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# **THE DODD-FRANK ACT IS WORKING AND WILL PROTECT THE AMERICAN PEOPLE IF IT IS NOT KILLED BEFORE FULLY IMPLEMENTED**

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## **I. INTRODUCTION**

In September 2008, the nation's financial system teetered on the brink of collapse, staggered by the worst financial crisis since the Great Crash of 1929. The ensuing economic wreckage it caused was the worst since the Great Depression. Indeed, while a second Great Depression was just narrowly avoided,<sup>1</sup> the economic carnage will still cost the country more than \$20 trillion in lost GDP or more than \$170,000 for every man, woman and child alive in the United States today.<sup>2</sup>

Although the 2008 financial crisis reached a crescendo during a September week that saw the failure of Lehman Brothers, the collapse and \$100 billion bailout of the insurance giant AIG, a run on and bailout of the \$3.7 trillion money market fund industry, the near-death experiences and bailouts of Merrill Lynch, Citigroup, Bank of America, Goldman Sachs and Morgan Stanley, the crisis was years in the making. Rather than a bolt-from-the blue "Black Swan" event, the financial crisis resulted from profound changes in banking, finance, and the financial system, including but not limited to the:

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1. *See generally*, Ben S. Bernanke, *The Courage to Act* (2015).

2. *See* *The Cost of the Crisis: \$20 Trillion and Counting*, Better Markets, (Jul. 2015) [hereinafter *Cost of the Crisis*], <http://www.bettermarkets.com/costofthecrisis>.

- collapse in underwriting standards;
- proliferation of no skin-in-the-game “originate-to-distribute” products and business models;
- sale of tricked-up toxic subprime mortgages to consumers who didn’t understand and/or couldn’t afford them;
- sale, packaging, and distribution of these mortgages throughout the global financial system;
- creation of complex derivatives as well as derivatives of derivatives in an unregulated, opaque over-the-counter market;
- credit rating agencies that blindly blessed these mortgages, securities, and derivatives with undeserved triple-A ratings;
- compensation schemes that rewarded and incentivized taking the highest risk possible without regard for the consequences;
- deregulation of banking, finance, and financial consumer protection, often due to the misguided belief that the least regulation is the best regulation and a “market knows best” ideology;
- outbreak of predatory behavior and consumer exploitation; and
- pervasive fraud, illegality and, at times, criminal behavior at many levels of many financial institutions, including in particular at the gigantic too-big-to-fail banks and nonbank financial institutions.

The financial crisis exposed and exacerbated the weaknesses and flaws that had developed in virtually every level of the financial system. It also demonstrated that the regulatory system that may have been adequate to oversee the simpler financial system of the twentieth century was incapable of monitoring the risks generated by the considerably more complex and tightly inter-connected financial system of the twenty-first

century. This was, of course, made much worse by years of de-regulation and lack of enforcement. Regardless of the reasons, there is no doubt that the regulatory system in place was not capable of handling a large-scale crisis.

And the crisis came. In addition to the \$20 trillion cost referenced above, the 2008 crisis also inflicted incalculable human suffering, as tens of millions of Americans lost their jobs, homes, savings, and so much more. To prevent the financial system from completely imploding and utterly devastating the economy, the government devoted trillions of dollars in expenditures, backstops, and guarantees to rescue financial institutions and to stabilize the U.S. and global economies. Given the historic financial and economic shock to the country, the recovery has been painfully slow and arduous for the families and communities of America. In fact, the economic damage and the human misery caused by the 2008 crisis continue to burden millions of Americans today, over seven years after the crisis began to unfold.<sup>3</sup>

In response, Congress and the Obama Administration passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”),<sup>4</sup> the most comprehensive reform of the country’s financial laws since the Great Depression of the 1930s. That law thoroughly overhauled or enhanced virtually every aspect of financial market regulation in all sectors: banking, securities, commodities, derivatives, and consumer protection. It also created two entirely new regulatory agencies: the Consumer Financial Protection Bureau, to better protect Americans from predatory behavior by banks and other financial market participants; and the Financial Stability Oversight Council, to identify and address potentially dangerous concentrations of risk anywhere in our financial system, including in particular those risks posed by systemically significant non-bank financial firms, the so-called “shadow banking system.” Given the global nature of the crisis, governments around the world and, in particular, Europe also recognized the need for profound changes in their approach to financial market regulation, and they too

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3. See Dennis Kelleher, A Stronger State of the Union Begins with Reining in Wall Street, Huffington Post (Jan. 6, 2016), [http://www.huffingtonpost.com/dennis-m-kelleher/a-stronger-state-of-the-u\\_b\\_8912536.html](http://www.huffingtonpost.com/dennis-m-kelleher/a-stronger-state-of-the-u_b_8912536.html).

4. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”), Pub. L. No. 111–203, 124 Stat. 1376 (2010).

initiated major reforms, many of which parallel the Dodd-Frank Act.

Not surprisingly, given the breadth and complexity of the financial reform law, our federal regulatory agencies (the Federal Reserve Board, SEC, CFTC, FDIC, OCC, and others) were tasked with proposing, revising, finalizing, implementing, interpreting, and enforcing a broad array of rules to implement it. Most of the law and implementing rules were directed at the fifty or so systemically significant banks and nonbank financial firms that pose a unique danger to the financial system and the economy due to their size, complexity, leverage, interconnectedness, or high risk activities. These are the so-called “too-big-to-fail” firms.

Given that the actions and activities of these too-big-to-fail firms largely caused the crash and necessitated the law, Dodd-Frank focused on either reducing or eliminating the highest risk and most dangerous activities of these too-big-to-fail firms. That, however, also threatened some of their business lines, profits, and bonus pools. As a result, at every stage of the lawmaking and rulemaking, the too-big-to-fail firms, largely centered on Wall Street, and their allies have spared no expense in waging a relentless war to kill, gut, or weaken the financial reform. They, the firms, their lobbyists and political allies, have:

- aggressively lobbied Congress during the consideration of the law that became the Dodd-Frank Act;
- lobbied the regulatory agencies as the rules were being considered, proposed, and finalized;
- pressured the agencies during the implementation and interpretation of the finalized rules to “win” what they lost in the rulemaking process;
- filed lawsuits challenging not only portions of the statute but also rules promulgated by the agencies when the rules did not come out the way they wanted;
- filed bills and amendments to weaken, roll back, or kill parts of the law or rules; and
- held hundreds of hearings, too often to harass the regulators, and inundated the regulators with

letters and document and information requests that have needlessly consumed countless hours and expense.

Throughout this process, Wall Street and its allies have deployed a variety of strategies: They have downplayed or ignored altogether the severity of the financial crash and economic crisis;<sup>5</sup> they have denied or obscured their central role in causing it;<sup>6</sup> they have cast blame everywhere but on themselves by faulting the government, regulators, GSEs, homeowners, and even consumers;<sup>7</sup> they have issued dire but unfounded predictions about the impact of the law and new regulations on the financial industry and the economy as a whole;<sup>8</sup> and they have insisted that every new rule must pass muster under a painstaking and quantitative cost-benefit analysis before being implemented.<sup>9</sup>

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5. Kelleher, et al., *The Cost of The Wall Street-Caused Financial Collapse and Ongoing Economic Crisis is More than \$12.8 Trillion*, 7 (Sept. 15, 2012) (“Wall Street and its many allies and sympathizers are denying and understating the costs of the crisis, primarily to kill, weaken, or avoid financial reform and re-regulation.”), [https://www.bettermarkets.com/sites/default/files/Cost%20Of%20The%20Crisis\\_2.pdf](https://www.bettermarkets.com/sites/default/files/Cost%20Of%20The%20Crisis_2.pdf).

6. *Id.* at 10.

7. See e.g., Suzanne McGee, *5 Years After the Crash: Blame Washington or Wall Street*, *The Fiscal Times* (Sept. 16, 2013), <http://www.thefiscaltimes.com/Columns/2013/09/16/5-Years-After-Crisis-Blame-Washington-or-Wall-Street> (elaborating on the post-crisis claims made by Wall Street firms about regulatory failure).

8. See generally Jonathan Weisman & Eric Lipton, *Wall Street Chips Away at Dodd-Frank Rules*, *N.Y. Times*, Jan. 14, 2015, at A1 (detailing a number of doomsday predictions that Wall Street and its allies have made about Dodd-Frank); *The Dodd-Frank Act Five Years Later: Are We More Prosperous?* Before the H. Financial Services Committee, 114th Cong. 15 (Jul. 28, 2015) (statement of Peter J. Wallison, Arthur F. Burns Fellow in Financial Policy Studies, American Enterprise Institute) (“[T]he Dodd-Frank Act is . . . creating the foundation for another financial crisis.”); *The Dodd Frank Act Five Years Later: Are We More Free?* Before the H. Financial Services Committee, 114th Cong. 13 (Sep. 17, 2015) (statement of Todd Zywicki, George Mason University Foundation Professor of Law, Mercatus Center Senior Scholar) (“Dodd-Frank has interjected the tentacles of the federal regulatory state into every aspect of our financial system, and as a result we are less free to obtain the means to make our lives better.”).

9. See, e.g., Sam Batkins, *Dodd-Frank Fails at Measuring Costs and Benefits*, *American Action Forum* (Feb. 19, 2015), <http://americanactionforum.org/insights/dodd-frank-fails-at-measuring-costs-and-benefits>; Paul Rose & Christopher J. Walker, *Dodd-Frank Regulators, Cost-Benefit Analysis, and Agency Capture*, 66 *Stan. L. Rev. Online* 9 (Apr. 29, 2013), <http://www.stanfordlawreview.org/online/dodd-frank-regulators-cost-benefit-analysis-and-agency-capture>; Paul Rose & Christopher J. Walker, *The Importance of Cost-Benefit Analysis in Financial Regulation*, U.S. Chamber of Com. Ctr. for Capital Mkts. Competitiveness (Mar. 2013), <http://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/CBA-Report->

This is the context that is missing from most critiques of the Dodd-Frank Act, especially those that call for rigorous cost-benefit analysis of rulemakings.<sup>10</sup> Yet this backdrop is critically important. Reflecting on the impact of financial reform is a fair and useful exercise: Based on our experience so far, what can we say about the impact of the Dodd-Frank Act? Too often, however, critics of financial reform largely ignore the context and facts that gave rise to the law, including the actual financial crash and the economic wreckage it caused, when answering this question. Without fully considering the roots of the crisis, its terrible costs, and the need for fundamental regulatory reform, it is far too easy for critics to dismiss the new regulatory framework as simply unnecessary or even harmful, or to portray it as the work of misguided advocates devoted to regulation for its own sake.

In essence, rather than engaging in fair-minded, unbiased, and balanced assessment of the impact of Dodd-Frank, opponents frequently feed into industry-created and inflated fears and myths about the law. But merely reciting and restating these baseless speculations regarding the supposedly harmful impact of financial reform does not transform them into actual data elucidating where we are in the reform process, where we should be, or where we need to go.

In this article, we offer contrasting views on three major recurring themes in criticisms of Dodd-Frank:

1. Opponents often advance negative portrayals of reform advocates and regulators; fail to acknowledge the lessons of the financial crisis; and disregard Wall Street's relentless efforts to weaken the law, exploit its gaps, violate existing regulations.
2. Many of those who challenge financial reform also extol the virtues of rigorous cost-benefit analysis, and staunchly advocate that it should serve not only as a

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10. See, e.g., Steven Sloan, Cost-Benefit Analysis Puts the Brakes on Dodd-Frank, *Bloomberg Bus.* (Mar. 7, 2012), <http://www.bloomberg.com/news/articles/2012-05-07/cost-benefit-analysis-puts-the-brakes-on-dodd-frank>.

metric for judging the Dodd-Frank Act, but also as the template for all future rulemakings. Yet Congress, courts, and respected academics acknowledge that cost-benefit analysis is a burdensome, incomplete, and inaccurate methodology that hinders rather than promotes the development of sound financial regulation. Furthermore, sensible and sound rules are the *sine qua non* of fair, efficient and workable financial markets. Indeed, without regulation, there would be no free markets.

3. Recent findings show that the Dodd-Frank reforms appear to be working as intended without the costs and burdens predicted by its critics. Unable to point to a credible, empirically-based assessment of the law's effects, Dodd-Frank's critics revert to purely speculative warnings about the harmful impact it "could" have.

The short answer to the previously posed question, in the simplest terms, is this: It is too soon to know how effective Dodd-Frank will be, but the evidence so far—rather than agenda-driven speculation and claims—indicates that the statute is working as intended; that it will help reduce the likelihood or severity of another financial crisis; and that it will not choke the life out of the financial industry or stifle economic growth, but will, in fact, serve as the foundation for a thriving financial industry that supports stability, growth, employment, and broad-based prosperity.

This is, after all, what happened to the banking and financial industries and the U.S. economy following the Great Depression, when innumerable laws and regulations were passed. Those reforms imposed some of the heaviest financial regulation in the history of the world. Yet, the U.S. economy boomed, the financial industry expanded with soaring profits, and the country built the largest middle class ever, all under extensive and unprecedented regulation. Growth continued until the financial industry and its allies promoted and sold the myth that markets knew best and that the least regulation was the best regulation. That Wall Street-funded ideology ushered in an era of deregulation, unbridled risk-



taking, and illegal activity rising in some cases to the level of criminality. This history is powerful proof that regulation is simply not the enemy of growth and prosperity, but that broad-based de-regulation is.

The truth is that strong, robust, effective markets require equally strong, robust, and effective rules that establish a level playing field, enable competition, enforce a baseline of fair dealing, police market participants, engender investor confidence, and ultimately lead to a balanced financial system that fuels the American economy and raises the standard of living of all Americans.

## II. FORGETTING THE PAST AND IGNORING THE PRESENT: THE DODD-FRANK ACT WAS NECESSITATED BY A CRISIS OF HISTORIC PROPORTIONS AND WALL STREET'S CONTINUED RECKLESSNESS, FRAUD, AND ABUSE

The frequent attempt by opponents of the Dodd-Frank Act to portray pro-reform advocates as mindlessly and baselessly infatuated with regulation for its own sake is wrong for many reasons. The Dodd-Frank Act and its implementing regulations were necessitated by a crisis of historic proportions and by Wall Street's inability to police itself as evidenced by numerous instances of recklessness, fraud, and abuse.

First and foremost, the Dodd-Frank Act and its implementing regulations did not spring from a sudden, inexplicable Congressional impulse to pass laws and require numerous rulemakings for no reason. The many problems that culminated in the crisis manifested themselves at virtually every level of the financial system, starting with the toxic mortgages peddled to consumers by a new species of non-bank mortgage company all the way to the over-leveraged investment banks that packaged these mortgages and sold them to investors as ultra-safe assets. And when the financial crisis exploded, regulators found not only that they had missed the growing risks that spilled over the traditional boundaries separating commercial banks, broker-dealers, and insurance companies, but also that they were ill-equipped to face the extraordinary panics and runs they were confronting. The financial system had grown far more complex and inter-connected than they realized in the years since Congress enacted the banking and securities laws in the wake of the Great Depression.

When it came to addressing the weaknesses and flaws in the

financial and regulatory system that caused the crisis, the Dodd-Frank Act was, in the best judgment of Congress, the President, and countless experts, essential to protect our financial markets and our economy from another devastating financial and economic crisis.<sup>11</sup> The anti-reform lobby consistently fails to acknowledge the scale and scope of the 2008 financial crash, its underlying causes, and the costs it will inflict on the families and communities of the United States.

Second, the continuing need for strong regulation and enforcement is painfully evidenced by the never-ending pattern of lawlessness on Wall Street. The financial crisis itself, of course, largely resulted from reckless, illegal, and at times criminal misconduct by large financial institutions. For example, they engaged in illegal mortgage underwriting practices and fraudulently packaged and sold wave upon wave of toxic residential mortgage backed securities, which became the fuel for the crisis.<sup>12</sup> But more to the point, since then, Wall Street has continued to engage in a breathtaking array of illegal activities, including manipulation of the foreign currency market and the LIBOR benchmark, aiding and abetting tax evasion, and money laundering.<sup>13</sup> Again, the anti-reform lobby consistently fails to acknowledge this pattern of illegal conduct that cries out not only for the Dodd-Frank reforms, but much stronger regulatory and enforcement measures.

Any fair-minded analysis of the years before the crisis would conclude that de-regulation, not over-regulation, laid the groundwork for the crisis by permitting and incentivizing wanton high risk activities and in many cases, illegal and criminal conduct. Thus, from the standpoint of strengthening systemic stability, as well as protecting hardworking Americans from fraud and abuse, more regulation of financial services—not less—was, is, and for the foreseeable future will remain, essential. The conduct of the financial industry is what has made it so necessary. There are 20 trillion reasons not to let Wall Street police itself again and

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11. None of that is to say the law is perfect. No law is. It is, however, the best law our political system could produce at the time. Moreover, it was the best law that could be produced in the face of Wall Street's dedication of virtually unlimited resources to kill or weaken it. Indeed, much of the length and complexity in the law (and the implementing rules) so often cited by critics resulted from lobbying by the financial industry itself.

12. See Cost of the Crisis, *supra* note 2, at 83–84.

13. *Id.* at 85–87.

not to be deluded by an anti-regulatory zeal based on blind faith in a discredited “markets know best” ideology.<sup>14</sup>

III. REVERENCE FOR ONEROUS, YET INNOCENT SOUNDING, COST-BENEFIT ANALYSIS: A WEAPON DESIGNED TO KILL OR WEAKEN THE MOST SENSIBLE AND NECESSARY REGULATION

Dodd-Frank’s opponents, and proponents of less federal financial regulation in general, hold up rigorous quantitative cost-benefit analysis not only as the best metric for judging the success of Dodd-Frank, but also as the best template for all future rulemaking.<sup>15</sup> If such a broadly-applicable cost-benefit policy were adopted, it would severely limit the ability of lawmakers and regulators to protect the American people from fraud, abuse, and systemic instability in the financial markets. In practice, such cost-benefit analysis prioritizes Wall Street’s narrow cost interests above the public interest; places a huge drain on already scarce agency resources; prolongs the rulemaking process interminably; produces results that are notoriously incomplete, imprecise and unreliable; leads to weaker final rules; and provides the unfortunate breeding ground for contrived industry attacks on the rules in court.

Faith in the virtues of rigorous, quantifiable cost-benefit analysis is fundamentally misplaced. The truth is that Congress, the courts, and commentators all recognize the profound flaws in the cost-benefit methodology. They also recognize that it is often promoted by industry advocates not because it leads to strong and effective regulation, but because it is a singularly effective weapon in the fight to slow, weaken, and kill financial reform.<sup>16</sup>

With relatively few exceptions, Congress deliberately avoids

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14. Put differently, one could argue that the 2008 financial crisis was the most expensive cost-benefit analysis the world has ever conducted: no one has to guess at the horrific costs of an ineffective regulatory system. We now know that it is more than \$20 trillion. *Id.*

15. See Eric A. Posner & E. Glen Weyl, *The Case for Cost-Benefit Analysis of Financial Regulations*, *Regulation* (Winter 2013-2014); Jon C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, *Yale L.J.* 553, 882–1011 (2012).

16. See generally *Setting the Record Straight on Cost-Benefit Analysis and Financial Reform at the SEC*, *Better Markets, Inc.* (Jul. 30, 2012) [hereinafter *CBA Report*], <https://www.bettermarkets.com/sites/default/files/Setting%20The%20Record%20Straight.pdf>.

saddling financial regulators with the onerous duty to conduct rigorous cost-benefit analysis when developing rules to regulate the financial markets. In the securities laws, for example, Congress imposed on the SEC a much more limited obligation simply to consider three specific economic factors when promulgating rules, without any duty to quantify or compare them.<sup>17</sup> This reflects Congress's long-standing judgment that the benefits of protecting investors and the public interest must not be subordinated to excessive concern about quantifying the costs of regulation imposed on the financial industry.

The compelling reasons for this are clear, as a recent court decision stated: requiring cost-benefit analysis would put the SEC in the untenable position of second-guessing Congress's judgment about the need for regulation, and would require an "apples-to-bricks" comparison of costs and benefits.<sup>18</sup> The D.C. Circuit has recently affirmed this principle in rejecting attacks on SEC and CFTC rules. For example, in *ICI v. CFTC*,<sup>19</sup> the court declared that "[w]here Congress has required 'rigorous, quantitative economic analysis,' it has made that requirement clear in the agency's statute, but it has imposed no such requirement here."<sup>20</sup>

The Office of Management and Budget, the steward of executive branch compliance with cost-benefit analysis, acknowledges the inherent difficulty in quantifying regulatory costs and benefits:

Many rules have benefits or costs that cannot be quantified or monetized in light of existing information. . . . In fulfilling their statutory mandates, agencies must often act in the face of substantial uncertainty about the likely consequences. In some cases,

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17. 15 U.S.C. §§ 78c(t), 78w(a)(2) (2015); *see generally* CBA Report, *supra* note 16.

18. *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 369 (D.C. Cir. 2014).

19. *Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 379 (D.C. Cir. 2013) (internal citations omitted).

20. That is also why longstanding Supreme Court precedent has declared that an agency's duty to conduct such rigorous cost-benefit analysis is not to be inferred lightly or without a clear indication from Congress. *See American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510–512 & n. 30 (1981) (stating that "Congress uses specific language when intending that an agency engage in cost-benefit analysis").

quantification of various effects is highly speculative.<sup>21</sup>

Thus, under cost-benefit analysis, many *advantages* of regulation, no matter how important to society or to properly functioning markets, may be disregarded or simply not captured in the calculation.<sup>22</sup> As a result, cost-benefit analysis can become an “industry-cost only analysis,” which inevitably shifts regulatory policy in favor of industry and away from protecting investors or other public interests.<sup>23</sup>

Recent academic analysis also highlights the flaws in cost-benefit analysis. For example, one commentator concluded that early D.C. Circuit cases on cost-benefit analysis placed impossible burdens on the SEC, given the nature of financial regulation: “[T]he D.C. Circuit’s opinions set standards for economic analysis that no agency rulemaking could possibly comply with.”<sup>24</sup> Another analysis concluded that “[t]he D.C. Circuit presented no evidence that there is any available scientific technique for the SEC to ‘assess the economic effects’ of the rule along the lines that the court seemed to think legally required.”<sup>25</sup>

In fact, critics of cost-benefit analysis have long warned that it is used as a “device not for producing the right kind and amount of regulation, but for diminishing the role of regulation even when it was beneficial.”<sup>26</sup> As observed by one court, the imposition of technical and burdensome requirements relating to cost-benefit analysis “serve[s] as a dilatory device, obstructing the agency from proceeding with its primary mission.”<sup>27</sup>

Any requirement that a rigorous quantitative cost-benefit analysis accompany all new rulemakings would have precisely this obstructive impact. It would dramatically tip the entire legal and rulemaking analysis

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21. See Office of Mgmt. & Budget, 2011 Report to Cong. on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities, 4 (2011).

22. See *Am. Fin. Services Ass’n v. FTC*, 767 F.2d 957, 986 (D.C. Cir. 1985).

23. See Kelleher, et al., *supra* note 5, at 8.

24. See Bruce R. Kraus, *Economists in the Room at the SEC*, 124 Yale L.J. F. 280 (2015).

25. John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 Yale L.J. 1, 918–19 (2015).

26. See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. Chi. L. Rev. 1, 5–6 (1995).

27. *FMC Corp. v. Train*, 539 F.2d 973, 978–79 (4th Cir. 1976).

in favor of the financial industry and against the public interest.

Finally, the call for rule-by-rule cost-benefit analysis is premised on an overly narrow conception of regulatory reform, a process that must be viewed holistically. The Dodd-Frank Act is a comprehensive law designed to re-regulate an entire industry that poses a unique and lethal threat to the financial system and economy of the entire country, as well as to the economic security and well-being of every American. Congress passed and the President signed a comprehensive law for a reason: Only a collection of interrelated and highly dependent provisions could create an overall architecture of financial reform adequate to prevent the next crisis or significantly reduce its severity and costs. Demanding a cost-benefit analysis of each rule in isolation—and attacking rules one by one in court on that basis—ignores the critical benefits of the entire collection of reforms and poses a serious threat to the reform process.<sup>28</sup>

#### IV. DISTORTING AND SELECTIVELY REVIEWING THE DATA: A GROWING BODY OF EVIDENCE SUGGESTS THAT THE DODD-FRANK ACT IS REALIZING ITS PROMISE WITHOUT THE PREDICTED SIDE-EFFECTS

As a threshold point, it is premature to attempt a comprehensive, empirically-based assessment of the impact of Dodd-Frank. The reason is obvious. The statute has not even been fully implemented because not all of the rules mandated or authorized under the law have been written and finalized. Moreover, most of the rules that are in place have had very little time to produce their intended effects. The GAO put the matter succinctly in its most recent review of the Act: “The full impact of the Dodd-Frank Act remains uncertain because many of its rules have yet to be implemented and insufficient time has passed to evaluate others.”<sup>29</sup>

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28. Moreover, the history of regulation in this country amply demonstrates that Congress is well aware of how to impose rigorous, quantitative cost benefit analysis requirements. Yet Congress chose not to do so in the Dodd Frank Act. Under familiar canons of statutory interpretation, no such requirements should be imposed in the absence of a clear Congressional mandate. See Stijn Claessens & Laura Kodres, *The Regulatory Responses to the Global Financial Crisis: Some Uncomfortable Questions* 10–11 (Int’l Monetary Fund, Working Paper No. 14/46, 2014), <https://www.imf.org/external/pubs/ft/wp/2014/wp1446.pdf> (arguing that the effects of the economic crisis, subsequent supervision, and the institution of regulations should be done comprehensively, instead of addressing specific problems on an individual basis).

29. U.S. Gov’t Accountability Off., GAO-16-169, *Dodd-Frank Regulations: Impacts on*

These simple facts have not dissuaded opponents of the Dodd-Frank Act from continuing to make baseless and dire predictions regarding its effects.<sup>30</sup> These predictions range from warnings that Dodd-Frank will cause general economic harm to warnings that it may cause the next financial crisis. Popular regulatory targets include the much maligned Volcker Rule and the FSOC's SIFI designation regime.<sup>31</sup>

Those who attempt to justify such dramatic predictions with purported lessons from history ignore the clearest, most direct, and most compelling lesson from the past. For seventy-five years, from the reforms of the early 1930's to the 2008 crash, regulation led to prosperity and de-regulation led to disaster. In fact, for almost a century, Wall Street has responded to every major new regulatory reform with confident and alarming predictions that it will not only crush the financial services industry, but also cause grave damage to the larger economy, kill growth, and cause widespread unemployment. And in every case, these "sky-will-fall" predictions proved to be wrong. Major reforms, including the

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Community Banks, Credit Unions and Systemically Important Institutions 1 (2015) [hereinafter GAO Report].

30. A prime example is *Dodd-Frank: What It Does and Why It's Flawed* (Hester Peirce & James Broughel eds., Mercatus Center at George Mason University 2012). This critique of Dodd-Frank concedes up front that the "implementation" of the law is "far from complete," but it then purports to evaluate whether the law is an "effective response to the financial crisis." *Id.* at 11. What follows is a title-by-title rehash of theoretical criticisms of the law and pure speculation about its supposedly awful future consequences, including repeated warnings that it "could . . . lay the groundwork for a future financial crisis." *Id.* (emphasis added). The only empirical analysis is an odd chapter tallying up the considerable number of new requirements or "restrictions" that the law and its implementing rules are expected to impose, with little about its actual impact on our financial system. *Id.* at 193–200. Notably, the book lays out almost none of the essential context as it picks at the law—barely any mention of the devastation wrought by the financial crisis and scant analysis of its core underlying causes.

31. Attacks on FSOC's exercise of its designation authority exemplify the problem. See, e.g., Investment Company Institute, *SIFI Designation is Unnecessary for Regulated Funds—and Would Be Harmful to Funds, Investors, and the Capital Markets* (2016), [https://www.ici.org/policy/regulation/stability/sifi\\_designation\\_tps](https://www.ici.org/policy/regulation/stability/sifi_designation_tps). In reality, the FSOC has proceeded cautiously, designating only four large financial institutions in nearly six years. Moreover, its process has been thorough, deliberative, and fair to those institutions, as illustrated in its approach to the designation of MetLife. See *Metlife, Inc. v. Financial Stability Oversight Council*, No. 1:15-cv-45 (RMC), 2015 U.S. Dist. (D.D.C. 2015). Finally, the designations to date have resulted in none of the predicted harms to investors or our capital markets. On the contrary, it appears that their primary impact has been to induce some of the designees to re-evaluate their business structures and to make changes that ultimately will have the intended effect of making our system less vulnerable to material financial distress.

countless laws and voluminous regulations enacted during the 1930s, actually paved the way for unprecedented financial market stability and economic prosperity in the United States. Throughout it all, the financial services industry continues to prosper, with salaries and bonuses dwarfing the incomes of most Americans—who nevertheless must pay the price when Wall Street’s high risk, reckless, and illegal conduct becomes unsustainable and the system collapses.

If this history is any guide, then we can expect the Dodd-Frank Act to help protect the stability and integrity of our financial markets, protect consumers and investors, and promote economic growth for the foreseeable future without the terrible side effects predicted by naysayers.

Attempts to prove the dangers of regulation by invoking the savings and loan crisis as well as the role of Fannie Mae and Freddie Mac in the lead-up to the 2008 financial crisis are unconvincing. These episodes do not demonstrate that regulation causes financial disasters. Even if we were to assume that injudicious regulation can sometimes contribute to a financial crisis, in neither the savings and loan episode nor the financial crisis of 2008 was that by any stretch the principal cause of the catastrophe. Rather, it was the high risk, reckless, and often illegal conduct by financial institutions, coupled with inadequate or totally absent regulation and enforcement, that led to disaster. In any case, neither of these examples shed any light whatsoever on whether Congress got it right in 2010 when it passed the Dodd-Frank Act.

The anti-reform lobby also misinterprets the significance of the various regulatory costs and consequences associated with the Dodd-Frank Act. Among the adverse effects feared are increased regulatory compliance costs and a reduction in the financial products and services available to the public. But even if we assume that these more general cost predictions come true, they are not evidence that the Dodd-Frank Act reforms are flawed or injurious.

These regulatory impacts were certainly not unforeseen, nor are they necessarily bad. Congress obviously understood that regulation designed to rein in Wall Street would impose very substantial costs on the industry, not only in the form of additional compliance measures but also in the form of prohibited activities that were once highly profitable but unacceptably risky (such as the Volcker Rule ban on proprietary



trading).<sup>32</sup> Similarly, Congress understood that some of those costs may be passed on to consumers and may result in fewer “choices” and less credit availability (think capital, liquidity, and margin rules).<sup>33</sup> But this too is a natural consequence of sound regulation, and it is the more-than-acceptable price of a more stable, transparent, and fair financial system, less prone to the devastating, multi-trillion dollar cost of another financial crisis.

Indeed, there is a strong argument that the Dodd-Frank Act especially, and financial reform generally, will result in no incremental costs and may actually save the United States and its citizens money, not to mention untold human misery. How could this be? It is really a question of who pays those costs and when. Would we rather have the financial industry bear the costs of its high risk activities in the ordinary course of business,<sup>34</sup> accepting that some of those costs will be passed on to its clients who seek, need, or want those high risk activities? Or, would we rather that everyone in the country pay for those high risk activities after they lead to a financial crash and economic tragedy? It is not only rational, but appropriate for society to determine that the former is much preferable to the latter, particularly when we know the latter just cost the country more than \$20 trillion and widespread human suffering from coast to coast.

Regardless, the available evidence at this very early stage suggests that the impact of the Dodd-Frank Act is precisely what it should be. For example, the GAO’s most recent review of the Act paints a positive picture, based on a number of indicators. As to large bank holding companies, while they still have a long way to go, they have decreased their leverage; liquidity has improved; they have suffered little impact on their funding costs presumably due to improvements in their safety and soundness; and they have been requiring their counterparties

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32. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 619, 12 U.S.C. § 1851 (2012); 12 C.F.R. §§ 44, 248, 351 (2015); 17 C.F.R. §§ 75, 255 (2015).

33. See Donna Borak, *Four Years Later, Economic Cost of Dodd-Frank Remains Elusive*, *Am. Banker*, Jul. 18, 2014 (noting that “some portion of the regulatory cost is going to be passed on to the customers”).

34. This is a rather pedestrian economic concept of requiring companies to internalize their costs, rather than externalizing them onto the public, i.e., eliminating an unfair and unseen public subsidy or, in finance, the Greenspan or, if you will, the Bernanke put.

to post more collateral against derivatives contracts.<sup>35</sup> In fact, the Bank for International Settlements has found that the world's largest, most systemically important banks have become substantially better capitalized than they were in the years before the crisis, and—despite the baseless but dire warnings of rule bashers—they continue to lend.<sup>36</sup> As to smaller banks and credit unions, while they have experienced some increased compliance costs, borrowers have experienced only minimal to moderate reductions in the availability of credit, and no discernable impact on mortgage lending.<sup>37</sup>

## V. CONCLUSION

Many critics of the Dodd-Frank Act fail to acknowledge the full breadth and scope of the 2008 financial crash, the economic devastation that resulted, and the underlying causes of the crisis. They also ignore the relevant historical precedents of the Great Crash of 1929, the Great Depression of the 1930s, and the enormously beneficial regulation of the financial industry that emerged from that era. Therefore, they also fail to illuminate the core question regarding the impact of the Dodd-Frank Act. Unsupported imaginings about the supposedly dreadful impact of the Dodd Frank Act cloud the debate and fuel the passions of those who ardently oppose all regulation however modest, sensible, or necessary. Moreover, a prescription for mandatory rigorous cost-benefit analysis at every financial regulator for every rule—in the face of overwhelming evidence showing that such an approach is counterproductive and harmful—would be disastrous for our financial system, our economy, and the lives and livelihoods of all Americans.

We know that the financial crisis cost Americans more than \$20 trillion and incalculable human suffering. In response to that crisis, the American people—through their elected representatives—enacted the Dodd-Frank Act. We must allow the law a full and fair opportunity to take effect and stabilize our financial system, not undermine it with

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35. GAO Report, *supra* note 29, at 1.

36. Bank for Int'l Settlements, *How Have Banks Adjusted to Higher Capital Requirements*, BIS Quarterly Review (Sept. 2013).

37. GAO Report, *supra* note 29, at 1.

relentless attempts to obstruct its implementation and roll back its protections on the basis of alarmist and groundless speculation. The evidence so far indicates that the reforms are benefitting our financial system in the ways intended, without the dire consequences predicted by critics.