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REFORMING DODD-FRANK: IS THE FINANCIAL CHOICE ACT – OR ANY OTHER LEGISTLATION PROPOSED – THE RIGHT CHOICE?

by

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INTRODUCTION

A political storm has arisen with the election of President Donald Trump in 2016. President Trump inherited a Republican Senate and House of Representatives, somewhat comparable to the election of the Democrat President, Barack Obama, who initially had a Democrat legislative body eight years before. The U.S. economy was radically different at each commencement, with Obama facing the greatest financial crisis since the Great Depression of the 1930s while Trump witnessed a mainly recovered and prosperous economy. When President Trump took office, the unemployment rate had fallen from approximately 10 percent to below five percent,

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bordering on what some economists would term "full employment." Nevertheless, the economic status of many Americans remained stagnant as of 2016, causing an unexpected surge of dissatisfied voters who opted to change their political party-designation based upon the hope of the fulfillment of the slogan "Make America Great Again," the assumption underlying the slogan being that the United States no longer had the global economic and political power it once possessed.

A major alleged cause for the claim that America is not great was the proliferation of governmental regulation and oversight that allegedly was responsible for less than desired economic prosperity for middle- and lower-class American workers. This Article will explore the pros and cons of federal financial regulation – and efforts made to overturn a vast segment of the regulations. We will examine key provisions of the Dodd-Frank Act and the regulatory provisions enacted pursuant thereto that often cause consternation among the affected financial participants.

DODD-FRANK ACT AND REGULATIONS

President Trump's Executive Orders

President Donald Trump issued a series of executive orders to limit government regulation of large segments of the economy. One of his first executive orders was entitled, "*Reducing Regulation and Controlling Regulatory* Costs."[1] Historically, the claim by President Trump that excessive regulation impeded economic growth was the not the first such claim by a Republican President. President Ronald Reagan, in office from 1981 to 1989, also attributed the financial crisis he inherited upon taking office to over-regulation of industry; therefore he issued Executive Order 12291 as one of his first

actions as President.[2] That order, which is similar in scope and content to President Trump's Executive Orders of January 30, 2017 stated that each agency shall consider and prepare an analysis of the regulatory impact of every major rule.[3] President Trump issued a further Executive Order[4] requiring the head of each executive agency to submit within 180 days a proposed plan to reorganize the agency in order to improve its efficiency, effectiveness, and accountability. Recommendations sought were the elimination of unnecessary agencies, components thereof, agency programs, and the merger of functions. The factors to be considered are:

(i) whether some or all of the functions of an agency, a component, or a program are appropriate for the Federal Government or would be better left to State or local governments or to the private sector through free enterprise;
(ii) whether some or all of the functions of an agency, a component, or a program are redundant, including with those of another agency, component, or program;
(iii) whether certain administrative capabilities necessary for operating an agency, a component, or a program are redundant with those of another agency, component, or program;
(iv) whether the costs of continuing to operate an agency, a component, or a program are justified by the public benefits it provides; and
(v) the costs of shutting down or merging agencies, components, or programs, including the costs of addressing the equities of affected agency staff.[5]

Thus, the combined Presidential and Congressional actions raise the issue of governmental regulatory actions as roadblocks to economic expansion.

Purposes of Regulatory Oversight under the Dodd-Frank Act

The *Dodd-Frank Act*[6] was passed in 2010 solely by the unanimous vote of Democrat representatives in the House and the required super-majority of Senators in the Senate. In the face of total opposition of Republican legislators, the Act was signed into law by President Barack Obama in order to curb alleged significant abuses and lack of oversight by federal agencies that led to the 2007 recession. The demise of Lehman Brothers and the near demise of major financial institutions led the federal government to institute a major bailout of troubled banks and other entities to prevent the collapse of these institutions both domestically and worldwide.

Factors That Led to Economic Collapse:

There were a number of causes that led to the critical juncture of determining which responses were to be undertaken by the federal government. Those opposed to government bailouts believed that troubled institutions should be allowed to liquidate in accordance with market theory under capitalism or other economic theories[7] while other commentators and government officials such as U.S. Treasury Secretary Henry Paulson Jr. and Federal Reserve Chair Ben Bernanke believed that the failure to rescue them through TARP program[8] would cause a massive financial breakdown comparable to or worse than the Great Depression of the 1930s.[9]

The ostensible causes for the 2007 financial near collapse are many and are often recited according to the ideological preferences of the commentators. Nevertheless,

there appears to be a consensus of the major factors that led to it. The initial cause appears to be the grant and sale of subprime mortgages, that is, mortgage loans grated to home buyers who could ill afford to pay the monthly premiums particularly when the premiums initially given at "teaser" rates (rates that were very low but due to rise after one or more years) or if the homeowner lost his or her job or became incapacitated. Inasmuch as the cost of housing kept rising almost daily, there appeared to be no risk because the homes could be sold at a profit in the event the homeowner was unable to make the monthly payment. These loans, often consisting of the entire often highly inflated value of the home and even the closing costs, were pooled, packaged into levels of tranches depending on risk at increasing interest rates and sold to investors, including pension and mutual funds and foreign banks. Such investors heretofore believed the loans to be nearly risk-free.

The pooled mortgages were used to back securities called collateralized debt obligations. The major rating agencies gave the instruments unjustified high ratings, either due to lack of knowledge of the new forms of complex financial securities or outright neglect, as they profited from the fees from making the ratings in competition with each other. When homeowners began having difficulties making the premium payments, their properties were foreclosed upon. These many thousands of foreclosures were partly responsible for the ensuing death spiral of bank closures and job losses.[10] As described by another scholar, the death spiral consisted of a fall in the value of the inflated asset value that was backed by high leverage which then led to margin calls compelling investors to sell the asset which then lessened the value of the asset; the fall in value lessened the collateral backing the initial leveraged credit boom; which in turn forced a fire sale of the

asset and the cascading resulting financial events vicious circle of repeated events.[11]

There were other factors that contributed to the mortgage crisis. Forbes attributed the crisis to the removal of the separation of investment from commercial banks under the *Gramm-Leach-Bliley Act of 2009* (the "*2009 Act*") whereby banks were now able to engage in high risk behavior but also buttressed by the guaranteed deposits by the Federal Deposit Insurance Corporation ("FDIC"); the Fed's low interest prime rates; the new forms of loans by poorly understood mechanisms; credit agencies compliance; unregulated derivatives and their uncontrolled explosion; nonbank financial ventures; looser capital SEC requirements; lack of governmental oversight; compensation tied to short-term performance that led to high risk behavior; Fannie Mae and Freddie Mac underwriting of high risk loans; among other factors.[12]

There were international macro-and micro-economic causes for the financial downturn. Among them were the decline in short-term interest rates brought about in part by central banks, the opening of the Chinese economy, and the fall of the Soviet Union that led to downward pressure on wages and prices especially with the decline of labor unions; the growing demand for mortgages; the increased market for securitized bonds; and the rise of shadow banking were all contributing factors in the global economy of which the U.S. is the major player.[13]

Dodd-Frank Act Reform Efforts

The *2009 Act*, consisting of 16 titles, covered the largest segments of the U.S. economy and sought to remedy the perceived fault lines that led to the 2007 crisis. The major

concern was the promotion of the financial stability for the domestic economy.[14] It established the Financial Stability Oversight Council ("FSOC"), whose membership is composed of ten voting members and five non-voting members. Members' duties include identifying risks to the financial stability of the U.S. that could arise from the material financial distress or failure, promote market discipline, responding to emerging threats to the U.S. financial system or activities of the large interconnected banking and non-banking financial sectors of the economy.[15] FSOC is given the authority to supervise nonbanks (engaged in shadow banking), which previously had essentially been unregulated but now often became subsidiaries of bank holding companies.[16] FSOC was empowered to investigate and determine which financial institutions when facing possible collapse could lead to the overall harm to the general economy and make them subject to enhanced and somewhat prudential standards so as to prevent their demise or lessen the negative impacts such as those that ensued in the wake of the collapse of Lehman Brothers and American International Group.[17]

Additional areas of regulation of the *2009 Act* include regulation of hedge fund advisers and others, insurance orderly liquidation for systemic risk companies, additional securities laws regulation, consumer protection by the creation of the Consumer Financial Protection Bureau, and mortgage loan financing.[18]

CONGRESSIONAL RESPONSE THROUGH THE FINANCIAL CHOICE ACT[19]

In the House of Representatives, Jeb Hensarling,[20]chairman of the House Financial Services Committee, introduced a bill, *Financial Choice Act of 2017* (the "*Choice Act*")[21] which, in essence, would substantially

modify or repeal major provisions of the *Dodd-Frank Act of 2010*.[22] The bill was passed by the House of Representatives by a vote of 233 to 186 with no Democrat Representative voting for the bill. There is virtually no chance of passage in the Senate due to the opposition of Democrat senators who would filibuster such enactment and would require a super-majority vote of 60 of the 100 senators. The Republican legislators could attempt to bypass the supermajority required by passing a regulatory relief bill through reconciliation which requires only 50 votes in the Senate.[23] The bill raises, among many other issues, whether the regulations created pursuant to the *Dodd-Frank Act* are excessive and thereby impose too high a regulatory burden upon financial institutions and an impediment to the overall U.S. economy.

Former Senator Phil Gramm,[24] former chairman of the Senate Banking, Housing and Urban Affairs Committee and co-author of the *Gramm-Leach Bliley Act of 1999*,[25] which removed the separation of investment banks from commercial banks, testified on May 10, 2017 that the principal cause of low economic growth in the U.S. has been the result of the regulatory burden placed upon the financial sector of the economy.[26] In essence, the argument made by Gramm and others was that, although major financial institutions can afford to retain compliance officers to supervise and assure regulatory compliance, nevertheless, small entities, particularly community banks and credit unions cannot afford to retain such expertise. The net result allegedly is harm to the overall economy causing it to have less than optimum annual gross domestic product, which averaged 3.2 percent since 1947 and a first-quarter 2017 growth rate of 1.2 percent.[27]

Key Provisions of the Choice Act

Although the *Choice Act*, as of this writing has little chance of passage in the U.S. Senate, nevertheless, it does provide a comprehensive exposure of the Republican platform that has sought to lessen what it perceives to be the regulatory stranglehold on the domestic economy. It is anticipated that the Senate will emulate most of the key provisions of the *Choice Act*. Thus, we will review and discuss the key provisions of the bill and the likelihood of passage by both houses of Congress.

The 350-page proposed *Choice Act* (called by democrats "The Wrong Choice Act")[28], is composed of 12 titles. It substantially alters the *Dodd-Frank Act* by repealing the Volcker Rule, gutting the Orderly Liquidation Authority, and repealing the Fiduciary Duty rule. It practically reduces the protections of the Consumer Financial Protection Bureau, and exempts banks from alleged onerous requirements provided they hold 10 percent of capital assets. The first major change is stated in Title I, Subtitle A, "Ending "Too Big to Fail" and Bank Bailouts, Section 111, repeals the Orderly Liquidation Authority.

Choice Act Title I: Ending "Too Big to Fail" and Bank Bailouts

Repeal of the Orderly Liquidation Authority:

Although Title I of the *Choice Act* emphasizes the termination of taxpayer assistance to troubled banks, it does so by ending the *Dodd-Frank Act* mechanism for identifying those financial institutions which, if they were to become financially insolvent would cause substantial stress to the overall U.S. and global economies as discussed above.[29] Rather than identifying

"systemically important financial institutions" ("SIFIs") by FSOC under Title II of *the Dodd-Frank Ac*t and making them subject to enhanced prudential standards,[30] the *Choice Act* substitutes a bankruptcy procedure for a "covered financial corporation" defined as a bank holding company, which is corporation whose primary purpose is to own, control, or finance subsidiaries having a total consolidated assets of $50 billion or more, or such ownership or control of financial assets relating to depositary institutions represents 85 percent of the consolidated assets of the corporation.[31]

The proposed elimination of the orderly liquidation authority ("OLA") as an alternative to a Chapter 7 or Chapter 11 of the Bankruptcy Code[32] and its replacement of SIFI with an exclusive bankruptcy procedure has engendered much controversy. Most commentators appear to be opposed to the elimination of the Dodd-Frank mechanism.[33] One scholar, while acknowledging that the OLA is not perfect, nevertheless, recognizes it as an essential tool for government regulators to ensure that the financial crisis attributable to a particular SIFI does not escalate to a broader financial crisis. Substituting a bankruptcy judge's determination would be far less effective than that of highly experienced financial regulators who have extensive oversight over the U.S. economy.[34] These regulators are better able to deal with the complexities of the financial system and its relationship with the global economy in place of a bankruptcy judge lacking the overall experience of the regulators.[35] On the other hand, bankruptcy judges are more concerned with protecting the rights of creditors rather than determining what is best for the overall financial economy of the U.S.[36]

Another scholar noted that there were three main criticisms of the OLA: (1) that it creates a moral hazard by allegedly encouraging investors to take more risks because it

gives the government authority to resolve a failed entity, making it more likely to step in if the entity is "too-big-to-fail"; (2) the FDIC is given too much discretion under the OLA because it does not require it to use the "single-point-of-entry"[37] in the event of a crisis but may take options treating creditors differently that they had anticipated; and (3) that the use of bankruptcy procedures is better than the existing mechanism. The response to the criticism is (a) the financial firms, such as General Electric, that have been designated SIFIs instituted structural changes to conform to will no longer be subject to enhanced prudential standards; (b) the complaint can be resolved without the need for ending the OLA; and (c) the bankruptcy procedure is inadequate for large banks and institutions during a financial crisis and may require financial government intervention to prevent widespread disruption. Also, under Dodd-Frank, failing firms are to use the bankruptcy procedure and are required to have "living wills" negating OLA's involvement as a last resort.[38]

Constitutional objections have also been raised, namely, under Section 202 of the *Dodd-Frank Act*. This section, Judicial Review, provides for the commencement of orderly liquidation via a petition to the federal district court when there is a determination by the Treasury Secretary that a financial company satisfies the requirements establishing that the financial company is in default or in danger of default and that such failure would have a serious adverse effect on the financial stability of the U.S. and no other viable alternative is available.[39] If the board of directors of the financial company objects to the petition then the corporation is to be appointed as receiver.[40] The determination is to be confidential without public disclosure, and the court is to determine whether the finding of the secretary is arbitrary and capricious.[41] If the court does not make a determination within 24 hours then the Secretary is authorized to appoint the corporation as receiver

and liquidation is to take place automatically and immediately without further notice. Appeal is limited. There are criminal penalties for persons who recklessly disclose the determination of the Secretary of the petition and pendency of the proceeding.[42]

There appears to be serious constitutional objections to the secrecy of the proceedings; the criminal nature of any disclosure (reason for the provision is to avoid panic in the financial markets) that raises First Amendment freedom of speech issues; the limited time element for a court to make a determination; the mandatory nature of liquidation when other alternatives may be more properly available which may raise Fifth Amendment Takings Clause; the limited nature of judicial review; and other related constitutional issues.[43]

President Trump appears to favor the elimination of the OLA. In a memorandum to the Secretary of the Treasury, the President directed the Secretary to review the authority of the OLA within 180 days from April 21, 2017, consider the potential adverse effects of failing financial on the financial stability of the U.S.; whether invoking OLA could engender a cost to the Treasury; whether OLA's availability could lead to excessive risk taking by creditors, counterparties, and shareholders; whether a new chapter of the Bankruptcy Code would be a superior method of resolving the resolution of failing companies; OLA's anticipated direct and indirect effects; and recommendation for improvement, if any, for legislative changes.[44]

In another memorandum issued the same day, this one concerning FSOC, the President directed the Secretary of the Treasury to conduct a thorough review of FCO's determination and designation processes. He sought information on whether the processes are sufficiently transparent; provide entities with

adequate due process; give market participants the expectation that the Federal Government will shield supervised or designated entities from bankruptcy. He also sought an evaluation of a nonbank financial company's vulnerability to material financial distress; whether any determination as to whether a nonbank financial company's material financial distress could threaten the financial stability of the United States; and whether these processes adequately consider the costs of any determination or designation on the regulated entity.[45]

Repeal of the Volcker Rule:

The *Choice Act* repeals The Volcker Rule, the name of which refers to the former Federal Reserve Chair. Paul Volcker, Federal Reserve Board Chair under both Presidents Jimmy Carter, a Democrat, and Ronald Reagan, a Republican, instituted the Rule while acting as Chairman of the Economic Recovery Advisory Board under President Barack Obama. The financial crisis of 2007 and the events that brought about the closing of numerous banks for the first time since the Great Depression of the 1930s, led to an examination of the causes of the 2007 Recession. Historically, there were bank panics approximately every two decades since the founding of the nation but none for five decades after the *Glass-Steagall Act of 1933*[46] separation of investment from commercial banks instituted under President Franklin Roosevelt.

The separation ended with the passage of the *Gramm-Leach-Bliley Act of 1999* which permitted banks to engage in security offerings and insurance services.[47] A major factor for bank closings allegedly was the removal of the said separation. Although the current President, Donald Trump, stated that he wants to break up the large banking entities effectively by reviving the prior separation of banking entities,[48] it is unclear

whether the president will follow through inasmuch as his Secretary of the Treasury, Steven Mnuchin, and his economic adviser, Gary Cohn, stated that a "21st Century" version of the *Glass Steagall Act* will be endorsed, with its meaning being unclear.[49]

Pursuant to Section 619 of the *Dodd-Frank Act*, a new Section 13 was added to the *Bank Holding Act*. The "Volcker Rule" prohibits an insured depositary institution and holding company controlling an insured depositary institution from engaging in proprietary trading or from acquiring or retaining an ownership interest, sponsoring, or having certain relationships with hedge funds or private equity funds. "Proprietary trading" was given a broad definition that includes: acting as a principal or custodian for an affiliated party; for a trading account used by the entity to acquire or be financially involved in short-term resale; the prohibition of purchasing, selling, or otherwise acquiring or dispensing of stocks, bonds, or other financial instruments for the bank's own account. It covers both banking entities and nonbank (shadow banking) institutions. Title VI of the *Choice Act*[50] repeals Section 619 (the Volcker Rule) and related provisions of the *Dodd-Frank Act*.

The repeal the Volcker Rule has generated more controversy than may have been anticipated. Those scholars favoring the Rule describe the proposed repeal in terms such as "amnesia" by the negligent or deliberate lack of memory concerning the financial crisis that caused the Rule to be enacted. In order to prevent banks from being "too-big-to-fail and making use of the Federal Reserve Bank's discount window, banks should not be permitted to gamble with taxpayer funds.[51] Arguments for the repeal as stated before a House Capital Markets, Securities and Investment Subcommittee in March of 2017 include the alleged inability of

American businesses to obtain affordable financing for long-term growth; their significant increased borrowing costs; lower investment returns for households; harmful effects on corporate bond liquidity causing dealers to be more restrictive in providing liquidity during times of stress; additional restrictions on market making an underwriting activities, all of which serve to impact businesses and restrict their ability to finance short-term needs and plan for long-term growth.[52]

SIFI Designation Repeal:

The newly created Financial Stability Oversight Council ("FSOC"), pursuant to Section 111 of the *Dodd-Frank Act*, was given the power to designate banks and nonbanks for supervision by the Financial Stability Board. There are exceptions for trading in U.S. government securities, underwriting and market-related activities, trading on behalf of customers. FSOC's designation of a financial institution as a "systemically important financial institution" – or SIFI – would bring about a panoply of heightened prudential standards that are onerous to the designated firm.

The designation as a SIFI has been extremely controversial. Thus, when General Electric Capital Corporation received the designation, it sold off billions of dollars of assets to remove the said designation. MetLife's designation on December 18, 2014 was particularly contentious because it is essentially an insurance company with allegedly far less risk investments than the banking sector. It commenced litigation to invalidate the designation and to date has been successful at the District Court level.[53] It is pending appeal but there are indications that the current administration may rescind its appeal of the decision.[54]

Impact on Community Banks

A major concern underlying the *Choice Act* is the impact of federal regulation on smaller financial institutions which lack the resources to comply with onerous regulations. *The Economist* publication illustrates the difficulty by reference to the merger of Standard Financial, a bank with some $488 million and nine branches, with Allegheny Valley Bancorp a smaller neighboring bank in a Pittsburgh suburb. The main reason for the merger, quoting the CEO of Standard, was the cost of regulatory compliance that would not have occurred but for the cost. Larger banks inherently are more able to afford personnel assuring regulatory compliance while smaller entities operating on a smaller profit margin can ill afford the additional regulatory cost structure. Alleged proof of the effect of regulations is the number of community banks that have failed – over 400 – with only five new banks in existence, which provide 43 percent of small business loans nationally. The cost of compliance is illustrated by the additional personnel required to service mortgages, which is at the heart of community bank lending.[55] The Independent Community Bankers of America, an organization representing some 5,800 community banks is supportive of the *Choice Act* provisions reforming and lessening mortgage lending requirements.[56]

It appears that relief for community banks is bipartisan but Democrats object to the overall dismantling of the *Dodd-Frank Act* and would support a separate bill for community bank regulatory relief.[57] There appears to be mixed reactions to the bill from the banking sector. The American Bankers Association ("ABA") President and CEO, Rob Nichols, signified the ABA's support of the bill, which he described as providing "much-needed regulatory relief."[58] The publication *American Banker*, on the other hand, decries the claim of the chair of the committee that community banks are in a crisis due

to the *Dodd-Frank Act*. It alleges that the claim is divorced from reality in two respects, namely, that the main beneficiaries of the legislation are the megabanks, not the vast majority of community banks and that the challenges that community banks have been subjected to predate and were unrelated to the post 2007 financial crisis. It cited the Office of the Comptroller of the Currency, which illustrated that the top four banks accounted for 89 percent of all notional derivatives and 96 percent of credit derivatives. It noted that the *2009 Act* as stated above undermines the Consumer Financial Protection Bureau, nullifies key shareholder rights of all but the largest shareholders, eliminates the orderly liquidation authority of the FDIC, and nullifies the Volcker Rule that reinstitute the risks posed by the pre-2007 crisis[59].

The author further noted that the *Dodd-Frank Act* imposed few restrictions on community banks, which, except for six community banks of 5,000, were not subject to stress tests that were applicable only to banks with over $10 billion in consolidated assets and heightened requirements applicable to banks with over $50 billion in consolidated assets. The *Dodd-Frank Act*'s exemption of banks from most of the regulatory requirements having a 10 percent capital ratio is likely not sufficient to avert a further crisis should a 2007 scenario arise new. A safer capital ratio for regulatory exemptions should be in the range of 20 to 30 percent.[60] Other observers, however, while acknowledging the resiliency of community banks in attempting to comply with regulatory requirements, nevertheless note they have been seriously harmed in their attempt to grow and serve customers in their community. With an average of 42 employees for medium-size banks, they do not have the capacity to understand, train and test for compliance, and apply the multiplicity of rules and regulations required of them.[61]

In an extensive study by the Congressional Research Service,[62] it determined that, although the regulatory burden for small banks has increased in absolute terms, but not so in comparison with larger banks due to accommodations in recent rules and regulations since the financial crisis. It is exemplified by the fact that 13 of 14 "major rules" of baking regulators include either exemptions for small banks or the regulations are tailored to reduce the cost from small banks. The one exception provides regulatory relief for securities backed by capital frequently issued by small banks. None of these regulations are likely to negatively affect the ability of small banks to compete with large banks although there may be some effect in competitive dealings with nonbanks. It further concluded that overestimating the regulatory burden on small banks may lead to policy changes that may have negative consequences for consumers, banks, and the broader economy. Underestimating the regulatory burden could result in further consolidation of banks which, in turn, may lead to shifting of assets from banks to the shadow banking system.[63]

ECONOMIC GROWTH, REGULATORY RELIEF, AND CONSUMER PROTECTION ACT

The *Choice Act*, which was not adopted by the Congress, was followed by the *Economic Growth, Regulatory Relief, and Consumer Protection Act*[64] which was passed by the Senate but not yet adopted by the House. The Act is composed of seven titles, which include the establishments of lower regulatory requirements and oversight from the FSOC for banks between $50 billion and $250 billion in assets; the exemption from the Volcker Rule that bans banks from engaging in speculative trades for banks with less than $10 billion in assets and their total trading assets and trading liabilities that do not exceed more than five percent of total consolidated assets; the requirement that the Federal Reserve

not regulate banks in a "one size fits all" thus removing major roadblocks from community banks in their lending policies; and the allowance of foreign banks to avoid U.S. regulatory scrutiny by tallying their U.S. assets in a manner to keep them under the $250 billion threshold.[65]

The *Economic Growth, Regulatory Relief, and Consumer Protection Act* differs from the *Choice Act* in that its limits the scope of the Volcker Rule rather than provide for its total repeal. Unlike the *Dodd-Frank Act,* which faced near total Republican opposition and total Democrat Senate support, the Crapo bill (named for its sponsor Sen. Mike Crapo (Republican of Idaho), did have some Democrat support by its easing of restrictions on more local community banks. Individuals applying for mortgages in the post-Dodd-Frank era experienced significant roadblocks which often dissuaded otherwise eligible applicants from purchasing homes. Community banks, which relied on the issuance of mortgages for home purchases as a mainstream of their profitability found themselves unable to make loans in many cases due to the inordinate governmental regulatory restrictions. Community banks would have fared better under the *Choice Act* that has an "off-ramp" feature that allowed a qualifying banking organization of any size to elect to be exempt from risk-weighted capital requirements and other restrictions but the Crapo bill lessened oversight for banks with under $10 billion in total assets as stated above.[66]

PRESIDENT TRUMP AND THE ENVIRONMENT AND CONSUMER PROTECTION

Environmental Regulatory Changes

Although a Republican President, Richard Nixon, was responsible for much of the major legislation to protect the

environment, the Trump administration has made a concerted effort to remove alleged barriers to employment due to regulations pursuant to federal statutory obligations. National Geographic, in a lengthy presentation, recited a summary of decisions and actions that directed contradict decades of protection.[67] Among the changes is the Environmental Protection Agency's proposed rule that the Agency to only consider scientific studies for which the underlying data is made available publicly, The problem, according to at least 1,000 scientists who oppose the rule change, is that much of the underlying data is based on personal health information which cannot be made publicly available due to privacy concerns. The Department of the Interior submitted a rule change that removes protection for threatened wildlife species. Other changes affecting the environment is the rollback of car emissions standards; the reorganization of an EPA group that funds research on children's health and environmental health disparities; FEMA expelling of "climate change" from its strategic plan; cuts to clean-energy programs; loosening of regulations on toxic air pollution; removal of the U.S. from the Paris Accord (the only country in the world to do so); the proposal to scrap clean power plan; the halting of mining health studies; and numerous other anti-environmental programs.[68]

Consumer Protection Changes

The *Dodd-Frank Act* created in Title X, the *Consumer Financial Protection Act,* which established the consumer Financial Protection Bureau as an independent agency within the Board of Governors of the Federal Reserve System. The Bureau has been aggressive in combatting anti-consumer actions by credit card companies, pay-day loans that seriously jeopardize by grossly inflated interest charges loans made to

low income employees who require immediate moneys for payment of necessary daily living expenses.

President Trump's appointment of Director Mick Mulvaney signaled the end of its mission to protect consumers. The Bureau, albeit not ended, nevertheless has taken no punitive measures against any alleged wrongdoers and has not sought any funding for the investigation and prosecution of actions against consumers. It has essentially ended its investigation of Equifax with respect to a massive data breach; ended investigations of discriminatory lending practices against minorities, and let go a myriad of other alleged offenses against consumers.[69]

PROS AND CONS OF REGULATION

As with almost any statutory and regulatory enactment, there are winners and losers, but the goal of governmental action is to provide for the betterment of the common good – particularly when there are societal difficulties that need to be addressed. The problem arises that the philosophical differences make compromise exceedingly difficult particularly when the media reflects the nation's deep divide and its audience listens only to the viewpoint desired by it. Thus, while congressional representatives may individually desire to compromise their views for the benefit of their constituencies, the fear of retribution from extremist elements within their particular parties supported by extreme media outlets cause them to maintain uncompromising extreme views. The question posed in this Article is whether the regulatory regime created under different political administrations warrants significant downsizing or reform to accomplish the statutory goals of protection for the common good. There are major arguments that have some merit for either viewpoint.

Arguments in Favor of Regulation

The crisis of 2007 reflected major problems in the financial system that led to systemic risks that ultimately almost caused the collapse of the U.S. and global economies. With a decade to reflect on the events leading up to the crisis it becomes clearer to economists and policy makers what occurred and the options available to both end the economic downturn and attempt to prevent at least near future financial catastrophes. Among the arguments favoring government regulation is that it assists in keeping the markets competitive especially by prosecuting anti-monopolistic behavior; gives voice to consumers who often are ignored in the manipulations accompanying market activities such as drugs, stocks, and other commodity pricing; and compels greater transparency and freedom in the marketplace.[70]

The Geneva Report on Financial Regulation affirms in great part the regulatory environment such as that promulgated under Dodd-Frank.[71] Reflecting in large measure the financial bubble that burst in 2007 and immediately thereafter, it recommends both macro- and micro-prudential approaches for governmental regulation. It further recommends greater intervention in global markets to encourage competition and prevent oligopolistic behavior. Macro-prudential regulation should be countercyclical to negate the effect of bubbles whose bursting can lead to global distress. Regulators should agree on those sectors of the economy of systemic institutions that could cause disruptions and seek global solutions and cooperation.[72]

Arguments Alleging Excessive Regulation Impede Economic Growth

The essence of the claim that excessive regulation impedes growth was succinctly stated in Forbes Magazine. It recited that middle-class households received 15 percent less credit while wealthy households received increased credit of 21 percent; the nation's five largest banks control 44 percent of all U.S. banking assets; the *Dodd-Frank Act* resulted in 24,000 pages of regulations although one-quarter more of the required some 400 regulations are yet to be finalized; that the Volcker Rule which made the corporate bond market less liquid was created although evidenced lacked that proprietary trading contributed to the financial crisis; and that FSOC's extraordinary power to designate nonbanks SIFIs wrongfully designated insurance companies (Prudential and MetLife) as SIFIs causing them to be subject to prudential enhancement even though they did not contribute to the crisis.[73]

Did Bank Regulations Impede Financial Stability?

It appears that the large banks required to undergo stress testing under the *Dodd-Frank Act* have not suffered from the Act's requirements. On June 28, 2017, it was reported that all of the 34 largest U.S. banks required to undergo such testing had passed it thereby permitted to return 100 percent of profits at their option to investors in place of 65 percent last year. Even previously troubled banks, such as Citibank, Wells Fargo (which had undergone extraordinary scandal of creating fraudulent accounts),[74] and the American units of Santander Holdings USA and Deutsche Bank have met regulatory standards.[75] Nevertheless, although the largest banks have managed to recover from their major downturn and near demise of a decade ago, the question remains whether nonbanks (shadow banks) and community banks have also shared in the financial upturn.

CONCLUSION

The above discussion reflects the philosophical differences of the two major political parties. Although the *Dodd-Frank Act* was enacted without any Republican legislator voting for the Act to address the financial crisis of a decade ago, the question arose whether the enormous scope of the enactment was excessive. Republican legislators have historically been opposed to government intrusion, particularly in the financial sector, in the belief that the market should bear the positive and negative consequences of actions taken by all sectors of the economy. The *Choice Act* does reflect the philosophical views of the President, his key advisers, and the Republican Party.[76]

There are valid arguments both for and against significant changes in the *Dodd-Frank* all-encompassing regulatory system that Democrats also agree warrant revisiting. Nevertheless, it appears that the *Choice Act* and subsequent proposed legislation appear to ignore the origin and purposes for the 2010 Act. In any event, the discussion may be moot inasmuch as the Trump Administration may simply refuse to enforce the Dodd-Frank mandates and regulatory scheme. Treasury Secretary Steven Mnuchin, has indicated that he will simply not convene FSOC over which the Treasury Department jurisdiction. The *Dodd-Frank Act* requires the Treasury Secretary to consent to decisions made by the Council. The MetLife litigation whereby MetLife opposed its SIFI designation is on appeal and it appears that the Administration will not pursue the appeal and allow MetLife to prevail. Thus, it remains to be seen whether the changes made legally and politically will bring about another crisis or, as the President alleges, the U.S. will be great again.

ENDNOTES

[1] Exec. Order, 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017)
[2] Exec. Order, 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981)
[3] *See s*upra, note 1, §3(a)(b). For a brief historical context for the Executive Order, see JON MEACHAM, DESTINY AND POWER: THE AMERICAN ODYSSEY OF GEORGE HERBERT WALKER BUSH*,* (Random House, 2015).
[4] Exec. Order, 13781, 82 Fed. Reg. 13959 (Mar. 13, 2017)
[5] *Id*. §2 (a)-(d).
[6] Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).
[7] David M. Herszenhorn, *A Curious Coalition Opposed Bailout Bill*, N.Y. TIMES (Oct. 2, 2008), http://www.nytimes.com/2008/10/03/business/03naysayers.html; Robert A. Levy, *Is the Bailout Constitutional?,* CATO INST. (Oct. 20, 2018), https://www.cato.org/publications/commentary/is-bailout-constitutional.
[8] *Troubled Asset Relief Program*, which was designed to assist major financial sectors in order to stabilize the economy was authorized by Congress through Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 101-136, 122 Stat. 3765, 3767–3800 (2008).
[9] Mike Collins, *The Big Bank Bailout*, FORBES (July 14, 2015, 04:22 PM), https://www.forbes.com/sites/mikecollins/2015/07/14/the-big-bank-bailout/#545e9e9c2d83.
[10] *The origins of the financial crisis*, ECONOMIST (Sept. 7, 2013), https://www.economist.com/schools-brief/2013/09/07/crash-course. See, also, Martin Neil Baily et al., *The Origins of the Financial Crisis*, BROOKINGS INITIATIVE ON BUS. AND PUB. POL'Y (Nov. 24, 2018),

https://www.brookings.edu/research/the-origins-of-the-financial-crisis/.

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[12] Steve Denning, *Lest We Forget: Why We Had A Financial Crisis*, FORBES (Nov. 22, 2011, 11:28 AM), https://www.forbes.com/sites/stevedenning/2011/11/22/5086/#51c46cfdf92f.

[13] Paul Ramskogler, *Tracing the origins of the financial crisis,* 2 OECD J.: FIN. MKT. TRENDS 47 (2014).

[14] The Act's full title is: An Act to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to fail", to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."

[15] Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 111-112, 124 Stat. 1376, 1392-1398 (2010).

[16] For a detailed discussion of shadow banking, see ROY J. GIRASA, SHADOW BANKING: THE RISE, RISKS, AND REWARDS OF NON-BANK FINANCIAL SERVICES (2016)

[17] The prudential standards are set forth in Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 165, 124 Stat. 1376, 1423-1432 (2010).

[18] For an extensive discussion of the Dodd-Frank Act and financial regulation in general see ROY J. GIRASA, CORPORATE GOVERNANCE & FINANCE LAW (2013) and ROY J. GIRASA, LAWS AND REGULATIONS IN GLOBAL FINANCIAL MARKETS (2013).

[19] Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017). "An Act to create hope and opportunity for investors, consumers, and entrepreneurs by ending bailout and Too Big to Fail, holding Washington and Wall Street accountable,

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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." CHOICE is the acronym for "Creating Hope and Opportunity for Investors, Consumers and Entrepreneurs."

[20] Republican Congressman, TX 5th.

[21] Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017).

[22] Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[23] Donna Borak, *House votes to kill Dodd-Frank. Now what?*, CNN MONEY (June 8, 2017, 6:11 PM), http://money.cnn.com/2017/06/08/news/economy/house-dodd-frank-repeal/index.html.

[24] Senator Phil Gramm (Rep. TX. from 1985-2002), possesses a Ph.D. in economics, was formerly a professor of economics at Texas A&M University, and currently is a visiting scholar at the American Enterprise Institute.

[25] Financial Services Modernization Act of 1999 (Gramm-Leach-Bliley Act), Pub. L. No. 106-102, 113 Stat. 1338 (1999).

[26] *Policies to Grow the Economy hearing before the S. Committee on Budget*, 115th Congress (May 10, 2017) (statement of Phil Gramm, Former Senator, Economic Growth Policies), available at https://www.c-span.org/video/?428277-1/senate-budget-committee-hearing-examines-trump-economic-policy.

[27] BUREAU OF ECONOMIC ANALYSIS, NATIONAL INCOME AND PRODUCT ACCOUNTS GROSS DOMESTIC PRODUCT: FIRST QUARTER 2018 (SECOND ESTIMATE) CORPORATE PROFITS: FIRST QUARTER 2018 (PRELIMINARY ESTIMATE) (2018), available at https://www.bea.gov/newsreleases/national/gdp/gdpnewsrelease.htm..

[28] Jim Puzzanghera, *House votes along party lines to repeal key Dodd-Frank financial reforms*, L.A. TIMES (June 08, 2017,

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2:25 PM), http://www.latimes.com/business/la-fi-dodd-frank-repeal-20170608-story.html.
[29] Financial CHOICE Act of 2017, H.R. 10, 115th Cong.§111(a) (as passed by House, June 8, 2017).
[30] Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 203, 124 Stat. 1376, 1450-1454 (2010).
[31] Financial CHOICE Act of 2017, H.R. 10, 115th Cong.§121(a) (2017).
[32] United States Bankruptcy Code, 11 U.S.C. § 701 *et seq.* and § 1101 *et seq.*
[33] Matt Egan, *The most dangerous part about killing Dodd-Frank*, CNN MONEY (June 12, 2017, 10:18 AM), http://money.cnn.com/2017/06/12/investing/dodd-frank-bailouts-financial-choice-act-ola/index.html.
[34] The SIFI Council regulators include the Secretary of the Treasury, Chairperson of the Federal Reserve, the Comptroller of the Currency, Secretary of the Treasury (chairs the Council), Comptroller of the Currency, Director of the Consumer Financial Protection Bureau, Chairperson of the U.S. Securities and Exchange Commission; Chairperson of the Federal Deposit Insurance Corporation; Chairperson of the Commodity Futures Trading Commission, Director of the Federal Housing Finance Agency, Chairman of the National Credit Union Administration Board and an insurance expert.
[35] Ben Bernanke, *Why Dodd-Frank's orderly liquidation authority should be preserved*, BROOKINGS (Feb. 28, 2017), https://www.brookings.edu/blog/ben-bernanke/2017/02/28/why-dodd-franks-orderly-liquidation-authority-should-be-preserved/.
[36] *Id.*
[37] The "single-point-of-entry" strategy requires the FDIC to resolve a SIFI by making the owners and management accountable for the failure of the company and thereby maintaining the financial stability of the U.S. It requires the

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creditors and shareholders to bear the losses of the financial company in accordance with statutory priorities and negate taxpayers'' costs in its implementation. Press Release, Federal Deposit Insurance Corporation, *FDIC Board Releases Resolution Strategy for Public Comment* (Dec. 10, 2013), available at https://www.fdic.gov/news/news/press/2013/pr13112.html.

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[39] Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 203(b), 124 Stat. 1376, 1451 (2010).

[40] Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 202(a)(1)(A)(ii), 124 Stat. 1376, 1445 (2010).

[41] Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 202(a)(1)(A)(ii), 124 Stat. 1376, 1445 (2010).

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[43] For a lengthy review of the constitutional issues raised by Title II, see Thomas W. Merrill & Margaret L. Merrill, *Dodd-Frank Orderly Liquidation Authority: Too Big for the Constitution?*, 163 U. Pa. L. Rev. 165, 165-247 (2014). See also Sabrina R. Pellerin & John R. Walter, *Orderly Liquidation Authority as an Alternative to Bankruptcy*, 98 ECON. Q., No. 1-First Quarter 1, 1-31 (2012); and *Parallel Regimes: Bankruptcy and Dodd-Frank's Orderly Liquidation Authority*, 31 Rev. Banking & Fin. L. 531 (2012), available at https://www.bu.edu/rbfl/files/2013/09/ParallelRegimes.pdf.

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[45] *Id.*

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[51] See, e.g., John C. Coffee, Jr., *The Financial CHOICE Act of 2017: Will Collective Amnesia Triumph?*, THE CLA BLUE SKY BLOG (May 22, 2017), http://clsbluesky.law.columbia.edu/2017/05/22/the-financial-choice-act-of-2017-will-collective-amnesia-triumph/.

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