IV. The Dismantling of Dodd-Frank

A. Introduction

In 2008, the U.S. economy tumbled into a recession after a crisis in the subprime mortgage market led to the failure of Lehman Brothers, a stock market downturn, and a credit market freeze.[1] In response, the U.S. government stabilized the economy by taking extraordinary actions, including arranging Bank of America's acquisition of Merrill Lynch, nationalizing AIG through a massive bail-out, and injecting billions of dollars of capital into large banks.[2] In 2010, Congress, with the goal of preventing another financial crisis, enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Act) with the aim of regulating banks which were considered "too big to fail."[3] Critical reforms of the Act include an increase in the amount of cash capital that banks must hold in reserve, the heightening of regulatory requirements, and the banning of certain kinds of proprietary trading by banks and certain covered funds in order to prevent engagement in high-risk trading.[4] While the Act has succeeded in increasing economic growth and stability, it has been argued that the Act is overly restrictive, thus limiting the growth potential of the economy.[5]

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[1] John Maxfield, *The Dodd-Frank Act Explained*, USA TODAY (Feb. 3, 2017), https://www.usatoday.com/story/money/2017/02/03/the-doddfrank-act-explained/97454748/ [https://perma.cc/LL87-C7VG] ("It wasn't until September 2008 that the crisis climaxed with the failure of Lehman Brothers, the nation's fourth-biggest investment bank at the time. The stock market plummeted. Credit markets froze.").

[2] *Id.*

[3] *Id.* ("The Dodd-Frank Act was designed to ensure that a financial crisis like that in 2008 won't happen again.").

[4] Lisa Fu, *Is Dodd-Frank Crippling Banks or Saving Them?*, FORTUNE (Aug. 4, 2017), http://fortune.com/2017/08/04/dodd-frank-choice-act/ [http://perma.cc/R33H-NJUT] ("It was based on the premise that banks shouldn't gamble away their federally insured deposits, and on the idea that preventing such trading would curtail risky behavior.").

[5] *See* Editorial, *Playing Tricks with Dodd-Frank*, N.Y. TIMES, June 16, 2017, at A22, https://www.nytimes.com/2017/06/16/opinion/trump-dodd-frank-banks.html [https://perma.cc/22RF-W3W8] ("The Treasury review justifies the [proposed] changes [to the Act] by saying regulatory burdens have depressed lending and economic growth.").

On February 3, President Donald Trump issued an executive order, which directed the Secretary of the Treasury to consult with member agencies of the Financial Stability Oversight Council and report to the President within 120 days regarding how the "Core Principles" of regulation are furthered through the system of existing laws, regulation, guidance and other policies.[6] In June, the Treasury issued the first of four reports to the President and made recommendations to reform the Act by reducing regulatory overlaps and burdens caused by overcomplicated requirements and adapting the existing regulatory requirements to support critical functions of the U.S. economy.[7] The Treasury issued a second report in October, expounding upon recommendations made in the first report with a focus on capital market reform.[8] Meanwhile, Congress has also passed the Financial Choice of 2017, which rolled back various aspects of the Act.[9] These recommendations of eased regulatory restrictions are mostly favorable to large banks, though critics dispute whether they are necessary, as lending has increased and the economy has grown since the passage of the Act.[10] With debate and disagreement in Congress over the proper subjects and extent of regulation, it remains uncertain to what extent the Treasury will dismantle the Act.

This article discusses the regulatory reforms established by the Act, their impact on the financial system, the Department of the Treasury's recommendations to scale back the Act, and the possible implications of these actions. First, Part II provides historical context

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[6] Exec. Order No. 13772, 82 Fed. Reg. 9965 (Feb. 3, 2017).

[7] U.S. DEP'T OF THE TREASURY, 2017-04151 (REV. 1), A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: BANKS AND CREDIT UNIONS (2017), https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf [https://perma.cc/8SZ9-VEYS].

[8] U.S. DEP'T OF THE TREASURY, 2017-04856 (REV. 1), A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: CAPITAL MARKETS (2017), https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf [https://perma.cc/7CGU-3R4L].

[9] Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017) ("To create hope and opportunity for investors, consumers, and entrepreneurs by ending bailouts and Too Big to Fail, holding Washington and Wall Street accountable, eliminating red tape to increase access to capital and credit, and repealing the provisions of the Dodd-Frank Act that make America less prosperous, less stable, and less free, and for other purposes.").

[10] Gretchen Morgenson, *Yes, Mr. President, Banks Are Lending*, N.Y. TIMES, Feb. 18, 2017, at BU1 ("Indeed, a look at recent bank results shows that lending among the big institutions is rising, not falling.").

for the implementation of the Act. Second, Part III discusses the Act, its critical reforms, positive impacts, and negative impacts. Third, Part IV discusses the relevance of the Act today. Fourth, Part V discusses the Treasury's recommendations to reform the Act. Finally, Part VI discusses implications of the Treasury's proposed reform.

B. Brief Historical Context

During the years preceding the financial crisis, large financial institutions engaged in the practice of pooling risky subprime mortgages into securities, in which the risks of each loan were believed to be uncorrelated.[11] The securities were collateralized debt obligations (CDOs), which were categorized based upon the extent of their exposure to credit default.[12] Although investors sought to buy safe tranches with triple-A credit ratings, the rating agencies were overly generous in their credit assessments to avoid jeopardizing business with the banks issuing the securities.[13] When the housing market slumped in 2006, many mortgage-backed securities became worthless, and it became difficult to sell certain assets or to use them as collateral for short-term funding.[14] Fire-sales then reduced the capital of large financial institutions.[15] In June 2007, Bear Sterns used

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[11] *Origins of the Financial Crisis: Crash Course*, THE ECONOMIST (Sept. 7, 2013), www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article [https://perma.cc/4U8J-A7TN] ("[R]isky mortgages were passed on to financial engineers at the big banks, who turned them into supposedly low-risk securities by putting large numbers of them together in pools . . . . The big banks argued that the property markets in different American cities would rise and fall independently of one another.").

[12] *Id.* ("The pooled mortgages were used to back securities known as collateralized debt obligations (CDOs), which were sliced into tranches by the degree of exposure to default.").

[13] *Id.* ("Investors bought the safer tranches because they trusted the triple-A credit ratings assigned by agencies such as Moody's and Standard & Poor's . . . . The agencies were paid by, and so beholden to, the banks that created the CDOs. They were far too generous in their assessments of them.").

[14] *Id.* ("Mortgage-backed securities slumped in value, if they could be valued at all . . . . It became difficult to sell suspect assets at almost any price, or to use them as collateral for short-term funding . . . .").

[15] *Id.* ("Fire-sale prices . . . instantly dented banks' capital thanks to mark-to-market accounting rules, which required them to . . . acknowledge losses on paper that might never actually be incurred.").

$3.2 billion to recover two subprime mortgage hedge funds, though they still filed for bankruptcy two months later.[16] In the same month, BNP Paribas, France's largest listed bank, froze $2.2 billion worth of funds in response to fears regarding the subprime mortgage sector of the United States.[17] By March 2008, Bear Stearns shares collapsed, and the firm was acquired by JPMorgan for a mere $10 per share.[18] September 2008, Lehman Brothers, another large financial institution with significant exposure to subprime mortgages, filed for Chapter 11 bankruptcy protection.[19] Lehman Brothers employed many individuals to manage its risks and monitor its balance sheets but was unable to finance itself when the subprime mortgage and real estate markets slowed down.[20] After the Lehman Brothers bankruptcy, AIG, an American multinational insurance corporation, began to collapse due to the high amount of credit-risk protection it had sold.[21]

The U.S. government took a few immediate actions in response to the growing financial crisis. In September 2008, the Federal Reserve helped facilitate the acquisition of Merrill Lynch by Bank of America.[22] That same month, the Federal Reserve rescued

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[16] Bass Levin, *The Fall of Bear Stearns: A Quickie* Guide, N.Y. MAG. (Mar. 18, 2008), http://nymag.com/daily/intelligencer/2008/03/a_quickie_guide_to_the_fall_of .html [https://perma.cc/8VH6-U3SF].

[17] Sudip Kar-Gupta & Yann Le Guernigou, *BNP Freezes $2.2 bln of Funds Over* S*ubprime*, REUTERS (Aug. 7, 2007), www.reuters.com/article/us-bnpparibas-subprime-funds/bnp-freezes-2-2-bln-of-funds-over-subprime-idUSWEB612920070809 [https://perma.cc/QYN6-R87S] ("France's biggest listed bank, BNP Paribas, froze 1.6 billion euros worth of funds on Thursday, citing the U.S. subprime mortgage sector woes . . . .").

[18] Steve Schaefer, *A Look Back at Bear Stearns, Five Years After Its Shotgun Marriage to JPMorgan*, FORBES (Mar. 14, 2013), www.forbes.com/sites/steveschaefer/2013/03/14/a-look-back-at-bear-stearns-five-years-after-its-shotgun-marriage-to-jpmorgan/#1d898e377403 [https://perma.cc/3WVT-VVUQ] ("[T]he firm had been sold to JPMorgan for $2, a price that was ultimately raised to $10 two weeks later.").

[19] ROSALIND Z. WIGGINS ET AL., THE LEHMAN BROTHERS BANKRUPTCY A: OVERVIEW, YALE SCH. OF MGMT: PROGRAM ON FINANCIAL STABILITY 1 (case study 2014-3A-V1 2014), som.yale.edu/sites/default/files/files/001-2014-3A-V1-LehmanBrothers-A-REVA.pdf [https://perma.cc/75M2-PWQF].

[20] *Id.*

[21] *Origins of the Financial Crisis,* THE ECONOMIST, *supra* note 11.

[22] William D. Cohan, *The Final Days of Merrill Lynch*, THE ATLANTIC (Sept. 2009), www.theatlantic.com/magazine/archive/2009/09/the-final-days-of-merrill-lynch/307621/ [https://perma.cc/G3MJ-GRFK].

AIG with an $85 billion loan to prevent the firm from declaring bankruptcy.[23] In total, the U.S. government expended tens of billions in capital to rescue banks from failing.[24]

In the aftermath of the crisis, Congress enacted the Act, the most far reaching regulatory reform since the Glass-Steagall Act of 1933.[25] However, a debate now persists over whether the Act remains relevant and necessary as the Treasury ponders reform.[26]

C. The Dodd-Frank Act

The Act was enacted with the aim of preventing another financial crisis by increasing financial stability and closely monitoring and regulating the growth and proliferation of banks, which were considered too big to fail.[27] The Act contained critical reforms, including the establishment of the Consumer Financial Protection Bureau (CFPB), increased capital requirements and enhanced oversight of financial institutions.[28] Nevertheless, certain provisions of the Act have been detrimental to economic growth, including the requirement of the Federal Reserve to make emergency loans available to an entire category of institutions rather than a single firm.[29]

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[23] Reuters Staff, *Instant View: U.S. Bails Out Insurer AIG with $85 bln Loan*, REUTERS (Sept. 16, 2008), http://www.reuters.com/article/us-aig-rescue/instant-view-u-s-bails-out-insurer-aig-with-85-bln-loan-idUSN1645715120080917?sp=true [https://perma.cc/DLF8-C23X].

[24] Maxfield, *supra* note 1 ("[The U.S. government] arranged Bank of America's purchase of Merrill Lynch. It nationalized all but a small sliver of American International Group [and] . . . injected tens of billions of dollars' worth of capital into the nation's leading banks.").

[25] *See generally* Maxfield, *supra* note 1.

[26] *Playing Tricks with Dodd-Frank*, *supra* note 5 (providing a short summary of the debate regarding reform of Dodd-Frank).

[27] Martin N. Baily et al., *The Impact of the Dodd-Frank Act on Financial Stability and Economic Growth*, 3 THE RUSSELL SAGE FOUND. J. SOC. SCI. 20 (2017), http://www.rsfjournal.org/doi/pdf/10.7758/RSF.2017.3.1.02 [https://perma.cc/B63J-RJJU] ("Dodd-Frank . . . was designed to increase financial stability and prevent future devastation from financial crises.").

[28] *Id.* at 22 ("Among these successes are higher capital requirements . . . new authority and mechanisms to wind down failed financial institutions; the creation of the CFPB; and greater transparency for swaps and derivatives trades.").

[29] *Id.* at 32 ("[L]oans must be offered through programs with 'broad-based eligibility'—that is, they must be made available to a category of institutions rather than on a one-off basis to a single company.").

Ultimately, it is difficult, if not impossible, to ascertain the macroeconomic impact of many provisions of the Act because not enough time has passed since its passage.[30]

1. Critical Reforms of the Act

Dodd-Frank contains many critical reforms, which have shaped the current regulatory landscape of the U.S. economy.[31] The Act established the Financial Stability Oversight Council (FSOC), through which regulators can promote market discipline by identifying risks that could arise from material financial distress or failure and the activities of large inter-connected bank companies or nonbank companies.[32] The Act also established the Consumer Financial Protection Bureau to enable the government to better regulate the offering and provision of consumer financial products and services.[33] In response to the key role played by speculative investments during the financial crisis, the Volcker Rule, established in the Act, prohibits banking entities from engaging in proprietary trading or acquiring any equity, partnership, or other ownership interest in hedge funds and private equity funds.[34] Other notable reforms of the Act include increasing the amount of capital that banks must hold in reserve[35] and requiring banks to ensure an orderly liquidation process if it becomes necessary to liquidate assets.[36]

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[30] *Id.* at 41.

[31] *See id.* at 20 ("Dodd-Frank . . . was designed to increase financial stability and prevent future devastation from financial crises.").

[32] THE COUNCIL OF INSPECTORS GEN. ON FIN. OVERSIGHT, CIGFO-2007-01, AUDIT OF THE FINANCIAL STABILITY OVERSIGHT COUNCIL'S EFFORTS TO PROMOTE MARKET DISCIPLINE (2017) ("One of the statutory purposes of the Financial Stability Oversight Council is to promote market discipline, by eliminating expectations on the part of shareholders, creditors, and counter-parties, of large, interconnected bank holding companies and nonbank financial companies that the United States Government will shield them from losses in the event of failure.").

[33] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011, 124 Stat. 1376, 589–90 (2010).

[34] *Id.* § 619.

[35] *Id.* § 171.

[36] *Id.* § 204.

2. *Positive Impacts of the Act*

The Act increased economic growth and financial stability in various areas through higher capital requirements, enhanced transparency, and higher overarching regulatory standards.[37] These policies led to a financial sector safer than before the crisis, with gross loans across commercial banks in the United States growing steadily except for in home-equity lines of credit and loans to other banks.[38] The Act's higher capital requirements ensure financial institutions retain enough capital to stay solvent during times of financial stress.[39] While there is no consensus on when increasing capital requirements will outweigh its costs in terms of return on assets, they have been justified by their enhancement of safety.[40]

Before the financial crisis, the derivatives market was largely unregulated as information about particular derivatives was complex, and economic aggregate effects were difficult to comprehend.[41] Therefore, it became possible for some to undermine the regulatory system.[42] The Act facilitated greater transparency through increased oversight of the derivatives industry and required most derivatives to trade on open exchanges and be centrally cleared by authorities.[43]

The Act also had positive impact on the economy through the creation of the CFPB, though this has been disputed.[44] The CFPB was

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[37] Baily et al., *supra* note 27 (showcasing ways in which the Act has increased economic growth and financial stability).
[38] Ben McLannahan, *Did Dodd-Frank Really Hurt the US Economy?*, FIN. TIMES (Feb. 13, 2017), https://www.ft.com/content/dd4a6698-efe7-11e6-930f-061b01e23655 ("Gross loans across the US's commercial banks have grown pretty steadily for at least three years, spread across all categories except home-equity lines of credit and loans to other banks.").
[39] Baily et al., *supra* note 27, at 22.
[40] *Id.* at 24 ("[T]he increases in required capital have been justified by the increased safety they have brought.").
[41] *Id.* at 31 ("The complicated nature of many of these products and the lack of transparency surrounding them made such sleight of hand appear more plausible at the time.").
[42] *Id.*
[43] *Id.* ("Title VII of Dodd-Frank made real progress by subjecting swap dealers to greater oversight and requiring most derivatives to trade on open exchanges and be centrally cleared.").
[44] Diane Katz, *The CFPB in Action: Consumer Bureau Harms Those It Claims to Protect*, THE HERITAGE FOUND. (Jan. 22, 2013), http://www.heritage.org/housing/report/the-cfpb-action-consumer-bureau-harms-those-it-

established in response to the predatory and misleading lending practices, which went unseen by government authorities due to gaps and weaknesses in the regulatory structure.[45] The CFPB consolidated the oversight responsibilities of seven regulatory agencies with a focus on filling regulatory gaps and protecting consumers of financial products, and it has largely succeeded in its mission.[46]

3. *Negative Impacts of the Act*

Although the economy has grown and stabilized since the enactment of the Act, the Act has certain shortcomings.[47] In particular, restrictions on the crisis authority of the Federal Reserve and the FDIC have had negative impacts on the economy.[48] The Act prevents the Federal Reserve from providing emergency loans to single firms, and instead requires that such loans be made available to a category of institutions.[49] Although this provision intends to prevent bailouts reminiscent of AIG, it has been argued that this restriction on lending authority could increase potential moral hazard, as the Federal Reserve may be forced to decide between not lending at all during a time of crisis and distorting the provision to lend to a single firm in dire need of assistance.[50]

Furthermore, the Act's restrictions on the FDIC's crisis authority have the potential for negative impacts if the economy enters a systemic crisis.[51] By requiring that the FDIC obtain a joint resolution

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claims-protect [https://perma.cc/2Z32-J9J6] (disputing the positive effects of the CFPB on the United States economy).

[45] Baily et al., *supra* note 27, at 29 ("Such products and practices were allowed to proliferate in part because oversight was fragmented among several regulatory agencies, leading to significant "gaps and weaknesses" in supervision.").

[46] *Id.* at 19 ("By consolidating the oversight responsibilities of seven different agencies under a single roof with a unified focus, the creation of the CFPB was a significant achievement for consumer protection.").

[47] *Id.* at 21.

[48] *See id.*

[49] *Id.*

[50] *Id.* at 32 (stating that the Act "forces [the Federal Reserve] either to wait until a financial stress event has gotten worse or to evade the spirit of the law by lending, as before, to a single firm under cover of a tortured definition of 'broad-based' class of firms").

[51] *Id.* at 31 (explaining that the FDIC is required to obtain a joint resolution from Congress before issuing guarantees and though Congress should provide

from Congress before issuing temporary guarantees of debt issued by healthy insured depository institutions, the response to a financial crisis could be delayed due to congressional gridlock, possibly exacerbating the distress.[52] This measure, as well as the restrictions on the Federal Reserve, may potentially undermine the stability of the economy and delay recovery if another financial crisis materializes.[53]

4. *Relevance of the Act Today*

The Act seminally shaped the current regulatory structure by heightening the standards of oversight to ensure that the mistakes which led to the 2008 financial crisis cannot be replicated.[54] This regulatory structure has raised the costs of compliance for the depository sector, and it has been argued that the Act has contributed to the slow pace of economic recovery since the crisis.[55] On February 3, 2017, President Trump issued an executive order directing the Secretary of the Treasury to consult with member agencies of the FSOC and report back within 120 days on the extent to which existing laws, regulation, guidance and other policies promote the Core Principles of regulation.[56] These Core Principles include fostering independent and informed financial decision-making in the marketplace, preventing bailouts funded by the public, conducting regulatory impact analysis, facilitating American competition in domestic and foreign markets, supporting national interests in the international regulatory sphere, improving the efficiency of regulation, and holding the regulatory agencies and framework more

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a thorough review, "time is compressed in a crisis, . . . runs can begin and spread, threatening the entire financial system, within days or even hours [and therefore] [t]he longer responses are delayed, the greater the potential damage to the financial system and the economy.").

[52] *Id.* at 34 ("Having to wait for Congress to pass a resolution that may be unpopular, though necessary, would subject crisis response to an unnecessary and potentially costly delay or, in extreme circumstances, block debt guarantee authority entirely.").

[53] *Id.* at 21.

[54] *See id.* at 20.

[55] A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: BANKS AND CREDIT UNIONS, *supra* note 7, at 6 ("The U.S. economy has experienced the slowest economic recovery of the post-war period.").

[56] *Id.* at 3 ("President Donald J. Trump established the policy of his administration to regulate the United States financial system in a manner consistent with a set of Core Principles.").

accountable.[57] Bolstered by the newly elected President's support for regulatory restructuring, Republicans in the House of Representatives voted to approve the Financial CHOICE Act in June 2017,[58] which intends to roll back the Act by repealing the Volcker Rule and removing the CFPB's authority to regulate major banks and lenders.[59] It remains unclear whether the bill will be passed in the Senate, as Democrats are united in its opposition and Republicans must garner 60 votes to pass the legislation.[60] That same month, the Treasury issued its first report to President Trump regarding the depository system, financial regulatory structure, and the Act.[61] The report listed recommendations regarding improving the efficiency of bank regulation and providing credit to fund consumer and commercial needs to drive economic growth.[62] As the Republican-controlled legislative and executive branches of government contemplate financial regulatory reform, it remains unclear to what extent the Act will be rolled back in the face of Democratic opposition.

5. *Treasury's Proposed Reform of the Act*

The Treasury intends to divide its report to the President into four reports.[63] The first report, issued in June 2017, covers the depository system, banks, savings associations, and credit unions.[64] The second report, issued in October 2017, covers capital markets, and subsequent reports will cover the asset management and insurance industries, and non-bank financial institutions.[65]

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[57] *Id.*
[58] Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017).
[59] Geoff Bennett, *House Passes Bill Aimed At Reversing Dodd-Frank Financial Regulations*, NPR (June 8, 2017), http://www.npr.org/2017/06/08/532036374/house-passes-bill-aimed-at-reversing-dodd-frank-financial-regulations [https://perma.cc/C8R3-WWVR] ("Hensarling's nearly 600-page bill would defang Dodd-Frank by repealing the so-called Volcker Rule, which prevents government-insured banks from making risky bets with investments . . . . The bill aims to scale back the authority of the Consumer Financial Protection Bureau to regulate large banks and payday lenders").
[60] *Id.*
[61] A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: BANKS AND CREDIT UNIONS, *supra* note 7.
[62] *See id.* at 10.
[63] *Id.* at 4.
[64] *Id.*
[65] *Id.* (listing the series of reports to be issued by the Treasury).

First, the Treasury intends to evaluate regulatory mandates and their fragmentation, overlap, and duplication within the regulatory structure.[66] The Treasury recommends that Congress take action to merge regulators with similar purposes and provide clarity with regard to regulatory requirements.[67] Furthermore, by expanding FSOC's authority to coordinate and direct regulatory and supervisory policies, conflicting and overlapping regulatory jurisdiction can be avoided.[68] Finally, the Treasury recommends that regulatory agencies increase their coordination of supervision and examination activities.[69]

Second, the Treasury intends to refine capital, liquidity, and leverage standards in order to decrease the burden of statutory stress testing and improve its effectiveness by adjusting requirements in accordance with the size and complexity of financial institutions.[70] Under this plan, the Federal Reserve would also subject its stress testing and capital planning review frameworks to public notice and comment in the interest of transparency and accountability.[71]

Third, the Treasury seeks to ease regulatory burdens to allow banks to more easily provide credit to fund consumers and businesses in the interest of stimulating economic growth.[72] By revising capital and liquidity regulations, the proposal would increase the lending capacity of banks while ensuring safety and economic stability.[73] The Treasury argues that these regulatory reforms would protect consumer

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[66] *Id.* at 10 ("Improving regulatory efficiency and effectiveness by critically evaluating mandates and regulatory fragmentation, overlap, and duplication across regulatory agencies.").
[67] *Id.* at 11 ("This could include consolidating regulators with similar missions and more clearly defining regulatory mandates.").
[68] *Id.* ("Treasury recommends that Congress expand FSOC's authority to play a larger role in the coordination and direction of regulatory and supervisory policies.").
[69] *Id.* ("Finally, the agencies should work together to increase coordination of supervision and examination activities.").
[70] *Id.* ("[R]ecommendations aimed at both decreasing the burden of statutory stress testing and improving its effectiveness by tailoring the stress-testing requirements based on the size and complexity of banks.").
[71] *Id.* at 12 ("The Federal Reserve should subject its stress-testing and capital planning review frameworks to public notice and comment.").
[72] *Id.* at 13 ("Providing credit to fund consumers and businesses to drive economic growth.").
[73] *Id.* ("Treasury has identified numerous regulatory factors that are unnecessarily limiting the flow of credit to consumers and businesses and thereby constraining economic growth and vitality.").

interests while enabling banks to lend money and bring more consumers into the banking system.[74]

Fourth, the Treasury recommends improving market liquidity by significantly changing the Volcker Rule to eliminate compliance burdens.[75] The Treasury argues that by reducing the complexity of the Volcker Rule, banks would be allowed to "more easily hedge their risks and conduct market-making activities."[76] Specifically, the Treasury recommends that banks with $10 billion or less in assets should be exempt from the Volcker Rule, and that unless trading assets and liabilities exceed a certain threshold, banks with greater than $10 billion in assets should be exempt from Volcker Rule's proprietary trading restrictions.[77]

Fifth, the Treasury intends to facilitate and expand the operations of the banking and credit union sector by recommending an adjustment of the overall regulatory burden.[78] By streamlining regulatory supervisory burden and reporting requirements, banks and credit unions can grow without the costly burdens of compliance, and regulators can still implement examination procedures and data collection requirements, which promote accountability.[79]

Sixth, the Treasury recommends promoting transparency and accountability in international regulatory bodies by enhancing the coordination and implementation of international regulatory standards after careful consideration by the U.S. government of whether such standards are aligned with the needs of the United States.[80] This recommendation ensures that when the U.S implements international regulatory standards, they will meet domestic government objectives and promote a level playing field for U.S. firms.[81]

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[74] *Id.* at 14.
[75] *Id.*
[76] *Id.*
[77] *Id.* ("Banks with $10 billion or less in assets should not be subject to the Volcker Rule. Treasury also recommends that the proprietary trading restrictions of the rule not apply to [these] banks . . . unless they exceed a threshold amount of trading assets and liabilities.").
[78] *Id.* at 15.
[79] *Id.* ("Further, greater accountability and clarity should be incorporated into the examination procedures and data collection requirements.").
[80] *Id.* at 16.
[81] *Id.* ("Establishing a global playing risk-based capital floor in order to promote a more level playing field for U.S. firms and too strengthen the capital adequacy of global banks, especially non-U.S. institutions that, in some cases, have significantly lower capital requirements.").

Seventh, the Treasury aims to improve the regulatory engagement model by reforming regulatory expectations of the boards of banking organizations.[82] The Treasury argues that the current regulatory expectations of boards are flawed in that they can "crowd out critical functions that [b]oards and [b]oard [c]ommittees should play," blur the responsibilities between the Board and management, and impose a "one-size-fits-all" approach, which places a particular burden on mid-sized and community financial institutions."[83] The Treasury asserts that a modified approach to regulation could restore accountability while limiting excessive restrictions on banking activities and services provided.[84]

Eighth, the Treasury recommends greater use of cost-benefit analysis in regulatory actions in order to further transparency and public accountability.[85] Cost-benefit analysis is a mechanism used by executive agencies at the direction of the president to evaluate the costs and benefits of regulatory actions.[86] The Treasury contends that although Congress has implemented certain cost-benefit analysis requirements on independent financial regulatory agencies, financial regulators have not adopted universal methods to analyze costs and benefits.[87] The Treasury suggests that regulatory agencies adopt the Office of Management and Budget guidance on cost-benefit analysis.[88]

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[82] *Id.* ("The role of the boards of directors of banking organizations can be improved to enhance accountability by appropriately defining the Board's role and responsibilities for regulatory oversight and governance.").

[83] *Id.*

[84] *Id.* at 17 ("Regulators and banking organizations should develop an improved approach to addressing and clearing regulatory actions in order to limit the sustained and unnecessary restriction of banking activities and services provided to customers.").

[85] *See id.*

[86] *Id.* at 62 ("For over three decades, presidents of both parties have directed executive agencies to evaluate the costs and benefits of new regulatory actions.").

[87] *Id.* ("[W]hile Congress has imposed discrete cost-benefit analysis requirements on independent financial agencies . . . these agencies have long been exempt from Executive Order 12866 . . . [and therefore] financial regulators have not adopted uniform and consistent methods to analyze costs and benefits . . . .").

[88] *Id.* ("GAO. . . recommended that the financial regulatory agencies more fully apply Office of Management and Budget (OMB) guidance on cost-benefit analysis issued under Executive Order 12866 . . . .").

Finally, the Treasury seeks to level the playing field between domestic and foreign banks operating in the United States by changing the current regulatory framework to encourage the continuance of foreign investment in U.S. financial markets, as doing so would diversify risk and promote economic growth.[89] The Treasury is concerned that the regulations implemented by Dodd-Frank have discouraged foreign banking organizations (FBOs) from participating in U.S. markets.[90] Therefore, the Treasury recommends promoting the Federal Reserve's prudential supervision over FBO activities as well as implementing certain Federal Reserve practices to promote resolvability of global systematically important banks.[91]

6. *Potential Impact of Treasury's Proposed Reform of the Act*

The Treasury contends that its proposed reforms would break the cycle of low economic growth caused by the Act since the crisis of 2008.[92] The Treasury argues that the Act has stymied recovery due to its harsh regulations focused on issues unrelated to those which sparked the financial crisis, and thus, the scope of regulation should be more tailored to take into account the size and complexity of financial institutions.[93] However, many contend that evidence does not support the Treasury's argument that regulatory burdens have slowed lending

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[89] *Id.* at 70 ("Treasury supports a regulatory regime for FBOs that . . . promotes a level playing field between domestic and foreign banks . . . . However, changes to the current framework should be made to encourage foreign banks to continue to participate in U.S. financial markets and provide credit to the U.S. economy.").

[90] *Id.*

[91] *Id.* ("Treasury supports the continuation of the Federal Reserve's IHC regime to promote consolidated prudential supervision over FBOs' U.S. banking and non-banking activities (including investment banking and securities dealing). Treasury also supports application of the Federal Reserve's long-term debt and TLAC rule to improve the resolvability of G-SIBs.").

[92] *Id.* at 6 ("The U.S. economy has experienced the slowest economic recovery of the post-war period.").

[93] *Id.* ("The implementation of Dodd-Frank during this period created a new set of obstacles to the recovery by imposing a series of costly regulatory requirements on banks and credit unions, most of which were either unrelated to addressing problems leading up to the financial crisis or applied in an overly prescriptive or broad manner.").

and economic recovery.[94] In fact, "in the fourth quarter of 2016, . . . Bank of America, Citigroup, J.P. Morgan and Wells Fargo all reported increases in their average loan figures."[95] Bank lending has increased between 2012 and 2017, and opponents of reform argue that even if the economy could have recovered to a greater extent without the Act, the benefits of regulation outweigh the costs.[96] It is less disputed that the Treasury's recommendations are mostly favorable to large banks by loosening restrictions on traders, relaxing stress tests, and advising regulators to reconsider capital level requirements.[97] The proposed reform gives banks greater flexibility and the ability to take greater risks with less oversight, as the CFPB would become less independent and effective.[98]

D. Conclusion

The Treasury intends to reform the Act in order to ease regulatory burdens on large financial institutions and increase the frequency of bank lending in order to grow the economy.[99] However, opponents of reform contend that Dodd-Frank stabilized the economy and protected consumers precisely through heightened regulatory standards and the establishment of the CFPB.[100] Since Republicans will need Democratic support to pass reform in the Senate, it is not

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[94] *Playing Tricks with Dodd-Frank*, *supra* note 5 ("The Treasury review justifies the [proposed] changes [to the Act] by saying regulatory burdens have depressed lending and economic growth.").
[95] Morgenson, *supra* note 10.
[96] *Playing Tricks with Dodd-Frank*, *supra* note 5.
[97] Trefis Team, *Regulatory Reforms Recommended by Treasury Should Benefit Large U.S. Banks*, FORBES (June 13, 2017), https://www.forbes.com/sites/greatspeculations/2017/06/13/regulatory-reforms-recommended-by-treasury-should-benefit-large-u-s-banks/#57618e09c702 [https://perma.cc/W89M-BSET] (describing ways in which the Treasury's recommendations would likely benefit large banks in the United States).
[98] *Playing Tricks with Dodd-Frank*, *supra* note 5 ("The review also calls for changes in the financing and management of the Consumer Financial Protection Bureau that would reduce its independence and effectiveness.").
[99] *See generally* A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: BANKS AND CREDIT UNIONS, *supra* note 7.
[100] *See* McLannahan, *supra* note 38 (describing positive effects of the Act).

certain to what extent the Act will be rolled back by the Financial CHOICE Act or any other statute.[101]

Daniel Marks[102]

[101] *Id.* ("Only Congress can repeal Dodd-Frank, and while House Republicans have passed a bill to undo much of the law, it is unlikely to pass in the Senate, where it would need Democratic support.").
[102] Student, Boston University School of Law (J.D. 2019).