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The Long Game: The Decade-Long Effort to Dismantle the Dodd-Frank Act

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THE LONG GAME: THE DECADE-LONG EFFORT TO DISMANTLE THE DODD-FRANK ACT

ERIC J. SPITLER*

I. INTRODUCTION 3
II. LOBBYING 5
III. LITIGATION 13
A. Cost-Benefit Analysis Challenges 13
B. Constitutional Challenges 28
1. The "Kitchen Sink" Strategy: *State National Bank of Big Spring v. Lew* 28
2. Independent Agency Structure: The CFPB Line of Cases 30
3. The Pending Supreme Court Decision: *CFPB v. Seila Law* 32
4. Recess Appointments: *National Labor Relations Board v. Noel Canning* 35
5. Administrative Law Judges: *Lucia v. SEC* 35
6. First Amendment: *National Association of Manufacturers v. SEC* 37
C. Other Significant Litigation 38
1. FSOC Designations of Non-Bank Systemically Important Financial Institutions 38
2. Statutory Interpretation: Risk-Retention Requirement for CLO Managers 41
3. Statutorily-Mandated Reporting: Payments for Extractive Minerals 42
IV. LEGISLATION AND EXECUTIVE ACTION 45
A. The Financial CHOICE Act 46
B. S. 2155 – The Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 49

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C. Appropriations 55
D. Budget Reconciliation 58
E. Bankruptcy Code 61
F. Congressional Review Act 64
V. CONCLUSION 69

I. INTRODUCTION

On the July day in 2010 that President Barack Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "Act"),[1] he paused to recognize the challenges that had been overcome to pass the new law in the wake of the greatest financial crisis since the Great Depression.[2] In his remarks, he stated that "[p]assing this bill was no easy task. To get there, we had to overcome the furious lobbying of an array of powerful interest groups and a partisan minority determined to block change."[3] The final act of signing the legislation into law was the result of over a year of activity to enact "a sweeping overhaul of the financial regulatory system, a transformation on a scale not seen since the reforms that followed the Great Depression."[4]

The new law was the product of a concerted effort to address the many causes of the recent financial crisis and to put in place protections against similar future crises. It also was the embodiment of the famous admonition of Rahm Emanuel, then-White House Chief of Staff, that, "[y]ou never want a serious crisis to go to waste."[5] Yet even in that moment of celebration there was clearly a recognition that while one

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1. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203, 124 Stat. 1376 (2010).

2. *See* Barack Obama, U.S. President, Remarks by President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act (July 21, 2010) [hereinafter Obama, Statement at Signing of Dodd-Frank], https://obamawhitehouse.archives.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act [https://perma.cc/295C-RVSD].

3. *Id.*

4. Barack Obama, U.S. President, Remarks by the President on 21st Century Financial Reform (June 17, 2009), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-regulatory-reform/ [https://perma.cc/9X66-33WN].

5. Gerald F. Seib, *In Crisis, Opportunity for Obama*, WALL ST. J., (Nov. 21, 2008, 12:01 AM), https://www.wsj.com/articles/SB122721278056345271 [https://perma.cc/YXW9-VWGX] (quoting Rahm Emanuel). Although this quote has over time has come to be used as an example of gross political expediency, the full discussion in context was more bipartisan. Emanuel went on to say:

> And what I mean by that is an opportunity to do things that you think you could not do before. . . . This crisis provides the opportunity, for us, as I would say, the opportunity to do things that you could not do before. The good news, I suppose, if you want to see a silver lining, is the problems are big enough that they lend themselves to ideas from both parties for the solution.

Id.

phase of financial reform was over, another was just beginning. President Obama said: "Now, it doesn't mean our work is over. For these new rules to be effective, regulators will have to be vigilant."[6]

The President's comments were prescient, as even then, opponents of the new law were organizing and strategizing their next steps. As one prominent Washington financial lobbyist said: "[T]he signing of Dodd-Frank last July represented 'halftime' in the debate. Now opponents must fight a two-front war that has them trying to persuade elected officials to rethink decisions while influencing the regulators whose job it is to implement Dodd-Frank."[7] However, the declaration of a two-front war did not begin to describe the scope of the brewing opposition effort. The attacks against the Dodd-Frank Act would not be limited to efforts to persuade Congress or to influence regulators. As Secretary of the Treasury, Timothy F. Geithner, said after eighteen months of implementing the Act:

> The forces working against reform are trying a range of different strategies, including blocking appointments of new leadership to key oversight positions, cutting funding, policy riders on appropriations bills, new legislation to repeal the entire law or just critical pieces of it, efforts to use cost-benefit analysis as roadblocks to reform, and other efforts to slow the pace of implementation of regulation in the hopes of watering it down.[8]

This Article documents and analyzes several ways in which the Dodd-Frank Act has been challenged over the past decade. Part II briefly discusses the ongoing lobbying efforts in both Congress and at the regulatory agencies to affect the implementation of the Act.[9] Part III analyzes some of the key litigation that shaped the rulemaking under the

6. Obama, Statement at Signing of Dodd-Frank, *supra* note 2.

7. Gary Rivlin, *The Billion Dollar Bank Heist*, NEWSWEEK (July 11, 2011, 1:00 AM), https://www.newsweek.com/billion-dollar-bank-heist-68427 [https://perma.cc/7JQS-RKJK] (referring to Scott Talbott, then-Head of Government Affairs at the Financial Services Roundtable).

8. Timothy F. Geithner, Sec'y, U.S. Dep't of the Treasury, Remarks at The Macroprudential Toolkit: Measurement and Analysis Conference (Dec. 1, 2011), https://www.treasury.gov/press-center/press-releases/Pages/tg1371.aspx [https://perma.cc/7HGX-ZKDT].

9. *See infra* Part II.

Act.[10] Part IV discusses the legislative actions undertaken to amend the Act.[11] Part V concludes by identifying remaining challenges to implementation of the Dodd-Frank Act.[12]

II. LOBBYING

Recognizing the broad impact that financial reform legislation would have on the financial industry if it became law, large amounts of money were spent by opponents of reform on lobbying to influence the Dodd-Frank bill as it moved through Congress. At the height of the debate on the bill during the summer of 2010, the banks spent $27.3 million over just three months to influence the outcome.[13] Yet, the bill's final outcome—with its many provisions placing restrictions on the operations of large financial institutions,[14] such as the Volcker Rule[15]—begs the question of how much value that the industry received for its money.

With the debate surrounding the Dodd-Frank Act's passage following so closely after the financial crisis and the passage of the Emergency Economic Stabilization Act of 2008[16] which established the Troubled Asset Relief Program ("TARP"), big banks were severely hindered by a toxic public reputation in their efforts to lobby Congress. As House Financial Services Chairman Barney Frank remarked: "Beginning with TARP, they lost influence . . . . They substantially lost influence over the legislative process when Lehman Brothers collapsed

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10. *See infra* Part III.

11. *See infra* Part IV.

12. *See infra* Part V.

13. Pat Garofalo, *Wall Street Spending as Much to Undermine Dodd-Frank Regulations as It Spent Trying to Block Dodd-Frank*, THINKPROGRESS (Apr. 22, 2011, 4:00 PM), https://thinkprogress.org/wall-street-spending-as-much-to-undermine-dodd-frank-regulations-as-it-spent-trying-to-block-dodd-284cda06d99/ [https://perma.cc/KR7K-MULP].

14. Provisions in the bill opposed by large financial institutions included the Volker Rule, living wills, enhanced capital requirements, the swaps pushout rule, and the creation of the Consumer Financial Protection Bureau ("CFPB").

15. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 619, 12 U.S.C. § 1851 (2018). The Volcker Rule generally prohibits any banking entity from engaging in proprietary trading or from retaining an ownership interest in, sponsoring, or having certain relationships with a hedge fund or private equity fund. *See id.*

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

and the crisis hit, and they never regained it."[17] The damage to the reputations of the largest financial institutions that began with the financial crisis persists to this day. As one financial industry lobbyist said: "Our reputation took quite a hit."[18] He went on to contrast pre-crisis lobbying with lobbying today stating that: "In those days, we're taking one or two office visits to convince a lawmaker. Now sometimes it runs on three to four years. That may [still not] get done."[19] A 2016 poll found that 58% of those polled believed that Wall Street does more to harm the lives of Americans than help.[20]

At the same time, the influence of community banks—who consistently pointed out to Capitol Hill and the media that they had not been the cause of the financial crisis or received government bailouts—increased markedly in Congress and among the public.[21] Given the challenges to their ability to directly influence legislation because of their political unpopularity, the large financial institutions adopted strategies to project their influence in less direct and public ways. "Their influence in Congress was greatest when they could make their case quietly, out of public view."[22] Instead of advocating directly, they started to use community institutions "as the point of the spear on their lobbying efforts . . . essentially using small-bank legislation as a vehicle for large-bank provisions."[23]

The large banks, nevertheless, also continued to make campaign contributions to try to ensure that their voices were heard. Over the last four election cycles since passage of the Dodd-Frank Act, the Finance/Insurance/Real Estate industries have contributed over $1.2 billion to the Republican Party and its candidates directly, and

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17. Victoria Finkel, *The Crisis isn't Over*, AM. BANKER (July 29, 2018), https://www.americanbanker.com/news/the-crisis-isnt-over [https://perma.cc/Y7VT-SAWT].

18. Sylvan Lane, *Pushing for Change for Banks*, HILL (July 12, 2019, 6:00 AM), https://thehill.com/policy/finance/454223-pushing-for-change-for-banks [https://perma.cc/ZMW4-D28Q].

19. *Id.* (alteration in original).

20. Nancy Marshall-Genzer, *Why Americans Feel the Economy is Rigged*, MARKETPLACE (June 29, 2016), https://www.marketplace.org/2016/06/29/why-americans-feel-economy-rigged/ [https://perma.cc/6BPD-DJZ2].

21. Finkel, *supra* note 17.

22. ROBERT G. KAISER, ACT OF CONGRESS: HOW AMERICA'S ESSENTIAL INSTITUTION WORKS, AND HOW IT DOESN'T 83 (Vintage Books, 1st ed. 2014) (2013).

23. Finkel, *supra* note 17.

approximately $853 million to Democrats.[24] The results of their post-Dodd-Frank Act legislative efforts are discussed in Part IV of this Article.[25]

While continuing to lobby Congress and contribute to campaigns in the hope of influencing legislation, the large financial institutions also shifted their efforts to the less public and more obscure battlefields of the regulatory agencies and the courts. Although a huge piece of legislation at 849 pages, the Dodd-Frank Act is far broader in its construction than it is deep. Covering topics from systemic risk to large bank resolution to derivatives to the regulation of credit rating agencies, the Act has sixteen titles and numerous subtitles. However, in many areas, the Act provides only broad authority or general direction, often relying on rulemaking by the regulatory agencies to fill the legislative voids. According to one law firm tracking the Dodd-Frank Act's implementation, the agencies were required to implement 390 rulemaking requirements.[26]

The extensive rulemaking required to implement the Dodd-Frank Act provided many opportunities for interested parties to influence the rulemaking process, and the financial industry immediately directed its best legal talent and substantial resources at this critical aspect of the law's implementation. Through the first five years of implementation of the Dodd-Frank Act, the financial industry reported spending over $2.08 billion for lobbying expenses, much of it to influence federal agencies rather than Congress.[27] The financial regulatory agencies foresaw the coming onslaught and determined that public disclosure might provide some degree of insulation from the industry's aggressive lobbying. Very early in the rulemaking process, the regulatory agencies announced that they intended to go beyond the public notice requirements of the Administrative Procedure Act ("APA")[28] by publishing logs of their private meetings with interested parties on their websites to ensure public

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24. *Finance/Insurance/Real Estate: Long-Term Contribution Trends*, OPENSECRETS.ORG: CTR. FOR RESPONSIVE POLS., https://www.opensecrets.org/industries/totals.php?ind=F [https://perma.cc/BZ5N-6VZA] (last visited Jan. 31, 2020).

25. *See infra* Part IV (discussing legislative efforts against Dodd-Frank).

26. ANNETTE L. NAZARETH, GABRIEL D. ROSENBERG & MARGARET E. TAHYAR, DAVIS POLK & WARDWELL LLP, DODD-FRANK'S SEVENTH ANNIVERSARY (July 19, 2017), https://www.finregreform.com/?s=dodd-frank [https://perma.cc/69TS-XNEF].

27. Alan Pyke, *5 Numbers to Know as Dodd-Frank Wall Street Reform Celebrates Its 5th Birthday*, THINKPROGRESS (July 21, 2015, 12:00 PM), https://thinkprogress.org/5-numbers-to-know-as-dodd-frank-wall-street-reform-celebrates-its-5th-birthday-e145f4360b7c/ [https://perma.cc/9WU4-EGUU].

28. Administrative Procedure Act ("APA"), Pub. L. No. 79-404, 60 Stat. 237 (1946).

transparency.[29] These sites provide an illuminating window into the financial industry's activities directed at the regulatory agencies.[30]

The lobbying effort dedicated to the rulemaking process took on many forms. In some cases, lobbyists and law firms organized and divided up responsibilities for the rulemaking process.

> After Dodd-Frank's passage, lobbyists for the big banks and industry trade groups divided themselves into eighteen working groups, each organized around a different element of the new law. . . . One working group focused on derivatives reform, including the requirement that these complex financial instruments now be sold on open exchanges in the fashion of stocks and bonds. Another focused on efforts to hammer out the so-called Volcker Rule, which would limit the ability of federally insured banks to wager on risky ventures. A third tackled the new Consumer Financial Protection Bureau (CFPB), created to protect ordinary consumers from Wall Street

29. *See* Press Release, Fed. Deposit Ins. Corp., Release No. 187-2010, FDIC Announces Open Door Policy for Regulatory Reform Rulemaking (Aug. 12, 2010), https://www.fdic.gov/news/news/press/2010/pr10187.html [https://perma.cc/7KC9-DR4H] (announcing FDIC will release the names and affiliations of private sector individuals who meet with senior FDIC officials to discuss implementing the new law and the subject matter of those meetings); Press Release, U.S. Sec. & Exch. Comm'n, Release No. 2010-135, SEC Chairman Schapiro Announces Open Process for Regulatory Reform Rulemaking (July 27, 2010), https://www.sec.gov/news/press/2010/2010-135.htm [https://perma.cc/N9KN-7UTJ] ("[SEC staff] will follow newly-established best practices when holding meetings with interested parties in order to ensure full transparency to the public."); *Communications With the Public*, BD. OF GOVERNORS OF THE FED. RES. SYS., https://www.federalreserve.gov/regreform/communications-with-public.htm [https://perma.cc/5DVG-DCJ5] (last updated Feb. 14, 2011) (stating Federal Reserve "will be involved in many rulemakings to implement" Dodd-Frank Act and that "[d]uring the rulemaking process, meetings will take place between the [Federal Reserve]," the public, and representatives from banking organizations, and noting that contacts and summaries of meetings will be posted on webpage).

30. *See, e.g.*, *Private Sector Meetings on Financial Reform*, FED. DEPOSIT INS. CORP., https://www.fdic.gov/regulations/meetings/ [https://perma.cc/3SA6-GHDB] (last updated July 8, 2019); *Regulatory Reform: Communications with the Public*, BD. OF GOVERNORS OF THE FED. RES. SYS., https://www.federalreserve.gov/regreform/communications-with-public.htm [https://perma.cc/5WGW-KB9K] (last updated Feb. 14, 2011); *Public Comments on SEC Regulatory Initiatives Under the Dodd-Frank Act*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/spotlight/regreformcomments.shtml [https://perma.cc/23NE-3HZ4] (last updated June 21, 2016).

> deceptions involving mortgages, credit cards and other major profit centers for the banks.[31]

Those firms with special expertise or client interest focused on specific issues rather than attempting to comment on all issues that might be of interest or importance. This provided an efficient and targeted use of lobbying resources across a broad spectrum of rules and agencies.

With the incredible resources available to it, the financial industry was able to approach Congress, regulators, the courts, and the media with overwhelming force. Lobbyists for financial interests outnumbered those representing consumer protection interests on Capitol Hill by as much as twenty-to-one.[32] Like any successful army, the lobbying force was strongly supported by additional resources intended to magnify its impact. "The lobbyists are just the point of the spear . . . . There are also the regulatory lawyers, the research staffs, the PR people and all those loyal think tank supporters shilling for the banks."[33]

These industry resources were unleashed to meet with the political leadership and senior professional staff at the regulatory agencies to try to influence the rule writing process. Following the publication of proposed rules, interested stakeholders also hired lobbyists and lawyers to prepare extensive comment letters. Depending on the underlying issue, these comment letters were often lengthy and addressed highly complex areas of the proposed regulation. The letters frequently were not only intended to provide comment on the proposal at hand, but also to lay the groundwork for a potential legal challenge once the regulation was finalized. The impact of this strategy is discussed in greater detail in Part III of this Article.[34]

The complexity of many of the proposed rules and the importance of the public comment process also caused many law and lobbying firms to engage in a search for talent to ensure that they could provide their clients with effective representation. Firms sought to hire congressional and agency staff who had been involved with the passage of the Dodd-

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31. Gary Rivlin, *How Wall Street Defanged Dodd-Frank*, NATION (May 20, 2013), https://www.thenation.com/article/how-wall-street-defanged-dodd-frank/ [https://perma.cc/LP2S-Q5PE].

32. *Id.*

33. *Id.* (quoting Ed Mierzwinski, Director of Consumer Programs, U.S. Public Interest Research Group ("PIRG")).

34. *See infra* Part III.

Frank Act to draw on their expertise.[35] The impact of this "revolving door" where individuals move between regulators and the financial industry and vice versa has been the subject of considerable analysis reaching often differing conclusions. Critics of the revolving door often focus on the resulting quid pro quo, risk of regulatory capture, or reputational impacts of former government officials seeking to influence their colleagues.[36] Others see a more benign but similarly influential impact of "regulatory schooling" where regulators and industry participants provide a transfer of knowledge and expertise as they move between the public and private sector.[37] In either case, proponents of both schools of thought agree that there are ways to limit any negative effects

35. Jeff Stein, *Many Lawmakers and Aides Who Crafted Financial Regulations After the 2008 Crisis Now Work for Wall Street*, WASH. POST (Sept. 7, 2018, 5:02 PM), https://www.washingtonpost.com/business/economy/many-lawmakers-and-aids-who-crafted-financial-regulations-after-the-2008-crisis-now-work-for-wall-street/2018/09/07/50f63a1e-b075-11e8-a20b-5f4f84429666_story.html [https://perma.cc/KT8M-5TQ7].

36. *See, e.g.*, Elise S. Brezis & Joël Cariolle, *Chapter 3: Financial Sector Regulation and the Revolving Door in US Commercial Banks*, *in* STATE, INSTITUTIONS AND DEMOCRACY: CONTRIBUTIONS OF POLITICAL ECONOMY 53–76 (Springer Int'l Pub., Norman Schofield & Gonzalo Caballero eds., 2016) ("The distortive effects of the revolving door stem from the concentration of former regulators in a small number of firms."); Pedro Nicolaci Da Costa, *How to Break the Wall Street to Washington Merry-Go-Round*, FOREIGN POLICY (Dec. 10, 2015, 11:07 AM), https://foreignpolicy.com/2015/12/10/wall-street-to-washington-and-back-again-bernanke-revolving-door-federal-reserve/ [https://perma.cc/T4HQ-Q7BE] ("The revolving door isn't just unseemly — it's dangerous."); Lee Reiners, *The Problems with Crypto's Revolving Door*, AM. BANKER (Oct. 25, 2018, 11:13 AM), https://www.americanbanker.com/opinion/the-problems-with-cryptos-revolving-door [https://perma.cc/8RQE-LZWU] ("A more concerning motive for tapping former regulators as advisers and directors, is that it lends an aura of legitimacy to a product and industry that may not be legitimate."); Lisa Gilbert, *Reforming the Financial Services Revolving Door*, HILL, (July 15, 2015, 6:30 AM), https://thehill.com/blogs/pundits-blog/finance/247962-reforming-the-financial-services-revolving-door [https://perma.cc/9QE2-K2BF] ("[A] systemic corruption of government caused by the movement of high-level officials back and forth between government regulatory positions and the private sector to work in the industry they formerly regulated."); Craig Holman, Opinion, *A Matter of Trust — Slowing Wall Street's Revolving Door*, INSIDESOURCES (Oct. 20, 2015), https://www.insidesources.com/a-matter-of-trust-slowing-wall-streets-revolving-door/ [https://perma.cc/5WHZ-3QEE] ("The revolving door between Wall Street and Washington once again threatens our nation's financial health.").

37. David Luca, Amit Seru & Francesco Trebbi, *The Revolving Door and Worker Flows in Banking Regulation* 4–5 (NBER Working Paper Series, Paper No. 20241, 2014), https://www.nber.org/papers/w20241 [https://perma.cc/X3A2-3RHX] ("These results appear inconsistent with a 'quid-pro-quo' explanation of the revolving door, but consistent with a 'regulatory schooling' hypothesis."); Brian Wallheimer, *Should We Stop the 'Revolving Door'?*, CHI. BOOTH REV. (Aug. 7, 2017), https://review.chicagobooth.edu/public-policy/2017/article/should-we-stop-revolving-door [https://perma.cc/95FT-V3YL] ("Some findings suggest that regulators are actually tougher on potential employers—and get hired because private-sector companies want to employ talented people who know the ins and outs of the regulatory system.").

of the revolving door such as recusal requirements and "cooling off" periods.[38]

Because government ethics rules generally limit contact with former colleagues and establish cooling off periods that significantly restrict former government officials,[39] the regulatory schooling aspect of the revolving door seemed to be especially prevalent in the Dodd-Frank rulemaking process. Without communicating with their prior agencies, former officials still provided knowledge to their new employers and clients on how to frame arguments to their prior agencies to provide the best chance of success in the rulemaking process. Equally important, they possessed knowledge of what issues within the proposed rule most concerned the agencies regarding possible legal challenges. This expertise was often invaluable in shaping comment letters requiring a detailed agency response in the final rulemaking that might provide the basis of a successful legal challenge.

In the case of the implementation of the Dodd-Frank Act, the sheer number of required regulatory actions created additional pressure on the rulemaking activities of the regulatory agencies. As the agencies

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38. *See* Larry D. Wall, *The Revolving Door*, FED. RES. BANK ATLANTA: NOTES FROM VAULT (Jan. 2017), https://www.frbatlanta.org/cenfis/publications/notesfromthevault/01-the-revolving-door-2017-01-30.aspx [https://perma.cc/K5TA-WVYH] ("[T]he approach taken to date has been to seek to mitigate the problem via a set of ethics rules, backed up by outside monitoring."); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-118, LARGE BANK SUPERVISION: IMPROVED IMPLEMENTATION OF FEDERAL RESERVE POLICIES COULD HELP MITIGATE THREATS TO INDEPENDENCE 10, passim (2017) ("The potential negative effects of capture on bank regulation and supervision requires well-designed preventative measures by prudential banking regulators."); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-69, LARGE BANK SUPERVISION: OCC COULD BETTER ADDRESS RISK OF REGULATORY CAPTURE 4, passim (2019) ("To respond to risks such as regulatory capture, . . . agencies should apply the principles of internal control through control activities, including policies and procedures.").

39. Under 18 U.S.C. § 207, a former federal employee is barred from representing another person or entity by making a communication to or appearance before a Federal department, agency, or court concerning the same "particular matter . . . involving specific parties" (e.g., the same contract or grant) with which the former employee was involved while serving the Government. 18 U.S.C. § 207(a) (2018). If the matter was pending under the employee's official responsibility during the employee's last year of Government service, the bar lasts for two years. *Id.* § 207(a)(2). If the employee participated in the matter "personally and substantially," the bar is permanent. *Id.* § 207(a)(1).

In addition, for a period of one year after leaving a "senior" position, a former senior employee may not represent another person or entity by making a communication to or appearing before the former employee's former agency to seek official action on any matter. *Id.* § 207(c). A former "very senior" employee is subject to a similar prohibition, except that the bar lasts for two years and extends to contacts with specified high-level officials at any department or agency. *Id.* § 207(d). Separately, both former senior and very senior employees are prohibited for one year from representing, aiding, or advising a foreign government or foreign political party with the intent to influence certain Government officials. *Id.* § 207(f).

strove to implement the requirements of the Act, their progress was constantly monitored and publicized. Many of the rulemaking requirements in the Act were tied to specific deadlines for implementation that proved to be unrealistic. When the agencies began missing their regulatory deadlines, the missed deadlines began to feed a narrative that the agencies were failing to do their jobs.[40] To counter progress reports issued by private sources,[41] some agencies began issuing their own reports on their rulemaking progress.[42] Opponents of the Dodd-Frank Act seized on this reporting as proof that Congress had overreached and that the missed deadlines demonstrated that the Act was collapsing under its own weight. This, in turn, invited congressional oversight targeted at the delays which affected the agencies' ability to focus on the rulemaking as they diverted resources to draft responses to congressional inquiries, prepare for congressional testimony, and respond to congressional document requests.

The direct and indirect pressure from various stakeholders and their lobbyists resulted in slow downs and additional complexity in the rulemaking that substantially delayed the implementation of the Dodd-Frank Act. As former Federal Deposit Insurance Corporation ("FDIC") Chairman Sheila Bair said: "This stuff doesn't get any better with time . . . . The longer you wait to finalize the rules, the more they get watered down, the more exceptions that get built in, people's memories about the crisis start to fade and the pressure isn't there."[43]

40. *See* Kevin McCoy, *Dodd-Frank Act: After 3 Years, a Long to-do List*, USA TODAY (June 3, 2013, 8:10 PM), https://www.usatoday.com/story/money/business/2013/06/03/dodd-frank-financial-reform-progress/2377603/ [https://perma.cc/85WY-TG9X]; Kevin M. LaCroix, *Dodd-Frank Rulemaking Delays: Bad, and Likely to Get Worse*, LEXISNEXIS: LEGAL NEWSROOM (May 4, 2011), https://www.lexisnexis.com/legalnewsroom/banking/b/banking-finance/posts/dodd-frank-rulemaking-delays-bad-and-likely-to-get-worse [https://perma.cc/W5XV-WL3T]; Jesse Eisinger & Jake Bernstein, *From Dodd-Frank to Dud: How Financial Reform May Be Going Wrong*, PROPUBLICA (June 3, 2011, 8:16 AM), https://www.propublica.org/article/from-dodd-frank-to-dud [https://perma.cc/B7J8-UN3E]. In fact, one law firm issued a regular report tracking the rulemaking progress of the agencies, highlighting the number of missed deadlines and regulations that had yet to be proposed. *See Dodd-Frank Progress Report*, DAVIS POLK & WARDWELL LLP, https://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report [https://perma.cc/W45H-CYGD] (last visited Dec. 23, 2019) [hereinafter *Dodd-Frank Progress Report*, DAVIS POLK].

41. *See, e.g.*, *Dodd-Frank Progress Report*, DAVIS POLK, *supra* note 40 (highlighting agencies' missed deadlines set by Dodd-Frank Act and regulations yet to be proposed).

42. *See Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/spotlight/dodd-frank.shtml [https://perma.cc/N7DM-QDS9] (last visited Feb. 2, 2020).

43. McCoy, *supra* note 40 (quoting Sheila Bair, former Chairman, FDIC).

III. Litigation

Given the extensive rulemaking required to implement the Dodd-Frank Act and the high stakes for the financial and related industries, it is not surprising, and was probably inevitable, that opponents would adopt a litigation strategy. The legal challenges ranged from the sufficiency of the economic analysis in agency rulemaking to the constitutionality of many of the Act's provisions. At every step, interested parties affected by the Act sought relief in the courts, culminating in a decade of litigation which not only established the parameters of the Dodd-Frank Act, but also spilled over into a host of other important legal areas.

A. Cost-Benefit Analysis Challenges

The rulemaking process was upended just months after the Act became law by a court decision involving a provision of the Dodd-Frank Act that arguably was tangential to its core provisions designed to address the causes of the financial crisis. A year prior to passage of the Act, the Securities and Exchange Commission ("SEC" or "Commission") had decided by a three to two vote[44] to propose a new rule[45] that included

> changes to the federal proxy rules to remove impediments to the exercise of shareholders' rights to nominate and elect directors to company boards of directors. The new rules would require, under certain circumstances, a company to include in the company's proxy materials a shareholder's, or group of shareholders', nominees for director.[46]

The proposed rule was an attempt to address a long-standing debate about "proxy access."[47]

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44. Sara Hansard, *SEC Commissioners Approve Proposal to Allow Shareholders to Nominate Directors*, INVESTMENTNEWS (May 20, 2009), https://www.investmentnews.com/sec-commissioners-approve-proposal-to-allow-shareholders-to-nominate-directors-21907 [https://perma.cc/3HSH-FRC8].

45. Facilitating Shareholder Director Nominations, 74 Fed. Reg. 29024 (proposed June 18, 2009) (to be codified 17 C.F.R. pt. 240).

46. *Id.*

47. Mary L. Schapiro, Chairman, U.S. Sec. & Exch. Comm'n, Statement at SEC Open Meeting on Facilitating Shareholder Director Nominations (May 20, 2009), https://www.sec.gov/news/speech/2009/spch052009mls.htm [https://perma.cc/6QDW-

The two dissenting Commissioners questioned whether the SEC actually had the authority to make such a proposal.[48] This expression of doubt about the SEC's legal authority also was raised in public comment letters.[49] A few months later, Congress included a specific provision in the Dodd-Frank Act—section 971—to address the issue of authority.[50] Section 971 of the Act provides that:

> The Commission may issue rules permitting the use by a shareholder of proxy solicitation materials supplied by an issuer of securities for the purpose of nominating individuals to membership on the board of directors of the issuer, under such terms and conditions as the Commission determines are in the interests of shareholders and for the protection of investors.[51]

With this clear grant of statutory authority, the SEC moved ahead on August 25, 2010, shortly after passage of the Dodd-Frank Act, to finalize the regulation, making it one of the first regulations promulgated under the new law.[52] During the Commission's discussion of the final

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UQRK] ("As observers of the Commission will know, this day has been a long time coming.").

48. Kathleen L. Casey, Comm'r, U.S. Sec. & Exch. Comm'n, Statement at Open Meeting to Propose Amendments Regarding Facilitating Shareholder Director Nominations (May 20, 2009), https://www.sec.gov/news/speech/2009/spch052009klc.htm [https://perma.cc/UPY4-ZYCQ] ("[T]he Commission's authority to enact these rules is subject to significant doubt . . ."); Troy A. Paredes, Comm'r, U.S. Sec. & Exch. Comm'n, Statement at Open Meeting to Propose Amendments Regarding Facilitating Shareholder Director Nominations (May 20, 2009), https://www.sec.gov/news/speech/2009/spch052009tap.htm [https://perma.cc/56BR-M2L6] ("The proposal, especially proposed Rule 14a–11 dictating a direct right of access to the company's proxy materials, encroaches far too much on internal corporate affairs, the traditional domain of state corporate law.").

49. Business Roundtable, Comment Letter on Proposed Rule Regarding Facilitating Shareholder Director Nominations, at 5 (Aug. 17, 2009), https://www.sec.gov/comments/s7-10-09/s71009-267.pdf [https://perma.cc/679D-BWXP] ("In conclusion, we believe that a federal proxy access right is unnecessary, has serious adverse consequences, and is beyond the Commission's authority to adopt."); Chamber of Commerce of the United States of America, Comment Letter on Proposed Rule Regarding Facilitating Shareholder Director Nominations, at 2 (Aug. 14, 2009), https://www.sec.gov/comments/s7-10-09/s71009-181.pdf [https://perma.cc/TYF5-AY76] ("It is the judgment of the CCMC that the States, not the SEC, have the authority to act in this realm, through the traditional usage of state corporate law.").

50. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 971(b), 15 U.S.C. § 78n note (2018).

51. *Id.*

52. Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56668, 56669 (Sept. 16, 2010) (to be codified 17 C.F.R. pt. 240). *But see* Bus. Roundtable v. SEC, 647 F.3d 1144, 1156 (D.C. Cir. 2011) (invalidating SEC Rule 14a–11).

rule, both dissenting Commissioners abandoned the argument that the Commission lacked the authority to promulgate the rule in light of the congressional action and instead were deeply critical of the economic analysis underlying the rule, questioning whether it adequately balanced the costs and benefits of the final rule and whether it fairly considered contrary analyses.[53]

The criticism by the dissenting Commissioners of the economic analysis raised a particular red flag for the SEC. Unlike the banking regulators that are not required to perform an economic analysis as part of their rulemaking, the SEC was statutorily required to consider a rule's impact on "efficiency, competition, and capital formation ('ECCF')."[54] A string of cases[55] had evolved such that courts had essentially held that Congress had imposed on "the SEC an obligation to consider the economic implications of certain rules it proposes"[56] through this

53. Kathleen L. Casey, Comm'r, U.S. Sec. & Exch. Comm'n, Statement at Open Meeting to Adopt Amendments Regarding Facilitating Shareholder Director Nominations (Aug. 25, 2010), https://www.sec.gov/news/speech/2010/spch082510klc.htm [https://perma.cc/44GX-V2VN] ("I am not satisfied that the Commission has seriously considered the true costs to issuers and our capital markets of imposing a new federal proxy access right, nor weighed these costs against the anticipated benefits, which appear to be speculative at best and to depend largely on the inestimable benefits of improved 'investor confidence.'"); Troy A. Paredes, Comm'r, U.S. Sec. & Exch. Comm'n, Statement at Open Meeting to Adopt the Final Rule Regarding Facilitating Shareholder Director Nominations ("Proxy Access") (Aug. 25, 2010), https://www.sec.gov/news/speech/2010/spch082510tap.htm [https://perma.cc/DN89-KV4K] ("To my mind, the adopting release's treatment of the economic studies is not evenhanded.").

54. 15 U.S.C. § 77b(b) (2018) ("Whenever pursuant to this subchapter the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."); § 78c(f) ("Whenever pursuant to this chapter the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."); § 78w(a)(2) ("The Commission and the Secretary of the Treasury, in making rules and regulations pursuant to any provisions of this chapter, shall consider among other matters the impact any such rule or regulation would have on competition. The Commission and the Secretary of the Treasury shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this chapter."); § 80a-2(c) ("Whenever pursuant to this subchapter the Commission is engaged in rulemaking and is required to consider or determine whether an action is consistent with the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.").

55. *See* Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166 (D.C. Cir. 2010); Chamber of Commerce v. SEC *(Chamber II)*, 443 F.3d 890 (D.C Cir. 2006); Chamber of Commerce v. SEC *(Chamber I)*, 412 F.3d 133 (D.C. Cir. 2005).

56. *E.g.*, *Am. Equity Inv. Life Ins. Co.*, 613 F.3d 178.

statutory requirement.[57] However, as one commenter pointed out, what constitutes the proper extent of

> consider[ation given to the] ECCF factors is a matter of judgment—one that can and should vary significantly depending upon the rule and its context. No matter how much analysis the SEC undertakes, a court can always point to an additional issue that should have been analyzed, or analyzed differently or more deeply.[58]

Just months after President Obama signed the Dodd-Frank Act into law, a panel of the D.C. Circuit issued a harsh opinion in *Business Roundtable v. SEC*,[59] invalidating the SEC's new proxy access rule (Rule 14a–11)[60] as "arbitrary and capricious" under the APA.[61] The court found that "the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters."[62] The panel went on to establish a seemingly new standard of review in determining that the SEC had failed to demonstrate that the proposed rule would result in a "net benefit."[63]

Although many commenters have criticized the decision and reasoning in *Business Roundtable*,[64] it appeared to validate a narrative

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57. 15 U.S.C. § 77b(b) (2018).

58. Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. ON REG., 289, 303 (2013).

59. Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

60. Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56667, 56669 (Sept. 16, 2010) (to be codified 17 C.F.R. pt. 240).

61. Administrative Procedure Act ("APA"), Pub. L. No. 79–404, §10(e), 60 Stat. 237, 243–44 (1946).

62. *Bus. Roundtable*, 647 F.3d at 1148–49. Judge Douglas H. Ginsburg, who wrote the decision, was a former Administrator of the Office of Information and Regulatory Affairs, which is responsible for reviewing all rules promulgated by government agencies other than independent agencies, including their cost-benefit analyses.

63. *Id.* at 1153.

64. Jill E. Fisch, *The Long Road Back:* Business Roundtable *and the Future of SEC Rulemaking*, 36 SEATTLE U.L. REV. 695, 697–98 (2013) ("[T]he *Business Roundtable* decision was itself flawed. In evaluating the SEC's decision to adopt a proxy access rule, the D.C. Circuit completely disregarded the congressional policy judgments reflected in Dodd-Frank."); *see also* Kraus & Raso, *supra* note 58, at 303; Jonathan D. Guynn, *The Political Economy of Financial Rulemaking After* Business Roundtable, 99 VA. L. REV. 64 (2013); James D. Cox & Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C.*

that opponents of the Dodd-Frank Act had been attempting to establish for several months. At the first hearing on the implementation of the Act in February 2011, opponents expressed concern that, "[i]n the rush to comply with the unrealistic deadlines set in Dodd-Frank, the regulators have had to focus on speed rather than deliberation."[65] They argued that the speed of the process was undermining the integrity of the rulemaking and that this, along with the sheer number of rulemakings required by the Act, was stifling public participation.[66]

Reflecting the views of the opponents, Senator Richard Shelby also argued that the rush to implement the rules under the Dodd-Frank Act was undermining the quality of the economic analysis essential to proper rulemaking:

> Another consequence of the hasty rulemaking process is that our regulators may not be properly conducting economic analysis of proposed rules. Any thorough consideration of a proposed rule obviously should include an understanding of its cost. Unfortunately, there are serious questions regarding the willingness and ability of our regulators to conduct such an analysis. In light of the fact that the cost imposed by these rules may cause some Americans to lose their jobs, our regulatory agencies should, at the very least, make themselves aware of the economic impact of proposed rules before adopting them.[67]

With this opening shot, opponents served notice that they would attempt to wield economic analysis as a weapon in the ongoing implementation debate.

However, not all of the financial regulators had similar requirements to perform cost-benefit analyses. As previously mentioned,

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Circuit's Usurpation of SEC Rulemaking Authority, 90 TEX. L. REV. 1811 (2012); Recent Case, Business Roundtable v. SEC, *647 F.3d 1144 (D.C. Cir. 2011)*, 125 HARV. L. REV. 1088 (2012).

65. *Oversight of Dodd-Frank Implementation: A Progress Report by the Regulators at the Half-Year Mark: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 112th Cong. 3 (2011) (statement of Sen. Richard C. Shelby), https://www.govinfo.gov/content/pkg/CHRG-112shrg65718/pdf/CHRG-112shrg65718.pdf [https://perma.cc/J8Z2-4TVD].

66. *Id.*

67. *Id.*

the SEC was required to consider efficiency, competition, and capital formation in its rulemaking,[68] and the Commodity Futures Trading Commission ("CFTC") had similar statutory requirements mandated by section 15(a) of the Commodity Futures Trading Commission Act of 1974,[69] amending the Commodity Exchange Act ("CEA").[70] In addition, the Dodd-Frank Act required the CFPB to consider the potential benefits and costs of its rulemakings.[71] The Federal Reserve, the FDIC, and the Office of the Comptroller of the Currency ("OCC") (hereinafter the "Federal Banking Regulators") were not under similar statutory mandates. Dodd-Frank opponents nevertheless frequently point to section 302 of the Riegle Community Development and Regulatory Improvement Act[72] in attempting to argue that the Federal Banking Regulators are covered by an analogous statutory obligation.[73]

Although not every agency charged with implementing the Dodd-Frank Act had statutory obligations to conduct cost-benefit analyses, there were enough requirements for opponents of the Act to press the issue. For instance, the House Agriculture Committee sent a request to

68. *See supra* note 54.

69. Commodity Futures Trading Commission Act, Pub. L. No. 93-463, 88 Stat. 1389 (1974).

70. Commodity Exchange Act ("CEA") § 15(a), 7 U.S.C. § 19(a) (2018) ("Before promulgating a regulation under this chapter . . . the Commission shall consider the costs and benefits of the action of the Commission.").

71. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1022(b)(2)(a)(i), 12 U.S.C § 5512(b)(2)(a)(i) (2018) ("In prescribing a rule under the Federal consumer financial laws, the Bureau shall consider the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule . . . .").

72. Riegle Community Development and Regulatory Improvement Act, Pub. L. No. 103-325, § 302, 108 Stat. 2160 (1994) (codified at 12 U.S.C. § 4802).

73. Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994, codified at 12 U.S.C. § 4802, provides that:

> *In determining the effective date and administrative compliance requirements* for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, each Federal banking agency shall consider, consistent with the principles of safety and soundness and the public interest—(1) any administrative burdens that such regulations would place on depository institutions, including small depository institutions and customers of depository institutions; and (2) the benefits of such regulations.

Riegle Community Development and Regulatory Improvement Act § 302, 12 U.S.C. § 4802 (2018) (emphasis added). It is worth noting that, contrary to assertions that this statutory language creates a broad obligation for the federal banking agencies to conduct cost-benefit analyses for rulemakings, the introductory clause (emphasized above) makes clear that this requirement is specifically limited.

the CFTC Inspector General ("CFTC IG") to review whether the CFTC had met the cost-benefit requirements of section 15(a) of the CEA in its promulgation of four new rules required by the Dodd-Frank Act. The CFTC IG subsequently issued a report that was critical of the agency's rulemaking process.[74] The CFTC IG's report found that "it appears the [CFTC] generally adopted a 'one size fits all' approach to section 15(a) compliance without giving significant regard to the deliberations addressing idiosyncratic cost and benefit issues that were shaping each rule, and were often addressed in the preamble."[75] The CFTC IG went on to find that "it appears that the economic factors considered and embraced or rejected during the course of constructing the rule were not included in the cost-benefit analysis, and instead the cost-benefit analysis was given an homogenized treatment."[76]

Shortly after the CFTC IG issued its report, the Republican Senators on the Senate Banking Committee jointly sent letters to the Inspectors General ("IG") of the Federal Reserve, FDIC, OCC, SEC, and CFTC, asking them also to review the economic analyses performed by their respective agencies in proposing and adopting regulations under the Dodd-Frank Act.[77] The IG responses were sent to the Senators in mid-June 2011. Although the IG reports found that "the agencies largely followed the statutory and other requirements applicable to their rulemaking and related economic analysis,"[78] they formulated enough recommendations to provide additional ammunition for opponents. One Senator stated:

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74. *See* U.S. COMMODITY FUTURES TRADING COMM'N, OFFICE OF THE INSPECTOR GEN., AN INVESTIGATION REGARDING COST-BENEFIT ANALYSES PERFORMED BY THE COMMODITY FUTURES TRADING COMMISSION IN CONNECTION WITH RULEMAKINGS UNDERTAKEN PURSUANT TO THE DODD-FRANK ACT: REPORT OF INVESTIGATION 21 (2011).

75. *Id.*

76. *Id.*

77. *See* Mike Crapo, *Senators: Are the Costs of Dodd-Frank Being Counted?: Banking Committee Republicans Ask Inspectors General to Review Economic Analysis*, MIKE CRAPO: NEWSROOM/NEWS RELEASES (May 9, 2011), https://www.crapo.senate.gov/media/newsreleases/senators-are-the-costs-of-dodd-frank-being-countedd [https://perma.cc/VQ5E-N46B] ("The April Inspector General report raises a number of troubling issues with the cost benefit analysis being done by the CFTC and today we are requesting that the Inspectors General review the economic analyses performed by the Dodd-Frank regulators.").

78. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 12-151, DODD-FRANK ACT REGULATIONS: IMPLEMENTATION COULD BENEFIT FROM ADDITIONAL ANALYSES AND COORDINATION 14 (2011).

> The IG reports highlight the fact that there are no uniform cost-benefit requirements for our financial regulators that focus on economic growth, job creation, or competitiveness. The regulators need to conduct rigorous analyses of the costs and benefits of their rules and the effects those rules could have on the economy.[79]

Another Senator said that "[t]he [IG] reports deepened my concern that the regulatory agencies charged with implementing Dodd-Frank are not undertaking the type of economic analysis that is necessary to reveal how Dodd-Frank will affect our economy."[80]

When the court decided *Business Roundtable v. SEC*[81] a month later, it seemed to confirm the concerns expressed by Dodd-Frank Act opponents in Congress that the economic analysis backing the rulemaking was flawed. Senator Richard Shelby, the Ranking Minority Member of the Senate Banking Committee argued:

> This decision is an unequivocal validation of the concerns that Republicans have raised repeatedly over the past year. Our regulatory agencies are not undertaking rigorous and deliberate analysis to understand the economic impacts of their actions. This cavalier approach to their job is particularly damaging at a time of painfully high unemployment when American businesses face hundreds of forthcoming rules mandated by the Dodd-Frank Act. This is just the latest in a series of SEC reprimands and confirms the need for Congressional action.[82]

Congressional action would soon follow on both the oversight and legislative fronts.

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79. Mike Crapo, *Crapo, Shelby Concerned by IG Reports on Dodd-Frank Implementation*, MIKE CRAPO: NEWSROOM/NEWS RELEASES (June 16, 2011), https://www.crapo.senate.gov/media/newsreleases/crapo-shelby-concerned-by-ig-reports-on-dodd-frank-implementation [https://perma.cc/ZZB4-WAWR].

80. *Id.*

81. Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

82. Richard Shelby, *Shelby, Crapo: Further Evidence of Careless Rulemaking*, RICHARD SHELBY: NEWS RELEASES (July 22, 2011), https://www.shelby.senate.gov/public/index.cfm/newsreleases?ID=D5998BF5-9D64-4254-B593-E519DDD67D94 [https://perma.cc/TY7Y-ARBV].

With Republicans in control of the House of Representatives in the 112th Congress starting in January 2011, multiple House committees and subcommittees stepped up their oversight of rulemaking under the Dodd-Frank Act. As a result, agencies were required increasingly to spend time justifying their rule proposals and economic analyses to Congress. For example, at a congressional hearing titled *The SEC's Aversion to Cost-Benefit Analysis*,[83] SEC Chairman Mary Schapiro defended her agency's rulemaking practices and unveiled new internal guidance for producing future economic analyses.[84] Just over a week later, she appeared on Capitol Hill again to testify on the same topic.[85]

In addition to initiating time-consuming oversight hearings, Members of Congress also introduced legislation seeking to embed additional cost-benefit requirements in law. Representative Scott Garrett, Chairman of the House Subcommittee on Capital Markets and Government Sponsored Enterprises, introduced the SEC Regulatory Accountability Act.[86] The initial bill required that the SEC "propose or adopt a regulation or order only on a reasoned determination that the benefits of the intended regulation or order justify the costs."[87] In addition, the bill added a list of additional "considerations" the SEC may take into account as part of its analysis of the costs and benefits of a proposed regulation or order.[88] By requiring the benefits in favor of the regulation to outweigh the costs, the bill converted cost-benefit analysis from an analytical tool for rule development into a threshold requirement.

In testimony on the proposed legislation, Chairman Schapiro detailed the impact that the proposed legislation would have on SEC rulemaking:

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83. *The SEC's Aversion to Cost-Benefit Analysis*, COMM. ON OVERSIGHT & GOV'T REFORM (Apr. 17, 2012), https://republicans-oversight.house.gov/hearing/the-secs-aversion-to-cost-benefit-analysis/ [https://perma.cc/U7ZV-9V7P].

84. *Testimony Concerning Economic Analysis in SEC Rulemaking: Hearing Before the H. Subcomm. on TARP, Fin. Servs. & Bailouts of Pub. & Private Programs of the Oversight & Gov't Reform Comm.*, 112th Cong. 1–17 (2012) (statement of Mary L. Shapiro, Chairman, U.S. Sec. & Exch. Comm'n), https://republicans-oversight.house.gov/wp-content/uploads/2012/04/4-17-12-Schapiro-Testimony.pdf [https://perma.cc/D6SZ-2A2B].

85. *Oversight of the U.S. Securities and Exchange Commission: Hearing Before the Subcomm. on Capital Mkts. & Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 112th Cong. 52–66 (2012) (statement of Mary L. Shapiro, Chairman, U.S. Sec. & Exch. Comm'n), https://www.govinfo.gov/content/pkg/CHRG-112hhrg75091/pdf/CHRG-112hhrg75091.pdf [https://perma.cc/X6ZA-4YXP].

86. SEC Regulatory Accountability Act, H.R. 2308, 112th Cong. (2011).

87. *Id.* § 2.

88. *Id.*

> The bill enumerates eleven new factors for the SEC to consider in its economic analysis, each of which would create a new potential challenge to future rules. Moreover, a number of these new factors are potentially in conflict with the SEC's mission, duplicative of existing requirements, unrelated to SEC rulemaking, or unclear in scope. For example, the bill's direction to "assess the best ways of protecting market participants" could conflict with the SEC's mission. The SEC's mission is to protect investors, which in some cases means protecting them from certain market participants.[89]

She also pointed out that the bill extended these requirements beyond rulemaking to include agency orders, resulting in a need for a cost-benefit analysis whenever the SEC sought to bring an enforcement order.[90]

As the bill was amended and reported to the full House for consideration,[91] its purpose became clearer. Recognizing the political peril of requiring cost-benefit analyses for enforcement orders, the amended version of the bill limited its requirements to "orders of general applicability."[92] However, in almost every other respect, the bill layered on additional requirements that were more prescriptive than the original version. The bill also was amended to require that the SEC "shall" consider certain factors, where the original version merely said the SEC "may" consider them.[93] In addition, it required the SEC to assess the costs and benefits of a proposed rule and "choose the approach that maximizes net benefits."[94] Similarly, the amended bill required the SEC to "evaluate whether, consistent with obtaining regulatory objectives, the regulation is tailored to impose the least burden on society, including market participants, individuals, businesses of differing sizes, and other

89. *Testimony on "Fixing the Watchdog: Legislative Proposals to Improve and Enhance the Securities and Exchange Commission": Hearing Before the H. Comm. on Fin. Servs.*, 112th Cong. 134 (2011) (statement of Mary L. Schapiro, Chairman, U.S. Sec. & Exch. Comm'n), https://www.govinfo.gov/content/pkg/CHRG-112hhrg72603/pdf/CHRG-112hhrg72603.pdf [https://perma.cc/BM75-SFRG].

90. *Id.*

91. H.R. 2308 § 2 (2011) (as amended).

92. *Id.*

93. *Id.*

94. *Id.*

entities."[95] By requiring subjective determinations through the specific language used, such as "maximizes" or "least burden," the bill guaranteed that any rule could be subject to a subsequent legal challenge, and that any court could substitute its judgment for that of the agency. The bill also added a host of post-adoption requirements[96] that could trigger an endless stream of additional legal challenges, even if the original proposal was successfully promulgated. Although two versions of the bill would pass the House, one in the 113th Congress[97] and another in the 115th Congress,[98] the Senate never considered the legislation.

The effort to add cost-benefit criteria in agency rulemaking through legislation was also reflected in the introduction of the Financial Regulatory Responsibility Act ("FRRA")[99] by Senator Shelby. The FRRA included many of the requirements found in the SEC Regulatory Accountability Act,[100] but the FRRA would have applied them to all of the federal financial regulators.[101] However, the FRRA also would have prohibited an agency from issuing a regulation if it "determine[d] that the quantified costs [were] greater than the quantified benefits."[102] In essence, this provision would have permitted a financial regulator to nullify a provision of law duly passed by Congress and signed by the President if it determined that the costs outweighed the benefits—that is, unless Congress voted to override the agency's judgment and allow the rule to go forward.[103]

The bill also enhanced its cost-benefit requirements by including a new judicial review requirement that expanded the standing to legally challenge a rule promulgated by a financial regulator to any "person that is adversely affected or aggrieved by the regulation.[104] Additionally, it established a statutory standard of review by including a requirement that the court shall vacate any rule where the court finds that the agency did not comply with the cost-benefit provisions of the bill,[105] inviting the court to substitute its judgment for that of the agency in any rulemaking.

95. *Id.*
96. *See, e.g.*, *id.*
97. SEC Regulatory Accountability Act, H.R. 1062, 113th Cong. (2013).
98. SEC Regulatory Act, H.R. 78, 115th Cong. (2017).
99. Financial Regulatory Responsibility Act, S. 1615, 112th Cong. (2011).
100. SEC Regulatory Accountability Act, H.R. 2308, 112th Cong. § 2 (2011).
101. S. 1615 § 2.
102. *Id.* § 3(b)(4).
103. *Id.*
104. *Id.* § 8(a).
105. *Id*. § 8(c).

The judicial review elements of the bill also demonstrated conclusively that the legislation went far beyond the prior Executive Orders regarding agency cost-benefit analyses that the bill's supporters claimed they were simply trying to memorialize in statute. While the bill created new standards of judicial review, the prior Executive Orders explicitly did not create new legal rights enforceable by the courts.[106] Ultimately, the bill was never considered by the Senate.

In a third bill focused on cost-benefit analysis, Senator Rob Portman introduced the Independent Agency Regulatory Analysis Act ("IARAA").[107] Taking a slightly different approach, the IARAA authorized the President to issue an Executive Order to require specified elements in their economic analyses for all independent federal agencies.[108] The Executive Order contemplated by the bill also would require all independent regulatory agencies to submit their proposed regulations to the Office and Management and Budget's ("OMB") Office of Information and Regulatory Affairs ("OIRA") for review.[109] If OIRA determined that the agency had not satisfied the requirements of the Executive Order, the agency would have to respond to OIRA's criticisms.[110] Although the bill included language that "the compliance or noncompliance of an independent regulatory agency with the requirements of an Executive Order issued under this Act shall not be subject to judicial review[,]"[111] the bill also required that OIRA's analysis be made part of the rulemaking public record.[112]

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106. *See, e.g.*, Exec. Order No. 13579, 76 Fed. Reg. 41585, 41587–88 (July 14, 2011) ("This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person."); Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993), https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf [https://perma.cc/8M7J-QKX4] ("Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.").

107. Independent Agency Regulatory Analysis Act ("IARAA"), S. 3468, 112th Cong. (2012).

108. *Id.* § 3(a).

109. *Id.* § 3(c).

110. *Id.* § 3(c)(3).

111. *Id.* § 4(a).

112. *Id.* § 4(b) (requiring inclusion of the OIRA analysis within the rulemaking record provides an opportunity for a court to give deference to the OIRA review in its review of the underlying cost-benefit analysis).

The prospects for passage of the IARAA spurred the heads of the federal financial regulators to write the Senate sponsors, warning them that the bill "would give any President unprecedented authority to influence the policy and rulemaking functions of independent regulatory agencies and would constitute a fundamental change in the role of independent regulatory agencies."[113] As the agency heads recognized, the new bill escalated well beyond an effort to impose new requirements on cost-benefit analyses subject to judicial review, instead presenting an existential threat that "would undermine the independence of the independent agencies and, and with it, their ability to do their jobs."[114]

Although none of the bills described above were enacted into law, they were introduced and debated in several subsequent Congresses, and the debate on precisely what cost-benefit requirements should be applied to financial regulators continued. In March 2019, the Trump Administration added a new element to the debate when it issued guidance[115] to require independent agencies to submit their regulations to OMB, ostensibly for review for compliance with the Congressional Review Act.[116] The Congressional Review Act requires that "major rules" be submitted to Congress before they take effect,[117] and the OMB guidance on its face establishes a process for OIRA to determine whether a proposed regulation constitutes a "major rule" under the statute.[118] However, the OMB guidance also effectively requires independent agencies to perform cost-benefit analyses under OIRA standards and submit them and any proposed rule to OIRA for review prior to issuing a new regulation or guidance.[119] By leveraging the requirements of the Congressional Review Act, OMB appears to be attempting to achieve

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113. Letter from federal financial regulators to U.S. Senators Joseph Lieberman & Susan Collins (Oct. 26, 2012), https://www.foreffectivegov.org/sites/default/files/regs/financial_regulators_ltr_lieberman_collins_s3468.pdf [https://perma.cc/5VEP-BAC4].

114. Teresa Tritch, *Making Independent Agencies Less Independent*, N.Y. TIMES: OPINION (Nov. 6, 2012, 5:44 PM), https://takingnote.blogs.nytimes.com/2012/11/06/making-independent-agencies-less-independent/ [https://perma.cc/36YM-ZUBD].

115. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: GUIDANCE ON COMPLIANCE WITH THE CONGRESSIONAL REVIEW ACT 2–4 (Apr. 11, 2019) [hereinafter OMB GUIDANCE MEMORANDUM], https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf [https://perma.cc/CAY9-WGS6].

116. Congressional Review Act ("CRA"), Pub. L. No. 104-121, 110 Stat. 847, 868–74 (1996).

117. *Id.*; *see also infra* Part IV.F.

118. OMB GUIDANCE MEMORANDUM, *supra* note 115, *passim*.

119. *Id.*

many of the same results of the IARAA without Congress passing the bill. If the independent agencies accede to the OMB guidance, it will give the Executive Branch unprecedented control over the rulemaking activities of the independent financial regulatory agencies.[120] The impact of the new guidance and the willingness of the independent financial regulators to accept its limitations remains an open question.

Few issues had a greater impact on rulemaking under the Dodd-Frank Act than the many issues surrounding the supporting economic analyses. Rules were delayed as agencies put additional resources and time into refining their economic analyses.[121] In addition, as mentioned above, some of the agencies established formal policies to support the economic analysis in their rulemakings[122] with some evidence that the new policies were producing economic analyses that were more

120. Hal S. Scott, *OMB's Guidance Memorandum to Independent Agencies*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (June 26, 2019), https://corpgov.law.harvard.edu/2019/06/26/ombs-guidance-memorandum-to-independent-agencies/ [https://perma.cc/PQ6J-Y2MX] ("[The OMB Guidance Memorandum] could be read to require, for the first time, that independent financial regulatory agencies ('IFRAs') conduct a cost-benefit analysis under OIRA methodology of all proposed rules, and that such analysis be reviewed by OIRA."); William Funk, *OMB Leveraging the CRA to Add to Its Oversight of Independent Regulatory Agencies*, YALE J. ON REG. (Apr. 18, 2019), https://yalejreg.com/nc/omb-leveraging-the-cra-to-add-to-its-oversight-of-independent-regulatory-agencies-by-william-funk/ [https://perma.cc/26CK-AX3F] (noting that OMB is effectively applying the same cost-benefit standards that it requires for executive agencies to independent agencies by claiming that the only way it can make the major rule determination is to have independent regulatory agencies engage in essentially the same procedures as executive agencies with respect to the adoption of final rules and guidance); *accord* OMB GUIDANCE MEMORANDUM, *supra* note 115, *passim*.

121. Sarah N. Lynch, *U.S. SEC Looks to Economists for Legal* Cover, CHI. TRIB. (Apr. 16, 2012), https://www.chicagotribune.com/news/ct-xpm-2012-04-16-sns-rt-sececonomic-analysisl2e8fg6xg-20120416-story.html [https://perma.cc/A6HN-5SGJ] ("Since the SEC's proxy access rule was overturned, the pace of Dodd-Frank rulemaking at the agency has slowed considerably.").

122. *E.g.*, Memorandum from Division of Risk, Strategy, and Financial Innovation ("RSFI") & Office of the General Counsel ("OGC"), U.S. Sec. & Exch. Comm'n, on Current Guidance on Economic Analysis in SEC Rulemakings, to Staff of the Rulewriting Divisions and Offices, U.S. Sec. & Exch. Comm'n (Mar. 16, 2012), https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf [https://perma.cc/RZ5A-YDCE]; *Statement of Policy on the Development and Review of Regulations and Policies*, FED. DEPOSIT INS. CORP., (last updated Apr. 30, 2018), https://www.fdic.gov/regulations/laws/rules/5000-400.html [https://perma.cc/XVL9-M9EX]; U.S. COMMODITY FUTURES TRADING COMMISSION, OFFICE OF THE INSPECTOR GENERAL, AN INVESTIGATION REGARDING COST-BENEFIT ANALYSES PERFORMED BY THE COMMODITY FUTURES TRADING COMMISSION IN CONNECTION WITH RULEMAKINGS UNDERTAKEN PURSUANT TO THE DODD-FRANK ACT 21 (2011), https://www.cftc.gov/sites/default/files/idc/groups/public/@aboutcftc/documents/file/oig_investigation_041511.pdf [https://perma.cc/VK58-MMAP].

defensible in the courts.[123] Joint agency rulemakings were especially difficult because each agency needed to satisfy their individual rulemaking and analysis requirements. Opponents of specific rules laid the groundwork for legal challenges through detailed comment letters that raised a multitude of potential impacts, cost considerations, and alternative approaches, forcing the agencies to respond to all of them or otherwise risk having their rulemaking judged "arbitrary and capricious" under the APA.[124] Agencies governed by boards and commissions now found minority members routinely challenging the economic analyses underlying their rule proposals, providing a boost to legal challenges.

The ultimate impact of the focus on economic analysis in promulgating regulations under the Dodd-Frank Act remains the subject of considerable debate. Some commentators have expressed concern that legal and judicial requirements for economic analysis have created an environment where rulemaking is unnecessarily delayed or extremely difficult to successfully accomplish, resulting in undesirable consequences, such as delay, unending legal challenges, and rulemaking by enforcement.[125] Others have argued that the focus on economic analysis has been appropriate and has resulted in better, more effective regulations that properly take into account the impact on the public.[126] In

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123. *See* Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 552 (D.C. Cir. 2015) ("[W]e find it difficult to see what the Commission could have done better.").

124. Administrative Procedure Act ("APA") § 706, 5 U.S.C. § 706 (2018) ("[In reviewing an agency action, t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions of law found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . . ."); *see* Motor Vehicle Mfrs. Ass'n v. State Farm Auto. Ins. Co., 463 U.S. 29, 42–44 (1983) (establishing multi-factor test agencies must satisfy to successfully defend arbitrary and capricious challenges).

125. *See, e.g.*, John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 882 (2015) ("[P]recise, reliable, quantified CBA remains unfeasible."); Donna M. Nagy, *The Costs of Mandatory Cost-Benefit Analysis in SEC Rulemaking*, 57 ARIZ. L. REV. 129, 159–60 (2015) ("[T]he costs of such mandatory analysis in SEC rulemaking include: SEC paralysis, new investor-driven challenges to deregulatory initiatives, an increasing tendency for regulation by enforcement, a greater penchant for informal and unofficial rulemaking by the SEC staff, and fewer congressional delegations of authority or discretion to the SEC.").

126. Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935, 935–43 (2018) (arguing that the regulators' cost-benefit analyses were defective and the courts were right to require the agencies to show that their regulations passed an adequate cost-benefit analysis); Jerry Ellig, *Improvements in SEC Economic Analysis Since* Business Roundtable*: A Structured Assessment* 7, 48 (Mercantus Center, George Mason University, Mercatus Working Paper, 2016), https://www.mercatus.org/system/files/mercatus-ellig-sec-business-roundtable-v1.pdf [https://perma.cc/E8M7-4SGJ] ("[J]udicial review can prompt a regulatory agency to produce higher-quality analysis and to provide a more complete explanation of how that analysis affected its decisions.").

either case, the debate over economic analysis became one of the defining backdrops for implementation of the Dodd-Frank Act over the past decade and has more broadly shaped administrative law for years to come.

B. Constitutional Challenges

1. The "Kitchen Sink" Strategy: *State National Bank of Big Spring v. Lew*

The broadest constitutional challenge to the Dodd-Frank Act and the rules promulgated thereunder was brought by a relatively small national bank in Texas which included a wide range of legal challenges. In *State National Bank of Big Spring v. Lew*,[127] the bank challenged the constitutionality of: (1) Title I of the Dodd-Frank Act, which established the Financial Stability Oversight Council ("FSOC");[128] (2) Title II of the Act, which established the Orderly Liquidation Authority ("OLA");[129] and (3) Title X, which established the CFPB.[130] For good measure, the bank also challenged the constitutionality of the recess appointment of the CFPB Director.[131] Ultimately, the bank was joined in the suit by the Attorneys General of eleven states.[132]

In arguing that Title I of the Dodd-Frank Act was unconstitutional, the plaintiffs contended that it violated the non-delegation doctrine[133] and separation of powers principles based on the

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127. State Nat'l Bank of Big Spring v. Lew, 795 F.3d 48 (D.C. Cir. 2015).

128. *Id.* at 52, 54–55; *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 111, 12 U.S.C. § 5321 (2018) (establishing FSOC).

129. *State Nat'l Bank*, 795 F.3d at 52, 55–57; *see also* Dodd-Frank § 204, 12 U.S.C. § 5384 (2018) (establishing necessary authority and providing purpose and procedure for orderly liquidation of covered financial institutions).

130. *State Nat'l Bank*, 795 F.3d at 51, 53–54; *see also* Dodd-Frank § 1011, 12 U.S.C. § 5491 (2018) (establishing Bureau of Consumer Financial Protection, commonly known as Consumer Financial Protection Bureau or CFPB); Dodd-Frank § 1021, 12 U.S.C. § 5511 (2018) (providing purpose, objectives, and functions of CFPB).

131. *State Nat'l Bank*, 795 F.3d at 52.

132. Those eleven states whose Attorneys General joined in the suit were Alabama, Georgia, Kansas, Michigan, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, and West Virginia. *See id.* at 50–51.

133. The non-delegation doctrine is the principle that Congress cannot delegate its legislative powers to agencies, thereby preserving the separation of powers between the executive and legislative branches. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 458 (2001) ("When conferring decisionmaking authority upon agencies, Congress must lay down an intelligible principle to which the person or body authorized to act is directed to conform." (citing J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928))).

Act's broad grant of authority to FSOC to designate institutions as systemically important financial institutions ("SIFI"), thereby subjecting them to enhanced government oversight.[134] Given that the bank was not a nonbank financial company, as defined by the statute, and that banks are specifically exempt from the provisions of Title I, the bank argued instead that it had standing because it was harmed competitively by FSOC's designation of GE Capital as a SIFI.[135] Writing for a unanimous panel, then-Judge Kavanaugh found "the link between (i) the enhanced regulation of GE Capital, (ii) any alleged reputational benefit to GE Capital, and (iii) any harm to State National Bank is simply too attenuated and speculative to show the causation necessary to support standing."[136]

The constitutional challenges to Title II were based on the State plaintiffs' claim as possible creditors of future financial companies potentially subject to the Dodd-Frank Act's OLA provisions. The States argued that they had suffered a loss of statutory rights they previously enjoyed under the U.S. Bankruptcy Code. They contended that they could suffer future harm based on the provisions of OLA that permitted the FDIC to treat similarly situated creditors differently under certain circumstances than the uniform treatment they would receive under bankruptcy. Again, the court determined that the claims failed on standing and ripeness grounds, given that the claim did not involve the actual application of Title II and was based on a set of highly speculative preconditions before the States could demonstrate that they had been harmed.[137] Judge Kavanaugh wrote: "It is premature for a court to consider the legality of how the Government might wield the orderly liquidation authority in a potential future proceeding."[138] The court also noted that, "[i]f the State plaintiffs are injured at some point in the future by a liquidation or reorganization under the Government's orderly liquidation authority, the State plaintiffs can seek to raise their

134. *State Nat'l Bank*, 795 F.3d at 52, 54–55; *see also, e.g.*, Dodd-Frank § 112, 12 U.S.C. § 5322(a)(1)(A) (2018) ("The purposes of the [FSOC] are . . . to identify risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected bank holding companies or nonbank financial companies, or that could arise outside the financial services marketplace . . . .").

135. The bank contended that GE Capital's designation as a SIFI provided it a competitive advantage over the bank because investors might perceive GE Capital, as a SIFI, to be safer due to the possibility of government backing and enhanced supervision. *State Nat'l Bank*, 795 F.3d at 55.

136. *Id.*

137. *Id.* at 56.

138. *Id.*

constitutional arguments then, as the Government acknowledges."[139] Yet some commentators have noted that because plaintiffs cannot challenge OLA in advance of its use, which will be by definition in an emergency situation, the decision "raises serious doubts about the viability of OLA challenges."[140]

The remaining constitutional challenges to the Dodd-Frank Act in *State National Bank of Big Spring* involved the CFPB.[141] The plaintiffs challenged the constitutionality of the structure of the CFPB as an independent agency under a single Director.[142] The plaintiffs also challenged the constitutionality of the recess appointment of CFPB's Director.[143] Unlike the other constitutional challenges in the case, the D.C. Circuit reversed the district court, determined that the plaintiffs did have standing to raise the constitutionality of the structure of the CFPB and the appointment of its Director and remanded the case.[144]

On remand, the district court was forced to consider the issue of the constitutionality of the recess appointment where the Director ultimately had been confirmed by the Senate while the case was working its way through the courts.[145] Subsequent to his confirmation, Director Cordray ratified the actions he had taken during his recess appointment. The court determined that the ratification "saves the regulations from plaintiff's challenge."[146]

2. Independent Agency Structure: The CFPB Line of Cases

The constitutional challenge to the structure of the CFPB raised in *State National Bank of Big Spring* was addressed by another case: *PHH Corp. v. CFPB*.[147] In that case, the CFPB brought charges against PHH Corp., a large mortgage lender, for violations under the Real Estate

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139. *Id.*

140. Recent Case, State National Bank of Big Spring v. Lew, *795 F.3d 48 (D.C. Cir. 2015)*, 129 HARV. L. REV. 835, 841 (2016).

141. *State Nat'l Bank*, 795 F.3d at 51–52.

142. *Id.* at 51.

143. *Id.* at 52.

144. *Id.* at 57.

145. President Obama re-nominated Richard Cordray as Director of the CFPB on January 24, 2013, and he was confirmed by the Senate on July 16, 2013.

146. *State Nat'l Bank*, No. 12-1032 ESH (D.D.C. 2016) (order and judgment of D.C. District Court on remand from D.C. Circuit Court of Appeals), https://www.scotusblog.com/wp-content/uploads/2018/12/18-307-opinion-below.pdf [https://perma.cc/YGQ7-XTV4].

147. PHH Corp. v. CFPB, 881 F.3d 75 (D.C. Cir. 2018).

Settlement Procedures Act ("RESPA").[148] In his decision to bring charges, the CFPB Director read the statute to support a broader finding of misconduct than the administrative law judge ("ALJ") who had heard the case. Consequently, the Director significantly increased the disgorgement from the $6.4 million recommended by the ALJ to $109 million. PHH Corp., among other issues, challenged the constitutionality of the structure of the CFPB with a sole Director, with a five-year term in office, subject to removal by the President only for "inefficiency, neglect of duty, or malfeasance in office."[149] Specifically, PHH Corp. asserted that this structure was inconsistent with Article II of the Constitution that vests executive power in the President.[150]

A splintered D.C. Circuit, hearing the case en banc, rejected PHH Corp.'s challenge and found that the "for cause" removal protections for the CFPB Director are consistent with other independent regulatory agencies,[151] that the functions of the CFPB are not core executive functions,[152] and noted that such provisions had been consistently provided to independent financial regulators.[153] In his dissent, then-Judge Kavanaugh argued that prior independent agency precedents required that independent agencies have multi-member structures to pass constitutional muster.[154] Neither party sought Supreme Court review.

The constitutionality of the CFPB's structure as an independent financial regulatory agency with a sole Director continues to generate legal challenges. In *CFPB v. RD Legal Funding, LLC*,[155] the Southern District of New York rejected the en banc decision of the D.C. Circuit in *PHH Corp. v. CFPB*, and adopted the reasoning in Judge Kavanaugh's dissent that the CFPB is unconstitutional "because it is an independent agency that exercises substantial executive power and is headed by a

148. *Id.* at 76–84; *see* Real Estate Settlement Procedures Act, Pub. L. No. 93-533, 88 Stat. 1724 (1974) (codified at 12 U.S.C. §§ 2601–17); 12 U.S.C. § 2607 (2018).

149. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1011(c)(3), 12 U.S.C. § 5491(c)(3) (2018); *see PHH Corp.*, 881 F.3d at 79–80, 84.

150. *PHH Corp.*, 881 F.3d at 79–80, 84; U.S. CONST. art. II, § 1, cl. 1.

151. *PHH Corp.*, 881 F.3d at 80 ("Because we see no constitutional defect in Congress's choice to bestow on the CFPB Director protection against removal except for 'inefficiency, neglect of duty, or malfeasance in office,' we sustain it.").

152. *Id.* ("Wide margins separate the validity of an independent CFPB from any unconstitutional effort to attenuate presidential control over core executive functions.").

153. *Id.* ("Congress and the President have historically countenanced sole-headed financial regulatory bodies.").

154. *Id.* at 165 (Kavanaugh, J., dissenting).

155. CFPB v. RD Legal Funding, LLC, 332 F. Supp. 3d 729 (S.D.N.Y. 2018).

single Director."[156] The Fifth Circuit Court of Appeals is considering a case out of the Southern District of Mississippi, *CFPB v. All American Check Cashing*,[157] where a company engaged in payday lending is challenging the constitutionality of the CFPB's structure in an enforcement action.[158] In a similar case, the Fifth Circuit Court of Appeals in *Collins v. Mnuchin*[159] found the structure of the Federal Housing Finance Agency ("FHFA") unconstitutional by distinguishing it from the CFPB.[160] In that case, the court hightlighted that FSOC has authority to act as a check on CFPB rulemaking, whereas the FHFA has no similar oversight authority.[161]

3. The Pending Supreme Court Decision: *CFPB v. Seila Law*

In October 2019, the Supreme Court agreed to hear a case out of the Ninth Circuit, *CFPB v. Seila Law*.[162] In that case, the CFPB is seeking to enforce a law firm's compliance with a civil investigative demand. Among other defenses, the law firm challenged the constitutionality of the CFPB's structure. Affirming the decision of the district court and following the reasoning of the D.C. Circuit in *PHH Corp.*,[163] the Ninth Circuit held that the CFPB's structure was constitutional. In response to the firm's petition for certiorari, the CFPB reversed the legal stance it had taken in the Ninth Circuit and its Director announced that the CFPB has "determined that the for-cause removal provision of the Consumer Financial Protection Act of 2010 . . . is unconstitutional."[164]

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156. *Id.* at 784 (quoting *PHH Corp.*, 881 F.3d at 198 (Kavanaugh, J., dissenting)).

157. CFPB v. All Am. Check Cashing, No. 3:16-cv-356-WHB-JCG, 2018 WL 9812125, slip op. at *1–4 (S.D. Miss. Mar. 21, 2018).

158. *Id.* at *1; *see* Alan S. Kaplinsky, *Fifth Circuit Hears Oral Argument in* All American Check Cashing, NAT'L L. REV. (Mar. 18, 2019), https://www.natlawreview.com/article/fifth-circuit-hears-oral-argument-all-american-check-cashing [https://perma.cc/N5JK-7G2Y].

159. Collins v. Mnuchin, 938 F.3d 553 (5th Cir. 2019).

160. *Id.* at 587–89.

161. *Id.*

162. CFPB v. Seila Law LLC, 923 F.3d 680 (9th Cir. 2019), *cert. granted*, 140 S. Ct. 427 (2019). The Court also directed the parties to brief and argue the question of: "If the [CFPB] is found unconstitutional on the basis of the separation of powers, can 12 U.S.C. § 5491(c)(3) be severed from the Dodd-Frank Act?" 140 S. Ct. 427.

163. *Seila Law*, 923 F.3d at 682 ("We see no need to re-plow the same ground here.").

164. Letter from Kathleen L. Kraninger, Dir., Consumer Fin. Prot. Bureau, to Nancy Pelosi, Speaker, House of Representatives (Sept. 17, 2019), https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2019/09/Pelosi-letter.pdf [https://perma.cc/A7DC-AES4].

In questioning the constitutionality of her own agency, Director Kraninger said that she believes that a decision that the structure of the CFPB is unconstitutional "should not affect our ability to carry out the Bureau's important mission."[165] However, the ability to sever the structure of the agency from its actions is by no means a certain result.[166] In reaching this view, Kraninger seems to be relying on the reasoning in the Kavanaugh dissent in *PHH Corp. v. CFPB*. Applying the two-part test in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[167] then-Judge Kavanaugh determined that severability of the "for cause protections" of the CFPB Director would be the appropriate remedy.[168] However, Judge Henderson, in a separate dissenting opinion, argued: "In my view, the Congress would not have enacted Title X in its current form absent for-cause removal protection. I believe, therefore, that the appropriate remedy for the CFPB's Article II problem is to invalidate Title X in its entirety."[169] In addition, entities regulated by the CFPB are arguing that "[t]he logical conclusion is, if the power vested in the Director is unconstitutional, then anything that stems from those powers is null and void because that power is unchecked."[170] In taking up the case, the Supreme Court has specifically directed the parties to address the question of severability.

Even if the CFPB had not changed its position on constitutionality, it likely would not have had the opportunity to defend the constitutionality of its structure before the Court. Although the CFPB has independent litigating authority,[171] section 1054(e) of the Dodd-Frank Act provides:

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165. Kathleen L. Krainger, *Director Kraninger's Speech at the National Consumer Empowerment Conference*, CFPB: NEWSROOM (Sept. 18, 2019), https://www.consumerfinance.gov/about-us/newsroom/director-kraningers-speech-national-consumer-empowerment-conference/ [https://perma.cc/KW2H-GX4M].

166. Evan Weinberger, *CFPB May Not Get Supreme Court Closure It Wants*, BLOOMBERG LAW (Oct. 4, 2019, 2:11 PM), https://news.bloomberglaw.com/banking-law/cfpb-may-not-get-supreme-court-closure-it-wants [https://perma.cc/3VQ4-6FEB].

167. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).

168. PHH Corp. v. CFPB, 881 F.3d 199 (Kavanaugh, J., dissenting) ("Severability is appropriate . . . so long as (i) Congress would have preferred the law with the offending provision severed over no law at all; and (ii) the law with the offending provision severed would remain 'fully operative as a law.'" (quoting *Free Enter. Fund*, 561 U.S. at 509)).

169. *Id.* at 160 (Henderson, J., dissenting).

170. Kate Berry, *Kraninger's Stance on CFPB Constitutionality Puts Rules in Limbo*, AM. BANKER (Oct. 1, 2019, 12:07 PM), https://www.americanbanker.com/news/kraningers-stance-on-cfpb-constitutionality-puts-rules-in-limbo [https://perma.cc/TX53-V7HN].

171. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1054(b), 12 U.S.C. § 5564(b) (2018).

> The Bureau may represent itself in its own name before the Supreme Court of the United States, provided that the Bureau makes a written request to the Attorney General within the 10-day period which begins on the date of entry of the judgment which would permit any party to file a petition for writ of certiorari, and the Attorney General concurs with such request or fails to take action within 60 days of the request of the Bureau.[172]

The Department of Justice ("DOJ") already had made its position on the constitutionality of the CFPB's structure very clear. In its brief opposing certiorari in *State National Bank of Big Spring*, the DOJ argued that restrictions on removal of the CFPB Director "impermissibly infringes on the President's control of the Executive Branch, and unconstitutionally frustrates the President's 'responsibility to take care that the laws be faithfully executed.'"[173] But the DOJ went on to say that, while the question was important, the *State National Bank of Big Spring* case "would be a poor vehicle for considering the constitutionality of the Bureau's structure."[174] In particular, the DOJ pointed to the fact that Justice Kavanaugh's participation in the decision at the Court of Appeals likely would preclude his participation in the Supreme Court's subsequent consideration of the case. However, the DOJ, referencing their position in *State National Bank of Big Spring*, argued that *Seila Law* "presents a suitable vehicle for the Court's review of the question."[175] With the CFPB abandoning its position that its structure was constitutional and joining the DOJ in opposition, the Court appointed an amicus to argue the case in support of the lower court's judgment.[176]

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172. *Id.* § 1054(e), 12 U.S.C. § 5564(e).

173. Brief for the Respondent in Opposition to Writ of Certiorari at 10, State Nat'l Bank of Big Spring v. Mnuchin, 795 F.3d 48 (D.C. Cir. 2015) (No. 18-307) (quoting *Free Enter. Fund*, 561 U.S. at 493), *cert. denied*, 139 S. Ct. 916 (2019).

174. *Id.*

175. Brief for the Respondent in Opposition to Petition for Writ of Certiorari at 7, CFPB v. Seila Law LLC, No. 19-7 (Sept. 2019), https://www.supremecourt.gov/DocketPDF/19/19-7/116040/20190917144324154_19-7%20Seila%20Law.pdf [https://perma.cc/AWW2-LLSW].

176. Jordan S. Rubin, *Clement 'Unusual,' 'Excellent' Friend for Wall Street Watchdog*, BLOOMBERG LAW (Oct. 25, 2019, 4:50 AM), https://news.bloomberglaw.com/us-law-week/clement-unusual-excellent-friend-for-wall-street-watchdog [https://perma.cc/QX3B-JNW2].

4. Recess Appointments: *National Labor Relations Board v. Noel Canning*

Although the court in *State National Bank of Big Spring* did not consider the question of the validity of CFPB Director Cordray's recess appointment, that issue effectively would be addressed in *National Labor Relations Board v. Noel Canning*.[177] In that case, the Supreme Court determined that President Obama's recess appointment of three members of the National Labor Relations Board ("NLRB") violated the requirements of the Appointments Clause of the Constitution that requires the President to obtain the "advice and consent" of the Senate when appointing an officer of the United States.[178] The Court held that "[a] Senate recess that is so short that it does not require the consent of the House is not long enough to trigger the President's recess-appointment power."[179] Therefore, because Director Cordray's recess appointment was made on the same day as the NLRB appointees, the Court's decision would have applied to the constitutionality of his recess appointment had he not been subsequently re-nominated and confirmed.

5. Administrative Law Judges: *Lucia v. SEC*

The appointment power of agency heads is not the only issue regarding appointments of government officials that has been raised by opponents of the Dodd-Frank Act. Prior to passage of the Act, the SEC could bring certain types of enforcement actions before its own ALJs but could only impose monetary penalties if the subject of the action was a regulated entity or a person associated with a regulated entity. Section 929P of the Dodd-Frank Act expanded this authority to impose monetary penalties to include any person who violates the federal securities laws.[180]

In *Lucia v. SEC*,[181] the SEC brought an enforcement action against an individual charging that he acted to deceive potential investors. In a proceeding before an SEC ALJ, Lucia was fined and banned from the industry. Lucia challenged the validity of the proceeding, arguing

177. Nat'l Labor Relations Bd. v. Noel Canning, 573 U.S. 513 (2014).
178. *Id.* at 518–19, 528–38; *accord* U.S. CONST. art. II, § 2, cl. 2.
179. *Noel Canning*, 573 U.S. at 537.
180. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 929P(a)(1), 15 U.S.C. § 77h–1(g)(1) (2018).
181. Lucia v. SEC, 138 S. Ct. 2044 (2018).

that the ALJ had not been properly appointed under the Appointments Clause.[182]

The Appointments Clause states that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[183] The key question for decision was whether the SEC ALJs were "officers" requiring appointment by the Commission or employees who could be appointed by other staff within the SEC. In deciding the question, the majority looked to *Freytag v. Commissioner*[184] to determine the status of SEC ALJs. The Court found that ALJs held a continuing office established by law, that they exercise significant discretion in carrying out their adjudicative functions,[185] and that they have the ability to issue decisions at the close of proceedings.[186] Having met all of the elements present in *Freytag*, the Court held that the Commission's ALJs were "Officers of the United States"[187] and had been unconstitutionally appointed because the Commission had left the appointment of ALJs to SEC staff members.[188]

The decision in *Lucia* completely changed the hiring process for the approximately 1900 ALJ positions across the government.[189] President Trump issued Executive Order 13843[190] placing all ALJs in the excepted service and abolished the competitive hiring system under the Office of Personnel Management. "*Lucia* and Executive Order 13843 have made it necessary for agencies to construct new practices for [ALJ] hiring."[191]

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182. U.S. CONST. art. II, § 2, cl. 2.

183. *Id.*

184. Freytag v. Comm'r, 501 U.S. 868 (1991) (applying the "significant authority" test to adjudicative officials—specifically, to special trial judges of the U.S. Tax Court).

185. *Lucia*, 138 S. Ct. at 2053. As in *Freytag*, the SEC ALJs had the power to take testimony, conduct trials, rule on the admissibility of evidence, as well as the power to enforce compliance with discovery orders. *See id.*

186. *Id.* The Court noted that the SEC ALJ decisions had greater independent effect, as their decisions become final if the Commission declines review. *See id.* at 2053–54.

187. *Id.* at 2055.

188. *Id.* The Court's remedy was to provide a rehearing with a different ALJ. *See id.*

189. JACK M. BEERMANN & JENNIFER L. MASCOTT, ADMIN. CONFERENCE OF THE U.S., RESEARCH REPORT ON FEDERAL AGENCY ALJ HIRING AFTER LUCIA AND EXECUTIVE ORDER 13843, at 3–6 (May 29, 2019), https://www.acus.gov/sites/default/files/documents/Submitted%20final%20draft%20JB.pdf [https://perma.cc/ZAC8-AFTV] ("Agencies have now commenced working on altering their ALJ hiring procedures to conform to both the Lucia decision and the executive order.").

190. Exec. Order No. 13843, 83 Fed. Reg. 32755 (July 13, 2018).

191. BEERMANN & MASCOTT, *supra* note 189, at 26.

6. First Amendment: *National Association of Manufacturers v. SEC*

Beyond issues of the Appointments Clause, recess appointments, and the executive powers of the President, the breadth of the Dodd-Frank Act has even resulted in constitutional challenges on First Amendment grounds. Section 1502 of the Dodd-Frank Act[192] required the SEC to issue regulations requiring firms using "conflict minerals"[193] to report publicly whether they originated in the Democratic Republic of the Congo ("DRC") or an adjoining country, and include "a description of the products manufactured or contracted to be manufactured that are not DRC conflict free."[194] In *National Association of Manufacturers v. SEC*,[195] a panel of the D.C. Circuit held that certain specific reporting requirements of the Dodd-Frank Act and the rules promulgated under them violated the First Amendment because it unconstitutionally compelled speech.[196] The court held:

> At all events, it is far from clear that the description at issue—whether a product is "conflict free"—is factual and non-ideological. Products and minerals do not fight conflicts. The label "conflict free" is a metaphor that conveys moral responsibility for the Congo war. It requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups. An issuer, including an issuer who condemns the atrocities of the Congo war in the strongest terms, may disagree with that assessment of its moral responsibility.[197]

The court ruled that the statute and rule implementing section 1502 were unconstitutional only to the extent that they required regulated entities to

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192. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203, § 1502(e)(4), 124 Stat. 1376, 2218 (2010) (codified at 15 U.S.C. § 78m note).

193. Under section 1502 of the Dodd-Frank Act, "[t]he term 'conflict mineral' means[:] (A) columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country." *Id.*

194. *Id.* § 1502(p)(1)(A)(ii), 15 U.S.C. § 78m(p)(1)(A)(ii) (2018).

195. Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015).

196. *Id.* at 533.

197. *Id.* at 554.

report to the Commission and to state on their website that any of their products have "not been found to be 'DRC conflict free.'"[198]

It also is worth noting that the D.C. Circuit was compelled to review the cost-benefit analysis performed by the SEC in support of the rule, and it did "not see any problems with the Commission's cost-side analysis."[199] In what surely must have been a relief to the SEC, the court went on to say, "we find it difficult to see what the Commission could have done better."[200]

Shortly after the case was remanded back to the SEC, Acting Chairman Piwowar announced that he had directed staff to reconsider how companies should comply with the law and to solicit comments from the public on whether SEC staff should update its guidance on compliance.[201] Subsequently, Piwowar announced that the SEC was suspending enforcement of the rule.[202] In a reversal of roles, supporters of the Dodd-Frank Act in the person of Commissioner Stein criticized the action stating that "[i]t is unprecedented for one commissioner, acting alone and without official notice and comment, to engage in de facto rulemaking."[203]

C. Other Significant Litigation

1. FSOC Designations of Non-Bank Systemically Important Financial Institutions

In *MetLife v. Financial Stability Oversight Council*,[204] MetLife—a non-bank financial institution—challenged its designation by FSOC as a non-bank SIFI. Section 113 of the Dodd-Frank Act[205] empowers FSOC

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198. *Id.* at 556.
199. *Id.* at 552.
200. *Id.*
201. Sarah N. Lynch, *Acting SEC Chair Seeks to Scale Back 'Conflict Minerals' Rule*, REUTERS (Jan. 31, 2017, 7:25 PM), https://www.reuters.com/article/us-usa-sec-conflictminerals/acting-sec-chair-seeks-to-scale-back-conflict-minerals-rule-idUSKBN15G2ZF [https://perma.cc/T7EK-CD9B].
202. Sarah N. Lynch, *SEC Halts Some Enforcement of Conflict Minerals Rule Amid Review*, REUTERS (Apr. 7, 2017, 3:23 PM), https://www.reuters.com/article/us-usa-sec-conflictminerals/sec-halts-some-enforcement-of-conflict-minerals-rule-amid-review-idUSKBN1792WX [https://perma.cc/Z367-VXTJ].
203. *Id.*
204. MetLife, Inc. v. FSOC, 177 F. Supp. 3d 219 (D.D.C. 2016).
205. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 113, 12 U.S.C. § 5323(a)(1) (2018).

to determine that a nonbank financial company "shall be supervised by the Federal Reserve and shall be subject to prudential standards."[206] In making the determination, FSOC is required to consider ten statutorily enumerated factors and "any other risk-related factors that the Council deems appropriate."[207] FSOC subsequently issued guidance on its designation of SIFIs.[208] On December 18, 2014, FSOC voted to designate MetLife as a SIFI and MetLife sued to challenge the designation.

Although section 113 limited judicial review to "whether the final determination . . . was arbitrary and capricious,"[209] the district court in *MetLife* rescinded the designation on two grounds. First, the court found that "FSOC made critical departures from two of the standards it adopted in its Guidance, never explaining such departures or even recognizing them as such."[210] By failing to assess MetLife's vulnerability to material financial distress and failing to determine that MetLife's material financial distress would materially impact MetLife counterparties, the court determined that FSOC's designation was arbitrary and capricious.[211]

In addition, the court found the designation to be arbitrary and capricious because FSOC did not consider the cost of regulation.[212] Although there was no requirement in the Dodd-Frank Act requiring an analysis of costs, the court held that the "decision intentionally refused to consider the cost of regulation, a consideration that is essential to reasoned rulemaking."[213] The court also determined that FSOC was required to consider the costs of regulation in its designation by the statutory language that it "consider any other risk-related factors that [it] deems appropriate."[214] Thus, presumably any designation would require

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206. *Id.*

207. *Id.* § 113, 12 U.S.C. § 5323(a)(2).

208. *See* Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 Fed. Reg. 21637 (Apr. 11, 2012) (codified at 12 C.F.R. pt. 1310).

209. Dodd-Frank § 113, 12 U.S.C. § 5323(h).

210. MetLife, Inc. v. FSOC, 177 F. Supp. 3d 219, 230 (2016).

211. *Id.* at 239 ("Having announced two key interpretations, FSOC was required either to maintain them or to explain its deviation from them. It did neither. FSOC's reversal on either of these interpretations is enough to rescind the Final Determination as arbitrary and capricious.").

212. *Id.*

213. Dodd-Frank § 113, 12 U.S.C. § 5323(a)(2)(k); *MetLife*, 177 F. Supp. 3d at 241 (citing 12 U.S.C. § 5323(a)(2)(k) as "the textual hook" requiring FSOC to perform a cost-benefit analysis).

214. *MetLife*, 177 F. Supp. 3d at 240–41.

a finding that the costs of regulation integral to the designation must be outweighed by the congressionally determined, but not quantified, benefit of a safer financial system.

The Obama Administration appealed the district court's *MetLife* decision, but the Trump Administration settled the case[215] and the parties withdrew the appeal.[216] The drafters of the Dodd-Frank Act were deeply concerned by a decision that went straight to the heart of one of the key provisions of the Act designed to address future problems before they became systemic. Former House Financial Services Committee Chairman, Barney Frank, stated that he "was surprised that the district court judge substituted her judgment for the FSOC's on a specific issue that is solely within its jurisdiction and competence."[217] He went on to say he "was shocked that the judge went on to substitute her judgment for that of the entire Congress, by effectively amending the statute."[218]

Three years into the Trump Administration, none of the non-bank entities originally designated as SIFIs by FSOC retain their designations.[219] While MetLife avoided designation through litigation, GE Capital and AIG altered their business structures to reduce their potential systemic impact. Prudential was de-designated by a vote of FSOC, now composed of Trump Administration regulators, following "a detailed analysis showing that there is not a significant risk that the company could pose a threat to financial stability."[220] Whether because of the litigation or a change its philosophical approach, FSOC announced

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215. Press Release, U.S. Dep't of the Treasury, Secretary Mnuchin Statement on the *MetLife, Inc. v. Financial Stability Oversight Council* Appeal (Jan. 18, 2018), https://home.treasury.gov/index.php/news/press-releases/sm0254 [https://perma.cc/HBP5-WN6A] ("I am pleased that the Justice Department has settled the MetLife case, consistent with the recommendation by a majority of FSOC voting members. Treasury has recommended specific reforms to make the designation process more analytically rigorous, clear, and transparent.").

216. Pete Schroeder, *MetLife, U.S. Regulators Agree to Set Aside Legal Fight*, REUTERS (Jan. 18, 2018, 8:53 PM), https://www.reuters.com/article/us-usa-metlife-fsoc/metlife-u-s-regulators-agree-to-set-aside-legal-fight-idUSKBN1F8064 [https://perma.cc/VC6G-24LK].

217. Arthur D. Postal, *Dodd-Frank Drafters Rip MetLife Ruling*, CONST. ACCOUNTABILITY CTR. (June 23, 2016), https://www.theusconstitution.org/news/dodd-frank-drafters-rip-metlife-ruling/ [https://perma.cc/XH99-X2FS].

218. *Id.*

219. John Heltman, *Prudential, the Last Nonbank SIFI, Sheds the Label*, AM. BANKER (Oct. 17, 2018, 9:08 AM), https://www.americanbanker.com/news/prudential-the-last-nonbank-sifi-sheds-the-label [https://perma.cc/J9BP-334Y] (noting that the original designations included MetLife, GE Capital, AIG, and Prudential).

220. Press Release, U.S. Dep't of the Treasury, Financial Stability Oversight Council Announces Rescission of Nonbank Financial Company Designation (Oct. 17, 2018), https://home.treasury.gov/news/press-releases/sm525 [https://perma.cc/8R8B-E6QS].

its intention to move away from an entity-based approach in designating individual firms as SIFIs to "an activities-based approach to identifying and addressing potential risks to financial stability."[221] It is unclear how effective this new approach to this key element of the Dodd-Frank Act will be in identifying and placing regulatory restraints on nonbank financial institutions that contribute to systemic risk.

2. Statutory Interpretation: Risk-Retention Requirement for CLO Managers

Litigation also has defined the parameters of the statutory language in parts of the Dodd-Frank Act and the willingness of courts to interpret the statutory language broadly. In *Loan Syndications & Trading Association v. SEC*,[222] the court considered the application of the Act's risk retention requirements[223] to managers of open-market collateralized loan obligations ("CLO"), a type of asset-backed security.[224] Section 941 of the Act directs the SEC, Federal Reserve, FDIC and OCC to jointly promulgate "regulations to require any securitizer to retain an economic interest in a portion of the credit risk for any asset that the securitizer, through the issuance of an asset-backed security, transfers, sells, or conveys to a third party,"[225] specifically requiring that the securitizer retain "not less than 5% of the credit risk of any asset."[226] The SEC and Fed subsequently issued a regulation applying this requirement to managers of CLOs.[227] The CLO managers argued that the language of the statute did not reach to their activities.

The D.C. Circuit held that the activities of the CLO managers did not come under the definition of securitizer under the statute, stating that "[t]he agencies' interpretation seems to stretch the statute beyond the natural meaning of what Congress wrote."[228] In rejecting the agencies'

221. Press Release, U.S. Dep't of the Treasury, Financial Stability Oversight Council Proposes Changes to Nonbank Designations Guidance (Mar. 6, 2019), https://home.treasury.gov/news/press-releases/sm621 [https://perma.cc/NL55-7JTM].

222. Loan Syndications & Trading Ass'n v. SEC, 882 F.3d 220 (D.C. Cir. 2018).

223. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 941(b), 15 U.S.C. § 78*o*-11 (2018); *see id.* § 941(a), 15 U.S.C. § 78c(a)(79) (2018) (defining "asset-backed security").

224. *Id.* § 941(b), 15 U.S.C. § 78*o*-11(b)(1).

225. *Id.* § 941(b), 15 U.S.C. § 78*o*-11(b)(2).

226. *Id.* § 941(b), 15 U.S.C. § 78*o*-11(c)(1)(B)(i).

227. 12 C.F.R. § 244.9 (2019) (Fed); 17 C.F.R. § 246.9 (2019) (SEC).

228. Loan Syndications & Trading Ass'n v. SEC, 882 F.3d 220, 223 (D.C. Cir. 2018).

arguments for an expansive reading of the statute that would encompass CLO managers, the court said that it would

> sweep in brokers, lawyers, and non-CLO investment managers who, though they play a part in organizing securities and "causing" the transfer of securitized assets, are clearly not the initiators of securitizations that Congress intended to regulate. That the agencies' interpretation sweeps so far beyond any reasonable estimate of the congressional purpose confirms our view that the interpretation is beyond the statutory language.[229]

Although the court acknowledged that statutory language might not reach all of the types of transactions that the regulators desired to cover or Congress intended, it stated that if the language resulted in a loophole, "it is one that the statute itself creates, and not one that the agencies may close with an unreasonable distortion of the text's ordinary meaning."[230] With this decision, the court signaled its intent to carefully circumscribe the agencies' interpretations of the extensive grants of regulatory authority in the Dodd-Frank Act within the limits of the statute's language.[231]

3. Statutorily-Mandated Reporting: Payments for Extractive Minerals

The set of cases surrounding provisions of the Dodd-Frank Act regarding reporting of payments for extractive minerals may be illustrative of the future course of litigation under the Act involving dueling lawsuits and competing legislative mandates. Unlike most statutorily required reporting to the SEC which is intended for the benefit of investors, section 1504 of the Dodd-Frank Act,[232] like the reporting requirements of section 1502[233] described above,[234] was designed to

229. *Id.* at 224–25.

230. *Id.* at 226.

231. For a more fulsome discussion of this case, see Elliot Ganz & Phillip Black, *CLO Risk Retention: A Case Study in Regulatory Indiscretion*, 24 N.C. BANKING INST. Parts II–III (2020).

232. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203, § 1504, 124 Stat. 1376, 2220–22 (2010) (codified at 15 U.S.C. § 78m(q)(2)(A)).

233. *Id.* § 1502, 124 Stat. 1376, 2213–18 (codified at 15 U.S.C. § 78m note).

234. *See* discussion *supra* Part III.B.6.

serve a social goal of improving transparency of payments to governments regarding resource extraction. Specifically, section 1504 provided:

> Not later than 270 days after July 21, 2010, the Commission shall issue final rules that require each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals.[235]

Section 1504 also provided that, "[t]o the extent practicable, the Commission shall make available online, to the public, a compilation of the information required to be submitted."[236]

For a number of reasons, including the difficulty of completing an economic analysis on the new congressional mandate, the Commission did not meet the required deadline. In May 2012, Oxfam America, a "global organization working to end the injustice of poverty"[237] and a supporter of the provision, filed suit against the SEC to compel it to move forward with the implementing regulation, arguing that it was unlawfully delaying the issuance of the rule.[238] Subsequently, the SEC issued a final rule in August 2012.[239] Following the release of the final rule, Oxfam America dropped its suit.

The new rule's opponents then filed suit challenging the regulation. In *American Petroleum Institute v. SEC*,[240] the district court vacated the rule and remanded it back to the SEC. Although the opponents raised both First Amendment and cost-benefit issues, the court

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235. Dodd-Frank § 1504, 15 U.S.C. § 78m(q)(2)(A).

236. *Id.* § 1504, 15 U.S.C. § 78m(q)(3)(A).

237. *About Oxfam*, OXFAM AM., https://www.oxfamamerica.org/about/ [https://perma.cc/7SNB-HUSN] (last visited Feb. 13, 2019).

238. *Oxfam America Files Lawsuit Against Securities and Exchange Commission*, OXFAM AM.: PRESS RELEASES (May 16, 2012), https://www.oxfamamerica.org/press/oxfam-america-files-lawsuit-against-securities-and-exchange-commission/ [https://perma.cc/6C2K-M9BB].

239. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56365 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 & 249).

240. Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5 (D.D.C. 2013).

instead ruled on narrower grounds, stating that "the Commission misread the statute to mandate public disclosure of the reports, and its decision to deny any exemption [for countries that prohibit payment disclosure] was, given the limited explanation provided, arbitrary and capricious."[241]

When the SEC did not issue a revised final rule by September 2014, Oxfam America sued the SEC again claiming that it was unlawfully withholding a final rule implementing section 1504.[242] In *Oxfam America, Inc. v. SEC*,[243] the district court held that the SEC's failure to promulgate a final disclosure rule constituted agency action unlawfully withheld under the APA.[244] The SEC argued that it had promulgated a final rule and had not unlawfully withheld action, but the rule had been vacated by the D.C. District Court.[245] The court rejected the SEC's argument and held that the remand simply restored the status quo and "that the SEC's delay in promulgating the final extraction payments disclosure rule can be considered 'unlawfully withheld' as the duty to promulgate a final extraction payments disclosure rule remains unfulfilled more than four years past Congress's deadline."[246] The court ordered the SEC to file an expedited schedule for filing the rule.[247]

After having lost separate litigation battles to both opponents and supporters of the rule, the SEC issued its new final rule in June 2016.[248] Reporting under the new rule became effective in September 2016, but reporting was not required until 2019.[249] However, before the rule's reporting requirements became mandatory, Congress invalidated the rule in early 2017 under the Congressional Review Act.[250] These specific provisions of the Congressional Review Act are discussed in more detail in Part IV of this Article.[251]

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241. *Id.* at 11.

242. *See Oxfam America Sues SEC Over Delay on Oil, Gas and Mining Transparency Rules*, OXFAM AM.: PRESS RELEASES (Sept. 18, 2014), https://www.oxfamamerica.org/press/oxfam-america-sues-sec-over-delay-on-oil-gas-and-mining-transparency-rules/ [https://perma.cc/2EBJ-HENQ].

243. Oxfam Am., Inc. v. SEC, 126 F. Supp. 3d 168 (D. Mass. 2015).

244. *Id.* at 172.

245. *Id.*

246. *Id.*

247. *Id.* at 176.

248. Disclosure of Payments by Resource Extraction Issuers, 81 Fed. Reg. 49360 (July 27, 2016) (codified at 17 C.F.R. pts. 240 & 249b).

249. *Id.*

250. Congressional Review Act ("CRA"), Pub. L. No. 104-121, 110 Stat. 868 (1996).

251. *See* discussion *infra* Part IV.F.

The legal battle around section 1504 illustrates the potential future of litigation surrounding the Dodd-Frank Act. While opponents of the Act were far more vigorous in the courts in the early days of implementation, supporters of the Act have adopted several of the same legal strategies to challenge the deregulatory administrative actions of the Trump Administration. For example, in an echo of prior legal arguments, seven state attorneys general have sued to block the SEC's recent rulemaking on Regulation Best Interest,[252] claiming that the agency failed to follow the Dodd-Frank Act's statutory mandate and that it was based on a flawed economic analysis.[253] A decade into implementation, the Dodd-Frank Act continues to provide grist for the legal mill.

IV. LEGISLATION AND EXECUTIVE ACTION

The most important factor determining whether legislative activity around the Dodd-Frank Act for the past decade was successful has been divided government. Except for a brief two-year period (2017–2018), neither political party has controlled the House, Senate, and Presidency. In addition, neither party during that time has held more than sixty seats in the Senate—the threshold necessary to invoke cloture and close off debate in the Senate.[254] As a result, this has meant that opponents of the Dodd-Frank Act only have been able to make changes to the law if they can convince supporters of the law to join them, or by pursuing legislative strategies that involve the limited exceptions that avoid the cloture requirements in the Senate.

While some of the legislative efforts to amend the Dodd-Frank Act described in this Part were unsuccessful, they provide important insight into the policy goals of the opponents of the Act. In addition,

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252. Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33318 (July 12, 2019) (to be codified at 17 C.F.R. pt. 240).

253. Complaint for Declaratory & Injunctive Relief, New York v. SEC, No. 1:19-cv-08365 (S.D.N.Y. 2019); *see also* Dave Michaels, *Seven States Sue SEC on Concern Broker Rule Is Weak*, WALL ST. J. (Sept. 9, 2019, 11:31 PM), https://www.wsj.com/articles/seven-states-sue-sec-on-concern-broker-rule-is-weak-11568085859 [https://perma.cc/UNZ3-MVP3].

254. CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., 98-425, INVOKING CLOTURE IN THE SENATE 1 (2017), https://www.senate.gov/CRSpubs/be873e40-a966-4feb-9d72-cf23a93cbe46.pdf [https://perma.cc/QZ4C-WC39] ("Cloture is the only procedure by which the Senate can vote to set an end to a debate without also rejecting the bill, amendment, conference report, motion, or other matter it has been debating. . . . The majority required to invoke cloture for most business is three-fifths of the Senators duly chosen and sworn, or 60 votes if there are no vacancies in the Senate's membership.").

these unsuccessful efforts built a legislative foundation and contributed provisions to the limited number of legislative changes that ultimately passed. It is, therefore, useful to consider these bills to provide context for the legislative changes to the Act that were ultimately enacted into law.

A. The Financial CHOICE Act

The Financial CHOICE[255] Act ("CHOICE Act")[256] was first introduced in the 114th Congress by Representative Jeb Hensarling (R-TX), the Chairman of the House Financial Services Committee. Although the bill passed the Committee on a partisan vote of thirty to twenty-six, the full House of Representatives never considered the bill. An amended version of the bill was introduced as H.R. 10 in the 115th Congress.[257]

The CHOICE Act's supporters argued that, if adopted, the more than 600-page bill

> replaces onerous government fiat with market discipline; substitutes bankruptcy for taxpayer-funded bailouts; throws a deregulatory life preserver to our community financial institutions; replaces complexity with simplicity; holds both Washington and Wall Street accountable; and unleashes capital formation so the economy can move yet again for the betterment of our citizens.[258]

In furtherance of this expressed goal, the CHOICE Act would have repealed or amended almost every section of the Dodd-Frank Act

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255. The acronym "CHOICE" stands for "Crea[ting] Hope and Opportunity for Investors, Consumers, and Entrepreneurs." *See* H.R. 10, 115th Cong. (2017) ("[An Act t]o create hope and opportunity for investors, consumers, and entrepreneurs by ending bailouts and Too Big to fail, holding Washington and Wall Street accountable, eliminating red tape to increase access to capital and credit, and repealing the provisions of the Dodd-Frank Act that make America less prosperous, less stable, and less free, and for other purposes.").

256. H.R. 5983, 114th Cong. (2016).

257. H.R. 10. The biggest change between the original version of the CHOICE Act and H.R. 10 was the removal of a provision that would have deleted the Durbin amendment to the Dodd-Frank Act (section 1075) that limits transaction fees imposed on merchants by debit card issuers. This provision was highly contentious, and the provision was removed to attract additional Republican votes for the bill.

258. H.R REP. NO. 115-153, pt. 1, bk. 1, at 153 (2017) (accompanying H.R. 10).

had it been enacted into law. Major sections of the Dodd-Frank Act that would have been affected include:

- Repeal of Title II of the Dodd-Frank Act which establishes orderly liquidation authority for the FDIC to resolve failing nonbank financial institutions. The CHOICE Act also would have removed the FDIC from the review of "living wills,"[259] and created a new section in Chapter 11 of the U. S. Bankruptcy Code with procedures for "liquidating, reorganizing or recapitalizing covered financial corporations."[260]

- Repeal the powers of FSOC to designate nonbank financial institutions as SIFIs. It also would have canceled any existing designations, as well as repealed the Federal Reserve's authority to supervise and set regulations for nonbank financial institutions.[261]

- Exempt banks from risk-weighted capital ratios, liquidity requirements, enhanced prudential regulation (if the bank has more than $50 billion in assets), and other regulations if the bank opts to be subject to a 10% leverage ratio.[262]

- Require financial regulatory agencies to include cost-benefit analyses with all rulemakings and prohibit them from issuing a notice of final rulemaking if costs are greater than benefits without a joint resolution from Congress directing the agency to issue a notice of final rulemaking.[263] It also would have required that Congress approve rules having an annual effect on the economy of $100 million or more.[264]

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259. H.R. 10 § 111.
260. *Id.* § 122.
261. *Id.* § 151.
262. *Id.* §§ 601, 602.
263. *Id.* § 312.
264. *Id.* § 331.

- Place federal financial regulators under the congressional appropriations process.[265]
- Replace the CFPB with the Consumer Law Enforcement Agency and change that agency's powers, leadership, mandate, and funding.[266] It also would have removed the agency's examination and supervisory powers and made the Director removable at-will by the President.[267]
- Repeal the Volcker Rule limitations on bank proprietary trading.[268]
- Require an annual audit of the Federal Reserve and limit its emergency lending powers.[269]

The bill also contained dozens of additional changes targeted at specific issues of concern to opponents of the Dodd-Frank Act.

The CHOICE Act passed the House on June 8, 2017, with no Democrats voting in favor of the bill. Without a sixty-vote margin in the Senate, and with strong opposition to the bill by the Democrats in the Senate, there was never any real prospect that the Senate would take it up.

Turning to a different strategy, Chairman Hensarling began breaking off pieces of some of the less controversial provisions of the CHOICE Act in an attempt to garner support from some Democrats, offering them as individual bills in the Financial Services Committee and the House. Focusing on provisions to benefit small banks and credit unions, and ostensibly to assist borrowers and investors, Hensarling was able to gain at least some Democratic support for many of the bills. For example, in October 2017, the Financial Services Committee passed twenty-two bills—many by a bipartisan majority—including several that originated as provisions in the CHOICE Act.[270] In January 2018, the

265. *Id.* §§ 361–65.
266. *Id.* §§ 711–37.
267. *Id.*
268. *Id.* § 901.
269. *Id.* §§ 1008, 1010.
270. Press Release from Republicans on the U.S. House of Representatives Fin. Servs. Comm., Committee Advances 22 Bills Forward for House Consideration (Oct. 12, 2017),

Committee passed fifteen individual bills, several with bipartisan support, and many of which were derived from provisions in the CHOICE Act or included provisions under consideration in financial reform legislation that was concurrently being negotiated in the Senate.[271]

While continuing to push the CHOICE Act would have achieved very little legislatively, focusing on individual issues that had the potential to generate bipartisan support allowed Hensarling to show that the opponents of Dodd-Frank were willing to negotiate and accept less than their ultimate legislative desires. It also was an attempt to keep the House relevant in the deregulatory debate that was progressing in the Senate.

B. S. 2155 – The Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018

S. 2155,[272] the Economic Growth, Regulatory Relief, and Consumer Protection Act ("EGRRCPA"),[273] which made the most significant legislative changes to the Dodd-Frank Act since its enactment, grew out of bipartisan negotiations in the Senate Banking Committee and the election year needs of several Democratic Senators. Whether because of a desire to demonstrate that they could legislate in a bipartisan fashion or a need to demonstrate flexibility to potential campaign donors, several Senators who were up for reelection, many in states that had been carried in the 2016 election by President Trump, were primed to engage in discussions to amend the Dodd-Frank Act. However, their intention was to keep the effort limited to popular provisions intended to assist community banks and local communities. Initially four Democratic members of the Senate Banking Committee engaged in discussions with Chairman Crapo to identify areas of agreement.[274]

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https://republicans-financialservices.house.gov/news/documentsingle.aspx?DocumentID=402432 [https://perma.cc/6A86-2TS9].

271. Press Release from Republicans on the U.S. House of Representatives Fin. Servs. Comm., Committee Advances 15 Bills (Jan. 18, 2018), https://republicans-financialservices.house.gov/news/documentsingle.aspx?DocumentID=402932 [https://perma.cc/GC5P-LWUC].

272. S. 2155, 115th Cong. (2017) (enacted); *accord* Economic Growth, Regulatory Relief, and Consumer Protection Act ("EGRRCPA"), Pub. L. No. 115-174, 132 Stat. 1296 (2018).

273. EGRRCPA, Pub. L. No. 115-174, 132 Stat. 1296.

274. Amanda Terkel, Arthur Delaney & Zach Carter, *Behind the Scenes of the Bruising Bank Fight that Divided Senate Democrats*, HUFFPOST (June 7, 2018, 2:41 PM), https://www.huffpost.com/entry/senate-democrats-banking-fight_n_5b188c89e4b09578259ed910 [https://perma.cc/WYK3-4S24].

Following a few months of negotiations, the EGRRCPA was introduced as S. 2155 on November 16, 2017, with nine Democratic Senators and one Independent as cosponsors.[275] The bill quickly passed the Senate Banking Committee a month later and passed the full Senate on March 14, 2018, by a vote of sixty-seven in favor and thirty-one against—far exceeding the sixty-vote threshold—with the concurrence of seventeen Democrats and Independents. After a delay of several months where Chairman Hensarling sought to add additional provisions from the CHOICE Act and various House bills to the bill, S. 2155 passed the House by a bipartisan vote of 258 to 159 and was signed into law by President Trump on May 24, 2018.[276]

Although the EGRRCPA, as enacted, was a far cry from the extensive rollback of the Dodd-Frank Act that many of its opponents had wanted, it nevertheless included several significant changes. Among other things, the main provisions of EGRRCPA, as enacted, included the following:

- Increases the asset threshold for automatic designations of banks as SIFIs to $250 billion from the Dodd-Frank Act's $50 billion threshold. This amendment reduced by more than half the number of banks with assets over $50 billion that would automatically be designated as SIFIs. The Act also sets a $250 billion asset threshold for all Federal Reserve- and company-run tests, as well as permits changes in the test scenarios and reduces the frequency of self-conducted tests.[277]

- Exempts banks with $10 billion or less in assets from the Volcker Rule.[278]

- Creates a community bank leverage ratio[279] for banks with less than $10 billion to simplify their capital

275. Non-Republican original cosponsors included Senators Donnelly, Heitkamp, Tester, Warner, McCaskill, Manchin, King, Kaine, Peters, and Bennet.

276. EGRRCPA, Pub. L. No. 115-174, 132 Stat. 1296.

277. *Id.* § 401, 132 Stat. at 1356–59.

278. *Id.* § 203, 132 Stat. at 1309.

279. *Id.* § 201(a)(1), 132 Stat. at 1306 ("[T]he ratio of the tangible equity capital of a qualifying community bank, as reported on the qualifying community bank's applicable

compliance.[280] The leverage ratio would be at least 8% and no more than 10%.[281]

- Relaxes the supplementary leverage ratio ("SLR")[282] requirements established by the federal financial regulators under the enhanced capital requirements of the Dodd-Frank Act for banks that are "predominantly engaged in custody, safekeeping, and asset servicing activities."[283] Custodian bank funds that are deposited with the Fed or another central bank would not be counted as assets for the SLR calculation.[284]

- Revises the liquidity coverage ratio[285] rule that requires banks with at least $250 billion in assets, or $10 billion in on-balance-sheet foreign exposure, to hold a certain amount of high-quality liquid assets ("HQLA")[286] that can be easily sold during a crisis to

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regulatory filing with the qualifying community bank's appropriate Federal banking agency, to the average total consolidated assets of the qualifying community bank, as reported on the qualifying community bank's applicable regulatory filing with the qualifying community bank's appropriate Federal banking agency.").

280. *Id.* § 201(c)(1)(A)–(B), 132 Stat. at 1307. A bank that exceeds the ratio would be considered to have met: (1) generally applicable leverage and risk-based capital requirements under federal banking rules; and (2) banking regulatory standards for well-capitalized depository institutions. *Id.*

281. *Id.* § 201(b)(1), 132 Stat. at 1306.

282. Regulatory capital Rules: Regulatory Capital, Enhanced Supplementary Leverage Ratio Standards for Certain Bank Holding Companies and Their Subsidiary Insured Depository Institutions, 79 Fed. Reg. 24528, 24530 (May 1, 2014) (codified at 12 C.F.R. pts. 6, 208, 217 & 324) ("[A] non-risk-based measure of tier 1 capital relative to an exposure amount that includes both on- and off-balance sheet exposures.").

283. EGRRCPA § 402(a), 132 Stat. at 1359.

284. *Id.* § 402(b)(2)(a), 132 Stat. at 1359–60.

285. Liquidity Coverage Ratio: Liquidity Risk Measurement Standards, 79 Fed. Reg. 61439, 61443 (Oct. 10, 2014) (codified at 12 C.F.R. pts. 50, 249 & 329) ("The final rule requires a covered company to maintain an amount of HQLA meeting the criteria set forth in this final rule (the HQLA amount, which is the numerator of the ratio) that is no less than 100 percent of its total net cash outflows over a prospective 30 calendar-day period (the denominator of the ratio).").

286. Liquidity Coverage Ratio: Liquidity Risk Measurement, Standards, and Monitoring, 78 Fed. Reg. 71817, 71823 (Nov. 29, 2013) (to be codified at 12 C.F.R. pts. 50, 249 & 329) ("Assets that would qualify as HQLA should be easily and immediately convertible into cash with little or no loss of value during a period of liquidity stress.").

include a municipal security that is liquid, readily marketable, and investment-grade.[287]

- Increases an asset cap from $1 billion to $3 billion under which well-capitalized and highly rated insured banks can receive an on-site regulatory examination every eighteen months instead of every twelve months.[288]

- Allows banks with less than $5 billion in assets to submit abbreviated required financial reports to federal regulators every other quarter. However, full reports would still be required for the remaining quarters.[289]

- Allows a residential mortgage loan to qualify as a qualified mortgage[290] if it is originated and held in portfolio for the duration of the loan by an insured depository institution or credit union that—together with its affiliates—has less than $10 billion in assets.[291]

The EGRRCPA also included a number of additional provisions to reduce the regulatory burden regarding community banks, residential mortgage lending, and capital formation.

The passage of the EGRRCPA left many hard feelings between Democrats who supported the bill and those who opposed it. The presidential campaign of one of the bill's strongest opponents, Senator Elizabeth Warren, published the names of Democrats who voted for the bill and said, "[w]e want everyone to know whose side their senators are standing on this week: the big banks or the American people."[292] Democratic Senators supporting the bill issued a seven point rebuttal of

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287. EGRRCPA § 403, 132 Stat. at 1360.
288. *Id.* § 210, 132 Stat. at 1316.
289. *Id.* § 205, 132 Stat. at 1310.
290. *Id.* § 101, 132 Stat. at 1297–98; *accord* 15 U.S.C. § 1639c(b)(2)(A) (2018) (defining "qualified mortgage" as any residential mortgage where the consumer is presumed to have a reasonable ability to repay the loan).
291. EGRRCPA § 101, 132 Stat. at 1297–98.
292. Terkel, Delaney & Carter, *supra* note 274.

the "Fact versus Fiction" of the bill arguing that it was appropriately targeted to benefit Main Street and not Wall Street.[293] The fact that a number of the Senators who supported the EGRRCPA lost in the 2018 election[294]—despite their participation in the bipartisan effort to pass the bill—would not provide much encouragement for future bipartisan support for additional legislation to amend the Dodd-Frank Act.[295]

The EGRRCPA was clearly the most significant legislative change to the Dodd-Frank Act. Its sponsors were able to seize a brief window of time to pass a bill with limited reach that served the political needs of both sides of the aisle. This differentiated it from prior legislative deregulation efforts which followed much more partisan legislative strategies with limited effect.

Although the law was passed with bipartisan support, its implementation has been controversial. House Financial Services Chairman Maxine Waters summed up the concerns of many supporters of the Dodd-Frank Act in stating that she is

> concerned that our banking regulators are following the dangerous deregulatory blueprint that the Trump Administration laid out in a series of Treasury reports, and checking off deregulatory items one by one. For example, they have moved to weaken capital, stress testing, and other requirements for the largest financial institutions; taken action to weaken the Volcker rule, a rule which prevents banks from gambling with taxpayer dollars; and proposed weakening the swap margin rule, which would threaten our economic stability for a $40 billion giveaway to Wall Street megabanks. In rolling

293. Joint Statement from Senators Donnelly, Heitkamp, Tester & Warner, U.S. Senate Comm. on Banking, Hous. & Urban Affairs, FACT versus FICTION: Bipartisan regulatory relief helps Main Street and rural communities while staying tough on Wall Street, https://www.banking.senate.gov/download/12-4-myth-fact-on-fin-reg-reform-billheitkamp-tester-donnelly-warnerdocx [https://perma.cc/B6KT-MZLQ].

294. Democratic Senators who supported the bill and lost the election included Donnelly, Heitkamp, McCaskill, and Nelson. Republican Senator Heller also supported the bill and lost his reelection bid.

295. Victoria Guida & Zachary Warmbrodt, *Bank-Friendly Senate Democrats Fall in Midterms, in Blow to Industry*, POLITICO (Nov. 7, 2018, 10:11 PM), https://www.politico.com/story/2018/11/07/banking-financial-services-committees-see-shakeup-in-blow-to-industry-2164813 [https://perma.cc/H2HW-H43W] ("After last night, it would be hard for Dem senators to think that cooperating with Republicans on financial policy is helpful to winning re-election.").

> back important reforms put in place in the [Dodd-Frank Act] to protect consumers, investors and the economy, regulators are opening the door to bad practices that contributed to the devastating financial crisis of 2008.[296]

The Trump Administration has moved aggressively to implement the EGRRCPA. In the eighteen months since its passage, the federal financial regulators have issued final rules for twelve provisions of the Act.[297] These regulations include changes to the rules regarding the examination cycle, resolution plans, stress tests, capital ratios, and the Volcker Rule.

Although Administration officials have contended that they are implementing the Act in a manner intended to "ensure our regulatory regime is not only simple, efficient, and transparent, but also coherent and effective,"[298] supporters of the Dodd-Frank Act have questioned whether they are using the EGRRCPA as license to greatly expand the deregulatory impact of the enacted reforms. For example, in commenting on the regulators' proposed rule to amend the Volcker Rule, Paul Volcker wrote that, "[t]he new rule amplifies risk in the financial system, increases moral hazard and erodes protections against conflicts of interest that were so glaringly on display during the last crisis."[299] He went on to note:

> It bolsters the views of skeptics who believe that the "simplification" effort was merely a ploy to weaken the core elements of the reform. It also serves as a reminder of the insidious nature of lobbying in regulation and

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296. Press Release, House Comm. on Fin. Servs., Waters Urges Regulators to Hold Depository Institutions Accountable (Dec. 4, 2019), https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=404887 [https://perma.cc/AD88-AS76].

297. *Oversight of Prudential Regulators: Ensuring the Safety, Soundness, Diversity, and Accountability of Depository Institutions?: Hearing Before the H. Comm. on Fin. Servs.*, 116th Cong. (Dec. 4, 2019) (statement of Jelena McWilliams, Chairman, Fed. Deposit Ins. Corp.), https://financialservices.house.gov/uploadedfiles/hhrg-116-ba00-wstate-mcwilliamsj-20191204.pdf [https://perma.cc/JMJ8-YAJE].

298. *Statement Before the Comm. on Fin. Servs. on the Economic Growth, Regulatory Relief, and Consumer Protection Act*, 116th Cong. (Dec. 4, 2019) (statement of Randal K. Quarles, Vice Chair for Supervision, Bd. of Governors of the Fed. Reserve Sys.), https://www.federalreserve.gov/newsevents/testimony/files/quarles20191204a.pdf [https://perma.cc/TP3B-DNZH].

299. Letter from Paul Volcker to Chairman Jerome Powell (Aug. 20, 2019) (on file with author).

> should trouble anyone concerned with the eroding public trust in government and the role of the Federal Reserve as the principle guardian of financial stability.[300]

For their part, the Republican supporters of the EGRRCPA on the Senate Banking Committee continued to urge federal financial agencies to move forward rapidly with implementation,[301] partially to avoid delayed rulemaking that would not be finalized within sixty legislative days of the end to the Congress and thus potentially subject to the future application of the Congressional Review Act depending on the outcome of the 2020 elections.[302]

C. Appropriations

Appropriations bills are one of the favored ways for Members of Congress to attempt to pass legislation that they otherwise can not pass through the normal legislative process. Congress must pass legislation each year to fund government programs, thus providing annual opportunities for making legislative changes. Although the Rules of the House of Representatives[303] and of the Senate[304] generally prohibit legislating on an appropriations bill, it is nevertheless a fairly common practice. Like their legislative brethren, appropriations bills in the Senate still must by rule meet a sixty-vote threshold to limit debate,[305] so their utility as legislative vehicles is limited for controversial legislation.

Since the passage of the Dodd-Frank Act, opponents of the Act have sought to use the appropriations process to alter its provisions with limited success. Nevertheless, the appropriations process did result in

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300. *Id.*

301. Letter from Republican Members of the U.S. Senate Banking Comm. to Jerome H. Powell, Chairman, Bd. of Governors of the Fed. Reserve Sys., Joseph M. Otting, Comptroller, Office of the Comptroller of the Currency, and Jelena McWilliams, Chairman, Fed. Deposit Ins. Corp. (July 30, 2019), https://www.banking.senate.gov/imo/media/doc/Powell%20Otting%20McWilliams%20Letter%207-30-19.pdf [https://perma.cc/7U5F-ZLXJ].

302. For a deeper discussion of the Congressional Review Act, see *infra* Part IV.F of this Article.

303. RULES OF THE HOUSE OF REPRESENTATIVES, R. XXI, cl. 2, at 35 (116th Cong., 2019), https://rules.house.gov/sites/democrats.rules.house.gov/files/116-1/116-House-Rules-Clerk.pdf [https://perma.cc/XNF7-XWGL].

304. STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, R. XVI, at 11–12 (2013), https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf [https://perma.cc/S3ZS-N6DB] (GPO edition).

305. *Id.* at R. XXII, at 15–17.

one significant change to the Dodd-Frank Act. Section 716 of the Act,[306] known as the "swaps pushout rule," prohibited federal assistance (including access to the Federal Reserve's discount window and deposit insurance) to banks that engaged in certain swap activities. As a result, banks were required to move such activities outside the bank to separately capitalized nonbank affiliates. The provision had been controversial since it was originally proposed during consideration of the Dodd-Frank Act.[307]

The large banks that were most affected by the swaps pushout rule disliked the provision, arguing that it was costly and difficult to implement. They had spent several years trying to amend or repeal the Act. Working behind the scenes to change the language, the large banks had enlisted some regional banks in the effort to amend the law. In 2013, a bill to amend the swaps pushout rule[308] passed the House by a vote of 292 to 122, with seventy Democrats voting in support. The passage of the bill was the subject of some controversy when it was revealed that most of the bill was based on language that had been drafted by lobbyists for the large banks.[309] The bill did not repeal the swaps pushout rule, but permitted banks to retain certain types of swap activities within the bank, requiring that far fewer activities be pushed out of the bank. Although the bill had passed the House with the support of seventy Democrats, the Senate did not take it up.

In 2014, similar language was added the Financial Services and General Government Appropriations bill.[310] Late in that year, Congress and the Obama Administration reached an agreement and passed legislation that was signed into law to fund the government for the coming fiscal year through a last-minute omnibus appropriations bill that

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306. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 716, 15 U.S.C. § 8305 (2018).

307. Dave Clarke, Kate Davidson & John Prior, *How Wall St. Got Its Way: Liberals Fight Back, But can't Stop, Bonanza for Banks.*, POLITICO (Dec. 11, 2014, 10:40 PM), https://www.politico.com/story/2014/12/wall-street-spending-bill-congress-113525 [https://perma.cc/JB5D-YXNV].

308. Swaps Regulatory Improvement Act, H.R. 992, 113th Cong. (2013); *see* Dodd-Frank § 716, 15 U.S.C. § 8305.

309. Eric Lipton & Ben Protess, *Banks' Lobbyists Help in Drafting Financial Bills*, N.Y. TIMES (May 23, 2013, 9:44 PM), https://dealbook.nytimes.com/2013/05/23/banks-lobbyists-help-in-drafting-financial-bills/ [https://perma.cc/X95C-K8TF] ("Citigroup's recommendations were reflected in more than 70 lines of the House Committee's 85-line bill.").

310. Financial Services and General Government Appropriations Act, H.R. 5016, 113th Cong. (2014).

included language to amend the swaps pushout rule.[311] The language caused an uproar among the Dodd-Frank Act's strongest supporters.[312] Not only were they concerned about the substance of the legislation, they also were concerned that the precedent of attaching changes to the Dodd-Frank Act in must-pass funding bills would provide a roadmap to future legislative changes.[313] However, the uproar surrounding the efforts to change the Act through this process generated so much public attention and negative publicity that the heightened vigilance of the Dodd-Frank Act supporters in subsequent appropriations bills ensured that no other significant changes to the Act would be made successfully through this process going forward.

For example, the Fiscal Year 2018 ("FY18") Financial Services and General Government Appropriations bill,[314] as introduced, included numerous provisions from the Financial CHOICE Act, including: (a) repealing the FSOC's ability to designate nonbank financial institutions as SIFIs;[315] (b) altering the membership, proceedings and duties of the FSOC;[316] (c) making all of the federal financial regulators subject to appropriations;[317] (d) repealing the Volcker Rule;[318] (e) altering the living will process;[319] (f) eliminating the CFPB's authority to supervise and examine financial institutions;[320] and (g) eliminating the enforcement authority of the CFPB with regard to payday loans.[321] In addition, the bill included a new Chapter 14 of the U.S. Bankruptcy Code regarding the failure of large complex financial institutions.[322] Yet, none of these provisions survived the appropriations process, nor were they enacted into law.

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311. Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235, 128 Stat. 2130 (2014).

312. Lipton & Protess, *supra* note 309.

313. *Id.* ("This is a road map for stealth unwinding of financial reform." (quoting Representative Barney Frank)).

314. Financial Services and General Government Appropriations Act, H.R. 3280, 115th Cong. (2017).

315. *See id.* § 903.

316. *See id.*

317. *See id.* §§ 904–08.

318. *See id.* § 933.

319. *See id.* § 903.

320. *See id.* § 927.

321. *See id.* § 928.

322. *See id.* § 1001.

D. Budget Reconciliation

In 2017, with Republicans in control of the House, Senate, and Presidency, but with a Senate majority still below the sixty-vote threshold to cut off debate, opponents of the Dodd-Frank Act looked for legislative actions that they could take with a simple majority vote in the Senate. A process known as budget reconciliation provided just such an opportunity.

Under the Congressional Budget Act,[323] the Congress annually adopts a budget resolution setting out the budgetary goals for the coming fiscal year. The budget resolution is not signed by the President and therefore does not carry the force of law. To meet the budgetary goals, Congress often must pass separate legislation "to reconcile existing law with its current priorities."[324] "Reconciliation" provides an expedited procedure for considering legislation to bring existing spending and revenue laws into compliance with the new budget.[325]

Congress first adopts a budget resolution that includes reconciliation instructions which instruct relevant authorizing committees to develop and report legislation that will achieve the budget goals of the budget resolution.[326] The relevant committees develop and report legislation that meets their assigned targets of spending reductions or revenue increases. The committees then report their legislative recommendations to the Budget Committee which packages them into a reconciliation bill for consideration by the House and Senate.[327] In the Senate, reconciliation bills are privileged and it is generally "unnecessary to invoke cloture in order to reach a final vote on a reconciliation bill in the Senate."[328] Thus, if legislation will reduce spending or increase revenues through reconciliation, it is possible for a simple majority in both the House and the Senate to move legislation to the President. During times of unified government, this allows the majorities in the

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323. Congressional Budget and Impoundment Act, Pub. L. No. 93-344, 88 Stat. 297 (1974).

324. MEGAN S. LYNCH, CONG. RESEARCH SERV., R44058, THE BUDGET RECONCILIATION PROCESS: STAGES OF CONSIDERATION 1 (2017), https://crsreports.congress.gov/product/pdf/R/R44058 [https://perma.cc/RV82-2BW8].

325. *Id.*

326. *Id.* at 2.

327. *Id.* at 5.

328. *Id.* at 8.

House and Senate and the President to enact laws under expedited procedures with no minority support.

Prior to passage of the Dodd-Frank Act, the FDIC only had authority to manage the failure of banks, but not their holding companies or other nonbank entities.[329] Title II of the Dodd-Frank Act gave the FDIC orderly liquidation authority ("OLA") to manage the failures of bank holding companies and other financial institutions that had been designated as SIFIs.[330] The FDIC is empowered to borrow from the Treasury to fund these resolutions[331] and to recapture any costs from remaining bank holding companies and SIFIs at no cost to the taxpayer.[332]

Critics of OLA have argued that Title II effectively enshrines "Too Big to Fail" by using government resources to manage the resolution of these institutions rather than having them go through bankruptcy as in the case of the failure of Lehman Brothers.[333] Supporters of OLA argue that the inability to manage the failures of large, complex financial institutions actually results in "Too Big to Fail" as the government has limited options for managing their failure other than providing financial support.[334] Under OLA, if an institution fails, its management is replaced, and its assets are liquidated.[335]

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329. *Establishing a Framework for Systemic Risk Regulation: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 111th Cong. (2009) (statement of Sheila C. Bair, Chairman, Fed. Deposit Ins. Corp.), *republished in Speeches & Testimony*, FED. DEPOSIT INS. CORP. (July 23, 2009), https://www.fdic.gov/news/news/speeches/archives/2009/spjuly2309.html [https://perma.cc/925A-N2NA].

330. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 204, 12 U.S.C. § 5384(a) (2018).

331. *Id.* § 210, 12 U.S.C. § 5390(n) (2018).

332. *Id.* § 214, 12 U.S.C. § 5394 (2018).

333. REPUBLICAN STAFF OF THE H. FIN. SERVS. COMM., 113TH CONG., 2D SESS., REPORT ON FAILING TO END "TOO BIG TO FAIL": AN ASSESSMENT FOR THE DODD-FRANK ACT FOUR YEARS LATER 1, *passim* (July 2014), http://faculty.haas.berkeley.edu/ross_levine/Other/House_Republications_071814_tbtf_report_final.pdf [https://perma.cc/D67Y-RDXJ] ("[The report] concludes that not only did the Dodd-Frank Act not end 'too big to fail,' it had the opposite effect of further entrenching it as official government policy.").

334. Erika Eichelberger, *The House GOP's Hypocrisy on "Too-Big-To-Fail"*, MOTHER JONES (Nov. 22, 2013), https://www.motherjones.com/politics/2013/11/house-republicans-too-big-to-fail/ [https://perma.cc/AE4S-BMBD] ("The GOP-controlled House, meanwhile, has passed legislation making it more likely that failing banks will get government handouts, and attempted to defund measures that would help the government wind down failing banks.").

335. Martin J. Gruenberg, Chairman, Fed. Deposit Ins. Corp., A Progress Report on the Resolution of Systemically Important Financial Institutions (May 12, 2015) (speaking to the Peterson Institute for International Economics in Washington, D.C.), *reprinted in Speeches &*

Although OLA is designed to recover any costs incurred in the resolution of a large, complex financial institution from assessments on the financial industry,[336] the Congressional Budget Office ("CBO") has "scored" OLA as increasing the deficit by approximately $15 billion under congressional budget rules.[337] In preparing its estimate, CBO recognized:

> Although the probability that the FDIC will have to liquidate a systemically important firm in any year is small, the potential cash flows associated with resolving them would likely be large. CBO's baseline projections reflect the estimated probability of various scenarios regarding the frequency and magnitude of systemic financial problems.[338]

CBO also recognized that "the FDIC would eventually recover the cost of any additional losses by raising assessments on insured deposits; however, CBO estimates that such recoveries would occur over many years."[339] "The true cost to taxpayers from OLA is zero, although over an arbitrary ten-year period it may be counted as having a cost. Thus, if OLA is counted as increasing the deficit over a ten-year period, repealing OLA is counted as reducing the deficit."[340]

Based on the CBO score, repeal of OLA under Title II of the Dodd-Frank Act would result in deficit reduction of $15 billion.[341] This budget "savings" made the repeal of OLA a very attractive target for its opponents. By including repeal of OLA in the reconciliation bill, they

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Testimony, FED. DEPOSIT INS. CORP., https://www.fdic.gov/news/news/speeches/archives/2015/spmay1215.html [https://perma.cc/Y7RM-7Q75] (last updated May 13, 2015).

336. Dodd-Frank § 214, 12 U.S.C. § 5394(b).

337. CONG. BUDGET OFFICE, COST ESTIMATE OF H.R. 4894: A BILL TO REPEAL TITLE II OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 3 (2016) [hereinafter CBO COST ESTIMATE OF H.R. 4894], https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/costestimate/hr4894.pdf [https://perma.cc/GU6D-9XCM].

338. *Id.*

339. *Id.* at 4.

340. Aaron Klein, *A Primer on Dodd-Frank's Orderly Liquidation Authority*, BROOKINGS (June 5, 2017), https://www.brookings.edu/blog/up-front/2017/06/05/a-primer-on-dodd-franks-orderly-liquidation-authority/ [https://perma.cc/PJR8-59A3].

341. CBO COST ESTIMATE OF H.R. 4894, *supra* note 337, at 5.

could achieve a very substantial savings under the budget rules and achieve a major legislative goal at the same time.

Previous efforts by opponents of the Dodd-Frank Act to repeal OLA had been unsuccessful in a world of divided government with no support by Democrats in the Senate,[342] so reconciliation was frequently considered as a way to amend OLA.[343] In the end, however, OLA was not included in the reconciliation bills during the two years of Republican control of the House and Senate from 2017 to 2018. Instead, the Republican leadership chose to use reconciliation as the legislative vehicle for other high-profile, controversial legislation, such as the unsuccessful attempt to repeal the Affordable Care Act and the successful effort to enact the Trump Administration's tax cuts.[344] When Democrats retook the House in 2018, reconciliation ceased being a viable legislative alternative to repeal OLA for the time being.

E. Bankruptcy Code

As detailed above, opponents of the Dodd-Frank Act sought to repeal OLA through the CHOICE Act and reconciliation. However, simply repealing OLA begged the question of how to handle the failure of large, complex financial institutions when the bankruptcy process failed so completely during the financial crisis. To address this issue, opponents proposed amending the U.S. Bankruptcy Code[345] to address the failure of large financial institutions.[346]

342. Andrew Leonard, *Sabotage: The New GOP Plan*, SALON (May 4, 2012, 3:45 PM), https://www.salon.com/2012/05/04/sabotage_the_new_gop_plan/ [https://perma.cc/V9U8-QQYX].

343. Norbert Michel, *Budget Reconciliation: A Viable Path for CHOICE Act Reforms*, FORBES (Sept. 4, 2017, 10:26 PM), https://www.forbes.com/sites/norbertmichel/2017/09/04/budget-reconciliation-a-viable-path-for-choice-act-reforms/#3d8627b9496f [https://perma.cc/A9T6-EU92].

344. Ryan Rainey, *GOP Lawmakers Weighing Whether to Use Tax Bill to Dismantle Dodd-Frank*, MORNING CONSULT: FIN. REG. (Sept. 28, 2017, 5:14 PM), https://morningconsult.com/2017/09/28/gop-lawmakers-weighing-whether-use-tax-bill-dismantle-dodd-frank/ [https://perma.cc/MWH8-QUGE].

345. *See* S. 1861, 113th Congress (2013) (illustrating legislation introduced by Senators Cornyn and Toomey to create a new Chapter 14 of the U.S. Bankruptcy Code); H.R. 5421, 113th Cong. (2014) (proposing to add a new subchapter V to Chapter 11 of the U.S. Bankruptcy Code).

346. *See* S. 1861; H.R. 5421.

The Dodd-Frank Act contemplates bankruptcy as the first option in the case of a large systemic financial institution.[347] Before triggering the OLA,[348] the Act requires a determination by the Secretary of the Treasury, based on a recommendation from super majorities of the Boards of the Federal Reserve and the FDIC,[349] that a resolution of the firm under any other federal law, such as bankruptcy, "would have serious adverse effects on financial stability in the United States."[350] Section 165(d) of the Dodd-Frank Act requires certain defined financial institutions to provide resolution plans for the rapid and orderly resolution of the institutions in the event of material financial distress or failure to facilitate a resolution either in bankruptcy or under OLA.[351] These plans are required to be submitted to the Federal Reserve and the FDIC for review.[352]

Once OLA is triggered, the FDIC is granted powers and authorities similar to those it has historically exercised to manage the failure of a bank, including the authority to establish bridge companies and transfer assets.[353] To clarify how it would exercise those powers and authorities in the context of OLA, the FDIC published a plan, called the single point of entry ("SPOE") strategy, describing how it would manage the failure of a systemic institution.[354]

Opponents of the Dodd-Frank Act and OLA in the House introduced legislation, the Financial Institution Bankruptcy Act ("FIBA"),[355] to add a new subchapter V to Chapter 11 of the U.S. Bankruptcy Code and to address the special circumstances of the failure

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347. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 203(a)(2)(F), 12 U.S.C. § 5383(a)(2)(F) (2018).

348. *Id.* § 203(b)(2), 12 U.S.C. § 5383(b)(2).

349. *Id.* § 203(a)(1)(A), 12 U.S.C. § 5383(a)(1)(A).

350. *Id.* § 203(b)(2), 12 U.S.C. § 5383(b)(2).

351. 12 U.S.C. § 5365(a), (d)(1) (2018) (stating that bank holding companies with total consolidated assets of $250 billion or more and nonbank financial companies designated by the FSOC are subject to the OLA). Note that the EGRRCPA increased this threshold to $250 billion—the original threshold set by the Dodd-Frank Act was $50 billion. *Compare* Dodd-Frank Regulatory Relief and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203, § 113, 124 Stat. 1376, 1398–1402 (2010) (setting threshold at $50 billion); *with* Economic Growth, Regulatory Relief, and Consumer Protection Act ("EGRRCPA"), Pub. L. No. 115-174, § 401, 132 Stat. 1296, 1356–59 (2018) (raising threshold from $50 billion to $250 billion).

352. 12 U.S.C. § 5365(a), (d)(1).

353. 12 U.S.C. § 5390 (2018); *cf.* 12 U.S.C. § 1821(d) (2018).

354. Resolution of Systemically Important Financial Institutions: The Single Point of Entry Strategy, 78 Fed. Reg. 76614 (Dec. 18, 2013) (notice and request for comments).

355. H.R. 5421, 113th Cong. (2014).

of a large, complex financial institution. FIBA would authorize bankruptcy courts to operate over forty-eight hours to move the original firm's operations to a new bridge company and all operating subsidiaries would remain outside of the bankruptcy. The bridge company would be recapitalized by leaving behind long-term, unsecured debt to absorb the losses of the firm. Derivatives contracts would be stayed, and the proceedings would be overseen by a federal bankruptcy judge.

A similar bill, the Taxpayer Protection and Responsible Resolution Act,[356] was introduced in the Senate but took the additional step of repealing OLA. Interestingly, both bills essentially codified the SPOE strategy that the FDIC had developed in bankruptcy for systemic financial institutions. However, neither addressed the issues of funding, international cooperation, and preplanning that were so important to the SPOE strategy.

FIBA passed the House by voice vote in the 113th, 114th, and 115th Sessions of Congress. During debate, Democrats supported the legislation as a complement to OLA in Title II of the Dodd-Frank Act. They noted that the bill would improve the bankruptcy process and increase the chances that Title II would not need to be invoked in an emergency. They also made clear that their support was contingent on the bill not repealing Title II OLA.[357]

The concept of bankruptcy reform as a complement to Title II of the Dodd-Frank Act, rather than a replacement, has gained momentum over time. In a July 2015 hearing on the Taxpayer Protection and Responsible Resolution Act,[358] none of the witnesses called to support the bill were willing to support the repeal of Title II and most viewed it as an important backstop.[359] In April 2017, President Trump issued a memorandum to the Secretary of the Treasury directing him to "examine . . . OLA . . . to propose recommendations for reform of OLA guided by

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356. S. 1861, 113th Cong. (2013).

357. CONG. REC. H8178 (dailey ed. Dec. 1, 2014) (statement of Representative Conyers), https://www.congress.gov/113/crec/2014/12/01/CREC-2014-12-01-pt1-PgH8174-4.pdf [https://perma.cc/4BZ6-LGF2] ("[T]his bill, unlike similar legislation in the Senate, doesn't include any controversial provisionsaimed at undoing the important protections of the Dodd-Frank Act.").

358. S. 1861, 113th Cong. (2013).

359. *The Role of Bankruptcy Reform in Addressing Too Big to Fail: Hearing Before the Subcomm. on Fin. Insts. & Consumer Prot., S. Comm. on Banking, Hous. & Urban Affairs*, 114th Cong. 18–20 (2015) (statement of Simon Johnson, Ronald A. Kurtz Professor of Entrepreneurship, MIT Sloan Sch. of Mgmt.), https://www.govinfo.gov/content/pkg/CHRG-114shrg97650/pdf/CHRG-114shrg97650.pdf [https://perma.cc/4Q5C-ULWC].

the Core Principles[[360]] and to examine whether a new chapter of the Bankruptcy Code should be adopted for the resolution of financial companies."[361] Following the examination of OLA, the Treasury recommended revisions to it and "retaining OLA as an emergency tool for use under only extraordinary circumstances."[362] Treasury went on to state:

> While bankruptcy must be the presumptive option, the bankruptcy of large, complex financial institutions may not be feasible in some circumstances, including when there is insufficient private financing. In those cases, a reformed OLA process—with predictable, clear allocation of losses to shareholders and creditors—is a far preferable alternative to destabilizing financial contagion or ad hoc government bailouts.[363]

With this determination by the Treasury Department, it seems unlikely that Congress will repeal OLA in the near future. However, it is important to note that, even with strong bipartisan support, Congress has not yet passed legislation to improve the ability of the bankruptcy system to handle the failure of systemically significant institutions even thougth the Dodd-Frank Act retains this as the first option.

F. Congressional Review Act

The Congressional Review Act ("CRA")[364] is a law that previously only had been used one time between its passage in 1994 and 2017. As the name suggests, the law establishes a mechanism for Congress to review certain agency rules before they become effective.[365]

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360. Exec. Order No. 13722, 82 Fed. Reg. 9965 (Feb. 3, 2017); *see infra* Part V (excerpting Core Principles).

361. Memorandum from President Donald J. Trump on Orderly Liquidation Authority for the Secretary of the Treasury (Apr. 21, 2017), https://www.govinfo.gov/content/pkg/DCPD-201700266/pdf/DCPD-201700266.pdf [https://perma.cc/KG7T-6VFS].

362. U.S. DEP'T OF THE TREASURY, REPORT TO THE PRESIDENT OF THE UNITED STATES PURSUANT TO THE PRESIDENTIAL MEMORANDUM ISSUED APRIL 21, 2017, ORDERLY LIQUIDATION AUTHORITY AND BANKRUPTCY REFORM 2 (2018), https://home.treasury.gov/sites/default/files/2018-02/OLA_REPORT.pdf [https://perma.cc/295T-NDYJ].

363. *Id.*

364. Congressional Review Act ("CRA"), Pub. L. No. 104-121, 110 Stat. 868 (1996).

365. *See supra* Part III.A (discussing CRA).

Congress had previously sought to exercise a review over agency rulemaking through the mechanism of the "legislative veto" which was invalidated by the Supreme Court as unconstitutional.[366]

Under the CRA, agencies must submit final rules to Congress and the Government Accountability Office ("GAO") for review.[367] In the case of "major rules," defined as those rules that have an annual impact on the economy of more than $100 million,[368] the rules do not take effect until sixty *legislative* days after the report is submitted.[369] Non-major rules take effect as otherwise provided by law upon submission to Congress.[370] The class of rules covered by the CRA is broader than the definition of rules under the APA's notice-and-comment requirements, and provides that "some agency actions, such as guidance documents, that are not subject to notice-and-comment rulemaking procedures may still be considered rules under the CRA."[371]

In the case of major rules, once the rule is submitted, the rule takes effect on the later of (a) sixty legislative days after submission to Congress, or (b) publication in the Federal Register unless Congress passes and the President signs a joint resolution of disapproval.[372] The joint resolution is considered under expedited procedures and is not subject to the sixty-vote cloture requirement in the Senate.[373] If the rule was submitted within sixty legislative days of adjournment, the new Congress may consider the resolution of disapproval.[374] If Congress adopts and the President signs a resolution of disapproval, a rule

> may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is

366. *See* INS v. Chadha, 462 U.S. 919, 956–58 (1983) (holding statutory one-house legislative veto procedure violated constitutional requirements of bicameralism and presentment).

367. CRA § 251, 5 U.S.C. § 801(a)(1) (2018).

368. *Id.* § 251, 5 U.S.C. § 804(2) (2018).

369. *Id.* § 251, 5 U.S.C. § 801(a)(3).

370. *Id.* § 251, 5 U.S.C. § 801(a)(4).

371. VALERIE C. BRANNON & MAEVE P. CAREY, CONG. RESEARCH SERV., R45248, THE CONGRESSIONAL REVIEW ACT: DETERMINING WHICH "RULES" MUST BE SUBMITTED TO CONGRESS 1 (2019), https://crsreports.congress.gov/product/pdf/R/R45248 [https://perma.cc/92YH-BYVP].

372. CRA § 251, 5 U.S.C § 801(b).

373. *Id.* § 251, 5 U.S.C. § 802(d) (2018).

374. *Id.* § 251, 5 U.S.C. § 801(d).

> specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.[375]

While the effectiveness of the CRA is limited by time and circumstance, a change in administration combined with unified government can make it highly effective. Once the Republicans gained control of the House, the Senate, and the Presidency in early 2017, they were able to use the CRA to some effect against regulations issued under the Dodd-Frank Act.[376] With the availability of this tool, opponents of the Dodd-Frank Act moved quickly to target the handful of rules that fit the criteria of the CRA.

The SEC's extractive minerals rule discussed in Part II of this Article[377] was the first rule to be targeted with the CRA.[378] The long court battles around rulemaking to implement section 1504 of the Dodd-Frank Act[379] had delayed the rulemaking to the point that it fit within the CRA timeframe of sixty legislative days.[380] Following passage in the House and the Senate, the President signed the joint resolution of disapproval into law on February 14, 2017, blocking the SEC rule proposed under section 1504 of the Dodd-Frank Act.[381] With the statutory requirement for rulemaking under section 1504 still in place, the SEC recently proposed a rule[382] that includs several changes from the congressionally disapproved 2016 rule.[383] The SEC made these changes to promulgate the statutorily-required rule while at the same time

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375. *Id.* § 251, 5 U.S.C. § 801(b)(2).

376. Amber Phillips, *Why Republicans' 100-Day War on Obama is About to End*, WASH. POST (Apr. 25, 2017, 12:36 PM), https://www.washingtonpost.com/news/the-fix/wp/2017/04/25/why-republicans-100-day-war-on-obama-is-about-to-end/ [https://perma.cc/Z3AJ-TZVF].

377. *See supra* Part II.

378. Steven Mufson, *Trump Signs Law Rolling Back Disclosure Rule for Energy and Mining Companies*, WASH. POST (Feb. 14, 2017), https://www.washingtonpost.com/business/economy/trump-signs-law-rolling-back-disclosure-rule-for-energy-and-mining-companies/2017/02/14/ccd93e90-f2cd-11e6-b9c9-e83fce42fb61_story.html [https://perma.cc/CP9G-G8SN].

379. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1504, 15 U.S.C. § 78m(q) (2018).

380. *See supra* Part III.C.3.

381. Pub. L. No. 115-4, 115th Cong., 131 Stat. 9 (2017).

382. Disclosure of Payments by Resource Extration Issuers, 85 Fed. Reg. 2522 (proposed Jan. 15, 2020) (to be codified at 17 C.F.R. pts. 240 & 249b).

383. Disclosure of Payments by Resource Extraction Issuers, 81 Fed. Reg. 49360 (July 27, 2016) (codified at 17 C.F.R. pts. 240 & 249b).

complying with the CRA's requirement that any new rule not be "substantially the same"[384] as the rule that had been disapproved.[385]

In the area of financial regulations, Congress next used the CRA to invalidate a CFPB rule on arbitration agreements.[386] The rule in question had been promulgated pursuant to section 1028(b) of the Dodd-Frank Act,[387] which allows the CFPB to prohibit pre-dispute arbitration agreements in the consumer finance arena. In that case, rather than looking back to a rule from a prior administration, Congress contemporaneously invalidated a rule promulgated by an independent financial regulator with a holdover Director.

The third instance of opponents of the Dodd-Frank Act using the CRA illustrated a new, more-expansive application of the CRA.[388] In that case, Congress invalidated guidance issued by the CFPB on indirect auto lending that had been issued in 2013.[389] Congressional action on the five-year-old guidance was possible because, as described above, the CRA uses the APA definition of "rule" which includes agency actions beyond those that require APA rulemaking.[390] While the APA provides that notice-and-comment rulemaking is not required for interpretative rules or general statements of policy, they still fall under the definition of "rules" under the CRA.[391]

In addition, the "rule" could be reviewed five years after it was issued because, over time, a body of practice has evolved where Congress can request that the GAO opine on whether a particular agency action

384. Congressional Review Act ("CRA") § 251, 5 U.S.C. § 801(b)(2) (2018).

385. *Id.*

386. Arbitration Agreements, 82 Fed. Reg. 33210 (July 19, 2017) (codified at 12 C.F.R. pt. 1040).

387. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1028, 12 U.S.C. § 5518 (2018).

388. Joe Adler & Neil Haggerty, *Does Senate's Repeal of CFPB Policy Put All Guidance In Crosshairs?*, AM. BANKER (Apr. 18, 2018, 3:37 PM), https://www.americanbanker.com/news/does-senates-repeal-of-cfpb-policy-put-all-guidance-in-crosshairs [https://perma.cc/89G6-M2YM].

389. *See* CONSUMER FIN. PROT. BUREAU, CFPB BULL. NO. 2013-02, INDIRECT AUTO LENDING AND COMPLIANCE WITH THE EQUAL CREDIT OPPORTUNITY ACT 1–5 (2013) [hereinafter CFPB BULL. NO. 2013-02], https://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf [https://perma.cc/RWY7-5EBQ]; *see also* Adler & Haggerty, *supra* note 388 (noting Senate's repeal of CFPB's guidance on auto loans and the Equal Credit Opportunity Act).

390. Administrative Procedure Act ("APA") § 551(4), 5 U.S.C. § 551(4) (2018).

391. BRANNON & CAREY, *supra* note 371, at 12.

qualifies as a rule under the CRA.[392] If the GAO determines[393] that the action was a rule and if the rule had not been submitted to Congress and the GAO for review, the sixty-day clock starts from the date the GAO communicates its interpretation to Congress.[394] Thus, in that case, Congress was able to reach back to a 2013 interpretive bulletin[395] and invalidate it where it had not been submitted previously to Congress because the agency did not believe it was a rule requiring submission under the CRA.[396]

The expansive reach of the CRA was also demonstrated in two recent opinions of the GAO, providing that three issuances of guidance by the Federal Reserve, going back several years, constituted "rules" under the CRA and would need to be submitted to Congress.[397] In the first case, the GAO determined that Supervision and Regulation letters issued by the Federal Reserve regarding a framework for large bank supervision and actions banks should take for recovery planning that were issued in 2012 and 2014 were rules.[398] In the second case, the GAO determined that the Federal Reserve's 2011 guidance on model risk management was also a rule under the CRA.[399]

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392. *Id.* at 21–23.

393. The GAO's determination is likely determinative because 5 U.S.C. § 805 states that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review." Congressional Review Act ("CRA") § 251, 5 U.S.C. § 805 (2018).

394. BRANNON & CAREY, *supra* note 371, at 24–27.

395. *See* CFPB BULL. NO. 2013-02, *supra* note 389, at 1–5.

396. *See* Letter from Thomas H. Armstrong, Gen. Counsel, U.S. Gov't Accountability Office, to Senator Patrick J. Toomey 3 (Dec. 5, 2017) (B-329129), https://www.toomey.senate.gov/files/documents/GAO%20Lending.pdf [https://perma.cc/DHJ5-XLFH] ("CFPB did not send a report on the Bulletin to Congress or the Comptroller General because, as stated in their letter to our Office, in their opinion the Bulletin is not a rule under CRA.").

397. *See* Letter from Thomas H. Armstrong, Gen. Counsel, U.S. Gov't Accountability Office, to Congressional Requestors 1–13 (Oct. 22, 2019) [hereinafter GAO Letter to Congressional Requesters], https://www.tillis.senate.gov/services/files/7B65B068-8AD1-4013-8FFA-1CA11B108428 [https://perma.cc/TC2N-VJWY] (discussing congressional request for GAO's legal opinion regarding applicability of the CRA to supervision and regulation letters, specifically, three issued by the Federal Reserve); *see also* Letter from Thomas H. Armstrong, Gen. Counsel, U.S. Gov't Accountability Office, to Senator Thom R. Tillis 1–7 (Oct. 22, 2019) [hereinafter GAO Letter to Senator Thom R. Tillis], https://www.tillis.senate.gov/services/files/7B65B068-8AD1-4013-8FFA-1CA11B108428 [https://perma.cc/LE9V-JCJ6] (discussing congressional request for GAO's legal opinion regarding applicability of the CRA to supervision and regulation letter 11-7 issued by the Federal Reserve).

398. GAO Letter to Congressional Requesters, *supra* note 397, at 1–13.

399. GAO Letter to Senator Thom R. Tillis, *supra* note 397, at 1–7.

With Democrats in control of the House in 2019 and the CRA window effectively closed for now, the sixty legislative day clock expired without a successful congressional challenge to these particular guidance documents. However, the full impact of this expansive interpretation of the CRA remains to be seen. While agencies generally appear to regularly submit rules to Congress and the GAO that have been through notice-and-comment rulemaking, any rules that have not been submitted may be at risk of congressional disapproval at some future date unless agencies retroactively submit them. Yet, the application of the CRA to guidance, FAQs, press releases, and other agency actions may not be that impactful, as agencies generally do not view those actions as having the force of law. Nevertheless, under such an expansive interpretation of the CRA, Congress eventually could find itself inundated with thousands of agency actions if agencies decided that it was to their benefit to submit all agency pronouncements out of an abundance of caution.

V. CONCLUSION

The decade-long effort to dismantle Dodd-Frank has been impressive in its scope, patience, and creativity. Opponents of the Act have marshalled every tool available to them and acted aggressively when presented with opportunities. The fallout from the litigation battles has had a profound effect on many unrelated areas of government, including recess appointments, ALJ appointments, and agency rulemaking. Yet, the significant resources expended and the results achieved (or not achieved) warrant a few additional observations.

First, the effort expended in so many different arenas in attacking the Dodd-Frank Act created something of a multiplier effect. For example, congressional letters and hearings elicit responses that provide fodder for judicial decisions,[400] which in turn generate additional congressional hearings, document requests and letters This creates a closed loop of constant attacks on the Dodd-Frank Act. With each attack building on prior attacks, opponents have been able to delay and alter implementation. These delays often extended until a new line of attack presented itself.

400. PHH Corp. v. CFPB, 881 F.3d 75, 146–147 (D.C. Cir. 2018) (Henderson, J., dissenting) (citing numerous instances of testimony and responses to congressional inquiries and restating congressional criticisms of the CFPB).

Second, observing the mixed results of the extensive lobbying, litigation, and legislative strategies that have been employed over the past decade, none of them seem to have been as consequential as the opponents of the Dodd-Frank Act simply winning elections and replacing financial agency leadership with like-minded leadership. Shortly after being sworn in, President Trump issued Executive Order 13772[401] which required regulators to "regulate the [U.S.] financial system in a manner consistent with"[402] the following Core Principles:

> (a) empower Americans to make independent financial decisions and informed choices in the marketplace, save for retirement, and build individual wealth;
>
> (b) prevent taxpayer-funded bailouts;
>
> (c) foster economic growth and vibrant financial markets through more rigorous regulatory impact analysis that addresses systemic risk and market failures, such as moral hazard and information asymmetry;
>
> (d) enable American companies to be competitive with foreign firms in domestic and foreign markets;
>
> (e) advance American interests in international financial regulatory negotiations and meetings;
>
> (f) make regulation efficient, effective, and appropriately tailored; and
>
> (g) restore public accountability within Federal financial regulatory agencies and rationalize the Federal financial regulatory framework.[403]

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401. Exec. Order No. 13722, 82 Fed. Reg. 9965 (Feb. 3, 2017).
402. *Id.* at 9965.
403. *Id.*

Following these Core Principles, a new full complement of confirmed agency heads of the federal financial regulators have acted to materially change supervisory requirements for systemic institutions,[404] and the supervision of large banks.[405] At the CFPB, the impact of the appointment of a new Director was especially pronounced. In documenting the changes to the CFPB under Acting Director Mick Mulvaney, one reporter found:

> Over the last year, Mulvaney's temporary hiring freeze has turned into an indefinite one, slowly shrinking the [CFPB's] staff by attrition. Bureau news releases, once packed with colorful details about abusive lending practices, have been toned down to dry legalese. . . . In 2018, the bureau announced just 11 lawsuits or settlements, less than a third of the number during Cordray's last year. In the months since Mulvaney reorganized the Office of Fair Lending, the bureau has not brought a single case alleging illegal discrimination. While Mulvaney pledged data-driven enforcement, his bureau brought only one case against debt collectors, who account for more complaints to the [CFPB] than almost any other industry. Where Mulvaney or his successor have allowed cases to go forward, lenders have often settled with lowered fines or none at all. When the bureau settled a three-year prosecution of a group of payday lenders called NDG Enterprise — which found that the

404. Comment Letter from former Sec'ys of the U.S. Treasury, Timothy F. Geithner & Jacob J. Lew, and former Chairs of the Bd. of Governors of the Fed. Res. Sys., Ben S. Bernanke & Janet L. Yellen, concerning Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies (RIN 4030-ZA00), to Steven T. Mnuchin, Sec'y, U.S. Dep't of the Treasury, and Jerome H. Powell, Chairman, Bd. of Governors of the Fed. Res. Sys., https://int.nyt.com/data/documenthelper/887-bernanke-geithner-lew-yellen-letter/a22621b202dfcb0fe06e/optimized/full.pdf [https://perma.cc/T8NX-MKRW] ("[The proposed guidance] would be contrary to the statutory framework, and would lead the FSOC to adopt a standard that is unworkable – effectively neutering this authority.").

405. Danile K. Tarullo, former Member, Bd. of Governors of the Fed. Res. Sys., Remarks at the Americans for Financial Reform Conference on Big Bank Regulation Under the Trump Administration, Washington, D.C.: Taking the Stress Out of Stress Testing, at 3 (May 21, 2019), https://ourfinancialsecurity.org/wp-content/uploads/2019/05/Tarullo-AFR-Talk.pdf [https://perma.cc/9BUC-MJGF] ("Unfortunately, I fear that a good bit of that progress to which I referred a moment ago could be endangered by a kind of low-intensity deregulation, consisting of an accumulation of non-headline-grabbing changes and an opaque relaxation of supervisory rigor.").

> group had falsely threatened American customers with arrest and imprisonment if they failed to repay loans — NDG walked away without paying a cent.[406]

In the words of an aphorism popular during the Reagan Administration, "personnel is policy."

Finally, it is clear that after a decade of conflict, the final battles over the Dodd-Frank Act have yet to be fought. Deregulation under the APA must be achieved through and meet the same standards as new regulation.[407] It remains to be seen if the supporters of the Act will muster the same level of energy and creativity to repel the deregulatory efforts to roll back the Dodd-Frank Act[408] as their opponents have already shown and whether the opponents of the Act will hold themselves or be held to the same standards for dismantling the Dodd-Frank Act as supporters were for implementation.

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406. Nicholas Confessore, *Mick Mulvaney's Master Class in Destroying a Bureaucracy from Within*, N.Y. TIMES MAG. (Apr. 16, 2019), https://www.nytimes.com/2019/04/16/magazine/consumer-financial-protection-bureau-trump.html [https://perma.cc/F8U7-43NM].

407. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) ("While the removal of a regulation may not entail the monetary expenditures and other costs of enacting a new standard, and, accordingly, it may be easier for an agency to justify a deregulatory action, the direction in which an agency chooses to move does not alter the standard of judicial review established by law.").

408. Zachary Warmbrodt, *Warren, Waters Blast SEC Financial Advice Rule as Wall Street Cheers*, POLITICO (June 25, 2019, 6:15 PM), https://www.politico.com/story/2019/06/05/warren-waters-blast-sec-financial-advice-rule-as-wall-street-cheers-1507335 [https://perma.cc/MR5Z-K4ZV].