Widener University
Delaware Law School

Bruce Grohsgal
Professor of Law

Statement of

Bruce Grohsgal
Helen S. Balick Professor
in Business Bankruptcy Law

Submitted to the United States Senate Committee on the Judiciary
Regarding the Committee's Hearing on

"Big Bank Bankruptcy: 10 Years After Lehman Brothers"

and S.___. the "Taxpayer Protection and Responsible Resolution Act"

November 13, 2018
2:00 p.m.
Dirksen Senate Office Building 226

Widener University Delaware Law School, 4601 Concord Pike, Wilmington, DE 19803-0406
o: 302-477-2138 e: bgrohsgal@widener.edu delawarelaw.widener.edu

Background Statement

Bruce Grohsgal is the Helen S. Balick Professor in Business Bankruptcy Law at Widener University, Delaware Law School, where he teaches bankruptcy, contracts, secured transactions, and financial regulation, and is the Director of the Institute of Delaware Corporate and Business Law.

Prior to joining the Delaware Law School faculty in 2014, Professor Grohsgal was in private practice for more than 30 years, most recently as a partner in the Wilmington, Delaware office of Pachulski Stang Ziehl & Jones, LLP. He has represented numerous debtors, committees, trustees and other parties in chapter 11 business bankruptcy cases.

Professor Grohsgal was Chair of the Bankruptcy Section of the Delaware State Bar Association from 2008-2009, and was a Senior Fellow at Americans for Financial Reform, Washington, D.C. from October 2012 to January 2013.

Professor Grohsgal's publications include: *Case in Brief against Chapter 14*, American Bankruptcy Institute Journal, Vol. XXXIII, No. 5, May 2014, also available at Harvard Law School Business Bankruptcy Roundtable, June 17, 2014, http://blogs.law.harvard.edu/bankruptcyroundtable/page/3/; *Why Recent SPOE Bills for SIFIs Fail*, American Bankruptcy Institute Journal, Vol. XXXIII, No. 12, December 2014; and *How Absolute is the Absolute Priority Rule in Bankruptcy? The Case for Structured Dismissals*, 8 Wm. & Mary Bus. L. Rev. (2017). His article *Absolute Priority Redux: First-Day Orders and Pre-Plan Settlements Post*-Jevic, is scheduled for publication in the William & Mary Business Law Review in December 2018. For 15 years he has authored or co-authored the annual chapter on bankruptcy sales and financing, "Sections 363 and 364 – Use, Sale or Lease of Property and Obtaining Credit," in the *Norton Annual Survey of Bankruptcy Law*.

Professor Grohsgal received his J.D. in 1980 from Columbia University School of Law, and his B.A. in 1977 from Brandeis University.

Professor Grohsgal has not received any federal grants or other compensation in connection with this statement, and is not submitting this statement on behalf of any organization. The views expressed in this statement are solely his own.

CONTENTS

Chairman Grassley, Ranking Member Feinstein, Members of the Committee:

Thank you for inviting this statement on "Big Bank Bankruptcy: 10 Years After Lehman Brothers" and the proposed bill, S.___ "To amend title 11 . . . to provide for the liquidation, reorganization or recapitalization of a covered financial corporation, and for other purposes," the "Taxpayer Protection and Responsible Resolution Act." The proposed bill (the "Bill") would create a new chapter 14 of the Bankruptcy Code for eligible financial institutions.

I continue to have serious concerns about the Bill and whether it can adequately address the problems of the failure of large financial institutions.

I. Introduction – Single Point of Entry and the Bill

The goal of the Bill is to facilitate the resolution of a distressed financial institution under the Bankruptcy Code. The Bill would accomplish this through a new chapter 14 of the Bankruptcy Code and a "single point of entry" strategy to the financial institution's resolution.

In the typical single point of entry bankruptcy, only the bank holding company or other top-tier parent of the distressed financial institution would file for bankruptcy. Its U.S. and foreign operating subsidiaries, by contrast, would *not* commence bankruptcy cases under U.S. or other law, but would continue to operate outside of bankruptcy. The bankrupt top-tier parent would promptly transfer – likely within 48 hours of the filing – the equity in its solvent subsidiaries and certain other of its assets to a newly-formed bridge company.

Under this approach, insolvent subsidiaries and unsecured debt, such as trade debt and unsecured bonds and notes, are left behind in the bankruptcy estate. The Bill envisions that the new bridge company will be freed from many of failed financial institution's liabilities, and thus presumably will have a stronger balance sheet against which it can obtain new financing, making governmental intervention and a taxpayer bailout less likely.

The bridge company, upon completion of the transfers to it pursuant to the Bill, will immediately commence operations, without further bankruptcy court supervision.

The Bill recognizes that the current Bankruptcy Code is not optimally designed for the orderly resolution of a large financial institution in a manner that mitigates systemic risk. First, as a result of "safe harbors" enacted with respect to many kinds of repurchase agreements ("repo"), derivatives, and other financial contracts over the past several decades, the Bankruptcy Code does not stay the counterparties to financial contracts from exercising their pre-bankruptcy contractual rights to liquidate their collateral and positions.[1] Thus, runs on a distressed financial institution are encouraged, rather than stayed, on these repo transactions, derivatives, and other financial contracts, and on any property that the debtor posted as collateral to back its obligations under them. Second, the mitigation of systemic risk is not one of the purposes of bankruptcy law that a bankruptcy judge must consider in deciding a motion or other matter in a bankruptcy case.[2]

The key provisions of the Bill aimed at containing the contagion of a financial panic are a 48-hour stay of counterparties' actions under repo transactions, derivatives, and other qualified financial contracts (to enable the top-tier debtor financial institution to make the transfers to a newly-formed bridge company), and a provision that expressly authorizes the bankruptcy judge to take into account the extent to which her or his ruling on the motion

[1] The automatic stay is set forth in Bankruptcy Code section 362(a). 11 U.S.C. § 362(a). The counterparties to repurchase agreements, derivatives, and other financial contracts are exempted from the automatic stay by the "safe harbors" set forth in the Bankruptcy Code, at 11 U.S.C. §§ 362(b)(6), (7), (17) and (27), and 362(o).

[2] The purposes of chapter 11 are maximize the value of the bankruptcy estate and the distributions to creditors, *Fla. Dep't of Revenue v. Piccadilly Cafeterias*, 554 U.S. 33, 51 (2008), and to preserve businesses as going concerns. *Bank of Am. v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999) (Section 1129(b)(2)(B)(ii) of the Bankruptcy Code is "intended to reconcile the two recognized policies underlying Chapter 11, of preserving going concerns and maximizing property available to satisfy creditors."); *Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343, 352–53 (the trustee "has the duty to maximize the value of the estate," "an important goal of the bankruptcy laws"); *Kothe v. R.C. Taylor Tr.*, 280 U.S. 224, 227 (1930) ("The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate among creditors holding just demands based upon adequate consideration. Any agreement which tends to defeat that beneficent design must be regarded with disfavor.").

for approval of the transfers to the bridge company will mitigate risk to the financial system.

The premise behind the Bill appears to be that, under bankruptcy court supervision, a chapter 14 debtor will be able to restructure its debt by transferring its assets to a bridge company using the single point of entry approach enabled by the Bill. The key assumption behind the Bill is that the successor bridge company will have sufficient liquidity by which to prevent a run on the assets transferred to it by the debtor, including by obtaining new financing in the private credit markets, without the need for a taxpayer or other governmental bailout.

I focus in this statement on the significant shortcomings in the Bill regarding both bankruptcy court supervision and the liquidity and the strength of the balance sheet of the successor, bridge company. I urge revisions to the proposed legislation without which, I argue, the Bill should not be passed.[3]

II. The Bill Deprives the Bankruptcy Court of its Power to Supervise the Chapter 14 Debtor

Once a debtor has filed for bankruptcy under current bankruptcy law, it is under supervision of the bankruptcy court with respect to its making transfers or incurring obligations – such as a sale or other transfer of its business assets or incurring new debt – that are out of the ordinary course of the debtor's business.[4] The bankruptcy court by

[3] Prior versions of the Bill included provisions exculpating the bankrupt company's directors from liability to its regulators, shareholders, creditors, or other parties in interest for "good faith" actions taken by those directors in contemplation of or in connection with the filing of the bankruptcy case or the transfers to the bridge company. Such a "no liability" safe harbor for the directors of a failing financial institution does not exist under the Bankruptcy Code for the directors of other kinds of companies, would increase moral hazard, and would deprive the financial regulators of essential powers under Dodd-Frank, including the FDIC's authority under section 210(s) of Dodd-Frank to claw back the compensation of directors who were responsible for the failure of the financial institution. 12 U.S.C. § 5390(s)(1). I understand that the Bill currently proposed revises this provision, particularly by expressly preserving the FDIC's power under section 210(s) of Dodd-Frank, and thus I have not considered it here.

[4] 11 U.S.C. § 363(b) and (c)).

such authority can protect the debtor's creditors and estate. Key to this supervisory authority, the bankruptcy court may reverse any such transfer made or obligation incurred that a debtor makes post-petition in violation of this requirement. Thus, Bankruptcy Code section 549 provides that the court made avoid, i.e., reverse, any post-petition transfer made or obligation incurred by the debtor that was not authorized under the Bankruptcy Code or by an order of the bankruptcy court.[5]

The chapter 14 Bill unnecessarily deprives the bankruptcy court of its essential supervisory power in a chapter 14 case, by providing that any transfer made or obligation incurred by the debtor to an affiliate in contemplation of or in connection with a transfer to the bridge company is *not* avoidable under Bankruptcy Code section 549 or other provisions of the Bankruptcy Code or any similar non-bankruptcy law. No such provision exists with respect to chapter 11 or any other chapter of the Bankruptcy Code.[6]

I urge the revision of the Bill to eliminate this provision. This provision would create a bankruptcy proceeding in name only, in which court supervision is a pretense and the debtor's officers and directors are free to do as they please, even if the court finds that their actions are not in the interest of the debtor's estate or creditors and do not mitigate the risks to the financial system. Any proposed post-petition transfer or obligation that the debtor proposes to make or incur should be subject to the approval of the bankruptcy court. The bankruptcy court can then determine whether to authorize the transfer or obligation because it is the best interest of the debtor's estate and creditors or is otherwise in accordance with the Bankruptcy Code, including because, under chapter 14, it will mitigate risk to the financial system and thus make a financial crisis less likely.[7]

[5] 11 U.S.C. § 549.
[6] The Bill also undermines the bargained-for, prepetition rights of third parties who did business with the debtor and its affiliates. Fraudulent conveyance law protects such creditors by providing that a transfer made by an insolvent company for less than "reasonably equivalent value" prior to the filing of a bankruptcy case is avoidable. 11 U.S.C. § 548(a)(1)(B); Uniform Fraudulent Transfer Act § 5. The Bill deprives those creditors of their ability to avoid such transfers.
[7] As noted, the chapter 14 Bill presently contains a provision that expressly authorizes the bankruptcy judge to take into account the extent to which her or his ruling on the motion for approval of the transfers to the bridge company will mitigate risk to the financial system.

III. The Bill Decreases the Bridge Company's Liquidity and Ability to Restructure its Obligations and thus Increases the Likelihood of a Taxpayer Bailout

The Bill does not solve the problem of post-petition liquidity for the distressed financial institution. It actually makes the problem worse.

A major threat to the successful resolution of a large and failing financial institution is its inability to obtain sufficient liquidity and financing for its bankruptcy case and its postpetition operations. The size and cash needs of the firm and the likelihood that the values of financial assets will have decreased and that other financial institutions will be under stress and short on cash at the same time can be expected to decrease liquidity and to make the necessary financing difficult to obtain in the credit markets. This difficulty makes direct or indirect government bailouts all the more likely.

The hope under chapter 14 is that once the "good assets" are transferred to the new bridge company, and certain liabilities are left behind in the debtor's estate, the bridge company's balance sheet will be sufficiently strong to enable it borrow in the credit markets by using these assets as collateral, which will prevent a run on the bridge company.[8] But the Bill's provisions undermine this possibility, for two significant reasons.

First, the debtor or trustee cannot transfer assets that are subject to a mortgage or other lien securing a debt, executory contract, unexpired lease or agreement (including a qualified financial contract), unless the bridge company assumes the entire debt, executory contract, unexpired lease or agreement. The Bill – contrary to the provision of the Bankruptcy Code that apply to other chapters – imposes this requirement even if the collateral is worth far less than the debt, i.e., the loan is undersecured.

Consider the following example: the debtor's assets are worth $70 billion (for any number of reasons including a decrease in collateral value in a downturn), but are subject

[8] I note that these liabilities left behind are those owed by the debtor to its ordinary, Main Street creditors, including its suppliers, rank-and-file employees and retirees, judgment creditors, and those holding unsecured bonds or notes in 401k and other retirement accounts (in addition to secondary debt traders), and that the liabilities being transferred to the bridge company for likely payment in full are those owing to financial counterparties under secured loans and repo, derivatives and other qualified financial contracts.

to a lender's $100 billion lien. The debtor in the chapter 14 case cannot transfer these assets to the bridge company unless the bridge company assumes the entire $100 billion debt and thus undertakes to repay that debt to the lender from the assets of the bridge company.

This is opposite to the treatment that the holder of the lien would receive in a bankruptcy case outside of the proposed chapter 14. Under section 506 of the Bankruptcy Code the claim of a creditor secured by a lien on certain of the debtor's property is a secured claim only to the extent of the value of the collateral, and is an unsecured claim to the extent that the value of the collateral is less than the amount of the claim.[9] The $100 billion claim in the prior example would be bifurcated under section 506 into a $70 billion secured claim and a $30 billion unsecured claim. The debtor could pay the lender the cents on the dollar that it ultimately pays to all general unsecured creditors in the bankruptcy case. In chapter 14, the $100 billion lien remains against the collateral and the bridge company becomes obligated to pay the $100 billion in full, regardless of the value of the lender's collateral.

Second, a financial institution in a chapter 14 proceeding will have an unrealistic period of time within which to determine whether to assume or reject its repo transactions, derivatives, and other qualified financial contracts. Bankruptcy Code section 365 authorizes a debtor, with court approval, to assume advantageous contracts and preserve the value and benefit of those contracts for the estate, and to reject disadvantageous contracts and walk away from the debtor's obligations under those contracts.[10] Section 365 is a key to a debtor's ability to restructure and reorganize in a chapter 11 proceeding under current law.

Under the Bill, though, within *48 hours* after the case is filed the chapter 14 debtor will need to determine whether to assume and transfer to the bridge company – or reject – all of its repo, derivatives, and other qualified financial contracts, the bridge company

[9] 11 U.S.C. § 506(a)(1).
[10] 11 U.S.C. § 365(a). On rejection, the counterparty under the rejected lease or executory contract has a damage claim, but it is a general unsecured claim. General unsecured claims have no payment priority under the Bankruptcy Code, are paid after other claims are paid in full, and typically are paid cents on the dollar.

will need to determine whether to assume the debtor's obligations under these contracts (without which the transfer cannot be made), and the bankruptcy court will need to hold a hearing for approval (or disapproval) of all of these transactions. To complicate matters further, the debtor can transfer a qualified financial contract to the bridge company only if the bridge company assumes all the other qualified financial contracts between the debtor and the same counterparty on an all-or-nothing basis.

These provisions will put irresistible pressure on the chapter 14 debtor to obtain bankruptcy court approval for the transfer of all of its qualified financial contracts to the bridge company, and on the newly-formed bridge company to assume all of those obligations, within the first 48 hours of the case. The magnitude of the decisions that the debtor, the bridge company and the bankruptcy judge will need to make within the first 48 hours of the case is staggering. JP Morgan Chase, for example, currently is counterparty to nearly $50 *trillion* notional value in derivatives contracts,[11] that it assumes would require 18 months to wind down on an orderly basis in a resolution proceeding.[12] Lehman and its affiliates were party to approximately 1.2 *million* derivatives *contracts*, with approximately 65,000 counterparties, on its bankruptcy petition date.[13]

It is thus likely that the debtor will transfer and the bridge company will assume many disadvantageous contracts thus weakening the bridge company's balance sheet, and/or that the debtor will reject many advantageous contracts that would have strengthened the bridge company's balance sheet, all in the 48-hour rush to make a decision.

[11] JP Morgan Chase & Co., Annual Report 2017, Note 5 – Derivative Instruments, at 182, available at https://www.jpmorganchase.com/corporate/investor-relations/document/annualreport-2017.pdf.
[12] Even then, JP Morgan projects that only 96% of these derivatives would have been wound down by the end of the 18-month period. JP Morgan Chase & Co., Resolution Plan Public Filing 2017 at 59, available at https://www.jpmorganchase.com/corporate/investor-relations/document/resolution-plan-2017.pdf.
[13] Debtors' Disclosure Statement for Third Amended Joint Chapter 11 Plan of Lehman Brothers Holdings Inc. and its Affiliated Debtors Pursuant to § 1125 of the Bankruptcy Code, *Lehman Brothers Holdings Inc., et al.* (Bankr. S.D.N.Y. Case No. 08-13555 (JMP)), Docket No. 19629, at 33.

Once these obligations have been assumed by the bridge company, the bankruptcy court loses its jurisdiction and authority over the bridge company and the property transferred to it, and the bridge company loses any ability to further restructure its debt and other obligations in the chapter 14 bankruptcy case. This occurs because the property transferred is no longer property of the bankruptcy estate (and the bankruptcy court's jurisdiction over the property thus ends), and because the Bill expressly provides that upon entry of the bankruptcy court's order approving the transfer to the bridge company, the property transferred and the qualified financial contracts assigned shall no longer be property of the estate." The transfer to the bridge company, made within 48 hours of the chapter 14 filing, effectively ends the restructuring of the financial institution's assets and liabilities transferred.

For these reasons, the Bill decreases the likelihood that the bridge company will have the "clean" balance sheet that will enable it to obtain financing in the credit markets as hoped by the proponents of the single point of entry approach. The bridge company's balance sheet may look very much like the balance sheet of the failed company, with its assets under water and with too little cash to pay its liabilities. These provisions will hinder the bridge company's ability to find the liquidity and financing that it will need to operate and/or successfully complete an orderly resolution of its business, and will make a bailout and other emergency governmental support more likely.

I urge the following to begin the process of addressing this problem:

First, secured debt in chapter 14 should be subject to the same rules that apply in chapter 11 – the bankruptcy court determine the value of the collateral (either before or after the transfer to the bridge company), and the bridge company should be required to assume only that amount of the claim that equals the value of its collateral.

Second, the Bill should provide for a far longer stay of actions by counterparties under qualified financial contracts, so that the debtor, its counterparties and financial regulators, and the bankruptcy judge, can make informed decisions regarding the restructuring and, crucially, which qualified financial contracts the debtor will assume or reject.[14]

Third – essential to addressing the problem of financial institution insolvencies – the Bill should roll back some of the safe harbors that protect the counterparties under qualified financial contracts at the expense of ordinary creditors.

Ten years ago, these safe harbors put the financial system at risk, and they continue to do so. Numerous commentators since the crisis – both those directly involved in financial institution bankruptcies and those in the academy – have called for the end or severe limitation of the safe harbors.[15] The starting point in any chapter 14 bill should be reexamining and beginning the process of filling in some of these safe harbors.[16]

Special attention should be given to rolling back the safe harbors for mortgage-backed repo (which safe harbors were not expressly provided for in the Bankruptcy Code until 2005) and for credit default swaps (arguably nothing more than guaranties, which but for their involving financial contracts have no special safe harbor protection), and to limiting the netting requirements that apply to a debtor's assumption or rejection of qualified financial contracts with a single counterparty to qualified financial contracts of

---

[14] Counterparties to many of these transactions, including repo financing, already are protected under the Bankruptcy Code, which entitles them to seek, and the bankruptcy court to grant, adequate protection to counterparties against any diminution in the value of their collateral for the duration of the stay. 11 U.S.C. §§ 361 and 363(e).

[15] See e.g., Edward R. Morrison, Mark J. Roe and Hon. Christopher S. Sontchi, "Rolling Back Repo Safe Harbors," *Business Lawyer*, Vol. 69, 1015-47, August 2014; and David Skeel, *The New Financial Deal: Understanding the Dodd-Frank Act and Its (Unintended) Consequences*, 163 (John Wiley & Sons, 2011) ("if the special treatment of derivatives were reversed, the Dodd-Frank resolution regime would rarely, if ever, be necessary.").

[16] Defenders of the safe harbors argue that the parent entity that will be the debtor in any single point of entry bankruptcy proceeding will have no qualified financial contracts, all of which will be at the subsidiary level. There are major flaws in this argument. First, this argument relies entirely on financial regulators' requirements and the proclivities of the financial institutions, which could easily change during any period of less rigorous regulation and greater risk-taking, and also could change at a time of financial distress, including by the parent entity's deciding to shore up its key subsidiaries by guarantying or otherwise backstopping their obligations. Second, if it is certain that the parent entity-debtor will have no qualified financial contracts, then why does the Bill need to contain provisions for the transfer of those (supposedly non-existent) qualified financial contracts by the parent entity-debtor to the bridge company, and for the assumption by the bridge company of all of the parent-entity debtor's obligations under them?

the same type, e.g., the netting requirement would apply to all interest rate derivatives with a counterparty but would not extend to the credit default swaps with that counterparty.[17]

These revisions will make it far more likely that that the bridge company will have sufficient liquidity and the strong balance sheet that will enable the bridge company to obtain the financing in the credit markets that it will need to survive. Absent this liquidity and ability to borrow, it is likely that the run that began prior to the filing of the chapter 14 case will continue against the bridge company once the stay ends.

For these reasons, any chapter 14 bill should provide for: (1) the restructuring of secured debt, the collateral for which is worth less than the amount of the claim, as under the present Bankruptcy Code; (2) should extend the automatic stay applicable to qualified financial contracts to a longer, more reasonable period than the 48 hours currently proposed (with the proviso that counterparties are entitled to adequate protection as are other parties under the present Bankruptcy Code); and (3) should begin the process of rolling back the safe harbors that favor the non-debtor financial counterparties to qualified financial contracts, and should require an empirical study and report to Congress on the propriety of rolling back any remaining safe harbors.

IV. Orderly Resolution Authority under Dodd-Frank Title II

The current version of the Bill does not repeal the financial regulators' authority to place a large, failing financial institution into a Dodd-Frank title II receivership proceeding. I remain concerned that enactment of a chapter 14 bill might give some in Congress a basis on which to argue for the repeal of Dodd-Frank title II, either immediately following its enactment or at some later date, on the ground that the new

[17] Derivatives arguably are different from other contracts, because parties can and do hedge and speculate, and counter-hedge and counter-speculate on a future value, such as an interest rate, and the sum total of the contracts between two parties with respect to that future value represents their respective positions with respect to that future value. But there is no reason why the position of a debtor in its derivatives contracts with a counterparty with respect to the future rate of interest, should be tied to the parties' credit default swaps or to the future value of pork bellies.

chapter 14 addresses all of the problems of big bank failures. It is essential, in my view, that title II remain a last, if crucial, resort for the resolution of a distress financial institution in an orderly manner for the purpose of mitigating systemic risk to the financial system and reducing the risk-taking and moral hazard that led to the financial crisis 10 years ago.

Briefly, the proposed chapter 14 provides only for a very perfunctory restructuring (even if the 48-hour stay is lengthened as I propose). The tools and time available to an ordinary chapter 11 debtor, and to the FDIC in a title II proceeding, are far more likely to result in a successful restructuring. Simply put, the efforts to restructure in chapter 14 might not work, and the risks to the financial system may continue notwithstanding the chapter 14 filing, in which event the regulators will need to try to accomplish through title II what the financial institution could not accomplish in chapter 14.

Chapter 14 also does not adequately address the problem of the recalcitrant debtor. Even if the Bill provides for an involuntary filing by the financial regulators (which I understand it presently does), the directors and officers of the financial institution will remain in control as debtor in possession, and may not make the 48-hour transfers to the bridge bank that single point of entry and chapter 14 rely on to end the panic and protect the financial system. A key aspect of U.S. business bankruptcy law is that the debtor remains in control as debtor in possession, and replacing recalcitrant directors and officers with a trustee will require court approval, will take time, and will be far from automatic.

Bankruptcy law generally, and chapter 14 specifically, also do not address the problem of excessive risk-taking and moral hazard in the financial system. Dodd-Frank does so, by authorizing the FDIC to seek disgorgement of bonuses and other compensation by responsible officers and directors pursuant to section 210(s) of the title II of Dodd-Frank. Repeal of title II is also inadvisable because it would increase the moral hazard that prevailed in the financial system and led to the financial crisis 10 years ago.

V. Conclusion

Any new chapter 14 Bill designed to enable the resolution of a large financial institution through a single point of entry strategy under the Bankruptcy Code should ensure that the bankruptcy court has the authority to supervise the restructuring, and should maximize the likelihood that the bridge company will have the liquidity and ability to obtain the financing necessary to successfully restructure.

Present versions of the Bill do not accomplish this. The Bill should be revised to preserve the bankruptcy court's supervisory authority. The Bill should be further revised to treat a secured claim in excess of the value of the lender's collateral as a general unsecured claim (as does the present Bankruptcy Code), to roll back or materially amend certain of the safe harbors for repo, derivatives, and other qualified financial contracts, and to provide for a study and report to Congress on the advisability of the repeal or material amendment of the remaining safe harbors. Such provisions will make it more likely that the bridge bank will have sufficient liquidity and a strong enough balance sheet to restructure and survive, without a taxpayer bailout or other government assistance.

Even with these revisions, though, chapter 14 might not work and, in any event, the Bill does nothing to reduce moral hazard. For these reasons it is essential that the provisions of Dodd-Frank title II remain in effect, both upon any enactment of a chapter 14 bill and in the years which follow.