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CENTRAL COUNTERPARTIES AND ORDERLY LIQUIDATION AUTHORITY

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Can a clearinghouse be resolved under Dodd-Frank Title II? It is a question that many have assumed the answer to, but which becomes less certain the further one probes. For example, while there is no actual prohibition on putting a CCP into OLA, the lack of any mention of the CFTC in Title II, and the absence of any direct reference to either clearinghouses or even "financial market utilities" as debtors, might give one pause.

Yet the answer to this basic question remains of vital importance. After all, if OLA is unavailable, the resolution of a CCP, already a chancy proposition, becomes even more hazardous.

At best, there are currently two mechanisms for resolving a clearinghouse in financial distress: OLA and subchapter IV of chapter 7 of the Bankruptcy Code.[1] The second is primarily designed for the liquidation of commodities and other derivatives dealers, but the definition of "commodities broker" under the Code is broad enough to pick up clearinghouses too.[2] There has never been a clearinghouse chapter 7 case, but one would suspect it would not be pretty.[3]

That leaves Title II and OLA.

This short paper thus examines the statutory arguments for and against extending OLA to cover CCPs. There are good reasons to doubt the effectiveness of Title II when applied to a clearinghouse,[4] but the focus of this paper is on the simple statutory point: can a CCP even go into OLA?

Part 1 provides a brief overview of Title II and OLA, and develops the basic uncertainty that attends the resolution of systemically important clearinghouse. Part 2 then presents the argument that OLA was never envisioned to apply to clearinghouses, while part 3 presents the argument in favor of such application. Part 4 then weighs the merits of the various approaches. In short, while it might be possible to put a CCP into resolution under Title II, I argue that doing so will expose the United States government, and perhaps even the global financial system, to considerable risk.

For example, what would happen if a

district court held that a CCP was ineligible for OLA?[5] Regulators could undoubtedly press ahead, but doing so might expose taxpayers to a massive claim for damages. And regulators could hardly help but exacerbate a systemic crisis with a confused attempt at CCP resolution that was thrown into doubt by the courts.

On the other hand, what else could be done? The entire theme of Dodd-Frank is ending bailouts, while also avoiding systemic risk.[6] In the case of CCPs, especially given a very indeterminate statutory basis for action, these two goals might be irreconcilable.

Regulators have taken the public position that the CFTC is the *recovery* authority for clearinghouses, while the FDIC is the *resolution* authority, given its powers as receiver under OLA.[7] But as this paper makes clear, finding an actual statutory basis for the FDIC's role, and for placing clearinghouses into Title II, is at the very least more complex than it should be. And Title II offers little textual confirmation that Congress intended for OLA to be available to such entities. At present, Title II might be the best resolution tool available by process of elimination, but that surely is a far cry from saying Title II represents a legally secure way to address a clearinghouse in financial distress.

1. Dodd-Frank's Orderly Liquidation Authority

The core of Dodd-Frank Title II's orderly liquidation authority is an extension of the FDIC's traditional powers as bank receiver to a greater part of a systemically important financial institution. Because the FDIC's traditional receivership regime applies only to insured depository institutions, before Dodd-Frank, the agency had no jurisdiction over the failure of a depository institution's holding company or of nonbank subsidiaries of the holding company.

The new, broader receivership power under OLA applies to any "financial company" whose failure under the Bankruptcy Code or other applicable insolvency regime "would have serious adverse effects on the financial stability of the United States."[8] The definition of "financial company" includes bank holding companies, any nonbank financial company designated by the Financial Stability Oversight Council as systemically important, and any other company that is predominantly engaged in financial activities.[9]

A company is "predominantly engaged" in "financial activities" if it derives a least 85% of its total consolidated revenues from such activities.

The OLA process is triggered in two steps. First, the Federal Reserve Board, acting in conjunction with a relevant regulator of the financial institution, must recommend the use of Title II.[10] Then, the Secretary of the Treasury, after consulting with the President, must determine that, among other things, the failure of the company and its resolution under the Bankruptcy Code (or other applicable insolvency laws, like SIPA) would have serious adverse effects on the financial stability of the United States, and that the application of Title II would avoid or mitigate such effects.[11]

Thus, in cases where the financial institution in question is primarily a broker-dealer, the Federal Reserve Board and the SEC must recommend the use of Title II, and the Treasury Secretary must approve its use. In cases centered on insurance companies, the Director of the new

Federal Insurance Office and the Fed are the relevant parties to recommend use of Title II. In all other cases, the FDIC and the Fed are responsible for deciding whether to recommend to the Treasury Secretary that the appointment of the FDIC as receiver is appropriate.

A two-thirds vote is required of each applicable regulator (save for insurance companies, where the director of the FIO votes alone) for a recommendation to be approved and sent to the Treasury Secretary. And both the recommending regulators and the Secretary are required to address the specific question of whether the debtor-company satisfies the definition of "financial company" under Title II.

A financial company that becomes subject to the OLA is defined as a "covered financial company, " and if the company is a broker-dealer, the company is also termed a "covered broker or dealer."[12]

And therein lies the core of the question: is a CCP a "financial company," that can become a covered financial company?

Recall that three types of entities can be financial companies for Title II purposes. But clearinghouses are neither bank holding companies nor nonbank financial companies supervised by the Fed under section 113 of Dodd-Frank—in the latter case, because clearinghouses, even if designated as systemically important financial market utilities under Title VIII, are not regulated by the Fed under section 113, which governs the designation of "too big to fail" institutions under title I. And under title VIII, most CCPs are primarily regulated by either the CFTC or the SEC.[13]

The question of OLA's applicability to clearinghouses thus turns on the third category of eligible financial institutions, namely whether the CCP is a company predominantly engaged in activities that the Fed has determined are financial in nature or incidental thereto for purposes of the Bank Holding Company Act. Under section 201(b) of Dodd-Frank, the FDIC is given the power to establish, in consultation with the Secretary, standards for determining if a company is ''predominantly engaged in activities that the Board of Governors has determined are financial in nature or incidental thereto for purposes of section 4(k). . . .''

In 2013, the FDIC approved a final rule establishing such standards. The rule is notable for saying nothing about clearinghouses.

During the course of enacting those rules, CME argued that it could not be subject to Title II, because 85% of its revenues did not come from applicable financial activities, even if its clearing division could be deemed a "financial institution" because clearing "could be construed to entail the 'safeguarding of money'—a recognized type of financial activity under section 4(k) of the Bank Holding Company Act . . . 12 U.S.C. § 1843k(A)."[14] That argument apparently turns on the unique structure of CME, where its clearing operations remain unincorporated divisions of the larger whole.[15]

On the other hand, in a 2014 research note, provocatively entitled *What is the Resolution Plan for CCPs?*, JPMorgan Chase's Office of Regulatory Affairs argued that

> Absent unusual facts and circumstances, a CCP in the United States is a "financial company" because 85% or more of its revenue is derived from safekeeping, custody, clearance, settlement, extensions of credit and bilateral or multilateral

> netting services, all of which are not only financial activities but within the business of banking. Indeed, the core function of a CCP is to substitute itself as counterparty on both sides of a trade, which is essentially substituting its credit for the credit of the two counterparties, and reducing the overall credit risk of transactions through the bilateral or multilateral netting of obligations. Making extensions of credit either as a lender or guarantor, or providing bilateral or multilateral netting services, are traditional banking functions.

This interpretation is sensible, but also fails to closely engage with the actual language of Title II, or its overarching structure. For example, given that Title II typically gives authority over the resolution decision to a relevant regulator, along with the Fed and Treasury, can we be sure that OLA was intended to apply to CCPs when the CFTC never once appears in the title? Does it make sense to assume that Congress would have left this decision with the FDIC, which otherwise has no role with respect to clearinghouses? And surely title VIII, which provides for an extensive new system of regulation of "financial market utilities" might have made some reference to Title II if Congress contemplated resolution of FMUs in OLA?

The next two parts of this paper take up the task of weighing the arguments, based on a close reading of the statute and consideration of its configuration.

2. The Argument Against CCPs in OLA

The argument against CCPs in OLA is both textual and structural. Start with the textual.

As noted, in relevant part, Title II defines "financial company" by reference to those activities which are permissible for financial holding companies under the Gramm-Leach-Bliley Act.[16] Gramm-Leach-Bliley amended section 4 of the Bank Holding Company Act to allow certain, special bank holding companies—those that qualified as financial holding companies—to engage in a broad range of activities that Gramm-Leach-Bliley defines as financial in nature[17] or that the Fed, in consultation with the Treasury Secretary, determines to be financial in nature.[18]

In its recently enacted rule 380.8 under its Title II authority, the FDIC has essentially restated the rules previously enacted by the Fed or codified by Gramm-Leach-Bliley.[19] But in no case is there any reference to derivatives clearinghouses.

But there are express references to clearing in several other contexts. For example, financial activity under the FDIC's rule 380.8 includes providing "securities brokerage services . . . including securities clearing."[20] Financial activity likewise includes providing "Agency transactional services for customer investments . . ." including acting "as a futures commission merchant ("FCM") for unaffiliated persons in the execution, clearance, or execution and clearance of any futures contract and option on a futures contract."[21]

This latter provision clearly does not apply to swaps CCPs, but we might even doubt if it applies to futures clearinghouses, in as much as the members of the clearinghouses are arguably not "unaffiliated persons," nor are the members likely to be customers, which are defined to exclude "corporations or partnerships comprised of more than five persons."[22] Moreover, FCM's are typically thought of as the members of a CCP, rather than the CCP itself. In short, none of the references to clearing seem to apply to the clearinghouse itself.

By "invoking the language of a long gone civil law empire,"[23] as is often done with statutes—*expressio unius est exclusio alterius*—we might conclude that these express references to clearing show that both the FDIC did not originally intend to include clearinghouses within Title II, notwithstanding its subsequent statements to the contrary.

Indeed, the relevant intent here is more than a bit confused: Congress' intent in Title II apparently being to reference the Fed's intent, as expressed with regard to another Congressional statute, it is not clear that the FDIC has much of a role to play. Rather its role is as a conduit for the Fed.

Understood this way, the relevant intent for interpreting Title II's definition of "financial company" is Congress' understanding of what the Fed had done, or even might do, under Gramm-Leach-Bliley. There is no indication that either the Fed or Congress have ever intended to permit financial holding companies to own systemically important CCPs. After the financial crisis and the enactment of Dodd-Frank, such ownership seems particularly unlikely.

That then takes us to the structural argument. In short, Title II seems to have never contemplated a CCP being addressed by OLA and Title II.

First, as noted, OLA proceeding are typically instituted by the Fed acting in conjunction with a relevant regulator. But the CFTC has no role whatsoever to play under Title II, despite its status as the lead regulator for all of the major domestic swaps clearinghouses under title VIII of Dodd-Frank. Likewise, while the SEC is the lead regulator of The Options Clearing Corporation, it only plays a role in initiating an OLA proceeding when the financial company is primarily a broker-dealer.[24]

Thus, in the case of all of the systemically important domestic derivatives CCPs, the lead regulators have no formal role under Title II. Instead the decision to put a CCP into resolution would fall to the FDIC, an agency that has no involvement with clearinghouses. There are good reasons to doubt Congress intended such a result.

Next, there is the structure of the orderly liquidation fund under Title II. The FDIC acting as receiver is able to access the fund by issuing promissory notes to the Treasury. During the first 30 days after the FDIC's appointment as receiver, the FDIC is able to issue obligations of an amount equal to 10 percent of the total consolidated assets of the debtor-company. After 30 days, the FDIC can issue obligations for an amount that is equal to 90 percent of the fair value of the total consolidated assets that are available for repayment.

This inverts the cash needs of a CCP in resolution: during the early days of a receivership, the CCP—or its successor bridge institution—will need maximum funding to demonstrate its continued ability to perform. Without such a demonstration, the CCP will collapse as customers flee, with all the attendant systemic consequences. That is, the Congressional design of the orderly liquidation fund also suggests that it was never contemplated that CCPs would be in OLA.[25]

And there is the fundamental problem that

OLA was expressly designed to liquidate the financial institution in question. And while the FDIC's recent flirtation with single point of entry (or SPOE) surely searches the outer limits of the meaning of "liquidation,"[26] it seems quite clear that the only way to avoid the systemic consequences of a CCP's failure is to keep the CCP operating throughout the financial crisis. If the central clearing mandate is going to "work," it must be that systemically important CCPs operate in good times and bad, without exception. "Continued operations at all costs" is rather difficult to square with "liquidation," even granting a broad definition of the latter.

At best a CCP "liquidation" might involve an immediate "363 sale" to a well-capitalized bridge institution controlled by regulators ready to oversee the daily operation of the CCP.[27] But as noted herein, Title II is ill equipped to provide such an outcome, given that the process will be run by a regulator that is short on cash and lacking in relevant experience.

And then there is the general lack of any express reference to clearinghouses as debtor in Title II itself. The drafters of Title II show awareness of existence of clearinghouses in section 210, where subpart (c)(9)(c) provides that

> In the event that the Corporation as receiver for a financial institution transfers any qualified financial contract and related claims, property, or credit enhancement . . . and such contract is cleared by or subject to the rules of a clearing organization, the clearing organization shall not be required to accept the transferee as a member by virtue of the transfer.[28]

But again, what inference should we draw from this sole express reference, which clearly supposes the CCP will be outside the OLA proceeding?

3. The Argument for CCPs in OLA

The argument for CCPs in Title II begins by conceding that neither the Gramm-Leach-Bliley rules, nor the FDIC's Title II rules that derive from those earlier rules, expressly mention CCPs.

But the rules do mention a variety of activities that are commonly associated with CCPs. This is apparently the approach taken by JPMorgan in the aforementioned research note, where the bank argued that

> a CCP in the United States is a "financial company" because 85% or more of its revenue is derived from safekeeping, custody, clearance, settlement, extensions of credit and bilateral or multilateral netting services, all of which are not only financial activities but within the business of banking.

This argument is also seen in a recent staff presentation to the CFTC's Market Risk Advisory Committee, where the presenters submitted that "DCOs are likely eligible for resolution under the Orderly Liquidation Authority as 'financial companies' under FDIC Regulation 12 CFR § 380.[8]."[29]

Indeed, under subpart (b)(3) of that rule, financial activities include

> (i) Lending, exchanging, transferring, investing for others, or safeguarding money or securities
> . . .
>
> (vi) Engaging in any activity that the Board of Governors has determined to be so closely related to banking or managing or controlling banks as to be a proper incident thereto, which include—
>
>> (B) Activities related to extending credit. Any activity usual in connection with making, acquiring, brokering or servicing loans or other extensions of credit, including the following activities—

(6) Asset management, servicing, and collection activities. Engaging under contract with a third party in asset management, servicing, and collection[30] of assets of a type that an insured depository institution may originate and own.

(7) Acquiring debt in default. Acquiring debt that is in default at the time of acquisition.

(G) Agency transactional services for customer investments—

(4) Futures commission merchant. Acting as a futures commission merchant ("FCM") for unaffiliated persons in the execution, clearance, or execution and clearance of any futures contract and option on a futures contract.

(5) Other transactional services. Providing to customers as agent transactional services with respect to swaps and similar transactions, any transaction described in paragraph (b)(2)(vi)(H) of this section,[31] any transaction that is permissible for a state member bank, and any other transaction involving a forward contract, option, futures, option on a futures or similar contract (whether traded on an exchange or not) relating to a commodity that is traded on an exchange.

Taken as a whole, the bulk of a CCPs operations could be fit into these rules.

The argument in favor of putting CCPs into OLA then finds further support in section 210 of Dodd-Frank.[32] A subpart of that section provides:

(m) Liquidation of certain covered financial companies or bridge financial companies

(1) **In general**. Except as specifically provided in this section, and notwithstanding any other provision of law, the Corporation, in connection with the liquidation of any covered financial company or bridge financial company with respect to which the Corporation has been appointed as receiver, shall—

(B) in the case of any covered financial company or bridge financial company that is a commodity broker, apply the provisions of subchapter IV of chapter 7 [of] the Bankruptcy Code, in respect of the distribution to any customer of all customer property *and member property*, as if such covered financial company or bridge financial company were a debtor for purposes of such subchapter.

(2) **Definitions**. For purposes of this subsection—

(B) the terms "commodity broker" and "stockbroker" have the same meanings as in section 101 of the Bankruptcy Code.

(italics added).

As previously noted, the definition of "commodity broker" in the Bankruptcy Code includes "clearing organization,"[33] and Dodd-Frank's use of the phrase "and member property" provides direct suggestion of the presence of CCPs in Title II. As the aforesaid CFTC-FDIC staff presentation argues, this is "a provision that is applicable directly and only to DCOs."

4. An Appraisal

On the one hand, Title II omits key CCP regulators, most notably the CFTC, and the general structure suggests that Congress assumed that all debtor-groups would be either broker-dealers, insurance companies, or bank holding companies. The FDIC's initial rules with regard to Title II eligibility seem to follow the same path.

On the other hand, there are provisions of both the rules and Title II itself which could suggest an opening for CCPs to file under OLA. The trouble is that they are merely suggestions, and not very strong ones at that.

For example, while the proponents of putting CCPs into OLA focus on the use of "member property" in section 210(m)(1)(B), Dodd Frank also uses the same phrase in subpart A of that section. And the phrase makes no sense as so used.

In particular, that provision provides that when the FDIC is appointed as a receiver:

> in the case of any covered financial company or bridge financial company that is a stockbroker, but is not a member of the Securities Investor Protection Corporation, [the FDIC shall] apply the provisions of subchapter III of chapter 7 of the Bankruptcy Code, in respect of the distribution to any customer of all customer name security and customer property *and member property* . . .[34]

Stockbrokers do not have "member property." It seems Congress simply made a drafting error, but that suggests we should be a bit circumspect about placing too much weight on the use of "member property" in the next subsection, where it makes more sense.

More generally, one might well doubt that Congress would have included CCPs in OLA by a subtle reference in a somewhat obscure subpart of Title II. Justice Scalia once remarked that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[35] The point holds with regard to OLA as well.

Lacking better options, regulators might push ahead nonetheless. After all, if a CCP begins to falter, the potential systemic risks are legion.[36]

But risk to the government, and thus the taxpayers, from such an approach is equally large. If a court were to latter hold that Title II does not cover CCPs, the potential for a large damages claim against the Treasury seems obvious.[37] Few businesses would survive an "accidental" trip into bankruptcy court—even fewer an erroneous OLA proceeding.

Likewise, what would happen to the global financial system if a systemically important CCP, in danger of default, was placed in OLA by regulators, only to have a court question that decision? At that point, any attempt to "undo" the OLA filing would be futile.

Regulators are in an undeniably difficult spot. Lacking a clearly applicable tool, they have grasped an available one.

Is that solution better than nothing? Arguably no, especially if the assertion that CCPs can file under OLA obscures the need for a better solution. Certainly regulators have to plan to use the tools they presently have, but Congress also needs to know what is required of it too. If we continue to pretend OLA provides a clear solution to the problem of CCP resolution, Congress may never feel the need to address directly this important issue.

ENDNOTES:

[1]Theoretically, a CCP regulated only by the SEC (and not the CFTC) might be able to get into chapter 11, but given the robust safe harbors in chapter 11, it would seem to be an exercise in futility. Stephen J. Lubben, *Failure of the Clearinghouse: Dodd-Frank's Fatal Flaw?*, 10 Va. L. & Bus. Rev. 127, 152 (2015). The theoretical possibility exists because the Bankruptcy Code defines "clearing organization" to mean a CCP that is registered under the Commodity Exchange Act. 11 U.S.C. § 761(1), (2). Clearing organizations are then folded in with the definition of "commodity broker," and commodities brokers are prohibited from filing chapter 11 cases. 11 U.S.C. § 109(d); *see also* § 101(6). Thus, a clearinghouse regulated under some other law than the CEA might be eligible to file under chapter 11. Whether a clearinghouse that is registered with both the SEC and CFTC could file a chapter 11 case is another, mostly theoretical, puzzle.

[2]*See supra* note 1.

[3]BLOOMBERG LAW: BANKRUPTCY

TREATISE, pt. III, ch. 120 (D. Michael Lynn et al. eds., 2015).

[4]Lubben, *Failure of the Clearinghouse, supra* note 1, at 151.

[5]*Cf. MetLife, Inc. v. Fin. Stability Oversight Council*, No. CV 15-0045 (RMC), 2016 WL 1391569 (D.D.C. Mar. 30, 2016).

[6]*E.g.,* 12 U.S.C. § 5386.

[7]*E.g.,* Chairman Massad's opening remarks at the June 27, 2016 meeting of the CFTC's Market Risk Advisory Committee. *See also* 17 CFR 39.39(c)(2).

[8]12 U.S.C. § 5383(b)(2).

[9]12 U.S.C. § 5381(a)(11)(B)(i)-(iii).

[10]12 U.S.C. § 5383(a).

[11]12 U.S.C. § 5383(b).

[12]12 U.S.C. § 5381(a)(7), (8).

[13] https://www.federalreserve.gov/paymentsystems/designated_fmu_about.htm.

[14]Comment letter of CME Group, Inc. to FDIC, Proposed Rules on Orderly Liquidation Authority (Nov. 18, 2010).

[15]Presumably regulators could require the clearing operations to be incorporated into one or more subsidiaries.

[16]12 U.S.C. § 5381(a)(11)(B)(iii).

[17]12 U.S.C. § 1843(k)(4).

[18]*See* 12 CFR 225.86.

[19]12 CFR 380.8. FDIC's rule 380.8 incorporates not only Rule 225.86, but also 225.28, the latter being the list of permissible nonbanking actives for bank holding companies generally.

[20]12 CFR 380.8(b)(3)(G)(1).

[21]380.8(b)(3)(G)(4).

[22]12 CFR 219.2.

[23]Stephen J. Lubben, *Puerto Rico and the Bankruptcy Clause,* 88 Am. Bankr. L.J. 553, 572 (2014).

[24]12 U.S.C. § 5383(a)(1)(B).

[25]Instead, Congress may have presumed that the emergency discount window access provided in title VIII would be sufficient to fund a CCP in times of financial distress.

[26]For more on SPOE, see Lubben, Stephen J. and Wilmarth, Arthur E., *Too Big and Unable to Fail* (2016). Florida Law Review, Forthcoming 2016. http://ssrn.com/abstract=2839946.

[27]The reference here being to an even faster version of the Bankruptcy Code sales used with respect to the automakers in 2009.

[28]12 U.S.C. § 5390.

[29] http://goo.gl/bx7CZf.

[30][FDIC Footnote 2:] Asset management services include acting as agent in the liquidation or sale of loans and collateral for loans, including real estate and other assets acquired through foreclosure or in satisfaction of debts previously contracted.

[31][Author's note:] This cross-reference does not seem to make sense in the context of the FDIC's rule. The provision is derived from 12 CFR 225.28, and by reference to that rule, we can presume that the proper cross-reference should be to paragraph (b)(3), rather than (b)(2).

[32]12 U.S.C. § 5390.

[33]11 U.S.C. § 101(6). The phrase "clearing organization" is not defined in the Bankruptcy Code, but is used again in section 761 of the Code, where the term "customer" is defined to mean,

> with respect to a clearing organization, clearing member of such clearing organization with whom such clearing organization deals and that holds a claim against such clearing organization on account of cash, a security, or other property received by such clearing organization to margin, guarantee, or secure a commodity contract in such clearing member's proprietary account or customers' account.

11 U.S.C. § 761(9)(D). And the definition of "financial institution" under the Code includes "a clearing organization (as defined in section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991)," which may suggest that the latter definition was intended to be used for all purposes under the Code. 11 U.S.C. § 101(22)(B). There the term

> means a clearinghouse, clearing association, clear-

ing corporation, or similar organization—

(A) that provides clearing, netting, or settlement services for its members and—

(i) in which all members other than the clearing organization itself are financial institutions or other clearing organizations; or(ii) which is registered as a clearing agency under the Securities Exchange Act of 1934, or is exempt from such registration by order of the Securities and Exchange Commission; or

(B) that is registered as a derivatives clearing organization under section 5b of the Commodity Exchange Act, that has been granted an exemption under section 4(c)(1) of the Commodity Exchange Act, or that is a multilateral clearing organization (as defined in section 408 of this Act).

12 U.S.C. § 4402.

[34]12 U.S.C. § 5390(m)(1)(A) (emphasis added).

[35]*Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468, 121 S. Ct. 903, 910, 149 L. Ed. 2d 1 (2001).

[36]*See generally*, Lubben, *Failure of the Clearinghouse, supra* note 1.

[37]*See* Michael Lewyn, *Character Counts: The "Character of the Government Action" in Regulatory Takings Actions*, 40 Seton Hall L. Rev. 597, 613 (2010).