

DODD-FRANK AT ONE YEAR: GROWING PAINS

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Addressing a joint session of Congress for the first time in February 2009, President Obama asked Congress to “put in place tough, new common-sense rules of the road so that our financial market rewards drive and innovation, and punishes short-cuts and abuse.”¹ Nine months later, on November 3rd, then-Financial Services Committee Chairman Barney Frank (D-MA) introduced the Financial Stability Improvement Act.² The bill grew exponentially throughout the month of November, and by the time H.R. 4173 came before the full House of Representatives on December 10th, Rep. Frank’s 380-page bill had expanded to 1,279 pages. When the final conference bill was signed into law on July 21, 2010, not only was it the most significant regulatory overhaul since the New Deal, but at almost 2,400 pages,³ it was more than twice the length of the three previous regulatory bills – the Securities Act of 1933, the Securities Exchange Act of 1934 and Sarbanes-Oxley – combined.

In the year since Dodd-Frank was enacted, Republicans have launched countless attacks against it, claiming that it is too costly and unnecessarily increases the size of government.⁴ They have argued that the Volcker rule and derivative regulations harm U.S. competitiveness overseas, that regulatory agencies are overfunded, and that the Consumer Financial Protection Bureau (CFPB) and Office of Financial Research (OFR) have too much power and are not subject to enough oversight.⁵ Republicans, especially

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¹ Remarks of President Barack Obama – As Prepared for Delivery Address to Joint Session of Congress (Feb. 24, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress/

² H.R. RES. 4173, 111th Cong. (2010) (enacted).

³ H.R. REP. NO. 111-517 (2010).

⁴ *See, e.g.*, Phil Mattingly, *Republicans Would ‘Remedy’ Unwanted Dodd-Frank Effects*, BLOOMBERG, Feb. 1, 2011, <http://www.bloomberg.com/news/print/2011-02-01/house-panel-to-remedy-dodd-frank-s-unintended-consequences-draft-shows.html>.

⁵ *See id.*; Victoria McGrane, *Dodd-Frank-Created States Office Comes Under Fire*, WALL ST. J.

those in the House, have introduced bills to repeal Dodd-Frank in its entirety or scale back, defund, delay or otherwise prevent regulators from implementing individual provisions.

Given the rules of the House and the strength of the Republican majority, House Democratic proponents of Dodd-Frank have little recourse but to criticize attempts to overturn Dodd-Frank or portions of it. The Democratic-controlled Senate is another story. In the upper chamber, some have described Senate Banking Committee Democrats as circling the wagons around Dodd-Frank and fending off any and all attempts to amend or repeal it.⁶ The committee's oversight agenda has been noticeably less active than in past years, and some claim the reason is that the new Senate Banking Committee Chairman Tim Johnson (D-SD) is trying to refute Democratic colleagues' criticisms that he has been too 'pro-bank' in the past.⁷

Most of the Republican arguments fall into one of two categories: Dodd-Frank will cost too much and its regulatory requirements will create too much uncertainty for businesses to function properly and plan for the future. Dodd-Frank created thirteen new regulatory agencies, while only eliminating one: the Office of Thrift Supervision. The Congressional Budget Office estimates that it will cost \$2.9 billion over the next 5 years to implement Dodd-Frank,⁸ and some claim there could be up to \$1 trillion in broader economic costs resulting from the Act.⁹ The Act also creates more than 2,600 new positions at regulatory agencies, with some agencies, like the Office of Financial Research, lacking any size limitations on their budgets or staffs.¹⁰

Congressional Republicans have taken on some of the cost issues by using the annual appropriation process to impose deep cuts in agency budgets for the 2012 fiscal year. The 2012 Financial Services Appropriations Bill includes \$12.2 billion for the

WASHINGTON WIRE BLOG, July 14, 2011, <http://blogs.wsj.com/economics/2011/07/14/dodd-frank-created-stats-office-comes-under-fire/>.

⁶ Victoria McGrane, Senate Democrats: Still Making the Case for Dodd-Frank, WALL ST. J. WASHINGTON WIRE BLOG, May 11, 2011, <http://blogs.wsj.com/washwire/2011/05/11/senate-democrats-still-making-the-case-for-dodd-frank/>

⁷ See *Fight Over Dodd-Frank Headlines U.S. Senate Panel*, REUTERS, Feb. 17, 2011, <http://www.foxbusiness.com/2011/02/17/fight-dodd-frank-headlines-senate-panel/>.

⁸ Press Release, Representative Barney Frank, Frank statement on the cost of Dodd-Frank implementation (Mar. 30, 2011), <http://democrats.financialservices.house.gov/press/PRArticle.aspx?NewsID=1410>.

⁹ Daniel Indiviglio, *Dodd-Frank's Derivatives Rules Could Cost Main Street \$1 Trillion*, THE ATLANTIC, Jun. 30, 2010, <http://www.theatlantic.com/business/archive/2010/06/dodd-franks-derivatives-rules-could-cost-main-street-1-trillion/58989/>.

¹⁰ House Financial Services Committee, *One Year Later: The Consequences of the Dodd-Frank Act*, <http://financialservices.house.gov/UploadedFiles/FinancialServices-DoddFrank-REPORT.pdf>

Treasury Department, which is \$929 million below last year's level and nearly \$2 billion below the president's request. The bill also limits mandatory funds for the Consumer Financial Protection Bureau (CFPB) to \$200 million and subjects it to annual appropriations, giving the House more oversight capability. In addition, the bill limits funding to the Office of Financial Stability to \$200 million. The bill provides \$1.2 billion for the Securities and Exchange Commission (SEC), which is equal to last year's levels and \$222 million below the president's request.¹¹ The 2012 Agriculture Appropriations Bill includes \$172 million for the Commodity Futures Trading Commission (CFTC), a 15 percent cut from last year and nearly half of the \$308 million the President requested.¹²

The regulatory uncertainty has been harder to tackle. The sheer volume of deadlines contained in the almost 400 rulemakings required by the Act is overwhelming the regulatory agencies as well as the private sector. The CFTC announced in June that it will miss the July 16th deadline for its rules on derivatives and extended the rulemaking period until December 2011.¹³ The Securities and Exchange Commission (SEC), which shares the CFTC's responsibility for promulgating new derivative rules, has extended its deadlines as well.¹⁴ While some welcome the delays – like Senate Minority Leader Mitch McConnell (R-KY), who recently said that “anything we can do to slow down, deter or impede” these regulations would be “good for our country”¹⁵ – others, like some in industry who view the rules as inevitable, want the SEC and CFTC to finalize the rules as soon as possible so that firms have adequate time to implement them.¹⁶

Adding more drama are studies and analyses of various aspects of Dodd-Frank. The Government Accountability Office (GAO) released a study in early July 2011 saying that the U.S. regulators do not yet know enough about Wall Street's proprietary trading to effectively police it.¹⁷ This study pertains to the Act's Volcker Rule, named after the

¹¹ Press Release, House Appropriations Committee, Appropriations Committee Releases Fiscal Year 2012 Financial Services Appropriations Bill (Jun. 15, 2011), <http://appropriations.house.gov/News/DocumentSingle.aspx?DocumentID=246626>.

¹² House Appropriations Committee, *Summary: Fiscal Year 2012 Agriculture Appropriations Bill* (Jun. 13, 2011), http://appropriations.house.gov/UploadedFiles/6.13.11_FY_12_Agriculture_Conference_Summary.pdf.

¹³ Press Release, Commodity Futures Trading Commission, CFTC Clarifies Effective Date for Swaps Regulation Under the Dodd-Frank Act (Jul. 14, 2011), <http://www.cftc.gov/PressRoom/PressReleases/pr6073-11.html>.

¹⁴ Press Release, Securities and Exchange Commission, SEC Provides Additional Guidance, Interim Relief and Exemptions for Security-Based Swaps Under Dodd-Frank Act (Jul. 1, 2011), <http://www.sec.gov/news/press/2011/2011-141.htm>.

¹⁵ Tom Braithwaite and Richard McGregor, *McConnell attacks financial regulators*, FINANCIAL TIMES, Jun. 23, 2011, <http://www.ft.com/intl/cms/s/0/4841ccc6-9d22-11e0-997d-00144feabdc0.html>.

¹⁶ This viewpoint was expressed by witnesses at the June 29, 2011 Senate Banking Subcommittee on Securities, Insurance and Investment Hearing which included several derivatives industry executives. See, e.g. Testimony of Neal B. Brady, CEO of Eris Exchange, available at http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=6d382a10-f899-49d7-8040-fae575cfc140.

¹⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-529, PROPRIETARY TRADING: REGULATORS WILL

former Federal Reserve Chairman Paul Volcker and which restricts banks, their affiliates and holding companies from engaging in proprietary trading and sponsorship of hedge funds and private equity funds. The original rule was proposed by Senators Jeff Merkley (D-OR) and Carl Levin (D-MI) as an amendment to the Senate bill, but Sen. Richard Shelby (R-AL), Ranking Member of the Senate Banking Committee, blocked it from coming to a vote.¹⁸ Ultimately, the House-Senate conference committee passed a strengthened Volcker rule by adopting the language offered by Senators Merkley and Levin. However, conferees changed the proprietary trading ban to allow banks to invest up to three percent of Tier 1 Capital in hedge funds and private equity funds at the request of Sen. Scott Brown (R-MA), whose vote was needed in the Senate to pass the bill.

House Republicans have used the non-partisan GAO report to argue that the new requirements put American companies at a competitive disadvantage compared to foreign firms. "The GAO report confirms that neither European nor Asian regulators or legislators will establish similar proprietary trading restrictions that the Dodd-Frank Act imposed on U.S. financial institutions," said House Financial Services Committee Chairman Spencer Bachus (R-AL). "This will unquestionably harm the ability of American companies to compete and create jobs. Once again, the rhetoric of Dodd-Frank supporters that the world would follow the U.S. lead on financial regulatory reform is shown to be a myth."¹⁹ At the same time, Senate Democrats have been quick to criticize the report, calling the study "woefully incomplete."²⁰ Neither the House nor the Senate has taken any recent legislative steps to further scale back the Volcker Rule, and many large U.S. banks are actively divesting their proprietary trading businesses to prepare for the July 21, 2012 compliance deadline.

Congress continues to debate Dodd-Frank's costs and regulatory deadlines, but the U.S. Treasury Department's Assistant Secretary for Financial Markets Mary Miller recently warned that, "Scaling back or repealing major parts of the Dodd-Frank Act or not providing regulators with the funds they need to implement the Act will leave our economy exposed to a cycle of collapses and crises."²¹ In anticipation of the one-year anniversary, House Republicans gave the Dodd-Frank Act a failing report card in mid-July, saying that Dodd-Frank has failed in five categories, including its impact on

NEED MORE COMPREHENSIVE INFORMATION TO FULLY MONITOR COMPLIANCE WITH NEW RESTRICTIONS WHEN IMPLEMENTED (2011).

¹⁸ P.K. Semler, *Volcker rule unlikely to move forward in Senate, lawmakers say*, FINANCIAL TIMES, Feb. 1, 2010, <http://www.ft.com/intl/cms/s/2/76c55844-0f4b-11df-8a19-00144feabdc0.html>.

¹⁹ Peter Schroeder, *GAO: Regulators need more info before curbing proprietary trading*, FINANCIAL TIMES, Jul. 13, 2011, <http://thehill.com/blogs/on-the-money/banking-financial-institutions/171309-gao-regulators-need-more-info-before-curbing-proprietary-trading>.

²⁰ Alan Zibel, *Senate Democrats Criticize GAO Study Related to Volcker Rule*, Wall St. J. L. Blog (Jul. 13, 2011, 3:59 PM), <http://blogs.wsj.com/economics/2011/07/13/senate-democrats-criticize-gao-study-related-to-volcker-rule/>.

²¹ Cheyenne Hopkins and Ian Katz, *Treasury's Miller Warns Against 'Scaling Back' Major Parts of Dodd-Frank*, BLOOMBERG, Jul. 13, 2011, <http://www.bloomberg.com/news/2011-07-13/treasury-s-miller-warns-against-efforts-to-change-dodd-frank-act.html>.

strengthening the economy, streamlining financial rules and stabilizing the housing market.

At Dodd-Frank's passage last year, then-Senate Banking Committee Chairman Sen. Chris Dodd (D-CT) said, "No one will know until this is actually in place how it works."²² In the year since, there is still little understanding of when most of Dodd-Frank's extensive provisions will actually be in place and how they might affect the nation's financial systems and economy. The only certainties are that the hearings will continue, the partisan battles will rage on, and for better or worse, many of the Act's requirements could remain in limbo until well into the future.

²² David Cho, Jia Lynn Yang & Brady Dennis, *Lawmakers guide Dodd-Frank bill for Wall Street reform into homestretch*, WASHINGTON POST, Jun. 26, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/25/AR2010062500675.html>.