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S. 3505

To require analysis of various bankruptcy proposals in order to determine whether those proposals would reduce systemic risk and moral hazard, and for other purposes.

IN THE SENATE OF THE UNITED STATES

DECEMBER 6, 2016

Mr. REED (for himself, Mr. BROWN, Mr. MERKLEY, Mr. WHITEHOUSE, and Mr. BLUMENTHAL) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To require analysis of various bankruptcy proposals in order to determine whether those proposals would reduce systemic risk and moral hazard, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Bankruptcy Fairness Act of 2016''.

SEC. 2. DEFINITIONS.

In this Act—

(1) the term ''analytical work'' means an article, a thesis, a study, testimony, a speech, or a report that—

(A) is written, given, or conducted by—

(i) a Federal or State agency;

(ii) a Federal Government or State government official;

(iii) a policy organization;

(iv) a professional association;

(v) an academic;

(vi) a bankruptcy judge, trustee, or examiner;

(vii) a working group;

(viii) a commission; or

(ix) a person, entity, or body similar to those described in clauses (i) through (viii); and

(B) contains an analysis of, and conclusions or recommendations with respect to, a particular topic;

(2) the term ''avoidance action safe harbor'' means subsections (e), (f), (g), (h), and (j) of section 546 of the Bankruptcy Code;

(3) the term ''bank holding company'' has the meaning given the term in section 102 of the Financial Stability Act of 2010 (12 U.S.C. 5311);

(4) the term ''Bankruptcy Code'' means title 11, United States Code;

(5) the term ''bridge company'' means a bridge company that—

(A) management may create under the proposed subchapter; and

(B) has no assets and no liabilities;

(6) the term ''business judgment rule'' means the standard to which a trustee or debtor in possession is typically held in a bankruptcy case in determining whether the assumption, or assumption and assignment, of an executory contract under section 365 of the Bankruptcy Code is in the best interests of creditors and the estate;

(7) the term ''collateral haircut'' means the difference between the market value of an asset that is used as loan collateral and the amount of that loan;

(8) the term ''committees of jurisdiction'' means—

(A) the Committee on Banking, Housing, and Urban Affairs of the Senate;

(B) the Committee on the Judiciary of the Senate;

(C) the Committee on Financial Services of the House of Representatives; and

(D) the Committee on the Judiciary of the House of Representatives;

(9) the term ''Council'' means the Financial Stability Oversight Council;

(10) the term ''financial company'' has the meaning given the term in section 201(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5381(a));

(11) the term ''hypothetical bank holding company'' means a fictional bank holding company that has—

(A) a corporate organizational structure typical of the business structure of the 6 largest bank holding companies based in the United States, as measured by balance sheet assets on December 31, 2016, the holdings of which include commercial banking, capital markets, global asset management, and transaction services;

(B) assets and liabilities representing the median of the assets and liabilities held by the

6 largest bank holding companies based in the United States, as measured by balance sheet assets on December 31, 2016; and

(C) a global derivatives trading book representing the median of the gross notional value of the 6 largest bank holding companies based in the United States, as measured by balance sheet assets on December 31, 2016;

(12) the term ''management'' means the officers and members of the board of directors of a financial company;

(13) the term ''master netting agreement'' means an agreement providing for—

(A) the netting of amounts due between or among the parties to 2 or more qualified financial contracts on periodic reset dates; and

(B) the exercise of rights, including rights of netting, setoff, liquidation, termination, acceleration, or close out, under 1 or more qualified financial contracts upon the occurrence of an event of default;

(14) the term ''MBS repurchase agreement'' means a repurchase agreement that provides for the transfer of 1 or more—

(A) mortgage related securities;

(B) mortgage loans; or

(C) interests in mortgage related securities or mortgage loans;

(15) the term ''mortgage related security'' has the meaning given the term in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a));

(16) the term ''Office'' means the Office of Financial Research;

(17) the term ''primary financial regulatory agency'' has the meaning given the term in section 2 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5301);

(18) the term ''proposed subchapter'' means a hypothetical new subchapter to chapter 11 of the Bankruptcy Code that includes provisions specifically applicable to a financial company bankruptcy and permits—

(A) management to file, on behalf of the financial company controlled by management, a petition under the Bankruptcy Code;

(B) management to create a bridge company;

(C) management to supervise the drafting of the governing documents for the bridge company;

(D) management to propose the initial directors and senior officers of the bridge company;

(E) not later than 48 hours after the filing of the petition, the assets of the financial company to be transferred to the bridge company if the bankruptcy court has determined that—

(i) such a transfer is in the best interests of the bankruptcy estate of the financial company; and

(ii) the bridge company is not likely to fail to meet the obligations of any debt, executory contract, qualified financial contract, or unexpired lease that the bridge company has assumed;

(F)(i) if the bankruptcy court makes the determinations described in subparagraph (E), the bridge company to agree—

(I) to honor, forever, the obligations of the financial company under all of its qualified financial contracts;

(II) to pay in full all the claims of any person that has a qualified financial contract with the financial company; and

(III) to pay in full the claims of undersecured creditors of the financial company that have even a small amount of collateral; or

(ii) if the bankruptcy court is unable to make both of the determinations described in subparagraph (E), all qualified financial contracts and master netting agreements of the financial company to be terminated immediately;

(G) management—

(i) to leave behind in the financial company bankruptcy estate the claims of all creditors, including employees, suppliers, service providers, and fraud claimants, that have no collateral and no qualified financial contracts with the financial company; and

(ii) to provide the creditors described in clause (i) with, instead of a cash payment, an equity interest in the bridge company that is payable only after all of the claims described in subparagraph (F) have been paid in full;

(H) the bridge company to be placed under the control of a special trustee proposed by

management, over whose activities the bankruptcy court has no jurisdiction;

(I) the 20 largest unsecured creditors of the financial company to receive notice of only 24 hours that the events described in subparagraphs (A) through (H) will occur;

(J) the smaller creditors of the financial company, including the employees, suppliers, service providers, and fraud claimants of the financial company, to receive no notice that the events described in subparagraphs (A) through (H) will occur; and

(K) management to avoid being held liable for most actions taken in connection with the filing, including the actions described in subparagraphs (A) through (H);

(19) the term ''proposed subchapter with title II repealed'' means the proposed subchapter, assuming that title II, including the prohibition against taxpayer funding of the liquidation of a financial company under section 214 of that title (12 U.S.C. 5394), has been repealed;

(20) the term ''qualified financial contract'' means—

(A) a commodity contract, commodity option, foreign future, or leverage transaction, as those terms are defined in section 761 of the Bankruptcy Code;

(B) a forward contract, master netting agreement, repurchase agreement, or swap agreement, as those terms are defined in section 101 of the Bankruptcy Code; or

(C) a securities contract, as that term is defined in section 741 of the Bankruptcy Code;

(21) the term ''regulatory capital'' means the amount of capital that a bank holding company is required by its primary financial regulatory agency to hold on its balance sheet;

(22) the term ''repurchase agreement'' has the meaning given the term in section 101 of the Bankruptcy Code;

(23) the term ''safe harbor'' means—

(A) the avoidance action safe harbor; and

(B) the termination and liquidation safe harbor;

(24) the term ''termination and liquidation safe harbor'' means—

(A) paragraphs (6), (7), (17), and (27) of section 362(b) of the Bankruptcy Code; and

(B) sections 555, 556, 559, 560, and 561 of the Bankruptcy Code;

(25) the term ''title II'' means title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5381 et seq.); and

(26) the term ''Treasury repurchase agreement'' means a repurchase agreement that provides for the transfer of securities that are direct obligations of, or that are fully guaranteed by, the United States.

SEC. 3. JUDICIAL EXPERTISE IN COMPLEX FINANCIAL MATTERS AND BANKRUPTCY COURT PROCESSES FOR FINANCIAL COMPANIES.

(a) RECOMMENDATIONS AND REPORT.—The Director of the Administrative Office of the United States Courts, the Director of the Executive Office for United States Trustees, and the Director of the Federal Judicial Center shall jointly, in consultation with the Council and the Office—

(1) develop, and periodically update, recommendations with respect to—

(A) the type of expertise that would enable a judge to oversee more effectively the resolution of a financial company under the Bankruptcy Code in a manner that prevents adverse

impacts on financial stability in the United States without creating moral hazard; and

(B) a process for ensuring that a sufficient number of bankruptcy and district court judges—

(i) develop and maintain the level of expertise described in subparagraph (A); and

(ii) are available in each circuit to preside over cases that involve financial companies;

(2) identify, and periodically update the identification of—

(A) provisions in the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure that—

(i) increase the severity of the failure of a financial company;

(ii) complicate or impede the resolution of a financial company;

(iii) unfairly increase the risk of loss by ordinary creditors of a financial company;

(iv) shift the costs of the resolution of a financial company, or the risks of loss in

such a resolution, away from persons that are in a position to prevent or reduce such complications, impediments, risks, or costs;

(v) decrease the likelihood that a financial company will be able to obtain enough private financing to emerge successfully from bankruptcy without the need for a taxpayer bailout or other government financial assistance; or

(vi) otherwise pose a threat to financial stability in the United States;

(B) amendments to the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and other statutes and procedural rules that could help prevent or mitigate the complications, impediments, risks, and costs described in subparagraph (A); and

(C) ways in which financial companies and their customers, investors, and counterparties could adjust business practices to prevent or reduce the complications, impediments, risks, and costs described in subparagraph (A); and

(3) not later than 1 year after the date of enactment of this Act, and every other year thereafter, submit to the committees of jurisdiction a report

that sets forth recommendations and issues that may help—

(A) facilitate further the resolution of a financial company under the Bankruptcy Code; and

(B) prevent or mitigate risks to financial stability in the United States.

(b) ISSUANCE OF RULE.—Not later than 18 months after the initial report required under subsection (a)(3) is submitted, the Supreme Court of the United States, in consultation with the Council, the Office, the Director of the Administrative Office of the United States Courts, and the Director of the Executive Office for United States Trustees, shall issue a rule under section 2075 of title 28, United States Code, that provides for the orderly appointment, by the chief judge of the court of appeals for the circuit embracing the district in which a financial company has filed a petition, of a bankruptcy judge or district court judge having expertise in the resolution of financial companies under the Bankruptcy Code.

SEC. 4. ROLE OF REGULATORS IN FINANCIAL COMPANY BANKRUPTCY CASES.

The Bankruptcy Code is amended—

(1) in section 101, by inserting after paragraph (21B) the following:

''(21C) The term 'financial company' has the meaning given the term in section 201(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5381(a)).'';

(2) in section 307—

(A) by striking ''The United States'' and inserting the following:

''(a) IN GENERAL.—The United States''; and

(B) by adding at the end the following:

''(b) FINANCIAL COMPANIES.—The Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, any primary financial regulatory agency of the debtor or an affiliate, and the Chairperson of the Financial Stability Oversight Council may raise and may appear and be heard on any issue in any case or proceeding under this title in which the debtor is a financial company.

''(c) DEFINITION.—In this section, the term 'primary financial regulatory agency' has the meaning given the term in section 2 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5301).'';

(3) in section 322(b)(1), by inserting '', or any trustee appointed under section 1104(f),'' after ''The United States trustee''; and

(4) in section 1104—

(A) in subsection (b)(1), in the first sentence, by inserting ''subsection (f) and'' after ''as provided in''; and

(B) by adding at the end the following:

''(f)(1) If the debtor is a financial company—

''(A) the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation, as soon as practicable after the order for relief, shall submit a list of 5 disinterested persons that are qualified and willing to serve as trustees in the case; and

''(B) the United States trustee shall appoint 1 of the persons from the list submitted under subparagraph (A) to serve as trustee in the case.

''(2) The residence and office requirements set forth in section 321(a) shall not apply to a trustee appointed under this subsection.''.

SEC. 5. STUDIES AND REPORT.

(a) IN GENERAL.—Not later than 18 months after the date of enactment of this Act, and every 2 years thereafter, the Office, in consultation with the Council, authors of relevant analytical works, members drawn from the Financial Research Advisory Committee of the Office, and other relevant experts, shall submit to the committees of jurisdiction a report that contains—

(1) a summary and evaluation of the relevant analytical works published in the 10 years preceding the date of submission of the report with respect to the issues described in subsections (b) through (e);

(2) a statement identifying which analytical works described in paragraph (1) were prepared or paid for by a person, organization, or entity that—

(A) has or had a financial interest in the subject matter of the analytical work; or

(B) represents, has represented, or has received funding or compensation from such a person, organization, or entity; and

(3) the results of each of the studies described in subsections (b) through (e), including recommendations drawn from—

(A) the original research conducted by the Office; and

(B) the analytical work summarized and evaluated under paragraph (1).

(b) BANKRUPTCY CODE EFFECTIVENESS STUDY.—The study described in this subsection shall—

(1) analyze—

(A) the effectiveness of the Bankruptcy Code, as in effect on the date the analysis is undertaken, in facilitating the orderly resolution

of a financial company, including whether there are provisions in such Code that—

(i) increase the likelihood or severity of failure of a financial company;

(ii) complicate or impede such a resolution;

(iii) pose risks to financial stability in the United States;

(iv) shift the costs of such a resolution, or the risks of loss in such a resolution, away from persons that are in a position to prevent or reduce such complications, impediments, or risks; or

(v) create the risk that such a resolution could safely occur only with financial support from the Federal Government;

(B) whether other amendments to the Bankruptcy Code, as in effect on the date the analysis is undertaken, could enhance the ability of the bankruptcy court to resolve a financial company in a manner that could minimize the risk of adverse impacts in financial markets while—

(i) providing for fair distribution to creditors;

(ii) preserving financial stability in the United States; and

(iii) preventing moral hazard; and

(C) whether amendments to the Bankruptcy Code, as in effect on the date the analysis is undertaken, and other laws relating to insolvency to modify the treatment of qualified financial contracts and master netting agreements in future situations of insolvency could reduce—

(i) losses in the value of the financial company and its assets;

(ii) losses to other parties in interest;

(iii) moral hazard; and

(iv) risks to financial stability in the United States;

(2) in addition to the analyses required under paragraph (1), analyze the impacts on—

(A) the ability of employees, other creditors, and parties in interest to recover amounts owed;

(B) the behavior of counterparties and the economy of the United States before a bankruptcy case is filed, including the impacts dur-

ing normal economic conditions and during periods of financial stress on—

(i) the level of care and caution exercised before entering into qualified financial contracts;

(ii) the collateral haircuts applied to the products described in paragraph (3); and

(iii) the level of risk and leverage counterparties are willing to accept with respect to the products described in paragraph (3); and

(C) financial stability in the United States after a bankruptcy case is filed;

(3) in conducting the analysis required under paragraph (1) and paragraph (2), separately consider the impact of and on—

(A) Treasury repurchase agreements;

(B) MBS repurchase agreements;

(C) securities lending agreements;

(D) interest rate swap agreements;

(E) foreign exchange forward agreements; and

(F) any type of qualified financial contract that is not listed in subparagraphs (A) through (E) and that—

(i) is cleared under section 2(h) of the Commodity Exchange Act (7 U.S.C. 2(h)) or section 3C of the Securities Exchange Act of 1934 (15 U.S.C. 78c–3); or

(ii)(I) is not cleared under section 2(h) of the Commodity Exchange Act (7 U.S.C. 2(h)) or section 3C of the Securities Exchange Act of 1934 (15 U.S.C. 78c–3); and

(II) with respect to which the termination of the quantity held by a hypothetical bank holding company, within the timeframe permitted under the bankruptcy laws in effect on the date the analysis is undertaken, could cause a negative impact, including a negative impact on—

(aa) the price of the collateral;

(bb) the termination value of the qualified financial contract; or

(cc) the availability of liquidity to the bank holding company or a counterparty;

(4) in conducting the analysis required under paragraphs (1), (2), and (3), consider the impact on and of the qualified financial products described in paragraph (3), separately assuming that each category of qualified financial contract described in paragraph (3) that may be terminated is terminated—

(A) immediately upon the filing of a bankruptcy petition;

(B) 14 days after the filing of a bankruptcy petition;

(C) 30 days after the filing of a bankruptcy petition;

(D) 180 days after the filing of a bankruptcy petition; and

(E) on the earlier of—

(i) the date on which each qualified financial contract matures under its applicable non-default terms, assuming that the range of maturity dates is typical of the qualified financial contracts held by the hypothetical bank holding company; and

(ii) the date on which the nondebtor counterparty is no longer adequately protected, assuming that ''adequate protec-

tion'' means continued receipt of variation margin, as provided for by contract, and that the ability of the hypothetical bank holding company to provide such adequate protection is correlated with—

(I) the initial margin and variation margin that such hypothetical bank holding company and its counterparty are likely to negotiate if the Bankruptcy Code is—

(aa) as in effect on the date of enactment of this Act; and

(bb) amended to eliminate the right to terminate all qualified financial contracts immediately upon the petition date; and

(II) the quantity of debtor in possession financing that the hypothetical bank holding company is likely to be able to attract, as determined by the study conducted under subsection (d); and

(5) based on the analyses performed under paragraphs (1) through (4)—

(A) analyze how financial companies and their customers, investors, and counterparties could adjust their business practices if the safe harbors were no longer available to counterparties;

(B) recommend any changes to the treatment of qualified financial contracts and master netting agreements by the Bankruptcy Code, as in effect on the date the analysis is undertaken, that would—

(i) prevent potential risks to financial stability in the United States; and

(ii) help—

(I) preserve value for distribution to creditors;

(II) prevent fluctuations in asset prices; and

(III) counterparties receive the benefit of the non-default terms of their qualified financial contracts; and

(C) recommend any other legislative or regulatory changes that could help address any legislative or regulatory gaps, vulnerabilities, or suggestions identified by the analysis.

(c) BRIDGE COMPANY STUDY.—The study described in this subsection shall analyze the impact of the proposed subchapter on systemic risk, moral hazard, the availability of liquidity, the ability to reorganize successfully and restore profitability, and the ability to hold accountable the persons responsible for the failure of a financial company, with consideration given to—

(1) the effects of severely limiting, by statute, the ability to hold the board of directors of a financial company accountable for actions relating to its failure and bankruptcy filing;

(2) the risks that may impede successful capitalization and financing of the bridge company under the proposed subchapter and the likelihood that such risks will prevent such capitalization and financing within 48 hours of the commencement of a bankruptcy;

(3) the potential impact on financial stability in the United States if a bankruptcy is commenced and capitalization and financing of the bridge company cannot be successfully completed within 48 hours;

(4) the extent to which, if capitalization and financing of the bridge company under the proposed subchapter does not succeed within 48 hours—

(A) there is a means, under the proposed subchapter, to prevent risk to financial stability in the United States; and

(B) there would be a means, under the proposed subchapter with title II repealed, to prevent risk to financial stability in the United States;

(5) whether requiring the bridge company to assume all obligations under the qualified financial contracts of the financial company, and requiring the bridge company to assume the obligation to pay in full a secured claim where the value of the collateral is less than the claim, may—

(A) leave the bridge company with inadequate regulatory capital; or

(B) create a risk that the bridge company would be unable to secure adequate capital and liquidity during the timeframe and in the quantity in which such capital and liquidity are needed to pay—

(i) the obligations assumed;

(ii) the operating expenses of the bridge company;

(iii) the fees and expenses of the special trustee; and

(iv) the debt service on the new financing;

(6) whether the transfer to the bridge company of a material part of the assets of the debtor, with less than 48 hours of notice given to a limited number of the creditors of the debtor and parties in interest, and with no notice given to other creditors and parties in interest, may—

(A) violate the due process rights of some of those creditors or parties in interest; or

(B) expose the bridge company to potential liability due to the lack of adequate notice to such creditors or parties in interest;

(7) whether, if there is a violation of due process rights or the potential for successor liability, as described in paragraph (6), there is a risk that the restructuring may not be accomplished within 48 hours;

(8) whether—

(A) in light of the failure of the predecessor of the bridge company and the possibility of ongoing issues in the operating entities transferred to the bridge company, there is a risk that financial markets may consider the

bridge company unattractive as a potential borrower or investment opportunity; and

(B) the bankruptcy filing, in the absence of certainty of adequate financial support to ensure a positive outcome, could disrupt financial markets;

(9) whether the rights of all creditors whose claims are not assumed by the bridge company, including the claims of employees, suppliers, service providers, and fraud claimants of the financial company, will be adequately represented in the absence of—

(A) a secure source of funds to pay for the fees and expenses of counsel to a creditors' committee appointed under section 1102 of the Bankruptcy Code; and

(B) bankruptcy court jurisdiction and supervision over the bridge company and the special trustee's management of the assets transferred to the bridge company;

(10) whether, under the proposed subchapter, 48 hours is a sufficient amount of time to allow—

(A) a trustee of a financial company in bankruptcy to—

(i) assess—

(I) the future liquidity needs of the bridge company; and

(II) the ability of the bridge company to access sufficient liquidity to meet such needs;

(ii) make informed decisions about—

(I) which qualified financial contract portfolios the bridge company can reasonably expect to perform if the trustee's only choice is to assume or reject the qualified financial contracts of a given counterparty on an ''all or nothing'' basis;

(II) the potential consequences of rejecting the qualified financial contracts of a given counterparty on financial stability in the United States if the trustee's only choice is to assume or reject the qualified financial contracts of a given counterparty on an ''all or nothing'' basis;

(III) which encumbered assets may be transferred to the bridge company without triggering an obligation to pay an undersecured claim that is

too large for the bridge company realistically to pay; and

(IV) which qualified financial contracts may be assumed without triggering an obligation to pay an unsecured claim owed to the counterparty that is too large for the bridge company realistically to pay; and

(iii) assemble and fairly present evidence supporting the decisions described in clauses (i) and (ii) to the bankruptcy judge and other parties in interest; and

(B) a bankruptcy judge to hear and consider sufficient evidence to make an informed decision with respect to whether the actions proposed in clauses (i) and (ii) of subparagraph (A)—

(i) are in the best interests of creditors; and

(ii) will not pose risks to financial stability in the United States;

(11) if there is a risk that the bridge company capitalization will not be accomplished successfully

within 48 hours, the likely market and legal consequences, including—

(A) whether mass termination of the qualified financial contracts could be avoided;

(B) whether an extended period of financial market disruption is possible;

(C) what steps would be needed to contain the potential fallout from the events described in subparagraphs (A) and (B); and

(D) what legal authority exists to take the steps that would be needed to contain the fallout described in subparagraph (C);

(12) with respect to the proposed subchapter with title II repealed—

(A) whether repealing title II is an effective way to prevent systemic risk and moral hazard;

(B) whether there would be an increased likelihood of taxpayer bailouts in the absence of title II; and

(C) the effects of losing title II as a last resort if—

(i) the financial company is unable to resolve itself under chapter 11 of the Bankruptcy Code; or

(ii) the bridge company is unable to repay all of the obligations assumed by the bridge company under the proposed subchapter; and

(13) any other material issues with respect to the bridge company that may pose a threat to—

(A) financial stability in the United States; or

(B) the laws, procedures, or regulations established to prevent or mitigate risks to financial stability in the United States.

(d) FINANCING AND LIQUIDITY STUDY.—

(1) IN GENERAL.—The study described in this subsection shall report on—

(A) the amount of liquidity needed by a hypothetical bank holding company in bankruptcy, the availability of private financing to fulfill that need, and the likelihood of attracting that financing; and

(B) whether amending the Bankruptcy Code to permit pre-arranging a debtor in possession financing facility for a financial company, particularly a hypothetical bank holding company, that is enforceable after the filing of a bankruptcy petition, would—

(i) increase the level of certainty that the private financing described in subparagraph (A) would be available when needed;

(ii) pose risks to lenders of the private financing described in subparagraph (A) that could not be mitigated in advance by—

(I) assessing the credit risk posed by the financial company;

(II) taking and perfecting a security interest in collateral owned by the financial company;

(III) limiting the size of a lender's exposure to a particular financial company; or

(IV) taking any other steps similar to those described in subclauses (I) through (III);

(iii) pose risks to financial stability in the United States; or

(iv) have other effects.

(2) CONSIDERATIONS.—In conducting the study required under paragraph (1), the Office shall—

(A) project the amount of financing that the trustee would need during the 2-year period

immediately following the petition date of a hypothetical bank holding company—

(i) with an operating company that has suffered an unexpected loss of $10,000,000,000 one week before the petition date due to fraud and a lack of internal controls; and

(ii) that, immediately before the loss described in clause (i), had exactly the minimum amount of regulatory capital and liquidity required;

(B) conduct a market survey of, and, if necessary, use analytical techniques to determine, the potential sources of private financing to cover the projected shortfall, if any, under each set of conditions established by the Board of Governors of the Federal Reserve System under section 165(i)(1)(B)(i) of the Financial Stability Act of 2010 (12 U.S.C. 5365(i)(1)(B)(i)) that is in effect on the date the survey is conducted;

(C) based on the market survey conducted and, if applicable, the analytical techniques used under subparagraph (B), describe the amount of private financing that is likely to be

available to the hypothetical bank holding company and the terms and conditions under which it is likely to be available;

(D) describe the timeline and logistics for obtaining the private financing described in subparagraph (C), assuming that the need for such financing became apparent at the time of the loss described in subparagraph (A)(i);

(E) assess—

(i) the likelihood that the trustee will be successful in obtaining the amount of private financing needed, on terms that a hypothetical bank holding company can afford and within the timeframe in which such financing is needed—

(I) under the circumstances described in subparagraph (A); and

(II) in light of the results of the market survey and analytical techniques described in subparagraph (B); and

(ii) the potential risks that could prevent the trustee from obtaining the financing described in clause (i); and

(F) assess whether a bridge company with the ability to pre-arrange private financing, as described in paragraph (1)(B), would be able to obtain an adequate amount of financing more easily than a financial company that is a debtor under the provisions of chapter 11 of the Bankruptcy Code that are in effect on the date the analysis is undertaken.

(3) RECOMMENDATIONS.—The study described in this subsection shall contain recommendations regarding any legislative or regulatory changes that are necessary or would be helpful to address any gaps, vulnerabilities, or suggestions identified in the study.

(e) MASTER NETTING AGREEMENT STUDY.—

(1) IN GENERAL.—The study described in this subsection shall analyze and report on whether, considering the size and complexity of the master netting agreements of a hypothetical bank holding company—

(A) the laws in effect on the date of enactment of this Act with respect to assumption and assignment of qualified financial contracts and master netting agreements could pose risks to financial stability in the United States;

(B) any risks described in subparagraph (A) could be avoided or mitigated by changes in the law that would—

(i)(I) require master netting agreements to be more limited in size and scope; and

(II) permit master netting agreements to be assigned to separate assignees;

(ii)(I) allow master netting agreements to remain as configured on the date of enactment of this Act, as long as a financial company is not in bankruptcy; and

(II) following a bankruptcy petition, if no qualified assignee were able to assume all obligations under a master netting agreement, or if such an assignment would pose systemic risk, allow the trustee to—

(aa) divide qualified financial contracts that are under a single master netting agreement into groups based on product type and level of risk; and

(bb) assign the qualified financial contracts that have been divided as

described in item (aa) to separate assignees; or

(iii) permit or require other actions; and

(C) there is an alternative means of assuming and assigning, or winding down, the qualified financial contracts and master netting agreements of the hypothetical bank holding company without posing risks to financial stability in the United States.

(2) CONSIDERATIONS.—In conducting the study required under paragraph (1), the Office shall separately model and quantify the potential direct and indirect economic consequences, including the consequences described in subparagraphs (B), (C), and (G) of section 203(a)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5383(a)(2)), of the disposition of the master netting agreements typical of those of a hypothetical bank holding company under each of the 5 scenarios described in paragraph (3).

(3) SCENARIOS.—The 5 scenarios described in this subparagraph are as follows:

(A) The Bankruptcy Code, as in effect on the date of enactment of this Act, remains in effect and the course of dealing among bank

holding companies is similar to that commonly in practice on December 31, 2016, including the following conditions:

(i) The trustee or receiver for a hypothetical bank holding company may not assume, or assume and assign, the qualified financial contracts or master netting agreements of the hypothetical bank holding company to a third party because those contracts are considered financial accommodations under section 365(c)(2) of the Bankruptcy Code.

(ii) Because of the safe harbors, counterparties may, immediately upon the filing of the petition—

(I) liquidate, terminate, and accelerate qualified financial contracts and master netting agreements; and

(II) retrieve their collateral.

(B) The facts are as provided in subparagraph (A), except that—

(i) the Bankruptcy Code has been amended to allow for the assumption, but not the assignment, of qualified financial

contracts and master netting agreements by a hypothetical bank holding company;

(ii) the choice of the hypothetical bank holding company is limited to assuming—

(I) all of the qualified financial contracts and master netting agreements between the debtor and a particular counterparty; or

(II) none of the qualified financial contracts or master netting agreements between the debtor and the counterparty described in subclause (I); and

(iii) the hypothetical bank holding company assumes all of the qualified financial contracts and master netting agreements without conducting an analysis of its future cash flow.

(C) The facts are as provided in subparagraph (B), except that—

(i) the hypothetical bank holding company has sufficient liquidity to perform the obligations under only 2 of the 5 master netting agreements with the largest

counterparties of the hypothetical bank holding company; and

(ii) any remaining master netting agreements would be terminated immediately.

(D) The facts are as provided in subparagraph (B), except that—

(i) the Bankruptcy Code has been amended to allow the trustee or receiver for a hypothetical bank holding company to separately assign 1 or more of its master netting agreements to 1 or more third parties that have the ability to perform such master netting agreements; and

(ii) the number of third parties that would have the ability to perform, and be likely assignees of, the master netting agreement with 1 of the 5 largest counterparties of the hypothetical bank holding company, based on gross notional amount as of December 31, 2016, is similar to the number of parties that would have the ability to perform and would be interested in assuming such master netting agreements under each set of economic conditions es-

tablished by the Board under section 165(i)(1)(B)(i) of the Financial Stability Act of 2010 (12 U.S.C. 5365(i)(1)(B)(i)) that is in effect on the date the study is conducted.

(E) The facts are as provided in subparagraph (B), except that—

(i) the Bankruptcy Code has been amended to allow the trustee for a hypothetical bank holding company to divide the qualified financial contracts under each master netting agreement into several smaller groups, each of which—

(I) contains 1 product class and, within that product class, 1 risk level; and

(II) may be separately—

(aa) assumed;

(bb) assumed and assigned; or

(cc) rejected; and

(ii) the potential assignees are similar to the parties that would have the ability to perform, and would be likely interested purchasers, of such group under each set

of economic conditions established by the Board under section 165(i)(1)(B)(i) of the Financial Stability Act of 2010 (12 U.S.C. 5365(i)(1)(B)(i)) that is in effect on the date the study is conducted.

(4) FACTORS.—In conducting the study required under this subsection, the Office shall analyze factors that include—

(A) the data needed to determine whether the qualified financial contracts under each master netting agreement are in the money or out of the money, including—

(i) the contractual terms of the master netting agreements and qualified financial contracts of the debtor;

(ii) current market pricing, interest rates, foreign exchange rates, and similar data;

(iii) data on potential future market trends during the remaining term of the qualified financial contracts, taking into consideration potential short term market disruptions as a consequence of the conditions that led to the filing of a bankruptcy

petition by the hypothetical bank holding company;

(iv) the existence, location, and format of the data described in clause (iii); and

(v) the legal authority of the trustee to access the data described in clause (iii);

(B) the data needed to determine whether the qualified financial contracts under each master netting agreement will be valuable to the reorganized debtor, including—

(i) the proposed future business configuration, capitalization, borrowing capacity, and cash flow projections of the hypothetical bank holding company when it becomes a reorganized debtor; and

(ii) the ability of the trustee to service the qualified financial contracts and master netting agreements until the debtor is reorganized;

(C) the existence of systems architecture and programs to analyze the data described in subparagraphs (A) and (B) (in this paragraph referred to as ''the systems and programs'') in order to draw the conclusions necessary to exercise business judgment;

(D) the capacity of the systems and programs to process the data described in subparagraphs (A) and (B);

(E) the legal authority of the trustee to access the systems and programs;

(F) the professional skills and quantity of personnel needed to run the systems and programs and draw conclusions from the data described in subparagraphs (A) and (B), including the availability of such personnel; and

(G) the amount of time needed for—

(i) gathering or developing the data described in subparagraphs (A) and (B);

(ii) identifying and retaining the personnel needed to run the systems and programs;

(iii) testing and running the systems and programs;

(iv) assembling the results of the data analysis;

(v) developing conclusions and recommendations based on the results described in clause (iv);

(vi) presenting and explaining the conclusions and recommendations described in clause (v) to the trustee;

(vii) determining whether assumption, assumption and assignment, or rejection of the qualified financial contracts and master netting agreements described in subparagraph (A)—

(I) is consistent with the business judgment rule; and

(II) even if consistent with the business judgment rule, could impact financial stability in the United States;

(viii) providing notice to creditors articulating how the trustee's determination under clause (vii) is consistent with the business judgment rule; and

(ix) allowing creditors a reasonable opportunity to review and object to the proposed course of action of the trustee.

(5) ASSUMPTIONS.—In conducting the study required under this subsection, the Office shall assume that—

(A) except as otherwise expressly provided, the laws in effect on the date of enactment of this Act remain in effect;

(B) the qualified financial contract and master netting agreement configurations that are typical in the market on December 31, 2016, remain in effect; and

(C) the projected availability of financing and liquidity to perform the master netting agreements described in subparagraph (B) is consistent with the amount determined to be available under subsection (d)(2)(C).

(6) RECOMMENDATIONS.—The study described in this subsection shall contain recommendations regarding any legislative or regulatory changes that could help address any gaps or vulnerabilities identified in the study.

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