that contributed to the recent financial crisis, such as the use of excessive leverage and major off-balance-sheet exposure. The fact that a company is large or is significantly involved in financial services does not mean that it poses significant risks to the financial stability of the United States. There are large companies providing financial services that are in fact traditionally low-risk businesses, such as mutual funds and mutual fund advisers. We do not envision nonbank financial companies that pose little risk to the stability of the financial system to be supervised by the Federal Reserve. Does the chairman of the Banking Committee share my understanding of this provision?

Section 171. The Senator from Massachusetts is correct. Size and involvement in providing credit or liquidity alone should not be determining factors. The Banking Committee has included a number of high-risk, nonbank financial companies would join large bank holding companies in being regulated and supervised by the Federal Reserve.

CAPITAL REQUIREMENTS

Ms. COLLINS. Mr. President, I understand that it is the intent of paragraph 7 of section 171(b) of this legislation to require the Federal banking agencies, subject to the recommendations of the council, to develop capital requirements applicable to insured depository institutions, depository institution holding companies, and nonbank financial companies supervised by the Board of Governors that are engaged in activities that are subject to heightened standards under section 129. It is well understood that minimum capital requirements can help to shield various public and private stakeholders from risks posed by material distress that could arise at these entities from engaging in these activities. It is also understood and recognized that minimum capital requirements may not be an appropriate tool to apply under all circumstances and that by prescribing specific capital requirements for specific activities at section 7, it should not be inferred that capital requirements should be required for any other companies not covered by paragraph 7.

Mrs. SHAHEEN. I also understand that the intent of this section is not to create any inference that minimum capital requirements are the appropriate standard or safeguard for the council to recommend to be applied to any nonbank financial company that is not subject to supervision by the Federal Reserve under title I of this legislation, with respect to any activity subject to section 129. Rather, the council should have full discretion not to recommend the application of capital requirements to any such nonbank financial company engaged in any such activity.

Mr. DODD. I concur with Senator Collins and Senator Shaheen. Section 171 of this legislation came from an amendment that Senator Collins offered on the Senate floor, and I truly appreciate the constructive contribution she has made to this legislative process. My understanding also is that banks are subject to regulation under paragraph 7 are intended to apply only to insured depository institutions, depository institution holding companies, and nonbank financial companies supervised by the Board of Governors. I thank my friends from Maine and New Hampshire for this clarification.

INSURANCE COMPANY DEFINITION

Mr. NELSON of Nebraska. Mr. President, first. I would like to commend Chairman Dodd for his hard work on the Wall Street reform bill and for maintaining an open and transparent process while developing this legislation. With regard to the orderly liquidation authority under title II of the bill, an “insurance company” is defined in section 201 as any insurer that is engaged in the business of insurance, subject to regulation by a State insurance regulator, and covered by a State law that is designed to specifically deal with the regulation, or the insolvency of an insurance company. Is it the intent of this definition that a mutual insurance holding company organized and operating under State insurance laws should be considered an insurance company for the purpose of this title?

Mr. DODD. Yes, that is correct. It is intended that a mutual insurance holding company organized and operating under State insurance laws should be considered an insurance company for the purpose of title II of this legislation. I thank the Senator from Nebraska for this clarification.

INDEPENDENT REPRESENTATIVES

Mrs. LINCOLN. Mr. President, as chairman of the Agriculture, Nutrition, and Forestry Committee, I became acutely aware that our pension plans, government investors, and charitable endowments were falling victim to swap dealers marketing swaps and derivatives that were inappropriate for them or should have known to be inappropriate or unsuitable for their clients. Jefferson County, AL, is probably the most infamous example, but there are many others in Pennsylvania and across the country. That is why I worked with Senator Harkin and our colleagues in the House to include protections for pension funds, government entities, and charitable endowments in the Dodd-Frank Wall Street and Consumer Protection Act.

Those protections—set forth in sections 731 of the Dodd-Frank Act and section 716 of the conference report—place certain duties and obligations on swap dealers and security-based swap dealers when they deal with special entities. One of these obligations is that a swap dealer or the security-based swap dealer entering into a swap or security-based swap with a special entity must have a reasonable basis for believing that the special entity was an independent representative evaluating the transaction.

Our intention in imposing the independent representative requirement was to ensure that there was always someone independent of the swap dealer to review and approve swap or security-based swap transactions. However, we did not intend to require that the special entity hire an investment manager independent of the swap dealer. Is that your understanding, Senator Harkin?

Mr. HARKIN. Yes, that is correct. We certainly understand that many special entities have internal managers that may meet the independent representative requirement. For example, many public electric and gas systems have employees whose job it is to police the day-to-day hedging operations of the system, and we intended to allow them to continue to rely on those in-house managers to evaluate and approve swap and security-based swap transactions. Section 716 provided that the manager remained independent of the swap dealer or the security-based swap dealer and met the other conditions of the provision, namely, the manager is an independent fiduciary or in-house asset manager—INHAM—for a pension plan may continue to approve swap and security-based swap transactions.

FOREIGN BANKS

Mrs. LINCOLN. Mr. President, I wish to engage my colleague, Senator Dodd, in a brief colloquy related to the section 716, the bank swap desk provision. In our rush to conclude the conference there was a significant oversight made in finalizing section 716 as it relates to the treatment of uninsured U.S. branches and agencies of foreign banks. Under the U.S. policy of national treatment, which has been part of U.S. law since the International Banking Act of 1978, uninsured U.S. branches and agencies of foreign banks are authorized to engage in certain activities as insured depository institutions. While these U.S. branches and agencies of foreign banks do not have deposits insured by the FDIC, they are subject to the same regulations by a Federal banking regulator, they have access to the Federal Reserve discount window, and other Federal Reserve credit facilities.

It is my understanding that a number of these U.S. branches and agencies of foreign banks will be swap entities under section 716 and title VII of Dodd-Frank. Due to the fact that the section 716 safe harbor only applies to “insured depository institutions” it means that U.S. branches and agencies of foreign banks will be forced to push out all of these activities. This result was not intended. U.S. branches and agencies of foreign banks should be subject to the same swap desk push out requirements as insured depository institutions under section 716. Under section 716, insured depository institutions must push out all swaps and security-based swaps activities except for those specifically enumerated activities such as hedging and other similar risk mitigating activities directly related
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Would you please explain the safeguards included in this bill to prevent abuse?

Mrs. LINCOLN. It is also critical to ensure that we only exempt those transactions that are used to hedge by manufacturers, commercial entities and a limited number of financial entities. We were surgical in our approach to a clearing exemption, making it as narrow as possible and excluding speculators.

In addition to a narrow end-user exemption, this bill empowers regulators to take action against manipulation. Also, the Commodity Futures Trading Commission and the Securities Exchange Commission will have a broad authority to write and enforce rules to prevent abuse and to go after anyone that attempts to circumvent regulation.

America’s consumers and businesses deserve strong derivatives reform that will ensure that the country’s financial oversight system promotes and fosters the most honest, open and reliable financial markets in the world.

Mr. President, I thank the Chairman for this opportunity to clarify some of the provisions in this bill. I appreciate the Senator’s help to ensure that this bill recognizes that manufacturers and commercial entities are victims of this financial crisis, not the cause, and that it does not unfairly penalize them for using these products as part of a risk-mitigation strategy. I hope we can agree on a light hand for derivatives trading and bring transparency and fairness to this market, not just for the families and businesses that were taken advantage of but also for the long-term health of our economy and particularly our manufacturers.

STABLE VALUE FUNDS

Mr. HARKIN. Mr. President, as chairman of the Health, Education, Labor and Pension Committee, the pensions community approached me about a possible unintended consequence of the derivatives title of the Dodd-Frank Wall Street Reform and Consumer Protection Act. They were concerned that the provisions regulating swaps might also apply to stable value funds.

Stable value funds are a popular, conservative investment choice for many employee benefit plans because they provide a guaranteed rate of return. As I understand it, there are about $690 billion invested in stable value funds, and these and those approaching retirement often favor those funds to minimize their exposure to market fluctuations. When the derivatives title was put together, I do not think anyone had stable value funds or stable value wrap contracts—some of which could be viewed as swaps—specifically in mind, and I do not think it is clear to any of us what effect this legislation would have on them.

Therefore, I worked with Chairman LINCOLN, Senator LEAHY, and Senator CASEY to develop a proposal to direct the SEC and CFTC to conduct a study—in consultation with DOL, Treasury, and State insurance regulators—to determine whether it is in the public interest to treat stable value funds and wrap contracts like swaps. This provision is intended to apply to all stable value fund and wrap contracts held by employee benefit plans—defined contribution, defined benefit, health, or welfare—subject to any deemed representative of transactions directly by participants, including benefit payment elections, or by persons who are legally required to act solely in the interest of participants such as trustees. If the SEC and CFTC determine that it is in the public interest to regulate stable value fund and wrap contracts as swaps, then they would have the power to do so. I think this achieves the policy goals underlying the derivatives title while still making sure that we don’t cause unintended harm to people’s pension plans.

Mrs. LINCOLN. Mr. President, I share Chairman HARKIN’s concern about possible unintended consequences the Dodd-Frank Wall Street Reform and Consumer Protection Act could have on pension and welfare plans which provide their participant with stable value fund options. These stable value fund options and their contract wrappers are viewed as being a swap or a security-based swap. As Chairman HARKIN has stated, there is a significant amount of retirement savings in stable value funds, $690 billion, which are retirement funds of millions of hardworking Americans. One of my major goals in this legislation was to protect Main Street. We should try to avoid doing any harm to pension plan beneficiaries. When the stable value fund issue was brought to my attention, I knew it was something we had to address. That is why I worked with Chairman HARKIN and Senator LEAHY and CASEY to craft a provision that would give the CFTC and the SEC time to study the issue of whether the stable value fund options and contract wrappers for these stable value funds are “swaps” or some other type of financial instrument such as an insurance contract. I think subjecting this issue to further study will provide a measure of stability to participants and beneficiaries in employee benefit plans—including those participants in defined benefit pension plans, 401(k) plans, annuity plans, supplemental retirement plans, 403(b) plans, and voluntary employee beneficiary associations—while allowing the CFTC and SEC to make an informed decision about what the stable value fund options and their contract wrappers are and whether they should be regulated as swaps or security-based swaps. It is a commonsense solution, and I am proud to address this important issue which could affect the retirement funds of millions of pension beneficiaries.

Mr. BAYH. I thank the Chairman. With respect to the Volcker Rule, the conference report states that banking entities are not prohibited from purchasing and disposing of securities and other instruments in connection with underwriting or market making activities, provided that activity does not expose the financial entity to permanent losses and residual risks positions, which are essential parts of the market making function. Without that flexibility, market makers would not be able to provide liquidity to the market.

Mr. DODD. The gentleman is correct in his description of the language.

EVENT CONTRACTS

Mrs. FEINSTEIN. I thank Chairman LINCOLN and Chairman DODD for maintaining section 746 in the conference report accompanying the Dodd-Frank Wall Street Reform and Consumer Protection Act, which gives authority to the Commodity Futures Trading Commission to prevent the trading of futures and swaps contracts that are contrary to the public interest.

Mr. LINCOLN, Chairman DODD and I maintained this provision in the conference report to assure that the Commodity Futures Trading Commission has the power to prevent the creation of futures and swaps markets that would allow citizens to profit from devastating events and also prevent gambling through futures markets.

I thank the Senator from California for encouraging Chairman DODD and me to include this a bill on derivatives trading and bring transparency and fairness to this market, not just for the families and businesses that were taken advantage of but also for the long-term health of our economy and particularly our manufacturers.