

based swaps markets in a foreign country undermines the stability of the United States financial system, either Commission, in consultation with the Secretary of the Treasury, may prohibit an entity domiciled in the foreign country from participating in the United States in any swap or security-based swap activities.

(Pub. L. 111–203, title VII, §715, July 21, 2010, 124 Stat. 1647.)

§ 8305. Prohibition against Federal Government bailouts of swaps entities

(a) Prohibition on Federal assistance

Notwithstanding any other provision of law (including regulations), no Federal assistance may be provided to any swaps entity with respect to any swap, security-based swap, or other activity of the swaps entity.

(b) Definitions

In this section:

(1) Federal assistance

The term “Federal assistance” means the use of any advances from any Federal Reserve credit facility or discount window that is not part of a program or facility with broad-based eligibility under section 343(3)(A) of title 12, Federal Deposit Insurance Corporation insurance or guarantees for the purpose of—

(A) making any loan to, or purchasing any stock, equity interest, or debt obligation of, any swaps entity;

(B) purchasing the assets of any swaps entity;

(C) guaranteeing any loan or debt issuance of any swaps entity; or

(D) entering into any assistance arrangement (including tax breaks), loss sharing, or profit sharing with any swaps entity.

(2) Swaps entity

(A) In general

The term “swaps entity” means any swap dealer, security-based swap dealer, major swap participant, major security-based swap participant, that is registered under—

(i) the Commodity Exchange Act (7 U.S.C. 1 et seq.); or

(ii) the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.).

(B) Exclusion

The term “swaps entity” does not include any major swap participant or major security-based swap participant that is an¹ covered depository institution.

(3) Covered depository institution

The term “covered depository institution” means—

(A) an insured depository institution, as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813); and

(B) a United States uninsured branch or agency of a foreign bank.

(c) Affiliates of covered depository institutions

The prohibition on Federal assistance contained in subsection (a) does not apply to and

shall not prevent a covered depository institution from having or establishing an affiliate which is a swaps entity, as long as such covered depository institution is part of a bank holding company, savings and loan holding company, or foreign banking organization (as such term is defined under Regulation K of the Board of Governors of the Federal Reserve System (12 CFR 211.21(o))), that is supervised by the Federal Reserve and such swaps entity affiliate complies with sections 371c and 371c–1 of title 12 and such other requirements as the Commodity Futures Trading Commission or the Securities Exchange Commission, as appropriate, and the Board of Governors of the Federal Reserve System, may determine to be necessary and appropriate.

(d) Only bona fide hedging and traditional bank activities permitted

(1) In general

The prohibition in subsection (a) shall not apply to any covered depository institution that limits its swap and security-based swap activities to the following:

(A) Hedging and other similar risk mitigation activities

Hedging and other similar risk mitigating activities directly related to the covered depository institution’s activities.

(B) Non-structured finance swap activities

Acting as a swaps entity for swaps or security-based swaps other than a structured finance swap.

(C) Certain structured finance swap activities

Acting as a swaps entity for swaps or security-based swaps that are structured finance swaps, if—

(i) such structured finance swaps are undertaken for hedging or risk management purposes; or

(ii) each asset-backed security underlying such structured finance swaps is of a credit quality and of a type or category with respect to which the prudential regulators have jointly adopted rules authorizing swap or security-based swap activity by covered depository institutions.

(2) Definitions

For purposes of this subsection:

(A) Structured finance swap

The term “structured finance swap” means a swap or security-based swap based on an asset-backed security (or group or index primarily comprised of asset-backed securities).

(B) Asset-backed security

The term “asset-backed security” has the meaning given such term under section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)).

(e) Existing swaps and security-based swaps

The prohibition in subsection (a) shall only apply to swaps or security-based swaps entered into by a covered depository institution after the end of the transition period described in subsection (f).

¹ So in original. Probably should be “a”.

(f) Transition period

To the extent a covered depository institution qualifies as a “swaps entity” and would be subject to the Federal assistance prohibition in subsection (a), the appropriate Federal banking agency, after consulting with and considering the views of the Commodity Futures Trading Commission or the Securities Exchange Commission, as appropriate, shall permit the covered depository institution up to 24 months to divest the swaps entity or cease the activities that require registration as a swaps entity. In establishing the appropriate transition period to effect such divestiture or cessation of activities, which may include making the swaps entity an affiliate of the covered depository institution, the appropriate Federal banking agency shall take into account and make written findings regarding the potential impact of such divestiture or cessation of activities on the covered depository institution’s (1) mortgage lending, (2) small business lending, (3) job creation, and (4) capital formation versus the potential negative impact on insured depositors and the Deposit Insurance Fund of the Federal Deposit Insurance Corporation. The appropriate Federal banking agency may consider such other factors as may be appropriate. The appropriate Federal banking agency may place such conditions on the covered depository institution’s divestiture or ceasing of activities of the swaps entity as it deems necessary and appropriate. The transition period under this subsection may be extended by the appropriate Federal banking agency, after consultation with the Commodity Futures Trading Commission and the Securities and Exchange Commission, for a period of up to 1 additional year.

(g) Excluded entities

For purposes of this section, the term “swaps entity” shall not include any insured depository institution under the Federal Deposit Insurance Act [12 U.S.C. 1811 et seq.] or a covered financial company under title II which is in a conservatorship, receivership, or a bridge bank operated by the Federal Deposit Insurance Corporation.

(h) Effective date

The prohibition in subsection (a) shall be effective 2 years following the date on which this Act is effective.

(i) Liquidation required**(1) In general****(A) FDIC insured institutions**

All swaps entities that are FDIC insured institutions that are put into receivership or declared insolvent as a result of swap or security-based swap activity of the swaps entities shall be subject to the termination or transfer of that swap or security-based swap activity in accordance with applicable law prescribing the treatment of those contracts. No taxpayer funds shall be used to prevent the receivership of any swap entity resulting from swap or security-based swap activity of the swaps entity.

(B) Institutions that pose a systemic risk and are subject to heightened prudential supervision as regulated under section 5323 of title 12

All swaps entities that are institutions that pose a systemic risk and are subject to heightened prudential supervision as regulated under section 5323 of title 12, that are put into receivership or declared insolvent as a result of swap or security-based swap activity of the swaps entities shall be subject to the termination or transfer of that swap or security-based swap activity in accordance with applicable law prescribing the treatment of those contracts. No taxpayer funds shall be used to prevent the receivership of any swap entity resulting from swap or security-based swap activity of the swaps entity.

(C) Non-FDIC insured, non-systemically significant institutions not subject to heightened prudential supervision as regulated under section 5323 of title 12

No taxpayer resources shall be used for the orderly liquidation of any swaps entities that are non-FDIC insured, non-systemically significant institutions not subject to heightened prudential supervision as regulated under section 5323 of title 12.

(2) Recovery of funds

All funds expended on the termination or transfer of the swap or security-based swap activity of the swaps entity shall be recovered in accordance with applicable law from the disposition of assets of such swap entity or through assessments, including on the financial sector as provided under applicable law.

(3) No losses to taxpayers

Taxpayers shall bear no losses from the exercise of any authority under this title.²

(j) Prohibition on unregulated combination of swaps entities and banking

At no time following adoption of the rules in subsection (k) may a bank or bank holding company be permitted to be or become a swap entity unless it conducts its swap or security-based swap activity in compliance with such minimum standards set by its prudential regulator as are reasonably calculated to permit the swaps entity to conduct its swap or security-based swap activities in a safe and sound manner and mitigate systemic risk.

(k) Rules

In prescribing rules, the prudential regulator for a swaps entity shall consider the following factors:

(1) The expertise and managerial strength of the swaps entity, including systems for effective oversight.

(2) The financial strength of the swaps entity.

(3) Systems for identifying, measuring and controlling risks arising from the swaps entity’s operations.

(4) Systems for identifying, measuring and controlling the swaps entity’s participation in existing markets.

² See References in Text note below.

(5) Systems for controlling the swaps entity's participation or entry into in³ new markets and products.

(l) Authority of the Financial Stability Oversight Council

The Financial Stability Oversight Council may determine that,⁴ when other provisions established by this Act are insufficient to effectively mitigate systemic risk and protect taxpayers, that swaps entities may no longer access Federal assistance with respect to any swap, security-based swap, or other activity of the swaps entity. Any such determination by the Financial Stability Oversight Council of a prohibition of federal assistance shall be made on an institution-by-institution basis, and shall require the vote of not fewer than two-thirds of the members of the Financial Stability Oversight Council, which must include the vote by the Chairman of the Council, the Chairman of the Board of Governors of the Federal Reserve System, and the Chairperson of the Federal Deposit Insurance Corporation. Notice and hearing requirements for such determinations shall be consistent with the standards provided in title I.

(m) Ban on proprietary trading in derivatives

An insured depository institution shall comply with the prohibition on proprietary trading in derivatives as required by section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act [12 U.S.C. 1851].

(Pub. L. 111-203, title VII, § 716, July 21, 2010, 124 Stat. 1648; Pub. L. 113-235, div. E, title VI, § 630, Dec. 16, 2014, 128 Stat. 2378.)

REFERENCES IN TEXT

The Commodity Exchange Act, referred to in subsec. (b)(2)(A)(i), is act Sept. 21, 1922, ch. 369, 42 Stat. 998, which is classified generally to chapter 1 (§ 1 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 1 of Title 7 and Tables.

The Securities Exchange Act of 1934, referred to in subsec. (b)(2)(A)(ii), is act June 6, 1934, ch. 404, 48 Stat. 881, which is classified principally to chapter 2B (§ 78a et seq.) of this title. For complete classification of this Act to the Code, see section 78a of this title and Tables.

The Federal Deposit Insurance Act, referred to in subsec. (g), is act Sept. 21, 1950, ch. 967, § 2, 64 Stat. 873, which is classified generally to chapter 16 (§ 1811 et seq.) of Title 12, Banks and Banking. For complete classification of this Act to the Code, see Short Title note set out under section 1811 of Title 12 and Tables.

Title II, referred to in subsec. (g), is title II of Pub. L. 111-203, July 21, 2010, 124 Stat. 1442, which is classified principally to subchapter II (§ 5381 et seq.) of chapter 53 of Title 12, Banks and Banking. For complete classification of title II to the Code, see Tables.

For the date on which this Act is effective, referred to in subsec. (h), see section 4 of Pub. L. 111-203, set out as an Effective Date note under section 5301 of Title 12, Banks and Banking, and section 754 of Pub. L. 111-203, set out as an Effective Date of 2010 Amendment note under section 1a of Title 7, Agriculture.

This title, referred to in subsec. (i)(3), is title VII of Pub. L. 111-203, July 21, 2010, 124 Stat. 1641, known as the Wall Street Transparency and Accountability Act of 2010, which enacted this chapter and enacted and amended numerous other sections and notes in the Code. For complete classification of title VII to the Code, see Short Title note set out under section 8301 of this title and Tables.

³So in original.

⁴So in original. The word "that" probably should not appear.

This Act, referred to in subsec. (l), is Pub. L. 111-203, July 21, 2010, 124 Stat. 1376, known as the Dodd-Frank Wall Street Reform and Consumer Protection Act. For complete classification of this Act to the Code, see Short Title note set out under section 5301 of Title 12, Banks and Banking, and Tables.

Title I, referred to in subsec. (l), is title I of Pub. L. 111-203, July 21, 2010, 124 Stat. 1391, known as the Financial Stability Act of 2010, which is classified principally to subchapter I (§ 5311 et seq.) of chapter 53 of Title 12, Banks and Banking. For complete classification of title I to the Code, see Short Title note set out under section 5301 of Title 12 and Tables.

Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, referred to in subsec. (m), is section 619 of Pub. L. 111-203, which enacted section 1851 of Title 12, Banks and Banking.

AMENDMENTS

2014—Subsec. (b)(2)(B). Pub. L. 113-235, § 630(1)(A), substituted "covered depository institution" for "insured depository institution".

Subsec. (b)(3). Pub. L. 113-235, § 630(1)(B), added par. (3).

Subsec. (c). Pub. L. 113-235, § 630(2), in heading, substituted "covered" for "insured" and, in text, substituted "a covered" for "an insured", "such covered" for "such insured", and "savings and loan holding company, or foreign banking organization (as such term is defined under Regulation K of the Board of Governors of the Federal Reserve System (12 CFR 211.21(o)))" for "or savings and loan holding company".

Subsec. (d). Pub. L. 113-235, § 630(3), amended subsec. (d) generally. Prior to amendment, text read as follows: "The prohibition in subsection (a) shall apply to any insured depository institution unless the insured depository institution limits its swap or security-based swap activities to:

"(1) Hedging and other similar risk mitigating activities directly related to the insured depository institution's activities.

"(2) Acting as a swaps entity for swaps or security-based swaps involving rates or reference assets that are permissible for investment by a national bank under the paragraph designated as 'Seventh.' of section 24 of title 12, other than as described in paragraph (3).

"(3) LIMITATION ON CREDIT DEFAULT SWAPS.—Acting as a swaps entity for credit default swaps, including swaps or security-based swaps referencing the credit risk of asset-backed securities as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)) (as amended by this Act) shall not be considered a bank permissible activity for purposes of subsection (d)(2) unless such swaps or security-based swaps are cleared by a derivatives clearing organization (as such term is defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a)) or a clearing agency (as such term is defined in section 3 of the Securities Exchange Act (15 U.S.C. 78c)) that is registered, or exempt from registration, as a derivatives clearing organization under the Commodity Exchange Act or as a clearing agency under the Securities Exchange Act, respectively."

Subsec. (e). Pub. L. 113-235, § 630(4), substituted "a covered" for "an insured".

Subsec. (f). Pub. L. 113-235, § 630(5), substituted "a covered depository" for "an insured depository" and substituted "the covered depository" for "the insured depository" wherever appearing.

DEFINITIONS

For definitions of terms used in this section, see section 5301 of Title 12, Banks and Banking.

§ 8306. Determining status of novel derivative products

(a) Process for determining the status of a novel derivative product

(1) Notice

(A) In general

Any person filing a proposal to list or trade a novel derivative product that may have elements of both securities and contracts of sale of a commodity for future delivery (or options on such contracts or options on commodities) may concurrently provide notice and furnish a copy of such filing with the Securities and Exchange Commission and the Commodity Futures Trading Commission. Any such notice shall state that notice has been made with both Commissions.

(B) Notification

If no concurrent notice is made pursuant to subparagraph (A), within 5 business days after determining that a proposal that seeks to list or trade a novel derivative product may have elements of both securities and contracts of sale of a commodity for future delivery (or options on such contracts or options on commodities), the Securities and Exchange Commission or the Commodity Futures Trading Commission, as applicable, shall notify the other Commission and provide a copy of such filing to the other Commission.

(2) Request for determination

(A) In general

No later than 21 days after receipt of a notice under paragraph (1), or upon its own initiative if no such notice is received, the Commodity Futures Trading Commission may request that the Securities and Exchange Commission issue a determination as to whether a product is a security, as defined in section 78c(a)(10) of this title.

(B) Request

No later than 21 days after receipt of a notice under paragraph (1), or upon its own initiative if no such notice is received, the Securities and Exchange Commission may request that the Commodity Futures Trading Commission issue a determination as to whether a product is a contract of sale of a commodity for future delivery, an option on such a contract, or an option on a commodity subject to the Commodity Futures Trading Commission's exclusive jurisdiction under section 2(a)(1)(A) of title 7.

(C) Requirement relating to request

A request under subparagraph (A) or (B) shall be made by submitting such request, in writing, to the Securities and Exchange Commission or the Commodity Futures Trading Commission, as applicable.

(D) Effect

Nothing in this paragraph shall be construed to prevent—

(i) the Commodity Futures Trading Commission from requesting that the Securities

and Exchange Commission grant an exemption pursuant to section 78mm(a)(1) of this title with respect to a product that is the subject of a filing under paragraph (1); or

(ii) the Securities and Exchange Commission from requesting that the Commodity Futures Trading Commission grant an exemption pursuant to section 6(c)(1) of title 7 with respect to a product that is the subject of a filing under paragraph (1),

Provided, however, that nothing in this subparagraph shall be construed to require the Commodity Futures Trading Commission or the Securities and Exchange Commission to issue an exemption requested pursuant to this subparagraph; *provided further*, That an order granting or denying an exemption described in this subparagraph and issued under paragraph (3)(B) shall not be subject to judicial review pursuant to subsection (b).

(E) Withdrawal of request

A request under subparagraph (A) or (B) may be withdrawn by the Commission making the request at any time prior to a determination being made pursuant to paragraph (3) for any reason by providing written notice to the head of the other Commission.

(3) Determination

Notwithstanding any other provision of law, no later than 120 days after the date of receipt of a request—

(A) under subparagraph (A) or (B) of paragraph (2), unless such request has been withdrawn pursuant to paragraph (2)(E), the Securities and Exchange Commission or the Commodity Futures Trading Commission, as applicable, shall, by order, issue the determination requested in subparagraph (A) or (B) of paragraph (2), as applicable, and the reasons therefor; or

(B) under paragraph (2)(D), unless such request has been withdrawn, the Securities and Exchange Commission or the Commodity Futures Trading Commission, as applicable, shall grant an exemption or provide reasons for not granting such exemption, provided that any decision by the Securities and Exchange Commission not to grant such exemption shall not be reviewable under section 78y of this title.

(b) Judicial resolution

(1) In general

The Commodity Futures Trading Commission or the Securities and Exchange Commission may petition the United States Court of Appeals for the District of Columbia Circuit for review of a final order of the other Commission issued pursuant to subsection (a)(3)(A), with respect to a novel derivative product that may have elements of both securities and contracts of sale of a commodity for future delivery (or options on such contracts or options on commodities) that it believes affects its statutory jurisdiction within 60 days after the date of entry of such order, a written petition requesting a review of the order. Any such proceeding shall be expedited by the Court of Appeals.