REALIZING THE RECESSION: MODIFYING DODD-FRANK WITH A VIEW TO THE FUTURE

I. INTRODUCTION

September 15, 2008, is a date when the impossible became possible: Lehman Brothers, the fourth-largest United States investment bank at the time, filed for bankruptcy.[1] The 158-year-old firm drew their curtains shut and became

[1] ROSALIND Z. WIGGINS ET AL., YALE SCH. MGMT., THE LEHMAN BROTHERS BANKRUPTCY A: OVERVIEW 2 (2014), http://som.yale.edu/sites/default/files/files/001-2014-3A-V1-LehmanBrothers-A-REVA.pdf.

the largest bankruptcy proceeding in United States history.[2] The collapse of Lehman Brothers was unprecedented, as many thought the investment bank was "too big to fail."[3] One of the main causes of Lehman Brothers' demise was its exposure to real estate and subprime mortgages; however, Lehman Brothers was not the only entity hurt by the subprime market craze.[4]

The Great Recession of 2008 struck a heavy hand to many investors, families, and businesses. The crisis began long before the downfall in 2008.[5] In late 2001, the Federal Reserve dropped interest rates to new lows in order to restore a fragile economy caused by the bursting of the dotcom bubble,[6] high oil prices, and the terrorist attacks of September 11.[7] The low interest rates created a boom in the market, dramatically increasing the number of borrowers that were willing to accept the new interest rates.[8] These borrowers created a large demand for real estate, increasing the price dramatically.[9] Due to these conditions, many individuals treated homes as an asset to be bought and sold in order to make money.[10] These owners were not committed to the idea of continuing payments on their mortgage when the housing market tumbled.[11] Some individuals simply could not keep up with their payments.[12] Furthermore, the Federal Reserve's decision to lower interest rates had a profound effect on bond investors who, seeking a higher return, looked at AAA mortgage-backed-securities as more attractive than real estate investments.[13]

To remain competitive as a lender in the increasingly competitive housing industry, the credit standards for lenders declined.[14] Thus, many investment and commercial banks entered into the subprime mortgage markets to have an edge against others. In 2000, a subprime borrower had a FICO credit

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2 *Id.*

3 *Id.*

4 *See id.*

5 *See generally* MARK T. WILLIAMS, UNCONTROLLED RISK: THE LESSONS OF LEHMAN BROTHERS AND HOW SYSTEMIC RISK CAN STILL BRING DOWN THE WORLD FINANCIAL SYSTEM (2010) [hereinafter UNCONTROLLED RISK].

6 The "dotcom bubble" is a reference to the building up of new businesses online that led to uncontrolled investment growth. This growth resulted in a steep market decline in March of 2000. *See* Ben Geier, *What Did We Learn from the Dotcom Stock Bubble of 2000?*, TIME (Mar. 12, 2015), http://time.com/3741681/2000-dotcom-stock-bust/.

7 *See* UNCONTROLLED RISK, *supra* note 5, at 118.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *See generally id.*

13 *Id.* at 119.

14 *Id.*

score of 660 or less, and, by 2005, many lenders had dropped that score to 620.[15] From 2004 to 2006, subprime mortgage rates rose from 8% to approximately 20%.[16] Trouble began to appear in late 2006, when default rates on subprime and even prime mortgages began to increase dramatically.[17] One of the main factors leading to this was the sharp decline in housing prices in mid-2006, which drove interest rates back up and made refinancing more difficult.[18] Mortgages continued a downward spiral and, by August 2008, 9.2% of U.S. mortgages were either delinquent or in foreclosure.[19] This number rose to 14.4% by September 2009.[20]

The collapse of the housing market and subsequent defaults by borrowers had a spillover effect in other areas of finance. The Dow Jones Industrial Average ("DJIA") peaked at an all-time high for the period on October 9, 2007, with an adjusted closing price of $14,164.53.[21] From this peak, the DJIA started its rapid decline, losing over 54% of its value by March 9, 2009, with an adjusted closing price of $6,547.05.[22] However, from this low, the market began to recover from the financial crisis. The Wall Street Journal reported that the Dow Jones had risen 21% in 13 days after the early March low.[23] Even though the markets were recovering, many individuals demanded a change in the regulatory structure of the financial markets to ensure that future recessions would never be as serious. From these discussions, Congress passed and the President signed the Dodd-Frank Wall Street Reform and Consumer Protection

15 *Id.* at 124.

16 DEP'T. OF STATISTICS & OPERATIONS RESEARCH, THE UNIV. OF N.C. AT CHAPEL HILL, SUBPRIME MORTGAGE CRISIS 1 (2008) [hereinafter CRISIS], http://www.stat.unc.edu/faculty/cji/fys/2012/Subprime%20mortgage%20crisis.pdf.

17 Gene Amromin & Anna L. Paulson, *Default Rates on Prime and Subprime Mortgages: Differences and Similarities*, PROFITWISE: NEWS & VIEWS 1, 1 (2010), https://www.chicagofed.org/~/media/publications/profitwise-news-and-views/2010/pnv-aug2010-reed-final-web-pdf.pdf.

18 *See* CRISIS, *supra* note 16, at 2; *see also* JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 2008 1 (2008), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2008.pdf.

19 *See* CRISIS, *supra* note 16, at 4.

20 *Id.*

21 *Dow Jones Industrial Average: Historical Data*, YAHOO! FIN., https://finance.yahoo.com/quote/%5EDJI/history?period1=1191816000&period2=1236571200&interval=1d&filter=history&frequency=1d (last visited Aug. 23, 2018).

22 *Id.*

23 E. S. Browning, *Bears Are Wary as Bull Returns*, WALL ST. J. (Mar. 27, 2009, 12:01 AM), https://www.wsj.com/articles/SB123811041706752903.

Act in 2010.[24] Many economists and news organizations hailed the Act as the "biggest overhaul of U.S. financial regulation since the 1930s . . . ."[25] However, some have since proposed rolling back the Dodd-Frank Act of 2010.

This Note argues that Congress should be wary of rolling back the Dodd-Frank Act of 2010 and should instead seek to improve the Act by altering parts of existing language and implementing new sections to cure deficiencies. Rolling back the Dodd-Frank Act could lead to excessive risk-taking in markets by banks and investors. Part II of this Note discusses the Dodd-Frank Act of 2010 and the effects of the legislation seven years after its enactment. Furthermore, this Note analyzes current attempts by Congress to rollback certain provisions of the Dodd-Frank Act and the effect that economists believe these rollbacks may have on the future of the markets. Part III argues that, instead of rolling back major parts of the Dodd-Frank Act, which is a short-sighted approach to fixing the deficiencies within the current Act, alterations can be made to current Dodd-Frank Act language. Part III contains proposed language not mentioned in the Act to rectify these deficiencies.

II. BACKGROUND

The financial crisis of 2008 sent shockwaves through the financial sectors of the United States. Calls by legislators and citizens to further regulate actions by investors and banks were heard nationwide.[26] These efforts led to several regulatory reforms,[27] including one this Note will analyze in depth: the Dodd-Frank Act.

Since its inception in 2010, many have been unsure whether the landmark financial regulation bill has accomplished all that it purported to do.[28] Some claim that the law has crushed small banks, restricted access to credit, and caused more financial instability in the market.[29] Others argue that the Dodd-

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[24] Jesse Lee, *President Obama Signs Wall Street Reform: "No Easy Task"*, WHITE HOUSE, (July 21, 2010, 2:22 PM), https://obamawhitehouse.archives.gov/blog/2010/07/21/president-obama-signs-wall-street-reform-no-easy-task.

[25] *Factbox: Highlights of U.S. Dodd-Frank Wall St Reform Bill*, REUTERS (Nov. 8, 2010, 12:26 PM), https://www.reuters.com/article/us-financial-regulation-sifma-doddfrank/factbox-highlights-of-u-s-dodd-frank-wall-st-reform-bill-idUSTRE6A73MR20101108.

[26] Edmund L. Andrews, *Greenspan Concedes Error on Regulation*, N.Y. TIMES (Oct. 23, 2008), http://www.nytimes.com/2008/10/24/business/economy/24panel.html.

[27] *See* DARRELL DUFFIE, STAN. UNIV., FINANCIAL REGULATORY REFORM AFTER THE CRISIS: AN ASSESSMENT, (2016), https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/rp3440_financial_regulatory_reform_after_the_crisis.pdf.

[28] *See* Jeb Hensarling, *After Five Years, Dodd-Frank is a Failure*, WALL ST. J. (July 19, 2015, 5:50 PM), https://www.wsj.com/articles/after-five-years-dodd-frank-is-a-failure-1437342607.

[29] *Id.*

Frank Act has been a "stabilizing force" for the United States economy and that any attempt to roll back the regulations would be catastrophic.[30]

The following sections further analyze the Dodd-Frank Act. Section II.A discusses the various provisions of the Dodd-Frank Act and the purpose(s) behind each provision. Next, Section II.B examines new efforts by Congress to look through the Act and overhaul or rollback certain provisions mentioned in Section II.A.

A. The Dodd-Frank Act of 2010

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 was initially proposed by President Barack Obama in June 2009.[31] The bill was created as a response to the recession, which had led to a high unemployment rate as well as losses and instability with banks, investors, and businesses. The bill was later revised and named after then Financial Services Committee Chairman, Barney Frank, and former Chairman of the Senate Banking Committee, Chris Dodd, for their work on the bill.[32] On July 21, 2010, the bill officially became law.[33]

On its face, the purpose of the law is to "promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."[34] The law includes several provisions to curtail the major drivers of the 2008 financial crisis. Some of these provisions include changes to federal financial regulation and substantive requirements that apply to a range of market participants.[35] The full Act includes more than 16 titles, and, thus, is too large to fully evaluate and discuss in this Note.[36] Therefore, this Note

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30 Andrew Soergel, *A Stabilizing Force*, U.S. NEWS (July 21, 2015, 6:00 AM), https://www.usnews.com/news/the-report/articles/2015/07/21/ask-an-economist-did-dodd-frank-stabilize-the-financial-sector.

31 President Barack Obama, Remarks of the President on Regulatory Reform (June 17, 2009), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-regulatory-reform.

32 Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2009–10), https://www.congress.gov/bill/111th-congress/house-bill/04173#major%20actions.

33 *Id.*

34 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5301 (2012)).

35 David S. Huntington et al., *Summary of Dodd-Frank Financial Regulation Legislation*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE AND FIN. REGULATION (July 7, 2010), https://corpgov.law.harvard.edu/2010/07/07/summary-of-dodd-frank-financial-regulation-legislation/#comments.

36 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5301 et seq. (2012)).

will focus on three major provisions that are currently in debate for rollback or alteration at the Congressional level: the Volcker Rule, the Consumer Financial Protection Bureau, and the Orderly Liquidation Authority of regulators.

1. The Volcker Rule

The Volcker Rule is buried in the Dodd-Frank Act and is found in Section 619.[37] Paul Volcker, the former Federal Reserve Chairman for whom the rule is named, states that the purpose of the rule is to keep banks from taking excessive risks based on the implied notion of government support.[38]

The Bank Holding Company Act of 1956 was amended to incorporate the prohibitions included in the Volcker Rule.[39] The Volcker Rule sought to end excessive risk-taking by stopping banking entities from "(A) engag[ing] in proprietary trading; or (B) acquir[ing] or retain[ing] any equity, partnership, or other ownership interest in or sponsor[ing] a hedge fund or a private equity fund."[40] In more common terms, the Rule stops banks from engaging in risky actions by "restricting certain types of trading activities."[41] Commissioner Kara Stein, when explaining how the Rule sought to protect the market, stated that "[t]he Volcker Rule seeks to limit those threats and the need for that type of a rescue by restoring part of the firewall between commercial and investment banking, redrawn in ways to reflect some of the more potent risks modern markets pose."[42] She went on to explain that the Rule was implemented to encompass certain activities not covered by the Glass-Steagall Act and to encourage the banks to focus on serving customers—not on making large speculative bets.[43]

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37 *Id.*

38 *See* Paul A. Volcker, *Commentary on the Restrictions on Proprietary Trading by Insured Depositary Institutions*, http://online.wsj.com/public/resources/documents/Volcker_Rule_Essay_2-13-12.pdf (last visited Aug. 23, 2018).

39 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5301 et seq. (2018)).

40 12 U.S.C. § 1851 (2018).

41 MATTHEW RICHARDSON, N.Y.U. STERN SCH. OF BUS., WHY THE VOLCKER RULE IS A USEFUL TOOL FOR MANAGING SYSTEMIC RISK 3, https://www.sec.gov/comments/s7-41-11/s74111-316.pdf.

42 Commissioner Kara M. Stein, *The Volcker Rule: Observations on Systemic Resiliency, Competition, and Implementation*, U.S. SEC. AND EXCHANGE COMM'N (Feb. 9, 2015), https://www.sec.gov/news/speech/volcker-rule-observations-on-systemic-resiliency-competition.html.

43 *Id.*

While the Volcker Rule prohibits proprietary trading[44] and ownership interest in hedge funds or a private equity fund, the Rule does offer several exemptions to these prohibitions.[45] For proprietary trading, the Rule provides exemptions for underwriting, market making-related activities, risk-mitigating hedging, trading in certain government obligations, certain trading activities of foreign banking entities, and a few other permitted activities.[46] The underwriting exemption requires that "a banking entity act as an underwriter for a distribution of securities (including both public and private offerings) and that the trading desk's underwriting position be related to that distribution."[47] The market making-related activities exemption requires that a trading desk stand ready to "purchase and sell one or more types of financial instruments."[48] The trading in certain government obligations exemptions permit banks to continue to engage in proprietary trading with U.S. governmental obligations.[49] Certain trading activities of foreign banking entities are generally not prohibited under this rule so long as the trading decisions and principal risks of the foreign banking entity take place outside of the United States.[50] Finally, trading on behalf of a customer in a fiduciary capacity or in principal trades that are not with risk for an insurance company for its general or separate account are generally allowed.[51]

For the covered funds prohibitions, hedge funds, and private equity funds, the Volcker Rule offers several exemptions and exclusions. The prohibition excludes entities with more general corporate purposes.[52] Examples of entities that fall under this category are wholly-owned subsidiaries, joint ventures, acquisition vehicles, SEC-registered investment companies, and business development companies.[53] Other exclusions include the availability of foreign funds offered abroad, loan securitizations, insurance company separate accounts, small business investment companies, and public welfare

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44 Proprietary trading occurs when financial institutions utilize customer money to lend again and make profits. *See* Heather Stewart, *What Is "Proprietary Trading"?*, THE GUARDIAN (Jan. 21, 2010, 2:06 PM), https://www.theguardian.com/business/2010/jan/21/proprietary-trading-wall-street-banks.

45 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5301 et seq. (2012)).

46 OFFICE OF THE COMPTROLLER OF THE CURRENCY, U.S. DEP'T OF TREASURY, FINAL RULES TO IMPLEMENT THE "VOLCKER RULE" 1, https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20131210a3.pdf.

47 *Id.*

48 *Id.*

49 *Id.* at 2.

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

investments.[54] The Rule also permits "a banking entity, subject to appropriate conditions, to invest in or sponsor a covered fund in connection with: organizing and offering the covered fund; underwriting or market making-related activities; certain types of risk-mitigating hedging activities; activities that occur solely outside of the United States and insurance company activities."[55]

The Volcker Rule became effective on April 1, 2014.[56] At that time, the Federal Reserve Board extended the conformance until July 21, 2015.[57] The Board hoped that this extra time would allow bank entities to conform to the various rules implemented in Section 619. The final Volcker Rule requires all, except the "less active" bank entities, to set forth a compliance program to ensure that their respective entities remain in compliance with the various prohibitions and exemptions provided for in the Volcker Rule.[58] However, for our purposes, we will not delve into the intricacies of the compliance procedures.

However, the Volcker Rule has not been implemented without stiff opposition. Many claim that the Rule limits market-making activities through which financial institutions use to assist their customers.[59] Furthermore, several experts have indicated that the Rule will impede on a financial institution's ability to manage a customer's risk by hedging positions.[60] Another problem with the Rule arises under the interpretation of regulators between different administrations. The Rule was constructed with an ability to allow it to be construed broadly or narrowly.[61] The Rule also requires more information to be disclosed by boards and directors of large organizations.[62] This requirement puts a large responsibility on upper-level management that may lead to

54 *Id.*

55 *Id.* at 2–3.

56 *Id.* at 3.

57 *Id.*

58 *See* A USER'S GUIDE TO THE VOLCKER RULE, INT'L FIN. L. REV. 27 (2014) [hereinafter USER'S GUIDE], http://www.iflr.com/pdfs/A-users-guide-to-the-Volcker-Rule.pdf.

59 *The Volcker Rule's Impact on Financial Institutions and Companies*, LEXISNEXIS, https://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2014/01/06/the-volcker-rule-s-impact-on-financial-institutions-and-companies.aspx (last visited Sept. 6, 2018).

60 *Id.*

61 *The Final Volcker Rule: 10 Issues for Banks to Consider*, WALL ST. J. (Feb. 25, 2014, 12:01 AM), http://deloitte.wsj.com/riskandcompliance/2014/02/25/the-final-volcker-rule-10-issues-for-banks-to-consider/.

62 *Id.*

disorganization and difficulties.[63] Lastly, many worry that the large compliance burden may negatively affect community banks.[64]

2. The Consumer Financial Protection Bureau

Title X of the Dodd-Frank Act establishes the Bureau of Consumer Financial Protection (hereinafter "CFPB" or "the Bureau").[65] On the Bureau's website, it states that its core function is to "provide a single point of accountability for enforcing federal consumer financial laws and protecting consumers in the financial marketplace."[66] The Bureau lists its core work as rooting out unfair, deceptive, or abusive acts or practices by writing rules, supervising companies, and enforcing the law; enforcing laws that outlaw discrimination in consumer finance; taking consumer complaints; enhancing financial education; researching the consumer experience of using financial products; and monitoring financial markets for new risks to consumers.[67] The Bureau was first proposed in 2007 by Professor Elizabeth Warren, who was working at Harvard University at the time.[68] The Bureau formally began operations on July 21, 2011, with Richard Cordray at the helm.[69]

The White House under President Barack Obama released a page detailing the various uses for the Consumer Financial Protection Bureau.[70] President Obama contended that the Bureau was needed to consolidate the already existing regulatory structure and to focus on consumers.[71] The page stated that, "for the first time, the Federal government w[ould] be able to regulate

63 *Id.*

64 *See generally* MARSHALL LUX & ROBERT GREENE, HARVARD KENNEDY SCH., THE STATE AND FATE OF COMMUNITY BANKING (2015), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/Final_State_and_Fate_Lux_Greene.pdf.

65 Dodd Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5301 et seq. (2012)).

66 *The Bureau*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/about-us/the-bureau/ (last visited Aug. 23, 2018).

67 *Id.*

68 *See generally* Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY (Summer 2007), http://democracyjournal.org/magazine/5/unsafe-at-any-rate/.

69 Binyamin Applebaum, *Former Ohio Attorney General to Head New Consumer Agency*, N.Y. TIMES (July 17, 2011), http://www.nytimes.com/2011/07/18/business/former-ohio-attorney-general-picked-to-lead-consumer-agency.html?_r=0&pagewanted=all.

70 *See generally* Megan Slack, *Consumer Financial Protection Bureau 101: Why We Need a Consumer Watchdog*, WHITE HOUSE: BLOG (Jan. 4, 2012, 11:13 AM), https://obamawhitehouse.archives.gov/blog/2012/01/04/consumer-financial-protection-bureau-101-why-we-need-consumer-watchdog.

71 *Id.*

the activities of independent payday lenders, private mortgage lenders and servicers, debt collectors, credit reporting agencies, and private student loan companies."[72] The availability of these regulations, President Obama argued, would allow for greater consumer protection across the financial markets.[73] Furthermore, the President argued that the Bureau had sufficient tools in its arsenal to protect individuals and their money.[74] The President stated that the main duties of the Bureau fell into three broad categories.[75] These categories are to educate, enforce, and research.[76] For education, the White House stated that the "CFPB provides financial education to consumers and ensures people are able to get the information they need to make sound financial decisions."[77] The President hoped that this information would help consumers with a more transparent financial system for non-banking entities.[78] Under enforcement, the President stated that the Bureau "is responsible for rule-making, supervision, and enforcement of Federal consumer financial protection laws and restricting unfair, deceptive, or abusive acts or practices against consumers."[79] Thus, the Bureau would have the ability to punish and fine those that hurt consumers directly.[80] Finally, the White House stated that the Bureau had the duties to research by analyzing how people respond and interact with financial institutions and vice-versa.[81]

The Bureau has been able to accomplish a variety of goals since its inception. To start, the Bureau successfully set new standards for the mortgage market.[82] These standards require lenders to verify that borrowers have the income necessary in order to repay loans.[83] Furthermore, the standards have discouraged lenders from having exotic mortgages that boasted introductory

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

77 *See id.*

78 *Id.*

79 *Id.*

80 *See generally The Dodd-Frank Act Reinforces and Expands SEC Enforcement Powers*, GIBSON DUNN (July 21, 2010), https://www.gibsondunn.com/the-dodd-frank-act-reinforces-and-expands-sec-enforcement-powers/.

81 *Id.*

82 Ian Salisbury, *The CFPB Turns 5 Today. Here's What It's Done (and What it Hasn't)*, TIME: MONEY (July 21, 2016), http://time.com/money/4412754/cfpb-5-year-anniversary-accomplishments/; *see also* Slack, *supra* note 70.

83 *See* Salisbury, *supra* note 82; *see also* Slack, *supra* note 70.

"teaser" rates.[84] The Bureau has been using their enforcement power liberally.[85] As of the summer of 2016, the Bureau had obtained more than $11.7 billion in relief for consumers.[86] These payments went on to reimburse more than 27 million consumers who have been victims, according to the Bureau.[87] The Bureau also created a "shopping sheet" for use by students who seek financial aid from the government.[88] These sheets are meant to inform institutions and schools on how to better inform prospective students on the costs of college.[89] Lastly, the Bureau instituted new card agreements for consumers who seek credit cards in order to allow them to better digest the information given to them at the time of signing.[90]

Since the Bureau's inception, it has been rife with legal challenges and controversy. Two main lawsuits were filed in the early years of the Bureau. The first of these law suits was filed on June 21, 2012, and argued that the Bureau is an "Unconstitutional Power-Grab."[91] The Complaint further alleged that using a recess appointment to appoint the Bureau's Director was beyond the President's power and is unconstitutional.[92] One year later, the judge dismissed the Complaint finding that the plaintiff lacked standing to bring the proceeding.[93] However, in the summer of 2015, the United States Court of Appeals for the District of Columbia Circuit found that the bank in the suit did have standing to challenge the Bureau but that the states mentioned in the complaint did not have standing to bring the suit.[94] After the case was remanded to the lower court, the District Court granted and denied summary judgment in part.[95] The district court judge wrote that the plaintiff's assertion that the Director did not have the authority to ratify his actions prior to his official confirmation were not persuasive.[96]

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84 *See* Salisbury, *supra* note 82; *see also* Slack, *supra* note 70.

85 *See* Salisbury, *supra* note 82.

86 *Id.*

87 *Id.*

88 *See* Slack, *supra* note 70.

89 *Id.*

90 *Id.*

91 Christine Hall, *Dodd-Frank Unconstitutional Power-Grab, Says New Lawsuit*, COMPETITIVE ENTER. INST. (June 21, 2012), https://cei.org/content/dodd-frank-unconstitutional-power-grab-says-new-lawsuit.

92 State Nat'l Bank of Big Spring v. Lew, 958 F. Supp. 2d 127, 132 (D.D.C. 2013).

93 *Id.* at 165.

94 State Nat'l Bank of Big Spring v. Lew, 795 F.3d 48, 57 (D.C. Cir. 2015).

95 State Nat'l Bank of Big Spring v. Lew, 197 F. Supp. 3d 177, 186 (D.D.C. 2016).

96 *Id.* at 184–85.

On July 22, 2013, another complaint was filed by a private law firm challenging the Bureau's constitutionality.[97] This complaint by Kimberly A. Pisinski and Morgan Drexen, Inc. alleged that the Bureau's structure "insulates it from political accountability and internal checks and balances in violation of the United States Constitution."[98] However, later that October, the Court dismissed the Complaint and never addressed the merits of the plaintiff's constitutionality claim.[99]

Requiring "for cause" removal of the Director has also been debated among the courts since the Bureau's inception. In 2016, the United States Court of Appeals for the District of Columbia heard this argument.[100] In *PHH Corp. v. Consumer Financial Protection Bureau*, the Court discussed the background and the role of independent agencies in the Federal Government.[101] The Court further delved into the intricacies of the formation of the Consumer Financial Protection Bureau.[102] The Court explained that, originally, the Bureau, as explained by the White House and Senator Warren, was to be made up of a multi-member board or panel to ensure a balance and check on power.[103] The Court summarized this idea by stating:

> [T]o help preserve individual liberty under Article II, the heads of executive agencies are accountable to and checked by the President, and the heads of independent agencies, although not accountable to or checked by the President, are at least accountable to and checked by their fellow commissioners or board members.[104]

However, after multiple reiterations in Congress, the Dodd-Frank Act was passed with a provision stating that the Bureau was to be headed by a single director and not a multi-member commission.[105] Thus, as the Court stated, "the Director enjoys more unilateral authority than any other officer in any of the

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97 Richard Pollock, *Private Firm Sues CFPB, Challenges Board's Constitutionality*, WASH. EXAM'R (July 23, 2013, 12:00 AM), http://www.washingtonexaminer.com/private-firm-sues-cfpb-challenges-boards-constitutionality/article/2533354.

98 Complaint at 1, Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau, 979 F. Supp. 2d 104 (D.D.C. 2013) (No. 13-CV-1112).

99 Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau, 979 F. Supp. 2d 104, 122 (D.D.C. 2013).

100 PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 7 (D.C. Cir. 2016).

101 *Id.* at 12–15.

102 *Id.* at 15.

103 *Id.* at 7.

104 *Id.*

105 *Id.*

three branches of the U.S. Government, other than the President."[106] After evaluating the powers given to the Bureau, the Court decided to require the agency to conform to *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and become a position with "at will" removal by the President.[107] This opinion made national headlines across the United States.[108]

The following year, the same court granted the respondent's petition for a rehearing *en banc*.[109] The Court asked the parties to answer three questions.[110] The first of these was, "Is the CFPB's structure as a single-Director independent agency consistent with Article II of the Constitution and, if not, is the proper remedy to sever the for-cause provision of the statute?"[111] The second was, "May the court appropriately avoid deciding that constitutional question given the panel's ruling on the statutory issues in this case?"[112] The last question the court wished for the parties to answer was, "If the *en banc* court, which has today separately ordered *en banc* consideration of *Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), concludes in that case that the administrative law judge who handled that case was an inferior officer rather than an employee, what is the appropriate disposition of this case?"[113] These questions may form the foundation for further legal analysis by other courts in the future.

Further controversy and opposition has arisen in committees in Congress. The United States House Financial Services Committee ("the Committee") published a press release criticizing the Bureau for its lack of oversight and accountability.[114] The Subcommittee Chairman Patrick McHenry asserted that, "[i]n the end, this single director can disregard advice and manage as he wishes. He has little accountability to the Administration, and even less to Congress; his budget is secure."[115] The Committee further condemned the Bureau citing several specific problems.[116] Some of these included not following the Office of Management and Budget guidelines, rules and regulations, not

106 *Id.*

107 *Id.* at 39.

108 Stacy Cowley, *Court Gives President More Power Over Consumer Agency Chief*, N.Y. TIMES (Oct. 11, 2016), https://www.nytimes.com/2016/10/12/business/dealbook/consumer-financial-protection-bureau-court-ruling-unconstitutional.html?_r=1.

109 PHH Corp. v. Consumer Fin. Prot. Bureau, No. 15-1177, 2017 U.S. App. LEXIS 2733 (D.C. Cir. Feb. 16, 2017).

110 *Id.* at *5–6.

111 *Id.* at *6.

112 *Id.*

113 *Id.*

114 *CFPB Lacks Oversight and Accountability*, U.S. HOUSE FIN. SERVS. COMM. (June 18, 2013), https://financialservices.house.gov/news/documentprint.aspx?DocumentID=339512.

115 *Id.*

116 *Id.*

participating in the Office of Personnel Management Employee Viewpoint Survey, and spending a substantial amount of money on travel for its employees.[117]

The Bureau has also been under heavy scrutiny for its methodology in identifying alleged acts of racial discrimination among auto lenders.[118] The Bureau, because of legal restraints, utilized a method of identifying applicants' last names and addresses to "guess" the race of auto loan applicants.[119] The Bureau used this information to charge several lenders with discriminating against minority applicants.[120] These charges led to a large amount of fines and settlement fees paid to the Bureau.[121] However, as of late 2015, the Bureau had yet to compensate the individuals who were victims of the auto loan discrimination, and the government still was not sure whether the individuals that would be receiving payments were actual minorities.[122] The Bureau even admitted in private documents that it knew the methodology was flawed and was overestimating the number of minority applicants, but they continued to use the method regardless.[123]

3. Orderly Liquidation Authority for Regulators

Title II of the Dodd-Frank Act outlines the orderly liquidation authority for regulators.[124] The purpose behind the provision is to allow for the quick and orderly liquidation of large financial companies that are close to failing.[125] The provision allows the government to liquidate large organizations so that they do not need to bailout businesses that subsequently file for bankruptcy after being provided government funds.[126] Entities that are subject to the provisions provided

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117 *Id.*

118 Yuka Hayashi, *Lawmakers Dispute Method to Identify Victims of Racial Bias in Auto Lending*, WALL ST. J. (Jan. 19, 2016, 7:06 PM), https://www.wsj.com/articles/lawmakers-dispute-method-to-identify-victims-of-racial-bias-in-auto-lending-1453248363.

119 *Id.*

120 *Id.*

121 *Id.*

122 AnnaMaria Andriotis & Rachel Louise Ensign, *U.S. Government Uses Race Test for $80 Million in Payments*, WALL ST. J. (Oct. 29, 2015), https://www.wsj.com/articles/u-s-uses-race-test-to-decide-who-to-pay-in-ally-auto-loan-pact-1446111002.

123 Rachel Witkowski, *CFPB Overestimates Potential Discrimination, Documents Show*, AM. BANKER (Sept. 17, 2015, 10:00 PM), https://www.americanbanker.com/news/cfpb-overestimates-potential-discrimination-documents-show.

124 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5381 et seq. (2012)).

125 *Id.*

126 *Id.*

for in the authority are those classified as "financial companies."[127] The provision lists four separate categories of financial companies that fall under the reach of the Act.[128]

Title II provides several provisions which outline the process by which organizations in financial distress will be evaluated and liquidated. First, the Secretary of the Treasury ("the Secretary") will determine if the company should be placed in a receivership under Title II.[129] The Secretary utilizes a two-pronged test to determine this.[130] First, the Secretary reviews the company and determines whether it is in default or in danger of defaulting.[131] Some contributing factors in this analysis include whether the company is likely to file for bankruptcy, has greater debts than assets, has incurred debts that will deplete most capital, or will likely be able to not pay debts in the normal course of business.[132] Next, the Secretary evaluates the systemic risk involved if the company were to default.[133] These risks include the effect of default on financial stability, lower income communities, creditors, and shareholders.[134] The Secretary will also examine the likelihood of bankruptcy, private sector alternatives, and what future actions can be taken to help the company.[135] If the Secretary completes this analysis and believes that the company should be placed into receivership under the Federal Deposit Insurance Corporation ("FDIC"), the FDIC will take control of the assets, liabilities, and operations of the company.[136]

As receiver of the company, the FDIC takes on the duties of the company which has been placed under receivership. These duties include the transfer or sale of assets, creating bridge financial organizations to help assume assets or liabilities during liquidation, and approving or denying creditor's claims against the company.[137] This liquidation process imposes heavy financial burdens on the FDIC, however. Thus, Title II of the Dodd-Frank Act also creates the Orderly Liquidation Fund.[138] This fund is created by the U.S. Treasury to cover the

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127 MARK A. MCDERMOTT, SKADDEN, ORDERLY LIQUIDATION AUTHORITY 1, https://files.skadden.com/newsletters%2FFSR_Orderly_Liquidation_Authority.pdf.

128 *Id.*

129 *See* 12 U.S.C. § 5383 (2018).

130 *Id.*

131 *Id.*

132 *See id.*

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.* § 5390.

administrative costs of liquidation that the FDIC may incur during the process.[139] As receiver, the FDIC may also invalidate prior agreements that hinder the ability of it to carry out its duties.[140] If the financial company is a broker or dealer, not only is the FDIC appointed receiver, the Securities Investor Protection Corporation ("SIPC") is appointed as trustee to manage any assets that are not transferred over to a bridge company by the FDIC.[141]

Once the FDIC has been placed as the receiver for a financial company, the claims process begins. Title II also provides the process for asserting claims against the defaulting company and establishes a ladder to determine the priority of payments made to creditors.[142] The "ladder" for claims is set up as follows with (1) administrative costs; (2) the government; (3) wages, salaries, or commissions of employees; (4) contributions to employee benefit plans; (5) any other general or senior liability of the company; (6) any junior obligation; (7) salaries of executives and directors of the company; and (8) obligations to shareholders, members, general partners, and other equity holders.[143] The list was constructed in this way to ensure that the executives, directors, and shareholders bear the burden of the losses and failures of the company by being the last in line to receive payments.[144] Further, the Act makes directors and management personally liable for losses that occurred from their gross negligence or bad conduct.[145] However, when the FDIC is working to conduct the liquidation, the FDIC must take action not to preserve the company they have been appointed receiver to but rather to preserve the financial stability of the economy as a whole.[146]

Many argue that one of the most important provisions provided under Title II of the Dodd-Frank Act is the ban of the use of taxpayer funds to preserve a company into receivership under Title II.[147] Many of the controversies from the 2008 Financial Crisis was the use of taxpayer money to bail out many major companies. Congress hoped that the implementation of this provision with the liquidation authority granted to it would ensure that taxpayer funds would be protected.

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139 *Id.*

140 *Id.*

141 *Id.* § 5385.

142 *Id.* §§ 5389, 5390.

143 *Id.* § 5389.

144 *Dodd-Frank: Title II – Orderly Liquidation Authority*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/dodd-frank_title_II (last visited Aug. 24, 2018).

145 *Id.*

146 *Id.*

147 *Id.*

B. Proposed Congressional Changes

For many years, Congress has discussed changing key provisions of the landmark Dodd-Frank Act. However, recently, Congress has finally taken the first actions to implement and modify provisions to the Dodd-Frank Act.[148] Congressional leaders claim that the Dodd-Frank Act encourages bailouts, and they, instead, wish to pursue market discipline to enforce regulatory behavior.[149] Others claim that these "modifications" will strip the bill of its key provisions that protect the United States economy from another crash.[150] One of the key bills that was passed in the House of Representatives is the Financial CHOICE Act of 2017.[151]

The Financial Services Committee set up a website to view the Financial CHOICE Act and its key provisions.[152] The Committee summarized the bill by stating the following seven key principles:[153]

> 1. Taxpayer bailouts of financial institutions must end and no company can remain too big to fail; 2. Both Wall Street and Washington must be held accountable; 3. Simplicity must replace complexity, because complexity can be gamed by the well-connected and abused by the Washington powerful; 4. Economic growth must be revitalized through competitive, transparent, and innovative capital markets; 5. Every American, regardless of their circumstances, must have the opportunity to achieve financial independence; 6. Consumers must be vigorously protected from fraud and deception as well as the loss of economic liberty; and 7. Systemic risk must be managed in a market with profit and loss.[154]

The bill seeks to accomplish these principles in a variety of ways. However, for purposes of this Note, I will focus on alterations to the three

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148 H.R. 10, 115th Cong. (2017).

149 Jim Puzzanghera, *House Votes Along Party Lines to Repeal Key Dodd-Frank Financial Reforms*, L. A. TIMES (Jun. 8, 2017, 2:25 PM), http://www.latimes.com/business/la-fi-dodd-frank-repeal-20170608-story.html.

150 Bob Bryan, *The House Quietly Voted to Destroy Post-Financial-Crisis Wall Street Regulations*, BUS. INSIDER (June 8, 2017, 4:56 PM), http://www.businessinsider.com/house-vote-on-financial-choice-act-wall-street-dodd-frank-regulation-2017-6.

151 H.R. 10, 116th Cong. (2017).

152 *See generally The Financial CHOICE Act*, HOUSE COMMITTEE ON FIN. SERVS., https://financialservices.house.gov/choice/ (last visited Aug. 23, 2018).

153 HOUSE COMM. ON FIN. SERVS., THE FINANCIAL CHOICE ACT: EXECUTIVE SUMMARY, https://financialservices.house.gov/uploadedfiles/financial_choice_act_executive_summary_final.pdf (last visited Aug. 21, 2018).

154 *Id.*

provisions of the Dodd-Frank Act above. The first provision that the bill seeks to modify is Title II of the Dodd-Frank Act, which outlines the Orderly Liquidation Authority. The bill, as proposed, offers a "six-step plan to end bailouts."[155] First, the bill seeks to repeal the Orderly Liquidation Authority in its entirety.[156] After repealing the Orderly Liquidation Authority, the bill wishes to replace it with a new chapter to the federal Bankruptcy Code that could accommodate the failure of large, complex financial institutions.[157] Next, the bill seeks to impose new limitations on the Federal Reserve's emergency lending authority.[158] The bill also wishes to prohibit the future use of the Exchange Stabilization Fund to bail out a financial firm or creditors.[159] Fifth, the bill seeks to repeal the FDIC's authority to establish a widely available program to guarantee obligations of banks during times of severe economic crisis.[160] Finally, the bill repeals the authority in the Financial Stability Oversight Council to designate certain financial organizations as "too big to fail."[161]

The drafters of the Financial CHOICE Act expressed their worry that taxpayers would be exposed to pay under the Orderly Liquidation Authority.[162] The drafters cited to the six largest United States banking organizations, discussing that the FDIC could borrow potentially over $10 trillion to cover the assets of these institutions.[163] This large amount of exposure worried the drafters who state that "taxpayers have received such promises from their government before, only to find themselves holding the bag for billions of dollars in losses . . . ."[164]

Another key bill that is currently being discussed in the Senate is entitled the Economic Growth, Regulatory Relief and Consumer Protection Act ("Economic Act").[165] The bill took the work the House had done in the Financial CHOICE Act and attempted to make it more bipartisan to attain the votes

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155 HOUSE COMM. ON FIN. SERVS., THE FINANCIAL CHOICE ACT: CREATING HOPE AND OPPORTUNITY FOR INVESTORS, CONSUMERS, AND ENTREPRENEURS 22 (2017), https://financialservices.house.gov/uploadedfiles/2017-04-24_financial_choice_act_of_2017_comprehensive_summary_final.pdf.

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.* at 24.

163 *Id.* at 25.

164 *Id.* at 24.

165 Jim Puzzanghera, *Senate Committee Advances Bipartisan Measure Rolling Back Some Bank Regulations*, L. A. TIMES (Dec. 5, 2017, 2:35 PM), http://beta.latimes.com/business/la-fi-senate-banking-regulations-20171205-story.html.

required. The Economic Act is much narrower in scope than the Financial CHOICE Act. The Congressional Research Service ("CRS") published a report that summarized the arguments for and in opposition to the bill.[166] The CRS states that the general purpose of the bill is to "provide regulatory relief to banks, relax mortgage lending rules, and provide additional consumer protections related to credit reporting and other areas."[167] Supporters of the bill stated that it would eliminate a number of burdensome regulations, foster economic growth, and provide consumer protections.[168] Opponents of the bill argued that it would needlessly eliminate provisions of Dodd-Frank to benefit large and profitable banks.[169] The CRS categorized the provisions of the bill into five main categories: (1) regulatory relief for "community" banks, (2) regulatory relief for large banks, (3) amendments to mortgage lending regulations, (4) new consumer protections in credit reporting, and (5) regulatory changes in capital markets.[170] Proponents contend that the bill offered by the Senate would eliminate unduly burdensome regulations, foster economic growth, and provide increased consumer protections.[171] Opponents argue that the bill would needlessly limit Dodd-Frank protections in order to benefit large and profitable banks.[172]

III. ANALYSIS

This Note argues that drastically overhauling the three sections of the Dodd-Frank Act listed above would lead to another financial crisis and cause more financial strain. Thus, smart economic regulatory policies need to be put in place to alleviate the dangerous precedent of the past. These policies need to be efficient and effective, to prevent an overburdening of the economy, while providing for a satisfactory amount of regulatory oversight by the government.

Economic performance and growth is related to the performance of the government in regulating the market effectively and efficiently. Too many cumbersome regulations slow markets and make it difficult for smaller businesses to compete.[173] Too little regulation allows businesses to take

166 David W. Perkins, *Financial Regulation: The Economic Growth, Regulatory Relief, and Consumer Protection Act (S. 2155)*, CONG. RES. SERV. (May 14, 2018), https://fas.org/sgp/crs/misc/IN10833.pdf.

167 *Id.*

168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.*

172 *Id.*

173 Joshua Aizenman, *Financial Crisis and the Paradox of Under- and Over-Regulation* 5 (Nat'l Bureau of Econ. Research, Working Paper No. 15018, 2009), http://www.nber.org/papers/w15018.pdf.

advantage of loopholes and cause economic bubbles, like the one that resulted in the economic recession in 2008.[174] Thus, a happy medium must be found to ensure that businesses compete fairly and ethically, while also remaining competitive in the global economy.[175]

A largely regulated or unregulated economy leads to economic decline and depression in the markets.[176] After periods of economic recession and difficulties, governments tend to over-regulate businesses in the hopes of dispelling another financial crises.[177] However, this over-regulation leads the economy to become static and makes growth difficult.[178] On the opposite end of the spectrum, governments may wish to under-regulate in times of economic prosperity in hopes of inducing further growth.[179] Instead, under-regulation may end up causing another financial disaster.[180] As Congress seeks more under-regulation, there could be a greater risk of the next financial disaster being larger and more severe.[181]

Overall, this Section argues that Congress should not simply repeal Dodd-Frank in its entirety but rather enact amendments to cure its deficiencies. First, Congress should amend the Volcker Rule to encourage liquidity while protecting community banks. This can be achieved by lowering the regulatory burden placed on institutions, simplifying the definition of proprietary trading under the Volker Rule, and, finally, exempting smaller financial institutions. Next, this Section argues that the Bureau should remain independent but altered to ensure accountability. To encourage accountability but remain independent, the Bureau should be amended to implement a multi-member committee to replace the current single director structure. Finally, this Section argues that the Orderly Liquidation Authority should be maintained and promoted as it allows regulators with experience to determine what is the best course of action for failing financial institutions.

A. The Volcker Rule Needs to be Altered to Encourage Liquidity and

174 *Id.*

175 *Id.* at 6.

176 *Id.*

177 *Id.* at 5.

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

Protect Community Banks

The Volcker Rule has been met with opposition from many in Congress.[182] Many claim that the rule reduces liquidity of the market, which makes market making difficult.[183] The declining share percentage of community banks has also been disconcerting.[184] Congress views this declining percentage as direct proof that the Volcker Rule is having damaging effects due to the considerable and tedious compliance burdens.[185] However, many in Congress seek to rid the Dodd-Frank Act of the Volcker Rule completely.[186] First, I suggest reducing the compliance burden of the Volcker Rule. Next, I suggest simplifying the definition of proprietary trading. Finally, I encourage Congress to exempt smaller financial institutions from the Volcker Rule.

1. Congress Should Reduce the Compliance Burden of the Volcker Rule

The Volcker's Rule's current compliance burden is substantial. The Office of the Comptroller of the Currency ("OCC") estimated that the Volcker Rule would cost banks up to $4.3 billion to fall into compliance standards.[187] The current Financial Services Committee blames these massive regulations because "big banks are bigger and small banks are fewer."[188]

The National Bureau of Economic Research released a report shortly after the economic recession of 2008.[189] In the report, Mr. Aizenman discussed the paradox of regulation depending on the state of the economy.[190] The paper supported the idea that higher effort, i.e. more regulation, in helping avert a crisis today would lead the public to infer that the risk of participating in the market is

182 *See supra* notes 59–64 and accompanying text.

183 *See supra* notes 59–64 and accompanying text.

184 *See* LUX & GREENE, *supra* note 64.

185 *Id.* at 3; *see also Fixing What's Wrong with Dodd-Frank – And That's a Lot*, INV.'S BUS. DAILY (June 17, 2016), https://www.investors.com/politics/editorials/fixing-whats-wrong-with-dodd-frank-and-thats-a-lot/.

186 *See* Jim Puzzanghera, *House Votes Along Party Lines to Repeal Key Dodd-Frank Financial Reforms*, L. A. TIMES (June 8, 2017, 2:25 PM), http://beta.latimes.com/business/la-fi-dodd-frank-repeal-20170608-story.html.

187 *OCC Volcker Rule Will Cost Banks Up to 4.3 Billion*, AM. BANKR. INST. (Mar. 21, 2014), https://www.abi.org/newsroom/bankruptcy-headlines/occ-volcker-rule-will-cost-banks-up-to-43-billion.

188 *The Failures of Dodd-Frank*, HOUSE COMMITTEE ON FIN. SERVS. [hereinafter *Failures*], https://financialservices.house.gov/issueshome/issue/?IssueID=57976 (last visited Oct. 10, 2018).

189 *See* Aizenman, *supra* note 173.

190 *Id.*

lower than the actual risk.[191] This would then lend less support to regulations in the future, which could lead to another crisis.[192]

This appears to be the situation that happened after the Great Recession of 2008. Immediately following the crisis, and with the election of Barack Obama, Congress passed the Dodd-Frank Act, which was deemed the "most ambitious overhaul of financial regulation in generations."[193] Several years later, when a new Congress was elected, efforts to repeal parts of the Dodd-Frank Act took center stage.[194]

Thus, Congress needs to define a reasonable balance in the regulations used to oversee banks and financial centers without becoming burdensome on these institutions. This over-and under-regulation can lead to a paradox that will continue until Congress promulgates regulations that adopt a more median approach.[195] The Volcker Rule needs to lower the compliance burden and request only the information necessary to help those who oversee the various organizations to monitor them effectively.

2. Congress Should Simplify the Definition of Proprietary Trading

The Volcker Rule includes a prohibition to prevent entities from engaging in "proprietary trading."[196] Currently, the Volcker Rule defines proprietary trading as

> engaging as a principal for the trading account of the banking entity or nonbank financial company . . . in any transaction to purchase or sell, or otherwise acquire or dispose of, any security, any derivative, any contract of sale of a commodity for future delivery, any option on any such security, derivative, or contract, or any other security or financial instrument that the appropriate Federal banking agencies, the Securities and

191 *Id.*

192 *Id.*

193 Brady Dennis, *Obama Signs Financial Overhaul Into Law*, WASH. POST (July 22, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/07/21/AR2010072100512.html.

194 *See Failures*, *supra* note 188; Kelsey Ramirez, *Senate Banking Committee Introduces Repeal of Dodd-Frank Act*, HOUSINGWIRE (Dec. 5, 2017), https://www.housingwire.com/articles/42010-senate-banking-committee-introduces-repeal-of-dodd-frank-act.

195 *See supra* notes 171–179 and accompanying text.

196 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5301 (2018)).

> Exchange Commission, and the Commodity Futures Trading Commission may . . . determine.[197]

This definition is seen by many to be overly broad and could hurt liquidity in the markets.[198] One of the key terms within the definition is the term "trading account." The Final Rule provides functional definitions of "trading account." The Rule provides for three separate tests for determining a trading account: the "purpose test," "Market Risk Capital Rule test," or "status test."

The "purpose test" examines what the account is principally used for. The test requires the examination of whether any of the accounts were principally used for the purpose of selling in the near term.[199] This language is provided for in the Bank Holding Company Act as it was amended by Dodd-Frank.[200] It is the only of these three tests that is explicitly mentioned in the statutory text.

The "market risk capital rule test" requires accounts to be treated as trading accounts if they are used to acquire, or take one or more; covered financial positions, other than positions that are foreign exchange derivatives; commodity derivatives, or contracts of sale of a commodity for future delivery that are Market Risk Capital Rule covered positions; if the banking entity, or any affiliate of the banking entity that is a bank holding company, calculates risk-based capital ratios under the Market Risk Capital Rule.[201] Basically, the Market Risk Capital Rule test ensures that any accounts that are used to purchase or sell financial instruments (that are market risk capital rule covered positions and trading positions) would fall under the definition of a trading account for purposes of Dodd-Frank.

Lastly, the "status test" considers a transaction a trading account, regardless of purpose, if the banking entity is licensed or registered to engage in the business of a dealer, swap dealer, or security-based swap dealer.[202] The test also looks to whether the banking entity engages with dealers, swap dealers, or security-based swap dealers outside of the United States.[203]

As many organizations have attempted to apply these tests to their own accounts and transactions, they have found it very difficult to determine what may constitute a trading account. Each entity has had differing views on the way to correct these problems. The Securities Industry and Financial Markets Association, the American Bankers Association, the Financial Services

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197 12 U.S.C. § 1851 (2018).

198 Tom Braithwaite, *Volcker Conundrums Fuel Confusion Over Rules*, FIN. TIMES (Dec. 20, 2011), https://www.ft.com/content/9f3e4ed4-2a24-11e1-b7f2-00144feabdc0.

199 12 U.S.C. § 1851.

200 *Id.*

201 *See* USER'S GUIDE, *supra* note 58, at 5.

202 *Id.*

203 *Id.*

Roundtable, and the Clearing House Association submitted a comment letter in regards to the proprietary trading provisions included in the Volcker Rule.[204] In the letter, the entities hold the view that the only test that should be used in determining what constitutes a trading account under the Volcker Rule is the "purpose test."[205] They argue that the other tests, the "Market Risk Capital Rule" and "status," are beyond the authority that the statutory language has granted to the rule-makers.[206] The letter supports the idea that, instead of adding other tests not included in the statutory language, the "purpose test" should only be applied to accounts and transactions.[207]

Another view, submitted by the United States Department of the Treasury ("Treasury") to President Donald Trump, holds the opposite view and seeks to eliminate the "purpose test" in its entirety while keeping the other two tests.[208] The report states that the "purpose test" is too subjective.[209] The report encourages the application of the "Market Risk Capital Rule" and "status" tests as these are more objective.[210]

Regardless of an individual's thoughts on which tests to apply, it appears that the large complexity of factors makes it difficult for organizations to determine what falls under the definition of proprietary trading. Thus, Congress needs to designate an overarching test to allow organizations to determine whether their activities fall under the definition of proprietary trading. The uncertainty in determining whether this definition applies to their accounts and transactions can cause the market to suffer.

3. Congress Should Exempt Smaller Financial Institutions

Another option available to Congress to correct some of the disagreements with the Volcker Rule is to exempt smaller institutions that do not pose risks to financial stability or exempt firms engaged in little to no proprietary trading as the substantial burden imposed by the rule outweighs the benefits in monitoring these institutions.

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[204] FED. RESERVE, COMMENT LETTER ON THE NOTICE OF PROPOSED RULEMAKING IMPLEMENTING THE VOLCKER RULE—PROPRIETARY TRADING (2012), https://www.federalreserve.gov/SECRS/2012/February/20120213/R-1432/R-1432_021312_104404_346801484756_1.pdf.

[205] *Id.* at A-12, A-16.

[206] *Id.* at A-16.

[207] *Id.*

[208] U.S. DEP'T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES 74–75 (2017) [hereinafter OPPORTUNITIES], https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf.

[209] *Id.*

[210] *Id.*

Many members of Congress have pointed to the Dodd-Frank Act for the declining market share of small banks within the United States.[211] From 2006 to 2010, the market share of small banks was declining at a rate of about six percent.[212] However, after the passage of the Dodd-Frank Act, the share of small banks has been declining at a rate almost double that.[213]

In an effort to curb this sudden accelerated decline of smaller institutions, exempting certain small and "community" banks would help stop the decline while also maintaining a stable economy. A current Treasury report lends support to the fact that regulators will likely pursue the option of differentiating requirements for smaller institutions,[214] and, thus, easing the burden on them. However, many argue that a full exemption would be more beneficial for small institutions.[215] The opposite argument provides that a blanket exemption for small banks under a certain asset amount would not solve anything and could lead to another recession.[216]

It is important for Congress to give relief to these smaller institutions. These "community" banks cannot handle the large compliance burden that the Volcker Rule imposes upon them. Therefore, an exemption for certain entities would ease the burden on the small banks and would benefit regulators with less oversight needed. Recently, the Treasury submitted a recommendation for exempting banks with $10 billion or less in assets.[217] While this appears to be a reasonable starting point for easing the burden on smaller institutions, it is unlikely to make its way through Congress. The recommendations from the Treasury need to be limited in their exemption. By limiting the dollar amount for the assets, the exemption will ensure the benefit will only go towards small banking entities.

B. The Consumer Financial Protection Bureau Should Be Altered to

211 *See Failures*, *supra* note 188.

212 PETER J. WALLISON, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, THE DODD FRANK ACT FIVE YEARS LATER: ARE WE MORE PROSPEROUS? 11–12 (2015), https://financialservices.house.gov/uploadedfiles/hhrg-114-ba00-wstate-pwallison-20150728.pdf.

213 *Id.*

214 *Id.*

215 Emily Stephenson, *U.S. Congress Should Exempt Small Banks From Volcker Rule—Regulator*, REUTERS (Dec. 2, 2014, 12:30 PM), https://www.reuters.com/article/financial-regulations-volcker/u-s-congress-should-exempt-small-banks-from-volcker-rule-regulator-idUSL2N0TM0VR20141202.

216 Thomas M. Hoenig, *Volcker Rule Rollback is Not the Kind of Reg Relief Small Banks Need*, AM. BANKER (Aug. 24, 2017, 9:30 AM), https://www.americanbanker.com/opinion/volcker-rule-rollback-is-not-the-kind-of-reg-relief-small-banks-need.

217 *See* OPPORTUNITIES, *supra* note 208, at 14.

Protect Its Independence and Stop Its Abuse of Power.

The Consumer Financial Protection Bureau ("CFPB") should be altered to retain its purpose when first created and reign in some of its overly broad powers. As discussed above, the CFPB has been under scrutiny for its questionable practices.[218] Many have pointed to the lack of accountability and overly broad substantive authority as to why the CFPB has failed to be effective.[219] I suggest that the CFPB should be headed by a multi-member board to avoid accountability issues. I conclude by encouraging the retention of the CFPB's authority to regulate industries.

1. The CFPB Should Be Held Accountable for Its Actions While Maintaining a Level of Independence

The CFPB structure invests power in a single director that has the power to enforce many federal consumer finance laws.[220] This organizational structure has encouraged many legal challenges against the Bureau.[221] The idea of having a single director with such an immense amount of authority concerns many.

Currently, the CFPB is undergoing changes and conflict under the new Trump administration, after Richard Cordray, the CFPB's director since 2012, appointed his deputy director, Leandra English, to the position upon his departure.[222] Following the decision of the courts to make the position "at-will," Trump appointed his own director to the position, Mick Mulvaney.[223] A judge ruled that he would maintain Trump's appointment to the position.[224]

Originally, the CFPB was to be headed by a multi-member board.[225] However, reiterations in Congress altered the language to create the Bureau with a single director at its head.[226] Reverting to a multi-member commission would likely help with the concern over a lack of accountability. An organizational structure similar to the SEC would likely help to ease worries created by the

218 *See* discussion *supra* Section II.A.2.

219 *See* OPPORTUNITIES, *supra* note 208, at 81.

220 *See* discussion *supra* Section II.A.2.

221 *See* discussion *supra* Section II.A.2.

222 Pete Williams, *Judge Declines to Remove Trump Pick Mulvaney at Consumer Financial Protection Bureau*, NBC NEWS (Nov. 28, 2017, 7:12 PM), https://www.nbcnews.com/news/us-news/judge-declines-remove-trump-pick-mulvaney-consumer-financial-protection-bureau-n824711.

223 *Id.*

224 *See id.*

225 *See supra* notes 99, 100 and accompanying text.

226 *Id.*

current structure.[227] Members of the board could account for and provide for a check on the various organizational activities. This structure would also ensure the independence of the agency.

Many pursue the idea that the President's Article II powers allow him to appoint and remove the head of the CFPB "at-will."[228] They maintain that it is important for the President to be able to control and lead the Executive Branch.[229] While the power to control the Executive Branch is important and fundamental to the Constitution, the importance of protecting American consumers' interests from the political pressures of lobbyists and others is more important. Thus, to maintain accountability and the independence of the CFPB, Congress should amend the CFPB to include a multi-member board that is accountable to one another. This would help to curb the problem in regard to investing all of the power in one director.

2. The CFPB's Authority Should Be Maintained to Ensure They Have the Authority to Protect Individuals

Many have argued that the CFPB has overly broad authority granted to it under the Dodd-Frank Act. These individuals point to the problems that have occurred recently within the CFPB.[230] They worry that even terms that are already defined in statutory and case law seem to have no power to control the CFPB, as the CFPB may redefine terms mentioned in their statutory power as provided in the Dodd-Frank Act.[231]

While this argument has merit, the current push to immensely limit the CFPB's powers would have a detrimental effect on consumer protection. The regulatory framework needs to be malleable so that the CFPB can effectively regulate the ever-changing market and ensure consumers are protected. The issue regarding the failure to follow precedents established by other financial organizations is one that is pressing. These "agency-specific" precedents challenge the fundamental canon of administrative law that principles developed within this area of the law are applicable to all agencies and are not applied on

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227 SEC. AND EXCH. COMM'N, SECURITIES AND EXCHANGE COMMISSION ORGANIZATION CHART, https://www.sec.gov/about/secorg.pdf (last visited Aug. 23, 2018).

228 Akhil Reed Amar & Steven G. Calabresi, *President Trump Is Constitutionally Right on the CFPB Even if We Oppose Him Otherwise*, USA TODAY, https://www.usatoday.com/story/opinion/2017/11/30/president-trump-constitutionally-right-cfpb-even-if-we-oppose-him-otherwise-calabresi-akhilma-column/906003001/(last updated Nov. 30, 2017, 6:08 PM).

229 *Id.*

230 *See* OPPORTUNITIES, *supra* note 208, at 81.

231 *See* Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 918 (2013); *see also* OPPORTUNITIES, *supra* note 208, at 81.

an agency-by-agency basis.[232] The opponents of the CFPB point to the ability of the Bureau to redefine some terms that have already been defined in other administrative agencies.[233] This "silo" approach by the CFPB can lead to disorganization and confusion when courts seek to apply definitions to administrative law issues. Thus, while the CFPB's power to prosecute certain activities should not be limited, the ability to redefine terms already defined can create conflict between separate agencies.

Therefore, the broad authority granted to the CFPB should be maintained so that the Bureau can effectively protect the interests of consumers. However, canons of administrative law should be maintained, and precedents set within one agency should be applicable to all. This follows canons of administrative law that holds that precedents are universal regardless of the agency applying them.[234]

C. The Orderly Liquidation Authority Should Be Maintained and Promoted.

Many have wondered whether the Orderly Liquidation Authority ("OLA") is necessary, and whether the goals of the OLA can be met in other ways.[235] They argue that OLA creates another avenue from bankruptcy that is unnecessary and tedious.[236] Furthermore, they point to the legal issues facing OLA that may prevent it from being used.[237] Others have cited the OLA as a positive alternative to regular bankruptcy proceedings for ensuring economic stability.[238]

The current OLA should be maintained from the Dodd-Frank Act. The provision provides an important avenue for large financial firms to reorganize and consolidate debts when their failure could lead to problems, as seen in 2008

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232 *See* Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 500 (2011).

233 *See* OPPORTUNITIES, *supra* note 208.

234 *See generally id.* and accompanying text.

235 *See* Paul H. Kupiec, *Is Dodd Frank Orderly Liquidation Authority Necessary to Fix Too-Big-to-Fail* (Am. Enter. Inst., Working Paper No. 2015-09, 2015), https://www.aei.org/wp-content/uploads/2015/10/Kupiec-Oct-22-working-paper.pdf.

236 *Id.*

237 *Id.*

238 *See* Sabrine R. Pellerin & John R. Walter, *Orderly Liquidation Authority as an Alternative to Bankruptcy*, 98 ECON. Q. 1, 2 (2012), https://www.richmondfed.org/~/media/richmondfedorg/publications/research/economic_quarterly/2012/q1/pdf/walter.pdf (last visited Aug. 23, 2018); *see also* Ben Bernanke, *Why Dodd-Frank's Orderly Liquidation Authority Should Be Preserved*, BROOKINGS (Feb. 28, 2017), https://www.brookings.edu/blog/ben-bernanke/2017/02/28/why-dodd-franks-orderly-liquidation-authority-should-be-preserved/.

with the collapse of Lehman Brothers and other large financial institutions. Furthermore, the provision gives more power to government agencies to regulate the fallout of economic institutions in danger of failing.

The reasons for maintaining the OLA are vast. This avenue is controlled by the major regulators in the United States economic system, including the FDIC, Federal Reserve, and others.[239] These agencies monitor and regulate the various financial institutions that would likely need to use the provisions of the OLA. Thus, the institutional knowledge that these agencies have will be instrumental in understanding the proper course to follow in liquidating and reorganizing.

Many argue that passage of OLA has reinforced the idea of "too-big-to-fail" and that large firms would be able to rely on a bail out when they encounter financial difficulty.[240] Instead, they propose enhancements to the current Bankruptcy Code.[241] The proposed enhancements mirror many provisions available in the OLA.[242] However, these enhancements have suffered setbacks as any bills to amend the Bankruptcy Code included provisions repealing Title II's OLA entirely.[243] Others have put forth the idea that if the enhancements are included in the Bankruptcy Code, Title II's OLA should remain within the regulatory regime.

The OLA should remain within the regulatory structure of the financial system because it provides relief for important and large financial institutions that are not available under regular bankruptcy law. First, OLA allows the FDIC to take control of the financial firm quickly.[244] This quick movement prevents banking entities from moving away from failing financial firms and creating a situation in which a financial firm that may have been viable then no longer becomes viable. Second, OLA provides a source of immediate funding for these firms so that they can maintain relationships with creditors and retain their

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239 12 U.S.C. § 5390 (2018).

240 *See, e.g.*, Peter J. Wallison, *The Error at the Heart of the Dodd-Frank Act*, AM. ENTER. INST. (Sept. 6, 2011), http://www.aei.org/publication/the-error-at-the-heart-of-the-dodd-frank-act; *see also Failing to End "Too Big to Fail": An Assessment of the Dodd-Frank Act Four Years Later*, REPUBLICAN STAFF OF THE COMMITTEE ON FIN. SERVS, U.S. HOUSE OF REPRESENTATIVES, 113th Cong. (July 2014), http://faculy.haas.berkeley.edu/ross_levine/Other?House_Republications_071814_tbtf_report_final.pdf.

241 Paul L. Lee, *The Case Against Repealing Title II of the Dodd-Frank Act*, THE CLS BLUE SKY BLOG: COLUM. LAW SCH.'S BLOG ON CORPS. AND THE CAP. MKTS. (Dec. 12, 2016), http://clsbluesky.law.columbia.edu/2016/12/12/the-case-against-repealing-title-ii-of-the-dodd-frank-act/#_ednref6.

242 *Id.*

243 *Id.*; *see also* H.R. 4894, 114th Cong. (2015).

244 Daniel K. Tarulla, *Repealing Title II of Dodd-Frank*, MASS. INST. OF TECH. (May 8, 2017, 9:54 AM), https://gcfp.mit.edu/tarullo-guest-blog/.

value.[245] This funding may need to be attained quickly and in large amounts for the financial institution to continue. The provisions of the OLA are important because it provides for a pre-arranged financing arrangement so that these firms can have immediate access once the Secretary has determined that the firm qualifies.[246] Lastly, the OLA provides for a limited stay of close-out rights of qualified financial contracts ("QFC").[247] This important part of the OLA ensures that if one entity within a large financial firm fails, the failure will not trigger a large-scale termination of QFC's seeking to liquidate and seize the firm's assets.[248] This power ensures that an uncertainty-driven craze does not remove contracts important to preserve the firm's critical operations. Therefore, the OLA should remain as an important part of the regulatory structure to ensure that large financial institutions can liquidate and consolidate without fear of another recession.

IV. CONCLUSION

Congress and the government should maintain the provisions of the Dodd-Frank Act mentioned above. The Dodd-Frank Act provides important regulatory structure to help thwart another Great Recession. While these provisions are in no way perfect, they provide a framework that will be helpful in developing future revisions. As this Note has discussed, several small changes to the current Dodd-Frank Act would provide substantial benefits to the economy.

Congress can begin by altering the Volcker Rule to encourage liquidity and protect community banks. To accomplish this, Congress can reduce the compliance burden of the Volcker Rule. Much of the information given to regulators is not necessary for their oversight, so by reducing the information given to regulators, Congress can help smaller institutions who cannot meet the burdens provided in the Volcker Rule. Next, the definition of proprietary trading can be simplified to ensure firms understand what accounts and transactions fall under the purview of the Rule. Lastly, an exemption for smaller financial institutions would provide much needed relief for those who do not participate in proprietary trading often, or are small enough not to affect economic stability.

The Consumer Financial Protection Bureau should be altered to strike a balance between preventing abuses of powers and remaining a leader in consumer protection. The CFPB can be reformed to remove the single director and adopt the original idea of having a multi-member board. This will ensure a level of accountability while the Bureau maintains its independence from

245 *Id.*

246 *Id.*

247 *Id.*

248 *Id.*

political influence. However, the CFPB's authority needs to be maintained to ensure that the Bureau can shift with time to the ever-changing market.

The Orderly Liquidation Authority should remain as an alternative to traditional bankruptcy. The OLA provides important provisions that traditional bankruptcy does not and will allow for the quick and orderly liquidation of large financial institutions. These provisions include the quick control attained by the FDIC, immediate funding available to institutions, and a limited stay on qualified financial contracts.

The Great Recession of 2008 not only affected some of the largest financial institutions in the country, but it also shook the foundation of American society. Millions of men and women became unemployed because the regulatory structure in place failed them. Thus, it is important to introduce and maintain new regimes of financial regulation to ensure that a large collapse does not happen at the level of severity it did in 2008. The Dodd-Frank Act does several things right and several things wrong. However, repealing the entirety of the Act would only lead to more problems in financial markets. Thus, the Act should be modified to fix problems that have been discovered. These modifications will build upon one another and hopefully, by the end, will create a dependable regulatory structure.

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