Dodd-Frank: Consumers' Friend or Another D.C. Con Job?

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ABSTRACT

In the shadow of the worst economic recession in recent memory, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") was passed by Congress and signed into law by President Obama. This complex law was presented as the cure to just about every conceivable financial problem in the country. It promised to help consumers in multiple ways. Two of the best-known aspects of the Act are the Consumer Financial Protection Bureau (the "CFPB"), and the Financial Stability Oversight Council (the "FSOC"). The first was to protect consumers from being victimized by banks, lenders, and other financial services firms. The second was to prevent another massive taxpayer bail-out of private firms such as the AIG bailout. In light of the recent court rulings against both, a U.S. Appeals Court ruling in PHH Corp. v. CFPB and a Federal District Court determination that MetLife was not properly considered "too big to fail," it is fair to question whether Dodd-Frank actually accomplishes anything for the consumers it was supposed to protect. This paper examines both the court decisions involving Dodd-Frank and the results reportedly produced by them in light of prior legislation in many areas covered by the Act.

TABLE OF CONTENTS

ABSTRACT 140
TABLE OF CONTENTS 140
INTRODUCTION 141
I. INTENT AND RESULTS OF DODD-FRANK WITH FOCUS ON THE CFPB AND THE FSOC 141
II. COMPARISON OF THE FRAMEWORK OF LAWS TO REGULATE THE BANKING AND FINANCIAL SERVICES INDUSTRY 148
III. THE LEGAL CHALLENGES TO DODD-FRANK 149
A. *The CFPB* 149
1. The Due Process Claim 150
2. The Statute of Limitations Claim 151
3. The Single-Director Structure and the Article II Claim 152
4. Implications for the CFPB 153
B. *The FSOC* 153
IV. PROPOSED LEGISLATIVE CHANGES TO DODD-FRANK 156

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April 2019 Vol. 2 No. 2

V. RECOMMENDATIONS FOR A PATH FORWARD 159
CONCLUSION 160

INTRODUCTION

The Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") was passed by Congress and signed into law by President Obama in 2010.[1] This complex law was presented as the cure to just about every conceivable financial problem in the country. Two of the best-known aspects of the Act are the Consumer Financial Protection Bureau (the "CFPB" or the "Bureau"),[2] and the Financial Stability Oversight Council (the "FSOC" or the "Agency").[3] In light of the recent court rulings against both agencies, it is fair to question whether Dodd-Frank actually accomplished significant protection for consumers. In Part I, this paper presents a brief overview of the intent of the law compared to the reported results. In Part II, the paper examines the framework of laws to regulate the banking and financial services industry post-Dodd-Frank. Part III reviews the legal challenges to Dodd-Frank. Part IV compares some of the many proposed legislative changes to Dodd-Frank with the shortcomings of the law. Finally, Part V recommends a path forward in light of the court challenges and possible remedies for the failures of the law.

I. INTENT AND RESULTS OF DODD-FRANK WITH FOCUS ON THE CFPB AND THE FSOC

The Dodd-Frank's rationale was that the Great Recession was caused by a series of failures of the banking and financial institutions in the United States.[4] Some of the best known signs of the economic downturn were: the "Subprime Mortgage Crisis";[5] the failure of two of the three largest American car manufacturers, GM and Chrysler;[6] the failure of Lehman Brothers;[7]

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[1] *See generally* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z 124 Stat. 1376 (codified as amended in scattered sections of 7, 12, 15, 22, 31, 42 U.S.C.) (2010) (codified at 15 U.S.C. § 780).
[2] James Allen, *Big Risks in the Big Bill*, 66 FIN. ANALYSTS J. 6, 8 (2010).
[3] Takeo Hoshi, *Financial Regulation: Lessons from the Recent Financial Crises,* 49 J. ECON. LITERATURE 120, 125 (2011).
[4] Larry Bartels, *Political Effects of the Great Recession*, 650 ANNALS AM. ACAD. POL. & SOC. SCI. 47, 53 (2013).
[5] *See generally* Yulia Demyanyk & Otto Van Hemert, *Understanding the Subprime Mortgage Crisis*, 24 REV. FIN. STUD. 1848 (2011).
[6] *See* Austan D. Goolsbee & Alan B. Krueger, *A Retrospective Look at Rescuing and Restructuring General Motors and Chrysler*, 29 J. ECON. PERSP. 3, 4 (2015).
[7] Carrick Mollenkamp et al., *Lehman Files for Bankruptcy, Merrill Sold, AIG Seeks Cash*, WALL ST. J. (Sept. 16, 2008), https://www.wsj.com/articles/SB122145492097035549.

the government bailout of AIG;[8] a collapse in the stock market;[9] and a ten percent (10%) unemployment rate by the end of 2009.[10] The collapse in the home mortgage market combined with the losses in investments marked an estimated loss in wealth of $11 trillion for Americans.[11] This occurred during the second term of President George W. Bush. The GOP was held accountable for these series of failures with a sweep by the Democrats in the 2008 election.

With control of both houses of Congress and the Presidency, the Democrats were able to enact Dodd-Frank with little input from the GOP and business interests.[12] The precedent for this was laid out in 2001 when Congress passed the Sarbanes-Oxley Act of 2002 ("SOX").[13] SOX was a patchwork of laws designed to avoid the securities scandals revealed in 2001 including Enron, Worldcom, Tyco, Healthsouth, Adelphia, and others.[14] The legislators at that time conveniently overlooked the fact that the type of scandals that SOX was supposed to prevent in the future were largely already illegal under the Securities Acts of 1933 and 1934.[15] And, in fact, the law failed to prevent the stock frauds by Bernie Madoff and Allen Stanford, which were reported in 2008 and 2009, respectively.[16] In reviewing both scandals, many analysts note that the Securities and Exchange Commission ("SEC") was asleep at the switch.[17] So, in many cases, it is the enforcement of existing laws by existing agencies, not creating new laws and new agencies that might provide the most protection for the public. Further, given the bloated federal budget and the near $23 trillion national

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[8] *See* Scott E. Harrington, *The Financial Crisis, Systemic Risk, and the Future of Insurance Regulation*, 76 J. RISK & INS. 785, 785 (2009).
[9] *See id.* at 788.
[10] Justin Lahart, *Top '09 Forecasters Saw Bad Times*, WALL ST. J. (Feb. 5, 2010), https://www.wsj.com/articles/SB10001424052748703575004575043362084592270.
[11] FIN. CRISIS INQUIRY COMM'N, THE FIN. CRISIS INQUIRY REPORT 23 (2011).
[12] *But see* Ryan K. Brissette, *The Volcker Rule's Unintended Consequences*, 15 N.C. BANKING INST. 231, 238–39 (2011) (noting the influence of Republican Senator Scott Brown in curtailing regulations on banks).
[13] Pub. L. No. 107–204, 116 Stat. 745 (codified in 15 U.S.C. § 7201) (2002).
[14] *See Enron: Scandals and Governance*, 41 ECON. & POL. WKLY. 2176, 2177 (2006).
[15] *Cf.* Stephen Falanga, *Sarbanes-Oxley Impact on Banks Under Review*, METRO. CORP. COUNS., July 2006, at 16 (stating that many banks were subject to similar disclosure regulations).
[16] Josh Clark & Jane McGrath, *How Ponzi Schemes Work,* HOWSTUFFWORKS (Feb. 9, 2009), https://money.howstuffworks.com/ponzi-scheme.htm.
[17] Brian G. Cartwright, *Whither the SEC Now?*, 95 VA. L. REV. 1085, 1102 (2009).

debt,[18] reducing, not increasing, the size of the federal workforce might be more productive.

Dodd-Frank's complex structure included 236 mandates monitored by the U.S. Government Accountability Office.[19] The Act created a handful of new agencies and related enforcement regimens.[20] The two most visible agencies under the law are the CFPB and the FSOC. The first agency was created to protect consumers from being victimized by banks, lenders and other financial services firms. A U.S. Appeals Court ruling in the PPH case, discussed below, found the appointment of the Bureau's head to be unconstitutional.[21] However, that ruling, as discussed in more detail below, was later overturned by an *en banc* ruling of Appeals Court.[22] The second agency was created to prevent another massive taxpayer bail-out of a private firm such as the AIG bailout. In light of the recent Federal District Court determination that MetLife was improperly considered "Too Big to Fail," also discussed below, there are issues regarding the scope and discretion assigned to the FSOC.[23]

The CFPB was created with a broad mandate to correct a long list of complaints against various banks and financial institutions, some of which arose from the economic recession of 2008-09. Its independence from presidential removal, congressional appropriations, and the Federal Reserve Bank, among other constraints, has generated a significant range and level of criticism.[24] Moreover, this insulation from political headwinds, thought to be a positive dimension to enhance its autonomy and effectiveness, has resulted in its critics claiming that the agency will be more susceptible to bureaucratic malaise.[25] Perhaps if the Bureau were doing more of what the Act claimed it would accomplish, some of the criticism would be reduced.

The Bureau is the brainchild of academic, now Senator, Elizabeth Warren (D) of Massachusetts. In an article published in 2007, she suggested the creation of a new agency to protect the consumer from bad financial

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[18] U.S. NAT'L DEBT CLOCK, http://www.usdebtclock.org/ (last visited Mar. 4, 2019).
[19] U.S. Gov't Accountability Office, *Dodd-Frank Regulations: Agencies' Efforts to Analyze and Coordinate Their Recent Final Rules*, GAO HIGHLIGHTS (Dec. 2016), http://www.gao.gov/assets/690/681869.pdf.
[20] Daniel T. Deacon, *Agencies and Arbitration*, 114 COLUM. L. REV. 991, 1007 (2017).
[21] *See* PHH Corp. v. CFPB, 839 F.3d 1, 8 (D.C. Cir. 2016), *vacated*, 2017 U.S. App. LEXIS 2733 (D.C. Cir. Feb. 16, 2017).
[22] *See* sources cited *supra* note 97–98.
[23] *See* MetLife, Inc. v. FSOC, 177 F. Supp. 3d 219, 242 (D.C. Cir. 2016).
[24] *See* Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 858–59 (2013).
[25] *See id.* at 856.

products. She compared this to the protection of consumers from dangerous products by the Consumer Products Safety Commission.[26] The CFPB emerged in the Dodd-Frank bill, structured as a bureau of the Federal Reserve with a single director and an independent source of funding.[27]

The Bureau describes its fundamental purpose as ". . . [w]e work to give consumers the information they need to understand the terms of their agreements with financial companies," and "to make regulations and guidance as clear . . . as possible so providers of consumer financial products and services can follow the rules on their own."[28] This purpose attempts to impact both the consumer and the lender.[29] The stance that lenders need guidance insured that the law's implementation would be as complex as it has been to date. Indeed, the regulations promulgated have been widely criticized as being overburdening and stifling.[30]

The CFPB is designed to have rule-making authority, including the prohibition of unfair, deceptive, and vituperative practices.[31] The Bureau also has jurisdiction over banks and credit unions with assets over $10 billion, all nonbank mortgage originators and brokers, private student loan originators, and payday lenders.[32] The Bureau has attempted to issue regulations over a wide range of entities, from automobile finance companies to consumer reporting agencies.[33]

The Act enabled the CFPB's Office of Enforcement the power to launch federal investigations through issuing investigation demands, serving subpoenas, and compelling testimony.[34] The Bureau's powers to investigate extend not only to specifically enumerated entities, but to reasonably related persons and agencies who have evidence relevant to the Bureau's investigations.[35] Congress also authorized the Bureau to enforce consumer protection laws either through the administrative process or through litigation in federal courts.[36] Its litigation authority is independent from the De-

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[26] *See* Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY: A JOURNAL OF IDEAS, Summer 2007, https://democracyjournal.org/magazine/5/unsafe-at-any-rate/.
[27] Consumer Financial Protection Act of 2010, 12 U.S.C. § 5491 (2012).
[28] *The Bureau*, CONSUMER FIN. PROTECTION BUREAU, https://www.consumerfinance.gov/about-us/the-bureau/ (last visited Jan. 12, 2019).
[29] *Id.*
[30] *Dodd-Frank Wall Street Reform and Consumer Protection Act*, INVESTOPEDIA, https://www.investopedia.com/terms/d/dodd-frank-financial-regulatory-reform-bill.asp (last visited Jan. 19, 2019).
[31] *See* 12 U.S.C. § 5512 (2010); *see also* 15 U.S.C. § 45 (2010).
[32] *See* 12 U.S.C. § 5514 (2010); *see also* 12 U.S.C. § 5515 (2010).
[33] 12 C.F.R. §§ 1090.104–1090.108 (2018).
[34] *See* 12 U.S.C. § 5562 (2010).
[35] *See* 12 U.S.C. § 5562(c)(1) (2010).
[36] *Id.*; *see also* 12 U.S.C. § 5563 (2010); 12 U.S.C. § 5564 (2010).

partment of Justice, merely requiring notification to the U.S. Attorney General when instituting a court action.[37] In any administrative or judicial proceeding, the CFPB is enabled by law to seek appropriate relief including: rescission, restitution, damages, and public advisories of violations.[38] Moreover, the Bureau can seek punitive damages up to five thousand dollars per day during continuing violations where warranted, up to twenty-five thousand dollars per day for reckless violations, and up to one million dollars a day for intentional and knowing violations.[39] This sweeping authority of enforcement and imposition of large money damages has provided fertile ground for criticism and challenges to the Bureau's authority by numerous business groups including the Chamber of Commerce of the United States, the American Bankers Association, and The National Association of Realtors, *inter alia*.[40]

The other entity authorized by Dodd-Frank is the FSOC, an agency with the broad authority of identifying and responding to emerging risks throughout the financial system.[41] Essentially, the Agency is charged with preventing a repeat of the 2008 financial crash by proactively instituting measures to avoid placing the economy of the United States in jeopardy and ending the "too big to fail" bailouts.[42] The FSOC is chaired by the Secretary of the Treasury and includes almost all of the heads of the federal financial agencies, as well as the head of the CFPB, and state banking, insurance, and securities regulators.[43] Acting together, these federal agencies have the authority to make sweeping decisions designed to prevent the United States from entering another recession. While this goal is unlikely to be met, the agencies collective power includes breaking up large and complex companies, preventing the shopping for "friendly" regulators, creating liquidity, and creating minimum capital standards.[44] This broad delegation by Congress has subjected the FSOC to similar criticism and challenges as the CFPB.

A major foundation of the FSOC's authority was to facilitate the sharing of information in the regulatory framework so that financial institutions could not operate outside the purview of regulators. Prior to the financial

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[37] *See* 12 U.S.C. § 5564(d).
[38] *See* 12 U.S.C. § 5565(a)(2) (2010).
[39] *See* 12 U.S.C. § 5565(c)(2).
[40] *See generally* PHH Corp. v. CFPB, 881 F.3d 75 (D.C. Cir. 2018).
[41] *About FSOC*, U.S. DEP'T TREASURY, https://www.treasury.gov/initiatives/fsoc/about/Pages/default.aspx (last visited Jan. 19 2019).
[42] Cody Vitello, *The Wall Street Reform Act of 2010 and What It Means for Joe & Jane Consumer*, 23 LOY. CONSUMER L. REV. 99, 103 (2010).
[43] *Id.*
[44] *Id.*

crisis, the financial regulatory system focused narrowly on specific institutions and markets, and not on financial systems, allowing gaps to grow and regulatory inconsistencies to appear. Moreover, the alleged rationale behind Dodd-Frank was that no single regulatory agency had responsibility for overseeing risks to the whole economy's financial stability. Therefore, there was a need for some type of super agency.[45] By statute, the FSOC has the ability to share data and information among its member agencies. Even more importantly, the FSOC has the authority to collect data from individual institutions in order to assess certain types of risks. Finally, the FSOC has the authority to issue stricter standards for the most "interconnected" financial companies and can determine whether action should be taken to break up firms which present a "grave threat" to stability of the U.S. economy.[46]

Five years after the enactment of Dodd-Frank, numerous articles began to appear regarding the accomplishments of the Act and suggesting possible amendments to it to improve its effectiveness.[47] It is not surprising there are a handful of laudatory articles about the Act. However, a review of the authors of some of those journal articles reveals they were either present or former employees of the CFPB or other agencies created by the Act. On the plus side, the CFPB claimed to have collected billions for consumers.[48] Importantly, the self-generated claims by the CFPB do not account for two aspects: (1) the agencies previously designated to enforce the consumer protection laws still exist; and (2) these other agencies should have obtained the same results, but without the overhead of the CFPB. In fact, a

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[45] *Financial Stability Oversight Council*, U.S. DEP'T TREASURY, https://www.treasury.gov/initiatives/fsoc/Pages/home.aspx (last visited Jan. 19, 2019).

[46] *See supra* note 39.

[47] *See* Joe Valenti, *Why We Need a Strong CFPB, in 5 Numbers*, CTR. FOR AM. PROGRESS (Jan. 18, 2017, 9:08 AM), https://www.americanprogress.org/issues/economy/news/2017/01/18/296539/why-we-need-a-strong-cfpb-in-5-numbers/; *see also* Gretchen Morgenson, *The Watchdog Protecting Consumers May Be Too Effective*, N.Y. TIMES (Feb. 10, 2017), https://www.nytimes.com/2017/02/10/business/consumer-financial-protection-bureau-gretchen-morgenson.html.

[48] *See generally* CONSUMER FIN. PROTECTION BUREAU, CONSUMER FINANCIAL PROTECTION BUREAU: BY THE NUMBERS (July 2016), http://files.consumerfinance.gov/f/documents/07132016_cfpb_By_the_numbers_factsheet.pdf; *see also CFPB and 13 State Attorneys General Obtain About $92 Million in Debt Relief for Service Members Harmed by Predatory Lending Scheme*, CONSUMER FIN. PROT. BUREAU (Jul. 29, 2014), https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-13-state-attorneys-general-obtain-about-92-million-in-debt-relief-for-servicemembers-harmed-by-predatory-lending-scheme/.

one-year CFPB budget is approximately $650 million.[49] Some of the reported results are also certainly suspect.[50]

A more fundamental step might be to examine why this albatross of a law was passed in the first place. Often mentioned as a major trigger for the 2008 crash was the "subprime mortgage crisis."[51] Frequently listed as most important by financial experts was Congressional pressure on the two government-sponsored mortgage buying entities, Fannie Mae and Freddie Mac, combined with the Community Reinvestment Act (the "CRA").[52] Interestingly, the chief congressional proponent in 1992 was Barney Frank, who mandated that Fannie Mae and Freddie Mac provide more affordable mortgages, especially for minority households, to the tune of $1 trillion in mortgages.[53] Adding to this, in 1995 banks were pressured to ease lending standards to provide more mortgages to minority and lower income com-

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[49] Transfers from the Federal Reserve System are capped at $618.7 million for FY 2015. For FY 2016, the transfer cap is estimated to be $631.7 million. *See* CONSUMER FIN. PROT. BUREAU, THE CFPB STRATEGIC PLAN, BUDGET, AND PERFORMANCE PLAN AND REPORT (2016), http://files.consumerfinance.gov/f/201602_cfpb_report_strategic-plan-budget-and-performance-plan_FY2016.pdf; CONSUMER FIN. PROT. BUREAU, THE CFPB STRATEGIC PLAN, BUDGET, AND PERFORMANCE PLAN AND REPORT (2015), http://files.consumerfinance.gov/f/201502_cfpb_report_strategic-plan-budget-and-performance-plan_FY2014-2016.pdf; *see also* Ben Lane, *Trump Budget Surprise: Gutting the CFPB*, HOUSINGWIRE (May 23, 2017), https://www.housingwire.com/articles/40196-trump-budget-surprise-gutting-the-cfpb ("The CFPB's budget for 2018 is not yet public, but the most recent budgetary documentation from the CFPB pegs the agency's 2017 budget at $636.1 million, an increase from its 2016 budget of $605.9 million."); *see also* Press Release, Fin. Servs. Comm., CFPB Lacks Oversight and Accountability (Jun. 18, 2013), https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=339512.

[50] *See The CFPB, 5 Years in Consumer Complaints, PYMTS.COM* (Oct. 6, 2016), http://www.pymnts.com/news/cfpb/2016/the-cfpb-5-years-in-consumer-complaints/; *see also This Week in Washington: OIG Releases Audit of CFPB Civil Penalty Fund*, RESPA NEWS (Jan. 23, 2014), http://www.respanews.com/RN/ArticlesRN/OIG-releases-audit-of-CFPB-civil-penalty-fund-60005.aspx.

[51] DAVID D. SCHEIN, THE DECLINE OF AMERICA: 100 YEARS OF LEADERSHIP FAILURES 209 (2018) ("This was based on the large number of mortgage defaults with the end of the "housing bubble," a period of sustained increases in housing prices in many areas across the U.S.").

[52] *See* Peter J. Wallison & Edward J. Pinto, *A Government-Mandated Housing Bubble*, FORBES (Feb. 16, 2009), https://www.aei.org/publication/a-government-mandated-housing-bubble/.

[53] *Id.*; *see also* Richard Finger, *FHA Will Cost Taxpayers $150 Billion,* FORBES (Dec. 7, 2012), http://www.forbes.com/sites/richardfinger/2012/12/07/fha-will-cost-taxpayers-150-billion/#4b271e564616.

munities.[54] Following the financial crisis, Frank admitted that many of the persons with the sub-prime loans he helped to foster would have been better off renting their homes.[55] Therefore, the same Congressman who helped to cause the crisis used it to create the rationale for the Dodd-Frank law in 2010.

Further, the U.S. economy has not recovered from the Great Recession as it has from prior recessions. Not a single year from 2010 through 2016 had a growth rate in excess of 2.7%.[56] A telling report by Professor Jason Scott Johnson strongly suggests that the Dodd-Frank Act has been a factor in tying up the economy and restricting economic growth.[57] Other reputable sources agree with Professor Johnson's appraisal.[58] While reports on the economy for 2017 and 2018 have suggested a stronger economy, the annual growth rate for 2017 and 2018 were 2.2% and 2.9% respectively.[59] The growth in 2018 has largely been attributed to the stimulus provided by the December 2017 Tax Cuts and Jobs Act.[60]

II. COMPARISON OF THE FRAMEWORK OF LAWS TO REGULATE THE BANKING AND FINANCIAL SERVICES INDUSTRY

The complex matrix of financial regulations and agencies is illustrated by attached Tables I and II. The tables show the regulations and the related agencies responsible for enforcement prior to the Act and the administration under the Act. Note that virtually all of the agencies that existed prior to the Act are still in existence, simply supplemented by even more agencies with their own budgets. Requiring that the existing agencies enforce the laws already on the books, such as the Sherman Act, the Clayton Act, and the Securities Acts of 1933 and 1934, might have been a more effective way of achieving such objectives rather than creating new agencies.

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[54] Finger, *supra* note 51.
[55] Wallison & Pinto, *supra* note 50.
[56] *Longer Run FOMC Summary of Economic Projections for the Growth Rate of Real Gross Domestic Product, Central Tendency, Midpoint*, ECON. RES. FED. RES. BANK ST. LOUIS, https://fred.stlouisfed.org/series/GDPC1CTMLR (last updated Dec. 19, 2018).
[57] Jason S. Johnson, *The Freedom to Fail: Market Access as the Path to Overcoming Poverty & Inequality*, 40 HARV. J.L. & PUB. POL'Y 41, 42 (2017).
[58] Will Kenton, *Dodd-Frank Wall Street Reform and Consumer Protection Act*, INVESTOPEDIA, http://www.investopedia.com/terms/d/dodd-frank-financial-regulatory-reform-bill.asp (last updated May 23, 2018).
[59] Bureau of Econ. Analysis, *Gross Domestic Product, Fourth Quarter and Annual 2018 (Initial Estimate)* (February 28, 2019, 8:30 AM), https://www.bea.gov/news/2019/initial-gross-domestic-product-4th-quarter-and-annual-2018.
[60] Tax Cuts and Jobs Act, Pub. L. No. 115–97, 131 Stat. 2054 (2017).

Table I illustrates that there were seven agencies administering sixteen different federal consumer protection laws prior to the enactment of Dodd-Frank in 2010. Now, with the addition of the CFPB, there are eight agencies enforcing the same laws, with a concurrent increase in federal expenditures. Table II illustrates that there were nine agencies administering twenty-two different federal financial control laws prior to the enactment of Dodd-Frank in 2010. Now, with the addition of the FSOC, there are ten agencies enforcing the same laws with of course, a parallel increase in federal expenditures. Again, if the agencies originally charged with enforcing these laws are doing a bad job, then replace the employees and managers of those agencies or eliminate them. The taxpayers should not shoulder the burden for poor performance by the existing agencies.

III. THE LEGAL CHALLENGES TO DODD-FRANK

A. The CFPB

PHH, a mortgage lender, was subjected to a CFPB administrative action that resulted in a $109 million fine against it (the "Action").[61] The Action dealt with the interpretation of Section 8 of the Real Estate Settlement Procedures Act (the "Act"), 12 U.S.C. § 2607. The Act prohibits payments from mortgage insurers to lenders for customer referrals (e.g., from customers that just bought a home) unless those payments are made as bona fide salaries, compensation, or other payment for goods or facilities actually furnished or for services actually performed.[62]

After the Action was instated, PHH brought a claim against CFPB in the United States Court of Appeals for the District of Columbia claiming several constitutional violations. PHH argued that: (1) the agency not only misinterpreted the Act, but also departed from consistent prior interpretations of it without prior notice, thereby violating PHH's Due Process rights;[63] (2) the transactions in question were barred by the Act's three year statute of limitations;[64] and (3) the single-director structure of the CFPB violated Article II of the Constitution, since the Director was not accountable to the President or any other member of the agency.[65]

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[61] *See* PHH Corp v. CFPB, 839 F.3d 1, 8 (D.C. Cir. 2016), *vacated*, 2017 U.S. App. LEXIS 2733 (D.C. Cir. Feb. 16, 2017).
[62] *Id.* at 11.
[63] *Id.* at 41.
[64] *Id.* at 50.
[65] *Id.* at 12.

1. The Due Process Claim

As previously indicated, the enactment of the Dodd-Frank Act provided the CFPB with enforcement authority. Formerly, Housing and Urban Development ("HUD") was in charge of such enforcement.[66] According to HUD's interpretation of Section 8, mortgage insurers and lenders were allowed to make bona fide transactions so long as the mortgage insurer did not pay the lender for referrals.[67] HUD had previously "interpreted Section 8(c) to establish a safe harbor allowing bona fide transactions between a lender and a mortgage insurer, or between a mortgage insurer and a lender-affiliated reinsurer, so long as the mortgage insurer did not pay the lender for referrals.[68] In the industry, HUD's interpretation was the norm until 2014 when CFPB started the Action. Under CFPB's newly expanded interpretation under Section 8, CFPB prohibits "most referrals made by lenders to mortgage insurers in exchange for the insurer's purchasing reinsurance from a lender-affiliated reinsurer." This was the practice used by PHH which resulted in the enforcement action.[69] As a result, HUD's interpretation was repealed and PHH was fined.[70] The CFPB ordered PHH to pay at least $121,729,499 in disgorgement and "enjoined PHH from entering into future captive reinsurance arrangements."[71] In other words, a conflict between two agencies enforcing the same law, HUD and the CFPB, caused this lawsuit.

On this count, the Court of Appeals held that the CFPB's interpretation departed not only from the text of the Act, but also from decades of careful and repeated official government interpretations.[72] The Court reasoned that if a new prohibition on captive reinsurance arrangements was to be established, it was up to Congress and the President to decide. Moreover, the CFPB did not have unilateral decision-making power.[73] The Court recognized that "[a]gency change is not a fatal flaw in and of itself, so long as the change is reasonably explained and so long as the new interpretation is consistent with the statute,"[74] but because the CFPB retroactively applied a new interpretation to PHH's conduct without reasonable explanation or

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[66] *Id.* at 45.
[67] *Id.*
[68] *Id.* at 21.
[69] *Id.*
[70] *Id.* at 22.
[71] *See* PHH Corp., CFPB No. 2014-CFPB-0002, 2015 CFPB Admin. Proc. LEXIS 268, at *50 (June 4, 2015).
[72] *See PHH Corp.*, 839 F.3d at 42.
[73] *Id.* at 44 ("the decision whether to adopt a new prohibition on captive reinsurance arrangements is for Congress and the President when exercising the legislative authority. It is not a decision for the CFPB to make unilaterally.").
[74] *Id.*

notice, the action violated PHH's due process rights.[75] The Court also cited the Supreme Court decision in *SmithKline* to state that "an agency should not change an interpretation in an adjudicative proceeding where doing so would impose new liability on individuals for past actions which were taken in good-faith reliance on agency pronouncements."[76] Hence, since PHH actions were bona fide in nature and there was no notice on behalf of the agency that those transactions were subject to a new interpretation of the statute, the Court found the action unconstitutional.[77]

2. The Statute of Limitations Claim

Dodd-Frank authorized the CFPB to conduct hearings and adjudications to enforce the Act.[78] The Act provides that the CFPB, or any other agency, may bring an action to enjoin violations of Section 8 within three years from the date of the occurrence of the violation.[79]

The CFPB argued that the Dodd-Frank Act imposed no statute of limitations on administrative proceedings as opposed to court proceedings.[80] Furthermore, the CFPB claimed that even the Act itself did not impose a three year statute of limitations on administrative actions but only court proceedings.[81] The Court held that Congress had tied the Dodd-Frank's reach to those of the nineteen federal laws CFPB was charged with enforcing and therefore, the CFBP was limited by the statutory period set in the Act.[82] The Court went further and explained that wording of Dodd-Frank contained no indicators that Congress's intention was for Dodd-Frank to alter the statute of limitations of the different applicable consumer laws relevant to this matter.[83]

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[75] *Id.* at 9.
[76] *Id.* at 47 (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 157 (2012)).
[77] *Id.* at 47.
[78] *Id.* at 50 (quoting Dodd-Frank Wall Street and Consumer Protection Act, 12 U.S.C. § 2614 (2012)).
[79] *Id.* at 50 (quoting Real Estate Settlement Procedures Act, 12 U.S.C. § 5563(a) (2012)).
[80] *Id.* at 50. The CFPB supported its argument with the U.S. Supreme Court decision, BP America Production Co. v. Burton, 549 U.S. 69 (2006), which stated that in a civil action for money damages brought by the Government, the statute of limitations provision encompassed only court actions, and not agency enforcement actions.
[81] *Id.* at 50.
[82] *Id.* at 51.
[83] *Id.* at 51–52

3. The Single-Director Structure and the Article II Claim

The CFPB was established as an independent agency headed by a single director instead of by a multi-member commission.[84] PHH claimed that this structure contravened Article II of the Constitution which grants the Executive Power to the President.[85] The Court agreed.[86]

The Court held that the structure was unconstitutional because the agency lacked the "critical check and structural constitutional protection."[87] According to the Court, to help preserve individual liberties the heads of the executive agencies must be accountable to and checked by the President or at least accountable and checked by other commissioners or board members.[88] An agency may not operate independently without being accountable for its actions.[89] The Court compared the CFPB structure with those of multi-member board structures opining that the latter act as safeguards, preventing arbitrary decision-making and thereby protecting individual liberties.[90]

In a lengthy decision, the Court explained that the President is the one personally responsible for the Executive Power and in order to exercise this power the President must be able to supervise and direct those subordinate executive officers.[91] Supervision and direction means the capacity to remove the officers at will.[92]

The Court further explained: "The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else."[93]

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[84] *Id.* at 6.
[85] *Id.* at 8.
[86] *Id.*
[87] *Id.* (supporting its conclusion in Morrison v. Olsen, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) ("this wolf comes as a wolf")).
[88] *Id.* at 25–26.
[89] *Id.* at 26.
[90] *Id.* at 26–27 ("[T]he deliberative process and multiple viewpoints in a multi-member independent agency can help ensure that an agency does not wrongly bring an enforcement action or adopt rules that unduly infringe individual liberty.").
[91] *Id.* at 12 (relying primarily on Free Enter. Fund v. PCAOB, 561 U.S. 477, 498–502 (2010)).
[92] *Id.* at 13.
[93] *Id.* (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513–14 (2010)).

Dodd-Frank gave the power to pursue actions, issue subpoenas, and impose legal and equitable remedies to a sole individual (the CFPB Director) vesting in the position as many powers as the President has but to consumer laws.[94] Although Dodd-Frank required the Director to establish and consult with an advisory board, the Court reasoned that the board's role was merely advisory as its name indicates.[95] Furthermore, neither the Judiciary nor Congress is a check to the Agency's actions.[96] Agency discretionary actions are rarely reviewed by courts and therefore, threaten individual liberties.[97] Additionally, Congress cannot supervise or order the Director to institute enforcement actions since that power is vested in the President.[98]

4. Implications for the CFPB

The Court of Appeals determined that besides all the constitutional issues, the CFPB could still operate as an executive agency but under the supervision of the President, who may be able to remove the Director at any time.[99]

On February 16, 2017, the Court of Appeals determined that the matter needed to be reheard and the judgment described above was vacated.[100] Oral arguments were heard on May 24, 2017 and the Court seemed worried about the diminishment of the President's power and the President's capacity to enforce legislation, if the CFPB would still be structured as a single-director agency. The January 31, 2018, *en banc* decision of the DC Circuit upheld the constitutionality of the CFPB's single-head executive agency. This decision was accompanied by a strong dissent by now Supreme Court Justice Brett Kavanaugh, which may portend a further challenge to this ruling in the future.[101]

B. The FSOC

The other major court challenge to Dodd-Frank was the challenge to the Financial Stability Oversight Council. In the case of *MetLife, Inc. v. Financial Stability Oversight Council*,[102] a D.C. District Court reviewed the purpose and action of this agency. The District Court noted that the purpose

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94 *Id.* at 16.
95 *Id.* ("But the advisory board is just that: advisory. Nothing requires the Director to heed the Board's advice.").
96 *Id.* at 35–36.
97 *Id.* at 35.
98 *Id.* at 36.
99 *Id.* at 10, 12.
100 *See* PHH Corp. v. CFPB, No. 15-1117, 2017 U.S. App. LEXIS 2733, at *5 (D.C. Cir. Feb. 16, 2017).
101 PHH Corp. v. CFPB, 881 F.3d 75 (D.C. Cir. 2018).
102 MetLife, Inc. v. FSOC, 177 F. Supp. 3d 219, 223–24 (D.D.C. 2016).

of the Act was to prevent a reoccurrence of the financial distress of certain non-bank financial organizations that contributed to the collapse of the financial markets in 2008–09.[103] The FSOC was given the power to designate certain non-bank financial institutions for supervision by the Federal Reserve under enhanced prudential standards.[104]

To be eligible for this "Too Big to Fail" designation, the institution must be a U.S. corporation or organized entity engaged predominantly in financial activities and able to satisfy one of two tests under the Act: (1) at least eighty-five percent (85%) of the entity's "consolidated annual gross revenues must be derived from financial in nature activities; or (2) eighty-five percent (85%) or more of the "consolidated assets of the company" must be related to financial in nature activities.[105] If the entity's material financial distress could pose a threat to the financial stability of the country or when the "very nature, scope, size, scale, concentration, interconnectedness, or mix of the company's activities could pose the same threat," eligible entities may be designated by the FSOC for enhanced supervision.[106]

After its creation, the FSOC, utilizing a formal rule making process, promulgated the Guidance for Non-Bank Financial Company Determinations (the "Guidance") to inform the public which thresholds were to be followed to determine the susceptibility and potential for financial distress of non-bank financial companies.[107] The Guidance showed a three stage process that was to be followed by the FSOC to make its determination.[108] In the first stage, the FSOC would use "uniform quantitative metrics" to be applied to a broad number of non-bank financial institutions that would be most likely to present financial distress capable of destabilizing the financial market.[109] The second stage would further analyze and prioritize the selected group utilizing quantitative and qualitative information available to the Agency in public and regulatory sources.[110] Stages 1 and 2 are conducted completely internally by the Agency. Until Stage 3, which consists of an "in-depth evaluation," only then would the FSOC notify the entity that it was under scrutiny, invite it to submit information, and request a hearing.[111]

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[103] *Id.* at 223.
[104] *Id.* at 223–24.
[105] *Id.* at 224–25.
[106] *Id.*
[107] *Id.* at 226–28.
[108] *Id.* at 228.
[109] *Id.*
[110] *Id.*
[111] *Id.*

MetLife was first notified that it was under scrutiny on July 16, 2013, having reached Stage 3.[112] Between September 2013 and September 2014, the FSOC and MetLife met twelve times and the company submitted over 21,000 pages of material.[113] A hearing was held and additional documents were submitted. Nonetheless, on December 18, 2014, the FSOC determined that MetLife was eligible for designation under Dodd-Frank concluding that "material distress at MetLife could pose a threat to the financial stability of the United States" (the "Final Determination").[114] The Final Determination was based on four conclusions: (1) "exposed counterparts could suffer significant losses if MetLife experience material financial distress"; (2) the distress might prompt the company to liquidate assets quickly and hence, disrupt capital markets; (3) existing regulatory scrutiny would not stop the threat from being realized; and (4) MetLife's size and complexity would deter its resolution and prolong uncertainty requiring more developed efforts by other regulatory bodies.[115]

Following the Final Determination, MetLife appealed the decision in the United States District Court for the District of Columbia claiming that the determination was "arbitrary and capricious."[116] The Court agreed.[117] First, it held that the FSOC decision had made "critical departures" from the Guidance and never gave an explanation for such departure.[118] Additionally, relying on the U.S. Supreme Court decision in *Michigan v. EPA,*[119] it held that the determination was arbitrary and capricious since it did not consider the costs of the MetLife designation.[120] In its reasoning, the Court opined that although MetLife might qualify for designation, there were no good reasons provided in the Final Determination to support the notion that potential financial distress within MetLife would cause harm to the financial stability of the country.[121] Furthermore, "[b]ecause [the FSOC] never projected any estimated losses, the [Agency] never established a basis for finding that MetLife's financial distress would 'materially impair' [its counter-parties] within the meaning of the [Agency's] Guidance." Therefore, the Court ruled that the determination was based on unreasoned predictions and that merely summarizing the exposures and assets

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[112] *Id.*
[113] *Id.* at 229.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.* at 230.
[118] *Id.*
[119] *See generally* Michigan v. EPA, 135 S. Ct. 2699 (2015).
[120] *MetLife, Inc.*, 177 F. Supp. at 239–40.
[121] *See id.* at 230, 237.

of the company could not be dispositive of determining whether or not an institution could be a severe peril to financial market functions.[122] The Court went further to explain that costs are essential to reasoned rule making since "[c]onsideration of costs reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions."[123] Therefore, the Agency did not consider all the appropriate risk-related factors required by Dodd-Frank.[124] In sum, the Court found the Final Determination to be arbitrary and capricious because it violated well-established principles of administrative law.[125]

IV. PROPOSED LEGISLATIVE CHANGES TO DODD-FRANK

Dodd-Frank was passed in 2010 during the 111th Congress, which was the last Congress in which the Democrats controlled both chambers. For the next seven years, headlines in financial publications touted the many proposals to either fix or repeal Dodd-Frank.[126] During the 112th Congress, Members proposed over one hundred bills to either amend or repeal parts of Dodd-Frank. However, only two passed, which reflected the division between the Democrat-controlled Senate and the then GOP-controlled House.

The first was the Jumpstart our Business Startups Act.[127] The concept behind this bill was to help stimulate new business startups. The provision related to Dodd-Frank amended the Securities and Exchange Act and the Investor Protection and Securities Reform Act of 2010. The purpose was to exempt emerging growth companies from the requirement of separate shareholder approval for executive compensation, including golden parachute compensation.[128] This was unlikely to have much impact on startup businesses and it markedly failed to achieve its stated purpose. Additional-

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[122] *See id.* at 237–38.
[123] *Id.* at 242 (quoting Michigan v. EPA, 135 S.Ct. 2699, 2707 (2015)).
[124] *See id.* at 240.
[125] *See id.* at 241.
[126] *See* Charles W. Calomiris, *Four Principles for Replacing Dodd-Frank*, WALL ST. J. (Jun. 15, 2017), https://www.wsj.com/articles/four-principles-for-replacing-dodd-frank-1497571869; Frank Keating, *A Checklist for Fixing Dodd-Frank*, WALL ST. J. (Dec. 19, 2016), https://www.wsj.com/articles/a-checklist-for-fixing-dodd-frank-1482192156; *see also* Cheyenne Hopkins, *Too-Big-to-Fail Bill Pitched as Fix for Dodd-Frank Act's Flaws*, BLOOMBERG (Apr. 24, 2013), https://www.bloomberg.com/news/articles/2013-04-25/too-big-to-fail-bill-pitched-as-fix-for-dodd-frank-act-s-flaws.
[127] Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112–106, 126 Stat. 306 (2012) (codified as amended in scattered sections of 15 U.S.C.) (providing exemptions to emerging growth companies from filing and reporting requirements with the U.S. Securities and Exchange Commission).
[128] *Id.*

ly, the second bill, the Consolidated Appropriations Act of 2012, had a provision requiring a report on the costs of implementing Dodd-Frank.[129]

During the 113th Congress between 2013 and 2014, over a hundred bills regarding the Act were again proposed, but only four became law.[130] Most of the bills failed to move forward because the Senate was controlled by the Democrats and the House was controlled by the GOP. Of the bills that did pass, the first allowed exemption of certain insurance companies from the capital provisions of the Act.[131] Second, a provision allowed exemption of smaller banking institutions from certain aspects of the Act.[132] Third, an act amended Dodd-Frank to expand the permissible derivatives activities of financial institutions receiving federal assistance such as deposit insurance.[133] And fourth, a provision required the Director of OMB to submit to a Congressional appropriations committee a report on the costs of implementing Dodd-Frank.[134]

The 114th Congress, from 2015 to 2016, featured GOP control of both houses. This essentially confirmed the deadlock with a Democrat President for his last two years. During this session, over 110 bills were proposed to repeal or amend Dodd-Frank and again, only four were passed. The first legislation amended the Act to terminate the GAO's annual reporting after 2020, but requires GAO reports in 2022 and 2024 about the effectiveness

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[129] Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, 125 Stat. 786 (2012).

[130] The Insurance Capital Standards Clarification Act of 2014 amended the Dodd-Frank Act to establish minimum leverage and minimum risk-based capital requirements on a consolidated basis for a depository institution holding company or a nonbank financial company supervised by the Board of Governors of the Federal Reserve System. Pub. L. No. 113-250, 128 Stat. 2886 (2014) exempted from the leverage and risk-based capital requirements of Dodd-Frank any bank holding company or savings and loan holding company having less than $1 billion in total consolidated assets that complies with the requirements of the Policy Statement. The Consolidated and Further Continuing Appropriations Act of 2015 amended the Act to expand the permissible derivatives activities of financial institutions receiving federal assistance such as deposit insurance. Finally, the Consolidated Appropriations Act of 2014 required the Director of OMB to submit to congressional appropriations committees a report on the costs of implementing Dodd-Frank.

[131] Insurance Capital Standards Clarification Act of 2014, Pub. L. No. 113-279, 128 Stat. 3017 (2014).

[132] To Enhance the Ability of Community Financial Institutions to Foster Economic Growth and Serve Their Communities, Boost Small Businesses, Increase Individual Savings, and for Other Purposes, Pub. L. No. 113-250, 128 Stat. 2886 (2014).

[133] Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014).

[134] Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, 128 Stat. 5 (2014).

of disclosures relating to conflict minerals.[135] The second law allows the FDIC to take action in state court if a state regulatory agency fails to file an action deemed necessary.[136] The third law was a technical change extending special insurance for terrorism-related events.[137] The fourth law was a technical correction to Dodd-Frank due to poor drafting in the original bill. The new act, known as FAST,[138] provided that foreign governments providing financial information were not required to indemnify the U.S. government in order to encourage more transparency in exchanging international financial information.[139]

The 115th Congress started in January 2017. Both houses of Congress and the Presidency are controlled by the GOP. Many representations have been made regarding repealing or significantly amending Dodd-Frank. The 115th Congress proposed forty bills and enacted two minor amendments.[140] Major changes to Dodd-Frank have taken a back seat to the so far unsuccessful reform or repeal of Obamacare and the December 2017 tax reform bill. However, in May 2018, President Trump signed into law a bi-partisan reform of a specific provision of Dodd-Frank regarding "too big to fail" by raising the threshold level of assets, from $50 billion to $250 billion, that banks could hold without having to undergo "stress tests" to determine whether and how big of an impact would occur to the United States economy if they were to fail.[141] The passage of this bill signals that any reforms to Dodd-Frank will be accomplished incrementally and around the edges of the law's sweeping provisions.

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[135] GAO Mandates Revision Act of 2016, Pub. L. No. 114-301, §§ 2(a)(1)(A), 3(b), 130 Stat. 1514-15 (2016).

[136] Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 706(b), 129 Stat. 2242, 3029 (2015).

[137] Terrorism Risk Insurance Program Reauthorization Act of 2015, Pub. L. No. 114-1, §101, 129 Stat. 3 (2015).

[138] Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015).

[139] *Id.* § 86001(b), at 129 Stat. 1797-98 (amending the Commodity Exchange Act to repeal the requirement that specified entities agree to indemnify the Commodity Futures Trading Commission); *see also* Stinson Leonard Street & Stephen M. Quinlivan, *FAST Act Fixes Dodd-Frank Swap Glitch*, JDSUPRA.COM (Dec. 8, 2015), http://www.jdsupra.com/legalnews/fast-act-fixes-dodd-frank-swap-glitch-16651/.

[140] *See* Consolidated Appropriations Act of 2017, Pub. L. No. 115-31, 131 Stat. 135 (2017); H.R.J. Res. 41, 115th Cong. (2017).

[141] The Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. 115–174 (2018).

V. RECOMMENDATIONS FOR A PATH FORWARD

The evidence supports the position that creating laws to make political points rather than a carefully reasoned approach to regulation does not correct long-term financial industry issues. On one hand, the U.S. government established over 130 years ago with the Sherman Anti-Trust Act[142] that the U.S. cannot operate with a complete *laissez faire* approach to business. At the same time, the staggering cost to the economy of the regulations under SOX[143] and then Dodd-Frank[144] have firmly established that writing regulations to respond to a recent crisis or to make points with the electorate does not work.

A much simpler approach would be to examine the financial regulatory system prior to 2000. The regulations should be conformed across the entire financial services industry. Referring to Tables I and II, the agencies that existed prior to the enactment of Dodd-Frank still exist. Eliminating the CFPB and the FSOC and requiring the listed agencies to perform their designated responsibilities would make a great deal more sense than having Washington create more bureaucracies.

Fixing "Too Big to Fail," as an example, is a two-pronged approach. First, there is no rational explanation for the U.S. taxpayers to bail out any non-governmental organization. Systems like the FDIC and its sister organizations exist for just that purpose. The U.S. Bankruptcy laws are there for an orderly process of working out debts when businesses fail in a capitalist system. Certainly, some of the draconian recommendations to further increase the choke-hold of the U.S. government on the financial industry should be ignored.[145]

In tandem with this first step, the U.S. federal court system must stop allowing massive mergers and acquisitions which has helped to create the "Too Big to Fail" situation in large part. Enforcing the U.S. anti-trust laws that have been on the books for over a century would certainly help to head off the problem at its roots. The anti-trust laws provide for two ways to analyze monopolization—*per se* or "rule- of-reason."[146] The minority of cases over the last twenty years have been decided under the *per se* standard. This would be a case of an overt attempt to monopolize. Therefore,

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[142] Sherman Anti-Trust Act, 15 U.S.C. §§ 1–7 (2013). This Act was first enacted in 1890.
[143] Sarbanes-Oxley Act of 2002, *supra* note 13.
[144] Dodd-Frank Act, *supra* note 1.
[145] Norbert Michel, *Kashkari Highlights Too Big To Fail Reform*, FORBES (Feb. 22, 2017), https://www.forbes.com/sites/norbertmichel/2017/02/22/kashkari-highlights-too-big-to-fail-reform/#29149bf24e2f.
[146] David Schein et al., *American Cities Held Hostage: Public Stadiums and Pro Sports Franchises*, 20 RICH. PUB. INT. L. REV. 63, 85 (2017).

most cases have been decided under the vague rule-of-reason standard. This judge-created law has allowed the mega-mergers that the U.S. and world economy has witnessed over the same time period. In just one example, the Exxon-Mobil merger in 1998, completed in 1999, cost 14,000 jobs and significantly reduced competition in the U.S. energy market, if not the world market. [147] The U.S. Federal Trade Commission signed off on the merger after the two companies made some minor concessions.[148]

A careful examination of the so-called "dot com" market collapse in 2000 reveals that failures by the SEC led to the collapse.[149] This was shortly followed by the series of stock-manipulation scandals referenced above.[150] It is notable that most of the involved executives were convicted under the laws in effect prior to the enactment of SOX.[151] Further, the mortgage companies and banks involved in the subprime crisis referenced above have paid hundreds of millions in fines under the laws in effect prior to the enactment of Dodd-Frank.[152] Sadly, the cost of the prosecution was paid for by the taxpayers, but the taxpayers did not receive individual checks or tax rebates in return.

CONCLUSION

The United States struggles to pay its bills and meet its many demands, both internally and externally. Indeed, the federal government is currently operating at record deficits. A more efficient and pragmatic regulatory approach is needed for financial institutions, the failure of which have the potential for critical impacts on the economy. Complex and redundant regulations that do not work, or even accomplish their intent, have no place in modern America. Therefore, the dead weight of Dodd-Frank should be lifted and the agencies already charged with enforcement must be held to a much higher standard and actually follow their mandates.

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[147] Steve Liesman, *Exxon Mobil to Cut 14,000 Jobs, Expects $3.8 Billion in Savings*, WALL ST. J., Dec. 16, 1999, at A3.
[148] John R. Wilke et al., *Exxon-Mobil Merger Gets Approval; FTC May Be Tougher on Future Deals*, WALL ST. J., Dec. 1, 1999, at A3.
[149] *See* Stephen Labaton, *S.E.C. Concedes Oversight Flaws Fueled Collapse*, N.Y. TIMES, Sept. 26, 2008, at A1.
[150] See Steve Denning, *Lest We Forget: Why We Had A Financial Crisis*, FORBES (Nov. 22, 2011), https://www.forbes.com/sites/stevedenning/2011/11/22/5086/#2e418601f92f.
[151] *See* Diana B. Henriques & Jack Healy*, Madoff Jailed After Pleading Guilty to Fraud: Victims Hear Apology but Few Answers*, N.Y. TIMES, Mar. 13, 2009, at A1.
[152] Alanna Petroff, *DOJ vs Big Banks: $60 Billion in Fines for Toxic Mortgages*, CNN BUS. (Dec. 23, 2016, 1:34 PM), https://money.cnn.com/2016/12/23/investing/banks-fines-mortgages.

TABLE 1
FEDERAL AGENCIES BEFORE AND AFTER CFPB

PRE-2010 AGENCY	LAWS THAT AGENCY USED TO HELP UPHOLD	IS LAW NOW UPHELD BY CPFB?	SOURCE
Federal Deposit Insurance Corporation	Subsections (b) through (f) of Section 43 of the Federal Deposit Insurance Act	Yes	Federal Deposit Insurance Corporation website: https://www.fdic.gov/regulations/laws/rules/1000-4500.html
Department of Housing and Urban Development	The Home Owners Protection Act of 1998	Yes	*CFPB Provides Guidance About Private Mortgage Insurance Cancellation and Termination*, Aug. 4, 2015, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/about-us/newsroom/cfpb-provides-guidance-about-private-mortgage-insurance-cancellation-and-termination/ (last visited Mar. 11, 2018).
Federal Reserve Board	The Home Ownership and Equity Protection Act of 1994	Yes	CONSUMER FIN. PROT. BUREAU, 2013 HOME OWNERSHIP AND EQUITY PROTECTION ACT (HOEPA) RULE, SMALL ENTITY COMPLIANCE GUIDE, (May 2, 2013), https://files.consumerfinance.gov/f/201305_compliance-guide_home-ownership-and-equity-protection-act-rule.pdf.
Federal Reserve Board	The Home Mortgage Disclosure Act of 1975	Yes	*About HMDA*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/data-research/hmda/learn-more (last visited Mar. 11, 2018).

Federal Reserve Board	The Electronic Fund Transfer Act	Yes	OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S HANDBOOK: CONSUMER COMPLIANCE, ELECTRONIC FUND TRANSFER ACT, (2014), https://www.occ.gov/publications/publications-by-type/comptrollers-handbook/electronic-fund-transfer-act/pub-ch-efta.pdf.
Federal Reserve Board	The Equal Credit Opportunity Act	Yes	CONSUMER FIN. PROT. BUREAU, EQUAL CREDIT OPPORTUNITY ACT (2013), https://files.consumerfinance.gov/f/201306_cfpb_laws-and-regulations_ecoa-combined-june-2013.pdf.
Federal Trade Commission	The Fair Credit Billing Act	Yes	*Disputing Credit Card Charges*, FED. TRADE COMMISSION, https://www.consumer.ftc.gov/articles/0219-disputing-credit-card-charges (last visited Mar. 12, 2018).
Federal Trade Commission	The Fair Credit Reporting Act	Yes	Al Krulick, *What Is the Fair Credit Reporting Act?,* DEBT.ORG, https://www.debt.org/credit/your-consumer-rights/fair-credit-reporting-act/ (last visited Mar. 12, 2018).
Federal Trade Commission	The Fair Debt Collection Practices Act	Yes	*Debt Collection*, FED. TRADE COMMISSION, https://www.consumer.ftc.gov/articles/0149-debt-collection (last visited Mar. 12, 2018).
Department of Housing and Urban Development	The Real Estate Settlement Procedures Act of 1974	Yes	CONSUMER FIN. PROT. BUREAU, REGULATION X: REAL ESTATE SETTLEMENT PROCEDURES ACT (2015), https://files.consumerfinance.gov/f/201503_cfpb_regulation-x-real-estate-settlement-procedures-act.pdf (last visited Mar. 12, 2018).

Board of Governors of the Federal Reserve	The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act)	Yes	S.A.F.E. Mortgage Licensing Act (Regulation G) 76 Fed. Reg. 78483, 78487 (Dec. 19, 2011), https://www.federalregister.gov/documents/2011/12/19/2011-31730/safe-mortgage-licensing-act-regulations-g-and-h (last visited Mar. 20, 2018)
(1) Board of Governors of the Federal Reserve System; (2) Federal Deposit Insurance Corporation; (3) National Credit Union Administration; (4) Office of the Comptroller of the Currency; and (5) the former Office of Thrift Supervision	Financial Services Modernization Act of 1999 (Gramm-Leach-Bliley Act), 15 USC § 6801-6810	Yes	FED. DEPOSIT INS. CORP., GRAMM-LEACH-BLILEY ACT (2016), https://www.fdic.gov/regulations/compliance/manual/8/viii-1.1.pdf.
Board of Governors of the Federal Reserve System	The Truth in Lending Act (TILA)	Yes	CONSUMER FIN. PROT. BUREAU, TRUTH IN LENDING ACT (2015), https://files.consumerfinance.gov/f/201503_cfpb_truth-in-lending-act.pdf.
Federal Deposit Insurance Corporation	The Truth in Savings Act	Yes	Truth in Savings Act (TISA) Examination Procedures, Consumer Fin. Protection Bureau (Oct. 1, 2012), https://www.consumerfinance.gov/policy-compliance/guidance/supervision-examinations/truth-in-savings-act-tisa-examination-procedures/.
Federal Trade Commission	Omnibus Appropriations Act, 12 U.S.C. § 5538 (2009)	Yes	MORTGAGE-RELATED PROVISIONS OF OMNIBUS APPROPRIATIONS ACT OF 2009, TITLE VI, SECTION 626, FEDERAL TRADE COMMISSION, https://www.ftc.gov/enforcement/statutes/mortgage-related-provisions-omnibus-appropriations-act-2009-title-vi-section (last visited Mar. 20, 2018).

Department of Housing and Urban Development	Interstate Land Sales Full Disclosure Act, 15 U.S.C. §1701 et seq.	Yes	Joseph Lubinski, *Interstate Land Sales Full Disclosure Act: 2012 Update*, AMERICANBAR.ORG, https://www.americanbar.org/content/dam/aba/publishing/rpte_ereport/2012/1_february/rp_lubinski.authcheckdam.pdf (last visited Mar. 20, 2018).

TABLE II
FEDERAL AGENCIES BEFORE AND AFTER FSOC

PRE-2010 AGENCY	LAWS THAT AGENCY HELPED UPHOLD	JOINT POWERS WITH FSOC?	SOURCES
The Federal Deposit Insurance Corporation	The Federal Deposit Insurance Act of 1950	Yes	Diane Katz & Norbert Michel, *Consumer Protection Predates the Consumer Financial Protection Bureau*, THE HERITAGE FOUND. (May 11, 2017), http://www.heritage.org/government-regulation/report/consumer-protection-predates-the-consumer-financial-protection-bureau.
Federal Trade Commission	The Truth in Lending Act (TILA) of 1968	Yes	CONSUMER FIN. PROT. BUREAU, LAWS AND REGULATIONS: TILA (2015), https://files.consumerfinance.gov/f/201503_cfpb_truth-in-lending-act.pdf.
Federal Trade Commission	The Fair Credit Reporting Act (FCRA) of 1970	Yes	Jake Stroup, *The Fair Credit Reporting Act of 1970*, THE BALANCE, https://www.thebalance.com/fair-credit-reporting-act-of-1970-1947567 (last updated Feb. 15, 2017).
The Department of Housing and Urban Development	The Real Estate Settlement Procedures Act (RESPA) of 1974	Yes	CONSUMER FIN. PROT. BUREAU, LAW AND REGULATIONS: RESPA, https://files.consumerfinance.gov/f/201503_cfpb_regulation-x-real-estate-settlement-procedures-act.pdf.
Federal Trade Commission	The Equal Credit Opportunity Act (ECOA) of 1974	Yes	*Your Equal Credit Opportunity Rights*, FED. TRADE COMMISSION (January 2013), https://www.consumer.ftc.gov/articles/0347-your-equal-credit-opportunity-rights.
Department of Justice	The Privacy Act of 1974	Yes	Privacy Act of 1974 5 U.S.C. § 552a (1974), https://www.justice.gov/opcl/privacy-act-1974.
Federal Trade Commission	The Fair Credit Billing Act of 1974	Yes	Kelly Dillworth, *Your rights under the Fair Credit Billing Act*, NASDAQ.COM (Jun. 5, 2015), https://www.nasdaq.com/article/your-rights-under-the-fair-credit-billing-act-

			cm484107.
The Federal Reserve Board	The Home Mortgage Disclosure Act (HMDA) of 1975	Yes	*About HMDA*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/data-research/hmda/learn-more (last visited Jan. 30, 2019).
Federal Trade Commission	The Fair Debt Collection Practices Act of 1977	Yes	*Debt Collection FAQs*, FED. TRADE COMMISSION (Mar. 2018), https://www.consumer.ftc.gov/articles/0149-debt-collection
Federal Reserve Board	The Electronic Fund Transfer Act (EFTA) of 1978	Yes	*See* Electronic Fund Transfer Act, 15 U.S.C. § 1693 et seq. (1978); *see also Electronic Fund Transfer Act (EFTA) Examination Procedures*, CONSUMER FIN. PROTECTION BUREAU (Oct. 30, 2013), https://www.consumerfinance.gov/policy-compliance/guidance/supervision-examinations/electronic-fund-transfer-act-efta-examination-procedures/.
Federal Reserve Board	The Federal Financial Institutions Examination Council Act of 1978	Yes	*About the FFIEC*, FED. FIN. INSTITUTION EXAMINATION COUNCIL, https://www.ffiec.gov/about.htm (last modified Aug. 29, 2018).
Federal Reserve Board	The Right to Financial Privacy Act of 1978	Yes	*See generally* The Right to Financial Privacy Act, EPIC.ORG, https://www.epic.org/privacy/rfpa/ (last visited Mar. 6, 2018).
(1) Office of the Comptroller of the Currency;(2) National Credit Union Administration; and (3) Office of Thrift Supervision	The Alternative Mortgage Transaction Parity Act (AMTPA) of 1982	Yes	CONSUMER FIN. PROT. BUREAU, CFPB BULLETIN 11-1, AMENDMENTS TO THE ALTERNATIVE MORTGAGE TRANSACTION PARITY ACT (2011).
Federal Reserve Board	The Expedited Funds Availability Act (EFAA) of 1987	Yes	Expedited Funds Availability Act, 12 C.F.R. pt. 229 (1987).

Federal Trade Commission	The Fair and Accurate Cred-it Transactions Act (FAC-TA) of 2003	Yes	Fair and Accurate Credit Transactions Act 15 U.S.C. §§ 1681-1681x (2013)
(1) Federal Re-serve Board; (2) Office of the Comptroller of the Currency; (3) Federal Depos-it Insurance Cor-poration; (4) Office of Thrift Supervision; (5) National Credit Union Administra-tion; (6) Farm Credit Administration	The Secure and Fair En-forcement for Mortgage Licensing Act (SAFE Act) of 2008	Yes	*Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (S.A.F.E. Act) Implementation*, FEDER-ALRESEERVE.GOV, https://www.federalreserve.gov/supervisionreg/safeact.htm (last updated Mar. 7, 2017).
Federal Trade Commission	The Federal Trade Commis-sion Act of 1914	Yes	*Federal Trade Commission Act*, DEBT.ORG, https://www.debt.org/credit/your-consumer-rights/federal-trade-commission-act/ (last visited Mar. 7, 2018).
Federal Trade Commission	The Gramm–Leach–Bliley Act of 1999	Yes	*How To Comply with the Privacy of Consumer Financial Information Rule of the Gramm-Leach-Bliley Act*, FED. TRADE COMMISSION (July 2002), https://www.ftc.gov/tips-advice/business-center/guidance/how-comply-privacy-consumer-financial-information-rule-gramm.
Department of Housing and Ur-ban Development	The Interstate Land Sales Full Disclosure Act of 1968	Yes	Joseph Lubinski, *Interstate Land Sales Full Disclosure Act: 2012 Update*, AM. BAR ASS'N, https://www.americanbar.org/content/dam/aba/publishing/rpte_ereport/2012/1_february/rp_lubinski.authcheckdam.pdf (last visited Mar. 7, 2018).
Commodity Fu-tures Trading Commission	The Truth in Savings Act	Yes	12 C.F.R. § 1030.1 (2011).

Federal Trade Commission	The Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994	Yes	Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108.
Office of the Comptroller of the Currency	The Homeowners Protection Act of 1998	Yes	12 U.S.C. Section 4901 et. seq. Pub L. 105-216, July 29, 1998, 112 Stat. 897.