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FINANCIAL INSTITUTION BANKRUPTCY ACT OF 2014

DECEMBER 1, 2014.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 5421]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5421) to amend title 11 of the United States Code in order to facilitate the resolution of an insolvent financial institution in bankruptcy, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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Purpose and Summary

The U.S. bankruptcy process is not optimally designed for the orderly resolution of financial institutions for many reasons, including these institutions' interconnectedness and, in the case of larger and more interconnected institutions, a potential to pose "systemic

risk" to the broader financial system. H.R. 5421, the "Financial Institution Bankruptcy Act of 2014," amends chapter 11 of the Bankruptcy Code to address better the unique challenges presented by the insolvency of a financial institution and better allow such an institution to be resolved through the bankruptcy process.

Background and Need for the Legislation

A. BRIEF OVERVIEW OF CHAPTER 11

Chapter 11 of the Bankruptcy Code is designed primarily to allow a business to restructure its debt obligations while maintaining its operations. The underlying principle is that a business in its entirety is more valuable than its assets each valued independently. Preservation of a business through chapter 11, and in turn its enterprise value, can benefit both creditors, who should receive a higher recovery as a result of a debtor's restructuring than they would otherwise obtain through a liquidation, and debtors, who benefit from the ability to continue their business operations. Employees, suppliers, customers and others can also benefit if debtors continue their business operations.

A chapter 11 case begins by the filing of a petition for relief with the relevant bankruptcy court. Once the petition is filed, an "automatic stay" is put into place that prevents, with some exceptions, creditors from taking actions to recover their debts. The automatic stay allows a debtor the breathing room necessary to organize its operations, negotiate with creditors, and achieve consensus on a chapter 11 plan. The inflection point of a chapter 11 case is the chapter 11 plan, which dictates what each of the creditors will receive as a recovery. The chapter 11 plan must be approved by the debtor's creditors and the bankruptcy court. Once a chapter 11 plan is approved, creditors of the debtor may only pursue recoveries as provided by the chapter 11 plan, and the reorganized company is treated as a new corporate entity.

There are generally two primary paths for a debtor to restructure under chapter 11. The first path is a traditional reorganization of a debtor's capital structure. A simple example of this type of reorganization would involve a debtor's shareholders not receiving any recovery on account of their shares, and the debtor's secured creditors becoming the new equity holders of the reorganized company. The second path is a sale of a debtor's primary business, with the proceeds of the sale used to provide recoveries to the debtor's creditors. The sale of a business as a whole is distinct from a liquidation, in that the enterprise typically will continue to operate in a substantially similar form under new, third party ownership. In a liquidation, the debtor's assets can be sold in piecemeal fashion or simply handed over to creditors.

B. THE EXISTING BANKRUPTCY CODE AND ADDRESSING FINANCIAL INSTITUTION INSOLVENCIES

The bankruptcy process has been the traditional mechanism for handling the orderly resolution of distressed companies in the U.S. because of bankruptcy's established history of laws, precedent and impartial administration. According to a report by the Federal Deposit Insurance Corporation (FDIC) and the Bank of England, "[t]he U.S. would prefer that large financial organizations be re-

solvable through ordinary bankruptcy."[1] However, the report added that "the U.S. bankruptcy process may not be able to handle the failure of a systemic financial institution without significant disruption to the financial system."[2] Of note, smaller financial institutions can also restructure their operations under the Bankruptcy Code in the event of material financial distress or failure.

In the wake of the 2008 financial crisis, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, directed the Board of Governors of the Federal Reserve System (Federal Reserve) and the Governmental Accountability Office (GAO) to study the Bankruptcy Code and international issues related to the insolvency of financial institutions as part of an overall effort to reduce systemic risk within the financial sector.[3] The studies identified a number of issues specific to the resolution of insolvent financial institutions and discussed theories regarding how to address such issues, without offering specific recommendations or independent opinions regarding potential revisions to the Bankruptcy Code.[4]

Following these reports, the FDIC published a notice detailing its intended method for implementing its resolution/orderly liquidation authority under Title II of the Dodd-Frank Act, a non-bankruptcy resolution process the Dodd-Frank legislation made available for large, "systemically important" financial institutions.[5] The FDIC's method, referred to as "single point of entry," relies on placing a parent holding company into receivership while maintaining the operations and solvency of its operating subsidiaries.[6] Under this approach, the FDIC would be appointed as the receiver of the parent holding company and could transfer the parent company's assets into a bridge financial holding company, impose losses on the shareholders and creditors of the parent company, and eventually transition ownership of the bridge financial company into private hands.[7]

Some commentators have suggested that the "single point of entry" approach should also be made available in the Bankruptcy Code.[8] One of the proposed methods to amend the Bankruptcy Code to facilitate the use of this approach creates an entirely new subchapter within chapter 11, referred to as "subchapter V," dedicated to addressing the insolvency of a financial institution.[9]

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[1] *See* Federal Deposit Insurance Corporation and the Bank of England, Resolving Globally Active, Systemically Important, Financial Institutions (Dec. 10, 2012), *available at* http://www.bankofengland.co.uk/publications/Documents/news/2012/nr156.pdf.

[2] *Id.*

[3] Pub. L. No. 111–203 §§ 202(e), 216, 217 (2010)

[4] *See* the Board of Governors of the Federal Reserve System, *Study on the International Coordination Relating to Bankruptcy Process for Nonbank Financial Institutions* (July 2011); *see also* Government Accountability Office, *Complex Financial Institutions and International Coordinate Pose Challenges* (July 2011).

[5] Resolution of Systemically Important Financial Institutions: The Single Point of Entry Strategy, 78 Fed. Reg. 76,614 (Dec. 18, 2013).

[6] *Id.*

[7] *Id.*

[8] *See The Bankruptcy Code and Financial Institution Insolvencies: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary,* 113th Cong. 12 (2013) [hereinafter the "December Bankruptcy Hearing"] (statement of Donald S. Bernstein).

[9] Another leading proposal is referred to as "chapter 14" and would introduce an entirely new chapter to the Bankruptcy Code, with substantially similar amendments to the Bankruptcy Code as subchapter V. One significant difference between these two approaches is that chapter 14 may not incorporate the relevant case law related to other components of chapter 11 that remain undisturbed under both approaches, while subchapter V clearly maintains such case law.

As explained in additional detail below, the subchapter V proposal is designed to address the unique issues presented by a financial institution's bankruptcy. Subchapter V would, among other elements: apply to financial institutions; allow not just the debtor institution, but also the financial institution's primary regulator, to initiate and have standing in the institution's bankruptcy proceeding; designate a select group of appellate and bankruptcy judges to oversee these bankruptcies; and, provide specialized treatment for derivative contracts. Advocates of this approach argue that a transparent judicial process that allows for the reorganization, rather than liquidation, of a large financial institution is a preferable resolution strategy because of, among other things, the benefits of due process.

C. THE CHALLENGES PRESENTED BY A FINANCIAL INSTITUTION INSOLVENCY AND HOW THE FINANCIAL INSTITUTION BANKRUPTCY ACT ADDRESSES THESE CHALLENGES

There are a number of challenges posed by the insolvency of a financial institution, particularly the insolvency of a large, multinational financial institution. The resolution of a financial institution must be swift, transparent, and account for the potential impact on the general financial system, due to the typically liquid and quickly transferable assets of a financial institution. While the existing Bankruptcy Code possesses many of the provisions necessary to resolve a large, failing firm, commentators have suggested that improvements are necessary to resolve effectively a financial institution.[10]

As explained above, commentators generally agree that the "single point of entry" approach is the most efficient proposal to provide for an expeditious resolution of a financial firm.[11] H.R. 5421, the "Financial Institution Bankruptcy Act of 2014" (referred to herein as "Subchapter V") adopts the proposed method of creating a new subchapter within chapter 11 of the Bankruptcy Code to allow the "single point of entry" approach to be utilized in the bankruptcy process. H.R. 5421 allows the debtor holding company that sits atop the financial firm's corporate structure to transfer its assets, including the equity in all of its operating subsidiaries, to a newly-formed bridge company over a single weekend.[12] The debt, any remaining assets, and equity of the holding company will remain in the bankruptcy process and absorb the losses of the financial institution. Identifying the debt and equity to remain in the bankruptcy process allows existing creditors of the debtor to price appropriately their dealings and investment with the debtor prior to any bankruptcy proceeding.

Furthermore, the Subchapter V "single point of entry" approach allows all of the financial institution's operating subsidiaries to remain out of the bankruptcy process. Keeping these entities out of

[10] *See, e.g., Too Big To Fail: The Role for Bankruptcy and Antitrust Law in Financial Regulation Reform (Part I): Hearing before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary,* 111th Cong. 64–79 (2009) (statement of Harvey R. Miller).

[11] *See, e.g., H.R. ____, the "Financial Institution Bankruptcy Act of 2014": Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. (2014) (statements of Donald Bernstein and Thomas Jackson).

[12] Given the sensitivity of banking relationships and the financial marketplace, practicalities dictate that this transfer must be performed over the course of a period when the financial markets are not open.

an insolvency proceeding is particularly helpful for multi-national firms that otherwise could be required to comply with multiple, and potentially conflicting, insolvency jurisdictions.

The amendments to the Bankruptcy Code contained in H.R. 5421 also account for the potential of a financial firm's insolvency to impact the general financial markets, often referred to as systemic risk. One such amendment included in H.R. 5421 is the ability of the Federal Reserve to initiate a bankruptcy case. In order to commence a case over the objection of the subject financial institution, the Federal Reserve must demonstrate to the presiding bankruptcy court, which must agree with the Federal Reserve's assessment, that initiation of a Subchapter V case is "necessary to prevent serious adverse effects on financial stability in the United States."[13] By allowing the Federal Reserve to commence a Subchapter V case, subject to careful judicial oversight, a near-failing financial firm may be resolved quickly and potentially in advance of its losses spreading to the financial markets.

An additional element of H.R. 5421 intended to address systemic risk is Bankruptcy Code amendments designed to deal with the types of transactions through which systemic contagion can most readily spread and that financial institutions engage in routinely—derivative and similarly-structured transactions. Currently, the Bankruptcy Code contains exemptions for counterparties to derivative and similarly-structured transactions to collect on outstanding debts notwithstanding the commencement of a chapter 11 case and the consequent "automatic stay." This exemption stands in contrast to the treatment of other contracts and debts under the Bankruptcy Code, which typically requires creditors to wait until a chapter 11 plan is approved before they receive a recovery on account of their relationship with the debtor. H.R. 5421 overrides the exemption for derivative and similarly-structured transactions contained in the Bankruptcy Code by imposing a temporary 2-day stay that would allow for the effective transfer of the financial institution's operations to a bridge company. Without this override of the existing exemption, counterparties to derivatives and similarly-structured transactions could terminate their relationships with a financial institution debtor upon the commencement of a bankruptcy case, which likely would endanger the successful transfer and continued operation of the bridge company and potentially threaten other entities within the broader financial system.[14]

H.R. 5421 also expressly acknowledges the speed by which a financial institution must be resolved in order to mitigate financial contagion. To that end, the legislation includes specific and expedient timeframes for the commencement of a case as well as court approval of the transfer of assets to the bridge company.

The bill also recognizes that overseeing a Subchapter V case requires a presiding bankruptcy judge or a judge sitting on appeal in such a case to have a certain level of expertise and experience with either financial industry cases or large corporate reorganizations. To that end, H.R. 5421 contains provisions that require the ad-

[13] Subchapter V, § 1183.

[14] *See H.R. ____, the "Financial Institution Bankruptcy Act of 2014": Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 12 (2014) (statement of Stephen E. Hessler).

vance designation of select bankruptcy and appellate judges who can be available to hear these cases and appeals from them.

Hearings

The Committee conducted two separate hearings on the topic of enhancing the Bankruptcy Code to address the resolution of a financial institution through the bankruptcy process. On December 3, 2013, the Subcommittee on Regulatory Reform, Commercial and Antitrust Law (hereinafter, the "Subcommittee") conducted a hearing entitled "The Bankruptcy Code and Financial Institution Insolvencies."[15] The witnesses at the hearing were: the Honorable Jeffrey M. Lacker, President of the Federal Reserve Bank of Richmond; Professor Mark J. Roe, David Berg Professor of Law, Harvard Law School; and Donald S. Bernstein, Esq., partner and head of Davis Polk & Wardwell LLP's Insolvency and Restructuring Practice and past chair of the National Bankruptcy Conference. At the hearing, witnesses testified that a financial institution's bankruptcy presents unique issues that the existing Bankruptcy Code could be equipped better to address. On March 26, 2014, the Subcommittee conducted a hearing entitled "Exploring Chapter 11 Reform: Corporate and Financial Institution Insolvencies; Treatment of Derivatives."[16] The witnesses at the hearing were: Professor Michelle Harner, Reporter for the American Bankruptcy Institute Commission to Study the Reform of Chapter 11, University of Maryland; Professor Thomas H. Jackson, William E. Simon School of Business, University of Rochester; the Honorable Christopher Sontchi, U.S. Bankruptcy Court for the District of Delaware; Seth Grosshandler, Esq., Partner, Cleary Gottlieb Steen & Hamilton, LLP; and Jane Vris, Millstein & Co, on behalf of the National Bankruptcy Conference. During this hearing, the Committee received testimony in support of amending the Bankruptcy Code to create a subchapter V under chapter 11 to allow the resolution of a financial institution through the bankruptcy process, using the single-point-of-entry approach.[17]

In addition, on July 15, 2014, the Subcommittee conducted a hearing on a discussion draft of the Financial Institution Bankruptcy Act. The witnesses at the hearing were: Donald S. Bernstein, Esq., partner and head of Davis Polk & Wardwell LLP's Insolvency and Restructuring Practice and past chair of the National Bankruptcy Conference; Stephen E. Hessler, Esq., Partner, Kirkland & Ellis, LLP; Professor Thomas H. Jackson, William E. Simon School of Business, University of Rochester; and, Professor Stephen J. Lubben, Seton Hall University School of Law. All four witnesses, including the Minority witness, testified that they believed the Financial Institution Bankruptcy Act, subject to certain modifications, should be enacted into law.

Following the hearing, the Committee received informal staff-level comments on the discussion draft of the Financial Institution Bankruptcy Act from, among others, the Federal Reserve, the FDIC, the Office of the Comptroller of the Currency, the Adminis-

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[15] December Bankruptcy Hearing.

[16] *Exploring Chapter 11 Reform: Corporate and Financial Institution Insolvencies; Treatment of Derivatives: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary,* 113th Cong. (2014).

[17] *Id.* (testimony of Prof. Jackson).

trative Office of the U.S. Courts, the National Conference of Bankruptcy Judges, the National Bankruptcy Conference, and the International Swaps and Derivatives Association. The comments received from these parties served as the basis for revisions to the discussion draft that was the subject of the July 15 Subcommittee hearing, and which ultimately became H.R. 5421.

Committee Consideration

On September 10, 2014, the Committee met in open session and ordered the bill H.R. 5421 favorably reported without amendment, by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 5421.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 5421, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 7, 2014.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN:

The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 5421, the "Financial Institution Bankruptcy Act of 2014."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Daniel Hoople, who can be reached at 226–2800.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 5421—Financial Institution Bankruptcy Act of 2014.

As ordered reported by the House Committee on the Judiciary on September 10, 2014.

H.R. 5421 would modify the bankruptcy process for certain large financial institutions. Pay-as-you-go procedures apply because enacting the legislation would lower the probability that such an institution would be liquidated by the Federal Government upon failure, potentially having a small effect on direct spending and revenues. However, CBO expects that failures handled through the bankruptcy code under the bill would not affect the net cash flows of the Federal Government under current law. Thus, we estimate that H.R. 5421 would have no significant effect on the budget, including discretionary spending, over the next 10 years.

Under current law, the Federal Government may place certain large and interconnected financial institutions, upon failure, into receivership of the Federal Deposit Insurance Corporation (FDIC). Similar to its historical role as receiver of commercial banks and thrifts, the FDIC may sell the failed institution's assets, merge it with a healthy institution, continue operations through a bridge company, or some combination thereof. Most likely, the receivership will require short-term (and in some cases long-term) financing to quell the liquidity and insolvency concerns that result in the institution's failure. Under current law, such funding is available through the Treasury. While this borrowing must be repaid in full, CBO believes that repayment generally will occur over multiple years. As such, CBO estimates that this authority (also known as Orderly Liquidation Authority, or OLA) will have no net budget effect over time, but will increase deficits in some years. CBO's most recent baseline projects that use of OLA will increase deficits by about $19 billion over the 2015–2024 period. (This projection assumes a low probability that OLA will be triggered in each year. Actual cash flows will be zero in most years and much higher in years when OLA is used.)

H.R. 5421 would establish a separate bankruptcy process for bank holding companies and certain large financial institutions. This process would differ from current law in several ways. First, the court would have the authority to transfer certain property, contracts, and leases of the estate to a bridge company, if necessary to prevent serious adverse effects on the financial stability of the United States (That property could not include unsecured debt or equity, which instead would remain with the estate.) The legisla-

tion also would allow for a temporary stay of certain contractual rights tied to the financial condition of the failed institution—for example, collection of collateral, acceleration of debt, or close-out netting of derivatives. Similarly, other leases, contracts, licenses, permits, or registration could not be modified or terminated upon failure, instead transferring to the bridge company.

CBO believes that the changes made by H.R. 5421 would establish a viable alternative to the use of OLA in some circumstances and would increase the probability that a failure would be handled through the bankruptcy code rather than by the FDIC, causing a small change in the FDIC's workload. However, those circumstances are likely to occur when the use of OLA under current law would have generated little to no Federal cash flows—for example, the failure of a single entity during a relatively stable economy. More severe situations requiring significant capital or liquidity to proceed probably would continue to be handled by the FDIC under the bill because private debtor-in-possession financing would be difficult to obtain, particularly during economic contractions. Because we expect H.R. 5421 to only affect failures that would otherwise have no budgetary impact under current law, CBO estimates that enacting this legislation would have no significant effect on the Federal budget.

H.R. 5421 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA).

H.R. 5421 would impose a private-sector mandate, as defined in UMRA, on entities that have certain types of contracts with a bank holding company or a large financial institution that has entered the bankruptcy process established under the bill. The bill would limit the contractual rights that those entities have under current law by imposing a temporary stay on actions to terminate or modify such contracts for 48 hours after a bankruptcy petition is filed. The cost of the mandate would amount to any losses sustained by such parties as result of the stay. Because of uncertainty about both the number and size of contracts that would be affected and the amount of losses that would occur as a result of this provision, CBO cannot determine whether the cost of the mandate would exceed the annual threshold established in UMRA for private-sector mandates ($152 million in 2014, adjusted annually for inflation).

The CBO staff contacts for this estimate are Daniel Hoople (for Federal costs) and Paige Piper-Bach (for the private-sector impact). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 5421 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from GAO to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 5421 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 5421 amends title 11 of the United States Code in order to facilitate the resolution of an insolvent financial institution in bankruptcy.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 5421 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f) or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short Title.

Sets forth the short title of the legislation as the "Financial Institution Bankruptcy Act of 2014."

Section 2. General Provisions Relating to Covered Financial Corporations.

Subsection (a) amends Bankruptcy Code section 101, which defines various terms used throughout the Bankruptcy Code, to add the definition of "covered financial corporation." In sum, the term is defined as a bank holding company, as defined in the Bank Holding Company Act of 1956 (BHCA),[18] or a corporation that: exists for the primary purpose of owning subsidiaries; has consolidated assets of $50 billion or more; and derives annual gross revenues from activities that are financial in nature as defined in the BHCA or with respect to which at least 85% of the company's consolidated assets are financial in nature as defined in the BHCA.[19]

Subsection (b) provides that subchapter V of chapter 11 (as added by the legislation) will only apply to chapter 11 cases in which a covered financial corporation is the debtor. To be clear, to the extent a covered financial corporation could utilize the chapter 11 process and chooses not to invoke the subchapter V process, that covered financial corporation can still choose to pursue a "traditional" chapter 11 case.

Subsection (c) amends Bankruptcy Code section 109, which sets forth the eligibility criteria for a bankruptcy debtor, to provide that a covered financial corporation is eligible to be a chapter 11 debtor.

Subsection (d) amends Bankruptcy Code section 1112, which authorizes conversion of a chapter 11 case to chapter 7 or dismissal of the chapter 11 case, under certain, specified circumstances. This subsection adds new subsection (g) to section 1112 to permit the

[18] *See* 12 U.S.C. § 1841(a) (2014).
[19] *See* 12 U.S.C. § 1843(k) (2014).

conversion of a subchapter V case to a chapter 7 case, if: (1) a transfer approved under section 1185 (as added by the bill) has been consummated; (2) the court has ordered the appointment of a special trustee under section 1186 (as added by the bill); and (3) the court finds that such conversion is in the best interest of creditors and the estate.

Subsection (e)(1) amends Bankruptcy Code section 726(a)(1) to accord first payment priority to the fees, costs and expenses of a special trustee appointed under section 1186. Subsection (e)(2) makes two amendments to Bankruptcy Code section 1129(a), which sets forth the requirements for confirmation of a chapter 11 case. First, it requires the fees, costs and expenses of a special trustee to have been paid or for the subchapter V plan to provide for such payment. Second, it requires the court to find that confirmation of a subchapter V plan is not likely to cause adverse effects on financial stability in the United States.

Subsection (f) provides that a U.S. Trustee will recommend to the court the amount of a bond necessary in the event of a trustee appointment in a subchapter V case.

Section 3. Liquidation, Reorganization, or Recapitalization of a Covered Financial Corporation.

Section 3 inserts a new subchapter V into chapter 11 designed to address a bankruptcy of a covered financial corporation. All further references are to the new sections added to chapter 11 by the bill.

§ 1181. Inapplicability of other sections.

Specifies that Bankruptcy Code sections 303 (authorizing the commencement of an involuntary bankruptcy case, under certain circumstances) and 321(c) (which permits the United States Trustee to serve as a trustee in a bankruptcy case) do not apply to a subchapter V case.

§ 1182. Definitions for this chapter.

Defines the following terms: Board; bridge company; capital structure debt; contractual right; qualified financial contract; and special trustee.

§ 1183. Commencement of a case concerning a covered financial corporation.

Subsection (a) authorizes the voluntary commencement of a subchapter V case if the debtor states under penalty of perjury that it is a covered financial corporation. In addition, it allows the involuntary commencement of such a case by the Federal Reserve against a covered financial corporation if the Federal Reserve states under penalty of perjury that the corporation: (1) has incurred losses that will deplete all or substantially all of the corporation's capital and there is no reasonable prospect for the corporation to avoid such depletion; (2) is insolvent; (3) is not, or is unable, to pay its debts as they become due; or (4) is likely to experience any of these conditions sufficiently soon. The Federal Reserve must also certify that the bankruptcy filing is necessary to effect a transfer of the debtor's assets under section 1185 to pre-

vent imminent substantial harm to financial stability in the United States.

If the debtor does not consent to an order for relief, subsection (b) requires the bankruptcy court to hold a hearing as soon as practicable, but no later than within 16 hours of the filing of an involuntary petition, with notice provided to the debtor, the FDIC, the OCC, and the Treasury Secretary, which entities, in addition to the Federal Reserve, are the only ones authorized to participate at such hearing. Subsection (b) further provides that the Federal Reserve or the debtor may request that pleadings, hearings, transcripts, and orders be sealed if their disclosure could create financial instability in the United States. Access to such documents is only given to the bankruptcy court, the appellate panel, the debtor, the FDIC, the OCC, the Treasury Secretary, and the Federal Reserve. If the case is dismissed, all such documents are permanently sealed.

A subchapter V case commenced by the debtor constitutes an order for relief. With respect to a case involuntarily commenced by the Federal Reserve, subsection (c)(2) requires the bankruptcy court, within 18 hours after the filing of the Federal Reserve's involuntary petition, to either: (1) enter an order of relief, if the Federal Reserve has shown by a preponderance of the evidence that the criteria specified in its petition have been satisfied, or the debtor consents to the Federal Reserve's petition; or (2) enter an order dismissing the case.

Subsection (d)(1) authorizes the debtor and the Federal Reserve to appeal directly to the presiding court of appeals an order granting relief under subchapter V or dismissing a case. The appeal must be filed within 1 hour after such order has been entered, with notice to the debtor, the FDIC, the OCC, the Treasury Secretary, and the Federal Reserve. Such order is stayed pending appeal. Subsection (d)(2) requires the appellate panel to hear the appeal within 12 hours of the filing of the notice of appeal. It specifies that the standard of review is abuse of discretion. Such panel must enter an order determining the appeal within 14 hours after the notice of appeal is filed. Subsection (d)(3) specifies that the court may not delay any proceeding pertaining to the transfer of the debtor's assets pursuant to section 1185 because of a pending appeal, except that the transfer may not be authorized before determination of such appeal. This allows the bankruptcy court to hear the motions related to the section 1185 transfer while the appeal is pending.

Subsection (e) shields a debtor's board of directors from any liability to shareholders, creditors or other parties in interest for a good faith filing or consent in good faith to a subchapter V petition or with respect to a transfer under sections 1185 and 1186, as added by the bill.

Subsection (f) requires the debtor's counsel or the Federal Reserve to give confidential notice to the courts regarding the potential commencement of a subchapter V case in order to allow the court and the potential bankruptcy judge to make any necessary preparations in advance of a potential filing.

§ 1184. Regulators.

Provides the Federal Reserve, the Securities and Exchange Commission, the Office of the Comptroller of the Currency of the De-

partment of Treasury, and the FDIC with standing in a subchapter V bankruptcy case.

§ 1185. Special transfer of property of the estate.

On request of the debtor or Federal Reserve, subsection (a) authorizes the bankruptcy court to order a transfer of estate property and the assignment of executory contracts and unexpired leases to a bridge company after notice and a hearing that must occur not less than 24 hours after commencement of the case. This subsection also clarifies that all property transferred is no longer property of the estate. Subsection (a) further provides that Bankruptcy Code sections 363 (concerning sales of bankruptcy case assets) and 365 (executory contracts and unexpired leases) apply to such transfer, unless otherwise specified.

Subsection (b) requires not less than 24 hours' notice of the hearing under subsection (a), to be provided either by electronic or telephonic means, and identifies who must receive such notice.

Subsection (c) provides that the court may not order a transfer unless it determines by a preponderance of the evidence that: (1) the transfer is necessary to prevent serious adverse effects on financial stability in the United States; (2) the transfer does not provide for the assumption of any capital structure debt by the bridge company; (3) the transfer does not provide for the transfer of the debtor's equity; (4) the party requesting the transfer has demonstrated that the bridge company is not likely to fail to meet the obligations of any debt, executory contract, qualified financial contract or unexpired lease assumed and assigned to such company; (5) the bridge company after the transfer has adequate provision for fees, costs and expenses of the special trustee; (6) all of the bridge company's equity securities are transferred to a special trustee; (7) adequate provision has been made for the payment of the expenses of the bankruptcy estate and the special trustee; and (8) the bridge company has governing documents and initial directors and senior officers that are in the best interests of creditors and the estate.

With respect to property of the estate that is subject to a lien securing a debt, executory contract, unexpired lease, or agreement of the debtor, subsection (c)(3) specifies that the transfer of this secured property may not be authorized unless:

> (A) the bridge company assumes such debt, executory contract, unexpired lease or agreement, and the property remains subject to such lien securing such debt, executory contract, unexpired lease, or agreement and the court determines that assumption of such debt, executory contract, unexpired lease, or agreement by the bridge company is in the best interests of the estate; or
>
> (B) such property is being transferred to the bridge company in accordance with the provisions of section 363.

Subsection (d) requires the bridge company to: (1) not have any property (*e.g.,* executory contracts, unexpired leases) or debts; and (2) have equity securities that are property of the estate, which may be sold or distributed subject to the limitations contained in subchapter V.

§ 1186. Special Trustee.

Requires the section 1185 transfer order to provide that the debtor transfer to the special trustee all of the equity securities in the bridge company, and for the bridge company's equity to be held in trust for the sole benefit of the estate, subject to the payment of the special trustee's fees, costs and expenses. The court must approve the trust agreement as being in the best interests of the estate. Subsection (a)(2) requires the debtor to confirm to the court that the Federal Reserve was consulted regarding the identity of the proposed special trustee and advise the court of the results of such consultation.

Subsection (b) specifies that the trust agreement governing the trust must satisfy certain requirements. These requirements include: (1) the trust must provide for the payment of the special trustee's fees, costs, expenses and indemnities from the debtor's estate; (2) the special trustee must prepare a quarterly report to the estate that is filed with the court; (3) the special trustee must provide information about the bridge company as reasonably requested by a party in interest; (4) as long as the equity securities of the bridge company are held by the trust, the special trustee must file with the court a notice regarding any change in the management of the bridge company, its governing documents and any material corporate action of the company; (5) any sale of any equity securities of the bridge company may not be consummated until the special trustee consults with the FDIC and the Federal Reserve regarding such sale, and discloses the results of such consultation with the court; and (6) the proceeds of the sale of any equity securities of the bridge company by the special trustee must be held in trust for the benefit of, or transferred to, the estate.

Subsection (c)(1) requires the special trustee to distribute the trust assets in accordance with a confirmed chapter 11 plan on its effective date or as ordered by the court if the subchapter V case is converted to a case under chapter 7. Subsection (c)(2) specifies that the office of the special trustee terminates as soon as practicable after final distribution.

Subsection (d) specifies that after the transfer of the bridge company's equity is made to the special trustee under this section, such trustee is subject only to applicable nonbankruptcy law and the trustee is no longer subject to the control of the bankruptcy court.

§ 1187. Temporary and supplemental automatic stay; assumed debt.

Extends the "automatic stay" triggered by the filing of a chapter 11 case to creditors who entered into contracts, leases, agreements and debt contracts with the debtor or its affiliates. Contrary to the typical automatic stay, which often can extend for the duration of the bankruptcy case and only is for the benefit of the entities that file for bankruptcy, the stay provided for under this section expires after 48 hours or the transfer of the subject contracts to the bridge company, and extends both to the debtor and to its affiliates. This section provides for temporary relief so that the debtor's and its affiliates' essential contracts, leases and agreements that are critical for the future operation of the bridge company can be transferred without disruption.

Qualified financial contracts are excluded from this section because their treatment is provided for in section 1188. Capital structure debt is also excluded from this section because that debt remains in the bankruptcy case and those creditors will receive their recoveries through the traditional bankruptcy process.

§ 1188. Treatment of qualified financial contracts and affiliate contracts.

Extends the "automatic stay" triggered by the filing of a chapter 11 case to creditors who entered into derivative, repurchase and similarly constructed contracts with the debtor and its affiliates. In a typical chapter 11 case, these contracts are not subject to the automatic stay and creditors may exercise certain contractual remedies upon the filing of a bankruptcy case. This section provides that creditors are prohibited from exercising such rights for 48 hours from the commencement of the case, until the transfer of the contracts to the bridge company, or the bankruptcy court's entry of an order denying the transfer to the bridge company, whichever of these events occurs earliest.

In order to transfer a qualified contract to the bridge company, the terms of the contract must continue to be honored and all of the obligations must continue to be performed. Furthermore, all of the qualified contracts between the entity and the debtor and/or its affiliates must be transferred to the bridge company. This provision is intended to prevent against "cherry picking" transfers of only a select number of contracts. Again, this section is critical to ensure that the bridge company can continue to operate the debtor's business in the normal course following the transfer.

§ 1189. Licenses, permits, and registrations.

Provides that the bridge company will retain the debtor's and its affiliates' rights and obligations under the debtor's and its affiliates' licenses, permits and registrations. In other words, the bridge company will continue to operate under these contracts just as the debtor operated prior to the commencement of the bankruptcy. Furthermore, the bridge company will be subject to the same regulatory oversight as the debtor following the transfer. This section also overrides all nonbankruptcy laws to prevent the termination or modification of any federal, state or local license, permit, or registration that the debtor or an affiliate had immediately before the commencement of the case, if a request is made to transfer property of the estate under section 1185 and such default is based on certain *ipso facto* events.

§ 1190. Exemption from securities laws and special tax provisions.

Provides the same exemption granted to the securities (or equity) of a typical debtor company to the securities of the bridge company. Specifically, this provision clarifies that with respect to Bankruptcy Code section 1145 (which exempts the offer or sale of securities from certain federal, state and local laws requiring registration of such offer and sale if it occurs under a plan), a bridge company's security shall be deemed to be the security of the debtor's successor under a plan if the court approves the disclosure statement for the

plan as having adequate information about the bridge company and its securities.

§ 1191. Inapplicability of certain avoiding powers.

Provides for an exemption from the avoidance powers contained in the Bankruptcy Code for the transfer from the debtor to the bridge company. In other words, this prevents a subchapter V transfer, or certain aspects of the transfer, from being unwound at a later date.

§ 1192. Consideration of Financial Stability.

Allows, but does not require, the bankruptcy court to consider the financial stability of the United States when rendering decisions related to a subchapter V case.

Section 4. Amendments to Title 28, United States Code.

§ 298. Judge for a case under Subchapter V of title 11.

Provides that the Chief Justice of the United States will designate appellate court judges to hear appeals of decisions regarding petitions to commence subchapter V bankruptcy cases. Also, provides that the Chief Justice will designate at least ten experienced bankruptcy judges to be available to hear subchapter V bankruptcy cases. Bankruptcy and appellate judges may request that they be considered for such designation by the Chief Justice. Further, this provision clarifies that the district courts will not have jurisdiction over the issues related to the appointment of a special trustee and the formation of the bridge company.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 11, UNITED STATES CODE

* * * * * * *

CHAPTER 1—GENERAL PROVISIONS

* * * * * * *

§ 101. Definitions

In this title the following definitions shall apply:

(1) * * *

* * * * * * *

(9A) The term "covered financial corporation" means any corporation incorporated or organized under any Federal or State law, other than a stockbroker, a commodity broker, or an entity of the kind specified in paragraph (2) or (3) of section 109(b), that is—

(A) a bank holding company, as defined in section 2(a) of the Bank Holding Company Act of 1956; or

(B) a corporation that exists for the primary purpose of owning, controlling and financing its subsidiaries, that has total consolidated assets of $50,000,000,000 or greater, and for which, in its most recently completed fiscal year—

(i) annual gross revenues derived by the corporation 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 corporation; or

(ii) the consolidated assets of the corporation 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 corporation.

* * * * * * *

§ 103. Applicability of chapters

(a) * * *

* * * * * * *

(l) Subchapter V of chapter 11 of this title applies only in a case under chapter 11 concerning a covered financial corporation.

* * * * * * *

§ 109. Who may be a debtor

(a) * * *

(b) A person may be a debtor under chapter 7 of this title only if such person is not—

(1) * * *

(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, a New Markets Venture Capital company as defined in section 351 of the Small Business Investment Act of 1958, a small business investment company licensed by the Small Business Administration under section 301 of the Small Business Investment Act of 1958, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act, except that an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor if a petition is filed at the direction of the Board of Governors of the Federal Reserve System; [or]

(3)(A) * * *

(B) a foreign bank, savings bank, cooperative bank, savings and loan association, building and loan association, or credit union, that has a branch or agency (as defined in section 1(b) of the International Banking Act of 1978) in the United States[.]*; or*

(4) a covered financial corporation.

* * * * * * *

(d) Only a railroad, a person that may be a debtor under chapter 7 of this title (except a stockbroker or a commodity broker), [and] an uninsured State member bank, [or] a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991, *or a covered financial corporation* may be a debtor under chapter 11 of this title.

* * * * * * *

CHAPTER 3—CASE ADMINISTRATION

* * * * * * *

SUBCHAPTER II—OFFICERS

* * * * * * *

§ 322. Qualification of trustee

(a) * * *

(b)(1) * * *

(2) [The] *In cases under subchapter V, the United States trustee shall recommend to the court, and in all other cases, the* United States trustee shall determine—

(A) * * *

* * * * * * *

CHAPTER 7—LIQUIDATION

* * * * * * *

SUBCHAPTER II—COLLECTION, LIQUIDATION, AND DISTRIBUTION OF THE ESTATE

* * * * * * *

§ 726. Distribution of property of the estate

(a) Except as provided in section 510 of this title, property of the estate shall be distributed—

(1) first, *in payment of any unpaid fees, costs, and expenses of a special trustee appointed under section 1186, and then* in payment of claims of the kind specified in, and in the order specified in, section 507 of this title, proof of which is timely filed under section 501 of this title or tardily filed on or before the earlier of—

(A) * * *

* * * * * * *

CHAPTER 11—REORGANIZATION

SUBCHAPTER I—OFFICERS AND ADMINISTRATION

* * * * * * *

§ 1112. Conversion or dismissal

(a) * * *

* * * * * * *

(g) Notwithstanding section 109(b), the court may convert a case under subchapter V to a case under chapter 7 if—

(1) a transfer approved under section 1185 has been consummated;

(2) the court has ordered the appointment of a special trustee under section 1186; and

(3) the court finds, after notice and a hearing, that conversion is in the best interest of the creditors and the estate.

* * * * * * *

SUBCHAPTER II—THE PLAN

* * * * * * *

§ 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) * * *

* * * * * * *

(17) In a case under subchapter V, all payable fees, costs, and expenses of the special trustee have been paid or the plan provides for the payment of all such fees, costs, and expenses on the effective date of the plan.

(18) In a case under subchapter V, confirmation of the plan is not likely to cause serious adverse effects on financial stability in the United States.

* * * * * * *

SUBCHAPTER V—LIQUIDATION, REORGANIZATION, OR RECAPITALIZATION OF A COVERED FINANCIAL CORPORATION

§ 1181. Inapplicability of other sections

Sections 303 and 321(c) do not apply in a case under this subchapter concerning a covered financial corporation.

§ 1182. Definitions for this subchapter

In this subchapter, the following definitions shall apply:

(1) The term "Board" means the Board of Governors of the Federal Reserve System.

(2) The term "bridge company" means a newly formed corporation to which property of the estate may be transferred under section 1185(a) and the equity securities of which may be transferred to a special trustee under section 1186(a).

(3) The term "capital structure debt" means all unsecured debt of the debtor for borrowed money, other than a qualified financial contract, for which the debtor is the primary obligor other than debt secured by a lien on property of the estate that is to be transferred to a bridge company pursuant to an order of the court under section 1185(a).

(4) The term "contractual right" means a contractual right of a kind defined in section 555, 556, 559, 560, or 561.

(5) The term "qualified financial contract" means any contract of a kind defined in paragraph (25), (38A), (47), or (53B) of section 101, section 741(7), or paragraph (4), (5), (11), or (13) of section 761.

(6) The term "special trustee" means the trustee of a trust formed under section 1186(a)(1).

§ 1183. Commencement of a case concerning a covered financial corporation

(a) A case under this subchapter concerning a covered financial corporation may be commenced by the filing of a petition with the court—

(1) by the debtor under section 301 only if the debtor states to the best of its knowledge under penalty of perjury in the petition that it is a covered financial corporation; or

(2) by the Board only if the Board states to the best of its knowledge under penalty of perjury in the petition that—

(A) the debtor is a covered financial corporation that—

(i) has incurred losses that will deplete all or substantially all of the capital of the covered financial corporation, and there is no reasonable prospect for the covered financial corporation to avoid such depletion;

(ii) is insolvent;

(iii) is not paying, or is unable to pay, the debts of the covered financial corporation (other than debts subject to a bona fide dispute as to liability or amount) as they become due; or

(iv) is likely to be in a financial condition specified in clause (i), (ii), or (iii) sufficiently soon such that the immediate commencement of a case under this subchapter is necessary to prevent serious adverse effects on financial stability in the United States; and

(B) the commencement of a case under this title and effecting a transfer under section 1185 is necessary to prevent serious adverse effects on financial stability in the United States.

(b)(1) Unless the debtor consents to an order for relief, the court shall hold a hearing on the Board's petition under subsection (a)(2) as soon as practicable but not later than 16 hours after the Board files such a petition, with notice only to—

(A) the covered financial corporation;

(B) the Federal Deposit Insurance Corporation;

(C) the Office of the Comptroller of the Currency of the Department of the Treasury; and

(D) the Secretary of the Treasury.

(2) Only the Board and the entities specified in paragraph (1) and their counsel may participate in a hearing described in this

subsection. The Board or the trustee may request that pleadings, hearings, transcripts, and orders in connection with a hearing described in this subsection be sealed if their disclosure could create financial instability in the United States.

(3) All pleadings, hearings, transcripts, and orders sealed under paragraph (2) shall be available to only the court, the appellate panel, the covered financial corporation, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency of the Department of the Treasury, the Secretary of the Treasury, and the Board. Notwithstanding paragraph (2), if the case is dismissed, all court documents, including pleadings, hearings, transcripts, and orders, shall be permanently sealed.

(c)(1) The commencement of a case under subsection (a)(1) constitutes an order for relief under this subchapter.

(2) In a case commenced under subsection (a)(2), after notice and hearing required under subsection (b) and not later than 18 hours after the filing of the Board's petition, the court shall enter—

(A) an order for relief—

(i) if the Board has shown at the hearing under this subsection that the requirements under subsection (a)(2) are supported by a preponderance of the evidence; or

(ii) if the debtor consents to the Board's petition under subsection (a)(2); or

(B) an order dismissing the case.

(d)(1) The covered financial corporation or the Board may appeal to the court of appeals from an order entered by the court under subsection (c)(2) not later than 1 hour after the court enters such order, with notice only to the entities specified in subsection (b)(1) and the Board. Such order shall be stayed pending such appeal.

(2) The appellate panel specified under section 298(c)(1) of title 28 for the judicial circuit in which the case is pending shall hear the appeal under paragraph (1) within 12 hours of the filing of the notice of appeal under this subsection. The standard of review shall be abuse of discretion. The appellate panel shall enter an order determining the matter that is the subject of the appeal not later than 14 hours after the notice of appeal is filed.

(3) The court may not, on account of an appeal from an order for relief under section 1183(d)(1), delay any proceeding under section 1185, except that the court shall not authorize a transfer under section 1185 before the determination of the appeal.

(e) The members of the board of directors (or body performing similar functions) of a covered financial company shall have no liability to shareholders, creditors or other parties in interest for a good faith filing or consenting in good faith to a petition with respect to a case under this subchapter, or for any reasonable action taken in good faith in contemplation of or in connection with such a petition or a transfer under section 1185 or section 1186, whether prior to or after commencement of the case.

(f) Counsel to the debtor or the Board shall provide, to the greatest extent practicable, sufficient confidential notice to the Office of Court Services of the Administrative Office of the United States Courts regarding the potential commencement of a subchapter V case without disclosing the identity of the potential debtor in order to allow such office to randomly designate and ensure the ready

availability of one of the bankruptcy judges designated under section 298(b)(1) of title 28 to be available to preside over such subchapter V case.

§ 1184. Regulators

The Board, the Securities Exchange Commission, the Office of the Comptroller of the Currency of the Department of the Treasury, and the Federal Deposit Insurance Corporation may raise and may appear and be heard on any issue in any case or proceeding under this subchapter.

§ 1185. Special transfer of property of the estate

(a) On request of the trustee or the Board, and after notice and a hearing that shall occur not less than 24 hours after the order for relief, the court may order a transfer under this section of property of the estate, and the assignment of executory contracts, unexpired leases, and qualified financial contracts of the debtor, to a bridge company. Upon the entry of an order approving such transfer, any property transferred, and any executory contracts, unexpired leases, and qualified financial contracts assigned under such order shall no longer be property of the estate. Except as provided under this section, the provisions of sections 363 and 365 shall apply to a transfer and assignment under this section.

(b) Unless the court orders otherwise, notice of a request for an order under subsection (a) shall consist of electronic or telephonic notice of not less than 24 hours to—

(1) the debtor;

(2) the holders of the 20 largest secured claims against the debtor;

(3) the holders of the 20 largest unsecured claims against the debtor;

(4) counterparties to any debt, executory contract, unexpired lease, and qualified financial contract requested to be transferred under this section;

(5) the Board;

(6) the Federal Deposit Insurance Corporation;

(7) the Secretary of the Treasury and the Office of the Comptroller of the Currency of the Treasury;

(8) the Securities and Exchange Commission;

(9) the United States trustee or bankruptcy administrator; and

(10) each primary financial regulatory agency, as defined in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, with respect to any affiliate the equity securities of which are proposed to be transferred under this section.

(c) The court may not order a transfer under this section unless the court determines, based upon a preponderance of the evidence, that—

(1) the transfer under this section is necessary to prevent serious adverse effects on financial stability in the United States;

(2) the transfer does not provide for the assumption of any capital structure debt by the bridge company;

(3) the transfer does not provide for the transfer to the bridge company of any property of the estate that is subject to

a lien securing a debt, executory contract, unexpired lease or agreement of the debtor unless—

(A)(i) the bridge company assumes such debt, executory contract, unexpired lease or agreement, including any claims arising in respect thereof that would not be allowed secured claims under section 506(a)(1) and after giving effect to such transfer, such property remains subject to the lien securing such debt, executory contract, unexpired lease or agreement; and

(ii) the court has determined that assumption of such debt, executory contract, unexpired lease or agreement by the bridge company is in the best interests of the estate; or

(B) such property is being transferred to the bridge company in accordance with the provisions of section 363;

(4) the transfer does not provide for the assumption by the bridge company of any debt, executory contract, unexpired lease or agreement of the debtor secured by a lien on property in which the estate has an interest unless the transfer provides for such property to be transferred to the bridge company in accordance with paragraph (3)(A) of this subsection;

(5) the transfer does not provide for the transfer of the equity of the debtor;

(6) the party requesting the transfer under this subsection has demonstrated that the bridge company is not likely to fail to meet the obligations of any debt, executory contract, qualified financial contract, or unexpired lease assumed and assigned to the bridge company;

(7) the transfer provides for the transfer to a special trustee all of the equity securities in the bridge company and appointment of a special trustee in accordance with section 1186;

(8) after giving effect to the transfer, adequate provision has been made for the fees, costs, and expenses of the estate and special trustee; and

(9) the bridge company will have governing documents, and initial directors and senior officers, that are in the best interest of creditors and the estate.

(d) Immediately before a transfer under the section, the bridge company that is the recipient of the transfer shall—

(1) not have any property, executory contracts, unexpired leases, or debts, other than any property acquired or executory contracts, unexpired leases, or debts assumed when acting as a transferee of a transfer under this section; and

(2) have equity securities that are property of the estate, which may be sold or distributed in accordance with this title.

§ 1186. Special trustee

(a)(1) An order approving a transfer under section 1185 shall require the trustee to transfer to a qualified and independent special trustee all of the equity securities in the bridge company that is the recipient of a transfer under section 1185 to hold in trust for the sole benefit of the estate, subject to satisfaction of the special trustee's fees, costs, and expenses. The trust of which the special trustee is the trustee shall be a newly formed trust governed by a trust agreement approved by the court as in the best interests of the estate, and shall exist for the sole purpose of holding and admin-

istering, and shall be permitted to dispose of, the equity securities of the bridge company in accordance with the trust agreement.

(2) In connection with the hearing to approve a transfer under section 1185, the trustee shall confirm to the court that the Board has been consulted regarding the identity of the proposed special trustee and advise the court of the results of such consultation.

(b) The trust agreement governing the trust shall provide—

(1) for the payment of the fees, costs, expenses, and indemnities of the special trustee from the assets of the debtor's estate;

(2) that the special trustee provide—

(A) quarterly reporting to the estate, which shall be filed with the court; and

(B) information about the bridge company reasonably requested by a party in interest to prepare a disclosure statement for a plan providing for distribution of any securities of the bridge company if such information is necessary to prepare such disclosure statement;

(3) that for as long as the equity securities of the bridge company are held by the trust, the special trustee shall file a notice with the court in connection with—

(A) any change in a director or senior officer of the bridge company;

(B) any modification to the governing documents of the bridge company; and

(C) any material corporate action of the bridge company, including—

(i) recapitalization;

(ii) a material borrowing;

(iii) termination of an intercompany debt or guarantee;

(iv) a transfer of a substantial portion of the assets of the bridge company; or

(v) the issuance or sale of any securities of the bridge company;

(4) that any sale of any equity securities of the bridge company shall not be consummated until the special trustee consults with the Federal Deposit Insurance Corporation and the Board regarding such sale and discloses the results of such consultation with the court;

(5) that, subject to reserves for payments permitted under paragraph (1) provided for in the trust agreement, the proceeds of the sale of any equity securities of the bridge company by the special trustee be held in trust for the benefit of or transferred to the estate;

(6) the process and guidelines for the replacement of the special trustee; and

(7) that the property held in trust by the special trustee is subject to distribution in accordance with subsection (c).

(c)(1) The special trustee shall distribute the assets held in trust—

(A) if the court confirms a plan in the case, in accordance with the plan on the effective date of the plan; or

(B) if the case is converted to a case under chapter 7, as ordered by the court.

(2) As soon as practicable after a final distribution under paragraph (1), the office of the special trustee shall terminate, except as may be necessary to wind up and conclude the business and financial affairs of the trust.

(d) After a transfer to the special trustee under this section, the special trustee shall be subject only to applicable nonbankruptcy law, and the actions and conduct of the special trustee shall no longer be subject to approval by the court in the case under this subchapter.

§ 1187. Temporary and supplemental automatic stay; assumed debt

(a)(1) A petition filed under section 1183 operates as a stay, applicable to all entities, of the termination, acceleration, or modification of any debt, contract, lease, or agreement of the kind described in paragraph (2), or of any right or obligation under any such debt, contract, lease, or agreement, solely because of—

(A) a default by the debtor under any such debt, contract, lease, or agreement; or

(B) a provision in such debt, contract, lease, or agreement, or in applicable nonbankruptcy law, that is conditioned on—

(i) the insolvency or financial condition of the debtor at any time before the closing of the case;

(ii) the commencement of a case under this title concerning the debtor;

(iii) the appointment of or taking possession by a trustee in a case under this title concerning the debtor or by a custodian before the commencement of the case; or

(iv) a credit rating agency rating, or absence or withdrawal of a credit rating agency rating—

(I) of the debtor at any time after the commencement of the case;

(II) of an affiliate during the period from the commencement of the case until 48 hours after such order is entered;

(III) of the bridge company while the trustee or the special trustee is a direct or indirect beneficial holder of more than 50 percent of the equity securities of—

(aa) the bridge company; or

(bb) the affiliate, if all of the direct or indirect interests in the affiliate that are property of the estate are transferred under section 1185; or

(IV) of an affiliate while the trustee or the special trustee is a direct or indirect beneficial holder of more than 50 percent of the equity securities of—

(aa) the bridge company; or

(bb) the affiliate, if all of the direct or indirect interests in the affiliate that are property of the estate are transferred under section 1185.

(2) A debt, contract, lease, or agreement described in this paragraph is—

(A) any debt (other than capital structure debt), executory contract, or unexpired lease of the debtor (other than a qualified financial contract);

(B) any agreement under which the debtor issued or is obligated for debt (other than capital structure debt);

(C) any debt, executory contract, or unexpired lease of an affiliate (other than a qualified financial contract); or

(D) any agreement under which an affiliate issued or is obligated for debt.

(3) The stay under this subsection terminates—

(A) for the benefit of the debtor, upon the earliest of—

(i) 48 hours after the commencement of the case;

(ii) assumption of the debt, contract, lease, or agreement by the bridge company under an order authorizing a transfer under section 1185; or

(iii) a final order of the court denying the request for a transfer under section 1185; and

(B) for the benefit of an affiliate, upon the earliest of—

(i) the entry of an order authorizing a transfer under section 1185 in which the direct or indirect interests in the affiliate that are property of the estate are not transferred under section 1185;

(ii) a final order by the court denying the request for a transfer under section 1185; or

(iii) 48 hours after the commencement of the case if the court has not ordered a transfer under section 1185.

(4) Subsections (d), (e), (f), and (g) of section 362 apply to a stay under this subsection.

(b) A debt, executory contract (other than a qualified financial contract), or unexpired lease of the debtor, or an agreement under which the debtor has issued or is obligated for any debt, may be assumed by a bridge company in a transfer under section 1185 notwithstanding any provision in an agreement or in applicable nonbankruptcy law that—

(1) prohibits, restricts, or conditions the assignment of the debt, contract, lease, or agreement; or

(2) terminates or modifies, or permits a party other than the debtor to terminate or modify, the debt, contract, lease, or agreement on account of—

(A) the assignment of the debt, contract, lease, or agreement; or

(B) a change in control of any party to the debt, contract, lease, or agreement.

(c)(1) A debt, contract, lease, or agreement of the kind described in subparagraph (A) or (B) of subsection (a)(2) may not be terminated or modified, and any right or obligation under such debt, contract, lease, or agreement may not be terminated or modified, as to the bridge company solely because of a provision in the debt, contract, lease, or agreement or in applicable nonbankruptcy law—

(A) of the kind described in subsection (a)(1)(B) as applied to the debtor;

(B) that prohibits, restricts, or conditions the assignment of the debt, contract, lease, or agreement; or

(C) that terminates or modifies, or permits a party other than the debtor to terminate or modify, the debt, contract, lease or agreement on account of—

(i) the assignment of the debt, contract, lease, or agreement; or

(ii) a change in control of any party to the debt, contract, lease, or agreement.

(2) If there is a default by the debtor under a provision other than the kind described in paragraph (1) in a debt, contract, lease or agreement of the kind described in subparagraph (A) or (B) of subsection (a)(2), the bridge company may assume such debt, contract, lease, or agreement only if the bridge company—

(A) shall cure the default;

(B) compensates, or provides adequate assurance in connection with a transfer under section 1185 that the bridge company will promptly compensate, a party other than the debtor to the debt, contract, lease, or agreement, for any actual pecuniary loss to the party resulting from the default; and

(C) provides adequate assurance in connection with a transfer under section 1185 of future performance under the debt, contract, lease, or agreement, as determined by the court under section 1185(c)(4).

§ 1188. Treatment of qualified financial contracts and affiliate contracts

(a) Notwithstanding sections 362(b)(6), 362(b)(7), 362(b)(17), 362(b)(27), 362(o), 555, 556, 559, 560, and 561, a petition filed under section 1183 operates as a stay, during the period specified in section 1187(a)(3)(A), applicable to all entities, of the exercise of a contractual right—

(1) to cause the modification, liquidation, termination, or acceleration of a qualified financial contract of the debtor or an affiliate;

(2) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with a qualified financial contract of the debtor or an affiliate; or

(3) under any security agreement or arrangement or other credit enhancement forming a part of or related to a qualified financial contract of the debtor or an affiliate.

(b)(1) During the period specified in section 1187(a)(3)(A), the trustee or the affiliate shall perform all payment and delivery obligations under such qualified financial contract of the debtor or the affiliate, as the case may be, that become due after the commencement of the case. The stay provided under subsection (a) terminates as to a qualified financial contract of the debtor or an affiliate immediately upon the failure of the trustee or the affiliate, as the case may be, to perform any such obligation during such period.

(2) Any failure by a counterparty to any qualified financial contract of the debtor or any affiliate to perform any payment or delivery obligation under such qualified financial contract, including during the pendency of the stay provided under subsection (a), shall constitute a breach of such qualified financial contract by the counterparty.

(c) A qualified financial contract between an entity and the debtor may not be assigned to or assumed by the bridge company in a transfer under section 1185 unless—

(1) all qualified financial contracts between the entity and the debtor are assigned to and assumed by the bridge company in the transfer under section 1185;

(2) all claims of the entity against the debtor under any qualified financial contract between the entity and the debtor (other than any claim that, under the terms of the qualified financial contract, is subordinated to the claims of general unsecured creditors) are assigned to and assumed by the bridge company;

(3) all claims of the debtor against the entity under any qualified financial contract between the entity and the debtor are assigned to and assumed by the bridge company; and

(4) all property securing or any other credit enhancement furnished by the debtor for any qualified financial contract described in paragraph (1) or any claim described in paragraph (2) or (3) under any qualified financial contract between the entity and the debtor is assigned to and assumed by the bridge company.

(d) Notwithstanding any provision of a qualified financial contract or of applicable nonbankruptcy law, a qualified financial contract of the debtor that is assumed or assigned in a transfer under section 1185 may not be accelerated, terminated, or modified, after the entry of the order approving a transfer under section 1185, and any right or obligation under the qualified financial contract may not be accelerated, terminated, or modified, after the entry of the order approving a transfer under section 1185 solely because of a condition described in section 1187(c)(1), other than a condition of the kind specified in section 1187(a)(1)(B)(iv)(III) or section 1187(b) that occurs after property of the estate no longer includes a direct beneficial interest or an indirect beneficial interest through the special trustee, in more than 50 percent of the equity securities of the bridge company.

(e) Notwithstanding any provision of any agreement or in applicable nonbankruptcy law, an agreement of an affiliate (including an executory contract, an unexpired lease, qualified financial contract, or an agreement under which the affiliate issued or is obligated for debt) and any right or obligation under such agreement may not be terminated or modified, solely because of a condition described in section 1187(c)(1), other than a condition of the kind specified in section 1187(a)(1)(B)(iv)(III) or section 1187(b) that occurs after the bridge company is no longer a direct or indirect beneficial holder of more than 50 percent of the equity securities of the affiliate, at any time after the commencement of the case if—

(1) all direct or indirect interests in the affiliate that are property of the estate are transferred under section 1185 to the bridge company within the period specified in subsection (a);

(2) the bridge company assumes—

(A) any guarantee or other credit enhancement issued by the debtor relating to the agreement of the affiliate; and

(B) any right of setoff, netting arrangement, or debt of the debtor that directly arises out of or directly relates to the guarantee or credit enhancement; and

(3) any property of the estate that directly serves as collateral for the guarantee or credit enhancement is transferred to the bridge company.

§ 1189. Licenses, permits, and registrations

(a) Notwithstanding any otherwise applicable nonbankruptcy law, if a request is made under section 1185 for a transfer of property of the estate, any Federal, State, or local license, permit, or registration that the debtor or an affiliate had immediately before the commencement of the case and that is proposed to be transferred under section 1185 may not be terminated or modified at any time after the request solely on account of—

(1) the insolvency or financial condition of the debtor at any time before the closing of the case;

(2) the commencement of a case under this title concerning the debtor;

(3) the appointment of or taking possession by a trustee in a case under this title concerning the debtor or by a custodian before the commencement of the case; or

(4) a transfer under section 1185.

(b) Notwithstanding any otherwise applicable nonbankruptcy law, any Federal, State, or local license, permit, or registration that the debtor had immediately before the commencement of the case that is included in a transfer under section 1185 shall be valid and all rights and obligations thereunder shall vest in the bridge company.

§ 1190. Exemption from securities laws

For purposes of section 1145, a security of the bridge company shall be deemed to be a security of a successor to the debtor under a plan if the court approves the disclosure statement for the plan as providing adequate information (as defined in section 1125(a)) about the bridge company and the security.

§ 1191. Inapplicability of certain avoiding powers

A transfer made or an obligation incurred by the debtor to an affiliate prior to or after the commencement of the case, including any obligation released by the debtor or the estate to or for the benefit of an affiliate, in contemplation of or in connection with a transfer under section 1185 is not avoidable under section 544, 547, 548(a)(1)(B), or 549, or under any similar nonbankruptcy law.

§ 1192. Consideration of financial stability

The court may consider the effect that any decision in connection with this subchapter may have on financial stability in the United States.

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TITLE 28, UNITED STATES CODE

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PART I—ORGANIZATION OF COURTS

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CHAPTER 13—ASSIGNMENT OF JUDGES TO OTHER COURTS

Sec.
291. Circuit judges.

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298. Judge for a case under subchapter V of chapter 11 of title 11.

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§ 298. Judge for a case under subchapter V of chapter 11 of title 11

(a) Notwithstanding section 295, the Chief Justice of the United States shall designate not fewer than 3 judges of the courts of appeals in not fewer than 4 circuits to serve on an appellate panel to be available to hear an appeal under section 1183 of title 11 in a case under such title concerning a covered financial corporation. Appellate judges may request to be considered by the Chief Justice of the United States for such designation.

(b)(1) Notwithstanding section 295, the Chief Justice of the United States shall designate not fewer than 10 bankruptcy judges to be available to hear a case under subchapter V of chapter 11 of title 11. Bankruptcy judges may request to be considered by the Chief Justice of the United States for such designation.

(2) Notwithstanding section 155, a case under subchapter V of chapter 11 of title 11 shall be heard under section 157 by a bankruptcy judge designated under paragraph (1), who shall be assigned to hear such case by the chief judge of the court of appeals for the circuit embracing the district in which the case is pending. To the greatest extent practicable, the approvals required under section 155 should be obtained.

(3) If the bankruptcy judge assigned to hear a case under paragraph (2) is not assigned to the district in which the case is pending, the bankruptcy judge shall be temporarily assigned to the district.

(c)(1) The court of appeals shall have jurisdiction of appeals from all orders for relief and orders of dismissal under section 1183 of title 11.

(2) Notwithstanding section 295, in an appeal under paragraph (1) in a case under title 11 concerning a covered financial corporation shall be heard by—

(A) 3 judges selected from the appellate panel designated under subsection (a); or

(B) if the 3 judges of such panel are not immediately available to hear the case, 3 judges designated under subsection (a) from another circuit and assigned by the Chief Justice of the United States to hear the case.

(3) If any of the judges of the appellate panel specified in paragraph (2) is not assigned to the circuit in which the appeal is pending, the judges shall be temporarily assigned to the circuit.

(4) A case under subchapter V of chapter 11 of title 11, and all proceedings in the case, shall take place in the district in which the case is pending.

(d) In this section, the term "covered financial corporation" has the meaning given that term in section 101(9A) of title 11.

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PART IV—JURISDICTION AND VENUE

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CHAPTER 85—DISTRICT COURTS; JURISDICTION

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§ 1334. Bankruptcy cases and proceedings

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(f) This section does not grant jurisdiction to the district court after a transfer pursuant to an order under section 1185 of title 11 of any proceeding related to a special trustee appointed, or to a bridge company formed, in connection with a case under subchapter V of chapter 11 of title 11.

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