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**Criminal Provisions in the Dodd-Frank
Wall Street Reform & Consumer
Protection Act**

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Criminal Provisions in the Dodd-Frank Wall Street Reform & Consumer Protection Act

The Dodd-Frank Wall Street Reform & Consumer Protection Act of 2009¹ is 848 single-spaced pages in length and contains over two dozen criminal offenses. While some of these offenses are based on existing federal criminal law and simply extend criminal liability to additional types of financial instruments or actors dealing in those instruments, many of these offenses expand the breadth and reach of federal criminal law to criminalize conduct for the first time. Despite the criminal provisions, neither the base text for the final legislation, nor the Act itself, was referred to either chamber's Judiciary Committee.

What follows below is a good-faith attempt to identify the criminal offenses² and provide basic explanation of the conduct criminalized by each offense:

- **Disclosures:** Section 202(a)(1)(C)³ criminalizes reckless disclosures of a “systemic risk determination” by the Secretary of the Treasury under section 203(b),⁴ a petition of the Secretary for an “orderly liquidation,” or the pendency of court proceedings related to such a petition. This offense is not limited in application to a set of individuals who are on notice, or likely to be on notice, of the prohibition. Other comparable disclosure provisions in the federal code have different *mens rea* requirements, are limited to a class of defendants, or have civil penalties.⁵
- **Clearing and Indexing of Swap Transactions:** Section 723(a)(2)⁶ makes it a criminal offense for any person, other than an eligible contract participant, to enter into a swap unless the swap is entered into on, or subject to the rules of, a board of trade properly designated as a contract market. This offense will be enforced under 7 U.S.C. § 13(a)(5), which makes any willful violation criminally punishable, but prevents imposition of a custodial prison sentence if the defendant “proves that he had no knowledge of such rule or regulation.”
- **Swap Registration and Segregation Requirements:** Section 724(a)⁷ criminalizes the acceptance of money, securities, or property, or the extension of credit, from, for, or on behalf of a customer to margin, guarantee, or secure a swap cleared by or through a derivatives clearing organization, by individuals who are not registered as futures commission merchants with the Securities and Exchange Commission.⁸ Section 724(a) also criminalizes failure to segregate money, securities, or property of swap customers.⁹ This offense will also be enforced under 7 U.S.C. § 13(a)(5), as explained above.
- **Registration Requirement for Swap Data Repositories:** Section 728 makes it a criminal offense for any person, unless registered with the Commission, directly or indirectly to make use of the mails or any instrumentality of interstate commerce to perform the functions of a swap data repository.¹⁰ This offense will also be enforced under 7 U.S.C. § 13(a)(5), as explained above. As compared to the registration requirements in Sections 723 and 724 of this Act, which prohibit

specific defined actions by unregistered persons, this offense criminalizes a broader range of conduct without providing similar specificity.

- **Reporting Requirement for Large Swap Traders:** Section 730¹¹ criminalizes the failure to report swap transactions that the Commission finds to perform a significant price discovery function, with respect to registered entities, if the person directly or indirectly enters into the swap in any one day in an amount equal to or in excess of a pre-designated amount (to be determined by the Commission), and the person directly or indirectly obtains a position in the swap in an amount equal to or in excess of an amount to be designated by the Commission. The offense provides an exception to criminal punishment where the individual files certain reports, to be determined by Commission rules and regulations, with the Commission, and maintains necessary records. This offense will also be enforced under 7 U.S.C. § 13(a)(5), as explained above.
- **Registration Requirement for Swap Dealers and Major Swap Participants:** Section 731¹² criminalizes acting as a swap dealer or major swap participant unless registered as such with the Commission. This offense will also be enforced under 7 U.S.C. § 13(a)(5), as explained above.
- **Registration Requirement for Swap Execution Facilities:** Section 733¹³ criminalizes the operation of a facility for the trading or processing of swaps unless the facility is registered as a swap execution facility or an appropriately designated contract market. This offense will also be enforced under 7 U.S.C. § 13(a)(5), as explained above.
- **Fraud and False Statements:** Section 741¹⁴ makes it a criminal offense for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, to commit certain fraudulent or deceitful acts, including the making of an untrue statement of a material fact or the omission of a material fact necessary to make the statements made not misleading, in connection with certain orders for commodity futures or swaps. This offense will also be enforced under 7 U.S.C. § 13(a)(5), as explained above.
- **Insider Trading:** Section 746¹⁵ broadens the criminal insider trading prohibition already in the federal code. First, it expands the application of the insider trading prohibition to any employees or agents of the federal government and any individual who uses information imparted by such employees or agents. Second, it broadens the definition of insider information to include “information that may affect or tend to affect the price of any commodity in interstate commerce, or for future delivery, or any swap, and which information has not been disseminated by the department or agency of the Federal Government holding or creating the information in a manner which makes it generally available to the trading public” Third, it creates a “Theft of Nonpublic Information” offense, which makes it criminal to “steal, convert, or misappropriate” nonpublic information “where such person knows, or acts in reckless disregard of the fact, that such information” is

nonpublic. This offense will also be enforced under 7 U.S.C. § 13(a)(5), as explained above.

Compared to the existing insider trading federal code provision, 7 U.S.C. § 13(e), the prohibitions of Section 746 are broader and vaguer. The existing provision sets forth two types of insider trading. The first, 7 U.S.C. § 13(e)(1), is limited to those who are insiders and who “willfully and knowingly” trade upon or disclose “any material nonpublic information obtained through special access related to the performance of such duties.” The second, 7 U.S.C. § 13(e)(2), applies to “any person” but is limited to “willfully and knowingly” trading upon the basis of any “material nonpublic information that such person knows was obtained in violation of paragraph (1) from [an insider].”

- **Antidisruptive Practices Provision:** Section 747¹⁶ makes it criminal for any person to engage in any behavior that violates bids or offers, demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period, or is spoofing (bidding or offering with the intent to cancel the bid or offer before execution). Section 747 also makes it criminal for any person to enter into a swap knowing, or acting in reckless disregard of the fact, that its counterparty will use the swap as part of a device, scheme, or artifice to defraud any third party. This offense will also be enforced under 7 U.S.C. § 13(a)(5), as explained above.
- **Violations of Cease and Desist Orders:** Section 753,¹⁷ which amends 7 U.S.C. § 136, criminalizes knowing failures or refusals to obey or comply with cease and desist orders made or entered by the Commission after notice, hearing and appeal. Prior to this amendment, 7 U.S.C. § 136 contained no *mens rea* terms. This amendment adds the *mens rea* terms “knowingly” and “knowing.” In addition, it removes the minimum sentence of six months where a sentence is imposed. Amongst other changes, it deletes the language deeming each day of violation a separate offense and the categorization of conduct as a misdemeanor or a felony.
- **Securities Registration Requirement:** Section 764¹⁸ makes it a criminal offense for all persons to participate in security-based swaps if not registered with the Commission. It makes it a criminal offense for any person as to whom an order of restriction, censure or suspension, from the Commission, is in effect, willfully to become associated with a security-based swap dealer or participant in contravention of said order.¹⁹ Section 764 also makes it a criminal offense for a security-based swap dealer or participant to become associated in contravention of such order, if the dealer or participant “knew, or in the exercise of reasonable care should have known, of such order.”²⁰ This offense will be enforced under 15 U.S.C. § 78ff, which makes any willful violation criminally punishable, but prevents imposition of a custodial prison sentence if the defendant “proves that he had no knowledge of such rule or regulation.”

- **Transactions with Ineligible Participants:** Section 768²¹ makes it a criminal offense for any person, directly or indirectly, to make use of the mails or any means or instrumentalities of interstate commerce, to offer to sell, offer to buy, or to trade a security-based swap with any ineligible person. This offense will be enforced under 15 U.S.C. § 77x, which makes any willful violation criminally punishable, but does not provide a defense to custodial prison for those who prove a lack of knowledge of the rule. As compared to the registration requirements in Sections 723 and 724 of this Act, which prohibit specific defined actions by unregistered persons, this offense criminalizes a broader range of conduct absent specific definition.
- **Margin Lending:** Section 929,²² which amends 15 U.S.C. § 78g(c)(1)(A), makes it a criminal offense for any member of a national securities exchange or any broker or dealer, directly or indirectly, to extend or maintain credit, or arrange for such, to or for any customer: (1) on any security in contravention of the rules and regulations prescribed by the Board of Governors of the Federal Reserve System; or (2) without collateral or on any collateral other than securities (with some exceptions). This amendment creates two separate criminal offenses where only one previously existed.
- **Violations Reporting Requirement for Rating Agencies:** Section 934²³ requires each nationally recognized statistical rating organization to refer to the appropriate law enforcement authorities any information that it receives from a third party and finds credible that alleges that an issuer of securities rated by that organization has committed or is committing a material violation of law that has not been adjudicated by a Federal or State court. This provision does not require the organization to verify the accuracy of this information.
- **Regulation of Municipal Advisors:** Section 975(a)(1)²⁴ makes it a criminal offense for an unregistered municipal advisor to provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person. This offense will also be enforced under 15 U.S.C. § 78ff, as explained above.
- **Municipal Advisor Fraud:** Section 975(a)(5)²⁵ makes it a criminal offense for a municipal advisor to make use of the mails or any means or instrumentality of interstate commerce to provide advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products, the issuance of municipal securities, or to undertake a solicitation of a municipal entity or obligated person, in connection with which such municipal advisor engages in any fraudulent, deceptive, or manipulative act or practice. This offense will also be enforced under 15 U.S.C. § 78ff, as explained above. As compared to similar provisions already existing in the code, this offense is broader in that it is not limited to conduct violating the rules and regulations of the Commission.²⁶

- **Bureau of Consumer Financial Protection (BCFP) – Unlawful Acts:** Section 1036²⁷ makes it a criminal offense for any covered person or service provider to offer or provide to a consumer any financial product or service not in conformity with Federal consumer financial law, or otherwise commit any act or omission in violation of a Federal consumer financial law, or to engage in any unfair, deceptive, or abusive act or practice. It also criminalizes the failure or refusal by any covered person or service provider to permit access to or copying of records, to establish or maintain records, or to make reports or provide information to the Bureau, as required by Federal consumer financial law, or any rule or order issued by the Bureau thereunder. Additionally, Section 1036 criminalizes knowingly or recklessly providing substantial assistance to a covered person or service provider in violation of these provisions or any rules or regulations issued thereunder (exception for solely providing or selling time or space for advertisements).

In addition to the criminal offenses outlined above, Section 741(B) expands existing law to another type of financial instrument by adding “swap” to a variety of existing enforcement provisions,²⁸ and Sections 763 and 764²⁹ repeat many of the aforementioned offenses.

The Financial Reform Act explicitly sets forth over two dozen criminal offenses, and allows un-elected officials to enact a significant number of new regulations for the financial sector, many of which will be tied directly to criminal enforcement provisions and thus criminally punishable. Promulgation of these regulations may take a great deal of time, and many could remain in flux indefinitely. Therefore, although this document identifies over two dozen criminal offenses in the 848-page Financial Reform Act, there is no realistic mechanism for calculating the actual number of criminal offenses that will result from enactment of this legislation.

Even at this early stage, a great deal has been written about the Financial Reform Act. But very little commentary has specifically addressed the criminal provisions included in the Act.³⁰ Supporters of this Act, and of the increase in federalization of crime more generally, may make the following claims: the Act regulates an industry that may have contributed to the country’s economic collapse; it should regulate only behavior that cuts across state lines; it is designed to regulate conduct that fits within Congress’s commerce clause power; and it seeks to regulate industries that may be beyond the reach of individual states.

Conversely, advocates against federal criminalization might offer criticism on at least three major fronts. First, critics might argue that the Act is constitutionally suspect to the extent it creates crimes but allows the precise contours of the criminal conduct to be defined by unelected regulatory authorities. Second, critics might argue that traditional police powers reside at the state level, making states more appropriate enforcers of criminal penalties. Third, many of the criminal provisions are drafted in an overly broad or vague manner, creating issues of fair notice and due process.

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¹ Hereinafter the “Financial Reform Act” or the “Act”.

² All page numbers herein refer to the Dodd-Frank Wall Street Reform & Consumer Protection Act, as presented in the Enrolled Bill, H.R. 4173.ENR.

³ H.R. 4173.ENR at 69, 71.

⁴ Section 203(b), entitled “Systemic Risk Determination . . . Determination by the Secretary,” establishes that the Secretary should take action under Section 202 if the Secretary determines a financial company is failing or in danger of failing, if the failure would have serious adverse effects on United States financial stability, and a variety of other factors. H.R. 4173.ENR at 75-76.

⁵ See 26 U.S.C. § 7216 (misdemeanor for a tax preparer to “recklessly disclose” information provided to prepare an individual’s taxes); 42 U.S.C. § 3537a (criminal penalty for “willful” advance disclosure of HUD funding decisions to applicants and their agents); 42 U.S.C. § 300i-2 (misdemeanor, applicable to a set class of individuals, for “knowingly and recklessly” revealing a vulnerability assessment); 42 U.S.C. 299b-22 (civil penalty for “reckless” disclosure of certain privileged patient health information).

⁶ H.R. 4173.ENR at 300.

⁷ H.R. 4173.ENR at 307.

⁸ Hereinafter the “Commission.”

⁹ H.R. 4173.ENR at 307, 309.

¹⁰ H.R. 4173.ENR at 322.

¹¹ H.R. 4173.ENR at 327-328.

¹² H.R. 4173.ENR at 328.

¹³ H.R. 4173.ENR at 337.

¹⁴ H.R. 4173.ENR at 354, 356.

¹⁵ H.R. 4173.ENR at 362-364.

¹⁶ H.R. 4173.ENR at 364.

¹⁷ H.R. 4173.ENR at 375, 378-379.

¹⁸ H.R. 4173.ENR at 409-410.

¹⁹ H.R. 4173.ENR at 409, 421.

²⁰ H.R. 4173.ENR at 409, 421.

²¹ H.R. 4173.ENR at 425-426.

²² H.R. 4173.ENR at 477.

²³ H.R. 4173.ENR at 509.

²⁴ H.R. 4173.ENR at 540-541.

²⁵ H.R. 4173.ENR at 540-541.

²⁶ For example, 15 U.S.C. § 78j, entitled “Manipulative and deceptive devices,” prohibits the use of “any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe”

²⁷ H.R. 4173.ENR at 635-636.

²⁸ This specifically includes 7 U.S.C. §§ 6b, 6c, 9, 13, 13a-1, and 13b. H.R. 4173.ENR at 354-357.

²⁹ H.R. 4173.ENR at 387, 409.

³⁰ To the extent any commentary on the Act's criminal provisions exists, that commentary appears to come only in the form of criticism.

Related Links:

Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. 111-203 (2010),
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4173enr.txt.pdf

Resources on the Dodd-Frank Wall Street Reform & Consumer Protection Act [HR 4173],
National Association of Criminal Defense Lawyers,
<http://www.nacdl.org/public.nsf/whitecollar/HR4173>

“The Dodd-Frank Wall Street Reform & Consumer Protection Act of 2010: Is It Constitutional?”
by C. Boyden Gray and John Shu *Engage*, Volume 11, Issue 3, November 16, 2010:
http://www.fed-soc.org/publications/pubID.2012/pub_detail.asp

"Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Passed by the
House of Representatives on June 30, 2010" by John Douglas:
http://www.davispolk.com/files/Publication/7084f9fe-6580-413b-b870-b7c025ed2ecf/Presentation/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910_Financial_Reform_Summary.pdf