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Dodd-Frank as Maginot Line

Steven A. Ramirez*

INTRODUCTION

On May 10, 1940 the German Army opened a massive offensive aimed at France.¹ Five weeks later, on June 14, 1940, the Germans occupied Paris and essentially knocked the French out of World War II.² The French defense strategy relied upon a system of fixed fortifications on the French frontier known as the Maginot Line, which ran from Switzerland to Luxembourg.³ The Germans countered the Maginot Line with a new form of mechanized warfare that allowed them to fly over and drive around the fixed fortifications with airplanes and armored vehicles, through the unfortified Ardennes Forest.⁴ The engine-driven warfare of World War II displaced the trench warfare of World War I and rendered the Maginot Line strategically irrelevant. Indeed, the Maginot Line drew massive resources from the French military elsewhere, engendered an illusory sense of security, and enabled the Germans to craft a strategy in full view of the primary French defense deployments.⁵ While the Maginot Line would have helped the French effort to win a war like World War I (a catastrophe for all concerned), it did little to prevent France's more catastrophic defeat in World War II, and even hastened the French defeat.⁶

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Dodd-Frank)⁷ may prove as ineffective as the Maginot Line. It will likely foreclose a

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¹ Gary Sheffield, *The Fall of France*, BBC (Sept. 8, 2010), http://www.bbc.co.uk/history/worldwars/wwtwo/fall_france_01.shtml.

² *Id.*

³ *Id.*; JULIAN JACKSON, *THE FALL OF FRANCE: THE NAZI INVASION OF 1940*, at 26 (2003).

⁴ JACKSON, *supra* note 3, at 39.

⁵ *Id.* at 26–27.

⁶ J. E. KAUFMANN & H. W. KAUFMANN, *FORTRESS FRANCE: THE MAGINOT LINE AND FRENCH DEFENSES IN WORLD WAR II* 166 (2006); WILLIAM ALLCORN, *THE MAGINOT LINE 1928–45*, at 57 (2003).

⁷ See generally Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

subprime mortgage crisis like the one that nearly crashed global capitalism in the fall of 2008; however, it will not foreclose a future debt crisis that could well eclipse the financial crisis of 2007-2009 in terms of severity and macroeconomic pain.⁸ The Dodd-Frank Act does nothing to address the underlying structure of globalization that creates incentives for excessive debt and impairs employment in the United States and throughout the developed world. This renders future debt crises inevitable. Banks have every incentive to enhance their profits (especially short-term profits that may support higher CEO compensation) while being exposed to excessive risks of the financial crisis.⁹ Most importantly, the largest American banks continue to benefit from government subsidies under the too-big-to-fail legal construct that permits banks to privatize gains and socialize losses.¹⁰ Banks can continue to manipulate risks and profits through the use of derivatives and securities trading for many years to come.¹¹ Thus, while Dodd-Frank may prevent another subprime crisis, it will prove unable to prevent a future, more serious debt crisis.¹² Indeed, it may render such a crisis more likely by transforming implicit guarantees for megabanks into explicit guarantees.¹³

⁸ According to Noble laureate economist Joseph Stiglitz in an interview by Kerry O'Brien on ABC Australia:

It can and it almost surely will happen again, because we didn't deal with the problem of too-big-to-fail banks. It is one of the reasons why it will happen again. And we didn't really deal effectively with all the kinds of excessive risk-taking, all the problems of lack of transparency that were at the core of this crisis. And so, yes, we understand what the issues are, we understand the issues better than we did three years ago, but politics intruded the power of the banks, was too great. They're making \$20 billion off of derivatives. So rather than lending, they're engaged in all of these kinds of gambling and excessive risk-taking and generating large profits, but it's not helping the American economy and it's putting at risk American taxpayers.

The 7.30 Report: Troubles Ahead for World Economy, ABC (Austl.) (July 27, 2010), <http://www.abc.net.au/7.30/content/2010/s2965891.htm>.

⁹ Joseph E. Stiglitz, *Obama's Ersatz Capitalism*, N.Y. TIMES, Apr. 1, 2009, at A31.

¹⁰ Simon Johnson, *Banking's 'Toxic Cocktail' Is Too Big to Forget*, *Simon Johnson*, BLOOMBERG BUS. WK. (Jan. 26, 2011, 9:03 PM), <http://www.businessweek.com/news/2011-01-26/banking-s-toxic-cocktail-is-too-big-to-forget-simon-johnson.html> (opining that "the situation still is dire").

¹¹ Louise Story, *A Secretive Banking Elite Rules Trading in Derivatives*, N.Y. TIMES, Dec. 12, 2010, at A1.

¹² NOURIEL ROUBINI & STEPHEN MIHM, *CRISIS ECONOMICS: A CRASH COURSE IN THE FUTURE OF FINANCE* 239 (2010) (raising the prospect of sovereign debt defaults among the "risky rich" and concluding that such a crisis "may well take place in a disruptive, disorderly fashion" and, if so, "won't be pretty").

¹³ John B. Taylor, *The Dodd-Frank Financial Fiasco*, WALL ST. J., July 1, 2010, at A19 ("Effectively the bill institutionalizes the harmful bailout process by giving the government more discretionary power to intervene The problem of 'too big to fail' remains, and any cozy relationship between certain large financial institutions and the

Part I of this article will explore the broad outlines (details will remain elusive) of such a future crisis in order to reveal the challenges facing legal reform. Part II will compare the risks highlighted in Part I with the key elements of Dodd-Frank as well as the gaps left unaddressed in Dodd-Frank. The article concludes that the Dodd-Frank Act will not help avert the next crisis and may well facilitate or exacerbate the next crisis. Much like the Maginot Line, Dodd-Frank encourages complacency, represents a massive diversion of resources and encourages bank managers to strategically flank its proscriptions. Dodd-Frank, unfortunately, limits itself to the last crisis, not to the next crisis.

I. THE CONTINUING PROBLEM OF EXCESSIVE DEBT

Debt continues to plague the global economy. In the United States, for example, while the rate of debt accumulation slowed during the crisis, it now seems poised to reaccelerate to levels that are even higher than those at the outset of the crisis.¹⁴ The United States' current account deficit is increasing again, meaning that the nation continues to borrow hundreds of billions of dollars per annum from abroad.¹⁵ The U.S. economy remains the consumer of last resort for the global economy, thereby fueling growth throughout the developing world. Since dollars earned from selling to the United States exceed those spent on buying from the same, the excess is plowed into U.S. debt instruments.¹⁶ This constant demand for the purchase of U.S. debt instruments induces excessive debt in the United States by lowering interest rates on dollar denominated debt.¹⁷ This debt funds higher consumption in the United States and the only question remaining today is when the next debt bubble will bust.

The former chief economist of the International Monetary Fund (IMF), Professor Simon Johnson, sees future debt problems arising from the recent extension of the Bush-era tax cuts. Specifically, Johnson argues that the recent bi-partisan agreement to extend the so-called Bush tax cuts "moved us closer to a fiscal crisis, just as the euro zone now is experiencing."¹⁸

government that existed before the crisis will continue.").

¹⁴ *U.S. Current Account Gap Widens*, INVESTOR'S BUS. DAILY, Dec. 17, 2010, at A2.

¹⁵ Peter Morici, *Morici: Japan Sound, U.S. Insolvent*, FOXBUSINESS.COM (Jan. 27, 2011), <http://www.foxbusiness.com/markets/2011/01/27/peter-morici-japan-sound-insolvent/>.

¹⁶ Don Lee, *Mountain of Economic Trouble Ahead?*, CHI. TRIB., June 20, 2010, at 3, available at http://articles.chicagotribune.com/2010-06-20/business/ct-biz-0620-global-economy-20100620_1_consumer-debt-global-economy-american-consumer.

¹⁷ Joseph E. Stiglitz, *Thanks to the Deficit, the Buck Stops Here*, WASH. POST, Aug. 30, 2009, at B3.

¹⁸ Simon Johnson, *Tax Cutters Set Up Tomorrow's Fiscal Crisis: Simon Johnson*, BLOOMBERG.COM (Dec. 22, 2010, 6:00 PM), <http://www.bloomberg.com/news/2010-12->

The extension of those tax cuts will add \$400 billion to the U.S. government's fiscal deficit in 2011, creating the second largest deficit since World War II.¹⁹ The IMF found that the tax cuts would have little stimulative effect given their cost.²⁰ On January 28, 2011, Moody's threatened to downgrade the credit rating of the United States as early as 2013.²¹ Usually, an economic crisis leads to chronic fiscal deficits for governments because an economic contraction means diminished tax revenues.²² In the United States, the decision to cut taxes, even for the wealthiest, means deeper deficits with minimal countervailing economic benefit.²³

The United States also faces problematic state and local debts. Like the federal government, state and local tax collections plunged during the financial crash and still hover below the pre-crisis level.²⁴ Expenditures increased in the face of more economic suffering and needs arising from increased unemployment and poverty.²⁵ Meredith Whitney, a bank analyst renowned for her prescient prediction of the financial collapse, projects a major crisis in the state and municipal bond markets.²⁶ Whitney recently claimed that up to one hundred municipal bond issuers may default, leading to hundreds of billions in losses.²⁷ She terms this problem "the single most important issue in the US, and certainly the largest threat to the US economy."²⁸ Credit rating agencies now warn that downgrades and increasing yields in the state and local bond markets will exacerbate funding challenges state and local governments are facing.²⁹

Similarly, student loans will inexorably create more bank losses because of the dearth of job opportunities for graduates.

23/tax-cutters-set-up-tomorrow-s-fiscal-crisis-commentary-by-simon-johnson.html.

¹⁹ Damian Paletta et al., *Deficit Outlook Darkens: Stark Warning for 2011 Fuels Battle Over Government Spending and Taxation*, WALL ST. J., Jan. 27, 2011, at A1.

²⁰ Michael R. Crittenden, *IMF Urges U.S. to Take Fiscal Steps to Cut Deficit*, WSJ.COM (Jan. 27, 2011), <http://online.wsj.com/article/SB10001424052748704268104576108123476047128.html>.

²¹ Jed Graham, *U.S. Debt Shock May Hit in 2018, Maybe As Soon As 2013*, INVESTOR'S BUS. DAILY, May 6, 2010, at A1, available at <http://www.investors.com/NewsAndAnalysis/Article.aspx?id=532490>.

²² *Sharing the Pain: Dealing with Fiscal Deficit*, THE ECONOMIST, Mar. 6, 2010, available at <http://www.economist.com/node/15604130>.

²³ Paul Krugman, *Let's Not Make a Deal*, N.Y. TIMES, Dec. 6, 2010, at A25.

²⁴ Ezra Klein, *How Much Can We Blame on State Pensions?*, WASH. POST (Oct. 12, 2010), http://voices.washingtonpost.com/ezra-klein/2010/10/brooks_draft.html.

²⁵ *Id.*

²⁶ Nicole Bullock, *Spotlight Falls on US Cities' Fundraising*, FIN. TIMES, Jan. 26, 2011, at 4.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Jeanette Neumann, *Global Finance: Warning From S&P on Munis*, WALL ST. J., Jan. 24, 2011, at C3.

Recently, student loan debt burgeoned past one trillion dollars and now exceeds credit card debt.³⁰ Unemployment among recent graduates soared in the wake of the financial crisis as salaries fell, with no significant recovery in sight.³¹ Many student loans carry punitive, even predatory features.³² With student debt at a record high, a wave of defaults appears inevitable and already reached an eleven-year high in 2008.³³ The exposure of the financial sector to student loan losses is unclear at best.³⁴ While many of these loans are guaranteed by the federal government, these losses do not disappear.³⁵ Rather, they exacerbate the risk of a sovereign debt crisis afflicting the federal government, as discussed above.

Many private student loans are held by the financial system which may well absorb further massive losses to bank capital. For example, according to economist Nouriel Roubini, who famously predicted the financial collapse in the fall of 2008, “one of the most important risks” facing the global economy is the “likely” spread of the Eurozone debt crisis to Portugal, Spain, and Belgium.³⁶ Moreover, the IMF and the stronger nations of Europe seemingly lack the resources to contain this crisis.³⁷ In affected nations, the economic crisis holds profound political implications and appears likely to topple governments.³⁸ Currently, the Eurozone holds out hope that restructuring debts can resolve the crisis.³⁹ Such restructuring, however, is likely to trigger loss realization among Eurozone banks and lead to another source of stress on bank capital. European banks have a

³⁰ Scott Cohn, *Student Loans Leave Crushing Debt Burden*, MSNBC.COM (Dec. 21, 2010, 7:39 PM), http://www.msnbc.msn.com/id/40772705/ns/business-cnbc_tv/.

³¹ Steven Greenhouse, *'Glimmers of Hope' for Grads*, N.Y. TIMES, May 25, 2010, at B1.

³² Mary Pilon, *The \$555,000 Student-Loan Burden*, WALL ST. J. (Feb. 13, 2010), <http://online.wsj.com/article/SB10001424052748703389004575033063806327030.html>.

³³ Hibah Yousuf, *Student Loan Default Rate Creeps Higher*, CNNMONEY.COM (Sept. 13, 2010, 11:47 AM), http://money.cnn.com/2010/09/13/pf/college/student_loan_default_rate/index.htm.

³⁴ Eric Dash, *Citigroup to Sell Unit that Lends to Students*, N.Y. TIMES, Sept. 18, 2010, at B3.

³⁵ *Student Loan Debt Slaves*, LIBERTY INSIGHT (Jan. 13, 2011), <http://libertyinsight.com/2011/01/13/student-loan-debt-slaves/>.

³⁶ Michael Heath, *Roubini Sees Spread of Europe Debt Crisis Among Key 2011 Risks*, BLOOMBERG (Jan. 17, 2011), <http://www.bloomberg.com/news/2011-01-17/roubini-sees-spread-of-europe-debt-crisis-among-key-2011-risks.html>.

³⁷ Nouriel Roubini, *Global Risk and Reward in 2011*, PROJECT SYNDICATE (Jan. 13, 2011), <http://www.project-syndicate.org/commentary/roubini34/English>.

³⁸ Gavin Hewitt, *The Eurozone Crisis and the Voters*, BBC NEWS BLOG (Jan. 25, 2011, 1:05 PM), http://www.bbc.co.uk/blogs/thereporters/gavinhewitt/2011/01/the_eurozone_crisis_and_the_vo.html.

³⁹ *Europe Bends Over to Help Greece Rip Up Debts*, ASSOCIATED FOREIGN PRESS (Jan. 28, 2011), http://www.google.com/hostednews/afp/article/ALeqM5jXmo2b42waHr-ZKyfjOIPiyQT_w?docId=CNG.6b94de75d88998f6d0176a48ce43503c.191.

total exposure of twice their capital to sovereign debt of so-called peripheral European Union nations.⁴⁰ Thus, restructuring may well simply replace one debt crisis with another.

These sovereign credit issues may trigger massive losses throughout the global financial system. Because the government allowed the previous system of financial non-regulation and mis-regulation to fester unabated until the passage of the Dodd-Frank Act on July 21, 2010, bank exposure to these sources of financial losses are largely governed by the pre-Dodd-Frank regime.⁴¹ Most importantly, it is impossible to surmise which banks have what exposure to losses arising from these sources of financial losses. Banks are largely able to gamble with this risk through the derivatives markets on a completely unregulated basis.⁴² When losses from these sources are realized, bank capital could be compromised. This is particularly so, given that banks still face massive losses of unknown magnitude from before the period of 2007–2009.⁴³

For example, bank capital remains under siege from the massive foreclosure crisis arising from the “utter carelessness” of the banks during the real estate boom.⁴⁴ Essentially, banks not only engaged in reckless underwriting of high-risk residential real estate loans, they also failed to document mortgages and repayment rights appropriately (destabilizing middle class property rights along the way).⁴⁵ The entire industry used fictitious mortgagees on recorded mortgage documents to evade state and local recording fees.⁴⁶ Banks seem to have lost (or at

⁴⁰ John Paul Rathbone, *Eurozone Can Learn Grim Latin Lessons*, FIN. TIMES (Dec. 21, 2010, 11:20 PM), <http://www.ft.com/cms/s/0/ac9b6954-0d33-11e0-82ff-00144feabdc0.html#axzz1CgfvDT9H>.

⁴¹ The Dodd-Frank Act was signed into law by President Obama on July 21, 2010. See *Bill Summary & Status*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR04173:@@R> (last visited Mar. 22, 2011). Therefore, the banking industry was governed by pre-Dodd-Frank regime prior to July 21, 2010.

⁴² David Min & Pat Garafalo, *Regulating Derivatives Traffic: Establishing Speed Limits and Traffic Lights to Improve Derivatives Safety*, CTR. FOR AM. PROGRESS (Apr. 19, 2010), http://www.americanprogress.org/issues/2010/04/derivatives_traffic.html.

⁴³ Martin Jacques, *The New Depression*, NEW STATESMAN (Feb. 12, 2009), available at <http://www.newstatesman.com/economy/2009/02/financial-crisis-china-banks>.

⁴⁴ U.S. Bank, Nat'l Ass'n v. Ibanez, 941 N.E.2d 40, 55 (Mass. 2011) (Cordy, J., concurring) (“[W]hat is surprising about these cases is not the statement of principles articulated by the court regarding title law and the law of foreclosure in Massachusetts, but rather the utter carelessness with which the plaintiff banks documented the titles to their assets.”).

⁴⁵ Barry Ritholz, *Foreclosure Fraud Reveals Structural & Legal Crisis*, ROUBINI GLOBAL ECONOMICS (Oct. 10, 2010, 12:48 PM), http://www.roubini.com/us-monitor/259737/foreclosure_fraud_reveals_structural_legal_crisis.

⁴⁶ See generally Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359 (2010) (analyzing MERS, a nominee mortgage holder which was created by banking industry to evade recording fees, and how it conflicts with laws and policy).

least failed to negotiate to purchasers) huge numbers of negotiable instruments such that many mortgage debts suffer impaired enforcement.⁴⁷ According to bank analyst Chris Whalen, the banks will suffer debilitating losses as a result of this recklessness for years to come akin to a kind of “cancer” on their financial health.⁴⁸ This cancer will impair bank earnings and balance sheets for years to come. This will compound losses flowing into the financial sector from the continued meltdown of residential real estate into 2011.⁴⁹ Banks still hold exposure to trillions of dollars in residential real estate loans, most of which now suffer from impaired valuation.⁵⁰

As the residential real estate market continues to melt down, banks face numerous other challenges. The commercial real estate market may inflict billions more in losses on the financial sector. Despite bank efforts to “extend and pretend” that commercial loans are not troubled, a record high amount of commercial loans are in default.⁵¹ Nearly one trillion dollars of consumer debt suffers from serious delinquency.⁵² Low interest rates impair net interest income as margins shrink.⁵³ Thus, experts evince serious concern that many banks, particularly the most risky megabanks, flirt with insolvency.⁵⁴

⁴⁷ Gretchen Morgenson & Andrew Martin, *Battle Lines Forming in Clash Over Foreclosures*, N.Y. TIMES, Oct. 21, 2010, at A1.

⁴⁸ Interview by Bloomberg with Christopher Whalen, Managing Director, Inst. Risk Analytics (Oct. 18, 2010), available at <http://www.bloomberg.com/video/63795070/>.

⁴⁹ Alejandro Lazo, *Home Prices Decline in November*, L.A. TIMES BLOG (Jan. 25, 2011, 6:28 AM), http://latimesblogs.latimes.com/money_co/2011/01/home-prices-declined-in-november.html.

⁵⁰ Steven A. Ramirez, *Are the Megabanks Insolvent?*, CORPORATE JUSTICE BLOG, (Nov. 23, 2010, 3:36 PM), <http://corporatejusticeblog.blogspot.com/2010/11/are-megabanks-insolvent.html>.

⁵¹ Julie Satow, *'Bad Boy' Guarantees Snarl Billions in Real Estate Debt*, N.Y. TIMES, Jan. 19, 2011, at B9.

⁵² Christine Ricciardi, *More Current Mortgages Go Delinquent in 3Q as Household Debt Falls*, HOUSINGWIRE, Nov. 8, 2010, available at <http://www.housingwire.com/2010/11/08/more-current-mortgages-go-delinquent-in-3q-as-household-debt-falls>.

⁵³ See Joe Rauch, *Corrected: Wells and US Bancorp Profits Up but Margins Squeezed*, REUTERS (Jan. 19, 2011), <http://www.reuters.com/article/2011/01/19/us-lvabanks-earnings-idUSTRE70I5SJ20110119?pageNumber=2>.

⁵⁴ William K. Black & L. Randall Wray, *Foreclose on the Foreclosure Fraudsters, Part I: Put Bank of America in Receivership*, HUFFINGTON POST (Oct. 22, 2010, 2:08 PM), http://www.huffingtonpost.com/william-k-black/foreclose-on-the-foreclos_b_772434.html; Simon Johnson, *Time for Some New Stress Tests for Banks*, N.Y. TIMES ECONOMIX BLOG (Oct. 21, 2010, 5:00 AM), <http://economix.blogs.nytimes.com/2010/10/21/time-for-some-new-stress-tests-for-banks/>. See also CONG. OVERSIGHT PANEL, NOVEMBER OVERSIGHT REPORT: EXAMINING THE CONSEQUENCES OF MORTGAGE IRREGULARITIES FOR FINANCIAL STABILITY AND FORECLOSURE MITIGATION 3 (2010), available at <http://www.gpo.gov/fdsys/pkg/CPRT-111JPRT61835/pdf/CPRT-111JPRT61835.pdf> (assessing foreclosure crisis and concluding that “[b]ank regulators should also conduct new stress tests on Wall Street banks to measure their ability to deal with a potential crisis”).

Further, economic growth appears unlikely to rescue the banks. Consumer deleveraging will continue to suppress demand for quite some time.⁵⁵ While the government seemingly mustered endless resources to save a handful of banks, government programs to help the great mass of American citizens can only be termed modest at best.⁵⁶ Unemployment rivals the joblessness during the Great Depression, with little relief expected.⁵⁷ Government spending seems destined to contract as austerity rhetoric takes hold.⁵⁸ Finally, the banks themselves continue to hoard capital in the form of excess reserves which now total one trillion dollars.⁵⁹ Economic pessimism and concerns regarding financial markets caused non-financial firms to hoard nearly two trillion dollars more.⁶⁰ All of this suggests continued economic sluggishness, more losses on outstanding debt, and therefore more bank losses.

The United States faces a crisis. Its banking and financial sector fails to lend, and lending plays a crucial role in growth.⁶¹ Its economy fails to generate jobs.⁶² Yet the economy faces a debt burden on par with the level of debt on the eve of the subprime crisis.⁶³ The financial sector faces staggering losses from a variety of sources. The entire global economy bears too much

⁵⁵ James Saft, *Good-bye Credit Crunch, Hello Slog*, REUTERS BLOG (Jan. 25, 2011, 9:04 AM), <http://blogs.reuters.com/jim-saft/2011/01/25/good-bye-credit-crunch-hello-slog/>.

⁵⁶ Jean Braucher, *Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster First Year of the Home Affordable Modification Program (HAMP)*, 52 ARIZ. L. REV. 727, 787–88 (2010).

⁵⁷ Ann Saphir, *Cleveland Fed: US Jobless Rate Likely to Stay High*, REUTERS (Jan. 31, 2011), <http://www.reuters.com/article/2011/01/31/usa-fed-unemployment-idINN3123119920110131>.

⁵⁸ See Martin Crutsinger, *Builders Began Work on Fewer Projects in 2010*, KANSASCITY.COM (Feb. 1, 2011, 9:18 AM), <http://www.kansascity.com/2011/02/01/2624194/builders-began-work-on-fewer-projects.html> (“Spending on government projects fell in December 2.8 percent. State and local spending dropped 1.8 percent and spending by the federal government plunged 11.6 percent to the lowest level since October 2004.”).

⁵⁹ Silvio Contessi, *Are Bank Reserves and Bank Lending Connected?*, MONETARY TRENDS (Feb. 2011), <http://research.stlouisfed.com/publications/mt/20110201/cover.pdf>.

⁶⁰ Justin Lahart, *Companies Cling to Cash: Coffers Swell to 51-Year High as Cautious Firms Put Off Investing in Growth*, WALL ST. J., Dec. 10, 2010, at A1, available at <http://online.wsj.com/article/SB10001424052748703766704576009501161973480.html>.

⁶¹ This contraction of credit predictably arose from a financial sector facing capital depletion even after a bailout as incumbent bank managers (who logically should have been terminated in the wake of their reckless stewardship) sought to conceal the full extent of losses and become very risk-averse in order to maintain their incumbency. Steven A. Ramirez, *Subprime Bailouts and the Predator State*, 35 DAYTON L. REV. 81, 96–101 (2009).

⁶² Jon Hilsenrath, *Messy New Estimates Complicate Explanation for Unemployment Rate Drop*, WSJ.COM BLOG (Feb. 4, 2011, 1:12 PM), available at <http://blogs.wsj.com/economics/2011/02/04/messy-new-estimates-complicate-explanation-for-unemployment-rate-drop/>.

⁶³ Annaly Capital Management, *Charts of the Day: The New Z.1 is Out!*, CREDIT WRITEDOWNS (Sept. 21, 2010, 5:00 PM), <http://www.creditwritedowns.com/2010/09/charts-of-the-day-the-new-z-1-is-out.html>.

debt.⁶⁴ Another debt crisis appears inevitable. When this crisis hits, creditors will flee for safety and credit costs for the entire economy will soar as they did in 2008. At that point, markets will need to reckon with the fiscal position of the U.S. government. The key issue will be whether the U.S. government will rescue the megabanks again. Dodd-Frank suggests that the government will do precisely that, as shown below.⁶⁵ Then, the riskiness of the megabanks will once again privatize gains and socialize losses, which would culminate into a crisis that could make the subprime crisis seem like an appetizer to a far more grand main course.

II. THE FAILURES OF DODD-FRANK

The Dodd-Frank Act creates a toxic mix of affirmatively dangerous statutory law, while at the same time failing to address key structural causes of the financial crisis. The continued presence of toxic debt, for example, is a direct function of a flawed model of globalization that Dodd-Frank (indeed, our entire political leadership) left unaddressed. Under Dodd-Frank, the perverse incentives created by too-big-to-fail and the primary arenas for such incentives will continue to operate unimpeded for at least years to come. Finally, Dodd-Frank leaves the same inept bank managers in power at the apex of our economy and financial system despite proof positive of their willingness to inflict massive and reckless risks upon our system in exchange for short-term gains and concomitant compensation payments.⁶⁶

A. Fundamentally Flawed Globalization

The global economy relies upon the U.S. dollar as its reserve currency, and this central flaw means excessive accumulation of debt in the United States and the developed world generally.⁶⁷ As issuer of the reserve currency, the United States must act as

⁶⁴ Daniel Fisher, *The Global Debt Bomb*, FORBES (Feb. 8, 2010, 12:00 AM), <http://www.forbes.com/forbes/2010/0208/debt-recession-worldwide-finances-global-debt-bomb.html>.

⁶⁵ Treasury Secretary Timothy Geithner recently admitted that in the event of another credit crisis “we may have to do exceptional things again.” OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR THE TEMPORARY ASSET RELIEF PROGRAM, QUARTERLY REPORT TO CONGRESS 10 (Jan. 26, 2011) (“To the extent that those ‘exceptional things’ include taxpayer-supported bailouts, his acknowledgement serves as an important reminder that TARP’s price tag goes far beyond dollars and cents, and that the ultimate cost of TARP will remain unknown until the next financial crisis occurs.”).

⁶⁶ Raghuram Rajan, *Banker’s Pay Is Deeply Flawed*, FIN. TIMES (Jan. 8, 2008), http://us.ft.com/ftgateway/superpage.ft?news_id=fto010920081142101282 (noting the incentives for CEOs and financial managers to tolerate excessive risks that increase short-term returns in order to receive immediate compensation).

⁶⁷ JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK 245–68 (2006) [hereinafter STIGLITZ, MAKING GLOBALIZATION WORK].

borrower of last resort and consumer of last resort for the global economy.⁶⁸ The problem is that it cannot sustainably fulfill this role any longer and the dollar reserve system is now breaking down in a sea of debt that will trigger serial crises.⁶⁹ Over two years after the greatest debt crisis in our history, the global economy is still rigged to create excessive debt within the United States.⁷⁰ Further, the dollar reserve system weakens demand within the global economy which contributes to the loss of jobs in the United States.⁷¹ Dodd-Frank fails to address this dynamic in any way whatsoever and therefore can only be termed a failure of political will.⁷² This failure of political will, in turn, represents the powerful interests that continue to benefit from this flawed model of globalization—CEOs of transnational corporations, particularly in the United States.⁷³

Dodd-Frank fails to address the problems arising from this deeply flawed model of globalization. Indeed, although the Act mandates at least sixty-seven studies from various agencies, it does not require any study of the impact of globalization or the dollar reserve system.⁷⁴ This is despite the fact that many

⁶⁸ *Id.* at 265.

⁶⁹ *Id.* at 254–56.

⁷⁰ Aaron Task, *Cruel Irony: Dollar's Reserve Status Enables U.S. Debt Addiction*, YAHOO! FINANCE (Feb. 3, 2011, 8:00 AM), <http://finance.yahoo.com/tech-ticker/cruel-irony-dollar%27s-reserve-status-enables-u.s.-debt-addiction-535886.html>. See also Joseph Stiglitz, *Towards a New Global Reserve System*, in ASIAN DEVELOPMENT BANK, THE FUTURE GLOBAL RESERVE SYSTEM—AN ASIAN PERSPECTIVE 1, 2 (Jeffrey D. Sachs et al. eds., 2010), available at http://aric.adb.org/grs/papers/Future_Global_Reserve_System.pdf (showing that “the dollar reserve system contributed to global financial instability and a weak global economy” because “the reserve currency country got increasingly in debt as others held more of its IOUs as part of their reserves” and “the build-up of reserves by surplus countries led to weaknesses in global aggregate demand”).

⁷¹ See Stiglitz, *Towards a New Global Reserve System*, *supra* note 70, at 2.

⁷² According to Fed Chair Ben Bernanke:

One way or the other, fiscal adjustments sufficient to stabilize the federal budget must occur at some point. The question is whether these adjustments will take place through a careful and deliberative process that weighs priorities and gives people adequate time to adjust to changes in government programs or tax policies, or whether the needed fiscal adjustments will be a rapid and painful response to a looming or actual fiscal crisis.

Ben Bernanke, Chairman, Fed. Reserve, Speech before the National Press Club: The Economic Outlook and Macroeconomic Policy (Feb. 3, 2011), available at <http://www.federalreserve.gov/newsevents/speech/bernanke20110203a.htm>.

⁷³ Steven A. Ramirez, *American Corporate Governance and Globalization*, 18 BERKELEY LA RAZA L.J. 47, 63 (2007).

⁷⁴ The SEC, CFTC, FDIC and Federal Reserve System each maintain websites detailing the reports and studies they issue. See *Reports and Studies*, U.S. COMMODITY FUTURES TRADING COMM'N, <http://www.cftc.gov/LawRegulation/DoddFrankAct/ReportsandStudies/index.htm> (last visited Mar. 16, 2011); *Implementing Dodd-Frank Wall Street Reform and Consumer Protection Act—Accomplishments*, U.S. SEC. EXCH. COMM'N, <http://www.sec.gov/spotlight/dodd-frank/accomplishments.shtml> (last visited Mar. 16, 2011); *FDIC and Financial Regulatory Reform*, FED. DEPOSIT INS. CORP., <http://www.fdic.gov/regulations/reform/> (last visited Mar. 16, 2011); *Regulatory Reform*,

prominent economists and other commentators proposed sensible solutions to the problem both before and after the crisis. For example, Joseph Stiglitz recently highlighted a “remarkably simple solution” (first proposed by John Maynard Keynes) to the problem of reserves: allow the IMF to issue Special Drawing Rights (SDRs) to act as a reserve currency so that no single nation would bear the burden of the concomitant debt.⁷⁵ I recently expanded upon this proposal and argued that this new issuer of a new reserve currency could act as a bank, and leverage these currency reserves through fractional banking to fund low-cost loans for high pay-off development initiatives that could vindicate economic human rights.⁷⁶ This would divert reserves from funding excessive debt in the United States to funding sustainable global growth.

B. Too-Big-to-Fail Endures

If credit markets perceive that a bank will not be allowed to fail due to government intervention or guarantees, then creditors will supply more credit at a lower cost. Further, managers will tolerate excessive risk because they anticipate that gains are privatized while losses are socialized through government backing.⁷⁷ Since the enactment of Dodd-Frank, there is increasing skepticism that the Act will prevent future bailouts of large financial firms in a manner different from the ad hoc bailouts of late 2008.⁷⁸ The statutory details of the Dodd-Frank Act belie any claim that it ended bailouts for firms deemed too-big-to-fail.⁷⁹

Section 1101 paves the way for the Fed to bail out large banks, so long as it does so pursuant to a program or facility that features “broad-based eligibility.”⁸⁰ Indeed, the Act directs the Fed and the Treasury to create emergency lending programs and facilities “[a]s soon as practicable.”⁸¹ Similarly, section 1105 of

FED. RESERVE., <http://www.federalreserve.gov/newsevents/reform.htm> (last visited Mar. 16, 2011); Christine Harper, *Crash of 2015 Won't Wait for Regulators to Rein in Wall Street*, BLOOMBERG (Aug. 8, 2010, 5:48 PM), <http://www.bloomberg.com/news/2010-08-09/crash-of-2015-won-t-wait-for-regulators-to-buckle-wall-street-safety-belts.html>.

⁷⁵ STIGLITZ, MAKING GLOBALIZATION WORK, *supra* note 67, at 260.

⁷⁶ Steven A. Ramirez, *Taking Economic Rights Seriously after the Debt Crisis*, 42 LOYOLA U. CHI. L.J. (forthcoming 2011).

⁷⁷ Ramirez, *supra* note 61, at 82.

⁷⁸ *The Ruling Ad-Hocracy*, WALL ST. J., Jan. 21, 2011, at A12.

⁷⁹ *Text of Obama Remarks on Dodd-Frank*, MARKETWATCH (Jul 21, 2010, 11:43 AM), <http://www.marketwatch.com/story/text-of-obama-remarks-on-dodd-frank-2010-07-21>.

⁸⁰ *Title XI Overview: 11.1 Emergency Lending Authority to Be Used Only to Provide Broad-based Liquidity*, AM. BANKERS ASS'N, http://www.aba.com/RegReform/RR11_1.htm (last visited Mar. 21, 2011).

⁸¹ Dodd-Frank Act § 1101. Section 1101 amends section 13(3) of the Federal Reserve Act, which operated as the primary mechanism of bailouts through the use of funds

the Act directs the FDIC, in consultation with the Secretary of Treasury, to create a “widely available program to guarantee obligations of solvent insured depository institutions or solvent depository institution holding companies (including any affiliates thereof) during times of severe economic distress. . . .”⁸² As a result, after Dodd-Frank, virtually every type of bailout pursued by the Fed and the FDIC that occurred between 2007 and 2009 will now be more explicitly and more broadly available.⁸³ Ironically, Dodd-Frank therefore mandates more “broad-based” and “widely available” bailouts.⁸⁴

Dodd-Frank also includes an “Orderly Liquidation Authority” (OLA) for large, systemically significant firms that appear poised to “default.”⁸⁵ Such firms may be placed into FDIC receivership, but only upon a vote of at least: (1) 2/3 of the members of the Federal Reserve Board of Governors, (2) 2/3 of the members of the board of directors of the FDIC, and (3) a written recommendation of the Treasury Secretary (made in consultation with the President).⁸⁶ As receiver, the FDIC holds total managerial power and succeeds by operation of law to all powers of the stockholders, officers, and directors.⁸⁷ The FDIC thus controls all aspects of a firm’s business, including decisions whether to liquidate or sell the company or parts of the company.⁸⁸ The FDIC may make loans to guarantee assets or obligations or to purchase assets of any financial company put

supplied by the Federal Reserve System. Christian A. Johnson, *Exigent and Unusual Circumstances: The Federal Reserve and the U.S. Financial Crisis*, 11 EUR. BUS. ORG. L. REV. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1584731.

⁸² Dodd-Frank Act § 1105.

⁸³ See Johnson, *supra* note 81 (“Under the Dodd-Frank Act amendment, it would appear that the Federal Reserve would have been unable to lend directly to Bear Stearns or AIG unless Bear Stearns or AIG would have otherwise qualified for the terms of a facility or program in place ‘with broad-based eligibility.’”).

⁸⁴ Dodd-Frank Act §§ 1101, 1105.

⁸⁵ Dodd-Frank Act § 203(b).

⁸⁶ *Id.* Recently President Obama named William Daley, Midwest Chairman of JP Morgan Chase & Co., as his new Chief of Staff. Becky Yerak, *William Daley Becomes White House’s Business Connection*, CHI. TRIB. (Jan. 31, 2011), http://articles.chicagotribune.com/2011-01-31/business/ct-biz-0131-daley-chase-20110131-137_1-william-daley-jpmorgan-chase-business-connection (“It’s a big plus for the banking industry,’ . . . banking analyst Richard Bove said of Daley’s move to the White House earlier this month. “The fact that a banker is chief of staff is going to change the rhetoric dramatically. With Daley there, JPMorgan will benefit, along with every other bank.”).

⁸⁷ Dodd-Frank Act § 210(a)(1)(A).

⁸⁸ Dodd-Frank Act § 210(a)(1). Should the government ever muster the political will, this provision paves the way to fragment the megabanks the next time they flirt with insolvency. Unfortunately, the FDIC too often exercises its managerial powers to create even larger banks. See David Miltenberg, *Citigroup Agrees to Buy Wachovia’s Banking Business*, BLOOMBERG (Sept. 29, 2008), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aWwkv.J3bhY4>.

into FDIC receivership under this authority.⁸⁹ This further expands bailout powers.⁹⁰ The Act includes provisions designed to conceal this form of bailout; however, in the end creditors do not face a real prospect of loss in a crisis due to government funding.⁹¹ If senior executives or directors of a firm are “substantially responsible” for the failure of the firm, whether by gross negligence or disregard of a duty of care, any compensation they received within two years of receivership may be recouped by the FDIC.⁹² This OLA process consequently could dissuade managers from excessive risk. Nevertheless, most firms will never enter that process due to the multiple approvals necessary to trigger the process and the political influence of the financial sector.⁹³

Dodd-Frank also gives regulators the power to break up systemically risky firms. Ultimately, keeping banks from growing too large limits their economic and political influence.⁹⁴ As a result, commentators greeted this part of the Act with some degree of optimism.⁹⁵ However, section 121 requires a determination by the Fed that a firm poses a “grave threat” to financial stability as well as the approval of 2/3 of the newly created Financial Stability Oversight Board.⁹⁶ No divestiture can proceed without the Fed finding that other mitigatory actions are “inadequate” for addressing threats to financial stability.⁹⁷ Thus, divestiture must be a last resort after all other options are exhausted, and this presumably is subject to judicial review.

⁸⁹ Dodd-Frank Act § 204(d). Under section 206, these actions must be for the purpose of financial stability, not for the benefit of any particular company, and must be approved by the Treasury under section 210(n)(9).

⁹⁰ See Taylor, *supra* note 13 (“The FDIC does not have the capability to take over large, complex financial institutions without causing disruption, so such firms and their creditors are likely to be bailed out again.”).

⁹¹ Robert J. Shiller, *Bailouts, Reframed as ‘Orderly Resolutions’*, N.Y. TIMES, Nov. 14, 2010, at BU5.

⁹² Dodd-Frank Act §§ 210(f), 203(c)(2)(s).

⁹³ SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 6 (2010). According to Senate Majority Whip Dick Durbin, the banking industry is the “most powerful lobby” and they “frankly own the place.” Representative Collin C. Peterson, the former Chair of the House Agriculture Committee, claims that they “run the place.” Ramirez, *supra* note 61, at 81.

⁹⁴ In fact, the FDIC routinely manages large banks in the context of traditional failed bank receiverships without severe economic or financial consequences. The largest such receivership to date is WaMu Savings Bank with \$307 billion in assets, which occurred at the height of the financial crisis with minimal impact. Robin Sidel et al., *WaMu Is Seized, Sold Off to J.P. Morgan, In Largest Failure in U.S. Banking History*, WALL ST. J., Sep. 26, 2008, at A1.

⁹⁵ Simon Johnson, *A Roosevelt Moment for America’s Megabanks?*, PROJECT SYNDICATE (July 14, 2010), <http://www.project-syndicate.org/commentary/johnson10/English>.

⁹⁶ See Dodd-Frank Act § 121.

⁹⁷ See *id.*

Notably, all of the too-big-to-fail banks that the government rescued in 2008 are even larger today.⁹⁸ Further, they remain dangerously leveraged.⁹⁹ As such, they all have proven to pose a grave threat to financial stability, with little or no countervailing economic benefit.¹⁰⁰ Yet no action to mitigate that threat is pending, much less any break-up. Break-ups consequently appear remote.

Creditors have already concluded that Dodd-Frank preserves the too-big-to-fail subsidies and therefore will fuel the continued growth of such banks with cheaper capital. In fact, due to the presence of government backing, the credit ratings agencies specifically give the megabanks much higher credit ratings than otherwise, notwithstanding Dodd-Frank.¹⁰¹ Thus, according to Neil Barofsky, the Special Inspector General of the TARP program: “These [too-big-to-fail] institutions and their leaders are incentivized to engage in precisely the sort of behavior that could trigger the next financial crisis, perpetuating a doomsday cycle of booms, busts and bailouts.”¹⁰² As economist Simon Johnson puts it: “If the big banks get large enough, we’ll become like Ireland today—saving those institutions will ruin us fiscally,

⁹⁸ Thomas M. Hoenig, Op-Ed., *Too Big to Succeed*, N.Y. TIMES, Dec. 2, 2010, at A37 (“[T]he five largest financial institutions are 20 percent larger than they were before the crisis. They control \$8.6 trillion in financial assets—the equivalent of nearly 60 percent of gross domestic product. Like it or not, these firms remain too big to fail.”).

⁹⁹ Anat R. Admati, *Should Mega Banks Be Broken Apart?: Bankruptcy Is Not an Option*, N.Y. TIMES (Jan. 28, 2011, 4:05 PM), <http://www.nytimes.com/roomfordebate/2010/12/07/should-megabanks-be-broken-apart/bankruptcy-is-not-an-option>. Numerous studies demonstrate that banks should be required to hold much more capital than they are currently required by law to hold or what they will be required to hold under the Basel III international capital accords. See generally David Miles et al., *Optimal Bank Capital, Discussion Paper No. 31*, BANK OF ENGLAND, (Jan. 2011), <http://www.bankofengland.co.uk/publications/externalmpcpapers/extmpcpaper0031.pdf>; Anat R. Admati et al., *Fallacies, Irrelevant Facts, and Myths in the Discussion of Capital Regulation: Why Bank Equity Is Not Expensive* 4 (Stan. Grad. Sch. of Bus., Research Paper No. 2065, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669704. (“Setting equity requirements significantly higher than the levels currently proposed would entail large social benefits and minimal, if any, social costs.”). Thus, not only does the United States continue to suffer from too-big-to-fail banks, but these banks are also significantly undercapitalized.

¹⁰⁰ Simon Johnson, *Should Megabanks Be Broken Apart?: We Haven’t Learned From Ireland*, N.Y. TIMES (Dec. 7, 2010), <http://www.nytimes.com/roomfordebate/2010/12/07/should-megabanks-be-broken-apart/we-havent-learned-from-ireland> (“There are no economies of scale or scope in banking over about \$100 billion in assets. [There is not] a single piece of evidence that society gains from having megabanks at today’s scale and with today’s leverage.”).

¹⁰¹ Ronald D. Orol, *‘Too Big to Fail’ a Recipe for Disaster, Watchdog Says*, MARKET WATCH (Jan. 25, 2011, 6:47 PM), http://www.marketwatch.com/story/too-big-to-fail-a-recipe-for-disaster-watchdog-2011-01-26?reflink=MW_news_stmp.

¹⁰² *Id.*

destroy the dollar as a haven currency, and end financial life as we know it.”¹⁰³

Professor Arthur E. Wilmarth, Jr. also concludes that “Dodd-Frank does not solve the [too-big-to-fail] problem.”¹⁰⁴ He concurs that too many avenues remain open for regulators to rescue creditors of large banks, and that those regulators now have a proven track record of indulging powerful banking interests, such as managers of too-big-to-fail megabanks.¹⁰⁵ Finally, Professor Wilmarth echoes economists such as Joseph Stiglitz: “There is an obvious solution to the too-big-to-fail banks: break them up. If they are too big to fail, they are too big to exist.”¹⁰⁶ Thus, Congress ignored the thinking of leading academics and economists and instead preserved the economic and political power of the most reckless bankers in U.S. history, despite their central role in causing the crisis.¹⁰⁷ To the extent politicians sold Dodd-Frank as the end of taxpayer-funded bailouts for large financial firms, it may well prove a monumental political fraud.¹⁰⁸

C. The Derivatives and Hedge Fund Casino is Open Too Late

Derivatives are complex financial contracts that derive their value by reference to some other securities, commodities or debt instruments.¹⁰⁹ Hedge funds are private pools of capital that may invest or speculate in the full range of financial products.¹¹⁰ Hedge funds and derivatives exposed banks to massive losses that were not transparent to regulators, often because of the fact that much of this activity occurred through unregulated

¹⁰³ Simon Johnson, *'Citi Weekend' Shows Too-Big-to-Fail Endures: Simon Johnson*, BLOOMBERG BUS. WK. (Jan. 17, 2011, 9:10 PM), <http://www.businessweek.com/news/2011-01-17-citi-weekend-shows-too-big-to-fail-endures-simon-johnson.html>.

¹⁰⁴ Arthur E. Wilmarth, Jr., *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-to-Fail Problem*, 89 OR. L. REV. 3 (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719126.

¹⁰⁵ *Id.*

¹⁰⁶ JOSEPH E. STIGLITZ, *FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY* 165–66 (2010). See also SIMON JOHNSON & JAMES KWAK, *supra* note 93, at 221 (“The best defense against a massive financial crisis is a popular consensus that too big to fail is too big to exist.”); ROUBINI & MIHM, *supra* note 12, at 226 (“[N]ot only are such firms too-big-to-fail; they’re too big to exist, and too complex to manage properly.”).

¹⁰⁷ See 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, 1032–43 (2009).

¹⁰⁸ *Watchdog Disputes White House Claim that Wall Street Reform Will End Taxpayer Bailouts*, ABCNEWS (Jan. 27, 2011, 10:02 AM), <http://blogs.abcnews.com/thenote/2011/01/watchdog-disputes-white-house-claim-that-wall-street-reform-will-end-taxpayer-bailouts.html>.

¹⁰⁹ Dodd-Frank Act § 716.

¹¹⁰ *Id.*

affiliates.¹¹¹ A review of Dodd-Frank regarding derivatives and securities prohibitions illustrates that banks may continue to gamble with derivatives and other complex securities and hedge fund “investment” for years to come.¹¹²

Under section 716, banks are generally prohibited from using derivatives.¹¹³ But, there is an exception for “bona fide hedging and traditional bank activities.”¹¹⁴ This exception apparently would include eighty percent of the derivatives market.¹¹⁵ The prohibition on derivatives in this section does not even take effect until July 21, 2012.¹¹⁶ Further, the prohibition regarding bank derivative activities may be extended until July 21, 2014, or possibly as late as July 21, 2015.¹¹⁷ Finally, banks may continue to trade derivatives through affiliates in accordance with Federal Reserve strictures.¹¹⁸ Thus, all of the derivative trading that fueled the crisis will continue for at least four years, and most derivatives trading will be permissible for banks thereafter. Moreover, during that hiatus, banks can be counted on to use their considerable political influence to further dilute the derivatives prohibitions.¹¹⁹

Section 723 mandates that derivatives transactions be cleared, but regulators have one year for promulgating a process by which determinations are made for which derivatives must be cleared and which ones may remain over-the-counter.¹²⁰ Specifically, the U.S. Commodity Futures Trading Commission and the Securities Exchange Commission must “review each swap, or any group, category, type, or class of swaps to make a determination as to whether the swap or group, category, type or class of swaps should be required to be cleared.”¹²¹ The following factors, among others, bear upon this determination: (1) liquidity for given type of derivative, (2) pricing data, and (3) effect on systemic risk. If no facility wishes to clear a type of derivative

111 CCH, DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: LAW, EXPLANATION AND ANALYSIS 30–31 (2010).

112 *Id.* at 28.

113 Dodd-Frank Act § 716.

114 *Id.*

115 Orrick, *Wall Street Transparency and Accountability Act of 2010*, FINANCIAL MARKETS ALERT, July 21, 2010, at 3–4, available at <http://www.orrick.com/fileupload/2833.pdf>.

116 Dodd-Frank Act § 716(h).

117 Dodd-Frank Act § 716(f).

118 Dodd-Frank Act § 716(c).

119 John Carney, *Blanche Lincoln Is Gone. Will Dodd-Frank Derivatives Rules Be Next?*, CNBC (Nov. 4, 2010, 11:44 AM), http://www.cnbc.com/id/40007299/Blanche_Lincoln_Is_Gone_Will_Dodd_Frank_Derivatives_Rules_be_Next.

120 Dodd-Frank Act § 723.

121 *Id.*

then no clearing is necessary.¹²² Thus, highly customized derivatives likely need not be cleared. Again, the exceptions threaten to swallow the rule, and much depends upon regulatory rule-making.¹²³ Further, the clearinghouses themselves may now be too-big-to-fail because if they were to fail the banks would be exposed to huge losses.¹²⁴ To the extent that the large banks that control a huge portion of derivatives trading are the most influential members of the new derivatives exchanges, the entire effort to shift counterparty risk of default to the clearinghouses could lead to even bigger bailouts.¹²⁵ Rather than controlling risk through clearing of derivatives, Dodd-Frank may give the large banks even more power.

The Act's approach to securities trading and bank hedge fund activities similarly proves relatively toothless. Under section 619, banks cannot engage in proprietary trading or invest in hedge funds.¹²⁶ The Fed, however, may permit bank investments in illiquid hedge funds or private equity funds until 2022.¹²⁷ Liquid funds may be held until 2017.¹²⁸ Indeed, nothing changes at all until October of 2012, and no divestitures are required until October of 2014, at the earliest.¹²⁹ While some transition time may be warranted, a spin-off to shareholders or public investors could certainly occur within a year.¹³⁰ In any event, bank capital will continue to be exposed to securities trading and hedge funds for many years notwithstanding the so-called Volcker Rule.¹³¹

The second problem is the exceptions to the trading and hedge fund ban under section 619.¹³² Hedging, underwriting and market-making activities are permissible.¹³³ Banks may still continue to organize and offer hedge funds and private equity funds. They may still devote up to three percent of their capital

¹²² *Id.*

¹²³ Aline Van Duyn, *Derivatives Still in Flux as Dodd-Frank Deadline Looms*, FIN. TIMES (Jan. 28, 2011, 9:19 PM), <http://www.ft.com/cms/s/0/6211d098-2b07-11e0-a65f-00144feab49a.html#axzz1HJV8vyP3>.

¹²⁴ Gretchen Morgenson, *Count on Sequels to TARP*, N.Y. TIMES, Oct. 3, 2010, at BU1.

¹²⁵ Louise Story, *A Secretive Banking Elite Rules Trading in Derivatives*, N.Y. TIMES, Dec. 12, 2010, at A1.

¹²⁶ Dodd-Frank Act § 619(a).

¹²⁷ Dodd-Frank Act § 619(c)(3)(B). See also *Financial Regulation*, SKADDEN (Jan. 10, 2011), <http://www.skadden.com/Index.cfm?contentID=51&itemID=2328>.

¹²⁸ Dodd-Frank Act § 619(c).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Dodd-Frank Act § 619 (implying securities trading and liquid hedge funds are allowed until October 2012).

¹³² *Id.*

¹³³ *Id.*

to trading and hedge fund investments.¹³⁴ The regulators may further permit trading and investments that promote “the safety and soundness of the banking entity . . . and the financial stability of the United States.”¹³⁵ These exceptions may well operate to swallow the rule when it takes effect in coming years and decades. Even the intellectual father of these rules—former Fed Chair Paul Volcker—remains dissatisfied with the so-called Volcker Rule.¹³⁶

This approach toward securities and derivatives trading exacerbates the fundamental distortion toward risk. The exceptions to the prohibition of derivatives trading within banks swallow the rule. The Act allows banks to trade securities and invest in hedge funds into the next decade. Thus, the Act gives large banks a subsidized cost of capital while largely preserving their ability to gamble in the derivatives and securities markets. CEOs and other senior bank managers therefore face the identical incentives to gorge on risk that they faced before 2008 to ring up short profits without regard to future losses that may come to fruition only after the payment of incentive-based compensation. Even if a firm approaches insolvency, the payment of golden parachute arrangements further blunts the disincentives senior managers face for excessively risky conduct.

D. CEOs as the New Potentates

Public corporations in the United States are burdened by excessive CEO autonomy.¹³⁷ As John Cassidy highlights, economists and others have reached a “rare consensus” that managerial pay played a central role in the financial crisis.¹³⁸ The essential problem revolves around the manipulation of risk to achieve artificially high profits today, at the expense of long-term solvency.¹³⁹ Ultimately, Dodd-Frank fails to disrupt this

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Tom Braithwaite, *Volcker Takes Aim at Long Term Investments*, FIN. TIMES (Jan. 20, 2011, 12:30 AM), <http://www.ft.com/cms/s/0/2a03c58c-242a-11e0-a89a-00144feab49a.html>.

¹³⁷ Steven A. Ramirez, *Lessons from the Subprime Debacle: Stress Testing CEO Autonomy*, 54 ST. LOUIS U. L.J. 1, 1–2 (2010) [hereinafter Ramirez, *Lessons from the Subprime Debacle*].

¹³⁸ John Cassidy, *Wall Street Pay: Where is the Reform?*, NEW YORKER (July 23, 2010), <http://www.newyorker.com/online/blogs/johncassidy/2010/07/wall-street-pay.html> (“Despite widespread anger on the part of the public, and a rare consensus among economists that faulty compensation structures were partly responsible for the financial crisis, the U.S. political system has failed to rise to the challenge.”).

¹³⁹ Paul Krugman, Op-Ed., *Banks Gone Wild*, N.Y. TIMES, Nov. 23, 2007, at A37, available at <http://www.nytimes.com/2007/11/23/opinion/23krugman.html>.

reality in the foreseeable future, despite including some positive steps.

For example, section 951 gives shareholders a say on pay via non-binding shareholder resolutions to approve executive compensation including severance pay.¹⁴⁰ Section 952 requires all listed companies to have independent compensation committees with the power to directly retain compensation advisers, including independent legal counsel.¹⁴¹ Section 953 directs the SEC to issue rules requiring more expansive disclosures to shareholders regarding executive compensation, “including information that shows the relationship between executive compensation actually paid and the financial performance of the issuer, taking into account any change in the value of the shares of stock and dividends of the issuer and any distributions.”¹⁴² Section 954 mandates the SEC to promulgate rules requiring national securities exchanges and associations to prohibit the listing of issuers that do not comply with their own compensation recovery policies.¹⁴³ In these policies, issuers must set forth requirements on recovery of executive compensation in the event there was a material noncompliance that led to an accounting restatement.¹⁴⁴ Further, under these policies, the issuers must be able to recover up to three years worth of executive compensation from the date of an accounting restatement.¹⁴⁵ Due to the perception that financial CEOs manipulated risk to enhance their compensation, Congress directed the Fed to issue rules creating independent risk management committees at large bank holding companies.¹⁴⁶ Each of these laudatory initiatives mitigates the control of the CEO and senior management over the public firm, yet even taken together, they will not alter the autonomy of CEOs over the proxy machinery and the board of directors.

Other sections do, in fact, address this core source of CEO power. Section 957 now requires rules of exchanges to prohibit broker votes without shareholder direction in all “significant matter[s],” including executive compensation and election of members of the board of directors.¹⁴⁷ This is a significant step toward real corporate democracy. Uninstructed broker votes distort election results, thereby benefiting managers because

¹⁴⁰ Dodd-Frank Act § 951.

¹⁴¹ Dodd-Frank Act § 952.

¹⁴² Dodd-Frank Act § 953.

¹⁴³ Dodd-Frank Act § 954(a).

¹⁴⁴ Dodd-Frank Act § 954(b).

¹⁴⁵ *Id.*

¹⁴⁶ Dodd-Frank Act § 165.

¹⁴⁷ Dodd-Frank Act § 957.

they “almost always are cast in favor of management’s proposals and candidates for board seats,” according to the Council of Institutional Investors.¹⁴⁸ This new rule ensures that biases in favor of management are removed in contested elections or proxy contests.

Section 971 could operate to create more contested elections, as it explicitly gives the SEC the power to permit shareholders to use companies’ proxy solicitation materials to nominate directors.¹⁴⁹ The struggle for shareholder access to management’s proxy for the purpose of director elections lingered for decades prior to Dodd-Frank.¹⁵⁰ The SEC’s exercise of this power could hardly warrant the term radical; the SEC rule allows shareholders with three percent ownership or more that have held such ownership for at least three years to nominate directors to stand for election through management’s proxy statement.¹⁵¹ Nevertheless, the SEC unexpectedly stayed the effectiveness of its own rule in response to lobbying efforts from business interests.¹⁵² Therefore, at least until 2012, this rule remains mired in litigation.¹⁵³ In the meantime, as I have argued elsewhere, the current managers hold too much sway over board members, who in turn are subject to insufficient accountability under law.¹⁵⁴

In all, these changes hold the potential for a real revolution in corporate governance. Yet, that revolutionary change will take years to take root. The power of the CEO in the public firm has receded in the past ten years with respect to key elements of the public firm such as the audit committee and the nominating committee.¹⁵⁵ The Dodd-Frank Act constitutes another step in the federal redesign of corporate governance to stem excessive

¹⁴⁸ *Broker Voting*, COUNCIL OF INSTITUTIONAL INVESTORS, <http://www.cii.org/resources/KeyGovernanceIssues/BrokerVoting> (last visited Mar. 22, 2011). See also Proposal to Eliminate Broker Discretionary Voting for the Election of Directors, Elizabeth M. Murphy, Securities and Exchange Commission (Mar. 19, 2009), available at [http://www.cii.org/UserFiles/file/resource%20center/correspondence/2009/CII%20Broker%20Voting%20Comment%20Letter%20\(File%20Number%20SR-NYSE-2006-92\).pdf](http://www.cii.org/UserFiles/file/resource%20center/correspondence/2009/CII%20Broker%20Voting%20Comment%20Letter%20(File%20Number%20SR-NYSE-2006-92).pdf) (advocating strongly for the elimination of uninstructed broker voting and detailing the partial results of this type of voting).

¹⁴⁹ Dodd-Frank Act § 971.

¹⁵⁰ Laurenz Vuchetich, *The Rise and Fall of the Proxy Access Idea: A Narrative*, 1 HARV. BUS. L. REV. ONLINE 18, 18 (2010), available at <http://www.hblr.org/wp-content/uploads/2010/11/Laurenz-Rise-and-Fall-of-Proxy-Access.pdf>.

¹⁵¹ Facilitating Shareholder Director Nominations, 75 Fed. Reg. 179 (Sept. 16, 2010) (to be codified at 17 C.F.R. pts. 200, 232, 240, 249).

¹⁵² Vuchetich, *supra* note 150, at 19.

¹⁵³ *Id.*

¹⁵⁴ Ramirez, *Lessons from the Subprime Debacle*, *supra* note 137, at 30–34.

¹⁵⁵ Steven A. Ramirez, *The End of Corporate Governance Law: Optimizing Regulatory Structures for a Race to the Top*, 24 YALE J. ON REG. 321, 343 (2007).

CEO autonomy. Nevertheless, it will take years for these changes to take root in the boardroom. Even after the litigation challenging shareholder proxy access ends, it will take many years for boards to truly exercise independence from the CEO in the face of long-standing institutional barriers to independent monitoring.¹⁵⁶ Simply put, deeper and more fundamental reform of corporate governance is needed to take effect more rapidly. The Act offers a package of reforms on this front that will likely prove to be too little too late in order to fundamentally change managerial incentives for at least the next decade.

E. Winning the Subprime War

Dodd-Frank effectively stems predatory lending and holds the potential to reduce the prospect of exploitative debt generally.

Under section 1403: “[N]o person shall pay to a mortgage originator . . . compensation that varies based on the terms of the loan (other than the amount of the principal).”¹⁵⁷ Section 1404 creates broad private remedies for the violation of this prohibition.¹⁵⁸ This should end the steering of prime borrowers into subprime loans.¹⁵⁹ Section 1411 requires mortgage lenders to make a good faith determination that a mortgage loan can be repaid.¹⁶⁰ Section 1413 permits the victim of a loan that does not comply to raise a violation of section 1411 as a defense even against subsequent assignees, and even after the expiration of any statute of limitations.¹⁶¹ The amount of the defense includes costs and attorney fees. This should end predatory loans.¹⁶² Section 917 requires a study regarding financial literacy.¹⁶³ Section 1021 requires the new Consumer Financial Protection Bureau to conduct financial education programs and to

¹⁵⁶ MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS 186–88 (2005).

¹⁵⁷ Dodd-Frank Act § 1403.

¹⁵⁸ Dodd-Frank Act § 1404.

¹⁵⁹ This created unnecessary defaults as more borrowers bore the burden of excessive fees and costs. Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy*, WALL ST. J., Dec. 3, 2007, at A1 available at http://online.wsj.com/article/SB119662974358911035.html?mod=hps_us_whats_news (reporting on study that found up to sixty-one percent of subprime borrowers could qualify for prime loans).

¹⁶⁰ Dodd-Frank Act § 1411.

¹⁶¹ Dodd-Frank Act § 1413. The fact that the defense can be raised against assignees means that it will now be difficult to securitize predatory loans.

¹⁶² Predatory loans sparked the crisis. Indeed, the nation’s largest mortgage lender, Countrywide Financial, also settled the largest predatory lending case. Ramirez, *Lessons from the Subprime Debacle*, *supra* note 137, at 24–25.

¹⁶³ Dodd-Frank Act § 917.

promulgate regulations prohibiting abusive and predatory loans.¹⁶⁴

In aggregate, these provisions reflect Congressional determination to stem abusive and predatory lending which lay at the root of the subprime debacle. Consumer lending will not likely form the center of a future credit crisis as a result of these provisions. Indeed, critics suggest the Dodd-Frank Act essentially abolishes all but “plain vanilla” mortgages.¹⁶⁵

CONCLUSION

Like the Maginot Line, the Dodd-Frank Act will prove useful in winning the last war—the subprime crisis—but it will not prevent future debt crises. The Dodd-Frank Act can only be termed an epic failure of policy. The Act includes some positive elements such as the corporate governance reforms and predatory finance prohibitions. Nevertheless, the importance of these reforms pales in comparison to the risks of another financial meltdown, as well as deeply impaired macroeconomic performance far into the future.

The Act allows massive government guarantees of the largest financial concerns to persist and even makes such backstops explicitly available under law.¹⁶⁶ This continues the massive subsidies implicit in the too-big-to-fail problem, and entails a proven means of assuring excessive risk in the financial system. Indeed, the Act formalizes the power of the FDIC and the Fed to bail out systemically critical financial institutions.¹⁶⁷ The orderly liquidation process offers further bailout mechanisms. Dodd-Frank therefore continues regulatory indulgence, even facilitation, of excessive risk in the financial sector.

The Act also allows essentially unbridled derivatives and securities trading for years into the future and beyond.¹⁶⁸ Large banks will in fact likely control any derivatives clearinghouse or

¹⁶⁴ Dodd-Frank Act § 1021. It appears that an early effort of the new Consumer Financial Protection Bureau will be to standardize loan disclosure statements to permit earlier comparison shopping by consumers. Carter Dougherty, *Big Lenders May Lose with Simpler Mortgage Disclosure*, BLOOMBERG BUS. WK. (Jan. 14, 2011, 2:44 PM) <http://www.businessweek.com/news/2011-01-14/big-lenders-may-lose-with-simpler-mortgage-disclosure.html>.

¹⁶⁵ Kristie D. Kully & Laurence E. Platt, *Hope You Like Plain Vanilla!: Mortgage Reform and Anti-Predatory Lending Act (Title XIV)*, FIN. SERVS. REFORM ALERT (K&L/Gates), July 8, 2010, available at <http://www.klgates.com/newsstand/Detail.aspx?publication=6528> (last visited Mar. 11, 2011).

¹⁶⁶ Dodd-Frank Act §§ 1101, 1105.

¹⁶⁷ Dodd-Frank Act § 203.

¹⁶⁸ See Orrick, *supra* note 115.

exchange which are likely themselves too-big-to-fail.¹⁶⁹ Many derivatives will not be cleared and banks will continue to trade these instruments. Hedge fund investments also continue after the Act.¹⁷⁰ So, the very risky securities and trading activities that culminated in the crisis of 2007–2009 may continue unabated despite the presence of the massive subsidized capital provided by the government.

The Act mitigates these negative elements through the possibility of corporate governance reform. Yet, there is no restoration of private liability and the government continues to act parsimoniously to say the least in pursuing criminal actions and civil enforcement through the SEC. The remaining provisions may well diminish CEO autonomy to saddle the firm with excessive risk as a means of pumping up current profits, but these provisions will not compensate for the basic profit incentives in favor of recklessness and fraud within the boardroom of the public firm. The best hope for changing this outcome, shareholder nominees to the board, could take years to hold sway.

The upshot of Dodd-Frank is that it continues and even formalizes massive subsidies and incentives for risk within the financial firm. Managers continue to have the means and the motive to crash the global financial system. Our debt laden economy will certainly provide the opportunity for financial manipulation of risk. The global economy and the U.S. economy remain mired in debt. With continuing financial losses for the banking sector, the credit mechanism seems broken and bankers continue to hoard massive cash. The basic structure of the global economy will continue to generate more debt in the developed world even as growth is impaired. Dodd-Frank seems oblivious to all of this.

Capitalism in America appears destined to continue to degenerate into a rigged game in favor of those controlling the most amounts of wealth. Dodd-Frank may well entrench this pernicious economic reality by allowing it to fester. By any measure, it preserves the power and economic prospects of the very financial elites whose misconduct caused the crisis in the first instance. In my view, the estimated \$591 million invested in lobbying (since January of 2009)¹⁷¹ and the \$112 million

¹⁶⁹ See Morgenson, *supra* note 124.

¹⁷⁰ See *Financial Regulation*, *supra* note 127 and accompanying text.

¹⁷¹ Jennifer Liberto, *Lobbyists Swarm as Wall Street Bill Talks Start*, CNNMONEY.COM (June 10, 2010, 11:22 PM), http://money.cnn.com/2010/06/10/news/economy/Wall_Street_Reform/index.htm.

invested in campaign contributions to the members of the conference committee (since 1989)¹⁷² yielded precisely the returns expected and demanded by our financial elite: the ability to play in the high-risk securities and derivatives markets with continued government backing without any prospect of being broken up.

Dodd-Frank will prevent a crisis in subprime lending from recurring. But, a future credit crisis, one that may well be brewing presently, could deliver a shock to the financial system similar to, if not worse than, that which triggered the crisis of late 2008. Dodd-Frank will be useless against that crisis because it essentially preserves the power of the financial elite that caused the last crisis and preserves the incentives that gave rise to that crisis. Dodd-Frank stands as a monument to a deeply misguided, if not actually corrupt, political and economic elite.

¹⁷² *Id.*