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Title XI of Dodd-Frank and its Effort to End “Too Big to Fail”

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Abstract

This article reviews Title XI of Dodd-Frank and its stated goal of ending “too big to fail.” The article examines the meaning of “too big to fail,” explains Title XI and some of its modifications to prior law, and analyzes whether Title XI achieves its stated goal. The article concludes that because federal money may be used to rescue financial institutions, “too big to fail” and “bailouts” will continue beyond this legislation.

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Herbert Shelton*

1. Introduction

On September 15, 2008, Lehman Brothers Holdings filed for Chapter 11 bankruptcy.1 On that same day, the Dow Jones Industrial Average fell from 11,421.99 to 10,917.51, a fall of more than 500 points, or 4.4%.2 By the end of the year, the Dow Jones had fallen to 8,776.39, or more than 23% off its September 12, 2008 close.3 Although this fall clearly demonstrates the uncertainty on Wall Street and in the broader economy, unemployment numbers demonstrate the hardship felt by the wider American population. The unemployment rate moved up from 4.6% in 2007 to 9.3% in 2009, adding 7.2 million people to the unemployment roster.4 The failure of the $613 billion Lehman, the dramatic losses in the stock market, and the large increase in unemployment all reflected a broader problem: there were deep and systemic problems in the American economy.

Many players in the financial services sector had already recognized and hedged against the systemic problems. However, this recognition did not prevent the problem from spreading through the financial services sector, impacting companies both large and small. In the end, many companies needed large amounts of assistance from the Federal Reserve (“Reserve”) and the Federal Deposit Insurance Corporation (“FDIC”). American International Group (“AIG”) stands as the most visible of the financial firms to receive assistance. On September 16, 2008, the very day after Lehman’s collapse, AIG also stood on the verge of bankruptcy. But AIG presented a different problem than Lehman. Rather than being the first high-profile failed financial firm to go, it would have been the second. This may have signaled many investors, the global economy, and the American consumers that the problems were just getting started. In fact, many feared a domino of failures.5 Over the next two years, the Reserve stepped in and assisted many financial firms under emergency lending

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3 Id.
programs. The main programs were the Primary Dealer Credit Facility, the Term Auction Facility, the Term Securities Lending Facility, the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility, and the Term Asset-Backed Securities Loan Facility. The FDIC also assisted with a program called the Temporary Liquidity Guarantee Program (“TLGP”). Some of the many recipients of funds under these emergency lending programs include: Lehman, Citigroup, Morgan Stanley, JP Morgan, UBS, Wells Fargo Bank, Bank of America, and Wachovia Bank.

Many people considered these $3.3 trillion in loans to be “bailouts” of the same financial firms that caused the problems in the first place. These bailouts angered many who considered the bailouts to be a forgiveness of corporate mismanagement and a method of privatizing gains and socializing losses. The problem of bailouts, along with many other problems, lead Representative Barney Frank and Senator Christopher Dodd to introduce the Dodd-Frank Wall Street Reform and Consumer Protect Act (“Dodd-Frank”) on December 2, 2009. Dodd-Frank was eventually signed into law by President Barack Obama on July 21, 2010 and it comes with many provisions designed to prevent future financial difficulties of this sort, to enhance consumer protection, and finally, the topic of this article, to prevent bailouts. The term “bailout,” based on all the material discussing the topic, appears to mean: the use of taxpayer money, whether or not reimbursement is required, to assist a private company or companies to remain ongoing enterprises.

Dodd-Frank immediately met with both fan-fare and criticism. One commentator, while Dodd-Frank was still in reconciliation, said “Welcome to the next global credit cycle – with too big to fail banks at center stage.” Timothy Geitner, the Treasury Secretary, said “The bill that has emerged from conference is strong. It represents the most sweeping set of financial reforms since those that followed the Great Depression.” However, as will be shown, the bill probably cannot be reduced to one line quotes or bullet point summaries.

2. Title XI
a. The Various Meanings of “Too Big to Fail”

The internet is alive with critiques of Dodd-Frank. However, there appear to be multiple meanings of “too big to fail.” FDIC chairman Sheila Bair believes that “too big to fail” means that resolution of some non-bank financial institutions through bankruptcy would be too disruptive to the financial system as a whole and that, without Dodd-Frank, the only alternative would be a

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7 Id.
9 Grocer, supra note 6 (Lehman received federal funds three times within days after their collapse).
10 Id.
11 See e.g., Webpage for Bailout Nation, http://bailoutnation.net/
13 Id.
bailout. 17 This legislation creates a third option, Title II, which, Bair argues, is a major reason why Dodd-Frank will end “too big to fail.” 18 Under Title II, a failing non-bank financial institution can be resolved by the FDIC, once appointed as receiver, in a manner similar to the method historically used for banks. 19 This should mean that failed non-bank financial institutions can be resolved quickly without causing or permitting a run on the institution’s assets (many of these firms’ assets, the investments themselves, are not subject to the automatic stay provision of the bankruptcy code 20) and creating market-wide liquidity concerns. This understanding of “too big to fail” could be characterized as a concern not so much for the company, its employees, or its creditors as much as a concern for the economy and market as a whole and the effect on them of a large non-bank financial institution going through bankruptcy.

A second understanding of “too big to fail” seems to be based more on the interconnectedness of financial institutions. This understanding shifts the focus from Chairman Bair’s concern of a disorderly and uneven distribution of an insolvent institution’s assets, which might lead to widespread market panic, to an arguably more salient concern: a failed firm, no matter how cleanly and fairly it is resolved, will not be able to pay all of its creditors. This concern, succinctly stated, is that “Banks appear to be discrete businesses, but there are so many interbank transactions and obligations that a single default can easily start a chain reaction. The real problem is less ‘Too Big to Fail’ than it is ‘Failures too Damaging to Permit’.” 21 This reveals the second understanding of “too big to fail.” Many are not as concerned with some creditors receiving full distribution and others receiving nothing, as they are with the cascade of frustrated expectations, decreased returns on investment, and increasing write-offs. This could lead to a decrease in value in a much broader category of entities and effectively cause global value to disappear. Such a concern is not directly addressed by Title II, which creates bankruptcy-like proceedings for these institutions. This leads some to argue that it is unrealistic to believe Congress will not step in and prop up the institution and thereby help the institution’s creditors as well as many collateral sectors of the economy. However, Dodd-Frank does provide at least some effort to try and address this problem. Title I creates the Financial Stability Oversight Council (“FSOC”). The FSOC has the power to submit non-bank financial companies to the authority of the Board of Governors of the Federal Reserve System (“Board of Governors”). 22 Additionally, the Board of Governors shall require companies under its authority to submit an orderly resolution plan. 23 Also, the FSOC can recommend to the

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18 Id.
20 A large part of the concern with permitting non-bank financial institutions to go through bankruptcy is the fact that a large bulk of the “assets” of the institution, the investments, are exempt from bankruptcy law. As such, there could be a “run” on the assets leaving some investors with no recovery. The orderly distribution of assets in a bankruptcy might, therefore, be limited to computers and furniture. ELIZABETH WARREN & JAY WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 885 (6th ed. Aspen Publishers 2009); see also, e.g., 11 U.S.C. §§ 362(b)(6)-(7), (17). These numbers can certainly be large and could easily reach into the hundreds of billions of dollars. For example, the Lehman Brothers’ September, 2008 bankruptcy included $613 billion (and is still ongoing, generating $1 billion in legal fees). Mamundi, supra note 1; see also Liz Moyer, Lehman Bankruptcy Fees Top $1 Billion, THE WALL STREET JOURNAL, Nov. 22, 2010, available at http://online.wsj.com/article/SB100014240527487042439044675763063583513816.html
23 Id. § 165(b)(1)(A)(iv), 124 Stat. 1376, 1424.
Board of Governors prudential standards regarding, inter alia, liquidity, capital requirements, and
resolution plans for those companies under the Board of Governor’s authority. These prudential
standards would be recommended with the primary purpose of reducing the impact of a failure of a
heavily interconnected firm.

The third understanding of “too big to fail” is that of “bailouts.” This understanding posits
that some companies, owing to their size, systemic risk, or strategic value, will be bailed out in the
face of the probable collapse of, or substantial damage to, the company. As already defined, a
“bailout” is the use of taxpayer money, whether or not reimbursement is required, to assist a private
company or companies to remain ongoing enterprises. Title XI of Dodd-Frank addresses this
conception of “too big to fail” with a multitude of provisions targeted at ending bailouts for failing
companies. It also attempts to prevent the rescue of any particular company. However, as will also
be discussed, some argue that “the bill institutionalizes the harmful bailout process by giving the
government more discretionary power to intervene.”

Therefore, if someone states that Dodd-Frank does (or, in the alternative, does not) end
“too big to fail,” they could be stating that it ends the problem of a largely ineffective bankruptcy
process, that it prevents companies from posing a systemic-risk, or that it ends bailouts. This article
is primarily focused on the last of these three conceptions of “too big to fail.” As such, the majority
of the discussion will be limited to Title XI and its attempt to end “bailouts.” Any discussion of the
other titles is only cursory and will be merely incidental to the main topic of Title XI.

b. The Primary Components of Title XI

Title XI comes with nine sections and is titled as “Federal Reserve System Provisions.”
Briefly, these nine sections modify the Reserve’s lending authority, enhance the FDIC’s capacity to
provide emergency financial stabilization, provide for audits of the Reserve by the Government
Accountability Office (“GAO”), and enhance public participation and access to information. These
sections are intended to combine to form a mechanism to prevent bailouts of failing companies
while at the same time to protect the national economy and the pocketbooks of taxpayers.

i. Amendments to the Reserve’s Emergency Lending Authority

Section 1101 limits the Reserve’s power to lend on an emergency basis. Such lending is only
available in “unusual and exigent circumstances” and requires an affirmative vote of at least five
members of the Board of Governors. Under the new legislation, the Reserve can only lend via an
emergency lending program or a credit facility when: 1) such program has a broad-based eligibility;
2) such lending is “for the purpose of providing liquidity to the financial system and not to aid a
failing financial company;” and 3) when “the security for emergency loans is sufficient to protect
taxpayers from losses.” Additionally, the Reserve can no longer lend to insolvent institutions.

24 Id. § 112(a)(2)(I), 124 Stat. 1376, 1395.
26 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1101(a), 124 Stat. 1376, 2113-
27 Id.
28 Id.
borrower is deemed insolvent if the borrower is in bankruptcy, is in resolution under Title II, or if the borrower is in any Federal or State insolvency proceedings.  

Regarding the first requirement, that the program be one of “broad-based eligibility,” section 1101 changes the original language of the statute, which permitted a loan to “any individual, partnership, or corporation” and replaces it with any “participant in any program or facility with broad-based eligibility.” Also, Dodd-Frank clearly states that a program designed to remove assets from the balance sheet of a specific company, or that is designed to help a specific company avoid bankruptcy, resolution under Title II, or any other solvency proceeding is deemed to not be a program with broad-based eligibility. This provision works in tandem with the second requirement. The idea is clearly to prevent a targeted rescue of a single company.

Also, it is important to note that any reserve bank that realizes a net loss on a loan made under the emergency lending provisions will be considered a priority lender on par with the Secretary of the Treasury. This priority now carries over to bankruptcy in the event the loan recipient eventually fails. Therefore, even if collateral turns out to have been insufficient, the Treasury and the Reserve will be among the first creditors to receive any bankruptcy assets. The only odd part of this section is that the new law does not affect the vast majority of the bankruptcy code and leaves, as explained earlier, most financial firm assets out of the bankruptcy estate. This may provide a large incentive to the federal government to ensure that the non-bank financial firms avoid Chapter 7 bankruptcy and remain ongoing concerns through Chapter 11. It also provides an incentive to the federal government to ensure that, in the event of complete failure, these firms are wound down through Title II’s resolution authority.

ii. Emergency Financial Stabilization and Liquidity Event Determinations

Sections 1104 and 1105 combine to form the second major portion of the Title XI. These sections state that if the Reserve determines that a “liquidity event” exists that warrants the use of the remedies provided for in section 1105, then the FDIC will create a widely available program to guarantee the “obligations” of solvent banks or bank holding companies (“BHCs”). This guarantee cannot include the provision of equity in any form.

A liquidity event, as defined in Dodd-Frank, can mean either an “unusual and significant reduction in the ability of financial market participants to obtain unsecured credit” or an “exceptional and broad reduction in the general ability of financial market participants- (i) to sell financial assets without an unusual and significant discount; or (ii) to borrow using financial assets as collateral without an unusual and significant increase in margin . . . .”

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29 Id.
32 Id.
33 Id.
34 Id. § 1101(b), 124 Stat. 1376, 2115.
35 Id. § 1105(a), 124 Stat. 1376, 2121.
36 Id.
37 Id. § 1105(g)(3), 124 Stat. 1376, 2124.
In order for the liquidity event to warrant the use of the remedies provided for in section 1105, the Reserve must also determine that failure to take action would have serious repercussions on the national economy and that section 1105’s remedies are needed to avoid or lessen such repercussions.\(^{38}\)

If it is ultimately determined that section 1105’s remedies are indeed required, as already stated, the FDIC will create a widely available program to guarantee the obligations of solvent banks and BHCs. The Treasury Secretary must determine the maximum amount such obligations the FDIC may guarantee and then Congressional approval of that amount is required before the program may continue.\(^{39}\) The FDIC is financially protected by subsection (e), which requires the FDIC to assess member banks the fees necessary to cover projected losses.\(^{40}\)

These sections reduce the FDIC’s power from where it was under prior law. Before Dodd-Frank, the FDIC was permitted to take action on a determination that the FDIC’s resolution of a corporation under 12 U.S.C. 1823(d)(4) would have “serious adverse effects on economic conditions . . . .”\(^{41}\) Now, the FDIC must determine that a liquidity event exists. The original statute was used in 2008 to establish the TLGP.\(^{42}\) To understand the potential scope of “obligations” to be guaranteed, it is worth noting that the TLGP provided coverage for the recently issued senior unsecured debt of any member bank and certain BHCs.\(^{43}\) It also provided complete coverage on non-interest bearing deposit transaction accounts.\(^{44}\) This indicates that the term “obligations” may end up being very broad indeed and Dodd-Frank does nothing to limit this scope. However, the deposit insurance fund cannot be used to provide this protection.\(^{45}\)

### iii. GAO Audits of the Reserve

Title XI also provides the GAO with an enhanced capacity to audit the Reserve. The GAO can audit the Reserve, reserve bank, a credit facility (i.e. emergency lending), or a “covered transaction” (i.e. open market transaction) in order to assess, inter alia, the credit facility’s or covered transaction’s accounting, reporting, and collateral.\(^{46}\) Prior to this legislation, the GAO was not permitted to audit covered transactions.\(^{47}\) Also, certain audits must now be submitted to Congress\(^{48}\) whereas under prior law, the audits simply could not be withheld from Congress.\(^{49}\) Finally, the GAO must conduct an audit of all loans provided under a multitude of Reserve

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\(^{38}\) Id. § 1104(a), 124 Stat. 1376, 2120.

\(^{39}\) Id. § 1105(c), 124 Stat. 1376, 2121-22.

\(^{40}\) Id. § 1105(e), 124 Stat. 1376, 2124.


\(^{42}\) Title XI – Federal Reserve System Provisions, supra note 8.


\(^{44}\) Id.


emergency lending programs between December 1, 2007 and Dodd-Frank’s enactment.\textsuperscript{50} The Reserve was required to disclose the results of the audits on its website no later than December 1, 2010.\textsuperscript{51}

Additionally, the GAO must audit the Reserve governance system and determine if the public is adequately represented and if there are any conflicts of interests when directors of reserve banks are elected by member banks.\textsuperscript{52} The GAO must also make suggestions on how to increase public representation, decrease conflicts of interest, and increase the availability of information.\textsuperscript{53}

\textbf{iv. Public Access to Information}

Dodd-Frank also increases public access to information regarding the performance and activities of the Reserve. The Reserve must post relevant GAO reports, reports to Congress related to the use of the emergency lending authority, and other such information that the Reserve believes is necessary to help the public understand the Reserve’s and reserve banks’ accounting, financial reporting, and internal controls.\textsuperscript{54} The Reserve must disclose the identities of those who received funds from emergency lending programs, discount window programs, and open market transactions and must also disclose the material provisions of such loans.\textsuperscript{55} The disclosure related to borrower identities and the material provisions of such lending must occur one year after the termination of an emergency credit facility or, in the case of a covered transaction, disclosure must occur two years after the transaction was conducted.\textsuperscript{56}

\textbf{v. Reserve Bank Governance}

Finally, the Reserve’s method of composing its governing persons is slightly altered. Each reserve bank President is to be appointed by the Class B and Class C directors of the bank.\textsuperscript{57} Class A directors are representatives of member banks.\textsuperscript{58} Class B and C directors are representatives of the public.\textsuperscript{59} Prior to Dodd-Frank, each reserve bank President was appointed by the board of directors of that reserve bank.\textsuperscript{60} Therefore, this legislation now provides the public with the power to select reserve bank Presidents. This is one method Dodd-Frank uses to increase public participation in the Reserve system process.

Dodd-Frank also creates the position of Vice Chairman for Supervision who will be responsible for recommending policies for supervision and regulation of BHCs and other firms

\textsuperscript{51} Id. § 1109(c), 124 Stat. 1376, 2129.
\textsuperscript{52} Id. § 1109(b), 124 Stat. 1376, 2128-29.
\textsuperscript{53} Id.
\textsuperscript{54} Id. § 1103(a), 124 Stat. 1376, 2118, amending 12 U.S.C. § 225(b) (2006).
\textsuperscript{56} Id.
\textsuperscript{59} Id.
supervised by the Reserve.\textsuperscript{61} The Vice Chairman for Supervision is to be appointed by the President, with the advice and consent of the Senate, and he or she will serve in his or her post for four years.\textsuperscript{62}

3. Title XI’s Policy Goals and its Likely Impact

a. The Stated Policy Goals of Title XI

President Barack Obama explained the anti-bailout provisions by stating that Dodd-Frank would ensure that “the American people will never again be asked to foot the bill for Wall Street’s mistakes.”\textsuperscript{63} He went on further to state that taxes will no longer be used for bailouts and that the new rules ensure that no firm will be protected because of its size.\textsuperscript{64} President Obama’s statement succinctly captures the general refrain. A November 12, 2010 press release reinforces these ideas: “. . . if a big financial firm is failing, it will have only one fate: liquidation. There will be no taxpayer funded bailout.”\textsuperscript{65}

b. Does Dodd-Frank End Too Big to Fail?

Despite such clear Presidential language, the question remains, “does Dodd-Frank end too big to fail?” Several arguments line up on either side of the question. Some argue that since Dodd-Frank provides the Reserve with the \textit{ability} to lend to firms and the FDIC with the \textit{ability} to guarantee obligations, bailouts have not ended. A second argument is that as taxpayer funds might still be put at risk, one of the primary concerns with bailouts has not been addressed. A third argument is that Dodd-Frank still permits the use of taxpayer money to assist private firms. Finally, some might argue that even if all the foregoing concerns are true, Dodd-Frank prohibits propping up individual companies and, therefore, ends too big to fail.

Again, when companies, owing to their size, systemic risk, or strategic value, are bailed out in the face of otherwise probable collapse or severe damage, they are considered “too big to fail.” As already defined, a “bailout” is the use of taxpayer money, whether or not reimbursement is required, to assist a private company or companies to remain ongoing enterprises.\textsuperscript{66} Under this framework, the question of whether Dodd-Frank ends “too big to fail” becomes a bit simpler. However, simplicity does not mean that there is only one answer.

Some argue that the Reserve’s \textit{ability} to lend to firms during difficult economic times amounts to a legislative permission slip to bailout companies. The natural rebuttal to this argument is that section 1101 does somewhat lessen the Reserve’s capacity to lend. As indicated earlier, it removes the language permitting the Reserve to lend to any “individual, partnership, or corporation” and replaces it with any “participant in any program or facility with broad-based eligibility.”\textsuperscript{67} Such


\textsuperscript{62} Id.


\textsuperscript{64} Id.


\textsuperscript{66} CNN Student News, \textit{supra} note 14 and related text.

borrowers must also be solvent and cannot receive equity in any form. However, these limitations do not address the concerns of many commentators as the Reserve still has emergency lending authority and, therefore, such lending could still be characterized as a bailout. The answer to whether the ability to lend to firms through a widely available program is a bailout must rest with the reader. It either is or it isn’t and the answer depends on one’s definition. As defined in this article though, the ability to lend to firms in a widely available program, even if no single firm can be targeted, is still a bailout.

A second argument might be that, although Dodd-Frank slightly decreases the Reserve’s ability to lend and the FDIC’s ability to guarantee obligations, the legislation still permits the Reserve system to risk taxpayer funds. This argument really drives at another problem that many have with bailouts. Helping out failed companies who operated under failed policies is bad enough, but this legislation puts taxpayers at risk for those failed policies. The legislative response is that Dodd-Frank takes measures to decrease the risk that taxpayers will be harmed and, therefore, bailouts, to the extent that they risk taxpayer funds, have been eliminated. This argument is based on the requirements in the legislation that, prior to any emergency Reserve loan, the Reserve must ensure that collateral is “sufficient to protect taxpayers” and that the FDIC must assess fees to member banks in order to cover the anticipated losses from its guarantee of their obligations. But this misses the main points. First, there are other concerns at work besides solely the risk of taxpayer funds. Some are concerned with the anti-competitive effects of bailouts, the market distortions they generate, the perverse incentives they permit to exist at the executive level of firms, and in many ways they just seem unfair to those persons in the lower and middle income brackets. Second, if the government chooses to assist these firms, there is virtually no way to eliminate all risk. The FDIC fees are supposedly only to mitigate anticipated losses, and although the Reserve requires collateral to be sufficient, the value of its priority position in bankruptcy is predicated on there being enough assets left over for it to be compensated. One way or the other, even if the risk of loss is highly remote, this arrangement seems to be somewhat removed from what President Obama proclaimed when he signed the legislation, “There will be no more tax-funded bailouts—period.”

Further, whether one focuses on the ability to lend or the risking of taxpayer money, Dodd-Frank still, undoubtedly, permits the use of taxpayer money to assist struggling, or soon to be struggling, firms. This concern focuses not so much on the Reserve’s capacity to rescue an industry or to what extent government funds are being risked. Rather, it focuses on the concept as a whole, without parsing out its individual elements.

Dodd-Frank does prohibit the provision of equity (except in the receivership context). Dodd-Frank clearly states that the FDIC, pursuant to its section 1105 powers, can guarantee the obligations of banks and BHCs but that such guarantee cannot include the provision of equity in any form. Additionally, limitations have been placed on the Reserve’s power to lend in an emergency.

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68 Id.
69 See e.g., Taylor, supra note 25 and related text.
71 Id. § 1105(e), 124 Stat. 1376, 2124.
Such loans, in addition to the other limitations, cannot be structured to remove assets from the borrower’s balance sheet. These limitations on the Reserve should address any concern that an emergency loan may be only a loan in name only. A concern could be that without this provision, the Reserve would lend to an organization on the agreement that the loan payments are to be derived from assets that both the borrower and the Reserve know are not going to be able to meet the obligation. This, if both parties knew the ultimate outcome, would appear to be a transaction designed to remove the failing assets from a firm’s books. Effectively, it would be a loan in name, but it would really be the Reserve buying the poor investments.

But the truth is that the Reserve and the FDIC can both continue to use taxpayer money to assist financial institutions through difficult economic times. The FDIC ability to guarantee the obligations of banks and BHCs clearly target the debtor bank or BHC. This is obvious from the wording of the statute itself. The bank or BHC must be solvent, the guarantee cannot be the provision of equity (which indicates it will be a loan to the debtor bank or BHC), and the implementing regulations may require collateral. But even if the statutes are not designed to protect the debtor, and rather they are designed to protect the creditor, they still include, at a minimum, the *pledging* of taxpayer dollars. An argument that the mere *pledging* of taxpayer dollars is not the *use* of taxpayer dollars is clearly unsupportable. If the pledge is a truthful one, it could in fact lead to the *use* of taxpayer dollars to support the nationwide economy. This may not be a bailout of a particular company, but it does authorize bailouts for banks, BHCs, and their creditors. The limiting provision, that the firms must be solvent to receive funds, does not really provide any limitation at all. If the firms were solvent and there was no concern whatsoever regarding their future viability, there would be no reason to guarantee their obligations. However, the statute clearly contemplates that the financial viability of the relevant stakeholders may decrease without the guarantee. As such, there is no reason to believe that the guarantee will only serve to help companies that would be fine even without it. That limiting provision may only serve to prevent the government from rescuing surprise failures such as Lehman.

Perhaps the strongest argument that the legislation has ended bailouts is that the legislation limits the capacity of the Reserve and the FDIC to assist particular companies. The emergency programs they are now authorized to implement are limited to “widely available programs” or programs with “broad-based eligibility.” Theoretically, this means that if one company is struggling through its own imprudent actions and the remainder of the market is succeeding, that company will not be rescued pursuant to an emergency lending program. However, the initial and obvious strengths of this argument do no stand up under scrutiny. Although these portions of Dodd-Frank do limit the government’s capacity to bailout individual firms, as pointed out by John Taylor, in an inter-connected financial world it is likely that if one firm is struggling, the rest probably are too. This means that if another incident occurs similar to the AIG incident, the Reserve might determine that, considering their exposure, inter-connectedness, and systemic-risk, an “unusual and exigent” circumstance exists that calls for a program of broad-based eligibility. Once this hypothetical AIG-like company stops paying its obligations, under this new legislation, the AIG-like company may not itself be saved, but its creditors will probably be, even if it is by borrowing from the Reserve. The

74 Id. § 1101(a), 124 Stat. 1376, 2113-15.
75 Id. § 1101(a)-(b), 124 Stat. 1376, 2113-15.
76 Id. § 1105(a), 124 Stat. 1376, 2121.
77 Id. § 1101(a), 124 Stat. 1376, 2113-15.
78 See Taylor, supra note 25.
thought process would be that, although these firms are currently solvent, allowing these firms to write-off the monies they were anticipating receiving from the AIG-like company would be too harmful to the economy. The good news here is that the taxpayers should be protected and the main culprit, the new AIG, will not survive. To this extent, it appears that the new legislation will increase accountability and will encourage firms to investigate their investments more thoroughly. But the truth remains that if “Wall Street” runs into trouble because of widely-engaged-in practices, at most only a handful of companies will suffer and the Reserve will, perhaps wisely, step in and perform its function as the lender of last resort.