Is Senate reg relief a scalpel or hatchet to Dodd-Frank?

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Smaller banks, particularly those banks with less than $10 billion in assets, could see relief from some obligations imposed by the 2010 Dodd-Frank Act under bi-partisan legislation (S. 2155) that passed the Senate on March 21. In addition to providing regulatory relief to community banks, the proposed “Economic Growth, Regulatory Relief, and Consumer Protection Act” is intended to increase mortgage access and provide certain protections to consumers. The bill’s passage in the Senate marks a first step in the effort to revise a number of laws impacting the financial services industry. This Strategic Perspectives provides an overview of the Senate’s vision of the reform efforts and, perhaps, a look at whether the bill will “do a big number” on the Dodd-Frank Act as promised by President Donald J. Trump.

The Economic Growth, Regulatory Relief, and Consumer Protection Act, which was introduced in November 2017 by Senate Banking Committee Chairman Mike Crapo (R-Idaho), is a bipartisan measure that is intended primarily to provide regulatory relief to many smaller banks, particularly those with less than $10 billion in assets. As noted by the Senate Banking Committee, the legislation “is targeted toward helping community banks, credit unions, mid-sized banks, regional banks and custody banks” (see Banking and Finance Law Daily, Nov. 13, 2017).

“[W]e pulled back on a blunt instrument law, Dodd-Frank, that was totally ineffective and achieved the opposite results of what it intended.”

As originally proposed, the bill only addressed measures to increase mortgage access, provide regulatory relief to community banks, and provide certain protections to consumers. The bill approved by the Senate built upon those goals and added provisions to encourage capital formation. The legislation also contains a number of provisions recommended by the Treasury Department’s June 2017 report entitled “A Financial System That Creates Economic Opportunities: Banks and Credit Unions.” The report found that those regulatory burdens caused by Dodd-Frank have reduced economic growth. It said that these regulations “have undermined the ability of banks to deliver attractively priced credit in sufficient quantity to meet the needs of the economy.”

Commenting on the bipartisan nature of the bill, Timothy Q. Karcher, a partner at the international law firm Proskauer Rose LLP, noted, “What is interesting about the Senate Bill is that it was able to garner Democratic support, and I believe it did so by leaving some of the more stringent requirements in place.”
Shortly after Senate approval, Sen. David Perdue (R-Ga), a member of the Senate Banking Committee, remarked, “Yesterday, we pulled back on a blunt instrument law, Dodd-Frank, that was totally ineffective and achieved the opposite results of what it intended. Since Dodd-Frank was enacted over 1,700 small banks have gone out of business. Many because they were unable to afford to comply with the 2,319 pages and 390 new regulations imposed by Dodd-Frank.” He added, “Two-thirds of the U.S. Senate put the national interests above self-interests and passed a bipartisan bill that will change the face of lending for community banks and regional banks across our country.”

Significant portions of S. 2155 affect consumer credit. Title I of the bill, “Improving Consumer Access to Mortgage Credit,” is intended to encourage banks to participate in making loans, in many cases by broadening exemptions or exclusions from the more strict requirements of the Dodd-Frank Act. Titles III and VI add consumer protection provisions to existing laws and include sections that focus on veterans, homeowners, and student loan borrowers. Title III is “Protections for Veterans, Consumers, and Homeowners”; Title VI is “Protections for Student Borrowers.”

Titles II and IV are intended to provide regulatory relief to community banks by tailoring regulations. Finally, Title V, which was added during debate on S. 2155, is intended to further clarify the division of responsibility between federal and state securities regulators; encourage capital formation; and changes some rules for closed-end companies, investment companies outside of the U.S. mainland, and hedge and private equity funds.

Regulatory Relief

The bulk of regulatory relief afforded to community banks can be found in Titles II and IV of the legislation. These provisions would reduce some the operational restrictions and burdens placed on community banks by the Dodd-Frank Act.

Capital. A number of provisions in Titles II and IV address concerns raised by community banks regarding burdens placed on them by the banking agencies’ regulatory capital framework.

At the time the Office of the Comptroller of the Currency, Federal Reserve Board, and Federal Deposit Insurance Corporation adopted their regulatory capital rules in 2013, the agencies noted that community banks had concerns regarding the rules’ application to their operations. For instance, then-Comptroller of the Currency Thomas J. Curry noted that the “new capital rule not only improves the quantity and quality of capital, but does so in a way that minimizes the burden on community banks and savings associations” (see Banking and Finance Law Daily, July 9, 2013).

However, a subsequent 2016 analysis by the Federal Reserve Bank of Philadelphia found that while the rise in total capital requirements primarily affected large banks, certain requirements may have disproportionately affected small banks due to the types of loans held in their portfolios.
To allay these concerns, the Economic Growth, Regulatory Relief, and Consumer Protection Act would take a number of steps to alleviate the regulatory burden imposed on community banks by the banking agencies’ regulatory capital rules.

**Leverage ratio.** Section 201 would require the three banking agencies to establish a community bank leverage ratio of tangible equity to average total consolidated assets of not less than eight percent and not more than 10 percent. Banks with less than $10 billion in total consolidated assets that maintain tangible equity in an amount that exceeds the community bank leverage ratio will be deemed to be in compliance with capital and leverage requirements.

**ADC loans.** Given the increased risk-weighting of certain loans in the agencies’ regulatory capital rules, Section 214 of S. 2155 would require that certain credit facilities that finance the acquisition, development, and construction (ADC) of real property will not be subject to a heightened risk weighting under risk-based capital rules if certain criteria are met. Specifically, the banking agencies will only be able to require a bank to assign a heightened risk weight to a high volatility commercial real estate (HVCRE) exposure if that exposure is an HVCRE ADC loan.

**Custodial bank SLR.** Another provision in Title IV, Section 402, would require the OCC, Fed, and FDIC to amend their regulatory capital rules to specify that funds of a “custodial bank” that are deposited with a central bank will not be taken into account when calculating the supplementary leverage ratio (SLR) as applied to the custodial bank. A bank's supplementary leverage ratio is generally calculated as a ratio of its tier 1 capital to total leverage exposure.

The agencies’ SLR typically only applies to banks using the Advanced Approaches capital framework. Generally, these banks are large, internationally active banking organizations with at least $250 billion in total consolidated assets or at least $10 billion in total on-balance sheet foreign exposure.

For purposes of Section 402, the term “custodial bank” would be defined as any depository institution holding company predominantly engaged in custody, safekeeping, and asset servicing activities, including any insured depository institution subsidiary of such a holding company.

This change is intended to exempt these particular banks from the SLR requirements, since their holdings in central banks consist mainly of cash and low-risk securities.

A final provision of S. 2155 that would provide community banks relief from the banking agencies’ regulatory capital rules can be found in Section 403. In that provision, the OCC, Fed, and FDIC would be directed to classify qualifying investment-grade, liquid and readily-marketable municipal securities as level 2B liquid assets under their Liquidity Coverage Ratio final rule.

The liquidity coverage ratio is the ratio of a financial firm’s high-quality liquid assets to its projected net cash outflow over a short term—generally 30 days. The largest, most internationally active financial institutions must maintain a LCR of at least 1:1.
Section 403 is based on bill—S. 828—introduced by Sen. Mike Rounds (R-SD) in April 2017. At the time he introduced S. 828, Rounds noted that exclusion of high quality municipal debt created “a disincentive for banks to hold their positions in the municipal-debt market, potentially making it harder for state and local governments to issue bonds to fund infrastructure projects.”

**Volcker Rule relief.** The Economic Growth, Regulatory Relief, and Consumer Protection Act provide two instances of regulatory relief from the requirements of Section 619 of the Dodd-Frank Act, commonly referred to as the Volcker Rule. The language of the Volcker Rule prohibits or places restrictions on certain types of proprietary trading or investment fund activities conducted by “banking entities” and nonbank financial companies supervised by the Fed.

Although the regulations implementing the Volcker Rule provide banking entities with $10 billion or less in assets with accommodations from the Volcker Rule’s compliance program requirements, these banks have still been required to expend considerable resources to ensure that their activities do not constitute prohibited proprietary trading.

**Community bank exemption.** Under Section 203 of the Economic Growth, Regulatory Relief, and Consumer Protection Act, banking entities will be exempt from the Volcker Rule if they have: less than $10 billion in total consolidated assets, and total trading assets and trading liabilities that are not more than five percent of total consolidated assets.

The House Financial Services Committee is to consider a bill, H.R. 4790, the Volcker Rule Regulatory Harmonization Act, in a March 21, 2018, markup hearing that would exempt community banks from the Volcker Rule. H.R. 4790 would also give the Fed exclusive rulemaking authority for the Volcker Rule.

*The “relatively small risk that these institutions pose to the financial system does not justify the compliance burden of the [Volcker Rule].”*

This exemption was recommended in the Treasury Department June 2017 report entitled **A Financial System That Creates Economic Opportunities: Banks and Credit Unions.** The report noted that the “relatively small risk that these institutions pose to the financial system does not justify the compliance burden of the rule, and the risk posed by the limited amount of trading that banks of this size could engage in can easily be addressed through existing prudential regulation and supervision.”

**Naming restrictions.** Another provision of S. 2155, Section 204, would resolve a “statutory error” in the text of the Volcker Rule that limited the ability of bank holding companies and their affiliates, which would include investment advisers, to sponsor hedge funds and private equity funds. That “statutory error” prohibits a covered fund from using the name of a sponsor. Section 204 would permit certain hedge or private equity funds to share names with their bank-affiliated investment adviser.
Section 204 is similar to a House bill introduced by Rep. Michael Capuano (D-Mass) in June 2017. Under H.R. 3093, the “Investor Clarity and Bank Parity Act,” banking entities other than depository institutions and their holding companies should be permitted to share a name with funds they sponsor, provided that the separate identity of the funds is clearly disclosed to investors. The House of Representatives passed the H.R. 3093 by a voice vote on Dec. 11, 2017.

Weighing in on the Volcker Rule changes, Karcher, noted, “I think with the new administration it was inevitable that congress would revisit some of the requirements of the Volcker Rule and Dodd-Frank with a financial regulatory reform bill.” He added, “The changes to the Volcker Rule will allow smaller banks to operate with more freedom than their larger counterparts, and that can create issues in the future.”

**Structural and operational changes.** Other provisions found in Titles II and IV of the Economic Growth, Regulatory Relief, and Consumer Protection Act provide additional relief from other regulatory requirements.

**Enhanced prudential standards.** Section 401 of S. 2155 would raise the asset threshold for automatic application of Dodd-Frank enhanced prudential standards from $50 billion to $250 billion. The Fed would also be given the authority to tailor regulations to a bank’s business model and risk profile.

The changes made by Section 401 would maintain the Fed’s authority to apply any enhanced prudential standard to any bank with total assets of more than $100 billion as necessary to mitigate risks to financial stability or promote safety and soundness.

**Stress tests.** Section 401 would also make a number of changes to the Dodd-Frank stress test requirements. The Fed would be required to conduct periodic supervisory stress tests on banks with between $100 billion and $250 billion in total assets. The threshold for required annual company-run stress tests for mid-sized banks would be raised from $10 billion to $250 billion.

Regarding the changes to enhanced prudential standards thresholds, Proskauer’s Karcher questioned whether “the pendulum is swinging too far in the other direction for smaller banks”. He further noted, “Raising the limits for enhanced prudential standards and stress testing from $50 billion to $250 billion means that only the largest banks will be tested on a regular basis, while smaller and mid-sized banks will see a relaxation of some of the testing and other requirements.”

**Small bank holding companies.** Section 207 raises the consolidated asset threshold of the Fed’s Small Bank Holding Company Policy Statement from $1 billion to $3 billion.

The Policy Statement permits the formation and expansion of small bank holding companies with debt levels that are higher than what would be permitted for larger bank holding companies. The original Policy Statement issued in 1980 set the qualifying asset threshold at $150 million. In 2006, the Fed increased this threshold to $500 million. In April 2015, the Fed issued a final rule to implement Public Law 113-250, which required the Fed to raise the policy statement threshold to $1 billion.
Call Reports. Section 205 directs OCC, Fed, and FDIC to issue regulations that would streamline reporting requirements for banks with less than $5 billion in total assets. Generally, eligible depository institution would be subject to reduced reporting requirements when the institution makes the first and third report of condition for a year.

Recently the agencies did finalize a streamlined Call Reports for both small and large banking institutions (see Banking and Finance Law Daily, Jan. 4, 2018).

Examination cycle. Section 210 would allow well-managed and highly capitalized banks with up to $3 billion in assets to have full-scope, on-site examinations every 18 months, rather than every 12 months. Under current law, only banks with up to $1 billion in assets may qualify for the 18-month examination cycle. The current asset threshold of $1 billion was added by Section 83001 of the Fixing America’s Surface Transportation Act (FAST Act). Prior to the FAST Act change, the 18-month exam cycle has previously been limited to institutions with less than $500 million in assets.

National bank treatment. Finally, federal savings associations with less than $20 billion in total consolidated assets would be permitted, under Section 206, to elect to operate with the same powers and duties as national banks without being required to convert their charters.

Consumer credit, consumer protection

Significant portions of S. 2155 affect consumer credit in one way or another. Title I of the bill, “Improving Consumer Access to Mortgage Credit,” is intended to encourage banks to make more mortgage loans by broadening exemptions or exclusions from the more strict requirements of the Dodd-Frank Act. Titles III and VI add consumer protection provisions to existing laws and include sections that focus on veterans, homeowners, and student loan borrowers. Title III is “Protections for Veterans, Consumers, and Homeowners”; Title VI is “Protections for Student Borrowers.”

“The primary purpose of this legislation is to make targeted changes to simplify and improve the regulatory regime for community banks, credit unions, midsize banks and regional banks to promote economic growth”—Sen. Crapo.

During debate on the bill, Senate Banking Committee Chairman and bill sponsor Mike Crapo (R-Idaho) said that “The primary purpose of this legislation is to make targeted changes to simplify and improve the regulatory regime for community banks, credit unions, midsize banks and regional banks to promote economic growth.” He also asserted that the bill would restore community banks’ ability to use the competitive advantage they derive from understanding their customers’ needs.

Mortgage lending. One of the Dodd-Frank Act’s many efforts to enhance systemic stability while also protecting customers was aimed at reducing banks’ incentives to make risky, or possibly even abusive, mortgage loans. Creditors (all creditors, not just banks) are prohibited from making residential mortgage loans unless they have first engaged in an appropriate analysis that documents that the borrowers
will be able to meet their mortgage loan payment obligations and pay their real estate taxes, assessments, and insurance premiums. A violation of this restriction is a violation of the Truth in Lending Act (15 U.S.C. §1693c) that subjects the lender to civil liability and administrative enforcement actions.

The Dodd-Frank Act also created the “qualified mortgage”—a mortgage loan that would be presumed to satisfy the ability-to-repay standards because it met specified criteria relating to the loan and the borrower. There has been some concern that smaller banks have found it difficult or expensive to make loans that do not meet the qualified mortgage criteria, with the result that some have made fewer loans. In particular, loans that meet the needs of some creditworthy borrowers but that do not meet the qualified mortgage criteria have become less available.

Section 101 of S. 2155 would address this problem by creating a safe harbor for mortgage loans made by a bank or credit union with less than $10 billion in assets. These loans would be deemed to be qualified mortgages if they met a reduced set of criteria, as long as they were not voluntarily sold by the original creditor other than to another bank or credit union. The restrictions include:

- no prohibited prepayment penalties;
- point and fees of no more than 3 percent of the loan amount;
- no negative amortization or interest-only options; and
- underwriting of fixed-rate loans based on full amortization over the loan term, with proper documentation, taking into consideration taxes, insurance, and assessments.

“*This bill chips away at key mortgage rules put in place after the last crisis. It includes several provisions that, when taken together, weaken transparency, inclusiveness, and fairness in mortgage lending*”—Sen. Brown.

Of course, not all senators agree with the changes. According to Sen. Sherrod Brown (D-Ohio), the Banking Committee’s Ranking Member, “this bill chips away at key mortgage rules put in place after the last crisis. It includes several provisions that, when taken together, weaken transparency, inclusiveness, and fairness in mortgage lending . . . The bill makes it easier for some lenders to mislead families into mortgages they can’t afford—and takes away those families’ right to take the bank to court.”

The section’s provisions are similar to those passed by the House as H.R. 2226.

**Appraisals.** Two sections of Title I would address loan appraisal requirements.

Section 103 attempts to ease problems caused by a lack of qualified appraisers in some rural areas. A mortgage loan for less than $400,000, secured by property in a designated rural area, could be extended without the ordinarily-required appraisal if the lender has been unable to secure the services of an appraiser who is on the lender’s approved list in a reasonable period of time. To be permitted to take advantage of this exemption, the lender must attempt to obtain an appraisal from at least three
qualified appraisers within three days after having given the borrower the required closing disclosure form, and it must document that no qualified appraiser could provide an appraisal within five business days of a reasonable and customary time limit.

Only a federally-regulated loan originator can rely on this exemption, and the loan could not be transferred voluntarily other than to a federally regulated institution that would keep the loan in its portfolio. Loans deemed high-cost under TILA still would require appraisals, and regulatory agencies would retain the ability to require appraisals if doing so were necessary to meet safety and soundness concerns.

Section 102 would modify the TILA independent appraiser requirements (15 U.S.C. §1693e(i)). Ordinarily, lenders are required to compensate appraisers at a market-based “customary and reasonable” rate. However, concerns have been raised that this requirement could prevent appraisers from donating their services to charitable organizations, with Habitat for Humanity being the often-cited example.

S. 2155, Section 102 would provide specifically that an appraiser who donates his services to an organization that is eligible to receive tax-deductible contributions would be deemed to have been properly compensated. It is comparable to H.R. 2255.

**Escrow requirements.** Currently, TILA requires that lenders in many situations establish escrow accounts for the payment of taxes, insurance, and some similar periodic expenses before a loan secured by a consumer’s principal dwelling may be consummated (15 U.S.C. §1693d). However, the Consumer Financial Protection Bureau has the authority to adopt a rule that exempt loans made by smaller institutions that operate in rural markets, make a limited number of loans each year, and hold those loans in portfolio. (The Bureau in fact has adopted some exemptions, at 12 CFR 1026.35(b).)

Section 108 of S. 2155 would require the CFPB to adopt an exemption. The exemption, which would benefit banks and credit unions with assets of $10 billion or less, would apply if the lender originated no more than 1,000 first-lien mortgages in the prior year and made a loan in a rural area during that year. The lender may not require escrow accounts for other comparable loans.

However, the exemption is not available if the loan is a “higher-priced” loan that, when consummated, was subject to an agreement that it would be transferred to an ineligible institution. Escrow accounts still would be required for such loans.

H.R. 3971, which the House has passed, also seeks to address escrow account exemptions.

**Home mortgage disclosures.** The Home Mortgage Disclosure Act requires depository institutions to collect and make available a great deal of information on the mortgage loans it originates or purchases. The information must be itemized in specific ways. HMDA data is important because it can reveal whether the institution might be in violation of anti-discrimination laws. It also can be relevant if the institution files a merger or acquisition application. The section is comparable to H.R. 2954, which the House has passed.
S. 2155 would, in Section 104, reduce the burden on smaller banks and credit unions—those with assets of less than $30 million or less that made fewer than 500 closed-end mortgage loans, or 500 open-end lines of credit, in each of the two preceding years. Institutions that qualified for relief would be exempt from the need to group mortgage loans by total points and fees, annual percentage rates, and prepayment penalties. Also, they would be exempt from the need to group loans and completed loan applications by nine specific criteria.

Any institution that was rated “needs to improve” at its two most recent Community Reinvestment Act examinations, or was rated “substantial noncompliance” at its most recent exam, would be required to fulfill the more stringent HMDA duties.

Section 104 also would require a study and report to the relevant Congressional committees of the effect the statutory changes have had on the amount of HMDA data that is available.

Senator Elizabeth Warren (D-Mass) asserted during debate that the bill would make 85 percent of banks exempt from reporting HMDA data. “If this bill passes, there will be entire communities where there won’t be enough data to figure out whether borrowers are getting ripped off. Entire communities where it will be impossible to monitor whether people are getting cheated because of their race or their gender,” she charged.

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Other mortgage lending changes. S. 2155 also would make several somewhat less important changes that would affect specific aspects of mortgage lending:

• Section 105 would provide that a loan secured by a one- to four-family dwelling that was not a credit union member’s primary dwelling would not be treated as a member business loan.
• Section 106 would give some mortgage loan originators who change jobs the ability to work for 120 days as they pursue registration or a state license. It also would protect from civil liability government officials who make good faith errors when collecting or reporting information on loan originators who are registered with the Nationwide Mortgage Licensing System and Registry.
• Section 107 would provide that employees of companies that make manufactured or modular homes would not be considered to be mortgage originators as long as they are not compensated for taking loan applications.
• Section 109 would allow a mortgage lender to offer a borrower a loan with a lower APR without triggering a three-day waiting period before closing the loan.
Consumer credit. Moving on from the mortgage lending changes, S. 2155 Titles III and VI would add some potentially useful credit-based consumer protections through amendments to the Fair Credit Reporting Act, Truth in Lending Act, Servicemembers Civil Relief Act, and other statutes. Different changes would benefit not just consumers generally, but specifically would aid servicemembers and their dependents, elderly consumers, student loan borrowers, and home loan borrowers.

Security freezes. Under Section 301, consumer reporting agencies would be required to place a security freeze on a consumer’s file, at the consumer’s request, and to place or remove the freeze without charge. A security freeze would prevent the agency from reporting the contents of the file; however, the bill includes 10 categories of exceptions to the reporting ban.

A reporting agency would be required to put a freeze into effect no later than one business day after a consumer’s request by telephone or “secure electronic means,” or within three business days after receiving a mailed request. Reporting agencies would be obligated to create websites where consumers could request security freezes. Within five business days after a security freeze is put in place, the agency would be required to confirm the freeze with the consumer and tell the consumer how to remove the freeze.

Section 301 also sets the standards for how a freeze could be temporarily removed. Like placing a freeze, removing a freeze would be free of charge.

Exceptions to the reporting ban include file releases to permit the review or collection of existing accounts, background screening, government investigations, and insurance underwriting. A security freeze also would not block the release of a consumer’s file information to facilitate a prescreened offer of credit or insurance, although a consumer still would have the ability to request to be excluded from these lists.

Credit reporting agencies could not report a veteran’s medical debt until the debt was at least one year old. If the debt has been settled or paid in full, it could not be reported at all.

Special protections for “protected consumers”—those who are less than 16 years old or are under a guardianship or conservatorship—are included.

In another effort to shield consumers from identity theft, the duration of fraud alerts would be extended to one year, rather than the current 90 days.

One important aspect of the FCRA security freeze provision is that related state laws would be preempted, meaning that reporting agencies would need to comply only with federal law.

Servicemembers. S. 2155 includes four separate sections that are intended to enhance consumer protections for servicemembers.

First, responding to problems that some servicemembers have experienced due to slow payment of medical bills by the Department of Veterans Affairs, S. 2155 would restrict the reporting of “veteran’s
medical debt.” This is defined by Section 302 as debt for medical care that was provided to a veteran by a non-VA care provider, with the VA’s approval, and debt for VA-provided care for which the VA has incorrectly charged the veteran.

Credit reporting agencies could not report a veteran’s medical debt until the debt was at least one year old. If the debt has been settled or paid in full, it could not be reported at all. There would be a special procedure that a veteran could use to contest the inclusion of medical debt in a consumer report, and the VA would be required to create a database that agencies could use to verify the claim that a debt was a veteran’s medical debt. These provisions are similar to those of H.R. 2683.

Second, reporting agencies would be required to offer free electronic credit monitoring services to all servicemembers on active duty. Servicemembers would need to sign up for the service, show evidence they were on active duty, and tell the agency how to contact them.

However, reporting agencies that failed to offer credit monitoring services would have no liability to servicemembers, even if the failure was willful. Only administrative enforcement would be available. Again, comparable state laws would be preempted.

Third, the SCRA provision delaying home mortgage foreclosures would be reinstated permanently. Currently, a foreclosure on a servicemember’s mortgage is invalid if it occurs while she is on active duty or within the first 90 days after her active duty ends. This 90-day term was extended to one year in 2012, but the extension was subject to a Jan. 1, 2015, sunset date. Under Section 313, the one-year term would be made permanent.

A fourth benefit would be conferred by Section 309. If a mortgage insured by the VA were refinanced, the agency could not insure the new mortgage unless the loan originator disclosed all of the fees, costs, and expenses that would be paid by the borrower and showed that those amounts will be recouped within three years based on lower monthly payments. The refinancing would need to satisfy a “net tangible benefit test” that includes a lower interest rate.

In addition, there would be a “loan seasoning” requirement, under which refinancing loans (other than cash-out loans) could not be insured unless at least 210 days had passed since the first payment or the due date for the sixth payment has arrived.

The statutory provisions do not apply to cash-out loans; however, the VA would be instructed to adopt regulations that imposed comparable requirements.

**Real estate-related provisions.** In addition to the SCRA’s protection against foreclosures, Title III would affect other laws that affect real estate-related credit more generally. These include:

- Section 304 would permanently reenact the Protecting Tenants at Foreclosure Act, which allows residential tenants at least 90 days to find a new residence after the home is sold in foreclosure. It is comparable to H.R. 915.
• Section 305 would allow the Treasury Department to use the Hardest Hit Fund to assist in the remediation of lead and asbestos hazards.
• Section 306 would broaden the services that are available under the Department of Housing and Urban Development’s Family Self-Sufficiency Program.
• Section 307 would apply TILA mortgage loan underwriting requirements to loans under the Property Assessed Clean Energy Program, which finances improvements that make homes more energy efficient using loans secured by the homes. It is comparable to H.R. 1958.
• Section 310 would require Fannie Mae and Freddie Mac to rely only on credit scores that have been validated and approved, but would permit the use of any validated and approved credit score. This section is titled “Credit score competition,” and is seen as potentially replacing the FICO score. It is comparable to H.R. 898.

Elderly consumer protection. Title III includes one other provision of note. Section 303 would create a safe harbor for financial institution bank secrecy officers, and for broker-dealers with comparable duties, who report the possible financial exploitation of a senior citizen to appropriate government agencies. Their employers would receive similar protection.

The section outlines the necessary bank secrecy officer training. It also permits states to enact laws that grant even greater protection. The provisions of H.R. 3758 would offer a similar safe harbor.

Should a student loan borrower die, the creditor would be required to release all cosigners from their liability under the loan.

Student loans. Title VI of S. 2155 includes protections for student loan borrowers and their cosigners.

Section 601 would amend TILA provisions on cosigners. It would prevent a creditor from declaring a student loan to be in default simply because a cosigner has died or filed for bankruptcy. Also, should a student loan borrower die, the creditor would be required to release all cosigners from their liability under the loan.

Section 602 would amend the FCRA to allow a student loan borrower to rehabilitate a delinquent loan and have it removed from his credit report. However, this ability would rely on the financial institution’s decision to offer a loan rehabilitation program, and the section would not require institutions to do so. Simply put, if the institution offered a loan rehabilitation program that called for the borrower to make enough consecutive on-time payments to demonstrate an ability and willingness to pay, and the borrower made those payments, the borrower could ask the institution to stop reporting the default.

Rehabilitation would be a one-time event.

If the institution were supervised by one of the federal regulatory agencies, it would need to obtain that regulator’s approval of the program terms and conditions.

Section 603 would direct the Treasury’s Financial Literacy and Education Commission to determine best practices for higher education institutions to improve students’ financial literacy. Schools also
would be encouraged to provide students with “useful and necessary information” about student loans. However, no school would be required to implement the best practices.

Securities provisions

Title V of S. 2155, plus a few provisions from other titles, would address securities laws and regulations. Topics covered include the definition of “covered securities,” algorithmic trading, financial exploitation of seniors, cybersecurity, and hedge fund names. Although Senators submitted more than 150 amendments, the only substantive amendment came in the form of a manager's amendment (S. Amdt. 2151) consisting of a substitute version of the bill that added seven securities-related provisions to the five that were contained in the original version of S. 2155. This section examines each of the securities provisions in the context of the seven broader categories into which they fall. The section concludes with an analysis of additional House securities bills that could be in play during future negotiations between House and Senate leaders over the fate of S. 2155.

The exchange parity provision, however, also would end the role currently played by the Commission in determining whether listing standards are substantially similar to those of specified exchanges.

Exchange listing standards. The National Securities Markets Improvement Act re-allocated and clarified the division of duties between federal and state securities regulators, including by defining the term “covered securities.” Section 501 of S. 2155 would amend Securities Act Section 18(b)(1) to achieve parity among national securities exchanges by revising the term “covered securities” to reference securities qualified for trading under Exchange Act Section 11A(a)(2). The exchange parity provision, however, also would end the role currently played by the Commission in determining whether listing standards are substantially similar to those of specified exchanges. One of the goals of S. 2155 is to update Section 18 by eliminating references to stock exchanges that have now been merged into other entities.

The North American Securities Administrators Association had previously commented on the identical Senate provision in S. 2155. NASAA said the Senate version of exchange parity would lower listing standards by removing language that requires these standards to be substantially similar to those of the exchanges named in existing Securities Act Section 18(b)(1)(A). NASAA has since reiterated its concerns with respect to similar House-passed legislation (H.R. 3978).

Capital formation. S. 2155 would aid capital formation by opening the Securities and Exchange Commission’s Regulation A to more companies and closing a gap in the Jumpstart Our Business Startups (JOBS) Act. The bill also would require the Commission to have a greater role in the work of an advisory body on capital formation issues.

Under Section 508, the Commission would be directed to remove the requirement under Rule 251 of Regulation A that an issuer of securities must satisfy a variety of requirements, including that the issuer is not subject to reporting under Exchange Act Sections 13 or 15(d) immediately before
the offering. Rule 257 also would be amended to conform to the revision to Rule 251 (H.R. 2864, which passed the House 403-3).

Section 504 includes the Supporting America’s Innovators Act of 2017 (H.R. 1219 and S. 444) and would amend the Investment Company Act to fix an oversight by the JOBS Act that left in place a 1940s-era investor threshold that hinders investments by venture capital funds. Specifically, the bill would amend the exemption in Investment Company Act Section 3(c)(1) to apply to a qualifying venture capital fund with up to 250 persons. “Qualifying venture capital fund” would be defined as a venture capital fund with no more than $10 million in aggregate capital contributions and uncalled committed capital, as periodically indexed for inflation.

Under Section 503, the Commission would have to review findings and recommendations submitted by the Government-Business Forum on Capital Formation and publicly disclose any action the Commission plans to take on any recommendations made by the forum. The House passed identical legislation (H.R. 1312) by a vote of 406-0, while S. 416 passed the Senate by unanimous consent.

Investment companies and advisers. Under S. 2155, closed-end companies would get broader proxy powers, while Puerto Rico and other U.S. territories would achieve regulatory parity with mainland U.S. rules for investment companies. Certain hedge funds also would be allowed to have names that would be prohibited under current banking regulations.

Section 509 contains a provision that would allow closed-end companies to use offering and proxy rules currently available to operating companies. The SEC would have to adopt regulations to implement this provision within two years of enactment. The Commission also would have to mull the amount of disclosure needed to be a well-known seasoned issuer. Moreover, S. 2155 provision includes text that tracks an amendment offered by Rep. Bill Foster (D-Ill) to the equivalent House bill, which would extend parity to interval funds that make periodic repurchase offers. However, regardless of the S. 2155 provision, a registered closed-end company could still invoke Securities Act Rule 482 with respect to the distribution of sales materials.

Section 506 contains text equivalent to the U.S. Territories Investor Protection Act of 2016 (H.R. 1366 and S. 484), which strikes the text of Investment Company Act Section 6(a)(1) to bring U.S. territories within the Investment Company Act. A transitional period would allow for compliance with the new statutory scheme, although the Commission may extend the transitional period for up to six years. A similar bill previously sailed through the House Financial Services Committee and was approved by the House by voice vote. The Senate likewise approved an identical bill by unanimous consent.

Section 204 of S. 2155 would permit a hedge fund or private equity fund to have the same name as a banking entity that is an investment adviser to the fund, provided that the investment adviser is not an insured depository institution or bank holding company, does not have the same name as an insured depository institution or bank holding company, and the name does not use the word “bank.”

Technology and cybersecurity. Two provisions in S. 2155 address technology issues. Under Section 502, the SEC would have to submit a report to Congress on algorithmic trading. Likewise, the
Treasury Department would have to report to Congress under Section 216 regarding the preparedness of federal banking regulators and the SEC to handle cybersecurity issues.

**Registration exemption for compensatory benefit plans.** Section 507 of S. 2155 would direct the Commission, within 60 days of enactment, to revise Securities Act Rule 701(e) to raise the additional disclosure threshold with respect to compensatory benefit plans from $5 million to $10 million, adjusted for inflation (H.R. 1343, which passed the House 331-87, and S. 488, which passed the Senate by unanimous consent).

**SEC administration.** Under Section 505, which contains the Securities and Exchange Commission Overpayment Credit Act (H.R. 1257 and S. 462), and which cleared the House Financial Services Committee 59-0 and passed the Senate by unanimous consent, the SEC would have to credit future fee assessments of national securities exchanges and associations for overpayments the exchanges or associations made and informed the SEC of within a 10-year period. The provision, however, would apply only to fees required to be paid before enactment of S. 2155.

**Looking ahead: additional securities bills in the mix?** While S. 2155 perhaps represents nearly the maximum extent of bipartisanship on Dodd-Frank Act tweaks, it seems likely that the House will attempt to negotiate the inclusion of at least some additional provisions before a final Dodd-Frank Act corrections package, with S. 2155 at its core, could become law. With respect to securities provisions, House leaders may draw from a deep pool of bills that won House approval during 2017 and early 2018, including the highly controversial Financial CHOICE Act. Although it is possible that some controversial provisions might be considered, it is more likely that a final Dodd-Frank Act corrections package may include any of the numerous bills that have recently passed the House with significant bipartisan support.

Of the 18 securities bills passed by the House during the 115th Congress, five of them already have equivalents in S. 2155. Seven bills that passed the house by voice vote or by overwhelming majorities would seem to be the mostly likely candidates for inclusion in a wider Dodd-Frank Act corrections package because they would be less likely to disturb the delicate bipartisan coalition in the Senate, where any corrections bill will have to get at least 60 votes. Those bills range in subject matter from mergers and acquisition brokers to capital formation to risk-based examinations of credit rating agencies to a technical fix for family offices.

A select number of more controversial bills may also be considered in future negotiations between the two chambers. These bills include a measure to create a micro offering safe harbor, to require the SEC to issue a subpoena for algorithmic trading source code, to provide a temporary exemption from Sarbanes-Oxley Act Section 404(b) for low-revenue issuers, to regulate proxy advisory firms, and to raise the Regulation A Tier 2 limit from $50 to $75 million. Each of these bills, however, faced a nearly party-line vote before the full House.

Depending on how Senate and House leaders proceed with S. 2155, it is possible that the House could seek to pass additional related bills that were marked-up in January 2018. A few of these bills are controversial and received close votes during the mark-up session, but a small number of them received near unanimous committee approval. Two bills that garnered wide bipartisan support would
address small business capital formation after natural disasters and provide for a national strategy on combating transnational criminal organizations. Those with less bipartisan support include bills that would allow open-end investment companies to make an election to avoid certain money market fund reform requirements, toughen the pleading standard and quantum of proof required in suits for breach of fiduciary duty against advisers to investment companies, and bar the consolidated audit trail from accepting most forms of personally identifying information.

The derivatives reform package contained in the CFTC reauthorization bill (H.R. 238), which passed the House in January 2017, is somewhat of an outlier. While some provisions in the reauthorization bill could receive bipartisan support, others might be too controversial for many lawmakers. Still, the House FSC in February 2018 held a hearing on nine related bills aimed at revising Dodd-Frank Act provisions on swaps and security-based swaps. These bills generally seek to harmonize rules adopted, or yet to be adopted, by the SEC and the CFTC, while also providing targeted relief for derivatives end-users. Moreover, the House FSC is expected to mark up the Derivatives Fairness Act and related bills in late March.

For more information on securities bills that passed the House during the 115th Congress, please click here.

Conclusion

S. 2155 is not an attempt to rewrite the Dodd-Frank Act. Most significant parts of that legislation, such as the Federal Deposit Insurance Corporation's orderly liquidation authority and the existence and organization of the Consumer Financial Protection Bureau, would be untouched. Instead, the bill would largely do what its proponents claim—attempt to provide regulatory relief that is focused on the demands of community banks. It probably would not be Trump's “big number.”

However, the custody services provisions clearly would benefit only a few of the largest banks. Also, one could ask whether increasing the threshold for enhanced prudential standards consideration to $250 billion would benefit at least some banks that are larger than what might be thought of as community banks.

The immediate question, though, is whether the bill can be passed at all. The conflict between Republican members of the House of Representatives and Democratic senators has the potential to prevent further progress. House members would seem to have a reasonable argument that bills the House has passed with bipartisan support ought to be added to S. 2155, but it is possible the Senate Democrats have no inclination to make further compromises.

Of course, there is no way to know whether provisions of any of those House bills were included in the senators’ negotiations and omitted from the resulting bill. As the above discussion shows, S. 2155 already includes many provisions that are comparable to bills considered or passed by the House.

House Financial Services Committee Chairman Jeb Hensarling (R-Texas) has warned that the House will not “rubber stamp” S. 2155. However, it is likely that any House effort to amend S. 2155 to reach farther than it now does, such as by making changes to the CFPB, would doom the bill.
Ultimately, passage might depend on whether either the House Republicans will back off from their refusal to move the bill without making their own changes or the Senate Democrats will consider making some apparently uncontroversial changes.

That this is an election year, when all of the House members and one-third of the Senators will need eventually to stop working on congressional business and begin actively campaigning for reelection, could further complicate matters.