Securities and Banking Regulations News

The Trump Administration's First 100 Days: Impact on Securities and Banking Regulations

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Executive Summary

Some of the Trump Administration's financial policy goals are beginning to take concrete form after having evolved beyond presidential campaign rhetoric as the new Administration nears 100 days in office. This white paper examines the impact the Trump Administration has already had on securities and banking regulations:

- First, on the securities side of the ledger, the Administration has altered oil & gas and related conflict minerals disclosures. The nomination of persons to head both the SEC and CFTC also will likely result in significant policy changes.
- Second, this white paper examines the Trump Administration's impact on banking regulations, including the ongoing political and court battles over the fate of the Consumer Financial Protection Bureau.
- Third, both the securities and banking sections of this white paper review the applicable portions of the Financial CHOICE Act, first introduced in 2016 and recently re-proposed, the singular Dodd-Frank Act corrections proposal currently being floated by lawmakers.

Inside

Introduction

With an unconventional campaign that resulted in the election of Donald J. Trump as the 45th President of the United States, along with Republican control of both houses of Congress, the stage has been set to bring about changes in regulation of the banking and securities industries. Some of these changes have already had a direct impact on securities regulations, while other changes may come in the form of new policy directions for the SEC and CFTC.

Meanwhile, executive orders and other memoranda seeking to impose greater Administration control over agency rulemaking coupled with a broad-based

review of "core" financial regulatory principles could yield still more proposals to alter banking regulations. Not to be forgotten, the director-led structure of the CFPB hangs in the balance as the Trump Administration mulls its authority to fire the current director and the full D.C. Circuit reviews the constitutionality of the CFPB's structure.

SEC rules targeted while specific agency policy direction remains unclear

Congress and the Trump Administration moved quickly to disapprove the SEC's resource extraction issuers rule and the Commission's Acting Chairman, Michael Piwowar, has called upon the SEC's Division of Corporation Finance to issue updated guidance on the agency's conflict minerals rule. Meanwhile, the personalities that will shape SEC policy are becoming clearer with the nomination of Jay Clayton to be SEC chairman. But the Trump Administration's pre-inauguration plan to "dismantle" the Dodd-Frank Act appears to have been temporarily eclipsed by the Administration's and Congress's desire to first tackle health care and tax reform.

Oil & gas disclosure rule disapproved. In mid-February, President Trump signed a joint Congressional resolution that disapproved the SEC's resource extraction issuers rule. The Commission adopted the Dodd-Frank Act-mandated rule last summer which, under the timing provisions of the Congressional Review Act, made the rule eligible for a second look by lawmakers.

This was the first time Trump had signed CRA legislation, although he said more CRA actions were planned, according to a transcript of the signing ceremony published by the White House. Trump had earlier pledged to "dismantle" the Dodd-Frank Act, but the disapproval resolution only nullifies the SEC's implementing rule and does not repeal the authority for the rule contained in Dodd-Frank Act Section 1504. The Republican-led effort to push the joint resolution through Congress emphasized the costs of the rule to businesses and the impact of foreign competition on U.S. firms. Democrats had emphasized the rule's anti-corruption goals.

The SEC's latest version of the resource extraction issuers rule was the product of a re-write following protracted court battles. Legislation to repeal the rule passed Congress just as the White House was unveiling a series of executive orders and other memoranda directing reviews of the Department of Labor's fiduciary standard rule and a wide-ranging review of U.S. financial system regulations.

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The revised resource extraction issuers rule applied broadly to payments that are "not de minimis," meaning one or a series of related payments of at least $100,000. The rule included exemptions for acquired companies and for exploratory activities, and it reiterated that the Commission could grant other case-by-case exemptions. The rule became effective September 26, 2016, and compliance was set to begin for fiscal years ending on or after September 30, 2018.

The SEC could issue a new resource extraction issuers rule, but that may be difficult to do since the CRA prohibits the adoption of a rule in substantially the same form as a disapproved rule without specific, new legislative authority. A group of Democratic Senators urged the SEC to re-issue the resource extraction issuers rule in a form that aligns with similar rules in the E.U. and Canada. The senators also said that while they could accept the SEC once again taking a case-by-case approach to exemptive relief under the rule for country laws that ban certain disclosures, they argued that a blanket exemption approach would undermine the Dodd-Frank Act mandate.

Conflict minerals guidance adds complexity. New guidance from the SEC's Corporation

Finance Division (CorpFin) provides that staff will not recommend enforcement if companies do not comply with the due diligence part of the conflict minerals rule. But this guidance may be more complex than it seems.

The SEC's conflict minerals rule, like the resource extraction issuers rule, has been lauded by those seeking to advance human rights around the globe and criticized as a legislative and regulatory overreach by those who view securities regulation as traditionally focused on financial disclosures to investors. The Dodd-Frank mandate to inquire into conflict minerals supply chains also plays into recent trends for companies to voluntarily engage in environmental, social and governance reforms to satisfy various corporate constituencies.

The Commission adopted the conflict minerals rule to implement Dodd-Frank Act Section 1502's mandate to press companies to improve their handling of supply chains for tin, tantalum, tungsten, and gold. Required disclosures are made on Form SD, which accommodates specialized disclosures, including for the now defunct resource extraction issuers rule. The final conflict minerals rule created a complex set of inquiries that can result in varying degrees of compliance, including the filing of a conflict minerals report.

Litigation ends—Three years ago, a three-judge panel of the D.C. Circuit Court upheld the bulk of the conflict minerals rule against a challenge under the Administrative Procedure Act and the Exchange Act. That same panel, however, faulting a narrow, but to the drafters of Dodd-Frank Act Section 1502 a critical, provision on freedom of speech grounds further held:

> that [the applicable Dodd-Frank Act provision], and the Commission's final rule,..., violate the First Amendment to the extent the statute and rule require regulated entities to report to the Commission and to state on their website that any of their products have "not been found to be 'DRC conflict free.'"

In August 2015, the panel reheard the case and reached the same conclusion, albeit with one additional justification to conform its opinion to a related en banc D.C. Circuit decision applying the Supreme Court's commercial speech doctrine. The SEC chose to forgo appealing the conflict minerals decision to the Supreme Court. The district court has since issued its final judgment remanding the conflict minerals rule to the SEC.

As a result, except for the portion held invalid by the courts, the SEC's conflict minerals rule remains in effect. But the agency's latest guidance likely increases the complexity of companies' decisions about how to comply with the rule.

New SEC guidance—In January, just weeks after President Trump took office, and nearly two months before the district court's final judgment, newly appointed Acting SEC Chairman Piwowar issued a statement reciting what he viewed as defects in the rule and recalling his personal experience visiting Africa as highlighting for him how those defects burden companies that must comply with the rule. Specifically, Piwowar directed SEC staff to mull whether existing guidance issued in April 2014 remained "appropriate" and, in the interim, if more guidance is needed.

Piwowar's statement also noted that the phased implementation of the conflict minerals rule would soon end and many smaller companies would have to comply. Large companies, especially those with global business, already have several years' compliance experience and will have done much of the groundwork for the next round of disclosures due in May 2017. Companies with global business also will be planning to comply with newly approved European Union rules on conflict minerals that are binding as of January 1, 2021 (E.U. Council; E.U. Parliament).

Piwowar invited public comments on the question of new guidance. As of April 11, 2017, the SEC had received over 12,000 comments, mostly form letters, although the 284 individual comment letters run the gamut from urging repeal, expressing support, or recommending specific adjustments. Commenters include Amnesty International USA, which intervened in the conflict minerals litigation, and Stein Mart, Inc.,

Elm Sustainability Partners LLC, NYSE, and the Sustainability Accounting Standards Board.

CorpFin's April 2014 guidance addressed what a company should do in the event it is (is not) required to file a conflict minerals report. The existing guidance also left open the possibility that a company could voluntarily describe a product as "DRC conflict free" if it also provided an independent private sector audit, but no company would be required to describe its products in this manner or as "DRC conflict undeterminable" or "not found to be 'DRC conflict free.'"

The April 2017 guidance on conflict minerals only addresses enforcement with respect to the due diligence efforts required by companies that must reach Item 1.01(c) of Form SD. Specifically, CorpFin will not recommend enforcement action to the Commission if a company only files the disclosures under Items 1.01(a) and (b) of Form SD. Those provisions require a registrant to conduct a reasonable country of origin inquiry and to disclose on Form SD its determination based on the RCOI and to briefly describe the RCOI it undertook.

Acting Chairman Piwowar issued a separate statement related to the new guidance in which he said the due diligence requirement's purpose was to "to enable companies to make the disclosure found to be unconstitutional." He later summed up his request for additional CorpFin guidance: "In light of the foregoing regulatory uncertainties, until these issues are resolved, it is difficult to conceive of a circumstance that would counsel in favor of enforcing Item 1.01(c) of Form SD." The acting chairman also confirmed that he has asked SEC staff to prepare a recommendation for Commission action on the conflict minerals rule.

The April 2017 guidance makes no explicit reference to the April 2014 guidance, nor does it explicitly say the prior guidance is superseded. The two January 2017 statements by CorpFin and Piwowar, as well as the April 2017 CorpFin statement, speak only of "whether the 2014 guidance is still appropriate and whether any additional relief is appropriate in the interim" and of public comments on "the desirability of additional guidance or whether relief under the rule is appropriate."

New and Existing Guidance Compared

April 2014 Guidance		April 2017 Guidance
Reasonable country of origin inquiry	Disclose reasonable country of origin inquiry. Briefly describe the inquiry.	Still requires filing of disclosures per Form SD, Items 1.01(a) and (b).
Due diligence	Describe due diligence.	CorpFin will not recommend enforcement if company does not file due diligence disclosures per Form SD, Item 1.01(c).
Product within Form SD Items 1.01(c)(2) or (c)(2)(i)	No need to identify product as "DRC conflict undeterminable" or "not found to be 'DRC conflict free.'" Disclose (i) facilities used to produce the conflict minerals; (ii) country of origin of the minerals; and (iii) efforts to determine the mine or location of origin.	
Voluntary election to describe product as "DRC conflict Free" in conflict minerals report	Guidance does not require this. If elect voluntary description, obtain IPSA (IPSA not otherwise required).	

Source: Adapted from (i) Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule, Keith F. Higgins, Director, SEC Division of Corporation Finance (April 29, 2014); and (ii) Updated Statement on the Effect of the Court of Appeals Decision on the Conflict Minerals Rule, SEC Division of Corporation Finance (April 7, 2017).

Significantly, CorpFin cautioned that its new guidance is subject to renewed action by the Commission, only states the division's view about enforcement, and does not state a "legal conclusion" about the conflict minerals rule. The new CorpFin guidance may raise more questions than it answers for some companies, especially those well into disclosure preparation for the upcoming deadline. Since the conflict minerals rule became effective, some companies have gone beyond what they have been expected to disclose under SEC guidance, including obtaining IPSAs. Companies subject to the conflict minerals rule will need to make individualized decisions about what to file in their next Forms SD, which are due May 31. Overshadowing these decisions is the potential for liability under Exchange Act Section 18 for misleading statements in documents filed with the Commission.

How Do the Authorities Line Up?

Document	Status
Dodd-Frank Act Section 1502.	Statutory authority for SEC's conflict minerals rule. Still in force. Allows presidential directives for SEC to waive or revise rule for up to two years, or for termination of disclosure requirement.
SEC conflict minerals rule.	Still in effect. Rule remanded by U.S. District court to Commission. Open question regarding whether the statute or the SEC rule required portion of rule held to violate First Amendment.
FAQ within Exchange Act Rules C&DIs: • Questions 1-12 (May 30, 2013). • Questions 13-21 (April 7, 2014).	Question (12) states that the failure to timely file a Form SD will not result in an issuer losing eligibility to use Form S-3. The FAQ notes that the Commission's partial stay and the April 29, 2014 CorpFin guidance may have superseded some of the items addressed in the FAQ.
CorpFin Guidance (April 29, 2014).	Extensive instructions on how to comply after first D.C. Circuit opinion upheld bulk of rule, but found part of rule violated the First Amendment.
Partial stay (May 2, 2014).	Conflict minerals rule partially "stayed pending the completion of judicial review, at which point the stay will terminate." Commission elected to forgo appeal to the U.S. Supreme Court; the district court remanded the rule to the Commission.
CorpFin Guidance (April 7, 2017).	Statement that CorpFin "will not recommend enforcement action to the Commission if companies, including those that are subject to paragraph (c) of Item 1.01 of Form SD, only file disclosure under the provisions of paragraphs (a) and (b) of Item 1.01 of Form SD."
Exchange Act Section 18.	Provides for private action alleging misleading statements in filed documents. States elements of action and defense, and gives court discretion to allocate costs and attorney's fees among parties. Action must be brought within one year of discovery of facts giving rise to suit and within three years after accrual. Form SD is filed per final conflict minerals rule (proposal required disclosure to be furnished as exhibit to annual report).

Source: Adapted from (i) Dodd-Frank Act Section 1502; (ii) SEC Release No. Release No. 34–67716 (August 22, 2012); (iii) Dodd-Frank Wall Street Reform and Consumer Protection Act Frequently Asked Questions, Conflict Minerals, issued May 30, 2013 and April 7, 2014; (iv) Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule, Keith F. Higgins, Director, SEC Division of Corporation Finance (April 29, 2014); (v) In the Matter of Exchange Act Rule 13p-1 and Form SD, Release No. 34-72079 (May 2, 2014) (order issuing partial stay); (vi) Updated Statement on the Effect of the Court of Appeals Decision on the Conflict Minerals Rule, SEC Division of Corporation Finance (April 7, 2017); and (vii); Exchange Act Section 18.

Moreover, in February, several media outlets and securities law blogs reported that the Trump Administration may be considering invoking the Dodd-Frank Act's revise or waive language regarding the conflict minerals rule based on a purported draft memorandum, but that possibility has not yet occurred. The Dodd-Frank Act permits the president to direct the Commission to revise or waive the conflict minerals rule for up to two years if the president transmits his determination that such action is in the U.S.'s national security interest and he states the reasons for the determination. The Dodd-Frank Act also permits the president to terminate the conflict minerals disclosure requirement if he determines and certifies to Congress "that no armed groups continue to be directly involved and benefitting from commercial activity involving conflict minerals."

Spotlight on Piwowar; State Department request—Even before CorpFin issued its new conflict minerals guidance, Piwowar's direction to agency staff to review exiting guidance had evoked concern from members of Congress. Senator Bob Menendez (D-NJ), joined by Sens. Elizabeth Warren (D-Mass), Brian Schatz (D-Hawaii), and Senate Banking Committee Ranking Member Sherrod Brown (D-Ohio), wrote to the SEC's inspector general to request an investigation into Piwowar's use of his powers as acting chairman. The senators questioned whether Piwowar's actions regarding the conflict minerals rule, the reopening of comments on the pay ratio rule, and new limits imposed on the enforcement division's subpoena authority were lawful and consistent with the SEC's mission.

Meanwhile, the State Department has asked "stakeholders" to comment on how the department and other agencies can best support responsible sourcing of conflict minerals. The department's notice observed that the U.S. "remains committed" to partnering with others to sever ties between armed groups in Africa's Great Lakes Region and the conflict minerals trade. Comments are due by April 28, 2017.

Clayton nominated to head SEC. President Trump announced his intent to nominate Sullivan & Cromwell LLP deal lawyer Jay Clayton to be the next SEC chairman several weeks before inauguration day. Clayton has since been reported out of the Senate Banking Committee by a vote of 15-8 and awaits consideration by the full Senate. In the Banking Committee, Ranking Member Sherrod Brown (D-Ohio) led the opposition to Clayton by focusing on the nominee's potential conflicts of interest, an issue he had raised regarding Clayton's predecessor, Mary Jo White, whom the committee approved by a vote of 21-1 and who has returned to private practice.

SEC nominee Clayton said he had "no specific plans for attack" on Dodd-Frank and that rulemaking required by statute should continue.

At his nomination hearing, Clayton testified that he would energetically pursue the SEC's fundamental responsibility of investor protection, said bad actors have no place in U.S. capital markets, and pledged "no favoritism." When asked about the possibility he may have to recuse himself from numerous matters due to his prior work in private practice, Clayton said he believed that any recusals would be manageable since other commissioners would be available to act in specific matters. Clayton said in reply to questions about Trump adviser Carl Icahn that he would continue to talk to a variety of market participants but that those talks might be inadvisable in some contexts.

Aside from a stream of questions about potential conflicts of interest, Clayton also provided one of the more detailed explanations to date of his possible policy views. Clayton said initial public offerings remained sluggish because of costs and other burdens on companies but also because of the abundance of private capital, which allows growing companies to stay private longer. With respect to enforcement, Clayton suggested that individual accountability can be a more effective deterrent than firm accountability.

The Dodd-Frank Act was a target of President Trump during the 2016 election, although so far it has taken a back seat to other legislative priorities such as health care and taxes. SEC nominee Clayton said he had "no specific plans for attack" on Dodd-Frank and that rulemaking required by statute should continue.

If confirmed, the Independent Clayton would join Piwowar, a Republican, and Commissioner Kara Stein, a Democrat, thus providing the Commission a likely majority in many matters. But the Commission would still have two open seats.

CFTC nomination and reorganization. President Trump announced his intention to nominate CFTC Commissioner J. Christopher Giancarlo, the CFTC's acting chairman since January, to be the agency's chairman. Giancarlo became a commissioner in June 2014 after having been nominated by President Obama. Previously, Giancarlo was executive vice president of GFI Group Inc., a financial services firm providing wholesale brokerage services in cash and derivatives markets.

Since becoming acting chairman, Giancarlo has proposed a significant restructuring of the CFTC and a regulatory policy focused on economic growth, enhancing U.S. financial markets, and "Rightsizing" the agency's rulebook. The restructuring emphasizes market intelligence and will result in some functions now performed by the Division of Market Oversight shifting to the Division of Enforcement. The DMO, however, will be further reorganized to house a new market intelligence branch; Giancarlo recently announced the appointment of the unit's first chief market intelligence officer. The acting chairman also plans to address "flawed" swaps regulations.

During his time as a commissioner, Giancarlo encountered controversy over a position limits report that he later withdrew after Sen. Warren voiced concerns. Policy-wise, Giancarlo has backed the overall direction of the Dodd-Frank Act's swaps reforms, but in a white paper he also questioned the rules applicable to swap execution facilities.

In terms of rulemaking, the CFTC may eventually finish rules on position limits and automated trading. The comment period on proposed Regulation AT ends May 1, 2017. Legislatively, the CFTC still awaits its Congressional reauthorization, although the House in January passed a bill (H.R. 238) that would extend the agency's operations, reform the CFTC, and provide for additional derivatives end-user relief.

Giancarlo and Commissioner Sharon Bowen are currently the CFTC's only commissioners, pending any additional nominations to fill the three vacancies. President Trump withdrew the pending nominations of Brian Quintenz and Christopher Brummer, whom President Obama had re-nominated after the start of the new Congress.

Administration and Congressional legislative goals. The long-term impact of a Trump White House on financial regulation remains somewhat unclear, but the new administration may focus on the repeal or replacement of portions of the Dodd-Frank Act. The Trump transition website stated that its financial policy would be to "dismantle" the Dodd-Frank Act. By contrast, the Republican Party platform published ahead of last year's Republican convention included language that called for a return to the Depression-era Glass-Steagall Act's separation of traditional banking from investment banking and insurance activities, a view that also prompted a bipartisan group of Senators to push for a modern version of Glass-Steagall in the last Congress. The same group of senators, led by Sen. Warren, has re-introduced the Glass-Steagall bill (S. 881) in the 115th Congress.

Still, it remains unclear how the seemingly conflicted Trump-RNC goals will take shape in the 115th Congress. Significant Democratic minorities in both chambers, but especially in the Senate, could play a role in shaping any financial legislation. House Financial Services Committee Ranking Member Maxine Waters (D-Calif), has vowed to hold the Trump administration accountable for its financial policies, including by urging the inspectors general to monitor financial regulators.

House FSC Chairman Jeb Hensarling (R-Texas) said he would work with the Trump Administration on "bold and ambitious solutions." The re-election of Hensarling to the chairman role will enable him to re-introduce legislation known as the "CHOICE Act" that would repeal or replace portions of the Dodd Frank Act. Ranking Member Waters has already characterized the expected revised version of this bill as the "Wrong Choice" because in her view it is a politicized roll-back of the Dodd-Frank Act.

Blueprint for Dodd-Frank repeal or replacement? Last year, Chairman Hensarling published a draft of the Financial CHOICE Act of 2016 (H.R. 5983; Substitute version from House FSC mark-up), recently re-proposed and modified (Discussion Draft), which is the latest proposal for making comprehensive revisions to the Dodd-Frank Act. In 2015, then-Senate Banking Committee Chairman Richard Shelby (R-Ala), proposed his own Dodd-Frank corrections bill (S. 1484), while Ranking Member Sherrod Brown (D-Ohio) introduced a competing proposal focused on smaller banks and consumers. The CHOICE Act, if enacted as drafted, could dramatically alter the Dodd-Frank Act by repealing some provisions and revising many others.

CHOICE Act repeal provisions—The CHOICE Act would repeal several major provisions of the Dodd-Frank Act:

- Title I—Financial Stability Act of 2010 (many sections impacted) (Section 211) (v. 2.0 at Section 151).
- Title II—Orderly liquidation provisions (Section 221) (v. 2.0 at Section 111).
- Title VIII—Financial market utility designation authority (Section 251) (v. 2.0 at Section 141).
- Title VI—Provisions related to the Volcker Rule ban on many forms of proprietary trading (Section 901) (v. 2.0 at Section 901).
- Title IX—Impacts 40 provisions within the Investor Protection and Securities Reform Act of 2010 (Section 449) (v. 2.0 at Section 857).
- Title XV—Repeals the bulk of this title, including provisions requiring companies to make disclosures about conflict minerals, resource extraction issuers, and mine safety (Section 455) (v. 2.0 at Section 862). Questions have arisen over whether the securities laws are the proper locus of "social" disclosures, but several bills introduced in the last Congress would expand this type of disclosure to human trafficking in companies' labor supply chains (H.R. 3226; S. 1968).
- Dodd-Frank Act Section 413—Repeals a provision that adjusted the definition of accredited investor and would instead amend Securities Act Section 2(a)(15) to codify portions of the accredited investor definition that are now part of Regulation D while extending accredited investor status to licensed/registered brokers and investment advisers, and to professionals with related investment education or job experience (Section 452) (v. 2.0 at Section 860).
- Fiduciary standard—The revised CHOICE Act repeals the Department of Labor's fiduciary standard rule prior to the SEC issuing an equivalent rule for broker-dealers. The question of whether the DOL or the SEC should act first in this area has permeated the debate over the fiduciary standard. Former SEC Chair Mary Jo White testified to Congress that SEC staff "provided technical assistance" to the DOL before the DOL adopted its version of the fiduciary standard.

Lawmakers in the 115th Congress have begun to move smaller bills that resemble CHOICE Act provisions and which could eventually pass individually or as part of a larger package, possibly in the context of other must-pass legislation such as an appropriations bill. Yet the big question now is whether the revised CHOICE Act can pass the Senate.

Securities and derivatives provisions in the CHOICE Act—The CHOICE Act would alter many securities provisions, including the rulemaking and enforcement processes at the SEC, while also subjecting proxy advisory firms to new oversight. The bill also would make changes to derivatives laws. Some of these provisions have been previously introduced, and in some instances, have passed the House or Senate.

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- Officer and director bars—Repeals Securities Act Section 8A(f) and Exchange Act Section 21C(f); The bill would add Exchange Act Section 4G to provide for non-automatic disqualifications.
- SEC penalties—The bill would increase penalties in civil and administrative enforcement proceedings and add a fourth tier to penalties provisions in the securities laws to deal with recidivists. The Exchange Act penalty for controlling persons regarding insider trading would be raised to the greater of $2.5 million (from $1 million, and $500,000 more than the first version of the CHOICE Act) or three times the amount of the profit gained or loss avoided. The Stronger Enforcement of Civil Penalties Act of 2017 (S. 779), introduced in the 115th Congress by Sen. Jack Reed (D-RI) and co-sponsored by two additional Democrats and Sen. Chuck Grassley (R-Iowa), would likewise revise existing penalties under the securities laws and create a new tier of penalties for recidivists.
- SEC enforcement procedure—The CHOICE Act would require the Commission to have a process for closing investigations and to create the role of enforcement ombudsman. The bill also would give individuals who receive Wells notices the right to appear before the Commission while also directing the Commission to approve and publish an updated enforcement manual.
- Sarbanes-Oxley Act—The bill would require the PCAOB to abolish the Investor Advisory Group, make certain confidential information available to Congress in addition to the Commission, and strike a SOX provision that funds the PCAOB's merit scholarship program. Another provision would increase the amount of penalties the PCAOB can impose in enforcement actions.
- CFTC division directors—The revised bill dropped a provision that would amend Commodity Exchange Act Section 2(a)(6)(C) to provide that the agency's division directors (i.e., "heads of the units") would serve at the pleasure of the Commission. Currently, the Chairman appoints the heads of major administrative units, subject to Commission approval.
- Derivatives—The bill would direct the SEC and the CFTC to work together to eliminate inconsistencies from their separate rules on derivatives.
- M&A brokers—The CHOICE Act would create a new securities law exemption for mergers and acquisitions brokers. The North American Securities Administrators Association previously adopted a model rule for an M&A broker registration exemption. Bills introduced in the 114th Congress (S. 1010; H.R. 37; H.R. 686; and H.R. 1675, which passed the House by a vote of 265-159) would achieve similar results, although questions remain whether they are needed in light of an SEC no-action letter. Representative Rep. Bill Huizenga (R-Mich) has re-introduced similar legislation (H.R. 477) in the 115th Congress.
- Small business issues—The bill would create within the SEC the Office of the Advocate for Small Business Capital Formation and the Small Business Capital Formation Advisory Committee. President Obama signed into law a similar bill (Public Law No. 114-284) last December. The revised CHOICE Act would amend Exchange Act Section 40 by eliminating the Federal Advisory Committee Act exemption for the SEC's new committee. But the CHOICE Act also contains crowdfunding and micro offering provisions similar to those introduced in other bills in the 114th and 115th Congresses.
- Regulatory oversight by Congress—Financial regulators, including the SEC and the CFTC, would have to provide more cost-benefit analysis in rule proposals, could not issue a final rule without a 90-day public comment period, and could not publish a final rule if the quantified costs exceed the quantified benefits. A person adversely affected or aggrieved by a final regulation could sue the agency in the D.C. Circuit Court for violations of the regulatory analysis requirement; the court could stay the regulation's effective date, and the court must vacate the regulation unless the agency can show by clear and convincing evidence that irreparable harm would result from vacating the regulation. The CHOICE Act also contains a Congressional approval procedure for major rules and a related disapproval procedure for non-major rules.
- FIRREA penalties and whistleblowers—The bill would amend the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, a key part of the federal government's post-Great Recession enforcement activity, to

raise the civil penalty amount from $1 million to $1.5 million, and the penalty for continuing violations from the lesser of $1 million per day or $5 million, to the lesser of $1.5 million per day or $7.5 million. But the bill contains no provision to adjust the maximum $1.6 million amount that can be awarded to FIRREA whistleblowers (former U.S. Attorney General Eric Holder and then-SEC Chair Mary Jo White have both criticized the low amount available under FIRREA as compared to other federal whistleblower laws). But other bills introduced in the 114th Congress could be models for enhanced whistleblower protections (H.R. 4619; S. 2591).

- SEC whistleblowers—The revised CHOICE Act includes a provision that would deny Dodd-Frank Act whistleblower status to culpable whistleblowers. A culpable whistleblower is a person who is "responsible for" or "complicit in" the activity underlying the whistleblower award claim. These terms are further defined by the proposed legislation.
- Proxy advisers—The CHOICE Act contains provisions that would require proxy advisers to register with the Commission. Some proxy advisers currently register with the Commission as pension consultants under an exemption from the prohibition on SEC registration under the Investment Advisers Act that otherwise applies unless the adviser meets the assets under management requirement. The Hensarling bill is similar to the Corporate Governance Reform and Transparency Act of 2016 (H.R. 5311), introduced by Rep. Sean Duffy (R-Wis) and co-sponsor Rep. John Carney (D-Del). The Duffy bill cleared the House FSC by a vote of 41-18, albeit without the backing of Ranking Member Waters.
- Proxies and shareholder proposals—The revised CHOICE Act would significantly alter the shareholder proposal requirements by changing the eligibility threshold to eliminate the dollar amount threshold and by increasing the holding period from one to three years. The bill also would increase the tiered resubmission thresholds, currently set at 3, 6, and 10 percent, to 6, 15, and 30 percent. Shareholder proposals also could not be submitted by proxies on behalf of a shareholder. Moreover, the revised bill would bar the Commission from requiring a single ballot. The Commission issued its proposal for a universal proxy last year.

Financial Services Regulation Under the Trump Administration

Dodd-Frank and Banking. On the campaign trail, as he secured the delegates needed to become the Republican nominee, Trump called the reforms in the Dodd-Frank Act harmful to the economy and said he planned to overhaul Dodd-Frank. In an August 2016 speech before the Detroit Economic Club, he called for a temporary moratorium on new agency regulations and stated that every federal agency will be required to prepare a list of all of the regulations that are "not necessary, do not improve public safety, and which needlessly kill jobs."

Strip back parts—After winning the presidential election, the Financial Services Policy Implementation team, which was part of the Trump presidential transition, said the "Dodd-Frank economy does not work for working people." The team added it will be working "to dismantle the Dodd-Frank Act and replace it with new policies to encourage economic growth and job creation." Prior to his nomination and subsequent confirmation as Treasury Secretary, Steven Mnuchin noted that the incoming Trump administration will strip back parts of Dodd-Frank that prevent banks from lending.

Total repeal—Although Republicans control both houses of Congress, the total repeal of the Dodd-Frank Act will probably not occur due to the small majority the Republicans hold in the Senate. For any legislation to move forward, roughly eight or nine Democrat senators will need to side with the Republican senators.

Nuclear option—It is possible that Senate Majority Leader Mitch McConnell (R-Ky) could remove the 60-vote cloture rule for legislation to move forward, but he is also deemed to be an "institutionalist" and may retain the cloture rule. However, McConnell's role as an "institutionalist" may no longer hold following the use of the "nuclear option" to confirm Neil M. Gorsuch to be an Associate Justice of the U.S. Supreme Court.

Mid-term elections—Total repeal of Dodd-Frank maybe a possibility following the 2018 mid-term elections since Democrats will have to defend 25 of the 33 Senate seats being contested.

Then again, political pundits are already calling the 2018 mid-term elections a referendum on the Trump presidency with Democrats having a chance to regain control of either or both Houses of Congress.

Roll back of Dodd-Frank—Rolling back provisions of the Dodd-Frank Act maybe more feasible. Legislation introduced by Rep. Jeb Hensarling (R-Texas), Chairman of the House Financial Services Committee in the 114th Congress, was to serve as a template. The Financial CHOICE Act was labeled by Hensarling labeled a "new legislative paradigm" for banking and the capital markets.

Financial CHOICE Act 2.0—In advance of Financial Services Committee hearing to be held on April 26, 2017, Hensarling released a discussion draft of his latest version of the Financial CHOICE Act, commonly referred to as the Financial CHOICE Act 2.0.

Hensarling noted, "Republicans are eager to work with the President to end and replace the Dodd-Frank mistake with the Financial CHOICE Act because it holds Wall Street and Washington accountable, ends taxpayer-funded bank bailouts, and unleashes America's economic potential," said Chairman Hensarling. "We want economic opportunity for all, bailouts for none. We want real consumer protections that will give you more choices. Our solution grows the economy from Main Street up, creates more opportunities for working families to get ahead, and levels the playing field with no more Wall Street bailouts."

The Financial CHOICE Act 2.0 retains many of the same provisions as the earlier legislation. The updated version would allow strongly capitalized banks to opt out of burdensome regulations, end too-big-to-fail, and impose greater accountability on regulatory agencies. The plan also would repeal Dodd-Frank's controversial Volcker Rule.

Other provisions of the Financial CHOICE Act 2.0 would:

- repeal the Orderly Liquidation Authority, found in Title II of the Dodd-Frank Act, and incorporate a new "bankruptcy not bailout" chapter into the Bankruptcy Code so that a large financial institution that takes on unsustainable risks could fail without disrupting the financial system;
- require cost-benefit tests of new regulations;
- convert financial regulatory agencies now headed by single directors, such as the Office of the Comptroller of the Currency, into bipartisan commissions; and
- require that the Federal Reserve Board "describe the strategy or rule of the Federal Open Market Committee for the systematic quantitative adjustment" of its policy instruments.

Trump has already taken steps to slow the pace of regulatory activity.

Recently, the House of Representatives approved, by a voice vote, H.R. 1667, the Financial Institutions Bankruptcy Act that would enable the Bankruptcy Code to be better equipped to handle the potential failure of a financial institution, while shielding taxpayers and the economy. It should be noted that Federal Reserve Bank of New York President and CEO William C. Dudley cautioned that those advocating the use of ordinary bankruptcy rather than Title II of the Dodd-Frank Act for the resolution of a systemically important financial firm must "ensure that the bankruptcy regime would work in a way that does not destabilize the financial system."

Wrong Choice Act—Following media reports that the Financial CHOICE Act 2.0 was to be released, Rep. Maxine Waters (D-Calif), Ranking Member of the Financial Services Committee, stated, "The so-called Financial Choice Act is a piece of legislation that will essentially kill the most important aspects of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which was designed to prevent another financial crisis." The lawmaker said that the Republicans and President Donald Trump are prioritizing Wall Street over hard-working Americans and putting the nation's economic security at risk. She called the bill the "Wrong Choice Act."

Executive action. Even if legislation to roll back or repeal the Dodd-Frank Act grinds to a halt in Congress, the president has already taken steps to slow the pace of regulatory activity.

One-in-two-out—As one of his first actions as president, Trump signed Executive Order 13771 that requires any executive department or executive agency that proposes a new regulation, during the current fiscal year, to identify at least two regulations to be repealed. The order also requires that, beginning in fiscal year 2018 and going forward, each agency identify to the OMB each regulation that increases incremental costs, the offsetting regulations, and the best approximation of the total costs or savings associated with each new regulation or repealed regulation. It could be argued that the executive order has no impact on independent agencies like the Fed or the Federal Deposit Insurance Corporation.

Shortly after the Executive Order was signed, Public Citizen, the Natural Resources Defense Council, and the Communications Workers of America filed the lawsuit in a federal court in the District of Columbia. The groups alleged that the Executive Order "exceeds President Trump's constitutional authority, violates his duty under the Take Care Clause of the Constitution, and directs federal agencies to engage in unlawful actions that will harm countless Americans, including plaintiffs' members.," They further alleged that repealing two regulations for the purpose of adopting one new one, based only on a directive to impose zero net costs and without any consideration of benefits, is arbitrary, capricious, an abuse of discretion, and not in accordance with law.

Impact on 'Core Principles'—Although the one-in-two-out Executive Order may not have impact on the banking agencies, a subsequent Executive Order singed on Feb. 3, 2017, could impact the banking agencies.

Executive Order 13772, entitled "Core Principles for Regulating the United States Financial System," requires the Treasury Department to conduct a 120-day review of financial regulations to assess the impact these regulations have on seven core principles:

- empower Americans to make independent financial decisions and informed choices in the marketplace, save for retirement, and build individual wealth;
- prevent taxpayer-funded bailouts;
- foster economic growth and vibrant financial markets through more rigorous regulatory impact analysis that addresses systemic risk and market failures, such as moral hazard and information asymmetry;
- enable American companies to be competitive with foreign firms in domestic and foreign markets;
- advance American interests in international financial regulatory negotiations and meetings;
- make regulation efficient, effective, and appropriately tailored; and
- restore public accountability within Federal financial regulatory agencies and rationalize the Federal financial regulatory framework.

Trump staffing of agencies could provide "wide latitude to reinterpret or roll back new rules and regulations."

Prior to the Executive Order's signing, Trump remarked, said, "we expect to be cutting a lot out of Dodd-Frank, because, frankly, I have so many people, friends of mine that have nice businesses that can't borrow money, they just can't get any money because the banks just won't let them borrow because of the rules and regulations in Dodd-Frank." It should be noted that the Executive Order does not explicitly mention the Dodd-Frank Act.

Hensarling said he was "very pleased that President Trump signed this executive action, which closely mirrors provisions that are found in the Financial CHOICE Act to end Wall Street bailouts, end 'too big to fail,' and end top-down regulations that make it harder for our economy to grow and for hardworking Americans to achieve financial independence."

To assist the Treasury Secretary's review of the regulatory impact on the Core Principles, the American Bankers Association is releasing a series of white papers to identify key regulatory topics. To date, the ABA has released white papers on liquidity, capital, and fair lending. The trade association expects to also release a white paper on housing/mortgage finance.

Staffing of agencies. A failed or prolonged attempt to making changes to the Dodd-Frank Act would not necessarily doom chances to reinterpret or roll back new rules and regulations. Trump's appointments to various independent financial regulatory agencies could, as noted by Justin Schardin, director of the Bipartisan Policy Center's Financial Regulatory Reform Initiative, provide "wide latitude to reinterpret or roll back new rules and regulations."

Although some of the agencies may be headed up by members that could reinterpret or roll back regulations, any type of action would still need to go through the normal proposal and comment process.

It was also observed with the various agency appointments that the role of the Financial Stability Oversight Council could change, with the new Treasury Secretary using FSOC's statutory mandate as a means for coordinating regulators to streamline existing regulations.

However, as reported in the media, there is a backlog of executive branch nominations that require Senate confirmation. For example, there are no nominees for Assistant Secretary for Financial Institutions, Assistant Secretary for Financial Markets, or Assistant Secretary for Financial Stability at the Treasury Department.

Moreover, Trump administration will also need to fill vacancies at the Fed and Office of the Comptroller of the Currency. Fed Governor Daniel Tarullo officially stepped down in early April 2017, and Comptroller of the Currency Thomas Curry's five-year term recently expired. It is widely speculated that Trump will nominate Randal Quarles as the Fed's vice chair in charge of banking oversight.

Fate of CFPB. Since its inception, Republican lawmakers have sought to abolish or diminish the role of the Consumer Financial Bureau; in fact the 2016 Republican platform called the CFPB a "rogue agency" with a director exercising "dictatorial powers unique in the American Republic."

Reform or repeal—Republican lawmakers have consistently sought to replace the single directorship with a commission and to make the bureau subject to normal congressional appropriations process. During the first few months of the 115th Congress, there have been a number of bills introduced in the House and Senate to achieve these ends.

> *Flaws in CFPB's structure may not be resolved until late 2017 or beyond.*

Sen. Ted Cruz (R-Texas) and Rep. John Ratcliffe (R-Texas) has introduced S. 370 and H.R. 1031 that would outright abolish the CFPB.

The Consumer Financial Protection Bureau Accountability Act of 2017, which was introduced by Sen. David Perdue, would subject the CFPB to normal congressional appropriations process. Another bill, S. 365 introduced by Sen. Mike Round (R-SD), would amend the Consumer Financial Protection Act of 2010 to remove the funding cap relating to the transfer of funds from the Fed to the CFPB. Essentially, cutting the bureau's funding mechanism.

'You're fired!'—Although Congressional Republicans have taken steps to abolish or neutralize the CFPB, the October 2106 case of PHH Corporation v. Consumer Financial Protection Bureau which called into question the constitutionality of the bureau's structure could have a more far reaching effect on the nature of the CFPB.

To remedy the constitutional deficiency of the bureau's structure, a panel of the U.S. Circuit Court of Appeals for the District of Columbia would place the CFPB under the Executive

Branch, thereby allowing the president to dismiss the director at will.

At the start of the Trump presidency that ruling could have allowed the president to dismiss the current director, Richard Cordray, and replace him with a person that would take a less vigorous approach to enforcement of consumer financial laws.

However, in February 2017, the U.S. Court of Appeals for the District of Columbia Circuit has granted the CFPB's request for a full-court rehearing of *PHH Corp. v. CFPB*. The full court also vacated the panel's ruling placing the CFPB under the Executive Branch, thereby precluding Trump dismissing Cordray.

The appeals court's final resolution of the PHH case will probably not be resolved until late 2017 since oral arguments are scheduled for May 24, 2017.

Depending upon how the full court of appeals rules in the PHH case, the CFPB may have a difficult time with an appeal to the Supreme Court since the bureau is required to seek concurrence from the U.S. Attorney General Jeff Sessions. Without the Attorney General's concurrence, the Trump administration effectively blocks the CFPB's decision to appeal to the Supreme Court.

Despite a final resolution in the PHH case, there is still "media chatter" that Trump may not fire Cordray at all. A recent article in POLITICO reported that "Gary Cohn [Director of the National Economic Council] gave Richard Cordray, the head of the Consumer Financial Protection Bureau, an ultimatum over dinner a few weeks ago: Go the easy way, or go the hard way." The article noted that by keeping Cordray as the CFPB Director he would be deprived of the time to fundraise for a possible 2018 gubernatorial campaign in Ohio. ■