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## Understanding the Yoder Provision: Analyzing the Impact of Amendments to Dodd-Frank's Swaps "Push-Out" Provision

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# UNDERSTANDING THE YODER PROVISION: ANALYZING THE IMPACT OF AMENDMENTS TO DODD- FRANK’S SWAPS “PUSH-OUT” PROVISION

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## I. INTRODUCTION

On December 16, 2014, Congress enacted the Consolidated and Further Continuing Appropriations Act, 2015 (Act) to fund the federal government through the 2015 fiscal year and forestall an imminent government shutdown.<sup>1</sup> However, the content of this legislation was not limited exclusively to the allocation of funds; the Act controversially amended several provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).<sup>2</sup> In a section now known as the “Yoder provision,”<sup>3</sup> the Act amended section 716 of Dodd-Frank, which originally required certain financial institutions to “push-out” certain swap

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<sup>1</sup> Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014).

<sup>2</sup> *Id.* § 630 (amending the Dodd-Frank Wall Street Reform and Consumer Protection Act).

<sup>3</sup> The language in the Act is herein referred to as the “Yoder provision,” in reference to Kansas Congressman Kevin Yoder, who, after initially attempting to introduce the Act’s amendments to Dodd-Frank in 2013, inserted the amendments into the Act. See Jennifer Bendery, *Kevin Yoder MIA After Tucking Wall Street Bailout Into Government Spending Bill*, THE HUFFINGTON POST (Dec. 15, 2014), [http://www.huffingtonpost.com/2014/12/15/kevin-yoder-wall-street-bailout\\_n\\_6329784.html](http://www.huffingtonpost.com/2014/12/15/kevin-yoder-wall-street-bailout_n_6329784.html).

transactions to outside institutions that were not covered by federal insurance or surety programs.<sup>4</sup>

This Article discusses the implementation and impact of the Yoder provision on derivative finance and analyzes whether the provision creates an excessive fiscal liability for taxpayers. Part II of this Article discusses the initial implementation of Dodd-Frank's swaps "push-out" provision and analyze its importance in preventing government subsidization of losses that ensue from private financial transactions. Part III further examines the Act, specifically the Yoder provision, and explains the application of the Act's amendments to section 716 of Dodd-Frank. Part IV argues that the Act's amendments to Dodd-Frank expose American taxpayers to significant financial liability by allowing covered depository institutions (CDIs) to participate in a larger variety of swaps transactions.

## II. DODD-FRANK'S SWAPS "PUSH-OUT" PROVISION

On July 21, 2010, Congress enacted Dodd-Frank in an effort to "promote the financial stability of the United States by improving accountability and transparency in the financial system. . . ."<sup>5</sup> Dodd-Frank was also designed to end stimulus-era taxpayer bailouts of financial institutions by prohibiting the federal government from "bailing out," insuring, or otherwise subsidizing losses to financial institutions that arise from risky financial transactions, such as swaps.<sup>6</sup> A swap can be generally

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<sup>4</sup> Consolidated and Further Continuing Appropriations Act, 2015, 128 Stat at 2378 (section 716 of the Act (codified at 15 U.S.C. § 8305 (2010) was amended to add a provision to subsection (d) of the swaps "push out" rule); 15 U.S.C § 8305(d)(1)(C) (2010) (allowing covered financial institutions to engage in a broader scope of swaps activities by narrowing the types of swaps that are required to be pushed out); see American Bankers Association, *Swaps Push-Out Provision*, ABA BACKGROUNDER 1, (2014) ("The amendment to the Swaps Push-Out Rule does not repeal Section 716; it narrows the scope of products that are required to be "pushed-out" of an FDIC-insured bank to certain swaps related to structured finance."); Peter Eavis, *Wall Street Embraces a Rule It Hates*, N.Y. TIMES (May 2, 2014), <http://dealbook.nytimes.com/2014/05/02/wall-streets-quiet-turnabout-on-swaps/> ("Dodd-Frank's swaps push-out rule seeks to reduce those effective government subsidies on Wall Street trading. It requires certain types of derivatives to be pushed out of insured banks into another part of the bank that does not benefit from federal backing.").

<sup>5</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010) (codified at 15 U.S.C. § 8305 (2010)). Dodd Frank was enacted primarily in response to the financial crises of 2008, colloquially termed the "Great Recession," which many argue was caused predominantly by the failure of complicated financial instruments such as mortgage-backed securities. See David Line Batty, *Dodd-Frank's Requirement of "Skin in the Game" for Asset-Backed Securities May Scalp Corporate Loan Liquidity*, 15 N.C. BANKING INST. 13, 44 (2011) (stating that asset-backed securities were arguably the "prime culprit" in causing the recession).

<sup>6</sup> Consolidated and Further Continuing Appropriations Act, 2015, 128 Stat at 2378. Section 712(d)(1) of Dodd-Frank required the SEC and CFTC to further define the term "swap." Dodd-Frank Wall Street Reform and Consumer Protection Act 124 Stat. at 1644.

described as a transaction involving the exercise of an option, such as a put or call, or any type of “purchase, sale [or] payment that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency. . . .”<sup>7</sup> Foreign currency swaps, debt swaps, commodity swaps and credit default swaps are common examples of transactions that fall under this definition.<sup>8</sup>

Section 716 of Dodd-Frank contained a provision, originally proposed by Senator Blanche Lincoln, titled “Prohibition Against Federal Government Bailouts of Swaps Entities.”<sup>9</sup> Section 716 explicitly prohibited the federal government from providing “federal assistance” to any distressed “swaps entity with respect to any swap, security-based swap, or other activity of the swaps entity.”<sup>10</sup>

Under Dodd-Frank, federally insured depository institutions (IDIs) that participated in swaps transactions were required to “push out” certain types of swaps to an uninsured or “uncovered” affiliate capitalized separately from the IDI.<sup>11</sup> Despite the ostensibly broad scope of the law, Dodd-Frank’s prohibition on federal assistance to IDIs was limited in effect

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However, a “swap” was initially defined in Section 721(47)(a)(i)-(iii) of Dodd-Frank and can be generally described as a transaction involving the exercise of an option, such as a put or call, or any type of “purchase, sale [or] payment that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency...” 7 U.S.C. § 1a (2010). Swaps have also been defined as “an agreement between two parties to exchange one or more cash flows measured by different rates or prices with payments calculated by reference to a principal base.” Mark D. Young et al., *Large Trader Reporting Rules for Physical Commodity Swaps: An Overview of the New Obligations*, 31 No. 10 FUTURES & DERIVATIVES L. REP. 1,1 (2011).

<sup>7</sup> 7 U.S.C. § 1a (2010).

<sup>8</sup> *Id.*

<sup>9</sup> Victoria McGrane, *Swap Talk: Why Are People Fighting Over Dodd Frank and Derivatives?*, WALL ST. J. (Dec. 10, 2014), <http://blogs.wsj.com/washwire/2014/12/10/swap-talk-why-are-people-fighting-over-dodd-frank-and-derivatives/> (“The provision is the work of former Democratic Sen. Blanche Lincoln of Arkansas.”).

<sup>10</sup> 15 U.S.C. § 8305 (2010) (defining “federal assistance” as the “use of any advances from any Federal Reserve credit facility or discount window that is not part of a program or facility with broad-based eligibility under . . . Federal Deposit Insurance Corporation insurance or guarantees. . . .”); Charles L. Hauch, *Dodd-Frank’s Swap Clearing Requirements and Systemic Risk*, 30 YALE J. ON REG. 277, 283 (2013) (“‘Federal assistance’ includes insurance from the Federal Deposit Insurance Corporation (FDIC) and access to the Federal Reserve’s discount window.”); 15 U.S.C. § 8305 (2010) (defining a swaps entity as “any swap dealer, security-based swap dealer, major swap participant, major security-based swap participant, that is registered (i) under the Commodity Exchange Act; or (ii) the Securities Exchange act of 1934”).

<sup>11</sup> Hauch, *supra* note 10 (“As every commercial bank in the U.S. is obligated to have FDIC insurance, banks must either cease being a swaps dealer or spin off such activities into a separately capitalized affiliate.”); Rob Garver, *Cromnibus Swaps Provision: Some Real Problems, Some Imaginary Ones*, THE FISCAL TIMES (Dec. 14, 2011), [www.thefiscaltimes.com/2014/12/14/Cromnibus-Swaps-Provision-Some-Real-Problems-Some-Imaginary-Ones](http://www.thefiscaltimes.com/2014/12/14/Cromnibus-Swaps-Provision-Some-Real-Problems-Some-Imaginary-Ones) (“The Dodd-Frank Act, which reined in various dubious Wall Street practices in 2010, forced banks to ‘push out’ most swaps and derivatives trading activity to affiliates that are capitalized separately from the bank.”).

due to the law's numerous carve-outs and exceptions.<sup>12</sup> For example, the prohibition on federal assistance did not apply to major swap participants and major security-based swap participants that were IDIs.<sup>13</sup> Dodd-Frank also permitted IDIs to participate in swaps that either (1) were executed for hedging or other risk mitigation activities, or (2) involved rates or reference assets that are permissible for investment by a national bank.<sup>14</sup> In all, the exceptions and carve-outs to the swaps "push out" rule exempt around ninety to ninety-five percent of most financial institution's activities.<sup>15</sup>

To understand the importance of Dodd-Frank's swaps "push-out" provision in the field of derivative finance, one must first understand the thinking behind it. Certain types of swaps transactions have the potential to cause a chain reaction of bank failures, due to the systematic counterparty risks associated with derivative transactions.<sup>16</sup> A common example of this systematic risk can be observed by analyzing credit default swaps. A credit default swap is a common swap transaction where one party, the protection seller, accepts periodic payments from another party, the protection buyer, in exchange for the protection seller's assumption of the default risk of one or more underlying transactions, such as an institution's purchase of a bundle of mortgage securities from a bank.<sup>17</sup>

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<sup>12</sup> Robert S. Bloink, *Does the Dodd-Frank Wall Street Reform Act Rein in Credit Default Swaps? An EU Comparative Analysis*, 89 NEB. L. REV. 587, 611 (2011) (explaining that "exceptions to the general prohibition threaten to swallow the rule").

<sup>13</sup> 15 U.S.C. § 8305(b)(2)(B) (2010); *id.* ("Major swap participants and major security-based swap participants that are insured depository institutions are excluded from the prohibition on federal assistance."); Joel Zoch, *Regulation of Swap Markets Under the Dodd-Frank Act*, 30 REV. BANKING & FIN. L. 102, 108 (2010) ("Exceptions are made for major swap participants that are insured depository institutions, as well as swaps entities that limit their swap activities to hedging and other specially permitted activities."). A "major swap participant" is defined at 7 U.S.C. § 1a(33)(a). A "major security-based swap participant" has the meaning given the term in section 3(a) of the Securities Exchange Act of 1934. 7 U.S.C. § 1a(32) (2010).

<sup>14</sup> 15 U.S.C. § 8305 (2010) ("The prohibition in subsection (a) shall apply to any insured depository institution unless the insured depository institution limits its swap or security-based swap activities to: (1) Hedging and other similar risk mitigating activities directly related to the insured depository institution's activities. (2) Acting as a swaps entity for swaps or security-based swaps involving rates or reference assets that are permissible for investment by a national bank under the paragraph designated as "Seventh." of section 24 of Title 12, other than as described in paragraph (3).").

<sup>15</sup> Scott Patterson, *What's at Stake in Swaps Market as Congress Tussles Over Dodd-Frank*, WALL ST. J. (Dec. 11, 2014), <http://blogs.wsj.com/moneybeat/2014/12/11/whats-at-stake-in-swaps-market-as-congress-tussles-over-dodd-frank/> (explaining "the brouhaha over the swaps push-out rule involves roughly 5% to 10% of banks' activities").

<sup>16</sup> Hal S. Scott, *The Reduction of Systemic Risk in the United States Financial System*, 33 HARV. J. L. & PUB. POL'Y 671, 675 (2010) (stating "a chain reaction of bank failures can occur as a result of counterparty risk on derivative transactions, such as credit default swaps (CDSs).").

<sup>17</sup> David Mingle, *Credit Derivatives: An Overview*, 92 ECON. REV., No. 4, at 1-2 ("One party, the protection buyer, pays a periodic fee to the other party, the protection seller, during the term of the CDS. If the reference entity defaults or declares bankruptcy or

In this type of transaction, there is a great deal of counterparty risk, as it is possible that the protection buyer, protection seller, or the underlying parties to the transaction could become insolvent or otherwise unable to meet their obligations. This counterparty risk of default contributes to the systematic risk of the derivatives system because if one party fails to meet its obligations, its counterparty may also be forced to default due to lack of funds or illiquidity.<sup>18</sup> Systematic risk has been defined as “the risk that the failure of one significant financial institution can cause or significantly contribute to the failure of other significant financial institutions as a result of their linkages to each other.”<sup>19</sup>

The systematic risk that occurred from swaps transactions, such as credit default swaps and other asset-backed securities, was perhaps the “prime culprit” in the financial collapse of 2008 because the failure of institutions that had heavily invested in swaps caused a chain reaction of failures in other institutions.<sup>20</sup> In the midst of the Great Recession, the American taxpayers were forced to “bail out” several financial institutions that had heavily invested in swaps and sustained massive losses.<sup>21</sup> Facing widespread insolvency among major financial institutions, the federal government provided assistance to numerous institutions by injecting funds, providing loans, and administering other types of aid.<sup>22</sup>

Dodd-Frank’s “push-out” provision, as described above, sought to end these government bailouts—and their associated costs to taxpayers—by keeping the government’s pockets out of the risky swaps and derivative finance business.<sup>23</sup> Congress made it clear in Dodd-Frank that the federal government was no longer willing to subsidize financial institutions’

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another credit event occurs, the protection seller is obligated to compensate the protection buyer for the loss by means of a specified settlement procedure.”); *see also* Zoch, *supra* note 13, at 103 (“For example, in a credit default swap (“CDS”), one party accepts periodic payments in exchange for assuming some or all of the risk of default on an underlying credit obligation.”).

<sup>18</sup> *Id.* at 103 (“Financial companies heavily invested in CDS transactions contribute to systemic risk, for if one party to a CDS cannot meet its obligations, its counterparty may then find itself unable to meet other financial obligations.”). This factor is particularly relevant, as liquidity becomes an issue; institutions may have abundant assets on paper but be unable to meet their obligations when a counterparty defaults due to the institution’s assets being tied up in long-term financial instruments.

<sup>19</sup> Hal S. Scott, *The Reduction of Systemic Risk in the United States Financial System*, 33 HARV. J.L. & PUB. POL’Y 671, 673 (2010).

<sup>20</sup> David Line Batty, *Dodd-Frank’s Requirement of “Skin in the Game” for Asset-Backed Securities May Scalp Corporate Loan Liquidity*, 15 N.C. BANKING INST. 13, 44 (2011) (stating that asset-backed securities were arguably the “prime culprit” in causing the recession).

<sup>21</sup> Scott, *supra* note 19, at 675.

<sup>22</sup> *Id.*

<sup>23</sup> Zoch, *supra* note 13, at 108 (stating the Dodd Frank came about as a response by Congress to public outcry resulting from “the bailouts of Citigroup, Bank of America, and others. . .”).

swaps-related losses, stating “[t]axpayers shall bear no losses from the exercise of any authority under [Title VII of Dodd-Frank].”<sup>24</sup>

Predictably, many financial institutions immediately opposed the swaps “push-out” provision.<sup>25</sup> Large financial institutions argued that the law would expose institutions to an unreasonable amount of liability by taking away their access to Federal Deposit Insurance Corporation (FDIC) insurance, which in turn would raise costs for consumers.<sup>26</sup> Smaller banks also opposed the law, arguing that the swaps “push-out” provision created an issue of vertical equity because many regional banks, unlike national banks, lacked existing affiliates that were uninsured by the FDIC with whom they could execute swaps.<sup>27</sup> Despite their opposition, financial institutions were unsuccessful in encouraging Congress to repeal or make substantive changes in the swaps “push-out” provision until 2014, when Dodd-Frank was amended by language inserted into the Act.<sup>28</sup>

### III. THE YODER PROVISION AND THE CONSOLIDATED AND FURTHER CONTINUING APPROPRIATIONS ACT OF 2015

The Yoder provision broadly expanded the types of swaps transactions that could be executed by federally insured or backed institutions.<sup>29</sup> Initially, the Yoder provision faced minimal opposition when it was first proposed and adopted as part of the Act.<sup>30</sup> In fact, most of the language of the Yoder provision was not new, but rather recycled from a “standalone” bill containing essentially the same text that was introduced in 2013, yet failed to pass.<sup>31</sup> However, the provision soon faced opposition from powerful Senate democrats including Nancy Pelosi, Maxine Walters,

<sup>24</sup> 15 U.S.C. § 8305(i)(3) (2010).

<sup>25</sup> Victoria McGrane, *Regional Banks Push Back Against Swaps ‘Push-Out’ Rule*, WALL ST. J. (Oct. 30, 2014), <http://www.wsj.com/articles/regional-banks-push-back-against-swaps-push-out-rule-1414677032> (stating that “[b]ig banks that engage in a lot of derivatives trading such as J.P. Morgan Chase & Co., Citigroup Inc. and Bank of America Corp. have long made their concern about the provision known” and “[t]he stakes are high for banks subject to the provision: Firms that don’t comply face the potential loss of access to federal deposit insurance and the Federal Reserve’s discount window”).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014) (amending the Dodd-Frank Wall Street Reform and Consumer Protection Act).

<sup>29</sup> *Id.*

<sup>30</sup> Jonathan Weisman, *A Window Into Washington in an Effort to Undo a Dodd-Frank Rule*, N.Y. TIMES (Dec. 15, 2014), <http://dealbook.nytimes.com/2014/12/15/in-push-out-provision-example-of-how-congress-does-its-job/> (“[The Yoder provision] was adopted after a few minutes of low-key debate, without a recorded vote, really without much notice . . .”).

<sup>31</sup> *Id.*; Jennifer Bendery, *Kevin Yoder MIA After Tucking Wall Street Bailout Into Government Spending Bill*, THE HUFFINGTON POST 1 (Dec. 15, 2014), [http://www.huffingtonpost.com/2014/12/15/kevin-yoder-wall-street-bailout\\_n\\_6329784.html](http://www.huffingtonpost.com/2014/12/15/kevin-yoder-wall-street-bailout_n_6329784.html).

and Elizabeth Warren.<sup>32</sup> Despite this formidable resistance, the measure passed the House with bipartisan support, was inserted into Section 630 of the Act, and signed into law by President Obama on December 16, 2014.<sup>33</sup>

The Yoder provision amended Dodd-Frank's swaps "push-out" provision by striking out certain segments and inserting alternative language.<sup>34</sup> Thus, perhaps the easiest way to observe the changes in the law is to review a blacklined copy of the provision. The first substantive change in the swaps "push-out" provision was the inclusion of a new term, "covered depository institutions" (CDIs). An entire section was added to precisely define CDIs: "(A) an insured depository institution, as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813); or (B) a United States uninsured branch or agency of a foreign bank."<sup>35</sup> This section essentially clarified an ambiguity in the provision concerning whether IDI protection applied to uninsured United States branches and agencies of foreign banks: a commonly cited problem in the original law.<sup>36</sup> These uninsured agencies are now given CDI status.<sup>37</sup>

Next, the Yoder provision inserted a provision into the swaps "push-out" rule that allows CDIs to participate in a larger variety of swaps transactions.<sup>38</sup> The Act amended Dodd-Frank by including a section titled "Certain Structured Finance Swap Activities" that designates permissible swap activities for CDIs.<sup>39</sup> Under the amended law, CDIs may act as swaps entities for structured finance swaps, so long as the structured finance swaps are executed for "hedging or risk management purposes" or meet certain credit quality and categorical classification requirements set by "prudential regulators."<sup>40</sup> The law also added language in a section titled "Non-Structured Finance Swap Activities," which allows CDIs to act as a "swaps entity for swaps or security based swaps other than a structured

<sup>32</sup> *Id.*; Weisman, *supra* note 30.

<sup>33</sup> Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat 2130 (2014).

<sup>34</sup> *See id.*

<sup>35</sup> *See id.*

<sup>36</sup> 156 CONG. REC. S5903-S5904 (daily ed. Jul. 15, 2010) (Colloquy between Senator Christopher Dodd, Chairman of the Senate Banking Committee, and Senator Blanche Lincoln, Chairman of the Senate Agriculture Committee and sponsor of the Swaps Pushout Rule) (noting the ambiguity in the law).

<sup>37</sup> Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat 2130 (2014).

<sup>38</sup> *Id.*; American Bankers Association, *Swaps Push-Out Provision*, ABA BACKGROUNDER, 1 (2014) ("The amendment to the Swaps Push-Out Rule does not repeal Section 716; it narrows the scope of products that are required to be "pushed-out" of an FDIC-insured bank to certain swaps related to structured finance.").

<sup>39</sup> Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat 2130 (2014).

<sup>40</sup> *Id.*; Julian Hammar, *New Law Limits the Swaps Pushout Requirement to Apply Only to Certain ABS Swaps*, MORRISON & FOERSTER CLIENT ALERT (Dec. 22, 2014), <http://www.mofo.com/~media/Files/ClientAlert/2014/12/141222SwapsPushoutRequirements.pdf>.

finance swap,” and eliminated a section that contained a limitation concerning credit default swaps.<sup>41</sup> These additions allow CDIs to participate in: (1) any swap for the purpose of hedging and risk mitigation, (2) non-structured finance swaps, and (3) certain structured finance swaps, provided the aforementioned requirements are satisfied.<sup>42</sup> These requirements are estimated to affect around five to ten percent of most CDIs activities.<sup>43</sup>

The new amendments to Dodd-Frank’s swaps “push-out” rule essentially give CDIs more freedom to engage in swap transactions than the original IDIs were given because the original law limited IDIs’ swaps activity to a narrower range of transactions.<sup>44</sup> It is notable that the Yoder provision did not change or alter the transition period, or time limit, given to CDIs for divesting swap activities to an outside affiliate.<sup>45</sup> Understanding the implementation and application of the Act’s amendments to Dodd-Frank, one can analyze the effects of this legislation.

#### IV. THE YODER PROVISION SIGNIFICANTLY INCREASES TAXPAYER LIABILITY FOR LOSSES RESULTING FROM PRIVATE STRUCTURED FINANCE SWAPS

It is undisputable that the Act brought about significant changes to the way the federal government regulates the swaps and derivatives trading activities of CDIs. However, there is a considerable amount of dispute concerning whether the Act’s changes to Dodd-Frank are positive or negative. As mentioned *infra* in Section III, the Yoder provision faced significant opposition in Congress from pro-regulation representatives, who were irritated that Congressman Yoder attempted to insert the Yoder

<sup>41</sup> Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat 2130 (2014).

<sup>42</sup> *Id.*; Julian Hammar, *New Law Limits the Swaps Pushout Requirement to Apply Only to Certain ABS Swaps*, MORRISON & FOERSTER CLIENT ALERT (Dec. 22, 2014), <http://www.mofo.com/~media/Files/ClientAlert/2014/12/141222SwapsPushoutRequirements.pdf>; Patterson, *supra* note 15 (“The rule states that the prohibition ‘shall not apply’ to swap-trading activities in which a firm is ‘acting as a swaps entity for swaps or security-based swaps other than a structured finance swap.’ In other words, any swaps that is not a structured finance swap is not covered by the push-out.”).

<sup>43</sup> Patterson, *supra* note 15 (explaining “the brouhaha over the swaps push-out rule involves roughly 5% to 10% of banks’ activities”).

<sup>44</sup> 15 U.S.C. § 8305 (2010); Julian Hammar, *New Law Limits the Swaps Pushout Requirement to Apply Only to Certain ABS Swaps*, MORRISON & FOERSTER CLIENT ALERT (Dec. 22, 2014), <http://www.mofo.com/~media/Files/ClientAlert/2014/12/141222SwapsPushoutRequirements.pdf>; Patterson, *supra* note 16 (“The rule states that the prohibition ‘shall not apply’ to swap-trading activities in which a firm is ‘acting as a swaps entity for swaps or security-based swaps other than a structured finance swap.’ In other words, any swaps that is not a structured finance swap is not covered by the push-out.”).

<sup>45</sup> Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat 2130 (2014).

provision into the appropriations bill needed to avert a costly government shutdown.<sup>46</sup> For the purpose of analysis, however, this Article is not concerned with how the Yoder provision came to be, but rather what the Act will do.

Banks and proponents of the Yoder provision argue that the Act's amendments to Dodd-Frank will result in reduced costs for consumers, greater financial security, and decreased risk in the financial system because fewer swaps will be pushed out to uncovered (less regulated) institutions.<sup>47</sup> Ben Bernanke, former Chairman of the Federal Reserve, is among those who question the utility of the swaps "push-out" provision, stating, "[i]t's not evident why [the "push-out" provision] makes the company as a whole safer. And what we do see is that it will likely increase costs of people who use the derivatives and make it more difficult for the bank to compete with foreign competitors."<sup>48</sup>

Supporters of the provision also argue that the law will not have the sweeping effect detractors fear because, due to the Dodd-Frank's numerous carve-outs and exceptions, Dodd-Frank's swaps "push-out" provision may only affect around ten percent of most financial institutions' swaps activities.<sup>49</sup> In addition, Dodd-Frank complicates the regulation of derivatives trading by requiring, in enigmatic language, certain swaps to occur in one type of institution and other swaps to occur in another.<sup>50</sup> Further complicating matters, Dodd-Frank would essentially require

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<sup>46</sup> Weisman, *supra* note 30; Victoria Finkle, *Swaps 'Pushout' Repeal Survives House Vote*, AMERICAN BANKER (Dec. 11, 2014), <http://www.americanbanker.com/news/law-regulation/swaps-pushout-repeal-survives-house-vote-1071632-1.html>. (explaining opposition to the bill and referring to the Act as "Cromnibus").

<sup>47</sup> Patterson, *supra* note 15; McGrane, *supra* note 9 ("[Supporters] argue the provision would actually increase risks in the financial system by pushing this swaps activity into entities that are less-heavily regulated than banks and where regulators have less insight. Big banks, who have been working for years to kill or scale back the provision, say the rule would result in higher costs to corporations to hedge everyday business risks, like the cost of jet fuel or interest rate changes.").

<sup>48</sup> McGrane, *supra* note 9 ("Former Fed Chairman Ben Bernanke was among those who questioned its efficacy: 'It's not evident why that makes the company as a whole safer. And what we do see is that it will likely increase costs of people who use the derivatives and make it more difficult for the bank to compete with foreign competitors,' he said in 2013.").

<sup>49</sup> Scott Patterson, *What's at Stake in Swaps Market as Congress Tussles Over Dodd-Frank*, WALL ST. J. (Dec. 11, 2014), <http://blogs.wsj.com/moneybeat/2014/12/11/whats-at-stake-in-swaps-market-as-congress-tussles-over-dodd-frank/> ("Swaps tied to interest rates, foreign exchange, precious metals such as gold and silver and credit default swaps that are centrally cleared, a process regulators consider safer since clearinghouses takes on the risk of a default, are given a pass by the push-out requirement. Such contracts cover about 90% to 95% of banks' swaps businesses, according to market experts and regulatory officials.").

<sup>50</sup> *Id.* ("Supporters of the swaps-push-out repeal argue that the rule made little sense in the first place and needlessly complicated the market by segmenting swaps trading into separate parts of the bank.").

institutions to review each swap to ascertain whether the institution was legally permitted to execute the transaction without pushing it out to a separate affiliate. This raises costs for the institution—which are passed on to the consumer—and jeopardizes time-sensitive deals.

In response, opponents of the Yoder provision allege that the Act's amendments to Dodd-Frank will subject taxpayers to significant fiscal liability, representing yet another illustration of "big business" asserting its interests in Washington.<sup>51</sup> Senator Elizabeth Warren argued that the Yoder provision "would let derivatives traders on Wall Street gamble with taxpayer money — and, when it all blows up, require the government to bail them out."<sup>52</sup> Representative Maxine Waters also condemned the provision, stating that "[u]nregulated trading in risky derivatives, especially those tied to subprime loans, was a leading cause of the financial crisis, which resulted in the taxpayer-funded bailouts of the banks and the worst economy since the Great Depression."<sup>53</sup> Opponents also argue that the Yoder provision could be the first skirmish in an ongoing attempt by financial institutions to repeal Dodd-Frank in its entirety.<sup>54</sup>

Both arguments have their merits. It is clear that the swaps "push out" rule increases costs for consumers by increasing compliance and transactions costs for the institutions. Dodd-Frank also creates competition issues because smaller banks will have more difficulty competing with larger financial institutions, and larger financial institutions will have more difficulty competing against foreign, less regulated competitors. On the other hand, it is also true that allowing institutions to execute risky swaps transactions in federally insured units could lead to the resurgence of Great Recession-era taxpayer bailouts. The Act's amendments to Dodd-Frank subject taxpayers to trillions of dollars of financial liability.

After evaluating both arguments, it is clear that the Yoder provision will produce one tangible result: federally insured banks will now be allowed to participate in a greater variety of swaps. These transactions, as discussed, *supra*, in Section II, can be very risky and have the potential to bring about financial crises as we observed in 2008.<sup>55</sup> Furthermore, the

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<sup>51</sup> Finkle, *supra* note 46 ("This probably does represent a situation of where we are going from 'Dodd-Frank is sacrosanct' to 'Dodd-Frank is an amendable piece of legislation,' said Edward Mills, an analyst at FBR Capital Markets.").

<sup>52</sup> *Id.*

<sup>53</sup> McGrane, *supra* note 9 ("Unregulated trading in risky derivatives, especially those tied to subprime loans, was a leading cause of the financial crisis, which resulted in the taxpayer-funded bailouts of the banks and the worst economy since the Great Depression," said Rep. Maxine Waters, the top Democrat on the House Financial Services panel.").

<sup>54</sup> *Id.*

<sup>55</sup> David Line Batty, *Dodd-Frank's Requirement of "Skin in the Game" for Asset-Backed Securities May Scalp Corporate Loan Liquidity*, 15 N.C. BANKING INST. 13, 44 (2011) (stating that asset-backed securities were arguably the "prime culprit" in causing the recession).

Yoder provision is unquestionably exposing taxpayers to any losses associated with these investments by allowing more of these swap transactions to occur in CDIs, who, in turn, can fall back on government surety and insurance programs. Therefore, the Yoder provision exposes taxpayers to liability so substantial that it outweighs any proffered justification for the current law because the swaps “push-out” theoretically affects seven to fourteen trillion dollars of swaps which the Act now allows to be executed in federally insured units.<sup>56</sup> In addition, despite the institutions complaints about the complexity of the law and the difficulty of conforming their systems to the swaps “push-out” rule, affected institutions were given years to make the transition.<sup>57</sup> Therefore, institutions should have had plans in place to comply with the original law.

Moving forward, regulators and policymakers should consider the issue of taxpayer liability while drafting swaps-related regulations and legislation. With tougher regulation and rules relating to Dodd-Frank’s swaps “push-out” provision, it is possible that regulators could significantly reduce the fiscal liabilities of taxpayers, yet also allow CDIs to engage in a broader range of swaps transactions. Regulators, rather than legislators, now shoulder the responsibility of deciding how to best balance the competing economic interests of financial institutions and taxpayers, short of Dodd-Frank’s repeal or further amendment.

## V. CONCLUSION

By amending Dodd-Frank’s swaps “push-out” rule, the Yoder provision allows CDIs to engage in a greater variety of swap transactions. Although it represents a victory for financial institutions, the Yoder provision exposes taxpayers to unjustifiable fiscal liability and risks the reoccurrence of Great Recession-era government bailouts. Regulators and legislators should evaluate and, if necessary, repeal, amend, or limit the Yoder provision, and thus limit taxpayer liability for losses relating to the swap activities of CDIs.

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<sup>56</sup> Patterson, *supra* note 15 (“As of the second quarter, U.S. commercial banks held \$146.5 trillion worth of swaps, according to Tabb Group. That means, in theory, about \$7 trillion to \$14 trillion in historical swaps deals could have been covered by the push-out rule.”).

<sup>57</sup> 15 U.S.C. § 8305(f) and (h) (2010) (explaining that the law will take effect in two years following its package and laying out the law’s applicable transition period).