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# The Financial CHOICE Act in the 115th Congress: Selected Policy Issues

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# Summary

The Financial CHOICE Act (FCA; H.R. 10) was introduced on April 26, 2017, by Representative Jeb Hensarling, chairman of the House Committee on Financial Services. It passed the House on June 8, 2017. Selected provisions of H.R. 10 were then added to the appropriations bill passed by the House (H.R. 3354).

H.R. 10, as passed, is a wide-ranging proposal with 12 titles that would alter many parts of the financial regulatory system. Much of the FCA is in response to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act; P.L. 111-203), a broad package of regulatory reform following the financial crisis that initiated the largest change to the financial regulatory system since at least 1999. Many of the provisions of the FCA would modify or repeal provisions from the Dodd-Frank Act, although others would address long-standing or more recent issues.

This report highlights major proposals included in the FCA but is not a comprehensive summary. In general, the bill proposes changes that can be divided into two categories: (1) changes to financial policies and regulations and (2) changes to the regulatory structure and rulemaking process.

Major policy-related changes proposed by the FCA include the following:

- **Leverage Ratio—**allowing a banking organization to choose to be subject to a higher, 10% leverage ratio in exchange for being exempt from risk-weighted capital ratios, liquidity requirements, enhanced prudential regulation (if the bank has more than $50 billion in assets), and other regulations.
- **Regulatory Relief**—providing regulatory relief throughout the financial system to banks, consumers, and capital market participants, including by repealing the Volcker Rule, fiduciary rule, and risk retention requirements for nonmortgage asset-backed securities. Some provisions are targeted at small financial institutions or issuers, whereas others provisions are applied across the board.
- **Too Big To Fail**—repealing the designation of systemically important nonbank financial institutions, repealing or restricting authority to provide emergency assistance to financial markets, and replacing an option for winding down systemic institutions with a new chapter in the Bankruptcy Code that is tailored to financial firms.

Structural and procedural changes that affect the balance between regulator independence from and accountability to Congress and the judiciary include the following:

- **Funding**—subjecting regulators that currently set their own budgets to the traditional congressional appropriations process.
- **Rulemaking**—requiring regulators to perform more detailed cost-benefit analysis when issuing new rules and to use cost-benefit analysis to review existing rules, as well as requiring congressional approval for a major rule to come into effect.
- **Judicial Review**—requiring courts to apply a heightened judicial review standard for agency actions taken by financial regulators rather than applying varying levels of deference to the agencies' interpretations of the law.

- **Enforcement**—increasing the maximum civil penalties that could be assessed for violations of certain banking and securities laws and restraining certain agency enforcement powers.
- **CFPB**—replacing the Consumer Financial Protection Bureau with the Consumer Law Enforcement Agency and modifying its powers, leadership, mandate, and funding. The new agency would not have the CFPB's examination or supervisory powers, but would have similar enforcement powers. Its director would be removable at-will by the President.
- **Federal Reserve**—requiring a GAO audit of the Fed, restricting emergency lending, and requiring the Fed to compare its monetary policy decisions to a mathematical rule.

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# Introduction

In the 114th Congress, the Financial CHOICE Act of 2016 (H.R. 5983) was sponsored by Representative Jeb Hensarling, chairman of the House Committee on Financial Services. The bill was reported by the House Committee on Financial Services on December 20, 2016. In the 115th Congress, a modified version of the CHOICE Act was introduced as the Financial CHOICE Act of 2017 (H.R. 10, FCA) on April 26, 2017. It passed the House on June 8, 2017. This report describes the FCA as passed in the 115th Congress.[1] The Congressional Budget Office estimated that a similar version of the bill would reduce budget deficits by $33.6 billion over the next 10 years.[2]

**The Financial CHOICE Act and FY2018 Appropriations**

Selected provisions of the Financial CHOICE Act were included in the FY2018 Financial Services and General Government Appropriations Act (H.R. 3280), which was reported by the House Appropriations Committee on July 18, 2017. For more information, see **Appendix B**. H.R. 3280 was then combined with other appropriation bills in H.R. 3354, which passed the House on September 14, 2017.

The FCA is a wide-ranging proposal with 12 titles that would alter many parts of the financial regulatory system. Many of the provisions can be categorized as providing regulatory relief to financial firms, investors, or borrowers. Other provisions alter the financial regulatory architecture or change the relationship between financial regulators and Congress or the judiciary. For background and reference, **Table 1** lists the federal financial regulators and their general responsibilities.

**Table 1. Overview of Federal Financial Regulators Discussed in this Report**

| Name/Acronym | Composition/General Responsibilities |
|---|---|
| *Regulator* | |
| Commodity Futures Trading Commission (CFTC) | Regulation of derivatives markets |
| Consumer Financial Protection Bureau (CFPB) | Regulation of financial products for consumer protection |
| Federal Deposit Insurance Corporation (FDIC) | Provision of deposit insurance, regulation of banks, receiver for failing banks |
| Federal Housing Finance Agency (FHFA) | Regulation of housing government sponsored enterprises |
| Federal Reserve System (Fed)[a] | Monetary policy; regulation of banks, systemically important financial institutions, and the payment system |
| National Credit Union Administration (NCUA) | Provision of deposit insurance, regulation of credit unions, receiver for failing credit unions |

[1] A major difference between H.R. 10 as reported by the Financial Services Committee and the version that passed the House is that the reported version included a repeal of the Durbin Amendment and the version that passed the House did not. The Durbin Amendment caps interchange fees on debit transactions for banks with over $10 billion in assets. For more information, see CRS Report R41913, *Regulation of Debit Interchange Fees*, by Darryl E. Getter.

[2] Congressional Budget Office, *Cost Estimate for the Manager's Amendment to H.R. 10*, June 6, 2017, at https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/H.R. 10 managers.pdf. Of the $33.6 billion reduction in deficits, CBO attributes $14.5 billion to the repeal of the Orderly Liquidation Authority and $18.5 billion to a reduction in direct spending by moving certain agencies to appropriations, which would be offset by discretionary spending on those agencies in future appropriations acts. These two changes are discussed in more detail in the sections below entitled "Resolving a Failing TBTF Firm and Preventing "Bailouts"" and "Appropriations", respectively.

| Name/Acronym | Composition/General Responsibilities |
|---|---|
| Office of the Comptroller of the Currency (OCC) | Regulation of banks |
| Securities and Exchange Commission (SEC) | Regulation of securities markets |
| *Other Federal Financial Entities* | |
| Financial Stability Oversight Council (FSOC) | Council of financial regulators and state and industry representatives accountable for financial stability |
| Office of Financial Research (OFR) | Provides research support to FSOC |

**Source:** Table compiled by the Congressional Research Service (CRS).

**Notes:** The Financial CHOICE Act of 2017 (FCA) would replace the CFPB with the newly created Consumer Law Enforcement Agency (CLEA). For more information on the roles, duties, and responsibilities of the federal financial regulators, see CRS Report R44918, *Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework*, by Marc Labonte.

a. The Federal Reserve System is composed of the Board of Governors and 12 regional Federal Reserve banks. Unless otherwise noted, provisions of the FCA involving the Fed affect the Board of Governors.

Many parts of the FCA would repeal or amend provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[3] a broad package of regulatory reform legislation passed following the 2007-2009 financial crisis that initiated the largest change to the financial regulatory system since at least 1999 (see **Appendix A**). President Trump has called for the Dodd-Frank Act to be "dismantled," and Chairman Hensarling has characterized the FCA as "work(ing) with the president to end and replace the Dodd-Frank mistake."[4] The minority on the House Financial Services Committee stated that the FCA "dismantles critical safeguards included in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), the law that was put in place to protect the American economy from another financial crisis. Dodd-Frank improves accountability in the financial system and protects consumers, investors, and the economy from abusive Wall Street practices."[5] Although many of the provisions of the bill focus on parts of the Dodd-Frank Act, others would address long-standing or more recent issues.

This report highlights major policy proposals in the version of the bill as passed in the 115th Congress, but it is not a comprehensive summary of the bill. It provides context for these proposals in the form of background and policy debate. This report also includes an experts' contact list for FCA topics in **Appendix C**.

# Regulatory Relief

As financial regulators have implemented the Dodd-Frank Act and other reforms, some Members of Congress argue that the pendulum has swung too far toward excessive regulation. As a result, they argue that additional regulatory burden—the cost associated with government regulation and its implementation—has stymied economic growth and restricted consumer and business access to credit. Other Members, however, contend the current regulatory structure has appropriately strengthened financial stability and increased protections for consumers and investors. They are

[3] P.L. 111-203. For more information, see CRS Report R41350, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Background and Summary*, coordinated by Baird Webel.

[4] Quoted in Pete Schroeder, "U.S. House Banking Chairman Unveils Dodd-Frank Replacement," *Reuters*, April 20, 2017, at http://www.reuters.com/article/us-usa-banks-doddfrank-idUSKBN17L2VE.

[5] House Financial Services Committee (minority), "House Republicans to Bring Bill to Floor to Gut Wall Street Reform, Harm Americans," *Press Release*, June 7, 2017.

concerned that regulatory relief for financial institutions could negatively affect consumers and market stability.

In determining whether to provide regulatory relief, a central question is whether an appropriate trade-off has been struck between the benefits and costs of regulation. In other words, can relief be provided while maintaining the stability of the financial system and ensuring taxpayers, consumers, and investors are protected, or would relief undermine those goals? Regulatory relief is generally focused on the financial services providers—such as banks, broker-dealers, and other institutions—but what effect would relief have on consumers, investors, particular markets, and market stability more broadly? The answers to these and other policy questions will vary based on the particulars of the relief being proposed.

The FCA would provide regulatory relief to two broad categories—banks and securities markets' participants.

The FCA would provide regulatory relief to banks through more than two dozen provisions. Some of the proposals are aimed at assisting community banks, whereas others would apply to all banks, regardless of size. Some provisions provide relief from regulations, whereas others target supervisory practices. Many would modify or repeal rules stemming from the Dodd-Frank Act, whereas others target long-standing regulatory practices. This report highlights two provisions providing relief to banks—the Volcker Rule and the leverage ratio.

Many of the securities-related provisions in the FCA provide regulatory relief with the aim of facilitating capital formation. Among the over three dozen securities-related provisions in the FCA are provisions that relax restrictions on who is eligible to invest in certain types of securities, including venture capital investors; provisions that relax regulatory requirements on licensed professionals in the securities industry, including private equity advisers, private funds, municipal advisors, investment fund researchers, and credit rating agencies; and provisions that relax regulatory requirements for firms that issue capital or securities, including emerging growth companies, risk retention requirements for nonmortgage securitizers, firms subject to disclosures on conflict minerals, and companies raising funds via crowdfunding or from angel investors. Many of these issues are discussed in further detail below.

## Leverage Ratio as an Alternative to Current Bank Regulation[6]

### *Background*

With more than 500 banks failing between 2007 and 2014,[7] strengthening prudential regulation has been a major goal of postcrisis financial reforms. Prudential regulation covers a broad set of a bank's activities, including assessing whether a bank will be able to meet its obligations during a market downturn, evaluating the quality of its assets and management team, and other factors. One of the main areas of focus is bank capital adequacy.

Capital is the difference between the value of a bank's assets and its liabilities and is an indicator of a bank's ability to absorb losses. For example, if a bank has $100 worth of assets and $90 of liabilities, then the bank has capital of $10. If the value of the assets decreases by $5 to $95 and the bank still has $90 in liabilities, then the $5 decline in asset value would be absorbed by the capital, which would decrease from $10 to $5.

[6] This section was authored by David Perkins.

[7] For more on bank failures, see CRS In Focus IF10055, *Bank Failures and the FDIC*, by Raj Gnanarajah.

Capital requirements are stated as the ratio of capital to the bank's assets. Banks are required to satisfy several different capital ratios, but the ratios fall into two main categories: (1) a leverage ratio and (2) a risk-weighted asset ratio. Failure to satisfy the required ratios could lead to regulators taking corrective action against a bank, including ultimately shutting the bank down.

Under a leverage ratio, all assets regardless of riskiness are treated the same and the ratio is calculated by dividing capital by assets. A 10% leverage ratio, for example, would imply $10 of capital for every $100 of assets. Under a risk-weighted asset ratio, each asset is assigned a risk weight to account for the fact that some assets are more likely to lose value than others. Riskier assets receive a higher risk weight, which requires banks to hold more capital—and so be better able to absorb losses—to meet the ratio requirement.

**Leverage Ratio and Risk-Weighted Ratio Sample Calculations**

$$\text{Leverage Ratio} = \frac{\text{Capital}}{\text{Assets}}$$

$$\text{Risk-Weighted Ratio} = \frac{\text{Capital}}{(\text{Risk Weight for Asset 1}) \times (\text{Asset 1}) + (\text{Risk Weight for Asset 2}) \times (\text{Asset 2})}$$

The specifics of the capital ratios—what the minimum levels are, what qualifies as capital, what the asset risk weights are, what is included in total assets—were proposed by the Basel Committee on Bank Supervision and then implemented by the U.S. financial regulators.[8] The Basel Committee "is the primary global standard-setter for the prudential regulation of banks and provides a forum for cooperation on banking supervisory matters."[9] The most recent comprehensive reform proposal is referred to as Basel III.

The capital ratios that a bank must satisfy and how those levels are computed varies based on a bank's size and complexity. The largest banks are required to hold more capital than smaller, less complex banks.[10] In regard to the simple leverage ratio, most banks are required to meet a 4% leverage ratio.[11] Large banks must also comply with a supplementary leverage ratio ranging from 3% to 6% depending on their size and the organizational unit within the bank.[12] The supplementary leverage ratio is more expansive than the leverage ratio because it takes into account certain off-balance-sheet assets and exposures.

[8] For more on the Basel III regulations, see CRS Report R44573, *Overview of the Prudential Regulatory Framework for U.S. Banks: Basel III and the Dodd-Frank Act*, by Darryl E. Getter.

[9] Bank for International Settlements, "About the Basel Committee," at https://www.bis.org/bcbs/about.htm.

[10] The largest banks are also referred to as "advanced approaches banks" (referring to the different approach for capital regulation to which they are subject), which are institutions with at least $250 billion in consolidated assets or on-balance-sheet foreign exposures of at least $10 billion.

[11] Federal Reserve, *Final Rule on Enhanced Regulatory Capital Standards—Implications for Community Banking Organizations*, July 2013, at http://www.federalreserve.gov/newsevents/press/bcreg/commbankguide20130702.pdf.

[12] Federal Deposit Insurance Corporation (FDIC), Federal Reserve, and Office of the Comptroller of the Currency (OCC), "Regulatory Capital Rules: Regulatory Capital, Revisions to the Supplementary Leverage Ratio," 79 *Federal Register* 57725, September 26, 2014.

### *Policy Issues*

Some economists argue that it is important to have both a risk-weighted ratio and a leverage ratio because the two complement each other.[13] A basic tenet of finance is that riskier assets have a higher *expected* rate of return to compensate the investor for bearing more risk. Without risk weighting, banks would have an incentive to hold riskier assets because capital is costly and the same amount of capital must be held against riskier and safer assets. For example, banks might decide to shift out of certain lines of business that involve holding large amounts of safe assets, such as cash, if risk-weighted ratios were replaced by a higher leverage ratio. But relying solely on risk-weighted ratios could be problematic, because the weight assigned to an asset may in fact be an inaccurate measure of its riskiness and therefore distort bank behavior. For example, banks held highly rated mortgage-backed securities (MBSs) before the crisis, in part because those assets had a higher expected rate of return than other assets with the same risk weight. The crisis revealed that MBSs were more risky than their risk weights indicated, and banks holding them suffered unexpectedly large losses. Thus, the leverage ratio can be thought of as a backstop to ensure that incentives posed by risk-weighted capital ratios do not result in a bank holding insufficient capital.

Others argue that the risk-weighted system provides "needless complexity" and is an example of "central planning." The complexity generally benefits those largest banks that have the resources to absorb the added regulatory cost. They contend that the risk weights in place prior to the financial crisis were poorly calibrated and "encouraged financial firms to crowd into these" unexpectedly risky assets, exacerbating the downturn. Risk weighting may encourage regulators to set the weights so as "to provide a cheaper source of funding for governments and projects favored by politicians," which can lead to a distortion in credit allocation. Better, they argue, to eliminate the risk-weighted system for those banks that agree to hold more capital and satisfy a higher, simpler leverage ratio.[14]

In addition to the issue of whether it is better to have both a risk-weighted ratio and a leverage ratio or only a leverage ratio is the broader issue of the role of capital in bank regulation. Those who argue in favor of having only a higher leverage ratio also generally support eliminating some other forms of prudential regulation, such as liquidity requirements, asset concentration guidelines, and counterparty limits. They argue that, so long as sufficient capital is in place in case of losses, banks should not be subject to excessive regulatory micromanagement.[15] Others, however, contend that the different components of prudential regulation each play an important role in ensuring the safety and soundness of financial institutions and are essential complements to bank capital.[16] In other words, capital can absorb losses, but unlike other forms of prudential regulation, it cannot make losses less likely.

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[13] See Chair Yellen comments during U.S. Congress, House Committee on Financial Services, *Monetary Policy and the State of the Economy*, 114th Cong., 2nd sess., June 22, 2016, at http://www.cq.com/doc/congressionaltranscripts-4915133?2.

[14] Quotations in this paragraph from House Committee on Financial Services, *The Financial CHOICE Act: A Republican Proposal to Reform the Financial Regulatory System*, June 23, 2016, pp. 6, 8, and 9, at http://financialservices.house.gov/uploadedfiles/financial_choice_act_comprehensive_outline.pdf.

[15] House Committee on Financial Services, *The Financial CHOICE Act: A Republican Proposal to Reform the Financial Regulatory System*, June 23, 2016, p. 7.

[16] The Government Accountability Office (GAO) presents evidence that capital ratios alone (the method currently used for prompt corrective action) were not as good a predictor of historical failures as measures that used a range of indicators. Government Accountability Office, *Bank Regulation: Modified Prompt Corrective Action Framework Would Improve Effectiveness*, GAO-11-612, June 2011, at http://www.gao.gov/new.items/d11612.pdf.

### *Provision in the FCA*

Under the FCA, a banking organization could choose to be subject to a higher, 10% leverage ratio,[17] and in exchange would be exempt from risk-weighted capital ratios; liquidity requirements; stress-test requirements; certain merger, acquisition, and consolidation restrictions; limitations on dividends; and other regulations.[18] A bank would have the option to follow current regulatory requirements or this new regulatory approach.

Some of the regulations from which a bank could receive relief are regulations that apply to all banks, such as the risk-weighted capital ratios set by Basel III. Other regulations from which a bank could receive relief under the FCA would only apply to larger banks (with an asset threshold of $50 billion to $700 billion, depending on the provision). For example, banks opting in to the new leverage ratio approach would be exempt from the Dodd-Frank Act's enhanced prudential regulations for banks with $50 billion or more in assets and other regulations based on financial stability considerations (discussed in "Regulating Systemically Important Financial Institutions and Limiting Their Size").

Although a 10% leverage ratio is significantly more capital than what banks are currently *required* to hold, it is not necessarily more capital than they are currently holding. For example, under the current definition of the leverage ratio, banks except those with more than $250 billion in assets had an average leverage ratio above 10% at the end of 2016.[19] For traditional banks, as defined in the FCA, the bill uses a slightly different definition of leverage ratio than found in regulatory filings, however, making a direct comparison to the bill's requirement difficult. For traditional banks that are already above a 10% ratio, the FCA would provide them with regulatory relief without requiring them to hold more capital.

Predicting which banks would elect to hold the 10% leverage ratio involves a degree of uncertainty, but CBO did make such an estimate when scoring the bill. In general, the CBO estimates that larger banks would be less likely to elect to be subject to the 10% leverage ratio than smaller banks and expects none of the eight U.S. globally systemically important banks would make the election. One source of uncertainty the CBO had to address is that some banks that hold enough capital to meet the requirement would not necessarily make the election. CBO estimated that half the banks whose leverage ratio (as defined by the bill) currently exceeds 10%—most of which are banks with less than $50 billion in assets—would make the election. As a result, the CBO estimated that the banks that would make the election would account for roughly 9% of total bank industry assets.[20]

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[17] Larger and more complex banks would have to comply with the supplemental leverage ratio (which includes off-balance-sheet exposures) and credit unions and more traditional banks would have to comply with narrower definitions of the leverage ratio.

[18] The Financial CHOICE Act defines a banking organization to include an insured depository institution, an insured credit union, a depository institution holding company, a company that is treated as a bank holding company for purposes of Section 8 of the International Banking Act, and certain U.S. intermediate holding companies established by foreign banking organizations.

[19] Data from FDIC, *Quarterly Banking Profile*, Fourth Quarter, 2016, p. 9.

[20] Congressional Budget Office, *Cost Estimate: H.R. 10 Financial CHOICE Act of 2017*, May 18, 2017, pp. 7-10, https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/hr10.pdf.

# Volcker Rule[21]

## *Background*

Section 619 of the Dodd-Frank Act, also known as the Volcker Rule, has two main parts—it prohibits banks from proprietary trading of "risky" assets and from "certain relationships" with risky investment funds, including acquiring or retaining "any equity, partnership, or other ownership interest in or sponsor[ing] a hedge fund or a private equity fund."[22] The statute carves out exemptions from the rule for trading activities that Congress viewed as legitimate for banks to participate in, such as risk-mitigating hedging and market making related to broker-dealer activities. It also exempts certain securities, including those issued by the federal government, government agencies, states, and municipalities, from the ban on proprietary trading.[23]

## *Policy Issues*

The Volcker Rule is named after Paul Volcker, former chair of the Federal Reserve (Fed) and former chair of President Obama's Economic Recovery Advisory Board. Volcker proposed this rule on the grounds that

> adding further layers of risk to the inherent risks of essential commercial bank functions doesn't make sense, not when those risks arise from more speculative activities far better suited for other areas of the financial markets…. Apart from the risks inherent in these activities, they also present virtually insolvable conflicts of interest with customer relationships, conflicts that simply cannot be escaped by an elaboration of so-called Chinese walls between different divisions of an institution. The further point is that the three activities at issue—which in themselves are legitimate and useful parts of our capital markets—are in no way dependent on commercial banks' ownership.[24]

Volcker also pointed out that in the presence of deposit insurance, banks are implicitly backed by taxpayers, which presents moral hazard problems. Thus, support for the Volcker Rule has often been posed as preventing banks from "gambling" in securities markets with taxpayer-backed deposits.[25] In Volcker's view, moving these activities out of the banking system reduces moral hazard and systemic risk concerns.

Although proprietary trading and hedge fund sponsorship pose risks, it is not clear whether they pose greater risks to bank solvency and financial stability than traditional banking activities, such as mortgage lending. They could be viewed as posing *additional* risks that might make banks more likely to fail, but alternatively those risks might better diversify a bank's risks, making it less likely to fail. Further, the Volcker Rule bans these activities from any subsidiary within a bank holding company, including nonbank subsidiaries. Proprietary trading in nonbank

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[21] This section was authored by Marc Labonte.

[22] P.L. 111-203, §619. For more information, see CRS Legal Sidebar, *What Companies Must Comply with the Volcker Rule?*, David H. Carpenter.

[23] For a summary of the Volcker Rule, see Federal Reserve, Commodity Futures Trading Commission (CFTC), FDIC, OCC, and Securities and Exchange Commission (SEC), "Final Rules to Implement the 'Volcker Rule,'" at http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20131210a3.pdf.

[24] Paul Volcker, "How to Reform Our Financial System," *New York Times*, January 30, 2010, at http://www.nytimes.com/2010/01/31/opinion/31volcker.html.

[25] See, for example, House Financial Services Committee, "Waters: Dodd-Frank Repeal is Truly the Wrong Choice," press release, June 24, 2016, at http://democrats.financialservices.house.gov/news/documentsingle.aspx?DocumentID=399901.

subsidiaries would be less likely to pose concerns about moral hazard and taxpayer risk unless the firm poses too big to fail problems.

A House Financial Services Committee majority report argues that the Volcker Rule is "a solution in search of a problem—it seeks to address activities that had nothing to do with the financial crisis, and its practical effect has been to undermine financial stability rather than preserve it."[26]

The Volcker Rule poses a practical challenge in differentiating between proprietary trading and permissible activities, such as hedging and market making. For example, how can regulators determine whether a broker-dealer is holding a security as inventory for market making, as a hedge against another risk, or as a speculative investment? Differentiating between these motives creates regulatory complexity, and if the benefits are not sufficient, the Volcker Rule might be unduly burdensome. The House Financial Services Committee report argues that banks will alter their behavior to avoid this regulatory burden, and this will reduce financial market efficiency:

> The Volcker Rule will increase borrowing costs for businesses, lower investment returns for households, and reduce economic activity overall because it constrains market-making activity that has already reduced liquidity in key fixed-income markets, including the corporate bond market.[27]

### *Provision in the FCA*

The FCA would repeal the Volcker Rule in its entirety.

## Relief for Small Capital Issuers

### *Background*

Some small and emerging companies may be interested in accessing funds for investment through issuing (or expanding their issuance of) securities that represent ownership in the firms. Such companies, however, may be disproportionally burdened by the costs of complying with the Securities and Exchange Commission's (SEC's) regime of securities registration and periodic disclosure aimed at protecting investors through the provision of material information.

Many existing securities requirements already have exemptions and tailoring for small capital issuers. For example, the Jumpstart Our Businesses Startup Act of 2012 (JOBS Act; P.L. 112-106) expanded on the regulatory relief that had historically been given to companies who issue unregistered securities called private placements when certain conditions (such as limitations on the issuance size or the types of eligible investors) are met.

### *Policy Issues*

In a securities context, granting regulatory relief to boost capital formation may diminish the content and the efficacy of investor-based SEC disclosures, a potential trade-off between two of the SEC's statutory goals—investor protection and capital formation. This trade-off might also be informed by the fact that small and emerging firms are often described as risky investments.[28]

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[26] U.S. Congress, House Financial Services Committee, *The Financial CHOICE Act: Comprehensive Summary*, June 23, 2016, at http://financialservices.house.gov/uploadedfiles/financial_choice_act_comprehensive_outline.pdf.

[27] Ibid.

[28] For example, see "What factors might make a private placement a risky investment?," *Investopedia*, April 2, 2015, at

Conversely, some observers note that expanding the range of securities an investor can purchase will potentially allow them to increase risk diversification.[29] Another potentially complicating dimension to the dynamic is the notion that some mandatory SEC corporate disclosures may not necessarily facilitate informed investing because they may be superfluous or may contribute to investor information overload. For example, in a 2013 speech, then-SEC Chair Mary Jo White observed that the agency would be examining whether investors' needs are served by the "detailed and lengthy disclosures about all of the topics that companies currently provide in the reports they are required to prepare and file with us … [and] whether information overload is occurring."[30] In contrast, there is some evidence that giving small issuers exemptions from certain disclosure requirements reduces the price that investors are willing to pay when a firm issues equity—an example of how the goals of investor protection and capital formation sometimes reinforce each other.[31]

### *Provisions in the FCA*

The FCA contains numerous provisions that would provide regulatory relief related to capital issuance by small firms, whether through public secondary markets or private placements (privately issued corporate securities). Examples of these provisions include the following:

**Auditor Attestation.** Internal controls are the policies and procedures that a company employs to maintain the accuracy of its financial reporting. Section 404(b) of the Sarbanes-Oxley Act of 2002 (SOX; P.L. 107-204) requires that a public company's outside auditor attest to its senior managers' assertions about the company's internal controls for its financial reporting (ICFR). In response to concerns over the burdens for small firms of complying with the auditor attestation provision, the Dodd-Frank Act included an exemption from Section 404(b) for public companies with a public float of less than $75 million. In 2011, the SEC reported that such companies represented about 60% of all public companies.[32] The FCA would increase the exemption from Section 404(b) to nondepository corporate issuers with a public float from $75 million to $500 million.

**Equity Crowdfunding.** Traditionally, crowdfunding constituted the online donation of small amounts of capital from a large number of individuals to help finance a startup firm. It was initially illegal for donors to obtain an ownership stake through a debt or equity interest in the firms, however. The JOBS Act enabled firms to offer and sell securities conferring ownership through crowdfunding, known as equity crowdfunding, without SEC registration. To take advantage of the crowdfunding exemption, a crowdfunding issuer must conduct its offering solely through an online platform operated by an intermediary that is a SEC-registered broker-dealer or that is operated as a funding portal, subject to various requirements. Companies face limits on how much they can raise and investors face limits on how much they can invest.

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http://www.investopedia.com/ask/answers/040215/what-factors-might-make-private-placement-risky-investment.asp.

[29] For example, see Michael S. Piwowar, "Remarks at the "SEC Speaks" Conference 2017: Remembering the Forgotten Investor," *SEC*, February 24, 2017, at https://www.sec.gov/news/speech/piwowar-remembering-the-forgotten-investor.html.

[30] "Speech on the Path Forward on Disclosure by Chair Mary Jo White before the National Association of Corporate Directors—Leadership Conference 2013," *SEC*, October 15, 2013, at http://www.sec.gov/News/Speech/Detail/Speech/1370539878806.

[31] For example, see Susan Chaplinsky, Kathleen Weiss Hanley, and S. Katie Moon, "The JOBS Act and the Costs of Going Public," *SSRN*, August 14, 2014, at http://ssrn.com/abstract=2492241.

[32] SEC, "Study and Recommendations on Section 404(b) of the Sarbanes-Oxley Act of 2002," *SEC Office of the Chief Accountant*, April 2011, at https://www.sec.gov/news/studies/2011/404bfloat-study.pdf.

The FCA would significantly loosen the regulation of the current equity crowdfunding regime. Among other things, it would subject crowdfunding issuers and investors to no limits in terms of the amount of securities that they could issue and invest in. Issuers would be allowed to offer securities directly to investors, provided that they complied with certain requirements. Equity crowdfunding firms would also be able to bypass broker-dealer or funding portal intermediaries and issue securities directly to the public.

**General Solicitation and Demo Days.** SEC Regulation D (Reg D) exempts certain securities offerings from SEC registration requirements, while also prohibiting issuers of Reg D securities from publicly marketing them via general solicitation.[33] However, various members of the business community have criticized what they describe as the SEC policy's lack of clarity on whether general solicitation is permissible during promotional events, commonly known as "demo days." The FCA attempts to address such concerns by directing the SEC to revise Reg D to lift the prohibition on the use of general solicitation by issuers offering securities under Reg D in the context of a demo day as long as the demo day promotions do not specifically reference a given securities offering.

**XBRL Exemptions for Emerging Growth Companies and Smaller Companies.** Extensible Business Reporting Language (XBRL) is a freely available global standard developed to improve the way financial data are disseminated, compiled, and shared electronically. Historically, publicly traded companies were required to submit paper-based filings of mandatory financial statement disclosures to the SEC. Beginning in 2011, all publicly traded firms were required to submit disclosures to the agency in XBRL. A provision in the FCA would exempt emerging growth companies (EGCs) and other small public companies with annual revenues of less than $250 million from the requirement to use XBRL for SEC disclosures.[34]

**Raising Venture Capital Funds' Investment Company Act Registration Threshold.** One exception from SEC registration requirements is for a pooled investment entity whose outstanding stock is owned by 100 beneficial owners or fewer and is neither currently making nor intends to make a public securities offering.[35]

Organized and run by their general partners, venture capital funds are investment pools that manage the funds of their wealthy investors interested in acquiring private equity stakes in emerging small- and medium-sized firms and startup firms with perceived growth potential. Currently, within the business community, there are some concerns over the perceived behavioral impact of the 100-owner limit. Some say that to avoid registration and its potentially significant compliance costs, some venture capital funds are reluctant to add additional investors—potentially foregoing the opportunity to expand the capital to invest in various businesses.

A provision in the FCA attempts to address such concerns by creating a new subset of venture capital fund called a *qualifying venture capital fund* (QVCF). QVCFs are defined as venture capital funds with no more than $50 million in invested capital. They could be owned by up to 500 beneficial owners before triggering registration requirements.

[33] Issuers who can market their securities via *general solicitations* mean that they can freely advertise the securities through any medium of their choice.

[34] To help foster more initial public offerings, the JOBS Act of 2012 created a new category of corporate issuer, an emerging growth company (EGC), which must have recent total gross annual revenues of less than $1 billion (subject to SEC inflation adjustment every five years). EGCs are exempt from various forms of SEC disclosure-based requirements, rules which publicly traded firms generally must comply with.

[35] A beneficial owner is a person who enjoys the benefits of ownership even when the title to a security is in another person's name, such as a broker-dealer who is acting on behalf of an investor.

# Fiduciary Rule[36]

## *Background*

Under federal securities laws, SEC-registered investment advisers are *fiduciaries*, a designation that carries a legal obligation to act in a client's best interest. By contrast, brokers and dealers who receive commissions are generally not subject to the fiduciary standard, and are instead required to make investment recommendations that are *suitable* for the customer—a comparatively less demanding standard of client duty. The Dodd-Frank Act authorized, but did not require, the SEC to promulgate rules to establish a uniform standard of client responsibility for broker-dealers and investment advisers, which it has not done to date. In 2016, the Department of Labor (DOL) finalized rules to amend the definition of *investment advice* to broaden the class of financial professionals (including broker-dealers and insurance agents) subject to the fiduciary obligation under the Employee Retirement Income Security Act of 1974,[37] which governs investment advisers for private-sector retirement accounts.[38]

On February 23, 2017, President Donald Trump issued an executive memorandum directing the DOL to analyze the fiduciary rule's impact. If the study found that the rule would negatively affect investors in specified ways, the agency was then authorized to either rescind or revise the rule.[39] Subsequent to the presidential memorandum, the DOL delayed the effective date of the fiduciary rule to June 9, 2017.[40]

## *Policy Issues*

In announcing the fiduciary rule, DOL observed that investment advisers and consultants have increasingly assumed greater roles in managing retirement accounts.[41] The services provided by broker-dealers and investment advisers often overlap—both can provide investment advice—and there are some concerns that customers may falsely assume that the person advising them is required to be acting in their best interests.

Among other things, DOL said that the rule would help address instances in which plan advisers (1) steer Individual Retirement Account (IRA) owners into investments based on their—not the investors'—own financial interests; (2) have conflicts of interests with respect to the investment advice that they give; and (3) give imprudent investment advice.[42] Critics of the rule, including

[36] This section was authored by Gary Shorter.

[37] P.L. 93-406.

[38] See CRS Legal Sidebar WSLG1562, *Labor Department Issues Final Rule on Fiduciaries and Investment Advice*, by Jennifer A. Staman and Jon O. Shimabukuro.

[39] Executive Office of the President, Memorandum for the Secretary of Labor, "Fiduciary Duty Rule," 82 *Federal Register* 9675, February 7, 2017, at https://www.federalregister.gov/documents/2017/02/07/2017-02656/fiduciary-duty-rule.

[40] Department of Labor (DOL), "U.S. Labor Department Extends Fiduciary Rule Applicability Date," press release, April 4, 2017, at https://www.dol.gov/newsroom/releases/ebsa/ebsa20170404.

[41] DOL, Employee Benefits Security Administration, "Definition of the Term Fiduciary," 81 *Federal Register* 21928, April 8, 2016, at https://www.federalregister.gov/documents/2015/04/20/2015-08831/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice.

[42] Ibid.

some Members of Congress, have argued that it would have a negative impact on retirees[43] and would result in higher costs for people who seek financial advice.[44]

### *Provisions in the FCA*

The FCA would repeal the DOL's fiduciary rule. Additionally, before it promulgated any fiduciary standard rule, the SEC would have to report to Congress on whether

1. retail customers are being harmed because there is not a uniform standard;
2. alternative reforms would alleviate retail investor harm and confusion;
3. adoption of a uniform fiduciary standard would adversely impact the broker-dealers; and
4. the adoption of a uniform fiduciary standard would adversely affect retail investor access to personalized and cost-effective investment advice.

In addition, the DOL could not reissue a fiduciary rule until after the SEC publishes one.

## Risk Retention

### *Background*

Securitization is the process of turning mortgages, credit card loans, and other debt into securities that can be purchased by investors. Securitizers make or acquire a pool of many loans, then issue securities—called *asset-backed securities* (ABS)—which entitle the holder of the security to receive payments based on the flow of payments being made on the underlying loans. Banks can reduce their exposed risk on their retained portfolios by securitizing the loans they hold, spreading risks to other types of investors more willing to bear them. If risks are adequately managed and understood, this can enhance financial stability. In addition, securitization allows nonbank lenders with limited sources of long-term funding to make loans, and thus can increase the total amount of credit available to businesses and consumers.

In the years leading up to the financial crisis, securitization grew rapidly, driving loan origination and becoming an increasingly important source of funding for lenders. During the crisis, the value of ABS that were backed by residential mortgages—called *residential mortgage backed securities* (RMBS)—decreased significantly, precipitating systemic distress. The decline, and the general contraction in credit following the crisis, resulted in a sharp decline in new ABS issuance. Although ABS issuance has grown in the years since the crisis, it remains below precrisis levels.

The Dodd-Frank Act generally required securitizers to retain some of the risk if they issue ABS. The amount of risk required to be retained depends in part on the quality and type of the underlying assets. The act instructed regulators to require not less than 5% retention of risk unless the securitized assets meet underwriting standards prescribed by the regulators. Securitizers were prohibited from hedging the retained credit risk.

[43] CRS Legal Sidebar WSLG1562, *Labor Department Issues Final Rule on Fiduciaries and Investment Advice*, by Jennifer A. Staman and Jon O. Shimabukuro.

[44] For example, see Office of Honorable Paul Ryan, Speaker of the House of Representative, *A Dictionary Definition of the Fiduciary Regulation, Department of Labor*, March 1, 2016, at http://www.speaker.gov/general/dictionary-definition.

The act required securitizers to perform due diligence on the underlying assets of the securitization and to disclose the nature of the due diligence. In addition, ABS investors are to receive more information about the underlying assets.

### *Policy Issues*

Securitization can create an incentive to originate loans without appropriate underwriting because lenders collect origination fees but are not exposed to losses from borrower defaults. These incentives likely contributed to deteriorating underwriting standards prior to the crisis, the housing bubble, and the turmoil experienced during the financial crisis. Private-label securitization was prevalent in the subprime mortgage market, the nonconforming mortgage market, and in regions where loan defaults were particularly severe. Losses and illiquidity in the RMBS market led to wider problems in the crisis, including a lack of confidence in financial firms because of uncertainty about their exposure to potential RMBS losses, through their holdings of RMBS or off-balance-sheet support to securitizers.

One approach to address incentive problems in securitization is to require loan securitizers to retain a portion of the long-term default risk. An advantage of this "skin in the game" requirement is that it may help preserve underwriting standards among lenders funded by securitization, because securitizers would share in their investors' securities risks.

One possible cost of risk retention is that it may make less credit available in markets in which loans are securitized. If securitizers must hold onto, rather than sell, a portion of their securities or underlying assets, a portion of their funding remains tied up in those assets, making less funding available for new loans.[45] Reducing the availability of credit could also increase the cost to borrowers. Another possible disadvantage is that less risk may be shifted away from lenders and other securitizers and out to a broader sector of investors willing and able to bear it. Concentrating risk in certain financial sectors could increase financial instability. Finally, opponents of risk retention assert that certain loan types—including commercial real estate loans and certain corporate loans—feature characteristics and securitization practices that differ from residential mortgages and RMBS in ways that reduce the incentive problem. They note that nonresidential mortgage ABS performed relatively well during the crisis and were not a source of systemic risk, making the risk retention rule inappropriate for these markets.[46]

### *Provisions in the FCA*

The FCA would amend the provision of Dodd-Frank Act mandating risk retention rules by applying those requirements only to securities that are wholly composed of residential mortgages. Under this definition, securities backed by assets that are not residential mortgages—such as commercial real estate mortgages, commercial loans, auto loans, or other types of debt—would not be subject to the risk retention rule.

[45] Board of Governors of the Federal Reserve System, *Report to the Congress on Risk Retention*, October 2010, p. 3, 84, at https://www.federalreserve.gov/boarddocs/rptcongress/securitization/riskretention.pdf.

[46] American Bar Association, *Comment Letter: Credit Risk Retention (Rel. No. 34-70277; File No. S7-14-11)*, November 12, 2013, pp. 5-6, at https://www.sec.gov/comments/s7-14-11/s71411-496.pdf.

## Executive Compensation[47]

### *Background*

In general, federal policy does not limit or regulate executive compensation levels. Instead, publicly listed companies are required to disclose certain information about their executive compensation levels and practices.

Two examples of the general approach to current disclosure requirements come from the Dodd-Frank Act. The "say-on-pay" provision requires public companies to conduct a nonbinding shareholder vote on executive compensation at least every three years. The "pay ratio" provision requires publicly traded companies to calculate and disclose the median annual total compensation of all employees excluding the chief executive officer (CEO), the annual total compensation of the CEO, and the ratio between the two.

One exception to this general approach on executive compensation is a Dodd-Frank Act requirement that federal financial regulators promulgate rules aimed at prohibiting incentive-based compensation (performance-based variable employee pay) that encourages "inappropriate risks" at financial institutions with greater than $1 billion in assets. In 2016, the regulators jointly released proposed rules to implement the requirement.[48]

### *Policy Issues*

Proponents of greater disclosure believe that requiring transparency about executive compensation will help prevent outsized pay arrangements that are not in the interest of investors or in line with social values. Critics argue current disclosure requirements impose unnecessary costs that do not impart useful information that helps maximize shareholder return. For example, critics of the pay ratio have cited the compliance challenges and costs of building systems capable of generating the worker pay data needed to arrive at worker median pay data, particularly for large multinational or multisegmented firms with decentralized payroll systems.[49]

A key question in this debate is whether high executive compensation levels reflect executives' productivity or result from corporate governance shortcomings. Those who contend it is due to corporate governance shortcomings can point to research that found that executive pay has become decoupled from corporate financial performance.[50] Critics of this view counter that, overall, the body of research on the issue has failed to convincingly make the case for such a decoupling.[51]

On the proposed rule prohibiting incentive-based compensation at financial firms, proponents have described the proposals as critically important to mitigating systemic risk.[52] Critics,

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[47] This section was authored by Marc Labonte and Gary Shorter.

[48] See CRS Report R44554, *The Dodd-Frank Act: An Overview of the 2016 Incentive-Based Compensation Proposal*, by Raj Gnanarajah and Gary Shorter.

[49] See CRS Report R43262, *The "Pay Ratio Provision" in the Dodd-Frank Act: Legislation to Repeal It in the 113th Congress*, by Gary Shorter.

[50] Lucian A. Bebchuk, Martijn Cremers, and Urs Peyeret, "CEO Pay Slice," *Journal of Financial Economics*, October 2011, pp. 199-206, at http://www.law.harvard.edu/faculty/bebchuk/pdfs/Bebchuk-Cremers-Peyer_CEO-Pay-Slice_Sept2010.pdf.

[51] Stephen M. Bainbridge, "Dodd-Frank: Quack Federal Corporate Governance Round II," UCLA School of Law, Law-Econ Research Paper no. 10-12, pp. 1-3, September 7, 2010, at http://ssrn.com/abstract=1673575.

[52] Statement by FDIC Chairman Martin J. Gruenberg on the "Federal Deposit Insurance Corporation Notice of

however, dispute that it would mitigate systemic risk, and argue it would result in an exodus of talent from various financial institutions.[53]

### *Provisions in the FCA*

The FCA would amend the Dodd-Frank Act's say-on-pay provision by eliminating mandatory periodic shareholder votes on executive pay and limiting such votes to when a company has made a *material change* to the previous year's executive compensation. The FCA would repeal the Dodd-Frank Act requirement that companies calculate and disclose the CEO-worker pay ratio.[54] The FCA would also repeal the Dodd-Frank Act's incentive compensation mandate.

# Systemically Important ("Too Big To Fail") Financial Institutions

Although "too big to fail" (TBTF) has been a long-standing policy issue, it was highlighted by the near-collapse of several large financial firms in 2008, including Bear Stearns, Fannie Mae, Freddie Mac, Lehman Brothers, and AIG, which led to a worsening of the financial crisis. With the exception of Lehman Brothers (which filed for bankruptcy), all of these firms received government assistance under emergency authority to avoid insolvency. Financial firms are said to be TBTF when policymakers judge that the firms' failure would cause unacceptable disruptions to financial stability. Financial firms can be perceived as TBTF because of their size or interconnectedness. In addition to fairness issues, economic theory suggests that market expectations that the government will not allow a firm to fail create moral hazard—if the creditors and counterparties of a TBTF firm believe that the government will protect them from losses, they have less incentive to monitor the firm's riskiness (referred to as *market discipline*). If this is the case, a firm that is perceived to be TBTF could have a funding advantage, which some call an implicit subsidy, compared with other firms.

## Regulating Systemically Important Financial Institutions and Limiting Their Size[55]

### *Background*

The Dodd-Frank Act included a number of provisions to address TBTF, using several different policy approaches.[56] The act's main approach was to create an enhanced regulatory regime mostly administered by the Federal Reserve to hold systemically important firms to stricter prudential standards than other financial firms. Prudential regulation is a concept from banking regulation that refers to monitoring an institution's financial safety and soundness; the concept was

Proposed Rulemaking on Incentive-Based Compensation Arrangements," FDIC, April 26, 2016, at https://www.fdic.gov/news/news/speeches/spapr2616a.html.

[53] For example, see U.S. Congress, House Financial Services Committee. *The Financial Choice Act, A Republican Proposal to Reform the Financial Regulatory System*, April 24, 2017, at https://financialservices.house.gov/uploadedfiles/2017-04-24_financial_choice_act_of_2017_comprehensive_summary_final.pdf.

[54] This provision is similar to as reported by the House Committee on Financial Services.

[55] This section was authored by Marc Labonte.

[56] For more information, see CRS Report R42150, *Systemically Important or "Too Big to Fail" Financial Institutions*, by Marc Labonte.

generally not applied federally to nonbank financial firms before the crisis, with limited exceptions. The enhanced regulatory regime can include capital standards, liquidity standards, counterparty limits, stress tests, risk-management standards, "living will" requirements, and early remediation requirements.

The Dodd-Frank Act applied enhanced prudential regulation to three sets of financial entities—banks; nonbank financial firms; and payment, clearing, and settlement systems (called *financial market utilities*, or FMUs).[57] Bank holding companies (BHCs) are automatically subject to enhanced regulation if they have $50 billion or more in assets. More than 30 BHCs—which include most of the largest U.S. financial firms—meet this criterion. A BHC cannot "debank" to avoid enhanced regulation if it received funds under the Troubled Asset Relief Program (referred to as the "Hotel California" provision). A smaller subset of the largest U.S. BHCs also faces additional capital, leverage, and liquidity requirements through U.S. regulations implementing Basel III, an international accord. Nonbank financial firms and FMUs are subject to enhanced regulation only if they are designated as *systemically important financial institutions* (SIFIs) by the Financial Stability Oversight Council (FSOC). To date, eight FMUs and four nonbank financial firms, three of which are insurance companies, have been designated. Subsequently, one firm (GE Capital) has had its designation removed by FSOC and one designation (MetLife) has been overturned in court, subject to pending appeals.[58]

The Dodd-Frank Act included other approaches to coping with the TBTF problem, including provisions to limit the size of financial firms and narrow the scope of emergency authority to limit future bailouts. It gave the Federal Reserve the authority to restrict the size and activities of a financial firm that posed a grave threat to financial stability and prevented a nonbank financial firm from most mergers and acquisitions that would cause its liabilities to exceed 10% of total financial-sector liabilities. These powers could be used only in limited circumstances, however, and have not been exercised to date.

**Table 2. Institutions Designated by FSOC as Systemically Important**

| SIFIs | FMUs |
|---|---|
| *Current* | *Current* |
| AIG | The Clearing House Payments Co. |
| Prudential Financial | CLS Bank International |
| *Former* | Chicago Mercantile Exchange |
| GE Capital[a] | The Depository Trust Company |
| MetLife[b] | Fixed Income Clearing Corporation |
| | ICE Clear Credit |
| | National Securities Clearing Corp. |
| | The Options Clearing Corp. |

**Source:** FSOC at https://www.treasury.gov/initiatives/fsoc/designations/Pages/default.aspx.

**Notes:** See text for details.

[57] The types of tools prescribed for enhanced regulation of FMUs differ from those listed above for banks and nonbank financial firms. For more information, see CRS Report R41529, *Supervision of U.S. Payment, Clearing, and Settlement Systems: Designation of Financial Market Utilities (FMUs)*, by Marc Labonte.

[58] Information on designated firms is available at https://www.treasury.gov/initiatives/fsoc/designations/Pages/default.aspx.

a. On June 28, 2016, FSOC rescinded GE Capital's designation.
b. On March 30, 2016, the U.S. District Court for the District of Columbia struck down MetLife's designation.

### *Policy Issues*

The fact that many large firms have grown in dollar terms since the enactment of the Dodd-Frank Act has led some critics to question whether the TBTF problem has been solved. Debate continues about whether the best policy approach to address excessive risk-taking from moral hazard is through enhanced prudential regulation or market discipline—the fear of losses curbing excessive risk-taking. Although these two approaches need not be at odds with one another in theory—and policymakers have tried to pursue both simultaneously—in practice they may be. Critics of enhanced prudential regulation fear that if the government explicitly designates specific firms as systemically important, investors will assume that the firms will not be allowed to fail, which will undermine market discipline. If enhanced regulation is not tough enough—critics point to regulatory failures during the crisis as evidence that it may not be—and market discipline is undermined, designated firms might take greater risks and the financial system could be less stable.

Proponents of enhanced regulation question how credible a pledge to let firms fail can be. They point to the excessive risk-taking leading up to 2008—when the government did not have a policy of aiding failing firms—and the subsequent decision to assist large firms to avoid a further deterioration in financial conditions as an example of the failure of market discipline. In addition, the fact that many large failing firms did receive government assistance in 2008 may have already undermined the viability of the market discipline approach going forward, by undermining the credibility of any subsequent pledge to allow firms to fail (regardless of current statutory limitations). Furthermore, systemic risk is a risk to the rest of society that investors do not internalize. From a policymaker's perspective, systemic risk may still be too high in the presence of perfect market discipline, because a TBTF firm's creditors have less to lose from its failure than the financial system as a whole. Another limit to market discipline is that creditors do not have access to the same confidential information as regulators.

Extending prudential regulation to nonbank SIFIs raises additional policy questions:

- **Enhanced regulation.** Can the Federal Reserve effectively adapt banking prudential regulation and supervision to nonbanks, tailoring regulation to match their business models and the risks that they pose?
- **Designation process.** Given the lack of consensus on how to measure systemic importance, is FSOC's discretion appropriate or is the existing designation process too opaque and arbitrary?
- **Insurance and systemic risk.** Given that all currently designated SIFIs are insurers, are large insurance firms a source of systemic risk and, if so, is it already adequately addressed by prudential regulation at the state level?
- **Size vs. activities.** Is the source of systemic risk for nonbanks caused mainly by firm size or by specific market practices by firms of all size? If the latter, then SIFI regulation is unlikely to contain systemic risk.

### *Provisions in the FCA*

The FCA would repeal several provisions of the Dodd-Frank Act related to TBTF. Notably, it would repeal FSOC's ability to designate nonbank financial firms or FMUs as SIFIs and subject them to enhanced regulation, as detailed above. Firms and FMUs currently designated as SIFIs

(see **Table 2**) would no longer be subject to enhanced regulation. The FCA also would repeal early remediation requirements for SIFIs and bank holding companies with more than $50 billion in assets. It would also reduce the frequency of and modify the frameworks for stress testing and living wills for large banks.

The FCA would leave in place enhanced regulation from the Dodd-Frank Act and Basel III for large BHCs. However, banks that qualify for regulatory exemptions under the 10% leverage ratio would no longer be subject to these enhanced regulations. The FCA would also repeal the Hotel California provision prohibiting a BHC from debanking to avoid enhanced regulation.

In addition, the FCA would repeal Dodd-Frank Act provisions that gave the Federal Reserve the ability to restrict the size and activities of a financial firm that posed "a grave threat to financial stability" and the limit on a nonbank financial firm exceeding 10% of total financial sector liabilities (the provision would still apply to banks).

Whether these changes would increase or decrease the riskiness of large financial firms and the financial system as a whole depends on whether the effect of potentially greater market discipline or reduced prudential regulation dominates. The effect on market discipline, in turn, will depend in part on what market participants believe will happen in the event of a failure, which is addressed in the next section.

## Resolving a Failing TBTF Firm and Preventing "Bailouts"[59]

### *Background*

The financial crisis raised issues about how to allow large financial firms to fail without triggering financial instability. In an attempt to quell the crisis, the Fed (under Section 13(3) of the Federal Reserve Act), FDIC, and Treasury (using the Exchange Stabilization Fund) used emergency authority to offer loans and guarantees to financial firms and markets. Broadly speaking, the Dodd-Frank Act (for the Fed and FDIC) and the Emergency Economic Stabilization Act (P.L. 110-343) (for Treasury) narrowed the scope of these authorities in an attempt to rule out "bailouts" to insolvent, failing firms, while preserving their authority to provide emergency liquidity to healthy but illiquid firms. The Dodd-Frank Act also extended access to the Fed's discount window to FMUs.

Policymakers at the time of the crisis argued that government intervention was unavoidable in the absence of a means to wind down systemically important firms without triggering financial instability.[60] Some argued that these concerns were confirmed by the financial instability associated with the government's decision to allow the broker-dealer Lehman Brothers to enter the bankruptcy process rather than extending it assistance to remain solvent and.[61] Critics, by contrast, argue that repeated ad hoc interventions by policymakers created uncertainty that contributed to financial instability.[62]

In response to these concerns, Title II of the Dodd-Frank Act created a special resolution regime (called Orderly Liquidation Authority or OLA) for liquidating failing financial firms only if federal policymakers determine that a firm's imminent failure poses a threat to financial stability.

[59] This section was authored by Marc Labonte.

[60] Ben Bernanke, *Courage to Act* (W.W. Norton and Company, 2015).

[61] Henry Paulson, Jr., *On the Brink: Inside the Race to Stop the Collapse of the Global Financial System* (Business Plus, 2010).

[62] John Taylor, "How Government Created the Financial Crisis," *Wall Street Journal*, February 9, 2009.

OLA is an administrative, rather than judicial, resolution forum modeled on how the FDIC resolves insured depository institutions. Should the failing firm's estate lack sufficient liquid assets to prevent creditor reactions from contributing to financial instability, the FDIC is empowered to contribute resources to the failing firm's estate. Any such payments would be recouped through the liquidation of the failed firm's assets or after-the-fact assessments on surviving firms in the financial industry. (Note that access to OLA is not limited to designated SIFIs and has not been used to date.)

OLA is statutorily structured as a fallback alternative to the normally applicable insolvency regimes;[63] the failure of most nonbank financial institutions generally is dealt with under the Bankruptcy Code.[64] The Bankruptcy Code consists of separate chapters designed to resolve a variety of failing entities through judicial processes.[65] However, certain entities are not statutorily permitted to be resolved through the Bankruptcy Code. For example, FDIC insured depositories are not permitted to be debtors under the Bankrutpcy Code.[66] Instead, the FDIC is statutorily authorized to resolve failing insured depositories through a largely nonjudicial, FDIC-administered conservatorship or receivership. Part of the policy justification for resolving insured depositories through this administrative regime, rather than the normally applicable Bankruptcy Code, is that the FDIC, as deposit insurer, guarantees payment to depositors even if such obligations exceed the resources of the failing firm's estate, but also due to the threat of financial instability accompanied by widespread failures of depositories.[67]

### *Policy Issues*

Advocates of OLA highlight several specific characteristics of financial markets and the Bankruptcy Code at the time that may have magnified financial instability.[68] First, some argue that the Lehman Brothers bankruptcy announcement was a negative shock to confidence because investors had assumed that Lehman was "too big to fail." By contrast, OLA has a statutory focus on maintaining financial stability, of which there is no statutory equivalent under the existing Bankruptcy Code. Second, some argue that the length of a typical judicial bankruptcy proceeding compared to an administrative agency resolution process would contribute to financial uncertainty. Proponents argue that OLA's administrative forum would allow the FDIC to move more quickly than generally is possible through a judicial bankruptcy proceeding, thus decreasing market uncertainty. Third, some argue that the treatment of some financial contracts, such as acceleration and netting of qualifying financial contracts (QFCs), under the Bankruptcy Code is done selectively by counterparties to the detriment of the bankruptcy estate.[69]

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[63] For more on OLA, see CRS Report R43801, *"Living Wills": The Legal Regime for Constructing Resolution Plans for Certain Financial Institutions*, by David H. Carpenter.

[64] 11 U.S.C. §109.

[65] Federal Reserve, *Study on the Resolution of Financial Companies Under the Bankruptcy Code*, Washington, DC, July 10, 2011, at https://www.federalreserve.gov/publications/other-reports/files/bankruptcy-financial-study-201107.pdf.

[66] 11 U.S.C. §109(b).

[67] FDIC. *Resolutions Handbook*, pp. 24-25, rev. December 23, 2014, at https://www.fdic.gov/about/freedom/drr_handbook.pdf#nameddest=Ch1.

[68] Critics have disagreed with some of these assessments of the Lehman Moment and the Bankruptcy Code. For example, some argue that the 2008 run on money market mutual funds (MMFs) that held Lehman's debt would have occurred even if Lehman's failure was handled administratively and quickly.

[69] Some believe that issues related to the treatment of certain financial contracts can be handled through private contract. There have been amendments to many existing derivative contracts, in part under encouragement by federal

Critics say these three advantages of OLA could be replicated in a judicial forum by establishing a new chapter of the Bankruptcy Code designed specifically to address the unique characteristics of large financial institutions.

Fourth, supporters of OLA argue that the nature of financial intermediaries' continuous need to access credit (liquidity) makes a bankruptcy process impractical for large financial institutions.[70] They view it as unlikely that markets will be able to provide sufficient private financing during the bankruptcy of a failing firm and, therefore, "it is not credible to suggest that a financial institution bankruptcy can work without standby government financing," like that which is provided by Title II.[71]

The FDIC's option to temporarily use government funds to meet creditor claims under OLA leads critics to argue that it "institutionalized bailouts" and that the FDIC's plan for implementing OLA has promoted "expectations that the government will come to the rescue of large financial institutions and insulate their creditors and counterparties from losses."[72] OLA cannot be used to bail out failing firms in the sense that it can only be used to wind a firm down, but it could potentially be used to bail out a firm's creditors by making them whole or at least compensating them more than would be available through a bankruptcy proceeding. Although Title II instructs the FDIC to generally treat similarly situated creditors similarly, critics worry that the fact that, if necessary for financial stability, the FDIC has "authority to treat similarly situated creditors differently places far too much discretion in the hands of the government to pick winners and losers" during a resolution.[73] The FDIC, in addressing these concerns, has noted that it "expects that disparate treatment of creditors would occur only in very limited circumstances and has, by regulation, expressly limited its discretion to treat similarly situated creditors differently."[74]

### *Provisions in FCA*

The FCA would repeal Title II of the Dodd-Frank Act and would add a new subchapter to the Bankruptcy Code designed specifically to handle the arguably unique characteristics associated with the failure of certain financial firms. As such, the resolution process would be handled through the courts rather than through largely nonjudicial proceedings administered by the financial regulators. However, the relevant financial regulators would, under certain circumstances, have the right to "appear and be heard" in certain bankruptcy proceedings of covered financial institutions.

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regulators through the living wills process and through modifications of derivative contracts to comply with the International Swaps and Derivatives Association, Inc. (ISDA) Resolution Stay Protocol to implement a temporary stay from counterparties' ability to terminate, liquidate, and accelerate the contracts when one of the other participating financial institutions enters a resolution process. See International Swaps and Derivatives Assoc., Inc., *Major Banks Agree to Sign ISDA Resolution Stay Protocol*, press release, October 11, 2014, at http://www2.isda.org/news/major-banks-agree-to-sign-isda-resolution-stay-protocol.

[70] For a more detailed discussion of these issues, see CRS Report R40530, *Insolvency of Systemically Significant Financial Companies (SSFCs): Bankruptcy vs. Conservatorship/Receivership*, by David H. Carpenter.

[71] Testimony of Adam Levitin at U.S. Congress, House Committee on Financial Services, *Making a Financial Choice: More Capital or More Government Control*, 114th Cong., 2nd sess., July 12, 2016.

[72] U.S. Congress, House Committee on Financial Services, *The Financial CHOICE Act: A Republican Proposal to Reform the Financial Regulatory System*, June 23, 2016, pp. 18-20, at http://financialservices.house.gov/uploadedfiles/financial_choice_act_comprehensive_outline.pdf.

[73] Ibid., p. 25.

[74] FDIC, "Resolution of Systemically Important Financial Institutions: The Single Point of Entry Strategy," 78 *Federal Register* 76618, December 18, 2013.

Similar to the current Bankruptcy Code, under the FCA there would be several resolution options available to covered financial institutions. The firm could be liquidated (Chapter 7) or reorganized (Chapter 11). However, the plan must meet a number of conditions, including that it is in the best interests of the creditors and must not pose a likely threat to the financial stability of the United States.

The FCA would add additional limits to the Fed's emergency lending authority and would eliminate FMU access to the discount window, the FDIC's emergency authority to guarantee bank debt and systemic risk exception to least cost resolution, and the use of the Exchange Stabilization Fund for government guarantees.

CBO projects that the elimination of the Orderly Liquidation Authority would reduce the budget deficit by $14.5 billion over 10 years based on the probability of a firm being resolved through OLA over the next 10 years multiplied by the net cost to the government of doing so. Eliminating OLA reduces the deficit mainly because of scoring conventions. Although the FDIC is required to assess fees on large financial firms after the fact sufficient to completely offset the costs of an OLA resolution, CBO assumes that some of these fees (and asset sales from the resolution) would be collected outside of the 10-year scoring window.[75]

# Changes to Regulatory Authority

Conventional wisdom regarding regulators is that the structure and design of the organization matters for policy outcomes. These agencies have been given certain characteristics that enhance their day-to-day independence from the President or Congress, which may make policymaking more technical and less political or partisan, for better or worse.[76] Independence also may make regulators less accountable to elected officials and can reduce congressional influence. From a practical perspective, independence and accountability take various forms and each regulator has a unique group of characteristics that, along with tradition, determine its relative independence and accountability. Two of the most independent regulators, the Fed and the CFPB, would see their independence reduced and congressional oversight increased by the FCA. The rest of this section discusses issues raised by the FCA related to independence and accountability, with added focus on the CFPB and the Fed.

## Appropriations[77]

### *Background*

The annual appropriations processes and periodic reauthorization legislation provide Congress with opportunities to influence the size, scope, priorities, and activities of an agency. Most financial regulators determine their own budgets and assess fees to cover expenditures, as shown in **Table 3**, typically subject to some general language regarding proportionality of budget and mission. Currently, the two financial regulators whose funding is primarily determined through

[75] Congressional Budget Office, *Cost Estimate for the Manager's Amendment to* H.R. 10, June 6, 2017, at https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/H.R. 10 managers.pdf; Congressional Budget Office, *Cost Estimate: H.R. 10*, May 18, 2017, at https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/hr10.pdf.

[76] For more information, see CRS Report R43391, *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues*, by Henry B. Hogue, Marc Labonte, and Baird Webel.

[77] This section was authored by Marc Labonte.

the appropriations process and who are subject to periodic reauthorizations are the CFTC and the SEC.[78] Most financial regulators generate income from various sources, particularly fees or assessments on entities that they oversee. The two financial regulators that do not largely raise their own revenues are the CFTC and the CFPB. The CFTC's funding comes from general revenues and CFPB funding is transferred from the Federal Reserve's revenues.

**Table 3. Current Funding for Financial Regulatory Agencies**

| Regulator | Subject to Annual Appropriations? | Subject to Periodic Reauthorization? | Primary Revenue Source |
|---|---|---|---|
| Commodity Futures Trading Commission | Yes | Yes, latest authorization expired Sept. 30, 2013. | Treasury general fund per congressional appropriation. |
| Consumer Financial Protection Bureau | No | No | Transfer from Federal Reserve System limited to 12% of the Fed's operating expenses. |
| Federal Deposit Insurance Corporation | No | No | Deposit insurance premiums determined by FDIC to meet a reserve ratio set by FDIC (with a statutory minimum of 1.35% of insured deposits). |
| Federal Housing Finance Agency | No | No | Fees and assessments on regulated institutions. Amounts determined by FHFA. |
| Federal Reserve | No | No | Income on securities and loans held by the Fed. The Fed also charges fees to cover the costs of business services it offers. |
| National Credit Union Administration | No | No | Deposit insurance premiums determined by NCUA to meet a reserve ratio set by NCUA (with a statutory minimum of 1.2% of insured deposits). |
| Office of the Comptroller of the Currency | No | No | Fees on regulated institutions. Amounts determined by OCC. |
| Securities and Exchange Commission | Yes, except for $100 million reserve fund. | Yes, latest authorization expired September 30, 2015. | Fees and assessments on regulated entities. Amounts set to meet congressional appropriation. |

**Source:** CRS analysis of federal statute.

**Note:** Both the SEC and CFTC have continued to operate since their authorizations expired.

## *Policy Issues*

The appropriations and authorization processes provide Congress regular opportunities to evaluate an agency's performance. During these processes, Congress might also influence the activities of these agencies by legislating provisions that reallocate resources or place limitations on the use of appropriated funds to better reflect congressional priorities. Through line-item

[78] The SEC is funded through the Financial Services and General Government (FSGG) appropriations bill. The CFTC funding is split, appearing in the FSGG bill in the Senate and the Agriculture appropriations bill in the House. The FDIC (for its inspector general) and NCUA (for the Community Development Revolving Loan Fund Program) also receive minor funding through the FSGG bill.

funding, bill text, or accompanying committee report text, Congress can encourage, discourage, require, or forbid specific activities at the agency, including rulemaking. Alternatively, Congress can adjust an agency's overall funding level if Congress is supportive or unsupportive of the agency's mission or conduct. Thus, congressional control over an agency's funding reduces its independence from (and increases its accountability to) Congress. To the extent that agency budget requests exceed appropriations in practice, bringing agencies into the appropriations process could result in lower agency funding levels, for better or worse.

### *Provisions in the FCA*

The FCA would bring the rest of the financial regulators—the FDIC, FHFA, NCUA, OCC, Fed, and CLEA—as well as FSOC into the appropriations process. For the Fed, spending related to monetary policy would remain outside of the appropriation process.[79] For the FDIC, the Deposit Insurance Fund would remain outside of the appropriations process. The CLEA, replacing the CFPB, would not receive transfers from the Federal Reserve and thus would not have a dedicated source of revenues. Fees and assessments that agencies currently collect to fund themselves would appear as offsetting collections in the federal budget with certain exceptions. Agencies that are currently permanently authorized would remain so. The FCA would also reauthorize the SEC through 2022 and the CLEA through 2018.

CBO estimates that moving these agencies to appropriations would reduce direct spending (and therefore decrease the deficit) by $18.4 billion over 10 years. To the extent that these agencies were funded through future appropriations acts, discretionary spending would rise and offset that reduction in the deficit.[80]

## Consumer Financial Protection Bureau

### *Background*[81]

Before Title X of the Dodd-Frank Act (entitled the Consumer Financial Protection Act) went into effect,[82] federal consumer financial protection regulatory authority was split between five banking agencies—the OCC, Fed, FDIC, NCUA, and Office of Thrift Supervision (OTS)[83]—as well as the Federal Trade Commission (FTC) and the Department of Housing and Urban Development (HUD). These seven agencies shared (1) the authority to write rules to implement most federal consumer financial protection laws; (2) the power to enforce those laws; and (3) supervisory authority over the individuals and companies offering and selling consumer financial products

[79] Currently, the 12 Federal Reserve banks include a breakout of expenses associated with "monetary and economic policy" in their budget reporting, but the Board of Governors does not. In 2015, the banks spent $632 million on monetary and economic policy and $3,243 million on other operations. Federal Reserve, *Annual Report for 2015*, May 2016, Table 8, at http://www.federalreserve.gov/publications/annual-report/2015-federal-reserve-system-budgets.htm#xfederalreservebanksbudgets-f2c5aba5.

[80] Congressional Budget Office, *Cost Estimate for the Manager's Amendment to H.R. 10*, June 6, 2017, at https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/H.R. 10 managers.pdf.

[81] This section was authored by David H. Carpenter.

[82] Most of Title X went into effect on July 21, 2011, which the act refers to as the "designated transfer date." 12 U.S.C. §5582. See also Bureau of Consumer Financial Protection, "Designated Transfer Date," 75 *Federal Register* 57252, September 20, 2010.

[83] The OTS was eliminated, and its powers were transferred to the OCC, FDIC, Fed, and CFPB. Dodd-Frank Act §§300-378.

and services. The jurisdictions of these agencies varied based on the type of institution involved and, in some cases, based on the type of financial activities in which institutions engaged.[84]

The regulatory authority of the banking agencies varied by depository charter. The OCC regulated depository institutions with a national bank charter.[85] The Fed regulated the domestic operations of foreign banks and state-chartered banks that were members of the Federal Reserve System (FRS).[86] The FDIC regulated state-chartered banks and other state-chartered depository institutions that were not members of the FRS.[87] The NCUA regulated federally insured credit unions,[88] and the OTS regulated institutions with a federal thrift charter.[89]

The banking agencies were charged with a two-pronged mandate to regulate depository institutions within their jurisdiction for safety and soundness, as well as consumer compliance.[90] The focus of safety and soundness regulation is ensuring that institutions are managed in a safe and sound manner so as to maintain profitability and avoid failure.[91] The focus of consumer compliance regulation is ensuring that institutions abide by applicable consumer protection and fair lending laws.[92] To reach these ends, the banking agencies held broad authority to subject depository institutions to up-front supervisory standards, including the authority to conduct regular, if not continuous, on-site examinations of depository institutions.[93] They also had flexible enforcement powers to redress consumer harm, as well as to rectify proactively compliance issues found in the course of examinations and the exercise of their other supervisory powers, potentially *before* consumers suffered harm.[94]

The FTC was the primary federal regulator for nondepository financial companies, such as payday lenders and mortgage brokers.[95] Unlike the federal banking agencies, the FTC had little up-front supervisory or enforcement authority.[96] For instance, the FTC did not have the statutory authority to examine nondepository financial companies regularly or impose reporting requirements on them as a way proactively to ensure they were complying with consumer protection laws.[97] Instead, the FTC's powers generally were limited to enforcing federal

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[84] See the "Federal Consumer Financial Protection Regulation Before the CFPB" section of CRS Report R42572, *The Consumer Financial Protection Bureau (CFPB): A Legal Analysis*, by David H. Carpenter.

[85] 12 U.S.C. §1813(q) (2009).

[86] 12 U.S.C. §1813(q)(3) (2009). The Fed also supervised bank holding companies. 12 U.S.C. §1844 (2009).

[87] 12 U.S.C. §1813(q) (2009). The FDIC, which administers the Deposit Insurance Fund, also has certain regulatory powers over state and federal depositories holding FDIC-insured deposits. However, these authorities generally are secondary to those of the institution's primary federal regulator. See, e.g., 12 U.S.C. §1820.

[88] 12 U.S.C. §1766 (2009).

[89] The OTS also supervised thrift holding companies. 12 U.S.C. §1467a(b) (2009).

[90] 12 U.S.C. §1(a) (2009) (OCC); 12 U.S.C. §248(p) (2009) (Fed); 12 U.S.C. §1463 (2009) (OTS); 12 U.S.C. §1766 (2009) (NCUA); 12 U.S.C. §1820(b) (2009) (FDIC).

[91] Heidi Mandanis Schooner, "Consuming Debt: Structuring the Federal Response to Abuses in Consumer Credit," *Loyola Consumer Law Review*, vol. 18, no. 1 (2005), pp. 43, 52-53.

[92] Ibid., pp. 50 and 54-55.

[93] 12 U.S.C. §1820(b) (2009) (OCC, Fed, FDIC, OTS); 12 U.S.C. §1756 (2009) (NCUA). All depositories generally must be examined at least once every 18 months, but the largest depositories have examiners on-site on a continuous basis. See, e.g., 12 U.S.C. §1820(d) (2009) (banks and thrifts); 12 U.S.C. §1756 (2009) (credit unions).

[94] See, e.g., 12 U.S.C. §§1818 and 1831o (2009) (OCC, Fed, FDIC, OTS); 12 U.S.C. §1766 (2009) (NCUA).

[95] 15 U.S.C. §45 (2009). The FTC also has regulatory jurisdiction over many nonfinancial commercial enterprises. Ibid.

[96] Federal Trade Commission, *Operating Manual*, Ch. 11, pp. 4-5, at https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch11judiciaryenforcement.pdf.

[97] Heidi Mandanis Schooner, "Consuming Debt: Structuring the Federal Response to Abuses in Consumer Credit," *Loyola Consumer Law Review*, vol. 18, no. 1 (2005), pp. 43, 56-58. The FTC also did not have any direct safety and

consumer laws.[98] However, because the FTC lacked supervisory powers, it generally initiated enforcement actions in response to consumer complaints, private litigation, or similar "triggering events [that] postdate injury to the consumer."[99]

Additionally, both depository institutions and nondepository financial companies were subject to the federal consumer financial protection laws.[100] Together, these federal laws establish consumer protections for a broad and diverse set of activities and services, including consumer credit transactions,[101] third-party debt collection,[102] and credit reporting.[103] Before the Dodd-Frank Act went into effect, the rulemaking authority to implement federal consumer financial protection laws was largely held by the Fed.[104] However, the authority to enforce the federal consumer financial protection laws and regulations was spread among all of the banking agencies, the FTC, and HUD.[105]

Some scholars and consumer advocates contended that this arguably complex, fragmented federal consumer financial protection regulatory regime failed to protect consumers adequately and created market inefficiencies to the detriment of both financial companies and consumers.[106] Some argued that these problems could be corrected if federal consumer financial regulatory powers were strengthened and consolidated in a single regulator with a consumer-centric mission and supervisory, rulemaking, and enforcement powers akin to those held by the banking agencies.[107]

The Dodd-Frank Act established the Consumer Financial Protection Bureau (CFPB, or Bureau), in part to address these concerns.[108] The CFPB is established as an independent agency[109] within the Federal Reserve System.[110] The Bureau is headed by a single director who is appointed by the President of the United States, subject to the advice and consent of the Senate, and may only be removed from office "for inefficiency, neglect of duty, or malfeasance in office."[111] The Bureau is

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soundness authority over companies.

[98] Ibid., pp. 3-18.

[99] Ibid.. p. 57. Nondepository financial companies also were subject to varying levels of supervision by state regulators. Oren Bar-Gill and Elizabeth Warren, "Making Credit Safer," *University of Pennsylvania Law Review*, vol. 157, no. 1 (November 2008), p. 89.

[100] Ibid., pp. 87-89.

[101] 15 U.S.C. §§1601-1667f.

[102] 15 U.S.C. §§1692-1692p.

[103] 15 U.S.C. §§1681-1681x.

[104] To a lesser extent, other agencies held rulemaking authority under federal consumer laws. For example, rulemaking authority under the Real Estate Settlement Procedures Act of 1974 (RESPA) was held by HUD. 12 U.S.C. §2617 (2009).

[105] Heidi Mandanis Schooner, "Consuming Debt: Structuring the Federal Response to Abuses in Consumer Credit," *Loyola Consumer Law Review*, vol. 18, no. 1 (2005), pp. 43, 56-58; Oren Bar-Gill and Elizabeth Warren, "Making Credit Safer," *University of Pennsylvania Law Review*, vol. 157, no. 1 (November 2008), pp. 86-97.

[106] See, e.g., Heidi Mandanis Schooner, "Consuming Debt: Structuring the Federal Response to Abuses in Consumer Credit," *Loyola Consumer Law Review*, vol. 18, no. 1 (2005), pp. 43, 82; Oren Bar-Gill and Elizabeth Warren, "Making Credit Safer," *University of Pennsylvania Law Review*, vol. 157, no. 1 (November 2008), pp. 98-100.

[107] Ibid.

[108] CRS Report R42572, *The Consumer Financial Protection Bureau (CFPB): A Legal Analysis*, by David H. Carpenter.

[109] 12 U.S.C. §5491(b).

[110] 12 U.S.C. §5491(a).

[111] 12 U.S.C. §5491(b). A mortgage company has challenged the constitutionality of the CFPB's structure in a lawsuit that is currently before the full U.S. Court of Appeals for the District of Columbia. See PHH Corp. v. Consumer Fin.

funded primarily through transfers of nonappropriated funds from the Federal Reserve System's combined earnings in an amount "determined by the Director to be reasonably necessary to carry out the authorities of the Bureau," subject to specified caps.[112]

The CFPB has regulatory jurisdiction over a broad array of consumer financial products and services, as well as the entities that sell them.[113] The Dodd-Frank Act significantly enhances federal consumer protection regulatory authority over nondepository financial companies, for instance, by providing the CFPB with supervisory and examination authority over such companies akin to those powers long held by the banking agencies over depository institutions.[114] Although the Dodd-Frank Act consolidates in the CFPB much of the federal consumer financial protection authority, at least six other agencies—the OCC, Fed, FDIC, NCUA, HUD, and FTC—retain some powers in this field.[115] The Dodd-Frank Act also explicitly exempts certain industries from CFPB regulation.[116]

The Dodd-Frank Act transferred from the banking agencies to the Bureau primary consumer compliance authority over banks, thrifts, and credit unions with more than $10 billion in assets.[117] However, the banking agencies continue to hold safety and soundness authority over these "larger depositories,"[118] as well as both consumer compliance and safety and soundness authority over "smaller depositories" (i.e., bank, thrifts, and credit unions with $10 billion or less in assets).[119]

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Prot. Bureau, No. 15-1177, 2017 U.S. App. LEXIS 2733 (D.C. Cir. Feb. 16, 2017) (granting petition for rehearing by full court and vacating the court's three-judge panel decision in the case). A discussion of the constitutionality of the CFPB's structure is outside the scope of this report. For more information on the case, see CRS Legal Sidebar WSLG1680, *UPDATE: D.C. Circuit Rules Consumer Financial Protection Bureau's Structure is Unconstitutional*, by Jared P. Cole and Todd Garvey.

[112] 12 U.S.C. §5497.

[113] 12 U.S.C. §5492. Under the Dodd-Frank Act, the Bureau has authority over an array of consumer financial products and services, including deposit taking, mortgages, credit cards and other extensions of credit, loan servicing, check guaranteeing, collection of consumer report data, debt collection associated with consumer financial products and services, real estate settlement, money transmitting, and financial data processing. 12 U.S.C. §5481(15). The Bureau also has authority over "service providers," that is, entities that provide "a material service to a covered person in connection with the offering or provision of a consumer financial product or service." 12 U.S.C. §5481(26).

[114] 12 U.S.C. §5514. The CFPB is authorized to supervise three groups of nondepository financial companies. First, the CFPB may supervise nondepository financial companies, regardless of size, in three specific markets—mortgage companies (such as lenders, brokers, and servicers), payday lenders, and private education lenders. 12 U.S.C. §5514(a)(1)(A), (D), (E). Second, the CFPB may supervise "larger participants" in consumer financial markets. 12 U.S.C. §5514(a)(1)(B). The Bureau has designated certain entities as larger participants in several markets, including consumer debt collection, consumer reporting, and student loan servicing. 12 C.F.R. §§1090.104-108. Third, although it has not exercised the authority to date, the CFPB may supervise a nondepository financial company if the Bureau has reasonable cause to determine that the company poses risks to consumers in offering its financial services or products. 12 U.S.C. §5514(a)(C).

[115] 12 U.S.C. §§5515-17, 5519.

[116] 12 U.S.C. §§5517, 5519. For example, the CFPB generally does not have rulemaking, supervisory, or enforcement authority over automobile dealers; merchants, retailers, and sellers of nonfinancial goods and services; real estate brokers; insurance companies; or accountants. Ibid. However, certain business practices of these generally exempt entities could trigger CFPB regulatory authority (i.e., engaging in an activity that makes an otherwise exempt entity subject to an enumerated consumer law). See, for example, 12 U.S.C. §5517(a)(2)(C)(ii)(II).

[117] 12 U.S.C. §5515. The CFPB's regulatory authorities over larger depositories include the power to conduct examinations, impose reporting requirements, enforce consumer financial laws, and prescribe consumer financial regulations. Ibid.

[118] 12 U.S.C. §§5515-5516.

[119] 12 U.S.C. §5516.

The CFPB has significant rulemaking authority. The Dodd-Frank Act transferred to the Bureau the primary rulemaking authority over 19 "enumerated consumer laws,"[120] which, with one exception,[121] were enacted prior to the Dodd-Frank Act.[122] These laws, which include the Truth in Lending Act (TILA)[123] and the Real Estate Settlement Procedures Act of 1974 (RESPA),[124] govern a broad and diverse set of consumer activities and services.[125] Additionally, the CFPB is authorized to prohibit unfair, deceptive, and abusive acts or practices associated with consumer financial products and services that fall under the Bureau's general regulatory jurisdiction.[126]

The Bureau also is authorized to enforce consumer financial protection laws either through the courts[127] or administrative adjudications.[128] The CFPB is authorized by statute to redress violations of consumer financial protection laws through the assessment of civil monetary penalties, restitution orders, and various other forms of legal and equitable relief.[129]

### *Policy Issues*[130]

Since the CFPB was established, some have argued that the agency has overly broad powers, too much independence, and not enough accountability. Much of the policy discussion around it has focused on two main questions. First, is the CFPB as an institution structured appropriately to achieve the correct balance between independence on the one hand and transparency and accountability on the other? Those who criticize the CFPB's policy choices often attribute some of the perceived shortcomings to what they see as the CFPB's excessive independence, insularity, and lack of sufficient accountability. The presence of a director rather than a board, some argue, leads to a lack of diverse viewpoints at the CFPB. Some also cite funding that is outside the traditional appropriations process as a contributing factor to the CFPB's independence. Supporters of the CFPB highlight other aspects of its structure that they argue provide sufficient transparency and accountability, including the director's biannual testimony before Congress and the cap on CFPB funding. Other structural characteristics, they argue, are important for ensuring that the CFPB is somewhat insulated from political pressures and can focus on the technical aspect of policymaking.

The second major policy question is whether the substance of the CFPB's rulemakings has struck an appropriate balance between protecting consumers and ensuring that consumers have access to

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[120] 12 U.S.C. §5481(12).

[121] 12 U.S.C. §§5581-87. The Bureau acquired rulemaking authority pursuant to most provisions of the Mortgage Reform and Anti-Predatory Lending Act, which was enacted as Title XIV of the Dodd-Frank Act. 12 U.S.C. §5481 note; Dodd-Frank Act §1400. For more information on Title XIV, see the "Mortgage Standards" section of CRS Report R41350, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Background and Summary*, coordinated by Baird Webel.

[122] Dodd-Frank Act §§1081-1104 (codified in numerous places throughout the U.S. Code).

[123] 15 U.S.C. §§1601-1667f.

[124] 12 U.S.C. §§2601-2671.

[125] Oren Bar-Gill and Elizabeth Warren, *Making Credit Safer*, *University of Pennsylvania Law Review*, vol. 157, no. 1 (November 2008), pp. 83-85. The activities and services that are covered by the enumerated consumer laws include debt collection practices; debit card transfers; overdraft services; consumer leases; mortgage lending; credit card lending; mortgage appraisals; real estate settlement practices; and credit reporting.

[126] 12 U.S.C. §5531.

[127] 12 U.S.C. §5564.

[128] 12 U.S.C. §5563.

[129] 12 U.S.C. §5565.

[130] This section was authored by Baird Webel and adapted from CRS In Focus IF10031, *Introduction to Financial Services: The Consumer Financial Protection Bureau (CFPB)*, by David H. Carpenter and Baird Webel.

financial products while also safeguarding lenders from unduly burdensome regulations. One of the long-standing issues in the regulation of consumer financial services is the perceived trade-off between protecting consumers and ensuring the providers of financial services are not unduly burdened. If regulation intended to protect consumers increases the cost of providing a financial product, a company may reduce how much of that product it is willing to provide and to whom it is willing to provide it. Those who still receive the product may benefit from the enhanced disclosure or added legal protections of the regulation but at the cost of a potentially higher price.

Some Members of Congress believe the CFPB has struck an appropriate balance in its rulemaking between protecting consumers and ensuring that credit availability is not restricted due to overly burdensome regulations on financial institutions. Others counter that some of the CFPB's rules have imposed compliance costs on lenders of all sizes that will result in less credit available to consumers and restrict the types of products available. An analysis of whether recent rulemakings have restricted the availability of credit is complicated by the effects of the financial crisis on the supply of and demand for credit, as well as by the fact that many of the more significant CFPB rulemakings only took effect in early 2014.

### *Provisions in the FCA*[131]

The FCA would replace the CFPB with a "Consumer Law Enforcement Agency" (CLEA) and would make numerous other significant alterations to the federal consumer financial regulatory system put in place by the Dodd-Frank Act.[132] Although the CLEA would take over some of the Bureau's regulatory functions,[133] the CLEA would not acquire all of the powers currently held by the CFPB, and the CLEA would have a substantively distinct administrative structure.

Similar to the CFPB,[134] the CLEA would be headed by a single director, but unlike the CFPB director, who can only be removed by the President for cause, the CLEA director would be removable at-will by the President.[135] The CLEA would be funded through appropriations, rather than through a transfer of nonappropriated funds from the Federal Reserve System, as is the case for the CFPB.[136]

The CLEA, in contrast to the CFPB,[137] would not be authorized to conduct examinations of or engage in other supervisory activities involving covered financial institutions. However, the CLEA would have at its disposal many of the same enforcement powers that currently are held by the CFPB.[138] The CLEA also would acquire the CFPB's rulemaking authority over the 19 "enumerated consumer laws."[139] However, prior to initiating an enforcement action, entering a consent order, or issuing a regulation, the FCA would require the CLEA to analyze the costs and

[131] This section was authored by David Carpenter.

[132] The proposed changes are too numerous to be addressed comprehensively within the scope of this report; instead, this section addresses a sampling of the FCA's more important proposals. The bulk of these consumer financial protection-related provisions are in Title VII of the FCA.

[133] 12 U.S.C. §5492.

[134] 12 U.S.C. §5491(b).

[135] The FCA would also make the FHFA director removable at will.

[136] 12 U.S.C. §5497(a).

[137] See, e.g., 12 U.S.C. §§1024-26.

[138] 12 U.S.C. §§5561-67.

[139] 12 U.S.C. §5481(12).

benefits of such an action and evaluate how such an action would affect "consumer choice, price, and access to credit products."

Unlike the CFPB,[140] the CLEA would not serve as the primary consumer compliance regulator for larger depositories. Instead, the FCA would transfer those powers to the relevant banking agencies. The CLEA also would not have the CFPB's authority to prohibit unfair, deceptive, and abusive acts or practices in consumer financial markets.[141]

## Federal Reserve[142]

### *Background*

The Federal Reserve is unique among financial regulators in that, in addition to its regulatory role, it is responsible for conducting monetary policy and operating parts of the payment system. The Federal Reserve System is comprised of a Board of Governors and 12 regional Federal Reserve Banks. Monetary policy is set by the Federal Open Market Committee (FOMC), comprised of all seven governors, the president of the New York Fed, and four of the regional bank presidents (selected on a rotating basis among the other 11 banks).

The Fed's financial statements are annually audited by a private sector auditor, and its policies are regularly evaluated by GAO, subject to statutory restrictions. The Dodd-Frank Act allowed the Fed's monetary policy and lending activities to be audited by GAO for the first time, but limited the scope of those audits to waste, fraud, and abuse.

In normal conditions, the Fed lends minimally to banks through its discount window and does not provide any credit to nonbank financial firms. During the 2007 to 2009 financial crisis, it provided extensive credit to banks and nonbanks, the latter through its emergency powers found in Section 13(3) of the Federal Reserve Act. Some criticized the Fed's use of Section 13(3) in the bailouts of Bear Stearns and AIG, although the funds were repaid in full with interest. The Dodd-Frank Act restricted Section 13(3) to prohibit assistance to failing firms, while still allowing the Fed to provide liquidity to healthy firms through broadly based facilities.

### *Policy Issues*

To shield monetary policy from undue political influence, Congress made the Federal Reserve more independent from Congress and the Administration than other financial regulators. It currently has broad discretion to set monetary policy as it sees fit to achieve its dual statutory mandate of maximum employment and stable prices. Nevertheless, it is still subject to congressional oversight. Recent Congresses have debated whether the balance should be tilted toward greater congressional oversight and less independence, notably by expanding the scope of GAO audits of the Fed and reducing the Fed's discretion over monetary policy.

### *Provisions in the FCA*

The FCA contains 11 Fed-related sections, including provisions that would[143]

[140] 12 U.S.C. §5515.

[141] 12 U.S.C. §5531.

[142] This section was authored by Marc Labonte.

[143] These provisions originally appeared in H.R. 3189, which passed the House on November 19, 2015. For more information, see CRS Report R44273, *Federal Reserve: Legislation in the 114th Congress*, by Marc Labonte.

- remove statutory restrictions on Government Accountability Office (GAO) audits of monetary policy and require an annual audit that is not subject to current statutory provisions, such as confidentiality requirements. Effectively, this provision would expand GAO's powers to allow it to evaluate the economic merits of Fed policy decisions.
- require the Fed to formulate a mathematical rule (called the "Directive Policy Rule") that would instruct it how to set monetary policy so as to achieve its mandate of stable prices and maximum employment based on macroeconomic variables. The provision would also require the Fed to calculate a traditional Taylor Rule (called the "Reference Policy Rule" in the bill) and compare it to the Directive Policy rule.[144] If the Fed did not comply, it would trigger a GAO audit and testimony by the Fed chair before the committees of jurisdiction.
- change the voting membership of the FOMC. The provision would dilute the voting power of the Fed governors and the New York Fed president by expanding the votes of the other regional bank presidents.
- further restrict the Fed's emergency lending powers. It would limit eligible collateral and eligible firms, establish a minimum "penalty" interest rate, and require approval by at least nine Fed bank presidents.
- create a commission whose voting members are composed of eight Members of Congress from the majority party and four Members from the minority party, split evenly between the House and Senate. The commission would examine and make recommendations on monetary policy, the dual mandate, macroprudential regulation, and lender of last resort functions.

The FCA would also enhance oversight at the expense of Fed independence by moving the Fed's nonmonetary policy activities to appropriations (see the section entitled "Appropriations") and subjecting Fed rulemaking to cost-benefit analysis requirements (see the section entitled "Cost-Benefit Analysis").

## Rulemaking

Rulemaking is one of the basic tools that federal agencies use to implement public policy. In enacting legislation, Congress often grants agencies rulemaking authority, under which they are required or permitted to set standards and prescribe the details of certain federal policies and programs. Some rules an agency issues are promulgated under the agency's inherent authority, while others are in response to the specific requirements of legislation. When they issue those regulations, agencies are generally required to follow a certain set of procedures established by Congress. The most long-standing and broadly applicable federal rulemaking requirements are in the Administrative Procedure Act (APA) of 1946,[145] which applies to all executive agencies, including independent regulatory agencies. The APA contains rulemaking requirements and procedures for agency adjudications,[146] and it provides for judicial review of rulemaking and agency actions.

[144] For more information on the Taylor Rule, see CRS In Focus IF10207, *Monetary Policy and the Taylor Rule*, by Marc Labonte.

[145] 5 U.S.C. §551 et seq.

[146] The Administrative Procedure Act (APA) of 1946's requirements for issuing rules generally include (with some exceptions) publication of a notice of proposed rulemaking, a comment period, publication of a final rule, and a

Three proposals in the FCA—requiring cost-benefit analysis (CBA), modifying the Congressional Review Act (CRA),[147] and overturning the judicial Chevron Doctrine—would affect regulator discretion and accountability in the rulemaking process.

## Cost-Benefit Analysis[148]

### *Background*

In the rulemaking process, cost-benefit analysis is the systematic examination of estimated total costs incurred and benefits accrued if a proposed rule were to be implemented. Many regulatory agencies are required to perform some analysis of the potential effects of the rule prior to finalizing it, but not necessarily a quantified CBA. The scope of consideration and the level of detail required of the analysis can vary between different departments and agencies, and financial regulators generally are not required to quantify and evaluate total economic costs and benefits.[149]

Financial regulators generally face requirements that involve a relatively narrow analysis of a specific effect of a regulation—such as the effect on small businesses or the burden of recordkeeping and reporting necessary to comply with a new regulation—or that leave the parameters of a CBA to the discretion of the issuing agency. Also, because financial regulators are generally classified as *independent regulatory agencies*, they are exempted from Executive Order (EO) 12866. EO 12866 establishes analytical principles for federal CBA and a review process—performed by the Office of Information and Regulatory Affairs within the Office of Management and Budget—to ensure rulemaking adheres to those principles.[150]

### *Policy Issues*

CBA requirements help to ensure that regulators are held accountable during the development, issuance, and implementation of rules, by requiring regulators to demonstrate that their decisions are based on an informed estimation of likely consequences. However, a statutory requirement for financial regulators to perform certain types of CBAs that are subject to judicial, presidential, or congressional review would change the balance between their independence and accountability.[151]

One side of the debate asserts that financial regulators should not be subject to rigid legal structure when performing CBA—especially in regard to quantification of costs and benefits. One argument for this position is that attempts to quantify the effects of financial regulation are imprecise and unreliable, because they entail making causal assumptions that are contestable and uncertain and often face issues concerning data availability and accuracy.[152] The reason for this imprecise analysis is that financial regulation aims to induce behavioral, microeconomic, and

minimum 30-day period from the rule's publication to its effective date.

[147] P.L. 104-121.

[148] This section was authored by David Perkins.

[149] For more information on financial regulations and cost-benefit analysis, see CRS Report R44813, *Cost-Benefit Analysis and Financial Regulator Rulemaking*, by David W. Perkins and Maeve P. Carey.

[150] For more information on CBA and independent regulatory agencies, see CRS Report R42821, *Independent Regulatory Agencies, Cost-Benefit Analysis, and Presidential Review of Regulations*, by Maeve P. Carey and Michelle D. Christensen. The independent regulatory agencies are listed in statute at 44 U.S.C. §3502(5).

[151] Cass R. Sunstein, "Financial Regulation and Cost-Benefit Analysis," *The Yale Law Journal Forum*, January 22, 2015, pp. 263-266.

[152] John C. Coates IV, "Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications," *The Yale Law Journal*, vol. 124, no. 4, pp. 882-887.

macroeconomic responses, and its effects can be harder to quantify than other types of regulation, which generally require firms to take actions with more measurable effects.[153] Some warn that increasing rulemaking requirements could lead to "ossification" of the rulemaking process, meaning agencies find it difficult to regulate because the rulemaking process becomes difficult, costly, and time consuming.[154]

Others assert that financial regulators should be subject to stricter CBA requirements than is currently the case. They argue that the CBA—even in the case of financial regulation, when it might yield a wide range of estimates of costs and benefits or when technical experts might disagree over the accuracy—is necessary because it disciplines agencies in regard to what rules they implement and allows for an assessment of whether a regulation is desirable.[155] Some also argue that the challenges of performing CBA for financial regulations are not greater than for other industries, arguing that the necessary data are available and estimations of benefits and costs—while challenging—are possible.[156]

### *Provisions in the FCA*

The FCA would require the financial regulators listed in **Table 1** to perform CBA as part of the rulemaking process and lists 12 specified areas of analysis. The 12 areas relate to verifying the necessity, efficacy, benefits, and costs of the rule, and include a quantitative and qualitative assessment of all anticipated direct and indirect costs and benefits of the regulation. Other provisions would restrict the implementation of rules depending on the findings of the CBA and the agencies' adherence to the requirements of the bill. For example, agencies would be prohibited from issuing a final rule if the expected quantified costs were greater than expected quantified benefits, unless Congress granted a waiver by joint resolution. Also, the bill would entitle parties adversely affected by regulation to bring action to the U.S. Court of Appeals for the District of Columbia Circuit for judicial review. The court may vacate a rule if it finds the agency did not comply with certain requirements. Finally, the bill would require each financial regulator to conduct certain additional CBA after the rule is issued and implemented, a type of analysis often referred to as retrospective analysis.

## Congressional Review of Federal Financial Agency Rulemaking[157]

### *Background*

The Congressional Review Act is an oversight tool that Congress can use to invalidate a final rule issued by a federal agency.[158] The CRA provides Congress with a special set of expedited

[153] John Cochrane, "Challenges for Cost-Benefit Analysis of Financial Regulation," *Journal of Legal Studies*, vol. 43 (June 2014), pp. S63-S69.

[154] See, for example, Thomas O. McGarity, "Some Thoughts on 'Deossifying' the Rulemaking Process," *Duke Law Journal*, vol. 41, no. 6 (June 1992), and Stuart Shapiro, "Explaining Ossification: An Examination of the Time to Finish Rulemakings," August 11, 2009, at https://ssrn.com/abstract=1447337.

[155] Cass R. Sunstein, "Financial Regulation and Cost-Benefit Analysis," *The Yale Law Journal Forum*, January 22, 2015, pp. 263-266.

[156] Eric A. Posner and E. Glen Weyl, "Benefit-Cost Paradigms in Financial Regulation," *University of Chicago Coase-Sandor Institute for Law and Economics Working Paper*, no. 660 (March 2014), pp. 1-3, 9-12.

[157] This section was authored by Christopher Davis.

[158] The Congressional Review Act was enacted on March 29, 1996 as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA), Title II of P.L. 104-121, 110 stat. 868. The act is codified at 5 U.S.C. §§801-808. For more information on the act, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently*

parliamentary procedures, which Congress can use to consider legislation striking down agency rules it opposes. These "fast track" parliamentary procedures, which are available primarily in the Senate, limit debate and amendment on a joint resolution disapproving a rule and ensure that a simple majority can reach a final up-or-down vote on the measure.

Members of Congress have specified time periods in which to submit and act on a joint resolution of disapproval invalidating the rule. If both houses agree to such a joint resolution, it is sent to the President for his signature or veto. If a CRA joint resolution of disapproval is enacted, either by being signed by the President or by being enacted over his veto, the agency final rule in question "shall not take effect (or continue)."[159] The act also provides that if a joint resolution of disapproval is enacted, a new rule may not be issued in "substantially the same form" as the disapproved rule unless the rule is specifically authorized by a subsequent law. The CRA prohibits judicial review of any "determination, finding, action, or omission under" the act.[160]

Prior to 2017, the CRA mechanism had successfully overturned one agency final rule: a 2000 Occupational Safety and Health Administration (OSHA) rule related to workplace ergonomics standards. Thus far in the 115th Congress (2017-2018), Congress has passed, and President Trump has signed into law, 13 CRA disapproval resolutions aimed at rules issued by the Obama Administration.[161]

## *Policy Issues*

The CRA was enacted in 1996 in response to concerns expressed by Members of both parties about Congress's ability to control what many viewed as a rapidly growing body of administrative rules. Simply put, many Members felt that as Congress delegated more power to agencies to implement law, the traditional oversight tools Congress possessed were not adequate. Congressional concern about administrative rules is arguably as high as ever, but in recent years, there has been a growing bipartisan consensus that the CRA has not been particularly effective as an oversight tool. As one House 2015 committee report noted of the expedited disapproval mechanism, "Despite its conceptual promise, the CRA has produced few results."[162] It is too early to tell if the increased successful use of the CRA in the 115th Congress has influenced or will influence this viewpoint or perhaps give rise to new opinions of the act.

Prior to 2017, perhaps the most widely cited reason why the CRA had overturned only one agency rule in 20 years is the de facto two-thirds supermajority of both houses of Congress required to enact a CRA resolution of disapproval. This is because a President is likely to veto a joint resolution that attempts to strike down a final rule proposed by his or her own Administration or by a like-minded independent agency. As a result, observers have argued that the structure of the CRA disapproval process tilts the playing field away from Congress and toward the President in a way that renders the CRA largely unworkable as an oversight mechanism.[163] Such observers argue that the CRA can only be generally effective during periods

*Asked Questions*, by Maeve P. Carey and Christopher M. Davis.

[159] 5 U.S.C. §801(b)(1).

[160] 5 U.S.C. §805.

[161] One of these 13 resolutions of disapproval in the 115th Congress was a financial regulation—the SEC's resource extraction rule (P.L. 115-4). That rule was pursuant to Section 1504 of the Dodd-Frank Act, which the FCA would repeal.

[162] U.S. Congress, House Committee on the Judiciary, *Regulations from the Executive in Need of Scrutiny Act of 2015*, report to accompany H.R. 427, 114th Cong., 1st sess., H.Rept. 114-214, Part 1 (Washington: GPO, 2015), p. 8.

[163] Since 1789, 37 of 44 Presidents have exercised their veto authority a total of 2,574 times. Congress has overridden

when there is a change in party control of the White House to match that of the party controlling Congress. These are the exact circumstances in force at the beginning of the 115th Congress.

Such concerns have led in recent Congresses to the introduction of several proposals that would restructure the CRA disapproval mechanism from a resolution of *disapproval* to a resolution of *approval*. Under proposals of this type, instead of rules automatically going into force unless Congress could enact a measure stopping them, some or all rules would become effective only upon the enactment of a law approving them.

Chief among proposals of this type is the Regulations from the Executive in Need of Scrutiny Act (REINS Act; H.R. 26). The REINS Act would keep the CRA process the same for nonmajor agency rules but would require Congress to vote to approve all so-called "major" rules before they could become effective. H.R. 26 passed the House on January 5, 2017.

Supporters of these proposals argue that amending the CRA mechanism in this way would properly "flip" the balance of power in agency rulemaking to favor Congress—the lawmaking branch—by requiring affirmative congressional action for significant rules to become effective. Opponents of such an approach have expressed concern that it could make it difficult or impossible for agencies to issue needed rules and might significantly increase congressional workload. In the case of financial regulators, the approach would reduce their independence from—and increase their accountability to—Congress.

### *Provisions in the FCA*

The FCA would amend the CRA in a manner virtually identical to that proposed in H.R. 26, described above. Unlike H.R. 26, however, the FCA would apply this revised CRA approval mechanism only to rules promulgated by a "federal financial agency," a term it defines as the financial regulators listed in **Table 1**.

The FCA would require the agency to meet a number of reporting requirements to Congress when issuing a rule. The FCA would require a joint resolution of approval for major financial agency rules to be enacted under "fast track" consideration before such rules could take effect. (As noted above, currently, major rules automatically take effect unless a joint resolution disapproving them is enacted. The bill defines "major rule" using the same definition as is currently contained in the CRA.)[164] The FCA would provide that if a joint resolution of approval is not enacted by the end of 70 session days or legislative days (as applicable) after the financial agency proposing the rule submits its report on the rule to Congress, the major rule is not approved and will not take effect.

The FCA would, however, permit a major financial rule to take effect for one 90-calendar-day period without congressional approval if the President determined that the rule was necessary because of an imminent threat to health or safety or other emergency, for the enforcement of criminal laws, for national security, or to implement an international trade agreement. Unlike the

these vetoes on 110 occasions (4.3%). For more information, see CRS Report RS22188, *Regular Vetoes and Pocket Vetoes: In Brief*, by Meghan M. Stuessy.

[164] The CRA establishes a unique category of final rule which it defines as a "major rule." 5 U.S.C. §804(2) defines a major rule as, "any rule that the Administrator of the Office of Information and Regulatory Affairs [OIRA] of the Office of Management and Budget [OMB] finds has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act."

current CRA, the FCA would allow a court to review whether a financial agency has completed the necessary requirements for a final rule to take effect.[165]

## Judicial Review of Administrative Rulemakings[166]

### *Background*

The FCA contains a provision that would change how agency interpretations of the law would be reviewed. Before discussing the benefits or drawbacks of such an approach, it is important to discuss the current legal framework in which courts generally review agency interpretations of the law. An administrative agency may generally only exercise that authority that is provided to it by Congress.[167] Often, however, congressional delegations of authority may be imprecise and, as a result, agencies often must construe ambiguous terms and make interpretive decisions to implement Congress's delegation.[168] The Supreme Court, in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[169] envisioned a limited role for courts in reviewing agency interpretations of law. *Chevron* has been a cornerstone of administrative law since being handed down more than three decades ago, having been cited and followed thousands of times by federal courts.[170] The *Chevron* test requires courts to enforce the clearly expressed intent of Congress. In the absence of such clarity, generally *Chevron* instructs reviewing courts to defer to an agency's construction of an ambiguous statute if the agency's interpretation is reasonable.[171] When assessing the reasonableness of an agency's interpretation, reviewing courts generally "will consider whether the agency's position comports with the overall purpose and goal of the statute in question."[172] Thus, under *Chevron*, it is generally left to federal agencies, and not the courts, to resolve ambiguities necessary to interpret and implement authority provided to the agency by Congress.

Although *Chevron* did not directly involve a federal financial regulator, courts have applied *Chevron's* principles to statutory interpretations of the federal financial agencies.[173]

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[165] The FCA also would provide that any rule promulgated by a federal financial agency that relates to a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping, or any rule other than a major rule for which a financial agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, will take effect at such time as the agency determines. In addition, the FCA would exempt monetary policy rules from the FCA's provisions related to the CRA.

[166] This section was authored by David Carpenter.

[167] Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act ... unless and until Congress confers power upon it.").

[168] This report discusses agency interpretations of ambiguous statutes; for a report regarding court treatment of agency interpretations of ambiguous regulations, see CRS Report R43203, *Chevron Deference: Court Treatment of Agency Interpretations of Ambiguous Statutes*, by Daniel T. Shedd and Todd Garvey.

[169] 467 U.S. 837 (1984).

[170] Stephen G. Breyer et al., ADMINISTRATIVE LAW AND REGULATORY POLICY 247 (2006) ("In a remarkably short period, *Chevron* ... may have become the most frequently cited case of all time. As of December 2005, *Chevron* had been cited in federal courts nearly 8,000 times—far more than three far better known and much older cases, Brown v. Board of Education [1,829 cites], Roe v. Wade [1,801 cites], and Marbury v. Madison [1,559 cites]").

[171] *Chevron*, 467 U.S. at 842-43.

[172] CRS Report R43203, *Chevron Deference: Court Treatment of Agency Interpretations of Ambiguous Statutes*, by Daniel T. Shedd and Todd Garvey. See, e.g., Mueller v. Reich, 54 F.3d 438, 442 (7th Cir. 1995) (suggesting that when a statute is ambiguous "about all the court can do is determine whether the agency's action is rationally related to the objectives of the statute containing the delegation.").

[173] See, e.g., NationsBank of North Carolina v. Variable Annuity Life Ins. Co., 513 U.S. 251, 254 (1993) ("holding that

### *Policy Issues*

The *Chevron* Court explained that when Congress has delegated the authority to interpret the statute to the administrative agency, a judge must not substitute his or her own interpretation of the statute in question when the agency has provided a permissible construction of the statute.[174] In reaching its decision, the Supreme Court established a two-part test, commonly referred to as the "*Chevron* two-step," to be applied when a court is reviewing an agency's statutory interpretation. The Court announced

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[175]

In *Chevron*, the Supreme Court elucidated several reasons for favoring a restrained judicial role when reviewing an agency interpretation of an ambiguous statute. First, the Court noted that when Congress enacts an ambiguous statute, it has, in effect, delegated to the agency the authority to clarify the ambiguity.[176] In other words, Congress made a conscious choice in selecting a specific agency to implement the statutory delegation, and the courts, the Supreme Court reasoned, should respect Congress's decision by granting the agency leeway in interpreting the statute. Moreover, the Court noted that interpreting a statutory ambiguity is akin to making a policy decision on how to implement a statutory program. In the Court's view, agencies and legislators are best suited to balance applicable considerations and to resolve debates regarding competing, acceptable interpretations of an ambiguous delegation.[177]

Second, according to the Court, agencies have technical expertise in the field in which they are acting and are, therefore, in a better position to make appropriate policy decisions as part of a large and complex regulatory scheme. Courts, on the other hand, generally lack such expertise. In *Chevron*, the Court specifically acknowledged that "judges are not experts in the field" and thus "may not substitute [their] own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[178]

Finally, the *Chevron* Court noted that administrative agencies are politically accountable—though not directly—through the democratic process.[179] Although courts are called to reconcile political

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OCC's determination that sale of annuities is "incidental" to "the business of banking" is a reasonable interpretation of Glass-Steagall Act §16, as amended).; Sec. Indus. Assoc. v. Bd. of Governors of the Fed. Reserve Sys., 468 U.S. 207, 221 (1984) ("This interpretation of the Glass-Steagall Act is reasonable, consistent with the plain language of the statute and its legislative history, and deserves the deference normally accorded the Board's construction of the banking laws.").

[174] *Chevron*, 467 U.S. at 843-44.

[175] Ibid at 842-43.

[176] Ibid at 843-44 (noting that when Congress leaves "a gap" in a statute, "there is an express delegation of authority to the agency to elucidate" that provision).

[177] Ibid at 864 ("Such policy arguments are more properly addressed to legislators or administrators, not to judges.").

[178] Ibid at 844, 865.

[179] Ibid at 865-66.

preferences in certain circumstances, they should not do so when the power to implement the statute has been delegated to an administrative agency. In the Court's view, an Administration has the authority to implement its policy judgments through the permissible interpretation of a statute.[180] If the agency's, and by extension the Administration's, permissible construction of a statute is undesirable, the electorate may have its voice heard through the democratic process. On the other hand, when a federal court interprets a statute, the electorate cannot voice similar concerns to the unelected court. These general justifications for *Chevron* deference are arguably applicable with regard to agency enforcement of federal financial laws, which typically are broadly worded, and allow expert agencies to craft more specific rules in a highly technical environment.

Some have argued, however, that judicial deference under *Chevron* has allowed administrative agencies to exercise too much "power to expand the scope of their own authority ... to decide what and who they can regulate, and how to regulate," risking abrupt deviations from long-standing statutory interpretations.[181] Thus, the argument has been made that a recalibration of judicial review of administrative interpretations of law is necessary to ensure that federal statutes are interpreted as intended by Congress and to effectively hold the federal financial agencies accountable in how they implement federal law.[182] By contrast, such a recalibration of the judicial review over agency interpretations of statutes arguably could result in courts more closely scrutinizing agency decisions.[183] A departure from *Chevron* also might increase the number of legal challenges to agency rulemakings, which could delay the time it takes for new regulations to take legal effect, as well as increase the costs of promulgating regulations.[184]

### *Provisions in the FCA*

The FCA would upend *Chevron's* policy of judicial deference to interpretations of the law that are issued by the CLEA, Fed, CFTC, FDIC, FHFA, OCC, NCUA, and SEC. In lieu of deferring to the covered agencies' reasonable interpretations of silent or ambiguous statutes in accordance with *Chevron*, the FCA would require courts to apply a *de novo* review of administrative actions—that is, review wherein a court reviews an administrative agency's interpretation of a law without any deference.[185] *De novo* review would require courts to independently interpret a covered agency's statutory authority, rather than deferring to that agency's reasonable interpretation of the law. (It should be noted that, while the focus of this section is on regulations, the FCA would require *de novo* review on not just administrative rulemakings but also the

[180] Ibid. ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.")

[181] See, e.g., *The Financial Choice Act Detailed Summary*, House Committee of Financial Services, p. 78, at http://financialservices.house.gov/uploadedfiles/financial_choice_act_comprehensive_outline.pdf.

[182] Ibid. See, e.g., Philip Wallach, "Policy Erosion and Policy Maintenance: The Case of Glass-Steagall," November 24, 2008 (assessing how judicial deference to federal financial agencies' interpretations of the Glass-Steagall Act may have contributed to the financial crisis of the mid- to late-2000s).

[183] See, generally, U.S. Congress, House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial And Antitrust Law, *H.R. 4768, the "Separation of Powers Restoration Act of 2016"*, 114th Cong., 2nd sess., May 17, 2016 (written testimony of John D. Walke at https://judiciary.house.gov/wp-content/uploads/2016/05/Walke-Testimony.pdf).

[184] Ibid.

[185] *Black's Law Dictionary*, 94 (7th ed. 1999).

broader set of "final agency actions,"[186] which are subject to varying degrees of judicial deference.)[187] The FCA would bar reviewing courts from "rely[ing] on [a] gap or ambiguity [in the law] as a justification either for interpreting agency authority expansively or for deferring to the agency's interpretation on the question of law." Although the bill would not explicitly prohibit courts from taking into account the relevant agency's reasoning and technical expertise of the subject matter, courts would appear to have much greater latitude to set aside, overrule, and modify agency interpretations if the FCA were enacted into law.[188] This provision would go into effect two years after the FCA is enacted.

## Enforcement Powers

### *Background*[189]

Another major administrative tool held by the federal financial agencies is their power to enforce laws within their jurisdictions. The strength and effectiveness of an administrative agency's enforcement power can be affected by, among other things

- the scope of the agency's statutory authority (e.g., the types of entities that fall within its enforcement jurisdiction);
- the type of enforcement powers (e.g., civil penalties, criminal penalties, restitution, and disgorgement, in the agency's arsenal; maximum and minimum penalties available for certain violations); and
- the enforcement-related resources (e.g., financial, personnel) at its disposal.

### *Policy Issues*[190]

The way in which federal financial regulators exercise their enforcement powers requires a balance between protecting consumers and investors from unlawful conduct, on the one hand, and ensuring that law-abiding financial institutions are not pushed out of certain markets and the costs of their products and services for consumers and investors are not unduly increased, on the other.[191]

[186] 5 U.S.C. §704.

[187] For a discussion of the varying judicial standards of review that typically apply to different types of final agency actions, see the "Threshold Limitations on What Interpretations Qualify for *Chevron* Deference" section of CRS Report R43203, *Chevron Deference: Court Treatment of Agency Interpretations of Ambiguous Statutes*, by Daniel T. Shedd and Todd Garvey and the "Standards of Review" section of CRS Report R44356, *The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action*, by Jared P. Cole.

[188] Similar legislation (H.R. 4768) passed the House on July 12, 2016. The scope of that bill was not limited to the financial regulators, however.

[189] This section was authored by David Carpenter.

[190] This section was authored by Marc Labonte.

[191] For a general discussion of these issues, see the "Arguments for Consolidating Federal Consumer Financial Regulatory Powers" section of CRS Report R42572, *The Consumer Financial Protection Bureau (CFPB): A Legal Analysis*, by David H. Carpenter.

### *Provisions in the FCA*[192]

The FCA would make a number of changes that would directly or indirectly affect the enforcement authorities of the federal financial regulators.[193] For example, the FCA would increase the maximum civil penalties that could be assessed for violations of various laws, including Section 8A of the Securities Act of 1933[194] and Section 951(b) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.[195]

The bill also would constrain the enforcement powers of certain federal financial regulators. For example, the bill would repeal the SEC's current statutory authority to, under certain circumstances, permanently or temporarily prohibit individuals from serving as an officer or director of a securities issuer.[196] The FCA would also restrict the ability of the federal financial regulators, as well as the Department of Justice, Department of Housing and Urban Development, and Rural Housing Service of the Department of Agriculture, from entering into legal settlements that allow or require a party to "direct or provide for a payment to any person who is not a victim of the alleged wrongdoing."[197] Additionally, the FCA's proposals to modify the way in which various federal financial regulators are funded (see the "Appropriations" section, above) could indirectly impact the enforcement resources at the disposal of those regulators.

[192] This section was authored by David Carpenter.

[193] This section does not discuss every enforcement-related provision of the FCA.

[194] 15 U.S.C. §77h-1(g).

[195] 12 U.S.C. §1833a(b).

[196] The SEC's current authority is found at 15 U.S.C. §77h-1(f).

[197] FCA §393(a).

# Appendix A. The Financial CHOICE Act and the Dodd-Frank Act

This table provides a brief overview of selected changes that the Financial CHOICE Act makes to the Dodd-Frank Act on a title-by-title basis for the 16 titles in the Dodd-Frank Act.

**Table A-1. Selected Changes to the Dodd-Frank Act in the Financial CHOICE Act**

| Title Number | Subject of Title | Selected Changes |
|---|---|---|
| I | Financial Stability | Repeals Office of Financial Research, SIFI designations; modifies FSOC authority, funding, procedures, and structure; exemption from enhanced regulation if 10% leverage ratio |
| II | Orderly Liquidation Authority | Repeals entire title |
| III | Office of Thrift Supervision | No changes |
| IV | Advisers to Hedge Funds | Exempts private equity advisers from registration requirements, expands accredited investor definition |
| V | Insurance | Creates new office combining FSOC insurance expert and Federal Insurance Office |
| VI | Regulation of Depository Institutions | Repeals Volcker Rule, nonbank concentration limits |
| VII | Derivatives | Requires SEC-CFTC harmonization of rules; modifies requirements on swaps between affiliates |
| VIII | Payment, Clearing, and Settlement Supervision | Repeals entire title |
| IX | Investor Protections | Repeals SEC reserve fund, certain provisions affecting credit agencies, various executive compensation requirements; exempts securities from risk retention rules that are not residential mortgages |
| X | Bureau of Consumer Financial Protection | Modifies CFPB authority, structure, and funding |
| XI | Federal Reserve | Repeals FDIC authority to provide emergency guarantees; narrows Fed's emergency lending authority |
| XII | Access to Mainstream Financial Institutions | No changes |
| XIII | TARP funding | No changes |
| XIV | Mortgage Reform | Modifies mortgage rules, including manufactured housing, points and fees, and portfolio lending |
| XV | Miscellaneous Provisions | Repeals provisions on conflict minerals, mine safety, and resource extraction disclosure |
| XVI | Section 1256 Contracts | No changes |

**Source:** Congressional Research Service.

# Appendix B. Provisions of the Financial CHOICE Act Included in FY2018 Appropriations Bills

Selected provisions of the Financial CHOICE Act were included in the FY2018 Financial Services and General Government Appropriations Act (H.R. 3280). On September 5, 2017, the House Rules Committee combined H.R. 3280 with selected other appropriation bills in H.R. 3354. The Financial CHOICE Act provisions are found in Division D of H.R. 3354 as passed by the House on September 14, 2017.[198] **Table B-1** provides an overview of the provisions of the Financial CHOICE Act that were included in H.R. 3354.

**Table B-1. Provisions of the Financial CHOICE Act in the Appropriations Omnibus**

| Topic | H.R. 3354 | H.R. 10 |
|---|---|---|
| Repeals rules whose authority is eliminated by bill | Section 902 | Section 2 |
| Repeals various Financial Stability Act provisions | Section 903 | Section 151 |
| Brings FDIC under appropriations | Sections 904 | Section 361 |
| Brings FHFA under appropriations | Section 905 | Section 362 |
| Brings OCC under appropriations | Section 907 | Section 364 |
| Brings nonmonetary functions of Fed under appropriations | Section 908 | Section 365 |
| Issuer disclosures | Section 909 | Section 426 |
| Section 31 fees | Section 910 | Section 416 |
| Investment fund research | Section 911 | Section 421 |
| Government-business forum on capital formation | Section 912 | Section 446 |
| Angel investors | Section 913 | Sections 451-452 |
| Venture capital funds | Section 914 | Section 471 |
| Manufactured housing | Section 915 | Sections 501-502 |
| Deposit account termination | Section 916 | Section 511 |
| FIRREA amendments | Section 917 | Section 512 |
| Loans held in portfolio | Section 918 | Section 516 |
| Small bank holding company policy | Section 919 | Section 526 |
| Community financial institution mortgage relief | Section 920 | Section 531 |
| Regulations appropriate to business models | Section 921 | Section 546 |
| Jobs for loan originators | Section 922 | Section 556 |
| Small business loan data | Section 923 | Section 561 |
| Depository institution records and disclosure requirements | Section 924 | Section 576 |
| Interest rate after loan transfer | Section 925 | Section 581 |
| CFBP authority and budget changes | Sections 926-930 | Sections 712, 727, 733, 735, 737 |

[198] Available at http://docs.house.gov/billsthisweek/20170904/BILLS%20-115HR3354HR3268HR3267HR3280HR3355HR3358HR3362HR3353-RCP115-31.pdf.

| Topic | H.R. 3354 | H.R. 10 |
|---|---|---|
| Nonresidential risk retention requirements | Section 931 | Section 842 |
| Prohibition in single ballot requirement | Section 932 | Section 845 |
| Volcker Rule repeal | Section 933 | Section 901 |
| Financial institution bankruptcy | Title X | Section 121-123 |

**Source:** CRS.

**Note:** The section numbers for H.R. 3354 refer to Division D of that bill as passed by the House.

Two notable policy changes were included in both bills in different versions. First, H.R. 10 repealed the Conflict Minerals provision (Section 1502) of the Dodd-Frank Act, whereas H.R. 3354 prohibited the use of appropriated funds toward enforcing the rule implementing it. Second, H.R. 3354 contains Section 841(a) of H.R. 10, repealing the Department of Labor's 2016 Fiduciary Rule, but does not contain the rest of Section 841.

# Appendix C. Authors of this Report and Areas of Research

**Table C-1. CRS Contact Information**

| Author | Title | Area of Research |
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