

2009

Financial Products and Services Industry

Walter Stuber

Adriana M. Stuber Godel

Philip J. Henderson

Mark Melton

Gregory S. Arnold

See next page for additional authors

Recommended Citation

Walter Stuber et al., *Financial Products and Services Industry*, 43 INT'L L. 641 (2009)
<https://scholar.smu.edu/til/vol43/iss2/21>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in *International Lawyer* by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Financial Products and Services Industry

Authors

Walter Stuber, Adriana M. Stuber Godel, Philip J. Henderson, Mark Melton, Gregory S. Arnold, and Robert L. Brown

Financial Products and Services Industry

WALTER STUBER AND ADRIANA MARIA GÖDEL STUBER, PHILIP J. HENDERSON, MARK MELTON, GREGORY S. ARNOLD, AND ROBERT L. BROWN*

The financial sector crisis and meltdown in 2008 was of proportions not seen since the 1930s. What began with the sub-prime crisis in the United States quickly spread throughout the global financial system. Governments around the world responded with unprecedented acts of intervention that were unimaginable only a few months earlier. Regulators, financial services firms, and professional services providers are still reeling as the crisis spreads throughout non-financial sectors of the economy. Extensive reform of the global financial system, including the regulation of credit derivatives, increased regulation of financial services firms and their activities, greater international coordination of financial regulation, and the overhaul of employee compensation incentives and corporate governance practices in the financial services sector, is widely anticipated. 2009 should prove to be an interesting year for such developments.

The following report on recent developments in the financial products and services industry describes a variety of recent developments in Brazil, Canada, and the United States that are independent of the global financial turmoil that has dominated the headlines in the latter half of 2008 as well as the government responses in Canada and, more extensively, the United States to the financial sector crisis.¹

* Section I, Developments in Brazil, was contributed by Walter Stuber and Adriana Maria Gödel Stuber of Walter Stuber Consultoria Jurídica in São Paulo, Brazil. Section II, Developments in Canada, was contributed by Philip J. Henderson of Stikeman Elliott LLP in Toronto, Canada. Section III.A, Developments in the United States—New Guidance Allows Greater Use of Built-in Losses in Bank M&A Deals, was contributed by Mark Melton of Hunton & Williams LLP in Dallas, Texas; Section III.B, Developments in the United States—The Reinsurance Collateral Debate and 2008 Proposed Regulatory Reform Efforts, was contributed by Gregory S. Arnold, a January 2009 candidate for an LLM in insurance law at the University of Connecticut School of Law and an employee of Hanover Insurance Company in Worcester, Massachusetts; and Section III.C, Developments in the United States—U.S. Reaction to the 2008 Financial Crisis, was contributed by Robert L. Brown of Greenbaum Doll & McDonald, PLLC in Louisville, Kentucky.

1. The descriptions of legislative provisions and proposals and government programs in this article are general summaries of selected key provisions only and should not be considered complete. There are numerous conditions to participation in any government program that may not be mentioned in this article because of space limitations.

I. Developments in Brazil

A. IMPROVEMENTS IN BRAZILIAN EXCHANGE REGULATIONS

The Brazilian Monetary Council (*Conselho Monetário Nacional*—CMN) approved Resolution No. 3568 on May 29, 2008.² The intention of the Resolution is to reduce the cost of small value exchange transactions, which are not commercially attractive to large banks and financial institutions, and increase competition by admitting other players into the exchange market. Institutions that are authorized to deal in the exchange market can now enter into agreements (limited to US\$3,000 per transaction³) with:

- Legal entities in general (e.g., small supermarkets, bakeries, and lottery houses) to negotiate the performance of unilateral transfers in the form defined by the Central Bank of Brazil (Banco Central do Brasil—Bacen).⁴ Companies so accredited are known as “correspondentes bancários.” This change facilitates the life of Brazilians who live abroad and regularly send money to Brazil, as well as the redemption of amounts remitted to Brazil by foreigners;
- Legal entities listed in the Ministry of Tourism for the performance of foreign currency transactions in cash, checks, or traveler’s checks (*câmbio manual*).⁵ This change will increase the number of tourism agencies, which was limited to only 240 hotels and lodgings registered with Bacen, and may now include 11,000 companies that render tourism services in the country;
- Financial institutions and other entities, which are not authorized to deal in exchange markets, for the performance of unilateral transfers and the purchase and sale of foreign currency in cash, checks, or traveler’s checks (*câmbio manual*).⁶

Banks authorized to deal in the exchange market (other than development banks) may now perform exchange transactions with banks abroad, receiving and delivering Brazilian currency (*reais*) in cash.⁷ Foreign tourists may now acquire Brazilian currency from their banks outside Brazil before traveling to Brazil. This change represents the beginning of the internationalization process of the *real* as a reliable currency.

The presentation of documents for foreign currency purchase and sale transactions up to the amount of US\$3,000 is no longer necessary. But clients must be properly identified.⁸ Bacen is authorized to establish simplified forms of registration for transactions up to the US\$3,000 threshold.⁹

To reflect recent amendments made by the Brazilian Federal Revenue Service (*Secretaria da Receita Federal*—SRF), through SRF Normative Instruction No. 846 of May 12, 2008, Resolution No. 3568 increases from US\$20,000 to US\$50,000 the limit of simplified exchange transactions of import and export by non-banking financial institutions.¹⁰

2. Resolução No. 3.568, de 29 de maio de 2008, D.O.U. de 02.06.2008. (Brazil), available at <https://www3.bcb.gov.br/normativo/detalharNormativo.do?N=108050745&method=detalharNormativo>.

3. *Id.* art. 4, § III.3.

4. *Id.* art. 4, § I.

5. *Id.* art. 4, § II.

6. *Id.* art. 4, § III.

7. *Id.* art. 16.

8. *Id.* art.8, § 5.

9. *Id.* art. 9.

10. *Id.* art. 3, § 3.

B. USE OF POWERS OF ATTORNEY IN DIGITAL FORM FOR VOTING IN GENERAL SHAREHOLDERS' MEETINGS

The Board of Directors of the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários—CVM*) has expressly sanctioned the use of powers of attorney (proxy instruments) in digital form for voting in general shareholders' meetings of Brazilian publicly-held corporations for those companies that contract the service known as Online Shareholders' Meetings (*Assembléias Online*). This decision is registered in the minutes of the CVM Board Meeting No. 24, dated June 24, 2008,¹¹ and was given in response to a consultation made by *MZ Consult Serviços e Negócios Ltda.* (*MZ*), a Brazilian company that provides this type of service.

There is general consensus that documents executed outside Brazil must be notarized (i.e., certified by a Notary Public) and consularized (i.e., legalized at the Brazilian consulate or embassy nearest to the place of signature) in order to produce legal effects in Brazil. Furthermore, electronic signatures on online business transactions are allowed when ICP-Brasil (*Infra-Estrutura de Chaves Públicas Brasileira—ICP-Brasil*, which may be translated into English as "Brazilian Public Key Infrastructure"), the body responsible for the management of the digital certification market in Brazil, certifies them.

MZ asked CVM in what circumstances the notarization and consularization of the proxy instruments granted by such shareholders to their Brazilian attorneys-in-fact may be waived, in the case of foreign shareholders (i.e., shareholders resident abroad), and if there are any restrictions on a vote in general shareholders' meetings by using electronic powers of attorney in digital form, duly certified by ICP-Brasil.¹²

CVM concluded that neither the Brazilian Civil Code nor the Brazilian Corporate Law requires that such proxy instruments be notarized or consularized.¹³ Consequently, a company may, at its own discretion, waive the notarization and consularization of proxy instruments granted by foreign shareholders to their Brazilian attorneys-in-fact. CVM also concluded that proxy instruments may be granted by electronic means, provided that they are duly certified by ICP-Brasil and admitted as valid by all the involved parties and extended to all shareholders.

Pursuant to the provisions of section 1 of Article 126 of the Brazilian Corporate Law (BCL)¹⁴, the attorney-in-fact must be appointed less than one year before and may be any shareholder, a company officer, or a lawyer, and in a publicly-held corporation, may also be a financial institution.

In addition, by virtue of section 2 of the same Article 126¹⁵ of the BCL, a request for the appointment of a proxy, made by post or by public notice, is subject to any regulations that may be issued by CVM and must (a) contain all information necessary to exercise the

11. Comissão de Valores Mobiliários, Processo Administrativo No. RJ 2008-1794 (Reg. Col. No. 5973/2008) (June 24, 2008), available at <http://www.cvm.gov.br/port/descol/respdecis.asp?File=5973-0.HTM>.

12. *Id.*

13. *Id.*

14. The BCL is contained in Lei No. 6.404, de 15 de dezembro de 1976, D.O.U. de 17.12.1976 (Brazil) as subsequently amended. The original wording of Article 126, Section 1 of the BCL, however, remains in full force and effect without any change.

15. The current wording of Article 126, section 2 of the BCL has been amended by Lei No. 9.457, de 05 de maio de 1997, D.O.U. de 06.05.1997 (Brazil).

requested votes, (b) entitle the shareholder to vote against a resolution by appointing another proxy to exercise the said vote, and (c) be addressed to all shareholders whose addresses are kept by the company.

II. Developments in Canada¹⁶

A. NEW PRINCIPAL PROTECTED NOTES REGULATIONS

On July 1, 2008, the Canadian government's new Principal Protected Notes Regulations came into force.¹⁷ The Regulations were introduced in response to the growing variety and complexity of principal protected notes (PPNs) being offered on a retail basis in Canada by federally regulated financial institutions.¹⁸ The new regulations supplanted the previous Index-linked Deposits Interest Disclosure Regulations,¹⁹ and therefore the latter were repealed.²⁰ The new regulations seek to ensure that investors are adequately informed by improving the manner, content, and timing of disclosure with respect to PPNs.²¹

The accompanying Regulatory Impact Analysis Statement states that the regulations are intended to implement a "more principles-based approach to regulation, which focuses on outcomes rather than prescriptive check-lists."²² In addition to a new "plain language" requirement,²³ the Regulations prescribe a number of specific disclosure requirements. Information that must be disclosed to investors includes, inter alia, the term of the note, how interest is accrued and limitations in respect of interest payable, risks associated with the note, the distinction between PPNs and fixed-rate investments with respect to levels of risk and return, and any other information that could be reasonably expected to affect an investor's purchasing decision.²⁴ Institutions must generally provide the information orally and (except in the case of a contract entered into by electronic means, in which event different rules apply) in writing at least two days prior to selling the notes to an investor,²⁵ and must also make information available on their websites and, where requested to do so, in written format.²⁶

Institutions must also disclose, upon request, the value of a PPN on any specific day, including the net asset value of the note or the last available measure of the index or reference point on which the interest is determined (and how the value of the note or relevant measure is related to the interest payable on the note).²⁷ The Regulations also

16. For other legal developments in Canada during 2008.

17. Principal Protected Notes Regulation, SOR/2008-180 (Can.); see *Regulatory Impact Analysis Statement*, 142 CANADA GAZETTE 1363, 1363 (June 11, 2008), available at <http://www.gazette.gc.ca/rp-pr/p2/2008/2008-06-11/html/sor-dors180-eng.html>.

18. *Id.*

19. Index-linked Deposits Interest Disclosure Regulations, SOR/2002-102 (Can.); see 136 CANADA GAZETTE 597, available at <http://www.gazette.gc.ca/archives/p1/2002/2002-02-09/html/index-eng.html>.

20. SOR/2008-180 at § 14.

21. Regulatory Impact Analysis Statement, *supra* note 17, at 1363.

22. *Id.* at 1364.

23. SOR/2008-180 at § 2.

24. *Id.* § 3.

25. *Id.* §§ 3, 5-6.

26. *Id.* § 8.

27. *Id.* § 9.

specify the information to be disclosed to investors prior to early redemption²⁸ and require that certain information be included in any advertisements.²⁹

B. QUEBEC ADOPTS NEW DERIVATIVES AND SECURITIES TRANSFER LEGISLATION

The Province of Quebec enacted a new Derivatives Act, regulating both exchange-traded and OTC derivatives, on June 20, 2008.³⁰ While this Act imposes recognition and registration requirements on intermediaries as well as registration requirements on dealers and advisers, OTC derivatives and transactions involving “accredited counterparties” are carved-out from the application of some (although not all) provisions of the legislation. Although passed by the Quebec National Assembly, the Derivatives Act is not yet in force, and the specific rules required to implement it (that will determine the breadth of its scope) have yet to be published in final form. A draft Derivatives Regulation was released for comment by the *Autorité des Marchés Financiers* on October 3, 2008.³¹ The driving force behind the fast-track adoption of the Act is the determination of the Government of Quebec to become the lead jurisdiction in the derivatives market in Canada. Quebec is home to the Montreal Exchange (MX), Canada’s financial derivatives exchange, as well as to the new Montreal Climate Exchange (MCeX).

Another significant development in Quebec in 2008 was the adoption of securities transfer legislation compatible with corresponding legislation recently adopted in most other Canadian provinces. The new Act Respecting the Transfer of Securities and the Establishment of Securities Entitlements is based on Canada’s model legislation, the Uniform Securities Transfer Act, which in turn adopts the principles of Article 8 of the U.S. Uniform Commercial Code, including the companion provisions of U.C.C. Article 9. The new Quebec Act is in force as of January 1, 2009.³²

C. ONTARIO COURT OF APPEAL UPHOLDS RELEASES AGAINST THIRD-PARTY CLAIMS IN ABCP RESTRUCTURING PROCESS

The restructuring of Canada’s third party or non-bank sponsored asset-backed commercial paper (ABCP) market was a major focus of attention in 2008. A significant hurdle in the ongoing restructuring was overcome in August 2008 when the Ontario Court of Appeal ruled in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*³³ that the court-sanctioned restructuring plan, which was proceeding under the federal Companies’ Creditors Arrangement Act (CCAA),³⁴ could require creditors, including the minor-

28. *Id.* § 12.

29. *Id.* § 13.

30. Derivatives Act, S.Q., ch. 24 (2008) (Can.), available at http://www.lautorite.qc.ca/userfiles/File/projets-speciaux/produits-derives/LID_sanctionnee_A.pdf.

31. Derivatives Regulation, (Can) (proposed Oct. 3, 2008), available at http://www.lautorite.qc.ca/userfiles/File/reglementation/valeurs-mobilieres/autres-reglements-textes-consultation/produits-derives/RID_regl_cons_ang.pdf.

32. An Act Respecting the Transfer of Securities and the Establishment of Securities Entitlements, S.Q., ch. 20 (2008) (Can.), available at <http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2008C20A.PDF>.

33. *ATB Fin. v. Metcalfe & Mansfield Alternative Invs. II Corp.*, [2008] ONCA 587 (Can.).

34. Companies’ Creditors Arrangement Act, R.S.C., ch. C-36 (1985), available at <http://www.canlii.org/ca/sta/c-36/>.

ity that had unsuccessfully opposed the plan, to release claims against non-debtor third parties. The releases in question were required by banks, dealers, and other market participants as a condition of participating in the plan but were opposed by some noteholders. Particularly contentious was the inclusion of claims against third parties with respect to fraud, with only limited exceptions that applied only to dealers. The Court of Appeal ruling, and the subsequent decision of the Supreme Court of Canada against hearing an appeal from the ruling,³⁵ represented a major milestone in Canada's ABCP restructuring process and will undoubtedly have implications for future restructurings under the CCAA.

D. FEDERAL GOVERNMENT GUARANTEE OF BANK DEBT

On October 23, 2008, the Government of Canada announced a temporary program to guarantee mid- to longer-term debt issued by Canadian banks and other federally-regulated deposit-taking institutions.³⁶ The Canadian Lenders Assurance Facility (CLAF) will insure certain categories of senior unsecured wholesale debt with a term to maturity of at least three months, covering principal and interest payments for up to three years from the date of issue. Debt denominated in Canadian dollars, U.S. dollars, Euros, Sterling, or Yen is eligible for the program, which will issue insurance until April 30, 2009.

The CLAF will charge a base annualized premium of 135 basis points, with surcharges depending on the credit rating of the issuing institution and an additional surcharge for debt that is not denominated in Canadian dollars. There is a limit on the amount of insurance available to each institution based on the amount of wholesale debt of the institution maturing in the next six months and on the amount of deposits held by the institution.

E. FEDERAL GOVERNMENT SETS ASIDE \$75 BILLION FOR PURCHASE OF MORTGAGE-BACKED SECURITIES

The Canadian federal government's program to provide additional liquidity to Canadian financial institutions through the purchase of up to \$75 billion of mortgage-backed securities (MBS), contained in announcements on October 10 and November 12, 2008,³⁷ is part of Canada's implementation of the G7 plan of action to stabilize global financial markets. Under the MBS plan, banks, trust companies, insurance companies, credit unions, loan companies, and *caisses populaires* that issue MBS under the National Housing Act MBS program are eligible to participate. Because the underlying mortgages already carry guarantees backed by the Canadian government, there is no incremental risk to the government in the purchase of these securities. The purchases are being undertaken through

35. *Jean Coutu Group (PJC) Inc. v. Metcalfe & Mansfield Alternative Invs. II Corp.*, [2008] CanLII 46997 (S.C.C.) (Can.).

36. See Canadian Dep't of Fin., News Release 2008-080, Background: Canadian Lenders Assurance Facility (Oct. 23, 2008), http://www.fin.gc.ca/news08/08-080_1e.html. See also Canadian Dep't of Fin., News Release 2008-090, Terms of Canadian Lenders Assurance Facility (Nov. 13, 2008), http://www.fin.gc.ca/news08/08-090_1e.html.

37. See Canadian Dep't of Fin., News Release 2008-075, Government of Canada Responds to Global Financial Turmoil with Support for Canadian Credit Markets (Oct. 10, 2008), <http://www.fin.gc.ca/news08/08-075e.html>; see also Canadian Dep't of Fin., News Release 2008-090, Government of Canada Announces Additional Support for Canadian Credit Markets (Nov. 12, 2008), <http://www.fin.gc.ca/news08/08-090e.html>.

a series of competitive auctions, with the \$25 billion committed in the initial October 10 announcement purchased at auctions held between October 16 and November 21, 2008.³⁸

Like the CLAF, the MBS program is modest in comparison with its counterparts in a number of other countries. But Canadian banks appear to be well-capitalized by international standards and have not suffered the domestic mortgage losses experienced by banks in some other jurisdictions. Public statements by the federal Minister of Finance suggest that no further assistance to Canadian financial institutions is currently contemplated. For example, it appears that there are no plans to raise the deposit insurance limit above its current level of C\$100,000.³⁹ If Canada's banks continue to be the soundest in the world, as stated in the World Economic Forum's Global Competitiveness Report released in October 2008,⁴⁰ then the present initiatives may be sufficient to see them through the current global liquidity squeeze.

III. Developments in the United States

A. NEW GUIDANCE ALLOWS GREATER USE OF BUILT-IN LOSSES IN BANK M&A DEALS

On October 1, 2008, the U.S. Treasury Department and the Internal Revenue Service (IRS) issued favorable guidance under Section 382 of the Internal Revenue Code for banks engaging in merger and acquisition activities, as well as certain capital raising efforts.⁴¹ Given the current state of the economy, banks engaging in such transactions are likely to hold financial assets that have decreased in value. Traditionally, bank investors and acquirers would be subject to significant limitations with respect to utilizing these unrealized losses after an acquisition when the losses were eventually triggered. The new guidance imposes no such limitation. This shift is no doubt part of a larger policy initiative to encourage the capitalization and acquisition of troubled banks in the wake of the current financial crisis.

Section 382 of the Code, generally, imposes limitations on the use of existing unrealized losses against income earned after a corporation has experienced a change in ownership of fifty percent or more.⁴² The policy behind this rule is to prevent the development of a market where taxpayers could buy and sell tax losses. Effectively, it prevents one corporation from buying another corporation with significant losses for the primary purpose of using those losses to offset the acquiring corporation's future taxable income.

Generally, unrealized losses can only be used after an ownership change up to the amount of the Section 382 limitation.⁴³ The limitation is equal to the fair market value of the corporation on the date of the ownership change multiplied by the long-term tax-

38. See Canadian Dep't of Fin., News Release 2008-080, *supra* note 36.

39. See David Friend, *Canada's Banking System Kept High and Dry by Strict Regulation: Flaberty*, CANADIAN PRESS, Oct. 8, 2008, available at <http://ca.news.finance.yahoo.com/s/08102008/2/biz-finance-canada-s-banking-system-kept-high-dry-strict.html>.

40. World Econ. Forum, *The Global Competitiveness Report 2008-2009*, at 129, indicator 8.07, available at <http://www.weforum.org/documents/gcr0809/index.html> (indicating that Canada ranks number one with respect to "soundness of banks").

41. I.R.S. Notice 2008-83, 2008-42 I.R.B. 905.

42. I.R.C. § 382 (2005).

43. I.R.C. § 382(a).

exempt rate, which is published each month by the IRS⁴⁴ (5.4% in December 2008)⁴⁵. Notice 2008-83, however, provides that, with respect to a bank, losses on loans or bad debts shall not be treated as a built-in loss or a deduction that is attributable to periods before the change date.⁴⁶ Practically speaking, the impact of this new rule is that acquiring companies may be able to utilize fully any unrealized losses held by target banks if the acquisitions are otherwise properly structured.

In addition, the Treasury Department and the IRS have relaxed the presumption of a tax avoidance motive with respect to capital contributions made within two years of an ownership change.⁴⁷ The “anti-stuffing” provisions attempt to disallow the arbitrary inflation of a company’s value when capital contributions are made in anticipation of a change in ownership, as increases in value would result in a higher limitation amount under Section 382. Currently, any contribution made within two years of a change in ownership is presumed to be part of a plan for tax avoidance and is subtracted from the value of the company for purposes of calculating the section 382 limitation, thereby reducing the amount of losses that can be utilized after the change date. Notice 2008-78 removes this presumption altogether (and not just for banks) and provides four safe harbors where contributions will not be deemed to be part of a tax avoidance plan.⁴⁸ It also makes clear that failure to fall within one of the safe harbors is not evidence of a tax avoidance plan.

B. THE REINSURANCE COLLATERAL DEBATE AND 2008 PROPOSED REGULATORY REFORM EFFORTS

Critics claim that the U.S. system of requiring collateral security from non-U.S., unlicensed reinsurers is anti-competitive and discriminatory. Those with a vested interest in maintenance of the status quo argue that the reinsurance collateral requirements are prudential measures that exist for the protection of policy holders and the solvency of the ceding, primary insurance companies.⁴⁹

The European Union’s Reinsurance Directive⁵⁰ still has not been implemented into national law in each of the EU Member States. It has nonetheless emboldened financial regulators in Europe to push for federal regulation of insurance in the United States under the misguided assumption that federal regulation of insurance in the United States, by way of an optional federal charter (OFC) or otherwise, would somehow lead to the scrapping of the reinsurance collateral requirements.

During 2008, the United States, guided by the National Association of Insurance Commissioners (NAIC), embarked upon another means to achieve the goal of relaxing rein-

44. I.R.C. § 382(b)(1) (2005).

45. Rev. Rul. 2008-53, 2008-49 I.R.B. 1231.

46. I.R.S. Notice 2008-83, *supra* note 41.

47. Notice 2008-78, 2008-41 I.R.B. 851.

48. *Id.*

49. See Gregory S. Arnold, *The Doubtful Impact of An Optional Federal Charter on the Reinsurance Collateral Debate*, 44 TORT TRIAL & INS. PRAC. L.J. 79, available at http://works.bepress.com/gregory_arnold/1/ (providing a background of the reinsurance collateral debate set against European initiatives to influence insurance regulation in the United States).

50. Council Directive 2005/68, 2005 O.J. (L 323) 1 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:323:0001:0050:EN:PDF>.

surance collateral requirements in order to accommodate more reinsurance capacity in the United States. In an effort to accommodate reinsurance companies worldwide, the various states in the United States are willing to relax collateral requirements within a range from 0 to 100% of gross ceded liabilities, based in part upon credit ratings. But suggested reform includes elements that have created new legal issues under both U.S. constitutional law and international treaties.

The NAIC developed the latest framework for reinsurance regulatory reform, and the New York State Insurance Department was the first to announce it would implement such reform. The U.S. constitutional problem is the method by which such reform is to be carried out, insofar as the proposal includes memoranda of understanding (MOU's) or mutual recognition agreements (MRA's) between or among U.S. state insurance regulators and the regulators in non-U.S. jurisdictions.

There are also complications under international treaties with the mere existence of reinsurance collateral requirements, without the proposed regulatory reforms. These complications arise under the World Trade Organization (WTO) General Agreement on Trade in Services (GATS), a multilateral treaty that binds the United States to certain commitments with respect to financial services, including reinsurance and retrocession.

1. *U.S. Constitutional Issues*

The Reinsurance Collateral Study Group of the Task Force released the Reinsurance Supervision Review Department Draft Proposal to Grant Recognition of Regulatory Equivalence to Non-U.S. Insurance Supervisors (RSRD Proposal) on September 7, 2007. The MOU's and MRA's contemplated by the RSRD Proposal, and the potential violations of the U.S. constitution and doctrinal law, can be analyzed in the context of the Compact Clause; the Doctrine of Dormant Foreign Affairs Preemption; and the Dormant Federal Foreign Commerce Clause. Persuasive arguments have been made that both the current collateral requirements and proposals for reform do not run afoul of the U.S. constitution or constitutional doctrines.⁵¹

2. *WTO GATS Issues*

Two parts of GATS are critical to the maintenance of collateral requirements analysis: the Most-Favored-Nation and National Treatment obligations.⁵²

51. For an excellent summary of the RSRD Proposal and analysis of the U.S. Constitutional issues, see Memorandum on the National Association of Insurance Commissioners' [NAIC] Reinsurance Regulatory Modernization Framework Proposal from Ryan Couch, NAIC, to Reinsurance Task Force Members, Sept. 12, 2008, available at http://www.naic.org/documents/committees_e_reinsurance_080912_rtf_mod_prop.pdf.

52. For a detailed analysis of these and other GATS requirements, see Gregory S. Arnold, Reinsurance Collateral at The Intersection of International Law and the U.S. Constitution—A PowerPoint Presentation, slides 7-16 (Dec. 2008), Univ. of Conn. Sch. of Law, Ins. Law Ctr., available at http://works.bepress.com/gregory_arnold/14. See also Gregory S. Arnold, Security from Unlicensed Foreign Reinsurers: Are the U.S. Practices a Violation of International Trade Conventions? (Dec. 10, 2008) (unpublished paper), available at http://works.bepress.com/gregory_arnold/18/.

a. Most-Favored-Nation Obligations

With respect to GATS Part II, Article II, Paragraph 1, the question is whether Section 3 of the NAIC's Credit For Reinsurance Model Law (CFRML), which requires collateral security from both domestic and non-U.S. unlicensed reinsurers, is in violation of GATS for failure of the United States, a Member of GATS, to "accord immediately and unconditionally to [reinsurance] services and service suppliers [non-U.S., unlicensed reinsurers] of any other Member [regulators/countries of domicile of non-U.S., unlicensed reinsurers], treatment no less favourable than that it accords to like [reinsurance] services and service suppliers [domestic reinsurers, both licensed and unlicensed] of any other country."⁵³ It is important to note that CFRML section 3 does not discriminate among non-U.S., unlicensed reinsurers with its descriptor "alien assuming reinsurers" (i.e. there is no provision that makes an exception for, say, Australia from the requirement to post collateral, while requiring that collateral be posted by reinsurers or reinsurance markets in, say, the United Kingdom). Hence, it does not appear the United States is in violation of this provision.

An analysis of GATS Part II, Article II, Paragraph 2, the safe harbor from Paragraph 1, requires an assumption that CFRML section 3 discriminates among non-U.S., unlicensed reinsurers. So, let us assume that the U.S. provides MFN treatment to Belgium, but not to France. For such a measure to benefit from the safe harbor, it would need to be listed in, and meet the conditions of, the "Annex on Financial Services" found in the Annex on Article II Exemptions. Paragraph 2(a), "Domestic Regulation," contains the following important exemption language:

Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.⁵⁴

"[T]he WTO legal framework for financial services addresses the intersection between financial services liberalization commitments and the role of prudential regulation."⁵⁵ Legal authorities such as Dr. Sydney J. Key refer to a "prudential carve-out" for "domestic regulation that is designed to ensure that the obligations or commitments a country has undertaken in the GATS will not interfere with the ability of the national authorities to exercise their responsibilities for prudential regulation and supervision."⁵⁶ According to Dr. Key, "[t]his provision was included in the GATS at the insistence of financial regula-

53. General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, art. II(1), Most-Favoured-Nation Treatment, 33 I.L.M. 1125 (1994).

54. General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex on Financial Services, 33 I.L.M. 1125 (1994).

55. DOUGLAS W. ARNER, *FINANCIAL STABILITY, ECONOMIC GROWTH, AND THE ROLE OF LAW* 273 (Cambridge Univ. Press 2007).

56. *Increasing Efficiency and Economic Growth Through Trade in Financial Services: Hearing Before the H. Subcomm. on Domestic and Int'l Monetary Policy, Trade, and Tech. of the H. Comm. on Fin. Services*, 109th Cong. 63 (2005) (testimony of Dr. Sydney J. Key, Former Staff Director of the Subcommittee), available at <http://financialservices.house.gov/media/pdf/111505sk.pdf> [hereinafter Key testimony].

tors, who made it clear that the inclusion of financial services in a multilateral trade agreement such as the GATS would be unacceptable without a specific carve-out from the obligations of the agreement for prudential measures.”⁵⁷

Douglas W. Arner provides a succinct summary of the carve-out:

The scope of the prudential carve-out depends upon the distance between prudential measures and GATS obligations: the longer the distance, the broader the scope of the carve-out, and vice versa. To identify the scope of the prudential carve-out is, in essence, to identify the distance of GATS obligations and prudential measures, or to strike a balance between the two. Para. 2(a) does not define the concept of prudential carve-out, or clearly identify the distance between the carve-out and GATS obligations, so there is much room for members to maneuver.⁵⁸

Based upon Arner’s reasoning, there is ample room to argue that U.S. reinsurance collateral requirements are not a violation of GATS: “The prudential carve-out allows states to impose regulatory barriers to trade in financial services if such measures are adopted for ‘prudential reasons’ or to ‘ensure the integrity and stability of the financial system.’”⁵⁹ Under the prudential carve-out, “all prudential measures are excepted. As a result, a prudential measure may not be challenged on the ground that it is not ‘necessary’ or ‘least trade restrictive.’ Moreover, the prudential carve-out overrides the GATS requirements for domestic regulations.”⁶⁰

b. National Treatment Commitments

Another important part of GATS is the provisions related to National Treatment Commitments, found in GATS Article XVII. Paragraph 1 requires that:

In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.⁶¹

Under all four modes of supply of the U.S. Sector Specific Commitments, Sub-sector c), “Reinsurance and retrocession,” the United States has committed to little that would involve non-U.S. reinsurers. There is a reference under “Limitations on National Treatment” to “[a] one percent federal excise tax” imposed on premiums covering U.S. risks paid to “companies not incorporated under U.S. law.”⁶² Premiums that are earned by such companies through an office or independent agent in the United States are excepted.

57. *Id.* at 2.

58. ARNER, *supra* note 55, at 275-76.

59. KEN ALEXANDER, RAHUL DHUMALE & JOHN EATWELL, GLOBAL GOVERNANCE OF FINANCIAL SYSTEMS: THE INTERNATIONAL REGULATION OF SYSTEMIC RISK 108 (Oxford Univ. Press 2006).

60. Key testimony, *supra* note 56, at 2.

61. General Agreement on Trade in Services art. XVII, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1125 (1994) [hereinafter GATS art. XVII].

62. *Id.*; see also U.S. Schedule of Commitments and List of MFN Exemptions, WTO Doc. GATS/SC/90/Suppl.3 (Feb. 26, 1998), available at http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm.

There are Market Access Restrictions with respect to where government-owned insurance companies (both foreign and domestic) may not operate, licensing restrictions involving foreign companies, restrictions whereby reinsurance in some states is limited to reinsurance service providers in the same state, and other restrictions based upon the domicile of the reinsurer. There are no references, however, to collateral security in any of the Sector Specific Commitments.

Since the CFRML imposes reinsurance collateral requirements on both domestic and non-U.S. reinsurers who are not licensed, accredited, or otherwise permitted to operate in a particular state, there is no disparate treatment, or treatment of non-U.S., unlicensed, unaccredited, or non-permitted reinsurers by the United States that is "less favourable than that it accords to its own like services and service suppliers."⁶³ The prudential carve-out should meet any arguments that there are technical violations.

C. U.S. REACTION TO THE 2008 FINANCIAL CRISIS

In reaction to the 2008 financial crisis, the United States has adopted several measures that can be analyzed in two main categories: The Emergency Economic Stabilization Act of 2008⁶⁴ and the Private Bank Program.

1. *The Emergency Economic Stabilization Act of 2008*

Congress passed the Emergency Economic Stabilization Act of 2008 (the Act), authorizing a US\$700 billion economic rescue plan, on October 3, 2008, and President Bush signed the Act into law. Since that date, financial industry regulators have announced a number of significant initiatives designed to foster liquidity and confidence in the U.S. financial system. Certain key provisions of this historic legislation and related developments are outlined below.

a. Troubled Asset Relief Program (TARP)

The Act authorizes a troubled asset relief program (TARP) administered by the Secretary of Treasury (Treasury) through a new Office of Financial Security (OFS).⁶⁵ The OFS is to exercise its authority in consultation with the Federal Reserve Board of Governors (FRB), the Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS), and the Department of Housing and Urban Development (HUD). TARP expires on December 31, 2009, but is subject to extension to a date not later than two years from enactment.

- *Purchase Authority.* Treasury has authority to purchase directly or through auction up to \$700 billion in troubled assets of financial institutions, of which \$250 billion was immediately available.⁶⁶ On October 14, 2008, President Bush announced that the first \$250 billion authorized under TARP would be used to buy shares of U.S.

63. GATS art. XVII, *supra* note 61.

64. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008).

65. *Id.* § 101.

66. *Id.* § 115(a)(3).

financial institutions.⁶⁷ Initially, the government would purchase \$125 billion in senior preferred shares of nine major financial institutions with the remaining \$125 billion to be spread potentially among thousands of other financial institutions. “The senior preferred shares will pay a cumulative dividend rate of 5 percent per annum for the first five years and will reset to a rate of 9 percent per annum.”⁶⁸ In addition to senior preferred shares, Treasury will receive warrants to purchase common stock with an aggregate market price equal to 15 percent of the senior preferred investment.⁶⁹

- *Financial Institutions Eligible to Participate.* Eligible financial institutions include banks, broker-dealers, and insurance companies established and regulated under U.S. law (or state, territory or possession law) and having significant operations in the United States, as well as licensed U.S. branches of foreign banks. In addition, troubled assets held by foreign banks as a result of extending financing to U.S. financial institutions that have failed or defaulted on such financing may be purchased under TARP.
- *Troubled Assets.* Troubled assets eligible for purchase are “residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages, in each case that [were] originated on or before March 14, 2008.”⁷⁰ Other financial instruments may be classified as eligible troubled assets by Treasury following consultation with the FRB Chairman.
- *Pricing of Assets.* Troubled assets are to be priced at the “lowest price. . . consistent with the purposes” of the Act.⁷¹ Treasury is to take steps to ensure that direct purchases are at reasonable prices and reflect the underlying value of the asset. But, subject to certain exceptions, Treasury may not purchase assets at a price higher than the seller’s purchase price.
- *Oversight.* The program is subject to review and recommendations by a Financial Stability Board, consisting of the FRB Chairman, Treasury Secretary, Director of the Federal Housing Finance Agency, Securities and Exchange Commission (SEC) Chairman, and HUD Secretary.⁷² The U.S. Government Accountability Office (GAO) will also have oversight and audit authority. An independent Office of Inspector General was established for TARP and a Congressional Oversight Panel was created.
- *Reporting.* Treasury must report to Congress within sixty days of its exercise of authority under TARP and every thirty days thereafter and disclose publicly the details of all asset purchases, trades and other dispositions.⁷³
- *Government to Receive Warrants or Debt Instruments.* Treasury may not purchase any troubled assets without receiving non-voting common or preferred stock war-

67. Chris Isidore, *U.S. Pulls the Trigger: Government to Pump Billions into Banks, Expand Deposit, and Loan Guarantees*, CNNMONEY.COM, Oct. 14, 2008, http://money.cnn.com/2008/10/14/news/economy/bank_bailout/index.htm?postversion=2008101411.

68. T.D. News Release HP1207 (Oct. 14, 2008), available at <http://ustreas.gov/press/releases/hp1207.htm>.

69. *Id.*; U.S. DEP’T OF TREASURY, TARP CAPITAL PURCHASE PROGRAM: SUMMARY OF SENIOR PREFERRED TERMS (2008) [hereinafter SUMMARY OF SENIOR PREFERRED TERMS].

70. Emergency Economic Stabilization Act § 3(9).

71. *Id.* § 113(b)(1).

72. *Id.* § 104(b).

73. *Id.* § 125(b)(1)(B).

rants from public institutions or senior debt instruments from other institutions, subject to a “de minimis” exception.

- Executive Compensation and Golden Parachutes. If Treasury purchases assets directly from a financial institution, the institution must observe executive compensation and corporate governance standards to be established by Treasury so long as Treasury holds a debt or equity position in the financial institution.

b. FDIC Temporary Liquidity Guarantee Program

On October 14, the FDIC announced the Temporary Liquidity Guarantee Program (TLGP) to strengthen confidence and encourage liquidity in the banking system.⁷⁴ The FDIC will guarantee specified newly issued senior unsecured debt of banks, thrifts, and certain holding companies. “Certain newly issued senior unsecured debt issued on or before June 30, 2009, would be fully protected in the event the issuing institution subsequently fails, or its holding company files for bankruptcy. Coverage would be limited to June 30, 2012, even if the maturity exceeds that date.”⁷⁵ FDIC will charge participants “a 75-basis point fee to protect their new debt issues.”⁷⁶

c. FDIC Deposit Insurance Temporarily Increased

From the date of enactment of the Act through December 31, 2009, the FDIC will insure deposits up to \$250,000 per account (\$100,000 per account prior to the increase).⁷⁷

In addition, the FDIC announced on October 14 that under its new TLGP, “any participating depository institution will be able to provide full deposit insurance coverage for non-interest bearing deposit transaction accounts, regardless of dollar amount.”⁷⁸ The FDIC stated that this coverage would mainly pertain to payment-processing accounts, such as payroll accounts used by businesses which frequently exceed the current maximum limit of \$250,000. This coverage will expire at the end of 2009.

d. FRB to Purchase Commercial Paper

The FRB announced additional information on October 14 about its Commercial Paper Funding Facility (CPFF). The FRB noted that it would begin funding purchases of commercial paper under CPFF on October 27, 2008.⁷⁹ CPFF is intended to “improve liquidity in short-term funding markets and thereby increase the availability of credit for businesses and households.”⁸⁰ Under CPFF, the Federal Reserve Bank of New York will finance the purchase of highly rated, U.S. dollar-denominated, three-month unsecured and asset-backed commercial paper from eligible issuers. CPFF will cease commercial paper purchases on April 30, 2009, unless the FRB extends the program, but the Federal

74. FEDERAL DEPOSIT INSURANCE CORPORATION, PR-100-2008, FDIC ANNOUNCES PLAN TO FREE UP BANK LIQUIDITY (Oct. 14, 2008), available at <http://www.fdic.gov/news/news/press/2008/pr08100.html>.

75. *Id.*

76. *Id.*

77. Emergency Economic Stabilization Act § 136.

78. *Id.*

79. Press Release, Federal Reserve Board, Board Announces Additional Details Regarding the Commercial Paper Funding Facility (Oct. 14, 2008), available at <http://www.federalreserve.gov/newsevents/press/monetary/20081014b.htm>.

80. *Id.*

Reserve Bank of New York will continue to fund CPFF until CPFF's underlying assets mature.

e. Mark to Market Accounting Subject to Suspension

The SEC may suspend the application of mark to market accounting as provided in Statement No. 157 of the Financial Accounting Standards Board (FASB).⁸¹ The SEC, FRB, and Treasury are required to study mark to market accounting and report back to Congress within ninety days.

f. Regulatory Modernization and Study of Leverage and Margin

Treasury must deliver a regulatory modernization report and recommendations to Congress by April 30, 2009. The report must include the results of Treasury's review of the financial markets and existing regulatory system, including regulations governing the over-the-counter swaps market and whether there should be regulatory enhancements. The Act also calls for a GAO study of the role of leverage in the financial crisis.

2. *Private Bank Program*

In November 2008, Treasury Secretary Henry Paulson announced terms for private bank participation in Treasury's capital purchase program (the CPP).⁸² Private bank applications under the CPP were due on December 8, 2008. Certain key features of the CPP for private banks (the Private Bank Program) are noteworthy.

- **Amount of Equity; Eligible Institutions.** Eligible institutions will be able to sell Preferred Stock to Treasury in a minimum amount equal to 1 percent of the institution's risk-weighted assets.⁸³ The maximum amount of Preferred Stock eligible for purchase by Treasury is the lesser of (a) an amount equal to 3 percent of the institution's risk-weighted assets and (b) \$25 billion.⁸⁴ In general, the Private Bank Program is available to U.S. private banks and bank holding companies, as well as private savings and loan holding companies and savings associations.
- **Features of Preferred Stock.** Holding company purchases will be in the form of cumulative perpetual Preferred Stock. But if an institution is not controlled by a holding company, the purchase will be in the form of non-cumulative perpetual Preferred Stock. Shares purchased by Treasury will have a dividend rate of 5 percent per annum until the fifth anniversary of the investment and a dividend rate of 9 percent per annum thereafter.⁸⁵
- **Warrants.** In addition to Preferred Stock, subject to certain exceptions, Treasury will obtain warrants for additional shares of the institution's Preferred Stock (Warrant Preferred) with "an aggregate liquidation preference equal to 5 [percent] of the Preferred [Stock] amount on the date of investment."⁸⁶ The Warrant Preferred will

81. Emergency Economic Stabilization Act § 132.

82. T.D. News Release HP-1277 (Nov. 17, 2008), available at <http://www.ustreas.gov/press/releases/hp1277.htm>.

83. U.S. DEP'T OF TREASURY, TARP CAPITAL PURCHASE PROGRAM: SUMMARY OF PREFERRED TERMS 2 (2008).

84. *Id.*

85. *Id.*

86. *Id.* at 6.

have the same terms as the Preferred Stock except that the Warrant Preferred will pay a dividend of 9 percent per annum and may not be redeemed until all the Preferred Stock has been redeemed.⁸⁷

- *Transferability of Preferred Stock and Warrants.* Neither the Preferred Stock nor the warrants will be subject to any restrictions on transfer.
- *Restrictions on Dividends and Repurchases.* The Preferred Terms state that: Subject to certain exceptions, for as long as any Preferred [Stock] is outstanding, no dividends may be declared or paid on junior preferred shares, preferred shares ranking pari passu with the Preferred [Stock], or common shares (other than in the case of pari passu preferred shares, dividends on a pro rata basis with the Preferred [Stock]), nor may the [institution] repurchase or redeem any junior preferred shares, preferred shares ranking pari passu with the Preferred [Stock] or common shares, unless (i) in the case of cumulative Preferred all accrued dividends for all past periods are fully paid or (ii) in the case of non-cumulative Preferred [Stock] the full dividend for the latest completed dividend period has been declared and paid in full.⁸⁸
- *Executive Compensation Standards.* So long as Treasury owns equity in the institution, compensation for certain senior officers must meet standards established by Treasury. Among other things, the Treasury standards: (a) require institutions to avoid compensation that would provide incentives for senior executive officers to take "unnecessary and excessive risks" that threaten the value of the institution; (b) require that institutions provide for the recovery of any bonus or incentive compensation paid to a senior executive officer if the financial criteria on which it was based later proves to be materially inaccurate; (c) establish a deduction limit of \$500,000 for remuneration paid by the institution to a senior executive officer for federal tax purposes; and (d) prohibit golden parachute payments to senior executive officers.⁸⁹

87. *Id.*

88. *Id.* at 3.

89. T.D. News Release HP-1207, *supra* note 68; see SUMMARY OF SENIOR PREFERRED TERMS, *supra* note 69.