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# THE DODD-FRANK ACT: TARP BAILOUT BACKLASH AND TOO BIG TO FAIL

LISSA LAMKIN BROOME\*

## I. INTRODUCTION

In the pages of this journal two years ago, I wrote about “Extraordinary Government Intervention to Bolster Bank Balance Sheets.”<sup>1</sup> One component of this intervention was the Troubled Asset Relief Program (TARP) created by the Emergency Economic Stabilization Act of 2008.<sup>2</sup> Although TARP may have saved the United States economy from a lengthy depression, it was perceived by many as a “bailout” of the banks whose own greed had precipitated the financial crisis. A number of institutions received TARP funds, but two – Citigroup and Bank of America – were identified as “systemically significant” and received additional equity infusions and other extraordinary aid from the government. As I noted then, “systemically significant” had become a “thinly veiled code-name for institutions that are ‘too big to fail.’”<sup>3</sup> There were significant concerns that the government’s intervention created moral hazard and that risk-taking of financial institutions would remain unchecked if the market believed that the government would intervene if necessary to prevent the failure of the largest financial institutions.

On July 21, 2010, President Obama signed the massive Dodd-Frank Wall Street Reform and Consumer Protection Act of

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1. Lissa L. Broome, *Extraordinary Government Intervention to Bolster Bank Balance Sheets*, 13 N.C. BANKING INST. 137 (2009) [hereinafter *Extraordinary Intervention*]. See also Lissa L. Broome, *Government Investment in Banks: Creeping Nationalization or Prudent, Temporary Aid?*, 4 FIU L. REV. 409 (2009) [hereinafter *Government Investment*].

2. Emergency Economic Stabilization Act of 2008 § 101, 12 U.S.C.A. § 5211 (West 2009).

3. Broome, *Extraordinary Intervention*, *supra* note 1, at 153.

2010 (Dodd-Frank).<sup>4</sup> This essay will describe how Dodd-Frank responds to TARP and attempts to change the phrase “too big to fail” to “too big, will fail.” The centerpiece of Dodd-Frank is the creation of the Financial Stability Oversight Council (FSOC) as the new systemic risk regulator, with the authority to identify systemically significant institutions, subject them to additional prudential regulation by the Federal Reserve Board, and to mandate an orderly liquidation without the possibility of reorganization in the event they are not able to remain solvent on their own. Whether this new regime will ever be used and whether it will incentivize bank and nonbank financial institutions to reduce their size and complexity so they will not become subject to it, of course, remain to be seen.

## II. OVERVIEW OF TARP

After the numerous financial calamities of September 2008,<sup>5</sup> Congress enacted the Emergency Economic Stabilization Act of 2008 (EESA) on October 3, 2008.<sup>6</sup> A centerpiece of EESA was the authorization of up to \$700 billion to fund TARP. What often gets lost in this very large number is that only \$245 billion of this sum (still a huge number) was actually used for government investments in the preferred stock of banks and bank holding companies.<sup>7</sup> Of that \$245 billion, \$204.9 billion was expended to

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4. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of U.S.C.).

5. During September 2008, Fannie Mae and Freddie Mac were placed in government conservatorship, Merrill Lynch was taken over by Bank of America, Lehman Brothers entered bankruptcy with the Fed declining to provide it assistance similar to that extended to assist JP Morgan Chase in a takeover of Bear Stearns the prior spring, AIG was taken over by the government, the net asset value of the money market mutual fund Reserve Primary Fund fell below \$1 per share, and the government contemplated providing assistance to Citigroup to purchase Wachovia bank – the fourth largest banking institution in the U.S. at the time – as it bordered on insolvency. See Federal Reserve Bank of St. Louis, *The Financial Crisis: A Timeline of Events and Policy Actions*, <http://timeline.stlouisfed.org/> (last visited Feb. 7, 2011).

6. Pub. L. No. 110-343, 122 Stat. 3767 (2008) (to be codified in scattered sections of U.S.C.).

7. Of the \$700 billion initially authorized by Congress for this program, only \$474.8 billion had been obligated as of October 3, 2010, and no further obligations could be incurred with TARP funds after the two-year anniversary of EESA. SIGTARP, QUARTERLY REPORT TO CONGRESS 43 (Oct. 26, 2010)[hereinafter

buy preferred stock in banks under the Capital Purchase Program (CPP).<sup>8</sup> The Treasury determined that the maximum that could be invested in any one institution under the CPP would be \$25 billion.<sup>9</sup> Nine of the largest financial institutions received the lion's share of the initial CPP funds, \$125 billion,<sup>10</sup> even though Jamie Dimon, the CEO of one of those recipients – JPMorgan Chase – was reported to say, “we didn’t ask for it, didn’t want it, and didn’t need it.”<sup>11</sup> Nevertheless, government authorities wanted the largest institutions to participate in the program so that there would be no stigma attached to accepting the funds for the banks that did need the additional capital to maintain solvency and liquidity.<sup>12</sup>

It didn’t take long, however, for Citigroup to find itself in need of additional equity. On November 23, 2008, Citigroup was granted an additional \$20 billion in funding under the newly created Targeted Investment Program (TIP). This “program” had one participant until Citigroup was joined by Bank of America on January 16, 2009. Bank of America also received an additional \$20 billion to assist it with unexpected losses resulting from its acquisition of Merrill Lynch.<sup>13</sup> The government’s total investment in each institution of \$45 billion gave it a very significant ownership percentage in each.<sup>14</sup>

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SIGTARP ]. Of the \$475 billion, \$250 billion was the maximum allocated to investments in bank capital, with \$245 billion of that sum actually spent. OFFICE OF FINANCIAL STABILITY, TROUBLED ASSET RELIEF PROGRAM: TWO YEAR RETROSPECTIVE i (Oct. 2010) [hereinafter OFFICE OF FINANCIAL STABILITY].

8. SIGTARP, *supra* note 7.

9. U.S. TREAS. DEPT., PROGRAM DESCRIPTIONS, CAPITAL PURCHASE PROGRAM 1-2 (Jan. 2009).

10. Citigroup (\$25 billion), JPMorgan Chase & Co. (\$25 billion), Wells Fargo & Company (\$25 billion), Bank of America Corporation (\$15 billion plus \$10 billion from Merrill Lynch), The Goldman Sachs Group, Inc. (\$10 billion), Morgan Stanley (\$10 billion), The Bank of New York Mellon Corporation (\$3 billion), State Street Corporation (\$2 billion). U.S. TREAS. DEPT., TROUBLED ASSET RELIEF PROGRAM (TARP) MONTHLY 105(a) – REPORT – DECEMBER 2010 App. 2 (Jan. 2011).

11. Interview by Erin Burnett, CNBC *Street Signs*, with Jamie Dimon, Chairman and CEO, JPMorgan Chase (Dec. 11, 2008).

12. Mike Ferullo, *Credit Markets: Industry Group, Lawmakers Welcome Treasury Plan to Purchase Equity in Banks*, 91 BNA BANKING REP. 644 (Oct. 20, 2008).

13. See *Extraordinary Intervention*, *supra* note 1, at 142.

14. *Id.* at 153-54.

TARP recipients were not required to use TARP funds for any particular purpose, although many hoped that the additional capital would be used by the recipients to support new lending that would help ease the credit crunch which had stalled the economy. Some TARP recipients found the conditions attached to TARP funding to be onerous, leading them to seek to repay the government as soon as feasible. These conditions included quarterly dividend payments to the government of five percent per year (with the TIP dividend at eight percent per year), dividends that could be paid to common stockholders limited to one cent per quarter, and restrictions on executive compensation. The latter restriction seemingly provided the most powerful incentive to get out from under the TARP funding regime. As a result, as of September 30, 2010, \$192 billion of the \$245 billion in TARP bank stock investments, or 78% of the total, had been repaid.<sup>15</sup> This includes the Citigroup and Bank of America CPP and TIP preferred stock, along with the CPP stock in the remaining six of those nine large financial institutions. A few of the smaller institutions receiving TARP investments have failed, but it is hoped that the remainder of the outstanding investments will be repaid in the future. Moreover, as of September 30, 2010, the government earned some \$26.8 billion in income from its TARP investments through the dividends it received as a preferred stockholder and on the sale of warrants that it was granted by the TARP recipients at the time of the initial preferred stock investment.<sup>16</sup>

The TARP program has been remarkably successful, in terms of cost to the government and in its goal to help stabilize the financial system.<sup>17</sup> The largest financial institutions did not fail. Citigroup and Bank of America survived. Wachovia might exist as

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15. OFFICE OF FINANCIAL STABILITY, *supra* note 7, at i.

16. *Id.*

17. Steven Rattner, *How an Unloved Bail-out Saved America*, FIN. TIMES, Oct. 3, 2010 (“But instead of euthanising Tarp [sic] we should be eulogizing it as, without exaggeration, this legislation did more to keep America’s financial system – and therefore its economy – functioning than any passed since the 1930s.”); Kera Ritter, *Bank Bailout Seen to Benefit Big Banks More than Small Ones; \$49 Billion Unpaid*, 96 BNA BANKING REP. 132 (Jan. 21, 2011) (“Banking organizations, Treasury officials and the Office of the Special Inspector General for TARP agree that CPP and other components of TARP averted a financial collapse.”).

an independent institution today if its liquidity crisis had occurred after the passage of EESA instead of before. Ironically, Wachovia's purchase by Wells Fargo was announced the same day that EESA was enacted, but this followed a week of turmoil in which Wachovia was almost sold to Citigroup with FDIC assistance.<sup>18</sup>

Notwithstanding the relatively low losses to the government and the rapid payback of TARP funds, there is serious concern about the moral hazard created by TARP. As discussed in a report on Citigroup by the Office of the Special Inspector General for TARP (SIGTARP), when the government "assured the world in 2008 that it would not let Citigroup fail, it did more than reassure troubled markets – it encouraged high-risk behavior by insulating risk-takers from the consequence of failure."<sup>19</sup> As Professor Art Wilmarth of George Washington University Law School observed, the "explicit and implicit public subsidies . . . undermine market discipline and distort economic incentives" for the institutions that receive them.<sup>20</sup>

### III. THE DODD-FRANK ACT AND TOO BIG TO FAIL

Dodd-Frank addressed the financial crisis and its fallout on a number of fronts. A centerpiece of Dodd-Frank was the creation of the Financial Stability Oversight Council (FSOC or Council), to serve as a systemic risk regulator.<sup>21</sup> Dodd-Frank does not continue TARP, and instead consciously adopted numerous provisions indicating that systemically significant bank and nonbank financial companies would be subject to stringent regulation and subject to liquidation if unable to maintain their

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18. See RICK ROTHACKER, *BANKTOWN: THE RISE AND STRUGGLES OF CHARLOTTE'S BIG BANKS* 123-26 (2010) (discussing the sale of Wachovia).

19. SIGTARP, *EXTRAORDINARY FINANCIAL ASSISTANCE PROVIDED TO CITIGROUP, INC.: SUMMARY OF REPORT: SIGTARP-11-002* (Jan. 2011).

20. Arthur E. Wilmarth, Jr., *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-To-Fail Problem*, 89 OR. L. REV. \_\_ (forthcoming 2011).

21. Dodd-Frank Act § 111 (to be codified at 12 U.S.C. § 5321 and 5 U.S.C. § 5314). The voting members of the FSOC, headed by the Secretary of the Treasury, include the heads of the Board of Governors of the Federal Reserve System, OCC, FDIC, NCUA, SEC, CFTC, Federal Housing Finance Agency, the new Bureau of Consumer Financial Protection, and an independent member appointed by the President and knowledgeable about insurance. *Id.*

solvency. The tough measures are an obvious reaction to the concerns about the moral hazard created by TARP and other government measures used to diminish the harsh effects of the financial crisis on the economy.

#### A. TARP Measures

The total amount of TARP funds authorized under the EESA was reduced by Dodd-Frank from \$700 billion to \$475 billion.<sup>22</sup> Furthermore, Dodd-Frank provides that no new TARP programs may be established, and that any money repaid may not be reused to fund additional TARP expenditures under existing TARP programs.<sup>23</sup>

Although Dodd-Frank purposely does not provide any TARP-like structure for government investment in bank equity during difficult financial times, it does require the FSOC to conduct a study about the “feasibility, benefits, costs, and structure of a contingent capital requirement” for the systemically significant bank holding companies and nonbank financial companies identified by the FSOC.<sup>24</sup> If contingent capital bonds were required to be issued by these largest institutions and could be converted to equity capital in times of financial stress, then the capital markets could provide equity, rather than the government stepping in as in TARP. Further, the pricing of the contingent capital bond would provide the market’s measure of the riskiness of each institution’s activities, with those viewed the riskiest (and most likely to require conversion in times of financial stress), priced the highest. It is possible, however, that the price of such contingent capital would be so high,<sup>25</sup> because of the possibility of conversion to equity and loss of the creditor’s priority claim in a

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22. *Id.* § 1302 (to be codified at 12 U.S.C. § 5225). By the terms of EESA, TARP funds not committed on October 3, 2010, could not be allocated further, so this provision reinforced the existing TARP commitment level of \$475 billion.

23. *Id.*

24. *Id.* § 115(c) (to be codified at 12 U.S.C. § 5325).

25. Wilmarth, *supra* note 20 (institutional investors are likely to demand a “comparatively high yield and other investor-friendly features that may not be acceptable to” the systemically significant institutions that might be required to issue contingent capital).

liquidation, that institutions would break themselves into smaller pieces so as not to be within the systemically significant group of institutions subject to this requirement.

Subsequent to Dodd-Frank, Congress enacted the Small Business Jobs Act of 2010 (SBJA).<sup>26</sup> The SBJA established a \$30 billion Small Business Lending Fund (SBLF) and itself provides for government equity investment in small banks. The SBJA has been dubbed “Son of TARP” by some. The SBLF provides capital to each bank and takes an ownership interest in the bank, but the dividend amounts and repayment plans are determined on a bank-by-bank basis. A bank with less than \$10 billion in assets would be subject to an initial dividend payment to the government of five percent, but this rate could be reduced to as low as one percent depending on how much the bank increased its small business lending after receiving the government’s equity investment. The SBLF provides a clear incentive to a bank to make the loans that the government wishes to encourage, in contrast to TARP which was premised on the idea that increased capital would naturally result in increased credit, but did not have any specific requirement that the capital be used to support new loans. In addition, the SBJA provides a disincentive for not lending by increasing the dividend rate payable to the government if the government’s capital infusion has not increased the bank’s small business lending in the first two and one-half years after the government’s equity investment. If no small business lending improvement is shown thereafter, the dividend rate may increase to nine percent. Those banks currently enrolled in TARP may switch to the SBJA program in an effort to lower the dividend payment rate.<sup>27</sup> The focus of the SBLF is on small banks since smaller banks – those with less than \$1 billion in assets – hold forty percent of all outstanding small business loans, although only twelve percent of all bank assets.<sup>28</sup>

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26. See The Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504 (to be codified in scattered sections of U.S.C.).

27. Banks that have missed a TARP dividend payment to the government are not eligible for the SBLF.

28. Rob Cox & Rolfe Winkler, *Smaller Banks Don’t Need \$30 Billion From U.S.*, N.Y. TIMES, Feb. 1, 2010, at B2.

*B. Too Big to Fail Countermeasures*

Dodd-Frank responded to concerns about the bailout of too big to fail financial institutions during the financial crisis in part by creating the FSOC. Dodd-Frank provides that 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.<sup>29</sup>

The large, interconnected bank holding companies whose risks the FSOC must identify, include bank holding companies with greater than \$50 billion in consolidated assets, although the Board of Governors may, upon a recommendation of the FSOC, increase the asset size above \$50 billion.<sup>30</sup> The Council must also identify systemically significant nonbank financial companies; once designated, the Fed will for the first time have supervision of and regulatory authority over these companies.<sup>31</sup> A company will be considered a “financial company” if eighty-five percent of its consolidated assets or revenues come from “financial in nature” activities as specified in the Bank Holding Company Act.<sup>32</sup>

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29. Dodd-Frank Act § 112 (to be codified at 12 U.S.C. § 5322).

30. *Id.* § 115(a) (to be codified at 12 U.S.C. § 5325). As of June 30, 2010, approximately 25 domestic bank holding companies had assets exceeding \$50 billion. *Banks and Thrifts with Most Assets*, AM. BANKER, Nov. 18, 2010, <http://www.americanbanker.com/rankings/bt-most-assets-1028909-1.html>.

31. Dodd-Frank Act § 113 (to be codified at 12 U.S.C. § 5323).

32. *Id.* § 101 (to be codified at 12 U.S.C. § 5311).

Presumably, if this authority had been in place prior to the financial crisis, Bear Stearns, Lehman Brothers, AIG, and the largest bank holding companies, such as Bank of America, Citigroup, JP Morgan Chase, and Wachovia, among others, would have been identified as systemically significant.

Systemically significant institutions are subject to more stringent capital, leverage, and liquidity requirements as to be recommended by the Council and developed by regulation by the Fed.<sup>33</sup> Of most relevance to this discussion, however, is how Dodd-Frank directs such institutions to be treated in the event they seem headed towards failure. These “systemic” institutions are the ones that have been thought of as “too big to fail,” but Dodd-Frank turns this assumption on its head and seems determined to allow the institutions to fail and be handled through an orderly liquidation process. To assist in planning for a systemic institution’s demise, the institution must prepare and submit to the Fed a so-called “resolution plan,” otherwise dubbed a “living will” to instruct the FDIC as receiver how to resolve and unwind the institution’s various exposures.<sup>34</sup> If the institution poses a “grave threat” to the financial stability of the United States, as a “last resort” the FSOC may order the institution to divest some of its holdings,<sup>35</sup> presumably making the institution less systemically significant if it has been broken up into separate pieces. If the institution is still unable to retain solvency, then the FSOC may recommend that instead of a bankruptcy procedure, the institution be subject to an “orderly liquidation authority.”<sup>36</sup> The FDIC would serve as the institution’s receiver, even for nonbank institutions.<sup>37</sup> Its mandate is to liquidate the institution, without the possibility of reorganization.<sup>38</sup>

Any costs associated with the insolvency would be funded by FDIC borrowing from the Treasury.<sup>39</sup> This debt would be

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33. *Id.* § 115 (to be codified at 12 U.S.C. § 5325).

34. *Id.* §165 (to be codified at 12 U.S.C. § 5365).

35. *Id.* § 121 (to be codified at 12 U.S.C. § 5331).

36. *Id.* § 204 (to be codified at 12 U.S.C. § 5384).

37. The SIPC would act as trustee for an orderly liquidation of a broker-dealer. *Id.* at § 205 (to be codified at 12 U.S.C. § 5385).

38. *Id.* § 204 (to be codified at 12 U.S.C. § 5384).

39. *Id.* § 201(n)(5) (to be codified at 12 U.S.C. § 5384).

repaid by the assets of the liquidated institution. In the event these funds are not sufficient to reimburse the Treasury, then all other systemically significant institutions would be assessed their share of the cost of the resolution.<sup>40</sup> The potential for funding losses associated with another systemic institution's demise might be an incentive to bank holding companies to reduce their consolidated assets below the \$50 billion threshold and to nonbank financial companies to voluntarily divide their multiple business lines into separate entities so that no one of them is considered to be systemically significant and subject to the FDIC's orderly liquidation authority.<sup>41</sup> Indeed, one might suggest to those financial institutions that became bank holding companies during the financial crisis to have access to TARP funds and the investor comfort of the Fed as an involved regulator, that they should undo the bank holding company label. Congress, however, was one step ahead and inserted a "Hotel California" provision that states that if an institution had \$50 billion in assets or more, was a bank holding company on January 1, 2010, and if it had received TARP funds, it may cease to be a BHC, but it will continue to be regulated as one.<sup>42</sup>

Dodd-Frank also enacted two provisions to prevent systemically significant institutions from receiving other special treatment that might manifest the government's decision that they indeed are too big to fail. First, the Fed's emergency lending authority, Section 13(3) of the Federal Reserve Act, was revised.<sup>43</sup> During the financial crisis, this authority had been used as the basis for a number of the Fed's broad-based credit and liquidity programs, but also as the vehicle to justify credit extended to assist JPMorgan Chase in its acquisition of Bear Stearns, and to provide extraordinary loans to AIG. Dodd-Frank limits the Fed's

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40. *Id.* at §§ 204, 210, 214 (to be codified in scattered sections of U.S.C.).

41. *See* Wilmarth, *supra* note 20 (criticizing this ex post funding mechanism in part because it does not require systemically significant institutions to internalize the costs of their own risk-taking activities).

42. Dodd-Frank Act § 117 (to be codified at 12 U.S.C. § 5327). The "Hotel California" reference is to an Eagles song by the same name with the lyric, "You may check out any time you like, but you can never leave." THE EAGLES, HOTEL CALIFORNIA (Asylum Records 1977). So too, new BHCs may cease to have that status, but they cannot leave the regulatory apparatus that applies to BHCs.

43. Dodd-Frank Act, § 1101 (to be codified at 12 U.S.C. § 343).

emergency lending authority to permit assistance only to a “participant in any program or facility with *broad-based* eligibility.”<sup>44</sup> Second, the Act amended the systemic risk exception to the requirement that the FDIC use the “least cost method of resolution” for an insolvent depository institution.<sup>45</sup> This language was used first by the FDIC to justify aid to Citigroup for the potential acquisition of Wachovia, although ultimately Wells Fargo won Wachovia’s hand in a bid without government assistance. The FDIC also used the systemic risk authority to support its broad-based guarantee programs for bank deposits and other liabilities that benefited all banks, not just those nearing insolvency. Dodd-Frank responded to those who criticized this as an improper use of the systemic risk exception<sup>46</sup> and provided a new statutory scheme that specifically authorizes the use of such broad measures during times of severe economic distress, rather than including these programs within the systemic risk exception.<sup>47</sup> As Professor Wilmarth notes, the FDIC’s systemic risk exception and the Federal Reserve’s section 13(3) authority to provide emergency assistance under a highly selective “program” are still available to bail out creditors of failing systemically significant institutions.<sup>48</sup>

Finally, Dodd-Frank introduced a liability concentration limit for “financial companies” that includes bank holding companies and the systemically significant nonbank financial companies identified by the FSOC. These entities may not capture more than ten percent of the consolidated liabilities of all such entities via any merger or combination.<sup>49</sup> The FSOC is required to prepare a study regarding how this concentration limit will affect financial stability, moral hazard, efficiency, and competitiveness of U.S. financial firms, and the cost and availability of credit.<sup>50</sup> The

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44. *Id.* (emphasis added).

45. *Id.* at §1105 (to be codified at 12 U.S.C. § 5612). The FDIC’s systemic risk exception to the least cost resolution for an insolvent depository institution is at 12 U.S.C. § 1823(c)(4)(G).

46. See *Extraordinary Intervention*, *supra* note 1.

47. Dodd-Frank Act § 1105 (to be codified at 12 U.S.C. § 5612).

48. Wilmarth, *supra* note 20.

49. Dodd-Frank Act, sec. 622, § 14 (to be codified at 12 U.S.C. §1852).

50. *Id.*

FSOC may then make recommendations regarding modification of the liability cap.<sup>51</sup> For this reason, Professor Wilmarth is worried that the FSOC will succumb to pressure to “weaken or remove” the liability cap.<sup>52</sup> This provision will complement the ten percent nationwide deposit cap introduced by Riegle-Neal for bank acquisitions<sup>53</sup> by adding a new size cap that will relate to combinations between financial companies and between banks and other financial companies.

#### IV. CONCLUSION

Dodd-Frank represents a multi-faceted effort to tackle the problem of financial institutions that may grow so big that their failure would lead to a systemic risk to our financial system. The impetus for these changes was the public’s backlash to the TARP bailout and the moral hazard that it created. Financial institutions that do not bear the full costs of their risky activities have no incentive to reduce or alleviate that risk. Dodd-Frank attempts to reverse that moral hazard by clearly providing that these institutions are subject to additional oversight, must provide resolution plans, are subject to asset divestiture, and in the event their failure may still not be prevented must be liquidated without the possibility of reorganization. Moreover, large, systemically significant financial institutions may be stuck with the costs associated with the failure of other systemically significant institutions even if they are not themselves engaging in inappropriate or excessively risky activities. Large institutions will also have a hard cap on how large they may grow through acquisition (rather than internal growth) through the liability concentration provision.

It remains to be seen, however, whether the FSOC will have the political will and foresight to identify the systemically significant nonbank financial institutions, to hold to the \$50 billion asset threshold for systemically significant bank holding companies, and whether and under what circumstances the FDIC

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51. 12 U.S.C. § 1852.

52. Wilmarth, *supra* note 20.

53. 12 U.S.C. § 1842(d)(2).

will exercise the orderly liquidation authority rather than opt for a Chapter 11 reorganization. Dodd-Frank provides a framework for ending too big to fail *if* the regulators have the will.<sup>54</sup>

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54. Ron Feldman, Senior Vice President for Supervision, Regulation and Credit at the Federal Reserve Bank of Minneapolis asserts that “if Dodd-Frank is implemented effectively, large financial companies will voluntarily choose to downsize because their funding costs will increase as creditors realize they will not be protected in a failure.” Barbara A. Rehm, *Strange But True: Dodd-Frank May Actually End TBTF*, AM. BANKER, Oct. 21, 2010, [http://www.americanbanker.com/issues/175\\_202/dodd-frank-too-big-to-fail-1027404-1.html](http://www.americanbanker.com/issues/175_202/dodd-frank-too-big-to-fail-1027404-1.html).

