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Submitted By Electronic Transmission and
Via www.regulations.gov

Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Robert Feldman
Executive Secretary
Attn: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Re: Notice of Proposed Rulemaking Regarding Resolution Plans and Credit Exposure Reports Required; 12 C.F.R. Part 225, Regulation Y; Docket No. R–1414; RIN 7100–AD73; 12 C.F.R. Part 381, RIN 3063-AD77

Dear Ladies and Gentlemen:

Introduction

We are writing on behalf of our client, Federated Investors, Inc. and its subsidiaries ("Federated"), to provide comments in response to the joint Board of Governors of the Federal Reserve System's ("Board's") and Federal Deposit Insurance Corporation's ("FDIC's") Notice of Proposed Rulemaking Regarding Resolution Plans and Credit Reports Required ("Joint NPR").[1] Federated has served since 1974 as an investment adviser to money market mutual

[1] Board of Governors of the Federal Reserve System and FDIC, *Notice of Proposed Rulemaking and Request for Comment Regarding Resolution Plans and Credit Exposure Reports Required*, 76 Fed. Reg. 22648 (Apr. 22, 2011).

funds ("Money Funds").[2] We appreciate the opportunity to assist the Board and FDIC as they consider the regulatory framework for resolution plans and credit exposure reports proposed in the Joint NPR.

Federated, as a participant in the money markets and a sponsor of Money Funds, is interested in many of the details of the Joint NPR and related rulemakings specifying processes for designation and liquidation of financial firms. As an investor and creditor of financial issuers, we are concerned that certain aspects of Titles I and II, the implementing rules, and the way in which they will be interpreted and applied, will increase uncertainty, risk and volatility in the money markets and other fixed income markets, particularly in times of crisis. This letter also addresses fundamental issues regarding the designation of nonbank financial firms under Titles I and II which is a predicate to the application of the regulation contemplated by the Joint NPR.

The Joint NPR is part of an intertwined series of rulemakings by the Board, the Financial Stability Oversight Council ("Council") and the FDIC to implement Titles I and II of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("DFA").[3] The Board and the FDIC are both represented on the Council, along with other federal and state financial regulators and industry experts.

The Joint NPR requests comments on a joint Board and FDIC rulemaking proposal to implement Section 165(d) of the DFA[4] by requiring each financial firm designated under Title I of the DFA to submit and obtain regulatory approval for a detailed resolution plan, to be used in connection with liquidations conducted by the FDIC under Title II. The plan must include both a

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[2] Federated has more than thirty-five years in the business of managing Money Funds and, during that period, has participated actively in the money market as it has developed over the years. The registration statement for Federated's Money Market Management fund first became effective on January 16, 1974, making it perhaps the longest continuously operating Money Fund to use the Amortized Cost Method. Federated also received one of the initial exemptive orders permitting use of the Amortized Cost Method in 1979.

[3] Pub. L. No. 111-203, 124 Stat. 1376 (2010). These intertwined rulemakings also include: Financial Stability Oversight Council, *Notice of Proposed Rulemaking Regarding Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies*, 76 Fed. Reg. 4555 (Jan. 26, 2011); FDIC, *Notice of Proposed Rulemaking Implementing Certain Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 12 C.F.R. pt. 380, 76 Fed. Reg. 16324-02 (Mar. 23, 2011), FDIC, *Notice of Interim Final Rulemaking Regarding Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 12 CFR pt. 380, 76 Fed. Reg. 4207 (Jan. 25, 2011) ("NIFR"), and Board, *Proposed Rule: Definitions of ''Predominantly Engaged in Financial Activities'' and ''Significant'' Nonbank Financial Company and Bank Holding Company*, 76 Fed. Reg. 7731, 7737 (Feb. 11, 2011).

[4] Codified at 12 U.S.C. § 5365(d) (2010).

plan for the rapid and orderly resolution of the covered company in the event of financial distress or failure of the company, and a report on the nature and extent of material credit exposure to other major financial companies and the nature and extent to which other major financial companies have material financial exposure to the company submitting the plan.

The resolution plan (referred to in the Joint NPR as a "living will") and report are required by statute to cover the following areas in detail:

- the manner and extent to which any insured bank affiliated with the company is protected from risks arising from the activities of any nonbank subsidiaries of the company;
- the ownership structure, assets, liabilities, and contractual obligations of the company;
- identification of the cross-guarantees tied to different securities;
- identification of major counterparties;
- the process for determining to whom the collateral of the company is pledged; and
- any other information that the Board and the Corporation jointly require by rule or order.

The proposed rule would require in addition:

- an analysis of how the company can be resolved under the Bankruptcy Code in a way that would not pose systemic risk to the financial system;
- a map of the company's business lines to material legal entities;
- an analysis of its corporate structure, credit and other exposures, funding, capital and cash flows; the domestic and foreign jurisdictions in which it operates, and its supporting information systems for core business lines and critical operations.

The FDIC and Federal Reserve estimate that a covered institution will need to devote approximately 12,400 hours to creating and obtaining approval of the initial resolution plan, and approximately 2,881 hours annually in the maintenance of the resolution plan.[5] This hours estimate gives a good idea of the level of detail, information gathering and analysis that will be required to prepare an acceptable resolution plan and credit exposure report.

But the resolution plan is not simply a document prepared by the company and filed with the regulators. It is an interactive process through which the regulators will review the resolution plan and may reject and require changes to the plan, and thus to the structure, assets, balance sheet, activities and operations of the company. In the event that a company does not adequately

[5] 76 Fed. Reg. at 22654.

address the deficiencies found by the Board and FDIC in the resolution plan, the proposed rule specifies that the Board and FDIC may jointly subject the company to more stringent capital, leverage, or liquidity requirements, or restrictions on growth, activities, or operations.[6]

The Joint NPR requests comments on a number of questions. Our comments focus on two of those questions. Under the heading of "Definitions," the Joint NPR asks: "[w]hat terms defined by the proposal require further clarification and how should they be defined?" For the reasons discussed more fully below, we respectfully suggest that the term "Covered Company" be defined so as specifically to acknowledge that Money Funds are not within the term and are not subject to designation under Titles I, II or otherwise required to submit a resolution plan or credit exposure report and have those documents approved by the Board or the FDIC.

Similarly, under the heading of "Governance," the Joint NPR asks: "[w]hat alternative governance requirements might exist that would ensure that a Covered Company places adequate importance and attention on resolution planning?" As discussed more fully below, the governance, regulatory oversight, and reporting requirements applicable to Money Funds under the Investment Company Act and rules of the U.S. Securities and Exchange Commission ("SEC") ensure that a Money Fund will devote ongoing and detailed attention and efforts to these issues and place more than adequate importance and attention to resolution planning.

Discussion

The requirement that a covered financial company submit and have approved by the Board and FDIC a resolution plan serves two basic regulatory purposes. First, the Board and FDIC can use the approval process effectively to require a firm to reduce the complexity, leverage, and risk in its operations, and increase capital ratios and liquidity, in order to get the plan approved. Second, the resolution plan serves as a roadmap to assist the FDIC as receiver in understanding and quickly implementing a plan to resolve the company should it be at risk of insolvency.

Neither purpose justifies the imposition on a Money Fund of a resolution plan process under Board and FDIC auspices. As discussed below, Money Funds do not have a complex structure. A Money Fund is simply an investment pool that holds short-term high quality, marketable fixed income instruments, with a readily available asset value. Money Funds are entirely transparent. There are no holding companies, foreign affiliates, off-balance sheet structures or complex structures of any kind allowed within a Money Fund. Money Funds do not

[6] 76 Fed. Reg. 22648 at 22652 (Apr. 22, 2011).

use leverage or other forms of borrowing to any material degree. Money Funds do not have concentrated exposures to other companies. They do not have complex capital structures. Money Fund balance sheets are all simple common equity essentially of one class. Money Fund capital ratios are 100% equity, and they hold only high quality, liquid assets. If the fund manager does not continue to reinvest the portfolio, a Money Fund converts to cash in very short order through the customary maturity of its portfolio of assets. All of this is dictated by the Investment Company Act and rules of the SEC that apply to Money Funds.

Money Funds and the SEC over the past 40 years have worked through in detail the issues of maintaining liquidity and asset values in the absence of a federal safety net. These are exactly the type of issues with which the banking regulators are now struggling under the DFA. Money Funds and the SEC have come at this problem from a very different direction and used a much simpler approach than have the banks and their regulators over this period: do not use leverage, only equity, and invest only in short-term, high-quality, liquid debt instruments. That is why, over four decades and through many business cycles, only two Money Funds have ever "broken the buck" (one returning 96 cents on the dollar to investors and the other over 99 cents on the dollar to investors, and no loss to the federal government), while over the same period over 2800 banks have failed at a cost to the federal government in excess of $164 billion.

(1) Money Funds Are Financed By Equity, Not Debt, and Cannot Default in the Way Contemplated by Title II of DFA

The resolution plans required by the Joint NPR will be required of financial companies designated as systemically important under Title I of DFA, in preparation for a potential FDIC receivership and liquidation under Title II. However, the basis for conducting an FDIC resolution under a resolution plan, as specified in the statute and described in the Proposing Release, will not exist for Money Funds. Money Funds do not borrow money or rely on leverage. Money Funds are financed 100% by equity. Shareholders do not have a right to the payment of $1.00 per share. Instead, Money Fund shareholders have a right to the return of their pro-rata portion of the net asset value of the Money Fund upon redemption. If a Money Fund "breaks a buck" and falls below $1.00 per share, the Money Fund has not defaulted on an obligation or breached a contractual right of shareholders. "Breaking the buck" is an occasion for unhappiness, but it is not an insolvency. Money fund shareholders are not creditors. The statutory "hook" for resolution by the FDIC under Title II is simply not triggered.

The central criteria in triggering a receivership under Section 203(a) of the DFA through a recommendation by the Board and the FDIC for a designation under Title II, as well as the determinations that must be made by the Secretary of Treasury under Section 203(b), are premised on a default or potential default by a financial company on its debt obligations. The

terms "default or in danger of default" are defined in Section 203(c)(4) in a way that could not reasonably be triggered in the context of a company, such as a Money Fund, that has only equity capital and no material debt, and thus has no debt or other obligations that it could default on. As defined in Section 203(c)(4) of the DFA, a financial company may be considered to be in default or in danger of default if:

> (A) a case has been, or likely will promptly be, commenced with respect to the financial company under the Bankruptcy Code;
>
> (B) the financial company has incurred, or is likely to incur, losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the company to avoid such depletion;
>
> (C) the assets of the financial company are, or are likely to be, less than its obligations to creditors and others; or
>
> (D) the financial company is, or is likely to be, unable to pay its obligations (other than those subject to a bona fide dispute) in the normal course of business.

The Joint NPR similarly defines "material financial distress" (the event which triggers the resolution plan being actually used) with regard to a Covered Company to mean that:

> (i) The Covered Company has incurred, or is likely to incur, losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the company to avoid such depletion; (ii) the assets of the Covered Company are, or are likely to be, less than its obligations to creditors and others; or (iii) the Covered Company is, or is likely to be, unable to pay its obligations (other than those subject to a bona fide dispute) in the normal course of business.[7]

None of these statutory or proposed regulatory conditions to a resolution plan actually being used can exist at a Money Fund, because a Money Fund (i) is financed entirely by equity capital, (ii) does not use debt or other forms of leverage or derivatives to a significant degree and thus does not have significant obligations to creditors and others, and (iii) since it has no material debts or similar obligations and is financed entirely by equity capital, it cannot be in a situation where it is unable to pay its obligations in the normal course of business.

[7] 78 Fed. Reg. at 22649.

If the statutory and regulatory conditions requiring the use of a resolution plan cannot realistically exist at a Money Fund, it makes no sense to require Money Funds to prepare a resolution plan, and have it reviewed and approved by the Board and FDIC.

(2) Money Funds By Nature Are Self-Liquidating Because They Hold Only Short-Term, High Quality Debt Instruments with an Average Maturity of 60 Days or Less

It does not take an elaborate roadmap to understand and figure out how to liquidate a Money Fund. Money Fund balance sheets are filed with the SEC and available to the public online. If there is a need to liquidate a Money Fund, the fund manager can simply wait for the portfolio assets to repay at maturity. Due to the very short weighted average maturity of a Money Fund's Portfolio mandated by SEC rules, most of the assets will be fully repaid in cash in very short order. In the alternative, some or all of the portfolio assets can be sold into the open market for cash. Or, some assets can be held to maturity and others sold. This is not very complicated, and does not justify a separate plan for every Money Fund requiring 12,400 hours to develop and 2,881 hours per year to update, as is contemplated by the Joint NPR.

The liquidity of Money Funds is dictated by SEC rules, including Rule 2a-7 under the Investment Company Act.[8] Money Funds are allowed to invest only in short-term, high-quality debt. Rule 2a-7 and related SEC rules impose requirements on Money Funds in the following areas:

Liquidity Matching of Portfolio Maturities to Cash Needs for Redemptions. Under the 2010 amendments to Rule 2a-7--promulgated in large part in response to the financial crisis-- a Money Fund is required to have a minimum percentage of its assets in highly liquid securities so that it can meet reasonably foreseeable shareholder redemptions.[9] Under new minimum daily liquidity requirements applicable to all taxable Money Funds, at least 10 percent of the assets in the fund must be in cash, U.S. Treasury securities, or securities that convert into cash (*e.g.*, mature) within one business day. In addition, under a new weekly requirement applicable to all Money Funds, at least 30 percent of assets must be in cash, U.S. Treasury securities, certain other government securities with remaining maturities of 60 days or less, or securities that

[8] *See* 17 C.F.R. § 270.2a-7.

[9] Depending upon the volatility of the fund's cash flows (in particular shareholder redemptions), a fund may be required to maintain greater liquidity than would be required by the daily and weekly minimum liquidity requirements set forth in Rule 2a-7. *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10074 (Mar. 4, 2010).

convert into cash within five business days. No more than 5 percent of a fund's portfolio may be "illiquid" (i.e., cannot be sold or disposed of within seven days at carrying value).

High Credit Quality. Rule 2a-7 limits a Money Fund to investing in securities that are, at the time of their acquisition, "Eligible Securities." "Eligible Securities" include a security with a remaining maturity of 397 calendar days or less, that meet stringent credit quality standards dictated by the rule.[10] Under the 2010 amendments, 97% of a Money Fund's assets must be invested in "First Tier Securities."[11] Only 3 percent of its assets may be held in lower quality, "Second Tier Securities."[12] In addition, a Money Fund may not invest more than ½ of 1 percent of its assets in "Second Tier Securities" issued by any one issuer (rather than the previous limit of the greater of 1 percent or $1 million). Under the 2010 amendments, a Money Fund also is prohibited from purchasing "Second Tier Securities" that mature in more than 45 days (rather than the previous limit of 397 days). As required by the DFA, the SEC has proposed to remove the references to NRSRO ratings and replace them with equivalent high credit quality determinations by the fund board or its designee.[13]

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[10] Under Rule 2a-7(a)(12), if only one designated NRSRO has rated a security, it will be considered a rated security if it is rated within one of the rating agency's two highest short-term rating categories. Under certain conditions, a security that is subject to a guarantee or that has a demand feature that enhances its credit quality may also be deemed an "Eligible Security." In addition, an unrated security that is of comparable quality to a rated security also may qualify as an "Eligible Security."

[11] A "First Tier Security" means any Eligible Security that:

(i) is a Rated Security (as defined in Rule 2a-7) that has received a short-term rating from the requisite NRSROs in the highest short-term rating category for debt obligations (within which there may be sub-categories or gradations indicating relative standing);

(ii) is an unrated security that is of comparable quality to a security meeting the requirements for a rated security in (i) above, as determined by the fund's board of directors;

(iii) is a security issued by a registered investment company that is a Money Fund; or

(iv) is a Government Security.

The term "requisite NRSROs" is defined in Rule 2a-7(a)(23) to mean "(i) Any two Designated NRSROs that have issued a rating with respect to a security or class of debt obligations of an issuer; or (ii) If only one Designated NRSRO has issued a rating with respect to such security or class of debt obligations of an issuer at the time the fund acquires the security, that Designated NRSRO."

[12] Second Tier Securities are any Eligible Securities that are not First Tier Securities.

[13] *References to Credit Ratings in Certain Investment Company Act Rules and Forms*, 76 Fed. Reg. 12896 (Mar. 9, 2011).

Short Maturity Limits. Rule 2a-7 limits the exposure of Money Funds to risks like sudden interest rate movements by restricting the average maturity of portfolio investments. (This also helps a Money Fund maintain a stable NAV). Under the 2010 amendments to Rule 2a-7, the "weighted average maturity" of a Money Fund's portfolio is restricted to 60 days. In addition, the 2010 amendments limit the maximum "weighted average life" maturity of a fund's portfolio to 120 days.[14] This restriction limits the fund's ability to invest in long-term floating rate securities. In practice, 93% of "prime" Money Funds at year-end 2010 had a weighted average life of 90 days or less, and 80% had a weighted average maturity of 50 days or less.[15]

(3) Money Funds Are Already Required by SEC Rules to Structure their Portfolios and Conduct Operations to Address Liquidity Needs

Money Funds are subject to detailed SEC requirements on the tracking and reporting of portfolio asset values and per-share NAV, maintenance of a portfolio with sufficient liquidity to pay reasonably foreseeable investor redemptions, the ability to pay fund redemption requests at NAV even during a market crisis or if NAV drops below $1 per share, and a program to temporarily suspend redemptions and liquidate, if needed. Key elements of these requirements are highlighted below.

Shadow Pricing. To reduce the chance of a material deviation between the amortized cost value of a portfolio and its market-based value, Rule 2a-7 requires Money Funds to "shadow price" the amortized cost net asset value of the fund's portfolio against its mark-to-market net asset value. If there is a deviation of more than ½ of 1 percent, the fund's board of directors must promptly consider what action, if any, it should take,[16] including whether the fund should discontinue using the amortized cost method of valuation and re-price the securities of the fund below (or above) $1.00 per share.[17] Regardless of the extent of the deviation, Rule 2a–7 obligates the board of a Money Fund to take action whenever it believes any deviation may result in material dilution or other unfair results to investors.[18]

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[14] The "weighted average maturity" of a Money Fund's portfolio is usually shorter than its "weighted average life" because the former is measured at the earlier of repayment or reset of interest rates, while the latter is tied to the contractual repayment date on the fixed income instrument.

[15] Money Fund Regulatory Changes Post Financial Crisis, 2011 Investment Company Institute ("ICI") Money Market Funds Summit (May 16, 2011) (slides available on ICI website).

[16] 17 C.F.R. § 270.2a-7(c)(8)(ii)(B) (2010).

[17] *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10061 (Mar. 4, 2010).

[18] 17 C.F.R. § 270.2a-7(c)(8)(ii)(C).

Monthly Disclosure of Portfolio Information. Under the 2010 amendments, Money Funds also must now file monthly reports of portfolio holdings with the SEC, and post their portfolio holdings each month on their websites,[19] which must include the market-based values of each portfolio security and the fund's "shadow" NAV.[20] The information becomes publicly available after 60 days.[21]

Maintaining Cash to Pay Reasonably Foreseeable Redemptions/Know Your Customer. Under a new requirement added to Rule 2a-7 in 2010, Money Funds must hold securities portfolios that are sufficiently liquid to meet reasonably foreseeable redemptions. To satisfy this new requirement, a Money Fund must adopt policies and procedures to identify the risk characteristics of large shareholders and anticipate the likelihood of large redemptions.[22] Depending upon the volatility of its cash flows, and in particular shareholder redemptions, this may require a fund to maintain greater liquidity than would be required by the daily and weekly minimum liquidity requirements discussed above.[23]

Processing of Transactions. Under a new requirement adopted in 2010, Rule 2a–7 requires a Money Fund to have the capacity to redeem and sell its securities at a price based on its current NAV. This requirement applies even if the fund's current net asset value does not correspond to the fund's stable net asset value or price per share. The new requirement minimizes operational difficulties in satisfying shareholder redemption requests and increases speed and efficiency if a fund breaks the buck. This change requires Money Funds to be able to process redemptions and thus provide liquidity if market prices of their portfolio assets decline, rather than defer share redemptions and corresponding sales of portfolio assets in order to avoid recognizing that decline in portfolio value. In essence, if market conditions dictate a movement to a floating NAV in order to process transactions and provide liquidity to redeeming shareholders, Rule 2a-7 requires Money Funds to do so. By forcing shareholder transactions to be processed at a price other than $1.00 when portfolio asset market conditions dictate, this rule change both enhances liquidity and addresses policy concerns over potential "runs" by shareholders seeking to redeem Money Fund shares ahead of unrecognized portfolio price declines or related deferrals by Money Funds of processing of redemptions.

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[19] 17 C.F.R. § 270.2a-7(c)(12); 17 C.F.R. § 270.30b1-7(a).

[20] *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10083 (Mar. 4, 2010).

[21] 17 C.F.R. § 270.30b1-7(b).

[22] *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10075, n.198 and accompanying text (Mar. 4, 2010).

[23] *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10074 (Mar. 4, 2010).

Handling Default in a Portfolio Instrument. Rule 2a-7 establishes procedures that a Money Fund must follow if a portfolio instrument is downgraded or a default or other event occurs with respect thereto. In some cases, a fund may be required to dispose of, or reduce its investments in, the issuers of such instruments.

Risk Management. Money Funds have robust risk management requirements, beginning with Rule 2a-7's requirements that they limit holdings to the safest, most liquid and short-term investments and strict diversification requirements. Moreover, boards of Money Funds have substantial, detailed, and ongoing risk management responsibilities. For example, Money Fund boards must adopt written procedures regarding:

- Stabilization of NAV (which must take current market conditions, shadow pricing and consideration of material dilution and unfair results into account);
- Ongoing review of credit risks and demand features of portfolio holdings;
- Periodic review of decisions not to rely on demand features or guarantees in the determination of a portfolio security's quality, maturity or liquidity; and
- Periodic review of interest rate formulas for variable and floating rate securities in order to determine whether adjustments will reasonably value a security.

In order to ensure that boards are diligent and act in good faith, funds must also keep records of board consideration and actions taken in the discharge of their responsibilities. Management's decision-making processes must also be reflected in records such as whenever a security is determined to present a minimal credit risk, or when it makes a determination regarding deviations in amortized value and market value of securities.

Delegations of responsibilities by the board must be pursuant to written guidelines and procedures, and the Board must oversee the exercise of responsibilities. Even then, boards may not delegate certain functions, such as any decisions as to whether to continue to hold securities that are subject to default, or that are no longer eligible securities, or that no longer present minimal credit risk, or whose issuers have experienced an event of insolvency, or that have been downgraded under certain circumstances Nor may boards delegate their responsibility to consider action when shadow pricing results in a deviation of 1/2 of 1%, or to determine whether such deviations could result in dilution or unfairness to investors.

Rule 2a-7 provides that if a "First Tier Security" is downgraded to a "Second Tier Security" or the fund's adviser becomes aware that any unrated security or Second Tier Security has been downgraded, the board must reassess promptly whether the security continues to present minimal credit risks and must cause the fund to take actions that the board determines is

in the best interests of the fund and its shareholders.[24] A reassessment is not required if the fund disposes of the security (or it matures) within five business days of the event.[25]

If securities accounting for 1/2 of 1% or more of a Money Fund's total assets default (other than an immaterial default unrelated to the issuer's financial condition) or become subject to certain events of insolvency, the fund must promptly notify the SEC and state the actions the Money Fund intends to take in response to such event.[26] If an affiliate of the fund purchases a security from the fund in reliance on Rule 17a-9, the SEC must be notified of the identity of the security, its amortized cost, the sale price, and the reasons for such purchase.[27]

In the event that after giving effect to a rating downgrade, more than 2.5 percent of the Money Fund's total assets are invested in securities issued by or subject to demand features from a single institution that are "Second Tier Securities," the fund must reduce its investments in such securities to 2.5% or less of its total assets by exercising the demand features at the next exercise date(s), unless the fund's board finds that disposal of the portfolio security would not be in the best interests of the fund.[28]

When a portfolio security defaults (other than an immaterial default unrelated to the financial condition of the issuer), ceases to be an Eligible Security, has been determined to no longer present minimal credit risks, or certain events of insolvency occur with respect to the issuer of a portfolio security or the provider of any demand feature or guarantee of a portfolio security, the Money Fund is required to dispose of the security as soon as practicable consistent with achieving an orderly disposition of the security (by sale, exercise of a demand feature, or otherwise), unless the fund's board finds that disposal of the portfolio security would not be in the best interests of the fund.[29]

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[24] *See* 17 C.F.R. § 270.2a-7(c)(7)(i)(A).

[25] Where a Money Fund's investment adviser becomes aware that any unrated security or "Second Tier Security" held by the fund has, since the security was acquired by the fund, been given a rating by a Designated NRSRO below the Designated NRSRO's second highest short-term rating category, the board must be subsequently notified of the adviser's actions. *See* 17 C.F.R. § 270.2a-7(c)(7)(i)(B).

[26] *See* 17 C.F.R. § 270.2a-7(c)(7)(iii)(A).

[27] *See* 17 C.F.R. § 270.2a-7(c)(7)(iii)(B).

[28] *See* 17 C.F.R. § 270.2a-7(c)(7)(i)(C).

[29] *See* 17 C.F.R. § 270.2a-7(c)(7)(ii).

Periodic Stress Tests. Under the 2010 amendments to Rule 2a-7, the board of directors of each Money Fund must adopt procedures providing for periodic stress testing of the funds' portfolio. Fund managers are required to examine a fund's ability to maintain a stable NAV per share based upon certain hypothetical events. These include a change in short-term interest rates, higher redemptions, a downgrade of or default on portfolio securities, and widening or narrowing of spreads between yields on an appropriate benchmark selected by the fund for overnight interest rates and commercial paper and other types of securities held by the fund.

Diversification. In order to limit the exposure of a Money Fund to any one issuer or guarantor, Rule 2a-7 requires the fund's portfolio to be diversified with regard to both issuers of securities it acquires and guarantors of those securities.[30] Money Funds generally must limit their investments in the securities of any one issuer (other than Government securities) to no more than five percent of fund assets.[31] Money Funds also must generally limit their investments in securities subject to a demand feature or a guarantee to no more than ten percent of fund assets from any one provider.[32] Under the 2010 amendments to Rule 2a-7, a Money Fund may not invest more than ½ of 1 percent of its assets in "Second Tier Securities" issued by any one issuer.

Fund Liquidation. New SEC Rule 22e-3,[33] adopted in 2010, permits a Money Fund's board of directors to suspend redemptions and postpone payment of redemption proceeds if the fund is about to break the buck and the board decides to liquidate the fund. This amendment is designed to facilitate an orderly liquidation of fund assets in the event of a threatened run on the fund.[34]

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[30] 17 C.F.R. § 270.2a-7(c)(4)(i).

[31] Rule 2a-7(c)(4)(i)(A). Rule 2a-7 includes a safe harbor that permits a taxable and national tax exempt fund to invest up to 25 percent of its assets in the first tier securities of a single issuer for a period of up to three business days after acquisition (but a fund may use this exception for only one issuer at a time). Rule 2a-7(c)(4)(i)(A).

[32] Rule 2a-7(c)(4)(iii). With respect to 25 percent of total assets, holdings of a demand feature or guarantee provider may exceed the 10 percent limit subject to certain conditions. *See* Rule 2a-7(c)(4)(iii)(A), (B), and (C). *See also* Rule 2a-7(a)(9) (definition of "demand feature") and (a)(15) (definition of "guarantee").

[33] *See* 17 C.F.R. § 270.22e-3.

[34] The rule permits a fund to suspend redemptions and payment of proceeds if (i) the fund's board, including a majority of disinterested directors, determines that the deviation between the fund's amortized cost price per share and the market-based net asset value per share may result in material dilution or other unfair results to investors, (ii) the board, including a majority of disinterested directors, irrevocably has approved the liquidation of the fund, and (iii) the fund, prior to suspending redemptions, notifies the SEC of its decision to liquidate and suspend redemptions.

As described further below, the SEC has broad powers under the Investment Company Act and other federal securities laws to oversee the liquidation of a Money Fund.

(4) Money Funds Are Already Subject to Highly Successful SEC and Judicial Resolution Authority; Unlikely FDIC Could Do This Task As Well

The SEC has ample authority to enforce regulatory requirements and take comprehensive emergency actions involving Money Funds. In addition to its comprehensive program of regulation and supervision of Money Funds, the SEC has broad powers to take prompt action to address emergency situations at a Money Fund and promptly resolve the problem. In the Reserve Primary Fund situation, the SEC successfully invoked certain of these powers. Should such a situation arise again in the future, the SEC is able to draw upon the experience it gained in the Fall of 2008, and promptly intervene to oversee an orderly and prompt wind-down of the Money Fund. An FDIC receivership is not necessary to accomplish a wind-down of a Money Fund. The SEC powers to address emergency situations at a Money Fund (some of which must by rule occur automatically without action by the SEC) include:

- SEC rules impose a requirement that the Money Fund make an immediate shift to floating NAV if it departs from the stable NAV;
- Money Fund trustees' are authorized to defer share redemptions, and liquidate the Money Fund, thus treating all investors the same;
- The SEC has the ability to immediately intervene and force a court-supervised liquidation of a troubled Money Fund where the trustees are unwilling or unable to take the above steps;
- The SEC has emergency power under Section 12(k) of the 1934 Act to act by order in an emergency with respect to any matter subject to its regulation, including investment companies;
- The SEC is authorized under Section 25 of the Investment Company Act to intervene in respect of reorganizations and liquidations of investment companies;
- The SEC has cease-and-desist powers under Section 9(f) of the Investment Company Act;
- The SEC has power to obtain injunctive relief under Sections 36 and 40(d) of the Investment Company Act;
- The SEC has power to impose civil money penalties on Money Funds and their related persons under Sections 9(d) and 40(e) of the Investment Company Act;
- The SEC can bring a judicial action and invoke the Federal courts' 1934 Act § 21(d)(5) equitable remedies powers; and

- The SEC can bring a judicial action and petition the Federal court to invoke the All Writs Act[35] powers to enjoin other proceedings that interfere with the court's jurisdiction over the matter.

Other than a federal guarantee of investors, an injection of liquidity into a Money Fund, or a bail-out of Money Fund shareholders (the "too big to fail" federal safety net that Title I of the Dodd Frank Act was designed to limit, Title II prohibits, and which public opinion strongly opposes) there are no additional steps involving Money Funds that the Board could take under Title I of the DFA or the FDIC could take under Title II of the DFA that have not already been addressed by the SEC or for which the SEC does not have ample statutory authority to address going forward.

The proposed resolution plan requirement in the Joint NPR implements the requirements of Section 165(d) of the DFA and helps prepare the FDIC for a resolution of the financial company, if needed, under the receivership powers of Title II of the DFA. The FDIC stated in its January 25, 2011 NIFR that the receivership provisions under Title II were enacted due to the inadequacy of disparate insolvency regimes to effectively address the actual or potential failure of a financial company that could adversely affect economic conditions or financial stability in the United States.[36] Under Title II, the FDIC may be appointed receiver for a nonbank financial company only if the Treasury Secretary finds that the company is in default or in danger of default and "its resolution under otherwise applicable Federal or State law would have serious adverse consequences on financial stability in the U.S." and there is no other viable private sector alternative. This finding cannot be made in respect of a Money Fund, because Money Funds do not use leverage or debt that can be defaulted on, by the nature of their short-term, high-quality, marketable assets they are effectively self-liquidating and Money Funds are required by rule to be in a position to do so if needed, and because the SEC has broad regulatory and supervisory authority to oversee the orderly liquidation of a Money Fund.

If Money Funds cannot legitimately be designated under Title II, it makes no sense in light of the text, structure and purposes of the Act to designate Money Funds under Title I and require a that a Money Fund submit and have approved a resolution plan under Section 165(d) and the rule proposed by the Joint NPR.

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[35] 28 U.S.C. § 1651.

[36] 76 Fed. Reg. at 4207, 4208.

(5) Stable NAV a Result of Stable Portfolio Assets, Not An Accounting Gimmick; And Use Fully Transparent Valuation Methodologies

Money Funds seek to maintain a stable NAV of $1 per share, but do not promise to investors that they will be able to do so, and fully disclose to investors that they might not be able to do so. Money Funds, like all mutual funds, price their shares in dollars and cents, and round asset values up or down to the nearest penny (the "penny rounding" method of calculating share prices). This practice is consistent with most other areas of American commerce, in which most goods and services are priced in dollars and cents, not in mils.

Rule 2a-7 permits a Money Fund to use the "amortized cost" method of accounting for the value of assets held in portfolio.[37] This method for valuing portfolio securities has also been in use for many decades under federal banking regulations for "short term investment funds" operated by bank trust departments for investment of fiduciary and pension accounts.[38]

This method of valuing short-term debt instruments, and rounding share prices to the nearest penny is a convenience that allows investors, broker-dealers, banks, investment advisers and Money Funds to keep track of asset values (and indirectly, customer account values which are calculated by dividing the total net value of the portfolio by the number of outstanding shares of the Money Fund) without excessive and elaborate account-level daily price tracking of fractions of a cent. This use of stable NAV pricing is permitted by SEC rules only for funds that comply with the strict requirements of Rule 2a-7 to ensure that these funds are as stable and low risk as possible, and only for so long as the NAV calculated using the amortized cost value of the portfolio does not materially depart from the shadow price of shares calculated using mark-to-market assets values. Thus, a Money Fund must meet stringent portfolio liquidity, credit quality, maturity, and diversification requirements. These were strengthened by amendments in 2010 that were "designed to make money market funds more resilient to certain short-term market risks, and to provide greater protections for investors in a money market mutual fund that is unable to maintain a stable net asset value per share."[39]

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[37] Under the "amortized cost" method of accounting, Money Funds value the securities in their portfolios at acquisition cost as adjusted for amortization of premium or accretion of discount rather than market value. *See* 17 C.F.R. § 270.2a-7(a)(2). The Rule also allows Money Funds to use the "penny-rounding" method of pricing, which permits rounding to one cent rather than one-tenth of a cent. 17 C.F.R. § 270.2a-7(a)(20). However, this method is seldom used because it does not eliminate daily "mark to market" accounting requirements.

[38] 12 C.F.R. § 9.18(b)(4)(ii)(B).

[39] *See* Release No. IC-29132, 75 Fed. Reg. 10060 (Mar. 4, 2010).

But this is not an accounting gimmick. The permitted use by Money Funds of amortized cost accounting recognizes that the underlying market value of the assets held by a Money Fund are, and are required to be, assets that do not fluctuate to any material degree in market value. Money Fund assets are short term to avoid interest rate and liquidity risk. Money Fund assets are diversified and high credit quality to minimize credit risk. To track compliance with this mandate, Money Funds are required to track and report a "shadow price" of their shares based on a mark-to-market asset value of the portfolio of assets of the Money Fund.

An analysis of shadow price data demonstrates that Money Funds' $1 per share stable net asset value is not an accounting trick, but reflects the stable market values of the assets owned by Money Funds. A recent study of Money Fund shadow prices published by the Investment Company Institute ("ICI"), show that, due to the portfolio restrictions in Rule 2a-7, Money Fund NAVs maintain their values in the face of credit events, interest rate changes and extraordinary market changes.[40] Even in September 2008, in the worst days of the financial crisis, average Money Fund shadow share prices did not break a buck – but stayed above 99.8 cents per share, and returned to an average NAV of 100.0000 cents within a very short period.[41]

The stability of Money Fund NAVs is driven by the stable market value of the underlying assets of Money Funds. This is why, in 2008, during the worst financial crisis since the 1930s, only one Money Fund "broke a buck," over 800 Money Funds did not "break a buck," and the overwhelming majority of those did not require any sponsor support to maintain stable net asset value of $1 per share.

The 2010 amendments to Rule 2a-7 have further removed price movements from the portfolios of assets owned by Money Funds, as shown by mark-to-market to shadow NAVs. As of year-end 2010, for example, 50% of "prime" Money Funds' reported shadow prices are between 99.96 cents and 100.01 cents per share, 38% were between 100.01 and 100.10 cents per share, 6% were between 99.91 and 99.95 cents per share, and the remaining 6% had a shadow price between 99.80 and 99.90 cents per share. Money Fund "shadow prices" must move below 99.5 cents per share or above 100.5 cents per share to cause the Money Fund to "break a buck."[42] Nonetheless, Money Funds continue to warn investors that a Money Fund may not always be able to maintain a stable NAV.

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[40] ICI Research Report, Pricing of Money Market Funds (Jan. 2011).

[41] Money Fund Regulatory Changes Post Financial Crisis, 2011 ICI Money Market Funds Summit (May 16, 2011) (slides available on ICI website).

[42] *Id.*

Thus, the ability of Money Funds to maintain a stable net asset value of $1.00 is not the result of an accounting gimmick. It is the result of very stringent portfolio restrictions that apply to all Money Funds under SEC regulations.

Nor is there a lack of transparency of the valuation methods used by Money Funds. Money Funds are also required to calculate the "shadow price" value of their shares, based on a mark-to-market valuation of portfolio assets, file that information with the SEC and publish that information on the Money Fund's website. The use of the amortized cost method of accounting, and of rounding share prices to the nearest penny, is clearly disclosed to investors in the offering documents and reports provided to Money Fund investors. Moreover, if the NAV of Money Fund shares calculated using the amortized cost method departs materially (0.50 cents per share or more) from the "shadow price" calculated using mark-to-market values, the Money Fund is required to notify the SEC and move to the shadow price in offering and redeeming shares with investors. These disclosures to every Money Fund investor, as well as the periodic public disclosure of the shadow NAV and portfolio holdings, make Money funds perhaps the most thoroughly transparent investment available to the public.

(6) Money Funds Are Not "Shadow Banks"

In recent months, some have called for bank-type regulation of money funds on the theory that they are "shadow banks." Until recently, the term "shadow bank" meant an offshore parallel bank operating in an unregulated jurisdiction and engaged in shady dealings. During the financial crisis, the term was repurposed by bank regulators as a pejorative label for segments of the financial services industry that they did not regulate.[43] As redefined, the term "shadow bank" has been used to mean an unregulated financing vehicle with a lot of leverage and little capital.[44] The exemplar is a securitization vehicle, with an asset base of loans and receivables and a capital

[43] Zoltan, Pozsar, Tobias, Federal Reserve Bank of New York, Staff Report no. 458, Shadow Banking at 4 (July 2010) ("We use the term 'shadow banking system' for this paper, but we believe that it is an incorrect and perhaps pejorative name for such a large and important part of the financial system."). The first use of the term "shadow bank" in August 2007 to refer to ABCP and similar off-balance sheet issuers was apparently by an economist and management officials at a mutual fund management firm, PIMCO, who were seeking to draw bank regulatory policy makers' attention to the risks inherent in the bank regulators allowing these financing structures to grow. *See* Gross, *Beware our shadow banking system*, Fortune Magazine (Nov. 28, 2007); McCulley, PIMCO Global Central Bank Focus, *The Shadow Banking System and Hyman Minsky's Economic Journey* (May 2009). In a classic display of the maxim that "no good deed goes unpunished," the federal bank regulators. who ignored these warnings about the risks associated with ABCP and other off-balance sheet financing in 2007 and early 2008, have now sought to blame the problem on the mutual fund industry that called the issue to their attention in the first place.

[44] The Financial Crisis Inquiry Report: Final Report of the National Commission of the Causes of the Financial and Economic Crisis in the United States at xxi, 27-37 (June 2011).

structure consisting of a couple of percentage points of equity, a tranche of subordinated debt, and a large slug of secured short-term notes, commonly referred to as "asset backed commercial paper" ("ABCP").

Money Funds differ from these entities in that Money Funds are heavily regulated by the SEC, subject to extensive audit, public reporting and transparency requirements, and do not use leverage. Unlike true "shadow banks," Money Funds are financed 100 percent by common equity. In essence, Money Funds do not meet any of the criteria used to define a "shadow bank."

Some in the policy debate have sought to label Money Funds' shares as "debt" (it is equity), argue that shareholders have a "put" to the fund or its manager at $1 per share (they do not)[45] or that the manager or the fund "guarantees" the $1 per share net asset value (they do not). To the contrary, Money Fund investors receive explicit disclosure that investments in Money Funds may lose value and are not insured or guaranteed. Item 4(b) of the Form N-1A registration form that is used by open-end management investment companies to register under the Investment Company Act and to offer their shares under the Securities Act states that if a fund is a Money Fund, it must state:

> An investment in the Fund is not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency. Although the Fund seeks to preserve the value of your investment at $1.00 per share, it is possible to lose money by investing in the Fund.

In addition, if a Money Fund is advised by or sold through an insured depository institution, the above disclosure must be combined in a single statement with disclosure that an investment in the fund is not a deposit of, or guaranteed by a bank and is not insured or guaranteed by the FDIC or any other government agency. The Investment Advisers Act of 1940 ("Advisers Act"), prohibits a registered investment adviser from guaranteeing the value of an advised account's assets, including a mutual fund.[46]

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[45] SEC Roundtable Discussion on Money Funds and Systemic Risk (May 10, 2011) (archived webcast *available on* SEC website at http://www.sec.gov/news/otherwebcasts/2011/mmf-risk051011.shtml).

[46] Representations of guarantees violate Advisers Act Sections 206(1), (2) and (4), which prohibit fraudulent and misleading statements by investment advisers (15 U.S.C. §80b-6(1), (2) and (4)), as well as Rule 206(4)-8 under the Advisers Act, which prohibits fraudulent and misleading statements by investment advisers of pooled investment vehicles, including mutual funds. 17 C.F.R. §275.206(4)-8. *See SEC v. Wehrs*, Lit. Rel. No. 21399, 2010 SEC Lexis 259 (Feb. 1, 2010).

Others have sought to label Money Funds as "shadow banks" by claiming that Money Funds are unregulated. For example, a former Board Chairman recently testified before the Financial Crisis Inquiry Commission ("FCIC") that Money Funds were not regulated, and the FCIC summarized in its report that:

> money market funds had no capital or leverage standards…. The funds had to follow only regulations restricting the type of securities in which they could invest, the duration of those securities, and the diversification of their portfolios. These requirements were supposed to ensure that investors' shares would not diminish in value and would be available anytime-- important reassurances, but not the same as FDIC insurance.[47]

The truth is that Money Funds are ***comprehensively regulated*** by the SEC under a statute and regulations that essentially require them to be capitalized entirely with equity and that preclude the use of leverage. The SEC regulations restricting the type of securities in which Money Funds can invest and their maturity and duration are a central reason why only two Money Funds have broken the buck in forty years of the industry's existence; and in those two cases investors got back the overwhelming majority of their investments relatively quickly. The regulatory regime governing Money Funds is not the same as FDIC insurance, it is far more effective than the FDIC and the regime of federal banking regulation, both in protecting Money Funds and their customer/investors against insolvency and in protecting the federal government from having to bail them out. Money Funds do not represent a case of no regulation, but of profoundly successful, yet simple and extraordinarily elegant, regulation.

The stability of Money Funds – especially when compared with banks – is due in large part to a regulatory system that provides for investor protection, active oversight, inspections and a competitive environment. The investment restrictions applicable to Money Funds are far more stringent than those that apply to banks in terms of duration, credit quality, and liquidity. In brief, Money Funds may invest in short-term debt instruments in which a national bank may invest, including prime commercial paper, bank deposits, short-term U.S. government securities, and short-term municipal government securities.[48] However, they may not invest in many of the higher risk, less liquid and longer-term investments that national banks may own, such as medium and long-term government or corporate debt and most types of loans (*e.g.*, mortgages and consumer loans). In short, Money Fund investment portfolios are far less risky and far more

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[47] Final Report of the National Commission on the Causes of the Financial and Economic Crisis In the United States at 33 (Jan. 2011).

[48] 12 U.S.C. §24 (Seventh), 12 C.F.R. Part 1 (2008).

liquid than those of banks. They need to be. Money Funds do not rely on a Federal government guarantee to operate.

Money Funds are a type of mutual fund. As such, they must register with the SEC as "investment companies" under the Investment Company Act, which subjects them to stringent regulatory, disclosure, and reporting provisions. Thus, they must register offerings of their securities with the SEC and provide perpetually updated prospectuses to potential investors. They must also file periodic reports with the SEC and provide shareholders with annual and semi-annual reports, which must include financial data and a list of portfolio securities. In addition, the Investment Company Act governs virtually every aspect of a mutual fund's structure and operations, including its capital structure, investment activities, valuation of shares, the composition of the board, and the duties and independence of its directors. Mutual funds also are subject to extensive recordkeeping requirements and regular inspections. In addition, the advisers to mutual funds, including Money Funds, are subject to SEC registration under the Advisers Act, which imposes its own reporting and recordkeeping requirements, prescribes the terms of advisory contracts, and provides for SEC inspections and examinations. As described elsewhere in this letter, the SEC has adopted and enforces detailed and elaborate rules governing the portfolios and operations of Money Funds, including Rules 2a-7, 17a-9, 22e-3, 30b1-7, and Form N-MFP (17 C.F.R. §§ 270.2a-7, 270.17a-9, 270.22e-3 and 270.30b1-7, and 17 C.F.R. §274.201. No realistic assessment of Money Funds can conclude that they are not regulated.

Money funds have been lumped in with "shadow banks" by some voices in the policy debate in part because prior to 2008, Money Funds were significant investors in ABCP and thus were characterized by some as helping to finance the shadow banking system.[49] Notably, commercial banks have been and continue to be significant investors in ABCP.[50] Indeed, a very large portion of the ABCP market, and the special purpose investment vehicle ("SIV") financing market was created, controlled and driven by commercial banks and was designed and developed to address accounting and commercial bank regulatory issues in getting financing structures off the balance sheets of banks that effectively controlled the conduits that were the issuers of the paper. However, with changes to accounting and commercial bank regulatory capital treatment of commercial-bank-sponsored commercial paper conduits, and to a lesser extent the 2010 amendments to Rule 2a-7, and changes to the SIV, ABCP and commercial paper market, issuances of ABCP have fallen by roughly two-thirds since 2007. As a consequence, Money

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[49] Federal Reserve Bank of New York Staff Report No. 458, *supra*, at 11; Konczal, Shadow Banking: What It Is, How It Broke, and How to Fix It, *The Atlantic* (July 13, 2009).

[50] See 12 C.F.R. Part 1 (commercial paper a permitted investment for national banks in an amount of up to 10% of the bank's capital per issuer).

Funds' investments in ABCP have been substantially reduced.[51] Thus, the characterization of Money Funds as "shadow banks" by virtue of these investments no longer has a factual basis, to the extent it ever did, and the true focal point of financing for ABCP and SIVs was commercial banks, not Money Funds.

In summary, Money Funds are not "shadow banks" and are not part of the "shadow banking system."

(7) Money Funds Should be Specifically Excluded Pursuant to Section 170 of DFA

Money Funds are a regulatory success. They are subject to robust regulation by the SEC, which has an excellent record in its oversight of Money Funds and a superior track record in this area in comparison to bank-type prudential regulation or FDIC receivership.

Money Funds should not be designated for prudential regulation by the Board under Title I or FDIC receivership under Title II or required to submit resolution plans to the Board and FDIC. The receivership process created by Title II is inappropriate for Money Funds which rely on equity, rather than debt financing, are essentially self liquidating by the nature of their assets, and are already covered by existing regulatory and judicial protocols when necessary for a prompt and efficient wind-down of a Money Fund.

Section 170 of the DFA dictates that in connection with Council rules implementing Title I, the Board "***shall*** promulgate regulations in consultation with and on behalf of the Council setting forth the criteria for exempting certain types or classes of U.S. nonbank financial companies… from supervision by the" Board. Section 170 is not merely a grant of authority, it is a specific rulemaking requirement that the exemptive rules ***shall*** be promulgated.

In oversight hearings before the Senate Banking Committee on February 17, 2011, FDIC Chairman Sheila Bair testified, when asked what criteria will be used to designate companies under Titles I and II, that it is easier to define what companies will *not* be subject to designation.[52] The Chairman is correct. That should be done through the Section 170 exemption

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[51] *See* Crane Data, *ICI's Latest Shows MMF Assets Rising, Cont. Shift from Repo to CDs* (May 27, 2011) (*available at* http://www.cranedata.com/archives/all-articles/3457/).

[52] *Oversight of Dodd Frank Implementation*, Hearings Before Senate Banking Committee (Feb. 17, 2011) *available at* http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=c43953db-0fd7-43c3-b6b8-97e2d0da3ef7.

criteria rulemaking that the Board is required to conduct, to provide more certainty around the process.

The U.S. economic system demands stability and a clear regulatory framework. Indeed, the President's recent Executive Order directs that regulations "must promote predictability and reduce uncertainty."[53]

As one of the Federal Reserve Banks recently noted in comments to the FDIC, the uncertainty over the terms, standards and processes to be used under Titles I and II presents a danger and may increase, rather than decrease, risks in the financial system.[54] In comments filed with the FDIC on its rulemaking proposal earlier this year, the Federal Reserve Bank of Richmond stated that:

> the orderly liquidation authority should be as transparent, unambiguous, and predictable as possible, and Title II would benefit from any rulemaking that makes the FDIC's authority clearer and more consistent. For this reason, we're pleased to read that the proposed rule's purpose "is to provide clarity and certainty to the financial industry and to ensure that the liquidation process under Title II reflects the Dodd-Frank Act's mandate of transparency in the liquidation of failing systemic financial companies." We worry, however, that despite the FDIC's efforts to enhance the orderly liquidation authority's transparency and predictability, the constructive ambiguity that accompanies the FDIC's discretion is likely to breed market uncertainty, which can add to financial volatility when market participants are forced to speculate on the FDIC's treatment of various similarly situated creditors. The potential for panics and runs in the face of such ambiguity could in turn impinge on the FDIC's decision making in the midst of a crisis. Greater transparency and predictability would help limit this adverse feedback loop.[55]

We think the best way to reduce the uncertainty created by the ambiguity in Title I is to make clear to investors and the public that Money Funds will ***not*** be required to submit resolution plans under Section 165(d) because they will not be designated for FDIC receivership under Title II or Board supervision under Title I of DFA. This can be done through a combination of revising the definition of "covered company" in the rules proposed by the Joint

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[53] *Improving Regulation and Regulatory Review*, Exec. Order No., at 3821 13563 (Jan. 18, 2011).

[54] Letter from Jeffrey M. Lacker, President, Federal Reserve Bank of Richmond to FDIC (Jan. 18, 2011) (*available at* http://www.fdic.gov/regulations/laws/federal/2010/10c35Orderliq.PDF).

[55] Letter from Jeffrey M. Lacker, President, Federal Reserve Bank of Richmond to FDIC, at 2 (Jan. 18, 2011) (*available at* http://www.fdic.gov/regulations/laws/federal/2010/10c35Orderliq.PDF).

NPR, formal statements on this point by the Board, FDIC, and Council, action by the Board on behalf of the Council pursuant to Section 170 of the DFA to exclude Money Funds from coverage, and actions consistent with that position over time by the Board, Council and FDIC.

We note in this regard that it is doubtful that *any* open-end investment company (*e.g.* a mutual fund), including a Money Fund, is within the definition of a "nonbank financial company" that is subject to designation under Title I or Title II of the DFA.[56] The Board has steadfastly refused for nearly six decades to interpret the provisions of Section 4 of the BHC Act that are incorporated into the DFA definition of a "nonbank financial company" to permit bank holding companies to control, be affiliated with, or be open-end investment companies (i.e. mutual funds), and has taken actions to prevent that from occurring.[57] Because the Board has not determined that being or controlling an open-end investment company or mutual funds is an eligible activity under those provisions, the activity of being an open end investment company is not a "financial" activity and thus mutual funds are not "nonbank financial companies" for purposes of Title I of Dodd Frank. The Board cannot have it both ways.[58] If Sections 4(c)(8) and 4(k) do not authorize a bank holding company to engage in the activity of being or controlling a mutual fund, then a mutual fund cannot be a nonbank financial company within the meaning of Title I.

Moreover, a primary purpose of designation of a nonbank financial company under Title I is to prepare it, and place it in line, for a potential FDIC receivership under Title II. Because the text, purpose and structure of Title II (and of Sections 165(d) & (g)) clearly establish that Title II receiverships are to address defaults by a nonbank financial company on its obligations, and Money Funds are financed entirely by shareholder equity and do not borrow or otherwise

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[56] Section 102 of the DFA defines the universe of "nonbank financial companies," that potentially are subject to designation under Title I, by reference to the financial powers of Section 4(k) of the Bank Holding Company Act ("BHC Act"), 12 U.S.C. 1843(k). Section 4(k) in turn has its own list of activities, including those permitted under Section 4(c)(8) of the BHC Act and Regulation K, 12 C.F.R. § 211. Other parts of the BHC Act (Sections 4(c)(5), 4(c)(6) and 4(c)(7) of that Act) authorize investing in securities and in investment companies, and 4(c)(8) and Regulation K have been interpreted by the Board to include sponsoring, advising, administering and providing other services to open-end and closed end investment companies, as well as dealing and underwriting in securities (as contrasted to investing, reinvesting and trading in securities). But the Board has gone out of its way <u>*not*</u> to determine that being, or controlling, an open-end investment company is a permitted Section 4(c)(8) or 4(k) activity. Petition of the United States in *Board of Governors of the Federal Reserve System v Investment Company Institute* (in U.S. Supreme Court Docket No. 79-927, October Term, 1979), 450 U.S. 46 (1981).

[57] *See* 12 C.F.R. §§ 211.10(a)(11), 225.28(b)(6), 225.86(b)(3), 225.125.

[58] *Cf. Citicorp v Bd. of Governors*, 936 F.2d 66 (2d Cir. 1991), *cert. denied* 502 U.S. 1031 (1992) (Federal Reserve Board cannot simultaneously interpret the BHC Act in two different, conflicting ways).

use leverage, they do not have the ability to default on their obligations in a way contemplated by Section 165(d) and Title II. If Money Funds do not have the kinds of debts and counterparty obligations that Titles I and II were intended to address, it makes no sense within the structure and purposes of Titles I and II to treat Money Funds as nonbank financial companies that are subject to designation under those Titles.

To the extent that there is any doubt on this question, it would be appropriate and in the public interest for the Board acting in consultation with the FDIC and the Council to exercise the mandatory exemptive authority in Section 170 of the DFA to exclude Money Funds from coverage under Titles I and II.

(8) The Resolution Plan Requirement Is Part of an Integrated Statutory Program That Is Fundamentally Flawed

The statute and the various proposed rules that would implement the statute contain a number of other flaws and shortcomings, which are discussed in more detail in our previous comment letters, two of which are attached hereto and should be included in the comment file on the Joint NPR. If applied to Money Funds, the Joint NPR is subject to these same flaws. Due to the procedural and practical linkages and statutory intertwining of Titles I and II of the DFA with Title I of the DFA and the rules under both Titles, the Joint NPR implementing Section 165(d) of Title I is made defective by the shortcomings in other parts of Titles I and II and the related implementing rules. Certain of these are highlighted below, and described more fully in our prior comment letters.

The interrelated provisions of Titles I and II concerning the designation of nonbank financial companies contain significant Constitutional defects that have not been addressed, or even mentioned, in the Joint NPR or in the related rulemakings of the Board, the FDIC and the Council implementing Title I and Title II. In the context of this Joint NPR to implement the resolution plan provisions of Section 165(d) of the DFA, the judicial review provisions of Titles I and II of the DFA, which dramatically curtail judicial oversight of agency actions particularly those related to designation of firms under Titles I and II and resolution of firms, and the implementing rules, infringe inappropriately on the role of the Federal courts under Article III of the Constitution and the right of private parties to have access to Article III courts, rather than a federal agency, in the ultimate determination and disposition of their private property rights and interests.

The curtailment of the role and authority of Article III federal courts in the process of reviewing agency action associated with the designation of nonbank financial companies under Titles I and II of DFA, and in adjudicating private rights, violates the Constitution.[59]

Although the property interests and contractual rights of investors, counterparties and other private parties will be profoundly affected by a receivership under Title II of the DFA, and the decisions and determinations of the receiver, the stated purposes of Title II do not include protecting those private parties' interests and rights, as against one another, as against the failed institution or its management, as against the government, or as against the general good of the public. Instead, the prime directive in designating and liquidating companies under Title II is protecting the financial stability of the United States, and the priority of payments places the claims of the United States ahead of everyone (other than the administrative expenses of the receiver).[60]

Unlike banks, which choose to subject themselves to potential FDIC receivership when they apply for FDIC insurance, nonbank financial companies that are designated under Title I of the DFA and potentially subject to Title II FDIC receivership do not elect that treatment. Becoming subject to Title II is not a voluntary, consensual step undertaken by the subject company. It is instead thrust upon a nonbank financial company (and thus upon the company's creditors, counterparties, shareholders and employees and others whose private property and rights would be affected by a receivership) by virtue of engaging in any of a broad and ill-defined swath of activities deemed to be financial in nature. Banks voluntarily apply for and obtain FDIC insurance and thus opt into the federal receivership provisions that come along with FDIC insurance and have direct access to Federal Reserve Bank lending on a regular basis, enjoy a federal government-granted monopoly to subsidized deposit-taking as a means to finance their operations, and in the case of national banks and federal savings associations, are organized and exist under Federal law, and thus are both willing participants in, and direct beneficiaries of, a federal safety net that effectively subsidizes their costs of doing business. In contrast, nonbank financial entities are not voluntary participants in the DFA Title I and Title II designation process and receivership provisions, nor are they participants in the federal safety net on a regular and continuous basis. Whatever may or may not be the Constitutionality of limited

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[59] *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); (Boyden Gray & John Shu, *The Dodd-Frank Wall Street Reform & Consumer Protection Act of 2010: Is It Constitutional?* (Nov. 16, 2010) (*available at* www.fed-soc.org); Federalist Society Panel Discussion on the Constitutionality of the Dodd-Frank Financial Services Reform Act (Nov. 19, 2010), webcast *available at* www.youtube.com/watch?v=qX2iDe1eox0; Cato Institute Policy Forum, *Is Dodd Frank Constitutional?* (Feb. 15, 2011), webcast *available at* http://www.cato.org/event.php?eventid=7732.

[60] DFA § 210(b).

judicial involvement in and oversight of the designation and receivership powers as applied to banks that voluntarily elect into a federal receivership system outside of the normal bankruptcy process, the analysis is very different in the case of nonbank financial services companies.

As part of the statutory program, judicial review of placement of a nonbank financial company into receivership is extraordinarily limited by Section 202 to a period of 24 hours, on an arbitrary and capricious standard, with no stay. Other provisions of Title II of the DFA, including Section 205(c), 208, 210(a)(4), 210(a)(8), 210(e), and 210(h)(6), further limit judicial participation in the process. Individual claims brought against the receivership, after initial determination by the FDIC as receiver, are subject to determination in the district court on a *de novo* standard, but the resolution or plan for resolution of the estate, payment of those claims, and the ultimate disposition of the assets of the estate, are determined by the FDIC as receiver subject only to very limited judicial review.[61]

Due to the extraordinary limitation on judicial review of the designation and actions taken under Title II of the DFA, the determination and resolution of the property rights and interests of private parties under Title II and the Joint NPR as currently structured would violate due process requirements under the Fifth Amendment to the Constitution, and would otherwise conflict with the due process rights of private parties under the Constitution. Designation under Title I of the DFA places a nonbank financial company by definition and through the interrelated provisions of Title I and Title II at risk of a Title II receivership and thus shares the inherent Constitutional flaw that exists in Title II.

The Board and FDIC have an obligation in conducting a rulemaking to consider the Constitutional issues associated with these provisions.[62] This has not been done, and no effort has been made in the rulemaking to address or ameliorate these issues. If the Constitutional flaws in the statute can be fixed as part of the rulemaking, they must be fixed. If they are not fixable, then the rule cannot be validly adopted and must be withdrawn.

The breadth and vagueness of the authority granted under Titles I and II on such issues as who will be subject to designation and on what grounds, and the lack of clarity as to what agency is responsible, impermissibly delegates legislative authority, a flaw that is compounded by the failure of the regulators in their respective rulemakings to clarify and narrow these provisions. Under these circumstances, the Joint NPR and other actions taken by the Board, the Council, the

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[61] DFA §§ 210(a)(2)-(4), (e)(4).

[62] *See Whitney Nat'l Bank v. Bank of New Orleans*, 379 U.S. 411, 418-425 (1965); *Iowa Indep. Bankers Ass'n v. Bd. of Governors*, 511 F.2d 1288, 1293 n. 4 (D.C. Cir. 1975).

FDIC, and other federal agencies pursuant to Titles I and II are not subject to judicial deference under the standards of *Chevron* and its progeny[63] but instead under the less deferential judicial review standards of *Industrial Union Department, AFL-CIO*, and similar cases.[64]

(9) Paperwork Reduction Act Estimates Internally Inconsistent, In Conflict With Representations Made to Congress

The Paperwork Reduction Act estimates in the Joint NPR do not add up, and are inconsistent with the other estimates of how many companies will be designated under Titles I and II of DFA and how much work will be required by companies to comply with regulatory requirements. The Joint NPR estimates 124 firms will be required to submit resolution plans and reports of exposure, with an average time involved per covered financial institution of 12,400 hours for the first year and 2,881 for subsequent years, for a total of 1,337,600 hours for the first year across all respondents, and 267,544 annually thereafter across all respondents in total. We note that 124 respondents multiplied by 12,400 hours does not equal or even approximate 1,337,600 hours, and 124 respondents multiplied by 2881 hours does not equal or approximate 267,544 hours.

Title I specifies that banking entities with $50 billion or more of consolidated assets shall be deemed to be systemically important and designated under Title I.[65] According to data posted on the FFIEC website, there are approximately 35 U.S. banking organizations with $50 billion or more in consolidated assets.[66] If there are a total of 124 firms designated under Title I, that suggests that approximately 89 foreign banks with U.S. branches and non-bank financial firms will be designated under Title I and required to submit resolution plans.

When Congress was considering Titles I and II of the DFA, Board Chairman Ben Bernanke testified that a total of roughly 25 firms, "virtually all of" which were bank holding

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[63] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *United States v. Mead Corp.*, 533 U.S. 218 (2001).

[64] *Indus. Union Dep't, AFL, CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980); *City of New York v. Clinton*, 985 F. Supp. 168 (D.D.C. 1998), *aff'd on other grounds, Clinton v. City of New York*, 534 U.S. 417 (1998); *Whitman v. Am. Trucking Co.*, 531 U.S. 457, 487 (2001) (concurring opinion of Justice Thomas). The normal cure for an overly broad delegation of legislative power is a narrow reading by the courts of the grant of authority in order to avoid the Constitutional issue, *see e.g., Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998); *Whitman*, 531 U.S. at 476 (concurring opinion of Justices Stevens and Souter).

[65] Federal Reserve, *Proposed Rule: Definitions of "Predominantly Engaged in Financial Activities" and "Significant" Nonbank Financial Company and Bank Holding Company*, 76 Fed. Reg. 7731, 7737 (Feb. 11, 2011).

[66] http://www.ffiec.gov/nicpubweb/nicweb/top50form.aspx.

companies already regulated by the Board, would meet the test of systemic significance for designation under the Act.[67] In its paperwork estimate as of February 11, 2011, the Board suggested that only three nonbank financial firms will be designated under Title I[68] (and as a result would need to submit resolution plans under Section 165(d)).

"Mission creep" has now entered the DFA rulemaking process. The estimate of 124 firms being subject to the rule proposed in the Joint NPR signals that the regulators will be overly inclusive in their designation of financial companies for supervision under Title I, submission of resolution plans under Section 165(d) and receivership under Title II, in conflict with the intent of Congress, the terms of the statute, and the economic best interests of the American people.

(10) Money Funds Represent a Regulatory Success, Particularly As Compared to Regulation of Depository Institutions

History and Importance of Money Funds

Approximately thirty million investors own shares of Money Funds. The utility of Money Funds and their popularity with citizens, as well as Money Funds' successful forty-year track record of operations, cannot be overlooked in the policy discussion involving whether Money Funds should be regulated like banks by the Board and FDIC.

Money Funds are leading investors in the short-term debt instruments that are issued and traded in the "money market," including Treasury bills, bankers' acceptances, certificates of deposit, federal funds and commercial paper.[69] The money market is the single most important source of liquidity funding for the global financial system. It permits large institutions to meet

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[67] Regulatory Perspectives on the Obama Administration's Regulatory Reform Proposals, Part II, Hearings before the Financial Services Committee, U.S. House of Representatives, 111th Cong., 1st Sess. July 24, 2009, H.R. 111-68 at 47-48 (testimony of Federal Reserve Board Chairman Ben Bernanke). Similar statements that only a very few firms were appropriate for designation under Title I were made on several occasions during consideration of the DFA. *See, e.g.* Written Statement of former Federal Reserve Board Chairman Paul A. Volcker to Senate Banking Committee (Feb. 2, 2010); Written Statement of former Federal Reserve Board Chairman Paul A Volcker to House Financial Services Committee (Sept. 24, 2009) (estimating number between 5 and 25 firms globally).

[68] 76 Fed. Reg. 7731, 7735-37.

[69] Commercial paper consists of short-term, promissory notes issued primarily by corporations with maturities of up to 270 days but averaging about 30 days. Companies use commercial paper to raise cash for current operations as it is often cheaper than securing a bank loan. Federal Reserve Board, *Commercial Paper, available at* http://www.federalreserve.gov/releases/cp/about.htm.

short-term borrowing needs and invest cash holdings for brief periods. Federal, state and local governments also use the money market to meet liquidity needs by issuing short-term paper, including municipal paper and Treasury bills. The Federal Reserve utilizes Money Funds in its reverse repurchase program.

Money Funds were first offered in the U.S. in 1971 as a way to preserve investor principal while earning a reasonable return – and for the first time made a market interest rate available to retail investors. They have become widely held by many types of investors and are subject to pervasive regulation and oversight by the SEC. Due in large part to SEC rules that require them to invest exclusively in specific high-quality, short-term instruments issued by financially stable entities, they also have enjoyed a high degree of success, greatly increasing in number and in assets under management. Thus, Money Funds are now among the most widely held, low-risk and liquid investments in the world.[70]

For investors of all types, Money Funds offer numerous benefits. They come in several forms, including both taxable funds (which invest in securities such as Treasury bills and commercial paper) and tax-free funds (which generally invest in municipal securities), government funds (which invest only in U.S. government and agency securities and repurchase agreements on those securities), and "prime" funds (which invest in short-term corporate and bank debt, but not government securities).[71] Investors can choose between and among funds that offer slightly higher yields, funds that offer less credit risk, and funds that offer tax advantages. For institutional investors, Money Funds offer low cost, convenient ways to invest cash in the short-term. Many institutional investors, including companies and governmental entities, have cash balances swept from their operating accounts into Money Funds on a nightly basis. For retail investors, Money Funds continue to offer a low-risk, low-expense way to diversify liquid holdings.

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[70] Notwithstanding relatively low prevailing yields, according to the Investment Company Institute, as of June 8, 2011, Money Funds had over $2.7 trillion in assets under management. *See* Investment Company Institute, *Money Market Mutual Fund Assets*, Jun. 9, 2011, *available at* http://www.ici.org/research/stats/mmf/mm_06_09_11. Investment Company Institute historical weekly money market data show that assets under management have declined significantly since January 2009. As of January 7, 2009, Money Funds had over $3.8 trillion in assets. *See* Investment Company Institute, *Weekly Total Net Assets (TNA) and Number of Money Market Mutual Funds*, *available at* http://www.ici.org/pdf/mm_data_2010.pdf.

[71] *See* Sue Asci, *Prime Money Funds See Recent Inflows*, Investment News, Feb. 22, 2009.

Based on Investment Company Institute data, as of December 2010, there were approximately 652 Money Funds.[72] As of June 8, 2011, Money Funds held over $2.7 trillion in assets under management.[73] Money Funds account for investments in almost 40% of outstanding commercial paper, approximately two-thirds of short-term state and local government debt, and a substantial amount of outstanding short-term Treasury and federal agency securities.[74] During the more than 25 years since Rule 2a-7 was adopted in 1983, over $335 trillion has flowed in and out of Money Funds.[75]

Performance Comparison of Money Funds to Bank Failures

Banks and their trade associations viewed Money Funds in their early years as competitors for retail business, and supported efforts to subject Money Funds to "bank-like" or "prudential" supervision.[76] Policy makers, however, recognized that bank-like regulation would

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[72] Investment Company Institute, *Money Market Mutual Fund Assets*, Jun. 9, 2011, *available at* http://www.ici.org/research/stats/mmf/mm_06_09_11.

[73] Of this amount, retail Money Funds held an estimated $933 billion of this sum, while institutional funds held over $1.8 trillion – though this distinction is somewhat arbitrary. Investment Company Institute, *Money Market Mutual Fund Assets*, Mar. 17, 2011, *available at* http://www.ici.org/research/stats/mmf/mm_03_17_11.

[74] *See* REPORT OF THE PRESIDENT'S WORKING GROUP ON FINANCIAL MARKETS, MONEY MARKET FUND REFORM OPTIONS 7, *available at* http://treas.gov/press/releases/docs/10.21%20PWG%20Report%20Final.pdf.

[75] *See* Investment Company Institute, *Report of the Money Market Working Group*, Mar. 17, 2009 (hereinafter "ICI Money Market Working Group Report"), at 38, *available at* www.ici.org/pdf/ppr_09_mmwg.pdf.

[76] *See, e.g.*, *Shooting at Money Market Funds*, Time, Mar. 23, 1981, *available at* http://www.time.com/time/magazine/article/0,9171,952946,00.html. The article states that that banking and savings institutions had "undoubtedly been hurt by the Money Funds" and that "banks and savings and loans have launched drives to bring them down…Last week the U.S. League of Savings Associations urged the Government to impose sharp restrictions on the money market funds and asked the Federal Savings and Loan Insurance Corporation to pledge up to $7 billion in low-cost loans." The article further notes that "Senate Banking Committee Chairman Jake Garn of Utah wants to prevent money market funds from offering check-writing privileges; Congressman James Leach of Iowa has introduced a bill that would diminish the funds' appeal by setting reserve requirements on them…The funds are also under heavy assault in several state legislatures." *See also* Karen W. Arenson, *Volcker Proposes Money Funds Be Subject to Rules on Reserves*, N.Y. TIMES, June 26, 1981 (noting that former Federal Reserve Chairman Paul A. Volcker testified before a Congressional subcommittee that money market funds should be subject to regulations that would make them more competitive with banking institutions and less attractive to investors. Mr. Volcker also testified that reserve requirements were a key part of monetary policy and because they could not be removed from banking institutions, also should apply to other investment vehicles); Beatson Wallace, *Money Funds Aren't Banks*, BOSTON GLOBE, May 21, 1981 (noting that "[m]oney market funds continue to be the whipping boy of the banking industry and the delight of the small sum investor.") The article explains that Treasury Secretary Donald T. Regan testified that "imposing new controls on our financial markets would be the wrong approach to assisting the thrift industry," but that nevertheless Senator Jake Garn "persists in his effort to curry

Footnote continued on next page

effectively kill off what has become not only an important investment choice for millions of individuals and institutions,[77] but also a highly efficient and essential mechanism to fund the needs of business and government borrowers in the short-term market.[78]

Moreover, Money Funds have enjoyed a stunningly superior safety record compared to insured depository institutions. Only two Money Funds have "broken the buck" and returned shareholders less than 100 cents on the dollar: the Community Bankers U.S. Government Fund, which in 1994 repaid its investors 96 cents on the dollar,[79] and the Reserve Primary Fund, which was forced to liquidate in September 2008 as a result of a run triggered by Lehman's bankruptcy and the fund's holdings of Lehman commercial paper. The Reserve Primary Fund has returned to shareholders more than 99 cents on the dollar.[80] Significantly, no taxpayer funds were used to bail out shareholders.

Footnote continued from previous page
support for legislation to curb the funds' check-writing feature and make the funds maintain a percent of their assets in a reserve account."

[77] *See, e.g., Competition and Conditions in the Financial System*, Hearings Before the Committee on Banking, Housing, and Urban Affairs, United States Senate, 97th Cong., 939 (1981) (statement of former SEC Commissioner John R. Evans, who testified that "we are very concerned with suggestions that legislation should be enacted which would impose bank-type regulation on money market funds to the detriment of [public] investors." Noting that "many depository institutions are having difficulty attracting savings during a period when money market funds are experiencing dramatic growth….We can understand why certain depository institutions might like their competitors to be restricted. We believe, however, that any consideration of legislation to impose bank-type regulatory burdens and limitations on money market funds should include an evaluation of the existing regulation of such funds, the present protection provided to investors, and the negative impact that such proposals would have on the millions of people who invest in money market funds." Further, "[i]t is the Commission's view that the harm to small investors, and the inconvenience to large investors, which could result from the imposition of bank-type regulations on money market funds may not be significantly offset by any benefit to banks and thrift institutions."

[78] *See* Phillip R. Mack, *Recent Trends in the Mutual Fund Industry*, 79 Fed. Res. Bull. 1001, 1005 (1993), *available at* http://findarticles.com/p/articles/mi_m4126/is_n11_v79/ai_14714669/pg_5/?tag=content;col1, stating that "[m]oney market mutual funds grew rapidly in the late 1970s and early 1980s, when interest rates on money market instruments exceeded regulatory ceilings that applied to depository institutions. Flows from depositories to money funds supported expansion of the commercial paper market, an important alternative to bank loans for businesses."

[79] Note that the fund had only institutional investors, so individual investors were not directly harmed. *See* ICI Money Market Working Group Report, at 39, *available at* www.ici.org/pdf/ppr_09_mmwg.pdf. *See* Saul S. Cohen, *The Challenge of Derivatives*, 63 Fordham L. Rev. 1993, 1995 n.15 (1995) (internal citations omitted).

[80] *See* Press Release, *Reserve Primary Fund to Distribute $215 Million* (July 15, 2010), *available at* http://www.reservefunds.com/pdfs/Primary%20Distribution_71510.pdf; *see also* SEC Press Release: *Reserve Primary Fund Distributes Assets to Investors* (Jan. 29, 2010), *available at* http://www.sec.gov/news/press/2010/2010-16.htm.

Money Funds achieved this success under the regulation and oversight of the SEC and its Division of Investment Management.[81] At the core of this regulatory program is SEC Rule 2a-7, which in eleven pages imposes sound principals that are the secret of the stability and solvency of Money Funds: invest only in very short-term, high quality, marketable debt instruments in a diversified manner, and do not use any leverage. Rule 2a-7 is the Occam's Razor of financial regulation.

In comparison, the prudential regulation of banks involves four (formerly five) federal regulators and over fifty regulators in states and other districts. The federal agencies alone require over 26,000 full-time employees.[82] The federal banking code – Title 12 of the United States Code and Title 12 of the Code of Federal Regulations – totals fourteen volumes and many thousands of pages of requirements and prohibitions. Yet, during the 40 years since the launch of the first Money Fund – a period during which the Money Fund industry experienced exactly two "failures" – some 2,840 depository institutions have failed, and an additional 592 were the subject of "assistance transactions" in which the government injected capital to keep them afloat.[83] From 1971 through 2010, total estimated FDIC losses incurred in connection with failed banks or assistance transactions amount to $188,538,945,000.[84]

Performance of Money Funds During the Financial Crisis

Even in times of greatest financial stress, Money Funds have proved to be more stable than depository institutions. Since January 2008, as a result of the financial crisis that followed the burst of the housing bubble and the collapse of mortgage-backed securities investments, at least 358 banks have failed,[85] and even more would have failed but for dozens of federal programs that infused banks with cash. The Board, Department of the Treasury, and FDIC spent approximately $2 trillion on an array of programs to infuse cash into the banking system.[86] In

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[81] We note that the SEC's program of regulating and supervising investment companies has been extraordinarily efficient and effective to date and that the SEC is appropriately seeking additional funding to carry out its new responsibilities under the DFA.

[82] FDIC 2009 Annual Report; FRB 2009 Annual Report; OCC 2009 Annual Report; OTS 2009 Annual Report.

[83] FDIC Database of Failures and Assistance Transactions, *available at* http://www2.fdic.gov/hsob/SelectRpt.asp?EntryTyp=30.

[84] FDIC Database of Failures and Assistance Transactions, *available at* http://www2.fdic.gov/hsob/SelectRpt.asp?EntryTyp=30.

[85] FDIC Failed Bank List, *available at* http://www.fdic.gov/bank/individual/failed/banklist.html.

[86] Congressional Oversight Panel, *September Oversight Report: Assessing the TARP on the Eve of Its Expiration*, at 145-46 (Sept. 16, 2010).

addition, the Board has kept interest rates close to zero, allowing banks to borrow at almost no cost and to lend at higher rates so as to practically guarantee risk-free profits. This is estimated to cost savers $350 billion each year as banks do not have to compete for depositors' funds, and therefore may offer only low interest rates on deposits.[87]

During the same period, only one Money Fund, the Reserve Primary Fund, failed to return investors' shares at less than 100 cents on the dollar.[88] Nonetheless, the massive requests for redemptions by the Reserve Primary Fund shareholders beginning on September 15, 2008 when Lehman declared bankruptcy, and Reserve's announcement the following day that it would re-price its shares, triggered a run by investors in other prime Money Funds who feared that those funds' holdings of commercial paper of other financial institutions would decline in value. Numerous Money Funds liquidated assets or imposed redemption limits[89] and a number of funds obtained support from their advisers or other affiliated persons.[90] As the PWG Report describes,

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[87] Yalman Onaran and Alexis Leondis, *Bank Bailout Returns 8.2% Beating Treasury Yields*, Bloomberg (Oct. 20, 2010), *available at* http://www.bloomberg.com/news/2010-10-20/bailout-of-wall-street-returns-8-2-profit-to-taxpayers-beating-treasuries.html.

[88] On September 16, 2008, the Reserve Primary Fund's shares were priced at 97 cents after it wrote off debt issued by Lehman Brothers, which had declared bankruptcy the day before. Even so, this event was in large part due to misconduct by the Fund's management, as the SEC has alleged in a pending enforcement proceeding. *See* SEC Press Release: *SEC Charges Operators of Reserve Primary Fund With Fraud* , May 5, 2009, *available at* http://www.sec.gov/news/press/2009/2009-104.htm and related SEC Complaint, *available at* http://www.sec.gov/litigation/complaints/2009/comp21025.pdf, at 35. Moreover, Reserve Fund shareholders recovered more than 99 cents on the dollar after it closed. Press Release, *Reserve Primary Fund to Distribute $215 Million* (July 15, 2010), *available at* http://www.reservefunds.com/pdfs/Primary%20Distribution_71510.pdf; SEC Press Release: *Reserve Primary Fund Distributes Assets to Investors* (Jan. 29, 2010), *available at* http://www.sec.gov/news/press/2010/2010-16.htm.

[89] In response to a request, the SEC, by order, permitted suspension of redemptions in certain Reserve funds in order to allow for orderly liquidation. *See Matter of The Reserve Fund*, Investment Company Act Release No. 28386 (Sept. 22, 2008), 73 Fed. Reg. 55572 (Sept. 25, 2008); Reserve Municipal Money-Market Trust, et al., Investment Company Act Release No. 28466 (Oct. 24, 2008), 73 Fed. Reg. 64993 (Oct. 31, 2008).

[90] The SEC notes that with the exception of the Reserve Primary Fund, all of the funds that were exposed to losses during 2007-2008 from debt securities issued by structured investment vehicles or as a result of the default of debt securities issued by Lehman Brothers Holdings Inc. obtained support of some kind from their advisers or other affiliated persons, who absorbed the losses or provided a guarantee covering a sufficient amount of losses to prevent these funds from breaking the buck. *See* Money Market Fund Reform, Release No. IC-29132, 75 Fed. Reg. 10060, 10061 (Mar. 4, 2010).

the liquidation of Money Fund assets to meet redemptions led to a reduction of Money Fund holdings of commercial paper by about 25 percent.[91]

No Money Funds were "bailed out" by the government, but the extraordinary conditions in the market, including illiquidity in the secondary market for commercial paper, led to the adoption of special measures to restore confidence in the money markets and Money Funds and address the freeze-up in the commercial paper market. The Treasury Department implemented a limited "Temporary Guarantee Program for Money Market Funds" whereby Money Funds could, in exchange for a payment, receive insurance on investors' holdings such that if shares broke the buck, they would be restored to a $1 net asset value ("NAV").[92] The program expired about one year later, experienced no losses (because the insurance guarantee was never called upon), and earned the Treasury about $1.2 billion in participation fees.[93]

The Federal Reserve also created an "Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility" ("AMLF") to provide credit for banks and bank holding companies to finance their purchases of commercial paper from Money Funds.[94] This program lent $150 billion in just its first 10 days of operation and was terminated with no credit losses.[95] All loans made under the AMLF were repaid in full, with interest, in accordance with the terms of the facility.[96] Indeed, the Federal Reserve Bank of Boston Statements of Income and Comprehensive Income for the years ended December 31, 2009 and December 31, 2008 show the total amount of interest income made on "other loans" (which refers to the AMLF program)

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[91] *See* REPORT OF THE PRESIDENT'S WORKING GROUP ON FINANCIAL MARKETS, MONEY MARKET FUND REFORM OPTIONS 12, (2010) *available at* http://treas.gov/press/releases/docs/10.21%20PWG%20Report%20Final.pdf.

[92] Press Release, *Treasury Announces Guaranty Program for Money Market Funds* (Sept. 19, 2008), *available at* http://www.treasury.gov/press-center/press-releases/Pages/hp1147.aspx.

[93] Press Release, *Treasury Announces Expiration of Guarantee Program for Money Market Funds* (Sept. 18, 2009), *available at* http://www.ustreas.gov/press/releases/tg293.htm.

[94] Federal Reserve Board, *Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility, available at* http://www.federalreserve.gov/monetarypolicy/abcpmmmf.htm.

[95] Burcu Duygan-Bump, Patrick M. Parkinson, Eric S. Rosengren, Gustavo A. Suarez, and Paul S. Willen, QAU Working Paper No. QAU10-3, *How Effective Were the Federal Reserve Emergency Liquidity Facilities? Evidence from the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility* (available at http://www.bos.frb.org/bankinfo/qau/wp/2010/qau1003.htm). The program ceased operation in February, 2010. Federal Reserve Board Press Release, FOMC Statement (Jan. 27, 2010), *available at* http://www.federalreserve.gov/newsevents/press/monetary/20100127a.htm.

[96] Federal Reserve Board, *Monthly Report on Credit and Liquidity Programs and the Balance Sheet,* Appendix B at 31 (October 2010), *available at* http://www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201010.pdf.

during 2008 and 2009 was $543 million ($470 million and $73 million in 2008 and 2009, respectively).[97] Advances made under the AMLF were made at a rate equal to the primary credit rate offered by the Boston Federal Reserve Bank to depository institutions at the time the advance was made.[98] In sum, the program was extremely profitable to the government. Both programs were limited in scope and involved relatively low risk to taxpayers when compared to other steps taken by the government during the financial crisis.

Going forward, the type of intervention in which the Government may engage will be limited. Congress has forbidden the use of the Exchange Stabilization Fund to guarantee the obligations of Money Funds.[99] The Board's lending authority has been restricted by Section 1101 of the DFA, so that it is not permitted to lend to individual firms that are insolvent.[100] In addition, under Section 214 of the DFA, financial companies placed in receivership under Title II of the DFA cannot receive bailouts or taxpayer-funded expenditures to prevent their liquidation.[101] It is anticipated that these limitations will go a long way in promoting market discipline by eliminating expectations of a Government "bail out" – either of Money Funds or other institutions.

In addition, changes to accounting standards and commercial bank regulatory capital requirements on off-balance sheet treatment of commercial paper financing conduits, as well as changes to commercial paper market conditions (and to a lesser extent the 2010 amendments to Rule 2a-7) have resulted in a substantial decline (by roughly two-thirds) in Money Fund investments in ABCP. As a result, the category of assets financed under the AMLF program no longer are held by Money Funds at anywhere near the dollar levels that existed at the time of the AMLF program.

Moreover, although the Board and the Council have just begun to consider the use of the Government's new tools under the DFA to identify and apply new prudential regulation to systemically significant nonbank institutions that, like Lehman, may rely heavily upon short term funding, the SEC, as discussed below, already has acted to substantially enhance the liquidity of

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[97] *See* The Federal Reserve Bank of Boston, Financial Statements as of and for the Years Ended December 31, 2009 and 2008 and Independent Auditors' Report, *available at* http://www.federalreserve.gov/monetarypolicy/files/BSTBostonfinstmt2009.pdf.

[98] *Id.*, at 19.

[99] Economic Emergency Stabilization Act of 2008, Div. A of Pub. L. 110-343 (Oct. 3, 2008), §131(b).

[100] Pub. L. No. 111-203, 124 § 1101 (2010).

[101] Pub. L. No. 111-203, 124 § 214 (2010).

Money Funds and further enhance their ability to withstand the potential failure of institutions in whose securities they invest. In addition, the SEC in September 2010 proposed new rules that will shed new light on a company's short-term borrowing practices, including balance sheet "window dressing."[102] The SEC's proposed rules require public companies to disclose additional information to investors about short-term borrowing arrangements, including commercial paper, repurchase agreements, letters of credit, promissory notes, and factoring, used to fund their operations.[103] These actions by the SEC, in combination with future actions by the Board and the Council to apply prudential regulation to certain financial institutions that are issuers of the commercial paper purchased by Money Funds, should, in combination, amplify and reinforce each other to prevent or mitigate the impact of future failures of systemically significant financial institutions and, in particular, mitigate the impact of their failures on investors, such as Money Funds, in the short-term markets.

Conclusion

Money Funds have been a success story in U.S. financial regulation. Using a very simple, common sense approach, which permits investment only in short term, high quality money market instruments, the SEC has succeeded in supervising an efficient and effective program by which investors' cash balances provide financing for American businesses and governmental units. They are very popular with consumers, government and business investors, and very useful to the economy.

Even if Money Funds were within the statutory criteria for designation under Title II of DFA (which they are not), under an appropriate consideration of the potential damage and lack of benefit to the economic system from such a designation, Money Funds should never be designated for FDIC receivership under Title II of the DFA. We request that the final rules or

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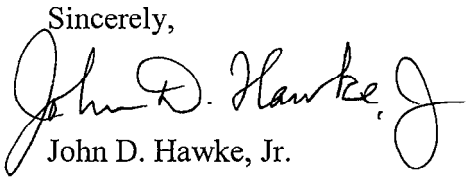
[102] *See* Release No. 33-9143, *Short-Term Borrowings Disclosure*, 75 Fed. Reg. 59866 (Sept. 28, 2010). Currently, SEC rules require public companies to disclose short-term borrowings at the end of the reporting period, but generally there is no requirement to disclose information about the amount of short-term borrowings outstanding throughout the reporting period. The only exception is for bank holding companies, which must disclose annually the average and maximum amounts of short-term borrowings outstanding during the year.

[103] *Id.* The proposed rules distinguish between "financial companies" and other companies. Financial companies would be required to report data for the maximum daily amounts outstanding (meaning the largest amount outstanding at the end of any day in the reporting period) and the average amounts outstanding during the reporting period computed on a daily average basis (meaning the amount outstanding at the end of each day, averaged over the reporting period). All other companies would be permitted to calculate averages using an averaging period not to exceed a month and to disclose the maximum month-end amount during the period. *See id.* *See also*, Release No. 33-9144, *Commission Guidance on Presentation of Liquidity and Capital Resources Disclosures in Management's Discussion and Analysis*, 75 Fed. Reg. 59894 (Sept. 28, 2010).

the release that will accompany the final rules provide more clarity on this point and state that due to the comprehensive SEC regulation and supervision of Money Funds, in light of the definitions and criteria in the statute, Money Funds will not be designated under Title I or Title II and thus will not be required to file and have approved resolution plans or exposure reports.

Although we recognize that there continue to be some critics of Money Funds who continue to espouse the Carter Administration-era view that Money Funds should be regulated like banks, the reality is that the SEC's regulation of Money Funds has been far more effective than the federal banking agencies' regulation of banks. In the past 40 years only two Money Funds have broken the buck, and both were liquidated with relatively minimal losses to investors on a percentage basis and zero cost to the federal government. During that same period, more than 2,800 depository institutions failed, and almost 600 were kept afloat with government infusions of capital, at a total cost to the government of more than $164 billion. There is nothing in the historical record to suggest that imposing "bank like" regulatory, resolution or receivership requirements on Money Funds will make Money Funds, or the American economy, safer. The prudent course, in our view, is to continue to build upon what has worked and to refine the current program of regulation of Money Funds under the supervision of the SEC.

Sincerely,



John D. Hawke, Jr.

cc: The Honorable Mary Schapiro, Chairman, Securities and Exchange Commission
The Honorable Luis A. Aguilar, Commissioner
The Honorable Kathleen L. Casey, Commissioner
The Honorable Troy A. Paredes, Commissioner
The Honorable Elisse B. Walter, Commissioner

Attachments

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555 Twelfth Street, NW
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March 30, 2011

Submitted By Electronic Transmission
Via www.regulations.gov

Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Re: Notice of Proposed Rulemaking Regarding Definitions of ''Predominantly Engaged in Financial Activities'' and ''Significant'' Nonbank Financial Company and Bank Holding Company; 12 C.F.R. Part 225, Regulation Y; Docket No. R–1405; RIN 7100–AD64

Dear Ladies and Gentlemen:

I. Introduction and Summary of Conclusions

We are writing on behalf of our client, Federated Investors, Inc. and its subsidiaries ("Federated"), to provide comments in response to the Board of Governors of the Federal Reserve System's ("Board's") Notice of Proposed Rulemaking Regarding Definitions of ''Predominantly Engaged in Financial Activities'' and ''Significant'' Nonbank Financial Company and Bank Holding Company ("NPR").[1] Federated has served since 1974 as an investment adviser to money market mutual funds ("Money Funds").[2] We appreciate the opportunity to assist the Board as it considers the regulatory framework proposed in the NPR.

[1] Board of Governors of the Federal Reserve System (''Board''), *Notice of proposed rulemaking and request for comment Regarding Definitions of ''Predominantly Engaged in Financial Activities'' and ''Significant'' Nonbank Financial Company and Bank Holding Company*, 76 Fed. Reg. 7731 (Feb. 11, 2011).

[2] Federated has more than thirty-five years in the business of managing Money Funds and, during that period, has participated actively in the money market as it has developed over the years. The registration statement for Federated's Money Market Management fund first became effective on January 16, 1974, making it perhaps the longest continuously operating Money Fund to use the Amortized Cost Method. Federated also received one of the initial exemptive orders permitting use of the Amortized Cost Method in 1979.

Federated, as a participant in the money markets and a sponsor of Money Funds, is interested in many of the details of the NPR and related rulemakings specifying processes for designation and liquidation of financial firms. As an investor and potential creditor, we are concerned that the ambiguity of Titles I and II, the implementing rules, and the way in which they will be interpreted and applied, will increase uncertainty, risk and volatility in the money markets and other fixed income markets, particularly in times of crisis. This letter also addresses fundamental issues regarding the designation of nonbank financial firms under Titles I and II.

The NPR is part of an intertwined series of rulemakings by the Board, the Financial Stability Oversight Council ("Council") and the Federal Deposit Insurance Corporation ("FDIC") to implement Titles I and II of the Dodd Frank Wall Street Reform and Consumer Protection Act ("DFA").[3] The Board and the FDIC are both represented on the Council, along with other federal and state financial regulators.

Titles I and II of the DFA are closely interconnected statutory provisions that authorize the designation by the Council of financial companies for additional regulation and supervision by the Board and for potential receivership by the FDIC. Section 113 of DFA gives the Council authority to designate a U.S. nonbank financial company for supervision by the Board and subject it to the prudential standards of Title I if the Council determines that material financial distress at the company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of its activities, could pose a threat to the financial stability of the U.S. Section 203 gives authority for the Secretary of the Treasury, upon the recommendation of the Board and the FDIC, to place a nonbank financial company that has been designated under Section 113 (and certain other nonbank financial companies) into FDIC receivership. If a nonbank financial company is designated by the Council under Section 113 of the DFA (or is separately designated under Title II) it is subject to resolution by the FDIC in a receivership under Title II if the Secretary of the Treasury, upon the recommendation of the Board, FDIC and other specified regulators in consultation with the President, determines that the company is in default or in danger of default and presents a danger to the financial stability of the United States.

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[3] Pub. L. No. 111-203, 124 Stat. 1376 (2010). These intertwined rulemakings also include: Financial Stability Oversight Council, *Notice of Proposed Rulemaking Regarding Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies*, 76 Fed. Reg. 4555 (Jan. 26, 2011); FDIC, *Notice of Proposed Rulemaking Implementing Certain Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 12 C.F.R. pt. 380, 76 Fed. Reg. 16324-02 (Mar. 23, 2011), FDIC, *Notice of Interim Final Rulemaking Regarding Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 12 CFR pt. 380, 76 Fed. Reg. 4207 (Jan. 25, 2011) ("NIFR"), and FDIC & Federal Reserve System, Resolution Plans and Credit Exposure Reports Required, 12 C.F.R. Part 225 and 12 C.F.R. Part 360 RIN 3064-AD77, FDIC Press Release Mar. 29, 2011.

The statute is not a model of clarity. Which agency has what authority to do what, when, and to whom, with the consent of which other agencies, is not entirely clear. Compounding this uncertainty, some have called into question whether it is the Board alone that has authority to adopt substantive regulations implementing Title I or the Council has joint or parallel rulemaking authority.[4]

The purposes of Title I of the DFA include identifying risks to the financial stability of the U.S. that could arise from large interconnected bank holding companies or nonbank financial companies, promoting market discipline by eliminating expectations that the Government will shield shareholders, creditors, and counterparties of such companies from losses if they fail, and responding to emerging threats to the stability of the U.S. financial system.[5] The purposes of Title II of the DFA include providing authority to liquidate failing nonbank financial companies that pose a threat to the financial stability of the United States in a manner that mitigates that risk and minimizes moral hazards, and is intended to be implemented in a way that creditors and shareholders will bear the losses of the financial institution.[6]

The NPR requests comments on a Board rulemaking proposal to define certain terms used in Title I, including terms that may affect what companies may be designated by the Council for Board regulation under Title I and potentially for FDIC liquidation under Title II. Unfortunately, however, the NPR fails to define the terms used in Titles I or II in a way that sheds much light on what companies can be designated or the standards that will be considered and applied in doing so. None of the current rulemaking proposals describes the qualitative or quantitative considerations to be used in making assessments with regard to any of them. None of the current proposals describes how the factors will be weighed against one another. The Council's rulemaking proposal simply regroups the ten statutory criteria for designation, for discussion purposes, into six categories, while the Board's NPR in large part parrots portions of the statute.

A purpose of an implementing rule, and an administrative rulemaking process, is to provide an analytical framework and context for the individual determinations that the Council will make in designating particular firms under Title I. Under the rule, firms notified of a proposed designation will have 30 days or less to respond as to why they should not be so

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[4] *See* Comment Letter of Mr. Thomas Vartanian to Council Chairman Timothy F. Geithner (Feb. 24, 2011) (*available at* http://www.regulations.gov/#!documentDetail;D=FSOC-2011-0001-0014.1). *See also*, Rules of Organization of the Financial Stability Oversight Council Articles XXX.11 (Oct. 1, 2010) (narrowly defining Council rulemaking authority).

[5] DFA § 112.

[6] DFA § 204(a).

designated. Without more context and elaboration in the rule, it will be difficult for a firm receiving that Council notice to know how to respond or what criteria or facts are relevant to include in a response.

Section 170 of the DFA requires the Board to adopt regulations on behalf of and in consultation with the Council setting forth criteria for exempting certain types of nonbank financial companies from designation under Title I. Without action on Section 170 to define what types of nonbank financial companies are not subject to designation, the entire framework of Title I and II and its implementing rules are an unintelligible and unworkable morass. In oversight hearings before the Senate Banking Committee on February 17, 2011, FDIC Chairman Sheila Bair testified, when asked what criteria will be used to designate companies under Titles I and II, that it is easier to define what companies will *not* be subject to designation.[7] The Chairman is correct. That needs to be done, through the Section 170 exemption criteria rulemaking that the Board is required to conduct, for any of the rules proposed under Titles I and II to be intelligible, to provide meaningful standards for designations, and to provide notice to nonbank financial companies and the public as to what is intended, so that there will be more certainty around the process. We appreciate that the regulators want maximum flexibility to do whatever they want, to whomever they want, whenever they want, in order to address potential threats to the financial system and are accordingly loathe to define terms in a way that might limit their future options and authority. However, as one of the Federal Reserve Banks recently noted in comments to the FDIC, the uncertainty over the terms, standards and processes to be used under Titles I and II presents a danger and may increase, rather than decrease, risks in the financial system.[8] Accordingly, it is critical that the Board use its rulemaking authority under Section 170 and more generally Title I to reduce that uncertainty.

The Board's Title I rulemakings should be used to among other things, clarify that Money Funds are not nonbank financial companies that are subject to designation under Titles I and II of the DFA, based upon the plain language of the statute, as well as its structure and purposes. Moreover, application of the statutory and proposed regulatory criteria for making a determination under Titles I and II clearly establish that Money Funds cannot appropriately be designated. We believe that one metric in particular should outweigh all others and should be used to exclude a firm from designation: "those firms that are already subject to consolidated

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[7] *Oversight of Dodd Frank Implementation*, Hearings Before Senate Banking Committee (Feb. 17, 2011) *available at* http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=c43953db-0fd7-43c3-b6b8-97e2d0da3ef7.

[8] Letter from Jeffrey M. Lacker, President, Federal Reserve Bank of Richmond to FDIC (Jan. 18, 2011) (*available at* http://www.fdic.gov/regulations/laws/federal/2010/10c35Orderliq.PDF).

supervision and/or heightened reporting requirements."[9] We believe that this exclusion from designation under Section 113 should apply where (1) the Council has access to comprehensive and timely information concerning the firm, either through its primary regulator or directly, and (2) the primary regulator is a member organization of the Council and has comprehensive supervisory and rulemaking authority over the type of entity comparable to those of the Board. If this criteria (the eighth criterion listed in Section 113 and the sixth criterion as grouped in the Council's NPR), is given an appropriate weight in light of the purposes of the statute and its interaction with other programs of federal oversight and regulation, Money Funds would not be designated for regulation under Title I of the DFA.

As discussed more fully below, our major comments regarding the NPR are as follows:

- Designation of Money Funds as systemically significant or systemically risky under Titles I or II of the DFA or for FDIC receivership under Title II of the DFA would not be appropriate or in the public interest due to Money Funds' exclusive reliance on equity, their lack of leverage, debt or other counterparty exposure, the short-term nature of their investment portfolios which by regulatory design are essentially self-liquidating, and the existing comprehensive framework of the Securities and Exchange Commission ("SEC") regulation and supervision that applies to Money Funds. Money Funds are required to be essentially self-liquidating. Federal securities law establish a clear process for an orderly wind-down of a Money Fund with SEC and judicial oversight. This existing framework has been effective in resolving those few Money Funds that have been unable to maintain their targeted per-share value.

- The FDIC stated in its NIFR that the receivership provisions under Title II were enacted due to the inadequacy of disparate insolvency regimes to effectively address the actual or potential failure of a financial company that could adversely affect economic conditions or financial stability in the United States. Under Title II, the FDIC may be appointed receiver for a nonbank financial company only if the Treasury Secretary finds that the company is in default or in danger of default and "its resolution under otherwise applicable Federal or State law would have serious adverse consequences on financial stability in the U.S." and there is no other viable private sector alternative. This finding cannot be made in respect of a Money Fund, because Money Funds do not use leverage or debt that can be defaulted on, and because the SEC has broad regulatory and supervisory authority to oversee the orderly liquidation of a Money Fund. If Money Funds cannot

[9] 76 Fed. Reg. at 4557.

legitimately be designated under Title II, it makes no sense in light of the text, structure and purposes of the Act to designate Money Funds under Title I.

- The Board has an obligation in conducting a rulemaking to consider the Constitutional validity of its actions, the proposed rules and the statutes upon which they are based. This has not been done, and no effort has been made in the rulemaking to address or ameliorate these issues.

- Titles I and II of the DFA, which dramatically curtail judicial oversight of agency actions, and the implementing rules, infringe inappropriately on the role of the Federal courts under Article III of the Constitution and the right of private parties to have access to Article III courts, rather than a federal agency, in the ultimate determination and disposition of their private property rights and interests.

- Determination and resolution of the property rights and interests of private parties under Title II would violate the due process rights of private parties under the Constitution.

- The breadth and vagueness of the authority granted under Titles I and II on such issues as who will be subject to designation and on what grounds, and the lack of clarity as to what agency is responsible, impermissibly delegates legislative authority, a flaw that is compounded by the failure of the Board in the rulemaking to clarify and narrow these provisions through the NPR.

- Under these circumstances, the NPR and actions taken by the Board, the Council, the FDIC, and other federal agencies pursuant to Titles I and II are not subject to judicial deference under the standards of *Chevron* and its progeny[10] but instead under the less deferential judicial review standards of *Industrial Union Department, AFL-CIO*, and similar cases.[11]

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[10] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *United States v. Mead Corp.*, 533 U.S. 218 (2001).

[11] *Indus. Union Dep't, AFL, CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980); *City of New York v. Clinton*, 985 F. Supp. 168 (D.D.C. 1998), *aff'd on other grounds*, *Clinton v. City of New York*, 534 U.S. 417 (1998); *Whitman v. Am. Trucking Co.*, 531 U.S. 457, 487 (2001) (concurring opinion of Justice Thomas). The normal cure for an overly broad delegation of legislative power is a narrow reading by the courts of the grant of authority in order to avoid the Constitutional issue, *see e.g., Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998); *Whitman*, 531 U.S. at 476 (concurring opinion of Justices Stevens and Souter).

- The NPR is arbitrary and capricious in violation of the Administrative Procedure Act.

- The required Small Business impact assessment has not been properly conducted.

- The Paperwork Reduction Act estimates are inconsistent among the various proposals, and, unless the Board is correct in its projections that only three nonbank financial firms will be designated under Title I, seriously underestimate the time and cost associated with reporting and recordkeeping under the new provisions.

- Due to the procedural and practical linkages and statutory intertwining of Titles I and II of the DFA with Title I of the DFA and the rules under both Titles, the NPR implementing Title I is made further defective by the shortcomings in Title II and its implementing rules.

For the reasons discussed in this Letter, Money Funds registered with the Securities and Exchange Commission ("SEC") should not be designated under either Title I or II of the DFA for regulation by the Board or for receivership by the FDIC.

II. Money Funds Should Not Be Designated Under Titles I or II of DFA, But Should Instead be Excluded From Coverage Under Both Titles

We think the best way to reduce the uncertainty created by the ambiguity in Title I is to make clear to investors and the public that Money Funds will ***not*** be designated for FDIC receivership under Title II or Board supervision under Title I of DFA. This can be done through a combination of formal statements on this point by the Board, FDIC, and Council, action by the Board on behalf of the Council pursuant to Section 170 of the DFA to exclude Money Funds from coverage, and actions consistent with that position over time by the Board, Council and FDIC

We note as an initial matter that it is doubtful that *any* open-end investment company (*e.g.* a mutual fund), including a Money Fund, is within the definition of a "nonbank financial company" that is subject to designation under Title I or Title II of the DFA. Section 102 of the DFA defines the universe of "nonbank financial companies," that potentially are subject to designation under Title I, by reference to the financial powers of Section 4(k) of the Bank Holding Company Act ("BHC Act"), 12 U.S.C. 1843(k). Section 4(k) in turn has its own list of activities, including those permitted under Section 4(c)(8) of the BHC Act and Regulation K, 12 C.F.R. § 211. Other parts of the BHC Act (Sections 4(c)(5), 4(c)(6) and 4(c)(7) of that Act)

authorize investing in securities and in investment companies, and 4(c)(8) and Regulation K have been interpreted by the Board to include sponsoring, advising, administering and providing other services to open-end and closed end investment companies, as well as dealing and underwriting in securities (as contrasted to investing, reinvesting and trading in securities). But the Board has gone out of its way *not* to determine that being, or controlling, an open-end investment company is a permitted Section 4(c)(8) or 4(k) activity.[12] The Board has steadfastly refused for nearly six decades to interpret those provisions to permit bank holding companies to control, be affiliated with, or be open-end investment companies (i.e. mutual funds), and has taken actions to prevent that from occurring. The Board has *not* reinterpreted these provisions in wake of the Gramm Leach Bliley Act's 1999 repeal of Section 20 of the Glass-Steagall Act to permit bank holding companies or financial holding companies to be or control an open-end investment company using BHC Act Section 4(c)(8) or 4(k) powers, but has instead aggressively enforced the position that bank holding company cannot be or control mutual funds.[13] Because the Board has not determined that being or controlling an open-end investment company or mutual funds is an eligible activity under those provisions, the activity of being an open end investment company is not a "financial" activity and thus mutual funds are not "nonbank financial companies" for purposes of Title I of Dodd Frank. The Board cannot have it both ways.[14] If Sections 4(c)(8) and 4(k) do not authorize a bank holding company to engage in the activity of being or controlling a mutual fund, then a mutual fund cannot be a nonbank financial company within the meaning of Title I.

In the NPR, the Board seeks to dance around this type of contradiction by arguing that an activity may be prohibited for bank holding companies (presumably by some other statutory provision such as the Volcker Rule contained in Section 619 of the DFA or former Section 20 of the Glass Steagall Act of 1933) and yet be an authorized activity under 4(c)(8) or 4(k) of the BHC Act and therefore a financial activity within the meaning of Title I that if engaged in primarily by a nonbank company could bring with it the potential for designation under Section 113. Yet in the 43 years from the enactment of the BHC Act in 1956 to the repeal of Section 20 in 1999 during which time Section 20 of the Glass Steagall Act was in effect but was by its terms inapplicable to state nonmember banks, the Board never permitted bank holding companies of state nonmember banks to be or control mutual funds as nonbank subsidiaries under Section 4(c)(8). During the eleven years between the Gramm Leach Bliley Act of 1999 (which repealed Section 20 of the Glass Steagall Act and added Section 4(k) financial powers to the BHC Act),

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[12] Petition of the United States in *Board of Governors of the Federal Reserve System v Investment Company Institute* (in U.S. Supreme Court Docket No. 79-927, October Term, 1979), 450 U.S. 46 (1981).

[13] *See* 12 C.F.R. §§ 211.10(a)(11), 225.28(b)(6), 225.86(b)(3), 225.125.

[14] *Cf. Citicorp v Bd. of Governors*, 936 F.2d 66 (2d Cir. 1991), *cert. denied* 502 U.S. 1031 (1992) (Federal Reserve Board cannot simultaneously interpret the BHC Act in two different, conflicting ways).

and the adoption of the Volcker Rule in 2010 as Section 619 of the DFA which limited bank hedge fund and proprietary trading by bank holding companies and financial holding companies and their bank and nonbank subsidiaries, the Board continued to prohibit bank holding companies to be or control mutual funds as an activity not permitted by Section 4(c)(8) or 4(k) of the BHC Act. Being or controlling a mutual fund has never been an activity permitted under Board interpretations of Section 4(c)(8) or 4(k) of the BHC Act.

Moreover, a primary purpose of designation of a nonbank financial company under Title I is to prepare it, and place it in line, for a potential FDIC receivership under Title II. Because the text, purpose and structure of Title II (and of Sections 165(d) & (g)) clearly establish that Title II receiverships are to address defaults by a nonbank financial company on its obligations, and Money Funds are financed entirely by shareholder equity and do not borrow or otherwise use leverage, they do not have the ability to default on their obligations in a way contemplated by Title II. If Money Funds do not have the kinds of debts and counterparty obligations that Titles I and II were intended to address, it makes no sense within the structure and purposes of Titles I and II to treat Money Funds as nonbank financial companies that are subject to designation under those Titles.

To the extent that there is any doubt on this question, it would be appropriate and in the public interest for the Board acting in consultation with the FDIC and the Council to exercise the mandatory exemptive authority in Section 170 of the DFA to exclude Money Funds from coverage under Titles I and II.

Moreover, even if Money Funds were deemed to be "nonbank financial companies" within the meaning of Titles I and II of DFA, FDIC receivership and Board prudential regulation would be inappropriate and unnecessary in view of the SEC's authority, regulation and oversight over Money Funds – including its recent amendments to Rule 2a-7 under the Investment Company Act of 1940 ("Investment Company Act") and related rules, as well as its continuing review of these issues. There is an existing protocol for dealing with the wind-down of Money Funds. In those rare instances in which it has been needed, it has worked well.

Although the Council has yet to develop recommendations concerning the prudential standards under Section 115 of the DFA for entities designated for Board regulation, it is clear that the general standards identified by statute in Section 115 and Section 165 (directing and authorizing the Board to adopt prudential standards for supervised nonbank financial companies) are either addressed in current regulation of Money Funds in a manner far more robust than for other financial institutions (*e.g.*, Money Funds' lack of leverage, liquidity requirements, resolution plan, enhanced public disclosure, and overall risk management requirements) or are requirements (*e.g.*, risk-based capital requirements) which, if applied to Money Funds, would

undermine their vitally important role in providing highly liquid investments for individuals and institutions and critical short-term funding for issuers and others who rely upon them.

In October 2010, the President's Working Group on Financial Markets ("PWG") issued its Report on Money Market Fund Reform Options ("PWG Report" or "Report").[15] The Report acknowledges the concern of financial regulators that, notwithstanding the Money Fund reforms adopted by the SEC earlier this year, more should be done to address Money Funds' susceptibility to runs, such as the run precipitated by the bankruptcy of Lehman Brothers Holdings, Inc. ("Lehman") in September 2008 and the resulting losses at the Reserve Primary Fund, which held Lehman commercial paper. While the Report sets forth eight policy options which its drafters suggest could mitigate the susceptibility of Money Funds to runs, the discussion of the various options is accompanied by a sobering discussion of the potential serious and adverse ramifications – for investors, issuers, other financial market participants, and taxpayers – of the various courses of action. Thus, after an 18-month review, the PWG recommended further study and public comment.

The process recommended by the PWG that the SEC publish the various options in the PWG Report for public comment and that the Council also review these matters is the appropriate process to address any remaining concerns regarding Money Funds. During the comment period on the Council's earlier ANPR release, the SEC requested comments on the PWG Report and received over 75 public comments not only from the fund industry but also from a broad range of state and local governments, large and small businesses, retail investors and other members of the public.[16] With only three exceptions,[17] the commenters overwhelmingly supported the retention of the current program of SEC regulation of Money Funds and stable NAV, with continued incremental improvements to the SEC's program of Money Fund regulation.[18] This is an overwhelming affirmation -- from industry participants,

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[15] REPORT OF THE PRESIDENT'S WORKING GROUP ON FINANCIAL MARKETS - MONEY MARKET FUND REFORM OPTIONS (Oct. 2010), *available at* http://treas.gov/press/releases/docs/10.21%20PWG%20Report%20Final.pdf.

[16] Submissions in response to the SEC's Request for Comment on PWG Report are available at: http://www.sec.gov/comments/s7-04-09/s70409.shtml.

[17] Letters from Federal Reserve Bank of Richmond President Jeffrey Lacker (*available at* http://www.sec.gov/comments/4-619/4619-54.pdf); Paul A. Volcker (*available at* http://www.sec.gov/comments/4-619/4619-79.pdf); Shadow Financial Regulatory Committee (*available at* http://www.sec.gov/comments/4-619/4619-81.pdf).

[18] *See e.g.,* Letters from the Financial Services Roundtable; Port of Houston Authority; Cincinnati/Northern Kentucky International Airport; Treasurer of the State of New Hampshire; the Business Council of New York State; Dallas Regional Chamber; Associated Industries of Florida; New Jersey Chamber of Commerce. Letter filed by the following associations of state and local entities: the American Public Power Association; the Council of Development Finance Agencies; the Council of Infrastructure Financing Authorities; the Government Finance

Footnote continued on next page

issuers, and other users of Money Funds -- that the SEC's regulation of Money Funds, including its more recent rules to strengthen Money Fund regulations, is appropriate and more than sufficient.

Section 113 designation and the accompanying Board prudential regulation, and potential FDIC receivership, of nonbank financial companies is best utilized to address large, systemically important institutions that previously lacked comprehensive consolidated supervision (or, if they were subject to it, were inadequately supervised) and which, when overly dependent upon the short-term markets, pose the threat of creating the type of panic in the short-term markets that occurred in September 2008. Indeed, it was the precarious state of these entities and their exposure to the collapse in mortgage-related instruments that caused the 2008 market panic. Designation under either Title I or Title II is unnecessary, inappropriate, and potentially harmful if applied to Money Funds.

As discussed further below:

- Money Funds are a regulatory success. They are subject to robust regulation by the SEC, which has an excellent record in its oversight of Money Funds and a superior track record in this area in comparison to bank-type prudential regulation or FDIC receivership.

- Title I and Title II designation is for individual companies, not for an entire industry as a whole. There are over 650 separate Money Funds. Money Funds generally are not permitted to lend to one another or co-invest as groups. As a result, unlike banks, the financial conditions of different Money Funds are not linked to one another. They cannot be lumped together as a single entity and designated under Titles I or II of DFA.

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Officers Association; the International City/County Managers Association; the International Municipal Lawyers Association; the National Association of Counties; the National League of Cities; the National Association of Local Housing Financing Agencies; the National Association of State Auditors, Comptrollers and Treasurers; the National Association of State Treasurers and the U.S. Conference of Mayors. Letter from the following businesses and associations: Agilent Technologies, Inc.; Air Products & Chemicals, Inc.; Association for Financial Professionals; The Boeing Company; Cadence Design Systems; CVS Caremark Corporation; Devon Energy; Dominion Resources, Inc.; Eastman Chemical Company; Eli Lilly & Company; Financial Executives International's Committee on Corporate Treasury; FMC Corporation; Institutional Cash Distributors; Kentucky Chamber of Commerce; Kraft Foods Global, Inc.; National Association of Corporate Treasurers; New Hampshire Business and Industry Association; Nissan North America; Pacific Gas and Electric Company; Safeway Inc.; Weatherford International; U.S. Chamber of Commerce.

- Individual Money Funds should not be designated for prudential regulation by the Board under Title I or FDIC receivership under Title II. The prudential standards specified for Section 113 entities under the Board's Section 165 authority are either addressed in current Money Fund regulation in a manner far more robust than for other financial institutions, or they are an inappropriate fit for Money Funds. The receivership process created by Title II is inappropriate for Money Funds which rely on equity, rather than debt financing, are essentially self liquidating by the nature of their assets, and are already covered by existing regulatory and judicial protocols when necessary for a prompt and efficient wind-down of a Money Fund.

- Because Money Funds are already subject to comprehensive SEC regulations and the SEC has robust regulatory tools to address any situation in which a Money Fund presents undue risk, Money Funds should be excluded from designation where (1) the Council has access to comprehensive and timely information concerning the Money Fund, either through the SEC or directly, and (2) the primary regulator of Money Funds, the SEC, is a member organization of the Council and has comprehensive supervisory (examination, reporting and enforcement powers) and rulemaking authority over Money Funds comparable to those that the Board exercises over bank holding companies or that the Board can exercise over Section 113 designated nonbank financial firms, or subject to more stringent judicial oversight over SEC actions, the FDIC could exercise under Title II.

- Regulators should proceed with caution on changes to Money Fund regulation that would impose undue burdens on their continued operation or that would create in investors an expectation of a *de facto* federal guarantee.

A. Money Funds Represent a Regulatory Success, Particularly As Compared to Regulation of Depository Institutions

History and Importance of Money Funds

Money Funds are leading investors in the short-term debt instruments that are issued and traded in the "money market," including Treasury bills, bankers' acceptances, certificates of deposit, federal funds and commercial paper.[19] The money market is the single most important

[19] Commercial paper consists of short-term, promissory notes issued primarily by corporations with maturities of up to 270 days but averaging about 30 days. Companies use commercial paper to raise cash for current operations as it

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source of liquidity funding for the global financial system. It permits large institutions to meet short-term borrowing needs and invest cash holdings for brief periods. Issuers in the money market include companies whose financial strength allows them to issue commercial paper directly to buyers, without credit support or collateral. Other companies issue "asset-backed" commercial paper, secured by the pledge of mortgage loans, auto loans, credit card receivables, or other assets. Federal, state and local governments also use the money market to meet liquidity needs by issuing short-term paper, including municipal paper and Treasury bills. The Federal Reserve utilizes Money Funds in its reverse repurchase program.

Money Funds were first offered in the U.S. in 1971 as a way to preserve investor principal while earning a reasonable return – and for the first time made a market interest rate available to retail investors. They have become widely held by many types of investors and are subject to pervasive regulation and oversight by the SEC. Due in large part to SEC rules that require them to invest exclusively in specific high-quality, short-term instruments issued by financially stable entities, they also have enjoyed a high degree of success, greatly increasing in number and in assets under management. Thus, Money Funds are now among the most widely held, low-risk and liquid investments in the world.[20]

For investors of all types, Money Funds offer numerous benefits. They come in several forms, including both taxable funds (which invest in securities such as Treasury bills and commercial paper) and tax-free funds (which generally invest in municipal securities). Funds that invest in short-term corporate and bank debt, but not government securities, are also known as "prime" Money Funds.[21] Investors can choose between and among funds that offer slightly higher yields, funds that offer less credit risk, and funds that offer tax advantages. For institutional investors, Money Funds offer low cost, convenient ways to invest cash in the short-term. Many institutional investors, including companies and governmental entities, have cash balances swept from their operating accounts into Money Funds on a nightly basis. For retail

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is often cheaper than securing a bank loan. Federal Reserve Board, *Commercial Paper, available at* http://www.federalreserve.gov/releases/cp/about.htm.

[20] Notwithstanding relatively low prevailing yields, according to the Investment Company Institute, as of March 17, 2011, Money Funds had over $2.7 trillion in assets under management. *See* Investment Company Institute, *Money Market Mutual Fund Assets*, Mar. 17, 2011, *available at* http://www.ici.org/research/stats/mmf/mm_03_17_11. Investment Company Institute historical weekly money market data show that assets under management have declined significantly since January 2009. As of January 7, 2009, Money Funds had over $3.8 trillion in assets. *See* Investment Company Institute, *Weekly Total Net Assets (TNA) and Number of Money Market Mutual Funds, available at* http://www.ici.org/pdf/mm_data_2010.pdf.

[21] *See* Sue Asci, *Prime Money Funds See Recent Inflows*, Investment News, Feb. 22, 2009.

investors, Money Funds continue to offer a low-risk, low-expense way to diversify liquid holdings.

Based on Investment Company Institute data, as of December 2010, there were approximately 652 Money Funds.[22] As of March 16, 2011, Money Funds held over $2.7 trillion in assets under management.[23] Money Funds account for investments in almost 40% of outstanding commercial paper, approximately two-thirds of short-term state and local government debt, and a substantial amount of outstanding short-term Treasury and federal agency securities.[24] During the more than 25 years since Rule 2a-7 was adopted in 1983, over $335 trillion has flowed in and out of Money Funds.[25]

Performance Comparison of Money Funds to Bank Failures

In their early years, banks and their trade associations viewed Money Funds as competitors for retail business, and supported efforts to subject Money Funds to "bank-like" or "prudential" supervision.[26] Policy makers, however, recognized that bank-like regulation would

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[22] Investment Company Institute, *Trends in Mutual Fund Investing*, Jan. 27, 2011, *available at http://www.ici.org/research/stats/trends/trends_12_10.*

[23] Of this amount, retail Money Funds held an estimated $933 billion of this sum, while institutional funds held over $1.8 trillion – though this distinction is somewhat arbitrary. Investment Company Institute, *Money Market Mutual Fund Assets*, Mar. 17, 2011, *available at* http://www.ici.org/research/stats/mmf/mm_03_17_11.

[24] *See* REPORT OF THE PRESIDENT'S WORKING GROUP ON FINANCIAL MARKETS, MONEY MARKET FUND REFORM OPTIONS 7, *available at* http://treas.gov/press/releases/docs/10.21%20PWG%20Report%20Final.pdf.

[25] *See* Investment Company Institute, *Report of the Money Market Working Group*, Mar. 17, 2009 (hereinafter "ICI Money Market Working Group Report"), at 38, *available at* www.ici.org/pdf/ppr_09_mmwg.pdf.

[26] *See, e.g., Shooting at Money Market Funds*, Time, Mar. 23, 1981, *available at* http://www.time.com/time/magazine/article/0,9171,952946,00.html. The article states that that banking and savings institutions had "undoubtedly been hurt by the Money Funds" and that "banks and savings and loans have launched drives to bring them down…Last week the U.S. League of Savings Associations urged the Government to impose sharp restrictions on the money market funds and asked the Federal Savings and Loan Insurance Corporation to pledge up to $7 billion in low-cost loans." The article further notes that "Senate Banking Committee Chairman Jake Garn of Utah wants to prevent money market funds from offering check-writing privileges; Congressman James Leach of Iowa has introduced a bill that would diminish the funds' appeal by setting reserve requirements on them…The funds are also under heavy assault in several state legislatures." *See also* Karen W. Arenson, *Volcker Proposes Money Funds Be Subject to Rules on Reserves,* N.Y. TIMES, June 26, 1981 (noting that former Federal Reserve Chairman Paul A. Volcker testified before a Congressional subcommittee that money market funds should be subject to regulations that would make them more competitive with banking institutions and less attractive to investors. Mr. Volcker also testified that reserve requirements were a key part of monetary policy and because they could not be removed from banking institutions, also should apply to other investment vehicles); Beatson Wallace, *Money Funds Aren't Banks*, BOSTON GLOBE, May 21, 1981 (noting that "[m]oney market funds continue to be the whipping boy of the banking industry and the delight of the small sum investor.") The article explains that Treasury

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effectively kill off what has become not only an important investment choice for millions of individuals and institutions,[27] but also a highly efficient and essential mechanism to fund the needs of business and government borrowers in the short-term market.[28]

Moreover, Money Funds have enjoyed a stunningly superior safety record compared to insured depository institutions. Only two Money Funds have "broken the buck" and returned shareholders less than 100 cents on the dollar: the Community Bankers U.S. Government Fund, which in 1994 repaid its investors 96 cents on the dollar,[29] and the Reserve Primary Fund, which was forced to liquidate in September 2008 as a result of a run triggered by Lehman's bankruptcy and the fund's holdings of Lehman commercial paper. The Reserve Primary Fund has returned to shareholders more than 99 cents on the dollar.[30] Significantly, no taxpayer funds were used to bail out shareholders.

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Secretary Donald T. Regan testified that "imposing new controls on our financial markets would be the wrong approach to assisting the thrift industry," but that nevertheless Senator Jake Garn "persists in his effort to curry support for legislation to curb the funds' check-writing feature and make the funds maintain a percent of their assets in a reserve account."

[27] *See, e.g., Competition and Conditions in the Financial System,* Hearings Before the Committee on Banking, Housing, and Urban Affairs, United States Senate, 97th Cong., 939 (1981) (statement of former SEC Commissioner John R. Evans, who testified that "we are very concerned with suggestions that legislation should be enacted which would impose bank-type regulation on money market funds to the detriment of [public] investors." Noting that "many depository institutions are having difficulty attracting savings during a period when money market funds are experiencing dramatic growth….We can understand why certain depository institutions might like their competitors to be restricted. We believe, however, that any consideration of legislation to impose bank-type regulatory burdens and limitations on money market funds should include an evaluation of the existing regulation of such funds, the present protection provided to investors, and the negative impact that such proposals would have on the millions of people who invest in money market funds." Further, "[i]t is the Commission's view that the harm to small investors, and the inconvenience to large investors, which could result from the imposition of bank-type regulations on money market funds may not be significantly offset by any benefit to banks and thrift institutions."

[28] *See* Phillip R. Mack, *Recent Trends in the Mutual Fund Industry,* 79 Fed. Reserve Bull. 1001 (1993), *available at* http://findarticles.com/p/articles/mi_m4126/is_n11_v79/ai_14714669/pg_5/?tag=content;col1, stating that "[m]oney market mutual funds grew rapidly in the late 1970s and early 1980s, when interest rates on money market instruments exceeded regulatory ceilings that applied to depository institutions. Flows from depositories to money funds supported expansion of the commercial paper market, an important alternative to bank loans for businesses."

[29] Note that the fund had only institutional investors, so individual investors were not directly harmed. *See* ICI Money Market Working Group Report, at 39, *available at* www.ici.org/pdf/ppr_09_mmwg.pdf. *See* Saul S. Cohen, *The Challenge of Derivatives,* 63 Fordham L. Rev. 1993, 1995 n.15 (1995) (internal citations omitted).

[30] *See* Press Release, *Reserve Primary Fund to Distribute $215 Million* (July 15, 2010), *available at* http://www.reservefunds.com/pdfs/Primary%20Distribution_71510.pdf; *see also* SEC Press Release: *Reserve*

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Money Funds achieved this success under the regulation and oversight of the SEC and its Division of Investment Management.[31] At the core of this regulatory program is SEC Rule 2a-7, which in eleven pages imposes sound principals that are the secret of the stability and solvency of Money Funds: invest only in very short-term, high quality, marketable debt instruments in a diversified manner, and do not use any leverage. Rule 2a-7 is the Occam's Razor of financial regulation.

In comparison, the prudential regulation of banks involves four (formerly five) federal regulators and over fifty regulators in states and other districts. The federal agencies alone require over 26,000 full-time employees.[32] The federal banking code – Title 12 of the United States Code and Title 12 of the Code of Federal Regulations – totals fourteen volumes and many thousands of pages of requirements and prohibitions. Yet, during the 40 years since the launch of the first Money Fund – a period during which the Money Fund industry experienced exactly two "failures" – some 2,830 depository institutions have failed, and an additional 592 were the subject of "assistance transactions" in which the government injected capital to keep them afloat.[33] From 1971 until February 4, 2011, total estimated FDIC losses incurred in connection with failed banks or assistance transactions amount to $164,820,462,000.[34]

Performance of Money Funds During the Financial Crisis

Even in times of greatest financial stress, Money Funds have proved to be more stable than depository institutions. Since January 2008, as a result of the financial crisis that followed the burst of the housing bubble and the collapse of mortgage-backed securities investments, at least 347 banks have failed,[35] and even more would have failed but for dozens of federal programs that infused banks with cash. The Board, Department of the Treasury, and FDIC spent

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Primary Fund Distributes Assets to Investors (Jan. 29, 2010), *available at* http://www.sec.gov/news/press/2010/2010-16.htm.

[31] We note that the SEC's program of regulating and supervising investment companies has been extraordinarily efficient and effective to date and that the SEC is appropriately seeking additional funding to carry out its new responsibilities under the DFA.

[32] FDIC 2009 Annual Report; FRB 2009 Annual Report; OCC 2009 Annual Report; OTS 2009 Annual Report.

[33] FDIC Database of Failures and Assistance Transactions, *available at* http://www2.fdic.gov/hsob/SelectRpt.asp?EntryTyp=30.

[34] FDIC Database of Failures and Assistance Transactions, *available at* http://www2.fdic.gov/hsob/SelectRpt.asp?EntryTyp=30.

[35] FDIC Failed Bank List, *available at* http://www.fdic.gov/bank/individual/failed/banklist.html.

approximately $2 trillion on an array of programs to infuse cash into the banking system.[36] In addition, the Board has kept interest rates close to zero, allowing banks to borrow at almost no cost and to lend at higher rates so as to practically guarantee risk-free profits. This is estimated to cost savers $350 billion each year as banks do not have to compete for depositors' funds, and therefore may offer only low interest rates on deposits.[37]

During the same period, only one Money Fund, the Reserve Primary Fund, failed to return investors' shares at less than 100 cents on the dollar.[38] Nonetheless, the massive requests for redemptions by the Reserve Primary Fund shareholders beginning on September 15, 2008 when Lehman declared bankruptcy, and Reserve's announcement the following day that it would re-price its shares, triggered a run by investors in other prime Money Funds who feared that those funds' holdings of commercial paper of other financial institutions would decline in value. Numerous Money Funds liquidated assets or imposed redemption limits[39] and a number of funds obtained support from their advisers or other affiliated persons.[40] As the PWG Report describes,

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[36] Congressional Oversight Panel, *September Oversight Report: Assessing the TARP on the Eve of Its Expiration*, at 145-146 (Sept. 16, 2010).

[37] Yalman Onaran and Alexis Leondis, *Wall Street Bailout Returns 8.2% Profit Beating Treasury Bonds*, Bloomberg (Oct. 20, 2010), *available at* http://www.bloomberg.com/news/2010-10-20/bailout-of-wall-street-returns-8-2-profit-to-taxpayers-beating-treasuries.html.

[38] On September 16, 2008, the Reserve Primary Fund's shares were priced at 97 cents after it wrote off debt issued by Lehman Brothers, which had declared bankruptcy the day before. Even so, this event was in large part due to misconduct by the Fund's management, as the SEC has alleged in a pending enforcement proceeding. *See* SEC Press Release: *SEC Charges Operators of Reserve Primary Fund With Fraud* , May 5, 2009, *available at* http://www.sec.gov/news/press/2009/2009-104.htm and related SEC Complaint, *available at* http://www.sec.gov/litigation/complaints/2009/comp21025.pdf, at 35. Moreover, Reserve Fund shareholders recovered more than 99 cents on the dollar after it closed. Press Release, *Reserve Primary Fund to Distribute $215 Million* (July 15, 2010), *available at* http://www.reservefunds.com/pdfs/Primary%20Distribution_71510.pdf; SEC Press Release: *Reserve Primary Fund Distributes Assets to Investors* (Jan. 29, 2010), *available at* http://www.sec.gov/news/press/2010/2010-16.htm.

[39] In response to a request, the SEC, by order, permitted suspension of redemptions in certain Reserve funds in order to allow for orderly liquidation. *See Matter of The Reserve Fund*, Investment Company Act Release No. 28386 (Sept. 22, 2008), 73 Fed. Reg. 55572 (Sept. 25, 2008); Reserve Municipal Money-Market Trust, et al., Investment Company Act Release No. 28466 (Oct. 24, 2008), 73 Fed. Reg. 64993 (Oct. 31, 2008).

[40] The SEC notes that with the exception of the Reserve Primary Fund, all of the funds that were exposed to losses during 2007-2008 from debt securities issued by structured investment vehicles or as a result of the default of debt securities issued by Lehman Brothers Holdings Inc. obtained support of some kind from their advisers or other affiliated persons, who absorbed the losses or provided a guarantee covering a sufficient amount of losses to prevent these funds from breaking the buck. *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10061 (Mar. 4, 2010).

the liquidation of Money Fund assets to meet redemptions led to a reduction of Money Fund holdings of commercial paper by about 25 percent.[41]

No Money Funds were "bailed out" by the government, but the extraordinary conditions in the market, including illiquidity in the secondary market for commercial paper, led to the adoption of special measures to restore confidence in the money markets and Money Funds and address the freeze-up in the commercial paper market. The Treasury Department implemented a limited "Temporary Guarantee Program for Money Market Funds" whereby Money Funds could, in exchange for a payment, receive insurance on investors' holdings such that if shares broke the buck, they would be restored to a $1 net asset value ("NAV").[42] The program expired about one year later, experienced no losses (because the insurance guarantee was never called upon), and earned the Treasury about $1.2 billion in participation fees.[43]

The Federal Reserve also created an "Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility" ("AMLF") to provide credit for banks and bank holding companies to finance their purchases of commercial paper from Money Funds.[44] This program lent $150 billion in just its first 10 days of operation and was terminated with no credit losses.[45] All loans made under the AMLF were repaid in full, with interest, in accordance with the terms of the facility.[46] Indeed, the Federal Reserve Bank of Boston Statements of Income and Comprehensive Income for the years ended December 31, 2009 and December 31, 2008 show the total amount of interest income made on "other loans" (which refers to the AMLF program) during 2008 and 2009 was $543 million ($470 million and $73 million in 2008 and 2009,

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[41] *See* REPORT OF THE PRESIDENT'S WORKING GROUP ON FINANCIAL MARKETS, MONEY MARKET FUND REFORM OPTIONS 12, *available at* http://treas.gov/press/releases/docs/10.21%20PWG%20Report%20Final.pdf.

[42] Press Release, *Treasury Announces Guaranty Program for Money Market Funds* (Sept. 29, 2008), *available at* http://www.treas.gov/press/releases/hp1147.htm.

[43] Press Release, *Treasury Announces Expiration of Guarantee Program for Money Market Funds* (Sept. 19, 2009), *available at* http://www.ustreas.gov/press/releases/tg293.htm.

[44] Federal Reserve Board, *Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility, available at* http://www.federalreserve.gov/monetarypolicy/abcpmmmf.htm.

[45] Burcu Duygan-Bump, Patrick M. Parkinson, Eric S. Rosengren, Gustavo A. Suarez, and Paul S. Willen, QAU Working Paper No. QAU10-3, *How Effective Were the Federal Reserve Emergency Liquidity Facilities? Evidence from the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility* (available at http://www.bos.frb.org/bankinfo/qau/wp/2010/qau1003.htm). The program ceased operation in February, 2010. Federal Reserve Board Press Release, FOMC Statement (Jan. 27, 2010), *available at* http://www.federalreserve.gov/newsevents/press/monetary/20100127a.htm.

[46] Federal Reserve Board, *Monthly Report on Credit and Liquidity Programs and the Balance Sheet,* Appendix B at 31 (October 2010), *available at* http://www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201010.pdf.

respectively).[47] Advances made under the AMLF were made at a rate equal to the primary credit rate offered by the Boston Federal Reserve Bank to depository institutions at the time the advance was made.[48] In sum, the program was extremely profitable to the government. Both programs were limited in scope and involved relatively low risk to taxpayers when compared to other steps taken by the government during the financial crisis.

Going forward, the type of intervention in which the Government may engage will be limited. Congress has forbidden the use of the Exchange Stabilization Fund to guarantee the obligations of Money Funds.[49] The Board's lending authority has been restricted by Section 1101 of the DFA, so that it is not permitted to lend to individual firms that are insolvent.[50] In addition, under Section 214 of the DFA, financial companies placed in receivership under Title II of the DFA cannot receive bailouts or taxpayer-funded expenditures to prevent their liquidation.[51] It is anticipated that these limitations will go a long way in promoting market discipline by eliminating expectations of a Government "bail out" – either of Money Funds or other institutions.

Moreover, although the Board and the Council have just begun to consider the use of the Government's new tools under the DFA to identify and apply new prudential regulation to systemically significant nonbank institutions that, like Lehman, may rely heavily upon short term funding, the SEC, as discussed below, already has acted to substantially enhance the liquidity of Money Funds and further enhance their ability to withstand the potential failure of institutions in whose securities they invest. In addition, the SEC in September 2010 proposed new rules that will shed new light on a company's short-term borrowing practices, including balance sheet "window dressing."[52] The SEC's proposed rules require public companies to disclose additional information to investors about short-term borrowing arrangements, including commercial paper, repurchase agreements, letters of credit, promissory notes, and factoring, used to fund their

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[47] *See* The Federal Reserve Bank of Boston, Financial Statements as of and for the Years Ended December 31, 2009 and 2008 and Independent Auditors' Report, *available at* http://www.federalreserve.gov/monetarypolicy/files/BSTBostonfinstmt2009.pdf.

[48] *Id.*, at 19.

[49] Economic Emergency Stabilization Act of 2008, Div. A of Pub. L. 110-343 (Oct. 3, 2008), §131(b).

[50] Pub. L. No. 111-203, § 1101.

[51] Pub. L. No. 111-203, § 214.

[52] *See* Release No. 33-9143, *Short-Term Borrowings Disclosure*, 75 Fed. Reg. 59866 (Sept. 28, 2010). Currently, SEC rules require public companies to disclose short-term borrowings at the end of the reporting period, but generally there is no requirement to disclose information about the amount of short-term borrowings outstanding throughout the reporting period. The only exception is for bank holding companies, which must disclose annually the average and maximum amounts of short-term borrowings outstanding during the year.

operations.[53] These actions by the SEC, in combination with future actions by the Board and the Council to apply prudential regulation to certain financial institutions that are issuers of the commercial paper purchased by Money Funds, should, in combination, amplify and reinforce each other to prevent or mitigate the impact of future failures of systemically significant financial institutions and, in particular, mitigate the impact of their failures on investors, such as Money Funds, in the short-term markets.

Money Funds are Subject to Comprehensive SEC Regulation and Supervision

A former Board Chairman recently testified before the Financial Crisis Inquiry Commission ("FCIC") that Money Funds were not regulated, and the FCIC summarized in its report that:

> money market funds had no capital or leverage standards…. The funds had to follow only regulations restricting the type of securities in which they could invest, the duration of those securities, and the diversification of their portfolios. These requirements were supposed to ensure that investors' shares would not diminish in value and would be available anytime-- important reassurances, but not the same as FDIC insurance.[54]

The truth is that Money Funds are ***comprehensively regulated*** by the SEC under a statute and regulations that essentially require them to be capitalized entirely with equity and that preclude the use of leverage. The SEC regulations restricting the type of securities in which Money Funds can invest and their maturity and duration are a central reason why only two Money Funds have broken the buck in forty years of the industry's existence; and in those two cases investors got back the overwhelming majority of their investments relatively quickly. The regulatory regime governing Money Funds is not the same as FDIC insurance, it is far more effective than the FDIC and the regime of federal banking regulation, both in protecting Money Funds and their customer/investors against insolvency and in protecting the federal government

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[53] *See* Release No. 33-9143, *Short-Term Borrowings Disclosure,* 75 Fed. Reg. 59866 (Sept. 28, 2010). The proposed rules distinguish between "financial companies" and other companies. Financial companies would be required to report data for the maximum daily amounts outstanding (meaning the largest amount outstanding at the end of any day in the reporting period) and the average amounts outstanding during the reporting period computed on a daily average basis (meaning the amount outstanding at the end of each day, averaged over the reporting period). All other companies would be permitted to calculate averages using an averaging period not to exceed a month and to disclose the maximum month-end amount during the period. *See id. See also,* Release No. 33-9144, *Commission Guidance on Presentation of Liquidity and Capital Resources Disclosures in Management's Discussion and Analysis,* 75 Fed. Reg. 59894 (Sept. 28, 2010).

[54] Final Report of the National Commission on the Causes of the Financial and Economic Crisis In the United States, January 2011, at 33.

from having to bail them out. Money Funds do not represent a case of no regulation, but of profoundly successful, yet simple and extraordinarily elegant, regulation.

The stability of Money Funds – especially when compared with banks – is due in large part to a regulatory system that provides for investor protection, active oversight, inspections and a competitive environment. The investment restrictions applicable to Money Funds are far more stringent than those that apply to banks in terms of duration, credit quality, and liquidity. In brief, Money Funds may invest in debt instruments in which a national bank may invest, including prime commercial paper, bank deposits, short-term U.S. government securities, and short-term municipal government securities.[55] However, they may not invest in many of the higher risk, less liquid and longer-term investments that national banks may own, such as medium and long-term government or corporate debt and most types of loans (*e.g.*, mortgages and consumer loans). In short, Money Fund investment portfolios are far less risky and far more liquid than those of banks. They need to be. Money Funds do not rely on a Federal government guarantee to operate.

Money Funds are a type of mutual fund. As such, they must register with the SEC as "investment companies" under the Investment Company Act, which subjects them to stringent regulatory, disclosure, and reporting provisions. Thus, they must register offerings of their securities with the SEC and provide perpetually updated prospectuses to potential investors. They must also file periodic reports with the SEC and provide shareholders with annual and semi-annual reports, which must include financial data and a list of portfolio securities. In addition, the Investment Company Act governs virtually every aspect of a mutual fund's structure and operations, including its capital structure, investment activities, valuation of shares, the composition of the board, and the duties and independence of its directors. Mutual funds also are subject to extensive recordkeeping requirements and regular inspections. In addition, the advisers to mutual funds, including Money Funds, are subject to SEC registration under the Investment Advisers Act of 1940 ("Advisers Act"), which imposes its own reporting and recordkeeping requirements, prescribes the terms of advisory contracts, and provides for SEC inspections and examinations. Of particular significance to the Section 113 analysis, investment companies (including Money Funds) are restricted from investing in securities firms or their holding companies,[56] from lending to or borrowing from other investment companies with whom they are affiliated,[57] or from jointly investing alongside other related Money Funds in other

[55] 12 U.S.C. 24 (Seventh), 12 C.F.R. Part 1.

[56] Investment Company Act § 12(d).

[57] See Investment Company Act §§ 17(a)(3),(4) (restricting borrowing and lending by investment companies and their affiliates).

companies.[58] As a result, the financial conditions of different investment companies (even if they have the same investment adviser) generally are not linked to one another in the way that is common, for example, among correspondent or affiliate banks.[59]

Money Funds are subject to an additional SEC regulation: Rule 2a-7 under the Investment Company Act.[60] Money Funds seek to generate income and preserve investor funds by investing in short-term, high-quality debt. At the same time, they seek to maintain a stable NAV of $1 per share, so Rule 2a-7 permits a Money Fund to maintain a stable net asset value by using the "amortized cost" method of accounting.[61] This comes subject to the strict requirements of Rule 2a-7 to ensure that these funds are as stable and low risk as possible. Thus, a Money Fund must meet stringent portfolio liquidity, credit quality, maturity, and diversification requirements. These were strengthened by amendments in 2010 that were "designed to make money market funds more resilient to certain short-term market risks, and to provide greater

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[58] Investment Company Act §§ 12(a)(2); 17(d).

[59] See, 12 U.S.C. §§ 371c, 371c-1; 12 C.F.R. § 223 (sister bank exemption permitting lending and other transactions between affiliate banks), 12 U.S.C. § 1815(e) (cross-guarantee liability of affiliated banks). In this fashion, losses at one bank can precipitate losses at other banks. In fact, it was in this very context that the term "too big to fail" was first used – as an explanation of the bailout of Continental Illinois National Bank and Trust Company in 1984. The FDIC has explained that in that case

> the regulators' greatest concern was systemic risk … . Continental had an extensive network of correspondent banks, almost 2,300 of which had funds invested in Continental; more than 42 percent of those banks had invested funds in excess of $100,000, with a total investment of almost $6 billion. The FDIC determined that 66 of these banks, with total assets of almost $5 billion, had more than 100 percent of their equity capital invested in Continental and that an additional 113 banks with total assets of more than $12 billion had between 50 and 100 percent of their equity capital invested.

See FDIC Study: *History of the Eighties — Lessons for the Future*, Part 2.7, Continental Illinois and "Too Big to Fail," at 250 (available at http://www.fdic.gov/bank/historical/history/vol1.html). In this situation, the FDIC concluded that "handling Continental through a payoff and liquidation was simply not … a viable option." Instead, the bank was provided with a $2 billion government rescue package and the FDIC purchased 4.5 billion in bad loans. *History of the Eighties — Lessons for the Future*, Part 2.7 at 244. *See also* FDIC *Managing the Crisis: The FDIC and RTC Experience* at 542 (describing how the failure of Penn Square Bank led to the forced merger of the holding company of Seattle First National Bank) (available at http://www.fdic.gov/bank/historical/managing/history2-03.pdf).

[60] *See* 17 C.F.R. § 270.2a-7.

[61] Under the "amortized cost" method of accounting, Money Funds value the securities in their portfolios at acquisition cost as adjusted for amortization of premium or accretion of discount rather than market value. *See* 17 C.F.R. § 270.2a-7(a)(2). The Rule also allows Money Funds to use the "penny-rounding" method of pricing, which permits rounding to one cent rather than one-tenth of a cent. 17 C.F.R. § 270.2a-7(a)(20). However, this method is seldom used because it does not eliminate daily "mark to market" accounting requirements.

protections for investors in a money market mutual fund that is unable to maintain a stable net asset value per share."[62] In particular, Rule 2a-7 and related SEC rules impose requirements on Money Funds in the following areas:

Liquidity. Under the 2010 amendments to Rule 2a-7, a Money Fund is required to have a minimum percentage of its assets in highly liquid securities so that it can meet reasonably foreseeable shareholder redemptions.[63] Under new minimum daily liquidity requirements applicable to all taxable Money Funds, at least 10 percent of the assets in the fund must be in cash, U.S. Treasury securities, or securities that convert into cash (*e.g.*, mature) within one business day. In addition, under a new weekly requirement applicable to all Money Funds, at least 30 percent of assets must be in cash, U.S. Treasury securities, certain other government securities with remaining maturities of 60 days or less, or securities that convert into cash within five business days. No more than 5 percent of a fund's portfolio may be "illiquid" (i.e., cannot be sold or disposed of within seven days at carrying value). Prior to the 2010 amendments, Rule 2a-7 did not include any minimum liquidity requirements.

High Credit Quality. Rule 2a-7 limits a Money Fund to investing in securities that are, at the time of their acquisition, "Eligible Securities." "Eligible Securities" include a security with a remaining maturity of 397 calendar days or less that has received a rating by two designated nationally recognized statistical rating organizations ("NRSROs") in one of the two highest short-term rating categories and unrated securities of comparable quality.[64] Under the 2010 amendments, 97% of a Money Fund's assets must be invested in "First Tier Securities."[65] Only

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[62] *See* Release No. IC-29132, 75 Fed. Reg. 10060 (Mar. 4, 2010).

[63] Depending upon the volatility of the fund's cash flows (in particular shareholder redemptions), a fund may be required to maintain greater liquidity than would be required by the daily and weekly minimum liquidity requirements set forth in Rule 2a-7. *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10074 (Mar. 4, 2010).

[64] Under Rule 2a-7(a)(12), if only one designated NRSRO has rated a security, it will be considered a rated security if it is rated within one of the rating agency's two highest short-term rating categories. Under certain conditions, a security that is subject to a guarantee or that has a demand feature that enhances its credit quality may also be deemed an "Eligible Security." In addition, an unrated security that is of comparable quality to a rated security also may qualify as an "Eligible Security."

[65] A "First Tier Security" means any Eligible Security that:

(i) is a Rated Security (as defined in Rule 2a-7) that has received a short-term rating from the requisite NRSROs in the highest short-term rating category for debt obligations (within which there may be sub-categories or gradations indicating relative standing);

(ii) is an unrated security that is of comparable quality to a security meeting the requirements for a rated security in (i) above, as determined by the fund's board of directors;

(iii) is a security issued by a registered investment company that is a Money Fund; or

Footnote continued on next page

3 percent of its assets may be held in lower quality, "Second Tier Securities."[66] Previously, a Money Fund was permitted to invest 5% of its assets in "Second Tier Securities." In addition, a Money Fund may not invest more than ½ of 1 percent of its assets in "Second Tier Securities" issued by any one issuer (rather than the previous limit of the greater of 1 percent or $1 million). Under the 2010 amendments, a Money Fund also is prohibited from purchasing "Second Tier Securities" that mature in more than 45 days (rather than the previous limit of 397 days). As required by the DFA, the SEC has proposed the remove the references to NRSRO ratings and replace them with equivalent high credit quality determinations by the fund board or its designee.[67]

Short Maturity Limits. Rule 2a-7 limits the exposure of Money Funds to risks like sudden interest rate movements by restricting the average maturity of portfolio investments. (This also helps a Money Fund maintain a stable NAV). Under the 2010 amendments to Rule 2a-7, the "weighted average maturity" of a Money Fund's portfolio is restricted to 60 days (compared to the previous limit of 90 days). In addition, the 2010 amendments limit the maximum "weighted average life" maturity of a fund's portfolio to 120 days. This restriction limits the fund's ability to invest in long-term floating rate securities. (Previously, there was no such restriction.) Thus, the "maturity mismatch" that Money Funds are subject to is far smaller than that faced by banks, which offer demand deposits, but make long-term loans.

Periodic Stress Tests. Under the 2010 amendments to Rule 2a-7, the board of directors of each Money Fund must adopt procedures providing for periodic stress testing of the funds' portfolio. Fund managers are required to examine a fund's ability to maintain a stable NAV per share based upon certain hypothetical events. These include a change in short-term interest rates, higher redemptions, a downgrade of or default on portfolio securities, and widening or narrowing of spreads between yields on an appropriate benchmark selected by the fund for overnight interest rates and commercial paper and other types of securities held by the fund. Previously, Money Funds were not subject to stress test requirements.

Footnote continued from previous page

(iv) is a Government Security.

The term "requisite NRSROs" is defined in Rule 2a-7(a)(23) to mean "(i) Any two Designated NRSROs that have issued a rating with respect to a security or class of debt obligations of an issuer; or (ii) If only one Designated NRSRO has issued a rating with respect to such security or class of debt obligations of an issuer at the time the fund acquires the security, that Designated NRSRO."

[66] Second Tier Securities are any Eligible Securities that are not First Tier Securities.

[67] SEC, *References to Credit Ratings in Certain Investment Company Act Rules and Forms*, 76 Fed. Reg. 12896 (Mar. 9, 2011).

NRSRO Ratings. Rule 2a-7 currently limits a Money Fund's investment in rated securities to those rated in the top two rating categories or unrated securities of comparable quality. It also requires Money Funds to perform independent credit analyses of every security they purchase. Credit ratings help funds screen credit quality, but are never the sole factor relied upon in making an investment decision.[68] Under the 2010 amendments, improvements were made to the way that funds evaluate securities ratings by NRSROs. A Money Fund's board is required to designate annually at least four NRSROs that will be used by the fund based on the board's determination on at least an annual basis that such credit ratings are sufficiently reliable. This permits a Money Fund to disregard ratings by NRSROs that have not been so designated for purposes of satisfying the Rule's minimum rating requirements. The previous requirement that funds invest only in those asset-backed securities that have been rated by an NRSRO was eliminated.[69] Consistent with the DFA, the SEC is in the process of further amending its rules to reduce the role of ratings in the process of selecting investments by Money Funds.[70]

Repurchase Agreements. Money Funds generally invest a significant part of their assets in repurchase agreements. Many such agreements mature the following day and provide an immediate source of liquidity. In 2010, the SEC adopted two changes to Rule 2a-7 that strengthen the requirements for permitting a Money Fund to "look through" the repurchase issuer to the underlying collateral securities for diversification purposes. First, the SEC limited Money Funds to investing in repurchase agreements collateralized by cash items or government securities (in contrast to the prior requirement of highly rated securities) in order to obtain

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[68] The DFA gave the SEC new authority to regulate NRSROs in order to improve the quality and reliability of credit ratings. A new Office of Credit Ratings to be established within the SEC in order to protect users of credit ratings and promote credit rating accuracy will administer the SEC's rules with respect to the practices of NRSROs in determining ratings. The SEC is required to examine NRSROs at least once a year and make its inspection reports publicly available. The SEC has been given additional rulemaking authority to take steps to enhance the accuracy and integrity of credit ratings and increase the transparency of the credit rating process. The DFA also increases the potential liability of credit rating agencies**.** The increased oversight of NRSROs by the SEC authorized by the DFA helps ensure that issues and risks associated with inappropriate credit ratings of commercial paper held by Money Funds are less likely to occur.

[69] The SEC noted in the release adopting the 2010 amendments that as part of the minimal credit risk analysis that any Money Fund must conduct before investing in an asset-backed security ("ABS"), the fund's board should: (i) analyze the underlying ABS assets to ensure that they are properly valued and provide adequate asset coverage for the cash flows required to fund the ABS under various market conditions; (ii) analyze the terms of any liquidity or other support provided by the sponsor of the ABS; and (iii) perform legal, structural, and credit analyses required to determine that the particular ABS involves appropriate risks for the fund. *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10070 (Mar. 4, 2010). In October, 2009, the SEC deferred consideration of proposals to remove NRSRO references from Rule 2a-7. Release No. IC–28940, 74 Fed. Reg. 52374 (Oct. 9, 2009).

[70] SEC, *References to Credit Ratings in Certain Investment Company Act Rules and Forms*, 76 Fed. Reg. 12896 (Mar. 9, 2011).

special treatment of those investments under the diversification provisions of Rule 2a–7. Second, the fund's board of directors must evaluate the creditworthiness of the counterparty. This amendment requires a fund adviser to determine that the counterparty is a creditworthy institution, separate and apart from the value of the collateral supporting the counterparty's obligation under the repurchase agreement. The 2010 amendments are designed to prevent losses caused by a counterparty's default.[71]

Monthly Disclosure of Portfolio Information. Under the 2010 amendments, Money Funds must post their portfolio holdings each month on their websites and maintain this information for no less than six months after posting.[72] (Previously, Money Funds were not required to disclose information on their websites). Under the 2010 amendments, Money Funds also must now file monthly reports of portfolio holdings with the SEC,[73] which must include the market-based values of each portfolio security and the fund's "shadow" NAV.[74] The information becomes publicly available after 60 days.[75] (Previously, a Money Fund's "shadow" NAV was reported twice a year with a lag of 60 days).

Redemptions / Know Your Customer. Under a new requirement added to Rule 2a-7 in 2010, Money Funds must hold securities that are sufficiently liquid to meet reasonably foreseeable redemptions. (Previously, there was no such requirement). To satisfy this new requirement, a Money Fund must adopt policies and procedures to identify the risk characteristics of large shareholders and anticipate the likelihood of large redemptions.[76] Depending upon the volatility of its cash flows, and in particular shareholder redemptions, this may require a fund to maintain greater liquidity than would be required by the daily and weekly minimum liquidity requirements discussed above.[77]

Processing of Transactions. Under a new requirement adopted in 2010, Rule 2a–7 requires a Money Fund to have the capacity to redeem and sell its securities at a price based on its current NAV. This requirement applies even if the fund's current net asset values does not correspond to the fund's stable net asset value or price per share. The new requirement minimizes operational difficulties in satisfying shareholder redemption requests and increases

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[71] *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10081 (Mar. 4, 2010).

[72] 17 C.F.R. § 270.2a-7(c)(12).

[73] 17 C.F.R. § 270.30b1-7(a).

[74] *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10083 (Mar. 4, 2010).

[75] 17 C.F.R. § 270.30b1-7(b).

[76] *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10075, n.198 and accompanying text (Mar. 4, 2010).

[77] *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10074 (Mar. 4, 2010).

speed and efficiency if a fund breaks the buck. This change requires Money Funds to be able to process redemptions and thus provide liquidity if market prices of their portfolio assets decline, rather than defer share redemptions and corresponding sales of portfolio assets in order to avoid recognizing that decline in portfolio value. In essence, if market conditions dictate a movement to a floating NAV in order to process transactions and provide liquidity to redeeming shareholders, Rule 2a-7 requires Money Funds to do so. By forcing shareholder transactions to be processed at a price other than $1.00 when portfolio asset market conditions dictate, this rule change both enhances liquidity and addresses policy concerns over potential "runs" by shareholders seeking to redeem Money Fund shares ahead of unrecognized portfolio price declines or related deferrals by Money Funds of processing of redemptions.

Handling Default in a Portfolio Instrument. Rule 2a-7 establishes procedures that a Money Fund must follow if a portfolio instrument is downgraded or a default or other event occurs with respect thereto. In some cases, a fund may be required to dispose of, or reduce its investments in, the issuers of such instruments.

Shadow Pricing. To reduce the chance of a material deviation between the amortized cost value of a portfolio and its market-based value, Rule 2a-7 requires Money Funds to "shadow price" the amortized cost net asset value of the fund's portfolio against its mark-to-market net asset value. If there is a deviation of more than ½ of 1 percent, the fund's board of directors must promptly consider what action, if any, it should take,[78] including whether the fund should discontinue using the amortized cost method of valuation and re-price the securities of the fund below (or above) $1.00 per share.[79] Regardless of the extent of the deviation, Rule 2a–7 obligates the board of a Money Fund to take action whenever it believes any deviation may result in material dilution or other unfair results to investors.[80]

Diversification. In order to limit the exposure of a Money Fund to any one issuer or guarantor, Rule 2a-7 requires the fund's portfolio to be diversified with regard to both issuers of securities it acquires and guarantors of those securities.[81] Money Funds generally must limit their investments in the securities of any one issuer (other than Government securities) to no more than five percent of fund assets.[82] Money Funds also must generally limit their investments in

[78] 17 C.F.R. § 270.2a-7(c)(8)(ii)(B).

[79] *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10061 (Mar. 4, 2010).

[80] 17 C.F.R. § 270.2a-7(c)(8)(ii)(C).

[81] 17 C.F.R. § 270.2a-7(c)(4)(i).

[82] Rule 2a-7(c)(4)(i)(A). Rule 2a-7 includes a safe harbor that permits a taxable and national tax exempt fund to invest up to 25 percent of its assets in the first tier securities of a single issuer for a period of up to three business days after acquisition (but a fund may use this exception for only one issuer at a time). Rule 2a-7(c)(4)(i)(A).

securities subject to a demand feature or a guarantee to no more than ten percent of fund assets from any one provider.[83] As noted above, under the 2010 amendments to Rule 2a-7, a Money Fund may not invest more than ½ of 1 percent of its assets in "Second Tier Securities" issued by any one issuer.

Risk Management. Money Funds have robust risk management requirements, beginning with Rule 2a-7's requirements that they limit holdings to the safest, most liquid and short-term investments and strict diversification requirements. Moreover, boards of Money Funds have substantial, detailed, and ongoing risk management responsibilities. For example, Money Fund boards must adopt written procedures regarding:

- Stabilization of NAV (which must take current market conditions, shadow pricing and consideration of material dilution and unfair results into account);
- Ongoing review of credit risks and demand features of portfolio holdings;
- Periodic review of decisions not to rely on demand features or guarantees in the determination of a portfolio security's quality, maturity or liquidity; and
- Periodic review of interest rate formulas for variable and floating rate securities in order to determine whether adjustments will reasonably value a security.

In order to ensure that boards are diligent and act in good faith, funds must also keep and maintain records of board consideration and actions taken in the discharge of their responsibilities. Management's decision-making processes must also be reflected in records such as whenever a security is determined to present a minimal credit risk, or when it makes a determination regarding deviations in amortized value and market value of securities and others.

Delegations of responsibilities by the board must be pursuant to written guidelines and procedures, and the Board must oversee the exercise of responsibilities. Even then, boards may not delegate certain functions, such as any decisions as to whether to continue to hold securities that are subject to default, or that are no longer eligible securities, or that no longer present minimal credit risk, or whose issuers have experienced an event of insolvency, or that have been downgraded under certain circumstances Nor may boards delegate their responsibility to consider action when shadow pricing results in a deviation of 1/2 of 1%, or to determine whether such deviations could result in dilution or unfairness to investors.

[83] Rule 2a-7(c)(4)(iii). With respect to 25 percent of total assets, holdings of a demand feature or guarantee provider may exceed the 10 percent limit subject to certain conditions. *See* Rule 2a-7(c)(4)(iii)(A), (B), and (C). *See also* Rule 2a-7(a)(8) (definition of "demand feature") and (a)(15) (definition of "guarantee").

Rule 2a-7 provides that if a "First Tier Security" is downgraded to a "Second Tier Security" or the fund's adviser becomes aware that any unrated security or Second Tier Security has been downgraded, the board must reassess promptly whether the security continues to present minimal credit risks and must cause the fund to take actions that the board determines is in the best interests of the fund and its shareholders.[84] A reassessment is not required if the fund disposes of the security (or it matures) within five business days of the event.[85]

If securities accounting for 1/2 of 1% or more of a Money Fund's total assets default (other than an immaterial default unrelated to the issuer's financial condition) or become subject to certain events of insolvency, the fund must promptly notify the SEC and indicate the actions the Money Fund intends to take in response to such event.[86] If an affiliate of the fund purchases a security from the fund in reliance on Rule 17a-9, the SEC must be notified of the identity of the security, its amortized cost, the sale price, and the reasons for such purchase.[87]

In the event that after giving effect to a rating downgrade, more than 2.5 percent of the Money Fund's total assets are invested in securities issued by or subject to demand features from a single institution that are "Second Tier Securities," the fund must reduce its investments in such securities to 2.5% or less of its total assets by exercising the demand features at the next exercise date(s), unless the fund's board finds that disposal of the portfolio security would not be in the best interests of the fund.[88]

When a portfolio security defaults (other than an immaterial default unrelated to the financial condition of the issuer), ceases to be an Eligible Security, has been determined to no longer present minimal credit risks, or certain events of insolvency occur with respect to the issuer of a portfolio security or the provider of any demand feature or guarantee of a portfolio security, the Money Fund is required to dispose of the security as soon as practicable consistent with achieving an orderly disposition of the security (by sale, exercise of a demand feature, or

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[84] *See* 17 C.F.R. § 270.2a-7(c)(7)(i)(A).

[85] Where a Money Fund's investment adviser becomes aware that any unrated security or "Second Tier Security" held by the fund has, since the security was acquired by the fund, been given a rating by a Designated NRSRO below the Designated NRSRO's second highest short-term rating category, the board must be subsequently notified of the adviser's actions. *See* 17 C.F.R. § 270.2a-7(c)(7)(i)(B).

[86] *See* 17 C.F.R. § 270.2a-7(c)(7)(iii)(A).

[87] *See* 17 C.F.R. § 270.2a-7(c)(7)(iii)(B).

[88] *See* 17 C.F.R. § 270.2a-7(c)(7)(i)(C).

otherwise), unless the fund's board finds that disposal of the portfolio security would not be in the best interests of the fund.[89]

Fund Liquidation. New SEC Rule 22e-3,[90] adopted in 2010, permits a Money Fund's board of directors to suspend redemptions and postpone payment of redemption proceeds if the fund is about to break the buck and the board decides to liquidate the fund. Previously, the fund board was required to obtain an order from the SEC before suspending redemptions. This amendment is designed to facilitate an orderly liquidation of fund assets in the event of a threatened run on the fund.[91] As described further below, the SEC has broad powers under the Investment Company Act and other federal securities laws, to oversee the liquidation of a Money Fund.

Purchases by Sponsors or Other Affiliated Persons. Under the SEC's rules, affiliated persons are permitted, but not required, to purchase distressed assets from a Money Fund in order to protect the Money Fund from loss.[92] Conditions apply under the SEC rules to such affiliate purchases that are designed to protect the Money Fund from transactions that would disadvantage the fund.[93] The SEC rules also require the Money Fund to report all such purchases to the SEC.

Explicit Disclosures to Investors that the Fund is Not Federally Insured. Money Fund investors receive explicit disclosure that investments in Money Funds are not insured or guaranteed by the Federal Deposit Insurance Corporation. Item 4(b) of the Form N-1A registration form that is used by open-end management investment companies to register under

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[89] *See* 17 C.F.R. § 270.2a-7(c)(7)(ii).

[90] *See* 17 C.F.R. § 270.22e-3.

[91] The rule permits a fund to suspend redemptions and payment of proceeds if (i) the fund's board, including a majority of disinterested directors, determines that the deviation between the fund's amortized cost price per share and the market-based net asset value per share may result in material dilution or other unfair results to investors, (ii) the board, including a majority of disinterested directors, irrevocably has approved the liquidation of the fund, and (iii) the fund, prior to suspending redemptions, notifies the SEC of its decision to liquidate and suspend redemptions.

[92] *See* 17 C.F.R. § 270.17a-9.

[93] Rule 17a–9 provides an exemption from Section 17(a) of the Investment Company Act to permit affiliated persons of a Money Fund to purchase distressed portfolio securities from the fund. Absent an SEC exemption, Section 17(a)(2) prohibits any affiliated person or promoter of or principal underwriter for a fund (or any affiliated person of such a person), acting as principal, from knowingly purchasing securities from the fund. Rule 17a–9 exempts certain purchases of securities from a Money Fund from Section 17(a), if the purchase price is equal to the greater of the security's amortized cost or market value (in each case, including accrued interest). *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10087 (Mar. 4, 2010), at n. 365.

the Investment Company Act and to offer their shares under the Securities Act states that if a fund is a Money Fund, it must state:

> An investment in the Fund is not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency. Although the Fund seeks to preserve the value of your investment at $1.00 per share, it is possible to lose money by investing in the Fund.

In addition, if a Money Fund is advised by or sold through an insured depository institution, the above disclosure must be combined in a single statement with disclosure that an investment in the fund is not a deposit of the bank and is not insured or guaranteed by the FDIC or any other government agency.

For those Money Funds that are rated by NRSROs, additional stringent criteria beyond the requirements of Rule 2a-7 must be met to achieve the top ratings. The ratings criteria of the NRSROs recently have been made even more stringent based upon the lessons learned in 2008.

Standard & Poor's ("S&P") assigns "principal stability fund ratings" ("PFSRs") to Money Funds based on an analysis of the creditworthiness of a fund's investments and counterparties, the market exposure of its investments, its portfolio liquidity, and management's overall ability to maintain a stable NAV.[94] S&P does not rely on a fund sponsor's willingness and/or ability to support the fund's NAV, but does review and evaluate the measures that a sponsor chooses to take to support its NAV during times of market stress or when a fund sponsor decides to take action to support the fund's NAV or liquidity. S&P has recently proposed additional requirements for Money Funds to achieve its top ratings,[95] and has also proposed to modify its criteria for assessing counterparty credit risk.[96]

Fitch Ratings Research has Money Fund rating scale and rating definitions, from 'Bmmf' to 'AAAmmf.' To be rated 'AAAmmf,' a fund must have "extremely strong capacity to achieve its investment objective of preserving principal and providing shareholder liquidity through

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[94] *See* Standard & Poor's, *Principal Stability Fund Ratings Criteria*, published Feb. 2, 2007, on RatingsDirect® and at www.standardandpoors.com.

[95] *See* Standard & Poor's, *Principal Stability Fund Rating Criteria* (Jan. 5, 2010), *available at* http://www2.standardandpoors.com/spf/pdf/events/FITcon11410RFC.pdf. *See also* Release No. IC-29132, 75 Fed. Reg. 10060, 10073 n.176 (Mar. 4, 2010).

[96] These counterparty transactions include repos, reverse repurchase agreements, swaps, forward purchases, foreign-exchange contracts, and other hedging positions. *See Request for Comment: Fund Ratings Criteria,* Sep. 17, 2010, *available at* http://www.standardandpoors.com/ratings/articles/en/us/?assetID=1245224119805.

limiting credit, market, and liquidity risk."[97] Money Funds given Fitch's top rating of 'AAAmmf' meet more stringent criteria than is required under Rule 2a-7.[98]

Moody's Investors Service has recently revised its rating scale and methodology for rating Money Funds. Its new methods are meant to better assess factors such as liquidity risk, market risk, asset quality and obligor concentrations.[99]

B. Money Funds Should Not Be Designated for Prudential Regulation under Title I or for FDIC Receivership Under Title II of DFA

Sections 113 and 203 Standards for Designation as Applied to Money Funds

Under Section 113 of the DFA, the Council has the authority to designate a U.S. nonbank financial company for supervision by the Board and subject to its prudential regulation. To make this determination, the Council must find that material financial stress at the nonbank financial company or the nature, scope, size, scale, concentration, interconnectedness, or mix of its activities could pose a threat to U.S. financial stability. Paragraph 113(b)(2) sets out ten risk-related factors the Council must consider in making the determination, and permits the Council to consider other risk-related factors it deems appropriate. The NPR sets out the text of a proposed rule implementing this provision, which repeats the same ten specific factors as well as the eleventh statutory catch-all of unspecified factors deemed appropriate by the Council by regulation or on a case-by-case basis. While not embodied in the proposed rule text, the NPR contains a discussion of these ten criteria that groups the ten criteria into six categories (size, lack of substitutes for the financial services and products the company provides, interconnectedness with other financial firms, leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny) for the Council to use in making a Section 113 designation.

Nonbank financial companies become subject to additional Board regulation as a result of designation under Section 113 of Title I and for potential FDIC receivership(and if not designated under Title I can become subject to FDIC receivership through a separate systemic

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[97] *See* Fitch Ratings, *Global Money Market Fund Rating Criteria (Oct. 5, 2009), available at* http:// www.fitchratings.com/creditdesk/reports/ report_frame.cfm?rpt_id=470368; *Fitch Implements New Money Market Fund Criteria; Revises Ratings,* Business Wire, Jan. 19, 2010, *available at* http://www.businesswire.com/news/home/20100119007345/en/Fitch-Implements-Money-Market-Fund-Criteria-Revises.

[98] *See* Fitch Ratings, *U.S. Money Market Funds: A Year of Changes and Challenges - and More to Come?,* Oct. 26, 2010, *available at* http://insurancenewsnet.com/article.aspx?id=232263&type=newswires.

[99] *Moody's Proposes New Money Market Fund Rating Methodology and Symbols,* Sept. 17, 2010, *available at* http://www.v3.moodys.com/researchdocumentcontentpage.aspx?docid=PBC_126642.

risk determination under Section 203 of Title II. Designation under Title I is closely related to potential for designation under Title II due to shared definitional criteria intertwining Titles I and II and the relationship through the Council among the agencies making the designations under Titles I and II.

Under Section 203 of the DFA, the FDIC, working with the Board, can recommend to the Secretary of the Treasury (who also serves as chairman of the Council) that the Secretary designate a financial company for receivership under Title II, taking into consideration eight factors: (A) an evaluation of whether the financial company is in default or in danger of default; (B) a description of the effect that the default of the financial company would have on financial stability in the United States; (C) a description of the effect that the default of the financial company would have on economic conditions or financial stability for low income, minority, or underserved communities; (D) a recommendation regarding the nature and the extent of actions to be taken under this title regarding the financial company; (E) an evaluation of the likelihood of a private sector alternative to prevent the default of the financial company; (F) an evaluation of why a case under the Bankruptcy Code is not appropriate for the financial company; (G) an evaluation of the effects on creditors, counterparties, and shareholders of the financial company and other market participants; and (H) an evaluation of whether the company satisfies the definition of a financial company under Section 201.

The Secretary, in consultation with the President of the United States, is permitted to designate a company for FDIC receivership under Title II after a recommendation by the Board and the FDIC, if the Secretary makes a seven-part determination that: (1) the financial company is in default or in danger of default; (2) the failure of the financial company and its resolution under otherwise applicable Federal or State law would have serious adverse effects on financial stability in the United States; (3) no viable private sector alternative is available to prevent the default of the financial company; (4) any effect on the claims or interests of creditors, counterparties, and shareholders of the financial company and other market participants as a result of actions to be taken under this title is appropriate, given the impact that any action taken under this title would have on financial stability in the United States; (5) any action under section 204 would avoid or mitigate such adverse effects, taking into consideration the effectiveness of the action in mitigating potential adverse effects on the financial system, the cost to the general fund of the Treasury, and the potential to increase excessive risk taking on the part of creditors, counterparties, and shareholders in the financial company; (6) a Federal regulatory agency has ordered the financial company to convert all of its convertible debt instruments that are subject to the regulatory order; and (7) the company satisfies the definition of a financial company under section 201.

The Board's NPR does not seek to define or specify criteria for designation of nonbank financial firms under Title I. The lack of specificity in the NPR as well as in the closely-related

Council and FDIC rulemaking proposals, and the failure to describe the quantitative and qualitative considerations that underlie the regulators' application of these criteria in assessing any potential institution in the proposal is troubling. No objective quantitative measures are set forth in NPR, the rule text or in the other related agency rulemakings, and it appears that none of the agencies are proposing to clarify publicly how they plan to arrive at a systemic risk designation under Title I or Title II.

This does not move the ball forward. If the Board, FDIC, and the Council do not create regulations that are reasonably specific, they will be subject to varying interpretations and unpredictable application. If rules remain ambiguous firms (and investors in those firms) will not be able to accurately predict how they might be treated and what they should plan for, or what information would be appropriate to include in a response to a notice of designation (which response must be submitted in 30 days or less). The U.S. economic system demands stability and a clear regulatory framework. Indeed, the President's recent Executive Order directs that regulations "must promote predictability and reduce uncertainty." Accordingly, we urge the Board to defer action on implementing the rules as proposed until they can be refined with further precision.[100]

We are apparently not alone in our concern. In comments filed with the FDIC on its rulemaking proposal earlier this year, the Federal Reserve Bank of Richmond stated that:

> the orderly liquidation authority should be as transparent, unambiguous, and predictable as possible, and Title II would benefit from any rulemaking that makes the FDIC's authority clearer and more consistent. For this reason, we're pleased to read that the proposed rule's purpose "is to provide clarity and certainty to the financial industry and to ensure that the liquidation process under Title II reflects the Dodd-Frank Act's mandate of transparency in the liquidation of failing systemic financial companies." We worry, however, that despite the FDIC's efforts to enhance the orderly liquidation authority's transparency and predictability, the constructive ambiguity that accompanies the FDIC's discretion is likely to breed market uncertainty, which can add to financial volatility when market participants are forced to speculate on the FDIC's treatment of various similarly situated creditors. The potential for panics and runs in the face of such ambiguity could in turn impinge on the FDIC's decision making in the midst of a crisis. Greater transparency and predictability would help limit this adverse feedback loop.[101]

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[100] *Improving Regulation and Regulatory Review*, Executive Order 13563 (Jan. 18, 2011).

[101] Letter from Jeffrey M. Lacker, President, Federal Reserve Bank of Richmond to FDIC (Jan. 18, 2011) (*available at* http://www.fdic.gov/regulations/laws/federal/2010/10c35Orderliq.PDF).

Accordingly, we urge the Board to defer implementation of the rules in the NPR until they, and the other related Board, Council and FDIC rules implementing Titles I and II, are refined with further precision, including adopting rules under Section 170 specifying what types of nonbank financial firms are excluded from coverage under Titles I and II of the DFA.

Whatever factors or criteria are used, Section 113 clearly does not contemplate designation of an entire industry as systemically significant. The designation is for individual companies. There are currently 652 separate money market mutual funds. Each one has a separate investment portfolio. Even when two money market mutual funds share a single investment adviser, their investments are segregated, and typically have investment specializations. For example, one fund may invest only in short-term U.S. government securities, another may invest in short term municipal government securities, and a third may invest more broadly in commercial paper, government securities and other money market instruments. Consequently, each fund caters to different groups of investors. They cannot be lumped together and designated *en masse* as systemically significant under Section 113. We note that the press has reported that an unpublished draft FSOC staff report has reached this conclusion.[102]

The size of a particular Money Fund varies over time due to the fluctuations in prevailing interest rates, shareholder liquidity needs, other market conditions, and significant liquidity required of a Money Fund portfolio through its investment in high-quality, marketable, short-term money market instruments, and the fact that financing is entirely equity. A Money Fund by its very nature is scalable and can expand or contract dramatically based upon investor demand within a few months with little impact on its risk profile, liquidity or profitability.[103] Thus, use by the Council of size as the primary factor in designating a Money Fund as systemically important, particularly if that designation imposes material costs or other regulatory burdens on a fund that make it unattractive to investors, would be an inherently fruitless exercise.

The second broad criteria in the Council's NPR, whether there is a lack of substitutes, similarly weighs against designation of Money Funds under Section 113. There are currently over 650 Money Funds that are to some degree substitutes for one another, and few barriers to

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[102] Rebecca Christie and Ian Katz, Hedge Funds May Pose Systemic Risk in Crisis, U.S. Report Says (Bloomberg, Feb. 17, 2011) (*available at* http://noir.bloomberg.com/apps/news?pid=newsarchive&sid=aodA4jeoNSxE).

[103] For example assets under management in Federated's Prime Value Obligations Fund decreased by approximately $1.6 billion in August-September 2006, increased by approximately $1.4 billion in January-February 2007, increased by approximately $1.9 billion in February-March 2007 and decreased by approximately $1.7 billion in August-September 2007. These fluctuations did not affect the fund's operations, and are not unusual for a Money Fund.

creating additional Money Funds. Moreover, direct investment in money market instruments, and use of bank deposits, remain as far less efficient substitutes for Money Funds. What could impact this factor is the potential for new regulatory burdens imposed on Money Funds under Section 113 (or otherwise) that might render them less attractive as a class to investors and less efficient at rechanneling investor cash to financing the cash needs of businesses and governmental entities, thereby creating a lack of efficient substitutes for investors seeking to manage a cash position and for companies seeking short term financing.[104] Presumably, the regulatory risks and burdens associated with being designated under Section 113 is not a legitimate basis for designating Money Funds as systemically important under Section 113.

The third criteria in the Council's NPR, interconnectedness, similarly weighs against designation of a Money Fund under Section 113. The portfolio exposure of a Money Fund to any one issuer or group of related issuers is sharply limited by SEC Rule 2a-7. Money Funds do not have "contagion" risk in the way that banks or certain other categories of financial firms do. Money Funds are not like Penn Square Bank, Continental Illinois or the Herstatt Bank where losses at a Money Fund results in insolvencies of other firms with which that Money Fund does business. At worst, investors in the two Money Funds that have broken a buck over the past 40 years have had a relatively short wait to recover the overwhelming majority of their cash, and companies whose commercial paper is owned by a Money Fund that is being wound down simply sell future issuances of their commercial paper to other Money Funds, banks, insurance companies or institutional investors.

As regards the fourth, fifth and sixth criteria in the Council's NPR: leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny-- as discussed above-- Money Funds are precluded from using leverage to any material degree and are instead financed by equity, and under SEC rules the portfolio of a Money Fund is limited to short-term, high quality debt instruments. This is a central part of the comprehensive program of SEC regulation of Money Funds, and a main reason that Money Funds have had (as discussed elsewhere in this letter) a far better track record in maintaining their solvency than have, for example, banks. As noted above, Money Funds do not have the kind of asset/obligation mismatch that plagues the banking industry. And as discussed at length elsewhere in this letter, Money Funds are comprehensively regulated and supervised by the SEC which is a member organization of the Council. Accordingly, the fourth, fifth and sixth criteria listed in the Council's NPR weigh strongly against designating a Money Fund under Section 113.

Similarly, certain of the ten specific factors set forth in Section 113 and in the text of the proposed Council rule implementing Section 113 weigh against designating any Money Fund for

[104] *See supra* note18.

supervision under Section 113, due to the way Money Funds are required to operate. For example, a Money Fund does not employ leverage in its operation (DFA §113(b)(2)(A) & (J), Council Proposed Rule at § 1310.10(c)(1) & (10)); is it not permitted to create off-balance sheet liabilities (DFA §113(b)(2)(B) & (J), Council Proposed Rule at § 1310.10(c)(2) & (10)); it is not a source of credit for low-income, minority, or underserved communities (DFA §113(b)(2)(E), Council Proposed Rule at § 1310.10(c)(5)). The nature of the assets of Money Funds are that they invest only in certain high-quality, short-term investments issued by the U.S. government, U.S. corporations, and state and local governments (DFA §113(b)(2)(I), Council Proposed Rule at § 1310.10(c)(9)).[105] The only activity of a Money Fund is investing in these high-quality, liquid securities, a large percentage of which must be readily converted to cash to pay redeeming shareholders, as described above. Money Funds are required to "shadow price" their portfolio investments, which requires them to monitor the market value of these assets and to make adjustments if the market value of their assets varies significantly from their amortized cost value. Money Funds are not permitted to make loans or offer mortgages. The liquid nature of Money Fund portfolios gives them the ability to meet usual and even high-level shareholder redemption requests. Money Funds are prohibited from purchasing any security on margin, except short-term credits as required for clearing transactions.

While the Money Fund industry, as a whole, supplies liquidity to the U.S. financial system (DFA §113(b)(2)(D). Proposed Rule § 1310.11(c)(4)) and to significant nonbank financial companies and significant bank holding companies (DFA §113(b)(2)(C)), it does so only through the investment activities of 652 individual Money Funds. Furthermore, the governmental units and businesses that tap Money Funds as a source of short-term financing have come out very strongly *against* imposing additional burdensome regulatory restrictions on Money Funds (such as a floating NAV) that would undermine the effectiveness and efficiency of Money Funds in supplying that financing.[106] Presumably the purpose of this factor is to evaluate whether additional regulation is appropriate to protect that source of financing, rather than to choke it off.

Moreover, because each Money Fund is "already regulated by one or more primary financial regulatory agencies" (DFA §113(b)(2)(H), Proposed Rule § 1310.11(c)(8)) – it is subject to pervasive and effective SEC regulation and oversight – the exercise of matching up a

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[105] SEC Office of Investor Education and Advocacy, Mutual Funds —*A Guide for Investors*, at 8, *available at* http://www.sec.gov/investor/pubs/sec-guide-to-mutual-funds.pdf. The description of Money Funds on the SEC's website similarly states: "[a] money market fund is a type of mutual fund that is required by law to invest in low-risk securities. These funds have relatively low risks compared to other mutual funds and pay dividends that generally reflect short-term interest rates." *See* SEC, *Money Market Funds*, *available at* http://www.sec.gov/answers/mfmmkt.htm.

[106] *See supra* note 18.

Money Fund to one or more of the above Section 113 criteria does not answer the question of whether it should, in fact, be designated for prudential regulation by the Board. The appropriate question should be whether the type of Board prudential regulation envisioned by Section 165 of DFA is necessary or appropriate, in light of the SEC's authority, regulation, and oversight of Money Funds. As discussed below, in most of the areas of prudential standards identified under Section 165 (relating to Board authority for nonbank financial institutions) and Section 115 (relating to the Council's authority in Section §115 to make recommendations to the Board regarding prudential standards), the current regulatory standards for Money Funds are far more robust than standards for other financial institutions. In a few narrow areas not currently addressed by SEC rule, the application of inappropriate prudential standards, such as bank-like capital structures, would effectively destroy a Money Fund.

Section 203 Designation Criteria

The central criteria in Section 203(a) for a recommendation by the Board and the FDIC for a designation under Title II, as well as the determinations that must be made by the Secretary of Treasury under Section 203(b), are premised on a default or potential default by a financial company on its debt obligations. The terms "default or in danger of default" are defined in Section 203(c)(4) in a way that could not reasonably be triggered in the context of a company, such as a Money Fund, that has only equity capital and no material debt, and thus has no debt or other obligations that it could default on. As defined in Section 203(c)(4), a financial company may be considered to be in default or in danger of default if:

(A) a case has been, or likely will promptly be, commenced with respect to the financial company under the Bankruptcy Code;

(B) the financial company has incurred, or is likely to incur, losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the company to avoid such depletion;

(C) the assets of the financial company are, or are likely to be, less than its obligations to creditors and others; or

(D) the financial company is, or is likely to be, unable to pay its obligations (other than those subject to a bona fide dispute) in the normal course of business.

In addition, both the recommendation by the Board and the FDIC under Section 203(a), and the determination by the Secretary of the Treasury under Section 203(b) require a consideration of whether there are other alternatives for the resolution of the situation that do not require and FDIC receivership under Title II, and the potential impact of a Title II designation on stakeholders. As discussed below, the SEC regulations governing Money Funds require them to

be essentially self-liquidating and those regulations and other federal securities laws establish a clear process for an orderly wind-down of a Money Fund, with SEC and judicial intervention if needed. This framework has proven to be quite effective in resolving and liquidating those few Money Funds that have been unable to maintain their targeted per-share value.

Due to the way in which Titles I and II are interrelated, the inappropriateness of applying Section 203 and a Title II receivership to a Money Fund demonstrates the inappropriateness, both as a matter of statutory construction and as a policy matter, of designating a Money Fund under Title I of the DFA.

The Prudential Standards Applicable to Systemically Important Nonbank Financial Companies under Title I of the DFA are Not Appropriately Applied to Money Funds

Under Section 165 of DFA, the Board must establish, on its own or pursuant to the Council's recommendations, prudential standards for nonbank financial companies that it supervises that are more stringent than otherwise applicable. Paragraph (b)(1)(A) provides that the Board shall provide certain specified prudential standards, discussed below.[107]

(i) *Risk-based capital requirements and leverage limits*. These standards must be applied unless the Board, in consultation with the Council, determines that they are not appropriate because of the activities of such company (such as investment company activities or assets under management) or structure, in which case, the Board "shall apply other standards that result in similarly stringent risk controls." While it is unclear what those other standards would be, it is clear that a requirement for risk-based capital standards for entities that currently rely entirely on equity financing is inappropriate and unnecessary. In contrast to banks, Money Funds do not accept deposits or make loans or use other forms of debt financing. The assets of Money Funds are comprised only of the investments permitted by Rule 2a-7, rather than the riskier assets held by banks. These assets are financed entirely by the equity capital of the investor/shareholders of the Money Fund.

Similarly, in contrast to banks, Money Funds do not leverage their assets, securitize them, hold assets off-balance sheet, or engage in any of the other risky activities in which banks engage. Therefore, leverage limits are similarly not appropriately applied to Money Funds. They do not use leverage at all.

[107] Pub. L. No. 111-203, § 165(b)(1)(A).

(ii) *Liquidity requirements*. As discussed above (*see* p. 23, *supra*), liquidity requirements are the core of existing Money Fund regulation, and these requirements were enhanced with the SEC's recent amendments to Rule 2a-7. By law, Money Funds can invest in only certain high-quality, short-term investments issued by the U.S. government, U.S. corporations, and state and local governments.[108] A Money Fund is required to hold securities that are sufficiently liquid to meet reasonably foreseeable shareholder redemptions in light of the fund's obligations under Section 22(e) of the Investment Company Act and any commitments the fund has made to shareholders.[109]

(iii) *Risk management requirements.* It is difficult to conceptualize what new prudential risk management requirements the Board could craft for a Money Fund, beyond those required under current law and regulation. (*See* pp. 23-29, *supra.*) Money Fund regulation manages portfolio risk by limiting holdings to the safest, most liquid and shortest-term investments in existence. Money Fund boards have rigorous, detailed, and ongoing risk management responsibilities with respect to pricing, review of credit risks, and other aspects of Money Fund operations. Designation of an entity as systemically significant would not be appropriate where the risk management requirements that might be imposed would not materially enhance those already in place.

(iv) *Resolution plan and credit exposure report.* Rule 2a-7 includes a regulatory scheme that effectively makes them self-liquidating, and mandates a resolution plan and liquidation procedure for Money Funds, including reporting to the SEC under certain circumstances. Rule 2a-7 requires Money Funds to invest predominantly in securities that can be sold at book value in short order and have a weighted average maturity of 60 days or less. All taxable Money Funds must hold at least 10 percent of their assets in cash, U.S. Treasury securities, or securities that convert into cash within one business day. All Money Funds must hold at least 30 percent of assets in cash, U.S. Treasury securities, certain other government securities with remaining maturities of 60 days or less, or securities that convert into cash within five business days. No more than 5 percent of a fund's portfolio may be "illiquid" (i.e., cannot be sold or disposed of within seven days at carrying value). In addition, a Money Fund generally may not acquire any securities with a remaining maturity greater than 397 days.[110] Because Money Funds invest only in short-term, high-quality securities in accordance with the requirements of Rule 2a-7, a Money Fund can

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[108] SEC Office of Investor Education and Advocacy, Mutual Funds —*A Guide for Investors,* at 8, *available at* http://www.sec.gov/investor/pubs/sec-guide-to-mutual-funds.pdf.

[109] *See* 17 C.F.R. § 270.2a-7(c)(5).

[110] *See* 17 C.F.R. § 270.2a-7(c)(2). The SEC used its existing powers under the federal securities laws to oversee the liquidation of the Reserve Primary Fund in a judicial proceeding brought for that purpose.

self-liquidate in a short period of time as long as it stops reinvesting the proceeds of such securities as they come due. Money Funds are also permitted to defer redemption requests for seven days (like a bank is permitted to defer withdrawals from a money market deposit account, savings account or NOW account) to address liquidity needs. In addition, as discussed above, SEC Rule 22e-3 permits a Money Fund's board of directors to suspend redemptions and postpone payment of redemption proceeds if the fund is about to break the buck and the board decides to liquidate the fund. This facilitates an orderly liquidation of fund assets in the event of a threatened run on the fund by ensuring that no one is advantaged by redeeming early. Although Money Funds extend credit via their purchases of commercial paper and by engaging in repurchase agreements, Rule 2a-7 contains several conditions (which the SEC refers to as "risk-limiting conditions") that "limit the funds exposure to certain risks, such as credit, currency, and interest rate risks."[111] For example, a Money Fund must limit its portfolio investments to securities that meet certain credit quality requirements under Rule 2a-7. Each Fund reports its portfolio securities to the SEC on a monthly basis, including the market-based values of each security and the Fund's shadow NAV. Nothing would be accomplished by also requiring, under Section 165(d) of the DFA, a Money Fund to submit its resolution plan to the Board and FDIC, or by submitting a "credit exposure" plan to the Board and FDIC.[112]

(v) *Concentration limits.* As of February 2011 there were approximately 652 Money Funds. Total estimated assets under management are approximately $2.7 trillion. The Money Fund industry is highly competitive. The size and the depth of the industry poses little risk of concentration that could potentially harm issuers of commercial paper or other users. Moreover, because of the nature of money funds, investors can easily and quickly redeem shares of one fund and reinvest in another.

In addition, under paragraph (b)(1)(B) of Section 165 of the DFA,[113] the Board <u>may</u> establish additional prudential standards for nonbank financial companies supervised by the Board, including the following. These, too, are inappropriate as applied to a Money Fund.

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[111] *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10061 (Mar. 4, 2010).

[112] These features of Money Funds similarly address the need for resolution authority that underlies Title II of the DFA. Title II provides for orderly liquidation of large interconnected nonbank financial companies where there may be no other practical means for the government to wind them down in an orderly manner. The procedures already in place for the liquidation of a Money Fund are highly effective. Therefore, it is unnecessary for a Money Fund to be designated under Section 113 in order to give the FDIC authority to provide for an orderly resolution of the entity under Title II.

[113] Pub. L. No. 111-203, § 165(b)(1)(B).

(i) *Contingent capital requirement*. As noted above, Money Funds are capitalized solely with equity. They do not use leverage.

(ii) *Enhanced public disclosures.* Money Funds are transparent. Their portfolio holdings must be posted to their websites on a monthly basis. Their activities are limited to investment activities, and the range of their investments is limited. They are easy to understand. Money Funds register with the SEC and provide a fund prospectus to investors, which is updated on a continual basis. The fund must keep its prospectus "current" by periodically filing post-effective amendments to its Securities Act registration statement. A fund prospectus for a mutual fund includes important information for investors, such as investment objectives and strategies, risks, performance pricing, and fees and expenses. Some funds provide a summary prospectus containing key information about the fund, in which case the long-form prospectus is available on an internet website and a paper copy may be obtained by shareholders free of charge upon request. The registration statement for a mutual fund also includes a statement of additional information, which must be furnished upon request to fund shareholders. Money Funds are subject to stringent regulatory, disclosure, and reporting provisions. Registered investment companies are required to file periodic reports with the SEC and must provide shareholders with annual and semi-annual reports, including updated financial information, a list of the fund's portfolio securities, and other information.

(iii) *Short-term debt limits*. Money Funds are not operating companies. Their only activity is investing in certain high-quality, short-term investments issued by the U.S. government, U.S. corporations, and state and local governments. Money Funds do not leverage their assets and do not have debt. Since they have no debt, there is no need to subject such funds to short-term debt limits.

A number of other provisions of the DFA require the Board to impose additional prudential standards on nonbank financial companies supervised by the Board, including:

(i) *Stress Tests.* Section 165 requires the Board to impose stress tests on nonbank financial companies subject to its supervision.[114] As noted above, under Rule 2a-7, the board of directors of each Money Fund must adopt procedures providing for periodic stress testing of the fund's portfolio. Fund managers are required to examine the fund's ability to maintain a stable NAV per share based upon certain hypothetical events. These include an increase in short-term interest rates, higher shareholder redemptions, a downgrade of

[114] *See* Pub. L. No. 111-203, § 165(i).

or default on portfolio securities, and widening or narrowing of spreads between yields on an appropriate benchmark selected by the fund for overnight interest rates and commercial paper and other types of securities held by the fund.

(ii) *Acquisition Limits.* Section 163 requires the Board to impose restrictions on nonbank financial companies subject to its supervision that acquire companies engaged in financial activities.[115] Such a limitation would be irrelevant to Money Funds, which are owned by their shareholders.

(iii) *Early Remediation*. Section 166 requires the Board to impose early remediation requirements on nonbank financial companies subject to its supervision.[116] Current regulation of Money Funds includes significant requirements that are remedial in nature. For example, Rule 2a-7(c)(8) of the Investment Company Act requires Money Funds using the amortized cost method to "shadow price" their portfolio investments. The board must establish written procedures that require periodic calculations of the deviation between the current net asset value using available market quotations (or substitutions) and the fund's amortized cost price per share. The board must promptly consider whether any action should be taken if the fund's amortized cost price per share exceeds 1/2 of 1 percent, and must take prompt action if any deviation may result in material dilution or unfair results to investors or shareholders. Because of these requirements, additional early remediation requirements should not be necessary.

While many of the above requirements may be appropriate for large, interconnected nonbank financial institutions, many are either not appropriately applied to Money Funds, or if applicable, are addressed under the Investment Company Act and SEC rules in ways that are more stringent than bank-type prudential regulation.

Because the Money Fund industry operates on narrow margins, designating one or perhaps a handful of large Money Funds under Section 113 and subjecting them to additional prudential regulation under Section 165 would inevitably raise their costs, lower the rates they could pay to their customers, and result in a flight of investors from these funds to others that are not subject to these additional requirements.[117] Indeed, the President's Working Group recognized this inevitable consequence of uneven regulation in its discussion of possible new

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[115] *See* Pub. L. No. 111-203, § 163.

[116] *See* Pub. L. No. 111-203, § 166.

[117] Of course, it is possible that such designation would have the reverse effect by creating the perception that such an institution were "too big to fail."

regulations for registered Money Funds, which could drive investors to other unregistered substitutes.[118]

The SEC has Ample Authority to Enforce Regulatory Requirements and Take Comprehensive Emergency Actions Involving Money Funds.

In addition to its comprehensive program of regulation and supervision of Money Funds, the SEC has broad powers to take prompt action to address emergency situations at a Money Fund and promptly resolve the problem. In the Reserve Primary Fund situation, the SEC successfully invoked certain of these powers. Should such a situation arise again in the future, the SEC is able to draw upon the experience it gained in the Fall of 2008, and promptly intervene to oversee an orderly and prompt wind-down of the Money Fund. An FDIC receivership is not necessary to accomplish a wind-down of a Money Fund. The SEC powers to address emergency situations at a Money Fund (some of which must by rule occur automatically without action by the SEC) include:

- SEC rules impose a requirement that the Money Fund make an immediate shift to floating NAV if it departs from the stable NAV;
- Money Fund trustees' are authorized to defer share redemptions, and liquidate the Money Fund, thus treating all investors the same;
- The SEC has the ability to immediately intervene and force a court-supervised liquidation of a troubled Money Fund where the trustees are unwilling or unable to take the above steps;
- The SEC has emergency power under Section 12(k) of the 1934 Act to act by order in an emergency with respect to any matter subject to its regulation, including investment companies;
- The SEC is authorized under Section 25 of the Investment Company Act to intervene in respect of reorganizations and liquidations of investment companies;
- The SEC has cease-and-desist powers under Section 9(f) of the Investment Company Act;

[118] *See* REPORT OF THE PRESIDENT'S WORKING GROUP ON FINANCIAL MARKETS, MONEY MARKET FUND REFORM OPTIONS 21, 35, *available at* http://treas.gov/press/releases/docs/10.21%20PWG%20Report%20Final.pdf ("Reforms that reduce the appeal of MMFs may motivate some institutional investors to move assets to alternative cash management vehicles with stable NAVs, such as offshore MMFs, enhanced cash funds, and other stable value vehicles. These vehicles typically invest in the same types of short-term instruments that MMFs hold and share many of the features that make MMFs vulnerable to runs, so growth of unregulated MMF substitutes would likely increase systemic risks. However, such funds need not comply with rule 2a-7 or other ICA protections and in general are subject to little or no regulatory oversight. In addition, the risks posed by MMF substitutes are difficult to monitor, since they provide far less market transparency than MMFs.")

- The SEC has power to obtain injunctive relief under Sections 36 and 40(d) of the Investment Company Act;
- The SEC has power to impose civil money penalties on Money Funds and their related persons under Sections 9(d) and 40(e) of the Investment Company Act;
- The SEC can bring a judicial action and invoke the Federal courts' 1934 Act § 21(d)(5) equitable remedies powers; and
- The SEC can bring a judicial action and petition the Federal court to invoke the All Writs Act[119] powers to enjoin other proceedings that interfere with the court's jurisdiction over the matter.

Other than a federal guarantee of investors, an injection of liquidity into a Money Fund, or a bail-out of Money Fund shareholders (the "too big to fail" federal safety net that Title I of the Dodd Frank Act was designed to limit, Title II prohibits, and which public opinion strongly opposes) there are no additional steps involving Money Funds that the Board could take under Title I of the Dodd-Frank Act or the FDIC could take under Title II of the DFA that have not already been addressed by the SEC or for which the SEC does not have ample statutory authority to address going forward.

C. Regulators Should Proceed with Caution in Altering Current Regulation and Oversight of Money Funds, and Should Not Subject Money Funds to Title II

As discussed above, the current comprehensive regulatory system governing Money Funds has been very successful in maintaining the solvency of Money Funds and for resolving those few Money Funds that "break a buck." Significant enhancements were put in place by the SEC in 2010, building upon the lessons of the financial crisis, which further enhanced the program of regulation applicable to Money Funds and further reduced the risks associated with them. As the Council considers the instant proposal, it must bear in mind the President's recent Executive Order, which emphasizes that agencies must "seek to find the least burdensome tools for achieving regulatory ends," and notes that "[s]ome sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. … In developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote … coordination, simplification, and harmonization."[120] In keeping with the Executive Order, care should be taken in any change to these rules not to undermine the strength and simplicity of the current system of regulation in a way that would

[119] 28 U.S.C. § 1651.

[120] *Improving Regulation and Regulatory Review*, Executive Order No. 13563 (Jan. 18, 2011).

increase risks or impair the ability of Money Funds to continue to provide a high quality product for consumers and businesses.

In this regard, we note that it was the bankruptcy of Lehman Brothers that triggered the problem at the Reserve Primary Fund in 2008, not the other way around. As discussed above, Section 113 and Section 203 designations, together with the regulatory and receivership tools that flow from such designations are designed and necessary to address the risk posed by large, interconnected nonbank financial institutions like Lehman – the company whose financial stress and ultimate failure actually did destabilize the financial markets. Lehman was already overly leveraged in 2008. In 2004, as part of its Consolidated Supervised Entities program for the supervision of investment banks, the SEC permitted the firm to calculate capital requirements by alternative methods based on Basel II standards, and which relied on Lehman's internal risk models.[121] The result was that Lehman and other investment banks more than doubled their leverage ratios – for Lehman, this meant a gross leverage ratio of average assets to net capital of almost 32 to 1.[122] In fact, Lehman's situation was even more precarious according to the Bankruptcy Examiner, as it projected the appearance of financial health by using accounting methods that disguised repurchase agreements as outright sales.[123] Yet, notwithstanding its status as an SEC-supervised firm and a primary dealer subject to applicable capital and related standards of the Board,[124] Lehman's regulators either did not have or did not use authority to limit its activities or institute prudential measures to reduce the systemic risk posed by its operations and potential failure.

Lehman was also heavily reliant upon short-term funding, and its paper was held by many companies. The Reserve Primary Fund's loss on Lehman commercial paper that led to its share repricing was a symptom, but not a cause, of the systemic risk posed by Lehman's failure, although mismanagement at Reserve undoubtedly compounded its problems, and, ultimately,

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[121] SEC Rel. No. 34-49830, *Alternative Net Capital Requirements for Broker-Dealers That Are Part of Consolidated Supervised Entities; Supervised Investment Bank Holding Companies; Final Rules,* (Jun. 8, 2004) 69 FR 34428 (Jun. 24, 2004).

[122] SEC Office of the Inspector General Report: *SEC's Oversight of Bear Stearns and Related Entities: The Consolidated Supervised Entity Program,* at 120 (Sept. 25, 2008), *available at* http://www.sec-oig.gov/Reports/AuditsInspections/2008/446-a.pdf.

[123] *Report of Anton R. Valukas, Examiner,* In re Lehman Brothers Holdings, Inc., Chapter 11 Case No. 08-13555 (JMP) (Bankr. S.D.N.Y., Mar. 11, 2010).

[124] *See* Federal Reserve Bank of New York, Operating Policy: *Administration of Relationships with Primary Dealers* (Jan. 22, 1992), *available at* http://www.ny.frb.org/markets/pridealers_policies_920122.html.

compounded the uncertainty among Money Fund investors in September 2008 that led to the broader run on Money Funds.[125]

Investment risks in the portfolios of Money Funds have historically been the result of problems at issuers of commercial paper, particularly at financial services firms. In addition to the solvency of the issuers of commercial paper, the solvency of banks that issue letters of credit that backstop commercial paper is also significant to the strength of the investment portfolios of Money Funds.

Titles I and II and other provisions of the DFA are intended to address and control the risk at financial services firms – particularly those entities which are so interconnected that they present "systemic risk" – and thus controls risk in the financial services industry as a whole. If implemented effectively by regulators, this will have the effect of significantly reducing the risks in the portfolios of Money Funds as investors in commercial paper issued by those companies. These changes at financial services firms include increased oversight of the holding companies of nonbank financial services firms, increased capital requirements, reduction in counterparty exposure, and significantly, measures to reduce liquidity risk and over-reliance on short term funding of financial services firms. Particularly as regards the larger and systemically significant companies that have been major issuers of commercial paper, the changes being put in place under the DFA in the regulation of the financial services firms as issuers or guarantors of commercial paper will have the added benefit of further reducing portfolio risks at Money Funds. Had the DFA been in place prior to 2008, Lehman may not have failed and, thus, the Reserve Primary Fund might not have broken a buck and consequently suffered a run and been forced to liquidate.

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[125] The Reserve Primary Fund was a large fund that held debt owed by many issuers and that had many investors. Yet, as the stability of other money funds in 2008 shows, being large or having many relationships did not increase its chances of failure. The Reserve Primary Fund broke the buck because management unduly concentrated assets in Lehman debt, notwithstanding numerous warning signs as to Lehman's weakness. Moreover, management fraudulently "significantly understated the volume of redemption requests received … and failed to provide [the fund's] trustees with accurate information concerning the value of Lehman securities." SEC Litigation Release No. 21025, *SEC v. Reserve Management Company, Inc., Reserve Partners, Inc., Bruce Bent Sr. and Bruce Bent II* (May 5, 2009). Indeed, the fund's management assured shareholders, ratings agencies and the fund's trustees that the fund's adviser had agreed to provide capital to the fund, even though this was not true. *See* Complaint of the SEC, *SEC v. Reserve Management Company, Inc., Reserve Partners, Inc., Bruce Bent Sr. and Bruce Bent II*, Civ. No. 09 CV 4346 (May 5, 2009), *available at* http://www.sec.gov/litigation/complaints/2009/comp21025.pdf. If management had not made such false statements, but had priced holdings as required by law or had supplied the price support that they had stated they would, the resulting run on the fund might have been significantly reduced or even averted.

Similarly, the DFA's new requirements for regulation and SEC oversight of credit rating agencies and the movement away from excessive reliance on their ratings, is a systemic change that will have the effect of further reducing risk in Money Fund portfolios.

Care should be taken not to impose excessive regulatory burdens on Money Funds that would effectively force them out of business. Several sponsors of Treasury-only funds have had to close their funds, or limit new investments to existing investors.[126] Recently, the seven-day average yields on taxable Money Funds fell to a record low, according to data published by iMoneyNet. Narrow margins are leading to a shake-out in the industry. Despite these enormous pressures on Money Funds, they remain popular due in large part to their stable NAV.[127] Major regulatory change, such as forcing these funds to adopt a floating NAV, is likely to lead to few funds surviving.[128]

The consequences of doing away with Money Funds would have far-reaching implications. For example, if Money Funds were to be regulated out of existence, the balances would need to go somewhere. The most likely destination for a large portion would be into money market deposit accounts at banks. But the addition to bank balance sheets of a large portion of the $2.7 trillion currently invested in Money Funds would require a significant amount of new equity capital in banks to offset the added leverage of the new deposits, just as banks are scrambling to increase capital for the balance sheet sizes they currently carry. Moreover, the net

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[126] *See* Andrew J. Donohue, Director, SEC Division of Investment Management, *Keynote Address at the Practising Law Institute's Investment Management Institute*, April 2, 2009, *available at* http://www.sec.gov/news/speech/2009/spch040209ajd.htm. Mr. Donohue points out that "money market funds have also had to address the challenges posed by low or non-existent yields in treasury securities — in fact, we have been seeing the lowest yields on Treasuries in 50 years. These low yields are driven by the flight to quality as institutions increasingly move into U.S. government money market funds. As some portfolio securities mature and these funds purchase new treasuries with new money the yield is diluted even further. As a result we have seen a number of treasury money market funds close to new investors and we understand funds have waived fees and expenses in order to avoid negative yields."

[127] *See* Steve Watkins, *Money Market Industry Opposes Mandate for Floating Share Value*—Some managers fear change could kill the industry, Aug. 2010, *available at* http://www.heartland.org/full/28211/Money_Market_Industry_Opposes_Mandate_for_Floating_Share_Value.html (noting that according to Brian Reid, the ICI's chief economist, demand for Money Funds has held up even with interest rates so low that funds averaged a 0.11 percent yield in early August 2010, based on data from Crane Data, which tracks Money Funds. Mr. Reid "fears the industry would be severely damaged if funds are forced to switch to a floating NAV. Institutions would likely form their own investment pools, and individuals would likely turn to banks. You would very likely see significant outflows.")

[128] *See id.* (noting that Brian Kalish, director of the finance practice at the Bethesda, Maryland-based Association for Financial Professionals, believes that requiring a floating NAV "will pretty much kill the money market product…The reason investors buy money markets is for the stable NAV.")

result would be to greatly increase the size of the federal safety net, to cover these new FDIC-insured deposits. One of the fundamental purposes of the DFA was to scale back the size of the federal safety net and the amount that taxpayers are on the hook for in the future. Forcing investors out of Money Funds and into bank deposits will have the perverse effect of increasing the size of the federal safety net.

Some balances from Money Funds might be invested in floating NAV funds. But those funds, in the form of ultra short bond funds, have been around for many years and have never been particularly popular with either retail or institutional investors.

Some balances from Money Funds might be invested directly in money market instruments. For retail investors and smaller businesses and institutions that do not have a large, sophisticated treasury desk, this is not a realistic alternative. For larger corporations and institutional investors with a large treasury function, this may simply transform the risk of institutional runs on Money Funds to a risk of runs by investors on particular issuers of commercial paper. This would not protect the commercial paper market and the financing needs of issuers; instead, it might amplify the problem and trigger more insolvencies of issuers of commercial paper by removing Money Funds as a buffer against the nervous impulses of institutional investors that are loaded up on paper from underlying issuers.

Money Funds provide essential short-term funding for corporations and municipalities. They account for almost 40% of outstanding commercial paper, approximately two-thirds of short-term state and local government debt, and a substantial amount of outstanding short-term Treasury and federal agency securities.[129] Banks are not equipped to provide short-term funding through the purchase of commercial paper and other short-term debt instruments.[130] Banks are unable to pass through tax-exempt income to depositors and therefore cannot replace tax-exempt Money Funds, which would deprive state and local governments of an important source of financing.[131] Moreover, if funds withdrawn from Money Funds were reinvested with banks, this would result in tighter short-term credit for U.S. companies unless banks raised significant amounts of capital to support their expanded balance sheets.

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[129] *See* REPORT OF THE PRESIDENT'S WORKING GROUP ON FINANCIAL MARKETS, MONEY MARKET FUND REFORM OPTIONS 7, *available at* http://treas.gov/press/releases/docs/10.21%20PWG%20Report%20Final.pdf.

[130] *See* BlackRock, Inc., *Viewpoint: Money Market Mutual Funds*, July 13, 2010 (stating BlackRock's belief that "banks are not equipped to provide short-term funding to the economy in the way that money market funds are through the purchase of commercial paper and other short-term debt instruments. This could result in a meaningful disruption to corporations, municipalities, our entire financial system and our economy.") *Available at* https://www2.blackrock.com/webcore/litService/search/getDocument.seam?venue=PUB_INS&source=CONTENT&ServiceName=PublicServiceView&ContentID=1111117211.

[131] *See* ICI Money Market Working Group Report, at 111, *available at* http://www.ici.org/pdf/ppr_09_mmwg.pdf.

Even then, the cost of short-term credit is likely to rise and would be less efficient.[132] As letters submitted to the SEC in response to the PWG Report make clear, Money Funds are a significant source of short-term financing of state and local governments, purchasing about 65% of all short-term public debt.[133] Commenters on the Report, such as the National League of Cities, noted that regulations that inhibit investment in money funds "would dampen investor demand for the securities we offer and deprive state and local governments of much-needed capital."[134] Letters from business associations describe how important Money Funds are as a source of short-term financing to small and large businesses for such things as inventory, receivables, and payroll. These letters also express similar concerns on restrictions that may result in investor money flowing out of money funds.[135] For example, the New Jersey Chamber of Commerce has noted that "[r]egulations that shrink the pool of money market mutual fund capital available to businesses will negatively impact their ability to meet their cash requirements, causing large disruptions in the nation's economy."[136]

Another potential downside to designation of a company as systemically significant under Title I is the increased public perception that it is "too big to fail" and will ultimately be bailed out by the government if things go wrong, as was the case in investor expectations with respect to the commercial paper of Lehman. Money Fund investors are advised in no uncertain terms in the prospectus and sales materials that the funds are not insured and may lose value. But a designation of a Money Fund for regulation like a bank may tend to confuse that message in the public's mind.

Designation of one or more Money Funds as systemically significant could be disruptive. As discussed above, Sections 113 and 203 do not contemplate designation of an entire industry

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[132] *Id.*

[133] *See* Letters from state and local government entities listed in footnote 9 supra; Letter from the Treasurer of the State of New Hampshire.

[134] Letters from state and local government entities listed in footnote 9 supra. *See also* letters from the Port of Houston Authority; Cincinnati/Northern Kentucky International Airport; Treasurer of the State of New Hampshire.

[135] Letters from the Financial Services Roundtable; Business Council of New York State; Dallas Regional Chamber; Associated Industries of Florida; New Jersey Chamber of Commerce. *See also* letter from the following businesses and associations: Agilent Technologies, Inc.; Air Products & Chemicals, Inc.; Association for Financial Professionals; The Boeing Company; Cadence Design Systems; CVS Caremark Corporation; Devon Energy; Dominion Resources, Inc.; Eastman Chemical Company; Eli Lilly & Company; Financial Executives International's Committee on Corporate Treasury; FMC Corporation; Institutional Cash Distributors; Kentucky Chamber of Commerce; Kraft Foods Global, Inc.; National Association of Corporate Treasurers; New Hampshire Business and Industry Association; Nissan North America; Pacific Gas and Electric Company; Safeway Inc.; Weatherford International; U.S. Chamber of Commerce.

[136] Letter from the New Jersey Chamber of Commerce.

as significant; rather, it contemplates company-by-company designations. But designation of a few of the larger Money Funds under Section 113 would place those designated Money Funds at a competitive disadvantage (or possibly advantage) to the rest of the 652 Money Funds with which they compete. Designation of a Money Fund under Title II would adversely affect the industry and investors in Money Funds, and create uncertainties as to the status and liquidation process applicable to Money Funds generally, and the involvement of the FDIC with the receivership of one Money Fund could increase the risk that investors might become confused and expect an FDIC bail-out of Money Funds in a future crisis. Continued regulation by the SEC of Money Funds, including involvement in the liquidation process when needed allows the crafting of rules and processes that apply equally to all Money Funds – something that cannot be accomplished under Title II or Title I of the DFA.

Rather than imposing dramatic and potentially dislocative changes on the regulation of Money Funds through Title I of the DFA, we believe it would be more prudent to continue the careful fine-tuning of the SEC's highly successful regulatory program. The SEC has acted wisely in adopting new rules to substantially enhance the liquidity of Money Funds and further enhance their ability to withstand a potential run. Moreover, the SEC currently is evaluating the public comments submitted in response to its request for comments on the PWG Report on the results of its 18-month study of Money Funds. The PWG Report acknowledges the importance of the SEC's actions in making Money Funds more resilient. The PWG Report also presents eight separate options for additional reform, including a requirement to require floating net asset values for Money Funds generally, providing for differential requirements for different types of funds, providing various backstops (a private liquidity facility; Government insurance) and regulating stable NAV Money Funds as special purpose banks. A number of the options could be accomplished by SEC rule or, in the case of a private liquidity facility, by the private sector. Several options would require action by Congress. However, none of the options discussed in the PWC Report involve designation under Sections 113 or 203 of the DFA and prudential regulation by the Board or receivership by the FDIC as a necessary or viable reform measure.

III. Other Flaws In the Proposed Rule

The Limitations on Judicial Review in the DFA Conflict With the Judicial Powers In Article III of the Constitution and Could Result In a Taking Without Due Process

The interrelated provisions of Titles I and II relating to the designation of nonbank financial companies contain significant Constitutional defects that have not been addressed, or even mentioned, in the NPR or in the related rulemakings of the FDIC and the Council implementing Title I and Title II. The curtailment of the role and authority of Article III federal courts in the process of reviewing agency action associated with the designation of nonbank

financial companies under Titles I and II of DFA, and in adjudicating private rights, violates the Constitution.[137]

Although the property interests and contractual rights of investors, counterparties and other private parties will be profoundly affected by a receivership under Title II, and the decisions and determinations of the receiver, the stated purposes of Title II do not include protecting those private parties' interests and rights, as against one another, as against the failed institution or its management, as against the government, or as against the general good of the public. Instead, the prime directive in designating and liquidating companies under Title II is protecting the financial stability of the United States, and the priority of payments places the claims of the United States ahead of everyone (other than the administrative expenses of the receiver).[138]

Unlike banks, which choose to subject themselves to potential FDIC receivership when they apply for FDIC insurance, nonbank financial firms that are designated under Title I and potentially subject to Title II FDIC receivership do not elect that treatment. Becoming subject to Title II is not a voluntary, consensual step undertaken by the subject company. It is instead thrust upon a nonbank financial company (and thus upon the company's creditors, counterparties, shareholders and employees and others whose private property and rights would be affected by a receivership) by virtue of engaging in any of a broad and ill-defined swath of activities deemed to be financial in nature. Banks voluntarily apply for and obtain FDIC insurance and thus opt in to the federal receivership provisions that come along with FDIC insurance and have direct access to Federal Reserve Bank lending on a regular basis, enjoy a federal government-granted monopoly to subsidized deposit-taking as a means to finance their operations, and in the case of national banks and federal savings associations, are organized and exist under Federal law, and thus are both willing participants in, and direct beneficiaries of, a federal safety net that effectively subsidizes their costs of doing business. In contrast, nonbank financial entities are not voluntary participants in the Title I and Title II designation process and receivership provisions, nor are they participants in the federal safety net on a regular and continuous basis. Whatever may or may not be the Constitutionality of limited judicial involvement in and oversight of the designation and receivership powers as applied to banks that

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[137] *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); Gray & Shu, *The Dodd-Frank Wall Street Reform & Consumer Protection Act of 2010: Is It Constitutional?* (*available at* www.fed-soc.org); Federalist Society Panel Discussion on the Constitutionality of the Dodd-Frank Financial Services Reform Act (Nov. 19, 2010), webcast *available at* www.youtube.com/watch?v=qX2iDe1eox0; Cato Institute Policy Forum, *Is Dodd Frank Constitutional?* (Feb. 15, 2011), webcast available at http://www.cato.org/event.php?eventid=7732.

[138] DFA § 210(b).

voluntarily elect into a federal receivership system outside of the normal bankruptcy process, the analysis is very different in the case of nonbank financial services firms.

As part of the statutory program, judicial review of placement of a nonbank financial firm into receivership is extraordinarily limited by Section 202 to a period of 24 hours, on an arbitrary and capricious standard, with no stay. Other provisions of Title II, including Section 205(c), 208, 210(a)(4), 210(a)(8), 210(e), and 210(h)(6), further limit judicial participation in the process. Individual claims brought against the receivership, after initial determination by the FDIC as receiver, are subject to determination in the district court on a *de novo* standard, but the resolution or plan for resolution of the estate, payment of those claims, and the ultimate disposition of the assets of the estate, are determined by the FDIC as receiver subject only to very limited judicial review.[139]

Due to the extraordinary limitation on judicial review of the designation and actions taken under Title II, the determination and resolution of the property rights and interests of private parties under Title II and the NIFR as currently structured would violate due process requirements under the Fifth Amendment to the Constitution, and would otherwise conflict with the due process rights of private parties under the Constitution. Designation under Title I places a nonbank financial company by definition and through the interrelated provisions of Title I and Title II at risk of a Title II receivership and thus shares the inherent Constitutional flaw that exists in Title II.

As part of the process to taking agency action implementing these titles, the Board, the FDIC, and the Council are required to consider the Constitutional issues associated with these provisions.[140] The Board must withdraw the NPR and consider the Constitutional issues associated with Titles I and II before re-proposing the rule for an additional comment period. If the Constitutional flaws in the statute can be fixed as part of the rulemaking, they must be fixed. If they are not fixable, then the rule cannot be validly adopted and must be withdrawn.

The Delegation of Authority to the Board, Council, Treasury and FDIC and In Titles I and II of the DFA Conflict with Non-Delegation Principles

A second Constitutional flaw in Titles I and II of the DFA (and thus in the Board rules implementing Title I) involves an inappropriate delegation of overly broad legislative power by Congress to the Board, the Council, Secretary of the Treasury and the FDIC to determine criteria

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[139] DFA §§ 210(a)(2)-(4), (e)(4).

[140] *See Whitney Nat'l Bank v. Bank of New Orleans*, 379 U.S. 411, 418-425 (1965); *Iowa Indep. Bankers Ass'n v. Bd. of Governors*, 511 F.2d 1288, 1293 n. 4 (D.C. Cir. 1975).

and designate nonbank financial firms for receivership under Title II.[141] Article I of the Constitution vests legislative authority exclusively in the Congress. An excessively broad grant of authority to an administrative agency (or in this case several administrative agencies) conflicts with basic separation of powers principles, particularly where there is potential for a broad economic impact, and uncertainty as to what or who might be covered by the authority and what steps might be taken by the administrative agency to those who become subject to the legislative rulemaking powers.

The normal cure for an overly broad delegation is a narrow reading by the courts of the grant of authority in order to avoid the Constitutional issue.[142] Where, as here, there is not an effective means of judicial review of those designations, and the agencies have not through their rulemaking actions narrowed the impermissible delegation, it is appropriate for the courts to review and narrow the authority of the agency. In this context, courts do not accord *Chevron* deference to administrative actions and determinations, but instead engage in a more stringent review of the agency's decision.[143]

Administrative Law Shortcomings in the NPR

The NPR contains a number of other flaws that are serious enough that the proposed rule should be withdrawn and re-proposed in a substantially modified form in order to address those flaws. To begin, as noted, the NPR fails to describe with specificity the quantitative or qualitative considerations used in making assessments under any of the criteria listed in the proposed rule or the statute. More specificity is needed as part of the rulemaking process both in order for members of the public to have a reasonable opportunity to comment on the rule, and for companies potentially subject to designation to have a meaningful opportunity to contest designation. The lack of detail in the rules is not consistent with the requirements of the Administrative Procedures Act. A rulemaking must be based on reasonable decision-making and show the agency's views in a concrete and focused form. The vagueness of the NPR and in the interrelated rulemakings of the Council and FDIC do not meet this requirement.

There has been some suggestion in recent testimony to Congress that the agencies have agreed among themselves, without the benefit of a public notice-and-comment rulemaking under

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[141] *Cf., City of New York v. Clinton*, 985 F. Supp. 168 (D.D.C. 1998), *aff'd on other grounds, Clinton v. City of New York*, 534 U.S. 417 (1998), *Whitman v. Am. Trucking Co.*, 531 U.S. 457, 487 (2001) (concurring opinion of Justice Thomas).

[142] *See e.g., Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998); *Whitman*, 531 U.S. at 476 (concurring opinion of Justices Stevens and Souter).

[143] *See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Institute*, 448 U.S. 607 (1980).

the Administrative Procedure Act, to certain specific criteria or principles and protocols to use in designating companies under Titles I and II of the DFA.[144] If that is accurate, those key criteria, principles and protocols must be proposed formally for public comment as part of the formal rulemaking process.[145]

In addition, Section 170 of the DFA dictates that in connection with Council rules implementing Title I, the Board "***shall*** promulgate regulations in consultation with and on behalf of the Council setting forth the criteria for exempting certain types or classes of U.S. nonbank financial companies… from supervision by the" Board, taking into account the ten criteria listed in Section 113(a)(2) that are discussed above. Section 170 is not merely a grant of authority, it is a specific rulemaking requirement that the exemptive rules ***shall*** be promulgated. The rules required by Sections 113, 170 and Title II are inextricably intertwined, both operationally and textually, beginning with the process of Council designation of certain nonbank financial companies for Board supervision under Title I of the DFA continuing with the preparation, review and approval of "living wills" or prepackaged resolution plans required of companies designated under Title I and the FDIC's back-up examination authority over companies designated under Title I,[146] through a receivership conducted under Title II and cannot operate independently. For example, a financial company designated under Section 113 is automatically within the financial companies covered under Title II. The resolution plan required for companies designated under Title I is intended in part as a road map for the FDIC's use in a receivership conducted on that company under Title II.[147] The Board, working with the Council, has not yet promulgated rules implementing Section 170. Without the completion of the required Section 170 exemptive rulemaking, the rulemakings conducted under other provisions of Titles I and II are themselves incomplete and should be stayed or withdrawn until the Section 170 exemptive rule is promulgated by the Board in consultation with and on behalf of the Council.

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[144] *See Oversight of Dodd Frank Implementation*, Hearings Before Senate Banking Committee (Feb. 17, 2011) (*available at* http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=c43953db-0fd7-43c3-b6b8-97e2d0da3ef7).

[145] *Motor Vehicle Mfgs Ass'n, Inc. v. State Farm Mutual Auto. Ins. Co*., 463 U.S. 29 (1983); *MCI Telecom. Corp. v. FCC*, 57 F.3d 1136 (D.C. Cir. 1995); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506 (D.C. Cir. 1983); *Conn. Light & Power v. N.R.C.*, 673 F.2d 525 (D.C. Cir. 1982); *Home Box Office v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977); *United Church Bd. for World Change v. SEC*, 617 F. Supp. 837 (D.D.C. 1985).

[146] DFA §§ 165(d), 172; FDIC Press Release, *FDIC Board Approved Joint Proposed Rule on Resolution Plans and Credit Exposure Reports for Covered Systemic Organizations* (Mar. 29, 2011) (attaching text of proposed joint FDIC and Board rule on required resolution plans).

[147] FDIC NIFR, 76 Fed. Reg. at 4210.

The NPR states that the proposed rule will have no direct impact on small businesses on the theory that small businesses, apparently themselves would not be directly designated. However, the imposition of Title I and II requirements on Money Funds would have an indirect, yet substantial, impact on small business enterprises if applied to Money Funds, as reflected in the comments submitted in the SEC docket on the PWG Report discussed above. Among other effects, the private rights of small businesses as investors in Money Funds, and the access by small businesses to funding available through Money Funds, would be substantially affected by a designation of a Money Fund under Title I or II. As a result, an assessment of the regulatory impact on small businesses is required in connection with consideration of the proposed rule.

The Board's NPR estimates, for Paperwork Reduction Act ("PRA") purposes, that the reporting obligations under its Title I rules will be applicable to only three respondents and will take four hours per respondent, for an aggregate total paperwork obligation of 12 hours for the industry as a whole. The FDIC estimates that there will be no paperwork -- zero-- generated by its rulemaking. For its part, the Council's NPR estimates that the total reporting burden on the financial service industry under its proposed rules will be 500 hours. In other words, the Council estimates that one individual, working ten hour days, could complete all of the paperwork and reporting required for the entire industry, working from Monday through Friday, in ten weeks. None of these is a credible estimate of the reporting burden for one company, much less the entire universe of financial services companies in the aggregate. By way of comparison, the SEC version of the interagency rulemaking under Section 956 of the DFA, which requires banks, broker-dealers and investment advisers to evaluate their compensation systems and eliminate features that cause those firms to engage in excessive risk-taking, and imposes related reporting and recordkeeping requirements, estimates that the combined initial recordkeeping and reporting burden on broker-dealers and investment advisers with over $50 billion in assets, at 8,500 hours for the first year (and an associated cost of $3,400,000), and 4,400 hours per year thereafter (and associated annual cost of $1,750,000). The estimate for broker-dealers and investment advisers with $1 billion to $50 billion in balance sheet assets adds another 66,400 hours of initial reporting and recordkeeping burden for the first year (and associated cost of $27.1 million) and 22,300 hours of annual recordkeeping and reporting (and associated cost of $8.9 million) for subsequent years. Titles I and II are far more complex and will require far more extensive recordkeeping, reporting and paperwork than is Section 956. Surely the paperwork and reporting hourly burden and costs of Title I and II will be far higher than those under Section 956, unless the agencies truly plan to designate only two or three firms as systemically important.

Unless the Board is correct that only three nonbank financial firms will be designated, each of the Board paperwork estimate, the Council's paperwork estimate, and the FDIC's paperwork estimate, is off by orders of many magnitudes. This error is central to the consideration of the proposed rule. Section 112(a)(2) of the DFA requires the Council to consider the impact on the efficiency and competitiveness of U.S. financial markets, a point

which is emphasized in Section 112(d) and elsewhere in Titles I and II of the DFA. The President's recent Executive Order similarly required agency consideration of the time and burden associated with any new or amended regulation and its impact on efficiency and competitiveness.[148]

When the estimated paperwork and reporting burden is so badly underestimated, the evaluation of the administrative and personnel costs and burdens associated with the rule, and their impact on the efficiency and competitiveness of financial firms, is necessarily flawed. This burden and benefit analysis, if done appropriately, should affect how broadly the Council chooses to go in sweeping in financial firms for additional supervision by the Board under Title I and receivership by the FDIC under Title II.

When Congress was considering this provision, Board Chairman Ben Bernanke testified that a total of roughly 25 firms, "virtually all of" which were bank holding companies already regulated by the Board, would meet the test of systemic significance for designation under the Act.[149] In its paperwork estimate as of February 11, 2011, the Board suggests that only three nonbank financial firms will be designated. That estimate would be consistent with the Chairman's testimony, and we applaud it if it remains the Board's position. However, now that Titles I and II are being implemented, "mission creep" has entered the process, at least at some of the regulators that are implementing Titles I and II. Recent testimony, while recognizing the need to consider the cost and economic burden associated with regulation, suggests that the Council plans to exercise its designation authority very broadly.[150] When the costs and

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[148] *Improving Regulation and Regulatory Review*, Executive Order 13563 (Jan. 18, 2011).

[149] Regulatory Perspectives on the Obama Administration's Regulatory Reform Proposals, Part II, Hearings before the Financial Services Committee, U.S. House of Representatives, 111th Cong., 1st Sess. July 24, 2009, H.R. 111-68 at 47-48 (testimony of Federal Reserve Board Chairman Ben Bernanke). Similar statements that only a very few firms were appropriate for designation under Title I were made on several occasions during consideration of the DFA. *See, e.g.* Written Statement of former Federal Reserve Board Chairman Paul A. Volcker to Senate Banking Committee (Feb. 2, 2010), Written Statement of former Federal Reserve Board Chairman Paul A Volcker to House Financial Services Committee (Sept. 24, 2009) (estimating number between 5 and 25 firms globally).

[150] Written Statement of FDIC Chairman Sheila C. Bair before Senate Banking Committee (Feb. 17, 2011) (*available at http://www.fdic.gov/news/news/speeches/chairman/spfeb1711.html)*. In fact, on March 29, 2011, the FDIC and the Board issued joint proposed rule changes to implement resolution plan and credit reporting requirements for non-bank financial firms designated for supervision by the Board and bank holding companies with assets of $50 billion or more. The PRA estimates for this release indicate that there would be 124 such firms (both non-bank financial companies and bank holding companies). The two regulators estimate that the process of creating and filing initial resolution plans will consume a minimum of approximately 7,200 hours *per firm*, with an additional minimum of 800 hours to be spent every year thereafter on updates. They further estimate that initial reporting on credit exposures will take approximately 3,200 hours per firm, with an additional 124 hours every year

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economic burdens of a broad implementation are not accurately estimated, there is a significant risk that the regulators will be overly inclusive in their designation of financial companies for supervision under Title I and receivership under Title II, in conflict with the intent of Congress, the terms of the statute, and the economic best interests of the American people.

Similarly, the NPR states that, in order to avoid "evasions" of the Act, Section 113(c) of the DFA will be read to reach companies that make changes to the manner in which they conduct business to avoid designation under Title I. But when Congress was considering Title I, Chairman Bernanke was specifically asked in hearings before the House Financial Services Committee whether companies could make changes to their manner of doing business to avoid designation, and he responded that would be permitted.[151] Changing the activities, and financial and operational structure of a company to address the terms set out in Title I or implementing rules is not an evasion, it is compliance with the law. The decision of a company to change its business structure and manner of doing business to reduce its systemic riskiness accomplishes the statutory goal of reducing systemic risk. If the criteria specified in the statute and implementing rules accurately and validly identify the characteristics of a company that would make it systemically risky, then changes to a company's activities and structure to avoid those factors or reduce the degree to which those factors are present at the company necessarily reduce that company's systemic risk. On the other hand, if the Board is of the view that such changes by a company to address the specified criteria in order to avoid designation under Title I do not in fact reduce the company's systemic risk, then how can the criteria specified in the rule be anything other than arbitrary and capricious?

Finally, as a procedural matter, the Council has not yet been fully established. Section 111 of the DFA requires the appointment and confirmation of additional members of the Council, including among others, the Director of the Bureau of Consumer Financial Protection, the Director of the Office of Financial Research, and the Director of the Federal Insurance Office. This is not a situation of a board missing a member whose term has expired and a successor not yet confirmed to fill it. Rather, these seats have yet to be filled, and in some instances the agencies they are to represent have not yet been established. The purpose of a board with broad representation is to draw upon the viewpoints and expertise of all of the different members designated by statute. Without their participation, any action taken by the

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Footnote continued from previous page
thereafter. *Resolution Plans and Credit Exposure Reports Required* (available at http://www.fdic.gov/news/board/29Marchno4.pdf).

[151] Regulatory Perspectives on the Obama Administration's Regulatory Reform Proposals, Part II, Hearings before the Financial Services Committee, U.S. House of Representatives, 111th Cong., 1st Sess. July 24, 2009, H.R. 111-68 at 48 (testimony of Federal Reserve Board Chairman Ben Bernanke).

Council is taken without the inclusion of that expertise and viewpoint and is procedurally incomplete. Without these areas being represented by the members specified in the statute, the formation of the Council is not yet complete, and it cannot validly take action to propose or adopt regulations or designate any nonbank financial companies under Title I of the DFA. Title I and II of the DFA are inextricably intertwined both operationally and procedurally in the designation, regulation and receivership of systemically significant or risky financial firms. Until all parts of this intertwined regulatory system are fully constituted, no part of it can be separately implemented.

VI. Conclusion

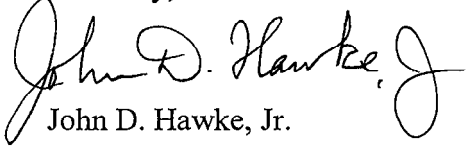
Money Funds have been a success story in U.S. financial regulation. Using a very simple, common sense approach, which permits investment only in short term, high quality money market instruments, the SEC has succeeded in supervising an efficient and effective program by which investors' cash balances provide financing for American businesses and governmental units. They are very popular with consumers, and very useful to the economy.

Even if they were within the statutory definition of a "nonbank financial firm" and thus potentially subject to designation under Section 113, under an appropriate consideration of the statutory criteria for designation, as well as the potential damage and lack of benefit to the economic system from such a designation, Money Funds should appropriately not be designated for additional Board regulation under Title I or FDIC receivership under Title II of the DFA. We suggest that the final rules or the release that will accompany the final rules provide more clarity on this point and indicate that due to the comprehensive SEC regulation and supervision of Money Funds, in light of the definitions and criteria in the statute, Money Funds will not be designated under Title I.

Although we recognize that some quarters continue to espouse the Carter Administration-era view that Money Funds should be regulated like banks, the reality is that the SEC's regulation of Money Funds has been far more effective than the federal banking agencies' regulation of banks. In the past 40 years only two Money Funds have broken the buck, and both were liquidated with relatively minimal losses to investors on a percentage basis and zero cost to the federal government. During that same period, more than 2,800 depository institutions failed, and almost 600 were kept afloat with government infusions of capital, at a total cost to the government of more than $164 billion. There is nothing in the historical record to suggest that imposing "bank like" regulatory requirements on Money Funds through designation for

regulation under Section 113 or receivership under 203 will make Money Funds, or the American economy, safer. The prudent course, in our view, is to continue to build upon what has worked and to refine the current program of regulation of Money Funds under the supervision of the SEC.

Sincerely,



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March 28, 2011

Submitted By Electronic Transmission
Via www.regulations.gov

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW.,
Washington, DC 20429
Attention: Comments

Re: Notice of Interim Final Rulemaking Regarding Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 C.F.R. Part 380;
Notice of Proposed Rulemaking, Orderly Liquidation Authority, 12 CFR Part 380, RIN-3064-AD73

Dear Ladies and Gentlemen:

I. Introduction and Summary of Conclusions

We are writing on behalf of our client, Federated Investors, Inc. and its subsidiaries ("Federated"), to provide comments in response to the Federal Deposit Insurance Corporation's ("FDIC's") Notice of Interim Final Rulemaking Regarding Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("NIFR"),[1] and Notice of Proposed Rulemaking Regarding Orderly Liquidation Authority ("NPR").[2] Federated has served since 1974 as an investment adviser to money market mutual funds ("Money Funds").[3] We appreciate the opportunity to assist the FDIC as it considers the liquidation authority rules proposed in the NIFR and the NPR.

[1] 76 Fed. Reg. 4207 (Jan. 25, 2011).

[2] 76 Fed. Reg. 16324 (Mar. 23, 2011).

[3] Federated has more than thirty-five years in the business of managing Money Funds and, during that period, has participated actively in the money market as it has developed over the years. The registration statement for Federated's Money Market Management fund first became effective on January 16, 1974, making it perhaps the longest continuously operating Money Fund to use the Amortized Cost Method. Federated also received one of the initial exemptive orders permitting use of the Amortized Cost Method in 1979.

The NIFR and NPR implement certain portions of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 ("DFA"). Title I and II of the DFA are closely intertwined statutory provisions that authorize the designation of financial companies for additional regulation and supervision by the Federal Reserve Board and for potential receivership by the FDIC. If a nonbank financial company is designated by the Council under Section 113 of the DFA (or is separately designated under Title II) it is subject to resolution by the FDIC in a receivership under Title II if the Secretary of the Treasury, upon the recommendation of the FDIC and other specified regulators in consultation with the President, determines that the company is in default or in danger of default and presents a danger to the financial stability of the United States.[4]

The purposes of Title I of the DFA include identifying risks to the financial stability of the U.S. that could arise from large interconnected bank holding companies, nonbank financial companies or otherwise; promoting market discipline by eliminating expectations that the Government will shield shareholders, creditors, and counterparties of such companies from losses if they fail; and responding to emerging threats to the stability of the U.S. financial system.[5] The purposes of Title II of the DFA include providing authority to liquidate failing financial companies that pose a threat to the financial stability of the United States in a manner that mitigates that risk and minimizes moral hazards, and is intended to be implemented in a way that creditors and shareholders will bear the losses of the financial institution.[6]

Federated, as a participant in the money markets and a sponsor of Money Funds, is interested in many of the details of the NIFR and NPR specifying who may be designated and the processes for liquidation of financial firms. As a creditor, we are concerned that the ambiguity of the NIFR and NPR (and Title II) and the way in which they will be interpreted and applied will increase uncertainty, risk and volatility in the money markets and other fixed income markets, particularly in times of crisis. This letter addresses, however, fundamental issues regarding the designation of financial firms under Titles I and II and the process for appointment of the FDIC as receiver.

The NIFR and NPR are parts of an intertwined series of rulemakings by the FDIC, the Board of Governors of the Federal Reserve System ("Federal Reserve Board"),[7] and the

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[4] DFA Pub. L. No. 111-203, 124 Stat. 1376 §§ 201(a)(11)(B), 203(b) (2010).

[5] DFA § 112.

[6] DFA § 204(a).

[7] Council, Notice of Proposed Rulemaking Regarding Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 76 Fed. Reg. 4555 (Jan. 26, 2011).

Financial Stability Oversight Council ("Council"), to implement Titles I and II of the Dodd Frank Wall Street Reform and Consumer Protection Act ("DFA").[8] The FDIC and the Federal Reserve Board are both represented on the Council, along with other federal and state financial regulators.

Titles I and II of the DFA are closely interconnected statutory provisions that authorize the designation by the Council of financial companies for additional regulation and supervision by the Board and for potential receivership by the FDIC. Section 113 of DFA gives the Council authority to designate a U.S. nonbank financial company for supervision by the Board and subject it to the prudential standards of Title I if the Council determines that material financial distress at the company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of its activities, could pose a threat to the financial stability of the U.S. Section 203 gives authority for the Secretary of the Treasury, upon the recommendation of the FDIC and certain other agencies, to place a nonbank financial company that has been designated under Section 113 (and certain other nonbank financial companies) into FDIC receivership. If a nonbank financial company is designated by the Council under Section 113 of the DFA (or is separately designated under Title II) it is subject to resolution by the FDIC in a receivership under Title II if the Secretary of the Treasury, upon the recommendation of the FDIC and other specified regulators in consultation with the President, determines that the company is in default or in danger of default and presents a danger to the financial stability of the United States.

The statute is not a model of clarity. Which agency has what authority to do what, when, and to whom, with the consent of which other agencies, is not entirely clear. Compounding this uncertainty, some have called into question whether it is the Board alone that has authority to adopt substantive regulations implementing Title I or the Council has joint or parallel rulemaking authority.[9]

The purposes of Title I of the DFA include identifying risks to the financial stability of the U.S. that could arise from large interconnected bank holding companies or nonbank financial companies, promoting market discipline by eliminating expectations that the Government will

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[8] Pub. L. No. 111-203 (2010). These intertwined rulemakings also include: Financial Stability Oversight Council, *Notice of Proposed Rulemaking Regarding Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies*, 76 Fed. Reg. 4555 (Jan. 26, 2011); Federal Reserve Board, *Notice of Proposed Rulemaking and Request for Comment Regarding Definitions of ''Predominantly Engaged in Financial Activities'' and ''Significant'' Nonbank Financial Company and Bank Holding Company*, 76 Fed. Reg. 7731-01 (Feb. 11, 2011).

[9] *See* Comment Letter of Mr. Thomas Vartanian to Council Chairman Timothy F. Geithner (Feb. 24, 2011) (*available at* http://www.regulations.gov/#!documentDetail;D=FSOC-2011-0001-0014.1). *See also*, Rules of Organization of the Financial Stability Oversight Council Articles XXX.11 (Oct. 1, 2010) (narrowly defining Council rulemaking authority).

shield shareholders, creditors, and counterparties of such companies from losses if they fail, and responding to emerging threats to the stability of the U.S. financial system.[10] The purposes of Title II of the DFA include providing authority to liquidate failing nonbank financial companies that pose a threat to the financial stability of the United States in a manner that mitigates that risk and minimizes moral hazards, and is intended to be implemented in a way that creditors and shareholders will bear the losses of the financial institution.[11]

The NPR requests comments on a new FDIC rulemaking proposal to define certain terms used in Title II, including terms that may affect what companies may be designated under Title II for FDIC liquidation under Title II. Unfortunately, however, the NPR, like the NIPR and the Council and Federal Reserve Board rulemaking proposals, fails to define the terms used in Titles I or II in a way that sheds much light on what companies can be designated or the standards that will be considered and applied in doing so. None of the current rulemaking proposals describes the qualitative or quantitative considerations to be used in making assessments with regard to any of them. None of the current proposals describes how the factors will be weighed against one another. The Council's rulemaking proposal simply regroups the ten statutory criteria for designation, for discussion purposes, into six categories, while the Federal Reserve Board's proposal in large part parrots portions of the statute, and the FDIC's NPR in relevant part appears to repeat discussions in the Board's rulemaking proposal.

A purpose of an implementing rule, and an administrative rulemaking process, is to provide an analytical framework and context for the individual determinations that the regulators will make in designating particular firms under the DFA. Under the DFA, firms notified of a proposed designation will have very little time to respond as to why they should not be so designated. Without more context and elaboration in the rule, it will be difficult for a firm receiving that notice to know how to respond or what criteria or facts are relevant to include in a response.

Section 170 of the DFA requires the Federal Reserve Board to adopt regulations on behalf of and in consultation with the Council, setting for the criteria for exempting certain types of nonbank financial companies from designation under Title I. Without action on Section 170 to define what types of nonbank financial companies are not subject to designation, the entire framework of Title I and II and its implementing rules are an unintelligible and unworkable morass. In oversight hearings before the Senate Banking Committee on February 17, 2011, FDIC Chairman Sheila Bair testified, when asked what criteria will be used to designate companies under Titles I and II, that it is easier to define what companies will *not* be subject to

[10] DFA § 112.

[11] DFA § 204(a).

designation.[12] The Chairman is correct. That needs to be done, through the Section 170 exemption criteria rulemaking that the Federal Reserve Board is required to conduct, for any of the rules proposed under Titles I and II to be intelligible, to provide meaningful standards for designations, and to provide notice to nonbank financial companies and the public as to what is intended, so that there will be more certainty around the process. We appreciate that the regulators want maximum flexibility to do whatever they want, to whomever they want, whenever they want, in order to address potential threats to the financial system and are accordingly loathe to define terms in a way that might limit their future options and authority. However, as one of the Federal Reserve Banks recently noted in comments to the FDIC, the uncertainty over the terms, standards and processes to be used under Titles I and II presents a danger and may increase, rather than decrease, risks in the financial system.[13] Accordingly, it is critical that the Federal Reserve Board use its rulemaking authority under Section 170 and the rest of Title I and the FDIC use its rulemaking authority under Title II to reduce that uncertainty.

The FDIC's Title II rulemakings should be used to among other things, clarify that Money Funds are not nonbank financial companies that are subject to designation under Titles I and II of the DFA, based upon the plain language of the statute, as well as its structure and purposes. Moreover, application of the statutory and proposed regulatory criteria for making a determination under Titles I and II clearly establish that Money Funds cannot appropriately be designated. We believe that one metric in particular should outweigh all others and should be used to exclude a firm from designation: "those firms that are already subject to consolidated supervision and/or heightened reporting requirements."[14] We believe that this exclusion from designation under the DFA should apply where (1) the Council has access to comprehensive and timely information concerning the firm, either through its primary regulator or directly, and (2) the primary regulator is a member organization of the Council and has comprehensive supervisory and rulemaking authority over the type of entity comparable to those of the Board. If this criteria (the eighth criterion listed in Section 113 and the sixth criterion as grouped in the Council's NPR), is given an appropriate weight in light of the purposes of the statute and its interaction with other programs of federal oversight and regulation, Money Funds would not be designated for regulation under Titles I or II of the DFA.

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[12] *Oversight of Dodd Frank Implementation*, Hearings Before Senate Banking Committee (Feb. 17, 2011) *available at* http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=c43953db-0fd7-43c3-b6b8-97e2d0da3ef7.

[13] Letter from Jeffrey M. Lacker, President, Federal Reserve Bank of Richmond to FDIC (Jan. 18, 2011) (*available at* http://www.fdic.gov/regulations/laws/federal/2010/10c35Orderliq.PDF).

[14] 76 Fed. Reg. at 4557.

As discussed more fully below, our major comments regarding the NIFR and NPR are as follows:

- Designation of Money Funds as systemically significant or systemically risky under Titles I or II of the DFA or for FDIC receivership under Title II of the DFA would not be appropriate or in the public interest due to Money Funds' exclusive reliance on equity, their lack of leverage, debt or other counterparty exposure, the short-term nature of their investment portfolios which by regulatory design are essentially self-liquidating, and the existing comprehensive framework of the Securities and Exchange Commission ("SEC") regulation and supervision that applies to Money Funds. Money Funds are required to be essentially self-liquidating. Federal securities laws establish a clear process for an orderly wind-down of a Money Fund with SEC and judicial oversight. This existing framework has been effective in resolving those few Money Funds that have been unable to maintain their targeted per-share value.

- The NIFR states that the FDIC receivership provisions under Title II were enacted due to the inadequacy of disparate insolvency regimes to effectively address the actual or potential failure of a financial company that could adversely affect economic conditions or financial stability in the United States. Under Title II, the FDIC may be appointed receiver for a nonbank financial company only if the Treasury Secretary finds that the company is in default or in danger of default and "its resolution under otherwise applicable Federal or State law would have serious adverse consequences on financial stability in the U.S." and there is no other viable private sector alternative. This finding cannot be made in respect of a Money Fund, because Money Funds do not use leverage or debt that can be defaulted on, and because the SEC has broad regulatory and supervisory authority to oversee the orderly liquidation of a Money Fund.

- The FDIC has an obligation in conducting a rulemaking to consider the Constitutional validity of its actions, the proposed rules and the statutes upon which they are based. This has not been done, and no effort has been made in the rulemaking to address or ameliorate these issues.

- Title II of the DFA which dramatically curtails judicial oversight, and the implementing rules, infringe inappropriately on the role of the Federal courts under Article III of the Constitution and the right of private parties to have access to Article III courts, rather than a federal agency, in the ultimate determination and disposition of their private property rights and interests.

- Determination and resolution of the property rights and interests of private parties under Title II and the NIFR and the NPR as currently structured would violate due process rights of private parties under the Constitution.

- The breadth and vagueness of the authority granted under Titles I and II on such issues as who will be subject to designation and on what grounds, and the lack of clarity as to what agency is responsible, impermissibly delegates legislative authority, a flaw that is compounded by the failure of the FDIC in the rulemaking to clarify and narrow these provisions through the NIFR and NPR.

- Under these circumstances, the NIFR, the NPR and actions taken by the FDIC and other federal agencies pursuant to Titles I and II are not subject to judicial deference under the standards of *Chevron* and its progeny[15] but instead under the less deferential judicial review standards of *Industrial Union Department, AFl-CIO*, and similar cases.[16]

- The NIFR and NPR are arbitrary and capricious in violation of the Administrative Procedure Act.

- The required Small Business impact assessment has not been properly conducted.

- The Paperwork Reduction Act estimates are inconsistent among the various proposals, and, unless the Board is correct in its projections that only three nonbank financial firms will be designated under Title I, seriously underestimate the time and cost associated with reporting and recordkeeping under the new provisions.

- Due to the procedural and practical linkages and statutory intertwining of Title II of the DFA and the NIFR and NPR with Title I of the DFA and the rules under that Title, the NIFR and NPR are made further defective by the shortcomings in Title I and its implementing rules.

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[15] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *United States v. Mead Corp.*, 533 U.S. 218 (2001).

[16] *Indus. Union Dep't, AFL, CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980); *City of New York v. Clinton*, 985 F. Supp. 168 (D.D.C. 1998), *aff'd on other grounds*, *Clinton v. City of New York*, 534 U.S. 417 (1998); *Whitman v. Am. Trucking Co.*, 531 U.S. 457, 487 (2001) (concurring opinion of Justice Thomas). The normal cure for an overly broad delegation of legislative power is a narrow reading by the courts of the grant of authority in order to avoid the Constitutional issue. *See e.g., Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998); *Whitman*, 531 U.S. at 476 (concurring opinion of Justices Stevens and Souter).

For the reasons discussed in this Letter, Money Funds registered with the Securities and Exchange Commission ("SEC") should not be designated under either Titles I or II of the DFA for receivership by the FDIC or for regulation by the Federal Reserve.

II. Money Funds Should Not Be Designated Under Titles I or II of DFA, But Should Instead be Excluded From Coverage Under Both Titles

In the NIFR, the FDIC asks whether there are ways to reduce moral hazard and increase market discipline and to clarify that creditors should assume that they will receive no additional payments (i.e. an FDIC bail-out of a "too big to fail" company) and that their recoveries will be limited to what they will be paid from the assets of the estate under the liquidation priorities established by law. We think the best way to accomplish this goal is to make clear to investors and the public that Money Funds will ***not*** be designated for FDIC receivership under Title II or Federal Reserve supervision under Title I of DFA. This can be done through a combination of formal statements on this point by the FDIC, Federal Reserve and Council, action by the Federal Reserve on behalf of the Council pursuant to Section 170 of the DFA to exclude Money Funds from coverage, and actions consistent with that position over time by the Council and FDIC.

We note as an initial matter that it is doubtful that *any* open-end investment company (*e.g.* a mutual fund), including a Money Fund, is within the definition of a "nonbank financial company" that is subject to designation under Title I or Title II of the DFA. Section 102 of the DFA defines the universe of "nonbank financial companies," that potentially are subject to designation under Title I, by reference to the financial powers of Section 4(k) of the Bank Holding Company Act ("BHC Act"), 12 U.S.C. 1843(k). Section 4(k) in turn has its own list of activities, including those permitted under Section 4(c)(8) of the BHC Act and Regulation K, 12 C.F.R. § 211. Other parts of the BHC Act (Sections 4(c)(5), 4(c)(6) and 4(c)(7) of that Act) authorize investing in securities and in investment companies, and 4(c)(8) and Regulation K have been interpreted by the Federal Reserve Board to include sponsoring, advising, administering and providing other services to open-end and closed end investment companies, as well as dealing and underwriting in securities (as contrasted to investing, reinvesting and trading in securities). But the Board has gone out of its way *not* to determine that being, or controlling, an open-end investment company is a permitted Section 4(c)(8) or 4(k) activity.[17] The Federal Reserve Board has steadfastly refused for nearly six decades to interpret those provisions to permit bank holding companies to control, be affiliated with, or be open-end investment companies (i.e. mutual funds), and has taken actions to prevent that from occurring. The Federal Reserve Board has *not* reinterpreted these provisions in wake of the Gramm Leach Bliley Act's

[17] Petition of the United States in *Board of Governors of the Federal Reserve System v Investment Company Institute* (in U.S. Supreme Court Docket No. 79-927, October Term, 1979), 450 U.S. 46 (1981).

1999 repeal of Section 20 of the Glass-Steagall Act to permit bank holding companies or financial holding companies to be or control an open-end investment company using BHC Act Section 4(c)(8) or 4(k) powers, but has instead aggressively enforced the position that bank holding company cannot be or control mutual funds.[18] Because the Federal Reserve Board has not determined that being or controlling an open-end investment company or mutual funds is an eligible activity under those provisions, the activity of being an open end investment company is not a "financial" activity and thus mutual funds are not "nonbank financial companies" for purposes of Title I of Dodd Frank. The federal banking regulators cannot have it both ways.[19] If Sections 4(c)(8) and 4(k) do not authorize a bank holding company to engage in the activity of being or controlling a mutual fund, then a mutual fund cannot be a nonbank financial company within the meaning of Title I.

In their respective NPRs, both the FDIC and the Federal Reserve Board seek to dance around this type of contradiction by arguing that an activity may be prohibited for bank holding companies (presumably by some other statutory provision such as the Volcker Rule contained in Section 619 of the DFA or former Section 20 of the Glass Steagall Act of 1933) and yet be an authorized activity under 4(c)(8) or 4(k) of the BHC Act and therefore a financial activity within the meaning of Title I that if engaged in primarily by a nonbank company could bring with it the potential for designation under Section 113. Yet in the 43 years from the enactment of the BHC Act in 1956 to the repeal of Section 20 in 1999 during which time Section 20 of the Glass Steagall Act was in effect but was by its terms inapplicable to state nonmember banks, the Board never permitted bank holding companies of state nonmember banks to be or control mutual funds as nonbank subsidiaries under Section 4(c)(8). During the eleven years between the Gramm Leach Bliley Act of 1999 (which repealed Section 20 of the Glass Steagall Act and added Section 4(k) financial powers to the BHC Act), and the adoption of the Volcker Rule in 2010 as Section 619 of the DFA which limited bank hedge fund and proprietary trading by bank holding companies and financial holding companies and their bank and nonbank subsidiaries, the Federal Reserve Board continued to prohibit bank holding companies to be or control mutual funds as an activity not permitted by Section 4(c)(8) or 4(k) of the BHC Act. Being or controlling a mutual fund has never been an activity permitted under Federal Reserve Board interpretations of Section 4(c)(8) or 4(k) of the BHC Act.

Moreover, a primary purpose of designation of a nonbank financial company under Title I is to prepare it, and place it in line, for a potential FDIC receivership under Title II. Because the text, purpose and structure of Title II clearly establish that Title II receiverships are to

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[18] *See* 12 C.F.R. §§ 211.10(a)(11), 225.28(b)(6), 225.86(b)(3), 225.125.

[19] *Cf. Citicorp v Bd. of Governors*, 936 F.2d 66 (2d Cir. 1991), *cert. denied* 502 U.S. 1031 (1992) (Federal Reserve Board cannot simultaneously interpret the BHC Act in two different, conflicting ways).

address defaults by a nonbank financial company on its obligations, and Money Funds are financed entirely by shareholder equity and do not borrow or otherwise use leverage, they do not have the ability to default on their obligations in a way contemplated by Title II. If Money Funds do not have the kinds of debts and counterparty obligations that Titles I and II were intended to address, it makes no sense within the structure and purposes of Titles I and II to treat Money Funds as nonbank financial companies that are subject to designation under those Titles.

To the extent that there is any doubt on this question, it would be appropriate and in the public interest for the Federal Reserve acting in consultation with the FDIC and the Council to exercise the mandatory exemptive authority in Section 170 of the DFA to exclude Money Funds from coverage under Titles I and II.

Moreover, even if Money Funds were deemed to be "nonbank financial companies" within the meaning of Titles I and II of DFA, FDIC receivership and Federal Reserve prudential regulation would be inappropriate and unnecessary in view of the SEC's authority, regulation and oversight over Money Funds – including its recent amendments to Rule 2a-7 under the Investment Company Act of 1940 ("Investment Company Act") and related rules, as well as its continuing review of these issues. There is an existing protocol for dealing with the wind-down of Money Funds. In those rare instances in which it has been needed, it has worked well.

Furthermore, although the Council has yet to develop recommendations concerning the prudential standards under Section 115 of the DFA for entities designated for Federal Reserve regulation, it is clear that the general standards identified by statute in Section 115 and Section 165 (directing and authorizing the Federal Reserve to adopt prudential standards for supervised nonbank financial companies) are either addressed in current regulation of Money Funds in a manner far more robust than for other financial institutions (*e.g.*, Money Funds' lack of leverage, liquidity requirements, resolution plan, enhanced public disclosure, and overall risk management requirements) or are requirements (*e.g.*, risk-based capital requirements) which, if applied to Money Funds, would undermine their vitally important role in providing highly liquid investments for individuals and institutions and critical short-term funding for issuers and others who rely upon them.

In October 2010, the President's Working Group on Financial Markets ("PWG") issued its Report on Money Market Fund Reform Options ("PWG Report" or "Report").[20] The Report acknowledges the concern of financial regulators that, notwithstanding the Money Fund reforms adopted by the SEC earlier this year, more should be done to address Money Funds'

[20] REPORT OF THE PRESIDENT'S WORKING GROUP ON FINANCIAL MARKETS - MONEY MARKET FUND REFORM OPTIONS (Oct. 2010), *available at* http://treas.gov/press/releases/docs/10.21%20PWG%20Report%20Final.pdf.

susceptibility to runs, such as the run precipitated by the bankruptcy of Lehman Brothers Holdings, Inc. ("Lehman") in September 2008 and the resulting losses at the Reserve Primary Fund, which held Lehman commercial paper. While the Report sets forth eight policy options which its drafters suggest could mitigate the susceptibility of Money Funds to runs, the discussion of the various options is accompanied by a sobering discussion of the potential serious and adverse ramifications – for investors, issuers, other financial market participants, and taxpayers – of the various courses of action. Thus, after an 18-month review, the PWG recommended further study and public comment.

The process recommended by the PWG that the SEC publish the various options in the PWG Report for public comment and that the Council also review these matters is the appropriate process to address any remaining concerns regarding Money Funds. During the comment period on the Council's earlier ANPR release, the SEC requested comments on the PWG Report and received over 75 public comments not only from the fund industry but also from a broad range of state and local governments, large and small businesses, retail investors and other members of the public.[21] With only three exceptions,[22] the commenters overwhelmingly supported the retention of the current program of SEC regulation of Money Funds and stable NAV, with continued incremental improvements to the SEC's program of Money Fund regulation.[23] This is an overwhelming affirmation -- from industry participants,

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[21] Submissions in response to the SEC's Request for Comment on PWG Report are available at: http://www.sec.gov/comments/s7-04-09/s70409.shtml.

[22] Letters from Federal Reserve Bank of Richmond President Jeffrey Lacker (*available at* http://www.sec.gov/comments/4-619/4619-54.pdf); Paul A. Volcker (*available at* http://www.sec.gov/comments/4-619/4619-79.pdf); Shadow Financial Regulatory Committee (*available at* http://www.sec.gov/comments/4-619/4619-81.pdf).

[23] *See e.g.,* Letters from the Financial Services Roundtable; Port of Houston Authority; Cincinnati/Northern Kentucky International Airport; Treasurer of the State of New Hampshire; the Business Council of New York State; Dallas Regional Chamber; Associated Industries of Florida; New Jersey Chamber of Commerce. Letter filed by the following associations of state and local entities: the American Public Power Association; the Council of Development Finance Agencies; the Council of Infrastructure Financing Authorities; the Government Finance Officers Association; the International City/County Managers Association; the International Municipal Lawyers Association; the National Association of Counties; the National League of Cities; the National Association of Local Housing Financing Agencies; the National Association of State Auditors, Comptrollers and Treasurers; the National Association of State Treasurers and the U.S. Conference of Mayors. Letter from the following businesses and associations: Agilent Technologies, Inc.; Air Products & Chemicals, Inc.; Association for Financial Professionals; The Boeing Company; Cadence Design Systems; CVS Caremark Corporation; Devon Energy; Dominion Resources, Inc.; Eastman Chemical Company; Eli Lilly & Company; Financial Executives International's Committee on Corporate Treasury; FMC Corporation; Institutional Cash Distributors; Kentucky Chamber of Commerce; Kraft Foods Global, Inc.; National Association of Corporate Treasurers; New Hampshire Business and Industry Association; Nissan North America; Pacific Gas and Electric Company; Safeway Inc.; Weatherford International; U.S. Chamber of Commerce.

issuers, and other users of Money Funds -- that the SEC's regulation of Money Funds, including its more recent rules to strengthen Money Fund regulations, is appropriate and more than sufficient.

Designation under Titles I and II of the DFA and the accompanying FDIC receivership or Federal Reserve prudential regulation of nonbank financial companies are best utilized to address large, systemically important institutions that previously lacked comprehensive consolidated supervision (or, if they were subject to it, were inadequately supervised) and which, when overly dependent upon the short-term markets, pose the threat of creating the type of panic in the short-term markets that occurred in September 2008. Indeed, it was the precarious state of these entities and their exposure to the collapse in mortgage-related instruments that caused the 2008 market panic. Designation under either Title I or Title II is unnecessary, inappropriate, and potentially harmful if applied to Money Funds.

As discussed further below:

- Money Funds are a regulatory success. They are subject to robust regulation by the SEC, which has an excellent record in its oversight of Money Funds and a superior track record in this area in comparison to bank-type prudential regulation or FDIC receivership.

- Title I or Title II designation is for individual companies, not for an entire industry as a whole. There are over 650 separate Money Funds. Money Funds generally are not permitted to lend to one another or co-invest as groups. As a result, unlike banks, the financial conditions of different Money Funds are not linked to one another. They cannot be lumped together as a single entity and designated under Titles I or II of DFA.

- Individual Money Funds should not be designated for prudential regulation by the Federal Reserve under Title I or FDIC receivership under Title II. The prudential standards specified for Section 113 entities under the Federal Reserve's Section 165 authority are either addressed in current Money Fund regulation in a manner far more robust than for other financial institutions, or they are an inappropriate fit for Money Funds. The receivership process created by Title II is inappropriate for Money Funds which rely on equity, rather than debt financing, are essentially self liquidating by the nature of their assets, and are already covered by existing regulatory and judicial protocols when necessary for a prompt and efficient wind-down of a Money Fund.

- Because Money Funds are already subject to comprehensive SEC regulations and the SEC has robust regulatory tools to address any situation in which a Money Fund presents undue risk, Money Funds should be excluded from designation where (1) the FDIC through the Council has access to comprehensive and timely information concerning the Money Fund, either through the SEC or directly, and (2) the primary regulator of Money Funds, the SEC, like the FDIC, is a member organization of the Council and has comprehensive supervisory (examination, reporting and enforcement powers) and rulemaking authority over Money Funds comparable to those that the Federal Reserve exercises over bank holding companies or that the Federal Reserve can exercise over Section 113 designated nonbank financial firms, or subject to more stringent judicial oversight over SEC actions, the FDIC could exercise under Title II.

- Regulators should proceed with caution on changes to Money Fund regulation that would impose undue burdens on their continued operation or that would create in investors an expectation of FDIC insurance or some other *de facto* federal guarantee.

A. Money Funds Represent a Regulatory Success, Particularly As Compared to Regulation of Depository Institutions

History and Importance of Money Funds

Money Funds are leading investors in the short-term debt instruments that are issued and traded in the "money market," including Treasury bills, bankers' acceptances, certificates of deposit, federal funds and commercial paper.[24] The money market is the single most important source of liquidity funding for the global financial system. It permits large institutions to meet short-term borrowing needs and invest cash holdings for brief periods. Issuers in the money market include companies whose financial strength allows them to issue commercial paper directly to buyers, without credit support or collateral. Other companies issue "asset-backed" commercial paper, secured by the pledge of mortgage loans, auto loans, credit card receivables, or other assets. Federal, state and local governments also use the money market to meet liquidity

[24] Commercial paper consists of short-term, promissory notes issued primarily by corporations with maturities of up to 270 days but averaging about 30 days. Companies use commercial paper to raise cash for current operations as it is often cheaper than securing a bank loan. Federal Reserve Board, *Commercial Paper, available at* http://www.federalreserve.gov/releases/cp/about.htm.

needs by issuing short-term paper, including municipal paper and Treasury bills. The Federal Reserve utilizes Money Funds in its reverse repurchase program.

Money Funds were first offered in the U.S. in 1971 as a way to preserve investor principal while earning a reasonable return – and for the first time made a market interest rate available to retail investors. They have become widely held by many types of investors and are subject to pervasive regulation and oversight by the SEC. Due in large part to SEC rules that require them to invest exclusively in specific high-quality, short-term instruments issued by financially stable entities, they also have enjoyed a high degree of success, greatly increasing in number and in assets under management. Thus, Money Funds are now among the most widely held, low-risk and liquid investments in the world.[25]

For investors of all types, Money Funds offer numerous benefits. They come in several forms, including both taxable funds (which invest in securities such as Treasury bills and commercial paper) and tax-free funds (which generally invest in municipal securities). Funds that invest in short-term corporate and bank debt, but not government securities, are also known as "prime" Money Funds.[26] Investors can choose between and among funds that offer slightly higher yields, funds that offer less credit risk, and funds that offer tax advantages. For institutional investors, Money Funds offer low cost, convenient ways to invest cash in the short-term. Many institutional investors, including companies and governmental entities, have cash balances swept from their operating accounts into Money Funds on a nightly basis. For retail investors, Money Funds continue to offer a low-risk, low-expense way to diversify liquid holdings.

Based on Investment Company Institute data, as of December 2010, there were approximately 652 Money Funds.[27] As of March 17, 2011, Money Funds held over $2.7 trillion

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[25] Notwithstanding relatively low prevailing yields, according to the Investment Company Institute, as of March 17, 2011, Money Funds had over $2.7 trillion in assets under management. *See* Investment Company Institute, *Money Market Mutual Fund Assets*, Mar. 17, 2011, *available at* http://www.ici.org/research/stats/mmf/mm_03_17_11. Investment Company Institute historical weekly money market data show that assets under management have declined significantly since January 2009. As of January 7, 2009, Money Funds had over $3.8 trillion in assets. *See* Investment Company Institute, *Weekly Total Net Assets (TNA) and Number of Money Market Mutual Funds*, *available at* http://www.ici.org/pdf/mm_data_2010.pdf.

[26] *See* Sue Asci, *Prime Money Funds See Recent Inflows*, Investment News, Feb. 22, 2009.

[27] Investment Company Institute, *Trends in Mutual Fund Investing*, Jan. 27, 2011, *available at http://www.ici.org/research/stats/trends/trends_12_10.*

in assets under management.[28] Money Funds account for investments in almost 40% of outstanding commercial paper, approximately two-thirds of short-term state and local government debt, and a substantial amount of outstanding short-term Treasury and federal agency securities.[29] During the more than 25 years since Rule 2a-7 was adopted in 1983, over $335 trillion has flowed in and out of Money Funds.[30]

Performance Comparison of Money Funds to Bank Failures

In their early years, banks and their trade associations viewed Money Funds as competitors for retail business, and supported efforts to subject Money Funds to "bank-like" or "prudential" supervision.[31] Policy makers, however, recognized that bank-like regulation would effectively kill off what has become not only an important investment choice for millions of

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[28] Of this amount, retail Money Funds held an estimated $933 billion of this sum, while institutional funds held over $1.8 trillion – though this distinction is somewhat arbitrary. Investment Company Institute, *Money Market Mutual Fund Assets*, Mar. 17, 2011, *available at* http://www.ici.org/research/stats/mmf/mm_03_17_11.

[29] *See* REPORT OF THE PRESIDENT'S WORKING GROUP ON FINANCIAL MARKETS, MONEY MARKET FUND REFORM OPTIONS 7, *available at* http://treas.gov/press/releases/docs/10.21%20PWG%20Report%20Final.pdf.

[30] *See* Investment Company Institute, *Report of the Money Market Working Group*, Mar. 17, 2009 (hereinafter "ICI Money Market Working Group Report"), at 38, *available at* www.ici.org/pdf/ppr_09_mmwg.pdf.

[31] *See, e.g., Shooting at Money Market Funds*, Time, Mar. 23, 1981, *available at* http://www.time.com/time/magazine/article/0,9171,952946,00.html. The article states that that banking and savings institutions had "undoubtedly been hurt by the Money Funds" and that "banks and savings and loans have launched drives to bring them down…Last week the U.S. League of Savings Associations urged the Government to impose sharp restrictions on the money market funds and asked the Federal Savings and Loan Insurance Corporation to pledge up to $7 billion in low-cost loans." The article further notes that "Senate Banking Committee Chairman Jake Garn of Utah wants to prevent money market funds from offering check-writing privileges; Congressman James Leach of Iowa has introduced a bill that would diminish the funds' appeal by setting reserve requirements on them…The funds are also under heavy assault in several state legislatures." *See also* Karen W. Arenson, *Volcker Proposes Money Funds Be Subject to Rules on Reserves,* N.Y. TIMES, June 26, 1981 (noting that former Federal Reserve Chairman Paul A. Volcker testified before a Congressional subcommittee that money market funds should be subject to regulations that would make them more competitive with banking institutions and less attractive to investors. Mr. Volcker also testified that reserve requirements were a key part of monetary policy and because they could not be removed from banking institutions, also should apply to other investment vehicles); Beatson Wallace, *Money Funds Aren't Banks*, BOSTON GLOBE, May 21, 1981 (noting that "[m]oney market funds continue to be the whipping boy of the banking industry and the delight of the small sum investor.") The article explains that Treasury Secretary Donald T. Regan testified that "imposing new controls on our financial markets would be the wrong approach to assisting the thrift industry," but that nevertheless Senator Jake Garn "persists in his effort to curry support for legislation to curb the funds' check-writing feature and make the funds maintain a percent of their assets in a reserve account."

individuals and institutions,[32] but also a highly efficient and essential mechanism to fund the needs of business and government borrowers in the short-term market.[33]

Moreover, Money Funds have enjoyed a stunningly superior safety record compared to insured depository institutions. Only two Money Funds have "broken the buck" and returned shareholders less than 100 cents on the dollar: the Community Bankers U.S. Government Fund, which in 1994 repaid its investors 96 cents on the dollar,[34] and the Reserve Primary Fund, which was forced to liquidate in September 2008 as a result of a run triggered by Lehman's bankruptcy and the fund's holdings of Lehman commercial paper. The Reserve Primary Fund has returned to shareholders more than 99 cents on the dollar.[35] Significantly, no taxpayer funds were used to bail out shareholders.

Money Funds achieved this success under the regulation and oversight of the SEC and the relatively small staff of its Division of Investment Management.[36] At the core of this

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[32] *See, e.g., Competition and Conditions in the Financial System,* Hearings Before the Committee on Banking, Housing, and Urban Affairs, United States Senate, 97th Cong., 939 (1981) (statement of former SEC Commissioner John R. Evans, who testified that "we are very concerned with suggestions that legislation should be enacted which would impose bank-type regulation on money market funds to the detriment of [public] investors." Noting that "many depository institutions are having difficulty attracting savings during a period when money market funds are experiencing dramatic growth….We can understand why certain depository institutions might like their competitors to be restricted. We believe, however, that any consideration of legislation to impose bank-type regulatory burdens and limitations on money market funds should include an evaluation of the existing regulation of such funds, the present protection provided to investors, and the negative impact that such proposals would have on the millions of people who invest in money market funds." Further, "[i]t is the Commission's view that the harm to small investors, and the inconvenience to large investors, which could result from the imposition of bank-type regulations on money market funds may not be significantly offset by any benefit to banks and thrift institutions."

[33] *See* Phillip R. Mack, *Recent Trends in the Mutual Fund Industry,* 79 Fed. Reserve Bull. 1001 (1993), *available at* http://findarticles.com/p/articles/mi_m4126/is_n11_v79/ai_14714669/pg_5/?tag=content;col1, stating that "[m]oney market mutual funds grew rapidly in the late 1970s and early 1980s, when interest rates on money market instruments exceeded regulatory ceilings that applied to depository institutions. Flows from depositories to money funds supported expansion of the commercial paper market, an important alternative to bank loans for businesses."

[34] Note that the fund had only institutional investors, so individual investors were not directly harmed. *See* ICI Money Market Working Group Report, at 39, *available at* www.ici.org/pdf/ppr_09_mmwg.pdf. *See* Saul S. Cohen, *The Challenge of Derivatives*, 63 Fordham L. Rev. 1993, 1995 n.15 (1995) (internal citations omitted).

[35] *See* Press Release, *Reserve Primary Fund to Distribute $215 Million* (July 15, 2010), *available at* http://www.reservefunds.com/pdfs/Primary%20Distribution_71510.pdf; *see also* SEC Press Release: *Reserve Primary Fund Distributes Assets to Investors* (Jan. 29, 2010), *available at* http://www.sec.gov/news/press/2010/2010-16.htm.

[36] We note that the SEC's program of regulating and supervising investment companies has been extraordinarily efficient and effective to date and that the SEC is appropriately seeking additional funding to carry out its new responsibilities under the DFA.

regulatory program is SEC Rule 2a-7, which in eleven pages imposes sound principals that are the secret of the stability and solvency of Money Funds: invest only in very short-term, high quality, marketable debt instruments in a diversified manner, and do not use any leverage. Rule 2a-7 is the Occam's Razor of financial regulation.

In comparison, the prudential regulation of banks involves four (formerly five) federal regulators and over fifty regulators in states and other districts. The federal agencies alone require over 26,000 full-time employees.[37] The federal banking code – Title 12 of the United States Code and Title 12 of the Code of Federal Regulations – totals fourteen volumes and many thousands of pages of requirements and prohibitions. Yet, during the 40 years since the launch of the first Money Fund – a period during which the Money Fund industry experienced exactly two "failures" – some 2,830 depository institutions have failed, and an additional 592 were the subject of "assistance transactions" in which the government injected capital to keep them afloat.[38] From 1971 until February 4, 2011, total estimated FDIC losses incurred in connection with failed banks or assistance transactions amount to $164,820,462,000.[39]

Performance of Money Funds During the Financial Crisis

Even in times of greatest financial stress, Money Funds have proved to be more stable than depository institutions. Since January 2008, as a result of the financial crisis that followed the burst of the housing bubble and the collapse of mortgage-backed securities investments, at least 347 banks have failed,[40] and even more would have failed but for dozens of federal programs that infused banks with cash. The Federal Reserve, Department of the Treasury, and FDIC spent approximately $2 trillion on an array of programs to infuse cash into the banking system.[41] In addition, the Federal Reserve has kept interest rates close to zero, allowing banks to borrow at almost no cost and to lend at higher rates so as to practically guarantee risk-free

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[37] FDIC 2009 Annual Report; FRB 2009 Annual Report; OCC 2009 Annual Report; OTS 2009 Annual Report.

[38] FDIC Database of Failures and Assistance Transactions, *available at* http://www2.fdic.gov/hsob/SelectRpt.asp?EntryTyp=30.

[39] FDIC Database of Failures and Assistance Transactions, *available at* http://www2.fdic.gov/hsob/SelectRpt.asp?EntryTyp=30.

[40] FDIC Failed Bank List, *available at* http://www.fdic.gov/bank/individual/failed/banklist.html.

[41] Congressional Oversight Panel, *September Oversight Report: Assessing the TARP on the Eve of Its Expiration*, at 145-146 (Sept. 16, 2010).

profits. This is estimated to cost savers $350 billion each year as banks do not have to compete for depositors' funds, and therefore may offer only low interest rates on deposits.[42]

During the same period, only one Money Fund, the Reserve Primary Fund, failed to return investors' shares at less than 100 cents on the dollar.[43] Nonetheless, the massive requests for redemptions by the Reserve Primary Fund shareholders beginning on September 15, 2008 when Lehman declared bankruptcy, and Reserve's announcement the following day that it would re-price its shares, triggered a run by investors in other prime Money Funds who feared that those funds' holdings of commercial paper of other financial institutions would decline in value. Numerous Money Funds liquidated assets or imposed redemption limits[44] and a number of funds obtained support from their advisers or other affiliated persons.[45] As the PWG Report describes, the liquidation of Money Fund assets to meet redemptions led to a reduction of Money Fund holdings of commercial paper by about 25 percent.[46]

No Money Funds were "bailed out" by the government, but the extraordinary conditions in the market, including illiquidity in the secondary market for commercial paper, led to the

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[42] Yalman Onaran and Alexis Leondis, *Wall Street Bailout Returns 8.2% Profit Beating Treasury Bonds*, Bloomberg (Oct. 20, 2010), *available at* http://www.bloomberg.com/news/2010-10-20/bailout-of-wall-street-returns-8-2-profit-to-taxpayers-beating-treasuries.html.

[43] On September 16, 2008, the Reserve Primary Fund's shares were priced at 97 cents after it wrote off debt issued by Lehman Brothers, which had declared bankruptcy the day before. Even so, this event was in large part due to misconduct by the Fund's management, as the SEC has alleged in a pending enforcement proceeding. *See* SEC Press Release: *SEC Charges Operators of Reserve Primary Fund With Fraud* , May 5, 2009, *available at* http://www.sec.gov/news/press/2009/2009-104.htm and related SEC Complaint, *available at* http://www.sec.gov/litigation/complaints/2009/comp21025.pdf, at 35. Moreover, Reserve Fund shareholders recovered more than 99 cents on the dollar after it closed. Press Release, *Reserve Primary Fund to Distribute $215 Million* (July 15, 2010), *available at* http://www.reservefunds.com/pdfs/Primary%20Distribution_71510.pdf; SEC Press Release: *Reserve Primary Fund Distributes Assets to Investors* (Jan. 29, 2010), *available at* http://www.sec.gov/news/press/2010/2010-16.htm.

[44] In response to a request, the SEC, by order, permitted suspension of redemptions in certain Reserve funds in order to allow for orderly liquidation. *See Matter of The Reserve Fund*, Investment Company Act Release No. 28386 (Sept. 22, 2008), 73 Fed. Reg. 55572 (Sept. 25, 2008); Reserve Municipal Money-Market Trust, et al., Investment Company Act Release No. 28466 (Oct. 24, 2008), 73 Fed. Reg. 64993 (Oct. 31, 2008).

[45] The SEC notes that with the exception of the Reserve Primary Fund, all of the funds that were exposed to losses during 2007-2008 from debt securities issued by structured investment vehicles or as a result of the default of debt securities issued by Lehman Brothers Holdings Inc. obtained support of some kind from their advisers or other affiliated persons, who absorbed the losses or provided a guarantee covering a sufficient amount of losses to prevent these funds from breaking the buck. *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10061 (Mar. 4, 2010).

[46] *See* REPORT OF THE PRESIDENT'S WORKING GROUP ON FINANCIAL MARKETS, MONEY MARKET FUND REFORM OPTIONS 12, *available at* http://treas.gov/press/releases/docs/10.21%20PWG%20Report%20Final.pdf.

adoption of special measures to restore confidence in the money markets and Money Funds and address the freeze-up in the commercial paper market. The Treasury Department implemented a limited "Temporary Guarantee Program for Money Market Funds" whereby Money Funds could, in exchange for a payment, receive insurance on investors' holdings such that if shares broke the buck, they would be restored to a $1 net asset value ("NAV").[47] The program expired about one year later, experienced no losses (because the insurance guarantee was never called upon), and earned the Treasury about $1.2 billion in participation fees.[48]

The Federal Reserve also created an "Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility" ("AMLF") to provide credit for banks and bank holding companies to finance their purchases of commercial paper from Money Funds.[49] This program lent $150 billion in just its first 10 days of operation and was terminated with no credit losses.[50] All loans made under the AMLF were repaid in full, with interest, in accordance with the terms of the facility.[51] Indeed, the Federal Reserve Bank of Boston Statements of Income and Comprehensive Income for the years ended December 31, 2009 and December 31, 2008 show the total amount of interest income made on "other loans" (which refers to the AMLF program) during 2008 and 2009 was $543 million ($470 million and $73 million in 2008 and 2009, respectively).[52] Advances made under the AMLF were made at a rate equal to the primary credit rate offered by the Boston Federal Reserve Bank to depository institutions at the time the advance was made.[53] In sum, the program was extremely profitable to the government. Both

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[47] Press Release, *Treasury Announces Guaranty Program for Money Market Funds* (Sept. 29, 2008), *available at* http://www.treas.gov/press/releases/hp1147.htm.

[48] Press Release, *Treasury Announces Expiration of Guarantee Program for Money Market Funds* (Sept. 19, 2009), *available at* http://www.ustreas.gov/press/releases/tg293.htm.

[49] Federal Reserve Board, *Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility, available at* http://www.federalreserve.gov/monetarypolicy/abcpmmmf.htm.

[50] Burcu Duygan-Bump, Patrick M. Parkinson, Eric S. Rosengren, Gustavo A. Suarez, and Paul S. Willen, QAU Working Paper No. QAU10-3, *How Effective Were the Federal Reserve Emergency Liquidity Facilities? Evidence from the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility* (available at http://www.bos.frb.org/bankinfo/qau/wp/2010/qau1003.htm). The program ceased operation in February, 2010. Federal Reserve Board Press Release, FOMC Statement (Jan. 27, 2010), *available at* http://www.federalreserve.gov/newsevents/press/monetary/20100127a.htm.

[51] Federal Reserve Board, *Monthly Report on Credit and Liquidity Programs and the Balance Sheet,* Appendix B at 31 (October 2010), *available at* http://www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201010.pdf.

[52] *See* The Federal Reserve Bank of Boston, Financial Statements as of and for the Years Ended December 31, 2009 and 2008 and Independent Auditors' Report, *available at* http://www.federalreserve.gov/monetarypolicy/files/BSTBostonfinstmt2009.pdf.

[53] *Id.*, at 19.

programs were limited in scope and involved relatively low risk to taxpayers when compared to other steps taken by the government during the financial crisis.

Going forward, the type of intervention in which the Government may engage will be limited. Congress has forbidden the use of the Exchange Stabilization Fund to guarantee the obligations of Money Funds.[54] The Federal Reserve Board's lending authority has been restricted by Section 1101 of the DFA, so that it is not permitted to lend to individual firms that are insolvent.[55] In addition, under Section 214 of the DFA, financial companies placed in receivership under Title II of the DFA cannot receive bailouts or taxpayer-funded expenditures to prevent their liquidation.[56] It is anticipated that these limitations will go a long way in promoting market discipline by eliminating expectations of a Government "bail out" – either of Money Funds or other financial institutions.

Moreover, although the Council has just begun to consider the use of the Government's new tools under the DFA to identify and apply new prudential regulation to systemically significant nonbank institutions that, like Lehman, may rely heavily upon short term funding, the SEC, as discussed below, already has acted to substantially enhance the liquidity of Money Funds and further enhance their ability to withstand the potential failure of institutions in whose securities they invest. In addition, the SEC in September 2010 proposed new rules that will shed new light on a company's short-term borrowing practices, including balance sheet "window dressing."[57] The SEC's proposed rules require public companies to disclose additional information to investors about short-term borrowing arrangements, including commercial paper, repurchase agreements, letters of credit, promissory notes, and factoring, used to fund their operations.[58] These actions by the SEC, in combination with future actions by the Council and

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[54] Economic Emergency Stabilization Act of 2008, Div. A of Pub. L. 110-343 (Oct. 3, 2008), §131(b).

[55] Pub. L. No. 111-203, § 1101.

[56] Pub. L. No. 111-203, § 214.

[57] *See* Release No. 33-9143, *Short-Term Borrowings Disclosure*, 75 Fed. Reg. 59866 (Sept. 28, 2010). Currently, SEC rules require public companies to disclose short-term borrowings at the end of the reporting period, but generally there is no requirement to disclose information about the amount of short-term borrowings outstanding throughout the reporting period. The only exception is for bank holding companies, which must disclose annually the average and maximum amounts of short-term borrowings outstanding during the year.

[58] *See* Release No. 33-9143, *Short-Term Borrowings Disclosure*, 75 Fed. Reg. 59866 (Sept. 28, 2010). The proposed rules distinguish between "financial companies" and other companies. Financial companies would be required to report data for the maximum daily amounts outstanding (meaning the largest amount outstanding at the end of any day in the reporting period) and the average amounts outstanding during the reporting period computed on a daily average basis (meaning the amount outstanding at the end of each day, averaged over the reporting period). All other companies would be permitted to calculate averages using an averaging period not to exceed a month and to disclose the maximum month-end amount during the period. *See id.* *See also*, Release No. 33-9144,

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Federal Reserve to apply prudential regulation to certain financial institutions that are issuers of the commercial paper purchased by Money Funds, should, in combination, amplify and reinforce each other to prevent or mitigate the impact of future failures of systemically significant financial institutions and, in particular, mitigate the impact of their failures on investors, such as Money Funds, in the short-term markets.

SEC Regulation of Money Funds

A former federal bank regulator recently testified before the Financial Crisis Inquiry Commission ("FCIC") that Money Funds were not regulated, and the FCIC summarized in its report that:

> money market funds had no capital or leverage standards…. The funds had to follow only regulations restricting the type of securities in which they could invest, the duration of those securities, and the diversification of their portfolios. These requirements were supposed to ensure that investors' shares would not diminish in value and would be available anytime-- important reassurances, but not the same as FDIC insurance.[59]

The truth is that Money Funds are ***comprehensively regulated*** by the SEC under a statute and regulations that essentially require them to be capitalized entirely with equity and that preclude the use of leverage. The SEC regulations restricting the type of securities in which Money Funds can invest and their maturity and duration are a central reason why only two Money Funds have broken the buck in forty years of the industry's existence; and in those two cases investors got back the overwhelming majority of their investments relatively quickly. The regulatory regime governing Money Funds is not the same as FDIC insurance, it is far more effective than the FDIC and the regime of federal banking regulation, both in protecting Money Funds and their customer/investors against insolvency and in protecting the federal government from having to bail them out. Money Funds do not represent a case of no regulation, but of profoundly successful, yet simple and extraordinarily elegant, regulation.

The stability of Money Funds – especially when compared with banks – is due in large part to a regulatory system that provides for investor protection, active oversight, inspections and a competitive environment. The investment restrictions applicable to Money Funds are far more

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Commission Guidance on Presentation of Liquidity and Capital Resources Disclosures in Management's Discussion and Analysis, 75 Fed. Reg. 59894 (Sept. 28, 2010).

[59] Final Report of the National Commission on the Causes of the Financial and Economic Crisis In the United States, January 2011, at 33.

stringent than those that apply to banks in terms of duration, credit quality, and liquidity. In brief, Money Funds may invest in debt instruments in which a national bank may invest, including prime commercial paper, bank deposits, short-term U.S. government securities, and short-term municipal government securities.[60] However, they may not invest in many of the higher risk, less liquid and longer-term investments that national banks may own, such as medium and long-term government or corporate debt and most types of loans (*e.g.*, mortgages and consumer loans). In short, Money Fund investment portfolios are far less risky and far more liquid than those of banks. They need to be. Money Funds do not rely on a Federal government guarantee to operate.

Money Funds are a type of mutual fund. As such, they must register with the SEC as "investment companies" under the Investment Company Act, which subjects them to stringent regulatory, disclosure, and reporting provisions. Thus, they must register offerings of their securities with the SEC and provide perpetually updated prospectuses to potential investors. They must also file periodic reports with the SEC and provide shareholders with annual and semi-annual reports, which must include financial data and a list of portfolio securities. In addition, the Investment Company Act governs virtually every aspect of a mutual fund's structure and operations, including its capital structure, investment activities, valuation of shares, the composition of the board, and the duties and independence of its directors. Mutual funds also are subject to extensive recordkeeping requirements and regular inspections. In addition, the advisers to mutual funds, including Money Funds, are subject to SEC registration under the Investment Advisers Act of 1940 ("Advisers Act"), which imposes its own reporting and recordkeeping requirements, prescribes the terms of advisory contracts, and provides for SEC inspections and examinations. Of particular significance to the Section 113 analysis, investment companies (including Money Funds) are restricted from investing in securities firms or their holding companies,[61] from lending to or borrowing from other investment companies with whom they are affiliated,[62] or from jointly investing alongside other related Money Funds in other companies.[63] As a result, the financial conditions of different investment companies (even if they have the same investment adviser) generally are not linked to one another in the way that is common, for example, among correspondent or affiliate banks.[64]

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[60] 12 U.S.C. 24 (Seventh), 12 C.F.R. Part 1.

[61] Investment Company Act § 12(d).

[62] See Investment Company Act §§ 17(a)(3),(4) (restricting borrowing and lending by investment companies and their affiliates).

[63] Investment Company Act §§ 12(a)(2); 17(d).

[64] See, 12 U.S.C. §§ 371c, 371c-1; 12 C.F.R. § 223 (sister bank exemption permitting lending and other transactions between affiliate banks), 12 U.S.C. § 1815(e) (cross-guarantee liability of affiliated banks). In this fashion, losses at

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Money Funds are subject to an additional SEC regulation: Rule 2a-7 under the Investment Company Act.[65] Money Funds seek to generate income and preserve investor funds by investing in short-term, high-quality debt. At the same time, they seek to maintain a stable NAV of $1 per share, so Rule 2a-7 permits a Money Fund to maintain a stable net asset value by using the "amortized cost" method of accounting.[66] This comes subject to the strict requirements of Rule 2a-7 to ensure that these funds are as stable and low risk as possible. Thus, a Money Fund must meet stringent portfolio liquidity, credit quality, maturity, and diversification requirements. These were strengthened by amendments in 2010 that were "designed to make money market funds more resilient to certain short-term market risks, and to provide greater protections for investors in a money market mutual fund that is unable to maintain a stable net asset value per share."[67] In particular, Rule 2a-7 and related SEC rules impose requirements on Money Funds in the following areas:

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one bank can precipitate losses at other banks. In fact, it was in this very context that the term "too big to fail" was first used – as an explanation of the bailout of Continental Illinois National Bank and Trust Company in 1984. The FDIC has explained that in that case

> the regulators' greatest concern was systemic risk … . Continental had an extensive network of correspondent banks, almost 2,300 of which had funds invested in Continental; more than 42 percent of those banks had invested funds in excess of $100,000, with a total investment of almost $6 billion. The FDIC determined that 66 of these banks, with total assets of almost $5 billion, had more than 100 percent of their equity capital invested in Continental and that an additional 113 banks with total assets of more than $12 billion had between 50 and 100 percent of their equity capital invested.

See FDIC Study: *History of the Eighties — Lessons for the Future*, Part 2.7, Continental Illinois and "Too Big to Fail," at 250 (available at http://www.fdic.gov/bank/historical/history/vol1.html). In this situation, the FDIC concluded that "handling Continental through a payoff and liquidation was simply not … a viable option." Instead, the bank was provided with a $2 billion government rescue package and the FDIC purchased 4.5 billion in bad loans. *History of the Eighties — Lessons for the Future*, Part 2.7 at 244. *See also* FDIC *Managing the Crisis: The FDIC and RTC Experience* at 542 (describing how the failure of Penn Square Bank led to the forced merger of the holding company of Seattle First National Bank) (available at http://www.fdic.gov/bank/historical/managing/history2-03.pdf).

[65] *See* 17 C.F.R. § 270.2a-7.

[66] Under the "amortized cost" method of accounting, Money Funds value the securities in their portfolios at acquisition cost as adjusted for amortization of premium or accretion of discount rather than market value. *See* 17 C.F.R. § 270.2a-7(a)(2). The Rule also allows Money Funds to use the "penny-rounding" method of pricing, which permits rounding to one cent rather than one-tenth of a cent. 17 C.F.R. § 270.2a-7(a)(20). However, this method is seldom used because it does not eliminate daily "mark to market" accounting requirements.

[67] *See* Release No. IC-29132, 75 Fed. Reg. 10060 (Mar. 4, 2010).

Liquidity. Under the 2010 amendments to Rule 2a-7, a Money Fund is required to have a minimum percentage of its assets in highly liquid securities so that it can meet reasonably foreseeable shareholder redemptions.[68] Under new minimum daily liquidity requirements applicable to all taxable Money Funds, at least 10 percent of the assets in the fund must be in cash, U.S. Treasury securities, or securities that convert into cash (*e.g.*, mature) within one business day. In addition, under a new weekly requirement applicable to all Money Funds, at least 30 percent of assets must be in cash, U.S. Treasury securities, certain other government securities with remaining maturities of 60 days or less, or securities that convert into cash within five business days. No more than 5 percent of a fund's portfolio may be "illiquid" (i.e., cannot be sold or disposed of within seven days at carrying value). Prior to the 2010 amendments, Rule 2a-7 did not include any minimum liquidity requirements.

High Credit Quality. Rule 2a-7 limits a Money Fund to investing in securities that are, at the time of their acquisition, "Eligible Securities." "Eligible Securities" include a rated security with a remaining maturity of 397 calendar days or less that has received a rating by two designated nationally recognized statistical rating organizations ("NRSROs") in one of the two highest short-term rating categories and unrated securities of comparable quality.[69] Under the 2010 amendments, 97% of a Money Fund's assets must be invested in "First Tier Securities."[70]

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[68] Depending upon the volatility of the fund's cash flows (in particular shareholder redemptions), a fund may be required to maintain greater liquidity than would be required by the daily and weekly minimum liquidity requirements set forth in Rule 2a-7. *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10074 (Mar. 4, 2010).

[69] Under Rule 2a-7(a)(12), if only one designated NRSRO has rated a security, it will be considered a rated security if it is rated within one of the rating agency's two highest short-term rating categories. Under certain conditions, a security that is subject to a guarantee or that has a demand feature that enhances its credit quality may also be deemed an "Eligible Security." In addition, an unrated security that is of comparable quality to a rated security also may qualify as an "Eligible Security."

[70] A "First Tier Security" means any Eligible Security that:

(i) is a Rated Security (as defined in Rule 2a-7) that has received a short-term rating from the requisite NRSROs in the highest short-term rating category for debt obligations (within which there may be sub-categories or gradations indicating relative standing);

(ii) is an unrated security that is of comparable quality to a security meeting the requirements for a rated security in (i) above, as determined by the fund's board of directors;

(iii) is a security issued by a registered investment company that is a Money Fund; or

(iv) is a Government Security.

The term "requisite NRSROs" is defined in Rule 2a-7(a)(23) to mean "(i) Any two Designated NRSROs that have issued a rating with respect to a security or class of debt obligations of an issuer; or (ii) If only one Designated NRSRO has issued a rating with respect to such security or class of debt obligations of an issuer at the time the fund acquires the security, that Designated NRSRO."

Only 3 percent of its assets may be held in lower quality, "Second Tier Securities."[71] Previously, a Money Fund was permitted to invest 5% of its assets in "Second Tier Securities." In addition, a Money Fund may not invest more than ½ of 1 percent of its assets in "Second Tier Securities" issued by any one issuer (rather than the previous limit of the greater of 1 percent or $1 million). Under the 2010 amendments, a Money Fund also is prohibited from purchasing "Second Tier Securities" that mature in more than 45 days (rather than the previous limit of 397 days). As required by the DFA, the SEC has proposed the remove the references to NRSRO ratings and replace them with equivalent high credit quality determinations by the fund board or its designee.[72]

Short Maturity Limits. Rule 2a-7 limits the exposure of Money Funds to risks like sudden interest rate movements by restricting the average maturity of portfolio investments. (This also helps a Money Fund maintain a stable NAV). Under the 2010 amendments to Rule 2a-7, the "weighted average maturity" of a Money Fund's portfolio is restricted to 60 days (compared to the previous limit of 90 days). In addition, the 2010 amendments limit the maximum "weighted average life" maturity of a fund's portfolio to 120 days. This restriction limits the fund's ability to invest in long-term floating rate securities. (Previously, there was no such restriction.) Thus, the "maturity mismatch" that Money Funds are subject to is far smaller than that faced by banks, which offer demand deposits, but make long-term loans.

Periodic Stress Tests. Under the 2010 amendments to Rule 2a-7, the board of directors of each Money Fund must adopt procedures providing for periodic stress testing of the funds' portfolio. Fund managers are required to examine a fund's ability to maintain a stable NAV per share based upon certain hypothetical events. These include a change in short-term interest rates, higher redemptions, a downgrade of or default on portfolio securities, and widening or narrowing of spreads between yields on an appropriate benchmark selected by the fund for overnight interest rates and commercial paper and other types of securities held by the fund. Previously, Money Funds were not subject to stress test requirements.

NRSRO Ratings. Rule 2a-7 limits a Money Fund's investment in rated securities to those rated in the top two rating categories or unrated securities of comparable quality. It also requires Money Funds to perform independent credit analyses of every security they purchase. Credit ratings help funds screen credit quality, but are never the sole factor relied upon in making an

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[71] Second Tier Securities are any Eligible Securities that are not First Tier Securities.

[72] SEC, *References to Credit Ratings in Certain Investment Company Act Rules and Forms*, 76 Fed. Reg. 12896 (Mar. 9, 2011).

investment decision.[73] Under the 2010 amendments, improvements were made to the way that funds evaluate securities ratings by NRSROs. A Money Fund's board is required to designate annually at least four NRSROs that will be used by the fund based on the board's determination on at least an annual basis that such credit ratings are sufficiently reliable. This permits a Money Fund to disregard ratings by NRSROs that have not been so designated for purposes of satisfying the Rule's minimum rating requirements. The previous requirement that funds invest only in those asset-backed securities that have been rated by an NRSRO was eliminated.[74] Consistent with the DFA, the SEC is in process of further amending its rules to reduce the role of ratings in the process of selecting investments by Money Funds.[75]

Repurchase Agreements. Money Funds generally invest a significant part of their assets in repurchase agreements. Many such agreements mature the following day and provide an immediate source of liquidity. In 2010, the SEC adopted two changes to Rule 2a-7 that strengthen the requirements for permitting a Money Fund to "look through" the repurchase issuer to the underlying collateral securities for diversification purposes. First, the SEC limited Money Funds to investing in repurchase agreements collateralized by cash items or government securities (in contrast to the prior requirement of highly rated securities) in order to obtain special treatment of those investments under the diversification provisions of Rule 2a–7. Second, the fund's board of directors must evaluate the creditworthiness of the counterparty. This amendment requires a fund adviser to determine that the counterparty is a creditworthy institution, separate and apart from the value of the collateral supporting the counterparty's

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[73] The DFA gave the SEC new authority to regulate NRSROs in order to improve the quality and reliability of credit ratings. A new Office of Credit Ratings to be established within the SEC in order to protect users of credit ratings and promote credit rating accuracy will administer the SEC's rules with respect to the practices of NRSROs in determining ratings. The SEC is required to examine NRSROs at least once a year and make its inspection reports publicly available. The SEC has been given additional rulemaking authority to take steps to enhance the accuracy and integrity of credit ratings and increase the transparency of the credit rating process. The DFA also increases the potential liability of credit rating agencies**.** The increased oversight of NRSROs by the SEC authorized by the DFA helps ensure that issues and risks associated with inappropriate credit ratings of commercial paper held by Money Funds are less likely to occur.

[74] The SEC noted in the release adopting the 2010 amendments that as part of the minimal credit risk analysis that any Money Fund must conduct before investing in an asset-backed security ("ABS"), the fund's board should: (i) analyze the underlying ABS assets to ensure that they are properly valued and provide adequate asset coverage for the cash flows required to fund the ABS under various market conditions; (ii) analyze the terms of any liquidity or other support provided by the sponsor of the ABS; and (iii) perform legal, structural, and credit analyses required to determine that the particular ABS involves appropriate risks for the fund. *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10070 (Mar. 4, 2010). In October, 2009, the SEC deferred consideration of proposals to remove NRSRO references from Rule 2a-7. Release No. IC–28940, 74 Fed. Reg. 52374 (Oct. 9, 2009).

[75] SEC, *References to Credit Ratings in Certain Investment Company Act Rules and Forms*, 76 Fed. Reg. 12896 (Mar. 9, 2011).

obligation under the repurchase agreement. The 2010 amendments are designed to prevent losses caused by a counterparty's default.[76]

Monthly Disclosure of Portfolio Information. Under the 2010 amendments, Money Funds must post their portfolio holdings each month on their websites and maintain this information for no less than six months after posting.[77] (Previously, Money Funds were not required to disclose information on their websites). Under the 2010 amendments, Money Funds also must now file monthly reports of portfolio holdings with the SEC,[78] which must include the market-based values of each portfolio security and the fund's "shadow" NAV.[79] The information becomes publicly available after 60 days.[80] (Previously, a Money Fund's "shadow" NAV was reported twice a year with a lag of 60 days).

Redemptions / Know Your Customer. Under a new requirement added to Rule 2a-7 in 2010, Money Funds must hold securities that are sufficiently liquid to meet reasonably foreseeable redemptions. (Previously, there was no such requirement). To satisfy this new requirement, a Money Fund must adopt policies and procedures to identify the risk characteristics of large shareholders and anticipate the likelihood of large redemptions.[81] Depending upon the volatility of its cash flows, and in particular shareholder redemptions, this may require a fund to maintain greater liquidity than would be required by the daily and weekly minimum liquidity requirements discussed above.[82]

Processing of Transactions. Under a new requirement adopted in 2010, Rule 2a–7 requires a Money Fund to have the capacity to redeem and sell its securities at a price based on its current NAV. This requirement applies even if the fund's current net asset values does not correspond to the fund's stable net asset value or price per share. The new requirement minimizes operational difficulties in satisfying shareholder redemption requests and increases speed and efficiency if a fund breaks the buck. This change requires Money Funds to be able to process redemptions and thus provide liquidity if market prices of their portfolio assets decline, rather than defer share redemptions and corresponding sales of portfolio assets in order to avoid recognizing that decline in portfolio value. In essence, if market conditions dictate a movement

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[76] *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10081 (Mar. 4, 2010).

[77] 17 C.F.R. § 270.2a-7(c)(12).

[78] 17 C.F.R. § 270.30b1-7(a).

[79] *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10083 (Mar. 4, 2010).

[80] 17 C.F.R. § 270.30b1-7(b).

[81] *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10075, n.198 and accompanying text (Mar. 4, 2010).

[82] *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10074 (Mar. 4, 2010).

to a floating NAV in order to process transactions and provide liquidity to redeeming shareholders, Rule 2a-7 requires Money Funds to do so. By forcing shareholder transactions to be processed at a price other than $1.00 when portfolio asset market conditions dictate, this rule change both enhances liquidity and addresses policy concerns over potential "runs" by shareholders seeking to redeem Money Fund shares ahead of unrecognized portfolio price declines or related deferrals by Money Funds of processing of redemptions.

Handling Default in a Portfolio Instrument. Rule 2a-7 establishes procedures that a Money Fund must follow if a portfolio instrument is downgraded or a default or other event occurs with respect thereto. In some cases, a fund may be required to dispose of, or reduce its investments in, the issuers of such instruments.

Shadow Pricing. To reduce the chance of a material deviation between the amortized cost value of a portfolio and its market-based value, Rule 2a-7 requires Money Funds to "shadow price" the amortized cost net asset value of the fund's portfolio against its mark-to-market net asset value. If there is a deviation of more than ½ of 1 percent, the fund's board of directors must promptly consider what action, if any, it should take,[83] including whether the fund should discontinue using the amortized cost method of valuation and re-price the securities of the fund below (or above) $1.00 per share.[84] Regardless of the extent of the deviation, Rule 2a–7 obligates the board of a Money Fund to take action whenever it believes any deviation may result in material dilution or other unfair results to investors.[85]

Diversification. In order to limit the exposure of a Money Fund to any one issuer or guarantor, Rule 2a-7 requires the fund's portfolio to be diversified with regard to both issuers of securities it acquires and guarantors of those securities.[86] Money Funds generally must limit their investments in the securities of any one issuer (other than Government securities) to no more than five percent of fund assets.[87] Money Funds also must generally limit their investments in securities subject to a demand feature or a guarantee to no more than ten percent of fund assets

[83] 17 C.F.R. § 270.2a-7(c)(8)(ii)(B).

[84] *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10061 (Mar. 4, 2010).

[85] 17 C.F.R. § 270.2a-7(c)(8)(ii)(C).

[86] 17 C.F.R. § 270.2a-7(c)(4)(i).

[87] Rule 2a-7(c)(4)(i)(A). Rule 2a-7 includes a safe harbor that permits a taxable and national tax exempt fund to invest up to 25 percent of its assets in the first tier securities of a single issuer for a period of up to three business days after acquisition (but a fund may use this exception for only one issuer at a time). Rule 2a-7(c)(4)(i)(A).

from any one provider.[88] As noted above, under the 2010 amendments to Rule 2a-7, a Money Fund may not invest more than ½ of 1 percent of its assets in "Second Tier Securities" issued by any one issuer.

Risk Management. Money Funds have robust risk management requirements, beginning with Rule 2a-7's requirements that they limit holdings to the safest, most liquid and short-term investments and strict diversification requirements. Moreover, boards of Money Funds have substantial, detailed, and ongoing risk management responsibilities. For example, Money Fund boards must adopt written procedures regarding:

- Stabilization of NAV (which must take current market conditions, shadow pricing and consideration of material dilution and unfair results into account);
- Ongoing review of credit risks and demand features of portfolio holdings;
- Periodic review of decisions not to rely on demand features or guarantees in the determination of a portfolio security's quality, maturity or liquidity; and
- Periodic review of interest rate formulas for variable and floating rate securities in order to determine whether adjustments will reasonably value a security.

In order to ensure that boards are diligent and act in good faith, funds must also keep and maintain records of board consideration and actions taken in the discharge of their responsibilities. Management's decision-making processes must also be reflected in records such as whenever a security is determined to present a minimal credit risk, or when it makes a determination regarding deviations in amortized value and market value of securities and others.

Delegations of responsibilities by the board must be pursuant to written guidelines and procedures, and the board must oversee the exercise of responsibilities. Even then, boards may not delegate certain functions, such as any decisions as to whether to continue to hold securities that are subject to default, or that are no longer eligible securities, or that no longer present minimal credit risk, or whose issuers have experienced an event of insolvency, or that have been downgraded under certain circumstances Nor may boards delegate their responsibility to consider action when shadow pricing results in a deviation of 1/2 of 1%, or to determine whether such deviations could result in dilution or unfairness to investors.

Rule 2a-7 provides that if a "First Tier Security" is downgraded to a "Second Tier Security" or the fund's adviser becomes aware that any unrated security or Second Tier Security

[88] Rule 2a-7(c)(4)(iii). With respect to 25 percent of total assets, holdings of a demand feature or guarantee provider may exceed the 10 percent limit subject to certain conditions. *See* Rule 2a-7(c)(4)(iii)(A), (B), and (C). *See also* Rule 2a-7(a)(8) (definition of "demand feature") and (a)(15) (definition of "guarantee").

has been downgraded, the board must reassess promptly whether the security continues to present minimal credit risks and must cause the fund to take actions that the board determines is in the best interests of the fund and its shareholders.[89] A reassessment is not required if the fund disposes of the security (or it matures) within five business days of the event.[90]

If securities accounting for 1/2 of 1% or more of a Money Fund's total assets default (other than an immaterial default unrelated to the issuer's financial condition) or become subject to certain events of insolvency, the fund must promptly notify the SEC and indicate the actions the Money Fund intends to take in response to such event.[91] If an affiliate of the fund purchases a security from the fund in reliance on Rule 17a-9, the SEC must be notified of the identity of the security, its amortized cost, the sale price, and the reasons for such purchase.[92]

In the event that after giving effect to a rating downgrade, more than 2.5 percent of the Money Fund's total assets are invested in securities issued by or subject to demand features from a single institution that are "Second Tier Securities," the fund must reduce its investments in such securities to 2.5% or less of its total assets by exercising the demand features at the next exercise date(s), unless the fund's board finds that disposal of the portfolio security would not be in the best interests of the fund.[93]

When a portfolio security defaults (other than an immaterial default unrelated to the financial condition of the issuer), ceases to be an Eligible Security, has been determined to no longer present minimal credit risks, or certain events of insolvency occur with respect to the issuer of a portfolio security or the provider of any demand feature or guarantee of a portfolio security, the Money Fund is required to dispose of the security as soon as practicable consistent with achieving an orderly disposition of the security (by sale, exercise of a demand feature, or otherwise), unless the fund's board finds that disposal of the portfolio security would not be in the best interests of the fund.[94]

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[89] *See* 17 C.F.R. § 270.2a-7(c)(7)(i)(A).

[90] Where a Money Fund's investment adviser becomes aware that any unrated security or "Second Tier Security" held by the fund has, since the security was acquired by the fund, been given a rating by a Designated NRSRO below the Designated NRSRO's second highest short-term rating category, the board must be subsequently notified of the adviser's actions. *See* 17 C.F.R. § 270.2a-7(c)(7)(i)(B).

[91] *See* 17 C.F.R. § 270.2a-7(c)(7)(iii)(A).

[92] *See* 17 C.F.R. § 270.2a-7(c)(7)(iii)(B).

[93] *See* 17 C.F.R. § 270.2a-7(c)(7)(i)(C).

[94] *See* 17 C.F.R. § 270.2a-7(c)(7)(ii).

Fund Liquidation. New SEC Rule 22e-3,[95] adopted in 2010, permits a Money Fund's board of directors to suspend redemptions and postpone payment of redemption proceeds if the fund is about to break the buck and the board decides to liquidate the fund. Previously, the fund board was required to obtain an order from the SEC before suspending redemptions. This amendment is designed to facilitate an orderly liquidation of fund assets in the event of a threatened run on the fund.[96] As described further below, the SEC has broad powers under the Investment Company Act and other federal securities laws to oversee the liquidation of a Money Fund.

Purchases by Sponsors or Other Affiliated Persons. The SEC also adopted new rules in 2010 that expand the ability of affiliated persons to purchase distressed assets from a Money Fund in order to protect the fund from losses.[97] Prior to the 2010 amendments to Rule 17a-9 under the Investment Company Act, an affiliate could not purchase securities from the fund before a ratings downgrade or a default of the securities without receiving individual relief from the SEC. The 2010 amendments permit such purchases without the need for relief from the SEC under conditions that protect the fund from transactions that disadvantage the fund.[98] The SEC also adopted a related amendment to Rule 2a-7, which requires funds to report all such transactions to the SEC.

Explicit Disclosures to Investors that the Fund is Not Federally Insured. Money Fund investors receive explicit disclosure that investments in Money Funds are not insured or guaranteed by the Federal Deposit Insurance Corporation. Item 4(b) of the Form N-1A registration form that is used by open-end management investment companies to register under the Investment Company Act and to offer their shares under the Securities Act states that if a fund is a Money Fund, it must state:

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[95] *See* 17 C.F.R. § 270.22e-3.

[96] The rule permits a fund to suspend redemptions and payment of proceeds if (i) the fund's board, including a majority of disinterested directors, determines that the deviation between the fund's amortized cost price per share and the market-based net asset value per share may result in material dilution or other unfair results to investors, (ii) the board, including a majority of disinterested directors, irrevocably has approved the liquidation of the fund, and (iii) the fund, prior to suspending redemptions, notifies the SEC of its decision to liquidate and suspend redemptions.

[97] *See* 17 C.F.R. § 270.17a-9.

[98] Rule 17a–9 provides an exemption from Section 17(a) of the Investment Company Act to permit affiliated persons of a Money Fund to purchase distressed portfolio securities from the fund. Absent an SEC exemption, Section 17(a)(2) prohibits any affiliated person or promoter of or principal underwriter for a fund (or any affiliated person of such a person), acting as principal, from knowingly purchasing securities from the fund. Rule 17a–9 exempts certain purchases of securities from a Money Fund from Section 17(a), if the purchase price is equal to the greater of the security's amortized cost or market value (in each case, including accrued interest). *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10087 (Mar. 4, 2010), at n.365.

> An investment in the Fund is not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency. Although the Fund seeks to preserve the value of your investment at $1.00 per share, it is possible to lose money by investing in the Fund.

In addition, if a Money Fund is advised by or sold through an insured depository institution, the above disclosure must be combined in a single statement with disclosure that an investment in the fund is not a deposit of the bank and is not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency.

For those Money Funds that are rated by NRSROs, additional stringent criteria beyond the requirements of Rule 2a-7 must be met to achieve the top ratings. The ratings criteria of the NRSROs recently have been made even more stringent based upon the lessons learned in 2008.

Standard & Poor's ("S&P") assigns "principal stability fund ratings" ("PFSRs") to Money Funds based on an analysis of the creditworthiness of a fund's investments and counterparties, the market exposure of its investments, its portfolio liquidity, and management's overall ability to maintain a stable NAV.[99] S&P does not rely on a fund sponsor's willingness and/or ability to support the fund's NAV, but does review and evaluate the measures that a sponsor chooses to take to support its NAV during times of market stress or when a fund sponsor decides to take action to support the fund's NAV or liquidity. S&P has recently proposed additional requirements for Money Funds to achieve its top ratings,[100] and has also proposed to modify its criteria for assessing counterparty credit risk.[101]

Fitch Ratings Research has Money Fund rating scale and rating definitions, from 'Bmmf' to 'AAAmmf.' To be rated 'AAAmmf,' a fund must have "extremely strong capacity to achieve its investment objective of preserving principal and providing shareholder liquidity through limiting credit, market, and liquidity risk."[102] Money Funds given Fitch's top rating of 'AAAmmf' meet more stringent criteria than is required under Rule 2a-7.[103]

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[99] *See* Standard & Poor's, *Principal Stability Fund Ratings Criteria*, published Feb. 2, 2007, on RatingsDirect® and at www.standardandpoors.com.

[100] *See* Standard & Poor's, *Principal Stability Fund Rating Criteria* (Jan. 5, 2010), *available at* http://www2.standardandpoors.com/spf/pdf/events/FITcon11410RFC.pdf. *See also* Release No. IC-29132, 75 Fed. Reg. 10060, 10073 n.176 (Mar. 4, 2010).

[101] These counterparty transactions include repos, reverse repurchase agreements, swaps, forward purchases, foreign-exchange contracts, and other hedging positions. *See Request for Comment: Fund Ratings Criteria*, Sep. 17, 2010, *available at* http://www.standardandpoors.com/ratings/articles/en/us/?assetID=1245224119805.

[102] *See* Fitch Ratings, *Global Money Market Fund Rating Criteria (Oct. 5, 2009), available at* http:// www.fitchratings.com/creditdesk/reports/ report_frame.cfm?rpt_id=470368; *Fitch Implements New Money Market*

Footnote continued on next page

Moody's Investors Service has also recently revised its rating scale and methodology for rating Money Funds. Its new methods are meant to better assess factors such as liquidity risk, market risk, asset quality and obligor concentrations.[104]

B. Money Funds Should Not Be Designated for Prudential Regulation under Title I or FDIC Receivership Under Title II of DFA

Sections 113 and 203 Standards for Designation as Applied to Money Funds

Nonbank financial companies can become subject to potential FDIC receivership either as a result of designation under Section 113 of Title I for additional Federal Reserve regulation, or through a separate systemic risk determination under Section 203 of Title II. Designation under Title I is closely related to potential for designation under Title II due to shared definitional criteria intertwining Titles I and II and the relationship through the Council among the agencies making the designations under Titles I and II.

Under Section 113 of the DFA, the Council has the authority to designate a U.S. nonbank financial company for supervision by the Federal Reserve and subject to its prudential regulation. To make this determination, the Council must find that material financial stress at the nonbank financial company or the nature, scope, size, scale, concentration, interconnectedness, or mix of its activities could pose a threat to U.S. financial stability. Paragraph 113(b)(2) sets out ten risk-related factors the Council must consider in making the determination, and permits the Council to consider other risk-related factors it deems appropriate. The Council's NPR sets out the text of a proposed rule implementing this provision, which repeats the same ten specific factors as well as the eleventh statutory catch-all of unspecified factors deemed appropriate by the Council by regulation or on a case-by-case basis. While not embodied in the proposed rule text, the NPR contains a discussion of these ten criteria that groups the ten criteria into six categories (size, lack of substitutes for the financial services and products the company provides,

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Footnote continued from previous page
Fund Criteria; Revises Ratings, Business Wire, Jan. 19, 2010, *available at* http://www.businesswire.com/news/home/20100119007345/en/Fitch-Implements-Money-Market-Fund-Criteria-Revises.

[103] *See* Fitch Ratings, *U.S. Money Market Funds: A Year of Changes and Challenges - and More to Come?*, Oct. 26, 2010, *available at* http://insurancenewsnet.com/article.aspx?id=232263&type=newswires.

[104] *Moody's Proposes New Money Market Fund Rating Methodology and Symbols*, Sept. 17, 2010, *available at* http://www.v3.moodys.com/researchdocumentcontentpage.aspx?docid=PBC_126642.

interconnectedness with other financial firms, leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny) for the Council to use in making a Section 113 designation.

Under Section 203 of the DFA, the FDIC, working with the Federal Reserve, can recommend to the Secretary of the Treasury (who also serves as chairman of the Council) that the Secretary designate a financial company for receivership under Title II, taking into consideration eight factors: (A) an evaluation of whether the financial company is in default or in danger of default; (B) a description of the effect that the default of the financial company would have on financial stability in the United States; (C) a description of the effect that the default of the financial company would have on economic conditions or financial stability for low income, minority, or underserved communities; (D) a recommendation regarding the nature and the extent of actions to be taken under this title regarding the financial company; (E) an evaluation of the likelihood of a private sector alternative to prevent the default of the financial company; (F) an evaluation of why a case under the Bankruptcy Code is not appropriate for the financial company; (G) an evaluation of the effects on creditors, counterparties, and shareholders of the financial company and other market participants; and (H) an evaluation of whether the company satisfies the definition of a financial company under section 201.

The Secretary, in consultation with the President of the United States, is permitted to designate a company for FDIC receivership under Title II after a recommendation by the FDIC and the Federal Reserve, if the Secretary makes a seven-part determination that: (1) the financial company is in default or in danger of default; (2) the failure of the financial company and its resolution under otherwise applicable Federal or State law would have serious adverse effects on financial stability in the United States; (3) no viable private sector alternative is available to prevent the default of the financial company; (4) any effect on the claims or interests of creditors, counterparties, and shareholders of the financial company and other market participants as a result of actions to be taken under this title is appropriate, given the impact that any action taken under this title would have on financial stability in the United States; (5) any action under section 204 would avoid or mitigate such adverse effects, taking into consideration the effectiveness of the action in mitigating potential adverse effects on the financial system, the cost to the general fund of the Treasury, and the potential to increase excessive risk taking on the part of creditors, counterparties, and shareholders in the financial company; (6) a Federal regulatory agency has ordered the financial company to convert all of its convertible debt instruments that are subject to the regulatory order; and (7) the company satisfies the definition of a financial company under section 201.

The NIFR and the NPR do not seek to define or specify criteria for designation of nonbank financial firms. The lack of specificity in the NIFR, the NPR, as well as in the closely-related Council and Federal Reserve rulemaking proposals, and the failure to describe the quantitative and qualitative considerations that underlie the regulators' application of these

criteria in assessing any potential institution is troubling. No objective quantitative measures are set forth in NIFR rule text, the new NPR or in the other related agency rulemakings, and it appears that none of the agencies are proposing to clarify publicly how they plan to arrive at a systemic risk designation under Title I or Title II.

This does not move the ball forward. If the FDIC, Federal Reserve and the Council do not create regulations that are reasonably specific, they will be subject to varying interpretations and unpredictable application. If rules remain ambiguous, firms (and investors in those firms) will not be able to accurately predict how they might be treated and what they should plan for, or what information would be appropriate to include in a response to a notice of designation (which response must be submitted in 30 days or less). The U.S. economic system demands stability and a clear regulatory framework. Indeed, the President's recent Executive Order directs that regulations "must promote predictability and reduce uncertainty."[105]

We are apparently not alone in our concern. In comments filed with the FDIC on its rulemaking proposal earlier this year, the Federal Reserve Bank of Richmond stated that:

> the orderly liquidation authority should be as transparent, unambiguous, and predictable as possible, and Title II would benefit from any rulemaking that makes the FDIC's authority clearer and more consistent. For this reason, we're pleased to read that the proposed rule's purpose "is to provide clarity and certainty to the financial industry and to ensure that the liquidation process under Title II reflects the Dodd-Frank Act's mandate of transparency in the liquidation of failing systemic financial companies." We worry, however, that despite the FDIC's efforts to enhance the orderly liquidation authority's transparency and predictability, the constructive ambiguity that accompanies the FDIC's discretion is likely to breed market uncertainty, which can add to financial volatility when market participants are forced to speculate on the FDIC's treatment of various similarly situated creditors. The potential for panics and runs in the face of such ambiguity could in turn impinge on the FDIC's decision making in the midst of a crisis. Greater transparency and predictability would help limit this adverse feedback loop.[106]

Accordingly, we urge the FDIC to defer implementation of the rules in the NIFR and NPR until they, and the other related FDIC, Council and Federal Reserve rules implementing Titles I and II, are refined with further precision.

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[105] *Improving Regulation and Regulatory Review*, Exec. Order No. 13,563 (Jan. 18, 2011).

[106] Letter from Jeffrey M. Lacker, President, Federal Reserve Bank of Richmond to FDIC (Jan. 18, 2011) (*available at* http://www.fdic.gov/regulations/laws/federal/2010/10c35Orderliq.PDF).

Whatever factors or criteria are used, Sections 113 and 203 clearly do not contemplate designation of an entire industry as systemically significant. The designation is for individual companies. There are currently 652 separate money market mutual funds. Each one has a separate investment portfolio. Even when two money market mutual funds share a single investment adviser, their investments are segregated, and typically have investment specializations. For example, one fund may invest only in short-term U.S. government securities, another may invest in short term municipal government securities, and a third may invest more broadly in commercial paper, government securities and other money market instruments. Consequently, each fund caters to different groups of investors. They cannot be lumped together and designated *en masse* as systemically significant under Section 113 or systemically risky under Section 203. We note that the press has reported that an unpublished draft FSOC staff report has reached this conclusion.[107]

Section 113 Criteria

The size of a particular Money Fund varies over time due to the significant liquidity required of a Money Fund portfolio through its investment in high-quality, marketable, short-term money market instruments, and the fact that financing is entirely equity. A Money Fund by its very nature is scalable and can expand or contract dramatically based upon investor demand within a few months with little impact on its risk profile, liquidity or profitability. Thus, use by the Council of size as the primary factor in designating a Money Fund as systemically important, particularly if that designation imposes material costs or other regulatory burdens on a fund that make it unattractive to investors, would be an inherently fruitless exercise.

The second broad criteria in the Council's NPR, whether there is a lack of substitutes, similarly weighs against designation of Money Funds under Section 113. There are currently over 650 Money Funds that are to some degree substitutes for one another, and few barriers to creating additional Money Funds. Moreover, direct investment in money market instruments, and use of bank deposits, remain as far less efficient substitutes for Money Funds. What could impact this factor is the potential for new regulatory burdens imposed on Money Funds under Section 113 (or otherwise) that might render them less attractive as a class to investors and less efficient at rechanneling investor cash to financing the cash needs of businesses and governmental entities, thereby creating a lack of efficient substitutes for investors seeking to manage a cash position and for companies seeking short term financing.[108] Presumably, the

[107] Rebecca Christie and Ian Katz, Hedge Funds May Pose Systemic Risk in Crisis, U.S. Report Says (Bloomberg, Feb. 17, 2011), http://noir.bloomberg.com/apps/news?pid=newsarchive&sid=aodA4jeoNSxE.

[108] *See supra* note 23.

regulatory risks and burdens associated with being designated under Section 113 is not a legitimate basis for designating Money Funds as systemically important under Section 113.

The third criteria in the Council's NPR, interconnectedness, similarly weighs against designation of a Money Fund under Section 113. The portfolio exposure of a Money Fund to any one issuer or group of related issuers is sharply limited by SEC Rule 2a-7. Money Funds do not have "contagion" risk in the way that banks or certain other categories of financial firms do. Money Funds are not like Penn Square Bank, Continental Illinois or the Herstatt Bank where losses at a Money Fund results in insolvencies of other firms with which that Money Fund does business. At worst, investors in the two Money Funds that have broken a buck over the past 40 years have had a relatively short wait to recover the overwhelming majority of their cash, and companies whose commercial paper is owned by a Money Fund that is being wound down simply sell future issuances of their commercial paper to other Money Funds, banks, insurance companies or institutional investors.

As regards the fourth, fifth and sixth criteria in the Council's NPR: leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny-- as discussed above-- Money Funds are precluded from using leverage to any material degree and are instead financed by equity, and under SEC rules the portfolio of a Money Fund is limited to short-term, high quality debt instruments. This is a central part of the comprehensive program of SEC regulation of Money Funds, and a main reason that Money Funds have had (as discussed elsewhere in this letter) a far better track record in maintaining their solvency than have, for example, banks. As noted above, Money Funds do not have the kind of asset/obligation mismatch that plagues the banking industry. And as discussed at length elsewhere in this letter, Money Funds are comprehensively regulated and supervised by the SEC which is a member organization of the Council. Accordingly, the fourth, fifth and sixth criteria listed in the in the Council's NPR weigh strongly against designating a Money Fund under Section 113.

Similarly, certain of the ten specific factors set forth in Section 113 and in the text of the proposed rule implementing Section 113 weigh against designating any Money Fund for supervision under Section 113, due to the way Money Funds are required to operate. For example, a Money Fund does not employ leverage in its operation (DFA §113(b)(2)(A) & (J), Council Proposed Rule at § 1310.10(c)(1) & (10)); is it not permitted to create off-balance sheet liabilities (DFA §113(b)(2)(B) & (J), Council Proposed Rule at § 1310.10(c)(2) & (10)); it is not a source of credit for low-income, minority, or underserved communities (DFA §113(b)(2)(E), Council Proposed Rule at § 1310.10(c)(5)). The nature of the assets of Money Funds are that they invest only in certain high-quality, short-term investments issued by the U.S. government, U.S. corporations, and state and local governments (DFA §113(b)(2)(I), Council Proposed Rule

at § 1310.10(c)(9)).[109] The only activity of a Money Fund is investing in these high-quality, liquid securities, a large percentage of which must be readily converted to cash to pay redeeming shareholders, as described above. Money Funds are required to "shadow price" their portfolio investments, which requires them to monitor the market value of these assets and to make adjustments if the market value of their assets varies significantly from their amortized cost value. Money Funds are not permitted to make loans or offer mortgages. The liquid nature of Money Fund portfolios gives them the ability to meet usual and even high-level shareholder redemption requests. Money Funds are prohibited from purchasing any security on margin, except short-term credits as required for clearing transactions.

While the Money Fund industry, as a whole, supplies liquidity to the U.S. financial system (DFA §113(b)(2)(D). Council Proposed Rule § 1310.11(c)(4)) and to significant nonbank financial companies and significant bank holding companies (DFA §113(b)(2)(C)), it does so only through the investment activities of 652 individual Money Funds. Furthermore, the governmental units and businesses that tap Money Funds as a source of short-term financing have come out very strongly *against* imposing additional burdensome regulatory restrictions on Money Funds (such as a floating NAV) that would undermine the effectiveness and efficiency of Money Funds in supplying that financing.[110] Presumably the purpose of this factor is to evaluate whether additional regulation is appropriate to protect that source of financing, rather than to choke it off.

Moreover, because each Money Fund is "already regulated by one or more primary financial regulatory agencies" (DFA §113(b)(2)(H), Council Proposed Rule § 1310.11(c)(8)) – it is subject to pervasive and effective SEC regulation and oversight – the exercise of matching up a Money Fund to one or more of the above Section 113 criteria does not answer the question of whether it should, in fact, be designated for prudential regulation by the Federal Reserve. The appropriate question should be whether the type of Federal Reserve prudential regulation envisioned by Section 165 of DFA is necessary or appropriate, in light of the SEC's authority, regulation, and oversight of Money Funds. As discussed below, in most of the areas of prudential standards identified under Section 165 (relating to Federal Reserve authority for nonbank financial institutions) and Section 115 (relating to the Council's authority in Section §115 to make recommendations to the Federal Reserve regarding prudential standards), the

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[109] SEC Office of Investor Education and Advocacy, Mutual Funds —*A Guide for Investors*, at 8, *available at* http://www.sec.gov/investor/pubs/sec-guide-to-mutual-funds.pdf. The description of Money Funds on the SEC's website similarly states: "[a] money market fund is a type of mutual fund that is required by law to invest in low-risk securities. These funds have relatively low risks compared to other mutual funds and pay dividends that generally reflect short-term interest rates." *See* SEC, *Money Market Funds*, *available at* http://www.sec.gov/answers/mfmmkt.htm.

[110] *See supra* note 23.

current regulatory standards for Money Funds are far more robust than standards for other financial institutions. In a few narrow areas not currently addressed by SEC rule, the application of inappropriate prudential standards, such as bank-like capital standards, would effectively destroy a Money Fund.

Section 203 Designation Criteria

The central criteria in Section 203(a) for a recommendation by the FDIC and Federal Reserve for a designation under Title II, as well as the determinations that must be made by the Secretary of Treasury under Section 203(b), are premised on a default or potential default by a financial company on its debt obligations. The terms "default or in danger of default" are defined in Section 203(c)(4) in a way that could not reasonably be triggered in the context of a company, such as a Money Fund, that has only equity capital and no material debt, and thus has no debt or other obligations that it could default on. As defined in Section 203(c)(4), a financial company may be considered to be in default or in danger of default if:

> (A) a case has been, or likely will promptly be, commenced with respect to the financial company under the Bankruptcy Code;
> (B) the financial company has incurred, or is likely to incur, losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the company to avoid such depletion;
> (C) the assets of the financial company are, or are likely to be, less than its obligations to creditors and others; or
> (D) the financial company is, or is likely to be, unable to pay its obligations (other than those subject to a bona fide dispute) in the normal course of business.

In addition, both the recommendation by the FDIC and Federal Reserve under Section 203(a), and the determination by the Secretary of the Treasury under Section 203(b) require a consideration of whether there are other alternatives for the resolution of the situation that do not require and FDIC receivership under Title II, and the potential impact of a Title II designation on stakeholders. As discussed below, the SEC regulations governing Money Funds require them to be essentially self-liquidating and those regulations and other federal securities laws establish a clear process for an orderly wind-down of a Money Fund, with SEC and judicial intervention if needed. This framework has proven to be quite effective in resolving and liquidating those few Money Funds that have been unable to maintain their targeted per-share value.

The Prudential Standards Applicable to Systemically Important Nonbank Financial Companies under Title I of the DFA are Not Appropriately Applied to Money Funds

Under Section 165 of DFA, the Federal Reserve must establish, on its own or pursuant to the Council's recommendations, prudential standards for nonbank financial companies that it supervises that are more stringent than otherwise applicable. Paragraph (b)(1)(A) provides that the Federal Reserve shall provide certain specified prudential standards, discussed below.[111]

(i) *Risk-based capital requirements and leverage limits*. These standards must be applied unless the Federal Reserve, in consultation with the Council, determines that they are not appropriate because of the activities of such company (such as investment company activities or assets under management) or structure, in which case, the Federal Reserve "shall apply other standards that result in similarly stringent risk controls." While it is unclear what those other standards would be, it is clear that a requirement for risk-based capital standards for entities that currently rely entirely on equity financing is inappropriate and unnecessary. In contrast to banks, Money Funds do not accept deposits or make loans or use other forms of debt financing. The assets of Money Funds are comprised only of the investments permitted by Rule 2a-7, rather than the riskier assets held by banks. These assets are financed entirely by the equity capital of the investor/shareholders of the Money Fund.

Similarly, in contrast to banks, Money Funds do not leverage their assets, securitize them, hold assets off-balance sheet, or engage in any of the other risky activities in which banks engage. Therefore, leverage limits are similarly not appropriately applied to Money Funds. They do not use leverage at all.

(ii) Liquidity requirements. As discussed above (*see* p. 24, *supra*), liquidity requirements are the core of existing Money Fund regulation, and these requirements were enhanced with the SEC's recent amendments to Rule 2a-7. By law, Money Funds can invest in only certain high-quality, short-term investments issued by the U.S. government, U.S. corporations, and state and local governments.[112] A Money Fund is required to hold securities that are sufficiently liquid to meet reasonably foreseeable shareholder

[111] Pub. L. No. 111-203, § 165(b)(1)(A).

[112] SEC Office of Investor Education and Advocacy, Mutual Funds —*A Guide for Investors*, at 8, *available at* http://www.sec.gov/investor/pubs/sec-guide-to-mutual-funds.pdf.

redemptions in light of the fund's obligations under Section 22(e) of the Investment Company Act and any commitments the fund has made to shareholders.[113]

(iii) *Risk management requirements.* It is difficult to conceptualize what new prudential risk management requirements the Federal Reserve could craft for a Money Fund, beyond those required under current law and regulation. (*See* pp. 24-31, *supra.*) Money Fund regulation manages portfolio risk by limiting holdings to the safest, most liquid and shortest-term investments in existence. Money Fund boards have rigorous, detailed, and ongoing risk management responsibilities with respect to pricing, review of credit risks, and other aspects of Money Fund operations. Designation of an entity as systemically significant would not be appropriate where the risk management requirements that might be imposed would not materially enhance those already in place.

(iv) *Resolution plan and credit exposure report.* Rule 2a-7 includes a regulatory scheme that effectively makes them self-liquidating, and mandates a resolution plan and liquidation procedure for Money Funds, including reporting to the SEC under certain circumstances. Rule 2a-7 requires Money Funds to invest predominantly in securities that can be sold at book value in short order and have a weighted average maturity of 60 days or less. All taxable Money Funds must hold at least 10 percent of their assets in cash, U.S. Treasury securities, or securities that convert into cash within one business day. All Money Funds must hold at least 30 percent of assets in cash, U.S. Treasury securities, certain other government securities with remaining maturities of 60 days or less, or securities that convert into cash within five business days. No more than 5 percent of a fund's portfolio may be "illiquid" (i.e., cannot be sold or disposed of within seven days at carrying value). In addition, a Money Fund generally may not acquire any securities with a remaining maturity greater than 397 days.[114] Because Money Funds invest only in short-term, high-quality securities in accordance with the requirements of Rule 2a-7, a Money Fund can self-liquidate in a short period of time as long as it stops reinvesting the proceeds of such securities as they come due. Money Funds are also permitted to defer redemption requests for seven days (like a bank is permitted to defer withdrawals from a money market deposit account, savings account or NOW account) to address liquidity needs. In addition, as discussed above, SEC Rule 22e-3 permits a Money Fund's board of directors to suspend redemptions and postpone payment of redemption proceeds if the fund is about to break the buck and the board decides to liquidate the fund. This facilitates an orderly liquidation of fund assets in the event of a threatened run on the fund by ensuring

[113] *See* 17 C.F.R. § 270.2a-7(c)(5).

[114] *See* 17 C.F.R. § 270.2a-7(c)(2). The SEC used its existing powers under the federal securities laws to oversee the liquidation of the Reserve Primary Fund in a judicial proceeding brought for that purpose.

that no one is advantaged by redeeming early. Although Money Funds extend credit via their purchases of commercial paper and by engaging in repurchase agreements, Rule 2a-7 contains several conditions (which the SEC refers to as "risk-limiting conditions") that "limit the funds exposure to certain risks, such as credit, currency, and interest rate risks."[115] For example, a Money Fund must limit its portfolio investments to securities that meet certain credit quality requirements under Rule 2a-7. Each Fund reports its portfolio securities to the SEC on a monthly basis, including the market-based values of each security and the Fund's shadow NAV. Nothing could be accomplished by requiring a Money Fund to submit its resolution plan to the Federal Reserve, or to submitting a "credit exposure" plan to the Federal Reserve.[116]

(v) *Concentration limits.* As of February 2011 there were approximately 652 Money Funds. Total estimated assets under management are approximately $2.7 trillion. The Money Fund industry is highly competitive. The size and the depth of the industry poses little risk of concentration that could potentially harm issuers of commercial paper or other users. Moreover, because of the nature of money funds, investors can easily and quickly redeem shares of one fund and reinvest in another.

In addition, under paragraph (b)(1)(B) of Section 165 of the DFA,[117] the Federal Reserve may establish additional prudential standards for nonbank financial companies supervised by the Federal Reserve, including the following. These, too, are inappropriate as applied to a Money Fund.

(i) *Contingent capital requirement*. As noted above, Money Funds are capitalized solely with equity. They do not use leverage.

(ii) *Enhanced public disclosures.* Money Funds are transparent. Their portfolio holdings must be posted to their websites on a monthly basis. Their activities are limited to investment activities, and the range of their investments is limited. They are easy to understand. Money Funds register with the SEC and provide a fund prospectus to investors, which is updated on a continual basis. The fund must keep its prospectus

[115] *See* Release No. IC-29132, 75 Fed. Reg. 10060, 10061 (Mar. 4, 2010).

[116] These features of Money Funds similarly address the need for resolution authority that underlies Title II of the DFA. Title II provides for orderly liquidation of large interconnected nonbank financial companies where there may be no other practical means for the government to wind them down in an orderly manner. The procedures already in place for the liquidation of a Money Fund are highly effective. Therefore, it is unnecessary for a Money Fund to be designated under Section 113 in order to give the FDIC authority to provide for an orderly resolution of the entity under Title II.

[117] Pub. L. No. 111-203, § 165(b)(1)(B).

"current" by periodically filing post-effective amendments to its Securities Act registration statement. A fund prospectus for a mutual fund includes important information for investors, such as investment objectives and strategies, risks, performance pricing, and fees and expenses. Some funds provide a summary prospectus containing key information about the fund, in which case the long-form prospectus is available on an internet website and a paper copy may be obtained by shareholders free of charge upon request. The registration statement for a mutual fund also includes a statement of additional information, which must be furnished upon request to fund shareholders. Money Funds are subject to stringent regulatory, disclosure, and reporting provisions. Registered investment companies are required to file periodic reports with the SEC and must provide shareholders with annual and semi-annual reports, including updated financial information, a list of the fund's portfolio securities, and other information.

(iii) *Short-term debt limits*. Money Funds are not operating companies. Their only activity is investing in certain high-quality, short-term investments issued by the U.S. government, U.S. corporations, and state and local governments. Money Funds do not leverage their assets and do not have debt. Since they have no debt, there is no need to subject such funds to short-term debt limits.

A number of other provisions of the DFA require the Federal Reserve to impose additional prudential standards on nonbank financial companies supervised by the Federal Reserve, including:

(i) *Stress Tests.* Section 165 requires the Federal Reserve to impose stress tests on nonbank financial companies subject to its supervision.[118] As noted above, under Rule 2a-7, the board of directors of each Money Fund must adopt procedures providing for periodic stress testing of the fund's portfolio. Fund managers are required to examine the fund's ability to maintain a stable NAV per share based upon certain hypothetical events. These include an increase in short-term interest rates, higher shareholder redemptions, a downgrade of or default on portfolio securities, and widening or narrowing of spreads between yields on an appropriate benchmark selected by the fund for overnight interest rates and commercial paper and other types of securities held by the fund.

(ii) *Acquisition Limits.* Section 163 requires the Federal Reserve to impose restrictions on nonbank financial companies subject to its supervision that acquire companies engaged in

[118] *See* Pub. L. No. 111-203, § 165(i).

financial activities.[119] Such a limitation would be irrelevant to Money Funds, which are owned by their shareholders.

(iii) *Early Remediation*. Section 166 requires the Federal Reserve to impose early remediation requirements on nonbank financial companies subject to its supervision.[120] Current regulation of Money Funds includes significant requirements that are remedial in nature. For example, Rule 2a-7(c)(8) of the Investment Company Act requires Money Funds using the amortized cost method to "shadow price" their portfolio investments. The board must establish written procedures that require periodic calculations of the deviation between the current net asset value using available market quotations (or substitutions) and the fund's amortized cost price per share. The board must promptly consider whether any action should be taken if the fund's amortized cost price per share exceeds 1/2 of 1 percent, and must take prompt action if any deviation may result in material dilution or unfair results to investors or shareholders. Because of these requirements, additional early remediation requirements should not be necessary.

While many of the above requirements may be appropriate for large, interconnected nonbank financial institutions, many are either not appropriately applied to Money Funds, or if applicable, are addressed under the Investment Company Act and SEC rules in ways that are more stringent than bank-type prudential regulation.

Because the Money Fund industry operates on narrow margins, designating one or perhaps a handful of large Money Funds under Section 113 and subjecting them to additional prudential regulation under Section 165 would inevitably raise their costs, lower the rates they could pay to their customers, and result in a flight of investors from these funds to others that are not subject to these additional requirements.[121] Indeed, the President's Working Group recognized this inevitable consequence of uneven regulation in its discussion of possible new regulations for registered Money Funds, which could drive investors to other unregistered substitutes.[122]

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[119] *See* Pub. L. No. 111-203, § 163.

[120] *See* Pub. L. No. 111-203, § 166.

[121] Of course, it is possible that such designation would have the reverse effect by creating the perception that such an institution were "too big to fail."

[122] *See* REPORT OF THE PRESIDENT'S WORKING GROUP ON FINANCIAL MARKETS, MONEY MARKET FUND REFORM OPTIONS 21, 35, *available at* http://treas.gov/press/releases/docs/10.21%20PWG%20Report%20Final.pdf ("Reforms that reduce the appeal of MMFs may motivate some institutional investors to move assets to alternative cash management vehicles with stable NAVs, such as offshore MMFs, enhanced cash funds, and other stable value vehicles. These vehicles typically invest in the same types of short-term instruments that MMFs hold and share

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The SEC has Ample Authority to Enforce Regulatory Requirements and Take Comprehensive Emergency Actions Involving Money Funds.

In addition to its comprehensive program of regulation and supervision of Money Funds, the SEC has broad powers to take prompt action to address emergency situations at a Money Fund and promptly resolve the problem. In the Reserve Primary Fund situation, the SEC successfully invoked certain of these powers. Should such a situation arise again in the future, the SEC is able to draw upon the experience it gained in the Fall of 2008, and promptly intervene to oversee an orderly and prompt wind-down of the Money Fund. An FDIC receivership is not necessary to accomplish a wind-down of a Money Fund. The SEC powers to address emergency situations at a Money Fund (some of which must by rule occur automatically without action by the SEC) include:

- SEC rules impose a requirement that the Money Fund make an immediate shift to floating NAV if it departs from the stable NAV;
- Money Fund trustees' are authorized to defer share redemptions, and liquidate the Money Fund, thus treating all investors the same;
- The SEC has the ability to immediately intervene and force a court-supervised liquidation of a troubled Money Fund where the trustees are unwilling or unable to take the above steps;
- The SEC has emergency power under Section 12(k) of the 1934 Act to act by order in an emergency with respect to any matter subject to its regulation, including investment companies;
- The SEC is authorized under Section 25 of the Investment Company Act to intervene in respect of reorganizations and liquidations of investment companies;
- The SEC has cease-and-desist powers under Section 9(f) of the Investment Company Act;
- The SEC has power to obtain injunctive relief under Sections 36 and 40(d) of the Investment Company Act;
- The SEC has power to impose civil money penalties on Money Funds and their related persons under Sections 9(d) and 40(e) of the Investment Company Act;
- The SEC can bring a judicial action and invoke the Federal courts' 1934 Act § 21(d)(5) equitable remedies powers; and

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many of the features that make MMFs vulnerable to runs, so growth of unregulated MMF substitutes would likely increase systemic risks. However, such funds need not comply with rule 2a-7 or other ICA protections and in general are subject to little or no regulatory oversight. In addition, the risks posed by MMF substitutes are difficult to monitor, since they provide far less market transparency than MMFs.")

- The SEC can bring a judicial action and petition the Federal court to invoke the All Writs Act[123] powers to enjoin other proceedings that interfere with the court's jurisdiction over the matter.

Other than a federal guarantee of investors, an injection of liquidity into a Money Fund, or a bail-out of Money Fund shareholders (the "too big to fail" federal safety net that Title I of the Dodd Frank Act was designed to limit, Title II prohibits, and which public opinion strongly opposes) there are no additional steps involving Money Funds that the FDIC could take under Title II of the Dodd-Frank Act, or the Federal Reserve could take under Title I of the DFA that have not already been addressed by the SEC or for which the SEC does not have ample statutory authority to address going forward.

C. Regulators Should Proceed with Caution in Altering Current Regulation and Oversight of Money Funds, and Should Not Subject Money Funds to Title II

As discussed above, the current comprehensive regulatory system governing Money Funds has been very successful in maintaining the solvency of Money Funds and for resolving those few Money Funds that "break a buck." Significant enhancements were put in place by the SEC in 2010, building upon the lessons of the financial crisis, which further enhanced the program of regulation applicable to Money Funds and further reduced the risks associated with them. As the Council considers the instant proposal, it must bear in mind the President's recent Executive Order, which emphasizes that agencies must "seek to find the least burdensome tools for achieving regulatory ends," and notes that "[s]ome sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. … In developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote … coordination, simplification, and harmonization."[124] In keeping with the Executive Order, care should be taken in any change to these rules not to undermine the strength and simplicity of the current system of regulation in a way that would increase risks or impair the ability of Money Funds to continue to provide a high quality product for consumers and businesses.

In this regard, we note that it was the bankruptcy of Lehman Brothers that triggered the problem at the Reserve Primary Fund in 2008, not the other way around. As discussed above, Section 113 and Section 203 designations, together with the regulatory and receivership tools that flow from such designations, are designed and necessary to address the risk posed by large,

[123] 28 U.S.C. § 1651.

[124] *Improving Regulation and Regulatory Review*, Executive Order No. 13563 (Jan. 18, 2011).

interconnected nonbank financial institutions like Lehman – the company whose financial stress and ultimate failure actually did destabilize the financial markets. Lehman was already overly leveraged in 2008. In 2004, as part of its Consolidated Supervised Entities program for the supervision of investment banks, the SEC permitted the firm to calculate capital requirements by alternative methods based on Basel II standards, and which relied on Lehman's internal risk models.[125] The result was that Lehman and other investment banks more than doubled their leverage ratios – for Lehman, this meant a gross leverage ratio of average assets to net capital of almost 32 to 1.[126] In fact, Lehman's situation was even more precarious according to the Bankruptcy Examiner, as it projected the appearance of financial health by using accounting methods that disguised repurchase agreements as outright sales.[127] Yet, notwithstanding its status as an SEC-supervised firm and a primary dealer subject to applicable capital and related standards of the Federal Reserve,[128] Lehman's regulators either did not have or did not use authority to limit its activities or institute prudential measures to reduce the systemic risk posed by its operations and potential failure.

Lehman was also heavily reliant upon short-term funding, and its paper was held by many companies. The Reserve Primary Fund's loss on Lehman commercial paper that led to its share repricing was a symptom, but not a cause, of the systemic risk posed by Lehman's failure, although mismanagement at Reserve undoubtedly compounded its problems, and, ultimately, compounded the uncertainty among Money Fund investors in September 2008 that led to the broader run on Money Funds.[129]

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[125] SEC Rel. No. 34-49830, *Alternative Net Capital Requirements for Broker-Dealers That Are Part of Consolidated Supervised Entities; Supervised Investment Bank Holding Companies; Final Rules,* (Jun. 8, 2004) 69 FR 34428 (Jun. 24, 2004).

[126] SEC Office of the Inspector General Report: *SEC's Oversight of Bear Stearns and Related Entities: The Consolidated Supervised Entity Program,* at 120 (Sept. 25, 2008), *available at* http://www.sec-oig.gov/Reports/AuditsInspections/2008/446-a.pdf.

[127] *Report of Anton R. Valukas, Examiner,* In re Lehman Brothers Holdings, Inc., Chapter 11 Case No. 08-13555 (JMP) (Bankr. S.D.N.Y., Mar. 11, 2010).

[128] *See* Federal Reserve Bank of New York, Operating Policy: *Administration of Relationships with Primary Dealers* (Jan. 22, 1992), *available at* http://www.ny.frb.org/markets/pridealers_policies_920122.html.

[129] The Reserve Primary Fund was a large fund that held debt owed by many issuers and that had many investors. Yet, as the stability of other money funds in 2008 shows, being large or having many relationships did not increase its chances of failure. The Reserve Primary Fund broke the buck because management unduly concentrated assets in Lehman debt, notwithstanding numerous warning signs as to Lehman's weakness. Moreover, management fraudulently "significantly understated the volume of redemption requests received … and failed to provide [the fund's] trustees with accurate information concerning the value of Lehman securities." SEC Litigation Release No. 21025, *SEC v. Reserve Management Company, Inc., Reserve Partners, Inc., Bruce Bent Sr. and Bruce Bent II* (May 5, 2009). Indeed, the fund's management assured shareholders, ratings agencies and the fund's trustees that the

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Investment risks in the portfolios of Money Funds have historically been the result of problems at issuers of commercial paper, particularly at financial services firms. In addition to the solvency of the issuers of commercial paper, the solvency of banks that issue letters of credit that backstop commercial paper is also significant to the strength of the investment portfolios of Money Funds.

Titles I and II and other provisions of the DFA are intended to address and control the risk at financial services firms – particularly those entities which are so interconnected that they present "systemic risk" – and thus controls risk in the financial services industry as a whole. If implemented effectively by regulators, this will have the effect of significantly reducing the risks in the portfolios of Money Funds as investors in commercial paper issued by those companies. These changes at financial services firms include increased oversight of the holding companies of nonbank financial services firms, increased capital requirements, reduction in counterparty exposure, and significantly, measures to reduce liquidity risk and over-reliance on short term funding of financial services firms. Particularly as regards the larger and systemically significant companies that have been major issuers of commercial paper, the changes being put in place under the DFA in the regulation of the financial services firms as issuers or guarantors of commercial paper will have the added benefit of further reducing portfolio risks at Money Funds. Had the DFA been in place prior to 2008, Lehman may not have failed and, thus, the Reserve Primary Fund might not have broken a buck and consequently suffered a run and been forced to liquidate.

Similarly, the DFA's new requirements for regulation and SEC oversight of credit rating agencies and the movement away from excessive reliance on their ratings, is a systemic change that will have the effect of further reducing risk in Money Fund portfolios.

Care should be taken not to impose excessive regulatory burdens on Money Funds that would effectively force them out of business. Several sponsors of Treasury-only funds have had to close their funds, or limit new investments to existing investors.[130] Recently, the seven-day

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fund's adviser had agreed to provide capital to the fund, even though this was not true. *See* Complaint of the SEC, *SEC v. Reserve Management Company, Inc., Reserve Partners, Inc., Bruce Bent Sr. and Bruce Bent II*, Civ. No. 09 CV 4346 (May 5, 2009), *available at* http://www.sec.gov/litigation/complaints/2009/comp21025.pdf. If management had not made such false statements, but had priced holdings as required by law or had supplied the price support that they had stated they would, the resulting run on the fund might have been significantly reduced or even averted.

[130] *See* Andrew J. Donohue, Director, SEC Division of Investment Management, *Keynote Address at the Practising Law Institute's Investment Management Institute*, April 2, 2009, *available at* http://www.sec.gov/news/speech/2009/spch040209ajd.htm. Mr. Donohue points out that "money market funds have also had to address the challenges posed by low or non-existent yields in treasury securities — in fact, we have been

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average yields on taxable Money Funds fell to a record low, according to data published by iMoneyNet. Narrow margins are leading to a shake-out in the industry. Despite these enormous pressures on Money Funds, they remain popular due in large part to their stable NAV.[131] Major regulatory change, such as forcing these funds to adopt a floating NAV, is likely to lead to few funds surviving.[132]

The consequences of doing away with Money Funds would have far-reaching implications. For example, if Money Funds were to be regulated out of existence, the balances would need to go somewhere. The most likely destination for a large portion would be into money market deposit accounts at banks. But the addition to bank balance sheets of a large portion of the $2.7 trillion currently invested in Money Funds would require a significant amount of new equity capital in banks to offset the added leverage of the new deposits, just as banks are scrambling to increase capital for the balance sheet sizes they currently carry. Moreover, the net result would be to greatly increase the size of the federal safety net, to cover these new FDIC-insured deposits. One of the fundamental purposes of the DFA was to scale back the size of the federal safety net and the amount that taxpayers are on the hook for in the future. Forcing investors out of Money Funds and into bank deposits will have the perverse effect of increasing the size of the federal safety net.

Some balances from Money Funds might be invested in floating NAV funds. But those funds, in the form of ultra short bond funds, have been around for many years and have never been particularly popular with either retail or institutional investors.

Footnote continued from previous page
seeing the lowest yields on Treasuries in 50 years. These low yields are driven by the flight to quality as institutions increasingly move into U.S. government money market funds. As some portfolio securities mature and these funds purchase new treasuries with new money the yield is diluted even further. As a result we have seen a number of treasury money market funds close to new investors and we understand funds have waived fees and expenses in order to avoid negative yields."

[131] *See* Steve Watkins, *Money Market Industry Opposes Mandate for Floating Share Value*—Some managers fear change could kill the industry, Aug. 2010, *available at* http://www.heartland.org/full/28211/Money_Market_Industry_Opposes_Mandate_for_Floating_Share_Value.html (noting that according to Brian Reid, the ICI's chief economist, demand for Money Funds has held up even with interest rates so low that funds averaged a 0.11 percent yield in early August 2010, based on data from Crane Data, which tracks Money Funds. Mr. Reid "fears the industry would be severely damaged if funds are forced to switch to a floating NAV. Institutions would likely form their own investment pools, and individuals would likely turn to banks. You would very likely see significant outflows.")

[132] *See id.* (noting that Brian Kalish, director of the finance practice at the Bethesda, Maryland-based Association for Financial Professionals, believes that requiring a floating NAV "will pretty much kill the money market product…The reason investors buy money markets is for the stable NAV.")

Some balances from Money Funds might be invested directly in money market instruments. For retail investors and smaller businesses and institutions that do not have a large, sophisticated treasury desk, this is not a realistic alternative. For larger corporations and institutional investors with a large treasury function, this may simply transform the risk of institutional runs on Money Funds to a risk of runs by investors on particular issuers of commercial paper. This would not protect the commercial paper market and the financing needs of issuers; instead, it might amplify the problem and trigger more insolvencies of issuers of commercial paper by removing Money Funds as a buffer against the nervous impulses of institutional investors that are loaded up on paper from underlying issuers.

Money Funds provide essential short-term funding for corporations and municipalities. They account for almost 40% of outstanding commercial paper, approximately two-thirds of short-term state and local government debt, and a substantial amount of outstanding short-term Treasury and federal agency securities.[133] Banks are not equipped to provide short-term funding through the purchase of commercial paper and other short-term debt instruments.[134] Banks are unable to pass through tax-exempt income to depositors and therefore cannot replace tax-exempt Money Funds, which would deprive state and local governments of an important source of financing.[135] Moreover, if funds withdrawn from Money Funds were reinvested with banks, this would result in tighter short-term credit for U.S. companies unless banks raised significant amounts of capital to support their expanded balance sheets.

Even then, the cost of short-term credit is likely to rise and would be less efficient.[136] As letters submitted to the SEC in response to the PWG Report make clear, Money Funds are a significant source of short-term financing of state and local governments, purchasing about 65% of all short-term public debt.[137] Commenters on the Report, such as the National League of Cities, noted that regulations that inhibit investment in money funds "would dampen investor

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[133] *See* REPORT OF THE PRESIDENT'S WORKING GROUP ON FINANCIAL MARKETS, MONEY MARKET FUND REFORM OPTIONS 7, *available at* http://treas.gov/press/releases/docs/10.21%20PWG%20Report%20Final.pdf.

[134] *See* BlackRock, Inc., *Viewpoint: Money Market Mutual Funds*, July 13, 2010 (stating BlackRock's belief that "banks are not equipped to provide short-term funding to the economy in the way that money market funds are through the purchase of commercial paper and other short-term debt instruments. This could result in a meaningful disruption to corporations, municipalities, our entire financial system and our economy.") *Available at* https://www2.blackrock.com/webcore/litService/search/getDocument.seam?venue=PUB_INS&source=CONTENT&ServiceName=PublicServiceView&ContentID=1111117211.

[135] *See* ICI Money Market Working Group Report, at 111, *available at* http://www.ici.org/pdf/ppr_09_mmwg.pdf.

[136] *Id.*

[137] *See* Letters from state and local government entities listed in footnote 23 supra; Letter from the Treasurer of the State of New Hampshire.

demand for the securities we offer and deprive state and local governments of much-needed capital."[138] Letters from business associations describe how important Money Funds are as a source of short-term financing to small and large businesses for such things as inventory, receivables, and payroll. These letters also express similar concerns on restrictions that may result in investor money flowing out of money funds.[139] For example, the New Jersey Chamber of Commerce has noted that "[r]egulations that shrink the pool of money market mutual fund capital available to businesses will negatively impact their ability to meet their cash requirements, causing large disruptions in the nation's economy."[140]

Another potential downside to designation of a company as systemically significant under Title I is the increased public perception that it is "too big to fail" and will ultimately be bailed out by the government if things go wrong, as was the case in investor expectations with respect to the commercial paper of Lehman. Money Fund investors are advised in no uncertain terms in the prospectus and sales materials that the funds are not insured and may lose value. But a designation of a Money Fund for regulation like a bank may tend to confuse that message in the public's mind.

Designation of one or more Money Funds as systemically significant could be disruptive. As discussed above, Sections 203 and 113 do not contemplate designation of an entire industry as significant; rather, it contemplates company-by-company designations. But designation of a few of the larger Money Funds under Section 113 would place those designated Money Funds at a competitive disadvantage (or possibly advantage) to the rest of the 652 Money Funds with which they compete. Designation of a Money Fund under Title II would adversely affect the industry and investors in Money Funds, and create uncertainties as to the status and liquidation process applicable to Money Funds generally, and the involvement of the FDIC with the receivership of one Money Fund could increase the risk that investors might become confused and expect an FDIC bail-out of Money Funds in a future crisis. Continued regulation by the SEC

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[138] Letters from state and local government entities listed in footnote 23 supra. *See also* letters from the Port of Houston Authority; Cincinnati/Northern Kentucky International Airport; Treasurer of the State of New Hampshire.

[139] Letters from the Financial Services Roundtable; Business Council of New York State; Dallas Regional Chamber; Associated Industries of Florida; New Jersey Chamber of Commerce. *See also* letter from the following businesses and associations: Agilent Technologies, Inc.; Air Products & Chemicals, Inc.; Association for Financial Professionals; The Boeing Company; Cadence Design Systems; CVS Caremark Corporation; Devon Energy; Dominion Resources, Inc.; Eastman Chemical Company; Eli Lilly & Company; Financial Executives International's Committee on Corporate Treasury; FMC Corporation; Institutional Cash Distributors; Kentucky Chamber of Commerce; Kraft Foods Global, Inc.; National Association of Corporate Treasurers; New Hampshire Business and Industry Association; Nissan North America; Pacific Gas and Electric Company; Safeway Inc.; Weatherford International; U.S. Chamber of Commerce.

[140] Letter from the New Jersey Chamber of Commerce.

of Money Funds, including involvement in the liquidation process when needed, allows the crafting of rules and processes that apply equally to all Money Funds – something that cannot be accomplished under Title II or Title I of the DFA.

Rather than imposing dramatic and potentially dislocative changes on the regulation of Money Funds through Title I of the DFA, we believe it would be more prudent to continue the careful fine-tuning of the SEC's highly successful regulatory program. The SEC has acted wisely in adopting new rules to substantially enhance the liquidity of Money Funds and further enhance their ability to withstand a potential run. Moreover, the SEC currently is evaluating the public comments submitted in response to its request for comments on the PWG Report on the results of its 18-month study of Money Funds. The PWG Report acknowledges the importance of the SEC's actions in making Money Funds more resilient. The PWG Report also presents eight separate options for additional reform, including a requirement to require floating net asset values for Money Funds generally, providing for differential requirements for different types of funds, providing various backstops (a private liquidity facility; Government insurance) and regulating stable NAV Money Funds as special purpose banks. A number of the options could be accomplished by SEC rule or, in the case of a private liquidity facility, by the private sector. Several options would require action by Congress. However, none of the options discussed in the PWC Report involve designation under Sections 113 or 203 of the DFA and prudential regulation by the Federal Reserve or receivership by the FDIC as a necessary or viable reform measure.

III. Other Flaws In the Proposed Rules

The Limitations on Judicial Review in Title II Conflict With the Judicial Powers In Article III of the Constitution and Could Result In a Taking Without Due Process

The interrelated provisions of Titles I and II relating to the designation of nonbank financial companies contain significant Constitutional defects that have not been addressed, or even mentioned, in the NIFR, the NPR, or in the related rulemakings of the Federal Reserve and the Council implementing Title I. The curtailment of the role and authority of Article III federal courts in the process of reviewing agency action associated with the designation of nonbank financial companies under Titles I and II of DFA, and in adjudicating private rights, violates the Constitution.[141]

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[141] *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); Gray & Shu, *The Dodd-Frank Wall Street Reform & Consumer Protection Act of 2010: Is It Constitutional?* (*available at* www.fed-soc.org); Federalist Society Panel Discussion on the Constitutionality of the Dodd-Frank Financial Services Reform Act (Nov. 19, 2010), webcast available at www.youtube.com/watch?v=qX2iDe1eox0; Cato Institute Policy Forum, *Is Dodd Frank Constitutional?* (Feb. 15, 2011), webcast *available at* http://www.cato.org/event.php?eventid=7732.

Although the property interests and contractual rights of investors, counterparties and other private parties will be profoundly affected by a receivership under Title II, and the decisions and determinations of the receiver, the stated purposes of Title II do not include protecting those private parties' interests and rights, as against one another, as against the failed institution or its management, as against the government, or as against the general good of the public. Instead, the prime directive in designating and liquidating companies under Title II is protecting the financial stability of the United States, and the priority of payments places the claims of the United States ahead of everyone (other than the administrative expenses of the receiver).[142]

Unlike banks, which choose to subject themselves to potential FDIC receivership when they apply for FDIC insurance, nonbank financial firms potentially subject to Title II FDIC receivership do not elect that treatment. Becoming subject to Title II is not a voluntary, consensual step undertaken by the subject company. It is instead thrust upon a nonbank financial company (and thus upon the company's creditors, counterparties, shareholders and employees and others whose private property and rights would be affected by a receivership) by virtue of engaging in any of a broad and ill-defined swath of activities deemed to be financial in nature. Banks voluntarily apply for and obtain FDIC insurance and thus opt in to the federal receivership provisions that come along with FDIC insurance and have direct access to Federal Reserve lending on a regular basis, enjoy a federal government-granted monopoly to subsidized deposit-taking as a means to finance their operations, and in the case of national banks and federal savings associations, are organized and exist under Federal law, and thus are both willing participants in, and direct beneficiaries of, a federal safety net that effectively subsidizes their costs of doing business. In contrast, nonbank financial entities are not voluntary participants in the Title I and Title II designation process and receivership provisions, nor are they participants in the federal safety net on a regular and continuous basis. Whatever may or may not be the Constitutionality of limited judicial involvement in and oversight of the designation and receivership powers as applied to banks that voluntarily elect into a federal receivership system outside of the normal bankruptcy process, the analysis is very different in the case of nonbank financial services firms.

As part of the statutory program to help the FDIC achieve that end, judicial review of placement of a nonbank financial firm into receivership is extraordinarily limited by Section 202 to a period of 24 hours, on an arbitrary and capricious standard, with no stay. Other provisions of Title II, including Section 205(c), 208, 210(a)(4), 210(a)(8), 210(e), and 210(h)(6), further limits judicial participation in the process. Individual claims brought against the receivership, after initial determination by the FDIC as receiver, are subject to determination in the district

[142] DFA § 210(b).

court on a *de novo* standard, but the resolution or plan for resolution of the estate, payment of those claims, and the ultimate disposition of the assets of the estate, are determined by the FDIC as receiver subject only to very limited judicial review.[143]

Due to the extraordinary limitation on judicial review of the designation and actions taken under Title II, the determination and resolution of the property rights and interests of private parties under Title II and the NIFR and NPR as currently structured would violate due process requirements under the Fifth Amendment to the Constitution, and would otherwise conflict with the due process rights of private parties under the Constitution. Designation under Title I places a nonbank financial company by definition and through the interrelated provisions of Title I and Title II place that company at risk of a Title II receivership and thus shares the inherent Constitutional flaw that exists in Title II.

As part of the process to taking agency action implementing these titles, the FDIC, the Council and the Federal Reserve are required to consider the Constitutional issues associated with these provisions.[144] The FDIC must withdraw the NIFR and NPR and consider the Constitutional issues associated with Title II before re-proposing the rule for an additional comment period. If the Constitutional flaws in the statute can be fixed as part of the rulemaking, they must be fixed. If they are not fixable, then the rule cannot be validly adopted and must be withdrawn.

The Delegation of Authority to the FDIC, Federal Reserve, Council and Treasury In Titles I and II of the DFA Conflict with Non-Delegation Principles

A second Constitutional flaw in Title II (and thus in the FDIC rule implementing Title II) involves an inappropriate delegation of overly broad legislative power by Congress to the FDIC, Federal Reserve, Secretary of the Treasury and the Council to determine criteria and designate nonbank financial firms for receivership under Title II.[145] Article I of the Constitution vests legislative authority exclusively in the Congress. An excessively broad grant of authority to an administrative agency (or in this case several administrative agencies) conflicts with basic separation of powers principles, particularly where there is potential for a broad economic impact, and uncertainty as to what or who might be covered by the authority and what steps

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[143] DFA §§ 210(a)(2)-(4), (e)(4).

[144] *See Whitney Nat'l Bank v. Bank of New Orleans*, 379 U.S. 411, 418-25 (1965); *Iowa Indep. Bankers Ass'n v. Bd. of Governors*, 511 F.2d 1288, 1293 n. 4 (D.C. Cir. 1975).

[145] *Cf., City of New York v. Clinton*, 985 F. Supp. 168 (D.D.C. 1998), *aff'd on other grounds, Clinton v. City of New York*, 524 U.S. 417 (1998), *Whitman v. Am. Trucking Co.*, 531 U.S. 457, 487 (2001) (concurring opinion of Justice Thomas).

might be taken by the administrative agency to those who become subject to the legislative rulemaking powers.

The normal cure for an overly broad delegation is a narrow reading by the courts of the grant of authority in order to avoid the Constitutional issue.[146] Where, as here, there is not an effective means of judicial review of those designations, and the agencies have not through their rulemaking actions narrowed the impermissible delegation, it is appropriate for the courts to review and narrow the authority of the agency. In this context, courts do not accord *Chevron* deference to administrative actions and determinations, but instead engage in a more stringent review of the agency's decision.[147]

Other Administrative Law Shortcomings in the NIFR and NPR

The rule adopted in the NIFR, and the rules proposed in the FDIC's new NPR, contain a number of other flaws that are serious enough that the proposed rule should be withdrawn and re-proposed in a substantially modified form in order to address those flaws. To begin, as noted, the NIFR and the NPR fail to describe with specificity the quantitative or qualitative considerations used in making assessments under any of the criteria listed in Section 203 or the implementing rules. More specificity is needed as part of the rulemaking process both in order for members of the public to have a reasonable opportunity to comment on the rule, and for companies potentially subject to designation to have a meaningful opportunity to contest designation. The lack of detail in the rules is not consistent with the requirements of the Administrative Procedure Act. A rulemaking must be based on reasonable decision-making and show the agency's views in a concrete and focused form. The vagueness of the NIFR, the NPR and in the interrelated rulemakings of the Council and Federal Reserve do not meet this requirement.

There has been some suggestion in recent testimony to Congress that the agencies have agreed among themselves, without the benefit of a public notice-and-comment rulemaking under the Administrative Procedure Act, to certain specific criteria or principles and protocols to use in designating companies under Titles I and II of the DFA.[148] If that is accurate, those key criteria,

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[146] *See e.g., Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998); *Whitman*, 531 U.S. at 476 (concurring opinion of Justices Stevens and Souter).

[147] *See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980).

[148] *See Oversight of Dodd Frank Implementation*, Hearings Before Senate Banking Committee (Feb. 17, 2011) *available at* http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=c43953db-0fd7-43c3-b6b8-97e2d0da3ef7

principles and protocols must be proposed formally for public comment as part of the formal rulemaking process.[149]

In addition, Section 170 of the DFA dictates that in connection with Council rules implementing Title I, the Federal Reserve "***shall*** promulgate regulations in consultation with and on behalf of the Council setting forth the criteria for exempting certain types or classes of U.S. nonbank financial companies… from supervision by the" Federal Reserve, taking into account the ten criteria listed in Section 113(a)(2) that are discussed above. Section 170 is not merely a grant of authority, it is a specific rulemaking requirement that the exemptive rules ***shall*** be promulgated. The rules required by Sections 203, 113 and 170, and the rest of Titles I and II, are inextricably intertwined, both operationally and textually, beginning with the process of Council designation of certain nonbank financial companies for Federal Reserve supervision under Title I of the DFA, continuing with the preparation, review and approval of "living wills" or prepackaged resolution plans required of companies designated under Title I and the FDIC's back-up examination authority over companies designated under Title I,[150] through a receivership conducted under Title II and cannot operate independently. For example, a financial company designated under Section 113 is automatically within the financial companies covered under Title II. The resolution plan required for companies designated under Title I is intended in part as a road map for the FDIC's use in a receivership conducted on that company under Title II.[151] The Federal Reserve, working with the Council, has not yet promulgated rules implementing Section 170. Without the completion of the required Section 170 exemptive rulemaking, the rulemakings conducted under Sections 203 and 113 as well as the rest of Titles I and II are themselves incomplete and should be stayed or withdrawn until the Section 170 exemptive rule is promulgated by the Federated Reserve in consultation with and on behalf of the Council.

The NIFR and the NPR each states that the proposed rule is not a major rule that will have an impact on small businesses, apparently on the theory that small businesses themselves would not be directly designated. However, the imposition of Title I and II requirements on Money Funds would have an indirect, yet substantial, impact on small business enterprises, as reflected in the comments submitted in the SEC docket on the PWG Report discussed above. Among other effects, the private rights of small businesses as investors in Money Funds, and the

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[149] *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mutual Auto. Ins. Co*., 463 U.S. 29 (1983); *MCI Telecomm. Corp. v. FCC*, 57 F.3d 1136 (D.C. Cir. 1995); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506 (D.C. Cir. 1983); *Conn. Light & Power v. N.R.C.*, 673 F.2d 525 (D.C. Cir. 1982); *Home Box Office v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977); *United Church Bd. for World Change v. SEC*, 617 F. Supp. 837 (D.D.C. 1985).

[150] DFA §§ 165(d), 172.

[151] NIFR, 76 Fed. Reg. at 4207, 4210.

access by small businesses to funding available through Money Funds, would be substantially affected by a designation of a Money Fund under Title I or II. As a result, an assessment of the regulatory impact on small businesses is required in connection with consideration of the rules.

The NIFR and the NPR contain no Paperwork Reduction Act estimate of the total reporting burden on the financial service industry, saying no new reporting will be required. Given the involvement of the FDIC in the process of approving "living wills" and exercising back up examination authority over companies designated under Title I in preparation for exercising Title II resolution power, this is not credible. This error is central to the consideration of the proposed rule. The Titles I and II of the DFA require consideration the impact on the efficiency and competitiveness of U.S. financial markets. The President's recent Executive Order similarly required agency consideration of the time and burden associated with any new or amended regulation and its impact on efficiency and competitiveness.[152]

When the estimated paperwork and reporting burden is so badly underestimated, the evaluation of the administrative and personnel costs and burdens associated with the rule, and their impact on the efficiency and competitiveness of financial firms, is necessarily flawed. This burden and benefit analysis, if done appropriately, should affect how broadly the Council chooses to go in sweeping in financial firms for additional supervision by the Federal Reserve under Title I and receivership by the FDIC under Title II.

When Congress was considering this provision, Federal Reserve Chairman Ben Bernanke testified that a total of roughly 25 firms, "virtually all of" which were bank holding companies already regulated by the Federal Reserve, would meet the test of systemic significance for designation under the Act.[153] Now that Titles I and II are being implemented, "mission creep" has entered the process. More recent testimony, while recognizing the need to consider the cost and economic burden associated with regulation, suggests that the Council plans to exercise its designation authority very broadly.[154] When the costs and economic burdens of a broad implementation are not accurately estimated, there is a significant risk that the regulators will be

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[152] *Improving Regulation and Regulatory Review*, Executive Order 13563 (Jan. 18, 2011).

[153] Regulatory Perspectives on the Obama Administration's Regulatory Reform Proposals, Part II, Hearings before the Financial Services Committee, U.S. House of Representatives, 111th Cong., 1st Sess. July 24, 2009, H.R. 111-68 at 47-48 (testimony of Federal Reserve Board Chairman Ben Bernanke). Similar statements that only a very few firms were appropriate for designation under Title I were made on several occasions during consideration of the DFA. *See, e.g.* Written Statement of former Federal Reserve Board Chairman Paul A. Volcker to Senate Banking Committee (Feb. 2, 2010), Written Statement of former Federal Reserve Board Chairman Paul A Volcker to House Financial Services Committee (Sept. 24, 2009) (estimating number between 5 and 25 firms globally).

[154] Written Statement of FDIC Chairman Sheila C. Bair before Senate Banking Committee (Feb. 17, 2011) (*available at http://www.fdic.gov/news/news/speeches/chairman/spfeb1711.html).*

overly inclusive in their designation of financial companies for supervision under Title I and receivership under Title II, in conflict with the intent of Congress, the terms of the statute, and the economic best interests of the American people.

Finally, as a procedural matter, the Council has not yet been fully established. The DFA requires the appointment and confirmation of additional members of the Council, including among others, the Director of the Bureau of Consumer Financial Protection, the Director of the Office of Financial Research, and the Director of the Federal Insurance Office. This is not a situation of a board missing a member whose term has expired and a successor not yet confirmed to fill it. Rather, these seats have yet to be filled, and in some instances the agencies they are to represent have not yet been established. The purpose of a board with broad representation is to draw upon the viewpoints and expertise of all of the different members designated by statute. Without their participation, any action taken by the Council is taken without the inclusion of that expertise and viewpoint and is procedurally incomplete. Without these areas being represented by the members specified in the statute, the formation of the Council is not yet complete, and it cannot validly take action to propose or adopt regulations or designate any nonbank financial companies under Title I of the DFA. Titles I and II of the DFA are inextricably intertwined both operationally and procedurally in the designation, regulation and receivership of systemically significant or risky financial firms. Until all parts of this intertwined regulatory system are fully constituted, no part of it can be separately implemented.

IV. Conclusion

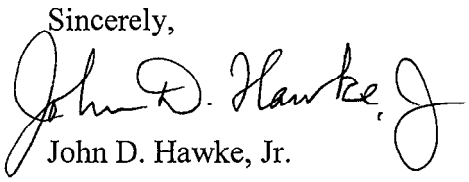
Money Funds have been a success story in U.S. financial regulation. Using a very simple, common sense approach, which permits investment only in short term, high quality money market instruments, the SEC has succeeded in supervising an efficient and effective program by which investors' cash balances provide financing for American businesses and governmental units. They are very popular with consumers, and very useful to the economy.

Even if they were within the statutory definition of a "nonbank financial firm" and thus potentially subject to designation under Section 113 and 203, under an appropriate consideration of the statutory criteria for designation, as well as the potential damage and lack of benefit to the economic system from such a designation, Money Funds should appropriately not be designated for additional Federal Reserve regulation under Title I or FDIC receivership under Title II of the DFA. We suggest that the FDIC provide more clarity on this point and indicate that due to the comprehensive SEC regulation and supervision of Money Funds, in light of the definitions and criteria in the statute, Money Funds will not be designated under Title II.

Although we recognize that some quarters continue to espouse the Carter Administration-era view that Money Funds should be regulated like banks, the reality is that the SEC's

regulation of Money Funds has been far more effective than the federal banking agencies' regulation of banks. In the past 40 years only two Money Funds have broken the buck, and both were liquidated with relatively minimal losses to investors on a percentage basis and zero cost to the federal government. During that same period, more than 2,800 depository institutions failed, and almost 600 were kept afloat with government infusions of capital, at a total cost to the government of more than $164 billion. There is nothing in the historical record to suggest that imposing "bank like" requirements on Money Funds through designation for regulation under Section 113 or receivership under 203 will make Money Funds, or the American economy, safer. The prudent course, in our view, is to continue to build upon what has worked and to refine the current program of regulation of Money Funds under the supervision of the SEC, including the existing process for orderly wind-down of Money Funds under SEC and judicial supervision in those rare cases in which such action is required.

Sincerely,



John D. Hawke, Jr.