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House Passes Financial Regulatory Reform Legislation

On December 11, the House of Representatives passed H.R. 4173, the “Wall Street Reform and Consumer Protection Act of 2009” (see [H.R. 4173 as introduced](#)), by a vote of 223 to 203. Twenty-seven Democrats voted against the bill and no Republicans voted in favor of the bill.

House passage came quickly after the House Financial Services Committee (“HFSC”) reported the last bills in the regulatory reform package on December 2. Over 240 amendments were filed with the House Rules Committee ahead of Floor consideration (see [Rules and Committee Reports](#)). Nearly 60 of the amendments were incorporated into the Manager’s Amendment and 35 of the amendments were considered on the Floor.

Systemic Risk

The legislation would create a Financial Services Oversight Council (“FSOC”), which would be responsible for identifying and regulating systemic risk. The FSOC and the Federal Reserve would be jointly responsible for imposing higher regulatory and capital standards on financial institutions identified as posing a systemic risk.

Several amendments were filed pertaining to H.R. 4173’s more controversial systemic risk provisions; the amendments, however, were not included in the rule governing the Floor debate and amendment of the bill. In the bill as passed, the FSOC would have the authority, in certain cases of serious systemic risks, to limit the size of and dismantle financial institutions. Additionally, the legislation would establish an enhanced authority for the Federal Deposit Insurance Corporation (“FDIC”) to resolve failing financial institutions that pose a systemic risk. The legislation would create a \$150 billion resolution fund, which would be funded by an assessment on financial firms with at least \$50 billion in assets.

Consumer Financial Protection Agency

The legislation would create a Consumer Financial Protection Agency (“CFPA”) to protect consumers from unfair and abusive financial products and services. The Manager’s Amendment, which was adopted, included provisions that clarified the authority of the CFPA. Specifically, the bill as passed would prohibit the CFPA from exercising authority over merchants, retailers, and sellers of non-financial services. Additionally, the bill as passed would clarify that the CFPA would only be able to issue product-specific rules for non-bank products.

The Manager's Amendment also included a compromise measure on preemption, which had been an issue of significant debate during the HFSC's consideration of the CFPA Act. Under the Manager's Amendment, states would be allowed to adopt more stringent consumer protections than those put in place by the CFPA. The Manager's Amendment, however, would provide the Office of the Comptroller of the Currency ("OCC") with the authority to make a case-by-case preemption determination, in consultation with the CFPA, on standards that it determines materially affect bank operations.

The House rejected an amendment offered by Congressman Walter Minnick (D-ID) and other Democrats which would have replaced the CFPA with a 12-member council housed at the Treasury Department.

Over-the-Counter ("OTC") Derivatives Markets

The House agreed to amendments modifying the provisions regulating OTC derivatives. The House approved an amendment filed by HFSC Chairman Barney Frank (D-MA) clarifying the Commodity Futures Trading Commission's ("CFTC") jurisdiction over non-security-based swaps and the Securities and Exchange Commission's ("SEC") jurisdiction over security-based swaps. The amended bill would require that a derivatives clearinghouse accept a swap for clearing if the CFTC or SEC has determined that clearing is mandatory for the swap. Under the amended legislation, the CFTC would also be required to establish position limits on swaps that perform a significant price discovery function, though the CFTC would be authorized to provide exemptions to position limits. The CFTC would also be required to set aggregate position limits across all markets.

The House accepted an amendment filed by Congressmen Scott Murphy (D-NY), Mike McMahon (D-NY), and Frank Kratovil (D-MD) which narrows the definition of "major swap participant" so that end-users who are neither a major swap dealer nor pose a systemic risk would be exempt from the requirements of the legislation. Also approved was a controversial amendment

offered by Congressman Stephen Lynch (D-MA) which would bar financial holding companies from acquiring ownership directly or indirectly in a derivatives clearinghouse if after the transaction the financial holding company would hold more than 20 percent ownership in the clearinghouse.

Other Amendments

The House-passed bill strikes language that would have permitted the Financial Industry Regulatory Authority ("FINRA") to regulate investment advisers that are associated with broker-dealers.

On the issue of private fund registration, the House accepted an amendment filed by Congresswoman Stephanie Herseth Sandlin (D-SD) which would require the SEC to take into account the risk profile of different types of private funds when it determines the private fund registration regime.

Next Steps

Now that the House has completed its consideration of the financial regulatory reform package, attention turns to the Senate. Senate Banking Chairman Chris Dodd (D-CT) released a [discussion draft](#) of the Senate legislation, the "Restoring American Financial Stability Act of 2009," on November 10 (for additional information, see K&L Gates alert [Senator Dodd Releases Financial Reform Proposal: The Restoring American Financial Stability Act of 2009](#)). With the impending Congressional holiday recess, the Committee is unlikely to begin marking up the legislation until it returns in mid-January. The markup is expected to take several weeks, followed by a lengthy conference proceeding to reconcile the differences in the House and Senate bill.

Please see previous K&L Gates updates, including [Financial Regulatory Reform Legislation Moves to House Floor](#) and [Redoubling Efforts on the Financial Reform Debate: House Approaches Floor Vote, While Senate Gets Underway](#), for additional information and background about the reform effort. In addition, please see the K&L Gates [Global Financial Market Watch Blog](#) for detailed analysis on many of the Obama proposals and future updates.

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