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Backstop, not Bailout: The Case for Preserving the Orderly Liquidation Authority under Dodd-Frank

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BACKSTOP, NOT BAILOUT: THE CASE FOR PRESERVING THE ORDERLY LIQUIDATION AUTHORITY UNDER DODD-FRANK

ABSTRACT

The Trump Administration and Republicans have initiated efforts to repeal certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), one of which is the Orderly Liquidation Authority (OLA) under Title II of Dodd-Frank. Critics of the OLA argue that it enables, rather than prevents, future bailouts funded by taxpayers. These critics are concerned with the Federal Deposit Insurance Corporation's (FDIC) discretion to decide when and how to resolve distressed financial firms, as well as the FDIC's access to large amounts of funds from the U.S. Department of the Treasury to carry out these functions. Proponents of the Financial CHOICE Act prefer that instead of a governmental regulatory body, failing firms be resolved exclusively through the bankruptcy court system, which they believe provides a fair and dependable process that protects U.S. consumers by not using taxpayer-funded bailouts. However, this Note will argue that while the bankruptcy process should be improved upon, the OLA must be preserved to serve as a fallback and last resort when other resolution regimes fail. The OLA is led by professional financial experts deeply integrated into the financial industry who can act quickly and effectively to wind-up failing firms in the safest manner possible and prevent economic collapse. The OLA also provides access to critical liquidity necessary for resolving failing firms in short time frames. A bankruptcy alternative simply cannot provide such remedies in times of high financial stress because the typical sources of liquidity in a bankruptcy process, such as creditors and other investors from the private sector, will also be affected during a crisis and limited in their ability to provide liquidity to a large failing firm. While improvements can be made to the OLA, it should not be repealed in its entirety. The OLA is necessary to protect the economy and prevent the need for another bailout.

INTRODUCTION

Following the financial crisis of 2008, Congress introduced and passed into law the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).[1] Under Title II of Dodd-Frank, Congress created the Orderly Liquidation Authority (OLA) to provide for the "quick[] and efficient[] liquida[tion]" of large failing financial institutions to reduce negative

1. *Dodd-Frank Wall Street Reform and Consumer Protection Act*, INVESTOPEDIA, http://www.investopedia.com/terms/d/dodd-frank-financial-regulatory-reform-bill.asp (last visited Aug. 15, 2018).

economic impact.[2] Republicans and the Trump Administration have sought to repeal certain provisions of Dodd-Frank, including the OLA, and replace it with the Financial CHOICE Act (CHOICE Act).[3] The CHOICE Act proposes an amendment to the United States (U.S.) Bankruptcy Code to allow bankruptcy courts to exclusively handle resolutions and liquidations of large, distressed financial institutions.[4] This Note focuses on the purpose and intention of the OLA and argues for its preservation against repeal. While amendments to the Bankruptcy Code are encouraged by opponents and supporters alike, the OLA should remain in place, as it serves a vital function in the prevention of another financial crisis.[5] If other attempts at resolution fail, the OLA serves as a fallback by providing financial regulatory expertise, coordination benefits, and crucial liquidity.[6] Despite criticisms that the OLA enables future government bailouts and provides too much discretion to government regulators, the OLA allows for the quick and effective resolution of large, complex financial institutions and shifts losses to the private sector, thereby preventing taxpayer-funded bailouts.[7]

Part I of this Note provides a brief background of the 2008 financial crisis, a summary of the purpose and function of the OLA, and the Republican efforts to repeal and replace it with the CHOICE Act. Part II reviews criticisms of the OLA and how the CHOICE Act hopes to solve these issues by amending the Bankruptcy Code to exclusively handle the resolutions of large financial firms. Next, Part III addresses misconceptions of the OLA's intent and purpose while highlighting its benefits and advantages. It also points out potential pitfalls of an exclusively bankruptcy-based resolution scheme. Finally, Part IV proposes the best approach going forward, focusing on the strongest aspects of regulatory and bankruptcy resolution schemes for creating a workable compromise that addresses current concerns while remaining an effective resolution method for large financial firms. The Bankruptcy Code must be amended to better

2. *Dodd-Frank: Title II - Orderly Liquidation Authority*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/dodd-frank_title_II (last visited Aug. 15, 2018).

3. *See* Aaron Klein, *A Primer on Dodd-Frank's Orderly Liquidation Authority*, BROOKINGS (June 5, 2017), https://www.brookings.edu/blog/up-front/2017/06/05/a-primer-on-dodd-franks-orderly-liquidation-authority.

4. Letter from Jeffrey N. Gordon, Richard Paul Richman Professor of Law, Columbia Law School, and Mark J. Roe, David Berg Professor of Law, Harvard Law School, et. al., to the Hon. Michael Crapo, Chairman, Senate Committee on Banking, Housing, and Urban Affairs, and the Hon. Jeb Hensarling, Chairman, House Financial Services Committee, et. al., *Financial Scholars Oppose Eliminating "Orderly Liquidation Authority" As Crisis-Avoidance Restructuring Backstop* 3 (May 23, 2017), https://corpgov.law.harvard.edu/wp-content/uploads/2017/05/Scholars-Letter-on-OLA-final-for-Congress.pdf.

5. *See id.*

6. Ben S. Bernanke, *Why Dodd-Frank's Orderly Liquidation Authority Should Be Preserved*, BROOKINGS (Feb. 28, 2017), https://www.brookings.edu/blog/ben-bernanke/2017/02/28/why-dodd-franks-orderly-liquidation-authority-should-be-preserved/; *see also* Gordon & Roe, *supra* note 4, at 3.

7. Bernanke, *supra* note 6.

handle large failing financial firms; however, the OLA should also be preserved as an ancillary mechanism to step in if bankruptcy fails. Maintaining the safety net that is the OLA is crucial to preventing a repeat of the 2008 financial crisis.

I. THE 2008 FINANCIAL CRISIS, CREATION OF THE OLA, AND REPUBLICAN REPEAL EFFORTS

A. BACKGROUND AND HISTORY OF THE 2008 FINANCIAL CRISIS

In 2008, the U.S. economy faced an unprecedented financial crisis.[8] The combination of debt and mortgage-backed securities (MBSs) within financial markets facilitated the crisis.[9] Through securitization, the process of "pooling [] debt and then issuing assets based upon that debt," financial institutions restructured payments from U.S. mortgages into products available for sale to investors in the form of MBSs.[10] As the availability of new mortgages for securitization decreased, the various firms "repackag[ed]" the unsellable batches of MBSs and sold them as a new product called "collateralized debt obligations" (CDOs).[11] These CDOs appeared to be the same quality investment as previous well-performing MBSs and were given AAA ratings[12] by credit rating agencies such as Moody's and Standard & Poor's.[13] Unfortunately, the reality was that the CDOs were primarily comprised of riskier subprime[14] mortgages.[15] While added risk typically yields high returns in a normal economic environment, if the economy is struggling and mortgage defaults are frequent, lenders are

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8. *Financial Crisis 2008 - Detailed Overview*, WALL ST. OASIS, https://www.wallstreetoasis.com/financial-crisis-overview (last visited Aug. 15, 2018).

9. *Id.*

10. *Id.*

11. *Id.*

12. "AAA is the highest possible rating assigned to an issuer's bonds by credit rating agencies." *AAA*, INVESTOPEDIA, https://www.investopedia.com/terms/a/aaa.asp (last visited Aug. 15, 2018). A high credit rating allows issuers to borrow money at a cheaper interest rate, which in turn gives the issuer a real advantage over competitors by enabling issuers to borrow more money at any given time to capture potential business opportunities. *Id.* Many businesses rely on short term credit to pay operating costs while the business waits for payment on the products it sells. *Credit Crisis*, INVESTOPEDIA, https://www.investopedia.com/terms/c/credit-crisis.asp (last visited Aug. 15, 2018). Leading up to the financial crisis, credit rating agencies were favorable in rating securitized loans such as MBSs and CDOs which were not properly priced to reflect their risk. *Id.* When these loans began to default, inter-lending between firms stopped and the financial system froze. *Id.*

13. WALL ST. OASIS, *supra* note 8.

14. A subprime mortgage is a type of loan available to applicants with low credit scores (often below 600), who could not normally qualify for a traditional mortgage. Shauna Carther, *What is a Subprime Mortgage?*, INVESTOPEDIA (updated Dec. 12, 2017, 10:15 AM), http://www.investopedia.com/ask/answers/07/subprime-mortgage.asp.

15. WALL ST. OASIS, *supra* note 8.

exposed to large losses.[16] Residential home prices eventually hit their apex, and a sale or refinance by the owner was insufficient to pay back the mortgage debt, which in turn forced losses onto lenders and ultimately threw the entire financial system into crisis.[17] Many major financial institutions, heavily invested in MBSs were left exposed and suffered enormous losses, resulting in an inability to meet existing debt obligations.[18] These large financial conglomerates, dubbed "too big to fail,"[19] were in "dire financial straits."[20] Bear Stearns, the fifth-largest U.S. bank, was forced to merge with JP Morgan, and Lehman Brothers, the fourth-largest U.S. bank, filed for bankruptcy, making it the largest ever Chapter 11 bankruptcy filing in U.S. history.[21] In the following months, the U.S. government was forced to preserve the remaining financial institutions with a bailout.[22] During the crisis, the U.S. government provided failing firms with over $1.7 trillion in bailout money through its Troubled Asset Relief Program.[23]

B. SUMMARY OF THE ORDERLY LIQUIDATION AUTHORITY

Believing a government authority was necessary to properly dissolve large financial institutions and eliminate risk of future government bailouts, Congress formed the OLA under Title II of Dodd-Frank.[24] The OLA facilitate the rapid restructuring and stabilization of large faltering financial firms.[25] The provisions of the OLA include: (i) "Placing a Financial Company in Receivership"; (ii) "Receiver Duties of the Federal Deposit Insurance Corporation [(FDIC)]"; (iii) "Claim Priority"; and (iv) "Elimination of Government Bailouts for Struggling Financial Institutions."[26] Upon receiving written recommendation from the FDIC and the Federal Reserve (Fed),[27] the Secretary of the Treasury, in consultation

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16. John Ogg, *CDOs and the Mortgage Market*, INVESTOPEDIA (Oct. 14, 2016, 2:00 PM), http://www.investopedia.com/articles/07/cdo-mortgages.asp.

17. John V. Duca, Fed. Reserve Bank of Dallas, *Subprime Mortgage Crisis*, FED. RES. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/subprime_mortgage_crisis#how.

18. *See* WALL ST. OASIS, *supra* note 8.

19. When a firm is "too big to fail," the firm is so large and so interconnected with other firms that its failure would have catastrophic sprawling effects throughout the economy. *Too Big To Fail*, INVESTOPEDIA, http://www.investopedia.com/terms/t/too-big-to-fail.asp (last visited Aug. 16, 2018).

20. LEGAL INFO. INST., *supra* note 2.

21. *See* WALL ST. OASIS, *supra* note 8.

22. A bailout is a situation in which the government injects liquidity into a failing firm to avoid the ramifications of that firm's failure. *Bailout*, INVESTOPEDIA, http://www.investopedia.com/terms/b/bailout.asp (last visited Aug. 16, 2018); *see also* LEGAL INFO. INST., *supra* note 2.

23. *Id.*

24. *Id.*

25. *See id.*

26. *Id.*

27. This recommendation must be supported by a vote of two-thirds of the directors of the FDIC and two-thirds of the members of the Board of Governors of the Federal Reserve System.

with the President, must place a financial company into resolution under the OLA if the firm is determined to be in danger of default, and its resolution under bankruptcy law would have serious adverse effects on the financial stability of the United States.[28] If the board of directors of the distressed firm acquiesce to the appointment of the FDIC as receiver, the Secretary will immediately appoint the FDIC as receiver of the distressed firm.[29] If the distressed firm rejects the appointment, the Secretary must petition the U.S. District Court for the District of Columbia for an order authorizing the Secretary to appoint the FDIC as receiver.[30] The petition is then filed under seal and reviewed[31] by the district court on a strictly confidential basis.[32] Depending how the district court rules, either the Secretary or the resisting distressed firm may appeal the district court's decision to the Court of Appeals for the District of Columbia no later than thirty days from the date the decision was rendered, which will consider the appeal on an expedited basis.[33]

As an alternative to bankruptcy, the OLA enables the FDIC to be appointed as receiver and perform the liquidation and wind-up[34] of the firm.[35] When a firm is placed into receivership under the OLA, the FDIC "assumes responsibility for efficiently recovering the maximum amount possible from the disposition of the receivership's assets."[36] The FDIC

Paul L. Lee, *Cross-Border Resolution of Banking Groups: International Initiatives and U.S. Perspectives — Part V*, 13 PRATT'S J. BANKR. L. 395, 418 (2017), https://www.debevoise.com/~/media/files/insights/publications/2017/11/cross_border_resolutions_of_banking_groups_part_v.pdf [hereinafter Lee, *Cross-Border Resolution*].

28. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 203(b)(1)–(7), 124 Stat. 1376, 1451 (2010) (codified in 12 U.S.C. § 5383) [hereinafter the "Dodd-Frank Act" or "Dodd-Frank"].

29. Lee, *Cross-Border Resolution*, *supra* note 27, at 419. The OLA specifically absolves the board of director members from liability to shareholders or creditors for acquiescing in good faith to the appointment of the FDIC as receiver. *Id.*; *see also* Dodd-Frank Act § 207, 124 Stat. at 1459 (codified at 12 U.S.C. § 5387). § 207 is intended to incentivize boards to acquiesce and thus avoid the need for court review of the decision to appoint the FDIC as receiver. Lee, *Cross-Border Resolution*, *supra* note 27, at 420.

30. Lee, *Cross-Border Resolution*, *supra* note 27, at 420.

31. The district court's review of the petition is limited to two issues: the determination that the firm is "in default or in danger of default" and whether the firm meets the statutory definition of a "financial company." *Id.*; *see also* Dodd-Frank Act § 202, 124 Stat. at 1444–45 (codified at 12 U.S.C. § 5382). The district court does not review the determination of whether a resolution under the Bankruptcy Code would have "serious adverse effects on the financial stability of the U.S." Lee, *Cross-Border Resolution*, *supra* note 27, at 420.

32. Lee, *Cross-Border Resolution*, *supra* note 27, at 420.

33. *Id.* at 421.

34. "Winding up" is the process of selling all the assets of a business, paying off creditors, distributing any remaining assets to the partners or shareholders, and then dissolving the business. *Winding Up*, INVESTOPEDIA, https://www.investopedia.com/terms/w/windingup.asp (last visited Aug. 16, 2018).

35. LEGAL INFO. INST., *supra* note 2.

36. *Receivership Management Program*, FED. DEPOSIT INS. CORP., https://www.fdic.gov/about/strategic/strategic/receivership.html (last visited Aug. 16, 2018).

amasses funds from the sale of firm assets and the disposition of valid claims that are then distributed to its creditors according to applicable law.[37] Once this process is completed and all legal impediments have been addressed, "the receivership is terminated, and a final distribution is made to creditors."[38] The OLA intends to safeguard the financial stability of the U.S. economy, impose losses of the failed firm on shareholders and creditors (not taxpayers), oust management at fault, and ensure that payouts to claimants are the same as claimants would receive under a bankruptcy resolution.[39]

C. PRESIDENT TRUMP ORDERS REVIEW OF THE OLA AND REPUBLICANS INTRODUCE THE FINANCIAL CHOICE ACT

On February 3, 2017, President Trump issued an Executive Order setting forth his Administration's policy to regulate the U.S. financial system in a manner consistent with seven "Core Principles."[40] On April 21, 2017, President Trump issued a presidential memorandum ordering the U.S. Department of the Treasury (the Treasury) to review two provisions of Dodd-Frank, including the OLA.[41] The memorandum directed the Treasury to submit a report within 180 days, focusing on whether the OLA exposes taxpayers to losses and encourages companies to take on more risk, and whether a revamped bankruptcy process would be preferable.[42] In addition to the executive action taken by President Trump, Republican Congressman Jeb Hensarling introduced the Financial CHOICE Act of 2017, H.R. 10, which passed in the House of Representatives and aims to repeal major provisions of Dodd-Frank.[43] The CHOICE Act would repeal the OLA in its entirety and proposes to replace it with an amendment[44] to the Bankruptcy

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37. *Id.*
38. *Id.*
39. LEGAL INFO. INST., *supra* note 2.
40. Exec. Order No. 13,772, 82 Fed. Reg. 9965, 9965 (Feb. 3, 2017).
41. Presidential Memorandum for the Secretary of the Treasury, Subject: Orderly Liquidation Authority, DAILY COMP. PRES. DOC. 201700266 (Apr. 21, 2017); Pete Schroeder, *Trump Orders Review of Financial Rules to Prevent Future Crises*, REUTERS (Apr. 21, 2017, 12:33 PM), https://www.reuters.com/article/us-usa-trump-regulation/trump-orders-review-of-financial-rules-to-prevent-future-crises-idUSKBN17N248. However, on November 29, 2017, the Trump administration announced it does not plan to recommend repealing the OLA in its entirety. *See* Ryan Tracy, *Trump Team to Recommend Keeping Dodd-Frank Liquidation Power*, WALL ST. J. (Nov. 29, 2017, 6:00 AM), https://www.wsj.com/articles/trump-team-to-recommend-keeping-dodd-frank-liquidation-power-1511953200.
42. Schroeder, *supra* note 41.
43. Jeff Cox, *House Passes Choice Act That Would Gut Dodd-Frank Banking Reforms*, CNBC (updated June 8, 2017, 7:09 PM), https://www.cnbc.com/2017/06/08/house-has-votes-to-pass-choice-act-that-would-gut-dodd-frank-banking-reforms.html; *see also* Financial CHOICE Act of 2017, H.R. 10, 115th Cong. § 111 (2017).
44. Financial CHOICE Act of 2017, H.R. 10, 115th Cong. §§ 121–23 (2017). The CHOICE Act incorporates provisions from the Financial Institution Bankruptcy Act of 2017 (FIBA), which was passed in the House earlier in the year. *See* Financial Institution Bankruptcy Act of 2017,

Code, which, in theory, should enable large, complex financial institutions to fail safely in a bankruptcy process without using any taxpayers funds.[45]

On February 21, 2018, the Treasury issued its report to President Trump on the OLA and bankruptcy reform (the Report).[46] In contrast to the CHOICE Act, the Report recommended retaining the OLA as an "emergency tool for use under only extraordinary circumstances."[47] However, similar to the CHOICE Act, the Report also recommended significant reforms to the bankruptcy process by concurring with a proposal put forth by the Hoover Institution to create a new Chapter 14 of the Bankruptcy Code to handle large failing financial institutions.[48] The Report concluded unequivocally that bankruptcy should be the resolution method of first resort.[49] While some applauded the Treasury's attempt to work a reasonable compromise, stern advocates of repealing the OLA expressed disappointment.[50]

H.R. 1667, 115th Cong. §§ 1181–92 (2017); Financial CHOICE Act of 2017, H.R. 10, 115th Cong. §§ 121–23 (2017). FIBA and the CHOICE Act propose to amend chapter 11 of the Bankruptcy Code to add a new subchapter V to provide for the liquidation, reorganization, or recapitalization of a covered financial corporation, as defined in FIBA. *See* Financial Institution Bankruptcy Act of 2017, H.R. 1667, 115th Cong. §§ 1181–92 (2017); Financial CHOICE Act of 2017, H.R. 10, 115th Cong. §§ 121–23 (2017).

45. H. COMM. ON FIN. SERVS., THE FINANCIAL CHOICE ACT, CREATING HOPE AND OPPORTUNITY FOR INVESTORS, CONSUMERS, AND ENTREPRENEURS, A REPUBLICAN PROPOSAL TO REFORM THE FINANCIAL REGULATORY SYSTEM 22 (2017), https://financialservices.house.gov/uploadedfiles/2017-04-24_financial_choice_act_of_2017_comprehensive_summary_final.pdf [hereinafter CHOICE Act Summary].

46. *See generally* Dep't of the Treas., Report to the President of the United States Pursuant to the Presidential Memorandum Issued April 21, 2017, Orderly Liquidation Authority and Bankruptcy Reform (Feb. 21, 2018) [hereinafter Report].

47. *Id.* at 2.

48. *Id.* at 2–3; *see generally* Thomas H. Jackson, MAKING FAILURE FEASIBLE: HOW BANKRUPTCY REFORM CAN END "TOO BIG TO FAIL" 15–58 (Kenneth E. Scott, Thomas H. Jackson, John B. Taylor, eds., 2015) (proposing a Chapter 14 of the Bankruptcy Code for the Recapitalization, Reorganization, or Liquidation of Large Financial Institutions).

49. Report, *supra* note 46, at 2.

50. *Compare* Christopher Beddor, *Trump Hoping to Roll Back Dodd-Frank, but Treasury Offers More Sensible Option*, GLOB. TIMES (Feb. 26, 2018, 9:18 PM), http://www.globaltimes.cn/content/1090796.shtml (commenting that the Treasury report strikes a balance between new bankruptcy proposals and the OLA), *and* Aaron D. Klein, *Treasury Gets It Right: Bankruptcy Code, Dodd-Frank Can Work Together*, AM. BANKER (Feb. 28, 2018, 9:30 AM), https://www.americanbanker.com/opinion/treasury-gets-it-right-bankruptcy-code-dodd-frank-can-work-together (commending the Treasury for rejecting the notion of a choice between an amended bankruptcy scheme or the OLA), *and* Press Release, H.R. Judiciary Comm., Goodlatte and Marino Praise Treasury Report on Bankruptcy Reform (Feb. 21, 2018), https://judiciary.house.gov/press-release/goodlatte-marino-praise-treasury-report-bankruptcy-reform/ (praising the Treasury's support for new bankruptcy legislation), *with* Peter J. Wallison, *The Treasury Still Needs to Bid Adios to OLA*, WALL ST. J. (Mar. 4, 2018, 1:47 PM), https://www.wsj.com/articles/the-treasury-still-needs-to-bid-adios-to-ola-1520189245 (stating it would be a mistake to keep the flawed OLA as a backstop), *and* Norbert Michel, *Treasury Disappoints Again on Dodd-Frank – Calls for Supporting Too Big to Fail Firms*, FORBES (Feb. 26, 2018, 1:15 PM), https://www.forbes.com/sites/norbertmichel/2018/02/26/treasury-disappoints-

II. CRITICISMS OF THE OLA AND ALTERNATIVE BANKRUPTCY PROPOSALS

A. CRITICISMS OF THE OLA

The OLA has prompted criticism for enabling the very thing it was meant to prevent: taxpayer-funded bailouts.[51] A key argument is that any government-supervised resolution regime will inevitably lead to bailouts in which taxpayer funds are at risk.[52] Instead of preventing bailouts, the OLA institutionalizes them.[53] Critics argue that the OLA effectively gives some firms a "too big to fail" status, which encourages them to take more risk and necessitates government intervention if they fail.[54] This behavior presents a moral hazard, in that individuals sheltered from the negative consequences of precarious behavior will be tempted to take more risks.[55] Under the OLA, once a large financial firm is placed into receivership, the FDIC can use government funds to keep a firm running during the resolution process.[56] Financial firms are incentivized to become "too big to fail" and to qualify for the OLA because the market would provide them with cheaper cost funding.[57] So long as market participants perceive that the government will become involved in times of crisis, they will be tempted to engage in risky behavior, which will make a crisis more likely and force the government to "again resort to extraordinary measures to avoid it."[58]

Furthermore, adversaries argue the OLA gives "unelected bureaucrats" broad power to overtake a faltering firm and wind it down in a manner that unfairly pays some creditors while foisting losses on others.[59] More so, such decisions are made "behind closed doors" and offer no way for the firm, its creditors or the public to formally object.[60] The FDIC's ability to treat similarly situated creditors differently under the OLA exemplifies the cause of such skepticism.[61] This discretion leaves market participants guessing as

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again-on-dodd-frank-calls-for-supporting-too-big-to-fail-firms/#7d7c5561625a (reacting to the Treasury Report as "puzzling and utterly disappointing"), *and* Press Release, H. R. Fin. Servs. Comm., Hensarling: Treasury Report 'Inconsistent' With President's Core Principle on Dodd-Frank Bailouts (Feb. 21, 2018), https://financialservices.house.gov/blog/?postid=403087 (expressing regret in the Treasury's failure to recommend repeal of the OLA).

51. CHOICE Act Summary, *supra* note 45, at 21.

52. *See* MARTIN N. BAILY & DOUGLAS J. ELLIOTT, IN ACROSS THE GREAT DIVIDE: NEW PERSPECTIVES ON THE FINANCIAL CRISIS 165, 189–90 (Martin N. Baily et al. eds., Hoover Institution Press 2014), http://www.hoover.org/sites/default/files/across-the-great-divide-ch9.pdf.

53. CHOICE Act Summary, *supra* note 45, at 21.

54. Schroeder, *supra* note 41.

55. Steven L. Schwarcz, *Too Big to Fool: Moral Hazard, Bailouts, and Corporate Responsibility*, 102 MINN. L. REV. 761, 761 (2017).

56. *See* Klein, *supra* note 3.

57. *Id.*

58. CHOICE Act Summary, *supra* note 45, at 22.

59. *Id.* at 29.

60. *Id.*

61. *Id.* at 28.

to how the FDIC may choose to resolve failing firms because the FDIC is not required to be transparent and consistent.[62] The FDIC has also indicated it may use a proposed "single point of entry" (SPOE) approach.[63] Under this approach, only the parent holding company of a failed firm would be placed in receivership, and its operating subsidiaries would be recapitalized and kept open for business.[64] However, the SPOE approach is fairly new and untested, and implementation of such a method could pose challenges.[65] For example, if too many of the holding company's assets are transferred to various subsidiaries in advance, then no resources will be left to fund subsidiaries that encounter unexpected distress.[66] Alternatively, if the holding company retains its assets, then commitments of subsidiary support may not be credible, and it will be difficult to then distribute those assets to subsidiaries later.[67] Further, the FDIC is not required to use the SPOE approach and may use any resolution scheme it sees fit given the circumstances.[68] This is the very uncertainty that led to ad hoc policies and precipitated the 2008 financial crisis.[69]

Another concern, and the primary reason for fear of another bailout, is the FDIC's authority to borrow from the Treasury's established Orderly Liquidation Fund (OLF) as a liquidity facility to resolve a failing firm.[70] Currently, under the OLA, "the FDIC can borrow up to 10 percent of the book value of the failed firm's total consolidated assets in the 30 days immediately following its appointment as receiver."[71] "After those 30 days, the FDIC can borrow up to 90 percent of the fair value of the failed firm's total consolidated assets."[72] Government regulators have assured the public that taxpayer funds will not be used in such situations, and losses will be absorbed by the private sector.[73] This means that losses should be suffered

62. *Id.* at 29.

63. Arthur Wilmarth, *'Single Point of Entry' Plan Ensures More Megabank Bailouts*, AM. BANKER (July 16, 2015, 10:00 AM), https://www.americanbanker.com/opinion/single-point-of-entry-plan-ensures-more-megabank-bailouts-tab-tab.

64. *Id.* After seizing the parent company, the FDIC would "downstream" its assets to the subsidiaries, thereby depleting shareholder value and forcing creditors of the holding company to suffer losses. Howell E. Jackson & Stephanie Massman, *The Resolution of Distressed Financial Conglomerates,* 3 RUSSELL SAGE FOUND. J. SOC. SCI. 48 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2912980. These steps allow the government to "resolve the entire group without disrupting the business operations of operating subsidiaries . . . or risking systemic consequences for the broader economy." *Id.*

65. Jackson & Massman, *supra* note 64, at 48.

66. *See id.* at 48, 53–54.

67. *See id.*

68. CHOICE Act Summary, *supra* note 45, at 29.

69. *Id.*

70. *Id.* at 25; Report, *supra* note 46, at 1.

71. CHOICE Act Summary, *supra* note 45, at 25.

72. *Id.*

73. *Id.* at 24.

by the stakeholders of the distressed firm.[74] Furthermore, regulators promise that if funds are borrowed from the Treasury, they will be backed by first claims on the firm's assets, and if that is not enough, by imposing an assessment on other large financial firms in the industry, thereby protecting taxpayers and preventing bailouts.[75] However, the government has issued such promises before, only to resort to taxpayer funds in times of crisis regardless.[76] Even if healthy firms are forced to pay for the resolutions of failed competitors, as is stipulated under the OLA, they will simply pass these costs off to consumers in the form of higher fees for financial products and services.[77] Moreover, this assessment is essentially forcing responsible firms to pay for the mistakes of their reckless counterparts, which is fundamentally unfair.[78] The mechanisms of the OLA are institutionalizing bailouts which encourages reckless behavior in the financial industry, such as borrowing too much money.[79] This behavior puts taxpayers at risk of paying to protect the economy.[80]

The OLA has yet to be triggered and it remains to be seen whether it will work as designed.[81] Additionally, no case law has been developed to assess the FDIC's use of this power. In 2015, the U.S. Court of Appeals for the District of Columbia dismissed a claim challenging the constitutionality of the OLA for lack of standing and the absence of ripeness.[82] No other cases have addressed the use of the OLA. Unfortunately, the only way the OLA can be tested is if another financial institution fails, the collapse of which would have serious adverse effects on the U.S. economic system.[83]

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74. *See* Bernanke, *supra* note 6.
75. *Id.*
76. CHOICE Act Summary, *supra* note 45, at 24.
77. *Id.* at 25–26.
78. *Id.* at 26.
79. *See id.* at 20–21.
80. *See id.*
81. Klein, *supra* note 3.
82. In *State National Bank of Big Spring v. Lew*, 795 F.3d 48, 52 (D.C. Cir. 2015), plaintiffs (including a national bank, private plaintiffs, and a group of states) sued to challenge various provisions of Dodd-Frank, one of which was the OLA. *State Nat. Bank of Big Spring*, 795 F.3d at 56. The plaintiffs argued that as investors in financial companies, the states were potential creditors in possible future liquidations or reorganizations of those financial companies, and in danger of being deprived of uniform treatment to which they are entitled to as creditors. *Id.* Further, the plaintiffs argued that their current investments were worth less now because of the danger of unfair treatment. *Id.* The court held it was premature to consider the legality of how the government might use the OLA in a potential future proceeding. *Id.* The court also held that the plaintiffs failed to sufficiently allege or demonstrate that their current investments were worth less now because of the government's new orderly liquidation authority, and plaintiffs cited no authority for such a pre-bankruptcy lawsuit. *Id.*
83. Bankruptcy is the preferred resolution mechanism, and the OLA is triggered only in extreme circumstances when multiple large firms fail simultaneously and their resolution under bankruptcy law would have serious adverse effects on the financial stability of the United States. *See* Paul L. Lee, *The Case Against Repealing Title II of the Dodd-Frank Act*, THE CLS BLUE SKY BLOG (Dec. 12, 2016), http://clsbluesky.law.columbia.edu/2016/12/12/the-case-against-repealing-title-ii-of-the-dodd-frank-act/ [hereinafter Lee, *The Case Against Repealing Title II*].

B. PROPOSALS OF THE FINANCIAL CHOICE ACT AND U.S. TREASURY DEPARTMENT/HOOVER INSTITUTION

An alternative to the OLA has been put forth in the Republican-sponsored Financial CHOICE Act, which is largely parallel to a similar proposal by the Treasury and the Hoover Institution.[84] The fear of future bailouts and unease regarding government secrecy has led to the belief that resolutions of large financial institutions need to be conducted in a more fair and transparent manner through the bankruptcy court system.[85] However, the Lehman bankruptcy showed that the Bankruptcy Code in its present form is inadequate during an economic crisis.[86] To address such concerns, the CHOICE Act, by incorporating provisions of the Financial Institution Bankruptcy Act, proposes a new subchapter V within Chapter 11 of the Bankruptcy Code to accommodate the failure of large financial institutions.[87] Generally, firms entering bankruptcy receive a "stay," which prevents creditors from collecting on debts during the bankruptcy process.[88] However, the current Bankruptcy Code does not provide a stay for certain "qualified financial contracts," which were at the root of the financial crisis.[89] This allows creditors to "run"[90] on financial institutions by

84. Cox, *supra* note 43; Report, *supra* note 46, at 2–3.

85. *See* CHOICE Act Summary, *supra* note 45, at 21.

86. H. Rodgin Cohen & Michael M. Wiseman, *Resolving Resolution: A Path to End "Too Big to Fail" and Taxpayer Exposure*, BROOKINGS (Mar. 15, 2017), https://www.brookings.edu/research/resolving-resolution-a-path-to-end-too-big-to-fail-and-taxpayer-exposure/.

87. Financial Institution Bankruptcy Act of 2017, H.R. 1667, 115th Cong. §§ 1181–92 (2017); Financial CHOICE Act of 2017, H.R. 10, 115th Cong. §§ 121–23 (2017); CHOICE Act Summary, *supra* note 45, at 28. The Hoover Institution proposal similarly suggests amending the Bankruptcy Code to add a new Chapter 14 for the purpose of resolving large complex financial institutions. Report, *supra* note 46, at 25.

88. Trey Monsour, *Understanding The Automatic Stay In Bankruptcy*, LAW360 (June 25, 2014, 5:25 PM), https://www.law360.com/articles/551844/understanding-the-automatic-stay-in-bankruptcy.

89. Gordon & Roe, *supra* note 4, at 2 n.2. Currently, the Bankruptcy Code's automatic stay does not apply to qualified financial contracts due to special "safe harbor" provisions. *See* Rashmi Seth, *Federal Reserve Board and FDIC Restrict Immediate Exercise of Default Rights in Qualified Financial Contracts of GSIBs*, ARNOLD & PORTER KAYE SCHOLER LLP (Oct. 10, 2017), https://www.apks.com/en/perspectives/publications/2017/10/federal-reserve-board-restricts-immediate-exercise. "A safe harbor is a provision in a law or regulation that affords protection from liability or penalty under specific situations or if certain conditions are met." Jean Murray, *What is a Safe Harbor Law or Provision?*, THE BALANCE (updated Mar. 7, 2018), https://www.thebalance.com/what-is-a-safe-harbor-law-or-provision-398457. In a bankruptcy context, "safe harbor provisions exempt . . . certain financial and derivatives contracts from sections 362 and 365(e)(1), which, respectively, impose the automatic stay and prohibit [] enforcement to the extent those sections would prevent certain counterparties from exercising certain contractual rights to terminate, liquidate or accelerate safe harbored contracts." Sunny Singh & Adam Lavine, *ABI Chapter 11 Reform Commission Series: Shallow Harbors? An In-Depth Look at the Proposed Changes to the Safe Harbor Provisions*, WEIL BANKR. BLOG (Jan. 29, 2015), https://business-finance-restructuring.weil.com/executory-contracts/abi-chapter-11-reform-commission-series-shallow-harbors-an-in-depth-look-at-the-proposed-changes-to-the-safe-harbor-provisions/.

demanding repayments all at once, which could destroy the firm's value and have serious effects on the markets as a whole.[91] The new subchapter would permit a forty-eight hour stay for qualified financial contracts and prevent creditors from taking devastating actions against the distressed financial firms.[92] Additionally, the new subchapter provides for the use of a "bridge company"[93] to transfer assets and liabilities of the failed firm to the company over a "resolution weekend."[94] The viable assets of the firm are separated from the liabilities, allowing the firm to survive until it is able to recover and repay its debt obligations.[95] This SPOE provision, as well as other provisions, of the proposed bankruptcy subchapter is designed to mirror the SPOE option that already exists under the OLA.[96]

Furthermore, advocates of the CHOICE Act believe that bankruptcy is the preferred alternative to the OLA because it is "administered through the judicial system, by impartial bankruptcy judges . . . to guarantee due process . . . under well-settled rules and procedures."[97] Bankruptcy utilizes developed rules and procedures that interested parties can understand, whereas the FDIC's discretion under the OLA makes it unpredictable.[98] Finally, the CHOICE Act requires the Chief Justice of the U.S. Supreme Court to designate "not fewer than 10 bankruptcy judges to be available to hear a case," who will presumably have the necessary competence to handle

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90. Generally, a bank run occurs when many customers withdraw their money from a bank simultaneously due to concerns over the bank's insolvency. *Bank Run*, INVESTOPEDIA, https://www.investopedia.com/terms/b/bankrun.asp (last visited Aug. 17, 2018). Bank runs are usually the result of panic rather than true insolvency; however, mass withdrawals can push the bank to actual insolvency in a self-fulfilling prophecy. *Id.* Prior to the financial crisis, qualified financial contracts were excluded from the automatic stay to permit non-defaulting counterparties to "liquidate its contracts with the bankrupt entity immediately and minimize the ongoing risk in the market position." Lee, *Cross-Border Resolution*, *supra* note 27, at 412. However, after the Lehman bankruptcy, observers noticed that this exemption inadvertently created another type of systemic risk by fueling a wholesale "run" by non-defaulting contract counterparties. *Id.*

91. Gordon & Roe, *supra* note 4, at 2; Report, *supra* note 46, at 17–18.

92. Gordon & Roe, *supra* note 4, at 2.

93. The FDIC describes a bridge bank (or in the context of the OLA, a non-bank bridge company) as follows:

A bridge bank is a temporary national bank chartered by the Office of the Comptroller of the Currency (OCC) and organized by the FDIC to take over and maintain banking services for the customers of a failed bank. It is designed to "bridge" the gap between the failure of a bank and the time when the FDIC can implement a satisfactory acquisition by a third party. An important part of the FDIC's bank resolution process for large or complex failing bank situations, a bridge bank provides the time the FDIC needs to take control of a failed bank's business, stabilize the situation, effectively market the bank's franchise, and determine an appropriate resolution.

FED. DEPOSIT INS. CORP., MANAGING THE CRISIS: THE FDIC AND RTC EXPERIENCE 171 (1998). The FDIC establishes the bridge bank for two years with the possibility of up to three one-year extensions. *Id.* at 175.

94. Lee, *The Case Against Repealing Title II*, *supra* note 83.

95. *See id.*

96. *Id.*

97. CHOICE Act Summary, *supra* note 45, at 29.

98. *Id.*

such cases.[99] Building on the CHOICE Act proposal, the Treasury/Hoover Institution's Chapter 14 proposal suggests a designated set of district court judges to preside over the case until the assets and liabilities are transferred to the bridge company, after which "the district judge could then refer the case to a bankruptcy judge or appoint a bankruptcy judge to assist as a special master."[100] Additionally, Chapter 14 provides standing for regulators/agencies to raise and be heard on any issue in the bankruptcy case.[101]

Overall, "bankruptcy does not depend on taxpayer-provided funds to bail out, liquidate, or reorganize a failing institution."[102] Rather, bankruptcy ensures that creditors and stakeholders absorb losses of a failed firm.[103] Ultimately, the goal is to eliminate implicit government guarantees, create more market discipline, and encourage more due diligence before a large financial institution reaches the brink of collapse.[104]

III. THE CASE FOR PRESERVING THE OLA

A. MISCONCEPTIONS ABOUT THE OLA

Many criticisms of the OLA are inaccurate and mischaracterize its intent and function as they wrongly portray the OLA as a mechanism that enables, rather than prevents, future bailouts.[105] The purpose of the OLA was to "provide the necessary authority to liquidate failing financial companies that pose a significant risk to the financial stability of the United States in a manner that mitigates such risk and minimizes moral hazard."[106] First, it is worthwhile to note that the FDIC already possessed the power to resolve commercial banks, and Dodd-Frank, through the OLA, expanded this power to also cover investment banks, insurance firms, and other forms of financial institutions.[107] The primary concern is that the OLA is a "thinly disguised, taxpayer-funded bailout."[108] Because the FDIC can borrow funds from the Treasury to stabilize a large failing firm, the perception is created that the firm is "too big to fail."[109] Firms with government support will attract investors who in turn will be more willing to lend at a greater

99. Financial Institution Bankruptcy Act of 2017, H.R. 1667, 115th Cong. § 298 (2017); Financial CHOICE Act of 2017, H.R. 10, 115th Cong. § 123 (2017); Report, *supra* note 46, at 29–30.

100. Report, *supra* note 46, at 30.

101. *Id.* at 28.

102. CHOICE Act Summary, *supra* note 45, at 29.

103. *Id.* at 30.

104. *Id.*

105. *See id.* at 21.

106. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 204(a), 124 Stat. 1376, 1454 (2010) (codified in 12 U.S.C. § 5384).

107. *See* Klein, *supra* note 3.

108. *See* Bernanke, *supra* note 6.

109. *Id.*

discount than to firms without government support and will likely have a higher tolerance for poor decision-making or excessive risk-taking.[110] However, the OLA is not designed to be a bailout in that all costs of resolving the firm are borne by the private sector, particularly by shareholders, managers, and creditors.[111] Former FDIC Chairman Sheila C. Bair said, "[t]he orderly liquidation process established under Title II of the Dodd-Frank Act imposes the losses on shareholders and creditors, while also protecting the economy and taxpayer interests. . . . [T]he law's overarching public policy objective [is] to maximize market discipline and make clear that all equity and unsecured debt holders are at risk."[112] The law even expressly states that "[t]axpayers shall bear no losses from the exercise of any authority" under the OLA.[113] Current FDIC Chairman, Martin J. Gruenberg, also "warned against making significant changes to Dodd-Frank reforms" and noted that the OLA is an "essential element of a stable prudential framework."[114] Even global banks and large financial institutions, along with U.S. and European regulators, lobbied the Treasury to preserve the OLA.[115] First, the "living will" provision of Dodd-Frank is "a proactive attack on [the] 'too big to fail' problem."[116] The provision requires companies to prepare and submit a plan for a "rapid and orderly resolution in the event of material financial distress or failure" to the Fed and FDIC who review and decide whether to approve the plan as viable.[117] Furthermore, the resolution plan is evaluated by the Fed and the FDIC against the Bankruptcy Code, *not* the OLA, reflecting legislative preference for the Bankruptcy Code over the OLA.[118] This legislative intent reinforces the concept that the OLA is only to be used in extraordinary circumstances

110. *Id.*

111. *Id.*

112. Press Release, Fed. Deposit Ins. Corp., FDIC Board Issues Proposed Rule on Claims Process Under New Resolution Authority*,* F.D.I.C. PR-224-10 (Oct. 12, 2010).

113. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 214(c), 124 Stat. 1376, 1518 (2010) (codified in 12 U.S.C. § 5394).

114. Steven D. Lofchie, *United States: FDIC Chair Warns Against Weakening Dodd-Frank Requirements*, MONDAQ (Nov. 23, 2017), http://www.mondaq.com/unitedstates/x/649132/Commodities+Derivatives+Stock+Exchanges/FDIC+Chair+Warns+against+Weakening+DoddFrank+Requirements.

115. For instance, Jose Vinals, chairman of the British bank Standard Chartered, and one of the industry's most senior and influential bankers, said, "[i]t's very important to preserve the ability of the U.S. to have special procedures to intervene and resolve systemically important financial institutions when there is an emergency. . . . In exceptional circumstances you need to resort to exceptional means." Michelle Price, *Standard Chartered Chairman Urges U.S. to Preserve Bank Resolution Regime*, REUTERS UK (Oct. 12, 2017, 7:03 PM), https://uk.reuters.com/article/uk-usa-iif-scb/standard-chartered-chairman-urges-u-s-to-preserve-bank-resolution-regime-idUKKBN1CH37D. Similarly, Anthony Cimino, head of government affairs at bank lobby group, Financial Services Roundtable, stated that "large financial firms strongly support efforts to beef up the bankruptcy code but insist that regulators must retain the OLA as an extra buffer." *Id.*

116. *See* Bernanke, *supra* note 6.

117. Dodd-Frank Act § 165(d)(1), 124 Stat. at 1426 (codified at 12 U.S.C. § 5365).

118. *See* Lee, *The Case Against Repealing Title II*, *supra* note 83.

and should remain in place for that reason.[119] Another preemptive measure is to "require that [the] large financial holding companies issue substantial amounts of debt, with the advance understanding that this debt can be zeroed out or converted to equity in a resolution."[120] This debt composes the firm's "total loss-absorbing capacity (TLAC),"[121] mitigating the risk of a taxpayer bailout.[122]

Furthermore, the purported incentive to large firms to become "too big to fail" is contradicted by the fact that many firms have fought to avoid being designated by the government as a "SIFI," or a systemically important financial institution, and do not want to be perceived as "too big to fail."[123] Studies have not found any "market based discounts for large, complex financial firms as a result of the so-called 'too big to fail' advantage."[124] A large firm's ability to borrow at a lower cost than smaller competitors can be attributable to other factors, such as: "(1) economies of scale; (2) better access to debt markets; (3) larger dividend pay-out ratios; and (4) credit that is less vulnerable to market disruption."[125] Excessive risk-taking is also attributable to other factors, such as the disconnect between private and public interests.[126] Firms view risk-taking only from the standpoint of the firm and its investors.[127] Therefore, firms can engage in risk-taking ventures that have a positive expected value to their investors, but a negative expected value to the public, because systemic harm from the firm's failure would be externalized onto other market participants as well as onto the general public.[128]

Republicans have also expressed uncertainty over what resolution methods the FDIC would employ if the OLA is triggered.[129] The FDIC has developed innovative methods of resolution planning, such as the SPOE strategy.[130] As previously explained, the SPOE strategy would place only the parent holding company into resolution proceedings.[131] "This approach minimizes the complexities and conflicts that would invariably arise if multiple resolution proceedings in the United States and foreign

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119. *See* Cohen & Wiseman, *supra* note 86.

120. Bernanke, *supra* note 6.

121. It is currently estimated that U.S. global systemically important banks (G-SIBs) have an aggregate total loss-absorbing capacity amount of approximately $2 trillion, which constitutes about thirty percent of their aggregate risk-weighted assets. Report, *supra* note 46, at 16. This is a significant increase from the previous loss-absorbing capacity of five percent of risk-weighted assets. *Id.* at 16–17.

122. Bernanke, *supra* note 6.

123. *See* Klein, *supra* note 3.

124. *Id.*

125. Schwarcz, *supra* note 55, at 767.

126. *See id.* at 770.

127. *Id.*

128. *Id.*

129. CHOICE Act Summary, *supra* note 45, at 29.

130. Lee, *The Case Against Repealing Title II*, *supra* note 83.

131. *See id.*

jurisdictions had to be commenced at the level of the operating subsidiaries."[132] The SPOE approach is designed to reduce the risk of runs on the operating subsidiaries, when depositors and other short-term creditors of the subsidiary all request repayment of their funds simultaneously causing the firm to become insolvent. Rather, long-term debt (the firm's TLAC) and equity holders absorb the losses of the firm, avoiding the need to use taxpayer funds for another bailout.[133]

Another misguided concern is over the FDIC's authority to borrow funds from the Treasury.[134] As a practical matter, troubled firms need cash to maintain operations while the FDIC resolves them.[135] However, "these loans are limited in size and are *temporary* funding, *not* permanent capital."[136] In contrast to the Troubled Asset Relief Program in 2008, no provision of the OLA directs the government to inject capital into a failing firm.[137] More so, the OLF does not represent a blank check to the FDIC. The Treasury maintains control of any funding provided to the FDIC, and the Secretary of the Treasury must approve each FDIC request for such funds.[138] Any loans are required to be backed by the assets of the firm, and the Treasury maintains priority lien positions to recover funds in the resolution process, or from the financial industry thereafter.[139] If there is a "net cost" after resolution of the firm, then the FDIC imposes a fee on surviving firms to make up the difference and fully pay back the government.[140] Furthermore, if ultimate recoveries are insufficient to repay the temporary government liquidity support provided, the FDIC can recoup any "'additional payments' or excess benefits beyond the minimum recovery right received by creditors."[141] The FDIC also has the authority "to recover from any current or former senior executive or director 'substantially responsible' for the 'failed condition' of the covered financial company any 'compensation' received by such person during the 2-year period preceding the date the FDIC was appointed receiver."[142] Therefore, other banks in the financial system, creditors, executives and shareholders

132. *Id.*

133. *Id.*

134. CHOICE Act Summary, *supra* note 45, at 25.

135. Klein, *supra* note 3.

136. Bernanke, *supra* note 6.

137. *Id.*

138. Report, *supra* note 46, at 9. "The Secretary sets the terms and conditions of such funding, including the interest rate, amount and duration of the advances." *Id.*

139. Gordon & Roe, *supra* note 4, at 5; Report, *supra* note 46, at 12.

140. Klein, *supra* note 3.

141. Donald S. Bernstein et al., *A Creditor's Guide to the FDIC's Orderly Liquidation Authority*, DAVIS POLK & WARDWELL LLP, 20 (Nov. 30, 2011).

142. *Id.* The standard of care triggering recovery is negligence (ordinarily prudent person under similar circumstances). *Id.*

pay for the bailout, not taxpayers.[143] Finally, the FDIC's ability to treat similarly situated creditors differently is overstated. Pursuant to 12 C.F.R. § 380.27, holders of long-term senior debt, subordinated debt or equity interests cannot receive any additional payments that would result in those creditors recovering more than other creditors entitled to the same priority of payments under the law.[144] No creditor of any kind can receive any additional payment unless the FDIC determines that the payments meet the statutory standards.[145] Only creditors considered "essential vendors" who provide services necessary to the continuation of the receivership are eligible for favorable treatment.[146]

Bailouts may even be more, rather than less, likely if the OLA does not exist.[147] In the event of another crisis, if the OLA is not in place to quickly and efficiently resolve the distressed firm, then government officials may decide once again that a taxpayer-funded bailout is the only viable option to protect the economy.[148] The OLA "explicitly has the financial stability of the U.S. as its primary goal," and uses tools such as living wills, SPOE resolution, and other regulatory and statutory protections to accomplish this goal.[149]

B. FLAWS OF THE BANKRUPTCY ALTERNATIVE

Opponents of the OLA argue that bankruptcy should be the only channel for resolving distressed large, complex financial firms.[150] Under Dodd-Frank, "the [B]ankruptcy [C]ode is the first option for a failing financial firm, leaving Title II and OLA as a last resort."[151] Although a bankruptcy mechanism provides another adjudication option for distressed firms, a "full-blown crisis" is beyond a bankruptcy court's capacities.[152]

143. Bob Bryan, *Here's a Breakdown of the Republican Plan to Tear Up Wall Street Regulations*, BUS. INSIDER (May 3, 2017, 2:05 PM), http://www.businessinsider.com/financial-choice-act-wall-street-regulation-bill-2017-5.

144. FDIC Certain Orderly Liquidation Authority Provisions under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 C.F.R. § 380.27(b) (2017); *see also* Press Release, Fed. Deposit Ins. Corp., FDIC Board Issues Proposed Rule on Claims Process Under New Resolution Authority, F.D.I.C. PR-224-10 (Oct. 12, 2010).

145. FDIC Certain Orderly Liquidation Authority Provisions under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 C.F.R. § 380.27 (2017); *see also FDIC Board Issues Proposed Rule on Claims Process Under New Resolution Authority,* F.D.I.C. PR-224-10 (Oct. 12, 2010).

146. Report, *supra* note 46, at 33.

147. *See* Bernanke, *supra* note 6.

148. *Id.*

149. Elham Saeidinezhad, *Orderly Resolution: Dodd Frank Versus Chapter 14*, THE CLS BLUE SKY BLOG (Mar. 24, 2017), http://clsbluesky.law.columbia.edu/2017/03/24/orderly-resolution-dodd-frank-versus-chapter-14.

150. *See* Gordon & Roe, *supra* note 4, at 2.

151. Klein, *supra* note 3.

152. Gordon & Roe, *supra* note 4, at 2.

Crisis management must be conducted by regulatory authorities.[153] The CHOICE Act strips away a crucial government safeguard against systemic collapse.[154] The OLA's function as a regulatory backstop for any proposed bankruptcy alternative must be retained.[155]

Without the OLA, bankruptcy courts alone are faced with the task of navigating a crisis "in ways that they have never done before."[156] Further, the proposed CHOICE Act inadvisably makes no room for a regulatory role.[157] Regulators are forced to watch as a firm totters, and any subsequent actions will be too late to prevent massive losses.[158] Bankruptcy is unaccustomed to controlling fundamental risk in this context.[159] Its focus is on "protecting creditors, not protecting the economy, which is the priority of the OLA."[160]

Additionally, a bankruptcy judge is not as proficient as financial regulators in preparing for or reacting to widespread economic catastrophe.[161] Lack of regulatory backup could fuel financial panic rather than restore public confidence.[162] "[T]he Fed and the FDIC have extensive, granular knowledge of the balance sheets and operations of the largest firms."[163] "A judge or panel of judges could not replicate this knowledge without effectively becoming a full-fledged supervisory agency itself."[164] Furthermore, particularly in resolutions involving global institutions, some doubt bankruptcy judges' ability to coordinate successfully with foreign regulators and authorities.[165] During periods of high financial stress, there is no assurance of foreign regulator cooperation in a U.S. judicial proceeding, which may lead them to "ring-fence"[166] assets in their jurisdictions.[167] The

153. *Id.*

154. John C. Coffee, Jr., *The Financial CHOICE Act of 2017: Will Collective Amnesia Triumph?*, THE CLS BLUE SKY BLOG (May 22, 2017), http://clsbluesky.law.columbia.edu/2017/05/22/the-financial-choice-act-of-2017-will-collective-amnesia-triumph/.

155. Gordon & Roe, *supra* note 4, at 3.

156. *Id.* at 2.

157. Coffee, *supra* note 154.

158. *Id.*

159. Gordon & Roe, *supra* note 4, at 2.

160. Coffee, *supra* note 154.

161. Bernanke, *supra* note 6.

162. Gordon & Roe, *supra* note 4, at 2.

163. Bernanke, *supra* note 6.

164. *Id.*

165. *See* Lee, *The Case Against Repealing Title II*, *supra* note 83; Report, *supra* note 46, at 22.

166. "'Ring-fencing'. . . refers to limitations on the transfer of funds from institutions in a host country to their respective parent holding companies in the home country or affiliates located in other countries . . . ." Report, *supra* note 46, at 22. The incentive for a host country to ring-fence is to maximize remaining funds in the host country to cover the losses of local depositors, creditors and other stakeholders first. *Id.*

167. Adam J. Levitin, *Treasury's Bankruptcy Plan Would Mean More, Not Fewer, Bailouts*, AM. BANKER (Feb. 23, 2018, 12:30 PM), https://www.americanbanker.com/opinion/treasurys-bankruptcy-plan-would-mean-more-not-fewer-bailouts.

elimination of the OLA may encourage such behavior.[168] Under the OLA, "the FDIC will have prior understandings with foreign regulators," which will help prevent runs on foreign subsidiaries of distressed U.S. firms and avoid "global financial contagion."[169]

Finally, the availability of liquidity is an important aspect of any resolution process, including bankruptcy.[170] Liquidity is imperative to "stabiliz[e]" and "maintain critical operations as the firm is restructured."[171] Neither bankruptcy judges nor private markets can provide with certainty the necessary liquidity to quash financial contagion.[172] Bankruptcy assumes that liquidity can be provided through debtor-in-possession financing from the private sector; however, financing may not be available for a "large, complex financial institution whose assets are hard to value," particularly with simultaneous failures across an industry.[173] While liquidity is generally available in stable economic conditions, sources of such liquidity can disappear altogether in a crisis.[174]

Thus, liquidity funding must be available from the government, and only the OLA provides access to such support.[175] "Public knowledge of the availability of this [government] backstop would be essential to stabilizing the financial system and maintaining public confidence in the American financial structure . . . ."[176] Relying on bankruptcy as the exclusive mechanism for resolving enormous financial institutions with global reach is a "reckless gamble with the stability of the U.S. financial system" considering its lack of expertise, coordination and liquidity capabilities in times of high financial stress.[177]

IV. THE BEST PATH FORWARD

The OLA should not be repealed in its entirety as it serves as an essential backstop during a potentially catastrophic financial crisis.[178] However, amendments to both the Bankruptcy Code and the OLA will allow both mechanisms to work more effectively during such a crisis while reducing the risk of another taxpayer bailout. "A principal cause of both the financial crisis of 2008 and the government's 'too big to fail' response was

168. Report, *supra* note 46, at 22.
169. Gordon & Roe, *supra* note 4, at 3.
170. *See* BAILY & ELLIOTT, *supra* note 52, at 191; *see also* Levitin, *supra* note 167.
171. Gordon & Roe, *supra* note 4, at 5; *see* Bernanke, *supra* note 6.
172. Gordon & Roe, *supra* note 4, at 5; *see also* Levitin, *supra* note 167.
173. Klein, *supra* note 3; BAILY & ELLIOT, *supra* note 52, at 191.
174. Martin N. Baily, *Did Policymakers Get Post-Crisis Financial Regulation Right*, BIPARTISAN POL'Y 10 (Sept. 25, 2016), https://bipartisanpolicy.org/library/post-crisis-financial-regulation/.
175. *See* BAILY & ELLIOTT, *supra* note 52, at 191; *see also* Gordon & Roe, *supra* note 4, at 5.
176. Gordon & Roe, *supra* note 4, at 5.
177. *Id.*
178. *See id.* at 2.

the absence of an effective resolution framework for major financial service companies."[179] "[I]nconsistent approaches by government authorities for individual companies produced confusion, perceptions of fundamental unfairness and, ultimately, systemic consequences to the industry and the economy, as well as taxpayer exposure."[180] The OLA was created to avoid repeating these mistakes, but as previously mentioned, bankruptcy is the preferred resolution mechanism.[181] Importantly, "bankruptcy alone cannot handle a financial crisis" resulting from the simultaneous collapse of banks or other large, complex financial institutions.[182] On the other hand, there are valid questions about the OLA's lack of transparency and risk exposure to taxpayers emanating from the use of Treasury funds.[183]

Therefore, an effective approach going forward is to implement amendments to the Bankruptcy Code, as well as preserve the OLA to serve as a safety net and last resort if bankruptcy resolution attempts fail.[184] Bankruptcy can provide the substantive and procedural provisions of the Bankruptcy Code with which creditors are familiar and comfortable, and the OLA can serve as backstop capable of providing crucial temporary liquidity if a crisis escalates.[185]

First, regulators must retain the authority to place a distressed financial institution into receivership.[186] Bank executives are incentivized to resist initiating any form of restructuring in hopes that the economy or the firm will recover first.[187] Such a delay can be fatal in a crisis in that most of the value of a firm's remaining assets are destroyed before any restructuring plan is implemented.[188] Therefore, if regulators determine there is a serious risk of systemic collapse, the FDIC must be allowed to act swiftly and decisively to prevent financial contagion from spreading. However, the FDIC's responsibility and duties should only extend to the transfer of assets and liabilities to a bridge company and managing the bridge company until it can be returned to private ownership.[189] From this point, adjudication of subsequent claims against the receivership should be handled in the transparent and fair process provided in bankruptcy court.[190]

179. Cohen & Wiseman, *supra* note 86.
180. *Id.*
181. *Id.*
182. Mark J. Roe, *Why Regulators are Needed to Handle Failed Banks*, N.Y. TIMES (June 6, 2017), https://www.nytimes.com/2017/06/06/business/dealbook/why-regulators-are-needed-to-handle-failed-banks.html.
183. *See* CHOICE Act Summary, *supra* note 45, at 21, 30.
184. Gordon & Roe, *supra* note 4, at 3.
185. Cohen & Wiseman, *supra* note 86.
186. *See* Roe, *Why Regulators are Needed to Handle Failed Banks*, *supra* note 182.
187. *Id.*
188. *Id.*
189. Report, *supra* note 46, at 35.
190. *Id.* at 34–35.

The urgency of a crisis should not deprive distressed firms of due process. As explained previously, a distressed firm may force the Secretary of the Treasury to petition the U.S. District Court for the District of Columbia to appoint the FDIC as receiver for the firm.[191] The firm may then appeal the district court's decision to the Court of Appeals for the District of Columbia within thirty days.[192] However, the appeal would not stay the district court's order authorizing the Secretary to appoint the FDIC as receiver.[193] Therefore, the FDIC will almost certainly have already taken substantial steps to resolve the firm before an appeal is even heard, thereby depriving the firm of an effective remedy should the Court of Appeals overturn the district court's decision.[194] The firm should retain a fair opportunity to obtain meaningful relief from the Court of Appeals; however, in an economic crisis, time is of the essence. Therefore, an appeal should be made within three days of the district court's decision and the case must be heard by the Court of Appeals on an expedited basis no later than seven days of the appeal. This will provide the firm a realistic possibility of remedy before substantial reorganization has been carried out by the FDIC.

Bankruptcy is the preferred mechanism for resolving distressed financial institutions because it provides transparency and due process to all parties involved.[195] However, the current Bankruptcy Code must be made more robust to effectively restructure a large, complex institution.[196] Applying the automatic "stay" to qualified financial contracts, as proposed in the CHOICE Act, is an effective starting point.[197] This will prevent creditors from making devastating runs on the distressed firm, giving it the necessary time to restructure and avoid complete collapse.[198] Additionally, aspects of the SPOE strategy, such as the use of a bridge company, should also be incorporated into the Bankruptcy Code.[199] This mechanism allows viable assets of a company to be transferred and continue operating and generating profits without being taken down along with the failing aspects of the firm.[200]

A Bankruptcy Code amendment should also include a provision that allows the Fed, FDIC, or other U.S. regulators with financial expertise to be appointed as special masters, or at least grant them standing to raise issues and be heard in any bankruptcy proceeding involving a large, complex

191. Lee, *Cross-Border Resolution*, *supra* note 27, at 420.
192. *Id.* at 421.
193. *Id.*
194. *Id.*
195. *See* CHOICE Act Summary, *supra* note 45, at 29.
196. *See* Gordon & Roe, *supra* note 4, at 4.
197. *See id.* at 2; Report, *supra* note 46, at 25–26.
198. *See* Gordon & Roe, *supra* note 4, at 2.
199. *See* Report, *supra* note 46, at 26.
200. *See* Lee, *Cross-Border Resolution*, *supra* note 27, at 425.

financial institution.[201] This would provide the courts with invaluable financial expertise and resources to boost public confidence and ensure that bankruptcy proceedings align with industry expectations in the United States and abroad.[202]

Even with a more robust Bankruptcy Code, a bankruptcy court will still face considerable difficulty finding the necessary liquidity to facilitate reorganization during a financial crisis.[203] The OLA is the only assured and guaranteed source of liquidity.[204] Therefore, as part of any proposed new bankruptcy chapter, a debtor-in-possession should be permitted to request funding from the Treasury when it is apparent that private financing is unavailable or insufficient.[205] In a crisis, counterparties and foreign authorities must feel secure that the OLA will step in to provide liquidity to prevent bank runs and ring-fencing.[206] Again, the probability that regulators exercise this power is low considering numerous developments, including TLAC and resolution planning (i.e., living wills) requirements, as well as the adoption of the SPOE strategy.[207]

The Report also seeks to repeal the tax-exempt status of bridge companies formed in the resolution process, but the more practical approach is to limit the duration of this status.[208] A newly-formed bridge company is already burdened with priority debt obligations to the Treasury and piling on tax obligations before market confidence is restored may cause uncertainty about the bridge company's ability to survive. Alternatively, the tax-exempt status should be maintained until OLF advances are repaid (by the firm or through an assessment on the industry), and the firm has regained financial health.

Finally, the amount of funds the FDIC is authorized to borrow from the Treasury causes fear of another bailout.[209] As mentioned previously, the FDIC can initially borrow ten percent of the firm's value, and then ninety percent of the firm's value after the first thirty days of receivership.[210] The OLA requires that any borrowed funds be secured by collateral assets of the firm, and the Treasury maintains priority lien position to be paid back before any other creditors through the resolution process.[211] If there still remains a "net cost" after resolution, an assessment or fee is levied on the

201. Cohen & Wiseman, *supra* note 86; Report, *supra* note 46, at 28.
202. Cohen & Wiseman, *supra* note 86; *see* Gordon & Roe, *supra* note 4, at 3.
203. Gordon & Roe, *supra* note 4, at 5.
204. *Id.*
205. *See* Jackson, *supra* note 48, at 28.
206. *See* Report, *supra* note 46, at 31–32.
207. *Id.* at 31.
208. *Id.* at 36.
209. *See* CHOICE Act Summary, *supra* note 45, at 25.
210. *Id.*
211. Cohen & Wiseman, *supra* note 86.

other major members of the financial industry to make up the difference.[212] There is a need for the enhancement of protection to further ensure that taxpayers are never exposed to risk.[213] Temporary liquidity is necessary initially to keep a firm from collapsing overnight; however, once a firm has survived this critical period, further resolution costs or losses must be absorbed by stakeholders and creditors in the private sector. Therefore, the FDIC should be limited in the amount of funds it can provide to a firm after its first thirty days of receivership. Capping the amount that the FDIC can borrow to seventy-five percent of the fair value of the failed firm's total consolidated assets will still provide a substantial source of liquidity, while preventing firms from implicitly relying on unlimited government bailouts and motivate private funding. Additionally, the ex-post assessment on the industry is only imposed on firms with "total consolidated assets of $50 billion or more."[214] This threshold should be reduced to firms with total consolidated assets of $25 billion or more, which will expand the pool from which the Treasury can recoup funds if necessary. These steps will increase the likelihood that creditors, shareholders and the remaining private sector absorb their share of losses before any government funds are used. If such measures are put in place, bankruptcy and the OLA can work together to achieve the ultimate goal of preventing another financial crisis and use of a taxpayer-funded bailout.

CONCLUSION

The OLA should not be repealed in its entirety. It provides crucial and necessary liquidity in times of high financial stress, as well as financial expertise and coordination benefits that a bankruptcy court simply cannot match. However, bankruptcy should remain the primary and preferred resolution mechanism. The Bankruptcy Code can be made more robust by implementing a forty-eight hour stay for qualified financial contracts and allowing the use of bridge companies to transfer the viable operating assets of a distressed firm to a successor entity. However, the threat of economic catastrophe occurs only when multiple firms are in danger of failing simultaneously. Despite a more robust Bankruptcy Code, bankruptcy courts are still incapable of handling a widespread economic crisis. Therefore, the OLA must remain intact, as it serves as a backstop to be used in emergency situations when all other resolution remedies fail. The OLA prevents economic collapse and the use of taxpayer funds in the form of another bailout.

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212. Klein, *supra* note 3.
213. *See* Cohen & Wiseman, *supra* note 86.
214. Lee, *Cross-Border Resolution*, *supra* note 27, at 423.

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