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112TH CONGRESS
2ND SESSION

H. R. 940

[Report No. 112–407, Part I]

To establish standards for covered bond programs and a covered bond regulatory oversight program, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 8, 2011

Mr. GARRETT (for himself and Mrs. MALONEY) introduced the following bill; which was referred to the Committee on Financial Services, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

MARCH 5, 2012

Reported from the Committee on Financial Services with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

MARCH 5, 2012

Referral to the Committee on Ways and Means extended for a period ending no later than March 30, 2012

MARCH 30, 2012

Referral to the Committee on Ways and Means extended for a period ending no later than May 18, 2012

MAY 18, 2012

Referral to the Committee on Ways and Means extended for a period ending no later than June 29, 2012

JUNE 29, 2012

Referral to the Committee on Ways and Means extended for a period ending no later than September 14, 2012

SEPTEMBER 14, 2012

Referral to the Committee on Ways and Means extended for a period ending no later than November 16, 2012

NOVEMBER 16, 2012

Referral to the Committee on Ways and Means extended for a period ending no later than November 30, 2012

NOVEMBER 30, 2012

Referral to the Committee on Ways and Means extended for a period ending no later than December 14, 2012

DECEMBER 14, 2012

Referral to the Committee on Ways and Means extended for a period ending no later than December 21, 2012

DECEMBER 21, 2012

Referral to the Committee on Ways and Means extended for a period ending no later than December 31, 2012

DECEMBER 31, 2012

The Committee on Ways and Means discharged; committed to the Committee of the Whole House on the State of the Union and ordered to be printed

[For text of introduced bill, see copy of bill as introduced on March 8, 2011]

A BILL

To establish standards for covered bond programs and a covered bond regulatory oversight program, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "United States Covered Bond Act of 2011".

SEC. 2. DEFINITIONS.

For purposes of this Act, the following definitions shall apply:

(1) ANCILLARY ASSET.—The term "ancillary asset" means—

(A) any interest rate or currency swap associated with 1 or more eligible assets, substitute assets, or other assets in a cover pool;

(B) any credit enhancement or liquidity arrangement associated with 1 or more eligible assets, substitute assets, or other assets in a cover pool;

(C) any guarantee, letter-of-credit right, or other secondary obligation that supports any payment or performance of 1 or more eligible assets, substitute assets, or other assets in a cover pool; and

(D) any proceeds of, or other property incident to, 1 or more eligible assets, substitute assets, or other assets in a cover pool.

(2) CORPORATION.—The term "Corporation" means the Federal Deposit Insurance Corporation.

(3) COVER POOL.—The term "cover pool" means a dynamic pool of assets that is comprised of—

(A) in the case of any eligible issuer described in subparagraph (A), (B), or (C) of paragraph (9)—

(i) 1 or more eligible assets from a single eligible asset class; and

(ii) 1 or more substitute assets or ancillary assets; and

(B) in the case of any eligible issuer described in paragraph (9)(D)—

(i) the covered bonds issued by each sponsoring eligible issuer; and

(ii) 1 or more substitute assets or ancillary assets.

(4) COVERED BOND.—The term "covered bond" means any recourse debt obligation of an eligible issuer that—

(A) has an original term to maturity of not less than 1 year;

(B) is secured by a perfected security interest in or other perfected lien on a cover pool that

is owned directly or indirectly by the issuer of the obligation;

(C) is issued under a covered bond program that has been approved by the applicable covered bond regulator;

(D) is identified in a register of covered bonds that is maintained by the Secretary; and

(E) is not a deposit (as defined in section 3(l) of the Federal Deposit Insurance Act (12 U.S.C. 1813(l))).

(5) COVERED BOND PROGRAM.—The term "covered bond program" means any program of an eligible issuer under which, on the security of a single cover pool, 1 or more series or tranches of covered bonds may be issued.

(6) COVERED BOND REGULATOR.—The term "covered bond regulator" means—

(A) for any eligible issuer that is subject to the jurisdiction of an appropriate Federal banking agency (as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q))), the appropriate Federal banking agency;

(B) for any eligible issuer that is described in paragraph (9)(D), that is not subject to the jurisdiction of an appropriate Federal banking

agency, and that is sponsored by only 1 eligible issuer, the covered bond regulator for the sponsor;

(C) for any eligible issuer that is described in paragraph (9)(D), that is not subject to the jurisdiction of an appropriate Federal banking agency, and that is sponsored by more than 1 eligible issuer, the covered bond regulator for the sponsor whose covered bonds constitute the largest share of the cover pool of the issuer; and

(D) for any other eligible issuer that is not subject to the jurisdiction of an appropriate Federal banking agency, the Secretary.

(7) ELIGIBLE ASSET.—The term "eligible asset" means—

(A) in the case of the residential mortgage asset class—

(i) any first-lien mortgage loan that is secured by 1-to-4 family residential property;

(ii) any mortgage loan that is insured under the National Housing Act (12 U.S.C. 1701 et seq.); and

(iii) any loan that is guaranteed, insured, or made under chapter 37 of title 38, United States Code;

(B) in the case of the commercial mortgage asset class, any commercial mortgage loan (including any multifamily mortgage loan);

(C) in the case of the public sector asset class—

(i) any security issued by a State, municipality, or other governmental authority;

(ii) any loan made to a State, municipality, or other governmental authority; and

(iii) any loan, security, or other obligation that is insured or guaranteed, in full or substantially in full, by the full faith and credit of the United States Government (whether or not such loan, security, or other obligation is also part of another eligible asset class);

(D) in the case of the auto asset class, any auto loan or lease;

(E) in the case of the student loan asset class, any student loan (whether guaranteed or nonguaranteed);

(F) in the case of the credit or charge card asset class, any extension of credit to a person under an open-end credit plan;

(G) in the case of the small business asset class, any loan that is made or guaranteed under a program of the Small Business Administration; and

(H) in the case of any other eligible asset class, any asset designated by the Secretary, by rule and in consultation with the covered bond regulators, as an eligible asset for purposes of such class.

(8) ELIGIBLE ASSET CLASS.—The term "eligible asset class" means—

(A) a residential mortgage asset class;

(B) a commercial mortgage asset class;

(C) a public sector asset class;

(D) an auto asset class;

(E) a student loan asset class;

(F) a credit or charge card asset class;

(G) a small business asset class; and

(H) any other eligible asset class designated by the Secretary, by rule and in consultation with the covered bond regulators.

(9) ELIGIBLE ISSUER.—The term "eligible issuer" means—

(A) any insured depository institution and any subsidiary of such institution;

(B) any bank holding company, any savings and loan holding company, and any subsidiary of any of such companies;

(C) any nonbank financial company (as defined in section 102(a)(4) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5311(a)(4))) that is supervised by the Board of Governors of the Federal Reserve System under section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5323), including any intermediate holding company supervised as a nonbank financial company, and any subsidiary of such a nonbank financial company; and

(D) any issuer that is sponsored by 1 or more eligible issuers for the sole purpose of issuing covered bonds on a pooled basis.

(10) OVERSIGHT PROGRAM.—The term "oversight program" means the covered bond regulatory oversight program established under section 3(a).

(11) SECRETARY.—The term "Secretary" means the Secretary of the Department of the Treasury.

(12) SUBSTITUTE ASSET.—The term "substitute asset" means—

(A) cash;

(B) any direct obligation of the United States Government, and any security or other obligation whose full principal and interest are insured or guaranteed by the full faith and credit of the United States Government;

(C) any direct obligation of a United States Government corporation or Government-sponsored enterprise of the highest credit quality, and any other security or other obligation of the highest credit quality whose full principal and interest are insured or guaranteed by such corporation or enterprise, except that the outstanding principal amount of these obligations in any cover pool may not exceed an amount equal to 20 percent of the outstanding principal amount of all assets in the cover pool without the approval of the applicable covered bond regulator;

(D) any overnight investment in Federal funds;

(E) any other substitute asset designated by the Secretary, by rule and in consultation with the covered bond regulators; and

(F) any deposit account or securities account into which only an asset described in sub-

paragraph (A), (B), (C), (D), or (E) may be deposited or credited.

SEC. 3. REGULATORY OVERSIGHT OF COVERED BOND PROGRAMS ESTABLISHED.

(a) ESTABLISHMENT.—

(1) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act, the Secretary shall, by rule and in consultation with the covered bond regulators, establish a covered bond regulatory oversight program that provides for—

(A) covered bond programs to be evaluated according to reasonable and objective standards in order to be approved under paragraph (2), including any additional eligibility standards for eligible assets and any other criteria determined appropriate by the Secretary to further the purposes of this Act;

(B) covered bond programs to be maintained in a manner that is consistent with this Act and safe and sound asset-liability management and other financial practices; and

(C) any estate created under section 4 to be administered in a manner that is consistent with maximizing the value and the proceeds of the related cover pool in a resolution under this Act.

(2) APPROVAL OF EACH COVERED BOND PROGRAM.—

(A) IN GENERAL.—A covered bond shall be subject to this Act only if the covered bond is issued by an eligible issuer under a covered bond program that is approved by the applicable covered bond regulator.

(B) APPROVAL PROCESS.—Each covered bond regulator shall apply the standards established by the Secretary under the oversight program to evaluate a covered bond program that has been submitted by an eligible issuer for approval. Each covered bond regulator also shall take into account relevant supervisory factors, including safety and soundness considerations, in evaluating a covered bond program that has been submitted for approval. Each covered bond regulator, promptly after approving a covered bond program, shall provide the Secretary with the name of the covered bond program, the name of the eligible issuer, and all other information reasonably requested by the Secretary in order to update the registry under paragraph (3)(A). Each eligible issuer, promptly after issuing a covered bond under an approved covered bond

program, shall provide the Secretary with all information reasonably requested by the Secretary in order to update the registry under paragraph (3)(B).

(C) EXISTING COVERED BOND PROGRAMS.—A covered bond regulator may approve a covered bond program that is in existence on the date of the enactment of this Act. Upon such approval, each covered bond under the covered bond program shall be subject to this Act, regardless of when the covered bond was issued.

(D) MULTIPLE COVERED BOND PROGRAMS PERMITTED.—An eligible issuer may have more than 1 covered bond program.

(E) CEASE AND DESIST AUTHORITY.—The applicable covered bond regulator may direct an eligible issuer to cease issuing covered bonds under an approved covered bond program if the covered bond program is not maintained in a manner that is consistent with this Act and the oversight program and if, after notice that is reasonable under the circumstances, the issuer does not remedy all deficiencies identified by the applicable covered bond regulator.

(F) CAP ON THE AMOUNT OF OUTSTANDING COVERED BONDS.—

(i) IN GENERAL.—With respect to each eligible issuer that submits a covered bond program for approval, the applicable covered bond regulator shall set, consistent with safety and soundness considerations and the financial condition of the eligible issuer, the maximum amount, as a percentage of the eligible issuer's total assets, of outstanding covered bonds that the eligible issuer may issue.

(ii) REVIEW OF CAP.—The applicable covered bond regulator may, not more frequently than quarterly, review the percentage set under clause (i) and, if safety and soundness considerations or the financial condition of the eligible issuer has changed, increase or decrease such percentage. Any decrease made pursuant to this clause shall have no effect on existing covered bonds issued by the eligible issuer.

(3) REGISTRY.—Under the oversight program, the Secretary shall maintain a registry that is published on a Web site available to the public and that,

for each covered bond program approved by a covered bond regulator, contains—

(A) the name of the covered bond program, the name of the eligible issuer, and all other information that the Secretary considers necessary to adequately identify the covered bond program and the eligible issuer; and

(B) all information that the Secretary considers necessary to adequately identify all outstanding covered bonds issued under the covered bond program (including the reports described in paragraphs (3) and (4) of subsection (b)).

(4) FEES.—Each covered bond regulator may levy, on the issuers of covered bonds under the primary supervision of such covered bond regulator, reasonably apportioned fees that such covered bond regulator considers necessary, in the aggregate, to defray the costs of such covered bond regulator carrying out the provisions of this Act. Such funds shall not be construed to be Government funds or appropriated monies and shall not be subject to apportionment for purposes of chapter 15 of title 31, United States Code, or any other provision of law.

(b) MINIMUM OVER-COLLATERALIZATION REQUIREMENTS.—

(1) REQUIREMENTS ESTABLISHED.—The Secretary, by rule and in consultation with the covered bond regulators, shall establish minimum over-collateralization requirements for covered bonds backed by each of the eligible asset classes. The minimum over-collateralization requirements shall be designed to ensure that sufficient eligible assets and substitute assets are maintained in the cover pool to satisfy all principal and interest payments on the covered bonds when due through maturity and shall be based on the credit, collection, and interest rate risks (excluding the liquidity risks) associated with the eligible asset class.

(2) ASSET COVERAGE TEST.—The eligible assets and the substitute assets in any cover pool shall be required, in the aggregate, to meet at all times the applicable minimum over-collateralization requirements.

(3) MONTHLY REPORTING.—On a monthly basis, each issuer of covered bonds shall submit a report on whether the cover pool that secures the covered bonds meets the applicable minimum over-collateralization requirements to—

(A) the Secretary;

(B) the applicable covered bond regulator;

(C) the applicable indenture trustee;

(D) the applicable covered bondholders; and

(E) the applicable independent asset monitor.

(4) INDEPENDENT ASSET MONITOR.—

(A) APPOINTMENT.—Each issuer of covered bonds shall appoint the indenture trustee for the covered bonds, or another unaffiliated entity, as an independent asset monitor for the applicable cover pool.

(B) DUTIES.—An independent asset monitor appointed under subparagraph (A) shall, on an annual or other more frequent periodic basis determined by the Secretary under the oversight program—

(i) verify whether the cover pool meets the applicable minimum over-collateralization requirements; and

(ii) report to the Secretary, the applicable covered bond regulator, the applicable indenture trustee, and the applicable covered bondholders on whether the cover pool meets the applicable minimum over-collateralization requirements.

(5) NO LOSS OF STATUS.—Covered bonds shall remain subject to this Act regardless of whether the

applicable cover pool ceases to meet the applicable minimum over-collateralization requirements.

(6) FAILURE TO MEET REQUIREMENTS.—

(A) IN GENERAL.—If a cover pool fails to meet the applicable minimum over-collateralization requirements, and if the failure is not cured within the time specified in the related transaction documents, the failure shall be an uncured default for purposes of section 4(a).

(B) NOTICE REQUIRED.—An issuer of covered bonds shall promptly give the Secretary and the applicable covered bond regulator written notice if the cover pool securing the covered bonds fails to meet the applicable minimum over-collateralization requirements, if the failure is cured within the time specified in the related transaction documents, or if the failure is not so cured.

(c) REQUIREMENTS FOR ELIGIBLE ASSETS.—

(1) REQUIREMENTS.—

(A) LOANS.—A loan shall not qualify as an eligible asset for so long as the loan is delinquent for more than 60 consecutive days.

(B) SECURITIES.—A security shall not qualify as an eligible asset for so long as the se-

curity does not meet any credit-quality requirement under this Act.

(C) ORIGINATION.—An asset shall not qualify as an eligible asset if the asset was not originated in compliance with any rule or supervisory guidance of a Federal agency applicable to the asset at the time of origination.

(D) NO DOUBLE PLEDGE.—An asset shall not qualify as an eligible asset for so long as the asset is subject to a prior perfected security interest or other prior perfected lien that has been granted in an unrelated transaction. Nothing in this Act shall affect such a prior perfected security interest or other prior perfected lien, and the rights of such lien holders.

(2) FAILURE TO MEET REQUIREMENTS.—Subject to paragraph (1)(D), if an asset in a cover pool does not satisfy any applicable requirement described in paragraph (1) or any other applicable standard or criterion described in this Act, the oversight program, or the related transaction documents, the asset shall not qualify as an eligible asset for purposes of the asset coverage test described in subsection (b)(2). A disqualified asset shall remain in the cover pool unless and until removed by the issuer in compliance

with the provisions of this Act, the oversight program, and the related transaction documents. No disqualified asset may be removed from the cover pool after an estate has been created for the related covered bond program under section 4(b)(1) or 4(c)(2), except in connection with the management of the cover pool under section 4(d)(1)(E).

(d) OTHER REQUIREMENTS.—

(1) BOOKS AND RECORDS OF ISSUER.—Each issuer of covered bonds shall clearly mark its books and records to identify the assets that comprise the cover pool securing the covered bonds.

(2) SCHEDULE OF ELIGIBLE ASSETS AND SUBSTITUTE ASSETS.—Each issuer of covered bonds shall deliver to the applicable indenture trustee and the applicable independent asset monitor, on at least a monthly basis, a schedule that identifies all eligible assets and substitute assets in the cover pool securing the covered bonds.

(3) SINGLE ELIGIBLE ASSET CLASS.—No cover pool described in section 2(3)(A) may include eligible assets from more than 1 eligible asset class. No cover poll described in section 2(3)(B) may include covered bonds backed by more than 1 eligible asset class.

SEC. 4. RESOLUTION UPON DEFAULT OR INSOLVENCY.

(a) UNCURED DEFAULT DEFINED.—For purposes of this section, the term "uncured default" means a default on a covered bond that has not been cured within the time, if any, specified in the related transaction documents.

(b) DEFAULT ON COVERED BONDS PRIOR TO CONSERVATORSHIP, RECEIVERSHIP, LIQUIDATION, OR BANKRUPTCY.—

(1) CREATION OF SEPARATE ESTATE.—If an uncured default occurs on a covered bond before the issuer of the covered bond enters conservatorship, receivership, liquidation, or bankruptcy, an estate shall be immediately and automatically created by operation of law and shall exist and be administered separate and apart from the issuer or any subsequent conservatorship, receivership, liquidating agency, or estate in bankruptcy for the issuer or any other assets of the issuer. A separate estate shall be created for each affected covered bond program.

(2) ASSETS AND LIABILITIES OF ESTATE.—Any estate created under paragraph (1) shall be comprised of the cover pool (including over-collateralization in the cover pool) that secures the covered bond. The cover pool shall be immediately and automatically released to and held by the estate free and clear of any right, title, interest, or claim of the issuer or any con-

servator, receiver, liquidating agent, or trustee in bankruptcy for the issuer or any other assets of the issuer. The estate shall be fully liable on the covered bond and all other covered bonds and related obligations of the issuer (including obligations under related derivative transactions) that are secured by a perfected security interest in or other perfected lien on the cover pool when the estate is created. The estate shall not be liable on any obligation of the issuer that is not secured by a perfected security interest in or other perfected lien on the cover pool when the estate is created. No conservator, receiver, liquidating agent, or trustee in bankruptcy for the issuer may charge or assess the estate for any claim of the conservator, receiver, liquidating agent, or trustee in bankruptcy or the conservatorship, receivership, liquidating agency, or estate in bankruptcy and may not obtain or perfect a security interest in or other lien on the cover pool to secure such a claim.

(3) RETENTION OF CLAIMS.—Any holder of a covered bond or related obligation for which an estate has become liable under paragraph (2) shall retain a claim against the issuer for any deficiency with respect to the covered bond or related obligation. If the issuer enters conservatorship, receivership, liquida-

tion, or bankruptcy, any contingent claim for such a deficiency shall be allowed as a provable claim in the conservatorship, receivership, liquidating agency, or bankruptcy case. The contingent claim shall be estimated by the conservator, receiver, liquidating agent, or bankruptcy court for purposes of allowing the claim as a provable claim if awaiting the fixing of the contingent claim would unduly delay the resolution of the conservatorship, receivership, liquidating agency, or bankruptcy case.

(4) RESIDUAL INTEREST.—

(A) ISSUANCE OF RESIDUAL INTEREST.—Upon the creation of an estate under paragraph (1), a residual interest in the estate shall be immediately and automatically issued by operation of law to the issuer.

(B) NATURE OF RESIDUAL INTEREST.—The residual interest under subparagraph (A) shall—

(i) be an exempted security as described in section 5;

(ii) represent the right to any surplus from the cover pool after the covered bonds and all other liabilities of the estate have been fully and irrevocably paid; and

(iii) be evidenced by a certificate executed by the trustee of the estate.

(5) OBLIGATIONS OF ISSUER.—

(A) IN GENERAL.—After the creation of an estate under paragraph (1), the issuer shall—

(i) transfer to or at the direction of the trustee for the estate all property of the estate that is in the possession or under the control of the issuer, including all tangible or electronic books, records, files, and other documents or materials relating to the assets and liabilities of the estate; and

(ii) at the election of the trustee or a servicer or administrator for the estate, continue servicing the applicable cover pool for 120 days after the creation of the estate in return for a fair-market-value fee, as determined by the trustee in consultation with the applicable covered bond regulator, that shall be payable from the estate as an administrative expense.

(B) OBLIGATIONS ABSOLUTE.—Neither the issuer, whether acting as debtor in possession or in any other capacity, nor any conservator, receiver, liquidating agent, or trustee in bank-

ruptcy for the issuer or any other assets of the issuer may disaffirm, repudiate, or reject the obligation to turn over property or to continue servicing the cover pool as provided in subparagraph (A).

(c) DEFAULT ON COVERED BONDS UPON CONSERVATORSHIP, RECEIVERSHIP, LIQUIDATION, OR BANKRUPTCY.—

(1) CORPORATION CONSERVATORSHIP OR RECEIVERSHIP.—

(A) IN GENERAL.—If the Corporation is appointed as conservator or receiver for an issuer of covered bonds before an uncured default results in the creation of an estate under subsection (b), the Corporation as conservator or receiver shall have an exclusive right, during the 1-year period beginning on the date of the appointment, to transfer any cover pool owned by the issuer in its entirety, together with all covered bonds and related obligations that are secured by a perfected security interest in or other perfected lien on the cover pool, to another eligible issuer that meets all conditions and requirements specified in the related transaction documents. The Corporation as conservator or receiver may not re-

move any asset from the cover pool, except to the extent otherwise agreed by a transferee that has assumed the covered bond program pursuant to subparagraph (C).

(B) OBLIGATIONS DURING 1-YEAR PERIOD.—During the 1-year period described in subparagraph (A), the Corporation as conservator or receiver shall fully and timely satisfy all monetary and nonmonetary obligations of the issuer under all covered bonds and the related transaction documents and shall fully and timely cure all defaults by the issuer (other than its conservatorship or receivership) under the applicable covered bond program, in each case, until the earlier of—

(i) the transfer of the applicable covered bond program to another eligible issuer as provided in subparagraph (A); or

(ii) the delivery to the Secretary, the applicable covered bond regulator, the applicable indenture trustee, and the applicable covered bondholders of a written notice from the Corporation as conservator or receiver electing to cease further performance under the applicable covered bond program.

(C) ASSUMPTION BY TRANSFEREE.—If the Corporation as conservator or receiver transfers a covered bond program to another eligible issuer within the 1-year period as provided in subparagraph (A), the transferee shall take ownership of the applicable cover pool and shall become fully liable on all covered bonds and related obligations of the issuer that are secured by a perfected security interest in or other perfected lien on the cover pool.

(2) OTHER CIRCUMSTANCES.—An estate shall be immediately and automatically created by operation of law and shall exist and be administered separate and apart from an issuer of covered bonds and any conservatorship, receivership, liquidating agency, or estate in bankruptcy for the issuer or any other assets of the issuer, if—

(A) a conservator, receiver, liquidating agent, or trustee in bankruptcy, other than the Corporation, is appointed for the issuer before an uncured default results in the creation of an estate under subsection (b); or

(B) in the case of the appointment of the Corporation as conservator or receiver as de-

scribed in paragraph (1)(A), the Corporation as conservator or receiver—

(i) does not complete the transfer of the applicable covered bond program to another eligible issuer within the 1-year period as provided in paragraph (1)(A);

(ii) delivers to the Secretary, the applicable covered bond regulator, the applicable indenture trustee, and the applicable covered bondholders a written notice electing to cease further performance under the applicable covered bond program; or

(iii) fails to fully and timely satisfy all monetary and nonmonetary obligations of the issuer under the covered bonds and the related transaction documents or to fully and timely cure all defaults by the issuer (other than its conservatorship or receivership) under the applicable covered bond program.

A separate estate shall be created for each affected covered bond program.

(3) ASSETS AND LIABILITIES OF ESTATE.—Any estate created under paragraph (2) shall be comprised of the cover pool (including over-collateralization in

the cover pool) that secures the covered bonds. The cover pool shall be immediately and automatically released to and held by the estate free and clear of any right, title, interest, or claim of the issuer or any conservator, receiver, liquidating agent, or trustee in bankruptcy for the issuer or any other assets of the issuer. The estate shall be fully liable on the covered bonds and all other covered bonds and related obligations of the issuer (including obligations under related derivative transactions) that are secured by a perfected security interest in or other perfected lien on the cover pool when the estate is created. The estate shall not be liable on any obligation of the issuer that is not secured by a perfected security interest in or other perfected lien on the cover pool when the estate is created. No conservator, receiver, liquidating agent, or trustee in bankruptcy for the issuer may charge or assess the estate for any claim of the conservator, receiver, liquidating agent, or trustee in bankruptcy or the conservatorship, receivership, liquidating agency, or estate in bankruptcy and may not obtain or perfect a security interest in or other lien on the cover pool to secure such a claim.

(4) CONTINGENT CLAIM.—Any contingent claim against an issuer for a deficiency with respect to a

covered bond or related obligation for which an estate has become liable under paragraph (3) shall be allowed as a provable claim in the conservatorship, receivership, liquidating agency, or bankruptcy case for the issuer. The contingent claim shall be estimated by the conservator, receiver, liquidating agent, or bankruptcy court for purposes of allowing the claim as a provable claim if awaiting the fixing of the contingent claim would unduly delay the resolution of the conservatorship, receivership, liquidating agency, or bankruptcy case.

(5) RESIDUAL INTEREST.—

(A) ISSUANCE OF RESIDUAL INTEREST.— Upon the creation of an estate under paragraph (2), and regardless of whether any contingent claim described in paragraph (4) becomes fixed or is estimated, a residual interest in the estate shall be immediately and automatically issued by operation of law to the conservator, receiver, liquidating agent, or trustee in bankruptcy for the issuer.

(B) NATURE OF RESIDUAL INTEREST.—The residual interest under subparagraph (A) shall—

(i) be an exempted security as described in section 5;

(ii) represent the right to any surplus from the cover pool after the covered bonds and all other liabilities of the estate have been fully and irrevocably paid; and

(iii) be evidenced by a certificate executed by the trustee of the estate.

(6) OBLIGATIONS OF ISSUER.—

(A) IN GENERAL.—After the creation of an estate under paragraph (2), the issuer and its conservator, receiver, liquidating agent, or trustee in bankruptcy shall—

(i) transfer to or at the direction of the trustee for the estate all property of the estate that is in the possession or under the control of the issuer or its conservator, receiver, liquidating agent, or trustee in bankruptcy, including all tangible or electronic books, records, files, and other documents or materials relating to the assets and liabilities of the estate; and

(ii) at the election of the trustee or a servicer or administrator for the estate, continue servicing the applicable cover pool for 120 days after the creation of the estate in return for a fair-market-value fee, as deter-

mined by the trustee in consultation with the applicable covered bond regulator, that shall be payable from the estate as an administrative expense.

(B) OBLIGATIONS ABSOLUTE.—Neither the issuer, whether acting as debtor in possession or in any other capacity, nor any conservator, receiver, liquidating agent, or trustee in bankruptcy for the issuer or any other assets of the issuer may disaffirm, repudiate, or reject the obligation to turn over property or to continue servicing the cover pool as provided in subparagraph (A).

(d) ADMINISTRATION AND RESOLUTION OF ESTATES.—

(1) TRUSTEE, SERVICER, AND ADMINISTRATOR.—

(A) IN GENERAL.—Upon the creation of any estate under subsection (b)(1) or (c)(2), the applicable covered bond regulator shall—

(i) appoint the trustee for the estate;

(ii) appoint 1 or more servicers or administrators for the cover pool held by the estate; and

(iii) give the Secretary, the applicable indenture trustee, the applicable covered

bondholders, and the owner of the residual interest written notice of the creation of the estate.

(B) TERMS AND CONDITIONS OF APPOINTMENT.—All terms and conditions of any appointment under paragraph (1), including the terms and conditions relating to compensation, shall conform to the requirements of this Act and the oversight program and otherwise shall be determined by the applicable covered bond regulator.

(C) QUALIFICATION.—The applicable covered bond regulator may require the trustee or any servicer or administrator for an estate to post in favor of the United States, for the benefit of the estate, a bond that is conditioned on the faithful performance of the duties of the trustee or the servicer or administrator. The covered bond regulator shall determine the amount of any bond required under this subparagraph and the sufficiency of the surety on the bond. A proceeding on a bond required under this subparagraph may not be commenced after two years after the date on which the trustee or the servicer or administrator was discharged.

(D) POWERS AND DUTIES OF TRUSTEE.—The trustee for an estate is the representative of the estate and, subject to the provisions of this Act, has capacity to sue and be sued. The trustee shall—

(i) administer the estate in compliance with this Act, the oversight program, and the related transaction documents;

(ii) be accountable for all property of the estate that is received by the trustee;

(iii) make a final report and file a final account of the administration of the estate with the applicable covered bond regulator; and

(iv) after the estate has been fully administered, close the estate.

(E) POWERS AND DUTIES OF SERVICER OR ADMINISTRATOR.—Any servicer or administrator for an estate—

(i) shall—

(I) collect, realize on (by liquidation or other means), and otherwise manage the cover pool held by the estate in compliance with this Act, the oversight program, and the related

transaction documents and in a manner consistent with maximizing the value and the proceeds of the cover pool;

(II) deposit or invest all proceeds and funds received in compliance with this Act, the oversight program, and the related transaction documents and in a manner consistent with maximizing the net return to the estate, taking into account the safety of the deposit or investment; and

(III) apply, or direct the trustee for the estate to apply, all proceeds and funds received and the net return on any deposit or investment to make distributions in compliance with paragraphs (3) and (4);

(ii) may borrow funds or otherwise obtain credit, for the benefit of the estate, in compliance with paragraph (2) on a secured or unsecured basis and on a priority, pari passu, or subordinated basis;

(iii) shall, at the times and in the manner required by the applicable covered

bond regulator, submit to the covered bond regulator, the Secretary, the applicable indenture trustee, the applicable covered bondholders, the owner of the residual interest, and any other person designated by the covered bond regulator, reports that describe the activities of the servicer or administrator on behalf of the estate, the performance of the cover pool held by the estate, and distributions made by the estate; and

(iv) shall assist the trustee in preparing the final report and the final account of the administration of the estate.

(F) SUPERVISION OF TRUSTEE, SERVICER, AND ADMINISTRATOR.—The applicable covered bond regulator shall supervise the trustee and any servicer or administrator for an estate. The covered bond regulator shall require that all reports submitted under subparagraph (E)(iii) do not contain any untrue statement of a material fact and do not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading.

(G) REMOVAL AND REPLACEMENT OF TRUSTEE, SERVICER, AND ADMINISTRATOR.—If the covered bond regulator determines that it is in the best interests of an estate, the covered bond regulator may remove or replace the trustee or any servicer or administrator for the estate. The removal of the trustee or any servicer or administrator does not abate any pending action or proceeding involving the estate, and any successor or other trustee, servicer, or administrator shall be substituted as a party in the action or proceeding.

(H) PROFESSIONALS.—The trustee or any servicer or administrator for an estate may employ 1 or more attorneys, accountants, appraisers, auctioneers, or other professional persons to represent or assist the trustee or the servicer or administrator in carrying out its duties. The employment of any professional person and all terms and conditions of employment, including the terms and conditions relating to compensation, shall conform to the requirements of this Act and the oversight program and otherwise shall be subject to the approval of the applicable covered bond regulator.

(I) APPROVED FEES AND EXPENSES.—Unless otherwise provided in the applicable terms and conditions of appointment or employment, all approved fees and expenses of the trustee, any servicer or administrator, or any professional person employed by the trustee or any servicer or administrator shall be payable from the estate as administrative expenses.

(J) ACTIONS BY OR ON BEHALF OF ESTATE.—The trustee or any servicer or administrator for an estate may commence or continue judicial, administrative, or other actions, in the name of the estate or in its own name on behalf of the estate, for the purpose of collecting, realizing on, or otherwise managing the cover pool held by the estate or exercising its other powers or duties on behalf of the estate.

(K) ACTIONS AGAINST ESTATE.—No court may issue an attachment or execution on any property of an estate. Except at the request of the applicable covered bond regulator or as otherwise provided in this subparagraph or subparagraph (J), no court may take any action to restrain or affect the resolution of an estate under this Act. No person (including the applicable indenture

trustee and any applicable covered bondholder) may commence or continue any judicial, administrative, or other action against the estate, the trustee, or any servicer or administrator or take any other act to affect the estate, the trustee, or any servicer or administrator that is not expressly permitted by this Act, the oversight program, and the related transaction documents, except for a judicial or administrative action to compel the release of funds that—

(i) are available to the estate;

(ii) are permitted to be distributed under this Act and the oversight program; and

(iii) are permitted and required to be distributed under the related transaction documents and any contracts executed by or on behalf of the estate.

(L) SOVEREIGN IMMUNITY.—Except in connection with a guarantee provided under paragraph (4) or any other contract executed by the applicable covered bond regulator under this section 4, the Secretary and the covered bond regulator shall be entitled to sovereign immunity in carrying out the provisions of this Act.

(2) BORROWINGS AND CREDIT.—

(A) IN GENERAL.—Any servicer or administrator for an estate created under subsection (b)(1) or (c)(2) may borrow funds or otherwise obtain credit, on behalf of and for the benefit of the estate, from any person in compliance with this paragraph (2) solely for the purpose of providing liquidity in the case of timing mismatches among the assets and the liabilities of the estate. Except with respect to an underwriter, section 5 of the Securities Act of 1933, the Trust Indenture Act of 1939, and any State or local law requiring registration for an offer or sale of a security or registration or licensing of an issuer of, underwriter of, or broker or dealer in a security does not apply to the offer or sale under this paragraph (2) of a security that is not an equity security.

(B) CONDITIONS.—A servicer or administrator may borrow funds or otherwise obtain credit under subparagraph (A)—

(i) on terms affording the lender only claims or liens that are fully subordinated to the claims and interests of the applicable indenture trustee and the applicable covered

bondholders and all other claims against and interests in the estate, except for the residual interest, if the servicer or administrator certifies to the applicable covered bond regulator that, in the business judgment of the servicer or administrator, the borrowing or credit is in the best interests of the estate and is expected to maximize the value and the proceeds of the cover pool held by the estate; or

(ii) on terms affording the lender claims or liens that have priority over or are pari passu with the claims or interests of the applicable indenture trustee or the applicable covered bondholders or other claims against or interests in the estate, if—

(I) the servicer or administrator certifies to the applicable covered bond regulator that, in the business judgment of the servicer or administrator, the borrowing or credit is in the best interests of the estate and is expected to maximize the value and the proceeds of the cover pool held by the estate; and

(II) the applicable covered bond regulator authorizes the borrowing or credit.

(C) LIMITED LIABILITY.—A servicer or administrator shall not be liable for any error in business judgment when borrowing funds or otherwise obtaining credit under this paragraph (2) unless the servicer or administrator acted in bad faith or in willful disregard of its duties.

(D) STUDY ON BORROWINGS AND CREDIT.—The Comptroller General of the United States shall conduct a study on whether the Federal reserve banks should be authorized to lend funds or otherwise extend credit to an estate under this paragraph (2) and, if so, what conditions and limits should be established to mitigate any risk that the United States Government could absorb credit losses on the cover pool held by the estate. The Comptroller General shall submit a report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives on the results of the study not later than 6 months after the date of enactment of this Act.

(3) DISTRIBUTIONS BY ESTATE.—All payments or other distributions by an estate shall be made at the times, in the amounts, and in the manner set forth in the covered bonds, the related transaction documents, and any contracts executed by or on behalf of the estate in compliance with this Act and the oversight program. To the extent that the relative priority of the liabilities of the estate are not specified in or otherwise ascertainable from their terms, distributions shall be made on each distribution date under the covered bonds, the related transaction documents, or any contracts executed by or on behalf of the estate—

(A) first, to pay accrued and unpaid superpriority claims under paragraph (2)(B)(ii);

(B) second, to pay accrued and unpaid administrative expense claims under paragraph (1)(I), paragraph (2)(B)(ii), section 4(b)(5)(A), or section 4(c)(6)(A);

(C) third, to pay—

(i) accrued and unpaid claims under the covered bonds and the related transaction documents according to their terms; and

(ii) accrued and unpaid pari passu claims under paragraph (2)(B)(ii); and

(D) fourth, to pay accrued and unpaid subordinated claims under paragraph (2)(B)(i).

(4) DISTRIBUTIONS ON RESIDUAL INTEREST.—After all other claims against and interests in an estate have been fully and irrevocably paid or defeased, the trustee shall or shall cause a servicer or administrator to distribute the remainder of the estate to or at the direction of the owner of the residual interest. No interim distribution on the residual interest may be made before that time, unless the applicable covered bond regulator—

(A) approves the distribution after determining that all other claims against and interests in the estate will be fully, timely, and irrevocably paid according to their terms; and

(B) provides an indemnity, for the benefit of the estate, assuring that all other claims against and interests in the estate will be fully, timely, and irrevocably paid according to their terms.

(5) CLOSING OF ESTATE.—After an estate has been fully administered, the trustee shall close the estate and, except as otherwise directed by the applicable covered bond regulator, shall destroy all records of the estate.

(6) NO LOSS TO TAXPAYERS.—Taxpayers shall bear no losses from the resolution of an estate under this Act. To the extent that the Secretary and the Corporation jointly determine that the Deposit Insurance Fund incurred actual losses that are higher because the covered bond program of an insured depository institution was subject to resolution under this Act rather than as part of the receivership of the institution under the Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.), the Corporation may exercise the powers available under section 7(b) of the Federal Deposit Insurance Act (12 U.S.C. 1817(b)) to recover an amount equal to those losses after consulting with the Secretary.

SEC. 5. SECURITIES LAW PROVISIONS.

(a) EXISTING EXEMPTIONS APPLICABLE TO COVERED BONDS.—

(1) TREATMENT OF CERTAIN BANKS AND OTHER ENTITIES.—Any covered bond issued or guaranteed by a bank or by an eligible issuer described in section 2(9)(D) and sponsored solely by 1 or more banks for the sole purpose of issuing covered bonds is and shall be treated as a security issued or guaranteed by a bank under section 3(a)(2) of the Securities Act of 1933 (15 U.S.C. 77c(a)(2)), section 3(c)(3) of the In-

vestment Company Act of 1940 (15 U.S.C. 80a-3(c)(3)), and section 304(a)(4)(A) of the Trust Indenture Act of 1939 (15 U.S.C. 77ddd(a)(4)(A)). No covered bond issued or guaranteed by a bank or by an eligible issuer described in section 2(9)(D) and sponsored solely by 1 or more banks for the sole purpose of issuing covered bonds shall be treated as an asset-backed security (as defined in section 3 of the Securities and Exchange Act of 1934 (15 U.S.C. 78c)). Each covered bond regulator for 1 or more banks shall adopt disclosure and reporting regulations for offers or sales of covered bonds by a bank or an eligible issuer described in this paragraph. Such regulations shall provide for uniform and consistent standards for such covered bond issuers, to the extent possible, and shall be consistent with existing regulations governing offers or sales of nonconvertible debt.

(2) TREATMENT OF CERTAIN ASSOCIATIONS AND COOPERATIVE BANKS.—Any covered bond issued by an entity described in section 3(a)(5)(A) of the Securities Act of 1933 (15 U.S.C. 77c(a)(5)(A)) or by an eligible issuer described in section 2(9)(D) and sponsored solely by 1 or more such entities for the sole purpose of issuing covered bonds is and shall be treated as a security issued by such an entity under sec-

tion 3(a)(5)(A) of the Securities Act of 1933 (15 U.S.C. 77c(a)(5)(A)), section 3(c)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a-3(c)(3)), and section 304(a)(4)(A) of the Trust Indenture Act of 1939 (15 U.S.C. 77ddd(a)(4)(A)). No covered bond issued by an entity described in section 3(a)(5)(A) of the Securities Act of 1933 (15 U.S.C. 77c(a)(5)(A)) or by an eligible issuer described in section 2(9)(D) and sponsored solely by 1 or more such entities for the sole purpose of issuing covered bonds shall be treated as an asset-backed security (as defined in section 3 of the Securities and Exchange Act of 1934 (15 U.S.C. 78c)). Each covered bond regulator for 1 or more entities described in section 3(a)(5)(A) of the Securities Act of 1933 (15 U.S.C. 77c(a)(5)(A)) shall adopt, as part of the securities regulations of the covered bond regulator, a separate scheme of registration, disclosure, and reporting obligations and exemptions for offers or sales of covered bonds that are described in this paragraph. Such regulations shall provide for uniform and consistent standards for such covered bond issuers, to the extent possible, and shall be consistent with regulations governing offers or sales of similar securities.

(3) CONSTRUCTION.—No provision of this Act, including paragraph (1) or (2), may be construed or applied in a manner that impairs or limits any other exemption that is available under applicable securities laws.

(b) EXEMPTIONS FOR ESTATES.—Any estate that is or may be created under section 4(b)(1) or 4(c)(2) shall be exempt from all securities laws but—

(1) shall be subject to the reporting requirements established by the applicable covered bond regulator under section 4(d)(1)(E)(iii); and

(2) shall succeed to any requirement of the issuer to file such periodic information, documents, and reports in respect of the covered bonds as specified in section 13(a) of the Securities and Exchange Act of 1934 (15 U.S.C. 78m(a)) or rules established by an appropriate Federal banking agency.

(c) EXEMPTIONS FOR RESIDUAL INTERESTS.—Any residual interest in an estate that is or may be created under section 4(b)(1) or 4(c)(2) shall be exempt from all securities laws.

SEC. 6. MISCELLANEOUS PROVISIONS.

(a) DOMESTIC SECURITIES.—Section 106(a)(1) of the Secondary Mortgage Market Enhancement Act of 1984 (15 U.S.C. 77r–1(a)(1)) is amended—

(1) in subparagraph (C), by striking "or" at the end;

(2) in subparagraph (D), by adding "or" at the end; and

(3) by inserting after subparagraph (D) the following:

"(E) covered bonds (as defined in section 2 of the United States Covered Bond Act of 2011),".

(b) NO TAX IMPLICATIONS.—Any estate created under section 4(b)(1) or 4(c)(2) shall not be treated as an entity subject to taxation separate from the owner of the residual interest for purposes of the Internal Revenue Code of 1986 (26 U.S.C. 1 et seq.), including by reason of the taxable mortgage pool provisions of section 7701(i) of the Internal Revenue Code of 1986 (26 U.S.C. 7701(i)), but instead shall be treated as a disregarded entity that is owned by the owner of the residual interest for such purposes as described in applicable regulations of the Secretary, as in effect on the date of the enactment of this Act. No transfer or assumption of any asset or liability to or by an estate or an eligible issuer under section 4(b) or 4(c) shall cause or constitute an event in which gain or loss shall be recognized under section 1001 of the Internal Revenue Code of 1986 (26 U.S.C. 1001).

(c) REAL ESTATE MORTGAGE INVESTMENT CONDUITS.—Section 860G(a)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 860G(a)(3)) is amended—

(1) in subparagraph (B), by striking "and" at the end;

(2) in subparagraph (C), by striking the period and inserting ", and"; and

(3) by inserting after subparagraph (C) the following:

"(D) covered bonds that are secured by eligible assets from the residential mortgage asset class or the commercial mortgage asset class, as such terms are defined in section 2 of the United States Covered Bond Act of 2011.".

(d) REAL ESTATE INVESTMENT TRUSTS.—To the extent provided by regulations that may be promulgated by the Secretary, a covered bond described in section 860G(a)(3)(D) of the Internal Revenue Code of 1986 shall be treated as a real estate asset in the same manner as a regular interest in a REMIC for purposes of section 856(c)(5)(E) of such Code.

(e) INVESTMENT TREATMENT FOR TAX PURPOSES.—The acquisition of any covered bond shall be treated as an acquisition of an investment security, and not as an acquisition of an interest in a loan or otherwise as a lending

transaction, for purposes of determining the character of any related trade or business activity of the acquirer or any asset held by the acquirer under the Internal Revenue Code of 1986 (26 U.S.C. 1 et seq.).

(f) STATE AND LOCAL TAXES.—The Secretary may promulgate regulations under this Act that are similar to the provisions of section 346 of title 11, United States Code, including regulations to provide that—

(1) if an estate created under section 4(b)(1) or 4(c)(2) is not treated as an entity subject to taxation separate from the owner of the residual interest for purposes of the Internal Revenue Code of 1986 (26 U.S.C. 1 et seq.), no separate taxable entity shall be created with respect to the estate for purposes of any State or local law imposing a tax on or measured by income; and

(2) if a transfer or assumption of an asset or liability to or by an estate or an eligible issuer under section 4(b) or 4(c) does not cause or constitute an event in which gain or loss is recognized under section 1001 of the Internal Revenue Code of 1986 (26 U.S.C. 1001), the transfer or assumption shall not cause or constitute a disposition for purposes of any provision assigning tax consequences to a disposition

in connection with any State or local law imposing a tax on or measured by income.

(g) NO CONFLICT.—The provisions of this Act shall apply, notwithstanding any provision of the Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.), title 11, United States Code, title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5381 et seq.), or any other provision of Federal law with respect to conservatorship, receivership, liquidation, or bankruptcy. No provision of the Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.), title 11, United States Code, title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5381 et seq.), or any other provision of Federal law with respect to conservatorship, receivership, liquidation, or bankruptcy may be construed or applied in a manner that defeats or interferes with the purpose or operation of this Act.

(h) ANNUAL REPORT TO CONGRESS.—The covered bond regulators shall, annually—

(1) submit a joint report to the Congress describing the current state of the covered bond market in the United States; and

(2) testify on the current state of the covered bond market in the United States before the Committee on Financial Services of the House of Rep-

resentatives and the Committee on Banking, Housing, and Urban Affairs of the Senate.

Union Calendar No. 542

112TH CONGRESS
2ND SESSION

H. R. 940

[Report No. 112–407, Part I]

A BILL

To establish standards for covered bond programs and a covered bond regulatory oversight program, and for other purposes.

DECEMBER 31, 2012

The Committee on Ways and Means discharged; committed to the Committee of the Whole House on the State of the Union and ordered to be printed