**recent DEVELOPMENTS in**

**OKLAHOMA business and corporate law ‑ 2010**

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**Introduction**

This is the fourth year in which the economic crisis has dominated our business and corporate law developments. Regulatory changes for corporations and financial institutions at the Federal and international levels greatly overshadow the more meager developments in Oklahoma business and corporate law. We shall cover these larger developments – focusing on the Dodd-Frank Act[[1]](#footnote-1) ‑ as well as the Oklahoma developments. While there were no notable Oklahoma cases this year, we have new legislation in the Uniform Limited Partnership Act.

A brief survey of the past four years will set the stage for this year’s Federal developments. In 2007, we examined the subprime mortgage crisis, which was precipitated by a drop in housing prices.[[2]](#footnote-2) The financial crisis deepened dramatically in 2008 as the fallout from the subprime mortgage crisis spread. The crisis would cause the venerable Lehman Brothers to fail, which shook financial markets worldwide.[[3]](#footnote-3) In its wake, the U.S. Treasury nationalized Fannie Mae and Freddie Mac, Bank of America scooped up the tottering Merrill Lynch, and the Federal Reserve bailed out AIG, the world’s largest insurer.[[4]](#footnote-4) The two remaining independent investment banks, Goldman Sachs and Morgan Stanley, made themselves into bank holding companies to ensure access to Fed funds, thus ending the era of independent investment banking on Wall Street.[[5]](#footnote-5) What began as a financial crisis spread to the overall economy resulting in the most significant economic downturn since the Great Depression.[[6]](#footnote-6)

To moderate the impact on the overall economy, the Federal government intervened in unprecedented fashion with a Congressionally-approved $700 billion bailout package for the purchase of troubled financial assets – the so-called TARP fund.[[7]](#footnote-7) A year later, Congress passed the Recovery Act providing almost $800 billion of economic stimulus.[[8]](#footnote-8) In addition to the economic stimulus, the Federal government also implemented wide-spread regulatory changes in what President Obama called a “sweeping overhaul of the United States financial regulatory system, a transformation on a scale not seen since the reforms that followed the Great Depression.”[[9]](#footnote-9) The bulk of the regulatory overhaul came in Dodd-Frank, which was adopted in July of this year.

### Dodd-Frank

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“*Dodd-Frank*”) is a compilation of several House and Senate bills dealing with financial regulatory reform. In 2,300 plus pages, it addresses agency consolidation, the liquidation of “too big to fail” financial institutions, residential mortgage and consumer lending practices, use of derivative securities, proprietary trading by banks, executive compensation, and consumer financial protections.

#### Changing the Roles of Federal Regulators

Dodd-Frank reflects a general perception that inadequate financial regulation contributed to the economic crisis and that the government agencies charged with regulating the financial industry should be strengthened.

*Agency Consolidation*.[[10]](#footnote-10) Banking and financial services industry is regulated by multiple Federal and state agencies. For example, federal and state banks and thrifts are regulated variously by the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision. The Securities and Exchange Commission regulates the sale and trading of securities, public companies, underwriters, broker-dealers, and investment advisors. The Commodity Futures Trading Commissions regulates commodity futures and options markets. Dodd-Frank did not adopt the massive consolidation proposed in some earlier bills. It eliminated only the Office of Thrift Supervision. The OTS’s authority for holding companies was transferred to the Federal Reserve, for state savings associations to the FDIC, and for other thrifts to the Office of the Comptroller. The consolidation does not change the dual Federal-state regulatory structure for state banks and thrifts, although such institutions would report to the new Federal agency.

*Bureau of Consumer Financial Protection*.[[11]](#footnote-11) The development that might have the broadest impact is the creation of the Bureau of **Consumer Financial Protection, which is an independent agency within the Federal Reserve. The new agency would assume the existing** consumer protection responsibilities handled by the Office of the Comptroller, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Federal Reserve, the National Credit Union Administration, and the Federal Trade Commission, and would have additional responsibilities as well. When the transition is complete, the Bureau will have the power to regulate how loans and other financial products are offered, the types of products that can be offered and who can qualify, the disclosures that must be made, and the type and amount of fees that can be charged. The Bureau’s scope is broad and will cover mortgage brokers, student loan companies and payday lenders, who are lightly regulated under the present system. A group that is not be covered are automobile dealers, although auto lenders can be regulated.

*Federal Insurance Office*.[[12]](#footnote-12) Dodd-Frank creates the Federal Insurance Office within the Department of Treasury. The office is charged generally with monitoring the domestic insurance industry, except for health insurance and crop insurance. It has broad powers to gather data from insurance companies and to assess a company’s risk profile. The office is also charged with coordinating state regulation with national and international needs.

*Other Federal Agencies*.[[13]](#footnote-13) Dodd-Frank creates two agencies to monitor systemic financial risks: the Financial Stability Oversight Council and the Office of Financial Research, both of which are in the Department of Treasury. The Council is composed generally of the Secretary of the Treasury (the chair) and the heads of various Federal financial regulatory agencies, including the SEC, FDIC and the Comptroller. It meets at least quarterly to review domestic and international regulatory and market developments and has broad powers to assess and investigate risks to the U.S. financial system. The Office of Financial Research provides administrative and technical support to the Council and its affiliated agencies.

*Too Big to Fail*.[[14]](#footnote-14) Dodd-Frank expands the liquidation procedures for banks, insured depository institutions and securities firms to include insurance companies and other non-bank financial companies. The FDIC or the Federal Reserve or both will cover financial institutions generally. The SEC or the Federal Reserve or both will cover broker-dealers. Insurance companies will be covered by the newly created Federal Insurance Office. Dodd-Frank creates the Orderly Liquidation Fund, which is an expansion of the FDIC’s Deposit Insurance Fund, to cover any additional costs from liquidation of the companies added by the expanded liquidation procedures. The fund is financed by assessments on the covered financial institutions.

*Mortgage Reforms*.[[15]](#footnote-15) Dodd-Frank adopts a number of changes to the residential mortgage market, which will be administered by the Bureau of Consumer Financial Protection. The changes will regulate “residential mortgage originators” by requiring a suitability determination for borrowers based on ability to pay and by controlling origination fees. The act will establish national underwriting standards for mortgages and will eliminate some prepayment penalties and mandatory arbitration provisions. “High cost” mortgages will be subject to special requirements, including the elimination of balloon payments and a requirement for pre-loan counseling. A new Office of Housing Counseling is created under the Department of Housing and Urban Development. New rules will deal with loan servicing, including escrow and settlement procedures, and will require prior written appraisals for “higher-risk” mortgages.

*Increased SEC Powers*.[[16]](#footnote-16) Dodd-Frank directs the SEC to make changes affecting broker-dealers, investment advisors and credit rating agencies. The SEC is to develop new rules for the fiduciary duties between customers and their brokers-dealers and investment advisors and for the disclosures that brokers-dealers and investment advisors make when selling an investment. Dodd-Frank gives the SEC greater authority regarding the credit rating agencies and charges the SEC with developing new regulations regarding conflicts of interest, rating performance and product marketing. The SEC is also to develop rules for “asset-backed securities”, which include collateralized mortgage and debt obligations. These rules will require that issuers retain some portion of the investment risk and will prohibit issuers from hedging the risk. The SEC is also charged with implementing the “say on pay” and “proxy access” rules.

*New Hedge Fund Regulations*.[[17]](#footnote-17) Dodd-Frank imposes significant new regulations over hedge funds, private equity funds and their advisors. Hedge funds and private equity funds are generally investment funds owned by no more than 100 beneficial owners or by qualified investors only. Because of their limited ownership, these funds were largely exempt from the reporting and regulatory requirements applicable to more widely held investment funds. Despite their exemption, however, many of the funds held assets of a billion dollars or more and their role in the financial markets was significant. Dodd-Frank increases the reporting requirements for these funds and their advisors. The new reporting requirements include disclosure of the businesses that service the funds, such as brokers, auditors and marketers. Fund advisers will have to disclose conflicts of interest, such as compensation for referrals. The requirements retain exemptions for closely held venture capital funds, funds under $150 million, and “family” funds. Dodd-Frank also increases the net worth requirement for “accredited investors” by excluding the value of the residence from the net worth calculation.

#### Limiting Derivative and Other Trading Risks

We have discussed the effects of collateralized debt and mortgage obligations and other types of financial derivatives, also known as “swaps”, in aggravating the financial crisis.[[18]](#footnote-18) Because financial derivatives extrapolate the value of an underlying asset, changes in the value of the underlying asset are magnified in the linked derivatives and market risks are increased accordingly. The size of the derivative market is enormous. The notional amount of U.S. derivatives was approximately $177.6 trillion in the second quarter of 2010.[[19]](#footnote-19) Yet despite its size, the market is relatively young and lacks the transparency and stability of older financial markets. Questions about whether signatories, counterparties and assignees of the derivatives could perform caused the financial markets to freeze in August 2007. Derivatives were instrumental in AIG’s fall and in many of the financial losses incurred by the investment banks.

*Limiting the Use of Derivatives*.[[20]](#footnote-20) To address these issues, Dodd-Frank requires that banks limit their derivative positions to “bona fide hedging and traditional bank activities.” It also requires that derivative contracts be cleared and exchange-traded, if possible, with the SEC and CFTC to clarify by rule-making. Derivatives (swap) dealers (mostly banks) will have additional margin and capital requirements. The intent of these provisions is to increase market transparency, accountability, and stability without adding regulatory burdens that would discourage institutions from hedging their own risks.

*Uniform Risk Management Standards*. Dodd-Frank also charges the Federal Reserve with developing uniform standards for risk management by “systemically important financial market utilities; strengthening the liquidity of systemically important financial market utilities; and providing the [Federal Reserve] an enhanced role in the supervision of risk management standards for systemically important payment, clearing, and settlement activities by financial institutions.”[[21]](#footnote-21)

*The Volker Rule – No Proprietary Trading*.[[22]](#footnote-22) The so-called “Volker Rule” bars a bank or an institution owning a bank from trading for its own account and from owning or investing in a hedge fund or private equity fund. The rule assumes that banks should use their assets and Fed borrowing access for making loans to borrowers rather than making investments for themselves. The rule is also intended to reduce the perceived risks of proprietary trading. The rule excepts trading in government securities, underwriting or market-making activity, and trading for customer accounts. The rule does not apply to non-bank financial companies, such as insurance companies and securities firms.

#### Corporate Governance

Advocates for stronger corporate governance argue that companies perform better – and take fewer risks – when management is more accountable to the shareholders. This idea harkens back to Berle and Means’ seminal 1932 work, which documented the separation of relatively passive shareholders from the executives who managed their companies.[[23]](#footnote-23) But idea has grown in recent years. Evidence can be seen in the Sarbanes Oxley Act,[[24]](#footnote-24) which strengthened corporate governance in the wake of the Enron, WorldCom and other corporate collapses in 2001 and 2002. Dodd-Frank makes further changes in corporate governance, including requirements that public companies allow their shareholders to vote on executive compensation and streamlining procedures for shareholders to nominate directors without board approval.

*“Say on Pay” – Shareholder Votes on Executive Compensation*.[[25]](#footnote-25) Under Dodd-Frank, the SEC is to promulgate rules implementing “say on pay”, which would give shareholders of public companies the right to cast non-binding, “advisory” votes on executive compensation. The presumption is that “say on pay” draws greater attention to the level of executive compensation, increases communication between directors and institutional investors, and moderates the levels of executive compensation.

The “say on pay” rules will require public companies to submit their executive compensation packages to a shareholder vote at least once every three years. At least every six years, companies must ask their shareholders whether they should vote on executive compensation more often than once every three years. Shareholders would also vote on executive compensation paid in a change of control – the so-called “golden parachute” payments. The law would also require institutional investors to disclose their votes on compensation. While the shareholder votes would have no legal effect – they are not binding ‑ a negative vote would pressure the boards of directors and compensation committees to develop compensation programs that are more palatable to the shareholders.

Dodd-Frank also increases disclosure for executive compensation. In addition to disclosing the amount of compensation, which companies must do currently, the companies must disclose the median annual income of all employees and the ratio between the median compensation and the CEO compensation.[[26]](#footnote-26)

*Executive Compensation in Financial Institutions*.[[27]](#footnote-27) Dodd-Frank requires all “covered financial institutions”, regardless of whether they are publicly held, to disclose the structure of their incentive-based compensation arrangements, so that regulators may determine whether the structures result in excessive compensation or could lead to material financial loss to the institution. The Dodd-Frank provisions are similar to earlier guidance from the Federal Reserve to its regulated financial institutions, which stated that incentive compensation arrangements must be compatible with the institution’s risk management and supported by effective oversight from the institution’s board of directors.[[28]](#footnote-28)

*Proxy Access – Facilitating Shareholder Involvement*.[[29]](#footnote-29) Expanded shareholder involvement also underlies the new “proxy access” rules. Since few shareholders actually attend the annual shareholder meetings of public companies, voting occurs through proxies. Management will solicit proxies for their director nominees and other matters to be considered. If a shareholder group wishes to advance its own director nominees or other matters, the group must produce and distribute its own proxy materials, the cost of which is substantial. Dodd-Frank directs the SEC to develop rules that would allow shareholders to nominate their own director candidates and include those candidates in the company’s proxy statement. The change eliminates the need for shareholders to produce and distribute their own proxy materials. This change is intended to make the companies – or more specifically, their boards of directors – more responsive to their shareholders.

#### Overview of Federal Developments

Despite its length, Dodd-Frank does not enact sweeping regulatory changes or fundamental alterations in the financial markets themselves. The changes are at the margins, which is perhaps to be expected. Many economists and politicians believe that the financial markets are generally healthy and largely self-regulating. Government involvement can suppress innovation and development and carry unintended consequences. The markets, they argue, work better with minimal regulation. The scope of the financial markets also limits domestic regulation. Many financial markets extend beyond domestic borders and require international coordination for effective regulation. Finally, the public will rely ultimately on the markets for economic recovery. These powerful incentives require a showing that new regulations will do more good than harm – a showing that for political or economic reasons can be hard to make.

Yet some changes may make a difference. The Volker Rule limiting proprietary trading by banks should reduce the risk profiles of those institutions. The mortgage markets – whether due to Dodd-Frank or the industry’s financial losses or both – are unlikely to return to the risky and abusive lending practices of the past.

Perhaps the most notable development with Dodd-Frank is its reach. If the changes are not deep, they are broad. Dodd-Frank touches upon virtually every corner of the financial markets, from investment banking to auto loans and credit cards, from residential mortgages to hedge funds, and from executive compensation to consumer credit counseling. The willingness to reach into these corners perpetuates a trend that we have noted before: the shift of corporate and financial regulation from the states to the Federal government.[[30]](#footnote-30)

### Oklahoma Developments

#### Legislation ‑ the Uniform Limited Partnership Act

The Oklahoma Legislature passed and the Governor signed the Uniform Limited Partnership Act of 2010 (“*ULPA*”).[[31]](#footnote-31) ULPA becomes effective January 1, 2011.[[32]](#footnote-32) It replaces the present Revised Uniform Limited Partnership Act (“*RULPA*”), which was adopted in 1976.[[33]](#footnote-33) While RULPA was regularly updated, including the addition of merger and conversion provisions, ULPA represents a more fundamental change. It presumes that limited partnerships are best suited for those wanting strong, centralized management and passive investment participation. ULPA is also more compatible with the estate planning needs of family limited partnerships.[[34]](#footnote-34)

*ULPA’s Notable Features*. ULPA is longer and more complex than RULPA it replaces in part because ULPA is a “stand alone” act. RULPA incorporated many of the provisions of the Revised Uniform Partnership Act (“*RUPA*”),[[35]](#footnote-35) which meant that one must consider both acts to understand the one.[[36]](#footnote-36) ULPA does not incorporate provisions of the RUPA and as a result is longer than RULPA.

Perhaps ULPA’s most important features are changes in the liability regime for both general and limited partners. General partners can be shielded from unlimited liability if the limited partnership elects limited liability limited partnership or LLLP (pronounced “*triple LP*”) status.[[37]](#footnote-37) A limited partnership becomes a LLLP by stating in its certificate of limited partnership that it is a LLLP. Its name must also use the phrase “limited liability limited partnership” or the abbreviation “LLLP” or “L.L.L.P.” and must not contain the abbreviation “L.P.” or “LP”.[[38]](#footnote-38) Existing limited partnerships may amend their certificates to elect LLLP status. New limited partnerships would presumably make the LLLP election since there is no cost to do so. The extent to which existing limited partnerships will make the election is uncertain. General partners are typically created as limited liability entities to limit their exposure. The LLLP election would add another layer of protection at the cost of preparing and filing the amendment.

As the liability loop is closed for general partners with the LLLP election, the liability loop for limited partners is closed with ULPA’s elimination of the “control rule”. The control rule held that a limited partner could lose its limited liability if it participates in control of the partnership’s business.[[39]](#footnote-39) The control rule was much criticized for the uncertainty that it fostered, even if RULPA attempted to reduce the uncertainty with a list of activities that did not constitute participation in control.[[40]](#footnote-40) By shielding general partners and eliminating the control rule for limited partners, limited partnerships now possess a complete liability regime like that of LLCs and corporations.

Another notable change is ULPA’s elimination of the old business purpose requirement in favor of any legal purpose. RULPA provided that a limited partnership may carry on any business that a partnership without limited partners may carry on.[[41]](#footnote-41) RUPA defines a [general] partnership as an “association of two or more persons to carry on as co-owners a business for profit . . ..”[[42]](#footnote-42) Read together, RULPA and RUPA required that a limited partnership have a business purpose. ULPA requires that a limited partnership may be formed “for any lawful purpose.”[[43]](#footnote-43) The change conforms to the requirements for LLCs and can be useful.[[44]](#footnote-44) For example, a family owning a vacation home or a boat could place the property in a limited partnership without jeopardizing the partnership’s formation. Non-profit corporations could use limited partnerships in joint ventures with for-profit entities without similar concerns.[[45]](#footnote-45)

ULPA’s provisions dealing with partnership dissolution are much more detailed that RULPA’s provisions. For example, ULPA provides that a limited partnership may amend its certificate of limited partnership to announce its dissolution and may file a statement of cessation when the winding up is finished.[[46]](#footnote-46) The uniform version of RULPA had no provisions for announcing a dissolution.[[47]](#footnote-47) The Oklahoma version of RULPA was amended to provide a certificate of cancellation to be filed upon the dissolution or conversion of a limited partnership, but the provisions are not as comprehensive as the ULPA provisions.[[48]](#footnote-48) ULPA also provides a procedure for disposing of known claims in a dissolution, which was not addressed in RULPA.[[49]](#footnote-49)

ULPA denies rights to withdraw (dissociate) to both general and limited partners, unless the partnership agreement otherwise provides.[[50]](#footnote-50) The denial of withdrawal rights is important from an estate planning standpoint and represents a difference from the uniform version of RULPA.[[51]](#footnote-51) In this sense, ULPA is like Oklahoma’s RULPA, which was modified in 1998 to eliminate the uniform version’s six-month withdrawal right for limited partners.[[52]](#footnote-52) ULPA and RULPA also differ in their treatment of buyouts. Under RULPA, general and limited partners received the fair value of their interest after withdrawal.[[53]](#footnote-53) Under ULPA, the withdrawing (dissociating) partner becomes a transferee of its own transferable interest, but receives no money unless the partnership agreement otherwise provides.[[54]](#footnote-54)

ULPA changes the limited partner consent requirements in certain instances. RULPA required unanimous partner consent to determine whether the partnership should dissolve.[[55]](#footnote-55) ULPA requires only the consent of the general partner and a majority in interest of the limited partners.[[56]](#footnote-56) RULPA also required unanimous partner consent to determine whether the partnership would continue after a general partner’s dissociation.[[57]](#footnote-57) Here too, ULPA requires only majority consent.[[58]](#footnote-58)

ULPA deals explicitly with the duties of general and limited partners. General partners owe the partnership the traditional fiduciary duties of loyalty and due care.[[59]](#footnote-59) These duties include a duty to preserve business opportunities and a duty not to compete, and the duties extend through the winding up of the partnership.[[60]](#footnote-60) ULPA permits partners to refine the scope of these duties in the partnership agreement.[[61]](#footnote-61) The agreement cannot, however, eliminate the duty of loyalty, unreasonably reduce the duty of care, or eliminate the duty of good faith and fair dealing. The agreement can specify activities that do not violate the duty of loyalty if not “manifestly unreasonable”.[[62]](#footnote-62) The general partner will owe individual partners – in contrast to the partnership and partners as a whole ‑ a duty of good faith and fair dealing.[[63]](#footnote-63)

ULPA states that limited partners owe no fiduciary duties, but do owe a duty of good faith and fair dealing to the partnership and its partners.[[64]](#footnote-64) ULPA’s position on the duties of limited partners is consistent with the absence of duties owed by corporate shareholders or LLC members.[[65]](#footnote-65) These persons typically owe no duties because they hold nothing in trust for another and have no control over the common assets.[[66]](#footnote-66) Limited partners are permitted to act in their own self-interest without a breach of duty.[[67]](#footnote-67) They must, however, deal with one another in good faith.[[68]](#footnote-68)

*Differences in the Oklahoma Version of ULPA*. Oklahoma’s version of ULPA has few substantive differences from the Uniform version. Most of the differences are changes in terminology made to minimize the implementation changes to the Secretary of State’s electronic filing system. For example, a certificate of termination in the Uniform version became a certificate of cessation in the Oklahoma version, since Oklahoma’s RULPA referred to certificates of cessation. Similarly, certificates of existence or authorization became certificates of good standing. Administrative dissolution became revocation of good standing. Other procedural steps in the Uniform version were revised to conform to the Secretary of State’s existing procedures. These changes affected provisions dealing with a registered agent’s resignation,[[69]](#footnote-69) the requirements for issuing certificates of good standing,[[70]](#footnote-70) and requirements for annual reports,[[71]](#footnote-71) and procedures for the revocation of good standing and subsequent reinstatement.[[72]](#footnote-72)

### Conclusion

While changes at the Federal level overshadow the changes at the state level for the laws affecting business entities, we must remain mindful that state laws do matter. Thousands of Oklahoma businesses are formed each year in addition to the existing businesses. Each of these many businesses depends on Oklahoma statutes and case law to guide their formation and operation. The law guides relationships among owners, between owners and managers, and between the entity and persons with whom it does business. As lawyers, we are uniquely positioned to assist these business and to encourage best business practices. Good corporate governance means better relationships. It also makes for a better marketplace.[[73]](#footnote-73) Markets are more efficient where transparency and trust are found, and transactional risk decreases. The resulting economic benefits help us all.

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1. The Dodd–Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203, H.R. 4173) (enacted July 21, 2010) (“*Dodd-Frank*”). [↑](#footnote-ref-1)
2. Gary W. Derrick, *Recent Developments in Oklahoma Business and Corporate Law – 2007*, OBA 2007 Recent Developments (Day Two). [↑](#footnote-ref-2)
3. Lehman Brothers filed the largest bankruptcy filing in U.S. history on September 15, 2008. Lehman had over $630 billion in assets and 25,000 employees. The largest previous filing was WorldCom, whose assets before bankruptcy were just over $100 billion. *Lehman's Demise Triggered Cash Crunch around the Globe*, Wall St. J. (Sept. 29, 2008). [↑](#footnote-ref-3)
4. “On [September 16, 2008], the Federal Reserve made a bridge loan to A.I.G., the largest insurance company in the world; . . . A.I.G. has assets of over $1 trillion and over 100,000 employees worldwide. The Fed has the option to purchase up to 80% of the shares of A.I.G., is replacing A.I.G.’s management, and is nearly wiping out A.I.G.’s existing shareholders. A.I.G. is to be wound down by selling its assets over the next two years. The Fed has never asserted its authority to intervene on this scale, in this form, or in a firm so far removed from its own supervisory authority.” Stephen J. Dubner, *Freakonomics: Diamond and Kashyap on the Recent Financial Upheavals*, NYTimes (Sept. 18, 2008). [↑](#footnote-ref-4)
5. “Goldman Sachs and Morgan Stanley, the last big independent investment banks on Wall Street, will transform themselves into bank holding companies subject to far greater regulation, the Federal Reserve said Sunday night, a move that fundamentally reshapes an era of high finance that defined the modern Gilded Age.” Andrew Ross Sorkin and Vikas Bajaj, *Goldman and Morgan Shift Marks End of Era in Finance*, NYTimes (Sept.21, 2008). [↑](#footnote-ref-5)
6. This is not to say that the economic problems are like those of the Great Depression. The Great Depression was much worse. In 1933, unemployment was over 25% and was far higher if part-time workers are included. Between 1929 and 1933, the gross domestic product (“*GDP*”) shrank to nearly half of what it was. Exports were one-fifth of what they were in 1929. Farm mortgages were being foreclosed at the rate of 20,000 a month. Banks were entirely closed in 38 states and restricted in the other ten states. Over 5,000 banks had failed by 1933, wiping out the savings of millions of people.

In comparison, unemployment peaked at 10.1% in October 2009 and was estimated at 9.6% in September 2010. After solid increases in 2006 and 2007, GDP was flat at 0.0% in 2008 and decreased 2.6% in 2009. Through the first three quarters of 2010, GDP increased by an estimated 3.7%, 1.7% and 2.0% per quarter, respectively. Americans have substantial savings, retirement funds, and equity in real estate. *See* Gross Domestic Product releases from the Bureau of Economic Analysis (available at <http://www.bea.gov/>); Bureau of Labor Statistics releases (available at <http://www.bls.gov/>); and *Freakonomics: John Steele Gordon on the Financial Mess: Greed, Stupidity, Delusion — and Some More Greed*, NYTimes (Sept. 22, 2008).

The U.S. economy is slowly recovering. Unemployment while high is declining, the banking and financial systems are stable, the stock market indices are up, and other economic indicators are generally positive. The economic consensus forecasts a relatively weak recovery, stymied perhaps by large governmental debt levels and weak consumer demand. *A Special Report on the World Economy*, The Economist (Oct 7, 2010). [↑](#footnote-ref-6)
7. Emergency Economic Stabilization Act of 2008 (the “*EESA*”), Pub. L. 110-343, 12 U.S.C. 5201 et seq. (enacted Oct. 3, 2008), which designated the bailout as the Troubled Assets Relief Program or “TARP”. The $700 billion purchase package paralleled other Federal guaranty and borrowing programs that totaled nearly $7.8 trillion in notional value. *See* Mark Pittman and Bob Ivry, *U.S. Pledges Top $7.7 Trillion to Ease Frozen Credit*, Bloomberg.com (Nov. 24, 2008).

The TARP formally ended in October 2010. The Department of Treasury released its report on TARP saying that the net cost of the program and other Treasury interests in AIG will be about $30 billion, the bulk of which relates to Fannie Mae and Freddie Mac debt assumptions and GM and Chrysler investments. If so, the net cost would be less than 1% of GDP and less than the taxpayers’ cost of the savings and loan crisis in the late 1980’s, which represented 3.2% of GDP. *See* Timothy F.Geithner, *Five Myths about TARP*, Wash. Post (Oct. 10, 2010). [↑](#footnote-ref-7)
8. The American Recovery and Reinvestment Act of 2009 (the “*ARRA*” or “*Recovery Act*”), Public Law 111-5 (enacted Feb. 17, 2009). The Recovery Act was a combination of federal tax incentives, expansion of unemployment benefits and other social welfare, and spending for education, health care, roads and highways, energy projects, and other infrastructure. [↑](#footnote-ref-8)
9. *Remarks by the President on 21st Century Financial Regulatory Reform*, White House press release (June 17, 2009) (available at <http://www.whitehouse.gov/the_press_office/Remarks-of-the-President-on-Regulatory-Reform/>). [↑](#footnote-ref-9)
10. *See* H.R. 4173, Tit. III, §300 *et seq.* [↑](#footnote-ref-10)
11. *See id.*, Tit. X, §1001 *et seq*. [↑](#footnote-ref-11)
12. *See id.*, Tit. V, §501 *et seq*. [↑](#footnote-ref-12)
13. *See id.*, Tit. I, §101 *et seq*. [↑](#footnote-ref-13)
14. *See id.*, Tit. II, §201 *et seq*. [↑](#footnote-ref-14)
15. *See id.*, Tit. XIV, §1400 *et seq*. [↑](#footnote-ref-15)
16. *See id.*, Tit. IX, §901 *et seq*. [↑](#footnote-ref-16)
17. *See id.*, Tit. IV, §401 *et seq*. [↑](#footnote-ref-17)
18. Gary W. Derrick, *Recent Developments in Oklahoma Business and Corporate Law – 2007*, OBA 2007 Recent Developments (Day Two). [↑](#footnote-ref-18)
19. The International Swaps and Derivatives Association, Inc. reported that the five largest U.S.-based dealers (banks) reported a notional amount of outstanding derivatives of $172.3 trillion as of June 30, 2010, which is 37% of the reported $466.8 trillion worldwide market. *See* ISDA news release (avail. at <http://www.isda.org/media/press/2010/press102510.html>) (Oct. 25, 1010). Based on reports of the Office of the Comptroller, the five largest U.S. banks hold 97% of the total notional amount of derivatives in the U.S. *OCC Reports Stong First Quarter Trading Revenues and Declining Derivatives Credit Exposure*, OCC news release (avail. at <http://www.occ.gov/news-issuances/news-releases/2010/nr-occ-2010-71.html>) (June 25, 1010). The notional amount is down from $203.5 trillion in the second quarter of 2009. *Quarterly Report on Bank Trading and Derivatives Activities*, OCC (2Q 2009). [↑](#footnote-ref-19)
20. *See* H.R. 4173, Tit. VII, §701. [↑](#footnote-ref-20)
21. *See id.*, Tit. VIII, §802. [↑](#footnote-ref-21)
22. *See id.*, Tit. VI, §601 *et seq*. and Tit. VII, §701 et seq. For a summary of the provisions, see <http://www.skadden.com/newsletters/FSR_The_Volcker_Rule.pdf>. [↑](#footnote-ref-22)
23. Adolf A. Berle, Jr., and Gardiner C. Means, *The Modern Corporation and Private Property* (Macmillan 1932). [↑](#footnote-ref-23)
24. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). In a 2005 report, the global accounting firm of Pricewaterhouse Coopers described Sarbanes-Oxley as the “single most important piece of legislation affecting corporate governance, financial disclosure and the practice of public accounting since the US securities laws of the early 1930s.” PricewaterhouseCoopers (Aug. 2005). [↑](#footnote-ref-24)
25. *See* H.R. 4173, §§951-957. [↑](#footnote-ref-25)
26. Whether and to what extent these requirements will reduce executive compensation is uncertain. Complaints about executive compensation, and attempts to control it, are nothing new. In 1993, the Internal Revenue Service capped the deductibility in public companies of executive compensation exceeding $1 million. Internal Revenue Code of 1986, §162(m). The section was intended to reign in executive compensation by eliminating the tax-deductibility of executive compensation above $1 million, unless the excess compensation was performance-based. The section led to greater use of performance-based stock options, which led to dramatic increases in executive compensation as the equity markets rose.

The Securities and Exchange Commission has long sought improved executive compensation disclosures. The SEC adopted new disclosure requirements for executive compensation in 1992 and in 1993. Executive Compensation Disclosure (Rel No. 6962, eff. Oct. 21, 1992) and Executive Compensation Disclosure, Securityholder Lists and Mailing Lists (Rel. No. 7032, eff. Nov. 22, 1993). Later major revisions occurred in 2006. Executive Compensation and Related Person Disclosure (Rel. Nos. 33-8732A; 34-54302A, eff. Nov. 6, 2006) (substantial revisions of disclosure regulations under Reg. S-K, including the adoption of a “compensation discussion and analysis” section for proxy statements). The SEC’s mandate for better transparency arguably focused a brighter light on executive pay. [↑](#footnote-ref-26)
27. *See* H.R. 4173, Tit. IX, §956. [↑](#footnote-ref-27)
28. *Guidance on Sound Incentive Compensation Policies*, Fed. Res. Dock. No. OP-1374 (June 21, 2010) (available at [http://www.federalreserve.gov/newsevents/press/bcreg/
bcreg20100621a1.pdf](http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20100621a1.pdf)). [↑](#footnote-ref-28)
29. *See* H.R. 4173, Tit. IX, §§971-972. [↑](#footnote-ref-29)
30. For those interested in the “Federalization” of corporate law, see Leo E. Strine Jr., *Breaking the Corporate Governance Logjam in Washington*, 63:4 Bus.Law 1073 (Aug. 2008). [↑](#footnote-ref-30)
31. ULPA was enacted as Senate Bill 1132, which was authored by Senators Patrick Anderson and Tom Ivester and Representative Ben Sherrer. ULPA was first enacted in 2008 when it was combined in Senate Bill 1708 with the Uniform Anatomical Gift Act, the Uniform Limited Cooperative Association Act, amendments to Articles 3 and 4 of the Uniform Commercial Code, and amendments to the Oklahoma Trust Act (formerly in Senate Bill 975). The combination of these acts and amendments in a single bill immediately raised questions about whether the bill comported with the constitutional “one subject requirement”. Suit was filed in September 2008 and, on November 24, 2008, the Oklahoma Supreme Court invalidated the bill as “facially contrary” to the constitutional provision. *Weddington v. Henry et al*, 2008 OK 102, 202 P.3d 143. [↑](#footnote-ref-31)
32. ULPA has transition provisions that stage its application. 54 O.S. §500-1203A. Before July 31, 2011, it applies to limited partnerships formed after January 1, 2011, and to limited partnerships formed earlier if they so elect. It applies to all limited partnerships after July 31, 2011, except for limited partnerships formed before January 1, 2011, that elect to be governed by the predecessor act. [↑](#footnote-ref-32)
33. Oklahoma has always provided for limited partnerships. The earliest statutes were derived from the Field Code as enacted in the Dakota Territories (Comp.Laws Dakota 1887, §§4072 - 4096), which provided for “special partnerships” with at least one general partner and at least one special partner, whose liability was limited to the special partner’s partnership capital. 54 O.S. §§101 – 125 (1951). The special partnership statutes were repealed in 1951 with Oklahoma’s adoption of the Uniform Limited Partnership Act (1916). 54 O.S. §§141 – 181 (2000). ULPA (1916) was replaced in 1976 by the Revised Uniform Limited Partnership Act (1976). 54 O.S. §§301 – 365 (2000). [↑](#footnote-ref-33)
34. *See Summary of the Uniform Limited Partnership Act* (2001) (avail. at [http://www.nccusl.org/
nccusl/uniformact\_summaries/uniformacts-s-ulpa.asp](http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-ulpa.asp)); and Daniel S. Kleinberger, *A User’s Guide to the New Uniform Limited Partnership Act*, 37 Suffolk. Univ. L. Rev 583 (2004) (Professor Kleinberger was the Reporter for the NCCUSL Drafting Committee on the Limited Partnership Act). [↑](#footnote-ref-34)
35. Enacted in Oklahoma as the Oklahoma Revised Uniform Partnership Act, 54 O.S. §1-100 *et seq*. [↑](#footnote-ref-35)
36. RULPA stated, “In any case not provided for in this act, the provisions of the Oklahoma Revised Uniform Partnership Act govern.” 54 O.S. §363 (2000). As an example of a case not provided for, RULPA stated that a general partner has the rights and powers and liabilities of a partner in a general partnership. *Id.* at §325. [↑](#footnote-ref-36)
37. As with other limited liability entities, the liability shield only protects against liability as a general partner, but not against liability for the general partner’s conduct. Like LLC managers or corporate officers, a general partner remains liable for the torts that it commits. [↑](#footnote-ref-37)
38. 54 O.S. §500-108A. [↑](#footnote-ref-38)
39. Compare 54 O.S. §500-303A (ULPA) with §320 (RULPA). [↑](#footnote-ref-39)
40. Joseph J. Basile Jr., *Limited Liability for Limited Partners: An Argument for the Abolition of the Control Rule*, 38 Vand. L. Rev. 1199, 1201 (1985). The list is at 54 O.S. §320.B. [↑](#footnote-ref-40)
41. 54 O.S. §307. [↑](#footnote-ref-41)
42. *Id.* at §1-101(6). [↑](#footnote-ref-42)
43. *Id.* at §500-104A(b). [↑](#footnote-ref-43)
44. 18 O.S. §2002. [↑](#footnote-ref-44)
45. The issue arose in Oklahoma in a somewhat novel case. *Roby v. Day*, 635 P.2d 611 (Okl. 1981) dealt with a limited partnership that would purchase and distribute alcohol to private clubs for the personal consumption of its partners. The arrangement was designed to circumvent the liquor law requirement that a club patron must drink only from his own bottle. In rejecting the plan, the Oklahoma Supreme Court held that “the purchase of alcohol by a ‘partnership’ for consumption by the individual partners without profit to the partnership is not an authorized purpose for the formation of a partnership . . ..” *At* 613. [↑](#footnote-ref-45)
46. 54 O.S. §500-103A (regarding an amendment for dissolution); and §500-203A (regarding a statement of cessation). [↑](#footnote-ref-46)
47. The detailed dissolution provisions reduce the risk of a decision like *In re Midpoint Development, L.L.C*., 2006 WL 3072688 (10th Cir., Oct. 31, 2006), in which the court held that an LLC ceased to exist, and could not wind up, after filing its articles of dissolution. The Oklahoma LLC Act was later amended to reverse the decision’s result and eliminate any ambiguity in the act’s dissolution provisions. [↑](#footnote-ref-47)
48. *Id.* at §311. [↑](#footnote-ref-48)
49. *Id.* at §500-806A. The procedures are comparable to those in the Oklahoma General Corporation Act (at 18 O.S. §§1100.1 through 1100.3), the Uniform Limited Liability Company Act (at §§807 and 808), and the Revised Model Business Corporation Act (at §§806 and 807). [↑](#footnote-ref-49)
50. *Id.* at §500-601A (for limited partners) and §500-604A (for general partners). [↑](#footnote-ref-50)
51. In estate planning, the valuation discounts used to reduce the value of property passing from one to another are enhanced if the statute restricts an owner’s ability to convert his/her interest into cash. [↑](#footnote-ref-51)
52. The Oklahoma RULPA permitted general partner withdrawals. *Id.* at §333. [↑](#footnote-ref-52)
53. The Oklahoma RULPA provided that a general partner would receive fair value. *Id.* at §335. The act provided that limited partners who withdraw wrongfully would be subject to damages, but the partnership could not seek equitable relief to prevent a withdrawal, and the wrongfully withdrawing limited partner would presumably receive the fair value of its interest reduced by any damages. *See id* at §§334 and 335. [↑](#footnote-ref-53)
54. *Id.* at §500-602A (for limited partners) and §500-605A (for general partners). [↑](#footnote-ref-54)
55. *Id.* at §345. [↑](#footnote-ref-55)
56. *Id.* at §500-801A. [↑](#footnote-ref-56)
57. *Id.* at §345. [↑](#footnote-ref-57)
58. *Id.* at §500-801A. [↑](#footnote-ref-58)
59. *Id.* at §500-408A(a). [↑](#footnote-ref-59)
60. *Id.* at §500-408A(b). [↑](#footnote-ref-60)
61. *Id.* at §500-110A. [↑](#footnote-ref-61)
62. *Id.* [↑](#footnote-ref-62)
63. *Id.* at §500-408A(d). Professor Kleinberger explains the differences between the heightened fiduciary duties and the duty of good faith and fair dealing:

“When a partner deals with the partnership, fiduciary duty applies in full force. However, when a partner deals with a fellow partner, undivided loyalty is neither possible nor required:

‘According to Cardozo, partner may not use tactics appropriate to ‘arm’s length’ transactions in their inter se dealings. But even if partners are never full at arm’s length, they are nonetheless occasionally on opposite sides of the negotiating table. In such circumstances, self-interest is inherent and inevitable. It therefore cannot be per se evil.’ [Kleinberger, *Agency, Partnership and LLCs*, §9.8.5, at 265 (2000)]

For an example of this reality, consider the partners in a law firm who, pursuant to a partnership agreement, decide annually how to share out a certain ‘bonus’ portion of the firm’s profits. In this ‘zero sum game,’ some self-interest is inevitably in play.” *A User’s Guide to the New Uniform Limited Partnership Act*, *supra* note 35 at 972.

Distinguishing when a partner is dealing with the partnerships – and thus owes a heightened fiduciary duty – and when with a fellow partner – and thus owes only a duty of good faith and fair dealing – is relatively simple when the partnership has multiple partners. Distinguishing between the two is more difficult when the partnership has only two partners. The analysis is akin to distinguishing whether one partner’s claim against another partner is direct or derivative. See *Tooley* v. *Donaldson, Lufkin* & *Jenrette, Inc.,* 845 A.2d 1031, 1033 (Del. 2004) (Whether a claim is derivative or direct “must turn solely on the following questions: (i) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (ii) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?”). If a partner’s action would injure the partnership (all partners proportionately), the partner would owe a fiduciary duty. If a partner’s action would injure one or some partners, but not other partners (excluding the acting partner), the partner would owe only a duty of good faith. [↑](#footnote-ref-63)
64. *Id.* at §500-305A(a) and (b). [↑](#footnote-ref-64)
65. *See, e.g.*, Jeffrey D. Bauman et al., *Corporations: Law and Policy* 36 (6th ed. 2007) (“Although directors owe fiduciary duties, shareholders generally do not.”); and Uniform Limited Liability Company Act (2006) §408(g)(5) (In a manager-managed LLC, “A member does not have any fiduciary duty to the company or to any other member solely by reason of being a member.”). While shareholders, members and limited partners generally owe no fiduciary duties, they can become fiduciaries if they exercise control to the detriment of another, most commonly when majority owners use their position to the detriment of the minority owners. *See, e.g.,* *Warren v. Century Bankcorporation, Inc*., 1987 OK 14, 741 P.2d 846 (majority shareholder breaches fiduciary duty to minority shareholders by unfairly diverting business from the corporation). [↑](#footnote-ref-65)
66. *See Bond Purchase, LLC v. Patriot Tax Credit Prop., L.P*. 746 A.2d 842, 864 (Del. Ch. 1999) (“A fiduciary is typically one who is entrusted with the power to manage and control the property of another.”); *see also* Comments to the uniform version of ULPA (2001), §305(a). [↑](#footnote-ref-66)
67. 54 O.S. §500-305A(c). [↑](#footnote-ref-67)
68. *Id.* at §500-305A(b). [↑](#footnote-ref-68)
69. *Id.* at §500-116A (adding requirement that a registered agent must certify in its statement of resignation that it sent due notice of its resignation to the limited partnership). [↑](#footnote-ref-69)
70. *Id.* at §500-209A. [↑](#footnote-ref-70)
71. *Id.* at §500-210A. [↑](#footnote-ref-71)
72. *Id.* at §§500-809A and 500-810A. [↑](#footnote-ref-72)
73. *See Down on the Street: A Special Report on American’s Capital Markets*, The Economist(Nov. 25, 2006) (“In theory, a higher standard of corporate governance should result in a higher valuation, since listing in a well-regulated market shows a commitment from a company that it will not abuse investors. One study, conducted post-Sarbanes-Oxley, found that the premium placed on the value of an emerging-market firm listing in New York can reach 37%; preliminary research suggests the value of a London listing is not as high.” [↑](#footnote-ref-73)