

### ***III. Dodd-Frank Proposed Legislative Amendments***

#### **A. The Future of Dodd-Frank and the Problem of Regulatory Reform**

One of the great ironies of contemporary politics is that efforts to provide for simplified regulation frequently lead to increasingly complex regulatory schemes.<sup>1</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank” or “Act”)<sup>2</sup> has significantly contributed to such complexity.<sup>3</sup> Indeed, partly because of its intricacy, Dodd-Frank has proven to be one of the more controversial laws to come out of Congress during the Obama presidency.<sup>4</sup> From the moment of its conception to its infancy as codified law, Dodd-Frank has caused division among politicians, academics, industry experts, and the public.<sup>5</sup>

Nevertheless, the implementation of Dodd-Frank, or something along its lines, was perhaps inevitable in the wake of the

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<sup>1</sup> See, e.g., *Of Sunstein and Sunsets*, ECONOMIST, Feb. 18, 2012, at 28 (commenting on this phenomenon in the Obama administration).

<sup>2</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>3</sup> See *Too Big Not to Fail*, ECONOMIST, Feb. 18, 2012, at 22 (“Laws classically provide people with rules. Dodd-Frank is not directed at people. It is an outline directed at bureaucrats and it instructs them to make still more regulations and to create more bureaucracies.” (quoting Jonathan Macey)).

<sup>4</sup> See Shah Gilani, *Dodd-Frank Isn’t Legislation; It’s a Comedy*, MONEY MORNING (Feb. 24, 2012), <http://moneymorning.com/2012/02/24/dodd-frank-isnt-legislation-its-a-comedy> (“I called the parents of the Volcker Rule, the Dodd-Frank Act, a ‘joke.’ . . . [Y]ou’d think I was talking about something *really* controversial, like contraception, for heaven’s sake.”); see also Sarah N. Lynch & Dave Clarke, *SEC Weighs Volcker Exemption for Insurance Companies*, REUTERS, Mar. 6, 2012, available at <http://www.reuters.com/article/2012/03/06/us-sec-volcker-exemption-idUSTRE8251Q720120306> (“The Volcker rule, which has become one of the most controversial parts of the 2010 Dodd-Frank financial oversight law, seeks to add distance between the world of speculative trading and commercial banking.”).

<sup>5</sup> See, e.g., Edward Wyatt, *Dodd-Frank Act a Favorite Target for Republicans Laying Blame*, N.Y. TIMES, Sept. 21, 2011, at B1 (discussing the division among presidential candidates, Republicans, Democrats, community bankers, and even economists over the Dodd-Frank).

2008 financial crisis.<sup>6</sup> The public, the financial industry and the state of the market called out for attention.<sup>7</sup> Thus, Dodd-Frank represented, for some, a necessary effort to curb the wiles of Wall Street and to restore regulatory sanity to what had become an increasingly free—if not entirely uninhibited—sector of the market.<sup>8</sup> To opponents of the Act, however, it has become yet another example of intrusive government and prolix legislation.<sup>9</sup> Of course, for the near future, at least, Dodd-Frank is here to stay and will continue to play an instrumental role in shaping the contemporary financial regulatory regime.<sup>10</sup>

The purpose of this article is to summarize current efforts to either curb the effects of Dodd-Frank, or to modify its regulatory reach. As will be demonstrated, a great deal of such legislation has flooded Congress since the opening of the 112th Session, which witnessed the installation of Speaker John Boehner and the present Republican majority.<sup>11</sup> Such efforts—ranging from all-out repeal, to more modest attempts at crafting existing provisions, especially in Title VII—reflect the general attitude that Dodd-Frank was drafted hastily and without careful consideration of the impact of entirely

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<sup>6</sup> See Lynn A. Stout, *Derivatives and the Legal Origin of the 2008 Credit Crisis*, 1 HARV. BUS. L. R. 301, 332 (2011) (“In the immediate wake of the 2008 credit crisis, there was widespread agreement among the Democratic lawmakers who controlled both the U.S. Senate and the House of Representatives on the need for some legal response.”).

<sup>7</sup> See Andrew W. Lo, *Regulatory reform in the wake of the financial crisis of 2007-2008*, 1 J. FIN. ECON. POL’Y 1, 5 (2009) (“[T]he focus on regulatory reform in its aftermath has been intense, with many diverse proposals for new laws and agencies from all the major stakeholders.”).

<sup>8</sup> See generally *Financial Regulatory Reform*, N.Y. TIMES, [http://topics.nytimes.com/topics/reference/timestopics/subjects/c/credit\\_crisis/financial\\_regulatory\\_reform/index.html](http://topics.nytimes.com/topics/reference/timestopics/subjects/c/credit_crisis/financial_regulatory_reform/index.html) (last updated Sept. 20, 2011).

<sup>9</sup> See, e.g., Gabriel Sherman, *The End of Wall Street As They Knew It*, N.Y. MAG. (Feb. 5, 2012), <http://nymag.com/news/features/wall-street-2012-2/> (“The too-big-to-fail banks, for their part, argued that the 2,300-page bill would create an overly complex morass of overlapping regulators that risked killing their ability to compete against foreign rivals.”).

<sup>10</sup> See generally PETER J. WALLISON, WILL (SHOULD) DODD-FRANK SURVIVE? (Networks Fin. Inst. at Ind. State Univ., Policy Brief No. 2011-PB-02, 2011), available at [http://www.networksfinancialinstitute.org/Lists/Publication%20Library/Attachments/178/2011-PB-02\\_Wallison.pdf](http://www.networksfinancialinstitute.org/Lists/Publication%20Library/Attachments/178/2011-PB-02_Wallison.pdf) (discussing the likelihood of repeal or modification of the Dodd-Frank Act in the near future).

<sup>11</sup> See *infra* notes 16-65 and accompanying text.

new regulatory regime.<sup>12</sup> Many fear that the Act has stifled Wall Street and retarded economic recovery; others suggest that it merely grows an already bloated federal bureaucracy and has moved regulatory power from accountable institutions to new organs that operate outside of Congressional purview.<sup>13</sup> The wide latitude given to the Consumer Financial Protection Bureau (“CFPB”) in drafting rules and “filling in” regulatory gaps left in the text of Dodd-Frank opens the door to complex regulations that could become as problematic as the complex securities that contributed to the last financial crisis.<sup>14</sup>

On the other hand, with the Act still in its infancy and not yet fully implemented, the fruit of Dodd-Frank have yet to ripen.<sup>15</sup> While it may be too soon to offer arguments for industry reliance on its provisions, the passage of significant amendments, let alone wholesale repeal, has the potential to only cause further confusion and complexity.

## **B. Overview of Proposed Legislative Amendments**

While an in-depth analysis of all the legislative amendments to Dodd-Frank would far exceed the scope of this article, the following discussion covers the most significant changes that could be made to the Act before or during the next Congressional Session.

### **1. Efforts to Repeal Dodd-Frank**

One of the first bills that was introduced into the House of Representatives following the GOP’s election victory in the 2010

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<sup>12</sup> See, e.g., Suzy Khimm, *Has Dodd-Frank Already Guttled Wall Street?*, EZRA KLEIN’S WONKBLOG (Feb. 6, 2012, 11:14 AM), [http://www.washingtonpost.com/blogs/ezra-klein/post/has-dodd-frank-already-guttled-wall-street/2012/02/06/gIQA1ft6tQ\\_blog.html](http://www.washingtonpost.com/blogs/ezra-klein/post/has-dodd-frank-already-guttled-wall-street/2012/02/06/gIQA1ft6tQ_blog.html) (quoting J.P. Morgan Chase’s CEO, Jamie Dimon as suggesting that Dodd-Frank took “a pickax to the Wall Street business model” without consideration of the consequences).

<sup>13</sup> See *Too Big Not to Fail*, *supra* note 3.

<sup>14</sup> See Joe Nocera, Op-Ed, *Keep It Simple*, N.Y. TIMES, Jan. 17, 2012, at A23 (discussing “complexity risk” and the opportunity that Dodd-Frank allows for financial institutions “game” the system, *etc.*).

<sup>15</sup> See Bloomberg Law, *Goldschmidt Says It’s Too Soon to Assess Dodd-Frank’s Impact: BLAW*, YOUTUBE (May 24, 2011), <http://www.youtube.com/watch?v=VWPYwNu9LdI>.

midterm, was H.R. 87, proposed on the first day of the 112th Congress in January of 2011, by Rep. Michelle Bachmann (R-MI).<sup>16</sup> This brief bill has only one purpose: the all-out repeal of Dodd-Frank and a return to the financial industry regulatory scheme as it existed before its passage.<sup>17</sup> Bachmann's proposal does not suggest an alternative set of financial regulations to replace Dodd-Frank following its repeal.<sup>18</sup>

Despite the significant attention that this bill garnered at the time of its introduction and during the course of its sponsor's presidential campaign, the whole-scale repeal of Dodd-Frank was unlikely to go anywhere even before H.R. 87 was introduced.<sup>19</sup> Rep. Spencer Bachus (R-AL), then the incoming Chairman of the House Financial Services Committee, indicated around the time of the bill's proposal that he intended to carefully examine Dodd-Frank "provision by provision" in an effort to streamline the regulations and assist regulatory agencies in meeting their deadlines for rule proposals.<sup>20</sup> At present, the bill has yet to move out of any of the committees to which it was assigned at the time of its introduction.<sup>21</sup> Similar bills proposed in the Senate by Sens. Jim DeMint (R-SC) and Richard Shelby (R-AL) have also languished in committee, failing to acquire any widespread bipartisan support.<sup>22</sup> While these bills have

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<sup>16</sup> H.R. 87, 112th Cong. (2011).

<sup>17</sup> *Id.* ("The Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203) is repealed . . .").

<sup>18</sup> *Id.* (declaring that the financial regulatory regime shall be "restored as if [Dodd-Frank] had not been enacted").

<sup>19</sup> See *infra* note 20 and accompanying text.

<sup>20</sup> See William J. Donovan, *What's Next for the Dodd-Frank Bill?*, LEXOLOGY (Jan. 24, 2012), <http://www.lexology.com/library/detail.aspx?g=39806c80-b4ef-4b75-b4ea-6a84aab86cef> ("However, even prior to the introduction of Rep. Bachmann's repeal bill, incoming House Financial Services Committee Chairman Spencer Bachus (R-AL) had indicated that he intends on reviewing the Dodd-Frank Act 'provision by provision' . . .").

<sup>21</sup> *Bill Summary & Status—112th Congress (2011-2012)—H.R. 87*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.00087>: (last visited Mar. 28, 2012).

<sup>22</sup> See Financial Takeover Repeal Act of 2011, S. 712, 112th Cong. (2011); Dodd-Frank Repeal Act of 2011, S. 746, 112th Cong. (2011). Sen. Shelby's proposal, S. 746, would only repeal Titles I-XV, leaving intact the new regulations on Section 1256 Contracts. Neither has left committee. See also *Bill Summary & Status—112th Congress (2011-2012)—S. 712*, LIBRARY OF

little chance of becoming law, they represent the current distaste for Dodd-Frank among conservatives and libertarians.<sup>23</sup>

## 2. Delayed Implementation of Dodd-Frank

While the preceding amendments would *repeal* Dodd-Frank, at least one other bill has been proposed which seeks only to delay its implementation.<sup>24</sup> H.R. 1573, introduced by Rep. Frank Lucas (R-OK), would have delayed the implementation of Title VII, concerning swap transactions, by eighteen months to December 31, 2012.<sup>25</sup> With a putative goal of giving regulatory agencies more time to assess what is actually required by the Act and to prioritize deliberation over speed, the bill would not alter the current rulemaking deadlines for the Commodity Futures Trading Commission (“CFTC”) or the Securities and Exchange Commission (“SEC”) for the drafting of definitions, reporting and recordkeeping regulations.<sup>26</sup> Having been approved by both the House Financial Services Committee and the House Agricultural Committee with only minor modification—namely, the reduction of the delay to September 30, 2012—the bill is now waiting to be taken up by the whole House.<sup>27</sup> Given its current composition, this amendment

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CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN00712>: (last visited Mar. 28, 2012); *Bill Summary & Status—112th Congress (2011-2012)—S. 746*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN00746>: (last visited Mar. 28, 2012).

<sup>23</sup> See generally, *Obama Foes Move to Undo Wall Street Reform*, AGENCE FRANCE PRESSE, Apr. 1, 2011, available at [http://www.google.com/hostednews/afp/article/ALeqM5gHmBGtFBgzZlB5nmS\\_Zt7l9vtzxw?docId=CNG.3bf4105ffa63410f8b0d2165e00d15f5.111](http://www.google.com/hostednews/afp/article/ALeqM5gHmBGtFBgzZlB5nmS_Zt7l9vtzxw?docId=CNG.3bf4105ffa63410f8b0d2165e00d15f5.111) (“Barack Obama’s Congressional foes on Friday moved to undo vast Wall Street reforms passed last year, a full-frontal attack on one of the US president’s key legislative trophies.”).

<sup>24</sup> See *infra* note 25 and accompanying text.

<sup>25</sup> H.R. 1573, 112th Cong. (2011).

<sup>26</sup> *Bill Would Delay Dodd-Frank Implementation*, WESTERN FARM PRESS, Jun. 1, 2011, <http://westernfarmpress.com/government/bill-would-delay-dodd-frank-implementation>. (“H.R. 1573 . . . would maintain the current July 21, 2011 deadlines . . .”).

<sup>27</sup> *Id.* (“The legislation, as amended, passed the Committee 30-24 along party lines. It now will be taken up by the entire House.”).

would likely pass, though it would face more significant opposition in the Senate.<sup>28</sup>

Rep. Barney Frank (D-MA) has voiced opposition to these efforts, however, claiming that Republicans hope to delay the implementation of Title VII, in short, to delay the entire Act; he has also argued that H.R. 153 would stop the CFTC from acting on position limits.<sup>29</sup> CFTC Chairman Bart Chilton has expressed similar doubts, claiming that, while regulatory reforms should not be pursued in a “hasty manner,” further delays were unnecessary.<sup>30</sup>

Another proposed Senate bill, the Dodd-Frank Improvement Act of 2011,<sup>31</sup> proposed by Sen. Mike Crapo (R-ID), would also make a number of amendments to Title VII, in order to effect its “orderly implementation.”<sup>32</sup> In particular, the proposed amendment would, *inter alia*, extend the deadline for derivatives rulemaking to July 16, 2012, and establish an Office of Derivatives within the SEC to monitor the swaps market and finalize swaps rules.<sup>33</sup> The Senate Committee on Banking, Housing, and Urban Affairs is still considering this bill.<sup>34</sup>

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<sup>28</sup> *Id.* (“Because Republicans hold an overwhelming majority in the House, the legislation should pass, but the outlook for approval by the Democrat-controlled Senate is highly questionable.”).

<sup>29</sup> *Id.* (“Rep. Frank focused his arguments in opposition to the bill on the fact that it would stop the CFTC from acting on position limits.”).

<sup>30</sup> Bart Chilton, Chairman, U.S. Commodities Futures Trading Comm’n, Statement Regarding H.R. 1573 (Apr. 15, 2011), *available at* <http://cftc.gov/PressRoom/SpeechesTestimony/chiltonstatement041511> (“While I appreciate and agree with those that want to ensure regulatory reforms are drafted in an appropriate fashion and not done in a hasty manner . . . legislation to delay the Dodd-Frank Wall Street Reform and Consumer Protection Act is not needed in my opinion.”).

<sup>31</sup> S. 1650, 112th Cong. (2011).

<sup>32</sup> *Id.*; Hind Sabir, *Sen. Crapo Introduces Bill to Provide for Orderly Implementation of Provisions of Title VII of Dodd-Frank Wall Street Reform, Consumer Protection Act*, TARGETED NEWS SERVICE, Oct. 6, 2011, *available at* [http://targetednews.com/disp\\_story.php?s\\_id=1063918](http://targetednews.com/disp_story.php?s_id=1063918).

<sup>33</sup> Jason M. Rosenstock & Abby Matousek, *Financial Services Legislative and Regulatory Update — October 17, 2011*, LEXOLOGY (Oct. 17, 2011), <http://www.lexology.com/library/detail.aspx?g=2f40afd4-39d4-49ad-a8aa-04d3c122412f>.

<sup>34</sup> *Bill Summary & Status—112th Congress (2011-2012)—S. 1650*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.01650>: (last visited Mar. 28, 2012).

### 3. Small Business Capital Access and Job Preservation Act<sup>35</sup>

The Small Business Capital Access and Job Preservation Act, proposed by Rep. Robert Hurt (R-VA), is not, *per se*, an amendment to Dodd-Frank, but rather a proposed change to the Investment Advisers Act of 1940.<sup>36</sup> To be precise, the bill hopes to provide an exemption to private equity fund advisors from registration and reporting requirements under 15 U.S.C. 80b-3.<sup>37</sup> Under Dodd-Frank, such advisors, as they are currently classified, would be required to register with the SEC along with most other private investment fund advisers.<sup>38</sup> The full House has yet to approve this bill as it remains at the Financial Services Committee.<sup>39</sup>

### 4. Asset-Backed Market Stabilization Act<sup>40</sup>

Prior to the passage of Dodd-Frank, the SEC had established a rule that exempted credit rating agencies qualifying as nationally recognized statistical rating organizations (“NRSRO”) from liability for false credit ratings contained in their registration statements or prospectus.<sup>41</sup> This changed after the 2008 financial crisis, when many

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<sup>35</sup> H.R. 1082, 112th Cong. (2011).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See Press Release, Securities & Exchange Comm’n, SEC Adopts Dodd-Frank Act Amendments to Investment Advisers Act (June 22, 2011), available at <http://www.sec.gov/news/press/2011/2011-133.htm> (“The [SEC] today adopted rules that require advisers to hedge funds and other private funds to register with the SEC, establish new exemptions from SEC registration and reporting requirements for certain advisers, and reallocate regulatory responsibility for advisers between the SEC and states.”).

<sup>39</sup> *Bill Summary & Status—112th Congress (2011-2012)—H.R. 1082*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.01082>: (last visited Mar. 28, 2012).

<sup>40</sup> H.R. 1539, 112th Cong. (2011).

<sup>41</sup> Pete Kasperowicz, *House Moves Toward Reinstating SEC Rule on Rating-Agency Liability*, THE HILL (Aug. 15, 2011, 1:29 PM), <http://thehill.com/blogs/floor-action/house/176909-house-moves-toward-reinstating-sec-rule-on-rating-agency-liability> (“[H.R. 1539] would re-establish an SEC rule that was repealed by last year’s Dodd-Frank financial reform law. Under the SEC rule, credit ratings from a nationally recognized statistical rating organization (NRSRO) were not considered as an expert-

politicians and experts were eager to reference irresponsible ratings as having contributed to the crisis.<sup>42</sup> Once the Republicans regained control of the House, they noted that ever since Dodd-Frank had opened the door to liability, NRSROs have removed credit ratings *entirely* from their registration statements and prospectus, much to the consternation of the asset-backed securities market.<sup>43</sup> While the SEC has taken efforts to avoid acting on the requirements of Dodd-Frank concerning such liability,<sup>44</sup> H.R. 1539, sponsored by Rep. Steve Stivers (R-OH), would permanently restore the expert liability exemption for credit rating agencies.<sup>45</sup> At present, the bill is still in committee and has yet to be taken up by the House as a whole.<sup>46</sup>

### 5. Burdensome Data Collection Relief Act<sup>47</sup>

This proposal, introduced by Rep. Nan Hayworth (R-NY), would repeal § 953(b) of Dodd-Frank, which requires that publicly traded companies calculate and disclose the ratio of the median of the

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certified part of a registration statement or prospectus, and thus the rating agencies were exempt from any liability arising from those statements.”).

<sup>42</sup> *Id.* (“In the wake of the financial crisis and criticisms of how the rating agencies overrated many financial products, the Dodd-Frank bill included language that struck this SEC rule, which made rating agencies liable for incorrect statements.”).

<sup>43</sup> Pete Kasperowicz, *GOP Takes Another Shot at Dodd-Frank, Seeks to Ease Rules on Municipal Advisers*, THE HILL (Aug. 29, 2011, 9:06 AM), <http://thehill.com/blogs/floor-action/house/178527-gop-takes-another-shot-at-dodd-frank-seeks-to-ease-rules-on-municipal-advisors> (“Republicans argue that since this language was passed, rating agencies stopped including statements in these documents, which has significantly stunted the asset-backed securities market.”).

<sup>44</sup> See “Rules Implementing Amendments to the Investment Advisers Act of 1940,” Investment Advisers Act Release No. 3110 (Nov. 19, 2010), available at <http://www.sec.gov/rules/proposed/2010/ia-3110.pdf>.

<sup>45</sup> See *Dodd-Frank at One Year: An Updated Overview*, SNR DENTON (July 27, 2011), [http://www.snr Denton.com/news\\_insights/alerts/2011-07-27\\_dodd\\_frank.aspx](http://www.snr Denton.com/news_insights/alerts/2011-07-27_dodd_frank.aspx) (“H.R. 1539 would restore credit rating agencies’ exemption from expert liability under the ’33 Act.”); H.R. 1539, 112th Cong. (2011).

<sup>46</sup> *Bill Summary & Status—112th Congress (2011-2012)—H.R. 1539*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.01539>: (last visited Mar. 28, 2012).

<sup>47</sup> H.R. 1062, 112th Cong. (2011).



annual total compensation of all their employees to their CEOs.<sup>48</sup> While H.R. 1062 has been voted successfully out of committee, the full House has yet to take up the measure.<sup>49</sup> Republicans, as well as many industry observers, have suggested that the disclosure requirement introduced by Dodd-Frank was motivated by politics, rather than economics, and was intended to provide fodder for the media and labor unions.<sup>50</sup> Senate Democrats anticipating the passage of H.R. 1062 have already expressed their opposition, claiming that § 953(b) furthers the goal of equitable wages and benefits by “increasing transparency, encouraging firms to take a harder look at the rising pay discrepancies between CEOs and their workers, and providing investors and policymakers with a better understanding of pay.”<sup>51</sup>

## 6. Proposed Changes to the CFPB

While Dodd-Frank was a controversial piece of legislation, the creation of the CFPB was especially divisive.<sup>52</sup> Indeed, the CFPB has not only inspired much proposed legislative change but has also been a source of great—if not entertaining—drama, as was seen in the controversy surrounding Elizabeth Warren<sup>53</sup> and the contentious

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<sup>48</sup> *Id.*

<sup>49</sup> See Jason M. Rosenstock & Cheryl Issac Aaron, *Financial Services Regulatory Reform Update — June 24, 2011*, LEXOLOGY (June 24, 2011), <http://www.lexology.com/library/detail.aspx?g=ffe2ca3b-951e-4911-92ca-ccfe7bf32337>.

<sup>50</sup> See Michael S. Melbinger, *Good News on the CEO Pay Ratio Requirement—Maybe*, LEXOLOGY (June 24, 2011), <http://www.lexology.com/library/detail.aspx?g=9399e2ba-ef0f-4b8d-ba04-376afc67d297> (“Everyone recognized that this is a political disclosure, not an economic one, intended to give unions and certain media folks a tool to bash corporate America, and that the costs to comply would be enormous.”).

<sup>51</sup> Ted Allen, *Democrats Oppose Repeal of Pay Equity Disclosure Mandate*, ISS GOVERNANCE (July 7, 2011, 5:48 PM), <http://blog.issgovernance.com/gov/2011/07/democrats-oppose-repeal-of-pay-equity-disclosure-mandate.html>.

<sup>52</sup> See Kent Barnett, *The Consumer Financial Protection Bureau’s Appointment with Trouble*, 60 AMER. U. L. REV. 1459, 1460 & n.4 (2011) (discussing the controversy over the creation of the CFPB).

<sup>53</sup> See, e.g., *Elizabeth Warren and Consumer Financial Protection Bureau: What’s Next?*, INT’L BUS. TIMES (July 18, 2011, 11:18 AM), <http://www.ibtimes.com/articles/182266/20110718/elizabeth-warren->

appointment of Richard Cordray.<sup>54</sup> One proposed amendment is the Responsible Consumer Financial Protection Regulations Act,<sup>55</sup> introduced by Rep. Spencer Bachus (R-AL), which would create a new five-member bipartisan commission under the aegis of the CFPB, which will replace the office of its Director.<sup>56</sup> The motivating principle behind this proposal is to model CFPB government on that employed, *inter alia*, at the SEC, the Federal Deposit Insurance Corporation (FDIC), and the Federal Trade Commission (FTC).<sup>57</sup> At present, H.R. 1121 is still in committee.<sup>58</sup>

Another proposed amendment is the Consumer Financial Protection Safety and Soundness Improvement Act, introduced by

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consumer-protection-elizabeth-warren-congress-elizabeth-warren-senate.htm ("President Barack Obama's decision to bypass Elizabeth Warren to head the new Consumer Financial Protection Bureau reflects a political calculation that she would be too polarizing to make it through a Congressional confirmation process.").

<sup>54</sup> See Suzy Khimm, *Cordray's First Target: The Housing Meltdown*, EZRA KLEIN'S WONKBLOG (Jan. 12, 2012, 4:44 PM), [http://www.washingtonpost.com/blogs/ezra-klein/post/first-on-cordrays-agenda-the-housing-meltdown/2012/01/12/gIQAWzHKuP\\_blog.html](http://www.washingtonpost.com/blogs/ezra-klein/post/first-on-cordrays-agenda-the-housing-meltdown/2012/01/12/gIQAWzHKuP_blog.html) ("Despite the controversy surrounding his appointment, Richard Cordray is barreling ahead with his work as head of the new Consumer Financial Protection Bureau . . .").

<sup>55</sup> H.R. 1121, 112th Cong. (2011).

<sup>56</sup> *Id.* (proposing to alter § 1011(c)(1) of the Consumer Financial Protection Act of 2010 to read the following: "The Commission shall be composed of 5 members who shall be appointed by the President, by and with the advice and consent of the Senate, from among individuals who (A) are citizens of the United States; and (B) have strong competencies and experiences related to consumer financial protection").

<sup>57</sup> See DIANE KATZ, HERITAGE FOUND., REFORMING CONSUMER FINANCIAL PROTECTION BUREAU NECESSARY TO PROTECT CONSUMERS, WebMemo No. 3216 (2011), available at <http://www.heritage.org/research/reports/2011/04/reforming-consumer-financial-protection-bureau-necessary-to-protect-consumers> ("In place of a lone director, H.R. 1121 would establish a five-member commission, also nominated by the President and confirmed by the Senate, for staggered five-year terms. . . . A similar structure exists at the Federal Trade Commission, the Federal Deposit Insurance Corporation, and the Securities and Exchange Commission.").

<sup>58</sup> *Bill Summary & Status—112th Congress (2011-2012)—H.R. 1121*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.01121>: (last visited Mar. 28, 2012).

Rep. Sean Duffy (R-WI).<sup>59</sup> In an effort to check what is seen as essentially the “unreviewable” power that the CFPB was granted in discretionary rulemaking under Dodd-Frank, H.R. 1315 would redesign the Financial Stability Oversight Committee’s (“FSOC”) review process in three fundamental ways: (1) requiring only a simple majority vote to overturn a CFPB rule; (2) requiring all CFPB rules to be “consistent with the safe and sound operations of United States financial institutions”; and, (3) giving the FSOC a longer period of time to consider the “safety and soundness implications” of CFPB rules.<sup>60</sup> The House of Representatives approved this bill on July 21, 2011.<sup>61</sup> It is now at the Senate Committee on Banking, Housing, and Urban Affairs, where it will likely face harsher opposition.<sup>62</sup>

More recently, Republicans have reinvigorated their efforts to dismantle the CFPB, or at least its current manifestation, by introducing a number of bills that would: (1) move the CFPB to the Treasury Department, thereby subjecting it to the same appropriations process;<sup>63</sup> (2) remove CFPB Director Cordray from his seat on the FDIC Board;<sup>64</sup> and, (3) preserve the attorney-client

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<sup>59</sup> H.R. 1315, 112th Cong. (2011).

<sup>60</sup> *Id.*; see Christine Ricciardi, *House Financial Services Committee Approves Bills to Reform CFPB*, HOUSINGWIRE (May 12, 2011, 9:27 PM), <http://www.housingwire.com/2011/05/12/house-financial-services-committee-approves-bills-to-reform-cfpb> (“Representatives in favor of the bills said the CFPB is flawed in structure and needs reforming in order to function adequately in the U.S. economy.”); see also *Duffy Bill Would Increase Consumer Protection Accountability and Oversight*, CONGRESSMAN SEAN DUFFY (Apr. 7, 2011), <http://duffy.house.gov/press-release/duffy-bill-would-increase-consumer-protection-accountability-and-oversight> (discussing the bill’s purpose, as envisioned by its sponsor and his supporters); see generally Melanie Waddell, *Consumer Groups Rally Against Passage of Bills to Alter CFPB*, ADVISORONE (May 3, 2011), <http://www.advisorone.com/2011/05/03/consumer-groups-rally-against-passage-of-bills-to>.

<sup>61</sup> See *infra* note 62 and accompanying text.

<sup>62</sup> See *House Approves CFPB Changes*, CREDIT UNION NATIONAL ASSOCIATION (July 25, 2011), <http://www.cuna.org/newsnow/11/wash072411-1.html> (“Although H.R. 1315 passed on a bipartisan House vote, the Senate prospects for the legislation are in doubt.”).

<sup>63</sup> Bureau of Consumer Financial Protection Accountability and Transparency Act of 2011, H.R. 1355, 112th Cong. (2011).

<sup>64</sup> H.R. 2081, 112th Cong. (2011).

privilege for information submitted to the CFPB.<sup>65</sup> The financial industry has generally been supportive of these new efforts, while opponents of the bills accuse House Republicans of attempting to weaken and defund the CFPB “under the guise of reform and good governance.”<sup>66</sup>

### C. Conclusion

This article has sought to reflect the general atmosphere in Congress as it pertains to the Dodd-Frank Act. The proposed changes—which range from all-out repeal,<sup>67</sup> to more modest attempts to draft narrower regulatory methods<sup>68</sup>—reflect the view of many legislators that the original Act was drafted without careful consideration of its regulatory impact.<sup>69</sup> On the other hand, this article has taken note of the vocal minority—the voice in the legislative wilderness—that has called for prudence and patience in postponing any sort of significant amendment to Dodd-Frank, whether piecemeal tinkering or wholesale repeal.<sup>70</sup> These experts and politicians argue that Dodd-Frank should be given time to be implemented.<sup>71</sup> There can be no doubt that the Act was, and is still, a divisive piece of legislation. And it is unlikely to cease to be controversial any time soon. At least for the near future, legislators, financial industry actors, and members of the public will have to tolerate its presence and succumb to its regulatory reach. Only time can tell its ultimate success or that of the many pending changes that threaten to modify its scope and influence.

Ryan P. Mulvey<sup>72</sup>

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<sup>65</sup> Proprietary Information Protection Act of 2012, H.R. 3871, 112th Cong. (2012).

<sup>66</sup> Suzy Khimm, *The GOP's New Push to Defang the CFPB*, EZRA KLEIN'S WONKBLOG (Feb. 8, 2012, 4:33 PM), [http://www.washingtonpost.com/blogs/ezra-klein/post/the-gops-new-push-to-defang-the-cfpb/2012/02/08/gIQA1DrfzQ\\_blog.html](http://www.washingtonpost.com/blogs/ezra-klein/post/the-gops-new-push-to-defang-the-cfpb/2012/02/08/gIQA1DrfzQ_blog.html) (“Supporters of the CFPB believe the bills are an attempt by Republicans to weaken and defund the CFPB under the guise of reform and good governance.”).

<sup>67</sup> See notes 16-17 and accompanying text.

<sup>68</sup> See, e.g., notes 40-41 and accompanying text.

<sup>69</sup> See note 12 and accompanying text.

<sup>70</sup> See note 15 and accompanying text.

<sup>71</sup> See *id.*

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