Senate Banking Committee Chairman Chris Dodd (D-CT) released a Committee Print of the “Restoring American Financial Stability Act of 2010” on March 15, 2010. Chairman Dodd indicated that the Committee would markup this legislation the week of March 22. The following is a quick summary of the highlights of the Committee Print of most interest to bankers.

1. **Consumer Financial Protection Bureau (CFPB)**

A new division within the Federal Reserve Board (Fed) would be created, the “Consumer Financial Protection Bureau” (CFPB). It would not report to the Board of Governors. Instead, the CFPB would have a Director appointed by the President, would be autonomous and would have its own dedicated budget paid for by the Fed.

- The CFPB would have sole consumer protection rule-writing authority for consumer financial products and services for banks and non-banks. This includes broad UDAP authority and the authority to prohibit practices and set standards for sales practices and compensation.

- CFPB would have examination and enforcement authority over banks and credit unions with more than $10 billion in assets. Banks and credit unions with $10 billion or less in assets would be examined by their prudential regulators. CFPB would still have backup examination authority over smaller banks and credit unions.

- It would specifically have authority over all mortgage-related businesses, such as lenders, servicers and mortgage brokers.

- The CFPB’s rules would also apply to non-banks. In particular, large payday lenders, debt collectors and consumer reporting agencies. CFPB would also have “risk-based” supervisory and enforcement authority over non-banks.

- Similar to the House bill, the Committee Print provides specific exceptions from CFPB oversight for entities regulated by state insurance regulators, the SEC, state securities regulators, the CFTC but not the Farm Credit System. In addition, merchants, retailers, and other sellers of non-financial products that are not engaging in financial activities are exempted.

- The new “Financial Stability Oversight Council” (see below) would have the ability to block a proposed CFPB rule by a 2/3 vote of the nine voting members of the Council.

2. **Preemption**

The Administration proposed language that eliminated federal preemption for national banks and federal savings associations. The Committee Print replaces this with an improved version of the language added by Rep. Bean (D-IL) to the House bill which restores much of the basic framework of preemption, but also creates potential litigation and procedural uncertainties.

Specifically, the Committee Print provides that a determination regarding the preemption of a state consumer financial law shall be made according to the legal standard established in the Barnett Bank case, thus moving closer to preserving the standard for preemption as it stands today (and the benefits it provides to the broader economy, national banks, and state-chartered banks in states that maintain parity of regulation between national and state chartered institutions). The same standard would apply to federal savings associations (though questions remain over how seamlessly this will work).

While each step in the process has seen these provisions improve, there continue to be problems with this language, including but not limited to the broad enforcement powers provided to state Attorneys General, potential procedural barriers to issuing preemption decisions, new substantive requirements, and the elimination of the ability of operating subsidiaries of national banks to benefit from preemption determinations.

• Like the House bill, the Committee Print expands state AGs general visitorial powers and their ability both to enforce federal and state laws, and to obtain significant monetary damages on behalf of its citizens against national banks. These provisions remain a serious problem as they go far beyond the recent Supreme Court decision in the Cuomo case that permitted state AGs to go to court to enforce non-preempted state laws.

• New requirements are added that create potential barriers to obtaining preemption decisions. For instance, although the Committee Print restores the basic tenets of the Barnett Bank case, it also requires courts and the OCC to find that substantive Federal standards exist before preemption may be ordered. What qualifies as a “substantive Federal standard” is left open to interpretation, and raises questions regarding situations where Federal regulators have chosen not to act in a specific area. Questions remain to what extent these provisions will impede the ability of courts and Federal regulators to issue preemption decisions.

• Federal savings associations are subject to the same preemption standards as national banks. This may represent a change in the existing thrift preemption provisions. Questions regarding the implementation of this new standard will need to be explored.

• Operating subsidiaries of national banks and federal savings associations would not receive the same preemption protections afforded national banks and federal thrifts. This would undercut protections given to such subsidiaries under existing OCC and OTS regulations and the recent decision by the Supreme Court in the Watters case.
Beginning on the date of enactment no new Federal thrift charter may be granted. After the transfer date, the OTS will be abolished, and the current functions of the OTS will be divided up among the surviving agencies as follows:

**Federal Reserve Board**

- All rulemaking authority over savings and loan holding companies, of any size.
- Supervisory authority over savings and loan holding companies with $50 billion or more in total assets.
- Rulemaking authority for inter-affiliate transactions and insider lending relating to savings associations.

**OCC**

- Supervisory (but not rulemaking) authority over savings and loan holding companies with less than $50 billion in total assets, but only if the majority of assets held by depository institution subsidiaries are held by national banks and Federal thrifts.
- Rulemaking authority for both Federal and State savings associations.
- Supervisory authority for Federal savings associations.

**FDIC**

- Supervisory (but not rulemaking) authority over savings and loan holding companies with less than $50 billion in total assets, but only if the majority of assets held by depository institution subsidiaries are held by State chartered institutions.
- Supervisory authority for State savings associations.

After the transfer date, certain functions will be transferred from the Federal Reserve Board to OCC and FDIC

**OCC**

Supervision of bank holding companies with less than $50 billion in assets, but only if the majority of assets held by depository institution subsidiaries are held by national banks and Federal thrifts. Rulemaking authority remains with the Federal Reserve, but consultation with the OCC is required.

**FDIC**

1 One year after enactment, unless extended for an additional 6 months.
• Supervision of bank holding companies with less than $50 billion in assets, but only if the majority of assets held by depository institution subsidiaries are held by State chartered institutions. Rulemaking authority remains with the Federal Reserve, but consultation with the OCC is required.

• All other authority with respect to State member banks.

4. **Systemic Risk Council**

There would be a nine-member “Financial Stability Oversight Council” Chaired by the Secretary of Treasury, an independent member with insurance experience appointed by the President and representatives of the Fed, FDIC, OCC, SEC, CFTC, the Federal Housing Finance Agency (FHFA) and the new CFPB.

The Council’s duties are to identify institutions and practices that might pose a systemic risk and make recommendations to the members of the Council for standards to address such risks. The House bill included ABA supported language that required the Council to review and comment on accounting practices and standards but the Committee Print does not contain this language.

The Council can make recommendations to the Fed regarding new and higher regulatory standards for financial companies as they grow larger and more complex, including more stringent capital, leverage, and liquidity requirements. Large, complex companies would be required to submit credible “funeral plans” for their rapid and orderly shutdown should they fail.

5. **“Dissolution Authority for Failing Companies”**

**FDIC.** The Committee Print would create a liquidation mechanism for the FDIC to act as receiver to unwind failing institutions where the failure would cause systemic risk. Shareholders and unsecured creditors would bear any losses and management would be removed.

Treasury, the FDIC and the Fed would have to agree to put a company into the liquidation process. A panel of three bankruptcy judges must convene and agree within 24 hours that a company is insolvent and should be put into liquidation.

**Funding.** Institutions with total consolidated assets equal to or greater than $50 billion would be assessed to pay for a $50 billion fund to pay for the liquidation of failing firms. Risk-based assessments would be imposed over a period that begins one-year after enactment and would not be shorter than 5 and not longer than 10 years. The House bill included a much larger $150 billion fund.

**Deposit Insurance Assessments.** Similar to the House bill and the original Dodd Discussion Draft, the Committee Print would broaden the base for FDIC insurance assessments to be consolidated assets less tangible equity and less long-term unsecured debt. If the FDIC finds that this change reduces the effectiveness of its risk-based assessment system, or increases the risk of loss to the FDIC, it may revert to the existing assessment base or establish a new assessment base.
**“Volcker” rule.** The Committee Print includes a modified version of the proposal by former Fed Chairman Paul Volcker to restrict bank proprietary trading. The regulatory agencies would be required to issue rules for banks, bank holding companies and their affiliates, to prohibit proprietary trading, investment in and sponsorship of hedge funds and private equity funds and to limit relationships with those funds. The Fed would be required to impose similar restrictions on the nonbank financial companies it supervises.

6. **Executive compensation**

In general, shareholders of public companies would be given a nonbinding vote on executive compensation. These same shareholders would also be allowed to nominate their own candidates using the company’s proxy ballots.

- Public companies would be required to disclose the relationship between executive compensation and company performance; to establish claw back provisions and independent compensation committees.

- Public companies would also be required to adopt majority voting and disclose why the roles of Chairman and CEO have not been separated.

- The Fed would be directed to promulgate rules prohibiting as unsafe and unsound excessive compensation paid to bank holding company executives, regardless of whether the company is publicly traded or not.

7. **Derivatives/23A**

The Committee Print makes several changes to the definition of a covered transaction under Section 23A, the most significant of which is the addition of securities lending and derivatives transactions with affiliates to the extent the transaction causes the member bank to have a credit exposure. Unlike the House bill, credit exposure is not defined and is left to the Fed’s determination.

Further, the House bill’s language has been improved to provide that both securities lending and derivatives transactions will be exempt from the numerical limits of Section 23A if they are collateralized by US government and agency securities.

The Fed would also be given authority to consider netting agreements in connection with determining both the amount of the covered transaction and whether the transaction is fully secured and, thus, exempt.

8. **Other Provisions**
• **Risk Retention.** Securitizers would be required to retain not less than 5 percent of the credit risk for any asset that is transferred, sold or conveyed through an asset-backed security. The Federal agencies can provide some exemptions or adjustments.

• **New HMDA Requirements.** Additional reporting on age of applicant, points and fees charged, prepayment penalties, value of property, terms of loan allowing for payments resulting in less than full amortization, and other information would be required.

• **Insurance Regulator.** A new Office of National Insurance (ONI) within the Department of the Treasury. The ONI would be headed by a Director, appointed by the Secretary of the Treasury.

• **Interstate Branching.** Removes restrictions on de novo interstate branching.