section to reflect evolving United States and international standards.”.

(c) Security-Based Swap Execution Facilities.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by inserting after section 3C (as added by subsection (a) of this section) the following:

“SEC. 3D. SECURITY-BASED SWAP EXECUTION FACILITIES.

“(a) Registration.—
“(1) In general.—No person may operate a facility for the trading or processing of security-based swaps, unless the facility is registered as a security-based swap execution facility or as a national securities exchange under this section.

“(2) Dual registration.—Any person that is registered as a security-based swap execution facility under this section shall register with the Commission regardless of whether the person also is registered with the Commodity Futures Trading Commission as a swap execution facility.

“(b) Trading and trade processing.—A security-based swap execution facility that is registered under subsection (a) may—

“(1) make available for trading any security-based swap; and

“(2) facilitate trade processing of any security-based swap.

“(c) Identification of facility used to trade security-based swaps by national securities exchanges.—A national securities exchange shall, to the extent that the exchange also operates a security-based swap execution facility and uses the same electronic trade execution system for listing and executing trades of security-based swaps on or through the exchange and the facility, identify whether electronic trading of such security-based swaps is taking place on or through the national securities exchange or the security-based swap execution facility.

“(d) Core principles for security-based swap execution facilities.—

“(1) Compliance with core principles.—

“(A) In general.—To be registered, and maintain registration, as a security-based swap execution facility, the security-based swap execution facility shall comply with—

“(i) the core principles described in this subsection; and

“(ii) any requirement that the Commission may impose by rule or regulation.

“(B) Reasonable discretion of security-based swap execution facility.—Unless otherwise determined by the Commission, by rule or regulation, a security-based swap execution facility described in subparagraph (A) shall have reasonable discretion in establishing the manner in which it complies with the core principles described in this subsection.

“(2) Compliance with rules.—A security-based swap execution facility shall—

“(A) establish and enforce compliance with any rule established by such security-based swap execution facility, including—

“(i) the terms and conditions of the security-based swaps traded or processed on or through the facility; and

“(ii) any limitation on access to the facility;

“(B) establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules, including means—

“(i) to provide market participants with impartial access to the market; and

“(ii) to capture information that may be used in establishing whether rule violations have occurred; and
“(C) establish rules governing the operation of the facility, including rules specifying trading procedures to be used in entering and executing orders traded or posted on the facility, including block trades.

“(3) Security-Based Swaps Not Readily Susceptible to Manipulation.—The security-based swap execution facility shall permit trading only in security-based swaps that are not readily susceptible to manipulation.

“(4) Monitoring of Trading and Trade Processing.—The security-based swap execution facility shall—

“(A) establish and enforce rules or terms and conditions defining, or specifications detailing—

“(i) trading procedures to be used in entering and executing orders traded on or through the facilities of the security-based swap execution facility; and

“(ii) procedures for trade processing of security-based swaps on or through the facilities of the security-based swap execution facility; and

“(B) monitor trading in security-based swaps to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process through surveillance, compliance, and disciplinary practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.

“(5) Ability to Obtain Information.—The security-based swap execution facility shall—

“(A) establish and enforce rules that will allow the facility to obtain any necessary information to perform any of the functions described in this subsection; and

“(B) provide the information to the Commission on request; and

“(C) have the capacity to carry out such international information-sharing agreements as the Commission may require.

“(6) Financial Integrity of Transactions.—The security-based swap execution facility shall establish and enforce rules and procedures for ensuring the financial integrity of security-based swaps entered on or through the facilities of the security-based swap execution facility, including the clearance and settlement of security-based swaps pursuant to section 3C(a)(1).

“(7) Emergency Authority.—The security-based swap execution facility shall adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, as is necessary and appropriate, including the authority to liquidate or transfer open positions in any security-based swap or to suspend or curtail trading in a security-based swap.

“(8) Timely Publication of Trading Information.—

“(A) In General.—The security-based swap execution facility shall make public timely information on price, trading volume, and other trading data on security-based swaps to the extent prescribed by the Commission.

“(B) Capacity of Security-Based Swap Execution Facility.—The security-based swap execution facility shall be required to have the capacity to electronically capture
and transmit and disseminate trade information with respect to transactions executed on or through the facility.

“(9) RECORDKEEPING AND REPORTING.—

“(A) IN GENERAL.—A security-based swap execution facility shall—

“(i) maintain records of all activities relating to the business of the facility, including a complete audit trail, in a form and manner acceptable to the Commission for a period of 5 years; and

“(ii) report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under this title.

“(B) REQUIREMENTS.—The Commission shall adopt data collection and reporting requirements for security-based swap execution facilities that are comparable to corresponding requirements for clearing agencies and security-based swap data repositories.

“(10) ANTITRUST CONSIDERATIONS.—Unless necessary or appropriate to achieve the purposes of this title, the security-based swap execution facility shall not—

“(A) adopt any rules or taking any actions that result in any unreasonable restraint of trade; or

“(B) impose any material anticompetitive burden on trading or clearing.

“(11) CONFLICTS OF INTEREST.—The security-based swap execution facility shall—

“(A) establish and enforce rules to minimize conflicts of interest in its decision-making process; and

“(B) establish a process for resolving the conflicts of interest.

“(12) FINANCIAL RESOURCES.—

“(A) IN GENERAL.—The security-based swap execution facility shall have adequate financial, operational, and managerial resources to discharge each responsibility of the security-based swap execution facility, as determined by the Commission.

“(B) DETERMINATION OF RESOURCE ADEQUACY.—The financial resources of a security-based swap execution facility shall be considered to be adequate if the value of the financial resources—

“(i) enables the organization to meet its financial obligations to its members and participants notwithstanding a default by the member or participant creating the largest financial exposure for that organization in extreme but plausible market conditions; and

“(ii) exceeds the total amount that would enable the security-based swap execution facility to cover the operating costs of the security-based swap execution facility for a 1-year period, as calculated on a rolling basis.

“(13) SYSTEM SAFEGUARDS.—The security-based swap execution facility shall—
“(A) establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and automated systems, that—

“(i) are reliable and secure; and

“(ii) have adequate scalable capacity;

“(B) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for—

“(i) the timely recovery and resumption of operations; and

“(ii) the fulfillment of the responsibilities and obligations of the security-based swap execution facility; and

“(C) periodically conduct tests to verify that the backup resources of the security-based swap execution facility are sufficient to ensure continued—

“(i) order processing and trade matching;

“(ii) price reporting;

“(iii) market surveillance; and

“(iv) maintenance of a comprehensive and accurate audit trail.

“(14) DESIGNATION OF CHIEF COMPLIANCE OFFICER.—

“(A) IN GENERAL.—Each security-based swap execution facility shall designate an individual to serve as a chief compliance officer.

“(B) DUTIES.—The chief compliance officer shall—

“(i) report directly to the board or to the senior officer of the facility;

“(ii) review compliance with the core principles in this subsection;

“(iii) in consultation with the board of the facility, a body performing a function similar to that of a board, or the senior officer of the facility, resolve any conflicts of interest that may arise;

“(iv) be responsible for establishing and administering the policies and procedures required to be established pursuant to this section;

“(v) ensure compliance with this title and the rules and regulations issued under this title, including rules prescribed by the Commission pursuant to this section;

“(vi) establish procedures for the remediation of noncompliance issues found during—

“(I) compliance office reviews;

“(II) look backs;

“(III) internal or external audit findings;

“(IV) self-reported errors; or

“(V) through validated complaints; and

“(vii) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

“(C) ANNUAL REPORTS.—

“(i) IN GENERAL.—In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—
“(I) the compliance of the security-based swap execution facility with this title; and

“(II) the policies and procedures, including the code of ethics and conflict of interest policies, of the security-based security-based swap execution facility.

“(ii) REQUIREMENTS.—The chief compliance officer shall—

“(I) submit each report described in clause (i) with the appropriate financial report of the security-based swap execution facility that is required to be submitted to the Commission pursuant to this section; and

“(II) include in the report a certification that, under penalty of law, the report is accurate and complete.

“(e) EXEMPTIONS.—The Commission may exempt, conditionally or unconditionally, a security-based swap execution facility from registration under this section if the Commission finds that the facility is subject to comparable, comprehensive supervision and regulation on a consolidated basis by the Commodity Futures Trading Commission.

“(f) RULES.—The Commission shall prescribe rules governing the regulation of security-based swap execution facilities under this section.”.

(d) SEGREGATION OF ASSETS HELD AS COLLATERAL IN SECURITY-BASED SWAP TRANSACTIONS.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by inserting after section 3D (as added by subsection (b)) the following:

“SEC. 3E. SEGREGATION OF ASSETS HELD AS COLLATERAL IN SECURITY-BASED SWAP TRANSACTIONS.

“(a) REGISTRATION REQUIREMENT.—It shall be unlawful for any person to accept any money, securities, or property (or to extend any credit in lieu of money, securities, or property) from, for, or on behalf of a security-based swaps customer to margin, guarantee, or secure a security-based swap cleared by or through a clearing agency (including money, securities, or property accruing to the customer as the result of such a security-based swap), unless the person shall have registered under this title with the Commission as a broker, dealer, or security-based swap dealer, and the registration shall not have expired nor been suspended nor revoked.

“(b) CLEARED SECURITY-BASED SWAPS.—

“(1) SEGREGATION REQUIRED.—A broker, dealer, or security-based swap dealer shall treat and deal with all money, securities, and property of any security-based swaps customer received to margin, guarantee, or secure a security-based swap cleared by or through a clearing agency (including money, securities, or property accruing to the security-based swaps customer as the result of such a security-based swap) as belonging to the security-based swaps customer.

“(2) COMMINGLING PROHIBITED.—Money, securities, and property of a security-based swaps customer described in paragraph (1) shall be separately accounted for and shall not be commingled with the funds of the broker, dealer, or security-based swap dealer or be used to margin, secure, or guarantee
any trades or contracts of any security-based swaps customer or person other than the person for whom the same are held.

"(c) EXCEPTIONS.—

"(1) USE OF FUNDS.—

"(A) IN GENERAL.—Notwithstanding subsection (b), money, securities, and property of a security-based swaps customer of a broker, dealer, or security-based swap dealer described in subsection (b) may, for convenience, be commingled and deposited in the same 1 or more accounts with any bank or trust company or with a clearing agency.

"(B) WITHDRAWAL.—Notwithstanding subsection (b), such share of the money, securities, and property described in subparagraph (A) as in the normal course of business shall be necessary to margin, guarantee, secure, transfer, adjust, or settle a cleared security-based swap with a clearing agency, or with any member of the clearing agency, may be withdrawn and applied to such purposes, including the payment of commissions, brokerage, interest, taxes, storage, and other charges, lawfully accruing in connection with the cleared security-based swap.

"(2) COMMISSION ACTION.—Notwithstanding subsection (b), in accordance with such terms and conditions as the Commission may prescribe by rule, regulation, or order, any money, securities, or property of a security-based swaps customer of a broker, dealer, or security-based swap dealer described in subsection (b) may be commingled and deposited as provided in this section with any other money, securities, or property received by the broker, dealer, or security-based swap dealer and required by the Commission to be separately accounted for and treated and dealt with as belonging to the security-based swaps customer of the broker, dealer, or security-based swap dealer.

"(d) PERMITTED INVESTMENTS.—Money described in subsection (b) may be invested in obligations of the United States, in general obligations of any State or of any political subdivision of a State, and in obligations fully guaranteed as to principal and interest by the United States, or in any other investment that the Commission may by rule or regulation prescribe, and such investments shall be made in accordance with such rules and regulations and subject to such conditions as the Commission may prescribe.

"(e) PROHIBITION.—It shall be unlawful for any person, including any clearing agency and any depository institution, that has received any money, securities, or property for deposit in a separate account or accounts as provided in subsection (b) to hold, dispose of, or use any such money, securities, or property as belonging to the depositing broker, dealer, or security-based swap dealer or any person other than the swaps customer of the broker, dealer, or security-based swap dealer.

"(f) SEGREGATION REQUIREMENTS FOR UNCLEARED SECURITY-BASED SWAPS.—

"(1) SEGREGATION OF ASSETS HELD AS COLLATERAL IN UNCLEARED SECURITY-BASED SWAP TRANSACTIONS.—

"(A) NOTIFICATION.—A security-based swap dealer or major security-based swap participant shall be required to notify the counterparty of the security-based swap dealer or major security-based swap participant at the beginning of a security-based swap transaction that the counterparty
has the right to require segregation of the funds of other property supplied to margin, guarantee, or secure the obligations of the counterparty.

“(B) SEGREGATION AND MAINTENANCE OF FUNDS.—At the request of a counterparty to a security-based swap that provides funds or other property to a security-based swap dealer or major security-based swap participant to margin, guarantee, or secure the obligations of the counterparty, the security-based swap dealer or major security-based swap participant shall—

“(i) segregate the funds or other property for the benefit of the counterparty; and

“(ii) in accordance with such rules and regulations as the Commission may promulgate, maintain the funds or other property in a segregated account separate from the assets and other interests of the security-based swap dealer or major security-based swap participant.

“(2) APPLICABILITY.—The requirements described in paragraph (1) shall—

“(A) apply only to a security-based swap between a counterparty and a security-based swap dealer or major security-based swap participant that is not submitted for clearing to a clearing agency; and

“(B)(i) not apply to variation margin payments; or

“(ii) not preclude any commercial arrangement regarding—

“(I) the investment of segregated funds or other property that may only be invested in such investments as the Commission may permit by rule or regulation; and

“(II) the related allocation of gains and losses resulting from any investment of the segregated funds or other property.

“(3) USE OF INDEPENDENT THIRD-PARTY CUSTODIANS.—The segregated account described in paragraph (1) shall be—

“(A) carried by an independent third-party custodian; and

“(B) designated as a segregated account for and on behalf of the counterparty.

“(4) REPORTING REQUIREMENT.—If the counterparty does not choose to require segregation of the funds or other property supplied to margin, guarantee, or secure the obligations of the counterparty, the security-based swap dealer or major security-based swap participant shall report to the counterparty of the security-based swap dealer or major security-based swap participant on a quarterly basis that the back office procedures of the security-based swap dealer or major security-based swap participant relating to margin and collateral requirements are in compliance with the agreement of the counterparties.

“(g) BANKRUPTCY.—A security-based swap, as defined in section 3(a)(68) shall be considered to be a security as such term is used in section 101(53A)(B) and subchapter III of title 11, United States Code. An account that holds a security-based swap, other than a portfolio margining account referred to in section 15(c)(3)(C) shall be considered to be a securities account, as that term is defined in section 741 of title 11, United States Code. The definitions
of the terms 'purchase' and 'sale' in section 3(a)(13) and (14) shall be applied to the terms 'purchase' and 'sale', as used in section 741 of title 11, United States Code. The term 'customer', as defined in section 741 of title 11, United States Code, excludes any person, to the extent that such person has a claim based on any open repurchase agreement, open reverse repurchase agreement, stock borrowed agreement, non-cleared option, or non-cleared security-based swap except to the extent of any margin delivered to or by the customer with respect to which there is a customer protection requirement under section 15(c)(3) or a segregation requirement.”.

(e) TRADING IN SECURITY-BASED SWAPS.—Section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f) is amended by adding at the end the following:

“(l) SECURITY-BASED SWAPS.—It shall be unlawful for any person to effect a transaction in a security-based swap with or for a person that is not an eligible contract participant, unless such transaction is effected on a national securities exchange registered pursuant to subsection (b).”.

(f) ADDITIONS OF SECURITY-BASED SWAPS TO CERTAIN ENFORCEMENT PROVISIONS.—Section 9(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78i(b)) is amended by striking paragraphs (1) through (3) and inserting the following:

“(1) any transaction in connection with any security whereby any party to such transaction acquires—

“(A) any put, call, straddle, or other option or privilege of buying the security from or selling the security to another without being bound to do so;

“(B) any security futures product on the security; or

“(C) any security-based swap involving the security or the issuer of the security;

“(2) any transaction in connection with any security with relation to which such person has, directly or indirectly, any interest in any—

“(A) such put, call, straddle, option, or privilege;

“(B) such security futures product; or

“(C) such security-based swap; or

“(3) any transaction in any security for the account of any person who such person has reason to believe has, and who actually has, directly or indirectly, any interest in any—

“(A) such put, call, straddle, option, or privilege;

“(B) such security futures product with relation to such security; or

“(C) any security-based swap involving such security or the issuer of such security.”.

(g) RULEMAKING AUTHORITY TO PREVENT FRAUD, MANIPULATION AND DECEPTIVE CONDUCT IN SECURITY-BASED SWAPS.—Section 9 of the Securities Exchange Act of 1934 (15 U.S.C. 78i) is amended by adding at the end the following:

“(j) It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange, to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security-based swap, in connection with which such person engages in any fraudulent, deceptive, or manipulative act or practice, makes any fictitious quotation, or engages in any transaction, practice, or course of business which operates as a fraud or deceit upon any person. The Commission may prescribe regulations.
shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such transactions, acts, practices, and courses of business as are fraudulent, deceptive, or manipulative, and such quotations as are fictitious.”

(h) **Position Limits and Position Accountability for Security-Based Swaps.**—The Securities Exchange Act of 1934 is amended by inserting after section 10A (15 U.S.C. 78j–1) the following:

**SEC. 10B. POSITION LIMITS AND POSITION ACCOUNTABILITY FOR SECURITY-BASED SWAPS AND LARGE TRADER REPORTING.**

“(a) **Position Limits.**—As a means reasonably designed to prevent fraud and manipulation, the Commission shall, by rule or regulation, as necessary or appropriate in the public interest or for the protection of investors, establish limits (including related hedge exemption provisions) on the size of positions in any security-based swap that may be held by any person. In establishing such limits, the Commission may require any person to aggregate positions in—

“(1) any security-based swap and any security or loan or group of securities or loans on which such security-based swap is based, which such security-based swap references, or to which such security-based swap is related as described in paragraph (68) of section 3(a), and any other instrument relating to such security or loan or group or index of securities or loans; or

“(2) any security-based swap and—

“(A) any security or group or index of securities, the price, yield, value, or volatility of which, or of which any interest therein, is the basis for a material term of such security-based swap as described in paragraph (68) of section 3(a); and

“(B) any other instrument relating to the same security or group or index of securities described under subparagraph (A).

“(b) **Exemptions.**—The Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person or class of persons, any security-based swap or class of security-based swaps, or any transaction or class of transactions from any requirement the Commission may establish under this section with respect to position limits.

“(c) **SRO Rules.**—

“(1) **In General.**—As a means reasonably designed to prevent fraud or manipulation, the Commission, by rule, regulation, or order, as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title, may direct a self-regulatory organization—

“(A) to adopt rules regarding the size of positions in any security-based swap that may be held by—

“(i) any member of such self-regulatory organization; or

“(ii) any person for whom a member of such self-regulatory organization effects transactions in such security-based swap; and

“SEC. 10A. POSITION LIMITS AND POSITION ACCOUNTABILITY FOR SECURITY-BASED SWAPS AND LARGE TRADER REPORTING.
(B) to adopt rules reasonably designed to ensure compliance with requirements prescribed by the Commission under this subsection.

(2) REQUIREMENT TO AGGREGATE POSITIONS.—In establishing the limits under paragraph (1), the self-regulatory organization may require such member or person to aggregate positions in—

(A) any security-based swap and any security or loan or group or narrow-based security index of securities or loans on which such security-based swap is based, which such security-based swap references, or to which such security-based swap is related as described in section 3(a)(68), and any other instrument relating to such security or loan or group or narrow-based security index of securities or loans; or

(B)(i) any security-based swap; and

(ii) any security-based swap and any other instrument relating to the same security or group or narrow-based security index of securities.

(d) LARGE TRADER REPORTING.—The Commission, by rule or regulation, may require any person that effects transactions for such person's own account or the account of others in any securities-based swap or uncleared security-based swap and any security or loan or group or narrow-based security index of securities or loans as set forth in paragraphs (1) and (2) of subsection (a) under this section to report such information as the Commission may prescribe regarding any position or positions in any security-based swap or uncleared security-based swap and any security or loan or group or narrow-based security index of securities or loans as set forth in paragraphs (1) and (2) of subsection (a) under this section.

(i) PUBLIC REPORTING AND REPOSITORIES FOR SECURITY-BASED SWAPS.—Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m) is amended by adding at the end the following:

"(m) PUBLIC AVAILABILITY OF SECURITY-BASED SWAP TRANSACTION DATA.—

(1) IN GENERAL.—

(A) DEFINITION OF REAL-TIME PUBLIC REPORTING.—

In this paragraph, the term 'real-time public reporting' means to report data relating to a security-based swap transaction, including price and volume, as soon as technologically practicable after the time at which the security-based swap transaction has been executed.

(B) PURPOSE.—The purpose of this subsection is to authorize the Commission to make security-based swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery.

(C) GENERAL RULE.—The Commission is authorized to provide by rule for the public availability of security-based swap transaction volume, and pricing data as follows:

(i) With respect to those security-based swaps that are subject to the mandatory clearing requirement described in section 3C(a)(1) (including those security-based swaps that are excepted from the requirement
pursuant to section 3C(g)), the Commission shall require real-time public reporting for such transactions.

“(ii) With respect to those security-based swaps that are not subject to the mandatory clearing requirement described in section 3C(a)(1), but are cleared at a registered clearing agency, the Commission shall require real-time public reporting for such transactions.

“(iii) With respect to security-based swaps that are not cleared at a registered clearing agency and which are reported to a security-based swap data repository or the Commission under section 3C(a)(6), the Commission shall require real-time public reporting for such transactions, in a manner that does not disclose the business transactions and market positions of any person.

“(iv) With respect to security-based swaps that are determined to be required to be cleared under section 3C(b) but are not cleared, the Commission shall require real-time public reporting for such transactions.

“(D) REGISTERED ENTITIES AND PUBLIC REPORTING.—
The Commission may require registered entities to publicly disseminate the security-based swap transaction and pricing data required to be reported under this paragraph.

“(E) RULEMAKING REQUIRED.—With respect to the rule providing for the public availability of transaction and pricing data for security-based swaps described in clauses (i) and (ii) of subparagraph (C), the rule promulgated by the Commission shall contain provisions—

“(i) to ensure such information does not identify the participants;

“(ii) to specify the criteria for determining what constitutes a large notional security-based swap transaction (block trade) for particular markets and contracts;

“(iii) to specify the appropriate time delay for reporting large notional security-based swap transactions (block trades) to the public; and

“(iv) that take into account whether the public disclosure will materially reduce market liquidity.

“(F) TIMELINESS OF REPORTING.—Parties to a security-based swap (including agents of the parties to a security-based swap) shall be responsible for reporting security-based swap transaction information to the appropriate registered entity in a timely manner as may be prescribed by the Commission.

“(G) REPORTING OF SWAPS TO REGISTERED SECURITY-BASED SWAP DATA REPOSITORIES.—Each security-based swap (whether cleared or uncleared) shall be reported to a registered security-based swap data repository.

“(H) REGISTRATION OF CLEARING AGENCIES.—A clearing agency may register as a security-based swap data repository.

“(2) SEMIANNUAL AND ANNUAL PUBLIC REPORTING OF AGGREGATE SECURITY-BASED SWAP DATA.—
“(A) IN GENERAL.—In accordance with subparagraph (B), the Commission shall issue a written report on a semiannual and annual basis to make available to the public information relating to—
  “(i) the trading and clearing in the major security-based swap categories; and
  “(ii) the market participants and developments in new products.
“(B) USE; CONSULTATION.—In preparing a report under subparagraph (A), the Commission shall—
  “(i) use information from security-based swap data repositories and clearing agencies; and
  “(ii) consult with the Office of the Comptroller of the Currency, the Bank for International Settlements, and such other regulatory bodies as may be necessary.
“(C) AUTHORITY OF COMMISSION.—The Commission may, by rule, regulation, or order, delegate the public reporting responsibilities of the Commission under this paragraph in accordance with such terms and conditions as the Commission determines to be appropriate and in the public interest.
“(n) SECURITY-BASED SWAP DATA REPOSITORIES.—
  “(1) REGISTRATION REQUIREMENT.—It shall be unlawful for any person, unless registered with the Commission, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a security-based swap data repository.
  “(2) INSPECTION AND EXAMINATION.—Each registered security-based swap data repository shall be subject to inspection and examination by any representative of the Commission.
  “(3) COMPLIANCE WITH CORE PRINCIPLES.—
    “(A) IN GENERAL.—To be registered, and maintain registration, as a security-based swap data repository, the security-based swap data repository shall comply with—
      “(i) the requirements and core principles described in this subsection; and
      “(ii) any requirement that the Commission may impose by rule or regulation.
    “(B) REASONABLE DISCRETION OF SECURITY-BASED SWAP DATA REPOSITORY.—Unless otherwise determined by the Commission, by rule or regulation, a security-based swap data repository described in subparagraph (A) shall have reasonable discretion in establishing the manner in which the security-based swap data repository complies with the core principles described in this subsection.
  “(4) STANDARD SETTING.—
    “(A) DATA IDENTIFICATION.—
      “(i) IN GENERAL.—In accordance with clause (ii), the Commission shall prescribe standards that specify the data elements for each security-based swap that shall be collected and maintained by each registered security-based swap data repository.
      “(ii) REQUIREMENT.—In carrying out clause (i), the Commission shall prescribe consistent data element standards applicable to registered entities and reporting counterparties.
“(B) DATA COLLECTION AND MAINTENANCE.—The Commission shall prescribe data collection and data maintenance standards for security-based swap data repositories.

“(C) COMPARABILITY.—The standards prescribed by the Commission under this subsection shall be comparable to the data standards imposed by the Commission on clearing agencies in connection with their clearing of security-based swaps.

“(5) DUTIES.—A security-based swap data repository shall—

“(A) accept data prescribed by the Commission for each security-based swap under subsection (b);

“(B) confirm with both counterparties to the security-based swap the accuracy of the data that was submitted;

“(C) maintain the data described in subparagraph (A) in such form, in such manner, and for such period as may be required by the Commission;

“(D)(i) provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity); and

“(ii) provide the information described in subparagraph (A) in such form and at such frequency as the Commission may require to comply with the public reporting requirements set forth in subsection (m);

“(E) at the direction of the Commission, establish automated systems for monitoring, screening, and analyzing security-based swap data;

“(F) maintain the privacy of any and all security-based swap transaction information that the security-based swap data repository receives from a security-based swap dealer, counterparty, or any other registered entity; and

“(G) on a confidential basis pursuant to section 24, upon request, and after notifying the Commission of the request, make available all data obtained by the security-based swap data repository, including individual counterparty trade and position data, to—

“(i) each appropriate prudential regulator;

“(ii) the Financial Stability Oversight Council;

“(iii) the Commodity Futures Trading Commission;

“(iv) the Department of Justice; and

“(v) any other person that the Commission determines to be appropriate, including—

“(I) foreign financial supervisors (including foreign futures authorities);

“(II) foreign central banks; and

“(III) foreign ministries.

“(H) CONFIDENTIALITY AND INDEMNIFICATION AGREEMENT.—Before the security-based swap data repository may share information with any entity described in subparagraph (G)—

“(i) the security-based swap data repository shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 24 relating to the information on security-based swap transactions that is provided; and
“(ii) each entity shall agree to indemnify the security-based swap data repository and the Commission for any expenses arising from litigation relating to the information provided under section 24.

“(6) DESIGNATION OF CHIEF COMPLIANCE OFFICER.—

“(A) IN GENERAL.—Each security-based swap data repository shall designate an individual to serve as a chief compliance officer.

“(B) DUTIES.—The chief compliance officer shall—

“(i) report directly to the board or to the senior officer of the security-based swap data repository;

“(ii) review the compliance of the security-based swap data repository with respect to the requirements and core principles described in this subsection;

“(iii) in consultation with the board of the security-based swap data repository, a body performing a function similar to the board of the security-based swap data repository, or the senior officer of the security-based swap data repository, resolve any conflicts of interest that may arise;

“(iv) be responsible for administering each policy and procedure that is required to be established pursuant to this section;

“(v) ensure compliance with this title (including regulations) relating to agreements, contracts, or transactions, including each rule prescribed by the Commission under this section;

“(vi) establish procedures for the remediation of noncompliance issues identified by the chief compliance officer through any—

“(I) compliance office review;

“(II) look-back;

“(III) internal or external audit finding;

“(IV) self-reported error; or

“(V) validated complaint; and

“(vii) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

“(C) ANNUAL REPORTS.—

“(i) IN GENERAL.—In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—

“(I) the compliance of the security-based swap data repository of the chief compliance officer with respect to this title (including regulations); and

“(II) each policy and procedure of the security-based swap data repository of the chief compliance officer (including the code of ethics and conflict of interest policies of the security-based swap data repository).

“(ii) REQUIREMENTS.—A compliance report under clause (i) shall—

“(I) accompany each appropriate financial report of the security-based swap data repository that is required to be furnished to the Commission pursuant to this section; and
“(II) include a certification that, under penalty of law, the compliance report is accurate and complete.

“(7) Core principles applicable to security-based swap data repositories.—

“(A) Antitrust considerations.—Unless necessary or appropriate to achieve the purposes of this title, the swap data repository shall not—

“(i) adopt any rule or take any action that results in any unreasonable restraint of trade; or

“(ii) impose any material anticompetitive burden on the trading, clearing, or reporting of transactions.

“(B) Governance arrangements.—Each security-based swap data repository shall establish governance arrangements that are transparent—

“(i) to fulfill public interest requirements; and

“(ii) to support the objectives of the Federal Government, owners, and participants.

“(C) Conflicts of interest.—Each security-based swap data repository shall—

“(i) establish and enforce rules to minimize conflicts of interest in the decision-making process of the security-based swap data repository; and

“(ii) establish a process for resolving any conflicts of interest described in clause (i).

“(D) Additional duties developed by Commission.—

“(i) In general.—The Commission may develop 1 or more additional duties applicable to security-based swap data repositories.

“(ii) Consideration of evolving standards.—In developing additional duties under subparagraph (A), the Commission may take into consideration any evolving standard of the United States or the international community.

“(iii) Additional duties for Commission designees.—The Commission shall establish additional duties for any registrant described in section 13(m)(2)(C) in order to minimize conflicts of interest, protect data, ensure compliance, and guarantee the safety and security of the security-based swap data repository.

“(8) Required registration for security-based swap data repositories.—Any person that is required to be registered as a security-based swap data repository under this subsection shall register with the Commission, regardless of whether that person is also licensed under the Commodity Exchange Act as a swap data repository.

“(9) Rules.—The Commission shall adopt rules governing persons that are registered under this subsection.”.

SEC. 764. REGISTRATION AND REGULATION OF SECURITY-BASED SWAP DEALERS AND MAJOR SECURITY-BASED SWAP PARTICIPANTS.

(a) In general.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by inserting after section 15E (15 U.S.C. 78o–7) the following:
SEC. 15F. REGISTRATION AND REGULATION OF SECURITY-BASED
SWAP DEALERS AND MAJOR SECURITY-BASED SWAP
PARTICIPANTS.

(a) Registration.—
“(1) Security-based swap dealers.—It shall be unlawful
for any person to act as a security-based swap dealer unless
the person is registered as a security-based swap dealer with
the Commission.
“(2) Major security-based swap participants.—It shall
be unlawful for any person to act as a major security-based
swap participant unless the person is registered as a major
security-based swap participant with the Commission.

(b) Requirements.—
“(1) In general.—A person shall register as a security-
based swap dealer or major security-based swap participant
by filing a registration application with the Commission.
“(2) Contents.—
“(A) In general.—The application shall be made in
such form and manner as prescribed by the Commission,
and shall contain such information, as the Commission
considers necessary concerning the business in which the
applicant is or will be engaged.
“(B) Continual reporting.—A person that is reg-
istered as a security-based swap dealer or major security-
based swap participant shall continue to submit to the
Commission reports that contain such information per-
taining to the business of the person as the Commission
may require.
“(3) Expiration.—Each registration under this section shall
expire at such time as the Commission may prescribe by rule
or regulation.
“(4) Rules.—Except as provided in subsections (d) and
(e), the Commission may prescribe rules applicable to security-
based swap dealers and major security-based swap participants,
including rules that limit the activities of non-bank security-
based swap dealers and major security-based swap participants.
“(5) Transition.—Not later than 1 year after the date
of enactment of the Wall Street Transparency and Account-
ability Act of 2010, the Commission shall issue rules under
this section to provide for the registration of security-based
swap dealers and major security-based swap participants.
“(6) Statutory disqualification.—Except to the extent
otherwise specifically provided by rule, regulation, or order
of the Commission, it shall be unlawful for a security-based
swap dealer or a major security-based swap participant to
permit any person associated with a security-based swap dealer
or a major security-based swap participant who is subject to
a statutory disqualification to effect or be involved in effecting
security-based swaps on behalf of the security-based swap
dealer or major security-based swap participant, if the security-
based swap dealer or major security-based swap participant
knew, or in the exercise of reasonable care should have known,
of the statutory disqualification.

(c) Dual Registration.—
“(1) Security-based swap dealer.—Any person that is
required to be registered as a security-based swap dealer under
this section shall register with the Commission, regardless
of whether the person also is registered with the Commodity Futures Trading Commission as a swap dealer.

(2) MAJOR SECURITY-BASED SWAP PARTICIPANT.—Any person that is required to be registered as a major security-based swap participant under this section shall register with the Commission, regardless of whether the person also is registered with the Commodity Futures Trading Commission as a major swap participant.

(d) RULEMAKING.—

(1) IN GENERAL.—The Commission shall adopt rules for persons that are registered as security-based swap dealers or major security-based swap participants under this section.

(2) EXCEPTION FOR PRUDENTIAL REQUIREMENTS.—

(A) IN GENERAL.—The Commission may not prescribe rules imposing prudential requirements on security-based swap dealers or major security-based swap participants for which there is a prudential regulator.

(B) APPLICABILITY.—Subparagraph (A) does not limit the authority of the Commission to prescribe rules as directed under this section.

(e) CAPITAL AND MARGIN REQUIREMENTS.—

(1) IN GENERAL.—

(A) SECURITY-BASED SWAP DEALERS AND MAJOR SECURITY-BASED SWAP PARTICIPANTS THAT ARE BANKS.—Each registered security-based swap dealer and major security-based swap participant for which there is not a prudential regulator shall meet such minimum capital requirements and minimum initial and variation margin requirements as the prudential regulator shall by rule or regulation prescribe under paragraph (2)(A).

(B) SECURITY-BASED SWAP DEALERS AND MAJOR SECURITY-BASED SWAP PARTICIPANTS THAT ARE NOT BANKS.—Each registered security-based swap dealer and major security-based swap participant for which there is not a prudential regulator shall meet such minimum capital requirements and minimum initial and variation margin requirements as the Commission shall by rule or regulation prescribe under paragraph (2)(B).

(2) RULES.—

(A) SECURITY-BASED SWAP DEALERS AND MAJOR SECURITY-BASED SWAP PARTICIPANTS THAT ARE BANKS.—The prudential regulators, in consultation with the Commission and the Commodity Futures Trading Commission, shall adopt rules for security-based swap dealers and major security-based swap participants, with respect to their activities as a swap dealer or major swap participant, for which there is a prudential regulator imposing—

(i) capital requirements; and

(ii) both initial and variation margin requirements on all security-based swaps that are not cleared by a registered clearing agency.

(B) SECURITY-BASED SWAP DEALERS AND MAJOR SECURITY-BASED SWAP PARTICIPANTS THAT ARE NOT BANKS.—The Commission shall adopt rules for security-based swap dealers and major security-based swap participants, with respect to their activities as a swap dealer or major swap
participant, for which there is not a prudential regulator imposing—

“(i) capital requirements; and
“(ii) both initial and variation margin requirements on all swaps that are not cleared by a registered clearing agency.

“(C) CAPITAL.—In setting capital requirements for a person that is designated as a security-based swap dealer or a major security-based swap participant for a single type or single class or category of security-based swap or activities, the prudential regulator and the Commission shall take into account the risks associated with other types of security-based swaps or classes of security-based swaps or categories of security-based swaps engaged in and the other activities conducted by that person that are not otherwise subject to regulation applicable to that person by virtue of the status of the person.

“(3) STANDARDS FOR CAPITAL AND MARGIN.—

“(A) IN GENERAL.—To offset the greater risk to the security-based swap dealer or major security-based swap participant and the financial system arising from the use of security-based swaps that are not cleared, the requirements imposed under paragraph (2) shall—
“(i) help ensure the safety and soundness of the security-based swap dealer or major security-based swap participant; and
“(ii) be appropriate for the risk associated with the non-cleared security-based swaps held as a security-based swap dealer or major security-based swap participant.

“(B) RULE OF CONSTRUCTION.—

“(i) IN GENERAL.—Nothing in this section shall limit, or be construed to limit, the authority—
“(I) of the Commission to set financial responsibility rules for a broker or dealer registered pursuant to section 15(b) (except for section 15(b)(11) thereof) in accordance with section 15(c)(3); or
“(II) of the Commodity Futures Trading Commission to set financial responsibility rules for a futures commission merchant or introducing broker registered pursuant to section 4f(a) of the Commodity Exchange Act (except for section 4f(a)(3) thereof) in accordance with section 4f(b) of the Commodity Exchange Act.

“(ii) FUTURES COMMISSION MERCHANTS AND OTHER DEALERS.—A futures commission merchant, introducing broker, broker, or dealer shall maintain sufficient capital to comply with the stricter of any applicable capital requirements to which such futures commission merchant, introducing broker, broker, or dealer is subject to under this title or the Commodity Exchange Act.

“(C) MARGIN REQUIREMENTS.—In prescribing margin requirements under this subsection, the prudential regulator with respect to security-based swap dealers and major security-based swap participants that are depository
institutions, and the Commission with respect to security-
based swap dealers and major security-based swap partici-
pants that are not depository institutions shall permit the
use of noncash collateral, as the regulator or the Commis-
sion determines to be consistent with—

“(i) preserving the financial integrity of markets
trading security-based swaps; and
“(ii) preserving the stability of the United States
financial system.

“(D) COMPARABILITY OF CAPITAL AND MARGIN REQUIRE-
MENTS.—

“(i) IN GENERAL.—The prudential regulators, the
Commission, and the Securities and Exchange
Commission shall periodically (but not less frequently
than annually) consult on minimum capital require-
ments and minimum initial and variation margin
requirements.

“(ii) COMPARABILITY.—The entities described in
clause (i) shall, to the maximum extent practicable,
establish and maintain comparable minimum capital
requirements and minimum initial and variation margin
requirements, including the use of noncash
collateral, for—

“(I) security-based swap dealers; and
“(II) major security-based swap participants.

“(f) REPORTING AND RECORDKEEPING.—

“(1) IN GENERAL.—Each registered security-based swap
dealer and major security-based swap participant—

“(A) shall make such reports as are required by the
Commission, by rule or regulation, regarding the trans-
actions and positions and financial condition of the reg-
istered security-based swap dealer or major security-based
swap participant;

“(B)(i) for which there is a prudential regulator, shall
keep books and records of all activities related to the busi-
ness as a security-based swap dealer or major security-
based swap participant in such form and manner and for
such period as may be prescribed by the Commission by
rule or regulation; and

“(ii) for which there is no prudential regulator, shall
keep books and records in such form and manner and
for such period as may be prescribed by the Commission
by rule or regulation; and

“(C) shall keep books and records described in subpara-
graph (B) open to inspection and examination by any rep-
resentative of the Commission.

“(2) RULES.—The Commission shall adopt rules governing
reporting and recordkeeping for security-based swap dealers
and major security-based swap participants.

“(g) DAILY TRADING RECORDS.—

“(1) IN GENERAL.—Each registered security-based swap
dealer and major security-based swap participant shall main-
tain daily trading records of the security-based swaps of the
registered security-based swap dealer and major security-based
swap participant and all related records (including related cash
or forward transactions) and recorded communications,
including electronic mail, instant messages, and recordings of
telephone calls, for such period as may be required by the Commission by rule or regulation.

“(2) INFORMATION REQUIREMENTS.—The daily trading records shall include such information as the Commission shall require by rule or regulation.

“(3) COUNTERPARTY RECORDS.—Each registered security-based swap dealer and major security-based swap participant shall maintain daily trading records for each counterparty in a manner and form that is identifiable with each security-based swap transaction.

“(4) AUDIT TRAIL.—Each registered security-based swap dealer and major security-based swap participant shall maintain a complete audit trail for conducting comprehensive and accurate trade reconstructions.

“(5) RULES.—The Commission shall adopt rules governing daily trading records for security-based swap dealers and major security-based swap participants.

“(h) BUSINESS CONDUCT STANDARDS.—

“(1) IN GENERAL.—Each registered security-based swap dealer and major security-based swap participant shall conform with such business conduct standards as prescribed in paragraph (3) and as may be prescribed by the Commission by rule or regulation that relate to—

“(A) fraud, manipulation, and other abusive practices involving security-based swaps (including security-based swaps that are offered but not entered into);

“(B) diligent supervision of the business of the registered security-based swap dealer and major security-based swap participant;

“(C) adherence to all applicable position limits; and

“(D) such other matters as the Commission determines to be appropriate.

“(2) RESPONSIBILITIES WITH RESPECT TO SPECIAL ENTITIES.—

“(A) ADVISING SPECIAL ENTITIES.—A security-based swap dealer or major security-based swap participant that acts as an advisor to special entity regarding a security-based swap shall comply with the requirements of paragraph (4) with respect to such special entity.

“(B) ENTERING OF SECURITY-BASED SWAPS WITH RESPECT TO SPECIAL ENTITIES.—A security-based swap dealer that enters into or offers to enter into security-based swap with a special entity shall comply with the requirements of paragraph (5) with respect to such special entity.

“(C) SPECIAL ENTITY DEFINED.—For purposes of this subsection, the term 'special entity' means—

“(i) a Federal agency;

“(ii) a State, State agency, city, county, municipality, or other political subdivision of a State or;

“(iii) any employee benefit plan, as defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);

“(iv) any governmental plan, as defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002); or
“(v) any endowment, including an endowment that is an organization described in section 501(c)(3) of the Internal Revenue Code of 1986.

“(3) BUSINESS CONDUCT REQUIREMENTS.—Business conduct requirements adopted by the Commission shall—

“(A) establish a duty for a security-based swap dealer or major security-based swap participant to verify that any counterparty meets the eligibility standards for an eligible contract participant;

“(B) require disclosure by the security-based swap dealer or major security-based swap participant to any counterparty to the transaction (other than a security-based swap dealer, major security-based swap participant, security-based swap dealer, or major security-based swap participant) of—

“(i) information about the material risks and characteristics of the security-based swap;

“(ii) any material incentives or conflicts of interest that the security-based swap dealer or major security-based swap participant may have in connection with the security-based swap; and

“(iii)(I) for cleared security-based swaps, upon the request of the counterparty, receipt of the daily mark of the transaction from the appropriate derivatives clearing organization; and

“(II) for uncleared security-based swaps, receipt of the daily mark of the transaction from the security-based swap dealer or the major security-based swap participant;

“(C) establish a duty for a security-based swap dealer or major security-based swap participant to communicate in a fair and balanced manner based on principles of fair dealing and good faith; and

“(D) establish such other standards and requirements as the Commission may determine are appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act.

“(4) SPECIAL REQUIREMENTS FOR SECURITY-BASED SWAP DEALERS ACTING AS ADVISORS.—

“(A) IN GENERAL.—It shall be unlawful for a security-based swap dealer or major security-based swap participant—

“(i) to employ any device, scheme, or artifice to defraud any special entity or prospective customer who is a special entity;

“(ii) to engage in any transaction, practice, or course of business that operates as a fraud or deceit on any special entity or prospective customer who is a special entity; or

“(iii) to engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative.

“(B) DUTY.—Any security-based swap dealer that acts as an advisor to a special entity shall have a duty to act in the best interests of the special entity.

“(C) REASONABLE EFFORTS.—Any security-based swap dealer that acts as an advisor to a special entity shall make reasonable efforts to obtain such information as is
necessary to make a reasonable determination that any
security-based swap recommended by the security-based
swap dealer is in the best interests of the special entity,
including information relating to—

“(i) the financial status of the special entity;
“(ii) the tax status of the special entity;
“(iii) the investment or financing objectives of the
special entity; and
“(iv) any other information that the Commission
may prescribe by rule or regulation.

“(5) SPECIAL REQUIREMENTS FOR SECURITY-BASED SWAP
DEALERS AS COUNTERPARTIES TO SPECIAL ENTITIES.—

“(A) IN GENERAL.—Any security-based swap dealer or
major security-based swap participant that offers to or
enters into a security-based swap with a special entity
shall—

“(i) comply with any duty established by the
Commission for a security-based swap dealer or major
security-based swap participant, with respect to a
counterparty that is an eligible contract participant
within the meaning of subclause (I) or (II) of clause
(vii) of section 1a(18) of the Commodity Exchange Act,
that requires the security-based swap dealer or major
security-based swap participant to have a reasonable
basis to believe that the counterparty that is a special
entity has an independent representative that—
“(I) has sufficient knowledge to evaluate the
transaction and risks;
“(II) is not subject to a statutory disqualification;
“(III) is independent of the security-based
swap dealer or major security-based swap partici-
pant;
“(IV) undertakes a duty to act in the best
interests of the counterparty it represents;
“(V) makes appropriate disclosures;
“(VI) will provide written representations to
the special entity regarding fair pricing and the
appropriateness of the transaction; and
“(VII) in the case of employee benefit plans
subject to the Employee Retirement Income Secu-
rit y act of 1974, is a fiduciary as defined in section
3 of that Act (29 U.S.C. 1002); and
“(ii) before the initiation of the transaction, disclose
to the special entity in writing the capacity in which
the security-based swap dealer is acting.

“(B) COMMISSION AUTHORITY.—The Commission may
establish such other standards and requirements under
this paragraph as the Commission may determine are
appropriate in the public interest, for the protection of
investors, or otherwise in furtherance of the purposes of
this Act.

“(6) RULES.—The Commission shall prescribe rules under
this subsection governing business conduct standards for secu-
rit y-based swap dealers and major security-based swap partici-
pants.
“(7) APPLICABILITY.—This subsection shall not apply with respect to a transaction that is—
“(A) initiated by a special entity on an exchange or security-based swaps execution facility; and
“(B) the security-based swap dealer or major security-based swap participant does not know the identity of the counterparty to the transaction.”

“(i) DOCUMENTATION STANDARDS.—
“(1) IN GENERAL.—Each registered security-based swap dealer and major security-based swap participant shall conform with such standards as may be prescribed by the Commission, by rule or regulation, that relate to timely and accurate confirmation, processing, netting, documentation, and valuation of all security-based swaps.
“(2) RULES.—The Commission shall adopt rules governing documentation standards for security-based swap dealers and major security-based swap participants.

“(j) DUTIES.—Each registered security-based swap dealer and major security-based swap participant shall, at all times, comply with the following requirements:
“(1) MONITORING OF TRADING.—The security-based swap dealer or major security-based swap participant shall monitor its trading in security-based swaps to prevent violations of applicable position limits.
“(2) RISK MANAGEMENT PROCEDURES.—The security-based swap dealer or major security-based swap participant shall establish robust and professional risk management systems adequate for managing the day-to-day business of the security-based swap dealer or major security-based swap participant.
“(3) DISCLOSURE OF GENERAL INFORMATION.—The security-based swap dealer or major security-based swap participant shall disclose to the Commission and to the prudential regulator for the security-based swap dealer or major security-based swap participant, as applicable, information concerning—
“(A) terms and conditions of its security-based swaps;
“(B) security-based swap trading operations, mechanisms, and practices;
“(C) financial integrity protections relating to security-based swaps; and
“(D) other information relevant to its trading in security-based swaps.
“(4) ABILITY TO OBTAIN INFORMATION.—The security-based swap dealer or major security-based swap participant shall—
“(A) establish and enforce internal systems and procedures to obtain any necessary information to perform any of the functions described in this section; and
“(B) provide the information to the Commission and to the prudential regulator for the security-based swap dealer or major security-based swap participant, as applicable, on request.
“(5) CONFLICTS OF INTEREST.—The security-based swap dealer and major security-based swap participant shall implement conflict-of-interest systems and procedures that—
“(A) establish structural and institutional safeguards to ensure that the activities of any person within the firm relating to research or analysis of the price or market for any security-based swap or acting in a role of providing

Compliance.
clearing activities or making determinations as to accepting clearing customers are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of persons whose involvement in pricing, trading, or clearing activities might potentially bias their judgment or supervision and contravene the core principles of open access and the business conduct standards described in this title; and

“(B) address such other issues as the Commission determines to be appropriate.

“(6) Antitrust Considerations.—Unless necessary or appropriate to achieve the purposes of this title, the security-based swap dealer or major security-based swap participant shall not—

“(A) adopt any process or take any action that results in any unreasonable restraint of trade; or

“(B) impose any material anticompetitive burden on trading or clearing.

“(7) Rules.—The Commission shall prescribe rules under this subsection governing duties of security-based swap dealers and major security-based swap participants.

“(k) Designation of Chief Compliance Officer.—

“(1) In General.—Each security-based swap dealer and major security-based swap participant shall designate an individual to serve as a chief compliance officer.

“(2) Duties.—The chief compliance officer shall—

“(A) report directly to the board or to the senior officer of the security-based swap dealer or major security-based swap participant;

“(B) review the compliance of the security-based swap dealer or major security-based swap participant with respect to the security-based swap dealer and major security-based swap participant requirements described in this section;

“(C) in consultation with the board of directors, a body performing a function similar to the board, or the senior officer of the organization, resolve any conflicts of interest that may arise;

“(D) be responsible for administering each policy and procedure that is required to be established pursuant to this section;

“(E) ensure compliance with this title (including regulations) relating to security-based swaps, including each rule prescribed by the Commission under this section;

“(F) establish procedures for the remediation of noncompliance issues identified by the chief compliance officer through any—

“(i) compliance office review;

“(ii) look-back;

“(iii) internal or external audit finding;

“(iv) self-reported error; or

“(v) validated complaint; and

“(G) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

“(3) Annual Reports.—
“(A) IN GENERAL.—In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—

“(i) the compliance of the security-based swap dealer or major swap participant with respect to this title (including regulations); and

“(ii) each policy and procedure of the security-based swap dealer or major security-based swap participant of the chief compliance officer (including the code of ethics and conflict of interest policies).

“(B) REQUIREMENTS.—A compliance report under subparagraph (A) shall—

“(i) accompany each appropriate financial report of the security-based swap dealer or major security-based swap participant that is required to be furnished to the Commission pursuant to this section; and

“(ii) include a certification that, under penalty of law, the compliance report is accurate and complete.

“(l) ENFORCEMENT AND ADMINISTRATIVE PROCEEDING AUTHORITY.—

“(1) PRIMARY ENFORCEMENT AUTHORITY.—

“(A) SECURITIES AND EXCHANGE COMMISSION.—Except as provided in subparagraph (B), (C), or (D), the Commission shall have primary authority to enforce subtitle B, and the amendments made by subtitle B of the Wall Street Transparency and Accountability Act of 2010, with respect to any person.

“(B) PRUDENTIAL REGULATORS.—The prudential regulators shall have exclusive authority to enforce the provisions of subsection (e) and other prudential requirements of this title (including risk management standards), with respect to security-based swap dealers or major security-based swap participants for which they are the prudential regulator.

“(C) REFERRAL.—

“(i) VIOLATIONS OF NONPRUDENTIAL REQUIREMENTS.—If the appropriate Federal banking agency for security-based swap dealers or major security-based swap participants that are depository institutions has cause to believe that such security-based swap dealer or major security-based swap participant may have engaged in conduct that constitutes a violation of the nonprudential requirements of this section or rules adopted by the Commission thereunder, the agency may recommend in writing to the Commission that the Commission initiate an enforcement proceeding as authorized under this title. The recommendation shall be accompanied by a written explanation of the concerns giving rise to the recommendation.

“(ii) VIOLATIONS OF PRUDENTIAL REQUIREMENTS.—If the Commission has cause to believe that a securities-based swap dealer or major securities-based swap participant that has a prudential regulator may have engaged in conduct that constitute a violation of the prudential requirements of subsection (e) or rules adopted thereunder, the Commission may recommend
in writing to the prudential regulator that the prudential regulator initiate an enforcement proceeding as authorized under this title. The recommendation shall be accompanied by a written explanation of the concerns giving rise to the recommendation.

“(D) BACKSTOP ENFORCEMENT AUTHORITY.

“(i) INITIATION OF ENFORCEMENT PROCEEDING BY PRUDENTIAL REGULATOR.—If the Commission does not initiate an enforcement proceeding before the end of the 90-day period beginning on the date on which the Commission receives a written report under subsection (C)(i), the prudential regulator may initiate an enforcement proceeding.

“(ii) INITIATION OF ENFORCEMENT PROCEEDING BY COMMISSION.—If the prudential regulator does not initiate an enforcement proceeding before the end of the 90-day period beginning on the date on which the prudential regulator receives a written report under subsection (C)(ii), the Commission may initiate an enforcement proceeding.

“(2) CENSURE, DENIAL, SUSPENSION; NOTICE AND HEARING.—
The Commission, by order, shall censure, place limitations on the activities, functions, or operations of; or revoke the registration of any security-based swap dealer or major security-based swap participant that has registered with the Commission pursuant to subsection (b) if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, or revocation is in the public interest and that such security-based swap dealer or major security-based swap participant, or any person associated with such security-based swap dealer or major security-based swap participant, whether prior or subsequent to becoming so associated—

“(A) has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), or (E) of paragraph (4) of section 15(b);

“(B) has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within 10 years of the commencement of the proceedings under this subsection;

“(C) is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4);

“(D) is subject to an order or a final order specified in subparagraph (F) or (H), respectively, of such paragraph (4); or

“(E) has been found by a foreign financial regulatory authority to have committed or omitted any act, or violated any foreign statute or regulation, enumerated in subparagraph (G) of such paragraph (4).

“(3) ASSOCIATED PERSONS.—With respect to any person who is associated, who is seeking to become associated, or, at the time of the alleged misconduct, who was associated or was seeking to become associated with a security-based swap dealer or major security-based swap participant for the purpose of effecting or being involved in effecting security-based swaps

Time period.
on behalf of such security-based swap dealer or major security-based swap participant, the Commission, by order, shall censure, place limitations on the activities or functions of such person, or suspend for a period not exceeding 12 months, or bar such person from being associated with a security-based swap dealer or major security-based swap participant, if the Commission finds, on the record after notice and opportunity for a hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person—

“(A) has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), or (E) of paragraph (4) of section 15(b);

“(B) has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within 10 years of the commencement of the proceedings under this subsection;

“(C) is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4);

“(D) is subject to an order or a final order specified in subparagraph (F) or (H), respectively, of such paragraph (4); or

“(E) has been found by a foreign financial regulatory authority to have committed or omitted any act, or violated any foreign statute or regulation, enumerated in subparagraph (G) of such paragraph (4).

(4) UNLAWFUL CONDUCT.—It shall be unlawful—

“(A) for any person as to whom an order under paragraph (3) is in effect, without the consent of the Commission, willfully to become, or to be, associated with a security-based swap dealer or major security-based swap participant in contravention of such order; or

“(B) for any security-based swap dealer or major security-based swap participant to permit such a person, without the consent of the Commission, to become or remain a person associated with the security-based swap dealer or major security-based swap participant in contravention of such order, if such security-based swap dealer or major security-based swap participant knew, or in the exercise of reasonable care should have known, of such order.”.

15 USC 8342.

(b) SAVINGS CLAUSE.—Notwithstanding any other provision of this title, nothing in this subtitle shall be construed as divesting any appropriate Federal banking agency of any authority it may have to establish or enforce, with respect to a person for which such agency is the appropriate Federal banking agency, prudential or other standards pursuant to authority by Federal law other than this title.

15 USC 8343.

SEC. 765. RULEMAKING ON CONFLICT OF INTEREST.

(a) IN GENERAL.—In order to mitigate conflicts of interest, not later than 180 days after the date of enactment of the Wall Street Transparency and Accountability Act of 2010, the Securities and Exchange Commission shall adopt rules which may include numerical limits on the control of, or the voting rights with respect to, any clearing agency that clears security-based swaps, or on the control of any security-based swap execution facility or national securities exchange that posts or makes available for trading security-based swaps, by a bank holding company (as defined in section
2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841) with total consolidated assets of $50,000,000,000 or more, a nonbank financial company (as defined in section 102) supervised by the Board of Governors of the Federal Reserve System, affiliate of such a bank holding company or nonbank financial company, a security-based swap dealer, major security-based swap participant, or person associated with a security-based swap dealer or major security-based swap participant.

(b) PURPOSES.—The Securities and Exchange Commission shall adopt rules if the Commission determines, after the review described in subsection (a), that such rules are necessary or appropriate to improve the governance of, or to mitigate systemic risk, promote competition, or mitigate conflicts of interest in connection with a security-based swap dealer or major security-based swap participant's conduct of business with, a clearing agency, national securities exchange, or security-based swap execution facility that clears, posts, or makes available for trading security-based swaps and in which such security-based swap dealer or major security-based swap participant has a material debt or equity investment.

(c) CONSIDERATIONS.—In adopting rules pursuant to this section, the Securities and Exchange Commission shall consider any conflicts of interest arising from the amount of equity owned by a single investor, the ability to vote, cause the vote of, or withhold votes entitled to be cast on any matters by the holders of the ownership interest, and the governance arrangements of any derivatives clearing organization that clears swaps, or swap execution facility or board of trade designated as a contract market that posts swaps or makes swaps available for trading.

SEC. 766. REPORTING AND RECORDKEEPING.

(a) IN GENERAL.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by inserting after section 13 the following:

"SEC. 13A. REPORTING AND RECORDKEEPING FOR CERTAIN SECURITY-BASED SWAPS.

("a) REQUIRED REPORTING OF SECURITY-BASED SWAPS NOT ACCEPTED BY ANY CLEARING AGENCY OR DERIVATIVES CLEARING ORGANIZATION.—"

"(1) IN GENERAL.—Each security-based swap that is not accepted for clearing by any clearing agency or derivatives clearing organization shall be reported to—"

"(A) a security-based swap data repository described in section 13(n); or"

"(B) in the case in which there is no security-based swap data repository that would accept the security-based swap, to the Commission pursuant to this section within such time period as the Commission may by rule or regulation prescribe.

"(2) TRANSITION RULE FOR PREENACTMENT SECURITY-BASED SWAPS.—"

"(A) SECURITY-BASED SWAPS ENTERED INTO BEFORE THE DATE OF ENACTMENT OF THE WALL STREET TRANSPARENCY AND ACCOUNTABILITY ACT OF 2010.—Each security-based swap entered into before the date of enactment of the Wall Street Transparency and Accountability Act of 2010, the terms of which have not expired as of the date of enactment of that Act, shall be reported to a registered
security-based swap data repository or the Commission by a date that is not later than—

“(i) 30 days after issuance of the interim final rule; or

“(ii) such other period as the Commission determines to be appropriate.

“(B) COMMISSION RULEMAKING.—The Commission shall promulgate an interim final rule within 90 days of the date of enactment of this section providing for the reporting of each security-based swap entered into before the date of enactment as referenced in subparagraph (A).

“(C) EFFECTIVE DATE.—The reporting provisions described in this section shall be effective upon the date of the enactment of this section.

“(3) REPORTING OBLIGATIONS.—

“(A) SECURITY-BASED SWAPS IN WHICH ONLY 1 COUNTERPARTY IS A SECURITY-BASED SWAP DEALER OR MAJOR SECURITY-BASED SWAP PARTICIPANT.—With respect to a security-based swap in which only 1 counterparty is a security-based swap dealer or major security-based swap participant, the security-based swap dealer or major security-based swap participant shall report the security-based swap as required under paragraphs (1) and (2).

“(B) SECURITY-BASED SWAPS IN WHICH 1 COUNTERPARTY IS A SECURITY-BASED SWAP DEALER AND THE OTHER A MAJOR SECURITY-BASED SWAP PARTICIPANT.—With respect to a security-based swap in which 1 counterparty is a security-based swap dealer and the other a major security-based swap participant, the security-based swap dealer shall report the security-based swap as required under paragraphs (1) and (2).

“(C) OTHER SECURITY-BASED SWAPS.—With respect to any other security-based swap not described in subparagraph (A) or (B), the counterparties to the security-based swap shall select a counterparty to report the security-based swap as required under paragraphs (1) and (2).

“(b) DUTIES OF CERTAIN INDIVIDUALS.—Any individual or entity that enters into a security-based swap shall meet each requirement described in subsection (c) if the individual or entity did not—

“(1) clear the security-based swap in accordance with section 3C(a)(1); or

“(2) have the data regarding the security-based swap accepted by a security-based swap data repository in accordance with rules (including timeframes) adopted by the Commission under this title.

“(c) REQUIREMENTS.—An individual or entity described in subsection (b) shall—

“(1) upon written request from the Commission, provide reports regarding the security-based swaps held by the individual or entity to the Commission in such form and in such manner as the Commission may request; and

“(2) maintain books and records pertaining to the security-based swaps held by the individual or entity in such form, in such manner, and for such period as the Commission may require, which shall be open to inspection by—

“(A) any representative of the Commission;

“(B) an appropriate prudential regulator;
“(C) the Commodity Futures Trading Commission;
“(D) the Financial Stability Oversight Council; and
“(E) the Department of Justice.

“(d) IDENTICAL DATA.—In prescribing rules under this section, the Commission shall require individuals and entities described in subsection (b) to submit to the Commission a report that contains data that is not less comprehensive than the data required to be collected by security-based swap data repositories under this title.”.

(b) BENEFICIAL OWNERSHIP REPORTING.—Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m) is amended—

(1) in subsection (d)(1), by inserting “or otherwise becomes or is deemed to become a beneficial owner of any of the foregoing upon the purchase or sale of a security-based swap that the Commission may define by rule, and” after “Alaska Native Claims Settlement Act,”; and

(2) in subsection (g)(1), by inserting “or otherwise becomes or is deemed to become a beneficial owner of any security of a class described in subsection (d)(1) upon the purchase or sale of a security-based swap that the Commission may define by rule” after “subsection (d)(1) of this section”.

(c) REPORTS BY INSTITUTIONAL INVESTMENT MANAGERS.—Section 13(f)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(f)(1)) is amended by inserting “or otherwise becomes or is deemed to become a beneficial owner of any security of a class described in subsection (d)(1) upon the purchase or sale of a security-based swap that the Commission may define by rule,” after “subsection (d)(1) of this section”.


(1) in subparagraph (C), by inserting “security-based swap dealer, major security-based swap participant,” after “government securities dealer,”; and

(2) in subparagraph (F), by striking “broker or dealer” and inserting “broker, dealer, security-based swap dealer, or a major security-based swap participant”.

(e) SECURITY-BASED SWAP BENEFICIAL OWNERSHIP.—Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m) is amended by adding at the end the following:

“(o) BENEFICIAL OWNERSHIP.—For purposes of this section and section 16, a person shall be deemed to acquire beneficial ownership of an equity security based on the purchase or sale of a security-based swap, only to the extent that the Commission, by rule, determines after consultation with the prudential regulators and the Secretary of the Treasury, that the purchase or sale of the security-based swap, or class of security-based swap, provides incidents of ownership comparable to direct ownership of the equity security, and that it is necessary to achieve the purposes of this section that the purchase or sale of the security-based swaps, or class of security-based swap, be deemed the acquisition of beneficial ownership of the equity security.”.

SEC. 767. STATE GAMING AND BUCKET SHOP LAWS.

Section 28(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(a)) is amended to read as follows:

“(a) LIMITATION ON JUDGMENTS.—
“(1) IN GENERAL.—No person permitted to maintain a suit for damages under the provisions of this title shall recover, through satisfaction of judgment in 1 or more actions, a total amount in excess of the actual damages to that person on account of the act complained of. Except as otherwise specifically provided in this title, nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations under this title.

“(2) RULE OF CONSTRUCTION.—Except as provided in subsection (f), the rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity.

“(3) STATE BUCKET SHOP LAWS.—No State law which prohibits or regulates the making or promoting of wagering or gaming contracts, or the operation of ‘bucket shops’ or other similar or related activities, shall invalidate—

‘‘(A) any put, call, straddle, option, privilege, or other security subject to this title (except any security that has a pari-mutuel payout or otherwise is determined by the Commission, acting by rule, regulation, or order, to be appropriately subject to such laws), or apply to any activity which is incidental or related to the offer, purchase, sale, exercise, settlement, or closeout of any such security;

“(B) any security-based swap between eligible contract participants; or

“(C) any security-based swap effected on a national securities exchange registered pursuant to section 6(b).

“(4) OTHER STATE PROVISIONS.—No provision of State law regarding the offer, sale, or distribution of securities shall apply to any transaction in a security-based swap or a security futures product, except that this paragraph may not be construed as limiting any State antifraud law of general applicability. A security-based swap may not be regulated as an insurance contract under any provision of State law.”.

SEC. 768. AMENDMENTS TO THE SECURITIES ACT OF 1933; TREATMENT OF SECURITY-BASED SWAPS.

(a) DEFINITIONS.—Section 2(a) of the Securities Act of 1933 (15 U.S.C. 77b(a)) is amended—

(1) in paragraph (1), by inserting “security-based swap,” after “security future,”;

(2) in paragraph (3), by adding at the end the following: “Any offer or sale of a security-based swap by or on behalf of the issuer of the securities upon which such security-based swap is based or is referenced, an affiliate of the issuer, or an underwriter, shall constitute a contract for sale of, sale of, offer for sale, or offer to sell such securities.”; and

(3) by adding at the end the following:

“(17) The terms ‘swap’ and ‘security-based swap’ have the same meanings as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

“(18) The terms ‘purchase’ or ‘sale’ of a security-based swap shall be deemed to mean the execution, termination (prior to its scheduled maturity date), assignment, exchange, or
similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require.’’.

(b) Registration of Security-Based Swaps.—Section 5 of the Securities Act of 1933 (15 U.S.C. 77e) is amended by adding at the end the following:

“(d) Notwithstanding the provisions of section 3 or 4, unless a registration statement meeting the requirements of section 10(a) is in effect as to a security-based swap, it shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell, offer to buy or purchase or sell a security-based swap to any person who is not an eligible contract participant as defined in section 1a(18) of the Commodity Exchange Act (7 U.S.C. 1a(18))).”.

SEC. 769. DEFINITIONS UNDER THE INVESTMENT COMPANY ACT OF 1940.

Section 2(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–2) is amended by adding at the end the following:


SEC. 770. DEFINITIONS UNDER THE INVESTMENT ADVISERS ACT OF 1940.

Section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2) is amended by adding at the end the following:


SEC. 771. OTHER AUTHORITY.

Unless otherwise provided by its terms, this subtitle does not divest any appropriate Federal banking agency, the Securities and Exchange Commission, the Commodity Futures Trading Commission, or any other Federal or State agency, of any authority derived from any other provision of applicable law.

SEC. 772. JURISDICTION.

(a) In General.—Section 36 of the Securities Exchange Act of 1934 (15 U.S.C. 78mm) is amended by adding at the end the following:

“(c) Derivatives.—Unless the Commission is expressly authorized by any provision described in this subsection to grant exemptions, the Commission shall not grant exemptions, with respect to amendments made by subtitle B of the Wall Street Transparency and Accountability Act of 2010, with respect to paragraphs (65), (66), (68), (69), (70), (71), (72), (73), (74), (75), (76), and (79) of section 3(a), and sections 10B(a), 10B(b), 10B(c), 13A, 15F, 17A(g), 17A(h), 17A(i), 17A(j), 17A(k), and 17A(l); provided that the Commission shall have exemptive authority under this title with respect to security-based swaps as to the same matters that the Commodity
Futures Trading Commission has under the Wall Street Transparency and Accountability Act of 2010 with respect to swaps, including under section 4(c) of the Commodity Exchange Act.”.

(b) Rule of Construction.—Section 30 of the Securities Exchange Act of 1934 (15 U.S.C. 78dd) is amended by adding at the end the following:

“(c) Rule of Construction.—No provision of this title that was added by the Wall Street Transparency and Accountability Act of 2010, or any rule or regulation thereunder, shall apply to any person insofar as such person transacts a business in security-based swaps without the jurisdiction of the United States, unless such person transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of any provision of this title that was added by the Wall Street Transparency and Accountability Act of 2010. This subsection shall not be construed to limit the jurisdiction of the Commission under any provision of this title, as in effect prior to the date of enactment of the Wall Street Transparency and Accountability Act of 2010.”.

SEC. 773. CIVIL PENALTIES.

Section 21B of the Securities Exchange Act of 1934 (15 U.S.C. 78p-2) is amended by adding at the end the following:

“(f) Security-based Swaps.—

“(1) Clearing Agency.—Any clearing agency that knowingly or recklessly evades or participates in or facilitates an evasion of the requirements of section 3C shall be liable for a civil money penalty in twice the amount otherwise available for a violation of section 3C.

“(2) Security-Based Swap Dealer or Major Security-Based Swap Participant.—Any security-based swap dealer or major security-based swap participant that knowingly or recklessly evades or participates in or facilitates an evasion of the requirements of section 3C shall be liable for a civil money penalty in twice the amount otherwise available for a violation of section 3C.”.

SEC. 774. EFFECTIVE DATE.

Unless otherwise provided, the provisions of this subtitle shall take effect on the later of 360 days after the date of the enactment of this subtitle or, to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of this subtitle.

TITLES VIII—PAYMENT, CLEARING, AND SETTLEMENT SUPERVISION

SEC. 801. SHORT TITLE.

This title may be cited as the “Payment, Clearing, and Settlement Supervision Act of 2010”.

SEC. 802. FINDINGS AND PURPOSES.

(a) Findings.—Congress finds the following:

(1) The proper functioning of the financial markets is dependent upon safe and efficient arrangements for the clearing
and settlement of payment, securities, and other financial transactions.

(2) Financial market utilities that conduct or support multilateral payment, clearing, or settlement activities may reduce risks for their participants and the broader financial system, but such utilities may also concentrate and create new risks and thus must be well designed and operated in a safe and sound manner.

(3) Payment, clearing, and settlement activities conducted by financial institutions also present important risks to the participating financial institutions and to the financial system.

(4) Enhancements to the regulation and supervision of systemically important financial market utilities and the conduct of systemically important payment, clearing, and settlement activities by financial institutions are necessary—

(A) to provide consistency;
(B) to promote robust risk management and safety and soundness;
(C) to reduce systemic risks; and
(D) to support the stability of the broader financial system.

(b) PURPOSE.—The purpose of this title is to mitigate systemic risk in the financial system and promote financial stability by—

(1) authorizing the Board of Governors to promote uniform standards for the—

(A) management of risks by systemically important financial market utilities; and
(B) conduct of systemically important payment, clearing, and settlement activities by financial institutions;

(2) providing the Board of Governors an enhanced role in the supervision of risk management standards for systemically important financial market utilities;

(3) strengthening the liquidity of systemically important financial market utilities; and

(4) providing the Board of Governors an enhanced role in the supervision of risk management standards for systemically important payment, clearing, and settlement activities by financial institutions.

SEC. 803. DEFINITIONS.

In this title, the following definitions shall apply:

(1) APPROPRIATE FINANCIAL REGULATOR.—The term “appropriate financial regulator” means—

(A) the primary financial regulatory agency, as defined in section 2 of this Act;
(B) the National Credit Union Administration, with respect to any insured credit union under the Federal Credit Union Act (12 U.S.C. 1751 et seq.); and
(C) the Board of Governors, with respect to organizations operating under section 25A of the Federal Reserve Act (12 U.S.C. 611), and any other financial institution engaged in a designated activity.

(2) DESIGNATED ACTIVITY.—The term “designated activity” means a payment, clearing, or settlement activity that the Council has designated as systemically important under section 804.
(3) Designated clearing entity.—The term “designated clearing entity” means a designated financial market utility that is a derivatives clearing organization registered under section 5b of the Commodity Exchange Act (7 U.S.C. 7a-1) or a clearing agency registered with the Securities and Exchange Commission under section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q-1).

(4) Designated financial market utility.—The term “designated financial market utility” means a financial market utility that the Council has designated as systemically important under section 804.

(5) Financial institution.—

(A) In general.—The term “financial institution” means—

(i) a depository institution, as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813);

(ii) a branch or agency of a foreign bank, as defined in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101);

(iii) an organization operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601–604a and 611 through 631);

(iv) a credit union, as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752);

(v) a broker or dealer, as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c);

(vi) an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3);

(vii) an insurance company, as defined in section 2 of the Investment Company Act of 1940 (15 U.S.C. 80a–2);

(viii) an investment adviser, as defined in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2);

(ix) a futures commission merchant, commodity trading advisor, or commodity pool operator, as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a); and

(x) any company engaged in activities that are financial in nature or incidental to a financial activity, as described in section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)).

(B) Exclusions.—The term “financial institution” does not include designated contract markets, registered futures associations, swap data repositories, and swap execution facilities registered under the Commodity Exchange Act (7 U.S.C. 1 et seq.), or national securities exchanges, national securities associations, alternative trading systems, securities information processors solely with respect to the activities of the entity as a securities information processor, security-based swap data repositories, and swap execution facilities registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), or designated clearing entities, provided that the exclusions in this
subparagraph apply only with respect to the activities that require the entity to be so registered.

(6) Financial Market Utility.—

(A) Inclusion.—The term “financial market utility” means any person that manages or operates a multilateral system for the purpose of transferring, clearing, or settling payments, securities, or other financial transactions among financial institutions or between financial institutions and the person.

(B) Exclusions.—The term “financial market utility” does not include—

(i) designated contract markets, registered futures associations, swap data repositories, and swap execution facilities registered under the Commodity Exchange Act (7 U.S.C. 1 et seq.), or national securities exchanges, national securities associations, alternative trading systems, security-based swap data repositories, and swap execution facilities registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), solely by reason of their providing facilities for comparison of data respecting the terms of settlement of securities or futures transactions effected on such exchange or by means of any electronic system operated or controlled by such entities, provided that the exclusions in this clause apply only with respect to the activities that require the entity to be so registered; and

(ii) any broker, dealer, transfer agent, or investment company, or any futures commission merchant, introducing broker, commodity trading advisor, or commodity pool operator, solely by reason of functions performed by such institution as part of brokerage, dealing, transfer agency, or investment company activities, or solely by reason of acting on behalf of a financial market utility or a participant therein in connection with the furnishing by the financial market utility of services to its participants or the use of services of the financial market utility by its participants, provided that services performed by such institution do not constitute critical risk management or processing functions of the financial market utility.

(7) Payment, Clearing, or Settlement Activity.—

(A) In General.—The term “payment, clearing, or settlement activity” means an activity carried out by 1 or more financial institutions to facilitate the completion of financial transactions, but shall not include any offer or sale of a security under the Securities Act of 1933 (15 U.S.C. 77a et seq.), or any quotation, order entry, negotiation, or other pre-trade activity or execution activity.

(B) Financial Transaction.—For the purposes of subparagraph (A), the term “financial transaction” includes—

(i) funds transfers;
(ii) securities contracts;
(iii) contracts of sale of a commodity for future delivery;
(iv) forward contracts;
(v) repurchase agreements;
(vi) swaps;
(vii) security-based swaps;
(viii) swap agreements;
(ix) security-based swap agreements;
(x) foreign exchange contracts;
(xi) financial derivatives contracts; and
(xii) any similar transaction that the Council determines to be a financial transaction for purposes of this title.

(C) INCLUDED ACTIVITIES.—When conducted with respect to a financial transaction, payment, clearing, and settlement activities may include—

(i) the calculation and communication of unsettled financial transactions between counterparties;
(ii) the netting of transactions;
(iii) provision and maintenance of trade, contract, or instrument information;
(iv) the management of risks and activities associated with continuing financial transactions;
(v) transmittal and storage of payment instructions;
(vi) the movement of funds;
(vii) the final settlement of financial transactions; and
(viii) other similar functions that the Council may determine.

(D) EXCLUSION.—Payment, clearing, and settlement activities shall not include public reporting of swap transaction data under section 727 or 763(i) of the Wall Street Transparency and Accountability Act of 2010.

(8) SUPERVISORY AGENCY.—

(A) IN GENERAL.—The term “Supervisory Agency” means the Federal agency that has primary jurisdiction over a designated financial market utility under Federal banking, securities, or commodity futures laws, as follows:

(i) The Securities and Exchange Commission, with respect to a designated financial market utility that is a clearing agency registered with the Securities and Exchange Commission.

(ii) The Commodity Futures Trading Commission, with respect to a designated financial market utility that is a derivatives clearing organization registered with the Commodity Futures Trading Commission.

(iii) The appropriate Federal banking agency, with respect to a designated financial market utility that is an institution described in section 3(q) of the Federal Deposit Insurance Act.

(iv) The Board of Governors, with respect to a designated financial market utility that is otherwise not subject to the jurisdiction of any agency listed in clauses (i), (ii), and (iii).

(B) MULTIPLE AGENCY JURISDICTION.—If a designated financial market utility is subject to the jurisdictional supervision of more than 1 agency listed in subparagraph (A), then such agencies should agree on 1 agency to act as the Supervisory Agency, and if such agencies cannot agree on which agency has primary jurisdiction, the Council
shall decide which agency is the Supervisory Agency for purposes of this title.

(9) **SYSTEMICALLY IMPORTANT AND SYSTEMIC IMPORTANCE.**—The terms “systemically important” and “systemic importance” mean a situation where the failure of or a disruption to the functioning of a financial market utility or the conduct of a payment, clearing, or settlement activity could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the financial system of the United States.

**SEC. 804. DESIGNATION OF SYSTEMIC IMPORTANCE.**

(a) **DESIGNATION.**—

(1) **FINANCIAL STABILITY OVERSIGHT COUNCIL.**—The Council, on a nondelegable basis and by a vote of not fewer than 2⁄3 of members then serving, including an affirmative vote by the Chairperson of the Council, shall designate those financial market utilities or payment, clearing, or settlement activities that the Council determines are, or are likely to become, systemically important.

(2) **CONSIDERATIONS.**—In determining whether a financial market utility or payment, clearing, or settlement activity is, or is likely to become, systemically important, the Council shall take into consideration the following:

(A) The aggregate monetary value of transactions processed by the financial market utility or carried out through the payment, clearing, or settlement activity.

(B) The aggregate exposure of the financial market utility or a financial institution engaged in payment, clearing, or settlement activities to its counterparties.

(C) The relationship, interdependencies, or other interactions of the financial market utility or payment, clearing, or settlement activity with other financial market utilities or payment, clearing, or settlement activities.

(D) The effect that the failure of or a disruption to the financial market utility or payment, clearing, or settlement activity would have on critical markets, financial institutions, or the broader financial system.

(E) Any other factors that the Council deems appropriate.

(b) **RESCISSON OF DESIGNATION.**—

(1) **IN GENERAL.**—The Council, on a nondelegable basis and by a vote of not fewer than 2⁄3 of members then serving, including an affirmative vote by the Chairperson of the Council, shall rescind a designation of systemic importance for a designated financial market utility or designated activity if the Council determines that the utility or activity no longer meets the standards for systemic importance.

(2) **EFFECT OF RESCISSION.**—Upon rescission, the financial market utility or financial institutions conducting the activity will no longer be subject to the provisions of this title or any rules or orders prescribed under this title.

(c) **CONSULTATION AND NOTICE AND OPPORTUNITY FOR HEARING.**—
(1) Consultation.—Before making any determination under subsection (a) or (b), the Council shall consult with the relevant Supervisory Agency and the Board of Governors.

(2) Advance Notice and Opportunity for Hearing.—

(A) In General.—Before making any determination under subsection (a) or (b), the Council shall provide the financial market utility or, in the case of a payment, clearing, or settlement activity, financial institutions with advance notice of the proposed determination of the Council.

(B) Notice in Federal Register.—The Council shall provide such advance notice to financial institutions by publishing a notice in the Federal Register.

(C) Requests for Hearing.—Within 30 days from the date of any notice of the proposed determination of the Council, the financial market utility or, in the case of a payment, clearing, or settlement activity, a financial institution engaged in the designated activity may request, in writing, an opportunity for a written or oral hearing before the Council to demonstrate that the proposed designation or rescission of designation is not supported by substantial evidence.

(D) Written Submissions.—Upon receipt of a timely request, the Council shall fix a time, not more than 30 days after receipt of the request, unless extended at the request of the financial market utility or financial institution, and place at which the financial market utility or financial institution may appear, personally or through counsel, to submit written materials, or, at the sole discretion of the Council, oral testimony or oral argument.

(3) Emergency Exception.—

(A) Waiver or Modification by Vote of the Council.—The Council may waive or modify the requirements of paragraph (2) if the Council determines, by an affirmative vote of not fewer than 2/3 of members then serving, including an affirmative vote by the Chairperson of the Council, that the waiver or modification is necessary to prevent or mitigate an immediate threat to the financial system posed by the financial market utility or the payment, clearing, or settlement activity.

(B) Notice of Waiver or Modification.—The Council shall provide notice of the waiver or modification to the financial market utility concerned or, in the case of a payment, clearing, or settlement activity, to financial institutions, as soon as practicable, which shall be no later than 24 hours after the waiver or modification in the case of a financial market utility and 3 business days in the case of financial institutions. The Council shall provide the notice to financial institutions by posting a notice on the website of the Council and by publishing a notice in the Federal Register.

(d) Notification of Final Determination.—

(1) After Hearing.—Within 60 days of any hearing under subsection (c)(2), the Council shall notify the financial market utility or financial institutions of the final determination of the Council in writing, which shall include findings of fact upon which the determination of the Council is based.
(2) **When no hearing requested.**—If the Council does not receive a timely request for a hearing under subsection (c)(2), the Council shall notify the financial market utility or financial institutions of the final determination of the Council in writing not later than 30 days after the expiration of the date by which a financial market utility or a financial institution could have requested a hearing. All notices to financial institutions under this subsection shall be published in the Federal Register.

(e) **Extension of Time Periods.**—The Council may extend the time periods established in subsections (c) and (d) as the Council determines to be necessary or appropriate.

### SEC. 805. **Standards for Systemically Important Financial Market Utilities and Payment, Clearing, or Settlement Activities.**

(a) **Authority to prescribe standards.**—

(1) **Board of Governors.**—Except as provided in paragraph (2), the Board of Governors, by rule or order, and in consultation with the Council and the Supervisory Agencies, shall prescribe risk management standards, taking into consideration relevant international standards and existing prudential requirements, governing—

(A) the operations related to the payment, clearing, and settlement activities of designated financial market utilities; and

(B) the conduct of designated activities by financial institutions.

(2) **Special procedures for designated clearing entities and designated activities of certain financial institutions.**—

(A) **CFTC and Commission.**—The Commodity Futures Trading Commission and the Commission may each prescribe regulations, in consultation with the Council and the Board of Governors, containing risk management standards, taking into consideration relevant international standards and existing prudential requirements, for those designated clearing entities and financial institutions engaged in designated activities for which each is the Supervisory Agency or the appropriate financial regulator, governing—

(i) the operations related to payment, clearing, and settlement activities of such designated clearing entities; and

(ii) the conduct of designated activities by such financial institutions.

(B) **Review and determination.**—The Board of Governors may determine that existing prudential requirements of the Commodity Futures Trading Commission, the Commission, or both (including requirements prescribed pursuant to subparagraph (A)) with respect to designated clearing entities and financial institutions engaged in designated activities for which the Commission or the Commodity Futures Trading Commission is the Supervisory Agency or the appropriate financial regulator are insufficient to prevent or mitigate significant liquidity, credit,
operational, or other risks to the financial markets or to the financial stability of the United States.

(C) **WRITTEN DETERMINATION.**—Any determination by the Board of Governors under subparagraph (B) shall be provided in writing to the Commodity Futures Trading Commission or the Commission, as applicable, and the Council, and shall explain why existing prudential requirements, considered as a whole, are insufficient to ensure that the operations and activities of the designated clearing entities or the activities of financial institutions described in subparagraph (B) will not pose significant liquidity, credit, operational, or other risks to the financial markets or to the financial stability of the United States. The Board of Governors' determination shall contain a detailed analysis supporting its findings and identify the specific prudential requirements that are insufficient.

(D) **CFTC AND COMMISSION RESPONSE.**—The Commodity Futures Trading Commission or the Commission, as applicable, shall within 60 days either object to the Board of Governors' determination with a detailed analysis as to why existing prudential requirements are sufficient, or submit an explanation to the Council and the Board of Governors describing the actions to be taken in response to the Board of Governors' determination.

(E) **AUTHORIZATION.**—Upon an affirmative vote by not fewer than 2/3 of members then serving on the Council, the Council shall either find that the response submitted under subparagraph (D) is sufficient, or require the Commodity Futures Trading Commission, or the Commission, as applicable, to prescribe such risk management standards as the Council determines is necessary to address the specific prudential requirements that are determined to be insufficient."

(b) **OBJECTIVES AND PRINCIPLES.**—The objectives and principles for the risk management standards prescribed under subsection (a) shall be to——

1. promote robust risk management;
2. promote safety and soundness;
3. reduce systemic risks; and
4. support the stability of the broader financial system.

(c) **SCOPE.**—The standards prescribed under subsection (a) may address areas such as——

1. risk management policies and procedures;
2. margin and collateral requirements;
3. participant or counterparty default policies and procedures;
4. the ability to complete timely clearing and settlement of financial transactions;
5. capital and financial resource requirements for designated financial market utilities; and
6. other areas that are necessary to achieve the objectives and principles in subsection (b).

(d) **LIMITATION ON SCOPE.**—Except as provided in subsections (e) and (f) of section 807, nothing in this title shall be construed to permit the Council or the Board of Governors to take any action or exercise any authority granted to the Commodity Futures Trading Commission under section 2(h) of the Commodity Exchange
Act or the Securities and Exchange Commission under section 3C(a) of the Securities Exchange Act of 1934, including—

(1) the approval of, disapproval of, or stay of the clearing requirement for any group, category, type, or class of swaps that a designated clearing entity may accept for clearing;

(2) the determination that any group, category, type, or class of swaps shall be subject to the mandatory clearing requirement of section 2(h)(1) of the Commodity Exchange Act or section 3C(a)(1) of the Securities Exchange Act of 1934;

(3) the determination that any person is exempt from the mandatory clearing requirement of section 2(h)(1) of the Commodity Exchange Act or section 3C(a)(1) of the Securities Exchange Act of 1934; or

(4) any authority granted to the Commodity Futures Trading Commission or the Securities and Exchange Commission with respect to transaction reporting or trade execution.

(e) Threshold Level.—The standards prescribed under subsection (a) governing the conduct of designated activities by financial institutions shall, where appropriate, establish a threshold as to the level or significance of engagement in the activity at which a financial institution will become subject to the standards with respect to that activity.

(f) Compliance Required.—Designated financial market utilities and financial institutions subject to the standards prescribed under subsection (a) for a designated activity shall conduct their operations in compliance with the applicable risk management standards.

SEC. 806. OPERATIONS OF DESIGNATED FINANCIAL MARKET UTILITIES.

(a) Federal Reserve Account and Services.—The Board of Governors may authorize a Federal Reserve Bank to establish and maintain an account for a designated financial market utility and provide the services listed in section 11A(b) of the Federal Reserve Act (12 U.S.C. 248a(b)) and deposit accounts under the first undesignated paragraph of section 13 of the Federal Reserve Act (12 U.S.C. 342) to the designated financial market utility that the Federal Reserve Bank is authorized under the Federal Reserve Act to provide to a depository institution, subject to any applicable rules, orders, standards, or guidelines prescribed by the Board of Governors.

(b) Advances.—The Board of Governors may authorize a Federal Reserve bank under section 10B of the Federal Reserve Act (12 U.S.C. 347b) to provide to a designated financial market utility discount and borrowing privileges only in unusual or exigent circumstances, upon the affirmative vote of a majority of the Board of Governors then serving (or such other number in accordance with the provisions of section 11(r)(2) of the Federal Reserve Act (12 U.S.C. 248(r)(2)) after consultation with the Secretary, and upon a showing by the designated financial market utility that it is unable to secure adequate credit accommodations from other banking institutions. All such discounts and borrowing privileges shall be subject to such other limitations, restrictions, and regulations as the Board of Governors may prescribe. Access to discount and borrowing privileges under section 10B of the Federal Reserve Act as authorized in this section does not require a designated
financial market utility to be or become a bank or bank holding company.

(c) Earnings on Federal Reserve Balances.—A Federal Reserve Bank may pay earnings on balances maintained by or on behalf of a designated financial market utility in the same manner and to the same extent as the Federal Reserve Bank may pay earnings to a depository institution under the Federal Reserve Act, subject to any applicable rules, orders, standards, or guidelines prescribed by the Board of Governors.

(d) Reserve Requirements.—The Board of Governors may exempt a designated financial market utility from, or modify any, reserve requirements under section 19 of the Federal Reserve Act (12 U.S.C. 461) applicable to a designated financial market utility.

(e) Changes to Rules, Procedures, or Operations.—

(1) Advance Notice.—

(A) Advance Notice of Proposed Changes Required.—A designated financial market utility shall provide notice 60 days in advance notice to its Supervisory Agency of any proposed change to its rules, procedures, or operations that could, as defined in rules of each Supervisory Agency, materially affect, the nature or level of risks presented by the designated financial market utility.

(B) Terms and Standards Prescribed by the Supervisory Agencies.—Each Supervisory Agency, in consultation with the Board of Governors, shall prescribe regulations that define and describe the standards for determining when notice is required to be provided under subparagraph (A).

(C) Contents of Notice.—The notice of a proposed change shall describe—

(i) the nature of the change and expected effects on risks to the designated financial market utility, its participants, or the market; and

(ii) how the designated financial market utility plans to manage any identified risks.

(D) Additional Information.—The Supervisory Agency may require a designated financial market utility to provide any information necessary to assess the effect the proposed change would have on the nature or level of risks associated with the designated financial market utility’s payment, clearing, or settlement activities and the sufficiency of any proposed risk management techniques.

(E) Notice of Objection.—The Supervisory Agency shall notify the designated financial market utility of any objection regarding the proposed change within 60 days from the later of—

(i) the date that the notice of the proposed change is received; or

(ii) the date any further information requested for consideration of the notice is received.

(F) Change Not Allowed If Objection.—A designated financial market utility shall not implement a change to which the Supervisory Agency has an objection.

(G) Change Allowed If No Objection Within 60 Days.—A designated financial market utility may implement a change if it has not received an objection to the proposed change within 60 days of the later of—
(i) the date that the Supervisory Agency receives the notice of proposed change; or
(ii) the date the Supervisory Agency receives any further information it requests for consideration of the notice.

(H) Review extension for novel or complex issues. — The Supervisory Agency may, during the 60-day review period, extend the review period for an additional 60 days for proposed changes that raise novel or complex issues, subject to the Supervisory Agency providing the designated financial market utility with prompt written notice of the extension. Any extension under this subparagraph will extend the time periods under subparagraphs (E) and (G).

(I) Change allowed earlier if notified of no objection. — A designated financial market utility may implement a change in less than 60 days from the date of receipt of the notice of proposed change by the Supervisory Agency, or the date the Supervisory Agency receives any further information it requested, if the Supervisory Agency notifies the designated financial market utility in writing that it does not object to the proposed change and authorizes the designated financial market utility to implement the change on an earlier date, subject to any conditions imposed by the Supervisory Agency.

(2) Emergency changes. —

(A) In general. — A designated financial market utility may implement a change that would otherwise require advance notice under this subsection if it determines that—

(i) an emergency exists; and
(ii) immediate implementation of the change is necessary for the designated financial market utility to continue to provide its services in a safe and sound manner.

(B) Notice required within 24 hours. — The designated financial market utility shall provide notice of any such emergency change to its Supervisory Agency, as soon as practicable, which shall be no later than 24 hours after implementation of the change.

(C) Contents of emergency notice. — In addition to the information required for changes requiring advance notice, the notice of an emergency change shall describe—

(i) the nature of the emergency; and
(ii) the reason the change was necessary for the designated financial market utility to continue to provide its services in a safe and sound manner.

(D) Modification or rescission of change may be required. — The Supervisory Agency may require modification or rescission of the change if it finds that the change is not consistent with the purposes of this Act or any applicable rules, orders, or standards prescribed under section 805(a).

(3) Copying the Board of Governors. — The Supervisory Agency shall provide the Board of Governors concurrently with a complete copy of any notice, request, or other information it issues, submits, or receives under this subsection.
(4) **Consultation with Board of Governors.**—Before taking any action on, or completing its review of, a change proposed by a designated financial market utility, the Supervisory Agency shall consult with the Board of Governors.

**SEC. 807. EXAMINATION OF AND ENFORCEMENT ACTIONS AGAINST DESIGNATED FINANCIAL MARKET UTILITIES.**

(a) **Examination.**—Notwithstanding any other provision of law and subject to subsection (d), the Supervisory Agency shall conduct examinations of a designated financial market utility at least once annually in order to determine the following:

1. The nature of the operations of, and the risks borne by, the designated financial market utility.
2. The financial and operational risks presented by the designated financial market utility to financial institutions, critical markets, or the broader financial system.
3. The resources and capabilities of the designated financial market utility to monitor and control such risks.
4. The safety and soundness of the designated financial market utility.
5. The designated financial market utility’s compliance with—
   (A) this title; and
   (B) the rules and orders prescribed under this title.

(b) **Service Providers.**—Whenever a service integral to the operation of a designated financial market utility is performed for the designated financial market utility by another entity, whether an affiliate or non-affiliate and whether on or off the premises of the designated financial market utility, the Supervisory Agency may examine whether the provision of that service is in compliance with applicable law, rules, orders, and standards to the same extent as if the designated financial market utility were performing the service on its own premises.

(c) **Enforcement.**—For purposes of enforcing the provisions of this title, a designated financial market utility shall be subject to, and the appropriate Supervisory Agency shall have authority under the provisions of subsections (b) through (n) of section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818) in the same manner and to the same extent as if the designated financial market utility was an insured depository institution and the Supervisory Agency was the appropriate Federal banking agency for such insured depository institution.

(d) **Board of Governors Involvement in Examinations.**—

1. **Board of Governors Consultation on Examination Planning.**—The Supervisory Agency shall consult annually with the Board of Governors regarding the scope and methodology of any examination conducted under subsections (a) and (b). The Supervisory Agency shall lead all examinations conducted under subsections (a) and (b).

2. **Board of Governors Participation in Examination.**—The Board of Governors may, in its discretion, participate in any examination led by a Supervisory Agency and conducted under subsections (a) and (b).

(e) **Board of Governors Enforcement Recommendations.**—

1. **Recommendation.**—The Board of Governors may, after consulting with the Council and the Supervisory Agency, at any time recommend to the Supervisory Agency that such
agency take enforcement action against a designated financial market utility in order to prevent or mitigate significant liquidity, credit, operational, or other risks to the financial markets or to the financial stability of the United States. Any such recommendation for enforcement action shall provide a detailed analysis supporting the recommendation of the Board of Governors.

(2) **Consideration.**—The Supervisory Agency shall consider the recommendation of the Board of Governors and submit a response to the Board of Governors within 60 days.

(3) **Binding Arbitration.**—If the Supervisory Agency rejects, in whole or in part, the recommendation of the Board of Governors, the Board of Governors may refer the recommendation to the Council for a binding decision on whether an enforcement action is warranted.

(4) **Enforcement Action.**—Upon an affirmative vote by a majority of the Council in favor of the Board of Governors’ recommendation under paragraph (3), the Council may require the Supervisory Agency to—

(A) exercise the enforcement authority referenced in subsection (c); and

(B) take enforcement action against the designated financial market utility.

(f) **Emergency Enforcement Actions by the Board of Governors.**—

(1) **Imminent Risk of Substantial Harm.**—The Board of Governors may, after consulting with the Supervisory Agency and upon an affirmative vote by a majority the Council, take enforcement action against a designated financial market utility if the Board of Governors has reasonable cause to conclude that—

(A) either—

(i) an action engaged in, or contemplated by, a designated financial market utility (including any change proposed by the designated financial market utility to its rules, procedures, or operations that would otherwise be subject to section 806(e)) poses an imminent risk of substantial harm to financial institutions, critical markets, or the broader financial system of the United States; or

(ii) the condition of a designated financial market utility poses an imminent risk of substantial harm to financial institutions, critical markets, or the broader financial system; and

(B) the imminent risk of substantial harm precludes the Board of Governors’ use of the procedures in subsection (e).

(2) **Enforcement Authority.**—For purposes of taking enforcement action under paragraph (1), a designated financial market utility shall be subject to, and the Board of Governors shall have authority under the provisions of subsections (b) through (n) of section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818) in the same manner and to the same extent as if the designated financial market utility was an insured depository institution and the Board of Governors was the appropriate Federal banking agency for such insured depository institution.
SEC. 808. EXAMINATION OF AND ENFORCEMENT ACTIONS AGAINST FINANCIAL INSTITUTIONS SUBJECT TO STANDARDS FOR DESIGNATED ACTIVITIES.

(a) EXAMINATION.—The appropriate financial regulator is authorized to examine a financial institution subject to the standards prescribed under section 805(a) for a designated activity in order to determine the following:

(1) The nature and scope of the designated activities engaged in by the financial institution.

(2) The financial and operational risks the designated activities engaged in by the financial institution may pose to the safety and soundness of the financial institution.

(3) The financial and operational risks the designated activities engaged in by the financial institution may pose to other financial institutions, critical markets, or the broader financial system.

(4) The resources available to and the capabilities of the financial institution to monitor and control the risks described in paragraphs (2) and (3).

(5) The financial institution’s compliance with this title and the rules and orders prescribed under section 805(a).

(b) ENFORCEMENT.—For purposes of enforcing the provisions of this title, and the rules and orders prescribed under this section, a financial institution subject to the standards prescribed under section 805(a) for a designated activity shall be subject to, and the appropriate financial regulator shall have authority under the provisions of subsections (b) through (n) of section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818) in the same manner and to the same extent as if the financial institution was an insured depository institution and the appropriate financial regulator was the appropriate Federal banking agency for such insured depository institution.

(c) TECHNICAL ASSISTANCE.—The Board of Governors shall consult with and provide such technical assistance as may be required by the appropriate financial regulators to ensure that the rules and orders prescribed under this title are interpreted and applied in as consistent and uniform a manner as practicable.

(d) DELEGATION.—

(1) EXAMINATION.—

(A) REQUEST TO BOARD OF GOVERNORS.—The appropriate financial regulator may request the Board of Governors to conduct or participate in an examination of a financial institution subject to the standards prescribed under section 805(a) for a designated activity in order to assess the compliance of such financial institution with—

(i) this title; or

(ii) the rules or orders prescribed under this title.

(B) EXAMINATION BY BOARD OF GOVERNORS.—Upon receipt of an appropriate written request, the Board of Governors will conduct the examination under such terms and conditions to which the Board of Governors and the appropriate financial regulator mutually agree.

(2) ENFORCEMENT.—

(A) REQUEST TO BOARD OF GOVERNORS.—The appropriate financial regulator may request the Board of Governors to enforce this title or the rules or orders prescribed

Consultation.
under this title against a financial institution that is subject to the standards prescribed under section 805(a) for a designated activity.

(B) Enforcement by Board of Governors.—Upon receipt of an appropriate written request, the Board of Governors shall determine whether an enforcement action is warranted, and, if so, it shall enforce compliance with this title or the rules or orders prescribed under this title and, if so, the financial institution shall be subject to, and the Board of Governors shall have authority under the provisions of subsections (b) through (n) of section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818) in the same manner and to the same extent as if the financial institution was an insured depository institution and the Board of Governors was the appropriate Federal banking agency for such insured depository institution.

(e) Back-Up Authority of the Board of Governors.—

(1) Examination and Enforcement.—Notwithstanding any other provision of law, the Board of Governors may—

(A) conduct an examination of the type described in subsection (a) of any financial institution that is subject to the standards prescribed under section 805(a) for a designated activity; and

(B) enforce the provisions of this title or any rules or orders prescribed under this title against any financial institution that is subject to the standards prescribed under section 805(a) for a designated activity.

(2) Limitations.—

(A) Examination.—The Board of Governors may exercise the authority described in paragraph (1)(A) only if the Board of Governors has—

(i) reasonable cause to believe that a financial institution is not in compliance with this title or the rules or orders prescribed under this title with respect to a designated activity;

(ii) notified, in writing, the appropriate financial regulator and the Council of its belief under clause (i) with supporting documentation included;

(iii) requested the appropriate financial regulator to conduct a prompt examination of the financial institution;

(iv) either—

(I) not been afforded a reasonable opportunity to participate in an examination of the financial institution by the appropriate financial regulator within 30 days after the date of the Board’s notification under clause (ii); or

(II) reasonable cause to believe that the financial institution’s noncompliance with this title or the rules or orders prescribed under this title poses a substantial risk to other financial institutions, critical markets, or the broader financial system, subject to the Board of Governors affording the appropriate financial regulator a reasonable opportunity to participate in the examination; and

(y) obtained the approval of the Council upon an affirmative vote by a majority of the Council.
(B) ENFORCEMENT.—The Board of Governors may exercise the authority described in paragraph (1)(B) only if the Board of Governors has—

(i) reasonable cause to believe that a financial institution is not in compliance with this title or the rules or orders prescribed under this title with respect to a designated activity;

(ii) notified, in writing, the appropriate financial regulator and the Council of its belief under clause (i) with supporting documentation included and with a recommendation that the appropriate financial regulator take 1 or more specific enforcement actions against the financial institution;

(iii) either—

(I) not been notified, in writing, by the appropriate financial regulator of the commencement of an enforcement action recommended by the Board of Governors against the financial institution within 60 days from the date of the notification under clause (ii); or

(II) reasonable cause to believe that the financial institution’s noncompliance with this title or the rules or orders prescribed under this title poses significant liquidity, credit, operational, or other risks to the financial markets or to the financial stability of the United States, subject to the Board of Governors notifying the appropriate financial regulator of the Board’s enforcement action; and

(iv) obtained the approval of the Council upon an affirmative vote by a majority of the Council.

(3) ENFORCEMENT PROVISIONS.—For purposes of taking enforcement action under paragraph (1), the financial institution shall be subject to, and the Board of Governors shall have authority under the provisions of subsections (b) through (n) of section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818) in the same manner and to the same extent as if the financial institution was an insured depository institution and the Board of Governors was the appropriate Federal banking agency for such insured depository institution.

SEC. 809. REQUESTS FOR INFORMATION, REPORTS, OR RECORDS.

(a) INFORMATION TO ASSESS SYSTEMIC IMPORTANCE.—

(1) FINANCIAL MARKET UTILITIES.—The Council is authorized to require any financial market utility to submit such information as the Council may require for the sole purpose of assessing whether that financial market utility is systemically important, but only if the Council has reasonable cause to believe that the financial market utility meets the standards for systemic importance set forth in section 804.

(2) FINANCIAL INSTITUTIONS ENGAGED IN PAYMENT, CLEARING, OR SETTLEMENT ACTIVITIES.—The Council is authorized to require any financial institution to submit such information as the Council may require for the sole purpose of assessing whether any payment, clearing, or settlement activity engaged in or supported by a financial institution is systemically important, but only if the Council has reasonable cause to believe
that the activity meets the standards for systemic importance set forth in section 804.

(b) REPORTING AFTER DESIGNATION.—

(1) DESIGNATED FINANCIAL MARKET UTILITIES.—The Board of Governors and the Council may each require a designated financial market utility to submit reports or data to the Board of Governors and the Council in such frequency and form as deemed necessary by the Board of Governors or the Council in order to assess the safety and soundness of the utility and the systemic risk that the utility’s operations pose to the financial system.

(2) FINANCIAL INSTITUTIONS SUBJECT TO STANDARDS FOR DESIGNATED ACTIVITIES.—The Board of Governors and the Council may each require 1 or more financial institutions subject to the standards prescribed under section 805(a) for a designated activity to submit, in such frequency and form as deemed necessary by the Board of Governors or the Council, reports and data to the Board of Governors and the Council solely with respect to the conduct of the designated activity and solely to assess whether—

(A) the rules, orders, or standards prescribed under section 805(a) with respect to the designated activity appropriately address the risks to the financial system presented by such activity; and

(B) the financial institutions are in compliance with this title and the rules and orders prescribed under section 805(a) with respect to the designated activity.

(3) LIMITATION.—The Board of Governors may, upon an affirmative vote by a majority of the Council, prescribe regulations under this section that impose a recordkeeping or reporting requirement on designated clearing entities or financial institutions engaged in designated activities that are subject to standards that have been prescribed under section 805(a)(2).

(c) COORDINATION WITH APPROPRIATE FEDERAL SUPERVISORY AGENCY.—

(1) ADVANCE COORDINATION.—Before requesting any material information from, or imposing reporting or recordkeeping requirements on, any financial market utility or any financial institution engaged in a payment, clearing, or settlement activity, the Board of Governors or the Council shall coordinate with the Supervisory Agency for a financial market utility or the appropriate financial regulator for a financial institution to determine if the information is available from or may be obtained by the agency in the form, format, or detail required by the Board of Governors or the Council.

(2) SUPERVISORY REPORTS.—Notwithstanding any other provision of law, the Supervisory Agency, the appropriate financial regulator, and the Board of Governors are authorized to disclose to each other and the Council copies of its examination reports or similar reports regarding any financial market utility or any financial institution engaged in payment, clearing, or settlement activities.

(d) TIMING OF RESPONSE FROM APPROPRIATE FEDERAL SUPERVISORY AGENCY.—If the information, report, records, or data requested by the Board of Governors or the Council under subsection (c)(1) are not provided in full by the Supervisory Agency Deadline. Notice.
or the appropriate financial regulator in less than 15 days after the date on which the material is requested, the Board of Governors or the Council may request the information or impose recordkeeping or reporting requirements directly on such persons as provided in subsections (a) and (b) with notice to the agency.

(e) SHARING OF INFORMATION.—

(1) MATERIAL CONCERNS.—Notwithstanding any other provision of law, the Board of Governors, the Council, the appropriate financial regulator, and any Supervisory Agency are authorized to—

(A) promptly notify each other of material concerns about a designated financial market utility or any financial institution engaged in designated activities; and

(B) share appropriate reports, information, or data relating to such concerns.

(2) OTHER INFORMATION.—Notwithstanding any other provision of law, the Board of Governors, the Council, the appropriate financial regulator, or any Supervisory Agency may, under such terms and conditions as it deems appropriate, provide confidential supervisory information and other information obtained under this title to each other, and to the Secretary, Federal Reserve Banks, State financial institution supervisory agencies, foreign financial supervisors, foreign central banks, and foreign finance ministries, subject to reasonable assurances of confidentiality, provided, however, that no person or entity receiving information pursuant to this section may disseminate such information to entities or persons other than those listed in this paragraph without complying with applicable law, including section 8 of the Commodity Exchange Act (7 U.S.C. 12).

(f) PRIVILEGE MAINTAINED.—The Board of Governors, the Council, the appropriate financial regulator, and any Supervisory Agency providing reports or data under this section shall not be deemed to have waived any privilege applicable to those reports or data, or any portion thereof, by providing the reports or data to the other party or by permitting the reports or data, or any copies thereof, to be used by the other party.

(g) DISCLOSURE EXEMPTION.—Information obtained by the Board of Governors, the Supervisory Agencies, or the Council under this section and any materials prepared by the Board of Governors, the Supervisory Agencies, or the Council regarding their assessment of the systemic importance of financial market utilities or any payment, clearing, or settlement activities engaged in by financial institutions, and in connection with their supervision of designated financial market utilities and designated activities, shall be confidential supervisory information exempt from disclosure under section 552 of title 5, United States Code. For purposes of such section 552, this subsection shall be considered a statute described in subsection (b)(3) of such section 552.

SEC. 810. RULEMAKING.

The Board of Governors, the Supervisory Agencies, and the Council are authorized to prescribe such rules and issue such orders as may be necessary to administer and carry out their respective authorities and duties granted under this title and prevent evasions thereof.
SEC. 811. OTHER AUTHORITY.

Unless otherwise provided by its terms, this title does not divest any appropriate financial regulator, any Supervisory Agency, or any other Federal or State agency, of any authority derived from any other applicable law, except that any standards prescribed by the Board of Governors under section 805 shall supersede any less stringent requirements established under other authority to the extent of any conflict.

SEC. 812. CONSULTATION.

(a) CFTC.—The Commodity Futures Trading Commission shall consult with the Board of Governors—

(1) prior to exercising its authorities under sections 2(h)(2)(C), 2(h)(3)(A), 2(h)(3)(C), 2(h)(4)(A), and 2(h)(4)(B) of the Commodity Exchange Act, as amended by the Wall Street Transparency and Accountability Act of 2010;

(2) with respect to any rule or rule amendment of a derivatives clearing organization for which a stay of certification has been issued under section 745(b)(3) of the Wall Street Transparency and Accountability Act of 2010; and

(3) prior to exercising its rulemaking authorities under section 728 of the Wall Street Transparency and Accountability Act of 2010.

(b) SEC.—The Commission shall consult with the Board of Governors—

(1) prior to exercising its authorities under sections 3C(a)(2)(C), 3C(a)(3)(A), 3C(a)(3)(C), 3C(a)(4)(A), and 3C(a)(4)(B) of the Securities Exchange Act of 1934, as amended by the Wall Street Transparency and Accountability Act of 2010;

(2) with respect to any proposed rule change of a clearing agency for which an extension of the time for review has been designated under section 19(b)(2) of the Securities Exchange Act of 1934; and

(3) prior to exercising its rulemaking authorities under section 13(n) of the Securities Exchange Act of 1934, as added by section 763(i) of the Wall Street Transparency and Accountability Act of 2010.

SEC. 813. COMMON FRAMEWORK FOR DESIGNATED CLEARING ENTITY RISK MANAGEMENT.

The Commodity Futures Trading Commission and the Commission shall coordinate with the Board of Governors to jointly develop risk management supervision programs for designated clearing entities. Not later than 1 year after the date of enactment of this Act, the Commodity Futures Trading Commission, the Commission, and the Board of Governors shall submit a joint report to the Committee on Banking, Housing, and Urban Affairs and the Committee on Agriculture, Nutrition, and Forestry of the Senate, and the Committee on Financial Services and the Committee on Agriculture of the House of Representatives recommendations for—

(1) improving consistency in the designated clearing entity oversight programs of the Commission and the Commodity Futures Trading Commission;

(2) promoting robust risk management by designated clearing entities;

(3) promoting robust risk management oversight by regulators of designated clearing entities; and
(4) improving regulators’ ability to monitor the potential effects of designated clearing entity risk management on the stability of the financial system of the United States.

SEC. 814. EFFECTIVE DATE.

This title is effective as of the date of enactment of this Act.

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

SEC. 901. SHORT TITLE.

This title may be cited as the “Investor Protection and Securities Reform Act of 2010”.

Subtitle A—Increasing Investor Protection

SEC. 911. INVESTOR ADVISORY COMMITTEE ESTABLISHED.

Title I of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by adding at the end the following:

“SEC. 39. INVESTOR ADVISORY COMMITTEE.

“(a) Establishment and Purpose.—

“(1) Establishment.—There is established within the Commission the Investor Advisory Committee (referred to in this section as the ‘Committee’).

“(2) Purpose.—The Committee shall—

“(A) advise and consult with the Commission on—

“(i) regulatory priorities of the Commission;

“(ii) issues relating to the regulation of securities products, trading strategies, and fee structures, and the effectiveness of disclosure;

“(iii) initiatives to protect investor interest; and

“(iv) initiatives to promote investor confidence and the integrity of the securities marketplace; and

“(B) submit to the Commission such findings and recommendations as the Committee determines are appropriate, including recommendations for proposed legislative changes.

“(b) Membership.—

“(1) In general.—The members of the Committee shall be—

“(A) the Investor Advocate;

“(B) a representative of State securities commissions;

“(C) a representative of the interests of senior citizens; and

“(D) not fewer than 10, and not more than 20, members appointed by the Commission, from among individuals who—

“(i) represent the interests of individual equity and debt investors, including investors in mutual funds;

“(ii) represent the interests of institutional investors, including the interests of pension funds and registered investment companies;
(iii) are knowledgeable about investment issues and decisions; and
(iv) have reputations of integrity.

(2) Term.—Each member of the Committee appointed under paragraph (1)(B) shall serve for a term of 4 years.

(3) Members Not Commission Employees.—Members appointed under paragraph (1)(B) shall not be deemed to be employees or agents of the Commission solely because of membership on the Committee.

(c) Chairman; Vice Chairman; Secretary; Assistant Secretary.—

(1) In general.—The members of the Committee shall elect, from among the members of the Committee—

(A) a chairman, who may not be employed by an issuer;

(B) a vice chairman, who may not be employed by an issuer;

(C) a secretary; and

(D) an assistant secretary.

(2) Term.—Each member elected under paragraph (1) shall serve for a term of 3 years in the capacity for which the member was elected under paragraph (1).

(d) Meetings.—

(1) Frequency of Meetings.—The Committee shall meet—

(A) not less frequently than twice annually, at the call of the chairman of the Committee; and

(B) from time to time, at the call of the Commission.

(2) Notice.—The chairman of the Committee shall give the members of the Committee written notice of each meeting, not later than 2 weeks before the date of the meeting.

(e) Compensation and Travel Expenses.—Each member of the Committee who is not a full-time employee of the United States shall—

(1) be entitled to receive compensation at a rate not to exceed the daily equivalent of the annual rate of basic pay in effect for a position at level V of the Executive Schedule under section 5316 of title 5, United States Code, for each day during which the member is engaged in the actual performance of the duties of the Committee; and

(2) while away from the home or regular place of business of the member in the performance of services for the Committee, be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703(b) of title 5, United States Code.

(f) Staff.—The Commission shall make available to the Committee such staff as the chairman of the Committee determines are necessary to carry out this section.

(g) Review by Commission.—The Commission shall—

(1) review the findings and recommendations of the Committee; and

(2) each time the Committee submits a finding or recommendation to the Commission, promptly issue a public statement—

(A) assessing the finding or recommendation of the Committee; and
“(B) disclosing the action, if any, the Commission intends to take with respect to the finding or recommendation.

“(h) COMMITTEE FINDINGS.—Nothing in this section shall require the Commission to agree to or act upon any finding or recommendation of the Committee.

“(i) FEDERAL ADVISORY COMMITTEE ACT.—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply with respect to the Committee and its activities.

“(j) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to the Commission such sums as are necessary to carry out this section.”.

SEC. 912. CLARIFICATION OF AUTHORITY OF THE COMMISSION TO ENGAGE IN INVESTOR TESTING.

Section 19 of the Securities Act of 1933 (15 U.S.C. 77s) is amended by adding at the end the following:

“(e) EVALUATION OF RULES OR PROGRAMS.—For the purpose of evaluating any rule or program of the Commission issued or carried out under any provision of the securities laws, as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c), and the purposes of considering, proposing, adopting, or engaging in any such rule or program or developing new rules or programs, the Commission may—

“(1) gather information from and communicate with investors or other members of the public;

“(2) engage in such temporary investor testing programs as the Commission determines are in the public interest or would protect investors; and

“(3) consult with academics and consultants, as necessary to carry out this subsection.

“(f) RULE OF CONSTRUCTION.—For purposes of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), any action taken under subsection (e) shall not be construed to be a collection of information.”.

SEC. 913. STUDY AND RULEMAKING REGARDING OBLIGATIONS OF BROKERS, DEALERS, AND INVESTMENT ADVISERS.

(a) DEFINITION.—For purposes of this section, the term “retail customer” means a natural person, or the legal representative of such natural person, who—

(1) receives personalized investment advice about securities from a broker or dealer or investment adviser; and

(2) uses such advice primarily for personal, family, or household purposes.

(b) STUDY.—The Commission shall conduct a study to evaluate—

(1) the effectiveness of existing legal or regulatory standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice and recommendations about securities to retail customers imposed by the Commission and a national securities association, and other Federal and State legal or regulatory standards; and

(2) whether there are legal or regulatory gaps, shortcomings, or overlaps in legal or regulatory standards in the protection of retail customers relating to the standards of care
for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice about securities to retail customers that should be addressed by rule or statute.

(c) Considerations.—In conducting the study required under subsection (b), the Commission shall consider—

1. the effectiveness of existing legal or regulatory standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice and recommendations about securities to retail customers imposed by the Commission and a national securities association, and other Federal and State legal or regulatory standards;

2. whether there are legal or regulatory gaps, shortcomings, or overlaps in legal or regulatory standards in the protection of retail customers relating to the standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice about securities to retail customers that should be addressed by rule or statute;

3. whether retail customers understand that there are different standards of care applicable to brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers in the provision of personalized investment advice about securities to retail customers;

4. whether the existence of different standards of care applicable to brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers is a source of confusion for retail customers regarding the quality of personalized investment advice that retail customers receive;

5. the regulatory, examination, and enforcement resources devoted to, and activities of, the Commission, the States, and a national securities association to enforce the standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers when providing personalized investment advice and recommendations about securities to retail customers, including—

   A. the effectiveness of the examinations of brokers, dealers, and investment advisers in determining compliance with regulations;

   B. the frequency of the examinations; and

   C. the length of time of the examinations;

6. the substantive differences in the regulation of brokers, dealers, and investment advisers, when providing personalized investment advice and recommendations about securities to retail customers;

7. the specific instances related to the provision of personalized investment advice about securities in which—

   A. the regulation and oversight of investment advisers provide greater protection to retail customers than the regulation and oversight of brokers and dealers; and
(B) the regulation and oversight of brokers and dealers provide greater protection to retail customers than the regulation and oversight of investment advisers;

(8) the existing legal or regulatory standards of State securities regulators and other regulators intended to protect retail customers;

(9) the potential impact on retail customers, including the potential impact on access of retail customers to the range of products and services offered by brokers and dealers, of imposing upon brokers, dealers, and persons associated with brokers or dealers—

(A) the standard of care applied under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) for providing personalized investment advice about securities to retail customers of investment advisers, as interpreted by the Commission and the courts; and

(B) other requirements of the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.);

(10) the potential impact of eliminating the broker and dealer exclusion from the definition of “investment adviser” under section 202(a)(11)(C) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(11)(C)), in terms of—

(A) the impact and potential benefits and harm to retail customers that could result from such a change, including any potential impact on access to personalized investment advice and recommendations about securities to retail customers or the availability of such advice and recommendations;

(B) the number of additional entities and individuals that would be required to register under, or become subject to, the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.), and the additional requirements to which brokers, dealers, and persons associated with brokers and dealers would become subject, including—

(i) any potential additional associated person licensing, registration, and examination requirements; and

(ii) the additional costs, if any, to the additional entities and individuals; and

(C) the impact on Commission and State resources to—

(i) conduct examinations of registered investment advisers and the representatives of registered investment advisers, including the impact on the examination cycle; and

(ii) enforce the standard of care and other applicable requirements imposed under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.);

(11) the varying level of services provided by brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers to retail customers and the varying scope and terms of retail customer relationships of brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers with such retail customers;

(12) the potential impact upon retail customers that could result from potential changes in the regulatory requirements
or legal standards of care affecting brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers relating to their obligations to retail customers regarding the provision of investment advice, including any potential impact on—

(A) protection from fraud;

(B) access to personalized investment advice, and recommendations about securities to retail customers; or

(C) the availability of such advice and recommendations;

(13) the potential additional costs and expenses to—

(A) retail customers regarding and the potential impact on the profitability of their investment decisions; and

(B) brokers, dealers, and investment advisers resulting from potential changes in the regulatory requirements or legal standards affecting brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers relating to their obligations, including duty of care, to retail customers; and

(14) any other consideration that the Commission considers necessary and appropriate in determining whether to conduct a rulemaking under subsection (f).

(d) REPORT.—

(1) IN GENERAL.—Not later than 6 months after the date of enactment of this Act, the Commission shall submit a report on the study required under subsection (b) to—

(A) the Committee on Banking, Housing, and Urban Affairs of the Senate; and

(B) the Committee on Financial Services of the House of Representatives.

(2) CONTENT REQUIREMENTS.—The report required under paragraph (1) shall describe the findings, conclusions, and recommendations of the Commission from the study required under subsection (b), including—

(A) a description of the considerations, analysis, and public and industry input that the Commission considered, as required under subsection (b), to make such findings, conclusions, and policy recommendations; and

(B) an analysis of whether any identified legal or regulatory gaps, shortcomings, or overlap in legal or regulatory standards in the protection of retail customers relating to the standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice about securities to retail customers.

(e) PUBLIC COMMENT.—The Commission shall seek and consider public input, comments, and data in order to prepare the report required under subsection (d).

(f) RULEMAKING.—The Commission may commence a rulemaking, as necessary or appropriate in the public interest and for the protection of retail customers (and such other customers as the Commission may by rule provide), to address the legal or regulatory standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice about securities to retail customers.
investment advice about securities to such retail customers. The Commission shall consider the findings, conclusions, and recommendations of the study required under subsection (b).

(g) Authority to Establish a Fiduciary Duty for Brokers and Dealers.—

(1) Securities Exchange Act of 1934.—Section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o) is amended by adding at the end the following:

“(k) Standard of Conduct.—

“(1) In General.—Notwithstanding any other provision of this Act or the Investment Advisers Act of 1940, the Commission may promulgate rules to provide that, with respect to a broker or dealer, when providing personalized investment advice about securities to a retail customer (and such other customers as the Commission may by rule provide), the standard of conduct for such broker or dealer with respect to such customer shall be the same as the standard of conduct applicable to an investment adviser under section 211 of the Investment Advisers Act of 1940. The receipt of compensation based on commission or other standard compensation for the sale of securities shall not, in and of itself, be considered a violation of such standard applied to a broker or dealer. Nothing in this section shall require a broker or dealer or registered representative to have a continuing duty of care or loyalty to the customer after providing personalized investment advice about securities.

“(2) Disclosure of Range of Products Offered.—Where a broker or dealer sells only proprietary or other limited range of products, as determined by the Commission, the Commission may by rule require that such broker or dealer provide notice to each retail customer and obtain the consent or acknowledgment of the customer. The sale of only proprietary or other limited range of products by a broker or dealer shall not, in and of itself, be considered a violation of the standard set forth in paragraph (1).

“(l) Other Matters.—The Commission shall—

“(1) facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers, and investment advisers, including any material conflicts of interest; and

“(2) examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors.”.

(2) Investment Advisers Act of 1940.—Section 211 of the Investment Advisers Act of 1940, is further amended by adding at the end the following new subsections:

“(g) Standard of Conduct.—

“(1) In General.—The Commission may promulgate rules to provide that the standard of conduct for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers (and such other customers as the Commission may by rule provide), shall be to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice. In accordance with such
rules, any material conflicts of interest shall be disclosed and may be consented to by the customer. Such rules shall provide that such standard of conduct shall be no less stringent than the standard applicable to investment advisers under section 206(1) and (2) of this Act when providing personalized investment advice about securities, except the Commission shall not ascribe a meaning to the term ‘customer’ that would include an investor in a private fund managed by an investment adviser, where such private fund has entered into an advisory contract with such adviser. The receipt of compensation based on commission or fees shall not, in and of itself, be considered a violation of such standard applied to a broker, dealer, or investment adviser.

“(2) RETAIL CUSTOMER DEFINED.—For purposes of this subsection, the term ‘retail customer’ means a natural person, or the legal representative of such natural person, who—

“(A) receives personalized investment advice about securities from a broker, dealer, or investment adviser; and

“(B) uses such advice primarily for personal, family, or household purposes.

“(h) OTHER MATTERS.—The Commission shall—

“(1) facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers, and investment advisers, including any material conflicts of interest; and

“(2) examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors.”.

(h) HARMONIZATION OF ENFORCEMENT.—

(1) SECURITIES EXCHANGE ACT OF 1934.—Section 15 of the Securities Exchange Act of 1934, as amended by subsection (g)(1), is further amended by adding at the end the following new subsection:

“(m) HARMONIZATION OF ENFORCEMENT.—The enforcement authority of the Commission with respect to violations of the standard of conduct applicable to a broker or dealer providing personalized investment advice about securities to a retail customer shall include—

“(1) the enforcement authority of the Commission with respect to such violations provided under this Act; and

“(2) the enforcement authority of the Commission with respect to violations of the standard of conduct applicable to an investment adviser under the Investment Advisers Act of 1940, including the authority to impose sanctions for such violations, and

the Commission shall seek to prosecute and sanction violators of the standard of conduct applicable to a broker or dealer providing personalized investment advice about securities to a retail customer under this Act to same extent as the Commission prosecutes and sanctions violators of the standard of conduct applicable to an investment adviser under the Investment Advisers Act of 1940.”.

(2) INVESTMENT ADVISERS ACT OF 1940.—Section 211 of the Investment Advisers Act of 1940, as amended by subsection
(g)(2), is further amended by adding at the end the following new subsection:

“(i) HARMONIZATION OF ENFORCEMENT.—The enforcement authority of the Commission with respect to violations of the standard of conduct applicable to an investment adviser shall include—

“(1) the enforcement authority of the Commission with respect to such violations provided under this Act; and

“(2) the enforcement authority of the Commission with respect to violations of the standard of conduct applicable to a broker or dealer providing personalized investment advice about securities to a retail customer under the Securities Exchange Act of 1934, including the authority to impose sanctions for such violations, and

the Commission shall seek to prosecute and sanction violators of the standard of conduct applicable to an investment adviser under this Act to same extent as the Commission prosecutes and sanctions violators of the standard of conduct applicable to a broker or dealer providing personalized investment advice about securities to a retail customer under the Securities Exchange Act of 1934.”.

SEC. 914. STUDY ON ENHANCING INVESTMENT ADVISER EXAMINATIONS.

(a) STUDY REQUIRED.—

(1) IN GENERAL.—The Commission shall review and analyze the need for enhanced examination and enforcement resources for investment advisers.

(2) AREAS OF CONSIDERATION.—The study required by this subsection shall examine—

(A) the number and frequency of examinations of investment advisers by the Commission over the 5 years preceding the date of the enactment of this subtitle;

(B) the extent to which having Congress authorize the Commission to designate one or more self-regulatory organizations to augment the Commission’s efforts in overseeing investment advisers would improve the frequency of examinations of investment advisers; and

(C) current and potential approaches to examining the investment advisory activities of dually registered broker-dealers and investment advisers or affiliated broker-dealers and investment advisers.

(b) REPORT REQUIRED.—The Commission shall report its findings to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate, not later than 180 days after the date of enactment of this subtitle, and shall use such findings to revise its rules and regulations, as necessary. The report shall include a discussion of regulatory or legislative steps that are recommended or that may be necessary to address concerns identified in the study.

SEC. 915. OFFICE OF THE INVESTOR ADVOCATE.

Section 4 of the Securities Exchange Act of 1934 (15 U.S.C. 78d) is amended by adding at the end the following:

“(g) OFFICE OF THE INVESTOR ADVOCATE.—

“(1) OFFICE ESTABLISHED.—There is established within the Commission the Office of the Investor Advocate (in this subsection referred to as the ‘Office’).
“(2) INVESTOR ADVOCATE.—
   “(A) IN GENERAL.—The head of the Office shall be the Investor Advocate, who shall—
      “(i) report directly to the Chairman; and
      “(ii) be appointed by the Chairman, in consultation with the Commission, from among individuals having experience in advocating for the interests of investors in securities and investor protection issues, from the perspective of investors.
   “(B) COMPENSATION.—The annual rate of pay for the Investor Advocate shall be equal to the highest rate of annual pay for other senior executives who report to the Chairman of the Commission.
   “(C) LIMITATION ON SERVICE.—An individual who serves as the Investor Advocate may not be employed by the Commission—
      “(i) during the 2-year period ending on the date of appointment as Investor Advocate; or
      “(ii) during the 5-year period beginning on the date on which the person ceases to serve as the Investor Advocate.
   “(3) STAFF OF OFFICE.—The Investor Advocate, after consultation with the Chairman of the Commission, may retain or employ independent counsel, research staff, and service staff, as the Investor Advocate deems necessary to carry out the functions, powers, and duties of the Office.
   “(4) FUNCTIONS OF THE INVESTOR ADVOCATE.—The Investor Advocate shall—
      “(A) assist retail investors in resolving significant problems such investors may have with the Commission or with self-regulatory organizations;
      “(B) identify areas in which investors would benefit from changes in the regulations of the Commission or the rules of self-regulatory organizations;
      “(C) identify problems that investors have with financial service providers and investment products;
      “(D) analyze the potential impact on investors of—
         “(i) proposed regulations of the Commission; and
         “(ii) proposed rules of self-regulatory organizations registered under this title; and
      “(E) to the extent practicable, propose to the Commission changes in the regulations or orders of the Commission and to Congress any legislative, administrative, or personnel changes that may be appropriate to mitigate problems identified under this paragraph and to promote the interests of investors.
   “(5) ACCESS TO DOCUMENTS.—The Commission shall ensure that the Investor Advocate has full access to the documents of the Commission and any self-regulatory organization, as necessary to carry out the functions of the Office.
   “(6) ANNUAL REPORTS.—
      “(A) REPORT ON OBJECTIVES.—
         “(i) IN GENERAL.—Not later than June 30 of each year after 2010, the Investor Advocate shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report on
the objectives of the Investor Advocate for the following fiscal year.

“(ii) CONTENTS.—Each report required under clause (i) shall contain full and substantive analysis and explanation.

“(B) REPORT ON ACTIVITIES.—

“(i) IN GENERAL.—Not later than December 31 of each year after 2010, the Investor Advocate shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report on the activities of the Investor Advocate during the immediately preceding fiscal year.

“(ii) CONTENTS.—Each report required under clause (i) shall include—

“(I) appropriate statistical information and full and substantive analysis;

“(II) information on steps that the Investor Advocate has taken during the reporting period to improve investor services and the responsiveness of the Commission and self-regulatory organizations to investor concerns;

“(III) a summary of the most serious problems encountered by investors during the reporting period;

“(IV) an inventory of the items described in subclause (III) that includes—

“(aa) identification of any action taken by the Commission or the self-regulatory organization and the result of such action;

“(bb) the length of time that each item has remained on such inventory; and

“(cc) for items on which no action has been taken, the reasons for inaction, and an identification of any official who is responsible for such action;

“(V) recommendations for such administrative and legislative actions as may be appropriate to resolve problems encountered by investors; and

“(VI) any other information, as determined appropriate by the Investor Advocate.

“(iii) INDEPENDENCE.—Each report required under this paragraph shall be provided directly to the Committees listed in clause (i) without any prior review or comment from the Commission, any commissioner, any other officer or employee of the Commission, or the Office of Management and Budget.

“(iv) CONFIDENTIALITY.—No report required under clause (i) may contain confidential information.

“(7) REGULATIONS.—The Commission shall, by regulation, establish procedures requiring a formal response to all recommendations submitted to the Commission by the Investor Advocate, not later than 3 months after the date of such submission.”.
SEC. 916. STREAMLINING OF FILING PROCEDURES FOR SELF-REGULATORY ORGANIZATIONS.

(a) FILING PROCEDURES.—Section 19(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78s(b)) is amended by striking paragraph (2) (including the undesignated matter immediately following subparagraph (B)) and inserting the following:

“(2) APPROVAL PROCESS.—

“(A) APPROVAL PROCESS ESTABLISHED.—

“(i) IN GENERAL.—Except as provided in clause (ii), not later than 45 days after the date of publication of a proposed rule change under paragraph (1), the Commission shall—

“(I) by order, approve or disapprove the proposed rule change; or

“(II) institute proceedings under subparagraph (B) to determine whether the proposed rule change should be disapproved.

“(ii) EXTENSION OF TIME PERIOD.—The Commission may extend the period established under clause (i) by not more than an additional 45 days, if—

“(I) the Commission determines that a longer period is appropriate and publishes the reasons for such determination; or

“(II) the self-regulatory organization that filed the proposed rule change consents to the longer period.

“(B) PROCEEDINGS.—

“(i) NOTICE AND HEARING.—If the Commission does not approve or disapprove a proposed rule change under subparagraph (A), the Commission shall provide to the self-regulatory organization that filed the proposed rule change—

“(I) notice of the grounds for disapproval under consideration; and

“(II) opportunity for hearing, to be concluded not later than 180 days after the date of publication of notice of the filing of the proposed rule change.

“(ii) ORDER OF APPROVAL OR DISAPPROVAL.—

“(I) IN GENERAL.—Except as provided in subclause (II), not later than 180 days after the date of publication under paragraph (1), the Commission shall issue an order approving or disapproving the proposed rule change.

“(II) EXTENSION OF TIME PERIOD.—The Commission may extend the period for issuance under clause (I) by not more than 60 days, if—

“(aa) the Commission determines that a longer period is appropriate and publishes the reasons for such determination; or

“(bb) the self-regulatory organization that filed the proposed rule change consents to the longer period.

“(C) STANDARDS FOR APPROVAL AND DISAPPROVAL.—

“(i) APPROVAL.—The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent
with the requirements of this title and the rules and regulations issued under this title that are applicable to such organization.

“(ii) Disapproval.—The Commission shall disapprove a proposed rule change of a self-regulatory organization if it does not make a finding described in clause (i).

“(iii) Time for Approval.—The Commission may not approve a proposed rule change earlier than 30 days after the date of publication under paragraph (1), unless the Commission finds good cause for so doing and publishes the reason for the finding.

“(D) Result of Failure to Institute or Conclude Proceedings.—A proposed rule change shall be deemed to have been approved by the Commission, if—

“(i) the Commission does not approve or disapprove the proposed rule change or begin proceedings under subparagraph (B) within the period described in subparagraph (A); or

“(ii) the Commission does not issue an order approving or disapproving the proposed rule change under subparagraph (B) within the period described in subparagraph (B)(ii).

“(E) Publication Date Based on Federal Register Publishing.—For purposes of this paragraph, if, after filing a proposed rule change with the Commission pursuant to paragraph (1), a self-regulatory organization publishes a notice of the filing of such proposed rule change, together with the substantive terms of such proposed rule change, on a publicly accessible website, the Commission shall thereafter send the notice to the Federal Register for publication thereof under paragraph (1) within 15 days of the date on which such website publication is made. If the Commission fails to send the notice for publication thereof within such 15 day period, then the date of publication shall be deemed to be the date on which such website publication was made.

“(F) Rulemaking.—

“(i) In General.—Not later than 180 days after the date of enactment of the Investor Protection and Securities Reform Act of 2010, after consultation with other regulatory agencies, the Commission shall promulgate rules setting forth the procedural requirements of the proceedings required under this paragraph.

“(ii) Notice and Comment Not Required.—The rules promulgated by the Commission under clause (i) are not required to include republication of proposed rule changes or solicitation of public comment.”.

(b) Clarification of Filing Date.—

(1) Rule of construction.—Section 19(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78s(b)) is amended by adding at the end the following:

“(10) Rule of Construction Relating to Filing Date of Proposed Rule Changes.—

“(A) In General.—For purposes of this subsection, the date of filing of a proposed rule change shall be deemed
to be the date on which the Commission receives the proposed rule change.

“(B) EXCEPTION.—A proposed rule change has not been received by the Commission for purposes of subparagraph (A) if, not later than 7 business days after the date of receipt by the Commission, the Commission notifies the self-regulatory organization that such proposed rule change does not comply with the rules of the Commission relating to the required form of a proposed rule change, except that if the Commission determines that the proposed rule change is unusually lengthy and is complex or raises novel regulatory issues, the Commission shall inform the self-regulatory organization of such determination not later than 7 business days after the date of receipt by the Commission and, for the purposes of subparagraph (A), a proposed rule change has not been received by the Commission, if, not later than 21 days after the date of receipt by the Commission, the Commission notifies the self-regulatory organization that such proposed rule change does not comply with the rules of the Commission relating to the required form of a proposed rule change.”.

(2) PUBLICATION.—Section 19(b)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78s(b)(1)) is amended by striking “upon” and inserting “as soon as practicable after the date of”.  

(c) EFFECTIVE DATE OF PROPOSED RULES.—Section 19(b)(3) of the Securities Exchange Act of 1934 (15 U.S.C. 78s(b)(3)) is amended—

(1) in subparagraph (A)—

(A) by striking “may take effect” and inserting “shall take effect”; and

(B) by inserting “on any person, whether or not the person is a member of the self-regulatory organization” after “charge imposed by the self-regulatory organization”; and

(2) in subparagraph (C)—

(A) by amending the second sentence to read as follows:

“At any time within the 60-day period beginning on the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1), the Commission summarily may temporarily suspend the change in the rules of the self-regulatory organization made thereby, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title.”;

(B) by inserting after the second sentence the following:

“If the Commission takes such action, the Commission shall institute proceedings under paragraph (2)(B) to determine whether the proposed rule should be approved or disapproved.”; and

(C) in the third sentence, by striking “the preceding sentence” and inserting “this subparagraph”.

(d) CONFORMING CHANGE.—Section 19(b)(4)(D) of the Securities Exchange Act of 1934 (15 U.S.C. 78s(b)(4)(D)) is amended to read as follows:
“(D)(i) The Commission shall order the temporary suspension of any change in the rules of a clearing agency made by a proposed rule change that has taken effect under paragraph (3), if the appropriate regulatory agency for the clearing agency notifies the Commission not later than 30 days after the date on which the proposed rule change was filed of—

“(I) the determination by the appropriate regulatory agency that the rules of such clearing agency, as so changed, may be inconsistent with the safeguarding of securities or funds in the custody or control of such clearing agency or for which it is responsible; and

“(II) the reasons for the determination described in subclause (I).

“(ii) If the Commission takes action under clause (i), the Commission shall institute proceedings under paragraph (2)(B) to determine if the proposed rule change should be approved or disapproved.”.

SEC. 917. STUDY REGARDING FINANCIAL LITERACY AMONG INVESTORS.

(a) IN GENERAL.—The Commission shall conduct a study to identify—

(1) the existing level of financial literacy among retail investors, including subgroups of investors identified by the Commission;

(2) methods to improve the timing, content, and format of disclosures to investors with respect to financial intermediaries, investment products, and investment services;

(3) the most useful and understandable relevant information that retail investors need to make informed financial decisions before engaging a financial intermediary or purchasing an investment product or service that is typically sold to retail investors, including shares of open-end companies, as that term is defined in section 5 of the Investment Company Act of 1940 (15 U.S.C. 80a–5) that are registered under section 8 of that Act;

(4) methods to increase the transparency of expenses and conflicts of interests in transactions involving investment services and products, including shares of open-end companies described in paragraph (3);

(5) the most effective existing private and public efforts to educate investors; and

(6) in consultation with the Financial Literacy and Education Commission, a strategy (including, to the extent practicable, measurable goals and objectives) to increase the financial literacy of investors in order to bring about a positive change in investor behavior.

(b) REPORT.—Not later than 2 years after the date of enactment of this Act, the Commission shall submit a report on the study required under subsection (a) to—

(1) the Committee on Banking, Housing, and Urban Affairs of the Senate; and

(2) the Committee on Financial Services of the House of Representatives.
SEC. 918. STUDY REGARDING MUTUAL FUND ADVERTISING.

(a) In General.—The Comptroller General of the United States shall conduct a study on mutual fund advertising to identify—

(1) existing and proposed regulatory requirements for open-end investment company advertisements;

(2) current marketing practices for the sale of open-end investment company shares, including the use of past performance data, funds that have merged, and incubator funds;

(3) the impact of such advertising on consumers; and

(4) recommendations to improve investor protections in mutual fund advertising and additional information necessary to ensure that investors can make informed financial decisions when purchasing shares.

(b) Report.—Not later than 18 months after the date of enactment of this Act, the Comptroller General of the United States shall submit a report on the results of the study conducted under subsection (a) to—

(1) the Committee on Banking, Housing, and Urban Affairs of the United States Senate; and

(2) the Committee on Financial Services of the House of Representatives.

SEC. 919. CLARIFICATION OF COMMISSION AUTHORITY TO REQUIRE INVESTOR DISCLOSURES BEFORE PURCHASE OF INVESTMENT PRODUCTS AND SERVICES.

Section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o) is amended by adding at the end the following:

"(n) DISCLOSURES TO RETAIL INVESTORS.—

"(1) IN GENERAL.—Notwithstanding any other provision of the securities laws, the Commission may issue rules designating documents or information that shall be provided by a broker or dealer to a retail investor before the purchase of an investment product or service by the retail investor.

"(2) CONSIDERATIONS.—In developing any rules under paragraph (1), the Commission shall consider whether the rules will promote investor protection, efficiency, competition, and capital formation.

"(3) FORM AND CONTENTS OF DOCUMENTS AND INFORMATION.—Any documents or information designated under a rule promulgated under paragraph (1) shall—

"(A) be in a summary format; and

"(B) contain clear and concise information about—

"(i) investment objectives, strategies, costs, and risks; and

"(ii) any compensation or other financial incentive received by a broker, dealer, or other intermediary in connection with the purchase of retail investment products."

SEC. 919A. STUDY ON CONFLICTS OF INTEREST.

(a) In General.—The Comptroller General of the United States shall conduct a study—

(1) to identify and examine potential conflicts of interest that exist between the staffs of the investment banking and equity and fixed income securities analyst functions within the same firm; and
(2) to make recommendations to Congress designed to protect investors in light of such conflicts.

(b) CONSIDERATIONS.—In conducting the study under subsection (a), the Comptroller General shall—
   (1) consider—
      (A) the potential for investor harm resulting from conflicts, including consideration of the forms of misconduct engaged in by the several securities firms and individuals that entered into the Global Analyst Research Settlements in 2003 (also known as the “Global Settlement”);
      (B) the nature and benefits of the undertakings to which those firms agreed in enforcement proceedings, including firewalls between research and investment banking, separate reporting lines, dedicated legal and compliance staffs, allocation of budget, physical separation, compensation, employee performance evaluations, coverage decisions, limitations on soliciting investment banking business, disclosures, transparency, and other measures;
      (C) whether any such undertakings should be codified and applied permanently to securities firms, or whether the Commission should adopt rules applying any such undertakings to securities firms; and
      (D) whether to recommend regulatory or legislative measures designed to mitigate possible adverse consequences to investors arising from the conflicts of interest or to enhance investor protection or confidence in the integrity of the securities markets; and
   (2) consult with State attorneys general, State securities officials, the Commission, the Financial Industry Regulatory Authority (“FINRA”), NYSE Regulation, investor advocates, brokers, dealers, retail investors, institutional investors, and academics.

(c) REPORT.—The Comptroller General shall submit a report on the results of the study required by this section to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives, not later than 18 months after the date of enactment of this Act.

SEC. 919B. STUDY ON IMPROVED INVESTOR ACCESS TO INFORMATION ON INVESTMENT ADVISERS AND BROKER-DEALERS.

(a) STUDY.—
   (1) IN GENERAL.—Not later than 6 months after the date of enactment of this Act, the Commission shall complete a study, including recommendations, of ways to improve the access of investors to registration information (including disciplinary actions, regulatory, judicial, and arbitration proceedings, and other information) about registered and previously registered investment advisers, associated persons of investment advisers, brokers and dealers and their associated persons on the existing Central Registration Depository and Investment Adviser Registration Depository systems, as well as identify additional information that should be made publicly available.

   (2) CONTENTS.—The study required by subsection (a) shall include an analysis of the advantages and disadvantages of further centralizing access to the information contained in the 2 systems, including—
(A) identification of those data pertinent to investors; and

(B) the identification of the method and format for displaying and publishing such data to enhance accessibility by and utility to investors.

(b) IMPLEMENTATION.—Not later than 18 months after the date of completion of the study required by subsection (a), the Commission shall implement any recommendations of the study.

SEC. 919C. STUDY ON FINANCIAL PLANNERS AND THE USE OF FINANCIAL DESIGNATIONS.

(a) IN GENERAL.—The Comptroller General of the United States shall conduct a study to evaluate—

(1) the effectiveness of State and Federal regulations to protect investors and other consumers from individuals who hold themselves out as financial planners through the use of misleading titles, designations, or marketing materials;

(2) current State and Federal oversight structure and regulations for financial planners; and

(3) legal or regulatory gaps in the regulation of financial planners and other individuals who provide or offer to provide financial planning services to consumers.

(b) CONSIDERATIONS.—In conducting the study required under subsection (a), the Comptroller General shall consider—

(1) the role of financial planners in providing advice regarding the management of financial resources, including investment planning, income tax planning, education planning, retirement planning, estate planning, and risk management;

(2) whether current regulations at the State and Federal level provide adequate ethical and professional standards for financial planners;

(3) the possible risk posed to investors and other consumers by individuals who hold themselves out as financial planners or as otherwise providing financial planning services in connection with the sale of financial products, including insurance and securities;

(4) the possible risk posed to investors and other consumers by individuals who otherwise use titles, designations, or marketing materials in a misleading way in connection with the delivery of financial advice;

(6) the ability of investors and other consumers to understand licensing requirements and standards of care that apply to individuals who hold themselves out as financial planners or as otherwise providing financial planning services;

(7) the possible benefits to investors and other consumers of regulation and professional oversight of financial planners; and

(8) any other consideration that the Comptroller General deems necessary or appropriate to effectively execute the study required under subsection (a).

(c) RECOMMENDATIONS.—In providing recommendations for the appropriate regulation of financial planners and other individuals who provide or offer to provide financial planning services, in order to protect investors and other consumers of financial planning services, the Comptroller General shall consider—
(1) the appropriate structure for regulation of financial planners and individuals providing financial planning services; and

(2) the appropriate scope of the regulations needed to protect investors and other consumers, including but not limited to the need to establish competency standards, practice standards, ethical guidelines, disciplinary authority, and transparency to investors and other consumers.

(d) REPORT.—

(1) In general.—Not later than 180 days after the date of enactment of this Act, the Comptroller General shall submit a report on the study required under subsection (a) to—

(A) the Committee on Banking, Housing, and Urban Affairs of the Senate;

(B) the Special Committee on Aging of the Senate; and

(C) the Committee on Financial Services of the House of Representatives.

(2) CONTENT REQUIREMENTS.—The report required under paragraph (1) shall describe the findings and determinations made by the Comptroller General in carrying out the study required under subsection (a), including a description of the considerations, analysis, and government, public, industry, nonprofit and consumer input that the Comptroller General considered to make such findings, conclusions, and legislative, regulatory, or other recommendations.

SEC. 919D. OMBUDSMAN.

Section 4(g) of the Securities Exchange Act of 1934, as added by section 914, is amended by adding at the end the following:

“(8) OMBUDSMAN.—

“(A) APPOINTMENT.—Not later than 180 days after the date on which the first Investor Advocate is appointed under paragraph (2)(A)(i), the Investor Advocate shall appoint an Ombudsman, who shall report directly to the Investor Advocate.

“(B) DUTIES.—The Ombudsman appointed under subparagraph (A) shall—

“(i) act as a liaison between the Commission and any retail investor in resolving problems that retail investors may have with the Commission or with self-regulatory organizations;

“(ii) review and make recommendations regarding policies and procedures to encourage persons to present questions to the Investor Advocate regarding compliance with the securities laws; and

“(iii) establish safeguards to maintain the confidentiality of communications between the persons described in clause (ii) and the Ombudsman.

“(C) LIMITATION.—In carrying out the duties of the Ombudsman under subparagraph (B), the Ombudsman shall utilize personnel of the Commission to the extent practicable. Nothing in this paragraph shall be construed as replacing, altering, or diminishing the activities of any ombudsman or similar office of any other agency.

“(D) REPORT.—The Ombudsman shall submit a semiannual report to the Investor Advocate that describes the
activities and evaluates the effectiveness of the Ombudsman during the preceding year. The Investor Advocate shall include the reports required under this section in the reports required to be submitted by the Inspector Advocate under paragraph (6).

Subtitle B—Increasing Regulatory Enforcement and Remedies

SEC. 921. AUTHORITY TO RESTRICT MANDATORY PRE-DISPUTE ARBITRATION.

(a) Amendment to Securities Exchange Act of 1934.—Section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o), as amended by this title, is further amended by adding at the end the following new subsection:

"(o) Authority to Restrict Mandatory Pre-Dispute Arbitration.—The Commission, by rule, may prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any broker, dealer, or municipal securities dealer to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors."

(b) Amendment to Investment Advisers Act of 1940.—Section 205 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–5) is amended by adding at the end the following new subsection:

"(f) Authority to Restrict Mandatory Pre-Dispute Arbitration.—The Commission, by rule, may prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any investment adviser to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors."

SEC. 922. WHISTLEBLOWER PROTECTION.

(a) In General.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by inserting after section 21E the following:

"SEC. 21F. SECURITIES WHISTLEBLOWER INCENTIVES AND PROTECTION.

"(a) Definitions.—In this section the following definitions shall apply:

"(1) Covered Judicial or Administrative Action.—The term 'covered judicial or administrative action' means any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000.

"(2) Fund.—The term 'Fund' means the Securities and Exchange Commission Investor Protection Fund.

"(3) Original Information.—The term 'original information' means information that—"
“(A) is derived from the independent knowledge or analysis of a whistleblower;
“(B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and
“(C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.
“(4) MONETARY SANCTIONS.—The term ‘monetary sanctions’, when used with respect to any judicial or administrative action, means—
“(A) any monies, including penalties, disgorgement, and interest, ordered to be paid; and
“(B) any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action.
“(5) RELATED ACTION.—The term ‘related action’, when used with respect to any judicial or administrative action brought by the Commission under the securities laws, means any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection (h)(2)(D)(i) that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.
“(6) WHISTLEBLOWER.—The term ‘whistleblower’ means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.
“(b) AWARDS.—
“(1) IN GENERAL.—In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—
“(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and
“(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.
“(2) PAYMENT OF AWARDS.—Any amount paid under paragraph (1) shall be paid from the Fund.
“(c) DETERMINATION OF AMOUNT OF AWARD; DENIAL OF AWARD.—
“(1) DETERMINATION OF AMOUNT OF AWARD.—
“(A) DISCRETION.—The determination of the amount of an award made under subsection (b) shall be in the discretion of the Commission.
“(B) CRITERIA.—In determining the amount of an award made under subsection (b), the Commission—
“(i) shall take into consideration—

(1) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;

(2) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;

(3) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and

(4) such additional relevant factors as the Commission may establish by rule or regulation;

and

(ii) shall not take into consideration the balance of the Fund.

(2) Denial of Award.—No award under subsection (b) shall be made—

(A) to any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of—

(i) an appropriate regulatory agency;

(ii) the Department of Justice;

(iii) a self-regulatory organization;

(iv) the Public Company Accounting Oversight Board; or

(v) a law enforcement organization;

(B) to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section;

(C) to any whistleblower who gains the information through the performance of an audit of financial statements required under the securities laws and for whom such submission would be contrary to the requirements of section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1); or

(D) to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require.

(d) Representation.—

(1) Permitted Representation.—Any whistleblower who makes a claim for an award under subsection (b) may be represented by counsel.

(2) Required Representation.—

(A) In General.—Any whistleblower who anonymously makes a claim for an award under subsection (b) shall be represented by counsel if the whistleblower anonymously submits the information upon which the claim is based.

(B) Disclosure of Identity.—Prior to the payment of an award, a whistleblower shall disclose the identity of the whistleblower and provide such other information
as the Commission may require, directly or through counsel for the whistleblower.

“(e) No Contract Necessary.—No contract with the Commission is necessary for any whistleblower to receive an award under subsection (b), unless otherwise required by the Commission by rule or regulation.

“(f) Appeals.—Any determination made under this section, including whether, to whom, or in what amount to make awards, shall be in the discretion of the Commission. Any such determination, except the determination of the amount of an award if the award was made in accordance with subsection (b), may be appealed to the appropriate court of appeals of the United States not more than 30 days after the determination is issued by the Commission.

“(g) Investor Protection Fund.—

“(1) Fund Established.—There is established in the Treasury of the United States a fund to be known as the ‘Securities and Exchange Commission Investor Protection Fund’.

“(2) Use of Fund.—The Fund shall be available to the Commission, without further appropriation or fiscal year limitation, for—

“(A) paying awards to whistleblowers as provided in subsection (b); and

“(B) funding the activities of the Inspector General of the Commission under section 4(i).

“(3) Deposits and Credits.—

“(A) In General.—There shall be deposited into or credited to the Fund an amount equal to—

“(i) any monetary sanction collected by the Commission in any judicial or administrative action brought by the Commission under the securities laws that is not added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) or otherwise distributed to victims of a violation of the securities laws, or the rules and regulations thereunder, underlying such action, unless the balance of the Fund at the time the monetary sanction is collected exceeds $300,000,000;

“(ii) any monetary sanction added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) that is not distributed to the victims for whom the Fund was established, unless the balance of the disgorgement fund at the time the determination is made not to distribute the monetary sanction to such victims exceeds $200,000,000; and

“(iii) all income from investments made under paragraph (4).

“(B) Additional Amounts.—If the amounts deposited into or credited to the Fund under subparagraph (A) are not sufficient to satisfy an award made under subsection (b), there shall be deposited into or credited to the Fund an amount equal to the unsatisfied portion of the award from any monetary sanction collected by the Commission.
in the covered judicial or administrative action on which the award is based.

“(4) INVESTMENTS.—

“(A) AMOUNTS IN FUND MAY BE INVESTED.—The Commission may request the Secretary of the Treasury to invest the portion of the Fund that is not, in the discretion of the Commission, required to meet the current needs of the Fund.

“(B) ELIGIBLE INVESTMENTS.—Investments shall be made by the Secretary of the Treasury in obligations of the United States or obligations that are guaranteed as to principal and interest by the United States, with maturities suitable to the needs of the Fund as determined by the Commission on the record.

“(C) INTEREST AND PROCEEDS CREDITED.—The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to the Fund.

“(5) REPORTS TO CONGRESS.—Not later than October 30 of each fiscal year beginning after the date of enactment of this subsection, the Commission shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives a report on—

“(A) the whistleblower award program, established under this section, including—

“(i) a description of the number of awards granted; and

“(ii) the types of cases in which awards were granted during the preceding fiscal year;

“(B) the balance of the Fund at the beginning of the preceding fiscal year;

“(C) the amounts deposited into or credited to the Fund during the preceding fiscal year;

“(D) the amount of earnings on investments made under paragraph (4) during the preceding fiscal year;

“(E) the amount paid from the Fund during the preceding fiscal year to whistleblowers pursuant to subsection (b);

“(F) the balance of the Fund at the end of the preceding fiscal year; and

“(G) a complete set of audited financial statements, including—

“(i) a balance sheet;

“(ii) income statement; and

“(iii) cash flow analysis.

“(h) PROTECTION OF WHISTLEBLOWERS.—

“(1) PROHIBITION AGAINST RETALIATION.—

“(A) IN GENERAL.—No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

“(i) in providing information to the Commission in accordance with this section;

“(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of
the Commission based upon or related to such information; or

"(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of title 18, United States Code, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

"(B) Enforcement.—

"(i) Cause of action.—An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C).

"(ii) Subpoenas.—A subpoena requiring the attendance of a witness at a trial or hearing conducted under this section may be served at any place in the United States.

"(iii) Statute of limitations.—

"(I) In general.—An action under this subsection may not be brought—

"(aa) more than 6 years after the date on which the violation of subparagraph (A) occurred; or

"(bb) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation of subparagraph (A).

"(II) Required action within 10 years.—Notwithstanding subclause (I), an action under this subsection may not in any circumstance be brought more than 10 years after the date on which the violation occurs.

"(C) Relief.—Relief for an individual prevailing in an action brought under subparagraph (B) shall include—

"(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;

"(ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and

"(iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees.

"(2) Confidentiality.—

"(A) In general.—Except as provided in subparagraphs (B) and (C), the Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of title 5, United States Code, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or any entity described in subparagraph (C). For purposes of section
552 of title 5, United States Code, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section.

"(B) EXEMPTED STATUTE.—For purposes of section 552 of title 5, United States Code, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section 552.

"(C) RULE OF CONSTRUCTION.—Nothing in this section is intended to limit, or shall be construed to limit, the ability of the Attorney General to present such evidence to a grand jury or to share such evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

"(D) AVAILABILITY TO GOVERNMENT AGENCIES.—

"(i) IN GENERAL.—Without the loss of its status as confidential in the hands of the Commission, all information referred to in subparagraph (A) may, in the discretion of the Commission, when determined by the Commission to be necessary to accomplish the purposes of this Act and to protect investors, be made available to—

"(I) the Attorney General of the United States;
"(II) an appropriate regulatory authority;
"(III) a self-regulatory organization;
"(IV) a State attorney general in connection with any criminal investigation;
"(V) any appropriate State regulatory authority;
"(VI) the Public Company Accounting Oversight Board;
"(VII) a foreign securities authority; and
"(VIII) a foreign law enforcement authority.

"(ii) CONFIDENTIALITY.—

"(I) IN GENERAL.—Each of the entities described in subclauses (I) through (VI) of clause (i) shall maintain such information as confidential in accordance with the requirements established under subparagraph (A).

"(II) FOREIGN AUTHORITIES.—Each of the entities described in subclauses (VII) and (VIII) of clause (i) shall maintain such information in accordance with such assurances of confidentiality as the Commission determines appropriate.

"(3) RIGHTS RETAINED.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any whistleblower under any Federal or State law, or under any collective bargaining agreement.

"(i) PROVISION OF FALSE INFORMATION.—A whistleblower shall not be entitled to an award under this section if the whistleblower—

"(1) knowingly and willfully makes any false, fictitious, or fraudulent statement or representation; or
"(2) uses any false writing or document knowing the writing or document contains any false, fictitious, or fraudulent statement or entry.

"(j) RULEMAKING AUTHORITY.—The Commission shall have the authority to issue such rules and regulations as may be necessary
or appropriate to implement the provisions of this section consistent with the purposes of this section.”.

(b) Protection for Employees of Nationally Recognized Statistical Rating Organizations.—Section 1514A(a) of title 18, United States Code, is amended—

(1) by inserting “or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c),” after “78o(d),”); and

(2) by inserting “or nationally recognized statistical rating organization” after “such company”.

c) Section 1514A of Title 18, United States Code.—

(1) Statute of Limitations; Jury Trial.—Section 1514A(b)(2) of title 18, United States Code, is amended—

(A) in subparagraph (D)—

(i) by striking “90” and inserting “180”; and

(ii) by striking the period at the end and inserting “, or after the date on which the employee became aware of the violation.”; and

(B) by adding at the end the following:

“(E) Jury Trial.—A party to an action brought under paragraph (1)(B) shall be entitled to trial by jury.”.

(2) Private Securities Litigation Witnesses; Non-enforceability; Information.—Section 1514A of title 18, United States Code, is amended by adding at the end the following:

“(e) Nonenforceability of Certain Provisions Waiving Rights and Remedies or Requiring Arbitration of Disputes.—

“(1) Waiver of Rights and Remedies.—The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.

“(2) Predispute Arbitration Agreements.—No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.”.

d) Study of Whistleblower Protection Program.—

(1) Study.—The Inspector General of the Commission shall conduct a study of the whistleblower protections established under the amendments made by this section, including—

(A) whether the final rules and regulation issued under the amendments made by this section have made the whistleblower protection program (referred to in this subsection as the “program”) clearly defined and user-friendly;

(B) whether the program is promoted on the website of the Commission and has been widely publicized;

(C) whether the Commission is prompt in—

(i) responding to—

(I) information provided by whistleblowers; and

(II) applications for awards filed by whistleblowers;

(ii) updating whistleblowers about the status of their applications; and

(iii) otherwise communicating with the interested parties;

(D) whether the minimum and maximum reward levels are adequate to entice whistleblowers to come forward with
information and whether the reward levels are so high as to encourage illegitimate whistleblower claims;

(E) whether the appeals process has been unduly burdensome for the Commission;

(F) whether the funding mechanism for the Investor Protection Fund is adequate;

(G) whether, in the interest of protecting investors and identifying and preventing fraud, it would be useful for Congress to consider empowering whistleblowers or other individuals, who have already attempted to pursue the case through the Commission, to have a private right of action to bring suit based on the facts of the same case, on behalf of the Government and themselves, against persons who have committed securities fraud;

(H)(i) whether the exemption under section 552(b)(3) of title 5 (known as the Freedom of Information Act) established in section 21F(h)(2)(A) of the Securities Exchange Act of 1934, as added by this Act, aids whistleblowers in disclosing information to the Commission;

(ii) what impact the exemption described in clause (i) has had on the ability of the public to access information about the regulation and enforcement by the Commission of securities; and

(iii) any recommendations on whether the exemption described in clause (i) should remain in effect; and

(I) such other matters as the Inspector General deems appropriate.

(2) REPORT.—Not later than 30 months after the date of enactment of this Act, the Inspector General shall—

(A) submit a report on the findings of the study required under paragraph (1) to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House; and

(B) make the report described in subparagraph (A) available to the public through publication of the report on the website of the Commission.

SEC. 923. CONFORMING AMENDMENTS FOR WHISTLEBLOWER PROTECTION.

(a) IN GENERAL.—


(b) SECURITIES EXCHANGE ACT.—

by inserting “and section 21F of this title” after “the Sarbanes-Oxley Act of 2002”.


(A) in subsection (d)(1) by—

(i) striking “(subject to subsection (e))”; and

(ii) inserting “and section 21F of this title” after “the Sarbanes-Oxley Act of 2002”;

(B) by striking subsection (e); and

(C) by redesignating subsections (f) and (g) as subsections (e) and (f), respectively.

SEC. 924. IMPLEMENTATION AND TRANSITION PROVISIONS FOR WHISTLEBLOWER PROTECTION.

Deadline.

(a) IMPLEMENTING RULES.—The Commission shall issue final regulations implementing the provisions of section 21F of the Securities Exchange Act of 1934, as added by this subtitle, not later than 270 days after the date of enactment of this Act.

(b) ORIGINAL INFORMATION.—Information provided to the Commission in writing by a whistleblower shall not lose the status of original information (as defined in section 21F(a)(3) of the Securities Exchange Act of 1934, as added by this subtitle) solely because the whistleblower provided the information prior to the effective date of the regulations, if the information is provided by the whistleblower after the date of enactment of this subtitle.

(c) AWARDS.—A whistleblower may receive an award pursuant to section 21F of the Securities Exchange Act of 1934, as added by this subtitle, regardless of whether any violation of a provision of the securities laws, or a rule or regulation thereunder, underlying the judicial or administrative action upon which the award is based, occurred prior to the date of enactment of this subtitle.

(d) ADMINISTRATION AND ENFORCEMENT.—The Securities and Exchange Commission shall establish a separate office within the Commission to administer and enforce the provisions of section 21F of the Securities Exchange Act of 1934 (as add by section 922(a)). Such office shall report annually to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives on its activities, whistleblower complaints, and the response of the Commission to such complaints.

SEC. 925. COLLATERAL BARS.

(a) SECURITIES EXCHANGE ACT OF 1934.—

(1) SECTION 15.—Section 15(b)(6)(A) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(6)(A)) is amended by striking “12 months, or bar such person from being associated with a broker or dealer,” and inserting “12 months, or bar any such person from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization,”.

(2) SECTION 15B.—Section 15B(c)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–4(c)(4)) is amended by striking “twelve months or bar any such person from being associated with a municipal securities dealer,” and inserting “12 months or bar any such person from being associated with a broker, dealer, investment adviser, municipal securities
dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.”.

(3) SECTION 17A.—Section 17A(c)(4)(C) of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1(c)(4)(C)) is amended by striking “twelve months or bar any such person from being associated with the transfer agent,” and inserting “12 months or bar any such person from being associated with any transfer agent, broker, dealer, investment adviser, municipal securities dealer, municipal advisor, or nationally recognized statistical rating organization.”.

(b) INVESTMENT ADVISERS ACT OF 1940.—Section 203(f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(f)) is amended by striking “twelve months or bar any such person from being associated with an investment adviser,” and inserting “12 months or bar any such person from being associated with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.”.

SEC. 926. DISQUALIFYING FELONS AND OTHER “BAD ACTORS” FROM REGULATION D OFFERINGS.

Not later than 1 year after the date of enactment of this Act, the Commission shall issue rules for the disqualification of offerings and sales of securities made under section 230.506 of title 17, Code of Federal Regulations, that—

(1) are substantially similar to the provisions of section 230.262 of title 17, Code of Federal Regulations, or any successor thereto; and

(2) disqualify any offering or sale of securities by a person that—

(A) is subject to a final order of a State securities commission (or an agency or officer of a State performing like functions), a State authority that supervises or examines banks, savings associations, or credit unions, a State insurance commission (or an agency or officer of a State performing like functions), an appropriate Federal banking agency, or the National Credit Union Administration, that—

(i) bars the person from—

(I) association with an entity regulated by such commission, authority, agency, or officer;

(II) engaging in the business of securities, insurance, or banking; or

(III) engaging in savings association or credit union activities; or

(ii) constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct within the 10-year period ending on the date of the filing of the offer or sale; or

(B) has been convicted of any felony or misdemeanor in connection with the purchase or sale of any security or involving the making of any false filing with the Commission.
SEC. 927. EQUAL TREATMENT OF SELF-REGULATORY ORGANIZATION RULES.

Section 29(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78cc(a)) is amended by striking “an exchange required thereby” and inserting “a self-regulatory organization.”

SEC. 928. CLARIFICATION THAT SECTION 205 OF THE INVESTMENT ADVISERS ACT OF 1940 DOES NOT APPLY TO STATE-REGISTERED ADVISERS.

Section 205(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–5(a)) is amended, in the matter preceding paragraph (1)—

(1) by striking “, unless exempt from registration pursuant to section 203(b),” and inserting “registered or required to be registered with the Commission”; 

(2) by striking “make use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, to”; and

(3) by striking “to” after “in any way”.

SEC. 929. UNLAWFUL MARGIN LENDING.

Section 7(c)(1)(A) of the Securities Exchange Act of 1934 (15 U.S.C. 78g(c)(1)(A)) is amended by striking “; and” and inserting “; or”.

SEC. 929A. PROTECTION FOR EMPLOYEES OF SUBSIDIARIES AND AFFILIATES OF PUBLICLY TRADED COMPANIES.

Section 1514A of title 18, United States Code, is amended by inserting “including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company” after “the Securities Exchange Act of 1934 (15 U.S.C. 78o(d))”.

SEC. 929B. FAIR FUND AMENDMENTS.

Section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(a)) is amended—

(1) by striking subsection (a) and inserting the following:

“(a) CIVIL PENALTIES TO BE USED FOR THE RELIEF OF VICTIMS.—If, in any judicial or administrative action brought by the Commission under the securities laws, the Commission obtains a civil penalty against any person for a violation of such laws, or such person agrees, in settlement of any such action, to such civil penalty, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of a disgorgement fund or other fund established for the benefit of the victims of such violation.”;

(2) in subsection (b)—

(A) by striking “for a disgorgement fund described in subsection (a)” and inserting “for a disgorgement fund or other fund described in subsection (a)”; and

(B) by striking “in the disgorgement fund” and inserting “in such fund”; and

(3) by striking subsection (e).

SEC. 929C. INCREASING THE BORROWING LIMIT ON TREASURY LOANS.

Section 4(h) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78ddd(h)) is amended in the first sentence, by striking “$1,000,000,000” and inserting “$2,500,000,000”.

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SEC. 929D. LOST AND STOLEN SECURITIES.

(1) in subparagraph (A), by striking “missing, lost, counterfeit, or stolen securities” and inserting “securities that are missing, lost, counterfeit, stolen, or cancelled”; and
(2) in subparagraph (B), by striking “or stolen” and inserting “stolen, cancelled, or reported in such other manner as the Commission, by rule, may prescribe”.

SEC. 929E. NATIONWIDE SERVICE OF SUBPOENAS.

(a) Securities Act of 1933.—Section 22(a) of the Securities Act of 1933 (15 U.S.C. 77v(a)) is amended by inserting after the second sentence the following: “In any action or proceeding instituted by the Commission under this title in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence.”.

(b) Securities Exchange Act of 1934.—Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. 78aa) is amended by inserting after the third sentence the following: “In any action or proceeding instituted by the Commission under this title in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence.”.

(c) Investment Company Act of 1940.—Section 44 of the Investment Company Act of 1940 (15 U.S.C. 80a–43) is amended by inserting after the fourth sentence the following: “In any action or proceeding instituted by the Commission under this title in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence.”.

(d) Investment Advisers Act of 1940.—Section 214 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–14) is amended by inserting after the third sentence the following: “In any action or proceeding instituted by the Commission under this title in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence.”.

SEC. 929F. FORMERLY ASSOCIATED PERSONS.

(a) Member or Employee of the Municipal Securities Rule-Making Board.—Section 15B(c)(8) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–4(c)(8)) is amended by striking “any member
or employee” and inserting “any person who is, or at the time of the alleged violation or abuse was, a member or employee”.

(b) PERSON ASSOCIATED WITH A GOVERNMENT SECURITIES BROKER OR DEALER.—Section 15C(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–5(c)) is amended—
(1) in paragraph (1)(C), by striking “any person associated, or seeking to become associated,” and inserting “any person who is, or at the time of the alleged misconduct was, associated or seeking to become associated”; and
(2) in paragraph (2)—
(A) in subparagraph (A), by inserting “, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated” after “any person associated”; and
(B) in subparagraph (B), by inserting “, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated” after “any person associated”.

c) PERSON ASSOCIATED WITH A MEMBER OF A NATIONAL SECURITIES EXCHANGE OR REGISTERED SECURITIES ASSOCIATION.—Section 21(a)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(a)(1)) is amended, in the first sentence, by inserting “or, as to any act or practice, or omission to act, while associated with a member, formerly associated” after “member or a person associated”.

d) PARTICIPANT OF A REGISTERED CLEARING AGENCY.—Section 21(a)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(a)(1)) is amended, in the first sentence, by inserting “, as to any act or practice, or omission to act, while a participant, was a participant,” after “in which such person is a participant”.

(1) by striking “any officer or director” and inserting “any person who is, or at the time of the alleged misconduct was, an officer or director”; and
(2) by striking “such officer or director” and inserting “such person”.

f) OFFICER OR DIRECTOR OF AN INVESTMENT COMPANY.—Section 36(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–35(a)) is amended—
(1) by striking “a person serving or acting” and inserting “a person who is, or at the time of the alleged misconduct was, serving or acting”; and
(2) by striking “such person so serves or acts” and inserting “such person so serves or acts, or at the time of the alleged misconduct, so served or acted”.

g) PERSON ASSOCIATED WITH A PUBLIC ACCOUNTING FIRM.—
(1) SARBANES-OXLEY ACT OF 2002 AMENDMENT.—Section 2(a)(9) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201(9)) is amended by adding at the end the following:

“(C) INVESTIGATIVE AND ENFORCEMENT AUTHORITY.—
For purposes of sections 3(c), 101(c), 105, and 107(c) and the rules of the Board and Commission issued thereunder, except to the extent specifically excepted by such rules, the terms defined in subparagraph (A) shall include any
person associated, seeking to become associated, or formerly associated with a public accounting firm, except that—

“(i) the authority to conduct an investigation of such person under section 105(b) shall apply only with respect to any act or practice, or omission to act, by the person while such person was associated or seeking to become associated with a registered public accounting firm; and

“(ii) the authority to commence a disciplinary proceeding under section 105(c)(1), or impose sanctions under section 105(c)(4), against such person shall apply only with respect to—

“(I) conduct occurring while such person was associated or seeking to become associated with a registered public accounting firm; or

“(II) non-cooperation, as described in section 105(b)(3), with respect to a demand in a Board investigation for testimony, documents, or other information relating to a period when such person was associated or seeking to become associated with a registered public accounting firm.”.

(2) SEcurities Exchange act of 1934 amendment.—Section 21(a)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(a)(1)) is amended by striking “or a person associated with such a firm” and inserting “, a person associated with such a firm, or, as to any act, practice, or omission to act, while associated with such firm, a person formerly associated with such a firm”.

(h) Supervisory PERSONnel of an audit firm.—Section 105(c)(6) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7215(c)(6)) is amended—

(1) in subparagraph (A), by striking “the supervisory personnel” and inserting “any person who is, or at the time of the alleged failure reasonably to supervise was, a supervisory person”; and

(2) in subparagraph (B)—

(A) by striking “No associated person” and inserting “No current or former supervisory person”; and

(B) by striking “any other person” and inserting “any associated person”.

(i) Member of the public company accounting oversight board.—Section 107(d)(3) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7217(d)(3)) is amended by striking “any member” and inserting “any person who is, or at the time of the alleged misconduct was, a member”.

SEC. 929G. Streamlined hiring authority for market specialists.

(a) Appointment AUTHORITY.—Section 3114 of title 5, United States Code, is amended by striking the section heading and all that follows through the end of subsection (a) and inserting the following:

SEC. 929G. Streamlined hiring authority for market specialists.

(a) APPOINTMENT AUTHORITY.—Section 3114 of title 5, United States Code, is amended by striking the section heading and all that follows through the end of subsection (a) and inserting the following:
§ 3114. Appointment of candidates to certain positions in the competitive service by the Securities and Exchange Commission

(a) Applicability.—This section applies with respect to any position of accountant, economist, and securities compliance examiner at the Commission that is in the competitive service, and any position at the Commission in the competitive service that requires specialized knowledge of financial and capital market formation or regulation, financial market structures or surveillance, or information technology.

(b) Clerical Amendment.—The table of sections for chapter 31 of title 5, United States Code, is amended by striking the item relating to section 3114 and inserting the following:

"3114. Appointment of candidates to positions in the competitive service by the Securities and Exchange Commission."

(c) Pay Authority.—The Commission may set the rate of pay for experts and consultants appointed under the authority of section 3109 of title 5, United States Code, in the same manner in which it sets the rate of pay for employees of the Commission.

SEC. 929H. SIPC REFORMS.

(a) Increasing the Cash Limit of Protection.—Section 9 of the Securities Investor Protection Act of 1970 (15 U.S.C. 78fff-3) is amended—

(1) in subsection (a)(1), by striking "$100,000 for each such customer" and inserting "the standard maximum cash advance amount for each such customer, as determined in accordance with subsection (d)"; and

(2) by adding the following new subsections:

"(d) Standard Maximum Cash Advance Amount Defined.—For purposes of this section, the term 'standard maximum cash advance amount' means $250,000, as such amount may be adjusted after December 31, 2010, as provided under subsection (e).

"(e) Inflation Adjustment.—

"(1) In General.—Not later than January 1, 2011, and every 5 years thereafter, and subject to the approval of the Commission as provided under section 3(e)(2), the Board of Directors of SIPC shall determine whether an inflation adjustment to the standard maximum cash advance amount is appropriate. If the Board of Directors of SIPC determines such an adjustment is appropriate, then the standard maximum cash advance amount shall be an amount equal to—

"(A) $250,000 multiplied by—

"(B) the ratio of the annual value of the Personal Consumption Expenditures Chain-Type Price Index (or any successor index thereto), published by the Department of Commerce, for the calendar year preceding the year in which such determination is made, to the published annual value of such index for the calendar year preceding the year in which this subsection was enacted.

The index values used in calculations under this paragraph shall be, as of the date of the calculation, the values most recently published by the Department of Commerce.

"(2) Rounding.—If the standard maximum cash advance amount determined under paragraph (1) for any period is not
a multiple of $10,000, the amount so determined shall be rounded down to the nearest $10,000.

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(3) PUBLICATION AND REPORT TO THE CONGRESS.—Not later than April 5 of any calendar year in which a determination is required to be made under paragraph (1)—

(A) the Commission shall publish in the Federal Register the standard maximum cash advance amount; and

(B) the Board of Directors of SIPC shall submit a report to the Congress stating the standard maximum cash advance amount.

(4) IMPLEMENTATION PERIOD.—Any adjustment to the standard maximum cash advance amount shall take effect on January 1 of the year immediately succeeding the calendar year in which such adjustment is made.

(5) INFLATION ADJUSTMENT CONSIDERATIONS.—In making any determination under paragraph (1) to increase the standard maximum cash advance amount, the Board of Directors of SIPC shall consider—

(A) the overall state of the fund and the economic conditions affecting members of SIPC;

(B) the potential problems affecting members of SIPC; and

(C) such other factors as the Board of Directors of SIPC may determine appropriate.''
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(1) by striking the undesignated matter immediately following subparagraph (B);

(2) in subparagraph (A), by striking “any member of SIPC” and inserting “the member”;

(3) in subparagraph (B), by striking the comma at the end and inserting a period;

(4) by striking “If SIPC” and inserting the following:

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(A) IN GENERAL.—SIPC may, upon notice to a member of SIPC, file an application for a protective decree with any court of competent jurisdiction specified in section 21(e) or 27 of the Securities Exchange Act of 1934, except that no such application shall be filed with respect to a member, the only customers of which are persons whose claims could not be satisfied by SIPC advances pursuant to section 9, if SIPC”;
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(5) by adding at the end the following:

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(B) CONSENT REQUIRED.—No member of SIPC that has a customer may enter into an insolvency, receivership, or bankruptcy proceeding, under Federal or State law, without the specific consent of SIPC, except as provided in title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.”.
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SEC. 929I. PROTECTING CONFIDENTIALITY OF MATERIALS SUBMITTED TO THE COMMISSION.

(a) SECURITIES EXCHANGE ACT OF 1934.—Section 24 of the Securities Exchange Act of 1934 (15 U.S.C. 78x) is amended—

(1) in subsection (d), by striking “subsection (e)” and inserting “subsection (f)”;

(2) by redesignating subsection (e) as subsection (f); and
(3) by inserting after subsection (d) the following:

“(e) Records Obtained from Registered Persons.—

“(1) IN GENERAL.—Except as provided in subsection (f), the Commission shall not be compelled to disclose records or information obtained pursuant to section 17(b), or records or information based upon or derived from such records or information, if such records or information have been obtained by the Commission for use in furtherance of the purposes of this title, including surveillance, risk assessments, or other regulatory and oversight activities.

“(2) TREATMENT OF INFORMATION.—For purposes of section 552 of title 5, United States Code, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552. Collection of information pursuant to section 17 shall be an administrative action involving an agency against specific individuals or agencies pursuant to section 3518(c)(1) of title 44, United States Code.”.

(b) INVESTMENT COMPANY ACT OF 1940.—Section 31 of the Investment Company Act of 1940 (15 U.S.C. 80a-30) is amended—

(1) by striking subsection (c) and inserting the following:

“(c) Limitations on Disclosure by Commission.—Notwithstanding any other provision of law, the Commission shall not be compelled to disclose any records or information provided to the Commission under this section, or records or information based upon or derived from such records or information, if such records or information have been obtained by the Commission for use in furtherance of the purposes of this title, including surveillance, risk assessments, or other regulatory and oversight activities. Nothing in this subsection authorizes the Commission to withhold information from the Congress or prevent the Commission from complying with a request for information from any other Federal department or agency requesting the information for purposes within the scope of jurisdiction of that department or agency, or complying with an order of a court of the United States in an action brought by the United States or the Commission. For purposes of section 552 of title 5, United States Code, this section shall be considered a statute described in subsection (b)(3)(B) of such section 552. Collection of information pursuant to section 31 shall be an administrative action involving an agency against specific individuals or agencies pursuant to section 3518(c)(1) of title 44, United States Code.”;

(2) by striking subsection (d); and

(3) by redesignating subsections (e) and (f) as subsections (d) and (e), respectively.

(c) INVESTMENT ADVISERS ACT OF 1940.—Section 210 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-10) is amended by adding at the end the following:

“(d) Limitations on Disclosure by the Commission.—Notwithstanding any other provision of law, the Commission shall not be compelled to disclose any records or information provided to the Commission under section 204, or records or information based upon or derived from such records or information, if such records or information have been obtained by the Commission for use in furtherance of the purposes of this title, including surveillance, risk assessments, or other regulatory and oversight activities. Nothing in this subsection authorizes the Commission to withhold information from the Congress or prevent the Commission from
SEC. 929J. EXPANSION OF AUDIT INFORMATION TO BE PRODUCED AND EXCHANGED.

Section 106 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7216) is amended—

(1) by striking subsection (b) and inserting the following:

“(b) PRODUCTION OF DOCUMENTS.—

“(1) PRODUCTION BY FOREIGN FIRMS.—If a foreign public accounting firm performs material services upon which a registered public accounting firm relies in the conduct of an audit or interim review, issues an audit report, performs audit work, or conducts interim reviews, the foreign public accounting firm shall—

“(A) produce the audit work papers of the foreign public accounting firm and all other documents of the firm related to any such audit work or interim review to the Commission or the Board, upon request of the Commission or the Board; and

“(B) be subject to the jurisdiction of the courts of the United States for purposes of enforcement of any request for such documents.

“(2) OTHER PRODUCTION.—Any registered public accounting firm that relies, in whole or in part, on the work of a foreign public accounting firm in issuing an audit report, performing audit work, or conducting an interim review, shall—

“(A) produce the audit work papers of the foreign public accounting firm and all other documents related to any such work in response to a request for production by the Commission or the Board; and

“(B) secure the agreement of any foreign public accounting firm to such production, as a condition of the reliance by the registered public accounting firm on the work of that foreign public accounting firm.”;

(2) by redesignating subsection (d) as subsection (g); and

(3) by inserting after subsection (c) the following:

“(d) SERVICE OF REQUESTS OR PROCESS.—

“(1) IN GENERAL.—Any foreign public accounting firm that performs work for a domestic registered public accounting firm shall furnish to the domestic registered public accounting firm a written irrevocable consent and power of attorney that designates the domestic registered public accounting firm as an agent upon whom may be served any request by the Commission or the Board under this section or upon whom may be served any process, pleadings, or other papers in any action brought to enforce this section.
“(2) SPECIFIC AUDIT WORK.—Any foreign public accounting firm that performs material services upon which a registered public accounting firm relies in the conduct of an audit or interim review, issues an audit report, performs audit work, or, performs interim reviews, shall designate to the Commission or the Board an agent in the United States upon whom may be served any request by the Commission or the Board under this section or upon whom may be served any process, pleading, or other papers in any action brought to enforce this section.

“(e) SANCTIONS.—A willful refusal to comply, in whole in or in part, with any request by the Commission or the Board under this section, shall be deemed a violation of this Act.

“(f) OTHER MEANS OF SATISFYING PRODUCTION OBLIGATIONS.—Notwithstanding any other provisions of this section, the staff of the Commission or the Board may allow a foreign public accounting firm that is subject to this section to meet production obligations under this section through alternate means, such as through foreign counterparts of the Commission or the Board.”.

SEC. 929K. SHARING PRIVILEGED INFORMATION WITH OTHER AUTHORITIES.


(1) in subsection (d), as amended by subsection (d)(1)(A), by striking “subsection (f)” and inserting “subsection (g)”;
(2) in subsection (e), as added by subsection (d)(1)(C), by striking “subsection (f)” and inserting “subsection (g)”;
(3) by redesignating subsection (f) as subsection (g); and
(4) by inserting after subsection (e) the following:

“(f) SHARING PRIVILEGED INFORMATION WITH OTHER AUTHORITIES.—

“(1) PRIVILEGED INFORMATION PROVIDED BY THE COMMISSION.—The Commission shall not be deemed to have waived any privilege applicable to any information by transferring that information to or permitting that information to be used by—

“(A) any agency (as defined in section 6 of title 18, United States Code);
“(B) the Public Company Accounting Oversight Board;
“(C) any self-regulatory organization;
“(D) any foreign securities authority;
“(E) any foreign law enforcement authority; or
“(F) any State securities or law enforcement authority.

“(2) NONDISCLOSURE OF PRIVILEGED INFORMATION PROVIDED TO THE COMMISSION.—The Commission shall not be compelled to disclose privileged information obtained from any foreign securities authority, or foreign law enforcement authority, if the authority has in good faith determined and represented to the Commission that the information is privileged.

“(3) NONWAIVER OF PRIVILEGED INFORMATION PROVIDED TO THE COMMISSION.—

“(A) IN GENERAL.—Federal agencies, State securities and law enforcement authorities, self-regulatory organizations, and the Public Company Accounting Oversight Board shall not be deemed to have waived any privilege applicable to any information by transferring that information to or permitting that information to be used by the Commission.
“(B) EXCEPTION.—The provisions of subparagraph (A) shall not apply to a self-regulatory organization or the Public Company Accounting Oversight Board with respect to information used by the Commission in an action against such organization.

“(4) DEFINITIONS.—For purposes of this subsection—

“(A) the term ‘privilege’ includes any work-product privilege, attorney-client privilege, governmental privilege, or other privilege recognized under Federal, State, or foreign law;

“(B) the term ‘foreign law enforcement authority’ means any foreign authority that is empowered under foreign law to detect, investigate or prosecute potential violations of law; and

“(C) the term ‘State securities or law enforcement authority’ means the authority of any State or territory that is empowered under State or territory law to detect, investigate, or prosecute potential violations of law.”.

SEC. 929L. ENHANCED APPLICATION OF ANTIFRAUD PROVISIONS.


(1) in section 9—

(A) by striking “registered on a national securities exchange” each place that term appears and inserting “other than a government security”;

(B) in subsection (b), by striking “by use of any facility of a national securities exchange,”; and

(C) in subsection (c), by inserting after “unlawful for any” the following: “broker, dealer, or”;

(2) in section 10(a)(1), by striking “registered on a national securities exchange” and inserting “other than a government security”;

(3) in section 15(c)(1)(A), by striking “otherwise than on a national securities exchange of which it is a member”.

SEC. 929M. AIDING AND ABETTING AUTHORITY UNDER THE SECURITIES ACT AND THE INVESTMENT COMPANY ACT.

(a) UNDER THE SECURITIES ACT OF 1933.—Section 15 of the Securities Act of 1933 (15 U.S.C. 77o) is amended—

(1) by striking “Every person who” and inserting “(a) CONTROLLING PERSONS.—Every person who”;

(2) by adding at the end the following:

“(b) PROSECUTION OF PERSONS WHO AID AND ABET VIOLATIONS.—For purposes of any action brought by the Commission under subparagraph (b) or (d) of section 20, any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this Act, or of any rule or regulation issued under this Act, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.”.

(b) UNDER THE INVESTMENT COMPANY ACT OF 1940.—Section 48 of the Investment Company Act of 1940 (15 U.S.C. 80a–48) is amended by redesignating subsection (b) as subsection (c) and inserting after subsection (a) the following:

“(b) For purposes of any action brought by the Commission under subsection (d) or (e) of section 42, any person that knowingly or recklessly provides substantial assistance to another person in
violation of a provision of this Act, or of any rule or regulation issued under this Act, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.”.

SEC. 929N. AUTHORITY TO IMPOSE PENALTIES FOR AIDING AND ABETTING VIOLATIONS OF THE INVESTMENT ADVISERS ACT.

Section 209 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–9) is amended by inserting at the end the following new subsection:

“(f) AIDING AND ABETTING.—For purposes of any action brought by the Commission under subsection (e), any person that knowingly or recklessly has aided, abetted, counseled, commanded, induced, or procured a violation of any provision of this Act, or of any rule, regulation, or order hereunder, shall be deemed to be in violation of such provision, rule, regulation, or order to the same extent as the person that committed such violation.”.

SEC. 929O. AIDING AND ABETTING STANDARD OF KNOWLEDGE SATISFIED BY RECKLESSNESS.

Section 20(e) of the Securities Exchange Act of 1934 (15 U.S.C. 78t(e)) is amended by inserting “or recklessly” after “knowingly”.

SEC. 929P. STRENGTHENING ENFORCEMENT BY THE COMMISSION.

(a) AUTHORITY TO IMPOSE CIVIL PENALTIES IN CEASE AND DESIST PROCEEDINGS.—

(1) UNDER THE SECURITIES ACT OF 1933.—Section 8A of the Securities Act of 1933 (15 U.S.C. 77h–1) is amended by adding at the end the following new subsection:

“(g) AUTHORITY TO IMPOSE MONEY PENALTIES.—

“(1) GROUNDS.—In any cease-and-desist proceeding under subsection (a), the Commission may impose a civil penalty on a person if the Commission finds, on the record, after notice and opportunity for hearing, that—

“(A) such person—

“(i) is violating or has violated any provision of this title, or any rule or regulation issued under this title; or

“(ii) is or was a cause of the violation of any provision of this title, or any rule or regulation thereunder; and

“(B) such penalty is in the public interest.

“(2) MAXIMUM AMOUNT OF PENALTY.—

“(A) FIRST TIER.—The maximum amount of a penalty for each act or omission described in paragraph (1) shall be $7,500 for a natural person or $75,000 for any other person.

“(B) SECOND TIER.—Notwithstanding subparagraph (A), the maximum amount of penalty for each such act or omission shall be $75,000 for a natural person or $375,000 for any other person, if the act or omission described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

“(C) THIRD TIER.—Notwithstanding subparagraphs (A) and (B), the maximum amount of penalty for each such act or omission shall be $150,000 for a natural person or $725,000 for any other person, if—
“(i) the act or omission described in paragraph
(1) involved fraud, deceit, manipulation, or deliberate
or reckless disregard of a regulatory requirement; and
“(ii) such act or omission directly or indirectly
resulted in—
“(I) substantial losses or created a significant
risk of substantial losses to other persons; or
“(II) substantial pecuniary gain to the person
who committed the act or omission.
“(3) EVIDENCE CONCERNING ABILITY TO PAY.—In any pro-
cceeding in which the Commission may impose a penalty under
this section, a respondent may present evidence of the ability
of the respondent to pay such penalty. The Commission may,
in its discretion, consider such evidence in determining whether
such penalty is in the public interest. Such evidence may relate
to the extent of the ability of the respondent to continue in
business and the collectability of a penalty, taking into account
any other claims of the United States or third parties upon
the assets of the respondent and the amount of the assets
of the respondent.”.

(2) UNDER THE SECURITIES EXCHANGE ACT OF 1934.—Section
2(a)) is amended—
(A) by striking the matter following paragraph (4);
(B) in the matter preceding paragraph (1), by inserting
after “opportunity for hearing,” the following: “that such
penalty is in the public interest and”;
(C) by redesignating paragraphs (1) through (4) as
subparagraphs (A) through (D), respectively, and adjusting
the margins accordingly;
(D) by striking “In any proceeding” and inserting the
following:
“(1) IN GENERAL.—In any proceeding”;
and
(E) by adding at the end the following:
“(2) CEASE-AND-DESIST PROCEEDINGS.—In any proceeding
instituted under section 21C against any person, the Commis-
sion may impose a civil penalty, if the Commission finds, on
the record after notice and opportunity for hearing, that such
person—
“(A) is violating or has violated any provision of this
title, or any rule or regulation issued under this title; or
“(B) is or was a cause of the violation of any provision
of this title, or any rule or regulation issued under this
title.”.

(3) UNDER THE INVESTMENT COMPANY ACT OF 1940.—Section
9(d)(1) of the Investment Company Act of 1940 (15 U.S.C.
80a–9(d)(1)) is amended—
(A) by striking the matter following subparagraph (C);
(B) in the matter preceding subparagraph (A), by inserting
after “opportunity for hearing,” the following: “that such penalty is in the public interest, and”; 
(C) by redesignating subparagraphs (A) through (C) as
clauses (i) through (iii), respectively, and adjusting
the margins accordingly;
(D) by striking “In any proceeding” and inserting the
following:
“(A) IN GENERAL.—In any proceeding”; and
(E) by adding at the end the following:
“(B) CEASE-AND-DESIST PROCEEDINGS.—In any proceeding instituted pursuant to subsection (f) against any person, the Commission may impose a civil penalty if the Commission finds, on the record, after notice and opportunity for hearing, that such person—
“(i) is violating or has violated any provision of this title, or any rule or regulation issued under this title; or
“(ii) is or was a cause of the violation of any provision of this title, or any rule or regulation issued under this title.”.

(4) UNDER THE INVESTMENT ADVISERS ACT OF 1940.—Section 203(i)(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(i)(1)) is amended—
(A) by striking the matter following subparagraph (D);
(B) in the matter preceding subparagraph (A), by inserting after “opportunity for hearing,” the following: “that such penalty is in the public interest and”;
(C) by redesignating subparagraphs (A) through (D) as clauses (i) through (iv), respectively, and adjusting the margins accordingly;
(D) by striking “In any proceeding” and inserting the following:
“(A) IN GENERAL.—In any proceeding”; and
(E) by adding at the end the following new subparagraph:
“(B) CEASE-AND-DESIST PROCEEDINGS.—In any proceeding instituted pursuant to subsection (k) against any person, the Commission may impose a civil penalty if the Commission finds, on the record, after notice and opportunity for hearing, that such person—
“(i) is violating or has violated any provision of this title, or any rule or regulation issued under this title; or
“(ii) is or was a cause of the violation of any provision of this title, or any rule or regulation issued under this title.”.

(b) EXTRATERRITORIAL JURISDICTION OF THE ANTIFRAUD PROVISIONS OF THE FEDERAL SECURITIES LAWS.—
(1) UNDER THE SECURITIES ACT OF 1933.—Section 22 of the Securities Act of 1933 (15 U.S.C. 77v(a)) is amended by adding at the end the following new subsection:
“(c) EXTRATERRITORIAL JURISDICTION.—The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of section 17(a) involving—
“(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
“(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.”.

(A) by striking “The district” and inserting the following:

“(a) IN GENERAL.—The district”; and

(B) by adding at the end the following new subsection:

“(b) EXTRATERRITORIAL JURISDICTION.—The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this title involving—

“(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or

“(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.”.

(3) UNDER THE INVESTMENT ADVISERS ACT OF 1940.—Section 214 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–14) is amended—

(A) by striking “The district” and inserting the following:

“(a) IN GENERAL.—The district”; and

(B) by adding at the end the following new subsection:

“(b) EXTRATERRITORIAL JURISDICTION.—The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of section 206 involving—

“(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the violation is committed by a foreign adviser and involves only foreign investors; or

“(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.”.

(4) CONTROL PERSON LIABILITY UNDER THE SECURITIES EXCHANGE ACT OF 1934.—Section 20(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78t(a)) is amended by inserting after “controlled person is liable” the following: “(including to the Commission in any action brought under paragraph (1) or (3) of section 21(d))”.

SEC. 929Q. REVISION TO RECORDKEEPING RULE.

(a) INVESTMENT COMPANY ACT OF 1940 AMENDMENTS.—Section 31 of the Investment Company Act of 1940 (15 U.S.C. 80a–30) is amended—

(1) in subsection (a)(1), by adding at the end the following:

“Each person having custody or use of the securities, deposits, or credits of a registered investment company shall maintain and preserve all records that relate to the custody or use by such person of the securities, deposits, or credits of the registered investment company for such period or periods as the Commission, by rule or regulation, may prescribe, as necessary or appropriate in the public interest or for the protection of investors.”; and

(2) in subsection (b), by adding at the end the following:

“(4) RECORDS OF PERSONS WITH CUSTODY OR USE.—
“(A) IN GENERAL.—Records of persons having custody or use of the securities, deposits, or credits of a registered investment company that relate to such custody or use, are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations and other information and document requests by representatives of the Commission, as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

“(B) CERTAIN PERSONS SUBJECT TO OTHER REGULATION.—Any person that is subject to regulation and examination by a Federal financial institution regulatory agency (as such term is defined under section 212(c)(2) of title 18, United States Code) may satisfy any examination request, information request, or document request described under subparagraph (A), by providing to the Commission a detailed listing, in writing, of the securities, deposits, or credits of the registered investment company within the custody or use of such person.”.

(b) INVESTMENT ADVISERS ACT OF 1940 AMENDMENT.—Section 204 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–4) is amended by adding at the end the following new subsection:

“(d) RECORDS OF PERSONS WITH CUSTODY OR USE.—

“(1) IN GENERAL.—Records of persons having custody or use of the securities, deposits, or credits of a client, that relate to such custody or use, are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations and other information and document requests by representatives of the Commission, as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

“(2) CERTAIN PERSONS SUBJECT TO OTHER REGULATION.—Any person that is subject to regulation and examination by a Federal financial institution regulatory agency (as such term is defined under section 212(c)(2) of title 18, United States Code) may satisfy any examination request, information request, or document request described under paragraph (1), by providing the Commission with a detailed listing, in writing, of the securities, deposits, or credits of the client within the custody or use of such person.”.

SEC. 929R. BENEFICIAL OWNERSHIP AND SHORT-SWING PROFIT REPORTING.

(a) BENEFICIAL OWNERSHIP REPORTING.—Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m) is amended—

(1) in subsection (d)(1)—

(A) by inserting after “within ten days after such acquisition” the following: “or within such shorter time as the Commission may establish by rule”; and

(B) by striking “send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and”;

(2) in subsection (d)(2)—

(A) by striking “in the statements to the issuer and the exchange, and”;

and
(B) by striking “shall be transmitted to the issuer and the exchange and”;
(3) in subsection (g)(1), by striking “shall send to the issuer of the security and”; and
(4) in subsection (g)(2)—
(A) by striking “sent to the issuer and”; and
(B) by striking “shall be transmitted to the issuer and”.

(b) SHORT-SWING PROFIT REPORTING.—Section 16(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78p(a)) is amended—
(1) in paragraph (1), by striking “(and, if such security is registered on a national securities exchange, also with the exchange)”; and
(2) in paragraph (2)(B), by inserting after “officer” the following: “, or within such shorter time as the Commission may establish by rule”.

SEC. 929S. FINGERPRINTING.

(1) in the first sentence, by striking “and registered clearing agency,” and inserting “registered clearing agency, registered securities information processor, national securities exchange, and national securities association”; and
(2) in the second sentence, by striking “or clearing agency,” and inserting “clearing agency, securities information processor, national securities exchange, or national securities association.”.

SEC. 929T. EQUAL TREATMENT OF SELF-REGULATORY ORGANIZATION RULES.

Section 29(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78cc(a)) is amended by striking “an exchange required thereby” and inserting “a self-regulatory organization.”.

SEC. 929U. DEADLINE FOR COMPLETING EXAMINATIONS, INSPECTIONS AND ENFORCEMENT ACTIONS.

The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by inserting after section 4D the following new section:

“SEC. 4E. DEADLINE FOR COMPLETING ENFORCEMENT INVESTIGATIONS AND COMPLIANCE EXAMINATIONS AND INSPECTIONS.

“(a) Enforcement Investigations.—
“(1) IN GENERAL.—Not later than 180 days after the date on which Commission staff provide a written Wells notification to any person, the Commission staff shall either file an action against such person or provide notice to the Director of the Division of Enforcement of its intent to not file an action.
“(2) EXCEPTIONS FOR CERTAIN COMPLEX ACTIONS.—Notwithstanding paragraph (1), if the Director of the Division of Enforcement of the Commission or the Director's designee determines that a particular enforcement investigation is sufficiently complex such that a determination regarding the filing of an action against a person cannot be completed within the deadline specified in paragraph (1), the Director of the Division of Enforcement of the Commission or the Director's designee may, after providing notice to the Chairman of the Commission,
extend such deadline as needed for one additional 180-day period. If after the additional 180-day period the Director of the Division of Enforcement of the Commission or the Director's designee determines that a particular enforcement investigation is sufficiently complex such that a determination regarding the filing of an action against a person cannot be completed within the additional 180-day period, the Director of the Division of Enforcement of the Commission or the Director's designee may, after providing notice to and receiving approval of the Commission, extend such deadline as needed for one or more additional successive 180-day periods.

(b) Compliance Examinations and Inspections.—

(1) In general.—Not later than 180 days after the date on which Commission staff completes the on-site portion of its compliance examination or inspection or receives all records requested from the entity being examined or inspected, whichever is later, Commission staff shall provide the entity being examined or inspected with written notification indicating either that the examination or inspection has concluded, has concluded without findings, or that the staff requests the entity undertake corrective action.

(2) Exception for certain complex actions.—Notwithstanding paragraph (1), if the head of any division or office within the Commission responsible for compliance examinations and inspections or his designee determines that a particular compliance examination or inspection is sufficiently complex such that a determination regarding concluding the examination or inspection, or regarding the staff requests the entity undertake corrective action, cannot be completed within the deadline specified in paragraph (1), the head of any division or office within the Commission responsible for compliance examinations and inspections or his designee may, after providing notice to the Chairman of the Commission, extend such deadline as needed for one additional 180-day period.”.

SEC. 929V. SECURITY INVESTOR PROTECTION ACT AMENDMENTS.

(a) Increasing the Minimum Assessment Paid by SIPC Members.—Section 4(d)(1)(C) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78ddd(d)(1)(C)) is amended by striking “$150 per annum” and inserting the following: “0.02 percent of the gross revenues from the securities business of such member of SIPC”.

(b) Increasing the Fine for Prohibited Acts Under SIPA.—Section 14(c) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78jjj(c)) is amended—

(1) in paragraph (1), by striking “$50,000” and inserting “$250,000”; and

(2) in paragraph (2), by striking “$50,000” and inserting “$250,000”.

(c) Penalty for Misrepresentation of SIPC Membership or Protection.—Section 14 of the Securities Investor Protection Act of 1970 (15 U.S.C. 78jjj) is amended by adding at the end the following new subsection:

“(d) Misrepresentation of SIPC Membership or Protection.—

(1) In general.—Any person who falsely represents by any means (including, without limitation, through the Internet or any other medium of mass communication), with actual
knowledge of the falsity of the representation and with an intent to deceive or cause injury to another, that such person, or another person, is a member of SIPC or that any person or account is protected or is eligible for protection under this Act or by SIPC, shall be liable for any damages caused thereby and shall be fined not more than $250,000 or imprisoned for not more than 5 years.

“(2) INJUNCTIONS.—Any court having jurisdiction of a civil action arising under this Act may grant temporary injunctions and final injunctions on such terms as the court deems reasonable to prevent or restrain any violation of paragraph (1). Any such injunction may be served anywhere in the United States on the person enjoined, shall be operative throughout the United States, and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction over that person. The clerk of the court granting the injunction shall, when requested by any other court in which enforcement of the injunction is sought, transmit promptly to the other court a certified copy of all papers in the case on file in such clerk's office.”.

SEC. 929W. NOTICE TO MISSING SECURITY HOLDERS.

Section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1) is amended by adding at the end the following new subsection:

“(g) DUE DILIGENCE FOR THE DELIVERY OF DIVIDENDS, INTEREST, AND OTHER VALUABLE PROPERTY RIGHTS.—

“(1) REVISION OF RULES REQUIRED.—The Commission shall revise its regulations in section 240.17Ad–17 of title 17, Code of Federal Regulations, as in effect on December 8, 1997, to extend the application of such section to brokers and dealers and to provide for the following:

“(A) A requirement that the paying agent provide a single written notification to each missing security holder that the missing security holder has been sent a check that has not yet been negotiated. The written notification may be sent along with a check or other mailing subsequently sent to the missing security holder but must be provided no later than 7 months after the sending of the not yet negotiated check.

“(B) An exclusion for paying agents from the notification requirements when the value of the not yet negotiated check is less than $25.

“(C) A provision clarifying that the requirements described in subparagraph (A) shall have no effect on State escheatment laws.

“(D) For purposes of such revised regulations—

“(i) a security holder shall be considered a ‘missing security holder’ if a check is sent to the security holder and the check is not negotiated before the earlier of the paying agent sending the next regularly scheduled check or the elapsing of 6 months after the sending of the not yet negotiated check; and

“(ii) the term ‘paying agent’ includes any issuer, transfer agent, broker, dealer, investment adviser, indenture trustee, custodian, or any other person that
accepts payments from the issuer of a security and distributes the payments to the holders of the security.

“(2) RULEMAKING.—The Commission shall adopt such rules, regulations, and orders necessary to implement this subsection no later than 1 year after the date of enactment of this subsection. In proposing such rules, the Commission shall seek to minimize disruptions to current systems used by or on behalf of paying agents to process payment to account holders and avoid requiring multiple paying agents to send written notification to a missing security holder regarding the same not yet negotiated check.”.

SEC. 929X. SHORT SALE REFORMS.

(a) SHORT SALE DISCLOSURE.—Section 13(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(f)) is amended by redesignating paragraphs (2), (3), (4), and (5) as paragraphs (3), (4), (5), and (6), respectively, and inserting after paragraph (1) the following:

“(2) The Commission shall prescribe rules providing for the public disclosure of the name of the issuer and the title, class, CUSIP number, aggregate amount of the number of short sales of each security, and any additional information determined by the Commission following the end of the reporting period. At a minimum, such public disclosure shall occur every month.”.

(b) SHORT SELLING ENFORCEMENT.—Section 9 of the Securities Exchange Act of 1934 (15 U.S.C. 78i) is amended—

(1) by redesignating subsections (d), (e), (f), (g), (h), and (i) as subsections (e), (f), (g), (h), (i), and (j), respectively; and

(2) inserting after subsection (c), the following new subsection:

“(d) TRANSACTIONS RELATING TO SHORT SALES OF SECURITIES.—It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange to effect, alone or with one or more other persons, a manipulative short sale of any security. The Commission shall issue such other rules as are necessary or appropriate to ensure that the appropriate enforcement options and remedies are available for violations of this subsection in the public interest or for the protection of investors.”.

(c) INVESTOR NOTIFICATION.—Section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o) is amended—

(1) by redesignating subsections (e), (f), (g), (h), and (i) as subsections (f), (g), (h), (i), and (j), respectively; and

(2) inserting after subsection (d) the following new subsection:

“(e) NOTICES TO CUSTOMERS REGARDING SECURITIES LENDING.—Every registered broker or dealer shall provide notice to its customers that they may elect not to allow their fully paid securities to be used in connection with short sales. If a broker or dealer uses a customer’s securities in connection with short sales, the broker or dealer shall provide notice to its customer that the broker or dealer may receive compensation in connection with lending the customer’s securities. The Commission, by rule, as it deems necessary or appropriate in the public interest and for the protection
of investors, may prescribe the form, content, time, and manner of delivery of any notice required under this paragraph.”.

SEC. 929Y. STUDY ON EXTRATERRITORIAL PRIVATE RIGHTS OF ACTION.

(a) IN GENERAL.—The Securities and Exchange Commission of the United States shall solicit public comment and thereafter conduct a study to determine the extent to which private rights of action under the antifraud provisions of the Securities and Exchange Act of 1934 (15 U.S.C. 78u-4) should be extended to cover—

(1) conduct within the United States that constitutes a significant step in the furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; and

(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

(b) CONTENTS.—The study shall consider and analyze, among other things—

(1) the scope of such a private right of action, including whether it should extend to all private actors or whether it should be more limited to extend just to institutional investors or otherwise;

(2) what implications such a private right of action would have on international comity;

(3) the economic costs and benefits of extending a private right of action for transnational securities frauds; and

(4) whether a narrower extraterritorial standard should be adopted.

(c) REPORT.—A report of the study shall be submitted and recommendations made to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House not later than 18 months after the date of enactment of this Act.

SEC. 929Z. GAO STUDY ON SECURITIES LITIGATION.

(a) STUDY.—The Comptroller General of the United States shall conduct a study on the impact of authorizing a private right of action against any person who aids or abets another person in violation of the securities laws. To the extent feasible, this study shall include—

(1) a review of the role of secondary actors in companies issuance of securities;

(2) the courts interpretation of the scope of liability for secondary actors under Federal securities laws after January 14, 2008; and

(3) the types of lawsuits decided under the Private Securities Litigation Act of 1995.

(b) REPORT.—Not later than 1 year after the date of enactment of this Act, the Comptroller General shall submit a report to Congress on the findings of the study required under subsection (a).
Subtitle C—Improvements to the Regulation of Credit Rating Agencies

SEC. 931. FINDINGS.

Congress finds the following:

(1) Because of the systemic importance of credit ratings and the reliance placed on credit ratings by individual and institutional investors and financial regulators, the activities and performances of credit rating agencies, including nationally recognized statistical rating organizations, are matters of national public interest, as credit rating agencies are central to capital formation, investor confidence, and the efficient performance of the United States economy.

(2) Credit rating agencies, including nationally recognized statistical rating organizations, play a critical “gatekeeper” role in the debt market that is functionally similar to that of securities analysts, who evaluate the quality of securities in the equity market, and auditors, who review the financial statements of firms. Such role justifies a similar level of public oversight and accountability.

(3) Because credit rating agencies perform evaluative and analytical services on behalf of clients, much as other financial “gatekeepers” do, the activities of credit rating agencies are fundamentally commercial in character and should be subject to the same standards of liability and oversight as apply to auditors, securities analysts, and investment bankers.

(4) In certain activities, particularly in advising arrangers of structured financial products on potential ratings of such products, credit rating agencies face conflicts of interest that need to be carefully monitored and that therefore should be addressed explicitly in legislation in order to give clearer authority to the Securities and Exchange Commission.

(5) In the recent financial crisis, the ratings on structured financial products have proven to be inaccurate. This inaccuracy contributed significantly to the mismanagement of risks by financial institutions and investors, which in turn adversely impacted the health of the economy in the United States and around the world. Such inaccuracy necessitates increased accountability on the part of credit rating agencies.

SEC. 932. ENHANCED REGULATION, ACCOUNTABILITY, AND TRANSPARENCY OF NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATIONS.


(1) in subsection (b)—

(A) in paragraph (1)(A), by striking “furnished” and inserting “filed” and by striking “furnishing” and inserting “filing”;

(B) in paragraph (1)(B), by striking “furnishing” and inserting “filing”;

and

(C) in the first sentence of paragraph (2), by striking “furnish to” and inserting “file with”;

(2) in subsection (c)—

(A) in paragraph (2)—
(i) in the second sentence, by inserting “any other provision of this section, or” after “Notwithstanding”; and

(ii) by inserting after the period at the end the following: “Nothing in this paragraph may be construed to afford a defense against any action or proceeding brought by the Commission to enforce the antifraud provisions of the securities laws.”; and

(B) by adding at the end the following:

“(3) INTERNAL CONTROLS OVER PROCESSES FOR DETERMINING CREDIT RATINGS.—

“(A) IN GENERAL.—Each nationally recognized statistical rating organization shall establish, maintain, enforce, and document an effective internal control structure governing the implementation of and adherence to policies, procedures, and methodologies for determining credit ratings, taking into consideration such factors as the Commission may prescribe, by rule.

“(B) ATTESTATION REQUIREMENT.—The Commission shall prescribe rules requiring each nationally recognized statistical rating organization to submit to the Commission an annual internal controls report, which shall contain—

“(i) a description of the responsibility of the management of the nationally recognized statistical rating organization in establishing and maintaining an effective internal control structure under subparagraph (A);

“(ii) an assessment of the effectiveness of the internal control structure of the nationally recognized statistical rating organization; and

“(iii) the attestation of the chief executive officer, or equivalent individual, of the nationally recognized statistical rating organization.”;

(3) in subsection (d)—

(A) by inserting after “or revoke the registration of any nationally recognized statistical rating organization” the following: “, or with respect to any person who is associated with, who is seeking to become associated with, or, at the time of the alleged misconduct, who was associated or was seeking to become associated with a nationally recognized statistical rating organization, the Commission, by order, shall censure, place limitations on the activities or functions of such person, suspend for a period not exceeding 1 year, or bar such person from being associated with a nationally recognized statistical rating organization,”;

(B) by inserting “bar” after “placing of limitations, suspension,”;

(C) in paragraph (2), by striking “furnished to” and inserting “filed with”;

(D) in paragraph (2), by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively, and adjusting the clause margins accordingly;

(E) by redesignating paragraphs (1) through (5) as subparagraphs (A) through (E), respectively, and adjusting the subparagraph margins accordingly;
(F) in the matter preceding subparagraph (A), as so redesignated, by striking “The Commission” and inserting the following:

“(1) IN GENERAL.—The Commission”;

(G) in subparagraph (D), as so redesignated—

(i) by striking “furnish” and inserting “file”; and

(ii) by striking “or” at the end.

(H) in subparagraph (E), as so redesignated, by striking the period at the end and inserting a semicolon; and

(I) by adding at the end the following:

“(F) has failed reasonably to supervise, with a view to preventing a violation of the securities laws, an individual who commits such a violation, if the individual is subject to the supervision of that person.

“(2) SUSPENSION OR REVOCATION FOR PARTICULAR CLASS OF SECURITIES.—

“(A) IN GENERAL.—The Commission may temporarily suspend or permanently revoke the registration of a nationally recognized statistical rating organization with respect to a particular class or subclass of securities, if the Commission finds, on the record after notice and opportunity for hearing, that the nationally recognized statistical rating organization does not have adequate financial and managerial resources to consistently produce credit ratings with integrity.

“(B) CONSIDERATIONS.—In making any determination under subparagraph (A), the Commission shall consider—

“(i) whether the nationally recognized statistical rating organization has failed over a sustained period of time, as determined by the Commission, to produce ratings that are accurate for that class or subclass of securities; and

“(ii) such other factors as the Commission may determine.”;

(4) in subsection (h), by adding at the end the following:

“(3) SEPARATION OF RATINGS FROM SALES AND MARKETING.—

“(A) RULES REQUIRED.—The Commission shall issue rules to prevent the sales and marketing considerations of a nationally recognized statistical rating organization from influencing the production of ratings by the nationally recognized statistical rating organization.

“(B) CONTENTS OF RULES.—The rules issued under subparagraph (A) shall provide for—

“(i) exceptions for small nationally recognized statistical rating organizations with respect to which the Commission determines that the separation of the production of ratings and sales and marketing activities is not appropriate; and

“(ii) suspension or revocation of the registration of a nationally recognized statistical rating organization, if the Commission finds, on the record, after notice and opportunity for a hearing, that—

“(I) the nationally recognized statistical rating organization has committed a violation of a rule issued under this subsection; and

“(II) the violation of a rule issued under this subsection affected a rating.
“(4) LOOK-BACK REQUIREMENT.—

“(A) REVIEW BY THE NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATION.—Each nationally recognized statistical rating organization shall establish, maintain, and enforce policies and procedures reasonably designed to ensure that, in any case in which an employee of a person subject to a credit rating of the nationally recognized statistical rating organization or the issuer, underwriter, or sponsor of a security or money market instrument subject to a credit rating of the nationally recognized statistical rating organization was employed by the nationally recognized statistical rating organization and participated in any capacity in determining credit ratings for the person or the securities or money market instruments during the 1-year period preceding the date an action was taken with respect to the credit rating, the nationally recognized statistical rating organization shall—

“(i) conduct a review to determine whether any conflicts of interest of the employee influenced the credit rating; and

“(ii) take action to revise the rating if appropriate, in accordance with such rules as the Commission shall prescribe.

“(B) REVIEW BY COMMISSION.—

“(i) IN GENERAL.—The Commission shall conduct periodic reviews of the policies described in subparagraph (A) and the implementation of the policies at each nationally recognized statistical rating organization to ensure they are reasonably designed and implemented to most effectively eliminate conflicts of interest.

“(ii) TIMING OF REVIEWS.—The Commission shall review the code of ethics and conflict of interest policy of each nationally recognized statistical rating organization—

“(I) not less frequently than annually; and

“(II) whenever such policies are materially modified or amended.

“(5) REPORT TO COMMISSION ON CERTAIN EMPLOYMENT TRANSITIONS.—

“(A) REPORT REQUIRED.—Each nationally recognized statistical rating organization shall report to the Commission any case such organization knows or can reasonably be expected to know where a person associated with such organization within the previous 5 years obtains employment with any obligor, issuer, underwriter, or sponsor of a security or money market instrument for which the organization issued a credit rating during the 12-month period prior to such employment, if such employee—

“(i) was a senior officer of such organization;

“(ii) participated in any capacity in determining credit ratings for such obligor, issuer, underwriter, or sponsor; or

“(iii) supervised an employee described in clause (ii).
“(B) PUBLIC DISCLOSURE.—Upon receiving such a report, the Commission shall make such information publicly available.”;

(5) in subsection (j)—

(A) by striking “Each” and inserting the following:

“(1) IN GENERAL.—Each”;

(B) by adding at the end the following:

“(2) LIMITATIONS.—

“(A) IN GENERAL.—Except as provided in subparagraph (B), an individual designated under paragraph (1) may not, while serving in the designated capacity—

“(i) perform credit ratings;

“(ii) participate in the development of ratings methodologies or models;

“(iii) perform marketing or sales functions; or

“(iv) participate in establishing compensation levels, other than for employees working for that individual.

“(B) EXCEPTION.—The Commission may exempt a small nationally recognized statistical rating organization from the limitations under this paragraph, if the Commission finds that compliance with such limitations would impose an unreasonable burden on the nationally recognized statistical rating organization.

“(3) OTHER DUTIES.—Each individual designated under paragraph (1) shall establish procedures for the receipt, retention, and treatment of—

“(A) complaints regarding credit ratings, models, methodologies, and compliance with the securities laws and the policies and procedures developed under this section; and

“(B) confidential, anonymous complaints by employees or users of credit ratings.

“(4) COMPENSATION.—The compensation of each compliance officer appointed under paragraph (1) shall not be linked to the financial performance of the nationally recognized statistical rating organization and shall be arranged so as to ensure the independence of the officer’s judgment.

“(5) ANNUAL REPORTS REQUIRED.—

“(A) ANNUAL REPORTS REQUIRED.—Each individual designated under paragraph (1) shall submit to the nationally recognized statistical rating organization an annual report on the compliance of the nationally recognized statistical rating organization with the securities laws and the policies and procedures of the nationally recognized statistical rating organization that includes—

“(i) a description of any material changes to the code of ethics and conflict of interest policies of the nationally recognized statistical rating organization; and

“(ii) a certification that the report is accurate and complete.

“(B) SUBMISSION OF REPORTS TO THE COMMISSION.—Each nationally recognized statistical rating organization shall file the reports required under subparagraph (A) together with the financial report that is required to be submitted to the Commission under this section.”;
(6) in subsection (k), by striking “furnish to” and inserting “file with”;
(7) in subsection (l)(2)(A)(i), by striking “furnished” and inserting “filed”; and
(8) by striking subsection (p) and inserting the following:
"(p) Regulation of Nationally Recognized Statistical Rating Organizations.—
"(1) Establishment of Office of Credit Ratings.—
"(A) Office Established.—The Commission shall establish within the Commission an Office of Credit Ratings (referred to in this subsection as the ‘Office’) to administer the rules of the Commission—
"(i) with respect to the practices of nationally recognized statistical rating organizations in determining ratings, for the protection of users of credit ratings and in the public interest;
"(ii) to promote accuracy in credit ratings issued by nationally recognized statistical rating organizations; and
"(iii) to ensure that such ratings are not unduly influenced by conflicts of interest.
"(B) Director of the Office.—The head of the Office shall be the Director, who shall report to the Chairman.
"(2) Staffing.—The Office established under this subsection shall be staffed sufficiently to carry out fully the requirements of this section. The staff shall include persons with knowledge of and expertise in corporate, municipal, and structured debt finance.
"(3) Commission Examinations.—
"(A) Annual Examinations Required.—The Office shall conduct an examination of each nationally recognized statistical rating organization at least annually.
"(B) Conduct of Examinations.—Each examination under subparagraph (A) shall include a review of—
"(i) whether the nationally recognized statistical rating organization conducts business in accordance with the policies, procedures, and rating methodologies of the nationally recognized statistical rating organization;
"(ii) the management of conflicts of interest by the nationally recognized statistical rating organization;
"(iii) implementation of ethics policies by the nationally recognized statistical rating organization;
"(iv) the internal supervisory controls of the nationally recognized statistical rating organization;
"(v) the governance of the nationally recognized statistical rating organization;
"(vi) the activities of the individual designated by the nationally recognized statistical rating organization under subsection (j)(1);
"(vii) the processing of complaints by the nationally recognized statistical rating organization; and
"(viii) the policies of the nationally recognized statistical rating organization governing the post-employment activities of former staff of the nationally recognized statistical rating organization.
“(C) Inspection reports.—The Commission shall make available to the public, in an easily understandable format, an annual report summarizing—

“(i) the essential findings of all examinations conducted under subparagraph (A), as deemed appropriate by the Commission;

“(ii) the responses by the nationally recognized statistical rating organizations to any material regulatory deficiencies identified by the Commission under clause (i); and

“(iii) whether the nationally recognized statistical rating organizations have appropriately addressed the recommendations of the Commission contained in previous reports under this subparagraph.

“(4) Rulemaking authority.—The Commission shall—

“(A) establish, by rule, fines, and other penalties applicable to any nationally recognized statistical rating organization that violates the requirements of this section and the rules thereunder; and

“(B) issue such rules as may be necessary to carry out this section.

“(q) Transparency of Ratings Performance.—

“(1) Rulemaking required.—The Commission shall, by rule, require that each nationally recognized statistical rating organization publicly disclose information on the initial credit ratings determined by the nationally recognized statistical rating organization for each type of obligor, security, and money market instrument, and any subsequent changes to such credit ratings, for the purpose of allowing users of credit ratings to evaluate the accuracy of ratings and compare the performance of ratings by different nationally recognized statistical rating organizations.

“(2) Content.—The rules of the Commission under this subsection shall require, at a minimum, disclosures that—

“(A) are comparable among nationally recognized statistical rating organizations, to allow users of credit ratings to compare the performance of credit ratings across nationally recognized statistical rating organizations;

“(B) are clear and informative for investors having a wide range of sophistication who use or might use credit ratings;

“(C) include performance information over a range of years and for a variety of types of credit ratings, including for credit ratings withdrawn by the nationally recognized statistical rating organization;

“(D) are published and made freely available by the nationally recognized statistical rating organization, on an easily accessible portion of its website, and in writing, when requested;

“(E) are appropriate to the business model of a nationally recognized statistical rating organization; and

“(F) each nationally recognized statistical rating organization include an attestation with any credit rating it issues affirming that no part of the rating was influenced by any other business activities, that the rating was based solely on the merits of the instruments being rated, and
that such rating was an independent evaluation of the risks and merits of the instrument.

“(r) CREDIT RATINGS METHODOLOGIES.—The Commission shall prescribe rules, for the protection of investors and in the public interest, with respect to the procedures and methodologies, including qualitative and quantitative data and models, used by nationally recognized statistical rating organizations that require each nationally recognized statistical rating organization—

“(1) to ensure that credit ratings are determined using procedures and methodologies, including qualitative and quantitative data and models, that are—

“A) approved by the board of the nationally recognized statistical rating organization, a body performing a function similar to that of a board; and

“B) in accordance with the policies and procedures of the nationally recognized statistical rating organization for the development and modification of credit rating procedures and methodologies;

“(2) to ensure that when material changes to credit rating procedures and methodologies (including changes to qualitative and quantitative data and models) are made, that—

“A) the changes are applied consistently to all credit ratings to which the changed procedures and methodologies apply;

“B) to the extent that changes are made to credit rating surveillance procedures and methodologies, the changes are applied to then-current credit ratings by the nationally recognized statistical rating organization within a reasonable time period determined by the Commission, by rule; and

“C) the nationally recognized statistical rating organization publicly disclosed the reason for the change; and

“(3) to notify users of credit ratings—

“A) of the version of a procedure or methodology, including the qualitative methodology or quantitative inputs, used with respect to a particular credit rating;

“B) when a material change is made to a procedure or methodology, including to a qualitative model or quantitative inputs;

“C) when a significant error is identified in a procedure or methodology, including a qualitative or quantitative model, that may result in credit rating actions; and

“(D) of the likelihood of a material change described in subparagraph (B) resulting in a change in current credit ratings.

“(s) TRANSPARENCY OF CREDIT RATING METHODOLOGIES AND INFORMATION REVIEWED.—

“(1) FORM FOR DISCLOSURES.—The Commission shall require, by rule, each nationally recognized statistical rating organization to prescribe a form to accompany the publication of each credit rating that discloses—

“A) information relating to—

“(i) the assumptions underlying the credit rating procedures and methodologies;

“(ii) the data that was relied on to determine the credit rating; and
“(iii) if applicable, how the nationally recognized statistical rating organization used servicer or remittance reports, and with what frequency, to conduct surveillance of the credit rating; and
“(B) information that can be used by investors and other users of credit ratings to better understand credit ratings in each class of credit rating issued by the nationally recognized statistical rating organization.
“(2) FORMAT.—The form developed under paragraph (1) shall—
“(A) be easy to use and helpful for users of credit ratings to understand the information contained in the report;
“(B) require the nationally recognized statistical rating organization to provide the content described in paragraph (3)(B) in a manner that is directly comparable across types of securities; and
“(C) be made readily available to users of credit ratings, in electronic or paper form, as the Commission may, by rule, determine.
“(3) CONTENT OF FORM.—
“(A) QUALITATIVE CONTENT.—Each nationally recognized statistical rating organization shall disclose on the form developed under paragraph (1)—
“(i) the credit ratings produced by the nationally recognized statistical rating organization;
“(ii) the main assumptions and principles used in constructing procedures and methodologies, including qualitative methodologies and quantitative inputs and assumptions about the correlation of defaults across underlying assets used in rating structured products;
“(iii) the potential limitations of the credit ratings, and the types of risks excluded from the credit ratings that the nationally recognized statistical rating organization does not comment on, including liquidity, market, and other risks;
“(iv) information on the uncertainty of the credit rating, including—
“(I) information on the reliability, accuracy, and quality of the data relied on in determining the credit rating; and
“(II) a statement relating to the extent to which data essential to the determination of the credit rating were reliable or limited, including—
“(aa) any limits on the scope of historical data; and
“(bb) any limits in accessibility to certain documents or other types of information that would have better informed the credit rating;
“(v) whether and to what extent third party due diligence services have been used by the nationally recognized statistical rating organization, a description of the information that such third party reviewed in conducting due diligence services, and a description of the findings or conclusions of such third party;
“(vi) a description of the data about any obligor, issuer, security, or money market instrument that were relied upon for the purpose of determining the credit rating;

“(vii) a statement containing an overall assessment of the quality of information available and considered in producing a rating for an obligor, security, or money market instrument, in relation to the quality of information available to the nationally recognized statistical rating organization in rating similar issuances;

“(viii) information relating to conflicts of interest of the nationally recognized statistical rating organization; and

“(ix) such additional information as the Commission may require.

“(B) Quantitative Content.—Each nationally recognized statistical rating organization shall disclose on the form developed under this subsection—

“(i) an explanation or measure of the potential volatility of the credit rating, including—

“(I) any factors that might lead to a change in the credit ratings; and

“(II) the magnitude of the change that a user can expect under different market conditions;

“(ii) information on the content of the rating, including—

“(I) the historical performance of the rating; and

“(II) the expected probability of default and the expected loss in the event of default;

“(iii) information on the sensitivity of the rating to assumptions made by the nationally recognized statistical rating organization, including—

“(I) 5 assumptions made in the ratings process that, without accounting for any other factor, would have the greatest impact on a rating if the assumptions were proven false or inaccurate; and

“(II) an analysis, using specific examples, of how each of the 5 assumptions identified under subclause (I) impacts a rating;

“(iv) such additional information as may be required by the Commission.

“(4) Due Diligence Services for Asset-Backed Securities.—

“(A) Findings.—The issuer or underwriter of any asset-backed security shall make publicly available the findings and conclusions of any third-party due diligence report obtained by the issuer or underwriter.

“(B) Certification Required.—In any case in which third-party due diligence services are employed by a nationally recognized statistical rating organization, an issuer, or an underwriter, the person providing the due diligence services shall provide to any nationally recognized statistical rating organization that produces a rating to which
such services relate, written certification, as provided in subparagraph (C).

“(C) Format and Content.—The Commission shall establish the appropriate format and content for the written certifications required under subparagraph (B), to ensure that providers of due diligence services have conducted a thorough review of data, documentation, and other relevant information necessary for a nationally recognized statistical rating organization to provide an accurate rating.

“(D) Disclosure of Certification.—The Commission shall adopt rules requiring a nationally recognized statistical rating organization, at the time at which the nationally recognized statistical rating organization produces a rating, to disclose the certification described in subparagraph (B) to the public in a manner that allows the public to determine the adequacy and level of due diligence services provided by a third party.

“(t) Corporate Governance, Organization, and Management of Conflicts of Interest.—

“(1) Board of Directors.—Each nationally recognized statistical rating organization shall have a board of directors.

“(2) Independent Directors.—

“(A) In General.—At least \( \frac{1}{2} \) of the board of directors, but not fewer than 2 of the members thereof, shall be independent of the nationally recognized statistical rating agency. A portion of the independent directors shall include users of ratings from a nationally recognized statistical rating organization.

“(B) Independence Determination.—In order to be considered independent for purposes of this subsection, a member of the board of directors of a nationally recognized statistical rating organization—

“(i) may not, other than in his or her capacity as a member of the board of directors or any committee thereof—

“(I) accept any consulting, advisory, or other compensatory fee from the nationally recognized statistical rating organization; or

“(II) be a person associated with the nationally recognized statistical rating organization or with any affiliated company thereof; and

“(ii) shall be disqualified from any deliberation involving a specific rating in which the independent board member has a financial interest in the outcome of the rating.

“(C) Compensation and Term.—The compensation of the independent members of the board of directors of a nationally recognized statistical rating organization shall not be linked to the business performance of the nationally recognized statistical rating organization, and shall be arranged so as to ensure the independence of their judgment. The term of office of the independent directors shall be for a pre-agreed fixed period, not to exceed 5 years, and shall not be renewable.

“(3) Duties of Board of Directors.—In addition to the overall responsibilities of the board of directors, the board shall oversee—
“(A) the establishment, maintenance, and enforcement of policies and procedures for determining credit ratings;
“(B) the establishment, maintenance, and enforcement of policies and procedures to address, manage, and disclose any conflicts of interest;
“(C) the effectiveness of the internal control system with respect to policies and procedures for determining credit ratings; and
“(D) the compensation and promotion policies and practices of the nationally recognized statistical rating organization.
“(4) TREATMENT OF NRSRO SUBSIDIARIES.—If a nationally recognized statistical rating organization is a subsidiary of a parent entity, the board of the directors of the parent entity may satisfy the requirements of this subsection by assigning to a committee of such board of directors the duties under paragraph (3), if—
“(A) at least ½ of the members of the committee (including the chairperson of the committee) are independent, as defined in this section; and
“(B) at least 1 member of the committee is a user of ratings from a nationally recognized statistical rating organization.
“(5) EXCEPTION AUTHORITY.—If the Commission finds that compliance with the provisions of this subsection present an unreasonable burden on a small nationally recognized statistical rating organization, the Commission may permit the nationally recognized statistical rating organization to delegate such responsibilities to a committee that includes at least one individual who is a user of ratings of a nationally recognized statistical rating organization.”.

(b) CONFORMING AMENDMENT.—Section 3(a)(62) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(62)) is amended by striking subparagraph (A) and redesignating subparagraphs (B) and (C) as subparagraphs (A) and (B), respectively.

SEC. 933. STATE OF MIND IN PRIVATE ACTIONS.
(a) ACCOUNTABILITY.—Section 15E(m) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–7(m)) is amended to read as follows:
“(m) ACCOUNTABILITY.—
“(1) IN GENERAL.—The enforcement and penalty provisions of this title shall apply to statements made by a credit rating agency in the same manner and to the same extent as such provisions apply to statements made by a registered public accounting firm or a securities analyst under the securities laws, and such statements shall not be deemed forward-looking statements for the purposes of section 21E.
“(2) RULEMAKING.—The Commission shall issue such rules as may be necessary to carry out this subsection.”.
(1) by striking “In any” and inserting the following:
“(A) IN GENERAL.—Except as provided in subparagraph (B), in any”; and
(2) by adding at the end the following:
“(B) EXCEPTION.—In the case of an action for money damages brought against a credit rating agency or a controlling person under this title, it shall be sufficient, for purposes of pleading any required state of mind in relation to such action, that the complaint state with particularity facts giving rise to a strong inference that the credit rating agency knowingly or recklessly failed—

“(i) to conduct a reasonable investigation of the rated security with respect to the factual elements relied upon by its own methodology for evaluating credit risk; or

“(ii) to obtain reasonable verification of such factual elements (which verification may be based on a sampling technique that does not amount to an audit) from other sources that the credit rating agency considered to be competent and that were independent of the issuer and underwriter.”.

SEC. 934. REFERRING TIPS TO LAW ENFORCEMENT OR REGULATORY AUTHORITIES.

Section 15E of the Securities Exchange Act of 1934 (15 U.S.C. 78o–7), as amended by this subtitle, is amended by adding at the end the following:

“(u) DUTY TO REPORT TIPS ALLEGING MATERIAL VIOLATIONS OF LAW.—

“(1) DUTY TO REPORT.—Each nationally recognized statistical rating organization shall refer to the appropriate law enforcement or regulatory authorities any information that the nationally recognized statistical rating organization receives from a third party and finds credible that alleges that an issuer of securities rated by the nationally recognized statistical rating organization has committed or is committing a material violation of law that has not been adjudicated by a Federal or State court.

“(2) RULE OF CONSTRUCTION.—Nothing in paragraph (1) may be construed to require a nationally recognized statistical rating organization to verify the accuracy of the information described in paragraph (1).”.

SEC. 935. CONSIDERATION OF INFORMATION FROM SOURCES OTHER THAN THE ISSUER IN RATING DECISIONS.

Section 15E of the Securities Exchange Act of 1934 (15 U.S.C. 78o–7), as amended by this subtitle, is amended by adding at the end the following:

“(v) INFORMATION FROM SOURCES OTHER THAN THE ISSUER.—In producing a credit rating, a nationally recognized statistical rating organization shall consider information about an issuer that the nationally recognized statistical rating organization has, or receives from a source other than the issuer or underwriter, that the nationally recognized statistical rating organization finds credible and potentially significant to a rating decision.”.

SEC. 936. QUALIFICATION STANDARDS FOR CREDIT RATING ANALYSTS.

Not later than 1 year after the date of enactment of this Act, the Commission shall issue rules that are reasonably designed to ensure that any person employed by a nationally recognized statistical rating organization to perform credit ratings—
(1) meets standards of training, experience, and competence necessary to produce accurate ratings for the categories of issuers whose securities the person rates; and

(2) is tested for knowledge of the credit rating process.

SEC. 937. TIMING OF REGULATIONS.

Unless otherwise specifically provided in this subtitle, the Commission shall issue final regulations, as required by this subtitle and the amendments made by this subtitle, not later than 1 year after the date of enactment of this Act.

SEC. 938. UNIVERSAL RATINGS SYMBOLS.

(a) Rulemaking.—The Commission shall require, by rule, each nationally recognized statistical rating organization to establish, maintain, and enforce written policies and procedures that—

(1) assess the probability that an issuer of a security or money market instrument will default, fail to make timely payments, or otherwise not make payments to investors in accordance with the terms of the security or money market instrument;

(2) clearly define and disclose the meaning of any symbol used by the nationally recognized statistical rating organization to denote a credit rating; and

(3) apply any symbol described in paragraph (2) in a manner that is consistent for all types of securities and money market instruments for which the symbol is used.

(b) Rule of Construction.—Nothing in this section shall prohibit a nationally recognized statistical rating organization from using distinct sets of symbols to denote credit ratings for different types of securities or money market instruments.

SEC. 939. REMOVAL OF STATUTORY REFERENCES TO CREDIT RATINGS.

(a) Federal Deposit Insurance Act.—The Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.) is amended—

(1) in section 7(b)(1)(E)(i), by striking “credit rating entities, and other private economic” and insert “private economic, credit,”;

(2) in section 28(d)—

(A) in the subsection heading, by striking “NOT OF INVESTMENT GRADE”;

(B) in paragraph (1), by striking “not of investment grade” and inserting “that does not meet standards of credit-worthiness as established by the Corporation”;

(C) in paragraph (2), by striking “not of investment grade”;

(D) by striking paragraph (3);

(E) by redesigning paragraph (4) as paragraph (3); and

(F) in paragraph (3), as so redesignated—

(i) by striking subparagraph (A);

(ii) by redesigning subparagraphs (B) and (C) as subparagraphs (A) and (B), respectively; and

(iii) in subparagraph (B), as so redesignated, by striking “not of investment grade” and inserting “that does not meet standards of credit-worthiness as established by the Corporation”;

and

(3) in section 28(e)—
(A) in the subsection heading, by striking “NOT OF INVESTMENT GRADE”;

(B) in paragraph (1), by striking “not of investment grade” and inserting “that does not meet standards of credit-worthiness as established by the Corporation”;

(C) in paragraphs (2) and (3), by striking “not of investment grade” each place that it appears and inserting “that does not meet standards of credit-worthiness established by the Corporation”.

(b) FEDERAL HOUSING ENTERPRISES FINANCIAL SAFETY AND SOUNDNESS ACT OF 1992.—Section 1319 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4519) is amended by striking “that is a nationally recognized statistical rating organization, as such term is defined in section 3(a) of the Securities Exchange Act of 1934.”.

(c) INVESTMENT COMPANY ACT OF 1940.—Section 6(a)(5)(A)(iv)(I) Investment Company Act of 1940 (15 U.S.C. 80a–6(a)(5)(A)(iv)(I)) is amended by striking “is rated investment grade by not less than 1 nationally recognized statistical rating organization” and inserting “meets such standards of credit-worthiness as the Commission shall adopt”.

(d) REvised STATUTES.—Section 5136A of title LXII of the Revised Statutes of the United States (12 U.S.C. 24a) is amended—

(1) in subsection (a)(2)(E), by striking “any applicable rating” and inserting “standards of credit-worthiness established by the Comptroller of the Currency”;

(2) in the heading for subsection (a)(3) by striking “RATING OR COMPARABLE REQUIREMENT” and inserting “REQUIREMENT”;

(3) subsection (a)(3), by amending subparagraph (A) to read as follows:

“(A) IN GENERAL.—A national bank meets the requirements of this paragraph if the bank is one of the 100 largest insured banks and has not fewer than 1 issue of outstanding debt that meets standards of credit-worthiness or other criteria as the Secretary of the Treasury and the Board of Governors of the Federal Reserve System may jointly establish.”

(4) in the heading for subsection (f), by striking “MAINTAIN PUBLIC RATING OR” and inserting “MEET STANDARDS OF CREDIT-WORTHINESS”;

(5) in subsection (f)(1), by striking “any applicable rating” and inserting “standards of credit-worthiness established by the Comptroller of the Currency”.

(e) SECURITIES EXCHANGE ACT OF 1934.—Section 3(a) Securities Exchange Act of 1934 (15 U.S.C. 78a(3)(a)) is amended—

(1) in paragraph (41), by striking “is rated in one of the two highest rating categories by at least one nationally recognized statistical rating organization” and inserting “meets standards of credit-worthiness as established by the Commission”;

(2) in paragraph (53)(A), by striking “is rated in 1 of the 4 highest rating categories by at least 1 nationally recognized statistical rating organization” and inserting “meets standards of credit-worthiness as established by the Commission”.

(f) WORLD BANK DISCUSSIONS.—Section 3(a)(6) of the amendment in the nature of a substitute to the text of H.R. 4645, as ordered reported from the Committee on Banking, Finance and
Urban Affairs on September 22, 1988, as enacted into law by section 555 of Public Law 100–461, (22 U.S.C. 286hh(a)(6)), is amended by striking “credit rating” and inserting “credit-worthiness”.

(g) Effective Date.—The amendments made by this section shall take effect 2 years after the date of enactment of this Act.

(h) Study and Report.—

(1) In General.—Commission shall undertake a study on the feasability and desirability of—

(A) standardizing credit ratings terminology, so that all credit rating agencies issue credit ratings using identical terms;

(B) standardizing the market stress conditions under which ratings are evaluated;

(C) requiring a quantitative correspondence between credit ratings and a range of default probabilities and loss expectations under standardized conditions of economic stress; and

(D) standardizing credit rating terminology across asset classes, so that named ratings correspond to a standard range of default probabilities and expected losses independent of asset class and issuing entity.

(2) Report.—Not later than 1 year after the date of enactment of this Act, the Commission shall submit to Congress a report containing the findings of the study under paragraph (1) and the recommendations, if any, of the Commission with respect to the study.

SEC. 939A. REVIEW OF RELIANCE ON RATINGS.

(a) Agency Review.—Not later than 1 year after the date of enactment of this subtitle, each Federal agency shall, to the extent applicable, review—

(1) any regulation issued by such agency that requires the use of an assessment of the credit-worthiness of a security or money market instrument; and

(2) any references to or requirements in such regulations regarding credit ratings.

(b) Modifications Required.—Each such agency shall modify any such regulations identified by the review conducted under subsection (a) to remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations such standard of credit-worthiness as each respective agency shall determine as appropriate for such regulations. In making such determination, such agencies shall seek to establish, to the extent feasible, uniform standards of credit-worthiness for use by each such agency, taking into account the entities regulated by each such agency and the purposes for which such entities would rely on such standards of credit-worthiness.

(c) Report.—Upon conclusion of the review required under subsection (a), each Federal agency shall transmit a report to Congress containing a description of any modification of any regulation such agency made pursuant to subsection (b).

SEC. 939B. ELIMINATION OF EXEMPTION FROM FAIR DISCLOSURE RULE.

Not later than 90 days after the date of enactment of this subtitle, the Securities Exchange Commission shall revise Regulation FD (17 C.F.R. 243.100) to remove from such regulation the...
exemption for entities whose primary business is the issuance of credit ratings (17 C.F.R. 243.100(b)(2)(iii)).

SEC. 939C. SECURITIES AND EXCHANGE COMMISSION STUDY ON STRENGTHENING CREDIT RATING AGENCY INDEPENDENCE.

(a) Study.—The Commission shall conduct a study of—
    (1) the independence of nationally recognized statistical rating organizations; and
    (2) how the independence of nationally recognized statistical rating organizations affects the ratings issued by the nationally recognized statistical rating organizations.

(b) Subjects for Evaluation.—In conducting the study under subsection (a), the Commission shall evaluate—
    (1) the management of conflicts of interest raised by a nationally recognized statistical rating organization providing other services, including risk management advisory services, ancillary assistance, or consulting services;
    (2) the potential impact of rules prohibiting a nationally recognized statistical rating organization that provides a rating to an issuer from providing other services to the issuer; and
    (3) any other issue relating to nationally recognized statistical rating organizations, as the Chairman of the Commission determines is appropriate.

(c) Report.—Not later than 3 years after the date of enactment of this Act, the Chairman of the Commission shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report on the results of the study conducted under subsection (a), including recommendations, if any, for improving the integrity of ratings issued by nationally recognized statistical rating organizations.

SEC. 939D. GOVERNMENT ACCOUNTABILITY OFFICE STUDY ON ALTERNATIVE BUSINESS MODELS.

(a) Study.—The Comptroller General of the United States shall conduct a study on alternative means for compensating nationally recognized statistical rating organizations in order to create incentives for nationally recognized statistical rating organizations to provide more accurate credit ratings, including any statutory changes that would be required to facilitate the use of an alternative means of compensation.

(b) Report.—Not later than 18 months after the date of enactment of this Act, the Comptroller General shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report on the results of the study conducted under subsection (a), including recommendations, if any, for providing incentives to credit rating agencies to improve the credit rating process.

SEC. 939E. GOVERNMENT ACCOUNTABILITY OFFICE STUDY ON THE CREATION OF AN INDEPENDENT PROFESSIONAL ANALYST ORGANIZATION.

(a) Study.—The Comptroller General of the United States shall conduct a study on the feasibility and merits of creating an independent professional organization for rating analysts employed by nationally recognized statistical rating organizations that would be responsible for—
(1) establishing independent standards for governing the profession of rating analysts;  
(2) establishing a code of ethical conduct; and  
(3) overseeing the profession of rating analysts.

(b) REPORT.—Not later than 1 year after the date of publication of the rules issued by the Commission pursuant to section 936, the Comptroller General shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report on the results of the study conducted under subsection (a).

SEC. 939F. STUDY AND RULEMAKING ON ASSIGNED CREDIT RATINGS.

(a) DEFINITION.—In this section, the term “structured finance product” means an asset-backed security, as defined in section 3(a)(77) of the Securities Exchange Act of 1934, as added by section 941, and any structured product based on an asset-backed security, as determined by the Commission, by rule.

(b) STUDY.—The Commission shall carry out a study of—

(1) the credit rating process for structured finance products and the conflicts of interest associated with the issuer-pay and the subscriber-pay models;

(2) the feasibility of establishing a system in which a public or private utility or a self-regulatory organization assigns nationally recognized statistical rating organizations to determine the credit ratings of structured finance products, including—

(A) an assessment of potential mechanisms for determining fees for the nationally recognized statistical rating organizations;

(B) appropriate methods for paying fees to the nationally recognized statistical rating organizations;

(C) the extent to which the creation of such a system would be viewed as the creation of moral hazard by the Federal Government; and

(D) any constitutional or other issues concerning the establishment of such a system;

(3) the range of metrics that could be used to determine the accuracy of credit ratings; and

(4) alternative means for compensating nationally recognized statistical rating organizations that would create incentives for accurate credit ratings.

(c) REPORT AND RECOMMENDATION.—Not later than 24 months after the date of enactment of this Act, the Commission shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report that contains—

(1) the findings of the study required under subsection (b); and

(2) any recommendations for regulatory or statutory changes that the Commission determines should be made to implement the findings of the study required under subsection (b).

(d) RULEMAKING.—

(1) RULEMAKING.—After submission of the report under subsection (c), the Commission shall, by rule, as the Commission determines is necessary or appropriate in the public interest or for the protection of investors, establish a system...
for the assignment of nationally recognized statistical rating organizations to determine the initial credit ratings of structured finance products, in a manner that prevents the issuer, sponsor, or underwriter of the structured finance product from selecting the nationally recognized statistical rating organization that will determine the initial credit ratings and monitor such credit ratings. In issuing any rule under this paragraph, the Commission shall give thorough consideration to the provisions of section 15E(w) of the Securities Exchange Act of 1934, as that provision would have been added by section 939D of H.R. 4173 (111th Congress), as passed by the Senate on May 20, 2010, and shall implement the system described in such section 939D unless the Commission determines that an alternative system would better serve the public interest and the protection of investors.

(2) RULE OF CONSTRUCTION.—Nothing in this subsection may be construed to limit or suspend any other rulemaking authority of the Commission.

SEC. 939G. EFFECT OF RULE 436(G).

Rule 436(g), promulgated by the Securities and Exchange Commission under the Securities Act of 1933, shall have no force or effect.

SEC. 939H. SENSE OF CONGRESS.

It is the sense of Congress that the Securities and Exchange Commission should exercise the rulemaking authority of the Commission under section 15E(h)(2)(B) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–7(h)(2)(B)) to prevent improper conflicts of interest arising from employees of nationally recognized statistical rating organizations providing services to issuers of securities that are unrelated to the issuance of credit ratings, including consulting, advisory, and other services.

Subtitle D—Improvements to the Asset-Backed Securitization Process

SEC. 941. REGULATION OF CREDIT RISK RETENTION.

(a) DEFINITION OF ASSET-BACKED SECURITY.—Section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)) is amended by adding at the end the following:

"(77) ASSET-BACKED SECURITY.—The term ‘asset-backed security’—

(A) means a fixed-income or other security collateralized by any type of self-liquidating financial asset (including a loan, a lease, a mortgage, or a secured or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flow from the asset, including—

(i) a collateralized mortgage obligation;

(ii) a collateralized debt obligation;

(iii) a collateralized bond obligation;

(iv) a collateralized debt obligation of asset-backed securities;

(v) a collateralized debt obligation of collateralized debt obligations; and
“(vi) a security that the Commission, by rule, determines to be an asset-backed security for purposes of this section; and
“(B) does not include a security issued by a finance subsidiary held by the parent company or a company controlled by the parent company, if none of the securities issued by the finance subsidiary are held by an entity that is not controlled by the parent company.”.

(b) CREDIT RISK RETENTION.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by inserting after section 15F, as added by this Act, the following:

“SEC. 15G. CREDIT RISK RETENTION.

“(a) DEFINITIONS.—In this section—
“(1) the term ‘Federal banking agencies’ means the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation;
“(2) the term ‘insured depository institution’ has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c));
“(3) the term ‘securitizer’ means—
“(A) an issuer of an asset-backed security; or
“(B) a person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer; and
“(4) the term ‘originator’ means a person who—
“(A) through the extension of credit or otherwise, creates a financial asset that collateralizes an asset-backed security; and
“(B) sells an asset directly or indirectly to a securitizer.

“(b) REGULATIONS REQUIRED.—
“(1) IN GENERAL.—Not later than 270 days after the date of enactment of this section, the Federal banking agencies and the Commission shall jointly prescribe regulations to require any securitizer to retain an economic interest in a portion of the credit risk for any asset that the securitizer, through the issuance of an asset-backed security, transfers, sells, or conveys to a third party.
“(2) RESIDENTIAL MORTGAGES.—Not later than 270 days after the date of the enactment of this section, the Federal banking agencies, the Commission, the Secretary of Housing and Urban Development, and the Federal Housing Finance Agency, shall jointly prescribe regulations to require any securitizer to retain an economic interest in a portion of the credit risk for any residential mortgage asset that the securitizer, through the issuance of an asset-backed security, transfers, sells, or conveys to a third party.

“(c) STANDARDS FOR REGULATIONS.—
“(1) STANDARDS.—The regulations prescribed under subsection (b) shall—
“(A) prohibit a securitizer from directly or indirectly hedging or otherwise transferring the credit risk that the securitizer is required to retain with respect to an asset;
“(B) require a securitizer to retain—
“(i) not less than 5 percent of the credit risk for any asset—

“(I) that is not a qualified residential mortgage that is transferred, sold, or conveyed through the issuance of an asset-backed security by the securitizer; or

“(II) that is a qualified residential mortgage that is transferred, sold, or conveyed through the issuance of an asset-backed security by the securitizer, if 1 or more of the assets that collateralize the asset-backed security are not qualified residential mortgages; or

“(ii) less than 5 percent of the credit risk for an asset that is not a qualified residential mortgage that is transferred, sold, or conveyed through the issuance of an asset-backed security by the securitizer, if the originator of the asset meets the underwriting standards prescribed under paragraph (2)(B);

“(C) specify—

“(i) the permissible forms of risk retention for purposes of this section;

“(ii) the minimum duration of the risk retention required under this section; and

“(iii) that a securitizer is not required to retain any part of the credit risk for an asset that is transferred, sold or conveyed through the issuance of an asset-backed security by the securitizer, if all of the assets that collateralize the asset-backed security are qualified residential mortgages;

“(D) apply, regardless of whether the securitizer is an insured depository institution;

“(E) with respect to a commercial mortgage, specify the permissible types, forms, and amounts of risk retention that would meet the requirements of subparagraph (B), which in the determination of the Federal banking agencies and the Commission may include—

“(i) retention of a specified amount or percentage of the total credit risk of the asset;

“(ii) retention of the first-loss position by a third-party purchaser that specifically negotiates for the purchase of such first loss position, holds adequate financial resources to back losses, provides due diligence on all individual assets in the pool before the issuance of the asset-backed securities, and meets the same standards for risk retention as the Federal banking agencies and the Commission require of the securitizer;

“(iii) a determination by the Federal banking agencies and the Commission that the underwriting standards and controls for the asset are adequate; and

“(iv) provision of adequate representations and warranties and related enforcement mechanisms; and

“(F) establish appropriate standards for retention of an economic interest with respect to collateralized debt obligations, securities collateralized by collateralized debt obligations, and similar instruments collateralized by other asset-backed securities; and

“(G) provide for—

Applicability.
“(i) a total or partial exemption of any securitization, as may be appropriate in the public interest and for the protection of investors;
“(ii) a total or partial exemption for the securitization of an asset issued or guaranteed by the United States, or an agency of the United States, as the Federal banking agencies and the Commission jointly determine appropriate in the public interest and for the protection of investors, except that, for purposes of this clause, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation are not agencies of the United States;
“(iii) a total or partial exemption for any asset-backed security that is a security issued or guaranteed by any State of the United States, or by any political subdivision of a State or territory, or by any public instrumentality of a State or territory that is exempt from the registration requirements of the Securities Act of 1933 by reason of section 3(a)(2) of that Act (15 U.S.C. 77c(a)(2)), or a security defined as a qualified scholarship funding bond in section 150(d)(2) of the Internal Revenue Code of 1986, as may be appropriate in the public interest and for the protection of investors; and
“(iv) the allocation of risk retention obligations between a securitizer and an originator in the case of a securitizer that purchases assets from an originator, as the Federal banking agencies and the Commission jointly determine appropriate.

“(2) Asset classes.—
“(A) Asset classes.—The regulations prescribed under subsection (b) shall establish asset classes with separate rules for securitizers of different classes of assets, including residential mortgages, commercial mortgages, commercial loans, auto loans, and any other class of assets that the Federal banking agencies and the Commission deem appropriate.
“(B) Contents.—For each asset class established under subparagraph (A), the regulations prescribed under subsection (b) shall include underwriting standards established by the Federal banking agencies that specify the terms, conditions, and characteristics of a loan within the asset class that indicate a low credit risk with respect to the loan.

“(d) Originators.—In determining how to allocate risk retention obligations between a securitizer and an originator under subsection (c)(1)(E)(iv), the Federal banking agencies and the Commission shall—
“(1) reduce the percentage of risk retention obligations required of the securitizer by the percentage of risk retention obligations required of the originator; and
“(2) consider—
“(A) whether the assets sold to the securitizer have terms, conditions, and characteristics that reflect low credit risk;
“(B) whether the form or volume of transactions in securitization markets creates incentives for imprudent
origination of the type of loan or asset to be sold to the
securitizer; and
“(C) the potential impact of the risk retention obliga-
tions on the access of consumers and businesses to credit
on reasonable terms, which may not include the transfer
of credit risk to a third party.
“(e) Exemptions, Exceptions, and Adjustments.—
“(1) In General.—The Federal banking agencies and the
Commission may jointly adopt or issue exemptions, exceptions,
or adjustments to the rules issued under this section, including
exemptions, exceptions, or adjustments for classes of institu-
tions or assets relating to the risk retention requirement and
the prohibition on hedging under subsection (c)(1).
“(2) Applicable Standards.—Any exemption, exception,
or adjustment adopted or issued by the Federal banking agen-
cies and the Commission under this paragraph shall—
“(A) help ensure high quality underwriting standards
for the securitizers and originators of assets that are
securitized or available for securitization; and
“(B) encourage appropriate risk management practices
by the securitizers and originators of assets, improve the
access of consumers and businesses to credit on reasonable
terms, or otherwise be in the public interest and for the
protection of investors.
“(3) Certain Institutions and Programs Exempt.—
“(A) Farm Credit System Institutions.—Notwith-
standing any other provision of this section, the require-
ments of this section shall not apply to any loan or other
financial asset made, insured, guaranteed, or purchased
by any institution that is subject to the supervision of
the Farm Credit Administration, including the Federal
Agricultural Mortgage Corporation.
“(B) Other Federal Programs.—This section shall
not apply to any residential, multifamily, or health care
facility mortgage loan asset, or securitization based directly
or indirectly on such an asset, which is insured or guaran-
teed by the United States or an agency of the United
States. For purposes of this subsection, the Federal
National Mortgage Association, the Federal Home Loan
Mortgage Corporation, and the Federal home loan banks
shall not be considered an agency of the United States.
“(4) Exemption for Qualified Residential Mortgages.—
“(A) In General.—The Federal banking agencies, the
Commission, the Secretary of Housing and Urban Develop-
ment, and the Director of the Federal Housing Finance
Agency shall jointly issue regulations to exempt qualified
residential mortgages from the risk retention requirements
of this subsection.
“(B) Qualified Residential Mortgage.—The Federal
banking agencies, the Commission, the Secretary of
Housing and Urban Development, and the Director of the
Federal Housing Finance Agency shall jointly define the
term 'qualified residential mortgage' for purposes of this
subsection, taking into consideration underwriting and
product features that historical loan performance data
indicate result in a lower risk of default, such as—
“(i) documentation and verification of the financial resources relied upon to qualify the mortgagor;
“(ii) standards with respect to—
“(I) the residual income of the mortgagor after all monthly obligations;
“(II) the ratio of the housing payments of the mortgagor to the monthly income of the mortgagor;
“(III) the ratio of total monthly installment payments of the mortgagor to the income of the mortgagor;
“(iii) mitigating the potential for payment shock on adjustable rate mortgages through product features and underwriting standards;
“(iv) mortgage guarantee insurance or other types of insurance or credit enhancement obtained at the time of origination, to the extent such insurance or credit enhancement reduces the risk of default; and
“(v) prohibiting or restricting the use of balloon payments, negative amortization, prepayment penalties, interest-only payments, and other features that have been demonstrated to exhibit a higher risk of borrower default.
“(C) LIMITATION ON DEFINITION.—The Federal banking agencies, the Commission, the Secretary of Housing and Urban Development, and the Director of the Federal Housing Finance Agency in defining the term ‘qualified residential mortgage’, as required by subparagraph (B), shall define that term to be no broader than the definition ‘qualified mortgage’ as the term is defined under section 129C(c)(2) of the Truth in Lending Act, as amended by the Consumer Financial Protection Act of 2010, and regulations adopted thereunder.
“(5) CONDITION FOR QUALIFIED RESIDENTIAL MORTGAGE EXEMPTION.—The regulations issued under paragraph (4) shall provide that an asset-backed security that is collateralized by tranches of other asset-backed securities shall not be exempt from the risk retention requirements of this subsection.
“(6) CERTIFICATION.—The Commission shall require an issuer to certify, for each issuance of an asset-backed security collateralized exclusively by qualified residential mortgages, that the issuer has evaluated the effectiveness of the internal supervisory controls of the issuer with respect to the process for ensuring that all assets that collateralize the asset-backed security are qualified residential mortgages.
“(f) ENFORCEMENT.—The regulations issued under this section shall be enforced by—
“(1) the appropriate Federal banking agency, with respect to any securitizer that is an insured depository institution; and
“(2) the Commission, with respect to any securitizer that is not an insured depository institution.
“(g) AUTHORITY OF COMMISSION.—The authority of the Commission under this section shall be in addition to the authority of the Commission to otherwise enforce the securities laws.
“(h) AUTHORITY TO COORDINATE ON RULEMAKING.—The Chairperson of the Financial Stability Oversight Council shall coordinate all joint rulemaking required under this section.
“(i) Effective Date of Regulations.—The regulations issued under this section shall become effective—

“(1) with respect to securitizers and originators of asset-backed securities backed by residential mortgages, 1 year after the date on which final rules under this section are published in the Federal Register; and

“(2) with respect to securitizers and originators of all other classes of asset-backed securities, 2 years after the date on which final rules under this section are published in the Federal Register.”.

(c) Study on Risk Retention.—

(1) Study.—The Board of Governors of the Federal Reserve System, in coordination and consultation with the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Chairperson of the Federal Deposit Insurance Corporation, and the Securities and Exchange Commission shall conduct a study of the combined impact on each individual class of asset-backed security established under section 15G(c)(2) of the Securities Exchange Act of 1934, as added by subsection (b), of—

(A) the new credit risk retention requirements contained in the amendment made by subsection (b), including the effect credit risk retention requirements have on increasing the market for Federally subsidized loans; and

(B) the Financial Accounting Statements 166 and 167 issued by the Financial Accounting Standards Board.

(2) Report.—Not later than 90 days after the date of enactment of this Act, the Board of Governors of the Federal Reserve System shall submit to Congress a report on the study conducted under paragraph (1). Such report shall include statutory and regulatory recommendations for eliminating any negative impacts on the continued viability of the asset-backed securitization markets and on the availability of credit for new lending identified by the study conducted under paragraph (1).

SEC. 942. DISCLOSURES AND REPORTING FOR ASSET-BACKED SECURITIES.


(1) by striking “(d) Each” and inserting the following:

“(d) Supplementary and Periodic Information.—

“(1) In General.—Each;

(2) in the third sentence, by inserting after “securities of each class” the following: “, other than any class of asset-backed securities,”; and

(3) by adding at the end the following:

“(2) Asset-Backed Securities.—

“(A) Suspension of Duty to File.—The Commission may, by rule or regulation, provide for the suspension or termination of the duty to file under this subsection for any class of asset-backed security, on such terms and conditions and for such period or periods as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

“(B) Classification of Issuers.—The Commission may, for purposes of this subsection, classify issuers and
prescribe requirements appropriate for each class of issuers of asset-backed securities.

(b) Securities Act of 1933.—Section 7 of the Securities Act of 1933 (15 U.S.C. 77g) is amended by adding at the end the following:

“(c) Disclosure Requirements.—

“(1) In General.—The Commission shall adopt regulations under this subsection requiring each issuer of an asset-backed security to disclose, for each tranche or class of security, information regarding the assets backing that security.

“(2) Content of Regulations.—In adopting regulations under this subsection, the Commission shall—

“(A) set standards for the format of the data provided by issuers of an asset-backed security, which shall, to the extent feasible, facilitate comparison of such data across securities in similar types of asset classes; and

“(B) require issuers of asset-backed securities, at a minimum, to disclose asset-level or loan-level data, if such data are necessary for investors to independently perform due diligence, including—

“(i) data having unique identifiers relating to loan brokers or originators;

“(ii) the nature and extent of the compensation of the broker or originator of the assets backing the security; and

“(iii) the amount of risk retention by the originator and the securitizer of such assets.”.

SEC. 943. REPRESENTATIONS AND WARRANTIES IN ASSET-BACKED OFFERINGS.

Not later than 180 days after the date of enactment of this Act, the Securities and Exchange Commission shall prescribe regulations on the use of representations and warranties in the market for asset-backed securities (as that term is defined in section 3(a)(77) of the Securities Exchange Act of 1934, as added by this subtitle) that—

(1) require each national recognized statistical rating organization to include in any report accompanying a credit rating a description of—

(A) the representations, warranties, and enforcement mechanisms available to investors; and

(B) how they differ from the representations, warranties, and enforcement mechanisms in issuances of similar securities; and

(2) require any securitizer (as that term is defined in section 15G(a) of the Securities Exchange Act of 1934, as added by this subtitle) to disclose fulfilled and unfulfilled repurchase requests across all trusts aggregated by the securitizer, so that investors may identify asset originators with clear underwriting deficiencies.

SEC. 944. EXEMPTED TRANSACTIONS UNDER THE SECURITIES ACT OF 1933.

(a) Exemption Eliminated.—Section 4 of the Securities Act of 1933 (15 U.S.C. 77d) is amended—

(1) by striking paragraph (5); and

(2) by striking “(6) transactions” and inserting the following:
“(5) transactions”.


SEC. 945. DUE DILIGENCE ANALYSIS AND DISCLOSURE IN ASSET-BACKED SECURITIES ISSUES.

Section 7 of the Securities Act of 1933 (15 U.S.C. 77g), as amended by this subtitle, is amended by adding at the end the following:

“(d) REGISTRATION STATEMENT FOR ASSET-BACKED SECURITIES.—Not later than 180 days after the date of enactment of this subsection, the Commission shall issue rules relating to the registration statement required to be filed by any issuer of an asset-backed security (as that term is defined in section 3(a)(77) of the Securities Exchange Act of 1934) that require any issuer of an asset-backed security—

“(1) to perform a review of the assets underlying the asset-backed security; and

“(2) to disclose the nature of the review under paragraph (1).”.

SEC. 946. STUDY ON THE MACROECONOMIC EFFECTS OF RISK RETENTION REQUIREMENTS.

(a) STUDY REQUIRED.—The Chairman of the Financial Services Oversight Council shall carry out a study on the macroeconomic effects of the risk retention requirements under this subtitle, and the amendments made by this subtitle, with emphasis placed on potential beneficial effects with respect to stabilizing the real estate market. Such study shall include—

(1) an analysis of the effects of risk retention on real estate asset price bubbles, including a retrospective estimate of what fraction of real estate losses may have been averted had such requirements been in force in recent years;

(2) an analysis of the feasibility of minimizing real estate price bubbles by proactively adjusting the percentage of risk retention that must be borne by creditors and securitizers of real estate debt, as a function of regional or national market conditions;

(3) a comparable analysis for proactively adjusting mortgage origination requirements;

(4) an assessment of whether such proactive adjustments should be made by an independent regulator, or in a formulaic and transparent manner;

(5) an assessment of whether such adjustments should take place independently or in concert with monetary policy; and

(6) recommendations for implementation and enabling legislation.

(b) REPORT.—Not later than the end of the 180-day period beginning on the date of the enactment of this title, the Chairman of the Financial Services Oversight Council shall issue a report to the Congress containing any findings and determinations made in carrying out the study required under subsection (a).
Subtitle E—Accountability and Executive Compensation

SEC. 951. SHAREHOLDER VOTE ON EXECUTIVE COMPENSATION DISCLOSURES.


"SEC. 14A. SHAREHOLDER APPROVAL OF EXECUTIVE COMPENSATION.

"(a) SEPARATE RESOLUTION REQUIRED.—

"(1) IN GENERAL.—Not less frequently than once every 3 years, a proxy or consent or authorization for an annual or other meeting of the shareholders for which the proxy solicitation rules of the Commission require compensation disclosure shall include a separate resolution subject to shareholder vote to approve the compensation of executives, as disclosed pursuant to section 229.402 of title 17, Code of Federal Regulations, or any successor thereto.

"(2) FREQUENCY OF VOTE.—Not less frequently than once every 6 years, a proxy or consent or authorization for an annual or other meeting of the shareholders for which the proxy solicitation rules of the Commission require compensation disclosure shall include a separate resolution subject to shareholder vote to determine whether votes on the resolutions required under paragraph (1) will occur every 1, 2, or 3 years.

"(3) EFFECTIVE DATE.—The proxy or consent or authorization for the first annual or other meeting of the shareholders occurring after the end of the 6-month period beginning on the date of enactment of this section shall include—

"(A) the resolution described in paragraph (1); and

"(B) a separate resolution subject to shareholder vote to determine whether votes on the resolutions required under paragraph (1) will occur every 1, 2, or 3 years.

"(b) SHAREHOLDER APPROVAL OF GOLDEN PARACHUTE COMPENSATION.—

"(1) DISCLOSURE.—In any proxy or consent solicitation material (the solicitation of which is subject to the rules of the Commission pursuant to subsection (a)) for a meeting of the shareholders occurring after the end of the 6-month period beginning on the date of enactment of this section, at which shareholders are asked to approve an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all the assets of an issuer, the person making such solicitation shall disclose in the proxy or consent solicitation material, in a clear and simple form in accordance with regulations to be promulgated by the Commission, any agreements or understandings that such person has with any named executive officers of such issuer (or of the acquiring issuer, if such issuer is not the acquiring issuer) concerning any type of compensation (whether present, deferred, or contingent) that is based on or otherwise relates to the acquisition, merger, consolidation, sale, or other disposition of all or substantially all of the assets of the issuer and the aggregate total of all such compensation that may (and the conditions upon which

15 USC 78n–1.
Deadlines.
it may) be paid or become payable to or on behalf of such executive officer.

“(2) Shareholder approval.—Any proxy or consent or authorization relating to the proxy or consent solicitation material containing the disclosure required by paragraph (1) shall include a separate resolution subject to shareholder vote to approve such agreements or understandings and compensation as disclosed, unless such agreements or understandings have been subject to a shareholder vote under subsection (a).

“(c) Rule of construction.—The shareholder vote referred to in subsections (a) and (b) shall not be binding on the issuer or the board of directors of an issuer, and may not be construed—

“(1) as overruling a decision by such issuer or board of directors;

“(2) to create or imply any change to the fiduciary duties of such issuer or board of directors;

“(3) to create or imply any additional fiduciary duties for such issuer or board of directors; or

“(4) to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation.

“(d) Disclosure of votes.—Every institutional investment manager subject to section 13(f) shall report at least annually how it voted on any shareholder vote pursuant to subsections (a) and (b), unless such vote is otherwise required to be reported publicly by rule or regulation of the Commission.

“(e) Exemption.—The Commission may, by rule or order, exempt an issuer or class of issuers from the requirement under subsection (a) or (b). In determining whether to make an exemption under this subsection, the Commission shall take into account, among other considerations, whether the requirements under subsections (a) and (b) disproportionately burdens small issuers.”.

SEC. 952. COMPENSATION COMMITTEE INDEPENDENCE.

(a) In general.—The Securities Exchange Act of 1934 (15 U.S.C. 78 et seq.) is amended by inserting after section 10B, as added by section 753, the following:

“SEC. 10C. COMPENSATION COMMITTEES.

“(a) Independence of compensation committees.—

“(1) Listing standards.—The Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any equity security of an issuer, other than an issuer that is a controlled company, limited partnership, company in bankruptcy proceedings, open-ended management investment company that is registered under the Investment Company Act of 1940, or a foreign private issuer that provides annual disclosures to shareholders of the reasons that the foreign private issuer does not have an independent compensation committee, that does not comply with the requirements of this subsection.

“(2) Independence of compensation committees.—The rules of the Commission under paragraph (1) shall require that each member of the compensation committee of the board of directors of an issuer be—

“(A) a member of the board of directors of the issuer; and

“(B) independent.
“(3) INDEPENDENCE.—The rules of the Commission under paragraph (1) shall require that, in determining the definition of the term ‘independence’ for purposes of paragraph (2), the national securities exchanges and the national securities associations shall consider relevant factors, including—

“A) the source of compensation of a member of the board of directors of an issuer, including any consulting, advisory, or other compensatory fee paid by the issuer to such member of the board of directors; and

“B) whether a member of the board of directors of an issuer is affiliated with the issuer, a subsidiary of the issuer, or an affiliate of a subsidiary of the issuer.

“(4) EXEMPTION AUTHORITY.—The rules of the Commission under paragraph (1) shall permit a national securities exchange or a national securities association to exempt a particular relationship from the requirements of paragraph (2), with respect to the members of a compensation committee, as the national securities exchange or national securities association determines is appropriate, taking into consideration the size of an issuer and any other relevant factors.

“(b) INDEPENDENCE OF COMPENSATION CONSULTANTS AND OTHER COMPENSATION COMMITTEE ADVISERS.—

“(1) IN GENERAL.—The compensation committee of an issuer may only select a compensation consultant, legal counsel, or other adviser to the compensation committee after taking into consideration the factors identified by the Commission under paragraph (2).

“(2) RULES.—The Commission shall identify factors that affect the independence of a compensation consultant, legal counsel, or other adviser to a compensation committee of an issuer. Such factors shall be competitively neutral among categories of consultants, legal counsel, or other advisers and preserve the ability of compensation committees to retain the services of members of any such category, and shall include—

“A) the provision of other services to the issuer by the person that employs the compensation consultant, legal counsel, or other adviser;

“B) the amount of fees received from the issuer by the person that employs the compensation consultant, legal counsel, or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel, or other adviser;

“C) the policies and procedures of the person that employs the compensation consultant, legal counsel, or other adviser that are designed to prevent conflicts of interest;

“D) any business or personal relationship of the compensation consultant, legal counsel, or other adviser with a member of the compensation committee; and

“E) any stock of the issuer owned by the compensation consultant, legal counsel, or other adviser.

“(c) COMPENSATION COMMITTEE AUTHORITY RELATING TO COMPENSATION CONSULTANTS.—

“(1) AUTHORITY TO RETAIN COMPENSATION CONSULTANT.—
“(A) IN GENERAL.—The compensation committee of an issuer, in its capacity as a committee of the board of directors, may, in its sole discretion, retain or obtain the advice of a compensation consultant.

“(B) DIRECT RESPONSIBILITY OF COMPENSATION COMMITTEE.—The compensation committee of an issuer shall be directly responsible for the appointment, compensation, and oversight of the work of a compensation consultant.

“(C) RULE OF CONSTRUCTION.—This paragraph may not be construed—

“(i) to require the compensation committee to implement or act consistently with the advice or recommendations of the compensation consultant; or

“(ii) to affect the ability or obligation of a compensation committee to exercise its own judgment in fulfillment of the duties of the compensation committee.

“(2) DISCLOSURE.—In any proxy or consent solicitation material for an annual meeting of the shareholders (or a special meeting in lieu of the annual meeting) occurring on or after the date that is 1 year after the date of enactment of this section, each issuer shall disclose in the proxy or consent material, in accordance with regulations of the Commission, whether—

“(A) the compensation committee of the issuer retained or obtained the advice of a compensation consultant; and

“(B) the work of the compensation consultant has raised any conflict of interest and, if so, the nature of the conflict and how the conflict is being addressed.

“(d) AUTHORITY TO ENGAGE INDEPENDENT LEGAL COUNSEL AND OTHER ADVISERS.—

“(1) IN GENERAL.—The compensation committee of an issuer, in its capacity as a committee of the board of directors, may, in its sole discretion, retain and obtain the advice of independent legal counsel and other advisers.

“(2) DIRECT RESPONSIBILITY OF COMPENSATION COMMITTEE.—The compensation committee of an issuer shall be directly responsible for the appointment, compensation, and oversight of the work of independent legal counsel and other advisers.

“(3) RULE OF CONSTRUCTION.—This subsection may not be construed—

“(A) to require a compensation committee to implement or act consistently with the advice or recommendations of independent legal counsel or other advisers under this subsection; or

“(B) to affect the ability or obligation of a compensation committee to exercise its own judgment in fulfillment of the duties of the compensation committee.

“(e) COMPENSATION OF COMPENSATION CONSULTANTS, INDEPENDENT LEGAL COUNSEL, AND OTHER ADVISERS.—Each issuer shall provide for appropriate funding, as determined by the compensation committee in its capacity as a committee of the board of directors, for payment of reasonable compensation—

“(1) to a compensation consultant; and

“(2) to independent legal counsel or any other adviser to the compensation committee.
“(f) Commission Rules.—
   “(1) In General.—Not later than 360 days after the date of enactment of this section, the Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that is not in compliance with the requirements of this section.
   “(2) Opportunity to Cure Defects.—The rules of the Commission under paragraph (1) shall provide for appropriate procedures for an issuer to have a reasonable opportunity to cure any defects that would be the basis for the prohibition under paragraph (1), before the imposition of such prohibition.
   “(3) Exemption Authority.—
      “(A) In General.—The rules of the Commission under paragraph (1) shall permit a national securities exchange or a national securities association to exempt a category of issuers from the requirements under this section, as the national securities exchange or the national securities association determines is appropriate.
      “(B) Considerations.—In determining appropriate exemptions under subparagraph (A), the national securities exchange or the national securities association shall take into account the potential impact of the requirements of this section on smaller reporting issuers.
   “(g) Controlled Company Exemption.—
      “(1) In General.—This section shall not apply to any controlled company.
      “(2) Definition.—For purposes of this section, the term ‘controlled company’ means an issuer—
         “(A) that is listed on a national securities exchange or by a national securities association; and
         “(B) that holds an election for the board of directors of the issuer in which more than 50 percent of the voting power is held by an individual, a group, or another issuer.”

(b) Study and Report.—
   (1) Study.—The Securities and Exchange Commission shall conduct a study and review of the use of compensation consultants and the effects of such use.
   (2) Report.—Not later than 2 years after the date of the enactment of this Act, the Commission shall submit a report to Congress on the results of the study and review required by this subsection.

SEC. 953. EXECUTIVE COMPENSATION DISCLOSURES.
   (a) Disclosure of Pay Versus Performance.—Section 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78n), as amended by this title, is amended by adding at the end the following:
      “(i) Disclosure of Pay Versus Performance.—The Commission shall, by rule, require each issuer to disclose in any proxy or consent solicitation material for an annual meeting of the shareholders of the issuer a clear description of any compensation required to be disclosed by the issuer under section 229.402 of title 17, Code of Federal Regulations (or any successor thereto), including information that shows the relationship between executive compensation actually paid and the financial performance of the issuer, taking into account any change in the value of the shares of stock and dividends of the issuer and any distributions. The
disclosure under this subsection may include a graphic representation of the information required to be disclosed.”.

(b) ADDITIONAL DISCLOSURE REQUIREMENTS.—

(1) IN GENERAL.—The Commission shall amend section 229.402 of title 17, Code of Federal Regulations, to require each issuer to disclose in any filing of the issuer described in section 229.10(a) of title 17, Code of Federal Regulations (or any successor thereto)—

(A) the median of the annual total compensation of all employees of the issuer, except the chief executive officer (or any equivalent position) of the issuer;

(B) the annual total compensation of the chief executive officer (or any equivalent position) of the issuer; and

(C) the ratio of the amount described in subparagraph (A) to the amount described in subparagraph (B).

(2) TOTAL COMPENSATION.—For purposes of this subsection, the total compensation of an employee of an issuer shall be determined in accordance with section 229.402(c)(2)(x) of title 17, Code of Federal Regulations, as in effect on the day before the date of enactment of this Act.

SEC. 954. RECOVERY OF ERRONEOUSLY AWARDED COMPENSATION.

The Securities Exchange Act of 1934 is amended by inserting after section 10C, as added by section 952, the following:

"SEC. 10D. RECOVERY OF ERRONEOUSLY AWARDED COMPENSATION POLICY.

"(a) LISTING STANDARDS.—The Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that does not comply with the requirements of this section.

"(b) RECOVERY OF FUNDS.—The rules of the Commission under subsection (a) shall require each issuer to develop and implement a policy providing—

"(1) for disclosure of the policy of the issuer on incentive-based compensation that is based on financial information required to be reported under the securities laws; and

"(2) that, in the event that the issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirement under the securities laws, the issuer will recover from any current or former executive officer of the issuer who received incentive-based compensation (including stock options awarded as compensation) during the 3-year period preceding the date on which the issuer is required to prepare an accounting restatement, based on the erroneous data, in excess of what would have been paid to the executive officer under the accounting restatement.”.

SEC. 955. DISCLOSURE REGARDING EMPLOYEE AND DIRECTOR HEDGING.

Section 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78n), as amended by this title, is amended by adding at the end the following:

"(j) DISCLOSURE OF HEDGING BY EMPLOYEES AND DIRECTORS.—The Commission shall, by rule, require each issuer to disclose in any proxy or consent solicitation material for an annual meeting of the shareholders of the issuer whether any employee or member
of the board of directors of the issuer, or any designee of such employee or member, is permitted to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds) that are designed to hedge or offset any decrease in the market value of equity securities—

“(1) granted to the employee or member of the board of directors by the issuer as part of the compensation of the employee or member of the board of directors; or

“(2) held, directly or indirectly, by the employee or member of the board of directors.”.

SEC. 956. ENHANCED COMPENSATION STRUCTURE REPORTING.

(a) Enhanced Disclosure and Reporting of Compensation Arrangements.—

(1) In general.—Not later than 9 months after the date of enactment of this title, the appropriate Federal regulators jointly shall prescribe regulations or guidelines to require each covered financial institution to disclose to the appropriate Federal regulator the structures of all incentive-based compensation arrangements offered by such covered financial institutions sufficient to determine whether the compensation structure—

(A) provides an executive officer, employee, director, or principal shareholder of the covered financial institution with excessive compensation, fees, or benefits; or

(B) could lead to material financial loss to the covered financial institution.

(2) Rules of construction.—Nothing in this section shall be construed as requiring the reporting of the actual compensation of particular individuals. Nothing in this section shall be construed to require a covered financial institution that does not have an incentive-based payment arrangement to make the disclosures required under this subsection.

(b) Prohibition on Certain Compensation Arrangements.—Not later than 9 months after the date of enactment of this title, the appropriate Federal regulators shall jointly prescribe regulations or guidelines that prohibit any types of incentive-based payment arrangement, or any feature of any such arrangement, that the regulators determine encourages inappropriate risks by covered financial institutions—

(1) by providing an executive officer, employee, director, or principal shareholder of the covered financial institution with excessive compensation, fees, or benefits; or

(2) that could lead to material financial loss to the covered financial institution.

(c) Standards.—The appropriate Federal regulators shall—

(1) ensure that any standards for compensation established under subsections (a) or (b) are comparable to the standards established under section of the Federal Deposit Insurance Act (12 U.S.C. 1831p–1) for insured depository institutions; and

(2) in establishing such standards under such subsections, take into consideration the compensation standards described in section 39(c) of the Federal Deposit Insurance Act (12 U.S.C. 1831p–9 1(c)).

(d) Enforcement.—The provisions of this section and the regulations issued under this section shall be enforced under section 5641.
505 of the Gramm-Leach-Bliley Act and, for purposes of such section, a violation of this section or such regulations shall be treated as a violation of subtitle A of title V of such Act.

(e) Definitions.—As used in this section—

(1) the term “appropriate Federal regulator” means the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Board of Directors of the Federal Deposit Insurance Corporation, the Director of the Office of Thrift Supervision, the National Credit Union Administration Board, the Securities and Exchange Commission, the Federal Housing Finance Agency; and

(2) the term “covered financial institution” means—

(A) a depository institution or depository institution holding company, as such terms are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813);

(B) a broker-dealer registered under section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o);

(C) a credit union, as described in section 19(b)(1)(A)(iv) of the Federal Reserve Act;

(D) an investment advisor, as such term is defined in section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(11));

(E) the Federal National Mortgage Association;

(F) the Federal Home Loan Mortgage Corporation; and

(G) any other financial institution that the appropriate Federal regulators, jointly, by rule, determine should be treated as a covered financial institution for purposes of this section.

(f) Exemption for Certain Financial Institutions.—The requirements of this section shall not apply to covered financial institutions with assets of less than $1,000,000,000.

SEC. 957. VOTING BY BROKERS.

Section 6(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(b)) is amended—

(1) in paragraph (9)—

(A) in subparagraph (A), by redesignating clauses (i) through (v) as subclauses (I) through (V), respectively, and adjusting the margins accordingly;

(B) by redesignating subparagraphs (A) through (D) as clauses (i) through (iv), respectively, and adjusting the margins accordingly;

(C) by inserting “(A)” after “(9)”; and

(D) in the matter immediately following clause (iv), as so redesignated, by striking “As used” and inserting the following:

“(B) As used”.

(2) by adding at the end the following:

“(10)(A) The rules of the exchange prohibit any member that is not the beneficial owner of a security registered under section 12 from granting a proxy to vote the security in connection with a shareholder vote described in subparagraph (B), unless the beneficial owner of the security has instructed the member to vote the proxy in accordance with the voting instructions of the beneficial owner.

“(B) A shareholder vote described in this subparagraph is a shareholder vote with respect to the election of a member
of the board of directors of an issuer, executive compensation, or any other significant matter, as determined by the Commission, by rule, and does not include a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80b–1 et seq.).

"(C) Nothing in this paragraph shall be construed to prohibit a national securities exchange from prohibiting a member that is not the beneficial owner of a security registered under section 12 from granting a proxy to vote the security in connection with a shareholder vote not described in subparagraph (A).”.

Subtitle F—Improvements to the Management of the Securities and Exchange Commission

SEC. 961. REPORT AND CERTIFICATION OF INTERNAL SUPERVISORY CONTROLS.

(a) Annual Reports and Certification.—Not later than 90 days after the end of each fiscal year, the Commission shall submit a report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives on the conduct by the Commission of examinations of registered entities, enforcement investigations, and review of corporate financial securities filings.

(b) Contents of Reports.—Each report under subsection (a) shall contain—

(1) an assessment, as of the end of the most recent fiscal year, of the effectiveness of—

(A) the internal supervisory controls of the Commission; and

(B) the procedures of the Commission applicable to the staff of the Commission who perform examinations of registered entities, enforcement investigations, and reviews of corporate financial securities filings;

(2) a certification that the Commission has adequate internal supervisory controls to carry out the duties of the Commission described in paragraph (1)(B); and

(3) a summary by the Comptroller General of the United States of the review carried out under subsection (d).

(c) Certification.—

(1) Signature.—The certification under subsection (b)(2) shall be signed by the Director of the Division of Enforcement, the Director of the Division of Corporation Finance, and the Director of the Office of Compliance Inspections and Examinations (or the head of any successor division or office).

(2) Content of Certification.—Each individual described in paragraph (1) shall certify that the individual—

(A) is directly responsible for establishing and maintaining the internal supervisory controls of the Division or Office of which the individual is the head;

(B) is knowledgeable about the internal supervisory controls of the Division or Office of which the individual is the head;
(C) has evaluated the effectiveness of the internal supervisory controls during the 90-day period ending on the final day of the fiscal year to which the report relates; and

(D) has disclosed to the Commission any significant deficiencies in the design or operation of internal supervisory controls that could adversely affect the ability of the Division or Office to consistently conduct inspections, or investigations, or reviews of filings with professional competence and integrity.

(d) NEW DIRECTOR OR ACTING DIRECTOR.—Notwithstanding subsection (a), if the Director of the Division of Enforcement, the Director of the Division of Corporate Finance, or the Director of the Office of Compliance Inspections and Examinations has served as Director of the Division or Office for less than 90 days on the date on which a report is required to be submitted under subsection (a), the Commission may submit the report on the date on which the Director has served as Director for 90 days. If there is no Director of the Division of Enforcement, the Division of Corporate Finance, or the Office of Compliance Inspections and Examinations, on the date on which a report is required to be submitted under subsection (a), the Acting Director of the Division or Office may make the certification required under subsection (c).

(e) REVIEW BY THE COMPTROLLER GENERAL.—

(1) REPORT.—The Comptroller General of the United States shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report that contains a review of the adequacy and effectiveness of the internal supervisory control structure and procedures described in subsection (b)(1), not less frequently than once every 3 years, at a time to coincide with the publication of the reports of the Commission under this section.

(2) AUTHORITY TO HIRE EXPERTS.—The Comptroller General of the United States may hire independent consultants with specialized expertise in any area relevant to the duties of the Comptroller General described in this section, in order to assist the Comptroller General in carrying out such duties.

SEC. 962. TRIENNIAL REPORT ON PERSONNEL MANAGEMENT.

(a) TRIENNIAL REPORT REQUIRED.—Once every 3 years, the Comptroller General of the United States shall submit a report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives on the quality of personnel management by the Commission.

(b) CONTENTS OF REPORT.—Each report under subsection (a) shall include—

(1) an evaluation of—

(A) the effectiveness of supervisors in using the skills, talents, and motivation of the employees of the Commission to achieve the goals of the Commission;

(B) the criteria for promoting employees of the Commission to supervisory positions;

(C) the fairness of the application of the promotion criteria to the decisions of the Commission;
(D) the competence of the professional staff of the Commission;

(E) the efficiency of communication between the units of the Commission regarding the work of the Commission (including communication between divisions and between subunits of a division) and the efforts by the Commission to promote such communication;

(F) the turnover within subunits of the Commission, including the consideration of supervisors whose subordinates have an unusually high rate of turnover;

(G) whether there are excessive numbers of low-level, mid-level, or senior-level managers;

(H) any initiatives of the Commission that increase the competence of the staff of the Commission;

(I) the actions taken by the Commission regarding employees of the Commission who have failed to perform their duties and circumstances under which the Commission has issued to employees a notice of termination; and

(J) such other factors relating to the management of the Commission as the Comptroller General determines are appropriate;

(2) an evaluation of any improvements made with respect to the areas described in paragraph (1) since the date of submission of the previous report; and

(3) recommendations for how the Commission can use the human resources of the Commission more effectively and efficiently to carry out the mission of the Commission.

(c) Consultation.—In preparing the report under subsection (a), the Comptroller General shall consult with current employees of the Commission, retired employees and other former employees of the Commission, the Inspector General of the Commission, persons that have business before the Commission, any union representing the employees of the Commission, private management consultants, academics, and any other source that the Comptroller General deems appropriate.

(d) Report by Commission.—Not later than 90 days after the date on which the Comptroller General submits each report under subsection (a), the Commission shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report describing the actions taken by the Commission in response to the recommendations contained in the report under subsection (a).

(e) Reimbursements for Cost of Reports.—

(1) Reimbursements Required.—The Commission shall reimburse the Government Accountability Office for the full cost of making the reports under this section, as billed therefor by the Comptroller General.

(2) Crediting and Use of Reimbursements.—Such reimbursements shall—

(A) be credited to the appropriation account “Salaries and Expenses, Government Accountability Office” current when the payment is received; and

(B) remain available until expended.

(f) Authority to Hire Experts.—The Comptroller General of the United States may hire independent consultants with specialized expertise in any area relevant to the duties of the Comptroller
General described in this section, in order to assist the Comptroller General in carrying out such duties.

SEC. 963. ANNUAL FINANCIAL CONTROLS AUDIT.

(a) REPORTS OF COMMISSION.—

(1) ANNUAL REPORTS REQUIRED.—Not later than 6 months after the end of each fiscal year, the Commission shall publish and submit to Congress a report that—

(A) describes the responsibility of the management of the Commission for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and

(B) contains an assessment of the effectiveness of the internal control structure and procedures for financial reporting of the Commission during that fiscal year.

(2) ATTESTATION.—The reports required under paragraph (1) shall be attested to by the Chairman and chief financial officer of the Commission.

(b) REPORT BY COMPTROLLER GENERAL.—

(1) REPORT REQUIRED.—Not later than 6 months after the end of the first fiscal year after the date of enactment of this Act, the Comptroller General of the United States shall submit a report to Congress that assesses—

(A) the effectiveness of the internal control structure and procedures of the Commission for financial reporting; and

(B) the assessment of the Commission under subsection (a)(1)(B).

(2) ATTESTATION.—The Comptroller General shall attest to, and report on, the assessment made by the Commission under subsection (a).

(c) REIMBURSEMENTS FOR COST OF REPORTS.—

(1) REIMBURSEMENTS REQUIRED.—The Commission shall reimburse the Government Accountability Office for the full cost of making the reports under subsection (b), as billed therefor by the Comptroller General.

(2) CREDITING AND USE OF REIMBURSEMENTS.—Such reimbursements shall—

(A) be credited to the appropriation account “Salaries and Expenses, Government Accountability Office” current when the payment is received; and

(B) remain available until expended.

SEC. 964. REPORT ON OVERSIGHT OF NATIONAL SECURITIES ASSOCIATIONS.

(a) REPORT REQUIRED.—Not later than 2 years after the date of enactment of this Act, and every 3 years thereafter, the Comptroller General of the United States shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report that includes an evaluation of the oversight by the Commission of national securities associations registered under section 15A of the Securities Exchange Act of 1934 (15 U.S.C. 78o–3) with respect to—

(1) the governance of such national securities associations, including the identification and management of conflicts of interest by such national securities associations, together with an analysis of the impact of any conflicts of interest on the
regulatory enforcement or rulemaking by such national securities associations;

(2) the examinations carried out by the national securities associations, including the expertise of the examiners;

(3) the executive compensation practices of such national securities associations;

(4) the arbitration services provided by the national securities associations;

(5) the review performed by national securities associations of advertising by the members of the national securities associations;

(6) the cooperation with and assistance to State securities administrators by the national securities associations to promote investor protection;

(7) how the funding of national securities associations is used to support the mission of the national securities associations, including—

(A) the methods of funding;

(B) the sufficiency of funds;

(C) how funds are invested by the national securities association pending use; and

(D) the impact of the methods, sufficiency, and investment of funds on regulatory enforcement by the national securities associations;

(8) the policies regarding the employment of former employees of national securities associations by regulated entities;

(9) the ongoing effectiveness of the rules of the national securities associations in achieving the goals of the rules;

(10) the transparency of governance and activities of the national securities associations; and

(11) any other issue that has an impact, as determined by the Comptroller General, on the effectiveness of such national securities associations in performing their mission and in dealing fairly with investors and members;

(b) Reimbursements for Cost of Reports.—

(1) Reimbursements Required.—The Commission shall reimburse the Government Accountability Office for the full cost of making the reports under subsection (a), as billed therefor by the Comptroller General.

(2) Crediting and Use of Reimbursements.—Such reimbursements shall—

(A) be credited to the appropriation account “Salaries and Expenses, Government Accountability Office” current when the payment is received; and

(B) remain available until expended.

SEC. 965. COMPLIANCE EXAMINERS.

Section 4 of the Securities Exchange Act of 1934 (15 U.S.C. 78d) is amended by adding at the end the following:

“(h) Examiners.—

“(1) Division of Trading and Markets.—The Division of Trading and Markets of the Commission, or any successor organizational unit, shall have a staff of examiners who shall—

“(A) perform compliance inspections and examinations of entities under the jurisdiction of that Division; and

“(B) report to the Director of that Division.
“(2) DIVISION OF INVESTMENT MANAGEMENT.—The Division of Investment Management of the Commission, or any successor organizational unit, shall have a staff of examiners who shall—
“(A) perform compliance inspections and examinations of entities under the jurisdiction of that Division; and
“(B) report to the Director of that Division.”.

SEC. 966. SUGGESTION PROGRAM FOR EMPLOYEES OF THE COMMISSION.


“SEC. 4D. ADDITIONAL DUTIES OF INSPECTOR GENERAL.

“(a) SUGGESTION SUBMISSIONS BY COMMISSION EMPLOYEES.—
“(1) HOTLINE ESTABLISHED.—The Inspector General of the Commission shall establish and maintain a telephone hotline or other electronic means for the receipt of—
“(A) suggestions by employees of the Commission for improvements in the work efficiency, effectiveness, and productivity, and the use of the resources, of the Commission; and
“(B) allegations by employees of the Commission of waste, abuse, misconduct, or mismanagement within the Commission.
“(2) CONFIDENTIALITY.—The Inspector General shall maintain as confidential—
“(A) the identity of any individual who provides information by the means established under paragraph (1), unless the individual requests otherwise, in writing; and
“(B) at the request of any such individual, any specific information provided by the individual.
“(b) CONSIDERATION OF REPORTS.—The Inspector General shall consider any suggestions or allegations received by the means established under subsection (a)(1), and shall recommend appropriate action in relation to such suggestions or allegations.
“(c) RECOGNITION.—The Inspector General may recognize any employee who makes a suggestion under subsection (a)(1) (or by other means) that would or does—
“(1) increase the work efficiency, effectiveness, or productivity of the Commission; or
“(2) reduce waste, abuse, misconduct, or mismanagement within the Commission.
“(d) REPORT.—The Inspector General of the Commission shall submit to Congress an annual report containing a description of—
“(1) the nature, number, and potential benefits of any suggestions received under subsection (a);
“(2) the nature, number, and seriousness of any allegations received under subsection (a);
“(3) any recommendations made or actions taken by the Inspector General in response to substantiated allegations received under subsection (a); and
“(4) any action the Commission has taken in response to suggestions or allegations received under subsection (a).
“(e) FUNDING.—The activities of the Inspector General under this subsection shall be funded by the Securities and Exchange
SEC. 967. COMMISSION ORGANIZATIONAL STUDY AND REFORM.

(a) Study Required.—

(1) In General.—Not later than the end of the 90-day period beginning on the date of the enactment of this subtitle, the Securities and Exchange Commission (hereinafter in this section referred to as the “SEC”) shall hire an independent consultant of high caliber and with expertise in organizational restructuring and the operations of capital markets to examine the internal operations, structure, funding, and the need for comprehensive reform of the SEC, as well as the SEC’s relationship with and the reliance on self-regulatory organizations and other entities relevant to the regulation of securities and the protection of securities investors that are under the SEC’s oversight.

(2) Specific Areas for Study.—The study required under paragraph (1) shall, at a minimum, include the study of—

(A) the possible elimination of unnecessary or redundant units at the SEC;

(B) improving communications between SEC offices and divisions;

(C) the need to put in place a clear chain-of-command structure, particularly for enforcement examinations and compliance inspections;

(D) the effect of high-frequency trading and other technological advances on the market and what the SEC requires to monitor the effect of such trading and advances on the market;

(E) the SEC’s hiring authorities, workplace policies, and personal practices, including—

(i) whether there is a need to further streamline hiring authorities for those who are not lawyers, accountants, compliance examiners, or economists;

(ii) whether there is a need for further pay reforms;

(iii) the diversity of skill sets of SEC employees and whether the present skill set diversity efficiently and effectively fosters the SEC’s mission of investor protection; and

(iv) the application of civil service laws by the SEC;

(F) whether the SEC’s oversight and reliance on self-regulatory organizations promotes efficient and effective governance for the securities markets; and

(G) whether adjusting the SEC’s reliance on self-regulatory organizations is necessary to promote more efficient and effective governance for the securities markets.

(b) Consultant Report.—Not later than the end of the 150-day period after being retained, the independent consultant hired pursuant to subsection (a)(1) shall issue a report to the SEC and the Congress containing—

(1) a detailed description of any findings and conclusions made while carrying out the study required under subsection (a)(1); and

(2) recommendations for legislative, regulatory, or administrative action that the consultant determines appropriate to
enable the SEC and other entities on which the consultant
reports to perform their statutorily or otherwise mandated mis-
sions.

(c) SEC REPORT.—Not later than the end of the 6-month period
beginning on the date the consultant issues the report under sub-
section (b), and every 6-months thereafter during the 2-year period
following the date on which the consultant issues such report,
the SEC shall issue a report to the Committee on Financial Services
of the House of Representatives and the Committee on Banking,
Housing, and Urban Affairs of the Senate describing the SEC’s
implementation of the regulatory and administrative recommenda-
tions contained in the consultant’s report.

SEC. 968. STUDY ON SEC REVOLVING DOOR.

(a) GOVERNMENT ACCOUNTABILITY OFFICE STUDY.—The Com-
troller General of the United States shall conduct a study that
will—

(1) review the number of employees who leave the Securities
and Exchange Commission to work for financial institutions
regulated by such Commission;

(2) determine how many employees who leave the Securities
and Exchange Commission worked on cases that involved finan-
cial institutions regulated by such Commission;

(3) review the length of time employees work for the Securi-
ties and Exchange Commission before leaving to be employed
by financial institutions regulated by such Commission;

(4) review existing internal controls and make rec-
ommendations on strengthening such controls to ensure that
employees of the Securities and Exchange Commission who
are later employed by financial institutions did not assist such
institutions in violating any rules or regulations of the Commis-
sion during the course of their employment with such Commis-

(5) determine if greater post-employment restrictions are
necessary to prevent employees of the Securities and Exchange
Commission from being employed by financial institutions after
employment with such Commission;

(6) determine if the volume of employees of the Securities
and Exchange Commission who are later employed by financial
institutions has led to inefficiencies in enforcement;

(7) determine if employees of the Securities and Exchange
Commission who are later employed by financial institutions
assisted such institutions in circumventing Federal rules and
regulations while employed by such Commission;

(8) review any information that may address the volume
of employees of the Securities and Exchange Commission who
are later employed by financial institutions, and make rec-
ommendations to Congress; and

(9) review other additional issues as may be raised during
the course of the study conducted under this subsection.

(b) REPORT.—Not later than 1 year after the date of the enact-
ment of this subtitle, the Comptroller General of the United States
shall submit to the Committee on Financial Services of the House
of Representatives and the Committee on Banking, Housing, and
Urban Affairs of the Senate a report on the results of the study
required by subsection (a).
Subtitle G—Strengthening Corporate Governance

SEC. 971. PROXY ACCESS.

(a) Proxy Access.—Section 14(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78n(a)) is amended—
(1) by inserting “(1)” after “(a)”;
and
(2) by adding at the end the following:
“(2) The rules and regulations prescribed by the Commission under paragraph (1) may include—
“(A) a requirement that a solicitation of proxy, consent, or authorization by (or on behalf of) an issuer include a nominee submitted by a shareholder to serve on the board of directors of the issuer; and
“(B) a requirement that an issuer follow a certain procedure in relation to a solicitation described in subparagraph (A).”.

(b) Regulations.—The Commission may issue rules permitting the use by a shareholder of proxy solicitation materials supplied by an issuer of securities for the purpose of nominating individuals to membership on the board of directors of the issuer, under such terms and conditions as the Commission determines are in the interests of shareholders and for the protection of investors.

(c) Exemptions.—The Commission may, by rule or order, exempt an issuer or class of issuers from the requirement made by this section or an amendment made by this section. In determining whether to make an exemption under this subsection, the Commission shall take into account, among other considerations, whether the requirement in the amendment made by subsection (a) disproportionately burdens small issuers.

SEC. 972. DISCLOSURES REGARDING CHAIRMAN AND CEO STRUCTURES.

The Securities Exchange Act of 1934 (15 U.S. C. 78a et seq.) is amended by inserting after section 14A, as added by this title, the following:

“SEC. 14B. CORPORATE GOVERNANCE.

“Not later than 180 days after the date of enactment of this subsection, the Commission shall issue rules that require an issuer to disclose in the annual proxy sent to investors the reasons why the issuer has chosen—
“(1) the same person to serve as chairman of the board of directors and chief executive officer (or in equivalent positions); or
“(2) different individuals to serve as chairman of the board of directors and chief executive officer (or in equivalent positions of the issuer).”.

Subtitle H—Municipal Securities

SEC. 975. REGULATION OF MUNICIPAL SECURITIES AND CHANGES TO THE BOARD OF THE MSRB.

(a) Registration of Municipal Securities Dealers and Municipal Advisors.—Section 15B(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–4(a)) is amended—
(1) in paragraph (1)—
   (A) by inserting “(A)” after “(1)”; and
   (B) by adding at the end the following:
   “(B) It shall be unlawful for a municipal advisor to
   provide advice to or on behalf of a municipal entity or
   obligated person with respect to municipal financial prod-
   ucts or the issuance of municipal securities, or to undertake
   a solicitation of a municipal entity or obligated person,
   unless the municipal advisor is registered in accordance
   with this subsection.”;
(2) in paragraph (2), by inserting “or municipal advisor”
after “municipal securities dealer” each place that term appears;
(3) in paragraph (3), by inserting “or municipal advisor”
after “municipal securities dealer” each place that term appears;
(4) in paragraph (4), by striking “dealer, or municipal secu-
  rities dealer or class of brokers, dealers, or municipal securities
   dealers” and inserting “dealer, municipal securities dealer, or
   municipal advisor, or class of brokers, dealers, municipal securities
   dealers, or municipal advisors”; and
(5) by adding at the end the following:
   “(5) No municipal advisor shall make use of the mails
   or any means or instrumentality of interstate commerce to
   provide advice to or on behalf of a municipal entity or obligated
   person with respect to municipal financial products, the
   issuance of municipal securities, or to undertake a solicitation
   of a municipal entity or obligated person, in connection with
   which such municipal advisor engages in any fraudulent, decep-
   tive, or manipulative act or practice.”.

(b) MUNICIPAL SECURITIES RULEMAKING BOARD.—Section
4(b)) is amended—
(1) in paragraph (1)—
   (A) in the first sentence, by striking “Not later than”
   and all that follows through “appointed by the Commission”
   and inserting “The Municipal Securities Rulemaking Board
   shall be composed of 15 members, or such other number
   of members as specified by rules of the Board pursuant
   to paragraph (2)(B),”;
   (B) by striking the second sentence and inserting the
   following: “The members of the Board shall serve as members
   for a term of 3 years or for such other terms as specified by rules of the Board pursuant to paragraph (2)(B), and shall consist of (A) 8 individuals who are independent of any municipal securities broker, municipal securities dealer, or municipal advisor, at least 1 of whom shall be representative of institutional or retail investors in municipal securities, at least 1 of whom shall be representative of municipal entities, and at least 1 of whom shall be a member of the public with knowledge of or experience in the municipal industry (which members are hereinafter referred to as ‘public representatives’); and (B) 7 individuals who are associated with a broker, dealer, municipal securities dealer, or municipal advisor, including at least 1 individual who is associated with and representative of brokers, dealers, or municipal securities dealers that are not banks or subsidiaries or departments or divisions of banks (which members are hereinafter referred
(C) in the third sentence, by striking “initial”;

(2) in paragraph (2)—

(A) in the matter preceding subparagraph (A)—

(i) by inserting before the period at the end of the first sentence the following: “and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors”; and

(ii) by striking the second sentence;

(B) in subparagraph (A)—

(i) in the matter preceding clause (i)—

(I) by inserting “, and no broker, dealer, municipal securities dealer, or municipal advisor shall provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities,” after “sale of, any municipal security”; and

(II) by inserting “and municipal entities or obligated persons” after “protection of investors”;

(ii) in clause (i), by striking “municipal securities brokers and municipal securities dealers” each place that term appears and inserting “municipal securities brokers, municipal securities dealers, and municipal advisors”;

(iii) in clause (ii), by adding “and” at the end;

(iv) in clause (iii), by striking “; and” and inserting a period; and

(v) by striking clause (iv);

(C) by amending subparagraph (B) to read as follows:

“(B) establish fair procedures for the nomination and election of members of the Board and assure fair representation in such nominations and elections of public representatives, broker dealer representatives, bank representatives, and advisor representatives. Such rules—

“(i) shall provide that the number of public representatives of the Board shall at all times exceed the total number of regulated representatives and that the membership shall at all times be as evenly divided in number as possible between public representatives and regulated representatives;
“(ii) shall specify the length or lengths of terms members shall serve;
“(iii) may increase the number of members which shall constitute the whole Board, provided that such number is an odd number; and
“(iv) shall establish requirements regarding the independence of public representatives.”.

(D) in subparagraph (C)—
(i) by inserting “and municipal financial products” after “municipal securities” the first two times that term appears;
(ii) by inserting “, municipal entities, obligated persons,” before “and the public interest”;
(iii) by striking “between” and inserting “among”;
(iv) by striking “issuers, municipal securities brokers, or municipal securities dealers, to fix” and inserting “municipal entities, obligated persons, municipal securities brokers, municipal securities dealers, or municipal advisors, to fix”; and
(v) by striking “brokers or municipal securities dealers, to regulate” and inserting “brokers, municipal securities dealers, or municipal advisors, to regulate”;

(E) in subparagraph (D)—
(i) by inserting “and advice concerning municipal financial products” after “transactions in municipal securities”;
(ii) by striking “That no” and inserting “that no”;
(iii) by inserting “municipal advisor,” before “or person associated”; and
(iv) by striking “a municipal securities broker or municipal securities dealer may be compelled” and inserting “a municipal securities broker, municipal securities dealer, or municipal advisor may be compelled”;

(F) in subparagraph (E)—
(i) by striking “municipal securities brokers and municipal securities dealers” and inserting “municipal securities brokers, municipal securities dealers, and municipal advisors”; and
(ii) by striking “a municipal securities broker or municipal securities dealer” and inserting “municipal securities broker, municipal securities dealer, or municipal advisor”;

(G) in subparagraph (G), by striking “municipal securities brokers and municipal securities dealers” and inserting “municipal securities brokers, municipal securities dealers, and municipal advisors”;

(H) in subparagraph (J)—
(i) by striking “municipal securities broker and each municipal securities dealer” and inserting “municipal securities broker, municipal securities dealer, and municipal advisor”; and
(ii) by striking the period at the end of the second sentence and inserting “, which may include charges for failure to submit to the Board, or to any information system operated by the Board, within the prescribed timeframes, any items of information or documents
required to be submitted under any rule issued by the Board.’’;
(I) in subparagraph (K)—
   (i) by inserting “broker, dealer, or” before “munic-
   ipal securities dealer” each place that term appears; and
   (ii) by striking “municipal securities investment
   portfolio” and inserting “related account of a broker,
   dealer, or municipal securities dealer”; and
   (J) by adding at the end the following:
   “(L) with respect to municipal advisors—
   “(i) prescribe means reasonably designed to pre-
   vent acts, practices, and courses of business as are
   not consistent with a municipal advisor’s fiduciary duty
   to its clients;
   “(ii) provide continuing education requirements for
   municipal advisors;
   “(iii) provide professional standards; and
   “(iv) not impose a regulatory burden on small
   municipal advisors that is not necessary or appropriate
   in the public interest and for the protection of inves-
   tors, municipal entities, and obligated persons, pro-
   vided that there is robust protection of investors
   against fraud.’’;
(3) by redesignating paragraph (3) as paragraph (7); and
(4) by inserting after paragraph (2) the following:
“(3) The Board, in conjunction with or on behalf of any
Federal financial regulator or self-regulatory organization, may—
   “(A) establish information systems; and
   “(B) assess such reasonable fees and charges for the
   submission of information to, or the receipt of information
   from, such systems from any persons which systems may
   be developed for the purposes of serving as a repository
   of information from municipal market participants or other-
   wise in furtherance of the purposes of the Board, a Federal
   financial regulator, or a self-regulatory organization, except
   that the Board—
   “(i) may not charge a fee to municipal entities
   or obligated persons to submit documents or other
   information to the Board or charge a fee to any person
   to obtain, directly from the Internet site of the Board,
   documents or information submitted by municipal enti-
   ties, obligated persons, brokers, dealers, municipal
   securities dealers, or municipal advisors, including
   documents submitted under the rules of the Board
   or the Commission; and
   “(ii) shall not be prohibited from charging commer-
   cially reasonable fees for automated subscription-based
   feeds or similar services, or for charging for other
   data or document-based services customized upon
   request of any person, made available to commercial
   enterprises, municipal securities market professionals,
   or the general public, whether delivered through the
   Internet or any other means, that contain all or part
   of the documents or information, subject to approval
   of the fees by the Commission under section 19(b).
(4) The Board may provide guidance and assistance in the enforcement of, and examination for, compliance with the rules of the Board to the Commission, a registered securities association under section 15A, or any other appropriate regulatory agency, as applicable.

(5) The Board, the Commission, and a registered securities association under section 15A, or the designees of the Board, the Commission, or such association, shall meet not less frequently than 2 times a year—

(A) to describe the work of the Board, the Commission, and the registered securities association involving the regulation of municipal securities; and

(B) to share information about—

(i) the interpretation of the Board, the Commission, and the registered securities association of Board rules; and

(ii) examination and enforcement of compliance with Board rules.

(c) DISCIPLINE OF BROKERS, DEALERS, MUNICIPAL SECURITIES DEALERS AND MUNICIPAL ADVISORS; FIDUCIARY DUTY OF MUNICIPAL ADVISORS.—Section 15B(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–4(c)) is amended—

(1) in paragraph (1), by inserting ,, and no broker, dealer, municipal securities dealer, or municipal advisor shall make use of the mails or any means or instrumentality of interstate commerce to provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products, the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person,” after “any municipal security”;

(2) by adding at the end of paragraph (1) the following: “A municipal advisor and any person associated with such municipal advisor shall be deemed to have a fiduciary duty to any municipal entity for whom such municipal advisor acts as a municipal advisor, and no municipal advisor may engage in any act, practice, or course of business which is not consistent with a municipal advisor’s fiduciary duty or that is in contravention of any rule of the Board.”;

(3) in paragraph (2), by inserting “or municipal advisor” after “municipal securities dealer” each place that term appears;

(4) in paragraph (3)—

(A) by inserting “or municipal entities or obligated person” after “protection of investors” each place that term appears; and

(B) by inserting “or municipal advisor” after “municipal securities dealer” each place that term appears;

(5) in paragraph (4), by inserting “or municipal advisor” after “municipal securities dealer or obligated person” each place that term appears;

(6) in paragraph (6)(B), by inserting “or municipal entities or obligated person” after “protection of investors”;

(7) in paragraph (7)—

(A) in subparagraph (A)—

(i) in clause (i), by striking “; and” and inserting a semicolon;

(ii) in clause (ii), by striking the period and inserting “; and”;

and
(iii) by adding at the end the following:
   “(iii) the Commission, or its designee, in the case of municipal advisors.”.
(B) in subparagraph (B), by inserting “or municipal entities or obligated person” after “protection of investors”;
and
(8) by adding at the end the following:
   “(9)(A) Fines collected by the Commission for violations of the rules of the Board shall be equally divided between the Commission and the Board.
   
   (B) Fines collected by a registered securities association under section 15A(7) with respect to violations of the rules of the Board shall be accounted for by such registered securities association separately from other fines collected under section 15A(7) and shall be allocated between such registered securities association and the Board, and such allocation shall require the registered securities association to pay to the Board \( \frac{1}{3} \) of all fines collected by the registered securities association reasonably allocable to violations of the rules of the Board, or such other portion of such fines as may be directed by the Commission upon agreement between the registered securities association and the Board.”.
(1) by striking “through a municipal securities broker or municipal securities dealer or otherwise” and inserting “through a municipal securities broker, municipal securities dealer, municipal advisor, or otherwise”; and
(2) by inserting “or municipal advisors” before “to furnish”.  
(e) Definitions.—Section 15B of the Securities Exchange Act of 1934 (15 U.S.C. 78o–4) is amended by adding at the end the following:
   “(e) Definitions.—For purposes of this section—
   “(1) the term ‘Board’ means the Municipal Securities Rulemaking Board established under subsection (b)(1);
   “(2) the term ‘guaranteed investment contract’ includes any investment that has specified withdrawal or reinvestment provisions and a specifically negotiated or bid interest rate, and also includes any agreement to supply investments on 2 or more future dates, such as a forward supply contract;
   “(3) the term ‘investment strategies’ includes plans or programs for the investment of the proceeds of municipal securities that are not municipal derivatives, guaranteed investment contracts, and the recommendation of and brokerage of municipal escrow investments;
   “(4) the term ‘municipal advisor’—
   “(A) means a person (who is not a municipal entity or an employee of a municipal entity) that—
   “(i) provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or
   “(ii) undertakes a solicitation of a municipal entity;
“(B) includes financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors, if such persons are described in any of clauses (i) through (iii) of subparagraph (A); and

“(C) does not include a broker, dealer, or municipal securities dealer serving as an underwriter (as defined in section 2(a)(11) of the Securities Act of 1933) (15 U.S.C. 77b(a)(11)), any investment adviser registered under the Investment Advisers Act of 1940, or persons associated with such investment advisers who are providing investment advice, any commodity trading advisor registered under the Commodity Exchange Act or persons associated with a commodity trading advisor who are providing advice related to swaps, attorneys offering legal advice or providing services that are of a traditional legal nature, or engineers providing engineering advice;

“(5) the term ‘municipal financial product’ means municipal derivatives, guaranteed investment contracts, and investment strategies;

“(6) the term ‘rules of the Board’ means the rules proposed and adopted by the Board under subsection (b)(2);

“(7) the term ‘person associated with a municipal advisor’ or ‘associated person of an advisor’ means—

“(A) any partner, officer, director, or branch manager of such municipal advisor (or any person occupying a similar status or performing similar functions);

“(B) any other employee of such municipal advisor who is engaged in the management, direction, supervision, or performance of any activities relating to the provision of advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities; and

“(C) any person directly or indirectly controlling, controlled by, or under common control with such municipal advisor;

“(8) the term ‘municipal entity’ means any State, political subdivision of a State, or municipal corporate instrumentality of a State, including—

“(A) any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality;

“(B) any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and

“(C) any other issuer of municipal securities;

“(9) the term ‘solicitation of a municipal entity or obligated person’ means a direct or indirect communication with a municipal entity or obligated person made by a person, for direct or indirect compensation, on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser (as defined in section 202 of the Investment Advisers Act of 1940) that does not control, is not controlled by, or is not under common control with the person undertaking such solicitation for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of a broker, dealer,
municipal securities dealer, or municipal advisor for or in connection with municipal financial products, the issuance of municipal securities, or of an investment adviser to provide investment advisory services to or on behalf of a municipal entity; and

“(10) the term ‘obligated person’ means any person, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person, committed by contract or other arrangement to support the payment of all or part of the obligations on the municipal securities to be sold in an offering of municipal securities.”.

(f) REGISTERED SECURITIES ASSOCIATION.—Section 15A(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–3(b)) is amended by adding at the end the following:

“(15) The rules of the association provide that the association shall—

“(A) request guidance from the Municipal Securities Rulemaking Board in interpretation of the rules of the Municipal Securities Rulemaking Board; and

“(B) provide information to the Municipal Securities Rulemaking Board about the enforcement actions and examinations of the association under section 15B(b)(2)(E), so that the Municipal Securities Rulemaking Board may—

“(i) assist in such enforcement actions and examinations; and

“(ii) evaluate the ongoing effectiveness of the rules of the Board.”.

(g) REGISTRATION AND REGULATION OF BROKERS AND DEALERS.—Section 15 of the Securities Exchange Act of 1934 is amended—

(1) in subsection (b)(4), by inserting “municipal advisor,” after “municipal securities dealer” each place that term appears; and

(2) in subsection (c), by inserting “broker, dealer, or” before “municipal securities dealer” each place that term appears.

(h) ACCOUNTS AND RECORDS, REPORTS, EXAMINATIONS OF EXCHANGES, MEMBERS, AND OTHERS.—Section 17(a)(1) of the Securities Exchange Act of 1934 is amended by inserting “municipal advisor,” after “municipal securities dealer”.

(i) EFFECTIVE DATE.—This section, and the amendments made by this section, shall take effect on October 1, 2010.

SEC. 976. GOVERNMENT ACCOUNTABILITY OFFICE STUDY OF INCREASED DISCLOSURE TO INVESTORS.

(a) STUDY.—The Comptroller General of the United States shall conduct a study and review of the disclosure required to be made by issuers of municipal securities.

(b) SUBJECTS FOR EVALUATION.—In conducting the study under subsection (a), the Comptroller General of the United States shall—

(1) broadly describe—

(A) the size of the municipal securities markets and the issuers and investors; and

(B) the disclosures provided by issuers to investors;

(2) compare the amount, frequency, and quality of disclosures that issuers of municipal securities are required by law to provide for the benefit of municipal securities holders, including the amount of and frequency of disclosures actually
provided by issuers of municipal securities, with the amount of and frequency of disclosures that issuers of corporate securities provide for the benefit of corporate securities holders, taking into account the differences between issuers of municipal securities and issuers of corporate securities;

(3) evaluate the costs and benefits to various types of issuers of municipal securities of requiring issuers of municipal bonds to provide additional financial disclosures for the benefit of investors;

(4) evaluate the potential benefit to investors from additional financial disclosures by issuers of municipal bonds; and

(5) make recommendations relating to disclosure requirements for municipal issuers, including the advisability of the repeal or retention of section 15B(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–4(d)) (commonly known as the “Tower Amendment”).

(c) Report.—Not later than 24 months after the date of enactment of this Act, the Comptroller General of the United States shall submit a report to Congress on the results of the study conducted under subsection (a), including recommendations for how to improve disclosure by issuers of municipal securities.

SEC. 977. GOVERNMENT ACCOUNTABILITY OFFICE STUDY ON THE MUNICIPAL SECURITIES MARKETS.

(a) Study.—The Comptroller General of the United States shall conduct a study of the municipal securities markets.

(b) Report.—Not later than 18 months after the date of enactment of this Act, the Comptroller General of the United States shall submit a report to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives, with copies to the Special Committee on Aging of the Senate and the Commission, on the results of the study conducted under subsection (a), including—

(1) an analysis of the mechanisms for trading, quality of trade executions, market transparency, trade reporting, price discovery, settlement clearing, and credit enhancements;

(2) the needs of the markets and investors and the impact of recent innovations;

(3) recommendations for how to improve the transparency, efficiency, fairness, and liquidity of trading in the municipal securities markets, including with reference to items listed in paragraph (1); and

(4) potential uses of derivatives in the municipal securities markets.

(c) Responses.—Not later than 180 days after receipt of the report required under subsection (b), the Commission shall submit a report to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives, with a copy to the Special Committee on Aging of the Senate, stating the actions the Commission has taken in response to the recommendations contained in such report.

SEC. 978. FUNDING FOR GOVERNMENTAL ACCOUNTING STANDARDS BOARD.

(a) Amendment to the Securities Act of 1933.—Section 19 of the Securities Act of 1933 (15 U.S.C. 77s), as amended by section 912, is further amended by adding at the end the following:
“(g) FUNDING FOR THE GASB.—


“(A) a reasonable annual accounting support fee to adequately fund the annual budget of the Governmental Accounting Standards Board (referred to in this subsection as the ‘GASB’); and

“(B) rules and procedures, in consultation with the principal organizations representing State governors, legislators, local elected officials, and State and local finance officers, to provide for the equitable allocation, assessment, and collection of the accounting support fee established under subparagraph (A) from the members of the association, and the remittance of all such accounting support fees to the Financial Accounting Foundation.

“(2) ANNUAL BUDGET.—For purposes of this subsection, the annual budget of the GASB is the annual budget reviewed and approved according to the internal procedures of the Financial Accounting Foundation.

“(3) USE OF FUNDS.—Any fees or funds collected under this subsection shall be used to support the efforts of the GASB to establish standards of financial accounting and reporting recognized as generally accepted accounting principles applicable to State and local governments of the United States.

“(4) LIMITATION ON FEE.—The annual accounting support fees collected under this subsection for a fiscal year shall not exceed the recoverable annual budgeted expenses of the GASB (which may include operating expenses, capital, and accrued items).

“(5) RULES OF CONSTRUCTION.—

“(A) FEES NOT PUBLIC MONIES.—Accounting support fees collected under this subsection and other receipts of the GASB shall not be considered public monies of the United States.

“(B) LIMITATION ON AUTHORITY OF THE COMMISSION.—Nothing in this subsection shall be construed to—

“(i) provide the Commission or any national securities association direct or indirect oversight of the budget or technical agenda of the GASB; or

“(ii) affect the setting of generally accepted accounting principles by the GASB.

“(C) NONINTERFERENCE WITH STATES.—Nothing in this subsection shall be construed to impair or limit the authority of a State or local government to establish accounting and financial reporting standards.”.

(b) STUDY OF FUNDING FOR GOVERNMENTAL ACCOUNTING STANDARDS BOARD.—

(1) STUDY.—The Comptroller General of the United States shall conduct a study that evaluates—

(A) the role and importance of the Governmental Accounting Standards Board in the municipal securities markets; and

(B) the manner and the level at which the Governmental Accounting Standards Board has been funded.
(2) CONSULTATION.—In conducting the study required under paragraph (1), the Comptroller General shall consult with the principal organizations representing State governors, legislators, local elected officials, and State and local finance officers.

(3) REPORT.—Not later than 180 days after the date of enactment of this Act, the Comptroller General shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report on the study required under paragraph (1).

SEC. 979. COMMISSION OFFICE OF MUNICIPAL SECURITIES.

(a) IN GENERAL.—There shall be in the Commission an Office of Municipal Securities, which shall—

(1) administer the rules of the Commission with respect to the practices of municipal securities brokers and dealers, municipal securities advisors, municipal securities investors, and municipal securities issuers; and

(2) coordinate with the Municipal Securities Rulemaking Board for rulemaking and enforcement actions as required by law.

(b) DIRECTOR OF THE OFFICE.—The head of the Office of Municipal Securities shall be the Director, who shall report to the Chairman.

(c) STAFFING.—

(1) IN GENERAL.—The Office of Municipal Securities shall be staffed sufficiently to carry out the requirements of this section.

(2) REQUIREMENT.—The staff of the Office of Municipal Securities shall include individuals with knowledge of and expertise in municipal finance.

Subtitle I—Public Company Accounting Oversight Board, Portfolio Margining, and Other Matters

SEC. 981. AUTHORITY TO SHARE CERTAIN INFORMATION WITH FOREIGN AUTHORITIES.

(a) DEFINITION.—Section 2(a) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201(a)) is amended by adding at the end the following:

“(17) FOREIGN AUDITOR OVERSIGHT AUTHORITY.—The term ‘foreign auditor oversight authority’ means any governmental body or other entity empowered by a foreign government to conduct inspections of public accounting firms or otherwise to administer or enforce laws related to the regulation of public accounting firms.”.

(b) AVAILABILITY TO SHARE INFORMATION.—Section 105(b)(5) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7215(b)(5)) is amended by adding at the end the following:

“(C) AVAILABILITY TO FOREIGN OVERSIGHT AUTHORITIES.—Without the loss of its status as confidential and privileged in the hands of the Board, all information referred to in subparagraph (A) that relates to a public accounting firm that a foreign government has empowered
a foreign auditor oversight authority to inspect or otherwise enforce laws with respect to, may, at the discretion of the Board, be made available to the foreign auditor oversight authority, if—

“(i) the Board finds that it is necessary to accomplish the purposes of this Act or to protect investors;

“(ii) the foreign auditor oversight authority provides—

“(I) such assurances of confidentiality as the Board may request;

“(II) a description of the applicable information systems and controls of the foreign auditor oversight authority; and

“(III) a description of the laws and regulations of the foreign government of the foreign auditor oversight authority that are relevant to information access; and

“(iii) the Board determines that it is appropriate to share such information.”.

(c) CONFORMING AMENDMENT.—Section 105(b)(5)(A) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7215(b)(5)(A)) is amended by striking “subparagraph (B)” and inserting “subparagraphs (B) and (C)”.

SEC. 982. OVERSIGHT OF BROKERS AND DEALERS.

(a) DEFINITIONS.—

(1) DEFINITIONS AMENDED.—Title I of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.) is amended by adding at the end the following new section:

“SEC. 110. DEFINITIONS.

“For the purposes of this title, the following definitions shall apply:

“(1) AUDIT.—The term ‘audit’ means an examination of the financial statements, reports, documents, procedures, controls, or notices of any issuer, broker, or dealer by an independent public accounting firm in accordance with the rules of the Board or the Commission, for the purpose of expressing an opinion on the financial statements or providing an audit report.

“(2) AUDIT REPORT.—The term ‘audit report’ means a document, report, notice, or other record—

“(A) prepared following an audit performed for purposes of compliance by an issuer, broker, or dealer with the requirements of the securities laws; and

“(B) in which a public accounting firm either—

“(i) sets forth the opinion of that firm regarding a financial statement, report, notice, or other document, procedures, or controls; or

“(ii) asserts that no such opinion can be expressed.

“(3) BROKER.—The term ‘broker’ means a broker (as such term is defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4))) that is required to file a balance sheet, income statement, or other financial statement under section 17(e)(1)(A) of such Act (15 U.S.C. 78q(e)(1)(A)), where such balance sheet, income statement, or financial statement is required to be certified by a registered public accounting firm.
“(4) DEALER.—The term ‘dealer’ means a dealer (as such term is defined in section 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(5))) that is required to file a balance sheet, income statement, or other financial statement under section 17(e)(1)(A) of such Act (15 U.S.C. 78q(e)(1)(A)), where such balance sheet, income statement, or financial statement is required to be certified by a registered public accounting firm.

“(5) PROFESSIONAL STANDARDS.—The term ‘professional standards’ means—

“(A) accounting principles that are—

“(i) established by the standard setting body described in section 19(b) of the Securities Act of 1933, as amended by this Act, or prescribed by the Commission under section 19(a) of that Act (15 U.S.C. 17a(s)) or section 13(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78a(m)); and

“(ii) relevant to audit reports for particular issuers, brokers, or dealers, or dealt with in the quality control system of a particular registered public accounting firm; and

“(B) auditing standards, standards for attestation engagements, quality control policies and procedures, ethical and competency standards, and independence standards (including rules implementing title II) that the Board or the Commission determines—

“(i) relate to the preparation or issuance of audit reports for issuers, brokers, or dealers; and

“(ii) are established or adopted by the Board under section 103(a), or are promulgated as rules of the Commission.

“(6) SELF-REGULATORY ORGANIZATION.—The term ‘self-regulatory organization’ has the same meaning as in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)).”.

(2) CONFORMING AMENDMENT.—Section 2(a) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201(a)) is amended in the matter preceding paragraph (1), by striking “In this” and inserting “Except as otherwise specifically provided in this Act, in this”.

(b) ESTABLISHMENT AND ADMINISTRATION OF THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD.—Section 101 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7211) is amended—

(1) by striking “issuers” each place that term appears and inserting “issuers, brokers, and dealers”; and

(2) in subsection (a)—

(A) by striking “public companies” and inserting “companies”; and

(B) by striking “for companies the securities of which are sold to, and held by and for, public investors”.

(c) REGISTRATION WITH THE BOARD.—Section 102 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7212) is amended—

(1) in subsection (a)—

(A) by striking “Beginning 180” and all that follows through “101(d), it” and inserting “It”; and

(B) by striking “issuer” and inserting “issuer, broker, or dealer”; and

(2) in subsection (b)—
(A) in paragraph (2)(A), by striking “issuers” and inserting “issuers, brokers, and dealers”; and
(B) by striking “issuer” each place that term appears and inserting “issuer, broker, or dealer”.
(d) AUDITING AND INDEPENDENCE.—Section 103(a) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7213(a)) is amended—
(1) in paragraph (1), by striking “and such ethics standards” and inserting “such ethics standards, and such independence standards”;
(2) in paragraph (2)(A)(iii), by striking “describe in each audit report” and inserting “in each audit report for an issuer, describe”; and
(3) in paragraph (2)(B)(i), by striking “issuers” and inserting “issuers, brokers, and dealers”.
(e) INSPECTIONS OF REGISTERED PUBLIC ACCOUNTING FIRMS.—
(1) AMENDMENTS.—Section 104(a) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7214(a)) is amended—
(A) by striking “The Board shall” and inserting the following:
“(1) INSPECTIONS GENERALLY.—The Board shall”; and
(B) by adding at the end the following:
“(2) INSPECTIONS OF AUDIT REPORTS FOR BROKERS AND DEALERS.—
“(A) The Board may, by rule, conduct and require a program of inspection in accordance with paragraph (1), on a basis to be determined by the Board, of registered public accounting firms that provide one or more audit reports for a broker or dealer. The Board, in establishing such a program, may allow for differentiation among classes of brokers and dealers, as appropriate.
“(B) If the Board determines to establish a program of inspection pursuant to subparagraph (A), the Board shall consider in establishing any inspection schedules whether differing schedules would be appropriate with respect to registered public accounting firms that issue audit reports only for one or more brokers or dealers that do not receive, handle, or hold customer securities or cash or are not a member of the Securities Investor Protection Corporation.
“(C) Any rules of the Board pursuant to this paragraph shall be subject to prior approval by the Commission pursuant to section 107(b) before the rules become effective, including an opportunity for public notice and comment.
“(D) Notwithstanding anything to the contrary in section 102 of this Act, a public accounting firm shall not be required to register with the Board if the public accounting firm is exempt from the inspection program which may be established by the Board under subparagraph (A).”.
(2) CONFORMING AMENDMENT.—Section 17(e)(1)(A) of the Securities Exchange Act of 1934 (15 U.S.C. 78q(e)(1)(A)) is amended by striking “registered public accounting firm” and inserting “independent public accounting firm, or by a registered public accounting firm if the firm is required to be registered under the Sarbanes-Oxley Act of 2002.”.
(f) INVESTIGATIONS AND DISCIPLINARY PROCEEDINGS.—Section 105(c)(7)(B) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7215(c)(7)(B)) is amended—
(1) in the subparagraph heading, by inserting “, BROKER, OR DEALER” after “ISSUER”;
(2) by striking “any issuer” each place that term appears and inserting “any issuer, broker, or dealer”;
(3) by striking “an issuer under this subsection” and inserting “a registered public accounting firm under this subsection”.

(g) FOREIGN PUBLIC ACCOUNTING FIRMS.—Section 106(a) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7216(a)) is amended—
(1) in paragraph (1), by striking “issuer” and inserting “issuer, broker, or dealer”;
(2) in paragraph (2), by striking “issuers” and inserting “issuers, brokers, or dealers”.

(h) FUNDING.—Section 109 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7219) is amended—
(1) in subsection (c)(2), by striking “subsection (i)” and inserting “subsection (j)”;
(2) in subsection (d)—
(A) in paragraph (2), by striking “allowing for differentiation among classes of issuers, as appropriate” and inserting “and among brokers and dealers, in accordance with subsection (h), and allowing for differentiation among classes of issuers, brokers and dealers, as appropriate”;
and
(B) by adding at the end the following:

“(3) BROKERS AND DEALERS.—The Board shall begin the allocation, assessment, and collection of fees under paragraph (2) with respect to brokers and dealers with the payment of support fees to fund the first full fiscal year beginning after the date of enactment of the Investor Protection and Securities Reform Act of 2010.”;

(3) by redesignating subsections (h), (i), and (j) as subsections (i), (j), and (k), respectively; and
(4) by inserting after subsection (g) the following:

“(h) ALLOCATION OF ACCOUNTING SUPPORT FEES AMONG BROKERS AND DEALERS.—

“(1) OBLIGATION TO PAY.—Each broker or dealer shall pay to the Board the annual accounting support fee allocated to such broker or dealer under this section.

“(2) ALLOCATION.—Any amount due from a broker or dealer (or from a particular class of brokers and dealers) under this section shall be allocated among brokers and dealers and payable by the broker or dealer (or the brokers and dealers in the particular class, as applicable).

“(3) PROPORTIONALITY.—The amount due from a broker or dealer shall be in proportion to the net capital of the broker or dealer (before or after any adjustments), compared to the total net capital of all brokers and dealers (before or after any adjustments), in accordance with rules issued by the Board.”;

(1) by redesignating clauses (ii) and (iii) as clauses (iii) and (iv), respectively; and
(2) by inserting after clause (i) the following:
“(ii) to a self-regulatory organization, in the case of an investigation that concerns an audit report for a broker or dealer that is under the jurisdiction of such self-regulatory organization.”.


(1) in subclause (III), by striking “and” at the end;

(2) in subclause (IV), by striking the comma and inserting “; and”;

(3) by inserting after subclause (IV) the following:

“(V) a self-regulatory organization, with respect to an audit report for a broker or dealer that is under the jurisdiction of such self-regulatory organization.”.

SEC. 983. PORTFOLIO MARGINING.

(a) ADVANCES.—Section 9(a)(1) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78fff3(a)(1)) is amended by inserting “or options on commodity futures contracts” after “claim for securities”.

(b) DEFINITIONS.—Section 16 of the Securities Investor Protection Act of 1970 (15 U.S.C. 78lll) is amended—

(1) by striking paragraph (2) and inserting the following:

“(2) CUSTOMER.—

“(A) IN GENERAL.—The term ‘customer’ of a debtor means any person (including any person with whom the debtor deals as principal or agent) who has a claim on account of securities received, acquired, or held by the debtor in the ordinary course of its business as a broker or dealer from or for the securities accounts of such person for safekeeping, with a view to sale, to cover consummated sales, pursuant to purchases, as collateral, security, or for purposes of effecting transfer.

“(B) INCLUDED PERSONS.—The term ‘customer’ includes—

“(i) any person who has deposited cash with the debtor for the purpose of purchasing securities;

“(ii) any person who has a claim against the debtor for cash, securities, futures contracts, or options on futures contracts received, acquired, or held in a portfolio margining account carried as a securities account pursuant to a portfolio margining program approved by the Commission; and

“(iii) any person who has a claim against the debtor arising out of sales or conversions of such securities.

“(C) EXCLUDED PERSONS.—The term ‘customer’ does not include any person, to the extent that—

“(i) the claim of such person arises out of transactions with a foreign subsidiary of a member of SIPC; or

“(ii) such person has a claim for cash or securities which by contract, agreement, or understanding, or by operation of law, is part of the capital of the debtor, or is subordinated to the claims of any or all creditors of the debtor, notwithstanding that some ground exists

15 USC 78fff–3.
(2) in paragraph (4)—
   (A) in subparagraph (C), by striking “and” at the end;
   (B) by redesignating subparagraph (D) as subparagraph (E); and
   (C) by inserting after subparagraph (C) the following:
     “(D) in the case of a portfolio margining account of
     a customer that is carried as a securities account pursuant
     to a portfolio margining program approved by the Commis-
     sion, a futures contract or an option on a futures contract
     received, acquired, or held by or for the account of a debtor
     from or for such portfolio margining account, and the pro-
     ceeds thereof; and”;
(3) in paragraph (9), in the matter following subparagraph
   (L), by inserting after “Such term” the following: “includes
   revenues earned by a broker or dealer in connection with a
   transaction in the portfolio margining account of a customer
   carried as securities accounts pursuant to a portfolio margining
   program approved by the Commission. Such term”; and
(4) in paragraph (11)—
   (A) in subparagraph (A)—
     (i) by striking “filing date, all” and all that follows
     through the end of the subparagraph and inserting
     the following: “filing date—
     “(i) all securities positions of such customer (other
     than customer name securities reclaimed by such cus-
     tomer); and
     “(ii) all positions in futures contracts and options
     on futures contracts held in a portfolio margining
     account carried as a securities account pursuant to
     a portfolio margining program approved by the Commis-
     sion, including all property collateralizing such
     positions, to the extent that such property is not other-
     wise included herein; minus”; and
   (B) in the matter following subparagraph (C), by
     striking “In determining” and inserting the following: “A
     claim for a commodity futures contract received, acquired,
     or held in a portfolio margining account pursuant to a
     portfolio margining program approved by the Commission
     or a claim for a security futures contract, shall be deemed
to be a claim with respect to such contract as of the
filing date, and such claim shall be treated as a claim
for cash. In determining”.

SEC. 984. LOAN OR BORROWING OF SECURITIES.

   (a) Rulemaking Authority.—Section 10 of the Securities
the end the following:
   “(c)(1) To effect, accept, or facilitate a transaction involving
   the loan or borrowing of securities in contravention of such
   rules and regulations as the Commission may prescribe as
   necessary or appropriate in the public interest or for the protec-
   tion of investors.
   “(2) Nothing in paragraph (1) may be construed to limit
   the authority of the appropriate Federal banking agency (as
defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q))), the National Credit Union Administration, or any other Federal department or agency having a responsibility under Federal law to prescribe rules or regulations restricting transactions involving the loan or borrowing of securities in order to protect the safety and soundness of a financial institution or to protect the financial system from systemic risk.”.

(b) R
c

ULEMAKING REQUIRED.—Not later than 2 years after the date of enactment of this Act, the Commission shall promulgate rules that are designed to increase the transparency of information available to brokers, dealers, and investors, with respect to the loan or borrowing of securities.

SEC. 985. TECHNICAL CORRECTIONS TO FEDERAL SECURITIES LAWS.

(a) SECURITIES ACT OF 1933.—The Securities Act of 1933 (15 U.S.C. 77a et seq.) is amended—

(1) in section 3(a)(4) (15 U.S.C. 77c(a)(4)), by striking “individual;” and inserting “individual,”; and

(2) in section 18 (15 U.S.C. 77r)—

(A) in subsection (b)(1)(C), by striking “is a security” and inserting “a security”; and

(B) in subsection (c)(2)(B)(i), by striking “State, or” and inserting “State or”;

(3) in section 19(d)(6)(A) (15 U.S.C. 77s(d)(6)(A)), by striking “in paragraph (1) of (3)” and inserting “in paragraph (1) or (3)”;


(b) SECURITIES EXCHANGE ACT OF 1934.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended—

(1) in section 2 (15 U.S.C. 78b), by striking “affected” and inserting “effected”;

(2) in section 3 (15 U.S.C. 78c)—

(A) in subsection (a)(55)(A), by striking “section 3(a)(12) of the Securities Exchange Act of 1934” and inserting “section 3(a)(12) of this title”; and

(B) in subsection (g), by striking “company, account person, or entity” and inserting “company, account, person, or entity”;


(A) in the subparagraph heading, by striking “MINIMUS” and inserting “MINIMIS”;

(B) in clause (i), by striking “nonaudit” and inserting “non-audit”;

(4) in section 13(b)(1) (15 U.S.C. 78m(b)(1)), by striking “earning statement” and inserting “earnings statement”;

(5) in section 15 (15 U.S.C. 78o)—

(A) in subsection (b)(1)—

(i) in subparagraph (B), by striking “The order granting” and all that follows through “from such membership,”; and

(ii) in the undesignated matter immediately following subparagraph (B), by inserting after the first sentence the following: “The order granting registration shall not be effective until such broker or dealer has become a member of a registered securities association,
or until such broker or dealer has become a member of a national securities exchange, if such broker or dealer effects transactions solely on that exchange, unless the Commission has exempted such broker or dealer, by rule or order, from such membership.

   (A) by redesignating clauses (i) and (ii) as subparagraphs (A) and (B), respectively, and adjusting the subparagraph margins accordingly;
   (B) in subparagraph (B), as so redesignated, by striking “The order granting” and all that follows through “from such membership.”;
   (C) in the matter following subparagraph (B), as so redesignated, by inserting after the first sentence the following: “The order granting registration shall not be effective until such government securities broker or government securities dealer has become a member of a national securities exchange registered under section 6 of this title, or a securities association registered under section 15A of this title, unless the Commission has exempted such government securities broker or government securities dealer, by rule or order, from such membership.”;

(7) in section 17(b)(1)(B) (15 U.S.C. 78q(b)(1)(B)), by striking “15A(k) gives” and inserting “15A(k), give”;

(8) in section 21C(c)(2) (15 U.S.C. 78u–3(c)(2)), by striking “paragraph (1) subsection” and inserting “Paragraph (1)”.

(c) TRUST INDENTURE ACT OF 1939.—The Trust Indenture Act of 1939 (15 U.S.C. 77aaa et seq.) is amended—
   (1) in section 304(b) (15 U.S.C. 77ddd(b)), by striking “section 2 of such Act” and inserting “section 2(a) of such Act”;
   and
   (2) in section 317(a)(1) (15 U.S.C. 77qqq(a)(1)), by striking “in the” and inserting “in the”.

(d) INVESTMENT COMPANY ACT OF 1940.—The Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.) is amended—
   (1) in section 2(a)(19) (15 U.S.C. 80a–2(a)(19)), in the matter following subparagraph (B)(vi)—
      (A) by striking “clause (vi)” each place that term appears and inserting “clause (vii)”;
      (B) in each of subparagraphs (A)(vi) and (B)(vi), by adding “and” at the end of each clause (vii);
   (2) in section 9(b)(4)(B) (15 U.S.C. 80a–9(b)(4)(B)), by adding “or” after the colon at the end;
   (3) in section 12(d)(1)(J) (15 U.S.C. 80a–12(d)(1)(J)), by striking “any provision of this subsection” and inserting “any provision of this paragraph”;
   (4) in section 17(f) (15 U.S.C. 80a–17(f))—
      (A) in paragraph (4), by striking “No such member” and inserting “No member of a national securities exchange”;
      (B) in paragraph (6), by striking “company may serve” and inserting “company, may serve”; and
      (A) by striking “paragraph (1) of section 205” and inserting “section 205(a)(1)”;

and
(B) by striking “clause (A) or (B) of that section” and inserting “paragraph (1) or (2) of section 205(b)”.

(e) INVESTMENT ADVISERS ACT OF 1940.—The Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) is amended—

(1) in section 203 (15 U.S.C. 80b–3)—

(A) in subsection (c)(1)(A), by striking “principal business office and” and inserting “principal office, principal place of business, and”; and

(B) in subsection (k)(4)(B), in the matter following clause (ii), by striking “principal place of business” and inserting “principal office or place of business”;

(2) in section 206(3) (15 U.S.C. 80b–6(3)), by adding “or” after the semicolon at the end;

(3) in section 213(a) (15 U.S.C. 80b–13(a)), by striking “principal place of business” and inserting “principal office or place of business”; and

(4) in section 222 (15 U.S.C. 80b–18a), by striking “principal place of business” each place that term appears and inserting “principal office and place of business”.


(2) in section 12(k) (15 U.S.C. 78l(k)), by amending paragraph (7) to read as follows:

“(7) DEFINITION.—For purposes of this subsection, the term ‘emergency’ means—

“(A) a major market disturbance characterized by or constituting—

“(i) sudden and excessive fluctuations of securities prices generally, or a substantial threat thereof, that threaten fair and orderly markets; or

“(ii) a substantial disruption of the safe or efficient operation of the national system for clearance and settlement of transactions in securities, or a substantial threat thereof; or

“(B) a major disturbance that substantially disrupts, or threatens to substantially disrupt—

“(i) the functioning of securities markets, investment companies, or any other significant portion or segment of the securities markets; or

“(ii) the transmission or processing of securities transactions.”; and

(3) in section 21(h)(2) (15 U.S.C. 78u(h)(2)), by striking “section 18(c) of the Public Utility Holding Company Act of 1935.”

(b) TRUST INDENTURE ACT OF 1939.—The Trust Indenture Act of 1939 (15 U.S.C. 77aaa et seq.) is amended—

(1) in section 303 (15 U.S.C. 77ccc), by striking paragraph (17) and inserting the following:

“(17) The terms ‘Securities Act of 1933’ and ‘Securities Exchange Act of 1934’ shall be deemed to refer, respectively,

(3) in section 310 (15 U.S.C. 77jjj), by striking subsection (c);

(4) in section 311 (15 U.S.C. 77kkk), by striking subsection (c);

(5) in section 323(b) (15 U.S.C. 77www(b)), by striking “Securities Act of 1933, or the Securities Exchange Act of 1934, or the Public Utility Holding Company Act of 1935” and inserting “Securities Act of 1933 or the Securities Exchange Act of 1934”; and


(c) INVESTMENT COMPANY ACT OF 1940.—The Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.) is amended—


(2) in section 3(c) (15 U.S.C. 80a–3(c)), by striking paragraph (8) and inserting the following:

“(8) [Repealed];

(3) in section 38(b) (15 U.S.C. 80a–37(b)), by striking “the Public Utility Holding Company Act of 1935,”; and

(4) in section 50 (15 U.S.C. 80a–49), by striking “the Public Utility Holding Company Act of 1935,”.


SEC. 987. AMENDMENT TO DEFINITION OF MATERIAL LOSS AND NON-MATERIAL LOSSES TO THE DEPOSIT INSURANCE FUND FOR PURPOSES OF INSPECTOR GENERAL REVIEWS.

(a) IN GENERAL.—Section 38(k) of the Federal Deposit Insurance Act (U.S.C. 1831o(k)) is amended—

(1) in paragraph (2), by striking subparagraph (B) and inserting the following:

“(B) MATERIAL LOSS DEFINED.—The term ‘material loss’ means any estimated loss in excess of—

“(i) $200,000,000, if the loss occurs during the period beginning on January 1, 2010, and ending on December 31, 2011;

“(ii) $150,000,000, if the loss occurs during the period beginning on January 1, 2012, and ending on December 31, 2013; and

“(iii) $50,000,000, if the loss occurs on or after January 1, 2014, provided that if the inspector general of a Federal banking agency certifies to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House
of Representatives that the number of projected failures of depository institutions that would require material loss reviews for the following 12 months will be greater than 30 and would hinder the effectiveness of its oversight functions, then the definition of ‘material loss’ shall be $75,000,000 for a duration of 1 year from the date of the certification.”;

(2) in paragraph (4)(A) by striking “the report” and inserting “any report on losses required under this subsection;”;

(3) by striking paragraph (6);

(4) by redesignating paragraph (5) as paragraph (6); and

(5) by inserting after paragraph (4) the following:

“(5) LOSSES THAT ARE NOT MATERIAL.—

“(A) SEMIANNUAL REPORT.—For the 6-month period ending on March 31, 2010, and each 6-month period thereafter, the Inspector General of each Federal banking agency shall—

“(i) identify losses that the Inspector General estimates have been incurred by the Deposit Insurance Fund during that 6-month period, with respect to the insured depository institutions supervised by the Federal banking agency;

“(ii) for each loss incurred by the Deposit Insurance Fund that is not a material loss, determine—

“(I) the grounds identified by the Federal banking agency or State bank supervisor for appointing the Corporation as receiver under section 11(c)(5); and

“(II) whether any unusual circumstances exist that might warrant an in-depth review of the loss; and

“(iii) prepare and submit a written report to the appropriate Federal banking agency and to Congress on the results of any determination by the Inspector General, including—

“(I) an identification of any loss that warrants an in-depth review, together with the reasons why such review is warranted, or, if the Inspector General determines that no review is warranted, an explanation of such determination; and

“(II) for each loss identified under subclause (I) that warrants an in-depth review, the date by which such review, and a report on such review prepared in a manner consistent with reports under paragraph (1)(A), will be completed and submitted to the Federal banking agency and Congress.

“(B) DEADLINE FOR SEMIANNUAL REPORT.—The Inspector General of each Federal banking agency shall—

“(i) submit each report required under paragraph (A) expeditiously, and not later than 90 days after the end of the 6-month period covered by the report; and

“(ii) provide a copy of the report required under paragraph (A) to any Member of Congress, upon request.”.
(b) TECHNICAL AND CONFORMING AMENDMENT.—The heading for subsection (k) of section 38 of the Federal Deposit Insurance Act (U.S.C. 1831o(k)) is amended to read as follows:

“(k) REVIEWS REQUIRED WHEN DEPOSIT INSURANCE FUND INCURS LOSSES.—”

SEC. 988. AMENDMENT TO DEFINITION OF MATERIAL LOSS AND NON-MATERIAL LOSSES TO THE NATIONAL CREDIT UNION SHARE INSURANCE FUND FOR PURPOSES OF INSPECTOR GENERAL REVIEWS.

(a) IN GENERAL.—Section 216(j) of the Federal Credit Union Act (12 U.S.C. 1790d(j)) is amended to read as follows:

“(j) REVIEWS REQUIRED WHEN SHARE INSURANCE FUND EXPERIENCES LOSSES.—

“(1) IN GENERAL.—If the Fund incurs a material loss with respect to an insured credit union, the Inspector General of the Board shall—

“(A) submit to the Board a written report reviewing the supervision of the credit union by the Administration (including the implementation of this section by the Administration), which shall include—

“(i) a description of the reasons why the problems of the credit union resulted in a material loss to the Fund; and

“(ii) recommendations for preventing any such loss in the future; and

“(B) submit a copy of the report under subparagraph (A) to—

“(i) the Comptroller General of the United States;

“(ii) the Corporation;

“(iii) in the case of a report relating to a State credit union, the appropriate State supervisor; and

“(iv) to any Member of Congress, upon request.

“(2) MATERIAL LOSS DEFINED.—For purposes of determining whether the Fund has incurred a material loss with respect to an insured credit union, a loss is material if it exceeds the sum of—

“(A) $25,000,000; and

“(B) an amount equal to 10 percent of the total assets of the credit union on the date on which the Board initiated assistance under section 208 or was appointed liquidating agent.

“(3) PUBLIC DISCLOSURE REQUIRED.—

“(A) IN GENERAL.—The Board shall disclose a report under this subsection, upon request under section 552 of title 5, United States Code, without excising—

“(i) any portion under section 552(b)(5) of title 5, United States Code; or

“(ii) any information about the insured credit union (other than trade secrets) under section 552(b)(8) of title 5, United States Code.

“(B) RULE OF CONSTRUCTION.—Subparagraph (A) may not be construed as requiring the agency to disclose the name of any customer of the insured credit union (other than an institution-affiliated party), or information from which the identity of such customer could reasonably be ascertained.
“(4) LOSSES THAT ARE NOT MATERIAL.—
“(A) SEMIANNUAL REPORT.—For the 6-month period ending on March 31, 2010, and each 6-month period thereafter, the Inspector General of the Board shall—
“(i) identify any losses that the Inspector General estimates were incurred by the Fund during such 6-month period, with respect to insured credit unions;
“(ii) for each loss to the Fund that is not a material loss, determine—
“(I) the grounds identified by the Board or the State official having jurisdiction over a State credit union for appointing the Board as the liquidating agent for any Federal or State credit union; and
“(II) whether any unusual circumstances exist that might warrant an in-depth review of the loss; and
“(iii) prepare and submit a written report to the Board and to Congress on the results of the determinations of the Inspector General that includes—
“(I) an identification of any loss that warrants an in-depth review, and the reasons such review is warranted, or if the Inspector General determines that no review is warranted, an explanation of such determination; and
“(II) for each loss identified in subclause (I) that warrants an in-depth review, the date by which such review, and a report on the review prepared in a manner consistent with reports under paragraph (1)(A), will be completed.
“(B) DEADLINE FOR SEMIANNUAL REPORT.—The Inspector General of the Board shall—
“(i) submit each report required under subparagraph (A) expeditiously, and not later than 90 days after the end of the 6-month period covered by the report; and
“(ii) provide a copy of the report required under subparagraph (A) to any Member of Congress, upon request.
“(5) GAO REVIEW.—The Comptroller General of the United States shall, under such conditions as the Comptroller General determines to be appropriate—
“(A) review each report made under paragraph (1), including the extent to which the Inspector General of the Board complied with the requirements under section 8L of the Inspector General Act of 1978 (5 U.S.C. App.) with respect to each such report; and
“(B) recommend improvements to the supervision of insured credit unions (including improvements relating to the implementation of this section).”.

SEC. 989. GOVERNMENT ACCOUNTABILITY OFFICE STUDY ON PROPRIETARY TRADING.

(a) DEFINITIONS.—In this section—
(1) the term “covered entity” means—
(A) an insured depository institution, an affiliate of an insured depository institution, a bank holding company,
a financial holding company, or a subsidiary of a bank holding company or a financial holding company, as those terms are defined in the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.); and

(B) any other entity, as the Comptroller General of the United States may determine; and

(2) the term "proprietary trading" means the act of a covered entity investing as a principal in securities, commodities, derivatives, hedge funds, private equity firms, or such other financial products or entities as the Comptroller General may determine.

(b) Study.—

(1) In general.—The Comptroller General of the United States shall conduct a study regarding the risks and conflicts associated with proprietary trading by and within covered entities, including an evaluation of—

(A) whether proprietary trading presents a material systemic risk to the stability of the United States financial system, and if so, the costs and benefits of options for mitigating such systemic risk;

(B) whether proprietary trading presents material risks to the safety and soundness of the covered entities that engage in such activities, and if so, the costs and benefits of options for mitigating such risks;

(C) whether proprietary trading presents material conflicts of interest between covered entities that engage in proprietary trading and the clients of the institutions who use the firm to execute trades or who rely on the firm to manage assets, and if so, the costs and benefits of options for mitigating such conflicts of interest;

(D) whether adequate disclosure regarding the risks and conflicts of proprietary trading is provided to the depositors, trading and asset management clients, and investors of covered entities that engage in proprietary trading, and if not, the costs and benefits of options for the improvement of such disclosure; and

(E) whether the banking, securities, and commodities regulators of institutions that engage in proprietary trading have in place adequate systems and controls to monitor and contain any risks and conflicts of interest related to proprietary trading, and if not, the costs and benefits of options for the improvement of such systems and controls.

(2) Considerations.—In carrying out the study required under paragraph (1), the Comptroller General shall consider—

(A) current practice relating to proprietary trading;

(B) the advisability of a complete ban on proprietary trading;

(C) limitations on the scope of activities that covered entities may engage in with respect to proprietary trading;

(D) the advisability of additional capital requirements for covered entities that engage in proprietary trading;

(E) enhanced restrictions on transactions between affiliates related to proprietary trading;

(F) enhanced accounting disclosures relating to proprietary trading;

(G) enhanced public disclosure relating to proprietary trading; and
(H) any other options the Comptroller General deems appropriate.

c) REPORT TO CONGRESS.—Not later than 15 months after the date of enactment of this Act, the Comptroller General shall submit a report to Congress on the results of the study conducted under subsection (b).

d) ACCESS BY COMPTROLLER GENERAL.—For purposes of conducting the study required under subsection (b), the Comptroller General shall have access, upon request, to any information, data, schedules, books, accounts, financial records, reports, files, electronic communications, or other papers, things, or property belonging to or in use by a covered entity that engages in proprietary trading, and to the officers, directors, employees, independent public accountants, financial advisors, staff, and agents and representatives of a covered entity (as related to the activities of the agent or representative on behalf of the covered entity), at such reasonable times as the Comptroller General may request. The Comptroller General may make and retain copies of books, records, accounts, and other records, as the Comptroller General deems appropriate.

e) CONFIDENTIALITY OF REPORTS.—

1. In general.—Except as provided in paragraph (2), the Comptroller General may not disclose information regarding—

   A) any proprietary trading activity of a covered entity, unless such information is disclosed at a level of generality that does not reveal the investment or trading position or strategy of the covered entity for any specific security, commodity, derivative, or other investment or financial product; or

   B) any individual interviewed by the Comptroller General for purposes of the study under subsection (b), unless such information is disclosed at a level of generality that does not reveal—

      i) the name of or identifying details relating to such individual; or

      ii) in the case of an individual who is an employee of a third party that provides professional services to a covered entity believed to be engaged in proprietary trading, the name of or any identifying details relating to such third party.

2. EXCEPTIONS.—The Comptroller General may disclose the information described in paragraph (1)—

   A) to a department, agency, or official of the Federal Government, for official use, upon request;

   B) to a committee of Congress, upon request; and

   C) to a court, upon an order of such court.

SEC. 989A. SENIOR INVESTOR PROTECTIONS.

(a) DEFINITIONS.—As used in this section—

1. In general.—The term “eligible entity” means—

   A) a securities commission (or any agency or office performing like functions) of a State that the Office determines has adopted rules on the appropriate use of designations in the offer or sale of securities or the provision of investment advice that meet or exceed the minimum requirements of the NASAA Model Rule on the Use of


12 USC 5537.
Senior-Specific Certifications and Professional Designations (or any successor thereto);
(B) the insurance commission (or any agency or office performing like functions) of any State that the Office determines has—
   (i) adopted rules on the appropriate use of designations in the sale of insurance products that, to the extent practicable, conform to the minimum requirements of the National Association of Insurance Commissioners Model Regulation on the Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities (or any successor thereto); and
   (ii) adopted rules with respect to fiduciary or suitability requirements in the sale of annuities that meet or exceed the minimum requirements established by the Suitability in Annuity Transactions Model Regulation of the National Association of Insurance Commissioners (or any successor thereto); or
(C) a consumer protection agency of any State, if—
   (i) the securities commission (or any agency or office performing like functions) of the State is eligible under subparagraph (A); or
   (ii) the insurance commission (or any agency or office performing like functions) of the State is eligible under subparagraph (B);
(2) the term “financial product” means a security, an insurance product (including an insurance product that pays a return, whether fixed or variable), a bank product, and a loan product;
(3) the term “misleading designation”—
   (A) means a certification, professional designation, or other purported credential that indicates or implies that a salesperson or adviser has special certification or training in advising or servicing seniors; and
   (B) does not include a certification, professional designation, license, or other credential that—
      (i) was issued by or obtained from an academic institution having regional accreditation;
      (ii) meets the standards for certifications and professional designations outlined by the NASAA Model Rule on the Use of Senior-Specific Certifications and Professional Designations (or any successor thereto) or by the Model Regulations on the Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities, adopted by the National Association of Insurance Commissioners (or any successor thereto); or
      (iii) was issued by or obtained from a State;
(4) the term “misleading or fraudulent marketing” means the use of a misleading designation by a person that sells to or advises a senior in connection with the sale of a financial product;
(5) the term “NASAA” means the North American Securities Administrators Association;
(6) the term “Office” means the Office of Financial Literacy of the Bureau;
(7) the term "senior" means any individual who has attained the age of 62 years or older; and

(8) the term "State" has the same meaning as in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)).

(b) GRANTS TO STATES FOR ENHANCED PROTECTION OF SENIORS FROM BEING MISLED BY FALSE DESIGNATIONS.—The Office shall establish a program under which the Office may make grants to States or eligible entities—

1. to hire staff to identify, investigate, and prosecute (through civil, administrative, or criminal enforcement actions) cases involving misleading or fraudulent marketing;

2. to fund technology, equipment, and training for regulators, prosecutors, and law enforcement officers, in order to identify salespersons and advisers who target seniors through the use of misleading designations;

3. to fund technology, equipment, and training for prosecutors to increase the successful prosecution of salespersons and advisers who target seniors with the use of misleading designations;

4. to provide educational materials and training to regulators on the appropriateness of the use of designations by salespersons and advisers in connection with the sale and marketing of financial products;

5. to provide educational materials and training to seniors to increase awareness and understanding of misleading or fraudulent marketing;

6. to develop comprehensive plans to combat misleading or fraudulent marketing of financial products to seniors; and

7. to enhance provisions of State law to provide protection for seniors against misleading or fraudulent marketing.

(c) APPLICATIONS.—A State or eligible entity desiring a grant under this section shall submit an application to the Office, in such form and in such a manner as the Office may determine, that includes—

1. a proposal for activities to protect seniors from misleading or fraudulent marketing that are proposed to be funded using a grant under this section, including—

   A. an identification of the scope of the problem of misleading or fraudulent marketing in the State;

   B. a description of how the proposed activities would—

      i. protect seniors from misleading or fraudulent marketing in the sale of financial products, including by proactively identifying victims of misleading and fraudulent marketing who are seniors;

      ii. assist in the investigation and prosecution of those using misleading or fraudulent marketing; and

      iii. discourage and reduce cases of misleading or fraudulent marketing; and

   C. a description of how the proposed activities would be coordinated with other State efforts; and

   D. any other information, as the Office determines is appropriate.

(d) PERFORMANCE OBJECTIVES AND REPORTING REQUIREMENTS.—The Office may establish such performance objectives and reporting requirements for States and eligible entities receiving a grant under this section as the Office determines are necessary
to carry out and assess the effectiveness of the program under this section.

(e) **Maximum Amount.**—The amount of a grant under this section may not exceed—

(1) $500,000 for each of 3 consecutive fiscal years, if the recipient is a State, or an eligible entity of a State, that has adopted rules—

(A) on the appropriate use of designations in the offer or sale of securities or investment advice that meet or exceed the minimum requirements of the NASAA Model Rule on the Use of Senior-Specific Certifications and Professional Designations (or any successor thereto);

(B) on the appropriate use of designations in the sale of insurance products that, to the extent practicable, conform to the minimum requirements of the National Association of Insurance Commissioners Model Regulation on the Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities (or any successor thereto); and

(C) with respect to fiduciary or suitability requirements in the sale of annuities that meet or exceed the minimum requirements established by the Suitability in Annuity Transactions Model Regulation of the National Association of Insurance Commissioners (or any successor thereto); and

(2) $100,000 for each of 3 consecutive fiscal years, if the recipient is a State, or an eligible entity of a State, that has adopted—

(A) rules on the appropriate use of designations in the offer or sale of securities or investment advice that meet or exceed the minimum requirements of the NASAA Model Rule on the Use of Senior-Specific Certifications and Professional Designations (or any successor thereto); or

(B) rules—

(i) on the appropriate use of designations in the sale of insurance products that, to the extent practicable, conform to the minimum requirements of the National Association of Insurance Commissioners Model Regulation on the Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities (or any successor thereto); and

(ii) with respect to fiduciary or suitability requirements in the sale of annuities that meet or exceed the minimum requirements established by the Suitability in Annuity Transactions Model Regulation of the National Association of Insurance Commissioners (or any successor thereto).

(f) **Subgrants.**—A State or eligible entity that receives a grant under this section may make a subgrant, as the State or eligible entity determines is necessary to carry out the activities funded using a grant under this section.

(g) **Reapplication.**—A State or eligible entity that receives a grant under this section may reapply for a grant under this section, notwithstanding the limitations on grant amounts under subsection (e).
(h) **Authorization of Appropriations.**—There are authorized to be appropriated to carry out this section, $8,000,000 for each of fiscal years 2011 through 2015.

SEC. 989B. DESIGNATED FEDERAL ENTITY INSPECTORS GENERAL INDEPENDENCE.


(1) in subsection (a)(4)—

(A) in the matter preceding subparagraph (A), by inserting “the board or commission of the designated Federal entity, or in the event the designated Federal entity does not have a board or commission,” after “means”;

(B) in subparagraph (A), by striking “and” after the semicolon; and

(C) by adding after subparagraph (B) the following:

“(C) with respect to the Federal Labor Relations Authority, such term means the members of the Authority (described under section 7104 of title 5, United States Code);

“(D) with respect to the National Archives and Records Administration, such term means the Archivist of the United States;

“(E) with respect to the National Credit Union Administration, such term means the National Credit Union Administration Board (described under section 102 of the Federal Credit Union Act (12 U.S.C. 1752a);

“(F) with respect to the National Endowment of the Arts, such term means the National Council on the Arts;

“(G) with respect to the National Endowment for the Humanities, such term means the National Council on the Humanities; and

“(H) with respect to the Peace Corps, such term means the Director of the Peace Corps”; and

(2) in subsection (h), by inserting “if the designated Federal entity is not a board or commission, include” after “designated Federal entities and”.

SEC. 989C. STRENGTHENING INSPECTOR GENERAL ACCOUNTABILITY.

Section 5(a) of the Inspector General Act of 1978 (5 U.S.C. App.) is amended—

(1) in paragraph (12), by striking “and” after the semicolon;

(2) in paragraph (13), by striking the period and inserting a semicolon; and

(3) by adding at the end the following:

“(14)(A) an appendix containing the results of any peer review conducted by another Office of Inspector General during the reporting period; or

“(B) if no peer review was conducted within that reporting period, a statement identifying the date of the last peer review conducted by another Office of Inspector General;

“(15) a list of any outstanding recommendations from any peer review conducted by another Office of Inspector General that have not been fully implemented, including a statement describing the status of the implementation and why implementation is not complete; and

“(16) a list of any peer reviews conducted by the Inspector General of another Office of the Inspector General during the
reporting period, including a list of any outstanding recommendations made from any previous peer review (including any peer review conducted before the reporting period) that remain outstanding or have not been fully implemented.”.

SEC. 989D. REMOVAL OF INSPECTORS GENERAL OF DESIGNATED FEDERAL ENTITIES.

Section 8G(e) of the Inspector General Act of 1978 (5 U.S.C. App.) is amended—

(1) by redesignating the sentences following “(e)” as paragraph (2); and

(2) by striking “(e)” and inserting the following:

“(e)(1) In the case of a designated Federal entity for which a board or commission is the head of the designated Federal entity, a removal under this subsection may only be made upon the written concurrence of a 2/3 majority of the board or commission.”.

SEC. 989E. ADDITIONAL OVERSIGHT OF FINANCIAL REGULATORY SYSTEM.

(a) COUNCIL OF INSPECTORS GENERAL ON FINANCIAL OVERSIGHT.—

(1) ESTABLISHMENT AND MEMBERSHIP.—There is established a Council of Inspectors General on Financial Oversight (in this section referred to as the “Council of Inspectors General”) chaired by the Inspector General of the Department of the Treasury and composed of the inspectors general of the following:

(A) The Board of Governors of the Federal Reserve System.

(B) The Commodity Futures Trading Commission.

(C) The Department of Housing and Urban Development.

(D) The Department of the Treasury.

(E) The Federal Deposit Insurance Corporation.

(F) The Federal Housing Finance Agency.

(G) The National Credit Union Administration.

(H) The Securities and Exchange Commission.

(I) The Troubled Asset Relief Program (until the termination of the authority of the Special Inspector General for such program under section 121(k) of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5231(k))).

(2) DUTIES.—

(A) MEETINGS.—The Council of Inspectors General shall meet not less than once each quarter, or more frequently if the chair considers it appropriate, to facilitate the sharing of information among inspectors general and to discuss the ongoing work of each inspector general who is a member of the Council of Inspectors General, with a focus on concerns that may apply to the broader financial sector and ways to improve financial oversight.

(B) ANNUAL REPORT.—Each year the Council of Inspectors General shall submit to the Council and to Congress a report including—

(i) for each inspector general who is a member of the Council of Inspectors General, a section within the exclusive editorial control of such inspector general that highlights the concerns and recommendations of such inspector general in such inspector general’s
ongoing and completed work, with a focus on issues that may apply to the broader financial sector; and
(ii) a summary of the general observations of the Council of Inspectors General based on the views expressed by each inspector general as required by clause (i), with a focus on measures that should be taken to improve financial oversight.

(3) WORKING GROUPS TO EVALUATE COUNCIL.—
   (A) CONVENING A WORKING GROUP.—The Council of Inspectors General may, by majority vote, convene a Council of Inspectors General Working Group to evaluate the effectiveness and internal operations of the Council.
   (B) PERSONNEL AND RESOURCES.—The inspectors general who are members of the Council of Inspectors General may detail staff and resources to a Council of Inspectors General Working Group established under this paragraph to enable it to carry out its duties.
   (C) REPORTS.—A Council of Inspectors General Working Group established under this paragraph shall submit regular reports to the Council and to Congress on its evaluations pursuant to this paragraph.

(b) RESPONSE TO REPORT BY COUNCIL.—The Council shall respond to the concerns raised in the report of the Council of Inspectors General under subsection (a)(2)(B) for such year.

SEC. 989F. GAO STUDY OF PERSON TO PERSON LENDING.

(a) STUDY.—
   (1) IN GENERAL.—The Comptroller General of the United States shall conduct a study of person to person lending to determine the optimal Federal regulatory structure.
   (2) CONSULTATION.—In conducting the study required under paragraph (1), the Comptroller General shall consult with Federal banking agencies, the Commission, consumer groups, outside experts, and the person to person lending industry.
   (3) CONTENT OF STUDY.—The study required under paragraph (1) shall include an examination of—
      (A) the regulatory structure as it exists on the date of enactment of this Act, as determined by the Commission, with particular attention to—
         (i) the application of the Securities Act of 1933 to person to person lending platforms;
         (ii) the posting of consumer loan information on the EDGAR database of the Commission; and
         (iii) the treatment of privately held person to person lending platforms as public companies;
      (B) the State and other Federal regulators responsible for the oversight and regulation of person to person lending markets;
      (C) any Federal, State, or local government or private studies of person to person lending completed or in progress on the date of enactment of this Act;
      (D) consumer privacy and data protections, minimum credit standards, anti-money laundering and risk management in the regulatory structure as it exists on the date of enactment of this Act, and whether additional or alternative safeguards are needed; and
(E) the uses of person to person lending.

(b) Report.—

(1) In general.—Not later than 1 year after the date of enactment of this Act, the Comptroller General shall submit a report on the study required under subsection (a) to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.

(2) Content of report.—The report required under paragraph (1) shall include alternative regulatory options, including—

(A) the involvement of other Federal agencies; and
(B) alternative approaches by the Commission and recommendations on whether the alternative approaches are effective.

SEC. 989G. EXEMPTION FOR NONACCELERATED FILERS.

(a) Exemption.—Section 404 of the Sarbanes-Oxley Act of 2002 is amended by adding at the end the following:

“(c) Exemption for smaller issuers.—Subsection (b) shall not apply with respect to any audit report prepared for an issuer that is neither a ‘large accelerated filer’ nor an ‘accelerated filer’ as those terms are defined in Rule 12b–2 of the Commission (17 C.F.R. 240.12b–2).”.

(b) Study.—The Securities and Exchange Commission shall conduct a study to determine how the Commission could reduce the burden of complying with section 404(b) of the Sarbanes-Oxley Act of 2002 for companies whose market capitalization is between $75,000,000 and $250,000,000 for the relevant reporting period while maintaining investor protections for such companies. The study shall also consider whether any such methods of reducing the compliance burden or a complete exemption for such companies from compliance with such section would encourage companies to list on exchanges in the United States in their initial public offerings. Not later than 9 months after the date of the enactment of this subtitle, the Commission shall transmit a report of such study to Congress.

SEC. 989H. CORRECTIVE RESPONSES BY HEADS OF CERTAIN establishments to deficiencies identified by inspectors general.

The Chairman of the Board of Governors of the Federal Reserve System, the Chairman of the Commodity Futures Trading Commission, the Chairman of the National Credit Union Administration, the Director of the Pension Benefit Guaranty Corporation, and the Chairman of the Securities and Exchange Commission shall each—

(1) take action to address deficiencies identified by a report or investigation of the Inspector General of the establishment concerned; or

(2) certify to both Houses of Congress that no action is necessary or appropriate in connection with a deficiency described in paragraph (1).

SEC. 989I. GAO STUDY REGARDING EXEMPTION FOR SMALLER ISSUERS.

(a) Study regarding exemption for smaller issuers.—The Comptroller General of the United States shall carry out a study
on the impact of the amendments made by this Act to section 404(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7262(b)), which shall include an analysis of—

(1) whether issuers that are exempt from such section 404(b) have fewer or more restatements of published accounting statements than issuers that are required to comply with such section 404(b); 

(2) the cost of capital for issuers that are exempt from such section 404(b) compared to the cost of capital for issuers that are required to comply with such section 404(b); 

(3) whether there is any difference in the confidence of investors in the integrity of financial statements of issuers that comply with such section 404(b) and issuers that are exempt from compliance with such section 404(b); 

(4) whether issuers that do not receive the attestation for internal controls required under such section 404(b) should be required to disclose the lack of such attestation to investors; and 

(5) the costs and benefits to issuers that are exempt from such section 404(b) that voluntarily have obtained the attestation of an independent auditor.

(b) REPORT.—Not later than 3 years after the date of enactment of this Act, the Comptroller General shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report on the results of the study required under subsection (a).

SEC. 989J. FURTHER PROMOTING THE ADOPTION OF THE NAIC MODEL REGULATIONS THAT ENHANCE PROTECTION OF SENIORS AND OTHER CONSUMERS.

(a) IN GENERAL.—The Commission shall treat as exempt securities described under section 3(a)(8) of the Securities Act of 1933 (15 U.S.C. 77c(a)(8)) any insurance or endowment policy or annuity contract or optional annuity contract—

(1) the value of which does not vary according to the performance of a separate account; 

(2) that—

(A) satisfies standard nonforfeiture laws or similar requirements of the applicable State at the time of issue; or 

(B) in the absence of applicable standard nonforfeiture laws or requirements, satisfies the Model Standard Nonforfeiture Law for Life Insurance or Model Standard Nonforfeiture Law for Individual Deferred Annuities, or any successor model law, as published by the National Association of Insurance Commissioners; and 

(3) that is issued—

(A) on and after June 16, 2013, in a State, or issued by an insurance company that is domiciled in a State, that—

(i) adopts rules that govern suitability requirements in the sale of an insurance or endowment policy or annuity contract or optional annuity contract, which shall substantially meet or exceed the minimum requirements established by the Suitability in Annuity Transactions Model Regulation adopted by the
National Association of Insurance Commissioners in March 2010; and
(ii) adopts rules that substantially meet or exceed the minimum requirements of any successor modifications to the model regulations described in subparagraph (A) within 5 years of the adoption by the Association of any further successors thereto; or
(B) by an insurance company that adopts and implements practices on a nationwide basis for the sale of any insurance or endowment policy or annuity contract or optional annuity contract that meet or exceed the minimum requirements established by the National Association of Insurance Commissioners Suitability in Annuity Transactions Model Regulation (Model 275), and any successor thereto, and is therefore subject to examination by the State of domicile of the insurance company, or by any other State where the insurance company conducts sales of such products, for the purpose of monitoring compliance under this section.

(b) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to affect whether any insurance or endowment policy or annuity contract or optional annuity contract that is not described in this section is or is not an exempt security under section 3(a)(8) of the Securities Act of 1933 (15 U.S.C. 77c(a)(8)).

Subtitle J—Securities and Exchange Commission Match Funding

SEC. 991. SECURITIES AND EXCHANGE COMMISSION MATCH FUNDING.

(a) MATCH FUNDING AUTHORITY.—

(A) by striking subsection (a) and inserting the following:

“(a) RECOVERY OF COSTS OF ANNUAL APPROPRIATION.—The Commission shall, in accordance with this section, collect transaction fees and assessments that are designed to recover the costs to the Government of the annual appropriation to the Commission by Congress.”;
(B) in subsection (e)(2), by striking “September 30” and inserting “September 25”;
(C) in subsection (g), by striking “April 30 of the fiscal year preceding the fiscal year to which such rate applies” and inserting “30 days after the date on which an Act making a regular appropriation to the Commission for such fiscal year is enacted”;
(D) by striking subsection (j) and inserting the following:

“(j) ADJUSTMENTS TO FEE RATES.—

“(1) ANNUAL ADJUSTMENT.—Subject to subsections (i)(1)(B) and (k), for each fiscal year, the Commission shall by order adjust each of the rates applicable under subsections (b) and (c) for such fiscal year to a uniform adjusted rate that, when applied to the baseline estimate of the aggregate dollar amount of sales for such fiscal year, is reasonably likely to produce Fees. Assessments.
aggregate fee collections under this section (including assessments collected under subsection (d) of this section) that are equal to the regular appropriation to the Commission by Congress for such fiscal year.

“(2) **Mid-Year Adjustment**.—Subject to subsections (i)(1)(B) and (k), for each fiscal year, the Commission shall determine, by March 1 of such fiscal year, whether, based on the actual aggregate dollar volume of sales during the first 5 months of such fiscal year, the baseline estimate of the aggregate dollar volume of sales used under paragraph (1) for such fiscal year is reasonably likely to be 10 percent (or more) greater or less than the actual aggregate dollar volume of sales for such fiscal year. If the Commission so determines, the Commission shall by order, no later than March 1, adjust each of the rates applicable under subsections (b) and (c) for such fiscal year to a uniform adjusted rate that, when applied to the revised estimate of the aggregate dollar amount of sales for the remainder of such fiscal year, is reasonably likely to produce aggregate fee collections under this section (including fees collected during such five-month period and assessments collected under subsection (d) of this section) that are equal to the regular appropriation to the Commission by Congress for such fiscal year. In making such revised estimate, the Commission shall, after consultation with the Congressional Budget Office and the Office of Management and Budget, use the same methodology required by subsection (l).

“(3) **Review**.—In exercising its authority under this subsection, the Commission shall not be required to comply with the provisions of section 553 of title 5, United States Code. An adjusted rate prescribed under paragraph (1) or (2) and published under subsection (g) shall not be subject to judicial review.

“(4) **Effective Date.**—

“(A) **Annual Adjustment.**—Subject to subsections (i)(1)(B) and (k), an adjusted rate prescribed under paragraph (1) shall take effect on the later of—

“(i) the first day of the fiscal year to which such rate applies; or

“(ii) 60 days after the date on which an Act making a regular appropriation to the Commission for such fiscal year is enacted.

“(B) **Mid-Year Adjustment.**—An adjusted rate prescribed under paragraph (2) shall take effect on April 1 of the fiscal year to which such rate applies.”;

(E) in subsection (k), by striking “30 days” and inserting “60 days”; and

(F) in subsection (l), by striking “DEFINITIONS.—” and all that follows through “SALES.—The baseline” and inserting “BASELINE ESTIMATE OF THE AGGREGATE DOLLAR AMOUNT OF SALES.—The baseline”.

(2) **Effective Date.**—The amendments made by this subsection shall take effect on the later of—

(A) October 1, 2011; or

(B) the date of enactment of an Act making a regular appropriation to the Commission for fiscal year 2012.

(b) **Amendments to Registration Fee Provisions.**—
(1) Section 6(b) of the Securities Act of 1933.—Section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)) is amended—
(A) by striking “offsetting” each place that term appears and inserting “fee”;
(B) by striking paragraphs (1), (3), (4), (6), (8), and (9);
(C) by redesignating paragraph (2) as paragraph (1);
(D) by redesignating paragraph (5) as paragraph (2);
(E) by redesignating paragraph (7) as paragraph (3);
(F) by redesignating paragraph (10) as paragraph (5);
(G) by redesignating paragraph (11) as paragraph (6);
(H) in paragraph (1), as so redesignated, by striking “paragraph (5) or (6).” and inserting “paragraph (2).”;
(I) in paragraph (2), as so redesignated—
(i) by striking “of the fiscal years 2003 through 2011” and inserting “fiscal year”; and
(ii) by striking “paragraph (2)” and inserting “paragraph (1)”;
(J) by inserting after paragraph (3), as so redesignated, the following:
“(4) REVIEW AND EFFECTIVE DATE.—In exercising its authority under this subsection, the Commission shall not be required to comply with the provisions of section 553 of title 5, United States Code. An adjusted rate prescribed under paragraph (2) and published under paragraph (5) shall not be subject to judicial review. An adjusted rate prescribed under paragraph (2) shall take effect on the first day of the fiscal year to which such rate applies.”;
(K) in paragraph (5), as redesignated, by striking “April 30” and inserting “August 31”;
(L) in paragraph (6), as so redesignated—
(i) by striking “of the fiscal years 2002 through 2011” and inserting “fiscal year”; and
(ii) by inserting at the end of the table in subparagraph (A) the following:

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(2) Section 13(e) of the Securities Exchange Act of 1934.—Section 13(e) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(e)) is amended—
(A) in paragraph (3), by striking “paragraphs (5) and (6)” and inserting “paragraph (4)”;
(B) by striking paragraphs (4), (5), and (6);
(C) by inserting after paragraph (3) the following:
“(4) Annual Adjustment.—For each fiscal year, the Commission shall by order adjust the rate required by paragraph (3) for such fiscal year to a rate that is equal to the rate (expressed in dollars per million) that is applicable under section 6(b) of the Securities Act of 1933 for such fiscal year.

“(5) Fee Collections.—Fees collected pursuant to this subsection for fiscal year 2012 and each fiscal year thereafter shall be deposited and credited as general revenue of the Treasury and shall not be available for obligation.

“(6) Effective Date; Publication.—In exercising its authority under this subsection, the Commission shall not be required to comply with the provisions of section 553 of title 5, United States Code. An adjusted rate prescribed under paragraph (4) shall be published and take effect in accordance with section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)).”; and

(D) by striking paragraphs (8), (9), and (10).

(3) Section 14(g) of the Securities Exchange Act of 1934.—Section 14(g) of the Securities Exchange Act of 1934 (15 U.S.C. 78n(g)) is amended—

(A) in paragraph (1), by striking “paragraphs (5) and (6)” each time that term appears and inserting “paragraph (4)”;

(B) in paragraph (3), by striking “paragraphs (5) and (6)” and inserting “paragraph (4)”;

(C) by striking paragraphs (4), (5), and (6);

(D) by inserting after paragraph (3) the following:

“(4) Annual Adjustment.—For each fiscal year, the Commission shall by order adjust the rate required by paragraphs (1) and (3) for such fiscal year to a rate that is equal to the rate (expressed in dollars per million) that is applicable under section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)) for such fiscal year.

“(5) Fee Collection.—Fees collected pursuant to this subsection for fiscal year 2012 and each fiscal year thereafter shall be deposited and credited as general revenue of the Treasury and shall not be available for obligation.

“(6) Review; Effective Date; Publication.—In exercising its authority under this subsection, the Commission shall not be required to comply with the provisions of section 553 of title 5, United States Code. An adjusted rate prescribed under paragraph (4) shall be published and take effect in accordance with section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)).”;

(E) by striking paragraphs (8), (9), and (10); and

(F) by redesignating paragraph (11) as paragraph (8).

(4) Effective Date.—The amendments made by this subsection shall take effect on October 1, 2011, except that for fiscal year 2012, the Commission shall publish the rate established under section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)), as amended by this Act, on August 31, 2011.

(c) Authorization of Appropriations.—Section 35 of the Securities Exchange Act of 1934 (15 U.S.C. 78kk) is amended to read as follows:
SEC. 35. AUTHORIZATION OF APPROPRIATIONS.

"In addition to any other funds authorized to be appropriated to the Commission, there are authorized to be appropriated to carry out the functions, powers, and duties of the Commission—

“(1) for fiscal year 2011, $1,300,000,000;
“(2) for fiscal year 2012, $1,500,000,000;
“(3) for fiscal year 2013, $1,750,000,000;
“(4) for fiscal year 2014, $2,000,000,000; and
“(5) for fiscal year 2015, $2,250,000,000.”.

(d) TRANSMITTAL OF BUDGET REQUESTS.—

(1) AMENDMENT.—Section 31 of the Securities Exchange Act of 1934 (15 U.S.C. 78ee) is amended by adding at the end the following:

“(m) TRANSMITTAL OF COMMISSION BUDGET REQUESTS.—

“(1) BUDGET REQUIRED.—For fiscal year 2012, and each fiscal year thereafter, the Commission shall prepare and submit a budget to the President. Whenever the Commission submits a budget estimate or request to the President or the Office of Management and Budget, the Commission shall concurrently transmit copies of the estimate or request to the Committee on Appropriations of the Senate, the Committee on Appropriations of the House of Representatives, the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives.

“(2) SUBMISSION TO CONGRESS.—The President shall submit each budget submitted under paragraph (1) to Congress, in unaltered form, together with the annual budget for the Administration submitted by the President.

“(3) CONTENTS.—The Commission shall include in each budget submitted under paragraph (1)—

“(A) an itemization of the amount of funds necessary to carry out the functions of the Commission.
“(B) an amount to be designated as contingency funding to be used by the Commission to address unanticipated needs; and
“(C) a designation of any activities of the Commission for which multi-year budget authority would be suitable.”.

(2) BUDGET OF THE PRESIDENT.—For fiscal year 2012, and each fiscal year thereafter, the annual budget for the Administration submitted by the President to Congress shall reflect the amendments made by this section.

(e) SECURITIES AND EXCHANGE COMMISSION RESERVE FUND.—

(1) AMENDMENT.—Section 4 of the Securities Exchange Act of 1934 (15 U.S.C. 78d), as amended by this Act, is amended by adding at the end the following:

“(i) SECURITIES AND EXCHANGE COMMISSION RESERVE FUND.—

“(1) RESERVE FUND ESTABLISHED.—There is established in the Treasury of the United States a separate fund, to be known as the ‘Securities and Exchange Commission Reserve Fund’ (referred to in this subsection as the ‘Reserve Fund’).

“(2) RESERVE FUND AMOUNTS.—

“(A) IN GENERAL.—Except as provided in subparagraph (B), any registration fees collected by the Commission under section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)) or section 24(f) of the Investment Company Act of 1940
(15 U.S.C. 80a-24(f)) shall be deposited into the Reserve Fund.

“(B) LIMITATIONS.—For any 1 fiscal year—

“(i) the amount deposited in the Fund may not exceed $50,000,000; and

“(ii) the balance in the Fund may not exceed $100,000,000.

“(C) EXCESS FEES.—Any amounts in excess of the limitations described in subparagraph (B) that the Commission collects from registration fees under section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)) or section 24(f) of the Investment Company Act of 1940 (15 U.S.C. 80a-24(f)) shall be deposited in the General Fund of the Treasury of the United States and shall not be available for obligation by the Commission.

“(3) USE OF AMOUNTS IN RESERVE FUND.—The Commission may obligate amounts in the Reserve Fund, not to exceed a total of $100,000,000 in any 1 fiscal year, as the Commission determines is necessary to carry out the functions of the Commission. Any amounts in the reserve fund shall remain available until expended. Not later than 10 days after the date on which the Commission obligates amounts under this paragraph, the Commission shall notify Congress of the date, amount, and purpose of the obligation.

“(4) RULE OF CONSTRUCTION.—Amounts collected and deposited in the Reserve Fund shall not be construed to be Government funds or appropriated monies and shall not be subject to apportionment for the purpose of chapter 15 of title 31, United States Code, or under any other authority.”.

(2) EFFECTIVE DATE.—The amendment made by this subsection shall take effect on October 1, 2011.

TITLE X—BUREAU OF CONSUMER FINANCIAL PROTECTION

SEC. 1001. SHORT TITLE.

This title may be cited as the “Consumer Financial Protection Act of 2010”.

SEC. 1002. DEFINITIONS.

Except as otherwise provided in this title, for purposes of this title, the following definitions shall apply:

(1) AFFILIATE.—The term “affiliate” means any person that controls, is controlled by, or is under common control with another person.

(2) BUREAU.—The term “Bureau” means the Bureau of Consumer Financial Protection.

(3) BUSINESS OF INSURANCE.—The term “business of insurance” means the writing of insurance or the reinsuring of risks by an insurer, including all acts necessary to such writing or reinsuring and the activities relating to the writing of insurance or the reinsuring of risks conducted by persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons.
(4) CONSUMER.—The term “consumer” means an individual or an agent, trustee, or representative acting on behalf of an individual.

(5) CONSUMER FINANCIAL PRODUCT OR SERVICE.—The term “consumer financial product or service” means any financial product or service that is described in one or more categories under—

(A) paragraph (15) and is offered or provided for use by consumers primarily for personal, family, or household purposes; or

(B) clause (i), (iii), (ix), or (x) of paragraph (15)(A), and is delivered, offered, or provided in connection with a consumer financial product or service referred to in subparagraph (A).

(6) COVERED PERSON.—The term “covered person” means—

(A) any person that engages in offering or providing a consumer financial product or service; and

(B) any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person.

(7) CREDIT.—The term “credit” means the right granted by a person to a consumer to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment for such purchase.

(8) DEPOSIT-TAKING ACTIVITY.—The term “deposit-taking activity” means—

(A) the acceptance of deposits, maintenance of deposit accounts, or the provision of services related to the acceptance of deposits or the maintenance of deposit accounts;

(B) the acceptance of funds, the provision of other services related to the acceptance of funds, or the maintenance of member share accounts by a credit union; or

(C) the receipt of funds or the equivalent thereof, as the Bureau may determine by rule or order, received or held by a covered person (or an agent for a covered person) for the purpose of facilitating a payment or transferring funds or value of funds between a consumer and a third party.

(9) DESIGNATED TRANSFER DATE.—The term “designated transfer date” means the date established under section 1062.

(10) DIRECTOR.—The term “Director” means the Director of the Bureau.

(11) ELECTRONIC CONDUIT SERVICES.—The term “electronic conduit services”—

(A) means the provision, by a person, of electronic data transmission, routing, intermediate or transient storage, or connections to a telecommunications system or network; and

(B) does not include a person that provides electronic conduit services if, when providing such services, the person—

(i) selects or modifies the content of the electronic data;

(ii) transmits, routes, stores, or provides connections for electronic data, including financial data, in a manner that such financial data is differentiated from other types of data of the same form that such
person transmits, routes, or stores, or with respect to which, provides connections; or

(iii) is a payee, payor, correspondent, or similar party to a payment transaction with a consumer.

(12) ENUMERATED CONSUMER LAWS.—Except as otherwise specifically provided in section 1029, subtitle G or subtitle H, the term “enumerated consumer laws” means—

(A) the Alternative Mortgage Transaction Parity Act of 1982 (12 U.S.C. 3801 et seq.);

(B) the Consumer Leasing Act of 1976 (15 U.S.C. 1667 et seq.);

(C) the Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.), except with respect to section 920 of that Act;

(D) the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.);

(E) the Fair Credit Billing Act (15 U.S.C. 1666 et seq.);

(F) the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), except with respect to sections 615(e) and 628 of that Act (15 U.S.C. 1681m(e), 1681w);

(G) the Home Owners Protection Act of 1998 (12 U.S.C. 4901 et seq.);

(H) the Fair Debt Collection Practices Act (15 U.S.C. 1692 et seq.);

(I) subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act (12 U.S.C. 1831t(c)–(f));

(J) sections 502 through 509 of the Gramm-Leach-Bliley Act (15 U.S.C. 6802–6809) except for section 505 as it applies to section 501(b);

(K) the Home Mortgage Disclosure Act of 1975 (12 U.S.C. 2801 et seq.);

(L) the Home Ownership and Equity Protection Act of 1994 (15 U.S.C. 1601 note);

(M) the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 et seq.);

(N) the S.A.F.E. Mortgage Licensing Act of 2008 (12 U.S.C. 5101 et seq.);

(O) the Truth in Lending Act (15 U.S.C. 1601 et seq.);

(P) the Truth in Savings Act (12 U.S.C. 4301 et seq.);

(Q) section 626 of the Omnibus Appropriations Act, 2009 (Public Law 111–8); and


(13) FAIR LENDING.—The term “fair lending” means fair, equitable, and nondiscriminatory access to credit for consumers.

(14) FEDERAL CONSUMER FINANCIAL LAW.—The term “Federal consumer financial law” means the provisions of this title, the enumerated consumer laws, the laws for which authorities are transferred under subtitles F and H, and any rule or order prescribed by the Bureau under this title, an enumerated consumer law, or pursuant to the authorities transferred under subtitles F and H. The term does not include the Federal Trade Commission Act.

(15) FINANCIAL PRODUCT OR SERVICE.—

(A) IN GENERAL.—The term “financial product or service” means—
(i) extending credit and servicing loans, including acquiring, purchasing, selling, brokering, or other extensions of credit (other than solely extending commercial credit to a person who originates consumer credit transactions);

(ii) extending or brokering leases of personal or real property that are the functional equivalent of purchase finance arrangements, if—

(I) the lease is on a non-operating basis;

(II) the initial term of the lease is at least 90 days; and

(III) in the case of a lease involving real property, at the inception of the initial lease, the transaction is intended to result in ownership of the leased property to be transferred to the lessee, subject to standards prescribed by the Bureau;

(iii) providing real estate settlement services, except such services excluded under subparagraph (C), or performing appraisals of real estate or personal property;

(iv) engaging in deposit-taking activities, transmitting or exchanging funds, or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer;

(v) selling, providing, or issuing stored value or payment instruments, except that, in the case of a sale of, or transaction to reload, stored value, only if the seller exercises substantial control over the terms or conditions of the stored value provided to the consumer where, for purposes of this clause—

(I) a seller shall not be found to exercise substantial control over the terms or conditions of the stored value if the seller is not a party to the contract with the consumer for the stored value product, and another person is principally responsible for establishing the terms or conditions of the stored value; and

(II) advertising the nonfinancial goods or services of the seller on the stored value card or device is not in itself an exercise of substantial control over the terms or conditions;

(vi) providing check cashing, check collection, or check guaranty services;

(vii) providing payments or other financial data processing products or services to a consumer by any technological means, including processing or storing financial or banking data for any payment instrument, or through any payments systems or network used for processing payments data, including payments made through an online banking system or mobile telecommunications network, except that a person shall not be deemed to be a covered person with respect to financial data processing solely because the person—
is a merchant, retailer, or seller of any nonfinancial good or service who engages in financial data processing by transmitting or storing payments data about a consumer exclusively for purpose of initiating payments instructions by the consumer to pay such person for the purchase of, or to complete a commercial transaction for, such nonfinancial good or service sold directly by such person to the consumer; or

(II) provides access to a host server to a person for purposes of enabling that person to establish and maintain a website;

(viii) providing financial advisory services (other than services relating to securities provided by a person regulated by the Commission or a person regulated by a State securities Commission, but only to the extent that such person acts in a regulated capacity) to consumers on individual financial matters or relating to proprietary financial products or services (other than by publishing any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation, including publishing market data, news, or data analytics or investment information or recommendations that are not tailored to the individual needs of a particular consumer), including—

(I) providing credit counseling to any consumer; and

(II) providing services to assist a consumer with debt management or debt settlement, modifying the terms of any extension of credit, or avoiding foreclosure;

(ix) collecting, analyzing, maintaining, or providing consumer report information or other account information, including information relating to the credit history of consumers, used or expected to be used in connection with any decision regarding the offering or provision of a consumer financial product or service, except to the extent that—

(I) a person—

(aa) collects, analyzes, or maintains information that relates solely to the transactions between a consumer and such person;

(bb) provides the information described in item (aa) to an affiliate of such person; or

(cc) provides information that is used or expected to be used solely in any decision regarding the offering or provision of a product or service that is not a consumer financial product or service, including a decision for employment, government licensing, or a residential lease or tenancy involving a consumer; and

(II) the information described in subclause (I)(aa) is not used by such person or affiliate in connection with any decision regarding the offering or provision of a consumer financial product or
service to the consumer, other than credit described in section 1027(a)(2)(A);
(x) collecting debt related to any consumer financial product or service; and
(xi) such other financial product or service as may be defined by the Bureau, by regulation, for purposes of this title, if the Bureau finds that such financial product or service is—
(I) entered into or conducted as a subterfuge or with a purpose to evade any Federal consumer financial law; or
(II) permissible for a bank or for a financial holding company to offer or to provide under any provision of a Federal law or regulation applicable to a bank or a financial holding company, and has, or likely will have, a material impact on consumers.

(B) RULE OF CONSTRUCTION.—
(i) IN GENERAL.—For purposes of subparagraph (A)(xi)(II), and subject to clause (ii) of this subparagraph, the following activities provided to a covered person shall not, for purposes of this title, be considered incidental or complementary to a financial activity permissible for a financial holding company to engage in under any provision of a Federal law or regulation applicable to a financial holding company:
(I) Providing information products or services to a covered person for identity authentication.
(II) Providing information products or services for fraud or identify theft detection, prevention, or investigation.
(III) Providing document retrieval or delivery services.
(IV) Providing public records information retrieval.
(V) Providing information products or services for anti-money laundering activities.
(ii) LIMITATION.—Nothing in clause (i) may be construed as modifying or limiting the authority of the Bureau to exercise any—
(I) examination or enforcement powers authority under this title with respect to a covered person or service provider engaging in an activity described in subparagraph (A)(ix); or
(II) powers authorized by this title to prescribe rules, issue orders, or take other actions under any enumerated consumer law or law for which the authorities are transferred under subtitle F or H.

(C) EXCLUSIONS.—The term “financial product or service” does not include—
(i) the business of insurance; or
(ii) electronic conduit services.

(16) FOREIGN EXCHANGE.—The term “foreign exchange” means the exchange, for compensation, of currency of the United States or of a foreign government for currency of another government.
(17) **Insured credit union.**—The term “insured credit union” has the same meaning as in section 101 of the Federal Credit Union Act (12 U.S.C. 1752).

(18) **Payment instrument.**—The term “payment instrument” means a check, draft, warrant, money order, traveler’s check, electronic instrument, or other instrument, payment of funds, or monetary value (other than currency).

(19) **Person.**—The term “person” means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

(20) **Person regulated by the Commodity Futures Trading Commission.**—The term “person regulated by the Commodity Futures Trading Commission” means any person that is registered, or required by statute or regulation to be registered, with the Commodity Futures Trading Commission, but only to the extent that the activities of such person are subject to the jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act.

(21) **Person regulated by the Commission.**—The term “person regulated by the Commission” means a person who is—

(A) a broker or dealer that is required to be registered under the Securities Exchange Act of 1934;

(B) an investment adviser that is registered under the Investment Advisers Act of 1940;

(C) an investment company that is required to be registered under the Investment Company Act of 1940, and any company that has elected to be regulated as a business development company under that Act;

(D) a national securities exchange that is required to be registered under the Securities Exchange Act of 1934;

(E) a transfer agent that is required to be registered under the Securities Exchange Act of 1934;

(F) a clearing corporation that is required to be registered under the Securities Exchange Act of 1934;

(G) any self-regulatory organization that is required to be registered with the Commission;

(H) any nationally recognized statistical rating organization that is required to be registered with the Commission;

(I) any securities information processor that is required to be registered with the Commission;

(J) any municipal securities dealer that is required to be registered with the Commission;

(K) any other person that is required to be registered with the Commission under the Securities Exchange Act of 1934; and

(L) any employee, agent, or contractor acting on behalf of, registered with, or providing services to, any person described in any of subparagraphs (A) through (K), but only to the extent that any person described in any of subparagraphs (A) through (K), or the employee, agent, or contractor of such person, acts in a regulated capacity.

(22) **Person regulated by a State insurance regulator.**—The term “person regulated by a State insurance regulator” means any person that is engaged in the business of
insurance and subject to regulation by any State insurance regulator, but only to the extent that such person acts in such capacity.

(23) Person that performs income tax preparation activities for consumers.—The term “person that performs income tax preparation activities for consumers” means—

(A) any tax return preparer (as defined in section 7701(a)(36) of the Internal Revenue Code of 1986), regardless of whether compensated, but only to the extent that the person acts in such capacity;

(B) any person regulated by the Secretary under section 330 of title 31, United States Code, but only to the extent that the person acts in such capacity; and

(C) any authorized IRS e-file Providers (as defined for purposes of section 7216 of the Internal Revenue Code of 1986), but only to the extent that the person acts in such capacity.

(24) Prudential regulator.—The term “prudential regulator” means—

(A) in the case of an insured depository institution or depository institution holding company (as defined in section 3 of the Federal Deposit Insurance Act), or subsidiary of such institution or company, the appropriate Federal banking agency, as that term is defined in section 3 of the Federal Deposit Insurance Act; and

(B) in the case of an insured credit union, the National Credit Union Administration.

(25) Related person.—The term “related person”—

(A) shall apply only with respect to a covered person that is not a bank holding company (as that term is defined in section 2 of the Bank Holding Company Act of 1956), credit union, or depository institution;

(B) shall be deemed to mean a covered person for all purposes of any provision of Federal consumer financial law; and

(C) means—

(i) any director, officer, or employee charged with managerial responsibility for, or controlling shareholder of, or agent for, such covered person;

(ii) any shareholder, consultant, joint venture partner, or other person, as determined by the Bureau (by rule or on a case-by-case basis) who materially participates in the conduct of the affairs of such covered person; and

(iii) any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in any—

(I) violation of any provision of law or regulation; or

(II) breach of a fiduciary duty.

(26) Service provider.—

(A) In general.—The term “service provider” means any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service, including a person that—
(i) participates in designing, operating, or maintaining the consumer financial product or service; or

(ii) processes transactions relating to the consumer financial product or service (other than unknowingly or incidentally transmitting or processing financial data in a manner that such data is undifferentiated from other types of data of the same form as the person transmits or processes).

(B) EXCEPTIONS.—The term ‘‘service provider’’ does not include a person solely by virtue of such person offering or providing to a covered person—

(i) a support service of a type provided to businesses generally or a similar ministerial service; or

(ii) time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media.

(C) RULE OF CONSTRUCTION.—A person that is a service provider shall be deemed to be a covered person to the extent that such person engages in the offering or provision of its own consumer financial product or service.

(27) STATE.—The term ‘‘State’’ means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, or the United States Virgin Islands or any federally recognized Indian tribe, as defined by the Secretary of the Interior under section 104(a) of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a–1(a)).

(28) STORED VALUE.—

(A) IN GENERAL.—The term ‘‘stored value’’ means funds or monetary value represented in any electronic format, whether or not specially encrypted, and stored or capable of storage on electronic media in such a way as to be retrievable and transferred electronically, and includes a prepaid debit card or product, or any other similar product, regardless of whether the amount of the funds or monetary value may be increased or reloaded.

(B) EXCLUSION.—Notwithstanding subparagraph (A), the term ‘‘stored value’’ does not include a special purpose card or certificate, which shall be defined for purposes of this paragraph as funds or monetary value represented in any electronic format, whether or not specially encrypted, that is—

(i) issued by a merchant, retailer, or other seller of nonfinancial goods or services;

(ii) redeemable only for transactions with the merchant, retailer, or seller of nonfinancial goods or services or with an affiliate of such person, which affiliate itself is a merchant, retailer, or seller of nonfinancial goods or services;

(iii) issued in a specified amount that, except in the case of a card or product used solely for telephone services, may not be increased or reloaded;

(iv) purchased on a prepaid basis in exchange for payment; and
Subtitle A—Bureau of Consumer Financial Protection

SEC. 1011. ESTABLISHMENT OF THE BUREAU OF CONSUMER FINANCIAL PROTECTION.

(a) BUREAU ESTABLISHED.—There is established in the Federal Reserve System, an independent bureau to be known as the “Bureau of Consumer Financial Protection”, which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws. The Bureau shall be considered an Executive agency, as defined in section 105 of title 5, United States Code. Except as otherwise provided expressly by law, all Federal laws dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Bureau.

(b) DIRECTOR AND DEPUTY DIRECTOR.—
(1) IN GENERAL.—There is established the position of the Director, who shall serve as the head of the Bureau.

(2) APPOINTMENT.—Subject to paragraph (3), the Director shall be appointed by the President, by and with the advice and consent of the Senate.

(3) QUALIFICATION.—The President shall nominate the Director from among individuals who are citizens of the United States.

(4) COMPENSATION.—The Director shall be compensated at the rate prescribed for level II of the Executive Schedule under section 5313 of title 5, United States Code.

(5) DEPUTY DIRECTOR.—There is established the position of Deputy Director, who shall—
(A) be appointed by the Director; and
(B) serve as acting Director in the absence or unavailability of the Director.

(c) TERM.—
(1) IN GENERAL.—The Director shall serve for a term of 5 years.

(2) EXPIRATION OF TERM.—An individual may serve as Director after the expiration of the term for which appointed, until a successor has been appointed and qualified.

(3) REMOVAL FOR CAUSE.—The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.
Service Restriction.—No Director or Deputy Director may hold any office, position, or employment in any Federal reserve bank, Federal home loan bank, covered person, or service provider during the period of service of such person as Director or Deputy Director.

Offices.—The principal office of the Bureau shall be in the District of Columbia. The Director may establish regional offices of the Bureau, including in cities in which the Federal reserve banks, or branches of such banks, are located, in order to carry out the responsibilities assigned to the Bureau under the Federal consumer financial laws.

SEC. 1012. EXECUTIVE AND ADMINISTRATIVE POWERS.

(a) Powers of the Bureau.—The Bureau is authorized to establish the general policies of the Bureau with respect to all executive and administrative functions, including—

(1) the establishment of rules for conducting the general business of the Bureau, in a manner not inconsistent with this title;
(2) to bind the Bureau and enter into contracts;
(3) directing the establishment and maintenance of divisions or other offices within the Bureau, in order to carry out the responsibilities under the Federal consumer financial laws, and to satisfy the requirements of other applicable law;
(4) to coordinate and oversee the operation of all administrative, enforcement, and research activities of the Bureau;
(5) to adopt and use a seal;
(6) to determine the character of and the necessity for the obligations and expenditures of the Bureau;
(7) the appointment and supervision of personnel employed by the Bureau;
(8) the distribution of business among personnel appointed and supervised by the Director and among administrative units of the Bureau;
(9) the use and expenditure of funds;
(10) implementing the Federal consumer financial laws through rules, orders, guidance, interpretations, statements of policy, examinations, and enforcement actions; and
(11) performing such other functions as may be authorized or required by law.

(b) Delegation of Authority.—The Director of the Bureau may delegate to any duly authorized employee, representative, or agent any power vested in the Bureau by law.

(c) Autonomy of the Bureau.—

(1) Coordination with the Board of Governors.—Notwithstanding any other provision of law applicable to the supervision or examination of persons with respect to Federal consumer financial laws, the Board of Governors may delegate to the Bureau the authorities to examine persons subject to the jurisdiction of the Board of Governors for compliance with the Federal consumer financial laws.

(2) Autonomy.—Notwithstanding the authorities granted to the Board of Governors under the Federal Reserve Act, the Board of Governors may not—

(A) intervene in any matter or proceeding before the Director, including examinations or enforcement actions, unless otherwise specifically provided by law;
(B) appoint, direct, or remove any officer or employee of the Bureau; or

(C) merge or consolidate the Bureau, or any of the functions or responsibilities of the Bureau, with any division or office of the Board of Governors or the Federal reserve banks.

(3) Rules and Orders.—No rule or order of the Bureau shall be subject to approval or review by the Board of Governors. The Board of Governors may not delay or prevent the issuance of any rule or order of the Bureau.

(4) Recommendations and Testimony.—No officer or agency of the United States shall have any authority to require the Director or any other officer of the Bureau to submit legislative recommendations, or testimony or comments on legislation, to any officer or agency of the United States for approval, comments, or review prior to the submission of such recommendations, testimony, or comments to the Congress, if such recommendations, testimony, or comments to the Congress include a statement indicating that the views expressed therein are those of the Director or such officer, and do not necessarily reflect the views of the Board of Governors or the President.

(5) Clarification of Autonomy of the Bureau in Legal Proceedings.—The Bureau shall not be liable under any provision of law for any action or inaction of the Board of Governors, and the Board of Governors shall not be liable under any provision of law for any action or inaction of the Bureau.

12 USC 5493.

SEC. 1013. Administration.

(a) Personnel.—

(1) Appointment.—

(A) In general.—The Director may fix the number of, and appoint and direct, all employees of the Bureau, in accordance with the applicable provisions of title 5, United States Code.

(B) Employees of the Bureau.—The Director is authorized to employ attorneys, compliance examiners, compliance supervision analysts, economists, statisticians, and other employees as may be deemed necessary to conduct the business of the Bureau. Unless otherwise provided expressly by law, any individual appointed under this section shall be an employee as defined in section 2105 of title 5, United States Code, and subject to the provisions of such title and other laws generally applicable to the employees of an Executive agency.

(C) Waiver Authority.—

(i) In general.—In making any appointment under subparagraph (A), the Director may waive the requirements of chapter 33 of title 5, United States Code, and the regulations implementing such chapter, to the extent necessary to appoint employees on terms and conditions that are consistent with those set forth in section 11(1) of the Federal Reserve Act (12 U.S.C. 248(1)), while providing for—

(I) fair, credible, and transparent methods of establishing qualification requirements for, recruitment for, and appointments to positions;
(II) fair and open competition and equitable treatment in the consideration and selection of individuals to positions;

(III) fair, credible, and transparent methods of assigning, reassigning, detailing, transferring, and promoting employees.

(ii) Veterans Preferences.—In implementing this subparagraph, the Director shall comply with the provisions of section 2302(b)(11), regarding veterans’ preference requirements, in a manner consistent with that in which such provisions are applied under chapter 33 of title 5, United States Code. The authority under this subparagraph to waive the requirements of that chapter 33 shall expire 5 years after the date of enactment of this Act.

(2) Compensation.—Notwithstanding any otherwise applicable provision of title 5, United States Code, concerning compensation, including the provisions of chapter 51 and chapter 53, the following provisions shall apply with respect to employees of the Bureau:

(A) The rates of basic pay for all employees of the Bureau may be set and adjusted by the Director.

(B) The Director shall at all times provide compensation (including benefits) to each class of employees that, at a minimum, are comparable to the compensation and benefits then being provided by the Board of Governors for the corresponding class of employees.

(C) All such employees shall be compensated (including benefits) on terms and conditions that are consistent with the terms and conditions set forth in section 11(l) of the Federal Reserve Act (12 U.S.C. 248(l)).

(3) Bureau Participation in Federal Reserve System Retirement Plan and Federal Reserve System Thrift Plan.—

(A) Employee Election.—Employees appointed to the Bureau may elect to participate in either—

(i) both the Federal Reserve System Retirement Plan and the Federal Reserve System Thrift Plan, under the same terms on which such participation is offered to employees of the Board of Governors who participate in such plans and under the terms and conditions specified under section 1064(i)(1)(C); or

(ii) the Civil Service Retirement System under chapter 83 of title 5, United States Code, or the Federal Employees Retirement System under chapter 84 of title 5, United States Code, if previously covered under one of those Federal employee retirement systems.

(B) Election Period.—Bureau employees shall make an election under this paragraph not later than 1 year after the date of appointment by, or transfer under subtitle F to, the Bureau. Participation in, and benefit accruals under, any other retirement plan established or maintained by the Federal Government shall end not later than the date on which participation in, and benefit accruals under, the Federal Reserve System Retirement Plan and Federal Reserve System Thrift Plan begin.
(C) **EMPLOYER CONTRIBUTION.**—The Bureau shall pay an employer contribution to the Federal Reserve System Retirement Plan, in the amount established as an employer contribution under the Federal Employees Retirement System, as established under chapter 84 of title 5, United States Code, for each Bureau employee who elects to participate in the Federal Reserve System Retirement Plan. The Bureau shall pay an employer contribution to the Federal Reserve System Thrift Plan for each Bureau employee who elects to participate in such plan, as required under the terms of such plan.

(D) **CONTROLLED GROUP STATUS.**—The Bureau is the same employer as the Federal Reserve System (as comprised of the Board of Governors and each of the 12 Federal reserve banks prior to the date of enactment of this Act) for purposes of subsections (b), (c), (m), and (o) of section 414 of the Internal Revenue Code of 1986, (26 U.S.C. 414).

(4) **LABOR-MANAGEMENT RELATIONS.**—Chapter 71 of title 5, United States Code, shall apply to the Bureau and the employees of the Bureau.

(5) **AGENCY OMBUDSMAN.**—

(A) **ESTABLISHMENT REQUIRED.**—Not later than 180 days after the designated transfer date, the Bureau shall appoint an ombudsman.

(B) **DUTIES OF OMBUDSMAN.**—The ombudsman appointed in accordance with subparagraph (A) shall—

(i) act as a liaison between the Bureau and any affected person with respect to any problem that such party may have in dealing with the Bureau, resulting from the regulatory activities of the Bureau; and

(ii) assure that safeguards exist to encourage complainants to come forward and preserve confidentiality.

(b) **SPECIFIC FUNCTIONAL UNITS.**—

(1) **RESEARCH.**—The Director shall establish a unit whose functions shall include researching, analyzing, and reporting on—

(A) developments in markets for consumer financial products or services, including market areas of alternative consumer financial products or services with high growth rates and areas of risk to consumers;

(B) access to fair and affordable credit for traditionally underserved communities;

(C) consumer awareness, understanding, and use of disclosures and communications regarding consumer financial products or services;

(D) consumer awareness and understanding of costs, risks, and benefits of consumer financial products or services;

(E) consumer behavior with respect to consumer financial products or services, including performance on mortgage loans; and

(F) experiences of traditionally underserved consumers, including un-banked and under-banked consumers.
(2) COMMUNITY AFFAIRS.—The Director shall establish a unit whose functions shall include providing information, guidance, and technical assistance regarding the offering and provision of consumer financial products or services to traditionally underserved consumers and communities.

(3) COLLECTING AND TRACKING COMPLAINTS.—

(A) IN GENERAL.—The Director shall establish a unit whose functions shall include establishing a single, toll-free telephone number, a website, and a database or utilizing an existing database to facilitate the centralized collection of, monitoring of, and response to consumer complaints regarding consumer financial products or services. The Director shall coordinate with the Federal Trade Commission or other Federal agencies to route complaints to such agencies, where appropriate.

(B) ROUTING CALLS TO STATES.—To the extent practicable, State agencies may receive appropriate complaints from the systems established under subparagraph (A), if—

(i) the State agency system has the functional capacity to receive calls or electronic reports routed by the Bureau systems;

(ii) the State agency has satisfied any conditions of participation in the system that the Bureau may establish, including treatment of personally identifiable information and sharing of information on complaint resolution or related compliance procedures and resources; and

(iii) participation by the State agency includes measures necessary to provide for protection of personally identifiable information that conform to the standards for protection of the confidentiality of personally identifiable information and for data integrity and security that apply to the Federal agencies described in subparagraph (D).

(C) REPORTS TO THE CONGRESS.—The Director shall present an annual report to Congress not later than March 31 of each year on the complaints received by the Bureau in the prior year regarding consumer financial products and services. Such report shall include information and analysis about complaint numbers, complaint types, and, where applicable, information about resolution of complaints.

(D) DATA SHARING REQUIRED.—To facilitate preparation of the reports required under subparagraph (C), supervision and enforcement activities, and monitoring of the market for consumer financial products and services, the Bureau shall share consumer complaint information with prudential regulators, the Federal Trade Commission, other Federal agencies, and State agencies, subject to the standards applicable to Federal agencies for protection of the confidentiality of personally identifiable information and for data security and integrity. The prudential regulators, the Federal Trade Commission, and other Federal agencies shall share data relating to consumer complaints regarding consumer financial products and services with the Bureau, subject to the standards applicable to Federal agencies.
for protection of confidentiality of personally identifiable information and for data security and integrity.

(c) Office of Fair Lending and Equal Opportunity.—

(1) Establishment.—The Director shall establish within the Bureau the Office of Fair Lending and Equal Opportunity.

(2) Functions.—The Office of Fair Lending and Equal Opportunity shall have such powers and duties as the Director may delegate to the Office, including—

(A) providing oversight and enforcement of Federal laws intended to ensure the fair, equitable, and nondiscriminatory access to credit for both individuals and communities that are enforced by the Bureau, including the Equal Credit Opportunity Act and the Home Mortgage Disclosure Act;

(B) coordinating fair lending efforts of the Bureau with other Federal agencies and State regulators, as appropriate, to promote consistent, efficient, and effective enforcement of Federal fair lending laws;

(C) working with private industry, fair lending, civil rights, consumer and community advocates on the promotion of fair lending compliance and education; and

(D) providing annual reports to Congress on the efforts of the Bureau to fulfill its fair lending mandate.

(3) Administration of Office.—There is established the position of Assistant Director of the Bureau for Fair Lending and Equal Opportunity, who—

(A) shall be appointed by the Director; and

(B) shall carry out such duties as the Director may delegate to such Assistant Director.

(d) Office of Financial Education.—

(1) Establishment.—The Director shall establish an Office of Financial Education, which shall be responsible for developing and implementing initiatives intended to educate and empower consumers to make better informed financial decisions.

(2) Other Duties.—The Office of Financial Education shall develop and implement a strategy to improve the financial literacy of consumers that includes measurable goals and objectives, in consultation with the Financial Literacy and Education Commission, consistent with the National Strategy for Financial Literacy, through activities including providing opportunities for consumers to access—

(A) financial counseling, including community-based financial counseling, where practicable;

(B) information to assist with the evaluation of credit products and the understanding of credit histories and scores;

(C) savings, borrowing, and other services found at mainstream financial institutions;

(D) activities intended to—

(i) prepare the consumer for educational expenses and the submission of financial aid applications, and other major purchases;

(ii) reduce debt; and

(iii) improve the financial situation of the consumer;
(E) assistance in developing long-term savings strategies; and
(F) wealth building and financial services during the preparation process to claim earned income tax credits and Federal benefits.

(3) COORDINATION.—The Office of Financial Education shall coordinate with other units within the Bureau in carrying out its functions, including—
(A) working with the Community Affairs Office to implement the strategy to improve financial literacy of consumers; and
(B) working with the research unit established by the Director to conduct research related to consumer financial education and counseling.

(4) REPORT.—Not later than 24 months after the designated transfer date, and annually thereafter, the Director shall submit a report on its financial literacy activities and strategy to improve financial literacy of consumers to—
(A) the Committee on Banking, Housing, and Urban Affairs of the Senate; and
(B) the Committee on Financial Services of the House of Representatives.

(5) MEMBERSHIP IN FINANCIAL LITERACY AND EDUCATION COMMISSION.—Section 513(c)(1) of the Financial Literacy and Education Improvement Act (20 U.S.C. 9702(c)(1)) is amended—
(A) in subparagraph (B), by striking ''and'' at the end;
(B) by redesignating subparagraph (C) as subparagraph (D); and
(C) by inserting after subparagraph (B) the following new subparagraph:
``(C) the Director of the Bureau of Consumer Financial Protection; and''.

(6) CONFORMING AMENDMENT.—Section 513(d) of the Financial Literacy and Education Improvement Act (20 U.S.C. 9702(d)) is amended by adding at the end the following: “The Director of the Bureau of Consumer Financial Protection shall serve as the Vice Chairman.”.

(7) STUDY AND REPORT ON FINANCIAL LITERACY PROGRAM.—
(A) IN GENERAL.—The Comptroller General of the United States shall conduct a study to identify—
(i) the feasibility of certification of persons providing the programs or performing the activities described in paragraph (2), including recognizing outstanding programs, and developing guidelines and resources for community-based practitioners, including—
(I) a potential certification process and standards for certification;
(II) appropriate certifying entities;
(III) resources required for funding such a process; and
(IV) a cost-benefit analysis of such certification;
(ii) technological resources intended to collect, analyze, evaluate, or promote financial literacy and counseling programs;
(iii) effective methods, tools, and strategies intended to educate and empower consumers about personal finance management; and

(iv) recommendations intended to encourage the development of programs that effectively improve financial education outcomes and empower consumers to make better informed financial decisions based on findings.

(B) REPORT.—Not later than 1 year after the date of enactment of this Act, the Comptroller General of the United States shall submit a report on the results of the study conducted under this paragraph to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.

(e) OFFICE OF SERVICE MEMBER AFFAIRS.—

(1) IN GENERAL.—The Director shall establish an Office of Service Member Affairs, which shall be responsible for developing and implementing initiatives for service members and their families intended to—

(A) educate and empower service members and their families to make better informed decisions regarding consumer financial products and services;

(B) coordinate with the unit of the Bureau established under subsection (b)(3), in order to monitor complaints by service members and their families and responses to those complaints by the Bureau or other appropriate Federal or State agency; and

(C) coordinate efforts among Federal and State agencies, as appropriate, regarding consumer protection measures relating to consumer financial products and services offered to, or used by, service members and their families.

(2) COORDINATION.—

(A) REGIONAL SERVICES.—The Director is authorized to assign employees of the Bureau as may be deemed necessary to conduct the business of the Office of Service Member Affairs, including by establishing and maintaining the functions of the Office in regional offices of the Bureau located near military bases, military treatment facilities, or other similar military facilities.

(B) AGREEMENTS.—The Director is authorized to enter into memoranda of understanding and similar agreements with the Department of Defense, including any branch or agency as authorized by the department, in order to carry out the business of the Office of Service Member Affairs.

(3) DEFINITION.—As used in this subsection, the term “service member” means any member of the United States Armed Forces and any member of the National Guard or Reserves.

(f) TIMING.—The Office of Fair Lending and Equal Opportunity, the Office of Financial Education, and the Office of Service Member Affairs shall each be established not later than 1 year after the designated transfer date.

(g) OFFICE OF FINANCIAL PROTECTION FOR OLDER AMERICANS.—

(1) ESTABLISHMENT.—Before the end of the 180-day period beginning on the designated transfer date, the Director shall
establish the Office of Financial Protection for Older Americans, the functions of which shall include activities designed to facilitate the financial literacy of individuals who have attained the age of 62 years or more (in this subsection, referred to as “seniors”) on protection from unfair, deceptive, and abusive practices and on current and future financial choices, including through the dissemination of materials to seniors on such topics.

(2) ASSISTANT DIRECTOR.—The Office of Financial Protection for Older Americans (in this subsection referred to as the “Office”) shall be headed by an assistant director.

(3) DUTIES.—The Office shall—

(A) develop goals for programs that provide seniors financial literacy and counseling, including programs that—

(i) help seniors recognize warning signs of unfair, deceptive, or abusive practices, protect themselves from such practices;
(ii) provide one-on-one financial counseling on issues including long-term savings and later-life economic security; and
(iii) provide personal consumer credit advocacy to respond to consumer problems caused by unfair, deceptive, or abusive practices;

(B) monitor certifications or designations of financial advisors who advise seniors and alert the Commission and State regulators of certifications or designations that are identified as unfair, deceptive, or abusive;

(C) not later than 18 months after the date of the establishment of the Office, submit to Congress and the Commission any legislative and regulatory recommendations on the best practices for—

(i) disseminating information regarding the legitimacy of certifications of financial advisers who advise seniors;
(ii) methods in which a senior can identify the financial advisor most appropriate for the senior’s needs; and
(iii) methods in which a senior can verify a financial advisor’s credentials;

(D) conduct research to identify best practices and effective methods, tools, technology and strategies to educate and counsel seniors about personal finance management with a focus on—

(i) protecting themselves from unfair, deceptive, and abusive practices;
(ii) long-term savings; and
(iii) planning for retirement and long-term care;

(E) coordinate consumer protection efforts of seniors with other Federal agencies and State regulators, as appropriate, to promote consistent, effective, and efficient enforcement; and

(F) work with community organizations, non-profit organizations, and other entities that are involved with educating or assisting seniors (including the National Education and Resource Center on Women and Retirement Planning).
SEC. 1014. CONSUMER ADVISORY BOARD.

(a) Establishment Required.—The Director shall establish a Consumer Advisory Board to advise and consult with the Bureau in the exercise of its functions under the Federal consumer financial laws, and to provide information on emerging practices in the consumer financial products or services industry, including regional trends, concerns, and other relevant information.

(b) Membership.—In appointing the members of the Consumer Advisory Board, the Director shall seek to assemble experts in consumer protection, financial services, community development, fair lending and civil rights, and consumer financial products or services and representatives of depository institutions that primarily serve underserved communities, and representatives of communities that have been significantly impacted by higher-priced mortgage loans, and seek representation of the interests of covered persons and consumers, without regard to party affiliation. Not fewer than 6 members shall be appointed upon the recommendation of the regional Federal Reserve Bank Presidents, on a rotating basis.

(c) Meetings.—The Consumer Advisory Board shall meet from time to time at the call of the Director, but, at a minimum, shall meet at least twice in each year.

(d) Compensation and Travel Expenses.—Members of the Consumer Advisory Board who are not full-time employees of the United States shall—

1. be entitled to receive compensation at a rate fixed by the Director while attending meetings of the Consumer Advisory Board, including travel time; and
2. be allowed travel expenses, including transportation and subsistence, while away from their homes or regular places of business.

SEC. 1015. COORDINATION.

The Bureau shall coordinate with the Commission, the Commodity Futures Trading Commission, the Federal Trade Commission, and other Federal agencies and State regulators, as appropriate, to promote consistent regulatory treatment of consumer financial and investment products and services.

SEC. 1016. APPEARANCES BEFORE AND REPORTS TO CONGRESS.

(a) Appearances Before Congress.—The Director of the Bureau shall appear before the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services and the Committee on Energy and Commerce of the House of Representatives at semi-annual hearings regarding the reports required under subsection (b).

(b) Reports Required.—The Bureau shall, concurrent with each semi-annual hearing referred to in subsection (a), prepare and submit to the President and to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services and the Committee on Energy and Commerce of the House of Representatives, a report, beginning with the session following the designated transfer date. The Bureau may also submit such report to the Committee on Commerce, Science, and Transportation of the Senate.

(c) Contents.—The reports required by subsection (b) shall include—
(1) a discussion of the significant problems faced by consumers in shopping for or obtaining consumer financial products or services;

(2) a justification of the budget request of the previous year;

(3) a list of the significant rules and orders adopted by the Bureau, as well as other significant initiatives conducted by the Bureau, during the preceding year and the plan of the Bureau for rules, orders, or other initiatives to be undertaken during the upcoming period;

(4) an analysis of complaints about consumer financial products or services that the Bureau has received and collected in its central database on complaints during the preceding year;

(5) a list, with a brief statement of the issues, of the public supervisory and enforcement actions to which the Bureau was a party during the preceding year;

(6) the actions taken regarding rules, orders, and supervisory actions with respect to covered persons which are not credit unions or depository institutions;

(7) an assessment of significant actions by State attorneys general or State regulators relating to Federal consumer financial law;

(8) an analysis of the efforts of the Bureau to fulfill the fair lending mission of the Bureau; and

(9) an analysis of the efforts of the Bureau to increase workforce and contracting diversity consistent with the procedures established by the Office of Minority and Women Inclusion.

SEC. 1017. FUNDING; PENALTIES AND FINES.

(a) Transfer of Funds From Board of Governors.—

(1) In general.—Each year (or quarter of such year), beginning on the designated transfer date, and each quarter thereafter, the Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law, taking into account such other sums made available to the Bureau from the preceding year (or quarter of such year).

(2) Funding cap.—

(A) In general.—Notwithstanding paragraph (1), and in accordance with this paragraph, the amount that shall be transferred to the Bureau in each fiscal year shall not exceed a fixed percentage of the total operating expenses of the Federal Reserve System, as reported in the Annual Report, 2009, of the Board of Governors, equal to—

(i) 10 percent of such expenses in fiscal year 2011;

(ii) 11 percent of such expenses in fiscal year 2012; and

(iii) 12 percent of such expenses in fiscal year 2013, and in each year thereafter.

(B) Adjustment of amount.—The dollar amount referred to in subparagraph (A)(iii) shall be adjusted...
annually, using the percent increase, if any, in the employment cost index for total compensation for State and local government workers published by the Federal Government, or the successor index thereto, for the 12-month period ending on September 30 of the year preceding the transfer.

(C) REVIEWABILITY.—Notwithstanding any other provision in this title, the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate.

(3) TRANSITION PERIOD.—Beginning on the date of enactment of this Act and until the designated transfer date, the Board of Governors shall transfer to the Bureau the amount estimated by the Secretary needed to carry out the authorities granted to the Bureau under Federal consumer financial law, from the date of enactment of this Act until the designated transfer date.

(4) BUDGET AND FINANCIAL MANAGEMENT.—

(A) FINANCIAL OPERATING PLANS AND FORECASTS.—The Director shall provide to the Director of the Office of Management and Budget copies of the financial operating plans and forecasts of the Director, as prepared by the Director in the ordinary course of the operations of the Bureau, and copies of the quarterly reports of the financial condition and results of operations of the Bureau, as prepared by the Director in the ordinary course of the operations of the Bureau.

(B) FINANCIAL STATEMENTS.—The Bureau shall prepare annually a statement of—

(i) assets and liabilities and surplus or deficit;
(ii) income and expenses; and
(iii) sources and application of funds.

(C) FINANCIAL MANAGEMENT SYSTEMS.—The Bureau shall implement and maintain financial management systems that comply substantially with Federal financial management systems requirements and applicable Federal accounting standards.

(D) ASSERTION OF INTERNAL CONTROLS.—The Director shall provide to the Comptroller General of the United States an assertion as to the effectiveness of the internal controls that apply to financial reporting by the Bureau, using the standards established in section 3512(c) of title 31, United States Code.

(E) RULE OF CONSTRUCTION.—This subsection may not be construed as implying any obligation on the part of the Director to consult with or obtain the consent or approval of the Director of the Office of Management and Budget with respect to any report, plan, forecast, or other information referred to in subparagraph (A) or any jurisdiction or oversight over the affairs or operations of the Bureau.

(F) FINANCIAL STATEMENTS.—The financial statements of the Bureau shall not be consolidated with the financial statements of either the Board of Governors or the Federal Reserve System.

(5) AUDIT OF THE BUREAU.—
(A) IN GENERAL.—The Comptroller General shall annually audit the financial transactions of the Bureau in accordance with the United States generally accepted government auditing standards, as may be prescribed by the Comptroller General of the United States. The audit shall be conducted at the place or places where accounts of the Bureau are normally kept. The representatives of the Government Accountability Office shall have access to the personnel and to all books, accounts, documents, papers, records (including electronic records), reports, files, and all other papers, automated data, things, or property belonging to or under the control of or used or employed by the Bureau pertaining to its financial transactions and necessary to facilitate the audit, and such representatives shall be afforded full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents, and custodians. All such books, accounts, documents, records, reports, files, papers, and property of the Bureau shall remain in possession and custody of the Bureau. The Comptroller General may obtain and duplicate any such books, accounts, documents, records, working papers, automated data and files, or other information relevant to such audit without cost to the Comptroller General, and the right of access of the Comptroller General to such information shall be enforceable pursuant to section 716(c) of title 31, United States Code.

(B) REPORT.—The Comptroller General shall submit to the Congress a report of each annual audit conducted under this subsection. The report to the Congress shall set forth the scope of the audit and shall include the statement of assets and liabilities and surplus or deficit, the statement of income and expenses, the statement of sources and application of funds, and such comments and information as may be deemed necessary to inform Congress of the financial operations and condition of the Bureau, together with such recommendations with respect thereto as the Comptroller General may deem advisable. A copy of each report shall be furnished to the President and to the Bureau at the time submitted to the Congress.

(C) ASSISTANCE AND COSTS.—For the purpose of conducting an audit under this subsection, the Comptroller General may, in the discretion of the Comptroller General, employ by contract, without regard to section 3709 of the Revised Statutes of the United States (41 U.S.C. 5), professional services of firms and organizations of certified public accountants for temporary periods or for special purposes. Upon the request of the Comptroller General, the Director of the Bureau shall transfer to the Government Accountability Office from funds available, the amount requested by the Comptroller General to cover the full costs of any audit and report conducted by the Comptroller General. The Comptroller General shall credit funds transferred to the account established for salaries and expenses of the Government Accountability Office, and such amount shall be available upon receipt and without fiscal year limitation to cover the full costs of the audit and report.

(b) CONSUMER FINANCIAL PROTECTION FUND.—
There is established in the Federal Reserve a separate fund, to be known as the “Bureau of Consumer Financial Protection Fund” (referred to in this section as the “Bureau Fund”). The Bureau Fund shall be maintained and established at a Federal reserve bank, in accordance with such requirements as the Board of Governors may impose.

(2) FUND RECEIPTS.—All amounts transferred to the Bureau under subsection (a) shall be deposited into the Bureau Fund.

(3) INVESTMENT AUTHORITY.—
(A) AMOUNTS IN BUREAU FUND MAY BE INVESTED.—The Bureau may request the Board of Governors to direct the investment of the portion of the Bureau Fund that is not, in the judgment of the Bureau, required to meet the current needs of the Bureau.
(B) ELIGIBLE INVESTMENTS.—Investments authorized by this paragraph shall be made in obligations of the United States or obligations that are guaranteed as to principal and interest by the United States, with maturities suitable to the needs of the Bureau Fund, as determined by the Bureau.
(C) INTEREST AND PROCEEDS CREDITED.—The interest on, and the proceeds from the sale or redemption of, any obligations held in the Bureau Fund shall be credited to the Bureau Fund.

(c) USE OF FUNDS.—
(1) IN GENERAL.—Funds obtained by, transferred to, or credited to the Bureau Fund shall be immediately available to the Bureau and under the control of the Director, and shall remain available until expended, to pay the expenses of the Bureau in carrying out its duties and responsibilities. The compensation of the Director and other employees of the Bureau and all other expenses thereof may be paid from, obtained by, transferred to, or credited to the Bureau Fund under this section.

(2) FUNDS THAT ARE NOT GOVERNMENT FUNDS.—Funds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies.

(3) AMOUNTS NOT SUBJECT TO APPORTIONMENT.—Notwithstanding any other provision of law, amounts in the Bureau Fund and in the Civil Penalty Fund established under subsection (d) shall not be subject to apportionment for purposes of chapter 15 of title 31, United States Code, or under any other authority.

(d) PENALTIES AND FINES.—
(1) ESTABLISHMENT OF VICTIMS RELIEF FUND.—There is established in the Federal Reserve a separate fund, to be known as the “Consumer Financial Civil Penalty Fund” (referred to in this section as the “Civil Penalty Fund”). The Civil Penalty Fund shall be maintained and established at a Federal reserve bank, in accordance with such requirements as the Board of Governors may impose. If the Bureau obtains a civil penalty against any person in any judicial or administrative action under Federal consumer financial laws, the Bureau shall deposit into the Civil Penalty Fund, the amount of the penalty collected.
(2) Payment to victims.—Amounts in the Civil Penalty Fund shall be available to the Bureau, without fiscal year limitation, for payments to the victims of activities for which civil penalties have been imposed under the Federal consumer financial laws. To the extent that such victims cannot be located or such payments are otherwise not practicable, the Bureau may use such funds for the purpose of consumer education and financial literacy programs.

(e) Authorization of Appropriations; Annual Report.—

(1) Determination regarding need for appropriated funds.—

(A) In General.—The Director is authorized to determine that sums available to the Bureau under this section will not be sufficient to carry out the authorities of the Bureau under Federal consumer financial law for the upcoming year.

(B) Report Required.—When making a determination under subparagraph (A), the Director shall prepare a report regarding the funding of the Bureau, including the assets and liabilities of the Bureau, and the extent to which the funding needs of the Bureau are anticipated to exceed the level of the amount set forth in subsection (a)(2). The Director shall submit the report to the President and to the Committee on Appropriations of the Senate and the Committee on Appropriations of the House of Representatives.

(2) Authorization of Appropriations.—If the Director makes the determination and submits the report pursuant to paragraph (1), there are hereby authorized to be appropriated to the Bureau, for the purposes of carrying out the authorities granted in Federal consumer financial law, $200,000,000 for each of fiscal years 2010, 2011, 2012, 2013, and 2014.

(3) Appportionment.—Notwithstanding any other provision of law, the amounts in paragraph (2) shall be subject to appportionment under section 1517 of title 31, United States Code, and restrictions that generally apply to the use of appropriated funds in title 31, United States Code, and other laws.

(4) Annual Report.—The Director shall prepare and submit a report, on an annual basis, to the Committee on Appropriations of the Senate and the Committee on Appropriations of the House of Representatives regarding the financial operating plans and forecasts of the Director, the financial condition and results of operations of the Bureau, and the sources and application of funds of the Bureau, including any funds appropriated in accordance with this subsection.

SEC. 1018. EFFECTIVE DATE.

This subtitle shall become effective on the date of enactment of this Act.

Subtitle B—General Powers of the Bureau

SEC. 1021. PURPOSE, OBJECTIVES, AND FUNCTIONS.

(a) Purpose.—The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets
for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.

(b) OBJECTIVES.—The Bureau is authorized to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services—

(1) consumers are provided with timely and understandable information to make responsible decisions about financial transactions;

(2) consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination;

(3) outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens;

(4) Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and

(5) markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

(c) FUNCTIONS.—The primary functions of the Bureau are—

(1) conducting financial education programs;

(2) collecting, investigating, and responding to consumer complaints;

(3) collecting, researching, monitoring, and publishing information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets;

(4) subject to sections 1024 through 1026, supervising covered persons for compliance with Federal consumer financial law, and taking appropriate enforcement action to address violations of Federal consumer financial law;

(5) issuing rules, orders, and guidance implementing Federal consumer financial law; and

(6) performing such support activities as may be necessary or useful to facilitate the other functions of the Bureau.

SEC. 1022. RULEMAKING AUTHORITY.

(a) IN GENERAL.—The Bureau is authorized to exercise its authorities under Federal consumer financial law to administer, enforce, and otherwise implement the provisions of Federal consumer financial law.

(b) RULEMAKING, ORDERS, AND GUIDANCE.—

(1) GENERAL AUTHORITY.—The Director may prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.

(2) STANDARDS FOR RULEMAKING.—In prescribing a rule under the Federal consumer financial laws—

(A) the Bureau shall consider—

(i) the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule; and
(ii) the impact of proposed rules on covered persons, as described in section 1026, and the impact on consumers in rural areas;

(B) the Bureau shall consult with the appropriate prudential regulators or other Federal agencies prior to proposing a rule and during the comment process regarding consistency with prudential, market, or systemic objectives administered by such agencies; and

(C) if, during the consultation process described in subparagraph (B), a prudential regulator provides the Bureau with a written objection to the proposed rule of the Bureau or a portion thereof, the Bureau shall include in the adopting release a description of the objection and the basis for the Bureau decision, if any, regarding such objection, except that nothing in this clause shall be construed as altering or limiting the procedures under section 1023 that may apply to any rule prescribed by the Bureau.

(3) EXEMPTIONS.—

(A) IN GENERAL.—The Bureau, by rule, may conditionally or unconditionally exempt any class of covered persons, service providers, or consumer financial products or services, from any provision of this title, or from any rule issued under this title, as the Bureau determines necessary or appropriate to carry out the purposes and objectives of this title, taking into consideration the factors in subparagraph (B).

(B) FACTORS.—In issuing an exemption, as permitted under subparagraph (A), the Bureau shall, as appropriate, take into consideration—

(i) the total assets of the class of covered persons;

(ii) the volume of transactions involving consumer financial products or services in which the class of covered persons engages; and

(iii) existing provisions of law which are applicable to the consumer financial product or service and the extent to which such provisions provide consumers with adequate protections.

(4) EXCLUSIVE RULEMAKING AUTHORITY.—

(A) IN GENERAL.—Notwithstanding any other provisions of Federal law and except as provided in section 1061(b)(5), to the extent that a provision of Federal consumer financial law authorizes the Bureau and another Federal agency to issue regulations under that provision of law for purposes of assuring compliance with Federal consumer financial law and any regulations thereunder, the Bureau shall have the exclusive authority to prescribe rules subject to those provisions of law.

(B) DEFERENCE.—Notwithstanding any power granted to any Federal agency or to the Council under this title, and subject to section 1061(b)(5)(E), the deference that a court affords to the Bureau with respect to a determination by the Bureau regarding the meaning or interpretation of any provision of a Federal consumer financial law shall be applied as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law.

(c) MONITORING.—
(1) IN GENERAL.—In order to support its rulemaking and other functions, the Bureau shall monitor for risks to consumers in the offering or provision of consumer financial products or services, including developments in markets for such products or services.

(2) CONSIDERATIONS.—In allocating its resources to perform the monitoring required by this section, the Bureau may consider, among other factors—

(A) likely risks and costs to consumers associated with buying or using a type of consumer financial product or service;

(B) understanding by consumers of the risks of a type of consumer financial product or service;

(C) the legal protections applicable to the offering or provision of a consumer financial product or service, including the extent to which the law is likely to adequately protect consumers;

(D) rates of growth in the offering or provision of a consumer financial product or service;

(E) the extent, if any, to which the risks of a consumer financial product or service may disproportionately affect traditionally underserved consumers; or

(F) the types, number, and other pertinent characteristics of covered persons that offer or provide the consumer financial product or service.

(3) SIGNIFICANT FINDINGS.—

(A) IN GENERAL.—The Bureau shall publish not fewer than 1 report of significant findings of its monitoring required by this subsection in each calendar year, beginning with the first calendar year that begins at least 1 year after the designated transfer date.

(B) CONFIDENTIAL INFORMATION.—The Bureau may make public such information obtained by the Bureau under this section as is in the public interest, through aggregated reports or other appropriate formats designed to protect confidential information in accordance with paragraphs (4), (6), (8), and (9).

(4) COLLECTION OF INFORMATION.—

(A) IN GENERAL.—In conducting any monitoring or assessment required by this section, the Bureau shall have the authority to gather information from time to time regarding the organization, business conduct, markets, and activities of covered persons and service providers.

(B) METHODOLOGY.—In order to gather information described in subparagraph (A), the Bureau may—

(i) gather and compile information from a variety of sources, including examination reports concerning covered persons or service providers, consumer complaints, voluntary surveys and voluntary interviews of consumers, surveys and interviews with covered persons and service providers, and review of available databases; and

(ii) require covered persons and service providers participating in consumer financial services markets to file with the Bureau, under oath or otherwise, in such form and within such reasonable period of time as the Bureau may prescribe by rule or order, annual
or special reports, or answers in writing to specific questions, furnishing information described in paragraph (4), as necessary for the Bureau to fulfill the monitoring, assessment, and reporting responsibilities imposed by Congress.

(C) Limitation.—The Bureau may not use its authorities under this paragraph to obtain records from covered persons and service providers participating in consumer financial services markets for purposes of gathering or analyzing the personally identifiable financial information of consumers.

(5) Limited Information Gathering.—In order to assess whether a nondepository is a covered person, as defined in section 1002, the Bureau may require such nondepository to file with the Bureau, under oath or otherwise, in such form and within such reasonable period of time as the Bureau may prescribe by rule or order, annual or special reports, or answers in writing to specific questions.

(6) Confidentiality Rules.—

(A) Rulemaking.—The Bureau shall prescribe rules regarding the confidential treatment of information obtained from persons in connection with the exercise of its authorities under Federal consumer financial law.

(B) Access by the Bureau to Reports of Other Regulators.—

(i) Examination and Financial Condition Reports.—Upon providing reasonable assurances of confidentiality, the Bureau shall have access to any report of examination or financial condition made by a prudential regulator or other Federal agency having jurisdiction over a covered person or service provider, and to all revisions made to any such report.

(ii) Provision of Other Reports to the Bureau.—In addition to the reports described in clause (i), a prudential regulator or other Federal agency having jurisdiction over a covered person or service provider may, in its discretion, furnish to the Bureau any other report or other confidential supervisory information concerning any insured depository institution, credit union, or other entity examined by such agency under authority of any provision of Federal law.

(C) Access by Other Regulators to Reports of the Bureau.—

(i) Examination Reports.—Upon providing reasonable assurances of confidentiality, a prudential regulator, a State regulator, or any other Federal agency having jurisdiction over a covered person or service provider shall have access to any report of examination made by the Bureau with respect to such person, and to all revisions made to any such report.

(ii) Provision of Other Reports to Other Regulators.—In addition to the reports described in clause (i), the Bureau may, in its discretion, furnish to a prudential regulator or other agency having jurisdiction over a covered person or service provider any
other report or other confidential supervisory information concerning such person examined by the Bureau under the authority of any other provision of Federal law.

(7) **Registration.**—

(A) **IN GENERAL.**—The Bureau may prescribe rules regarding registration requirements applicable to a covered person, other than an insured depository institution, insured credit union, or related person.

(B) **Registration Information.**—Subject to rules prescribed by the Bureau, the Bureau may publicly disclose registration information to facilitate the ability of consumers to identify covered persons that are registered with the Bureau.

(C) **Consultation with State Agencies.**—In developing and implementing registration requirements under this paragraph, the Bureau shall consult with State agencies regarding requirements or systems (including coordinated or combined systems for registration), where appropriate.

(8) **Privacy Considerations.**—In collecting information from any person, publicly releasing information held by the Bureau, or requiring covered persons to publicly report information, the Bureau shall take steps to ensure that proprietary, personal, or confidential consumer information that is protected from public disclosure under section 552(b) or 552a of title 5, United States Code, or any other provision of law, is not made public under this title.

(9) **Consumer Privacy.**—

(A) **IN GENERAL.**—The Bureau may not obtain from a covered person or service provider any personally identifiable financial information about a consumer from the financial records of the covered person or service provider, except—

(i) if the financial records are reasonably described in a request by the Bureau and the consumer provides written permission for the disclosure of such information by the covered person or service provider to the Bureau; or

(ii) as may be specifically permitted or required under other applicable provisions of law and in accordance with the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 et seq.).

(B) **Treatment of Covered Person or Service Provider.**—With respect to the application of any provision of the Right to Financial Privacy Act of 1978, to a disclosure by a covered person or service provider subject to this subsection, the covered person or service provider shall be treated as if it were a “financial institution”, as defined in section 1101 of that Act (12 U.S.C. 3401).

(d) **Assessment of Significant Rules.**—

(1) **IN GENERAL.**—The Bureau shall conduct an assessment of each significant rule or order adopted by the Bureau under Federal consumer financial law. The assessment shall address, among other relevant factors, the effectiveness of the rule or order in meeting the purposes and objectives of this title and the specific goals stated by the Bureau. The assessment shall
reflect available evidence and any data that the Bureau reasonably may collect.

(2) REPORTS.—The Bureau shall publish a report of its assessment under this subsection not later than 5 years after the effective date of the subject rule or order.

(3) PUBLIC COMMENT REQUIRED.—Before publishing a report of its assessment, the Bureau shall invite public comment on recommendations for modifying, expanding, or eliminating the newly adopted significant rule or order.

SEC. 1023. REVIEW OF BUREAU REGULATIONS.

(a) REVIEW OF BUREAU REGULATIONS.—On the petition of a member agency of the Council, the Council may set aside a final regulation prescribed by the Bureau, or any provision thereof, if the Council decides, in accordance with subsection (c), that the regulation or provision would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk.

(b) PETITION.—

(1) PROCEDURE.—An agency represented by a member of the Council may petition the Council, in writing, and in accordance with rules prescribed pursuant to subsection (f), to stay the effectiveness of, or set aside, a regulation if the member agency filing the petition—

(A) has in good faith attempted to work with the Bureau to resolve concerns regarding the effect of the rule on the safety and soundness of the United States banking system or the stability of the financial system of the United States; and

(B) files the petition with the Council not later than 10 days after the date on which the regulation has been published in the Federal Register.

(2) PUBLICATION.—Any petition filed with the Council under this section shall be published in the Federal Register and transmitted contemporaneously with filing to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.

(c) STAYS AND SET ASIDES.—

(1) STAY.—

(A) IN GENERAL.—Upon the request of any member agency, the Chairperson of the Council may stay the effectiveness of a regulation for the purpose of allowing appropriate consideration of the petition by the Council.

(B) EXPIRATION.—A stay issued under this paragraph shall expire on the earlier of—

(i) 90 days after the date of filing of the petition under subsection (b); or

(ii) the date on which the Council makes a decision under paragraph (3).

(2) NO ADVERSE INFERENCE.—After the expiration of any stay imposed under this section, no inference shall be drawn regarding the validity or enforceability of a regulation which was the subject of the petition.

(3) VOTE.—

(A) IN GENERAL.—The decision to issue a stay of, or set aside, any regulation under this section shall be made
only with the affirmative vote in accordance with subparagraph (B) of 2⁄3 of the members of the Council then serving.

(B) AUTHORIZATION TO VOTE.—A member of the Council may vote to stay the effectiveness of, or set aside, a final regulation prescribed by the Bureau only if the agency or department represented by that member has—

(i) considered any relevant information provided by the agency submitting the petition and by the Bureau; and

(ii) made an official determination, at a public meeting where applicable, that the regulation which is the subject of the petition would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk.

(4) DECISIONS TO SET ASIDE.—

(A) EFFECT OF DECISION.—A decision by the Council to set aside a regulation prescribed by the Bureau, or provision thereof, shall render such regulation, or provision thereof, unenforceable.

(B) TIMELY ACTION REQUIRED.—The Council may not issue a decision to set aside a regulation, or provision thereof, which is the subject of a petition under this section after the expiration of the later of—

(i) 45 days following the date of filing of the petition, unless a stay is issued under paragraph (1); or

(ii) the expiration of a stay issued by the Council under this section.

(C) SEPARATE AUTHORITY.—The issuance of a stay under this section does not affect the authority of the Council to set aside a regulation.

(5) DISMISSAL DUE TO INACTION.—A petition under this section shall be deemed dismissed if the Council has not issued a decision to set aside a regulation, or provision thereof, within the period for timely action under paragraph (4)(B).

(6) PUBLICATION OF DECISION.—Any decision under this subsection to issue a stay of, or set aside, a regulation or provision thereof shall be published by the Council in the Federal Register as soon as practicable after the decision is made, with an explanation of the reasons for the decision.

(7) RULEMAKING PROCEDURES INAPPLICABLE.—The notice and comment procedures under section 553 of title 5, United States Code, shall not apply to any decision under this section of the Council to issue a stay of, or set aside, a regulation.

(8) JUDICIAL REVIEW OF DECISIONS BY THE COUNCIL.—A decision by the Council to set aside a regulation prescribed by the Bureau, or provision thereof, shall be subject to review under chapter 7 of title 5, United States Code.

(d) APPLICATION OF OTHER LAW.—Nothing in this section shall be construed as altering, limiting, or restricting the application of any other provision of law, except as otherwise specifically provided in this section, including chapter 5 and chapter 7 of title 5, United States Code, to a regulation which is the subject of a petition filed under this section.

(e) SAVINGS CLAUSE.—Nothing in this section shall be construed as limiting or restricting the Bureau from engaging in a rulemaking in accordance with applicable law.
SEC. 1024. SUPERVISION OF NONDEPOSITORY COVERED PERSONS.

(a) Scope of Coverage.—

(1) Applicability.—Notwithstanding any other provision of this title, and except as provided in paragraph (3), this section shall apply to any covered person who—

(A) offers or provides origination, brokerage, or servicing of loans secured by real estate for use by consumers primarily for personal, family, or household purposes, or loan modification or foreclosure relief services in connection with such loans;

(B) is a larger participant of a market for other consumer financial products or services, as defined by rule in accordance with paragraph (2);

(C) the Bureau has reasonable cause to determine, by order, after notice to the covered person and a reasonable opportunity for such covered person to respond, based on complaints collected through the system under section 1013(b)(3) or information from other sources, that such covered person is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services;

(D) offers or provides to a consumer any private education loan, as defined in section 140 of the Truth in Lending Act (15 U.S.C. 1650), notwithstanding section 1027(a)(2)(A) and subject to section 1027(a)(2)(C); or

(E) offers or provides to a consumer a payday loan.

(2) Rulemaking to Define Covered Persons Subject to This Section.—The Bureau shall consult with the Federal Trade Commission prior to issuing a rule, in accordance with paragraph (1)(B), to define covered persons subject to this section. The Bureau shall issue its initial rule not later than 1 year after the designated transfer date.

(3) Rules of Construction.—

(A) Certain Persons Excluded.—This section shall not apply to persons described in section 1025(a) or 1026(a).

(B) Activity Levels.—For purposes of computing activity levels under paragraph (1) or rules issued thereunder, activities of affiliated companies (other than insured depository institutions or insured credit unions) shall be aggregated.

(b) Supervision.—

(1) In General.—The Bureau shall require reports and conduct examinations on a periodic basis of persons described in subsection (a)(1) for purposes of—

(A) assessing compliance with the requirements of Federal consumer financial law;

(B) obtaining information about the activities and compliance systems or procedures of such person; and

(C) detecting and assessing risks to consumers and to markets for consumer financial products and services.

(2) Risk-Based Supervision Program.—The Bureau shall exercise its authority under paragraph (1) in a manner designed to ensure that such exercise, with respect to persons described in subsection (a)(1), is based on the assessment by the Bureau Consultation. Deadline. Reports. Examinations.
of the risks posed to consumers in the relevant product markets and geographic markets, and taking into consideration, as applicable—

(A) the asset size of the covered person;
(B) the volume of transactions involving consumer financial products or services in which the covered person engages;
(C) the risks to consumers created by the provision of such consumer financial products or services;
(D) the extent to which such institutions are subject to oversight by State authorities for consumer protection; and
(E) any other factors that the Bureau determines to be relevant to a class of covered persons.

(3) COORDINATION.—To minimize regulatory burden, the Bureau shall coordinate its supervisory activities with the supervisory activities conducted by prudential regulators and the State bank regulatory authorities, including establishing their respective schedules for examining persons described in subsection (a)(1) and requirements regarding reports to be submitted by such persons.

(4) USE OF EXISTING REPORTS.—The Bureau shall, to the fullest extent possible, use—

(A) reports pertaining to persons described in subsection (a)(1) that have been provided or required to have been provided to a Federal or State agency; and
(B) information that has been reported publicly.

(5) PRESERVATION OF AUTHORITY.—Nothing in this title may be construed as limiting the authority of the Director to require reports from persons described in subsection (a)(1), as permitted under paragraph (1), regarding information owned or under the control of such person, regardless of whether such information is maintained, stored, or processed by another person.

(6) REPORTS OF TAX LAW NONCOMPLIANCE.—The Bureau shall provide the Commissioner of Internal Revenue with any report of examination or related information identifying possible tax law noncompliance.

(7) REGISTRATION, RECORDKEEPING AND OTHER REQUIREMENTS FOR CERTAIN PERSONS.—

(A) IN GENERAL.—The Bureau shall prescribe rules to facilitate supervision of persons described in subsection (a)(1) and assessment and detection of risks to consumers.

(B) RECORDKEEPING.—The Bureau may require a person described in subsection (a)(1), to generate, provide, or retain records for the purposes of facilitating supervision of such persons and assessing and detecting risks to consumers.

(C) REQUIREMENTS CONCERNING OBLIGATIONS.—The Bureau may prescribe rules regarding a person described in subsection (a)(1), to ensure that such persons are legitimate entities and are able to perform their obligations to consumers. Such requirements may include background checks for principals, officers, directors, or key personnel and bonding or other appropriate financial requirements.
(D) Consultation with state agencies.—In developing and implementing requirements under this paragraph, the Bureau shall consult with state agencies regarding requirements or systems (including coordinated or combined systems for registration), where appropriate.

(c) Enforcement Authority.—

(1) The bureau to have enforcement authority.—Except as provided in paragraph (3) and section 1061, with respect to any person described in subsection (a)(1), to the extent that Federal law authorizes the Bureau and another Federal agency to enforce Federal consumer financial law, the Bureau shall have exclusive authority to enforce that Federal consumer financial law.

(2) Referral.—Any Federal agency authorized to enforce a Federal consumer financial law described in paragraph (1) may recommend in writing to the Bureau that the Bureau initiate an enforcement proceeding, as the Bureau is authorized by that Federal law or by this title.

(3) Coordination with the Federal Trade Commission.—

(A) In general.—The Bureau and the Federal Trade Commission shall negotiate an agreement for coordinating with respect to enforcement actions by each agency regarding the offering or provision of consumer financial products or services by any covered person that is described in subsection (a)(1), or service providers thereto. The agreement shall include procedures for notice to the other agency, where feasible, prior to initiating a civil action to enforce any Federal law regarding the offering or provision of consumer financial products or services.

(B) Civil actions.—Whenever a civil action has been filed by, or on behalf of, the Bureau or the Federal Trade Commission for any violation of any provision of Federal law described in subparagraph (A), or any regulation prescribed under such provision of law—

(i) the other agency may not, during the pendency of that action, institute a civil action under such provision of law against any defendant named in the complaint in such pending action for any violation alleged in the complaint; and

(ii) the Bureau or the Federal Trade Commission may intervene as a party in any such action brought by the other agency, and, upon intervening—

(I) be heard on all matters arising in such enforcement action; and

(II) file petitions for appeal in such actions.

(C) Agreement terms.—The terms of any agreement negotiated under subparagraph (A) may modify or supersede the provisions of subparagraph (B).

(D) Deadline.—The agencies shall reach the agreement required under subparagraph (A) not later than 6 months after the designated transfer date.

(d) Exclusive rulemaking and examination authority.—Notwithstanding any other provision of Federal law and except as provided in section 1061, to the extent that Federal law authorizes the Bureau and another Federal agency to issue regulations or guidance, conduct examinations, or require reports from a person described in subsection (a)(1) under such law for purposes of Contracts.
assuring compliance with Federal consumer financial law and any regulations thereunder, the Bureau shall have the exclusive authority to prescribe rules, issue guidance, conduct examinations, require reports, or issue exemptions with regard to a person described in subsection (a)(1), subject to those provisions of law.

(e) SERVICE PROVIDERS.—A service provider to a person described in subsection (a)(1) shall be subject to the authority of the Bureau under this section, to the same extent as if such service provider were engaged in a service relationship with a bank, and the Bureau were an appropriate Federal banking agency under section 7(c) of the Bank Service Company Act (12 U.S.C. 1867(c)). In conducting any examination or requiring any report from a service provider subject to this subsection, the Bureau shall coordinate with the appropriate prudential regulator, as applicable.

(f) PRESERVATION OF FARM CREDIT ADMINISTRATION AUTHORITY.—No provision of this title may be construed as modifying, limiting, or otherwise affecting the authority of the Farm Credit Administration.

SEC. 1025. SUPERVISION OF VERY LARGE BANKS, SAVINGS ASSOCIATIONS, AND CREDIT UNIONS.

(a) SCOPE OF COVERAGE.—This section shall apply to any covered person that is—

(1) an insured depository institution with total assets of more than $10,000,000,000 and any affiliate thereof; or

(2) an insured credit union with total assets of more than $10,000,000,000 and any affiliate thereof.

(b) SUPERVISION.—

(1) IN GENERAL.—The Bureau shall have exclusive authority to require reports and conduct examinations on a periodic basis of persons described in subsection (a) for purposes of—

(A) assessing compliance with the requirements of Federal consumer financial laws;

(B) obtaining information about the activities subject to such laws and the associated compliance systems or procedures of such persons; and

(C) detecting and assessing associated risks to consumers and to markets for consumer financial products and services.

(2) COORDINATION.—To minimize regulatory burden, the Bureau shall coordinate its supervisory activities with the supervisory activities conducted by prudential regulators and the State bank regulatory authorities, including consultation regarding their respective schedules for examining such persons described in subsection (a) and requirements regarding reports to be submitted by such persons.

(3) USE OF EXISTING REPORTS.—The Bureau shall, to the fullest extent possible, use—

(A) reports pertaining to a person described in subsection (a) that have been provided or required to have been provided to a Federal or State agency; and

(B) information that has been reported publicly.

(4) PRESERVATION OF AUTHORITY.—Nothing in this title may be construed as limiting the authority of the Director to require reports from a person described in subsection (a), as permitted under paragraph (1), regarding information owned
or under the control of such person, regardless of whether such information is maintained, stored, or processed by another person.

(5) **REPORTS OF TAX LAW NONCOMPLIANCE.**—The Bureau shall provide the Commissioner of Internal Revenue with any report of examination or related information identifying possible tax law noncompliance.

(c) **PRIMARY ENFORCEMENT AUTHORITY.**—

(1) **THE BUREAU TO HAVE PRIMARY ENFORCEMENT AUTHORITY.**—To the extent that the Bureau and another Federal agency are authorized to enforce a Federal consumer financial law, the Bureau shall have primary authority to enforce that Federal consumer financial law with respect to any person described in subsection (a).

(2) **REFERRAL.**—Any Federal agency, other than the Federal Trade Commission, that is authorized to enforce a Federal consumer financial law may recommend, in writing, to the Bureau that the Bureau initiate an enforcement proceeding with respect to a person described in subsection (a), as the Bureau is authorized to do by that Federal consumer financial law.

(3) **BACKUP ENFORCEMENT AUTHORITY OF OTHER FEDERAL AGENCY.**—If the Bureau does not, before the end of the 120-day period beginning on the date on which the Bureau receives a recommendation under paragraph (2), initiate an enforcement proceeding, the other agency referred to in paragraph (2) may initiate an enforcement proceeding, including performing follow up supervisory and support functions incidental thereto, to assure compliance with such proceeding.

(d) **SERVICE PROVIDERS.**—A service provider to a person described in subsection (a) shall be subject to the authority of the Bureau under this section, to the same extent as if the Bureau were an appropriate Federal banking agency under section 7(c) of the Bank Service Company Act 12 U.S.C. 1867(c). In conducting any examination or requiring any report from a service provider subject to this subsection, the Bureau shall coordinate with the appropriate prudential regulator.

(e) **SIMULTANEOUS AND COORDINATED SUPERVISORY ACTION.**—

(1) **EXAMINATIONS.**—A prudential regulator and the Bureau shall, with respect to each insured depository institution, insured credit union, or other covered person described in subsection (a) that is supervised by the prudential regulator and the Bureau, respectively—

(A) coordinate the scheduling of examinations of the insured depository institution, insured credit union, or other covered person described in subsection (a);

(B) conduct simultaneous examinations of each insured depository institution or insured credit union, unless such institution requests examinations to be conducted separately;

(C) share each draft report of examination with the other agency and permit the receiving agency a reasonable opportunity (which shall not be less than a period of 30 days after the date of receipt) to comment on the draft report before such report is made final; and
(D) prior to issuing a final report of examination or taking supervisory action, take into consideration concerns, if any, raised in the comments made by the other agency.

(2) Coordination with State bank supervisors.—The Bureau shall pursue arrangements and agreements with State bank supervisors to coordinate examinations, consistent with paragraph (1).

(3) Avoidance of conflict in supervision.—

(A) Request.—If the proposed supervisory determinations of the Bureau and a prudential regulator (in this section referred to collectively as the “agencies”) are conflicting, an insured depository institution, insured credit union, or other covered person described in subsection (a) may request the agencies to coordinate and present a joint statement of coordinated supervisory action.

(B) Joint statement.—The agencies shall provide a joint statement under subparagraph (A), not later than 30 days after the date of receipt of the request of the insured depository institution, credit union, or covered person described in subsection (a).

(4) Appeals to governing panel.—

(A) In general.—If the agencies do not resolve the conflict or issue a joint statement required by subparagraph (B), or if either of the agencies takes or attempts to take any supervisory action relating to the request for the joint statement without the consent of the other agency, an insured depository institution, insured credit union, or other covered person described in subsection (a) may institute an appeal to a governing panel, as provided in this subsection, not later than 30 days after the expiration of the period during which a joint statement is required to be filed under paragraph (3)(B).

(B) Composition of governing panel.—The governing panel for an appeal under this paragraph shall be composed of—

(i) a representative from the Bureau and a representative of the prudential regulator, both of whom—

(II) do not directly or indirectly report to the person who participated materially in the supervisory determinations under appeal; and

(ii) one individual representative, to be determined on a rotating basis, from among the Board of Governors, the Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency, other than any agency involved in the subject dispute.

(C) Conduct of appeal.—In an appeal under this paragraph—

(i) the insured depository institution, insured credit union, or other covered person described in subsection (a)—

(II) shall include in its appeal all the facts and legal arguments pertaining to the matter; and
(II) may, through counsel, employees, or representatives, appear before the governing panel in person or by telephone; and

(ii) the governing panel—

(I) may request the insured depository institution, insured credit union, or other covered person described in subsection (a), the Bureau, or the prudential regulator to produce additional information relevant to the appeal; and

(II) by a majority vote of its members, shall provide a final determination, in writing, not later than 30 days after the date of filing of an informationally complete appeal, or such longer period as the panel and the insured depository institution, insured credit union, or other covered person described in subsection (a) may jointly agree.

(D) Public Availability of Determinations.—A governing panel shall publish all information contained in a determination by the governing panel, with appropriate redactions of information that would be subject to an exemption from disclosure under section 552 of title 5, United States Code.

(E) Prohibition against Retaliation.—The Bureau and the prudential regulators shall prescribe rules to provide safeguards from retaliation against the insured depository institution, insured credit union, or other covered person described in subsection (a) instituting an appeal under this paragraph, as well as their officers and employees.

(F) Limitation.—The process provided in this paragraph shall not apply to a determination by a prudential regulator to appoint a conservator or receiver for an insured depository institution or a liquidating agent for an insured credit union, as the case may be, or a decision to take action pursuant to section 38 of the Federal Deposit Insurance Act (12 U.S.C. 1831o) or section 212 of the Federal Credit Union Act (112 U.S.C. 1790a), as applicable.

(G) Effect on Other Authority.—Nothing in this section shall modify or limit the authority of the Bureau to interpret, or take enforcement action under, any Federal consumer financial law, or the authority of a prudential regulator to interpret or take enforcement action under any other provision of Federal law for safety and soundness purposes.

SEC. 1026. OTHER BANKS, SAVINGS ASSOCIATIONS, AND CREDIT UNIONS.

(a) Scope of Coverage.—This section shall apply to any covered person that is—

(1) an insured depository institution with total assets of $10,000,000,000 or less; or

(2) an insured credit union with total assets of $10,000,000,000 or less.

(b) Reports.—The Director may require reports from a person described in subsection (a), as necessary to support the role of the Bureau in implementing Federal consumer financial law, to
support its examination activities under subsection (c), and to assess and detect risks to consumers and consumer financial markets.

(1) **USE OF EXISTING REPORTS.**—The Bureau shall, to the fullest extent possible, use—

(A) reports pertaining to a person described in subsection (a) that have been provided or required to have been provided to a Federal or State agency; and

(B) information that has been reported publicly.

(2) **PRESERVATION OF AUTHORITY.**—Nothing in this subsection may be construed as limiting the authority of the Director from requiring from a person described in subsection (a), as permitted under paragraph (1), information owned or under the control of such person, regardless of whether such information is maintained, stored, or processed by another person.

(3) **REPORTS OF TAX LAW NONCOMPLIANCE.**—The Bureau shall provide the Commissioner of Internal Revenue with any report of examination or related information identifying possible tax law noncompliance.

(c) **EXAMINATIONS.**—

(1) **IN GENERAL.**—The Bureau may, at its discretion, include examiners on a sampling basis of the examinations performed by the prudential regulator to assess compliance with the requirements of Federal consumer financial law of persons described in subsection (a).

(2) **AGENCY COORDINATION.**—The prudential regulator shall—

(A) provide all reports, records, and documentation related to the examination process for any institution included in the sample referred to in paragraph (1) to the Bureau on a timely and continual basis;

(B) involve such Bureau examiner in the entire examination process for such person; and

(C) consider input of the Bureau concerning the scope of an examination, conduct of the examination, the contents of the examination report, the designation of matters requiring attention, and examination ratings.

(d) **ENFORCEMENT.**—

(1) **IN GENERAL.**—Except for requiring reports under subsection (b), the prudential regulator is authorized to enforce the requirements of Federal consumer financial laws and, with respect to a covered person described in subsection (a), shall have exclusive authority (relative to the Bureau) to enforce such laws.

(2) **COORDINATION WITH PRUDENTIAL REGULATOR.**—

(A) **REFERRAL.**—When the Bureau has reason to believe that a person described in subsection (a) has engaged in a material violation of a Federal consumer financial law, the Bureau shall notify the prudential regulator in writing and recommend appropriate action to respond.

(B) **RESPONSE.**—Upon receiving a recommendation under subparagraph (A), the prudential regulator shall provide a written response to the Bureau not later than 60 days thereafter.

(e) **SERVICE PROVIDERS.**—A service provider to a substantial number of persons described in subsection (a) shall be subject to the authority of the Bureau under section 1025 to the same
extent as if the Bureau were an appropriate Federal bank agency under section 7(c) of the Bank Service Company Act (12 U.S.C. 1867(c)). When conducting any examination or requiring any report from a service provider subject to this subsection, the Bureau shall coordinate with the appropriate prudential regulator.

SEC. 1027. LIMITATIONS ON AUTHORITIES OF THE BUREAU; PRESERVATION OF AUTHORITIES.

(a) Exclusion for Merchants, Retailers, and Other Sellers of Nonfinancial Goods or Services.—

(1) Sale or brokerage of nonfinancial good or service.—The Bureau may not exercise any rulemaking, supervisory, enforcement or other authority under this title with respect to a person who is a merchant, retailer, or seller of any nonfinancial good or service and is engaged in the sale or brokerage of such nonfinancial good or service, except to the extent that such person is engaged in offering or providing any consumer financial product or service, or is otherwise subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H.

(2) Offering or provision of certain consumer financial products or services in connection with the sale or brokerage of nonfinancial good or service.—

(A) In general.—Except as provided in subparagraph (B), and subject to subparagraph (C), the Bureau may not exercise any rulemaking, supervisory, enforcement, or other authority under this title with respect to a merchant, retailer, or seller of nonfinancial goods or services, but only to the extent that such person—

(i) extends credit directly to a consumer, in a case in which the good or service being provided is not itself a consumer financial product or service (other than credit described in this subparagraph), exclusively for the purpose of enabling that consumer to purchase such nonfinancial good or service directly from the merchant, retailer, or seller;

(ii) directly, or through an agreement with another person, collects debt arising from credit extended as described in clause (i); or

(iii) sells or conveys debt described in clause (i) that is delinquent or otherwise in default.

(B) Applicability.—Subparagraph (A) does not apply to any credit transaction or collection of debt, other than as described in subparagraph (C)(i), arising from a transaction described in subparagraph (A)—

(i) in which the merchant, retailer, or seller of nonfinancial goods or services assigns, sells or otherwise conveys to another person such debt owed by the consumer (except for a sale of debt that is delinquent or otherwise in default, as described in subparagraph (A)(iii));

(ii) in which the credit extended significantly exceeds the market value of the nonfinancial good or service provided, or the Bureau otherwise finds that the sale of the nonfinancial good or service is done as a subterfuge, so as to evade or circumvent the provisions of this title; or
(iii) in which the merchant, retailer, or seller of nonfinancial goods or services regularly extends credit and the credit is subject to a finance charge.

(C) LIMITATIONS.—

(i) IN GENERAL.—Notwithstanding subparagraph (B), subparagraph (A) shall apply with respect to a merchant, retailer, or seller of nonfinancial goods or services that is not engaged significantly in offering or providing consumer financial products or services.

(ii) EXCEPTION.—Subparagraph (A) and clause (i) of this subparagraph do not apply to any merchant, retailer, or seller of nonfinancial goods or services—

(I) if such merchant, retailer, or seller of nonfinancial goods or services is engaged in a transaction described in subparagraph (B)(i) or (B)(ii); or

(II) to the extent that such merchant, retailer, or seller is subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H, but the Bureau may exercise such authority only with respect to that law.

(D) RULES.—

(i) AUTHORITY OF OTHER AGENCIES.—No provision of this title shall be construed as modifying, limiting, or superseding the supervisory or enforcement authority of the Federal Trade Commission or any other agency (other than the Bureau) with respect to credit extended, or the collection of debt arising from such extension, directly by a merchant or retailer to a consumer exclusively for the purpose of enabling that consumer to purchase nonfinancial goods or services directly from the merchant or retailer.

(ii) SMALL BUSINESSES.—A merchant, retailer, or seller of nonfinancial goods or services that would otherwise be subject to the authority of the Bureau solely by virtue of the application of subparagraph (B)(iii) shall be deemed not to be engaged significantly in offering or providing consumer financial products or services under subparagraph (C)(i), if such person—

(I) only extends credit for the sale of nonfinancial goods or services, as described in subparagraph (A)(i);

(II) retains such credit on its own accounts (except to sell or convey such debt that is delinquent or otherwise in default); and

(III) meets the relevant industry size threshold to be a small business concern, based on annual receipts, pursuant to section 3 of the Small Business Act (15 U.S.C. 632) and the implementing rules thereunder.

(iii) INITIAL YEAR.—A merchant, retailer, or seller of nonfinancial goods or services shall be deemed to meet the relevant industry size threshold described in clause (ii)(III) during the first year of operations of that business concern if, during that year, the
receipts of that business concern reasonably are expected to meet that size threshold.

(iv) OTHER STANDARDS FOR SMALL BUSINESS.—With respect to a merchant, retailer, or seller of nonfinancial goods or services that is a classified on a basis other than annual receipts for the purposes of section 3 of the Small Business Act (15 U.S.C. 632) and the implementing rules thereunder, such merchant, retailer, or seller shall be deemed to meet the relevant industry size threshold described in clause (ii)(III) if such merchant, retailer, or seller meets the relevant industry size threshold to be a small business concern based on the number of employees, or other such applicable measure, established under that Act.

(E) EXCEPTION FROM STATE ENFORCEMENT.—To the extent that the Bureau may not exercise authority under this subsection with respect to a merchant, retailer, or seller of nonfinancial goods or services, no action by a State attorney general or State regulator with respect to a claim made under this title may be brought under subsection 1042(a), with respect to an activity described in any of clauses (i) through (iii) of subparagraph (A) by such merchant, retailer, or seller of nonfinancial goods or services.

(b) EXCLUSION FOR REAL ESTATE BROKERAGE ACTIVITIES.—

(1) REAL ESTATE BROKERAGE ACTIVITIES EXCLUDED.—Without limiting subsection (a), and except as permitted in paragraph (2), the Bureau may not exercise any rulemaking, supervisory, enforcement, or other authority under this title with respect to a person that is licensed or registered as a real estate broker or real estate agent, in accordance with State law, to the extent that such person—

(A) acts as a real estate agent or broker for a buyer, seller, lessor, or lessee of real property;

(B) brings together parties interested in the sale, purchase, lease, rental, or exchange of real property;

(C) negotiates, on behalf of any party, any portion of a contract relating to the sale, purchase, lease, rental, or exchange of real property (other than in connection with the provision of financing with respect to any such transaction); or

(D) offers to engage in any activity, or act in any capacity, described in subparagraph (A), (B), or (C).

(2) DESCRIPTION OF ACTIVITIES.—The Bureau may exercise rulemaking, supervisory, enforcement, or other authority under this title with respect to a person described in paragraph (1) when such person is—

(A) engaged in an activity of offering or providing any consumer financial product or service, except that the Bureau may exercise such authority only with respect to that activity; or

(B) otherwise subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H, but the Bureau may exercise such authority only with respect to that law.

(c) EXCLUSION FOR MANUFACTURED HOME RETAILERS AND MODULAR HOME RETAILERS.—
(1) IN GENERAL.—The Director may not exercise any rulemaking, supervisory, enforcement, or other authority over a person to the extent that—
   (A) such person is not described in paragraph (2); and
   (B) such person—
      (i) acts as an agent or broker for a buyer or seller of a manufactured home or a modular home;
      (ii) facilitates the purchase by a consumer of a manufactured home or modular home, by negotiating the purchase price or terms of the sales contract (other than providing financing with respect to such transaction); or
      (iii) offers to engage in any activity described in clause (i) or (ii).

(2) DESCRIPTION OF ACTIVITIES.—A person is described in this paragraph to the extent that such person is engaged in the offering or provision of any consumer financial product or service or is otherwise subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H.

(3) DEFINITIONS.—For purposes of this subsection, the following definitions shall apply:
   (A) MANUFACTURED HOME.—The term "manufactured home" has the same meaning as in section 603 of the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5402).
   (B) MODULAR HOME.—The term "modular home" means a house built in a factory in 2 or more modules that meet the State or local building codes where the house will be located, and where such modules are transported to the building site, installed on foundations, and completed.

(d) EXCLUSION FOR ACCOUNTANTS AND TAX PREPARERS.—
   (1) IN GENERAL.—Except as permitted in paragraph (2), the Bureau may not exercise any rulemaking, supervisory, enforcement, or other authority over—
      (A) any person that is a certified public accountant, permitted to practice as a certified public accounting firm, or certified or licensed for such purpose by a State, or any individual who is employed by or holds an ownership interest with respect to a person described in this subparagraph, when such person is performing or offering to perform—
         (i) customary and usual accounting activities, including the provision of accounting, tax, advisory, or other services that are subject to the regulatory authority of a State board of accountancy or a Federal authority; or
         (ii) other services that are incidental to such customary and usual accounting activities, to the extent that such incidental services are not offered or provided—
            (I) by the person separate and apart from such customary and usual accounting activities; or
            (II) to consumers who are not receiving such customary and usual accounting activities; or
(B) any person, other than a person described in subparagraph (A) that performs income tax preparation activities for consumers.

(2) DESCRIPTION OF ACTIVITIES.—

(A) IN GENERAL.—Paragraph (1) shall not apply to any person described in paragraph (1)(A) or (1)(B) to the extent that such person is engaged in any activity which is not a customary and usual accounting activity described in paragraph (1)(A) or incidental thereto but which is the offering or provision of any consumer financial product or service, except to the extent that a person described in paragraph (1)(A) is engaged in an activity which is a customary and usual accounting activity described in paragraph (1)(A), or incidental thereto.

(B) NOT A CUSTOMARY AND USUAL ACCOUNTING ACTIVITY.—For purposes of this subsection, extending or brokering credit is not a customary and usual accounting activity, or incidental thereto.

(C) RULE OF CONSTRUCTION.—For purposes of subparagraphs (A) and (B), a person described in paragraph (1)(A) shall not be deemed to be extending credit, if such person is only extending credit directly to a consumer, exclusively for the purpose of enabling such consumer to purchase services described in clause (i) or (ii) of paragraph (1)(A) directly from such person, and such credit is—

(i) not subject to a finance charge; and

(ii) not payable by written agreement in more than 4 installments.

(D) OTHER LIMITATIONS.—Paragraph (1) does not apply to any person described in paragraph (1)(A) or (1)(B) that is otherwise subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H.

(e) EXCLUSION FOR PRACTICE OF LAW.—

(1) IN GENERAL.—Except as provided under paragraph (2), the Bureau may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to practice law.

(2) RULE OF CONSTRUCTION.—Paragraph (1) shall not be construed so as to limit the exercise by the Bureau of any supervisory, enforcement, or other authority regarding the offering or provision of a consumer financial product or service described in any subparagraph of section 1002(5)—

(A) that is not offered or provided as part of, or incidental to, the practice of law, occurring exclusively within the scope of the attorney-client relationship; or

(B) that is otherwise offered or provided by the attorney in question with respect to any consumer who is not receiving legal advice or services from the attorney in connection with such financial product or service.

(3) EXISTING AUTHORITY.—Paragraph (1) shall not be construed so as to limit the authority of the Bureau with respect to any attorney, to the extent that such attorney is otherwise subject to any of the enumerated consumer laws or the authorities transferred under subtitle F or H.
(f) Exclusion for Persons Regulated by a State Insurance Regulator.—

(1) In general.—No provision of this title shall be construed as altering, amending, or affecting the authority of any State insurance regulator to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by a State insurance regulator. Except as provided in paragraph (2), the Bureau shall have no authority to exercise any power to enforce this title with respect to a person regulated by a State insurance regulator.

(2) Description of activities.—Paragraph (1) does not apply to any person described in such paragraph to the extent that such person is engaged in the offering or provision of any consumer financial product or service or is otherwise subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H.

(3) State Insurance Authority under Gramm-Leach-Bliley.—Notwithstanding paragraph (2), the Bureau shall not exercise any authorities that are granted a State insurance authority under section 505(a)(6) of the Gramm-Leach-Bliley Act with respect to a person regulated by a State insurance authority.

(g) Exclusion for Employee Benefit and Compensation Plans and Certain Other Arrangements Under the Internal Revenue Code of 1986.—

(1) Preservation of authority of other agencies.—No provision of this title shall be construed as altering, amending, or affecting the authority of the Secretary of the Treasury, the Secretary of Labor, or the Commissioner of Internal Revenue to adopt regulations, initiate enforcement proceedings, or take any actions with respect to any specified plan or arrangement.

(2) Activities not constituting the offering or provision of any consumer financial product or service.—For purposes of this title, a person shall not be treated as having engaged in the offering or provision of any consumer financial product or service solely because such person is—

(A) a specified plan or arrangement;

(B) engaged in the activity of establishing or maintaining, for the benefit of employees of such person (or for members of an employee organization), any specified plan or arrangement; or

(C) engaged in the activity of establishing or maintaining a qualified tuition program under section 529(b)(1) of the Internal Revenue Code of 1986 offered by a State or other prepaid tuition program offered by a State.

(3) Limitation on bureau authority.—

(A) In general.—Except as provided under subparagraphs (B) and (C), the Bureau may not exercise any rulemaking or enforcement authority with respect to products or services that relate to any specified plan or arrangement.

(B) Bureau action pursuant to agency request.—

(i) Agency request.—The Secretary and the Secretary of Labor may jointly issue a written request to the Bureau regarding implementation of appropriate consumer protection standards under this title with
respect to the provision of services relating to any specified plan or arrangement.

(ii) AGENCY RESPONSE.—In response to a request by the Bureau, the Secretary and the Secretary of Labor shall jointly issue a written response, not later than 90 days after receipt of such request, to grant or deny the request of the Bureau regarding implementation of appropriate consumer protection standards under this title with respect to the provision of services relating to any specified plan or arrangement.

(iii) SCOPE OF BUREAU ACTION.—Subject to a request or response pursuant to clause (i) or clause (ii) by the agencies made under this subparagraph, the Bureau may exercise rulemaking authority, and may act to enforce a rule prescribed pursuant to such request or response, in accordance with the provisions of this title. A request or response made by the Secretary and the Secretary of Labor under this subparagraph shall describe the basis for, and scope of, appropriate consumer protection standards to be implemented under this title with respect to the provision of services relating to any specified plan or arrangement.

(C) DESCRIPTION OF PRODUCTS OR SERVICES.—To the extent that a person engaged in providing products or services relating to any specified plan or arrangement is subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H, subparagraph (A) shall not apply with respect to that law.

(4) SPECIFIED PLAN OR ARRANGEMENT.—For purposes of this subsection, the term “specified plan or arrangement” means any plan, account, or arrangement described in section 220, 223, 401(a), 403(a), 403(b), 408, 408A, 529, or 530 of the Internal Revenue Code of 1986, or any employee benefit or compensation plan or arrangement, including a plan that is subject to title I of the Employee Retirement Income Security Act of 1974, or any prepaid tuition program offered by a State.

(h) PERSONS REGULATED BY A STATE SECURITIES COMMISSION.—

(1) IN GENERAL.—No provision of this title shall be construed as altering, amending, or affecting the authority of any securities commission (or any agency or office performing like functions) of any State to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by any securities commission (or any agency or office performing like functions) of any State. Except as permitted in paragraph (2) and subsection (f), the Bureau shall have no authority to exercise any power to enforce this title with respect to a person regulated by any securities commission (or any agency or office performing like functions) of any State, but only to the extent that the person acts in such regulated capacity.

(2) DESCRIPTION OF ACTIVITIES.—Paragraph (1) shall not apply to any person to the extent such person is engaged in the offering or provision of any consumer financial product or service, or is otherwise subject to any enumerated consumer
law or any law for which authorities are transferred under subtitle F or H.

(i) Exclusion for Persons Regulated by the Commission.—

(1) In general.—No provision of this title may be construed as altering, amending, or affecting the authority of the Commission to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by the Commission. The Bureau shall have no authority to exercise any power to enforce this title with respect to a person regulated by the Commission.

(2) Consultation and Coordination.—Notwithstanding paragraph (1), the Commission shall consult and coordinate, where feasible, with the Bureau with respect to any rule (including any advance notice of proposed rulemaking) regarding an investment product or service that is the same type of product as, or that competes directly with, a consumer financial product or service that is subject to the jurisdiction of the Bureau under this title or under any other law. In carrying out this paragraph, the agencies shall negotiate an agreement to establish procedures for such coordination, including procedures for providing advance notice to the Bureau when the Commission is initiating a rulemaking.

(j) Exclusion for Persons Regulated by the Commodity Futures Trading Commission.—

(1) In general.—No provision of this title shall be construed as altering, amending, or affecting the authority of the Commodity Futures Trading Commission to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by the Commodity Futures Trading Commission. The Bureau shall have no authority to exercise any power to enforce this title with respect to a person regulated by the Commodity Futures Trading Commission.

(2) Consultation and Coordination.—Notwithstanding paragraph (1), the Commodity Futures Trading Commission shall consult and coordinate with the Bureau with respect to any rule (including any advance notice of proposed rulemaking) regarding a product or service that is the same type of product as, or that competes directly with, a consumer financial product or service that is subject to the jurisdiction of the Bureau under this title or under any other law.

(k) Exclusion for Persons Regulated by the Farm Credit Administration.—

(1) In general.—No provision of this title shall be construed as altering, amending, or affecting the authority of the Farm Credit Administration to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by the Farm Credit Administration. The Bureau shall have no authority to exercise any power to enforce this title with respect to a person regulated by the Farm Credit Administration.

(2) Definition.—For purposes of this subsection, the term “person regulated by the Farm Credit Administration” means any Farm Credit System institution that is chartered and subject to the provisions of the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.).

(l) Exclusion for Activities Relating to Charitable Contributions.—
(1) **IN GENERAL.**—The Director and the Bureau may not exercise any rulemaking, supervisory, enforcement, or other authority, including authority to order penalties, over any activities related to the solicitation or making of voluntary contributions to a tax-exempt organization as recognized by the Internal Revenue Service, by any agent, volunteer, or representative of such organizations to the extent the organization, agent, volunteer, or representative thereof is soliciting or providing advice, information, education, or instruction to any donor or potential donor relating to a contribution to the organization.

(2) **LIMITATION.**—The exclusion in paragraph (1) does not apply to other activities not described in paragraph (1) that are the offering or provision of any consumer financial product or service, or are otherwise subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H.

(m) **INSURANCE.**—The Bureau may not define as a financial product or service, by regulation or otherwise, engaging in the business of insurance.

(n) **LIMITED AUTHORITY OF THE BUREAU.**—Notwithstanding subsections (a) through (h) and (l), a person subject to or described in one or more of such provisions—

(1) may be a service provider; and

(2) may be subject to requests from, or requirements imposed by, the Bureau regarding information in order to carry out the responsibilities and functions of the Bureau and in accordance with section 1022, 1052, or 1053.

(o) **NO AUTHORITY TO IMPOSE USURY LIMIT.**—No provision of this title shall be construed as conferring authority on the Bureau to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authorized by law.

(p) **ATTORNEY GENERAL.**—No provision of this title, including section 1024(c)(1), shall affect the authorities of the Attorney General under otherwise applicable provisions of law.

(q) **SECRETARY OF THE TREASURY.**—No provision of this title shall affect the authorities of the Secretary, including with respect to prescribing rules, initiating enforcement proceedings, or taking other actions with respect to a person that performs income tax preparation activities for consumers.

(r) **DEPOSIT INSURANCE AND SHARE INSURANCE.**—Nothing in this title shall affect the authority of the Corporation under the Federal Deposit Insurance Act or the National Credit Union Administration Board under the Federal Credit Union Act as to matters related to deposit insurance and share insurance, respectively.

(s) **FAIR HOUSING ACT.**—No provision of this title shall be construed as affecting any authority arising under the Fair Housing Act.

**SEC. 1028. AUTHORITY TO RESTRICT MANDATORY PRE-DISPUTE ARBITRATION.**

(a) **STUDY AND REPORT.**—The Bureau shall conduct a study of, and shall provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute
between covered persons and consumers in connection with the offering or providing of consumer financial products or services.

(b) Further Authority.—The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers. The findings in such rule shall be consistent with the study conducted under subsection (a).

(c) Limitation.—The authority described in subsection (b) may not be construed to prohibit or restrict a consumer from entering into a voluntary arbitration agreement with a covered person after a dispute has arisen.

(d) Effective Date.—Notwithstanding any other provision of law, any regulation prescribed by the Bureau under subsection (b) shall apply, consistent with the terms of the regulation, to any agreement between a consumer and a covered person entered into after the end of the 180-day period beginning on the effective date of the regulation, as established by the Bureau.

SEC. 1029. EXCLUSION FOR AUTO DEALERS.

(a) Sale, Servicing, and Leasing of Motor Vehicles Excluded.—Except as permitted in subsection (b), the Bureau may not exercise any rulemaking, supervisory, enforcement or any other authority, including any authority to order assessments, over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.

(b) Certain Functions Excepted.—Subsection (a) shall not apply to any person, to the extent that such person—

(1) provides consumers with any services related to residential or commercial mortgages or self-financing transactions involving real property;

(2) operates a line of business—

(A) that involves the extension of retail credit or retail leases involving motor vehicles; and

(B) in which—

(i) the extension of retail credit or retail leases are provided directly to consumers; and

(ii) the contract governing such extension of retail credit or retail leases is not routinely assigned to an unaffiliated third party finance or leasing source; or

(3) offers or provides a consumer financial product or service not involving or related to the sale, financing, leasing, rental, repair, refurbishment, maintenance, or other servicing of motor vehicles, motor vehicle parts, or any related or ancillary product or service.

(c) Preservation of Authorities of Other Agencies.—Except as provided in subsections (b) and (d), nothing in this title, including subtitle F, shall be construed as modifying, limiting, or superseding the operation of any provision of Federal law, or otherwise affecting the authority of the Board of Governors, the Federal Trade Commission, or any other Federal agency, with respect to a person described in subsection (a).

(d) Federal Trade Commission Authority.—Notwithstanding section 18 of the Federal Trade Commission Act, the Federal Trade
Commission is authorized to prescribe rules under sections 5 and 18(a)(1)(B) of the Federal Trade Commission Act, in accordance with section 553 of title 5, United States Code, with respect to a person described in subsection (a).

(e) Coordination with Office of Service Member Affairs.—The Board of Governors and the Federal Trade Commission shall coordinate with the Office of Service Member Affairs, to ensure that—

(1) service members and their families are educated and empowered to make better informed decisions regarding consumer financial products and services offered by motor vehicle dealers, with a focus on motor vehicle dealers in the proximity of military installations; and

(2) complaints by service members and their families concerning such motor vehicle dealers are effectively monitored and responded to, and where appropriate, enforcement action is pursued by the authorized agencies.

(f) Definitions.—For purposes of this section, the following definitions shall apply:

(1) Motor vehicle.—The term “motor vehicle” means—

(A) any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

(B) recreational boats and marine equipment;

(C) motorcycles;

(D) motor homes, recreational vehicle trailers, and slide-in campers, as those terms are defined in sections 571.3 and 575.103(d) of title 49, Code of Federal Regulations, or any successor thereto; and

(E) other vehicles that are titled and sold through dealers.

(2) Motor vehicle dealer.—The term “motor vehicle dealer” means any person or resident in the United States, or any territory of the United States, who—

(A) is licensed by a State, a territory of the United States, or the District of Columbia to engage in the sale of motor vehicles; and

(B) takes title to, holds an ownership in, or takes physical custody of motor vehicles.

SEC. 1029A. EFFECTIVE DATE.

This subtitle shall become effective on the designated transfer date, except that sections 1022, 1024, and 1025(e) shall become effective on the date of enactment of this Act.

Subtitle C—Specific Bureau Authorities

SEC. 1031. PROHIBITING UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES.

(a) In General.—The Bureau may take any action authorized under subtitle E to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.

(b) Rulemaking.—The Bureau may prescribe rules applicable to a covered person or service provider identifying as unlawful
unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. Rules under this section may include requirements for the purpose of preventing such acts or practices.

(c) UNFAIRNESS.—

(1) IN GENERAL.—The Bureau shall have no authority under this section to declare an act or practice in connection with a transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service, to be unlawful on the grounds that such act or practice is unfair, unless the Bureau has a reasonable basis to conclude that—

(A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and

(B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.

(2) CONSIDERATION OF PUBLIC POLICIES.—In determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

(d) ABUSIVE.—The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice—

(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or

(2) takes unreasonable advantage of—

(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

(B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or

(C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

(e) CONSULTATION.—In prescribing rules under this section, the Bureau shall consult with the Federal banking agencies, or other Federal agencies, as appropriate, concerning the consistency of the proposed rule with prudential, market, or systemic objectives administered by such agencies.

(f) CONSIDERATION OF SEASONAL INCOME.—The rules of the Bureau under this section shall provide, with respect to an extension of credit secured by residential real estate or a dwelling, if documented income of the borrower, including income from a small business, is a repayment source for an extension of credit secured by residential real estate or a dwelling, the creditor may consider the seasonality and irregularity of such income in the underwriting of and scheduling of payments for such credit.
fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.

(b) MODEL DISCLOSURES.—

(1) IN GENERAL.—Any final rule prescribed by the Bureau under this section requiring disclosures may include a model form that may be used at the option of the covered person for provision of the required disclosures.

(2) FORMAT.—A model form issued pursuant to paragraph (1) shall contain a clear and conspicuous disclosure that, at a minimum—

(A) uses plain language comprehensible to consumers;

(B) contains a clear format and design, such as an easily readable type font; and

(C) succinctly explains the information that must be communicated to the consumer.

(3) CONSUMER TESTING.—Any model form issued pursuant to this subsection shall be validated through consumer testing.

c) BASIS FOR RULEMAKING.—In prescribing rules under this section, the Bureau shall consider available evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services.

d) SAFE HARBOR.—Any covered person that uses a model form included with a rule issued under this section shall be deemed to be in compliance with the disclosure requirements of this section with respect to such model form.

e) TRIAL DISCLOSURE PROGRAMS.—

(1) IN GENERAL.—The Bureau may permit a covered person to conduct a trial program that is limited in time and scope, subject to specified standards and procedures, for the purpose of providing trial disclosures to consumers that are designed to improve upon any model form issued pursuant to subsection (b)(1), or any other model form issued to implement an enumerated statute, as applicable.

(2) SAFE HARBOR.—The standards and procedures issued by the Bureau shall be designed to encourage covered persons to conduct trial disclosure programs. For the purposes of administering this subsection, the Bureau may establish a limited period during which a covered person conducting a trial disclosure program shall be deemed to be in compliance with, or may be exempted from, a requirement of a rule or an enumerated consumer law.

(3) PUBLIC DISCLOSURE.—The rules of the Bureau shall provide for public disclosure of trial disclosure programs, which public disclosure may be limited, to the extent necessary to encourage covered persons to conduct effective trials.

(f) COMBINED MORTGAGE LOAN DISCLOSURE.—Not later than 1 year after the designated transfer date, the Bureau shall propose for public comment rules and model disclosures that combine the disclosures required under the Truth in Lending Act and sections 4 and 5 of the Real Estate Settlement Procedures Act of 1974, into a single, integrated disclosure for mortgage loan transactions covered by those laws, unless the Bureau determines that any proposal issued by the Board of Governors and the Secretary of Housing and Urban Development carries out the same purpose.
SEC. 1033. CONSUMER RIGHTS TO ACCESS INFORMATION.

(a) In General.—Subject to rules prescribed by the Bureau, a covered person shall make available to a consumer, upon request, information in the control or possession of the covered person concerning the consumer financial product or service that the consumer obtained from such covered person, including information relating to any transaction, series of transactions, or to the account including costs, charges and usage data. The information shall be made available in an electronic form usable by consumers.

(b) Exceptions.—A covered person may not be required by this section to make available to the consumer—

(1) any confidential commercial information, including an algorithm used to derive credit scores or other risk scores or predictors;

(2) any information collected by the covered person for the purpose of preventing fraud or money laundering, or detecting, or making any report regarding other unlawful or potentially unlawful conduct;

(3) any information required to be kept confidential by any other provision of law; or

(4) any information that the covered person cannot retrieve in the ordinary course of its business with respect to that information.

(c) No Duty to Maintain Records.—Nothing in this section shall be construed to impose any duty on a covered person to maintain or keep any information about a consumer.

(d) Standardized Formats for Data.—The Bureau, by rule, shall prescribe standards applicable to covered persons to promote the development and use of standardized formats for information, including through the use of machine readable files, to be made available to consumers under this section.

(e) Consultation.—The Bureau shall, when prescribing any rule under this section, consult with the Federal banking agencies and the Federal Trade Commission to ensure, to the extent appropriate, that the rules—

(1) impose substantively similar requirements on covered persons;

(2) take into account conditions under which covered persons do business both in the United States and in other countries; and

(3) do not require or promote the use of any particular technology in order to develop systems for compliance.

SEC. 1034. RESPONSE TO CONSUMER COMPLAINTS AND INQUIRIES.

(a) Timely Regulator Response to Consumers.—The Bureau shall establish, in consultation with the appropriate Federal regulatory agencies, reasonable procedures to provide a timely response to consumers, in writing where appropriate, to complaints against, or inquiries concerning, a covered person, including—

(1) steps that have been taken by the regulator in response to the complaint or inquiry of the consumer;

(2) any responses received by the regulator from the covered person; and

(3) any follow-up actions or planned follow-up actions by the regulator in response to the complaint or inquiry of the consumer.
(b) **Timely Response to Regulator by Covered Person.**—A covered person subject to supervision and primary enforcement by the Bureau pursuant to section 1025 shall provide a timely response, in writing where appropriate, to the Bureau, the prudential regulators, and any other agency having jurisdiction over such covered person concerning a consumer complaint or inquiry, including—

1. steps that have been taken by the covered person to respond to the complaint or inquiry of the consumer;
2. responses received by the covered person from the consumer; and
3. follow-up actions or planned follow-up actions by the covered person to respond to the complaint or inquiry of the consumer.

(c) **Provision of Information to Consumers.**—

1. **In General.**—A covered person subject to supervision and primary enforcement by the Bureau pursuant to section 1025 shall, in a timely manner, comply with a consumer request for information in the control or possession of such covered person concerning the consumer financial product or service that the consumer obtained from such covered person, including supporting written documentation, concerning the account of the consumer.

2. **Exceptions.**—A covered person subject to supervision and primary enforcement by the Bureau pursuant to section 1025, a prudential regulator, and any other agency having jurisdiction over a covered person subject to supervision and primary enforcement by the Bureau pursuant to section 1025 may not be required by this section to make available to the consumer—

   A. any confidential commercial information, including an algorithm used to derive credit scores or other risk scores or predictors;
   B. any information collected by the covered person for the purpose of preventing fraud or money laundering, or detecting or making any report regarding other unlawful or potentially unlawful conduct;
   C. any information required to be kept confidential by any other provision of law; or
   D. any nonpublic or confidential information, including confidential supervisory information.

(d) **Agreements With Other Agencies.**—The Bureau shall enter into a memorandum of understanding with any affected Federal regulatory agency regarding procedures by which any covered person, and the prudential regulators, and any other agency having jurisdiction over a covered person, including the Secretary of the Department of Housing and Urban Development and the Secretary of Education, shall comply with this section.

**SEC. 1035. Private Education Loan Ombudsman.**

(a) **Establishment.**—The Secretary, in consultation with the Director, shall designate a Private Education Loan Ombudsman (in this section referred to as the “Ombudsman”) within the Bureau, to provide timely assistance to borrowers of private education loans.

(b) **Public Information.**—The Secretary and the Director shall disseminate information about the availability and functions of the Ombudsman to borrowers and potential borrowers, as well
as institutions of higher education, lenders, guaranty agencies, loan
servicers, and other participants in private education student loan
programs.

(c) **FUNCTIONS OF OMBUDSMAN.**—The Ombudsman designated
under this subsection shall—

1. in accordance with regulations of the Director, receive,
review, and attempt to resolve informally complaints from bor-
rowers of loans described in subsection (a), including, as appro-
priate, attempts to resolve such complaints in collaboration
with the Department of Education and with institutions of
higher education, lenders, guaranty agencies, loan servicers,
and other participants in private education loan programs;

2. not later than 90 days after the designated transfer
date, establish a memorandum of understanding with the stu-
dent loan ombudsman established under section 141(f) of the
Higher Education Act of 1965 (20 U.S.C. 1018(f)), to ensure
coordination in providing assistance to and serving borrowers
seeking to resolve complaints related to their private education
or Federal student loans;

3. compile and analyze data on borrower complaints
regarding private education loans; and

4. make appropriate recommendations to the Director,
the Secretary, the Secretary of Education, the Committee on
Banking, Housing, and Urban Affairs and the Committee on
Health, Education, Labor, and Pensions of the Senate and
the Committee on Financial Services and the Committee on
Education and Labor of the House of Representatives.

(d) **ANNUAL REPORTS.**—

1. IN GENERAL.—The Ombudsman shall prepare an annual
report that describes the activities, and evaluates the effective-
ness of the Ombudsman during the preceding year.

2. **SUBMISSION.**—The report required by paragraph (1)
shall be submitted on the same date annually to the Secretary,
the Secretary of Education, the Committee on Banking,
Housing, and Urban Affairs and the Committee on Health,
Education, Labor, and Pensions of the Senate and the Com-
mittee on Financial Services and the Committee on Education
and Labor of the House of Representatives.

(e) **DEFINITIONS.**—For purposes of this section, the terms “pri-
vate education loan” and “institution of higher education” have
the same meanings as in section 140 of the Truth in Lending

SEC. 1036. PROHIBITED ACTS.

(a) **IN GENERAL.**—It shall be unlawful for—

1. any covered person or service provider—

   A) to offer or provide to a consumer any financial
   product or service not in conformity with Federal consumer
   financial law, or otherwise commit any act or omission
   in violation of a Federal consumer financial law; or
   
   B) to engage in any unfair, deceptive, or abusive act
   or practice;

2. any covered person or service provider to fail or refuse,
as required by Federal consumer financial law, or any rule
or order issued by the Bureau thereunder—

   A) to permit access to or copying of records;
   
   B) to establish or maintain records; or
(C) to make reports or provide information to the Bureau; or
(3) any person to knowingly or recklessly provide substantial assistance to a covered person or service provider in violation of the provisions of section 1031, or any rule or order issued thereunder, and notwithstanding any provision of this title, the provider of such substantial assistance shall be deemed to be in violation of that section to the same extent as the person to whom such assistance is provided.

(b) Exception.—No person shall be held to have violated subsection (a)(1) solely by virtue of providing or selling time or space to a covered person or service provider placing an advertisement.

SEC. 1037. EFFECTIVE DATE.
This subtitle shall take effect on the designated transfer date.

Subtitle D—Preservation of State Law

SEC. 1041. RELATION TO STATE LAW.

(a) IN GENERAL.—
(1) RULE OF CONSTRUCTION.—This title, other than sections 1044 through 1048, may not be construed as annulling, altering, or affecting, or exempting any person subject to the provisions of this title from complying with, the statutes, regulations, orders, or interpretations in effect in any State, except to the extent that any such provision of law is inconsistent with the provisions of this title, and then only to the extent of the inconsistency.
(2) GREATER PROTECTION UNDER STATE LAW.—For purposes of this subsection, a statute, regulation, order, or interpretation in effect in any State is not inconsistent with the provisions of this title if the protection that such statute, regulation, order, or interpretation affords to consumers is greater than the protection provided under this title. A determination regarding whether a statute, regulation, order, or interpretation in effect in any State is inconsistent with the provisions of this title may be made by the Bureau on its own motion or in response to a nonfrivolous petition initiated by any interested person.

(b) RELATION TO OTHER PROVISIONS OF ENUMERATED CONSUMER LAWS THAT RELATE TO STATE LAW.—No provision of this title, except as provided in section 1083, shall be construed as modifying, limiting, or superseding the operation of any provision of an enumerated consumer law that relates to the application of a law in effect in any State with respect to such Federal law.

(c) ADDITIONAL CONSUMER PROTECTION REGULATIONS IN RESPONSE TO STATE ACTION.—
(1) NOTICE OF PROPOSED RULE REQUIRED.—The Bureau shall issue a notice of proposed rulemaking whenever a majority of the States has enacted a resolution in support of the establishment or modification of a consumer protection regulation by the Bureau.
(2) BUREAU CONSIDERATIONS REQUIRED FOR ISSUANCE OF FINAL REGULATION.—Before prescribing a final regulation based upon a notice issued pursuant to paragraph (1), the Bureau shall take into account whether—
A) the proposed regulation would afford greater protection to consumers than any existing regulation;
B) the intended benefits of the proposed regulation for consumers would outweigh any increased costs or inconveniences for consumers, and would not discriminate unfairly against any category or class of consumers; and
C) a Federal banking agency has advised that the proposed regulation is likely to present an unacceptable safety and soundness risk to insured depository institutions.

3) EXPLANATION OF CONSIDERATIONS.—The Bureau—
(A) shall include a discussion of the considerations required in paragraph (2) in the Federal Register notice of a final regulation prescribed pursuant to this subsection; and
(B) whenever the Bureau determines not to prescribe a final regulation, shall publish an explanation of such determination in the Federal Register, and provide a copy of such explanation to each State that enacted a resolution in support of the proposed regulation, the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives.

4) RESERVATION OF AUTHORITY.—No provision of this subsection shall be construed as limiting or restricting the authority of the Bureau to enhance consumer protection standards established pursuant to this title in response to its own motion or in response to a request by any other interested person.

5) RULE OF CONSTRUCTION.—No provision of this subsection shall be construed as exempting the Bureau from complying with subchapter II of chapter 5 of title 5, United States Code.

6) DEFINITION.—For purposes of this subsection, the term “consumer protection regulation” means a regulation that the Bureau is authorized to prescribe under the Federal consumer financial laws.

12 USC 5552.

SEC. 1042. PRESERVATION OF ENFORCEMENT POWERS OF STATES.

a) IN GENERAL.—

(1) ACTION BY STATE.—Except as provided in paragraph (2), the attorney general (or the equivalent thereof) of any State may bring a civil action in the name of such State in any district court of the United States in that State or in State court that is located in that State and that has jurisdiction over the defendant, to enforce provisions of this title or regulations issued under this title, and to secure remedies under provisions of this title or remedies otherwise provided under other law. A State regulator may bring a civil action or other appropriate proceeding to enforce the provisions of this title or regulations issued under this title with respect to any entity that is State-chartered, incorporated, licensed, or otherwise authorized to do business under State law (except as provided in paragraph (2)), and to secure remedies under provisions of this title or remedies otherwise provided under other provisions of law with respect to such an entity.
(2) Action by State Against National Bank or Federal Savings Association to Enforce Rules.—

(A) In General.—Except as permitted under subparagraph (B), the attorney general (or equivalent thereof) of any State may not bring a civil action in the name of such State against a national bank or Federal savings association to enforce a provision of this title.

(B) Enforcement of Rules Permitted.—The attorney general (or the equivalent thereof) of any State may bring a civil action in the name of such State against a national bank or Federal savings association in any district court of the United States in the State or in State court that is located in that State and that has jurisdiction over the defendant to enforce a regulation prescribed by the Bureau under a provision of this title and to secure remedies under provisions of this title or remedies otherwise provided under other law.

(3) Rule of Construction.—No provision of this title shall be construed as modifying, limiting, or superseding the operation of any provision of an enumerated consumer law that relates to the authority of a State attorney general or State regulator to enforce such Federal law.

(b) Consultation Required.—

(1) Notice.—

(A) In General.—Before initiating any action in a court or other administrative or regulatory proceeding against any covered person as authorized by subsection (a) to enforce any provision of this title, including any regulation prescribed by the Bureau under this title, a State attorney general or State regulator shall timely provide a copy of the complete complaint to be filed and written notice describing such action or proceeding to the Bureau and the prudential regulator, if any, or the designee thereof.

(B) Emergency Action.—If prior notice is not practicable, the State attorney general or State regulator shall provide a copy of the complete complaint and the notice to the Bureau and the prudential regulator, if any, immediately upon instituting the action or proceeding.

(C) Contents of Notice.—The notification required under this paragraph shall, at a minimum, describe—

(i) the identity of the parties;

(ii) the alleged facts underlying the proceeding; and

(iii) whether there may be a need to coordinate the prosecution of the proceeding so as not to interfere with any action, including any rulemaking, undertaken by the Bureau, a prudential regulator, or another Federal agency.

(2) Bureau Response.—In any action described in paragraph (1), the Bureau may—

(A) intervene in the action as a party;

(B) upon intervening—

(i) remove the action to the appropriate United States district court, if the action was not originally brought there; and
(ii) be heard on all matters arising in the action;
and
(C) appeal any order or judgment, to the same extent as any other party in the proceeding may.

(c) REGULATIONS.—The Bureau shall prescribe regulations to implement the requirements of this section and, from time to time, provide guidance in order to further coordinate actions with the State attorneys general and other regulators.

(d) PRESERVATION OF STATE AUTHORITY.—

(1) STATE CLAIMS.—No provision of this section shall be construed as altering, limiting, or affecting the authority of a State attorney general or any other regulatory or enforcement agency or authority to bring an action or other regulatory proceeding arising solely under the law in effect in that State.

(2) STATE SECURITIES REGULATORS.—No provision of this title shall be construed as altering, limiting, or affecting the authority of a State securities commission (or any agency or office performing like functions) under State law to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by such commission or authority.

(3) STATE INSURANCE REGULATORS.—No provision of this title shall be construed as altering, limiting, or affecting the authority of a State insurance commission or State insurance regulator under State law to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by such commission or regulator.

SEC. 1043. PRESERVATION OF EXISTING CONTRACTS.

This title, and regulations, orders, guidance, and interpretations prescribed, issued, or established by the Bureau, shall not be construed to alter or affect the applicability of any regulation, order, guidance, or interpretation prescribed, issued, and established by the Comptroller of the Currency or the Director of the Office of Thrift Supervision regarding the applicability of State law under Federal banking law to any contract entered into on or before the date of enactment of this Act, by national banks, Federal savings associations, or subsidiaries thereof that are regulated and supervised by the Comptroller of the Currency or the Director of the Office of Thrift Supervision, respectively.

SEC. 1044. STATE LAW PREEMPTION STANDARDS FOR NATIONAL BANKS AND SUBSIDIARIES CLARIFIED.

(a) IN GENERAL.—Chapter one of title LXII of the Revised Statutes of the United States (12 U.S.C. 21 et seq.) is amended by inserting after section 5136B the following new section:

``SEC. 5136C. STATE LAW PREEMPTION STANDARDS FOR NATIONAL BANKS AND SUBSIDIARIES CLARIFIED.

“(a) DEFINITIONS.—For purposes of this section, the following definitions shall apply:

“(1) NATIONAL BANK.—The term ‘national bank’ includes—
“(A) any bank organized under the laws of the United States; and
“(B) any Federal branch established in accordance with the International Banking Act of 1978.

“(2) STATE CONSUMER FINANCIAL LAWS.—The term ‘State consumer financial law’ means a State law that does not directly or indirectly discriminate against national banks and that
directly and specifically regulates the manner, content, or terms
and conditions of any financial transaction (as may be author-
ized for national banks to engage in), or any account related
thereto, with respect to a consumer.

(3) OTHER DEFINITIONS.—The terms ‘affiliate’, ‘subsidiary’,
‘includes’, and ‘including’ have the same meanings as in section
3 of the Federal Deposit Insurance Act.

(b) PREEMPTION STANDARD.—

(1) IN GENERAL.—State consumer financial laws are pre-
empted, only if—

(A) application of a State consumer financial law
would have a discriminatory effect on national banks, in
comparison with the effect of the law on a bank chartered
by that State;

(B) in accordance with the legal standard for preemp-
tion in the decision of the Supreme Court of the United
States in Barnett Bank of Marion County, N. A. v. Nelson,
Florida Insurance Commissioner, et al., 517 U.S. 25 (1996),
the State consumer financial law prevents or significantly
interferes with the exercise by the national bank of its
powers; and any preemption determination under this
subparagraph may be made by a court, or by regulation
or order of the Comptroller of the Currency on a case-
by-case basis, in accordance with applicable law; or

(C) the State consumer financial law is preempted
by a provision of Federal law other than this title.

(2) SAVINGS CLAUSE.—This title and section 24 of the
Federal Reserve Act (12 U.S.C. 371) do not preempt, annul,
or affect the applicability of any State law to any subsidiary
or affiliate of a national bank (other than a subsidiary or
affiliate that is chartered as a national bank).

(3) CASE-BY-CASE BASIS.—

(A) DEFINITION.—As used in this section the term
‘case-by-case basis’ refers to a determination pursuant to
this section made by the Comptroller concerning the impact
of a particular State consumer financial law on any national
bank that is subject to that law, or the law of any other
State with substantively equivalent terms.

(B) CONSULTATION.—When making a determination
on a case-by-case basis that a State consumer financial
law of another State has substantively equivalent terms
as one that the Comptroller is preempting, the Comptroller
shall first consult with the Bureau of Consumer Financial
Protection and shall take the views of the Bureau into
account when making the determination.

(4) RULE OF CONSTRUCTION.—This title does not occupy
the field in any area of State law.

(5) STANDARDS OF REVIEW.—

(A) PREEMPTION.—A court reviewing any determina-
tions made by the Comptroller regarding preemption of
a State law by this title or section 24 of the Federal
Reserve Act (12 U.S.C. 371) shall assess the validity of
such determinations, depending upon the thoroughness evi-
dent in the consideration of the agency, the validity of
the reasoning of the agency, the consistency with other
valid determinations made by the agency, and other factors
which the court finds persuasive and relevant to its decision.

“(B) SAVINGS CLAUSE.—Except as provided in subparagraph (A), nothing in this section shall affect the deference that a court may afford to the Comptroller in making determinations regarding the meaning or interpretation of title LXII of the Revised Statutes of the United States or other Federal laws.

“(6) COMPTROLLER DETERMINATION NOT DELEGABLE.—Any regulation, order, or determination made by the Comptroller of the Currency under paragraph (1)(B) shall be made by the Comptroller, and shall not be delegable to another officer or employee of the Comptroller of the Currency.

“(c) SUBSTANTIAL EVIDENCE.—No regulation or order of the Comptroller of the Currency prescribed under subsection (b)(1)(B), shall be interpreted or applied so as to invalidate, or otherwise declare inapplicable to a national bank, the provision of the State consumer financial law, unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of such provision in accordance with the legal standard of the decision of the Supreme Court of the United States in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996).

“(d) PERIODIC REVIEW OF PREEMPTION DETERMINATIONS.—

“(1) IN GENERAL.—The Comptroller of the Currency shall periodically conduct a review, through notice and public comment, of each determination that a provision of Federal law preempts a State consumer financial law. The agency shall conduct such review within the 5-year period after prescribing or otherwise issuing such determination, and at least once during each 5-year period thereafter. After conducting the review of, and inspecting the comments made on, the determination, the agency shall publish a notice in the Federal Register announcing the decision to continue or rescind the determination or a proposal to amend the determination. Any such notice of a proposal to amend a determination and the subsequent resolution of such proposal shall comply with the procedures set forth in subsections (a) and (b) of section 5244 of the Revised Statutes of the United States (12 U.S.C. 43 (a), (b)).

“(2) REPORTS TO CONGRESS.—At the time of issuing a review conducted under paragraph (1), the Comptroller of the Currency shall submit a report regarding such review to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate. The report submitted to the respective committees shall address whether the agency intends to continue, rescind, or propose to amend any determination that a provision of Federal law preempts a State consumer financial law, and the reasons therefor.

“(e) APPLICATION OF STATE CONSUMER FINANCIAL LAW TO SUBSIDIARIES AND AFFILIATES.—Notwithstanding any provision of this title or section 24 of Federal Reserve Act (12 U.S.C. 371), a State consumer financial law shall apply to a subsidiary or affiliate of a national bank (other than a subsidiary or affiliate that is chartered as a national bank) to the same extent that
the State consumer financial law applies to any person, corporation, or other entity subject to such State law.

“(f) PRESERVATION OF POWERS RELATED TO CHARGING INTEREST.—No provision of this title shall be construed as altering or otherwise affecting the authority conferred by section 5197 of the Revised Statutes of the United States (12 U.S.C. 85) for the charging of interest by a national bank at the rate allowed by the laws of the State, territory, or district where the bank is located, including with respect to the meaning of ‘interest’ under such provision.

“(g) TRANSPARENCY OF OCC PREEMPTION DETERMINATIONS.—The Comptroller of the Currency shall publish and update no less frequently than quarterly, a list of preemption determinations by the Comptroller of the Currency then in effect that identifies the activities and practices covered by each determination and the requirements and constraints determined to be preempted.”.

(b) CLERICAL AMENDMENT.—The table of sections for chapter one of title LXII of the Revised Statutes of the United States is amended by inserting after the item relating to section 5136B the following new item:

“Sec. 5136C. State law preemption standards for national banks and subsidiaries clarified.”.

SEC. 1045. CLARIFICATION OF LAW APPLICABLE TO NONDEPOSITORY INSTITUTION SUBSIDIARIES.

Section 5136C of the Revised Statutes of the United States (as added by this subtitle) is amended by adding at the end the following:

“(h) CLARIFICATION OF LAW APPLICABLE TO NONDEPOSITORY INSTITUTION SUBSIDIARIES AND AFFILIATES OF NATIONAL BANKS.—

“(1) DEFINITIONS.—For purposes of this subsection, the terms ‘depository institution’, ‘subsidiary’, and ‘affiliate’ have the same meanings as in section 3 of the Federal Deposit Insurance Act.

“(2) RULE OF CONSTRUCTION.—No provision of this title or section 24 of the Federal Reserve Act (12 U.S.C. 371) shall be construed as preempting, annulling, or affecting the applicability of State law to any subsidiary, affiliate, or agent of a national bank (other than a subsidiary, affiliate, or agent that is chartered as a national bank).”.

SEC. 1046. STATE LAW PREEMPTION STANDARDS FOR FEDERAL SAVINGS ASSOCIATIONS AND SUBSIDIARIES CLARIFIED.

(a) IN GENERAL.—The Home Owners’ Loan Act (12 U.S.C. 1461 et seq.) is amended by inserting after section 5 the following new section:

“SEC. 6. STATE LAW PREEMPTION STANDARDS FOR FEDERAL SAVINGS ASSOCIATIONS CLARIFIED.

“(a) IN GENERAL.—Any determination by a court or by the Director or any successor officer or agency regarding the relation of State law to a provision of this Act or any regulation or order prescribed under this Act shall be made in accordance with the laws and legal standards applicable to national banks regarding the preemption of State law.

“(b) PRINCIPLES OF CONFLICT PREEMPTION APPLICABLE.—Notwithstanding the authorities granted under sections 4 and 5, this Act does not occupy the field in any area of State law.”.
(b) CLERICAL AMENDMENT.—The table of sections for the Home Owners’ Loan Act (12 U.S.C. 1461 et seq.) is amended by striking the item relating to section 6 and inserting the following new item:

“Sec. 6. State law preemption standards for Federal savings associations and subsidiaries clarified.”.

SEC. 1047. VISITORIAL STANDARDS FOR NATIONAL BANKS AND SAVINGS ASSOCIATIONS.

(a) NATIONAL BANKS.—Section 5136C of the Revised Statutes of the United States (as added by this subtitle) is amended by adding at the end the following:

“(i) VISITORIAL POWERS.—

“(1) IN GENERAL.—In accordance with the decision of the Supreme Court of the United States in Cuomo v. Clearing House Assn., L. L. C. (129 S. Ct. 2710 (2009)), no provision of this title which relates to visitorial powers or otherwise limits or restricts the visitorial authority to which any national bank is subject shall be construed as limiting or restricting the authority of any attorney general (or other chief law enforcement officer) of any State to bring an action against a national bank in a court of appropriate jurisdiction to enforce an applicable law and to seek relief as authorized by such law.

“(j) ENFORCEMENT ACTIONS.—The ability of the Comptroller of the Currency to bring an enforcement action under this title or section 5 of the Federal Trade Commission Act does not preclude any private party from enforcing rights granted under Federal or State law in the courts.”.

(b) SAVINGS ASSOCIATIONS.—Section 6 of the Home Owners’ Loan Act (as added by this title) is amended by adding at the end the following:

“(c) VISITORIAL POWERS.—The provisions of sections 5136C(i) of the Revised Statutes of the United States shall apply to Federal savings associations, and any subsidiary thereof, to the same extent and in the same manner as if such savings associations, or subsidiaries thereof, were national banks or subsidiaries of national banks, respectively.”

“(d) ENFORCEMENT ACTIONS.—The ability of the Comptroller of the Currency to bring an enforcement action under this Act or section 5 of the Federal Trade Commission Act does not preclude any private party from enforcing rights granted under Federal or State law in the courts.”.

SEC. 1048. EFFECTIVE DATE.

This subtitle shall become effective on the designated transfer date.

Subtitle E—Enforcement Powers

SEC. 1051. DEFINITIONS.

For purposes of this subtitle, the following definitions shall apply:

(1) BUREAU INVESTIGATION.—The term “Bureau investigation” means any inquiry conducted by a Bureau investigator for the purpose of ascertaining whether any person is or has
been engaged in any conduct that is a violation, as defined in this section.

(2) **BUREAU INVESTIGATOR.**—The term “Bureau investigator” means any attorney or investigator employed by the Bureau who is charged with the duty of enforcing or carrying into effect any Federal consumer financial law.

(3) **CUSTODIAN.**—The term “custodian” means the custodian or any deputy custodian designated by the Bureau.

(4) **DOCUMENTARY MATERIAL.**—The term “documentary material” includes the original or any copy of any book, document, record, report, memorandum, paper, communication, tabulation, chart, logs, electronic files, or other data or data compilations stored in any medium.

(5) **VIOLATION.**—The term “violation” means any act or omission that, if proved, would constitute a violation of any provision of Federal consumer financial law.

**SEC. 1052. INVESTIGATIONS AND ADMINISTRATIVE DISCOVERY.**

(a) **JOINT INVESTIGATIONS.**—

(1) **IN GENERAL.**—The Bureau or, where appropriate, a Bureau investigator, may engage in joint investigations and requests for information, as authorized under this title.

(2) **FAIR LENDING.**—The authority under paragraph (1) includes matters relating to fair lending, and where appropriate, joint investigations with, and requests for information from, the Secretary of Housing and Urban Development, the Attorney General of the United States, or both.

(b) **SUBPOENAS.**—

(1) **IN GENERAL.**—The Bureau or a Bureau investigator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, documents, or other material in connection with hearings under this title.

(2) **FAILURE TO OBEY.**—In the case of contumacy or refusal to obey a subpoena issued pursuant to this paragraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the Bureau or a Bureau investigator and after notice to such person, may issue an order requiring such person to appear and give testimony or to appear and produce documents or other material.

(3) **CONTEMPT.**—Any failure to obey an order of the court under this subsection may be punished by the court as a contempt thereof.

(c) **DEMANDS.**—

(1) **IN GENERAL.**—Whenever the Bureau has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to a violation, the Bureau may, before the institution of any proceedings under the Federal consumer financial law, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to—

(A) produce such documentary material for inspection and copying or reproduction in the form or medium requested by the Bureau;

(B) submit such tangible things;

(C) file written reports or answers to questions;
(D) give oral testimony concerning documentary material, tangible things, or other information; or
(E) furnish any combination of such material, answers, or testimony.

(2) Requirements.—Each civil investigative demand shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.

(3) Production of Documents.—Each civil investigative demand for the production of documentary material shall—
(A) describe each class of documentary material to be produced under the demand with such definiteness and certainty as to permit such material to be fairly identified;
(B) prescribe a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and
(C) identify the custodian to whom such material shall be made available.

(4) Production of Things.—Each civil investigative demand for the submission of tangible things shall—
(A) describe each class of tangible things to be submitted under the demand with such definiteness and certainty as to permit such things to be fairly identified;
(B) prescribe a return date or dates which will provide a reasonable period of time within which the things so demanded may be assembled and submitted; and
(C) identify the custodian to whom such things shall be submitted.

(5) Demand for Written Reports or Answers.—Each civil investigative demand for written reports or answers to questions shall—
(A) propound with definiteness and certainty the reports to be produced or the questions to be answered;
(B) prescribe a date or dates at which time written reports or answers to questions shall be submitted; and
(C) identify the custodian to whom such reports or answers shall be submitted.

(6) Oral Testimony.—Each civil investigative demand for the giving of oral testimony shall—
(A) prescribe a date, time, and place at which oral testimony shall be commenced; and
(B) identify a Bureau investigator who shall conduct the investigation and the custodian to whom the transcript of such investigation shall be submitted.

(7) Service.—Any civil investigative demand issued, and any enforcement petition filed, under this section may be served—
(A) by any Bureau investigator at any place within the territorial jurisdiction of any court of the United States; and
(B) upon any person who is not found within the territorial jurisdiction of any court of the United States—
(i) in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign nation; and
(ii) to the extent that the courts of the United States have authority to assert jurisdiction over such person, consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by such person that such district court would have if such person were personally within the jurisdiction of such district court.

(8) METHOD OF SERVICE.—Service of any civil investigative demand or any enforcement petition filed under this section may be made upon a person, including any legal entity, by—

(A) delivering a duly executed copy of such demand or petition to the individual or to any partner, executive officer, managing agent, or general agent of such person, or to any agent of such person authorized by appointment or by law to receive service of process on behalf of such person;

(B) delivering a duly executed copy of such demand or petition to the principal office or place of business of the person to be served; or

(C) depositing a duly executed copy in the United States mails, by registered or certified mail, return receipt requested, duly addressed to such person at the principal office or place of business of such person.

(9) PROOF OF SERVICE.—

(A) IN GENERAL.—A verified return by the individual serving any civil investigative demand or any enforcement petition filed under this section setting forth the manner of such service shall be proof of such service.

(B) RETURN RECEIPTS.—In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand or enforcement petition.

(10) PRODUCTION OF DOCUMENTARY MATERIAL.—The production of documentary material in response to a civil investigative demand shall be made under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by any person having knowledge of the facts and circumstances relating to such production, to the effect that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

(11) SUBMISSION OF TANGIBLE THINGS.—The submission of tangible things in response to a civil investigative demand shall be made under a sworn certificate, in such form as the demand designates, by the person to whom the demand is directed or, if not a natural person, by any person having knowledge of the facts and circumstances relating to such production, to the effect that all of the tangible things required by the demand and in the possession, custody, or control of the person to whom the demand is directed have been submitted to the custodian.

(12) SEPARATE ANSWERS.—Each reporting requirement or question in a civil investigative demand shall be answered separately and fully in writing under oath, unless it is objected...
to, in which event the reasons for the objection shall be stated in lieu of an answer, and it shall be submitted under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by any person responsible for answering each reporting requirement or question, to the effect that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted.

(13) **Testimony.**—

(A) **In General.**—

(i) **Oath and Recordation.**—The examination of any person pursuant to a demand for oral testimony served under this subsection shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place at which the examination is held. The officer before whom oral testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by any individual acting under the direction of and in the presence of the officer, record the testimony of the witness.

(ii) **Transcription.**—The testimony shall be taken stenographically and transcribed.

(iii) **Transmission to Custodian.**—After the testimony is fully transcribed, the officer investigator before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian.

(B) **Parties Present.**—Any Bureau investigator before whom oral testimony is to be taken shall exclude from the place where the testimony is to be taken all other persons, except the person giving the testimony, the attorney for that person, the officer before whom the testimony is to be taken, an investigator or representative of an agency with which the Bureau is engaged in a joint investigation, and any stenographer taking such testimony.

(C) **Location.**—The oral testimony of any person taken pursuant to a civil investigative demand shall be taken in the judicial district of the United States in which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the Bureau investigator before whom the oral testimony of such person is to be taken and such person.

(D) **Attorney Representation.**—

(i) **In General.**—Any person compelled to appear under a civil investigative demand for oral testimony pursuant to this section may be accompanied, represented, and advised by an attorney.

(ii) **Authority.**—The attorney may advise a person described in clause (i), in confidence, either upon the request of such person or upon the initiative of the attorney, with respect to any question asked of such person.

(iii) **Objections.**—A person described in clause (i), or the attorney for that person, may object on the record to any question, in whole or in part, and such
person shall briefly state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination, but such person shall not otherwise object to or refuse to answer any question, and such person or attorney shall not otherwise interrupt the oral examination.

(iv) Refusal to Answer.—If a person described in clause (i) refuses to answer any question—

(I) the Bureau may petition the district court of the United States pursuant to this section for an order compelling such person to answer such question; and

(II) if the refusal is on grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of section 6004 of title 18, United States Code.

(E) Transcripts.—For purposes of this subsection—

(i) after the testimony of any witness is fully transcribed, the Bureau investigator shall afford the witness (who may be accompanied by an attorney) a reasonable opportunity to examine the transcript;

(ii) the transcript shall be read to or by the witness, unless such examination and reading are waived by the witness;

(iii) any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the Bureau investigator, with a statement of the reasons given by the witness for making such changes;

(iv) the transcript shall be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign; and

(v) if the transcript is not signed by the witness during the 30-day period following the date on which the witness is first afforded a reasonable opportunity to examine the transcript, the Bureau investigator shall sign the transcript and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with any reasons given for the failure to sign.

(F) Certification by Investigator.—The Bureau investigator shall certify on the transcript that the witness was duly sworn by him or her and that the transcript is a true record of the testimony given by the witness, and the Bureau investigator shall promptly deliver the transcript or send it by registered or certified mail to the custodian.

(G) Copy of Transcript.—The Bureau investigator shall furnish a copy of the transcript (upon payment of reasonable charges for the transcript) to the witness only, except that the Bureau may for good cause limit such
witness to inspection of the official transcript of his testimony.

(H) WITNESS FEES.—Any witness appearing for the taking of oral testimony pursuant to a civil investigative demand shall be entitled to the same fees and mileage which are paid to witnesses in the district courts of the United States.

d) CONFIDENTIAL TREATMENT OF DEMAND MATERIAL.—

(1) IN GENERAL.—Documentary materials and tangible things received as a result of a civil investigative demand shall be subject to requirements and procedures regarding confidentiality, in accordance with rules established by the Bureau.

(2) DISCLOSURE TO CONGRESS.—No rule established by the Bureau regarding the confidentiality of materials submitted to, or otherwise obtained by, the Bureau shall be intended to prevent disclosure to either House of Congress or to an appropriate committee of the Congress, except that the Bureau is permitted to adopt rules allowing prior notice to any party that owns or otherwise provided the material to the Bureau and had designated such material as confidential.

(e) PETITION FOR ENFORCEMENT.—

(1) IN GENERAL.—Whenever any person fails to comply with any civil investigative demand duly served upon him under this section, or whenever satisfactory copying or reproduction of material requested pursuant to the demand cannot be accomplished and such person refuses to surrender such material, the Bureau, through such officers or attorneys as it may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person, a petition for an order of such court for the enforcement of this section.

(2) SERVICE OF PROCESS.—All process of any court to which application may be made as provided in this subsection may be served in any judicial district.

(f) PETITION FOR ORDER MODIFYING OR SETTING ASIDE DEMAND.—

(1) IN GENERAL.—Not later than 20 days after the service of any civil investigative demand upon any person under subsection (b), or at any time before the return date specified in the demand, whichever period is shorter, or within such period exceeding 20 days after service or in excess of such return date as may be prescribed in writing, subsequent to service, by any Bureau investigator named in the demand, such person may file with the Bureau a petition for an order by the Bureau modifying or setting aside the demand.

(2) COMPLIANCE DURING PENDENCY.—The time permitted for compliance with the demand in whole or in part, as determined proper and ordered by the Bureau, shall not run during the pendency of a petition under paragraph (1) at the Bureau, except that such person shall comply with any portions of the demand not sought to be modified or set aside.

(3) SPECIFIC GROUNDS.—A petition under paragraph (1) shall specify each ground upon which the petitioner relies in seeking relief, and may be based upon any failure of the demand to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of such person.
(g) Custodial Control.—At any time during which any custodian is in custody or control of any documentary material, tangible things, reports, answers to questions, or transcripts of oral testimony given by any person in compliance with any civil investigative demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section or rule promulgated by the Bureau.

(h) Jurisdiction of Court.—

(1) In General.—Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section.

(2) Appeal.—Any final order entered as described in paragraph (1) shall be subject to appeal pursuant to section 1291 of title 28, United States Code.

SEC. 1053. HEARINGS AND ADJUDICATION PROCEEDINGS.

(a) In General.—The Bureau is authorized to conduct hearings and adjudication proceedings with respect to any person in the manner prescribed by chapter 5 of title 5, United States Code in order to ensure or enforce compliance with—

(1) the provisions of this title, including any rules prescribed by the Bureau under this title; and

(2) any other Federal law that the Bureau is authorized to enforce, including an enumerated consumer law, and any regulations or order prescribed thereunder, unless such Federal law specifically limits the Bureau from conducting a hearing or adjudication proceeding and only to the extent of such limitation.

(b) Special Rules for Cease-and-Desist Proceedings.—

(1) Orders Authorized.—

(A) In General.—If, in the opinion of the Bureau, any covered person or service provider is engaging or has engaged in an activity that violates a law, rule, or any condition imposed in writing on the person by the Bureau, the Bureau may, subject to sections 1024, 1025, and 1026, issue and serve upon the covered person or service provider a notice of charges in respect thereof.

(B) Content of Notice.—The notice under subparagraph (A) shall contain a statement of the facts constituting the alleged violation or violations, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist should issue against the covered person or service provider, such hearing to be held not earlier than 30 days nor later than 60 days after the date of service of such notice, unless an earlier or a later date is set by the Bureau, at the request of any party so served.

(C) Consent.—Unless the party or parties served under subparagraph (B) appear at the hearing personally or by a duly authorized representative, such person shall be deemed to have consented to the issuance of the cease-and-desist order.

Deadlines.
(D) Procedure.—In the event of consent under subparagraph (C), or if, upon the record, made at any such hearing, the Bureau finds that any violation specified in the notice of charges has been established, the Bureau may issue and serve upon the covered person or service provider an order to cease and desist from the violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the covered person or service provider to cease and desist from the subject activity, and to take affirmative action to correct the conditions resulting from any such violation.

(2) Effectiveness of Order.—A cease-and-desist order shall become effective at the expiration of 30 days after the date of service of an order under paragraph (1) upon the covered person or service provider concerned (except in the case of a cease-and-desist order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable as provided therein, except to such extent as the order is stayed, modified, terminated, or set aside by action of the Bureau or a reviewing court.

(3) Decision and Appeal.—Any hearing provided for in this subsection shall be held in the Federal judicial district or in the territory in which the residence or principal office or place of business of the person is located unless the person consents to another place, and shall be conducted in accordance with the provisions of chapter 5 of title 5 of the United States Code. After such hearing, and within 90 days after the Bureau has notified the parties that the case has been submitted to the Bureau for final decision, the Bureau shall render its decision (which shall include findings of fact upon which its decision is predicated) and shall issue and serve upon each party to the proceeding an order or orders consistent with the provisions of this section. Judicial review of any such order shall be exclusively as provided in this subsection. Unless a petition for review is timely filed in a court of appeals of the United States, as provided in paragraph (4), and thereafter until the record in the proceeding has been filed as provided in paragraph (4), the Bureau may at any time, upon such notice and in such manner as the Bureau shall determine proper, modify, terminate, or set aside any such order. Upon filing of the record as provided, the Bureau may modify, terminate, or set aside any such order with permission of the court.

(4) Appeal to Court of Appeals.—Any party to any proceeding under this subsection may obtain a review of any order served pursuant to this subsection (other than an order issued with the consent of the person concerned) by the filing in the court of appeals of the United States for the circuit in which the principal office of the covered person is located, or in the United States Court of Appeals for the District of Columbia Circuit, within 30 days after the date of service of such order, a written petition praying that the order of the Bureau be modified, terminated, or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Bureau, and thereupon the Bureau shall file in the court the record in the proceeding, as provided in section 2112 of title 28 of the United States Code. Upon the filing of such petition, such court shall have jurisdiction, which upon
the filing of the record shall except as provided in the last sentence of paragraph (3) be exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the Bureau. Review of such proceedings shall be had as provided in chapter 7 of title 5 of the United States Code. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court of the United States, upon certiorari, as provided in section 1254 of title 28 of the United States Code.

(5) NO STAY.—The commencement of proceedings for judicial review under paragraph (4) shall not, unless specifically ordered by the court, operate as a stay of any order issued by the Bureau.

c) SPECIAL RULES FOR TEMPORARY CEASE-AND-DESIST PROCEEDINGS.—

(1) IN GENERAL.—Whenever the Bureau determines that the violation specified in the notice of charges served upon a person, including a service provider, pursuant to subsection (b), or the continuation thereof, is likely to cause the person to be insolvent or otherwise prejudice the interests of consumers before the completion of the proceedings conducted pursuant to subsection (b), the Bureau may issue a temporary order requiring the person to cease and desist from any such violation or practice and to take affirmative action to prevent or remedy such insolvency or other condition pending completion of such proceedings. Such order may include any requirement authorized under this subtitle. Such order shall become effective upon service upon the person and, unless set aside, limited, or suspended by a court in proceedings authorized by paragraph (2), shall remain effective and enforceable pending the completion of the administrative proceedings pursuant to such notice and until such time as the Bureau shall dismiss the charges specified in such notice, or if a cease-and-desist order is issued against the person, until the effective date of such order.

(2) APPEAL.—Not later than 10 days after the covered person or service provider concerned has been served with a temporary cease-and-desist order, the person may apply to the United States district court for the judicial district in which the residence or principal office or place of business of the person is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the person under subsection (b), and such court shall have jurisdiction to issue such injunction.

(3) INCOMPLETE OR INACCURATE RECORDS.—

(A) TEMPORARY ORDER.—If a notice of charges served under subsection (b) specifies, on the basis of particular facts and circumstances, that the books and records of a covered person or service provider are so incomplete or inaccurate that the Bureau is unable to determine the financial condition of that person or the details or purpose of any transaction or transactions that may have a material effect on the financial condition of that person, the Bureau may issue a temporary order requiring—
(i) the cessation of any activity or practice which gave rise, whether in whole or in part, to the incomplete or inaccurate state of the books or records; or
(ii) affirmative action to restore such books or records to a complete and accurate state, until the completion of the proceedings under subsection (b)(1).

(B) EFFECTIVE PERIOD.—Any temporary order issued under subparagraph (A)—
(i) shall become effective upon service; and
(ii) unless set aside, limited, or suspended by a court in proceedings under paragraph (2), shall remain in effect and enforceable until the earlier of—
(I) the completion of the proceeding initiated under subsection (b) in connection with the notice of charges; or
(II) the date the Bureau determines, by examination or otherwise, that the books and records of the covered person or service provider are accurate and reflect the financial condition thereof.

(d) SPECIAL RULES FOR ENFORCEMENT OF ORDERS.—
(1) IN GENERAL.—The Bureau may in its discretion apply to the United States district court within the jurisdiction of which the principal office or place of business of the person is located, for the enforcement of any effective and outstanding notice or order issued under this section, and such court shall have jurisdiction and power to order and require compliance herewith.

(2) EXCEPTION.—Except as otherwise provided in this subsection, no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order or to review, modify, suspend, terminate, or set aside any such notice or order.

(e) RULES.—The Bureau shall prescribe rules establishing such procedures as may be necessary to carry out this section.

SEC. 1054. LITIGATION AUTHORITY.

(a) IN GENERAL.—If any person violates a Federal consumer financial law, the Bureau may, subject to sections 1024, 1025, and 1026, commence a civil action against such person to impose a civil penalty or to seek all appropriate legal and equitable relief including a permanent or temporary injunction as permitted by law.

(b) REPRESENTATION.—The Bureau may act in its own name and through its own attorneys in enforcing any provision of this title, rules thereunder, or any other law or regulation, or in any action, suit, or proceeding to which the Bureau is a party.

(c) COMPROMISE OF ACTIONS.—The Bureau may compromise or settle any action if such compromise is approved by the court.

(d) NOTICE TO THE ATTORNEY GENERAL.—
(1) IN GENERAL.—When commencing a civil action under Federal consumer financial law, or any rule thereunder, the Bureau shall notify the Attorney General and, with respect to a civil action against an insured depository institution or insured credit union, the appropriate prudential regulator.

(2) NOTICE AND COORDINATION.—
(A) NOTICE OF OTHER ACTIONS.—In addition to any notice required under paragraph (1), the Bureau shall
notify the Attorney General concerning any action, suit, or proceeding to which the Bureau is a party, except an action, suit, or proceeding that involves the offering or provision of consumer financial products or services.

(B) COORDINATION.—In order to avoid conflicts and promote consistency regarding litigation of matters under Federal law, the Attorney General and the Bureau shall consult regarding the coordination of investigations and proceedings, including by negotiating an agreement for coordination by not later than 180 days after the designated transfer date. The agreement under this subparagraph shall include provisions to ensure that parallel investigations and proceedings involving the Federal consumer financial laws are conducted in a manner that avoids conflicts and does not impede the ability of the Attorney General to prosecute violations of Federal criminal laws.

(C) RULE OF CONSTRUCTION.—Nothing in this paragraph shall be construed to limit the authority of the Bureau under this title, including the authority to interpret Federal consumer financial law.

(e) APPEARANCE BEFORE THE SUPREME COURT.—The Bureau may represent itself in its own name before the Supreme Court of the United States, provided that the Bureau makes a written request to the Attorney General within the 10-day period which begins on the date of entry of the judgment which would permit any party to file a petition for writ of certiorari, and the Attorney General concurs with such request or fails to take action within 60 days of the request of the Bureau.

(f) FORUM.—Any civil action brought under this title may be brought in a United States district court or in any court of competent jurisdiction of a state in a district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to enjoin such person and to require compliance with any Federal consumer financial law.

(g) TIME FOR BRINGING ACTION.—

(1) IN GENERAL.—Except as otherwise permitted by law or equity, no action may be brought under this title more than 3 years after the date of discovery of the violation to which an action relates.

(2) LIMITATIONS UNDER OTHER FEDERAL LAWS.—

(A) IN GENERAL.—An action arising under this title does not include claims arising solely under enumerated consumer laws.

(B) BUREAU AUTHORITY.—In any action arising solely under an enumerated consumer law, the Bureau may commence, defend, or intervene in the action in accordance with the requirements of that provision of law, as applicable.

(C) TRANSFERRED AUTHORITY.—In any action arising solely under laws for which authorities were transferred under subtitles F and H, the Bureau may commence, defend, or intervene in the action in accordance with the requirements of that provision of law, as applicable.

SEC. 1055. RELIEF AVAILABLE.

(a) ADMINISTRATIVE PROCEEDINGS OR COURT ACTIONS.—
(1) JURISDICTION.—The court (or the Bureau, as the case may be) in an action or adjudication proceeding brought under Federal consumer financial law, shall have jurisdiction to grant any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law, including a violation of a rule or order prescribed under a Federal consumer financial law.

(2) RELIEF.—Relief under this section may include, without limitation—
   (A) rescission or reformation of contracts;
   (B) refund of moneys or return of real property;
   (C) restitution;
   (D) disgorgement or compensation for unjust enrichment;
   (E) payment of damages or other monetary relief;
   (F) public notification regarding the violation, including the costs of notification;
   (G) limits on the activities or functions of the person; and
   (H) civil money penalties, as set forth more fully in subsection (c).

(3) NO EXEMPLARY OR PUNITIVE DAMAGES.—Nothing in this subsection shall be construed as authorizing the imposition of exemplary or punitive damages.

(b) RECOVERY OF COSTS.—In any action brought by the Bureau, a State attorney general, or any State regulator to enforce any Federal consumer financial law, the Bureau, the State attorney general, or the State regulator may recover its costs in connection with prosecuting such action if the Bureau, the State attorney general, or the State regulator is the prevailing party in the action.

(c) CIVIL MONEY PENALTY IN COURT AND ADMINISTRATIVE ACTIONS.—

(1) IN GENERAL.—Any person that violates, through any act or omission, any provision of Federal consumer financial law shall forfeit and pay a civil penalty pursuant to this subsection.

(2) PENALTY AMOUNTS.—
   (A) FIRST TIER.—For any violation of a law, rule, or final order or condition imposed in writing by the Bureau, a civil penalty may not exceed $5,000 for each day during which such violation or failure to pay continues.
   (B) SECOND TIER.—Notwithstanding paragraph (A), for any person that recklessly engages in a violation of a Federal consumer financial law, a civil penalty may not exceed $25,000 for each day during which such violation continues.
   (C) THIRD TIER.—Notwithstanding subparagraphs (A) and (B), for any person that knowingly violates a Federal consumer financial law, a civil penalty may not exceed $1,000,000 for each day during which such violation continues.

(3) MITIGATING FACTORS.—In determining the amount of any penalty assessed under paragraph (2), the Bureau or the court shall take into account the appropriateness of the penalty with respect to—
   (A) the size of financial resources and good faith of the person charged;
(B) the gravity of the violation or failure to pay;
(C) the severity of the risks to or losses of the consumer, which may take into account the number of products or services sold or provided;
(D) the history of previous violations; and
(E) such other matters as justice may require.

(4) AUTHORITY TO MODIFY OR REMIT PENALTY.—The Bureau may compromise, modify, or remit any penalty which may be assessed or had already been assessed under paragraph (2). The amount of such penalty, when finally determined, shall be exclusive of any sums owed by the person to the United States in connection with the costs of the proceeding, and may be deducted from any sums owing by the United States to the person charged.

(5) NOTICE AND HEARING.—No civil penalty may be assessed under this subsection with respect to a violation of any Federal consumer financial law, unless—
(A) the Bureau gives notice and an opportunity for a hearing to the person accused of the violation; or
(B) the appropriate court has ordered such assessment and entered judgment in favor of the Bureau.

SEC. 1056. REFERRALS FOR CRIMINAL PROCEEDINGS.

If the Bureau obtains evidence that any person, domestic or foreign, has engaged in conduct that may constitute a violation of Federal criminal law, the Bureau shall transmit such evidence to the Attorney General of the United States, who may institute criminal proceedings under appropriate law. Nothing in this section affects any other authority of the Bureau to disclose information.

SEC. 1057. EMPLOYEE PROTECTION.

(a) IN GENERAL.—No covered person or service provider shall terminate or in any other way discriminate against, or cause to be terminated or discriminated against, any covered employee or any authorized representative of covered employees by reason of the fact that such employee or representative, whether at the initiative of the employee or in the ordinary course of the duties of the employee (or any person acting pursuant to a request of the employee), has—

(1) provided, caused to be provided, or is about to provide or cause to be provided, information to the employer, the Bureau, or any other State, local, or Federal, government authority or law enforcement agency relating to any violation of, or any act or omission that the employee reasonably believes to be a violation of, any provision of this title or any other provision of law that is subject to the jurisdiction of the Bureau, or any rule, order, standard, or prohibition prescribed by the Bureau;

(2) testified or will testify in any proceeding resulting from the administration or enforcement of any provision of this title or any other provision of law that is subject to the jurisdiction of the Bureau, or any rule, order, standard, or prohibition prescribed by the Bureau;

(3) filed, instituted, or caused to be filed or instituted any proceeding under any Federal consumer financial law; or

(4) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any law,
rule, order, standard, or prohibition, subject to the jurisdiction of, or enforceable by, the Bureau.

(b) Definition of Covered Employee.—For the purposes of this section, the term “covered employee” means any individual performing tasks related to the offering or provision of a consumer financial product or service.

(c) Procedures and Timetables.—

(1) Complaint.—

(A) In general.—A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 180 days after the date on which such alleged violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination and identifying the person responsible for such act.

(B) Actions of Secretary of Labor.—Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint who is alleged to have committed the violation, of—

(i) the filing of the complaint;
(ii) the allegations contained in the complaint;
(iii) the substance of evidence supporting the complaint; and
(iv) opportunities that will be afforded to such person under paragraph (2).

(2) Investigation by Secretary of Labor.—

(A) In general.—Not later than 60 days after the date of receipt of a complaint filed under paragraph (1), and after affording the complainant and the person named in the complaint who is alleged to have committed the violation that is the basis for the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary of Labor to present statements from witnesses, the Secretary of Labor shall—

(i) initiate an investigation and determine whether there is reasonable cause to believe that the complaint has merit; and

(ii) notify the complainant and the person alleged to have committed the violation of subsection (a), in writing, of such determination.

(B) Notice of Relief Available.—If the Secretary of Labor concludes that there is reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary of Labor shall, together with the notice under subparagraph (A)(ii), issue a preliminary order providing the relief prescribed by paragraph (4)(B).

(C) Request for Hearing.—Not later than 30 days after the date of receipt of notification of a determination of the Secretary of Labor under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Any such hearing shall be conducted expeditiously, and
if a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

(3) **GROUNDS FOR DETERMINATION OF COMPLAINTS.**—

(A) **IN GENERAL.**—The Secretary of Labor shall dismiss a complaint filed under this subsection, and shall not conduct an investigation otherwise required under paragraph (2), unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(B) **REBUTTAL EVIDENCE.**—Notwithstanding a finding by the Secretary of Labor that the complainant has made the showing required under subparagraph (A), no investigation otherwise required under paragraph (2) shall be conducted, if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(C) **EVIDENTIARY STANDARDS.**—The Secretary of Labor may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint. Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(4) **ISSUANCE OF FINAL ORDERS; REVIEW PROCEDURES.**—

(A) **TIMING.**—Not later than 120 days after the date of conclusion of any hearing under paragraph (2), the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

(B) **PENALTIES.**—

(i) **ORDER OF SECRETARY OF LABOR.**—If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation—

(I) to take affirmative action to abate the violation;

(II) to reinstate the complainant to his or her former position, together with compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and

(III) to provide compensatory damages to the complainant.

(ii) **PENALTY.**—If an order is issued under clause (i), the Secretary of Labor, at the request of the complainant, shall assess against the person against
whom the order is issued, a sum equal to the aggregate amount of all costs and expenses (including attorney fees and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

(C) Penalty for Frivolous Claims.—If the Secretary of Labor finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorney fee, not exceeding $1,000, to be paid by the complainant.

(D) De Novo Review.—

(i) Failure of the Secretary to Act.—If the Secretary of Labor has not issued a final order within 210 days after the date of filing of a complaint under this subsection, or within 90 days after the date of receipt of a written determination, the complainant may bring an action at law or equity for de novo review in the appropriate district court of the United States having jurisdiction, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.

(ii) Procedures.—A proceeding under clause (i) shall be governed by the same legal burdens of proof specified in paragraph (3). The court shall have jurisdiction to grant all relief necessary to make the employee whole, including injunctive relief and compensatory damages, including—

(I) reinstatement with the same seniority status that the employee would have had, but for the discharge or discrimination;

(II) the amount of back pay, with interest; and

(III) compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(E) Other Appeals.—Unless the complainant brings an action under subparagraph (D), any person adversely affected or aggrieved by a final order issued under subparagraph (A) may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation, not later than 60 days after the date of the issuance of the final order of the Secretary of Labor under subparagraph (A). Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order. An order of the Secretary of Labor with respect to which review could have been obtained under this subparagraph shall not be subject to judicial review in any criminal or other civil proceeding.
(5) Failure to Comply with Order.—

(A) Actions by the Secretary.—If any person has failed to comply with a final order issued under paragraph (4), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to have occurred, or in the United States district court for the District of Columbia, to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including injunctive relief and compensatory damages.

(B) Civil Actions to Compel Compliance.—A person on whose behalf an order was issued under paragraph (4) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(C) Award of Costs Authorized.—The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(D) Mandamus Proceedings.—Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28, United States Code.

(d) Unenforceability of Certain Agreements.—

(1) No Waiver of Rights and Remedies.—Except as provided under paragraph (3), and notwithstanding any other provision of law, the rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment, including by any predispute arbitration agreement.

(2) No Predispute Arbitration Agreements.—Except as provided under paragraph (3), and notwithstanding any other provision of law, no predispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section.

(3) Exception.—Notwithstanding paragraphs (1) and (2), an arbitration provision in a collective bargaining agreement shall be enforceable as to disputes arising under subsection (a)(4), unless the Bureau determines, by rule, that such provision is inconsistent with the purposes of this title.

SEC. 1058. EFFECTIVE DATE.

This subtitle shall become effective on the designated transfer date.

Subtitle F—Transfer of Functions and Personnel; Transitional Provisions

SEC. 1061. TRANSFER OF CONSUMER FINANCIAL PROTECTION FUNCTIONS.

(a) Defined Terms.—For purposes of this subtitle—
(1) the term “consumer financial protection functions” means—
   (A) all authority to prescribe rules or issue orders or
guidelines pursuant to any Federal consumer financial
law, including performing appropriate functions to promul-
gate and review such rules, orders, and guidelines; and
   (B) the examination authority described in subsection
(c)(1), with respect to a person described in subsection
1025(a); and
(2) the terms “transferor agency” and “transferor agencies”
mean, respectively—
   (A) the Board of Governors (and any Federal reserve
bank, as the context requires), the Federal Deposit Insur-
ance Corporation, the Federal Trade Commission, the
National Credit Union Administration, the Office of the
Comptroller of the Currency, the Office of Thrift Super-
vision, and the Department of Housing and Urban Develop-
ment, and the heads of those agencies; and
   (B) the agencies listed in subparagraph (A), collectively.

(b) IN GENERAL.—Except as provided in subsection (c), con-
sumer financial protection functions are transferred as follows:

(1) BOARD OF GOVERNORS.—
   (A) TRANSFER OF FUNCTIONS.—All consumer financial
protection functions of the Board of Governors are trans-
ferred to the Bureau.
   (B) BOARD OF GOVERNORS AUTHORITY.—The Bureau
shall have all powers and duties that were vested in the
Board of Governors, relating to consumer financial protec-
tion functions, on the day before the designated transfer
date.

(2) COMPTROLLER OF THE CURRENCY.—
   (A) TRANSFER OF FUNCTIONS.—All consumer financial
protection functions of the Comptroller of the Currency
are transferred to the Bureau.
   (B) COMPTROLLER AUTHORITY.—The Bureau shall have
all powers and duties that were vested in the Comptroller
of the Currency, relating to consumer financial protection
functions, on the day before the designated transfer date.

(3) DIRECTOR OF THE OFFICE OF THRIFT SUPERVISION.—
   (A) TRANSFER OF FUNCTIONS.—All consumer financial
protection functions of the Director of the Office of Thrift
Supervision are transferred to the Bureau.
   (B) DIRECTOR AUTHORITY.—The Bureau shall have all
powers and duties that were vested in the Director of
the Office of Thrift Supervision, relating to consumer finan-
cial protection functions, on the day before the designated
transfer date.

(4) FEDERAL DEPOSIT INSURANCE CORPORATION.—
   (A) TRANSFER OF FUNCTIONS.—All consumer financial
protection functions of the Federal Deposit Insurance Cor-
poration are transferred to the Bureau.
   (B) CORPORATION AUTHORITY.—The Bureau shall have
all powers and duties that were vested in the Federal
Deposit Insurance Corporation, relating to consumer finan-
cial protection functions, on the day before the designated
transfer date.

(5) FEDERAL TRADE COMMISSION.—
(A) TRANSFER OF FUNCTIONS.—The authority of the Federal Trade Commission under an enumerated consumer law to prescribe rules, issue guidelines, or conduct a study or issue a report mandated under such law shall be transferred to the Bureau on the designated transfer date. Nothing in this title shall be construed to require a mandatory transfer of any employee of the Federal Trade Commission.

(B) BUREAU AUTHORITY.—
   (i) IN GENERAL.—The Bureau shall have all powers and duties under the enumerated consumer laws to prescribe rules, issue guidelines, or to conduct studies or issue reports mandated by such laws, that were vested in the Federal Trade Commission on the day before the designated transfer date.
   (ii) FEDERAL TRADE COMMISSION ACT.—Subject to subtitle B, the Bureau may enforce a rule prescribed under the Federal Trade Commission Act by the Federal Trade Commission with respect to an unfair or deceptive act or practice to the extent that such rule applies to a covered person or service provider with respect to the offering or provision of a consumer financial product or service as if it were a rule prescribed under section 1031 of this title.

(C) AUTHORITY OF THE FEDERAL TRADE COMMISSION.—
   (i) IN GENERAL.—No provision of this title shall be construed as modifying, limiting, or otherwise affecting the authority of the Federal Trade Commission (including its authority with respect to affiliates described in section 1025(a)(1)) under the Federal Trade Commission Act or any other law, other than the authority under an enumerated consumer law to prescribe rules, issue official guidelines, or conduct a study or issue a report mandated under such law.
   (ii) COMMISSION AUTHORITY RELATING TO RULES PRESCRIBED BY THE BUREAU.—Subject to subtitle B, the Federal Trade Commission shall have authority to enforce under the Federal Trade Commission Act (15 U.S.C. 41 et seq.) a rule prescribed by the Bureau under this title with respect to a covered person subject to the jurisdiction of the Federal Trade Commission under that Act, and a violation of such a rule by such a person shall be treated as a violation of a rule issued under section 18 of that Act (15 U.S.C. 57a) with respect to unfair or deceptive acts or practices.

(D) COORDINATION.—To avoid duplication of or conflict between rules prescribed by the Bureau under section 1031 of this title and the Federal Trade Commission under section 18(a)(1)(B) of the Federal Trade Commission Act that apply to a covered person or service provider with respect to the offering or provision of consumer financial products or services, the agencies shall negotiate an agreement with respect to rulemaking by each agency, including consultation with the other agency prior to proposing a rule and during the comment period.
(E) **Deference.**—No provision of this title shall be construed as altering, limiting, expanding, or otherwise affecting the deference that a court affords to the—

(i) Federal Trade Commission in making determinations regarding the meaning or interpretation of any provision of the Federal Trade Commission Act, or of any other Federal law for which the Commission has authority to prescribe rules; or

(ii) Bureau in making determinations regarding the meaning or interpretation of any provision of a Federal consumer financial law (other than any law described in clause (i)).

(6) **National Credit Union Administration.**—

(A) **Transfer of Functions.**—All consumer financial protection functions of the National Credit Union Administration are transferred to the Bureau.

(B) **National Credit Union Administration Authority.**—The Bureau shall have all powers and duties that were vested in the National Credit Union Administration, relating to consumer financial protection functions, on the day before the designated transfer date.

(7) **Department of Housing and Urban Development.**—


(B) **Authority of the Department of Housing and Urban Development.**—The Bureau shall have all powers and duties that were vested in the Secretary of the Department of Housing and Urban Development relating to the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 et seq.), the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (12 U.S.C. 5101 et seq.), and the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 et seq.), on the day before the designated transfer date.

(c) **Authorities of the Prudential Regulators.**—

(1) **Examination.**—A transferor agency that is a prudential regulator shall have—

(A) authority to require reports from and conduct examinations for compliance with Federal consumer financial laws with respect to a person described in section 1025(a), that is incidental to the backup and enforcement procedures provided to the regulator under section 1025(c); and

(B) exclusive authority (relative to the Bureau) to require reports from and conduct examinations for compliance with Federal consumer financial laws with respect to a person described in section 1026(a), except as provided to the Bureau under subsections (b) and (c) of section 1026.

(2) **Enforcement.**—
(A) LIMITATION.—The authority of a transferor agency that is a prudential regulator to enforce compliance with Federal consumer financial laws with respect to a person described in section 1025(a), shall be limited to the backup and enforcement procedures in described in section 1025(c).

(B) EXCLUSIVE AUTHORITY.—A transferor agency that is a prudential regulator shall have exclusive authority (relative to the Bureau) to enforce compliance with Federal consumer financial laws with respect to a person described in section 1026(a), except as provided to the Bureau under subsections (b) and (c) of section 1026.

(C) STATUTORY ENFORCEMENT.—For purposes of carrying out the authorities under, and subject to the limitations of, subtitle B, each prudential regulator may enforce compliance with the requirements imposed under this title, and any rule or order prescribed by the Bureau under this title, under—

(i) the Federal Credit Union Act (12 U.S.C. 1751 et seq.), by the National Credit Union Administration Board with respect to any covered person or service provider that is an insured credit union, or service provider thereto, or any affiliate of an insured credit union, who is subject to the jurisdiction of the Board under that Act; and

(ii) section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to a covered person or service provider that is a person described in section 3(q) of that Act and who is subject to the jurisdiction of that agency, as set forth in sections 3(q) and 8 of the Federal Deposit Insurance Act; or

(iii) the Bank Service Company Act (12 U.S.C. 1861 et seq.).

(d) EFFECTIVE DATE.—Subsections (b) and (c) shall become effective on the designated transfer date.

SEC. 1062. DESIGNATED TRANSFER DATE.

(a) IN GENERAL.—Not later than 60 days after the date of enactment of this Act, the Secretary shall—

(1) in consultation with the Chairman of the Board of Governors, the Chairperson of the Corporation, the Chairman of the Federal Trade Commission, the Chairman of the National Credit Union Administration Board, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Secretary of the Department of Housing and Urban Development, and the Director of the Office of Management and Budget, designate a single calendar date for the transfer of functions to the Bureau under section 1061; and

(2) publish notice of that designated date in the Federal Register.

(b) CHANGING DESIGNATION.—The Secretary—

(1) may, in consultation with the Chairman of the Board of Governors, the Chairperson of the Federal Deposit Insurance Corporation, the Chairman of the Federal Trade Commission, the Chairman of the National Credit Union Administration
Board, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Secretary of the Department of Housing and Urban Development, and the Director of the Office of Management and Budget, change the date designated under subsection (a); and

(2) shall publish notice of any changed designated date in the Federal Register.

(c) PERMISSIBLE DATES.—

(1) IN GENERAL.—Except as provided in paragraph (2), any date designated under this section shall be not earlier than 180 days, nor later than 12 months, after the date of enactment of this Act.

(2) EXTENSION OF TIME.—The Secretary may designate a date that is later than 12 months after the date of enactment of this Act if the Secretary transmits to appropriate committees of Congress—

(A) a written determination that orderly implementation of this title is not feasible before the date that is 12 months after the date of enactment of this Act;

(B) an explanation of why an extension is necessary for the orderly implementation of this title; and

(C) a description of the steps that will be taken to effect an orderly and timely implementation of this title within the extended time period.

(3) EXTENSION LIMITED.—In no case may any date designated under this section be later than 18 months after the date of enactment of this Act.

SEC. 1063. SAVINGS PROVISIONS.

(a) BOARD OF GOVERNORS.—

(1) EXISTING RIGHTS, DUTIES, AND OBLIGATIONS NOT AFFECTED.—Section 1061(b)(1) does not affect the validity of any right, duty, or obligation of the United States, the Board of Governors (or any Federal reserve bank), or any other person that—

(A) arises under any provision of law relating to any consumer financial protection function of the Board of Governors transferred to the Bureau by this title; and

(B) existed on the day before the designated transfer date.

(2) CONTINUATION OF SUITS.—No provision of this Act shall abate any proceeding commenced by or against the Board of Governors (or any Federal reserve bank) before the designated transfer date with respect to any consumer financial protection function of the Board of Governors (or any Federal reserve bank) transferred to the Bureau by this title, except that the Bureau, subject to sections 1024, 1025, and 1026, shall be substituted for the Board of Governors (or Federal reserve bank) as a party to any such proceeding as of the designated transfer date.

(b) FEDERAL DEPOSIT INSURANCE CORPORATION.—

(1) EXISTING RIGHTS, DUTIES, AND OBLIGATIONS NOT AFFECTED.—Section 1061(b)(4) does not affect the validity of any right, duty, or obligation of the United States, the Federal Deposit Insurance Corporation, the Board of Directors of that Corporation, or any other person, that—
(A) arises under any provision of law relating to any consumer financial protection function of the Federal Deposit Insurance Corporation transferred to the Bureau by this title; and
(B) existed on the day before the designated transfer date.

2) Continuation of Suits.—No provision of this Act shall abate any proceeding commenced by or against the Federal Deposit Insurance Corporation (or the Board of Directors of that Corporation) before the designated transfer date with respect to any consumer financial protection function of the Federal Deposit Insurance Corporation transferred to the Bureau by this title, except that the Bureau, subject to sections 1024, 1025, and 1026, shall be substituted for the Federal Deposit Insurance Corporation (or Board of Directors) as a party to any such proceeding as of the designated transfer date.

(c) Federal Trade Commission.—Section 1061(b)(5) does not affect the validity of any right, duty, or obligation of the United States, the Federal Trade Commission, or any other person, that—

(1) arises under any provision of law relating to any consumer financial protection function of the Federal Trade Commission transferred to the Bureau by this title; and

(2) existed on the day before the designated transfer date.

(d) National Credit Union Administration.—

(1) Existing Rights, Duties, and Obligations Not Affected.—Section 1061(b)(6) does not affect the validity of any right, duty, or obligation of the United States, the National Credit Union Administration, the National Credit Union Administration Board, or any other person, that—

(A) arises under any provision of law relating to any consumer financial protection function of the National Credit Union Administration transferred to the Bureau by this title; and

(B) existed on the day before the designated transfer date.

(2) Continuation of Suits.—No provision of this Act shall abate any proceeding commenced by or against the National Credit Union Administration (or the National Credit Union Administration Board) before the designated transfer date with respect to any consumer financial protection function of the National Credit Union Administration transferred to the Bureau by this title, except that the Bureau, subject to sections 1024, 1025, and 1026, shall be substituted for the National Credit Union Administration (or National Credit Union Administration Board) as a party to any such proceeding as of the designated transfer date.

(e) Office of the Comptroller of the Currency.—

(1) Existing Rights, Duties, and Obligations Not Affected.—Section 1061(b)(2) does not affect the validity of any right, duty, or obligation of the United States, the Comptroller of the Currency, the Office of the Comptroller of the Currency, or any other person, that—

(A) arises under any provision of law relating to any consumer financial protection function of the Comptroller of the Currency transferred to the Bureau by this title; and
(B) existed on the day before the designated transfer date.

(2) Continuation of suits.—No provision of this Act shall abate any proceeding commenced by or against the Comptroller of the Currency (or the Office of the Comptroller of the Currency) with respect to any consumer financial protection function of the Comptroller of the Currency transferred to the Bureau by this title before the designated transfer date, except that the Bureau, subject to sections 1024, 1025, and 1026, shall be substituted for the Comptroller of the Currency (or the Office of the Comptroller of the Currency) as a party to any such proceeding as of the designated transfer date.

(f) Office of Thrift Supervision.—

(1) Existing rights, duties, and obligations not affected.—Section 1061(b)(3) does not affect the validity of any right, duty, or obligation of the United States, the Director of the Office of Thrift Supervision, the Office of Thrift Supervision, or any other person, that—

(A) arises under any provision of law relating to any consumer financial protection function of the Director of the Office of Thrift Supervision transferred to the Bureau by this title; and

(B) that existed on the day before the designated transfer date.

(2) Continuation of suits.—No provision of this Act shall abate any proceeding commenced by or against the Director of the Office of Thrift Supervision (or the Office of Thrift Supervision) with respect to any consumer financial protection function of the Director of the Office of Thrift Supervision transferred to the Bureau by this title before the designated transfer date, except that the Bureau, subject to sections 1024, 1025, and 1026, shall be substituted for the Director (or the Office of Thrift Supervision) as a party to any such proceeding as of the designated transfer date.

(g) Department of Housing and Urban Development.—

(1) Existing rights, duties, and obligations not affected.—Section 1061(b)(7) shall not affect the validity of any right, duty, or obligation of the United States, the Secretary of the Department of Housing and Urban Development (or the Department of Housing and Urban Development), or any other person, that—

(A) arises under any provision of law relating to any function of the Secretary of the Department of Housing and Urban Development with respect to the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 et seq.), the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (12 U.S.C. 5102 et seq.), or the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 et seq) transferred to the Bureau by this title; and

(B) existed on the day before the designated transfer date.

(2) Continuation of suits.—This title shall not abate any proceeding commenced by or against the Secretary of the Department of Housing and Urban Development (or the Department of Housing and Urban Development) with respect to any consumer financial protection function of the Secretary
of the Department of Housing and Urban Development transferred to the Bureau by this title before the designated transfer date, except that the Bureau, subject to sections 1024, 1025, and 1026, shall be substituted for the Secretary of the Department of Housing and Urban Development (or the Department of Housing and Urban Development) as a party to any such proceeding as of the designated transfer date.

(h) **CONTINUATION OF EXISTING ORDERS, RULINGS, DETERMINATIONS, AGREEMENTS, AND RESOLUTIONS.**

(1) **IN GENERAL.**—Except as provided in paragraph (2) and under subsection (i), all orders, resolutions, determinations, agreements, and rulings that have been issued, made, prescribed, or allowed to become effective by any transferor agency or by a court of competent jurisdiction, in the performance of consumer financial protection functions that are transferred by this title and that are in effect on the day before the designated transfer date, shall continue in effect, and shall continue to be enforceable by the appropriate transferor agency, according to the terms of those orders, resolutions, determinations, agreements, and rulings, and shall not be enforceable by or against the Bureau.

(2) **EXCEPTION FOR ORDERS APPLICABLE TO PERSONS DESCRIBED IN SECTION 1025(a).**—All orders, resolutions, determinations, agreements, and rulings that have been issued, made, prescribed, or allowed to become effective by any transferor agency or by a court of competent jurisdiction, in the performance of consumer financial protection functions that are transferred by this title and that are in effect on the day before the designated transfer date with respect to any person described in section 1025(a), shall continue in effect, according to the terms of those orders, resolutions, determinations, agreements, and rulings, and shall be enforceable by or against the Bureau or transferor agency.

(i) **IDENTIFICATION OF RULES AND ORDERS CONTINUED.**—Not later than the designated transfer date, the Bureau—

(1) shall, after consultation with the head of each transferor agency, identify the rules and orders that will be enforced by the Bureau; and

(2) shall publish a list of such rules and orders in the Federal Register.

(j) **STATUS OF RULES PROPOSED OR NOT YET EFFECTIVE.**—

(1) **PROPOSED RULES.**—Any proposed rule of a transferor agency which that agency, in performing consumer financial protection functions transferred by this title, has proposed before the designated transfer date, but has not been published as a final rule before that date, shall be deemed to be a proposed rule of the Bureau.

(2) **RULES NOT YET EFFECTIVE.**—Any interim or final rule of a transferor agency which that agency, in performing consumer financial protection functions transferred by this title, has published before the designated transfer date, but which has not become effective before that date, shall become effective as a rule of the Bureau according to its terms.

**SEC. 1064. TRANSFER OF CERTAIN PERSONNEL.**

(a) **IN GENERAL.**—

12 USC 5584.

Determinations.
(1) Certain Federal Reserve System Employees Transferred.—

(A) Identifying Employees for Transfer.—The Bureau and the Board of Governors shall—

(i) jointly determine the number of employees of the Board of Governors necessary to perform or support the consumer financial protection functions of the Board of Governors that are transferred to the Bureau by this title; and

(ii) consistent with the number determined under clause (i), jointly identify employees of the Board of Governors for transfer to the Bureau, in a manner that the Bureau and the Board of Governors, in their sole discretion, determine equitable.

(B) Identified Employees Transferred.—All employees of the Board of Governors identified under subparagraph (A)(ii) shall be transferred to the Bureau for employment.

(C) Federal Reserve Bank Employees.—Employees of any Federal reserve bank who are performing consumer financial protection functions on behalf of the Board of Governors shall be treated as employees of the Board of Governors for purposes of subparagraphs (A) and (B).

(2) Certain FDIC Employees Transferred.—

(A) Identifying Employees for Transfer.—The Bureau and the Board of Directors of the Federal Deposit Insurance Corporation shall—

(i) jointly determine the number of employees of that Corporation necessary to perform or support the consumer financial protection functions of the Corporation that are transferred to the Bureau by this title; and

(ii) consistent with the number determined under clause (i), jointly identify employees of the Corporation for transfer to the Bureau, in a manner that the Bureau and the Board of Directors of the Corporation, in their sole discretion, determine equitable.

(B) Identified Employees Transferred.—All employees of the Corporation identified under subparagraph (A)(ii) shall be transferred to the Bureau for employment.

(3) Certain NCUA Employees Transferred.—

(A) Identifying Employees for Transfer.—The Bureau and the National Credit Union Administration Board shall—

(i) jointly determine the number of employees of the National Credit Union Administration necessary to perform or support the consumer financial protection functions of the National Credit Union Administration that are transferred to the Bureau by this title; and

(ii) consistent with the number determined under clause (i), jointly identify employees of the National Credit Union Administration for transfer to the Bureau, in a manner that the Bureau and the National Credit Union Administration Board, in their sole discretion, determine equitable.
(B) IDENTIFIED EMPLOYEES TRANSFERRED.—All employees of the National Credit Union Administration identified under subparagraph (A)(ii) shall be transferred to the Bureau for employment.

(4) CERTAIN OFFICE OF THE COMPTROLLER OF THE CURRENCY EMPLOYEES TRANSFERRED.—

(A) IDENTIFYING EMPLOYEES FOR TRANSFER.—The Bureau and the Comptroller of the Currency shall—

(i) jointly determine the number of employees of the Office of the Comptroller of the Currency necessary to perform or support the consumer financial protection functions of the Office of the Comptroller of the Currency that are transferred to the Bureau by this title; and

(ii) consistent with the number determined under clause (i), jointly identify employees of the Office of the Comptroller of the Currency for transfer to the Bureau, in a manner that the Bureau and the Office of the Comptroller of the Currency, in their sole discretion, determine equitable.

(B) IDENTIFIED EMPLOYEES TRANSFERRED.—All employees of the Office of the Comptroller of the Currency identified under subparagraph (A)(ii) shall be transferred to the Bureau for employment.

(5) CERTAIN OFFICE OF THRIFT SUPERVISION EMPLOYEES TRANSFERRED.—

(A) IDENTIFYING EMPLOYEES FOR TRANSFER.—The Bureau and the Director of the Office of Thrift Supervision shall—

(i) jointly determine the number of employees of the Office of Thrift Supervision necessary to perform or support the consumer financial protection functions of the Office of Thrift Supervision that are transferred to the Bureau by this title; and

(ii) consistent with the number determined under clause (i), jointly identify employees of the Office of Thrift Supervision for transfer to the Bureau, in a manner that the Bureau and the Office of Thrift Supervision, in their sole discretion, determine equitable.

(B) IDENTIFIED EMPLOYEES TRANSFERRED.—All employees of the Office of Thrift Supervision identified under subparagraph (A)(ii) shall be transferred to the Bureau for employment.

(6) CERTAIN EMPLOYEES OF DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT TRANSFERRED.—

(A) IDENTIFYING EMPLOYEES FOR TRANSFER.—The Bureau and the Secretary of the Department of Housing and Urban Development shall—

(i) jointly determine the number of employees of the Department of Housing and Urban Development necessary to perform or support the consumer protection functions of the Department that are transferred to the Bureau by this title; and

(ii) consistent with the number determined under clause (i), jointly identify employees of the Department of Housing and Urban Development for transfer to the Bureau in a manner that the Bureau and the
Secretary of the Department of Housing and Urban Development, in their sole discretion, deem equitable.

(B) IDENTIFIED EMPLOYEES TRANSFERRED.—All employees of the Department of Housing and Urban Development identified under subparagraph (A)(ii) shall be transferred to the Bureau for employment.

(7) CONSUMER EDUCATION, FINANCIAL LITERACY, CONSUMER COMPLAINTS, AND RESEARCH FUNCTIONS.—The Bureau and each of the transferor agencies (except the Federal Trade Commission) shall jointly determine the number of employees and the types and grades of employees necessary to perform the functions of the Bureau under subtitle A, including consumer education, financial literacy, policy analysis, responses to consumer complaints and inquiries, research, and similar functions. All employees jointly identified under this paragraph shall be transferred to the Bureau for employment.

(8) AUTHORITY OF THE PRESIDENT TO RESOLVE DISPUTES.—

(A) ACTION AUTHORIZED.—In the event that the Bureau and a transferor agency are unable to reach an agreement under paragraphs (1) through (7) by the designated transfer date, the President, or the designee thereof, may issue an order or directive to the transferor agency to effect the transfer of personnel and property under this subtitle.

(B) TRANSMITTAL TO CONGRESS REQUIRED.—If an order or directive is issued under subparagraph (A), the President shall transmit a copy of the written determination made with respect to such order or directive, including an explanation for the need for the order or directive, to the Committee on Banking, Housing, and Urban Affairs and the Committee on Appropriations of the Senate and the Committee on Financial Services and the Committee on Appropriations of the House of Representatives.

(C) SUNSET.—The authority provided in this paragraph shall terminate 3 years after the designated transfer date.

(9) APPOINTMENT AUTHORITY FOR EXCEPTED SERVICE AND SENIOR EXECUTIVE SERVICE TRANSFERRED.—

(A) IN GENERAL.—In the case of an employee occupying a position in the excepted service or the Senior Executive Service, any appointment authority established pursuant to law or regulations of the Office of Personnel Management for filling such positions shall be transferred, subject to subparagraph (B).

(B) DECLINING TRANSFERS ALLOWED.—An agency or entity may decline to make a transfer of authority under subparagraph (A) (and the employees appointed pursuant thereto) to the extent that such authority relates to positions excepted from the competitive service because of their confidential, policy-making, policy-determining, or policy-advocating character, and non-career positions in the Senior Executive Service (within the meaning of section 3132(a)(7) of title 5, United States Code).

(b) TIMING OF TRANSFERS AND POSITION ASSIGNMENTS.—Each employee to be transferred under this section shall—

(1) be transferred not later than 90 days after the designated transfer date; and

(2) receive notice of a position assignment not later than 120 days after the effective date of his or her transfer.
(c) Transfer of Function.—

(1) In general.—Notwithstanding any other provision of law, the transfer of employees shall be deemed a transfer of functions for the purpose of section 3503 of title 5, United States Code.

(2) Priority of this title.—If any provisions of this title conflict with any protection provided to transferred employees under section 3503 of title 5, United States Code, the provisions of this title shall control.

(d) Equal Status and Tenure Positions.—

(1) Employees transferred from the Federal Reserve System, FDIC, HUD, NCUA, OCC, and OTS.—Each employee transferred to the Bureau from the Board of Governors, a Federal Reserve bank, the Federal Deposit Insurance Corporation, the Department of Housing and Urban Development, the National Credit Union Administration, the Office of the Comptroller of the Currency, or the Office of Thrift Supervision shall be placed in a position at the Bureau with the same status and tenure as that employee held on the day before the designated transfer date.

(2) Employees transferred from the Federal Reserve System.—For purposes of determining the status and position placement of a transferred employee, any period of service with the Board of Governors or a Federal Reserve bank shall be credited as a period of service with a Federal agency.

(e) Additional Certification Requirements Limited.—Examiners transferred to the Bureau are not subject to any additional certification requirements before being placed in a comparable examiner position at the Bureau examining the same types of institutions as they examined before they were transferred.

(f) Personnel Actions Limited.—

(1) 2-Year Protection.—Except as provided in paragraph (2), each transferred employee holding a permanent position on the day before the designated transfer date may not, during the 2-year period beginning on the designated transfer date, be involuntarily separated, or involuntarily reassigned outside his or her locality pay area.

(2) Exceptions.—Paragraph (1) does not limit the right of the Bureau—

(A) to separate an employee for cause or for unacceptable performance;

(B) to terminate an appointment to a position excepted from the competitive service because of its confidential policy-making, policy-determining, or policy-advocating character; or

(C) to reassign a supervisory employee outside of his or her locality pay area when the Bureau determines that the reassignment is necessary for the efficient operation of the Bureau.

(g) Pay.—

(1) 2-Year Protection.—

(A) In general.—Except as provided in paragraph (2), each transferred employee shall, during the 2-year period beginning on the designated transfer date, receive pay at a rate equal to not less than the basic rate of pay (including any geographic differential) that the employee received
during the pay period immediately preceding the date of transfer.

(B) LIMITATION.—Notwithstanding subparagraph (A), if the employee was receiving a higher rate of basic pay on a temporary basis (because of a temporary assignment, temporary promotion, or other temporary action) immediately before the date of transfer, the Bureau may reduce the rate of basic pay on the date on which the rate would have been reduced but for the transfer, and the protected rate for the remainder of the 2-year period shall be the reduced rate that would have applied, but for the transfer.

(2) EXCEPTIONS.—Paragraph (1) does not limit the right of the Bureau to reduce the rate of basic pay of a transferred employee—

(A) for cause;
(B) for unacceptable performance; or
(C) with the consent of the employee.

(3) PROTECTION ONLY WHILE EMPLOYED.—Paragraph (1) applies to a transferred employee only while that employee remains employed by the Bureau.

(4) PAY INCREASES PERMITTED.—Paragraph (1) does not limit the authority of the Bureau to increase the pay of a transferred employee.

(h) REORGANIZATION.—

(1) BETWEEN 1ST AND 3RD YEAR.—

(A) IN GENERAL.—If the Bureau determines, during the 2-year period beginning 1 year after the designated transfer date, that a reorganization of the staff of the Bureau is required—

(i) that reorganization shall be deemed a “substantial reorganization” for purposes of affording affected employees retirement under section 8336(d)(2) or 8414(b)(1)(B) of title 5, United States Code;

(ii) before the reorganization occurs, all employees in the same locality pay area as defined by the Office of Personnel Management shall be placed in a uniform position classification system; and

(iii) any resulting reduction in force shall be governed by the provisions of chapter 35 of title 5, United States Code, except that the Bureau shall—

(I) establish competitive areas (as that term is defined in regulations issued by the Office of Personnel Management) to include at a minimum all employees in the same locality pay area as defined by the Office of Personnel Management;

(II) establish competitive levels (as that term is defined in regulations issued by the Office of Personnel Management) without regard to whether the particular employees have been appointed to positions in the competitive service or the excepted service; and

(III) afford employees appointed to positions in the excepted service (other than to a position excepted from the competitive service because of its confidential policy-making, policy-determining, or policy-advocating character) the same assignment rights to positions within the Bureau as
employees appointed to positions in the competitive service.

(B) SERVICE CREDIT FOR REDUCTIONS IN FORCE.—For purposes of this paragraph, periods of service with a Federal home loan bank, a joint office of the Federal home loan banks, the Board of Governors, a Federal reserve bank, the Federal Deposit Insurance Corporation, or the National Credit Union Administration shall be credited as periods of service with a Federal agency.

(2) AFTER 3RD YEAR.—

(A) IN GENERAL.—If the Bureau determines, at any time after the 3-year period beginning on the designated transfer date, that a reorganization of the staff of the Bureau is required, any resulting reduction in force shall be governed by the provisions of chapter 35 of title 5, United States Code, except that the Bureau shall establish competitive levels (as that term is defined in regulations issued by the Office of Personnel Management) without regard to types of appointment held by particular employees transferred under this section.

(B) SERVICE CREDIT FOR REDUCTIONS IN FORCE.—For purposes of this paragraph, periods of service with a Federal home loan bank, a joint office of the Federal home loan banks, the Board of Governors, a Federal reserve bank, the Federal Deposit Insurance Corporation, or the National Credit Union Administration shall be credited as periods of service with a Federal agency.

(i) BENEFITS.—

(1) RETIREMENT BENEFITS FOR TRANSFERRED EMPLOYEES.—

(A) IN GENERAL.—

(i) CONTINUATION OF EXISTING RETIREMENT PLAN.—Unless an election is made under clause (iii) or subparagraph (B), each employee transferred pursuant to this subtitle shall remain enrolled in the existing retirement plan of that employee as of the date of transfer, through any period of continuous employment with the Bureau.

(ii) EMPLOYER CONTRIBUTION.—The Bureau shall pay any employer contributions to the existing retirement plan of each transferred employee, as required under that plan.

(iii) OPTION TO ELECT INTO THE FEDERAL RESERVE SYSTEM RETIREMENT PLAN AND FEDERAL RESERVE SYSTEM THRIFT PLAN.—Any employee transferred pursuant to this subtitle may, during the 1-year period beginning 6 months after the designated transfer date, elect to end their participation and benefit accruals under their existing retirement plan or plans and elect to participate in both the Federal Reserve System Retirement Plan and the Federal Reserve System Thrift Plan, through any period of continuous employment with the Bureau, under the same terms as are applicable to Federal Reserve System transferred employees, as provided in subparagraph (C). An election of coverage by the Federal Reserve System Retirement Plan and the Federal Reserve System Thrift Plan shall begin on the day following the end of the 18-
month period beginning on the designated transfer date, and benefit accruals under the existing retirement plan of the transferred employee shall end on the last day of the 18-month period beginning on the designated transfer date. If an employee elects to participate in the Federal Reserve System Retirement Plan and the Federal Reserve System Thrift Plan, all of the service of the employee that was creditable under their existing retirement plan shall be transferred to the Federal Reserve System Retirement Plan on the day following the end of the 18-month period beginning on the designated transfer date.

(iv) BUREAU CONTRIBUTION.—The Bureau shall pay an employer contribution to the Federal Reserve System Retirement Plan, in the amount established as an employer contribution under the Federal Employees Retirement System, as established under chapter 84 of title 5, United States Code, for each Bureau employee who elects to participate in the Federal Reserve System Retirement Plan under this subparagraph. The Bureau shall pay an employer contribution to the Federal Reserve System Thrift Plan for each Bureau employee who elects to participate in such plan, as required under the terms of the Federal Reserve System Thrift Plan.

(v) ADDITIONAL FUNDING.—The Bureau shall transfer to the Federal Reserve System Retirement Plan an amount determined by the Board of Governors, in consultation with the Bureau, to be necessary to reimburse the Federal Reserve System Retirement Plan for the costs to such plan of providing benefits to employees electing coverage under the Federal Reserve System Retirement Plan under subparagraph (iii), and who were transferred to the Bureau from outside of the Federal Reserve System.

(vi) OPTION TO ELECT INTO THRIFT PLAN CREATED BY THE BUREAU.—If the Bureau chooses to establish a thrift plan, the employees transferred pursuant to this subtitle shall have the option to elect, under such terms and conditions as the Bureau may establish, coverage under such a thrift plan established by the Bureau. Transferred employees may not remain in the thrift plan of the agency from which the employee transferred under this subtitle, if the employee elects to participate in a thrift plan established by the Bureau.

(B) OPTION FOR EMPLOYEES TRANSFERRED FROM FEDERAL RESERVE SYSTEM TO BE SUBJECT TO THE FEDERAL EMPLOYEE RETIREMENT PROGRAM.—

(i) ELECTION.—Any Federal Reserve System transferred employee who was enrolled in the Federal Reserve System Retirement Plan on the day before the date of his or her transfer to the Bureau may, during the 1-year period beginning 6 months after the designated transfer date, elect to be subject to the Federal Employee Retirement Program.
(ii) **Effective Date of Coverage.**—An election of coverage by the Federal Employee Retirement Program under this subparagraph shall begin on the day following the end of the 18-month period beginning on the designated transfer date, and benefit accruals under the existing retirement plan of the Federal Reserve System transferred employee shall end on the last day of the 18-month period beginning on the designated transfer date.

(C) **Bureau Participation in Federal Reserve System Retirement Plan.**—

(i) **Benefits Provided.**—Federal Reserve System employees transferred pursuant to this subtitle shall continue to be eligible to participate in the Federal Reserve System Retirement Plan and Federal Reserve System Thrift Plan through any period of continuous employment with the Bureau, unless the employee makes an election under subparagraph (A)(vi) or (B). The retirement benefits, formulas, and features offered to the Federal Reserve System transferred employees shall be the same as those offered to employees of the Board of Governors who participate in the Federal Reserve System Retirement Plan and the Federal Reserve System Thrift Plan, as amended from time to time.

(ii) **Limitation.**—The Bureau shall not have responsibility or authority—

(I) to amend an existing retirement plan (including the Federal Reserve System Retirement Plan or Federal Reserve System Thrift Plan);

(II) for administering an existing retirement plan (including the Federal Reserve System Retirement Plan or Federal Reserve System Thrift Plan);

or

(III) for ensuring the plans comply with applicable laws, fiduciary rules, and related responsibilities.

(ii) **Tax Qualified Status.**—Notwithstanding any other provision of law, providing benefits to Federal Reserve System employees transferred to the Bureau pursuant to this subtitle, and to employees who elect coverage pursuant to subparagraph (A)(iii) or under section 1013(a)(2)(B), shall not cause any existing retirement plan (including the Federal Reserve System Retirement Plan and the Federal Reserve System Thrift Plan) to lose its tax-qualified status under sections 401(a) and 501(a) of the Internal Revenue Code of 1986.

(iv) **Bureau Contribution.**—The Bureau shall pay any employer contributions to the existing retirement plan (including the Federal Reserve System Retirement Plan and the Federal Reserve System Thrift Plan) for each Federal Reserve System transferred employee participating in those plans, as required under the plan, after the designated transfer date.

(v) **Controlled Group Status.**—The Bureau is the same employer as the Federal Reserve System
(as comprised of the Board of Governors and each of the 12 Federal reserve banks prior to the date of enactment of this Act) for purposes of subsections (b), (c), (m), and (o) of section 414 of the Internal Revenue Code of 1986 (26 U.S.C. 414).

(D) DEFINITIONS.—For purposes of this paragraph—

(i) the term “existing retirement plan” means, with respect to an employee transferred pursuant to this subtitle, the retirement plan (including the Financial Institutions Retirement Fund) and any associated thrift savings plan, of the agency from which the employee was transferred under this subtitle, in which the employee was enrolled on the day before the date on which the employee was transferred;

(ii) the term “Federal Employee Retirement Program” means either the Civil Service Retirement System established under chapter 83 of title 5, United States Code, or the Federal Employees Retirement System established under chapter 84 of title 5, United States Code, depending upon the service history of the individual;

(iii) the term “Federal Reserve System transferred employee” means a transferred employee who is an employee of the Board of Governors or a Federal reserve bank on the day before the designated transfer date, and who is transferred to the Bureau on the designated transfer date pursuant to this subtitle;

(iv) the term “Federal Reserve System Retirement Plan” means the Retirement Plan for Employees of the Federal Reserve System; and

(v) the term “Federal Reserve System Thrift Plan” means the Thrift Plan for Employees of the Federal Reserve System.

(2) BENEFITS OTHER THAN RETIREMENT BENEFITS FOR TRANSFERRED EMPLOYEES.—

(A) DURING 1ST YEAR.—

(i) Existing plans continue.—Each employee transferred pursuant to this subtitle may, for 1 year after the designated transfer date, retain membership in any other employee benefit program of the agency or bank from which the employee transferred, including a medical, dental, vision, long term care, or life insurance program, to which the employee belonged on the day before the designated transfer date.

(ii) Employer contribution.—The Bureau shall reimburse the agency or bank from which an employee was transferred for any cost incurred by that agency or bank in continuing to extend coverage in the benefit program to the employee, as required under that program or negotiated agreements.

(B) MEDICAL, DENTAL, VISION, OR LIFE INSURANCE AFTER FIRST YEAR.—If, at the end of the 1-year period beginning on the designated transfer date, the Bureau has not established its own, or arranged for participation in another entity’s, medical, dental, vision, or life insurance program, an employee transferred pursuant to this subtitle who was a member of such a program at the agency or
Federal reserve bank from which the employee transferred may, before the coverage of that employee ends under subparagraph (A)(i), elect to enroll, without regard to any regularly scheduled open season, in—

(i) the enhanced dental benefits program established under chapter 89A of title 5, United States Code;

(ii) the enhanced vision benefits established under chapter 89B of title 5, United States Code;

(iii) the Federal Employees Group Life Insurance Program established under chapter 87 of title 5, United States Code, without regard to any requirement of insurability; and

(iv) the Federal Employees Health Benefits Program established under chapter 89 of title 5, United States Code.

(C) LONG TERM CARE INSURANCE AFTER 1ST YEAR.—If, at the end of the 1-year period beginning on the designated transfer date, the Bureau has not established its own, or arranged for participation in another entity's, long term care insurance program, an employee transferred pursuant to this subtitle who was a member of such a program at the agency or Federal reserve bank from which the employee transferred may, before the coverage of that employee ends under subparagraph (A)(i), elect to apply for coverage under the Federal Long Term Care Insurance Program established under chapter 90 of title 5, United States Code, under the underwriting requirements applicable to a new active workforce member (as defined in part 875 of title 5, Code of Federal Regulations).

(D) EMPLOYEE CONTRIBUTION.—An individual enrolled in the Federal Employees Health Benefits program shall pay any employee contribution required by the plan.

(E) ADDITIONAL FUNDING.—The Bureau shall transfer to the Federal Employees Health Benefits Fund established under section 8909 of title 5, United States Code, an amount determined by the Director of the Office of Personnel Management, after consultation with the Bureau and the Office of Management and Budget, to be necessary to reimburse the Fund for the cost to the Fund of providing benefits under this paragraph.

(F) CREDIT FOR TIME ENROLLED IN OTHER PLANS.—For employees transferred under this title, enrollment in a health benefits plan administered by a transferor agency or a Federal reserve bank, as the case may be, immediately before enrollment in a health benefits plan under chapter 89 of title 5, United States Code, shall be considered as enrollment in a health benefits plan under that chapter for purposes of section 8905(b)(1)(A) of title 5, United States Code.

(G) SPECIAL PROVISIONS TO ENSURE CONTINUATION OF LIFE INSURANCE BENEFITS.—

(i) IN GENERAL.—An annuitant (as defined in section 8901(3) of title 5, United States Code) who is enrolled in a life insurance plan administered by a transferor agency on the day before the designated transfer date shall be eligible for coverage by a life
insurance plan under sections 8706(b), 8714a, 8714b, and 8714c of title 5, United States Code, or in a life insurance plan established by the Bureau, without regard to any regularly scheduled open season and requirement of insurability.

(ii) **Employee Contribution.**—An individual enrolled in a life insurance plan under this subparagraph shall pay any employee contribution required by the plan.

(iii) **Additional Funding.**—The Bureau shall transfer to the Employees’ Life Insurance Fund established under section 8714 of title 5, United States Code, an amount determined by the Director of the Office of Personnel Management, after consultation with the Bureau and the Office of Management and Budget, to be necessary to reimburse the Fund for the cost to the Fund of providing benefits under this subparagraph not otherwise paid for by the employee under clause (ii).

(iv) **Credit for Time Enrolled in Other Plans.**—For employees transferred under this title, enrollment in a life insurance plan administered by a transferor agency immediately before enrollment in a life insurance plan under chapter 87 of title 5, United States Code, shall be considered as enrollment in a life insurance plan under that chapter for purposes of section 8706(b)(1)(A) of title 5, United States Code.

(3) **OPM Rules.**—The Office of Personnel Management shall issue such rules as are necessary to carry out this subsection.

(j) **Implementation of Uniform Pay and Classification System.**—Not later than 2 years after the designated transfer date, the Bureau shall implement a uniform pay and classification system for all employees transferred under this title.

(k) **Equitable Treatment.**—In administering the provisions of this section, the Bureau—

1. shall take no action that would unfairly disadvantage transferred employees relative to each other based on their prior employment by the Board of Governors, the Federal Deposit Insurance Corporation, the Department of Housing and Urban Development, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, a Federal reserve bank, a Federal home loan bank, or a joint office of the Federal home loan banks; and

2. may take such action as is appropriate in individual cases so that employees transferred under this section receive equitable treatment, with respect to the status, tenure, pay, benefits (other than benefits under programs administered by the Office of Personnel Management), and accrued leave or vacation time of those employees, for prior periods of service with any Federal agency, including the Board of Governors, the Corporation, the Department of Housing and Urban Development, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, a Federal reserve bank, a Federal home loan bank, or a joint office of the Federal home loan banks.
(l) **IMPLEMENTATION.**—In implementing the provisions of this section, the Bureau shall coordinate with the Office of Personnel Management and other entities having expertise in matters related to employment to ensure a fair and orderly transition for affected employees.

**SEC. 1065. INCIDENTAL TRANSFERS.**

(a) **INCIDENTAL TRANSFERS AUTHORIZED.**—The Director of the Office of Management and Budget, in consultation with the Secretary, shall make such additional incidental transfers and dispositions of assets and liabilities held, used, arising from, available, or to be made available, in connection with the functions transferred by this title, as the Director may determine necessary to accomplish the purposes of this title.

(b) **SUNSET.**—The authority provided in this section shall terminate 5 years after the date of enactment of this Act.

**SEC. 1066. INTERIM AUTHORITY OF THE SECRETARY.**

(a) **IN GENERAL.**—The Secretary is authorized to perform the functions of the Bureau under this subtitle until the Director of the Bureau is confirmed by the Senate in accordance with section 1011.

(b) **INTERIM ADMINISTRATIVE SERVICES BY THE DEPARTMENT OF THE TREASURY.**—The Department of the Treasury may provide administrative services necessary to support the Bureau before the designated transfer date.

**SEC. 1067. TRANSITION OVERSIGHT.**

(a) **PURPOSE.**—The purpose of this section is to ensure that the Bureau—

(1) has an orderly and organized startup;

(2) attracts and retains a qualified workforce; and

(3) establishes comprehensive employee training and benefits programs.

(b) **REPORTING REQUIREMENT.**—

(1) **IN GENERAL.**—The Bureau shall submit an annual report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives that includes the plans described in paragraph (2).

(2) **PLANS.**—The plans described in this paragraph are as follows:

(A) **TRAINING AND WORKFORCE DEVELOPMENT PLAN.**—The Bureau shall submit a training and workforce development plan that includes, to the extent practicable—

(i) identification of skill and technical expertise needs and actions taken to meet those requirements;

(ii) steps taken to foster innovation and creativity;

(iii) leadership development and succession planning; and

(iv) effective use of technology by employees.

(B) **WORKPLACE FLEXIBILITIES PLAN.**—The Bureau shall submit a workforce flexibility plan that includes, to the extent practicable—

(i) telework;

(ii) flexible work schedules;

(iii) phased retirement;

(iv) reemployed annuitants;

12 USC 5585.

12 USC 5586.

12 USC 5587.
(v) part-time work;
(vi) job sharing;
(vii) parental leave benefits and childcare assistance;
(viii) domestic partner benefits;
(ix) other workplace flexibilities; or
(x) any combination of the items described in clauses (i) through (ix).
(C) Recruitment and Retention Plan.—The Bureau shall submit a recruitment and retention plan that includes, to the extent practicable, provisions relating to—
(i) the steps necessary to target highly qualified applicant pools with diverse backgrounds;
(ii) streamlined employment application processes;
(iii) the provision of timely notification of the status of employment applications to applicants; and
(iv) the collection of information to measure indicators of hiring effectiveness.
(c) Expiration.—The reporting requirement under subsection (b) shall terminate 5 years after the date of enactment of this Act.
(d) Rule of Construction.—Nothing in this section may be construed to affect—
(1) a collective bargaining agreement, as that term is defined in section 7103(a)(8) of title 5, United States Code, that is in effect on the date of enactment of this Act; or
(2) the rights of employees under chapter 71 of title 5, United States Code.
(e) Participation in Examinations.—In order to prepare the Bureau to conduct examinations under section 1025 upon the designated transfer date, the Bureau and the applicable prudential regulator may agree to include, on a sampling basis, examiners on examinations of the compliance with Federal consumer financial law of institutions described in section 1025(a) conducted by the prudential regulators prior to the designated transfer date.

Subtitle G—Regulatory Improvements

SEC. 1071. Small Business Data Collection.
(a) In General.—The Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.) is amended by inserting after section 704A the following:

15 USC 1691o-2.

“SEC. 704B. SMALL BUSINESS LOAN DATA COLLECTION.
“(a) Purpose.—The purpose of this section is to facilitate enforcement of fair lending laws and enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.
“(b) Information Gathering.—Subject to the requirements of this section, in the case of any application to a financial institution for credit for women-owned, minority-owned, or small business, the financial institution shall—
“(1) inquire whether the business is a women-owned, minority-owned, or small business, without regard to whether such application is received in person, by mail, by telephone,
by electronic mail or other form of electronic transmission, or by any other means, and whether or not such application is in response to a solicitation by the financial institution; and

“(2) maintain a record of the responses to such inquiry, separate from the application and accompanying information.

“(c) Right To Refuse.—Any applicant for credit may refuse to provide any information requested pursuant to subsection (b) in connection with any application for credit.

“(d) No Access by Underwriters.—

“(1) Limitation.—Where feasible, no loan underwriter or other officer or employee of a financial institution, or any affiliate of a financial institution, involved in making any determination concerning an application for credit shall have access to any information provided by the applicant pursuant to a request under subsection (b) in connection with such application.

“(2) Limited Access.—If a financial institution determines that a loan underwriter or other officer or employee of a financial institution, or any affiliate of a financial institution, involved in making any determination concerning an application for credit should have access to any information provided by the applicant pursuant to a request under subsection (b), the financial institution shall provide notice to the applicant of the access of the underwriter to such information, along with notice that the financial institution may not discriminate on the basis of such information.

“(e) Form and Manner of Information.—

“(1) In General.—Each financial institution shall compile and maintain, in accordance with regulations of the Bureau, a record of the information provided by any loan applicant pursuant to a request under subsection (b).

“(2) Itemization.—Information compiled and maintained under paragraph (1) shall be itemized in order to clearly and conspicuously disclose—

“(A) the number of the application and the date on which the application was received;

“(B) the type and purpose of the loan or other credit being applied for;

“(C) the amount of the credit or credit limit applied for, and the amount of the credit transaction or the credit limit approved for such applicant;

“(D) the type of action taken with respect to such application, and the date of such action;

“(E) the census tract in which is located the principal place of business of the women-owned, minority-owned, or small business loan applicant;

“(F) the gross annual revenue of the business in the last fiscal year of the women-owned, minority-owned, or small business loan applicant preceding the date of the application;

“(G) the race, sex, and ethnicity of the principal owners of the business; and

“(H) any additional data that the Bureau determines would aid in fulfilling the purposes of this section.

“(3) No Personally Identifiable Information.—In compiling and maintaining any record of information under this
section, a financial institution may not include in such record the name, specific address (other than the census tract required under paragraph (1)(E)), telephone number, electronic mail address, or any other personally identifiable information concerning any individual who is, or is connected with, the women-owned, minority-owned, or small business loan applicant.

"(4) Discretion to delete or modify publicly available data.—The Bureau may, at its discretion, delete or modify data collected under this section which is or will be available to the public, if the Bureau determines that the deletion or modification of the data would advance a privacy interest.

"(f) Availability of information.—

"(1) Submission to Bureau.—The data required to be compiled and maintained under this section by any financial institution shall be submitted annually to the Bureau.

"(2) Availability of information.—Information compiled and maintained under this section shall be—

"(A) retained for not less than 3 years after the date of preparation;

"(B) made available to any member of the public, upon request, in the form required under regulations prescribed by the Bureau;

"(C) annually made available to the public generally by the Bureau, in such form and in such manner as is determined by the Bureau, by regulation.

"(3) Compilation of aggregate data.—The Bureau may, at its discretion—

"(A) compile and aggregate data collected under this section for its own use; and

"(B) make public such compilations of aggregate data.

"(g) Bureau action.—

"(1) In general.—The Bureau shall prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to this section.

"(2) Exceptions.—The Bureau, by rule or order, may adopt exceptions to any requirement of this section and may, conditionally or unconditionally, exempt any financial institution or class of financial institutions from the requirements of this section, as the Bureau deems necessary or appropriate to carry out the purposes of this section.

"(3) Guidance.—The Bureau shall issue guidance designed to facilitate compliance with the requirements of this section, including assisting financial institutions in working with applicants to determine whether the applicants are women-owned, minority-owned, or small businesses for purposes of this section.

"(h) Definitions.—For purposes of this section, the following definitions shall apply:

"(1) Financial institution.—The term ‘financial institution’ means any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity.

"(2) Small business.—The term ‘small business’ has the same meaning as the term ‘small business concern’ in section 3 of the Small Business Act (15 U.S.C. 632).
“(3) SMALL BUSINESS LOAN.—The term ‘small business loan’ means a loan made to a small business.

“(4) MINORITY.—The term ‘minority’ has the same meaning as in section 1204(c)(3) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

“(5) MINORITY-OWNED BUSINESS.—The term ‘minority-owned business’ means a business—

“(A) more than 50 percent of the ownership or control of which is held by 1 or more minority individuals; and

“(B) more than 50 percent of the net profit or loss of which accrues to 1 or more minority individuals.

“(6) WOMEN-OWNED BUSINESS.—The term ‘women-owned business’ means a business—

“(A) more than 50 percent of the ownership or control of which is held by 1 or more women; and

“(B) more than 50 percent of the net profit or loss of which accrues to 1 or more women.”.

(b) TECHNICAL AND CONFORMING AMENDMENTS.—Section 701(b) of the Equal Credit Opportunity Act (15 U.S.C. 1691(b)) is amended—

(1) in paragraph (3), by striking “or” at the end;

(2) in paragraph (4), by striking the period at the end and inserting “; or”; and

(3) by inserting after paragraph (4), the following:

“(5) to make an inquiry under section 704B, in accordance with the requirements of that section.”.

(c) CLERICAL AMENDMENT.—The table of sections for title VII of the Consumer Credit Protection Act is amended by inserting after the item relating to section 704A the following new item:

“704B. Small business loan data collection.”.

(d) EFFECTIVE DATE.—This section shall become effective on the designated transfer date.

SEC. 1072. ASSISTANCE FOR ECONOMICALLY VULNERABLE INDIVIDUALS AND FAMILIES.

(a) HERA AMENDMENTS.—Section 1132 of the Housing and Economic Recovery Act of 2008 (12 U.S.C. 1701x note) is amended—

(1) in subsection (a), by inserting in each of paragraphs (1), (2), (3), and (4) “or economically vulnerable individuals and families” after “homebuyers” each place that term appears;

(2) in subsection (b)(1), by inserting “or economically vulnerable individuals and families” after “homebuyers”;

(3) in subsection (c)(1)—

(A) in subparagraph (A), by striking “or” at the end;

(B) in subparagraph (B), by striking the period at the end and inserting “; or”; and

(C) by adding at the end the following:

“(C) a nonprofit corporation that—

“(i) is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986; and

“(ii) specializes or has expertise in working with economically vulnerable individuals and families, but whose primary purpose is not provision of credit counseling services.”; and

(4) in subsection (d)(1), by striking “not more than 5”.

15 USC 1691 note.
(b) APPLICABILITY.—Amendments made by subsection (a) shall not apply to programs authorized by section 1132 of the Housing and Economic Recovery Act of 2008 (12 U.S.C. 1701x note) that are funded with appropriations prior to fiscal year 2011.

SEC. 1073. REMITTANCE TRANSFERS.

(a) TREATMENT OF REMITTANCE TRANSFERS.—The Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.) is amended—

(1) in section 902(b) (15 U.S.C. 1693(b)), by inserting “and remittance” after “electronic fund”;

(2) in section 904(c) (15 U.S.C. 1693b(c)), in the first sentence, by inserting “or remittance transfers” after “electronic fund transfers”;

(3) by redesignating sections 919, 920, 921, and 922 as sections 920, 921, 922, and 923, respectively; and

(4) by inserting after section 918 the following:

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SEC. 919. REMITTANCE TRANSFERS.

(a) DISCLOSURES REQUIRED FOR REMITTANCE TRANSFERS.—

(1) IN GENERAL.—Each remittance transfer provider shall make disclosures as required under this section and in accordance with rules prescribed by the Board. Disclosures required under this section shall be in addition to any other disclosures applicable under this title.

(2) DISCLOSURES.—Subject to rules prescribed by the Board, a remittance transfer provider shall provide, in writing and in a form that the sender may keep, to each sender requesting a remittance transfer, as applicable to the transaction—

(A) at the time at which the sender requests a remittance transfer to be initiated, and prior to the sender making any payment in connection with the remittance transfer, a disclosure describing—

(i) the amount of currency that will be received by the designated recipient, using the values of the currency into which the funds will be exchanged;

(ii) the amount of transfer and any other fees charged by the remittance transfer provider for the remittance transfer; and

(iii) any exchange rate to be used by the remittance transfer provider for the remittance transfer, to the nearest 1/100th of a point; and

(B) at the time at which the sender makes payment in connection with the remittance transfer—

(i) a receipt showing—

(I) the information described in subparagraph (A);

(II) the promised date of delivery to the designated recipient; and

(III) the name and either the telephone number or the address of the designated recipient, if either the telephone number or the address of the designated recipient is provided by the sender; and

(ii) a statement containing—

(I) information about the rights of the sender under this section regarding the resolution of errors; and

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“(II) appropriate contact information for—
“(aa) the remittance transfer provider; and
“(bb) the State agency that regulates the remittance transfer provider and the Board, including the toll-free telephone number established under section 1013 of the Consumer Financial Protection Act of 2010.

“(3) REQUIREMENTS RELATING TO DISCLOSURES.—With respect to each disclosure required to be provided under paragraph (2) a remittance transfer provider shall—

“(A) provide an initial notice and receipt, as required by subparagraphs (A) and (B) of paragraph (2), and an error resolution statement, as required by subsection (d), that clearly and conspicuously describe the information required to be disclosed therein; and

“(B) with respect to any transaction that a sender conducts electronically, comply with the Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7001 et seq.).

“(4) EXCEPTION FOR DISCLOSURES OF AMOUNT RECEIVED.—

“(A) IN GENERAL.—Subject to the rules prescribed by the Board, and except as provided under subparagraph (B), the disclosures required regarding the amount of currency that will be received by the designated recipient shall be deemed to be accurate, so long as the disclosures provide a reasonably accurate estimate of the foreign currency to be received. This paragraph shall apply only to a remittance transfer provider who is an insured depository institution, as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813), or an insured credit union, as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752), and if—

“(i) a remittance transfer is conducted through a demand deposit, savings deposit, or other asset account that the sender holds with such remittance transfer provider; and

“(ii) at the time at which the sender requests the transaction, the remittance transfer provider is unable to know, for reasons beyond its control, the amount of currency that will be made available to the designated recipient.

“(B) DEADLINE.—The application of subparagraph (A) shall terminate 5 years after the date of enactment of the Consumer Financial Protection Act of 2010, unless the Board determines that termination of such provision would negatively affect the ability of remittance transfer providers described in subparagraph (A) to send remittances to locations in foreign countries, in which case, the Board may, by rule, extend the application of subparagraph (A) to not longer than 10 years after the date of enactment of the Consumer Financial Protection Act of 2010.

“(5) EXEMPTION AUTHORITY.—The Board may, by rule, permit a remittance transfer provider to satisfy the requirements of—

“(A) paragraph (2)(A) orally, if the transaction is conducted entirely by telephone;
“(B) paragraph (2)(B), in the case of a transaction conducted entirely by telephone, by mailing the disclosures required under such subparagraph to the sender, not later than 1 business day after the date on which the transaction is conducted, or by including such documents in the next periodic statement, if the telephone transaction is conducted through a demand deposit, savings deposit, or other asset account that the sender holds with the remittance transfer provider;

“(C) subparagraphs (A) and (B) of paragraph (2) together in one written disclosure, but only to the extent that the information provided in accordance with paragraph (3)(A) is accurate at the time at which payment is made in connection with the subject remittance transfer; and

“(D) paragraph (2)(A), without compliance with section 101(c) of the Electronic Signatures in Global Commerce Act, if a sender initiates the transaction electronically and the information is displayed electronically in a manner that the sender can keep.

“(6) STOREFRONT AND INTERNET NOTICES.—

“(A) IN GENERAL.—

“(i) PROMINENT POSTING.—Subject to subparagraph (B), the Board may prescribe rules to require a remittance transfer provider to prominently post, and timely update, a notice describing a model remittance transfer for one or more amounts, as the Board may determine, which notice shall show the amount of currency that will be received by the designated recipient, using the values of the currency into which the funds will be exchanged.

“(ii) ONSITE DISPLAYS.—The Board may require the notice prescribed under this subparagraph to be displayed in every physical storefront location owned or controlled by the remittance transfer provider.

“(iii) INTERNET NOTICES.—Subject to paragraph (3), the Board shall prescribe rules to require a remittance transfer provider that provides remittance transfers via the Internet to provide a notice, comparable to a storefront notice described in this subparagraph, located on the home page or landing page (with respect to such remittance transfer services) owned or controlled by the remittance transfer provider.

“(iv) RULEMAKING AUTHORITY.—In prescribing rules under this subparagraph, the Board may impose standards or requirements regarding the provision of the storefront and Internet notices required under this subparagraph and the provision of the disclosures required under paragraphs (2) and (3).

“(B) STUDY AND ANALYSIS.—Prior to proposing rules under subparagraph (A), the Board shall undertake appropriate studies and analyses, which shall be consistent with section 904(a)(2), and may include an advanced notice of proposed rulemaking, to determine whether a storefront notice or Internet notice facilitates the ability of a consumer—

“(i) to compare prices for remittance transfers; and
(ii) to understand the types and amounts of any fees or costs imposed on remittance transfers.

(b) FOREIGN LANGUAGE DISCLOSURES.—The disclosures required under this section shall be made in English and in each of the foreign languages principally used by the remittance transfer provider, or any of its agents, to advertise, solicit, or market, either orally or in writing, at that office.

(c) REGULATIONS REGARDING TRANSFERS TO CERTAIN NATIONS.—If the Board determines that a recipient nation does not legally allow, or the method by which transactions are made in the recipient country do not allow, a remittance transfer provider to know the amount of currency that will be received by the designated recipient, the Board may prescribe rules (not later than 18 months after the date of enactment of the Consumer Financial Protection Act of 2010) addressing the issue, which rules shall include standards for a remittance transfer provider to provide—

(1) a receipt that is consistent with subsections (a) and (b); and

(2) a reasonably accurate estimate of the foreign currency to be received, based on the rate provided to the sender by the remittance transfer provider at the time at which the transaction was initiated by the sender.

(d) REMITTANCE TRANSFER ERRORS.—

(1) ERROR RESOLUTION.—

(A) IN GENERAL.—If a remittance transfer provider receives oral or written notice from the sender within 180 days of the promised date of delivery that an error occurred with respect to a remittance transfer, including the amount of currency designated in subsection (a)(3)(A) that was to be sent to the designated recipient of the remittance transfer, using the values of the currency into which the funds should have been exchanged, but was not made available to the designated recipient in the foreign country, the remittance transfer provider shall resolve the error pursuant to this subsection and investigate the reason for the error.

(B) REMEDIES.—Not later than 90 days after the date of receipt of a notice from the sender pursuant to subparagraph (A), the remittance transfer provider shall, as applicable to the error and as designated by the sender—

(i) refund to the sender the total amount of funds tendered by the sender in connection with the remittance transfer which was not properly transmitted;

(ii) make available to the designated recipient, without additional cost to the designated recipient or to the sender, the amount appropriate to resolve the error;

(iii) provide such other remedy, as determined appropriate by rule of the Board for the protection of senders; or

(iv) provide written notice to the sender that there was no error with an explanation responding to the specific complaint of the sender.

(2) RULES.—The Board shall establish, by rule issued not later than 18 months after the date of enactment of the Consumer Financial Protection Act of 2010, clear and appropriate standards for remittance transfer providers with respect to
error resolution relating to remittance transfers, to protect senders from such errors. Standards prescribed under this para-
paragraph shall include appropriate standards regarding record keeping, as required, including documentation—

“(A) of the complaint of the sender;
“(B) that the sender provides the remittance transfer provider with respect to the alleged error; and
“(C) of the findings of the remittance transfer provider regarding the investigation of the alleged error that the sender brought to their attention.

“(3) CANCELLATION AND REFUND POLICY RULES.—Not later than 18 months after the date of enactment of the Consumer Financial Protection Act of 2010, the Board shall issue final rules regarding appropriate remittance transfer cancellation and refund policies for consumers.

“(e) APPLICABILITY OF THIS TITLE.—

“(1) IN GENERAL.—A remittance transfer that is not an electronic fund transfer, as defined in section 903, shall not be subject to any of the provisions of sections 905 through 913. A remittance transfer that is an electronic fund transfer, as defined in section 903, shall be subject to all provisions of this title, except for section 908, that are otherwise applicable to electronic fund transfers under this title.

“(2) RULE OF CONSTRUCTION.—Nothing in this section shall be construed—

“(A) to affect the application to any transaction, to any remittance provider, or to any other person of any of the provisions of subchapter II of chapter 53 of title 31, United States Code, section 21 of the Federal Deposit Insurance Act (12 U.S.C. 1829b), or chapter 2 of title I of Public Law 91–508 (12 U.S.C. 1951–1959), or any regulations promulgated thereunder; or

“(B) to cause any fund transfer that would not otherwise be treated as such under paragraph (1) to be treated as an electronic fund transfer, or as otherwise subject to this title, for the purposes of any of the provisions referred to in subparagraph (A) or any regulations promulgated thereunder.

“(f) ACTS OF AGENTS.—

“(1) IN GENERAL.—A remittance transfer provider shall be liable for any violation of this section by any agent, authorized delegate, or person affiliated with such provider, when such agent, authorized delegate, or affiliate acts for that remittance transfer provider.

“(2) OBLIGATIONS OF REMITTANCE TRANSFER PROVIDERS.—The Board shall prescribe rules to implement appropriate standards or conditions of, liability of a remittance transfer provider, including a provider who acts through an agent or authorized delegate. An agency charged with enforcing the requirements of this section, or rules prescribed by the Board under this section, may consider, in any action or other proceeding against a remittance transfer provider, the extent to which the provider had established and maintained policies or procedures for compliance, including policies, procedures, or other appropriate oversight measures designed to assure compliance by an agent or authorized delegate acting for such provider.
“(g) Definitions.—As used in this section—

“(1) the term ‘designated recipient’ means any person located in a foreign country and identified by the sender as the authorized recipient of a remittance transfer to be made by a remittance transfer provider, except that a designated recipient shall not be deemed to be a consumer for purposes of this Act;

“(2) the term ‘remittance transfer’—

“(A) means the electronic (as defined in section 106(2) of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7006(2))) transfer of funds requested by a sender located in any State to a designated recipient that is initiated by a remittance transfer provider, whether or not the sender holds an account with the remittance transfer provider or whether or not the remittance transfer is also an electronic fund transfer, as defined in section 903; and

“(B) does not include a transfer described in subparagraph (A) in an amount that is equal to or lesser than the amount of a small-value transaction determined, by rule, to be excluded from the requirements under section 906(a);

“(3) the term ‘remittance transfer provider’ means any person or financial institution that provides remittance transfers for a consumer in the normal course of its business, whether or not the consumer holds an account with such person or financial institution; and

“(4) the term ‘sender’ means a consumer who requests a remittance provider to send a remittance transfer for the consumer to a designated recipient.”.

(b) Automated Clearinghouse System.—

(1) Expansion of System.—The Board of Governors shall work with the Federal reserve banks and the Department of the Treasury to expand the use of the automated clearinghouse system and other payment mechanisms for remittance transfers to foreign countries, with a focus on countries that receive significant remittance transfers from the United States, based on—

(A) the number, volume, and size of such transfers;

(B) the significance of the volume of such transfers relative to the external financial flows of the receiving country, including—

(i) the total amount transferred; and

(ii) the total volume of payments made by United States Government agencies to beneficiaries and retirees living abroad;

(C) the feasibility of such an expansion; and

(D) the ability of the Federal Reserve System to establish payment gateways in different geographic regions and currency zones to receive remittance transfers and route them through the payments systems in the destination countries.

(2) Report to Congress.—Not later than one calendar year after the date of enactment of this Act, and on April 30 biennially thereafter during the 10-year period beginning on that date of enactment, the Board of Governors shall submit a report to the Committee on Banking, Housing, and Urban
Affairs of the Senate and the Committee on Financial Services of the House of Representatives on the status of the automated clearinghouse system and its progress in complying with the requirements of this subsection. The report shall include an analysis of adoption rates of International ACH Transactions rules and formats, the efficacy of increasing adoption rates, and potential recommendations to increase adoption.

(c) Expansion of Financial Institution Provision of Remittance Transfers.—

(1) Provision of Guidelines to Institutions.—Each of the Federal banking agencies and the National Credit Union Administration shall provide guidelines to financial institutions under the jurisdiction of the agency regarding the offering of low-cost remittance transfers and no-cost or low-cost basic consumer accounts, as well as agency services to remittance transfer providers.

(2) Assistance to Financial Literacy Commission.—As part of its duties as members of the Financial Literacy and Education Commission, the Bureau, the Federal banking agencies, and the National Credit Union Administration shall assist the Financial Literacy and Education Commission in executing the Strategy for Assuring Financial Empowerment (or the “SAFE Strategy”), as it relates to remittances.

(d) Federal Credit Union Act Conforming Amendment.—Paragraph (12) of section 107 of the Federal Credit Union Act (12 U.S.C. 1757) is amended to read as follows:

“(12) in accordance with regulations prescribed by the Board—

“(A) to sell, to persons in the field of membership, negotiable checks (including travelers checks), money orders, and other similar money transfer instruments (including international and domestic electronic fund transfers and remittance transfers, as defined in section 919 of the Electronic Fund Transfer Act); and

“(B) to cash checks and money orders for persons in the field of membership for a fee.”.

(e) Report on Feasibility of and Impediments to Use of Remittance History in Calculation of Credit Score.—Before the end of the 365-day period beginning on the date of enactment of this Act, the Director shall submit a report to the President, the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives regarding—

(1) the manner in which the remittance history of a consumer could be used to enhance the credit score of the consumer;

(2) the current legal and business model barriers and impediments that impede the use of the remittance history of the consumer to enhance the credit score of the consumer; and

(3) recommendations on the manner in which maximum transparency and disclosure to consumers of exchange rates for remittance transfers subject to this title and the amendments made by this title may be accomplished, whether or not such exchange rates are known at the time of origination or payment by the consumer for the remittance transfer, including disclosure to the sender of the actual exchange rate.
used and the amount of currency that the recipient of the remittance transfer received, using the values of the currency into which the funds were exchanged, as contained in sections 919(a)(2)(D) and 919(a)(3) of the Electronic Fund Transfer Act (as amended by this section).

SEC. 1074. DEPARTMENT OF THE TREASURY STUDY ON ENDING THE CONSERVATORSHIP OF FANNIE MAE, FREDDIE MAC, AND REFORMING THE HOUSING FINANCE SYSTEM.

(a) Study Required.—

(1) In General.—The Secretary of the Treasury shall conduct a study of and develop recommendations regarding the options for ending the conservatorship of the Federal National Mortgage Association (in this section referred to as “Fannie Mae”) and the Federal Home Loan Mortgage Corporation (in this section referred to as “Freddie Mac”), while minimizing the cost to taxpayers, including such options as—

(A) the gradual wind-down and liquidation of such entities;
(B) the privatization of such entities;
(C) the incorporation of the functions of such entities into a Federal agency;
(D) the dissolution of Fannie Mae and Freddie Mac into smaller companies; or
(E) any other measures the Secretary determines appropriate.

(2) Analyses.—The study required under paragraph (1) shall include an analysis of—

(A) the role of the Federal Government in supporting a stable, well-functioning housing finance system, and whether and to what extent the Federal Government should bear risks in meeting Federal housing finance objectives;
(B) how the current structure of the housing finance system can be improved;
(C) how the housing finance system should support the continued availability of mortgage credit to all segments of the market;
(D) how the housing finance system should be structured to ensure that consumers continue to have access to 30-year, fixed rate, pre-payable mortgages and other mortgage products that have simple terms that can be easily understood;
(E) the role of the Federal Housing Administration and the Department of Veterans Affairs in a future housing system;
(F) the impact of reforms of the housing finance system on the financing of rental housing;
(G) the impact of reforms of the housing finance system on secondary market liquidity;
(H) the role of standardization in the housing finance system;
(I) how housing finance systems in other countries offer insights that can help inform options for reform in the United States; and
(J) the options for transition to a reformed housing finance system.
(b) Report and Recommendations.—Not later than January 31, 2011, the Secretary of the Treasury shall submit the report and recommendations required under subsection (a) to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.

SEC. 1075. REASONABLE FEES AND RULES FOR PAYMENT CARD TRANSACTIONS.

(a) In General.—The Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.) is amended—

15 USC 1693p, 1693q.

(1) by redesignating sections 920 and 921 as sections 921 and 922, respectively; and

(2) by inserting after section 919 the following:

SEC. 920. REASONABLE FEES AND RULES FOR PAYMENT CARD TRANSACTIONS.

“(a) Reasonable Interchange Transaction Fees for Electronic Debit Transactions.—

“(1) Regulatory Authority over Interchange Transaction Fees.—The Board may prescribe regulations, pursuant to section 553 of title 5, United States Code, regarding any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction, to implement this subsection (including related definitions), and to prevent circumvention or evasion of this subsection.

“(2) Reasonable Interchange Transaction Fees.—The amount of any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction shall be reasonable and proportional to the cost incurred by the issuer with respect to the transaction.

“(3) Rulemaking Required.—

“(A) In general.—The Board shall prescribe regulations in final form not later than 9 months after the date of enactment of the Consumer Financial Protection Act of 2010, to establish standards for assessing whether the amount of any interchange transaction fee described in paragraph (2) is reasonable and proportional to the cost incurred by the issuer with respect to the transaction.

“(B) Information Collection.—The Board may require any issuer (or agent of an issuer) or payment card network to provide the Board with such information as may be necessary to carry out the provisions of this subsection and the Board, in issuing rules under subparagraph (A) and on at least a bi-annual basis thereafter, shall disclose such aggregate or summary information concerning the costs incurred, and interchange transaction fees charged or received, by issuers or payment card networks in connection with the authorization, clearance or settlement of electronic debit transactions as the Board considers appropriate and in the public interest.

“(4) Considerations; Consultation.—In prescribing regulations under paragraph (3)(A), the Board shall—

“(A) consider the functional similarity between—

“(i) electronic debit transactions; and

“(ii) checking transactions that are required within the Federal Reserve bank system to clear at par; and

“(B) distinguish between—
“(i) the incremental cost incurred by an issuer for the role of the issuer in the authorization, clearance, or settlement of a particular electronic debit transaction, which cost shall be considered under paragraph (2); and

“(ii) other costs incurred by an issuer which are not specific to a particular electronic debit transaction, which costs shall not be considered under paragraph (2); and

“(C) consult, as appropriate, with the Comptroller of the Currency, the Board of Directors of the Federal Deposit Insurance Corporation, the Director of the Office of Thrift Supervision, the National Credit Union Administration Board, the Administrator of the Small Business Administration, and the Director of the Bureau of Consumer Financial Protection.

“(5) ADJUSTMENTS TO INTERCHANGE TRANSACTION FEES FOR FRAUD PREVENTION COSTS.—

“(A) ADJUSTMENTS.—The Board may allow for an adjustment to the fee amount received or charged by an issuer under paragraph (2), if—

“(i) such adjustment is reasonably necessary to make allowance for costs incurred by the issuer in preventing fraud in relation to electronic debit transactions involving that issuer; and

“(ii) the issuer complies with the fraud-related standards established by the Board under subparagraph (B), which standards shall—

“(I) be designed to ensure that any fraud-related adjustment of the issuer is limited to the amount described in clause (i) and takes into account any fraud-related reimbursements (including amounts from charge-backs) received from consumers, merchants, or payment card networks in relation to electronic debit transactions involving the issuer; and

“(II) require issuers to take effective steps to reduce the occurrence of, and costs from, fraud in relation to electronic debit transactions, including through the development and implementation of cost-effective fraud prevention technology.

“(B) RULEMAKING REQUIRED.—

“(i) IN GENERAL.—The Board shall prescribe regulations in final form not later than 9 months after the date of enactment of the Consumer Financial Protection Act of 2010, to establish standards for making adjustments under this paragraph.

“(ii) FACTORS FOR CONSIDERATION.—In issuing the standards and prescribing regulations under this paragraph, the Board shall consider—

“(I) the nature, type, and occurrence of fraud in electronic debit transactions;

“(II) the extent to which the occurrence of fraud depends on whether authorization in an electronic debit transaction is based on signature, PIN, or other means;
“(III) the available and economical means by which fraud on electronic debit transactions may be reduced;

“(IV) the fraud prevention and data security costs expended by each party involved in electronic debit transactions (including consumers, persons who accept debit cards as a form of payment, financial institutions, retailers and payment card networks);

“(V) the costs of fraudulent transactions absorbed by each party involved in such transactions (including consumers, persons who accept debit cards as a form of payment, financial institutions, retailers and payment card networks);

“(VI) the extent to which interchange transaction fees have in the past reduced or increased incentives for parties involved in electronic debit transactions to reduce fraud on such transactions; and

“(VII) such other factors as the Board considers appropriate.

“(6) Exemption for Small Issuers.—

“(A) In general.—This subsection shall not apply to any issuer that, together with its affiliates, has assets of less than $10,000,000,000, and the Board shall exempt such issuers from regulations prescribed under paragraph (3)(A).

“(B) Definition.—For purposes of this paragraph, the term "issuer" shall be limited to the person holding the asset account that is debited through an electronic debit transaction.

“(7) Exemption for Government-Administered Payment Programs and Reloadable Prepaid Cards.—

“(A) In general.—This subsection shall not apply to an interchange transaction fee charged or received with respect to an electronic debit transaction in which a person uses—

“(i) a debit card or general-use prepaid card that has been provided to a person pursuant to a Federal, State or local government-administered payment program, in which the person may only use the debit card or general-use prepaid card to transfer or debit funds, monetary value, or other assets that have been provided pursuant to such program; or

“(ii) a plastic card, payment code, or device that is—

“(I) linked to funds, monetary value, or assets which are purchased or loaded on a prepaid basis;

“(II) not issued or approved for use to access or debit any account held by or for the benefit of the card holder (other than a subaccount or other method of recording or tracking funds purchased or loaded on the card on a prepaid basis);

“(III) redeemable at multiple, unaffiliated merchants or service providers, or automated teller machines;
“(IV) used to transfer or debit funds, monetary value, or other assets; and
“(V) reloadable and not marketed or labeled as a gift card or gift certificate.

“(B) EXCEPTION.—Notwithstanding subparagraph (A), after the end of the 1-year period beginning on the effective date provided in paragraph (9), this subsection shall apply to an interchange transaction fee charged or received with respect to an electronic debit transaction described in subparagraph (A)(i) in which a person uses a general-use prepaid card, or an electronic debit transaction described in subparagraph (A)(ii), if any of the following fees may be charged to a person with respect to the card:
“(i) A fee for an overdraft, including a shortage of funds or a transaction processed for an amount exceeding the account balance.
“(ii) A fee imposed by the issuer for the first withdrawal per month from an automated teller machine that is part of the issuer’s designated automated teller machine network.

“(C) DEFINITION.—For purposes of subparagraph (B), the term ‘designated automated teller machine network’ means either—
“(i) all automated teller machines identified in the name of the issuer; or
“(ii) any network of automated teller machines identified by the issuer that provides reasonable and convenient access to the issuer’s customers.

“(D) REPORTING.—Beginning 12 months after the date of enactment of the Consumer Financial Protection Act of 2010, the Board shall annually provide a report to the Congress regarding—
“(i) the prevalence of the use of general-use prepaid cards in Federal, State or local government-administered payment programs; and
“(ii) the interchange transaction fees and cardholder fees charged with respect to the use of such general-use prepaid cards.

“(8) REGULATORY AUTHORITY OVER NETWORK FEES.—
“(A) IN GENERAL.—The Board may prescribe regulations, pursuant to section 553 of title 5, United States Code, regarding any network fee.
“(B) LIMITATION.—The authority under subparagraph (A) to prescribe regulations shall be limited to regulations to ensure that—
“(i) a network fee is not used to directly or indirectly compensate an issuer with respect to an electronic debit transaction; and
“(ii) a network fee is not used to circumvent or evade the restrictions of this subsection and regulations prescribed under such subsection.
“(C) RULEMAKING REQUIRED.—The Board shall prescribe regulations in final form before the end of the 9-month period beginning on the date of the enactment of the Consumer Financial Protection Act of 2010, to carry out the authorities provided under subparagraph (A).
“(9) EFFECTIVE DATE.—This subsection shall take effect at the end of the 12-month period beginning on the date of the enactment of the Consumer Financial Protection Act of 2010.

(b) LIMITATION ON PAYMENT CARD NETWORK RESTRICTIONS.—

“(1) PROHIBITIONS AGAINST EXCLUSIVITY ARRANGEMENTS.—

“(A) NO EXCLUSIVE NETWORK.—The Board shall, before the end of the 1-year period beginning on the date of the enactment of the Consumer Financial Protection Act of 2010, prescribe regulations providing that an issuer or payment card network shall not directly or through any agent, processor, or licensed member of a payment card network, by contract, requirement, condition, penalty, or otherwise, restrict the number of payment card networks on which an electronic debit transaction may be processed to—

“(i) 1 such network; or

“(ii) 2 or more such networks which are owned, controlled, or otherwise operated by—

“(I) affiliated persons; or

“(II) networks affiliated with such issuer.

“(B) NO ROUTING RESTRICTIONS.—The Board shall, before the end of the 1-year period beginning on the date of the enactment of the Consumer Financial Protection Act of 2010, prescribe regulations providing that an issuer or payment card network shall not, directly or through any agent, processor, or licensed member of the network, by contract, requirement, condition, penalty, or otherwise, inhibit the ability of any person who accepts debit cards for payments to direct the routing of electronic debit transactions for processing over any payment card network that may process such transactions.

“(2) LIMITATION ON RESTRICTIONS ON OFFERING DISCOUNTS FOR USE OF A FORM OF PAYMENT.—

“(A) IN GENERAL.—A payment card network shall not, directly or through any agent, processor, or licensed member of the network, by contract, requirement, condition, penalty, or otherwise, inhibit the ability of any person to provide a discount or in-kind incentive for payment by the use of cash, checks, debit cards, or credit cards to the extent that—

“(i) in the case of a discount or in-kind incentive for payment by the use of debit cards, the discount or in-kind incentive does not differentiate on the basis of the issuer or the payment card network;

“(ii) in the case of a discount or in-kind incentive for payment by the use of credit cards, the discount or in-kind incentive does not differentiate on the basis of the issuer or the payment card network; and

“(iii) to the extent required by Federal law and applicable State law, such discount or in-kind incentive is offered to all prospective buyers and disclosed clearly and conspicuously.

“(B) LAWFUL DISCOUNTS.—For purposes of this paragraph, the network may not penalize any person for the providing of a discount that is in compliance with Federal law and applicable State law.
“(3) Limitation on restrictions on setting transaction minimums or maximums.—

“(A) In general.—A payment card network shall not, directly or through any agent, processor, or licensed member of the network, by contract, requirement, condition, penalty, or otherwise, inhibit the ability—

“(i) of any person to set a minimum dollar value for the acceptance by that person of credit cards, to the extent that—

“(I) such minimum dollar value does not differentiate between issuers or between payment card networks; and

“(II) such minimum dollar value does not exceed $10.00; or

“(ii) of any Federal agency or institution of higher education to set a maximum dollar value for the acceptance by that Federal agency or institution of higher education of credit cards, to the extent that such maximum dollar value does not differentiate between issuers or between payment card networks.

“(B) Increase in minimum dollar amount.—The Board may, by regulation prescribed pursuant to section 553 of title 5, United States Code, increase the amount of the dollar value listed in subparagraph (A)(i)(II).

“(4) Rule of construction.—No provision of this subsection shall be construed to authorize any person—

“(A) to discriminate between debit cards within a payment card network on the basis of the issuer that issued the debit card; or

“(B) to discriminate between credit cards within a payment card network on the basis of the issuer that issued the credit card.

“(c) Definitions.—For purposes of this section, the following definitions shall apply:

“(1) Affiliate.—The term ‘affiliate’ means any company that controls, is controlled by, or is under common control with another company.

“(2) Debit card.—The term ‘debit card’—

“(A) means any card, or other payment code or device, issued or approved for use through a payment card network to debit an asset account (regardless of the purpose for which the account is established), whether authorization is based on signature, PIN, or other means;

“(B) includes a general-use prepaid card, as that term is defined in section 915(a)(2)(A); and

“(C) does not include paper checks.

“(3) Credit card.—The term ‘credit card’ has the same meaning as in section 103 of the Truth in Lending Act.

“(4) Discount.—The term ‘discount’—

“(A) means a reduction made from the price that customers are informed is the regular price; and

“(B) does not include any means of increasing the price that customers are informed is the regular price.

“(5) Electronic debit transaction.—The term ‘electronic debit transaction’ means a transaction in which a person uses a debit card.

“(6) Federal agency.—The term ‘Federal agency’ means—
“(A) an agency (as defined in section 101 of title 31, United States Code); and
“(B) a Government corporation (as defined in section 103 of title 5, United States Code).
“(7) INSTITUTION OF HIGHER EDUCATION.—The term ‘institution of higher education’ has the same meaning as in 101 and 102 of the Higher Education Act of 1965 (20 U.S.C. 1001, 1002).
“(8) INTERCHANGE TRANSACTION FEE.—The term ‘interchange transaction fee’ means any fee established, charged or received by a payment card network for the purpose of compensating an issuer for its involvement in an electronic debit transaction.
“(9) ISSUER.—The term ‘issuer’ means any person who issues a debit card, or credit card, or the agent of such person with respect to such card.
“(10) NETWORK FEE.—The term ‘network fee’ means any fee charged and received by a payment card network with respect to an electronic debit transaction, other than an interchange transaction fee.
“(11) PAYMENT CARD NETWORK.—The term ‘payment card network’ means an entity that directly, or through licensed members, processors, or agents, provides the proprietary services, infrastructure, and software that route information and data to conduct debit card or credit card transaction authorization, clearance, and settlement, and that a person uses in order to accept as a form of payment a brand of debit card, credit card or other device that may be used to carry out debit or credit transactions.
“(d) ENFORCEMENT.—
“(1) IN GENERAL.—Compliance with the requirements imposed under this section shall be enforced under section 918.
“(2) EXCEPTION.—Sections 916 and 917 shall not apply with respect to this section or the requirements imposed pursuant to this section.”.

(b) AMENDMENT TO THE FOOD AND NUTRITION ACT OF 2008.—Section 7(h)(10) of the Food and Nutrition Act of 2008 (7 U.S.C. 2016(h)(10)) is amended to read as follows:
“(10) FEDERAL LAW NOT APPLICABLE.—Section 920 of the Electronic Fund Transfer Act shall not apply to electronic benefit transfer or reimbursement systems under this Act.”.

(c) AMENDMENT TO THE FARM SECURITY AND RURAL INVESTMENT ACT OF 2002.—Section 4402 of the Farm Security and Rural Investment Act of 2002 (7 U.S.C. 3007) is amended by adding at the end the following new subsection:
“(f) FEDERAL LAW NOT APPLICABLE.—Section 920 of the Electronic Fund Transfer Act shall not apply to electronic benefit transfer systems established under this Act.”.

(d) AMENDMENT TO THE CHILD NUTRITION ACT OF 1966.—Section 11 of the Child Nutrition Act of 1966 (42 U.S.C. 1780) is amended by adding at the end the following:
“(c) FEDERAL LAW NOT APPLICABLE.—Section 920 of the Electronic Fund Transfer Act shall not apply to electronic benefit transfer systems established under this Act or the Richard B. Russell National School Lunch Act (42 U.S.C. 1751 et seq.).”.
SEC. 1076. REVERSE MORTGAGE STUDY AND REGULATIONS.

(a) Study.—Not later than 1 year after the designated transfer date, the Bureau shall conduct a study on reverse mortgage transactions.

(b) Regulations.—

(1) In general.—If the Bureau determines through the study required under subsection (a) that conditions or limitations on reverse mortgage transactions are necessary or appropriate for accomplishing the purposes and objectives of this title, including protecting borrowers with respect to the obtaining of reverse mortgage loans for the purpose of funding investments, annuities, and other investment products and the suitability of a borrower in obtaining a reverse mortgage for such purpose.

(2) Identified Practices and Integrated Disclosures.—The regulations prescribed under paragraph (1) may, as the Bureau may so determine—

(A) identify any practice as unfair, deceptive, or abusive in connection with a reverse mortgage transaction; and

(B) provide for an integrated disclosure standard and model disclosures for reverse mortgage transactions, consistent with section 4302(d), that combines the relevant disclosures required under the Truth in Lending Act (15 U.S.C. 1601 et seq.) and the Real Estate Settlement Procedures Act, with the disclosures required to be provided to consumers for Home Equity Conversion Mortgages under section 255 of the National Housing Act.

(c) Rule of Construction.—This section shall not be construed as limiting the authority of the Bureau to issue regulations, orders, or guidance that apply to reverse mortgages prior to the completion of the study required under subsection (a).

SEC. 1077. REPORT ON PRIVATE EDUCATION LOANS AND PRIVATE EDUCATIONAL LENDERS.

(a) Report.—Not later than 2 years after the date of enactment of this Act, the Director and the Secretary of Education, in consultation with the Commissioners of the Federal Trade Commission, and the Attorney General of the United States, shall submit a report to the Committee on Banking, Housing, and Urban Affairs and the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Financial Services and the Committee on Education and Labor of the House of Representatives, on private education loans (as that term is defined in section 140 of the Truth in Lending Act (15 U.S.C. 1650)) and private educational lenders (as that term is defined in such section).

(b) Content.—The report required by this section shall examine, at a minimum—

(1) the growth and changes of the private education loan market in the United States;

(2) factors influencing such growth and changes;

(3) the extent to which students and parents of students rely on private education loans to finance postsecondary education and the private education loan indebtedness of borrowers;

(4) the characteristics of private education loan borrowers, including—
(A) the types of institutions of higher education that they attend;
(B) socioeconomic characteristics (including income and education levels, racial characteristics, geographical background, age, and gender);
(C) what other forms of financing borrowers use to pay for education;
(D) whether they exhaust their Federal loan options before taking out a private loan;
(E) whether such borrowers are dependent or independent students (as determined under part F of title IV of the Higher Education Act of 1965) or parents of such students;
(F) whether such borrowers are students enrolled in a program leading to a certificate, license, or credential other than a degree, an associates degree, a baccalaureate degree, or a graduate or professional degree; and
(G) if practicable, employment and repayment behaviors;

(5) the characteristics of private educational lenders, including whether such creditors are for-profit, non-profit, or institutions of higher education;
(6) the underwriting criteria used by private educational lenders, including the use of cohort default rate (as such term is defined in section 435(m) of the Higher Education Act of 1965);
(7) the terms, conditions, and pricing of private education loans;
(8) the consumer protections available to private education loan borrowers, including the effectiveness of existing disclosures and requirements and borrowers’ awareness and understanding about terms and conditions of various financial products;
(9) whether Federal regulators and the public have access to information sufficient to provide them with assurances that private education loans are provided in accord with the Nation’s fair lending laws and that allows public officials to determine lender compliance with fair lending laws; and
(10) any statutory or legislative recommendations necessary to improve consumer protections for private education loan borrowers and to better enable Federal regulators and the public to ascertain private educational lender compliance with fair lending laws.

SEC. 1078. STUDY AND REPORT ON CREDIT SCORES.

(a) Study.—The Bureau shall conduct a study on the nature, range, and size of variations between the credit scores sold to creditors and those sold to consumers by consumer reporting agencies that compile and maintain files on consumers on a nationwide basis (as defined in section 603(p) of the Fair Credit Reporting Act; 15 U.S.C. 1681a(p)), and whether such variations disadvantage consumers.

(b) Report to Congress.—The Bureau shall submit a report to Congress on the results of the study conducted under subsection (a) not later than 1 year after the date of enactment of this Act.
SEC. 1079. REVIEW, REPORT, AND PROGRAM WITH RESPECT TO EXCHANGE FACILITATORS.

(a) Review.—The Director shall review all Federal laws and regulations relating to the protection of consumers who use exchange facilitators for transactions primarily for personal, family, or household purposes.

(b) Report.—Not later than 1 year after the designated transfer date, the Director shall submit to Congress a report describing—

(1) recommendations for legislation to ensure the appropriate protection of consumers who use exchange facilitators for transactions primarily for personal, family, or household purposes;

(2) recommendations for updating the regulations of Federal departments and agencies to ensure the appropriate protection of such consumers; and

(3) recommendations for regulations to ensure the appropriate protection of such consumers.

(c) Program.—Not later than 2 years after the date of the submission of the report under subsection (b), the Bureau shall, consistent with subtitle B, propose regulations or otherwise establish a program to protect consumers who use exchange facilitators.

(d) Exchange Facilitator Defined.—In this section, the term “exchange facilitator” means a person that—

(1) facilitates, for a fee, an exchange of like kind property by entering into an agreement with a taxpayer by which the exchange facilitator acquires from the taxpayer the contractual rights to sell the taxpayer’s relinquished property and transfers a replacement property to the taxpayer as a qualified intermediary (within the meaning of Treasury Regulations section 1.1031(k)–1(g)(4)) or enters into an agreement with the taxpayer to take title to a property as an exchange accommodation titleholder (within the meaning of Revenue Procedure 2000–37) or enters into an agreement with a taxpayer to act as a qualified trustee or qualified escrow holder (within the meaning of Treasury Regulations section 1.1031(k)–1(g)(3));

(2) maintains an office for the purpose of soliciting business to perform the services described in paragraph (1); or

(3) advertises any of the services described in paragraph (1) or solicits clients in printed publications, direct mail, television or radio advertisements, telephone calls, facsimile transmissions, or other electronic communications directed to the general public for purposes of providing any such services.

SEC. 1079A. FINANCIAL FRAUD PROVISIONS.

(a) Sentencing Guidelines.—

(1) Securities Fraud.—

(A) Directive.—Pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this paragraph, the United States Sentencing Commission shall review and, if appropriate, amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of offenses relating to securities fraud or any other similar provision of law, in order to reflect the intent of Congress that penalties for the offenses under the guidelines and policy statements appropriately account for the potential and actual harm to the public and the financial markets from the offenses.
(B) Requirements.—In making any amendments to the Federal Sentencing Guidelines and policy statements under subparagraph (A), the United States Sentencing Commission shall—

(i) ensure that the guidelines and policy statements, particularly section 2B1.1(b)(14) and section 2B1.1(b)(17) (and any successors thereto), reflect—

(I) the serious nature of the offenses described in subparagraph (A);

(II) the need for an effective deterrent and appropriate punishment to prevent the offenses; and

(III) the effectiveness of incarceration in furthering the objectives described in subclauses (I) and (II);

(ii) consider the extent to which the guidelines appropriately account for the potential and actual harm to the public and the financial markets resulting from the offenses;

(iii) ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;

(iv) make any necessary conforming changes to guidelines; and

(v) ensure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.

(2) Financial Institution Fraud.—

(A) Directive.—Pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this paragraph, the United States Sentencing Commission shall review and, if appropriate, amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of fraud offenses relating to financial institutions or federally related mortgage loans and any other similar provisions of law, to reflect the intent of Congress that the penalties for the offenses under the guidelines and policy statements ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions.

(B) Requirements.—In making any amendments to the Federal Sentencing Guidelines and policy statements under subparagraph (A), the United States Sentencing Commission shall—

(i) ensure that the guidelines and policy statements reflect—

(I) the serious nature of the offenses described in subparagraph (A);

(II) the need for an effective deterrent and appropriate punishment to prevent the offenses; and

(III) the effectiveness of incarceration in furthering the objectives described in subclauses (I) and (II);

(ii) consider the extent to which the guidelines appropriately account for the potential and actual harm

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to the public and the financial markets resulting from the offenses;
   (iii) ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;
   (iv) make any necessary conforming changes to guidelines; and
   (v) ensure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.
(b) Extension of Statute of Limitations for Securities Fraud Violations.—
   (1) In General.—Chapter 213 of title 18, United States Code, is amended by adding at the end the following:

"§ 3301. Securities fraud offenses

"(a) Definition.—In this section, the term 'securities fraud offense' means a violation of, or a conspiracy or an attempt to violate—
   "(1) section 1348;
   "(2) section 32(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78ff(a));
   "(3) section 24 of the Securities Act of 1933 (15 U.S.C. 77x);
   "(4) section 217 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–17);
   "(5) section 49 of the Investment Company Act of 1940 (15 U.S.C. 80a–48); or
"(b) Limitation.—No person shall be prosecuted, tried, or punished for a securities fraud offense, unless the indictment is found or the information is instituted within 6 years after the commission of the offense.".

   (2) Technical and Conforming Amendment.—The table of sections for chapter 213 of title 18, United States Code, is amended by adding at the end the following:

"3301. Securities fraud offenses."

(c) Amendments to the False Claims Act Relating to Limitations on Actions.—Section 3730(h) of title 31, United States Code, is amended—

   (1) in paragraph (1), by striking "or agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter" and inserting "agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter"; and
   (2) by adding at the end the following:

"(3) Limitation on Bringing Civil Action.—A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.".
Subtitle H—Conforming Amendments

SEC. 1081. AMENDMENTS TO THE INSPECTOR GENERAL ACT.

Effective on the date of enactment of this Act, the Inspector General Act of 1978 (5 U.S.C. App. 3) is amended—

(1) in section 8G(a)(2), by inserting “and the Bureau of Consumer Financial Protection” after “Board of Governors of the Federal Reserve System”; and

(2) in section 8G(c), by adding at the end the following: “For purposes of implementing this section, the Chairman of the Board of Governors of the Federal Reserve System shall appoint the Inspector General of the Board of Governors of the Federal Reserve System and the Bureau of Consumer Financial Protection. The Inspector General of the Board of Governors of the Federal Reserve System and the Bureau of Consumer Financial Protection shall have all of the authorities and responsibilities provided by this Act with respect to the Bureau of Consumer Financial Protection, as if the Bureau were part of the Board of Governors of the Federal Reserve System.”; and

(3) in section 8G(g)(3), by inserting “and the Bureau of Consumer Financial Protection” after “Board of Governors of the Federal Reserve System” the first place that term appears.

SEC. 1082. AMENDMENTS TO THE PRIVACY ACT OF 1974.

Effective on the date of enactment of this Act, section 552a of title 5, United States Code, is amended by adding at the end the following: “(w) APPLICABILITY TO BUREAU OF CONSUMER FINANCIAL PROTECTION.—Except as provided in the Consumer Financial Protection Act of 2010, this section shall apply with respect to the Bureau of Consumer Financial Protection.”.

SEC. 1083. AMENDMENTS TO THE ALTERNATIVE MORTGAGE TRANSACTION PARITY ACT OF 1982.

(a) IN GENERAL.—The Alternative Mortgage Transaction Parity Act of 1982 (12 U.S.C. 3801 et seq.) is amended—

(1) in section 803 (12 U.S.C. 3802(1)), by striking “1974” and all that follows through “described and defined” and inserting the following: “1974), in which the interest rate or finance charge may be adjusted or renegotiated, described and defined”;

(2) in section 804 (12 U.S.C. 3803)—

(A) in subsection (a)—

(i) in each of paragraphs (1), (2), and (3), by inserting after “transactions made” each place that term appears “on or before the designated transfer date, as determined under section 1062 of the Consumer Financial Protection Act of 2010,”;

(ii) in paragraph (2), by striking “and” at the end;

(iii) in paragraph (3), by striking the period at the end and inserting “; and”;

(iv) by adding at the end the following new paragraph:

“(4) with respect to transactions made after the designated transfer date, only in accordance with regulations governing alternative mortgage transactions, as issued by the Bureau
of Consumer Financial Protection for federally chartered housing creditors, in accordance with the rulemaking authority granted to the Bureau of Consumer Financial Protection with regard to federally chartered housing creditors under provisions of law other than this section.”;

(B) by striking subsection (c) and inserting the following:

“(c) PREEMPTION OF STATE LAW.—An alternative mortgage transaction may be made by a housing creditor in accordance with this section, notwithstanding any State constitution, law, or regulation that prohibits an alternative mortgage transaction. For purposes of this subsection, a State constitution, law, or regulation that prohibits an alternative mortgage transaction does not include any State constitution, law, or regulation that regulates mortgage transactions generally, including any restriction on prepayment penalties or late charges.”; and

(C) by adding at the end the following:

“(d) BUREAU ACTIONS.—The Bureau of Consumer Financial Protection shall—

“(1) review the regulations identified by the Comptroller of the Currency and the National Credit Union Administration, as those rules exist on the designated transfer date, as applicable under paragraphs (1) through (3) of subsection (a);

“(2) determine whether such regulations are fair and not deceptive and otherwise meet the objectives of the Consumer Financial Protection Act of 2010; and

“(3) promulgate regulations under subsection (a)(4) after the designated transfer date.

“(e) DESIGNATED TRANSFER DATE.—As used in this section, the term ‘designated transfer date’ means the date determined under section 1062 of the Consumer Financial Protection Act of 2010.”.

(b) EFFECTIVE DATE.—This section and the amendments made by this section shall become effective on the designated transfer date.

(c) RULE OF CONSTRUCTION.—The amendments made by subsection (a) shall not affect any transaction covered by the Alternative Mortgage Transaction Parity Act of 1982 (12 U.S.C. 3801 et seq.) and entered into on or before the designated transfer date.

SEC. 1084. AMENDMENTS TO THE ELECTRONIC FUND TRANSFER ACT.

The Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.) is amended—

(1) by striking “Board” each place that term appears and inserting “Bureau”, except in subsections (a) and (e) of section 904 (as amended in paragraph (3) of this section) and in 918 (15 U.S.C. 1693o) (as so designated by the Credit Card Act of 2009) and section 920 (as added by section 1076);

(2) in section 903 (15 U.S.C. 1693a) —

(A) by redesignating paragraphs (3) through (11) as paragraphs (4) through (12), respectively; and

(B) by inserting after paragraph (3) the following:

“(4) the term ‘Bureau’ means the Bureau of Consumer Financial Protection”;

(3) in section 904 (15 U.S.C. 1693b) —
(A) in subsection (a), by striking “(a) PRESCRIPTION BY BOARD.—The Board shall prescribe regulations to carry out the purposes of this title.” and inserting the following:

“(a) PRESCRIPTION BY THE BUREAU AND THE BOARD.—

“(1) IN GENERAL.—Except as provided in paragraph (2), the Bureau shall prescribe rules to carry out the purposes of this title.

“(2) AUTHORITY OF THE BOARD.—The Board shall have sole authority to prescribe rules—

“(A) to carry out the purposes of this title with respect to a person described in section 1029(a) of the Consumer Financial Protection Act of 2010; and

“(B) to carry out the purposes of section 920.”;

(B) by adding at the end the following new subsection:

“(e) DEFERENCE.—No provision of this title may be construed as altering, limiting, or otherwise affecting the deference that a court affords to—

“(1) the Bureau in making determinations regarding the meaning or interpretation of any provision of this title for which the Bureau has authority to prescribe regulations; or

“(2) the Board in making determinations regarding the meaning or interpretation of section 920.”.

(4) in section 916(d) (15 U.S.C. 1693m) (as so designated by the Credit CARD Act of 2009)—

(A) in the subsection heading, by striking “OF BOARD OR APPROVAL OF DULY AUTHORIZED OFFICIAL OR EMPLOYEE OF FEDERAL RESERVE SYSTEM”;

(B) by inserting “Bureau or the” before “Board” each place that term appears; and

(C) by inserting “Bureau of Consumer Financial Protection or the” before “Federal Reserve System”; and

(5) in section 918 (15 U.S.C. 1693o) (as so designated by the Credit CARD Act of 2009)—

(A) in subsection (a)—

(i) by striking “Compliance” and inserting “Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance”;

(ii) by striking paragraphs (1) and (2), and inserting the following:

“(1) section 8 of the Federal Deposit Insurance Act, by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to—

“(A) national banks, Federal savings associations, and Federal branches and Federal agencies of foreign banks;

“(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act; and

“(C) banks and State savings associations insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), and insured State branches of foreign banks;”;

“subject to subtitle B of the Consumer Financial Protection Act of 2010,”.

“to carry out the purposes of section 920.”; and

“REGULATIONS.”.
(iii) by redesignating paragraphs (3) through (5) as paragraphs (2) through (4), respectively;
(iv) in paragraph (2) (as so redesignated), by striking the period at the end and inserting a semi-colon;
(v) in paragraph (3) (as so redesignated), by striking “and” at the end;
(vi) in paragraph (4) (as so redesignated), by striking the period at the end and inserting “and”;
and
(vii) by adding at the end the following:
“(5) subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau, with respect to any person subject to this title, except that the Bureau shall not have authority to enforce the requirements of section 920 or any regulations prescribed by the Board under section 920.”;

(B) in subsection (b), by inserting “any of paragraphs (1) through (4) of” before “subsection (a)” each place that term appears; and

(C) by striking subsection (c) and inserting the following:
“(c) OVERALL ENFORCEMENT AUTHORITY OF THE FEDERAL TRADE COMMISSION.—Except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other Government agency under any of paragraphs (1) through (4) of subsection (a), and subject to subtitle B of the Consumer Financial Protection Act of 2010, the Federal Trade Commission shall be authorized to enforce such requirements. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement imposed under this title shall be deemed a violation of a requirement imposed under that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Federal Trade Commission to enforce compliance by any person subject to the jurisdiction of the Federal Trade Commission with the requirements imposed under this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act.”.

SEC. 1085. AMENDMENTS TO THE EQUAL CREDIT OPPORTUNITY ACT.

The Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.) is amended—

(1) by striking “Board” each place that term appears, other than in section 703(f) (as added by this section) and section 704(a)(4) (15 U.S.C. 1691c(a)(4)), and inserting “Bureau”;

(2) in section 702 (15 U.S.C. 1691a), by striking subsection (c) and inserting the following:
“(c) The term ‘Bureau’ means the Bureau of Consumer Financial Protection.”;

(3) in section 703 (15 U.S.C. 1691b)—

(A) by striking the section heading and inserting the following:

“SEC. 703. PROMULGATION OF REGULATIONS BY THE BUREAU.”;

(B) by striking “(a) REGULATIONS.—”;

(C) by striking subsection (b);
(D) by redesignating paragraphs (1) through (5) as subsections (a) through (e), respectively;
(E) in subsection (c), as so redesignated, by striking “paragraph (2)’’) and inserting “subsection (b)”;
(F) by adding at the end the following:

“(f) BOARD AUTHORITY.—Notwithstanding subsection (a), the Board shall prescribe regulations to carry out the purposes of this title with respect to a person described in section 1029(a) of the Consumer Financial Protection Act of 2010. These regulations may contain but are not limited to such classifications, differentiation, or other provision, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.

“(g) DEFERENCE.—Notwithstanding any power granted to any Federal agency under this title, the deference that a court affords to a Federal agency with respect to a determination made by such agency relating to the meaning or interpretation of any provision of this title that is subject to the jurisdiction of such agency shall be applied as if that agency were the only agency authorized to apply, enforce, interpret, or administer the provisions of this title”;

(4) in section 704 (15 U.S.C. 1691c)—

(A) in subsection (a)—

(i) by striking “Compliance” and inserting “Subject to subtitle B of the Consumer Protection Financial Protection Act of 2010”;

(ii) by striking paragraphs (1) and (2) and inserting the following:

“(1) section 8 of the Federal Deposit Insurance Act, by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to—

“A national banks, Federal savings associations, and Federal branches and Federal agencies of foreign banks;

“B member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act; and

“C banks and State savings associations insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), and insured State branches of foreign banks;”;

(iii) by redesignating paragraphs (3) through (9) as paragraphs (2) through (8), respectively;

(iv) in paragraph (7) (as so redesignated), by striking “and” at the end;

(v) in paragraph (8) (as so redesignated), by striking the period at the end, and inserting “; and”;

and

(vi) by adding at the end the following:
“(9) Subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau, with respect to any person subject to this title.”;

(B) by striking subsection (c) and inserting the following:

“(c) OVERALL ENFORCEMENT AUTHORITY OF FEDERAL TRADE COMMISSION.—Except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other Government agency under any of paragraphs (1) through (8) of subsection (a), and subject to subtitle E of the Consumer Financial Protection Act of 2010, the Federal Trade Commission shall be authorized to enforce such requirements. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), a violation of any requirement imposed under this subchapter shall be deemed a violation of a requirement imposed under that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Federal Trade Commission to enforce compliance by any person with the requirements imposed under this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act, including the power to enforce any rule prescribed by the Bureau under this title in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.”;

(C) in subsection (d), by striking “Board” and inserting “Bureau”;

(5) in section 706(e) (15 U.S.C. 1691e(e))—

(A) in the subsection heading—

(i) by striking “BOARD” each place that term appears and inserting “BUREAU”; and

(ii) by striking “FEDERAL RESERVE SYSTEM” and inserting “BUREAU OF CONSUMER FINANCIAL PROTECTION”; and

(B) by striking “Federal Reserve System” and inserting “Bureau of Consumer Financial Protection”;

(6) in section 706(g) (15 U.S.C. 1691e(g)), by striking “(3)” and inserting “(9)”;

(7) in section 706(f) (15 U.S.C. 1691e(f)), by striking “two years from” each place that term appears and inserting “5 years after”.

SEC. 1086. AMENDMENTS TO THE EXPEDITED FUNDS AVAILABILITY ACT.

(a) AMENDMENT TO SECTION 603.—Section 603(d)(1) of the Expedited Funds Availability Act (12 U.S.C. 4002) is amended by inserting after “Board” the following “, jointly with the Director of the Bureau of Consumer Financial Protection,”;

(b) AMENDMENTS TO SECTION 604.—Section 604 of the Expedited Funds Availability Act (12 U.S.C. 4003) is amended—

(1) by inserting after “Board” each place that term appears, other than in subsection (f), the following: “, jointly with the Director of the Bureau of Consumer Financial Protection,”; and
(2) in subsection (f), by striking “Board,” each place that term appears and inserting the following: “Board, jointly with the Director of the Bureau of Consumer Financial Protection.”.

(c) AMENDMENTS TO SECTION 605.—Section 605 of the Expedited Funds Availability Act (12 U.S.C. 4004) is amended—
(1) by inserting after “Board” each place that term appears, other than in the heading for section 605(f)(1), the following: “, jointly with the Director of the Bureau of Consumer Financial Protection,”; and
(2) in subsection (f)(1), in the paragraph heading, by inserting “AND BUREAU” after “BOARD”.

(d) AMENDMENTS TO SECTION 609.—Section 609 of the Expedited Funds Availability Act (12 U.S.C. 4008) is amended:
(1) in subsection (a), by inserting after “Board” the following “, jointly with the Director of the Bureau of Consumer Financial Protection,”; and
(2) by striking subsection (e) and inserting the following:
“(e) CONSULTATIONS.—In prescribing regulations under subsections (a) and (b), the Board and the Director of the Bureau of Consumer Financial Protection, in the case of subsection (a), and the Board, in the case of subsection (b), shall consult with the Comptroller of the Currency, the Board of Directors of the Federal Deposit Insurance Corporation, and the National Credit Union Administration Board.”.

(e) EXPEDITED FUNDS AVAILABILITY IMPROVEMENTS.—Section 603 of the Expedited Funds Availability Act (12 U.S.C. 4002) is amended—
(1) in subsection (a)(2)(D), by striking “$100” and inserting “$200”; and
(2) in subsection (b)(3)(C), in the subparagraph heading, by striking “$100” and inserting “$200”; and
(3) in subsection (c)(1)(B)(iii), in the clause heading, by striking “$100” and inserting “$200”.

(f) REGULAR ADJUSTMENTS FOR INFLATION.—Section 607 of the Expedited Funds Availability Act (12 U.S.C. 4006) is amended by adding at the end the following:
“(f) ADJUSTMENTS TO DOLLAR AMOUNTS FOR INFLATION.—The dollar amounts under this title shall be adjusted every 5 years after December 31, 2011, by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers, as published by the Bureau of Labor Statistics, rounded to the nearest multiple of $25.”.

SEC. 1087. AMENDMENTS TO THE FAIR CREDIT BILLING ACT.

The Fair Credit Billing Act (15 U.S.C. 1666–1666j) is amended by striking “Board” each place that term appears, other than in section 105(i) (as added by this subtitle) and inserting “Bureau”.


(a) FAIR CREDIT REPORTING ACT.—The Fair Credit Reporting Act (15 U.S.C. 1681 et seq.) is amended—
(1) in section 603 (15 U.S.C. 1681a)—
(A) by redesignating subsections (w) and (x) as subsections (x) and (y), respectively; and
(B) by inserting after subsection (v) the following:
“(w) The term ‘Bureau’ means the Bureau of Consumer Financial Protection.”; and

(2) except as otherwise specifically provided in this subsection—

(A) by striking “Federal Trade Commission” each place that term appears and inserting “Bureau”;

(B) by striking “FTC” each place that term appears and inserting “Bureau”;

(C) by striking “the Commission” each place that term appears, other than sections 615(e) (15 U.S.C. 1681m(e)) and 628(a)(1) (15 U.S.C. 1681w(a)(1)), and inserting “the Bureau”; and

(D) by striking “The Federal banking agencies, the National Credit Union Administration, and the Commission shall jointly” each place that term appears, other than section 615(e)(1) (15 U.S.C. 1681m(e)) and section 628(a)(1) (15 U.S.C. 1681w(a)(1)), and inserting “The Bureau shall”;

(3) in section 603(k)(2) (15 U.S.C. 1681a(k)(2)), by striking “Board of Governors of the Federal Reserve System” and inserting “Bureau”;

(4) in section 604(g) (15 U.S.C. 1681b(g))—

(A) in paragraph (3), by striking subparagraph (C) and inserting the following:

“(C) as otherwise determined to be necessary and appropriate, by regulation or order, by the Bureau or the applicable State insurance authority (with respect to any person engaged in providing insurance or annuities).”; and

(B) by striking paragraph (5) and inserting the following:

“(5) REGULATIONS AND EFFECTIVE DATE FOR PARAGRAPH (2).—

“(A) REGULATIONS REQUIRED.—The Bureau may, after notice and opportunity for comment, prescribe regulations that permit transactions under paragraph (2) that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (and which shall include permitting actions necessary for administrative verification purposes), consistent with the intent of paragraph (2) to restrict the use of medical information for inappropriate purposes.”;

(5) in section 605(h)(2)(A) (15 U.S.C. 1681c(h)(2)(A)), by striking “with respect to the entities that are subject to their respective enforcement authority under section 621” and inserting “, in consultation with the Federal banking agencies, the National Credit Union Administration, and the Federal Trade Commission.”;

(6) in section 611(e)(2) (15 U.S.C. 1681i(e)), by striking paragraph (2) and inserting the following:

“(2) EXCLUSION.—Complaints received or obtained by the Bureau pursuant to its investigative authority under the Consumer Financial Protection Act of 2010 shall not be subject to paragraph (1).”;
(9) in section 615(h)(6) (15 U.S.C. 1681m(h)(6)), by striking subparagraph (A) and inserting the following:

"(A) RULES REQUIRED.—The Bureau shall prescribe rules to carry out this subsection."

(10) in section 621 (15 U.S.C. 1681s)—

(A) by striking subsection (a) and inserting the following:

"(a) ENFORCEMENT BY FEDERAL TRADE COMMISSION.—

"(1) IN GENERAL.—The Federal Trade Commission shall be authorized to enforce compliance with the requirements imposed by this title under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), with respect to consumer reporting agencies and all other persons subject thereto, except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other Government agency under any of subparagraphs (A) through (G) of subsection (b)(1), and subject to subtitle B of the Consumer Financial Protection Act of 2010, subsection (b). For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this title shall constitute an unfair or deceptive act or practice in commerce, in violation of section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)), and shall be subject to enforcement by the Federal Trade Commission under section 5(b) of that Act with respect to any consumer reporting agency or person that is subject to enforcement by the Federal Trade Commission pursuant to this subsection, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act. The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this title and to require the filing of reports, the production of documents, and the appearance of witnesses, as though the applicable terms and conditions of the Federal Trade Commission Act were part of this title. Any person violating any of the provisions of this title shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions of such Act are part of this title.

"(2) PENALTIES.—

"(A) KNOWING VIOLATIONS.—Except as otherwise provided by subtitle B of the Consumer Financial Protection Act of 2010, in the event of a knowing violation, which constitutes a pattern or practice of violations of this title, the Federal Trade Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person that violates this title. In such action, such person shall be liable for a civil penalty of not more than $2,500 per violation.

"(B) DETERMINING PENALTY AMOUNT.—In determining the amount of a civil penalty under subparagraph (A), the court shall take into account the degree of culpability, any history of such prior conduct, ability to pay, effect
on ability to continue to do business, and such other matters as justice may require.

“(C) LIMITATION.—Notwithstanding paragraph (2), a court may not impose any civil penalty on a person for a violation of section 623(a)(1), unless the person has been enjoined from committing the violation, or ordered not to commit the violation, in an action or proceeding brought by or on behalf of the Federal Trade Commission, and has violated the injunction or order, and the court may not impose any civil penalty for any violation occurring before the date of the violation of the injunction or order.”;

(B) by striking subsection (b) and inserting the following:

“(b) ENFORCEMENT BY OTHER AGENCIES.—

“(1) IN GENERAL.—Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance with the requirements imposed under this title with respect to consumer reporting agencies, persons who use consumer reports from such agencies, persons who furnish information to such agencies, and users of information that are subject to section 615(d) shall be enforced under—

“(A) section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to—

“(i) any national bank or State savings association, and any Federal branch or Federal agency of a foreign bank;

“(ii) any member bank of the Federal Reserve System (other than a national bank), a branch or agency of a foreign bank (other than a Federal branch, Federal agency, or insured State branch of a foreign bank), a commercial lending company owned or controlled by a foreign bank, and any organization operating under section 25 or 25A of the Federal Reserve Act; and

“(iii) any bank or Federal savings association insured by the Federal Deposit Insurance Corporation (other than a member of the Federal Reserve System) and any insured State branch of a foreign bank;

“(B) the Federal Credit Union Act (12 U.S.C. 1751 et seq.), by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

“(C) subtitle IV of title 49, United States Code, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

“(D) the Federal Aviation Act of 1958 (49 U.S.C. App. 1301 et seq.), by the Secretary of Transportation, with respect to any air carrier or foreign air carrier subject to that Act;

“(E) the Packers and Stockyards Act, 1921 (7 U.S.C. 181 et seq.) (except as provided in section 406 of that Act), by the Secretary of Agriculture, with respect to any activities subject to that Act;
“(F) the Commodity Exchange Act, with respect to a person subject to the jurisdiction of the Commodity Futures Trading Commission;

“(G) the Federal securities laws, and any other laws that are subject to the jurisdiction of the Securities and Exchange Commission, with respect to a person that is subject to the jurisdiction of the Securities and Exchange Commission; and

“(H) subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau, with respect to any person subject to this title.

“(2) INCORPORATED DEFINITIONS.—The terms used in paragraph (1) that are not defined in this title or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) have the same meanings as in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).”;

(C) in subsection (c)(2)—

(i) by inserting “‘and the Federal Trade Commission’ before “or the appropriate”; and

(ii) by inserting “‘and the Federal Trade Commission’ before “or appropriate” each place that term appears;

(D) in subsection (c)(4), by inserting before “or the appropriate” each place that term appears the following: “, the Federal Trade Commission’;

(E) by striking subsection (e) and inserting the following:

“(e) REGULATORY AUTHORITY.—

“(1) IN GENERAL.—The Bureau shall prescribe such regulations as are necessary to carry out the purposes of this title, except with respect to sections 615(e) and 628. The Bureau may prescribe regulations as may be necessary or appropriate to administer and carry out the purposes and objectives of this title, and to prevent evasions thereof or to facilitate compliance therewith. Except as provided in section 1029(a) of the Consumer Financial Protection Act of 2010, the regulations prescribed by the Bureau under this title shall apply to any person that is subject to this title, notwithstanding the enforcement authorities granted to other agencies under this section.

“(2) DEFERENCE.—Notwithstanding any power granted to any Federal agency under this title, the deference that a court affords to a Federal agency with respect to a determination made by such agency relating to the meaning or interpretation of any provision of this title that is subject to the jurisdiction of such agency shall be applied as if that agency were the only agency authorized to apply, enforce, interpret, or administer the provisions of this title. The regulations prescribed by the Bureau under this title shall apply to any person that is subject to this title, notwithstanding the enforcement authorities granted to other agencies under this section.”;

(F) in subsection (f)(2), by striking “‘the Federal banking agencies’ and insert “‘the Federal Trade Commission, the Federal banking agencies’”;

(11) in section 623 (15 U.S.C. 1681s–2)—

(A) in subsection (a)(7), by striking subparagraph (D) and inserting the following:

“(D) MODEL DISCLOSURE.—
“(i) DUTY OF BUREAU.—The Bureau shall prescribe a brief model disclosure that a financial institution may use to comply with subparagraph (A), which shall not exceed 30 words.

“(ii) USE OF MODEL NOT REQUIRED.—No provision of this paragraph may be construed to require a financial institution to use any such model form prescribed by the Bureau.

“(iii) COMPLIANCE USING MODEL.—A financial institution shall be deemed to be in compliance with subparagraph (A) if the financial institution uses any model form prescribed by the Bureau under this subparagraph, or the financial institution uses any such model form and rearranges its format.”;

(B) in subsection (a)(8), by inserting “in consultation with the Federal Trade Commission, the Federal banking agencies, and the National Credit Union Administration,” before “shall jointly”; and

(C) by striking subsection (e) and inserting the following:

“(e) ACCURACY GUIDELINES AND REGULATIONS REQUIRED.—

“(1) GUIDELINES.—The Bureau shall, with respect to persons or entities that are subject to the enforcement authority of the Bureau under section 621—

“(A) establish and maintain guidelines for use by each person that furnishes information to a consumer reporting agency regarding the accuracy and integrity of the information relating to consumers that such entities furnish to consumer reporting agencies, and update such guidelines as often as necessary; and

“(B) prescribe regulations requiring each person that furnishes information to a consumer reporting agency to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A).

“(2) CRITERIA.—In developing the guidelines required by paragraph (1)(A), the Bureau shall—

“(A) identify patterns, practices, and specific forms of activity that can compromise the accuracy and integrity of information furnished to consumer reporting agencies;

“(B) review the methods (including technological means) used to furnish information relating to consumers to consumer reporting agencies;

“(C) determine whether persons that furnish information to consumer reporting agencies maintain and enforce policies to ensure the accuracy and integrity of information furnished to consumer reporting agencies; and

“(D) examine the policies and processes that persons that furnish information to consumer reporting agencies employ to conduct reinvestigations and correct inaccurate information relating to consumers that has been furnished to consumer reporting agencies.”;

(12) in section 628(a)(1) (15 U.S.C. 1681w(a)(1)), by striking “Not later than” and all that follows through “Exchange Commission,” and inserting “The Federal Trade Commission, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Federal banking agencies,
and the National Credit Union Administration, with respect to the entities that are subject to their respective enforcement authority under section 621; and

(13) in section 628(a)(3) (15 U.S.C. 1681w(a)(3)), by striking “the Federal banking agencies, the National Credit Union Administration, the Commission, and the Securities and Exchange Commission” and inserting “the agencies identified in paragraph (1)”.

(b) FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003.—The Fair and Accurate Credit Transactions Act of 2003 (Public Law 108–159) is amended—

(1) in section 112(b) (15 U.S.C. 1681c–1 note), by striking “Commission” and inserting “Bureau”;

(2) in section 211(d) (15 U.S.C. 1681j note), by striking “Commission” each place that term appears and inserting “Bureau”;

(3) in section 214(b) (15 U.S.C. 1681s–3 note), by striking paragraph (1) and inserting the following:

“(1) IN GENERAL.—Regulations to carry out section 624 of the Fair Credit Reporting Act (15 U.S.C. 1681s–3), shall be prescribed, as described in paragraph (2), by—

“(A) the Commodity Futures Trading Commission, with respect to entities subject to its enforcement authorities;

“(B) the Securities and Exchange Commission, with respect to entities subject to its enforcement authorities; and

“(C) the Bureau, with respect to other entities subject to this Act.”; and


SEC. 1089. AMENDMENTS TO THE FAIR DEBT COLLECTION PRACTICES ACT.


15 USC 1692k, 1692m, 1692o.

(1) by striking “Commission” each place that term appears and inserting “Bureau”;

(2) in section 803 (15 U.S.C. 1692a)—

(A) by striking paragraph (1) and inserting the following:

“(1) The term ‘Bureau’ means the Bureau of Consumer Financial Protection.”;

(3) in section 814 (15 U.S.C. 1692l)—

(A) by striking subsection (a) and inserting the following:

“(a) FEDERAL TRADE COMMISSION.—The Federal Trade Commission shall be authorized to enforce compliance with this title, except to the extent that enforcement of the requirements imposed under this title is specifically committed to another Government agency under any of paragraphs (1) through (5) of subsection (b), subject to subtitle B of the Consumer Financial Protection Act of 2010. For purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), a violation of this title shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Federal Trade Commission

Compliance.
under the Federal Trade Commission Act are available to the Federal Trade Commission to enforce compliance by any person with this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act, including the power to enforce the provisions of this title, in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.

and

(B) in subsection (b)—

(i) by striking “Compliance” and inserting “Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance”;

(ii) by striking paragraphs (1) and (2) and inserting the following:

“(1) section 8 of the Federal Deposit Insurance Act, by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to—

(A) national banks, Federal savings associations, and Federal branches and Federal agencies of foreign banks;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act; and

(C) banks and State savings associations insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), and insured State branches of foreign banks;”;

(iii) by redesignating paragraphs (3) through (6), as paragraphs (2) through (5), respectively;

(iv) in paragraph (4) (as so redesignated), by striking “and” at the end;

(v) in paragraph (5) (as so redesignated), by striking the period at the end and inserting “; and”;

and

(vi) by inserting before the undesignated matter at the end the following:

“(6) subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau, with respect to any person subject to this title.”.

(4) in subsection (d), by striking “Neither the Commission” and all that follows through the end of the subsection and inserting the following: “Except as provided in section 1029(a) of the Consumer Financial Protection Act of 2010, the Bureau may prescribe rules with respect to the collection of debts by debt collectors, as defined in this title.”.

SEC. 1090. AMENDMENTS TO THE FEDERAL DEPOSIT INSURANCE ACT.

The Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.) is amended—

(1) in section 8(t) (12 U.S.C. 1818(t)), by adding at the end the following:
“(6) REFERRAL TO BUREAU OF CONSUMER FINANCIAL PROTECTION.—Subject to subtitle B of the Consumer Financial Protection Act of 2010, each appropriate Federal banking agency shall make a referral to the Bureau of Consumer Financial Protection when the Federal banking agency has a reasonable belief that a violation of an enumerated consumer law, as defined in the Consumer Financial Protection Act of 2010, has been committed by any insured depository institution or institution-affiliated party within the jurisdiction of that appropriate Federal banking agency.”; and

(2) in section 43 (12 U.S.C. 1831t)—

(A) in subsection (c), by striking “Federal Trade Commission” and inserting “Bureau”;

(B) in subsection (d), by striking “Federal Trade Commission” and inserting “Bureau”;

(C) in subsection (e)—

(i) in paragraph (2), by striking “Federal Trade Commission” and inserting “Bureau”; and

(ii) by adding at the end the following new paragraph:

“(5) BUREAU.—The term ‘Bureau’ means the Bureau of Consumer Financial Protection.”; and

(D) in subsection (f)—

(i) by striking paragraph (1) and inserting the following:

“(1) LIMITED ENFORCEMENT AUTHORITY.—Compliance with the requirements of subsections (b), (c), and (e), and any regulation prescribed or order issued under such subsection, shall be enforced under the Consumer Financial Protection Act of 2010, by the Bureau, subject to subtitle B of the Consumer Financial Protection Act of 2010, and under the Federal Trade Commission Act (15 U.S.C. 41 et seq.) by the Federal Trade Commission.”; and

(ii) in paragraph (2), by striking subparagraph (C) and inserting the following:

“(C) LIMITATION ON STATE ACTION WHILE FEDERAL ACTION PENDING.—If the Bureau or Federal Trade Commission has instituted an enforcement action for a violation of this section, no appropriate State supervisory agency may, during the pendency of such action, bring an action under this section against any defendant named in the complaint of the Bureau or Federal Trade Commission for any violation of this section that is alleged in that complaint.”.

SEC. 1091. AMENDMENT TO FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL ACT OF 1978.


SEC. 1092. AMENDMENTS TO THE FEDERAL TRADE COMMISSION ACT.

Section 18(f) of the Federal Trade Commission Act (15 U.S.C. 57a(f)) is amended—

(1) by striking the subsection heading and inserting the following:

“(f) THE BUREAU OF CONSUMER FINANCIAL PROTECTION.”

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“(f) Definitions of Banks, Savings and Loan Institutions, and Federal Credit Unions.—”.

(2) by striking paragraph (1) and inserting the following:

“(1) [Repealed.];

(3) by striking paragraphs (5) through (7);

(4) in paragraph (2)—

(A) by striking “(2) Enforcement” and all that follows through “in the case of” and inserting the following:

“(2) Definition.—For purposes of this Act, the term ‘bank’ means’;

(B) in subparagraph (A), by striking “, by the division” and all that follows through “Currency’;

(C) in subparagraph (B)—

(i) by striking “, by the division” and all that follows through “System’; and

(ii) by striking “25(a)” and inserting “25A’; and

(D) in subparagraph (C)—

(i) by striking “(other” and inserting “(other than’; and

(ii) by striking “, by the division” and all that follows through “Corporation’;

(5) in paragraph (3), by striking “Compliance” and all that follows through “as defined in’ and inserting the following: “For purposes of this Act, the term “savings and loan institution” has the same meaning as in’; and

(6) in paragraph (4), by striking “Compliance” and all that follows through “credit unions under” and inserting the following: “For purposes of this Act, the term “Federal credit union” has the same meaning as in”.

SEC. 1093. AMENDMENTS TO THE GRAMM-LEACH-BLILEY ACT.

Title V of the Gramm-Leach-Bliley Act (15 U.S.C. 6801 et seq.) is amended—

(1) in section 501(b) (15 U.S.C. 6801(b)), by inserting “, other than the Bureau of Consumer Financial Protection,” after “505(a)’;

(2) in section 502(e)(5) (15 U.S.C. 6802(e)(5)), by inserting “the Bureau of Consumer Financial Protection” after “including’;

(3) in section 504(a) (15 U.S.C. 6804(a))—

(A) by striking paragraphs (1) and (2) and inserting the following:

“(1) Rulemaking.—

“(A) In general.—Except as provided in subparagraph (C), the Bureau of Consumer Financial Protection and the Securities and Exchange Commission shall have authority to prescribe such regulations as may be necessary to carry out the purposes of this subtitle with respect to financial institutions and other persons subject to their respective jurisdiction under section 505 (and notwithstanding subtitle B of the Consumer Financial Protection Act of 2010), except that the Bureau of Consumer Financial Protection shall not have authority to prescribe regulations with respect to the standards under section 501.

“(B) CFTC.—The Commodity Futures Trading Commission shall have authority to prescribe such regulations as may be necessary to carry out the purposes of
this subtitle with respect to financial institutions and other persons subject to the jurisdiction of the Commodity Futures Trading Commission under section 5g of the Commodity Exchange Act.

"(C) Federal Trade Commission Authority.—Notwithstanding the authority of the Bureau of Consumer Financial Protection under subparagraph (A), the Federal Trade Commission shall have authority to prescribe such regulations as may be necessary to carry out the purposes of this subtitle with respect to any financial institution that is a person described in section 1029(a) of the Consumer Financial Protection Act of 2010.

"(D) Rule of Construction.—Nothing in this paragraph shall be construed to alter, affect, or otherwise limit the authority of a State insurance authority to adopt regulations to carry out this subtitle.

"(2) Coordination, Consistency, and Comparability.—Each of the agencies authorized under paragraph (1) to prescribe regulations shall consult and coordinate with the other such agencies and, as appropriate, with representatives of State insurance authorities designated by the National Association of Insurance Commissioners, for the purpose of assuring, to the extent possible, that the regulations prescribed by each such agency are consistent and comparable with the regulations prescribed by the other such agencies."; and

"(B) in paragraph (3), by striking ", and shall be issued in final form not later than 6 months after the date of enactment of this Act"; (4) in section 505(a) (15 U.S.C. 6805(a))— (A) by striking "This subtitle" and all that follows through "as follows:" and inserting "Subject to subtitle B of the Consumer Financial Protection Act of 2010, this subtitle and the regulations prescribed thereunder shall be enforced by the Bureau of Consumer Financial Protection, the Federal functional regulators, the State insurance authorities, and the Federal Trade Commission with respect to financial institutions and other persons subject to their jurisdiction under applicable law, as follows:"; (B) in paragraph (1)— (i) in the matter preceding subparagraph (A), by inserting "by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act," after "Act,"; (ii) in subparagraph (A), by striking ", by the Office of the Comptroller of the Currency"; (iii) in subparagraph (B), by striking "", by the Board of Governors of the Federal Reserve System"; (iv) in subparagraph (C), by striking "", by the Board of Directors of the Federal Deposit Insurance Corporation"; and (v) in subparagraph (D), by striking "", by the Director of the Office of Thrift Supervision"; and (C) by adding at the end the following: 

"(8) Under subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau of Consumer Financial Protection, in the case of any financial institution and other covered person or service provider that is subject to the jurisdiction of the
Bureau and any person subject to this subtitle, but not with respect to the standards under section 501.”;
(5) in section 505(b)(1) (15 U.S.C. 6805(b)(1)), by inserting “, other than the Bureau of Consumer Financial Protection,” after “subsection (a)”;
and

SEC. 1094. AMENDMENTS TO THE HOME MORTGAGE DISCLOSURE ACT OF 1975.

(1) by striking “Board” each place that term appears, other than in sections 303, 304(h), 305(b) (as amended by this section), and 307(a) (as amended by this section) and inserting “Bureau”.

(2) in section 303 (12 U.S.C. 2802)—
(A) by redesignating paragraphs (1) through (6) as paragraphs (2) through (7), respectively; and
(B) by inserting before paragraph (2) the following:
“(1) the term ‘Bureau’ means the Bureau of Consumer Financial Protection;”;

(3) in section 304 (12 U.S.C. 2803)—
(A) in subsection (b)—
(1) in paragraph (4), by inserting “age,” before “and gender”; and
(2) in paragraph (3), by striking “and” at the end;
(iii) in paragraph (4), by striking the period at the end and inserting a semicolon; and
(iv) by adding at the end the following:
“(5) the number and dollar amount of mortgage loans grouped according to measurements of—
“(A) the total points and fees payable at origination in connection with the mortgage as determined by the Bureau, taking into account 15 U.S.C. 1602(aa)(4);
“(B) the difference between the annual percentage rate associated with the loan and a benchmark rate or rates for all loans;
“(C) the term in months of any prepayment penalty or other fee or charge payable on repayment of some portion of principal or the entire principal in advance of scheduled payments; and
“(D) such other information as the Bureau may require; and
“(6) the number and dollar amount of mortgage loans and completed applications grouped according to measurements of—
“(A) the value of the real property pledged or proposed to be pledged as collateral;
“(B) the actual or proposed term in months of any introductory period after which the rate of interest may change;
“(C) the presence of contractual terms or proposed contractual terms that would allow the mortgagor or applicant to make payments other than fully amortizing payments during any portion of the loan term;
“(D) the actual or proposed term in months of the mortgage loan;
“(E) the channel through which application was made, including retail, broker, and other relevant categories;
“(F) as the Bureau may determine to be appropriate, a unique identifier that identifies the loan originator as set forth in section 1503 of the S.A.F.E. Mortgage Licensing Act of 2008;
“(G) as the Bureau may determine to be appropriate, a universal loan identifier;
“(H) as the Bureau may determine to be appropriate, the parcel number that corresponds to the real property pledged or proposed to be pledged as collateral;
“(I) the credit score of mortgage applicants and mortgagors, in such form as the Bureau may prescribe; and
“(J) such other information as the Bureau may require.”;

(B) by striking subsection (h) and inserting the following:

“(h) SUBMISSION TO AGENCIES.—
“(1) IN GENERAL.—The data required to be disclosed under subsection (b) shall be submitted to the Bureau or to the appropriate agency for the institution reporting under this title, in accordance with rules prescribed by the Bureau. Notwithstanding the requirement of subsection (a)(2)(A) for disclosure by census tract, the Bureau, in consultation with other appropriate agencies described in paragraph (2) and, after notice and comment, shall develop regulations that—
“(A) prescribe the format for such disclosures, the method for submission of the data to the appropriate agency, and the procedures for disclosing the information to the public;
“(B) require the collection of data required to be disclosed under subsection (b) with respect to loans sold by each institution reporting under this title;
“(C) require disclosure of the class of the purchaser of such loans;
“(D) permit any reporting institution to submit in writing to the Bureau or to the appropriate agency such additional data or explanations as it deems relevant to the decision to originate or purchase mortgage loans; and
“(E) modify or require modification of itemized information, for the purpose of protecting the privacy interests of the mortgage applicants or mortgagors, that is or will be available to the public.
“(2) OTHER APPROPRIATE AGENCIES.—The appropriate agencies described in this paragraph are—
“(A) the appropriate Federal banking agencies, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to the entities that are subject to the jurisdiction of each such agency, respectively;
“(B) the Federal Deposit Insurance Corporation for banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), mutual savings banks, insured State branches of foreign banks, and any other depository institution described in
section 303(2)(A) which is not otherwise referred to in this paragraph;

(C) the National Credit Union Administration Board with respect to credit unions; and

(D) the Secretary of Housing and Urban Development with respect to other lending institutions not regulated by the agencies referred to in subparagraph (A) or (B).

(3) RULES FOR MODIFICATIONS UNDER PARAGRAPH (1).—

(A) APPLICATION.—A modification under paragraph (1)(E) shall apply to information concerning—

(i) credit score data described in subsection (b)(6)(I), in a manner that is consistent with the purpose described in paragraph (1)(E); and

(ii) age or any other category of data described in paragraph (5) or (6) of subsection (b), as the Bureau determines to be necessary to satisfy the purpose described in paragraph (1)(E), and in a manner consistent with that purpose.

(B) STANDARDS.—The Bureau shall prescribe standards for any modification under paragraph (1)(E) to effectuate the purposes of this title, in light of the privacy interests of mortgage applicants or mortgagors. Where necessary to protect the privacy interests of mortgage applicants or mortgagors, the Bureau shall provide for the disclosure of information described in subparagraph (A) in aggregate or other reasonably modified form, in order to effectuate the purposes of this title.”;

(C) in subsection (i), by striking “subsection (b)(4)” and inserting “subsections (b)(4), (b)(5), and (b)(6)”;

(D) in subsection (j)—

(i) by striking paragraph (3) and inserting the following:

“(3) CHANGE OF FORM NOT REQUIRED.—A depository institution meets the disclosure requirement of paragraph (1) if the institution provides the information required under such paragraph in such formats as the Bureau may require”; and

(ii) in paragraph (2)(A), by striking “in the format in which such information is maintained by the institution” and inserting “in such formats as the Bureau may require”;

(E) in subsection (m), by striking paragraph (2) and inserting the following:

“(2) FORM OF INFORMATION.—In complying with paragraph (1), a depository institution shall provide the person requesting the information with a copy of the information requested in such formats as the Bureau may require.”; and

(F) by adding at the end the following:

“(n) TIMING OF CERTAIN DISCLOSURES.—The data required to be disclosed under subsection (b) shall be submitted to the Bureau or to the appropriate agency for any institution reporting under this title, in accordance with regulations prescribed by the Bureau. Institutions shall not be required to report new data under paragraph (5) or (6) of subsection (b) before the first January 1 that occurs after the end of the 9-month period beginning on the date on which regulations are issued by the Bureau in final form with respect to such disclosures.”;

(4) in section 305 (12 U.S.C. 2804)—
(A) by striking subsection (b) and inserting the following:

“(b) POWERS OF CERTAIN OTHER AGENCIES.—

“(1) IN GENERAL.—Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance with the requirements of this title shall be enforced—

“(A) under section 8 of the Federal Deposit Insurance Act, the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to—

“(i) any national bank or Federal savings association, and any Federal branch or Federal agency of a foreign bank;

“(ii) any member bank of the Federal Reserve System (other than a national bank), branch or agency of a foreign bank (other than a Federal branch, Federal agency, and insured State branch of a foreign bank), commercial lending company owned or controlled by a foreign bank, and any organization operating under section 25 or 25A of the Federal Reserve Act; and

“(iii) any bank or State savings association insured by the Federal Deposit Insurance Corporation (other than a member of the Federal Reserve System), any mutual savings bank as, defined in section 3(f) of the Federal Reserve Act (12 U.S.C. 1813(f)), any insured State branch of a foreign bank, and any other depository institution not referred to in this paragraph or subparagraph (B) or (C);

“(B) under subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau, with respect to any person subject to this subtitle;

“(C) under the Federal Credit Union Act, by the Administrator of the National Credit Union Administration with respect to any insured credit union; and

“(D) with respect to other lending institutions, by the Secretary of Housing and Urban Development.

“(2) INCORPORATED DEFINITIONS.—The terms used in paragraph (1) that are not defined in this title or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the same meanings as in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).”, and

(B) by adding at the end the following:

“(d) OVERALL ENFORCEMENT AUTHORITY OF THE BUREAU OF CONSUMER FINANCIAL PROTECTION.—Subject to subtitle B of the Consumer Financial Protection Act of 2010, enforcement of the requirements imposed under this title is committed to each of the agencies under subsection (b). To facilitate research, examinations, and enforcement, all data collected pursuant to section 304 shall be available to the entities listed under subsection (b). The Bureau may exercise its authorities under the Consumer Financial Protection Act of 2010 to exercise principal authority to examine and enforce compliance by any person with the requirements of this title.”;

(5) in section 306 (12 U.S.C. 2805(b)), by striking subsection (b) and inserting the following:

“(b) EXEMPTION AUTHORITY.—The Bureau may, by regulation, exempt from the requirements of this title any State-chartered
depository institution within any State or subdivision thereof, if
the agency determines that, under the law of such State or subdivi-
sion, that institution is subject to requirements that are substan-
tially similar to those imposed under this title, and that such
law contains adequate provisions for enforcement. Notwithstanding
any other provision of this subsection, compliance with the require-
ments imposed under this subsection shall be enforced by the Office
of the Comptroller of the Currency under section 8 of the Federal
Deposit Insurance Act, in the case of national banks and Federal
savings associations, the deposits of which are insured by the Fed-
eral Deposit Insurance Corporation.”; and
(6) by striking section 307 (12 U.S.C. 2806) and inserting
the following:

“SEC. 307. COMPLIANCE IMPROVEMENT METHODS.

“(a) IN GENERAL.—

“(1) Consultation Required.—The Director of the Bureau
of Consumer Financial Protection, with the assistance of the
Secretary, the Director of the Bureau of the Census, the Board
of Governors of the Federal Reserve System, the Federal
Deposit Insurance Corporation, and such other persons as the
Bureau deems appropriate, shall develop or assist in the
improvement of, methods of matching addresses and census
tracts to facilitate compliance by depository institutions in as
economical a manner as possible with the requirements of
this title.

“(2) Authorization of Appropriations.—There are
authorized to be appropriated, such sums as may be necessary
to carry out this subsection.

“(3) Contracting Authority.—The Director of the Bureau
of Consumer Financial Protection is authorized to utilize, con-
tract with, act through, or compensate any person or agency
in order to carry out this subsection.

“(b) Recommendations to Congress.—The Director of the
Bureau of Consumer Financial Protection shall recommend to the
Committee on Banking, Housing, and Urban Affairs of the Senate
and the Committee on Financial Services of the House of Represent-
atives, such additional legislation as the Director of the Bureau
of Consumer Financial Protection deems appropriate to carry out
the purpose of this title.”.

SEC. 1095. AMENDMENTS TO THE HOMEOWNERS PROTECTION ACT
OF 1998.

Section 10 of the Homeowners Protection Act of 1998 (12 U.S.C.
4909) is amended—

(1) in subsection (a)—

(A) by striking “Compliance” and all that follows
through the end of paragraph (1) and inserting the fol-
lowing: “Subject to subtitle B of the Consumer Financial
Protection Act of 2010, compliance with the requirements
imposed under this Act shall be enforced under—

“(1) section 8 of the Federal Deposit Insurance Act, by
the appropriate Federal banking agency (as defined in section
8(q) of that Act), with respect to—

“(A) insured depository institutions (as defined in sec-
tion 3(c)(2) of that Act);

“(B) depository institutions described in clause (i), (ii),
or (iii) of section 19(b)(1)(A) of the Federal Reserve Act
which are not insured depository institutions (as defined in section 3(c)(2) of the Federal Deposit Insurance Act); and

“(C) depository institutions described in clause (v) or (vi) of section 19(b)(1)(A) of the Federal Reserve Act which are not insured depository institutions (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);”;

(B) in paragraph (2), by striking “and” at the end;

(C) in paragraph (3), by striking the period at the end and inserting “; and”; and

(D) by adding at the end the following:

“(4) subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau of Consumer Financial Protection, with respect to any person subject to this Act.”; and

(2) in subsection (b)(2), by inserting before the period at the end the following: “, subject to subtitle B of the Consumer Financial Protection Act of 2010”.


(1) in section 158(a), by striking “Board of Governors of the Federal Reserve System, in consultation with the Consumer Advisory Council of the Board” and inserting “Bureau, in consultation with the Advisory Board to the Bureau”; and

(2) in section 158(b), by striking “Board of Governors of the Federal Reserve System” and inserting “Bureau”.

SEC. 1097. AMENDMENTS TO THE OMNIBUS APPROPRIATIONS ACT, 2009.

Section 626 of the Omnibus Appropriations Act, 2009 (15 U.S.C. 1638 note) is amended—

(1) by striking subsection (a) and inserting the following:

“(a)(1) The Bureau of Consumer Financial Protection shall have authority to prescribe rules with respect to mortgage loans in accordance with section 553 of title 5, United States Code. Such rulemaking shall relate to unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services. Any violation of a rule prescribed under this paragraph shall be treated as a violation of a rule prohibiting unfair, deceptive, or abusive acts or practices under the Consumer Financial Protection Act of 2010 and a violation of a rule under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices.

“(2) The Bureau of Consumer Financial Protection shall enforce the rules issued under paragraph (1) in the same manner, by the same means, and with the same jurisdiction, powers, and duties, as though all applicable terms and provisions of the Consumer Financial Protection Act of 2010 were incorporated into and made part of this subsection.

“(3) Subject to subtitle B of the Consumer Financial Protection Act of 2010, the Federal Trade Commission shall enforce the rules issued under paragraph (1), in the same manner, by the same means, and with the same jurisdiction, as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made part of this section.”; and

15 USC 1638 note.
(2) in subsection (b)—
(A) by striking paragraph (1) and inserting the following:
“(1) Except as provided in paragraph (6), in any case in which the attorney general of a State has reason to believe that an interest of the residents of the State has been or is threatened or adversely affected by the engagement of any person subject to a rule prescribed under subsection (a) in practices that violate such rule, the State, as parens patriae, may bring a civil action on behalf of its residents in an appropriate district court of the United States or other court of competent jurisdiction—
“(A) to enjoin that practice;
“(B) to enforce compliance with the rule;
“(C) to obtain damages, restitution, or other compensation on behalf of the residents of the State; or
“(D) to obtain penalties and relief provided under the Consumer Financial Protection Act of 2010, the Federal Trade Commission Act, and such other relief as the court deems appropriate.”;
(B) in paragraphs (2) and (3), by striking “the primary Federal regulator” each time the term appears and inserting “the Bureau of Consumer Financial Protection or the Commission, as appropriate”;
(C) in paragraph (3), by inserting “and subject to sub-title B of the Consumer Financial Protection Act of 2010,” after “paragraph (2),”; and
(D) in paragraph (6), by striking “the primary Federal regulator” each place that term appears and inserting “the Bureau of Consumer Financial Protection or the Commission”.

SEC. 1098. AMENDMENTS TO THE REAL ESTATE SETTLEMENT PROCEDURES ACT OF 1974.

The Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 et seq.) is amended—
(1) in section 3 (12 U.S.C. 2602)—
(A) in paragraph (7), by striking “and” at the end;
(B) in paragraph (8), by striking the period at the end and inserting “; and”; and
(C) by adding at the end the following:
“(9) the term ‘Bureau’ means the Bureau of Consumer Financial Protection.”;
(2) in section 4 (12 U.S.C. 2603)—
(A) in subsection (a), by striking the first sentence and inserting the following: “The Bureau shall publish a single, integrated disclosure for mortgage loan transactions (including real estate settlement cost statements) which includes the disclosure requirements of this section and section 5, in conjunction with the disclosure requirements of the Truth in Lending Act that, taken together, may apply to a transaction that is subject to both or either provisions of law. The purpose of such model disclosure shall be to facilitate compliance with the disclosure requirements of this title and the Truth in Lending Act, and...
to aid the borrower or lessee in understanding the trans-
action by utilizing readily understandable language to sim-
plify the technical nature of the disclosures.

(B) by striking “Secretary” each place that term
appears and inserting “Bureau”; and

(C) by striking “form” each place that term appears
and inserting “forms”;

(3) in section 5 (12 U.S.C. 2604)—

(A) by striking “Secretary” each place that term
appears and inserting “Bureau”; and

(B) in subsection (a), by striking the first sentence
and inserting the following: “The Bureau shall prepare
and distribute booklets jointly addressing compliance with
the requirements of the Truth in Lending Act and the
provisions of this title, in order to help persons borrowing
money to finance the purchase of residential real estate
better to understand the nature and costs of real estate
settlement services.”;

(4) in section 6(j)(3) (12 U.S.C. 2605(j)(3))—

(A) by striking “Secretary” and inserting “Bureau”; and

(B) by striking “, by regulations that shall take effect
not later than April 20, 1991.”;

(5) in section 7(b) (12 U.S.C. 2606(b)) by striking “Sec-
retary” and inserting “Bureau”;

(6) in section 8(c)(5) (12 U.S.C. 2607(c)(5)), by striking
“Secretary” and inserting “Bureau”;

(7) in section 8(d) (12 U.S.C. 2607(d))—

(A) in the subsection heading, by inserting “BUREAU
AND” before “SECRETARY”; and

(B) by striking paragraph (4), and inserting the fol-
lowing:

“(4) The Bureau, the Secretary, or the attorney general
or the insurance commissioner of any State may bring an
action to enjoin violations of this section. Except, to the extent
that a person is subject to the jurisdiction of the Bureau,
the Secretary, or the attorney general or the insurance com-
missioner of any State, the Bureau shall have primary authority
to enforce or administer this section, subject to subtitle B
of the Consumer Financial Protection Act of 2010.”;

(8) in section 10(c) (12 U.S.C. 2609(c) and (d)), by striking
“Secretary” and inserting “Bureau”;

(9) in section 16 (12 U.S.C. 2614), by inserting “the
Bureau,” before “the Secretary”;

(10) in section 18 (12 U.S.C. 2616), by striking “Secretary”
each place that term appears and inserting “Bureau”; and

(11) in section 19 (12 U.S.C. 2617)—

(A) in the section heading by striking “SECRETARY”
and inserting “BUREAU”; and

(B) in subsection (a), by striking “Secretary” each place
that term appears and inserting “Bureau”; and

(C) in subsections (b) and (c), by striking “the Sec-
retary” each place that term appears and inserting “the
Bureau”.

Booklets.
SEC. 1098A. AMENDMENTS TO THE INTERSTATE LAND SALES FULL DISCLOSURE ACT.

The Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 et seq.) is amended—

(1) by striking “Secretary” each place that term appears and inserting “Director”;
(2) by striking “Department of Housing and Urban Development” each place that term appears and inserting “Bureau of Consumer Financial Protection”;
(3) by striking “Department” each place that term appears and inserting “Bureau”;
(4) in section 1402 (15 U.S.C. 1701)—
   (A) by striking paragraph (1) and inserting the following:
   “(1) ‘Director’ means the Director of the Bureau of Consumer Financial Protection’’;
   (B) in paragraph (10), by striking “and” at the end;
   (C) in paragraph (11), by striking the period at the end and inserting “; and”;
   (D) by adding at the end the following:
   “(12) ‘Bureau’ means the Bureau of Consumer Financial Protection.’’; and
(5) in section 1416(a) (15 U.S.C. 1715(a)), by striking “Secretary of Housing and Urban Development” and inserting “Director of the Bureau of Consumer Financial Protection”.

SEC. 1099. AMENDMENTS TO THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978.


(1) in section 1101—
   (A) in paragraph (6)—
      (i) in subparagraph (A), by inserting “and” after the semicolon;
      (ii) in subparagraph (B), by striking “and” at the end; and
      (iii) by striking subparagraph (C); and
   (B) in paragraph (7), by striking subparagraph (B), and inserting the following:
   “(B) the Bureau of Consumer Financial Protection’’;
(2) in section 1112(e) (12 U.S.C. 3412(e)), by striking “and the Commodity Futures Trading Commission is permitted” and inserting “the Commodity Futures Trading Commission, and the Bureau of Consumer Financial Protection is permitted’’; and
(3) in section 1113 (12 U.S.C. 3413), by adding at the end the following new subsection:
   “(r) DISCLOSURE TO THE BUREAU OF CONSUMER FINANCIAL PROTECTION.—Nothing in this title shall apply to the examination by or disclosure to the Bureau of Consumer Financial Protection of financial records or information in the exercise of its authority with respect to a financial institution.”.

SEC. 1100. AMENDMENTS TO THE SECURE AND FAIR ENFORCEMENT FOR MORTGAGE LICENSING ACT OF 2008.

The S.A.F.E. Mortgage Licensing Act of 2008 (12 U.S.C. 5101 et seq.) is amended—
(1) by striking “a Federal banking agency” each place that term appears, other than in paragraphs (7) and (11) of section 1503 and section 1507(a)(1), and inserting “the Bureau”; 
(2) by striking “Federal banking agencies” each place that term appears and inserting “Bureau”; and 
(3) by striking “Secretary” each place that term appears and inserting “Director”; 
(4) in section 1503 (12 U.S.C. 5102)— 
(A) by redesignating paragraphs (2) through (12) as (3) through (13), respectively; 
(B) by striking paragraph (1) and inserting the following: “(1) BUREAU.—The term ‘Bureau’ means the Bureau of Consumer Financial Protection.”; and 
(C) by striking paragraph (10), as so designated by this section, and inserting the following: “(10) DIRECTOR.—The term ‘Director’ means the Director of the Bureau of Consumer Financial Protection.”; and 
(5) in section 1507 (12 U.S.C. 5106)— 
(A) in subsection (a)— 
(i) by striking paragraph (1) and inserting the following: “(1) IN GENERAL.—The Bureau shall develop and maintain a system for registering employees of a depository institution, employees of a subsidiary that is owned and controlled by a depository institution and regulated by a Federal banking agency, or employees of an institution regulated by the Farm Credit Administration, as registered loan originators with the Nationwide Mortgage Licensing System and Registry. The system shall be implemented before the end of the 1-year period beginning on the date of enactment of the Consumer Financial Protection Act of 2010.”; and 
(ii) in paragraph (2)— 
(I) by striking “appropriate Federal banking agency and the Farm Credit Administration” and inserting “Bureau”; and 
(II) by striking “employees’s identity” and inserting “identity of the employee”; and 
(B) in subsection (b), by striking “through the Financial Institutions Examination Council, and the Farm Credit Administration”, and inserting “and the Bureau of Consumer Financial Protection”; 
(6) in section 1508 (12 U.S.C. 5107)— 
(A) by striking the section heading and inserting the following: “SECTION 1508. BUREAU OF CONSUMER FINANCIAL PROTECTION BACKUP AUTHORITY TO ESTABLISH LOAN ORIGINATOR LICENSING SYSTEM.”; and 
(B) by adding at the end the following: “(f) REGULATION AUTHORITY.—
“(1) In General.—The Bureau is authorized to promulgate regulations setting minimum net worth or surety bond requirements for residential mortgage loan originators and minimum requirements for recovery funds paid into by loan originators.

“(2) Considerations.—In issuing regulations under paragraph (1), the Bureau shall take into account the need to provide originators adequate incentives to originate affordable and sustainable mortgage loans, as well as the need to ensure a competitive origination market that maximizes consumer access to affordable and sustainable mortgage loans.”;

“(7) by striking section 1510 (12 U.S.C. 5109) and inserting the following:

“SEC. 1510. FEES.

“The Bureau, the Farm Credit Administration, and the Nationwide Mortgage Licensing System and Registry may charge reasonable fees to cover the costs of maintaining and providing access to information from the Nationwide Mortgage Licensing System and Registry, to the extent that such fees are not charged to consumers for access to such system and registry.”;

“(8) by striking section 1513 (12 U.S.C. 5112) and inserting the following:

“SEC. 1513. LIABILITY PROVISIONS.

“The Bureau, any State official or agency, or any organization serving as the administrator of the Nationwide Mortgage Licensing System and Registry or a system established by the Director under section 1509, or any officer or employee of any such entity, shall not be subject to any civil action or proceeding for monetary damages by reason of the good faith action or omission of any officer or employee of any such entity, while acting within the scope of office or employment, relating to the collection, furnishing, or dissemination of information concerning persons who are loan originators or are applying for licensing or registration as loan originators.”; and

“(9) in section 1514 (12 U.S.C. 5113) in the section heading, by striking “UNDER HUD BACKUP LICENSING SYSTEM” and inserting “BY THE BUREAU”.

SEC. 1100A. AMENDMENTS TO THE TRUTH IN LENDING ACT.

The Truth in Lending Act (15 U.S.C. 1601 et seq.) is amended—

(1) in section 103 (15 U.S.C. 1602)—

(A) by redesignating subsections (b) through (bb) as subsections (c) through (cc), respectively; and

(B) by inserting after subsection (a) the following:

“(b) BUREAU.—The term ‘Bureau’ means the Bureau of Consumer Financial Protection.”;

(2) by striking “Board” each place that term appears, other than in section 140(d) and sections 105(i) and 108(a), as amended by this section, and inserting “Bureau”;

(3) by striking “Federal Trade Commission” each place that term appears, other than in section 108(c) and section 129(m), as amended by this Act, and other than in the context of a reference to the Federal Trade Commission Act, and inserting “Bureau”;

(4) in section 105(a) (15 U.S.C. 1604(a)), in the second sentence—
(A) by striking “Except in the case of a mortgage referred to in section 103(aa), these regulations may contain such” and inserting “Except with respect to the provisions of section 129 that apply to a mortgage referred to in section 103(aa), such regulations may contain such additional requirements,”; and
(B) by inserting “all or” after “exceptions for”;
(5) in section 105(b) (15 U.S.C. 1604(b)), by striking the first sentence and inserting the following: “The Bureau shall publish a single, integrated disclosure for mortgage loan transactions (including real estate settlement cost statements) which includes the disclosure requirements of this title in conjunction with the disclosure requirements of the Real Estate Settlement Procedures Act of 1974 that, taken together, may apply to a transaction that is subject to both or either provisions of law. The purpose of such model disclosure shall be to facilitate compliance with the disclosure requirements of this title and the Real Estate Settlement Procedures Act of 1974, and to aid the borrower or lessee in understanding the transaction by utilizing readily understandable language to simplify the technical nature of the disclosures.”;
(6) in section 105(f)(1) (15 U.S.C. 1604(f)(1)), by inserting “all or” after “from all or part of this title”;
(7) in section 105 (15 U.S.C. 1604), by adding at the end the following:
“(i) AUTHORITY OF THE BOARD TO PRESCRIBE RULES.—Notwithstanding subsection (a), the Board shall have authority to prescribe rules under this title with respect to a person described in section 1029(a) of the Consumer Financial Protection Act of 2010. Regulations prescribed under this subsection may contain such classifications, differentiations, or other provisions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.”;
(8) in section 108 (15 U.S.C. 1604), by adding at the end the following:
(A) by striking subsection (a) and inserting the following:
“(a) ENFORCING AGENCIES.—Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance with the requirements imposed under this title shall be enforced under—
“(1) section 8 of the Federal Deposit Insurance Act, by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to—
“(A) national banks, Federal savings associations, and Federal branches and Federal agencies of foreign banks;
“(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act; and
“(C) banks and State savings associations insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), and insured State branches of foreign banks;

“(2) the Federal Credit Union Act, by the Director of the National Credit Union Administration, with respect to any Federal credit union;

“(3) the Federal Aviation Act of 1958, by the Secretary of Transportation, with respect to any air carrier or foreign air carrier subject to that Act;

“(4) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture, with respect to any activities subject to that Act;

“(5) the Farm Credit Act of 1971, by the Farm Credit Administration with respect to any Federal land bank, Federal land bank association, Federal intermediate credit bank, or production credit association; and

“(6) subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau, with respect to any person subject to this title.”; and

(B) by striking subsection (c) and inserting the following:

“(c) OVERALL ENFORCEMENT AUTHORITY OF THE FEDERAL TRADE COMMISSION.—Except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other Government agency under any of paragraphs (1) through (5) of subsection (a), and subject to subtitle B of the Consumer Financial Protection Act of 2010, the Federal Trade Commission shall be authorized to enforce such requirements. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement imposed under this title shall be deemed a violation of a requirement imposed under that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Federal Trade Commission to enforce compliance by any person with the requirements under this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act.”; and

(9) in section 129 (15 U.S.C. 1639), by striking subsection (m) and inserting the following:

“(m) CIVIL PENALTIES IN FEDERAL TRADE COMMISSION ENFORCEMENT ACTIONS.—For purposes of enforcement by the Federal Trade Commission, any violation of a regulation issued by the Bureau pursuant to subsection (l)(2) shall be treated as a violation of a rule promulgated under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices.”; and

(10) in chapter 5 (15 U.S.C. 1667 et seq.)—

(A) by striking “the Board” each place that term appears and inserting “the Bureau”;

(B) by striking “The Board” each place that term appears and inserting “The Bureau”.

SEC. 1100B. AMENDMENTS TO THE TRUTH IN SAVINGS ACT.

The Truth in Savings Act (12 U.S.C. 4301 et seq.) is amended—
(1) by striking “Board” each place that term appears, other than in section 272(b) (12 U.S.C. 4311), and inserting “Bureau”; (2) in section 270(a) (12 U.S.C. 4309)—
   (A) by striking “Compliance” and all that follows through the end of paragraph (1) and inserting: “Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance with the requirements imposed under this subtitle shall be enforced under—
   (1) section 8 of the Federal Deposit Insurance Act by the appropriate Federal banking agency (as defined in section 3(q) of that Act), with respect to—
      “(A) insured depository institutions (as defined in section 3(c)(2) of that Act);”
      “(B) depository institutions described in clause (i), (ii), or (iii) of section 19(b)(1)(A) of the Federal Reserve Act which are not insured depository institutions (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);”
      “(C) depository institutions described in clause (v) or (vi) of section 19(b)(1)(A) of the Federal Reserve Act which are not insured depository institutions (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);”;
   (B) in paragraph (2), by striking the period at the end and inserting “; and”; and
   (C) by adding at the end the following:
      “(3) subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau, with respect to any person subject to this subtitle.”;
   (3) in section 272(b) (12 U.S.C. 4311(b)), by striking “regulation prescribed by the Board” each place that term appears and inserting “regulation prescribed by the Bureau”; and
   (4) in section 274 (12 U.S.C. 4313), by striking paragraph (4) and inserting the following:
      “(4) BUREAU.—The term ‘Bureau’ means the Bureau of Consumer Financial Protection.”.

SEC. 1100C. AMENDMENTS TO THE TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION ACT.

(a) Amendments to Section 3.—Section 3 of the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. 6102) is amended by striking subsections (b) and (c) and inserting the following:

“(b) Rulemaking Authority.—The Commission shall have authority to prescribe rules under subsection (a), in accordance with section 553 of title 5, United States Code. In prescribing a rule under this section that relates to the provision of a consumer financial product or service that is subject to the Consumer Financial Protection Act of 2010, including any enumerated consumer law thereunder, the Commission shall consult with the Bureau of Consumer Financial Protection regarding the consistency of a proposed rule with standards, purposes, or objectives administered by the Bureau of Consumer Financial Protection.

“(c) Violations.—Any violation of any rule prescribed under subsection (a)—

“(1) shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act regarding unfair or deceptive acts or practices; and
“(2) that is committed by a person subject to the Consumer Financial Protection Act of 2010 shall be treated as a violation of a rule under section 1031 of that Act regarding unfair, deceptive, or abusive acts or practices.”.

(b) AMENDMENTS TO SECTION 4.—Section 4(d) of the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. 6103(d)) is amended by inserting after “Commission” each place that term appears the following: “or the Bureau of Consumer Financial Protection”.

(c) AMENDMENTS TO SECTION 5.—Section 5(c) of the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. 6104(c)) is amended by inserting after “Commission” each place that term appears the following: “or the Bureau of Consumer Financial Protection”.

(d) AMENDMENT TO SECTION 6.—Section 6 of the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. 6105) is amended by adding at the end the following:

“(d) ENFORCEMENT BY BUREAU OF CONSUMER FINANCIAL PROTECTION.—Except as otherwise provided in sections 3(d), 3(e), 4, and 5, and subject to subtitle B of the Consumer Financial Protection Act of 2010, this Act shall be enforced by the Bureau of Consumer Financial Protection under subtitle E of the Consumer Financial Protection Act of 2010, with respect to the offering or provision of a consumer financial product or service subject to that Act.”.

SEC. 1100D. AMENDMENTS TO THE PAPERWORK REDUCTION ACT.

(a) DESIGNATION AS AN INDEPENDENT AGENCY.—Section 2(5) of the Paperwork Reduction Act (44 U.S.C. 3502(5)) is amended by inserting “the Bureau of Consumer Financial Protection, the Office of Financial Research,” after “the Securities and Exchange Commission,”.

(b) COMPARABLE TREATMENT.—Section 3513 of title 44, United States Code, is amended by adding at the end the following:

“(c) COMPARABLE TREATMENT.—Notwithstanding any other provision of law, the Director shall treat or review a rule or order prescribed or proposed by the Director of the Bureau of Consumer Financial Protection on the same terms and conditions as apply to any rule or order prescribed or proposed by the Board of Governors of the Federal Reserve System.”.

SEC. 1100E. ADJUSTMENTS FOR INFLATION IN THE TRUTH IN LENDING ACT.

(a) CAPS.—

(1) CREDIT TRANSACTIONS.—Section 104(3) of the Truth in Lending Act (15 U.S.C. 1603(3)) is amended by striking “$25,000” and inserting “$50,000”.

(2) CONSUMER LEASES.—Section 181(1) of the Truth in Lending Act (15 U.S.C. 1667(1)) is amended by striking “$25,000” and inserting “$50,000”.

(b) ADJUSTMENTS FOR INFLATION.—On and after December 31, 2011, the Bureau shall adjust annually the dollar amounts described in sections 104(3) and 181(1) of the Truth in Lending Act (as amended by this section), by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers, as published by the Bureau of Labor Statistics, rounded to the nearest multiple of $100, or $1,000, as applicable.

Deadline. 15 USC 1603 note.
SEC. 1100F. USE OF CONSUMER REPORTS.

Section 615 of the Fair Credit Reporting Act (15 U.S.C. 1681m) is amended—

(1) in subsection (a)—

(A) by redesignating paragraphs (2) and (3) as paragraphs (3) and (4), respectively;

(B) by inserting after paragraph (1) the following:

“(2) provide to the consumer written or electronic disclosure—

“(A) of a numerical credit score as defined in section 609(f)(2)(A) used by such person in taking any adverse action based in whole or in part on any information in a consumer report; and

“(B) of the information set forth in subparagraphs (B) through (E) of section 609(f)(1);”;

and

(C) in paragraph (4) (as so redesignated), by striking “paragraph (2)” and inserting “paragraph (3)”; and

(2) in subsection (h)(5)—

(A) in subparagraph (C), by striking “; and” and inserting a semicolon;

(B) in subparagraph (D), by striking the period and inserting “; and”;

and

(C) by inserting at the end the following:

“(E) include a statement informing the consumer of—

“(i) a numerical credit score as defined in section 609(f)(2)(A), used by such person in making the credit decision described in paragraph (1) based in whole or in part on any information in a consumer report; and

“(ii) the information set forth in subparagraphs (B) through (E) of section 609(f)(1).”.

SEC. 1100G. SMALL BUSINESS FAIRNESS AND REGULATORY TRANSPARENCY.

(a) Panel Requirement.—Section 609(d) of title 5, United States Code, is amended by striking “means the” and all that follows and inserting the following: “means—

“(1) the Environmental Protection Agency;

“(2) the Consumer Financial Protection Bureau of the Federal Reserve System; and

“(3) the Occupational Safety and Health Administration of the Department of Labor.”.

(b) Initial Regulatory Flexibility Analysis.—Section 603 of title 5, United States Code, is amended by adding at the end the following:

“(d)(1) For a covered agency, as defined in section 609(d)(2), each initial regulatory flexibility analysis shall include a description of—

“(A) any projected increase in the cost of credit for small entities;

“(B) any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any increase in the cost of credit for small entities; and

“(C) advice and recommendations of representatives of small entities relating to issues described in subparagraphs (A) and (B) and subsection (b).
“(2) A covered agency, as defined in section 609(d)(2), shall, for purposes of complying with paragraph (1)(C)—
   “(A) identify representatives of small entities in consultation with the Chief Counsel for Advocacy of the Small Business Administration; and
   “(B) collect advice and recommendations from the representatives identified under subparagraph (A) relating to issues described in subparagraphs (A) and (B) of paragraph (1) and subsection (b).”.
(c) Final Regulatory Flexibility Analysis.—Section 604(a) of title 5, United States Code, is amended—
   (1) in paragraph (4), by striking “and” at the end;
   (2) in paragraph (5), by striking the period at the end and inserting “; and”;
   (3) by adding at the end the following:
   “(6) for a covered agency, as defined in section 609(d)(2), a description of the steps the agency has taken to minimize any additional cost of credit for small entities.”.

SEC. 1100H. EFFECTIVE DATE.
Except as otherwise provided in this subtitle and the amendments made by this subtitle, this subtitle and the amendments made by this subtitle, other than sections 1081 and 1082, shall become effective on the designated transfer date.

TITLE XI—FEDERAL RESERVE SYSTEM PROVISIONS

SEC. 1101. FEDERAL RESERVE ACT AMENDMENTS ON EMERGENCY LENDING AUTHORITY.

(a) Federal Reserve Act.—The third undesignated paragraph of section 13 of the Federal Reserve Act (12 U.S.C. 343) (relating to emergency lending authority) is amended—
   (1) by inserting “(3)(A)” before “In unusual”;
   (2) by striking “individual, partnership, or corporation” the first place that term appears and inserting the following: “participant in any program or facility with broad-based eligibility”;
   (3) by striking “exchange for an individual or a partnership or corporation” and inserting “exchange,”;
   (4) by striking “such individual, partnership, or corporation” and inserting the following: “such participant in any program or facility with broad-based eligibility”;
   (5) by striking “for individuals, partnerships, corporations” and inserting “for any participant in any program or facility with broad-based eligibility”; and
   (6) by striking “may prescribe.” and inserting the following: “may prescribe.

“(B)(i) As soon as is practicable after the date of enactment of this subparagraph, the Board shall establish, by regulation, in consultation with the Secretary of the Treasury, the policies and procedures governing emergency lending under this paragraph. Such policies and procedures shall be designed to ensure that any emergency lending program or facility is for the purpose of providing liquidity to the financial system, and not to aid a failing financial
company, and that the security for emergency loans is sufficient to protect taxpayers from losses and that any such program is terminated in a timely and orderly fashion. The policies and procedures established by the Board shall require that a Federal reserve bank assign, consistent with sound risk management practices and to ensure protection for the taxpayer, a lendable value to all collateral for a loan executed by a Federal reserve bank under this paragraph in determining whether the loan is secured satisfactorily for purposes of this paragraph.

“(ii) The Board shall establish procedures to prohibit borrowing from programs and facilities by borrowers that are insolvent. Such procedures may include a certification from the chief executive officer (or other authorized officer) of the borrower, at the time the borrower initially borrows under the program or facility (with a duty by the borrower to update the certification if the information in the certification materially changes), that the borrower is not insolvent. A borrower shall be considered insolvent for purposes of this subparagraph, if the borrower is in bankruptcy, resolution under title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act, or any other Federal or State insolvency proceeding.

“(iii) A program or facility that is structured to remove assets from the balance sheet of a single and specific company, or that is established for the purpose of assisting a single and specific company avoid bankruptcy, resolution under title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act, or any other Federal or State insolvency proceeding, shall not be considered a program or facility with broad-based eligibility.

“(iv) The Board may not establish any program or facility under this paragraph without the prior approval of the Secretary of the Treasury.

“(C) The Board shall provide to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives—

“(i) not later than 7 days after the Board authorizes any loan or other financial assistance under this paragraph, a report that includes—

“(I) the justification for the exercise of authority to provide such assistance;

“(II) the identity of the recipients of such assistance;

“(III) the date and amount of the assistance, and form in which the assistance was provided; and

“(IV) the material terms of the assistance, including—

“(aa) duration;

“(bb) collateral pledged and the value thereof;

“(cc) all interest, fees, and other revenue or items of value to be received in exchange for the assistance;
“(dd) any requirements imposed on the recipient with respect to employee compensation, distribution of dividends, or any other corporate decision in exchange for the assistance; and
“(ee) the expected costs to the taxpayers of such assistance; and
“(ii) once every 30 days, with respect to any outstanding loan or other financial assistance under this paragraph, written updates on—
“(I) the value of collateral;
“(II) the amount of interest, fees, and other revenue or items of value received in exchange for the assistance; and
“(III) the expected or final cost to the taxpayers of such assistance.
“(D) The information required to be submitted to Congress under subparagraph (C) related to—
“(i) the identity of the participants in an emergency lending program or facility commenced under this paragraph;
“(ii) the amounts borrowed by each participant in any such program or facility;
“(iii) identifying details concerning the assets or collateral held by, under, or in connection with such a program or facility,
shall be kept confidential, upon the written request of the Chairman of the Board, in which case such information shall be made available only to the Chairpersons or Ranking Members of the Committees described in subparagraph (C).
“(E) If an entity to which a Federal reserve bank has provided a loan under this paragraph becomes a covered financial company, as defined in section 201 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, at any time while such loan is outstanding, and the Federal reserve bank incurs a realized net loss on the loan, then the Federal reserve bank shall have a claim equal to the amount of the net realized loss against the covered entity, with the same priority as an obligation to the Secretary of the Treasury under section 210(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act.”.

(b) CONFORMING AMENDMENT.—Section 507(a)(2) of title 11, United States Code, is amended by inserting “unsecured claims of any Federal reserve bank related to loans made through programs or facilities authorized under section 13(3) of the Federal Reserve Act (12 U.S.C. 343),” after “this title,”.

(c) REFERENCES.—On and after the date of enactment of this Act, any reference in any provision of Federal law to the third undesignated paragraph of section 13 of the Federal Reserve Act (12 U.S.C. 343) shall be deemed to be a reference to section 13(3) of the Federal Reserve Act, as so designated by this section.
“(f) Audits of Credit Facilities of the Federal Reserve System.—

“(1) Definitions.—In this subsection, the following definitions shall apply:

“(A) Credit facility.—The term ‘credit facility’ means a program or facility, including any special purpose vehicle or other entity established by or on behalf of the Board of Governors of the Federal Reserve System or a Federal reserve bank, authorized by the Board of Governors under section 13(3) of the Federal Reserve Act (12 U.S.C. 343), that is not subject to audit under subsection (e).

“(B) Covered transaction.—The term ‘covered transaction’ means any open market transaction or discount window advance that meets the definition of ‘covered transaction’ in section 11(s) of the Federal Reserve Act.

“(2) Authority for Audits and Examinations.—Subject to paragraph (3), and notwithstanding any limitation in subsection (b) on the auditing and oversight of certain functions of the Board of Governors of the Federal Reserve System or any Federal reserve bank, the Comptroller General of the United States may conduct audits, including onsite examinations, of the Board of Governors, a Federal reserve bank, or a credit facility, if the Comptroller General determines that such audits are appropriate, solely for the purposes of assessing, with respect to a credit facility or a covered transaction—

“(A) the operational integrity, accounting, financial reporting, and internal controls governing the credit facility or covered transaction;

“(B) the effectiveness of the security and collateral policies established for the facility or covered transaction in mitigating risk to the relevant Federal reserve bank and taxpayers;

“(C) whether the credit facility or the conduct of a covered transaction inappropriately favors one or more specific participants over other institutions eligible to utilize the facility; and

“(D) the policies governing the use, selection, or payment of third-party contractors by or for any credit facility or to conduct any covered transaction.

“(3) Reports and Delayed Disclosure.—

“(A) Reports Required.—A report on each audit conducted under paragraph (2) shall be submitted by the Comptroller General to the Congress before the end of the 90-day period beginning on the date on which such audit is completed.

“(B) Contents.—The report under subparagraph (A) shall include a detailed description of the findings and conclusions of the Comptroller General with respect to the matters described in paragraph (2) that were audited and are the subject of the report, together with such recommendations for legislative or administrative action relating to such matters as the Comptroller General may determine to be appropriate.

“(C) Delayed Release of Certain Information.—

“(i) In general.—The Comptroller General shall not disclose to any person or entity, including to Congress, the names or identifying details of specific
participants in any credit facility or covered transaction, the amounts borrowed by or transferred by or to specific participants in any credit facility or covered transaction, or identifying details regarding assets or collateral held or transferred by, under, or in connection with any credit facility or covered transaction, and any report provided under subparagraph (A) shall be redacted to ensure that such names and details are not disclosed.

(ii) DELAYED RELEASE.—The nondisclosure obligation under clause (i) shall expire with respect to any participant on the date on which the Board of Governors, directly or through a Federal reserve bank, publicly discloses the identity of the subject participant or the identifying details of the subject assets, collateral, or transaction.

(iii) GENERAL RELEASE.—The Comptroller General shall release a nonredacted version of any report on a credit facility 1 year after the effective date of the termination by the Board of Governors of the authorization for the credit facility. For purposes of this clause, a credit facility shall be deemed to have terminated 24 months after the date on which the credit facility ceases to make extensions of credit and loans, unless the credit facility is otherwise terminated by the Board of Governors.

(iv) EXCEPTIONS.—The nondisclosure obligation under clause (i) shall not apply to the credit facilities Maiden Lane, Maiden Lane II, and Maiden Lane III.

(v) RELEASE OF COVERED TRANSACTION INFORMATION.—The Comptroller General shall release a nonredacted version of any report regarding covered transactions upon the release of the information regarding such covered transactions by the Board of Governors of the Federal Reserve System, as provided in section 11(s) of the Federal Reserve Act.”.

(b) ACCESS TO RECORDS.—Section 714(d) of title 31, United States Code, is amended—

(1) in paragraph (2), by inserting “or any person or entity described in paragraph (3)(A)” after “used by an agency’’;

(2) in paragraph (3), by inserting “or (f)” after “subsection (e)” each place that term appears;

(3) in clauses (i) and (ii) of paragraph (3)(A), by inserting “or the Federal Reserve banks” after “by the Board” each place that term appears;

(4) in paragraph (3)(A)(ii), by inserting “participating in or” after “any entity”; and

(5) in paragraph (3)(B), by adding at the end the following: “The Comptroller General may make and retain copies of books, accounts, and other records provided under subparagraph (A) as the Comptroller General deems appropriate. The Comptroller General shall provide to any person or entity described in subparagraph (A) a current list of officers and employees to whom, with proper identification, records and property may be made available, and who may make notes or copies necessary to carry out a audit or examination under this subsection.”.
SEC. 1103. PUBLIC ACCESS TO INFORMATION.

(a) In General.—Section 2B of the Federal Reserve Act (12 U.S.C. 225b) is amended by adding at the end the following:

"(c) Public Access to Information.—The Board shall place on its home Internet website, a link entitled ‘Audit’, which shall link to a webpage that shall serve as a repository of information made available to the public for a reasonable period of time, not less than 6 months following the date of release of the relevant information, including—

"(1) the reports prepared by the Comptroller General under section 714 of title 31, United States Code;
"(2) the annual financial statements prepared by an independent auditor for the Board in accordance with section 11B;
"(3) the reports to the Committee on Banking, Housing, and Urban Affairs of the Senate required under section 13(3) (relating to emergency lending authority); and
"(4) such other information as the Board reasonably believes is necessary or helpful to the public in understanding the accounting, financial reporting, and internal controls of the Board and the Federal reserve banks.”.

(b) Federal Reserve Transparency and Release of Information.—Section 11 of the Federal Reserve Act (12 U.S.C. 248) is amended by adding at the end the following new subsection:

"(s) Federal Reserve Transparency and Release of Information.—

"(1) In General.—In order to ensure the disclosure in a timely manner consistent with the purposes of this Act of information concerning the borrowers and counterparties participating in emergency credit facilities, discount window lending programs, and open market operations authorized or conducted by the Board or a Federal reserve bank, the Board of Governors shall disclose, as provided in paragraph (2)—

"(A) the names and identifying details of each borrower, participant, or counterparty in any credit facility or covered transaction;
"(B) the amount borrowed by or transferred by or to a specific borrower, participant, or counterparty in any credit facility or covered transaction;
"(C) the interest rate or discount paid by each borrower, participant, or counterparty in any credit facility or covered transaction; and
"(D) information identifying the types and amounts of collateral pledged or assets transferred in connection with participation in any credit facility or covered transaction.

"(2) Mandatory Release Date.—In the case of—

"(A) a credit facility, the Board shall disclose the information described in paragraph (1) on the date that is 1 year after the effective date of the termination by the Board of the authorization of the credit facility; and
"(B) a covered transaction, the Board shall disclose the information described in paragraph (1) on the last day of the eighth calendar quarter following the calendar quarter in which the covered transaction was conducted.

"(3) Earlier Release Date Authorized.—The Chairman of the Board may publicly release the information described in paragraph (1) before the relevant date specified in paragraph
(2), if the Chairman determines that such disclosure would
be in the public interest and would not harm the effectiveness
of the relevant credit facility or the purpose or conduct of
covered transactions.

"(4) DEFINITIONS.—For purposes of this subsection, the fol-
lowing definitions shall apply:

"(A) CREDIT FACILITY.—The term 'credit facility' has
the same meaning as in section 714(f)(1)(A) of title 31,
United States Code.

"(B) COVERED TRANSACTION.—The term 'covered trans-
action' means—

"(i) any open market transaction with a nongovern-
mental third party conducted under the first undesig-
nated paragraph of section 14 or subparagraph (a),
(b), or (c) of the 2nd undesigned paragraph of such
section, after the date of enactment of the Dodd-Frank
Wall Street Reform and Consumer Protection Act; and

"(ii) any advance made under section 10B after
the date of enactment of that Act.

"(5) TERMINATION OF CREDIT FACILITY BY OPERATION
OF LAW.—A credit facility shall be deemed to have terminated
as of the end of the 24-month period beginning on the date
on which the credit facility ceases to make extensions of credit
and loans, unless the credit facility is otherwise terminated
by the Board before such date.

"(6) CONSISTENT TREATMENT OF INFORMATION.—Except as
provided in this subsection or section 13(3)(D), or in section
714(f)(3)(C) of title 31, United States Code, the information
described in paragraph (1) and information concerning the
transactions described in section 714(f) of such title, shall be
confidential, including for purposes of section 552(b)(3) of title
5 of such Code, until the relevant mandatory release date
described in paragraph (2), unless the Chairman of the Board
determines that earlier disclosure of such information would
be in the public interest and would not harm the effectiveness
of the relevant credit facility or the purpose of conduct of the
relevant transactions.

"(7) PROTECTION OF PERSONAL PRIVACY.—This subsection
and section 13(3)(C), section 714(f)(3)(C) of title 31, United
States Code, and subsection (a) or (c) of section 1109 of the
Dodd-Frank Wall Street Reform and Consumer Protection Act
shall not be construed as requiring any disclosure of nonpublic
personal information (as defined for purposes of section 502
of the Gramm-Leach-Bliley Act (12 U.S.C. 6802)) concerning
any individual who is referenced in collateral pledged or assets
transferred in connection with a credit facility or covered trans-
action, unless the person is a borrower, participant, or
counterparty under the credit facility or covered transaction.

"(8) STUDY OF FOIA EXEMPTION IMPACT.—

"(A) STUDY.—The Inspector General of the Board of
Governors of the Federal Reserve System shall—

"(i) conduct a study on the impact that the exemption
from section 552(b)(3) of title 5 (known as the
Freedom of Information Act) established under para-
graph (6) has had on the ability of the public to access
information about the administration by the Board of
Governors of emergency credit facilities, discount

Confidentiality.
window lending programs, and open market operations; and
“(ii) make any recommendations on whether the exemption described in clause (i) should remain in effect.

“(B) REPORT.—Not later than 30 months after the date of enactment of this section, the Inspector General of the Board of Governors of the Federal Reserve System shall submit a report on the findings of the study required under subparagraph (A) to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives, and publish the report on the website of the Board.

“(9) RULE OF CONSTRUCTION.—Nothing in this section is meant to affect any pending litigation or lawsuit filed under section 552 of title 5, United States Code (popularly known as the Freedom of Information Act), on or before the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act.”.

SEC. 1104. LIQUIDITY EVENT DETERMINATION.

(a) DETERMINATION AND WRITTEN RECOMMENDATION.—
(1) DETERMINATION REQUEST.—The Secretary may request the Corporation and the Board of Governors to determine whether a liquidity event exists that warrants use of the guarantee program authorized under section 1105.
(2) REQUIREMENTS OF DETERMINATION.—Any determination pursuant to paragraph (1) shall—
(A) be written; and
(B) contain an evaluation of the evidence that—
(i) a liquidity event exists;
(ii) failure to take action would have serious adverse effects on financial stability or economic conditions in the United States; and
(iii) actions authorized under section 1105 are needed to avoid or mitigate potential adverse effects on the United States financial system or economic conditions.

(b) PROCEDURES.—Notwithstanding any other provision of Federal or State law, upon the determination of both the Corporation (upon a vote of not fewer than 2/3 of the members of the Corporation then serving) and the Board of Governors (upon a vote of not fewer than 2/3 of the members of the Board of Governors then serving) under subsection (a) that a liquidity event exists that warrants use of the guarantee program authorized under section 1105, and with the written consent of the Secretary—
(1) the Corporation shall take action in accordance with section 1105(a); and
(2) the Secretary (in consultation with the President) shall take action in accordance with section 1105(c).

(c) DOCUMENTATION AND REVIEW.—
(1) DOCUMENTATION.—The Secretary shall—
(A) maintain the written documentation of each determination of the Corporation and the Board of Governors under this section; and
(B) provide the documentation for review under paragraph (2).
(2) **GAO REVIEW.**—The Comptroller General of the United States shall review and report to Congress on any determination of the Corporation and the Board of Governors under subsection (a), including—

(A) the basis for the determination; and

(B) the likely effect of the actions taken.

(d) **REPORT TO CONGRESS.**—On the earlier of the date of a submission made to Congress under section 1105(c), or within 30 days of the date of a determination under subsection (a), the Secretary shall provide written notice of the determination of the Corporation and the Board of Governors to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives, including a description of the basis for the determination.

SEC. 1105. EMERGENCY FINANCIAL STABILIZATION.

(a) **IN GENERAL.**—Upon the written determination of the Corporation and the Board of Governors under section 1104, the Corporation shall create a widely available program to guarantee obligations of solvent insured depository institutions or solvent depository institution holding companies (including any affiliates thereof) during times of severe economic distress, except that a guarantee of obligations under this section may not include the provision of equity in any form.

(b) **RULEMAKING AND TERMS AND CONDITIONS.**—

(1) **POLICIES AND PROCEDURES.**—As soon as is practicable after the date of enactment of this Act, the Corporation shall establish, by regulation, and in consultation with the Secretary, policies and procedures governing the issuance of guarantees authorized by this section. Such policies and procedures may include a requirement of collateral as a condition of any such guarantee.

(2) **TERMS AND CONDITIONS.**—The terms and conditions of any guarantee program shall be established by the Corporation, with the concurrence of the Secretary.

(c) **DETERMINATION OF GUARANTEED AMOUNT.**—

(1) **IN GENERAL.**—In connection with any program established pursuant to subsection (a) and subject to paragraph (2) of this subsection, the Secretary (in consultation with the President) shall determine the maximum amount of debt outstanding that the Corporation may guarantee under this section, and the President may transmit to Congress a written report on the plan of the Corporation to exercise the authority under this section to issue guarantees up to that maximum amount and a request for approval of such plan. The Corporation shall exercise the authority under this section to issue guarantees up to that specified maximum amount upon passage of the joint resolution of approval, as provided in subsection (d). Absent such approval, the Corporation shall issue no such guarantees.

(2) **ADDITIONAL DEBT GUARANTEE AUTHORITY.**—If the Secretary (in consultation with the President) determines, after a submission to Congress under paragraph (1), that the maximum guarantee amount should be raised, and the Council concurs with that determination, the President may transmit to Congress a written report on the plan of the Corporation to exercise the authority under this section to issue guarantees
up to the increased maximum debt guarantee amount. The Corporation shall exercise the authority under this section to issue guarantees up to that specified maximum amount upon passage of the joint resolution of approval, as provided in subsection (d). Absent such approval, the Corporation shall issue no such guarantees.

(d) RESOLUTION OF APPROVAL.—

(1) ADDITIONAL DEBT GUARANTEE AUTHORITY.—A request by the President under this section shall be considered granted by Congress upon adoption of a joint resolution approving such request. Such joint resolution shall be considered in the Senate under expedited procedures.

(2) FAST TRACK CONSIDERATION IN SENATE.—

(A) RECONVENING.—Upon receipt of a request under subsection (c), if the Senate has adjourned or recessed for more than 2 days, the majority leader of the Senate, after consultation with the minority leader of the Senate, shall notify the Members of the Senate that, pursuant to this section, the Senate shall convene not later than the second calendar day after receipt of such message.

(B) PLACEMENT ON CALENDAR.—Upon introduction in the Senate, the joint resolution shall be placed immediately on the calendar.

(C) FLOOR CONSIDERATION.—

(i) IN GENERAL.—Notwithstanding Rule XXII of the Standing Rules of the Senate, it is in order at any time during the period beginning on the 4th day after the date on which Congress receives a request under subsection (c), and ending on the 7th day after that date (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the joint resolution, and all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion to proceed is not debatable. The motion is not subject to a motion to postpone. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the resolution is agreed to, the joint resolution shall remain the unfinished business until disposed of.

(ii) DEBATE.—Debate on the joint resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours, which shall be divided equally between the majority and minority leaders or their designees. A motion further to limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the joint resolution is not in order.

(iii) VOTE ON PASSAGE.—The vote on passage shall occur immediately following the conclusion of the debate on the joint resolution, and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the Senate.
(iv) **Rulings of the Chair on Procedure.**—
Appeals from the decisions of the Chair relating to the application of the rules of the Senate, as the case may be, to the procedure relating to a joint resolution shall be decided without debate.

(3) **Rules.**—

(A) **Coordination with Action by House of Representatives.**—If, before the passage by the Senate of a joint resolution of the Senate, the Senate receives a joint resolution, from the House of Representatives, then the following procedures shall apply:

(i) The joint resolution of the House of Representatives shall not be referred to a committee.

(ii) With respect to a joint resolution of the Senate—

(I) the procedure in the Senate shall be the same as if no joint resolution had been received from the other House; but

(II) the vote on passage shall be on the joint resolution of the House of Representatives.

(B) **Treatment of Joint Resolution of House of Representatives.**—If the Senate fails to introduce or consider a joint resolution under this section, the joint resolution of the House of Representatives shall be entitled to expedited floor procedures under this subsection.

(C) **Treatment of Companion Measures.**—If, following passage of the joint resolution in the Senate, the Senate then receives the companion measure from the House of Representatives, the companion measure shall not be debatable.

(D) **Rules of the Senate.**—This subsection is enacted by Congress—

(i) as an exercise of the rulemaking power of the Senate, and as such it is deemed a part of the rules of the Senate, but applicable only with respect to the procedure to be followed in the Senate in the case of a joint resolution, and it supersedes other rules, only to the extent that it is inconsistent with such rules; and

(ii) with full recognition of the constitutional right of the Senate to change the rules (so far as relating to the procedure of the Senate) at any time, in the same manner, and to the same extent as in the case of any other rule of the Senate.

(4) **Definition.**—As used in this subsection, the term “joint resolution” means only a joint resolution—

(A) that is introduced not later than 3 calendar days after the date on which the request referred to in subsection (c) is received by Congress;

(B) that does not have a preamble;

(C) the title of which is as follows: “Joint resolution relating to the approval of a plan to guarantee obligations under section 1105 of the Dodd-Frank Wall Street Reform and Consumer Protection Act”; and

(D) the matter after the resolving clause of which is as follows: “That Congress approves the obligation of
any amount described in section 1105(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act.”.

(e) FUNDING.—

(1) FEES AND OTHER CHARGES.—The Corporation shall charge fees and other assessments to all participants in the program established pursuant to this section, in such amounts as are necessary to offset projected losses and administrative expenses, including amounts borrowed pursuant to paragraph (3), and such amounts shall be available to the Corporation.

(2) EXCESS FUNDS.—If, at the conclusion of the program established under this section, there are any excess funds collected from the fees associated with such program, the funds shall be deposited in the General Fund of the Treasury.

(3) AUTHORITY OF CORPORATION.—The Corporation—

(A) may borrow funds from the Secretary of the Treasury and issue obligations of the Corporation to the Secretary for amounts borrowed, and the amounts borrowed shall be available to the Corporation for purposes of carrying out a program established pursuant to this section, including the payment of reasonable costs of administering the program, and the obligations issued shall be repaid in full with interest through fees and charges paid by participants in accordance with paragraphs (1) and (4), as applicable; and

(B) may not borrow funds from the Deposit Insurance Fund established pursuant to section 11(a)(4) of the Federal Deposit Insurance Act.

(4) BACKUP SPECIAL ASSESSMENTS.—To the extent that the funds collected pursuant to paragraph (1) are insufficient to cover any losses or expenses, including amounts borrowed pursuant to paragraph (3), arising from a program established pursuant to this section, the Corporation shall impose a special assessment solely on participants in the program, in amounts necessary to address such insufficiency, and which shall be available to the Corporation to cover such losses or expenses.

(5) AUTHORITY OF THE SECRETARY.—The Secretary may purchase any obligations issued under paragraph (3)(A). For such purpose, the Secretary may use the proceeds of the sale of any securities issued under chapter 31 of title 31, United States Code, and the purposes for which securities may be issued under that chapter 31 are extended to include such purchases, and the amount of any securities issued under that chapter 31 for such purpose shall be treated in the same manner as securities issued under section 208(n)(5)(E).

(f) RULE OF CONSTRUCTION.—For purposes of this section, a guarantee of deposits held by insured depository institutions shall not be treated as a debt guarantee program.

(g) DEFINITIONS.—For purposes of this section, the following definitions shall apply:

(1) COMPANY.—The term “company” means any entity other than a natural person that is incorporated or organized under Federal law or the laws of any State.

(2) DEPOSITORY INSTITUTION HOLDING COMPANY.—The term “depository institution holding company” has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(3) LIQUIDITY EVENT.—The term “liquidity event” means—
(A) an exceptional and broad reduction in the general ability of financial market participants—
   (i) to sell financial assets without an unusual and significant discount; or
   (ii) to borrow using financial assets as collateral without an unusual and significant increase in margin; or
   (B) an unusual and significant reduction in the ability of financial market participants to obtain unsecured credit.
(4) Solvent.—The term “solvent” means that the value of the assets of an entity exceed its obligations to creditors.

SEC. 1106. ADDITIONAL RELATED AMENDMENTS.

(a) Suspension of Parallel Federal Deposit Insurance Act Authority.—Effective upon the date of enactment of this section, the Corporation may not exercise its authority under section 13(c)(4)(G)(i) of the Federal Deposit Insurance Act (12 U.S.C. 1823(c)(4)(G)(i)) to establish any widely available debt guarantee program for which section 1105 would provide authority.

(b) Federal Deposit Insurance Act.—Section 13(c)(4)(G) of the Federal Deposit Insurance Act (12 U.S.C. 1823(c)(4)(G)) is amended—
   (1) in clause (i)—
      (A) in subclause (I), by inserting “for which the Corporation has been appointed receiver” before “would have serious”; and
      (B) in the undesignated matter following subclause (II), by inserting “for the purpose of winding up the insured depository institution for which the Corporation has been appointed receiver” after “provide assistance under this section”; and
   (2) in clause (v)(I), by striking “The” and inserting “Not later than 3 days after making a determination under clause (i), the”.

(c) Effect of Default on an FDIC Guarantee.—If an insured depository institution or depository institution holding company (as those terms are defined in section 3 of the Federal Deposit Insurance Act) participating in a program under section 1105, or any participant in a debt guarantee program established pursuant to section 13(c)(4)(G)(i) of the Federal Deposit Insurance Act defaults on any obligation guaranteed by the Corporation after the date of enactment of this Act, the Corporation shall—
   (1) appoint itself as receiver for the insured depository institution that defaults; and
   (2) with respect to any other participating company that is not an insured depository institution that defaults—
      (A) require—
         (i) consideration of whether a determination shall be made, as provided in section 203 to resolve the company under section 202; and
         (ii) the company to file a petition for bankruptcy under section 301 of title 11, United States Code, if the Corporation is not appointed receiver pursuant to section 202 within 30 days of the date of default; or
(B) file a petition for involuntary bankruptcy on behalf of the company under section 303 of title 11, United States Code.

SEC. 1107. FEDERAL RESERVE ACT AMENDMENTS ON FEDERAL RESERVE BANK GOVERNANCE.

The 5th subparagraph of the 4th undesignated paragraph of section 4 of the Federal Reserve Act (12 U.S.C. 341) is amended by striking the 2nd sentence and inserting the following: “The president shall be the chief executive officer of the bank and shall be appointed by the Class B and Class C directors of the bank, with the approval of the Board of Governors of the Federal Reserve System, for a term of 5 years; and all other executive officers and all employees of the bank shall be directly responsible to the president.”

SEC. 1108. FEDERAL RESERVE ACT AMENDMENTS ON SUPERVISION AND REGULATION POLICY.

(a) ESTABLISHMENT OF THE POSITION OF VICE CHAIRMAN FOR SUPERVISION.—

(1) POSITION ESTABLISHED.—The second undesignated paragraph of section 10 of the Federal Reserve Act (12 U.S.C. 242) (relating to the Chairman and Vice Chairman of the Board) is amended by striking the third sentence and inserting the following: “Of the persons thus appointed, 1 shall be designated by the President, by and with the advice and consent of the Senate, to serve as Chairman of the Board for a term of 4 years, and 2 shall be designated by the President, by and with the advice and consent of the Senate, to serve as Vice Chairmen of the Board, each for a term of 4 years, 1 of whom shall serve in the absence of the Chairman, as provided in the fourth undesignated paragraph of this section, and 1 of whom shall be designated Vice Chairman for Supervision. The Vice Chairman for Supervision shall develop policy recommendations for the Board regarding supervision and regulation of depository institution holding companies and other financial firms supervised by the Board, and shall oversee the supervision and regulation of such firms.”

(2) EFFECTIVE DATE.—The amendment made by subsection (a) takes effect on the date of enactment of this title and applies to individuals who are designated by the President on or after that date to serve as Vice Chairman of Supervision.

(b) APPEARANCES BEFORE CONGRESS.—Section 10 of the Federal Reserve Act (12 U.S.C. 241 et seq.) is amended by adding at the end the following:

“(12) APPEARANCES BEFORE CONGRESS.—The Vice Chairman for Supervision shall appear before the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives and at semi-annual hearings regarding the efforts, activities, objectives, and plans of the Board with respect to the conduct of supervision and regulation of depository institution holding companies and other financial firms supervised by the Board.”

(c) BOARD RESPONSIBILITY TO SET SUPERVISION AND REGULATORY POLICY.—Section 11 of the Federal Reserve Act (12 U.S.C. 248) (relating to enumerated powers of the Board) is amended by adding at the end of subsection (k) (relating to delegation)
the following: “The Board of Governors may not delegate to a Federal reserve bank its functions for the establishment of policies for the supervision and regulation of depository institution holding companies and other financial firms supervised by the Board of Governors.”.

(d) Exercise of Federal Reserve Authority.—

(1) No decisions by Federal Reserve Bank Presidents.—No provision of title I relating to the authority of the Board of Governors shall be construed as conferring any decision-making authority on presidents of Federal reserve banks.

(2) Voting Decisions by Board.—The Board of Governors shall not delegate the authority to make any voting decision that the Board of Governors is authorized or required to make under title I of this Act in contravention of section 11(k) of the Federal Reserve Act.

SEC. 1109. GAO Audit of the Federal Reserve Facilities; Publication of Board Actions.

(a) GAO Audit.—

(1) In general.—Notwithstanding section 714(b) of title 31, United States Code, or any other provision of law, the Comptroller General of the United States (in this subsection referred to as the “Comptroller General”) shall conduct a one-time audit of all loans and other financial assistance provided during the period beginning on December 1, 2007 and ending on the date of enactment of this Act by the Board of Governors or a Federal reserve bank under the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility, the Term Asset-Backed Securities Loan Facility, the Primary Dealer Credit Facility, the Commercial Paper Funding Facility, the Term Securities Lending Facility, the Term Auction Facility, Maiden Lane, Maiden Lane II, Maiden Lane III, the agency Mortgage-Backed Securities program, foreign currency liquidity swap lines, and any other program created as a result of section 13(3) of the Federal Reserve Act (as so designated by this title).

(2) Assessments.—In conducting the audit under paragraph (1), the Comptroller General shall assess—

(A) the operational integrity, accounting, financial reporting, and internal controls of the credit facility;

(B) the effectiveness of the security and collateral policies established for the facility in mitigating risk to the relevant Federal reserve bank and taxpayers;

(C) whether the credit facility inappropriately favors one or more specific participants over other institutions eligible to utilize the facility;

(D) the policies governing the use, selection, or payment of third-party contractors by or for any credit facility; and

(E) whether there were conflicts of interest with respect to the manner in which such facility was established or operated.

(3) Timing.—The audit required by this subsection shall be commenced not later than 30 days after the date of enactment of this Act, and shall be completed not later than 12 months after that date of enactment.
REPORT REQUIRED.—The Comptroller General shall submit a report on the audit conducted under paragraph (1) to the Congress not later than 12 months after the date of enactment of this Act, and such report shall be made available to—

(A) the Speaker of the House of Representatives;
(B) the majority and minority leaders of the House of Representatives;
(C) the majority and minority leaders of the Senate;
(D) the Chairman and Ranking Member of the Committee on Banking, Housing, and Urban Affairs of the Senate and of the Committee on Financial Services of the House of Representatives; and
(E) any member of Congress who requests it.

(a) AUDIT OF FEDERAL RESERVE BANK GOVERNANCE.—

(1) AUDIT.—

(A) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Comptroller General shall complete an audit of the governance of the Federal reserve bank system.

(B) REQUIRED EXAMINATIONS.—The audit required under subparagraph (A) shall—

(i) examine the extent to which the current system of appointing Federal reserve bank directors effectively represents “the public, without discrimination on the basis of race, creed, color, sex or national origin, and with due but not exclusive consideration to the interests of agriculture, commerce, industry, services, labor, and consumers” in the selection of bank directors, as such requirement is set forth under section 4 of the Federal Reserve Act;

(ii) examine whether there are actual or potential conflicts of interest created when the directors of Federal reserve banks, which execute the supervisory functions of the Board of Governors of the Federal Reserve System, are elected by member banks;

(iii) examine the establishment and operations of each facility described in subsection (a)(1) and each Federal reserve bank involved in the establishment and operations thereof; and

(iv) identify changes to selection procedures for Federal reserve bank directors, or to other aspects of Federal reserve bank governance, that would—

(I) improve how the public is represented;

(II) eliminate actual or potential conflicts of interest in bank supervision;

(III) increase the availability of information useful for the formation and execution of monetary policy; or

(IV) in other ways increase the effectiveness or efficiency of reserve banks.

(2) REPORT REQUIRED.—A report on the audit conducted under paragraph (1) shall be submitted by the Comptroller General to the Congress before the end of the 90-day period beginning on the date on which such audit is completed, and such report shall be made available to—

(A) the Speaker of the House of Representatives;
(B) the majority and minority leaders of the House of Representatives;
(C) the majority and minority leaders of the Senate;
(D) the Chairman and Ranking Member of the Committee on Banking, Housing, and Urban Affairs of the Senate and of the Committee on Financial Services of the House of Representatives; and
(E) any member of Congress who requests it.

c) Publication of Board Actions.—Notwithstanding any other provision of law, the Board of Governors shall publish on its website, not later than December 1, 2010, with respect to all loans and other financial assistance provided during the period beginning on December 1, 2007 and ending on the date of enactment of this Act under the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility, the Term Asset-Backed Securities Loan Facility, the Primary Dealer Credit Facility, the Commercial Paper Funding Facility, the Term Securities Lending Facility, the Term Auction Facility, Maiden Lane, Maiden Lane II, Maiden Lane III, the agency Mortgage-Backed Securities program, foreign currency liquidity swap lines, and any other program created as a result of section 13(3) of the Federal Reserve Act (as so designated by this title)—

(1) the identity of each business, individual, entity, or foreign central bank to which the Board of Governors or a Federal reserve bank has provided such assistance;
(2) the type of financial assistance provided to that business, individual, entity, or foreign central bank;
(3) the value or amount of that financial assistance;
(4) the date on which the financial assistance was provided;
(5) the specific terms of any repayment expected, including the repayment time period, interest charges, collateral, limitations on executive compensation or dividends, and other material terms; and
(6) the specific rationale for each such facility or program.

TITLE XII—IMPROVING ACCESS TO MAINSTREAM FINANCIAL INSTITUTIONS

SEC. 1201. SHORT TITLE.

This title may be cited as the “Improving Access to Mainstream Financial Institutions Act of 2010”.

SEC. 1202. PURPOSE.

The purpose of this title is to encourage initiatives for financial products and services that are appropriate and accessible for millions of Americans who are not fully incorporated into the financial mainstream.

SEC. 1203. DEFINITIONS.

In this title, the following definitions shall apply:

(1) ACCOUNT.—The term “account” means an agreement between an individual and an eligible entity under which the individual obtains from or through the entity 1 or more banking products and services, and includes a deposit account, a savings
account (including a money market savings account), an account for a closed-end loan, and other products or services, as the Secretary deems appropriate.

(2) Community Development Financial Institution.—The term “community development financial institution” has the same meaning as in section 103(5) of the Community Development Banking and Financial Institutions Act of 1994 (12 U.S.C. 4702(5)).

(3) Eligible Entity.—The term “eligible entity” means—
(A) an organization described in section 501(c)(3) of the Internal Revenue Code of 1986, and exempt from tax under section 501(a) of such Code;
(B) a federally insured depository institution;
(C) a community development financial institution;
(D) a State, local, or tribal government entity; or
(E) a partnership or other joint venture comprised of 1 or more of the entities described in subparagraphs (A) through (D), in accordance with regulations prescribed by the Secretary under this title.

(4) Federally Insured Depository Institution.—The term “federally insured depository institution” means any insured depository institution (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)) and any insured credit union (as that term is defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752)).


(a) In General.—The Secretary is authorized to establish a multiyear program of grants, cooperative agreements, financial agency agreements, and similar contracts or undertakings to promote initiatives designed—
(1) to enable low- and moderate-income individuals to establish one or more accounts in a federally insured depository institution that are appropriate to meet the financial needs of such individuals; and
(2) to improve access to the provision of accounts, on reasonable terms, for low- and moderate-income individuals.

(b) Program Eligibility and Activities.—
(1) In General.—The Secretary shall restrict participation in any program established under subsection (a) to an eligible entity. Subject to regulations prescribed by the Secretary under this title, 1 or more eligible entities may participate in 1 or several programs established under subsection (a).

(2) Account Activities.—Subject to regulations prescribed by the Secretary, an eligible entity may, in participating in a program established under subsection (a), offer or provide to low- and moderate-income individuals products and services relating to accounts, including—
(A) small-dollar value loans; and
(B) financial education and counseling relating to conducting transactions in and managing accounts.

SEC. 1205. Low-Cost Alternatives to Small Dollar Loans.

(a) Grants Authorized.—The Secretary is authorized to establish multiyear demonstration programs by means of grants, cooperative agreements, financial agency agreements, and similar contracts or undertakings, with eligible entities to provide low-cost, small
loans to consumers that will provide alternatives to more costly small dollar loans.

(b) Terms and Conditions.—

(1) In general.—Loans under this section shall be made on terms and conditions, and pursuant to lending practices, that are reasonable for consumers.

(2) Financial literacy and education opportunities.—

(A) In general.—Each eligible entity awarded a grant under this section shall promote and take appropriate steps to ensure the provision of financial literacy and education opportunities, such as relevant counseling services, educational courses, or wealth building programs, to each consumer provided with a loan pursuant to this section.

(B) Authority to expand access.—As part of the grants, agreements, and undertakings established under this section, the Secretary may implement reasonable measures or programs designed to expand access to financial literacy and education opportunities, including relevant counseling services, educational courses, or wealth building programs to be provided to individuals who obtain loans from eligible entities under this section.

SEC. 1206. Grants to Establish Loan-Loss Reserve Funds.

The Community Development Banking and Financial Institutions Act of 1994 (12 U.S.C. 4701 et seq.) is amended by adding at the end the following:

"SEC. 122. Grants to Establish Loan-Loss Reserve Funds.

"(a) Purposes.—The purposes of this section are—

"(1) to make financial assistance available from the Fund in order to help community development financial institutions defray the costs of operating small dollar loan programs, by providing the amounts necessary for such institutions to establish their own loan loss reserve funds to mitigate some of the losses on such small dollar loan programs; and

"(2) to encourage community development financial institutions to establish and maintain small dollar loan programs that would help give consumers access to mainstream financial institutions and combat high cost small dollar lending.

"(b) Grants.—

"(1) Loan-Loss Reserve Fund Grants.—The Fund shall make grants to community development financial institutions or to any partnership between such community development financial institutions and any other federally insured depository institution with a primary mission to serve targeted investment areas, as such areas are defined under section 103(16), to enable such institutions or any partnership of such institutions to establish a loan-loss reserve fund in order to defray the costs of a small dollar loan program established or maintained by such institution.

"(2) Matching Requirement.—A community development financial institution or any partnership of institutions established pursuant to paragraph (1) shall provide non-Federal matching funds in an amount equal to 50 percent of the amount of any grant received under this section.

"(3) Use of Funds.—Any grant amounts received by a community development financial institution or any partnership between or among such institutions under paragraph (1)—
“(A) may not be used by such institution to provide direct loans to consumers;
“(B) may be used by such institution to help recapture a portion or all of a defaulted loan made under the small dollar loan program of such institution; and
“(C) may be used to designate and utilize a fiscal agent for services normally provided by such an agent.
“(4) TECHNICAL ASSISTANCE GRANTS.—The Fund shall make technical assistance grants to community development financial institutions or any partnership between or among such institutions to support and maintain a small dollar loan program. Any grant amounts received under this paragraph may be used for technology, staff support, and other costs associated with establishing a small dollar loan program.
“(c) DEFINITIONS.—For purposes of this section—
“(1) the term ‘consumer reporting agency that compiles and maintains files on consumers on a nationwide basis’ has the same meaning given such term in section 603(p) of the Fair Credit Reporting Act (15 U.S.C. 1681a(p)); and
“(2) the term ‘small dollar loan program’ means a loan program wherein a community development financial institution or any partnership between or among such institutions offers loans to consumers that—
“(A) are made in amounts not exceeding $2,500;
“(B) must be repaid in installments;
“(C) have no pre-payment penalty;
“(D) the institution has to report payments regarding the loan to at least 1 of the consumer reporting agencies that compiles and maintains files on consumers on a nationwide basis; and
“(E) meet any other affordability requirements as may be established by the Administrator.”.

SEC. 1207. PROCEDURAL PROVISIONS.

An eligible entity desiring to participate in a program or obtain a grant under this title shall submit an application to the Secretary, in such form and containing such information as the Secretary may require.

SEC. 1208. AUTHORIZATION OF APPROPRIATIONS.

(a) AUTHORIZATION TO THE SECRETARY.—There are authorized to be appropriated to the Secretary, such sums as are necessary to both administer and fund the programs and projects authorized by this title, to remain available until expended.

(b) AUTHORIZATION TO THE FUND.—There is authorized to be appropriated to the Fund for each fiscal year beginning in fiscal year 2010, an amount equal to the amount of the administrative costs of the Fund for the operation of the grant program established under this title.

SEC. 1209. REGULATIONS.

(a) IN GENERAL.—The Secretary is authorized to promulgate regulations to implement and administer the grant programs and undertakings authorized by this title.

(b) REGULATORY AUTHORITY.—Regulations prescribed under this section may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of grant programs, undertakings, or eligible
entities, as, in the judgment of the Secretary, are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion of this title, or to facilitate compliance with this title.

SEC. 1210. EVALUATION AND REPORTS TO CONGRESS.

For each fiscal year in which a program or project is carried out under this title, the Secretary shall submit a report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives containing a description of the activities funded, amounts distributed, and measurable results, as appropriate and available.

TITLE XIII—PAY IT BACK ACT

SEC. 1301. SHORT TITLE.

This title may be cited as the “Pay It Back Act”.

SEC. 1302. AMENDMENT TO REDUCE TARP AUTHORIZATION.

Section 115(a) of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5225(a)) is amended—

(1) in paragraph (3)—

(A) by striking “, $700,000,000,000, as such amount is reduced by $1,259,000,000, as such amount is reduced by $1,244,000,000” and inserting “$475,000,000,000”; and

(B) by striking “outstanding at any one time”; and

(2) by adding at the end the following:

“(4) For purposes of this subsection, the amount of authority considered to be exercised by the Secretary shall not be reduced by—

“(A) any amounts received by the Secretary before, on, or after the date of enactment of the Pay It Back Act from repayment of the principal of financial assistance by an entity that has received financial assistance under the TARP or any other program enacted by the Secretary under the authorities granted to the Secretary under this Act;

“(B) any amounts committed for any guarantees pursuant to the TARP that became or become uncommitted; or

“(C) any losses realized by the Secretary.

“(5) No authority under this Act may be used to incur any obligation for a program or initiative that was not initiated prior to June 25, 2010.”.

SEC. 1303. REPORT.

Section 106 of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5216) is amended by inserting at the end the following:

“(f) REPORT.—The Secretary of the Treasury shall report to Congress every 6 months on amounts received and transferred to the general fund under subsection (d).”.

12 USC 5201 note.
SEC. 1304. AMENDMENTS TO HOUSING AND ECONOMIC RECOVERY ACT OF 2008.

(a) Sale of Fannie Mae Obligations and Securities by the Treasury; Deficit Reduction.—Section 304(g)(2) of the Federal National Mortgage Association Charter Act (12 U.S.C. 1719(g)(2)) is amended—

(1) by redesignating subparagraph (C) as subparagraph (D); and

(2) by inserting after subparagraph (B) the following:

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"(C) DEFICIT REDUCTION.—The Secretary of the Treasury shall deposit in the General Fund of the Treasury any amounts received by the Secretary from the sale of any obligation acquired by the Secretary under this subsection, where such amounts shall be—

"(i) dedicated for the sole purpose of deficit reduction; and

"(ii) prohibited from use as an offset for other spending increases or revenue reductions.
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(b) Sale of Freddie Mac Obligations and Securities by the Treasury; Deficit Reduction.—Section 306(l)(2) of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1455(l)(2)) is amended—

(1) by redesignating subparagraph (C) as subparagraph (D); and

(2) by inserting after subparagraph (B) the following:

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"(C) DEFICIT REDUCTION.—The Secretary of the Treasury shall deposit in the General Fund of the Treasury any amounts received by the Secretary from the sale of any obligation acquired by the Secretary under this subsection, where such amounts shall be—

"(i) dedicated for the sole purpose of deficit reduction; and

"(ii) prohibited from use as an offset for other spending increases or revenue reductions.
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(c) Sale of Federal Home Loan Banks Obligations by the Treasury; Deficit Reduction.—Section 11(I)(2) of the Federal Home Loan Bank Act (12 U.S.C. 1431(I)(2)) is amended—

(1) by redesignating subparagraph (C) as subparagraph (D); and

(2) by inserting after subparagraph (B) the following:

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"(C) DEFICIT REDUCTION.—The Secretary of the Treasury shall deposit in the General Fund of the Treasury any amounts received by the Secretary from the sale of any obligation acquired by the Secretary under this subsection, where such amounts shall be—

"(i) dedicated for the sole purpose of deficit reduction; and

"(ii) prohibited from use as an offset for other spending increases or revenue reductions.
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(d) Repayment of Fees.—Any periodic commitment fee or any other fee or assessment paid by the Federal National Mortgage Association or Federal Home Loan Mortgage Corporation to the Secretary of the Treasury as a result of any preferred stock purchase agreement, mortgage-backed security purchase program, or any other program or activity authorized or carried out pursuant to the authorities granted to the Secretary of the Treasury under section 1117 of the Housing and Economic Recovery Act of 2008.
(Public Law 110–289; 122 Stat. 2683), including any fee agreed to by contract between the Secretary and the Association or Corporation, shall be deposited in the General Fund of the Treasury where such amounts shall be—

(1) dedicated for the sole purpose of deficit reduction; and

(2) prohibited from use as an offset for other spending increases or revenue reductions.

SEC. 1305. FEDERAL HOUSING FINANCE AGENCY REPORT.

The Director of the Federal Housing Finance Agency shall submit to Congress a report on the plans of the Agency to continue to support and maintain the Nation’s vital housing industry, while at the same time guaranteeing that the American taxpayer will not suffer unnecessary losses.

SEC. 1306. REPAYMENT OF UNOBLIGATED ARRA FUNDS.

(a) REJECTION OF ARRA FUNDS BY STATE.—Section 1607 of the American Recovery and Reinvestment Act of 2009 (Public Law 111–5; 123 Stat. 305) is amended by adding at the end the following:

“(d) STATEWIDE REJECTION OF FUNDS.—If funds provided to any State in any division of this Act are not accepted for use by the Governor of the State pursuant to subsection (a) or by the State legislature pursuant to subsection (b), then all such funds shall be—

“(1) rescinded; and

“(2) deposited in the General Fund of the Treasury where such amounts shall be—

“(A) dedicated for the sole purpose of deficit reduction; and

“(B) prohibited from use as an offset for other spending increases or revenue reductions.”.

(b) WITHDRAWAL OR RECAPTURE OF UNOBLIGATED FUNDS.—Title XVI of the American Recovery and Reinvestment Act of 2009 (Public Law 111–5; 123 Stat. 302) is amended by adding at the end the following:

“SEC. 1613. WITHDRAWAL OR RECAPTURE OF UNOBLIGATED FUNDS.

“Notwithstanding any other provision of this Act, if the head of any executive agency withdraws or recaptures for any reason funds appropriated or otherwise made available under this division, and such funds have not been obligated by a State to a local government or for a specific project, such recaptured funds shall be—

“(1) rescinded; and

“(2) deposited in the General Fund of the Treasury where such amounts shall be—

“(A) dedicated for the sole purpose of deficit reduction; and

“(B) prohibited from use as an offset for other spending increases or revenue reductions.”.

(c) RETURN OF UNOBLIGATED FUNDS BY END OF 2012.—Section 1603 of the American Recovery and Reinvestment Act of 2009 (Public Law 111–5; 123 Stat. 302) is amended by—

(1) striking “All funds” and inserting “(a) IN GENERAL.—All funds”; and

(2) adding at the end the following:

“(b) REPAYMENT OF UNOBLIGATED FUNDS.—Any discretionary appropriations made available in this division that have not been
obligated as of December 31, 2012, are hereby rescinded, and such amounts shall be deposited in the General Fund of the Treasury where such amounts shall be—

“(1) dedicated for the sole purpose of deficit reduction; and

“(2) prohibited from use as an offset for other spending increases or revenue reductions.

“(c) PRESIDENTIAL WAIVER AUTHORITY.—

“(1) IN GENERAL.—The President may waive the requirements under subsection (b), if the President determines that it is not in the best interest of the Nation to rescind a specific unobligated amount after December 31, 2012.

“(2) REQUESTS.—The head of an executive agency may also apply to the President for a waiver from the requirements under subsection (b).”.

TITLE XIV—MORTGAGE REFORM AND ANTI-PREDATORY LENDING ACT

SEC. 1400. SHORT TITLE; DESIGNATION AS ENUMERATED CONSUMER LAW.

(a) SHORT TITLE.—This title may be cited as the “Mortgage Reform and Anti-Predatory Lending Act”.

(b) DESIGNATION AS ENUMERATED CONSUMER LAW UNDER THE PURVIEW OF THE BUREAU OF CONSUMER FINANCIAL PROTECTION.—Subtitles A, B, C, and E and sections 1471, 1472, 1475, and 1476, and the amendments made by such subtitles and sections, shall be enumerated consumer laws, as defined in section 1002, and come under the purview of the Bureau of Consumer Financial Protection for purposes of title X, including the transfer of functions and personnel under subtitle F of title X and the savings provisions of such subtitle.

(c) REGULATIONS; EFFECTIVE DATE.—

(1) REGULATIONS.—The regulations required to be prescribed under this title or the amendments made by this title shall—

(A) be prescribed in final form before the end of the 18-month period beginning on the designated transfer date; and

(B) take effect not later than 12 months after the date of issuance of the regulations in final form.

(2) EFFECTIVE DATE ESTABLISHED BY RULE.—Except as provided in paragraph (3), a section, or provision thereof, of this title shall take effect on the date on which the final regulations implementing such section, or provision, take effect.

(3) EFFECTIVE DATE.—A section of this title for which regulations have not been issued on the date that is 18 months after the designated transfer date shall take effect on such date.
Subtitle A—Residential Mortgage Loan Origination Standards

SEC. 1401. DEFINITIONS.

Section 103 of the Truth in Lending Act (15 U.S.C. 1602) is amended by adding at the end the following new subsection:

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(cc) Definitions relating to mortgage origination and residential mortgage loans.—

(1) Commission.—Unless otherwise specified, the term 'Commission' means the Federal Trade Commission.

(2) Mortgage originator.—The term 'mortgage originator'—

(A) means any person who, for direct or indirect compensation or gain, or in the expectation of direct or indirect compensation or gain—

(i) takes a residential mortgage loan application;

(ii) assists a consumer in obtaining or applying to obtain a residential mortgage loan; or

(iii) offers or negotiates terms of a residential mortgage loan;

(B) includes any person who represents to the public, through advertising or other means of communicating or providing information (including the use of business cards, stationery, brochures, signs, rate lists, or other promotional items), that such person can or will provide any of the services or perform any of the activities described in subparagraph (A);

(C) does not include any person who is (i) not otherwise described in subparagraph (A) or (B) and who performs purely administrative or clerical tasks on behalf of a person who is described in any such subparagraph, or (ii) an employee of a retailer of manufactured homes who is not described in clause (i) or (iii) of subparagraph (A) and who does not advise a consumer on loan terms (including rates, fees, and other costs);

(D) does not include a person or entity that only performs real estate brokerage activities and is licensed or registered in accordance with applicable State law, unless such person or entity is compensated by a lender, a mortgage broker, or other mortgage originator or by any agent of such lender, mortgage broker, or other mortgage originator;

(E) does not include, with respect to a residential mortgage loan, a person, estate, or trust that provides mortgage financing for the sale of 3 properties in any 12-month period to purchasers of such properties, each of which is owned by such person, estate, or trust and serves as security for the loan, provided that such loan—

(i) is not made by a person, estate, or trust that has constructed, or acted as a contractor for the construction of, a residence on the property in the ordinary course of business of such person, estate, or trust;

(ii) is fully amortizing;
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“(iii) is with respect to a sale for which the seller determines in good faith and documents that the buyer has a reasonable ability to repay the loan;
“(iv) has a fixed rate or an adjustable rate that is adjustable after 5 or more years, subject to reasonable annual and lifetime limitations on interest rate increases; and
“(v) meets any other criteria the Board may prescribe;
“(F) does not include the creditor (except the creditor in a table-funded transaction) under paragraph (1), (2), or (4) of section 129B(c); and
“(G) does not include a servicer or servicer employees, agents and contractors, including but not limited to those who offer or negotiate terms of a residential mortgage loan for purposes of renegotiating, modifying, replacing and subordinating principal of existing mortgages where borrowers are behind in their payments, in default or have a reasonable likelihood of being in default or falling behind.
“(3) Nationwidemortgage licensing system and registry.—The term ‘Nationwide Mortgage Licensing System and Registry’ has the same meaning as in the Secure and Fair Enforcement for Mortgage Licensing Act of 2008.
“(4) Other definitions relating to mortgage originator.—For purposes of this subsection, a person ‘assists a consumer in obtaining or applying to obtain a residential mortgage loan’ by, among other things, advising on residential mortgage loan terms (including rates, fees, and other costs), preparing residential mortgage loan packages, or collecting information on behalf of the consumer with regard to a residential mortgage loan.
“(5) Residential mortgage loan.—The term ‘residential mortgage loan’ means any consumer credit transaction that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling or on residential real property that includes a dwelling, other than a consumer credit transaction under an open end credit plan or, for purposes of sections 129B and 129C and section 128(a) (16), (17), (18), and (19), and sections 128(f) and 130(k), and any regulations promulgated thereunder, an extension of credit relating to a plan described in section 101(53D) of title 11, United States Code.
“(6) Secretary.—The term ‘Secretary’, when used in connection with any transaction or person involved with a residential mortgage loan, means the Secretary of Housing and Urban Development.
“(7) Servicer.—The term ‘servicer’ has the same meaning as in section 6(i)(2) of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2605(i)(2)).’’.

SEC. 1402. RESIDENTIAL MORTGAGE LOAN ORIGINATION.

(a) In General.—Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.) is amended—
(1) by redesignating the 2nd of the 2 sections designated as section 129 (15 U.S.C. 1639a) (relating to duty of servicers of residential mortgages) as section 129A; and

(2) by inserting after section 129A (as so redesignated) the following new section:

“§ 129B. Residential mortgage loan origination

“(a) FINDING AND PURPOSE.—

“(1) FINDING.—The Congress finds that economic stabilization would be enhanced by the protection, limitation, and regulation of the terms of residential mortgage credit and the practices related to such credit, while ensuring that responsible, affordable mortgage credit remains available to consumers.

“(2) PURPOSE.—It is the purpose of this section and section 129C to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive or abusive.

“(b) DUTY OF CARE.—

“(1) STANDARD.—Subject to regulations prescribed under this subsection, each mortgage originator shall, in addition to the duties imposed by otherwise applicable provisions of State or Federal law—

“(A) be qualified and, when required, registered and licensed as a mortgage originator in accordance with applicable State or Federal law, including the Secure and Fair Enforcement for Mortgage Licensing Act of 2008; and

“(B) include on all loan documents any unique identifier of the mortgage originator provided by the Nationwide Mortgage Licensing System and Registry.

“(2) COMPLIANCE PROCEDURES REQUIRED.—The Board shall prescribe regulations requiring depository institutions to establish and maintain procedures reasonably designed to assure and monitor the compliance of such depository institutions, the subsidiaries of such institutions, and the employees of such institutions or subsidiaries with the requirements of this section and the registration procedures established under section 1507 of the Secure and Fair Enforcement for Mortgage Licensing Act of 2008.”.

(b) CLERICAL AMENDMENT.—The table of sections for chapter 2 of the Truth in Lending Act is amended by inserting after the item relating to section 129 the following new items:

“129A. Fiduciary duty of servicers of pooled residential mortgages.
129B. Residential mortgage loan origination.”.

SEC. 1403. PROHIBITION ON STEERING INCENTIVES.

Section 129B of the Truth in Lending Act (as added by section 1402(a)) is amended by inserting after subsection (b) the following new subsection:

“(c) PROHIBITION ON STEERING INCENTIVES.—

“(1) IN GENERAL.—For any residential mortgage loan, no mortgage originator shall receive from any person and no person shall pay to a mortgage originator, directly or indirectly, compensation that varies based on the terms of the loan (other than the amount of the principal).

“(2) RESTRUCTURING OF FINANCING ORIGINATION FEE.—

“(A) IN GENERAL.—For any mortgage loan, a mortgage originator may not receive from any person other than the consumer and no person, other than the consumer, who knows or has reason to know that a consumer has
directly compensated or will directly compensate a mortgage originator may pay a mortgage originator any origination fee or charge except bona fide third party charges not retained by the creditor, mortgage originator, or an affiliate of the creditor or mortgage originator.

"(B) EXCEPTION.—Notwithstanding subparagraph (A), a mortgage originator may receive from a person other than the consumer an origination fee or charge, and a person other than the consumer may pay a mortgage originator an origination fee or charge, if—

"(i) the mortgage originator does not receive any compensation directly from the consumer; and

"(ii) the consumer does not make an upfront payment of discount points, origination points, or fees, however denominated (other than bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or originator), except that the Board may, by rule, waive or provide exemptions to this clause if the Board determines that such waiver or exemption is in the interest of consumers and in the public interest.

"(3) REGULATIONS.—The Board shall prescribe regulations to prohibit—

"(A) mortgage originators from steering any consumer to a residential mortgage loan that—

"(i) the consumer lacks a reasonable ability to repay (in accordance with regulations prescribed under section 129C(a)); or

"(ii) has predatory characteristics or effects (such as equity stripping, excessive fees, or abusive terms);

"(B) mortgage originators from steering any consumer from a residential mortgage loan for which the consumer is qualified that is a qualified mortgage (as defined in section 129C(b)(2)) to a residential mortgage loan that is not a qualified mortgage;

"(C) abusive or unfair lending practices that promote disparities among consumers of equal credit worthiness but of different race, ethnicity, gender, or age; and

"(D) mortgage originators from—

"(i) mischaracterizing the credit history of a consumer or the residential mortgage loans available to a consumer;

"(ii) mischaracterizing or suborning the mischaracterization of the appraised value of the property securing the extension of credit; or

"(iii) if unable to suggest, offer, or recommend to a consumer a loan that is not more expensive than a loan for which the consumer qualifies, discouraging a consumer from seeking a residential mortgage loan secured by a consumer’s principal dwelling from another mortgage originator.

"(4) RULES OF CONSTRUCTION.—No provision of this subsection shall be construed as—

"(A) permitting any yield spread premium or other similar compensation that would, for any residential mortgage loan, permit the total amount of direct and indirect compensation from all sources permitted to a mortgage
originator to vary based on the terms of the loan (other than the amount of the principal);
“(B) limiting or affecting the amount of compensation received by a creditor upon the sale of a consummated loan to a subsequent purchaser;
“(C) restricting a consumer’s ability to finance, at the option of the consumer, including through principal or rate, any origination fees or costs permitted under this subsection, or the mortgage originator's right to receive such fees or costs (including compensation) from any person, subject to paragraph (2)(B), so long as such fees or costs do not vary based on the terms of the loan (other than the amount of the principal) or the consumer's decision about whether to finance such fees or costs; or
“(D) prohibiting incentive payments to a mortgage originator based on the number of residential mortgage loans originated within a specified period of time.”.

SEC. 1404. LIABILITY.
Section 129B of the Truth in Lending Act is amended by inserting after subsection (c) (as added by section 1403) the following new subsection:
“(d) LIABILITY FOR VIOLATIONS.—
“(1) IN GENERAL.—For purposes of providing a cause of action for any failure by a mortgage originator, other than a creditor, to comply with any requirement imposed under this section and any regulation prescribed under this section, section 130 shall be applied with respect to any such failure by substituting ‘mortgage originator’ for ‘creditor’ each place such term appears in each such subsection.
“(2) MAXIMUM.—The maximum amount of any liability of a mortgage originator under paragraph (1) to a consumer for any violation of this section shall not exceed the greater of actual damages or an amount equal to 3 times the total amount of direct and indirect compensation or gain accruing to the mortgage originator in connection with the residential mortgage loan involved in the violation, plus the costs to the consumer of the action, including a reasonable attorney's fee.”.

SEC. 1405. REGULATIONS.
(a) DISCRETIONARY REGULATORY AUTHORITY.—Section 129B of the Truth in Lending Act is amended by inserting after subsection (d) (as added by section 1404) the following new subsection:
“(e) DISCRETIONARY REGULATORY AUTHORITY.—
“(1) IN GENERAL.—The Board shall, by regulations, prohibit or condition terms, acts or practices relating to residential mortgage loans that the Board finds to be abusive, unfair, deceptive, predatory, necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of this section and section 129C, necessary or proper to effectuate the purposes of this section and section 129C, to prevent circumvention or evasion thereof, or to facilitate compliance with such sections, or are not in the interest of the borrower.
“(2) APPLICATION.—The regulations prescribed under paragraph (1) shall be applicable to all residential mortgage loans and shall be applied in the same manner as regulations prescribed under section 105.
“(f) Section 129B and any regulations promulgated thereunder do not apply to an extension of credit relating to a plan described in section 101(53D) of title 11, United States Code.”.

(b) DISCLOSURES.—Notwithstanding any other provision of this title, in order to improve consumer awareness and understanding of transactions involving residential mortgage loans through the use of disclosures, the Board may, by rule, exempt from or modify disclosure requirements, in whole or in part, for any class of residential mortgage loans if the Board determines that such exemption or modification is in the interest of consumers and in the public interest.

SEC. 1406. STUDY OF SHARED APPRECIATION MORTGAGES.

(a) STUDY.—The Secretary of Housing and Urban Development, in consultation with the Secretary of the Treasury and other relevant agencies, shall conduct a comprehensive study to determine prudent statutory and regulatory requirements sufficient to provide for the widespread use of shared appreciation mortgages to strengthen local housing markets, provide new opportunities for affordable homeownership, and enable homeowners at risk of foreclosure to refinance or modify their mortgages.

(b) REPORT.—Not later than the expiration of the 6-month period beginning on the date of the enactment of this Act, the Secretary of Housing and Urban Development shall submit a report to the Congress on the results of the study, which shall include recommendations for the regulatory and legislative requirements referred to in subsection (a).

Subtitle B—Minimum Standards For Mortgages

SEC. 1411. ABILITY TO REPAY.

(a) IN GENERAL.—

(1) RULE OF CONSTRUCTION.—No regulation, order, or guidance issued by the Bureau under this title shall be construed as requiring a depository institution to apply mortgage underwriting standards that do not meet the minimum underwriting standards required by the appropriate prudential regulator of the depository institution.

(2) AMENDMENT TO TRUTH IN LENDING ACT.—Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.) is amended by inserting after section 129B (as added by section 1402(a)) the following new section:

“§ 129C. Minimum standards for residential mortgage loans

“(a) ABILITY TO REPAY.—

“(1) IN GENERAL.—In accordance with regulations prescribed by the Board, no creditor may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments.

“(2) MULTIPLE LOANS.—If the creditor knows, or has reason to know, that 1 or more residential mortgage loans secured
by the same dwelling will be made to the same consumer, the creditor shall make a reasonable and good faith determination, based on verified and documented information, that the consumer has a reasonable ability to repay the combined payments of all loans on the same dwelling according to the terms of those loans and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments.

"(3) BASIS FOR DETERMINATION.—A determination under this subsection of a consumer's ability to repay a residential mortgage loan shall include consideration of the consumer's credit history, current income, expected income the consumer is reasonably assured of receiving, current obligations, debt-to-income ratio or the residual income the consumer will have after paying non-mortgage debt and mortgage-related obligations, employment status, and other financial resources other than the consumer's equity in the dwelling or real property that secures repayment of the loan. A creditor shall determine the ability of the consumer to repay using a payment schedule that fully amortizes the loan over the term of the loan.

"(4) INCOME VERIFICATION.—A creditor making a residential mortgage loan shall verify amounts of income or assets that such creditor relies on to determine repayment ability, including expected income or assets, by reviewing the consumer's Internal Revenue Service Form W-2, tax returns, payroll receipts, financial institution records, or other third-party documents that provide reasonably reliable evidence of the consumer's income or assets. In order to safeguard against fraudulent reporting, any consideration of a consumer's income history in making a determination under this subsection shall include the verification of such income by the use of—

"(A) Internal Revenue Service transcripts of tax returns; or

"(B) a method that quickly and effectively verifies income documentation by a third party subject to rules prescribed by the Board.

"(5) EXEMPTION.—With respect to loans made, guaranteed, or insured by Federal departments or agencies identified in subsection (b)(3)(B)(ii), such departments or agencies may exempt refinancings under a streamlined refinancing from this income verification requirement as long as the following conditions are met:

"(A) The consumer is not 30 days or more past due on the prior existing residential mortgage loan.

"(B) The refinancing does not increase the principal balance outstanding on the prior existing residential mortgage loan, except to the extent of fees and charges allowed by the department or agency making, guaranteeing, or insuring the refinancing.

"(C) Total points and fees (as defined in section 103(aa)(4), other than bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or mortgage originator) payable in connection with the refinancing do not exceed 3 percent of the total new loan amount.

"(D) The interest rate on the refinanced loan is lower than the interest rate of the original loan, unless the borrower is refinancing from an adjustable rate to a fixed-
rate loan, under guidelines that the department or agency shall establish for loans they make, guarantee, or issue.

“(E) The refinancing is subject to a payment schedule that will fully amortize the refinancing in accordance with the regulations prescribed by the department or agency making, guaranteeing, or insuring the refinancing.

“(F) The terms of the refinancing do not result in a balloon payment, as defined in subsection (b)(2)(A)(ii).

“(G) Both the residential mortgage loan being refinanced and the refinancing satisfy all requirements of the department or agency making, guaranteeing, or insuring the refinancing.

“(6) NONSTANDARD LOANS.—

“(A) VARIABLE RATE LOANS THAT DEFER REPAYMENT OF ANY PRINCIPAL OR INTEREST.—For purposes of determining, under this subsection, a consumer’s ability to repay a variable rate residential mortgage loan that allows or requires the consumer to defer the repayment of any principal or interest, the creditor shall use a fully amortizing repayment schedule.

“(B) INTEREST-ONLY LOANS.—For purposes of determining, under this subsection, a consumer’s ability to repay a residential mortgage loan that permits or requires the payment of interest only, the creditor shall use the payment amount required to amortize the loan by its final maturity.

“(C) CALCULATION FOR NEGATIVE AMORTIZATION.—In making any determination under this subsection, a creditor shall also take into consideration any balance increase that may accrue from any negative amortization provision.

“(D) CALCULATION PROCESS.—For purposes of making any determination under this subsection, a creditor shall calculate the monthly payment amount for principal and interest on any residential mortgage loan by assuming—

“(i) the loan proceeds are fully disbursed on the date of the consummation of the loan;

“(ii) the loan is to be repaid in substantially equal monthly amortizing payments for principal and interest over the entire term of the loan with no balloon payment, unless the loan contract requires more rapid repayment (including balloon payment), in which case the calculation shall be made (I) in accordance with regulations prescribed by the Board, with respect to any loan which has an annual percentage rate that does not exceed the average prime offer rate for a comparable transaction, as of the date the interest rate is set, by 1.5 or more percentage points for a first lien residential mortgage loan; and by 3.5 or more percentage points for a subordinate lien residential mortgage loan; or (II) using the contract’s repayment schedule, with respect to a loan which has an annual percentage rate, as of the date the interest rate is set, that is at least 1.5 percentage points above the average prime offer rate for a first lien residential mortgage loan; and 3.5 percentage points above the average prime offer rate for a subordinate lien residential mortgage loan; and
“(iii) the interest rate over the entire term of the loan is a fixed rate equal to the fully indexed rate at the time of the loan closing, without considering the introductory rate.

“(E) Refinance of Hybrid Loans with Current Lender.—In considering any application for refinancing an existing hybrid loan by the creditor into a standard loan to be made by the same creditor in any case in which there would be a reduction in monthly payment and the mortgagor has not been delinquent on any payment on the existing hybrid loan, the creditor may—

“(i) consider the mortgagor's good standing on the existing mortgage;
“(ii) consider if the extension of new credit would prevent a likely default should the original mortgage reset and give such concerns a higher priority as an acceptable underwriting practice; and
“(iii) offer rate discounts and other favorable terms to such mortgagor that would be available to new customers with high credit ratings based on such underwriting practice.

“(7) Fully-Indexed Rate Defined.—For purposes of this subsection, the term 'fully indexed rate' means the index rate prevailing on a residential mortgage loan at the time the loan is made plus the margin that will apply after the expiration of any introductory interest rates.

“(8) Reverse Mortgages and Bridge Loans.—This subsection shall not apply with respect to any reverse mortgage or temporary or bridge loan with a term of 12 months or less, including to any loan to purchase a new dwelling where the consumer plans to sell a different dwelling within 12 months.

“(9) Seasonal Income.—If documented income, including income from a small business, is a repayment source for a residential mortgage loan, a creditor may consider the seasonality and irregularity of such income in the underwriting of and scheduling of payments for such credit.”

(b) Clerical Amendment.—The table of sections for chapter 2 of the Truth in Lending Act is amended by inserting after the item relating to section 129B (as added by section 1402(b)) the following new item:

“129C. Minimum standards for residential mortgage loans.”.

SEC. 1412. SAFE HARBOR AND REBUTTABLE PRESUMPTION.

Section 129C of the Truth in Lending Act is amended by inserting after subsection (a) (as added by section 1411) the following new subsection:

“(b) Presumption of Ability to Repay.—

“(1) In general.—Any creditor with respect to any residential mortgage loan, and any assignee of such loan subject to liability under this title, may presume that the loan has met the requirements of subsection (a), if the loan is a qualified mortgage.

“(2) Definitions.—For purposes of this subsection, the following definitions shall apply:

“(A) Qualified Mortgage.—The term ‘qualified mortgage’ means any residential mortgage loan—
“(i) for which the regular periodic payments for
the loan may not—
“(I) result in an increase of the principal bal-
ance; or
“(II) except as provided in subparagraph (E),
allow the consumer to defer repayment of prin-
cipal;
“(ii) except as provided in subparagraph (E), the
terms of which do not result in a balloon payment,
where a ‘balloon payment’ is a scheduled payment
that is more than twice as large as the average of
earlier scheduled payments;
“(iii) for which the income and financial resources
relied upon to qualify the obligors on the loan are
verified and documented;
“(iv) in the case of a fixed rate loan, for which
the underwriting process is based on a payment
schedule that fully amortizes the loan over the loan
term and takes into account all applicable taxes, insur-
ance, and assessments;
“(v) in the case of an adjustable rate loan, for
which the underwriting is based on the maximum rate
permitted under the loan during the first 5 years,
and a payment schedule that fully amortizes the loan
over the loan term and takes into account all applicable
taxes, insurance, and assessments;
“(vi) that complies with any guidelines or regula-
tions established by the Board relating to ratios of
total monthly debt to monthly income or alternative
measures of ability to pay regular expenses after pay-
ment of total monthly debt, taking into account the
income levels of the borrower and such other factors
as the Board may determine relevant and consistent
with the purposes described in paragraph (3)(B)(i);
“(vii) for which the total points and fees (as defined
in subparagraph (C)) payable in connection with the
loan do not exceed 3 percent of the total loan amount;
“(viii) for which the term of the loan does not
exceed 30 years, except as such term may be extended
under paragraph (3), such as in high-cost areas; and
“(ix) in the case of a reverse mortgage (except
for the purposes of subsection (a) of section 129C,
to the extent that such mortgages are exempt
altogether from those requirements), a reverse mort-
gage which meets the standards for a qualified mort-
gage, as set by the Board in rules that are consistent
with the purposes of this subsection.
“(B) AVERAGE PRIME OFFER RATE.—The term ‘average
prime offer rate’ means the average prime offer rate for
a comparable transaction as of the date on which the
interest rate for the transaction is set, as published by
the Board.
“(C) POINTS AND FEES.—
“(i) In general.—For purposes of subparagraph
(A), the term ‘points and fees’ means points and fees
as defined by section 103(aa)(4) (other than bona fide
third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or mortgage originator).

“(ii) COMPUTATION.—For purposes of computing the total points and fees under this subparagraph, the total points and fees shall exclude either of the amounts described in the following subclauses, but not both:

“(I) Up to and including 2 bona fide discount points payable by the consumer in connection with the mortgage, but only if the interest rate from which the mortgage's interest rate will be discounted does not exceed by more than 1 percentage point the average prime offer rate.

“(II) Unless 2 bona fide discount points have been excluded under subclause (I), up to and including 1 bona fide discount point payable by the consumer in connection with the mortgage, but only if the interest rate from which the mortgage's interest rate will be discounted does not exceed by more than 2 percentage points the average prime offer rate.

“(iii) BONA FIDE DISCOUNT POINTS DEFINED.—For purposes of clause (ii), the term ‘bona fide discount points’ means loan discount points which are knowingly paid by the consumer for the purpose of reducing, and which in fact result in a bona fide reduction of, the interest rate or time-price differential applicable to the mortgage.

“(iv) INTEREST RATE REDUCTION.—Subclauses (I) and (II) of clause (ii) shall not apply to discount points used to purchase an interest rate reduction unless the amount of the interest rate reduction purchased is reasonably consistent with established industry norms and practices for secondary mortgage market transactions.

“(D) SMALLER LOANS.—The Board shall prescribe rules adjusting the criteria under subparagraph (A)(vii) in order to permit lenders that extend smaller loans to meet the requirements of the presumption of compliance under paragraph (1). In prescribing such rules, the Board shall consider the potential impact of such rules on rural areas and other areas where home values are lower.

“(E) BALLOON LOANS.—The Board may, by regulation, provide that the term ‘qualified mortgage’ includes a balloon loan—

“(i) that meets all of the criteria for a qualified mortgage under subparagraph (A) (except clauses (i)(II), (ii), (iv), and (v) of such subparagraph);

“(ii) for which the creditor makes a determination that the consumer is able to make all scheduled payments, except the balloon payment, out of income or assets other than the collateral;

“(iii) for which the underwriting is based on a payment schedule that fully amortizes the loan over a period of not more than 30 years and takes into...
account all applicable taxes, insurance, and assessments; and

“(iv) that is extended by a creditor that—

“(I) operates predominantly in rural or underserved areas;

“(II) together with all affiliates, has total annual residential mortgage loan originations that do not exceed a limit set by the Board;

“(III) retains the balloon loans in portfolio; and

“(IV) meets any asset size threshold and any other criteria as the Board may establish, consistent with the purposes of this subtitle.

“(3) Regulations.—

“(A) In general.—The Board shall prescribe regulations to carry out the purposes of this subsection.

“(B) Revision of safe harbor criteria.—

“(i) In general.—The Board may prescribe regulations that revise, add to, or subtract from the criteria that define a qualified mortgage upon a finding that such regulations are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of this section, necessary and appropriate to effectuate the purposes of this section and section 129B, to prevent circumvention or evasion thereof, or to facilitate compliance with such sections.

“(ii) Loan definition.—The following agencies shall, in consultation with the Board, prescribe rules defining the types of loans they insure, guarantee, or administer, as the case may be, that are qualified mortgages for purposes of paragraph (2)(A), and such rules may revise, add to, or subtract from the criteria used to define a qualified mortgage under paragraph (2)(A), upon a finding that such rules are consistent with the purposes of this section and section 129B, to prevent circumvention or evasion thereof, or to facilitate compliance with such sections:

“(I) The Department of Housing and Urban Development, with regard to mortgages insured under the National Housing Act (12 U.S.C. 1707 et seq.).

“(II) The Department of Veterans Affairs, with regard to a loan made or guaranteed by the Secretary of Veterans Affairs.

“(III) The Department of Agriculture, with regard to loans guaranteed by the Secretary of Agriculture pursuant to 42 U.S.C. 1472(h).

“(IV) The Rural Housing Service, with regard to loans insured by the Rural Housing Service.”.

SEC. 1413. DEFENSE TO FORECLOSURE.

Section 130 of the Truth in Lending Act (15 U.S.C. 1640) is amended by adding at the end the following new subsection:

“(k) Defense to foreclosure.—

“(1) In general.—Notwithstanding any other provision of law, when a creditor, assignee, or other holder of a residential
mortgage loan or anyone acting on behalf of such creditor, assignee, or holder, initiates a judicial or nonjudicial foreclosure of the residential mortgage loan, or any other action to collect the debt in connection with such loan, a consumer may assert a violation by a creditor of paragraph (1) or (2) of section 129B(c), or of section 129C(a), as a matter of defense by recoupment or set off without regard for the time limit on a private action for damages under subsection (e).

“(2) AMOUNT OF RECoupMENT OR SETOFF.—

“A) IN GENERAL.—The amount of recoupment or set off under paragraph (1) shall equal the amount to which the consumer would be entitled under subsection (a) for damages for a valid claim brought in an original action against the creditor, plus the costs to the consumer of the action, including a reasonable attorney’s fee.

“B) SPECIAL RULE.—Where such judgment is rendered after the expiration of the applicable time limit on a private action for damages under subsection (e), the amount of recoupment or set off under paragraph (1) derived from damages under subsection (a)(4) shall not exceed the amount to which the consumer would have been entitled under subsection (a)(4) for damages computed up to the day preceding the expiration of the applicable time limit.”

SEC. 1414. ADDITIONAL STANDARDS AND REQUIREMENTS.

(a) IN GENERAL.—Section 129C of the Truth in Lending Act is amended by inserting after subsection (b) (as added by this title) the following new subsections:

“(c) PROHIBITION ON CERTAIN PREPAYMENT PENALTIES.—

“(1) PROHIBITED ON CERTAIN LOANS.—

“A) IN GENERAL.—A residential mortgage loan that is not a ‘qualified mortgage’, as defined under subsection (b)(2), may not contain terms under which a consumer must pay a prepayment penalty for paying all or part of the principal after the loan is consummated.

“B) EXCLUSIONS.—For purposes of this subsection, a ‘qualified mortgage’ may not include a residential mortgage loan that—

“(i) has an adjustable rate; or
“(ii) has an annual percentage rate that exceeds the average prime offer rate for a comparable transaction, as of the date the interest rate is set—

“(I) by 1.5 or more percentage points, in the case of a first lien residential mortgage loan having a original principal obligation amount that is equal to or less than the amount of the maximum limitation on the original principal obligation of mortgage in effect for a residence of the applicable size, as of the date of such interest rate set, pursuant to the 6th sentence of section 305(a)(2) the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454(a)(2));
“(II) by 2.5 or more percentage points, in the case of a first lien residential mortgage loan having a original principal obligation amount that is more than the amount of the maximum limitation on the original principal obligation of mortgage in...
effect for a residence of the applicable size, as of the date of such interest rate set, pursuant to the 6th sentence of section 305(a)(2) the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454(a)(2)); and

“(III) by 3.5 or more percentage points, in the case of a subordinate lien residential mortgage loan.

“(2) Publication of average prime offer rate and APR thresholds.—The Board—

Deadline.

“(A) shall publish, and update at least weekly, average prime offer rates;
“(B) may publish multiple rates based on varying types of mortgage transactions; and
“(C) shall adjust the thresholds established under sub-clause (I), (II), and (III) of paragraph (1)(B)(ii) as necessary to reflect significant changes in market conditions and to effectuate the purposes of the Mortgage Reform and Anti-Predatory Lending Act.

Time periods.

“(3) Phased-out penalties on qualified mortgages.—A qualified mortgage (as defined in subsection (b)(2)) may not contain terms under which a consumer must pay a prepayment penalty for paying all or part of the principal after the loan is consummated in excess of the following limitations:

“(A) During the 1-year period beginning on the date the loan is consummated, the prepayment penalty shall not exceed an amount equal to 3 percent of the outstanding balance on the loan.
“(B) During the 1-year period beginning after the period described in subparagraph (A), the prepayment penalty shall not exceed an amount equal to 2 percent of the outstanding balance on the loan.
“(C) During the 1-year period beginning after the 1-year period described in subparagraph (B), the prepayment penalty shall not exceed an amount equal to 1 percent of the outstanding balance on the loan.
“(D) After the end of the 3-year period beginning on the date the loan is consummated, no prepayment penalty may be imposed on a qualified mortgage.

“(4) Option for no prepayment penalty required.—A creditor may not offer a consumer a residential mortgage loan product that has a prepayment penalty for paying all or part of the principal after the loan is consummated as a term of the loan without offering the consumer a residential mortgage loan product that does not have a prepayment penalty as a term of the loan.

“(d) Single Premium Credit Insurance Prohibited.—No creditor may finance, directly or indirectly, in connection with any residential mortgage loan or with any extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer, any credit life, credit disability, credit unemployment, or credit property insurance, or any other accident, loss-of-income, life, or health insurance, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract, except that—
“(1) insurance premiums or debt cancellation or suspension fees calculated and paid in full on a monthly basis shall not be considered financed by the creditor; and

“(2) this subsection shall not apply to credit unemployment insurance for which the unemployment insurance premiums are reasonable, the creditor receives no direct or indirect compensation in connection with the unemployment insurance premiums, and the unemployment insurance premiums are paid pursuant to another insurance contract and not paid to an affiliate of the creditor.

“(e) ARBITRATION.—

“(1) IN GENERAL.—No residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction.

“(2) POST-CONTROVERSY AGREEMENTS.—Subject to paragraph (3), paragraph (1) shall not be construed as limiting the right of the consumer and the creditor or any assignee to agree to arbitration or any other nonjudicial procedure as the method for resolving any controversy at any time after a dispute or claim under the transaction arises.

“(3) NO WAIVER OF STATUTORY CAUSE OF ACTION.—No provision of any residential mortgage loan or of any extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer, and no other agreement between the consumer and the creditor relating to the residential mortgage loan or extension of credit referred to in paragraph (1), shall be applied or interpreted so as to bar a consumer from bringing an action in an appropriate district court of the United States, or any other court of competent jurisdiction, pursuant to section 130 or any other provision of law, for damages or other relief in connection with any alleged violation of this section, any other provision of this title, or any other Federal law.

“(f) MORTGAGES WITH NEGATIVE AMORTIZATION.—No creditor may extend credit to a borrower in connection with a consumer credit transaction under an open or closed end consumer credit plan secured by a dwelling or residential real property that includes a dwelling, other than a reverse mortgage, that provides or permits a payment plan that may, at any time over the term of the extension of credit, result in negative amortization unless, before such transaction is consummated—

“(1) the creditor provides the consumer with a statement that—

“(A) the pending transaction will or may, as the case may be, result in negative amortization;

“(B) describes negative amortization in such manner as the Board shall prescribe;

“(C) negative amortization increases the outstanding principal balance of the account; and

“(D) negative amortization reduces the consumer’s equity in the dwelling or real property; and

“(2) in the case of a first-time borrower with respect to a residential mortgage loan that is not a qualified mortgage, the first-time borrower provides the creditor with sufficient
documentation to demonstrate that the consumer received homeownership counseling from organizations or counselors certified by the Secretary of Housing and Urban Development as competent to provide such counseling.”.

(b) CONFORMING AMENDMENT RELATING TO ENFORCEMENT.—
Section 108(a) of the Truth in Lending Act (15 U.S.C. 1607(a)) is amended by inserting after paragraph (6) the following new paragraph:

“(7) sections 21B and 21C of the Securities Exchange Act of 1934, in the case of a broker or dealer, other than a depository institution, by the Securities and Exchange Commission.”.

(c) PROTECTION AGAINST LOSS OF ANTI-DEFICIENCY PROTECTION.—Section 129C of the Truth in Lending Act is amended by inserting after subsection (f) (as added by subsection (a)) the following new subsection:

“(g) PROTECTION AGAINST LOSS OF ANTI-DEFICIENCY PROTECTION.—

“(1) DEFINITION.—For purposes of this subsection, the term ‘anti-deficiency law’ means the law of any State which provides that, in the event of foreclosure on the residential property of a consumer securing a mortgage, the consumer is not liable, in accordance with the terms and limitations of such State law, for any deficiency between the sale price obtained on such property through foreclosure and the outstanding balance of the mortgage.

“(2) NOTICE AT TIME OF CONSUMMATION.—In the case of any residential mortgage loan that is, or upon consummation will be, subject to protection under an anti-deficiency law, the creditor or mortgage originator shall provide a written notice to the consumer describing the protection provided by the anti-deficiency law and the significance for the consumer of the loss of such protection before such loan is consummated.

“(3) NOTICE BEFORE REFINANCING THAT WOULD CAUSE LOSS OF PROTECTION.—In the case of any residential mortgage loan that is subject to protection under an anti-deficiency law, if a creditor or mortgage originator provides an application to a consumer, or receives an application from a consumer, for any type of refinancing for such loan that would cause the loan to lose the protection of such anti-deficiency law, the creditor or mortgage originator shall provide a written notice to the consumer describing the protection provided by the anti-deficiency law and the significance for the consumer of the loss of such protection before any agreement for any such refinancing is consummated.”.

(d) POLICY REGARDING ACCEPTANCE OF PARTIAL PAYMENT.—Section 129C of the Truth in Lending Act is amended by inserting after subsection (g) (as added by subsection (c)) the following new subsection:

“(h) POLICY REGARDING ACCEPTANCE OF PARTIAL PAYMENT.—
In the case of any residential mortgage loan, a creditor shall disclose prior to settlement or, in the case of a person becoming a creditor with respect to an existing residential mortgage loan, at the time such person becomes a creditor—

“(1) the creditor’s policy regarding the acceptance of partial payments; and
“(2) if partial payments are accepted, how such payments will be applied to such mortgage and if such payments will be placed in escrow.

(i) TIMESHARE PLANS.—This section and any regulations promulgated under this section do not apply to an extension of credit relating to a plan described in section 101(53D) of title 11, United States Code.”.

SEC. 1415. RULE OF CONSTRUCTION.

Except as otherwise expressly provided in section 129B or 129C of the Truth in Lending Act (as added by this title), no provision of such section 129B or 129C shall be construed as superseding, repealing, or affecting any duty, right, obligation, privilege, or remedy of any person under any other provision of the Truth in Lending Act or any other provision of Federal or State law.

SEC. 1416. AMENDMENTS TO CIVIL LIABILITY PROVISIONS.

(a) INCREASE IN AMOUNT OF CIVIL MONEY PENALTIES FOR CERTAIN VIOLATIONS.—Section 130(a) of the Truth in Lending Act (15 U.S.C. 1640(a)) is amended—

(1) in paragraph (2)(A)(ii)—

(A) by striking “$100” and inserting “$200”; and

(B) by striking “$1,000” and inserting “$2,000”;

(2) in paragraph (2)(B), by striking “$500,000” and inserting “$1,000,000”; and

(3) in paragraph (4), by inserting “, paragraph (1) or (2) of section 129B(c), or section 129C(a)” after “section 129”.

(b) STATUTE OF LIMITATIONS EXTENDED FOR SECTION 129 VIOLATIONS.—Section 130(e) of the Truth in Lending Act (15 U.S.C. 1640(e)) is amended—

(1) in the first sentence, by striking “Any action” and inserting “Except as provided in the subsequent sentence, any action”; and

(2) by inserting after the first sentence the following new sentence: “Any action under this section with respect to any violation of section 129, 129B, or 129C may be brought in any United States district court, or in any other court of competent jurisdiction, before the end of the 3-year period beginning on the date of the occurrence of the violation.”.

SEC. 1417. LENDER RIGHTS IN THE CONTEXT OF BORROWER DECEPTION.

Section 130 of the Truth in Lending Act (15 U.S.C. 1640) is amended by adding after subsection (k) (as added by this title) the following new subsection:

“(l) EXEMPTION FROM LIABILITY AND RESCISSION IN CASE OF BORROWER FRAUD OR DECEPTION.—In addition to any other remedy available by law or contract, no creditor or assignee shall be liable to an obligor under this section, if such obligor, or co-obligor has been convicted of obtaining by actual fraud such residential mortgage loan.”.

SEC. 1418. SIX-MONTH NOTICE REQUIRED BEFORE RESET OF HYBRID ADJUSTABLE RATE MORTGAGES.

(a) IN GENERAL.—Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.) is amended by inserting after section 128 the following new section:

15 USC 1639b note.
§ 128A. Reset of hybrid adjustable rate mortgages

(a) Hybrid Adjustable Rate Mortgages Defined.—For purposes of this section, the term 'hybrid adjustable rate mortgage' means a consumer credit transaction secured by the consumer's principal residence with a fixed interest rate for an introductory period that adjusts or resets to a variable interest rate after such period.

(b) Notice of Reset and Alternatives.—During the 1-month period that ends 6 months before the date on which the interest rate in effect during the introductory period of a hybrid adjustable rate mortgage adjusts or resets to a variable interest rate or, in the case of such an adjustment or resetting that occurs within the first 6 months after consummation of such loan, at consummation, the creditor or servicer of such loan shall provide a written notice, separate and distinct from all other correspondence to the consumer, that includes the following:

(1) Any index or formula used in making adjustments to or resetting the interest rate and a source of information about the index or formula.

(2) An explanation of how the new interest rate and payment would be determined, including an explanation of how the index was adjusted, such as by the addition of a margin.

(3) A good faith estimate, based on accepted industry standards, of the creditor or servicer of the amount of the monthly payment that will apply after the date of the adjustment or reset, and the assumptions on which this estimate is based.

(4) A list of alternatives consumers may pursue before the date of adjustment or reset, and descriptions of the actions consumers must take to pursue these alternatives, including—

(A) refinancing;

(B) renegotiation of loan terms;

(C) payment forbearances; and

(D) pre-foreclosure sales.

(5) The names, addresses, telephone numbers, and Internet addresses of counseling agencies or programs reasonably available to the consumer that have been certified or approved and made publicly available by the Secretary of Housing and Urban Development or a State housing finance authority (as defined in section 1301 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989).

(6) The address, telephone number, and Internet address for the State housing finance authority (as so defined) for the State in which the consumer resides.

(c) Savings Clause.—The Board may require the notice in paragraph (b) or other notice consistent with this Act for adjustable rate mortgage loans that are not hybrid adjustable rate mortgage loans.

(b) Clerical Amendment.—The table of sections for chapter 2 of the Truth in Lending Act is amended by inserting after the item relating to section 128 the following new item:

“128A. Reset of hybrid adjustable rate mortgages.”.

SEC. 1419. REQUIRED DISCLOSURES.

Section 128(a) of Truth in Lending Act (15 U.S.C. 1638(a)) is amended by adding at the end the following new paragraphs:
“(16) In the case of a variable rate residential mortgage loan for which an escrow or impound account will be established for the payment of all applicable taxes, insurance, and assessments—

“(A) the amount of initial monthly payment due under the loan for the payment of principal and interest, and the amount of such initial monthly payment including the monthly payment deposited in the account for the payment of all applicable taxes, insurance, and assessments; and

“(B) the amount of the fully indexed monthly payment due under the loan for the payment of principal and interest, and the amount of such fully indexed monthly payment including the monthly payment deposited in the account for the payment of all applicable taxes, insurance, and assessments.

“(17) In the case of a residential mortgage loan, the aggregate amount of settlement charges for all settlement services provided in connection with the loan, the amount of charges that are included in the loan and the amount of such charges the borrower must pay at closing, the approximate amount of the wholesale rate of funds in connection with the loan, and the aggregate amount of other fees or required payments in connection with the loan.

“(18) In the case of a residential mortgage loan, the aggregate amount of fees paid to the mortgage originator in connection with the loan, the amount of such fees paid directly by the consumer, and any additional amount received by the originator from the creditor.

“(19) In the case of a residential mortgage loan, the total amount of interest that the consumer will pay over the life of the loan as a percentage of the principal of the loan. Such amount shall be computed assuming the consumer makes each monthly payment in full and on-time, and does not make any over-payments.”.

SEC. 1420. DISCLOSURES REQUIRED IN MONTHLY STATEMENTS FOR RESIDENTIAL MORTGAGE LOANS.

Section 128 of the Truth in Lending Act (15 U.S.C. 1638) is amended by adding at the end the following new subsection:

“(f) Periodic Statements for Residential Mortgage Loans.—

“(1) In general.—The creditor, assignee, or servicer with respect to any residential mortgage loan shall transmit to the obligor, for each billing cycle, a statement setting forth each of the following items, to the extent applicable, in a conspicuous and prominent manner:

“(A) The amount of the principal obligation under the mortgage.

“(B) The current interest rate in effect for the loan.

“(C) The date on which the interest rate may next reset or adjust.

“(D) The amount of any prepayment fee to be charged, if any.

“(E) A description of any late payment fees.

“(F) A telephone number and electronic mail address that may be used by the obligor to obtain information regarding the mortgage.
“(G) The names, addresses, telephone numbers, and
Internet addresses of counseling agencies or programs
reasonably available to the consumer that have been cer-
tified or approved and made publicly available by the Sec-
retary of Housing and Urban Development or a State
housing finance authority (as defined in section 1301 of
the Financial Institutions Reform, Recovery, and Enforce-
ment Act of 1989).

“(H) Such other information as the Board may pre-
scribe in regulations.

“(2) DEVELOPMENT AND USE OF STANDARD FORM.—The
Board shall develop and prescribe a standard form for the
disclosure required under this subsection, taking into account
that the statements required may be transmitted in writing
or electronically.

“(3) EXCEPTION.—Paragraph (1) shall not apply to any fixed
rate residential mortgage loan where the creditor, assignee,
or servicer provides the obligor with a coupon book that provides
the obligor with substantially the same information as required
in paragraph (1).”.

SEC. 1421. REPORT BY THE GAO.

(a) REPORT REQUIRED.—The Comptroller General of the United
States shall conduct a study to determine the effects the enactment
of this Act will have on the availability and affordability of credit
for consumers, small businesses, homebuyers, and mortgage
lending, including the effect—

(1) on the mortgage market for mortgages that are not
within the safe harbor provided in the amendments made by
this subtitle;

(2) on the ability of prospective homebuyers to obtain
financing;

(3) on the ability of homeowners facing resets or adjust-
m ents to refinance—for example, do they have fewer refi-
nancing options due to the unavailability of certain loan pro-
 ducts that were available before the enactment of this Act;

(4) on minorities’ ability to access affordable credit com-
pared with other prospective borrowers;

(5) on home sales and construction;

(6) of extending the rescission right, if any, on adjustable
rate loans and its impact on litigation;

(7) of State foreclosure laws and, if any, an investor’s
ability to transfer a property after foreclosure;

(8) of expanding the existing provisions of the Home Owner-
ship and Equity Protection Act of 1994;

(9) of prohibiting prepayment penalties on high-cost mort-
gages; and

(10) of establishing counseling services under the Depart-
ment of Housing and Urban Development and offered through
the Office of Housing Counseling.

(b) REPORT.—Before the end of the 1-year period beginning
on the date of the enactment of this Act, the Comptroller General
shall submit a report to the Congress containing the findings and
conclusions of the Comptroller General with respect to the study
conducted pursuant to subsection (a).

(c) EXAMINATION RELATED TO CERTAIN CREDIT RISK RETENTION
PROVISIONS.—The report required by subsection (b) shall also
include an analysis by the Comptroller General of the effect on the capital reserves and funding of lenders of credit risk retention provisions for non-qualified mortgages, including an analysis of the exceptions and adjustments authorized in section 129C(b)(3) of the Truth in Lending Act and a recommendation on whether a uniform standard is needed.

(d) Analysis of Credit Risk Retention Provisions.—The report required by subsection (b) shall also include—

(1) an analysis by the Comptroller General of whether the credit risk retention provisions have significantly reduced risks to the larger credit market of the repackaging and selling of securitized loans on a secondary market; and

(2) recommendations to the Congress on adjustments that should be made, or additional measures that should be undertaken.

SEC. 1422. STATE ATTORNEY GENERAL ENFORCEMENT AUTHORITY.

Section 130(e) of the Truth in Lending Act (15 U.S.C. 1640(e)) is amended by striking “section 129 may also” and inserting “section 129, 129B, 129C, 129D, 129E, 129F, 129G, or 129H of this Act may also”.

Subtitle C—High-Cost Mortgages

SEC. 1431. DEFINITIONS RELATING TO HIGH-COST MORTGAGES.

(a) High-Cost Mortgage Defined.—Section 103(aa) of the Truth in Lending Act (15 U.S.C. 1602(aa)) is amended by striking all that precedes paragraph (2) and inserting the following:

“(aa) High-Cost Mortgage.—

“(1) Definition.—

“(A) In General.—The term ‘high-cost mortgage’, and a mortgage referred to in this subsection, means a consumer credit transaction that is secured by the consumer’s principal dwelling, other than a reverse mortgage transaction, if—

“(i) in the case of a credit transaction secured—

“(I) by a first mortgage on the consumer’s principal dwelling, the annual percentage rate at consummation of the transaction will exceed by more than 6.5 percentage points (8.5 percentage points, if the dwelling is personal property and the transaction is for less than $50,000) the average prime offer rate, as defined in section 129C(b)(2)(B), for a comparable transaction; or

“(II) by a subordinate or junior mortgage on the consumer’s principal dwelling, the annual percentage rate at consummation of the transaction will exceed by more than 8.5 percentage points the average prime offer rate, as defined in section 129C(b)(2)(B), for a comparable transaction; or

“(ii) the total points and fees payable in connection with the transaction, other than bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or mortgage originator, exceed—
“(I) in the case of a transaction for $20,000 or more, 5 percent of the total transaction amount; or

“(II) in the case of a transaction for less than $20,000, the lesser of 8 percent of the total transaction amount or $1,000 (or such other dollar amount as the Board shall prescribe by regulation); or

“(iii) the credit transaction documents permit the creditor to charge or collect prepayment fees or penalties more than 36 months after the transaction closing or such fees or penalties exceed, in the aggregate, more than 2 percent of the amount prepaid.

“(B) INTRODUCTORY RATES TAKEN INTO ACCOUNT.—For purposes of subparagraph (A)(i), the annual percentage rate of interest shall be determined based on the following interest rate:

“(i) In the case of a fixed-rate transaction in which the annual percentage rate will not vary during the term of the loan, the interest rate in effect on the date of consummation of the transaction.

“(ii) In the case of a transaction in which the rate of interest varies solely in accordance with an index, the interest rate determined by adding the index rate in effect on the date of consummation of the transaction to the maximum margin permitted at any time during the loan agreement.

“(iii) In the case of any other transaction in which the rate may vary at any time during the term of the loan for any reason, the interest charged on the transaction at the maximum rate that may be charged during the term of the loan.

“(C) MORTGAGE INSURANCE.—For the purposes of computing the total points and fees under paragraph (4), the total points and fees shall exclude—

“(i) any premium provided by an agency of the Federal Government or an agency of a State; 

“(ii) any amount that is not in excess of the amount payable under policies in effect at the time of origination under section 203(c)(2)(A) of the National Housing Act (12 U.S.C. 1709(c)(2)(A)), provided that the premium, charge, or fee is required to be refundable on a pro-rated basis and the refund is automatically issued upon notification of the satisfaction of the underlying mortgage loan; and

“(iii) any premium paid by the consumer after closing.”.

(b) ADJUSTMENT OF PERCENTAGE POINTS.—Section 103(aa)(2) of the Truth in Lending Act (15 U.S.C. 1602(aa)(2)) is amended by striking subparagraph (B) and inserting the following new subparagraph:

“(B) An increase or decrease under subparagraph (A)—

“(i) may not result in the number of percentage points referred to in paragraph (1)(A)(i)(I) being less than 6 percentage points or greater than 10 percentage points; and
“(ii) may not result in the number of percentage points referred to in paragraph (1)(A)(i)(II) being less than 8 percentage points or greater than 12 percentage points.”.

(c) POINTS AND FEES DEFINED.—

(1) IN GENERAL.—Section 103(aa)(4) of the Truth in Lending Act (15 U.S.C. 1602(aa)(4)) is amended—

(A) by striking subparagraph (B) and inserting the following:

“(B) all compensation paid directly or indirectly by a consumer or creditor to a mortgage originator from any source, including a mortgage originator that is also the creditor in a table-funded transaction;”;

(B) by redesignating subparagraph (D) as subparagraph (G); and

(C) by inserting after subparagraph (C) the following new subparagraphs:

“(D) premiums or other charges payable at or before closing for any credit life, credit disability, credit unemployment, or credit property insurance, or any other accident, loss-of-income, life or health insurance, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract, except that insurance premiums or debt cancellation or suspension fees calculated and paid in full on a monthly basis shall not be considered financed by the creditor;

“(E) the maximum prepayment fees and penalties which may be charged or collected under the terms of the credit transaction;

“(F) all prepayment fees or penalties that are incurred by the consumer if the loan refinances a previous loan made or currently held by the same creditor or an affiliate of the creditor; and”;

(2) CALCULATION OF POINTS AND FEES FOR OPEN-END CONSUMER CREDIT PLANS.—Section 103(aa) of the Truth in Lending Act (15 U.S.C. 1602(aa)) is amended—

(A) by redesignating paragraph (5) as paragraph (6); and

(B) by inserting after paragraph (4) the following new paragraph:

“(5) CALCULATION OF POINTS AND FEES FOR OPEN-END CONSUMER CREDIT PLANS.—In the case of open-end consumer credit plans, points and fees shall be calculated, for purposes of this section and section 129, by adding the total points and fees known at or before closing, including the maximum prepayment penalties which may be charged or collected under the terms of the credit transaction, plus the minimum additional fees the consumer would be required to pay to draw down an amount equal to the total credit line.”.

(d) BONA FIDE DISCOUNT LOAN DISCOUNT POINTS.—Section 103 of the Truth in Lending Act (15 U.S.C. 1602) is amended by inserting after subsection (cc) (as added by section 1401) the following new subsection:

“(dd) BONA FIDE DISCOUNT POINTS AND PREPAYMENT PENALTIES.—For the purposes of determining the amount of points and fees for purposes of subsection (aa), either the amounts
described in paragraph (1) or (2) of the following paragraphs, but not both, shall be excluded:

“(1) Up to and including 2 bona fide discount points payable by the consumer in connection with the mortgage, but only if the interest rate from which the mortgage’s interest rate will be discounted does not exceed by more than 1 percentage point—

“(A) the average prime offer rate, as defined in section 129C; or

“(B) if secured by a personal property loan, the average rate on a loan in connection with which insurance is provided under title I of the National Housing Act (12 U.S.C. 1702 et seq.).

“(2) Unless 2 bona fide discount points have been excluded under paragraph (1), up to and including 1 bona fide discount point payable by the consumer in connection with the mortgage, but only if the interest rate from which the mortgage’s interest rate will be discounted does not exceed by more than 2 percentage points—

“(A) the average prime offer rate, as defined in section 129C; or

“(B) if secured by a personal property loan, the average rate on a loan in connection with which insurance is provided under title I of the National Housing Act (12 U.S.C. 1702 et seq.).

“(3) For purposes of paragraph (1), the term ‘bona fide discount points’ means loan discount points which are knowingly paid by the consumer for the purpose of reducing, and which in fact result in a bona fide reduction of, the interest rate or time-price differential applicable to the mortgage.

“(4) Paragraphs (1) and (2) shall not apply to discount points used to purchase an interest rate reduction unless the amount of the interest rate reduction purchased is reasonably consistent with established industry norms and practices for secondary mortgage market transactions.”.

SEC. 1432. AMENDMENTS TO EXISTING REQUIREMENTS FOR CERTAIN MORTGAGES.

(a) PREPAYMENT PENALTY PROVISIONS.—Section 129(c)(2) of the Truth in Lending Act (15 U.S.C. 1639(c)(2)) is hereby repealed.

(b) NO BALLOON PAYMENTS.—Section 129(e) of the Truth in Lending Act (15 U.S.C. 1639(e)) is amended to read as follows:

“(e) NO BALLOON PAYMENTS.—No high-cost mortgage may contain a scheduled payment that is more than twice as large as the average of earlier scheduled payments. This subsection shall not apply when the payment schedule is adjusted to the seasonal or irregular income of the consumer.”.

SEC. 1433. ADDITIONAL REQUIREMENTS FOR CERTAIN MORTGAGES.

(a) ADDITIONAL REQUIREMENTS FOR CERTAIN MORTGAGES.—Section 129 of the Truth in Lending Act (15 U.S.C. 1639) is amended—

(1) by redesignating subsections (j), (k), (l) and (m) as subsections (n), (o), (p), and (q) respectively; and

(2) by inserting after subsection (i) the following new subsections:

“(j) RECOMMENDED DEFAULT.—No creditor shall recommend or encourage default on an existing loan or other debt prior to and in connection with the closing or planned closing of a high-cost mortgage market transactions.”.
mortgage that refinances all or any portion of such existing loan or debt.

"(k) Late Fees.—

"(1) In general.—No creditor may impose a late payment charge or fee in connection with a high-cost mortgage—

"(A) in an amount in excess of 4 percent of the amount of the payment past due;

"(B) unless the loan documents specifically authorize the charge or fee;

"(C) before the end of the 15-day period beginning on the date the payment is due, or in the case of a loan on which interest on each installment is paid in advance, before the end of the 30-day period beginning on the date the payment is due; or

"(D) more than once with respect to a single late payment.

"(2) Coordination with subsequent late fees.—If a payment is otherwise a full payment for the applicable period and is paid on its due date or within an applicable grace period, and the only delinquency or insufficiency of payment is attributable to any late fee or delinquency charge assessed on any earlier payment, no late fee or delinquency charge may be imposed on such payment.

"(3) Failure to make installment payment.—If, in the case of a loan agreement the terms of which provide that any payment shall first be applied to any past due principal balance, the consumer fails to make an installment payment and the consumer subsequently resumes making installment payments but has not paid all past due installments, the creditor may impose a separate late payment charge or fee for any principal due (without deduction due to late fees or related fees) until the default is cured.

"(l) Acceleration of Debt.—No high-cost mortgage may contain a provision which permits the creditor to accelerate the indebtedness, except when repayment of the loan has been accelerated by default in payment, or pursuant to a due-on-sale provision, or pursuant to a material violation of some other provision of the loan document unrelated to payment schedule.

"(m) Restriction on Financing Points and Fees.—No creditor may directly or indirectly finance, in connection with any high-cost mortgage, any of the following:

"(1) Any prepayment fee or penalty payable by the consumer in a refinancing transaction if the creditor or an affiliate of the creditor is the noteholder of the note being refinanced.

"(2) Any points or fees.”.

(b) Prohibitions on Evasions.—Section 129 of the Truth in Lending Act (15 U.S.C. 1639) is amended by inserting after subsection (q) (as so redesignated by subsection (a)(1)) the following new subsection:

“(p) Prohibitions on Evasions, Structuring of Transactions, and Reciprocal Arrangements.—A creditor may not take any action in connection with a high-cost mortgage—

“(1) to structure a loan transaction as an open-end credit plan or another form of loan for the purpose and with the intent of evading the provisions of this title; or
“(2) to divide any loan transaction into separate parts for the purpose and with the intent of evading provisions of this title.”.

(c) Modification or Deferral Fees.—Section 129 of the Truth in Lending Act (15 U.S.C. 1639) is amended by inserting after subsection (r) (as added by subsection (b) of this section) the following new subsection:

“(s) Modification and Deferral Fees Prohibited.—A creditor, successor in interest, assignee, or any agent of any of the above, may not charge a consumer any fee to modify, renew, extend, or amend a high-cost mortgage, or to defer any payment due under the terms of such mortgage.”.

(d) Payoff Statement.—Section 129 of the Truth in Lending Act (15 U.S.C. 1639) is amended by inserting after subsection (s) (as added by subsection (c) of this section) the following new subsection:

“(t) Payoff Statement.—

“(1) Fees.—

“(A) In General.—Except as provided in subparagraph (B), no creditor or servicer may charge a fee for informing or transmitting to any person the balance due to pay off the outstanding balance on a high-cost mortgage.

“(B) Transaction Fee.—When payoff information referred to in subparagraph (A) is provided by facsimile transmission or by a courier service, a creditor or servicer may charge a processing fee to cover the cost of such transmission or service in an amount not to exceed an amount that is comparable to fees imposed for similar services provided in connection with consumer credit transactions that are secured by the consumer’s principal dwelling and are not high-cost mortgages.

“(C) Fee Disclosure.—Prior to charging a transaction fee as provided in subparagraph (B), a creditor or servicer shall disclose that payoff balances are available for free pursuant to subparagraph (A).

“(D) Multiple Requests.—If a creditor or servicer has provided payoff information referred to in subparagraph (A) without charge, other than the transaction fee allowed by subparagraph (B), on 4 occasions during a calendar year, the creditor or servicer may thereafter charge a reasonable fee for providing such information during the remainder of the calendar year.

“(2) Prompt Delivery.—Payoff balances shall be provided within 5 business days after receiving a request by a consumer or a person authorized by the consumer to obtain such information.”.

(e) Pre-Loan Counseling Required.—Section 129 of the Truth in Lending Act (15 U.S.C. 1639) is amended by inserting after subsection (t) (as added by subsection (d) of this section) the following new subsection:

“(u) Pre-Loan Counseling.—

“(1) In General.—A creditor may not extend credit to a consumer under a high-cost mortgage without first receiving certification from a counselor that is approved by the Secretary of Housing and Urban Development, or at the discretion of
the Secretary, a State housing finance authority, that the consumer has received counseling on the advisability of the mortgage. Such counselor shall not be employed by the creditor or an affiliate of the creditor or be affiliated with the creditor.

“(2) DISCLOSURES REQUIRED PRIOR TO COUNSELING.—No counselor may certify that a consumer has received counseling on the advisability of the high-cost mortgage unless the counselor can verify that the consumer has received each statement required (in connection with such loan) by this section or the Real Estate Settlement Procedures Act of 1974 with respect to the transaction.

“(3) REGULATIONS.—The Board may prescribe such regulations as the Board determines to be appropriate to carry out the requirements of paragraph (1).”.

(f) CORRECTIONS AND UNINTENTIONAL VIOLATIONS.—Section 129 of the Truth in Lending Act (15 U.S.C. 1639) is amended by inserting after subsection (u) (as added by subsection (e)) the following new subsection:

“(v) CORRECTIONS AND UNINTENTIONAL VIOLATIONS.—A creditor or assignee in a high-cost mortgage who, when acting in good faith, fails to comply with any requirement under this section will not be deemed to have violated such requirement if the creditor or assignee establishes that either—

“(1) within 30 days of the loan closing and prior to the institution of any action, the consumer is notified of or discovers the violation, appropriate restitution is made, and whatever adjustments are necessary are made to the loan to either, at the choice of the consumer—

“(A) make the loan satisfy the requirements of this chapter; or

“(B) in the case of a high-cost mortgage, change the terms of the loan in a manner beneficial to the consumer so that the loan will no longer be a high-cost mortgage; or

“(2) within 60 days of the creditor’s discovery or receipt of notification of an unintentional violation or bona fide error and prior to the institution of any action, the consumer is notified of the compliance failure, appropriate restitution is made, and whatever adjustments are necessary are made to the loan to either, at the choice of the consumer—

“(A) make the loan satisfy the requirements of this chapter; or

“(B) in the case of a high-cost mortgage, change the terms of the loan in a manner beneficial so that the loan will no longer be a high-cost mortgage.”.

Subtitle D—Office of Housing Counseling

SEC. 1441. SHORT TITLE.

This subtitle may be cited as the “Expand and Preserve Home Ownership Through Counseling Act”.

SEC. 1442. ESTABLISHMENT OF OFFICE OF HOUSING COUNSELING.

Section 4 of the Department of Housing and Urban Development Act (42 U.S.C. 3533) is amended by adding at the end the following new subsection:
“(g) Office of Housing Counseling.—

“(1) Establishment.—There is established, in the Department, the Office of Housing Counseling.

“(2) Director.—There is established the position of Director of Housing Counseling. The Director shall be the head of the Office of Housing Counseling and shall be appointed by, and shall report to, the Secretary. Such position shall be a career-reserved position in the Senior Executive Service.

“(3) Functions.—

“(A) In General.—The Director shall have primary responsibility within the Department for all activities and matters relating to homeownership counseling and rental housing counseling, including—

“(i) research, grant administration, public outreach, and policy development relating to such counseling; and

“(ii) establishment, coordination, and administration of all regulations, requirements, standards, and performance measures under programs and laws administered by the Department that relate to housing counseling, homeownership counseling (including maintenance of homes), mortgage-related counseling (including home equity conversion mortgages and credit protection options to avoid foreclosure), and rental housing counseling, including the requirements, standards, and performance measures relating to housing counseling.

“(B) Specific Functions.—The Director shall carry out the functions assigned to the Director and the Office under this section and any other provisions of law. Such functions shall include establishing rules necessary for—

“(i) the counseling procedures under section 106(g)(1) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(h)(1));

“(ii) carrying out all other functions of the Secretary under section 106(g) of the Housing and Urban Development Act of 1968, including the establishment, operation, and publication of the availability of the toll-free telephone number under paragraph (2) of such section;

“(iii) contributing to the distribution of home buying information booklets pursuant to section 5 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2604);

“(iv) carrying out the certification program under section 106(e) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(e));

“(v) carrying out the assistance program under section 106(a)(4) of the Housing and Urban Development Act of 1968, including criteria for selection of applications to receive assistance;

“(vi) carrying out any functions regarding abusive, deceptive, or unscrupulous lending practices relating to residential mortgage loans that the Secretary considers appropriate, which shall include conducting the study under section 6 of the Expand and Preserve Home Ownership Through Counseling Act;
“(vii) providing for operation of the advisory committee established under paragraph (4) of this subsection;
“(viii) collaborating with community-based organizations with expertise in the field of housing counseling; and
“(ix) providing for the building of capacity to provide housing counseling services in areas that lack sufficient services, including underdeveloped areas that lack basic water and sewer systems, electricity services, and safe, sanitary housing.

“(4) ADVISORY COMMITTEE.—
“(A) IN GENERAL.—The Secretary shall appoint an advisory committee to provide advice regarding the carrying out of the functions of the Director.
“(B) MEMBERS.—Such advisory committee shall consist of not more than 12 individuals, and the membership of the committee shall equally represent the mortgage and real estate industry, including consumers and housing counseling agencies certified by the Secretary.
“(C) TERMS.—Except as provided in subparagraph (D), each member of the advisory committee shall be appointed for a term of 3 years. Members may be reappointed at the discretion of the Secretary.
“(D) TERMS OF INITIAL APPOINTEES.—As designated by the Secretary at the time of appointment, of the members first appointed to the advisory committee, 4 shall be appointed for a term of 1 year and 4 shall be appointed for a term of 2 years.
“(E) PROHIBITION OF PAY; TRAVEL EXPENSES.—Members of the advisory committee shall serve without pay, but shall receive travel expenses, including per diem in lieu of subsistence, in accordance with applicable provisions under subchapter I of chapter 57 of title 5, United States Code.
“(F) ADVISORY ROLE ONLY.—The advisory committee shall have no role in reviewing or awarding housing counseling grants.
“(5) SCOPE OF HOMEOWNERSHIP COUNSELING.—In carrying out the responsibilities of the Director, the Director shall ensure that homeownership counseling provided by, in connection with, or pursuant to any function, activity, or program of the Department addresses the entire process of homeownership, including the decision to purchase a home, the selection and purchase of a home, issues arising during or affecting the period of ownership of a home (including refinancing, default and foreclosure, and other financial decisions), and the sale or other disposition of a home.”.

SEC. 1443. COUNSELING PROCEDURES.

“(a) IN GENERAL.—Section 106 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x) is amended by adding at the end the following new subsection:
“(g) PROCEDURES AND ACTIVITIES.—
“(1) COUNSELING PROCEDURES.—
"(A) IN GENERAL.—The Secretary shall establish, coordinate, and monitor the administration by the Department of Housing and Urban Development of the counseling procedures for homeownership counseling and rental housing counseling provided in connection with any program of the Department, including all requirements, standards, and performance measures that relate to homeownership and rental housing counseling.

(B) HOMEOWNERSHIP COUNSELING.—For purposes of this subsection and as used in the provisions referred to in this subparagraph, the term 'homeownership counseling' means counseling related to homeownership and residential mortgage loans. Such term includes counseling related to homeownership and residential mortgage loans that is provided pursuant to—

(ii) section 105(a)(20) of the Housing and Community Development Act of 1974 (42 U.S.C. 5305(a)(20));

(iii) in the United States Housing Act of 1937—

(I) section 9(e) (42 U.S.C. 1437g(e));

(II) section 8(y)(1)(D) (42 U.S.C. 1437f(y)(1)(D));

(III) section 18(a)(4)(D) (42 U.S.C. 1437p(a)(4)(D));

(IV) section 23(c)(4) (42 U.S.C. 1437u(c)(4));

(V) section 32(e)(4) (42 U.S.C. 1437z–4(e)(4));


(VII) sections 302(b)(6) and 303(b)(7) (42 U.S.C. 1437aaa–1(b)(6), 1437aaa–2(b)(7)); and

(VIII) section 304(c)(4) (42 U.S.C. 1437aaa–3(c)(4));

(iii) section 302(a)(4) of the American Homeownership and Economic Opportunity Act of 2000 (42 U.S.C. 1437f note);

(iv) sections 233(b)(2) and 258(b) of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12773(b)(2), 12808(b));

(v) this section and section 101(e) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x, 1701w(e));


(vii) sections 422(b)(6), 423(b)(7), 424(c)(4), 442(b)(6), and 443(b)(6) of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12872(b)(6), 12873(b)(7), 12874(c)(4), 12892(b)(6), and 12893(b)(6));

(viii) section 491(b)(1)(F)(iii) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11408(b)(1)(F)(iii));

(ix) sections 202(3) and 810(b)(2)(A) of the Native American Housing and Self-Determination Act of 1996 (25 U.S.C. 4132(3), 4229(b)(2)(A));

(x) in the National Housing Act—

(I) in section 203 (12 U.S.C. 1709), the penultimate undesignated paragraph of paragraph (2)
of subsection (b), subsection (c)(2)(A), and subsection (r)(4); "(II) subsections (a) and (c)(3) of section 237 (12 U.S.C. 1715z–2); and "(III) subsections (d)(2)(B) and (m)(1) of section 255 (12 U.S.C. 1715z–20); "(xi) section 502(h)(4)(B) of the Housing Act of 1949 (42 U.S.C. 1472(h)(4)(B)); "(xic) section 508 of the Housing and Urban Development Act of 1970 (12 U.S.C. 1701z–7); and "(xiii) section 106 of the Energy Policy Act of 1992 (42 U.S.C. 12712 note). “(C) RENTAL HOUSING COUNSELING.—For purposes of this subsection, the term ‘rental housing counseling’ means counseling related to rental of residential property, which may include counseling regarding future homeownership opportunities and providing referrals for renters and prospective renters to entities providing counseling and shall include counseling related to such topics that is provided pursuant to— "(i) section 105(a)(20) of the Housing and Community Development Act of 1974 (42 U.S.C. 5305(a)(20)); "(ii) in the United States Housing Act of 1937— "(I) section 9(e) (42 U.S.C. 1437g(e)); "(II) section 18(a)(4)(D) (42 U.S.C. 1437p(a)(4)(D)); "(III) section 23(c)(4) (42 U.S.C. 1437u(c)(4)); "(IV) section 32(e)(4) (42 U.S.C. 1437z–4(e)(4)); "(V) section 33(d)(2)(B) (42 U.S.C. 1437z–5(d)(2)(B)); and "(VI) section 302(b)(6) (42 U.S.C. 1437aaa–1(b)(6)); "(iii) section 233(b)(2) of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12773(b)(2)); "(iv) section 106 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x); "(v) section 422(b)(6) of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12872(b)(6)); "(vi) section 491(b)(1)(F)(iii) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11408(b)(1)(F)(iii)); "(vii) sections 202(3) and 810(b)(2)(A) of the Native American Housing and Self-Determination Act of 1996 (25 U.S.C. 4132(3), 4229(b)(2)(A)); and "(viii) the rental assistance program under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f). “(2) STANDARDS FOR MATERIALS.—The Secretary, in consultation with the advisory committee established under subsection (g)(4) of the Department of Housing and Urban Development Act, shall establish standards for materials and forms to be used, as appropriate, by organizations providing homeownership counseling services, including any recipients of assistance pursuant to subsection (a)(4). “(3) MORTGAGE SOFTWARE SYSTEMS.—
“(A) Certification.—The Secretary shall provide for the certification of various computer software programs for consumers to use in evaluating different residential mortgage loan proposals. The Secretary shall require, for such certification, that the mortgage software systems take into account—

“(i) the consumer’s financial situation and the cost of maintaining a home, including insurance, taxes, and utilities;

“(ii) the amount of time the consumer expects to remain in the home or expected time to maturity of the loan; and

“(iii) such other factors as the Secretary considers appropriate to assist the consumer in evaluating whether to pay points, to lock in an interest rate, to select an adjustable or fixed rate loan, to select a conventional or government-insured or guaranteed loan and to make other choices during the loan application process.

If the Secretary determines that available existing software is inadequate to assist consumers during the residential mortgage loan application process, the Secretary shall arrange for the development by private sector software companies of new mortgage software systems that meet the Secretary’s specifications.

“(B) Use and Initial Availability.—Such certified computer software programs shall be used to supplement, not replace, housing counseling. The Secretary shall provide that such programs are initially used only in connection with the assistance of housing counselors certified pursuant to subsection (e).

“(C) Availability.—After a period of initial availability under subparagraph (B) as the Secretary considers appropriate, the Secretary shall take reasonable steps to make mortgage software systems certified pursuant to this paragraph widely available through the Internet and at public locations, including public libraries, senior-citizen centers, public housing sites, offices of public housing agencies that administer rental housing assistance vouchers, and housing counseling centers.

“(D) Budget Compliance.—This paragraph shall be effective only to the extent that amounts to carry out this paragraph are made available in advance in appropriations Acts.

“(4) National Public Service Multimedia Campaigns to Promote Housing Counseling.—

“(A) In General.—The Director of Housing Counseling shall develop, implement, and conduct national public service multimedia campaigns designed to make persons facing mortgage foreclosure, persons considering a subprime mortgage loan to purchase a home, elderly persons, persons who face language barriers, low-income persons, minorities, and other potentially vulnerable consumers aware that it is advisable, before seeking or maintaining a residential mortgage loan, to obtain homeownership counseling from an unbiased and reliable
sources and that such homeownership counseling is available, including through programs sponsored by the Secretary of Housing and Urban Development.

"(B) CONTACT INFORMATION.—Each segment of the multimedia campaign under subparagraph (A) shall publicize the toll-free telephone number and website of the Department of Housing and Urban Development through which persons seeking housing counseling can locate a housing counseling agency in their State that is certified by the Secretary of Housing and Urban Development and can provide advice on buying a home, renting, defaults, foreclosures, credit issues, and reverse mortgages.

"(C) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Secretary, not to exceed $3,000,000 for fiscal years 2009, 2010, and 2011, for the development, implementation, and conduct of national public service multimedia campaigns under this paragraph.

"(D) FORECLOSURE RESCUE EDUCATION PROGRAMS.—

"(i) IN GENERAL.—Ten percent of any funds appropriated pursuant to the authorization under subparagraph (C) shall be used by the Director of Housing Counseling to conduct an education program in areas that have a high density of foreclosure. Such program shall involve direct mailings to persons living in such areas describing—

"(I) tips on avoiding foreclosure rescue scams;

"(II) tips on avoiding predatory lending mortgage agreements;

"(III) tips on avoiding for-profit foreclosure counseling services; and

"(IV) local counseling resources that are approved by the Department of Housing and Urban Development.

"(ii) PROGRAM EMPHASIS.—In conducting the education program described under clause (i), the Director of Housing Counseling shall also place an emphasis on serving communities that have a high percentage of retirement communities or a high percentage of low-income minority communities.

"(iii) TERMS DEFINED.—For purposes of this subparagraph:

"(I) HIGH DENSITY OF FORECLOSURES.—An area has a 'high density of foreclosures' if such area is one of the metropolitan statistical areas (as that term is defined by the Director of the Office of Management and Budget) with the highest home foreclosure rates.

"(II) HIGH PERCENTAGE OF RETIREMENT COMMUNITIES.—An area has a 'high percentage of retirement communities' if such area is one of the metropolitan statistical areas (as that term is defined by the Director of the Office of Management and Budget) with the highest percentage of residents aged 65 or older.

"(III) HIGH PERCENTAGE OF LOW-INCOME MINORITY COMMUNITIES.—An area has a 'high
if such area contains a higher-than-normal percentage of residents who are both minorities and low-income, as defined by the Director of Housing Counseling.

“(5) EDUCATION PROGRAMS.—The Secretary shall provide advice and technical assistance to States, units of general local government, and nonprofit organizations regarding the establishment and operation of, including assistance with the development of content and materials for, educational programs to inform and educate consumers, particularly those most vulnerable with respect to residential mortgage loans (such as elderly persons, persons facing language barriers, low-income persons, minorities, and other potentially vulnerable consumers), regarding home mortgages, mortgage refinancing, home equity loans, home repair loans, and where appropriate by region, any requirements and costs associated with obtaining flood or other disaster-specific insurance coverage.”.

(b) CONFORMING AMENDMENTS TO GRANT PROGRAM FOR HOMEOWNERSHIP COUNSELING ORGANIZATIONS.—Section 106(c)(5)(A)(ii) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(c)(5)(A)(ii)) is amended—

(1) in subclause (III), by striking “and” at the end;
(2) in subclause (IV) by striking the period at the end and inserting “; and”;
(3) by inserting after subclause (IV) the following new subclause:

“(V) notify the housing or mortgage applicant of the availability of mortgage software systems provided pursuant to subsection (g)(3).”.

SEC. 1444. GRANTS FOR HOUSING COUNSELING ASSISTANCE.

Section 106(a) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(a)) is amended by adding at the end the following new paragraph:

“(4) HOMEOWNERSHIP AND RENTAL COUNSELING ASSISTANCE.—

“(A) IN GENERAL.—The Secretary shall make financial assistance available under this paragraph to HUD-approved housing counseling agencies and State housing finance agencies.

“(B) QUALIFIED ENTITIES.—The Secretary shall establish standards and guidelines for eligibility of organizations (including governmental and nonprofit organizations) to receive assistance under this paragraph, in accordance with subparagraph (D).

“(C) DISTRIBUTION.—Assistance made available under this paragraph shall be distributed in a manner that encourages efficient and successful counseling programs and that ensures adequate distribution of amounts for rural areas having traditionally low levels of access to such counseling services, including areas with insufficient access to the Internet. In distributing such assistance, the Secretary may give priority consideration to entities serving areas with the highest home foreclosure rates.

“(D) LIMITATION ON DISTRIBUTION OF ASSISTANCE.—

“(i) IN GENERAL.—None of the amounts made available under this paragraph shall be distributed to—
“(I) any organization which has been convicted for a violation under Federal law relating to an election for Federal office; or
“(II) any organization which employs applicable individuals.
“(ii) Definition of applicable individuals.—In this subparagraph, the term ‘applicable individual’ means an individual who—
“(I) is—
“(aa) employed by the organization in a permanent or temporary capacity;
“(bb) contracted or retained by the organization; or
“(cc) acting on behalf of, or with the express or apparent authority of, the organization; and
“(II) has been convicted for a violation under Federal law relating to an election for Federal office.
“(E) Grantmaking process.—In making assistance available under this paragraph, the Secretary shall consider appropriate ways of streamlining and improving the processes for grant application, review, approval, and award.
“(F) Authorization of appropriations.—There are authorized to be appropriated $45,000,000 for each of fiscal years 2009 through 2012 for—
“(i) the operations of the Office of Housing Counseling of the Department of Housing and Urban Development;
“(ii) the responsibilities of the Director of Housing Counseling under paragraphs (2) through (5) of subsection (g); and
“(iii) assistance pursuant to this paragraph for entities providing homeownership and rental counseling.”.

SEC. 1445. REQUIREMENTS TO USE HUD-CERTIFIED COUNSELORS UNDER HUD PROGRAMS.

Section 106(e) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(e)) is amended—
(1) by striking paragraph (1) and inserting the following new paragraph:
“(1) Requirement for assistance.—An organization may not receive assistance for counseling activities under subsection (a)(1)(iii), (a)(2), (a)(4), (c), or (d) of this section, or under section 101(e), unless the organization, or the individuals through which the organization provides such counseling, has been certified by the Secretary under this subsection as competent to provide such counseling.”;
(2) in paragraph (2)—
(A) by inserting “and for certifying organizations” before the period at the end of the first sentence; and
(B) in the second sentence by striking “for certification” and inserting “, for certification of an organization, that each individual through which the organization provides counseling shall demonstrate, and, for certification of an individual,”;
(3) in paragraph (3), by inserting “organizations and” before “individuals”;
(4) by redesignating paragraph (3) as paragraph (5); and
5) by inserting after paragraph (2) the following new paragraphs:

“(3) Requirement under HUD programs.—Any homeownership counseling or rental housing counseling (as such terms are defined in subsection (g)(1)) required under, or provided in connection with, any program administered by the Department of Housing and Urban Development shall be provided only by organizations or counselors certified by the Secretary under this subsection as competent to provide such counseling.

“(4) Outreach.—The Secretary shall take such actions as the Secretary considers appropriate to ensure that individuals and organizations providing homeownership or rental housing counseling are aware of the certification requirements and standards of this subsection and of the training and certification programs under subsection (f).”.

SEC. 1446. STUDY OF DEFAULTS AND FORECLOSURES.

The Secretary of Housing and Urban Development shall conduct an extensive study of the root causes of default and foreclosure of home loans, using as much empirical data as are available. The study shall also examine the role of escrow accounts in helping prime and nonprime borrowers to avoid defaults and foreclosures, and the role of computer registries of mortgages, including those used for trading mortgage loans. Not later than 12 months after the date of the enactment of this Act, the Secretary shall submit to the Congress a preliminary report regarding the study. Not later than 24 months after such date of enactment, the Secretary shall submit a final report regarding the results of the study, which shall include any recommended legislation relating to the study, and recommendations for best practices and for a process to identify populations that need counseling the most.

SEC. 1447. DEFAULT AND FORECLOSURE DATABASE.

(a) Establishment.—The Secretary of Housing and Urban Development and the Director of the Bureau, in consultation with the Federal agencies responsible for regulation of banking and financial institutions involved in residential mortgage lending and servicing, shall establish and maintain a database of information on foreclosures and defaults on mortgage loans for one- to four-unit residential properties and shall make such information publicly available, subject to subsection (e).

(b) Census Tract Data.—Information in the database may be collected, aggregated, and made available on a census tract basis.

(c) Requirements.—Information collected and made available through the database shall include—

(1) the number and percentage of such mortgage loans that are delinquent by more than 30 days;

(2) the number and percentage of such mortgage loans that are delinquent by more than 90 days;

(3) the number and percentage of such properties that are real estate-owned;

(4) number and percentage of such mortgage loans that are in the foreclosure process;

(5) the number and percentage of such mortgage loans that have an outstanding principal obligation amount that is greater than the value of the property for which the loan was made; and
(6) such other information as the Secretary of Housing and Urban Development and the Director of the Bureau consider appropriate.

(d) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to encourage discriminatory or unsound allocation of credit or lending policies or practices.

(e) PRIVACY AND CONFIDENTIALITY.—In establishing and maintaining the database described in subsection (a), the Secretary of Housing and Urban Development and the Director of the Bureau shall—

(1) be subject to the standards applicable to Federal agencies for the protection of the confidentiality of personally identifiable information and for data security and integrity;

(2) implement the necessary measures to conform to the standards for data integrity and security described in paragraph (1); and

(3) collect and make available information under this section, in accordance with paragraphs (5) and (6) of section 1022(c) and the rules prescribed under such paragraphs, in order to protect privacy and confidentiality.

SEC. 1448. DEFINITIONS FOR COUNSELING-RELATED PROGRAMS.

Section 106 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x), as amended by the preceding provisions of this subtitle, is amended by adding at the end the following new subsection:

“(h) DEFINITIONS.—For purposes of this section:

“(1) NONPROFIT ORGANIZATION.—The term ‘nonprofit organization’ has the meaning given such term in section 104(5) of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12704(5)), except that subparagraph (D) of such section shall not apply for purposes of this section.

“(2) STATE.—The term ‘State’ means each of the several States, the Commonwealth of Puerto Rico, the District of Columbia, the Commonwealth of the Northern Mariana Islands, Guam, the Virgin Islands, American Samoa, the Trust Territories of the Pacific, or any other possession of the United States.

“(3) UNIT OF GENERAL LOCAL GOVERNMENT.—The term ‘unit of general local government’ means any city, county, parish, town, township, borough, village, or other general purpose political subdivision of a State.

“(4) HUD-APPROVED COUNSELING AGENCY.—The term ‘HUD-approved counseling agency’ means a private or public nonprofit organization that is—

“(A) exempt from taxation under section 501(c) of the Internal Revenue Code of 1986; and

“(B) certified by the Secretary to provide housing counseling services.

“(5) STATE HOUSING FINANCE AGENCY.—The term ‘State housing finance agency’ means any public body, agency, or instrumentality specifically created under State statute that is authorized to finance activities designed to provide housing and related facilities throughout an entire State through land acquisition, construction, or rehabilitation.”.
SEC. 1449. ACCOUNTABILITY AND TRANSPARENCY FOR GRANT RECIPIENTS.

Section 106 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x), as amended by the preceding provisions of this subtitle, is amended by adding at the end the following:

"(i) ACCOUNTABILITY FOR RECIPIENTS OF COVERED ASSISTANCE.—

"(1) TRACKING OF FUNDS.—The Secretary shall—

"(A) develop and maintain a system to ensure that any organization or entity that receives any covered assistance uses all amounts of covered assistance in accordance with this section, the regulations issued under this section, and any requirements or conditions under which such amounts were provided; and

"(B) require any organization or entity, as a condition of receipt of any covered assistance, to agree to comply with such requirements regarding covered assistance as the Secretary shall establish, which shall include—

"(i) appropriate periodic financial and grant activity reporting, record retention, and audit requirements for the duration of the covered assistance to the organization or entity to ensure compliance with the limitations and requirements of this section, the regulations under this section, and any requirements or conditions under which such amounts were provided; and

"(ii) any other requirements that the Secretary determines are necessary to ensure appropriate administration and compliance.

"(2) MISUSE OF FUNDS.—If any organization or entity that receives any covered assistance is determined by the Secretary to have used any covered assistance in a manner that is materially in violation of this section, the regulations issued under this section, or any requirements or conditions under which such assistance was provided—

"(A) the Secretary shall require that, within 12 months after the determination of such misuse, the organization or entity shall reimburse the Secretary for such misused amounts and return to the Secretary any such amounts that remain unused or uncommitted for use; and

"(B) such organization or entity shall be ineligible, at any time after such determination, to apply for or receive any further covered assistance.

The remedies under this paragraph are in addition to any other remedies that may be available under law.

"(3) COVERED ASSISTANCE.—For purposes of this subsection, the term 'covered assistance' means any grant or other financial assistance provided under this section."

SEC. 1450. UPDATING AND SIMPLIFICATION OF MORTGAGE INFORMATION BOOKLET.

Section 5 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2604) is amended—

(1) in the section heading, by striking “SPECIAL” and inserting “HOME BUYING”;

(2) by striking subsections (a) and (b) and inserting the following new subsections:
“(a) **Preparation and Distribution.**—The Director of the Bureau of Consumer Financial Protection (hereafter in this section referred to as the ‘Director’) shall prepare, at least once every 5 years, a booklet to help consumers applying for federally related mortgage loans to understand the nature and costs of real estate settlement services. The Director shall prepare the booklet in various languages and cultural styles, as the Director determines to be appropriate, so that the booklet is understandable and accessible to homebuyers of different ethnic and cultural backgrounds. The Director shall distribute such booklets to all lenders that make federally related mortgage loans. The Director shall also distribute to such lenders lists, organized by location, of homeownership counselors certified under section 106(e) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(e)) for use in complying with the requirement under subsection (c) of this section.

“(b) **Contents.**—Each booklet shall be in such form and detail as the Director shall prescribe and, in addition to such other information as the Director may provide, shall include in plain and understandable language the following information:

“(1) A description and explanation of the nature and purpose of the costs incident to a real estate settlement or a federally related mortgage loan. The description and explanation shall provide general information about the mortgage process as well as specific information concerning, at a minimum—

“(A) balloon payments;
“(B) prepayment penalties;
“(C) the advantages of prepayment; and
“(D) the trade-off between closing costs and the interest rate over the life of the loan.

“(2) An explanation and sample of the uniform settlement statement required by section 4.

“(3) A list and explanation of lending practices, including those prohibited by the Truth in Lending Act or other applicable Federal law, and of other unfair practices and unreasonable or unnecessary charges to be avoided by the prospective buyer with respect to a real estate settlement.

“(4) A list and explanation of questions a consumer obtaining a federally related mortgage loan should ask regarding the loan, including whether the consumer will have the ability to repay the loan, whether the consumer sufficiently shopped for the loan, whether the loan terms include prepayment penalties or balloon payments, and whether the loan will benefit the borrower.

“(5) An explanation of the right of rescission as to certain transactions provided by sections 125 and 129 of the Truth in Lending Act.

“(6) A brief explanation of the nature of a variable rate mortgage and a reference to the booklet entitled ‘Consumer Handbook on Adjustable Rate Mortgages’, published by the Director, or to any suitable substitute of such booklet that the Director may subsequently adopt pursuant to such section.

“(7) A brief explanation of the nature of a home equity line of credit and a reference to the pamphlet required to be provided under section 127A of the Truth in Lending Act.

“(8) Information about homeownership counseling services made available pursuant to section 106(a)(4) of the Housing
and Urban Development Act of 1968 (12 U.S.C. 1701x(a)(4)),
a recommendation that the consumer use such services, and
notification that a list of certified providers of homeownership
counseling in the area, and their contact information, is avail-
able.

“(9) An explanation of the nature and purpose of escrow
accounts when used in connection with loans secured by resi-
dential real estate and the requirements under section 10 of
this Act regarding such accounts.

“(10) An explanation of the choices available to buyers
of residential real estate in selecting persons to provide nec-
essary services incidental to a real estate settlement.

“(11) An explanation of a consumer’s responsibilities, liabil-
ities, and obligations in a mortgage transaction.

“(12) An explanation of the nature and purpose of real
estate appraisals, including the difference between an appraisal
and a home inspection.

“(13) Notice that the Office of Housing of the Department
of Housing and Urban Development has made publicly available
a brochure regarding loan fraud and a World Wide Web address
and toll-free telephone number for obtaining the brochure.
The booklet prepared pursuant to this section shall take into consid-
eration differences in real estate settlement procedures that may
exist among the several States and territories of the United States
and among separate political subdivisions within the same State
and territory.”;

(3) in subsection (c), by inserting at the end the following
new sentence: “Each lender shall also include with the booklet
a reasonably complete or updated list of homeownership coun-
selors who are certified pursuant to section 106(e) of the
Housing and Urban Development Act of 1968 (12 U.S.C.
1701x(e)) and located in the area of the lender.”; and

(4) in subsection (d), by inserting after the period at the
end of the first sentence the following: “The lender shall provide
the booklet in the version that is most appropriate for the
person receiving it.”.

SEC. 1451. HOME INSPECTION COUNSELING.

(a) PUBLIC OUTREACH.—

(1) IN GENERAL.—The Secretary of Housing and Urban
Development (in this section referred to as the “Secretary”) shall take such actions as may be necessary to inform potential
homebuyers of the availability and importance of obtaining
an independent home inspection. Such actions shall include—

(A) publication of the HUD/FHA form HUD 92564–
CN entitled “For Your Protection: Get a Home Inspection”,
in both English and Spanish languages;

(B) publication of the HUD/FHA booklet entitled “For
Your Protection: Get a Home Inspection”, in both English
and Spanish languages;

(C) development and publication of a HUD booklet
entitled “For Your Protection—Get a Home Inspection” that
does not reference FHA-insured homes, in both English
and Spanish languages; and

(D) publication of the HUD document entitled “Ten
Important Questions To Ask Your Home Inspector”, in
both English and Spanish languages.
(2) AVAILABILITY.—The Secretary shall make the materials specified in paragraph (1) available for electronic access and, where appropriate, inform potential homebuyers of such availability through home purchase counseling public service announcements and toll-free telephone hotlines of the Department of Housing and Urban Development. The Secretary shall give special emphasis to reaching first-time and low-income homebuyers with these materials and efforts.

(3) UPDATING.—The Secretary may periodically update and revise such materials, as the Secretary determines to be appropriate.

(b) REQUIREMENT FOR FHA-APPROVED LENDERS.—Each mortgagee approved for participation in the mortgage insurance programs under title II of the National Housing Act shall provide prospective homebuyers, at first contact, whether upon pre-qualification, pre-approval, or initial application, the materials specified in subparagraphs (A), (B), and (D) of subsection (a)(1).

(c) REQUIREMENTS FOR HUD-APPROVED COUNSELING AGENCIES.—Each counseling agency certified pursuant by the Secretary to provide housing counseling services shall provide each of their clients, as part of the home purchase counseling process, the materials specified in subparagraphs (C) and (D) of subsection (a)(1).

(d) TRAINING.—Training provided the Department of Housing and Urban Development for housing counseling agencies, whether such training is provided directly by the Department or otherwise, shall include—

(1) providing information on counseling potential homebuyers of the availability and importance of getting an independent home inspection;

(2) providing information about the home inspection process, including the reasons for specific inspections such as radon and lead-based paint testing;

(3) providing information about advising potential homebuyers on how to locate and select a qualified home inspector; and

(4) review of home inspection public outreach materials of the Department.

SEC. 1452. WARNINGS TO HOMEOWNERS OF FORECLOSURE RESCUE SCAMS.

(a) ASSISTANCE TO NRC.—Notwithstanding any other provision of law, of any amounts made available for any fiscal year pursuant to section 106(a)(4)(F) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(a)(4)(F)) (as added by section 1444), 10 percent shall be used only for assistance to the Neighborhood Reinvestment Corporation for activities, in consultation with servicers of residential mortgage loans, to provide notice to borrowers under such loans who are delinquent with respect to payments due under such loans that makes such borrowers aware of the dangers of fraudulent activities associated with foreclosure.

(b) NOTICE.—The Neighborhood Reinvestment Corporation, in consultation with servicers of residential mortgage loans, shall use the amounts provided pursuant to subsection (a) to carry out activities to inform borrowers under residential mortgage loans—

(1) that the foreclosure process is complex and can be confusing;
(2) that the borrower may be approached during the foreclosure process by persons regarding saving their home and they should use caution in any such dealings;

(3) that there are Federal Government and nonprofit agencies that may provide information about the foreclosure process, including the Department of Housing and Urban Development;

(4) that they should contact their lender immediately, contact the Department of Housing and Urban Development to find a housing counseling agency certified by the Department to assist in avoiding foreclosure, or visit the Department’s website regarding tips for avoiding foreclosure; and

(5) of the telephone number of the loan servicer or successor, the telephone number of the Department of Housing and Urban Development housing counseling line, and the Uniform Resource Locators (URLs) for the Department of Housing and Urban Development Web sites for housing counseling and for tips for avoiding foreclosure.

Subtitle E—Mortgage Servicing

SEC. 1461. ESCROW AND IMPOUND ACCOUNTS RELATING TO CERTAIN CONSUMER CREDIT TRANSACTIONS.

(a) IN GENERAL.—Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.) is amended by inserting after section 129C (as added by section 1411) the following new section:

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§ 129D. Escrow or impound accounts relating to certain consumer credit transactions

(a) IN GENERAL.—Except as provided in subsection (b), (c), (d), or (e), a creditor, in connection with the consummation of a consumer credit transaction secured by a first lien on the principal dwelling of the consumer, other than a consumer credit transaction under an open end credit plan or a reverse mortgage, shall establish, before the consummation of such transaction, an escrow or impound account for the payment of taxes and hazard insurance, and, if applicable, flood insurance, mortgage insurance, ground rents, and any other required periodic payments or premiums with respect to the property or the loan terms, as provided in, and in accordance with, this section.

(b) WHEN REQUIRED.—No impound, trust, or other type of account for the payment of property taxes, insurance premiums, or other purposes relating to the property may be required as a condition of a real property sale contract or a loan secured by a first deed of trust or mortgage on the principal dwelling of the consumer, other than a consumer credit transaction under an open end credit plan or a reverse mortgage, except when—

(1) any such impound, trust, or other type of escrow or impound account for such purposes is required by Federal or State law;

(2) a loan is made, guaranteed, or insured by a State or Federal governmental lending or insuring agency;

(3) the transaction is secured by a first mortgage or lien on the consumer’s principal dwelling having an original principal obligation amount that—

(A) does not exceed the amount of the maximum limitation on the original principal obligation of mortgage
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in effect for a residence of the applicable size, as of the date such interest rate set, pursuant to the sixth sentence of section 305(a)(2) the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454(a)(2)), and the annual percentage rate will exceed the average prime offer rate as defined in section 129C by 1.5 or more percentage points; or

(B) exceeds the amount of the maximum limitation on the original principal obligation of mortgage in effect for a residence of the applicable size, as of the date such interest rate set, pursuant to the sixth sentence of section 305(a)(2) the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454(a)(2)), and the annual percentage rate will exceed the average prime offer rate as defined in section 129C by 2.5 or more percentage points; or

(4) so required pursuant to regulation.

(c) Exemptions.—The Board may, by regulation, exempt from the requirements of subsection (a) a creditor that—

(1) operates predominantly in rural or underserved areas;

(2) together with all affiliates, has total annual mortgage loan originations that do not exceed a limit set by the Board;

(3) retains its mortgage loan originations in portfolio; and

(4) meets any asset size threshold and any other criteria the Board may establish, consistent with the purposes of this subtitle.

(d) Duration of Mandatory Escrow or Impound Account.—An escrow or impound account established pursuant to subsection (b) shall remain in existence for a minimum period of 5 years, beginning with the date of the consummation of the loan, unless and until—

(1) such borrower has sufficient equity in the dwelling securing the consumer credit transaction so as to no longer be required to maintain private mortgage insurance;

(2) such borrower is delinquent;

(3) such borrower otherwise has not complied with the legal obligation, as established by rule; or

(4) the underlying mortgage establishing the account is terminated.

(e) Limited Exemptions for Loans Secured by Shares in a Cooperative or in Which an Association Must Maintain a Master Insurance Policy.—Escrow accounts need not be established for loans secured by shares in a cooperative. Insurance premiums need not be included in escrow accounts for loans secured by dwellings or units, where the borrower must join an association as a condition of ownership, and that association has an obligation to the dwelling or unit owners to maintain a master policy insuring the dwellings or units.

(f) Clarification on Escrow Accounts for Loans Not Meeting Statutory Test.—For mortgages not covered by the requirements of subsection (b), no provision of this section shall be construed as precluding the establishment of an impound, trust, or other type of account for the payment of property taxes, insurance premiums, or other purposes relating to the property—

(1) on terms mutually agreeable to the parties to the loan;

(2) at the discretion of the lender or servicer, as provided by the contract between the lender or servicer and the borrower; or
“(3) pursuant to the requirements for the escrowing of flood insurance payments for regulated lending institutions in section 102(d) of the Flood Disaster Protection Act of 1973.

“(g) ADMINISTRATION OF MANDATORY ESCROW OR IMPOUND ACCOUNTS.—

“(1) IN GENERAL.—Except as may otherwise be provided for in this title or in regulations prescribed by the Board, escrow or impound accounts established pursuant to subsection (b) shall be established in a federally insured depository institution or credit union.

“(2) ADMINISTRATION.—Except as provided in this section or regulations prescribed under this section, an escrow or impound account subject to this section shall be administered in accordance with—

“(A) the Real Estate Settlement Procedures Act of 1974 and regulations prescribed under such Act;

“(B) the Flood Disaster Protection Act of 1973 and regulations prescribed under such Act; and

“(C) the law of the State, if applicable, where the real property securing the consumer credit transaction is located.

“(3) APPLICABILITY OF PAYMENT OF INTEREST.—If prescribed by applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held in any impound, trust, or escrow account that is subject to this section in the manner as prescribed by that applicable State or Federal law.

“(4) PENALTY COORDINATION WITH RESPA.—Any action or omission on the part of any person which constitutes a violation of the Real Estate Settlement Procedures Act of 1974 or any regulation prescribed under such Act for which the person has paid any fine, civil money penalty, or other damages shall not give rise to any additional fine, civil money penalty, or other damages under this section, unless the action or omission also constitutes a direct violation of this section.

“(h) DISCLOSURES RELATING TO MANDATORY ESCROW OR IMPOUND ACCOUNT.—In the case of any impound, trust, or escrow account that is required under subsection (b), the creditor shall disclose by written notice to the consumer at least 3 business days before the consummation of the consumer credit transaction giving rise to such account or in accordance with timeframes established in prescribed regulations the following information:

“(1) The fact that an escrow or impound account will be established at consummation of the transaction.

“(2) The amount required at closing to initially fund the escrow or impound account.

“(3) The amount, in the initial year after the consummation of the transaction, of the estimated taxes and hazard insurance, including flood insurance, if applicable, and any other required periodic payments or premiums that reflects, as appropriate, either the taxable assessed value of the real property securing the transaction, including the value of any improvements on the property or to be constructed on the property (whether or not such construction will be financed from the proceeds of the transaction) or the replacement costs of the property.

“(4) The estimated monthly amount payable to be escrowed for taxes, hazard insurance (including flood insurance, if
applicable) and any other required periodic payments or premiums.

“(5) The fact that, if the consumer chooses to terminate the account in the future, the consumer will become responsible for the payment of all taxes, hazard insurance, and flood insurance, if applicable, as well as any other required periodic payments or premiums on the property unless a new escrow or impound account is established.

“(6) Such other information as the Board determines necessary for the protection of the consumer.

“(i) **DEFINITIONS.**—For purposes of this section, the following definitions shall apply:

“(1) **Flood Insurance.**—The term ‘flood insurance’ means flood insurance coverage provided under the national flood insurance program pursuant to the National Flood Insurance Act of 1968.

“(2) **Hazard Insurance.**—The term ‘hazard insurance’ shall have the same meaning as provided for ‘hazard insurance’, ‘casualty insurance’, ‘homeowner’s insurance’, or other similar term under the law of the State where the real property securing the consumer credit transaction is located.”.

(b) **EXEMPTIONS AND MODIFICATIONS.**—The Board may prescribe rules that revise, add to, or subtract from the criteria of section 129D(b) of the Truth in Lending Act if the Board determines that such rules are in the interest of consumers and in the public interest.

(c) **CLERICAL AMENDMENT.**—The table of sections for chapter 2 of the Truth in Lending Act is amended by inserting after the item relating to section 129C (as added by section 1411) the following new item:

“129D. Escrow or impound accounts relating to certain consumer credit transactions.”.

**SEC. 1462. DISCLOSURE NOTICE REQUIRED FOR CONSUMERS WHO WAIVE ESCROW SERVICES.**

Section 129D of the Truth in Lending Act (as added by section 1461) is amended by adding at the end the following new subsection:

“(j) **DISCLOSURE NOTICE REQUIRED FOR CONSUMERS WHO WAIVE ESCROW SERVICES.**—

“(1) **IN GENERAL.**—If—

“(A) an impound, trust, or other type of account for the payment of property taxes, insurance premiums, or other purposes relating to real property securing a consumer credit transaction is not established in connection with the transaction; or

“(B) a consumer chooses, and provides written notice to the creditor or servicer of such choice, at any time after such an account is established in connection with any such transaction and in accordance with any statute, regulation, or contractual agreement, to close such account, the creditor or servicer shall provide a timely and clearly written disclosure to the consumer that advises the consumer of the responsibilities of the consumer and implications for the consumer in the absence of any such account.

“(2) **DISCLOSURE REQUIREMENTS.**—Any disclosure provided to a consumer under paragraph (1) shall include the following:
“(A) Information concerning any applicable fees or costs associated with either the non-establishment of any such account at the time of the transaction, or any subsequent closure of any such account.

“(B) A clear and prominent statement that the consumer is responsible for personally and directly paying the non-escrowed items, in addition to paying the mortgage loan payment, in the absence of any such account, and the fact that the costs for taxes, insurance, and related fees can be substantial.

“(C) A clear explanation of the consequences of any failure to pay non-escrowed items, including the possible requirement for the forced placement of insurance by the creditor or servicer and the potentially higher cost (including any potential commission payments to the servicer) or reduced coverage for the consumer in the event of any such creditor-placed insurance.

“(D) Such other information as the Board determines necessary for the protection of the consumer.”

SEC. 1463. REAL ESTATE SETTLEMENT PROCEDURES ACT OF 1974 AMENDMENTS.

(a) Servicer Prohibitions.—Section 6 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2605) is amended by adding at the end the following new subsections:

“(k) Servicer Prohibitions.—

“(1) In general.—A servicer of a federally related mortgage shall not—

“(A) obtain force-placed hazard insurance unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract’s requirements to maintain property insurance;

“(B) charge fees for responding to valid qualified written requests (as defined in regulations which the Bureau of Consumer Financial Protection shall prescribe) under this section;

“(C) fail to take timely action to respond to a borrower’s requests to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer’s duties;

“(D) fail to respond within 10 business days to a request from a borrower to provide the identity, address, and other relevant contact information about the owner or assignee of the loan; or

“(E) fail to comply with any other obligation found by the Bureau of Consumer Financial Protection, by regulation, to be appropriate to carry out the consumer protection purposes of this Act.

“(2) Force-placed insurance defined.—For purposes of this subsection and subsections (l) and (m), the term ‘force-placed insurance’ means hazard insurance coverage obtained by a servicer of a federally related mortgage when the borrower has failed to maintain or renew hazard insurance on such property as required of the borrower under the terms of the mortgage.

“(l) Requirements for force-placed insurance.—A servicer of a federally related mortgage shall not be construed as having
a reasonable basis for obtaining force-placed insurance unless the requirements of this subsection have been met.

“(1) Written notices to borrower.—A servicer may not impose any charge on any borrower for force-placed insurance with respect to any property securing a federally related mortgage unless—

(A) the servicer has sent, by first-class mail, a written notice to the borrower containing—

"(i) a reminder of the borrower's obligation to maintain hazard insurance on the property securing the federally related mortgage;

"(ii) a statement that the servicer does not have evidence of insurance coverage of such property;

"(iii) a clear and conspicuous statement of the procedures by which the borrower may demonstrate that the borrower already has insurance coverage; and

"(iv) a statement that the servicer may obtain such coverage at the borrower's expense if the borrower does not provide such demonstration of the borrower's existing coverage in a timely manner;

(B) the servicer has sent, by first-class mail, a second written notice, at least 30 days after the mailing of the notice under subparagraph (A) that contains all the information described in each clause of such subparagraph; and

(C) the servicer has not received from the borrower any demonstration of hazard insurance coverage for the property securing the mortgage by the end of the 15-day period beginning on the date the notice under subparagraph (B) was sent by the servicer.

“(2) Sufficiency of demonstration.—A servicer of a federally related mortgage shall accept any reasonable form of written confirmation from a borrower of existing insurance coverage, which shall include the existing insurance policy number along with the identity of, and contact information for, the insurance company or agent, or as otherwise required by the Bureau of Consumer Financial Protection.

“(3) Termination of force-placed insurance.—Within 15 days of the receipt by a servicer of confirmation of a borrower's existing insurance coverage, the servicer shall—

(A) terminate the force-placed insurance; and

(B) refund to the consumer all force-placed insurance premiums paid by the borrower during any period during which the borrower's insurance coverage and the force-placed insurance coverage were each in effect, and any related fees charged to the consumer's account with respect to the force-placed insurance during such period.

“(4) Clarification with respect to flood disaster protection act.—No provision of this section shall be construed as prohibiting a servicer from providing simultaneous or concurrent notice of a lack of flood insurance pursuant to section 102(e) of the Flood Disaster Protection Act of 1973.

“(m) Limitations on force-placed insurance charges.—All charges, apart from charges subject to State regulation as the business of insurance, related to force-placed insurance imposed on the borrower by or through the servicer shall be bona fide and reasonable.”.
(b) **INCREASE IN PENALTY AMOUNTS.**—Section 6(f) of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2605(f)) is amended—

1. in paragraphs (1)(B) and (2)(B), by striking “$1,000” each place such term appears and inserting “$2,000”; and
2. in paragraph (2)(B)(i), by striking “$500,000” and inserting “$1,000,000”.

(c) **DECREASE IN RESPONSE TIMES.**—Section 6(e) of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2605(e)) is amended—

1. in paragraph (1)(A), by striking “20 days” and inserting “5 days”;
2. in paragraph (2), by striking “60 days” and inserting “30 days”; and
3. by adding at the end the following new paragraph:

   “(4) **LIMITED EXTENSION OF RESPONSE TIME.**—The 30-day period described in paragraph (2) may be extended for not more than 15 days if, before the end of such 30-day period, the servicer notifies the borrower of the extension and the reasons for the delay in responding.”.

(d) **PROMPT REFUND OF ESCROW ACCOUNTS UPON PAYOFF.**—Section 6(g) of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2605(g)) is amended by adding at the end the following new sentence: “Any balance in any such account that is within the servicer’s control at the time the loan is paid off shall be promptly returned to the borrower within 20 business days or credited to a similar account for a new mortgage loan to the borrower with the same lender.”.

### SEC. 1464. TRUTH IN LENDING ACT AMENDMENTS.

(a) **REQUIREMENTS FOR PROMPT CREDITING OF HOME LOAN PAYMENTS.**—Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.) is amended by inserting after section 129E (as added by section 1472) the following new section:

**§ 129F. Requirements for prompt crediting of home loan payments**

“(a) **IN GENERAL.**—In connection with a consumer credit transaction secured by a consumer’s principal dwelling, no servicer shall fail to credit a payment to the consumer’s loan account as of the date of receipt, except when a delay in crediting does not result in any charge to the consumer or in the reporting of negative information to a consumer reporting agency, except as required in subsection (b).

“(b) **EXCEPTION.**—If a servicer specifies in writing requirements for the consumer to follow in making payments, but accepts a payment that does not conform to the requirements, the servicer shall credit the payment as of 5 days after receipt.”.

(b) **REQUESTS FOR PAYOFF AMOUNTS.**—Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.), as amended by this title, is amended by inserting after section 129F (as added by subsection (a)) the following new section:

**§ 129G. Requests for payoff amounts of home loan**

“A creditor or servicer of a home loan shall send an accurate payoff balance within a reasonable time, but in no case more
than 7 business days, after the receipt of a written request for such balance from or on behalf of the borrower.”.

SEC. 1465. ESCROWS INCLUDED IN REPAYMENT ANALYSIS.

Section 128(b) of the Truth in Lending Act (15 U.S.C. 1638(b)) is amended by adding at the end the following new paragraph:

“(4) Repayment analysis required to include escrow payments.—

“(A) In general.—In the case of any consumer credit transaction secured by a first mortgage or lien on the principal dwelling of the consumer, other than a consumer credit transaction under an open end credit plan or a reverse mortgage, for which an impound, trust, or other type of account has been or will be established in connection with the transaction for the payment of property taxes, hazard and flood (if any) insurance premiums, or other periodic payments or premiums with respect to the property, the information required to be provided under subsection (a) with respect to the number, amount, and due dates or period of payments scheduled to repay the total of payments shall take into account the amount of any monthly payment to such account for each such repayment in accordance with section 10(a)(2) of the Real Estate Settlement Procedures Act of 1974.

“(B) Assessment value.—The amount taken into account under subparagraph (A) for the payment of property taxes, hazard and flood (if any) insurance premiums, or other periodic payments or premiums with respect to the property shall reflect the taxable assessed value of the real property securing the transaction after the consummation of the transaction, including the value of any improvements on the property or to be constructed on the property (whether or not such construction will be financed from the proceeds of the transaction), if known, and the replacement costs of the property for hazard insurance, in the initial year after the transaction.”.

Subtitle F—Appraisal Activities

SEC. 1471. PROPERTY APPRAISAL REQUIREMENTS.

Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.) is amended by inserting after 129G (as added by section 1464(b)) the following new section:

“§ 129H. Property appraisal requirements

“(a) In general.—A creditor may not extend credit in the form of a higher-risk mortgage to any consumer without first obtaining a written appraisal of the property to be mortgaged prepared in accordance with the requirements of this section.

“(b) Appraisal requirements.—

“(1) Physical property visit.—Subject to the rules prescribed under paragraph (4), an appraisal of property to be secured by a higher-risk mortgage does not meet the requirement of this section unless it is performed by a certified or licensed appraiser who conducts a physical property visit of the interior of the mortgaged property.

“(2) Second appraisal under certain circumstances.—
“(A) IN GENERAL.—If the purpose of a higher-risk mortgage is to finance the purchase or acquisition of the mortgaged property from a person within 180 days of the purchase or acquisition of such property by that person at a price that was lower than the current sale price of the property, the creditor shall obtain a second appraisal from a different certified or licensed appraiser. The second appraisal shall include an analysis of the difference in sale prices, changes in market conditions, and any improvements made to the property between the date of the previous sale and the current sale.

“(B) NO COST TO APPLICANT.—The cost of any second appraisal required under subparagraph (A) may not be charged to the applicant.

“(3) CERTIFIED OR LICENSED APPRAISER DEFINED.—For purposes of this section, the term ‘certified or licensed appraiser’ means a person who—

“(A) is, at a minimum, certified or licensed by the State in which the property to be appraised is located; and

“(B) performs each appraisal in conformity with the Uniform Standards of Professional Appraisal Practice and title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, and the regulations prescribed under such title, as in effect on the date of the appraisal.

“(4) REGULATIONS.—

“(A) IN GENERAL.—The Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration Board, the Federal Housing Finance Agency, and the Bureau shall jointly prescribe regulations to implement this section.

“(B) EXEMPTION.—The agencies listed in subparagraph (A) may jointly exempt, by rule, a class of loans from the requirements of this subsection or subsection (a) if the agencies determine that the exemption is in the public interest and promotes the safety and soundness of creditors.

“(c) FREE COPY OF APPRAISAL.—A creditor shall provide 1 copy of each appraisal conducted in accordance with this section in connection with a higher-risk mortgage to the applicant without charge, and at least 3 days prior to the transaction closing date.

“(d) CONSUMER NOTIFICATION.—At the time of the initial mortgage application, the applicant shall be provided with a statement by the creditor that any appraisal prepared for the mortgage is for the sole use of the creditor, and that the applicant may choose to have a separate appraisal conducted at the expense of the applicant.

“(e) VIOLATIONS.—In addition to any other liability to any person under this title, a creditor found to have willfully failed to obtain an appraisal as required in this section shall be liable to the applicant or borrower for the sum of $2,000.

“(f) HIGHER-RISK MORTGAGE DEFINED.—For purposes of this section, the term ‘higher-risk mortgage’ means a residential mortgage loan, other than a reverse mortgage loan that is a qualified mortgage, as defined in section 129C, secured by a principal dwelling—
“(1) that is not a qualified mortgage, as defined in section 129C; and
“(2) with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction, as defined in section 129C, as of the date the interest rate is set—
“(A) by 1.5 or more percentage points, in the case of a first lien residential mortgage loan having an original principal obligation amount that does not exceed the amount of the maximum limitation on the original principal obligation of mortgage in effect for a residence of the applicable size, as of the date of such interest rate set, pursuant to the sixth sentence of section 305(a)(2) the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454(a)(2));
“(B) by 2.5 or more percentage points, in the case of a first lien residential mortgage loan having an original principal obligation amount that exceeds the amount of the maximum limitation on the original principal obligation of mortgage in effect for a residence of the applicable size, as of the date of such interest rate set, pursuant to the sixth sentence of section 305(a)(2) the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454(a)(2)); and
“(C) by 3.5 or more percentage points for a subordinate lien residential mortgage loan.”.

SEC. 1472. APPRAISAL INDEPENDENCE REQUIREMENTS.

(a) In General.—Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.) is amended by inserting after section 129D (as added by section 1461(a)) the following new section:

“§ 129E. Appraisal independence requirements

“(a) In General.—It shall be unlawful, in extending credit or in providing any services for a consumer credit transaction secured by the principal dwelling of the consumer, to engage in any act or practice that violates appraisal independence as described in or pursuant to regulations prescribed under this section.
“(b) Appraisal Independence.—For purposes of subsection (a), acts or practices that violate appraisal independence shall include—
“(1) any appraisal of a property offered as security for repayment of the consumer credit transaction that is conducted in connection with such transaction in which a person with an interest in the underlying transaction compensates, coerces, extorts, colludes, instructs, induces, bribes, or intimidates a person, appraisal management company, firm, or other entity conducting or involved in an appraisal, or attempts, to compensate, coerce, extort, collude, instruct, induce, bribe, or intimidate such a person, for the purpose of causing the appraised value assigned, under the appraisal, to the property to be based on any factor other than the independent judgment of the appraiser;
“(2) mischaracterizing, or suborning any mischaracterization of, the appraised value of the property securing the extension of the credit;
“(3) seeking to influence an appraiser or otherwise to encourage a targeted value in order to facilitate the making or pricing of the transaction; and
“(4) withholding or threatening to withhold timely payment for an appraisal report or for appraisal services rendered when the appraisal report or services are provided for in accordance with the contract between the parties.

“(c) EXCEPTIONS.—The requirements of subsection (b) shall not be construed as prohibiting a mortgage lender, mortgage broker, mortgage banker, real estate broker, appraisal management company, employee of an appraisal management company, consumer, or any other person with an interest in a real estate transaction from asking an appraiser to undertake 1 or more of the following:

“(1) Consider additional, appropriate property information, including the consideration of additional comparable properties to make or support an appraisal.

“(2) Provide further detail, substantiation, or explanation for the appraiser’s value conclusion.

“(3) Correct errors in the appraisal report.

“(d) PROHIBITIONS ON CONFLICTS OF INTEREST.—No certified or licensed appraiser conducting, and no appraisal management company procuring or facilitating, an appraisal in connection with a consumer credit transaction secured by the principal dwelling of a consumer may have a direct or indirect interest, financial or otherwise, in the property or transaction involving the appraisal.

“(e) MANDATORY REPORTING.—Any mortgage lender, mortgage broker, mortgage banker, real estate broker, appraisal management company, employee of an appraisal management company, or any other person involved in a real estate transaction involving an appraisal in connection with a consumer credit transaction secured by the principal dwelling of a consumer who has a reasonable basis to believe an appraiser is failing to comply with the Uniform Standards of Professional Appraisal Practice, is violating applicable laws, or is otherwise engaging in unethical or unprofessional conduct, shall refer the matter to the applicable State appraiser certifying and licensing agency.

“(f) NO EXTENSION OF CREDIT.—In connection with a consumer credit transaction secured by a consumer's principal dwelling, a creditor who knows, at or before loan consummation, of a violation of the appraisal independence standards established in subsections (b) or (d) shall not extend credit based on such appraisal unless the creditor documents that the creditor has acted with reasonable diligence to determine that the appraisal does not materially misstate or misrepresent the value of such dwelling.

“(g) RULES AND INTERPRETIVE GUIDELINES.—

“(1) IN GENERAL.—Except as provided under paragraph (2), the Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration Board, the Federal Housing Finance Agency, and the Bureau may jointly issue rules, interpretive guidelines, and general statements of policy with respect to acts or practices that violate appraisal independence in the provision of mortgage lending services for a consumer credit transaction secured by the principal dwelling of the consumer and mortgage brokerage services for such a transaction, within the meaning of subsections (a), (b), (c), (d), (e), (f), (h), and (i).

“(2) INTERIM FINAL REGULATIONS.—The Board shall, for purposes of this section, prescribe interim final regulations no later than 90 days after the date of enactment of this section defining with specificity acts or practices that violate...
appraisal independence in the provision of mortgage lending services for a consumer credit transaction secured by the principal dwelling of the consumer or mortgage brokerage services for such a transaction and defining any terms in this section or such regulations. Rules prescribed by the Board under this paragraph shall be deemed to be rules prescribed by the agencies jointly under paragraph (1).

"(h) APPRAISAL REPORT PORTABILITY.—Consistent with the requirements of this section, the Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration Board, the Federal Housing Finance Agency, and the Bureau may jointly issue regulations that address the issue of appraisal report portability, including regulations that ensure the portability of the appraisal report between lenders for a consumer credit transaction secured by a 1-4 unit single family residence that is the principal dwelling of the consumer, or mortgage brokerage services for such a transaction.

"(i) CUSTOMARY AND REASONABLE FEE.—

"(1) IN GENERAL.—Lenders and their agents shall compensate fee appraisers at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised. Evidence for such fees may be established by objective third-party information, such as government agency fee schedules, academic studies, and independent private sector surveys. Fee studies shall exclude assignments ordered by known appraisal management companies.

"(2) FEE APPRAISER DEFINITION.—For purposes of this section, the term 'fee appraiser' means a person who is not an employee of the mortgage loan originator or appraisal management company engaging the appraiser and is—

"(A) a State licensed or certified appraiser who receives a fee for performing an appraisal and certifies that the appraisal has been prepared in accordance with the Uniform Standards of Professional Appraisal Practice; or

"(B) a company not subject to the requirements of section 1124 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3331 et seq.) that utilizes the services of State licensed or certified appraisers and receives a fee for performing appraisals in accordance with the Uniform Standards of Professional Appraisal Practice.

"(3) EXCEPTION FOR COMPLEX ASSIGNMENTS.—In the case of an appraisal involving a complex assignment, the customary and reasonable fee may reflect the increased time, difficulty, and scope of the work required for such an appraisal and include an amount over and above the customary and reasonable fee for non-complex assignments.

"(j) SUNSET.—Effective on the date the interim final regulations are promulgated pursuant to subsection (g), the Home Valuation Code of Conduct announced by the Federal Housing Finance Agency on December 23, 2008, shall have no force or effect.

"(k) PENALTIES.—

"(1) FIRST VIOLATION.—In addition to the enforcement provisions referred to in section 130, each person who violates this section shall forfeit and pay a civil penalty of not more than $10,000 for each day any such violation continues.
Applicability.

“(2) SUBSEQUENT VIOLATIONS.—In the case of any person on whom a civil penalty has been imposed under paragraph (1), paragraph (1) shall be applied by substituting ‘$20,000’ for ‘$10,000’ with respect to all subsequent violations.

“(3) ASSESSMENT.—The agency referred to in subsection (a) or (c) of section 108 with respect to any person described in paragraph (1) shall assess any penalty under this subsection to which such person is subject.”.

(b) CLERICAL AMENDMENT.—The table of sections for chapter 2 of the Truth in Lending Act is amended by inserting after the item relating to section 129D (as added by section 1461(c)) the following new items:

“129E. Appraisal independence requirements.
“129F. Requirements for prompt crediting of home loan payments.
“129G. Requests for payoff amounts of home loan.
“129H. Property appraisal requirements.”.

(c) DEFERENCE.—Section 105 of the Truth in Lending Act (15 U.S.C. 1604) is amended by adding at the end the following:

“(h) DEFERENCE.—Notwithstanding any power granted to any Federal agency under this title, the deference that a court affords to the Bureau with respect to a determination made by the Bureau relating to the meaning or interpretation of any provision of this title, other than section 129E or 129H, shall be applied as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of this title.”.

(d) CONFORMING AMENDMENTS IN TITLE X NOT APPLICABLE TO SECTIONS 129E AND 129H.—Notwithstanding section 1099A, the term “Board” in sections 129E and 129H, as added by this subtitle, shall not be substituted by the term “Bureau”.

SEC. 1473. AMENDMENTS RELATING TO APPRAISAL SUBCOMMITTEE OF FFIEC, APPRAISER INDEPENDENCE MONITORING, APPROVED APPRAISER EDUCATION, APPRAISAL MANAGEMENT COMPANIES, APPRAISER COMPLAINT HOTLINE, AUTOMATED VALUATION MODELS, AND BROKER PRICE OPINIONS.

(a) THRESHOLD LEVELS.—Section 1112(b) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3341(b)) is amended by inserting before the period the following: “, and receives concurrence from the Bureau of Consumer Financial Protection that such threshold level provides reasonable protection for consumers who purchase 1–4 unit single-family residences”.

(b) ANNUAL REPORT OF APPRAISAL SUBCOMMITTEE.—Section 1103(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3332(a)) is amended at the end by inserting the following new paragraph:

“(5) transmit an annual report to the Congress not later than June 15 of each year that describes the manner in which each function assigned to the Appraisal Subcommittee has been carried out during the preceding year. The report shall also detail the activities of the Appraisal Subcommittee, including the results of all audits of State appraiser regulatory agencies, and provide an accounting of disapproved actions and warnings taken in the previous year, including a description of the conditions causing the disapproval and actions taken to achieve compliance.”.
(c) OPEN MEETINGS.—Section 1104(b) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3333(b)) is amended—

(1) by inserting “in public session after notice in the Federal Register, but may close certain portions of these meetings related to personnel and review of preliminary State audit reports,” after “shall meet”; and

(2) by adding after the final period the following: “The subject matter discussed in any closed or executive session shall be described in the Federal Register notice of the meeting.”.

(d) REGULATIONS.—Section 1106 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3335) is amended—

(1) by inserting “prescribe regulations in accordance with chapter 5 of title 5, United States Code (commonly referred to as the Administrative Procedures Act) after notice and opportunity for comment,” after “hold hearings”; and

(2) at the end by inserting “Any regulations prescribed by the Appraisal Subcommittee shall (unless otherwise provided in this title) be limited to the following functions: temporary practice, national registry, information sharing, and enforcement. For purposes of prescribing regulations, the Appraisal Subcommittee shall establish an advisory committee of industry participants, including appraisers, lenders, consumer advocates, real estate agents, and government agencies, and hold meetings as necessary to support the development of regulations.”.

(e) APPRAISAL REVIEWS AND COMPLEX APPRAISALS.—

(1) SECTION 1110.—Section 1110 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3339) is amended—

(A) in paragraph (1), by striking “and”;

(B) in paragraph (2), by striking the period at the end and inserting “; and”;

(C) by inserting after paragraph (2) the following:

“(3) that such appraisals shall be subject to appropriate review for compliance with the Uniform Standards of Professional Appraisal Practice.”.

(2) SECTION 1113.—Section 1113 of the Financial Institutions and Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3342) is amended by inserting before the period the following: “, where a complex 1-to-4 unit single family residential appraisal means an appraisal for which the property to be appraised, the form of ownership, the property characteristics, or the market conditions are atypical”.

(f) APPRAISAL MANAGEMENT SERVICES.—

(1) SUPERVISION OF THIRD PARTY PROVIDERS OF APPRAISAL MANAGEMENT SERVICES.—Section 1103(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3332(a)) (as previously amended by this section) is amended—

(A) by amending paragraph (1) to read as follows:

“(1) monitor the requirements established by States—

“(A) for the certification and licensing of individuals who are qualified to perform appraisals in connection with federally related transactions, including a code of professional responsibility; and
“(B) for the registration and supervision of the operations and activities of an appraisal management company;”;

(B) by adding at the end the following new paragraph:

“(6) maintain a national registry of appraisal management companies that either are registered with and subject to supervision of a State appraiser certifying and licensing agency or are operating subsidiaries of a Federally regulated financial institution.”.

(2) APPRAISAL MANAGEMENT COMPANY MINIMUM REQUIREMENTS.—Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3331 et seq.) is amended by adding at the end the following new section (and amending the table of contents accordingly):

“SEC. 1124. APPRAISAL MANAGEMENT COMPANY MINIMUM REQUIREMENTS.

“(a) IN GENERAL.—The Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration Board, the Federal Housing Finance Agency, and the Bureau of Consumer Financial Protection shall jointly, by rule, establish minimum requirements to be applied by a State in the registration of appraisal management companies. Such requirements shall include a requirement that such companies—

“(1) register with and be subject to supervision by a State appraiser certifying and licensing agency in each State in which such company operates;

“(2) verify that only licensed or certified appraisers are used for federally related transactions;

“(3) require that appraisals coordinated by an appraisal management company comply with the Uniform Standards of Professional Appraisal Practice; and

“(4) require that appraisals are conducted independently and free from inappropriate influence and coercion pursuant to the appraisal independence standards established under section 129E of the Truth in Lending Act.

“(b) RELATION TO STATE LAW.—Nothing in this section shall be construed to prevent States from establishing requirements in addition to any rules promulgated under subsection (a).

“(c) FEDERALLY REGULATED FINANCIAL INSTITUTIONS.—The requirements of subsection (a) shall apply to an appraisal management company that is a subsidiary owned and controlled by a financial institution and regulated by a Federal financial institution regulatory agency. An appraisal management company that is a subsidiary owned and controlled by a financial institution regulated by a Federal financial institution regulatory agency shall not be required to register with a State.

“(d) REGISTRATION LIMITATIONS.—An appraisal management company shall not be registered by a State or included on the national registry if such company, in whole or in part, directly or indirectly, is owned by any person who has had an appraiser license or certificate refused, denied, cancelled, surrendered in lieu of revocation, or revoked in any State. Additionally, each person that owns more than 10 percent of an appraisal management company shall be of good moral character, as determined by the State appraiser certifying and licensing agency, and shall submit to a
background investigation carried out by the State appraiser certifying and licensing agency.

“(e) REPORTING.—The Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration Board, the Federal Housing Finance Agency, and the Bureau of Consumer Financial Protection shall jointly promulgate regulations for the reporting of the activities of appraisal management companies to the Appraisal Subcommittee in determining the payment of the annual registry fee.

“(f) EFFECTIVE DATE.—

“(1) IN GENERAL.—No appraisal management company may perform services related to a federally related transaction in a State after the date that is 36 months after the date on which the regulations required to be prescribed under subsection (a) are prescribed in final form unless such company is registered with such State or subject to oversight by a Federal financial institutions regulatory agency.

“(2) EXTENSION OF EFFECTIVE DATE.—Subject to the approval of the Council, the Appraisal Subcommittee may extend by an additional 12 months the requirements for the registration and supervision of appraisal management companies if it makes a written finding that a State has made substantial progress in establishing a State appraisal management company registration and supervision system that appears to conform with the provisions of this title.”.

“(3) STATE APPRAISER CERTIFYING AND LICENSING AGENCY AUTHORITY.—Section 1117 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3346) is amended by adding at the end the following: “The duties of such agency may additionally include the registration and supervision of appraisal management companies and the addition of information about the appraisal management company to the national registry.”.

“(4) APPRAISAL MANAGEMENT COMPANY DEFINITION.—Section 1121 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3350) is amended by adding at the end the following:

“(11) APPRAISAL MANAGEMENT COMPANY.—The term ‘appraisal management company’ means, in connection with valuing properties collateralizing mortgage loans or mortgages incorporated into a securitization, any external third party authorized either by a creditor of a consumer credit transaction secured by a consumer’s principal dwelling or by an underwriter of or other principal in the secondary mortgage markets, that oversees a network or panel of more than 15 certified or licensed appraisers in a State or 25 or more nationally within a given year—

“(A) to recruit, select, and retain appraisers;

“(B) to contract with licensed and certified appraisers to perform appraisal assignments;

“(C) to manage the process of having an appraisal performed, including providing administrative duties such as receiving appraisal orders and appraisal reports, submitting completed appraisal reports to creditors and underwriters, collecting fees from creditors and underwriters for
services provided, and reimbursing appraisers for services performed; or

“(D) to review and verify the work of appraisers.”.

(g) STATE AGENCY REPORTING REQUIREMENT.—Section 1109(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3338(a)) is amended—

(1) by striking “and” after the semicolon in paragraph (1);

(2) by redesignating paragraph (2) as paragraph (4); and

(3) by inserting after paragraph (1) the following new paragraphs:

“(2) transmit reports on the issuance and renewal of licenses and certifications, sanctions, disciplinary actions, license and certification revocations, and license and certification suspensions on a timely basis to the national registry of the Appraisal Subcommittee;

“(3) transmit reports on a timely basis of supervisory activities involving appraisal management companies or other third-party providers of appraisals and appraisal management services, including investigations initiated and disciplinary actions taken; and”.

(h) REGISTRY FEES MODIFIED.—

(1) IN GENERAL.—Section 1109(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3338(a)) is amended—

(A) by amending paragraph (4) (as modified by section 1473(g)) to read as follows:

“(4) collect—

“(A) from such individuals who perform or seek to perform appraisals in federally related transactions, an annual registry fee of not more than $40, such fees to be transmitted by the State agencies to the Council on an annual basis; and

“(B) from an appraisal management company that either has registered with a State appraiser certifying and licensing agency in accordance with this title or operates as a subsidiary of a federally regulated financial institution, an annual registry fee of—

“(i) in the case of such a company that has been in existence for more than a year, $25 multiplied by the number of appraisers working for or contracting with such company in such State during the previous year, but where such $25 amount may be adjusted, up to a maximum of $50, at the discretion of the Appraisal Subcommittee, if necessary to carry out the Subcommittee’s functions under this title; and

“(ii) in the case of such a company that has not been in existence for more than a year, $25 multiplied by an appropriate number to be determined by the Appraisal Subcommittee, and where such number will be used for determining the fee of all such companies that were not in existence for more than a year, but where such $25 amount may be adjusted, up to a maximum of $50, at the discretion of the Appraisal Subcommittee, if necessary to carry out the Subcommittee’s functions under this title.”; and
(B) by amending the matter following paragraph (4), as redesignated, to read as follows:

“Subject to the approval of the Council, the Appraisal Subcommittee may adjust the dollar amount of registry fees under paragraph (4)(A), up to a maximum of $80 per annum, as necessary to carry out its functions under this title. The Appraisal Subcommittee shall consider at least once every 5 years whether to adjust the dollar amount of the registry fees to account for inflation. In implementing any change in registry fees, the Appraisal Subcommittee shall provide flexibility to the States for multi-year certifications and licenses already in place, as well as a transition period to implement the changes in registry fees. In establishing the amount of the annual registry fee for an appraisal management company, the Appraisal Subcommittee shall have the discretion to impose a minimum annual registry fee for an appraisal management company to protect against the under reporting of the number of appraisers working for or contracted by the appraisal management company.”

(2) INCREMENTAL REVENUES.—Incremental revenues collected pursuant to the increases required by this subsection shall be placed in a separate account at the United States Treasury, entitled the “Appraisal Subcommittee Account”.

(i) GRANTS AND REPORTS.—Section 1109(b) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3338(b)) is amended—

(1) by striking “and” after the semicolon in paragraph (3);

(2) by striking the period at the end of paragraph (4) and inserting a semicolon;

(3) by adding at the end the following new paragraphs:

“(5) to make grants to State appraiser certifying and licensing agencies, in accordance with policies to be developed by the Appraisal Subcommittee, to support the efforts of such agencies to comply with this title, including—

“(A) the complaint process, complaint investigations, and appraiser enforcement activities of such agencies; and

“(B) the submission of data on State licensed and certified appraisers and appraisal management companies to the National appraisal registry, including information affirming that the appraiser or appraisal management company meets the required qualification criteria and formal and informal disciplinary actions; and

“(6) to report to all State appraiser certifying and licensing agencies when a license or certification is surrendered, revoked, or suspended.”.

Obligations authorized under this subsection may not exceed 75 percent of the fiscal year total of incremental increase in fees collected and deposited in the “Appraisal Subcommittee Account” pursuant to subsection (h).

(j) CRITERIA.—Section 1116 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3345) is amended—

(1) in subsection (c), by inserting “whose criteria for the licensing of a real estate appraiser currently meet or exceed the minimum criteria issued by the Appraisal Qualifications Board of The Appraisal Foundation for the licensing of real estate appraisers” before the period at the end; and
(2) by striking subsection (e) and inserting the following new subsection:

“(e) MINIMUM QUALIFICATION REQUIREMENTS.—Any requirements established for individuals in the position of ‘Trainee Appraiser’ and ‘Supervisory Appraiser’ shall meet or exceed the minimum qualification requirements of the Appraiser Qualifications Board of The Appraisal Foundation. The Appraisal Subcommittee shall have the authority to enforce these requirements.”

(k) MONITORING OF STATE APPRAISER CERTIFYING AND LICENSING AGENCIES.—Section 1118 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3347) is amended—

(1) by amending subsection (a) to read as follows:

“(a) IN GENERAL.—The Appraisal Subcommittee shall monitor each State appraiser certifying and licensing agency for the purposes of determining whether such agency—

“(1) has policies, practices, funding, staffing, and procedures that are consistent with this title;

“(2) processes complaints and completes investigations in a reasonable time period;

“(3) appropriately disciplines sanctioned appraisers and appraisal management companies;

“(4) maintains an effective regulatory program; and

“(5) reports complaints and disciplinary actions on a timely basis to the national registries on appraisers and appraisal management companies maintained by the Appraisal Subcommittee.

The Appraisal Subcommittee shall have the authority to remove a State licensed or certified appraiser or a registered appraisal management company from a national registry on an interim basis, not to exceed 90 days, pending State agency action on licensing, certification, registration, and disciplinary proceedings. The Appraisal Subcommittee and all agencies, instrumentalities, and Federally recognized entities under this title shall not recognize appraiser certifications and licenses from States whose appraisal policies, practices, funding, staffing, or procedures are found to be inconsistent with this title. The Appraisal Subcommittee shall have the authority to impose sanctions, as described in this section, against a State agency that fails to have an effective appraiser regulatory program. In determining whether such a program is effective, the Appraisal Subcommittee shall include an analysis of the licensing and certification of appraisers, the registration of appraisal management companies, the issuance of temporary licenses and certifications for appraisers, the receiving and tracking of submitted complaints against appraisers and appraisal management companies, the investigation of complaints, and enforcement actions against appraisers and appraisal management companies. The Appraisal Subcommittee shall have the authority to impose interim actions and suspensions against a State agency as an alternative to, or in advance of, the derecognition of a State agency.”

(2) in subsection (b)(2), by inserting after “authority” the following: “or sufficient funding”.

(l) RECIPROCITY.—Subsection (b) of section 1122 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3351(b)) is amended to read as follows:

“(b) RECIPROCITY.—Notwithstanding any other provisions of this title, a federally related transaction shall not be appraised
by a certified or licensed appraiser unless the State appraiser certifying or licensing agency of the State certifying or licensing such appraiser has in place a policy of issuing a reciprocal certification or license for an individual from another State when—

“(1) the appraiser licensing and certification program of such other State is in compliance with the provisions of this title; and

“(2) the appraiser holds a valid certification from a State whose requirements for certification or licensing meet or exceed the licensure standards established by the State where an individual seeks appraisal licensure.”.

(m) **Consideration of Professional Appraisal Designations.**—Section 1122(d) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3351(d)) is amended by striking “shall not exclude” and all that follows through the end of the subsection and inserting the following: “may include education achieved, experience, sample appraisals, and references from prior clients. Membership in a nationally recognized professional appraisal organization may be a criteria considered, though lack of membership therein shall not be the sole bar against consideration for an assignment under these criteria.”.

(n) **Appraiser Independence.**—Section 1122 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3351) is amended by adding at the end the following new subsection:

“(g) Appraiser Independence Monitoring.—The Appraisal Subcommittee shall monitor each State appraiser certifying and licensing agency for the purpose of determining whether such agency’s policies, practices, and procedures are consistent with the purposes of maintaining appraiser independence and whether such State has adopted and maintains effective laws, regulations, and policies aimed at maintaining appraiser independence.”.

(o) **Appraiser Education.**—Section 1122 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3351) is amended by inserting after subsection (g) (as added by subsection (l) of this section) the following new subsection:

“(h) Approved Education.—The Appraisal Subcommittee shall encourage the States to accept courses approved by the Appraiser Qualification Board’s Course Approval Program.”.

(p) **Appraisal Complaint Hotline.**—Section 1122 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3351), as amended by this section, is amended by adding at the end the following new subsection:

“(i) Appraisal Complaint National Hotline.—If, 6 months after the date of the enactment of this subsection, the Appraisal Subcommittee determines that no national hotline exists to receive complaints of non-compliance with appraisal independence standards and Uniform Standards of Professional Appraisal Practice, including complaints from appraisers, individuals, or other entities concerning the improper influencing or attempted improper influencing of appraisers or the appraisal process, the Appraisal Subcommittee shall establish and operate such a national hotline, which shall include a toll-free telephone number and an email address. If the Appraisal Subcommittee operates such a national hotline, the Appraisal Subcommittee shall refer complaints for further action to appropriate governmental bodies, including a State appraiser certifying and licensing agency, a financial institution regulator,
or other appropriate legal authorities. For complaints referred to State appraiser certifying and licensing agencies or to Federal regulators, the Appraisal Subcommittee shall have the authority to follow up such complaint referrals in order to determine the status of the resolution of the complaint.”.

(q) AUTOMATED VALUATION MODELS.—Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3331 et seq.), as amended by this section, is amended by adding at the end the following new section (and amending the table of contents accordingly):

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SEC. 1125. AUTOMATED VALUATION MODELS USED TO ESTIMATE COLLATERAL VALUE FOR MORTGAGE LENDING PURPOSES.

(a) In General.—Automated valuation models shall adhere to quality control standards designed to—
   (1) ensure a high level of confidence in the estimates produced by automated valuation models;
   (2) protect against the manipulation of data;
   (3) seek to avoid conflicts of interest;
   (4) require random sample testing and reviews; and
   (5) account for any other such factor that the agencies listed in subsection (b) determine to be appropriate.

(b) Adoption of Regulations.—The Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration Board, the Federal Housing Finance Agency, and the Bureau of Consumer Financial Protection, in consultation with the staff of the Appraisal Subcommittee and the Appraisal Standards Board of the Appraisal Foundation, shall promulgate regulations to implement the quality control standards required under this section.

(c) Enforcement.—Compliance with regulations issued under this subsection shall be enforced by—
   (1) with respect to a financial institution, or subsidiary owned and controlled by a financial institution and regulated by a Federal financial institution regulatory agency, the Federal financial institution regulatory agency that acts as the primary Federal supervisor of such financial institution or subsidiary; and
   (2) with respect to other participants in the market for appraisals of 1-to-4 unit single family residential real estate, the Federal Trade Commission, the Bureau of Consumer Financial Protection, and a State attorney general.

(d) Automated Valuation Model Defined.—For purposes of this section, the term ‘automated valuation model’ means any computerized model used by mortgage originators and secondary market issuers to determine the collateral worth of a mortgage secured by a consumer’s principal dwelling.”.
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(r) BROKER PRICE OPINIONS.—Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3331 et seq.), as amended by this section, is amended by adding at the end the following new section (and amending the table of contents accordingly):

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SEC. 1126. BROKER PRICE OPINIONS.

(a) General Prohibition.—In conjunction with the purchase of a consumer’s principal dwelling, broker price opinions may not be used as the primary basis to determine the value of a piece
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12 USC 3354.

12 USC 3355.
of property for the purpose of a loan origination of a residential mortgage loan secured by such piece of property.

(b) Broker Price Opinion Defined.—For purposes of this section, the term ‘broker price opinion’ means an estimate prepared by a real estate broker, agent, or sales person that details the probable selling price of a particular piece of real estate property and provides a varying level of detail about the property's condition, market, and neighborhood, and information on comparable sales, but does not include an automated valuation model, as defined in section 1125(c).”.

(s) Amendments to Appraisal Subcommittee.—Section 1011 of the Federal Financial Institutions Examination Council Act of 1978 (12 U.S.C. 3310) is amended—

(1) in the first sentence, by adding before the period the following: “, the Bureau of Consumer Financial Protection, and the Federal Housing Finance Agency”; and

(2) by inserting at the end the following: “At all times at least one member of the Appraisal Subcommittee shall have demonstrated knowledge and competence through licensure, certification, or professional designation within the appraisal profession.”.

(t) Technical Corrections,—


(3) Section 1121(8) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3350(8)) is amended by striking “council” and inserting “Council”.

(4) Section 1122 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3351) is amended—

(A) in subsection (a)(1) by moving the left margin of subparagraphs (A), (B), and (C) 2 ems to the right; and

(B) in subsection (c)—

(i) by striking “Federal Financial Institutions Examination Council” and inserting “Financial Institutions Examination Council”;

(ii) by striking “the council’s functions” and inserting “the Council’s functions”.

SEC. 1474. EQUAL CREDIT OPPORTUNITY ACT AMENDMENT.

Subsection (e) of section 701 of the Equal Credit Opportunity Act (15 U.S.C. 1691) is amended to read as follows:

“(e) Copies Furnished to Applicants.—

“(1) In General.—Each creditor shall furnish to an applicant a copy of any and all written appraisals and valuations developed in connection with the applicant’s application for a loan that is secured or would have been secured by a first lien on a dwelling promptly upon completion, but in no case later than 3 days prior to the closing of the loan, whether the creditor grants or denies the applicant's request for credit or the application is incomplete or withdrawn.
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“(2) WAIVER.—The applicant may waive the 3 day requirement provided for in paragraph (1), except where otherwise required in law.

“(3) REIMBURSEMENT.—The applicant may be required to pay a reasonable fee to reimburse the creditor for the cost of the appraisal, except where otherwise required in law.

“(4) FREE COPY.—Notwithstanding paragraph (3), the creditor shall provide a copy of each written appraisal or valuation at no additional cost to the applicant.

“(5) NOTIFICATION TO APPLICANTS.—At the time of application, the creditor shall notify an applicant in writing of the right to receive a copy of each written appraisal and valuation under this subsection.

“(6) VALUATION DEFINED.—For purposes of this subsection, the term ‘valuation’ shall include any estimate of the value of a dwelling developed in connection with a creditor’s decision to provide credit, including those values developed pursuant to a policy of a government sponsored enterprise or by an automated valuation model, a broker price opinion, or other methodology or mechanism.”.

SEC. 1475. REAL ESTATE SETTLEMENT PROCEDURES ACT OF 1974
AMENDMENT RELATING TO CERTAIN APPRAISAL FEES.

Section 4 of the Real Estate Settlement Procedures Act of 1974 is amended by adding at the end the following new subsection:

“(c) The standard form described in subsection (a) may include, in the case of an appraisal coordinated by an appraisal management company (as such term is defined in section 1121(11) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3350(11))), a clear disclosure of—

“(1) the fee paid directly to the appraiser by such company; and

“(2) the administration fee charged by such company.”.

SEC. 1476. GAO STUDY ON THE EFFECTIVENESS AND IMPACT OF VARIOUS APPRAISAL METHODS, VALUATION MODELS AND DISTRIBUTIONS CHANNELS, AND ON THE HOME VALUATION CODE OF CONDUCT AND THE APPRAISAL SUBCOMMITTEE.

(a) IN GENERAL.—The Government Accountability Office shall conduct a study on—

(1) the effectiveness and impact of—

(A) appraisal methods, including the cost approach, the comparative sales approach, the income approach, and others that may be available;

(B) appraisal valuation models, including licensed and certified appraisals, broker-priced opinions, and automated valuation models; and

(C) appraisal distribution channels, including appraisal management companies, independent appraisal operations within mortgage originators, and fee-for-service appraisers;

(2) the Home Valuation Code of Conduct; and

(3) the Appraisal Subcommittee’s functions pursuant to title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

(b) STUDY.—Not later than—

(1) 12 months after the date of enactment of this Act, the Government Accountability Office shall submit a study

Deadline.
to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives; and

(2) 90 days after the date of enactment of this Act, the Government Accountability Office shall provide a report on the status of the study and any preliminary findings to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.

c) CONTENT OF STUDY.—The study required by this section shall include an examination of the following:

(1) APPRAISAL APPROACHES, VALUATION MODELS, AND DISTRIBUTION CHANNELS.—

(A) The prevalence, alone or in combination, of certain appraisal approaches, models, and channels in purchase-money and refinance mortgage transactions.

(B) The accuracy of these approaches, models, and channels in assessing the property as collateral.

(C) Whether and how these approaches, models, and channels contributed to price speculation during the previous cycle.

(D) The costs to consumers of these approaches, models, and channels.

(E) The disclosure of fees to consumers in the appraisal process.

(F) To what extent the usage of these approaches, models, and channels may be influenced by a conflict of interest between the mortgage lender and the appraiser and the mechanism by which the lender selects and compensates the appraiser.

(G) The suitability of these approaches, models, and channels in rural versus urban areas.

(2) HOME VALUATION CODE OF CONDUCT (HVCC).—

(A) How the HVCC affects mortgage lenders' selection of appraisers.

(B) How the HVCC affects State regulation of appraisers and appraisal distribution channels.

(C) How the HVCC affects the quality and cost of appraisals and the length of time to obtain an appraisal.

(D) How the HVCC affects mortgage brokers, small businesses, and consumers.

d) ADDITIONAL STUDY REQUIRED.—

(1) IN GENERAL.—Not later than 18 months after the date of enactment of this Act, the Government Accountability Office shall submit a study to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.

(2) CONTENT OF ADDITIONAL STUDY.—The study required under paragraph (1) shall include—

(A) an examination of—

(i) the Appraisal Subcommittee's ability to monitor and enforce State and Federal certification requirements and standards, including by providing a summary with a statistical breakdown of enforcement actions taken during the last 10 years;
SEC. 1481. MULTIFAMILY MORTGAGE RESOLUTION PROGRAM.

(a) Establishment.—The Secretary of Housing and Urban Development shall develop a program under this subsection to ensure the protection of current and future tenants and at-risk multifamily properties, where feasible, based on criteria that may include—

(1) creating sustainable financing of such properties, that may take into consideration such factors as—

(A) the rental income generated by such properties; and

(B) the preservation of adequate operating reserves;

(2) maintaining the level of Federal, State, and city subsidies in effect as of the date of the enactment of this Act;

(3) providing funds for rehabilitation; and

(4) facilitating the transfer of such properties, when appropriate and with the agreement of owners, to responsible new owners and ensuring affordability of such properties.

(b) Coordination.—The Secretary of Housing and Urban Development may, in carrying out the program developed under this section, coordinate with the Secretary of the Treasury, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the Federal Housing Finance Agency, and any other Federal Government agency that the Secretary considers appropriate.

(c) Definition.—For purposes of this section, the term “multifamily properties” means a residential structure that consists of 5 or more dwelling units.

(d) Prevention of Qualification for Criminal Applicants.—

(1) In general.—No person shall be eligible to begin receiving assistance from the Making Home Affordable Program authorized under the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5201 et seq.), or any other mortgage assistance program authorized or funded by that Act, on or after 60 days after the date of the enactment of this Act, if such person, in connection with a mortgage or real estate transaction, has been convicted, within the last 10 years, of any one of the following:

(A) Felony larceny, theft, fraud, or forgery.

(B) Money laundering.

(C) Tax evasion.

(2) Procedures.—The Secretary shall establish procedures to ensure compliance with this subsection.
(3) REPORT.—The Secretary shall report to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate regarding the implementation of this provision. The report shall also describe the steps taken to implement this subsection.

SEC. 1482. HOME AFFORDABLE MODIFICATION PROGRAM GUIDELINES.

(a) NET PRESENT VALUE INPUT DATA.—The Secretary of the Treasury (in this section referred to as the “Secretary”) shall revise the supplemental directives and other guidelines for the Home Affordable Modification Program of the Making Home Affordable initiative of the Secretary of the Treasury, authorized under the Emergency Economic Stabilization Act of 2008 (Public Law 110–343), to require each mortgage servicer participating in such program to provide each borrower under a mortgage whose request for a mortgage modification under the Program is denied with all borrower-related and mortgage-related input data used in any net present value (NPV) analyses performed in connection with the subject mortgage. Such input data shall be provided to the borrower at the time of such denial.

(b) WEB-BASED SITE FOR NPV CALCULATOR AND APPLICATION.—

(1) NPV CALCULATOR.—In carrying out the Home Affordable Modification Program, the Secretary shall establish and maintain a site on the World Wide Web that provides a calculator for net present value analyses of a mortgage, based on the Secretary’s methodology for calculating such value, that mortgagors can use to enter information regarding their own mortgages and that provides a determination after entering such information regarding a mortgage of whether such mortgage would be accepted or rejected for modification under the Program, using such methodology.

(2) DISCLOSURE.—Such Web site shall also prominently disclose that each mortgage servicer participating in such Program may use a method for calculating net present value of a mortgage that is different than the method used by such calculator.

(3) APPLICATION.—The Secretary shall make a reasonable effort to include on such World Wide Web site a method for homeowners to apply for a mortgage modification under the Home Affordable Modification Program.

(c) PUBLIC AVAILABILITY OF NPV METHODOLOGY, COMPUTER MODEL, AND VARIABLES.—The Secretary shall make publicly available, including by posting on a World Wide Web site of the Secretary—

(1) the Secretary’s methodology and computer model, including all formulae used in such computer model, used for calculating net present value of a mortgage that is used by the calculator established pursuant to subsection (b); and

(2) all non-proprietary variables used in such net present value analysis.

SEC. 1483. PUBLIC AVAILABILITY OF INFORMATION OF MAKING HOME AFFORDABLE PROGRAM.

(a) REVISIONS TO PROGRAM GUIDELINES.—The Secretary of the Treasury (in this section referred to as the “Secretary”) shall revise the guidelines for the Home Affordable Modification Program of the Making Home Affordable initiative of the Secretary of the

12 USC 5219a.
Treasury, authorized under the Emergency Economic Stabilization Act of 2008 (Public Law 110–343), to provide that the data being collected by the Secretary from each mortgage servicer and lender participating in the Program is made public in accordance with subsection (b).

(b) PUBLIC AVAILABILITY.—Data shall be made available according to the following guidelines:

(1) Not more than 14 days after each monthly deadline for submission of data by mortgage servicers and lenders participating in the Program, reports shall be made publicly available by means of a World Wide Web site of the Secretary, and by submitting a report to the Congress, that shall includes the following information:

(A) The number of requests for mortgage modifications under the Program that the servicer or lender has received.

(B) The number of requests for mortgage modifications under the Program that the servicer or lender has processed.

(C) The number of requests for mortgage modifications under the Program that the servicer or lender has approved.

(D) The number of requests for mortgage modifications under the Program that the servicer or lender has denied.

(2) Not more than 60 days after each monthly deadline for submission of data by mortgage servicers and lenders participating in the Program, the Secretary shall make data tables available to the public at the individual record level.

The Secretary shall issue regulations prescribing—

(A) the procedures for disclosing such data to the public; and

(B) such deletions as the Secretary may determine to be appropriate to protect any privacy interest of any mortgage modification applicant, including the deletion or alteration of the applicant's name and identification number.

SEC. 1484. PROTECTING TENANTS AT FORECLOSURE EXTENSION AND CLARIFICATION.

The Protecting Tenants at Foreclosure Act is amended—

(1) in section 702 (12 U.S.C. 5220 note)—

(A) in subsection (a)(2), by striking “, as of the date of such notice of foreclosure”; and

(B) in subsection (c), by inserting after the period the following: “For purposes of this section, the date of a notice of foreclosure shall be deemed to be the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed.”; and

(2) in section 704 (12 U.S.C. 5201 note), by striking “2012” and inserting “2014”.

Regulations.

Records.

Deadlines.

Reports.

Web posting.
(a) FINDINGS.—The Congress finds as follows:

(1) The Government-sponsored enterprises, Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), were chartered by Congress to ensure a reliable and affordable supply of mortgage funding, but enjoy a dual legal status as privately owned corporations with Government mandated affordable housing goals.

(2) In 1996, the Department of Housing and Urban Development required that 42 percent of Fannie Mae’s and Freddie Mac’s mortgage financing should go to borrowers with income levels below the median for a given area.

(3) In 2004, the Department of Housing and Urban Development revised those goals, increasing them to 56 percent of their overall mortgage purchases by 2008, and additionally mandated that 12 percent of all mortgage purchases by Fannie Mae and Freddie Mac be “special affordable” loans made to borrowers with incomes less than 60 percent of an area’s median income, a target that ultimately increased to 28 percent for 2008.

(4) To help fulfill those mandated affordable housing goals, in 1995 the Department of Housing and Urban Development authorized Fannie Mae and Freddie Mac to purchase subprime securities that included loans made to low-income borrowers.

(5) After this authorization to purchase subprime securities, subprime and near-prime loans increased from 9 percent of securitized mortgages in 2001 to 40 percent in 2006, while the market share of conventional mortgages dropped from 78.8 percent in 2003 to 50.1 percent by 2007 with a corresponding increase in subprime and Alt-A loans from 10.1 percent to 32.7 percent over the same period.

(6) In 2004 alone, Fannie Mae and Freddie Mac purchased $175,000,000,000 in subprime mortgage securities, which accounted for 44 percent of the market that year, and from 2005 through 2007, Fannie Mae and Freddie Mac purchased approximately $1,000,000,000,000 in subprime and Alt-A loans, while Fannie Mae’s acquisitions of mortgages with less than 10 percent down payments almost tripled.

(7) According to data from the Federal Housing Finance Agency (FHFA) for the fourth quarter of 2008, Fannie Mae and Freddie Mac own or guarantee 75 percent of all newly originated mortgages, and Fannie Mae and Freddie Mac currently own 13.3 percent of outstanding mortgage debt in the United States and have issued mortgage-backed securities for 31.0 percent of the residential debt market, a combined total of 44.3 percent of outstanding mortgage debt in the United States.

(8) On September 7, 2008, the FHFA placed Fannie Mae and Freddie Mac into conservatorship, with the Treasury
Department subsequently agreeing to purchase at least $200,000,000,000 of preferred stock from each enterprise in exchange for warrants for the purchase of 79.9 percent of each enterprise's common stock.

(9) The conservatorship for Fannie Mae and Freddie Mac has potentially exposed taxpayers to upwards of $5,300,000,000,000 worth of risk.

(10) The hybrid public-private status of Fannie Mae and Freddie Mac is untenable and must be resolved to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive, or abusive.

(b) Sense of the Congress.—It is the sense of the Congress that efforts to enhance by the protection, limitation, and regulation of the terms of residential mortgage credit and the practices related to such credit would be incomplete without enactment of meaningful structural reforms of Fannie Mae and Freddie Mac.


(a) Study.—The Comptroller General of the United States shall conduct a study of the current inter-agency efforts of the Secretary of the Treasury, the Secretary of Housing and Urban Development, the Attorney General, and the Federal Trade Commission to crackdown on mortgage foreclosure rescue scams and loan modification fraud in order to advise the Congress to the risks and vulnerabilities of emerging schemes in the loan modification arena.

(b) Report.—

(1) In General.—The Comptroller General shall submit a report to the Congress on the study conducted under subsection (a) containing such recommendations for legislative and administrative actions as the Comptroller General may determine to be appropriate in addition to the recommendations required under paragraph (2).

(2) Specific Topics.—The report made under paragraph (1) shall include—

(A) an evaluation of the effectiveness of the inter-agency task force current efforts to combat mortgage foreclosure rescue scams and loan modification fraud scams;

(B) specific recommendations on agency or legislative action that are essential to properly protect homeowners from mortgage foreclosure rescue scams and loan modification fraud scams; and

(C) the adequacy of financial resources that the Federal Government is allocating to—

(i) crackdown on loan modification and foreclosure rescue scams; and

(ii) the education of homeowners about fraudulent scams relating to loan modification and foreclosure rescues.

SEC. 1493. Reporting of Mortgage Data by State.

(a) In General.—Section 104(a) of the Helping Families Save Their Homes Act of 2009 (division A of Public Law 111–22) is amended—
(1) in paragraph (2), by striking “resulting” and inserting “in each State that result”;
(2) in paragraph (3), by inserting “each State for” after “modifications in”; and
(3) in paragraph (4), by inserting “in each State” after “total number of loans”.

(b) CONFORMING AMENDMENT.—Section 104(b)(1)(A) of such Act is amended by adding at the end the following sentence: “Not later than 60 days after the date of the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Comptroller of the Currency and the Director of the Office of Thrift Supervision shall update such requirements to reflect amendments made to this section by such Act.”.

SEC. 1494. STUDY OF EFFECT OF DRYWALL PRESENCE ON FORECLOSURES.

(a) STUDY.—The Secretary of Housing and Urban Development, in consultation with the Secretary of the Treasury, shall conduct a study of the effect on residential mortgage loan foreclosures of—

(1) the presence in residential structures subject to such mortgage loans of drywall that was imported from China during the period beginning with 2004 and ending at the end of 2007; and
(2) the availability of property insurance for residential structures in which such drywall is present.

(b) REPORT.—Not later than the expiration of the 120-day period beginning on the date of the enactment of this Act, the Secretary of Housing and Urban Development shall submit to the Congress a report on the study conducted under subsection (a) containing its findings, conclusions, and recommendations.

SEC. 1495. DEFINITION.

For purposes of this title, the term “designated transfer date” means the date established under section 1062 of this Act.

SEC. 1496. EMERGENCY MORTGAGE RELIEF.

(a) EMERGENCY HOMEOWNERS’ RELIEF FUND.—Effective October 1, 2010, and notwithstanding any other provision of law, there is hereby made available to the Secretary of Housing and Urban Development such sums as are necessary to provide $1,000,000,000 in assistance through the Emergency Homeowners’ Relief Fund, which such Secretary shall establish pursuant to section 107 of the Emergency Housing Act of 1975 (12 U.S.C. 2706), as such Act is amended by this section, for use for emergency mortgage assistance in accordance with title I of such Act.

(b) REAUTHORIZATION OF EMERGENCY MORTGAGE RELIEF PROGRAM.—Title I of the Emergency Housing Act of 1975 is amended—

(1) in section 103 (12 U.S.C. 2702)—

(A) in paragraph (2)—

(i) by striking “have indicated” and all that follows through “regulation of the holder” and insert “have certified”;

(ii) by striking “(such as the volume of delinquent loans in its portfolio)”;

(iii) by striking “, except that such statement” and all that follows through “purposes of this title”; and

15 USC 1601 note.

Deadline.

Effective date.

12 USC 2706 note.
(B) in paragraph (4), by inserting “or medical conditions” after “adverse economic conditions”;
(2) in section 104 (12 U.S.C. 2703)—
   (A) in subsection (b), by striking “, but such assistance” and all that follows through the period at the end and inserting the following: “. The amount of assistance provided to a homeowner under this title shall be an amount that the Secretary determines is reasonably necessary to supplement such amount as the homeowner is capable of contributing toward such mortgage payment, except that the aggregate amount of such assistance provided for any homeowner shall not exceed $50,000.”;
   (B) in subsection (d), by striking “interest on a loan or advance” and all that follows through the end of the subsection and inserting the following: “(1) the rate of interest on any loan or advance of credit insured under this title shall be fixed for the life of the loan or advance of credit and shall not exceed the rate of interest that is generally charged for mortgages on single-family housing insured by the Secretary of Housing and Urban Development under title II of the National Housing Act at the time such loan or advance of credit is made, and (2) no interest shall be charged on interest which is deferred on a loan or advance of credit made under this title. In establishing rates, terms and conditions for loans or advances of credit made under this title, the Secretary shall take into account a homeowner’s ability to repay such loan or advance of credit.”; and
   (C) in subsection (e), by inserting after the period at the end of the first sentence the following: “Any eligible homeowner who receives a grant or an advance of credit under this title may repay the loan in full, without penalty, by lump sum or by installment payments at any time before the loan becomes due and payable.”;
(3) in section 105 (12 U.S.C. 2704)—
   (A) by striking subsection (b);
   (B) in subsection (e)—
      (i) by inserting “and emergency mortgage relief payments made under section 106” after “insured under this section”; and
      (ii) by striking “$1,500,000,000 at any one time” and inserting “$3,000,000,000”;
   (C) by redesignating subsections (c), (d), and (e) as subsections (b), (c), and (d), respectively; and
   (D) by adding at the end the following new subsection:
   “(e) The Secretary shall establish underwriting guidelines or procedures to allocate amounts made available for loans and advances insured under this section and for emergency relief payments made under section 106 based on the likelihood that a mortgagor will be able to resume mortgage payments, pursuant to the requirement under section 103(5).”;
(4) in section 107—
   (A) by striking “(a)”; and
   (B) by striking subsection (b);
(5) in section 108 (12 U.S.C. 2707), by adding at the end the following new subsection:
“(d) COVERAGE OF EXISTING PROGRAMS.—The Secretary shall allow funds to be administered by a State that has an existing program that is determined by the Secretary to provide substantially similar assistance to homeowners. After such determination is made such State shall not be required to modify such program to comply with the provisions of this title.”;

(6) in section 109 (12 U.S.C. 2708)—

(A) in the section heading, by striking “AUTHORIZATION AND”;

(B) by striking subsection (a);

(C) by striking “(b)”;

(D) by striking “1977” and inserting “2011”;

(7) by striking sections 110, 111, and 113 (12 U.S.C. 2709, 2710, 2712); and

(8) by redesignating section 112 (12 U.S.C. 2711) as section 110.

SEC. 1497. ADDITIONAL ASSISTANCE FOR NEIGHBORHOOD STABILIZATION PROGRAM.

(a) IN GENERAL.—Effective October 1, 2010, out of funds in the Treasury not otherwise appropriated, there is hereby made available to the Secretary of Housing and Urban Development $1,000,000,000, and the Secretary of Housing and Urban Development shall use such amounts for assistance to States and units of general local government for the redevelopment of abandoned and foreclosed homes, in accordance with the same provisions applicable under the second undesignated paragraph under the heading “Community Planning and Development—Community Development Fund” in title XII of division A of the American Recovery and Reinvestment Act of 2009 (Public Law 111–5; 123 Stat. 217) to amounts made available under such second undesignated paragraph, except as follows:

(1) Notwithstanding the matter of such second undesignated paragraph that precedes the first proviso, amounts made available by this section shall remain available until expended.

(2) The 3rd, 4th, 5th, 6th, 7th, and 15th provisos of such second undesignated paragraph shall not apply to amounts made available by this section.

(3) Amounts made available by this section shall be allocated based on a funding formula for such amounts established by the Secretary in accordance with section 2301(b) of the Housing and Economic Recovery Act of 2008 (42 U.S.C. 5301 note), except that—

(A) notwithstanding paragraph (2) of such section 2301(b), the formula shall be established not later than 30 days after the date of the enactment of this Act;

(B) notwithstanding such section 2301(b), each State shall receive, at a minimum, not less than 0.5 percent of funds made available under this section;

(C) the Secretary may establish a minimum grant amount for direct allocations to units of general local government located within a State, which shall not exceed $1,000,000;

(D) each State and local government receiving grant amounts shall establish procedures to create preferences.
for the development of affordable rental housing for properties assisted with amounts made available by this section; and

(E) the Secretary may use not more than 2 percent of the funds made available under this section for technical assistance to grantees.

(4) Paragraph (1) of section 2301(c) of the Housing and Economic Recovery Act of 2008 shall not apply to amounts made available by this section.

(5) The fourth proviso from the end of such second undesignated paragraph shall be applied to amounts made available by this section by substituting “2013” for “2012”.

(6) Notwithstanding section 2301(a) of the Housing and Economic Recovery Act of 2008, the term “State,” as defined in section 102 of the Housing and Community Development Act of 1974 (42 U.S.C. 5302), and the District of Columbia, for purposes of this section and this title, as applied to amounts made available by this section.

(7)(A) None of the amounts made available by this section shall be distributed to—

(i) any organization which has been convicted for a violation under Federal law relating to an election for Federal office; or

(ii) any organization which employs applicable individuals.

(B) In this paragraph, the term “applicable individual” means an individual who—

(i) is—

(I) employed by the organization in a permanent or temporary capacity;

(II) contracted or retained by the organization; or

(III) acting on behalf of, or with the express or apparent authority of, the organization; and

(ii) has been convicted for a violation under Federal law relating to an election for Federal office.

(8) An eligible entity receiving a grant under this section shall, to the maximum extent feasible, provide for the hiring of employees who reside in the vicinity, as such term is defined by the Secretary, of projects funded under this section or contract with small businesses that are owned and operated by persons residing in the vicinity of such projects.

(b) ADDITIONAL AMENDMENTS.—


(A) is amended by striking “for the purchase and redevelopment of abandoned and foreclosed upon homes or residential properties that will be used”; and

(B) shall apply with respect to any unexpended or unobligated balances, including recaptured and reallocated funds made available under this Act, section 2301 of the Housing and Economic Recovery Act of 2008 (42 U.S.C. 5301), and the heading “Community Planning and Development—Community Development Fund” in title XII of division A of the American Recovery and Reinvestment Act of 2009 (Public Law 111-5; 123 Stat. 217).
(2) Notice of Foreclosure.—For any amounts made available under this section, under division B, title III of the Housing and Economic Recovery Act of 2008 (42 U.S.C. 5301), or under the heading “Community Planning and Development—Community Development Fund” in title XII of division A of the American Recovery and Reinvestment Act of 2009 (Public Law 111-5; 123 Stat. 217), the date of a notice of foreclosure shall be deemed to be the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed.

SEC. 1498. LEGAL ASSISTANCE FOR FORECLOSURE-RELATED ISSUES.

(a) Establishment.—The Secretary of Housing and Urban Development (hereafter in this section referred to as the “Secretary”) shall establish a program for making grants for providing a full range of foreclosure legal assistance to low- and moderate-income homeowners and tenants related to home ownership preservation, home foreclosure prevention, and tenancy associated with home foreclosure.

(b) Competitive Allocation.—The Secretary shall allocate amounts made available for grants under this section to State and local legal organizations on the basis of a competitive process. For purposes of this subsection “State and local legal organizations” are those State and local organizations whose primary business or mission is to provide legal assistance.

(c) Priority to Certain Areas.—In allocating amounts in accordance with subsection (b), the Secretary shall give priority consideration to State and local legal organizations that are operating in the 125 metropolitan statistical areas (as that term is defined by the Director of the Office of Management and Budget) with the highest home foreclosure rates.

(d) Legal Assistance.—

(1) In General.—Any State or local legal organization that receives financial assistance pursuant to this section may use such amounts only to assist—

(A) homeowners of owner-occupied homes with mortgages in default, in danger of default, or subject to or at risk of foreclosure; and

(B) tenants at risk of or subject to eviction as a result of foreclosure of the property in which such tenant resides.

(2) Commence Use Within 90 Days.—Any State or local legal organization that receives financial assistance pursuant to this section shall begin using any financial assistance received under this section within 90 days after receipt of the assistance.

(3) Prohibition on Class Actions.—No funds provided to a State or local legal organization under this section may be used to support any class action litigation.

(4) Limitation on Legal Assistance.—Legal assistance funded with amounts provided under this section shall be limited to mortgage-related default, eviction, or foreclosure proceedings, without regard to whether such foreclosure is judicial or nonjudicial.

(5) Effective Date.—Notwithstanding any other provision of this Act, this subsection shall take effect on the date of the enactment of this Act.
(e) Limitation on Distribution of Assistance.—

(1) In General.—None of the amounts made available under this section shall be distributed to—

(A) any organization which has been convicted for a violation under Federal law relating to an election for Federal office; or

(B) any organization which employs applicable individuals.

(2) Definition of Applicable Individuals.—In this subsection, the term “applicable individual” means an individual who—

(A) is—

(i) employed by the organization in a permanent or temporary capacity;

(ii) contracted or retained by the organization; or

(iii) acting on behalf of, or with the express or apparent authority of, the organization; and

(B) has been convicted for a violation under Federal law relating to an election for Federal office.

(f) Authorization of Appropriations.—There are authorized to be appropriated to the Secretary $35,000,000 for each of fiscal years 2011 through 2012 for grants under this section.

TITLE XV—MISCELLANEOUS PROVISIONS

SEC. 1501. RESTRICTIONS ON USE OF UNITED STATES FUNDS FOR FOREIGN GOVERNMENTS; PROTECTION OF AMERICAN TAXPAYERS.

The Bretton Woods Agreements Act (22 U.S.C. 286 et seq.) is amended by adding at the end the following:

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SEC. 68. RESTRICTIONS ON USE OF UNITED STATES FUNDS FOR FOREIGN GOVERNMENTS; PROTECTION OF AMERICAN TAXPAYERS.

“(a) In General.—The Secretary of the Treasury shall instruct the United States Executive Director at the International Monetary Fund—

“(1) to evaluate, prior to consideration by the Board of Executive Directors of the Fund, any proposal submitted to the Board for the Fund to make a loan to a country if—

“(A) the amount of the public debt of the country exceeds the gross domestic product of the country as of the most recent year for which such information is available; and

“(B) the country is not eligible for assistance from the International Development Association.

“(2) Opposition to Loans Unlikely to be Repaid in Full.—If any such evaluation indicates that the proposed loan is not likely to be repaid in full, the Secretary of the Treasury shall instruct the United States Executive Director at the Fund to use the voice and vote of the United States to oppose the proposal.

“(b) Reports to Congress.—Within 30 days after the Board of Executive Directors of the Fund approves a proposal described in subsection (a), and annually thereafter by June 30, for the
duration of any program approved under such proposals, the Secretary of the Treasury shall report in writing to the Committee on Financial Services of the House of Representatives and the Committee on Foreign Relations and the Committee on Banking, Housing, and Urban Affairs of the Senate assessing the likelihood that loans made pursuant to such proposals will be repaid in full, including—

“(1) the borrowing country’s current debt status, including, to the extent possible, its maturity structure, whether it has fixed or floating rates, whether it is indexed, and by whom it is held;

“(2) the borrowing country’s external and internal vulnerabilities that could potentially affect its ability to repay; and

“(3) the borrowing country’s debt management strategy.”.

SEC. 1502. CONFLICT MINERALS.

(a) Sense of Congress on Exploitation and Trade of Conflict Minerals Originating in the Democratic Republic of the Congo.—It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein, warranting the provisions of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b).

(b) Disclosure Relating to Conflict Minerals Originating in the Democratic Republic of the Congo.—Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m), as amended by this Act, is amended by adding at the end the following new subsection:

“(p) Disclosures Relating to Conflict Minerals Originating in the Democratic Republic of the Congo.—

“(1) Regulations.—

“(A) In general.—Not later than 270 days after the date of the enactment of this subsection, the Commission shall promulgate regulations requiring any person described in paragraph (2) to disclose annually, beginning with the person’s first full fiscal year that begins after the date of promulgation of such regulations, whether conflict minerals that are necessary as described in paragraph (2)(B), in the year for which such reporting is required, did originate in the Democratic Republic of the Congo or an adjoining country and, in cases in which such conflict minerals did originate in any such country, submit to the Commission a report that includes, with respect to the period covered by the report—

“(i) a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an independent private sector audit of such report submitted through the Commission that is conducted in accordance with standards established by the Comptroller General of the United States, in accordance with rules promulgated by the Commission, in consultation with the Secretary of State; and
“(ii) a description of the products manufactured or contracted to be manufactured that are not DRC conflict free (‘DRC conflict free’ is defined to mean the products that do not contain minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country), the entity that conducted the independent private sector audit in accordance with clause (i), the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.

“(B) CERTIFICATION.—The person submitting a report under subparagraph (A) shall certify the audit described in clause (i) of such subparagraph that is included in such report. Such a certified audit shall constitute a critical component of due diligence in establishing the source and chain of custody of such minerals.

“(C) UNRELIABLE DETERMINATION.—If a report required to be submitted by a person under subparagraph (A) relies on a determination of an independent private sector audit, as described under subparagraph (A)(i), or other due diligence processes previously determined by the Commission to be unreliable, the report shall not satisfy the requirements of the regulations promulgated under subparagraph (A)(i).

“(D) DRC CONFLICT FREE.—For purposes of this paragraph, a product may be labeled as ‘DRC conflict free’ if the product does not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country.

“(E) INFORMATION AVAILABLE TO THE PUBLIC.—Each person described under paragraph (2) shall make available to the public on the Internet website of such person the information disclosed by such person under subparagraph (A).

“(2) PERSON DESCRIBED.—A person is described in this paragraph if—

“(A) the person is required to file reports with the Commission pursuant to paragraph (1)(A); and

“(B) conflict minerals are necessary to the functionality or production of a product manufactured by such person.

“(3) REVISIONS AND WAIVERS.—The Commission shall revise or temporarily waive the requirements described in paragraph (1) if the President transmits to the Commission a determination that—

“(A) such revision or waiver is in the national security interest of the United States and the President includes the reasons therefor; and

“(B) establishes a date, not later than 2 years after the initial publication of such exemption, on which such exemption shall expire.

“(4) TERMINATION OF DISCLOSURE REQUIREMENTS.—The requirements of paragraph (1) shall terminate on the date on which the President determines and certifies to the appropriate congressional committees, but in no case earlier than
the date that is one day after the end of the 5-year period beginning on the date of the enactment of this subsection, that no armed groups continue to be directly involved and benefitting from commercial activity involving conflict minerals.

“(5) DEFINITIONS.—For purposes of this subsection, the terms ‘adjoining country’, ‘appropriate congressional committees’, ‘armed group’, and ‘conflict mineral’ have the meaning given those terms under section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.”.

(c) STRATEGY AND MAP TO ADDRESS LINKAGES BETWEEN CONFLICT MINERALS AND ARMED GROUPS.—

(1) STRATEGY.—

(A) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act, the Secretary of State, in consultation with the Administrator of the United States Agency for International Development, shall submit to the appropriate congressional committees a strategy to address the linkages between human rights abuses, armed groups, mining of conflict minerals, and commercial products.

(B) CONTENTS.—The strategy required by subparagraph (A) shall include the following:

(i) A plan to promote peace and security in the Democratic Republic of the Congo by supporting efforts of the Government of the Democratic Republic of the Congo, including the Ministry of Mines and other relevant agencies, adjoining countries, and the international community, in particular the United Nations Group of Experts on the Democratic Republic of Congo, to—

(I) monitor and stop commercial activities involving the natural resources of the Democratic Republic of the Congo that contribute to the activities of armed groups and human rights violations in the Democratic Republic of the Congo; and

(II) develop stronger governance and economic institutions that can facilitate and improve transparency in the cross-border trade involving the natural resources of the Democratic Republic of the Congo to reduce exploitation by armed groups and promote local and regional development.

(ii) A plan to provide guidance to commercial entities seeking to exercise due diligence on and formalize the origin and chain of custody of conflict minerals used in their products and on their suppliers to ensure that conflict minerals used in the products of such suppliers do not directly or indirectly finance armed conflict or result in labor or human rights violations.

(iii) A description of punitive measures that could be taken against individuals or entities whose commercial activities are supporting armed groups and human rights violations in the Democratic Republic of the Congo.

Deadline.

(2) MAP.—

(A) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act, the Secretary of State shall, in accordance with the recommendation of the United
Nations Group of Experts on the Democratic Republic of the Congo in their December 2008 report—

(i) produce a map of mineral-rich zones, trade routes, and areas under the control of armed groups in the Democratic Republic of the Congo and adjoining countries based on data from multiple sources, including—

(I) the United Nations Group of Experts on the Democratic Republic of the Congo;

(II) the Government of the Democratic Republic of the Congo, the governments of adjoining countries, and the governments of other Member States of the United Nations; and

(III) local and international nongovernmental organizations;

(ii) make such map available to the public; and

(iii) provide to the appropriate congressional committees an explanatory note describing the sources of information from which such map is based and the identification, where possible, of the armed groups or other forces in control of the mines depicted.

(B) DESIGNATION.—The map required under subparagraph (A) shall be known as the “Conflict Minerals Map”, and mines located in areas under the control of armed groups in the Democratic Republic of the Congo and adjoining countries, as depicted on such Conflict Minerals Map, shall be known as “Conflict Zone Mines”.

(C) UPDATES.—The Secretary of State shall update the map required under subparagraph (A) not less frequently than once every 180 days until the date on which the disclosure requirements under paragraph (1) of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b), terminate in accordance with the provisions of paragraph (4) of such section 13(p).

(D) PUBLICATION IN FEDERAL REGISTER.—The Secretary of State shall add minerals to the list of minerals in the definition of conflict minerals under section 1502, as appropriate. The Secretary shall publish in the Federal Register notice of intent to declare a mineral as a conflict mineral included in such definition not later than one year before such declaration.

(d) REPORTS.—

(1) BASELINE REPORT.—Not later than 1 year after the date of the enactment of this Act and annually thereafter until the termination of the disclosure requirements under section 13(p) of the Securities Exchange Act of 1934, the Comptroller General of the United States shall submit to appropriate congressional committees a report that includes an assessment of the rate of sexual- and gender-based violence in war-torn areas of the Democratic Republic of the Congo and adjoining countries.

(2) REGULAR REPORT ON EFFECTIVENESS.—Not later than 2 years after the date of the enactment of this Act and annually thereafter, the Comptroller General of the United States shall submit to the appropriate congressional committees a report that includes the following:
(A) An assessment of the effectiveness of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b), in promoting peace and security in the Democratic Republic of the Congo and adjoining countries.

(B) A description of issues encountered by the Securities and Exchange Commission in carrying out the provisions of such section 13(p).

(C)(i) A general review of persons described in clause (ii) and whether information is publicly available about—

(I) the use of conflict minerals by such persons; and

(II) whether such conflict minerals originate from the Democratic Republic of the Congo or an adjoining country.

(ii) A person is described in this clause if—

(I) the person is not required to file reports with the Securities and Exchange Commission pursuant to section 13(p)(1)(A) of the Securities Exchange Act of 1934, as added by subsection (b); and

(II) conflict minerals are necessary to the functionality or production of a product manufactured by such person.

(3) REPORT ON PRIVATE SECTOR AUDITING.—Not later than 30 months after the date of the enactment of this Act, and annually thereafter, the Secretary of Commerce shall submit to the appropriate congressional committees a report that includes the following:

(A) An assessment of the accuracy of the independent private sector audits and other due diligence processes described under section 13(p) of the Securities Exchange Act of 1934.

(B) Recommendations for the processes used to carry out such audits, including ways to—

(i) improve the accuracy of such audits; and

(ii) establish standards of best practices.

(C) A listing of all known conflict mineral processing facilities worldwide.

(e) DEFINITIONS.—For purposes of this section:

(1) ADJOINING COUNTRY.—The term “adjoining country”, with respect to the Democratic Republic of the Congo, means a country that shares an internationally recognized border with the Democratic Republic of the Congo.

(2) APPROPRIATE CONGRESSIONAL COMMITTEES.—The term “appropriate congressional committees” means—

(A) the Committee on Appropriations, the Committee on Foreign Affairs, the Committee on Ways and Means, and the Committee on Financial Services of the House of Representatives; and

(B) the Committee on Appropriations, the Committee on Foreign Relations, the Committee on Finance, and the Committee on Banking, Housing, and Urban Affairs of the Senate.

(3) ARMED GROUP.—The term “armed group” means an armed group that is identified as perpetrators of serious human rights abuses in the annual Country Reports on Human Rights Practices under sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (22 U.S.C. 2151n(d) and 2304(b)) relating
to the Democratic Republic of the Congo or an adjoining country.

(4) CONFLICT MINERAL.—The term “conflict mineral” means—

(A) columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives; or

(B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.

(5) UNDER THE CONTROL OF ARMED GROUPS.—The term “under the control of armed groups” means areas within the Democratic Republic of the Congo or adjoining countries in which armed groups—

(A) physically control mines or force labor of civilians to mine, transport, or sell conflict minerals;

(B) tax, extort, or control any part of trade routes for conflict minerals, including the entire trade route from a Conflict Zone Mine to the point of export from the Democratic Republic of the Congo or an adjoining country; or

(C) tax, extort, or control trading facilities, in whole or in part, including the point of export from the Democratic Republic of the Congo or an adjoining country.

SEC. 1503. REPORTING REQUIREMENTS REGARDING COAL OR OTHER MINE SAFETY.

(a) REPORTING MINE SAFETY INFORMATION.—Each issuer that is required to file reports pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o) and that is an operator, or that has a subsidiary that is an operator, of a coal or other mine shall include, in each periodic report filed with the Commission under the securities laws on or after the date of enactment of this Act, the following information for the time period covered by such report:

(1) For each coal or other mine of which the issuer or a subsidiary of the issuer is an operator—

(A) the total number of violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under section 104 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 814) for which the operator received a citation from the Mine Safety and Health Administration;

(B) the total number of orders issued under section 104(b) of such Act (30 U.S.C. 814(b));

(C) the total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health or safety standards under section 104(d) of such Act (30 U.S.C. 814(d));

(D) the total number of flagrant violations under section 110(b)(2) of such Act (30 U.S.C. 820(b)(2));

(E) the total number of imminent danger orders issued under section 107(a) of such Act (30 U.S.C. 817(a));

(F) the total dollar value of proposed assessments from the Mine Safety and Health Administration under such Act (30 U.S.C. 801 et seq.); and

(G) the total number of mining-related fatalities.
(2) A list of such coal or other mines, of which the issuer or a subsidiary of the issuer is an operator, that receive written notice from the Mine Safety and Health Administration of—

(A) a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under section 104(e) of such Act (30 U.S.C. 814(e)); or

(B) the potential to have such a pattern.

(3) Any pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine.

(b) REPORTING SHUTDOWNS AND PATTERNS OF VIOLATIONS.—Beginning on and after the date of enactment of this Act, each issuer that is an operator, or that has a subsidiary that is an operator, of a coal or other mine shall file a current report with the Commission on Form 8–K (or any successor form) disclosing the following regarding each coal or other mine of which the issuer or subsidiary is an operator:

(1) The receipt of an imminent danger order issued under section 107(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 817(a)).

(2) The receipt of written notice from the Mine Safety and Health Administration that the coal or other mine has—

(A) a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under section 104(e) of such Act (30 U.S.C. 814(e)); or

(B) the potential to have such a pattern.

(c) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to affect any obligation of a person to make a disclosure under any other applicable law in effect before, on, or after the date of enactment of this Act.

(d) COMMISSION AUTHORITY.—

(1) ENFORCEMENT.—A violation by any person of this section, or any rule or regulation of the Commission issued under this section, shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or the rules and regulations issued thereunder, consistent with the provisions of this section, and any such person shall be subject to the same penalties, and to the same extent, as for a violation of such Act or the rules or regulations issued thereunder.

(2) RULES AND REGULATIONS.—The Commission is authorized to issue such rules or regulations as are necessary or appropriate for the protection of investors and to carry out the purposes of this section.

(e) DEFINITIONS.—In this section—

(1) the terms “issuer” and “securities laws” have the meaning given the terms in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c);

(2) the term “coal or other mine” means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 et seq.); and
(3) the term “operator” has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).

(f) EFFECTIVE DATE.—This section shall take effect on the day that is 30 days after the date of enactment of this Act.

SEC. 1504. DISCLOSURE OF PAYMENTS BY RESOURCE EXTRACTION ISSUERS.

Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m), as amended by this Act, is amended by adding at the end the following:

“(q) DISCLOSURE OF PAYMENTS BY RESOURCE EXTRACTION ISSUERS.—

“(1) DEFINITIONS.—In this subsection—

“(A) the term ‘commercial development of oil, natural gas, or minerals’ includes exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity, as determined by the Commission;

“(B) the term ‘foreign government’ means a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government, as determined by the Commission;

“(C) the term ‘payment’—

“(i) means a payment that is—

“(I) made to further the commercial development of oil, natural gas, or minerals; and

“(II) not de minimis; and

“(ii) includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the Commission, consistent with the guidelines of the Extractive Industries Transparency Initiative (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals;

“(D) the term ‘resource extraction issuer’ means an issuer that—

“(i) is required to file an annual report with the Commission; and

“(ii) engages in the commercial development of oil, natural gas, or minerals;

“(E) the term ‘interactive data format’ means an electronic data format in which pieces of information are identified using an interactive data standard; and

“(F) the term ‘interactive data standard’ means standardized list of electronic tags that mark information included in the annual report of a resource extraction issuer.

“(2) DISCLOSURE.—

“(A) INFORMATION REQUIRED.—Not later than 270 days after the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Commission shall issue final rules that require each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or a company owned by a foreign government.
extraction issuer, or an entity under the control of the
resource extraction issuer to a foreign government or the
Federal Government for the purpose of the commercial
development of oil, natural gas, or minerals, including—
“(i) the type and total amount of such payments
made for each project of the resource extraction issuer
relating to the commercial development of oil, natural
gas, or minerals; and
“(ii) the type and total amount of such payments
made to each government.
“(B) CONSULTATION IN RULEMAKING.—In issuing rules
under subparagraph (A), the Commission may consult with
any agency or entity that the Commission determines is
relevant.
“(C) INTERACTIVE DATA FORMAT.—The rules issued
under subparagraph (A) shall require that the information
included in the annual report of a resource extraction issuer
be submitted in an interactive data format.
“(D) INTERACTIVE DATA STANDARD.—
“(i) IN GENERAL.—The rules issued under subpara-
graph (A) shall establish an interactive data standard
for the information included in the annual report of
a resource extraction issuer.
“(ii) ELECTRONIC TAGS.—The interactive data
standard shall include electronic tags that identify,
for any payments made by a resource extraction issuer
to a foreign government or the Federal Government—
“(I) the total amounts of the payments, by
category;
“(II) the currency used to make the payments;
“(III) the financial period in which the pay-
m ents were made;
“(IV) the business segment of the resource
extraction issuer that made the payments;
“(V) the government that received the pay-
ments, and the country in which the government
is located;
“(VI) the project of the resource extraction
issuer to which the payments relate; and
“(VII) such other information as the Commis-
sion may determine is necessary or appropriate
in the public interest or for the protection of inves-
tors.
“(E) INTERNATIONAL TRANSPARENCY EFFORTS.—To the
extent practicable, the rules issued under subparagraph
(A) shall support the commitment of the Federal Govern-
ment to international transparency promotion efforts
relating to the commercial development of oil, natural gas,
or minerals.
“(F) EFFECTIVE DATE.—With respect to each resource
extraction issuer, the final rules issued under subparagraph
(A) shall take effect on the date on which the resource
extraction issuer is required to submit an annual report
relating to the fiscal year of the resource extraction issuer
that ends not earlier than 1 year after the date on which
the Commission issues final rules under subparagraph (A).
“(3) PUBLIC AVAILABILITY OF INFORMATION.—
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"(A) IN GENERAL.—To the extent practicable, the Commission shall make available online, to the public, a compilation of the information required to be submitted under the rules issued under paragraph (2)(A).

"(B) OTHER INFORMATION.—Nothing in this paragraph shall require the Commission to make available online information other than the information required to be submitted under the rules issued under paragraph (2)(A).

"(4) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Commission such sums as may be necessary to carry out this subsection.”.

SEC. 1505. STUDY BY THE COMPTROLLER GENERAL.

(a) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Comptroller General of the United States shall issue a report assessing the relative independence, effectiveness, and expertise of presidentially appointed inspectors general and inspectors general of designated Federal entities, as such term is defined under section 8G of the Inspector General Act of 1978, and the effects on independence of the amendments to the Inspector General Act of 1978 made by this Act.

(b) REPORT.—The report required by subsection (a) shall be issued to the Committees on Financial Services and Oversight and Government Reform of the House of Representatives and the Committees on Banking, Housing, and Urban Affairs and Homeland Security and Governmental Affairs of the Senate.

SEC. 1506. STUDY ON CORE DEPOSITS AND BROKERED DEPOSITS.

(a) STUDY.—The Corporation shall conduct a study to evaluate—

1. the definition of core deposits for the purpose of calculating the insurance premiums of banks;
2. the potential impact on the Deposit Insurance Fund of revising the definitions of brokered deposits and core deposits to better distinguish between them;
3. an assessment of the differences between core deposits and brokered deposits and their role in the economy and banking sector of the United States;
4. the potential stimulative effect on local economies of redefining core deposits; and
5. the competitive parity between large institutions and community banks that could result from redefining core deposits.

(b) REPORT TO CONGRESS.—Not later than 1 year after the date of enactment of this Act, the Corporation shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report on the results of the study under subsection (a) that includes legislative recommendations, if any, to address concerns arising in connection with the definitions of core deposits and brokered deposits.
TITLE XVI—SECTION 1256 CONTRACTS

SEC. 1601. CERTAIN SWAPS, ETC., NOT TREATED AS SECTION 1256 CONTRACTS.

(a) In General.—Subsection (b) of section 1256 of the Internal Revenue Code of 1986 is amended—

(1) by redesignating paragraphs (1) through (5) as subparagraphs (A) through (E), respectively, and by indenting such subparagraphs (as so redesignated) accordingly,

(2) by striking “For purposes of” and inserting the following:

“(1) In General.—For purposes of”, and

(3) by striking the last sentence and inserting the following new paragraph:

“(2) Exceptions.—The term ‘section 1256 contract’ shall not include—

“(A) any securities futures contract or option on such a contract unless such contract or option is a dealer securities futures contract, or

“(B) any interest rate swap, currency swap, basis swap, interest rate cap, interest rate floor, commodity swap, equity swap, equity index swap, credit default swap, or similar agreement.”

(b) Effective Date.—The amendments made by this section shall apply to taxable years beginning after the date of the enactment of this Act.

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First Published 1996
Reprinted 2000
CHAPTER 18

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1996 CHAPTER 18

An Act to consolidate enactments relating to employment rights.
[22nd May 1996]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows.—

PART I

EMPLOYMENT PARTICULARS

Right to statements of employment particulars

1.—(1) Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.

(2) The statement may (subject to section 2(4)) be given in instalments and (whether or not given in instalments) shall be given not later than two months after the beginning of the employment.

(3) The statement shall contain particulars of—
(a) the names of the employer and employee,
(b) the date when the employment began, and
(c) the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).

(4) The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment containing them) is given, of—
(a) the scale or rate of remuneration or the method of calculating remuneration,
(b) the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),

Statement of initial employment particulars.
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(c) any terms and conditions relating to hours of work (including any terms and conditions relating to normal working hours),

(d) any terms and conditions relating to any of the following—

(i) entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee’s entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),

(ii) incapacity for work due to sickness or injury, including any provision for sick pay, and

(iii) pensions and pension schemes,

(e) the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment,

(f) the title of the job which the employee is employed to do or a brief description of the work for which he is employed,

(g) where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end,

(h) either the place of work or, where the employee is required or permitted to work at various places, an indication of that and of the address of the employer,

(j) any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made, and

(k) where the employee is required to work outside the United Kingdom for a period of more than one month—

(i) the period for which he is to work outside the United Kingdom,

(ii) the currency in which remuneration is to be paid while he is working outside the United Kingdom,

(iii) any additional remuneration payable to him, and any benefits to be provided to or in respect of him, by reason of his being required to work outside the United Kingdom, and

(iv) any terms and conditions relating to his return to the United Kingdom.

(5) Subsection (4)(d)(iii) does not apply to an employee of a body or authority if—

(a) the employee’s pension rights depend on the terms of a pension scheme established under any provision contained in or having effect under any Act, and

(b) any such provision requires the body or authority to give to a new employee information concerning the employee’s pension rights or the determination of questions affecting those rights.

2.—(1) If, in the case of a statement under section 1, there are no particulars to be entered under any of the heads of paragraph (d) or (k) of subsection (4) of that section, or under any of the other paragraphs of subsection (3) or (4) of that section, that fact shall be stated.
(2) A statement under section 1 may refer the employee for particulars of any of the matters specified in subsection (4)(d)(ii) and (iii) of that section to the provisions of some other document which is reasonably accessible to the employee.

(3) A statement under section 1 may refer the employee for particulars of either of the matters specified in subsection (4)(e) of that section to the law or to the provisions of any collective agreement directly affecting the terms and conditions of the employment which is reasonably accessible to the employee.

(4) The particulars required by section 1(3) and (4)(a) to (c), (d)(i), (f) and (h) shall be included in a single document.

(5) Where before the end of the period of two months after the beginning of an employee’s employment the employee is to begin to work outside the United Kingdom for a period of more than one month, the statement under section 1 shall be given to him not later than the time when he leaves the United Kingdom in order to begin so to work.

(6) A statement shall be given to a person under section 1 even if his employment ends before the end of the period within which the statement is required to be given.

3.—(1) A statement under section 1 shall include a note—

(a) specifying any disciplinary rules applicable to the employee or referring the employee to the provisions of a document specifying such rules which is reasonably accessible to the employee,

(b) specifying (by description or otherwise)—

(i) a person to whom the employee can apply if dissatisfied with any disciplinary decision relating to him, and

(ii) a person to whom the employee can apply for the purpose of seeking redress of any grievance relating to his employment, and the manner in which any such application should be made, and

(c) where there are further steps consequent on any such application, explaining those steps or referring to the provisions of a document explaining them which is reasonably accessible to the employee.

(2) Subsection (1) does not apply to rules, disciplinary decisions, grievances or procedures relating to health or safety at work.

(3) The note need not comply with the following provisions of subsection (1)—

(a) paragraph (a),

(b) in paragraph (b), sub-paragraph (i) and the words following sub-paragraph (ii) so far as relating to sub-paragraph (i), and

(c) paragraph (c),

if on the date when the employee’s employment began the relevant number of employees was less than twenty.
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(4) In subsection (3) "the relevant number of employees", in relation to an employee, means the number of employees employed by his employer added to the number of employees employed by any associated employer.

(5) The note shall also state whether there is in force a contracting-out certificate (issued in accordance with Chapter I of Part III of the Pension Schemes Act 1993) stating that the employment is contracted-out employment (for the purposes of that Part of that Act).

4.—(1) If, after the material date, there is a change in any of the matters particulars of which are required by sections 1 to 3 to be included or referred to in a statement under section 1, the employer shall give to the employee a written statement containing particulars of the change.

(2) For the purposes of subsection (1)—

(a) in relation to a matter particulars of which are included or referred to in a statement given under section 1 otherwise than in instalments, the material date is the date to which the statement relates,

(b) in relation to a matter particulars of which—

(i) are included or referred to in an instalment of a statement given under section 1, or

(ii) are required by section 2(4) to be included in a single document but are not included in an instalment of a statement given under section 1 which does include other particulars to which that provision applies, the material date is the date to which the instalment relates, and

(c) in relation to any other matter, the material date is the date by which a statement under section 1 is required to be given.

(3) A statement under subsection (1) shall be given at the earliest opportunity and, in any event, not later than—

(a) one month after the change in question, or

(b) where that change results from the employee being required to work outside the United Kingdom for a period of more than one month, the time when he leaves the United Kingdom in order to begin so to work, if that is earlier.

(4) A statement under subsection (1) may refer the employee to the provisions of some other document which is reasonably accessible to the employee for a change in any of the matters specified in sections 1(4)(d)(ii) and (iii) and 3(1)(a) and (c).

(5) A statement under subsection (1) may refer the employee for a change in either of the matters specified in section 1(4)(c) to the law or to the provisions of any collective agreement directly affecting the terms and conditions of the employment which is reasonably accessible to the employee.

(6) Where, after an employer has given to an employee a statement under section 1, either—

(a) the name of the employer (whether an individual or a body corporate or partnership) is changed without any change in the identity of the employer, or
(b) the identity of the employer is changed in circumstances in which the continuity of the employee’s period of employment is not broken, and subsection (7) applies in relation to the change, the person who is the employer immediately after the change is not required to give to the employee a statement under section 1; but the change shall be treated as a change falling within subsection (1) of this section.

(7) This subsection applies in relation to a change if it does not involve any change in any of the matters (other than the names of the parties) particulars of which are required by sections 1 to 3 to be included or referred to in the statement under section 1.

(8) A statement under subsection (1) which informs an employee of a change such as is referred to in subsection (6)(b) shall specify the date on which the employee’s period of continuous employment began.

5.—(1) Sections 1 to 4 apply to an employee who at any time comes or ceases to come within the exceptions from those sections provided by sections 196 and 199, and under section 209, as if his employment with his employer terminated or began at that time.

(2) The fact that section 1 is directed by subsection (1) to apply to an employee as if his employment began or his ceasing to come within the exceptions referred to in that subsection does not affect the obligation under section 1(3)(b) to specify the date on which his employment actually began.

6. In sections 2 to 4 references to a document or collective agreement which is reasonably accessible to an employee are references to a document or collective agreement which—

(a) the employee has reasonable opportunities of reading in the course of his employment, or

(b) is made reasonably accessible to the employee in some other way.

7. The Secretary of State may by order provide that section 1 shall have effect as if particulars of such further matters as may be specified in the order were included in the particulars required by that section; and, for that purpose, the order may include such provisions amending that section as appear to the Secretary of State to be expedient.

**Right to itemised pay statement**

8.—(1) An employee has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.

(2) The statement shall contain particulars of—

(a) the gross amount of the wages or salary,

(b) the amounts of any variable, and (subject to section 9) any fixed, deductions from that gross amount and the purposes for which they are made,

(c) the net amount of wages or salary payable, and
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(d) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.

Standing statement of fixed deductions.

9.—(1) A pay statement given in accordance with section 8 need not contain separate particulars of a fixed deduction if—

(a) it contains instead an aggregate amount of fixed deductions, including that deduction, and

(b) the employer has given to the employee, at or before the time at which the pay statement is given, a standing statement of fixed deductions which satisfies subsection (2).

(2) A standing statement of fixed deductions satisfies this subsection if—

(a) it is in writing,

(b) it contains, in relation to each deduction comprised in the aggregate amount of deductions, particulars of—

(i) the amount of the deduction,

(ii) the intervals at which the deduction is to be made, and

(iii) the purpose for which it is made, and

(c) it is (in accordance with subsection (5)) effective at the date on which the pay statement is given.

(3) A standing statement of fixed deductions may be amended, whether by—

(a) addition of a new deduction,

(b) a change in the particulars, or

(c) cancellation of an existing deduction,

by notice in writing, containing particulars of the amendment, given by the employer to the employee.

(4) An employer who has given to an employee a standing statement of fixed deductions shall—

(a) within the period of twelve months beginning with the date on which the first standing statement was given, and

(b) at intervals of not more than twelve months afterwards, re-issue it in a consolidated form incorporating any amendments notified in accordance with subsection (3).

(5) For the purposes of subsection (2)(c) a standing statement of fixed deductions—

(a) becomes effective on the date on which it is given to the employee, and

(b) ceases to be effective at the end of the period of twelve months beginning with that date or, where it is re-issued in accordance with subsection (4), with the end of the period of twelve months beginning with the date of the last re-issue.
10. The Secretary of State may by order—
   
   (a) vary the provisions of sections 8 and 9 as to the particulars which must be included in a pay statement or a standing statement of fixed deductions by adding items to, or removing items from, the particulars listed in those sections or by amending any such particulars, and
   
   (b) vary the provisions of subsections (4) and (5) of section 9 so as to shorten or extend the periods of twelve months referred to in those subsections, or those periods as varied from time to time under this section.

Enforcement

11.—(1) Where an employer does not give an employee a statement as required by section 1, 4 or 8 (either because he gives him no statement or because the statement he gives does not comply with what is required), the employee may require a reference to be made to an industrial tribunal to determine what particulars ought to have been included or referred to in a statement so as to comply with the requirements of the section concerned.

(2) Where—
   
   (a) a statement purporting to be a statement under section 1 or 4, or a pay statement or a standing statement of fixed deductions purporting to comply with section 8 or 9, has been given to an employee, and
   
   (b) a question arises as to the particulars which ought to have been included or referred to in the statement so as to comply with the requirements of this Part,

either the employer or the employee may require the question to be referred to and determined by an industrial tribunal.

(3) For the purposes of this section—
   
   (a) a question as to the particulars which ought to have been included in the note required by section 3 to be included in the statement under section 1 does not include any question whether the employment is, has been or will be contracted-out employment (for the purposes of Part III of the Pension Schemes Act 1993), and
   
   (b) a question as to the particulars which ought to have been included in a pay statement or standing statement of fixed deductions does not include a question solely as to the accuracy of an amount stated in any such particulars.

(4) An industrial tribunal shall not consider a reference under this section in a case where the employment to which the reference relates has ceased unless an application requiring the reference to be made was made—
   
   (a) before the end of the period of three months beginning with the date on which the employment ceased, or
   
   (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the application to be made before the end of that period of three months.
12.—(1) Where, on a reference under section 11(1), an industrial tribunal determines particulars as being those which ought to have been included or referred to in a statement given under section 1 or 4, the employer shall be deemed to have given to the employee a statement in which those particulars were included, or referred to, as specified in the decision of the tribunal.

(2) On determining a reference under section 11(2) relating to a statement purporting to be a statement under section 1 or 4, an industrial tribunal may—

(a) confirm the particulars as included or referred to in the statement given by the employer,

(b) amend those particulars, or

(c) substitute other particulars for them,

as the tribunal may determine to be appropriate; and the statement shall be deemed to have been given by the employer to the employee in accordance with the decision of the tribunal.

(3) Where on a reference under section 11 an industrial tribunal finds—

(a) that an employer has failed to give an employee any pay statement in accordance with section 8, or

(b) that a pay statement or standing statement of fixed deductions does not, in relation to a deduction, contain the particulars required to be included in that statement by that section or section 9,

the tribunal shall make a declaration to that effect.

(4) Where on a reference in the case of which subsection (3) applies the tribunal further finds that any unnotified deductions have been made from the pay of the employee during the period of thirteen weeks immediately preceding the date of the application for the reference (whether or not the deductions were made in breach of the contract of employment), the tribunal may order the employer to pay the employee a sum not exceeding the aggregate of the unnotified deductions so made.

(5) For the purposes of subsection (4) a deduction is an unnotified deduction if it is made without the employer giving the employee, in any pay statement or standing statement of fixed deductions, the particulars of the deduction required by section 8 or 9.

PART II

PROTECTION OF WAGES

Deductions by employer

13.—(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised—
(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

14.—(1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—

(a) an overpayment of wages, or

(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,

made (for any reason) by the employer to the worker.

(2) Section 13 does not apply to a deduction from a worker's wages made by his employer in consequence of any disciplinary proceedings if those proceedings were held by virtue of a statutory provision.

(3) Section 13 does not apply to a deduction from a worker's wages made by his employer in pursuance of a requirement imposed on the employer by a statutory provision to deduct and pay over to a public authority amounts determined by that authority as being due to it from the worker if the deduction is made in accordance with the relevant determination of that authority.
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(4) Section 13 does not apply to a deduction from a worker’s wages made by his employer in pursuance of any arrangements which have been established—

(a) in accordance with a relevant provision of his contract to the inclusion of which in the contract the worker has signified his agreement or consent in writing, or

(b) otherwise with the prior agreement or consent of the worker signified in writing,

and under which the employer is to deduct and pay over to a third person amounts notified to the employer by that person as being due to him from the worker, if the deduction is made in accordance with the relevant notification by that person.

(5) Section 13 does not apply to a deduction from a worker’s wages made by his employer where the worker has taken part in a strike or other industrial action and the deduction is made by the employer on account of the worker’s having taken part in that strike or other action.

(6) Section 13 does not apply to a deduction from a worker’s wages made by his employer with his prior agreement or consent signified in writing where the purpose of the deduction is the satisfaction (whether wholly or in part) of an order of a court or tribunal requiring the payment of an amount by the worker to the employer.

Payments to employer

15.—(1) An employer shall not receive a payment from a worker employed by him unless—

(a) the payment is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the payment.

(2) In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer receiving the payment in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) For the purposes of this section a relevant provision of a worker’s contract having effect by virtue of a variation of the contract does not operate to authorise the receipt of a payment on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(4) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the receipt of a payment on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.
(5) Any reference in this Part to an employer receiving a payment from a worker employed by him is a reference to his receiving such a payment in his capacity as the worker’s employer.

16.—(1) Section 15 does not apply to a payment received from a worker by his employer where the purpose of the payment is the reimbursement of the employer in respect of—

(a) an overpayment of wages, or

(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,

made (for any reason) by the employer to the worker.

(2) Section 15 does not apply to a payment received from a worker by his employer in consequence of any disciplinary proceedings if those proceedings were held by virtue of a statutory provision.

(3) Section 15 does not apply to a payment received from a worker by his employer where the worker has taken part in a strike or other industrial action and the payment has been required by the employer on account of the worker’s having taken part in that strike or other action.

(4) Section 15 does not apply to a payment received from a worker by his employer where the purpose of the payment is the satisfaction (whether wholly or in part) of an order of a court or tribunal requiring the payment of an amount by the worker to the employer.

Cash shortages and stock deficiencies in retail employment

17.—(1) In the following provisions of this Part—

“cash shortage” means a deficit arising in relation to amounts received in connection with retail transactions, and

“stock deficiency” means a stock deficiency arising in the course of retail transactions.

(2) In the following provisions of this Part “retail employment”, in relation to a worker, means employment involving (whether or not on a regular basis)—

(a) the carrying out by the worker of retail transactions directly with members of the public or with fellow workers or other individuals in their personal capacities, or

(b) the collection by the worker of amounts payable in connection with retail transactions carried out by other persons directly with members of the public or with fellow workers or other individuals in their personal capacities.

(3) References in this section to a “retail transaction” are to the sale or supply of goods or the supply of services (including financial services).

(4) References in the following provisions of this Part to a deduction made from wages of a worker in retail employment, or to a payment received from such a worker by his employer, on account of a cash shortage or stock deficiency include references to a deduction or payment so made or received on account of—

(a) any dishonesty or other conduct on the part of the worker which resulted in any such shortage or deficiency, or
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(b) any other event in respect of which he (whether or not together with any other workers) has any contractual liability and which so resulted,
in each case whether or not the amount of the deduction or payment is designed to reflect the exact amount of the shortage or deficiency.

(5) References in the following provisions of this Part to the recovery from a worker of an amount in respect of a cash shortage or stock deficiency accordingly include references to the recovery from him of an amount in respect of any such conduct or event as is mentioned in subsection (4)(a) or (b).

(6) In the following provisions of this Part “pay day”, in relation to a worker, means a day on which wages are payable to the worker.

18.—(1) Where (in accordance with section 13) the employer of a worker in retail employment makes, on account of one or more cash shortages or stock deficiencies, a deduction or deductions from wages payable to the worker on a pay day, the amount or aggregate amount of the deduction or deductions shall not exceed one-tenth of the gross amount of the wages payable to the worker on that day.

(2) Where the employer of a worker in retail employment makes a deduction from the worker’s wages on account of a cash shortage or stock deficiency, the employer shall not be treated as making the deduction in accordance with section 13 unless (in addition to the requirements of that section being satisfied with respect to the deduction)—

(a) the deduction is made, or

(b) in the case of a deduction which is one of a series of deductions relating to the shortage or deficiency, the first deduction in the series was made,

not later than the end of the relevant period.

(3) In subsection (2) “the relevant period” means the period of twelve months beginning with the date when the employer established the existence of the shortage or deficiency or (if earlier) the date when he ought reasonably to have done so.

19.—(1) This section applies where—

(a) by virtue of an agreement between a worker in retail employment and his employer, the amount of the worker’s wages or any part of them is or may be determined by reference to the incidence of cash shortages or stock deficiencies, and

(b) the gross amount of the wages payable to the worker on any pay day is, on account of any such shortages or deficiencies, less than the gross amount of the wages that would have been payable to him on that day if there had been no such shortages or deficiencies.

(2) The amount representing the difference between the two amounts referred to in subsection (1)(b) shall be treated for the purposes of this Part as a deduction from the wages payable to the worker on that day made by the employer on account of the cash shortages or stock deficiencies in question.
(3) The second of the amounts referred to in subsection (1)(b) shall be treated for the purposes of this Part (except subsection (1)) as the gross amount of the wages payable to him on that day.

(4) Accordingly—
   (a) section 13, and
   (b) if the requirements of section 13 and subsection (2) of section 18 are satisfied, subsection (1) of section 18, have effect in relation to the amount referred to in subsection (2) of this section.

20.—(1) Where the employer of a worker in retail employment receives from the worker a payment on account of a cash shortage or stock deficiency, the employer shall not be treated as receiving the payment in accordance with section 15 unless (in addition to the requirements of that section being satisfied with respect to the payment) he has previously—
   (a) notified the worker in writing of the worker's total liability to him in respect of that shortage or deficiency, and
   (b) required the worker to make the payment by means of a demand for payment made in accordance with the following provisions of this section.

(2) A demand for payment made by the employer of a worker in retail employment in respect of a cash shortage or stock deficiency—
   (a) shall be made in writing, and
   (b) shall be made on one of the worker's pay days.

(3) A demand for payment in respect of a particular cash shortage or stock deficiency, or (in the case of a series of such demands) the first such demand, shall not be made—
   (a) earlier than the first pay day of the worker following the date when he is notified of his total liability in respect of the shortage or deficiency in pursuance of subsection (1)(a) or, where he is so notified on a pay day, earlier than that day, or
   (b) later than the end of the period of twelve months beginning with the date when the employer established the existence of the shortage or deficiency or (if earlier) the date when he ought reasonably to have done so,

(4) For the purposes of this Part a demand for payment shall be treated as made by the employer on one of a worker's pay days if it is given to the worker or posted to, or left at, his last known address—
   (a) on that pay day, or
   (b) in the case of a pay day which is not a working day of the employer's business, on the first such working day following that pay day.

(5) Legal proceedings by the employer of a worker in retail employment for the recovery from the worker of an amount in respect of a cash shortage or stock deficiency shall not be instituted by the employer after the end of the period referred to in subsection (3)(b) unless the employer has within that period made a demand for payment in respect of that amount in accordance with this section.
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Limit on amount of payments.

21.—(1) Where the employer of a worker in retail employment makes on any pay day one or more demands for payment in accordance with section 20, the amount or aggregate amount required to be paid by the worker in pursuance of the demand or demands shall not exceed—

(a) one-tenth of the gross amount of the wages payable to the worker on that day, or

(b) where one or more deductions falling within section 18(1) are made by the employer from those wages, such amount as represents the balance of that one-tenth after subtracting the amount or aggregate amount of the deduction or deductions.

(2) Once an amount has been required to be paid by means of a demand for payment made in accordance with section 20 on any pay day, that amount shall not be taken into account under subsection (1) as it applies to any subsequent pay day, even though the employer is obliged to make further requests for it to be paid.

(3) Where in any legal proceedings the court finds that the employer of a worker in retail employment is (in accordance with section 15 as it applies apart from section 20(1)) entitled to recover an amount from the worker in respect of a cash shortage or stock deficiency, the court shall, in ordering the payment by the worker to the employer of that amount, make such provision as appears to the court to be necessary to ensure that it is paid by the worker at a rate not exceeding that at which it could be recovered from him by the employer in accordance with this section.

22.—(1) In this section “final instalment of wages”, in relation to a worker, means—

(a) the amount of wages payable to the worker which consists of or includes an amount payable by way of contractual remuneration in respect of the last of the periods for which he is employed under his contract prior to its termination for any reason (but excluding any wages referable to any earlier such period), or

(b) where an amount in lieu of notice is paid to the worker later than the amount referred to in paragraph (a), the amount so paid, in each case whether the amount in question is paid before or after the termination of the worker’s contract.

(2) Section 18(1) does not operate to restrict the amount of any deductions which may (in accordance with section 13(1)) be made by the employer of a worker in retail employment from the worker’s final instalment of wages.

(3) Nothing in section 20 or 21 applies to a payment falling within section 20(1) which is made on or after the day on which any such worker’s final instalment of wages is paid; but (even if the requirements of section 15 would otherwise be satisfied with respect to it) his employer shall not be treated as receiving any such payment in accordance with that section if the payment was first required to be made after the end of the period referred to in section 20(3)(b).

(4) Section 21(3) does not apply to an amount which is to be paid by a worker on or after the day on which his final instalment of wages is paid.
23.—(1) A worker may present a complaint to an industrial tribunal—
(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),
(b) that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),
(c) that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or
(d) that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

(2) Subject to subsection (4), an industrial tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—
(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—
(a) a series of deductions or payments, or
(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(4) Where the industrial tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

24. Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer—
(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13,
(b) in the case of a complaint under section 23(1)(b), to repay to the worker the amount of any payment received in contravention of section 15.
PART II

(c) in the case of a complaint under section 23(1)(c), to pay to the worker any amount recovered from him in excess of the limit mentioned in that provision, and

(d) in the case of a complaint under section 23(1)(d), to repay to the worker any amount received from him in excess of the limit mentioned in that provision.

25.—(1) Where, in the case of any complaint under section 23(1)(a), a tribunal finds that, although neither of the conditions set out in section 13(1)(a) and (b) was satisfied with respect to the whole amount of the deduction, one of those conditions was satisfied with respect to any lesser amount, the amount of the deduction shall for the purposes of section 24(a) be treated as reduced by the amount with respect to which that condition was satisfied.

(2) Where, in the case of any complaint under section 23(1)(b), a tribunal finds that, although neither of the conditions set out in section 15(1)(a) and (b) was satisfied with respect to the whole amount of the payment, one of those conditions was satisfied with respect to any lesser amount, the amount of the payment shall for the purposes of section 24(b) be treated as reduced by the amount with respect to which that condition was satisfied.

(3) An employer shall not under section 24 be ordered by a tribunal to pay or repay to a worker any amount in respect of a deduction or payment, or in respect of any combination of deductions or payments, in so far as it appears to the tribunal that he has already paid or repaid any such amount to the worker.

(4) Where a tribunal has under section 24 ordered an employer to pay or repay to a worker any amount in respect of a particular deduction or payment falling within section 23(1)(a) to (d), the amount which the employer is entitled to recover (by whatever means) in respect of the matter in relation to which the deduction or payment was originally made or received shall be treated as reduced by that amount.

(5) Where a tribunal has under section 24 ordered an employer to pay or repay to a worker any amount in respect of any combination of deductions or payments falling within section 23(1)(c) or (d), the aggregate amount which the employer is entitled to recover (by whatever means) in respect of the cash shortages or stock deficiencies in relation to which the deductions or payments were originally made or required to be made shall be treated as reduced by that amount.

26. Section 23 does not affect the jurisdiction of an industrial tribunal to consider a reference under section 11 in relation to any deduction from the wages of a worker; but the aggregate of any amounts ordered by an industrial tribunal to be paid under section 12(4) and under section 24 (whether on the same or different occasions) in respect of a particular deduction shall not exceed the amount of the deduction.
Supplementary

27.—(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

(b) statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992,

(c) statutory maternity pay under Part XII of that Act,

(d) a guarantee payment (under section 28 of this Act),

(e) any payment for time off under Part VI of this Act or section 169 of the Trade Union and Labour Relations (Consolidation) Act 1992 (payment for time off for carrying out trade union duties etc.),

(f) remuneration on suspension on medical grounds under section 64 of this Act and remuneration on suspension on maternity grounds under section 68 of this Act,

(g) any sum payable in pursuance of an order for reinstatement or re-engagement under section 113 of this Act,

(h) any sum payable in pursuance of an order for the continuation of a contract of employment under section 130 of this Act or section 164 of the Trade Union and Labour Relations (Consolidation) Act 1992, and

(j) remuneration under a protective award under section 189 of that Act,

but excluding any payments within subsection (2).

(2) Those payments are—

(a) any payment by way of an advance under an agreement for a loan or by way of an advance of wages (but without prejudice to the application of section 13 to any deduction made from the worker's wages in respect of any such advance),

(b) any payment in respect of expenses incurred by the worker in carrying out his employment,

(c) any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office,

(d) any payment referable to the worker's redundancy, and

(e) any payment to the worker otherwise than in his capacity as a worker.

(3) Where any payment in the nature of a non-contractual bonus is (for any reason) made to a worker by his employer, the amount of the payment shall for the purposes of this Part—

(a) be treated as wages of the worker, and

(b) be treated as payable to him as such on the day on which the payment is made.

(4) In this Part "gross amount", in relation to any wages payable to a worker, means the total amount of those wages before deductions of whatever nature.
PART II

(5) For the purposes of this Part any monetary value attaching to any payment or benefit in kind furnished to a worker by his employer shall not be treated as wages of the worker except in the case of any voucher, stamp or similar document which is—
(a) of a fixed value expressed in monetary terms, and
(b) capable of being exchanged (whether on its own or together with other vouchers, stamps or documents, and whether immediately or only after a time) for money, goods or services (or for any combination of two or more of those things).

PART III

GUARANTEE PAYMENTS

28.—(1) Where throughout a day during any part of which an employee would normally be required to work in accordance with his contract of employment the employee is not provided with work by his employer by reason of—
(a) a diminution in the requirements of the employer's business for work of the kind which the employee is employed to do, or
(b) any other occurrence affecting the normal working of the employer's business in relation to work of the kind which the employee is employed to do,
the employee is entitled to be paid by his employer an amount in respect of that day.

(2) In this Act a payment to which an employee is entitled under subsection (1) is referred to as a guarantee payment.

(3) In this Part—
(a) a day falling within subsection (1) is referred to as a “workless day”, and
(b) “workless period” has a corresponding meaning.

(4) In this Part “day” means the period of twenty-four hours from midnight to midnight.

(5) Where a period of employment begun on any day extends, or would normally extend, over midnight into the following day—
(a) if the employment before midnight is, or would normally be, of longer duration than that after midnight, the period of employment shall be treated as falling wholly on the first day, and
(b) in any other case, the period of employment shall be treated as falling wholly on the second day.

29.—(1) An employee is not entitled to a guarantee payment unless he has been continuously employed for a period of not less than one month ending with the day before that in respect of which the guarantee payment is claimed.

(2) An employee who is employed—
(a) under a contract for a fixed term of three months or less, or
(b) under a contract made in contemplation of the performance of
a specific task which is not expected to last for more than three
months,
is not entitled to a guarantee payment unless he has been continuously
employed for a period of more than three months ending with the day
before that in respect of which the guarantee payment is claimed.

(3) An employee is not entitled to a guarantee payment in respect of a
workless day if the failure to provide him with work for that day occurs
in consequence of a strike, lock-out or other industrial action involving
any employee of his employer or of an associated employer.

(4) An employee is not entitled to a guarantee payment in respect of a
workless day if—

(a) his employer has offered to provide alternative work for that day
which is suitable in all the circumstances (whether or not it is
work which the employee is under his contract employed to
perform), and

(b) the employee has unreasonably refused that offer.

(5) An employee is not entitled to a guarantee payment if he does not
comply with reasonable requirements imposed by his employer with a
view to ensuring that his services are available.

30.—(1) Subject to section 31, the amount of a guarantee payment
payable to an employee in respect of any day is the sum produced by
multiplying the number of normal working hours on the day by the
guaranteed hourly rate; and, accordingly, no guarantee payment is
payable to an employee in whose case there are no normal working hours
on the day in question.

(2) The guaranteed hourly rate, in relation to an employee, is the
amount of one week’s pay divided by the number of normal working
hours in a week for that employee when employed under the contract of
employment in force on the day in respect of which the guarantee
payment is payable.

(3) But where the number of normal working hours differs from week
to week or over a longer period, the amount of one week’s pay shall be
divided instead by—

(a) the average number of normal working hours calculated by
dividing by twelve the total number of the employee’s normal
working hours during the period of twelve weeks ending with
the last complete week before the day in respect of which the
guarantee payment is payable, or

(b) where the employee has not been employed for a sufficient period
to enable the calculation to be made under paragraph (a), a
number which fairly represents the number of normal working
hours in a week having regard to such of the considerations
specified in subsection (4) as are appropriate in the
circumstances.

(4) The considerations referred to in subsection (3)(b) are—

(a) the average number of normal working hours in a week which
the employee could expect in accordance with the terms of his
contract, and
(b) the average number of normal working hours of other employees engaged in relevant comparable employment with the same employer.

(5) If in any case an employee’s contract has been varied, or a new contract has been entered into, in connection with a period of short-time working, subsections (2) and (3) have effect as if for the references to the day in respect of which the guarantee payment is payable there were substituted references to the last day on which the original contract was in force.

31.—(1) The amount of a guarantee payment payable to an employee in respect of any day shall not exceed £14.50.

(2) An employee is not entitled to guarantee payments in respect of more than the specified number of days in any period of three months.

(3) The specified number of days for the purposes of subsection (2) is the number of days, not exceeding five, on which the employee normally works in a week under the contract of employment in force on the day in respect of which the guarantee payment is claimed.

(4) But where that number of days varies from week to week or over a longer period, the specified number of days is instead—

(a) the average number of such days, not exceeding five, calculated by dividing by twelve the total number of such days during the period of twelve weeks ending with the last complete week before the day in respect of which the guarantee payment is claimed, and rounding up the resulting figure to the next whole number, or

(b) where the employee has not been employed for a sufficient period to enable the calculation to be made under paragraph (a), a number which fairly represents the number of the employee’s normal working days in a week, not exceeding five, having regard to such of the considerations specified in subsection (5) as are appropriate in the circumstances.

(5) The considerations referred to in subsection (4)(b) are—

(a) the average number of normal working days in a week which the employee could expect in accordance with the terms of his contract, and

(b) the average number of such days of other employees engaged in relevant comparable employment with the same employer.

(6) If in any case an employee’s contract has been varied, or a new contract has been entered into, in connection with a period of short-time working, subsections (3) and (4) have effect as if for the references to the day in respect of which the guarantee payment is claimed there were substituted references to the last day on which the original contract was in force.

(7) The Secretary of State may by order made in accordance with section 208 vary any of the limits specified in this section, and (in particular) vary the length of the period specified in subsection (2), after a review under that section.
32.—(1) A right to a guarantee payment does not affect any right of an employee in relation to remuneration under his contract of employment ("contractual remuneration").

(2) Any contractual remuneration paid to an employee in respect of a workless day goes towards discharging any liability of the employer to pay a guarantee payment in respect of that day; and, conversely, any guarantee payment paid in respect of a day goes towards discharging any liability of the employer to pay contractual remuneration in respect of that day.

(3) For the purposes of subsection (2), contractual remuneration shall be treated as paid in respect of a workless day—

(a) where it is expressed to be calculated or payable by reference to that day or any part of that day, to the extent that it is so expressed, and

(b) in any other case, to the extent that it represents guaranteed remuneration, rather than remuneration for work actually done, and is referable to that day when apportioned rateably between that day and any other workless period falling within the period in respect of which the remuneration is paid.

33. The Secretary of State may by order provide that in relation to any description of employees the provisions of—

(a) sections 28(4) and (5), 30, 31(3) to (5) (as originally enacted or as varied under section 31(7)) and 32, and

(b) so far as they apply for the purposes of those provisions, Chapter II of Part XIV and section 234,

shall have effect subject to such modifications and adaptations as may be prescribed by the order.

34.—(1) An employee may present a complaint to an industrial tribunal that his employer has failed to pay the whole or any part of a guarantee payment to which the employee is entitled.

(2) An industrial tribunal shall not consider a complaint relating to a guarantee payment in respect of any day unless the complaint is presented to the tribunal—

(a) before the end of the period of three months beginning with that day, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(3) Where an industrial tribunal finds a complaint under this section well-founded, the tribunal shall order the employer to pay to the employee the amount of guarantee payment which it finds is due to him.

35.—(1) Where—

(a) at any time there is in force a collective agreement, or an agricultural wages order, under which employees to whom the agreement or order relates have a right to guaranteed remuneration, and
Part III

(b) on the application of all the parties to the agreement, or of the Board making the order, the appropriate Minister (having regard to the provisions of the agreement or order) is satisfied that section 28 should not apply to those employees, he may make an order under this section excluding those employees from the operation of that section.

(2) In subsection (1) "agricultural wages order" means an order made under—

1948 c. 47.

(a) section 3 of the Agricultural Wages Act 1948, or

1949 c. 30.

(b) section 3 of the Agricultural Wages (Scotland) Act 1949.

(3) In subsection (1) "the appropriate Minister" means—

(a) in relation to a collective agreement or to an order such as is referred to in subsection (2)(b), the Secretary of State, and

(b) in relation to an order such as is referred to in subsection (2)(a), the Minister of Agriculture, Fisheries and Food.

(4) The Secretary of State shall not make an order under this section in respect of an agreement unless—

(a) the agreement provides for procedures to be followed (whether by arbitration or otherwise) in cases where an employee claims that his employer has failed to pay the whole or any part of any guaranteed remuneration to which the employee is entitled under the agreement and those procedures include a right to arbitration or adjudication by an independent referee or body in cases where (by reason of an equality of votes or otherwise) a decision cannot otherwise be reached, or

(b) the agreement indicates that an employee to whom the agreement relates may present a complaint to an industrial tribunal that his employer has failed to pay the whole or any part of any guaranteed remuneration to which the employee is entitled under the agreement.

(5) Where an order under this section is in force in respect of an agreement indicating as described in paragraph (b) of subsection (4) an industrial tribunal shall have jurisdiction over a complaint such as is mentioned in that paragraph as if it were a complaint falling within section 34.

(6) An order varying or revoking an earlier order under this section may be made in pursuance of an application by all or any of the parties to the agreement in question, or the Board which made the order in question, or in the absence of such an application.

Part IV

Sunday Working for Shop and Betting Workers

Protected shop workers and betting workers.

36.—(1) Subject to subsection (5), a shop worker or betting worker is to be regarded as "protected" for the purposes of any provision of this Act if (and only if) subsection (2) or (3) applies to him.

(2) This subsection applies to a shop worker or betting worker if—
(a) on the day before the relevant commencement date he was employed as a shop worker or a betting worker but not to work only on Sunday,

(b) he has been continuously employed during the period beginning with that day and ending with the day which, in relation to the provision concerned, is the appropriate date, and

(c) throughout that period, or throughout every part of it during which his relations with his employer were governed by a contract of employment, he was a shop worker or a betting worker.

(3) This subsection applies to any shop worker or betting worker whose contract of employment is such that under it he—

(a) is not, and may not be, required to work on Sunday, and

(b) could not be so required even if the provisions of this Part were disregarded.

(4) Where on the day before the relevant commencement date an employee’s relations with his employer had ceased to be governed by a contract of employment, he shall be regarded as satisfying subsection (2)(a) if—

(a) that day fell in a week which counts as a period of employment with that employer under section 212(2) or (3) or under regulations under section 219, and

(b) on the last day before the relevant commencement date on which his relations with his employer were governed by a contract of employment, the employee was employed as a shop worker or a betting worker but not to work only on Sunday.

(5) A shop worker is not a protected shop worker, and a betting worker is not a protected betting worker, if—

(a) he has given his employer an opting-in notice on or after the relevant commencement date, and

(b) after giving the notice, he has expressly agreed with his employer to do shop work, or betting work, on Sunday or on a particular Sunday.

(6) In this Act “opting-in notice”, in relation to a shop worker or a betting worker, means written notice, signed and dated by the shop worker or betting worker, in which the shop worker or betting worker expressly states that he wishes to work on Sunday or that he does not object to Sunday working.

(7) In this Act “the relevant commencement date” means—

(a) in relation to a shop worker, 26th August 1994, and

(b) in relation to a betting worker, 3rd January 1995.

37.—(1) Any contract of employment under which a shop worker or betting worker who satisfies section 36(2)(a) was employed on the day before the relevant commencement date is unenforceable to the extent that it—

(a) requires the shop worker to do shop work, or the betting worker to do betting work, on Sunday on or after that date, or
(b) requires the employer to provide the shop worker with shop work, or the betting worker with betting work, on Sunday on or after that date.

(2) Subject to subsection (3), any agreement entered into after the relevant commencement date between a protected shop worker, or a protected betting worker, and his employer is unenforceable to the extent that it—

(a) requires the shop worker to do shop work, or the betting worker to do betting work, on Sunday, or

(b) requires the employer to provide the shop worker with shop work, or the betting worker with betting work, on Sunday.

(3) Where, after giving an opting-in notice, a protected shop worker or a protected betting worker expressly agrees with his employer to do shop work or betting work on Sunday or on a particular Sunday (and so ceases to be protected), his contract of employment shall be taken to be varied to the extent necessary to give effect to the terms of the agreement.

(4) The reference in subsection (2) to a protected shop worker, or a protected betting worker, includes a reference to an employee who although not a protected shop worker, or protected betting worker, at the time when the agreement is entered into is a protected shop worker, or protected betting worker, on the day on which she returns to work in accordance with section 79, or in pursuance of an offer made in the circumstances described in section 96(3), after a period of absence from work occasioned wholly or partly by pregnancy or childbirth.

(5) For the purposes of section 36(2)(b), the appropriate date—

(a) in relation to subsections (2) and (3) of this section, is the day on which the agreement is entered into, and

(b) in relation to subsection (4) of this section, is the day on which the employee returns to work.

38.—(1) This section applies where—

(a) under the contract of employment under which a shop worker or betting worker who satisfies section 36(2)(a) was employed on the day before the relevant commencement date, the employer is, or may be, required to provide him with shop work, or betting work, for a specified number of hours each week,

(b) under the contract the shop worker or betting worker was, or might have been, required to work on Sunday before that date, and

(c) the shop worker has done shop work, or the betting worker betting work, on Sunday in that employment (whether or not before that day) but has, on or after that date, ceased to do so.

(2) So long as the shop worker remains a protected shop worker, or the betting worker remains a protected betting worker, the contract shall not be regarded as requiring the employer to provide him with shop work, or betting work, on weekdays in excess of the hours normally worked by the shop worker or betting worker on weekdays before he ceased to do shop work, or betting work, on Sunday.
(3) For the purposes of section 36(2)(b), the appropriate date in relation to this section is any time in relation to which the contract is to be enforced.

39.—(1) This section applies where—
(a) under the contract of employment under which a shop worker or betting worker who satisfies section 36(2)(a) was employed on the day before the relevant commencement date, the shop worker or betting worker was, or might have been, required to work on Sunday before the relevant commencement date,
(b) the shop worker has done shop work, or the betting worker has done betting work, on Sunday in that employment (whether or not before that date) but has, on or after that date, ceased to do so, and
(c) it is not apparent from the contract what part of the remuneration payable, or of any other benefit accruing, to the shop worker or betting worker was intended to be attributable to shop work, or betting work, on Sunday.

(2) So long as the shop worker remains a protected shop worker, or the betting worker remains a protected betting worker, the contract shall be regarded as enabling the employer to reduce the amount of remuneration paid, or the extent of the other benefit provided, to the shop worker or betting worker in respect of any period by the relevant proportion.

(3) In subsection (2) "the relevant proportion" means the proportion which the hours of shop work, or betting work, which (apart from this Part) the shop worker, or betting worker, could have been required to do on Sunday in the period ("the contractual Sunday hours") bears to the aggregate of those hours and the hours of work actually done by the shop worker, or betting worker, in the period.

(4) Where, under the contract of employment, the hours of work actually done on weekdays in any period would be taken into account in determining the contractual Sunday hours, they shall be taken into account in determining the contractual Sunday hours for the purposes of subsection (3).

(5) For the purposes of section 36(2)(b), the appropriate date in relation to this section is the end of the period in respect of which the remuneration is paid or the benefit accrues.

Opting-out of Sunday work

40.—(1) A shop worker or betting worker to whom this section applies may at any time give his employer written notice, signed and dated by the shop worker or betting worker, to the effect that he objects to Sunday working.

(2) In this Act "opting-out notice" means a notice given under subsection (1) by a shop worker or betting worker to whom this section applies.

(3) This section applies to any shop worker or betting worker who under his contract of employment—
(a) is or may be required to work on Sunday (whether or not as a result of previously giving an opting-in notice), but
(b) is not employed to work only on Sunday.

41.—(1) Subject to subsection (2), a shop worker or betting worker is to be regarded as “opted-out” for the purposes of any provision of this Act if (and only if)—

(a) he has given his employer an opting-out notice,

(b) he has been continuously employed during the period beginning with the day on which the notice was given and ending with the day which, in relation to the provision concerned, is the appropriate date, and

(c) throughout that period, or throughout every part of it during which his relations with his employer were governed by a contract of employment, he was a shop worker or a betting worker.

(2) A shop worker is not an opted-out shop worker, and a betting worker is not an opted-out betting worker, if—

(a) after giving the opting-out notice concerned, he has given his employer an opting-in notice, and

(b) after giving the opting-in notice, he has expressly agreed with his employer to do shop work, or betting work, on Sunday or on a particular Sunday.

(3) In this Act “notice period”, in relation to an opted-out shop worker or an opted-out betting worker, means, subject to section 42(2), the period of three months beginning with the day on which the opting-out notice concerned was given.

42.—(1) Where a person becomes a shop worker or betting worker to whom section 40 applies, his employer shall, before the end of the period of two months beginning with the day on which that person becomes such a worker, give him a written statement in the prescribed form.

(2) If—

(a) an employer fails to comply with subsection (1) in relation to any shop worker or betting worker, and

(b) the shop worker or betting worker, on giving the employer an opting-out notice, becomes an opted-out shop worker or an opted-out betting worker,

section 41(3) has effect in relation to the shop worker or betting worker with the substitution for “three months” of “one month”.

(3) An employer shall not be regarded as failing to comply with subsection (1) in any case where, before the end of the period referred to in that subsection, the shop worker or betting worker has given him an opting-out notice.

(4) Subject to subsection (6), the prescribed form in the case of a shop worker is as follows—

"STATUTORY RIGHTS IN RELATION TO SUNDAY SHOP WORK"

You have become employed as a shop worker and are or can be required under your contract of employment to do the Sunday work your contract provides for.
However, if you wish, you can give a notice, as described in the next paragraph, to your employer and you will then have the right not to work in or about a shop on any Sunday on which the shop is open once three months have passed from the date on which you gave the notice.

Your notice must—
be in writing;
be signed and dated by you;
say that you object to Sunday working.

For three months after you give the notice, your employer can still require you to do all the Sunday work your contract provides for. After the three month period has ended, you have the right to complain to an industrial tribunal if, because of your refusal to work on Sundays on which the shop is open, your employer—
disses you, or
does something else detrimental to you, for example, failing to promote you.

Once you have the rights described, you can surrender them only by giving your employer a further notice, signed and dated by you, saying that you wish to work on Sunday or that you do not object to Sunday working and then agreeing with your employer to work on Sundays or on a particular Sunday.”

(5) Subject to subsection (6), the prescribed form in the case of a betting worker is as follows—

"STATUTORY RIGHTS IN RELATION TO SUNDAY BETTING WORK

You have become employed under a contract of employment under which you are or can be required to do Sunday betting work, that is to say, work—
at a track on a Sunday on which your employer is taking bets at the track, or
in a licensed betting office on a Sunday on which it is open for business.

However, if you wish, you can give a notice, as described in the next paragraph, to your employer and you will then have the right not to do Sunday betting work once three months have passed from the date on which you gave the notice.

Your notice must—
be in writing;
be signed and dated by you;
say that you object to doing Sunday betting work.

For three months after you give the notice, your employer can still require you to do all the Sunday betting work your contract provides for. After the three month period has ended, you have the right to complain to an industrial tribunal if, because of your refusal to do Sunday betting work, your employer—
disses you, or
PART IV

does something else detrimental to you, for example, failing to promote you.

Once you have the rights described, you can surrender them only by giving your employer a further notice, signed and dated by you, saying that you wish to do Sunday betting work or that you do not object to doing Sunday betting work and then agreeing with your employer to do such work on Sundays or on a particular Sunday.’

(6) The Secretary of State may by order amend the prescribed forms set out in subsections (4) and (5).

43.—(1) Where a shop worker or betting worker gives his employer an opting-out notice, the contract of employment under which he was employed immediately before he gave that notice becomes unenforceable to the extent that it—

(a) requires the shop worker to do shop work, or the betting worker to do betting work, on Sunday after the end of the notice period, or

(b) requires the employer to provide the shop worker with shop work, or the betting worker with betting work, on Sunday after the end of that period.

(2) Subject to subsection (3), any agreement entered into between an opted-out shop worker, or an opted-out betting worker, and his employer is unenforceable to the extent that it—

(a) requires the shop worker to do shop work, or the betting worker to do betting work, on Sunday after the end of the notice period, or

(b) requires the employer to provide the shop worker with shop work, or the betting worker with betting work, on Sunday after the end of that period.

(3) Where, after giving an opting-in notice, an opted-out shop worker or an opted-out betting worker expressly agrees with his employer to do shop work or betting work on Sunday or on a particular Sunday (and so ceases to be opted-out), his contract of employment shall be taken to be varied to the extent necessary to give effect to the terms of the agreement.

(4) The reference in subsection (2) to an opted-out shop worker, or an opted-out betting worker, includes a reference to an employee who although not an opted-out shop worker, or an opted-out betting worker, at the time when the agreement is entered into—

(a) had given her employer an opting-out notice before that time, and

(b) is an opted-out shop worker, or an opted-out betting worker, on the day on which she returns to work in accordance with section 79, or in pursuance of an offer made in the circumstances described in section 96(3), after a period of absence from work occasioned wholly or partly by pregnancy or childbirth.

(5) For the purposes of section 41(1)(b), the appropriate date—
Employment Rights Act 1996

Part IV

Protection from suffering detriment in employment

Rights not to suffer detriment

44.—(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) An employee is not to be regarded as having been subjected to any detriment on the ground specified in subsection (1)(e) if the employer...
PART V

shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have treated him as the employer did.

(4) Except where an employee is dismissed in circumstances in which, by virtue of section 197, Part X does not apply to the dismissal, this section does not apply where the detriment in question amounts to dismissal (within the meaning of that Part).

45.—(1) An employee who is—
(a) a protected shop worker or an opted-out shop worker, or
(b) a protected betting worker or an opted-out betting worker,

has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the employee refused (or proposed to refuse) to do shop work, or betting work, on Sunday or on a particular Sunday.

(2) Subsection (1) does not apply to anything done in relation to an opted-out shop worker or an opted-out betting worker on the ground that he refused (or proposed to refuse) to do shop work, or betting work, on any Sunday or Sundays falling before the end of the notice period.

(3) An employee who is a shop worker or a betting worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the employee gave (or proposed to give) an opting-out notice to his employer.

(4) Subsections (1) and (3) do not apply where the detriment in question amounts to dismissal (within the meaning of Part X).

(5) For the purposes of this section a shop worker or betting worker who does not work on Sunday or on a particular Sunday is not to be regarded as having been subjected to any detriment by—
(a) a failure to pay remuneration in respect of shop work, or betting work, on a Sunday which he has not done,
(b) a failure to provide him with any other benefit, where that failure results from the application (in relation to a Sunday on which the employee has not done shop work, or betting work) of a contractual term under which the extent of that benefit varies according to the number of hours worked by the employee or the remuneration of the employee, or
(c) a failure to provide him with any work, remuneration or other benefit which by virtue of section 38 or 39 the employer is not obliged to provide.

(6) Where an employer offers to pay a sum specified in the offer to any one or more employees—
(a) who are protected shop workers or opted-out shop workers or protected betting workers or opted-out betting workers, or
(b) who under their contracts of employment are not obliged to do shop work, or betting work, on Sunday,

if they agree to do shop work, or betting work, on Sunday or on a particular Sunday subsections (7) and (8) apply.
(7) An employee to whom the offer is not made is not to be regarded for the purposes of this section as having been subjected to any detriment by any failure to make the offer to him or to pay him the sum specified in the offer.

(8) An employee who does not accept the offer is not to be regarded for the purposes of this section as having been subjected to any detriment by any failure to pay him the sum specified in the offer.

(9) For the purposes of section 36(2)(b) or 41(1)(b), the appropriate date in relation to this section is the date of the act or failure to act.

(10) For the purposes of subsection (9)—

(a) where an act extends over a period, the “date of the act” means the first day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

46.—(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that, being a trustee of a relevant occupational pension scheme which relates to his employment, the employee performed (or proposed to perform) any functions as such a trustee.

(2) Except where an employee is dismissed in circumstances in which, by virtue of section 197, Part X does not apply to the dismissal, this section does not apply where the detriment in question amounts to dismissal (within the meaning of that Part).

(3) In this section “relevant occupational pension scheme” means an occupational pension scheme (as defined in section 1 of the Pension Schemes Act 1993) established under a trust.

47.—(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that, being—

(a) an employee representative for the purposes of Chapter II of Part IV of the Trade Union and Labour Relations (Consolidation) Act 1992 (redundancies) or Regulations 10 and 11 of the Transfer of Undertakings (Protection of Employment) Regulations 1981, or

(b) a candidate in an election in which any person elected will, or is being elected, be such an employee representative,

he performed (or proposed to perform) any functions or activities as such an employee representative or candidate.

(2) Except where an employee is dismissed in circumstances in which, by virtue of section 197, Part X does not apply to the dismissal, this section does not apply where the detriment in question amounts to a dismissal (within the meaning of that Part).
PART V

Complaints to industrial tribunals.

48.—(1) An employee may present a complaint to an industrial tribunal that he has been subjected to a detriment in contravention of section 44, 45, 46 or 47.

(2) On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

(3) An industrial tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the “date of the act” means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

Remedies.

49.—(1) Where an industrial tribunal finds a complaint under section 48 well-founded, the tribunal—

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.

(2) The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

(a) the infringement to which the complaint relates, and

(b) any loss which is attributable to the act, or failure to act, which infringed the complainant’s right.

(3) The loss shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates, and

(b) loss of any benefit which he might reasonably be expected to have had but for that act or failure to act.

(4) In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.
(5) Where the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.

PART VI
TIME OFF WORK

Public duties

50.—(1) An employer shall permit an employee of his who is a justice of the peace to take time off during the employee's working hours for the purpose of performing any of the duties of his office.

(2) An employer shall permit an employee of his who is a member of—
   (a) a local authority,
   (b) a statutory tribunal,
   (c) a police authority,
   (d) a board of prison visitors or a prison visiting committee,
   (e) a relevant health body,
   (f) a relevant education body, or
   (g) the Environment Agency or the Scottish Environment Protection Agency,
   to take time off during the employee's working hours for the purposes specified in subsection (3).

(3) The purposes referred to in subsection (2) are—
   (a) attendance at a meeting of the body or any of its committees or sub-committees, and
   (b) the doing of any other thing approved by the body, or anything of a class so approved, for the purpose of the discharge of the functions of the body or of any of its committees or sub-committees.

(4) The amount of time off which an employee is to be permitted to take under this section, and the occasions on which and any conditions subject to which time off may be so taken, are those that are reasonable in all the circumstances having regard, in particular, to—
   (a) how much time off is required for the performance of the duties of the office or as a member of the body in question, and how much time off is required for the performance of the particular duty,
   (b) how much time off the employee has already been permitted under this section or sections 168 and 170 of the Trade Union and Labour Relations (Consolidation) Act 1992 (time off for trade union duties and activities), and
   (c) the circumstances of the employer's business and the effect of the employee's absence on the running of that business.

(5) In subsection (2)(a) "a local authority" means—
   (a) a local authority within the meaning of the Local Government Act 1972,
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1994 c. 39. (b) a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994,
(c) the Common Council of the City of London,
(d) a National Park authority, or
(e) the Broads Authority.

1956 c. 16. (6) The reference in subsection (2) to a member of a police authority is to a person appointed as such a member under Schedule 2 to the Police Act 1996.

(7) In subsection (2)(d)—
1952 c. 52. (a) “a board of prison visitors” means a board of visitors appointed under section 6(2) of the Prison Act 1952, and
1989 c. 45. (b) “a prison visiting committee” means a visiting committee appointed under section 19(3) of the Prisons (Scotland) Act 1989 or constituted by virtue of rules made under section 39 (as read with section 8(1)) of that Act.

(8) In subsection (2)(e) “a relevant health body” means—
1990 c. 19. (a) a National Health Service trust established under Part I of the National Health Service and Community Care Act 1990 or the National Health Service (Scotland) Act 1978,
1978 c. 29. (b) a Health Authority established under section 8 of the National Health Service Act 1977 or a Special Health Authority established under section 11 of that Act, or
1977 c. 49. (c) a Health Board constituted under section 2 of the National Health Service (Scotland) Act 1978.

(9) In subsection (2)(f) “a relevant education body” means—
1973 c. 65. (a) a managing or governing body of an educational establishment maintained by a local education authority,
1988 c. 47. (b) a governing body of a grant-maintained school, further education corporation or higher education corporation,
(c) a school council appointed under section 125(1) of the Local Government (Scotland) Act 1973,
1980 c. 44. (d) a school board within the meaning of section 1(1) of the School Boards (Scotland) Act 1988,
1992 c. 37. (e) a board of management of a self-governing school within the meaning of section 135(1) of the Education (Scotland) Act 1980,
(f) a board of management of a college of further education within the meaning of section 36(1) of the Further and Higher Education (Scotland) Act 1992,
(g) a governing body of a central institution within the meaning of section 135(1) of the Education (Scotland) Act 1980, or
(h) a governing body of a designated institution within the meaning of Part II of the Further and Higher Education (Scotland) Act 1992.

(10) The Secretary of State may by order—
(a) modify the provisions of subsections (1) and (2) and (5) to (9) by adding any office or body, removing any office or body or altering the description of any office or body, or
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(b) modify the provisions of subsection (3).

(11) For the purposes of this section the working hours of an employee shall be taken to be any time when, in accordance with his contract of employment, the employee is required to be at work.

51.—(1) An employee may present a complaint to an industrial tribunal that his employer has failed to permit him to take time off as required by section 50.

(2) An industrial tribunal shall not consider a complaint under this section that an employer has failed to permit an employee to take time off unless it is presented—

(a) before the end of the period of three months beginning with the date on which the failure occurred, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(3) Where an industrial tribunal finds a complaint under this section well-founded, the tribunal—

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the employee.

(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

(a) the employer’s default in failing to permit time off to be taken by the employee, and

(b) any loss sustained by the employee which is attributable to the matters to which the complaint relates.

Looking for work and making arrangements for training

52.—(1) An employee who is given notice of dismissal by reason of redundancy is entitled to be permitted by his employer to take reasonable time off during the employee’s working hours before the end of his notice in order to—

(a) look for new employment, or

(b) make arrangements for training for future employment.

(2) An employee is not entitled to take time off under this section unless, on whichever is the later of—

(a) the date on which the notice is due to expire, and

(b) the date on which it would expire were it the notice required to be given by section 86(1),

he will have been (or would have been) continuously employed for a period of two years or more.

(3) For the purposes of this section the working hours of an employee shall be taken to be any time when, in accordance with his contract of employment, the employee is required to be at work.
53.—(1) An employee who is permitted to take time off under section 52 is entitled to be paid remuneration by his employer for the period of absence at the appropriate hourly rate.

(2) The appropriate hourly rate, in relation to an employee, is the amount of one week’s pay divided by the number of normal working hours in a week for that employee when employed under the contract of employment in force on the day when the notice of dismissal was given.

(3) But where the number of normal working hours differs from week to week or over a longer period, the amount of one week’s pay shall be divided instead by the average number of normal working hours calculated by dividing by twelve the total number of the employee’s normal working hours during the period of twelve weeks ending with the last complete week before the day on which the notice was given.

(4) If an employer unreasonably refuses to permit an employee to take time off from work as required by section 52, the employee is entitled to be paid an amount equal to the remuneration to which he would have been entitled under subsection (1) if he had been permitted to take the time off.

(5) The amount of an employer’s liability to pay remuneration under subsection (1) shall not exceed, in respect of the notice period of any employee, forty per cent. of a week’s pay of that employee.

(6) A right to any amount under subsection (1) or (4) does not affect any right of an employee in relation to remuneration under his contract of employment ("contractual remuneration").

(7) Any contractual remuneration paid to an employee in respect of a period of time off under section 52 goes towards discharging any liability of the employer to pay remuneration under subsection (1) in respect of that period; and, conversely, any payment of remuneration under subsection (1) in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

54.—(1) An employee may present a complaint to an industrial tribunal that his employer—

(a) has unreasonably refused to permit him to take time off as required by section 52, or

(b) has failed to pay the whole or any part of any amount to which the employee is entitled under section 53(1) or (4).

(2) An industrial tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date on which it is alleged that the time off should have been permitted, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(3) Where an industrial tribunal finds a complaint under this section well-founded, the tribunal shall—

(a) make a declaration to that effect, and

(b) order the employer to pay to the employee the amount which it finds due to him.
(4) The amount which may be ordered by a tribunal to be paid by an employer under subsection (3) (or, where the employer is liable to pay remuneration under section 53, the aggregate of that amount and the amount of that liability) shall not exceed, in respect of the notice period of any employee, forty per cent. of a week’s pay of that employee.

Ante-natal care

55.—(1) An employee who—

(a) is pregnant, and

(b) has, on the advice of a registered medical practitioner, registered midwife or registered health visitor, made an appointment to attend at any place for the purpose of receiving ante-natal care, is entitled to be permitted by her employer to take time off during the employee's working hours in order to enable her to keep the appointment.

(2) An employee is not entitled to take time off under this section to keep an appointment unless, if her employer requests her to do so, she produces for his inspection—

(a) a certificate from a registered medical practitioner, registered midwife or registered health visitor stating that the employee is pregnant, and

(b) an appointment card or some other document showing that the appointment has been made.

(3) Subsection (2) does not apply where the employee's appointment is the first appointment during her pregnancy for which she seeks permission to take time off in accordance with subsection (1).

(4) For the purposes of this section the working hours of an employee shall be taken to be any time when, in accordance with her contract of employment, the employee is required to be at work.

56.—(1) An employee who is permitted to take time off under section 55 is entitled to be paid remuneration by her employer for the period of absence at the appropriate hourly rate.

(2) The appropriate hourly rate, in relation to an employee, is the amount of one week's pay divided by the number of normal working hours in a week for that employee when employed under the contract of employment in force on the day when the time off is taken.

(3) But where the number of normal working hours differs from week to week or over a longer period, the amount of one week's pay shall be divided instead by—

(a) the average number of normal working hours calculated by dividing by twelve the total number of the employee's normal working hours during the period of twelve weeks ending with the last complete week before the day on which the time off is taken, or

(b) where the employee has not been employed for a sufficient period to enable the calculation to be made under paragraph (a), a number which fairly represents the number of normal working hours in a week having regard to such of the considerations specified in subsection (4) as are appropriate in the circumstances.
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(4) The considerations referred to in subsection (3)(b) are—

(a) the average number of normal working hours in a week which
the employee could expect in accordance with the terms of her
contract, and

(b) the average number of normal working hours of other
employees engaged in relevant comparable employment with
the same employer.

(5) A right to any amount under subsection (1) does not affect any
right of an employee in relation to remuneration under her contract of
employment ("contractual remuneration").

(6) Any contractual remuneration paid to an employee in respect of a
period of time off under section 55 goes towards discharging any liability
of the employer to pay remuneration under subsection (1) in respect of
that period; and, conversely, any payment of remuneration under
subsection (1) in respect of a period goes towards discharging any liability
of the employer to pay contractual remuneration in respect of that period.

Complaints to industrial tribunals.

57.—(1) An employee may present a complaint to an industrial tribunal
that her employer—

(a) has unreasonably refused to permit her to take time off as
required by section 55, or

(b) has failed to pay the whole or any part of any amount to which
the employee is entitled under section 56.

(2) An industrial tribunal shall not consider a complaint under this
section unless it is presented—

(a) before the end of the period of three months beginning with the
date of the appointment concerned, or

(b) within such further period as the tribunal considers reasonable
in a case where it is satisfied that it was not reasonably
practicable for the complaint to be presented before the end of
that period of three months.

(3) Where an industrial tribunal finds a complaint under this section
well-founded, the tribunal shall make a declaration to that effect.

(4) If the complaint is that the employer has unreasonably refused to
permit the employee to take time off, the tribunal shall also order the
employer to pay to the employee an amount equal to the remuneration to
which she would have been entitled under section 56 if the employer had
not refused.

(5) If the complaint is that the employer has failed to pay the employee
the whole or part of any amount to which she is entitled under section 56,
the tribunal shall also order the employer to pay to the employee the
amount which it finds due to her.

Occupational pension scheme trustees.

58.—(1) The employer in relation to a relevant occupational pension
scheme shall permit an employee of his who is a trustee of the scheme to
take time off during the employee’s working hours for the purpose of—

(a) performing any of his duties as such a trustee, or

(b) undergoing training relevant to the performance of those duties.
(2) The amount of time off which an employee is to be permitted to take under this section and the purposes for which, the occasions on which and any conditions subject to which time off may be so taken are those that are reasonable in all the circumstances having regard, in particular, to—

(a) how much time off is required for the performance of the duties of a trustee of the scheme and the undergoing of relevant training, and how much time off is required for performing the particular duty or for undergoing the particular training, and

(b) the circumstances of the employer’s business and the effect of the employee’s absence on the running of that business.

(3) In this section—

(a) “relevant occupational pension scheme” means an occupational pension scheme (as defined in section 1 of the Pension Schemes Act 1993) established under a trust, and

(b) references to the employer, in relation to such a scheme, are to an employer of persons in the description or category of employment to which the scheme relates.

(4) For the purposes of this section the working hours of an employee shall be taken to be any time when, in accordance with his contract of employment, the employee is required to be at work.

59.—(1) An employer who permits an employee to take time off under section 58 shall pay him for the time taken off pursuant to the permission.

(2) Where the employee’s remuneration for the work he would ordinarily have been doing during that time does not vary with the amount of work done, he must be paid as if he had worked at that work for the whole of that time.

(3) Where the employee’s remuneration for the work he would ordinarily have been doing during that time varies with the amount of work done, he must be paid an amount calculated by reference to the average hourly earnings for that work.

(4) The average hourly earnings mentioned in subsection (3) are—

(a) those of the employee concerned, or

(b) if no fair estimate can be made of those earnings, the average hourly earnings for work of that description of persons in comparable employment with the same employer or, if there are no such persons, a figure of average hourly earnings which is reasonable in the circumstances.

(5) A right to be paid an amount under subsection (1) does not affect any right of an employee in relation to remuneration under his contract of employment (“contractual remuneration”).

(6) Any contractual remuneration paid to an employee in respect of a period of time off under section 58 goes towards discharging any liability of the employer under subsection (1) in respect of that period; and, conversely, any payment under subsection (1) in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.
60.—(1) An employee may present a complaint to an industrial tribunal that his employer—

(a) has failed to permit him to take time off as required by section 58, or

(b) has failed to pay him in accordance with section 59.

(2) An industrial tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date when the failure occurred, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(3) Where an industrial tribunal finds a complaint under subsection (1)(a) well-founded, the tribunal—

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the employee.

(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

(a) the employer’s default in failing to permit time off to be taken by the employee, and

(b) any loss sustained by the employee which is attributable to the matters complained of.

(5) Where on a complaint under subsection (1)(b) an industrial tribunal finds that an employer has failed to pay an employee in accordance with section 59, it shall order the employer to pay the amount which it finds to be due.

Employee representatives

61.—(1) An employee who is—

(a) an employee representative for the purposes of Chapter II of Part IV of the Trade Union and Labour Relations (Consolidation) Act 1992 (redundancies) or Regulations 10 and 11 of the Transfer of Undertakings (Protection of Employment) Regulations 1981, or

(b) a candidate in an election in which any person elected will, on being elected, be such an employee representative,

is entitled to be permitted by his employer to take reasonable time off during the employee’s working hours in order to perform his functions as such an employee representative or candidate.

(2) For the purposes of this section the working hours of an employee shall be taken to be any time when, in accordance with his contract of employment, the employee is required to be at work.

62.—(1) An employee who is permitted to take time off under section 61 is entitled to be paid remuneration by his employer for the time taken off at the appropriate hourly rate.
(2) The appropriate hourly rate, in relation to an employee, is the amount of one week’s pay divided by the number of normal working hours in a week for that employee when employed under the contract of employment in force on the day when the time off is taken.

(3) But where the number of normal working hours differs from week to week or over a longer period, the amount of one week’s pay shall be divided instead by—

(a) the average number of normal working hours calculated by dividing by twelve the total number of the employee’s normal working hours during the period of twelve weeks ending with the last complete week before the day on which the time off is taken, or

(b) where the employee has not been employed for a sufficient period to enable the calculation to be made under paragraph (a), a number which fairly represents the number of normal working hours in a week having regard to such of the considerations specified in subsection (4) as are appropriate in the circumstances.

(4) The considerations referred to in subsection (3)(b) are—

(a) the average number of normal working hours in a week which the employee could expect in accordance with the terms of his contract, and

(b) the average number of normal working hours of other employees engaged in relevant comparable employment with the same employer.

(5) A right to any amount under subsection (1) does not affect any right of an employee in relation to remuneration under his contract of employment (“contractual remuneration”).

(6) Any contractual remuneration paid to an employee in respect of a period of time off under section 61 goes towards discharging any liability of the employer to pay remuneration under subsection (1) in respect of that period; and, conversely, any payment of remuneration under subsection (1) in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

63.—(1) An employee may present a complaint to an industrial tribunal that his employer—

(a) has unreasonably refused to permit him to take time off as required by section 61, or

(b) has failed to pay the whole or any part of any amount to which the employee is entitled under section 62.

(2) An industrial tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the day on which the time off was taken or on which it is alleged the time off should have been permitted, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
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(3) Where an industrial tribunal finds a complaint under this section well-founded, the tribunal shall make a declaration to that effect.

(4) If the complaint is that the employer has unreasonably refused to permit the employee to take time off, the tribunal shall also order the employer to pay to the employee an amount equal to the remuneration to which he would have been entitled under section 62 if the employer had not refused.

(5) If the complaint is that the employer has failed to pay the employee the whole or part of any amount to which he is entitled under section 62, the tribunal shall also order the employer to pay to the employee the amount which it finds due to him.

PART VII

SUSPENSION FROM WORK

Suspension on medical grounds

64.—(1) An employee who is suspended from work by his employer on medical grounds is entitled to be paid by his employer remuneration while he is so suspended for a period not exceeding twenty-six weeks.

(2) For the purposes of this Part an employee is suspended from work on medical grounds if he is suspended from work in consequence of—

(a) a requirement imposed by or under a provision of an enactment or of an instrument made under an enactment, or

(b) a recommendation in a provision of a code of practice issued or approved under section 16 of the Health and Safety at Work etc. Act 1974,

and the provision is for the time being specified in subsection (3).

(3) The provisions referred to in subsection (2) are—

- Regulation 16 of the Control of Lead at Work Regulations 1980,
- Regulation 16 of the Ionising Radiations Regulations 1985, and
- Regulation 11 of the Control of Substances Hazardous to Health Regulations 1988.

(4) The Secretary of State may by order add provisions to or remove provisions from the list of provisions specified in subsection (3).

(5) For the purposes of this Part an employee shall be regarded as suspended from work on medical grounds only if and for so long as he—

(a) continues to be employed by his employer, but

(b) is not provided with work or does not perform the work he normally performed before the suspension.

65.—(1) An employee is not entitled to remuneration under section 64 unless he has been continuously employed for a period of not less than one month ending with the day before that on which the suspension begins.

(2) An employee who is employed—

(a) under a contract for a fixed term of three months or less, or
(b) under a contract made in contemplation of the performance of a specific task which is not expected to last for more than three months,

is not entitled to remuneration under section 64 unless he has been continuously employed for a period of more than three months ending with the day before that on which the suspension begins.

(3) An employee is not entitled to remuneration under section 64 in respect of any period during which he is incapable of work by reason of disease or bodily or mental disablement.

(4) An employee is not entitled to remuneration under section 64 in respect of any period if—

(a) his employer has offered to provide him with suitable alternative work during the period (whether or not it is work which the employee is under his contract, or was under the contract in force before the suspension, employed to perform) and the employee has unreasonably refused to perform that work, or

(b) he does not comply with reasonable requirements imposed by his employer with a view to ensuring that his services are available.

Suspension on maternity grounds

66.—(1) For the purposes of this Part an employee is suspended from work on maternity grounds if, in consequence of any relevant requirement or relevant recommendation, she is suspended from work by her employer on the ground that she is pregnant, has recently given birth or is breastfeeding a child.

(2) In subsection (1)—

"relevant requirement" means a requirement imposed by or under a specified provision of an enactment or of an instrument made under an enactment, and

"relevant recommendation" means a recommendation in a specified provision of a code of practice issued or approved under section 16 of the Health and Safety at Work etc. Act 1974;

and in this subsection "specified provision" means a provision for the time being specified in an order made by the Secretary of State under this subsection.

(3) For the purposes of this Part an employee shall be regarded as suspended from work on maternity grounds only if and for so long as she—

(a) continues to be employed by her employer, but

(b) is not provided with work or (disregarding alternative work for the purposes of section 67) does not perform the work she normally performed before the suspension.

67.—(1) Where an employer has available suitable alternative work for an employee, the employee has a right to be offered to be provided with the alternative work before being suspended from work on maternity grounds.

(2) For alternative work to be suitable for an employee for the purposes of this section—
(a) the work must be of a kind which is both suitable in relation to her and appropriate for her to do in the circumstances, and
(b) the terms and conditions applicable to her for performing the work, if they differ from the corresponding terms and conditions applicable to her for performing the work she normally performs under her contract of employment, must not be substantially less favourable to her than those corresponding terms and conditions.

68.—(1) An employee who is suspended from work on maternity grounds is entitled to be paid remuneration by her employer while she is so suspended.

(2) An employee is not entitled to remuneration under this section in respect of any period if—
(a) her employer has offered to provide her during the period with work which is suitable alternative work for her for the purposes of section 67, and
(b) the employee has unreasonably refused to perform that work.

General

69.—(1) The amount of remuneration payable by an employer to an employee under section 64 or 68 is a week’s pay in respect of each week of the period of suspension; and if in any week remuneration is payable in respect of only part of that week the amount of a week’s pay shall be reduced proportionately.

(2) A right to remuneration under section 64 or 68 does not affect any right of an employee in relation to remuneration under the employee’s contract of employment (“contractual remuneration”).

(3) Any contractual remuneration paid by an employer to an employee in respect of any period goes towards discharging the employer’s liability under section 64 or 68 in respect of that period; and, conversely, any payment of remuneration in discharge of an employer’s liability under section 64 or 68 in respect of any period goes towards discharging any obligation of the employer to pay contractual remuneration in respect of that period.

70.—(1) An employee may present a complaint to an industrial tribunal that his or her employer has failed to pay the whole or any part of remuneration to which the employee is entitled under section 64 or 68.

(2) An industrial tribunal shall not consider a complaint under subsection (1) relating to remuneration in respect of any day unless it is presented—
(a) before the end of the period of three months beginning with that day, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented within that period of three months.

(3) Where an industrial tribunal finds a complaint under subsection (1) well-founded, the tribunal shall order the employer to pay the employee the amount of remuneration which it finds is due to him or her.
(4) An employee may present a complaint to an industrial tribunal that in contravention of section 67 her employer has failed to offer to provide her with work.

(5) An industrial tribunal shall not consider a complaint under subsection (4) unless it is presented—
   (a) before the end of the period of three months beginning with the first day of the suspension, or
   (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented within that period of three months.

(6) Where an industrial tribunal finds a complaint under subsection (4) well-founded, the tribunal may make an award of compensation to be paid by the employer to the employee.

(7) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to—
   (a) the infringement of the employee’s right under section 67 by the failure on the part of the employer to which the complaint relates, and
   (b) any loss sustained by the employee which is attributable to that failure.

**Part VIII**

**Maternity rights**

**General right to maternity leave**

71.—(1) An employee who is absent from work at any time during her maternity leave period is (subject to sections 74 and 75) entitled to the benefit of the terms and conditions of employment which would have been applicable to her if she had not been absent (and had not been pregnant or given birth to a child).

(2) Subsection (1) does not confer any entitlement to remuneration.

72.—(1) Subject to subsection (2), an employee’s maternity leave period commences with the earlier of—
   (a) the date which, in accordance with section 74(1) to (3), she notifies to her employer as the date on which she intends her period of absence from work in exercise of the right conferred by section 71 to commence, and
   (b) the first day after the beginning of the sixth week before the expected week of childbirth on which she is absent from work wholly or partly because of pregnancy.

(2) Where the employee’s maternity leave period has not commenced by virtue of subsection (1) when childbirth occurs, her maternity leave period commences with the day on which childbirth occurs.

(3) The Secretary of State may by order vary subsections (1) and (2).

73.—(1) Subject to subsections (2) and (3), an employee’s maternity leave period continues for the period of fourteen weeks from its commencement or until the birth of the child, if later.
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(2) Subject to subsection (3), where any requirement imposed by or under any relevant statutory provision prohibits the employee from working for any period after the end of the period mentioned in subsection (1) by reason of her having recently given birth, her maternity leave period continues until the end of that later period.

(3) Where the employee is dismissed after the commencement of her maternity leave period but before the time when (apart from this subsection) that period would end, the period ends at the time of the dismissal.

(4) In subsection (2) "relevant statutory provision" means a provision of—

(a) an enactment, or

(b) an instrument made under an enactment,

other than a provision for the time being specified in an order made under section 66(2).

(5) The Secretary of State may by order vary subsections (1) to (4).

74.—(1) Subject to subsections (4) and (5), an employee does not have the right conferred by section 71 unless she notifies her employer of the date on which she intends her period of absence from work in exercise of the right to commence.

(2) No date occurring before the beginning of the eleventh week before the expected week of childbirth may be notified under subsection (1).

(3) Notification under subsection (1) shall be given by an employee—

(a) not less than twenty-one days before the date on which she intends her period of absence from work in exercise of the right conferred by section 71 to commence, or

(b) if that is not reasonably practicable, as soon as is reasonably practicable.

(4) Where an employee’s maternity leave period commences with the first day after the beginning of the sixth week before the expected week of childbirth on which she is absent from work wholly or partly because of pregnancy—

(a) subsection (1) does not require her to notify her employer of the date specified in that subsection, but

(b) (whether or not she has notified him of that date) she does not have the right conferred by section 71 unless she notifies him as soon as is reasonably practicable that she is absent from work wholly or partly because of pregnancy.

(5) Where an employee’s maternity leave period commences with the day on which childbirth occurs—

(a) subsection (1) does not require her to notify her employer of the date specified in that subsection, but

(b) (whether or not she has notified him of that date) she does not have the right conferred by section 71 unless she notifies him as soon as is reasonably practicable after the birth that she has given birth.

(6) Any notification required by this section shall, if the employer so requests, be given in writing.
75.—(1) An employee does not have the right conferred by section 71 unless at least twenty-one days before her maternity leave period commences or, if that is not reasonably practicable, as soon as is reasonably practicable, she informs her employer in writing of—

(a) her pregnancy, and
(b) the expected week of childbirth,
or, if childbirth has occurred, of the date on which it occurred.

(2) An employee does not have the right conferred by section 71 unless, if requested to do so by her employer, she produces for his inspection a certificate from—

(a) a registered medical practitioner, or
(b) a registered midwife,
stating the expected week of childbirth.

76.—(1) An employee who intends to return to work earlier than the end of her maternity leave period shall give to her employer not less than seven days' notice of the date on which she intends to return.

(2) If an employee attempts to return to work earlier than the end of her maternity leave period without complying with subsection (1), her employer shall be entitled to postpone her return to a date such as will secure, subject to subsection (3), that he has seven days' notice of her return.

(3) An employer is not entitled under subsection (2) to postpone an employee's return to work to a date after the end of her maternity leave period.

(4) If an employee whose return to work has been postponed under subsection (2) has been notified that she is not to return to work before the date to which her return was postponed, the employer is under no contractual obligation to pay her remuneration until the date to which her return was postponed if she returns to work before that date.

77.—(1) This section applies where during an employee's maternity leave period it is not practicable by reason of redundancy for the employer to continue to employ her under her existing contract of employment.

(2) Where there is a suitable available vacancy, the employee is entitled to be offered (before the ending of her employment under her existing contract) alternative employment with her employer or his successor, or an associated employer, under a new contract of employment which complies with subsection (3) (and takes effect immediately on the ending of her employment under the previous contract).

(3) The new contract of employment must be such that—

(a) the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and
(b) its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than if she had continued to be employed under the previous contract.
PART VIII
Contractual rights to maternity leave.

78.—(1) An employee who has both the right to maternity leave under section 71 and another right to maternity leave (under a contract of employment or otherwise) may not exercise the two rights separately but may, in taking maternity leave, take advantage of whichever right is, in any particular respect, the more favourable.

(2) The provisions of sections 72 to 77 apply, subject to any modifications necessary to give effect to any more favourable contractual terms, to the exercise of the composite right described in subsection (1) as they apply to the exercise of the right under section 71.

Right to return to work.

79.—(1) An employee who—

(a) has the right conferred by section 71, and

(b) has, at the beginning of the eleventh week before the expected week of childbirth, been continuously employed for a period of not less than two years,

also has the right to return to work at any time during the period beginning at the end of her maternity leave period and ending twenty-nine weeks after the beginning of the week in which childbirth occurs.

(2) An employee's right to return to work under this section is the right to return to work with the person who was her employer before the end of her maternity leave period, or (where appropriate) his successor, in the job in which she was then employed—

(a) on terms and conditions as to remuneration not less favourable than those which would have been applicable to her had she not been absent from work at any time since the commencement of her maternity leave period,

(b) with her seniority, pension rights and similar rights as they would have been if the period or periods of her employment prior to the end of her maternity leave period were continuous with her employment following her return to work (but subject to the requirements of paragraph 5 of Schedule 5 to the Social Security Act 1989 (credit for the period of absence in certain cases)), and

(c) otherwise on terms and conditions not less favourable than those which would have been applicable to her had she not been absent from work after the end of her maternity leave period.

(3) The Secretary of State may by order vary the period of two years specified in subsection (1) or that period as varied by an order under this subsection.

Requirement to notify return.

80.—(1) An employee does not have the right conferred by section 79 unless she includes with the information required by section 75(1) the information that she intends to exercise the right.

(2) Where, not earlier than twenty-one days before the end of her maternity leave period, an employee is requested in accordance with subsection (3) by her employer, or a successor of his, to give him written confirmation that she intends to exercise the right conferred by section 79, the employee is not entitled to that right unless she gives the requested confirmation—

(a) within fourteen days of receiving the request, or
(b) if that is not reasonably practicable, as soon as is reasonably practicable.

(3) A request under subsection (2) shall be—

(a) made in writing, and

(b) accompanied by a written statement of the effect of that subsection.

**81.**—(1) This section applies where an employee has the right conferred by section 79 but it is not practicable by reason of redundancy for the employer to permit her to return in accordance with that right.

(2) Where there is a suitable available vacancy, the employee is entitled to be offered alternative employment with her employer or his successor, or an associated employer, under a new contract of employment which complies with subsection (3).

(3) The new contract of employment must be such that—

(a) the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and

(b) its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than if she had returned to work pursuant to the right conferred by section 79.

**82.**—(1) An employee shall exercise the right conferred by section 79 by giving written notice to the employer (who may be her employer before the end of her maternity leave period or a successor of his) at least twenty-one days before the day on which she proposes to return of her proposal to return on that day (the “notified day of return”).

(2) An employer may postpone an employee’s return to work until a date not more than four weeks after the notified day of return if he notifies her before that day that for specified reasons he is postponing her return until that date; and, accordingly, she will be entitled to return to work with him on that date.

(3) An employee to whom subsection (4) applies may—

(a) postpone her return to work until a date not more than four weeks after the notified day of return (even if that date falls after the end of the period of twenty-nine weeks beginning with the week in which childbirth occurred), and

(b) where no day of return has been notified to the employer, extend the time during which she may exercise her right to return in accordance with subsection (1), so that she returns to work not more than four weeks after the end of that period of twenty-nine weeks.

(4) This subsection applies to an employee if she gives to her employer, before the notified day of return (or the end of the period of twenty-nine weeks), a certificate from a registered medical practitioner stating that by reason of disease or bodily or mental disablement she will be incapable of work on the notified day of return (or at the end of that period).
(5) Where an employee has once exercised a right of postponement or extension under subsection (3), she is not entitled again to exercise a right of postponement or extension under that subsection in connection with the same return to work.

(6) If an employee has notified a day of return but there is an interruption of work (whether due to industrial action or some other reason) which renders it unreasonable to expect the employee to return to work on the notified day of return, she may instead return to work when work resumes after the interruption or as soon as reasonably practicable afterwards.

(7) Where in the case of an employee who has not already notified a day of return—

(a) there is an interruption of work (whether due to industrial action or some other reason) which renders it unreasonable to expect the employee to return to work before the end of the period of twenty-nine weeks beginning with the week in which childbirth occurred, or which appears likely to have that effect, and

(b) in consequence, the employee does not notify a day of return, the employee may exercise her right to return in accordance with subsection (1) so that she returns to work at any time before the end of the period of twenty-eight days after the end of the interruption even though that means that she returns to work outside the period of twenty-nine weeks.

(8) Where an employee has exercised the right under subsection (3)(b) to extend the period during which she may exercise her right to return, subsection (7) applies as if for the reference to the end of the period of twenty-nine weeks there were substituted a reference to the end of the further period of four weeks after the end of that period.

(9) Where in the case of an interruption of work an employee has refrained from notifying the day of return in the circumstances described in subsection (7), subsection (3)(b) applies as if for the reference to the end of the period of twenty-nine weeks there were substituted a reference to the end of the period of twenty-eight days after the end of the interruption of work.

83.—(1) Subject to subsection (2), in this Act “notified day of return” shall be construed in accordance with section 82(1).

(2) Where—

(a) an employee’s return is postponed under subsection (2) or (3)(a) of section 82, or

(b) the employee returns to work on a day later than the notified day of return in the circumstances described in subsection (6) of that section,

then, subject to subsection (5) of that section, references in subsections (2), (3)(a) and (6) of that section and the following provisions of this Act to the notified day of return shall be construed as references to the day to which the return is postponed or that later day.

84.—(1) This section applies where an employee has the right to return to work conferred by section 79 and either—

(a) her maternity leave period ends by reason of dismissal, or
(b) she is dismissed after the end of her maternity leave period, otherwise than in the course of attempting to return to work in accordance with her contract in circumstances in which section 85 applies.

(2) Where this section applies, the right conferred by section 79 is exercisable only on the employee repaying any compensation for unfair dismissal, or redundancy payment, paid in respect of the dismissal if the employer requests repayment.

85.—(1) An employee who has both the right to return to work conferred by section 79 and another right to return to work after absence because of pregnancy or childbirth (under a contract of employment or otherwise) may not exercise the two rights separately but may, in returning to work, take advantage of whichever right is, in any particular respect, the more favourable.

(2) Sections 79 and 81 to 84, and the provisions of the following Parts of this Act relating to the right conferred by section 79 (other than section 137(2)), apply, subject to any modifications necessary to give effect to any more favourable contractual terms, to the exercise of the composite right described in subsection (1) as they apply to the exercise of the right conferred by section 79.

PART IX
TERMINATION OF EMPLOYMENT
Minimum period of notice

86.—(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

(a) is not less than one week’s notice if his period of continuous employment is less than two years,

(b) is not less than one week’s notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and

(c) is not less than twelve weeks’ notice if his period of continuous employment is twelve years or more.

(2) The notice required to be given by an employee who has been continuously employed for one month or more to terminate his contract of employment is not less than one week.

(3) Any provision for shorter notice in any contract of employment with a person who has been continuously employed for one month or more has effect subject to subsections (1) and (2); but this section does not prevent either party from waiving his right to notice on any occasion or from accepting a payment in lieu of notice.

(4) Any contract of employment of a person who has been continuously employed for three months or more which is a contract for a term certain of one month or less shall have effect as if it were for an indefinite period; and, accordingly, subsections (1) and (2) apply to the contract.
(5) Subsections (1) and (2) do not apply to a contract made in contemplation of the performance of a specific task which is not expected to last for more than three months unless the employee has been continuously employed for a period of more than three months.

(6) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party.

87.—(1) If an employer gives notice to terminate the contract of employment of a person who has been continuously employed for one month or more, the provisions of sections 88 to 91 have effect as respects the liability of the employer for the period of notice required by section 86(1).

(2) If an employee who has been continuously employed for one month or more gives notice to terminate his contract of employment, the provisions of sections 88 to 91 have effect as respects the liability of the employer for the period of notice required by section 86(2).

(3) In sections 88 to 91 “period of notice” means—

(a) where notice is given by an employer, the period of notice required by section 86(1), and

(b) where notice is given by an employee, the period of notice required by section 86(2).

(4) This section does not apply in relation to a notice given by the employer or the employee if the notice to be given by the employer to terminate the contract must be at least one week more than the notice required by section 86(1).

88.—(1) If an employee has normal working hours under the contract of employment in force during the period of notice and during any part of those normal working hours—

(a) the employee is ready and willing to work but no work is provided for him by his employer,

(b) the employee is incapable of work because of sickness or injury,

(c) the employee is absent from work wholly or partly because of pregnancy or childbirth, or

(d) the employee is absent from work in accordance with the terms of his employment relating to holidays,

the employer is liable to pay the employee for the part of normal working hours covered by any of paragraphs (a), (b), (c) and (d) a sum not less than the amount of remuneration for that part of normal working hours calculated at the average hourly rate of remuneration produced by dividing a week’s pay by the number of normal working hours.

(2) Any payments made to the employee by his employer in respect of the relevant part of the period of notice (whether by way of sick pay, statutory sick pay, maternity pay, statutory maternity pay, holiday pay or otherwise) go towards meeting the employer’s liability under this section.

(3) Where notice was given by the employee, the employer’s liability under this section does not arise unless and until the employee leaves the service of the employer in pursuance of the notice.
89.—(1) If an employee does not have normal working hours under the contract of employment in force in the period of notice, the employer is liable to pay the employee for each week of the period of notice a sum not less than a week’s pay.

(2) The employer’s liability under this section is conditional on the employee being ready and willing to do work of a reasonable nature and amount to earn a week’s pay.

(3) Subsection (2) does not apply—
   (a) in respect of any period during which the employee is incapable of work because of sickness or injury,
   (b) in respect of any period during which the employee is absent from work wholly or partly because of pregnancy or childbirth, or
   (c) in respect of any period during which the employee is absent from work in accordance with the terms of his employment relating to holidays.

(4) Any payment made to an employee by his employer in respect of a period within subsection (3) (whether by way of sick pay, statutory sick pay, maternity pay, statutory maternity pay, holiday pay or otherwise) shall be taken into account for the purposes of this section as if it were remuneration paid by the employer in respect of that period.

(5) Where notice was given by the employee, the employer’s liability under this section does not arise unless and until the employee leaves the service of the employer in pursuance of the notice.

90.—(1) This section has effect where the arrangements in force relating to the employment are such that—
   (a) payments by way of sick pay are made by the employer to employees to whom the arrangements apply, in cases where any such employees are incapable of work because of sickness or injury, and
   (b) in calculating any payment so made to any such employee an amount representing, or treated as representing, short-term incapacity benefit or industrial injury benefit is taken into account, whether by way of deduction or by way of calculating the payment as a supplement to that amount.

(2) If—
   (a) during any part of the period of notice the employee is incapable of work because of sickness or injury,
   (b) one or more payments by way of sick pay are made to him by the employer in respect of that part of the period of notice, and
   (c) in calculating any such payment such an amount as is referred to in paragraph (b) of subsection (1) is taken into account as mentioned in that paragraph,

for the purposes of section 88 or 89 the amount so taken into account shall be treated as having been paid by the employer to the employee by way of sick pay in respect of that part of that period, and shall go towards meeting the liability of the employer under that section accordingly.
91.—(1) An employer is not liable under section 88 or 89 to make any payment in respect of a period during which an employee is absent from work with the leave of the employer granted at the request of the employee, including any period of time off taken in accordance with—
   (a) Part VI of this Act, or
   (b) section 168 or 170 of the Trade Union and Labour Relations (Consolidation) Act 1992 (trade union duties and activities).

(2) No payment is due under section 88 or 89 in consequence of a notice to terminate a contract given by an employee if, after the notice is given and on or before the termination of the contract, the employee takes part in a strike of employees of the employer.

(3) If, during the period of notice, the employer breaks the contract of employment, payments received under section 88 or 89 in respect of the part of the period after the breach go towards mitigating the damages recoverable by the employee for loss of earnings in that part of the period of notice.

(4) If, during the period of notice, the employee breaks the contract and the employer rightfully treats the breach as terminating the contract, no payment is due to the employee under section 88 or 89 in respect of the part of the period falling after the termination of the contract.

(5) If an employer fails to give the notice required by section 86, the rights conferred by sections 87 to 90 and this section shall be taken into account in assessing his liability for breach of the contract.

(6) Sections 86 to 90 and this section apply in relation to a contract all or any of the terms of which are terms which take effect by virtue of any provision contained in or having effect under an Act (whether public or local) as in relation to any other contract; and the reference in this subsection to an Act includes, subject to any express provision to the contrary, an Act passed after this Act.

Written statement of reasons for dismissal

92.—(1) An employee is entitled to be provided by his employer with a written statement giving particulars of the reasons for the employee’s dismissal—
   (a) if the employee is given by the employer notice of termination of his contract of employment,
   (b) if the employee’s contract of employment is terminated by the employer without notice, or
   (c) if the employee is employed under a contract for a fixed term and that term expires without being renewed under the same contract.

(2) Subject to subsection (4), an employee is entitled to a written statement under this section only if he makes a request for one; and a statement shall be provided within fourteen days of such a request.

(3) Subject to subsection (4), an employee is not entitled to a written statement under this section unless on the effective date of termination he has been, or will have been, continuously employed for a period of not less than two years ending with that date.
An employee is entitled to a written statement under this section without having to request it and irrespective of whether she has been continuously employed for any period if she is dismissed—

(a) at any time while she is pregnant, or
(b) after childbirth in circumstances in which her maternity leave period ends by reason of the dismissal.

(5) A written statement under this section is admissible in evidence in any proceedings.

(6) Subject to subsection (7), in this section “the effective date of termination” —

(a) in relation to an employee whose contract of employment is terminated by notice, means the date on which the notice expires,
(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and
(c) in relation to an employee who is employed under a contract for a fixed term which expires without being renewed under the same contract, means the date on which the term expires.

(7) Where —

(a) the contract of employment is terminated by the employer, and
(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (6)),

the later date is the effective date of termination.

(8) In subsection (7)(b) “the material date” means—

(a) the date when notice of termination was given by the employer, or
(b) where no notice was given, the date when the contract of employment was terminated by the employer.

93.—(1) A complaint may be presented to an industrial tribunal by an employee on the ground that—

(a) the employer unreasonably failed to provide a written statement under section 92, or
(b) the particulars of reasons given in purported compliance with that section are inadequate or untrue.

(2) Where an industrial tribunal finds a complaint under this section well-founded, the tribunal—

(a) may make a declaration as to what it finds the employer’s reasons were for dismissing the employee, and
(b) shall make an award that the employer pay to the employee a sum equal to the amount of two weeks’ pay.

(3) An industrial tribunal shall not consider a complaint under this section relating to the reasons for a dismissal unless it is presented to the
tribunal at such a time that the tribunal would, in accordance with section 111, consider a complaint of unfair dismissal in respect of that dismissal presented at the same time.

PART X

UNFAIR DISMISSAL

CHAPTER I

RIGHT NOT TO BE UNFAIRLY DISMISSED

The right

94.—(1) An employee has the right not to be unfairly dismissed by an employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

Dismissal

95.—(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) and section 96, only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) he is employed under a contract for a fixed term and that term expires without being renewed under the same contract, or

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—

(a) the employer gives notice to the employee to terminate his contract of employment, and

(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

96.—(1) Where an employee who—

(a) has the right conferred by section 79, and

(b) has exercised it in accordance with section 82,

is not permitted to return to work, she shall (subject to the following provisions of this section) be taken for the purposes of this Part to be dismissed for the reason for which she was not permitted to return with effect from the notified day of return (being deemed to have been continuously employed until that day).

(2) Subsection (1) does not apply in relation to an employee if—
(a) immediately before the end of her maternity leave period (or, if it ends by reason of dismissal, immediately before the dismissal) the number of employees employed by her employer, added to the number employed by any associated employer of his, did not exceed five, and

(b) it is not reasonably practicable for the employer (who may be the same employer or a successor of his) to permit her to return to work under section 79 or for him or an associated employer to offer her employment under a contract of employment satisfying the conditions specified in subsection (4).

(3) Subsection (1) does not apply in relation to an employee if—

(a) it is not reasonably practicable for a reason other than redundancy for the employer (who may be the same employer or a successor of his) to permit her to return to work under section 79,

(b) he or an associated employer offers her employment under a contract of employment satisfying the conditions specified in subsection (4), and

(c) she accepts or unreasonably refuses that offer.

(4) The conditions referred to in subsections (2) and (3) are—

(a) that the work to be done under the contract is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and

(b) that the provisions of the contract as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than if she had returned to work under section 79.

(5) Where on a complaint of unfair dismissal any question arises as to whether the operation of subsection (1) is excluded by the provisions of subsection (2) or (3), it is for the employer to show that the provisions in question were satisfied in relation to the complainant.

(6) Where subsection (1) applies to an employee who was employed as a shop worker, or a betting worker, under her contract of employment on the last day of her maternity leave period, she shall be treated for the purposes of this Act as if she had been employed as a shop worker, or a betting worker, on the day with effect from which she is treated as dismissed.

97.—(1) Subject to the following provisions of this section, in this Part "the effective date of termination"—

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

(c) in relation to an employee who is employed under a contract for a fixed term which expires without being renewed under the same contract, means the date on which the term expires.
(2) Where—
(a) the contract of employment is terminated by the employer, and
(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),

for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(3) In subsection (2)(b) “the material date” means—
(a) the date when notice of termination was given by the employer, or
(b) where no notice was given, the date when the contract of employment was terminated by the employer.

(4) Where—
(a) the contract of employment is terminated by the employee,
(b) the material date does not fall during a period of notice given by the employer to terminate that contract, and
(c) had the contract been terminated not by the employee but by notice given on the material date by the employer, that notice would have been required by section 86 to expire on a date later than the effective date of termination (as defined by subsection (1)),

for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(5) In subsection (4) “the material date” means—
(a) the date when notice of termination was given by the employee, or
(b) where no notice was given, the date when the contract of employment was terminated by the employee.

(6) Where an employee is taken to be dismissed for the purposes of this Part by virtue of section 96, references in this Part to the effective date of termination are to the notified date of return.

General.

98.—(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

(5) Where the employee is taken to be dismissed for the purposes of this Part by virtue of section 96, subsection (4)(a) applies as if for the words “acted reasonably” onwards there were substituted the words “would have been acting reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee if she had not been absent from work, and”.

(6) Subsections (4) and (5) are subject to—

(a) sections 99 to 107 of this Act, and

(b) sections 152, 153 and 238 of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).

99.—(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a) the reason (or, if more than one, the principal reason) for the dismissal is that she is pregnant or any other reason connected with her pregnancy,

(b) her maternity leave period is ended by the dismissal and the reason (or, if more than one, the principal reason) for the dismissal is that she has given birth to a child or any other reason connected with her having given birth to a child,

(c) her contract of employment is terminated after the end of her maternity leave period and the reason (or, if more than one, the principal reason) for the dismissal is that she took, or availed herself of the benefits of, maternity leave,

(d) the reason (or, if more than one, the principal reason) for the dismissal is a relevant requirement, or a relevant recommendation, as defined by section 66(2), or
(e) her maternity leave period is ended by the dismissal, the reason (or, if more than one, the principal reason) for the dismissal is that she is redundant and section 77 has not been complied with.

(2) For the purposes of subsection (1)(c)—

(a) a woman takes maternity leave if she is absent from work during her maternity leave period, and

(b) a woman avails herself of the benefits of maternity leave if, during her maternity leave period, she avails herself of the benefit of any of the terms and conditions of her employment preserved by section 71 during that period.

(3) An employee who is dismissed shall also be regarded for the purposes of this Part as unfairly dismissed if—

(a) before the end of her maternity leave period she gave to her employer a certificate from a registered medical practitioner stating that by reason of disease or bodily or mental disablement she would be incapable of work after the end of that period,

(b) her contract of employment was terminated within the period of four weeks beginning immediately after the end of her maternity leave period in circumstances in which she continued to be incapable of work and the certificate remained current, and

(c) the reason (or, if more than one, the principal reason) for the dismissal is that she has given birth to a child or any other reason connected with her having given birth to a child.

(4) Where—

(a) an employee has the right conferred by section 79,

(b) it is not practicable by reason of redundancy for the employer to permit her to return in accordance with that right, and

(c) no offer is made of such alternative employment as is referred to in section 81,

the dismissal of the employee which is treated as taking place by virtue of section 96 is to be regarded for the purposes of this Part as unfair.

100.—(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(c) being an employee at a place where—
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(a) a protected shop worker or an opted-out shop worker, or
(b) a protected betting worker or an opted-out betting worker,

is dismissed, he shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that he refused (or proposed to refuse) to do shop work, or betting work, on Sunday or on a particular Sunday.

(3) A shop worker or betting worker who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the shop worker or betting worker gave (or proposed to give) an opting-out notice to the employer.

(4) For the purposes of section 36(2)(b) or 41(1)(b), the appropriate date in relation to this section is the effective date of termination.

102.—(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that, being a trustee of a

Shop workers and betting workers who refuse Sunday work.

Trustees of occupational pension schemes.
relevant occupational pension scheme which relates to his employment, the employee performed (or proposed to perform) any functions as such a trustee.

(2) In this section “relevant occupational pension scheme” means an occupational pension scheme (as defined in section 1 of the Pension Schemes Act 1993) established under a trust.

103. An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee, being—

(a) an employee representative for the purposes of Chapter II of Part IV of the Trade Union and Labour Relations (Consolidation) Act 1992 (redundancies) or Regulations 10 and 11 of the Transfer of Undertakings (Protection of Employment) Regulations 1981, or

(b) a candidate in an election in which any person elected will, on being elected, be such an employee representative, performed (or proposed to perform) any functions or activities as such an employee representative or candidate.

104.—(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section—

(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an industrial tribunal,

(b) the right conferred by section 86 of this Act, and

(c) the rights conferred by sections 68, 86, 146, 168, 169 and 170 of the Trade Union and Labour Relations (Consolidation) Act 1992 (deductions from pay, union activities and time off).

105.—(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant,
(b) it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and

(c) it is shown that any of subsections (2) to (7) applies.

(2) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in any of paragraphs (a) to (d) of subsection (1) of section 99 (read with subsection (2) of that section) or subsection (3) of that section (and any requirements of the paragraph, or subsection, not relating to the reason are satisfied).

(3) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one of those specified in subsection (1) of section 100 (read with subsections (2) and (3) of that section).

(4) This subsection applies if either—

(a) the employee was a protected shop worker or an opted-out shop worker, or a protected betting worker or an opted-out betting worker, and the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in subsection (1) of section 101 (read with subsection (2) of that section), or

(b) the employee was a shop worker or a betting worker and the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in subsection (3) of that section.

(5) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in section 102(1).

(6) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in section 103.

(7) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one of those specified in subsection (1) of section 104 (read with subsections (2) and (3) of that section).

(8) For the purposes of section 36(2)(b) or 41(1)(b), the appropriate date in relation to this section is the effective date of termination.

(9) In this Part “redundancy case” means a case where paragraphs (a) and (b) of subsection (1) of this section are satisfied.

106.—(1) Where this section applies to an employee he shall be regarded for the purposes of section 98(1)(b) as having been dismissed for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) This section applies to an employee where—
(a) on engaging him the employer informs him in writing that his employment will be terminated on the resumption of work by another employee who is, or will be, absent wholly or partly because of pregnancy or childbirth, and
(b) the employer dismisses him in order to make it possible to give work to the other employee.

(3) This section also applies to an employee where—
(a) on engaging him the employer informs him in writing that his employment will be terminated on the end of a suspension of another employee from work on medical grounds or maternity grounds (within the meaning of Part VII), and
(b) the employer dismisses him in order to make it possible to allow the resumption of work by the other employee.

(4) Subsection (1) does not affect the operation of section 98(4) in a case to which this section applies.

107.—(1) This section applies where there fails to be determined for the purposes of this Part a question—
(a) as to the reason, or principal reason, for which an employee was dismissed,
(b) whether the reason or principal reason for which an employee was dismissed was a reason fulfilling the requirement of section 98(1)(b), or
(c) whether an employer acted reasonably in treating the reason or principal reason for which an employee was dismissed as a sufficient reason for dismissing him.

(2) In determining the question no account shall be taken of any pressure which by calling, organising, procuring or financing a strike or other industrial action, or threatening to do so, was exercised on the employer to dismiss the employee; and the question shall be determined as if no such pressure had been exercised.

Exclusion of right

108.—(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.

(2) If an employee is dismissed by reason of any such requirement or recommendation as is referred to in section 64(2), subsection (1) has effect in relation to that dismissal as if for the words “two years” there were substituted the words “one month”.

(3) Subsection (1) does not apply if—
(a) section 84 or 96(1) applies,
(b) subsection (1) of section 99 (read with subsection (2) of that section) or subsection (3) of that section applies,
(c) subsection (1) of section 100 (read with subsections (2) and (3) of that section) applies,
(d) subsection (1) of section 101 (read with subsection (2) of that section) or subsection (3) of that section applies,
(e) section 102 applies,
(f) section 103 applies,
(g) subsection (1) of section 104 (read with subsections (2) and (3) of that section) applies, or
(h) section 105 applies.

109.—(1) Section 94 does not apply to the dismissal of an employee if he has attained—
Upper age limit.

(a) in a case where—

(i) in the undertaking in which the employee was employed there was a normal retiring age for an employee holding the position held by the employee, and
(ii) the age was the same whether the employee holding that position was a man or a woman,

(b) in any other case, the age of sixty-five.

(2) Subsection (1) does not apply if—

(a) section 84 or 96(1) applies,
(b) subsection (1) of section 99 (read with subsection (2) of that section) or subsection (3) of that section applies,
(c) subsection (1) of section 100 (read with subsections (2) and (3) of that section) applies,
(d) subsection (1) of section 101 (read with subsection (2) of that section) or subsection (3) of that section applies,
(e) section 102 applies,
(f) section 103 applies,
(g) subsection (1) of section 104 (read with subsections (2) and (3) of that section) applies, or
(h) section 105 applies.

110.—(1) Where a dismissal procedures agreement is designated by an order under subsection (3) which is for the time being in force—

Dismissal
procedures agreements.

(a) the provisions of that agreement relating to dismissal shall have effect in substitution for any rights under section 94, and
(b) accordingly, section 94 does not apply to the dismissal of an employee from any employment if it is employment to which, and he is an employee to whom, those provisions of the agreement apply.

(2) Subsection (1) does not apply if—

(a) section 84 or 96(1) applies,
(b) subsection (1) of section 99 (read with subsection (2) of that section) or subsection (3) of that section applies,
(c) subsection (1) of section 101 (read with subsection (2) of that section) or subsection (3) of that section applies,
(d) subsection (1) of section 104 (read with subsections (2) and (3) of that section) applies, or
(e) section 105(1) and (4) applies.
(3) An order designating a dismissal procedures agreement may be made by the Secretary of State, on an application being made to him jointly by all the parties to the agreement, if he is satisfied that—

(a) every trade union which is a party to the agreement is an independent trade union,

(b) the agreement provides for procedures to be followed in cases where an employee claims that he has been, or is in the course of being, unfairly dismissed,

(c) those procedures are available without discrimination to all employees falling within any description to which the agreement applies,

(d) the remedies provided by the agreement in respect of unfair dismissal are on the whole as beneficial as (but not necessarily identical with) those provided in respect of unfair dismissal by this Part,

(e) the procedures provided by the agreement include a right to arbitration or adjudication by an independent referee, or by a tribunal or other independent body, in cases where (by reason of an equality of votes or for any other reason) a decision cannot otherwise be reached, and

(f) the provisions of the agreement are such that it can be determined with reasonable certainty whether or not a particular employee is one to whom the agreement applies.

(4) If at any time when an order under subsection (3) is in force in relation to a dismissal procedures agreement the Secretary of State is satisfied, whether on an application made to him by any of the parties to the agreement or otherwise, either—

(a) that it is the desire of all the parties to the agreement that the order should be revoked, or

(b) that the agreement no longer satisfies all the conditions specified in subsection (3),

the Secretary of State shall revoke the order by an order under this subsection.

(5) The transitional provisions which may be made in an order under subsection (4) include, in particular, provisions directing—

(a) that an employee—

(i) shall not be excluded from his right under section 94 where the effective date of termination falls within a transitional period which ends with the date on which the order takes effect and which is specified in the order, and

(ii) shall have an extended time for presenting a complaint under section 111 in respect of a dismissal where the effective date of termination falls within that period, and

(b) that, where the effective date of termination falls within such a transitional period, an industrial tribunal shall, in determining any complaint of unfair dismissal presented by an employee to whom the dismissal procedures agreement applies, have regard to such considerations as are specified in the order (in addition to those specified in this Part and section 10(4) and (5) of the Industrial Tribunals Act 1996).
CHAPTER II

REMEDIES FOR UNFAIR DISMISSAL

Introductory

111.—(1) A complaint may be presented to an industrial tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to subsection (3), an industrial tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(3) Where a dismissal is with notice, an industrial tribunal shall consider a complaint under this section if it is presented after the notice is given but before the effective date of termination.

(4) In relation to a complaint which is presented as mentioned in subsection (3), the provisions of this Act, so far as they relate to unfair dismissal, have effect as if—

(a) references to a complaint by a person that he was unfairly dismissed by his employer included references to a complaint by a person that his employer has given him notice in such circumstances that he will be unfairly dismissed when the notice expires,

(b) references to reinstatement included references to the withdrawal of the notice by the employer,

(c) references to the effective date of termination included references to the date which would be the effective date of termination on the expiry of the notice, and

(d) references to an employee ceasing to be employed included references to an employee having been given notice of dismissal.

112.—(1) This section applies where, on a complaint under section 111, an industrial tribunal finds that the grounds of the complaint are well-founded.

(2) The tribunal shall—

(a) explain to the complainant what orders may be made under section 113 and in what circumstances they may be made, and

(b) ask him whether he wishes the tribunal to make such an order.

(3) If the complainant expresses such a wish, the tribunal may make an order under section 113.

(4) If no order is made under section 113, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 127) to be paid by the employer to the employee.
Orders for reinstatement or re-engagement

113. An order under this section may be—
(a) an order for reinstatement (in accordance with section 114), or
(b) an order for re-engagement (in accordance with section 115),
as the tribunal may decide.

114.—(1) An order for reinstatement is an order that the employer shall
treat the complainant in all respects as if he had not been dismissed.

(2) On making an order for reinstatement the tribunal shall specify—
(a) any amount payable by the employer in respect of any benefit
which the complainant might reasonably be expected to have
had but for the dismissal (including arrears of pay) for the
period between the date of termination of employment and the
date of reinstatement,
(b) any rights and privileges (including seniority and pension rights)
which must be restored to the employee, and
(c) the date by which the order must be complied with.

(3) If the complainant would have benefited from an improvement in
his terms and conditions of employment had he not been dismissed, an
order for reinstatement shall require him to be treated as if he had
benefited from that improvement from the date on which he would have
done so but for being dismissed.

(4) In calculating for the purposes of subsection (2)(a) any amount
payable by the employer, the tribunal shall take into account, so as to
reduce the employer’s liability, any sums received by the complainant in
respect of the period between the date of termination of employment and
the date of reinstatement by way of—
(a) wages in lieu of notice or ex gratia payments paid by the
employer, or
(b) remuneration paid in respect of employment with another
employer,
and such other benefits as the tribunal thinks appropriate in the
circumstances.

(5) Where a dismissal is treated as taking place by virtue of section 96,
references in this section to the date of termination of employment are to
the notified date of return.

115.—(1) An order for re-engagement is an order, on such terms as the
tribunal may decide, that the complainant be engaged by the employer,
or by a successor of the employer or by an associated employer, in
employment comparable to that from which he was dismissed or other
suitable employment.

(2) On making an order for re-engagement the tribunal shall specify
the terms on which re-engagement is to take place, including—
(a) the identity of the employer,
(b) the nature of the employment,
(c) the remuneration for the employment,
(d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement,

(e) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(f) the date by which the order must be complied with.

(3) In calculating for the purposes of subsection (2)(d) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer’s liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of re-engagement by way of—

(a) wages in lieu of notice or ex gratia payments paid by the employer, or

(b) remuneration paid in respect of employment with another employer,

and such other benefits as the tribunal thinks appropriate in the circumstances.

(4) Where a dismissal is treated as taking place by virtue of section 96, references in this section to the date of termination of employment are to the notified date of return.

116.—(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—

(a) whether the complainant wishes to be reinstated,

(b) whether it is practicable for the employer to comply with an order for reinstatement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.

(3) In so doing the tribunal shall take into account—

(a) any wish expressed by the complainant as to the nature of the order to be made,

(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.

(4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.
(5) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining, for the purposes of subsection (1)(b) or (3)(b), whether it is practicable to comply with an order for reinstatement or re-engagement.

(6) Subsection (5) does not apply where the employer shows—

(a) that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement, or

(b) that—

(i) he engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and

(ii) when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement.

117.—(1) An industrial tribunal shall make an award of compensation, to be paid by the employer to the employee, if—

(a) an order under section 113 is made and the complainant is reinstated or re-engaged, but

(b) the terms of the order are not fully complied with.

(2) Subject to section 124, the amount of the compensation shall be such as the tribunal thinks fit having regard to the loss sustained by the complainant in consequence of the failure to comply fully with the terms of the order.

(3) Subject to subsections (1) and (2), if an order under section 113 is made but the complainant is not reinstated or re-engaged in accordance with the order, the tribunal shall make—

(a) an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 127), and

(b) except where this paragraph does not apply, an additional award of compensation of the appropriate amount,

to be paid by the employer to the employee.

(4) Subsection (3)(b) does not apply where—

(a) the employer satisfies the tribunal that it was not practicable to comply with the order, or

(b) the reason (or, if more than one, the principal reason)—

(i) in a redundancy case, for selecting the employee for dismissal, or

(ii) otherwise, for the dismissal,

is one of those specified in section 100(1)(a) and (b), 102(1) or 103.

(5) In subsection (3)(b) "the appropriate amount" means—

(a) where the dismissal is of a description referred to in subsection (6), not less than twenty-six nor more than fifty-two weeks' pay, and
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(b) in any other case, not less than thirteen nor more than twenty-six weeks' pay.

(6) The descriptions of dismissals in respect of which an employer may incur a higher additional award in accordance with subsection (5)(a) are—

(a) a dismissal which is an act of discrimination within the meaning of the Sex Discrimination Act 1975 which is unlawful by virtue of that Act, and

(b) a dismissal which is an act of discrimination within the meaning of the Race Relations Act 1976 which is unlawful by virtue of that Act.

(7) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining for the purposes of subsection (4)(a) whether it was practicable to comply with the order for reinstatement or re-engagement unless the employer shows that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement.

(8) Where in any case an industrial tribunal finds that the complainant has unreasonably prevented an order under section 113 from being complied with, in making an award of compensation for unfair dismissal (in accordance with sections 118 to 127) it shall take that conduct into account as a failure on the part of the complainant to mitigate his loss.

Compensation

118.—(1) Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—

(a) a basic award (calculated in accordance with sections 119 to 122 and 126), and

(b) a compensatory award (calculated in accordance with sections 123, 124, 126 and 127).

(2) Where this subsection applies, the award shall also include a special award calculated in accordance with section 125 unless—

(a) the complainant does not request the tribunal to make an order under section 113, or

(b) the case falls within section 121.

(3) Subsection (2) applies where the reason (or, if more than one, the principal reason)—

(a) in a redundancy case, for selecting the employee for dismissal, or

(b) otherwise, for the dismissal,

is one of those specified in section 100(1)(a) and (b), 102(i) or 103.

119.—(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—

(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,

(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and
(c) allowing the appropriate amount for each of those years of employment.

(2) In subsection (1)(c) "the appropriate amount" means—

(a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,

(b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and

(c) half a week's pay for a year of employment not within paragraph (a) or (b).

(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.

(4) Where the effective date of termination is after the sixty-fourth anniversary of the day of the employee's birth, the amount arrived at under subsections (1) to (3) shall be reduced by the appropriate fraction.

(5) In subsection (4) "the appropriate fraction" means the fraction of which—

(a) the numerator is the number of whole months reckoned from the sixty-fourth anniversary of the day of the employee's birth in the period beginning with that anniversary and ending with the effective date of termination, and

(b) the denominator is twelve.

(6) Subsections (4) and (5) do not apply to a case within section 96(1).

120.—(1) The amount of the basic award (before any reduction under section 122) shall not be less than £2,770 where the reason (or, if more than one, the principal reason)—

(a) in a redundancy case, for selecting the employee for dismissal, or

(b) otherwise, for the dismissal,

is one of those specified in section 100(1)(a) and (b), 102(1) or 103.

(2) The Secretary of State may by order increase the sum specified in subsection (1).

121. The amount of the basic award shall be two weeks' pay where the tribunal finds that the reason (or, where there is more than one, the principal reason) for the dismissal of the employee is that he was redundant and the employee—

(a) by virtue of section 138 is not regarded as dismissed for the purposes of Part XI, or

(b) by virtue of section 141 is not, or (if he were otherwise entitled) would not be, entitled to a redundancy payment.

122.—(1) Where the tribunal finds that the complainant has unreasonably refused an offer by the employer which (if accepted) would have the effect of reinstating the complainant in his employment in all respects as if he had not been dismissed, the tribunal shall reduce or further reduce the amount of the basic award to such extent as it considers just and equitable having regard to that finding.
(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

(3) Subsection (2) does not apply in a redundancy case unless the reason for selecting the employee for dismissal was one of those specified in section 100(1)(a) and (b), 102(1) or 103; and in such a case subsection (2) applies only to so much of the basic award as is payable because of section 120.

(4) The amount of the basic award shall be reduced or further reduced by the amount of—
   (a) any redundancy payment awarded by the tribunal under Part XI in respect of the same dismissal, or
   (b) any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy (whether in pursuance of Part XI or otherwise).

123.—(1) Subject to the provisions of this section and sections 124 and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—
   (a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
   (b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—
   (a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or
   (b) any expectation of such a payment,
only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

(5) In determining, for the purposes of subsection (1), how far any loss sustained by the complainant was attributable to action taken by the employer, no account shall be taken of any pressure which by—
   (a) calling, organising, procuring or financing a strike or other industrial action,
(b) threatening to do so,
was exercised on the employer to dismiss the employee; and that question shall be determined as if no such pressure had been exercised.

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

(7) If the amount of any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy (whether in pursuance of Part XI or otherwise) exceeds the amount of the basic award which would be payable but for section 122(4), that excess goes to reduce the amount of the compensatory award.

124.—(1) The amount of—
(a) any compensation awarded to a person under section 117(1) and (2), or
(b) a compensatory award to a person calculated in accordance with section 123,
shall not exceed £11,300.

(2) The Secretary of State may by order increase the sum specified in subsection (1).

(3) In the case of compensation awarded to a person under section 117(1) and (2), the limit imposed by this section may be exceeded to the extent necessary to enable the award fully to reflect the amount specified as payable under section 114(2)(a) or section 115(2)(d).

(4) Where—
(a) a compensatory award is an award under paragraph (a) of subsection (3) of section 117, and
(b) an additional award falls to be made under paragraph (b) of that subsection,
the limit imposed by this section on the compensatory award may be exceeded to the extent necessary to enable the aggregate of the compensatory and additional awards fully to reflect the amount specified as payable under section 114(2)(a) or section 115(2)(d).

(5) The limit imposed by this section applies to the amount which the industrial tribunal would, apart from this section, award in respect of the subject matter of the complaint after taking into account—
(a) any payment made by the respondent to the complainant in respect of that matter, and
(b) any reduction in the amount of the award required by any enactment or rule of law.

125.—(1) Subject to the following provisions, the amount of the special award shall be—
(a) one week's pay multiplied by 104, or
(b) £13,775,
whichever is the greater, but shall not exceed £27,500.
(2) Where the award of compensation is made under section 117(3)(a) then, unless the employer satisfies the tribunal that it was not practicable to comply with the order under section 113, the amount of the special award shall be increased to—

(a) one week's pay multiplied by 156, or

(b) £20,600,

whichever is the greater (but subject to the following provisions).

(3) In a case where the amount of the basic award is reduced under section 119(4), the amount of the special award shall be reduced by the same fraction.

(4) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the special award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

(5) Where the tribunal finds that the complainant has unreasonably—

(a) prevented an order under section 113 from being complied with, or

(b) refused an offer by the employer (made otherwise than in compliance with such an order) which, if accepted, would have the effect of reinstating the complainant in his employment in all respects as if he had not been dismissed,

the tribunal shall reduce or further reduce the amount of the special award to such extent as it considers just and equitable having regard to that finding.

(6) Where the employer has engaged a permanent replacement for the complainant, the tribunal shall not take that fact into account in determining for the purposes of subsection (2) whether it was practicable to comply with an order under section 113 unless the employer shows that it was not practicable for him to arrange for the complainant's work to be done without engaging a permanent replacement.

(7) The Secretary of State may by order increase any of the sums specified in subsections (1) and (2).

126.—(1) This section applies where compensation falls to be awarded in respect of any act both under—

(a) the provisions of this Act relating to unfair dismissal, and

(b) either or both of the Sex Discrimination Act 1975 and the Race Relations Act 1976.

(2) An industrial tribunal shall not award compensation under any one of those two or three Acts in respect of any loss or other matter which is or has been taken into account under the other, or any of the others, by the tribunal (or another industrial tribunal) in awarding compensation on the same or another complaint in respect of that act.

127. Where section 84 applies in relation to an employee, compensation in any unfair dismissal proceedings shall be assessed without regard to the right conferred on the employee by section 79.
Interim relief

128.—(1) An employee who presents a complaint to an industrial tribunal—

(a) that he has been unfairly dismissed by his employer, and

(b) that the reason (or, if more than one, the principal reason) for the dismissal is one of those specified in section 100(1)(a) and (b), 102(1) or 103,

may apply to the tribunal for interim relief.

(2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).

(3) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.

(4) The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing.

(5) The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so.

129.—(1) This section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find that the reason (or, if more than one, the principal reason) for his dismissal is one of those specified in section 100(1)(a) and (b), 102(1) or 103.

(2) The tribunal shall announce its findings and explain to both parties (if present)—

(a) what powers the tribunal may exercise on the application, and

(b) in what circumstances it will exercise them.

(3) The tribunal shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint—

(a) to reinstate the employee (that is, to treat him in all respects as if he had not been dismissed), or

(b) if not, to re-engage him in another job on terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed.

(4) For the purposes of subsection (3)(b) “terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed” means, as regards seniority, pension rights and other similar rights, that the period prior to the dismissal should be regarded as continuous with his employment following the dismissal.

(5) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.

(6) If the employer—

(a) states that he is willing to re-engage the employee in another job, and
(b) specifies the terms and conditions on which he is willing to do so, the tribunal shall ask the employee whether he is willing to accept the job on those terms and conditions.

(7) If the employee is willing to accept the job on those terms and conditions, the tribunal shall make an order to that effect.

(8) If the employee is not willing to accept the job on those terms and conditions—

(a) where the tribunal is of the opinion that the refusal is reasonable, the tribunal shall make an order for the continuation of his contract of employment, and

(b) otherwise, the tribunal shall make no order.

(9) If on the hearing of an application for interim relief the employer—

(a) fails to attend before the tribunal, or

(b) states that he is unwilling either to reinstate or re-engage the employee as mentioned in subsection (3), the tribunal shall make an order for the continuation of the employee’s contract of employment.

130.—(1) An order under section 129 for the continuation of a contract of employment is an order that the contract of employment continue in force—

(a) for the purposes of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters, and

(b) for the purposes of determining for any purpose the period for which the employee has been continuously employed, from the date of its termination (whether before or after the making of the order) until the determination or settlement of the complaint.

(2) Where the tribunal makes such an order it shall specify in the order the amount which is to be paid by the employer to the employee by way of pay in respect of each normal pay period, or part of any such period, falling between the date of dismissal and the determination or settlement of the complaint.

(3) Subject to the following provisions, the amount so specified shall be that which the employee could reasonably have been expected to earn during that period, or part, and shall be paid—

(a) in the case of a payment for any such period falling wholly or partly after the making of the order, on the normal pay day for that period, and

(b) in the case of a payment for any past period, within such time as may be specified in the order.

(4) If an amount is payable in respect only of part of a normal pay period, the amount shall be calculated by reference to the whole period and reduced proportionately.

(5) Any payment made to an employee by an employer under his contract of employment, or by way of damages for breach of that contract, in respect of a normal pay period, or part of any such period, goes towards discharging the employer’s liability in respect of that period.
under subsection (2); and, conversely, any payment under that subsection in respect of a period goes towards discharging any liability of the employer under, or in respect of breach of, the contract of employment in respect of that period.

(6) If an employee, on or after being dismissed by his employer, receives a lump sum which, or part of which, is in lieu of wages but is not referable to any normal pay period, the tribunal shall take the payment into account in determining the amount of pay to be payable in pursuance of any such order.

(7) For the purposes of this section, the amount which an employee could reasonably have been expected to earn, his normal pay period and the normal pay day for each such period shall be determined as if he had not been dismissed.

131.—(1) At any time between—
(a) the making of an order under section 129, and
(b) the determination or settlement of the complaint,
the employer or the employee may apply to an industrial tribunal for the revocation or variation of the order on the ground of a relevant change of circumstances since the making of the order.

(2) Sections 128 and 129 apply in relation to such an application as in relation to an original application for interim relief except that, in the case of an application by the employer, section 128(4) has effect with the substitution of a reference to the employee for the reference to the employer.

132.—(1) If, on the application of an employee, an industrial tribunal is satisfied that the employer has not complied with the terms of an order for the reinstatement or re-engagement of the employee under section 129(5) or (7), the tribunal shall—
(a) make an order for the continuation of the employee’s contract of employment, and
(b) order the employer to pay compensation to the employee.

(2) Compensation under subsection (1)(b) shall be of such amount as the tribunal considers just and equitable in all the circumstances having regard—
(a) to the infringement of the employee’s right to be reinstated or re-engaged in pursuance of the order, and
(b) to any loss suffered by the employee in consequence of the non-compliance.

(3) Section 130 applies to an order under subsection (1)(a) as in relation to an order under section 129.

(4) If on the application of an employee an industrial tribunal is satisfied that the employer has not complied with the terms of an order for the continuation of a contract of employment subsection (5) or (6) applies.

(5) Where the non-compliance consists of a failure to pay an amount by way of pay specified in the order—
(a) the tribunal shall determine the amount owed by the employer on the date of the determination, and
(b) if on that date the tribunal also determines the employee’s complaint that he has been unfairly dismissed, it shall specify that amount separately from any other sum awarded to the employee.

(6) In any other case, the tribunal shall order the employer to pay the employee such compensation as the tribunal considers just and equitable in all the circumstances having regard to any loss suffered by the employee in consequence of the non-compliance.

CHAPTER III
SUPPLEMENTSARY

133.—(1) Where—

(a) an employer has given notice to an employee to terminate his contract of employment, and
(b) before that termination the employee or the employer dies,

this Part applies as if the contract had been duly terminated by the employer by notice expiring on the date of the death.

(2) Where—

(a) an employee’s contract of employment has been terminated,
(b) by virtue of subsection (2) or (4) of section 97 a date later than the effective date of termination as defined in subsection (1) of that section is to be treated for certain purposes as the effective date of termination, and
(c) the employer or the employee dies before that date,

subsection (2) or (4) of section 97 applies as if the notice referred to in that subsection as required by section 86 expired on the date of the death.

(3) Where an employee has died, sections 113 to 116 do not apply; and, accordingly, if the industrial tribunal finds that the grounds of the complaint are well-founded, the case shall be treated as falling within section 112(4) as a case in which no order is made under section 113.

(4) Subsection (3) does not prejudice an order for reinstatement or re-engagement made before the employee’s death.

(5) Where an order for reinstatement or re-engagement has been made and the employee dies before the order is complied with—

(a) if the employer has before the death refused to reinstate or re-engage the employee in accordance with the order, subsections (3) to (6) of section 117 apply, and an award shall be made under subsection (3)(b) of that section, unless the employer satisfies the tribunal that it was not practicable at the time of the refusal to comply with the order, and
(b) if there has been no such refusal, subsections (1) and (2) of that section apply if the employer fails to comply with any ancillary terms of the order which remain capable of fulfilment after the employee’s death as they would apply to such a failure to comply fully with the terms of an order where the employee had been reinstated or re-engaged.
134.—(1) Where a teacher in an aided school is dismissed by the governors of the school in pursuance of a requirement of the local education authority under paragraph (a) of the proviso to section 24(2) of the Education Act 1944, this Part has effect in relation to the dismissal as if—

(a) the local education authority had at all material times been the teacher’s employer;

(b) the local education authority had dismissed him, and

(c) the reason or principal reason for which they did so had been the reason or principal reason for which they required his dismissal.

(2) For the purposes of a complaint under section 111 as it has effect by virtue of subsection (1)—

(a) section 117(4)(a) applies as if for the words “not practicable to comply” there were substituted the words “not practicable for the local education authority to permit compliance”, and

(b) section 123(5) applies as if the references in it to the employer were to the local education authority.

PART XI

REDUNDANCY PAYMENTS ETC.

CHAPTER I

RIGHT TO REDUNDANCY PAYMENT

135.—(1) An employer shall pay a redundancy payment to any employee of his if the employee—

(a) is dismissed by the employer by reason of redundancy, or

(b) is eligible for a redundancy payment by reason of being laid off or kept on short-time.

(2) Subsection (1) has effect subject to the following provisions of this Part (including, in particular, sections 140 to 144, 149 to 152, 155 to 161 and 164).

CHAPTER II

RIGHT ON DISMISSAL BY REASON OF REDUNDANCY

Dismissal by reason of redundancy

136.—(1) Subject to the provisions of this section and sections 137 and 138, for the purposes of this Part an employee is dismissed by his employer if (and only if)—

(a) the contract under which he is employed by the employer is terminated by the employer (whether with or without notice),

(b) he is employed under a contract for a fixed term and that term expires without being renewed under the same contract, or

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.

(2) Subsection (1)(c) does not apply if the employee terminates the contract without notice in circumstances in which he is entitled to do so by reason of a lock-out by the employer.
(3) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—

(a) the employer gives notice to the employee to terminate his contract of employment, and

(b) at a time within the obligatory period of notice the employee gives notice in writing to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire.

(4) In this Part the “obligatory period of notice”, in relation to notice given by an employer to terminate an employee’s contract of employment, means—

(a) the actual period of the notice in a case where the period beginning at the time when the notice is given and ending at the time when it expires is equal to the minimum period which (by virtue of any enactment or otherwise) is required to be given by the employer to terminate the contract of employment, and

(b) the period which—

(i) is equal to the minimum period referred to in paragraph (a), and

(ii) ends at the time when the notice expires, in any other case.

(5) Where in accordance with any enactment or rule of law—

(a) an act on the part of an employer, or

(b) an event affecting an employer (including, in the case of an individual, his death),

operates to terminate a contract under which an employee is employed by him, the act or event shall be taken for the purposes of this Part to be a termination of the contract by the employer.

137.—(1) Subject to subsection (2) and section 138, where an employee who—

(a) has the right conferred by section 79, and

(b) has exercised it in accordance with section 82,

is not permitted to return to work, she shall be taken for the purposes of this Part to be dismissed for the reason for which she was not permitted to return with effect from the notified day of return (being deemed to have been continuously employed until that day).

(2) Where in proceedings arising out of a failure to permit an employee to return to work pursuant to the right conferred by section 79 the employer shows—

(a) that the reason for the failure is that the employee is redundant, and
(b) that the employee was, or (had she continued to be employed by him) would have been, dismissed by reason of redundancy on a day falling after the commencement of her maternity leave period and before the notified day of return,

for the purposes of this Part the employee shall not be taken to be dismissed with effect from the notified day of return but shall be taken to be dismissed by reason of redundancy with effect from that earlier day (being deemed to have been continuously employed until that earlier day).

138.—(1) Where—

(a) an employee's contract of employment is renewed, or he is re-engaged under a new contract of employment in pursuance of an offer (whether in writing or not) made before the end of his employment under the previous contract, and

(b) the renewal or re-engagement takes effect either immediately on, or after an interval of not more than four weeks after, the end of that employment,

the employee shall not be regarded for the purposes of this Part as dismissed by his employer by reason of the ending of his employment under the previous contract.

(2) Subsection (1) does not apply if—

(a) the provisions of the contract as renewed, or of the new contract, as to—

(i) the capacity and place in which the employee is employed, and

(ii) the other terms and conditions of his employment, differ (wholly or in part) from the corresponding provisions of the previous contract, and

(b) during the period specified in subsection (3)—

(i) the employee (for whatever reason) terminates the renewed or new contract, or gives notice to terminate it and it is in consequence terminated, or

(ii) the employer, for a reason connected with or arising out of any difference between the renewed or new contract and the previous contract, terminates the renewed or new contract, or gives notice to terminate it and it is in consequence terminated.

(3) The period referred to in subsection (2)(b) is the period—

(a) beginning at the end of the employee's employment under the previous contract, and

(b) ending with—

(i) the period of four weeks beginning with the date on which the employee starts work under the renewed or new contract, or

(ii) such longer period as may be agreed in accordance with subsection (6) for the purpose of retraining the employee for employment under that contract;

and is in this Part referred to as the "trial period".

(4) Where subsection (2) applies, for the purposes of this Part—
(a) the employee shall be regarded as dismissed on the date on which his employment under the previous contract (or, if there has been more than one trial period, the original contract) ended, and

(b) the reason for the dismissal shall be taken to be the reason for which the employee was then dismissed, or would have been dismissed had the offer (or original offer) of renewed or new employment not been made, or the reason which resulted in that offer being made.

(5) Subsection (2) does not apply if the employee’s contract of employment is again renewed, or he is again re-engaged under a new contract of employment, in circumstances such that subsection (1) again applies.

(6) For the purposes of subsection (3)(b)(ii) a period of retraining is agreed in accordance with this subsection only if the agreement—

(a) is made between the employer and the employee or his representative before the employee starts work under the contract as renewed, or the new contract,

(b) is in writing,

(c) specifies the date on which the period of retraining ends, and

(d) specifies the terms and conditions of employment which will apply in the employee’s case after the end of that period.

139.—(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(3) For the purposes of subsection (1) the activities carried on by a local education authority with respect to the schools maintained by it, and the activities carried on by the governors of those schools, shall be treated as one business (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(4) Where—

(a) the contract under which a person is employed is treated by section 136(5) as terminated by his employer by reason of an act or event, and
(b) the employee’s contract is not renewed and he is not re-engaged under a new contract of employment,

he shall be taken for the purposes of this Act to be dismissed by reason of redundancy if the circumstances in which his contract is not renewed, and he is not re-engaged, are wholly or mainly attributable to either of the facts stated in paragraphs (a) and (b) of subsection (1).

(5) In its application to a case within subsection (4), paragraph (a)(i) of subsection (1) has effect as if the reference in that subsection to the employer included a reference to any person to whom, in consequence of the act or event, power to dispose of the business has passed.

(6) In subsection (1) “cease” and “diminish” mean cease and diminish either permanently or temporarily and for whatever reason.

**Exclusions**

140.—(1) Subject to subsections (2) and (3), an employee is not entitled to a redundancy payment by reason of dismissal where his employer, being entitled to terminate his contract of employment without notice by reason of the employee’s conduct, terminates it either—

(a) without notice,

(b) by giving shorter notice than that which, in the absence of conduct entitling the employer to terminate the contract without notice, the employer would be required to give to terminate the contract, or

(c) by giving notice which includes, or is accompanied by, a statement in writing that the employer would, by reason of the employee’s conduct, be entitled to terminate the contract without notice.

(2) Where an employee who—

(a) has been given notice by his employer to terminate his contract of employment, or

(b) has given notice to his employer under section 148(1) indicating his intention to claim a redundancy payment in respect of lay-off or short-time,

takes part in a strike at any relevant time in circumstances which entitle the employer to treat the contract of employment as terminable without notice, subsection (1) does not apply if the employer terminates the contract by reason of his taking part in the strike.

(3) Where the contract of employment of an employee who—

(a) has been given notice by his employer to terminate his contract of employment, or

(b) has given notice to his employer under section 148(1) indicating his intention to claim a redundancy payment in respect of lay-off or short-time,

is terminated as mentioned in subsection (1) at any relevant time otherwise than by reason of his taking part in a strike, an industrial tribunal may determine that the employer is liable to make an appropriate payment to the employee if on a reference to the tribunal it appears to the tribunal, in the circumstances of the case, to be just and equitable that the employee should receive it.

(4) In subsection (3) “appropriate payment” means—
(a) the whole of the redundancy payment to which the employee would have been entitled apart from subsection (1), or
(b) such part of that redundancy payment as the tribunal thinks fit.

(5) In this section "relevant time"—
(a) in the case of an employee who has been given notice by his employer to terminate his contract of employment, means any time within the obligatory period of notice, and
(b) in the case of an employee who has given notice to his employer under section 148(1), means any time after the service of the notice.

141.—(1) This section applies where an offer (whether in writing or not) is made to an employee before the end of his employment—
(a) to renew his contract of employment, or
(b) to re-engage him under a new contract of employment,
with renewal or re-engagement to take effect either immediately on, or after an interval of not more than four weeks after, the end of his employment.

(2) Where subsection (3) is satisfied, the employee is not entitled to a redundancy payment if he unreasonably refuses the offer.

(3) This subsection is satisfied where—
(a) the provisions of the contract as renewed, or of the new contract, as to—
(ii) the other terms and conditions of his employment, would not differ from the corresponding provisions of the previous contract, or
(b) those provisions of the contract as renewed, or of the new contract, would differ from the corresponding provisions of the previous contract but the offer constitutes an offer of suitable employment in relation to the employee.

(4) The employee is not entitled to a redundancy payment if—
(a) his contract of employment is renewed, or he is re-engaged under a new contract of employment, in pursuance of the offer,
(b) the provisions of the contract as renewed or new contract as to the capacity or place in which he is employed or the other terms and conditions of his employment differ (wholly or in part) from the corresponding provisions of the previous contract,
(c) the employment is suitable in relation to him, and
(d) during the trial period he unreasonably terminates the contract, or unreasonably gives notice to terminate it and it is in consequence terminated.

142.—(1) Subject to subsection (3), an employee is not entitled to a redundancy payment where—
(a) he is taken to be dismissed by virtue of section 136(3) by reason of giving to his employer notice terminating his contract of employment on a date earlier than the date on which notice by the employer terminating the contract is due to expire,
(b) before the employee’s notice is due to expire, the employer gives him a notice such as is specified in subsection (2), and
(c) the employee does not comply with the requirements of that notice.

(2) The employer’s notice referred to in subsection (1)(b) is a notice in writing—
(a) requiring the employee to withdraw his notice terminating the contract of employment and to continue in employment until the date on which the employer’s notice terminating the contract expires, and
(b) stating that, unless he does so, the employer will contest any liability to pay to him a redundancy payment in respect of the termination of his contract of employment.

(3) An industrial tribunal may determine that the employer is liable to make an appropriate payment to the employee if on a reference to the tribunal it appears to the tribunal, having regard to—
(a) the reasons for which the employee seeks to leave the employment, and
(b) the reasons for which the employer requires him to continue in it, to be just and equitable that the employee should receive the payment.

(4) In subsection (3) “appropriate payment” means—
(a) the whole of the redundancy payment to which the employee would have been entitled apart from subsection (1), or
(b) such part of that redundancy payment as the tribunal thinks fit.

143.—(1) This section applies where—
(a) an employer has given notice to an employee to terminate his contract of employment (“notice of termination”),
(b) after the notice is given the employee begins to take part in a strike of employees of the employer, and
(c) the employer serves on the employee a notice of extension.

(2) A notice of extension is a notice in writing which—
(a) requests the employee to agree to extend the contract of employment beyond the time of expiry by a period comprising as many available days as the number of working days lost by striking (“the proposed period of extension”),
(b) indicates the reasons for which the employer makes that request, and
(c) states that the employer will contest any liability to pay the employee a redundancy payment in respect of the dismissal effected by the notice of termination unless either—
(i) the employee complies with the request, or
(ii) the employer is satisfied that, in consequence of
sickness or injury or otherwise, the employee is unable to
comply with it or that (even though he is able to comply with
it) it is reasonable in the circumstances for him not to do so.

(3) Subject to subsections (4) and (5), if the employee does not comply
with the request contained in the notice of extension, he is not entitled to
a redundancy payment by reason of the dismissal effected by the notice
of termination.

(4) Subsection (3) does not apply if the employer agrees to pay a
redundancy payment to the employee in respect of the dismissal effected
by the notice of termination even though he has not complied with the
request contained in the notice of extension.

(5) An industrial tribunal may determine that the employer is liable to
make an appropriate payment to the employee if on a reference to the
tribunal it appears to the tribunal that—

(a) the employee has not complied with the request contained in the
notice of extension and the employer has not agreed to pay a
redundancy payment in respect of the dismissal effected by the
notice of termination, but

(b) either the employee was unable to comply with the request or it
was reasonable in the circumstances for him not to comply
with it.

(6) In subsection (5) “appropriate payment” means—

(a) the whole of the redundancy payment to which the employee
would have been entitled apart from subsection (3), or

(b) such part of that redundancy payment as the tribunal thinks fit.

(7) If the employee—

(a) complies with the request contained in the notice of extension, or

(b) does not comply with it but attends at his proper or usual place
of work and is ready and willing to work on one or more (but
not all) of the available days within the proposed period of
extension,

the notice of termination has effect, and shall be deemed at all material
times to have had effect, as if the period specified in it had been
appropriately extended; and sections 87 to 91 accordingly apply as if the
period of notice required by section 86 were extended to a
corresponding extent.

(8) In subsection (7) “appropriately extended” means—

(a) in a case within paragraph (a) of that subsection, extended
beyond the time of expiry by an additional period equal to the
proposed period of extension, and

(b) in a case within paragraph (b) of that subsection, extended
beyond the time of expiry up to the end of the day (or last of the
days) on which he attends at his proper or usual place of work
and is ready and willing to work.

144.—(1) For the purposes of section 143 an employee complies with
the request contained in a notice of extension if, but only if, on each
available day within the proposed period of extension, he—
(a) attends at his proper or usual place of work, and
(b) is ready and willing to work,
whether or not he has signified his agreement to the request in any other way.

(2) The reference in section 143(2) to the number of working days lost by striking is a reference to the number of working days in the period—
(a) beginning with the date of service of the notice of termination, and
(b) ending with the time of expiry,
which are days on which the employee in question takes part in a strike of employees of his employer.

(3) in section 143 and this section—
“available day”, in relation to an employee, means a working day beginning at or after the time of expiry which is a day on which he is not taking part in a strike of employees of the employer,
“available day within the proposed period of extension” means an available day which begins before the end of the proposed period of extension,
“time of expiry”, in relation to a notice of termination, means the time at which the notice would expire apart from section 143, and
“working day”, in relation to an employee, means a day on which, in accordance with his contract of employment, he is normally required to work.

(4) Neither the service of a notice of extension nor any extension by virtue of section 143(7) of the period specified in a notice of termination affects—
(a) any right either of the employer or of the employee to terminate the contract of employment (whether before, at or after the time of expiry) by a further notice or without notice, or
(b) the operation of this Part in relation to any such termination of the contract of employment.

Supplementary
The relevant date. 145.—(1) For the purposes of the provisions of this Act relating to redundancy payments “the relevant date” in relation to the dismissal of an employee has the meaning given by this section.

(2) Subject to the following provisions of this section, “the relevant date”—
(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,
(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and
(c) in relation to an employee who is employed under a contract for a fixed term which expires without being renewed under the same contract, means the date on which the term expires.
(3) Where the employee is taken to be dismissed by virtue of section 136(3) the "relevant date" means the date on which the employee's notice to terminate his contract of employment expires.

(4) Where the employee is regarded by virtue of section 138(4) as having been dismissed on the date on which his employment under an earlier contract ended, "the relevant date" means—
(a) for the purposes of section 164(1), the date which is the relevant date as defined by subsection (2) in relation to the renewed or new contract or, where there has been more than one trial period, the last such contract, and
(b) for the purposes of any other provision, the date which is the relevant date as defined by subsection (2) in relation to the previous contract or, where there has been more than one such trial period, the original contract.

(5) Where—
(a) the contract of employment is terminated by the employer, and
(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the relevant date (as defined by the previous provisions of this section),

for the purposes of sections 155, 162(1) and 227(3) the later date is the relevant date.

(6) In subsection (5)(b) "the material date" means—
(a) the date when notice of termination was given by the employer, or
(b) where no notice was given, the date when the contract of employment was terminated by the employer.

(7) Where an employee is taken to be dismissed for the purposes of this Part by virtue of section 137(1), references in this Part to the relevant date are (unless the context otherwise requires) to the notified date of return.

146.—(1) In sections 138 and 141—

(a) references to re-engagement are to re-engagement by the employer or an associated employer, and
(b) references to an offer are to an offer made by the employer or an associated employer.

(2) For the purposes of the application of section 138(1) or 141(1) to a contract under which the employment ends on a Friday, Saturday or Sunday—

(a) the renewal or re-engagement shall be treated as taking effect immediately on the ending of the employment under the previous contract if it takes effect on or before the next Monday after that Friday, Saturday or Sunday, and
(b) the interval of four weeks to which those provisions refer shall be calculated as if the employment had ended on that next Monday.

(3) Where section 138 or 141 applies in a case within section 137(1)—
PART XI
CHAPTER II

(a) references to a renewal or re-engagement taking effect immediately on, or after an interval of not more than four weeks after, the end of the employment are to a renewal or re-engagement taking effect on, or after an interval of not more than four weeks after, the notified day of return, and

(b) references to provisions of the previous contract are to the provisions of the contract under which the employee worked immediately before the beginning of her maternity leave period.

CHAPTER III
RIGHT BY REASON OF LAY-OFF OR SHORT-TIME

Lay-off and short-time

147.—(1) For the purposes of this Part an employee shall be taken to be laid off for a week if—

(a) he is employed under a contract on terms and conditions such that his remuneration under the contract depends on his being provided by the employer with work of the kind which he is employed to do, but

(b) he is not entitled to any remuneration under the contract in respect of the week because the employer does not provide such work for him.

(2) For the purposes of this Part an employee shall be taken to be kept on short-time for a week if by reason of a diminution in the work provided for the employee by his employer (being work of a kind which under his contract the employee is employed to do) the employee's remuneration for the week is less than half a week's pay.

148.—(1) Subject to the following provisions of this Part, for the purposes of this Part an employee is eligible for a redundancy payment by reason of being laid off or kept on short-time if—

(a) he gives notice in writing to his employer indicating (in whatever terms) his intention to claim a redundancy payment in respect of lay-off or short-time (referred to in this Part as "notice of intention to claim"), and

(b) before the service of the notice he has been laid off or kept on short-time in circumstances in which subsection (2) applies.

(2) This subsection applies if the employee has been laid off or kept on short-time—

(a) for four or more consecutive weeks of which the last before the service of the notice ended on, or not more than four weeks before, the date of service of the notice, or

(b) for a series of six or more weeks (of which not more than three were consecutive) within a period of thirteen weeks, where the last week of the series before the service of the notice ended on, or not more than four weeks before, the date of service of the notice.
Employment Rights Act 1996

Exclusions

149. Where an employee gives to his employer notice of intention to claim but—

(a) the employer gives to the employee, within seven days after the service of that notice, notice in writing (referred to in this Part as a “counter-notice”) that he will contest any liability to pay to the employee a redundancy payment in pursuance of the employee's notice, and

(b) the employer does not withdraw the counter-notice by a subsequent notice in writing,

the employee is not entitled to a redundancy payment in pursuance of his notice of intention to claim except in accordance with a decision of an industrial tribunal.

150.—(1) An employee is not entitled to a redundancy payment by reason of being laid off or kept on short-time unless he terminates his contract of employment by giving such period of notice as is required for the purposes of this section before the end of the relevant period.

(2) The period of notice required for the purposes of this section—

(a) where the employee is required by his contract of employment to give more than one week's notice to terminate the contract, is the minimum period which he is required to give, and

(b) otherwise, is one week.

(3) In subsection (1) “the relevant period”—

(a) if the employer does not give a counter-notice within seven days after the service of the notice of intention to claim, is three weeks after the end of those seven days,

(b) if the employer gives a counter-notice within that period of seven days but withdraws it by a subsequent notice in writing, is three weeks after the service of the notice of withdrawal, and

(c) if—

(i) the employer gives a counter-notice within that period of seven days, and does not so withdraw it, and

(ii) a question as to the right of the employee to a redundancy payment in pursuance of the notice of intention to claim is referred to an industrial tribunal,

is three weeks after the tribunal has notified to the employee its decision on that reference.

(4) For the purposes of subsection (3)(c) no account shall be taken of—

(a) any appeal against the decision of the tribunal, or

(b) any proceedings or decision in consequence of any such appeal.

151.—(1) An employee is not entitled to a redundancy payment by reason of being laid off or kept on short-time if he is dismissed by his employer.

(2) Subsection (1) does not prejudice any right of the employee to a redundancy payment in respect of the dismissal.
PART XI
CHAPTER III
Likelihood of full employment.

152.—(1) An employee is not entitled to a redundancy payment in pursuance of a notice of intention to claim if—

(a) on the date of service of the notice it was reasonably to be expected that the employee (if he continued to be employed by the same employer) would, not later than four weeks after that date, enter on a period of employment of not less than thirteen weeks during which he would not be laid off or kept on short-time for any week, and

(b) the employer gives a counter-notice to the employee within seven days after the service of the notice of intention to claim.

(2) Subsection (1) does not apply where the employee—

(a) continues or has continued, during the next four weeks after the date of service of the notice of intention to claim, to be employed by the same employer, and

(b) is or has been laid off or kept on short-time for each of those weeks.

Supplementary

153. For the purposes of the provisions of this Act relating to redundancy payments "the relevant date" in relation to a notice of intention to claim or a right to a redundancy payment in pursuance of such a notice—

(a) in a case falling within paragraph (a) of subsection (2) of section 148, means the date on which the last of the four or more consecutive weeks before the service of the notice came to an end, and

(b) in a case falling within paragraph (b) of that subsection, means the date on which the last of the series of six or more weeks before the service of the notice came to an end.

Provisions supplementing sections 148 and 152.

154. For the purposes of sections 148(2) and 152(2)—

(a) it is immaterial whether a series of weeks consists wholly of weeks for which the employee is laid off or wholly of weeks for which he is kept on short-time or partly of the one and partly of the other, and

(b) no account shall be taken of any week for which an employee is laid off or kept on short-time where the lay-off or short-time is wholly or mainly attributable to a strike or a lock-out (whether or not in the trade or industry in which the employee is employed and whether in Great Britain or elsewhere).

CHAPTER IV
GENERAL EXCLUSIONS FROM RIGHT

Qualifying period of employment.

155. An employee does not have any right to a redundancy payment unless he has been continuously employed for a period of not less than two years ending with the relevant date.

Upper age limit.

156.—(1) An employee does not have any right to a redundancy payment if before the relevant date he has attained—

(a) in a case where—
(i) in the business for the purposes of which the employee was employed there was a normal retiring age of less than sixty-five for an employee holding the position held by the employee, and
(ii) the age was the same whether the employee holding that position was a man or woman, that normal retiring age, and
(b) in any other case, the age of sixty-five.

(2) Subsection (1) does not apply to a case within section 137(1).

157.—(1) Where an order under this section is in force in respect of an agreement covered by this section, an employee who, immediately before the relevant date, is an employee to whom the agreement applies does not have any right to a redundancy payment.

(2) An agreement is covered by this section if it is an agreement between—
(a) one or more employers or organisations of employers, and
(b) one or more trade unions representing employees,
under which employees to whom the agreement applies have a right in certain circumstances to payments on the termination of their contracts of employment.

(3) Where, on the application of all the parties to an agreement covered by this section, the Secretary of State is satisfied, having regard to the provisions of the agreement, that the employees to whom the agreement applies should not have any right to a redundancy payment, he may make an order under this section in respect of the agreement.

(4) The Secretary of State shall not make an order under this section in respect of an agreement unless the agreement indicates (in whatever terms) the willingness of the parties to it to submit to an industrial tribunal any question arising under the agreement as to—
(a) the right of an employee to a payment on the termination of his employment, or
(b) the amount of such a payment.

(5) An order revoking an earlier order under this section may be made in pursuance of an application by all or any of the parties to the agreement in question or in the absence of such an application.

(6) Subsection (1) does not apply to a case within section 137(1).

158.—(1) The Secretary of State shall by regulations make provision for excluding the right to a redundancy payment, or reducing the amount of any redundancy payment, in such cases to which subsection (2) applies as are prescribed by the regulations.

(2) This subsection applies to cases in which an employee has (whether by virtue of any statutory provision or otherwise) a right or claim (whether or not legally enforceable) to a periodical payment or lump sum by way of pension, gratuity or superannuation allowance which—
(a) is to be paid by reference to his employment by a particular employer, and
(b) is to be paid, or to begin to be paid, at the time when he leaves the employment or within such period after he leaves the employment as may be prescribed by the regulations.

(3) The regulations shall secure that the right to a redundancy payment shall not be excluded, and that the amount of a redundancy payment shall not be reduced, by reason of any right of claim to a periodical payment or lump sum, in so far as the payment or lump sum—

(a) represents compensation for loss of employment or for loss or diminution of emoluments or of pension rights, and

(b) is payable under a statutory provision (whether passed or made before or after the passing of this Act).

(4) In relation to any case where (in accordance with any provision of this Part) an industrial tribunal determines that an employer is liable to pay part (but not the whole) of a redundancy payment the references in this section to a redundancy payment, or to the amount of a redundancy payment, are to the part of the redundancy payment, or to the amount of the part.

159. A person does not have any right to a redundancy payment in respect of any employment which—

(a) is employment in a public office within the meaning of section 39 of the Superannuation Act 1965, or

(b) is for the purposes of pensions and other superannuation benefits treated (whether by virtue of that Act or otherwise) as service in the civil service of the State.

160.—(1) A person does not have any right to a redundancy payment in respect of employment in any capacity under the Government of an overseas territory.

(2) The reference in subsection (1) to the Government of an overseas territory includes a reference to—

(a) a Government constituted for two or more overseas territories, and

(b) any authority established for the purpose of providing or administering services which are common to, or relate to matters of common interest to, two or more overseas territories.

(3) In this section references to an overseas territory are to any territory or country outside the United Kingdom.

161.—(1) A person does not have any right to a redundancy payment in respect of employment as a domestic servant in a private household where the employer is the parent (or step-parent), grandparent, child (or step-child), grandchild or brother or sister (or half-brother or half-sister) of the employee.

(2) Subject to that, the provisions of this Part apply to an employee who is employed as a domestic servant in a private household as if—

(a) the household were a business, and

(b) the maintenance of the household were the carrying on of that business by the employer.
CHAPTER V

OTHER PROVISIONS ABOUT REDUNDANCY PAYMENTS

162.—(1) The amount of a redundancy payment shall be calculated by—

(a) determining the period, ending with the relevant date, during which the employee has been continuously employed,

(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and

(c) allowing the appropriate amount for each of those years of employment.

(2) In subsection (1)(c) “the appropriate amount” means—

(a) one and a half weeks’ pay for a year of employment in which the employee was not below the age of forty-one,

(b) one week’s pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and

(c) half a week’s pay for each year of employment not within paragraph (a) or (b).

(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.

(4) Where the relevant date is after the sixty-fourth anniversary of the day of the employee’s birth, the amount arrived at under subsections (1) to (3) shall be reduced by the appropriate fraction.

(5) In subsection (4) “the appropriate fraction” means the fraction of which—

(a) the numerator is the number of whole months reckoned from the sixty-fourth anniversary of the day of the employee’s birth in the period beginning with that anniversary and ending with the relevant date, and

(b) the denominator is twelve.

(6) Subsections (1) to (5) apply for the purposes of any provision of this Part by virtue of which an industrial tribunal may determine that an employer is liable to pay to an employee—

(a) the whole of the redundancy payment to which the employee would have had a right apart from some other provision, or

(b) such part of the redundancy payment to which the employee would have had a right apart from some other provision as the tribunal thinks fit,

as if any reference to the amount of a redundancy payment were to the amount of the redundancy payment to which the employee would have been entitled apart from that other provision.

(7) Subsections (4) and (5) do not apply to a case within section 137(1).

(8) This section has effect subject to any regulations under section 158 by virtue of which the amount of a redundancy payment, or part of a redundancy payment, may be reduced.
163.—(1) Any question arising under this Part as to—

(a) the right of an employee to a redundancy payment, or
(b) the amount of a redundancy payment,

shall be referred to and determined by an industrial tribunal.

(2) For the purposes of any such reference, an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy.

(3) Any question whether an employee will become entitled to a redundancy payment if he is not dismissed by his employer and he terminates his contract of employment as mentioned in section 150(1) shall for the purposes of this Part be taken to be a question as to the right of the employee to a redundancy payment.

(4) Where an order under section 157 is in force in respect of an agreement, this section has effect in relation to any question arising under the agreement as to the right of an employee to a payment on the termination of his employment, or as to the amount of such a payment, as if the payment were a redundancy payment and the question arose under this Part.

164.—(1) An employee does not have any right to a redundancy payment unless, before the end of the period of six months beginning with the relevant date—

(a) the payment has been agreed and paid,
(b) the employee has made a claim for the payment by notice in writing given to the employer,
(c) a question as to the employee’s right to, or the amount of, the payment has been referred to an industrial tribunal, or
(d) a complaint relating to his dismissal has been presented by the employee under section 111.

(2) An employee is not deprived of his right to a redundancy payment by subsection (1) if, during the period of six months immediately following the period mentioned in that subsection, the employee—

(a) makes a claim for the payment by notice in writing given to the employer,
(b) refers to an industrial tribunal a question as to his right to, or the amount of, the payment, or
(c) presents a complaint relating to his dismissal under section 111, and it appears to the tribunal to be just and equitable that the employee should receive a redundancy payment.

(3) In determining under subsection (2) whether it is just and equitable that an employee should receive a redundancy payment an industrial tribunal shall have regard to—

(a) the reason shown by the employee for his failure to take any such step as is referred to in subsection (2) within the period mentioned in subsection (1), and
(b) all the other relevant circumstances.
165.—(1) On making any redundancy payment, otherwise than in pursuance of a decision of a tribunal which specifies the amount of the payment to be made, the employer shall give to the employee a written statement indicating how the amount of the payment has been calculated.

(2) An employer who without reasonable excuse fails to comply with subsection (1) is guilty of an offence and liable on summary conviction to a fine not exceeding level 1 on the standard scale.

(3) If an employer fails to comply with the requirements of subsection (1), the employee may by notice in writing to the employer require him to give to the employee a written statement complying with those requirements within such period (not being less than one week beginning with the day on which the notice is given) as may be specified in the notice.

(4) An employer who without reasonable excuse fails to comply with a notice under subsection (3) is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

CHAPTER VI
PAYMENTS BY SECRETARY OF STATE

166.—(1) Where an employee claims that his employer is liable to pay to him an employer’s payment and either—

(a) that the employee has taken all reasonable steps, other than legal proceedings, to recover the payment from the employer and the employer has refused or failed to pay it, or has paid part of it and has refused or failed to pay the balance, or

(b) that the employer is insolvent and the whole or part of the payment remains unpaid,

the employee may apply to the Secretary of State for a payment under this section.

(2) In this Part “employer’s payment”, in relation to an employee, means—

(a) a redundancy payment which his employer is liable to pay to him under this Part, or

(b) a payment which his employer is, under an agreement in respect of which an order is in force under section 157, liable to make to him on the termination of his contract of employment.

(3) In relation to any case where (in accordance with any provision of this Part) an industrial tribunal determines that an employer is liable to pay part (but not the whole) of a redundancy payment the reference in subsection (2)(a) to a redundancy payment is to the part of the redundancy payment.

(4) In subsection (1)(a) “legal proceedings”—

(a) does not include any proceedings before an industrial tribunal, but

(b) includes any proceedings to enforce a decision or award of an industrial tribunal.

(5) An employer is insolvent for the purposes of subsection (1)(b)—

(a) where the employer is an individual, if (but only if) subsection (6) is satisfied, and
(b) where the employer is a company, if (but only if) subsection (7) is satisfied.

(6) This subsection is satisfied in the case of an employer who is an individual—

(a) in England and Wales if—

(i) he has been adjudged bankrupt or has made a composition or arrangement with his creditors, or

(ii) he has died and his estate falls to be administered in accordance with an order under section 421 of the Insolvency Act 1986, and

(b) in Scotland if—

(i) sequestration of his estate has been awarded or he has executed a trust deed for his creditors or has entered into a composition contract, or

(ii) he has died and a judicial factor appointed under section 11A of the Judicial Factors (Scotland) Act 1889 is required by that section to divide his insolvent estate among his creditors.

(7) This subsection is satisfied in the case of an employer which is a company—

(a) if a winding up order or an administration order has been made, or a resolution for voluntary winding up has been passed, with respect to the company,

(b) if a receiver or (in England and Wales only) a manager of the company’s undertaking has been duly appointed, or (in England and Wales only) possession has been taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge, or

(c) if a voluntary arrangement proposed in the case of the company for the purposes of Part I of the Insolvency Act 1986 has been approved under that Part of that Act.

167.—(1) Where, on an application under section 166 by an employee in relation to an employer’s payment, the Secretary of State is satisfied that the requirements specified in subsection (2) are met, he shall pay to the employee out of the National Insurance Fund a sum calculated in accordance with section 168 but reduced by so much (if any) of the employer’s payment as has already been paid.

(2) The requirements referred to in subsection (1) are—

(a) that the employee is entitled to the employer’s payment, and

(b) that one of the conditions specified in paragraphs (a) and (b) of subsection (1) of section 166 is fulfilled,

and, in a case where the employer’s payment is a payment such as is mentioned in subsection (2)(b) of that section, that the employee’s right to the payment arises by virtue of a period of continuous employment (computed in accordance with the provisions of the agreement in question) which is not less than two years.

(3) Where under this section the Secretary of State pays a sum to an employee in respect of an employer’s payment—
(a) all rights and remedies of the employee with respect to the employer's payment, or (if the Secretary of State has paid only part of it) all the rights and remedies of the employee with respect to that part of the employer's payment, are transferred to and vest in the Secretary of State, and

(b) any decision of an industrial tribunal requiring the employer's payment to be paid to the employee has effect as if it required that payment, or that part of it which the Secretary of State has paid, to be paid to the Secretary of State.

(4) Any money recovered by the Secretary of State by virtue of subsection (3) shall be paid into the National Insurance Fund.

168.—(1) The sum payable to an employee by the Secretary of State under section 167—

(a) where the employer's payment to which the employee's application under section 166 relates is a redundancy payment or a part of a redundancy payment, is a sum equal to the amount of the redundancy payment or part, and

(b) where the employer's payment to which the employee's application under section 166 relates is a payment which the employer is liable to make under an agreement in respect of which an order is in force under section 157, is a sum equal to the amount of the employer's payment or of the relevant redundancy payment, whichever is less.

(2) The reference in subsection (1)(b) to the amount of the relevant redundancy payment is to the amount of the redundancy payment which the employer would have been liable to pay to the employee on the assumptions specified in subsection (3).

(3) The assumptions referred to in subsection (2) are that—

(a) the order in force in respect of the agreement had not been made,

(b) the circumstances in which the employer's payment is payable had been such that the employer was liable to pay a redundancy payment to the employee in those circumstances,

(c) the relevant date, in relation to any such redundancy payment, had been the date on which the termination of the employee's contract of employment is treated as having taken effect for the purposes of the agreement, and

(d) in so far as the provisions of the agreement relating to the circumstances in which the continuity of an employee's period of employment is to be treated as broken, and the weeks which are to count in computing a period of employment, are inconsistent with the provisions of Chapter I of Part XIV, the provisions of the agreement were substituted for those provisions.

169.—(1) Where an employee makes an application to the Secretary of State under section 166, the Secretary of State may, by notice in writing given to the employer, require the employer—

(a) to provide the Secretary of State with such information, and
(b) to produce for examination on behalf of the Secretary of State documents in his custody or under his control of such description,
as the Secretary of State may reasonably require for the purpose of
determining whether the application is well-founded.

(2) Where a person on whom a notice is served under subsection (1)
fails without reasonable excuse to comply with a requirement imposed by
the notice, he is guilty of an offence and liable on summary conviction to
a fine not exceeding level 3 on the standard scale.

(3) A person is guilty of an offence if—
(a) in providing any information required by a notice under
subsection (1), he makes a statement which he knows to be false
in a material particular or recklessly makes a statement which is
false in a material particular, or
(b) he produces for examination in accordance with a notice under
subsection (1) a document which to his knowledge has been
wilfully falsified.

(4) A person guilty of an offence under subsection (3) is liable—
(a) on summary conviction, to a fine not exceeding the statutory
maximum or to imprisonment for a term not exceeding three
months, or to both, or
(b) on conviction on indictment, to a fine or to imprisonment for a
term not exceeding two years, or to both.

176.—(1) Where on an application made to the Secretary of State for
a payment under section 166 it is claimed that an employer is liable to pay
an employer's payment, there shall be referred to an industrial tribunal—
(a) any question as to the liability of the employer to pay the
employer's payment, and
(b) any question as to the amount of the sum payable in accordance
with section 168.

(2) For the purposes of any reference under this section an employee
who has been dismissed by his employer shall, unless the contrary is
proved, be presumed to have been so dismissed by reason of redundancy.

CHAPTER VII

SUPPLEMENTARY

Application of Part to particular cases

171.—(1) The Secretary of State may by regulations provide that,
subject to such exceptions and modifications as may be prescribed by the
regulations, this Part and the provisions of this Act supplementary to this
Part have effect in relation to any employment of a description to which
this section applies as may be so prescribed as if—
(a) it were employment under a contract of employment,
(b) any person engaged in employment of that description were an
employee, and
(c) such person as may be determined by or under the regulations
were his employer.
(2) This section applies to employment of any description which—

(a) is employment in the case of which secondary Class 1 contributions are payable under Part I of the Social Security Contributions and Benefits Act 1992 in respect of persons engaged in it, but

(b) is not employment under a contract of service or of apprenticeship or employment of any description falling within subsection (3).

(3) The following descriptions of employment fall within this subsection—

(a) any employment such as is mentioned in section 159 (whether as originally enacted or as modified by an order under section 209(1)),

(b) any employment remunerated out of the revenue of the Duchy of Lancaster or the Duchy of Cornwall,

(c) any employment remunerated out of the Queen’s Civil List, and

(d) any employment remunerated out of Her Majesty’s Privy Purse.

172.—(1) The Secretary of State may by regulations provide that, subject to such exceptions and modifications as may be prescribed by the regulations, this Part has effect in relation to any person who by virtue of any statutory provisions—

(a) is transferred to, and becomes a member of, a body specified in those provisions, but

(b) at a time so specified ceases to be a member of that body unless before that time certain conditions so specified have been fulfilled,

as if the cessation of his membership of that body by virtue of those provisions were dismissal by his employer by reason of redundancy.

(2) The power conferred by subsection (1) is exercisable whether or not membership of the body in question constitutes employment within the meaning of section 230(5); and, where that membership does not constitute such employment, that power may be exercised in addition to any power exercisable under section 171.

173.—(1) For the purposes of the operation of the provisions of this Part (and Chapter I of Part XIV) in relation to any employee whose remuneration is, by virtue of any statutory provision, payable to him by a person other than his employer, each of the references to the employer specified in subsection (2) shall be construed as a reference to the person by whom the remuneration is payable.

(2) The references referred to in subsection (1) are the first reference in section 135(1), the third reference in section 140(3), the first reference in section 142(3) and the first reference in section 143(2)(e) and the references in sections 142(2)(b), 143(4) and (5), 149(a) and (b), 150(3), 152(1)(b), 158(4), 162(6), 164 to 169, 170(1) and 214(5).
174.—(1) Where the contract of employment of an employee is taken for the purposes of this Part to be terminated by his employer by reason of the employer’s death, this Part has effect in accordance with the following provisions of this section.

(2) Section 138 applies as if—
   (a) in subsection (1)(a), for the words “in pursuance” onwards there were substituted “by a personal representative of the deceased employer”,
   (b) in subsection (1)(b), for the words “either immediately” onwards there were substituted “not later than eight weeks after the death of the deceased employer”, and
   (c) in subsections (2)(b) and (6)(a), for the word “employer” there were substituted “personal representative of the deceased employer”.

(3) Section 141(1) applies as if—
   (a) for the words “before the end of his employment” there were substituted “by a personal representative of the deceased employer”, and
   (b) for the words “either immediately” onwards there were substituted “not later than eight weeks after the death of the deceased employer.”

(4) For the purposes of section 141—
   (a) provisions of the contract as renewed, or of the new contract, do not differ from the corresponding provisions of the contract in force immediately before the death of the deceased employer by reason only that the personal representative would be substituted for the deceased employer as the employer, and
   (b) no account shall be taken of that substitution in determining whether refusal of the offer was unreasonable or whether the employee acted reasonably in terminating or giving notice to terminate the new or renewed employment.

(5) Section 146 has effect as if—
   (a) subsection (1) were omitted, and
   (b) in subsection (2), paragraph (a) were omitted and, in paragraph (b), for the word “four” there were substituted “eight”.

(6) For the purposes of the application of this Part (in accordance with section 161(2)) in relation to an employee who was employed as a domestic servant in a private household, references in this section and sections 175 and 218(4) and (5) to a personal representative include a person to whom the management of the household has passed, otherwise than in pursuance of a sale or other disposition for valuable consideration, in consequence of the death of the employer.

175.—(1) Where an employee is laid off or kept on short-time and his employer dies, this Part has effect in accordance with the following provisions of this section.

(2) Where the employee—
(a) has been laid off or kept on short-time for one or more weeks before the death of the employer,
(b) has not given the deceased employer notice of intention to claim before the employer's death,
(c) after the employer's death has his contract of employment renewed, or is re-engaged under a new contract, by a personal representative of the deceased employer, and
(d) after renewal or re-engagement is laid off or kept on short-time for one or more weeks by the personal representative,

the week in which the employer died and the first week of the employee's employment by the personal representative shall be treated for the purposes of Chapter III as consecutive weeks (and references to four weeks or thirteen weeks shall be construed accordingly).

(3) The following provisions of this section apply where—
(a) the employee has given the deceased employer notice of intention to claim before the employer's death,
(b) the employer's death occurred before the end of the period of four weeks after the service of the notice, and
(c) the employee has not terminated his contract of employment by notice expiring before the employer's death.

(4) If the contract of employment is not renewed, and the employee is not re-engaged under a new contract, by a personal representative of the deceased employer before the end of the period of four weeks after the service of the notice of intention to claim—
(a) sections 149 and 152 do not apply, but
(b) (subject to that) Chapter III applies as if the employer had not died and the employee had terminated the contract of employment by a week's notice, or by the minimum notice which he is required to give to terminate the contract (if longer than a week), expiring at the end of that period.

(5) If—
(a) the contract of employment is renewed, or the employee is re-engaged under a new contract, by a personal representative of the deceased employer before the end of the period of four weeks after the service of the notice of intention to claim, and
(b) the employee was laid off or kept on short-time by the deceased employer for one or more of those weeks and is laid off or kept on short-time by the personal representative for the week, or for the next two or more weeks, following the renewal or re-engagement,

subsection (6) has effect.

(6) Where this subsection has effect Chapter III applies as if—
(a) all the weeks mentioned in subsection (5) were consecutive weeks during which the employee was employed (but laid off or kept on short-time) by the same employer, and
(b) the periods specified by section 150(3)(a) and (b) as the relevant period were extended by any week or weeks any part of which was after the death of the employer and before the date on which the renewal or re-engagement took effect.
176.—(1) Where an employee whose employer has given him notice to terminate his contract of employment dies before the notice expires, this Part applies as if the contract had been duly terminated by the employer by notice expiring on the date of the employee’s death.

(2) Where—

(a) an employee’s contract of employment has been terminated by the employer,

(b) (by virtue of subsection (5) of section 145) a date later than the relevant date as defined by the previous provisions of that section is the relevant date for the purposes of certain provisions of this Act, and

(c) the employee dies before that date,

that subsection applies as if the notice to which it refers would have expired on the employee’s death.

(3) Where—

(a) an employer has given notice to an employee to terminate his contract of employment and has offered to renew his contract of employment or to re-engage him under a new contract, and

(b) the employee dies without having accepted or refused the offer and without the offer having been withdrawn,

section 141(2) applies as if for the words “he unreasonably refuses” there were substituted “it would have been unreasonable on his part to refuse”.

(4) Where an employee’s contract of employment has been renewed or he has been re-engaged under a new contract—

(a) if he dies during the trial period without having terminated, or given notice to terminate, the contract, section 141(4) applies as if for paragraph (d) there were substituted—

“(d) it would have been unreasonable for the employee during the trial period to terminate or give notice to terminate the contract.”,

and

(b) if during that trial period he gives notice to terminate the contract but dies before the notice expires, sections 138(2) and 141(4) apply as if the notice had expired (and the contract had been terminated by its expiry) on the date of the employee’s death.

(5) Where in the circumstances specified in paragraphs (a) and (b) of subsection (3) of section 136 the employee dies before the notice given by him under paragraph (b) of that subsection expires—

(a) if he dies before his employer has given him a notice such as is specified in subsection (2) of section 142, subsections (3) and (4) of that section apply as if the employer had given him such a notice and he had not complied with it, and

(b) if he dies after his employer has given him such a notice, that section applies as if the employee had not died but did not comply with the notice.

(6) Where an employee has given notice of intention to claim—
(a) if he dies before he has given notice to terminate his contract of employment and before the relevant period (as defined in subsection (3) of section 150) has expired, that section does not apply, and

(b) if he dies within the period of seven days after the service of the notice of intention to claim, and before the employer has given a counter-notice, Chapter III applies as if the employer had given a counter-notice within that period of seven days.

(7) Where a claim for a redundancy payment is made by a personal representative of a deceased employee—

(a) if the employee died before the end of the period of six months beginning with the relevant date, subsection (1) of section 164, and

(b) if the employee died after the end of the period of six months beginning with the relevant date but before the end of the following period of six months, subsection (2) of that section, applies as if for the words “six months” there were substituted “one year”.

Equivalent payments

177.—(1) Where the terms and conditions (whether or not they constitute a contract of employment) on which a person is employed in employment of any description mentioned in section 171(3) include provision—

(a) for the making of a payment to which this section applies, and

(b) for referring to an industrial tribunal any question as to the right of any person to such a payment in respect of that employment or as to the amount of such a payment,

the question shall be referred to and determined by an industrial tribunal.

(2) This section applies to any payment by way of compensation for loss of employment of any description mentioned in section 171(3) which is payable in accordance with arrangements falling within subsection (3).

(3) The arrangements which fall within this subsection are arrangements made with the approval of the Treasury (or, in the case of persons whose service is for the purposes of pensions and other superannuation benefits treated as service in the civil service of the State, of the Minister for the Civil Service) for securing that a payment will be made—

(a) in circumstances which in the opinion of the Treasury (or Minister) correspond (subject to the appropriate modifications) to those in which a right to a redundancy payment would have accrued if the provisions of this Part (apart from section 159 and this section) applied, and

(b) on a scale which in the opinion of the Treasury (or Minister), taking into account any sums payable in accordance with—

(i) a scheme made under section 1 of the Superannuation Act 1972, or

1972 c. 11.
(ii) the Superannuation Act 1965 as it continues to have effect by virtue of section 23(1) of the Superannuation Act 1972,

to or in respect of the person losing the employment in question, corresponds (subject to the appropriate modifications) to that
on which a redundancy payment would have been payable if those provisions applied.

Other supplementary provisions

178.—(1) The Secretary of State may make provision by regulations for securing that where—

(a) (apart from this section) a person is entitled to compensation under a statutory provision to which this section applies, and

(b) the circumstances are such that he is also entitled to a redundancy payment,

the amount of the redundancy payment shall be set off against the compensation to which he would be entitled apart from this section; and

any statutory provision to which any such regulations apply shall have effect subject to the regulations.

(2) This section applies to any statutory provision—

(e) which was in force immediately before 6th December 1965, and

(b) under which the holders of such situations, places or employments as are specified in that provision are, or may become, entitled to compensation for loss of employment, or for loss or diminution of emoluments or of pension rights, in consequence of the operation of any other statutory provision referred to in that provision.

179.—(1) Any notice which under this Part is required or authorised to be given by an employer to an employee may be given by being delivered to the employee, or left for him at his usual or last-known place of residence, or sent by post addressed to him at that place.

(2) Any notice which under this Part is required or authorised to be given by an employee to an employer may be given either by the employee himself or by a person authorised by him to act on his behalf, and (whether given by or on behalf of the employee)—

(a) may be given by being delivered to the employer, or sent by post addressed to him at the place where the employee is or was employed by him, or

(b) if arrangements have been made by the employer, may be given by being delivered to a person designated by the employer in pursuance of the arrangements, left for such a person at a place so designated or sent by post to such a person at an address so designated.

(3) In this section any reference to the delivery of a notice includes, in relation to a notice which is not required by this Part to be in writing, a reference to the oral communication of the notice.

(4) Any notice which, in accordance with any provision of this section, is left for a person at a place referred to in that provision shall, unless the contrary is proved, be presumed to have been received by him on the day on which it was left there.
(5) Nothing in subsection (1) or (2) affects the capacity of an employer to act by a servant or agent for the purposes of any provision of this Part (including either of those subsections).

(6) In relation to an employee to whom section 173 applies, this section has effect as if—

(a) any reference in subsection (1) or (2) to a notice required or authorised to be given by or to an employer included a reference to a notice which, by virtue of that section, is required or authorised to be given by or to the person by whom the remuneration is payable,

(b) in relation to a notice required or authorised to be given to that person, any reference to the employer in paragraph (a) or (b) of subsection (2) were a reference to that person, and

(c) the reference to an employer in subsection (5) included a reference to that person.

180.—(1) Where an offence under this Part committed by a body corporate is proved—

(a) to have been committed with the consent or connivance of, or
(b) to be attributable to any neglect on the part of,

any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he (as well as the body corporate) is guilty of the offence and liable to be proceeded against and punished accordingly.

(2) In this section “director”, in relation to a body corporate established by or under any enactment for the purpose of carrying on under national ownership any industry or part of an industry or undertaking, being a body corporate whose affairs are managed by its members, means a member of that body corporate.

181.—(1) In this Part—

“counter-notice” shall be construed in accordance with section 149(a),

“dismissal” and “dismissed” shall be construed in accordance with sections 136 to 138,

“employer’s payment” has the meaning given by section 166,

“notice of intention to claim” shall be construed in accordance with section 148(1),

“obligatory period of notice” has the meaning given by section 136(4), and

“trial period” shall be construed in accordance with section 138(3).

(2) In this Part—

(a) references to an employee being laid off or being eligible for a redundancy payment by reason of being laid off, and
PART XI
CHAPTER VII

Employee's rights on insolvency of employer.

(b) references to an employee being kept on short-time or being eligible for a redundancy payment by reason of being kept on short-time,

shall be construed in accordance with sections 147 and 148.

PART XII
INSOLVENCY OF EMPLOYERS

182. If, on an application made to him in writing by an employee, the Secretary of State is satisfied that—

(a) the employee's employer has become insolvent,

(b) the employee's employment has been terminated, and

(c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies,

the Secretary of State shall, subject to section 186, pay the employee out of the National Insurance Fund the amount to which, in the opinion of the Secretary of State, the employee is entitled in respect of the debt.

183.—(1) An employer has become insolvent for the purposes of this Part—

(a) where the employer is an individual, if (but only if) subsection (2) is satisfied, and

(b) where the employer is a company, if (but only if) subsection (3) is satisfied.

(2) This subsection is satisfied in the case of an employer who is an individual—

(a) in England and Wales if—

(i) he has been adjudged bankrupt or has made a composition or arrangement with his creditors, or

(ii) he has died and his estate falls to be administered in accordance with an order under section 421 of the Insolvency Act 1986, and

(b) in Scotland if—

(i) sequestration of his estate has been awarded or he has executed a trust deed for his creditors or has entered into a composition contract, or

(ii) he has died and a judicial factor appointed under section 11A of the Judicial Factors (Scotland) Act 1889 is required by that section to divide his insolvent estate among his creditors.

(3) This subsection is satisfied in the case of an employer which is a company—

(a) if a winding up order or an administration order has been made, or a resolution for voluntary winding up has been passed, with respect to the company,

(b) if a receiver or (in England and Wales only) a manager of the company's undertaking has been duly appointed, or (in England and Wales only) possession has been taken, by or on
behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge, or

(c) if a voluntary arrangement proposed in the case of the company for the purposes of Part I of the Insolvency Act 1986 has been approved under that Part of that Act.

184.—(1) This Part applies to the following debts—

(a) any arrears of pay in respect of one or more (but not more than eight) weeks,

(b) any amount which the employer is liable to pay the employee for the period of notice required by section 86(1) or (2) or for any failure of the employer to give the period of notice required by section 86(1),

(c) any holiday pay—

(i) in respect of a period or periods of holiday not exceeding six weeks in all, and

(ii) to which the employee became entitled during the twelve months ending with the appropriate date,

(d) any basic award of compensation for unfair dismissal, and

(e) any reasonable sum by way of reimbursement of the whole or part of any fee or premium paid by an apprentice or articled clerk.

(2) For the purposes of subsection (1)(a) the following amounts shall be treated as arrears of pay—

(a) a guarantee payment,

(b) any payment for time off under Part VI of this Act or section 169 of the Trade Union and Labour Relations (Consolidation) Act 1992 (payment for time off for carrying out trade union duties etc.),

(c) remuneration on suspension on medical grounds under section 64 of this Act and remuneration on suspension on maternity grounds under section 68 of this Act, and

(d) remuneration under a protective award under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992.

(3) In subsection (1)(c) “holiday pay”, in relation to an employee, means—

(a) pay in respect of a holiday actually taken by the employee, or

(b) any accrued holiday pay which, under the employee’s contract of employment, would in the ordinary course have become payable to him in respect of the period of a holiday if his employment with the employer had continued until he became entitled to a holiday.

(4) A sum shall be taken to be reasonable for the purposes of subsection (1)(e) in a case where a trustee in bankruptcy, or (in Scotland) a permanent or interim trustee (within the meaning of the Bankruptcy (Scotland) Act 1985), or liquidator has been or is required to be appointed—
PART XII

(a) as respects England and Wales, if it is admitted to be reasonable by the trustee in bankruptcy or liquidator under section 348 of the Insolvency Act 1986 (effect of bankruptcy on apprenticeships etc.), whether as originally enacted or as applied to the winding up of a company by rules under section 411 of that Act, and

(b) as respects Scotland, if it is accepted by the permanent or interim trustee or liquidator for the purposes of the sequestration or winding up.

The appropriate date.

1992 c. 52.

185. In this Part “the appropriate date”—

(a) in relation to arrears of pay (not being remuneration under a protective award made under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992) and to holiday pay, means the date on which the employer became insolvent,

(b) in relation to a basic award of compensation for unfair dismissal and to remuneration under a protective award so made, means whichever is the latest of—

(i) the date on which the employer became insolvent,

(ii) the date of the termination of the employee’s employment, and

(iii) the date on which the award was made, and

(c) in relation to any other debt to which this Part applies, means whichever is the later of—

(i) the date on which the employer became insolvent, and

(ii) the date of the termination of the employee’s employment.

Limit on amount payable under section 182.

186.—(1) The total amount payable to an employee in respect of any debt to which this Part applies, where the amount of the debt is referable to a period of time, shall not exceed—

(a) £210 in respect of any one week, or

(b) in respect of a shorter period, an amount bearing the same proportion to £210 as that shorter period bears to a week.

(2) The Secretary of State may vary the limit specified in subsection (1), after a review under section 208, by order made in accordance with that section.

Role of relevant officer.

187.—(1) Where a relevant officer has been, or is required to be, appointed in connection with an employer’s insolvency, the Secretary of State shall not make a payment under section 182 in respect of a debt until he has received a statement from the relevant officer of the amount of that debt which appears to have been owed to the employee on the appropriate date and to remain unpaid.

(2) If the Secretary of State is satisfied that he does not require a statement under subsection (1) in order to determine the amount of a debt which was owed to the employee on the appropriate date and remains unpaid, he may make a payment under section 182 in respect of the debt without having received such a statement.
(3) A relevant officer shall, on request by the Secretary of State, provide him with a statement for the purposes of subsection (1) as soon as is reasonably practicable.

(4) The following are relevant officers for the purposes of this section—

(a) a trustee in bankruptcy or a permanent or interim trustee (within the meaning of the Bankruptcy (Scotland) Act 1985),

(b) a liquidator,

(c) an administrator,

(d) a receiver or manager,

(e) a trustee under a composition or arrangement between the employer and his creditors, and

(f) a trustee under a trust deed for his creditors executed by the employer.

(5) In subsection (4)(e) "trustee" includes the supervisor of a voluntary arrangement proposed for the purposes of, and approved under, Part I or VIII of the Insolvency Act 1986.

188.—(1) A person who has applied for a payment under section 182 may present a complaint to an industrial tribunal—

(a) that the Secretary of State has failed to make any such payment, or

(b) that any such payment made by him is less than the amount which should have been paid.

(2) An industrial tribunal shall not consider a complaint under subsection (1) unless it is presented—

(a) before the end of the period of three months beginning with the date on which the decision of the Secretary of State on the application was communicated to the applicant, or

(b) within such further period as the tribunal considers reasonable in a case where it is not reasonably practicable for the complaint to be presented before the end of that period of three months.

(3) Where an industrial tribunal finds that the Secretary of State ought to make a payment under section 182, the tribunal shall—

(a) make a declaration to that effect, and

(b) declare the amount of any such payment which it finds the Secretary of State ought to make.

189.—(1) Where, in pursuance of section 182, the Secretary of State makes a payment to an employee in respect of a debt to which this Part applies—

(a) on the making of the payment any rights and remedies of the employee in respect of the debt (or, if the Secretary of State has paid only part of it, in respect of that part) become rights and remedies of the Secretary of State, and

(b) any decision of an industrial tribunal requiring an employer to pay that debt to the employee has the effect that the debt (or the part of it which the Secretary of State has paid) is to be paid to the Secretary of State.
(2) Where a debt (or any part of a debt) in respect of which the Secretary of State has made a payment in pursuance of section 182 constitutes—

(a) a preferential debt within the meaning of the Insolvency Act 1986 for the purposes of any provision of that Act (including any such provision as applied by any order made under that Act) or any provision of the Companies Act 1985, or

(b) a preferred debt within the meaning of the Bankruptcy (Scotland) Act 1985 for the purposes of any provision of that Act (including any such provision as applied by section 11A of the Judicial Factors (Scotland) Act 1889),

the rights which become rights of the Secretary of State in accordance with subsection (1) include any right arising under any such provision by reason of the status of the debt (or that part of it) as a preferential or preferred debt.

(3) In computing for the purposes of any provision mentioned in subsection (2)(a) or (b) the aggregate amount payable in priority to other creditors of the employer in respect of—

(a) any claim of the Secretary of State to be paid in priority to other creditors of the employer by virtue of subsection (2), and

(b) any claim by the employee to be so paid made in his own right, any claim of the Secretary of State to be so paid by virtue of subsection (2) shall be treated as if it were a claim of the employee.

(4) But the Secretary of State shall be entitled, as against the employee, to be so paid in respect of any such claim of his (up to the full amount of the claim) before any payment is made to the employee in respect of any claim by the employee to be so paid made in his own right.

(5) Any sum recovered by the Secretary of State in exercising any right, or pursuing any remedy, which is his by virtue of this section shall be paid into the National Insurance Fund.

190.—(1) Where an application is made to the Secretary of State under section 182 in respect of a debt owed by an employer, the Secretary of State may require—

(a) the employer to provide him with such information as he may reasonably require for the purpose of determining whether the application is well-founded, and

(b) any person having the custody or control of any relevant records or other documents to produce for examination on behalf of the Secretary of State any such document in that person's custody or under his control which is of such a description as the Secretary of State may require.

(2) Any such requirement—

(a) shall be made by notice in writing given to the person on whom the requirement is imposed, and

(b) may be varied or revoked by a subsequent notice so given.

(3) If a person refuses or wilfully neglects to furnish any information or produce any document which he has been required to furnish or
produce by a notice under this section he is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(4) If a person, in purporting to comply with a requirement of a notice under this section, knowingly or recklessly makes any false statement he is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(5) Where an offence under this section committed by a body corporate is proved—

(a) to have been committed with the consent or connivance of, or

(b) to be attributable to any neglect on the part of,

any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he (as well as the body corporate) is guilty of the offence and liable to be proceeded against and punished accordingly.

(6) Where the affairs of a body corporate are managed by its members, subsection (5) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

PART XIII

MISCELLANEOUS

CHAPTER I

PARTICULAR TYPES OF EMPLOYMENT

Crown employment etc.

191.—(1) Subject to sections 192 and 193, the provisions of this Act to which this section applies have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees or workers.

(2) This section applies to—

(a) Parts I to III,

(b) Part V, apart from section 45,

(c) Parts VI to VIII,

(d) in Part IX, sections 92 and 93,

(e) Part X, apart from section 101, and

(f) this Part and Parts XIV and XV.

(3) In this Act “Crown employment” means employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision.

(4) For the purposes of the application of provisions of this Act in relation to Crown employment in accordance with subsection (1)—

(a) references to an employee or a worker shall be construed as references to a person in Crown employment,

(b) references to a contract of employment, or a worker’s contract, shall be construed as references to the terms of employment of a person in Crown employment,
(c) references to dismissal, or to the termination of a worker's contract, shall be construed as references to the termination of Crown employment,

(d) references to redundancy shall be construed as references to the existence of such circumstances as are treated, in accordance with any arrangements falling within section 177(3) for the time being in force, as equivalent to redundancy in relation to Crown employment, and

(e) references to an undertaking shall be construed—

(i) in relation to a Minister of the Crown, as references to his functions or (as the context may require) to the department of which he is in charge, and

(ii) in relation to a government department, officer or body, as references to the functions of the department, officer or body or (as the context may require) to the department, officer or body.

(5) Where the terms of employment of a person in Crown employment restrict his right to take part in—

(a) certain political activities, or

(b) activities which may conflict with his official functions,

nothing in section 50 requires him to be allowed time off work for public duties connected with any such activities.

(6) Sections 159 and 160 are without prejudice to any exemption or immunity of the Crown.

192.—(1) Section 191—

(a) applies to service as a member of the naval, military or air forces of the Crown but subject to the following provisions of this section, and

(b) applies to employment by an association, established for the purposes of Part XI of the Reserve Forces Act 1996.

(2) The provisions of this Act which have effect by virtue of section 191 in relation to service as a member of the naval, military or air forces of the Crown are—

(a) Part I,

(b) in Part VI, sections 55 to 57,

(c) Parts VII and VIII,

(d) in Part IX, sections 92 and 93,

(e) Part X, apart from sections 100 to 103 and 134, and

(f) this Part and Parts XIV and XV.

(3) Her Majesty may by Order in Council—

(a) amend subsection (2) by making additions to, or omissions from, the provisions for the time being specified in that subsection, and
(b) make any provision for the time being so specified apply to service as a member of the naval, military or air forces of the Crown subject to such exceptions and modifications as may be specified in the Order in Council, but no provision contained in Part II may be added to the provisions for the time being specified in subsection (2).

(4) Modifications made by an Order in Council under subsection (3) may include provision precluding the making of a complaint or reference to any industrial tribunal unless the person aggrieved has availed himself of the service redress procedures applicable to him.

(5) Where modifications made by an Order in Council under subsection (3) include provision such as is mentioned in subsection (4), the Order in Council shall also include provision designed to secure that the service redress procedures result in a determination, or what is to be treated under the Order in Council as a determination, in sufficient time to enable a complaint or reference to be made to an industrial tribunal.

(6) In subsections (4) and (5) “the service redress procedures” means the procedures, excluding those which relate to the making of a report on a complaint to Her Majesty, referred to in—

(a) sections 180 and 181 of the Army Act 1955, 1955 c. 18.
(b) sections 180 and 181 of the Air Force Act 1955, and 1955 c. 19.
(c) section 130 of the Naval Discipline Act 1957. 1957 c. 53.

(7) No provision shall be made by virtue of subsection (4) which has the effect of substituting a period longer than six months for any period specified as the normal period for a complaint or reference.

(8) In subsection (7) “the normal period for a complaint or reference”, in relation to any matter within the jurisdiction of an industrial tribunal, means the period specified in the relevant enactment as the period within which the complaint or reference must be made (disregarding any provision permitting an extension of that period at the discretion of the tribunal).

193.—(1) The provisions of this Act to which this section applies do not have effect in relation to any Crown employment in respect of which there is in force a certificate issued by or on behalf of a Minister of the Crown certifying that employment of a description specified in the certificate, or the employment of a particular person so specified, is (or, at a time specified in the certificate, was) required to be excepted from those provisions for the purpose of safeguarding national security.

(2) This section applies to—

(a) Part I, so far as it relates to itemised pay statements,
(b) Part III,
(c) in Part VI, sections 50 to 54,
(d) in Part VII, sections 64 and 65, and sections 69 and 70 so far as relating to those sections,
(e) in Part IX, sections 92 and 93, except where they apply by virtue of section 92(4),
(f) Part X, except so far as relating to a dismissal which is treated as unfair—
(i) by section 99(1) to (3), 100 or 103, or
(ii) by subsection (1) of section 105 by reason of the application of subsection (2), (3) or (6) of that section, and
(g) this Part and Parts XIV and XV (so far as relating to any of the provisions specified in paragraphs (a) to (f)).

(3) Any document purporting to be a certificate issued as mentioned in subsection (1)—
(a) shall be received in evidence, and
(b) unless the contrary is proved, shall be deemed to be such a certificate.

**Parliamentary staff**

194.—(1) The provisions of this Act to which this section applies have effect in relation to employment as a relevant member of the House of Lords staff as they have effect in relation to other employment.

(2) This section applies to—
(a) Part I,
(b) Part III,
(c) in Part V, sections 44 and 47, and sections 48 and 49 so far as relating to those sections,
(d) Part VI, apart from sections 58 to 60,
(e) Parts VII and VIII,
(f) in Part IX, sections 92 and 93,
(g) Part X, apart from sections 101 and 102, and
(h) this Part and Parts XIV and XV.

(3) For the purposes of the application of the provisions of this Act to which this section applies in relation to a relevant member of the House of Lords staff references to an undertaking shall be construed as references to the House of Lords.

(4) Nothing in any rule of law or the law or practice of Parliament prevents a relevant member of the House of Lords staff from bringing before the High Court or a county court—
(a) a claim arising out of or relating to a contract of employment or any other contract connected with employment, or
(b) a claim in tort arising in connection with employment.

(5) Where the terms of the contract of employment of a relevant member of the House of Lords staff restrict his right to take part in—
(a) certain political activities, or
(b) activities which may conflict with his official functions, nothing in section 50 requires him to be allowed time off work for public duties connected with any such activities.

(6) In this section "relevant member of the House of Lords staff" means any person who is employed under a contract of employment with the Corporate Officer of the House of Lords.

(7) For the purposes of the application of—
(a) the provisions of this Act to which this section applies, or
(b) a claim within subsection (4),
in relation to a person continuously employed in or for the purposes of
the House of Lords up to the time when he became so employed under a
contract of employment with the Corporate Officer of the House of
Lords, his employment shall not be treated as having been terminated by
reason only of a change in his employer before or at that time.

195.—(1) The provisions of this Act to which this section applies have
effect in relation to employment as a relevant member of the House of
Commons staff as they have effect in relation to other employment.

(2) This section applies to—

(a) Part I,
(b) Part III,
(c) in Part V, sections 44 and 47, and sections 48 and 49 so far as
relating to those sections,
(d) Part VI, apart from sections 58 to 60,
(e) Parts VII and VIII,
(f) in Part IX, sections 92 and 93,
(g) Part X, apart from sections 101 and 102, and
(h) this Part and Parts XIV and XV.

(3) For the purposes of the application of the provisions of this Act to
which this section applies in relation to a relevant member of the House
of Commons staff—

(a) references to an employee shall be construed as references to a
relevant member of the House of Commons staff,
(b) references to a contract of employment shall be construed as
including references to the terms of employment of a relevant
member of the House of Commons staff,
(c) references to dismissal shall be construed as including references
to the termination of the employment of a relevant member of
the House of Commons staff, and
(d) references to an undertaking shall be construed as references to
the House of Commons.

(4) Nothing in any rule of law or the law or practice of Parliament
prevents a relevant member of the House of Commons staff from bringing
before the High Court or a county court—

(a) a claim arising out of or relating to a contract of employment or
any other contract connected with employment, or
(b) a claim in tort arising in connection with employment.

(5) In this section “relevant member of the House of Commons staff”
means any person—

(a) who was appointed by the House of Commons Commission or
is employed in the refreshment department, or
(b) who is a member of the Speaker’s personal staff.

(6) Subject to subsection (7), for the purposes of—
(a) the provisions of this Act to which this section applies,
(b) Part XI (where applicable to relevant members of the House of Commons staff), and

c) a claim within subsection (4),

the House of Commons Commission is the employer of staff appointed by the Commission and the Speaker is the employer of his personal staff and of any person employed in the refreshment department and not appointed by the Commission.

(7) Where the House of Commons Commission or the Speaker designates a person to be treated for all or any of the purposes mentioned in subsection (6) as the employer of any description of staff (other than the Speaker's personal staff), the person so designated shall be treated for those purposes as their employer.

(8) Where any proceedings are brought by virtue of this section against—

(a) the House of Commons Commission,

(b) the Speaker, or

(c) any person designated under subsection (7),

the person against whom the proceedings are brought may apply to the court or industrial tribunal concerned to have some other person against whom the proceedings could at the time of the application be properly brought substituted for him as a party to the proceedings.

(9) For the purposes mentioned in subsection (6)—

(a) a person's employment in or for the purposes of the House of Commons shall not (provided he continues to be employed in such employment) be treated as terminated by reason only of a change in his employer, and

(b) (provided he so continues) his first appointment to such employment shall be deemed after the change to have been made by his employer for the time being.

(10) In accordance with subsection (9)—

(a) an employee shall be treated for the purposes mentioned in subsection (6) as being continuously employed by his employer for the time being from the commencement of his employment until its termination, and

(b) anything done by or in relation to his employer for the time being in respect of his employment before the change shall be so treated as having been done by or in relation to the person who is his employer for the time being after the change.

(11) In subsections (9) and (10) "employer for the time being", in relation to a person who has ceased to be employed in or for the purposes of the House of Commons, means the person who was his employer immediately before he ceased to be so employed, except that where some other person would have been his employer for the time being if he had not ceased to be so employed it means that other person.

(12) If the House of Commons resolves at any time that any provision of subsections (5) to (8) should be amended in its application to any member of the staff of that House, Her Majesty may by Order in Council amend that provision accordingly.
Excluded classes of employment

196.—(1) Sections 1 to 7 and sections 86 to 91 do not apply in relation to employment during any period when the employee is engaged in work wholly or mainly outside Great Britain unless—

(a) the employee ordinarily works in Great Britain and the work outside Great Britain is for the same employer, or

(b) the law which governs his contract of employment is the law of England and Wales or the law of Scotland.

(2) The provisions to which this subsection applies do not apply to employment where under the employee's contract of employment he ordinarily works outside Great Britain.

(3) Subsection (2) applies to—

(a) in Part I, sections 8 to 10,

(b) Parts II, III and V,

(c) Part VI, apart from sections 58 to 60,

(d) Parts VII and VIII,

(e) in Part IX, sections 92 and 93, and

(f) (subject to subsection (4)) Part X.

(4) Part X applies to employment where under her contract of employment the employee ordinarily works outside Great Britain if—

(a) section 84 applies to her dismissal, or

(b) she is treated as dismissed by section 96.

(5) For the purposes of subsections (2) and (4), a person employed to work on board a ship registered in the United Kingdom shall be regarded as a person who under his contract ordinarily works in Great Britain unless—

(a) the ship is registered at a port outside Great Britain,

(b) the employment is wholly outside Great Britain, or

(c) the person is not ordinarily resident in Great Britain.

(6) An employee—

(a) is not entitled to a redundancy payment if he is outside Great Britain on the relevant date unless under his contract of employment he ordinarily worked in Great Britain, and

(b) is not entitled to a redundancy payment if under his contract of employment he ordinarily works outside Great Britain unless on the relevant date he is in Great Britain in accordance with instructions given to him by his employer.

(7) Part XII does not apply to employment where, under the employee’s contract of employment, he ordinarily works outside the territory of the member States of the European Communities and of Norway and Iceland.

197.—(1) Part X does not apply to dismissal from employment under a contract for a fixed term of one year or more if—

(a) the dismissal consists only of the expiry of that term without its being renewed, and
(b) before the term expires the employee has agreed in writing to exclude any claim in respect of rights under that Part in relation to the contract.

(2) Subsection (1) does not prevent Part X from applying if the dismissal is regarded as unfair by virtue of section 101.

(3) An employee employed under a contract of employment for a fixed term of two years or more is not entitled to a redundancy payment in respect of the expiry of that term without its being renewed (whether by the employer or by an associated employer of his) if, before the term expires, the employee has agreed in writing to exclude any right to a redundancy payment in that event.

(4) An agreement such as is mentioned in subsection (1) or (3) may be contained—

(a) in the contract itself, or

(b) in a separate agreement.

(5) Where—

(a) an agreement such as is mentioned in subsection (3) is made during the currency of a fixed term, and

(b) the term is renewed,

the agreement shall not be construed as applying to the term as renewed; but this subsection is without prejudice to the making of a further agreement in relation to the renewed term.

198. Sections 1 to 7 do not apply to an employee if his employment continues for less than one month.

199.—(1) Sections 1 to 7, Part II and sections 86 to 91 do not apply to a person employed as a seaman in a ship registered in the United Kingdom under a crew agreement the provisions and form of which are of a kind approved by the Secretary of State.

(2) Sections 8 to 10, Part III, sections 44, 45, 47, 50 to 57 and 61 to 63, Parts VII and VIII, sections 92 and 93 and (subject to subsection (3)) Parts X to XII do not apply to employment as master, or as a member of the crew, of a fishing vessel where the employee is remunerated only by a share in the profits or gross earnings of the vessel.

(3) Part X applies to employment such as is mentioned in subsection (2) if—

(a) section 84 applies to the employee's dismissal, or

(b) she is treated as dismissed by section 96,

and Part XI applies to employment such as is so mentioned if the employee is treated as dismissed by section 137.

(4) Sections 8 to 10 and 50 to 54 and Part XII do not apply to employment as a merchant seaman.

(5) In subsection (4) “employment as a merchant seaman”—

(a) does not include employment in the fishing industry or employment on board a ship otherwise than by the owner, manager or charterer of that ship except employment as a radio officer, but
(b) subject to that, includes—
   (i) employment as a master or a member of the crew of any ship,
   (ii) employment as a trainee undergoing training for the sea service, and
   (iii) employment in or about a ship in port by the owner, manager or charterer of the ship to do work of the kind ordinarily done by a merchant seaman on a ship while it is in port.

(6) Section 196(6) does not apply to an employee, and section 197(3) does not apply to a contract of employment, if the employee is—
   (a) employed as a master or seaman in a British ship, and
   (b) ordinarily resident in Great Britain.

200.—(1) Sections 8 to 10, Part III, sections 44, 45, 47, 50 to 57 and 61 to 63, Parts VII and VIII, sections 92 and 93, Part X and section 137 do not apply to employment under a contract of employment in police service or to persons engaged in such employment.

(2) In subsection (1) “police service” means—
   (a) service as a member of a constabulary maintained by virtue of an enactment, or
   (b) subject to section 126 of the Criminal Justice and Public Order Act 1994 (prison staff not to be regarded as in police service), service in any other capacity by virtue of which a person has the powers or privileges of a constable.

Offshore employment

201.—(1) In this section “offshore employment” means employment for the purposes of activities—
   (a) in the territorial waters of the United Kingdom,
   (b) connected with the exploration of the sea-bed or subsoil, or the exploitation of their natural resources, in the United Kingdom sector of the continental shelf, or
   (c) connected with the exploration or exploitation, in a foreign sector of the continental shelf, of a cross-boundary petroleum field.

(2) Her Majesty may by Order in Council provide that—
   (a) the provisions of this Act, and
   (b) any Northern Ireland legislation making provision for purposes corresponding to any of the purposes of this Act,
   apply, to such extent and for such purposes as may be specified in the Order (with or without modification), to or in relation to a person in offshore employment.

(3) An Order in Council under this section—
   (a) may make different provision for different cases,
   (b) may provide that all or any of the provisions referred to in subsection (2), as applied by such an Order in Council, apply—
(i) to individuals whether or not they are British subjects, and
(ii) to bodies corporate whether or not they are incorporated under the law of a part of the United Kingdom, and apply even where the application may affect their activities outside the United Kingdom,
(c) may make provision for conferring jurisdiction on any court or class of court specified in the Order in Council, or on industrial tribunals, in respect of offences, causes of action or other matters arising in connection with offshore employment,
(d) may (without prejudice to subsection (2) and paragraph (a)) provide that the provisions referred to in subsection (2), as applied by the Order in Council, apply in relation to any person in employment in a part of the areas referred to in subsection (1)(a) and (b),
(e) may exclude from the operation of section 3 of the Territorial Waters Jurisdiction Act 1878 (consents required for prosecutions) proceedings for offences under the provisions referred to in subsection (2) in connection with offshore employment,
(f) may provide that such proceedings shall not be brought without such consent as may be required by the Order in Council,
(g) may (without prejudice to subsection (2)) modify or exclude the operation of any or all of sections 196, 199 and 215(2) to (6) or of any corresponding Northern Ireland legislation.

(4) Any jurisdiction conferred on a court or tribunal under this section is without prejudice to jurisdiction exercisable apart from this section by that or any other court or tribunal.

(5) In this section—
“cross-boundary petroleum field” means a petroleum field that extends across the boundary between the United Kingdom sector of the continental shelf and a foreign sector of the continental shelf,
“foreign sector of the continental shelf” means an area outside the territorial waters of any state, within which rights with respect to the sea-bed and subsoil and their natural resources are exercisable by a state other than the United Kingdom,
“petroleum field” means a geological structure identified as an oil or gas field by the Order in Council concerned, and
“United Kingdom sector of the continental shelf” means the area designated under section 1(7) of the Continental Shelf Act 1964.

CHAPTER II
OTHER MISCELLANEOUS MATTERS
Restrictions on disclosure of information

National security. 202.—(1) Where in the opinion of any Minister of the Crown the disclosure of any information would be contrary to the interests of national security—
(a) nothing in any of the provisions to which this section applies requires any person to disclose the information, and
(b) no person shall disclose the information in any proceedings in any court or tribunal relating to any of those provisions.

(2) This section applies to—

(a) Part I, so far as it relates to employment particulars,

(b) in Part V, sections 44 and 47, and sections 48 and 49 so far as relating to those sections,

(c) in Part VI, sections 55 to 57 and 61 to 63,

(d) in Part VII, sections 66 to 68, and sections 69 and 70 so far as relating to those sections,

(e) Part VIII,

(f) in Part IX, sections 92 and 93 where they apply by virtue of section 92(4),

(g) Part X so far as relating to a dismissal which is treated as unfair—

(i) by section 99(1) to (3), 100 or 103, or

(ii) by subsection (1) of section 105 by reason of the application of subsection (2), (3) or (6) of that section and

(h) this Part and Parts XIV and XV (so far as relating to any of the provisions in paragraphs (a) to (g)).

Contracting out etc. and remedies

203.—(1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports—

(a) to exclude or limit the operation of any provision of this Act, or

(b) to preclude a person from bringing any proceedings under this Act before an industrial tribunal.

(2) Subsection (1)—

(a) does not apply to any provision in a collective agreement excluding rights under section 28 if an order under section 35 is for the time being in force in respect of it,

(b) does not apply to any provision in a dismissal procedures agreement excluding the right under section 94 if that provision is not to have effect unless an order under section 110 is for the time being in force in respect of it,

(c) does not apply to any provision in an agreement if an order under section 157 is for the time being in force in respect of it,

(d) does not apply to any provision of an agreement relating to dismissal from employment such as is mentioned in section 197(1) or (3),

(e) does not apply to any agreement to refrain from instituting or continuing proceedings where a conciliation officer has taken action under section 18 of the Industrial Tribunals Act 1996, and

(f) does not apply to any agreement to refrain from instituting or continuing before an industrial tribunal any proceedings within section 18(1)(d) (proceedings under this Act where conciliation available) of the Industrial Tribunals Act 1996 if the conditions regulating compromise agreements under this Act are satisfied in relation to the agreement.
PART XIII
CHAPTER II

(3) For the purposes of subsection (2)(f) the conditions regulating compromise agreements under this Act are that—

(a) the agreement must be in writing,
(b) the agreement must relate to the particular complaint,
(c) the employee or worker must have received independent legal advice from a qualified lawyer as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an industrial tribunal,
(d) there must be in force, when the adviser gives the advice, a policy of insurance covering the risk of a claim by the employee or worker in respect of loss arising in consequence of the advice,
(e) the agreement must identify the adviser, and
(f) the agreement must state that the conditions regulating compromise agreements under this Act are satisfied.

(4) In subsection (3)—

"independent", in relation to legal advice received by an employee or worker, means that the advice is given by a lawyer who is not acting in the matter for the employer or an associated employer, and

"qualified lawyer" means—

(a) as respects England and Wales, a barrister (whether in practice as such or employed to give legal advice), or a solicitor who holds a practising certificate, and
(b) as respects Scotland, an advocate (whether in practice as such or employed to give legal advice), or a solicitor who holds a practising certificate.

Law governing employment.

Remedy for infringement of certain rights.

204.—(1) For the purposes of this Act it is immaterial whether the law which (apart from this Act) governs any person’s employment is the law of the United Kingdom, or of a part of the United Kingdom, or not.

(2) Subsection (1) is subject to section 196(1)(b).

205.—(1) The remedy of an employee for infringement of any of the rights conferred by section 8, Part III, Parts V to VIII, section 92, Part X and Part XII is, where provision is made for a complaint or the reference of a question to an industrial tribunal, by way of such a complaint or reference and not otherwise.

(2) The remedy of a worker in respect of any contravention of section 13, 15, 18(1) or 21(1) is by way of a complaint under section 23 and not otherwise.

General provisions about death of employer or employee

206.—(1) Where an employer has died, any tribunal proceedings arising under any of the provisions of this Act to which this section applies may be defended by a personal representative of the deceased employer.

(2) This section and section 207 apply to—

(a) Part I, so far as it relates to itemised pay statements,
(b) Part III,
(c) Part V,
(d) Part VI, apart from sections 58 to 60,
(e) Parts VII and VIII,
(f) in Part IX, sections 92 and 93, and
(g) Parts X to XII.

(3) Where an employee has died, any tribunal proceedings arising under any of the provisions of this Act to which this section applies may be instituted or continued by a personal representative of the deceased employee.

(4) If there is no personal representative of a deceased employee, any tribunal proceedings arising under any of the provisions of this Act to which this section applies may be instituted or continued on behalf of the estate of the deceased employee by any appropriate person appointed by the industrial tribunal.

(5) In subsection (4) “appropriate person” means a person who is—
(a) authorised by the employee before his death to act in connection with the proceedings, or
(b) the widow or widower, child, parent or brother or sister of the deceased employee;

and in Part XI and the following provisions of this section and section 207 references to a personal representative include a person appointed under subsection (4).

(6) In a case where proceedings are instituted or continued by virtue of subsection (4), any award made by the industrial tribunal shall be—
(a) made in such terms, and
(b) enforceable in such manner,
as the Secretary of State may by regulations provide.

(7) Any reference in the provisions of this Act to which this section applies to the doing of anything by or in relation to an employer or employee includes a reference to the doing of the thing by or in relation to a personal representative of the deceased employer or employee.

(8) Any reference in the provisions of this Act to which this section applies to a thing required or authorised to be done by or in relation to an employer or employee includes a reference to a thing required or authorised to be done by or in relation to a personal representative of the deceased employer or employee.

(9) Subsections (7) and (8) do not prevent a reference to a successor of an employer including a personal representative of a deceased employer.

207.—(1) Any right arising under any of the provisions of this Act to which this section applies which accrues after the death of an employee devolves as if it had accrued before his death.

(2) Where an industrial tribunal determines under any provision of Part XI that an employer is liable to pay to a personal representative of a deceased employee—
(a) the whole of a redundancy payment to which he would have been entitled but for some provision of Part XI or section 206, or
(b) such part of such a redundancy payment as the tribunal thinks fit,

the reference in subsection (1) to a right includes any right to receive it.

(3) Where—

(a) by virtue of any of the provisions to which this section applies a

personal representative is liable to pay any amount, and

(b) the liability has not accrued before the death of the employer,

it shall be treated as a liability of the deceased employer which had

accrued immediately before his death.

Modifications of Act

208.—(1) The Secretary of State shall in each calendar year review—

(a) the limits specified in section 31,

(b) the limit specified in section 186(1), and

(c) the limits imposed by subsection (1) of section 227 for the

purposes specified in paragraphs (a) to (c) of that subsection,

and shall determine whether any of those limits should be varied.

(2) In making a review under subsection (1) the Secretary of State shall consider—

(a) the general level of earnings obtaining in Great Britain at the

time of the review,

(b) the national economic situation as a whole, and

(c) such other matters as he thinks relevant.

(3) If on a review under subsection (1) the Secretary of State determines that, having regard to the considerations mentioned in subsection (2), any of the limits specified in subsection (1) should be varied, he shall prepare and lay before each House of Parliament the draft of an order giving effect to his decision.

(4) Where a draft of an order under this section is approved by resolution of each House of Parliament the Secretary of State shall make an order in the form of the draft.

(5) If, following the completion of a review under subsection (1), the Secretary of State determines that any of the limits referred to in that subsection should not be varied, he shall lay before each House of Parliament a report containing a statement of his reasons for that determination.

(6) The Secretary of State may at any time, in addition to the annual review provided by in subsection (1), conduct a further review of the limits specified in subsection (1) so as to determine whether any of them should be varied.

(7) Subsections (2) to (4) shall apply to a review under subsection (6) as if it were a review under subsection (1).
209.—(1) The Secretary of State may by order—
(a) provide that any provision of this Act, other than any to which this paragraph does not apply, which is specified in the order shall not apply to persons, or to employments, of such classes as may be prescribed in the order,
(b) provide that any provision of this Act, other than any to which this paragraph does not apply, shall apply to persons or employments of such classes as may be prescribed in the order subject to such exceptions and modifications as may be so prescribed, or
(c) vary, or exclude the operation of, any of the provisions to which this paragraph applies.

(2) Subsection (1)(a) does not apply to—
(a) Parts II and IV,
(b) in Part V, sections 45 and 46, and sections 48 and 49 so far as relating to those sections,
(c) in Part VI, sections 58 to 60,
(d) in Part IX, sections 87(3), 88 to 90, 91(1) to (4) and (6) and 92(6) to (8),
(e) in Part X, sections 95, 97(1) to (5), 98(1) to (4) and (6), 100, 101, 102, 103, 105, 107, 110, 111, 120(2), 124(1), (2) and (5), 125(7) and 134,
(f) in Part XI, sections 143, 144, 160(2) and (3), 166 to 173 and 177 to 180,
(g) in Part XIII, sections 196(1) and 197(1),
(h) Chapter I of Part XIV, or
(j) in Part XV, section 236(3) so far as relating to sections 120(2), 124(2) and 125(7).

(3) Subsection (1)(b) does not apply to—
(a) any of the provisions to which subsection (1)(a) does not apply,
(b) sections 1 to 7, or
(c) the provisions of sections 86 to 91 not specified in subsection (2).

(4) The provision which may be made by virtue of paragraph (b) of subsection (1) in relation to section 94 does not include provision for application subject to exceptions or modifications; but this subsection does not prejudice paragraph (a) of that subsection.

(5) Subsection (1)(c) applies to sections 29(2), 65(2), 86(5), 92(3), 108(1), 109(1), 159, 160(1), 196(2), (3) and (5) and 199(1), (2), (4) and (5).

(6) The Secretary of State may by order amend any of—
(a) sections 84, 85, 97(6), 98(5) and 99(4),
(b) sections 108(3), 109(2) and 110(2) so far as relating to section 84, and
(c) sections 114(5), 115(4), 119(6), 127, 137(2), 145(7), 146(3), 156(2), 157(6), 162(7), 196(4), 199(3), 226(3)(a) and (5)(a) and 227(4)(a),
or modify the application of any of those provisions to any description of case.
(7) The Secretary of State may by order provide that, subject to any such modifications and exceptions as may be prescribed in the order, section 44, and any other provisions of this Act so far as relating to that section, shall apply to such descriptions of persons other than employees as may be so prescribed as to employees (but as if references to their employer were to such person as may be so prescribed).

(8) The provisions of this section are without prejudice to any other power of the Secretary of State to amend, vary or repeal any provision of this Act or to extend or restrict its operation in relation to any person or employment.

PART XIV
INTERPRETATION
CHAPTER I
CONTINUOUS EMPLOYMENT

210.—(1) References in any provision of this Act to a period of continuous employment are (unless provision is expressly made to the contrary) to a period computed in accordance with this Chapter.

(2) In any provision of this Act which refers to a period of continuous employment expressed in months or years—
   (a) a month means a calendar month, and
   (b) a year means a year of twelve calendar months.

(3) In computing an employee’s period of continuous employment for the purposes of any provision of this Act, any question—
   (a) whether the employee’s employment is of a kind counting towards a period of continuous employment, or
   (b) whether periods (consecutive or otherwise) are to be treated as forming a single period of continuous employment,
   shall be determined week by week; but where it is necessary to compute the length of an employee’s period of employment it shall be computed in months and years of twelve months in accordance with section 211.

(4) Subject to sections 215 to 217, a week which does not count in computing the length of a period of continuous employment breaks continuity of employment.

(5) A person’s employment during any period shall, unless the contrary is shown, be presumed to have been continuous.

211.—(1) An employee’s period of continuous employment for the purposes of any provision of this Act—
   (a) (subject to subsections (2) and (3)) begins with the day on which the employee starts work, and
   (b) ends with the day by reference to which the length of the employee’s period of continuous employment is to be ascertained for the purposes of the provision.

(2) For the purposes of sections 155 and 162(1), an employee’s period of continuous employment shall be treated as beginning on the employee’s eighteenth birthday if that is later than the day on which the employee starts work.
Employment Rights Act 1996

PART XIV
CHAPTER I

212.—(1) Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee’s period of employment.

(2) Any week (not within subsection (1)) during an employee’s period of absence from work occasioned wholly or partly by pregnancy or childbirth after which the employee returns to work in accordance with section 79, or in pursuance of an offer described in section 96(3), counts in computing the employee’s period of employment.

(3) Subject to subsection (4), any week (not within subsection (1)) during the whole or part of which an employee is—

(a) incapable of work in consequence of sickness or injury,

(b) absent from work on account of a temporary cessation of work,

(c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose, or

(d) absent from work wholly or partly because of pregnancy or childbirth,

counts in computing the employee’s period of employment.

(4) Not more than twenty-six weeks count under subsection (3)(a) or (subject to subsection (2)) subsection (3)(d) between any periods falling under subsection (1).

213.—(1) Where in the case of an employee a date later than the date which would be the effective date of termination by virtue of subsection (1) of section 97 is treated for certain purposes as the effective date of termination by virtue of subsection (2) or (4) of that section, the period of the interval between the two dates counts as a period of employment in ascertaining for the purposes of section 106(1) or 119(1) the period for which the employee has been continuously employed.

(2) Where an employee is by virtue of section 138(1) regarded for the purposes of Part XI as not having been dismissed by reason of a renewal or re-engagement taking effect after an interval, the period of the interval counts as a period of employment in ascertaining for the purposes of section 155 or 162(1) the period for which the employee has been continuously employed (except so far as it is to be disregarded under section 214 or 215).

(3) Where in the case of an employee a date later than the date which would be the relevant date by virtue of subsections (2) to (4) of section 145 is treated for certain purposes as the relevant date by virtue of subsection (5) of that section, the period of the interval between the two dates counts as a period of employment in ascertaining for the purposes of section 155.
or 162(1) the period for which the employee has been continuously employed (except so far as it is to be disregarded under section 214 or 215).

214.—(1) This section applies where a period of continuous employment has to be determined in relation to an employee for the purposes of the application of section 155 or 162(1).

(2) The continuity of a period of employment is broken where—

(a) a redundancy payment has previously been paid to the employee (whether in respect of dismissal or in respect of lay-off or short-time), and

(b) the contract of employment under which the employee was employed was renewed (whether by the same or another employer) or the employee was re-engaged under a new contract of employment (whether by the same or another employer).

(3) The continuity of a period of employment is also broken where—

(a) a payment has been made to the employee (whether in respect of the termination of his employment or lay-off or short-time) in accordance with a scheme under section 1 of the Superannuation Act 1972 or arrangements falling within section 177(3), and

(b) he commenced new, or renewed, employment.

(4) The date on which the person's continuity of employment is broken by virtue of this section—

(a) if the employment was under a contract of employment, is the date which was the relevant date in relation to the payment mentioned in subsection (2)(a) or (3)(a), and

(b) if the employment was otherwise than under a contract of employment, is the date which would have been the relevant date in relation to the payment mentioned in subsection (2)(a) or (3)(a) had the employment been under a contract of employment.

(5) For the purposes of this section a redundancy payment shall be treated as having been paid if—

(a) the whole of the payment has been paid to the employee by the employer,

(b) a tribunal has determined liability and found that the employer must pay part (but not all) of the redundancy payment and the employer has paid that part, or

(c) the Secretary of State has paid a sum to the employee in respect of the redundancy payment under section 167.

215.—(1) This Chapter applies to a period of employment—

(a) (subject to the following provisions of this section) even where during the period the employee was engaged in work wholly or mainly outside Great Britain, and

(b) even where the employee was excluded by or under this Act from any right conferred by this Act.
(2) For the purposes of sections 155 and 162(1) a week of employment does not count in computing a period of employment if the employee—
   (a) was employed outside Great Britain during the whole or part of the week, and
   (b) was not during that week an employed earner for the purposes of the Social Security Contributions and Benefits Act 1992 in respect of whom a secondary Class 1 contribution was payable under that Act (whether or not the contribution was in fact paid).

(3) Where by virtue of subsection (2) a week of employment does not count in computing a period of employment, the continuity of the period is not broken by reason only that the week does not count in computing the period; and the number of days which, for the purposes of section 211(3), fall within the intervening period is seven for each week within this subsection.

(4) Any question arising under subsection (2) whether—
   (a) a person was an employed earner for the purposes of the Social Security Contributions and Benefits Act 1992, or
   (b) if so, whether a secondary Class 1 contribution was payable in respect of him under that Act,

shall be determined by the Secretary of State.

(5) Any legislation (including regulations) as to the determination of questions which under the Social Security Administration Act 1992 the Secretary of State is empowered to determine (including provisions as to the reference of questions for decision, or as to appeals, to the High Court or the Court of Session) apply to the determination of any question by the Secretary of State under subsection (4).

(6) Subsection (2) does not apply in relation to a person who is—
   (a) employed as a master or seaman in a British ship, and
   (b) ordinarily resident in Great Britain.

216.—(1) A week does not count under section 212 if during the week, or any part of the week, the employee takes part in a strike.

(2) The continuity of an employee's period of employment is not broken by a week which does not count under this Chapter (whether or not by virtue only of subsection (1)) if during the week, or any part of the week, the employee takes part in a strike; and the number of days which, for the purposes of section 211(3), fall within the intervening period is the number of days between the last working day before the strike and the day on which work was resumed.

(3) The continuity of an employee's period of employment is not broken by a week if during the week, or any part of the week, the employee is absent from work because of a lock-out by the employer; and the number of days which, for the purposes of section 211(3), fall within the intervening period is the number of days between the last working day before the lock-out and the day on which work was resumed.

217.—(1) If a person who is entitled to apply to his former employer under the Reserve Forces (Safeguard of Employment) Act 1985 enters the employment of the employer not later than the end of the six month
period mentioned in section 1(4)(b) of that Act, his period of service in the armed forces of the Crown in the circumstances specified in section 1(1) of that Act does not break his continuity of employment.

(2) In the case of such a person the number of days which, for the purposes of section 211(3), fall within the intervening period is the number of days between the last day of his previous period of employment with the employer (or, if there was more than one such period, the last of them) and the first day of the period of employment beginning in the six month period.

218.—(1) Subject to the provisions of this section, this Chapter relates only to employment by the one employer.

(2) If a trade or business, or an undertaking (whether or not established by or under an Act), is transferred from one person to another—

(a) the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and

(b) the transfer does not break the continuity of the period of employment.

(3) If by or under an Act (whether public or local and whether passed before or after this Act) a contract of employment between any body corporate and an employee is modified and some other body corporate is substituted as the employer—

(a) the employee’s period of employment at the time when the modification takes effect counts as a period of employment with the second body corporate, and

(b) the change of employer does not break the continuity of the period of employment.

(4) If on the death of an employer the employee is taken into the employment of the personal representatives or trustees of the deceased—

(a) the employee’s period of employment at the time of the death counts as a period of employment with the employer’s personal representatives or trustees, and

(b) the death does not break the continuity of the period of employment.

(5) If there is a change in the partners, personal representatives or trustees who employ any person—

(a) the employee’s period of employment at the time of the change counts as a period of employment with the partners, personal representatives or trustees after the change, and

(b) the change does not break the continuity of the period of employment.

(6) If an employee of an employer is taken into the employment of another employer who, at the time when the employee enters the second employer’s employment, is an associated employer of the first employer—

(a) the employee’s period of employment at that time counts as a period of employment with the second employer, and
(b) the change of employer does not break the continuity of the period of employment.

(7) If an employee of the governors of a school maintained by a local education authority is taken into the employment of the authority or an employee of a local education authority is taken into the employment of the governors of a school maintained by the authority—

(a) his period of employment at the time of the change of employer counts as a period of employment with the second employer, and

(b) the change does not break the continuity of the period of employment.

(8) If a person employed in relevant employment by a health service employer is taken into relevant employment by another such employer, his period of employment at the time of the change of employer counts as a period of employment with the second employer and the change does not break the continuity of the period of employment.

(9) For the purposes of subsection (8) employment is relevant employment if it is employment of a description—

(a) in which persons are engaged while undergoing professional training which involves their being employed successively by a number of different health service employers, and

(b) which is specified in an order made by the Secretary of State.

(10) The following are health service employers for the purposes of subsections (8) and (9)—

(a) Health Authorities established under section 8 of the National Health Service Act 1977,

(b) Special Health Authorities established under section 11 of that Act,

(c) National Health Service trusts established under Part I of the National Health Service and Community Care Act 1990,

(d) the Dental Practice Board, and

(e) the Public Health Laboratory Service Board.

219.—(1) Regulations made by the Secretary of State may make provision—

(a) for preserving the continuity of a person's period of employment for the purposes of this Chapter or for the purposes of this Chapter as applied by or under any other enactment specified in the regulations, or

(b) for modifying or excluding the operation of section 214 subject to the recovery of any such payment as is mentioned in that section,

in cases where, in consequence of action to which subsection (2) applies, a dismissed employee is reinstated or re-engaged by his employer or by a successor or associated employer of that employer.

(2) This subsection applies to any action taken in relation to the dismissal of an employee which consists of—

(a) his making a claim in accordance with a dismissal procedures agreement designated by an order under section 110,
(b) the presentation by him of a relevant complaint of dismissal,
(c) any action taken by a conciliation officer under section 18 of the Industrial Tribunals Act 1996, or
(d) the making of a relevant compromise contract.

(3) In subsection (2)(b) "relevant complaint of dismissal" means—
(a) a complaint under section 111 of this Act,
(b) a complaint under section 63 of the Sex Discrimination Act 1975 arising out of a dismissal,
(c) a complaint under section 54 of the Race Relations Act 1976 arising out of a dismissal, or
(d) a complaint under section 8 of the Disability Discrimination Act 1995 arising out of a dismissal.

(4) In subsection (2)(d) "relevant compromise contract" means—
(a) an agreement or contract authorised by—
   (i) section 203(2)(f) of this Act,
   (ii) section 77(4)(aa) of the Sex Discrimination Act 1975,
   (iii) section 72(4)(aa) of the Race Relations Act 1976, or
   (iv) section 9(2)(b) of the Disability Discrimination Act 1995, or
(b) an agreement to refrain from instituting or continuing any proceedings before an industrial tribunal where the tribunal has jurisdiction in respect of the proceedings by virtue of an order under section 3 of the Industrial Tribunals Act 1996.

CHAPTER II
A WEEK'S PAY

Introductory. 220. The amount of a week's pay of an employee shall be calculated for the purposes of this Act in accordance with this Chapter.

Employments with normal working hours

221.—(1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.

(3) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does vary with the amount of work done in the period, the amount of a week's pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration payable by the employer to the employee in respect of the period of twelve weeks ending—
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(c. 18)

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CHAPTER II

(a) where the calculation date is the last day of a week, with that week, and
(b) otherwise, with the last complete week before the calculation date.

(4) In this section references to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount.

(5) This section is subject to sections 227 and 228.

222.—(1) This section applies if the employee is required under the contract of employment in force on the calculation date to work during normal working hours on days of the week, or at times of the day, which differ from week to week or over a longer period so that the remuneration payable for, or apportionable to, any week varies according to the incidence of those days or times.

(2) The amount of a week's pay is the amount of remuneration for the average number of weekly normal working hours at the average hourly rate of remuneration.

(3) For the purposes of subsection (2)—

(a) the average number of weekly hours is calculated by dividing by twelve the total number of the employee's normal working hours during the relevant period of twelve weeks, and

(b) the average hourly rate of remuneration is the average hourly rate of remuneration payable by the employer to the employee in respect of the relevant period of twelve weeks.

(4) In subsection (3) “the relevant period of twelve weeks” means the period of twelve weeks ending—

(a) where the calculation date is the last day of a week, with that week, and

(b) otherwise, with the last complete week before the calculation date.

(5) This section is subject to sections 227 and 228.

223.—(1) For the purposes of sections 221 and 222, in arriving at the average hourly rate of remuneration, only—

(a) the hours when the employee was working, and

(b) the remuneration payable for, or apportionable to, those hours, shall be brought in.

(2) If for any of the twelve weeks mentioned in sections 221 and 222 no remuneration within subsection (1)(b) was payable by the employer to the employee, account shall be taken of remuneration in earlier weeks so as to bring up to twelve the number of weeks of which account is taken.

(3) Where—

(a) in arriving at the average hourly rate of remuneration, account has to be taken of remuneration payable for, or apportionable to, work done in hours other than normal working hours, and

Remuneration varying according to time of work.
(b) the amount of that remuneration was greater than it would have been if the work had been done in normal working hours (or, in a case within section 234(3), in normal working hours falling within the number of hours without overtime), account shall be taken of that remuneration as if the work had been done in such hours and the amount of that remuneration had been reduced accordingly.

**Employments with no normal working hours**

224.—(1) This section applies where there are no normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2) The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending—

(a) where the calculation date is the last day of a week, with that week, and

(b) otherwise, with the last complete week before the calculation date.

(3) In arriving at the average weekly remuneration no account shall be taken of a week in which no remuneration was payable by the employer to the employee and remuneration in earlier weeks shall be brought in so as to bring up to twelve the number of weeks of which account is taken.

(4) This section is subject to sections 227 and 228.

**The calculation date**

225.—(1) Where the calculation is for the purposes of section 30, the calculation date is—

(a) where the employee's contract has been varied, or a new contract entered into, in connection with a period of short-time working, the last day on which the original contract was in force, and

(b) otherwise, the day in respect of which the guarantee payment is payable.

(2) Where the calculation is for the purposes of section 53 or 54, the calculation date is the day on which the employer's notice was given.

(3) Where the calculation is for the purposes of section 56, the calculation date is the day of the appointment.

(4) Where the calculation is for the purposes of section 62, the calculation date is the day on which the time off was taken or on which it is alleged the time off should have been permitted.

(5) Where the calculation is for the purposes of section 69—

(a) in the case of an employee suspended on medical grounds, the calculation date is the day before that on which the suspension begins, and

(b) in the case of an employee suspended on maternity grounds, the calculation date is—

   (i) where the day before that on which the suspension begins falls within either the employee's maternity leave period or the further period up to the day on which the
employee exercises the right conferred on her by section 79, the day before the beginning of the maternity leave period, and

(ii) otherwise, the day before that on which the suspension begins.

226.—(1) Where the calculation is for the purposes of section 88 or 89, the calculation date is the day immediately preceding the first day of the period of notice required by section 86(1) or (2).

(2) Where the calculation is for the purposes of section 93, 117 or 125, the calculation date is—

(a) if the dismissal was with notice, the date on which the employer’s notice was given, and

(b) otherwise, the effective date of termination.

(3) Where the calculation is for the purposes of section 119 or 121, the calculation date is—

(a) if the employee is taken to be dismissed by virtue of section 96(1), the last day on which the employee worked under her contract of employment immediately before the beginning of her maternity leave period,

(b) if by virtue of subsection (2) or (4) of section 97 a date later than the effective date of termination as defined in subsection (1) of that section is to be treated for certain purposes as the effective date of termination, the effective date of termination as so defined, and

(c) otherwise, the date specified in subsection (6).

(4) Where the calculation is for the purposes of section 147(2), the calculation date is the day immediately preceding the first of the four, or six, weeks referred to in section 148(2).

(5) Where the calculation is for the purposes of section 162, the calculation date is—

(a) if the employee is taken to be dismissed by virtue of section 137(1), the last day on which the employee worked under her contract of employment immediately before the beginning of her maternity leave period,

(b) if by virtue of subsection (5) of section 145 a date is to be treated for certain purposes as the relevant date which is later than the relevant date as defined by the previous provisions of that section, the relevant date as so defined, and

(c) otherwise, the date specified in subsection (6).

(6) The date referred to in subsections (3)(c) and (5)(c) is the date on which notice would have been given had—

(a) the contract been terminable by notice and been terminated by the employer giving such notice as is required by section 86 to terminate the contract, and

(b) the notice expired on the effective date of termination, or the relevant date,

(whether or not those conditions were in fact fulfilled).
Maximum amount of week’s pay

227.—(1) For the purpose of calculating—
(a) a basic award of compensation for unfair dismissal,
(b) an additional award of compensation for unfair dismissal, or
(c) a redundancy payment,
the amount of a week’s pay shall not exceed £210.

(2) The Secretary of State may vary the limits imposed by subsection (1), after a review under section 208, by order made in accordance with that section.

(3) Such an order may provide that it applies in the case of a dismissal—
(a) in relation to which the date which is the effective date of termination for the purposes of this subsection by virtue of section 97(2) or (4) falls after the order comes into force, or
(b) in relation to which the date which is the relevant date for the purposes of this subsection by virtue of section 145(5) falls after the order comes into force,
even if the date which is the effective date of termination, or the relevant date, for other purposes of this Act falls before the order comes into force.

(4) Subsection (3)—
(a) does not apply to a case within section 96(1) or 137(1), but
(b) is without prejudice to section 236(5).

Miscellaneous

228.—(1) In any case in which the employee has not been employed for a sufficient period to enable a calculation to be made under the preceding provisions of this Chapter, the amount of a week’s pay is the amount which fairly represents a week’s pay.

(2) In determining that amount the industrial tribunal—
(a) shall apply as nearly as may be such of the preceding provisions of this Chapter as it considers appropriate, and
(b) may have regard to such of the considerations specified in subsection (3) as it thinks fit.

(3) The considerations referred to in subsection (2)(b) are—
(a) any remuneration received by the employee in respect of the employment in question,
(b) the amount offered to the employee as remuneration in respect of the employment in question,
(c) the remuneration received by other persons engaged in relevant comparable employment with the same employer, and
(d) the remuneration received by other persons engaged in relevant comparable employment with other employers.

(4) The Secretary of State may by regulations provide that in cases prescribed by the regulations the amount of a week’s pay shall be calculated in such manner as may be so prescribed.
229.—(1) In arriving at—
(a) an average hourly rate of remuneration, or
(b) average weekly remuneration,
under this Chapter, account shall be taken of work for a former employer within the period for which the average is to be taken if, by virtue of Chapter I of this Part, a period of employment with the former employer counts as part of the employee's continuous period of employment.

(2) Where under this Chapter account is to be taken of remuneration or other payments for a period which does not coincide with the periods for which the remuneration or other payments are calculated, the remuneration or other payments shall be apportioned in such manner as may be just.

CHAPTER III
OTHER INTERPRETATION PROVISIONS

230.—(1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
(a) a contract of employment, or
(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker’s contract shall be construed accordingly.

(4) In this Act “employer”, in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act “employment”—
(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and
(b) in relation to a worker, means employment under his contract; and “employed” shall be construed accordingly.

231. For the purposes of this Act any two employers shall be treated as associated if—
(a) one is a company of which the other (directly or indirectly) has control, or
(b) both are companies of which a third person (directly or indirectly) has control;

and “associated employer” shall be construed accordingly.
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Shop workers.

232.—(1) In this Act "shop worker" means an employee who, under his contract of employment, is or may be required to do shop work.

(2) In this Act "shop work" means work in or about a shop in England or Wales on a day on which the shop is open for the serving of customers.

(3) Subject to subsection (4), in this Act "shop" includes any premises where any retail trade or business is carried on.

(4) Where premises are used mainly for purposes other than those of retail trade or business and would not (apart from subsection (3)) be regarded as a shop, only such part of the premises as—

(a) is used wholly or mainly for the purposes of retail trade or business, or

(b) is used both for the purposes of retail trade or business and for the purposes of wholesale trade and is used wholly or mainly for those two purposes considered together,

is to be regarded as a shop for the purposes of this Act.

(5) In subsection (4)(b) "wholesale trade" means the sale of goods for use or resale in the course of a business or the hire of goods for use in the course of a business.

(6) In this section "retail trade or business" includes—

(a) the business of a barber or hairdresser,

(b) the business of hiring goods otherwise than for use in the course of a trade or business, and

(c) retail sales by auction.

but does not include catering business or the sale at theatres and places of amusement of programmes, catalogues and similar items.

(7) In subsection (6) "catering business" means—

(a) the sale of meals, refreshments or intoxicating liquor for consumption on the premises on which they are sold, or

(b) the sale of meals or refreshments prepared to order for immediate consumption off the premises;

and in paragraph (a) "intoxicating liquor" has the same meaning as in the Licensing Act 1964.

(8) In this Act—

"notice period", in relation to an opted-out shop worker, has the meaning given by section 41(3),

"opted-out", in relation to a shop worker, shall be construed in accordance with section 41(1) and (2),

"opting-in notice", in relation to a shop worker, has the meaning given by section 36(6),

"opting-out notice", in relation to a shop worker, has the meaning given by section 40(2), and

"protected", in relation to a shop worker, shall be construed in accordance with section 36(1) to (5).

233.—(1) In this Act "betting worker" means an employee who, under his contract of employment, is or may be required to do betting work.

(2) In this Act "betting work" means—
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(a) work at a track in England or Wales for a bookmaker on a day on which the bookmaker acts as such at the track, being work which consists of or includes dealing with betting transactions, and

(b) work in a licensed betting office in England or Wales on a day on which the office is open for use for the effecting of betting transactions.

(3) In subsection (2) “betting transactions” includes the collection or payment of winnings on a bet and any transaction in which one or more of the parties is acting as a bookmaker.

(4) In this section “bookmaker” means any person who—

(a) whether on his own account or as servant or agent to any other person, carries on (whether occasionally or regularly) the business of receiving or negotiating bets or conducting pool betting operations, or

(b) by way of business in any manner holds himself out, or permits himself to be held out, as a person who receives or negotiates bets or conducts such operations.

(5) Expressions used in this section and in the Betting, Gaming and Lotteries Act 1963 have the same meaning in this section as in that Act.

(6) In this Act—

“notice period”, in relation to an opted-out betting worker, has the meaning given by section 41(3),

“opted-out”, in relation to a betting worker, shall be construed in accordance with section 41(1) and (2),

“opting-in notice”, in relation to a betting worker, has the meaning given by section 36(6),

“opting-out notice”, in relation to a betting worker, has the meaning given by section 40(2), and

“protected”, in relation to a betting worker, shall be construed in accordance with section 36(1) to (5).

234.—(1) Where an employee is entitled to overtime pay when employed for more than a fixed number of hours in a week or other period, there are for the purposes of this Act normal working hours in his case.

(2) Subject to subsection (3), the normal working hours in such a case are the fixed number of hours.

(3) Where in such a case—

(a) the contract of employment fixes the number, or minimum number, of hours of employment in a week or other period (whether or not it also provides for the reduction of that number or minimum in certain circumstances), and

(b) that number or minimum number of hours exceeds the number of hours without overtime,

the normal working hours are that number or minimum number of hours (and not the number of hours without overtime).
235.—(1) In this Act, except in so far as the context otherwise requires—

"act" and "action" each includes omission and references to doing an act or taking action shall be construed accordingly,

"basic award of compensation for unfair dismissal" shall be construed in accordance with section 118,

"business" includes a trade or profession and includes any activity carried on by a body of persons (whether corporate or unincorporated),

"childbirth" means the birth of a living child or the birth of a child whether living or dead after twenty-four weeks of pregnancy,

"collective agreement" has the meaning given by section 178(1) and (2) of the Trade Union and Labour Relations (Consolidation) Act 1992,

"conciliation officer" means an officer designated by the Advisory, Conciliation and Arbitration Service under section 211 of that Act,

"dismissal procedures agreement" means an agreement in writing with respect to procedures relating to dismissal made by or on behalf of one or more independent trade unions and one or more employers or employers' associations,

"employers' association" has the same meaning as in the Trade Union and Labour Relations (Consolidation) Act 1992,

"expected week of childbirth" means the week, beginning with midnight between Saturday and Sunday, in which it is expected that childbirth will occur,

"guarantee payment" has the meaning given by section 28,

"independent trade union" means a trade union which—

(a) is not under the domination or control of an employer or a group of employers or of one or more employers' associations, and

(b) is not liable to interference by an employer or any such group or association (arising out of the provision of financial or material support or by any other means whatever) tending towards such control,

"job", in relation to an employee, means the nature of the work which he is employed to do in accordance with his contract and the capacity and place in which he is so employed,

"maternity leave period" shall be construed in accordance with sections 72 and 73,

"notified day of return" shall be construed in accordance with section 83,

"position", in relation to an employee, means the following matters taken as a whole—

(a) his status as an employee,

(b) the nature of his work, and

(c) his terms and conditions of employment,

"redundancy payment" has the meaning given by Part XI,

"relevant date" has the meaning given by sections 145 and 153,
“renewal” includes extension, and any reference to renewing a contract or a fixed term shall be construed accordingly,

“statutory provision” means a provision, whether of a general or a special nature, contained in, or in any document made or issued under, any Act, whether of a general or special nature,

“successor”, in relation to the employer of an employee, means (subject to subsection (2)) a person who in consequence of a change occurring (whether by virtue of a sale or other disposition or by operation of law) in the ownership of the undertaking, or of the part of the undertaking, for the purposes of which the employee was employed, has become the owner of the undertaking or part,

“trade union” has the meaning given by section 1 of the Trade Union and Labour Relations (Consolidation) Act 1992.

“week”—

(a) in Chapter I of this Part means a week ending with Saturday, and

(b) otherwise, except in section 86, means, in relation to an employee whose remuneration is calculated weekly by a week ending with a day other than Saturday, a week ending with that other day and, in relation to any other employee, a week ending with Saturday.

(2) The definition of “successor” in subsection (1) has effect (subject to the necessary modifications) in relation to a case where—

(a) the person by whom an undertaking or part of an undertaking is owned immediately before a change is one of the persons by whom (whether as partners, trustees or otherwise) it is owned immediately after the change, or

(b) the persons by whom an undertaking or part of an undertaking is owned immediately before a change (whether as partners, trustees or otherwise) include the persons by whom, or include one or more of the persons by whom, it is owned immediately after the change,

as it has effect where the previous owner and the new owner are wholly different persons.

(3) References in this Act to redundancy, dismissal by reason of redundancy and similar expressions shall be construed in accordance with section 139.

(4) In sections 136(2), 154 and 216(3) and paragraph 14 of Schedule 2 “lock-out” means—

(a) the closing of a place of employment,

(b) the suspension of work, or

(c) the refusal by an employer to continue to employ any number of persons employed by him in consequence of a dispute,
done with a view to compelling persons employed by the employer, or to aid another employer in compelling persons employed by him, to accept terms or conditions of or affecting employment.

(5) In sections 91(2), 140(2) and (3), 143(1), 144(2) and (3), 154 and 216(1) and (2) and paragraph 14 of Schedule 2 “strike” means—
(a) the cessation of work by a body of employed persons acting in combination, or
(b) a concerted refusal, or a refusal under a common understanding, of any number of employed persons to continue to work for an employer in consequence of a dispute, done as a means of compelling their employer or any employed person or body of employed persons, or to aid other employees in compelling their employer or any employed person or body of employed persons, to accept or not to accept terms or conditions of or affecting employment.

**PART XV**

**GENERAL AND SUPPLEMENTARY**

**General**

236.—(1) Any power conferred by any provision of this Act to make any order (other than an Order in Council) or regulations is exercisable by statutory instrument.

(2) A statutory instrument made under any power conferred by this Act to make an Order in Council or other order or regulations, except—

(a) an Order in Council or other order to which subsection (3) applies,

(b) an order under section 35 or Part II of Schedule 2, or

(c) an order made in accordance with section 208,

is subject to annulment in pursuance of a resolution of either House of Parliament.

(3) No recommendation shall be made to Her Majesty to make an Order in Council under section 192(3), and no order shall be made under section 72(3), 73(5), 79(3), 120(2), 124(2) or 125(7) or (subject to subsection (4)) section 209, unless a draft of the Order in Council or order has been laid before Parliament and approved by a resolution of each House of Parliament.

(4) Subsection (3) does not apply to an order under section 209(1)(b) which specifies only provisions contained in Part XI.

(5) Any power conferred by this Act which is exercisable by statutory instrument includes power to make such incidental, supplementary or transitional provisions as appear to the authority exercising the power to be necessary or expedient.

237. There shall be paid out of the National Insurance Fund into the Consolidated Fund sums equal to the amount of—

(a) any expenses incurred by the Secretary of State in consequence of Part XI, and

(b) any expenses incurred by the Secretary of State (or by persons acting on his behalf) in exercising his functions under Part XII.

**Reciprocal arrangements**

238.—(1) If provision is made by Northern Ireland legislation for purposes corresponding to any of the purposes of this Act, other than an excepted provision, the Secretary of State may, with the consent of the Treasury, make reciprocal arrangements with the appropriate Northern
Ireland authority for co-ordinating the relevant provisions of this Act with the corresponding provisions of the Northern Ireland legislation so as to secure that they operate, to such extent as may be provided by the arrangements, as a single system.

(2) The following provisions of this Act are excepted provisions for the purposes of subsection (1)—

(a) in Part I, sections 1 to 7,
(b) Parts II and IV,
(c) in Part V, sections 45 and 46,
(d) in Part VI, sections 58 to 60,
(e) in Part IX, sections 86 to 91, and
(f) in Part X, sections 101 and 102.

(3) The Secretary of State may make regulations for giving effect to any arrangements made under subsection (1).

(4) Regulations under subsection (3) may make different provision for different cases.

(5) Such regulations may provide that the relevant provisions of this Act have effect in relation to persons affected by the arrangements subject to such modifications and adaptations as may be specified in the regulations, including provision—

(a) for securing that acts, omissions and events having any effect for the purposes of the Northern Ireland legislation have a corresponding effect for the purposes of this Act (but not so as to confer a right to double payment in respect of the same act, omission or event), and

(b) for determining, in cases where rights accrue both under this Act and under the Northern Ireland legislation, which of those rights is available to the person concerned.

(6) In this section “the appropriate Northern Ireland authority” means such authority as may be specified in the Northern Ireland legislation.

239.—(1) If an Act of Tynwald is passed for purposes similar to the purposes of Part XI, the Secretary of State may, with the consent of the Treasury, make reciprocal arrangements with the appropriate Isle of Man authority for co-ordinating the provisions of Part XI with the corresponding provisions of the Act of Tynwald so as to secure that they operate, to such extent as may be provided by the arrangements, as a single system.

(2) For the purposes of giving effect to any arrangements made under subsection (1) the Secretary of State may, in conjunction with the appropriate Isle of Man authority, make any necessary financial adjustments between the National Insurance Fund and any fund established under the Act of Tynwald.

(3) The Secretary of State may make regulations for giving effect to any arrangements made under subsection (1).
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(4) Regulations under subsection (3) may provide that Part XI has effect in relation to persons affected by the arrangements subject to such modifications and adaptations as may be specified in the regulations, including provision—

(a) for securing that acts, omissions and events having any effect for the purposes of the Act of Tynwald have a corresponding effect for the purposes of Part XI (but not so as to confer a right to double payment in respect of the same act, omission or event), and

(b) for determining, in cases where rights accrue both under this Act and under the Act of Tynwald, which of those rights is available to the person concerned.

(5) In this section “the appropriate Isle of Man authority” means such authority as may be specified in an Act of Tynwald.

Final provisions

240. Schedule 1 (consequential amendments) shall have effect.

241. Schedule 2 (transitional provisions, savings and transitory provisions) shall have effect.

242. The enactments specified in Part I of Schedule 3 are repealed, and the instruments specified in Part II of that Schedule are revoked, to the extent specified in the third column of that Schedule.

243. This Act shall come into force at the end of the period of three months beginning with the day on which it is passed.

244.—(1) Subject to the following provisions, this Act extends to England and Wales and Scotland but not to Northern Ireland.

(2) The provisions of this Act which refer to shop workers and betting workers extend to England and Wales only.

(3) Sections 201 and 238 (and sections 236 and 243, this section and section 245) extend to Northern Ireland (as well as to England and Wales and Scotland).

(4) Sections 240 and 242 and Schedules 1 and 3 have the same extent as the provisions amended or repealed by this Act.

245. This Act may be cited as the Employment Rights Act 1996.
SCHEDULES

SCHEDULE 1
CONSEQUENTIAL AMENDMENTS

The Equal Pay Act 1970 (c.41)

1.—(1) Section 1 of the Equal Pay Act 1976 is amended as follows.

(2) In subsection (10A)—
   (a) for “section 139 of the Employment Protection (Consolidation) Act 1978” substitute “section 195 of the Employment Rights Act 1996”, and
   (b) for “subsections (4) to (9)” substitute “subsections (6) to (12)”,

(3) In subsection (10B)—
   (a) for “section 139A of the Employment Protection (Consolidation) Act 1978” substitute “section 194 of the Employment Rights Act 1996”, and
   (b) for “subsection (6)” substitute “subsection (7)”,

The Atomic Energy Authority Act 1971 (c.11)

2.—(1) Section 10 of the Atomic Energy Authority Act 1971 is amended as follows.

(2) In subsection (2)—
   (a) in paragraph (a), for “the said sections 1 to 4” substitute “sections 1 to 7 of the Employment Rights Act 1996”, and
   (b) in paragraph (b)—
      (i) for “section 5 of the said Act of 1978” substitute “the Employment Rights Act 1996”, and
      (ii) for “subsection (1) of that section” substitute “section 1 of that Act”.

(3) In subsection (3)—
   (a) for “the Employment Protection (Consolidation) Act 1978” substitute “the Employment Rights Act 1996”, and
   (b) for “sections 1 to 4” substitute “section 1”.

(4) In subsection (4)—
   (a) for “Schedule 13 to the said Act of 1978” substitute “Chapter I of Part XIV of the Employment Rights Act 1996”, and
   (b) for the words from “sub-paragraph (2)” to “the sub-paragraph” substitute “subsection (2) of section 218 of that Act, be taken to be such a transfer of an undertaking as is mentioned in that subsection”.

The Attachment of Earnings Act 1971 (c.32)

3. Paragraph 3 of Part I of Schedule 3 to the Attachment of Earnings Act 1971 shall continue to have effect with the substitution (originally made by paragraph 4 of Schedule 4 to the Wages Act 1986) of the following paragraph for paragraph (c)—

“(c) amounts deductible under any enactment, or in pursuance of a request in writing by the debtor, for the purposes of a superannuation scheme, namely any enactment, rules, deed or other instrument providing for the payment of annuities or lump sums—
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(i) to the persons with respect to whom the instrument has effect on their retirement at a specified age or on becoming incapacitated at some earlier age, or

(ii) to the personal representatives or the widows, relatives or dependants of such persons on their death or otherwise, whether with or without any further or other benefits.”

The British Library Act 1972 (c.54)


The Health and Safety at Work etc. Act 1974 (c.37)

5. In section 80(2A) of the Health and Safety at Work etc. Act 1974, for “the Employment Protection (Consolidation) Act 1978 which re-enact” substitute “the Employment Rights Act 1996 or the Trade Union and Labour Relations (Consolidation) Act 1992 which derive from provisions of the Employment Protection (Consolidation) Act 1978 which re-enacted”.

The Sex Discrimination Act 1975 (c.65)

6.—(1) The Sex Discrimination Act 1975 is amended as follows.

(2) In section 85A(2)—

(a) for “section 139 of the Employment Protection (Consolidation) Act 1978” substitute “section 195 of the Employment Rights Act 1996”, and

(b) for “subsections (4) to (9)” substitute “subsections (6) to (12)”.

(3) In section 85B(2)—

(a) for “section 139A of the Employment Protection (Consolidation) Act 1978” substitute “section 194 of the Employment Rights Act 1996”, and

(b) for “subsection (6)” substitute “subsection (7)”.

The Scottish Development Agency Act 1975 (c.69)


The Welsh Development Agency Act 1975 (c.70)


The Lotteries and Amusements Act 1976 (c.32)


The Race Relations Act 1976 (c.74)

10.—(1) The Race Relations Act 1976 is amended as follows.

(2) In section 75A(2)—

(a) for “section 139 of the Employment Protection (Consolidation) Act 1978” substitute “section 195 of the Employment Rights Act 1996”, and

(b) for “subsections (4) to (9)” substitute “subsections (6) to (12)”).

(3) In section 75B(2)—

(a) for “section 139A of the Employment Protection (Consolidation) Act 1978” substitute “section 194 of the Employment Rights Act 1996”, and

(b) for “subsection (6)” substitute “subsection (7)”.

(4) In paragraph 11(4) of Schedule 2, for paragraphs (a) and (c) substitute—

“(a) the Employment Rights Act 1996 except Part XI;

(b) the Trade Union and Labour Relations (Consolidation) Act 1992; and”.

The Development of Rural Wales Act 1976 (c.75)

11. In—

(a) paragraph 6 of Schedule 2, and

(b) paragraph 6 of Schedule 6,


The New Towns (Scotland) Act 1977 (c.16)


The National Health Service (Scotland) Act 1978 (c.29)

13. In section 12C(3) of the National Health Service (Scotland) Act 1978—

(a) for “Part VI of the Employment Protection (Consolidation) Act 1978” substitute “Part XI of the Employment Rights Act 1996”, and

(b) for “Part VI of that Act” substitute “that Part of that Act”.

The House of Commons (Administration) Act 1978 (c.36)


The New Towns Act 1981 (c.64)


The Wildlife and Countryside Act 1981 (c.69)

The Hops Marketing Act 1982 (c.5)


The Oil and Gas (Enterprise) Act 1982 (c.23)

18.—(1) In Schedule 3 to the Oil and Gas (Enterprise) Act 1982, after paragraph 45 add—

“The Employment Rights Act 1996

46.—(1) For subsection (1) of section 201 of the Employment Rights Act 1996 (offshore employment) there shall be substituted the following subsection—

(1) In this section “offshore employment” means employment for the purposes of—

(a) any activities in the territorial waters of the United Kingdom, or

(b) any such activities as are mentioned in section 23(2) of the Oil and Gas (Enterprise) Act 1982 in waters within subsection (6)(b) or (c) of that section.”

(2) Subsection (5) of that section shall be omitted.”

(2) The paragraph inserted by sub-paragraph (1) is subject to section 38(2) of the Oil and Gas (Enterprise) Act 1982 (power to bring provisions into force by order).

The Local Government Finance Act 1982 (c.32)


The Administration of Justice Act 1982 (c.53)

20. In section 10(d) of the Administration of Justice Act 1982—

(a) for “the Employment Protection (Consolidation) Act 1978” substitute “the Employment Rights Act 1996”, and

(b) for “section 81” substitute “section 135”.

The Health and Social Services and Social Security Adjudications Act 1983 (c.14)


The National Audit Act 1983 (c.44)


The National Heritage Act 1983 (c.47)

23. In—

(a) paragraph 5(5) of Part I of Schedule I,

(b) paragraph 15(5) of Part II of Schedule I,

(c) paragraph 25(5) of Part III of Schedule I,
(d) paragraph 35(5) of Part IV of Schedule 1,
(e) paragraph 2(5) of Schedule 2, and
(f) paragraph 5(5) of Schedule 3,

The National Heritage (Scotland) Act 1985 (c.16)

24. In—
(a) paragraph 5(5) of Part I, and
(b) paragraph 16(5) of Part II,
of Schedule 1 to the National Heritage (Scotland) Act 1985, for "the Employment Protection (Consolidation) Act 1978" substitute "the Employment Rights Act 1996".

The Prosecution of Offences Act 1985 (c.23)

25.—(1) The Prosecution of Offences Act 1985 is amended as follows.
(3) In section 15(6), for the words from "be treated as" to "shall not be so treated" substitute "not be treated as transferred functions".

The Local Government Act 1985 (c.51)

26.—(1) The Local Government Act 1985 is amended as follows.
(2) In section 54(2), for "Schedule 13 to the said Act of 1978" substitute "Chapter I of Part XIV of the Employment Rights Act 1996".
(3) In section 105(1), for "the Employment Protection (Consolidation) Act 1978" substitute "the Employment Rights Act 1996".

The Trustee Savings Banks Act 1985 (c.58)

27. In section 3(7) of the Trustee Savings Banks Act 1985, for "paragraph 17(3) of Schedule 13 to the Employment Protection (Consolidation) Act 1978" substitute "section 218(3) of the Employment Rights Act 1996".

The Housing (Consequential Provisions) Act 1985 (c.71)


The Insolvency Act 1986 (c.45)

29. In paragraph 13 of Schedule 6 to the Insolvency Act 1986, for sub-paragraph (2) substitute—
"(2) An amount falls within this sub-paragraph if it is—
(a) a guarantee payment under Part III of the Employment Rights Act 1996 (employee without work to do);
(b) any payment for time off under section 53 (time off to look for work or arrange training) or section 56 (time off for ante-natal care) of that Act or under section 169 of the Trade Union and Labour Relations (Consolidation) Act 1992 (time off for carrying out trade union duties etc.)."
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(c) remuneration on suspension on medical grounds, or on maternity grounds, under Part VII of the Employment Rights Act 1996; or
(d) remuneration under a protective award under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 (redundancy dismissal with compensation)."

The Legal Aid (Scotland) Act 1986 (c.47)

30. In paragraph 10(1) of Schedule 1 to the Legal Aid (Scotland) Act 1986, for “the Employment Protection (Consolidation) Act 1978” substitute “the Employment Rights Act 1996”.

The Debtors (Scotland) Act 1987 (c.18)


The Pilotage Act 1987 (c.21)


The Housing (Scotland) Act 1987 (c.26)

33. In paragraph 10(2)(b) of Schedule 22 to the Housing (Scotland) Act 1987, for “Schedule 13 to that Act” substitute “Chapter I of Part XIV of the Employment Rights Act 1996”.

The Consumer Protection Act 1987 (c.43)


The Income and Corporation Taxes Act 1988 (c.1)

35.—(1) The Income and Corporation Taxes Act 1988 is amended as follows.
(2) In section 579—
(a) in subsections (3)(a) and (5)(a) and in subsection (4)(a) as it has effect for the purposes of corporation tax, for the words from “by which” to “rebate” substitute “of the redundancy payment or the corresponding amount of the other employer’s payment”, and
(b) in subsection (6), for “section 106 of the Employment Protection (Consolidation) Act 1978” substitute “section 166 of the Employment Rights Act 1996”.
(3) In section 580(1)—
(a) in paragraph (a), for “‘employer’s payment” and “rebate” have the same meaning as in the Employment Protection (Consolidation) Act 1978 (“the 1978 Act”)” substitute “and ‘employer’s payment” have the same meaning as in Part XI of the Employment Rights Act 1996”;
(b) in paragraph (b), for the words “of the relevant redundancy payment” onwards substitute “which would have been payable as a redundancy payment had one been payable;”, and
(c) in paragraph (c), for “the 1978 Act” substitute “the Employment Rights Act 1996”.
(4) In—
(a) paragraph 19(a) of Part III of Schedule 9, and
(b) paragraph 2 of Schedule 10,
for "the Employment Protection (Consolidation) Act 1978" substitute "the Employment Rights Act 1996".

The Legal Aid Act 1988 (c.34)

36. In paragraph 7(1) of Schedule 7 to the Legal Aid Act 1988, for "the Employment Protection (Consolidation) Act 1978" substitute "the Employment Rights Act 1996".

The Education Reform Act 1988 (c.40)

37.—(1) The Education Reform Act 1988 is amended as follows.

(2) In section 174(2), for "Schedule 13 to that Act" substitute "Chapter I of Part XIV of the Employment Rights Act 1996".


(4) In section 221(2)(b), for "section 81 of the Employment Protection (Consolidation) Act 1978" substitute "section 135 of the Employment Rights Act 1996".

(5) In section 235—
(a) in subsection (1), for "the Employment Protection (Consolidation) Act 1978" substitute "the Employment Rights Act 1996", and
(b) in subsection (2)(f), for "section 81 of the Employment Protection (Consolidation) Act 1978" substitute "section 139 of the Employment Rights Act 1996".

The Local Government Finance Act 1988 (c.41)


The Housing (Scotland) Act 1988 (c.43)

39. In paragraph 12(1) of Schedule 1 to the Housing (Scotland) Act 1988, for "the Employment Protection (Consolidation) Act 1978" substitute "the Employment Rights Act 1996".

The Health and Medicines Act 1988 (c.49)


The Housing Act 1988 (c.50)

41. In paragraph 12(1) of Schedule 5 to the Housing Act 1988, for "the Employment Protection (Consolidation) Act 1978" substitute "the Employment Rights Act 1996".
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The Dock Work Act 1989 (c.13)

42. In section 6(3) of the Dock Work Act 1989—
(a) for “the 1978 Act” substitute “the Employment Rights Act 1996”,
(b) for “section 151 of, and Schedule 13 to,” substitute “Chapter I of Part XIV of”,
(c) for “paragraph 15 of Schedule 13” substitute “section 216 of that Act”, and
(d) for “paragraph 4 of that Schedule” substitute “section 212(1) of that Act”.

The Electricity Act 1989 (c.29)

43.—(1) The Electricity Act 1989 is amended as follows.

(2) In section 56(3), for “Schedule 13 to the said Act of 1978” substitute “Chapter I of Part XIV of the Employment Rights Act 1996”.

(3) In—
(a) paragraph 4(1) of Schedule 14, and
(b) paragraph 4(1) of Schedule 15,
for the words from the beginning to “continuous” substitute “Chapter I of Part XIV of the Employment Rights Act 1996”.

The Local Government and Housing Act 1989 (c.42)

44. In section 10 of the Local Government and Housing Act 1989—
(a) in subsection (1), for “subsection (4) of section 29 of the Employment Protection (Consolidation) Act 1978” substitute “section 50(4) of the Employment Rights Act 1996”, and
(b) in subsection (2)—
(i) for “the Employment Protection (Consolidation) Act 1978” substitute “the Employment Rights Act 1996”, and
(ii) for “subsection (1) of section 29” substitute “subsection (2) of section 50”.

The National Health Service and Community Care Act 1990 (c.19)

45.—(1) The National Health Service and Community Care Act 1990 is amended as follows.

(2) In section 7(3)—
(a) for “Part VI of the Employment Protection (Consolidation) Act 1978” substitute “Part XI of the Employment Rights Act 1996”, and
(b) for “the said Part VI” substitute “that Part of that Act”.

(3) In—
(a) section 20(6), and
(b) section 49(3)(b),
for “the Employment Protection (Consolidation) Act 1978” substitute “the Employment Rights Act 1996”.

(4) In section 60(3)—
(a) for “Part VI of the Employment Protection (Consolidation) Act 1978” substitute “Part XI of the Employment Rights Act 1996”, and
(b) for “the said Part VI” substitute “that Part of that Act”.
Employment Rights Act 1996  c. 18  155

The Enterprise and New Towns (Scotland) Act 1999 (c.35)

46. In paragraph 17(1) of Schedule 1 to the Enterprise and New Towns (Scotland) Act 1990, for “the Employment Protection (Consolidation) Act 1978” substitute “the Employment Rights Act 1996”.

The Environmental Protection Act 1990 (c.43)

47. In paragraph 15 of Schedule 10 to the Environmental Protection Act 1990, for “the Employment Protection (Consolidation) Act 1978” substitute “the Employment Rights Act 1996”.

The Natural Heritage (Scotland) Act 1991 (c.28)


The Coal Mining Subsidence Act 1991 (c.45)

49. In section 30(7) of the Coal Mining Subsidence Act 1991—

(a) for “section 153(4) of the Employment Protection (Consolidation) Act 1978” substitute “section 231 of the Employment Rights Act 1996”, and

(b) for “meaning given by section 153(1) of the Employment Protection (Consolidation) Act 1978” substitute “same meaning as in the Employment Rights Act 1996”.

The Ports Act 1991 (c.52)

50. In section 24(8) of the Ports Act 1991, for the words from the beginning to “continuous” substitute “Chapter I of Part XIV of the Employment Rights Act 1996”.

The Social Security Contributions and Benefits Act 1992 (c.4)

51.—(1) The Social Security Contributions and Benefits Act 1992 is amended as follows.

(2) In section 6(5), for “section 81” onwards substitute “Part XI of the Employment Rights Act 1996 (redundancy payments) does not apply by virtue of section 199(2) or 209 of that Act.”

(3) In—

(a) section 27(2)(b), and

(b) section 28(4),

for “section 81(2) of the Employment Protection (Consolidation) Act 1978” substitute “section 139(1) of the Employment Rights Act 1996”.

(4) In section 112(3)—

(a) in paragraph (a), for “the Employment Protection (Consolidation) Act 1978” substitute “the Employment Rights Act 1996”,

(b) in paragraph (b), after “that Act” insert “or the Trade Union and Labour Relations (Consolidation) Act 1992”, and

(c) in paragraph (c), for “the Employment Protection Act 1975” substitute “the Trade Union and Labour Relations (Consolidation) Act 1992”.

(5) In section 171(1), for “section 55(2) to (7) of the Employment Protection (Consolidation) Act 1978” substitute “Part X of the Employment Rights Act 1996”.
The Further and Higher Education Act 1992 (c.13)

52.—(1) The Further and Higher Education Act 1992 is amended as follows,

(2) In section 35—

(a) in subsection (1)(c)—

(i) for “section 84 of the Employment Protection (Consolidation) Act 1978” substitute “section 138 of the Employment Rights Act 1996”, and

(ii) for “Part VI” substitute “Part XIV”, and

(b) in subsection (2), for “Schedule 13 to” substitute “Chapter I of Part XIV of”.


(4) In section 90(1), for “the Employment Protection (Consolidation) Act 1978” substitute “the Employment Rights Act 1996”.

The Timeshare Act 1992 (c.35)

53. In section 1 of the Timeshare Act 1992—

(a) in subsection (3)(b), for “as defined in section 153 of the Employment Protection (Consolidation) Act 1978” substitute “within the meaning of the Employment Rights Act 1996”, and

(b) in subsection (8)(b), for “section 153 of the Employment Protection (Consolidation) Act 1978” substitute “the Employment Rights Act 1996”.

The Further and Higher Education (Scotland) Act 1992 (c.37)


The Museums and Galleries Act 1992 (c.44)

55. In section 1(7) of the Museums and Galleries Act 1992, for “paragraph 17(3) of Schedule 13 to the Employment Protection (Consolidation) Act 1978” substitute “section 218(3) of the Employment Rights Act 1996”.

The Trade Union and Labour Relations (Consolidation) Act 1992 (c.52)

56.—(1) The Trade Union and Labour Relations (Consolidation) Act 1992 is amended as follows.

(2) In section 67(8)—

(a) in paragraph (a), for “paragraph 8(1)(b) of Schedule 14 to the Employment Protection (Consolidation) Act 1978” substitute “section 227(1)(a) of the Employment Rights Act 1996”, and

(b) in paragraph (b), for “section 75” substitute “section 124(1)”.

(3) In section 68(11), for “Part I of the Wages Act 1986” substitute “the Employment Rights Act 1996”.

(4) In section 68A(4)—

(a) in paragraph (a), for “the Employment Protection (Consolidation) Act 1978” substitute “the Employment Rights Act 1996”, and

(b) in paragraph (b), for “section 1(1) of the Wages Act 1986” substitute “section 13 of that Act”.
(5) In section 88—
(a) in subsection (2), for “section 1 of the Wages Act 1966” substitute “section 13 of the Employment Rights Act 1996”,
(b) in subsection (3), for “section 5 of the Wages Act 1966” substitute “section 23 of the Employment Rights Act 1996”, and
(c) in subsection (4), for “section 5(2) of the Wages Act 1966” substitute “section 23(2) of the Employment Rights Act 1996”.

(6) In section 140(4), for “section 75 of the Employment Protection (Consolidation) Act 1978” substitute “section 124(1) of the Employment Rights Act 1996”.

(7) In—
(a) section 152(1), and
(b) section 153,

(8) In section 154, for “Section 64 of the Employment Protection (Consolidation) Act 1978 (qualifying period and upper age limit for unfair dismissal protection) does” substitute “Sections 108 and 109 of the Employment Rights Act 1996 (qualifying period and upper age limit for unfair dismissal protection) do”.

(9) In section 156—
(a) in subsection (1), for “subsection (7A), (7B) or (9) of section 73 of the Employment Protection (Consolidation) Act 1978” substitute “section 122 of the Employment Rights Act 1996”, and
(b) in subsection (2), for “subsection (7B)” substitute “subsection (2)”.

(10) In section 157—
(a) in subsection (1), for “section 73(2) of the Employment Protection (Consolidation) Act 1978” substitute “section 121 of the Employment Rights Act 1996”, and
(b) in subsection (2), for “section 71(2)(b) of the Employment Protection (Consolidation) Act 1978” substitute “section 117(3)(b) of the Employment Rights Act 1996”.

(11) In section 158—
(a) in subsection (2), for “section 71(2)(a) of the Employment Protection (Consolidation) Act 1978” substitute “section 117(3)(a) of the Employment Rights Act 1996”,
(b) in subsection (3), for “section 73(5) of the Employment Protection (Consolidation) Act 1978” substitute “section 119(4) of the Employment Rights Act 1996”, and
(c) in subsection (7), for the words from the beginning to “Part” substitute—
“(7) Chapter II of Part XIV of the Employment Rights Act 1996 (calculation of a week’s pay) applies for the purposes of this section with the substitution for section 226 of the following—

For the purposes of this Chapter”.

(12) In section 167—
(a) in subsection (1), for “Part V of the Employment Protection (Consolidation) Act 1978” substitute “Part X of the Employment Rights Act 1996”, and
(b) in subsection (2)—
(i) for “section 67 of the Employment Protection (Consolidation) Act 1978” substitute “section 111 of the Employment Rights Act 1996”,

(ii) for “section 68(2) or 71(2)(a)” substitute “section 112(4) or 117(3)(a)”, and

(iii) for “section 69” substitute “section 113”.

(13) In section 176(6)—

(a) in paragraph (a), for “paragraph 8(1)(b) of Schedule 14 to the Employment Protection (Consolidation) Act 1978” substitute “section 227(1)(a) of the Employment Rights Act 1996”, and

(b) in paragraph (b), for “section 75” substitute “section 124(1)”.

(14) In section 190—

(a) in subsection (4)—

(i) for “Schedule 3 to the Employment Protection (Consolidation) Act 1978” substitute “sections 87 to 91 of the Employment Rights Act 1996”, and

(ii) for “section 49(1)” substitute “section 86(1)”, and

(b) in subsection (5)—

(i) for “Schedule 14 to the Employment Protection (Consolidation) Act 1978” substitute “Chapter II of Part XIV of the Employment Rights Act 1996”,

(ii) for “Part II of that Schedule” substitute “that Chapter”, and

(iii) for “paragraph 7(1)(k) or (l) of that Schedule” substitute “section 226(5)”.

(15) In sections 237(1A) and 238(2A)—

(a) for “section 57A, 57AA or 60 of the Employment Protection (Consolidation) Act 1978 (dismissal in health and safety cases, employee representative and maternity cases)” substitute “section 99(1) to (3), 100 or 103 of the Employment Rights Act 1996 (dismissal in maternity, health and safety and employee representative cases)”, and

(b) for “section 59” substitute “section 105(9)”.

(16) In section 239—


(b) in subsection (2), for “section 67(2)” substitute “section 111(2)”, and

(c) in subsection (3), for “sections 57 to 61 of the Employment Protection (Consolidation) Act 1978” substitute “sections 98 to 106 of the Employment Rights Act 1996”.

(17) In section 278(6), for “Subsections (4) to (9) of section 139 of the Employment Protection (Consolidation) Act 1978” substitute “Subsections (6) to (12) of section 195 of the Employment Rights Act 1996”.

(18) In section 282, for subsection (2) substitute—

“(2) Chapter I of Part XIV of the Employment Rights Act 1996 (computation of period of continuous employment), and any provision modifying or supplementing that Chapter for the purposes of that Act, apply for the purposes of this section.”

Employment Rights Act 1996

The Tribunals and Inquiries Act 1992 (c.53)

57. In section 11(2) of the Tribunals and Inquiries Act 1992, for “Subsection (1)” substitute “This section”.

The Social Security Act 1993 (c.3)

58. In section 2(4)(b) of the Social Security Act 1993, for “sections 106(2) and 122(1) of the Employment Protection (Consolidation) Act 1978” substitute “sections 167(1) and 182 of the Employment Rights Act 1996”.

The Education Act 1993 (c.35)


The Railways Act 1993 (c.43)

60.—(1) The Railways Act 1993 is amended as follows.

(2) In section 93(5), (6) and (12), for “the Employment Protection (Consolidation) Act 1978” substitute “the Employment Rights Act 1996”.

(3) In paragraph 6 of Schedule 11, for sub-paragraphs (10) to (12) substitute—

“(10) Chapter I of Part XIV of the Employment Rights Act 1996, except section 218(6), shall apply for the purposes of this paragraph as it applies for the purposes of that Act.”

The Pension Schemes Act 1993 (c.48)

61.—(1) The Pension Schemes Act 1993 is amended as follows.

(2) In section 123(3), for “the Employment Protection (Consolidation) Act 1978” substitute “the Employment Rights Act 1996”.

(3) In section 124(4), for “maternity pay under Part III” onwards substitute “and any payment such as is referred to in section 184(2) of the Employment Rights Act 1996”.

(4) In section 165—

(a) in subsection (7), for “section 137 of the Employment Protection (Consolidation) Act 1978” substitute “section 201 of the Employment Rights Act 1996”, and

(b) in subsection (8), for “section 144(5) of the Employment Protection (Consolidation) Act 1978” substitute “section 199(5) of the Employment Rights Act 1996”.

The Finance Act 1994 (c.9)

62. In paragraph 27 of Schedule 24 to the Finance Act 1994—

(a) for sub-paragraphs (9) to (11) substitute—

“(9) Chapter I of Part XIV of the Employment Rights Act 1996, except section 218(6), shall apply for the purposes of this paragraph as it applies for the purposes of that Act.”, and

(b) in sub-paragraph (13), for “sub-paragraphs (11) and” substitute “sub-paragraph”.
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The Local Government (Wales) Act 1994 (c.19)

63.—(1) The Local Government (Wales) Act 1994 is amended as follows.

(2) In section 41—

(a) in subsection (1)—

(i) for "section 84 of the Employment Protection (Consolidation) Act 1978" substitute "section 138 of the Employment Rights Act 1996", and

(ii) for "Part VI" substitute "Part XI", and

(b) in subsection (2), for "Schedule 13 to the Act of 1978" substitute "Chapter I of Part XIV of the Employment Rights Act 1996".

(3) In section 43—

(a) in subsection (6), for "section 82(5) or (6) or 84(3) of the Employment Protection (Consolidation) Act 1978" substitute "section 138 or 141 of the Employment Rights Act 1996", and

(b) in subsection (7), for "Part VI of the Act of 1978" substitute "Part XI of the Employment Rights Act 1996".

(4) In section 44—

(a) in subsection (1), for "Part IV, V or VI of the Employment Protection (Consolidation) Act 1978" substitute "Part IX, X or XI of the Employment Rights Act 1996",

(b) in subsection (3), for "sections 101, 102, 108 and 119 of the Act of 1978" substitute "sections 164, 165, 170 and 179 of the Employment Rights Act 1996", and

(c) in subsection (4), for "sections 81(4), 82(1) and 101 of the Act of 1978, and in Schedule 4 to that Act," substitute "sections 155, 156, 162 and 164 of the Employment Rights Act 1996".


The Coal Industry Act 1994 (c.21)

64. In paragraph 4(11) of Schedule 5 to the Coal Industry Act 1994, for the words from the beginning to "that Schedule" substitute "Chapter I of Part XIV of the Employment Rights Act 1996, except section 218(6)", ".

The Criminal Justice and Public Order Act 1994 (c.33)

65. In section 126(2) of the Criminal Justice and Public Order Act 1994, for paragraph (a) substitute—


The Local Government etc. (Scotland) Act 1994 (c.39)

66.—(1) The Local Government etc. (Scotland) Act 1994 is amended as follows.

(2) In section 10—

(a) in subsection (1)—

(i) for "section 84 of the Employment Protection (Consolidation) Act 1978" substitute "section 138 of the Employment Rights Act 1996", and

(ii) for "Part VI" substitute "Part XI", and

(b) in subsection (2), for "Schedule 13 to the said Act of 1978" substitute "Chapter I of Part XIV of the Employment Rights Act 1996".
(3) In section 13—
   (a) in subsection (5), for the words from “subsections” to “1978” substitute “section 138 or 141 of the Employment Rights Act 1996 (renewal of contract or re-engagement)”, and
   (b) in subsection (6), for “Part VI of the said Act of 1978” substitute “Part XI of the Employment Rights Act 1996”.


The Jobseekers Act 1995 (c.18)

67.—(1) The Jobseekers Act 1995 is amended as follows.

(2) In—
   (a) section 14(3)(b), and
   (b) section 19(7),
for “section 81(2) of the Employment Protection (Consolidation) Act 1978” substitute “section 139(1) of the Employment Rights Act 1996”.

(3) In paragraph 6(2)(a)(i) of Schedule 1, for “the Employment Protection (Consolidation) Act 1978” substitute “the Employment Rights Act 1996”.

The Environment Act 1995 (c.25)

68. In paragraph 3 of Schedule 2 to the Environment Act 1995—
   (a) in sub-paragraph (6), for “section 84 of the Employment Protection (Consolidation) Act 1978” substitute “section 138 of the Employment Rights Act 1996”, and
   (b) in sub-paragraph (7), for “Schedule 13 to the Employment Protection (Consolidation) Act 1978” substitute “Chapter I of Part XIV of the Employment Rights Act 1996”.

The Disability Discrimination Act 1995 (c.50)

69.—(1) The Disability Discrimination Act 1995 is amended as follows.

(2) In section 50(9)(a), for “the Employment Protection (Consolidation) Act 1978” substitute “the Employment Rights Act 1996”.

(3) In section 65(2), for “section 139 of the Employment Protection (Consolidation) Act 1978” substitute “section 195 of the Employment Rights Act 1996”.

SCHEDULE 2

TRANSITIONAL PROVISIONS, SAVINGS AND TRANSITORY PROVISIONS

PART I

TRANSITIONAL PROVISIONS AND SAVINGS

General transitional and savings

1. The substitution of this Act for the provisions repealed or revoked by this Act does not affect the continuity of the law.
2.—(1) Anything done, or having effect as done, (including the making of subordinate legislation) under or for the purposes of any provision repealed or revoked by this Act has effect as if done under or for the purposes of any corresponding provision of this Act.

(2) Sub-paragraph (1) does not apply to the making of any subordinate legislation to the extent that it is reproduced in this Act.

3. Any reference (express or implied) in this Act or any other enactment, or in any instrument or document, to a provision of this Act is (so far as the context permits) to be read as (according to the context) being or including in relation to times, circumstances and purposes before the commencement of this Act a reference to the corresponding provision repealed or revoked by this Act.

4.—(1) Any reference (express or implied) in any enactment, or in any instrument or document, to a provision repealed or revoked by this Act is (so far as the context permits) to be read as (according to the context) being or including in relation to times, circumstances and purposes after the commencement of this Act a reference to the corresponding provision of this Act.

(2) In particular, where a power conferred by an Act is expressed to be exercisable in relation to enactments contained in Acts passed before or in the same Session as the Act conferring the power, the power is also exercisable in relation to provisions of this Act which reproduce such enactments.

5. Paragraphs 1 to 4 have effect in place of section 17(2) of the Interpretation Act 1978 (but are without prejudice to any other provision of that Act).

Preservation of old transitional and savings

6.—(1) The repeal by this Act of an enactment previously repealed subject to savings (whether or not in the repealing enactment) does not affect the continued operation of those savings.

(2) The repeal by this Act of a saving made on the previous repeal of an enactment does not affect the operation of the saving in so far as it remains capable of having effect.

(3) Where the purpose of an enactment repealed by this Act was to secure that the substitution of the provisions of the Act containing that enactment for provisions repealed by that Act did not affect the continuity of the law, the enactment repealed by this Act continues to have effect in so far as it is capable of doing so.

Employment particulars

7.—(1) In this paragraph “pre-TURERA employee” means an employee whose employment with his employer began before 30th November 1993 (the day on which section 26 of the Trade Union Reform and Employment Rights Act 1993 came into force), whether or not the provisions of sections 1 to 6 of the Employment Protection (Consolidation) Act 1978, as they had effect before the substitution made by that section, applied to him before that date.

(2) Subject to the following provisions of this paragraph, sections 1 to 7 of this Act do not apply to a pre-TURERA employee (but the provisions of sections 1 to 6 of the Employment Protection (Consolidation) Act 1978, as they had effect before the substitution made by section 26 of the Trade Union Reform and Employment Rights Act 1993, continue in force in his case).

(3) Where a pre-TURERA employee, at any time—

(a) on or after the day on which this Act comes into force, and
(b) either before the end of his employment or within the period of three
months beginning with the day on which his employment ends,
requests from his employer a statement under section 1 of this Act, the employer
shall (subject to section 5 and any other provision disapplying or having the effect
disapplying sections 1 to 4) be treated as being required by section 1 to give
him a written statement under that section not later than two months after the
request is made; and section 4 of this Act shall (subject to that) apply in relation
to the employee after he makes the request.

(4) An employer is not required to give an employee a statement under section
1 pursuant to sub-paragraph (3)—

(a) on more than one occasion, or

(b) if he has already given him a statement pursuant to paragraph 3(3) of
Schedule 9 to the Trade Union Reform and Employment Rights Act
1993.

(5) Where—

(a) on or after the day on which this Act comes into force there is in the case
of a pre-TURERA employee a change in any of the matters particulars
of which would, had he been given a statement of particulars on 30th
November 1993 under section 1 of the Employment Protection
(Consolidation) Act 1978 (as substituted by section 26 of the Trade
Union Reform and Employment Rights Act 1993), have been included
or referred to in the statement, and

(b) he has not previously requested a statement under sub-paragraph (3) or
paragraph 3(3) of Schedule 9 to the Trade Union Reform and
Employment Rights Act 1993,

subsections (1) and (6) of section 4 of this Act shall be treated (subject to section
5 and any other provision disapplying or having the effect of disapplying section
4) as requiring his employer to give him a written statement containing
particulars of the change at the time specified in subsection (3) of section 4; and
the other provisions of section 4 apply accordingly.

Monetary limits in old cases

8. In relation to any case in which (but for this Act) a limit lower than that set
by Article 3 of the Employment Protection (Increase of Limits) Order 1995
would have applied in accordance with Article 4 of that Order, this Act has effect
as if it reproduced that lower limit.

Shop workers and betting workers to whom old maternity provisions applied

9.—(1) This paragraph applies where an employee exercised a right to return
to work under Part III of the Employment Protection (Consolidation) Act 1978
at a time when the amendments of that Part made by the Trade Union Reform
and Employment Rights Act 1993 did not have effect in her case (so that her right
was a right to return to work in the job in which she was employed under the
original contract of employment).

(2) Section 36(4) shall have effect as if for paragraph (b) there were
substituted—

"(b) under her original contract of employment, she was a shop
worker, or a betting worker, but was not employed to work only
on Sunday.”

(3) If the employee was employed as a shop worker under her original
contract of employment, she shall not be regarded as failing to satisfy the
condition in section 36(2)(a) or (c) or 41(1)(k) merely because during her
pregnancy she was employed under a different contract of employment by virtue
of section 60(2) of the Employment Protection (Consolidation) Act 1978 (as it had effect before the commencement of section 24 of the Trade Union Reform and Employment Rights Act 1993) or otherwise by reason of her pregnancy.

(4) In this paragraph, and in section 36(4)(b) as substituted by sub-paragraph (2), "original contract of employment" has the meaning given by section 153(1) of the Employment Protection (Consolidation) Act 1978 as originally enacted.

Validity of provisions deriving from certain regulations

10. Any question as to the validity of any of sections 47, 61, 62, 63 and 103, which derive from the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 made under subsection (2) of section 2 of the European Communities Act 1972, shall be determined as if those provisions were contained in regulations made under that subsection.

Unfair dismissal

11. Part X does not apply to a dismissal from employment under a contract for a fixed term of two years or more (not being a contract of apprenticeship) if—

(a) the contract was made before 28th February 1972, and

(b) the dismissal consists only of the expiry of that term without its being renewed.

Redundancy payments

12.—(1) Section 135 does not apply to an employee who immediately before the relevant date is employed under a contract for a fixed term of two years or more (not being a contract of apprenticeship) if the contract was made before 6th December 1965.

(2) Section 197(3) does not apply if the contract was made before 6th December 1965.

Periods of employment

13.—(1) The reference in section 215(2)(b) to a person being an employed earner for the purposes of the Social Security Contributions and Benefits Act 1992 in respect of whom a secondary Class I contribution was payable under that Act (whether or not it was in fact paid) shall be construed—

(a) as respects a week of employment after 1st June 1976 and before 1st July 1992, as a reference to a person being an employed earner for the purposes of the Social Security Act 1975 in respect of whom a secondary Class I contribution was payable under that Act (whether or not it was in fact paid),

(b) as respects a week of employment after 6th April 1975 and before 1st June 1976, as a reference to a person being an employed earner for the purposes of the Social Security Act 1975, and

(c) as respects a week of employment before 6th April 1975, as a reference to a person being an employee in respect of whom an employer's contribution was payable in respect of the corresponding contribution week (whether or not it was in fact paid).

(2) For the purposes of the application of sub-paragraph (1) to a week of employment where the corresponding contribution week began before 5th July 1948, an employer's contribution shall be treated as payable as mentioned in that sub-paragraph if such a contribution would have been so payable had the statutory provisions relating to national insurance in force on 5th July 1948 been in force in that contribution week.
(3) The references in subsection (4) of section 215 to the Social Security Contributions and Benefits Act 1992 include the Social Security Act 1975; and that subsection applies to any question arising whether an employer's contribution was or would have been payable as mentioned in sub-paragraph (1) or (2).

(4) In this paragraph—

“employer's contribution” has the same meaning as in the National Insurance Act 1965, and

“corresponding contribution week”, in relation to a week of employment, means a contribution week (within the meaning of that Act) of which so much as falls within the period beginning with midnight between Sunday and Monday and ending with Saturday also falls within that week of employment.

14.—(1) Subject to paragraph 13 and sub-paragraphs (2) and (3) of this paragraph, Chapter I of Part XIV applies to periods before this Act comes into force as it applies to later periods.

(2) If, during the whole or any part of a week beginning before 6th July 1964, an employee was absent from work—

(a) because he was taking part in a strike, or

(b) because of a lock-out by his employer,

the week counts as a period of employment.

(3) Any week which counted as a period of employment in the computation of a period of employment for the purposes of the Employment Protection (Consolidation) Act 1978 counts as a period of employment for the purposes of this Act; and any week which did not break the continuity of a person's employment for the purposes of that Act shall not break the continuity of a period of employment for the purposes of this Act.

**PART II**

**Transitory provisions**

*Occupational pension scheme trustees*

15.—(1) If sections 42 to 46 of the Pensions Act 1995 have not come into force before the commencement of this Act, this Act shall have effect with the omission of sections 46, 58 to 60 and 102 until the relevant commencement date.

(2) The reference in sub-paragraph (1) to the relevant commencement date is a reference—

(a) if an order has been made before the commencement of this Act appointing a day after that commencement as the day on which sections 42 to 46 of the Pensions Act 1995 are to come into force, to the day so appointed, and

(b) otherwise, to such day as the Secretary of State may by order appoint.

*Armed forces*

16.—(1) If section 31 of the Trade Union Reform and Employment Rights Act 1993 has not come into force before the commencement of this Act, this Act shall have effect until the relevant commencement date as if for section 192 there were substituted—

"Armed forces. 192. Section 191—

(a) does not apply to service as a member of the naval, military or air forces of the Crown, but
Employment Rights Act 1996

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(b) does apply to employment by an association established for the purposes of Part XI of the Reserve Forces Act 1996."

1993 c. 19.

(2) The reference in sub-paragraph (1) to the relevant commencement date is a reference—

(a) if an order has been made before the commencement of this Act appointing a day after that commencement as the day on which section 31 of the Trade Union Reform and Employment Rights Act 1993 is to come into force, to the day so appointed, and

(b) otherwise, to such day as the Secretary of State may by order appoint.

1980 c. 9.

17.—(1) If Part XI of the Reserve Forces Act 1996 has not come into force before the commencement of this Act, section 192 of this Act shall have effect until the relevant commencement date as if for "Part XI of the Reserve Forces Act 1996" there were substituted "Part VI of the Reserve Forces Act 1980".

(2) The reference in sub-paragraph (1) to the relevant commencement date is a reference—

(a) if an order has been made before the commencement of this Act appointing a day after that commencement as the day on which Part XI of the Reserve Forces Act 1996 is to come into force, to the day so appointed, and

(b) otherwise, to such day as the Secretary of State may by order appoint.

Disability discrimination

1995 c. 50.

18.—(1) If paragraph 3 of Schedule 6 to the Disability Discrimination Act 1995 has not come into force before the commencement of this Act, this Act shall have effect with the omission of subsections (3)(d) and (4)(a)(iv) of section 219 until the relevant commencement date.

(2) The reference in sub-paragraph (1) to the relevant commencement date is a reference—

(a) if an order has been made before the commencement of this Act appointing a day after that commencement as the day on which paragraph 3 of Schedule 6 to the Disability Discrimination Act 1995 is to come into force, to the day so appointed, and

(b) otherwise, to such day as the Secretary of State may by order appoint.

Section 242.

SCHEDULE 3

REPEALS AND REVOCATIONS

PART I

REPEALS

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#### Revocations

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1. This Table shows the derivation of the provisions of the consolidation.

2. The following abbreviations are used in the Table—

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Brüssel, den 23.4.2018
COM(2018) 218 final
2018/0106 (COD)

Vorschlag für eine

RICHTLINIE DES EUROPÄISCHEN PARLAMENTS UND DES RATES

zum Schutz von Personen, die Verstöße gegen das Unionsrecht melden

BEGRÜNDUNG

1. KONTEXT DES VORSCHLAGS
   • Gründe und Ziele des Vorschlags

Illegale Tätigkeiten und Rechtsmissbrauch können in allen Organisationen auftreten, gleichgültig, ob es sich um private oder öffentliche, große oder kleine Organisationen handelt. Sie können sich auf unterschiedliche Weise äußern: Korruption oder Betrug, Fehlverhalten oder Fahrlässigkeit. Wenn nichts dagegen unternommen wird, können bisweilen schwere Schäden des öffentlichen Interesses entstehen. Menschen, die für eine Organisation tätig sind oder im Rahmen ihrer arbeitsbezogenen Tätigkeiten mit einer Organisation in Kontakt kommen, erfahren häufig als Erste von Vorkommnissen dieser Art; daher befinden sie sich in einer privilegierten Position, diejenigen Personen zu informieren, die das Problem angehen können.


Der derzeit vorhandene Hinweisgeberschutz in der EU ist fragmentiert. Ein unzureichender Schutz für Hinweisgeber in einem Mitgliedstaat kann die Funktionsweise der EU-politischen Maßnahmen in diesem Mitgliedstaat negativ beeinflussen und auch Nebeneffekte in anderen

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3 Dies gilt ebenso für Beschwerdeverfahren und gesetzliche Prüfungen.
4 Weitere Einzelheiten siehe unter „Subsidiarität“.

Hinweise darauf, welche Auswirkungen unzureichende Meldungen durch Hinweisegeber haben, lassen sich den Ergebnissen einschlägiger Umfragen, wie z. B. dem Eurobarometer Spezial 2017 über Korruption, entnehmen: 81 % der Europäer gaben an, dass sie erlebte oder beobachtete Korruption nicht gemeldet haben. In 85 % der Antworten auf die im Jahr 2017 von der Kommission durchgeführte öffentliche Konsultation wurde die Meinung vertreten, dass Arbeitnehmer sehr selten oder selten ihre Besorgnisse in Bezug auf Bedrohungen oder Schäden des öffentlichen Interesses melden, da sie Angst vor rechtlichen und finanziellen Konsequenzen haben. Was etwaige negative Auswirkungen auf das Funktionieren des Binnenmarkts anbelangt, so wurden die potenziellen, durch einen unzureichenden Hinweisegeberschutz bedingten Ertragsausfälle in einer im Jahr 2017 für die Kommission durchgeführten Studie allein für den Bereich des öffentlichen Auftragswesens auf EU-weit jährlich 5,8 bis 9,6 Mrd. EUR geschätzt.


6 Für nähere Informationen siehe das Kapitel „Kohärenz mit den bestehenden Vorschriften in diesem Bereich“.
7 http://ec.europa.eu/comfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/innovation/SPECIAL/surveyKy/2176
8 http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54254
9 Milieu (2017), „Estimating the economic benefits of whistleblower protection in public procurement“
In ihrer Mitteilung aus dem Jahr 2016 „EU-Recht: Bessere Ergebnisse durch bessere Anwendung“\textsuperscript{13} weist die Kommission darauf hin, dass die Durchsetzung des EU-Rechts nach wie vor eine Herausforderung darstellt, und sie verpflichtet sich, „im allgemeinen Interesse stärkeres Augenmerk auf die Durchsetzung [zu richten]“. Sie betont insbesondere, dass, „[w]enn ein Thema in den Vordergrund rückt — wie Pkw-Abgaswerte bei Zulassungstests, Wasserverschmutzung, illegale Deponien und Verkehrssicherheit —, [...] nicht fehlende EU-Vorschriften das Problem [sind], sondern vielmehr die Tatsache, dass das EU-Recht nicht wirksam angewendet wird“.

Im Einklang mit dieser Selbstverpflichtung soll im Wege dieses Vorschlags das Potenzial des Hinweisgeberschutzes mit Blick auf die Stärkung der Durchsetzung voll entfaltet werden. Der Vorschlag sieht eine Reihe ausgewogener gemeinsamer Mindeststandards vor, die Hinweisgebern einen soliden Schutz vor Repressalien bieten sollen, wenn diese Verstöße in bestimmten Bereichen der EU-Politik melden\textsuperscript{14}, in denen

i) die Durchsetzung gestärkt werden muss,

ii) die Durchsetzung durch die unzureichende Meldungserstattung maßgeblich beeinträchtigt wird und

iii) etwaige Verstöße schwere Schäden des öffentlichen Interesses nach sich ziehen können.

\textbf{Kohärenz mit den bestehenden Vorschriften in diesem Bereich}


Der Vorschlag stärkt den im Rahmen all dieser Instrumente gebotenen Schutz. Er ergänzt sie durch zusätzliche Vorschriften und Garantien und bringt sie mit Blick auf ein hohes Schutzniveau unter Beibehaltung ihrer Eigenheiten in Einklang.


\textbf{Kohärenz mit der Politik der Union in anderen Bereichen}

Die Sicherstellung eines soliden Hinweisgeberschutzes als Mittel zur Stärkung der Durchsetzung des Unionsrecht in den Bereichen, die unter den Vorschlag fallen, wird zur Verwirklichung der aktuellen Prioritäten der Kommission beitragen, insbesondere zum wirksamsten Funktionieren des Binnenmarkts einschließlich der Verbesserung des Geschäftsumfelds, zur Erhöhung der Steuergerechtigkeit und zur Förderung der Arbeitnehmerrechte.

\textsuperscript{13} C/2016/8600 (ABl. C 18 vom 19.1.2017, S. 10).
\textsuperscript{14} Siehe Artikel 1 des Vorschlags und die im Anhang aufgeführten einschlägigen Rechtsvorschriften.


Verfahren zur Durchsetzung der Einhaltung dieses Grundsatzes bietet, und (ii) über den Schutz vor Belästigung am Arbeitsplatz.


Die Sozialpartner spielen eine grundlegende und vielschichtige Rolle bei der Durchsetzung der Vorschriften über den Hinweisgeberschutz. Unabhängige Arbeitnehmervertreter werden eine wichtige Rolle bei der Förderung der Meldung von Missständen als Mechanismus einer verantwortungsvollen Staatsführung spielen. Im Rahmen des sozialen Dialogs kann sichergestellt werden, dass wirksame Melde- und Schutzvorkehrungen unter


2. RECHTSGRUNDLAGE, SUBSIDIARITÄT UND VERHÄLTNISMASSIGKEIT

• Rechtsgrundlage

Der Vorschlag basiert auf den Artikeln 16, 33, 43, 50, 53 Absatz 1, 62, 91, 100, 103, 109, 114, 168, 169, 192, 207 und 325 des Vertrags über die Arbeitsweise der Europäischen Union (AEUV) und Artikel 31 des Vertrags zur Gründung der Europäischen Atomgemeinschaft (Euratom-Vertrag). Diese Artikel bieten die Rechtsgrundlage für die Verbesserung der Durchsetzung des Unionsrechts

i) durch die Einführung neuer Bestimmungen zum Hinweisgeberschutz zwecks Stärkung des reibungslosen Funktionierens des Binnenmarkts, der ordnungsgemäßen Umsetzung der Unionspolitik in den Bereichen Produktsicherheit, Verkehrssicherheit, Umweltschutz, nukleare Sicherheit, Lebensmittel- und Futtermittelsicherheit, Gesundheit und Wohlergehen der Tiere, öffentliche Gesundheit, Verbraucherschutz, Wettbewerb, Schutz der Privatsphäre und personenbezogener Daten sowie Sicherheit von Netzen und Informationssystemen, Wettbewerb und finanzielle Interessen der Union

ii) zur Sicherstellung einheitlicher hoher Schutzstandards für Hinweisgeber nach Maßgabe sektorspezifischer EU-Instrumente in Bereichen, für die bereits einschlägige Vorschriften existieren.

• Subsidiarität

Das Ziel, die Durchsetzung des Unionsrechts durch den Hinweisgeberschutz zu verstärken, kann nicht angemessen verwirklicht werden, wenn die Mitgliedstaaten allein oder unkoordiniert handeln. Es wird davon ausgegangen, dass die Fragmentierung des Schutzes auf einzelstaatlicher Ebene weiterhin bestehen wird. Daher werden auch die negativen Auswirkungen dieser Fragmentierung auf die Funktionsweise verschiedener EU-politischer Maßnahmen in den einzelnen Mitgliedstaaten und die auf andere Mitgliedstaaten übergreifenden Folgen weiterhin bestehen bleiben.

Verstöße gegen die EU-Vorschriften für die öffentliche Auftragsvergabe oder gegen die Wettbewerbsregeln führen zu Wettbewerbsverzerrungen auf dem Binnenmarkt, einem Kostenanstieg für Unternehmen und einem für Investitionen weniger attraktiven Umfeld. Durch aggressive Steuerplanung entsteht ein ungerechter Steuerwettbewerb, und den

Daraus geht eindeutig hervor, dass nur durch ein gesetzgeberisches Handeln auf EU-Ebene die Durchsetzung des EU-Rechts verbessert werden kann, indem Mindeststandards für die Harmonisierung des Hinweisgeberschutzes festgelegt werden. Nur durch ein Tätigen der EU kann darüber hinaus für Kohärenz gesorgt und sichergestellt werden, dass die bestehenden sektorspezifischen EU-Vorschriften über den Hinweisgeberschutz angeglichen werden.

- **Verhältnismäßigkeit**

Dieser Vorschlag ist dem Ziel der Stärkung der Durchsetzung des Unionsrechts angemessen und geht nicht über das hierfür erforderliche hinaus.

Erstens werden nur gemeinsame Mindeststandards für den Schutz von Personen festgelegt, die Verstöße in bestimmten Bereichen melden, wenn i) die Durchsetzung verbessert werden muss, ii) unzureichende Meldungen durch Hinweisgeber ein Schlüsselkrit wirken, der die Durchsetzung beeinträchtigt, und iii) Verstöße schwere Schäden des öffentlichen Interesses nach sich ziehen können.

Daher konzentriert er sich auf Bereiche mit einer deutlichen EU-Dimension, in denen die Auswirkungen auf die Durchsetzung am stärksten sind.

Zweitens werden in dem Vorschlag lediglich Mindestschutzstandards festgelegt, d.h. den Mitgliedstaaten steht die Möglichkeit offen, günstigere Bestimmungen über die Rechte der Hinweisgeber einzuführen oder beizubehalten.

Drittens sind die Durchführungs- und Kosten (d. h. die Kosten für die Einrichtung interner Kanäle) für mittlere Unternehmen nicht erheblich, während die Vorteile (größere Unternehmensleistung und weniger Wettbewerbsverzerrung) als wesentlich betrachtet werden können. Abgesehen von bestimmten Ausnahmen bei den Finanzdienstleistungen werden Klein- und Kleinstunternehmen grundsätzlich von der Pflicht ausgenommen, interne Verfahren für Meldungen und deren Weiterverfolgung festzulegen. Es wird davon ausgegangen, dass die Durchführungs- und Kosten für die Mitgliedstaaten begrenzt sein werden, da die Mitgliedstaaten die neue Pflicht auf der Grundlage bereits bestehender, durch den geltenden sektorspezifischen Rechtsrahmen geschaffener Strukturen umsetzen können.

- **Wahl des Instruments**

Im Einklang mit dem Grundsatz der Verhältnismäßigkeit ist eine Richtlinie zur Mindestharmonisierung das geeignete Instrument, um das Potenzial der Meldung von Missständen als Komponente der Durchsetzung des Unionsrechts auszuschöpfen.
3. **ERGEBNISSE DER EX-POST-BEWERTUNG**\(^{25}\), DER KONSULTATION DER INTERESSENTRÄGER UND DER FOLGENABSCHÄTZUNG

- **Konsultation der Interessenträger**
  
  Der Vorschlag basiert auf den Ergebnissen der umfassenden Konsultationsarbeit, die die Kommission im Jahr 2017 im Rahmen der vorstehend genannten zwölfwöchigen offenen öffentlichen Konsultationen, von drei gezielter Konsultationen der Interessenträger, von zwei Workshops mit Experten aus den Mitgliedstaaten und eines Workshops mit Wissenschaftlern und Interessenvertretern durchgeführt hat\(^{26}\).

  Die Kommission hat 5707 Antworten auf die öffentliche Konsultation erhalten. Von diesen Antworten kamen 97 % (5516) von Privatpersonen. Die übrigen 3 % kamen von Personen, die im Namen einer Organisation antworteten (191 Antworten\(^ {27}\)). Zwei Drittel aller Antworten (von Privatpersonen und Organisationen) kamen aus Deutschland und Frankreich (jeweils 43 % und 23 %), aus Spanien kamen insgesamt 7 %, aus Italien und Belgien jeweils 5 % und aus Österreich 6 %. Die übrigen Antworten verteilten sich auf die übrigen Mitgliedstaaten.

  In fast allen Antworten (99,4 %) wurde befürwortet, dass Hinweisgeber geschützt werden sollten, und 96 % drückten eine sehr starke Unterstützung für die Festlegung rechtlich verbindlicher Mindeststandards zum Hinweisegeberschutz im Unionsrecht aus. Die vier wichtigsten Bereiche, in denen ein Hinweisegeberschutz notwendig ist, sind laut den Antworten (i) die Bekämpfung von Betrug und Korruption (95 % der Antwortenden), (ii) die Bekämpfung von Steuerhinterziehung und Steuervermeidung (93 % der Antwortenden), (iii) der Umweltschutz (93 % der Antwortenden) und (iv) der Schutz der öffentlichen Gesundheit und Sicherheit (92 % der Antwortenden).

  In den von der Kommission organisierten Workshops und in Antwort auf die öffentliche Konsultation wiesen einige Mitgliedstaaten darauf hin, dass im Rahmen einer EU-Gesetzgebungsinitiative der Grundsatz der Subsidiarität gewahrt werden müsse.

- **Einholung und Nutzung von Expertenwissen**

  Es wurde eine externe Studie\(^ {28}\) in Auftrag gegeben, um die quantitativen und qualitativen Auswirkungen und Vorteile der Umsetzung eines Hinweisegeberschutzes in verschiedenen Bereichen des Unionsrecht und des nationalen Rechts zu bewerten. Die im Rahmen dieser Studie analysierten Informationen und die daraus gewonnenen Erkenntnisse sind in die Definition des Problems und in die Bewertung der von der Kommission in Betracht gezogenen Optionen eingeflossen.

- **Folgenabschätzung**

  Für diesen Vorschlag wurde eine Folgenabschätzung durchgeführt. Der Ausschuss für Regulierungskontrolle (der „Ausschuss“) legte am 26. Januar 2018 zunächst eine negative

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\(^{25}\) Entfällt.

\(^{26}\) Weitere Details sind in Anhang 2 der Folgenabschätzung zu finden.

\(^{27}\) Über ein Viertel (26 %) der 191 teilnehmenden Organisationen waren nichtstaatliche Organisationen, 22 % waren Unternehmensverbände, 19 % Gewerkschaften, 13 % Unternehmen und 7 % öffentliche Behörden.

\(^{28}\) Der Bericht über die Studie ist in Anhang 13 der Folgenabschätzung zu finden. In Anhang 14 sind die Methoden, Annahmen, Quellen und Qualifikationen der Folgenabschätzung sowie die länderspezifischen Kennzahlen für die Bewertung der Optionen zu finden.
Stellungnahme mit detaillierten Kommentaren vor. Am 5. März legte der Ausschuss eine positive Stellungnahme mit Kommentaren zu der überarbeiteten Fassung der am 15. Februar übermittelten Fassung der Folgenabschätzung vor, die im Abschlussbericht über die Folgenabschätzung Berücksichtigung fanden.

Neben dem Basisszenario (Beibehaltung des Status Quo) wurden vier Optionen bewertet, von denen zwei Optionen verworfen wurden.

Die folgenden beiden Optionen wurden verworfen: (i) Gesetzgebungsinitiative auf Grundlage von Artikel 50 Absatz 2 Buchstabe g AEUV über die Verbesserung der Integrität des Privatsektors durch Einführung von Mindeststandards für die Einrichtung von Meldekanälen und (ii) Gesetzgebungsinitiative auf Grundlage von Artikel 153 Absatz 1 Buchstaben a und b AEUV über die Verbesserung des Arbeitsumfelds zum Schutz der Gesundheit und Sicherheit von Arbeitnehmern und über Arbeitsbedingungen.

Im ersten Fall wäre es nach der Rechtsgrundlage nicht möglich gewesen, den öffentlichen Sektor mit einzubeziehen, und die Verfügbarkeit und das Konzept der externen Meldekanäle (d.h. für die Meldungen an die zuständigen Behörden) sowie die Verfügbarkeit und die Formen des Schutzes von Hinweisgebern vor Repressalien würden der Regelung durch einzelstaatliche Rechtsvorschriften überlassen.

Im zweiten Fall wäre der persönliche Geltungsbereich der Richtlinie auf Arbeitnehmer beschränkt. Andere Kategorien potenzieller Hinweisegeber wie Selbstständige, Auftragnehmer usw., die wegen der Art der vorliegenden Hinweise und der internationalen Standards eine Schlüsselrolle bei der Offenlegung von Gefahren für das öffentliche Interesse oder diesbezüglichen Schädigungen spielen können, und ebenso Schutz vor Repressalien benötigen, blieben unberücksichtigt. Ein derart beschränkter Geltungsbereich würde eine große Lücke im Hinweisgeberschutz auf EU-Ebene darstellen, und zudem wäre diese Initiative, was die Verbesserung der Durchsetzung des Unionsrechts anbelangt, wegen des Ausschlusses wichtiger Kategorien potenzieller Hinweisegeber auch nur beschränkt wirksam. Der begrenzte persönliche Geltungsbereich würde nicht durch einen umfassenderen Schutz ausgeglichen werden, da die Rechtsgrundlage im Gegensatz zu den Optionen, an denen festgehalten wurde, keinen zusätzlichen Schutz bieten würde. Eine Ausweitung des Schutzes auf Situationen, in denen grenzüberschreitende Dimensionen oder andere übergreifenden Auswirkungen keine Rolle spielen, in denen keine Verbindung zum Unionsrecht besteht und in denen keine finanziellen Interessen der EU berührt werden, wäre darüber hinaus ein weitreichender und damit kostspieliger regulatorischer Eingriff durch die EU.

Folgende Optionen wurden geprüft: i) Empfehlung der Kommission mit Leitlinien für die Mitgliedstaaten zu Schlüsselfelementen des Hinweisgeberschutzes, ergänzt durch flankierende Maßnahmen zur Unterstützung der einzelstaatlichen Behörden, ii) Richtlinie zur Einführung eines Hinweisgeberschutzes im Bereich der finanziellen Interessen der Union, ergänzt durch eine Mitteilung für den Aufbau eines politischen Rahmens auf EU-Ebene, einschließlich Maßnahmen zur Unterstützung der einzelstaatlichen Behörden, iii) Richtlinie zur Einführung eines Hinweisgeberschutzes in bestimmten Bereichen (einschließlich der finanziellen Interessen der Union), in denen gegen die unzureichende Meldung durch Hinweisegeber vorgegangen werden muss, um die Durchsetzung des Unionsrechts zu verbessern, da Verstöße zu schweren Schäden des öffentlichen Interesses führen würden, iv) Richtlinie wie unter iii), ergänzt durch eine Mitteilung wie unter ii).

Die letztgenannte Option wurde für diesen Vorschlag ausgewählt. Eine Gesetzgebungsinitiative mit einem derart weiten Geltungsbereich ist besonders dazu geeignet, gegen die derzeitige Fragmentierung vorzugehen und die Rechtssicherheit zu verbessern, um wirksam gegen die unzureichende Meldung vorzugehen und die Durchsetzung des Unionsrechts in allen identifizierten Bereichen, in denen Verstöße schwere Schäden des öffentlichen Interesses nach sich ziehen können, zu verbessern. Die begleitende Mitteilung, in der zusätzliche von der Kommission ins Auge gefasste Maßnahmen und bewährte Verfahren vorgestellt werden, die auf mitgliedstaatlicher Ebene ergriffen werden könnten, wird zu einem wirksamen Hinweisgeberschutz beitragen.

Die bevorzugte Option birgt wirtschaftliche, gesellschaftliche und ökologische Vorteile. Die einzelstaatlichen Behörden werden dabei unterstützt, Betrug und Korruption im Zusammenhang mit dem EU-Haushalt aufzudecken und davor abzuschrecken (die durch diese Risiken bedingten Einnahmeausfälle werden derzeit auf schätzungsweise 179 bis 256 Mrd. EUR jährlich geschätzt). In anderen Bereichen des Binnenmarkts wie der öffentlichen Auftragsvergabe werden die Vorteile für die EU insgesamt auf schätzungsweise 5,8 bis 9,6 Mrd. EUR pro Jahr beziffert. Bei der bevorzugten Option würde zudem die Bekämpfung von Steuervermeidung unterstützt, die für die Mitgliedstaaten und die EU zu infolge von Gewinnverschiebungen entgangenen Steuereinnahmen von schätzungsweise 50 bis 70 Mrd. EUR pro Jahr führt. Durch die Einführung eines soliden Hinweisgeberschutzes werden die Arbeitsbedingungen für 40 % der EU-Arbeitnehmer, die derzeit nicht vor Repressalien geschützt sind, und das Schutzniveau von 20 % der Arbeitnehmer in der EU verbessert. Dadurch werden die Integrität und die Transparenz des privaten und des öffentlichen Sektors verbessert, und es wird ein Beitrag zu fairem Wettbewerb und einheitlichen Wettbewerbsbedingungen auf dem Binnenmarkt geleistet.


- **Effizienz der Rechtsetzung und Vereinfachung**

interne Meldekanäle einzurichten, sind unerheblich. Die durchschnittlichen Kosten für mittlere Unternehmen belaufen sich auf durchschnittliche einmalige Durchführungskosten von schätzungsweise 1374 EUR und durchschnittliche jährliche Betriebskosten von schätzungsweise 1054,6 EUR. Die allgemeine Ausnahme von Klein- und Kleinstunternehmen soll nicht für Unternehmen gelten, die im Bereich der Finanzdienstleistungen tätig oder anfällig für Geldwäsche oder Terrorismusfinanzierung sind.

• Grundrechte

Durch die Steigerung des aktuellen Schutzniveaus für Hinweisgeber wird der Vorschlag positive Auswirkungen auf die Grundrechte haben, insbesondere auf

i) die Meinungsfreiheit und die Informationsfreiheit (Artikel 11 der Charta): Ein unzureichender Schutz von Hinweisgebern vor Repressalien beeinträchtigt sowohl die freie Meinungsausübung der Menschen als auch das Recht auf Zugang zu Informationen und die Medienfreiheit. Durch die Stärkung des Hinweisgeberschutzes und die Klärung der Bedingungen für den Schutz auch für den Fall, dass Informationen der Öffentlichkeit gegenüber offengelegt werden, werden Meldungen an die Medien gefördert und ermöglicht;

ii) das Recht auf faire und angemessene Arbeitsbedingungen (Artikel 30 und 31 der Charta): Durch die Einrichtung von Meldekanälen und die Verbesserung des Schutzes vor Repressalien im Arbeitskontext wird ein höherer Hinweisgeberschutz sichergestellt;

iii) Das Recht auf Achtung ihres Privatlebens, Schutz der personenbezogenen Daten, Gesundheit, Umweltschutz und Verbraucherschutz (Artikel 7, 8, 35, 37 und 38 der Charta) sowie der allgemeine Grundsatz einer guten Verwaltung (Artikel 41) werden ebenfalls insofern gefördert, als der Vorschlag auf die Aufdeckung und die Verhütung von Verstößen abstellt.

Im Allgemeinen wird der Vorschlag dazu führen, dass Verstöße gegen die Grundrechte im Rahmen der Durchsetzung des Unionsrechts in den in seinen Geltungsbereich fallenden Bereichen häufiger gemeldet werden und stärker davor abgeschreckt wird.

Mit dem Vorschlag wird ein ausgewogener Ansatz verfolgt, damit etwaige weitere berührte Rechte vollständig gewahrt werden, darunter das Recht auf Achtung des Privatlebens und der Schutz der personenbezogenen Daten (Artikel 7 und Artikel 8 der Charta) sowohl der Hinweisgebern als auch der von den Berichten betroffenen Personen sowie das Recht letzterer auf die Wahrung der Unschuldsvermutung und die Verteidigungsrechte (Artikel 47 und Artikel 48 der Charta). Ebenso stehen die Auswirkungen auf die unternehmerische Freiheit (Artikel 16 der Charta) im Einklang mit Artikel 52 Absatz 1 der Charta.

4. AUSWIRKUNGEN AUF DEN HAUSHALT

Diese Initiative hat keine Auswirkungen auf den EU-Haushalt.

5. WEITERE ANGABEN

• Umsetzungspläne sowie Monitoring-, Bewertungs- und Berichterstattungsmodalitäten

Die Kommission soll verpflichtet werden, dem Europäischen Parlament und dem Rat jeweils zwei und sechs Jahre nach Ablauf der Umsetzungsfrist einen Bericht über die Umsetzung und Anwendung der vorgeschlagenen Richtlinie zu unterbreiten. Dadurch wird sichergestellt, dass
ein ausreichender Zeitraum zur Verfügung steht, um zu bewerten, wie die vorgeschlagene Richtlinie angewendet wird und welche zusätzlichen Maßnahmen (beispielsweise eine Ausweitung des Hinweisgeberschutzes auf weitere Bereiche) erforderlich sind.

Die Kommission soll zudem spätestens sechs Jahre nach Ablauf der Umsetzungsfrist dem Europäischen Parlament und dem Rat einen Bericht mit einer Bewertung der Auswirkungen der einzelstaatlichen Rechtsvorschriften zur Umsetzung der vorgeschlagene Richtlinie vorlegen müssen. Zu diesem Zweck sind Referenzwerte festgelegt worden, anhand derer sich die Fortschritte bei der Umsetzung und der Anwendung der Richtlinie bewerten lassen sollen (siehe Kapitel 8 der Folgenabschätzung). Der Vorschlag verpflichtet die Mitgliedstaaten, Daten über die Zahl der eingegangenen Hinweisgebermeldungen, über die Zahl der infolge derartiger Meldungen eingeleiteten Verfahren und über die betroffenen Rechtsbereiche sowie die Ergebnisse der Verfahren und ihre wirtschaftlichen Auswirkungen in Form von (Wieder)einziehungen von Mitteln und über gemeldete Repressalien zu sammeln, die dann in den zukünftigen Umsetzungsbericht einfließen und anhand derer die anvisierten Referenzwerte bewertet werden sollen. Diese Daten sollen ihrerseits in die Berichte des Europäischen Amts für Betrugsbekämpfung (OLAF) einfließen und könnten durch die Jahresberichte der Europäischen Staatsanwaltschaft (EUStA) und des EU-Bürgerbeauftragten ergänzt werden.

Zweitens sollen diese Daten durch andere einschlägige Datenquellen ergänzt werden, darunter die Eurobarometer-Umfragen der Kommission über Korruption und die Berichte über die Umsetzung der geltenden sektoralen EU-Rechtsvorschriften über den Hinweisgeberschutz.

• Ausführliche Erläuterung einzelner Bestimmungen des Vorschlags

Der Vorschlag basiert auf der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte zum Recht auf freie Meinungsäußerung, das in Artikel 10 der Europäischen Menschenrechtskonvention 10 (ECHR) verankert ist, und den auf dieser Grundlage vom Europarat in dessen Empfehlung aus dem Jahr 2014 zum Schutz von Whistleblowern aufgestellten Grundsätzen sowie auf weiteren vorstehend genannten internationalen Standards und bewährten Verfahren und EU-Grundrechten und -Vorschriften.

In Kapitel I (Artikel 1-3) wird der Anwendungsbereich der Richtlinie festgelegt und die Begriffsbestimmung vorgenommen.

In Artikel 1 werden die Bereiche aufgelistet, in denen gemäß den vorliegenden Hinweisen Hinweisgeberschutz erforderlich ist, um die Unionsvorschriften zu verschärfen, deren Verletzung schwere Schäden des öffentlichen Interesses nach sich ziehen kann.


Die Begriffsbestimmungen in Artikel 3 basieren auf den Grundsätzen der Empfehlung des Europarats zum Schutz von Whistleblowern. Vor allem die Begriffe „Hinweisgeber“ und „Repressalien“ sind so allgemein wie möglich definiert, um einen wirksamen
Hinweisgeberschutz als Mittel für eine bessere Durchsetzung des Unionsrechts sicherzustellen.

In Kapitel II (Artikel 4-5) wird die Pflicht der Mitgliedstaaten festgelegt, sicherzustellen, dass juristische Personen im privaten und öffentlichen Sektor geeignete interne Meldekanäle und Verfahren für die Entgegennahme und Weiterverfolgung der Meldungen einrichten. Durch diese Pflicht soll sichergestellt werden, dass Informationen zu tatsächlichen oder potenziellen Verstößen gegen das Unionsrecht schnell die Personen erreichen, die nah am Ursprung des Problems und am besten in der Lage sind, dieses zu untersuchen, und über geeignete Befugnisse verfügen, um es gegebenenfalls zu beheben.

In Artikel 4 wird der Grundsatz festgelegt, dass die Pflicht zur Einrichtung interner Meldekanäle im Verhältnis zur Größe der Unternehmen stehen sollte, und dass im Falle von Privatunternehmen die Höhe des von ihren Tätigkeiten ausgehenden Risikos für das öffentliche Interesse berücksichtigt werden muss. Mit Ausnahme von Unternehmen, die im Bereich der Finanzdienstleistungen tätig sind, werden Klein- und Kleinstunternehmen von der Pflicht zur Einrichtung interner Kanäle ausgenommen.

In Artikel 5 werden die Mindeststandards festgelegt, die die internen Meldekanäle und die Verfahren für die Weiterverfolgung der Meldungen erfüllen müssen. Es wird insbesondere festgelegt, dass die Meldekanäle die Vertraulichkeit der Identität des Hinweisgebers wahren müssen, was einen Eckpfeiler des Hinweisgeberschutzes darstellt. Darüber hinaus wird festgelegt, dass die Person oder Stelle, die für die Entgegennahme der Meldungen zuständig ist, eine sorgfältige Weiterverfolgung vornehmen und den Hinweisgeber innerhalb eines angemessenen Zeitrahmens über die Folgemaßnahmen informieren muss. Unternehmen, die bereits über interne Meldeverfahren verfügen, sollen leicht verständliche und zugängliche Informationen zu diesen Verfahren sowie zu Verfahren für externe Meldungen an die zuständigen Behörden bereitstellen müssen.

In Kapitel III (Artikel 6-12) werden die Mitgliedstaaten dazu verpflichtet, sicherzustellen, dass die zuständigen Behörden über externe Meldekanäle und -verfahren für die Entgegennahme und Weiterverfolgung der Meldungen verfügen, und es werden Mindeststandards für diese Kanäle und Verfahren festgelegt.

Gemäß Artikel 6 sollten die Behörden, denen die Mitgliedstaaten die Zuständigkeit übertragen, vor allem unabhängige und autonome externe Meldekanäle einrichten, die einerseits sicher sind und andererseits die Vertraulichkeit, die Weiterverfolgung der Meldungen und die Rückmeldung an den Hinweisgeber innerhalb eines angemessenen Zeitrahmens sicherstellen. In Artikel 7 werden Mindestanforderungen für die Gestaltung der externen Meldekanäle festgelegt. Gemäß Artikel 8 müssen die zuständigen Behörden über speziell geschulte, für die Bearbeitung der Meldungen zuständige Mitarbeiter verfügen, deren Aufgaben ebenfalls in Artikel 8 festgelegt werden.

In Artikel 9 werden die Anforderungen für die externen Meldeverfahren festgelegt, beispielsweise in Bezug auf die weitere Kommunikation mit dem Hinweisgeber, den Zeitrahmen für die Rückmeldung an den Hinweisgeber und die anwendbaren Vertraulichkeitsregelungen. Im Rahmen dieser Verfahren soll insbesondere der Schutz der personenbezogenen Daten sowohl des Hinweisgebers als auch der betroffenen Personen sichergestellt werden. In Artikel 10 wird festgelegt, dass die zuständigen Behörden benutzerfreundliche Informationen über die zur Verfügung stehenden Meldekanäle und die anwendbaren Verfahren für die Entgegennahme von Meldungen und deren Weiterverfolgung veröffentlichen und den Zugang dazu einfach gestalten müssen. Artikel 11 regelt die angemessene Aufbewahrung aller Meldungen. Artikel 12 schreibt eine regelmäßige
Überprüfung der Verfahren für die Entgegennahme und Weiterverfolgung der Meldungen durch die zuständigen einzelstaatlichen Behörden vor.

In Kapitel IV (Artikel 13-18) werden die Mindestanforderungen an den Schutz von Hinweisgebern und der von den Meldungen betroffenen Personen festgelegt.

In Artikel 13 werden die Bedingungen festgelegt, unter denen einem Hinweisgeber Schutz nach Maßgabe dieser Richtlinie geboten werden kann.


Darüber hinaus sollen Hinweisgeber in jedem Fall zunächst die internen Kanäle ausschöpfen müssen; wenn diese Kanäle nicht funktionieren oder davon ausgegangen werden kann, dass sie nicht funktionieren, können sie bei den zuständigen Behörden Meldung erstatten oder als letztes Mittel an die Öffentlichkeit bzw. Medien gehen. Diese Anforderung ist notwendig, damit die Informationen die Personen erreichen, die dazu beitragen können, dass die Risiken für das öffentliche Interesse frühzeitig und wirksam beseitigt werden und ungerechtfertigte Rufschädigungen infolge öffentlicher Offenlegungen verhindert werden. Durch das Vorsehen von Ausnahmen von dieser Vorschrift in Fällen, in denen interne und/oder externe Kanäle nicht funktionieren oder davon ausgegangen werden kann, dass sie nicht ordnungsgemäß funktionieren, wird in Artikel 13 gleichzeitig die Flexibilität geschaffen, die der Hinweisgeber bei der Wahl des am besten geeigneten Kanals je nach den individuellen Umständen des Falls benötigt. Darüber hinaus ermöglicht Artikel 13 den Schutz öffentliche Offenlegungen unter Berücksichtigung demokratischer Prinzipien wie Transparenz und Rechenschaftspflicht sowie von Grundrechten wie der freien Meinungsäußerung und der Medienfreiheit.

Artikel 14 enthält eine nicht erschöpfende Liste der vielen verschiedenen Formen von Repressalien.

In Artikel 15 wird die Anforderung festgelegt, dass Repressalien in all ihren Formen zu verbieten sind, und es werden weitere Maßnahmen festgelegt, die die Mitgliedstaaten ergreifen sollen, um den Schutz von Hinweisgebern sicherzustellen, darunter

- die Schaffung eines einfachen und kostenlosen Zugangs zu unabhängigen Informationen und zu Beratung über die vorhandenen Verfahren und Rechtsmitteln für den Schutz vor Repressalien,
- die Ausnahme von Hinweisgebern von der Haftung für Verstöße gegen vertragliche oder gesetzliche Beschränkungen der Offenlegung von Informationen,
- die Umkehr der Beweislast in Gerichtsverfahren, d.h. die gegen den Hinweisgeber vorgehende Person hat in Fällen, in denen dem ersten Anschein nach eine Repressalie vorliegt, nachzuweisen, dass es sich eben nicht um eine Repressalie handelt,
- die Bereitstellung von angemessenen Abhilfemaßnahmen gegen Repressalien gegen Hinweisgeber, darunter einstweilige Verfügungen bis zum Abschluss des Gerichtsverfahrens gemäß den einzelstaatlichen Rechtsvorschriften,
die Sicherstellung, dass Hinweisgeber in Gerichtsverfahren, die außerhalb des beruflichen Kontexts gegen sie eingeleitet werden (z.B. Verfahren wegen Verleumdung, Verstoß gegen das Urheberrecht oder Verstoß gegen die Vertraulichkeitspflicht), sich zu ihrer Verteidigung darauf berufen können, dass sie eine Meldung oder Offenlegung im Einklang mit der Richtlinie erstattet haben.

In Artikel 16 wird klargestellt, dass die von den Meldungen betroffenen Personen ihre Rechte nach der EU-Grundrechtecharta (die Unschuldsvermutung, das Recht auf wirksame Rechtsmittel und ein faires Verfahren und die Verteidigungsrechte) in vollem Umfang ausüben können.

In Artikel 17 werden wirksame, verhältnismäßige und abschreckende Strafen festgelegt, die notwendig sind,

- um die Wirksamkeit der Vorschriften zum Schutz von Hinweisgebern sicherzustellen, damit Handlungen, die darauf abzielen, Meldungen zu verhindern, sowie Repressalien, mutwillige Verfahren gegen Hinweisgeber und Verstöße gegen die Pflicht zur Wahrung der Vertraulichkeit ihrer Identität bestraft werden und proaktiv vor ihnen abgeschreckt wird, und

- um vor böswilligen und missbräuchlichen Meldungen abzuschrecken, die die Wirksamkeit und Glaubwürdigkeit des gesamten Hinweisgeberschutzsystems beeinträchtigen, und um ungerechtfertigte Schädigungen des Rufes betroffener Personen zu verhindern.


In Kapitel V (Artikel 19-22) werden die Schlussbestimmungen festgelegt.

In Artikel 19 wird vorgesehen, dass die Mitgliedstaaten weiterhin die Möglichkeit besitzen, günstigere Bestimmungen für Hinweisgeber einzuführen oder beizubehalten, sofern diese Bestimmungen nicht mit den Maßnahmen für den Schutz von Hinweisgebern Personen kollidieren. Artikel 20 regelt die Umsetzung der Richtlinie.

RICHTLINIE DES EUROPÄISCHEN PARLAMENTS UND DES RATES

zum Schutz von Personen, die Verstöße gegen das Unionsrecht melden

DAS EUROPÄISCHE PARLAMENT UND DER RAT DER EUROPÄISCHEN UNION —

gestützt auf den Vertrag über die Arbeitsweise der Europäischen Union, insbesondere auf Artikel 16, 33, 43, 50, 53 Absatz 1, 62, 91, 100, 103, 109, 114, 168, 169, 192, 207 und 325 Absatz 4 und auf den Vertrag zur Gründung der Europäischen Atomgemeinschaft, insbesondere auf Artikel 31,
auf Vorschlag der Europäischen Kommission,
nach Zuleitung des Entwurfs des Gesetzgebungsakts an die nationalen Parlamente,
nach Stellungnahme des Europäischen Wirtschafts- und Sozialausschusses\(^{31}\),
nach Stellungnahme des Ausschusses der Regionen\(^{32}\),
nach Stellungnahme des Rechnungshofs\(^{33}\),
gemäß dem ordentlichen Gesetzgebungsverfahren,
in Erwägung nachstehender Gründe:

(1) Personen, die für eine Organisation arbeiten oder im Rahmen ihrer beruflichen Tätigkeiten mit ihr in Kontakt stehen, nehmen eine in diesem Zusammenhang auftretende Gefährdung oder Schädigung des öffentlichen Interesses häufig als Erste wahr. Indem sie ihre Beobachtungen melden, tragen sie entscheidend dazu bei, Gesetzesverstöße aufzudecken und zu unterbinden und das Gemeinwohl zu schützen. Allerdings schrecken potenzielle Hinweisgeber (sogenannte „Whistleblower“) aus Angst vor Repressalien häufig davor zurück, ihre Bedenken oder ihren Verdacht zu melden.

(2) Auf Unionsebene sind Meldungen von Hinweisgebern eine Möglichkeit, wie dem Unionsrecht Geltung verschafft werden kann: Ihre Informationen fließen in die auf nationaler und Unionsebene bestehenden Rechtsdurchsetzungssysteme ein und tragen so dazu bei, dass Verstöße gegen das Unionsrecht wirksam aufgedeckt, untersucht und verfolgt werden.

(3) In bestimmten Politikbereichen können Verstöße gegen das Unionsrecht erhebliche Risiken für das Gemeinwohl bergen und damit das öffentliche Interesse ernsthaft schädigen. Werden in solchen Bereichen Schwächen bei der Rechtsdurchsetzung festgestellt und sind Hinweisgeber in einer privilegierten Position, um Verstöße ans Licht zu bringen, müssen die Hinweisgeber wirksam vor Repressalien geschützt und

\(^{31}\) ABl. C […] vom […], S. […].
\(^{32}\) ABl. C […] vom […], S. […].
\(^{33}\) ABl. C […] vom […], S. […].
effektive Meldesysteme eingerichtet werden, um die Rechtsdurchsetzung zu verbessern.

(4) Derzeit ist der Schutz, den Hinweisegeber in der Europäischen Union erhalten, in den Mitgliedstaaten und Politikbereichen uneinheitlich gestaltet. Die Folgen der von Hinweisegebern aufgedeckten Verstöße gegen das Unionsrecht, die eine grenzüberschreitende Dimension aufweisen, zeigen deutlich, dass ein unzureichender Schutz in einem Mitgliedstaat nicht nur die Funktionsweise der EU-Vorschriften in diesem Land beeinträchtigt, sondern auch für andere Mitgliedstaaten und die Union als Ganzes Konsequenzen nach sich ziehen kann.

(5) Dementsprechend sollten in den Rechtsakten und Politikbereichen, in denen 1) die Rechtsdurchsetzung verbessert werden muss, 2) eine unzureichende Meldung von Verstößen die Rechtsdurchsetzung wesentlich beeinträchtigt und 3) Verstöße gegen das Unionsrecht das Allgemeininteresse ernsthaft gefährden, gemeinsame Mindeststandards zur Gewährleistung eines wirksamen Hinweisegeberschutzes gelten.


(8) Was die Sicherheit der auf dem Binnenmarkt angebotenen Produkte anbelangt, so lassen sich Beweise in erster Linie in den an der Herstellung und am Vertrieb beteiligten Unternehmen sammeln; Meldungen von Hinweisegebern aus solchen Unternehmen haben einen hohen Mehrwert, da sie sehr viel näher an mögliche unlautere oder illegale Herstellungs-, Einfuhr- oder Vertriebspraktiken im Zusammenhang mit unsicheren Produkten herankommen. Daher ist es gerechtfertigt, 

34 Mitteilung von 8.12.2010 „Stärkung der Sanktionsregelungen im Finanzdienstleistungssektor“.


Ein verbesserter Hinweisgeberschutz würde auch dazu beitragen, Verstöße gegen Euratom-Vorschriften für die nukleare Sicherheit, den Strahlenschutz und die verantwortungsvolle und sichere Entsorgung abgebrannter Brennelemente und radioaktiver Abfälle zu verhindern und würde die Durchsetzung der bestehenden Bestimmungen der überarbeiteten Richtlinie über die nukleare Sicherheit in Bezug auf die effektive Sicherheitskultur im Nuklearbereich und insbesondere des Artikels 8b Absatz 2 Buchstabe a fördern, der unter anderem verlangt, dass die zuständige Regulierungsbehörde Managementsysteme einführt, die der nuklearen Sicherheit gebührend Vorrang einräumen; er würde zudem auf allen Ebenen des Personals und der Verwaltung die Fähigkeit fördern, zu hinterfragen, ob die einschlägigen Sicherheitsgrundsätze und -praktiken ihrer Funktion effektiv gerecht werden, und Sicherheitsprobleme rechtzeitig zu melden.

In gleicher Weise können Meldungen von Hinweisgebern entscheidend dazu beitragen, Risiken für die öffentliche Gesundheit und den Verbraucherschutz, die aus andernfalls womöglich unbemerken Verstößen gegen Unionsvorschriften erwachsen, aufzudecken, zu verhindern, einzudämmen oder zu beseitigen. Vor allem im Bereich Verbraucherschutz kann es zu Fällen kommen, in denen Verbraucher durch unsichere Produkte erheblich geschädigt werden können. Daher sollte der Hinweisgeberschutz unter Be zugnahme auf die einschlägigen Vorschriften der Union eingeführt werden, die gemäß den Artikeln 114, 168 und 169 AEUV erlassen wurden.

Der Schutz der Privatsphäre und der personenbezogenen Daten ist ein weiterer Bereich, in dem Hinweisgeber in einer privilegierten Position sind, Verstöße gegen das Unionsrecht, die das öffentliche Interesse ernsthaft gefährden können, ans Licht zu

43 ABl. L 84 vom 19.7.2016, S. 1.


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Handlungen, die gegen die Körperschaftsteuer-Vorschriften verstoßen, und Vereinbarungen, deren Zweck darin besteht, einen Steuvorteil zu erlangen und rechtliche Verpflichtungen zu umgehen, und die dem Ziel oder Zweck der geltenden Körperschaftsteuer-Vorschriften zuwiderlaufen, beeinträchtigen das reibungslose Funktionieren des Binnenmarkts. Sie können zu unlauterem Steuerwettbewerb und umfassender Steuerflucht führen, die Wettbewerbsbedingungen für Unternehmen zurverren und Steuereinbußen für die Mitgliedstaaten und den Unionshaushalt insgesamt nach sich ziehen. Der Hinweisegeberschutz ergänzt die jüngsten Initiativen der Kommission zur Verbesserung der Transparenz und des Informationsaustauschs im Steuerbereich und zur Schaffung eines gerechternen Steuerumfelds innerhalb der Union, um die Effizienz der Mitgliedstaaten bei der Ermittlung steuervermeidender und/oder missbräuchlicher Vereinbarungen zu erhöhen, die ansonsten unbemerkt bleiben könnten, und um solchen Vereinbarungen entgegenzuwirken.


Wird ein neuer Unionsrechtsakt erlassen, bei dem der Hinweisegeberschutz von Relevanz ist und zu einer wirksameren Durchsetzung beitragen kann, sollte geprüft werden, ob eine Änderung des Anhangs der vorliegenden Richtlinie angezeigt ist, um ihren Anwendungsbereich auf den betreffenden Rechtsakt auszudehnen.

Die vorliegende Richtlinie sollte den Arbeitnehmerschutz bei der Meldung von Verstößen gegen das EU-Arbeitsrecht unberührt lassen. Im Bereich der Sicherheit und des Gesundheitsschutzes am Arbeitsplatz verpflichtet Artikel 11 der Rahmenrichtlinie 89/391/EWG die Mitgliedstaaten schon jetzt, dafür zu sorgen, dass Arbeitnehmern oder Arbeitnehmervertretern keine Nachteile entstehen, wenn sie den Arbeitgeber um geeignete Maßnahmen ersuchen und ihm Vorschläge unterbreiten, um Gefahren für die Arbeitnehmer vorzubeugen und/oder Gefahrenquellen auszuschalten. Die Arbeitnehmer und ihre Vertreter sind berechtigt, die zuständigen nationalen Behörden...
auf Probleme hinzuweisen, wenn sie der Auffassung sind, dass die vom Arbeitgeber getroffenen Maßnahmen und eingesetzten Mittel nicht ausreichen, um die Sicherheit und den Gesundheitsschutz zu gewährleisten.


(22) Personen, die Informationen über eine Gefährdung oder Schädigung des öffentlichen Interesses im Zusammenhang mit ihren beruflichen Tätigkeiten melden, machen von ihrem Recht auf freie Meinungsäußerung Gebrauch. Das Recht auf freie Meinungsausserung, das in Artikel 11 der Charta der Grundrechte der Europäischen Union („Charta“) und in Artikel 10 der Europäischen Menschenrechtskonvention (EMRK) verankert ist, umfasst auch die Freiheit und die Pluralität der Medien.

(23) Dementsprechend stützt sich diese Richtlinie auf die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte zum Recht auf freie Meinungsaussprache und auf die auf dieser Grundlage vom Europarat in seiner Empfehlung zum Schutz von Whistleblower aus dem Jahr 201451 entwickelten Grundsätze.

(24) Personen benötigen besonderen Rechtsschutz, wenn sie Informationen melden, die sie im Rahmen ihrer beruflichen Tätigkeit erhalten, und sich damit dem Risiko von Repressalien am Arbeitsplatz aussetzen (z. B. aufgrund einer Verletzung der Vertraulichkeits- oder Loyalitätspflicht). Einen solchen Schutz benötigen sie aufgrund ihrer wirtschaftlichen Abhängigkeit von der Person, auf die sie de facto beruflich angewiesen sind. Liegt jedoch kein beruflich bedingtes Machtungleichgewicht vor (z. B. im Fall gewöhnlicher Beschwerden oder unbeteiligter Dritter), so ist kein Schutz vor Repressalien erforderlich.


(26) Schutz sollte zuallererst für „Arbeitnehmer“ im Sinne des Artikels 45 AEUV in der Auslegung durch den Gerichtshof der Europäischen Union52 gelten, d. h. für Personen,

die während eines bestimmten Zeitraums Dienstleistungen für und unter der Leitung einer anderen Person erbringen, für die sie eine Vergütung erhalten. Schutz sollte daher auch Arbeitnehmern in atypischen Beschäftigungsverhältnissen, einschließlich Teilzeitbeschäftigten und befristet Beschäftigten, sowie Personen gewährt werden, die einen Arbeitsvertrag oder ein Arbeitsverhältnis mit einem Leiharbeitsunternehmen geschlossen haben; bei derartigen Arbeitsbeziehungen ist es häufig schwierig, Standardschutzbestimmungen gegen unfaire Behandlung anzuwenden.


(29) Um eine ernsthafte Schädigung des öffentlichen Interesses wirksam aufdecken und verhindern zu können, sollte der Hinweisgeberschutz nicht nur bei der Meldung rechtswidriger Handlungen zur Anwendung kommen, sondern auch bei der Meldung von Rechtmissbrauch, also Handlungen oder Unterlassungen, die in formaler Hinsicht nicht als rechtswidrig erscheinen, die jedoch mit dem Ziel oder Zweck der einschlägigen Rechtsvorschriften unvereinbar sind.

(30) Um Verstöße gegen das Unionsrecht wirksam zu unterbinden, sollten auch Personen geschützt werden, die Informationen zu potenziellen Verstößen melden, die zwar noch nicht eingetreten sind, aber mit deren Eintreten zu rechnen ist. Aus denselben Gründen

ist der Schutz auch für Personen gerechtfertigt, die zwar keine eindeutigen Beweise beibringen, aber begründete Bedenken oder einen begründeten Verdacht äußern. Demgegenüber sollte bei der Meldung von Informationen, die bereits öffentlich sind oder bei denen es sich um unbegründete Spekulationen oder Gerüchte handelt, kein Schutz gewährt werden.

(31) Damit der Hinweisgeber Rechtsschutz erhalten kann, muss ein enger (kausalen) Zusammenhang zwischen der Meldung und der unmittelbar oder mittelbar von dem Hinweisgeber erlittenen Benachteiligung (Repressalie) bestehen. Ein wirksamer Schutz von Hinweisgebern als Mittel zur besseren Durchsetzung des Unionsrechts erfordert eine weit gefasste Definition des Begriffs Repressalien, die jede benachteiligende Handlung oder Unterlassung im beruflichen Kontext einschließt.

(32) Schutz vor Repressalien als Mittel zum Schutz der Freiheit der Meinungsäußerung und der Medienfreiheit sollte Personen gewährt werden, die Informationen über Handlungen oder Unterlassungen innerhalb einer Organisation melden (interne Meldungen) oder einer externen Behörde zukommen lassen (externe Meldungen), sowie Personen, die diese Informationen publik machen (etwa direkt über Web-Plattformen und soziale Medien oder indirekt über die Medien, gewählte Amtsträger, zivilgesellschaftliche Organisationen, Gewerkschaften oder Berufsverbände).


(34) Es ist Sache der Mitgliedstaaten, die zuständigen Behörden zu benennen, die befugt sind, Meldungen über unter diese Richtlinie fallende Verstöße entgegenzunehmen und geeignete Folgemaßnahmen zu ergreifen. Dabei kann es sich um Regulierungs- oder Aufsichtsstellen in den betreffenden Bereichen, Strafverfolgungsbehörden, Korruptionsbekämpfungsstellen und Ombudsleute handeln. Diese zuständigen Behörden müssen über die erforderlichen Kapazitäten und Befugnisse verfügen, um im Einklang mit ihrem Mandat die Stichhaltigkeit der in der Meldung erhobenen Vorwürfe zu beurteilen und die gemeldeten Verstöße abzustellen, etwa durch Einleitung einer Untersuchung, Strafverfolgung oder Einziehung von Mitteln oder durch sonstige geeignete Abhilfemaßnahmen.

(35) In bestimmten Bereichen wie Marktmisbrauch\(^{53}\), Zivilluftfahrt\(^{54}\) und Sicherheit von Offshore-Erdöl- und -Erdgasaktivitäten\(^{55}\) sieht das Unionsrecht schon jetzt die Einrichtung interner und externer Meldekanäle vor. Die nach dieser Richtlinie verpflichtend einzurichtenden Kanäle sollten so weit wie möglich auf den bestehenden Kanälen aufbauen, die in einschlägigen Unionsrechtsakten vorgesehen sind.

(36) Einige Einrichtungen und sonstige Stellen der Union, darunter das Europäische Amt für Betrugsbekämpfung (OLAF), die Europäische Agentur für die Sicherheit des

\(^{53}\) A. a. O.


Seeverkehrs (EMSA), die Europäische Agentur für Flugsicherheit (EASA) und die Europäische Arzneimittelagentur (EMA), verfügen über externe Kanäle und Verfahren für den Empfang von Meldungen über Verstöße, die in den Anwendungsbereich dieser Richtlinie fallen, wobei in erster Linie die Vertraulichkeit der Identität des Hinweisgebers gewährleistet wird. Diese Richtlinie lässt solche eventuell vorhandenen externen Meldekanäle und -verfahren unberührt, gewährleistet jedoch, dass Personen, die bei den Einrichtungen und sonstigen Stellen der Union Verstöße melden, in der gesamten Union von gemeinsamen Mindestschutzstandards profitieren.

(37) Damit Verstöße gegen das Unionsrecht wirksam aufgedeckt und unterbunden werden können, müssen die einschlägigen Informationen rasch zu denjenigen gelangen, die der Ursache des Problems am nächsten sind, der Meldung am ehesten nachgehen können und über entsprechende Befugnisse verfügen, um dem Problem, soweit möglich, abzuhelfen. Dies setzt voraus, dass juristische Personen im privaten und im öffentlichen Sektor geeignete interne Verfahren für die Entgegennahme von Meldungen und entsprechende Folgemaßnahmen einrichten.


(40) Sehen juristische Personen des Privatrechts keine internen Meldekanäle vor, sollten Hinweisgeber externe Meldungen direkt an die zuständigen Behörden richten können und nach Maßgabe dieser Richtlinie vor Repressalien geschützt sein.

(41) Um insbesondere die Einhaltung der Vorschriften für die Vergabe öffentlicher Aufträge im öffentlichen Sektor zu gewährleisten, sollten alle juristischen Personen des öffentlichen Rechts auf lokaler, regionaler und nationaler Ebene entsprechend ihrer Größe zur Einrichtung interner Meldekanäle verpflichtet sein. Bieten kleine öffentliche Einrichtungen keine internen Kanäle an, so können die Mitgliedstaaten interne Meldungen auf höherer Verwaltungsebene (d. h. auf regionaler oder zentraler Ebene) vorsehen.

(42) Solange die Vertraulichkeit der Identität des Hinweisgebers gewahrt bleibt, kann jede juristische Person des privaten und des öffentlichen Rechts selbst festlegen, über

welche Art von Kanälen Meldungen eingehen können, sei es auf persönlichem Weg, auf dem Postweg, über einen Beschwerde-Briefkasten, über eine Telefon-Hotline oder über eine Online-Plattform (Intranet oder Internet). Die Meldekanäle sollten jedoch nicht auf solche beschränkt sein, bei denen die Vertraulichkeit der Identität der meldenden Person nicht garantiert werden kann, etwa auf persönliche Meldungen oder Beschwerde-Briefkästen.


(44) Interne Meldeverfahren sollten juristische Personen des Privatrechts in die Lage versetzen, nicht nur den Meldungen ihrer Mitarbeiter bzw. der Mitarbeiter ihrer Tochterunternehmen oder verbundenen Unternehmen (d. h. der Gruppe) unter vollständiger Wahrung der Vertraulichkeit nachzugehen, sondern soweit möglich auch den Meldungen der Mitarbeiter von Vertretern und Lieferanten der Gruppe sowie von Personen, die im Rahmen ihrer beruflichen Zusammenarbeit mit dem Unternehmen und der Gruppe Informationen erhalten.

(45) Welche Personen oder Dienststellen innerhalb einer juristischen Person des Privatrechts am besten geeignet sind, Meldungen entgegenzunehmen und Folgemaßnahmen zu ergreifen, hängt von der Struktur des Unternehmens ab; ihre Funktion sollte jedenfalls Interessenkonflikte ausschließen und ihre Unabhängigkeit gewährleisten. In kleineren Unternehmen könnte diese Aufgabe durch einen Mitarbeiter in Doppelfunktion erfüllt werden, der direkt der Unternehmensleitung berichten kann, etwa ein Leiter der Compliance- oder Personalabteilung, ein Rechts- oder Datenschutzbeauftragter, ein Finanzvorstand, ein Auditverantwortlicher oder ein Vorstandsmitglied.

(46) Bei internen Meldungen trägt die Qualität und Transparenz der Informationen, die über die Folgemaßnahmen zu einer Meldung verbreitet werden, wesentlich dazu bei, Vertrauen in die Wirksamkeit des allgemeinen Hinweisgeberschutzes aufzubauen und die Wahrscheinlichkeit weiterer unnötiger Meldungen oder einer Offenlegung zu senken. Der Hinweisgeber sollte innerhalb eines angemessenen Zeitrahmens über die geplanten oder ergriffenen Folgemaßnahmen zu der Meldung informiert werden (z. B. Verfahrensabschluss aufgrund mangelnder Beweise oder anderer Gründe, Einleitung interner Nachforschungen, eventuell unter Angabe der Ergebnisse und/oder Maßnahmen zur Behebung des Problems, Befassung einer zuständigen Behörde zwecks weiterer Untersuchung), soweit diese Informationen die Nachforschungen oder Untersuchungen nicht berühren und die Rechte der von der Meldung betroffenen Person nicht beeinträchtigen. Ein solcher angemessener Zeitrahmen sollte drei Monate nicht überschreiten. Werden die geeigneten Folgemaßnahmen erst noch festgelegt, so sollte der Hinweisgeber auch darüber informiert werden; zudem sollte ihm mitgeteilt werden, welche weiteren Rückmeldungen er erwarten kann.

(47) Personen, die Verstöße gegen das Unionsrecht melden wollen, sollten eine fundierte Entscheidung darüber treffen können, ob, wann und auf welche Weise sie Meldung erstatten. Private und öffentliche Stellen, die über intern Meldeverfahren verfügen, stellen Informationen zu diesen Verfahren sowie über Verfahren für externe Meldungen an die jeweils zuständigen Behörden bereit. Diese Informationen müssen leicht verständlich und leicht zugänglich sein, und zwar – soweit möglich – auch für

(48) Eine wirksame Aufdeckung und Verhütung von Verstößen gegen das Unionsrecht setzt voraus, dass potenzielle Hinweisgeber die Informationen in ihrem Besitz einfach und unter vollständiger Wahrung der Vertraulichkeit an die zuständigen Behörden weitergeben können, die in der Lage sind, das Problem zu untersuchen und soweit wie möglich zu beheben.


(50) Folgemaßnahmen und Rückmeldungen sollten innerhalb eines angemessenen Zeitrahmens erfolgen, da eventuelle in der Meldung genannte Probleme unverzüglich angegangen werden müssen und eine unnötige Offenlegung vermieden werden muss. Der Zeitrahmen sollte nicht mehr als drei Monate umfassen, kann jedoch auf sechs Monate ausgedehnt werden, wenn die besonderen Umstände des Falls dies erfordern, insbesondere wenn die Art und die Komplexität des Gegenstands der Meldung eine langwierige Untersuchung nach sich zieht.

(51) Soweit dies nach nationalem Recht oder Unionsrecht vorgesehen ist, sollten die zuständigen Behörden Fälle oder relevante Informationen an die zuständigen Einrichtungen und sonstigen Stellen der Union übermitteln, einschließlich – für die Zwecke dieser Richtlinie – an das Europäische Amt für Betrugsbekämpfung (OLAF) und die Europäische Staatsanwaltschaft (EUSTA); dies gilt unbeschadet der Möglichkeit des Hinweisgebers, sich direkt an diese Einrichtungen und sonstigen Stellen der Union zu wenden.

(52) Um eine wirksame Kommunikation mit ihren zuständigen Mitarbeitern zu gewährleisten, sollten die zuständigen Behörden spezifische nutzerfreundliche Kommunikationskanäle einrichten und nutzen, die von ihrem normalen System für Beschwerden der Öffentlichkeit getrennt sind und sowohl schriftliche als auch mündliche Kommunikation auf elektronischem und nicht elektronischem Weg erlauben.

(53) Für die Bearbeitung der Meldungen, die Kommunikation mit dem Hinweisgeber und eine geeignete Nachverfolgung der Meldungen brauchen die zuständigen Behörden speziell geschulte Mitarbeiter, die auch mit den geltenden Datenschutzvorschriften vertraut sind.
Personen, die Verstöße melden wollen, sollten eine fundierte Entscheidung darüber treffen können, ob, wann und auf welche Weise sie Meldung erstatten. Daher sollten die zuständigen Behörden in öffentlicher und leicht zugänglicher Weise Informationen zu ihren verfügbaren Meldekanälen, den anwendbaren Verfahren und den innerhalb der Behörde zuständigen Mitarbeitern bereitstellen. Um Meldungen zu fördern und Hinweisegeber nicht abzuschrecken, sollten sämtliche Informationen zu Meldungen transparent, leicht verständlich und zuverlässig sein.

Die Mitgliedstaaten sollten sicherstellen, dass die zuständigen Behörden angemessene Schutzverfahren für die Bearbeitung der Verstoßmeldungen und den Schutz der personenbezogenen Daten der in der Meldung genannten Personen eingerichtet haben. Diese Verfahren sollen gewährleisten, dass die Identität aller Hinweisegeber, betroffenen Personen und in der Meldung genannten Dritten (z. B. Zeugen oder Kollegen) in allen Verfahrensstufen geschützt ist. Diese Verpflichtung sollte unbeschadet der Notwendigkeit und Verhältnismäßigkeit der Verpflichtung zur Offenlegung von Informationen gelten, sofern dies durch das Unionsrecht oder das nationale Recht gefordert ist; ferner sollte sie geeigneten Garantien nach Maßgabe der einschlägigen Rechtsvorschriften unterliegen, auch im Zusammenhang mit Ermittlungen oder Gerichtsverfahren oder zum Schutz der Freiheiten anderer, einschließlich der Verteidigungsrechte der betroffenen Person.

Die speziell für die Bearbeitung der Meldungen zuständigen Mitarbeiter wie auch andere Mitarbeiter der zuständigen Behörde, die Zugang zu den von einer Person gemeldeten Informationen haben, unterliegen bei der Übermittlung von Daten innerhalb und außerhalb der zuständigen Behörde ihrer beruflichen Schweigepflicht sowie der Pflicht zur Wahrung der Vertraulichkeit, und zwar auch dann, wenn eine zuständige Behörde im Zusammenhang mit der Meldung von Verstößen eine Untersuchung oder ein Ermittlungsverfahren bzw. in der Folge Durchsetzungsmaßnahmen einleitet.

Die Mitgliedstaaten sollten dafür Sorge tragen, dass Verstoßmeldungen in angemessener Weise dokumentiert werden, jede Meldung innerhalb der zuständigen Behörde abrufbar ist und Informationen aus Meldungen bei Durchsetzungsmaßnahmen gegebenenfalls als Beweismittel verwendbar sind.


Die Angemessenheit und Zweckdienlichkeit dieser Verfahren der zuständigen Behörden sollte anhand regelmäßiger Überprüfungen und anhand eines Austauschs der Behörden über bewährte Verfahren gewährleistet werden.

Hinweisegeber sollten nur dann geschützt sein, wenn sie zum Zeitpunkt der Meldung angesichts der Umstände und der verfügbaren Informationen berechtigten Grund zu
der Annahme haben, dass die von ihnen geschilderten Sachverhalte der Wahrheit entsprechen. Solange nicht das Gegenteil bewiesen wird, sollte die Vermutung gelten, dass ein berechtigter Grund für diese Annahme besteht. Dies ist eine wichtige Schutzvorkehrung gegen böswillige oder missbräuchliche Meldungen, die gewährleistet, dass Personen keinen Schutz erhalten, wenn sie wissentlich falsche oder irreführende Informationen meldet. Gleichzeitig wird damit gewährleistet, dass der Schutz auch dann gilt, wenn ein Hinweisgeber in gutem Glauben ungenaue Informationen meldet. In ähnlicher Weise sollten Hinweisgeber Schutz im Rahmen dieser Richtlinie erhalten, wenn sie hinreichenden Grund zu der Annahme haben, dass die gemeldeten Informationen in den Anwendungsbereich der Richtlinie fallen.


(62) In der Regel sollten Hinweisgeber zunächst die ihnen zur Verfügung stehenden internen Kanäle nutzen und ihrem Arbeitgeber Meldung erstatten. Allerdings kann es vorkommen, dass keine internen Kanäle bestehen (im Fall von Einrichtungen, die auf der Grundlage dieser Richtlinie oder des anwendbaren nationalen Rechts nicht verpflichtet sind, solche Kanäle einzurichten), dass ihre Verwendung nicht zwingend vorgeschrieben ist (etwa für Personen, die nicht in einem Beschäftigungsverhältnis stehen) oder dass sie zwar verwendet werden, aber nicht ordnungsgemäß funktionieren (etwa weil die Meldung nicht innerhalb eines angemessenen Zeitrahmens bearbeitet wurde oder trotz positiver Untersuchungsergebnisse keine Maßnahmen ergriffen wurden, um den Verstoß zu beheben).

(63) In anderen Fällen ist davon auszugehen, dass die internen Kanäle nicht angemessen funktionieren, wenn z. B. Hinweisgeber berechtigten Grund zu der Annahme haben, dass sie im Zusammenhang mit der Meldung Repressalien erleiden würden, die Vertraulichkeit nicht gewährleistet wäre, in einem beruflichen Kontext der letztlich verantwortliche Mitarbeiter an dem Verstoß beteiligt ist, der Verstoß verschleiert werden könnte, die Beweismittel beiseite geschafft oder vernichtet werden könnten, die Wirksamkeit von Untersuchungsmaßnahmen durch die zuständigen Behörden gefährdet sein könnte oder dringender Handlungsbedarf besteht (etwa aufgrund einer

57 Ob Repressalien gegenüber Hinweisgebern, die Informationen publik machen, die freie Meinungsausübung in einer für eine demokratische Gesellschaft ungeüblichen Weise beeinträchtigen, kann unter anderem anhand des Kriteriums bestimmt werden, ob den Personen, die die Informationen publik machen, alternative Kanäle für die Offenlegung zur Verfügung stehen; siehe zum Beispiel die Entscheidung des EGMR in der Rechtssache Guja gegen Moldawien [GC], Beschwerde Nr. 14277/04, vom 12. Februar 2008.
unmittelbar drohenden erheblichen und besonderen Gefahr für das Leben, die Gesundheit oder die Sicherheit von Menschen oder für die Umwelt). In all diesen Fällen sollen Hinweisgeber, die ihre Meldung extern an die zuständigen Behörden oder gegebenenfalls an die zuständigen Einrichtungen und sonstigen Stellen der Union übermitteln, geschützt werden. Der Schutz muss auch in Fällen gewährt werden, in denen Hinweisgeber Meldungen nach dem EU-Recht direkt an die zuständigen nationalen Behörden oder an die Einrichtungen und sonstigen Stellen der Union richten können, beispielsweise im Zusammenhang mit gegen den Unionsshaushalt gerichtetem Betrug, zur Verhütung und Aufdeckung von Geldwäsche und Terrorismusfinanzierung oder im Finanzdienstleistungsbereich.

(64) Personen, die Informationen unmittelbar publik machen, sollten in folgenden Fällen ebenfalls geschützt werden: Wenn ein Verstoß nicht behoben wird (z. B. wurde er nicht ordnungsgemäß bewertet oder untersucht oder es wurden keine Abhilfemaßnahmen getroffen), obwohl er intern und/oder extern unter gestaffelter Nutzung der verfügbaren Kanäle gemeldet wurde; wenn die Hinweisgeber berechtigten Grund zu der Annahme haben, dass zwischen dem Urheber des Verstoßes und der zuständigen Behörde geheime Absprachen bestehen, dass Beweismittel kaschiert oder vernichtet werden könnten oder dass die Wirksamkeit von Untersuchungsmaßnahmen durch die zuständigen Behörden gefährdet sein könnte; bei unmittelbarer und offenkundiger Gefahr für das öffentliche Interesse oder bei Gefahr einer irreversible Schädigung etwa der körperlichen Unversehrtheit.


(67) Ein potenzieller Hinweisgeber, der sich nicht sicher ist, wie er Meldung erstatten kann oder ob er letztendlich geschützt werden wird, verliert möglicherweise den Mut, Meldung zu erstatten. Die Mitgliedstaaten sollten daher sicherstellen, dass die allgemeine Öffentlichkeit ohne Weiteres Zugang zu benutzerfreundlichen Informationen zum Thema Whistleblowing erhält. Es sollten individuelle, unparteiische und vertrauliche Beratungsmöglichkeiten kostenlos verfügbar sein, beispielsweise zu der Frage, ob die gemeldeten Informationen unter die geltenden
Bestimmungen für den Schutz von Hinweisgebern fallen, welcher Meldekanal am besten geeignet ist und nach welchen alternativen Verfahren vorgegangen werden kann, falls die Informationen nicht unter die geltenden Bestimmungen fallen (wegweisende Hinweise). Derartige Beratungsmöglichkeiten können dazu beitragen, dass Meldungen über geeignete Kanäle und in verantwortungsvoller Weise vorgenommen und Verstöße und Fehlverhalten zeitnah aufgedeckt oder gar verhindert werden.

(68) In einigen nationalen Regelungen ist in bestimmten Fällen vorgesehen, dass sich Hinweisegeber, die sich Repressalien ausgesetzt sehen, bescheinigen lassen können, dass sie die geltenden rechtlichen Vorgaben erfüllen. Ungeachtet dieser Möglichkeiten sollten sie einen wirksamen Zugang zu einer gerichtlichen Überprüfung haben, wobei es den Gerichten obliegt, auf der Grundlage aller einzelnen Umstände des jeweiligen Falles zu entscheiden, ob sie die geltenden rechtlichen Vorgaben erfüllen.


(70) Für Repressalien werden als Gründe oftmals andere Ursachen als die erfolgte Meldung angeführt, und es kann für Hinweisegeber sehr schwierig sein, den kausalen Zusammenhang zwischen der Meldung und den Repressalien nachzuweisen; den Personen, die die Repressalien ergreifen, stehen hingegen unter Umständen größere Möglichkeiten und Ressourcen zur Verfügung, um ihr eigenes Vorgehen und die dahinter stehende Logik zu dokumentieren. Wenn ein Hinweisegeber glaubhaft macht, dass er Informationen im Einklang mit dieser Richtlinie gemeldet oder offengelegt hat, sollte die Beweislast auf die Person übergehen, die die Benachteiligung vorgenommen hat, d. h. diese sollte dann nachweisen müssen, dass ihr Vorgehen in keiner Weise mit der erfolgten Meldung oder Offenlegung in Verbindung stand.


(72) Die Art des Rechtsbehelfs kann dabei je nach Rechtsordnung variieren, aber sie sollte in jedem Fall eine möglichst umfassende und wirksame Abhilfe ermöglichen. Die
verfügbaren Abhilfen sollten keine abschreckende Wirkung auf potenzielle Hinweisgeber haben. Wenn alternativ zu einer Wiedereinstellung im Fall einer Entlassung auch die Möglichkeit einer Entschädigung besteht, kann dies dazu führen, dass insbesondere größere Organisationen in der Praxis systematisch von dieser Alternative Gebrauch machen - was auf potenzielle Hinweisgeber abschreckend wirkt.

Besonders wichtig für Hinweisgeber ist ein einstweiliger Rechtsschutz während laufender, mitunter langwieriger Gerichtsverfahren. Ein einstweiliger Rechtsschutz kann insbesondere dann vonnöten sein, wenn es darum geht, Drohungen oder anhaltende Repressalien (beispielsweise Mobbing am Arbeitsplatz) sowie deren Versuch zu unterbinden, oder Vergeltungsmaßnahmen wie eine Entlassung, die sich nach einem längeren Zeitraum unter Umständen nur schwer wieder rückgängig machen lässt und den Hinweisgeber finanziell ruinieren kann, zu verhindern, denn gerade diese Aussicht kann einen potenziellen Hinweisgeber ernsthaft entmutigen.


Für Hinweisgeber, die sich auf gerichtlichem Wege gegen erlittene Repressalien zur Wehr setzen, können die betreffenden Rechtskosten eine erhebliche Belastung darstellen. Wenngleich sie diese Kosten am Ende des Verfahrens möglicherweise erstattet bekommen, sind sie unter Umständen nicht in der Lage, diese Kosten vorab auszulegen; dies ist insbesondere dann der Fall, wenn sie arbeitslos sind oder auf eine schwarze Liste gesetzt wurden. Die Prozesskostenhilfe in Strafverfahren, insbesondere nach Maßgabe der Richtlinie (EU) 2016/1919 des Europäischen Parlaments und des Rates59, und eine allgemeine Unterstützung für Personen, die sich in ernsten finanziellen Nöten befinden, könnten in bestimmten Fällen zu einer wirksamen Durchsetzung des Rechts dieser Personen auf Schutz beitragen.


(77) Personen, die infolge einer Meldung oder Offenlegung ungenauer oder irreführender Informationen eine direkte oder indirekte Benachteiligung erfahren, sollten weiterhin den ihnen nach allgemeinem Recht zustehenden Schutz genießen und auf die nach allgemeinem Recht verfügbaren Rechtsbehelfe zurückgreifen können. In Fällen, in denen diese ungenauen oder irreführenden Informationen vorsätzlich und wissentlich gemeldet oder offenlegten wurden, sollte die betroffene Person Anspruch auf Schadensersatz nach nationalem Recht haben.


(80) Durch diese Richtlinie werden Mindeststandards eingeführt; die Mitgliedstaaten sollten gleichwohl die Möglichkeit haben, für Hinweisgeber günstigere Bestimmungen als jene dieser Richtlinie einzuführen oder beizubehalten, sofern diese die Maßnahmen zum Schutz der betroffenen Personen unberührt lassen.

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Der sachliche Anwendungsbereich dieser Richtlinie erstreckt sich auf Bereiche, in denen die Einführung eines Schutzes von Hinweisgebern gerechtfertigt und angesichts der bisher vorliegenden Erkenntnisse geboten scheint. Dieser sachliche Anwendungsbereich kann auf weitere Bereiche oder Rechtsakte der Union ausgeweitet werden, falls sich im Lichte etwaiger neuer Erkenntnisse oder der Ergebnisse einer Evaluierung dieser Richtlinie die Notwendigkeit ergibt, die Durchsetzung dieser Richtlinie zu verstärken.

In allen nachfolgenden Rechtsvorschriften mit Relevanz für diese Richtlinie sollte gegebenenfalls angegeben werden, dass diese Richtlinie Anwendung finden wird. Falls notwendig, sollten Artikel 1 und der Anhang geändert werden.


Der Europäische Datenschutzbeauftragte wurde gemäß Artikel 28 Absatz 2 der Verordnung (EG) Nr. 45/2001 angehört und hat am [...] eine Stellungnahme abgegeben —

HABEN FOLGENDE RICHTLINIE ERLASSEN:

**KAPITEL I**

**ANWENDUNGSBEREICH UND BEGRIFFSBESTIMMUNGEN**

*Artikel 1*

**Sachlicher Anwendungsbereich**

(1) Um die Durchsetzung des Rechts und der Politik der Union in bestimmten Bereichen zu verbessern, werden durch diese Richtlinie gemeinsame Mindeststandards für den Schutz von Personen festgelegt, die folgende rechtswidrige Handlungen oder Fälle von Rechtsmissbrauch melden:

a) Verstöße, die in den Anwendungsbereich der im Anhang (Teil I und Teil II) aufgeführten Rechtsakte der Union fallen, und folgende Bereiche betreffen:

   i) öffentliches Auftragswesen,
   ii) Finanzdienstleistungen sowie Verhütung von Geldwäsche und Terrorismusfinanzierung,
   iii) Produktsicherheit,
   iv) Verkehrssicherheit,
   v) Umweltschutz,
   vi) kerntechnische Sicherheit,
   vii) Lebensmittel- und Futtermittelsicherheit, Tiergesundheit und Tierschutz,
   viii) öffentliche Gesundheit,
   ix) Verbraucherschutz,
   x) Schutz der Privatsphäre und personenbezogener Daten sowie Sicherheit von Netz- und Informationssystemen;


c) Verstöße gegen die finanziellen Interessen der Union im Sinne von Artikel 325 AEUV sowie gemäß den näher spezifizierten Definitionen insbesondere der Richtlinie (EU) 2017/1371 und der Verordnung (EU, Euratom) Nr. 883/2013;

d) Verstöße gegen die Binnenmarktvorschriften im Sinne von Artikel 26 Absatz 2 AEUV, d. h. gegen die Körperschaftsteuer-Vorschriften und -Regelungen gerichtete...
Verstöße, die darauf abzielen, sich einen steuerlichen Vorteil zu verschaffen, der dem Ziel oder dem Zweck des geltenden Körperschaftsteuerrechts zuwiderläuft.

(2) Falls die in Teil 2 des Anhangs aufgeführten sektorspezifischen Rechtsvorschriften der Union spezifische Bestimmungen über die Meldung von Verstößen enthalten, haben diese Geltung. Die Bestimmungen dieser Richtlinie gelten für sämtliche im Zusammenhang mit dem Schutz von Hinweisgebern stehenden Sachverhalte, die nicht durch diese sektorspezifischen Rechtsvorschriften der Union geregelt sind.

Artikel 2

Persönlicher Anwendungsbereich

(1) Diese Richtlinie gilt für Hinweisegeber, die im privaten oder im öffentlichen Sektor tätig sind und im beruflichen Kontext Informationen über Verstöße erlangt haben, und schließt mindestens folgende Personen ein:

a) Arbeitnehmer im Sinne von Artikel 45 AEUV,

b) Selbstständige im Sinne von Artikel 49 AEUV,

c) Anteilseigner und Personen, die dem Leitungsorgan eines Unternehmens angehören, einschließlich der nicht geschäftsführenden Mitglieder, sowie Freiwillige und unbezahlte Praktikanten,

d) Personen, die unter der Aufsicht und Leitung von Auftragnehmern, Unter auftragnehmern und Lieferanten arbeiten.

(2) Diese Richtlinie gilt auch für Hinweisegeber, deren Arbeitsverhältnis noch nicht begonnen hat und die während des Einstellungsverfahrens oder anderer vorvertraglicher Verhandlungen Informationen über einen Verstoß erlangt haben.

Artikel 3

Begriffsbestimmungen

Für die Zwecke dieser Richtlinie bezeichnet der Ausdruck

1. „Verstöße“ tatsächliche oder potenzielle rechtswidrige Handlungen oder Fälle von Rechtsmissbrauch nach Maßgabe der in Artikel 1 und im Anhang genannten Rechtsakte der Union und in den dort aufgeführten Bereichen;

2. „rechtswidrige Handlungen“ gegen das Unionsrecht verstoßende Handlungen oder Unterlassungen;

3. „Rechtsmissbrauch“ unter das Unionsrecht fallende Handlungen oder Unterlassungen, die formal nicht den Anschein einer Rechtswidrigkeit haben, aber dem Ziel oder dem Zweck der geltenden Vorschriften zuwiderlaufen;

4. „Informationen über Verstöße“ Beweise für tatsächliche Verstöße sowie begründete Verdachtsmomente in Bezug auf potenzielle Verstöße, die noch nicht sichtbar geworden sind;
5. „Meldung“ die Übermittlung von Informationen über einen bereits begangenen oder wahrscheinlich erfolgenden Verstoß in der Organisation, in der der Hinweisgeber tätig ist oder war, oder in einer anderen Organisation, mit der er aufgrund seiner Tätigkeit im Kontakt steht oder stand;

6. „interne Meldung“ die Übermittlung von Informationen über Verstöße innerhalb einer juristischen Person des öffentlichen oder des privaten Rechts;

7. „externe Meldung“ die Übermittlung von Informationen über Verstöße an die zuständigen Behörden;

8. „Offenlegung“ das öffentlich Zugänglichmachen von im beruflichen Kontext erlangten Informationen über Verstöße;

9. „Hinweisgeber“ eine natürliche oder eine juristische Person, die im Zusammenhang mit ihren Arbeitstätigkeiten erlangte Informationen über Verstöße meldet oder offenlegt;

10. „beruflicher Kontext“ laufende oder frühere Arbeitstätigkeiten im öffentlichen oder im privaten Sektor, durch die unabhängig von ihrer Art Personen Informationen über Verstöße erlangen können und bei denen sich diese Personen Repressalien ausgesetzt sehen können, wenn sie diese Informationen melden;

11. „betroffene Person“ eine natürliche oder eine juristische Person, die in der Meldung oder in den offengelegten Informationen als eine Person bezeichnet wird, die den Verstoß begangen hat oder an diesem beteiligt ist;

12. „Repressalien“ angedrohte oder tatsächliche Handlungen oder Unterlassungen, die durch die im beruflichen Kontext erfolgende interne oder externe Meldung ausgelöst werden und durch die dem Hinweisgeber ein ungerechtfertigter Nachteil entsteht beziehungsweise entstehen kann;

13. „Folgemaßnahmen“ vom Empfänger der internen oder externen Meldung ergriffene Maßnahmen zur Prüfung der Stichhaltigkeit der in der Meldung erhobenen Behauptungen und gegebenenfalls zur Abstellung des gemeldeten Verstoßes (interne Nachforschungen, Ermittlungen, Strafverfolgungsmaßnahmen, Maßnahmen zur (Wieder)einziehung von Mitteln, Verfahrensabschluss usw.);

14. „zuständige Behörde“ die nationale Behörde, welche befugt ist, Meldungen nach Kapitel III entgegenzunehmen und als die Behörde benannt wurde, welche die in dieser Richtlinie vorgesehenen Aufgaben - insbesondere in Bezug auf etwaige Folgemaßnahmen zu den eingegangenen Meldungen - erfüllt.

KAPITEL II

INTERNE MELDUNGEN UND FOLGEMASSNAHMEN

Artikel 4

Pflicht zur Einrichtung interner Kanäle und Verfahren für Meldungen und Folgemaßnahmen
Die Mitgliedstaaten stellen sicher, dass juristische Personen des privaten und des öffentlichen Sektors - gegebenenfalls nach Rücksprache mit den Sozialpartnern - interne Kanäle und Verfahren für die Übermittlung und Weiterverfolgung von Meldungen einrichten.

Diese Kanäle und Verfahren müssen den Beschäftigten der juristischen Person die Übermittlung etwaiger Meldungen ermöglichen. Sie können auch den in Artikel 2 Absatz 1 Buchstaben b, c und d genannten anderen Personen, die im Zusammenhang mit ihren Arbeitstätigkeiten mit der juristischen Personen im Kontakt stehen, die Übermittlung von Meldungen ermöglichen; diese anderen Personen sind allerdings nicht verpflichtet, für etwaige Meldungen auf interne Meldekanäle zurückzugreifen.

Bei den in Absatz 1 genannten juristischen Personen im privaten Sektor handelt es sich um

a) juristische Personen des Privatrechts mit 50 oder mehr Beschäftigten,
b) juristische Personen des Privatrechts mit einem Jahresumsatz oder einer Jahresbilanzsumme von mehr als 10 Mio. EUR,
c) juristische Personen des Privatrechts, die im Finanzdienstleistungsbereich tätig oder im Sinne der im Anhang aufgeführten Unionsvorschriften für Geldwäsche- oder Terrorismusfinanzierungstätigkeiten anfällig sind.


Bei den in Absatz 1 genannten juristischen Personen im öffentlichen Sektor handelt es sich um

a) staatliche Verwaltungsstellen,
b) regionale Verwaltungen und Dienststellen,
c) Gemeinden mit mehr als 10 000 Einwohnern,
d) sonstige juristische Personen des öffentlichen Rechts.

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Artikel 5

Verfahren für interne Meldungen und Folgemaßnahmen

(1) Die in Artikel 4 genannten Verfahren für Meldungen und Folgemaßnahmen schließen Folgendes ein:

a) Meldekanäle, die so konzipiert, eingerichtet und betrieben werden, dass die Vertraulichkeit der Identität des Hinweisgebers gewahrt bleibt und nicht befugten Mitarbeitern der Zugriff auf diese Kanäle verwehrt wird,

b) die Benennung einer Person oder einer Dienststelle, die für die Folgemaßnahmen zu den Meldungen zuständig ist,

c) ordnungsgemäße Folgemaßnahmen der benannten Person oder Dienststelle zu den Meldungen,

d) ein angemessener zeitlicher Rahmen von maximal drei Monaten nach Meldungseingang für die Rückmeldung an den Hinweisgeber über die Folgemaßnahmen zu der Meldung,

e) klare und leicht zugängliche Informationen über die Verfahren sowie darüber, wie und unter welchen Bedingungen Meldungen extern an die zuständigen Behörden nach Artikel 13 Absatz 2 und gegebenenfalls an Einrichtungen oder sonstige Stellen der Union übermittelt werden können.

(2) Die unter Absatz 1 Buchstabe a vorgesehenen Meldekanäle müssen die Übermittlung von Meldungen in allen folgenden Weisen ermöglichen:

a) schriftliche Meldungsübermittlung in elektronischer Form oder auf Papier und/oder mündliche Meldungsübermittlung per aufgezeichnetem oder nicht aufgezeichnetem Telefongespräch,

b) physische Zusammenkunft mit der Person oder Dienststelle, die als für die Entgegennahme von Meldungen zuständig benannt wurde.

Meldekanäle können intern von einer hierfür benannten Person oder Dienststelle betrieben oder extern von einem Dritten bereitgestellt werden, sofern die unter Absatz 1 Buchstabe a genannten Garantien und Anforderungen eingehalten werden.

(3) Bei der unter Absatz 1 Buchstabe b genannten Person oder Dienststelle darf es sich um dieselbe Person handeln, die auch für die Entgegennahme von Meldungen zuständig ist. Es können weitere Personen als „Vertrauenspersonen“ benannt werden, von denen sich Hinweisgeber und Personen, die eine Meldung in Betracht ziehen, vertraulich beraten lassen können.
KAPITEL III

EXTERNE MELDUNGEN UND FOLGEMASSNAHMEN

Artikel 6

Pflicht zur Einrichtung externer Meldekanäle und Ergreifung geeigneter Folgemaßnahmen

(1) Die Mitgliedstaaten benennen die zuständigen Behörden, die befugt sind, Meldungen entgegenzunehmen und entsprechende Folgemaßnahmen zu ergreifen.

(2) Die Mitgliedstaaten stellen sicher, dass die zuständigen Behörden
   a) unabhängige, autonome, sichere und die Vertraulichkeit wahrnehmende externe Meldekanäle für die Entgegennahme und Bearbeitung der von Hinweisgebern übermittelten Informationen einrichten;
   b) Hinweisgebern binnen eines angemessenen zeitlichen Rahmens von maximal drei Monaten (beziehungsweise sechs Monaten in hinreichend begründeten Fällen) Rückmeldung über die zu ihren Meldungen ergriffenen Folgemaßnahmen erstatten;
   c) die in der Meldung enthaltenen Informationen gegebenenfalls an die zuständigen Einrichtungen und sonstigen Stellen der Union zur weiteren Untersuchung (sofern diese Möglichkeit nach dem Unionsrecht besteht) weiterleiten.


(4) Die Mitgliedstaaten stellen sicher, dass Behörden, die eine Meldung erhalten haben, aber nicht befugt sind, gegen den gemeldeten Verstoß vorzugehen, die Meldung an die zuständige Behörde weiterleiten und den Hinweisgeber davon in Kenntnis setzen.

Artikel 7

Gestaltung geeigneter externer Meldekanäle

(1) Externe Meldekanäle gelten als unabhängig und autonom, wenn sie alle folgenden Kriterien erfüllen:
   a) Sie verlaufen getrennt von den allgemeinen Kommunikationskanälen der zuständigen Behörde, einschließlich der Kommunikationskanäle, über die die zuständige Behörde in ihren allgemeinen Arbeitsabläufen intern und mit Dritten kommuniziert;
   b) sie werden so gestaltet, eingerichtet und betrieben, dass die Vollständigkeit, Integrität und Vertraulichkeit der Informationen gewährleistet ist und nicht befugten Mitarbeitern der Zugriff verwehrt wird;
c) sie ermöglichen die Speicherung dauerhafter Informationen gemäß Artikel 11, um weitere Untersuchungen zu ermöglichen.

(2) Die externen Meldekanäle müssen die Übermittlung von Meldungen in mindestens allen folgenden Weisen ermöglichen:
  a) schriftliche Meldungsübermittlung in elektronischer Form oder auf Papier,
  b) mündliche Meldungsübermittlung per aufgezeichnetem oder nicht aufgezeichnetem Telefongespräch,
  c) physische Zusammenkunft mit zuständigen Mitarbeitern der zuständigen Behörde.

(3) Die zuständigen Behörden stellen sicher, dass Meldungen, die über andere als die in den Absätzen 1 und 2 genannten speziellen Meldekanäle eingegangen sind, unverändert und unter Nutzung der hierfür vorgesehenen Kommunikationskanäle an die zuständigen Mitarbeiter der zuständigen Behörde weitergeleitet werden.

(4) Die Mitgliedstaaten führen Verfahren ein, durch die sichergestellt wird, dass Personen, an die eine Meldung ursprünglich adressiert wurde, die aber nicht als zuständige Sachbearbeiter für derartige Meldungen benannt wurden, keine Informationen offenlegen, durch die die Identität des Hinweisgebers oder der betroffenen Person bekannt werden könnte.

Artikel 8

Zuständige Mitarbeiter

(1) Die Mitgliedstaaten stellen sicher, dass die zuständigen Behörden über besondere Mitarbeiter verfügen, die für die Bearbeitung eingehender Meldungen zuständig sind. Diese Mitarbeiter werden für die Bearbeitung derartiger Meldungen speziell geschult.

(2) Die zuständigen Mitarbeiter nehmen folgende Aufgaben wahr:
  a) Übermittlung von Informationen über die Meldeverfahren an etwaige interessierte Personen,
  b) Entgegennahme von Meldungen und Ergreifung entsprechender Folgemaßnahmen,
  c) Aufrechterhaltung des Kontakts zum Hinweisgeber zwecks Information über den Fortgang und die Ergebnisse der Untersuchung.

Artikel 9

Verfahrensvorschriften für externe Meldungen

(1) In den Verfahrensvorschriften für externe Meldungen wird Folgendes festgelegt:
  a) die Art und Weise, in der die zuständige Behörde den Hinweisgeber auffordern kann, die gemeldeten Informationen zu präzisieren oder zusätzliche ihm vorliegende Informationen zu liefern;
  b) ein angemessener zeitlicher Rahmen von maximal drei Monaten (beziehungsweise sechs Monaten in hinreichend begründeten Fällen) für die Rückmeldung an den
Hinweisgeber über die zu seiner Meldung ergriffenen Folgemaßnahmen sowie Art und Inhalt dieser Rückmeldung;

c) die Vertraulichkeitsregelung für Meldungen einschließlich einer detaillierten Beschreibung der Umstände, unter denen die vertraulichen Daten eines Hinweisgebers offengelegt werden dürfen.

(2) Die detaillierte Beschreibung nach Absatz 1 Buchstabe c muss die Ausnahmefälle einschließen, in denen die Vertraulichkeit der Daten nicht gewährleistet werden kann, unter anderem, wenn die Offenlegung personenbezogener Daten eine notwendige und verhältnismäßige Pflicht nach dem Unionsrecht oder nach nationalem Recht im Zusammenhang mit Untersuchungen oder anschließenden Gerichtsverfahren darstellt oder erforderlich ist, um die Freiheiten anderer - unter anderem das Recht auf Verteidigung der betroffenen Person - zu gewährleisten, wobei die Offenlegung in jedem Fall geeigneten Garantien nach Maßgabe des einschlägigen Rechts unterliegt.

(3) Die in Absatz 1 Buchstabe c genannte detaillierte Beschreibung ist in klarer und leicht verständlicher Sprache zu verfassen und muss etwaigen Hinweisgebern leicht zugänglich sein.

Artikel 10

Informationen über die Entgegennahme von Meldungen und deren Weiterverfolgung

Die Mitgliedstaaten stellen sicher, dass die zuständigen Behörden in einem gesonderten sowie leicht erkennbaren und zugänglichen Abschnitt ihrer Website mindestens folgende Informationen veröffentlichen:

a) die Bedingungen, unter denen Hinweisgeber Schutz nach Maßgabe dieser Richtlinie genießen;

b) die Kommunikationskanäle für die Entgegennahme von Meldungen und entsprechende Folgemaßnahmen:
   i) Telefonnummern mit der Angabe, ob die Gespräche bei Nutzung dieser Anschlüsse aufgezeichnet werden oder nicht,
   ii) besondere E-Mail-Adressen und Postanschriften der zuständigen Mitarbeiter, die sicher sind und Vertraulichkeit gewährleisten;

c) die geltenden Verfahrensvorschriften nach Artikel 9 für die Meldung von Verstößen;


e) die Art der zu eingehenden Meldungen zu ergreifenden Folgemaßnahmen;

f) die verfügbaren Abhilfemöglichkeiten und Verfahren gegen Repressalien sowie Möglichkeiten für eine vertrauliche Beratung von Personen, die in Erwägung ziehen, einen Missstand zu melden;

g) eine Erklärung, aus der eindeutig hervorgeht, dass wenn eine Person der zuständigen Behörde im Einklang mit dieser Richtlinie Informationen meldet, dies nicht als
Verletzung einer vertraglich oder durch Rechts- oder Verwaltungsvorschriften geregelter Offenlegungsbeschränkung gilt und diese Person für die Offenlegung in keiner Form haftbar gemacht werden kann.

Artikel 11

Dokumentation eingehender Meldungen

(1) Die Mitgliedstaaten stellen sicher, dass die zuständigen Behörden alle eingehenden Meldungen dokumentieren.

(2) Die zuständigen Behörden übermitteln für jede eingehende schriftliche Meldung unverzüglich eine Eingangsbestätigung an die vom Hinweisgeber genannte Postanschrift oder E-Mail-Adresse, sofern der Hinweisgeber sich nicht ausdrücklich dagegen ausgesprochen oder die zuständige Behörde Grund zu der Annahme hat, dass die Bestätigung des Eingangs einer schriftlichen Meldung den Schutz der Identität des Hinweisgebers beeinträchtigen würde.

(3) Bei telefonisch übermittelten Meldungen, die aufgezeichnet werden, kann die zuständige Behörde vorbehaltlich der Zustimmung des Hinweisgebers die mündliche Meldung auf eine der folgenden Weisen dokumentieren:
   a) Tonaufzeichnung des Gesprächs in dauerhafter und abrufbarer Form,
   b) vollständige und genaue Transkription des Telefongesprächs durch die zuständigen Mitarbeiter der zuständigen Behörde.

Die zuständige Behörde gibt dem Hinweisgeber Gelegenheit, die Transkription zu überprüfen, gegebenenfalls zu korrigieren und durch seine Unterschrift zu bestätigen.

(4) Bei telefonisch übermittelten Meldungen, die nicht aufgezeichnet werden, kann die zuständige Behörde die mündliche Meldung mittels eines genauen, von den zuständigen Mitarbeitern erstellten Gesprächsprotokolls dokumentieren. Die zuständige Behörde gibt dem Hinweisgeber die Möglichkeit, das Gesprächsprotokoll zu überprüfen, gegebenenfalls zu korrigieren und durch seine Unterschrift zu bestätigen.

(5) Bittet ein Hinweisgeber um eine Zusammenkunft gemäß Artikel 7 Absatz 2 Buchstabe c mit den zuständigen Mitarbeitern der zuständigen Behörde, um einen Verstoß zu melden, so sorgen die zuständigen Behörden vorbehaltlich der Zustimmung des Hinweisgebers dafür, dass vollständige und genaue Aufzeichnungen über die Zusammenkunft in dauerhafter und abrufbarer Form aufbewahrt werden. Die zuständige Behörde ist berechtigt, die Zusammenkunft auf eine der folgenden Weisen zu dokumentieren:
   a) Tonaufzeichnung des Gesprächs in dauerhafter und abrufbarer Form,
   b) von den zuständigen Mitarbeitern der zuständigen Behörde erstelltes detailliertes Protokoll der Zusammenkunft.

Die zuständige Behörde gibt dem Hinweisgeber die Möglichkeit, das Protokoll der Zusammenkunft zu überprüfen, gegebenenfalls zu korrigieren und durch seine Unterschrift zu bestätigen.
Artikel 12

Überprüfung der Verfahren durch die zuständigen Behörden


KAPITEL IV

SCHUTZ VON HINWEISGEBERN UND BETROFFENEN PERSONEN

Artikel 13

Bedingungen für den Schutz von Hinweisgebern

(1) Ein Hinweisgeber hat Anspruch auf Schutz im Rahmen dieser Richtlinie, wenn er hinreichenden Grund zu der Annahme hat, dass die von ihm gemeldeten Informationen zum Zeitpunkt ihrer Übermittlung der Wahrheit entsprachen und in den Anwendungsbereich dieser Richtlinie fallen.

(2) Ein Hinweisgeber, der extern Meldung erstattet, hat Anspruch auf Schutz im Rahmen dieser Richtlinie, wenn eine der nachfolgenden Bedingungen erfüllt ist:
   a) Er hat ursprünglich intern Meldung erstattet, aber zu seiner Meldung wurden binnen des in Artikel 5 genannten angemessenen Zeitrahmens keine geeigneten Maßnahmen ergriffen;
   b) ihm standen keine internalen Meldekanäle zur Verfügung, oder von ihm konnte nach vernünftigem Ermessen nicht erwartet werden, dass ihm diese Kanäle bekannt waren;
   c) er war gemäß Artikel 4 Absatz 2 nicht verpflichtet, auf interne Meldekanäle zurückzugreifen;
   d) ein Rückgriff auf interne Meldekanäle konnte von ihm wegen des Inhalts seiner Meldung nach vernünftigem Ermessen nicht erwartet werden;
   e) er hatte hinreichenden Grund zu der Annahme, dass im Falle eines Rückgriffs auf interne Meldekanäle die Wirksamkeit etwiger Ermittlungen der zuständigen Behörden beeinträchtigt werden könnte;
   f) er war nach dem Unionsrecht berechtigt, seine Meldung auf direktem Wege durch externe Kanäle an eine zuständige Behörde zu übermitteln.

(3) Hinweisgeber, die in den Anwendungsbereich dieser Richtlinie fallende Verstöße den zuständigen Einrichtungen oder sonstigen Stellen der Union melden, haben unter den gleichen Bedingungen Anspruch auf Schutz im Rahmen dieser Richtlinie wie Hinweisgeber, die in Übereinstimmung mit den in Absatz 2 genannten Bedingungen extern Meldung erstatten.
(4) Ein Hinweisgeber, der in den Anwendungsbereich dieser Richtlinie fallende Informationen über Verstöße publik macht, hat Anspruch auf Schutz im Rahmen dieser Richtlinie, wenn

a) er ursprünglich intern und/oder extern Meldung gemäß den Kapiteln II und III und gemäß Absatz 2 dieses Artikels erstattet hat, aber zu seiner Meldung binnen des in Artikel 6 Absatz 2 Buchstabe b und Artikel 9 Absatz 1 Buchstabe b genannten Zeitrahmens keine geeigneten Maßnahmen ergriffen wurden, oder

b) von ihm wegen einer unmittelbaren oder offenkundigen Gefährdung des öffentlichen Interesses, aufgrund der besonderen Umstände des Falls oder wegen der Gefahr eines irreparablen Schadens nach vernünftigem Ermessen kein Rückgriff auf interne und/oder externe Meldekanäle erwartet werden konnte.

**Artikel 14**

**Verbot von Repressalien gegen Hinweisgeber**

Die Mitgliedstaaten ergreifen die erforderlichen Maßnahmen, um jede Form von Repressalien direkter oder indirekter Art gegen Hinweisgeber, die die in Artikel 13 genannten Bedingungen erfüllen, zu untersagen; dies schließt insbesondere folgende Repressalien ein:

a) Suspendierung, Entlassung oder vergleichbare Maßnahmen,
b) Herabstufung oder Versagung einer Beförderung,
c) Aufgabenverlagerung, Verlagerung des Arbeitsplatzes, Gehaltsminderung, Änderung der Arbeitszeiten,
d) Versagung der Teilnahme an Weiterbildungsmaßnahmen,
e) negative Leistungsbeurteilung oder Ausstellung eines schlechten Arbeitszeugnisses,
f) disziplinarischer Verweis, Rüge oder sonstige Sanktion (auch finanzieller Art),
g) Nötigung, Einschüchterung, Mobbing oder Ausgrenzung am Arbeitsplatz,
h) Diskriminierung, Benachteiligung oder Ungleichbehandlung,
i) Nichtumwandlung eines Zeitarbeitsvertrags in einen unbefristeten Arbeitsvertrag,
j) Nichtverlängerung oder vorzeitige Beendigung eines Zeitarbeitsvertrags,
k) Schädigung (einschließlich Rufschädigung) oder Herbeiführung finanzieller Verluste (einschließlich Auftrags- oder Einnahmenverluste),
l) Erfassung des Hinweisgebers auf einer schwarzen Liste auf Basis einer informellen oder formellen sektor- oder branchenspezifischen Vereinbarung mit der Folge, dass der Hinweisgeber sektor- oder branchenweit keine Beschäftigung mehr findet,
m) vorzeitige Kündigung oder Aufhebung eines Vertrags über Waren oder Dienstleistungen,
n) Entzug einer Lizenz oder einer Genehmigung.
Artikel 15

Maßnahmen zum Schutz von Hinweisgebern vor Repressalien

(1) Die Mitgliedstaaten ergreifen die erforderlichen Maßnahmen, um Hinweisgeber, die die in Artikel 13 genannten Bedingungen erfüllen, vor Repressalien zu schützen. Dabei handelt es sich insbesondere um die in den nachfolgenden Absätzen 2 bis 8 genannten Maßnahmen.

(2) Der Öffentlichkeit werden in leicht zugänglicher Weise und kostenlos umfassende und unabhängige Informations- und Beratungsmöglichkeiten über die verfügbaren Abhilfemöglichkeiten und Verfahren gegen Repressalien geboten.

(3) Hinweisgeber erhalten Zugang zu wirksamer Unterstützung vonseiten der zuständigen Behörden beim Kontakt mit etwaigen für ihren Schutz vor Repressalien zuständigen Behörden einschließlich - sofern nach nationalem Recht vorgesehen - einer Bescheinigung, dass sie die Voraussetzungen für einen Schutz gemäß dieser Richtlinie erfüllen.

(4) Hinweisgeber, die nach dieser Richtlinie extern Meldung an die zuständigen Behörden erstatten oder Informationen publik machen, gelten nicht als Personen, die eine vertraglich oder durch Rechts- oder Verwaltungsvorschriften geregelte Offenlegungsbeschränkung verletzt haben und für diese Offenlegung haftbar gemacht werden können.

(5) In Gerichtsverfahren, die sich auf eine vom Hinweisgeber erlittene Benachteiligung beziehen und in denen der Hinweisgeber glaubhaft machen kann, dass diese Benachteiligung eine Vergeltungsmaßnahme für seine Meldung oder Informationsoffenlegung war, obliegt es der Person, die die Vergeltungsmaßnahme ergriffen hat, nachzuweisen, dass die Benachteiligung keineswegs aufgrund der Meldung erfolgte, sondern ausschließlich auf hinreichenden sonstigen Gründen basierte.

(6) Hinweisgeber erhalten Zugang zu geeigneten Abhilfemaßnahmen gegen Repressalien einschließlich einstweiligen Rechtsschutzes während laufender Gerichtsverfahren nach Maßgabe des nationalen Rechts.


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Unterstützungsmaßnahmen rechtlicher oder finanzieller Art und sonstige Unterstützung für Hinweisgeber in Gerichtsverfahren vorsehen.

Artikel 16

Maßnahmen zum Schutz betroffener Personen

(1) Die Mitgliedstaaten stellen sicher, dass betroffene Personen ihr Recht auf einen wirksamen Rechtsbehelf und auf ein faires Gerichtsverfahren und die Wahrung der Unschuldsvermutung sowie ihre Verteidigungsrechte einschließlich des Rechts auf Anhörung und des Rechts auf Einsicht in ihre Akte gemäß der Charta der Grundrechte der Europäischen Union in vollem Umfang ausüben können.

(2) Bei betroffenen Personen, deren Identität der Öffentlichkeit nicht bekannt ist, stellen die zuständigen Behörden sicher, dass ihre Identität während der Dauer der Untersuchung geschützt bleibt.

(3) Die in den Artikeln 9 und 11 festgelegten Verfahren gelten auch für den Schutz der Identität der betroffenen Personen.

Artikel 17

Sanktionen

(1) Die Mitgliedstaaten legen wirksame, angemessene und abschreckende Sanktionen für natürliche oder juristische Personen fest, die
a) Meldungen behindern oder zu behindern versuchen,
b) Repressalien gegen Hinweisgeber ergreifen,
c) mutwillige Gerichtsverfahren gegen Hinweisgeber anstrengen,
d) gegen die Pflicht verstoßen, die Vertraulichkeit der Identität von Hinweisgebern zu wahren.

(2) Die Mitgliedstaaten legen wirksame, angemessene und abschreckende Sanktionen für Personen fest, die in böswilliger oder missbräuchlicher Absicht Informationen melden oder offenlegen, darunter Maßnahmen zur Entschädigung von Personen, die durch böswillige oder missbräuchliche Meldungen oder Offenlegungen geschädigt wurden.

Artikel 18

Verarbeitung personenbezogener Daten

durch die zuständigen Behörden auf Unionsebene sollte im Einklang mit der Verordnung (EG) Nr. 45/2001 erfolgen. Personenbezogene Daten, die für die Fallbearbeitung nicht relevant sind, werden unverzüglich gelöscht.

KAPITEL V

SCHLUSSBESTIMMUNGEN

Artikel 19

Günstigere Behandlung

Die Mitgliedstaaten können unbeschadet von Artikel 16 und Artikel 17 Absatz 2 für die Rechte von Hinweisgebern günstigere Bestimmungen als jene in dieser Richtlinie einführen oder beibehalten.

Artikel 20

Umsetzung


(2) Bei Erlass dieser Vorschriften nehmen die Mitgliedstaaten in den Vorschriften selbst oder durch einen Hinweis bei der amtlichen Veröffentlichung auf diese Richtlinie Bezug. Die Mitgliedstaaten regeln die Einzelheiten dieser Bezugnahme.

Artikel 21

Berichterstattung, Bewertung und Überprüfung


(2) Unbeschadet der in anderen Rechtsakten der Union festgelegten Berichtspflichten legen die Mitgliedstaaten der Kommission jährlich die folgenden statistischen Angaben in Bezug auf die in Kapitel III genannten Meldungen vor, soweit sie auf zentraler Ebene in dem betreffenden Mitgliedstaat verfügbar sind:

a) Zahl der bei den zuständigen Behörden eingegangenen Meldungen,
b) Zahl der Untersuchungen und Gerichtsverfahren, die infolge dieser Meldungen eingeleitet wurden, sowie deren endgültige Ergebnisse,

c) geschätzter finanzieller Schaden (sofern festgestellt) sowie im Anschluss an Untersuchungen und Gerichtsverfahren zu den gemeldeten Verstößen (wieder)eingezogene Beträge.


Artikel 22

Inkrafttreten

Diese Richtlinie tritt am zwanzigsten Tag nach ihrer Veröffentlichung im Amtsblatt der Europäischen Union in Kraft.

Artikel 23

Adressaten

Diese Richtlinie ist an die Mitgliedstaaten gerichtet.

Geschehen zu Brüssel am […]

Im Namen des Europäischen Parlaments
Der Präsident

Im Namen des Rates
Der Präsident
Zivilrechtsübereinkommen über Korruption

Straßburg/Strasbourg, 4.XI.1999

Bereinigte Übersetzung zwischen Deutschland, Österreich und der Schweiz abgestimmte Fassung

Präambel

Die Mitgliedstaaten des Europarats, die anderen Staaten und die Europäische Gemeinschaft, die dieses Übereinkommen unterzeichnen -

in der Erwägung, dass es das Ziel des Europarats ist, eine engere Verbindung zwischen seinen Mitgliedern herbeizuführen;

eingedenk der Bedeutung einer verstärkten internationalen Zusammenarbeit bei der Bekämpfung der Korruption;

hervorhebend, dass die Korruption eine schwere Bedrohung für Rechtsstaatlichkeit, Demokratie und Menschenrechte, für die Gerechtigkeit und den sozialen Ausgleich darstellt, dass sie die wirtschaftliche Entwicklung behindert und das ordnungsgemäße Funktionieren von Marktwirtschaften gefährdet;

in Erkenntnis der nachteiligen finanziellen Auswirkungen der Korruption auf Einzelne, Unternehmen, Staaten sowie internationale Einrichtungen;

überzeugt von der Bedeutung des Beitrags, den das Zivilrecht bei der Bekämpfung der Korruption leistet, insbesondere dadurch, dass die Geschädigten angemessenen Schadensersatz erhalten können;


unter Berücksichtigung des im November 1996 vom Ministerkomitee beschlossenen Aktionsprogramms gegen Korruption;

ferner unter Berücksichtigung der im Februar 1997 vom Ministerkomitee gebilligten Durchführbarkeitsstudie zur Schaffung eines zivilrechtlichen Übereinkommens über den Ersatz von Schäden aus Korruptionshandlungen;

(*) Der Vertrag von Lissabon zur Änderung des Vertrags über die Europäische Union und des Vertrags zur Gründung der Europäischen Gemeinschaft in Kraft am 1. Dezember 2009 in Kraft. Als Konsequenz ab diesem Zeitpunkt gilt jede Bezugnahme auf die Europäische Wirtschaftsgemeinschaft die Europäische Union zu lesen.

eingedenk der Schlusserklärung und des Aktionsplans, die von den Staats- und Regierungschefs der Mitgliedstaaten des Europarats bei ihrem 2. Gipfel im Oktober 1997 in Straßburg angenommen wurden -

sind wie folgt übereingekommen:

Kapitel I – Innerstaatliche Maßnahmen

Artikel 1 – Zweck

Jede Vertragspartei sieht in ihrem innerstaatlichen Recht einen wirksamen Rechtsschutz vor, damit durch Korruptionshandlungen Geschädigte ihre Rechte und Interessen wahrnehmen können; hierzu gehört auch die Möglichkeit, Schadensersatz zu erhalten.

Artikel 2 – Bestimmung des Begriffs „Korruption“

Im Sinne dieses Übereinkommens bezeichnet „Korruption“ das unmittelbare oder mittelbare Fordern, Anbieten, Gewähren, Annehmen oder Inaussichtstellen von Bestechungsgeldern oder eines anderen ungerechtfertigten Vorteils, das die Erfüllung der dem Begünstigten obliegenden Pflichten beeinträchtigt oder dazu führt, dass er sich nicht wie geboten verhält.

Artikel 3 – Schadensersatz

1 Jede Vertragspartei sieht in ihrem innerstaatlichen Recht vor, dass durch Korruption Geschädigte das Recht haben, auf vollständigen Ersatz des Schadens zu klagen.

2 Dieser Schadensersatz kann Vermögensschäden, entgangenen Gewinn und Nichtvermögensschäden umfassen.

Artikel 4 – Haftung

1 Jede Vertragspartei sieht in ihrem innerstaatlichen Recht vor, dass für den Ersatz des Schadens die folgenden Voraussetzungen erfüllt sein müssen:

   i Der Beklagte hat die Korruptionshandlung begangen, sie angeordnet oder gebilligt oder es unterlassen, die gebotenen Maßnahmen zu ergreifen, um die Korruptionshandlung zu verhindern;

   ii der Kläger hat einen Schaden erlitten, und

   iii es besteht ein ursächlicher Zusammenhang zwischen der Korruptionshandlung und dem Schaden.

2 Jede Vertragspartei sieht in ihrem innerstaatlichen Recht vor, dass mehrere Beklagte, die wegen derselben Korruptionshandlung schadensersatzpflichtig sind, als Gesamtschuldner haften.
Artikel 5 – Haftung des Staates


Artikel 6 – Mitverschulden

Jede Vertragspartei sieht in ihrem innerstaatlichen Recht vor, dass der Schadensersatz unter Berücksichtigung aller Umstände gemindert oder versagt wird, wenn der Kläger durch sein Verschulden zur Entstehung oder Vergrößerung des Schadens beigetragen hat.

Artikel 7 – Verjährung

1 Jede Vertragspartei sieht in ihrem innerstaatlichen Recht vor, dass die Schadensersatzansprüche frühestens nach drei Jahren ab dem Tag verjähren, an dem der Geschädigte von dem Schaden oder der Korruptionshandlung und von der dafür verantwortlichen Person Kenntnis erlangt hat oder hätte erlangen müssen. Diese Ansprüche verjähren jedoch nach Ablauf von mindestens zehn Jahren ab dem Zeitpunkt, zu dem die Korruptionshandlung begangen worden ist.

2 Die Hemmung oder Unterbrechung der Verjährungsfristen nach Absatz 1 richtet sich nach dem Recht der Vertragsparteien.

Artikel 8 – Gültigkeit von Verträgen

1 Jede Vertragspartei sieht in ihrem innerstaatlichen Recht vor, dass alle Verträge oder Vertragsklauseln, die eine Korruptionsabrede enthalten, nichtig sind.

2 Jede Vertragspartei sieht in ihrem innerstaatlichen Recht vor, dass jede Partei eines Vertrags, deren Willensbildung durch eine Korruptionshandlung beeinträchtigt worden ist, bei Gericht die Unwirksamkeit des Vertrags geltend machen kann; Schadensersatzansprüche bleiben davon unberührt.

Artikel 9 – Schutz von Beschäftigten

Jede Vertragspartei sieht in ihrem innerstaatlichen Recht vor, dass Beschäftigte, die den zuständigen Personen oder Behörden in redlicher Absicht einen begründeten Korruptionsverdacht mitteilen, angemessen vor ungerechtfertigten Nachteilen geschützt werden.

Artikel 10 – Rechnungslegung und Abschlussprüfung

1 Jede Vertragspartei trifft in ihrem innerstaatlichen Recht alle erforderlichen Maßnahmen dafür, dass Jahresabschlüsse von Gesellschaften klar und eindeutig abgefasst sind und die finanzielle Lage der Gesellschaften den Tatsachen entsprechend wiedergeben.

2 Zur Verhütung von Korruptionshandlungen sieht jede Vertragspartei in ihrem innerstaatlichen Recht vor, dass Abschlussprüfer eine Bestätigung darüber abgeben, dass die Jahresabschlüsse die finanzielle Lage der Gesellschaften den Tatsachen entsprechend wiedergeben.
Artikel 11 – Beweis

Jede Vertragspartei sieht in ihrem innerstaatlichen Recht wirksame Beweisverfahren in Zivilverfahren vor, die wegen einer Korruptionshandlung eingeleitet worden sind.

Artikel 12 – Einstweilige Maßnahmen

Jede Vertragspartei sieht in ihrem innerstaatlichen Recht vor, dass die Gerichte die erforderlichen Maßnahmen treffen können, um die Rechte und Interessen der Parteien in Zivilverfahren zu wahren, die wegen einer Korruptionshandlung eingeleitet worden sind.

Kapitel II – Internationale Zusammenarbeit und Überwachung der Durchführung

Artikel 13 – Internationale Zusammenarbeit

Die Vertragsparteien arbeiten in Übereinstimmung mit den völkerrechtlichen Übereinkünften über internationale Zusammenarbeit in Zivil- und Handelssachen, deren Vertragsparteien sie sind, sowie in Übereinstimmung mit ihrem innerstaatlichen Recht in Zivilverfahren wegen Korruption wirksam zusammen; dies gilt insbesondere für die Zustellung von Schriftstücken, die Beweisaufnahme im Ausland, die Zuständigkeit, die Anerkennung und Vollstreckung ausländischer Urteile und die Verfahrenskosten.

Artikel 14 – Überwachung

Die Staatsengruppe gegen Korruption (GRECO) überwacht die Durchführung dieses Übereinkommens durch die Vertragsparteien.

Kapitel III – Schlussbestimmungen

Artikel 15 – Unterzeichnung und Inkrafttreten

1 Dieses Übereinkommen liegt für die Mitgliedstaaten des Europarats, für die Nichtmitgliedstaaten, die sich an der Ausarbeitung des Übereinkommens beteiligt haben, sowie für die Europäische Gemeinschaft zur Unterzeichnung auf.


3 Dieses Übereinkommen tritt am ersten Tag des Monats in Kraft, der auf einen Zeitabschnitt von drei Monaten nach dem Tag folgt, an dem vierzehn Unterzeichner nach Absatz 2 ihre Zustimmung ausgedrückt haben, durch das Übereinkommen gebunden zu sein. Ist ein Unterzeichner bei der Ratifikation, Annahme oder Genehmigung nicht Mitglied der Staatsengruppe gegen Korruption (GRECO), so wird er am Tag des Inkrafttretens des Übereinkommens Mitglied.

4 Für jeden Unterzeichner, der später seine Zustimmung ausdrückt, durch das Übereinkommen gebunden zu sein, tritt es am ersten Tag des Monats in Kraft, der auf einen Zeitabschnitt von drei Monaten nach dem Tag folgt, an dem er nach Absatz 2 seine Zustimmung ausgedrückt hat, durch das Übereinkommen gebunden zu sein. Ist ein Unterzeichner bei der Ratifikation, Annahme oder Genehmigung nicht Mitglied der Staatsengruppe gegen Korruption (GRECO), so wird er an dem Tag Mitglied, an dem das Übereinkommen für ihn in Kraft tritt.

5 Soweit erforderlich werden Einzelheiten der Teilnahme der Europäischen Gemeinschaft an der Staatsengruppe gegen Korruption (GRECO) im gegenseitigen Einvernehmen mit der Europäischen Gemeinschaft festgelegt.
Artikel 16 – Beitritt zum Übereinkommen

1 Nach Inkrafttreten dieses Übereinkommens kann das Ministerkomitee des Europarats nach Konsultation der Vertragsparteien des Übereinkommens durch einen mit der in Artikel 20 Buchstabe d der Satzung des Europarats vorgesehenen Mehrheit und mit einhelliger Zustimmung der Vertreter der Vertragsparteien, die Anspruch auf einen Sitz im Komitee haben, gefassten Beschluss jeden Staat, der nicht Mitglied des Rates ist und der sich nicht an der Ausarbeitung des Übereinkommens beteiligt hat, einladen, dem Übereinkommen beizutreten.

2 Für jeden beitretenden Staat tritt das Übereinkommen am ersten Tag des Monats in Kraft, der auf einen Zeitabschnitt von drei Monaten nach Hinterlegung der Beitrittsurkunde beim Generalsekretär des Europarats folgt. Jeder beitretende Staat wird an dem Tag, an dem das Übereinkommen für ihn in Kraft tritt, Mitglied der GRECO, wenn er dies nicht bereits beim Beitritt ist.

Artikel 17 – Vorbehalte

Vorbehalte zu diesem Übereinkommen sind nicht zulässig.

Artikel 18 – Räumlicher Geltungsbereich

1 Jeder Staat oder die Europäische Gemeinschaft kann bei der Unterzeichnung oder bei der Hinterlegung der Ratifikations-, Annahme-, Genehmigungs- oder Beitrittsurkunde einzelne oder mehrere Hoheitsgebiete bezeichnen, auf die dieses Übereinkommen Anwendung findet.


Artikel 19 – Verhältnis zu anderen Übereinkünften

1 Dieses Übereinkommen lässt die Rechte und Pflichten aus mehrseitigen völkerrechtlichen Übereinkünften zu einzelnen Gegenständen dieses Übereinkommens unberührt.

2 Die Vertragsparteien dieses Übereinkommens können untereinander zwei- oder mehrseitige Übereinkünfte über Gegenstände schließen, die in diesem Übereinkommen geregelt sind, um seine Bestimmungen zu ergänzen oder zu verstärken oder die Anwendung der darin enthaltenen Grundsätze zu erleichtern; vorbehaltlich der Ziele und Grundsätze des Übereinkommens können sie sich auch im Rahmen eines besonderen Systems, das zum Zeitpunkt der Auflegung des Übereinkommens zur Unterzeichnung verbindlich ist, Regeln über solche Gegenstände unterwerfen.

3 Haben zwei oder mehr Vertragsparteien bereits eine Übereinkunft über einen Gegenstand geschlossen, der in diesem Übereinkommen geregelt ist, oder haben sie ihre Beziehungen hinsichtlich dieses Gegenstands anderweitig geregelt, so sind sie berechtigt, anstelle dieses Übereinkommens die Übereinkunft oder die Regelung anzuwenden.
Artikel 20 – Änderungen

1 Jede Vertragspartei kann Änderungen dieses Übereinkommens vorschlagen; der Generalsekretär des Europarats übermittelt jeden Vorschlag den Mitgliedstaaten des Europarats, den Nichtmitgliedstaaten, die sich an der Ausarbeitung des Übereinkommens beteiligt haben, der Europäischen Gemeinschaft sowie jedem Staat, der nach Artikel 16 diesem Übereinkommen beigetreten oder zum Beitritt eingeladen worden ist.

2 Jede von einer Vertragspartei vorgeschlagene Änderung wird dem Europäischen Ausschuss für rechtliche Zusammenarbeit (CDCJ) übermittelt; dieser unterbreitet dem Ministerkomitee seine Stellungnahme zu dem Änderungsvorschlag.

3 Das Ministerkomitee prüft den Änderungsvorschlag und die vom Europäischen Ausschuss für rechtliche Zusammenarbeit (CDCJ) unterbreitete Stellungnahme und kann nach Konsultation der Vertragsparteien des Übereinkommens, die nicht Mitglieder des Europarats sind, die Änderung beschließen.

4 Der Wortlaut jeder vom Ministerkomitee nach Absatz 3 beschlossenen Änderung wird den Vertragsparteien zur Annahme übermittelt.

5 Jede nach Absatz 3 beschlossene Änderung tritt am dreißigsten Tag nach dem Tag in Kraft, an dem alle Vertragsparteien dem Generalsekretär mitgeteilt haben, dass sie sie angenommen haben.

Artikel 21 – Beilegung von Streitigkeiten

1 Der Europäische Ausschuss für rechtliche Zusammenarbeit (CDCJ) des Europarats wird ständig über die Auslegung und Anwendung dieses Übereinkommens informiert.

2 Im Fall einer Streitigkeit zwischen den Vertragsparteien über die Auslegung oder Anwendung dieses Übereinkommens bemühen sich die Vertragsparteien, nach Maßgabe ihrer Vereinbarung die Streitigkeit durch Verhandlungen oder andere friedliche Mittel ihrer Wahl, einschließlich der Befassung des Europäischen Ausschusses für rechtliche Zusammenarbeit, eines Schiedsgerichts, das für die Streitparteien bindende Entscheidungen fällt, oder des Internationalen Gerichtshofs, beizulegen.

Artikel 22 – Kündigung

1 Jede Vertragspartei kann dieses Übereinkommen jederzeit durch eine an den Generalsekretär des Europarats gerichtete Notifikation kündigen.

2 Die Kündigung wird am ersten Tag des Monats wirksam, der auf einen Zeitabschnitt von drei Monaten nach Eingang der Notifikation beim Generalsekretär folgt.

Artikel 23 – Notifikationen

Der Generalsekretär des Europarats notifiziert den Mitgliedstaaten des Rates sowie allen anderen Unterzeichnern und Vertragsparteien dieses Übereinkommens

a jede Unterzeichnung;

b jede Hinterlegung einer Ratifikations-, Annahme-, Genehmigungs- oder Beitrittsurkunde;

c jeden Zeitpunkt des Inkrafttretens dieses Übereinkommens nach den Artikeln 15 und 16;
jede andere Handlung, Notifikation oder Mitteilung im Zusammenhang mit diesem Übereinkommen.

Zu Urkund dessen haben die hierzu gehörig befugten Unterzeichneten dieses Übereinkommen unterschrieben.

Internationalrechtliche Regulierung des Whistleblowing

Anpassungsbedarf im deutschen Recht

Juristisches Kurzgutachten
im Auftrag des DGB

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B. Fragestellung


Um dieses Spannungsfeld einigermaßen in Ausgleich zu bringen, um die für die Demokratie konstitutiven Funktionen des Whistleblowing freizusetzen und seine destruktiven Gefahren zugleich einzudämmen, hat die internationale Staatsengemeinschaft mit einer Vielzahl grenzüberschreitender Regelungsbemühungen reagiert. Das Whistleblowing schützende und regulierende
Normen finden sich im Antikorruptionsplan der G 20, in Aktionsplänen der OECD und in den rechtspolitischen Vorschlägen von Nichtregierungsorganisationen wie Transparency International. Völkervertragliche Vorkehrungen zur Regulierung des Whistleblowing finden sich zudem in zahlreichen Anti-Korruptions-Konventionen, aber auch in allgemeinen Menschenrechtsverträgen.\(^1\)

Im Hinblick auf die internationalrechtlichen Verpflichtungen der Bundesrepublik sieht der Koalitionsvertrag vom November 2013 einen Prüfungsauftrag im Hinblick auf das Whistleblowing vor:

„Beim Hinweisgeberschutz prüfen wir, ob die internationalen Vorgaben hinreichend umgesetzt sind“.\(^2\)

Die Erfüllung dieses Prüfauftrages steht noch aus. Die vorliegende Studie sucht die sich in diesem Zusammenhang stellenden Fragen zu beantworten. Sie wird in drei Schritten vorgehen:

(1) Zunächst ist der Status quo im deutschen Recht zu identifizieren. Welche Normen sind im Fall des Whistleblowing einschlägig und stellen diese einen umfassenden Schutz für Hinweisgebende sicher?

(2) Im zweiten Schritt wird herauszuarbeiten sein, aus welchen internationalen Rechtsquellen Vorgaben zum Schutz des Whistleblowing bzw. zum Verbot der Bestrafung aufgrund von Whistleblowing entnommen werden können und inwieweit rechtspolitische Initiativen diese völkervertraglichen Anforderungen konkretisieren.

(3) Schließlich, das ist der dritte Schritt, ist zu fragen, inwieweit Deutschland seinen völkerrechtlichen Verpflichtungen genügt und welcher Handlungsbedarf identifiziert werden kann.

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\(^2\) Koalitionsvertrag vom 27.11.2013, 18. Legislaturperiode, S. 70.
C. Rechtsgutachten
I. Whistleblowing im deutschen Recht

Grenzen und Schutz des Whistleblowing sind in Deutschland nicht ausdrücklich geregelt. Im Unterschied dazu haben viele andere Länder – darunter die USA, Frankreich, Kanada und Australien – spezifische Schutzgesetze erlassen, welche die Enthüllung von Missständen oder Verbrechen im Arbeitsverhältnis durch spezifische Meldeverfahren erleichtern und dadurch Hinweisgebende und Betroffene gleichermaßen vor ungerechtfertigten Nachteilen bewahren.³

1. Fehlender systematischer Schutz

Der gesetzliche Whistleblowingschutz in Deutschland wird zu Recht als fragmentiert beschrieben.⁴ Grundsätzlich hat jede und jeder das Recht, bei Verdacht einer Straftat eine Anzeige bei der Staatsanwaltschaft einzureichen (§ 158 StPO). Unter welchen Umständen Arbeitnehmerinnen und Arbeitnehmer eine Strafanzeige gegen die Arbeitgebenden einreichen oder sich außerhalb des strafrechtlichen Verfahrens an die Öffentlichkeit wenden dürfen, ohne sanktioniert zu werden, bleibt allerdings ungeklärt.⁵ Eine statusübergreifende Regelung, welche die Voraussetzungen für zulässige Veröffentlichungen von Informationen über Missstände und Straftaten im Arbeitsverhältnis klären und die divergierenden Interessen ins Verhältnis setzen würde, existiert nicht.


Ob und inwieweit Whistleblowing von den Arbeitgebenden sanktioniert werden kann, hängt von der Auslegung der im jeweiligen Arbeitsverhältnis geltenden Vorschriften ab. Das Recht operiert in Deutschland derzeit mit unbestimmten Rechtsbegriffen, ohne den Tatbestand des Whistleblowing explizit zu bestimmen. So dürfen Arbeitgebende die Arbeitnehmenden nicht benachteiligen, wenn die Arbeitnehmenden in zulässiger Weise ihre Rechte ausüben (§ 612a BGB). Ob und inwieweit die Weitergabe von Informationen über Missstände und Straftaten, die die Arbeitgebenden betreffen, eine zulässige Rechtsausübung darstellen kann, lässt die Norm jedoch genauso offen wie die Fragen der Beweislast im Hinblick auf Nachteile, die in (zeitlichem oder sachlichem) Zusammenhang mit einem Whistleblowing stehen.

Auch für Auszubildende gibt es Regelungslücken. So sieht § 10 Abs. 2 BBiG zwar teilweise eine entsprechende Anwendung arbeitsrechtlicher Regeln vor. § 13 Ziff. 6 BBiG enthält jedoch ein allgemeines Stillschweigungsgebot, das Whistleblowing entgegenstehen kann.

Grundsätzlich können sich Whistleblowerinnen und Whistleblower zwar auf das Grundrecht der Gewissensfreiheit (Art. 4 GG) und der Meinungsfreiheit (Art. 5 GG) und unter Umständen auch auf Art. 17 GG (Petitionsrecht) berufen. Die Rechtsprechung hat bislang jedoch nur in wenigen Fällen einen Schutz des Whistleblowing im Arbeitsverhältnis anerkannt. Das BVerfG hatte festgestellt, dass eine Strafanzeige durch einen Arbeitnehmer gegen seinen Arbeitgeber allein keinen Grund für eine fristlose Kündigung darstellen darf, auch wenn das Strafverfahren letztlich eingestellt wurde. Aufbauend auf dieser Entscheidung hat das BAG ebenfalls Strafanzeigen des Arbeitnehmers gegen den Arbeitgeber nicht in jedem Fall als Kündigungsgrund gelten lassen, hierbei aber sehr vage Kriterien genannt:

„Der Arbeitnehmer kann seine vertragliche Rücksichtnahmepflicht verletzen, wenn sich seine Strafanzeige gegen den Arbeitgeber oder dessen Repräsentanten als eine unverhältnismäßige Reaktion auf dessen Verhalten darstellt. Dabei können als Indizien für eine unverhältnismäßige Reaktion des anzeigenden Arbeitnehmers sowohl die Berechtigung der Anzeige als auch die Motivation des Anzeigenden oder ein fehlender innerbetrieblicher Hinweis auf die angezeigten Missstände sprechen.“

Zwar sind mittlerweile durch das Urteil des EGMR im Fall Heinisch – der EGMR hat hier die Bundesrepublik wegen der Verletzung des Art. 10 EMRK verurteilt, da eine Arbeitnehmerin nicht hinreichend vor Sanktionen im Arbeitsverhältnis geschützt wurde, obschon sie durch Whistleblowing von ihrer Meinungsfreiheit Gebrauch gemacht hatte – für das deutsche Recht einige Wegweisungen gegeben worden.

8 EGMR, Urteil v. 21.07.2011, 28274/08, Heinisch ./ Deutschland; hierzu siehe Claudia Schubert, Whistle-Blowing after Heinisch v. Germany, GYIL 54 (2011), S. 753 ff.; ferner Katharina Pabel, Der
Dennoch hat auch die Rechtsprechung des EGMR bislang nur punktuelle Vorgaben machen können. 9 Für einen systematisch umfassenden Schutz des Whistleblowing ist das ein erster Schritt, insgesamt aber noch zu wenig. Auch wenn man die für die Bundesrepublik völkerrechtlich verbindliche EGMR-Rechtsprechung als Teil des deutschen Whistleblowing-Rechts versteht, fehlt es an einem systematischen, kohärenten und umfassenden Schutzsystem. Die Regulierung des Whistleblowing wird der Einzelfalljurisdiktion nationaler und internationaler Gerichte übermittelt. Der Gesetzgeber lässt grundrechtswesentliche Gesichtspunkte unregelt und im Vagen. Es finden sich keine systematischen Regelungen zum Verbot zivil- und arbeitsrechtlicher Nachteile, keine hinreichenden Regelungen zur Beweislastverteilung bei Nachteilszufügung im Zusammenhang mit Whistleblowing im Arbeitsverhältnis und keine transparente Klärung für die Zulässigkeit der Einschaltung der Öffentlichkeit.

Diese Unklarheiten gehen zu Lasten der Whistleblowerinnen und Whistleblower, aber auch der Öffentlichkeit und der jeweils Beschuldigten.

2. Fehlende Vorgaben hinsichtlich der Meldeverfahren

Diese materiellrechtlichen Unklarheiten werden durch intransparente Verfahrensregelungen verschärft. Für die Arbeitnehmerinnen und Arbeitnehmer ist nicht nur intransparent und unsicher, was wann worüber mitgeteilt werden kann, wann öffentliche und wann private Interessen überwiegen. Im deutschen Recht ist vielmehr auch nicht hinreichend systematisch geregelt, womit der Mitteilung gemacht werden kann. So fehlen gesetzlich ausgestaltete Meldeverfahren, die Whistleblowing regulieren und einen angemessenen Schutz für Informantinnen und Informanten, aber auch für die Betroffenen vorsehen könnten.


9 Details hierzu siehe unten unter C.II.2.b)(2).

In der Summe bewirken diese Einzelregelungen aber keinen systematischen Schutz und keine klare Verfahrensregulierung. Sie belassen zentrale Begriffe im Unklaren. Das gefährdet hinweisgebende und belastete Personen gleichermaßen. Diese Unsicherheiten schränken den Zugang der Öffentlichkeit im Ergebnis ein. Insbesondere bleibt unsicher, wann der Weg an die Öffentlichkeit über externe Hinweisgebung gestattet und wann ein vorheriger interner Hinweis verpflichtend ist.\(^\text{10}\)

Die Rechtsunsicherheit in dieser für die Rechtmäßigkeit des Whistleblowing zentralen Frage wird durch Codes of Conduct und Ethikrichtlinien auf Unternehmensebene noch gesteigert.\(^\text{11}\) Das Verhältnis der unternehmensinternen Anreizsysteme, die das interne Whistleblowing befördern sollen,\(^\text{12}\) zu den öffentlichen Meldeverfahren ist ungeklärt. In der Rechtsprechung des BAG ist ein Kriterium für die Schutzwürdigkeit des Whistleblowing, ob interne Meldeverfahren genutzt wurden.\(^\text{13}\) Das birgt die Gefahr, dass es dann letztlich die Unternehmen in der Hand hätten, durch die Etablierung interner Verfahren – deren Effektivität, Anonymität und Unabhängigkeit durch den Gesetzgeber nicht vorgegeben sind – die Meinungsfreiheit und die öffentliche Diskussion einzuschränken. Im Extremfall könnte dann der Gang an die Öffentlichkeit durch die Einrichtung interner Scheinverfahren verhindert werden.

Hinzu kommt, dass die internen Meldesysteme – wie zum Beispiel Whistleblower-Hotlines – sich zwar in einigen Fällen als nützliches Instrument zur Beseitigung betriebsinterner Missstände bewähren und damit die Unternehmensinteressen befördern können. Interne Kontrollsysteme bergen allerdings die Gefahr, gerade in Verbindung mit unternehmensinternen Ethik-Richtlinien, welche die Arbeitnehmenden zur Meldung von jeglichen Verstößen gegen diese Richtlinien unter Wahrung der Anonymität verpflichten, dass hierdurch die Kontrolle der Arbeitgebenden über die Belegschaft erweitert wird. Eine mögliche Konsequenz solcher Strukturen kann sein, dass die internen Kommunikationskanäle dafür genutzt werden, kritische Arbeitnehmerinnen und Arbeitnehmer einzuschüchtern und sie vom Gang an die Öffentlichkeit abzuhalten. Im Ergebnis kann das wiederum dazu führen, dass sich interne und externe Meldeverfahren nicht komplementär zueinander verhalten, sondern dass erstere die Effektivität der externen Meldeverfahren und letztlich den Schutz der Meinungsfreiheit untergraben.

\(^{10}\) Siehe das Plädoyer für die Achtung des Arbeitgeberinteresses an Wahrung „geschäftlicher Interessen“ bei Bernd Wiebauer, Whistleblowing im Arbeitsschutz, NZA 2015, S. 22 ff.
\(^{11}\) Mike Schulz, Ethikrichtlinien und Whistleblowing. Arbeitsrechtliche Aspekte der Einführung eines Compliance-Systems, Frankfurt am Main 2010, 67 ff.
\(^{13}\) BAG, Fn. 7.
Die Unsicherheiten für die hinweisgebenden und die von den Hinweisen betroffenen Personen sind wegen des ungeklärten Zusammenspiels interner und externer Meldeverfahren evident und existentiell. Whistleblowing setzt in der Regel ein hohes Maß an Zivilcourage voraus und bleibt selten frei von negativen betrieblichen Folgen. Die Unsicherheit, die aus der mangelnden Verfahrensregulierung resultiert, belastet die Arbeitnehmerinnen und Arbeitnehmer zusätzlich. Sie belastet aber auch die Betroffenen, da der Gesetzgeber nicht hinreichend ausgestaltet hat, welche rechtsstaatlichen Anforderungen an unternehmensinterne Kontrollsysteme zu stellen sind. Das gefährdet im Ergebnis die Verfahrensrechte nicht nur der hinweisgebenden, sondern auch der belasteten Personen.

Die Gestaltung des Verhältnisses von internen und externen Meldesystemen wirft schwerwiegende Fragen im Hinblick auf die in Art. 5 GG und Art. 10 EMRK geschützten Grundrechte auf, die einer klärenden gesetzlichen Regelung bedürfen, da sie grundrechtswesentlich sind.

3. Unbestimmte Voraussetzungen bei der Strafbarkeit

All diese Rechtsunsicherheiten werden noch einmal potenziert durch die vom Gesetzgeber zu verantwortende Unklarheit im Hinblick auf eine mit dem Whistleblowing verbundene Strafbarkeit. Das deutsche Recht beinhaltet eine Reihe von Vorschriften, die Whistleblowerinnen und Whistleblowern ihrerseits dem Verdacht einer Straftat aussetzen können. Diese betrifft das Verbot der Preisgabe von Staatsgeheimnissen (§§ 93 ff. StGB) und Dienstgeheimnissen (§ 353b StGB). Diese Straftatbestände enthalten keine expliziten Ausnahmen, die ein Whistleblowing rechtfertigen könnten. Die Begriffe sind unklar, wie zuletzt die Anschuldigungen gegen netzpolitik.org wegen Landesverrats (§ 94 StGB) gezeigt haben, im Rahmen derer erst nach einem Gutachtenstreit die Rechte der Öffentlichkeit akzentuiert werden konnten. Auch daraus wird in der Literatur geschlussfolgert, dass man Whistleblowerinnen und Whistleblowern „nicht wirklich guten Gewissens raten [kann], sich zu trauen, Missstände öffentlich anzuprangern. Neben den arbeitsrechtlichen Folgen des Whistleblowing wird im Schrifttum zu Recht betont, dass auch die strafrechtlichen Folgen des Whistleblowing nicht zu unterschätzen seien.“

Diese Unsicherheit betrifft nicht nur die hinweisgebende Person. Auch für Journalistinnen und Journalisten – und damit die Pressefreiheit – und für die von den Hinweisen betroffenen Personen ist die Lage in grundrechtsrelevanter Weise ungeklärt. Die sich in dieser Kollisionslage stellenden Rechtsfragen sind durch den

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16 Barbara Weichselbaum, Whistleblowing. Der Meinungsfreiheit vertrauen und sich trauen?, in: Jahrbuch Menschenrechte 2012/2013, S. 213 ff. (226), m.w.N.
Gesetzgeber nur unzureichend gesetzlich beantwortet. Der Gesetzgeber kommt hier insbesondere seiner aus den Grundrechten der Meinungs- und Pressefreiheit resultierenden Gestaltungsverantwortung nicht hinreichend nach.

4. Zwischenergebnis

Das deutsche Recht ist im Hinblick auf den Schutz von hinweisgebenden Personen insgesamt dadurch geprägt, dass bereichsspezifische Spezialregelungen parallel gelten, über die je punktuell interveniert wird. Die einzelnen Sonderfälle werden nicht koordiniert geregelt, ein systemübergreifendes Politikziel ist nicht auszumachen.\(^\text{17}\) Zentrale Aspekte – wie die Frage, welche Kriterien bei der Abwägung zwischen unternehmerischen bzw. staatlichen Geheimhaltungsinteressen und öffentlichem Aufklärungsinteresse im Fall von Whistleblowing zu berücksichtigen und wie diese im Einzelfall zu gewichten sind, welche Meldeverfahren (intern oder extern) zu nutzen sind, wie der Schutz vor Nachteilen im Arbeitsverhältnis gestaltet werden kann – bleiben weiterhin ungeklärt.

Die Risiken für die von den Hinweisen Betroffenen, aber auch für die jeweiligen Arbeitnehmerinnen und Arbeitnehmer, sich durch einen Hinweis strafbar zu machen oder den Arbeitsplatz durch verhaltensbedingte Kündigung des Arbeitgebers zu verlieren, sind hoch. Die Unsicherheit betrifft nicht nur Beschäftigte privater Unternehmen, sondern auch Angestellte des öffentlichen Dienstes. So hat der wissenschaftliche Dienst des Schleswig-Holsteinischen Landtags im vergangenen Jahr festgestellt,

„dass in Ermangelung einer gesetzlichen Grundlage, die die Zulässigkeitsvoraussetzungen des Whistleblowing normiert, eine Rechtsunsicherheit – auch für Angestellte des Landes oder der Kommunen – verbleibt.“\(^\text{18}\)


\(^{19}\) BT-Drs. 18/3043 v. 4.11.2014 und BT-Drs. 18/3039 v. 4.11.2014 und die darauf bezogenen Stellungnahmen im Ausschuss Arbeit und Soziales des BT (Ausschuss-Drs. 18(11)321 v. 11.03.2015.
\(^{20}\) Ausschuss-Drs. 16(10)849; siehe hierzu Cornelius Becker, Whistleblowing. Anzeigepflicht des Arbeitnehmers, 120 ff.; Annemarie Berthold, Whistleblowing in der Rechtsprechung des Bundesarbeitsgerichts, Frankfurt am Main 2010, 94 ff.
\(^{21}\) BR-Drs. 534/11 vom 6.9.2011.
II. Whistleblowing im internationalen Recht

Ganz im Gegensatz zur rechtspolitischen Stagnation in Deutschland finden sich auf transnationaler Ebene zahlreiche rechtspolitische Initiativen (hierzu 1.) und internationale Konventionen (hierzu 2.), die auf eine Regulierung des Whistleblowing zielen.

1. Rechtspolitische Initiativen


Auf supranationaler Ebene hat das Europaparlament im Oktober 2013 die EU-Kommission dazu aufgefordert,

„einen Gesetzgebungsvorschlag vorzulegen, der für den privaten und den öffentlichen Sektor ein wirksames und umfassendes europäisches Schutzprogramm für Personen vorsieht, die Missmanagement und Unregelmäßigkeiten aufdecken und Hinweise zu Korruption im Zusammenhang mit nationalen und grenzüberschreitenden Belangen und finanziellen Interessen der EU geben, und insbesondere für Zeugen, die gegen mafiöse und andere kriminelle Organisationen aussagen, und das vor allem eine Lösung für ihre schwierigen Lebensbedingungen bietet (vom Risiko von Vergeltungsversuchen bis zur Isolierung von der Familie oder von der räumlichen Entwurzelung bis zur sozialen und beruflichen Ausgrenzung); fordert die Mitgliedstaaten auch auf, einen geeigneten und wirksamen Schutz für Informanten einzurichten“.²³

Neben diesen zivilgesellschaftlichen und supranationalen Impulsen, sind die völkerrechtspolitischen Initiativen im Rahmen der G20 und des Europarats für die deutsche Rechtsregelung von besonderer Bedeutung.

a) G 20

Im Rahmen der G20 stellt der – von Deutschland mitverabschiedete – Anti-Korruptions-Aktionsplan als Teil der Abschlusserklärung des Gipfels in Seoul vom 12. November 2010 (Annex III Nr. 7) die Forderung nach einem wirksamen Schutz von Whistleblowerinnen und Whistleblowern auf:

"To protect whistleblowers, who report in good faith suspected acts of corruption, from discriminatory and retaliatory actions, G20 countries will enact and implement whistleblower protection rules by the end of 2012. To that end, building upon the existing work of organizations such as the OECD and the World Bank, G20 experts will study and summarize existing whistleblower protection legislation and enforcement mechanisms, and propose best practices on whistleblower protection legislation."\textsuperscript{24}

Der Anti-Corruption Action Plan 2013 – 2014 wiederholt in Ziff. 9 die Aufforderung an die Staaten, den Schutz der Whistleblower gesetzlich zu verankern:

"The G20 countries that do not already have whistleblower protections will enact and implement whistleblower protection rules drawing on the principles developed in the Working Group, for which Leaders expressed their support in Cannes and also take specific actions, suitable to the jurisdiction, to ensure that those reporting on corruption, including journalists, can exercise their function without fear of any harassment or threat or of private or government legal action for reporting in good faith."\textsuperscript{25}

Die lediglich punktuellen Schutzvorschriften im deutschen Recht genügen diesen rechtspolitischen Vorstellungen im Rahmen der G20 nicht. Das wird auch an Erklärungen im Zusammenhang mit dem Gipfel in Cannes 2011 deutlich. Hier hatte die nach Seoul eingerichtete Arbeitsgruppe einen ersten Fortschrittsbericht zum Aktionsplan gegen Korruption vorgelegt. Darin findet sich in Ziff. 13 zum Thema Whistleblowing unter anderem die Formulierung:

"G20 countries have committed to enact and implement whistleblower protection rules by the end of 2012. Thirteen G20 countries already have relevant whistleblower protection legislation in place for the private sector, and fourteen for the public sector. Many countries are in the process of

\textsuperscript{24} Dt. Übersetzung: „Um Hinweisgeber, die gutgläubig einen Verdacht auf Korruption melden, vor Diskriminierung und Vergeltungsmaßnahmen zu schützen, werden die G20-Staaten bis Ende 2012 Regeln zum Whistleblower-Schutz erlassen und umsetzen. Zu diesem Zweck, und unter Rückgriff auf Ergebnisse von Organisationen wie der OECD und der Weltbank, werden Experten der G20-Staaten Whistleblowerschutzgesetze und Sanktionsmechanismen prüfen, zusammengfasst darzustellen und Best Practices für eine Whistleblowerschutzgesetzgebung vorschlagen."

\textsuperscript{25} Dt. Übersetzung: „Die G20-Staaten, welche bislang keinen Hinweigerberschutz haben, werden aufgefordert, entsprechende Regelungen zu verabschieden und umzusetzen, gestützt auf die Leitlinien, die in den Arbeitsgruppen entwickelt und von den Vorsitzenden akzeptiert wurden. Sie sind verpflichtet, gerichtliche Maßnahmen zu ergreifen, um sicherzustellen dass Whistleblower, welche auf Korruption hinweisen, dies ohne Angst vor Belästigungen oder Sanktionen tun können, solange sie im guten Willen handeln.“
strengthening existing whistleblower protection measures or introducing legislation.”

Die Bundesrepublik war bei jenen Staaten, die bereits über adäquate Schutzgesetze verfügten, nicht genannt. Der Aufforderung, den Schutz des Whistleblowing bis 2012 zu stärken, ist die Bundesrepublik bis heute nicht nachgekommen.

In Cannes hatten die G20 auch ein Kompendium zum Schutz des Whistleblowing bei der OECD in Auftrag gegeben, die dieses im Jahr darauf vorglegte. Das Ziel der Maßnahmen des Schutzes von Whistleblower, so heißt es darin, sei:

"Encouraging and facilitating whistleblowing, in particular by providing effective legal protection and clear guidance on reporting procedures".

Nur ein über einen punktuellen Schutz hinausgehendes systematisches Konzept zum Schutz des Whistleblowing entspricht demnach den rechtspolitischen Vorstellungen von OECD und G20. Im deutschen Recht haben sich diese Bemühungen um einen systematischen Schutz allerdings bislang nicht hinreichend niedergeschlagen.

b) Europarat

Auch auf der regionalen Ebene finden sich völkerrechtspolitische Entwürfe mit dem Ziel der Intensivierung des Schutzes für Whistleblowerinnen und Whistleblower. Für Deutschland sind insbesondere die Aktivitäten im Rahmen des Europarats von Relevanz.

(1) Parlamentarische Versammlung


"In view of the disclosures concerning mass surveillance and intrusions of privacy carried out by the United States National Security Agency and other intelligence agencies, which affect communications of numerous persons who are not suspected of any wrongdoing, the committee considers that whistle-

27 Ebd., Ziff. 2.
28 BGBl. 1950 S. 263; 1954 II S. 1126.
blower protection measures should cover all individuals who denounce wrongdoings which place fellow human beings at risk of violations of their rights protected under the European Convention on Human Rights, including persons working for national security or intelligence agencies. Given the importance of whistle-blowing to ensure that legal limits placed on mass surveillance are respected and the international ramifications of whistle-blowing in the field of national security or intelligence, whistleblowers (including employees of relevant government agencies or private contractors), whose disclosures are otherwise in line with Resolution 1729 (2010), Committee of Ministers Recommendation CM/Rec(2014)7 or the Tshwane Principles as supported by Resolution 1954 (2013), should be granted asylum in a member State of the Council of Europe when they are persecuted in their home country.\textsuperscript{30}

Die Stellungnahmen der Parlamentarischen Versammlung akzentuieren das Whistleblowing als Mechanismus zur Herstellung von Öffentlichkeit. Die Funktion des Whistleblowing erschöpft sich daher nicht in der wirksamen Korruptionsbekämpfung oder der Aufdeckung von Bestechung. Whistleblowing hat vielmehr eine polygonale Dimension und dient auch und gerade den Interessen einer demokratischen Öffentlichkeit. Die Bundesrepublik bleibt eine diesen Zielen und Vorgaben entsprechende systematische Regulierung zum Schutz des Whistleblowing weiterhin schuldig. Insbesondere im Bereich der Sicherheitspolitik sind Whistleblowerinnen und Whistleblower Unsicherheiten ausgesetzt, die es zu beseitigen gilt.\textsuperscript{31}

\textbf{(2) GRECO}

Neben der Parlamentarischen Versammlung hat sich auch die Staatengruppe gegen Korruption (GRECO) im Rahmen des Europarats der Intensivierung des Schutzes von Whistleblowerinnen und Whistleblowern gewidmet und insbesondere betont, dass der Schutz des Whistleblowing nur bei einem integrierten Ansatz gewährt werden kann, der

\textquote*{“measures in such areas as awareness-raising, guidance and support, institutional arrangements and administrative procedures, enforcement measures, compensation mechanisms etc.”}\textsuperscript{32}

beinhaltet. Lediglich punktuelle Schutznormen wie im deutschen Recht sind nicht hinreichend effektiv und widersprechen den Vorstellungen im Rahmen der GRECO.

\textsuperscript{30} Empfehlung 13791 vom 19.5.2015, S. 1.
\textsuperscript{31} Siehe die Beiträge in Dieter Deiseroth & Annegret Falter, Whistleblowing in der Sicherheitspolitik, Berlin 2014; ferner Andreas Fischer-Lescano, Mäßigung der Verhältnismäßigkeit. Whistleblowing im transnationalen Recht, in: Graß Calliess (Hg.), Transnationalisierung des Rechts, Tübingen 2014, S. 435 ff.; Dieter Deiseroth,
(3) Ministerkomitee

Schließlich hat auch das Ministerkomitee des Europarats Empfehlungen zur Regulierung des Whistleblowing abgegeben. So hatte zunächst der Europäische Ausschuss für rechtliche Zusammenarbeit, einer der Lenkungsausschüsse des Ministerkomitees nach Art. 17 der Europarats-Satzung, 2012 eine Studie zur Durchführbarkeit eines Rechtsinstruments zum Schutz von Whistleblowern erstellt.\(^{33}\) An diesen Bericht knüpften sodann die Empfehlungen des Ministerkomitees des Europarats, gestützt auf Art. 15 lit. b) der Satzung des Europarats, an.\(^{34}\) Das Ministerkomitee erlässt in seinen Empfehlungen 29 Prinzipien und betont, dass Whistleblowing eine Form der Ausübung des europäischen Grundrechts auf Meinungsfreiheit darstellt. Das Ministerkomitee ermuntert darin die Staaten nicht nur zur Schaffung kostenloser Beratungsangebote für Whistleblowerinnen und Whistleblower und zu Aufklärungskampagnen über die positiven Effekte von Whistleblowing, sondern stellt daneben sehr konkrete Regelungen vor, die einen Schutz von Whistleblowerinnen und Whistleblowern ermöglichen und die nationale Gesetze beachten sollen:

- So sollen die Gesetze die Minimalbedingungen des öffentlichen Interesses festlegen (Ziff. 3 der Empfehlungen: „zumindest die Gesetzes- und Menschenrechtsverletzungen sowie die Gefahren für die öffentliche Gesundheit und Sicherheit und für die Umwelt“).
- Der Schutz von Whistleblowerinnen und Whistleblowern soll statusübergreifend, also unabhängig von der Art des Arbeitsverhältnisses, erfolgen und Whistleblowing durch bezahlte und unbezahlte, gegenwärtige und frühere Beschäftigte sowohl in der Privatwirtschaft als auch im öffentlichen Sektor umfassen (Ziff. 3-6).
- Der gesetzgeberische Ansatz soll umfassend und kohärent sein und mehrere interne und externe Meldemöglichkeiten schaffen (Ziff. 7-17).
- Die nationalen Instanzen haben die Pflicht, unabhängige Untersuchungen einzuleiten (Ziff. 19-20).
- Der Schutz der Identität der Whistleblowerinnen und Whistleblower und die Vertraulichkeit der Kommunikation ist zu gewährleisten (Ziff. 18).
- Die Whistleblowerinnen und Whistleblower sollen vor Repressalien geschützt werden (Ziff. 21 ff.).
- Bei Nachteilen, die die Whistleblowerinnen und Whistleblower in laufenden Arbeitsbeziehungen erleiden, soll eine Beweislastumkehr gelten, nach der der jeweilige Arbeitgeber zu beweisen hat, dass die erlittenen Nachteile keine Sanktionierung des Whistleblowing darstellen (Ziff. 25).

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Diese Empfehlungen und rechtspolitischen Desiderata erfüllt das deutsche Recht mit seinen fragmentierten und punktuellen Einzelvorschriften zum Schutz des Whistleblowing nicht annähernd.

2. Internationale Verträge

Neben den rechtspolitischen Empfehlungen können sich konkrete rechtliche Umsetzungspflichten daraus ergeben, dass die Bundesrepublik Deutschland durch internationale Verträge zum Schutz von Whistleblower verpflichtet ist.

a) Universelle Ebene

Auf der universellen Ebene sind mit der UN-Konvention gegen Korruption (hierzu (1)), der OECD-Konvention zur Bestechungsbekämpfung (hierzu (2)) und dem ILO-Übereinkommen 158 (hierzu (3)) drei spezielle Konventionen in Kraft, aus denen sich ggf. Rechtswirkungen für Deutschland ergeben. Unter den menschenrechtlichen Konventionen schützt der UN-Zivilpakt die Meinungsäußerungsfreiheit. Auch hieraus sind Vorgaben für die Ausgestaltung des Whistleblowingschutzes zu entnehmen (hierzu (4)).

(1) UN-Konvention gegen Korruption (UNCAC)


„Jeder Vertragsstaat erwägt ferner, in Übereinstimmung mit den wesentlichen Grundsätzen seines innerstaatlichen Rechts Maßnahmen zu treffen und Regelungen vorzusehen, die es Amtsträgern erleichtern, den zuständigen Behörden Korruptionshandlungen zu melden, wenn ihnen solche Handlungen bei der Wahrnehmung ihrer Aufgaben bekannt werden."

36 BGBl. 2014 II S. 762, 763
37 BGBl. 2015 II S. 140.
Daneben verlangt die Konvention gemäß Art. 13 UNCAC eine Sicherstellung des Schutzes der Öffentlichkeit, in Art. 32 UNCAC die Etablierung eines Zeugen- und Expertenschutzes und in Art. 33 UNCAC generelle Schutzvorkehrungen für Hinweisegeber:

„Jeder Vertragsstaat erwägt, in seiner innerstaatlichen Rechtsordnung geeignete Maßnahmen vorzusehen, um Personen, die den zuständigen Behörden in redlicher Absicht und aus hinreichendem Grund Sachverhalte betreffend in Übereinstimmung mit diesem Übereinkommen umschriebene Straftaten mitteilen, vor ungerechtfertigter Behandlung zu schützen.“

Die Bundesregierung meint, so stellte sie es bei der Einbringung des Umsetzungsgesetzes zur UN-Antikorruptionskonvention im Juli 2014 dar, den internationalrechtlichen Anforderungen jedenfalls dieser Konvention sei durch das deutsche Recht bereits Genüge getan. Der Schutz des Whistleblowing in Deutschland entspreche den Vorgaben der UNCAC:

„Die Anregung des Übereinkommens ist in Deutschland bereits umgesetzt […] Der Schutz von Hinweisegebern wird derzeit außerdem im Hinblick auf sonstige internationale Vorgaben geprüft.“

An dieser Einschätzung ist zunächst einmal richtig, dass die Art. 8 und 33 UNCAC, auf die sich die o.g. Ausführung der Bundesregierung beziehen, nur Normerlassenregungen darstellen. Die Normen sind inhaltlich nicht-obligatorisch, auch wenn eine systematische Prüfung verpflichtend ist.

Nun ist zwar eine solche systematische Prüfung bislang in Deutschland nicht erfolgt und die apodiktische Feststellung in der Begründung zum Umsetzungsgesetz genügt dem Auftrag aus Art. 8 und 33 UNCAC jedenfalls nicht. Diese Verletzung der völkerrechtlichen Prüfungspflicht, so evident sie auch ist, heißt für die materielle Regulierung des Whistleblowing aber zunächst einmal nicht, dass die Bundesrepublik auch hier vertragsbrüchig wäre. Eine solche Vertragsbruchigkeit müsste sich aus den inhaltlichen Normen selbst ergeben.

Die Auslegung der UNCAC muss den gewohnheitsrechtlich anerkannten Auslegungsgesichtspunkten der Wiener Vertragsrechtskonvention (Art. 31 WVK) folgen. Danach ist der Ausgang der Wortlaut des Vertrages, verbunden mit systematisch-teleologischen Erwägungen, Art. 31 Abs. 1WVK:

38 BT-Drs. 18/2138 v. 17.7.2014, S. 74; siehe auch ebd., S. 86.
Ein Vertrag ist nach Treu und Glauben in Übereinstimmung mit der gewöhnlichen, seinen Bestimmungen in ihrem Zusammenhang zukommenden Bedeutung und im Lichte seines Zieles und Zweckes auszulegen."


Auch die Empfehlungen, die im Rahmen der Implementierung der UNCAC im Hinblick auf Staatenberichte an die Konferenz der Vertragsstaaten nach Art. 63 UNCAC abgegeben wurden, konkretisieren die Rechtspflichten aus dieser Konvention im Hinblick auf das Whistleblowing weiter. Im Hinblick auf die Anforderungen, die sich aus der systematischen Gesamtschau der UNCAC und den hierzu ergangenen Konkretisierungen in der Vertragspraxis, die nach Art. 31 Abs. 3 lit. b) WVK ebenfalls für die Auslegung dieses Völkerrechtsvertrages zu berücksichtigen ist, ergeben, ist die deutsche Rechtslage gleich mehrfach defizitär:

(a) Systematischer Schutz des Whistleblowing

In der Vertragspraxis der UNCAC werden die Staaten denn auch in Anwendung dieser systematischen Zusammenschau von Art. 8, 13, 32 und 33 UNCAC regelmäßig dafür kritisiert, dass sie den nach der UNCAC gebotenen Schutz des Whistleblowing nicht etabliert haben und

„have not established comprehensive whistle-blower protection programmes“. 43

Hierbei betont die Konferenz der Vertragsstaaten besonders, dass

„the existence of piecemeal and fragmented provisions does not contribute to the afforded protection." 44

42 Siehe die Zusammenfassung der Empfehlungen zum Schutz des Whistleblowing in: Conference of the State Parties to the UNCAC, State of Implementation of the UNCAC, Panama City 29.11.2013, CAC/COSP/2013/CRP.7, S. 80 ff.
43 Conference of the State Parties to the UNCAC, State of Implementation of the UNCAC, Fn. 42, S. 80.
44 Ebd.
In der Vertragspraxis der UNCAC wird diese Pflicht, einen umfassenden und kohärenten Schutzzansatz zu verfolgen, darum nicht aus Art. 33 UNCAC allein, sondern aus einer Gesamtschau der schutzbezogenen Normen hergeleitet. In dieser Hinsicht ist im Hinblick auf die deutsche Rechtslage zu bemängeln, dass dem integrierten Schutzzansatz der UNCAC bislang nicht hinreichend Beachtung geschenkt wird. Art. 33 komplettiert die obligatorischen Vorschriften zum Zeugen- und Expertenschutz, wie sie in Art. 32 UNCAC vorgesehen sind. So verpflichten sich die Vertragsstaaten nach Art. 32 Abs. 1 UNCAC zur Ergreifung von geeigneten Maßnahmen, um Zeugen und Sachverständigen, die über in Übereinstimmung mit diesem Übereinkommen umschriebene Straftaten aussagen, sowie gegebenenfalls ihren Verwandten und anderen ihnen nahe stehenden Personen wirksamen Schutz vor möglicher Vergeltung oder Einschüchterung zu gewähren.

Diese verbindlichen Vorgaben verpflichten zum Schutz von Whistleblower nicht nur dann, wenn sie als Zeugen für Gerichtsverfahren relevant sind. Der obligatorische Schutzauftrag geht vielmehr darüber hinaus. Nach dem Technical Guide sollen vom obligatorischen Schutz des Art. 32 UNCAC umfasst sein:

„all persons that can provide law enforcement bodies and courts with expertise whether during an investigation or as witnesses in court. They should be afforded the same range of protection measures applied to witnesses."

Daraus ergibt sich daher die Verpflichtung, auch Whistleblowerinnen und Whistleblower in den Quellenschutz einzubeziehen und „procedural safeguards to protect the source“ zu entwickeln. Diese Schutzvorschriften sind im deutschen Recht weder hinreichend systematisch angelegt noch schützen die einzelnen Normen die Hinweisgeberinnen und Hinweisgeber in der Breite, die Art. 32 i.V.m. Art. 33 UNCAC vorgibt. So etabliert zwar § 68 StPO einen Zeugenschutz. Dieser gilt aber nur für strafrechtliche Verfahren. Der Experten-, Zeugen- und Hinweispersonenschutz, auf den Art. 32 und 33 UNCAC zielen, geht aber über das Strafverfahren hinaus und erfordert auch für andere Verfahrensgestaltungen, insbesondere auch zivilrechtlicher Art, Schutzmaßnahmen für Whistleblowerinnen und Whistleblower. (b) Verbot von Rechtsnachteilen

Zu den nach UNCAC gebotenen Schutzmaßnahmen gehört nicht nur die Staatenpflicht, die körperliche Integrität von Whistleblowerinnen und Whistleblowern

zu schützen. Vielmehr hat die Konferenz der Vertragsstaaten in der Vertragspraxis der UNCAC mehrfach betont, dass es zu den Pflichten aus der Konvention gehört, Nachteile für Arbeitnehmerinnen und Arbeitnehmer zu verhindern, die auf das Whistleblowing zurückzuführen sind:

“A clear delineation of a reporting person’s rights and special measures for the enhancement of his/her protection are needed, including the explicit prohibition of discriminatory transfer, reassignment, demotion, pay cut, suspension from employment, dismissal, forced retirement, or any other professional disadvantage that may follow a whistle-blower report; and eventually shifting the burden of proof in related labour proceedings to the employer. In addition, it may be helpful, as one State party has done, to have a special agency in place to which persons can bring their own actions or complaints of adverse treatment, as well as to explore ways to expedite access to existing protection mechanisms and remove cumbersome processes.”

Verfahrensrechtlich ist diese Schutzpflicht, darauf weisen die Richtlinien des UNODC zur UNCAC explizit hin, durch eine Beweislastumkehr im arbeitsrechtlichen Verfahren abzusichern. Danach darf es nicht den Arbeitnehmerinnen und Arbeitnehmern obliegen, die Kausalität des Whistleblowing für damit im Zusammenhang stehende Nachteile im Arbeitsverhältnis nachzuweisen. Es ist vielmehr Sache der Arbeitgebenden, die Sachbezogenheit etwaiger Nachteile und deren Nichtverbindung zum Whistleblowing darzutun.

(c) Vertrauen auf die Richtigkeit der Angaben

Der Schutz, den die UNCAC in den Art. 8, 13, 32 und 33 UNCAC gewährt, ist unabhängig von der Motivlage der Hinweisgeberinnen und Hinweisgeber. Entscheidend ist vielmehr, ob die hinweisgebende Person von der Richtigkeit ihrer Angaben ausgehen durfte. Wenn eine Person nachvollziehbare Gründe für die Meldung hat, ist sie schützenswürdig, auf die Motive kommt es hierbei nicht an:

“Hence, if a person has reasonable grounds to believe that the information shows wrongdoing or malpractice, and that the belief was reasonable for someone in his or her position based on the information available to him or her, that person should be protected.”

Für diese ex ante-Perspektive ist es auch irrelevant, ob sich die Vorwürfe dann tatsächlich in Verfahren bewahrheiten. Der Schutz bezieht sich gerade auch auf solche Vorwürfe, die im Verfahren nicht nachgewiesen werden können – solange keine wissentlich falschen oder leichtfertigen Angaben gemacht wurden:

49 Conference of the State Parties to the UNCAC, State of Implementation of the UNCAC, Fn. 42, S. 81.
“If, however, someone reports information that they know to be untrue, then clearly there should be safeguards, meaning that the individual would not be able to seek protection from the law and could be sanctioned if harm was caused.”

(d) Prozedurale Staatenpflichten

Die Konferenz der Vertragsstaaten hat in der Vertragsimplementierung der UNCAC ferner regelmäßig darauf bestanden, dass die Abwägung von öffentlichen und privaten Interessen durch den Gesetzgeber vorstrukturiert wird. Die Vertragsstaaten sollen in Umsetzung der UNCAC

“make every effort to strike a balance between acknowledging the loyalty and confidentiality obligations of civil servants and private employees towards the State and their employer, respectively, and the obligation to provide protection against any “unjustified” treatment of reporting persons. This could be done by providing for different “spheres” of disclosure with corresponding levels of protection.”

Das heißt nicht nur, dass die Interessenabwägung gesetzlich strukturiert werden soll, sondern es bedeutet auch, dass Kommunikationskanäle für die Meldung eröffnet werden müssen. Die Verpflichtung der Staaten, alternative Kommunikationskanäle für Whistleblowerinnen und Whistleblower zu eröffnen, ergibt sich aus den Art. 8, 13, 32 und 33 UNCAC. Die UNCAC fordert einerseits effektive und andererseits auch alternative Meldekanäle:

“This will help ensure that individuals in the workplace can bypass their managers or go outside the organization, particularly if that is where the problem lies, and thus avoid the creation of a bottleneck or a potential breaking point in the regulatory or judicial system.”

Art. 13 UNCAC, der die diesbzgl. Fragen der öffentlichen Beteiligung detailliert regelt, verpflichtet die Staaten nicht nur, den öffentlichen Zugang zu Meldestellen zu ermöglichen, sondern hält auch dazu an, ein System für die Bearbeitung und Einreichung anonymer Meldungen zu etablieren.

Die Frage, die sich im Arbeitsverhältnis regelmäßig stellt, nämlich ob externe Meldestellen trotz vorhandener unternehmensinterner Meldesysteme in Anspruch genommen werden dürfen, entscheidet Art. 13 UNCAC für eine größtmögliche Öffentlichkeitsbeteiligung. So stellt das UNODC explizit klar:

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52 Ebd.
53 Conference of the State Parties to the UNCAC, State of Implementation of the UNCAC, Fn. 42, S. 82.
In many jurisdictions, and particularly with respect to the private sector, employees are subject to duties of loyalty or confidentiality with respect to technical or operational information, which means that it is often a disciplinary offence to report outside the organization itself. Business reputation is also highly valued and thus many workers are subject to strong contractual obligations in this regard. Therefore, it is important – above all with respect to reporting to competent or appropriate authorities, or more widely where necessary – that the law removes or settles any doubt that reporting wrongdoing or harm to the public interest will override any such duties to the employer.\textsuperscript{56}

Die UNODC beziehen sich hierbei für die Frage, welche Meldewege zu wählen sind, auf die Entschließung der parlamentarischen Versammlung des Europarates.\textsuperscript{57} Nach dieser Entschließung, die durch diese Heranziehung in der Vertragspraxis der UNCAC als Konkretisierung der Konventionspflichten mittelbare Rechtswirkung entfaltet, entfällt der Vorrang der internen Informationsweitergabe, wenn der interne Weg nicht zumutbar ist (weil die meldende Person in einer subjektiven ex ante-Perspektive eigene Nachteile zu erwarten hätte), wenn durch ihn – ex ante und in nachvollziehbarer Weise – keine Abhilfe erwartet werden kann und wenn interne Hinweise nicht zum Erfolg führen.\textsuperscript{58}


Aus alledem ergibt sich, dass interne Meldewege die externen Kommunikationskanäle nicht desavouieren dürfen. Der Gesetzgeber ist nach der UNCAC nicht nur dazu aufgerufen, Vorgaben für die rechtsstaatliche Ausgestaltung interner Meldeverfahren zu machen, sondern auch sicherzustellen, dass sich Whistleblowerinnen und Whistleblower immer dann an externe Verfahren und die Öffentlichkeit wenden können, wenn aus ihrer subjektiven ex ante-Perspektive der interne Weg nicht zumutbar, impraktikabel oder ineffektiv ist.

\textsuperscript{56} UNODC, Resource Guide on Good Practices in the Protection of Reporting Persons, Fn. 41, S. 27.
\textsuperscript{57} Parlamentarische Versammlung des Europarates, Entschließung 1729 v. 29.04.2010, Ziff. 6.1.2. und 6.1.3.
(2) OECD-Konvention zur Bestechungsbekämpfung


Im Rahmen des nach Art. 12 der Konvention etablierten Monitoring hat die OECD Working Group on Bribery in International Business Transactions eine Reihe von Empfehlungen zur Whistleblowing erlassen, die teilweise auch unmittelbar an Deutschland gerichtet wurden. Im Dezember 2014 fasste die Arbeitsgruppe die Forderungen in diesem Politikbereich wie folgt zusammen:

“Regarding whistleblower protection, the Working Group recommends that Germany enhance reporting of suspicions of foreign bribery by company employees, through any appropriate means, e.g. by codifying the protection identified by jurisprudence and disseminating information on such protection [2009 Recommendation, IX (iii) and X.C (v)].”

Die hier in Bezug genommene Empfehlung IX (iii) des Rates der OECD aus dem Jahr 2009 zielt auf die Einrichtung von

“appropriate measures […] to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions.”

Und X.C (v) rät dazu, zu ermutigen, dass Unternehmen

“provide channels for communication by, and protection of, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for persons willing to report breaches of the law or professional standards or ethics occurring within the company in good

60 BGBl II, S. 2327 ff.
faith and on reasonable grounds, and should encourage companies to take appropriate action based on such reporting”.64

Und 2013 anlässlich des Reports für die Phase 3 hat die Working Group die Bundesrepublik für die fehlende Whistleblower-Gesetzgebung gerügt:

“The Working Group again encouraged Germany to take steps to enhance reporting of suspicions of foreign bribery by company employees by, for example, codifying whistleblowers’ protections in the private sector and asked Germany to provide a written report on progress made in this regard within one year”.65

Auch im Zusammenhang der OECD-Konvention zur Bestechungsbekämpfung bleibt Deutschland damit den geforderten Schutz von Whistleblowerinnen und Whistleblowern schuldig.

(3) ILO-Übereinkommen 158

Auch in Artikel 5 des Übereinkommens der Internationalen Arbeitsorganisation über die Beendigung des Arbeitsverhältnisses durch den Arbeitgeber ist ein expliziter Schutz von Whistleblowerinnen und Whistleblowern vorgesehen:66

„Für die Beendigung des Arbeitsverhältnisses gelten insbesondere nicht als trifftige Gründe: […] (c) der Umstand, dass jemand wegen einer behaupteten Verletzung von Gesetzesvorschriften gegen den Arbeitgeber eine Klage eingebracht oder sich an einem Verfahren gegen ihn beteiligt oder die zuständigen Verwaltungsbehörden angerufen hat.“

Deutschland hat dieses Übereinkommen aber nicht ratifiziert, weshalb sich aus ihm derzeit auch keine völkervertraglichen Pflichten ergeben.

(4) UN-Zivilpakt

Der Internationale Pakt über bürgerliche und politische Rechte (UN-Zivilpakt) wurde 1973 durch die Bundesrepublik ratifiziert.67 Der Pakt schützt in Art. 19 Abs. 2 die Meinungsfreiheit einschließlich des Rechts, „ohne Rücksicht auf Staatsgrenzen Informationen und Gedankengut jeder Art in Wort, Schrift oder Druck, durch Kunstwerke oder andere Mittel eigener Wahl sich zu beschaffen, zu empfangen und weiterzugeben.“ Die Norm schützt nicht nur gegen staatliche Eingriffe, sondern verpflichtet auch zu Schutzmaßnahmen:

64Rat der OECD, Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, 26.11.2009.
65OECD Working Group on Bribery, Summary and conclusions to the Phase 3-Report of Germany, 15.4.2013, Ziff. 5.
67BGBl. 1973 II S. 1533, 1534.
“States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression.”

Das umfasst nach dem mit der Implementierung des UN-Zivilpaktes beauftragten Menschenrechtsausschuss auch den Schutz gegen Maßnahmen privater Rechtssubjekte, die die Ausübung der Meinungsfreiheit beeinträchtigen können. Zwar erwähnt die Spruchpraxis des Menschenrechtsausschusses bislang das Whistleblowing nicht explizit. Die besondere Schutzbedürftigkeit von Journalisten und Hinweisgebern im Allgemeinen hat der Ausschuss aber durchaus hervorgehoben:

„persons who engage in the gathering and analysis of information on the human rights situation and who publish human rights-related reports,“

seien durch Art. 19 Abs. 2 UN-Zivilpakt in besonderer Weise zu schützen. Für Whistleblowerinnen und Whistleblower, die von ihrer Meinungsäußerungsfreiheit Gebrauch machen und eine vergleichbare öffentliche Funktion einnehmen, gilt dies entsprechend.

Dementsprechend haben auch Frank de la Rua, UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, und Catalina Botero Marino, Inter-American Commission on Human Rights Special Rapporteur for Freedom of Expression, in einer gemeinsamen Erklärung 2010 die besondere Schutzbedürftigkeit von Whistleblowerinnen und Whistleblowern im Hinblick auf die Meinungsäußerungsfreiheit betont:

“whistleblowers' releasing information on violations of the law, on wrongdoing by public bodies, on a serious threat to health, safety or the environment, or on a breach of human rights or humanitarian law should be protected against legal, administrative or employment-related sanctions if they act in good faith.”

In dieser Erklärung kommt ein Grundsatz zum Ausdruck, der für die angemessene Ausgestaltung des Schutz des Whistleblowings von essentieller Bedeutung ist: Whistleblowing hat neben den in speziellen Konventionen zum Ausdruck kommenden Funktionen für die Bestechungs- und Korruptionsbekämpfung eine zentrale Funktion für die Öffentlichkeit. Die sich daraus ergebende Pflicht ist

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68 HRC, General Comment 34, CCPR/C/GC/34, Juli 2011, Ziff. 23.
69 HRC, ebd., Ziff. 7.
70 Ebd.
umfassend und nicht auf den Bereich der Wirtschaftskriminalität begrenzt: Whistleblowerinnen und Whistleblower sind, sofern sie keine wissentlich falschen Angaben machen, zu schützen.\footnote{Kaye, obere Fn. 1, Rdn. 30: “reasonable belief”} Das umfasst nicht nur das aus der Meinungsfreiheit fließende Verbot der Strafbarkeit sondern auch die Pflicht entsprechende prozedurale Voraussetzungen für das Whistleblowing zu schaffen, insbesondere durch die Einrichtung effektiver und unabhängiger Meldeverfahren, in denen die hinweisgebenden Personen auch durch die Gewährleistung der Vertraulichkeit zu schützen sind. I.d.S. forderte auch Navi Pillay, die UN-Menschenrechtskommissarin, einen Vertraulichkeitsschutz für hinweisgebende Personen:

> “confidentiality is an essential element of the working methods of UN human rights officers, and […] their work is of fundamental importance to the restoration and maintenance of international peace and security, the rule of law, and the administration of justice.”\footnote{Amicus Curiae Brief of the United Nations High Commissioner for Human Rights, Prosecutor v. Alex Tamba Brima et al., SCSL, No. SCSL-2004-16-AR73 (16.12.2005), Rn. 32 ff.}


> “to cooperate with, and provide reliable information to, UN human rights officers, thereby making it impossible for the human rights officers to carry out their functions effectively.”\footnote{Ebd., Rn. 37.}

Die Schutzbedürftigkeit der Whistleblowerinnen und Whistleblower als vulnerable Gruppe – vergleichbar derjenigen von Fact Finding Persons und UN-Beobachtungspersonen – wird in einer Vielzahl von Stellungnahmen anerkannt.\footnote{Nachweise bei CCR, Protection of Sources, Fn. 1, Ziff. 33 ff.}

Der deutsche Gesetzgeber ist diesen aus dem universellen Menschenrechtsschutz folgenden Schutzpflichten zum expliziten Schutz von Whistleblowerinnen und Whistleblower nicht bereit sein konnten.

b) Regionale Verträge

Von den regionalen Völkerverträgen sind insbesondere die beiden europäischen Antikorruptionskonventionen (hierzu (1)), die EMRK (hierzu (2)) und die rev. Europäische Sozialcharta (hierzu (3)) für den Schutz des Whistleblowing relevant.

(1) Europäische Antikorruptionskonventionen

Das im Rahmen des Europarats geschlossene Zivilrechtsübereinkommen über Korruption (Straßburg, 4. November 1999) sieht in Art. 9 einen Schutz von Arbeitsnehmerinnen und Arbeitnehmern vor:

„Jede Vertragspartei sieht in ihrem innerstaatlichen Recht vor, dass Beschäftigte, die den zuständigen Personen oder Behörden in redlicher Absicht einen begründeten Korruptionsverdacht mitteilen, angemessen vor ungerechtfertigten Nachteilen geschützt werden.“

In Art. 2 der Konvention wird der Begriff der „Korruption“ definiert:

„Im Sinne dieses Übereinkommens bezeichnet „Korruption“ das unmittelbare oder mittelbare Fordern, Anbieten, Gewähren, Annehmen oder Inaussichtstellen von Bestechungsgeldern oder eines anderen ungerechtfertigten Vorteils, das die Erfüllung der dem Begünstigten obliegenden Pflichten beeinträchtigt oder dazu führt, dass er sich nicht wie geboten verhält.“

Im Explanatory Report zu Art. 9 wird der verpflichtende Inhalt dieser Norm u.a. wie folgt konkretisiert:

“The "appropriate protection against any unjustified sanction" implies that, on the basis of this Convention, any sanction against employees based on the ground that they had reported an act of corruption to persons or authorities responsible for receiving such reports, will not be justified. Reporting should not be considered as a breach of the duty of confidentiality. Examples of unjustified sanctions may be a dismissal or demotion of these persons or otherwise acting in a way which limits progress in their career. […] Therefore the appropriate protection which Parties are required to take should encourage employees to report their suspicions to the responsible person or authority. Indeed, in many cases, persons who have information of corruption activities do not report them mainly because of fear of the possible negative consequences.”

Deutschland hat dieses Übereinkommen unterschrieben, allerdings bislang nicht ratifiziert. Die Bundesregierung sieht aber selbst, dass der Schutz von Whistleblowerinnen im deutschen Recht nicht dieser Norm entspricht.

78 Ebd., Ziff. 69 ff.
Auch das Strafrechtsübereinkommen über Korruption (Straßburg, 27. Januar 1999) hat die Bundesrepublik bislang nicht ratifiziert. Das Übereinkommen sieht in Art. 22 einen Whistleblowingschutz vor:

„Jede Vertragspartei trifft die erforderlichen gesetzgeberischen und anderen Maßnahmen, um einen wirksamen und angemessenen Schutz folgender Personen zu gewährleisten: (a) Personen, die Angaben über aufgrund der Artikel 2 bis 14 umschriebene Straftaten machen oder in anderer Weise mit den für Ermittlung oder Strafverfolgung zuständigen Behörden zusammenarbeiten; (b) Zeugen, die eine Aussage in Bezug auf solche Straftaten machen.“

Im Explanatory Report zu dieser Bestimmung heißt es dann, dass das Wort „Zeugen“, sich auf eine Person bezieht,

„who possess information relevant to criminal proceedings concerning corruption offences as contained in Articles 2 – 14 of the Convention and includes whistleblowers“.

Für diese Personen wird ein wirksamer und angemessener Schutz gefordert. Das verweise, so sagen es diese Ausführungsbestimmungen,

“to the need to adapt the level of protection granted to the risks that exist for collaborators of justice, witnesses or whistleblowers. In some cases it could be sufficient, for instance, to maintain their name undisclosed during the proceedings, in other cases they would need bodyguards, in extreme cases more far-reaching witnesses-protection measures such as change of identity, work, domicile, etc. might be necessary”.


(2) EMRK

Auch aus der Europäischen Menschenrechtskonvention (EMRK) können sich Pflichten im Hinblick auf das Whistleblowing ergeben. Nach Art. 10 Abs. 1 Satz 1 EMRK ist das Recht auf freie Meinungsäußerung umfassend geschützt. Nach Art. 10

80 Ebd., Ziff. 111.
81 Ebd., Ziff. 113.
Abs. 1 Satz 2 EMRK schließt das die Freiheit ein, Informationen und Ideen ohne behördliche Eingriffe und ohne Rücksicht auf Staatsgrenzen zu empfangen und weiterzugeben. Die Bundesrepublik Deutschland hat die EMRK in deutsches Recht transformiert. Aus der Völkerrechtsfreundlichkeit des Grundgesetzes und dem Bekenntnis zu den Menschenrechten in Art. 1 Abs. 2 GG hat das BVerfG der EMRK de facto einen quasi-konstitutionellen Rang zuerkannt. Die EMRK ist Auslegungshilfe im Hinblick auf die nationalen Grundrechte. Das BVerfG sieht alle Staatsorgane in der Pflicht, die Normen der EMRK im nationalen Recht zur Geltung zu bringen. Das BVerfG verlangt dabei kein blindes Nachvollziehen der Entscheidungen der EMRK und des EGMR, sondern eine wertende Berücksichtigung. Für den Fall, dass Entscheidungen des EGMR im nationalen Recht diese Berücksichtigung nicht zuteil kommt, sieht das BVerfG die Verfassungsbeschwerde für eröffnet. In der Nichtberücksichtigung läge nicht nur ein Konventionsverstoß, sondern auch eine Verletzung des Art. 20 Abs. 3 GG i.V.m. dem jeweiligen Korrespondenzgrundrecht des GG. Diese Berücksichtigungspflicht hat das BVerfG auch auf Entscheidungen anderer internationaler Gerichte erstreckt.

Der EGMR hat in einer Reihe von Entscheidungen die Rechte von Whistleblowerinnen und Whistleblowern gestärkt und den Schutz des Art. 10 EMRK auch in dem gegen die Bundesrepublik ergangenen Urteil in der Rechtssache Heinisch v. Deutschland auf das Whistleblowing erstreckt. Der EGMR hat für den konkreten Fall festgestellt, dass die Kündigung – und insbesondere die gerichtliche Bestätigung der Kündigung, es handelt sich um einen Fall mittelbaren Menschenrechtsschutzes – die Whistleblowerin in ihren Rechten verletzte, da das öffentliche Interesse im konkreten Fall das Geheimhaltungsinteresse überwiege.

Da das deutsche Recht nach der Rechtsprechung des BVerfG konventionskonform auszulegen ist und die deutschen Gerichte zur Berücksichtigung der Rechtsprechung des EGMR verpflichtet sind, wird vertreten, dass die EMRK-Konformität des deutschen Rechts nicht notwendig durch eine Gesetzesänderung hergestellt werden müsse. Es sei hinreichend, wenn die Arbeitsgerichtsbarkeit die Grundsätze des EGMR und der EMRK entsprechend der verfassungsgerichtlichen Rechtsprechung berücksichtige.

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83 BGBl. 1952 II S. 685.
84 BVerfGE 111, 307/317.
85 BVerfGE 111, 307/327ff.
86 In Bezug auf die Rechtsprechung des IGH siehe BVerfG NJW 2007, 499 ff.; zur vergleichbaren Verfassungspraxis in den USA und Italien siehe Supreme Court of the United States, Sanchez-Llamas v. Oregon, Gutachten v. 28.06.2006 – No. 04–10566; Italienischer Verfassungsgerichtshof, Urteil Nr. 238/2014 vom 22.10.2014 (Schadensersatzansprüche von NS-Opfern); auch der EuGH geht von einer dualistischen Theorie aus, siehe EuGH, Urteil v. 03.09.2008 – C-402/05.
88 EGMR, Urteil v. 21.07.2011, 28274/08, Heinisch /. Deutschland.
Dieser Rechtauffassung ist insofern beizupflichten, als das deutsche Recht im engen Kontext des Kündigungsschutzrechtes eine Durchlässigkeit ermöglicht: Die Arbeitsgerichte können im Rahmen unbestimmter nationaler Normen die Wertungen der EMRK und des EGMR berücksichtigen, wenn beispielsweise im Rahmen des § 612a BGB zu fragen ist, ob „der Arbeitnehmer in zulässiger Weise seine Rechte ausübt“.


(a) Systematischer Schutz

Der EGMR hat für den systematischen Schutz von hinweisgebenden Personen detaillierte Vorgaben gemacht. Das ergibt sich zum einen aus der Rechtsprechung des EGMR zum Quellenschutz der Presse. Der Schutz der journalistischen Quelle ist für den EGMR nicht einfach ein Privileg, sondern eine wesentliche Komponente der freien Presse. Quellenschutz und Schutz des Whistleblowing sind aufs Engste verknüpft.

Der Schutz des Whistleblowing, so wie der EGMR ihn aus Art. 10 EMRK konkretisiert hat, bezieht sich insbesondere auf solche Mitteilungen, die in gutem Glauben gemacht wurden, die die mitteilende Person also nach entsprechend sorgfältiger

90 EGMR, Urteil v. 23.04.1992, 11798/85, Castells ./. Spanien, Rn. 42.
91 EGMR, Urteil v. 27.11.2007, 20477/05, Tillack ./. Belgien.
92 Der Bericht von David Kaye, Special Rapporteur on freedom of opinion and expression, Fn. 1, führt daher konsequentenweise beide Komplexe zusammen.
Prüfung für wahr hält.\textsuperscript{93} Der EGMR setzt hierbei nicht voraus, dass sich die Vorwürfe später bewahrheiten. Er stellt auf eine ex ante-Perspektive ab und darauf, ob die hinweisgebende Person „to the extent permitted by the circumstances“ von der Wahrheit der Mitteilung ausgehen durfte.\textsuperscript{94} Bei der Konkretisierung der Gutglaubensanforderung lässt der EGMR die Motive regelmäßig dahinstehen und verlangt lediglich, dass die Vorwürfe „nicht gänzlich eines sachlichen Hintergrunds“ entbehren.\textsuperscript{95}

Wenn diese Voraussetzungen gegeben sind – keine wissentlich leichtfertigen und unwahren Angaben, Möglichkeit der Sachorientierung – prüft der EGMR, ob das Interesse der Öffentlichkeit im konkreten Fall überwiegt. Im Urteil Guja ./. Moldowa hat der EGMR daher die Bedeutung der Öffentlichkeit für das Funktionieren der Demokratie betont und verdeutlicht, dass die öffentlichen Interessen daher auch private und staatliche Geheimhaltungs- und Loyalitätsinteressen überwiegen können.\textsuperscript{96} Und auch im Urteil im Fall Heinisch hat der EGMR festgehalten,

„dass das Interesse der Allgemeinheit, über Defizite bei der institutionellen Altenpflege in einem staatlichen Unternehmen informiert zu werden, in einer demokratischen Gesellschaft so wichtig ist, dass es das Interesse am Schutz des geschäftlichen Rufs und der Interessen dieses Unternehmens überwiegt.\textsuperscript{97}

Um diese Pflichten zum Schutz der Meinungsfreiheit nach Art. 10 EMRK umzusetzen, ist der Gesetzgeber gefordert. Es gilt insbesondere, eine verlässliche Planungssicherheit für Beschäftigte und Arbeitgeber herzustellen. Der EGMR verweist bei der Konkretisierung des öffentlichen Interesses in seinem Urteil im Fall Heinisch auch auf rechtspolitische Empfehlungen, denen der Gerichtshof strukturierende Kriterien entnimmt. So bezieht sich der EGMR\textsuperscript{98} explizit auf die Entschließung der Parlamentarischen Versammlung des Europarats 1729.\textsuperscript{99} Das verleiht der Entschließung zumindest eine mittelbare Rechtswirkung,\textsuperscript{100} insbesondere auch im Hinblick auf die durch den EGMR zitierte Passage in ihrer Ziff. 6.1.1.:

„Die Definition geschützter Enthüllungen umfasst alle in gutem Glauben geäußerten Warnungen vor verschiedenen Arten rechtswidriger Handlungen, u. a. sämtliche schweren Menschenrechtsverletzungen, die das Leben, die Gesundheit, die Freiheit oder sonstige berechtigte Interessen Einzelner als Subjekte der öffentlichen Verwaltung oder als Steuerzahler, Anteilseigner, Arbeitnehmer oder Kunden von Privatunternehmen beeinträchtigen oder bedrohen“.  

\textsuperscript{93} EGMR, Urteil v. 12.2.2008, Az. 14277/04, Guja v. Moldova, Rn. 75.  
\textsuperscript{94} EGMR, ebd.  
\textsuperscript{95} EGMR, Urteil v. 21.07.2011, 28274/08, Heinisch ./. Deutschland, Rn. 85.  
\textsuperscript{96} EGMR, Urteil v. 12.2.2008, Az. 14277/04, Guja v. Moldova, Rn. 74.  
\textsuperscript{97} EGMR, Urteil v. 21.07.2011, 28274/08, Heinisch ./. Deutschland, Rn. 90.  
\textsuperscript{98} EGMR, Urteil v. 21.07.2011, 28274/08, Heinisch ./. Deutschland, Rn. 37.  
\textsuperscript{99} Siehe Fn. 29.  
\textsuperscript{100} Kritisch hierzu Pabel, Der grundrechtliche Schutz des Whistle-blowing, Fn. 8, S. 177.
Die Einbeziehung dieser Rechtsprechung ins deutsche Recht kann nicht einfach der Gerichtsbarkeit überlassen werden. Es gibt zahlreiche Normen, deren Wortlaut dieser Rechtslage evident zuwiderläuft und die Meinungs freiheit nicht hinreichend akzentuiert (so unter anderem § 10 Ziff. 6 BBiG). Vor dem Hintergrund der durch den EGMR entwickelten umfassenden Schutzgesichtspunkte und der bestehenden Unsicherheiten im deutschen Recht im Hinblick auf die Interessenabwägung ist die Forderung von Dieter Deiseroth daher konsequent:

„Die Rechtsprechung allein kann auf der Grundlage des bisherigen Normenbestandes in Deutschland für keinen hinreichenden Schutz von Whistleblowern sorgen. Denn die – mangels präziser gesetzlicher Vorgaben – von ihr praktizierte Abwägung von Einzelfallgesichtspunkten beinhaltet strukturell ein erhebliches Maß an Unbestimmtheit und Rechtsunsicherheit […] Damit wird die durch Art. 10 EMRK vorgegebene Pflicht zur Gewährleistung hinreichenden Schutzes nicht hinreichend erfüllt.“


**(b) Externe Meldungen**

Diese Schutzpflicht bezieht sich auch darauf, dass in der nationalen Rechtsordnung zu klären ist, wie mit dem Anzeigerecht umzugehen ist, wie also das Verhältnis von internen zu externen Meldeverfahren gestaltet ist. Die grundrechtliche Dimension des Whistleblowing rührt gerade daher, dass es nicht um einen lediglich bilateralen Konflikt geht, sondern polygonale Interessensdifferenzen bestehen. Der EGMR reflektiert dies in seiner Whistleblowing-Rechtsprechung und schließt daraus, dass es zwar Gründe für eine Nutzung interner Meldemechanismen geben kann, Die Pflicht, etablierte interne Meldesysteme zu nutzen, sei allerdings nicht grenzenlos. Der EGMR macht hierfür insbesondere die Einschränkung, dass es bei der Beurteilung, ob extern mitgeteilt werden kann, darauf ankommt, ob die interne Mitteilung „praktikabel“ ist. Bei dieser Beurteilung ist für den EGMR im Hinblick auf die deutsche Rechtsordnung relevant,

„dass das deutsche Recht keinen speziellen Durchführungsmechanismus für die Untersuchung von Hinweisen eines Whistleblowers und für Forderungen nach entsprechender Abhilfe durch den Arbeitgeber bereithält.“

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103 EGMR, Urteil v. 21.07.2011, 28274/08, Heinisch / J. Deutschland, Rn. 75.
104 Ebd., Rn. 65.
105 Ebd., Rn. 74.
Die Effektivität, das Schutzniveau und die Adäquanz interner Meldemechanismen sind in Deutschland nicht durch den Gesetzgeber vorstrukturiert. Der Gesetzgeber kommt auch in dieser Hinsicht seinen Schutzpflichten für die nach Art. 10 EMRK zu sichernde Meinungsfreiheit nicht hinreichend nach. Er wird Maßstäbe für die Effektivität und Adäquanz unternehmensinterner Meldesysteme in Gesetzesform geben müssen und dabei zugleich sicherstellen müssen, dass aus grundrechtlichen Gesichtspunkten der Vorrang der inneren Informationsweitergabe jedenfalls dann entfällt, wenn sie nicht zumutbar, impraktikabel oder ineffektiv ist. In diesen Fällen haben die Arbeitnehmerinnen und Arbeitnehmer ein vorbehaltlos gewährleistetes externes Anzeigerecht, das nicht zur Disposition von Arbeitsverträgen, Ethikrichtlinien oder Codes of Conduct steht.

(c) Zwischenergebnis

Das Gebot, Planungssicherheit für Arbeitnehmerinnen und Arbeitnehmer im Hinblick auf die Meinungsfreiheit nach Art. 10 EMRK herzustellen, macht eine gesetzliche Vorstrukturierung der Interessensabwägung und auch umfassende Schutznormen für Whistleblower nötig, die Diskriminierungen und Nachteilszufügungen im Arbeitsverhältnis auch jenseits des Kündigungsschutzes verhindern. Diesen Anforderungen aus Art. 10 EMRK entspricht das deutsche Recht bislang nicht. Der Gesetzgeber bleibt hier in der Pflicht. Der deutsche Gesetzgeber muss daher nicht nur die Abwägungsentscheidung gesetzlich vorstrukturieren, sondern auch dafür sorgen, dass die EMRK und die Urteile des EGMR zum Whistleblowing in jedem Fall befolgt werden.

(3) Rev. Europäische Sozialcharta

Auch die revidierte Europäische Sozialcharta sieht einen Schutz von Whistleblowern im Arbeitsverhältnis vor. So lautet Artikel 24:

„Um die wirksame Ausübung des Rechts auf Schutz bei Kündigung zu gewährleisten, verpflichten sich die Vertragsparteien: […] a) das Recht der Arbeitnehmer, nicht ohne einen triftigen Grund gekündigt zu werden, der mit ihrer Fähigkeit oder ihrem Verhalten zusammenhängt oder auf den Erfordernissen der Tätigkeit des Unternehmens, des Betriebs oder des Dienstes beruht; […] anzuerkennen.“

Und im Anhang zu Artikel 24 heißt es (Ziff. 3):

„Für die Zwecke dieses Artikels gelten insbesondere nicht als triftige Gründe für eine Kündigung: […] c) die Tatsache, dass jemand wegen einer behaupteten Verletzung von Rechtsvorschriften eine Klage gegen den Arbeitgeber einreicht, an einem Verfahren gegen ihn beteiligt ist oder die zuständigen Verwaltungsbehörden anruft.“

106 Zu dieser Trias siehe auch Branahl, Whistleblower zwischen Loyalitätspflichten und öffentlichem Informationsinteresse, Fn. 5, Rn. 17.

107 BGBl 1965 II S.1261 und BGBl II S. 1122.
108 BT-Drs. 17/12996 v. 2.4.2014, S. 4: „Die Bundesregierung wird in der kommenden Legislaturperiode eine erneute Prüfung der Ratifizierung der Revidierten Europäischen Sozialcharta vornehmen.“
III. Anpassungsbedarf

Das deutsche Recht entspricht den o.g. internationalrechtlichen Vorgaben nicht. Punktuell mag die deutsche Rechtsordnung in den letzten Jahren einige Verbesserungen zur Regulierung des Whistleblowing gebracht haben. Diese sind, da maßgebliche Fragen weiterhin ungeklärt bleiben und internationale Vorgaben ignoriert werden, allerdings nicht umfassend genug. Die völkerrechtlichen Pflichten werden nur rudimentär und punktuell umgesetzt. Die Bundesrepublik Deutschland ist bei der Regulierung des Whistleblowing vertragsbrüchig. Regelungsbedarf besteht vor allem in folgenden Punkten:

1. Statusübergreifender Schutz


2. Konturierung der Interessenabwägung


110 Kaye, obere Fn. 1, Rdn. 28 ff.
3. Systematischer Schutz

Es fehlt im deutschen Recht ferner an einem systematischen Schutz von Whistleblowerinnen und Whistleblowern. Das betrifft insbesondere die Verpflichtungen aus der UNCAC, der OECD-Konvention zur Bestechungsbekämpfung und den menschenrechtlichen Konventionen, sicherzustellen, dass die hinweisgebenden Personen keine arbeitsvertraglichen Nachteile erleiden, wenn sie Mitteilungen machen, die nicht wissentlich unwahr oder leichtfertig sind, auch wenn sie sich im Verfahrensverlauf als unrichtig erweisen sollten.

4. Prozedurale Schutzmaßnahmen


Schließlich verpflichtet die UNCAC zur Einrichtung effektiver und unabhängiger öffentlicher Verfahren zur Aufklärung der Vorwürfe. Auch das hat der Gesetzgeber umfassend, kohärent und systematisch zu strukturieren. Auch dieser Pflicht kommt er bislang nicht hinreichend nach.
D. Zusammenfassung


2. Die Bundesrepublik Deutschland ist völkervertraglich dazu verpflichtet, den Schutz des Whistleblowing umfassend und systematisch zu regeln. Diese Vertragspflicht ergibt sich insbesondere aus der UN-Konvention gegen Korruption (UNCAC), aus der OECD-Konvention zur Bestechungsbekämpfung, aus dem UN-Zivilpakt und aus der EMRK. Diese Übereinkommen hat die Bundesrepublik ratifiziert, an sie ist sie vertraglich gebunden. Aus diesen Verträgen ergeben sich Verpflichtungen, denen die Bundesrepublik bislang nicht hinreichend nachkommt:


- Die Bundesrepublik ist völkerrechtlich verpflichtet, einen verbindlichen Schutzrahmen zu für das Whistleblowing. Daraus resultiert, dass ein klarer Rahmen für die Frage zu entwickeln ist, wann die öffentlichen Interessen die gegenläufigen Interessen auf Geheimhaltung überwiegen. Hierbei ist eine Vermutungsregel für die Meinungsfreiheit zu etablieren.

- Der internationalrechtliche Schutz erstreckt sich auf Whistleblowerinnen und Whistleblower, die Angaben machen, die nicht unwahr und nicht wissentlich leichtfertig sind, auch wenn sich die Angaben im Verfahren nicht nachweisen lassen. Entscheidend ist die subjektive ex ante-Perspektive der hinweisgebenden Person. Das nationale Recht setzt auch diese internationalrechtlichen Vorgaben hinsichtlich der zu schützenden Information bislang nicht hinreichend um.

- Schließlich gehört zu dem durch die internationalen Verträge aufgegebenen umfassenden Schutz des Whistleblowing auch, dass das Verhältnis interner und externer Meldesysteme so zu arrangieren ist, dass den Öffentlichkeitserfordernissen, die Art. 13 UNCAC statuiert und
die sich daneben aus den menschenrechtlichen Pflichten ergeben, Rechnung getragen wird. Der Gesetzgeber muss rechtsstaatliche Vorgaben für die internen und externen Verfahren, ihre Unabhängigkeit und Effektivität, machen. Der Vorrang interner Informationsweitergabe entfällt nach internationalem Recht, wenn diese *nicht zumutbar* ist (weil der hinweisgebenden Person nach ihrem subjektiven Dafürhalten Nachteile drohen), wenn *Abhilfe durch sie nicht erwartet werden kann* und auch für den Fall, dass sie *bereits erfolglos* versucht wurde. In diesen Fällen besteht ein *vornehmtloses Anzeigerecht*, das im Arbeitsverhältnis nicht disponibel ist und das es Whistleblowerinnen und Whistleblowern ermöglicht, externe Meldesysteme und die Öffentlichkeit zu informieren.
Tierärztin Margrit Herbst

Vor BSE-Verdacht gewarnt und gefeuert


07.11.2014 09:39 Uhr

Von Bernhard Honnigfort

keine Entschädigung, sie wird nicht rehabilitiert. Das haben die Abgeordneten des Kreistages Segeberg in Schleswig-Holstein am Donnerstagabend so entschieden.


Für die Tierärztin hatte das harte Konsequenzen: Im Dezember 1994 wurde sie fristlos entlassen mit der Begründung, sie habe ihre Verschwiegenheitspflicht verletzt. Der Fall löste eine Welle der Empörung aus, schließlich hatte die Frau Recht: Damals tauchten die ersten BSE-Erkrankungen an Rindern in Deutschland auf, nur war die Erkrankung damals noch nicht einfach nachweisbar.

Aber sie sollte ihre Stelle als Tierärztin für Fleischhygiene nicht wiederbekommen. Sie zog mehrfach vor Arbeitsgerichte, konnte sich jedoch nicht durchsetzen. In einem Urteil des Landesarbeitsgerichts von 1997 wurde dem Kreis zwar empfohlen, Margrit Herbst wieder einzustellen, aber das passierte nicht.

**Von Vorgesetzten unter Druck gesetzt**


Doch im Kreistag Segeberg sehen einige Abgeordnete das heute noch anders. Die Tierärztin hätte sich damals einfach gegen ihre Vorgesetzten durchsetzen müssen, werfen ihr einige Abgeordnete vor. Falls ein Mensch das infizierte Fleisch konsumiert habe und an der Krankheit sterbe, sei das ihre Schuld. Margrit Herbst kennt den Vorwurf, er ist so alt wie der Skandal selbst: Sie sei von ihren Vorgesetzten unter Druck gesetzt worden, entgegnete sie stets darauf. „Meiner Mutter wurde gedroht: Sie müsse aufpassen, dass sie,


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Wiesbaden
18-Jährige mit Verbrennungen gefunden und...
Eine 18-Jährige ist am Montagmorgen mit schwersten Verbrennungen an einer Bahnstrecke nahe Wiesbaden gefunden worden und in der Nacht auf Dienstag in einer Spezialklinik gestorben. Zeugen hatten am Morgen ein...

Deutschtürken
„Eine deutsche Frau würde ich nicht heiraten“

Comic
Düstere Bilder vom Bahnhofsviertel
Der Deckenventilator läuft auf Hochtour, aus einer Box dudelt türkische Musik, hoch oben an der Wand hängt ein Eintracht-Schal. Wer sich seinen Weg durch den Kunstkiosk Yok Yok in der Münchener Straße 32 bahnt,...

Omarosa Manigault Newman
Donald Trump und sein böser Lehrling
Unter allen Hofschanzen, Karrieristen und Politikdarstellern, die Donald Trump in seinem Kosmos versammelt hat, gehört sie zu den schrillsten Exemplaren. Einmal lud sie ihre komplette Hochzeitsgesellschaft...

Verkehr in Frankfurt
Parkplätze besetzen
Parkplätze sind dafür gedacht, dass Fahrzeuge darauf parken – könnte man meinen. Am 21. und 22. September ist zwar nicht Karneval, aber trotzdem verkehrte Welt. Die Menschen machten mit den Parkplätzen einfach, was...

Karlsruhe
Eichhörnchen jagt Mann
Ein Mann ist in Karlsruhe von einem jungen Eichhörnchen derart gejagt worden, dass er aus lauter Verzweiflung die Polizei rief. Beim Eintreffen der Beamten sei ihm das Tier immer noch auf den Fersen gewesen, sagte...
Diese Diskussion wurde geschlossen

Die Zeitung für Menschen mit starken Überzeugungen.

Startseite
Politik Frankfurt
Wirtschaft Stadtteile
Sport Rhein-Main
Blog-G Städte
Kultur Landespolitik
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iPhone-Newssapp
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Abo-Angebote
Digital-Abo mit Tablet
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Public Interest Disclosure Act 1998

CHAPTER 23

ARRANGEMENT OF SECTIONS

Section
1. Protected disclosures.
2. Right not to suffer detriment.
3. Complaints to employment tribunal.
4. Limit on amount of compensation.
5. Unfair dismissal.
6. Redundancy.
7. Exclusion of restrictions on right not to be unfairly dismissed.
8. Compensation for unfair dismissal.
9. Interim relief.
12. Work outside Great Britain.
13. Police officers.
16. Dismissal of those taking part in unofficial industrial action.
17. Corresponding provision for Northern Ireland.
Public Interest Disclosure Act
1998

1998 CHAPTER 23

An Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes. [2nd July 1998]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. After Part IV of the Employment Rights Act 1996 (in this Act referred to as "the 1996 Act") there is inserted—

"PART IVA

PROTECTED DISCLOSURES

Meaning of "protected disclosure".

43A. In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

Disclosures qualifying for protection.

43B.—(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part “the relevant failure”, in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

43C.—(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith—

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

43D. A qualifying disclosure is made in accordance with this section if it is made in the course of obtaining legal advice.

43E. A qualifying disclosure is made in accordance with this section if—

(a) the worker’s employer is—
(i) an individual appointed under any enactment by a Minister of the Crown, or
(ii) a body any of whose members are so appointed, and
(b) the disclosure is made in good faith to a Minister of the Crown.

43F.—(1) A qualifying disclosure is made in accordance with this section if the worker—
(a) makes the disclosure in good faith to a person prescribed by an order made by the Secretary of State for the purposes of this section, and
(b) reasonably believes—
(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and
(ii) that the information disclosed, and any allegation contained in it, are substantially true.

(2) An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify the descriptions of matters in respect of which each person, or persons of each description, is or are prescribed.

43G.—(1) A qualifying disclosure is made in accordance with this section if—
(a) the worker makes the disclosure in good faith,
(b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
(c) he does not make the disclosure for purposes of personal gain,
(d) any of the conditions in subsection (2) is met, and
(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are—
(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,
(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or
(c) that the worker has previously made a disclosure of substantially the same information—
(i) to his employer, or
(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

43H.—(1) A qualifying disclosure is made in accordance with this section if—

(a) the worker makes the disclosure in good faith,

(b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) the relevant failure is of an exceptionally serious nature, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.

43J.—(1) Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.
(2) This section applies to any agreement between a worker and his employer (whether a worker's contract or not), including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract.

43K.—(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who—

(a) works or worked for a person in circumstances in which—

(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

(b) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for "personally" in that provision there were substituted "(whether personally or otherwise)",

(c) works or worked as a person providing general medical services, general dental services, general ophthalmic services or pharmaceutical services in accordance with arrangements made—

(i) by a Health Authority under section 29, 35, 38 or 41 of the National Health Service Act 1977, or

(ii) by a Health Board under section 19, 25, 26 or 27 of the National Health Service (Scotland) Act 1978, or

(d) is or was provided with work experience provided pursuant to a training course or programme or with training for employment (or with both) otherwise than—

(i) under a contract of employment, or

(ii) by an educational establishment on a course run by that establishment;

and any reference to a worker's contract, to employment or to a worker being "employed" shall be construed accordingly.

(2) For the purposes of this Part "employer" includes—

(a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged,
(b) in relation to a worker falling within paragraph (c) of that subsection, the authority or board referred to in that paragraph, and
(c) in relation to a worker falling within paragraph (d) of that subsection, the person providing the work experience or training.

(3) In this section “educational establishment” includes any university, college, school or other educational establishment.

43L.—(1) In this Part—

“qualifying disclosure” has the meaning given by section 43B;

“the relevant failure”, in relation to a qualifying disclosure, has the meaning given by section 43B(5).

(2) In determining for the purposes of this Part whether a person makes a disclosure for purposes of personal gain, there shall be disregarded any reward payable by or under any enactment.

(3) Any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention.”

2. After section 47A of the 1996 Act there is inserted—

"Protected disclosures.

47B.—(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(2) Except where the worker is an employee who is dismissed in circumstances in which, by virtue of section 197, Part X does not apply to the dismissal, this section does not apply where—

(a) the worker is an employee, and
(b) the detriment in question amounts to dismissal (within the meaning of that Part).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, “worker”, “worker's contract”, “employment” and “employer” have the extended meaning given by section 43K.”

3. In section 48 of the 1996 Act (complaints to employment tribunals), after subsection (1) there is inserted—

“(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.”
4.—(1) Section 49 of the 1996 Act (remedies) is amended as follows.

(2) At the beginning of subsection (2) there is inserted “Subject to subsection (6).”

(3) After subsection (5) there is inserted—

“(6) Where—
   (a) the complaint is made under section 48(1A),
   (b) the detriment to which the worker is subjected is the termination of his worker’s contract, and
   (c) that contract is not a contract of employment,

any compensation must not exceed the compensation that would be payable under Chapter II of Part X if the worker had been an employee and had been dismissed for the reason specified in section 103A.”

5. After section 103 of the 1996 Act there is inserted—

“Protected disclosure. 103A. An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.”

6. After subsection (6) of section 105 of the 1996 Act (redundancy) there is inserted—

“(6A) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in section 103A.”

7.—(1) In subsection (3) of section 108 of the 1996 Act (cases where qualifying period of employment not required), after paragraph (f) there is inserted—

“(ff) section 103A applies,”

(2) In subsection (2) of section 109 of the 1996 Act (disapplication of upper age limit), after paragraph (f) there is inserted—

“(ff) section 103A applies,”.

8.—(1) In section 112(4) of the 1996 Act (compensation for unfair dismissal) after “sections 118 to 127A” there is inserted “or in accordance with regulations under section 127B”.

(2) In section 117 of that Act (enforcement of order for reinstatement or re-engagement)—

(a) in subsection (2) after “section 124” there is inserted “and to regulations under section 127B”, and

(b) in subsection (3) after “and (2)” there is inserted “and to regulations under section 127B”.

(3) In section 118 of that Act (general provisions as to unfair dismissal), at the beginning of subsection (1) there is inserted “Subject to regulations under section 127B,”.

(4) After section 127A of the 1996 Act there is inserted—
"Dismissal as a result of protected disclosure.

127B.—(1) This section applies where the reason (or, if more than one, the principal reason)—

(a) in a redundancy case, for selecting the employee for dismissal, or

(b) otherwise, for the dismissal,

is that specified in section 103A.

(2) The Secretary of State may by regulations provide that where this section applies any award of compensation for unfair dismissal under section 112(4) or 117(1) or 117(3) shall, instead of being calculated in accordance with the provisions of sections 117 to 127A, consist of one or more awards calculated in such manner as may be prescribed by the regulations.

(3) Regulations under this section may, in particular, apply any of the provisions of sections 117 to 127A with such modifications as may be specified in the regulations.”

Interim relief.

9. In sections 128(1)(b) and 129(1) of the 1996 Act (which relate to interim relief) for “or 103” there is substituted “, 103 or 103A”.

Crown employment.

10. In section 191 of the 1996 Act (Crown employment), in subsection (2) after paragraph (a) there is inserted—

“(aa) Part IVA,”.

National security.

11.—(1) Section 193 of the 1996 Act (national security) is amended as follows.

(2) In subsection (2) after paragraph (b) there is inserted—

“(bb) Part IVA,

(bc) in Part V, section 47B,”.

(3) After subsection (3) of that section there is inserted—

“(4) Part IVA and sections 47B and 103A do not have effect in relation to employment for the purposes of the Security Service, the Secret Intelligence Service or the Government Communications Headquarters.”

Work outside Great Britain.

12.—(1) Section 196 of the 1996 Act (employment outside Great Britain) is amended as follows.

(2) After subsection (3) there is inserted—

“(3A) Part IVA and section 47B do not apply to employment where under the worker’s contract he ordinarily works outside Great Britain.”

(3) In subsection (5), after “subsections (2)” there is inserted “, (3A)”.

Police officers.

13. In section 200 of the 1996 Act (police officers), in subsection (1) (which lists provisions of the Act which do not apply to employment under a contract of employment in police service, or to persons engaged in such employment)—

(a) after “Part III” there is inserted “, Part IVA”, and
(b) after “47” there is inserted “, 47B”.

14. In section 205 of the 1996 Act (remedy for infringement of certain rights) after subsection (1) there is inserted—

“(1A) In relation to the right conferred by section 47B, the reference in subsection (1) to an employee has effect as a reference to a worker.”

15.—(1) At the end of section 230 of the 1996 Act (employees, workers etc) there is inserted—

“(6) This section has effect subject to sections 43K and 47B(3); and for the purposes of Part XIII so far as relating to Part IVA or section 47B, “worker”, “worker’s contract” and, in relation to a worker, “employer”, “employment” and “employed” have the extended meaning given by section 43K.”

(2) In section 235 of the 1996 Act (other definitions) after the definition of “position” there is inserted—

“...protected disclosure” has the meaning given by section 43A,”.

16.—(1) In section 237 of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal of those taking part in unofficial industrial action), in subsection (1A) (which provides that the exclusion of the right to complain of unfair dismissal does not apply in certain cases)—

(a) for “or 103” there is substituted “, 103 or 103A”, and

(b) for “and employee representative cases)” there is substituted “employee representative and protected disclosure cases)”.

17. An Order in Council under paragraph 1(1)(b) of Schedule 1 to the Northern Ireland Act 1974 (legislation for Northern Ireland in the interim period) which states that it is made only for purposes corresponding to those of this Act—

(a) shall not be subject to paragraph 1(4) and (5) of that Schedule (affirmative resolution of both Houses of Parliament), but

(b) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

18.—(1) This Act may be cited as the Public Interest Disclosure Act 1998.

(2) In this Act “the 1996 Act” means the Employment Rights Act 1996.

(3) Subject to subsection (4), this Act shall come into force on such day or days as the Secretary of State may by order made by statutory instrument appoint, and different days may be appointed for different purposes.

(4) The following provisions shall come into force on the passing of this Act—

(a) section 1 so far as relating to the power to make an order under section 43F of the 1996 Act,
(b) section 8 so far as relating to the power to make regulations under section 127B of the 1996 Act,
(c) section 17, and
(d) this section.

(5) This Act, except section 17, does not extend to Northern Ireland.
Public Law 107–204
107th Congress

An Act

To protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes. July 30, 2002

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the “Sarbanes-Oxley Act of 2002”.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Definitions.
Sec. 3. Commission rules and enforcement.

TITLE I—PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

Sec. 101. Establishment; administrative provisions.
Sec. 102. Registration with the Board.
Sec. 103. Auditing, quality control, and independence standards and rules.
Sec. 104. Inspections of registered public accounting firms.
Sec. 105. Investigations and disciplinary proceedings.
Sec. 106. Foreign public accounting firms.
Sec. 107. Commission oversight of the Board.
Sec. 108. Accounting standards.
Sec. 109. Funding.

TITLE II—AUDITOR INDEPENDENCE

Sec. 201. Services outside the scope of practice of auditors.
Sec. 202. Preapproval requirements.
Sec. 203. Audit partner rotation.
Sec. 204. Auditor reports to audit committees.
Sec. 205. Conforming amendments.
Sec. 206. Conflicts of interest.
Sec. 207. Study of mandatory rotation of registered public accounting firms.
Sec. 208. Commission authority.
Sec. 209. Considerations by appropriate State regulatory authorities.

TITLE III—CORPORATE RESPONSIBILITY

Sec. 301. Public company audit committees.
Sec. 302. Corporate responsibility for financial reports.
Sec. 303. Improper influence on conduct of audits.
Sec. 304. Forfeiture of certain bonuses and profits.
Sec. 305. Officer and director bars and penalties.
Sec. 306. Insider trades during pension fund blackout periods.
Sec. 307. Rules of professional responsibility for attorneys.
Sec. 308. Fair funds for investors.

TITLE IV—ENHANCED FINANCIAL DISCLOSURES

Sec. 401. Disclosures in periodic reports.
Sec. 402. Enhanced conflict of interest provisions.
Sec. 403. Disclosures of transactions involving management and principal stockholders.
Sec. 404. Management assessment of internal controls.
Sec. 405. Exception.
Sec. 407. Disclosure of audit committee financial expert.
Sec. 408. Enhanced review of periodic disclosures by issuers.
Sec. 409. Real time issuer disclosures.

TITLE V—ANALYST CONFLICTS OF INTEREST
Sec. 501. Treatment of securities analysts by registered securities associations and national securities exchanges.

TITLE VI—COMMISSION RESOURCES AND AUTHORITY
Sec. 601. Authorization of appropriations.
Sec. 602. Appearance and practice before the Commission.
Sec. 603. Federal court authority to impose penny stock bars.
Sec. 604. Qualifications of associated persons of brokers and dealers.

TITLE VII—STUDIES AND REPORTS
Sec. 701. GAO study and report regarding consolidation of public accounting firms.
Sec. 702. Commission study and report regarding credit rating agencies.
Sec. 703. Study and report on violators and violations.
Sec. 704. Study of enforcement actions.
Sec. 705. Study of investment banks.

TITLE VIII—CORPORATE AND CRIMINAL FRAUD ACCOUNTABILITY
Sec. 801. Short title.
Sec. 802. Criminal penalties for altering documents.
Sec. 803. Debts nondischargeable if incurred in violation of securities fraud laws.
Sec. 804. Statute of limitations for securities fraud.
Sec. 806. Protection for employees of publicly traded companies who provide evidence of fraud.
Sec. 807. Criminal penalties for defrauding shareholders of publicly traded companies.

TITLE IX—WHITE-COLLAR CRIME PENALTY ENHANCEMENTS
Sec. 901. Short title.
Sec. 902. Attempts and conspiracies to commit criminal fraud offenses.
Sec. 903. Criminal penalties for mail and wire fraud.
Sec. 905. Amendment to sentencing guidelines relating to certain white-collar offenses.
Sec. 906. Corporate responsibility for financial reports.

TITLE X—CORPORATE TAX RETURNS
Sec. 1001. Sense of the Senate regarding the signing of corporate tax returns by chief executive officers.

TITLE XI—CORPORATE FRAUD AND ACCOUNTABILITY
Sec. 1101. Short title.
Sec. 1102. Tampering with a record or otherwise impeding an official proceeding.
Sec. 1103. Temporary freeze authority for the Securities and Exchange Commission.
Sec. 1104. Amendment to the Federal Sentencing Guidelines.
Sec. 1105. Authority of the Commission to prohibit persons from serving as officers or directors.
Sec. 1106. Increased criminal penalties under Securities Exchange Act of 1934.
Sec. 1107. Retaliation against informants.

SEC. 2. DEFINITIONS.
(a) IN GENERAL.—In this Act, the following definitions shall apply:
(1) APPROPRIATE STATE REGULATORY AUTHORITY.—The term “appropriate State regulatory authority” means the State agency or other authority responsible for the licensure or other regulation of the practice of accounting in the State or States.
having jurisdiction over a registered public accounting firm or associated person thereof, with respect to the matter in question.

(2) **Audit.**—The term "audit" means an examination of the financial statements of any issuer by an independent public accounting firm in accordance with the rules of the Board or the Commission (or, for the period preceding the adoption of applicable rules of the Board under section 103, in accordance with then-applicable generally accepted auditing and related standards for such purposes), for the purpose of expressing an opinion on such statements.

(3) **Audit Committee.**—The term "audit committee" means—

(A) a committee (or equivalent body) established by and amongst the board of directors of an issuer for the purpose of overseeing the accounting and financial reporting processes of the issuer and audits of the financial statements of the issuer; and

(B) if no such committee exists with respect to an issuer, the entire board of directors of the issuer.

(4) **Audit Report.**—The term "audit report" means a document or other record—

(A) prepared following an audit performed for purposes of compliance by an issuer with the requirements of the securities laws; and

(B) in which a public accounting firm either—

(i) sets forth the opinion of that firm regarding a financial statement, report, or other document; or

(ii) asserts that no such opinion can be expressed.

(5) **Board.**—The term "Board" means the Public Company Accounting Oversight Board established under section 101.

(6) **Commission.**—The term "Commission" means the Securities and Exchange Commission.

(7) **Issuer.**—The term "issuer" means an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. 78l), or that is required to file reports under section 15(d) (15 U.S.C. 78o(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn.

(8) **Non-audit Services.**—The term "non-audit services" means any professional services provided to an issuer by a registered public accounting firm, other than those provided to an issuer in connection with an audit or a review of the financial statements of an issuer.

(9) **Person Associated with a Public Accounting Firm.**—

(A) **In General.**—The terms "person associated with a public accounting firm" (or with a "registered public accounting firm") and "associated person of a public accounting firm" (or of a "registered public accounting firm") mean any individual proprietor, partner, shareholder, principal, accountant, or other professional employee of a public accounting firm, or any other independent contractor or entity that, in connection with the preparation or issuance of any audit report—
(i) shares in the profits of, or receives compensation in any other form from, that firm; or
(ii) participates as agent or otherwise on behalf of such accounting firm in any activity of that firm.

(B) Exemption Authority.—The Board may, by rule, exempt persons engaged only in ministerial tasks from the definition in subparagraph (A), to the extent that the Board determines that any such exemption is consistent with the purposes of this Act, the public interest, or the protection of investors.

(10) Professional Standards.—The term “professional standards” means—

(A) accounting principles that are—

(i) established by the standard setting body described in section 19(b) of the Securities Act of 1933, as amended by this Act, or prescribed by the Commission under section 19(a) of that Act (15 U.S.C. 78a(a)) or section 13(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78a(m)); and

(ii) relevant to audit reports for particular issuers, or dealt with in the quality control system of a particular registered public accounting firm; and

(B) auditing standards, standards for attestation engagements, quality control policies and procedures, ethical and competency standards, and independence standards (including rules implementing title II) that the Board or the Commission determines—

(i) relate to the preparation or issuance of audit reports for issuers; and

(ii) are established or adopted by the Board under section 103(a), or are promulgated as rules of the Commission.

(11) Public Accounting Firm.—The term “public accounting firm” means—

(A) a proprietorship, partnership, incorporated association, corporation, limited liability company, limited liability partnership, or other legal entity that is engaged in the practice of public accounting or preparing or issuing audit reports; and

(B) to the extent so designated by the rules of the Board, any associated person of any entity described in subparagraph (A).

(12) Registered Public Accounting Firm.—The term “registered public accounting firm” means a public accounting firm registered with the Board in accordance with this Act.

(13) Rules of the Board.—The term “rules of the Board” means the bylaws and rules of the Board (as submitted to, and approved, modified, or amended by the Commission, in accordance with section 107), and those stated policies, practices, and interpretations of the Board that the Commission, by rule, may deem to be rules of the Board, as necessary or appropriate in the public interest or for the protection of investors.

(14) Security.—The term “security” has the same meaning as in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)).
(15) Securities laws.—The term “securities laws” means the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), as amended by this Act, and includes the rules, regulations, and orders issued by the Commission thereunder.

(16) State.—The term “State” means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other territory or possession of the United States.


SEC. 3. COMMISSION RULES AND ENFORCEMENT.

(a) Regulatory Action.—The Commission shall promulgate such rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act.

(b) Enforcement.—

(1) In general.—A violation by any person of this Act, any rule or regulation of the Commission issued under this Act, or any rule of the Board shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or the rules and regulations issued thereunder, consistent with the provisions of this Act, and any such person shall be subject to the same penalties, and to the same extent, as for a violation of that Act or such rules or regulations.


(A) in subsection (a)(1), by inserting “the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm,” after “is a participant,”;

(B) in subsection (d)(1), by inserting “the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm,” after “is a participant,”;

(C) in subsection (e), by inserting “the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm,” after “is a participant,”;

and

(D) in subsection (f), by inserting “or the Public Company Accounting Oversight Board” after “self-regulatory organization” each place that term appears.


(4) Enforcement by Federal banking agencies.—Section 12(i) of the Securities Exchange Act of 1934 (15 U.S.C. 78l(i)) is amended by—

(A) striking “sections 12,” each place it appears and inserting “sections 10A(m), 12,”; and
(B) striking “and 16,” each place it appears and inserting “and 16 of this Act, and sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes-Oxley Act of 2002.”.

c) Effect on Commission Authority.—Nothing in this Act or the rules of the Board shall be construed to impair or limit—

(1) the authority of the Commission to regulate the accounting profession, accounting firms, or persons associated with such firms for purposes of enforcement of the securities laws;

(2) the authority of the Commission to set standards for accounting or auditing practices or auditor independence, derived from other provisions of the securities laws or the rules or regulations thereunder, for purposes of the preparation and issuance of any audit report, or otherwise under applicable law; or

(3) the ability of the Commission to take, on the initiative of the Commission, legal, administrative, or disciplinary action against any registered public accounting firm or any associated person thereof.

TITLE I—PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

SEC. 101. ESTABLISHMENT; ADMINISTRATIVE PROVISIONS.

(a) Establishment of Board.—There is established the Public Company Accounting Oversight Board, to oversee the audit of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports for companies the securities of which are sold to, and held by and for, public investors. The Board shall be a body corporate, operate as a nonprofit corporation, and have succession until dissolved by an Act of Congress.

(b) Status.—The Board shall not be an agency or establishment of the United States Government, and, except as otherwise provided in this Act, shall be subject to, and have all the powers conferred upon a nonprofit corporation by, the District of Columbia Nonprofit Corporation Act. No member or person employed by, or agent for, the Board shall be deemed to be an officer or employee of or agent for the Federal Government by reason of such service.

(c) Duties of the Board.—The Board shall, subject to action by the Commission under section 107, and once a determination is made by the Commission under subsection (d) of this section—

(1) register public accounting firms that prepare audit reports for issuers, in accordance with section 102;

(2) establish or adopt, or both, by rule, auditing, quality control, ethics, independence, and other standards relating to the preparation of audit reports for issuers, in accordance with section 103;

(3) conduct inspections of registered public accounting firms, in accordance with section 104 and the rules of the Board;

(4) conduct investigations and disciplinary proceedings concerning, and impose appropriate sanctions where justified upon,
registered public accounting firms and associated persons of such firms, in accordance with section 105;

(5) perform such other duties or functions as the Board (or the Commission, by rule or order) determines are necessary or appropriate to promote high professional standards among, and improve the quality of audit services offered by, registered public accounting firms and associated persons thereof, or otherwise to carry out this Act, in order to protect investors, or to further the public interest;

(6) enforce compliance with this Act, the rules of the Board, professional standards, and the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, by registered public accounting firms and associated persons thereof; and

(7) set the budget and manage the operations of the Board and the staff of the Board.

(d) COMMISSION DETERMINATION.—The members of the Board shall take such action (including hiring of staff, proposal of rules, and adoption of initial and transitional auditing and other professional standards) as may be necessary or appropriate to enable the Commission to determine, not later than 270 days after the date of enactment of this Act, that the Board is so organized and has the capacity to carry out the requirements of this title, and to enforce compliance with this title by registered public accounting firms and associated persons thereof. The Commission shall be responsible, prior to the appointment of the Board, for the planning for the establishment and administrative transition to the Board’s operation.

(e) BOARD MEMBERSHIP.—

(1) COMPOSITION.—The Board shall have 5 members, appointed from among prominent individuals of integrity and reputation who have a demonstrated commitment to the interests of investors and the public, and an understanding of the responsibilities for and nature of the financial disclosures required of issuers under the securities laws and the obligations of accountants with respect to the preparation and issuance of audit reports with respect to such disclosures.

(2) LIMITATION.—Two members, and only 2 members, of the Board shall be or have been certified public accountants pursuant to the laws of 1 or more States, provided that, if 1 of those 2 members is the chairperson, he or she may not have been a practicing certified public accountant for at least 5 years prior to his or her appointment to the Board.

(3) FULL-TIME INDEPENDENT SERVICE.—Each member of the Board shall serve on a full-time basis, and may not, concurrent with service on the Board, be employed by any other person or engage in any other professional or business activity. No member of the Board may share in any of the profits of, or receive payments from, a public accounting firm (or any other person, as determined by rule of the Commission), other than fixed continuing payments, subject to such conditions as the Commission may impose, under standard arrangements for the retirement of members of public accounting firms.

(4) APPOINTMENT OF BOARD MEMBERS.—

(A) INITIAL BOARD.—Not later than 90 days after the date of enactment of this Act, the Commission, after consultation with the Chairman of the Board of Governors
of the Federal Reserve System and the Secretary of the Treasury, shall appoint the chairperson and other initial members of the Board, and shall designate a term of service for each.

(B) Vacancies.—A vacancy on the Board shall not affect the powers of the Board, but shall be filled in the same manner as provided for appointments under this section.

(5) Term of Service.—

(A) In General.—The term of service of each Board member shall be 5 years, and until a successor is appointed, except that—

(i) the terms of office of the initial Board members (other than the chairperson) shall expire in annual increments, 1 on each of the first 4 anniversaries of the initial date of appointment; and

(ii) any Board member appointed to fill a vacancy occurring before the expiration of the term for which the predecessor was appointed shall be appointed only for the remainder of that term.

(B) Term Limitation.—No person may serve as a member of the Board, or as chairperson of the Board, for more than 2 terms, whether or not such terms of service are consecutive.

(6) Removal From Office.—A member of the Board may be removed by the Commission from office, in accordance with section 107(d)(3), for good cause shown before the expiration of the term of that member.

(f) Powers of the Board.—In addition to any authority granted to the Board otherwise in this Act, the Board shall have the power, subject to section 107—

(1) to sue and be sued, complain and defend, in its corporate name and through its own counsel, with the approval of the Commission, in any Federal, State, or other court;

(2) to conduct its operations and maintain offices, and to exercise all other rights and powers authorized by this Act, in any State, without regard to any qualification, licensing, or other provision of law in effect in such State (or a political subdivision thereof);

(3) to lease, purchase, accept gifts or donations of or otherwise acquire, improve, use, sell, exchange, or convey, all of or an interest in any property, wherever situated;

(4) to appoint such employees, accountants, attorneys, and other agents as may be necessary or appropriate, and to determine their qualifications, define their duties, and fix their salaries or other compensation (at a level that is comparable to private sector self-regulatory, accounting, technical, supervisory, or other staff or management positions);

(5) to allocate, assess, and collect accounting support fees established pursuant to section 109, for the Board, and other fees and charges imposed under this title; and

(6) to enter into contracts, execute instruments, incur liabilities, and do any and all other acts and things necessary, appropriate, or incidental to the conduct of its operations and the exercise of its obligations, rights, and powers imposed or granted by this title.
(g) Rules of the Board.—The rules of the Board shall, subject to the approval of the Commission—

(1) provide for the operation and administration of the Board, the exercise of its authority, and the performance of its responsibilities under this Act;

(2) permit, as the Board determines necessary or appropriate, delegation by the Board of any of its functions to an individual member or employee of the Board, or to a division of the Board, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any matter, except that—

(A) the Board shall retain a discretionary right to review any action pursuant to any such delegated function, upon its own motion;

(B) a person shall be entitled to a review by the Board with respect to any matter so delegated, and the decision of the Board upon such review shall be deemed to be the action of the Board for all purposes (including appeal or review thereof); and

(C) if the right to exercise a review described in subparagraph (A) is declined, or if no such review is sought within the time stated in the rules of the Board, then the action taken by the holder of such delegation shall for all purposes, including appeal or review thereof, be deemed to be the action of the Board;

(3) establish ethics rules and standards of conduct for Board members and staff, including a bar on practice before the Board (and the Commission, with respect to Board-related matters) of 1 year for former members of the Board, and appropriate periods (not to exceed 1 year) for former staff of the Board; and

(4) provide as otherwise required by this Act.

(h) Annual Report to the Commission.—The Board shall submit an annual report (including its audited financial statements) to the Commission, and the Commission shall transmit a copy of that report to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives, not later than 30 days after the date of receipt of that report by the Commission.

SEC. 102. REGISTRATION WITH THE BOARD.

(a) Mandatory Registration.—Beginning 180 days after the date of the determination of the Commission under section 101(d), it shall be unlawful for any person that is not a registered public accounting firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer.

(b) Applications for Registration.—

(1) Form of Application.—A public accounting firm shall use such form as the Board may prescribe, by rule, to apply for registration under this section.

(2) Contents of Applications.—Each public accounting firm shall submit, as part of its application for registration, in such detail as the Board shall specify—

(A) the names of all issuers for which the firm prepared or issued audit reports during the immediately preceding calendar year, and for which the firm expects to prepare or issue audit reports during the current calendar year;
(B) the annual fees received by the firm from each such issuer for audit services, other accounting services, and non-audit services, respectively;

(C) such other current financial information for the most recently completed fiscal year of the firm as the Board may reasonably request;

(D) a statement of the quality control policies of the firm for its accounting and auditing practices;

(E) a list of all accountants associated with the firm who participate in or contribute to the preparation of audit reports, stating the license or certification number of each such person, as well as the State license numbers of the firm itself;

(F) information relating to criminal, civil, or administrative actions or disciplinary proceedings pending against the firm or any associated person of the firm in connection with any audit report;

(G) copies of any periodic or annual disclosure filed by an issuer with the Commission during the immediately preceding calendar year which discloses accounting disagreements between such issuer and the firm in connection with an audit report furnished or prepared by the firm for such issuer; and

(H) such other information as the rules of the Board or the Commission shall specify as necessary or appropriate in the public interest or for the protection of investors.

(3) CONSENTS.—Each application for registration under this subsection shall include—

(A) a consent executed by the public accounting firm to cooperation in and compliance with any request for testimony or the production of documents made by the Board in the furtherance of its authority and responsibilities under this title (and an agreement to secure and enforce similar consents from each of the associated persons of the public accounting firm as a condition of their continued employment by or other association with such firm); and

(B) a statement that such firm understands and agrees that cooperation and compliance, as described in the consent required by subparagraph (A), and the securing and enforcement of such consents from its associated persons, in accordance with the rules of the Board, shall be a condition to the continuing effectiveness of the registration of the firm with the Board.

(c) ACTION ON APPLICATIONS.—

(1) TIMING.—The Board shall approve a completed application for registration not later than 45 days after the date of receipt of the application, in accordance with the rules of the Board, unless the Board, prior to such date, issues a written notice of disapproval to, or requests more information from, the prospective registrant.

(2) TREATMENT.—A written notice of disapproval of a completed application under paragraph (1) for registration shall be treated as a disciplinary sanction for purposes of sections 105(d) and 107(c).

(d) PERIODIC REPORTS.—Each registered public accounting firm shall submit an annual report to the Board, and may be required...
to report more frequently, as necessary to update the information contained in its application for registration under this section, and to provide to the Board such additional information as the Board or the Commission may specify, in accordance with subsection (b)(2).

(e) Public Availability.—Registration applications and annual reports required by this subsection, or such portions of such applications or reports as may be designated under rules of the Board, shall be made available for public inspection, subject to rules of the Board, and to applicable laws relating to the confidentiality of proprietary, personal, or other information contained in such applications or reports, provided that, in all events, the Board shall protect from public disclosure information reasonably identified by the subject accounting firm as proprietary information.

(f) Registration and Annual Fees.—The Board shall assess and collect a registration fee and an annual fee from each registered public accounting firm, in amounts that are sufficient to recover the costs of processing and reviewing applications and annual reports.

SEC. 103. AUDITING, QUALITY CONTROL, AND INDEPENDENCE STANDARDS AND RULES.

(a) Auditing, Quality Control, and Ethics Standards.—

(1) In general.—The Board shall, by rule, establish, including, to the extent it determines appropriate, through adoption of standards proposed by 1 or more professional groups of accountants designated pursuant to paragraph (3)(A) or advisory groups convened pursuant to paragraph (4), and amend or otherwise modify or alter, such auditing and related attestation standards, such quality control standards, and such ethics standards to be used by registered public accounting firms in the preparation and issuance of audit reports, as required by this Act or the rules of the Commission, or as may be necessary or appropriate in the public interest or for the protection of investors.

(2) Rule Requirements.—In carrying out paragraph (1), the Board—

(A) shall include in the auditing standards that it adopts, requirements that each registered public accounting firm shall—

(i) prepare, and maintain for a period of not less than 7 years, audit work papers, and other information related to any audit report, in sufficient detail to support the conclusions reached in such report;

(ii) provide a concurring or second partner review and approval of such audit report (and other related information), and concurring approval in its issuance, by a qualified person (as prescribed by the Board) associated with the public accounting firm, other than the person in charge of the audit, or by an independent reviewer (as prescribed by the Board); and

(iii) describe in each audit report the scope of the auditor's testing of the internal control structure and procedures of the issuer, required by section 404(b), and present (in such report or in a separate report)—

15 USC 7213.
(I) the findings of the auditor from such testing;
(II) an evaluation of whether such internal control structure and procedures—
(aa) include maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer;
(bb) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the issuer; and
(III) a description, at a minimum, of material weaknesses in such internal controls, and of any material noncompliance found on the basis of such testing.

(B) shall include, in the quality control standards that it adopts with respect to the issuance of audit reports, requirements for every registered public accounting firm relating to—
(i) monitoring of professional ethics and independence from issuers on behalf of which the firm issues audit reports;
(ii) consultation within such firm on accounting and auditing questions;
(iii) supervision of audit work;
(iv) hiring, professional development, and advancement of personnel;
(v) the acceptance and continuation of engagements;
(vi) internal inspection; and
(vii) such other requirements as the Board may prescribe, subject to subsection (a)(1).

(3) AUTHORITY TO ADOPT OTHER STANDARDS.—
(A) IN GENERAL.—In carrying out this subsection, the Board—
(i) may adopt as its rules, subject to the terms of section 107, any portion of any statement of auditing standards or other professional standards that the Board determines satisfy the requirements of paragraph (1), and that were proposed by 1 or more professional groups of accountants that shall be designated or recognized by the Board, by rule, for such purpose, pursuant to this paragraph or 1 or more advisory groups convened pursuant to paragraph (4); and
(ii) notwithstanding clause (i), shall retain full authority to modify, supplement, revise, or subsequently amend, modify, or repeal, in whole or in part, any portion of any statement described in clause (i).

(B) INITIAL AND TRANSITIONAL STANDARDS.—The Board shall adopt standards described in subparagraph (A)(i) as initial or transitional standards, to the extent the Board determines necessary, prior to a determination of the
Commission under section 101(d), and such standards shall be separately approved by the Commission at the time of that determination, without regard to the procedures required by section 107 that otherwise would apply to the approval of rules of the Board.

(4) ADVISORY GROUPS.—The Board shall convene, or authorize its staff to convene, such expert advisory groups as may be appropriate, which may include practicing accountants and other experts, as well as representatives of other interested groups, subject to such rules as the Board may prescribe to prevent conflicts of interest, to make recommendations concerning the content (including proposed drafts) of auditing, quality control, ethics, independence, or other standards required to be established under this section.

(b) INDEPENDENCE STANDARDS AND RULES.—The Board shall establish such rules as may be necessary or appropriate in the public interest or for the protection of investors, to implement, or as authorized under, title II of this Act.

(c) COOPERATION WITH DESIGNATED PROFESSIONAL GROUPS OF ACCOUNTANTS AND ADVISORY GROUPS.—

(1) IN GENERAL.—The Board shall cooperate on an ongoing basis with professional groups of accountants designated under subsection (a)(3)(A) and advisory groups convened under subsection (a)(4) in the examination of the need for changes in any standards subject to its authority under subsection (a), recommend issues for inclusion on the agendas of such designated professional groups of accountants or advisory groups, and take such other steps as it deems appropriate to increase the effectiveness of the standard setting process.

(2) BOARD RESPONSES.—The Board shall respond in a timely fashion to requests from designated professional groups of accountants and advisory groups referred to in paragraph (1) for any changes in standards over which the Board has authority.

(d) EVALUATION OF STANDARD SETTING PROCESS.—The Board shall include in the annual report required by section 101(h) the results of its standard setting responsibilities during the period to which the report relates, including a discussion of the work of the Board with any designated professional groups of accountants and advisory groups described in paragraphs (3)(A) and (4) of subsection (a), and its pending issues agenda for future standard setting projects.

SEC. 104. INSPECTIONS OF REGISTERED PUBLIC ACCOUNTING FIRMS.

(a) IN GENERAL.—The Board shall conduct a continuing program of inspections to assess the degree of compliance of each registered public accounting firm and associated persons of that firm with this Act, the rules of the Board, the rules of the Commission, or professional standards, in connection with its performance of audits, issuance of audit reports, and related matters involving issuers.

(b) INSPECTION FREQUENCY.—

(1) IN GENERAL.—Subject to paragraph (2), inspections required by this section shall be conducted—

(A) annually with respect to each registered public accounting firm that regularly provides audit reports for more than 100 issuers; and
(B) not less frequently than once every 3 years with respect to each registered public accounting firm that regularly provides audit reports for 100 or fewer issuers.

(2) ADJUSTMENTS TO SCHEDULES.—The Board may, by rule, adjust the inspection schedules set under paragraph (1) if the Board finds that different inspection schedules are consistent with the purposes of this Act, the public interest, and the protection of investors. The Board may conduct special inspections at the request of the Commission or upon its own motion.

(c) PROCEDURES.—The Board shall, in each inspection under this section, and in accordance with its rules for such inspections—

(1) identify any act or practice or omission to act by the registered public accounting firm, or by any associated person thereof, revealed by such inspection that may be in violation of this Act, the rules of the Board, the rules of the Commission, the firm's own quality control policies, or professional standards;

(2) report any such act, practice, or omission, if appropriate, to the Commission and each appropriate State regulatory authority; and

(3) begin a formal investigation or take disciplinary action, if appropriate, with respect to any such violation, in accordance with this Act and the rules of the Board.

(d) CONDUCT OF INSPECTIONS.—In conducting an inspection of a registered public accounting firm under this section, the Board shall—

(1) inspect and review selected audit and review engagements of the firm (which may include audit engagements that are the subject of ongoing litigation or other controversy between the firm and 1 or more third parties), performed at various offices and by various associated persons of the firm, as selected by the Board;

(2) evaluate the sufficiency of the quality control system of the firm, and the manner of the documentation and communication of that system by the firm; and

(3) perform such other testing of the audit, supervisory, and quality control procedures of the firm as are necessary or appropriate in light of the purpose of the inspection and the responsibilities of the Board.

(e) RECORD RETENTION.—The rules of the Board may require the retention by registered public accounting firms for inspection purposes of records whose retention is not otherwise required by section 103 or the rules issued thereunder.

(f) PROCEDURES FOR REVIEW.—The rules of the Board shall provide a procedure for the review of and response to a draft inspection report by the registered public accounting firm under inspection. The Board shall take such action with respect to such response as it considers appropriate (including revising the draft report or continuing or supplementing its inspection activities before issuing a final report), but the text of any such response, appropriately redacted to protect information reasonably identified by the accounting firm as confidential, shall be attached to and made part of the inspection report.

(g) REPORT.—A written report of the findings of the Board for each inspection under this section, subject to subsection (h), shall be—
(1) transmitted, in appropriate detail, to the Commission and each appropriate State regulatory authority, accompanied by any letter or comments by the Board or the inspector, and any letter of response from the registered public accounting firm; and

(2) made available in appropriate detail to the public (subject to section 105(b)(5)(A), and to the protection of such confidential and proprietary information as the Board may determine to be appropriate, or as may be required by law), except that no portions of the inspection report that deal with criticisms of or potential defects in the quality control systems of the firm under inspection shall be made public if those criticisms or defects are addressed by the firm, to the satisfaction of the Board, not later than 12 months after the date of the inspection report.

(h) INTERIM COMMISSION REVIEW.—

(1) REVIEWABLE MATTERS.—A registered public accounting firm may seek review by the Commission, pursuant to such rules as the Commission shall promulgate, if the firm—

(A) has provided the Board with a response, pursuant to rules issued by the Board under subsection (f), to the substance of particular items in a draft inspection report, and disagrees with the assessments contained in any final report prepared by the Board following such response; or

(B) disagrees with the determination of the Board that criticisms or defects identified in an inspection report have not been addressed to the satisfaction of the Board within 12 months of the date of the inspection report, for purposes of subsection (g)(2).

(2) TREATMENT OF REVIEW.—Any decision of the Commission with respect to a review under paragraph (1) shall not be reviewable under section 25 of the Securities Exchange Act of 1934 (15 U.S.C. 78y), or deemed to be “final agency action” for purposes of section 704 of title 5, United States Code.

(3) TIMING.—Review under paragraph (1) may be sought during the 30-day period following the date of the event giving rise to the review under subparagraph (A) or (B) of paragraph (1).

SEC. 105. INVESTIGATIONS AND DISCIPLINARY PROCEEDINGS.

(a) IN GENERAL.—The Board shall establish, by rule, subject to the requirements of this section, fair procedures for the investigation and disciplining of registered public accounting firms and associated persons of such firms.

(b) INVESTIGATIONS.—

(1) AUTHORITY.—In accordance with the rules of the Board, the Board may conduct an investigation of any act or practice, or omission to act, by a registered public accounting firm, any associated person of such firm, or both, that may violate any provision of this Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under this Act, or professional standards, regardless of how the act, practice, or omission is brought to the attention of the Board.
(2) **Testimony and Document Production.**—In addition to such other actions as the Board determines to be necessary or appropriate, the rules of the Board may—

(A) require the testimony of the firm or of any person associated with a registered public accounting firm, with respect to any matter that the Board considers relevant or material to an investigation;

(B) require the production of audit work papers and any other document or information in the possession of a registered public accounting firm or any associated person thereof, wherever domiciled, that the Board considers relevant or material to the investigation, and may inspect the books and records of such firm or associated person to verify the accuracy of any documents or information supplied;

(C) request the testimony of, and production of any document in the possession of, any other person, including any client of a registered public accounting firm that the Board considers relevant or material to an investigation under this section, with appropriate notice, subject to the needs of the investigation, as permitted under the rules of the Board; and

(D) provide for procedures to seek issuance by the Commission, in a manner established by the Commission, of a subpoena to require the testimony of, and production of any document in the possession of, any person, including any client of a registered public accounting firm, that the Board considers relevant or material to an investigation under this section.

(3) **Noncooperation with Investigations.**—

(A) **In General.**—If a registered public accounting firm or any associated person thereof refuses to testify, produce documents, or otherwise cooperate with the Board in connection with an investigation under this section, the Board may—

(i) suspend or bar such person from being associated with a registered public accounting firm, or require the registered public accounting firm to end such association;

(ii) suspend or revoke the registration of the public accounting firm; and

(iii) invoke such other lesser sanctions as the Board considers appropriate, and as specified by rule of the Board.

(B) **Procedure.**—Any action taken by the Board under this paragraph shall be subject to the terms of section 107(c).

(4) **Coordination and Referral of Investigations.**—

(A) **Coordination.**—The Board shall notify the Commission of any pending Board investigation involving a potential violation of the securities laws, and thereafter coordinate its work with the work of the Commission's Division of Enforcement, as necessary to protect an ongoing Commission investigation.

(B) **Referral.**—The Board may refer an investigation under this section—

(i) to the Commission;
(ii) to any other Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act (15 U.S.C. 6809)), in the case of an investigation that concerns an audit report for an institution that is subject to the jurisdiction of such regulator; and

(iii) at the direction of the Commission, to—

(I) the Attorney General of the United States;
(II) the attorney general of 1 or more States;
and
(III) the appropriate State regulatory authority.

(5) USE OF DOCUMENTS.—

(A) CONFIDENTIALITY.—Except as provided in subparagraph (B), all documents and information prepared or received by or specifically for the Board, and deliberations of the Board and its employees and agents, in connection with an inspection under section 104 or with an investigation under this section, shall be confidential and privileged as an evidentiary matter (and shall not be subject to civil discovery or other legal process) in any proceeding in any Federal or State court or administrative agency, and shall be exempt from disclosure, in the hands of an agency or establishment of the Federal Government, under the Freedom of Information Act (5 U.S.C. 552a), or otherwise, unless and until presented in connection with a public proceeding or released in accordance with subsection (c).

(B) AVAILABILITY TO GOVERNMENT AGENCIES.—Without the loss of its status as confidential and privileged in the hands of the Board, all information referred to in subparagraph (A) may—

(i) be made available to the Commission; and
(ii) in the discretion of the Board, when determined by the Board to be necessary to accomplish the purposes of this Act or to protect investors, be made available to—

(I) the Attorney General of the United States;
(II) the appropriate Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act (15 U.S.C. 6809)), other than the Commission, with respect to an audit report for an institution subject to the jurisdiction of such regulator;
(III) State attorneys general in connection with any criminal investigation; and
(IV) any appropriate State regulatory authority,

each of which shall maintain such information as confidential and privileged.

(6) IMMUNITY.—Any employee of the Board engaged in carrying out an investigation under this Act shall be immune from any civil liability arising out of such investigation in the same manner and to the same extent as an employee of the Federal Government in similar circumstances.

(c) DISCIPLINARY PROCEDURES.—

(1) NOTIFICATION; RECORDKEEPING.—The rules of the Board shall provide that in any proceeding by the Board to determine
whether a registered public accounting firm, or an associated person thereof, should be disciplined, the Board shall—

(A) bring specific charges with respect to the firm or associated person;

(B) notify such firm or associated person of, and provide to the firm or associated person an opportunity to defend against, such charges; and

(C) keep a record of the proceedings.

(2) Public Hearings.—Hearings under this section shall not be public, unless otherwise ordered by the Board for good cause shown, with the consent of the parties to such hearing.

(3) Supporting Statement.—A determination by the Board to impose a sanction under this subsection shall be supported by a statement setting forth—

(A) each act or practice in which the registered public accounting firm, or associated person, has engaged (or omitted to engage), or that forms a basis for all or a part of such sanction;

(B) the specific provision of this Act, the securities laws, the rules of the Board, or professional standards which the Board determines has been violated; and

(C) the sanction imposed, including a justification for that sanction.

(4) Sanctions.—If the Board finds, based on all of the facts and circumstances, that a registered public accounting firm or associated person thereof has engaged in any act or practice, or omitted to act, in violation of this Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under this Act, or professional standards, the Board may impose such disciplinary or remedial sanctions as it determines appropriate, subject to applicable limitations under paragraph (5), including—

(A) temporary suspension or permanent revocation of registration under this title;

(B) temporary or permanent suspension or bar of a person from further association with any registered public accounting firm;

(C) temporary or permanent limitation on the activities, functions, or operations of such firm or person (other than in connection with required additional professional education or training);

(D) a civil money penalty for each such violation, in an amount equal to—

(i) not more than $100,000 for a natural person or $2,000,000 for any other person; and

(ii) in any case to which paragraph (5) applies, not more than $750,000 for a natural person or $15,000,000 for any other person;

(E) censure;

(F) required additional professional education or training; or

(G) any other appropriate sanction provided for in the rules of the Board.
(5) **Intentional or Other Knowing Conduct.**—The sanctions and penalties described in subparagraphs (A) through (C) and (D)(ii) of paragraph (4) shall only apply to—

(A) intentional or knowing conduct, including reckless conduct, that results in violation of the applicable statutory, regulatory, or professional standard; or

(B) repeated instances of negligent conduct, each resulting in a violation of the applicable statutory, regulatory, or professional standard.

(6) **Failure to Supervise.**—

(A) **In General.**—The Board may impose sanctions under this section on a registered accounting firm or upon the supervisory personnel of such firm, if the Board finds that—

(i) the firm has failed reasonably to supervise an associated person, either as required by the rules of the Board relating to auditing or quality control standards, or otherwise, with a view to preventing violations of this Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission under this Act, or professional standards; and

(ii) such associated person commits a violation of this Act, or any of such rules, laws, or standards.

(B) **Rule of Construction.**—No associated person of a registered public accounting firm shall be deemed to have failed reasonably to supervise any other person for purposes of subparagraph (A), if—

(i) there have been established in and for that firm procedures, and a system for applying such procedures, that comply with applicable rules of the Board and that would reasonably be expected to prevent and detect any such violation by such associated person; and

(ii) such person has reasonably discharged the duties and obligations incumbent upon that person by reason of such procedures and system, and had no reasonable cause to believe that such procedures and system were not being complied with.

(7) **Effect of Suspension.**—

(A) **Association with a Public Accounting Firm.**—It shall be unlawful for any person that is suspended or barred from being associated with a registered public accounting firm under this subsection willfully to become or remain associated with any registered public accounting firm, or for any registered public accounting firm that knew, or, in the exercise of reasonable care should have known, of the suspension or bar, to permit such an association, without the consent of the Board or the Commission.

(B) **Association with an Issuer.**—It shall be unlawful for any person that is suspended or barred from being associated with an issuer under this subsection willfully to become or remain associated with any issuer in an accountancy or a financial management capacity, and for any issuer that knew, or in the exercise of reasonable
care should have known, of such suspension or bar, to permit such an association, without the consent of the Board or the Commission.

(d) **Reporting of Sanctions.**—

(1) **Recipients.**—If the Board imposes a disciplinary sanction, in accordance with this section, the Board shall report the sanction to—

(A) the Commission;

(B) any appropriate State regulatory authority or any foreign accountancy licensing board with which such firm or person is licensed or certified; and

(C) the public (once any stay on the imposition of such sanction has been lifted).

(2) **Contents.**—The information reported under paragraph (1) shall include—

(A) the name of the sanctioned person;

(B) a description of the sanction and the basis for its imposition; and

(C) such other information as the Board deems appropriate.

(e) **Stay of Sanctions.**—

(1) **In general.**—Application to the Commission for review, or the institution by the Commission of review, of any disciplinary action of the Board shall operate as a stay of any such disciplinary action, unless and until the Commission orders (summarily or after notice and opportunity for hearing on the question of a stay, which hearing may consist solely of the submission of affidavits or presentation of oral arguments) that no such stay shall continue to operate.

(2) **Expedited Procedures.**—The Commission shall establish for appropriate cases an expedited procedure for consideration and determination of the question of the duration of a stay pending review of any disciplinary action of the Board under this subsection.

15 USC 7216.

SEC. 106. FOREIGN PUBLIC ACCOUNTING FIRMS.

(a) **Applicability to Certain Foreign Firms.**—

(1) **In general.**—Any foreign public accounting firm that prepares or furnishes an audit report with respect to any issuer, shall be subject to this Act and the rules of the Board and the Commission issued under this Act, in the same manner and to the same extent as a public accounting firm that is organized and operates under the laws of the United States or any State, except that registration pursuant to section 102 shall not by itself provide a basis for subjecting such a foreign public accounting firm to the jurisdiction of the Federal or State courts, other than with respect to controversies between such firms and the Board.

(2) **Board Authority.**—The Board may, by rule, determine that a foreign public accounting firm (or a class of such firms) that does not issue audit reports nonetheless plays such a substantial role in the preparation and furnishing of such reports for particular issuers, that it is necessary or appropriate, in light of the purposes of this Act and in the public interest or for the protection of investors, that such firm (or class of firms) should be treated as a public accounting firm
(or firms) for purposes of registration under, and oversight by the Board in accordance with, this title.

(b) PRODUCTION OF AUDIT WORKPAPERS.—

(1) CONSENT BY FOREIGN FIRMS.—If a foreign public accounting firm issues an opinion or otherwise performs material services upon which a registered public accounting firm relies in issuing all or part of any audit report or any opinion contained in an audit report, that foreign public accounting firm shall be deemed to have consented—

(A) to produce its audit workpapers for the Board or the Commission in connection with any investigation by either body with respect to that audit report; and

(B) to be subject to the jurisdiction of the courts of the United States for purposes of enforcement of any request for production of such workpapers.

(2) CONSENT BY DOMESTIC FIRMS.—A registered public accounting firm that relies upon the opinion of a foreign public accounting firm, as described in paragraph (1), shall be deemed—

(A) to have consented to supplying the audit workpapers of that foreign public accounting firm in response to a request for production by the Board or the Commission; and

(B) to have secured the agreement of that foreign public accounting firm to such production, as a condition of its reliance on the opinion of that foreign public accounting firm.

(c) EXEMPTION AUTHORITY.—The Commission, and the Board, subject to the approval of the Commission, may, by rule, regulation, or order, and as the Commission (or Board) determines necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions exempt any foreign public accounting firm, or any class of such firms, from any provision of this Act or the rules of the Board or the Commission issued under this Act.

(d) DEFINITION.—In this section, the term “foreign public accounting firm” means a public accounting firm that is organized and operates under the laws of a foreign government or political subdivision thereof.

SEC. 107. COMMISSION OVERSIGHT OF THE BOARD.

(a) GENERAL OVERSIGHT RESPONSIBILITY.—The Commission shall have oversight and enforcement authority over the Board, as provided in this Act. The provisions of section 17(a)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78q(a)(1)), and of section 17(b)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78q(b)(1)) shall apply to the Board as fully as if the Board were a “registered securities association” for purposes of those sections 17(a)(1) and 17(b)(1).

(b) RULES OF THE BOARD.—

(1) DEFINITION.—In this section, the term “proposed rule” means any proposed rule of the Board, and any modification of any such rule.

(2) PRIOR APPROVAL REQUIRED.—No rule of the Board shall become effective without prior approval of the Commission in accordance with this section, other than as provided in section 103(a)(3)(B) with respect to initial or transitional standards.
(3) **APPROVAL CRITERIA.**—The Commission shall approve a proposed rule, if it finds that the rule is consistent with the requirements of this Act and the securities laws, or is necessary or appropriate in the public interest or for the protection of investors.

(4) **PROPOSED RULE PROCEDURES.**—The provisions of paragraphs (1) through (3) of section 19(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78s(b)) shall govern the proposed rules of the Board, as fully as if the Board were a "registered securities association" for purposes of that section 19(b), except that, for purposes of this paragraph—

(A) the phrase "consistent with the requirements of this title and the rules and regulations thereunder applicable to such organization" in section 19(b)(2) of that Act shall be deemed to read "consistent with the requirements of title I of the Sarbanes-Oxley Act of 2002, and the rules and regulations issued thereunder applicable to such organization, or as necessary or appropriate in the public interest or for the protection of investors"; and

(B) the phrase "otherwise in furtherance of the purposes of this title" in section 19(b)(3)(C) of that Act shall be deemed to read "otherwise in furtherance of the purposes of title I of the Sarbanes-Oxley Act of 2002".

(5) **COMMISSION AUTHORITY TO AMEND RULES OF THE BOARD.**—The provisions of section 19(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78s(c)) shall govern the abrogation, deletion, or addition to portions of the rules of the Board by the Commission as fully as if the Board were a "registered securities association" for purposes of that section 19(c), except that the phrase "to conform its rules to the requirements of this title and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this title" in section 19(c) of that Act shall, for purposes of this paragraph, be deemed to read "to assure the fair administration of the Public Company Accounting Oversight Board, conform the rules promulgated by that Board to the requirements of title I of the Sarbanes-Oxley Act of 2002, or otherwise further the purposes of that Act, the securities laws, and the rules and regulations thereunder applicable to that Board".

(c) **COMMISSION REVIEW OF DISCIPLINARY ACTION TAKEN BY THE BOARD.**—

(1) **NOTICE OF SANCTION.**—The Board shall promptly file notice with the Commission of any final sanction on any registered public accounting firm or on any associated person thereof, in such form and containing such information as the Commission, by rule, may prescribe.

(2) **REVIEW OF SANCTIONS.**—The provisions of sections 19(d)(2) and 19(e)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78s (d)(2) and (e)(1)) shall govern the review by the Commission of final disciplinary sanctions imposed by the Board (including sanctions imposed under section 105(b)(3) of this Act for noncooperation in an investigation of the Board), as fully as if the Board were a self-regulatory organization and the Commission were the appropriate regulatory agency for such organization for purposes of those sections 19(d)(2) and 19(e)(1), except that, for purposes of this paragraph—
(A) section 105(e) of this Act (rather than that section 19(d)(2)) shall govern the extent to which application for, or institution by the Commission on its own motion of, review of any disciplinary action of the Board operates as a stay of such action;

(B) references in that section 19(e)(1) to “members” of such an organization shall be deemed to be references to registered public accounting firms;

(C) the phrase “consistent with the purposes of this title” in that section 19(e)(1) shall be deemed to read “consistent with the purposes of this title and title I of the Sarbanes-Oxley Act of 2002”;

(D) references to rules of the Municipal Securities Rule-making Board in that section 19(e)(1) shall not apply; and

(E) the reference to section 19(e)(2) of the Securities Exchange Act of 1934 shall refer instead to section 107(c)(3) of this Act.

(3) COMMISSION MODIFICATION AUTHORITY.—The Commission may enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board upon a registered public accounting firm or associated person thereof, if the Commission, having due regard for the public interest and the protection of investors, finds, after a proceeding in accordance with this subsection, that the sanction—

(A) is not necessary or appropriate in furtherance of this Act or the securities laws; or

(B) is excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed.

(d) CENSURE OF THE BOARD; OTHER SANCTIONS.—

(1) RESCISSION OF BOARD AUTHORITY.—The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this Act and the securities laws, may relieve the Board of any responsibility to enforce compliance with any provision of this Act, the securities laws, the rules of the Board, or professional standards.

(2) CENSURE OF THE BOARD; LIMITATIONS.—The Commission may, by order, as it determines necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act or the securities laws, censure or impose limitations upon the activities, functions, and operations of the Board, if the Commission finds, on the record, after notice and opportunity for a hearing, that the Board—

(A) has violated or is unable to comply with any provision of this Act, the rules of the Board, or the securities laws; or

(B) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by a registered public accounting firm or an associated person thereof.

(3) CENSURE OF BOARD MEMBERS; REMOVAL FROM OFFICE.—The Commission may, as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act or the securities laws, remove
from office or censure any member of the Board, if the Commission finds, on the record, after notice and opportunity for a hearing, that such member—

(A) has willfully violated any provision of this Act, the rules of the Board, or the securities laws;

(B) has willfully abused the authority of that member; or

(C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof.

SEC. 108. ACCOUNTING STANDARDS.

(a) Amendment to Securities Act of 1933.—Section 19 of the Securities Act of 1933 (15 U.S.C. 77s) is amended—

(1) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(2) by inserting after subsection (a) the following:

(b) Recognition of Accounting Standards.—

“(1) In General.—In carrying out its authority under subsection (a) and under section 13(b) of the Securities Exchange Act of 1934, the Commission may recognize, as ‘generally accepted’ for purposes of the securities laws, any accounting principles established by a standard setting body—

“(A) that—

“(i) is organized as a private entity;

“(ii) has, for administrative and operational purposes, a board of trustees (or equivalent body) serving in the public interest, the majority of whom are not, concurrent with their service on such board, and have not been during the 2-year period preceding such service, associated persons of any registered public accounting firm;

“(iii) is funded as provided in section 109 of the Sarbanes-Oxley Act of 2002;

“(iv) has adopted procedures to ensure prompt consideration, by majority vote of its members, of changes to accounting principles necessary to reflect emerging accounting issues and changing business practices; and

“(v) considers, in adopting accounting principles, the need to keep standards current in order to reflect changes in the business environment, the extent to which international convergence on high quality accounting standards is necessary or appropriate in the public interest and for the protection of investors; and

“(B) that the Commission determines has the capacity to assist the Commission in fulfilling the requirements of subsection (a) and section 13(b) of the Securities Exchange Act of 1934, because, at a minimum, the standard setting body is capable of improving the accuracy and effectiveness of financial reporting and the protection of investors under the securities laws.
"(2) ANNUAL REPORT.—A standard setting body described in paragraph (1) shall submit an annual report to the Commission and the public, containing audited financial statements of that standard setting body."

(b) COMMISSION AUTHORITY.—The Commission shall promulgate such rules and regulations to carry out section 19(b) of the Securities Act of 1933, as added by this section, as it deems necessary or appropriate in the public interest or for the protection of investors.

(c) NO EFFECT ON COMMISSION POWERS.—Nothing in this Act, including this section and the amendment made by this section, shall be construed to impair or limit the authority of the Commission to establish accounting principles or standards for purposes of enforcement of the securities laws.

(d) STUDY AND REPORT ON ADOPTING PRINCIPLES-BASED ACCOUNTING.—

(1) STUDY.—

(A) IN GENERAL.—The Commission shall conduct a study on the adoption by the United States financial reporting system of a principles-based accounting system.

(B) STUDY TOPICS.—The study required by subparagraph (A) shall include an examination of—

(i) the extent to which principles-based accounting and financial reporting exists in the United States;

(ii) the length of time required for change from a rules-based to a principles-based financial reporting system;

(iii) the feasibility of and proposed methods by which a principles-based system may be implemented; and

(iv) a thorough economic analysis of the implementation of a principles-based system.

(2) REPORT.—Not later than 1 year after the date of enactment of this Act, the Commission shall submit a report on the results of the study required by paragraph (1) to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.

SEC. 109. FUNDING.

(a) IN GENERAL.—The Board, and the standard setting body designated pursuant to section 19(b) of the Securities Act of 1933, as amended by section 108, shall be funded as provided in this section.

(b) ANNUAL BUDGETS.—The Board and the standard setting body referred to in subsection (a) shall each establish a budget for each fiscal year, which shall be reviewed and approved according to their respective internal procedures not less than 1 month prior to the commencement of the fiscal year to which the budget pertains (or at the beginning of the Board's first fiscal year, which may be a short fiscal year). The budget of the Board shall be subject to approval by the Commission. The budget for the first fiscal year of the Board shall be prepared and approved promptly following the appointment of the initial five Board members, to permit action by the Board of the organizational tasks contemplated by section 101(d).

(c) SOURCES AND USES OF FUNDS.—
(1) RECOVERABLE BUDGET EXPENSES.—The budget of the Board (reduced by any registration or annual fees received under section 102(e) for the year preceding the year for which the budget is being computed), and all of the budget of the standard setting body referred to in subsection (a), for each fiscal year of each of those 2 entities, shall be payable from annual accounting support fees, in accordance with subsections (d) and (e). Accounting support fees and other receipts of the Board and of such standard-setting body shall not be considered public monies of the United States.

(2) FUNDS GENERATED FROM THE COLLECTION OF MONETARY PENALTIES.—Subject to the availability in advance in an appropriations Act, and notwithstanding subsection (i), all funds collected by the Board as a result of the assessment of monetary penalties shall be used to fund a merit scholarship program for undergraduate and graduate students enrolled in accredited accounting degree programs, which program is to be administered by the Board or by an entity or agent identified by the Board.

(d) ANNUAL ACCOUNTING SUPPORT FEE FOR THE BOARD.—

(1) ESTABLISHMENT OF FEE.—The Board shall establish, with the approval of the Commission, a reasonable annual accounting support fee (or a formula for the computation thereof), as may be necessary or appropriate to establish and maintain the Board. Such fee may also cover costs incurred in the Board’s first fiscal year (which may be a short fiscal year), or may be levied separately with respect to such short fiscal year.

(2) ASSESSMENTS.—The rules of the Board under paragraph (1) shall provide for the equitable allocation, assessment, and collection by the Board (or an agent appointed by the Board) of the fee established under paragraph (1), among issuers, in accordance with subsection (g), allowing for differentiation among classes of issuers, as appropriate.

(e) ANNUAL ACCOUNTING SUPPORT FEE FOR STANDARD SETTING BODY.—The annual accounting support fee for the standard setting body referred to in subsection (a)—

(1) shall be allocated in accordance with subsection (g), and assessed and collected against each issuer, on behalf of the standard setting body, by 1 or more appropriate designated collection agents, as may be necessary or appropriate to pay for the budget and provide for the expenses of that standard setting body, and to provide for an independent, stable source of funding for such body, subject to review by the Commission; and

(2) may differentiate among different classes of issuers.

(f) LIMITATION ON FEE.—The amount of fees collected under this section for a fiscal year on behalf of the Board or the standards setting body, as the case may be, shall not exceed the recoverable budget expenses of the Board or body, respectively (which may include operating, capital, and accrued items), referred to in subsection (c)(1).

(g) ALLOCATION OF ACCOUNTING SUPPORT FEES AMONG ISSUERS.—Any amount due from issuers (or a particular class of issuers) under this section to fund the budget of the Board or the standard setting body referred to in subsection (a) shall be allocated among and payable by each issuer (or each issuer in
a particular class, as applicable) in an amount equal to the total of such amount, multiplied by a fraction—

(1) the numerator of which is the average monthly equity market capitalization of the issuer for the 12-month period immediately preceding the beginning of the fiscal year to which such budget relates; and

(2) the denominator of which is the average monthly equity market capitalization of all such issuers for such 12-month period.

(h) **Conforming Amendments.**—Section 13(b)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(b)(2)) is amended—

(1) in subparagraph (A), by striking “and” at the end; and

(2) in subparagraph (B), by striking the period at the end and inserting the following: “; and

“(C) notwithstanding any other provision of law, pay the allocable share of such issuer of a reasonable annual accounting support fee or fees, determined in accordance with section 109 of the Sarbanes-Oxley Act of 2002.”.

(i) **Rule of Construction.**—Nothing in this section shall be construed to render either the Board, the standard setting body referred to in subsection (a), or both, subject to procedures in Congress to authorize or appropriate public funds, or to prevent such organization from utilizing additional sources of revenue for its activities, such as earnings from publication sales, provided that each additional source of revenue shall not jeopardize, in the judgment of the Commission, the actual and perceived independence of such organization.

(j) **Start-Up Expenses of the Board.**—From the unexpended balances of the appropriations to the Commission for fiscal year 2003, the Secretary of the Treasury is authorized to advance to the Board not to exceed the amount necessary to cover the expenses of the Board during its first fiscal year (which may be a short fiscal year).

**TITLE II—AUDITOR INDEPENDENCE**

**SEC. 201. SERVICES OUTSIDE THE SCOPE OF PRACTICE OF AUDITORS.**

(a) **Prohibited Activities.**—Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1) is amended by adding at the end the following:

“(g) **Prohibited Activities.**—Except as provided in subsection (h), it shall be unlawful for a registered public accounting firm (and any associated person of that firm, to the extent determined appropriate by the Commission) that performs for any issuer any audit required by this title or the rules of the Commission under this title or, beginning 180 days after the date of commencement of the operations of the Public Company Accounting Oversight Board established under section 101 of the Sarbanes-Oxley Act of 2002 (in this section referred to as the 'Board'), the rules of the Board, to provide to that issuer, contemporaneously with the audit, any non-audit service, including—

“(1) bookkeeping or other services related to the accounting records or financial statements of the audit client;

“(2) financial information systems design and implementation;
“(3) appraisal or valuation services, fairness opinions, or contribution-in-kind reports;
“(4) actuarial services;
“(5) internal audit outsourcing services;
“(6) management functions or human resources;
“(7) broker or dealer, investment adviser, or investment banking services;
“(8) legal services and expert services unrelated to the audit; and
“(9) any other service that the Board determines, by regulation, is impermissible.

“(h) PREAPPROVAL REQUIRED FOR NON-AUDIT SERVICES.—A registered public accounting firm may engage in any non-audit service, including tax services, that is not described in any of paragraphs (1) through (9) of subsection (g) for an audit client, only if the activity is approved in advance by the audit committee of the issuer, in accordance with subsection (i).”.

(b) EXEMPTION AUTHORITY.—The Board may, on a case by case basis, exempt any person, issuer, public accounting firm, or transaction from the prohibition on the provision of services under section 10A(g) of the Securities Exchange Act of 1934 (as added by this section), to the extent that such exemption is necessary or appropriate in the public interest and is consistent with the protection of investors, and subject to review by the Commission in the same manner as for rules of the Board under section 107.

SEC. 202. PREAPPROVAL REQUIREMENTS.

Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1), as amended by this Act, is amended by adding at the end the following:

“(i) PREAPPROVAL REQUIREMENTS.—
““(1) IN GENERAL.—
““(A) AUDIT COMMITTEE ACTION.—All auditing services (which may entail providing comfort letters in connection with securities underwritings or statutory audits required for insurance companies for purposes of State law) and non-audit services, other than as provided in subparagraph (B), provided to an issuer by the auditor of the issuer shall be preapproved by the audit committee of the issuer.
““(B) DE MINIMUS EXCEPTION.—The preapproval requirement under subparagraph (A) is waived with respect to the provision of non-audit services for an issuer, if—
““(i) the aggregate amount of all such non-audit services provided to the issuer constitutes not more than 5 percent of the total amount of revenues paid by the issuer to its auditor during the fiscal year in which the nonaudit services are provided;
““(ii) such services were not recognized by the issuer at the time of the engagement to be non-audit services; and
““(iii) such services are promptly brought to the attention of the audit committee of the issuer and approved prior to the completion of the audit by the audit committee or by 1 or more members of the audit committee who are members of the board of directors to whom authority to grant such approvals has been delegated by the audit committee.
"(2) Disclosure to investors.—Approval by an audit committee of an issuer under this subsection of a non-audit service to be performed by the auditor of the issuer shall be disclosed to investors in periodic reports required by section 13(a).

(3) Delegation authority.—The audit committee of an issuer may delegate to 1 or more designated members of the audit committee who are independent directors of the board of directors, the authority to grant preapprovals required by this subsection. The decisions of any member to whom authority is delegated under this paragraph to preapprove an activity under this subsection shall be presented to the full audit committee at each of its scheduled meetings.

(4) Approval of audit services for other purposes.—In carrying out its duties under subsection (m)(2), if the audit committee of an issuer approves an audit service within the scope of the engagement of the auditor, such audit service shall be deemed to have been preapproved for purposes of this subsection."

SEC. 203. AUDIT PARTNER ROTATION.
Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1), as amended by this Act, is amended by adding at the end the following:

"(j) Audit partner rotation.—It shall be unlawful for a registered public accounting firm to provide audit services to an issuer if the lead (or coordinating) audit partner (having primary responsibility for the audit), or the audit partner responsible for reviewing the audit, has performed audit services for that issuer in each of the 5 previous fiscal years of that issuer."

SEC. 204. AUDITOR REPORTS TO AUDIT COMMITTEES.
Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1), as amended by this Act, is amended by adding at the end the following:

"(k) Reports to audit committees.—Each registered public accounting firm that performs for any issuer any audit required by this title shall timely report to the audit committee of the issuer—

(1) all critical accounting policies and practices to be used;
(2) all alternative treatments of financial information within generally accepted accounting principles that have been discussed with management officials of the issuer, ramifications of the use of such alternative disclosures and treatments, and the treatment preferred by the registered public accounting firm; and
(3) other material written communications between the registered public accounting firm and the management of the issuer, such as any management letter or schedule of unadjusted differences."

SEC. 205. CONFORMING AMENDMENTS.
(a) Definitions.—Section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)) is amended by adding at the end the following:

"(58) Audit committee.—The term ‘audit committee’ means—
(A) a committee (or equivalent body) established by and amongst the board of directors of an issuer for the
purpose of overseeing the accounting and financial reporting processes of the issuer and audits of the financial statements of the issuer; and

"(B) if no such committee exists with respect to an issuer, the entire board of directors of the issuer.

"(59) REGISTERED PUBLIC ACCOUNTING FIRM.—The term ‘registered public accounting firm’ has the same meaning as in section 2 of the Sarbanes-Oxley Act of 2002.”.

(b) AUDITOR REQUIREMENTS.—Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1) is amended—

(1) by striking “an independent public accountant” each place that term appears and inserting “a registered public accounting firm”;

(2) by striking “the independent public accountant” each place that term appears and inserting “the registered public accounting firm”;

(3) in subsection (c), by striking “No independent public accountant” and inserting “No registered public accounting firm”; and

(4) in subsection (b)—

(A) by striking “the accountant” each place that term appears and inserting “the firm”;

(B) by striking “such accountant” each place that term appears and inserting “such firm”; and

(C) in paragraph (4), by striking “the accountant’s report” and inserting “the report of the firm”.

(c) OTHER REFERENCES.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended—

(1) in section 12(b)(1) (15 U.S.C. 78l(b)(1)), by striking “independent public accountants” each place that term appears and inserting “a registered public accounting firm”; and

(2) in subsections (e) and (i) of section 17 (15 U.S.C. 78q), by striking “an independent public accountant” each place that term appears and inserting “a registered public accounting firm”.

(d) CONFORMING AMENDMENT.—Section 10A(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78k(f)) is amended—

(1) by striking “DEFINITION” and inserting “DEFINITIONS”; and

(2) by adding at the end the following: “As used in this section, the term 'issuer' means an issuer (as defined in section 3), the securities of which are registered under section 12, or that is required to file reports pursuant to section 15(d), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn.”.

SEC. 206. CONFLICTS OF INTEREST.

Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1), as amended by this Act, is amended by adding at the end the following:

“(l) CONFLICTS OF INTEREST.—It shall be unlawful for a registered public accounting firm to perform for an issuer any audit service required by this title, if a chief executive officer, controller, chief financial officer, chief accounting officer, or any person serving in an equivalent position for the issuer, was employed by that registered independent public accounting firm and participated in
any capacity in the audit of that issuer during the 1-year period preceding the date of the initiation of the audit.”.

SEC. 207. STUDY OF MANDATORY ROTATION OF REGISTERED PUBLIC ACCOUNTING FIRMS.

(a) Study and Review Required.—The Comptroller General of the United States shall conduct a study and review of the potential effects of requiring the mandatory rotation of registered public accounting firms.

(b) Report Required.—Not later than 1 year after the date of enactment of this Act, the Comptroller General shall submit a report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives on the results of the study and review required by this section.

(c) Definition.—For purposes of this section, the term “mandatory rotation” refers to the imposition of a limit on the period of years in which a particular registered public accounting firm may be the auditor of record for a particular issuer.

SEC. 208. COMMISSION AUTHORITY.

(a) Commission Regulations.—Not later than 180 days after the date of enactment of this Act, the Commission shall issue final regulations to carry out each of subsections (g) through (l) of section 10A of the Securities Exchange Act of 1934, as added by this title.

(b) Auditor Independence.—It shall be unlawful for any registered public accounting firm (or an associated person thereof, as applicable) to prepare or issue any audit report with respect to any issuer, if the firm or associated person engages in any activity with respect to that issuer prohibited by any of subsections (g) through (l) of section 10A of the Securities Exchange Act of 1934, as added by this title, or any rule or regulation of the Commission or of the Board issued thereunder.

SEC. 209. CONSIDERATIONS BY APPROPRIATE STATE REGULATORY AUTHORITIES.

In supervising nonregistered public accounting firms and their associated persons, appropriate State regulatory authorities should make an independent determination of the proper standards applicable, particularly taking into consideration the size and nature of the business of the accounting firms they supervise and the size and nature of the business of the clients of those firms. The standards applied by the Board under this Act should not be presumed to be applicable for purposes of this section for small and medium sized nonregistered public accounting firms.

TITLE III—CORPORATE RESPONSIBILITY

SEC. 301. PUBLIC COMPANY AUDIT COMMITTEES.

Section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78f) is amended by adding at the end the following:

“(m) Standards Relating to Audit Committees.—
“(1) Commission rules.—
Deadline.

“(A) IN GENERAL.—Effective not later than 270 days after the date of enactment of this subsection, the Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that is not in compliance with the requirements of any portion of paragraphs (2) through (6).

“(B) OPPORTUNITY TO CURE DEFECTS.—The rules of the Commission under subparagraph (A) shall provide for appropriate procedures for an issuer to have an opportunity to cure any defects that would be the basis for a prohibition under subparagraph (A), before the imposition of such prohibition.

“(2) RESPONSIBILITIES RELATING TO REGISTERED PUBLIC ACCOUNTING FIRMS.—The audit committee of each issuer, in its capacity as a committee of the board of directors, shall be directly responsible for the appointment, compensation, and oversight of the work of any registered public accounting firm employed by that issuer (including resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or related work, and each such registered public accounting firm shall report directly to the audit committee.

“(3) INDEPENDENCE.—

“(A) IN GENERAL.—Each member of the audit committee of the issuer shall be a member of the board of directors of the issuer, and shall otherwise be independent.

“(B) CRITERIA.—In order to be considered to be independent for purposes of this paragraph, a member of an audit committee of an issuer may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee—

“(i) accept any consulting, advisory, or other compensatory fee from the issuer; or

“(ii) be an affiliated person of the issuer or any subsidiary thereof.

“(C) EXEMPTION AUTHORITY.—The Commission may exempt from the requirements of subparagraph (B) a particular relationship with respect to audit committee members, as the Commission determines appropriate in light of the circumstances.

“(4) COMPLAINTS.—Each audit committee shall establish procedures for—

“(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and

“(B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.

“(5) AUTHORITY TO ENGAGE ADVISERS.—Each audit committee shall have the authority to engage independent counsel and other advisers, as it determines necessary to carry out its duties.

“(6) FUNDING.—Each issuer shall provide for appropriate funding, as determined by the audit committee, in its capacity as a committee of the board of directors, for payment of compensation—
“(A) to the registered public accounting firm employed by the issuer for the purpose of rendering or issuing an audit report; and
“(B) to any advisers employed by the audit committee under paragraph (5).”.

SEC. 302. CORPORATE RESPONSIBILITY FOR FINANCIAL REPORTS.

(a) Regulations Required.—The Commission shall, by rule, require, for each company filing periodic reports under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)), that the principal executive officer or officers and the principal financial officer or officers, or persons performing similar functions, certify in each annual or quarterly report filed or submitted under either such section of such Act that—

(1) the signing officer has reviewed the report;
(2) based on the officer’s knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading;
(3) based on such officer’s knowledge, the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition and results of operations of the issuer as of, and for, the periods presented in the report;
(4) the signing officers—
(A) are responsible for establishing and maintaining internal controls;
(B) have designed such internal controls to ensure that material information relating to the issuer and its consolidated subsidiaries is made known to such officers by others within those entities, particularly during the period in which the periodic reports are being prepared;
(C) have evaluated the effectiveness of the issuer’s internal controls as of a date within 90 days prior to the report; and
(D) have presented in the report their conclusions about the effectiveness of their internal controls based on their evaluation as of that date;
(5) the signing officers have disclosed to the issuer’s auditors and the audit committee of the board of directors (or persons fulfilling the equivalent function)—
(A) all significant deficiencies in the design or operation of internal controls which could adversely affect the issuer’s ability to record, process, summarize, and report financial data and have identified for the issuer’s auditors any material weaknesses in internal controls; and
(B) any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer’s internal controls; and
(6) the signing officers have indicated in the report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of their evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.
(b) **FOREIGN REINCORPORATIONS HAVE NO EFFECT.**—Nothing in this section 302 shall be interpreted or applied in any way to allow any issuer to lessen the legal force of the statement required under this section 302, by an issuer having reincorporated or having engaged in any other transaction that resulted in the transfer of the corporate domicile or offices of the issuer from inside the United States to outside of the United States.

(c) **DEADLINE.**—The rules required by subsection (a) shall be effective not later than 30 days after the date of enactment of this Act.

SEC. 303. IMPROPER INFLUENCE ON CONDUCT OF AUDITS.

(a) **RULES TO PROHIBIT.**—It shall be unlawful, in contravention of such rules or regulations as the Commission shall prescribe as necessary and appropriate in the public interest or for the protection of investors, for any officer or director of an issuer, or any other person acting under the direction thereof, to take any action to fraudulently influence, coerce, manipulate, or mislead any independent public or certified accountant engaged in the performance of an audit of the financial statements of that issuer for the purpose of rendering such financial statements materially misleading.

(b) **ENFORCEMENT.**—In any civil proceeding, the Commission shall have exclusive authority to enforce this section and any rule or regulation issued under this section.

(c) **NO PREEMPTION OF OTHER LAW.**—The provisions of subsection (a) shall be in addition to, and shall not supersede or preempt, any other provision of law or any rule or regulation issued thereunder.

(d) **DEADLINE FOR RULEMAKING.**—The Commission shall—

1. propose the rules or regulations required by this section, not later than 90 days after the date of enactment of this Act; and
2. issue final rules or regulations required by this section, not later than 270 days after that date of enactment.

SEC. 304. FORFEITURE OF CERTAIN BONUSES AND PROFITS.

(a) **ADDITIONAL COMPENSATION PRIOR TO NONCOMPLIANCE WITH COMMISSION FINANCIAL REPORTING REQUIREMENTS.**—If an issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws, the chief executive officer and chief financial officer of the issuer shall reimburse the issuer for—

1. any bonus or other incentive-based or equity-based compensation received by that person from the issuer during the 12-month period following the first public issuance or filing with the Commission (whichever first occurs) of the financial document embodying such financial reporting requirement; and
2. any profits realized from the sale of securities of the issuer during that 12-month period.

(b) **COMMISSION EXEMPTION AUTHORITY.**—The Commission may exempt any person from the application of subsection (a), as it deems necessary and appropriate.

SEC. 305. OFFICER AND DIRECTOR BARS AND PENALTIES.

(a) **UNFITNESS STANDARD.**—

(2) Securities Act of 1933.—Section 20(e) of the Securities Act of 1933 (15 U.S.C. 77t(e)) is amended by striking “substantial unfitness” and inserting “unfitness”.

(b) Equitable Relief.—Section 21(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)) is amended by adding at the end the following:

“(5) Equitable Relief.—In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.”.

SEC. 306. INSIDER TRADES DURING PENSION FUND BLACKOUT PERIODS.

(a) Prohibition of Insider Trading During Pension Fund Blackout Periods.—

(1) In General.—Except to the extent otherwise provided by rule of the Commission pursuant to paragraph (3), it shall be unlawful for any director or executive officer of an issuer of any equity security (other than an exempted security), directly or indirectly, to purchase, sell, or otherwise acquire or transfer any equity security of the issuer (other than an exempted security) during any blackout period with respect to such equity security if such director or officer acquires such equity security in connection with his or her service or employment as a director or executive officer.

(2) Remedy.—

(A) In General.—Any profit realized by a director or executive officer referred to in paragraph (1) from any purchase, sale, or other acquisition or transfer in violation of this subsection shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such director or executive officer in entering into the transaction.

(B) Actions to Recover Profits.—An action to recover profits in accordance with this subsection may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer fails or refuses to bring such action within 60 days after the date of request, or fails diligently to prosecute the action thereafter, except that no such suit shall be brought more than 2 years after the date on which such profit was realized.

(3) Rulemaking Authorized.—The Commission shall, in consultation with the Secretary of Labor, issue rules to clarify the application of this subsection and to prevent evasion thereof. Such rules shall provide for the application of the requirements of paragraph (1) with respect to entities treated as a single employer with respect to an issuer under section 414(b), (c), (m), or (o) of the Internal Revenue Code of 1986 to the extent necessary to clarify the application of such requirements and to prevent evasion thereof. Such rules may also provide for
appropriate exceptions from the requirements of this subsection, including exceptions for purchases pursuant to an automatic dividend reinvestment program or purchases or sales made pursuant to an advance election.

(4) **BLACKOUT PERIOD.**—For purposes of this subsection, the term “blackout period”, with respect to the equity securities of any issuer—

(A) means any period of more than 3 consecutive business days during which the ability of not fewer than 50 percent of the participants or beneficiaries under all individual account plans maintained by the issuer to purchase, sell, or otherwise acquire or transfer an interest in any equity of such issuer held in such an individual account plan is temporarily suspended by the issuer or by a fiduciary of the plan; and

(B) does not include, under regulations which shall be prescribed by the Commission—

(i) a regularly scheduled period in which the participants and beneficiaries may not purchase, sell, or otherwise acquire or transfer an interest in any equity of such issuer, if such period is—

(I) incorporated into the individual account plan; and

(II) timely disclosed to employees before becoming participants under the individual account plan or as a subsequent amendment to the plan; or

(ii) any suspension described in subparagraph (A) that is imposed solely in connection with persons becoming participants or beneficiaries, or ceasing to be participants or beneficiaries, in an individual account plan by reason of a corporate merger, acquisition, divestiture, or similar transaction involving the plan or plan sponsor.

(5) **INDIVIDUAL ACCOUNT PLAN.**—For purposes of this subsection, the term “individual account plan” has the meaning provided in section 3(34) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(34), except that such term shall not include a one-participant retirement plan (within the meaning of section 101(i)(8)(B) of such Act (29 U.S.C. 1021(i)(8)(B))).

(6) **NOTICE TO DIRECTORS, EXECUTIVE OFFICERS, AND THE COMMISSION.**—In any case in which a director or executive officer is subject to the requirements of this subsection in connection with a blackout period (as defined in paragraph (4)) with respect to any equity securities, the issuer of such equity securities shall timely notify such director or officer and the Securities and Exchange Commission of such blackout period.

(b) **NOTICE REQUIREMENTS TO PARTICIPANTS AND BENEFICIARIES UNDER ERISA.**—

(1) **IN GENERAL.**—Section 101 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1021) is amended by redesignating the second subsection (b) as subsection (j), and by inserting after the first subsection (h) the following new subsection:
‘(i) Notice of Blackout Periods to Participant or Beneficiary Under Individual Account Plan.—

‘(1) Duties of Plan Administrator.—In advance of the commencement of any blackout period with respect to an individual account plan, the plan administrator shall notify the plan participants and beneficiaries who are affected by such action in accordance with this subsection.

‘(2) Notice Requirements.—

‘(A) In General.—The notices described in paragraph (1) shall be written in a manner calculated to be understood by the average plan participant and shall include—

‘(i) the reasons for the blackout period,

‘(ii) an identification of the investments and other rights affected,

‘(iii) the expected beginning date and length of the blackout period,

‘(iv) in the case of investments affected, a statement that the participant or beneficiary should evaluate the appropriateness of their current investment decisions in light of their inability to direct or diversify assets credited to their accounts during the blackout period, and

‘(v) such other matters as the Secretary may require by regulation.

‘(B) Notice to Participants and Beneficiaries.—Except as otherwise provided in this subsection, notices described in paragraph (1) shall be furnished to all participants and beneficiaries under the plan to whom the blackout period applies at least 30 days in advance of the blackout period.

‘(C) Exception to 30-Day Notice Requirement.—In any case in which—

‘(i) a deferral of the blackout period would violate the requirements of subparagraph (A) or (B) of section 404(a)(1), and a fiduciary of the plan reasonably so determines in writing, or

‘(ii) the inability to provide the 30-day advance notice is due to events that were unforeseeable or circumstances beyond the reasonable control of the plan administrator, and a fiduciary of the plan reasonably so determines in writing,

subparagraph (B) shall not apply, and the notice shall be furnished to all participants and beneficiaries under the plan to whom the blackout period applies as soon as reasonably possible under the circumstances unless such a notice in advance of the termination of the blackout period is impracticable.

‘(D) Written Notice.—The notice required to be provided under this subsection shall be in writing, except that such notice may be in electronic or other form to the extent that such form is reasonably accessible to the recipient.

‘(E) Notice to Issuers of Employer Securities Subject to Blackout Period.—In the case of any blackout period in connection with an individual account plan, the plan administrator shall provide timely notice of such
blackout period to the issuer of any employer securities subject to such blackout period.

“(3) Exception for Blackout Periods With Limited Applicability.—In any case in which the blackout period applies only to 1 or more participants or beneficiaries in connection with a merger, acquisition, divestiture, or similar transaction involving the plan or plan sponsor and occurs solely in connection with becoming or ceasing to be a participant or beneficiary under the plan by reason of such merger, acquisition, divestiture, or transaction, the requirement of this subsection that the notice be provided to all participants and beneficiaries shall be treated as met if the notice required under paragraph (1) is provided to such participants or beneficiaries to whom the blackout period applies as soon as reasonably practicable.

“(4) Changes in Length of Blackout Period.—If, following the furnishing of the notice pursuant to this subsection, there is a change in the beginning date or length of the blackout period (specified in such notice pursuant to paragraph (2)(A)(iii)), the administrator shall provide affected participants and beneficiaries notice of the change as soon as reasonably practicable. In relation to the extended blackout period, such notice shall meet the requirements of paragraph (2)(D) and shall specify any material change in the matters referred to in clauses (i) through (v) of paragraph (2)(A).

“(5) Regulatory Exceptions.—The Secretary may provide by regulation for additional exceptions to the requirements of this subsection which the Secretary determines are in the interests of participants and beneficiaries.

“(6) Guidance and Model Notices.—The Secretary shall issue guidance and model notices which meet the requirements of this subsection.

“(7) Blackout Period.—For purposes of this subsection—

“(A) In General.—The term ‘blackout period’ means, in connection with an individual account plan, any period for which any ability of participants or beneficiaries under the plan, which is otherwise available under the terms of such plan, to direct or diversify assets credited to their accounts, to obtain loans from the plan, or to obtain distributions from the plan is temporarily suspended, limited, or restricted, if such suspension, limitation, or restriction is for any period of more than 3 consecutive business days.

“(B) Exclusions.—The term ‘blackout period’ does not include a suspension, limitation, or restriction—

“(i) which occurs by reason of the application of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934),

“(ii) which is a change to the plan which provides for a regularly scheduled suspension, limitation, or restriction which is disclosed to participants or beneficiaries through any summary of material modifications, any materials describing specific investment alternatives under the plan, or any changes thereto, or

“(iii) which applies only to 1 or more individuals, each of whom is the participant, an alternate payee
“(8) INDIVIDUAL ACCOUNT PLAN.—

“(A) IN GENERAL.—For purposes of this subsection, the term ‘individual account plan’ shall have the meaning provided such term in section 3(34), except that such term shall not include a one-participant retirement plan.

“(B) ONE-PARTICIPANT RETIREMENT PLAN.—For purposes of subparagraph (A), the term ‘one-participant retirement plan’ means a retirement plan that—

“(i) on the first day of the plan year—

“(I) covered only the employer (and the employer’s spouse) and the employer owned the entire business (whether or not incorporated), or

“(II) covered only one or more partners (and their spouses) in a business partnership (including partners in an S or C corporation (as defined in section 1361(a) of the Internal Revenue Code of 1986)),

“(ii) meets the minimum coverage requirements of section 410(b) of the Internal Revenue Code of 1986 (as in effect on the date of the enactment of this paragraph) without being combined with any other plan of the business that covers the employees of the business,

“(iii) does not provide benefits to anyone except the employer (and the employer’s spouse) or the partners (and their spouses),

“(iv) does not cover a business that is a member of an affiliated service group, a controlled group of corporations, or a group of businesses under common control, and

“(v) does not cover a business that leases employees.”.

(2) ISSUANCE OF INITIAL GUIDANCE AND MODEL NOTICE.—

The Secretary of Labor shall issue initial guidance and a model notice pursuant to section 101(i)(6) of the Employee Retirement Income Security Act of 1974 (as added by this subsection) not later than January 1, 2003. Not later than 75 days after the date of the enactment of this Act, the Secretary shall promulgate interim final rules necessary to carry out the amendments made by this subsection.

(3) CIVIL PENALTIES FOR FAILURE TO PROVIDE NOTICE.—

Section 502 of such Act (29 U.S.C. 1132) is amended—

(A) in subsection (a)(6), by striking “(5), or (6)” and inserting “(5), (6), or (7)”;

(B) by redesignating paragraph (7) of subsection (c) as paragraph (8); and

(C) by inserting after paragraph (6) of subsection (c) the following new paragraph:

“(7) The Secretary may assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator’s failure or refusal to provide notice to participants and beneficiaries in accordance with section 101(i). For purposes of this paragraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.”.
(3) PLAN AMENDMENTS.—If any amendment made by this subsection requires an amendment to any plan, such plan amendment shall not be required to be made before the first plan year beginning on or after the effective date of this section, if—

(A) during the period after such amendment made by this subsection takes effect and before such first plan year, the plan is operated in good faith compliance with the requirements of such amendment made by this subsection, and

(B) such plan amendment applies retroactively to the period after such amendment made by this subsection takes effect and before such first plan year.

(c) EFFECTIVE DATE.—The provisions of this section (including the amendments made thereby) shall take effect 180 days after the date of the enactment of this Act. Good faith compliance with the requirements of such provisions in advance of the issuance of applicable regulations thereunder shall be treated as compliance with such provisions.

SEC. 307. RULES OF PROFESSIONAL RESPONSIBILITY FOR ATTORNEYS.

Not later than 180 days after the date of enactment of this Act, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

(2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

SEC. 308. FAIR FUNDS FOR INVESTORS.

(a) CIVIL PENALTIES ADDED TO DISGORGEMENT FUNDS FOR THE RELIEF OF VICTIMS.—If in any judicial or administrative action brought by the Commission under the securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)) the Commission obtains an order requiring disgorgement against any person for a violation of such laws or the rules or regulations thereunder, or such person agrees in settlement of any such action to such disgorgement, and the Commission also obtains pursuant to such laws a civil penalty against such person, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of the disgorgement fund for the benefit of the victims of such violation.

(b) ACCEPTANCE OF ADDITIONAL DONATIONS.—The Commission is authorized to accept, hold, administer, and utilize gifts, bequests and devises of property, both real and personal, to the United
States for a disgorgement fund described in subsection (a). Such gifts, bequests, and devises of money and proceeds from sales of other property received as gifts, bequests, or devises shall be deposited in the disgorgement fund and shall be available for allocation in accordance with subsection (a).

(c) STUDY REQUIRED.—

(1) SUBJECT OF STUDY.—The Commission shall review and analyze—

(A) enforcement actions by the Commission over the five years preceding the date of the enactment of this Act that have included proceedings to obtain civil penalties or disgorgements to identify areas where such proceedings may be utilized to efficiently, effectively, and fairly provide restitution for injured investors; and

(B) other methods to more efficiently, effectively, and fairly provide restitution to injured investors, including methods to improve the collection rates for civil penalties and disgorgements.

(2) REPORT REQUIRED.—The Commission shall report its findings to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate within 180 days after of the date of the enactment of this Act, and shall use such findings to revise its rules and regulations as necessary. The report shall include a discussion of regulatory or legislative actions that are recommended or that may be necessary to address concerns identified in the study.

(d) CONFORMING AMENDMENTS.—Each of the following provisions is amended by inserting “, except as otherwise provided in section 308 of the Sarbanes-Oxley Act of 2002” after “Treasury of the United States”:


(2) Section 21A(d)(1) of such Act (15 U.S.C. 78u-1(d)(1)).


(e) DEFINITION.—As used in this section, the term “disgorgement fund” means a fund established in any administrative or judicial proceeding described in subsection (a).

TITLE IV—ENHANCED FINANCIAL DISCLOSURES

SEC. 401. DISCLOSURES IN PERIODIC REPORTS.

(a) DISCLOSURES REQUIRED.—Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m) is amended by adding at the end the following:

“(i) ACCURACY OF FINANCIAL REPORTS.—Each financial report that contains financial statements, and that is required to be prepared in accordance with (or reconciled to) generally accepted accounting principles under this title and filed with the Commission shall reflect all material correcting adjustments that have been
identified by a registered public accounting firm in accordance with generally accepted accounting principles and the rules and regulations of the Commission.

"(j) Off-Balance Sheet Transactions.—Not later than 180 days after the date of enactment of the Sarbanes-Oxley Act of 2002, the Commission shall issue final rules providing that each annual and quarterly financial report required to be filed with the Commission shall disclose all material off-balance sheet transactions, arrangements, obligations (including contingent obligations), and other relationships of the issuer with unconsolidated entities or other persons, that may have a material current or future effect on financial condition, changes in financial condition, results of operations, liquidity, capital expenditures, capital resources, or significant components of revenues or expenses.”.

(b) Commission Rules on Pro Forma Figures.—Not later than 180 days after the date of enactment of the Sarbanes-Oxley Act of 2002, the Commission shall issue final rules providing that pro forma financial information included in any periodic or other report filed with the Commission pursuant to the securities laws, or in any public disclosure or press or other release, shall be presented in a manner that—

1. does not contain an untrue statement of a material fact or omit to state a material fact necessary in order to make the pro forma financial information, in light of the circumstances under which it is presented, not misleading; and

2. reconciles it with the financial condition and results of operations of the issuer under generally accepted accounting principles.

(c) Study and Report on Special Purpose Entities.—

1. Study Required.—The Commission shall, not later than 1 year after the effective date of adoption of off-balance sheet disclosure rules required by section 13(j) of the Securities Exchange Act of 1934, as added by this section, complete a study of filings by issuers and their disclosures to determine—

   A. the extent of off-balance sheet transactions, including assets, liabilities, leases, losses, and the use of special purpose entities; and

   B. whether generally accepted accounting rules result in financial statements of issuers reflecting the economics of such off-balance sheet transactions to investors in a transparent fashion.

2. Report and Recommendations.—Not later than 6 months after the date of completion of the study required by paragraph (1), the Commission shall submit a report to the President, the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives, setting forth—

   A. the amount or an estimate of the amount of off-balance sheet transactions, including assets, liabilities, leases, and losses of, and the use of special purpose entities by, issuers filing periodic reports pursuant to section 13 or 15 of the Securities Exchange Act of 1934;

   B. the extent to which special purpose entities are used to facilitate off-balance sheet transactions;
(C) whether generally accepted accounting principles or the rules of the Commission result in financial statements of issuers reflecting the economics of such transactions to investors in a transparent fashion;
(D) whether generally accepted accounting principles specifically result in the consolidation of special purpose entities sponsored by an issuer in cases in which the issuer has the majority of the risks and rewards of the special purpose entity; and
(E) any recommendations of the Commission for improving the transparency and quality of reporting off-balance sheet transactions in the financial statements and disclosures required to be filed by an issuer with the Commission.

SEC. 402. ENHANCED CONFLICT OF INTEREST PROVISIONS.

(a) Prohibition on Personal Loans to Executives.—Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m), as amended by this Act, is amended by adding at the end the following:

“(k) Prohibition on Personal Loans to Executives.—
“(1) In general.—It shall be unlawful for any issuer (as defined in section 2 of the Sarbanes-Oxley Act of 2002), directly or indirectly, including through any subsidiary, to extend or maintain credit, to arrange for the extension of credit, or to renew an extension of credit, in the form of a personal loan to or for any director or executive officer (or equivalent thereof) of that issuer. An extension of credit maintained by the issuer on the date of enactment of this subsection shall not be subject to the provisions of this subsection, provided that there is no material modification to any term of any such extension of credit or any renewal of any such extension of credit on or after that date of enactment.
“(2) Limitation.—Paragraph (1) does not preclude any home improvement and manufactured home loans (as that term is defined in section 5 of the Home Owners’ Loan Act (12 U.S.C. 1464)), consumer credit (as defined in section 103 of the Truth in Lending Act (15 U.S.C. 1602)), or any extension of credit under an open end credit plan (as defined in section 103 of the Truth in Lending Act (15 U.S.C. 1602)), or a charge card (as defined in section 127(c)(4)(e) of the Truth in Lending Act (15 U.S.C. 1637(c)(4)(e)), or any extension of credit by a broker or dealer registered under section 15 of this title to an employee of that broker or dealer to buy, trade, or carry securities, that is permitted under rules or regulations of the Board of Governors of the Federal Reserve System pursuant to section 7 of this title (other than an extension of credit that would be used to purchase the stock of that issuer), that is—
“(A) made or provided in the ordinary course of the consumer credit business of such issuer;
“(B) of a type that is generally made available by such issuer to the public; and
“(C) made by such issuer on market terms, or terms that are no more favorable than those offered by the issuer to the general public for such extensions of credit.
“(3) Rule of Construction for Certain Loans.—Paragraph (1) does not apply to any loan made or maintained
by an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), if
the loan is subject to the insider lending restrictions of section
22(h) of the Federal Reserve Act (12 U.S.C. 375b)."

SEC. 403. DISCLOSURES OF TRANSACTIONS INVOLVING MANAGEMENT
AND PRINCIPAL STOCKHOLDERS.

(a) Amendment.—Section 16 of the Securities Exchange Act
of 1934 (15 U.S.C. 78p) is amended by striking the heading of
such section and subsection (a) and inserting the following:

"SEC. 16. DIRECTORS, OFFICERS, AND PRINCIPAL STOCKHOLDERS.

"(a) Disclosures Required.—

"(1) Directors, Officers, and Principal Stockholders
required to file.—Every person who is directly or indirectly
the beneficial owner of more than 10 percent of any class
of any equity security (other than an exempted security) which
is registered pursuant to section 12, or who is a director or
an officer of the issuer of such security, shall file the statements
required by this subsection with the Commission (and, if such
security is registered on a national securities exchange, also
with the exchange).

"(2) Time of filing.—The statements required by this sub-
section shall be filed—

"(A) at the time of the registration of such security
on a national securities exchange or by the effective date
of a registration statement filed pursuant to section 12(g);

"(B) within 10 days after he or she becomes such
beneficial owner, director, or officer;

"(C) if there has been a change in such ownership,
or if such person shall have purchased or sold a security-
based swap agreement (as defined in section 206(b) of
the Gramm-Leach-Bliley Act (15 U.S.C. 78c note)) involving
such equity security, before the end of the second business
day following the day on which the subject transaction
has been executed, or at such other time as the Commission
shall establish, by rule, in any case in which the Commis-
sion determines that such 2-day period is not feasible.

"(3) Contents of statements.—A statement filed—

"(A) under subparagraph (A) or (B) of paragraph (2)
shall contain a statement of the amount of all equity securi-
ties of such issuer of which the filing person is the beneficial
owner; and

"(B) under subparagraph (C) of such paragraph shall
indicate ownership by the filing person at the date of
filing, any such changes in such ownership, and such pur-
chases and sales of the security-based swap agreements
as have occurred since the most recent such filing under
such subparagraph.

"(4) Electronic filing and availability.—Beginning not
later than 1 year after the date of enactment of the Sarbanes-
Oxley Act of 2002—

"(A) a statement filed under subparagraph (C) of para-
graph (2) shall be filed electronically;

"(B) the Commission shall provide each such statement
on a publicly accessible Internet site not later than the end of the business day following that filing; and
“(C) the issuer (if the issuer maintains a corporate
website) shall provide that statement on that corporate
website, not later than the end of the business day following
that filing.”.

(b) Effective Date.—The amendment made by this section
shall be effective 30 days after the date of the enactment of this
Act.

SEC. 404. MANAGEMENT ASSESSMENT OF INTERNAL CONTROLS.

(a) Rules Required.—The Commission shall prescribe rules
requiring each annual report required by section 13(a) or 15(d)
of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d))
to contain an internal control report, which shall—

(1) state the responsibility of management for establishing
and maintaining an adequate internal control structure and
procedures for financial reporting; and

(2) contain an assessment, as of the end of the most recent
fiscal year of the issuer, of the effectiveness of the internal
control structure and procedures of the issuer for financial
reporting.

(b) Internal Control Evaluation and Reporting.—With
respect to the internal control assessment required by subsection
(a), each registered public accounting firm that prepares or issues
the audit report for the issuer shall attest to, and report on, the
assessment made by the management of the issuer. An attestation
made under this subsection shall be made in accordance with stand-
ards for attestation engagements issued or adopted by the Board.
Any such attestation shall not be the subject of a separate engage-
ment.

SEC. 405. EXEMPTION.

Nothing in section 401, 402, or 404, the amendments made
by those sections, or the rules of the Commission under those
sections shall apply to any investment company registered under
section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–
8).

SEC. 406. CODE OF ETHICS FOR SENIOR FINANCIAL OFFICERS.

(a) Code of Ethics Disclosure.—The Commission shall issue
rules to require each issuer, together with periodic reports required
pursuant to section 13(a) or 15(d) of the Securities Exchange Act
of 1934, to disclose whether or not, and if not, the reason therefor,
such issuer has adopted a code of ethics for senior financial officers,
applicable to its principal financial officer and comptroller or prin-
cipal accounting officer, or persons performing similar functions.

(b) Changes in Codes of Ethics.—The Commission shall
revise its regulations concerning matters requiring prompt disclo-
ure on Form 8–K (or any successor thereto) to require the imme-
diate disclosure, by means of the filing of such form, dissemination
by the Internet or by other electronic means, by any issuer of
any change in or waiver of the code of ethics for senior financial
officers.

(c) Definition.—In this section, the term “code of ethics” means
such standards as are reasonably necessary to promote—

(1) honest and ethical conduct, including the ethical han-
dling of actual or apparent conflicts of interest between personal
and professional relationships;
(2) full, fair, accurate, timely, and understandable disclosure in the periodic reports required to be filed by the issuer; and

(3) compliance with applicable governmental rules and regulations.

(d) Deadline for Rulemaking.—The Commission shall—

(1) propose rules to implement this section, not later than 90 days after the date of enactment of this Act; and

(2) issue final rules to implement this section, not later than 180 days after that date of enactment.

SEC. 407. DISCLOSURE OF AUDIT COMMITTEE FINANCIAL EXPERT.

(a) Rules Defining “Financial Expert”.—The Commission shall issue rules, as necessary or appropriate in the public interest and consistent with the protection of investors, to require each issuer, together with periodic reports required pursuant to sections 13(a) and 15(d) of the Securities Exchange Act of 1934, to disclose whether or not, and if not, the reasons therefor, the audit committee of that issuer is comprised of at least 1 member who is a financial expert, as such term is defined by the Commission.

(b) Considerations.—In defining the term “financial expert” for purposes of subsection (a), the Commission shall consider whether a person has, through education and experience as a public accountant or auditor or a principal financial officer, comptroller, or principal accounting officer of an issuer, or from a position involving the performance of similar functions—

(1) an understanding of generally accepted accounting principles and financial statements;

(2) experience in—

(A) the preparation or auditing of financial statements of generally comparable issuers; and

(B) the application of such principles in connection with the accounting for estimates, accruals, and reserves;

(3) experience with internal accounting controls; and

(4) an understanding of audit committee functions.

(c) Deadline for Rulemaking.—The Commission shall—

(1) propose rules to implement this section, not later than 90 days after the date of enactment of this Act; and

(2) issue final rules to implement this section, not later than 180 days after that date of enactment.

SEC. 408. ENHANCED REVIEW OF PERIODIC DISCLOSURES BY ISSUERS.

(a) Regular and Systematic Review.—The Commission shall review disclosures made by issuers reporting under section 13(a) of the Securities Exchange Act of 1934 (including reports filed on Form 10–K), and which have a class of securities listed on a national securities exchange or traded on an automated quotation facility of a national securities association, on a regular and systematic basis for the protection of investors. Such review shall include a review of an issuer’s financial statement.

(b) Review Criteria.—For purposes of scheduling the reviews required by subsection (a), the Commission shall consider, among other factors—

(1) issuers that have issued material restatements of financial results;

(2) issuers that experience significant volatility in their stock price as compared to other issuers;

(3) issuers with the largest market capitalization;
(4) emerging companies with disparities in price to earning ratios;
(5) issuers whose operations significantly affect any material sector of the economy; and
(6) any other factors that the Commission may consider relevant.

(c) Minimum Review Period.—In no event shall an issuer required to file reports under section 13(a) or 15(d) of the Securities Exchange Act of 1934 be reviewed under this section less frequently than once every 3 years.

SEC. 409. REAL TIME ISSUER DISCLOSURES.

Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m), as amended by this Act, is amended by adding at the end the following:

"(l) Real Time Issuer Disclosures.—Each issuer reporting under section 13(a) or 15(d) shall disclose to the public on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer, in plain English, which may include trend and qualitative information and graphic presentations, as the Commission determines, by rule, is necessary or useful for the protection of investors and in the public interest."

TITLE V—ANALYST CONFLICTS OF INTEREST

SEC. 501. TREATMENT OF SECURITIES ANALYSTS BY REGISTERED SECURITIES ASSOCIATIONS AND NATIONAL SECURITIES EXCHANGES.

(a) Rules Regarding Securities Analysts.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by inserting after section 15C the following new section:

"SEC. 15D. SECURITIES ANALYSTS AND RESEARCH REPORTS.

"(a) Analyst Protections.—The Commission, or upon the authorization and direction of the Commission, a registered securities association or national securities exchange, shall have adopted, not later than 1 year after the date of enactment of this section, rules reasonably designed to address conflicts of interest that can arise when securities analysts recommend equity securities in research reports and public appearances, in order to improve the objectivity of research and provide investors with more useful and reliable information, including rules designed—

"(1) to foster greater public confidence in securities research, and to protect the objectivity and independence of securities analysts, by—

"(A) restricting the prepublication clearance or approval of research reports by persons employed by the broker or dealer who are engaged in investment banking activities, or persons not directly responsible for investment research, other than legal or compliance staff;

"(B) limiting the supervision and compensatory evaluation of securities analysts to officials employed by the broker or dealer who are not engaged in investment banking activities; and

Deadline.

15 USC 78o–6.
“(C) requiring that a broker or dealer and persons employed by a broker or dealer who are involved with investment banking activities may not, directly or indirectly, retaliate against or threaten to retaliate against any securities analyst employed by that broker or dealer or its affiliates as a result of an adverse, negative, or otherwise unfavorable research report that may adversely affect the present or prospective investment banking relationship of the broker or dealer with the issuer that is the subject of the research report, except that such rules may not limit the authority of a broker or dealer to discipline a securities analyst for causes other than such research report in accordance with the policies and procedures of the firm;

“(2) to define periods during which brokers or dealers who have participated, or are to participate, in a public offering of securities as underwriters or dealers should not publish or otherwise distribute research reports relating to such securities or to the issuer of such securities;

“(3) to establish structural and institutional safeguards within registered brokers or dealers to assure that securities analysts are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of those whose involvement in investment banking activities might potentially bias their judgment or supervision; and

“(4) to address such other issues as the Commission, or such association or exchange, determines appropriate.

“(b) Disclosure.—The Commission, or upon the authorization and direction of the Commission, a registered securities association or national securities exchange, shall have adopted, not later than 1 year after the date of enactment of this section, rules reasonably designed to require each securities analyst to disclose in public appearances, and each registered broker or dealer to disclose in each research report, as applicable, conflicts of interest that are known or should have been known by the securities analyst or the broker or dealer, to exist at the time of the appearance or the date of distribution of the report, including—

“(1) the extent to which the securities analyst has debt or equity investments in the issuer that is the subject of the appearance or research report;

“(2) whether any compensation has been received by the registered broker or dealer, or any affiliate thereof, including the securities analyst, from the issuer that is the subject of the appearance or research report, subject to such exemptions as the Commission may determine appropriate and necessary to prevent disclosure by virtue of this paragraph of material non-public information regarding specific potential future investment banking transactions of such issuer, as is appropriate in the public interest and consistent with the protection of investors;

“(3) whether an issuer, the securities of which are recommended in the appearance or research report, currently is, or during the 1-year period preceding the date of the appearance or date of distribution of the report has been, a client of the registered broker or dealer, and if so, stating the types of services provided to the issuer;
“(4) whether the securities analyst received compensation with respect to a research report, based upon (among any other factors) the investment banking revenues (either generally or specifically earned from the issuer being analyzed) of the registered broker or dealer; and

“(5) such other disclosures of conflicts of interest that are material to investors, research analysts, or the broker or dealer as the Commission, or such association or exchange, determines appropriate.

“(c) DEFINITIONS.—In this section—

“(1) the term ‘securities analyst’ means any associated person of a registered broker or dealer that is principally responsible for, and any associated person who reports directly or indirectly to a securities analyst in connection with, the preparation of the substance of a research report, whether or not any such person has the job title of ‘securities analyst’; and

“(2) the term ‘research report’ means a written or electronic communication that includes an analysis of equity securities of individual companies or industries, and that provides information reasonably sufficient upon which to base an investment decision.”

(b) ENFORCEMENT.—Section 21B(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78u–2(a)) is amended by inserting “15D,” before “15B”.

(c) COMMISSION AUTHORITY.—The Commission may promulgate and amend its regulations, or direct a registered securities association or national securities exchange to promulgate and amend its rules, to carry out section 15D of the Securities Exchange Act of 1934, as added by this section, as is necessary for the protection of investors and in the public interest.

TITLE VI—COMMISSION RESOURCES AND AUTHORITY

SEC. 601. AUTHORIZATION OF APPROPRIATIONS.

Section 35 of the Securities Exchange Act of 1934 (15 U.S.C. 78kk) is amended to read as follows:

“SEC. 35. AUTHORIZATION OF APPROPRIATIONS.

“In addition to any other funds authorized to be appropriated to the Commission, there are authorized to be appropriated to carry out the functions, powers, and duties of the Commission, $776,000,000 for fiscal year 2003, of which—

“(1) $102,700,000 shall be available to fund additional compensation, including salaries and benefits, as authorized in the Investor and Capital Markets Fee Relief Act (Public Law 107–123; 115 Stat. 2390 et seq.);

“(2) $108,400,000 shall be available for information technology, security enhancements, and recovery and mitigation activities in light of the terrorist attacks of September 11, 2001; and

“(3) $98,000,000 shall be available to add not fewer than an additional 200 qualified professionals to provide enhanced oversight of auditors and audit services required by the Federal securities laws, and to improve Commission investigative and
disciplinary efforts with respect to such auditors and services, as well as for additional professional support staff necessary to strengthen the programs of the Commission involving Full Disclosure and Prevention and Suppression of Fraud, risk management, industry technology review, compliance, inspections, examinations, market regulation, and investment management.”.

SEC. 602. APPEARANCE AND PRACTICE BEFORE THE COMMISSION.

The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by inserting after section 4B the following:

“SEC. 4C. APPEARANCE AND PRACTICE BEFORE THE COMMISSION.

“(a) AUTHORITY TO CENSURE.—The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found by the Commission, after notice and opportunity for hearing in the matter—

“(1) not to possess the requisite qualifications to represent others;

“(2) to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or

“(3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations issued thereunder.

“(b) DEFINITION.—With respect to any registered public accounting firm or associated person, for purposes of this section, the term ‘improper professional conduct’ means—

“(1) intentional or knowing conduct, including reckless conduct, that results in a violation of applicable professional standards; and

“(2) negligent conduct in the form of—

“(A) a single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which the registered public accounting firm or associated person knows, or should know, that heightened scrutiny is warranted; or

“(B) repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.”.

SEC. 603. FEDERAL COURT AUTHORITY TO IMPOSE PENNY STOCK BARS.

(a) SECURITIES EXCHANGE ACT OF 1934.—Section 21(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)), as amended by this Act, is amended by adding at the end the following:

“(6) AUTHORITY OF A COURT TO PROHIBIT PERSONS FROM PARTICIPATING IN AN OFFERING OF PENNY STOCK.—

“(A) IN GENERAL.—In any proceeding under paragraph (1) against any person participating in, or, at the time of the alleged misconduct who was participating in, an offering of penny stock, the court may prohibit that person from participating in an offering of penny stock, conditionally or unconditionally, and permanently or for such period of time as the court shall determine.

“(B) DEFINITION.—For purposes of this paragraph, the term ‘person participating in an offering of penny stock’ includes

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any person engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of, any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from inclusion in such term.”.

(b) SECURITIES ACT OF 1933.—Section 20 of the Securities Act of 1933 (15 U.S.C. 77t) is amended by adding at the end the following:

“(g) AUTHORITY OF A COURT TO PROHIBIT PERSONS FROM PARTICIPATING IN AN OFFERING OF PENNY STOCK.—

“(1) IN GENERAL.—In any proceeding under subsection (a) against any person participating in, or, at the time of the alleged misconduct, who was participating in, an offering of penny stock, the court may prohibit that person from participating in an offering of penny stock, conditionally or unconditionally, and permanently or for such period of time as the court shall determine.

“(2) DEFINITION.—For purposes of this subsection, the term ‘person participating in an offering of penny stock’ includes any person engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of, any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from inclusion in such term.”.

SEC. 604. QUALIFICATIONS OF ASSOCIATED PERSONS OF BROKERS AND DEALERS.

(a) BROKERS AND DEALERS.—Section 15(b)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78o) is amended—

(1) by striking subparagraph (F) and inserting the following:

“(F) is subject to any order of the Commission barring or suspending the right of the person to be associated with a broker or dealer;”;

and

(2) in subparagraph (G), by striking the period at the end and inserting the following: “; or

“(H) is subject to any final order of a State securities commission (or any agency or officer performing like functions), State authority that supervises or examines banks, savings associations, or credit unions, State insurance commission (or any agency or office performing like functions), an appropriate Federal banking agency (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q))), or the National Credit Union Administration, that—

“(i) bars such person from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or
“(ii) constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct.”.

(b) INVESTMENT ADVISERS.—Section 203(e) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(e)) is amended—

(1) by striking paragraph (7) and inserting the following:

“(7) is subject to any order of the Commission barring or suspending the right of the person to be associated with an investment adviser;”;

(2) in paragraph (8), by striking the period at the end and inserting “; or”;

and

(3) by adding at the end the following:

“(9) is subject to any final order of a State securities commission (or any agency or officer performing like functions), State authority that supervises or examines banks, savings associations, or credit unions, State insurance commission (or any agency or officer performing like functions), an appropriate Federal banking agency (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q))), or the National Credit Union Administration, that—

“(A) bars such person from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or

“(B) constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct.”.

(c) CONFORMING AMENDMENTS.—


(i) by striking “or (G)” and inserting “(H), or (G)”;

and

(ii) by inserting “, or is subject to an order or finding,” before “enumerated”;

(B) in each of section 15(b)(6)(A)(i) (15 U.S.C. 78o(b)(6)(A)(i)), paragraphs (2) and (4) of section 15B(c) (15 U.S.C. 78o–4(c)), and subparagraphs (A) and (C) of section 15C(c)(1) (15 U.S.C. 78o–5(c)(1))—

(i) by striking “or (G)” each place that term appears and inserting “(H), or (G)”;

and

(ii) by striking “or omission” each place that term appears, and inserting “, or is subject to an order or finding,”;

and

(C) in each of paragraphs (3)(A) and (4)(C) of section 17A(c) (15 U.S.C. 78q–1(c))—

(i) by striking “or (G)” each place that term appears and inserting “(H), or (G)”;

and

(ii) by inserting “, or is subject to an order or finding,” before “enumerated” each place that term appears.

(2) INVESTMENT ADVISERS ACT OF 1940.—Section 203(f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(f)) is amended—

(A) by striking “or (8)” and inserting “(8), or (9)”;

and

(B) by inserting “or (3)” after “paragraph (2)”.

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TITLE VII—STUDIES AND REPORTS

SEC. 701. GAO STUDY AND REPORT REGARDING CONSOLIDATION OF PUBLIC ACCOUNTING FIRMS.

(a) Study Required.—The Comptroller General of the United States shall conduct a study—

(1) to identify—

(A) the factors that have led to the consolidation of public accounting firms since 1989 and the consequent reduction in the number of firms capable of providing audit services to large national and multi-national business organizations that are subject to the securities laws;

(B) the present and future impact of the condition described in subparagraph (A) on capital formation and securities markets, both domestic and international; and

(C) solutions to any problems identified under subparagraph (B), including ways to increase competition and the number of firms capable of providing audit services to large national and multinational business organizations that are subject to the securities laws;

(2) of the problems, if any, faced by business organizations that have resulted from limited competition among public accounting firms, including—

(A) higher costs;

(B) lower quality of services;

(C) impairment of auditor independence; or

(D) lack of choice; and

(3) whether and to what extent Federal or State regulations impede competition among public accounting firms.

(b) Consultation.—In planning and conducting the study under this section, the Comptroller General shall consult with—

(1) the Commission;

(2) the regulatory agencies that perform functions similar to the Commission within the other member countries of the Group of Seven Industrialized Nations;

(3) the Department of Justice; and

(4) any other public or private sector organization that the Comptroller General considers appropriate.

(c) Report Required.—Not later than 1 year after the date of enactment of this Act, the Comptroller General shall submit a report on the results of the study required by this section to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.

SEC. 702. COMMISSION STUDY AND REPORT REGARDING CREDIT RATING AGENCIES.

(a) Study Required.—

(1) In General.—The Commission shall conduct a study of the role and function of credit rating agencies in the operation of the securities market.

(2) Areas of Consideration.—The study required by this subsection shall examine—

(A) the role of credit rating agencies in the evaluation of issuers of securities;
(B) the importance of that role to investors and the functioning of the securities markets;

(C) any impediments to the accurate appraisal by credit rating agencies of the financial resources and risks of issuers of securities;

(D) any barriers to entry into the business of acting as a credit rating agency, and any measures needed to remove such barriers;

(E) any measures which may be required to improve the dissemination of information concerning such resources and risks when credit rating agencies announce credit ratings; and

(F) any conflicts of interest in the operation of credit rating agencies and measures to prevent such conflicts or ameliorate the consequences of such conflicts.

(b) REPORT REQUIRED.—The Commission shall submit a report on the study required by subsection (a) to the President, the Committee on Financial Services of the House of Representatives, and the Committee on Banking, Housing, and Urban Affairs of the Senate not later than 180 days after the date of enactment of this Act.

SEC. 703. STUDY AND REPORT ON VIOLATORS AND VIOLATIONS.

(a) STUDY.—The Commission shall conduct a study to determine, based upon information for the period from January 1, 1998, to December 31, 2001—

1) the number of securities professionals, defined as public accountants, public accounting firms, investment bankers, investment advisers, brokers, dealers, attorneys, and other securities professionals practicing before the Commission—

(A) who have been found to have aided and abetted a violation of the Federal securities laws, including rules or regulations promulgated thereunder (collectively referred to in this section as “Federal securities laws”), but who have not been sanctioned, disciplined, or otherwise penalized as a primary violator in any administrative action or civil proceeding, including in any settlement of such an action or proceeding (referred to in this section as “aiders and abettors”); and

(B) who have been found to have been primary violators of the Federal securities laws;

2) a description of the Federal securities laws violations committed by aiders and abettors and by primary violators, including—

(A) the specific provision of the Federal securities laws violated;

(B) the specific sanctions and penalties imposed upon such aiders and abettors and primary violators, including the amount of any monetary penalties assessed upon and collected from such persons;

(C) the occurrence of multiple violations by the same person or persons, either as an aider or abettor or as a primary violator; and

(D) whether, as to each such violator, disciplinary sanctions have been imposed, including any censure, suspension, temporary bar, or permanent bar to practice before the Commission; and
(3) the amount of disgorgement, restitution, or any other fines or payments that the Commission has assessed upon and collected from, aiders and abettors and from primary violators.

(b) REPORT.—A report based upon the study conducted pursuant to subsection (a) shall be submitted to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives not later than 6 months after the date of enactment of this Act.

SEC. 704. STUDY OF ENFORCEMENT ACTIONS.

(a) STUDY REQUIRED.—The Commission shall review and analyze all enforcement actions by the Commission involving violations of reporting requirements imposed under the securities laws, and restatements of financial statements, over the 5-year period preceding the date of enactment of this Act, to identify areas of reporting that are most susceptible to fraud, inappropriate manipulation, or inappropriate earnings management, such as revenue recognition and the accounting treatment of off-balance sheet special purpose entities.

(b) REPORT REQUIRED.—The Commission shall report its findings to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate, not later than 180 days after the date of enactment of this Act, and shall use such findings to revise its rules and regulations, as necessary. The report shall include a discussion of regulatory or legislative steps that are recommended or that may be necessary to address concerns identified in the study.

SEC. 705. STUDY OF INVESTMENT BANKS.

(a) GAO STUDY.—The Comptroller General of the United States shall conduct a study on whether investment banks and financial advisers assisted public companies in manipulating their earnings and obfuscating their true financial condition. The study should address the rule of investment banks and financial advisers—

(1) in the collapse of the Enron Corporation, including with respect to the design and implementation of derivatives transactions, transactions involving special purpose vehicles, and other financial arrangements that may have had the effect of altering the company's reported financial statements in ways that obscured the true financial picture of the company;

(2) in the failure of Global Crossing, including with respect to transactions involving swaps of fiberoptic cable capacity, in the designing transactions that may have had the effect of altering the company's reported financial statements in ways that obscured the true financial picture of the company; and

(3) generally, in creating and marketing transactions which may have been designed solely to enable companies to manipulate revenue streams, obtain loans, or move liabilities off balance sheets without altering the economic and business risks faced by the companies or any other mechanism to obscure a company's financial picture.

(b) REPORT.—The Comptroller General shall report to Congress not later than 180 days after the date of enactment of this Act on the results of the study required by this section. The report shall include a discussion of regulatory or legislative steps that
are recommended or that may be necessary to address concerns
identified in the study.

TITLE VIII—CORPORATE AND
CRIMINAL FRAUD ACCOUNTABILITY

SEC. 801. SHORT TITLE.
This title may be cited as the “Corporate and Criminal Fraud
Accountability Act of 2002”.

SEC. 802. CRIMINAL PENALTIES FOR ALTERING DOCUMENTS.
(a) In general.—Chapter 73 of title 18, United States Code,
is amended by adding at the end the following:

“§ 1519. Destruction, alteration, or falsification of records
in Federal investigations and bankruptcy

“Whoever knowingly alters, destroys, mutilates, conceals, covers
up, falsifies, or makes a false entry in any record, document, or
tangible object with the intent to impede, obstruct, or influence
the investigation or proper administration of any matter within
the jurisdiction of any department or agency of the United States
or any case filed under title 11, or in relation to or contemplation
of any such matter or case, shall be fined under this title, impris-
oneed not more than 20 years, or both.

“§ 1520. Destruction of corporate audit records

“(a)(1) Any accountant who conducts an audit of an issuer
of securities to which section 10A(a) of the Securities Exchange
Act of 1934 (15 U.S.C. 78j–1(a)) applies, shall maintain all audit
or review workpapers for a period of 5 years from the end of
the fiscal period in which the audit or review was concluded.

“(2) The Securities and Exchange Commission shall promulgate,
within 180 days, after adequate notice and an opportunity for
comment, such rules and regulations, as are reasonably necessary,
relating to the retention of relevant records such as workpapers,
documents that form the basis of an audit or review, memoranda,
correspondence, communications, other documents, and records
(including electronic records) which are created, sent, or received
in connection with an audit or review and contain conclusions,
opinions, analyses, or financial data relating to such an audit or
review, which is conducted by any accountant who conducts an
audit of an issuer of securities to which section 10A(a) of the
Commission may, from time to time, amend or supplement the
rules and regulations that it is required to promulgate under this
section, after adequate notice and an opportunity for comment,
in order to ensure that such rules and regulations adequately
comport with the purposes of this section.

“(b) Whoever knowingly and willfully violates subsection (a)(1),
or any rule or regulation promulgated by the Securities and
Exchange Commission under subsection (a)(2), shall be fined under
this title, imprisoned not more than 10 years, or both.

“(c) Nothing in this section shall be deemed to diminish or
relieve any person of any other duty or obligation imposed by
Federal or State law or regulation to maintain, or refrain from
destroying, any document.”.
(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 73 of title 18, United States Code, is amended by adding at the end the following new items:

"1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy.
"1520. Destruction of corporate audit records."

SEC. 803. DEBTS NONDISCHARGEABLE IF INCURRED IN VIOLATION OF SECURITIES FRAUD LAWS.

Section 523(a) of title 11, United States Code, is amended—
(1) in paragraph (17), by striking "or" after the semicolon; and
(2) in paragraph (18), by striking the period at the end and inserting "; or"; and
(3) by adding at the end, the following:

"(19) that—
"(A) is for—
"(i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or
"(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and
"(B) results from—
"(i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;
"(ii) any settlement agreement entered into by the debtor; or
"(iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.".

SEC. 804. STATUTE OF LIMITATIONS FOR SECURITIES FRAUD.

(a) IN GENERAL.—Section 1658 of title 28, United States Code, is amended—
(1) by inserting "(a)" before "Except"; and
(2) by adding at the end the following:

"(b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—
"(1) 2 years after the discovery of the facts constituting the violation; or
"(2) 5 years after such violation."

(b) EFFECTIVE DATE.—The limitations period provided by section 1658(b) of title 28, United States Code, as added by this section, shall apply to all proceedings addressed by this section that are commenced on or after the date of enactment of this Act.

(c) NO CREATION OF ACTIONS.—Nothing in this section shall create a new, private right of action.
(a) Enhancements of Fraud and Obstruction of Justice Sentences.—Pursuant to section 994 of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and amend, as appropriate, the Federal Sentencing Guidelines and related policy statements to ensure that—

(1) the base offense level and existing enhancements contained in United States Sentencing Guideline 2J1.2 relating to obstruction of justice are sufficient to deter and punish that activity;

(2) the enhancements and specific offense characteristics relating to obstruction of justice are adequate in cases where—

(A) the destruction, alteration, or fabrication of evidence involves—

(i) a large amount of evidence, a large number of participants, or is otherwise extensive;

(ii) the selection of evidence that is particularly probative or essential to the investigation; or

(iii) more than minimal planning; or

(B) the offense involved abuse of a special skill or a position of trust;

(3) the guideline offense levels and enhancements for violations of section 1519 or 1520 of title 18, United States Code, as added by this title, are sufficient to deter and punish that activity;

(4) a specific offense characteristic enhancing sentencing is provided under United States Sentencing Guideline 2B1.1 (as in effect on the date of enactment of this Act) for a fraud offense that endangers the solvency or financial security of a substantial number of victims; and

(5) the guidelines that apply to organizations in United States Sentencing Guidelines, chapter 8, are sufficient to deter and punish organizational criminal misconduct.

(b) Emergency Authority and Deadline for Commission Action.—The United States Sentencing Commission is requested to promulgate the guidelines or amendments provided for under this section as soon as practicable, and in any event not later than 180 days after the date of enactment of this Act, in accordance with the procedures set forth in section 219(a) of the Sentencing Reform Act of 1987, as though the authority under that Act had not expired.

SEC. 806. PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES WHO PROVIDE EVIDENCE OF FRAUD.

(a) In General.—Chapter 73 of title 18, United States Code, is amended by inserting after section 1514 the following:

"§ 1514A. Civil action to protect against retaliation in fraud cases

or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

“(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

“(A) a Federal regulatory or law enforcement agency;
“(B) any Member of Congress or any committee of Congress; or
“(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

“(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

(b) Enforcement action.—

“(1) In general.—A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by—

“(A) filing a complaint with the Secretary of Labor; or

“(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

“(2) procedure.—

“(A) In general.—An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

“(B) Exception.—Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

“(C) burdens of proof.—An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

“(D) statute of limitations.—An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.

(c) Remedies.—

“(1) In general.—An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.
“(2) COMPENSATORY DAMAGES.—Relief for any action under paragraph (1) shall include—
“(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
“(B) the amount of back pay, with interest; and
“(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.
“(d) RIGHTS RETAINED BY EMPLOYEE.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.”.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 73 of title 18, United States Code, is amended by inserting after the item relating to section 1514 the following new item:

“1514A. Civil action to protect against retaliation in fraud cases.”.

SEC. 807. CRIMINAL PENALTIES FOR DEFRAUDING SHAREHOLDERS OF PUBLICLY TRADED COMPANIES.

(a) IN GENERAL.—Chapter 63 of title 18, United States Code, is amended by adding at the end the following:

“§ 1348. Securities fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice—
“(1) to defraud any person in connection with any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); or
“(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); shall be fined under this title, or imprisoned not more than 25 years, or both.”.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 63 of title 18, United States Code, is amended by adding at the end the following new item:

“1348. Securities fraud.”.

TITLE IX—WHITE-COLLAR CRIME PENALTY ENHANCEMENTS

SEC. 901. SHORT TITLE.

This title may be cited as the “White-Collar Crime Penalty Enhancement Act of 2002”.
SEC. 902. ATTEMPTS AND CONSPIRACIES TO COMMIT CRIMINAL FRAUD OFFENSES.

(a) IN GENERAL.—Chapter 63 of title 18, United States Code, is amended by inserting after section 1348 as added by this Act the following:

"§ 1349. Attempt and conspiracy

"Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 63 of title 18, United States Code, is amended by adding at the end the following new item:

"1349. Attempt and conspiracy.".

SEC. 903. CRIMINAL PENALTIES FOR MAIL AND WIRE FRAUD.

(a) MAIL FRAUD.—Section 1341 of title 18, United States Code, is amended by striking "five" and inserting "20".

(b) WIRE FRAUD.—Section 1343 of title 18, United States Code, is amended by striking "five" and inserting "20".

SEC. 904. CRIMINAL PENALTIES FOR VIOLATIONS OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.


(1) by striking "$5,000" and inserting "$100,000";

(2) by striking "one year" and inserting "10 years"; and

(3) by striking "$100,000" and inserting "$500,000".

SEC. 905. AMENDMENT TO SENTENCING GUIDELINES RELATING TO CERTAIN WHITE-COLLAR OFFENSES.

(a) DIRECTIVE TO THE UNITED STATES SENTENCING COMMISSION.—Pursuant to its authority under section 994(p) of title 18, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and, as appropriate, amend the Federal Sentencing Guidelines and related policy statements to implement the provisions of this Act.

(b) REQUIREMENTS.—In carrying out this section, the Sentencing Commission shall—

(1) ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses and the penalties set forth in this Act, the growing incidence of serious fraud offenses which are identified above, and the need to modify the sentencing guidelines and policy statements to deter, prevent, and punish such offenses;

(2) consider the extent to which the guidelines and policy statements adequately address whether the guideline offense levels and enhancements for violations of the sections amended by this Act are sufficient to deter and punish such offenses, and specifically, are adequate in view of the statutory increases in penalties contained in this Act;

(3) assure reasonable consistency with other relevant directives and sentencing guidelines;

(4) account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges;
(5) make any necessary conforming changes to the sentencing guidelines; and
(6) assure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.

(c) Emergency Authority and Deadline for Commission Action.—The United States Sentencing Commission is requested to promulgate the guidelines or amendments provided for under this section as soon as practicable, and in any event not later than 180 days after the date of enactment of this Act, in accordance with the procedures set forth in section 219(a) of the Sentencing Reform Act of 1987, as though the authority under that Act had not expired.

SEC. 906. CORPORATE RESPONSIBILITY FOR FINANCIAL REPORTS.

(a) In General.—Chapter 63 of title 18, United States Code, is amended by inserting after section 1349, as created by this Act, the following:

“§ 1350. Failure of corporate officers to certify financial reports

(a) Certification of Periodic Financial Reports.—Each periodic report containing financial statements filed by an issuer with the Securities Exchange Commission pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a) or 78o(d)) shall be accompanied by a written statement by the chief executive officer and chief financial officer (or equivalent thereof) of the issuer.

“(b) Content.—The statement required under subsection (a) shall certify that the periodic report containing the financial statements fully complies with the requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) and that information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer.

“(c) Criminal Penalties.—Whoever—

“(1) certifies any statement as set forth in subsections (a) and (b) of this section knowing that the periodic report accompanying the statement does not comport with all the requirements set forth in this section shall be fined not more than $1,000,000 or imprisoned not more than 10 years, or both; or

“(2) willfully certifies any statement as set forth in subsections (a) and (b) of this section knowing that the periodic report accompanying the statement does not comport with all the requirements set forth in this section shall be fined not more than $5,000,000, or imprisoned not more than 20 years, or both.”.

(b) Clerical Amendment.—The table of sections at the beginning of chapter 63 of title 18, United States Code, is amended by adding at the end the following:

“1350. Failure of corporate officers to certify financial reports.”.
TITLE X—CORPORATE TAX RETURNS

SEC. 1001. SENSE OF THE SENATE REGARDING THE SIGNING OF CORPORATE TAX RETURNS BY CHIEF EXECUTIVE OFFICERS.

It is the sense of the Senate that the Federal income tax return of a corporation should be signed by the chief executive officer of such corporation.

TITLE XI—CORPORATE FRAUD ACCOUNTABILITY

SEC. 1101. SHORT TITLE.

This title may be cited as the “Corporate Fraud Accountability Act of 2002”.

SEC. 1102. TAMPERING WITH A RECORD OR OTHERWISE IMPEDING AN OFFICIAL PROCEEDING.

Section 1512 of title 18, United States Code, is amended—
(1) by redesignating subsections (c) through (i) as subsections (d) through (j), respectively; and
(2) by inserting after subsection (b) the following new subsection:
“(c) Whoever corruptly—
“(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
“(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,
shall be fined under this title or imprisoned not more than 20 years, or both.”.

SEC. 1103. TEMPORARY FREEZE AUTHORITY FOR THE SECURITIES AND EXCHANGE COMMISSION.

(a) IN GENERAL.—Section 21C(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78u–3(c)) is amended by adding at the end the following:
“(3) Temporary freeze.—
“(A) In general.—
“(i) Issuance of temporary order.—Whenever, during the course of a lawful investigation involving possible violations of the Federal securities laws by an issuer of publicly traded securities or any of its directors, officers, partners, controlling persons, agents, or employees, it shall appear to the Commission that it is likely that the issuer will make extraordinary payments (whether compensation or otherwise) to any of the foregoing persons, the Commission may petition a Federal district court for a temporary order requiring the issuer to escrow, subject to court supervision, those payments in an interest-bearing account for 45 days.
“(ii) Standard.—A temporary order shall be entered under clause (i), only after notice and opportunity for a hearing, unless the court determines that
notice and hearing prior to entry of the order would be impracticable or contrary to the public interest.

“(iii) Effective period.—A temporary order issued under clause (i) shall—

“(I) become effective immediately;

“(II) be served upon the parties subject to it; and

“(III) unless set aside, limited or suspended by a court of competent jurisdiction, shall remain effective and enforceable for 45 days.

“(iv) Extensions authorized.—The effective period of an order under this subparagraph may be extended by the court upon good cause shown for not longer than 45 additional days, provided that the combined period of the order shall not exceed 90 days.

“(B) Process on determination of violations.—

“(i) Violations charged.—If the issuer or other person described in subparagraph (A) is charged with any violation of the Federal securities laws before the expiration of the effective period of a temporary order under subparagraph (A) (including any applicable extension period), the order shall remain in effect, subject to court approval, until the conclusion of any legal proceedings related thereto, and the affected issuer or other person, shall have the right to petition the court for review of the order.

“(ii) Violations not charged.—If the issuer or other person described in subparagraph (A) is not charged with any violation of the Federal securities laws before the expiration of the effective period of a temporary order under subparagraph (A) (including any applicable extension period), the escrow shall terminate at the expiration of the 45-day effective period (or the expiration of any extension period, as applicable), and the disputed payments (with accrued interest) shall be returned to the issuer or other affected person.”.

(b) Technical Amendment.—Section 21C(c)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78u–3(c)(2)) is amended by striking “This” and inserting “paragraph (1)”.

SEC. 1104. AMENDMENT TO THE FEDERAL SENTENCING GUIDELINES.

(a) Request for Immediate Consideration by The United States Sentencing Commission.—Pursuant to its authority under section 994(p) of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission is requested to—

(1) promptly review the sentencing guidelines applicable to securities and accounting fraud and related offenses;

(2) expeditiously consider the promulgation of new sentencing guidelines or amendments to existing sentencing guidelines to provide an enhancement for officers or directors of publicly traded corporations who commit fraud and related offenses; and

(3) submit to Congress an explanation of actions taken by the Sentencing Commission pursuant to paragraph (2) and
any additional policy recommendations the Sentencing Commission may have for combating offenses described in paragraph (1).

(b) Considerations in Review.—In carrying out this section, the Sentencing Commission is requested to—

(1) ensure that the sentencing guidelines and policy statements reflect the serious nature of securities, pension, and accounting fraud and the need for aggressive and appropriate law enforcement action to prevent such offenses;

(2) assure reasonable consistency with other relevant directives and with other guidelines;

(3) account for any aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the sentencing guidelines currently provide sentencing enhancements;

(4) ensure that guideline offense levels and enhancements for an obstruction of justice offense are adequate in cases where documents or other physical evidence are actually destroyed or fabricated;

(5) ensure that the guideline offense levels and enhancements under United States Sentencing Guideline 2B1.1 (as in effect on the date of enactment of this Act) are sufficient for a fraud offense when the number of victims adversely involved is significantly greater than 50;

(6) make any necessary conforming changes to the sentencing guidelines; and

(7) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553 (a)(2) of title 18, United States Code.

(c) Emergency Authority and Deadline for Commission Action.—The United States Sentencing Commission is requested to promulgate the guidelines or amendments provided for under this section as soon as practicable, and in any event not later than the 180 days after the date of enactment of this Act, in accordance with the procedures set forth in section 21(a) of the Sentencing Reform Act of 1987, as though the authority under that Act had not expired.

SEC. 1105. AUTHORITY OF THE COMMISSION TO PROHIBIT PERSONS FROM SERVING AS OFFICERS OR DIRECTORS.

(a) Securities Exchange Act of 1934.—Section 21C of the Securities Exchange Act of 1934 (15 U.S.C. 78u–3) is amended by adding at the end the following:

“(f) Authority of the Commission to Prohibit Persons From Serving as Officers or Directors.—In any cease-and-desist proceeding under subsection (a), the Commission may issue an order to prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who has violated section 10(b) or the rules or regulations thereunder, from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 12, or that is required to file reports pursuant to section 15(d), if the conduct of that person demonstrates unfitness to serve as an officer or director of any such issuer.”

(b) Securities Act of 1933.—Section 8A of the Securities Act of 1933 (15 U.S.C. 77h–1) is amended by adding at the end of the following:
“(f) Authority of the Commission to Prohibit Persons from Serving as Officers or Directors.—In any cease-and-desist proceeding under subsection (a), the Commission may issue an order to prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who has violated section 17(a)(1) or the rules or regulations thereunder, from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 12 of the Securities Exchange Act of 1934, or that is required to file reports pursuant to section 15(d) of that Act, if the conduct of that person demonstrates unfitness to serve as an officer or director of any such issuer.”

SEC. 1106. INCREASED CRIMINAL PENALTIES UNDER SECURITIES EXCHANGE ACT OF 1934.

Section 32(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78ff(a)) is amended—

(1) by striking “$1,000,000, or imprisoned not more than 10 years” and inserting “$5,000,000, or imprisoned not more than 20 years”; and

(2) by striking “$2,500,000” and inserting “$25,000,000”.

SEC. 1107. RETALIATION AGAINST INFORMANTS.

(a) In General.—Section 1513 of title 18, United States Code, is amended by adding at the end the following:

“(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.”

Approved July 30, 2002.
Entlassener Whistleblower erhält Abfindung

Freitag, 23.03.2018, 16:00


Peter S. zieht die in der fristlosen Kündigung genannten Vorwürfe zurück und darf diese in Zukunft nicht mehr wiederholen. Er muss außerdem die Prozesskosten tragen. Der Apotheker hatte seinem ehemaligen Angestellten unter anderem vorgeworfen, Medikamente im Wert von rund 1000 Euro bezogen, aber nicht bezahlt zu haben.


Das Arbeitsgericht Gelsenkirchen hatte die Kündigung in der ersten Instanz bestätigt. In der mündlichen Berufungsverhandlung hatten die Arbeitsrichter in Hamm aber deutlich gemacht, dass es diese Sicht nicht teilt und zu einem Vergleich geraten.

dpa
Fotocredits:

dpa/Franz-Peter Tschauner dpa
Alle Inhalte, insbesondere die Texte und Bilder von Agenturen, sind urheberrechtlich geschützt und dürfen nur im Rahmen der gewöhnlichen Nutzung des Angebots vervielfältigt, verbreitet oder sonst genutzt werden.
Public Law 101-12
101st Congress

An Act

To amend title 5, United States Code, to strengthen the protections available to Federal employees against prohibited personnel practices, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Whistleblower Protection Act of 1989".

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds that—

(1) Federal employees who make disclosures described in section 2302(b)(8) of title 5, United States Code, serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary Government expenditures;

(2) protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service; and

(3) in passing the Civil Service Reform Act of 1978, Congress established the Office of Special Counsel to protect whistleblowers (those individuals who make disclosures described in such section 2302(b)(8)) from reprisal.

(b) PURPOSE.—The purpose of this Act is to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by—

(1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and

(2) establishing—

(A) that the primary role of the Office of Special Counsel is to protect employees, especially whistleblowers, from prohibited personnel practices;

(B) that the Office of Special Counsel shall act in the interests of employees who seek assistance from the Office of Special Counsel; and

(C) that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.

SEC. 3. MERIT SYSTEMS PROTECTION BOARD; OFFICE OF SPECIAL COUNSEL; INDIVIDUAL RIGHT OF ACTION.

(a) MERIT SYSTEMS PROTECTION BOARD.—Chapter 12 of title 5, United States Code is amended—

(1) in section 1201 in the second sentence by striking out "Chairman and";
(2) in the heading for section 1202 by striking out the comma and inserting in lieu thereof a semicolon;
(3) in section 1202(b)—
   (A) in the first sentence by striking out “his” and inserting in lieu thereof “the member’s”; and
   (B) in the second sentence by striking out “of this title”;
(4) in section 1203(a) in the first sentence by striking out the comma after “time”;
(5) in section 1203(c) by striking out “the Chairman and Vice Chairman” and inserting in lieu thereof “the Chairman and the Vice Chairman”;
(6) by redesignating section 1204 as section 1211(b) and inserting such subsection after section 1211(a) (as added in paragraph (11) of this subsection);
(7) by redesignating section 1205 as section 1204, and amending such redesignated section—
   (A) by striking out “and Special Counsel”, “the Special Counsel,” and “of this section” each place such terms appear;
   (B) by striking out “subpoena” and “subpoenaed” each place such terms appear and inserting in lieu thereof “subpoena” and “subpoenaed”, respectively;
   (C) in subsection (a)(4) by striking out “(e)” and inserting in lieu thereof “(f)”;  
   (D) by amending subsection (b)(2) to read as follows:
     “(2) Any member of the Board, any administrative law judge appointed by the Board under section 3105, and any employee of the Board designated by the Board may, with respect to any individual—
     “(A) issue subpoenas requiring the attendance and presentation of testimony of any such individual, and the production of documentary or other evidence from any place in the United States, any territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia; and
     “(B) order the taking of depositions from, and responses to written interrogatories by, any such individual.”;
   (E) in subsection (c) in the first sentence—
     (i) by striking out “(b)(2) of this section,” and inserting in lieu thereof “(b)(2)(A) or section 1214(b), upon application by the Board,”; and
     (ii) by striking out “judicial”;
   (F) by redesignating subsections (d) through (k) as subsections (e) through (l), respectively, and inserting after subsection (c) the following new subsection:
     “(d) A subpoena referred to in subsection (b)(2)(A) may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in such manner as the Federal Rules of Civil Procedure prescribe for service of a subpoena in a foreign country. To the extent that the courts of the United States can assert jurisdiction over such individual, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance under this subsection by such individual that such court would have if such individual were personally within the jurisdiction of such court.”;
   (G) in subsection (e) (as redesignated by subparagraph (F) of this paragraph)—
(i) in paragraph (1)—
   (I) by redesignating such paragraph as subparagraph (A) of paragraph (1); and
   (II) by inserting at the end thereof the following new subparagraph:

   "(B)(i) The Merit Systems Protection Board may, during an investigation by the Office of Special Counsel or during the pendency of any proceeding before the Board, issue any order which may be necessary to protect a witness or other individual from harassment, except that an agency (other than the Office of Special Counsel) may not request any such order with regard to an investigation by the Office of Special Counsel from the Board during such investigation.

   "(ii) An order issued under this subparagraph may be enforced in the same manner as provided for under paragraph (2) with respect to any order under subsection (a)(2)."

(ii) in paragraph (2)—
   (I) by redesignating such paragraph as subparagraph (A) of paragraph (2) and striking out "of this section" in the first sentence therein; and
   (II) by inserting at the end thereof the following new subparagraph (B):

   "(B) The Board shall prescribe regulations under which any employee who is aggrieved by the failure of any other employee to comply with an order of the Board may petition the Board to exercise its authority under subparagraph (A)."

(iii) in paragraph (3) by inserting "of Personnel Management" after "Office";

(H) in subsection (f) (as redesignated by subparagraph (F) of this paragraph)—
   (i) in paragraph (1) in the first sentence by inserting "of the Office of Personnel Management" after "Director", and by striking out "of this title";
   (ii) in paragraph (2)—
      (I) in the first sentence by inserting a comma after "subsection";
      (II) in subparagraph (A) by striking out "of this title"; and
      (III) in subparagraph (B) by striking out "of this title"; and
   (iii) in paragraph (3)—
      (I) in subparagraph (A) by striking out "(A)";
      (II) by striking out subparagraph (B); and
      (III) by redesignating subparagraph (C) and clauses (i) and (ii) therein as paragraph (4) and subparagraphs (A) and (B), respectively; and
   (I) in subsection (j) (as redesignated by subparagraph (F) of this paragraph) in the second sentence by striking out "of this title" after "chapter 33";

(8) by striking out sections 1206 through 1208;

(9) by redesignating section 1209(a) as section 1205, and inserting before such section the following section heading:

"§ 1205. Transmittal of information to Congress";

(10) by redesignating section 1209(b) as section 1206, and inserting before such section the following section heading:
§ 1206. Annual report;

(11) by inserting after section 1206 (as redesignated in paragraph (10) of this subsection) the following:

"SUBCHAPTER II—OFFICE OF SPECIAL COUNSEL

§ 1211. Establishment

“(a) There is established the Office of Special Counsel, which shall be headed by the Special Counsel. The Office shall have an official seal which shall be judicially noticed. The Office shall have its principal office in the District of Columbia and shall have field offices in other appropriate locations.”;

(12) by amending section 1211(b) (as redesignated and inserted by paragraph (6) of this subsection)—

(A) in the first sentence by striking out “of the Merit Systems Protection Board” and “from attorneys”;

(B) by striking the second sentence and inserting in lieu thereof “The Special Counsel shall be an attorney who, by demonstrated ability, background, training, or experience, is especially qualified to carry out the functions of the position. A Special Counsel appointed to fill a vacancy occurring before the end of a term of office of the Special Counsel’s predecessor serves for the remainder of the term.”; and

(C) by adding at the end thereof “The Special Counsel may not hold another office or position in the Government of the United States, except as otherwise provided by law or at the direction of the President.”; and

(13) inserting after section 1211 the following:

§ 1212. Powers and functions of the Office of Special Counsel

“(a) The Office of Special Counsel shall—

“(1) in accordance with section 1214(a) and other applicable provisions of this subchapter, protect employees, former employees, and applicants for employment from prohibited personnel practices;

“(2) receive and investigate allegations of prohibited personnel practices, and, where appropriate—

“(A) bring petitions for stays, and petitions for corrective action, under section 1214; and

“(B) file a complaint or make recommendations for disciplinary action under section 1215;

“(3) receive, review, and, where appropriate, forward to the Attorney General or an agency head under section 1213, disclosures of violations of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

“(4) review rules and regulations issued by the Director of the Office of Personnel Management in carrying out functions under section 1103 and, where the Special Counsel finds that any such rule or regulation would, on its face or as implemented, require the commission of a prohibited personnel practice, file a written complaint with the Board; and

“(5) investigate and, where appropriate, bring actions concerning allegations of violations of other laws within the
jurisdiction of the Office of Special Counsel (as referred to in section 1216).

“(b)(1) The Special Counsel and any employee of the Office of Special Counsel designated by the Special Counsel may administer oaths, examine witnesses, take depositions, and receive evidence.

“(2) The Special Counsel may—

“(A) issue subpoenas; and

“(B) order the taking of depositions and order responses to written interrogatories;

in the same manner as provided under section 1204.

“(3)(A) In the case of contumacy or failure to obey a subpoena issued under paragraph (2)(A), the Special Counsel may apply to the Merit Systems Protection Board to enforce the subpoena in court pursuant to section 1204(c).

“(B) A subpoena under paragraph (2)(A) may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in the manner referred to in subsection (d) of section 1204, and the United States District Court for the District of Columbia may, with respect to any such individual, compel compliance in accordance with such subsection.

“(4) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

“(c)(1) Except as provided in paragraph (2), the Special Counsel may as a matter of right intervene or otherwise participate in any proceeding before the Merit Systems Protection Board, except that the Special Counsel shall comply with the rules of the Board.

“(2) The Special Counsel may not intervene in an action brought by an individual under section 1221, or in an appeal brought by an individual under section 7701, without the consent of such individual.

“(d)(1) The Special Counsel may appoint the legal, administrative, and support personnel necessary to perform the functions of the Special Counsel.

“(2) Any appointment made under this subsection shall be made in accordance with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President (other than approval required under section 3324 or subchapter VIII of chapter 33).

“(e) The Special Counsel may prescribe such regulations as may be necessary to perform the functions of the Special Counsel. Such regulations shall be published in the Federal Register.

“(f) The Special Counsel may not issue any advisory opinion concerning any law, rule, or regulation (other than an advisory opinion concerning chapter 15 or subchapter III of chapter 73).

“(g)(1) The Special Counsel may not respond to any inquiry or provide information concerning any person making an allegation under section 1214(a), except in accordance with the provisions of section 552a of title 5, United States Code, or as required by any other applicable Federal law.

“(2) Notwithstanding the exception under paragraph (1), the Special Counsel may not respond to any inquiry concerning a matter described in subparagraph (A) or (B) of section 2302(b)(2) in connection with a person described in paragraph (1)—

“(A) unless the consent of the individual as to whom the information pertains is obtained in advance; or
"(B) except upon request of an agency which requires such information in order to make a determination concerning an individual's having access to the information unauthorized disclosure of which could be expected to cause exceptionally grave damage to the national security.

"§ 1213. Provisions relating to disclosures of violations of law, gross mismanagement, and certain other matters

"(a) This section applies with respect to—
"(1) any disclosure of information by an employee, former employee, or applicant for employment which the employee, former employee, or applicant reasonably believes evidences—
"(A) a violation of any law, rule, or regulation; or
"(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; and

"(2) any disclosure by an employee, former employee, or applicant for employment to the Special Counsel or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures of information which the employee, former employee, or applicant reasonably believes evidences—
"(A) a violation of any law, rule, or regulation; or
"(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

"(b) Whenever the Special Counsel receives information of a type described in subsection (a) of this section, the Special Counsel shall review such information and, within 15 days after receiving the information, determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety.

"(c)(1) Subject to paragraph (2), if the Special Counsel makes a positive determination under subsection (b) of this section, the Special Counsel shall promptly transmit the information with respect to which the determination was made to the appropriate agency head and require that the agency head—
"(A) conduct an investigation with respect to the information and any related matters transmitted by the Special Counsel to the agency head; and
"(B) submit a written report setting forth the findings of the agency head within 60 days after the date on which the information is transmitted to the agency head or within any longer period of time agreed to in writing by the Special Counsel.

"(2) The Special Counsel may require an agency head to conduct an investigation and submit a written report under paragraph (1) only if the information was transmitted to the Special Counsel by—
"(A) an employee, former employee, or applicant for employment in the agency which the information concerns; or
"(B) an employee who obtained the information in connection with the performance of the employee's duties and responsibilities.

"(d) Any report required under subsection (c) shall be reviewed and signed by the head of the agency and shall include—

"(1) a summary of the information with respect to which the investigation was initiated;

"(2) a description of the conduct of the investigation;

"(3) a summary of any evidence obtained from the investigation;

"(4) a listing of any violation or apparent violation of any law, rule, or regulation; and

"(5) a description of any action taken or planned as a result of the investigation, such as—

"(A) changes in agency rules, regulations, or practices;

"(B) the restoration of any aggrieved employee;

"(C) disciplinary action against any employee; and

"(D) referral to the Attorney General of any evidence of a criminal violation.

"(e)(1) Any such report shall be submitted to the Special Counsel, and the Special Counsel shall transmit a copy to the complainant, except as provided under subsection (f) of this section. The complainant may submit comments to the Special Counsel on the agency report within 15 days of having received a copy of the report.

"(2) Upon receipt of any report of the head of an agency required under subsection (c) of this section, the Special Counsel shall review the report and determine whether—

"(A) the findings of the head of the agency appear reasonable; and

"(B) the report of the agency under subsection (c)(1) of this section contains the information required under subsection (d) of this section.

"(3) The Special Counsel shall transmit any agency report received pursuant to subsection (c) of this section, any comments provided by the complainant pursuant to subsection (e)(1), and any appropriate comments or recommendations by the Special Counsel to the President, the congressional committees with jurisdiction over the agency which the disclosure involves, and the Comptroller General.

"(4) Whenever the Special Counsel does not receive the report of the agency within the time prescribed in subsection (c)(2) of this section, the Special Counsel shall transmit a copy of the information which was transmitted to the agency head to the President, the congressional committees with jurisdiction over the agency which the disclosure involves, and the Comptroller General together with a statement noting the failure of the head of the agency to file the required report.

"(f) In any case in which evidence of a criminal violation obtained by an agency in an investigation under subsection (c) of this section is referred to the Attorney General—

"(1) the report shall not be transmitted to the complainant; and

"(2) the agency shall notify the Office of Personnel Management and the Office of Management and Budget of the referral.

"(g)(1) If the Special Counsel receives information of a type described in subsection (a) from an individual other than an individual described in subparagraph (A) or (B) of subsection (c)(2), the Special
Counsel may transmit the information to the head of the agency which the information concerns. The head of such agency shall, within a reasonable time after the information is transmitted, inform the Special Counsel in writing of what action has been or is being taken and when such action shall be completed. The Special Counsel shall inform the individual of the report of the agency head. If the Special Counsel does not transmit the information to the head of the agency, the Special Counsel shall return any documents and other matter provided by the individual who made the disclosure.

"(2) If the Special Counsel receives information of a type described in subsection (a) from an individual described in subparagraph (A) or (B) of subsection (c)(2), but does not make a positive determination under subsection (b), the Special Counsel may transmit the information to the head of the agency which the information concerns, except that the information may not be transmitted to the head of the agency without the consent of the individual. The head of such agency shall, within a reasonable time after the information is transmitted, inform the Special Counsel in writing of what action has been or is being taken and when such action will be completed. The Special Counsel shall inform the individual of the report of the agency head.

"(3) If the Special Counsel does not transmit the information to the head of the agency under paragraph (2), the Special Counsel shall—

"(A) return any documents and other matter provided by the individual who made the disclosure; and

"(B) inform the individual of—

"(i) the reasons why the disclosure may not be further acted on under this chapter; and

"(ii) other offices available for receiving disclosures, should the individual wish to pursue the matter further.

"(h) The identity of any individual who makes a disclosure described in subsection (a) may not be disclosed by the Special Counsel without such individual's consent unless the Special Counsel determines that the disclosure of the individual's identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.

"(i) Except as specifically authorized under this section, the provisions of this section shall not be considered to authorize disclosure of any information by any agency or any person which is—

"(1) specifically prohibited from disclosure by any other provision of law; or

"(2) specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

"(j) With respect to any disclosure of information described in subsection (a) which involves foreign intelligence or counterintelligence information, if the disclosure is specifically prohibited by law or by Executive order, the Special Counsel shall transmit such information to the National Security Advisor, the Permanent Select Committee on Intelligence of the House of Representatives, and the Select Committee on Intelligence of the Senate.

"§ 1214. Investigation of prohibited personnel practices; corrective action

"(a)(1)(A) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to
the extent necessary to determine whether there are reasonable
grounds to believe that a prohibited personnel practice has occurred,
exists, or is to be taken.

(B) Within 15 days after the date of receiving an allegation of a
prohibited personnel practice under paragraph (1), the Special Coun-
sel shall provide written notice to the person who made the allega-
tion that—

(i) the allegation has been received by the Special Counsel; and

(ii) shall include the name of a person at the Office of Special
Counsel who shall serve as a contact with the person making
the allegation.

(C) Unless an investigation is terminated under paragraph (2),
the Special Counsel shall—

(i) within 90 days after notice is provided under subpara-
graph (B), notify the person who made the allegation of the
status of the investigation and any action taken by the Office of
the Special Counsel since the filing of the allegation;

(ii) notify such person of the status of the investigation and
any action taken by the Office of the Special Counsel since the
last notice, at least every 60 days after notice is given under
clause (i); and

(iii) notify such person of the status of the investigation and
any action taken by the Special Counsel at such time as deter-
mined appropriate by the Special Counsel.

(2)(A) If the Special Counsel terminates any investigation under
paragraph (1), the Special Counsel shall prepare and transmit to any
person on whose allegation the investigation was initiated a written
statement notifying the person of—

(i) the termination of the investigation;

(ii) a summary of relevant facts ascertained by the Special
Counsel, including the facts that support, and the facts that do
not support, the allegations of such person; and

(iii) the reasons for terminating the investigation.

(B) A written statement under subparagraph (A) may not be
admissible as evidence in any judicial or administrative proceeding,
without the consent of the person who received such statement
under subparagraph (A).

(3) Except in a case in which an employee, former employee, or
applicant for employment has the right to appeal directly to the
Merit Systems Protection Board under any law, rule, or regulation,
any such employee, former employee, or applicant shall seek correc-
tive action from the Special Counsel before seeking corrective action
from the Board. An employee, former employee, or applicant for
employment may seek corrective action from the Board under sec-
tion 1221, if such employee, former employee, or applicant seeks
corrective action for a prohibited personnel practice described in
section 2302(b)(8) from the Special Counsel and—

(A)(i) the Special Counsel notifies such employee, former
employee, or applicant that an investigation concerning such
employee, former employee, or applicant has been terminated; and

(ii) no more than 60 days have elapsed since notification was
provided to such employee, former employee, or applicant for
employment that such investigation was terminated; or

(B) 120 days after seeking corrective action from the Special
Counsel, such employee, former employee, or applicant has not
been notified by the Special Counsel that the Special Counsel shall seek corrective action on behalf of such employee, former employee, or applicant.

"(4) If an employee, former employee, or applicant seeks a corrective action from the Board under section 1221, pursuant to the provisions of paragraph (3)(B), the Special Counsel may continue to seek corrective action personal to such employee, former employee, or applicant only with the consent of such employee, former employee, or applicant.

"(5) In addition to any authority granted under paragraph (1), the Special Counsel may, in the absence of an allegation, conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a prohibited personnel practice (or a pattern of prohibited personnel practices) has occurred, exists, or is to be taken.

"(b)(1)(A)(i) The Special Counsel may request any member of the Merit Systems Protection Board to order a stay of any personnel action for 45 days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice.

"(iii) Unless denied under clause (ii), any stay under this subparagraph shall be granted within 3 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date of the request for the stay by the Special Counsel.

"(B) The Board may extend the period of any stay granted under subparagraph (A) for any period which the Board considers appropriate.

"(C) The Board shall allow any agency which is the subject of a stay to comment to the Board on any extension of stay proposed under subparagraph (B).

"(D) A stay may be terminated by the Board at any time, except that a stay may not be terminated by the Board—

"(i) on its own motion or on the motion of an agency, unless notice and opportunity for oral or written comments are first provided to the Special Counsel and the individual on whose behalf the stay was ordered; or

"(ii) on motion of the Special Counsel, unless notice and opportunity for oral or written comments are first provided to the individual on whose behalf the stay was ordered.

"(2)(A) If, in connection with any investigation, the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action, the Special Counsel shall report the determination together with any findings or recommendations to the Board, the agency involved and to the Office of Personnel Management, and may report such determination, findings and recommendations to the President. The Special Counsel may include in the report recommendations for corrective action to be taken.

"(B) If, after a reasonable period of time, the agency does not act to correct the prohibited personnel practice, the Special Counsel may petition the Board for corrective action.

"(C) If the Special Counsel finds, in consultation with the individual subject to the prohibited personnel practice, that the agency has
acted to correct the prohibited personnel practice, the Special Counsel shall file such finding with the Board, together with any written comments which the individual may provide.

“(3) Whenever the Special Counsel petitions the Board for corrective action, the Board shall provide an opportunity for—

“(A) oral or written comments by the Special Counsel, the agency involved, and the Office of Personnel Management; and

“(B) written comments by any individual who alleges to be the subject of the prohibited personnel practice.

“(4)(A) The Board shall order such corrective action as the Board considers appropriate, if the Board determines that the Special Counsel has demonstrated that a prohibited personnel practice, other than one described in section 2302(b)(8), has occurred, exists, or is to be taken.

“(B)(i) Subject to the provisions of clause (ii), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the Special Counsel has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against the individual.

“(ii) Corrective action under clause (i) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

“(c)(1) Judicial review of any final order or decision of the Board under this section may be obtained by any employee, former employee, or applicant for employment adversely affected by such order or decision.

“(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

“(d)(1) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that a criminal violation has occurred, the Special Counsel shall report the determination to the Attorney General and to the head of the agency involved, and shall submit a copy of the report to the Director of the Office of Personnel Management and the Director of the Office of Management and Budget.

“(2) In any case in which the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, the Special Counsel shall proceed with any investigation or proceeding unless—

“(A) the alleged violation has been reported to the Attorney General; and

“(B) the Attorney General is pursuing an investigation, in which case the Special Counsel, after consultation with the Attorney General, has discretion as to whether to proceed.

“(e) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred other than one referred to in subsection (b) or (d), the Special Counsel shall report such violation to the head of the agency involved. The Special Counsel shall require, within 30 days after the receipt of the report by the agency, a certification by the head of the agency which states—
“(1) that the head of the agency has personally reviewed the report; and
“(2) what action has been or is to be taken, and when the action will be completed.
“(f) During any investigation initiated under this subchapter, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel.

§ 1215. Disciplinary action

“(a)(1) Except as provided in subsection (b), if the Special Counsel determines that disciplinary action should be taken against any employee for having—
“(A) committed a prohibited personnel practice,
“(B) violated the provisions of any law, rule, or regulation, or engaged in any other conduct within the jurisdiction of the Special Counsel as described in section 1216, or
“(C) knowingly and willfully refused or failed to comply with an order of the Merit Systems Protection Board, the Special Counsel shall prepare a written complaint against the employee containing the Special Counsel’s determination, together with a statement of supporting facts, and present the complaint and statement to the employee and the Board, in accordance with this subsection.
“(2) Any employee against whom a complaint has been presented to the Merit Systems Protection Board under paragraph (1) is entitled to—
“(A) a reasonable time to answer orally and in writing, and to furnish affidavits and other documentary evidence in support of the answer;
“(B) be represented by an attorney or other representative;
“(C) a hearing before the Board or an administrative law judge appointed under section 3105 and designated by the Board;
“(D) have a transcript kept of any hearing under subparagraph (C); and
“(E) a written decision and reasons therefor at the earliest practicable date, including a copy of any final order imposing disciplinary action.
“(3) A final order of the Board may impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000.
“(4) There may be no administrative appeal from an order of the Board. An employee subject to a final order imposing disciplinary action under this subsection may obtain judicial review of the order by filing a petition therefor with such court, and within such time, as provided for under section 7703(b).
“(5) In the case of any State or local officer or employee under chapter 15, the Board shall consider the case in accordance with the provisions of such chapter.
“(b) In the case of an employee in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate (other than an individual in the Foreign Service of the United States), the complaint and statement referred to in subsection (a)(1), together with any response of the employee, shall be presented to the Presi-
dent for appropriate action in lieu of being presented under subsection (a).

"(c)(1) In the case of members of the uniformed services and individuals employed by any person under contract with an agency to provide goods or services, the Special Counsel may transmit recommendations for disciplinary or other appropriate action (including the evidence on which such recommendations are based) to the head of the agency concerned.

"(2) In any case in which the Special Counsel transmits recommendations to an agency head under paragraph (1), the agency head shall, within 60 days after receiving such recommendations, transmit a report to the Special Counsel on each recommendation and the action taken, or proposed to be taken, with respect to each such recommendation.

"§ 1216. Other matters within the jurisdiction of the Office of Special Counsel

"(a) In addition to the authority otherwise provided in this chapter, the Special Counsel shall, except as provided in subsection (b), conduct an investigation of any allegation concerning—

"(1) political activity prohibited under subchapter III of chapter 73, relating to political activities by Federal employees;

"(2) political activity prohibited under chapter 15, relating to political activities by certain State and local officers and employees;

"(3) arbitrary or capricious withholding of information prohibited under section 552, except that the Special Counsel shall make no investigation of any withholding of foreign intelligence or counterintelligence information the disclosure of which is specifically prohibited by law or by Executive order;

"(4) activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decisionmaking; and

"(5) involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action.

"(b) The Special Counsel shall make no investigation of any allegation of any prohibited activity referred to in subsection (a)(5), if the Special Counsel determines that the allegation may be resolved more appropriately under an administrative appeals procedure.

"(c)(1) If an investigation by the Special Counsel under subsection (a)(1) substantiates an allegation relating to any activity prohibited under section 7324, the Special Counsel may petition the Merit Systems Protection Board for any penalties provided for under section 7325.

"(2) If the Special Counsel receives an allegation concerning any matter under paragraph (3), (4), or (5) of subsection (a), the Special Counsel may investigate and seek corrective action under section 1214 in the same way as if a prohibited personnel practice were involved.

"§ 1217. Transmittal of information to Congress

"The Special Counsel or any employee of the Special Counsel designated by the Special Counsel, shall transmit to the Congress on the request of any committee or subcommittee thereof, by report, testimony, or otherwise, information and the Special Counsel's
views on functions, responsibilities, or other matters relating to the Office. Such information shall be transmitted concurrently to the President and any other appropriate agency in the executive branch.

"§ 1218. Annual report

"The Special Counsel shall submit an annual report to the Congress on the activities of the Special Counsel, including the number, types, and disposition of allegations of prohibited personnel practices filed with it, investigations conducted by it, and actions initiated by it before the Merit Systems Protection Board, as well as a description of the recommendations and reports made by it to other agencies pursuant to this subchapter, and the actions taken by the agencies as a result of the reports or recommendations. The report required by this section shall include whatever recommendations for legislation or other action by Congress the Special Counsel may consider appropriate.

"§ 1219. Public information

"(a) The Special Counsel shall maintain and make available to the public—

"(1) a list of noncriminal matters referred to heads of agencies under subsection (c) of section 1213, together with reports from heads of agencies under subsection (c)(1)(B) of such section relating to such matters;

"(2) a list of matters referred to heads of agencies under section 1215(c)(2);

"(3) a list of matters referred to heads of agencies under subsection (e) of section 1214, together with certifications from heads of agencies under such subsection; and

"(4) reports from heads of agencies under section 1213(g)(1).

"(b) The Special Counsel shall take steps to ensure that any list or report made available to the public under this section does not contain any information the disclosure of which is prohibited by law or by Executive order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs.

"SUBCHAPTER III—INDIVIDUAL RIGHT OF ACTION IN CERTAIN REPRISAL CASES

"§ 1221. Individual right of action in certain reprisal cases

"(a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8), seek corrective action from the Merit Systems Protection Board.

"(b) This section may not be construed to prohibit any employee, former employee, or applicant for employment from seeking corrective action from the Merit Systems Protection Board before seeking corrective action from the Special Counsel, if such employee, former employee, or applicant for employment has the right to appeal directly to the Board under any law, rule, or regulation.
“(c)(1) Any employee, former employee, or applicant for employment seeking corrective action under subsection (a) may request that the Board order a stay of the personnel action involved.

“(2) Any stay requested under paragraph (1) shall be granted within 10 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date the request is made, if the Board determines that such a stay would be appropriate.

“(3)(A) The Board shall allow any agency which would be subject to a stay under this subsection to comment to the Board on such stay request.

“(B) Except as provided in subparagraph (C), a stay granted under this subsection shall remain in effect for such period as the Board determines to be appropriate.

“(C) The Board may modify or dissolve a stay under this subsection at any time, if the Board determines that such a modification or dissolution is appropriate.

“(d)(1) At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (a), the Board may issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that such subpoena is necessary for the development of relevant evidence.

“(2) A subpoena under this subsection may be issued, and shall be enforced, in the same manner as applies in the case of subpoenas under section 1204.

“(e)(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant.

“(2) Corrective action under paragraph (1) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

“(f)(1) A final order or decision shall be rendered by the Board as soon as practicable after the commencement of any proceeding under this section.

“(2) A decision to terminate an investigation under subchapter II may not be considered in any action or other proceeding under this section.

“(g)(1) If an employee, former employee, or applicant for employment is the prevailing party before the Merit Systems Protection Board, and the decision is based on a finding of a prohibited personnel practice, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney’s fees and any other reasonable costs incurred.

“(2) If an employee, former employee, or applicant for employment is the prevailing party in an appeal from the Merit Systems Protection Board, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney’s fees and any other reasonable costs incurred, regardless of the basis of the decision.

“(h)(1) An employee, former employee, or applicant for employment adversely affected or aggrieved by a final order or decision of
the Board under this section may obtain judicial review of the order or decision.

"(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

"(i) Subsections (a) through (h) shall apply in any proceeding brought under section 7513(d) if, or to the extent that, a prohibited personnel practice as defined in section 2302(b)(3) is alleged.

"(j) In determining the appealability of any case involving an allegation made by an individual under the provisions of this chapter, neither the status of an individual under any retirement system established under a Federal statute nor any election made by such individual under any such system may be taken into account.

"§ 1222. Availability of other remedies

"Except as provided in section 1221(i), nothing in this chapter or chapter 23 shall be construed to limit any right or remedy available under a provision of statute which is outside of both this chapter and chapter 23.”.

(b) CONFORMING AMENDMENTS.—(1) The table of chapters for part II of title 5, United States Code, is amended by striking the item relating to chapter 12 and inserting in lieu thereof the following:

"12. Merit Systems Protection Board, Office of Special Counsel, and Individual Right of Action 1201”.

(2) The heading for chapter 12 of title 5, United States Code, is amended to read as follows:

"CHAPTER 12—MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION”.

(3) The table of sections for chapter 12 of title 5, United States Code, is amended to read as follows:

"SUBCHAPTER I—MERIT SYSTEMS PROTECTION BOARD

"Sec. 1201. Appointment of members of the Merit Systems Protection Board.
"Sec. 1202. Term of office; filling vacancies; removal.
"Sec. 1203. Chairman; Vice Chairman.
"Sec. 1204. Powers and functions of the Merit Systems Protection Board.
"Sec. 1205. Transmittal of information to Congress.
"Sec. 1206. Annual report.

"SUBCHAPTER II—OFFICE OF SPECIAL COUNSEL

"Sec. 1211. Establishment.
"Sec. 1212. Powers and functions of the Office of Special Counsel.
"Sec. 1213. Provisions relating to disclosures of violations of law, mismanagement, and certain other matters.
"Sec. 1214. Investigation of prohibited personnel practices; corrective action.
"Sec. 1215. Disciplinary action.
"Sec. 1216. Other matters within the jurisdiction of the Office of Special Counsel.
"Sec. 1217. Transmittal of information to Congress.
"Sec. 1218. Annual report.
"Sec. 1219. Public information.

"SUBCHAPTER III—INDIVIDUAL RIGHT OF ACTION IN CERTAIN REPRISAL CASES

"Sec. 1221. Individual right of action in certain reprisal cases.
"Sec. 1222. Availability of other remedies.”.

(4) Chapter 12 of title 5, United States Code, is further amended by inserting before section 1201 the following subchapter heading:
SEC. 4. REPRISALS.

(a) Amendments to Section 2302(b)(8).—Section 2302(b)(8) of title 5, United States Code, is amended—

(1) by inserting "or threaten to take or fail to take," after "take or fail to take";
(2) by striking out "as a reprisal for" and inserting in lieu thereof "because of";
(3) in subparagraph (A) by striking out "a disclosure" and inserting in lieu thereof "any disclosure";
(4) in subparagraph (A)(ii) by inserting "gross" before "mismanagement";
(5) in subparagraph (B) by striking out "a disclosure" and inserting in lieu thereof "any disclosure"; and
(6) in subparagraph (B)(ii) by inserting "gross" before "mismanagement".

(b) Amendment to Section 2302(b)(9).—Section 2302(b)(9) of title 5, United States Code, is amended to read as follows:

"(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;
(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);
(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or
(D) for refusing to obey an order that would require the individual to violate a law;"

SEC. 5. PREFERENCE IN TRANSFERS FOR WHISTLEBLOWERS.

(a) In General.—Subchapter IV of chapter 33 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"§ 3352. Preference in transfers for employees making certain disclosures

"(a) Subject to the provisions of subsections (d) and (e), in filling a position within any Executive agency, the head of such agency may give preference to any employee of such agency, or any other Executive agency, to transfer to a position of the same status and tenure as the position of such employee on the date of applying for a transfer under subsection (b) if—

(1) such employee is otherwise qualified for such position;
(2) such employee is eligible for appointment to such position; and
(3) the Merit Systems Protection Board makes a determination under the provisions of chapter 12 that a prohibited personnel action described under section 2302(b)(8) was taken against such employee.

(b) An employee who meets the conditions described under subsection (a) (1), (2), and (3) may voluntarily apply for a transfer to a position, as described in subsection (a), within the Executive agency employing such employee or any other Executive agency.
“(c) If an employee applies for a transfer under the provisions of subsection (b) and the selecting official rejects such application, the selecting official shall provide the employee with a written notification of the reasons for the rejection within 30 days after receiving such application.

“(d) An employee whose application for transfer is rejected under the provisions of subsection (c) may request the head of such agency to review the rejection. Such request for review shall be submitted to the head of the agency within 30 days after the employee receives notification under subsection (c). Within 30 days after receiving a request for review, the head of the agency shall complete the review and provide a written statement of findings to the employee and the Merit Systems Protection Board.

“(e) The provisions of subsection (a) shall apply with regard to any employee—

“(1) for no more than 1 transfer;

“(2) for a transfer from or within the agency such employee is employed at the time of a determination by the Merit Systems Protection Board that a prohibited personnel action as described under section 2302(b)(8) was taken against such employee; and

“(3) no later than 18 months after such a determination is made by the Merit Systems Protection Board.

“(f) Notwithstanding the provisions of subsection (a), no preference may be given to any employee applying for a transfer under subsection (b), with respect to a preference eligible (as defined under section 2108(3)) applying for the same position.”

(b) TECHNICAL AMENDMENT.—The table of sections for chapter 33 of title 5, United States Code, is amended by inserting after the item relating to section 3351 the following:

“3352. Preference in transfers for employees making certain disclosures.”

SEC. 6. INTERIM RELIEF.

Section 7701 of title 5, United States Code, is amended—

(1) by redesignating subsection (b) as paragraph (1) of subsection (b); and

(2) by adding at the end thereof the following new paragraph:

“(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless—

“(i) the deciding official determines that the granting of such relief is not appropriate; or

“(ii) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

“(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

“(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of
employment during the period pending the outcome of any petition for review under subsection (e).

“(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.”

SEC. 7. SAVINGS PROVISIONS.

(a) ORDERS, RULES, AND REGULATIONS.—All orders, rules, and regulations issued by the Merit Systems Protection Board or the Special Counsel before the effective date of this Act shall continue in effect, according to their terms, until modified, terminated, superseded, or repealed.

(b) ADMINISTRATIVE PROCEEDINGS.—No provision of this Act shall affect any administrative proceeding pending at the time such provisions take effect. Orders shall be issued in such proceedings, and appeals shall be taken therefrom, as if this Act had not been enacted.

(c) SUITS AND OTHER PROCEEDINGS.—No suit, action, or other proceeding lawfully commenced by or against the members of the Merit Systems Protection Board, the Special Counsel, or officers or employees thereof, in their official capacity or in relation to the discharge of their official duties, as in effect immediately before the effective date of this Act, shall abate by reason of the enactment of this Act. Determinations with respect to any such suit, action, or other proceeding shall be made as if this Act had not been enacted.

SEC. 8. AUTHORIZATION OF APPROPRIATIONS; RESTRICTION RELATING TO APPROPRIATIONS UNDER THE CIVIL SERVICE REFORM ACT OF 1978; TRANSFER OF FUNDS.

(a) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated—

(1) for each of fiscal years 1989, 1990, 1991, 1992, 1993, and 1994, such sums as necessary to carry out subchapter I of chapter 12 of title 5, United States Code (as amended by this Act); and

(2) for each of fiscal years 1989, 1990, 1991, and 1992, such sums as necessary to carry out subchapter II of chapter 12 of title 5, United States Code (as amended by this Act).

(b) RESTRICTION RELATING TO APPROPRIATIONS UNDER THE CIVIL SERVICE REFORM ACT OF 1978.—No funds may be appropriated to the Merit Systems Protection Board or the Office of Special Counsel pursuant to section 903 of the Civil Service Reform Act of 1978 (5 U.S.C. 5509 note).

(c) TRANSFER OF FUNDS.—The personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available or to be made available to the Special Counsel of the Merit Systems Protection Board are, subject to section 1581 of title 31, United States Code, transferred to the Special Counsel referred to in section 1211 of title 5, United States Code (as added by section 3(a) of this Act), for appropriate allocation.

SEC. 9. TECHNICAL AND CONFORMING AMENDMENTS.

(a)(1) Section 2303(c) of title 5, United States Code, is amended by striking “the provisions of section 1206” and inserting “applicable provisions of sections 1214 and 1221”.

5 USC 1201 note.

5 USC 5509 note.

5 USC 1211 note.
(2) Sections 7502, 7512(E), 7521(b)(C), and 7542 of title 5, United States Code, are amended by striking “1206” and inserting “1215”.

(3) Section 1109(a) of the Foreign Service Act of 1980 (22 U.S.C. 4139(a)) is amended by striking “1206” and inserting “1214 or 1221”.

(b) Section 3393(g) of title 5, United States Code, is amended by striking “1207” and inserting “1215”.

SEC. 10. BOARD RESPONDENT.

Section 7703(a)(2) of title 5, United States Code, is amended to read as follows:

“(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.”

SEC. 11. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect 90 days following the date of enactment of this Act.

Approved April 10, 1989.
Public Law 103–424
103d Congress

An Act

To reauthorize the Office of Special Counsel, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. AUTHORIZATION OF APPROPRIATIONS.


SEC. 2. REASONABLE ATTORNEY FEES IN CERTAIN CASES.

Section 1204 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

“(m)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case arising under section 1215, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

“(2) If an employee or applicant for employment is the prevailing party of a case arising under section 1215 and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(k)).”.

SEC. 3. OFFICE OF SPECIAL COUNSEL.

(a) SUCCESSION.—Section 1211(b) of title 5, United States Code, is amended by inserting after the first sentence: “The Special Counsel may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that the Special Counsel may not continue to serve for more than one year after
the date on which the term of the Special Counsel would otherwise expire under this subsection.

(b) LIMITATIONS ON DISCLOSURES.—Section 1212(g) of title 5, United States Code, is amended—

(1) in paragraph (1), by striking out "provide information concerning" and inserting in lieu thereof "disclose any information from or about"; and

(2) in paragraph (2), by striking out "a matter described in subparagraph (A) or (B) of section 2302(b)(2) in connection with a" and inserting in lieu thereof "an evaluation of the work performance, ability, aptitude, general qualifications, character, loyalty, or suitability for any personnel action of any"

(c) STATUS REPORT BEFORE TERMINATION OF INVESTIGATION.— Section 1214(a) of title 5, United States Code, is amended—

(1) in paragraph (1) by adding at the end thereof the following new subparagraph:

"(D) No later than 10 days before the Special Counsel terminates any investigation of a prohibited personnel practice, the Special Counsel shall provide a written status report to the person who made the allegation of the proposed findings of fact and legal conclusions. The person may submit written comments about the report to the Special Counsel. The Special Counsel shall not be required to provide a subsequent written status report under this subparagraph after the submission of such written comments.”;

and

(2) in paragraph (2)(A)—

(A) in clause (ii) by striking out "and" after the semicolon;

(B) in clause (iii) by striking out the period and inserting in lieu thereof a semicolon and "and"; and

(C) by adding at the end thereof the following new clause:

"(iv) a response to any comments submitted under paragraph (1)(D)."

(d) DETERMINATIONS.—Section 1214(b)(2) of title 5, United States Code, is amended—

(1) by redesignating subparagraphs (A), (B) and (C) as subparagraphs (B), (C) and (D), respectively;

(2) by inserting before subparagraph (B) (as redesignated by paragraph (1) of this subsection) the following:

"(A)(i) Except as provided under clause (ii), no later than 240 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel shall make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

"(ii) If the Special Counsel is unable to make the required determination within the 240-day period specified under clause (i) and the person submitting the allegation of a prohibited personnel practice agrees to an extension of time, the determination shall be made within such additional period of time as shall be agreed upon between the Special Counsel and the person submitting the allegation."; and
(3) by inserting after subparagraph (D) (as redesignated by paragraph (1) of this subsection) the following new subparagraph:

“(E) A determination by the Special Counsel under this paragraph shall not be cited or referred to in any proceeding under this paragraph or any other administrative or judicial proceeding for any purpose, without the consent of the person submitting the allegation of a prohibited personnel practice.”.

(e) REPORTS.—Section 1218 of title 5, United States Code, is amended by inserting "cases in which it did not make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken within the 240-day period specified in section 1214(b)(2)(A)(i)," after "investigations conducted by it, ".

SEC. 4. INDEPENDENT RIGHT OF ACTION.

(a) SUBPOENAS.—Section 1221(d) of title 5, United States Code, is amended by striking out paragraph (1) and inserting in lieu thereof the following:

“(1) At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (a), the Board shall issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that the testimony or production requested is not unduly burdensome and appears reasonably calculated to lead to the discovery of admissible evidence.”.

(b) CORRECTIVE ACTIONS.—Section 1221(e)(1) is amended by adding after the last sentence: "The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—

“A) the official taking the personnel action knew of the disclosure; and

“B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.”.

(c) REFERRALS.—Section 1221(f) of title 5, United States Code, is amended by adding after paragraph (2) the following new paragraph:

“(3) If, based on evidence presented to it under this section, the Merit Systems Protection Board determines that there is reason to believe that a current employee may have committed a prohibited personnel practice, the Board shall refer the matter to the Special Counsel to investigate and take appropriate action under section 1215.”.

SEC. 5. PROHIBITED PERSONNEL PRACTICES.

(a) PERSONNEL ACTIONS.—Section 2302(a)(2)(A) of title 5, United States Code, is amended—

(1) in clause (ix) by striking out “and” after the semicolon;

(2) by striking out clause (x) and inserting in lieu thereof the following:

“(x) a decision to order psychiatric testing or examination; and

“(xi) any other significant change in duties, responsibilities, or working conditions;”; and

5 USC 1221.
(3) in the matter following designated clause (xi) (as added by paragraph (2) of this subsection) by inserting before the semicolon the following: "and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31."

(b) COVERED POSITIONS.—Section 2302(a)(2)(B) of title 5, United States Code, is amended to read as follows:

"(B) 'covered position' means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action—

"(i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

"(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration; and"

(c) AGENCIES.—Section 2302(a)(2)(C) of title 5, United States Code, is amended in clause (i) by inserting before the semicolon: "except in the case of an alleged prohibited personnel practice described under subsection (b)(8)"

(d) INFORMATIONAL PROGRAM.—Section 2302(c) of title 5, United States Code, is amended in the first sentence by inserting before the period "and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title"

SEC. 6. PERFORMANCE APPRAISALS.

Section 4313(5) of title 5, United States Code, is amended to read as follows:

"(5) meeting affirmative action goals, achievement of equal employment opportunity requirements, and compliance with the merit systems principles set forth under section 2301 of this title."

SEC. 7. MERIT SYSTEMS APPLICATION TO CERTAIN VETERANS AFFAIRS PERSONNEL.

Section 2105 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

"(f) For purposes of sections 1212, 1213, 1214, 1215, 1216, 1221, 1222, 2302, and 7701, employees appointed under chapter 73 or 74 of title 33 shall be employees."

SEC. 8. CORRECTIVE ACTIONS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD.

(a) IN GENERAL.—Section 1214 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

"(g) If the Board orders corrective action under this section, such corrective action may include—

"(1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and
“(2) reimbursement for attorney’s fees, back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages.”.

(b) CERTAIN REPRISAL CASES.—Section 1221(g) of title 5, United States Code (as amended by section 4(d) of this Act), is further amended—

(1) by redesignating paragraphs (1) and (2) as paragraphs (2) and (3), respectively; and

(2) by inserting before paragraph (2) (as redesignated by paragraph (1) of this subsection) the following new paragraph:

“(1)(A) If the Board orders corrective action under this section, such corrective action may include—

“(i) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

“(ii) back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential changes.

“(B) Corrective action shall include attorney’s fees and costs as provided for under paragraphs (2) and (3).”.

SEC. 9. AUTHORITY RELATING TO ARBITRATORS AND CHOICE OF REMEDIES NOT INVOLVING JUDICIAL REVIEW.

(a) AUTHORITY WHICH MAY BE EXTENDED TO ARBITRATORS.—

Section 7121(b) of title 5, United States Code, is amended—

(1) by redesignating subparagraphs (A) through (C) of paragraph (3) as clauses (i) through (iii), respectively;

(2) by redesignating paragraphs (1) through (3) as subparagraphs (A) through (C), respectively;

(3) by striking “(b)” and inserting “(b)(1)”;

(4) by adding at the end the following:

“(2)(A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order—

“(i) a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board; and

“(ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.

“(B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.”.

(b) CHOICE OF REMEDIES PROVISION NOT INVOLVING JUDICIAL REVIEW.—Section 7121 of title 5, United States Code, is amended by adding at the end the following:

“(g)(1) This subsection applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which subsection (d) applies.

“(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described in paragraph (3) with respect thereto. For purposes of the preceding sentence, a determination as to whether a particular remedy has been elected shall be made as set forth under paragraph (4).
"(3) The remedies described in this paragraph are as follows:

"(A) An appeal to the Merit Systems Protection Board under section 7701.

"(B) A negotiated grievance procedure under this section.

"(C) Procedures for seeking corrective action under sub-chapters II and III of chapter 12.

"(4) For the purpose of this subsection, a person shall be considered to have elected—

"(A) the remedy described in paragraph (3)(A) if such person has timely filed a notice of appeal under the applicable appellate procedures;

"(B) the remedy described in paragraph (3)(B) if such person has timely filed a grievance in writing, in accordance with the provisions of the parties’ negotiated procedure; or

"(C) the remedy described in paragraph (3)(C) if such person has sought corrective action from the Office of Special Counsel by making an allegation under section 1214(a)(1)."

(c) TECHNICAL AND CONFORMING AMENDMENTS.—Section 7121(a)(1) of title 5, United States Code, is amended—

(1) by striking “(d) and (e)” and inserting “(d), (e), and (g)”;

(2) by inserting “administrative” after “exclusive”.

SEC. 10. EXPENSES RELATED TO FEDERAL RETIREMENT APPEALS.

Section 8348(a) of title 5, United States Code, is amended—

(1) in paragraph (1)(B) by striking out “and” at the end thereof;

(2) in paragraph (2) by striking out the period and inserting in lieu thereof a semicolon and “and”; and

(3) by adding at the end thereof the following new paragraph:

“(3) is made available, subject to such annual limitation as the Congress may prescribe, for any expenses incurred by the Merit Systems Protection Board in the administration of appeals authorized under sections 8347(d) and 8461(e) of this title.”.

SEC. 11. ELECTION OF APPLICATION OF LAWS BY EMPLOYEES OF THE RESOLUTION TRUST CORPORATION AND THRIFT DEPOSITOR PROTECTION OVERSIGHT BOARD.

(a) ELECTION OF PROVISIONS OF TITLE 5, UNITED STATES CODE.—If an individual who believes he has been discharged or discriminated against in violation of section 21a(q)(1) of the Federal Home Loan Bank Act (12 U.S.C. 1441a(q)(1)) seeks an administrative corrective action or judicial remedy for such violation under the provisions of chapters 12 and 23 of title 5, United States Code, the provisions of section 21a(q) of such Act shall not apply to such alleged violation.

(b) ELECTION OF PROVISIONS OF FEDERAL HOME LOAN BANK ACT.—If an individual files a civil action under section 21a(q)(2) of the Federal Home Loan Bank Act (12 U.S.C. 1441a(q)(2)), the provisions of chapters 12 and 23 of title 5, United States Code, shall not apply to any alleged violation of section 21a(q)(1) of such Act.

SEC. 12. IMPLEMENTATION.

(a) POLICY STATEMENT.—No later than 6 months after the date of enactment of this Act, the Special Counsel shall issue
a policy statement regarding the implementation of the Whistleblower Protection Act of 1989. Such policy statement shall be made available to each person alleging a prohibited personnel practice described under section 2302(b)(8) of title 5, United States Code, and shall include detailed guidelines identifying specific categories of information that may (or may not) be communicated to agency officials for an investigative purpose, or for the purpose of obtaining corrective action under section 1214 of title 5, United States Code, or disciplinary action under section 1215 of such title, the circumstances under which such information is likely to be disclosed, and whether or not the consent of any person is required in advance of any such communication.

(b) TERMINATION STATEMENT.—The Special Counsel shall include in any letter terminating an investigation under section 1214(a)(2) of title 5, United States Code, the name and telephone number of an employee of the Special Counsel who is available to respond to reasonable questions from the person regarding the investigation or review conducted by the Special Counsel, the relevant facts ascertained by the Special Counsel, and the law applicable to the person's allegations.

SEC. 13. ANNUAL SURVEY OF INDIVIDUALS SEEKING ASSISTANCE.

(a) IN GENERAL.—The Office of Special Counsel shall, after consulting with the Office of Policy and Evaluation of the Merit Systems Protection Board, conduct an annual survey of all individuals who contact the Office of Special Counsel for assistance. The survey shall—

(1) determine if the individual seeking assistance was fully apprised of their rights;

(2) determine whether the individual was successful either at the Office of Special Counsel or the Merit Systems Protection Board; and

(3) determine if the individual, whether successful or not, was satisfied with the treatment received from the Office of Special Counsel.

(b) REPORT.—The results of the survey conducted under subsection (a) shall be published in the annual report of the Office of Special Counsel.
SEC. 14. EFFECTIVE DATE.

The provisions of this Act and the amendments made by this Act shall be effective on and after the date of the enactment of this Act.


LEGISLATIVE HISTORY—H.R. 2970 (S. 622):

HOUSE REPORTS: No. 103-769 (Comm. on Post Office and Civil Service).
SENATE REPORTS: No. 103-358 accompanying S. 622 (Comm. on Governmental Affairs).

Oct. 3, considered and passed House. S. 622 considered and passed Senate.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 30 (1994):
Oct. 29, Presidential statement.