113TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPT. 113–229, Part 1

SWAPS REGULATORY IMPROVEMENT ACT

SEPTEMBER 25, 2013.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HENSARLING, from the Committee on Financial Services, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 992]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services, to whom was referred the bill (H.R. 992) to amend provisions in section 716 of the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to Federal assistance for swaps entities, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE AND SUMMARY

H.R. 992, the Swaps Regulatory Improvement Act, amends Section 716 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111–203) (the "Dodd-Frank Act") to allow covered depository institutions to trade swaps (other than certain structured finance swaps) with their affiliates. Under the legislation, the only swaps that covered depository institutions must spin out to separately capitalized entities are structured finance swaps unless they are undertaken for hedging or risk management purposes or expressly permitted by prudential regulators to take place in a covered depository institution. The bill also ensures that uninsured U.S. branches and agencies of foreign banks are treated the same as insured depository institutions by defining both groups as "covered depository institutions.

29–006

These amendments to the Dodd-Frank Act mitigate the potential negative impacts of Section 716. If Section 716 is left unchanged, it could weaken the U.S. financial system and place U.S. financial institutions at a competitive disadvantage to their foreign counterparts.

BACKGROUND AND NEED FOR LEGISLATION

Numerous participants in a variety of markets and industries use derivatives on a daily basis to hedge risk. Most types of derivatives were not the cause of the financial crisis. Swaps based on currencies, interest rates, agricultural products and equities performed as expected. Despite the irrelevance of most swaps to the financial crisis, Section 716 of the Dodd-Frank Act required financial institutions to "push-out" or "spin-off" all of their swaps, with exemptions for interest rate swaps and swaps that reference currencies, bullion metals, loans or bank-eligible debt securities, into a separate company. This requirement is too broad and over-inclusive. Rep. Randy Hultgren's bill, H.R. 992, changes the law so that the spin-off requirement applies only to the most problematic and potentially risky swaps, such as those whose value derived from the poorly rated and underwritten mortgages that were at the heart of the financial crisis. This legislation ensures that the U.S. financial system is not weakened and that U.S. financial institutions are not placed at a competitive disadvantage against their foreign counterparts.

Financial reform should not increase customer costs. Manufacturers, farmers, and industrial companies—all of whom use swaps daily in benign and economically beneficial ways—did not cause the financial crisis. Yet the Dodd-Frank Act sweeps in thousands of companies that had nothing to do with the financial crisis and subjects them to increased costs and additional layers of regulation. As currently constructed, section 716 of the Dodd-Frank Act would limit the types of risk-reducing products a bank could provide to a customer to protect its business from market disruptions. If Congress does nothing to amend section 716, customers would lose and the banks would win. Bank customers would have to create expensive and new business and legal relationships with a new banking entity to conduct most of their risk-reducing activities, thereby diverting funds that could otherwise be used to create jobs, expand their businesses and help the economy.

Section 716 of Dodd-Frank has prompted objections from Federal Reserve Board Chairman Ben Bernanke, former FDIC Chairman Sheila Bair, and economists such as Mark Zandi who said "section 716 would create significant complications and counter the efforts to resolve [large financial] firms in an orderly manner."

Left unamended, section 716 could result in at least two negative consequences for the U.S. financial system and U.S. financial institutions. First, section 716 may make the U.S. financial system less stable by forcing swap trading into the unregulated shadow banking system. As Chairman Bernanke has pointed out, section 716 "would make the U.S. financial system less resilient and more susceptible to systemic risk" because "forcing [commercial and hedging activities] out of insured depository institutions would weaken both financial stability and strong prudential regulation." Second, section 716 may place U.S. financial institutions at a significant competitive disadvantage against their foreign counterparts because foreign jurisdictions do not plan to adopt a provision similar to section 716 in their ongoing efforts to reform the global derivatives marketplace.

In light of the potential negative consequences, former Federal Reserve Board Chairman Paul Volcker and Chairman Bair both expressed reservations about section 716 during the Dodd-Frank House-Senate Conference Committee's deliberations. Mr. Volcker stated that the "provision of derivatives by commercial banks to their customers in the usual course of a banking relationship should not be prohibited." Chairman Bair stated that" by concentrating the activity in an affiliate of the insured bank, we could end up with less and lower quality capital, less information and oversight for the FDIC, and potentially less support for the insured bank in a time of crisis," and that "one unintended outcome of this provision would be weakened, not strengthened, protection of the insured bank and the Deposit Insurance Fund."

HEARINGS

The Committee on Financial Services' Subcommittee on Capital Markets and Government Sponsored Enterprises held a hearing on H.R. 992 on April 11, 2013.

COMMITTEE CONSIDERATION

The Committee on Financial Services met in open session on May 7, 2013, and ordered H.R. 992 to be reported favorably to the House by a recorded vote of 53 yeas to 6 nays (Record vote no. FC–14), a quorum being present.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto.

1. A motion by Chairman Hensarling to report the bill (H.R. 992) to the House with a favorable recommendation was agreed to by a record vote of 53 yeas and 6 nays (Record vote no. FC–14).

RECORD VOTE NO. FC–14

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Hensarling	X	....	....	Ms. Waters	....	X	....
Mr. Gary G. Miller (CA)	X	....	....	Mrs. Maloney (NY)	X	....	....
Mr. Bachus	X	....	....	Ms. Velázquez	....	X	....
Mr. King (NY)	X	....	....	Mr. Watt	X	....	....
Mr. Royce	X	....	....	Mr. Sherman	X	....	....
Mr. Lucas	X	....	....	Mr. Meeks	X	....	....
Mrs. Capito	X	....	....	Mr. Capuano	....	X	....
Mr. Garrett	X	....	....	Mr. Hinojosa	X	....	....
Mr. Neugebauer	X	....	....	Mr. Clay	X	....	....
Mr. McHenry	X	....	....	Mrs. McCarthy (NY)	X	....	....
Mr. Campbell	X	....	....	Mr. Lynch	....	X	....
Mrs. Bachmann	X	....	....	Mr. David Scott (GA)	X	....	....
Mr. McCarthy (CA)	X	....	....	Mr. Al Green (TX)	....	X	....
Mr. Pearce	....	....	....	Mr. Cleaver	X	....	....
Mr. Posey	X	....	....	Ms. Moore	X	....	....
Mr. Fitzpatrick	X	....	....	Mr. Ellison	....	X	....
Mr. Westmoreland	....	....	....	Mr. Perlmutter	X	....	....
Mr. Luetkemeyer	X	....	....	Mr. Himes	X	....	....

RECORD VOTE NO. FC–14—Continued

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Huizenga (MI)	X	....	....	Mr. Peters (MI)	X	....	....
Mr. Duffy	X	....	....	Mr. Carney	X	....	....
Mr. Hurt	X	....	....	Ms. Sewell (AL)	X	....	....
Mr. Grimm	X	....	....	Mr. Foster	X	....	....
Mr. Stivers	X	....	....	Mr. Kildee	X	....	....
Mr. Fincher	X	....	....	Mr. Murphy (FL)	X	....	....
Mr. Stutzman	X	....	....	Mr. Delaney	X	....	....
Mr. Mulvaney	X	....	....	Ms. Sinema	X	....	....
Mr. Hultgren	X	....	....	Mrs. Beatty	X	....	....
Mr. Ross	X	....	....	Mr. Heck (WA)	X	....	....
Mr. Pittenger	X	....	....				
Mrs. Wagner	X	....	....				
Mr. Barr	X	....	....				
Mr. Cotton	X	....	....				
Mr. Rothfus	X	....	....				

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee has held hearings and made findings that are reflected in this report.

PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee states that H.R. 992 will change the types of swaps that financial institutions are required to spin off to separately capitalized entities.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of new budget authority, entitlement authority, or tax expenditures or revenues contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATES

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 20, 2013.

Hon. JEB HENSARLING,
Chairman, Committee on Financial Services,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 992, the Swaps Regulatory Improvement Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Daniel Hoople and Barbara Edwards.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 992—Swaps Regulatory Improvement Act

H.R. 992 would allow certain financial firms to retain financial portfolios containing swaps while remaining eligible for assistance from the Federal Reserve and Federal Deposit Insurance Corporation (FDIC). A swap is a contract between two parties to exchange payments based on the price of an underlying asset or change in interest, exchange, or other reference rate. Swaps can be used to hedge or mitigate certain risks associated with a firm's traditional activities, such as interest rate risk, or to speculate based on expected changes in prices and rates.

Enacting this legislation could affect direct spending and revenues; therefore, pay-as-you-go procedures apply. However, CBO estimates that any impact on the net cash flows of the Federal Reserve or the FDIC over the next 10 years would not be significant.

Under current law, federal assistance is not available to any swaps dealer or major swaps participant registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission. Federal assistance includes access to any Federal Reserve credit facility and discount window (with some exceptions) and FDIC deposit insurance and guarantees. This prohibition does not apply to a major swaps participant that is an insured depository institution (DI) or an IDI acting as a swaps dealer for hedging purposes or for swaps involving bank-permissible securities. (Such swaps include those that reference interest rates, currencies, government securities, and precious metals. Examples of non-permissible swaps include equity swaps, commodity and agriculture swaps, energy swaps, and metal swaps excluding gold and silver.) Under current law, IDIs that do not meet these exceptions must "push out" their swaps portfolio to a separately capitalized affiliate if the firm is part of a financial holding company, or cease these activities altogether.

Similar to the exemption currently granted to IDIs, H.R. 992 would allow uninsured U.S. branches or agencies of a foreign bank to engage in certain permissible swaps activities and to push out others to an affiliate without jeopardizing access to federal assistance. In addition, the legislation would expand permissible swaps activities by excluding only swaps based on asset-backed securities that are unregulated or not of a credit quality established by regulation.

Enacting this legislation could affect direct spending and revenues if a change in swaps activity affects the financial stability of an IDI or other entity with access to assistance from the Federal Reserve. Because current law only affects IDIs that are swaps dealers and a small percentage of contracts, CBO estimates that any changes to the net cash flows of either agency would be insignificant for the next 10 years.

H.R. 992 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

On April 5, 2013, CBO transmitted a cost estimate for H.R. 992, the Swaps Regulatory Improvement Act, as ordered reported by the House Committee on Agriculture, on March 20, 2013. The two versions of the legislation are identical and the CBO cost estimates are the same.

The CBO staff contacts for this estimate are Daniel Hoople and Barbara Edwards. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Federal Mandates Statement

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates reform Act.

Advisory Committee Statement

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

Applicability to Legislative Branch

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of the section 102(b)(3) of the Congressional Accountability Act.

Earmark Identification

H.R. 992 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

Duplication of Federal Programs

Pursuant to section 3(j) of H. Res. 5, 113th Cong. (2013), the Committee states that no provision of H.R. 992 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULEMAKING

Pursuant to section 3(k) of H. Res. 5, 113th Cong. (2013), the Committee states that H.R. 992 requires no directed rulemaking.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

The short title of the Act is the "Swaps Regulatory Improvement Act."

Section 2. Reform of prohibition on swap activity assistance

This section defines a 'covered depository institution' as an insured depository institution or a United States uninsured branch or agency of a foreign bank that has a prudential regulator.

This section also replaces the term 'insured depository institution' in Section 716 with the term 'covered depository institution.'

This section provides that covered depository institutions can engage in to engage in all swap and security-based swap activities except structured finance swaps that are neither (1) undertaken for hedging or risk management purposes nor (2) expressly allowed by prudential regulators to take place in a covered depository institution.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

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

DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT

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TITLE VII—WALL STREET TRANSPARENCY AND ACCOUNTABILITY

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Subtitle A—Regulation of Over-the-Counter Swaps Markets

PART I—REGULATORY AUTHORITY

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SEC. 716. PROHIBITION AGAINST FEDERAL GOVERNMENT BAILOUTS OF SWAPS ENTITIES.

(a) * * *

(b) DEFINITIONS.—In this section:

(1) * * *

(2) SWAPS ENTITY.—

(A) * * *

(B) EXCLUSION.—The term "swaps entity" does not include any major swap participant or major security-based swap participant that is an ⟦insured depository institution⟧ *covered depository institution*.

(3) COVERED DEPOSITORY INSTITUTION.—The term "covered depository institution" means—

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

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

(c) AFFILIATES OF ⟦INSURED⟧ *COVERED* DEPOSITORY INSTITUTIONS.—The prohibition on Federal assistance contained in subsection (a) does not apply to and shall not prevent ⟦an insured⟧ *a covered* depository institution from having or establishing an affiliate which is a swaps entity, as long as ⟦such insured⟧ *such covered* depository institution is part of a bank holding company, ⟦or savings and loan holding company⟧ *savings and loan holding company, or foreign banking organization (as such term is defined under Regulation K of the Board of Governors of the Federal Reserve System (12 C.F.R. 211.21(o)))*, that is supervised by the Federal Reserve and such swaps entity affiliate complies with sections 23A and 23B of the Federal Reserve Act and such other requirements as the Commodity Futures Trading Commission or the Securities Exchange Commission, as appropriate, and the Board of Governors of the Federal Reserve System, may determine to be necessary and appropriate.

⟦(d) ONLY BONA FIDE HEDGING AND TRADITIONAL BANK ACTIVITIES PERMITTED.—The prohibition in subsection (a) shall apply to any insured depository institution unless the insured depository institution limits its swap or security-based swap activities to:

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

⟦(2) Acting as a swaps entity for swaps or security-based swaps involving rates or reference assets that are permissible for investment by a national bank under the paragraph designated as "Seventh." of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), other than as described in paragraph (3).

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

(d) ONLY BONA FIDE HEDGING AND TRADITIONAL BANK ACTIVITIES PERMITTED.—

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

(A) HEDGING AND OTHER SIMILAR RISK MITIGATION ACTIVITIES.—Hedging and other similar risk mitigating activities directly related to the covered depository institution's activities.

(B) NON-STRUCTURED FINANCE SWAP ACTIVITIES.—Acting as a swaps entity for swaps or security-based swaps other than a structured finance swap.

(C) CERTAIN STRUCTURED FINANCE SWAP ACTIVITIES.—Acting as a swaps entity for swaps or security-based swaps that are structured finance swaps, if—

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

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

(2) DEFINITIONS.—For purposes of this subsection:

(A) STRUCTURED FINANCE SWAP.—The term "structured finance swap" means a swap or security-based swap based on an asset-backed security (or group or index primarily comprised of asset-backed securities).

(B) ASSET-BACKED SECURITY.—The term "asset-backed security" has the meaning given such term under section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)).

(e) EXISTING SWAPS AND SECURITY-BASED SWAPS.—The prohibition in subsection (a) shall only apply to swaps or security-based swaps entered into by **[**an insured**]** *a covered* depository institution after the end of the transition period described in subsection (f).

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

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MINORITY VIEWS

Nearly three years after the adoption of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, adoption of the derivatives and banking rules seems to have stalled. The so-called "push-out rule," as section 716 of the Dodd-Frank Act is called, does not itself need implementing rules. Other rules under the Dodd-Frank Act, however, are very important to lowering the risks of bank derivatives and trading activities, particularly the "Volcker Rule." The Volcker Rule is intended to draw a line between hedging and market making, on the one hand, and proprietary trading, on the other, and prohibits banks from engaging in proprietary trading. That rule remains stalled between the agencies, which has important implications for the activities that remain within a bank.

A workable final version of the Volcker Rule will ensure that the regulators have the tools necessary to adequately oversee and examine the trading activities of banks and their affiliates. As we have seen from the delays in the finalization of the Volcker Rule, it is difficult to distinguish between hedging or market-making as opposed to proprietary trading. We are not comfortable expanding the kinds of swap activities that are permitted within depository institutions, including swaps related to commodities, equities, and certain structured finance swaps used for what we know to be the currently ill-defined exception of "hedging," when we still don't know the scope of the market-making and hedging exemptions that will be provided under the Volcker Rule.

We saw the importance of this very clearly in JPMorgan Chase's "London Whale," in which the bank lost more than $6 billion in short order when its Chief Investment Office put on a large position in risky derivatives that was purportedly for the purpose of "hedging," but that focused foremost on profit and would best be described as proprietary.

Allowing commodity, equity, and certain other types of swaps to remain in banks, without knowing that those activities will be subject to adequate monitoring and oversight, is not something that we believe is appropriate at the present time. For that reason, until we see a final version of the Volcker Rule that allows the regulators to adequately monitor the trading of the banks and their affiliates, we will not support this bill.

We are sensitive to the concern that under Section 716, foreign banks are not afforded the same hedging and market-making exemptions that U.S. institutions receive, but this is something we believe that the Federal Reserve has the authority to address. It is important to ensure that we have a complete set of workable rules before we reverse some of the pieces that were done as part of the Dodd-Frank Act. While some supporters claim that H.R. 992 protects taxpayers by maintaining the push-out for the riskiest obviously even these supporters see some benefit to continuing to push out at least some transactions.

We also note that the Secretary of the Treasury has opposed this and other derivatives bills as the agencies continue to work on completing the rules required under the Dodd-Frank Act.

For these reasons, we oppose H.R. 992.

MAXINE WATERS.
RUBÉN HINOJOSA.
KEITH ELLISON.
STEPHEN F. LYNCH.
MICHAEL E. CAPUANO.

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