

5-1-2013

# Congress Fumbled Again: Dodd-Frank Fails to Transcend the Influence of Wall Street

Felipe Neris De Los Santos

Follow this and additional works at: [https://scholarship.shu.edu/student\\_scholarship](https://scholarship.shu.edu/student_scholarship)

---

## Recommended Citation

De Los Santos, Felipe Neris, "Congress Fumbled Again: Dodd-Frank Fails to Transcend the Influence of Wall Street" (2013). *Law School Student Scholarship*. 338.  
[https://scholarship.shu.edu/student\\_scholarship/338](https://scholarship.shu.edu/student_scholarship/338)

CONGRESS FUMBLING AGAIN: DODD-FRANK FAILS TO TRANSCEND THE  
INFLUENCE OF WALL STREET.

Felipe De Los Santos

INTRODUCTION.....	2
I. DOES DODD-FRANK ACCOMPLISH CONGRESS'S INTENT TO REFORM WALL STREET?.....	5
A. <i>How did Congress formulate its initial intent to pass Dodd-Frank?</i> .....	8
B. <i>How did Wall Street circumvent Congress's intent in the final enactment of Dodd-Frank?</i> .....	10
1. The Volcker Rule.....	11
2. The Lincoln Amendment.....	14
3. The Kanjorski Amendment.....	17
a. <i>Rejection of the proposed Safe Banking Act</i> .....	18
II. CAN THE NEW AGENCIES CREATED BY DODD-FRANK MAKE UP FOR THE SHORT COMINGS IN THE LAW?.....	21
A. <i>Office of Financial Research</i> .....	21
B. <i>Financial Stability Oversight Council</i> .....	24
III. A PROPOSAL FOR CONGRESS THE NEXT TIME IT CONSIDERS REFORMING WALL STREET.....	27
A. <i>Recommendation: Systemic Insurance fund</i> .....	28
CONCLUSION.....	31

## INTRODUCTION

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank)<sup>1</sup>, is Congress's answer to the 2008 financial crises that began when HSBC revealed \$3.2 billion in write-downs linked to the U.S. sub-prime market.<sup>2</sup> Ironically, Congress was forced to pass Dodd-Frank only eight years after passing the Sarbanes-Oxley Act of 2002 (SOX), which followed a crisis stemming from the failures of Enron and Worldcom.<sup>3</sup> One could reasonable assume, if Congress faces two financial crises within ten years, the second time around it would pass a more robust financial reform law. Unfortunately, Congress's handling and its final enactment of Dodd-Frank appears more like a fumbled opportunity than a successful reform of Wall Street.<sup>4</sup>

Congress, by passing the enacted version of Dodd-Frank, squandered the opportunity to pass a robust financial reform law, because Wall Street lobbied<sup>5</sup> the

---

<sup>1</sup> Posting of Jesse Lee to The White House Blog, President Obama Signs Wall Street Reform: "No Easy Task," <http://www.whitehouse.gov/blog/2010/07/21/president-obama-signs-wall-street-reform-no-easy-task> (July 21, 2010, 2:22 PM EST).

<sup>2</sup> BBC, *HSBC in new sub-prime writedown*, May. 12 2008, available at <http://news.bbc.co.uk/2/hi/business/7395425.stm> (last visited Nov. 30, 2011) (HSBC was the first bank to write down its sub-prime investments).

<sup>3</sup> SOX was passed in reaction to corporate governance issues that were discovered following the failures of Enron and WorldCom. Both Enron and World entered bankruptcy proceedings following the revelations of deceptive accounting practices and "executives' self-dealing transactions." Roberta Romano, *The Sarbanes-Oxley Act and the making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1524, 1591-1592 (2005). The scandals at Enron and Worldcom were not isolated. *Id.* News of corporate shenanigans were also discovered at Global Crossing, Tyco, and Adelphia. *Id.*

<sup>4</sup> Congress, similar to the manner in which it passes SOX, responds to public outrage following the financial crisis of 2008 by passing a law directed towards Wall Street. Stephan M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1780 (2011). Professor Roberta Romano asserts that Congress, following a major financial collapse, often feels pressure to pass something "with the specific content of less concern and importance." Romano *Supra* note 7, at 1526.

<sup>5</sup> Lobbyists generally gain access to members of Congress and their staff through large campaign contributions. Marion McLane Read, *Between a Rock and a Hard Place: Looking Beyond Statutes and the First Amendment to Address Ethical Concerns in Federal Lobbying*, 24 GEO. J. LEGAL ETHICS 783, at 787 (2011). It is illegal for lobbyists to manipulate Congressional members with money but large campaign contributions will usually grant a lobbyist access to a particular Congressional member or their staff. *Id.* Lobbyist use access to the legislative member so they can attempt to convince the legislators behind a proposed law that their interest are aligned. Lloyd Hitoshi Mayer, *What Is This "Lobbying" That We Are So Worried About?*, 26 Yale L. & Pol'y Rev. 485, at 494 (2008). The lobbyists may influence other legislators

legislators until it got what it wanted—a weakened law.<sup>6</sup> Dodd-Frank began as a law intended to reform Wall Street, however, it ended up being a law subjugated by Wall Street because: (1) Wall Street and other political factors, influenced Congress into softening proposed sections that would have a) stopped risky Wall Street practices and b) capped the size of banks, and (2), the new agencies tasked with increasing transparency and identifying risk are subject to potential intervention from Wall Street that will weaken their effectiveness.

Part I of this paper outlines Congress’s goals in passing Dodd-Frank. Part I explores the early legislative history behind the law in order to find Congress’s intent in passing Dodd-Frank. This section concludes by examining three sections of Dodd-Frank to illustrate how Congress’s intent to reform Wall Street is altered, so that the enacted legislation is favorable to Wall Street.

Part II of this paper explores two new agencies created by Dodd-Frank, which focus on transparency and risk identification.<sup>7</sup> Part II discusses the strengths and weakness of the new agencies and the potential for Wall Street to influence them. Part III offers a proposal for Congress the next time it considers to reform Wall Street. Part III attempts to test the proposal against the goals in Dodd-Frank. With no foresight of when the next

---

to put pressure on “targeted legislators” to amend the proposed law so that it is favorable to their interest. *Id.*

<sup>6</sup> In the first nine months of 2010 3,659 lobbyists worked for companies that explicitly lobbied on the Dodd-Frank bill, compared to 2,375 in the whole 2009. Shannay Basar, *Lobbying Dodd-Frank*, FINANCIAL NEWS, Nov. 12, 2010, available at <http://www.efinancialnews.com/story/2010-11-12/lobbyists-dodd-frank> (last visited Dec. 6, 2011). The “top ten banks, in terms of deposits, reported spending a total of \$87 million lobbying Congress on multiple issues, including the Dodd-Frank legislation, from 2009 to 2010. Posting of Anupama Narayanswamy to SUNLIGHT FOUNDATION blog, *Lobbyists swarm agencies as Dodd-Frank is implemented*, <http://reporting.sunlightfoundation.com/2011/dodd-frank-lobbying/> (July 19, 2011, 11:34 AM).

<sup>7</sup> Dodd-Frank creates two important new agencies, which focus on transparency and risk identification, the Office of Financial Research and the Financial Stability Oversight Council. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). [hereinafter Dodd-Frank Act].

financial crisis is going to occur, this paper suggests that in the future Congress should pass a less politically polarizing bill, in which it creates a Systemic Insurance Fund that forces Wall Street to pay for its own risky behavior.<sup>8</sup>

---

<sup>8</sup> Financial and banking lobbyists, “if successful in opposing...[a]...proposed legislation [such as Dodd-Frank]...will [divest] protections for average consumers and investors.” C.M.A. Mc Cauliff, *Didn't Your Mother Teach You to Share?: Wealth, Lobbying and Distributive Justice in the Wake of the Economic Crisis*, 62 RUTGERS L. REV. 383, 428 (2010).

I. DOES DODD-FRANK ACCOMPLISH CONGRESS’S INTENT TO REFORM WALL STREET?

President Barack Obama signed Dodd-Frank into law on July 21, 2010.<sup>9</sup> The 111<sup>th</sup> Congress had several goals when it passed Dodd-Frank.<sup>10</sup> In the preamble Congress articulated those goals as follows:

To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail,’ to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.<sup>11</sup>

Commentators and some courts have stated that the preamble of a statute can be conferred as a source to determine a legislator’s intent when it passes legislation.<sup>12</sup> The preamble of Dodd-Frank states that it intends “to promote...financial stability,” “to end

---

<sup>9</sup> H.R. 4173, 111<sup>th</sup> Cong. (2009-2010).

<sup>10</sup> Dodd-Frank Act § (citing to preamble).

<sup>11</sup> *Id.*

<sup>12</sup> Some courts have stated that the preamble of legislation is evidence of legislative intent and may be considered. *Peffers v. City of Des Moines*, 299 N.W.2d 675, 678 (Iowa Sup. Ct.1980). Additionally, writers have stated that Congress can provide explanations of statutes in formal preambles. Benard W. Bell, *Legislative History Without Legislative Intent: The Public Justification approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1, 24 (1999). The preamble often accompanies a “bill throughout the legislative process, is voted upon by...[legislators]...and is included in the text which is presented to the [President] for signature highlights the unique character of the preamble in terms of legislative intent. *Atkins v. Deere & Co.*, 685 N.E.2d 342, 347 (Ill. Sup. Ct 1997). The preamble informs “the meaning of the remainder of the text.” *Dist. of Columbia v. Heller*, 554 U.S. 570, 643 (2008) The Supreme Court uses the preamble of a statute to ensure that it’s reading of an operative clause is consistent with the announced purpose. *Id.* See also, *King v. Ford Motor Credit Co.*, 257 Mich. App. 303, (Mich. Ct. App. 2003) (A preamble is useful for interpreting statutory purpose and scope); *Ass’n of Am. Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977) (A preamble contributes to a general understanding of a statute); *United States v. Fisher*, 6 U.S. 358, 400, 2 L. Ed. 304 (1805) (The preamble of an act can provide knowledge regarding the act and it can “open” the intent of the law makers); But See SUTHERLAND STATUTORY CONSTRUCTION § 20:3 (7th ed.) (Alternatively some commentator’s have stated that preamble cannot be used to discern legislative unless there is some doubt in the statute’s meaning); *People v. McCarty*, 223 Ill. 2d 109, 306 Ill. Dec. 570, 858 N.E.2d 15 (2006); Some courts have stated that the preamble should be interpreted for intent only where there are disputed issues of statutory interpretation. *Verbois v. Houston*, 784 So. 2d 12 (La. Ct. App. 4th Cir. 2001); See generally *In re Kavolchuck*, 154 B.R. 793, 801 (S.D. Fla. 1993); *Ass’n of Am. Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977)

to big to fail,” to “protect the American taxpayer,” and to “protect consumers.”<sup>13</sup> The phrase “too big to fail” (TBTF) refers to the eighteen leading global large complex financial institutions (LCFIs).<sup>14</sup> In order to ensure that it’s intent is fulfilled; Congress would have to structure the sections in the body of the law in a way that would fundamentally change Wall Street.<sup>15</sup> Arguably, these changes to Wall Street would entail preventing LCFIs from becoming too big by capping them and severely curtailing the types of risks they can assume.<sup>16</sup>

Given Wall Street’s influence<sup>17</sup> during the legislative process, the logical question to ask is whether the body of the statute, consisting of almost 1400 sections, falls short of accomplishing Congress’s intent.<sup>18</sup> If the body of the statute does falls short of fulfilling

---

<sup>13</sup> Dodd-Frank Act

<sup>14</sup> In order to determine which LCFIs are too big to fail federal regulators conducted stress test on the on the nineteen largest banking holding companies (BHCs). Arthur E. Wilmarth, Jr., *Reforming Financial Regulation to Address the Too-Big-to-Fail Problem*, 35 BROOK. J. INT’L L. 707, 713 (2010) Professor Wilmarth identified some of the too big to fail companies as “the four largest U.S. banks which includes Bank of America, Chase, Citigroup, and Wachovia. Arthur E. Wilmarth, Jr., *The Dark Side of Universal Banking: Financial Conglomerates and the Origins of the Subprime Financial Crisis*, 41 CONN. L. REV. 963, 980 (2009). It also includes the “five largest U.S. securities firms Bear Stearns, which is now defunct, Goldman, Lehman Brothers, which is also defunct, Merrill, and Morgan Stanley.” *Id.* at 989. Additionally, this list includes the largest U.S. insurer at the time American International Group (AIG). *Id.* at 994. Outside of the U.S it includes “eight foreign universal banks Barclays, BNP Paribas, Credit Suisse, Deutsche, HSBC, RBS, Soci t  G n rale, and UBS.” *Id.* at 994. According to Professor Wilmarth “the big eighteen dominated global and U.S. markets for securities underwriting, securitizations, structured financial products, and OTC derivatives.” Arthur E. Wilmarth, Jr., *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-to-Fail Problem*, 89 OR. L. REV. 951, 1057 (2011).

<sup>15</sup> Dodd-Frank on its face is structured in a manner that appears to address: too big to fail, loopholes in regulation, transparency of hedge funds, limiting the size of the largest firms, executive pay, separating banking and speculative trading, consumer protections, bad mortgage practices, transparent derivatives, and prevention of a future crises. U.S. DEPARTMENT OF THE TREASURY, *Top Ten Things You Should Know about the Dodd-Frank Wall Street Reform and Consumer Protection Act*, Oct. 2010 available at <http://www.treasur.gov/wallstreetreform> (last visited Nov. 30, 2011).

<sup>16</sup> See Kat Aaron, *Predatory Lendings: A Decade of Warnings*, THE CENTER FOR PUBLIC INTEGRITY, May. 6. 2009, [http://www.publicintegrity.org/investigations/economic\\_meltdown/articles/entry/1309/](http://www.publicintegrity.org/investigations/economic_meltdown/articles/entry/1309/) (last visited Dec. 5, 2011).

<sup>17</sup> See Michael Beckel, *Lobbyists’ Newest Targets in Wall Street Reform Battle? Federal Oversight Agencies*, OPENSECRETS.ORG, Nov. 11, 2010, <http://www.opensecrets.org/news/2010/11/lobbyists-newest-targets-in-wall-st.html> (last visited Dec. 6, 2011) (discussing Wall Street lobbying on Dodd-Frank).

<sup>18</sup> Dodd-Frank Act   (citing to preamble).

Congress's intent then whose intent is reflected in the law?<sup>19</sup> One might argue that certain sections reflect Wall Street intent.<sup>20</sup>

*A. How did Congress formulate its initial intent to pass Dodd-Frank?*

When Congress passed Dodd-Frank it sought to ensure that problematic Wall Street practices are stopped.<sup>21</sup> One way in which Congress intended to accomplish this goal was by addressing the issue of the federal safety net<sup>22</sup> that Wall Street used during the crisis.<sup>23</sup>

In order to gain a better understanding of how Congress formulated its intent, a logical place to start is the legislative history of Dodd-Frank.<sup>24</sup> In examining the legislative history, the reader should be mindful, that as Congress was legislating,

---

<sup>19</sup> Wall Street's intent is evidenced by the manner in which it hired lobbyists to mold the legislation so that it favored its interest. Reza Dibadj, *Dodd-Frank: Toward First Principles?*, 15 CHAP. L. REV. 79, at 103 (2011). Arguably, the Wall Street lobbyists played a crucial role in fostering an elaborate, yet perhaps less effective, statute. *Id.* Further proof of that Wall Street influence, the Centre for Public Integrity, a non-partisan research group, reckons the financial-services industries alone hired more than 3,000 lobbyists to influence Dodd-Frank. *Cheques and Imbalances: Financial firms bet on Republicans to fight for their interests*, ECONOMIST, June 11, 2010, at 33, available at [http://www.economist.com/node/16380025?story\\_id=16380025&CFID=165030874&CFTOKEN=60263434](http://www.economist.com/node/16380025?story_id=16380025&CFID=165030874&CFTOKEN=60263434) (last visited Nov. 30, 2011).

<sup>20</sup> See *infra* section B.

<sup>21</sup> Dodd-Frank Act (citing to preamble).

<sup>22</sup> During instances where there is "a systemic crisis, safety net subsidies become much larger because the federal government, in effect, provides 'catastrophe insurance.'" Arthur E. Wilmarth, Jr., *Subprime Crisis Confirms Wisdom of Separating Banking and Commerce*, BANKING & FIN. SERVICES POL'Y REP., May 2008, at 1, 5 available at <http://ssrn.com/abstract=1263453>. As Professor Wilmarth has documented, the federal "safety net" for financial institutions includes (1) federal deposit insurance, (2) protection of uninsured depositors and other uninsured creditors of TBTF institutions, and (3) discount window advances and other liquidity assistance provided by the Federal Reserve bank FRB as "lender of last resort" (LOLR), and (4) the FRB's guarantee of interbank payments made on Fedwire. *Id.* at 16, See also Joe Peek & James A. Wilcox, "The Fall and Rise of Banking Safety Net Subsidies," in *Too Big to Fail: Policies and Practices in Government Bailouts* 169, 179-183 (Benton E. Gup, ed. 2004); John R. Walter, "Can a Safety Net Subsidy Be Contained?," 84 Economic Quarterly No. 1, Fed. Res. Bank of Rich., VA, at 1, 2 (1998)

<sup>23</sup> See Gary H. Stern & Ron J. Feldman, *Managing the Expanded Safety Net*, May. 1, 2008, THE FED.

RESERVE BANK MINN. Available at

[http://www.minneapolisfed.org/publications\\_papers/pub\\_display.cfm?id=3471](http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=3471) (last visited Nov. 30, 2011).

<sup>24</sup> See Stephen Breyer, *On the uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848-860 (1992) (discussing using legislative history to help interpret statutory language seems natural. Legislative history helps a court understand the context and purpose of a statute. The legislative history can help determine Congressional intent); See also Federal Legislative History, DUKE LAW, available at <http://www.law.duke.edu/lib/researchguides/fedleg> (last visited Nov. 30, 2011) ("Statements made in testimony before the committee considering the proposed legislation or by committee members have been accepted by courts as evidence of legislative intent").



millions of Americans were losing their homes, major U.S. bank were reporting massive writedowns<sup>25</sup>, and some banks were collapsing.<sup>26</sup> Congress began the arduous process towards formulating its intent on February 4, 2009 when the United States Senate held a hearing titled “Modernizing the U.S Financial Regulatory System.”<sup>27</sup> In this hearing, Senator Christopher J. Dodd affirmed that Congress’s mission is to craft a framework for 21<sup>st</sup> century financial regulation that is informed by lessons learned from the 2008 crisis.<sup>28</sup> Furthermore, the new regulation should be designed so that it prevents excesses that wreaked havoc on homeowners and plunged the economy into a recession.<sup>29</sup> This hearing was the first of many hearings where members of Congress and other financial

---

<sup>25</sup> See PBS, *Foreclosure crisis pushes more Americans out of Their Homes*, Oct. 22, 2010, [http://www.pbs.org/newshour/extra/features/economics/july-dec10/Foreclosure\\_10-22.html](http://www.pbs.org/newshour/extra/features/economics/july-dec10/Foreclosure_10-22.html) (last visited Dec. 6, 2011) (discussing the number of Americans that lost their homes as a result of the financial crisis); Ruthie Ackerman, *Bank of America, Wachovia Crushed*, Jan. 22, 2008, FORBES, available at <http://www.forbes.com/2008/01/22/bankofamerica-wachovia-financials-markets-equity-cx-ra-0122markets23.html> (last visited Dec. 6, 2011) (discussing some of the loses that major banks were facing at the time).

<sup>26</sup> See Peter S. Goodman, *Big Spenders? They Wish*, N.Y. TIMES, Sept. 12, 2009, available at <http://www.nytimes.com/2009/09/13/business/economy/13excerpt.html?pagewanted=all> (last visited Nov. 30, 2011) (Millions of Americans have lost homes, jobs and savings to the financial crisis and recession). See also David Ellis, *Lehman Brothers collapse stuns global markets*, CNN, Sept. 1, 2008, available at <http://edition.cnn.com/2008/BUSINESS/09/15/lehman.merrill.stocks.turmoil/index.html> (last visited Nov. 30, 2011). Rodney Yap & Dave Pierson, *Subprime Mortgage-Related Losses Exceed \$1.77 Trillion: Table*, BLOOMBERG NEWS, May 11, 2010 (A table in the article shows “the \$815.6 billion in asset writedowns and credit losses at more than 100 of the world's biggest banks and securities firms as well as the \$855.7 billion capital raised to cope with them”).

Quoting Professor Willmarth, “household net worth in the United States fell by more than one-fifth (from \$64.2 trillion to \$48.8 trillion) from the end of 2007 through the first quarter of 2009.” Willmarth, *A Flawed and Inadequate Response*, *Supra* note 14, at 960.

<sup>27</sup> *Modernizing the U.S. Financial Regulatory System: Hearing Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs*, 111<sup>th</sup> Cong. (2009) (statement of Sen. Dodd, Chairman, Comm. On Banking, Housing, and Urban Affairs).

<sup>28</sup> *Id.* See generally, *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, (1976) (As a statement of one of the legislation's sponsors, this explanation is likely to be given some weight in interpreting the statute), *Humphrey's Ex'r v. United States*, 295 U.S. 602, (1935) (the legislative reports demonstrate congressional intent). But see, *Barber v. Thomas*, 130 S. Ct. 2499, (2010) (discussing that “whatever interpretive force one attaches to legislative history, the Court normally gives little weight to statements, such as those of the individual legislators, made *after* the bill in question has become law”).

<sup>29</sup> Statement of Sen. Dodd *Supra* note 27.

regulators would testify or submit statements regarding regulation of the financial industry.<sup>30</sup>

One of the earliest bills introduced in the House was narrow in scope and focused mainly on mortgage reform, as its title suggests “Mortgage Reform & Anti-Predatory Lending Act.”<sup>31</sup> The House, in this early bill, focused on issues that originated with mortgage lenders.<sup>32</sup> As time passed Congress determined that any new law needed to include measures to improve systematic stability, measures to improve options for dealing with failing firms, transparency of financial markets, and protections for consumers.<sup>33</sup> As the events from the financial crisis became more publicized, the scope of what Congress needed to do grew, and thus it’s intent behind Dodd-Frank began to take shape.<sup>34</sup> Motivated by “populist outrage” Congress over the months following the financial crisis appeared as if it intended to make dramatic changes on Wall Street.<sup>35</sup>

---

<sup>30</sup> See FEDERAL RESERVE BANK OF ST. LOUIS, *Reforming the Nation’s Financial System*, available at <http://regtimeline.stlouisfed.org/timeline.cfm> (last visited Nov. 30, 2011) (contains the timeline of hearings held by Congress).

<sup>31</sup> H.R.1728, 111<sup>th</sup> Congress (2009-2010); See also Federal Legislative History, DUKE LAW, available at <http://www.law.duke.edu/lib/researchguides/fedleg> (last visited Nov. 30, 2011) (“Frequently, before the final version of a bill is reported to the floor, a committee will consider alternative versions or proposed amendments. Comparing the enacted language with that found in earlier versions of the bill, or in amendments that were not accepted, can better illustrate the intent of the final version”).

<sup>32</sup> *Id.* (In title II sought to set minimum standards for mortgages. In title III it sought to regulate high cost mortgages).

<sup>33</sup> See Baird Webel, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Issues and Summary*, CONGRESSIONAL RESEARCH SERVICE, July 29, 2010, available at <http://www.llsdc.org/attachments/files/232/CRS-R41350.pdf> (last visited Dec. 6, 2011).

<sup>34</sup> See Testimony of Ben S. Bernanke, Chairman, Fed. Reserve Bd., Causes of the Recent Financial and Economic Crisis, Statement Before the Financial Crisis Inquiry Commission, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, (Sept. 2, 2010), available at <http://www.federalreserve.gov/newsevents/testimony/bernanke20100902a.htm>. (last visited Dec. 6, 2011).

<sup>35</sup> Bainbridge *Supra* note 4 at 1782. See also Andrew Leonard, *The Dodd-Frank bank reform bill: A deeply flawed success*, SALON, June 25, 2010 available at [http://politics.salon.com/2010/06/25/the\\_dodd\\_frank\\_bank\\_reform\\_bill/](http://politics.salon.com/2010/06/25/the_dodd_frank_bank_reform_bill/) (last visited Nov. 30, 2011) (Describing Dodd-Frank as a “concatenation of intricate compromises tied up in 2,000”).

As Congress learned more about how the financial crisis occurred, it appeared that Wall Street was the catalyst.<sup>36</sup> The moment that Congress began to add provisions in the law that impacted Wall Street practices, Wall Street began lobbying to weaken Dodd-Frank.<sup>37</sup> The question is what happened to Congress's intent to reform Wall Street? This paper argues that Congress gave into Wall Street influence and that as a result Dodd-Frank does not adequately reform Wall Street.<sup>38</sup>

*B. How did Wall Street circumvent Congress's intent in the final enactment of Dodd-Frank?*

Dodd-Frank is severally weakened in its enacted form.<sup>39</sup> During the legislative process of Dodd-Frank, there are several examples where Congress, in its initial proposal, directly addresses an important issue, only to weaken its effectiveness prior to its enactment.<sup>40</sup> In each instance that this occurs, the impact of that section of the law is

---

<sup>36</sup> Large complex financial institutions from Wall Street "were the primary private-sector catalysts for the crisis, and they received the lion's share of support from government programs that were established during the crisis to preserve financial stability." Wilmarth, *A Flawed and Inadequate Response*, *Supra* note 14, at 955.

<sup>37</sup> Several well-known Wall Street banks such as Goldman Sachs Group Inc., JPMorgan Chase & Co., and Bank of America Corp lobbied against portions of Dodd-Frank that would hurt their financial results." Clea Benson & Phil Mattingly, *Firms That Fought Dodd-Frank May Gain Under New House*, BLOOMBERG BUSINESSWEEK, November 3, 2010 available at <http://www.businessweek.com/news/2010-11-03/firms-that-fought-dodd-frank-may-gain-under-new-house.html>, (last visited Dec. 6, 2011); *See also* Jim Kuhnhenn, *Chamber, Wall Street lobby seek to alter Dodd Bill*, BREITBART, Mar. 16, 2008, [http://www.breitbart.com/article.php?id=D9EG1D400&show\\_article=1](http://www.breitbart.com/article.php?id=D9EG1D400&show_article=1) (last visited Dec. 6, 2011).

<sup>38</sup> *See* Posting of Simon Johnson to The Baseline Scenario Blog, *Dead on Arrival: Financial Reform Fails*, <http://baselinescenario.com/2010/06/21/dead-on-arrival-financial-reform-fails/> (June 21, 2010, 7:04 AM EST). (Congress intended to end too-big-to-fail but Dodd-Frank allows for these large institutions to continue in existence). Leonard *Supra* note 35. (Congress made numerous concessions regarding derivatives products that benefit Wall Street instead of reforming the trading of these risking products. ) Simon Johnson, *Flawed Financial Bill Contains Huge Surprise*, BLOOMBERG BUSINESSWEEK (July 8, 2010), <http://www.businessweek.com/news/2010-07-08/flawed-financial-bill-contains-huge-surprise-simon-johnson.html> ("Scouring all 2,400 or so pages of the bill, which has now passed the House and awaits final passage in the Senate, it is hard to find anything that will substantially change how Wall Street operates").

<sup>39</sup> *See* Christian Evans, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: A Missed Opportunity to Rein in Too-Big-to-Fail Banks*, 13 DUQ. BUS. L.J. 43, 57 (2011) (author concludes that Dodd-Frank fails to take into account many of the problems that TBTF pose to the economy. As a result, another economic catastrophe is inevitable) Leonard *Supra* note 35.

<sup>40</sup> *See notes 41-65 and accompanying text.*

scaled back considerably. Each time that Congress scales back the proposed legislation, the law overall, moves further way from accomplishing the goals in the preamble.

In the pre-Dodd-Frank world there was a federal safety that Wall Street firms were allowed to use if they were labeled TBTF.<sup>41</sup> Members of Congress proposed several provisions to address Wall Street's use of the federal safety net.<sup>42</sup> This paper focuses on three of those provisions. Two of the provisions were substantially weakened during the legislating process, while the third passed only after a much stronger bill was voted down.<sup>43</sup> The fashion in which Wall Street, on more than one occasion, influenced Congress to scale back proposed legislation exemplifies why Dodd-Frank will struggle to fulfill its goal of reforming Wall Street.

#### 1. The Volcker Rule

As enacted in section 619, the Volcker Rule<sup>44</sup>, places limits on proprietary trading<sup>45</sup> and speculative trading.<sup>46</sup> However, this rule as initially proposed, would have completely prohibited the use of the federal safety net by banks engaged in proprietary trading and speculative trading.<sup>47</sup> Former Federal Reserve Bank Chairman Paul Volcker proposed the Volcker rule.<sup>48</sup> According to the Committee on Banking, Housing, and Urban Affairs report, the proposed Volcker rule would have prevented taxpayer funds

---

<sup>41</sup> Stern & J. Feldman *Supra* note 23.

<sup>42</sup> See Johnson, BLOOMBERG, *Supra* note 38. (discussing the federal safety net provisions)

<sup>43</sup> *Id.*

<sup>44</sup> Dodd-Frank Act § 619(a)-(b) (a banking entity shall not engage in proprietary trading; or acquire or retain any equity, partnership, or other ownership interest in or sponsor a hedge fund or a private equity fund).

<sup>45</sup> Wilmarth, *A Flawed and Inadequate Response*, *Supra* note 14, at 1025 (i.e., buying and selling securities, derivatives, and other tradable assets for their own account)

<sup>46</sup> *Id.*

<sup>47</sup> See Louis Uchitelle, *Volcker Pushes for Reform, Regretting Past Silence*, N.Y. TIMES, July 10, 2010, available at <http://www.nytimes.com/2010/07/11/business/11volcker.html?pagewanted=all> (last visited Dec. 10, 2011).

<sup>48</sup> *Id.*

from being used to essentially support proprietary and speculative trading.<sup>49</sup> The Senate report explains that the proposed Volcker rule would have prevented deposit insurance and other federal safety nets from being used to “subsidize speculative capital markets activities.”<sup>50</sup> Further, the proposed version

prohibited banks and [bank holding companies] from (1) sponsoring or investing in hedge funds or private equity funds and (2) engaging in proprietary trading (i.e., buying and selling securities, derivatives, and other tradable assets for their own account)<sup>51</sup>

Essentially, the Volcker rule would have limited the conflicts that banks face when they bet against the clients they represent.

Not surprising, the LCFIs opposed the proposed Volcker Rule because it would lead to a fundamental change in the way LCFIs earn money on their own accounts.<sup>52</sup> However, two events related to Goldman Sachs allowed the Volcker rule to gain some momentary momentum.<sup>53</sup> First, there was a lawsuit filed by the SEC on April 16, 2010, against Goldman Sachs alleging that it defrauded two institutional investors.<sup>54</sup> Second, on April 27, 2010, the Senate Permanent Subcommittee on Oversight interrogated several employees from Goldman Sachs regarding the selling of mortgage-backed instruments

---

<sup>49</sup> See S. Rep. No. 111-176, at 90.

<sup>50</sup> *Id.*

<sup>51</sup> See Wilmarth, *A Flawed and Inadequate Response*, *Supra* note 14, at 1025.

<sup>52</sup> See S. Rep. No. 111-176, See Kevin L. Petrasic, *The Volcker Rule – Impact and Implications for Passage*, (March 2010), available at <http://www.paulhastings.com/assets/publications/1537.pdf> (last visited Dec. 6, 2011, Eamon Javers & Victoria McGrane, *Chris Dodd Proposal Hits Wall Street Hard*, POLITICO, Mar. 16, 2010), <http://www.politico.com/news/stories/0310/34463.html> (last visited 6, 2011) (the proposed Volcker rule “hated on Wall Street”).

<sup>53</sup> Securities and Exchange Comm’n, Litigation Release No. 21,489 (April 16, 2010). (SEC charges Goldman Sachs with Fraud), Posting of Zachary A. Goldfarb to Daily Strength, Goldman Sachs Executives Face Senators Investigating Role in Financial Crisis, <http://www.dailystrength.org/groups/true-debate/discussions/messages/9619824>, (April 27, 2010, 10:48 PM EST). (Congress intended to end too-big-to-fail but Dodd-Frank allows for these large institutions to continue in existence).

<sup>54</sup> See *id.* SEC Litigation Release.

while Goldman was betting against the housing market.<sup>55</sup> The combination of these two events provided a momentary political boost to the Volcker Rule and the Dodd-Frank legislation.<sup>56</sup>

Despite the events plaguing Goldman Sachs, large financial institutions, such as Goldman Sachs, continued to lobby to weaken the proposed Volcker rule.<sup>57</sup> The lobbying effort on behalf of financial institutions eventually led to several concessions, such as allowing banks to “increase up the forty percent the amount of money they put into risky investment vehicles.”<sup>58</sup> Eventually, Democratic leaders in both the House and Senate agreed to weaken the Volcker rule.<sup>59</sup> The most alarming concession is the delay of the Volcker Rule's effective date so that banks and bank holding companies will have

(1) up to seven years after Dodd-Frank's enactment date to bring most of their equity-investing and proprietary-trading activities into compliance with the Volcker Rule and (2) up to twelve years to bring ‘illiquid’ investments that were already in existence on May 1, 2010, into compliance with the Rule.<sup>60</sup>

---

<sup>55</sup> See Joshua Gallu & Jesse Westbrook, *Goldman Armed Salespeople to Dump Bonds, E-mails Show*, BLOOMBERG BUSINESSWEEK (Apr. 27, 2010), <http://industry-news.org/2010/04/28/goldman-armed-salespeople-to-dump-bonds-e-mails-show/> (last visited Dec. 6)

<sup>56</sup> *Id.*

<sup>57</sup> See John Cassidy, *The Volcker Rule*, July 26, 2010, THE NEW YORKER, July 26, 2010, available at [http://www.newyorker.com/reporting/2010/07/26/100726fa\\_fact\\_cassidy](http://www.newyorker.com/reporting/2010/07/26/100726fa_fact_cassidy) (last visited Dec. 6, 2010) (discussing the volcker rule); Yalman Onaran, *Volcker Rule Attacked as Lawmakers Seek Fund Loophole*, BLOOMBERG, Jun. 23, 2010, <http://www.bloomberg.com/news/2010-06-23/volcker-rule-under-attack-as-lawmakers-look-for-fund-loophole.html>, (last visited Dec. 6, 2010) (discussing lobbying efforts by banks on the proposed Volcker rule).

<sup>58</sup> See *Id.* Cassidy.

<sup>59</sup> See *Id.*; See Wilmarth, *A Flawed and Inadequate Response*, *Supra* note 14, at 1028.

The compromise inserted exemptions in the Volcker Rule that allow banks and BHCs (1) to invest up to three percent of their Tier 1 capital in hedge funds or private equity funds (as long as a bank's investments do not exceed three percent of the total ownership interests in any single fund), (2) to purchase and sell government securities, (3) to engage in ‘risk-mitigating hedging activities,’ (4) to make investments through insurance company affiliates, and (5) to make small business investment company investments.

See also Dodd-Frank Act § 619 (enacting §§ 13(d)(1)(A), (B), (C), (E), (F), (G)).

<sup>60</sup> See Wilmarth, *A Flawed and Inadequate Response*, *Supra* note 59, at 1028.

A former co-chief executive officer of Chase's investment bank, William T. Winters, made the following statement regarding the Volcker rule "I don't think [that it] will have any impact at all on most banks."<sup>61</sup>

As initially proposed, the Volcker rule sought to take away the federal safety net that supported proprietary trading and speculative market trading.<sup>62</sup> However, Wall Street benefits from the enacted version of the Volcker Rule because it contains ambiguous terms and numerous exemptions that rely on regulatory interpretation.<sup>63</sup> Professor Arthur E. Wilmarth, Jr concludes that commentators believe the rule will not have a significant impact in preventing banks from exploiting the safety net subsidies to fund speculative activities.<sup>64</sup>

The manner in which the Volcker rule is weakened provides a clear example where Congress's intent is not fulfilled. Here, Congress does not accomplish its goal reform Wall Street. In fact, Wall Street can continue its proprietary and speculative trading with the federal safety net for the foreseeable future.<sup>65</sup>

## 2. The Lincoln Amendment

Another major example where a section of Dodd-Frank is weakened is found in section 726—the “Lincoln Amendment.”<sup>66</sup> Senator Blanche Lincoln, the chair of the Senate Agriculture Committee, recommended on April 21, 2010, a bill that would bring

---

<sup>61</sup> See Christine Harper, Bradley Keoun, *The Financial Reform Law: A 'Fig Leaf'*, BLOOMBERG BUSINESSWEEK, July 1, 2010, available at [http://www.businessweek.com/magazine/content/10\\_28/b4186042369207.htm](http://www.businessweek.com/magazine/content/10_28/b4186042369207.htm) (last visited Dec. 6, 2010).

<sup>62</sup> See Senate Report No. 111-176 at 8.

<sup>63</sup> See Wilmarth, *A Flawed and Inadequate Response*, *Supra* note 14, at 1030.

<sup>64</sup> *Id.*

<sup>65</sup> See *Supra* notes 48-67.

<sup>66</sup> See Christine Harper & Bradley Keoun, *Supra* note 61.

“100 percent transparency” to derivatives trading.<sup>67</sup> The proposed bill mandated the reporting of all derivatives trading.<sup>68</sup> The bill would require a segment of derivatives to be cleared by a central repository and traded on a registered exchange.<sup>69</sup> Interestingly, the proposed bill also contained a clause that would prohibit banks that act as derivative dealers from receiving federal assistance.<sup>70</sup>

The premise behind the proposed Lincoln amendment was to force major banks to "spin off their derivatives operations" and to limit situations where taxpayer bailouts would be required.<sup>71</sup> The Lincoln amendment had similar objectives to the Volcker Rule, but the Lincoln Amendment focused on derivatives instead of all types of trading.<sup>72</sup> The bill would have forced banks to make a choice—either be a bank or engage in risky trading but not both.<sup>73</sup>

Not surprising, the Lincoln Amendment engendered tremendous pushback from Republicans, fellow Democrats, the White House, banking regulators, and Wall Street interests.<sup>74</sup> Wall Street claimed that as proposed it would require firms to raise more \$100 billion of additional capital to create separate derivatives trading subsidiaries.<sup>75</sup>

---

<sup>67</sup> See Richard Hill, *Lincoln Derivatives Language Recommended by AG Pane; Merger with Dodd Bill Expected*, 42 SEC. REG. & L. REP. (BNA) 810, (2010) (discussing the proposed Lincoln amendment and the goals of the amendment).

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

<sup>70</sup> *Id.* (Banks that act as derivative dealers would be barred from receiving assistance from the federal deposit insurance and access to the Federal Reserve discount window).

<sup>71</sup> See Richard Hill, *Derivatives: Conferees Reach Compromise: Banks Could Continue to Trade Some Derivatives*, 42 SEC. REG. & L. REP. (BNA) 1234 (June 28, 2010) (discussing goals and compromises of the Lincoln amendment).

<sup>72</sup> See Wilmarth, *A Flawed and Inadequate Response*, *Supra* note 14, at 1031. See Cassidy *Supra* note 57.

<sup>73</sup> See *Id.* Cassidy. (Lincoln said after the vote that “banks need to decide if they want to be banks or if they want to engage in the risky trading that caused the collapse of firms such as AIG”).

<sup>74</sup> See Wilmarth, *A Flawed and Inadequate Response*, *Supra* note 14, at 1032.

<sup>75</sup> See Agnes Crane & Rolfe Winkler, N.Y. TIMES, May 2, 2010, available at <http://www.nytimes.com/2010/05/03/business/economy/03views.html> (last visited Dec. 6, 2011) (discussing the cost of creating new subsidiaries under the proposed Volcker rule).



Here, politics perhaps played more of a role in the weakening of this amendment. In proposing section 726, Senator Lincoln was motivated by personal political reasons.<sup>76</sup> Prior to proposing the amendment she was being accused of being too close to Wall Street.<sup>77</sup> Despite Senator Lincoln's support for this new rule she eventually lost her re-election bid and the bill lost its initial sponsor.<sup>78</sup>

Similar to the Volcker Rule, the Democrats made last minute concessions before the final version of the Lincoln amendment was passed.<sup>79</sup> Professor Wilmarth suggests that the compromised Lincoln Amendment will require major banks to spin off only 10-20% of their existing derivatives activities into separate affiliates.<sup>80</sup> Commentators conclude that the Lincoln Amendment was watered down, with the result that the largest bank derivatives operations are largely left intact."<sup>81</sup>

The concessions made in the final enactment of the Lincoln amendment are another example where Congress proposed a solution only to weaken prior to enactment. In weakening the Lincoln amendment Congress's intent to directly address a risky Wall Street practice went unfulfilled.

---

<sup>76</sup> See Wilmarth, *A Flawed and Inadequate Response*, *Supra* note 14, at 1032 (discussing Senator Lincoln's political motivations for proposing the Lincoln amendment).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> See David Cho, Jia Lynn Yang & Brady Dennis, *Lawmakers guide Wall Street into homestretch; Industry left largely intact Regulators to gain more sway over risky investments*, GARP, June 26, 2010, <http://www.garp.org/news-and-publications/overview/story.aspx?newsId=14166> ("Sen. Blanche Lincoln (D-Ark.) agreed to scale back a controversial provision that would have forced the nation's biggest banks to spin off their lucrative derivatives-dealing businesses. The proposal had been a particularly thorny issue for Democrats, causing internal divisions that threatened to derail the entire process.")

<sup>80</sup> See Wilmarth, *A Flawed and Inadequate Response*, *Supra* note 14, at 1033.

<sup>81</sup> *Id.* at 1034.

### 3. The Kanjorski Amendment

Unlike the abovementioned sections, section 121 of Dodd-Frank, the “Kanjorski Amendment” passed closer to the proposed language,<sup>82</sup> but only after a more robust bill addressing TBTF was voted down in the Senate.<sup>83</sup> As enacted, section 121 provides the Federal Reserve Bank (FRB) the authority to require banks to divest high-risk operations.<sup>84</sup> The Kanjorski amendment is a substantially weakened version of the hard cap on bank size introduced by Democratic Senators Sherrod Brown and Ted Kaufman.<sup>85</sup>

The Kanjorski Amendment sponsored by Representative Paul Kanjorki proposes that a group of 10 federal regulators be given the power to breakup big financial firms when they pose systematic risk.<sup>86</sup> According to the language in Dodd-Frank, this statute would apply to, a bank holding company with total consolidated assets of \$50,000,000,000 or more, or a nonbank financial company supervised by the Board of Governors.<sup>87</sup> Moreover, before any action can take place, an affirmative vote of not fewer than 2/3 of the voting members of the Council need to be in place.<sup>88</sup> The term Council in Dodd-Frank refers to the new agency the Financial Stability Oversight Council (FSOC).<sup>89</sup>

---

<sup>82</sup> See Johnson BLOOMBERG *Supra* note 38. (discussing how the bill survived despite the influence from Wall Street)

<sup>83</sup> See Emily Calhoun, *Wall Street Reform: SAFE Banking Act Fails*, MAPLIGHT May 10, 2010, <http://maplight.org/wall-street-reform-amendments-safe-banking-act> (last visited Dec. 6, 2011).

<sup>84</sup> Dodd-Frank Act § 121(a) (describing what the Board of Governors can do if it deems a bank holding company or nonbank financial company under their supervision is a threat to the financial stability of the United States. See also See Wilmarth, *A Flawed and Inadequate Response*, *Supra* note 14, at 1024.

<sup>85</sup> Senators Sherrod Brown and Ted Kaufman proposed the SAFE Banking Act. In section three of this proposal would force the big banks to break up by placing a hard cap on their size. See S.R 3241, 111<sup>th</sup> Cong. (2d Session) (2010) See also Johnson The Baseline Scenario Blog *Supra* at note 40. (discussing the purpose of the SAFE Banking Act).

<sup>86</sup> *Id.*

<sup>87</sup> Dodd-Frank Act § 121(a) (describing the mitigatory actions that the Board of Governors must take is a company poses a grave threat to the financial stability of the United States).

<sup>88</sup> See Johnson BLOOMBERG *Supra* note 38.

<sup>89</sup> Dodd-Frank Act. § (2)(8) (The term "Council" means the Financial Stability Oversight Council established under title I.) The council includes “the treasury secretary (as chairman), the chairman of the Federal Reserve’s Board of Governors, the director of the new consumer protection agency, the head of Federal Housing Finance Agency, the chair of the National Credit Union Administration board, an

The triggers for an intervention require that an institution be a grave threat to the financial stability of the United States.<sup>90</sup> Section 121 requires that prior to any intervention the FRB have already attempted to “mitigate” the threat by taking less drastic remedial measures.<sup>91</sup> Only after the FRB conducts the following actions: (1) imposing limits on mergers or affiliations with other companies, (2) placing restrictions on offering financial products, (3) requiring termination of one or more activities, and (4) imposing conditions on the manner of conducting activities, can it begin the process of breaking up a bank that is too big to fail.<sup>92</sup>

The Kanjorski amendment provides the government with tools to deal with an institution that is a threat to the financial stability of the U.S.<sup>93</sup> During the 2008 financial crisis, the institutions that threatened the financial stability of the U.S. were those that were labeled TBTF.<sup>94</sup> Thus, it appears that the Kanjorski amendment will allow TBTF firms to remain in existence even though the preamble of Dodd-Frank states that it intends to end TBTF.<sup>95</sup> The Kanjorski amendment is a step in the right direction but it does not end TBTF. The Safe Banking Act proposed earlier during the Dodd-Frank legislation would have effectively ended TBTF as promised in the preamble.

a. Rejection of the proposed Safe Banking Act

Prior to the Kanjorski amendment, two Democratic Senators, Sherrod Brown and Ted Kaufman proposed the “Safe Banking Act of 2010” (SBA) which proposed a hard

---

individual who will represent insurance regulators and representatives from each of the four standard federal regulatory agencies.” See Johnson BLOOMBERG *Supra* note 38.

<sup>90</sup> Dodd-Frank Act *Supra* note 94.

<sup>91</sup> *Id.* § 121(a). See Wilmarth, *A Flawed and Inadequate Response*, *Supra* note 14, at 1024.

<sup>92</sup> *Id.* § 121(a).

<sup>93</sup> *Id.*

<sup>94</sup> See *Supra* notes 16-25 and accompanying text.

<sup>95</sup> See Dodd-Frank Act *Supra* note 10 (citing to preamble); note 84.

size limit on banks.<sup>96</sup> The SBA as proposed would have created size and leverage limits on the same institutions that are covered under the Kanjorski amendment.<sup>97</sup> The SBA required the six biggest banks -- Bank of America, JPMorgan Chase, Citigroup, Wells Fargo, Goldman Sachs and Morgan Stanley -- to significantly scale down their size.<sup>98</sup> If enacted as proposed it would have ended Too Big To Fail.<sup>99</sup>

Under the proposed bill, no single bank could hold more than “10% of percent of the total amount of deposits of insured depository institutions in the United States.”<sup>100</sup> Furthermore, leverage limits would be set at 6%<sup>101</sup>, and non-deposit liabilities would be capped at 2%<sup>102</sup> for banks and 3%<sup>103</sup> for non-bank firms.<sup>104</sup> As proposed the bill’s deposit cap would have led to the shrinking of some of the large Wall Street banks that played a large role in the 2008 financial crisis.<sup>105</sup> The proposed bill would bar any single bank from holding more than \$750 billion of the nation’s total deposits.<sup>106</sup>

The SBA made it to the Senate floor but ultimately failed, 33-61.<sup>107</sup> During the vote, the bill did receive some bipartisan support but it proved too radical for majority

---

<sup>96</sup> See S.R 3241, 111<sup>th</sup> Cong. (2d Session) (2010)

<sup>97</sup> *Id.* (3)(d) (describing the hard cap that would be placed on banks).

<sup>98</sup> Ryan Grim & Shahien Nasiripour, *Senate Votes for Wall Street; Megabanks to Remain Behemoths*, HUFFINGTONPOST, June 7, 2010, [http://www.huffingtonpost.com/2010/05/06/senate-votes-for-wall-str\\_n\\_567063.html](http://www.huffingtonpost.com/2010/05/06/senate-votes-for-wall-str_n_567063.html) (last visited Dec. 6, 2011).

<sup>99</sup> *Id.*

<sup>100</sup> S.R 3241 *Supra* note 93 at § (3)(d)

<sup>101</sup> *Id.* at § (5)(a)(2)

<sup>102</sup> *Id.* at § (5)(b)(1)(A)

<sup>103</sup> *Id.* at § (5)(b)(2)(A)

<sup>104</sup> *Id.*

<sup>105</sup> S.R 3241 *Supra* note 93

<sup>106</sup> David M. Herszenhorn & Swell Chan, *Financial Debate Renews Scrutiny on Banks’ Size*, N.Y. TIMES, Jan. 28, 2001, available at <http://www.nytimes.com/2010/04/22/business/22fail.html> (last visited Dec. 6, 2010) (“Three institutions — Bank of America, Wells Fargo and J.P. Morgan Chase — are over the limit now, and would have to shed the excess within three years”).

<sup>107</sup> See Johnson BLOOMBERG *Supra* note 38.

approval.<sup>108</sup> An interesting fact regarding the proposed bill is that Senate democrats that voted against the amendment received 55% more money from the banking industry compared to those who voted for it.<sup>109</sup> Of the top six banks<sup>110</sup> who would have been impacted by SBA, campaign finance contributions to then current Senators totaled \$5,894,844 over the last six years.<sup>111</sup> Furthermore, contributions to Senate Democrats who voted to defeat the measure were \$85,496 on average, versus \$50,241 for those who supported the Brown-Kaufman amendment.<sup>112</sup>

The SBA as proposed would have ended to big to fail as the preamble of Dodd-Frank promises. Although the Kanjorski amendment made it into Dodd-Frank largely intact, it allows TBTF banks to remain in operation and requires numerous steps before such a bank could be broken up.<sup>113</sup> The legislative process behind the Kanjorski amendment is another illustration of Congress proposing a strong bill only to soften it after Wall Street's political influence.

In final analysis, Congress fails short of accomplishing its intent to reform Wall Street. However, Dodd-Frank's legislative history provides future Congressional members an outline of issues should be addressed the next Congress attempts to reform Wall Street.

---

<sup>108</sup> See Firedoglake, *Safe Banking Amendment Fails in Snap Vote*, 33-61, <http://news.firedoglake.com/2010/05/07/safe-banking-amendment-fails-in-snap-vote-33-61/> ((discussing progressive momentum behind the bill) (May 7, 2010 5:00 AM)

<sup>109</sup> Emily Calhoun, *Wall Street Reform: SAFE Banking Act Fails*, May 20, 2010, <http://maplight.org/wall-street-reform-amendments-safe-banking-act> (last visited Dec. 6, 2011)

<sup>110</sup> The six banks that would have been impacted by this amendment are Bank of America, JPMorgan Chase, Citigroup, Wells Fargo, Goldman Sachs, and Morgan Stanley. Calhoun *Supra* note 106.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> See *supra* notes 82-92 and accompanying text.

## II. CAN THE NEW AGENCIES CREATED BY DODD-FRANK MAKE UP FOR THE SHORT COMINGS IN THE LAW?

Although the enacted version of Dodd-Frank is weakened, the new law is both comprehensive and far-reaching.<sup>114</sup> Some commentators believe that the full extent of Dodd-Frank will not be reached until regulatory agencies implement the directives in the act and carry out the studies mandated in the act.<sup>115</sup> Despite the concessions illustrated in the section above, another major goal in Dodd-Frank is to improve transparency so that regulators can more effectively identify risk.<sup>116</sup> To accomplish this task, Dodd-Frank creates two new agencies, 1) the Office of Financial Research (OFR) and, 2) the Financial Stability Oversight Council (FSOC).

### *A. Office of Financial Research*

Dodd-Frank, in section 152, establishes within the department of the Treasury the Office of Financial Research.<sup>117</sup> Already some commentators have called the OFR the “CIA of Finance.”<sup>118</sup> The OFR’s primary goal is to assist the FSOC in fulfilling its purposes and duties as set out in Dodd-Frank.<sup>119</sup> The OFR is also tasked with helping financial regulators identify and address intra institution and system wide problems in real time.<sup>120</sup> Furthermore, the OFR is tasked with improving the quality of financial data available to policymakers and fostering a more sophisticated analysis of the financial

---

<sup>114</sup> See Dodd-Frank Act *Supra* note 10. Manuel A. Utset, *Complex Financial Institutions and Systemic Risk*, 45 GA. L. REV. 779, 781-83 (2011).

<sup>115</sup> See Dodd-Frank Act §§ 151-156 (dealing the with Office of Financial Research). *Id.* at 781-83.

<sup>116</sup> See Dodd-Frank Act §§ 111-123, 151-156

<sup>117</sup> *Id.* at § 152 (a).

<sup>118</sup> See Carrick Mollenkamp, *How a Street Watchdog Got Its Bite*, WALL ST. J., Sept. 15, 2010, available at <http://finance.yahoo.com/banking-budgeting/article/110671/how-a-street-watchdog-got-its-bite?mod=bb-budgeting> (last visited Dec. 6, 2011). (At some point during 2009 some professors realized that “regulators had no ability, or legal framework, to collect and share data on the global financial system and therefore no way to measure system-wide risk”).

<sup>119</sup> See Dodd-Frank Act §§ 151-156. (The OFR should assist policymakers, regulators, including FSOC to promote financial stability and enhance market discipline).

<sup>120</sup> See Dodd-Frank Act § 153(a) (The OFR is responsible for collecting, processing, and analyzing information about individual institutions and the financial system).

system.<sup>121</sup> In addition, the OFR will also be responsible for collecting data for the public.<sup>122</sup> To carry out its responsibilities the OFR has two centers from which it operates: a data center<sup>123</sup> and a research and analysis center.<sup>124</sup> The OFR will make the results of its activities available to financial regulatory agencies and to the public.<sup>125</sup>

The OFR carries an important and complex mandate.<sup>126</sup> The OFR will be largely dependent on accessing information in real time so that regulators can attempt to identify risk real-time.<sup>127</sup> The fact is that there are real-time constraints and general complexity problems in carrying out such a task.<sup>128</sup> The success of the OFR will require the information it is accessing is sufficiently fresh, a task that is not easily accomplished.<sup>129</sup> Being able to give a real-time snap shot of market transactions is no easy task.<sup>130</sup>

The OFR will allow the Treasury Secretary, the FSOC, and other regulators to better understand complex financial products.<sup>131</sup> It will also assist regulators in uncovering fraud and monitoring risks from LCFIs.<sup>132</sup> Most of all, for the first time regulators will be able to see critical links between different firms in the financial market.<sup>133</sup>

---

<sup>121</sup> U.S. DEPARTMENT OF THE TREASURY, *Office of Financial Research Under the Dodd-Frank Wall Street Reform and Consumer Protection Act*, available at [http://www.treasury.gov/initiatives/Documents/OFR\\_FAQ-11242010-FINAL.PDF](http://www.treasury.gov/initiatives/Documents/OFR_FAQ-11242010-FINAL.PDF)

<sup>122</sup> See Dodd-Frank Act § 154(a)(1)(A)

<sup>123</sup> *Id.* at § 154(a)(1)(A). The data center is supposed to collect, validate, and maintain the data necessary to help regulators identify vulnerabilities in the system as a whole.

<sup>124</sup> *Id.* at § 154(c). The research and analysis center is supposed to conduct, coordinate, and sponsor research to support and improve regulation of financial firms and markets.

<sup>125</sup> Annette L. Nazareth, Margaret E. Tahyar, *Transparency and confidentiality in the Post Financial Crisis World—Where to strike the Balance?*, 1 HARV. BUS. L. REV. 146, 150

<sup>126</sup> See generally Dodd-Frank Act § 153 (the OFR is to assist the FSOC and other agencies).

<sup>127</sup> See generally Dodd-Frank Act §§ 151-156.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* Utset, *Supra* note 114 at 838.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

The OFR already faces some complicated obstacles. Dodd-Frank is silent as to the exact type of information to be published.<sup>134</sup> Senator Jack Reed proposed establishing the national institute of finance to support the OFR by creating a reference database.<sup>135</sup> Senator's Reed's proposal did not make it into the enacted Dodd-Frank so this issue remains somewhat unclear.<sup>136</sup> There is some insight from Senator Reed's proposal that the published information would concern counter parties and their legal entities.<sup>137</sup>

Predicting the success of the OFR is difficult because it has the difficult mandate of coordinating large amounts of financial data.<sup>138</sup> It is now 2011 and the OFR is already facing budget questions.<sup>139</sup> Politics aside, if under any scenario the OFR cannot adequately pay employees the agency will face retention problems and could fall victim to the issue of the revolving door.<sup>140</sup> Here, the revolving door is especially problematic because Wall Street tends to recruit former regulators via the revolving door.<sup>141</sup> If

---

<sup>134</sup> See Dodd-Frank Act § 154(b)(1)(B). See also Nazareth *Supra* note 125 at 152. (In order to effectively fulfill this task the OFR may "require the submission of periodic and other reports from any financial company for the purpose of assessing the extent to which a financial activity or financial market in which the financial company participates, or the financial company itself, poses a threat to the financial stability of the United States).

<sup>135</sup> See S. 3005, 111<sup>th</sup> Cong. (1st Session) (2010).

<sup>136</sup> Tracking the United States Congress, available at <http://www.govtrack.us/congress/bill.xpd?bill=s111-3005> (describing how this bill never became law).

<sup>137</sup> See *Id.* (A BILL To create an independent research institute, to be known as the "National Institute of Finance", that will oversee the collection and standardization of data on financial entities and activities, and conduct monitoring and other research and analytical activities to support the work of the Federal financial regulatory agencies and the Congress").

<sup>138</sup> See Dodd-Frank Act § 153

<sup>139</sup> See Peter Schroeder, *Republicans want details on new financial research office's budget*, THE HILL Nov. 14, 2011, available at <http://thehill.com/blogs/on-the-money/banking-financial-institutions/193449-republicans-want-details-on-new-financial-research-offices-budget> (last visited Dec. 6, 2011).

<sup>140</sup> The revolving door can be defined as the movement of employees into and out of government service. Kathryn L. Saurack, *The Revolving Door: An Analysis of Post-Government Employment Restrictions on Foreign Representation*, 14 J. L. & POLITICS 383 (1998). There are several reasons that the revolving exists. Among those reasons is "change is an inevitable part of the American democratic process." *Id.* When a new political party moves into the White House there is an influx of new employees, appointees, and advisors at various levels of the government. *Id.* Furthermore, those who work for the government typically are willing to forgo a higher salary in the private sector for only a few years. *Id.* at 384

<sup>141</sup> See Project on Government Oversight, *Revolving Regulators: SEC Faces Ethic Challenges with Revolving Door* (May 13, 2011), <http://www.pogo.org/pogo-files/reports/financial-oversight/revolving-regulators/fo-fra-20110513.html> (discussing the importance of integrity at U.S. regulators) See also David



regulators at the OFR know that that their next employer is on Wall Street, they might not properly examine that future employer to find issues in their business practices. It is crucial to the success of the OFR that it does not become an agency that Wall Street controls because it will have tremendous access to financial information.<sup>142</sup>

Some scholars have asserted that the OFR director must create a culture of strength and independence.<sup>143</sup> For the OFR to be successful the director of the agency must ensure that it is independent of special interests, and he or she must establish stronger standards for the employees who will influence the data integrity and analysis.<sup>144</sup>

If the OFR can establish itself as a primer agency in the financial sector it can make up for some of the shortcomings in Dodd-Frank. The OFR will have to identify those risky Wall Street practices that will be allowed to continue where specific sections of Dodd-Frank failed to stop them.

#### *B. Financial Stability Oversight Council*

In section 111 the Dodd-Frank act establishes the Financial Stability Oversight Council.<sup>145</sup> The FSOC functions as an overall economy watchdog.<sup>146</sup> The FSOC is a

---

*S. Hilzenrath, SEC Staff's 'Revolving Door' Prompts Concerns About Agency's Independence, Wash. Post, May 13, 2011, [http://www.washingtonpost.com/business/economy/sec-staffs-revolving-door-prompts-concerns-about-agencys-independence/2011/05/12/AF9F0f1G\\_story.html](http://www.washingtonpost.com/business/economy/sec-staffs-revolving-door-prompts-concerns-about-agencys-independence/2011/05/12/AF9F0f1G_story.html) (last visited Dec. 7, 2011).*

Lawrence G. Baxter, *"Capture" in Financial Regulation: Can We Channel It Toward the Common Good?*, 21 Cornell J.L. & Pub. Pol'y 175, 197 (2011).

<sup>142</sup> See Dodd-Frank Act §§ 151-156.

<sup>143</sup> Taub, Jennifer S., *Great Expectations for the Office of Financial Research*. VT. LAW SCHOOL, Research Paper No. 11-15. at 24 Available at SSRN: <http://ssrn.com/abstract=1784298> ("The Director must also go beyond the statute's bare bones mandates and fill out an agency that is more than just an extension of the Treasury and that has the freedom to seek the advice of those economists and other experts who got it right")

<sup>144</sup> *Id.*

<sup>145</sup> Dodd-Frank Act § 111(a)

<sup>146</sup> Cody Vitello, *The Wall Street Reform Act of 2010 and What It Means for Joe & Jane Consumer*, 23 LOY. CONSUMER L. REV. 99, 102 (2010).

collaborative body chaired by the Secretary of the Treasury.<sup>147</sup> The FSOC is responsible for identifying risks to the overall stability of the United States, promoting market discipline and responding to emerging threats.”<sup>148</sup> Congress intends that the FSOC remedy the fact that prior to the financial crisis “no regulator was responsible for the oversight of systemic risk created by large financial institutions or system-wide financial activities.”<sup>149</sup> The FSOC creates the first collective body that will be accountable for identifying risks and responding to emerging threat to financial stability.<sup>150</sup> Essentially, the FSOC is tasked with constraining excessive risk in the financial system.

The FSOC is granted unprecedented access to information from various agencies so that it can make informed decisions regarding systemic risk.<sup>151</sup> In order to successfully accomplish its task the FSOC has the power to collect and analyze information from and about financial institutions and financial activities in the United States.<sup>152</sup> Additionally, the FSOC can collect information from federal agencies, state agencies, and the Federal

---

<sup>147</sup> See Dodd-Frank Act § 111(a) (describing the members of the FSOC) See also *Supra* Vitello at note 138 at 103,

The FSOC be chaired by the Treasury Secretary and include the heads of the Federal Reserve Board, Securities and Exchange Commission, Commodities Futures Trading Commission, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Federal Housing Finance Agency, National Credit Union Administration, CFPB, and an insurance expert. The five nonvoting members of the council will include the heads of the Federal Insurance Office, Office of Financial Research, and state banking, insurance, and securities regulators. Together these financial elites will have the power to create strict liquidity, capital, and leverage ratios; regulate nonbank financial companies; create minimum capital standards; break up large and complex companies; and prevent companies from switching regulators by amending their corporate charters in order to get a more favorable examiner.

<sup>148</sup> See Dodd-Frank Act § 112

<sup>149</sup> U.S DEPARTMENT OF THE TREASURY, *Office of Financial Research Under the Dodd0Frank Wall Street Reform and Consumer Protection Act*, available at [http://www.treasury.gov/initiatives/Documents/OFR\\_FAQ-11242010-FINAL.PDF](http://www.treasury.gov/initiatives/Documents/OFR_FAQ-11242010-FINAL.PDF)

<sup>150</sup> *Id.*

<sup>151</sup> See Nazareth *Supra* note 125 at 148.

<sup>152</sup> See Dodd-Frank Act § 112

Insurance Office.<sup>153</sup> The FSOC can also use the resources of the OFR in collecting information.<sup>154</sup>

The FSOC has already proposed regulations, which would allow a company to submit written materials concerning whether, ‘in the company’s view’ it could threaten the financial stability of the United States.<sup>155</sup> It is difficult to imagine companies being forthcoming with such information. While the FSOC will not be as subjected to the same issues as the OFR, it will be faced with the difficult task of coordinating the information from many different agencies.<sup>156</sup> One potential criticism of the FSOC is that historically multi-agency oversight bodies have been difficult to implement.<sup>157</sup> Much of the information the FSOC will require is going to be sensitive in nature and there might reluctance by those with the information to give it up.<sup>158</sup>

Unlike, the OFR the FSOC will not need to hire employees therefore nullifying Wall Street’s ability to influence it via the revolving door.<sup>159</sup> The FSOC consists of multiple members and attempting to describe how Wall Street may try to influence each member is outside of the scope of this paper.<sup>160</sup> However, the Treasury Secretary, a political figure, which up until Timothy Geithner had been filled by an ex-Wall Street

---

<sup>153</sup> *Id.*

<sup>154</sup> *See id.* Nazareth *Supra* note 125 at 153

<sup>155</sup> Nazareth *Supra* note 121 at 149. Professor Nazareth describes the regulations as follows:

Paragraph (a) provides that the Council will deliver written notice to a nonbank financial company that it is being considered for a proposed determination and will provide the nonbank financial company an opportunity to submit written materials to contest the proposed determination. Paragraph (a) clarifies that the nonbank financial company may submit any written materials to contest the determination, including materials concerning whether the nonbank financial company meets the standards for a determination.

*See also* 12 C.F.R. pt. 1310, 1210.21 (2011) (the proposed regulation)

<sup>156</sup> *See* Dodd-Frank Act § 111

<sup>157</sup> *See* Dibadj *Supra* note 22 at 85.

<sup>158</sup> *See* Dodd-Frank Act § 112

<sup>159</sup> *See* Dodd-Frank Act § 111

<sup>160</sup> *See* Dodd-Frank Act § 112

executive, heads the FSOC.<sup>161</sup> In fact, with current Treasury Secretary Timothy Geithner rumored to be stepping down, Wall Street has begun to rally around possible replacements.<sup>162</sup> This paper argues that the FSOC mandate can be severely weakened if the Treasury Secretary has strong ties to Wall Street<sup>163</sup>. In order to ensure the success of the FSOC, Congress should ensure that the Treasury Secretary is not someone that sides with Wall Street.<sup>164</sup>

The ability of the agency to successfully carry out its mandate is probably going to depend on the independence of the Treasury Secretary.

### III. A PROPOSAL FOR CONGRESS THE NEXT TIME IT CONSIDERS REFORMING WALL STREET

Dodd-Frank is a Congressional response to a crisis in which Wall Street was the catalyst.<sup>165</sup> As described in this paper, it is difficult for Congress to carry its intent to

---

<sup>161</sup> In 2008 Timothy Geithner was chosen to become the next Treasury Secretary. CNBC, *Wall Street Cheers Choice of Geithner for Treasury*, Nov. 21, 2008, available at, <http://www.cnbc.com/id/27844707> (last visited Dec. 6, 2011). Unlike he predecessor, Hank Paulson, Mr. Geithner had over 15 years of public sector experience prior to becoming Treasury Secretary. BIOGRAPHY.COM, *Timothy Geithner*, available at, <http://www.biography.com/people/timothy-geithner-391494> (last visited Dec. 6, 2011). Moreover, he is not from one of the too big to fail banks that played a large role in the financial crisis. *Id.* These facts are important in assessing whether the Treasury Secretary can function independently as the chairman of FSOC. See also, See Firedoglake, *Wall Street Angles for Treasury Secretary Spot-They Didn't Have it Already?*, <http://news.firedoglake.com/2011/07/05/wall-street-angles-for-treasury-secretary-spot-they-didnt-have-it-already/> (general discussion of past Treasury Secretaries with wall street ties), <http://www.forbes.com/lists/2006/12/VY36.html> (July 5, 2011, 1:36 PM).

<sup>162</sup> See Peter Schroeder, *Wall Street looks to fill Treasury Secretary post after Geithner exit*, July 2, 2011, available at <http://thehill.com/blogs/on-the-money/banking-financial-institutions/169521-wall-street-looks-to-fill-treasury-post-after-potential-geithner-exit> (last visited Dec. 6, 2011).

<sup>163</sup> See Firedoglake *Supra* note 161.

<sup>164</sup> See 31 U.S.C.A. § 301(a)-(c) ("The Department of the Treasury is an executive department of the United States Government at the seat of the Government. The head of the Department is the Secretary of the Treasury. The Secretary is appointed by the President, by and with the advice and consent of the Senate").

<sup>165</sup> See Sen. Carl Levin, *Wall Street and the Financial Crisis: The Role of Investment Banks*, April 4, 2010, <http://thehill.com/blogs/congress-blog/campaign/94549-wall-street-and-the-financial-crisis-the-role-of-investment-banks-sen-carl-levin> (last visited Dec. 6, 2011).

reform Wall Street through the enactment of law.<sup>166</sup> Wall Street's ability to influence those responsible for enacting a financial reform law, makes it difficult to envision a law being passed that makes drastic changes to Wall Street.<sup>167</sup> Furthermore, the nature of two party politics favors Wall Street because it can back whatever party is not attempting to reform the financial industry.<sup>168</sup> Additionally, regulators are condemned for tightening regulatory conditions when the economy is doing well.<sup>169</sup> In order for agencies like the OFR and FSOC to have an impact on risky Wall Street practices they will need the support of the of the government and the courage to reign in Wall Street during times of expansion.<sup>170</sup>

With these facts in mind, this paper proposes that a systemic emergency fund can undercut Wall Street's influence while simultaneously allowing Congress to reform Wall Street before another financial crisis occurs.

#### *A. Recommendation: Systemic Insurance fund*

Currently under Dodd-Frank there too many steps that have to be taken to address a problematic LCFI.<sup>171</sup> This paper proposes that the next time Congress decides that is it would like to reform Wall Street it should consider a mandated Systemic Insurance Fund

---

<sup>166</sup> See *Supra* Part I.

<sup>167</sup> When President Barack Obama was elected in 2008 the financial services industry strongly backed him and his fellow democrats. Wilmarth, *A Flawed and Inadequate Response*, *Supra* note 14, at 1013. However, the passage of Dodd-Frank caused big financial institutions "to shift their support to Republicans in 2010." *Id.* at 1013-1014. The new Republican House leaders "quickly announced their intention to oversee and influence the implementation of Dodd-Frank by federal agencies in order to secure outcomes that were more favorable to the financial services industry." *Id.* at 1014.

<sup>168</sup> *Id.*

<sup>169</sup> See Charles A.E. Goodhart, *Central Banks' Function To Maintain Financial Stability: An Uncompleted Task*, VOX, June 24, 2008, [http:// www.voxeu.org/index.php?q=node/1263](http://www.voxeu.org/index.php?q=node/1263), (last visited Dec. 6, 2011) (discussing generally the difficulties that regulators face).

<sup>170</sup> *Id.* (Discussing how regulators will need some combination of courage, "reliance on quantitative triggers, and independence from government if they are to have the strength of mind and purpose to to dampen financial booms.")

<sup>171</sup> See *Supra* notes 85-98 and accompanying text.

(“SEIF” or “Fund”) for firms covered by Dodd-Frank.<sup>172</sup> Professor Jeffrey N. Gordon and Attorney Christopher Muller propose that such a fund should be scaled to the current size of the U.S. economy: \$1 trillion, in 2010.<sup>173</sup> The funding proposed for SEIF would amount to approximately 7% of GDP and 2% of the current credit market debt, which is a good indicator of the financial sector size.<sup>174</sup> As proposed the fund would be scaled to the growth of the U.S. economy.<sup>175</sup> The fund proposed would require large financial firms to mutually self-insure against outbreaks of systemic distress.<sup>176</sup>

This paper argues that all financial firms should be forced to buy into the fund. Professor Jeffrey N. Gordon and Attorney Christopher Muller do not propose that there be forced enrollment.<sup>177</sup> This paper proposes that the fund would reform Wall Street because it would contain risk assessments, which would increase the cost of insurance for riskier businesses.<sup>178</sup> Those firms unwilling to pay the insurance will opt out of those businesses that become too costly because of the insurance payments. This proposal, if successful, would lower overall risk in the financial market, thereby, reforming Wall Street. In theory institutions would be smaller because carrying too many risky businesses would be very expensive.

This paper argues that implementing something similar to the SEIF would allow Congress to reform Wall Street because Wall Street would be mandated to buy insurance.

---

<sup>172</sup> See Jeffrey N. Gordon, Christopher Muller, *Confronting Financial Crisis: Dodd-Frank's Dangers and the Case for A Systemic Emergency Insurance Fund*, 28 YALE J. ON REG. 151, 204 (2011) (discussing the benefits of such a fund).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 205

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Professor Gordon and Attorney Muller believe that the government should be pre-fund the SEIF. The paper argues that Wall Street will only truly be reformed if it is forced to pay into the fund from the beginning and is solely responsible for maintaining the cost of the fund. *Id.*

<sup>178</sup> *Id.*

Such a proposal is less political polarizing than Congress attempting to directly dissolve risky Wall Street business. Implementing a SEIF is less complex than attempting to implement the various emergency provisions in Dodd-Frank.<sup>179</sup> A possible objection to this proposal is that it might increase TBTF because banks would be insured.<sup>180</sup> This paper argues that if Wall Street has to pay a high enough price for its risky behavior in advance, it will stop those practices that become too expensive, therefore, making firms smaller and more risk adverse.

---

<sup>179</sup> Professor Gordon and Attorney Muller propose two scenarios in which the fund's use would be triggered.

Use of SEIF would be permitted only by a consensus determination by the Treasury, the Fed, and the FDIC that systemic financial distress exists, that it cannot be adequately addressed by the use of nonemergency authority (including the FDIC's receivership power), and that it threatens to severely disrupt the U.S. economy.

*Id.* at 205

Alternatively, such an emergency could be invoked by super-majority vote of the Financial Stability Oversight Council. We also favor reinstating the FDIC's loan guarantee authority upon the same regulatory approval triggers that pertain to SEIF, subject to the provision of a loan guarantee fee and the obtaining of warrants.

*Id.* at 211.

<sup>180</sup> Professor Gordon and Attorney Muller counter address TBTF concern. Both writers claim that using a fund like the one proposed would allow firms to fail without disrupting the greater U.S. economy because it would limit adverse market response. *Id.* at 208.

## CONCLUSION

Congress responded to the near collapse of the U.S. economy in 2008<sup>181</sup>, by passing Dodd-Frank. Dodd-Frank's is Congress's attempt to reform Wall Street<sup>182</sup> following what some pundits<sup>183</sup> consider as the worst financial crisis since the Great Depression.<sup>184</sup> Surely, Congress will be to blame if any of those sections that were diluted play a crucial role in the next financial crisis.

This paper shows, how the legislative process makes it difficult for legislators to successfully maintain their intent to reform Wall Street through the final enactment of a law. Congress should be credited for passing Dodd-Frank but the fact is that too many

---

<sup>181</sup> President Obama had to resort to a \$862 billion stimulus package in order to prevent the U.S. from falling into a deeper recession. THE WASHINGTON TIMES, *Debate rages over stimulus fallout*, Feb. 23, 2010, available at [http://www.washingtontimes.com/news/2010/feb/23/world-of-debate-rages-over-fallout-from-stimulus/?feat=home\\_headlines](http://www.washingtontimes.com/news/2010/feb/23/world-of-debate-rages-over-fallout-from-stimulus/?feat=home_headlines) (last visited Dec. 6, 2011) Ruth Stroppiana, chief international economist for Moody's Economy.com alleged "Governments and central banks around the world have spent more than \$11 trillion to support the financial sector and about \$6 trillion on fiscal stimulus programs." *Id.*

<sup>182</sup> When Congress passed the final version of Dodd-Frank it missed the opportunity to stand up to Wall Street because it made too many concessions. Dodd-Frank promised to end "too big to fail." However, the act in fact offers the government tools to deal with the failing firms, which means that too big to fail firms will continue to exist. The much "heralded derivative provisions" aggregate the risks of these products instead of reducing them. Dodd-Frank more than doubles the ceiling for insured bank deposits which puts the American taxpayer on the hook for any Federal Deposit Insurance Corp. losses. Furthermore, many sections of Dodd-Frank are to be enforced by "unelected bureaucrats." Mark A. Calabria, *Dodd-Frank: Missed Opportunity*, POLITICO, July. 7, 2011, <http://www.politico.com/news/stories/0711/59471.html> (last visited Dec. 6, 2011)

<sup>183</sup> Jon Hilsenrath, Serena Ng, & Damian Paletta, *Worst Crisis Since '30s, With No End in Sight*, WALL ST. J., Sept. 18, 2008, available at <http://online.wsj.com/article/SB122169431617549947.html> (last visited Dec. 5, 2011). The authors describe the financial crisis and the potential damage it can do several large financial institutions and the overall economy. *Id.* Steve Holland & Frances Kerry, *Obama: U.S. in worst crisis since Depression*, REUTERS., Oct. 7, 2008, available at <http://www.reuters.com/article/2008/10/08/usa-politics-debate-economy-idUSN0749084220081008> (last visited Dec. 5, 2011). Democratic presidential candidate Barack Obama said that U.S. is in the worst crisis since the Great Depression. *Id.*; See also, CNN, *World Bank: Economy worst since Depression*, Mar. 9, 2009, available at [http://money.cnn.com/2009/03/09/news/international/global\\_economy\\_world\\_bank/](http://money.cnn.com/2009/03/09/news/international/global_economy_world_bank/) (last visited Dec. 5, 2011) (discussing how the global economy would shrink as a result of the financial crisis).

<sup>184</sup> See Wilmarth, *A Flawed and Inadequate Response*, *Supra* note 14, at 953 (2011). See also Ben S. Bernanke, Chairman, U.S. Fed. Reserve, Remarks at the Swearing-In Ceremony, at Federal Reserve Board Washington, D.C. (Feb. 3, 2010), available at <http://www.federalreserve.gov/newsevents/speech/bernanke20100203a.htm> (Chairman Ben S. Bernanke describing the 2008 financial crisis as the deepest crisis since the great depression).



concessions were made. The real reforms in Dodd-Frank were left out. As a result, the OFR and FSOC are tasked with identifying the next crises before it occurs—a very difficult task. As the financial markets become more complex, Congress will have to make laws that either force Wall Street to insure itself or it will have to outlaw certain types of businesses altogether. In the meantime, Congress should consider making a law that would force Wall Street to pay for its risk before the next crisis occurs. Congress should get out of the business of trying to pass financial reform laws that cannot accomplish the goals set forth in the preamble.