Lehman 10 Years Later: The Dodd-Frank Rollback

*Thomas W. Joo**

In response to the financial crisis of 2007–08, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010. The Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 has repealed or altered many Dodd-Frank's reforms. This Article analyzes the EGRRCPA's deregulation of large banks, community banks, mortgage lending standards, and consumer protection in the industry. While Dodd-Frank may have taken only small steps to address the causes of the financial crisis, the EGRRCPA completely ignores those risk factors. Congress and the Administration have justified the counter-reforms on the ground that they have hampered economic growth, but economic growth since 2010 has in fact been very strong. The EGRRCPA is better explained as part of a larger deregulatory agenda that aims to make the financial sector, and industry generally, less and less accountable to customers and to society at large.

INTRODUCTION 562
I. BACKGROUND.. 562
    A. The Financial Crisis and Response 562
    B. Ten Years Later: The Ongoing Backlash..................... 566
II. DEREGULATING LARGE BANKS 568
    A. Raising the SIFI Threshold.. 568
    B. Relaxing Supplementary Leverage Ratio Rules........... 570
III. DEREGULATING "COMMUNITY" BANKS 574
    A. What Is a "Community Bank"? 574
    B. Simplified Capital Requirements for "Community Banks" 577
    C. Volcker Rule Exemption for "Community Banks" 579
IV. RELAXATION OF MORTGAGE LENDING STANDARDS............... 584

* Martin Luther King Jr. Professor, UC Davis School of Law. I wish to thank Steve Ramirez, Shelley Dunck, Loyola University Chicago School of Law, its Institute for Investor Protection, and its *Law Journal*, as well as all participants in the *Lehman 10 Years Later* Symposium for their helpful input. Thanks also to my UC Davis colleagues David Horton and Chris Elmendorf for their comments, and my research assistant Dale Clemons and faculty assistant Jennifer Angeles. Finally, I thank the UC Davis Law School for financial support.

A. Exemption from Appraisal Requirements 584
B. Ability to Pay and Qualified Mortgage Safe Harbor ... 585
V. IMPACT ON CONSUMER PROTECTION 589
A. Reporting Under the Home Mortgage Disclosure Act 590
B. Escrow Accounts 591
C. Seniors and Other Vulnerable Adults 592
D. Financing Manufactured Homes 592
VI. UNDOING DODD-FRANK BY OTHER MEANS 593
CONCLUSION.. 596

INTRODUCTION

The 2018 Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA) undoes many financial regulation provisions of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) and regulations passed thereunder, as well as other laws intended to address the causes of the great financial crisis of 2007–08. Those laws may or may not have achieved their purposes, but Congress made no serious inquiry into that question before passing the EGRRCPA. Rather, the new law, as its name indicates, aims primarily at an entirely different goal: "regulatory relief." That is, it seeks to reduce costs to financial firms. But even assuming Dodd-Frank's "regulatory burdens" are significant ones, "regulatory relief" is not necessarily justified: the cost savings for banks may be outweighed by increased risks to the institutions, their customers, or the financial system generally.[1] The EGRRCPA clearly prioritizes bank profits over these potential risks.

I. BACKGROUND

A. The Financial Crisis and Response

In 2009, Congress created the Financial Crisis Inquiry Commission (FCIC), an independent panel of private-sector experts charged with examining and reporting on the causes of the crisis. The FCIC found that systematically important financial institutions became not only "too big to fail," but also "too big to manage."[2] These gigantic and excessively complex financial conglomerates took on excessive risk due to "dramatic

1. SEAN M. HOSKINS & MARC LABONTE, CONG. RESEARCH SERV., R43999, AN ANALYSIS OF THE REGULATORY BURDEN ON SMALL BANKS 41 (2015).

2. FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES xix (2011) [hereinafter FCIC REPORT].

failures of corporate governance and risk management."[3] In particular, "collapsing mortgage-lending standards and the mortgage securitization pipeline" were the immediate impetus for the crisis and the means by which it spread.[4] The financial sector also experienced a "systemic breakdown in accountability and ethics."[5] When the inevitable crisis finally struck, the government was unprepared to deal with the consequences.[6]

The FCIC concluded that the financial sector and its regulators should have foreseen the crisis and could have averted it.[7] Financial deregulation in the decades leading up to the crisis had contributed to the problems. Regulators nonetheless retained enough power to avert or mitigate the crisis, but "chose not to use it."[8] The report cited regulators' "permissive" attitude toward "an explosion in risky subprime lending and securitization, an unsustainable rise in housing prices, widespread reports of egregious and predatory lending practices, dramatic increases in household mortgage debt, and exponential growth in financial firms' trading activities, unregulated derivatives, and short-term 'repo' lending markets, among many other red flags."[9] Former SEC Chair Richard Breeden told the FCIC, "Everybody in the whole world knew that the mortgage bubble was there . . . . You cannot look at any of this and say that the regulators did their job."[10] Housing was overvalued, lending was reckless and borrowing excessive, and financial firms' risky trading activities were increasing.[11] Regulators and financial executives "ignored warnings and failed to question, understand, and manage evolving risks."[12]

Banks and other lenders offered "nontraditional" loans that were highly risky and sometimes predatory, or even illegal.[13] Lenders often made loans regardless of borrowers' ability to repay.[14] Lenders made these loans to meet the market demand for high-yield mortgages that were used to build high-yield securities of increasing complexity.[15] Lenders

---

3. *Id.* at xviii.
4. *Id.* at xxiii.
5. *Id.* at xxii.
6. *Id.* at xxi.
7. *Id.* at xviii.
8. *Id.*
9. *Id.* at xvii.
10. *Id.* at 4.
11. *Id.* at xvii.
12. *Id.*
13. *Id.* at 10–11.
14. *Id.* at 7–11.
15. *Id.* at 8–9.

had little incentive to verify repayment ability because securitization allowed them to offload the default risk onto downstream investors.[16] Heavy investment in mortgage-backed securities, and unregulated over-the-counter derivatives based on them, spread the risks of these loans throughout the financial system.[17]

Many market participants saw the signs and responded to them. Money-managing giant PIMCO, for example, began to suspect a housing bubble in 2005. Unlike most other firms, it conducted market research that revealed an "outright degradation of underwriting standards."[18] PIMCO thus scaled back its exposure to mortgage securities even as the rest of the market blindly continued to invest.[19]

Regulators were also on notice. The Department of Housing and Urban Development and the Treasury Department, local officials, and nonprofit advocacy groups called for a regulatory response.[20] The Fed was the only regulatory body with the power to impose rules on all mortgage lenders,[21] but it took no significant action.[22] Former Fed Chair Ben Bernanke admitted that the lax regulation of mortgage lending was "the most severe failure of the Fed."[23] The FCIC concluded that the Fed could have stopped the "flow of toxic mortgages . . . by setting prudent mortgage-lending standards."[24] The SEC could have increased capital requirements and prohibited risky transactions by investment banks.[25] Regulators also "lacked the political will" to challenge existing institutions or seek additional regulatory authority.[26]

A dissenting statement signed by three of the Commission's Republican members objected to the report's conclusion that weak US financial regulations were to blame, citing the contemporaneous financial crisis in Europe.[27] It did, however, agree with the FCIC report as to many

16. *Id.* at 7–8.
17. *Id.* at xxiv–xxv.
18. *Id.* at 4 (quoting Paul McCulley, the managing director at PIMCO).
19. *Id.*
20. *Id.* at 10–12.
21. Of the nation's bank regulators, the Federal Reserve has the broadest purview, with supervisory and regulatory power over all bank holding companies in the United States. The Office of the Comptroller of the Currency (OCC) governs federally chartered banks and thrifts. The FDIC has authority over those state-chartered banks that are not members of the Federal Reserve system. *Id.* at 74.
22. *Id.* at 10–11.
23. *Id.* at 3.
24. *Id.* at xvii.
25. *Id.* at xviii.
26. *Id.*
27. *Id.* at 411–16 (Dissenting Statement of Commissioner Keith Hennessey, Commissioner Douglas Holtz-Eakin, and Vice Chairman Bill Thomas: Causes of the Financial and Economic

of the causes of the crisis, such as lax underwriting standards for nontraditional mortgages, low standards for credit ratings and debt securitization, financial institutions' poor risk-management practices, and insufficient capital cushions.[28]

Dodd-Frank was, bafflingly, drafted and passed months *before* the FCIC released its report. Nonetheless, it was generally consistent with the report's findings. It included provisions mitigating risk-taking by banks and non-bank financial firms as well as bank liquidation procedures that could be applied in future crises.[29] In particular, Dodd-Frank provided for more stringent regulation of banks with total assets of more than $50 billion.[30] Dodd-Frank also increased regulation of derivatives and mortgage standards, and gave the Consumer Financial Protection Bureau (CFPB) considerable authority to make rules with respect to consumer protection.[31]

During the crisis, the government rescued a number of large and systemically important financial institutions through bailouts and consolidations for fear that they were "too big to fail" without bringing down the financial system with them. Preserving and combining these problematic institutions only intensified concentration and the "too big to fail" problem.[32] Dodd-Frank contains some provisions to guard against and respond to the potential failures of these megabanks, but it did nothing to prevent their further growth and consolidation. Indeed, the largest banks have only gotten bigger and more concentrated since the

Crisis).

28. *Id.* at 413. The fourth Republican commissioner wrote a separate statement, joined by no other commission member, attributing the crisis to the federal government's affordable housing policies and Fannie Mae and Freddie Mac's purchases of subprime mortgages. *See id.* at 441 (Dissenting Statement of Peter J. Wallison). That 99-page dissent relied on questionable data that the FCIC report considered and rejected as flawed. *Compare id.* at 448 (citing study by Edward Pinto), *with* DEMOCRATIC STAFF, H. COMM. ON OVERSIGHT & GOV'T REFORM, AN EXAMINATION OF ATTACKS AGAINST THE FINANCIAL CRISIS INQUIRY COMMISSION 4, 17 (2011), https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/migrated/uploads/FCIC%20Report%2007-13-11.pdf (citing commission documents concluding that "Pinto's data didn't correctly add up" due to "arithmetic errors" and "faulty premises").

29. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 619, 123 Stat. 1376, 1920 (2010) (amending 12 U.S.C. § 1851 (2006)) [hereinafter Dodd-Frank] (also known as the "Volcker Rule," which is discussed in Part III.C, *infra*); Dodd-Frank §§ 201–217 (codified at 12 U.S.C. §§ 5381–5394 (2012), §§ 215–217 are not codified) (referred to as Orderly Liquidation Authority (OLA)); *see also* Thomas W. Joo, *A Comparison of Liquidation Regimes: Dodd-Frank's Orderly Liquidation Authority and the Securities Investor Protection Act*, 6 BROOK. J. CORP. FIN. & COM. L. 47 (2011) (discussing OLA).

30. *See* Dodd-Frank § 165(a)(1), 12 U.S.C. § 5365(a)(1) (2012); *see also infra* Part II.

31. Dodd-Frank § 610 (amending 12 U.S.C. § 84 (2006)) (controlling and defining derivatives); Dodd-Frank §§ 1400–1498 (establishing mortgage regulations); Dodd-Frank §§ 1001–1100H (establishing the Consumer Financial Protection Bureau (CFPB)).

32. FCIC REPORT, *supra* note 2, at 386.

crisis. The four largest commercial banks, JPMorgan Chase, Bank of America, Wells Fargo, and Citibank, had $1.4 to $2.2 trillion in assets *each* as of September 2018.[33] The five largest banks hold nearly half of all US commercial banking assets[34] and 40 percent of all loans made by commercial banks.[35]

B. Ten Years Later: The Ongoing Backlash

The GOP and the banking industry, which spent millions to prevent Dodd-Frank from passing,[36] have called for a rollback for years, claiming that it has hurt the economy by limiting banks' ability to make profitable investments and curtailing credit availability. While campaigning for office in 2016, President Trump promised to "dismantle" Dodd-Frank.[37] Upon assuming the presidency, he called the law a "disaster" and vowed to do "a big number" on it, while his designated treasury secretary, Stephen Mnuchin, pledged to "kill" it.[38] By the time Congress made serious attempts to reverse Dodd-Frank in 2016, however, the "credit crunch" was long gone. Banks enjoyed record profits and business borrowing reached record levels.

Congress nonetheless passed the EGRRCPA, and President Trump signed it into law in May 2018.[39] The EGRRCPA reverses many of Dodd-Frank's banking-regulation and consumer-protection provisions in the name of reducing regulatory burdens on financial firms.[40] The EGRRCPA is only one way regulators and Congress have been rolling back Dodd-Frank. Other tools include the rulemaking process and the Congressional Review Act (CRA), which allows Congress to strike down

---

33. *Federal Reserve Statistical Release: Large Commercial Banks*, FED. RES. (Sept. 30, 2018), https://www.federalreserve.gov/releases/lbr/20180930/default.htm [hereinafter *Large Commercial Banks*].

34. *See 5-Bank Asset Concentration for United States*, FED. RES. BANK ST. LOUIS (Sept. 21, 2018), https://fred.stlouisfed.org/series/DDOI06USA156NWDB (showing that, based on World Bank figures, the five largest banks held 46.5 percent of all banking assets in 2016); Steve Schaefer, *Five Biggest U.S. Banks Control Nearly Half Industry's $15 Trillion in Assets*, FORBES (Dec. 3, 2014, 10:37 AM), https://www.forbes.com/sites/steveschaefer/2014/12/03/five-biggest-banks-trillion-jpmorgan-citi-bankamerica/#42fff65bb539 (noting that based on data from SNL Financial, the five largest banks held 44 percent of all banking assets as of September 2017).

35. *A Breakdown of the Loan Portfolios of the Largest U.S. Banks*, FORBES (June 27, 2018, 1:11 PM), https://www.forbes.com/sites/greatspeculations/2018/06/27/a-breakdown-of-the-loan-portfolios-of-the-largest-u-s-banks-2/#292c6952126b.

36. Glenn Thrush, *Trump Vows to Dismantle Dodd-Frank 'Disaster'*, N.Y. TIMES (Jan. 30, 2017), https://www.nytimes.com/2017/01/30/us/politics/trump-dodd-frank-regulations.html.

37. *Id.*

38. *Id.*

39. Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174 (2018).

40. *See infra* Parts II, IV.

some agency regulations.[41]

Not only do the EGRRCPA and other counter-reforms seem unnecessary, in light of the strong financial sector, they may be affirmatively harmful. They ignore the causes of the crisis as determined by the FCIC. Former Fed Chair Ben Bernanke expressed hope that the FCIC report would help regulators "decisively address the issues of financial concentration and too big to fail."[42] In the years since the crisis, however, concentration has only increased.[43] The EGRRCPA does nothing to reverse this trend. Moreover, while Dodd-Frank's centerpiece was the enhanced regulation of large, systemically important banks, the EGRRCPA has significantly raised the size threshold at which such regulation applies. The reduced regulatory requirements for large institutions are likely to further increase bank mergers and acquisitions. Smaller banks have heretofore been wary of combinations that would take them over the $50 billion threshold. The market has also tended to assume that all bank combinations would be subject to higher scrutiny from antitrust authorities, but the reduced threshold may signal that such scrutiny will be reserved for combinations that exceed the $250 billion mark.[44] Increased combinations may aggravate bank concentration, stymie effective corporate governance, and increase the size and number of institutions considered "too big to fail."

Dodd-Frank included many provisions, such as mortgage underwriting standards, "stress-testing," and capital requirements, designed to guard against the risks that contributed to the financial crisis. The EGRRCPA undoes many of these rules. Finally, despite its name, the EGRRCPA weakens or removes many of Dodd-Frank's consumer-protection devices meant to combat abuses that occurred during the crisis. The EGRRCPA overrules the CFPB and restricts its rulemaking power by undoing many of its regulations and replacing the agency's discretion with statutory mandates.

---

41. Congressional Review Act, 5 U.S.C. §§ 801–808 (2012); *see also* Dylan Scott, *The New Republican Plan to Deregulate America, Explained*, VOX (Apr. 25, 2018, 9:30 AM), https://www.vox.com/policy-and-politics/2018/4/25/17275566/congressional-review-act-what-regulations-has-trump-cut (citing examples).

42. FCIC REPORT, *supra* note 2, at 369.

43. COMM. ON THE GLOB. FIN. SYS., STRUCTURAL CHANGES IN BANKING AFTER THE CRISIS 1 (2018), https://www.bis.org/publ/cgfs60.pdf.

44. Samuel R. Woodall III et al., "*Economic Growth, Regulatory Relief, and Consumer Protection Act" Is Enacted*, COMPLIANCE & ENFORCEMENT BLOG, https://wp.nyu.edu/compliance_enforcement/2018/06/05/economic-growth-regulatory-relief-and-consumer-protection-act-is-enacted/ (last visited May 20, 2019).

II. DEREGULATING LARGE BANKS

A. Raising the SIFI Threshold

Dodd-Frank instructed banking authorities to impose certain types of special regulations on bank holding companies with $50 billion or more in total assets. Dodd-Frank justified this on the ground that the failure of large financial institutions could once again threaten systemic stability. Thus, the $50 billion level is sometimes referred to as the "SIFI (Systemically Important Financial Institution) threshold." For banks above that threshold, Dodd-Frank instructed the Federal Reserve to establish "Enhanced Prudential Standards" (EPS).[45] These rules are to be "more stringent" than those for other banks and are to include "risk-based capital requirements," "liquidity requirements," and "overall risk management requirements."[46] Dodd-Frank also subjected SIFI banks to annual stress tests by the Fed.[47]

The EGRRCPA instructs federal banking regulators to raise the SIFI threshold—that is, the threshold for EPS and for regulatory stress testing.[48] The Act authorized immediately raising the threshold from $50 billion to $100 billion and raising it to $250 billion 18 months after enactment. Dodd-Frank requires all banks over $10 billion to conduct their own stress tests,[49] but the EGRRCPA changes the required frequency of testing from annual to "periodic." Under the EGRRCPA, the Federal Reserve retains the power to impose EPS on banks between $100 billion and $250 billion if it determines such action is appropriate to protect financial stability.[50]

---

45. *See* Dodd-Frank § 165(a)(1), 12 U.S.C. § 5365(a)(1) (2012); Enhanced Prudential Standards (Regulation YY), 12 C.F.R. §§ 252.1–252.221 (2018). Dodd-Frank also recognized that certain non-bank financial companies may qualify as SIFIs deserving of enhanced regulation. Dodd-Frank § 113(a)(1), 12 U.S.C. § 5323(a)(1) (2012). Thus, Dodd-Frank created the Financial Stability Oversight Council, one of whose roles is to identify and designate such companies. *Id.*

46. 12 U.S.C. § 5365(b)(1)(A).

47. *See* Dodd-Frank § 165(i), 12 U.S.C. § 5365(i) (providing annual stress test requirements). Dodd-Frank also required SIFI banks to undergo stress testing by the Fed. Dodd-Frank § 165(i)(1)(B), 12 U.S.C. § 5365(i)(1)(B).

48. The EPS and stress test requirements are in Dodd-Frank § 165, 12 U.S.C. § 5365. The Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, § 401(a) (2018) amends Dodd-Frank § 165(a)(1)'s applicability threshold from $50 billion to $250 billion.

49. Dodd-Frank § 165(i)(2), 12 U.S.C. § 5365(i)(2).

50. Gregg Gelzinis & Joe Valenti, *Fact Sheet: The Senate's Bipartisan Dodd-Frank Rollback Bill*, CTR. FOR AM. PROGRESS (Feb. 28, 2018, 12:01 AM), https://www.americanprogress.org/issues/economy/reports/2018/02/28/447264/fact-sheet-senates-bipartisan-dodd-frank-rollback-bill/ (citing Randal K. Quarles, Vice Chair for Supervision, Fed. Reserve, Address at the American Bar Association Banking Law Committee Annual Meeting, Washington D.C.: Early Observations on Improving the Effectiveness of Post-Crisis Regulation (Jan. 19, 2018), https://www.federalreserve.gov/newsevents/speech/files/quarles20180119a.pdf).

One of Dodd-Frank's namesake sponsors, former Congressman Barney Frank, has said in retrospect that the original $50 billion SIFI threshold was "a mistake" and should have been set higher.[51] But he also believes the new $250 billion threshold is "twice as high as is prudent."[52] If two or three banks of that size were to fail, it "would put us in Lehman Brothers territory."[53] Under Dodd-Frank's $50 billion threshold, the thirty-eight largest banks in the United States qualified as SIFIs.[54] As of March 2018, only nine US commercial banking institutions were large enough to surpass the EGRRCPA's new $250 billion threshold.[55] Twenty-five very large banks, with an aggregate $3.5 trillion in assets, or about 1/6 of all assets in the banking industry, will be released from SIFI status.[56] Together, they received $47 billion in bailout funds from the Troubled Asset Relief program during the financial crisis. They include BB&T, SunTrust Banks, Key Bank, and American Express, as well as the US holding companies of foreign banks, including Deutsche Bank, BNP Paribas, UBS, and Credit Suisse, all of which have been implicated in major financial scandals in the decade since the crisis.[57]

The EGRRCPA does not directly affect regulatory reforms that did not originate in Dodd-Frank, such as the Capital Plan Rule,[58] which governs the Fed's Comprehensive Capital Analysis and Review (CCAR). CCAR includes supervisory stress testing. It is likely, however, that bank regulators will revise the Capital Plan Rule to follow the $250 billion threshold.[59]

---

51. Barney Frank, *Why I Would Vote 'No' on Senate Bill to Amend Dodd-Frank*, CNBC (Mar. 1, 2018, 12:12 PM), https://www.cnbc.com/2018/03/01/barney-frank-why-i-would-vote-no-on-senate-bill-to-amend-dodd-frank-commentary.html.

52. *Id.*

53. *Id.*

54. *See* Gelzinis & Valenti, *supra* note 50 (stating that the new bill would deregulate twenty-five of those thirty-eight banks).

55. *Large Commercial Banks*, *supra* note 33.

56. *See* Gelzinis & Valenti, *supra* note 50. Some firms, such as Goldman Sachs and Morgan Stanley, fall below the new SIFI threshold, but will remain subject to EPS because the Basel Committee has designated them global systemically important banking organizations (GSIBs). *What Does the Partial Rollback of Dodd-Frank Mean for the Largest U.S. Banks?*, FORBES (May 29, 2018, 1:44 PM), https://www.forbes.com/sites/greatspeculations/2018/05/29/what-does-the-partial-rollback-of-dodd-frank-mean-for-the-largest-u-s-banks/#6e03164b2f19.

57. *See* Gelzinis & Valenti, *supra* note 50 (citing *Bailout Recipients*, PROPUBLICA, https://projects.propublica.org/bailout/list/index (last updated Feb. 25, 2019)).

58. 12 C.F.R. § 225.8(e)(2) (2018) (laying out the mandatory elements of a capital plan).

59. SULLIVAN & CROMWELL, LLP, "ECONOMIC GROWTH, REGULATORY RELIEF, AND CONSUMER PROTECTION ACT" IS ENACTED 2 (2018), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Financial_Services_Regulatory_Reform_Legislation_05_24_18.pdf.

B. Relaxing Supplementary Leverage Ratio Rules

Section 402 of the EGRRCPA belies lawmakers' insistence that the EGRRCPA does no favors to the largest banks. It orders banking regulators to relax the so-called "Supplemental Leverage Ratio" (SLR) rule, a size-based capital requirement, for two extremely large "custodial banks" and permits such changes for the nation's six largest banks. Custodial services are the holding, safekeeping, and servicing of financial assets. Custodians hold a customer's financial assets, receive and hold any dividends or interest payments from the issuer, inform the customer of any shareholder votes or similar actions, and process transactions involving the security.[60] Many banks and non-bank entities provide such services. The EGRRCPA requires the relaxation of the SLR rule only for bank holding companies that are "predominantly engaged in" custodial services.[61]

Dodd-Frank did not originate the SLR rule, but the rule is consistent with Dodd-Frank's endorsement of heightened capital requirements for systemically important institutions. The SLR is the work of the Basel Committee on Banking Supervision, a group of central banks and banking regulators from twenty-eight countries, including the United States.[62] The Basel Committee seeks international convergence on minimum banking standards. The Committee has no multilateral treaty status or supranational legal authority,[63] but its members pledge to use their domestic legal processes to implement its standards.[64]

In 2010, the Basel Committee responded to the financial crisis with a tightened set of banking standards referred to as the Basel III Framework (Basel III).[65] Among other things, Basel III seeks to limit banks' use of leverage.[66] Prior to the financial crisis, banks increased their risk

---

60. THE CLEARING HOUSE, THE CUSTODY SERVICES OF BANKS ii (2016), https://www.davispolk.com/files/20160728_tch_white_paper_the_custody_services_of_banks.pdf.

61. Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, § 402(a) (2018). The statutory definition also includes "any insured depository institution subsidiary" of such banks. *Id.*

62. *The Basel Committee—Overview*, BANK FOR INT'L SETTLEMENTS, https://www.bis.org/bcbs/index.htm (last visited May 22, 2019).

63. *Basel Committee Charter*, BANK FOR INT'L SETTLEMENTS § 3 (June 5, 2018), https://www.bis.org/bcbs/charter.html [hereinafter *Basel Committee Charter*].

64. *Id.* §§ 3, 5, 12.

65. BASEL COMM. ON BANKING SUPERVISION, BASEL III: A GLOBAL REGULATORY FRAMEWORK FOR MORE RESILIENT BANKS AND BANKING SYSTEMS ¶ 1 (2011), https://www.bis.org/publ/bcbs189.pdf [hereinafter BASEL III FRAMEWORK]; *see generally Basel III: International Regulatory Framework for Banks*, BANK FOR INT'L SETTLEMENTS, https://www.bis.org/bcbs/basel3.htm (last visited May 20, 2019).

66. BASEL III FRAMEWORK, *supra* note 65, ¶ 16.

exposure with enormous amounts of leverage without violating traditional risk-based capital ratio requirements. As asset prices fell during the financial crisis, banks rushed to reduce their leverage, further reducing asset prices, bank capital, and credit availability.[67] This is generally considered to be the mechanism that aggravated and spread the crisis.[68] Thus, in addition to traditional risk-based capital requirements, Basel III requires banks to meet a minimum, non-risk-based ratio of capital[69] to "total leverage exposure," which includes on-balance-sheet assets, derivative exposures, repo exposures, and other off-balance-sheet exposures.[70] Basel III refers to this as the "leverage ratio" or "Tier 1 leverage ratio."[71] Most banks must exceed a 3 percent ratio, but banks designated as "Global Systemically Important Banks" (GSIBs) are subject to a heightened requirement of 5 percent at the holding company level and 6 percent at the bank level.[72]

In 2014, US banking regulators—the Fed, Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC)—passed rules implementing the Basel III leverage ratio requirements; they went into effect on January 1, 2018.[73] As implemented under US banking regulations, the leverage ratio is referred to as the "supplementary leverage ratio" (SLR), as it is a supplement to traditional risk-based capital requirements. Only eight US banks are GSIBs subject to the SLR requirements.[74] These include the six largest

---

67. *Id.*

68. *Basel III Leverage Ratio Framework—Executive Summary*, BANK FOR INT'L SETTLEMENTS (Oct. 25, 2017), https://www.bis.org/fsi/fsisummaries/b3_lrf.htm [hereinafter *Basel III Executive Summary*].

69. "Capital" in this context means "Tier 1 capital," as defined in BASEL III FRAMEWORK, *supra* note 65, ¶ 49–96; *Basel III Executive Summary*, *supra* note 68. Common shares and retained earnings are the "predominant" form of Tier 1 capital. *See* BASEL III FRAMEWORK, *supra* note 65, ¶ 9.

70. DAVIS POLK, SUPPLEMENTARY LEVERAGE RATIO (SLR): VISUAL MEMORANDUM 1 (2014), https://www.davispolk.com/files/09.12.14.Supplementary_Leverage_Ratio.pdf (listing the components of Total Leverage Exposure).

71. *Id.* at 3 (calling it the "Basel III Leverage Ratio").

72. *See Basel III Executive Summary*, *supra* note 68 (discussing the minimum required leverage ratio); Martin J. Gruenberg, Member, Bd. of Dirs., Fed. Deposit Ins. Co., Remarks at the Peterson Institute for International Economics, Washington D.C.: An Essential Post-Crisis Reform Should Not Be Weakened: The Enhanced Supplementary Leverage Capitalization Ratio (Sept. 6, 2018), https://www.fdic.gov/news/news/speeches/spsep0618.html#_ftnref6 (explaining the raised requirements for GSIBs).

73. Regulatory Capital Rules: Regulatory Capital, Revisions to the Supplementary Leverage Ratio, 79 Fed. Reg. 57,725, 57,726 (Sept. 26, 2014).

74. *See* OFFICE OF FIN. RESEARCH, SIZE ALONE IS NOT SUFFICIENT TO IDENTIFY SYSTEMICALLY IMPORTANT BANKS 2 (2017), https://www.financialresearch.gov/viewpoint-papers/files/OFRvp_17-04_Systemically-Important-Banks.pdf [hereinafter SIZE ALONE].

banks in the United States.[75] The other two GSIBs, Bank of New York Mellon and State Street Bank, are not as large, but have systemic importance because their primary business is providing custodial services to financial institutions, including other banks and institutional investors. Bank of New York Mellon and State Street are each responsible for about $20 trillion dollars of customer assets.[76]

The original SLR rule was particularly burdensome for Bank of New York Mellon and State Street, because they hold large amounts of cash and US Treasury securities in custody for customers. These holdings pose minimal risk and generate little return, and the custodial banks further mitigate risk by depositing the customer cash and Treasury securities with the Federal Reserve.[77] Due to its non-risk-based nature, the original SLR rule included these holdings in total leverage exposure on the same basis as other exposures.[78]

All the GSIBs have argued against the SLR rule, arguing that it increases the cost of holding securities and the cost of transactions.[79] The Treasury Department has also supported relaxation of SLR requirements for all GSIBs on the ground that the indifference to risk in SLR calculations had the perverse result of encouraging the banks to take on riskier exposures.[80] Section 402 of the EGRRCPA instructs regulators to relax the SLR rule's method of calculating the supplemental leverage ratio for GSIBs that are "custodial banks," defined as banks that are "predominantly engaged in" custodial services: that is, Mellon and State Street.[81] With respect to those banks, the EGRRCPA requires banking regulators to revise the SLR rules to exclude assets deposited with central banks (i.e., the customer cash deposited with the Fed) from leverage exposure. Unlike the original, risk-indifferent rule, the new rule rewards

---

75. *Id.* at 4. Dodd-Frank created the Office of Financial Research to supply financial data to the FSOC, Congress, and the public. *See* OFFICE OF FIN. RESEARCH, WHO WE ARE, https://www.financialresearch.gov/about/files/OFR_Overview_2018.pdf.

76. SIZE ALONE, *supra* note 74, at 7; *The Custodian-Bank Business*, ECONOMIST (Feb. 2, 2017), https://www.economist.com/finance-and-economics/2017/02/02/the-custodian-bank-business.

77. Chris Kentouris, *Custodians Whammied by New US Leverage Ratios*, FINOPS REP. (Apr. 22, 2014), https://finopsinfo.com/regulations/custodians-whammied-by-new-us-leverage-ratios/.

78. *See id.*

79. Paul H. Kupiec, *BankThink: The Major Flaw in Big Banks' Argument Against the Leverage Ratio* (Aug. 7, 2017, 9:30 AM), https://www.americanbanker.com/opinion/the-major-flaw-in-big-banks-argument-against-the-leverage-ratio.

80. U.S. TREASURY DEP'T, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: BANKS AND CREDIT UNIONS 54–56 (2017), https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf.

81. Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-175, § 402(a) (2018). Banks that perform these services are also referred to as "custodian banks" or "custody banks."

custodial banks for the low-risk nature of those assets, significantly reducing their SLR requirements.

Although other GSIBs, including JPMorgan Chase and Citigroup, provide custodial services, their business is not "predominantly" custodial, and thus Section 402 does not require a change in SLR rules applying to them. This appears to be because legislators feared the riskier GSIBs might manipulate the relaxed rule to their advantage.[82] Nonetheless, Section 402 seems to signal bank regulators to relax the rule for all GSIBs, as the Treasury Department has recommended. While it *requires* SLR relaxation for statutory "custodial banks" only, it expressly *permits* bank regulators "to tailor or adjust the supplementary leverage ratio or any other leverage ratio *for any company that is not a custodial bank*."[83] Thus, although leverage ratios and other capital requirements are a direct response to the causes of the financial crisis, regulators now have wide discretion to relax them for the most systemically important banks. This expansion of discretion is notable in light of the constriction of agency discretion that is the hallmark of the EGRRCPA, especially with respect to the CFPB.[84]

INCREASED AND NEW REGULATORY THRESHOLDS UNDER EGRRCPA

Requirement	Old Threshold (bil)	New Threshold (bil)
EPS	$50	$250
Self-testing	$50	$250
Risk Committee	$10	$50
Volcker Rule	n/a	$10
Community Bank Leverage Ratio	n/a	<$10
Expanded QM Safe Harbor	<$2 (by rule)	<$10

82. *Congress Moves to Repeal Dodd-Frank: Custodian Banks to Gain*, NASDAQ (Mar. 9, 2018, 8:42 AM), https://www.nasdaq.com/article/congress-moves-to-repeal-dodd-frank-custodian-banks-to-gain-cm932512.

83. Economic Growth, Regulatory Relief, and Consumer Protection Act § 402(c) (emphasis added).

84. *See* Part V, *infra*.

III. DEREGULATING "COMMUNITY" BANKS

A. What Is a "Community Bank"?

The EGRRCPA contains two provisions that expressly purport to assist "community banks." Section 201 simplifies their capital compliance requirements, and Section 203 exempts them from the so-called Volcker Rule. For both these provisions, "community bank" has a bright-line definition based on asset size: less than $10 billion.[85] According to the FDIC,

> Community banks tend to be relationship lenders, characterized by local ownership, local control, and local decision making. By carrying out the traditional banking functions of lending and deposit gathering on a local scale, community banks foster economic growth and help to ensure that the financial resources of the local community are put to work on its behalf.[86]

Politicians and bankers have often claimed that smaller banks, particularly so-called "community banks," are unfairly burdened by Dodd-Frank and other financial regulations intended to police the large banks behind the financial crisis. One sponsor of the EGRRCPA, former North Dakota Senator Heidi Heitkamp (D-ND), described the new law as "perfectly crafted to allow greater flexibility for small community banks and credit unions . . . so it is purposeful that this bill does not include provisions for the largest banks."[87] The President and CEO of the American Bankers Association, the industry's leading lobbying group, wrote an editorial in 2016 celebrating community banks and claiming Dodd-Frank was driving them out of existence by imposing a "massive regulatory burden."[88] He did not identify any specific Dodd-Frank provision causing this supposed crisis. Furthermore, neither he nor former Senator Heitkamp defined what they meant by "community bank."

Beginning in 2012, the FDIC sought to identify and analyze community banks and developed a working definition for research

---

85. Economic Growth, Regulatory Relief, and Consumer Protection Act § 201(a)(3)(A).

86. FED. DEPOSIT INS. CORP., FDIC COMMUNITY BANKING STUDY, at I (2012), https://www.fdic.gov/regulations/resources/cbi/report/cbi-full.pdf [hereinafter FDIC COMMUNITY BANKING STUDY].

87. Michelle Price & Pete Schroeder, *Small Banks Trump Wall Street on Dodd-Frank Rewrite*, REUTERS (May 22, 2018, 5:23 PM), https://www.reuters.com/article/us-usa-house-banks-lobbying/small-banks-trump-wall-street-on-dodd-frank-rewrite-idUSKCN1IN328 (alteration in original).

88. Rob Nichols, *Yes, Community Banks Are Struggling Under Dodd-Frank*, POLITICO (Sept. 6, 2016, 3:18 PM), https://www.politico.com/agenda/story/2016/09/community-banks-dodd-frank-000197.

purposes.[89] Community banks under this definition have done very well in recent years. In the second quarter of 2017, 62 percent of them saw an increase in income over the previous year, their aggregate income was up 8.5 percent, and loans grew faster than at non-community banks.[90] The FDIC definition includes all of the smallest banks—those with less than $1 billion in assets—on the presumption that such small organizations focus on traditional neighborhood banking.[91] Banks larger than $1 billion qualify as "community banks" only if they have a loans-to-assets ratio of over 33 percent and a deposits-to-assets ratio of over 50 percent, and which operate in a limited geographical area.[92] In addition to these criteria, the "community bank" definition excludes all banks of any size that focus not on deposits and loans, but on specialty services such as credit cards, trust services, or financial services to other banks.[93]

The vast majority of American banks are relatively tiny community banks. At the end of 2010, there were 6914 banking organizations (bank holding companies).[94] Based on this definition, the FDIC classified 6524, or 94 percent, as "community banks."[95] Despite their large number, community banks are very small in terms of assets. In 2010, about 95 percent of them had less than $1 billion in total assets.[96] Their aggregate assets totaled only $1.9 trillion, or 15 percent of all banking assets.[97] Three hundred thirty banks above the $1 billion threshold were community banks, and 206 were noncommunity banks.[98] These 330 relatively large community banks had $623 billion in assets in the aggregate[99] (an average of only $1.9 billion each), accounting for only 0.04 percent of all banking assets.[100] As of 2016, after a post-crisis period

89. FDIC COMMUNITY BANKING STUDY, *supra* note 86, at I.

90. *Community Bank Performance: Second Quarter 2017*, FDIC (Dec. 6, 2018), https://www.fdic.gov/bank/analytical/qbp/2017jun/qbpcb.html [hereinafter *FDIC Quarterly Banking Profile*].

91. FDIC COMMUNITY BANKING STUDY, *supra* note 86, at 1-3.

92. *Id.*

93. *Id.* at 1-2 to 1-3.

94. *Id.* at 1-3. Together, they held 7658 bank charters. *Id.* at 1-4 tbl.1.2. Because some bank holding companies control multiple charters, the FDIC defined community banks at the bank holding company level rather than the charter level. *See id.* at 1-2 ("Under the FDIC definition, if the banking organization is designated as a community bank, every charter reporting under that organization is also considered a community bank . . . .").

95. *Id.* at 1-4 tbl.1.3.

96. *Id.* at 1-4 (according to Table 1.2, 6194 of the 6524 community banks had less than $1 billion in assets).

97. *Id.* at 1-4 tbl.1.3.

98. *Id.* at 1-4 tbls.1.2, 1.3.

99. *Id.* at 1-4 tbl.1.2.

100. *Id.* at 1-4 (according to Table 1.3, there were $13.3 trillion in total banking assets in 2010. 623 billion/13.3 trillion = .0004).

of consolidation and growth, the largest community bank had only $9.9 billion in assets.[101]

The Office of the Comptroller of the Currency (OCC), which supervises nationally-chartered banks, divides them into three categories for supervisory purposes: community, midsize, and large. The OCC categorization is based on a combination of asset size and other special "factors that affect its risk profile and complexity."[102] These factors include whether it is:

- . . . part of a much larger banking organization [i.e., holding company]
- supervision requires extensive coordination with other regulators
- the bank or company
  - is a dominant player within its market.
  - performs significant international activities.
  - owns unique subsidiaries.
  - offers high-risk, specialized, or complex products or services.
  - conducts sophisticated capital market activities.
  - has large asset management operations.[103]

This method of categorization reflects the OCC's "risk-based bank supervision approach."[104] That is, the OCC definition is intended to allow the OCC to regulate a bank according to the risks it poses, while the FDIC definition is intended to identify the services banks are providing and the communities they are serving. According to the OCC, while asset size is not the only criterion, "[c]ommunity banks generally are up to $10 billion in assets."[105] As noted above, the same is true under the FDIC definition, because there are thousands of banks below $1 billion and only 536 between $1 billion and $10 billion, of which the FDIC definition excludes 206. The EGRRCPA, however, lumps all banks under $10 billion together as "community banks," and awards them significant regulatory waivers.

---

101. *See FDIC Community Banking Study Reference Data*, FDIC (Feb. 25, 2018), https://www.fdic.gov/regulations/resources/cbi/data.html (*see* data file 2010–2016).

102. OFFICE OF THE COMPTROLLER OF THE CURRENCY, BANK SUPERVISION PROCESS: COMPTROLLER'S HANDBOOK 2 (2018), https://www.occ.treas.gov/publications/publications-by-type/comptrollers-handbook/bank-supervision-process/pub-ch-bank-supervision-process.pdf [hereinafter 2018 COMPTROLLER'S HANDBOOK]. The cited document is the handbook as revised after the passage of the EGRRCPA. The cited passages were substantially the same in the preceding version of the handbook dated 2007. COMPTROLLER OF THE CURRENCY ADM'R OF NAT'L BANKS, BANK SUPERVISION PROCESS: COMPTROLLER'S HANDBOOK 3 (2007), https://www.occ.treas.gov/publications/publications-by-type/comptrollers-handbook/bank-supervision-process/pub-ch-bank-supervision-process-previous.pdf.

103. 2018 COMPTROLLER'S HANDBOOK, *supra* note 102, at 2.

104. *Id.* at 1.

105. *Id.* at 2 n.5.

A 2015 report by the Congressional Research Service found that post-Dodd-Frank regulations did not impose greater burdens on small banks as compared to large ones.[106] According to the report, of the fourteen "major" regulations promulgated under Dodd-Frank, thirteen "either include an exemption for small banks or are tailored to reduce the cost for small banks to comply."[107] Thomas Hoenig, Vice Chair of the FDIC, has argued that regulatory burdens do not account for much of the competitive disadvantage of small banks.[108] The biggest difference, in his view, is the widely shared assumption that the government will protect the largest, most systemically important banks from failure because they are "too big to fail."[109] The response to the last financial crisis lent further support to this belief, as the government poured billions into the largest banks while letting small banks fail.[110] This implied bailout guarantee, he argues, reduces the biggest banks' cost of capital relative to smaller banks. Dodd-Frank did not change this imbalance, and neither does the EGRRCPA. Although Dodd-Frank's preamble claims its purposes are "to end 'too big to fail' [and] to protect the American taxpayer by ending bailouts," the law actually has no provisions prohibiting the government from bailing out a failing bank.[111] Dodd-Frank establishes a procedure by which the government *can* liquidate a failing "too big to fail" bank, but it does not *require* the government to use it.[112]

B. Simplified Capital Requirements for "Community Banks"

Basel III capital rules, as implemented in the United States, require banks to satisfy minimal requirements for four different ratios—common equity Tier 1, Tier 1, total capital, and Tier 1 leverage—in order to qualify as "well capitalized."[113] Section 201 of the EGRRCPA permits so-called

106. HOSKINS & LABONTE, *supra* note 1, at 40.

107. *Id.* at Summary.

108. *See* Arthur E. Wilmarth, Jr., *A Two-Tiered System of Regulation Is Needed to Preserve the Viability of Community Banks and Reduce the Risks of Megabanks*, 2015 MICH. ST. L. REV. 249, 313 (quoting Hoenig who said, "In times of financial stress, the knowledge that operating units [of failed SIFIs] will be provided funding to meet liquidity demands could serve to encourage corporate treasurers and others to place their funds with SIFIs' operating subsidiaries over other financial firms for whom such assurances are unavailable. Therefore, this assumption and access to funding provides SIFIs a significant competitive advantage . . . ." (alterations in original)).

109. *Id.* at 332–33.

110. *See id.* at 254 (noting that during the financial crisis (2008–2012) only one bank with deposits exceeding $100 billion was allowed to fail (Washington Mutual), while 450 community banks failed during that period).

111. Dodd-Frank, Pub. L. No. 111-203, Preamble, 124 Stat. 1376 (2010).

112. *See* Joo, *supra* note 29, at 60–64 ("The existence of liquidation authority will not necessarily result in its use.").

113. Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Minimum

"community banks" to qualify as well-capitalized if they satisfy a single "Community Bank Leverage Ratio" (CBLR).[114] This approach has been described as providing smaller banks with an "off-ramp" from the demanding Basel III requirements.[115] The new CBLR is to be based on the ratio of tangible equity capital to average total consolidated assets.[116] The Act instructs banking regulators to set the ratio between 8 and 10 percent.[117] Banks that satisfy the CBLR are "effectively exempt from all risk-based capital requirement[s], including Basel III and its predecessors."[118] Banks eligible for the simplified CBLR treatment include all banks with under $10 billion in assets.[119] The statute permits bank regulators to deny CBLR eligibility to banks based on their risk profiles, but does not require them to.[120]

There seems to be little need to reduce capital cushions for all banks smaller than $10 billion. Critics had argued that the stringent Basel III capital requirements were restricting community banks' ability to extend credit.[121] This argument is unconvincing, however: as noted above, community banks' loans and revenues have been growing even faster than those of non-community banks. Section 201 extends "community bank" treatment to every bank under $10 billion without consideration of the services the bank provides. Thus it does not seem aimed primarily at community banks, the vast majority of which are smaller than $1 billion.[122] Rather, it seems aimed at increasing business for these smaller banks at the expense of their stability and safety.

Regulatory Capital Ratios, Capital Adequacy, Transition Provisions, and Prompt Corrective Action, 77 Fed. Reg. 52,792, 52,807 tbl.6 (Aug. 30, 2012) (codified at 12 C.F.R. § 324.10(a) (2018) (for FDIC-supervised institutions); 12 C.F.R. § 3.10 (2018) (for national banks or federal savings associations); 12 C.F.R. § 6.4 (2018) (category definitions); 12 C.F.R. § 217.10 (2018) (minimum capital requirements).

114. Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, § 201(a)(1) (2018).

115. Rob McDonough, *Regulatory Update and 2019 Preview*, GLOBAL FIN. MKTS. INST. (Dec. 19, 2018), https://www.gfmi.com/articles/regulatory-update-2019-preview/.

116. Economic Growth, Regulatory Relief, and Consumer Protection Act § 201(a)(1).

117. *Id.* § 201(b)(1).

118. *S. 2155 Has Been Signed Into Law: Here's What It Means for Your Bank*, INDEP. COMMUNITY BANKERS AM. (May 24, 2018), https://www.icba.org/docs/default-source/icba/advocacy-documents/s-2155-what-it-means.pdf?sfvrsn=8.

119. Economic Growth, Regulatory Relief, and Consumer Protection Act § 201(a)(3)(A).

120. *Id.* § 201(a)(3)(B).

121. Richard Alexander et al., *How Senate Bill Would Change Compliance for Midsize Banks*, LAW360 (Apr. 2, 2018, 3:16 PM), https://www.law360.com/articles/1025865.

122. *See FDIC Quarterly Banking Profile*, *supra* note 90 ("Aggregate net income for the 5,338 community banks totaled $5.7 billion during the second quarter . . . .").

C. Volcker Rule Exemption for "Community Banks"

Section 619 of Dodd-Frank, known as the "Volcker Rule," prohibited banks from proprietary trading—that is, trading securities on their own accounts as distinct from trading on behalf of customers—as well as from investing in hedge funds. Section 203 of the EGRRCPA, vaguely and misleadingly entitled "Community Bank Relief," exempts most banks with less than $10 billion in assets from the Rule. The Volcker Rule states, "Unless otherwise provided in this section, a banking entity shall not—(A) engage in proprietary trading; or (B) acquire or retain any equity, partnership, or other ownership interest in or sponsor a hedge fund or a private equity fund."[123] The concept of the Rule is simple—to prevent banks from certain kinds of risky investment behavior. The complexity of investing makes it hard to describe the precise nature of the prohibited conduct, however. The Rule's key terms, "proprietary trading," "hedge fund," and "private equity fund," have no standard meanings and are difficult to define.[124] It is difficult to define the distinction between proprietary trading and other reasons a bank would hold securities positions. The Rule defines hedge funds and private equity funds as issuers that would be "investment companies" under the Investment Company Act (ICA) but for certain exemptions in that statute.[125] Thus, prohibited investments include not only highly speculative vehicles, but also other small corporate structures such as corporate subsidiaries and joint ventures, as well as many venture capital funds.[126] At the same time, the ICA exceptions may fail to catch larger funds that pursue speculative hedge fund strategies.[127]

Like much of Dodd-Frank, Section 619 did not directly regulate any industry conduct because it was not self-executing; it required implementation by agency rulemaking. The section required the Financial Stability Oversight Council (FSOC) to complete a study by January 2011. The Fed, the FDIC, the OCC, the SEC, and the Commodity Futures Trading Commission (CFTC) were instructed to work together to

123. 12 U.S.C. § 1851(a)(1) (2012).

124. *See* FIN. STABILITY OVERSIGHT COUNCIL, STUDY & RECOMMENDATIONS ON PROHIBITIONS ON PROPRIETARY TRADING & CERTAIN RELATIONSHIPS WITH HEDGE FUNDS & PRIVATE EQUITY FUNDS 18–25, 61–63 (2011), https://www.treasury.gov/initiatives/Documents/Volcker%20sec%20%20619%20study%20final%201%2018%2011%20rg.pdf [hereinafter FSOC STUDY] (providing a list of prohibited and permitted activities, defining terms to eliminate loopholes, and providing guidance for activities).

125. Those exemptions are based on nonpublic securities with an ownership comprised of one hundred persons or fewer or comprised solely of qualified purchasers. Investment Company Act of 1940 § 3(c)(1), (7), 15 U.S.C. § 80a-3(c)(1), (7) (2012).

126. FSOC STUDY, *supra* note 124, at 61–62.

127. *Id.* at 61.

adopt implementing regulations no later than October 2011. The regulations were not finalized until December 2013, however.[128] The banking industry delayed the rulemaking process with demands and objections, and ultimately had a significant say in shaping the regulations. The text of the final rule in the Federal Register was 26 pages long, accompanied by 246 pages of commentary and other supplementary materials.[129] It gave banks until July 2015 to comply, and various additional extensions have been granted.[130]

The tardy rulemaking under the Volcker Rule was hardly unique. When Dodd-Frank passed in 2010, it imposed 384 rulemaking requirements.[131] Forty-six of them gave agencies more than two years to pass the required rules.[132] One hundred twelve of them specified no deadline at all.[133] By July 2016, six years after the law's passage, the deadlines had passed for 271 of the rulemaking requirements, but 61 (22.5 percent) of those deadlines had not been met.[134] Rules were still in the proposal stage for 29 (10.7 percent) of them, and no rules had been proposed yet for 32 (11.8 percent) of them.[135]

The Volcker Rule gets its name from former Fed Chair Paul Volcker. Although he did not work on the legislation, he first called for such a rule in 2009.[136] The original White House proposals that evolved into Dodd-Frank placed no limits on proprietary trading; in fact, the administration actively opposed the idea.[137] The bill had difficulty gaining support, however. Some critics thought it did not sufficiently restrict risky investments by financial institutions. The administration thus revised its proposal to include the Rule "as a political concession"

---

128. Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5536 (Jan. 31, 2014) (codified at 12 C.F.R. pts. 44, 248, 351, 17 C.F.R. pt. 255).

129. *See id.* at 5779–5804 (text of the rule); *id.* at 5536–5779, 5804–06 (supplementary materials).

130. *Id.* at 5540.

131. DAVIS POLK, DODD-FRANK RULEMAKING PROGRESS REPORT 6 (2011), https://www.davispolk.com/files/files/Publication/47520503-eca0-44c6-8195-e1ef8a2040d9/Preview/PublicationAttachment/834a6131-02ff-4705-9200-e2cbfb8eb29e/040411_ProgressReport.pdf.

132. *Id.* at 3.

133. *Id.*

134. DAVIS POLK, DODD-FRANK PROGRESS REPORT 2 (2016), https://www.davispolk.com/files/2016-dodd-frank-six-year-anniversary-report.pdf.

135. *Id.*

136. Kimberly D. Krawiec & Guangya Liu, *The Volcker Rule: A Brief Political History*, 10 CAP. MARKETS L.J. 507, 510 (2015).

137. *See id.* (noting that the administration was "forced to make a number of concessions and revisions").

which helped the struggling bill get a public endorsement from the respected Volcker.[138] As a result, the Rule seems to have no committed backers in Washington.

It is not clear that proprietary trading was an important cause of the financial crisis. While short-term trading does not seem to have been a major factor, banks did experience great losses from holding long-term asset-backed securities for their own accounts.[139] (The Rule, however, applies only to short-term trading.)[140] Professor Charles Whitehead argues that the purpose of the Rule is to express "the populist view that commercial banking should be separated from investment banking," a distinction that had all but vanished since the repeal of Glass-Steagall.[141] He argues that it was not designed to address the causes of the crisis.[142] Volcker himself has conceded that proprietary trading was not a significant contributing cause of the financial crisis.[143] According to Volcker, the Rule is "not only, or perhaps most importantly, a matter of the immediate market risks involved."[144] Rather, it is also about the "culture of the commercial banking institutions," which he believed should avoid excessively enriching and incentivizing speculative traders and instead focus on basic customer financial services.[145] Professor Hal Scott questioned the need for the Volcker Rule.[146] According to Scott, proprietary trading accounts for only a tiny portion of bank revenues: less than 1 percent even at the largest commercial banks such as Wells Fargo.[147] Further, he argues, the major failures that triggered the crisis did not involve insured banks, and the main causes of the financial crisis

---

138. *Id.* at 508.

139. Charles K. Whitehead, *The Volcker Rule and Evolving Financial Markets*, 1 HARV. BUS. L. REV. 39, 42 n.10 (2011).

140. Section 619 defines "proprietary trading" as acting as a principal for a "trading account," defined in turn as an account "principally for the purpose of selling in the near term (or otherwise with the intent to resell in order to profit from short-term price movements)." Dodd-Frank, Pub. L. No. 111-203, § 619, 124 Stat. 1376, 1620 (2010) (amending 12 U.S.C. § 1851(h)(4), (6) (2006)).

141. Whitehead, *supra* note 139, at 42–43 (noting that the Rule was motivated by a desire to "return to a traditional banking model" with a "regulatory divide").

142. *See id.* at 41–42 (explaining how "the Rule's ultimate intention was less to cure a particular cause of the financial crisis").

143. *Id.* at 41.

144. Paul A. Volcker, *Commentary on the Restrictions on Proprietary Trading by Insured Depositary Institutions* 2 (Feb. 13, 2012), http://online.wsj.com/public/resources/documents/Volcker_Rule_Essay_2-13-12.pdf.

145. *Id.*

146. *See* Hal S. Scott, *The Reduction of Systemic Risk in the United States Financial System*, 33 HARV. J.L. & PUB. POL'Y 671, 677 (2010) (arguing that the Rule is "unlikely to reduce systemic risk").

147. *Id.*

were lending and securitization, not proprietary trading.[148]

Some critics of the Volcker Rule further alleged that it disproportionately burdened small banks, because larger banks could spread compliance costs over a larger asset base,[149] and also that it was preventing small banks from investing in cutting-edge technology. In response, FDIC vice chair Thomas Hoenig declared himself "disappointed that the Volcker Rule continues to be characterized as a burden to community banks . . . . This argument appears misleading and for the purpose of implementing broader rollbacks of the Volcker Rule."[150] In fact, community banks do not generally hold securities positions for their own accounts.[151] When they do, they tend to be government securities, which are expressly exempted from the Volcker regulations.

The EGRRCPA gives a complete Volcker Rule exemption to banks with total assets of less than $10 billion whose trading assets and liabilities comprise no more than 5 percent of total assets.[152] This exemption applies to most, if not all, community banks (as noted above, the largest community bank in 2010 had $9.9 billion in assets). It also applies to 76 percent of non-community banks.

If reporting costs were the real problem under the Volcker Rule, the obvious solution would be to ease reporting requirements, or even remove them completely. Permitting smaller banks to engage in such trading will of course remove the reporting burden, but that hardly appears to be its main intent. Rather, it seems intended to give speculative vehicles access to capital, potentially enriching those firms, while exposing insured deposits to greater volatility. Although its wisdom may be debated, the Rule reflects the view that proprietary trading and hedge fund investment are excessively risky practices for *any* bank. The EGRRCPA would continue to prohibit only large, presumably sophisticated banks from such activity, while permitting it for smaller, presumably less sophisticated banks. This seems to suggest that risky investment vehicles may not put the capital of systemically important

148. *Id.*

149. *Why Small Banks Need Volcker Rule Amendments*, INT'L FIN. L. REV. (Sept. 18, 2012), http://www.iflr.com/Article/3090581/Why-small-banks-need-Volcker-rule-amendments.html.

150. Thomas M. Hoenig, *BankThink: 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.

151. Robert Taylor, *Volcker Rule Requirements for Community Banks*, BANKING N.Y. (Apr. 19, 2012), http://www.bankingny.com/portal/Features/tabid/71/newsid413/2533/Default.aspx.

152. Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, § 203 (2018) (amending 12 U.S.C. § 1851 (2012)).

large banks at risk but may access the capital of smaller banks because their losses and failures are of less consequence.

In addition to Section 203, regulators and Congress are rolling back the Volcker Rule regulations (like other parts of Dodd-Frank) through the rulemaking process and through legislation. In July 2018, the Fed, FDIC, OCC, the SEC, and the CFTC proposed a set of changes to the Volcker Rule regulations,[153] a proposal sometimes referred to informally as "Volcker 2.0." The current administration's proposed changes would relax the Rule in many ways. Although Volcker 2.0 was intended to increase banks' freedom, the banking industry has objected that it does not go far enough in that direction.[154] Consumer advocates, on the other hand, argue that Volcker 2.0 is too permissive.[155]

Most significantly, Volcker 2.0 proposes to make it much easier for a bank to show that a proprietary trade falls under a permitted exception. Under the original 2013 Volcker Rule regulations, proprietary trades qualified for an exception if the bank could show its positions were justified by the "reasonably expected near term demand of customers" (RENTD).[156] Volcker 2.0 would eliminate the RENTD rule and replace the bank's burden of proof with a *presumption* that trading qualifies for an exception if trading complies with the bank's internal risk limits (as long as those internal limits are established according to requirements of the Volcker Rule).[157]

Despite its attempt to reduce regulation of proprietary trading, banks halted the passage of the proposed Volcker 2.0 due to one particular provision. The 2013 Volcker regulations had created a rebuttable presumption that a trading position violates the Volcker Rule if it is held for fewer than sixty days.[158] Banks complained that this rule was over-inclusive. They thought Volcker 2.0's proposed new approach was

153. Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 83 Fed. Reg. 33,432 (July 17, 2018).

154. *See* Jesse Hamilton, *Goldman Urges Do-Over by Trump Regulators in Easing Volcker Rule*, BLOOMBERG (Oct. 22, 2018, 3:00 AM), https://www.bloomberg.com/news/articles/2018-10-22/goldman-urges-do-over-by-trump-regulators-in-easing-volcker-rule (noting that Goldman Sachs claims the proposal "falls far short of what's needed to ease undue burdens on Wall Street").

155. *See id.* (stating that consumer groups have called the decision "dangerously misguided").

156. PRICE WATERHOUSE COOPERS, VOLCKER RULE: ARE YOU REALLY MARKET MAKING? (2015) (emphasis omitted), https://www.pwc.com/us/en/financial-services/regulatory-services/publications/assets/volcker-rule-rentd.pdf.

157. *Volcker 2.0: Proposed Changes to the Volcker Rule*, SIA PARTNERS (July 23, 2018), http://en.finance.sia-partners.com/20180723/Volcker-20-proposed-changes-Volcker-rule.

158. Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5536, 5542 (Jan. 31, 2014) (codified at 12 C.F.R. pts. 44, 248, 351, 17 C.F.R. pt. 255).

even worse, however. The new proposal would replace the time-based presumption with one based on the amount of profit and loss the bank generates by trading.[159] Accounting definitions recognize three kinds of securities positions: those that an institution (such as a bank) intends to hold to maturity, those held in order to be sold in the near term ("trading securities"), and "available-for-sale" securities, which include all securities positions that do not fall into the first two categories.[160] Under the Volcker 2.0 proposal, a rebuttable presumption of violation would apply if the average daily value of profits and losses from a bank's purchases and sales of available-for-sale securities and trading securities exceeds $25 million.[161] The Big Four banks condemned this approach as even more over-inclusive than the time-based presumption, stalling the progress of the regulation in Summer 2018.[162] The comment period was originally set to expire in September 2018, but was extended to October 17, 2018 in response to a flood of negative comments.[163]

IV. RELAXATION OF MORTGAGE LENDING STANDARDS

The relaxation of credit standards was a major contributor to the 2008 financial crisis and recession. Prior to the crisis, the high and rising value of real estate led many lenders to make mortgage loans based solely on a property's value, without assessing or documenting the borrower's creditworthiness.

A. Exemption from Appraisal Requirements

Dodd-Frank amended the Truth in Lending Act to require lenders to obtain a written professional appraisal before making a higher-risk residential mortgage.[164] The CFPB passed rules to this effect. Some

159. Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 83 Fed. Reg. 33,432, 33,438 (July 17, 2018).

160. FIN. ACCOUNTING STANDARDS BD., STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 115 ¶¶ 7, 12 (1993), https://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1218220123971&acceptedDisclaimer=true.

161. Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 83 Fed. Reg. at 33,450.

162. *See* Lalita Clozel, *Banks Say No Thanks to Volcker Rule Changes*, WALL ST. J. (Aug. 15, 2018, 1:25 PM), https://www.wsj.com/articles/banks-say-no-thanks-to-volcker-rule-changes-1534353932; Hamilton, *supra* note 154.

163. Press Release, Bd. of Governors of the Fed. Reserve Sys., Agencies Extend Comment Period for Proposed Rule Simplifying and Tailoring the "Volcker Rule" (Sept. 4, 2018), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20180904a.htm.

164. Dodd-Frank, Pub. L. No. 111-203, § 1471, 124 Stat. 1376, 2185 (2010) (amending 15 U.S.C. § 1639h (2006)). The statute defines higher-risk mortgages as certain mortgages whose interest rates exceed the average prime offer rate by a specified amount. 15 U.S.C. § 1639h(f)

lenders in rural areas, however, have reported difficulty in finding qualified appraisers.[165] Under the EGRRCPA, loan transactions in rural communities involving property valued at less than $400,000 no longer require an independent appraisal if the lender cannot procure an appraiser within 5 business days for a reasonable and customary fee.[166] This is likely to eliminate the appraisal requirement for the vast majority of residential mortgages in rural areas, where the median home value is $114,000.[167] This could result in overpayment by buyers or under collateralization for lenders.

B. Ability to Pay and Qualified Mortgage Safe Harbor

One of Dodd-Frank's responses to this phenomenon was to prohibit residential mortgage lending unless the lender, "based on verified and documented information," "makes a reasonable and good faith determination" that the borrower "has a reasonable ability to repay the loan," as well as taxes, insurance, and assessments.[168] Common law does not impose any requirement that a lender consider a borrower's ability to repay a loan; nor did federal banking law prior to Dodd-Frank.[169] Some state-level banking regulations had imposed such requirements on banks within their regulatory authority.[170] While there were some limited advances in federal mortgage regulation in the early 2000s, they were accompanied by preemption of such state laws; as a result, "the net regulatory effect was unclear."[171]

Dodd-Frank authorized the Federal Reserve to adopt regulations in accordance with these requirements. Violating this "ability to repay" (ATR) requirement can make a lender liable for up to three times the compensation received by the mortgage originator, as well as costs and attorney's fees.[172] A borrower may invoke a violation as a defense or

(2012).

165. *See generally* BD. OF GOVERNORS OF THE FED. RESERVE SYS. ET AL., INTERAGENCY ADVISORY ON THE AVAILABILITY OF APPRAISERS (2017), https://www.occ.gov/news-issuances/news-releases/2017/nr-ia-2017-60a.pdf.

166. Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, § 103 (2018) (amending 12 U.S.C. § 3356 (2012)).

167. Letter from Andy Green, Managing Dir., Econ. Policy et al. to Senator Mike Crapo & Senator Sherrod Brown 5 (Nov. 27, 2017), https://cdn.americanprogress.org/content/uploads/2017/11/26123637/CAP-Letter-on-Economic-Growth-Regulatory-Relief-and-Consumer-Protection-Act.pdf [hereinafter Letter from Green].

168. Dodd-Frank § 1411, 15 U.S.C. § 1639c (2012).

169. John Pottow, *Ability to Pay*, 8 BERKLEY BUS. L.J. 175, 177–78 (2011).

170. *See id.* at 184 n.57 (noting that Minnesota required such an analysis prior to Dodd-Frank).

171. *Id.* at 183.

172. Dodd-Frank, Pub. L. No. 111-203, § 1404, 124 Stat. 1376, 2141 (2010) (amending 15 U.S.C. § 1639b (2006)).

setoff in foreclosure proceedings.[173]

Dodd-Frank's ATR requirement was intended to curb the reckless lending that became prevalent during the bubble.[174] Some critics opposed the inclusion of the requirement in Dodd-Frank on the ground that it was too vague and subjective, potentially allowing regulators to retrospectively punish lenders for failed loans that were reasonable when issued.[175] In response, Congress included a safe harbor provision: so-called "qualified mortgages" are entitled to a conclusive presumption that they satisfy the ATR requirement.[176] To benefit from the presumption, a mortgage loan must satisfy the following criteria: it must meet certain underwriting requirements; it may not have interest-only payments or negative amortization; it may not require balloon payments; the lender must verify and document the borrower's income and financial resources; the loan underwriting process must meet certain requirements; the loan must follow CPFB rules setting a maximum debt-to-equity ratio (currently set at 43 percent[177]); points and fees may not exceed 3 percent of the loan amount; the loan term may not exceed 30 years;[178] and any prepayment penalties must abide by specified limits.[179]

The EGRRCPA lowers lending standards for smaller banks by relaxing the definition of "qualified mortgage" (QM) for banks with less than $10 billion in assets that originate and maintain a loan (that is, do not sell the loan).[180] As noted above, a $10 billion threshold is far higher than necessary to protect most so-called community banks. Prior to the EGRRCPA, the CFPB had "carefully contemplated" rules that relaxed QM standards only for truly small banks: those under $2 billion in size

---

173. Dodd-Frank § 1413 (amending 15 U.S.C. § 1640 (2006)).

174. In the words of a CFPB Brochure, "The Ability-to-Repay rule is intended to prevent consumers from getting trapped in mortgages that they cannot afford, and to prevent lenders from making loans that consumers do not have the ability to repay. It's that simple." CONSUMER FIN. PROT. BUREAU, ABILITY-TO-REPAY RULE: PROTECTING HOMEBUYERS FROM DEBT TRAPS 1, https://files.consumerfinance.gov/f/201312_cfpb_mortgage-rules_fact-vs-fiction.pdf (last visited May 22, 2019) [hereinafter ABILITY-TO-REPAY RULE].

175. Charles W. Murdock, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: What Caused the Financial Crisis and Will Dodd-Frank Prevent Future Crises?*, 64 S.M.U. L. REV. 1243, 1269 (2011) ("There is then the concern that a prior determination would be judged by hindsight.").

176. Dodd-Frank, Pub. L. No. 111-203, § 1412, 124 Stat. at 2145 (amending 12 U.S.C. § 1639c (2006) by adding § 1639(b)(1), "Presumption of Ability to Repay").

177. ABILITY-TO-REPAY RULE, *supra* note 174, at 1.

178. 15 U.S.C. § 1639c(b)(2)(A) (2012).

179. *Id.* § 1639c(c)(3).

180. Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, § 101 (2018) (amending 15 U.S.C. § 1639c(b)(2) (2012)).

that made fewer than 500 loans a year.[181]

The EGRRCPA removes many of the QM requirements for lenders smaller than $10 billion. Balloon payments and loan terms longer than 30 years are permitted, while the Dodd-Frank underwriting standards and CFPB's maximum debt-to-equity ratio rules no longer apply.[182] For lenders under $10 billion, the QM safe harbor now has only four requirements: the prohibition on interest-only payments and negative amortization; the 3 percent cap on points and fees; the limitations on prepayment penalties; and consideration and documentation of the borrower's income and financial resources.[183] The last requirement is similar to, but explicitly weaker than, the original QM criterion (which still applies to larger lenders). Under the original QM criterion, income and resources must be "*verified* and documented" by all lenders.[184] Under the EGRRCPA, smaller lenders need only "*consider*[] and document[]" them.[185]

While the QM rule does not mandate any lending practices, its safe harbor protection incentivizes adherence to a minimum set of standards, which the EGRRCPA has lowered. This will potentially encourage risky and abusive lending practices, undermining both consumer protection and the stability of banks and the financial system. One critic has argued that this change fails as consumer protection because it focuses on the lender, not the consumer: "the size of the originating bank should not determine whether [a homebuyer] obtains a fair deal and a safe mortgage."[186]

The original Dodd-Frank QM rules had no negative impact on banks'

---

181. Letter from Allied Progress et al. to Congress Regarding Opposition to S. 2155, the So-Called "Economic Growth, Regulatory Relief, and Consumer Protection Act" 3–4 (May 18, 2018), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-oppo-s2155-coalition-may2018.pdf [hereinafter Letter Regarding Opposition to S. 2155]; CONSUMER FIN. PROT. BUREAU, ABILITY-TO-REPAY AND QUALIFIED MORTGAGE RULE: SMALL ENTITY COMPLIANCE GUIDE 38–39 (2014), https://files.consumerfinance.gov/f/201512_cfpb_atr-qm_small-entity-compliance-guide.pdf.

182. *See* Joseph D. Simon, *Expansion of the Qualified Mortgage Safe Harbor Under the Regulatory Relief Bill: Significant Help for Portfolio Lenders Under $10 Billion in Assets*, CULLEN & DYKMAN LLP (May 31, 2018), http://www.cullenanddykman.com/news-advisories-195.html (explaining the effects of the EGRRCPA's expansion of the qualified mortgages definition).

183. Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, § 101 (amending 15 U.S.C. § 1639c(b)(2) (2012)).

184. Dodd-Frank, Pub. L. No. 111-203, § 1412, 124 Stat. 1376, 2145 (2010) (amending 15 U.S.C. § 1639c(b)(2)(A)(iii) (2006)) (emphasis added).

185. Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, § 101 (amending 15 U.S.C. 1639c(b)(2)(F)(ii)(I)(ee) (2018)) (emphasis added).

186. Gelzinis & Valenti, *supra* note 50 (explaining that the EGRRCPA violates the principle embedded in the Dodd-Frank Act that consumer-facing regulations should not regulate financial products based on the size of the lender).

mortgage activity or consumers' access to credit.[187] Mortgage loan activity increased by 13 percent from 2015 to 2016.[188] As the economy began to heat up, the Fed responded by raising interest rates. As a result, mortgage activity declined in 2017.[189] The changes in the EGRRCPA appear intended to permit, if not encourage, small lenders to return to the days of excessive, unverified lending. This ignores both the Fed's attempts to cool down the economy and the FCIC report's conclusion that lax underwriting processes and risky loans were a key cause of the financial crisis.

In response to Dodd-Frank regulations, mortgage lending activity has moved from banks to such non-bank mortgage companies.[190] These lenders, which are regulated at the state level and not subject to Dodd-Frank, saw massive growth during the last housing bubble.[191] Because these lenders finance loans with credit rather than deposits, the credit crunch of the financial crisis caused many of them to collapse.[192] Thus, in 2009, non-bank lenders issued only 9 percent of all mortgages.[193] In 2017, however, they accounted for over half, a level higher than before the financial crisis.[194] Moreover, non-bank lenders issue the vast majority of the mortgages under federal guarantee by the Federal Housing Administration, Department of Veterans Affairs, and Ginnie Mae; thus, their failures could put taxpayers at risk.[195] Rather than impose regulations on these lenders, the EGRRCPA has loosened restrictions on

---

187. CTR. FOR RESPONSIBLE LENDING, DESPITE GROWING MARKET, AFRICAN-AMERICANS AND LATINOS REMAIN UNDERSERVED 1 (2017), http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-2016hmda-policy-brief-sep2017.pdf.

188. Neil Bhutta, Steven Laufer & Daniel R. Ringo, *Residential Mortgage Lending in 2016: Evidence from the Home Mortgage Disclosure Act Data*, FED. RES. BULL., Nov. 2017, at 2, https://www.federalreserve.gov/publications/2017-november-residential-mortgage-lending-in-2016.htm.

189. *See FFIEC Announces Availability of 2017 Data on Mortgage Lending*, CONSUMER FIN. PROTECTION BUREAU (May 7, 2018), https://www.consumerfinance.gov/about-us/newsroom/ffiec-announces-availability-2017-data-mortgage-lending/ ("The total number of originated loans of all types and purposes decreased by more than 1 million between 2016 and 2017, or 12.4 percent.").

190. *See* Jonnelle Marte, *Non-Banks Are Back and Bigger than Ever*, L.A. TIMES (Sep. 21, 2018), http://www.latimes.com/business/la-fi-non-bank-lenders-20180921-story.html ("Non-bank lenders are gaining market share in large part because traditional banks are scaling back their presence in the mortgage market. New consumer protections and more rigorous underwriting standards have made it more expensive to offer mortgages by adding paperwork and increasing lenders' liability.").

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

smaller banks, possibly in an attempt to help them compete with non-bank mortgage companies. As the mortgage market shrinks and competition for originations increases, this deregulatory trend may encourage a "race to the bottom" with respect to lending standards.

V. IMPACT ON CONSUMER PROTECTION

Despite its name, the Economic Growth, Regulatory Relief and Consumer Protection Act contains only a few narrow and relatively minor consumer protection provisions. For example, it increases the time that consumer credit reporting agencies must keep a fraud alert in a consumer's file, requires the agencies to make free credit freezes available, and requires verification before veterans' medical debts can be included in their credit reports.[196] The EGRRCPA impacts consumers more significantly by eliminating many existing consumer protection provisions in favor of giving "regulatory relief" to financial institutions. Consumer exploitation contributed to the financial crisis in that many of lenders' risky mortgage practices also constituted predatory lending. Moreover, whatever the precise role of consumer exploitation in causing the crisis, the crisis revealed many such practices. Thus, the Dodd-Frank Act contained significant consumer-protection provisions. The most revolutionary was the creation of the Consumer Financial Protection Bureau as an independent agency within the Federal Reserve.[197] Dodd-Frank gave the CFPB broad rulemaking and enforcement authority with respect to consumer financial law "for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[198] Dodd-Frank gave the CFPB a unique structure intended to insulate it from political influence: it has a single director whom the President may remove only for cause. The constitutionality of this structure has been challenged by several defendants in CFPB actions, resulting in conflicting judicial decisions and a possible circuit split.[199] The EGRRCPA reverses many of the

---

196. *See generally* Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, §§ 301–313 (2018).

197. 12 U.S.C. § 5491 (2012).

198. 12 U.S.C. § 5511 (2012).

199. *See* Evan Weinberger, *N.Y. Judge Adds Fire to CFPB Constitutionality Question*, BLOOMBERG (June 22, 2018), https://www.bna.com/ny-judge-adds-n73014476808/ (discussing PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 84 (D.C. Cir. 2018) (en banc) (upholding the constitutionality of the CFPB)); Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, 332 F. Supp. 3d 729, 784 (S.D.N.Y. 2018) (holding that the CFPB is unconstitutionally structured); Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc., No. 3:16-cv-00356-WHB-JCG, slip op. at 5 (S.D. Miss. Mar. 21, 2018) (finding that the CFPB is not unconstitutional due to the single-

CFPB's existing rules and constrains its future discretion with statutes that reduce its rulemaking discretion. This tendency was noted in Section IV with respect to mortgage lending standards, which affect both consumer protection and bank stability. This Section analyzes examples pertaining more specifically to consumer protection.

A. Reporting Under the Home Mortgage Disclosure Act

The Home Mortgage Disclosure Act (HMDA) requires mortgage lenders to report data including the disposition of loan applications, and the race, sex, and income of applicants and borrowers.[200] According to the CFPB, the purposes of HMDA reporting include "determin[ing] whether financial institutions are serving the housing needs of their communities" and "identifying possible discriminatory lending patterns."[201] After Dodd-Frank moved HMDA rulemaking authority from the Fed to the CFPB, the CFPB passed rules requiring additional detail about loans, such as total points and fees, how the interest rate compares to a benchmark rate, and the property's value.[202] As with the Volcker Rule and other requirements, advocates of deregulation argue that the reporting requirements place too great a burden on small banks. The CFPB has apparently considered this argument and has exempted very small institutions from the reporting obligations. For 2017, banks with under $44 million in assets were exempt from collecting HMDA data.[203] Non-depository institutions were exempt if they had less than $10 million or originated fewer than 100 mortgages in the previous year.[204] EGRRCPA relaxes reporting for a much larger subset of banks, waiving certain disclosure requirements for those that originate fewer than 500 mortgages a year. The CFPB estimates this includes about 85 percent of

director structure), *appeal docketed*, No. 18-60302 (5th Cir. July 2, 2018); Consumer Fin. Prot. Bureau v. Seila Law, LLC, No. 8:17-cv-01081-JLS-JEM, slip op. at 4–5 (C.D. Cal. Aug. 25, 2017), *appeal docketed*, No. 17-56324 (9th Cir. Sept. 1, 2017); *see also* John Yoo & James C. Phillips, *With Kavanaugh, the Court Should Tame the Administrative State*, NAT'L REV. (Oct. 25, 2018, 6:30 AM), https://www.nationalreview.com/2018/10/supreme-court-brett-kavanaugh-administrative-state/ (explaining Justice Kavanaugh's vote against the CFPB by reason that it delegates unconstitutionally excessive independence to it). The constitutional critique of the CFPB happens to coincide neatly with the financial sector's self-interest in increasing profits by avoiding regulation.

200. *See generally* CFPB Home Mortgage Disclosure (Regulation C), 12 C.F.R. §§ 1003.1–1003.6 (2018); *see also History of HMDA*, FED. FIN. INSTITUTIONS EXAMINATION COUNCIL (Sept. 6, 2018, 7:10 PM), https://www.ffiec.gov/hmda/history2.htm [hereinafter *History of HMDA*].

201. 12 C.F.R. § 1003.1(b)(1)(i), (iii).

202. Home Mortgage Disclosure (Regulation C), 80 Fed. Reg. 66,128, 66,128–29 (Oct. 28, 2015).

203. *History of HMDA*, *supra* note 200.

204. *Id.*

banks.[205] Critics argue that reducing required disclosures will make it harder to detect lending discrimination and abusive practices.[206]

B. Escrow Accounts

Dodd-Frank required lenders to maintain escrow (also known as "impound") accounts for certain mortgages with higher-than-average interest rates.[207] The CFPB passed rules to this effect for "higher priced" residential mortgages.[208] Escrow accounts collect monthly payments from the borrower, in addition to mortgage payments, that are applied to large periodic costs such as property tax and homeowner's insurance. According to the CPFB, "[e]scrows can be an important consumer protection" because they help the consumer understand the full cost of homeownership.[209] This enables consumers to make more informed decisions about home-buying and mortgage borrowing.[210] Many lenders encourage borrowers to take out loans they cannot repay because the lender profits not from repayment, but from "late fees, serial loans, and repossession of collateral."[211] Escrow accounts also protect homeowners and lenders from losing homes to tax foreclosures and from losing insurance coverage.[212] Section 108 of the EGRRCPA partially overrules the CFPB regulation, eliminating escrow requirements for lenders that have less than $10 billion in assets and originated fewer than 1000 loans in the preceding calendar year. While the cost and inconvenience of maintaining escrow accounts may be a concern for very small banks, the

---

205. Letter Regarding Opposition to S. 2155, *supra* note 181, at 4.

206. *See* Rob Blackwell, *9 Provisions of Reg Relief Law Important to Small Banks*, AM. BANKER (May 24, 2018, 12:22 PM), https://www.americanbanker.com/slideshow/9-provisions-of-reg-relief-law-important-to-small-banks (noting the criticisms about the HMDA exemption); Letter Regarding Opposition to S. 2155, *supra* note 181, at 4 (noting that this results from a "sacrifice [of] key data about lending in underserved communities").

207. Dodd-Frank, Pub. L. No. 111-203, § 1461, 124 Stat. 1376, 2178 (2010) (adding 15 U.S.C. § 1639d (2012)).

208. 12 C.F.R. § 1026.35 (2018); *see also* CONSUMER FIN. PROT. BUREAU, WHAT THE NEW ESCROW ACCOUNT REQUIREMENTS MEAN FOR CONSUMERS (2013), https://files.consumerfinance.gov/f/201301_cfpb_escrow-requirements-rule_what-it-means-for-consumers.pdf [hereinafter NEW ESCROW ACCOUNT REQUIREMENTS]. The the CFPB rules refer to the mortgages requiring escrow accounts as "higher-priced mortgages," which are defined similarly, but not identically, to the "higher-risk mortgages" for which Dodd-Frank requires an appraisal. NEW ESCROW ACCOUNT REQUIREMENTS, *supra*. *See* 12 C.F.R. § 226.35(b)(3) (2018) (identifying the escrow rules for higher priced mortgage loans); *see also supra* Part IV (discussing exemptions from the appraisal requirement).

209. NEW ESCROW ACCOUNT REQUIREMENTS, *supra* note 208, at 2.

210. Letter from Green, *supra* note 167, at 4.

211. Joe Valenti et al., *Lending for Success*, CTR. FOR AM. PROGRESS (July 13, 2015, 9:04 AM), https://www.americanprogress.org/issues/economy/reports/2015/07/13/117020/lending-for-success/.

212. Letter from Green, *supra* note 167, at 4.

high threshold means the "regulatory relief" also extends to much larger lenders.

C. Seniors and Other Vulnerable Adults

The EGRRCPA includes the "Senior Safe Act," which

> exempts financial institutions from civil and administrative liability for reporting . . . potential exploitation [of seniors and other vulnerable adults] to governmental agencies. . . . Under the Senior Safe Act, institutions are exempt from civil and administrative liability if they (1) report potential exploitation of a senior citizen to regulatory or law-enforcement agencies in good faith and with reasonable care and (2) provide certain training to its employees related to the suspected financial exploitation of a senior citizen.[213]

A subset of financial firms—broker dealers and investment advisers—are already subject to rules that are more protective of vulnerable adults. Under the North American Securities Administrators Association (NASAA) Model Act, passed in thirteen states as of the beginning of 2018,[214] institutions are already required to report suspected exploitation.[215] The Senior Safe Act does not require reporting, and grants reporting institutions protection from liability, potentially allowing them to sacrifice their employees and avoid institutional liability. Both the Act and a rule of the Financial Industry Regulatory Authority (the self-regulatory organization governing securities broker-dealers) further protect vulnerable adults by permitting a financial institution to delay a disbursement from the account of a vulnerable adult if it reasonably believes that the disbursement may constitute financial exploitation.[216] The EGRRCPA has no such provision.

D. Financing Manufactured Homes

Dodd-Frank prohibits "steering incentives" intended to prevent lenders from paying their employees to sell costlier loans to their customers.[217] It prohibits mortgage originators from compensating their employees

---

213. Joshua D. Jones & W. Preston Martin, *Efforts to Protect Seniors and Other Vulnerable Adults from Financial Exploitation*, 79 ALA. LAW. 247, 251 (2018).

214. *Id.* at 250.

215. N. AM. SEC. ADM'RS ASS'N, NASAA MODEL LEGISLATION TO PROTECT VULNERABLE ADULTS FROM FINANCIAL EXPLOITATION: LEGISLATIVE TEXT & UPDATED COMMENTARY FOR 2018 LEGISLATIVE SESSION § 3 (2018) [hereinafter NASAA MODEL ACT]; ALA. CODE § 8-6-172 (2018); *Rule 2165: Financial Exploitation of Specified Adults*, FINRA (2018), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=12784.

216. NASAA MODEL ACT, *supra* note 215, § 7; ALA. CODE § 8-6-176.

217. Dodd-Frank, Pub. L. No. 111-203, § 1403, 124 Stat. 1376, 2139 (2010) (amending 15 U.S.C. § 1639b (2006)).

based on the terms of the loan (other than the principal), and prohibits third parties from paying kickbacks.[218] It also empowers the CFPB to pass regulations prohibiting mortgage originators from steering customers to predatory loans or loans they lack the ability to repay; mischaracterizing a borrower's credit history or the value of the mortgaged property; and discrimination based on race, ethnicity, gender, or age.[219] Under the guise of "Protecting Access to Manufactured Homes," the EGRRCPA redefines "mortgage originator" to exclude retailers of manufactured or modular homes.[220] As a result, it strips away all these protections for manufactured home buyers who obtain financing from the seller. Predatory lending practices, including outright fraud, have plagued the manufactured-home industry.[221] The industry is dominated by close relationships, including co-ownership, between retailers and financing businesses, resulting in conflicts of interest and incentives to steer their customers toward higher-priced financing.[222] These customers tend to be of low and moderate incomes, and people of color have been especially subject to exploitation.[223]

VI. UNDOING DODD-FRANK BY OTHER MEANS

The EGRRCPA is by no means the only way that the current Congress and administration are undoing Dodd-Frank. As noted above, regulatory agencies were already in the process of rewriting the original Volcker Rule regulations even before the EGRRCPA exempted banks under $10 billion from the Rule.

218. 15 U.S.C. § 1639b(c)(1), (2) (2012).

219. *Id.* § 1639b(c)(3).

220. Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 111-174, § 107 (2018) (amending the Truth in Lending Act to protect access to manufactured homes). "Manufactured homes" are those that are largely or completely prefabricated before being put into place. Although they are often inaccurately referred to as "mobile homes," they cannot normally be moved again after emplacement. Modular homes are those that are assembled on-site from prefabricated sections. *See generally* ESTHER SULLIVAN, MANUFACTURED INSECURITY: MOBILE HOME PARKS AND AMERICANS' TENUOUS RIGHT TO PLACE (2018).

221. Letter Regarding Opposition to S. 2155, *supra* note 181, at 4; *see* CONSUMER FIN. PROT. BUREAU, MANUFACTURED-HOUSING CONSUMER FINANCE IN THE UNITED STATES 27 (2014), http://files.consumerfinance.gov/f/201409_cfpb_report_manufactured-housing.pdf ("[R]etailer fraud in the form of artificially inflated home appraisals and invoice prices or falsified credit applications was a recognized issue as home sales surged.").

222. Mike Baker & Daniel Wagner, *The Mobile-Home Trap: How a Warren Buffett Empire Preys on the Poor*, SEATTLE TIMES (Apr. 2, 2015, 9:30 PM), https://www.seattletimes.com/business/real-estate/the-mobile-home-trap-how-a-warren-buffett-empire-preys-on-the-poor/.

223. Mike Baker & Daniel Wagner, *Minorities Exploited by Warren Buffett's Mobile-Home Empire*, SEATTLE TIMES (Dec. 26, 2015, 8:00 AM), https://www.seattletimes.com/seattle-news/times-watchdog/minorities-exploited-by-warren-buffetts-mobile-home-empire-clayton-homes/.

Dodd-Frank established the Consumer Financial Protection Bureau and the Financial Stability Oversight Council. The current Congress and administration are working to weaken those organizations and undo their previous actions. Congress used the Congressional Review Act to overturn the CFPB's guidance document on auto loans, which was intended to discourage the documented practice of racial discrimination by auto dealerships. That application of the CRA to an agency guidance, rather than a regulation, is particularly notable because it establishes an expansive definition of what qualifies as a "rule" subject to Congressional reversal under the CRA, opening the door to further Congressional reversals of agency actions and policies.[224]

The administration has been undermining the CFPB from within by appointing as its director Mick Mulvaney, who, in his previous position as a member of Congress, called the agency a "joke . . . in a sad, sick kind of way,"[225] and sponsored a bill to eliminate it.[226] In 2018, Mulvaney requested $0 in funding, arguing that the Bureau had sufficient financial reserves to meet its expenses for the upcoming quarter.[227] He announced that "[i]f there is one way to summarize the strategic changes occurring at the Bureau, it is this: we have committed to fulfill the Bureau's statutory responsibilities, but go no further."[228] He also amended the CFPB's mission statement to add the goal of fixing "outdated, unnecessary, or unduly burdensome regulations."[229] In his first report to Congress in April 2018, he asked lawmakers to reduce the agency's power and independent funding.[230] He also admitted that the CFPB had begun no new actions under his leadership.[231] Indeed, under Mulvaney,

224. *See* 5 U.S.C. § 551(4) (2012) (defining "rule"); 5 U.S.C. § 801(a)(1)(A) (2012) (explaining the congressional review processes for rules).

225. Jim Puzzanghera, *Consumer Protection Bureau's Chief Formally Asks Congress to Slash His Agency's Power*, L.A. TIMES (Apr. 2, 2018, 1:15 PM) (omission in original), http://www.latimes.com/business/la-fi-cfpb-mulvaney-20180402-story.html.

226. Chris Arnold, *Trump Administration's Latest Strike on CFPB: Budget Cuts*, NPR (Feb. 18, 2018, 7:41 AM), https://www.npr.org/2018/02/18/586493309/trump-administrations-latest-strike-on-cfpb-budget-cuts.

227. Donna Borak, *Trump Consumer Protection Chief Requests $0 in Funding*, CNN: MONEY (Jan. 18, 2018, 4:05 PM), https://money.cnn.com/2018/01/18/news/economy/cfpb-muvlaney-budget-request/index.html; Mick Mulvaney, Opinion, *I'm Not 'Gutting' CFPB*, USA TODAY (Feb. 13, 2018, 5:35 PM), https://www.usatoday.com/story/opinion/2018/02/13/mick-mulvaney-changing-cfpb-editorials-debates/110383654/.

228. BUREAU OF CONSUMER FIN. PROT., BUREAU OF CONSUMER FINANCIAL PROTECTION STRATEGIC PLAN: FY 2018–2022, at 2 (2018).

229. Puzzanghera, *supra* note 225.

230. *Id.* The CFPB is currently funded by the Federal Reserve; Mulvaney suggested that it be funded through the Congressional appropriations process. *Id.*

231. Matt Egan, *Trump Official Denies He's Trying to Destroy the CFPB*, CNN (Apr. 11, 2018, 3:13 PM), https://money.cnn.com/2018/04/11/investing/mulvaney-cfpb-hearing/index.html.

who received over $50,000 in congressional campaign contributions from the payday-lending industry, the CFPB has dropped multiple investigations of payday lenders, including one of his contributors, against the wishes of its career (nonpolitical) staff.[232] Under Richard Cordray, the CFPB director before Mulvaney, the CFPB had promulgated a final rule in 2017 requiring payday lenders to ascertain borrowers' ability to repay before making loans.[233] In 2018, Mulvaney announced that the Bureau was "reconsidering" the rule, while the Treasury department called it "unnecessary."[234]

Dodd-Frank created the Office of Fair Lending and Equal Opportunity (OFLEO) within the CFPB and gave it "such powers and duties as the Director may delegate to the Office, including . . . oversight and enforcement of Federal laws intended to ensure the fair, equitable, and nondiscriminatory access to credit for both individuals and communities that are enforced by the Bureau."[235] These laws include the HDMA. Mulvaney brought the OFLEO under his direct control and took away its enforcement powers.[236]

Like the CFPB, the FSOC, also created by the Dodd-Frank Act, has similarly withered under the current administration. Its ten voting members are mostly nominated or appointed by the President: the secretary of the Treasury, chairman of the Federal Reserve, comptroller of the Currency, director of the CFPB, the chairman of the SEC, chairman of the FDIC, chairman of the CFTC, director of the Federal Housing Finance Agency, chairman of the National Credit Union Administration Board, and a presidential appointee with expertise in insurance. Its mission is to identify systemically important non-bank financial

232. Josh Keefe, *CFPB Drops Investigation into Payday Lender that Contributed to Mick Mulvaney's Campaigns*, INT'L BUS. TIMES (Jan. 23, 2018, 1:58 PM), https://www.ibtimes.com/political-capital/cfpb-drops-investigation-payday-lender-contributed-mick-mulvaneys-campaigns.

233. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472 (Nov. 17, 2017) (codified at 12 C.F.R. pt. 1041).

234. Evan Weinberger, *Treasury Says CFPB's Payday Lending Rule Is Unnecessary*, BLOOMBERG (July 31, 2018), https://www.bna.com/treasury-says-cfpbs-n73014481295/ ("The Treasury Department is urging the Consumer Financial Protection Bureau to rescind its payday lending rule, which it labeled 'unnecessary' because states can provide more effective oversight of the industry.").

235. Dodd-Frank § 1013(c)(2), (c)(2)(A), 12 U.S.C. § 5493(c)(2), (c)(2)(A) (2012) (establishing the Office of Fair Lending and Equal Opportunity and defining its functions and administration).

236. Kate Berry, *CFPB's Mulvaney Strips His Fair-Lending Office of Enforcement Powers*, AM. BANKER (Feb. 1, 2018, 6:43 PM), https://www.americanbanker.com/news/cfpbs-mulvaney-strips-his-fair-lending-office-of-enforcement-powers; David Dayen, *After Boasting About Lowering Black Unemployment, Donald Trump Undermines the Federal Unit Defending Against Housing Discrimination*, INTERCEPT_ (Feb. 1, 2018, 6:38 AM), https://theintercept.com/2018/02/01/cfpb-mick-mulvaney-lending-housing-discrimination/.

institutions whose distress or activities could threaten the stability of the US economy. These designated firms are to be subject to oversight by the Fed as well as enhanced prudential standards like those applicable to SIFI banks. In 2013 and 2014, the FSOC identified four companies as being such that their "material financial distress . . . could pose a threat to U.S. financial stability": American International Group (AIG), General Electric Capital Corporation, MetLife, and Prudential Financial.[237] In the first two years of the current administration, each of these designations has been rescinded.[238] There are now no more non-bank financial companies with this designation.[239]

The current administration has also been undoing Dodd-Frank corporate governance reforms that were unrelated to the crisis. For example, Section 1504 of Dodd-Frank, known as the Cardin-Lugar anticorruption law, instructed the SEC to pass rules requiring publicly traded oil, gas, and mineral companies to disclose all payments made to foreign governments for permits for development. The law was meant to allow the citizens of poor countries to hold their leaders and foreign multinationals accountable for corruption in resource-extraction deals. In the face of corporate opposition, the SEC did not promulgate the required rule until 2016. The rule was to take effect in 2018. However, the House repealed it in 2017—the first time the CRA had been used in sixteen years.[240] At the time, President Trump's Secretary of State was Rex Tillerson, formerly the CEO of Exxon Mobil. Under Tillerson's tenure, Exxon Mobil had allegedly used corrupt means to obtain a government contract in Nigeria. An investigation was still underway in Nigeria as of Spring 2018.[241]

CONCLUSION

The gradual undoing of Dodd-Frank is hardly earthshaking, since

237. *Financial Stability Oversight Council*, U.S. DEP'T TREASURY (Mar. 6, 2019, 4:22 PM), https://www.treasury.gov/initiatives/fsoc/designations/Pages/default.aspx.

238. *Id.*

239. Katherine Chiglinsky & Jesse Hamilton, *Prudential Sheds Too Big to Fail Tag, Ending Tough Oversight (2)*, BLOOMBERG L. (Oct. 17, 2018, 9:05 AM), https://news.bloomberglaw.com/banking-law/prudential-sheds-too-big-to-fail-tag-ending-tough-oversight-2.

240. Dominic Rushe, *Donald Trump Lifts Anti-Corruption Rules in 'Gift to the American Oil Lobby'*, GUARDIAN (Feb. 14, 2017, 4:26 PM), https://www.theguardian.com/us-news/2017/feb/14/donald-trump-anti-corruption-rules-dodd-frank-oil-companies.

241. Gardiner Harris & Dionne Searcey, *Seeking to Heal a Rift, Tillerson Pledges New Aid to Africa*, N.Y. TIMES (Mar. 6, 2018), https://www.nytimes.com/2018/03/06/world/africa/tillerson-africa-new-aid.html ("In 2009, Exxon Mobil was under investigation in Nigeria after allegations surfaced that the oil company struck an illegal license renewal deal after being outbid by competitors. The investigation is continuing.").

Dodd-Frank itself was only a very moderate package of reforms to begin with. Economic historian Steve Fraser said of Dodd-Frank in 2011, "I am surprised—more than surprised, shocked even—that all that's transpired since 2007–8 has produced as little as it has, in terms of reckoning with how out of control this financial system was and the damage it's done."[242] Thus the EGRRCPA, regardless of its effect on Dodd-Frank, is hardly an epic tragedy. By itself, it has only modest impact on financial regulation and consumer protection.

Its significance becomes more apparent, however, when it is seen as part of a larger deregulatory agenda that makes the financial sector and other industries less and less accountable for the risks they place on their customers and on society at large. Those are the risks that led to the last financial crisis, and many of those before it. The EGRRCPA is part of the overall trend in this administration, and economically "conservative" governments generally, toward resisting or repealing regulations because they supposedly hamper business and economic growth. Despite the supposed burdens of regulation, however, finance and real estate have gone well beyond mere recovery. They are arguably in (as of this writing in mid-2019) another overheated bubble phase, which deregulation may aggravate. Thus the law of finance enables and encourages the boom-and-bust cycle to continue.

242. Sewell Chan, *Dissenters Fault Report on Crisis in Finance*, N.Y. TIMES (Jan. 26, 2011), https://www.nytimes.com/2011/01/27/business/economy/27inquiry.html.