BETTER MARKETS

SPECIAL REPORT

JULY 21, 2020

Ten Years of Dodd-Frank and Financial Reform

OBAMA'S SUCCESSES, TRUMP'S ROLLBACKS *and* FUTURE CHALLENGES


LOAN

Come in
we're
OPEN


Student
Loan
Student
Loan


HOUSE
FOR SALE
SOLD


Monthly Budget
rent
car
health
300 $

Table of Contents

INTRODUCTION 1

Dodd-Frank is Important and Relevant to Today's Social Upheaval 1

The Dangerous Deregulation of the Financial Industry 2

Financialization 5

Re-regulating the Financial Industry: The Dodd-Frank Act and the Obama Administration 9

The Trump Administration Adopts Wall Street's Deregulation Agenda 10

No Evil Required: Just the Siren Song of Market and Competitive Pressures 13

THE DODD-FRANK ACT 15

The Dodd-Frank Act was a Bipartisan Bill that Resulted from an Unprecedented Open and Public Process 15

Dodd-Frank Act Goals 18

Key Components of the Dodd-Frank Act 19

- Prudential Regulation 19
- Establishment of CFPB to Protect Financial Consumers from Predators 21
- Creating FSOC to Address Systemic Risk and Shadow Banking System 22
- Volcker Rule to Address Proprietary Trading by Banks 22
- Reform Securities Markets to Increase Investor Protection 24
- Derivatives Regulation 26

The Dodd-Frank Act Delegated to Regulatory Agencies 28

THE DODD-FRANK ACT UNDER THE OBAMA ADMINISTRATION 29

Prudential Bank Regulation 29

- Capital, Liquidity and Leverage Standards, Including Enhanced Prudential Standards for Megabanks 29
- Stress Tests 31
- Resolution Plans, aka "Living Wills" 31
- Orderly Liquidation Authority 32

Volcker Rule 32

Consumer Protection 33

Investor Protection 34

- Investment Advice 34
- Credit Risk Retention 35
- Whistleblower Programs 35

Derivatives 36

- Derivatives Market Structure Improvements and Trading and Clearing Requirements 36
- Margin for Uncleared Swaps 37
- Swap Dealer Business Conduct Standards 38

Cross-Border Activity 39
Addressing Systemic Risk 40
Entity Designations—MetLife, AIG, Prudential, GE Capital 40
Activity Designations—Recommended More Robust Money Market Fund Regulations to SEC 41
Office of Financial Research 41
The Obama Administration's Unfinished Agenda 42
Speculative Position Limits 42
Executive Compensation 42
Credit Rating Agencies 42

THE DODD-FRANK ACT UNDER THE TRUMP ADMINISTRATION 44

The Treasury Department's Review of Regulations Was a Roadmap for Widespread Deregulation 44
Prudential Standards 48
Capital and Liquidity Requirements 48
Undermining the Credibility of Stress Testing 49
Reduction of Living Will Requirements 49
Volcker Rule 50
Changing the CFPB from Consumer Protection to Predator Protection 51
Undermining Investor Protection 53
Finalizing a Flawed Regulation Best Interest 53
Threatening Whistleblower Protections 54
Undermining Derivatives Reforms 54
Proposal to Overhaul SEF Regime 54
Reducing Margin Requirements 54
Proposed Weak Cross-Border Rules 55
Gutting the Financial Stability Oversight Counsel 56
Abandoning Entity-Designation Authority 56
Abandoning Activity-Designation 58
De Facto Killing the Office of Financial Research 58

WHAT'S NEXT FOR FINANCIAL REFORM, INCLUDING BEYOND THE DODD-FRANK ACT? 59

Reversing Dangerous Trump-Era Deregulation 59
Finishing the Unfinished Obama-Era Business 60
Financial Reform Beyond the Dodd-Frank Act 60

CONCLUSION 67

APPENDIX: Republican-Sponsored Amendments to S. 3217 Adopted by the Senate 68
Citations 71

INTRODUCTION

Dodd-Frank is Important and Relevant to Today's Social Upheaval

As the country faces social upheaval, political unrest and economic turmoil, it is important to discuss and reflect on the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") because "financial stability," "financial reform" and "financial rules" are the **means** to achieve some of the nation's most important social, political and economic **goals**. Those goals include a strong and stable financial system that:

- Reduces inequality while creating economic security, opportunity and widespread prosperity for all people,
- Supports the productive economy,
- Produces sustained, durable and broad-based economic growth, and
- Protects investors, consumers, workers and the environment.

Those goals, however, are undermined by an economic system that does not work for the vast majority of Americans because, among other things, the financial system is too often a ***wealth-extraction mechanism*** for the few rather than a ***wealth-creation system*** for the many. This is the result of too many—certainly not all, but too many—in the financial sector using their economic power to buy political power, which they then use throughout the policymaking process to protect *and* increase their economic power, usually at the expense of everyone else, including their competitors and others in the financial sector. The financial sector thereby undermines and corrupts democracy by hijacking the government to serve its own ends, while also tilting the financial system decidedly in its favor.

Making all of that worse, the pandemic, and the economic crisis it has caused, have exposed the structural inequalities embedded in our economic and financial systems and how they egregiously and disproportionately impact Black Americans and people of color. The financial system and the financial industry have played a significant role in creating and perpetuating those racial

inequities. It is critical to remember that the economy—who it works for and who it does not—is not predetermined. It is shaped by people, and it is often rigged by connected, wealthy insiders protecting their own interests. Their actions to maximize their profits; protect and increase their wealth; and maintain their positions of privilege, power and influence profoundly impact who gets the benefits of our economic and financial systems—and who does not.

The Dodd-Frank Act could not have addressed and did not address all of those issues. But, it was intended to create and support guardrails, gatekeepers and guard-dogs that could force the financial sector to better serve society. That means supporting the real, productive economy that generates jobs and broad-based economic growth, rather than enriching financiers on Wall Street, destabilizing the financial system, draining public resources for Wall Street's own benefit and unleashing predators on consumers and investors.

That is why what is at stake in the Dodd-Frank Act—and in financial stability, reform and properly implemented rules more broadly—is nothing less than enabling more Americans to attain the American Dream and enhance their standard of living, quality of life and peace of mind. The Great Depression of the 1930s and the financial crash of 2008 illustrate that with heartbreaking clarity.

The Dangerous Deregulation of the Financial Industry

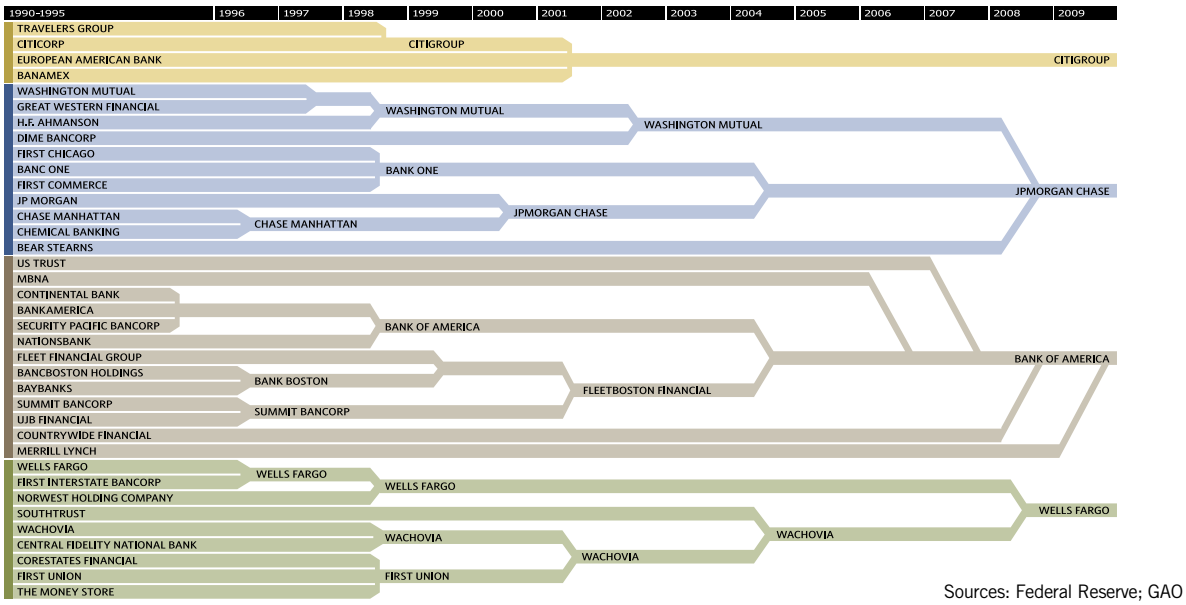
The Great Depression of the 1930s revealed how unregulated financial markets, rampant speculation, and illegal, if not criminal, conduct by Wall Street financiers could destroy the lives of tens of millions of hardworking Americans. In the wake of that economic and human tragedy, Congress passed a series of ambitious and far-reaching laws to protect Main Street families' jobs, homes and savings as well as the public interest by properly and comprehensively regulating the financial industry.[1] Remarkably, those laws—and the agencies created and rules promulgated to implement those laws—worked very well for almost 70 years, until they were slowly dismantled and, ultimately, repealed, gutted or unenforced.

Starting in the 1980s, elected officials, policymakers and regulators—all pushed by the financial industry's money, power and connections—increasingly took the view that markets knew best, that they could, and should, regulate themselves, and that market discipline would keep them all acting appropriately, eliminating the need for financial protection rules.[2] According to this view, lenders would not make bad loans, because bad loans meant they would not get paid; sophisticated investors and the market itself could and would accurately price and assess risks; and financial firms would never be so reckless as to endanger their firms because, well, that would be reckless. The industry and its allies also claimed they were merely "cutting red tape," "modernizing" or eliminating burdensome regulation, "right sizing" the rules or making the economy more efficient.

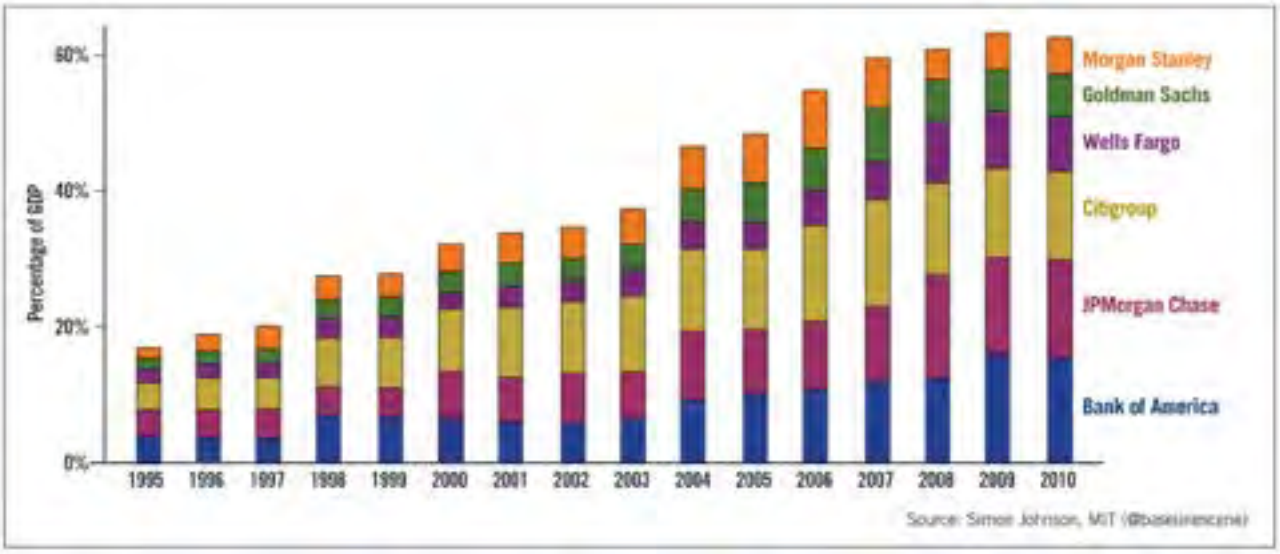
Armed with these euphemistic, self-serving arguments, Wall Street's army of lobbyists, lawyers, allies and sundry other denizens of the influence industry attacked the core pillars of financial reform that protected Main Street families from Wall Street's dangerous profit and bonus maximizing activities. The result was a tidal wave of deregulation that overwhelmed and effectively nullified many of the post-Great Depression laws and rules.

By the late 1990s and early 2000s, the country's largest financial firms, mostly centered on Wall Street, started to once again dramatically increase their now-unregulated, opaque and highly leveraged risk-taking. At the same time, those financial institutions went on a mindboggling acquisition and consolidation spree, increasing their size and complexity, which meant they posed bigger and bigger threats to the financial system, the economy and, indeed, the entire country.

For example, the premier Depression-era law—the Glass-Steagall Act, which separated traditional commercial banking from high-risk trading and investment banking—was de facto repealed in 1998 triggering a supersizing of the U.S. financial industry.[3] The result was that more than 30 financial institutions in 1998 were consolidated into just four gigantic, dangerous too-big-to-fail banks by 2008:[4]



At the same time, with short-term profit and bonus maximization as the primary, if not only goal, Wall Street banks turned their attention from feeding the economy to recklessly feeding on the economy. For example, the assets of the six largest Wall Street banks doubled over that same time period of 1998 to 2007, from about 30% of GDP to more than 60%:



Indicating how out of balance the U.S. economy had become, real corporate profits in the financial sector skyrocketed while nonfinancial profits lagged substantially:

Finally, proving beyond doubt that finance was literally consuming the real economy, financial sector profits as a share of total corporate profits reached 40% prior to the crash:

This shows that the financial sector, which is supposed to support the real economy (i.e., the nonfinancial sector), had instead become a parasite feeding on the real economy.

Financialization

Much of this was a consequence of what is often referred to as financialization: the increasing role of financial markets and financial firms in the economy, typically through the use of financial instruments of increasing complexity to define economic relationships.[5]

For example, a mortgage to buy a house is a fairly straightforward, standard financial transaction: a borrower needs money to purchase a home, and a bank (or other entity) lends the borrower that money, which the borrower repays at a predetermined interest rate over a predetermined amount of time. However, a financial firm could take this mortgage, package it with a number of other mortgages into a security, split it into pieces (called "tranches") according to the riskiness of the mortgages and sell those pieces to investors looking for "exposure" to different levels of risk. This is a much more complex instrument that brings in more parties to the transaction—more banks, the entity that packages and promotes the security, brokers that sell the security (for a commission), investors, the entity that manages the security, a credit rating agency to assess the quality of the security, etc. If the riskier tranches of the security do not sell, the firm could repackage those pieces into another complex security called a collateralized debt obligation ("CDO") and sell that security, adding another layer of complexity. Often, synthetic securities are then created referenced to the CDO. A firm could then write credit default swaps ("CDS") on those securities, that pay off if those securities fail, giving speculators the opportunity to bet on the direction of the housing market. In other words, a simple mortgage—a relatively straightforward loan—becomes part of an increasing number of complex interconnected financial instruments that are packaged and repackaged, sold and resold.

This pre-crash financialization had a number of related consequences. As financial instruments became increasingly complex, fewer people could understand them, including so-called sophisticated investors and regulators, and often, the financial companies themselves. Most also were not publicly traded or otherwise transparent, meaning no one knew which firms had how much exposure to how many complex, high-risk securities. Making all that worse, many people mistook that complexity for risk mitigation, as if through the alchemy of securitization and re-securitization plus structuring and tranching, the impact of defaults and real estate price volatility had been largely eliminated.

All of this also decreased the level of care lenders and others took in extending mortgages and selling the other "products" created in the process. That is because those mortgages and the related products were being packaged and sold off to investors with the originator and intermediaries holding little, if any, economic interest. Put differently, they did not have any "skin-in-the-game" so there was little incentive for lenders to ensure that borrowers could afford their loans. In fact, the incentives were the opposite: generate as many mortgages as possible as fast as possible without regard to ability to repay to feed the securitization machine and generate fees and short-term profits at every step of the process. There was no regard for the fact that on the other side of those

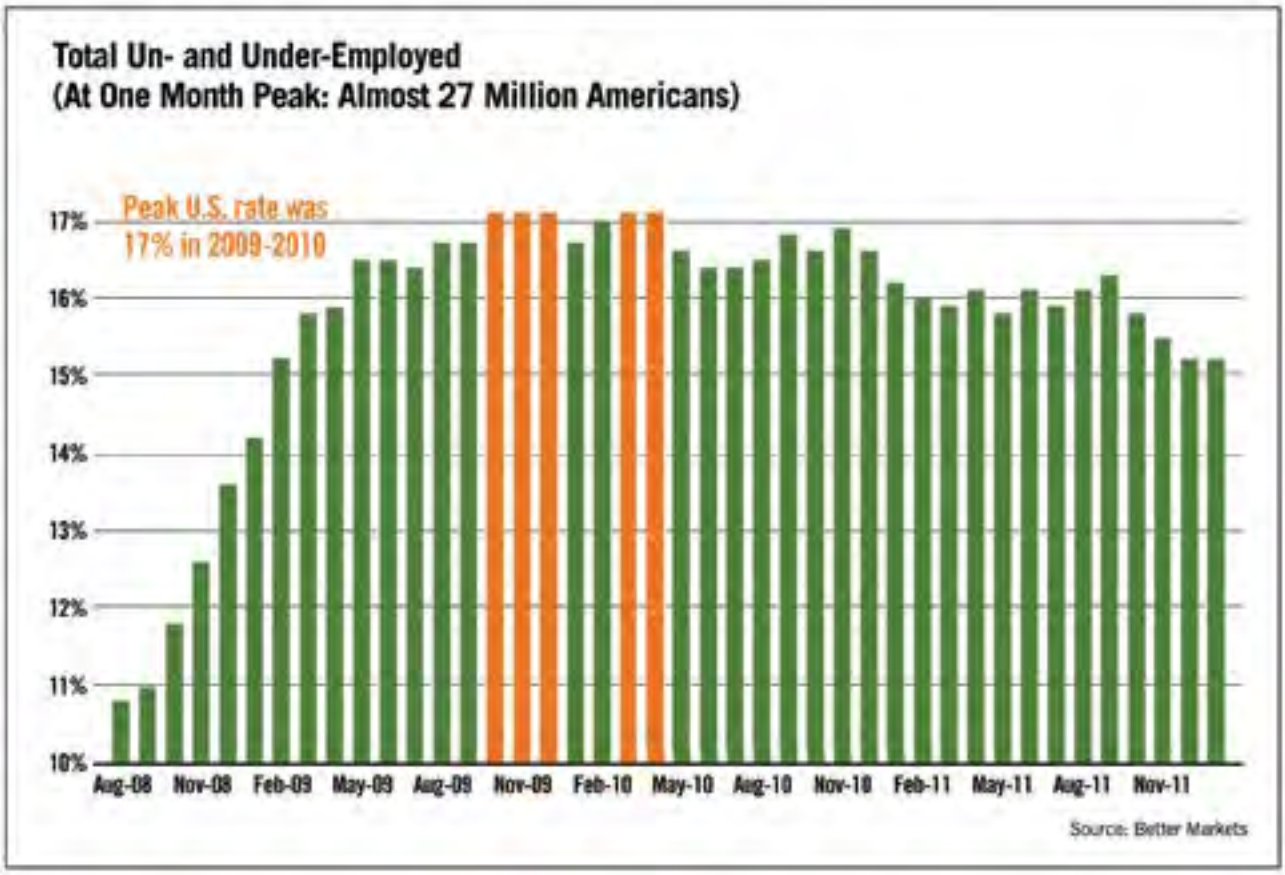
mortgages were real human beings whose lives would be devastated if and when their mortgages could not be refinanced or home values collapsed.

Finally, by early 2007, financialization and deregulation, along with predatory, reckless and illegal conduct at many financial firms, including the largest and most dangerous too-big-to-fail firms on Wall Street, combined into a combustible mix that brought the entire financial system to the brink of collapse.

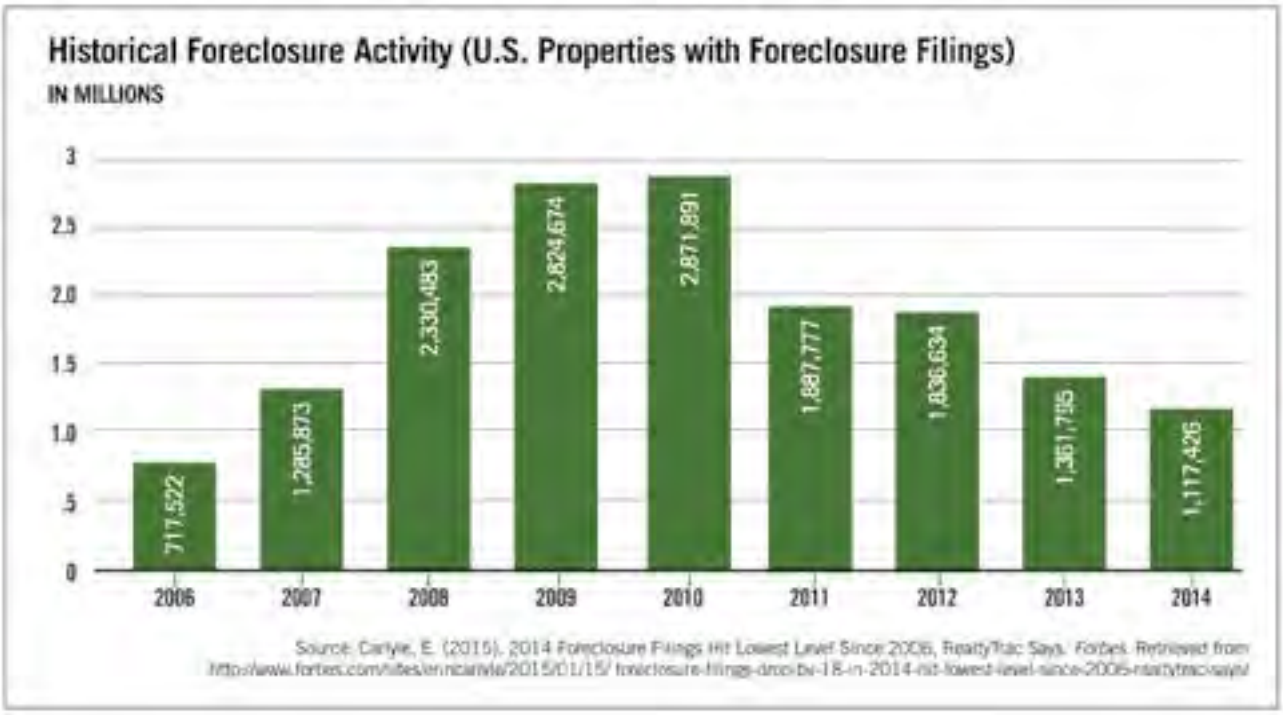
The 2008 Crash and its Costs

This period of financialization, deregulated and unregulated finance culminated—just seven years after many of the post-Great Depression protections were taken down—in the financial crash and economic crisis of 2007-2009.[6] That crash has already cost the U.S. more than $20 trillion dollars in lost GDP.[7]

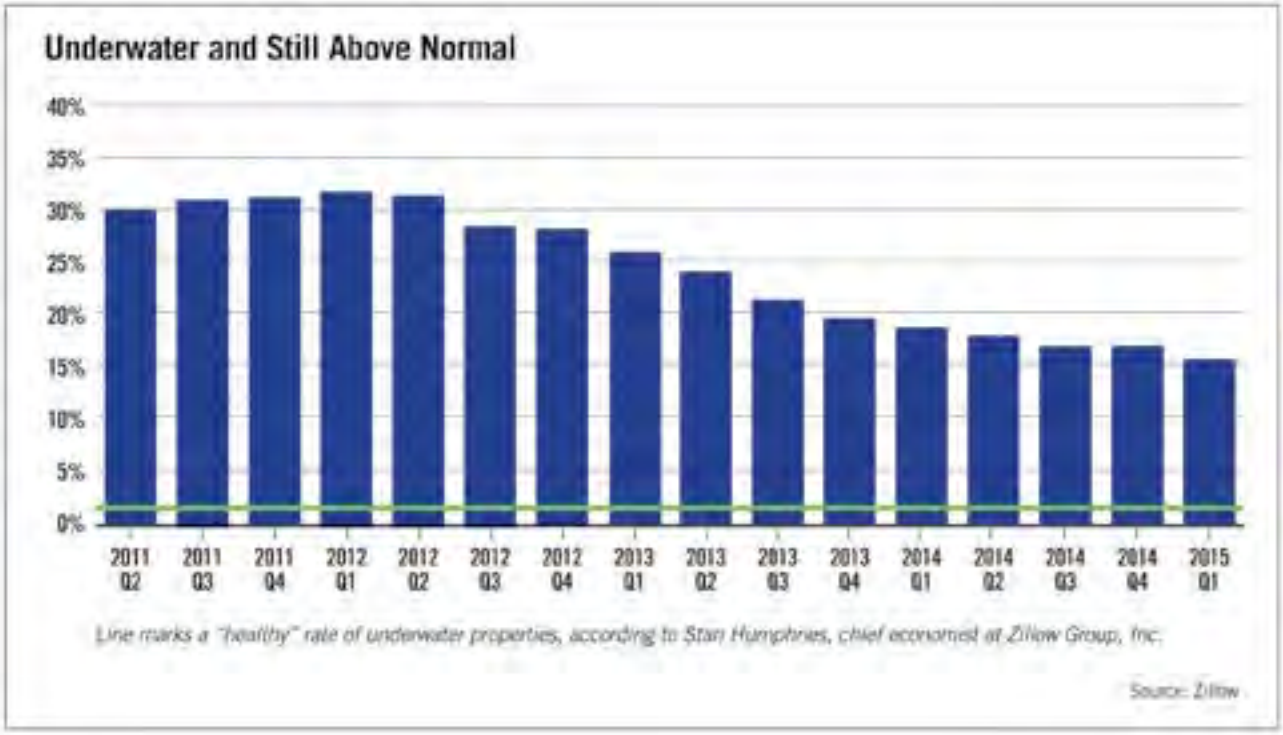
Yet, however astronomically high the dollar figures are, they do not tell the real story of the human wreckage, which was far-reaching and tragic. By October 2009, just a little over a year after the collapse of Lehman Brothers, the real unemployment rate—known as the "U 6 rate"—reached 17%. This meant that there were 27 million Americans out of work or forced to work part time because they could not find full time work:



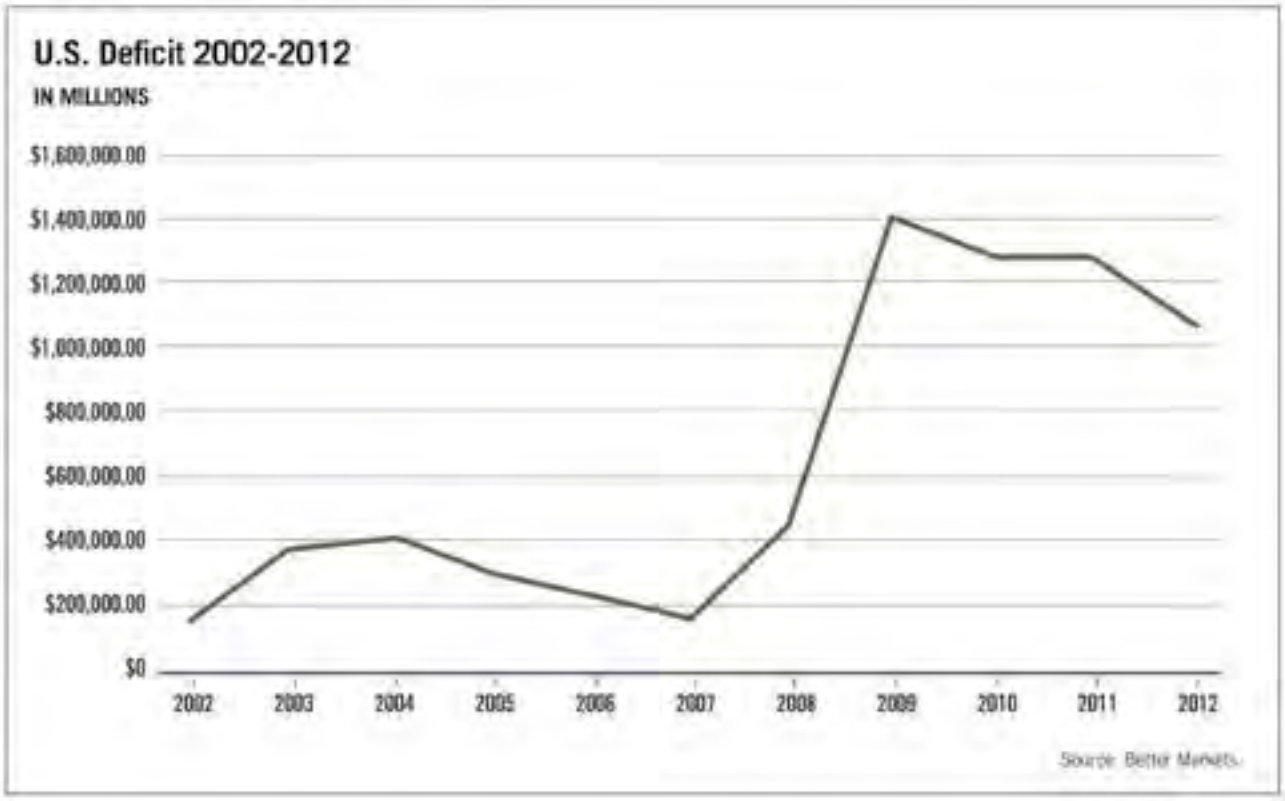
Because many of those people were heads of households, this unemployment tsunami directly hit about 50 million Americans. There were also more than 16 million foreclosure filings:



And, more than 30% of homes were underwater, meaning they were worth less than the amount of the mortgage they were paying (and more than 40% were "effectively" underwater because the sale proceeds would not cover closing costs):



Of course, as the economy collapsed, social needs and social spending skyrocketed, which caused massive deficits and debt:



That fueled a push for austerity and spending freezes and cuts. That, on top of plummeting economic activity and tax revenues coupled with the increasing costs of responding to the crash and crisis, resulted in less funding available for all the other needs of the American people. This included funding for priorities like education, health care, science, housing, energy, infrastructure and other critical items, which were all less because funds were diverted to stop the crash and respond to the consequences of it.

Adding insult to injury, taxpayers were put on the hook for a massive bailout of the financial system—up to $29 trillion was lent, spent, pledged, committed, loaned, guaranteed or otherwise used or made available to bailout Wall Street and the financial system during the crisis.[8] This massive bailout threatened to set a dangerous precedent: that the Federal Reserve and American taxpayers would always bailout Wall Street when its excessive risks turned catastrophic, even as those very same taxpayers were excluded from sharing in the pre-crash profits of that risk-taking, and even as hardworking Americans suffered from the fallout of that risk-taking.

Shamelessly, some claim that these bailouts were actually "profitable" for the American taxpayer. That is a pernicious myth based on the claim that most of the emergency funds expended or disbursed were returned to the Treasury or the Federal Reserve or that fees were collected from the banks and nonbanks under some of the programs. However, as detailed in Better Markets' report on the $20 trillion cost of the crisis,[9] this claim rests on the ludicrous assertion that a one penny "return" on even trillions of dollars somehow equates to a profit. That ignores the fundamental standard to which all financial institutions, including Wall Street's gigantic too-big-to-fail firms, adhere: A financial transaction or a return can only be evaluated if it is risk-adjusted and, in this

case, the government should have but never did any risk-adjusted calculations and never received any risk-adjusted returns on any of the funds expended, disbursed, guaranteed or otherwise used in any form or manner.

One useful metric to evaluate this claim is the return Warren Buffett received on his crisis "investments" in Goldman Sachs, which exceeded 60%.[10] Given that the U.S. government had guaranteed and all but nationalized the financial system by the time he made his investment, 60% could be considered the risk-free rate of return at that time. In contrast, the U.S. government as of December 2014, had received a paltry 3.6% return on its TARP investments. The good news, narrowly speaking, is that the government did not lose money on its bailouts of the financial industry, but that does not mean that it "made money" or that the bailouts were "profitable." Indeed, the facts show the opposite.[11] Mischaracterizing these facts is not only false but also dangerous because it minimizes the costs and damage of the crash to the American people, who had to bail out Wall Street and the financial industry from its very profitable but reckless activities.

This widespread and years-long damage to Main Street proved that Wall Street's too-big-to-fail financial giants, which were also too leveraged, too interconnected and too complex, were too-big-to manage, too-big-to-regulate, nearly too-big-to-bailout and, as we would learn in the years after 2008, too-big-to-jail or hold accountable. These devastating consequences of the 2008 financial crash made it clear that the financial industry had to be re-balanced, re-focused and re-regulated.

Re-regulating the Financial Industry: The Dodd-Frank Act and the Obama Administration

That is what the Dodd-Frank Act, signed ten years ago today on July 21, 2010, was all about. It was in response to the financial crisis and intended to reverse the decades of deregulation that spurred it; in effect, it was a re-regulation of the financial industry.

As detailed below, by the time the Obama administration left office in January 2017, the Dodd-Frank Act and financial reform more broadly were largely completed, and the evidence overwhelmingly demonstrated that its primary goals were being achieved.

First, the most dangerous and unreasonable risks in the financial system had been significantly reduced, making a financial crash much less likely, due to rules which, in summary:

- Increased capital and liquidity, and required the use of stress testing to measure capital and liquidity adequacy,
- Regulated derivatives,
- Required living wills and liquidation authority,
- Reduced short-term funding and counterparty exposure,
- Protected financial consumers and investors,
- Attacked predatory conduct,
- Prohibited proprietary trading by taxpayer-backed banks, and
- Enhanced supervision and regulation of systemically important banks and nonbanks.

> "After all, banks are backed by taxpayers and governments in the first place because of the critical role they are supposed to play in supporting the real economy through lending, facilitating transactions, and engaging in other useful activities, not so they can turn a quick trading profit and maximize their bonuses."

Second, the Dodd-Frank Act had another, equally important purpose, but one that is almost never mentioned: to ensure that the financial sector served its socially useful purpose, justified its social costs and earned its taxpayer backing. Thus, the law and rules were also meant to refocus the largest, most dangerous banks back to traditional banking activities and away from trading, which too often is little more than socially useless gambling designed to enrich a few thousand financiers and executives. While usually overlooked, getting banks back into banking was a key objective of the law. After all, banks are backed by taxpayers and governments in the first place because of the critical role they are supposed to play in supporting the real economy through lending, facilitating transactions, and engaging in other useful activities, not so they can turn a quick trading profit and maximize their bonuses.

It is important to remember that these financial protection rules were focused primarily on just a handful of uniquely dangerous financial institutions in the U.S. and the world. Those are the ones that have carved out an indefensible special exemption from the fundamental rule of capitalism—that failure leads to bankruptcy, not bailouts. Of the over 7,000 banks in the U.S. in 2010, when the Dodd-Frank Act was passed, fewer than 40 had $50 billion or more in assets.[12] That was less than 0.5% of all banks. Fewer than that were so big, complex, interconnected and leveraged as to threaten the financial system and economy. The Dodd-Frank Act was focused on that handful of uniquely dangerous too-big-to-fail institutions that threatened the financial system, economy and livelihoods of most Americans.

None of that is to say that the law was perfect. It was not. No law is, particularly one that intends to re-regulate one of the most complex and sprawling sectors of the economy. However, it was the best law the U.S. political system could produce at the time. And, all things considered, including that the most powerful, wealthy industry in the history of the world opposed it with unmatched ferocity, it has been an effective law, responsive to the causes of the crisis, and by the time the Obama administration left office, it was well on its way to being properly implemented.

The Trump Administration Adopts Wall Street's Deregulation Agenda

Unsurprisingly, with billions of dollars in bonuses at stake for the executives and traders at Wall Street's too-big-to-fail firms, there continued to be an all-out, well-funded attack on the Dodd-Frank Act and financial reform generally. Unfortunately, those attacks and Wall Street's economic and political power met a very receptive audience when the Trump administration came into office in January 2017.

As discussed in detail below, with Trump's Treasury Department initially taking the lead, Wall Street's wish list for deregulation became a roadmap for the Trump administration and its financial regulatory agencies. The result has been the partial deregulation of the systemically important too-

big-to-fail financial institutions. Although all the core pillars of the Dodd-Frank Act are still intact and working to protect Main Street families, many pillars have been weakened.

In summary, the deregulatory actions that the Trump administration has begun or completed, urged on by Wall Street and the financial industry, include:

- Lowering capital and liquidity at banks,
- Weakening stress testing and living wills,
- Allowing more proprietary trading,
- Enabling more unregulated derivatives trading,
- Decreasing margin for derivatives transactions,
- Rolling back consumer and investor protections,
- Reducing prudential regulation of systemically important banks,
- Neutering the regulation of systemically significant nonbanks and the shadow banking system,
- Defunding research and monitoring of the financial industry, and
- Stopping enforcement of laws, if not actually siding with the predators.

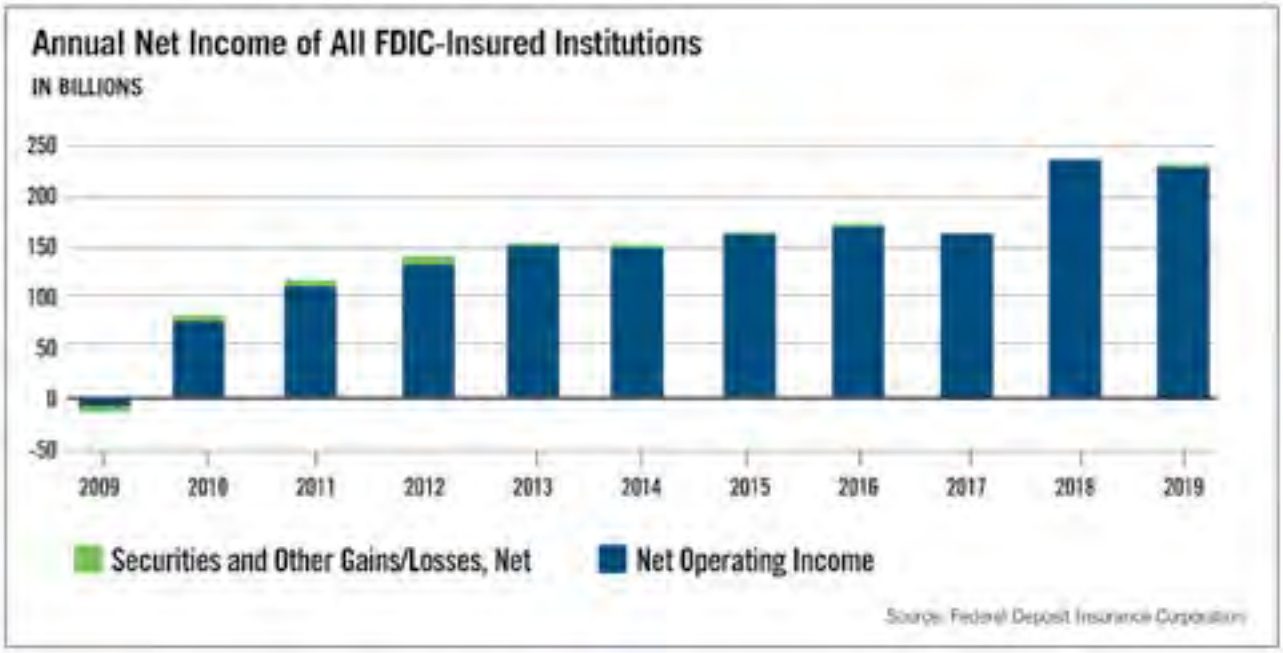
The result is that, like before the Great Depression and the 2008 financial crash, Wall Street's too-big-to-fail financial giants are once again:

- Reducing their capital buffers,
- Increasing their leverage,
- Ramping up their high-risk activities,
- Externalizing their costs,
- Increasing the risk of another financial crash, and
- Making economic wreckage on Main Street and taxpayer funded bailouts for Wall Street more likely.

The pretext for these attacks on the Dodd-Frank Act has been a series of baseless claims about the onerous burdens that financial reform rules supposedly imposed. The critics of financial reform have said over and over again that the law and rules would kill banks' revenue and profits, which would prevent them from lending. This, they claimed, would in turn kill economic growth and jobs. And, they also complained nonstop that it would put U.S. banks at a competitive disadvantage globally.[13]

The objective facts have demonstrated all of those self-serving claims have no merit. Virtually every quarter and year since the Dodd-Frank Act was passed, the biggest U.S. banks have reported record or near-record revenues, earnings and bonuses while usually increasing lending, with 2019 being "their best year in more than two decades."[14] (See graph next page.)

In fact, prior to the pandemic-caused economic downturn, America experienced the longest economic expansion in its history[15] and banks most of all have benefited. And, the biggest U.S. banks have not been hurt in global competition from the rules, as they continue to increasingly dominate the globe in almost all banking and finance categories.[16]



All of this historic economic and financial success happened under the heaviest financial regulation since the Great Depression of the 1930s and when the financial sector, the largest Wall Street banks in particular, was required to maintain substantially more capital and liquidity than pre-crisis.

This proves that, contrary to the industry talking point that regulation hurts markets, strong, robust and effective markets require equally strong, robust and effective rules[17] that:

- Require transparency, oversight and accountability,
- Establish a level playing field,
- Enable competition,
- Enforce a baseline of fair dealing,
- Police market participants,
- Engender investor confidence,
- Reduce income and wealth inequality, and
- Ultimately lead to a balanced financial system that fuels the productive economy, reduces inequality, increases broad-based prosperity and raises the standard of living of everyone.

That is why—in these dangerous times where economic inequality and insecurity are straining the fabric of society—financial stability, financial reform and implementation of the Dodd-Frank Act are so fundamentally important.

No Evil Required: Just the Siren Song of Market and Competitive Pressures

It is important to understand that mindless deregulation and reckless conduct do not necessarily require evil actors in—or motives by—the private sector or the financial industry. This also results from the combustible mix of a maniacal focus on short-term profit maximization; upside-down incentives; and, critically, the nature of markets and financial firms, individually and, ultimately, collectively. While the first two get attention, the last is too often unrecognized or unacknowledged.

However, that is the unsettling, but undeniable, truth behind former Citigroup CEO Chuck Prince's infamous and much misunderstood quote in July 2007:

> "When the music stops, in terms of liquidity, things will be complicated. But as long as the music is playing, you've got to get up and dance. We're still dancing."[18]

Translation: when a financial institution and its peer group are making lots of money doing roughly the same thing (meaning, the market "music" is playing), they have to keep doing the same thing ("dancing") or their revenues, profits, bonuses and stock will go down ***relative*** to their peer group.

While doing otherwise may be tolerated by the directors of a company and stockholders for a short time, it will not last long as revenues, profits and stock price drop relative to peers. That is why Mr. Prince was right: "as long as the music is playing, you've got to get up and dance" because, otherwise, you will be replaced with someone who will.

That is the (oversimplified) history of Morgan Stanley in the 2000s. John Mack was CEO until he was ousted in 2001, when Paul Purcell was appointed CEO. Morgan Stanley then pursued a business diversification strategy, seeking relatively stable revenues and profits from a broad mix of businesses that avoided the high-risk, high-leverage and high-return trading gambling that was taking off at its rivals.

As its revenues, profits, bonuses and stock lagged its rivals, the board ousted Mr. Purcell and in June 2005, brought back Mr. Mack as CEO, clearly with the mandate to catch its rivals by doing what they were doing. As the siren song of deregulatory music played, Mack got Morgan Stanley up and dancing to the tune of big proprietary trading, structured products and subprime mortgage activities. However, just a little over two years later in the fall of 2007, Morgan Stanley was forced to begin recognizing gigantic proprietary trading losses at the same time it was forced to take substantial subprime-related write downs. Eventually they were cumulatively so crippling that Morgan Stanley was on the verge of failure in the days following Lehman's bankruptcy and required a bailout by the Federal Reserve to survive.

"As the siren song of deregulatory music played, Mack got Morgan Stanley up and dancing to the tune of big prop trading, structured products, and subprime mortgage activities."

"That is why the re-regulation of the industry in the Dodd-Frank Act was necessary and why, in addition to numerous specific statutory mandates, it also empowered regulators to rein in and stand up to the financial industry. During the Obama administration, that is what happened more often than not; during the Trump administration, regulators have too often abandoned their role."

To his credit, Mr. Mack recognized what had happened and in 2009 embraced financial reform, regulation and regulators. In fact, he went so far as to say

> **"[w]e cannot control ourselves. You [lawmakers and regulators] have to step in and control the Street. Regulators? We just love them."**[19]

Without regulators taking such independent and, at times, unpopular actions, the public interest is subordinated and exposed to the erratic and volatile dynamics of the marketplace, with devastating crashes the inevitable result. This cautionary tale and the broader history before, during and after the 2008 crash demonstrate why banking regulators and supervisors as well as oversight, regulation and enforcement generally are so critically important. Put differently, they have to step in and slow the tune if not change the song or stop the "music" altogether, regardless of how much "dancing" the private sector is doing or wants to do.[20]

That is why the re-regulation of the industry in the Dodd-Frank Act was necessary and why, in addition to numerous specific statutory mandates, it also empowered regulators to rein in and stand up to the financial industry. During the Obama administration, that is what happened more often than not; during the Trump administration, regulators have too often abandoned their role, disregarded if not knowingly violated the Dodd-Frank Act, subordinated the public interest to the self-serving claims of industry and ignored history.

Nevertheless, while the Trump administration's blind deregulatory zeal threatens to snatch defeat from the jaws of victory, the story of the Dodd-Frank Act is one of success—qualified success to be sure, but success, nonetheless.[21] This Report provides a retrospective on those actions and some guideposts for the years to come. Section II discusses the Dodd-Frank Act itself—the bipartisan and transparent process that led to its passage, as well as a summary of some of its key provisions. Sections III and IV summarize some of the major actions of the Obama and Trump administrations, respectively, related to the Dodd-Frank Act. Section V concludes by discussing what comes next after financial reform and beyond the Dodd-Frank Act.

THE DODD-FRANK ACT

The Dodd-Frank Act was the legislative policy response to the crash of 2008 and the economic crisis it caused. The primary motivations in passing the Dodd-Frank Act were to re-regulate the financial system so as to prevent, or at least substantially reduce the likelihood of, such a financial collapse and economic crisis from ever happening again, including ultimately averting a second Great Depression. This re-regulation was also intended to shift the substantial costs of risky behavior and predatory practices from the public back onto the financial firms that profited from those activities and practices—as economists would say, forcing the industry to internalize the costs of the externalities that they imposed on society when they were deregulated. Finally, the Dodd-Frank Act was intended to get banks back into banking activities that serve the real economy, which is why they are backed by taxpayers in the first place and why they were bailed out in 2008.

The Dodd-Frank Act was a Bipartisan Bill that Resulted from an Unprecedented Open and Public Process

Those who seek to discredit or dismiss the Dodd-Frank Act often refer to it as a partisan law. However, that political and, usually, industry attack is not accurate. In fact, the Dodd-Frank Act was a remarkably bipartisan bill even though it passed a Democratic-controlled Congress on a largely partisan vote. Moreover, it resulted from one of the most open and public processes for major legislation in history.

The final votes may have been largely along party lines,[22] but the bill itself was the product of a lengthy, bipartisan effort, in which Republicans had significant input into the final product. That started with a broad, bipartisan consensus among economists and other experts that the financial crisis represented a failure of the free market caused by inadequate and insufficient regulation, and that stronger and more comprehensive regulation was needed moving forward.[23] Moreover,

PHOTO ABOVE: Massachusetts Democrat Representative Barney Frank (2nd R) shakes hands with Connecticut Democrat Senator Chris Dodd (2nd L) alongside Senate Majority Leader Harry Reid (L) and House Majority Leader Steny Hoyer (R) before U.S. President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act. Photo Credit: Rod Lamkey Jr/AFP via Getty Images

many of the ideas that formed the basis of the Dodd-Frank Act were first suggested by Hank Paulson, Treasury Secretary under Republican President George W. Bush.[24] Indeed, just before the Dodd-Frank Act was passed, former Secretary Paulson indicated that he was pleased with what it contained.[25]

Reflecting the priority placed on achieving a bipartisan bill, Republicans Richard Shelby and Spencer Bachus, ranking members of the Senate Banking Committee and House Financial Services Committee, respectively, were included in the earliest discussions with President Obama to outline the reform effort.[26] And in a speech to the Oxford Union in November 2009, Senator Shelby explicitly endorsed the idea of strong financial reform, including more robust capital requirements and meaningful resolution planning for large financial institutions.[27] Many of the key provisions in his speech would end up in the Dodd-Frank Act.

Furthermore, during the actual legislative process, there were repeated, significant efforts to seek Republican input, address Republican concerns and include Republican ideas. In the Senate, the Chairman of the Senate Committee on Banking, Housing, and Urban Affairs Chris Dodd "launch[ed] a bipartisan project to look for consensus on a regulatory reform package."[28] Indeed, the *Washington Post* reported that Senator "Dodd consulted extensively with Senator Shelby…in August [2009] before deciding to remain chairman of the banking committee…, explaining later that Shelby convinced him he was serious about trying to reform the financial rulebook."[29] Senator Dodd's efforts to include Republicans throughout the financial reform legislative process were extensive and broad-ranging.[30]

Demonstrating the lengths to which Republicans were included in the legislative formulation, Chairman Dodd, in an unprecedented move, publicly announced the establishment of bipartisan working committees led by Democratic and Republican members of the Senate Banking Committee:

Senate Banking Committee Working Groups

Senator Bob Corker (R-Tenn.), **Senator Mark Warner** (D-Va.) on Financial Stability and Orderly Liquidation Authority sections;

Senator Jack Reed (D-R.I.), **Senator Judd Gregg** (R-N.H.) on Derivatives;

Senator Mike Crapo (R-Idaho) and **Senator Chuck Schumer** (D-N.Y.) on Governance, Incentive Comp;

Senator Chris Dodd (D-Ct.) and **Senator Richard Shelby** (R-Ala.) on Consumer Protection and Prudential Supervision.

Many of the key provisions of the bill were informed by the work done by those bipartisan working groups. For example, Republican Senator Bob Corker, working with Democrat Mark Warner, played a key role in negotiating critical sections of the bill before it was sent to the Senate floor.

During negotiations over the Senate legislation, Chairman Dodd made a number of significant concessions at the request of Senate Republicans, including:

- Housing the Financial Stability Oversight Council ("FSOC") in the Department of the Treasury to be headed by the Treasury Secretary, rather than establishing it as a new, independent agency with its own leadership;

- Housing the Office of Financial Research ("OFR") within the Department of the Treasury;
- At the request of Senator Bob Corker, establishing the Consumer Financial Protection Bureau ("CFPB") as an independent agency within the Federal Reserve System;[31]
- Requiring an audit of the Federal Reserve System's emergency activities during the financial crisis.

Because of the extensive negotiations between Democrats and Republicans prior to the Banking Committee hearing at which the bill was supposed to be marked up (i.e., amended), the Committee bill was already de facto bipartisan (although no Republicans were willing to support it publicly or to be identified as supporting any particular provision). The markup of the bill itself lasted approximately 17 minutes. While Republicans filed over 200 amendments prior to the markup, none were actually offered at the hearing. As a result, the bill was reported out of Committee as filed without amendment, albeit on a party-line vote, and sent to the floor for consideration by the full Senate.

Debate in the Senate on what was then the Banking Committee bill lasted for four weeks, during which time nearly 60 different amendments were considered. In addition, hundreds of amendments were accepted informally by the Banking Committee and incorporated into the bill. On the Senate floor, the Senate held votes on 14 Republican-sponsored amendments, five of which were adopted. Another 10 Republican-sponsored amendments were adopted by unanimous consent or by voice vote.[32] Republican amendments dealt with credit ratings agency reform, ending too-big-to-fail, preventing overseas bailouts and maintaining the regulatory authority of the Federal Reserve Board of Governors—all were adopted. In all, nearly half of the amendments voted on and adopted by the Senate were Republican amendments.[33] The Appendix contains a chart summarizing the Republican-sponsored amendments adopted by the Senate.

"Republican amendments dealt with credit ratings agency reform, ending too-big-to-fail, preventing overseas bailouts, and maintaining the regulatory authority of the Federal Reserve Board of Governors."

During the debate in the House Financial Services Committee over the Financial Stability Improvement Act—the legislation which became the base text for major portions of the Dodd-Frank Act—the Committee considered 120 Republican amendments, 51 of which were adopted, as were 24 bipartisan amendments to the bill.[34]

The openness and Republican input into the bills did not stop there. The House and Senate bills had to be reconciled by a conference committee, which included Democratic and Republican members of the House and Senate. In an unprecedented move, both the House and Senate agreed that the conference committee would be open to the public. As a result, C-SPAN carried gavel-to-gavel coverage of the four-day conference committee's deliberations. As was available for all to see, Senate and House Republicans participated fully and heartedly throughout the proceedings, including offering an additional 17 amendments that were accepted.[35]

Thus, the facts demonstrate conclusively that the Dodd-Frank Act as passed by both the House and the Senate—and signed by President Obama—was indeed a bipartisan bill.

Dodd-Frank Act Goals

Like the post-Great Depression laws of the 1930s, the Dodd-Frank Act created layers of protections of different types (regulatory, supervisory and structural) between Wall Street's dangerous, high-risk and anti-social activities on the one hand and Main Street families' and taxpayers' pockets on the other. The Dodd-Frank Act had three main interrelated goals:

- Preventing devastating financial crashes, the threat of taxpayer bailouts and the attendant moral hazard by ending too-big-to-fail.[36] To this end, the law imposed enhanced prudential standards for the largest banks, prohibited certain high-risk trading activities for federally insured banks, required regulation of the derivatives markets, gave authority to regulate the nonbanks in the shadow banking system, and increased regulatory authority for the Federal Reserve and other financial regulators, including the Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC").
- Protecting financial consumers and investors, so many of whom were ripped off and defrauded in the runup to the crisis, including by creating a new agency, the CFPB, and authorizing tough new rules to prevent abusive practices by banks, mortgage brokers, derivatives dealers and other financial service providers.
- Re-directing the largest banks back into banking and supporting the real economy and away from dangerous, high-risk, anti-social gambling activities, by prohibiting proprietary trading; regulating derivatives; and increasing capital, margin, liquidity and other buffers so that the banks' bore the true cost of those activities, rather than invisibly shifting those costs to the taxpayers.

> "The 2008 crash painfully proved that when those too-big-to-fail financial firms fail, they get to avoid bankruptcy (unlike every other company in America) and fall into the comforting arms of the American taxpayer."

It is important to reiterate that the Dodd-Frank Act sought to achieve these goals through provisions and rules that were focused primarily on the handful of very large and uniquely dangerous too-big-to-fail financial institutions in the U.S. and the world. The 2008 crash painfully proved that when those too-big-to-fail financial firms fail, they get to avoid bankruptcy (unlike every other company in America) and fall into the comforting arms of the American taxpayer. That was indefensible and unacceptable, and the Dodd-Frank Act intended to end that.

The means to do that was to focus on banks that had more than $50 billion in assets.[37] As noted above, of the more than 7,000 banks in the U.S. at the time the Dodd-Frank Act was passed only about 40 had $50 billion or more in assets.[38] That is less than 0.5% of all banks. Fewer than that are so big, complex, interconnected and leveraged as to threaten the financial system and economy. That is where the provisions of the Dodd-Frank Act were aimed.

Prudential Regulation

Capital and liquidity standards, including enhanced standards for the largest banks

The only thing standing between a failing bank and a taxpayer bailout is the amount of its loss-absorbing capital, i.e. its so-called capital cushion. Among the most important lessons from the crisis was the inadequacy of the pre-crisis bank capital regime. That regime relied heavily on risk-weighting—whereby the banks assigned riskiness to particular assets—so that banks had to hold less capital for assets deemed less risky, and more capital for those assets deemed more risky. This attempted self-calibration by the banks of capital ratios proved utterly ineffective during the financial crisis—many assets the banks self-servingly deemed less risky (which therefore required less capital and allowed more leverage) in fact performed poorly during the crisis.[39] Moreover, banks had increasingly been allowed to satisfy capital requirements using instruments that did not effectively absorb losses.[40]

To address this, the Dodd-Frank Act required bank regulators to set minimum capital and leverage standards,[41] especially for the largest banks, in an effort to ensure that banks had sufficient resources to absorb losses. The Dodd-Frank Act also required bank regulators to establish liquidity requirements to ensure that banks would be able to meet cash flow needs and convert assets into cash. Title I of the Dodd-Frank Act established that enhanced rules would automatically apply to all banks and bank holding companies with assets of $50 billion or more, as well as any nonbank financial companies that are designated as Systemically Important Financial Institutions.

Stress tests

In early 2009, despite extraordinary government bailouts and other attempts to prop up the financial system, the financial crisis continued to rage because there was a significant degree of uncertainty about the actual financial condition of the largest banks.[42] In that environment, the Federal Reserve conducted stress tests of America's largest banks and published the results. This proved to be a turning point in the crisis. Even though the stress tests showed that many of the largest banks needed additional capital to survive the most adverse scenario,[43] they also suggested that those capital needs were manageable.[44] Moreover, the publication of the stress tests reduced uncertainty, which was critical in a crisis environment where many assumed the worst due to lack of information and lack of confidence.[45] Recognizing the importance of stress testing to the twin goals of ensuring the capital adequacy of large banks and building public confidence by providing sufficient transparency into their condition, the Dodd-Frank Act required that banking regulators finalize rules compelling the largest banks to undergo regular stress tests.

Resolution of failed institutions

The failure of Lehman Brothers on September 15, 2008, at the time the largest bankruptcy in American history, was an inflection point in the financial crisis, when profound concern about the financial system turned into panic.[46]

Lehman Brothers world headquarters is shown Monday, Sept. 15, 2008 in New York. Lehman Brothers, burdened by $60 billion in soured real-estate holdings, filed a Chapter 11 bankruptcy petition in U.S. Bankruptcy Court after attempts to rescue the 158-year-old firm failed.

Photo Credit: Mark Lennihan—AP

The Dow Jones dropped 500 points that day (which, at the time, was a 4.4% decrease). Within just a few days, the government orchestrated a massive bailout of international insurance giant AIG in an effort to avoid a repeat of the panic caused by Lehman's failure; a leading money market fund with significant exposures to Lehman reportedly "broke the buck" as it experienced a massive run, eventually precipitating a $3.7 trillion bailout of the entire money market fund industry; and within a month, Congress passed the $700 billion TARP bailout funded by taxpayers.

Simply put, Lehman's bankruptcy sparked chaos in the financial system and, in concert with a torrent of other destabilizing events, brought financial institutions, global markets and the entire U.S. economy to the brink of collapse. For example, just five days after Lehman's collapse, the two remaining U.S. investment banks, Morgan Stanley and Goldman Sachs, were on the verge of failure. Indeed, Goldman Sachs admitted to its regulators that it would be "toast" without an immediate bailout,[47] which it received in the form of, among other things, an overnight conversion into a bank holding company, giving it full access to all Federal Reserve facilities and programs.[48]

"Lehman was a textbook case of a complex, opaque and largely unregulated systemically significant nonbank financial institution."

Lehman was a textbook case of a complex, opaque and largely unregulated systemically important nonbank financial institution. As a result, regulators did not have adequate insight into the actual financial condition of Lehman, what it would take to save Lehman, and how Lehman's failure would impact other firms—particularly the counterparties to Lehman's over-the-counter derivatives contracts. The result was a disorderly collapse with significant collateral consequences and contagion across the U.S. and global financial markets. Ensuring that large, systemic financial firms like Lehman could fail without endangering the financial system was a critical concern of the Dodd-Frank Act.

Bank resolution plans

The Dodd-Frank Act required the Federal Reserve to adopt rules requiring large bank holding companies to periodically submit plans "for rapid and orderly resolution in the event of material financial distress or failure." Credible resolution plans—so-called "living wills"—are an essential part of the Dodd-Frank Act and part of the framework for ending too-big-to-fail. Importantly, the Dodd-Frank Act gave regulators the power to require banks to "divest certain assets or operations" if their proposed living wills would not result in an orderly resolution.

Thus, effective, comprehensive living wills, combined with other prudential standards, better ensure that (1) large, systemically important, risky institutions, are proactively assessing their risk and making resolution a key part of their corporate culture, and (2) regulators have adequate transparency into the workings of these large, complex companies, insight that will be critical in the event those firms fail.[49] While the reality of a gigantic bank being resolved in bankruptcy remains questionable, living wills are a key component of a comprehensive structure to reduce the threat from too-big-to-fail financial firms.

Orderly liquidation authority

However, even under the best of circumstances and even assuming all the other provisions of the Dodd-Frank Act worked as intended, there was still a risk that a systemically important firm would nevertheless collapse in the future due to unforeseen circumstances, creating contagion and widespread panic. Therefore, the Dodd-Frank Act also included a failsafe "break the glass" option: Title II of the Dodd-Frank Act expanded the ability of federal regulators to force collapsing systemically important nonbank financial institutions into receivership.

This was a critical expansion of the FDIC's authority—it included the authority to resolve large bank holding companies and nonbanks that FSOC designated as systemically important. If that ever became necessary, the Dodd-Frank Act also required the FDIC to levy a fee on large banks and nonbank financial institutions to pay for the eventual liquidation of a large, failing firm. This fund is intended to act as an industry-funded source of money, to ensure that taxpayers are not on the hook for bailing out a failing firm.[50]

Establishment of CFPB to Protect Financial Consumers from Predators

At the other end of the toxic mortgages that filled the risky securities that brought the financial system to the brink of collapse were everyday Americans, who were induced to enter those risky and exotic mortgages, which they often could not understand and more often could not afford. In many cases this was the result of egregiously fraudulent sales practices. These toxic mortgages and the related derivatives and structured products, which would nearly destroy the financial system, also destroyed the lives of many millions of consumers. In other words, one of the key weaknesses that the financial crisis revealed was the failure of regulators to protect hardworking Americans from predatory practices.[51]

To protect Main Street Americans—consumers, investors, homeowners, students, soldiers, retirees and the elderly—from predatory financial behavior and financial instability that can lead to devastating financial crashes as in 2008, the Dodd-Frank Act created the CFPB. First proposed by then-Professor Elizabeth Warren,[52] the CFPB was designed to be an independent and effective consumer cop, walking the beat to protect consumers of financial services from the sorts of predatory practices that not only fueled the financial crisis, but destroyed innumerable lives.

Pre-crash, the banking agencies had shared responsibility for consumer protection and were supposed to enforce the many existing laws and regulations. However, they indefensibly neglected consumer protection, subordinating it to their primary responsibility of ensuring the safety and soundness of banks and the banking system.[53] Worse, the banking agencies prevented states from using their own consumer protection laws to protect their citizen-consumers from mortgage and financial predators. They claimed it was the exclusive right of the federal banking regulators and that the states' laws were preempted. The courts agreed, shut down state enforcement and the Federal Reserve then did nothing, allowing the pervasive subprime lending fraud to metastasize and develop into a financial crisis, which, of course, also gravely compromised the safety and soundness of the banks and the banking system.[54] The establishment of the CFPB in Title X of the Dodd-Frank Act was intended to make sure this never happened again by establishing an independent agency whose primary mission was first and foremost to protect financial consumers.

Creating FSOC to Address Systemic Risk and Shadow Banking System

The financial crisis not only revealed substantive deficiencies in the regulation of the financial system, but also significant structural issues. For example, shadow banks grew to dominate the financial system, performing many of the same functions as banks, engaging in many of the same activities, and, critically, taking on many of the same types of risks, but without being properly regulated or, sometimes, without being regulated at all. Moreover, financial regulation was significantly siloed—individual regulators oversaw the particular activities and entities within their jurisdiction, but no one regulator monitored the entire financial sector for systemic risks.

In other words, the financial crisis demonstrated that there were parts of the financial system that lay beyond the responsibility of any single federal regulator—such as the risk posed by AIG. Regulatory experts, academics and financial market participants argued that a single regulatory body was needed to police systemic risk. The Dodd-Frank Act established the FSOC to remedy these critical shortcomings.[55]

The Dodd-Frank Act gave FSOC a variety of tools to reduce systemic risk. The most critical was the authority to designate systemically important nonbank financial firms for prudential regulation by the Federal Reserve—an authority designed to counteract the dangerous rise of the unregulated shadow banking system and to protect against regulatory arbitrage.[56] The Dodd-Frank Act also gave FSOC the authority to designate particular activities as posing systemic risk, and to make recommendations to the primary regulators of those designated activities.[57] The Dodd-Frank Act also established an independent, very powerful OFR[58] to conduct analysis and research of the financial system to assist FSOC and other regulators in monitoring the financial system, better enabling regulators to spot the build-up of systemic risk that had escaped their attention prior to the financial crisis.

Volcker Rule to Address Proprietary Trading by Banks

Banks provide an essential service to the country by intermediating financial transactions between and among individuals and businesses. Those transactions finance educations, homes, retirements, businesses of all sizes, jobs, economic growth and, ultimately, the American Dream. Those socially beneficial activities are why banks and the banking system are backstopped by the U.S. government

To stop taxpayer-backed banks from engaging in such dangerous gambling and holding taxpayers hostage, Title VI of the Dodd-Frank Act prohibited proprietary trading in provisions known as the 'Volcker Rule,' named after former Federal Reserve Chair Paul Volcker.

LEFT: Paul Volcker, July 2018, at an INET panel discussion moderated by Better Markets' Dennis Kelleher.

and taxpayers in the form of, for example, FDIC deposit insurance and Federal Reserve "lender of last resort" activities. To reduce the risks arising from the moral hazard created by that backstop, banks are supposed to be highly regulated to prevent abuses, reduce failures, and protect taxpayers.

However, much riskier but socially useless or even harmful financial activities by banks frequently provide much greater returns and much bigger paychecks than traditional banking intermediation between savers and borrowers. One such activity is known as proprietary trading, which is when a bank makes a usually highly leveraged and complex financial bet for its own account (often using low- to no-cost federally insured deposits). Because the potential for quick, short-term rewards to the trader and the bank are astronomically high, the incentives to engage in this trading are often irresistible. However, such trades are little more than gambling and have little if any socially useful or redeeming purpose. Indeed, they can threaten the safety, soundness and stability of the bank and the financial system itself if sufficiently pervasive.

Moreover, proprietary trading almost always involves conflicts of interest between the bank and its so-called customers, where the bank is advancing its own interests at the expense of whoever is on the other side of its "prop" trade. This perverse practice is reflected in the culture of the bank. Prop trading is a no-win proposition for the customer. That is the opposite of a traditional banking relationship where the customer's long-term success (and increased need for banking services) is the goal. With prop trading, customers become merely counterparties, wallets from which to extract as much profit as possible as fast as possible.[59] When the trading culture becomes the predominant one at a bank, outsized risk-taking, excessive leverage and an overall gambling attitude can come to be the norm and long-term customer relationships and customer-focused services become secondary at best. Put differently, a trading culture can dilute if not eliminate the very reason banks are backed by society in the first place.

That is what happened in the years before the 2008 financial crash when Goldman Sachs,[60] Lehman Brothers, Bear Stearns, Morgan Stanley, Citigroup and other systemically important banks and nonbanks engaged in substantial amounts of proprietary trading. Indeed, Morgan Stanley lost more than $9 billion in a single proprietary trade, which happened at the worst possible time: when it was also taking other huge losses due to the collapse of the subprime credit markets.[61]

Thus, the 2008 financial crisis exposed the fact that the largest U.S. banks had a "heads we win, tails you lose" proposition relative to the U.S. taxpayers:

1. When speculative trading was profitable, bank management, traders and shareholders were very substantially rewarded, but

2. When speculative trading resulted in significant losses or even insolvency, U.S. taxpayers were essentially extorted to provide the capital necessary to stabilize these banks to prevent losses to depositors and the banking system as a whole (i.e., taxpayers received the bill).

In fact, the largest banks knew that their critical role in the payments system, the potential impacts on their retail depositors and the interconnectedness of the financial markets all but guaranteed U.S.-taxpayer bailouts would be a consequence of any significant proprietary trading losses that threatened their financial condition and systemic stability.

To stop taxpayer-backed banks from engaging in such dangerous gambling and holding taxpayers hostage, Title VI of the Dodd-Frank Act prohibited proprietary trading in provisions known as the "Volcker Rule,"[62] named after former Federal Reserve Chair Paul Volcker. This ban restricted banks from engaging directly in proprietary trading as well as indirectly by limiting investments in hedge funds and other private funds. In addition to reducing the risk from these activities, the rule has had the added benefit of promoting greater scrutiny of trading activities on the part of banks' senior management and regulators. This has encouraged increased discipline over risk taking and risk measurement practices in banks' trading activities, as well as better identification and monitoring of banks' trading positions and enhanced controls and governance.

Reform Securities Markets to Increase Investor Protection

Title IX of the Dodd-Frank Act addressed a number of shortcomings in regulation of securities and investor protection.

Investment advice reform

Investors lose tens of billions of dollars a year as a result of conflicts of interest among financial advisers.[63] This is because of the confusing, dual regulatory scheme that governs investment advice. Advisers who are "investment advisers" are subject to a fiduciary duty requiring them to provide advice that is truly in the best interest of the client. However, those who are "broker-dealers" are subject to a lower, so-called "suitability" standard, which leaves the adviser free to recommend overpriced, underperforming, and risky investments to clients so the adviser can pocket large fees and commissions.

Recognizing this problem, the Dodd-Frank Act required the SEC staff to conduct a study examining this dual regulatory scheme. The Dodd-Frank Act further authorized the SEC to initiate a rulemaking adopting a uniform fiduciary standard to replace the confusing and costly two-tiered regulatory structure.

Executive compensation reform

Before the crisis, executive compensation schemes encouraged excessive risk-taking, incentivizing short-term gains over long-term stability. These sorts of risk-enhancing compensation schemes were critical factors in fueling the crisis.[64] The Dodd-Frank Act included several provisions intended to address these issues. These included enhanced disclosure by public companies of compensation practices, increased shareholder input into executive compensation and, critically, a requirement that federal regulators adopt rules prohibiting executive compensation plans that unnecessarily

WASHINGTON, DC - JULY 20: Former Rep. Barney Frank (D-MA) (L) and former Sen. Chris Dodd (D-CT) talk about their hallmark and namesake legislation, the Dodd-Frank Wall Street reform law, on the fifth anniversary of the law at the Newseum July 20, 2015 in Washington, D.C.

increase risk.[65] In addition, the Dodd-Frank Act required the SEC to adopt a rule that would require the claw-back of ill-gotten compensation.[66]

Credit rating agency reform

Credit rating agencies ("CRAs") helped fuel the financial crisis by providing grossly inflated credit ratings to thousands of mortgage-backed securities and other high-risk products.[67] They did so, in part, because their clients were involved in the issuance of the products they were rating and needed to maintain the marketability of the securities for investors, especially those with investment mandates limited to highly-rated assets. Often, CRA's clients would explicitly or implicitly threaten to take their business to competitors if the CRAs did not supply a high credit rating. Meanwhile, investors relied on these ostensibly independent rating agencies. As a direct result of the Triple-A ratings applied by the handful of leading CRAs, everyone from pension and mutual funds to individual investors bought huge amounts of extraordinarily complex and ultimately worthless structured debt instruments stuffed with toxic and, often, worthless mortgage loans. They did so largely because the rating agencies said they carried virtually no risk at all, which is what a Triple-A rating is commonly understood to mean.

But, of course, this turned out to be false; as the housing market collapsed, those securities failed in droves and the rating agencies were forced to issue sudden and dramatic ratings downgrades. In turn, the derivatives markets keyed to those investments sank, the credit markets froze, and banks and financial firms fell into a spiral of failures and near-failures prevented only by massive taxpayer bailouts.

The Dodd-Frank Act required reforms in the credit rating industry, not only to increase transparency and oversight but also to root out the driving force behind bloated ratings: the powerful conflicts of interest inherent in the "issuer-pay" compensation model. Those incentives induce the credit rating agencies to inflate their ratings to attract business from the issuers and underwriters, earn lucrative fees and maintain the flow of future deals.

Credit risk retention

One of the key, dangerous characteristics of the fee-based originate-to-distribute model of mortgage origination was that those who originated, packaged, and sold securities of mortgages did not retain sufficient "skin-in-the-game" to incentivize them to select well-underwritten loans for their mortgage-backed securities offerings.[68] Section 941 of the Dodd-Frank Act required the SEC, FDIC, Federal Reserve, Office of the Comptroller of the Currency ("OCC"), Federal Housing Finance Agency and the Department of Housing and Urban Development to jointly implement rules to require any securitizer to retain an economic interest in a material portion of the credit risk for any asset that the securitizer, through the issuance of an asset-backed security, transfers to a third party.

Whistleblower incentives and protections

The SEC has had several prominent failures in detecting and preventing massive frauds, most prominently Bernie Madoff's decades-long Ponzi Scheme.[69] Notably, that fraud could have been prevented had the SEC heeded the warnings of whistleblowers such as Harry Markopolos.[70] Recognizing that insiders frequently have the best information to provide to regulators regarding corporate fraud and other misconduct, Section 922 of the Dodd-Frank Act enhanced the whistleblower program at the SEC. Specifically, the Dodd-Frank Act requires the SEC to pay awards to eligible whistleblowers who voluntarily provide the SEC with original information that leads to a successful enforcement action yielding monetary sanctions of over $1 million. Section 922 requires the award amount to be between 10 percent and 30 percent of the total monetary sanctions collected in the SEC's action or any related action such as in a criminal case.

"The Dodd-Frank Act requires the SEC to pay awards to eligible whistleblowers who voluntarily provide the SEC with original information that leads to a successful enforcement."

The Dodd-Frank Act also expressly prohibits retaliation by employers against whistleblowers and provides them with a private cause of action in the event that they are discharged or discriminated against by their employers in violation of the Act.

Greater investor advocacy

Recognizing the need for greater representation of investors at the SEC, the Dodd-Frank Act also created two important entities within the SEC to advocate for investors. First, the Dodd-Frank Act created the Office of the Investor Advocate, and empowered it to review all SEC rulemakings as well as those from self-regulatory organizations such as the Financial Industry Regulatory Authority, which regulates brokers, and the stock exchanges, to ensure that those policies are enacted in the interest of investors, particularly retail and long-term investors. Second, the Dodd-Frank Act created the Investor Advisory Committee, which has advocated for critical investor-friendly policies. These have significantly increased investors' voice and input over SEC and self-regulatory organizations' policymaking.

Derivatives Regulation

As Warren Buffett has aptly noted, derivatives are "financial weapons of mass destruction."[71] That fact was proven all too clearly in the lead-up to the 2008 financial crisis when the unregulated

and opaque over-the-counter derivatives markets significantly contributed to the collapse of the financial system and resulted in trillions of dollars of cumulative U.S.-taxpayer bailouts for the very financial institutions that caused the meltdown.

The Commodity Futures Modernization Act of 2000[72] enabled the build-up of risk in the U.S. financial system, because it generally exempted over-the-counter derivatives and market participants from the regulatory framework applicable to other types of derivatives. As a result, these unregulated derivatives were often entered into with few, if any, financial safeguards to protect the U.S. financial system, such as capital requirements and clearing or margining to mitigate counterparty credit risk.

In addition, these derivatives were conducted in a dealer-dominated market structure with little or no pre- and post-trade transparency, no electronic trading, and minimal market infrastructure to facilitate multilateral trading and public reporting. A handful of derivatives dealers routinely controlled trading relationships and pricing, withheld critical information from the markets, and even misled customers and entire markets about prices and risks.[73] Ultimately, a handful of dominant derivatives dealers exploited the lack of oversight and transparency in these markets to facilitate risky but profitable activities involving complex, structured products and built up massive positions in certain derivatives, like credit default swaps on mortgage-backed securities involving toxic subprime mortgages.

"A handful of derivatives dealers routinely controlled trading relationships and pricing, withheld critical information from the markets, and even misled customers and entire markets about prices and risks."

Title VII of the Dodd-Frank Act remedied a number of these issues, setting forth a comprehensive framework for reform of the over-the-counter derivatives markets. Title VII provided the CFTC and SEC broad jurisdiction over different parts of the markets and included five primary pillars of reform:

- Registration and substantive regulation of derivatives dealers and major derivatives market participants that pose substantial risks to the U.S. financial system, bringing activities into scope for critical financial reforms, like capital, margin, business conduct standards and risk management frameworks;
- Providing a new framework for clearing the most actively traded derivatives through clearinghouses that mutualize certain risks and impose financial safeguards;
- Providing a new framework for trading derivatives through multilateral electronic platforms or systems with pre-trade transparency;
- Providing an oversight framework for data repositories that facilitate real-time, public reporting of derivatives transactions (post-trade transparency) and regulatory reporting necessary for meaningful U.S. oversight; and
- Providing a new mandate for the imposition of speculative positions limits on futures contracts on physical commodities and related options and economically equivalent swaps.

The Dodd-Frank Act Delegated to Regulatory Agencies

Many of the most critical financial safety provisions put into place under the Dodd-Frank Act were delegated to the banking, securities, derivatives and other regulators to develop and implement rules. The statute granted those regulators a significant amount of discretion. For example, the famed Volcker Rule—which prohibits banks from making risky, speculative bets with taxpayer-backed deposits—is a good example: the Dodd-Frank Act banned "proprietary trading," required FSOC to study the issue, and then required that regulators "consider the findings of the study… and adopt rules to carry out this section." In all, according to some counts, there are more than 300 provisions of the Dodd-Frank Act that require such rulemakings, with the vast majority assigned to the SEC, the Federal Reserve, the CFTC and the CFPB. But, as the Congressional Research Service noted, "the number of final rules that will be ultimately issued pursuant to the act is unknowable."[74]

One observer called the bill "a 2,000-page missive to federal agencies, instructing regulators to address subjects ranging from derivatives trading to document retention….notably short on specifics, giving regulators significant power to determine its impact."[75] Because these rules had to be considered, proposed and finalized pursuant to the Administrative Procedure Act, which requires, among other things, "public comment," this delegation of authority also provided the financial industry and its many lobbyists, lawyers and other allies with unending opportunities to fight and weaken the Dodd-Frank Act. Indeed, the industry saw this rulemaking process as an arena to win back much of what they had lost in the legislative process.[76]

"In all, according to some counts, there are more than 300 provisions of the Dodd-Frank Act that require rulemakings, with the vast majority assigned to the SEC, the Federal Reserve, the CFTC and the CFPB."

THE DODD-FRANK ACT UNDER
THE OBAMA ADMINISTRATION

Prudential Bank Regulation

The banking agencies under the Obama administration implemented many of the rules mandated by the Dodd-Frank Act to make the banking system safer, by increasing the loss-absorbing capacity of banks, mandating stress testing, better ensuring that failing banks could be resolved quickly, and preventing banks from gambling with depositor money.

Capital, Liquidity and Leverage Standards, Including Enhanced Prudential Standards for Megabanks

Under President Obama, the financial regulatory agencies made tremendous strides in implementing the Dodd-Frank Act's provisions designed to ensure the resiliency of the banking system, including the requirement of enhanced prudential standards for the largest banking organizations. The previous capital regime relied heavily on risk-weighting and capital instruments that did not end up absorbing losses as anticipated. The banking regulators' approach under the Obama administration, however, was not to tear down the prior capital rules, but instead to shore them up so that banks, especially the largest, would have adequate loss absorbing capital and be decidedly more resilient to stress.[77]

Accordingly, in 2013, the banking regulatory agencies issued a capital rule that increased the quantity and quality of capital banks are required to hold.[78] The rule increased certain capital requirements outright, specifically raising the minimum ratio of Tier 1 capital to risk-weighted assets from 4% to 6%.[79]

The rule also introduced a new ratio—common equity tier 1 capital ("CET1") to risk-weighted assets—and required banks to maintain a ratio of at least 4.5% of CET1 to risk-weighted assets.[80]

PHOTO ABOVE: U.S. President Barack Obama signs the Dodd-Frank Wall Street Reform and Consumer Protection Act at the Ronald Reagan Building in Washington, D.C., July 21, 2010. Photo Credit: Rod Lamkey, Jr/AFP via Getty Images.

"In 2014, the banking agencies also adopted an "enhanced supplementary leverage ratio" for the very largest banking organizations, global systemically important banks ("GSIBs"). Under the enhanced supplementary leverage ratio, GSIBs must hold an additional 2% capital above the 3% supplemental leverage ratio, or face restrictions on capital distributions."

This ensures that banks have a minimum amount of the highest quality capital, common equity, to absorb losses.[81] And while other required capital minimums remained nominally the same, the agencies made key changes to definitions of capital, prescribed new capital deductions, and also made changes to the risk-weighting to better reflect the riskiness of various assets.[82]

Similarly, the agencies also enhanced the leverage ratio, which was the ratio of tier 1 capital to average consolidated total assets. That serves as a backstop to prevent banks from taking advantage of the flaws of risk-weighting to meet their regulatory capital requirements while in fact holding insufficient capital to survive a period of stress.[83] While the leverage ratio remained nominally the same at 4%,[84] the revisions to the definition of capital effectively increased the amount of capital banks need to hold to meet the minimum requirement.[85]

The 2013 Capital Rule also induced banks to hold more capital by including a capital conservation buffer, above and beyond the regulatory minimums, of 2.5%.[86] Banks are not required to maintain the capital conservation buffer, but if they do not, their ability to make capital distributions and discretionary bonus payments is restricted.[87] Inclusion of the capital conservation buffer, and restrictions on distributions for failing to maintain it, were a response to the fact that, during the crisis, banks continued making capital distributions even as their capital positions deteriorated.[88]

In addition to the minimum capital requirements for all banking organizations, the agencies also introduced additional capital requirements for the largest banking organizations, those that are most critical to the financial system. The 2013 Capital Rule required those large banks to meet a supplemental leverage ratio of 3%. Most critically, this supplemental leverage ratio included both on-balance sheet and off-balance sheet exposures, to better ensure that the capital position of these large banks adequately reflects their riskier profile.[89] In 2014, the banking agencies also adopted an "enhanced supplementary leverage ratio" for the very largest banking organizations, global systemically important banks ("GSIBs"). Under the enhanced supplementary leverage ratio, GSIBs must hold an additional 2% capital above the 3% supplemental leverage ratio, or face restrictions on capital distributions.[90]

Also in 2014, the banking agencies implemented a "liquidity coverage ratio" ("LCR") for large banking organizations.[91] This requires those organizations to maintain enough high-quality liquid assets to cover expected cash outflows during a 30-day stress period.[92] This was a critical reform; it represented the first meaningful, quantitative liquidity requirement for the largest banks.

While the LCR has led to significantly better short-term liquidity positions at the largest banks, it was meant to be supplemented by a rule focused on longer-term liquidity positions. A 2016 Federal Reserve proposal for the Net Stable Funding Ratio—a liquidity regulation going out to one year rather than the LCR's 30 days—has regrettably not been finalized. It is currently unclear when or

if the Federal Reserve plans to enact reforms needed to further strengthen the longer-term liquidity position of the biggest banks.[93]

Stress Tests

As noted above, the stress tests conducted by the Federal Reserve of the largest banks during the financial crisis were a critical, positive, turning point in the crisis. After the crisis, the Federal Reserve took the lead in implementing comprehensive post-crisis stress testing requirements. The Federal Reserve's 2011 Capital Plan Rule implemented the Capital Analysis and Review ("CCAR") program, which required that systemically important banks—those with over $50 billion in assets—submit capital plans that demonstrate the bank will maintain adequate capital in stressed scenarios, including an assumption that, even under stress, the bank will make planned capital distributions for nine quarters. This requirement, in effect, required the banks to prefund those distributions.[94] Importantly, the CCAR stress test essentially requires not only that large banks meet all of the new higher capital standards, but do so even after accounting for losses they might experience during a period of severe stress. For example, if a bank's basic risk-based capital requirement is 8 percent, and the Fed's stress test shows the bank could see a 4 percent reduction of its capital under stress, the bank's effective capital requirement would be 12 percent.[95] Under the 2011 Capital Plan Rule, the Federal Reserve could also object to a bank's capital plan on qualitative grounds, which would result in a restriction in distributions. This was a significant enhancement of the Federal Reserve's supervisory practices and was designed to ensure that banks maintained adequate risk management practices.

In 2012, the Federal Reserve and other banking agencies issued rules further implementing the Dodd-Frank Act's stress testing requirements for banks.[96] Under these rules, large banking organizations, i.e. those with greater than $50 billion in assets, are required to undergo three stress tests per year—one stress test conducted by the Federal Reserve, and two semi-annual stress tests conducted by the banking organizations. Banking organizations with greater than $10 billion, but less than $50 billion, in assets were to be subject to an annual company-run stress test. Each of the stress tests runs through a variety of scenarios, a baseline, adverse and severely adverse scenario. The frequency of the stress tests, and the robustness of the scenarios, were designed to ensure that the stress tests are credible and perceived as credible, which is critical to their success, as Federal Reserve Bank Governor Daniel Tarullo explained in discussing why the 2009 stress tests were successful:

> "First, the results were deemed credible by most market participants, owing in part to the release of details about our assumptions and methods, as well as the variation in assessment of the banks."[97]

Resolution Plans, aka "Living Wills"

In 2011, the Federal Reserve and FDIC promulgated a final rule implementing Section 165(d) of the Dodd-Frank Act and requiring covered companies to submit resolution plans ("2011 Resolution Plan Rule").[98] The 2011 Resolution Plan Rule required that covered companies submit detailed resolution plans annually.[99] Frequent filing of detailed resolution plans advanced two related, critical goals. First, it ensured that resolution plans would be current, reflecting "structural changes, acquisitions and sales."[100] An outdated resolution plan that does not reflect the current size, scope

and complexity of a company is of little value. Frequent resolution planning also helps "make resolution planning an ongoing institutional aim."[101]

Under President Obama, the Federal Reserve and FDIC also signaled early that they took the resolution planning requirements seriously and would not tolerate banks treating it as a "check the box" exercise. For example, in 2014, the agencies rejected each of the eleven resolution plans submitted by the largest banks, which were brazenly deficient.[102] In April 2016, the agencies rejected the resolution plans of five banks,[103] and in December 2016, the agencies restricted the growth of one of those banks, Wells Fargo, which failed to adequately address the deficiencies identified by the agencies.[104]

Rigorous analysis of resolution plans, rejection of plans that are inadequate, and meaningful consequences for banks that repeatedly fail to submit credible resolution plans are essential components of the process. Otherwise, a bank has little incentive to plan for its own orderly resolution—if the government thinks a bank's failure will threaten the financial system, it is more likely to bail out the bank, allowing the bank to privatize the gains from taking excessive risk while socializing the losses. That is why credible resolution plans are an essential pillar for the post-2008 financial reform structure protecting the financial system and taxpayers.

Orderly Liquidation Authority

In 2011 the FDIC issued rules implementing certain provisions of its Orderly Liquidation Authority.[105] This included provisions related to clawing back executive compensation, the treatment of fraudulent and preferential transfers, the priority of expenses and unsecured claims, and the administrative resolution of claims. Perhaps more important than the specific, mechanical details of the liquidation process is simply the existence of the authority for the FDIC, with an established and transparent process, to prevent disorderly, Lehman-like failures that sow chaos in the financial system.[106]

Further, in 2013, the FDIC promulgated a final rule establishing which companies would be subject to its Orderly Liquidation Authority—generally speaking, if either: (1) at least 85% of the company's total consolidated revenues for either of its two most recent fiscal years were derived, directly or indirectly, from financial activities; or (2) based on the relevant facts and circumstances, the FDIC determines that the consolidated revenues of the entity from financial activities constitutes 85% or more of the total consolidated revenues of the entity.[107]

Volcker Rule

In 2014, the OCC, Federal Reserve, FDIC, SEC and CFTC issued regulations implementing the Volcker Rule by prohibiting banks from engaging in speculative, proprietary trading and providing an effective framework for identifying and risk-managing permitted activities not subject to the prohibition on proprietary trading. [108] Consistent with the intent of Congress, the agencies accomplished a meaningful prohibition on proprietary trading by broadly defining the scope of activities subject to the Volcker Rule, thereby bringing discipline to internal bank practices governing trading in securities, derivatives and other assets. For example, the agencies broadly

defined "trading account" as any transaction that constitutes "[p]urchases or sales principally for the purpose of short-term resale, benefiting from short-term price movements, realizing short-term arbitrage profits or hedging such a purchase or sale," and they established a presumption that any position held for less than 60 days would satisfy this test.

> "The negative effects [of the Volcker Rule] on market liquidity or bank profitability breathlessly predicted by the industry simply never materialized."

Importantly, the 2014 Volcker Rule's regulatory framework facilitated supervision of the banks subject to the rule.[109] For example, a bank seeking to take advantage of the underwriting and market-making exemptions to the rule were permitted to hold only those securities necessary to meet the "reasonably expected near-term demands of clients, customers or counterparties," and, as to market-making activities, would be required to, among other thing, provide a "demonstrable analysis of historical customer demand."[110] These standards and documentation requirements, among others, provided the agencies a window into banks' reliance on exceptions to the Volcker Rule and prevented evasion.

Ultimately, the 2014 Volcker Rule proved successful and effective; banks had implemented risk and control frameworks for their trading desks and had shown promising signs they were focusing less on speculative, proprietary trading in favor of activities, such as lending to consumers and small businesses, that support the real economy.[111] The negative effects on market liquidity or bank profitability breathlessly predicted by the industry simply never materialized.[112]

Consumer Protection

The new CFPB was a critical component of the Dodd-Frank Act, ensuring that there was a strong federal agency to protect consumers from financial predators. Under the Obama administration, the CFPB proved to be a strong and dedicated advocate for consumers of financial products.

One of the primary ways the CFPB protected consumers was through ensuring compliance with laws and rules already on the books through a robust supervision and enforcement program. Almost immediately after it was set up, the CFPB became one of the premier regulatory enforcement and supervisory agencies. During the Obama administration, enforcement and supervisory actions returned an astonishing $11.8 billion to 29 million consumers.[113] With these actions, the CFPB helped halt, and provide consumer redress for, a wide variety of unfair, deceptive, abusive and other illegal practices—mortgage servicers failing to apprise desperate homeowners of options to avoid foreclosures,[114] lenders collecting debts that consumers did not legally owe,[115] and some firms even defrauding 9/11 first responders out of settlement funds.[116]

In addition to vigorously enforcing existing laws and rules, the CFPB under the Obama administration also began filling in gaps in consumer financial protection regulation. It implemented rules providing protections to users of prepaid cards,[117] regulating mortgage servicers,[118] and ensuring that mortgage lenders ensure borrowers are able to repay loans before extending them.[119]

One of the most important consumer protection rules promulgated by the CFPB under former

Richard Cordray, director of the CFBP from 2012-2017, delivers remarks as U.S. President Barack Obama looks on during a visit to the CFPB in Washington D.C., on Jan. 6, 2012, just days after Cordray's nomination. Cordray's appointment as director of the CFPB moved the new agency nearer to fulfilling its intended role as a one-stop shop for borrower safeguards.

Photo Credit: Michael Reynolds/Pool–Bloomberg via Getty Images

Director Richard Cordray, and an example of quality public interest oriented rulemaking, was the payday lending rule promulgated in 2017.[120] Payday loans are one of the most pernicious consumer financial products—marketed as short-term loans intended to help consumers meet temporary shortfalls due to unexpected expenses, payday loans instead often result in consumers being trapped in a lengthy cycle of reborrowing, often costing them more in fees than the original principal amount of the loan. Indeed, the payday loan industry relies on consumers continuously rolling over their loans and paying fees on top of fees on top of fees.

The CFPB's rulemaking on the issue spanned five years, during which it sought input from stakeholders across the spectrum and considered evidence on the issue from all sources, before promulgating a final rule that required, among other things, payday lenders to actually ensure that borrowers can afford loans before making them.[121] If it had been allowed to go into effect, the rule would have prevented tens of millions of dollars in harm by helping consumers avoid debt traps.

Finally, the CFPB under Director Richard Cordray fought back against a relentless industry assault against its very existence. Specifically, the industry argued that the structure of the CFPB, a single director removable only for-cause to ensure its political independence and ability to protect consumers, was unconstitutional.[122] A panel of the D.C. Circuit held, in a flawed decision authored by then-Judge Brett Kavanaugh, that the CFPB's structure was unconstitutional.[123] However, the CFPB kept fighting, and the full D.C. Circuit, adopting arguments advanced by the Cordray-led CFPB, eventually overturned the panel decision and held that the CFPB's structure was constitutional.[124] Unfortunately, as detailed below, the CFPB under the Trump administration did an about face; current Director Kathleen Kraninger has taken the position that the CFPB's structure is unconstitutional, and on June 25, 2020, the Supreme Court accepted that argument, held that the CFPB's structure is unconstitutional, and that the remedy should be that the CFPB Director be removable at will by the president.[125]

Investor Protection

Investment Advice

The Obama administration began the process of establishing a fairer and more equitable system for investment advice to replace the prevailing two-tiered system that costs consumers billions of dollars a year. In 2011, SEC staff conducted a study examining this dual regulatory scheme, which was required by Section 913 of the Dodd-Frank Act.[126] The study, unsurprisingly, found that the current regulatory structure was harmful—investors find the differing standards of care confusing, and

the weak suitability standard governing advice from brokers leaves investors susceptible to costly conflicts of interest.[127]

SEC staff recommended that the SEC adopt a uniform fiduciary standard that would eliminate the confusing and harmful regime and maximize investor protection.[128] In response to claims by the brokerage industry, the SEC staff determined that adopting a uniform fiduciary standard would not undermine investor choice or access to a variety of investment products.[129] In 2013, the SEC's Investor Advisory Committee made a similar recommendation.[130] Separately, in 2016, the Department of Labor, which has jurisdiction over retirement plans, issued a rule strengthening the scope and content of the standards governing fiduciary advisers under the Employment Retirement Income Security Act.[131]

Unfortunately, the SEC, under the Obama administration, did not propose or finalize a uniform fiduciary duty rule, leaving it to the Trump SEC, which ended up adopting a weak, misleading and counterproductive rule that contradicted Congressional intent and its own staff's study.[132]

Credit Risk Retention

In 2014, as required by the Dodd-Frank Act, federal regulators finalized a rule on credit-risk retention, requiring sponsors of securitizations to retain a meaningful amount of risk, i.e. "skin-in-the-game" to ensure sponsors have an incentive to take greater care when assembling their asset-backed securities.[133] By establishing such requirements, the rule was a positive step forward, but contained a significant loophole, in the form of a broad definition of "qualified residential mortgages," which would ensure that almost all residential mortgages, securitizations of which were the fuel of the financial crisis, would be exempt from the retention requirements.[134]

Whistleblower Programs

In 2011, the SEC adopted rules implementing the whistleblower provisions of the Dodd-Frank Act. These rules ensured that whistleblowers would be adequately incentivized to provide valuable information, previously unknown to the SEC, including by allowing whistleblowers to collect, as an award, up to 30% of the money recovered by the SEC as a result of the whistleblower's information.[135] The whistleblower program, under both President Obama and President Trump, has been extraordinarily successful. It has led to over 33,000 high quality tips. Of whistleblowers who have received awards, 70% have provided information that has led to investigations, and another 32% have provided information that aided an ongoing investigation. Crucially, this information has resulted in the SEC recovering nearly $2 billion from fraudsters, including over $1 billion of disgorgement of ill-gotten gains, of which the SEC is scheduled to return $500 million to investors.[136]

"The whistleblower program, under both President Obama and President Trump, has been extraordinarily successful. It has led to over 33,000 high quality tips."

Derivatives

Without dangerous, unregulated, and opaque derivatives, including swaps, the financial crisis would almost certainly have been significantly less severe, if not avoided altogether. Title VII of the Dodd-Frank Act gave regulatory agencies, primarily the CFTC and SEC, broad, expansive authority to implement a comprehensive regulatory regime for over-the-counter derivatives, which the CFTC and SEC began to construct under President Obama, making the swaps market less risky, more transparent, and more fair.[137]

Derivatives Market Structure Improvements and Trading and Clearing Requirements

Before the Dodd-Frank Act, swaps were an over-the-counter market ("OTC"), meaning counterparties typically negotiated contracts and entered into them on a bilateral basis.[138] There were no multilateral exchanges facilitating trading and price transparency and discovery, and there was little or no clearing to mitigate counterparty credit risk. The Dodd-Frank Act gave the CFTC and SEC authority to construct a market for swaps and other OTC derivatives that was more like the futures and options markets—both of which have had multilateral, cleared markets with pre- and post-trade transparency for decades and both of which, as a result, performed reasonably well during the financial crisis.[139]

Under the Obama administration, the CFTC set about creating this more standardized, safer, more efficient and fairer market for swaps. In 2012, the CFTC issued a framework for a swaps clearing requirement, establishing the timeframes for clearing after the CFTC had made a determination that particular swaps need to be cleared.[140] Later in 2012, the CFTC issued a clearing mandate with respect to certain classes of interest rate and credit default swaps.[141] This clearing requirement also paved the way for these swaps to be subject to a trading requirement under a new regulatory process, called the "made-available-to-trade" process (under Section 723 of the Dodd-Frank Act, a swap that is required to be cleared is also required to be traded on a swap execution facility ("SEF") or other registered derivatives exchange, unless no SEF or exchange makes such a swap available to trade).

> "Banks and allies pressured and convinced the SEC to deviate from the CFTC's derivatives markets reforms in significant ways, ultimately running out the clock on the Obama administration."

Also in 2013, the CFTC adopted a regulatory framework for SEFs, implementing 23 statutory core principles intended to ensure that impartially accessed SEFs operate safely, transparently and without manipulation or fraud.[142] The CFTC also commenced a comprehensive trade reporting framework, for the first time bringing both public and regulatory transparency to the swaps markets and governing the dissemination of such information through new entities, swap data repositories.[143]

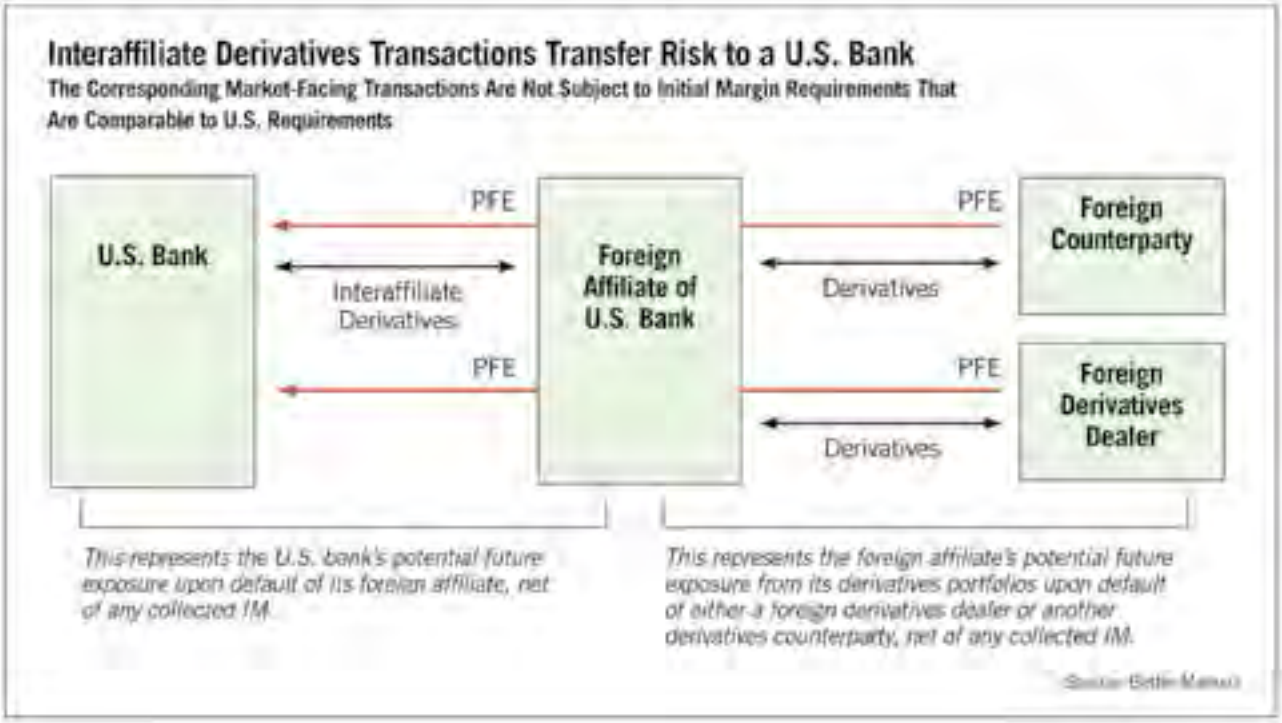
However, while the new derivatives regime has resulted in some strides in making the derivatives market more transparent and fairer, there was still more work to do when the Obama administration

ended. This is because the Wall Street banks that control the swaps market have successfully persuaded the regulators to fill the rules with loopholes and ambiguities that have enabled them to, in many significant ways, replicate the pre-crash derivatives markets.[144] Furthermore, these banks and allies pressured and convinced the SEC to deviate from the CFTC's derivatives markets reforms in significant ways, ultimately running out the clock on the Obama administration. The result was the SEC's complete failure to stand up the security-based swap regulatory framework, even though security-based swaps (like credit default swaps in one form or another based on mortgage-backed securities) were the very instruments at the center of the 2008 financial crisis.[145]

For these reasons, most of the handful of large dealers who have always dominated the derivatives markets continue to do so. In fact, more than 87 percent of the reported $201 trillion notional in derivatives within the U.S. banking system continues to be controlled by dealers within just four U.S. bank holding companies.[146] Each of these four bank holding companies also facilitates trading in a significant percentage of the $640 trillion notional in global derivatives markets through multiple affiliated non-U.S. dealers.[147] This anti-competitive market concentration of derivatives activities in such a small number of banks poses significant financial stability, contagion and other risks to the systemically important banks and nonbanks as well as the entire financial system.

Margin for Uncleared Swaps

For those swaps that are not centrally cleared, counterparty credit risk remains real. Failure of swaps market participants to manage counterparty credit risk was one of the drivers of the financial crisis—for example, the bailout of AIG was, in actuality, a bailout of AIG's counterparties; were AIG to default under the weight of its massive losses on its derivative bets, the entities on the other side of those bets, the purported "winners," would have been exposed themselves as a result of AIG's inability to meet its obligations.[148] This was the result of the failure of AIG's counterparties to timely collect sufficient initial and variation margin from AIG.[149]



Section 731 of the Dodd-Frank Act required that the CFTC and banking regulators adopt variation and initial margin requirements for swaps, specifically to reduce the market and counterparty credit risk associated with uncleared swaps, and to prevent the possibility of contagion that led to the bailout of AIG and numerous other interconnected and systemically important financial institutions with complex, massive, and poorly risk managed derivatives exposures to each other. Under the Obama administration, the CFTC and the banking regulators[150] implemented a comprehensive regulatory framework imposing margin requirements for swap dealers and major swap participants, as well as other market participants with material swaps exposures.[151] These rules generally required that swap dealers and major swap participants exchange initial and variation margin in swaps with other financial entities significantly involved in the derivatives markets.[152]

Unfortunately, the CFTC's rules contained a critical exception to the initial margin requirements, one that is inconsistent with the plain language of the Dodd-Frank Act—that swap dealers and major swap participants would not be required to collect initial margin in swaps with affiliates.[153] The banking regulators took a different view and required initial margin on these inter-affiliate swaps, explaining that permitting such unmargined intra-group derivatives transactions would pose risks to U.S. taxpayer-backed banks and other financial institutions with control or custody of customer deposits and assets.[154] Furthermore, the SEC's failure to implement the statutorily required regulatory framework for credit and equity derivatives (security-based swaps) means that the very credit default swaps at issue in the AIG case, for example, were in many cases never subject to regulatory margin requirements.

Swap Dealer Business Conduct Standards

In the runup to the financial crisis, OTC derivatives, especially the swaps that helped fuel the crisis, as well as the reference assets they were based upon, grew increasingly complex. This increasing complexity was often not necessary to meet client needs; indeed, much of this complexity appeared to often be artificially created for the purpose of disguising the many ways the creators—the largest derivatives dealers—extracted value from the swap and the counterparty.[155] Regardless of the purpose, as derivatives grew more complex, fewer and fewer people could truly understand them, including, often, the dealers themselves, which resulted in many banks and their counterparties holding derivatives positions they did not truly comprehend.[156]

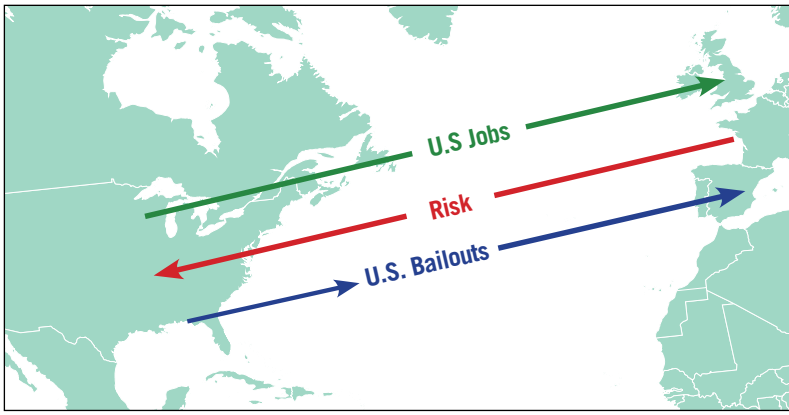
The Dodd-Frank Act addressed a number of risks in the derivatives markets by requiring the registration of derivatives dealers and, critically, requiring those registered derivatives dealers to adopt business conduct standards governing counterparty disclosures and communications, conflicts of interest, trading practices, fraud, manipulation and other matters. These standards for external communications and practices complemented internal business conduct standards also required by the Dodd-Frank Act, which addressed risk management programs, compliance programs and numerous other elements of the derivatives dealing business.

In 2012, the CFTC issued final rules governing swap dealer business conduct standards with counterparties.[157] These rules provided a host of protections to swap dealers' counterparties. Under the rules, swap dealers are prohibited from engaging in fraud and manipulation and must communicate with their counterparties in a fair manner. In addition, the rules required that swap dealers provide counterparties with a host of robust disclosures prior to entering into the swap,

including the material risks and characteristics of the swap, conflicts of interest relating to the swap, and, for swaps that are not subject to a trading requirement, a scenario analysis. These disclosures have been largely implemented by standard industry protocols that have undermined the meaningful disclosure framework intended by the Dodd-Frank Act. Nevertheless, they have helped ensure counterparties have at least the essential information to understand the risks and other relevant details about the swaps they enter into, including, importantly, the reality of conflicts of interest that permeate the derivatives dealing business.

Again, as noted with respect to other aspects of Title VII of the Dodd-Frank Act, the SEC's failure to implement the security-based swap dealer framework means that counterparties and security-based swap dealers will not benefit from these important financial reforms. Indeed, for that corner of the derivatives markets, dealers have largely continued trading based solely on commercial considerations, with few, if any, truly meaningful recent changes to the market structure and business practices.

Cross-Border Activity



Critical to rules that effectively regulate derivatives in the U.S. is to make sure that those rules cannot be evaded by participants engaged in derivatives activities in the U.S. or that otherwise create materials risks to the U.S. regardless of where they may take place. This was commonplace prior to the crash for a number of reasons. First, global banks and swap dealers were always looking to maximize profits and bonuses by lowering their costs any way possible, including by moving trading and other activities overseas to avoid financial safeguards and customer protection rules. Second, foreign jurisdictions often sought to attract global banks and swaps dealers by offering "light touch" regulation, which would create jobs and generate revenue for those foreign jurisdictions. London was notorious for doing this. The result was a global race to the regulatory bottom. However, while the foreign jurisdictions received the upside of little to no regulation in jobs and tax payments, the U.S. got the downside because, when those global banks and swap dealers failed, the U.S. bailed them out. This proves the old adage that "banks live globally but die locally."

The Dodd-Frank Act was intended to address derivatives-related risks presented to the U.S. financial system and U.S. taxpayers. Those risks were exemplified by the spectacular failures of almost all systemically important investment banks in 2008, in part due to their reckless derivatives risk management and trading practices. However, that requires prohibiting the use of legal, accounting and other tricks to allow derivatives dealers and other market participants to be subject to weaker, foreign regulation of their activities, even when those activities pose a risk to the U.S. financial system and, ultimately, U.S. taxpayers.[158] This is referred to as "cross-border" regulation.[159] A prime example of the danger of cross-border activity is AIG, whose credit defaults swaps business operated out of London, but which was bailed out by American taxpayers when the bill for its risky activities came due.[160] To prevent that in the future, the Dodd-Frank Act had a strong cross-border swaps

provision, establishing that the requirements of Title VII apply to swaps that "have a direct and significant connection with activities in, or effect on, commerce of the United States."[161]

Under the Obama administration, the CFTC took this broad mandate seriously. It implemented guidance[162] that appropriately asserted, consistent with the Dodd-Frank Act, the CFTC's authority to regulate swaps activity with a significant connection to the United States regardless of where that activity geographically took place.[163] That, however, did not stop Wall Street's too-big-to-fail swap dealing banks from continuing to evade the letter and intent of the statute and guidance.[164] One such transparent evasion was the "de-guarantee" dodge, by which each of the biggest Wall Street dealers entered into supposedly non-guaranteed swaps transactions in London and other foreign jurisdictions, which the dealers claimed made the Dodd-Frank Act inapplicable.[165] Another one was the relentless attempt to get U.S. regulators to allow foreign regulators to regulate U.S. dealers' overseas swaps activities under the claim of "comparable regulation." This was nothing more than outsourcing to foreign regulators the protection of U.S. taxpayers, even when those foreign regulators had a long and miserable record of failing to protect their own taxpayers and financial systems. It was grossly irresponsible to think that they would adequately regulate U.S. swap dealer activities to protect U.S. taxpayers.

Addressing Systemic Risk

The financial crisis revealed a number of structural issues in U.S. financial regulation. Importantly, gaps in regulation left many so-called "shadow-banks" that engaged in bank-like activities, such as AIG, Bear Stearns and Lehman Brothers, unregulated or underregulated. In addition, financial regulation was significantly siloed—individual regulators oversaw the particular activities and entities within their jurisdiction, but no one regulator monitored the entire financial system for risks. The Dodd-Frank Act established FSOC to remedy these critical shortcomings. Under the Obama administration, FSOC was formed and functioning.

Entity Designations—MetLife, AIG, Prudential, GE Capital

One of the most critical authorities provided to FSOC was the authority to designate nonbank financial firms as "systemically important", and therefore subject to enhanced prudential standards and oversight, if their failure would pose a threat to the financial system. AIG, Lehman Brothers, and Bear Stearns—the firms whose failures, or near failures, were perhaps most associated with the crisis—were nonbanks. Regulatory gaps allowed these shadow banks to escape meaningful prudential regulation; FSOC's entity-designation authority gave it a powerful tool to prevent systemically important shadow-banks from escaping regulation.

However, FSOC, under the Obama administration, designated just four financial firms for prudential regulation—Prudential, GE Capital, AIG and MetLife.[166] Pursuant to FSOC's guidance on designation, the process for each designation was thorough, including an opportunity for the company to present evidence relevant to the determination decision, and an exhaustive, data-driven analysis of each of the relevant factors.[167] FSOC also committed to an ongoing review of its designation determinations.[168] This resulted in the subsequent rescission of GE Capital's designation in 2016 after it had de-risked and was no longer systemically important.

Activity Designations—Recommended More Robust Money Market Fund Regulations to SEC

Section 120 of the Dodd-Frank Act also gave FSOC the responsibility of identifying particular activities that might pose a threat to the financial system and making recommendations to regulators to strengthen regulation of that activity. While this activity-designation authority is not as powerful as FSOC's entity designation authority—indeed, FSOC can only make recommendations—it is still an important tool for identifying risky activities and encouraging primary regulators to be proactive in addressing those risky activities.

FSOC, under the Obama administration, issued proposed recommendations to address risks in money market funds.[169] During the crisis, the money market fund industry nearly collapsed, and would have were it not for a $3.4 trillion bailout in the form of a taxpayer backed guarantee of the entire industry.[170] FSOC determined that stresses on money market funds could propagate through the entire financial system, and thus proposed a set of possible reforms to the SEC that would mitigate the risk of the sorts of runs that nearly collapsed the industry during the financial crisis.[171]

"During the crisis, the money market fund industry nearly collapsed, and would have were it not for a $3.4 trillion bailout in the form of a taxpayer backed guarantee of the entire industry."

Office of Financial Research

The Dodd-Frank Act created the OFR "to improve the quality of financial data available to policymakers and facilitate more robust and sophisticated analysis of the financial system."[172] Under the Obama administration, OFR was staffed and funded, and monitored the financial system and produced extensive, quality research to inform policymakers and the public about critical issues related to the financial system and financial stability.

The OFR also established a number of tools to monitor the condition of the financial system—the bank systemic risk monitor,[173] the financial stress index,[174] and the money market monitor,[175] among others. It published the "Financial System Monitor,"[176] a periodic report that represented "the OFR staff's best interpretation of financial market developments and views."[177] OFR also worked with other regulators on programs designed to increase the quality of data used by those regulators to monitor the markets they oversaw—including a critical project with the CFTC to improve the data collected by swap data repositories.[178] OFR also published a number of white papers, discussion papers, working papers, briefs and other documents reflecting its research, documents that contribute to the understanding of the risks and issues facing the financial system.

The Obama Administration's Unfinished Agenda

In spite of unrelenting opposition from the financial industry, with Wall Streets' handful of too-big-to-fail firms and their Washington trade groups and allies in the lead, the Obama administration completed many of the most important Dodd-Frank Act reforms that made the financial system safer, protected investors and consumers, and redirected banks to supporting the productive economy and away from socially useless gambling activities. Nonetheless, there were also important reforms that were left undone, or that needed significant additional work to be effective, and that were ultimately left for the next administration to tackle.[179]

Speculative Position Limits

While few know it, commodity markets are crucial for all Americans. For example, the availability and price of cereal, bread, gas, oil and many other daily items depend on commodity markets. Speculative position limits are critical to ensuring that those markets enable price discovery based primarily on the legitimate forces of supply and demand rather than excessive speculation that fuels price volatility as well as boom-bust cycles, all to the detriment of producers and purchasers.[180]

Section 737 of the Dodd-Frank Act required the CFTC to establish speculative position limits, "as necessary," to prevent price volatility in derivatives markets and key commodities. The CFTC, under President Obama, issued a comprehensive position limits rule,[181] although it failed to use its Dodd-Frank Act authority to also regulate destabilizing commodity index and similar funds that most recently played a role in the panic leading to negative prices in the oil markets.[182] However, that rule was vacated by a district court.[183] Since then, the CFTC has attempted in fits and starts to complete this rulemaking, but has failed to finalize a position limits rule, leaving Americans critically exposed to speculation-fueled price volatility for everyday goods.[184]

Executive Compensation

As noted above, pre-crisis executive compensation schemes incentivized short-term thinking and excessive risk-taking, at the expense of the long-term success and safety and soundness of the firm, as well as the financial system and the economy. The Dodd-Frank Act sought to correct this imbalance with a number of requirements related to executive compensation.[185] While there has been some movement in addressing executive compensation—for example the SEC has finalized rules requiring greater disclosure of executive pay[186] and giving shareholders some input into compensation decisions[187]—critical rules that would limit the incentivization of excessive risk-taking, have yet to be finalized.[188] The same is true for the rule requiring companies to claw-back executive compensation based on ill-gotten gains.[189]

Credit Rating Agencies

The SEC has failed to address the most critical reform to make credit rating agencies more reliable. Specifically, credit rating agencies are typically paid by the very issuers whose bonds and other securities they are called on to rate. This creates an obvious and dangerous conflict of interest

that manifested itself in a multiple, insidious ways in the financial crisis—many entities relied on credit ratings of the complex mortgage-backed securities that fueled the crisis, to the exclusion of their own analysis. However, the rating agencies, looking to ensure repeat business from the issuers whose securities they were rating, blessed the securities with higher ratings than the toxic mortgages underlying the securities warranted. The false sense of security this created, followed by the inevitable downgrades when the highly rated securities began to fail, arguably, "perhaps more than any other single event," triggered the crisis.[190] The Dodd-Frank Act required critical reforms to address these issues.

The SEC has adopted some reforms. However, the most important—creating an independent assignment system for ratings on "structured" debt securities (i.e. asset-backed securities) so the credit rating agencies will not have an incentive to yield to their clients, distort their ratings and retain a steady flow of repeat business—has yet to be addressed.[191] That reform was mandated by Section 939F of the Dodd-Frank Act.

"Pre-crisis executive compensation schemes incentivized short-term thinking and excessive risk-taking, at the expense of the long-term success and safety and soundness of the firm, as well as the financial system and the economy."

THE DODD-FRANK ACT UNDER

THE TRUMP ADMINISTRATION

Even though some of the rulemaking required by the Dodd-Frank Act was incomplete, the Obama administration was largely successful in fulfilling the Act's primary goals and implementing the law. Given the relentless and well-funded opposition from the financial industry and its allies, with Wall Street's most powerful and well-connected too-big-to-fail banks in the lead, this was an amazing accomplishment.

Unfortunately, President Trump entered office promising to undo that progress. Indeed, it was only ten days after his inauguration that he promised, to Wall Street's thunderous applause, to "do a big number" on the Dodd-Frank Act.[192] Appointing Goldman Sachs's President Gary Cohn as head of the National Economic Council signaled that he was committed to siding with Wall Street against Main Street at every opportunity. That is what his administration has done from the beginning to the present day as his (de)regulators rush to kill or weaken as many financial protection rules as possible before the presidential election in November 2020.

The Treasury Department's Review of Regulations Was a Roadmap for Widespread Deregulation

The Trump administration wasted no time in sending a clear signal that it was committed to deregulation and rolling back the financial protection gains made under the Obama administration. On February 3, 2017, President Trump issued Executive Order 13772, which identified the "Core Principles" that would guide his Administration's approach to financial regulation. The Executive Order also directed the Treasury Secretary to report on what actions "have been taken, and are currently being taken, to promote" those principles.

PHOTO ABOVE: U.S. President Donald Trump signs House Joint Resolution 41, which removes some Dodd-Frank regulations on oil and gas companies, during a bill signing ceremony in the Oval Office of the White House in Washington, D.C., February 14, 2017. Photo Credit: Saul Loeb via Getty Images.

In response, the Treasury Department released four reports between June 2017 and July 2018 on the following subjects:

- Banks and Credit Unions (released June 12, 2017)
- Capital Markets (released October 6, 2017)
- Asset Management and Insurance (released October 26, 2017) and
- Nonbanks and Financial Technology (released July 31, 2018).

These reports in substance largely reflected the financial industry's deregulatory wish lists that it had been pushing since the Dodd-Frank Act was enacted in July 2010. The intent was clear: undermine or eliminate as many of the financial stability rules as possible, particularly those Wall Street had been focusing its attacks on for years.

The supposed justification of the Trump administration's deregulatory agenda set forth in these reports is, unsurprisingly, baseless.[193] Essentially, the Trump administration, repeating the arguments of the financial industry and its allies, attacked financial reform generally and the Dodd-Frank Act in particular as so burdensome and onerous that banks would not be profitable, which would lead to lower lending and therefore less economic and job growth. Those unending "sky-will-fall" claims have been bellowed by the industry in response to virtually every proposed financial law, rule and regulation since the Great Depression of the 1930s. They have been equally ***consistently disproved over the decades by objective evidence on jobs, economic growth and increased lending***. However, that has not stopped the industry, its allies and the Trump administration from repeating them nonstop.

Contrary to these claims, it is simply not the case that financial protection rules, on the one hand, and bank profitability and lending as well as economic growth, on the other, are mutually exclusive. In fact, a strong banking sector and durable, sustainable economic growth require effective financial protection rules that ensure a balanced, competitive financial sector working in support of the real economy, jobs, savings, education, a secure retirement and a rising standard of living.[194] In addition,

financial crashes are the ultimate growth and job killer[195] as proved by the costs of the 2008 crash.[196] As Wall Street titan John Mack admitted, Wall Street needs strong regulation to prevent the negative outcomes of crashes: "We cannot control ourselves. You have to step in and control the Street. Regulators? We just love them."[197]

When the Trump administration came into office, America's financial system was much better capitalized[198] and much less leveraged, with lower risk, than it was before the 2008 financial crisis,[199] while still lending to and supporting the productive economy and economic growth. This has been amply demonstrated. For example, the FDIC reported at the beginning of the Trump administration that the financial sector was seeing record profits, the rate of loan growth for the industry remained above the growth rate of GDP, and loan balances for community banks were up an astonishing 7.7 percent year-over-year.[200]

Martin Gruenberg, the then-Chairman of the FDIC, reviewed this data at the beginning of the Trump administration in testimony before the Senate Banking Committee and noted "…[A]nnual increases in industry net income have averaged 7.8 percent per year since 2011. FDIC-insured institutions reported a record $171.3 billion in net income in 2016, marking a net increase of 44 percent over the past five years."[201] The *American Banker* also reviewed the evidence at the time and concluded:

> "Republicans have repeatedly asserted that the 2010 financial reform law has increased the cost of consumer lending and cut off access to credit. ... Yet the available data indicates otherwise. Consumer credit has roared back in the six years since Dodd-Frank, with a 46% jump in outstanding consumer credit to $3.8 trillion. ... *[T]he fact remains that mortgage, auto and credit card lending have all gone up since 2010.* [Mortgage] lending standards are as loose as they've been since the downturn. ... Auto lending has been on a tear since the financial crisis .... Credit card lending has returned to pre-crisis levels with total lending hitting an all-time high of $996 billion."[202]

Bloomberg reached a similar conclusion:

> "Lending declined initially after 2008, when the entire banking industry was almost wiped out by the collapse of the U.S. housing market. But it's grown steadily since then, expanding by 6 percent a year since 2013, far faster than the economy. Banks now have a record $9.1 trillion of loans outstanding."[203]

The Federal Reserve Board Chair testified before the Senate Banking Committee that commercial and industrial lending had surged in the years before the Trump administration came into office, along with industry profits:

> "There's much more capital in the banking system. U.S. banks are generally considered quite strong, relative to their [international] counterparts. They built up capital quickly, partly as a result of our insistence that they do so, following the financial crisis….They're gaining market share and they remain quite profitable."[204]

Former Federal Reserve Board Chair Paul Volcker made similar observations in April 2017 in remarks to the Bretton Woods Committee:

> "[C]laims that Dodd-Frank and other regulatory approaches have somehow gravely

> damaged the effective functioning of American financial markets, the commercial banking system, and prospects for economic growth simply do not comport with the mass of the evidence before us. Here we are in 2017 with a near fully employed economy, close to stable prices, bank profits at a new record, and the return on banking assets again exceeding one percent. Loans at both large and small banks are at new highs, double the pre-crisis years. In fact, loan growth has again been exceeding growth in nominal GDP."[205]

These statements and data, gathered years after the Dodd-Frank Act was passed and substantially implemented by the Obama administration, provide real-time, real-life evidence that financial protection rules had not damaged the banks or the economy when President Trump came into office. Rather, they had created the conditions for sustained and balanced economic growth as well as broader prosperity and reduced inequality, which, if the financial protection rules were allowed to continue working, would have become durable and sustainable.

At the heart of the banking industry's opposition to higher capital requirements is the assertion that such requirements will depress bank lending and thereby reduce output and employment in the economy. This assertion is at odds with the empirical evidence—as well as with the appraisals of senior bank supervisors. "Better capitalized banks lend more, not less, than weakly capitalized ones."[206]

One recent impressive study, which looked at 105 large banks from advanced economies over the 1994-2012 period, finds that after holding other factors constant, a 1%-point increase in the equity to total assets ratio (i.e., the leverage ratio) is associated with a 0.6% increase in total lending growth. With this empirical finding, a key pillar of the case against much higher capital requirements is taken away.[207] The upshot is that, when the Trump administration came into office, there was no legitimate basis for the rollback of financial protection rules described below—financial companies had been historically profitable as the Dodd-Frank Act reforms had been implemented.

> "When the Trump administration came into office, there was no legitimate basis for the rollback of financial protection rules—financial companies had been historically profitable as the Dodd-Frank Act reforms had been implemented."

Given that the stated arguments against the Dodd-Frank Act and financial reform have repeatedly and thoroughly proven to be false, the basis for the attacks become clear: the financial industry—and Wall Street's too-big-to-fail banks in particular—did not want to be forced to bear the actual costs of their high-risk, dangerous and anti-social activities. They wanted to continue the "heads I win, tails you lose" model that had enriched them for decades and shifted their losses to the public.

More importantly, they wanted to remain too-big-to-fail and be able to extort bailouts from regulators, policymakers and elected officials: "bail us out or the financial system will collapse and the Main Street economy will get crushed"—that is what too-big-to-fail means.[208] After all, if you had a choice to be bailed out and keep your hundreds of millions in wealth as well as your executive position or to lose all your money, your job and your reputation in bankruptcy, you would choose the bailout every time as well. The former is what Goldman, Sachs, Morgan Stanley, Citigroup and dozens of

"The Trump administration has sided with Wall Street, the financiers and the financial industry against Main Street families, businesses and the public interest almost every time."

Photo Credit: Drew Angerer via Getty Images

other financial firms in 2008 were afforded, while the latter is what happened at Lehman Brothers, the only financial firm that was allowed to go bankrupt.[209] That is why the role of regulators, policymakers and elected officials is inevitably adverse to the financiers and why they have to force even the most modest and sensible financial protection rules on the financial industry.[210]

That is what the Obama administration did and what the Trump administration refused to do; indeed, the Trump administration has sided with Wall Street, the financiers and the financial industry against Main Street families, businesses and the public interest almost every time, as the following demonstrates.

Prudential Standards[211]

Capital and Liquidity Requirements

Under the Trump administration, the banking agencies have weakened capital and liquidity requirements intended to ensure that banks, particularly the largest banks, will have sufficient financial resiliency in the face of severely adverse stress. This began with the 2017 Treasury Report on banks and credit unions, which generally favored relaxed capital, liquidity and leverage requirements. Over the next two years, the banking agencies sought to implement those goals by proposing a series of deregulatory rules, among other actions. This included an April 2018 proposal to weaken the enhanced supplementary leverage ratio ("eSLR") that applies to large banks,[212] and a December 2018 proposal to raise the thresholds for the applicability of enhanced capital and liquidity requirements.[213] These efforts culminated in a final rule issued on November 1, 2019, in which the FDIC, OCC and Federal Reserve reduced capital requirements for some of the largest and riskiest banks ("2019 Capital Rule").[214] For very large banks with $250 billion to $700 billion in assets, the 2019 Capital Rule allows them to exclude "accumulated other comprehensive income" in regulatory capital.[215] For these banks, it also significantly reduces liquidity coverage ratio ("LCR") requirements.

Further, large banks with $100 billion to $250 billion in assets are not subject to the SLR requirement, and, generally speaking, will not be subject to the LCR.[216] According to the agencies, the changes to the capital rule will result in a reduction of $11.5 billion of risk-mitigating capital in the system and would harm liquidity by reducing by about $62 billion the amount of high-quality liquid assets held by banking organizations.[217]

Undermining the Credibility of Stress Testing

Under the Trump administration, the Federal Reserve has also weakened stress testing requirements for the largest banks. In December 2017, the Federal Reserve proposed enhanced disclosure to the banks subject to the tests of the models used for supervisory stress tests, which would have the potential to allow banks to game the tests.[218] In 2018, the Federal Reserve issued a proposal to weaken stress testing and related capital requirements for large banks.[219] In November 2018, the Federal Reserve issued rules that would reduce the frequency of stress tests.[220] These efforts culminated in a final rule issued by the Federal Reserve on November 1, 2019, weakening this critical reform ("2019 Stress Test Rule").[221] These and other changes to the stress testing regime threatened to snatch defeat from the jaws of victory given that everyone but Wall Street's biggest banks subject to the tests recognized them as a wildly successful and effective post-crisis reform that have made the banks more resilient.[222]

The 2019 Stress Test Rule reduces the frequency of stress tests across the board. For GSIBs, the largest and most systemically significant banks, as well as banks with over $700 billion assets, the rule eliminates the requirement of a mid-year, company run stress test—these banks are now only required to conduct one company-run stress test per year. Banking organizations with assets between $250 billion and $700 billion must only publicly disclose company-run stress tests every other year. And finally, banking organizations with $100 billion to $250 billion in assets will not be required to conduct company-run stress tests at all and will only be subject to supervisory stress tests every other year. These reductions in the frequency and public disclosure of stress testing will reduce the credibility of the stress tests that are conducted and weaken public accountability of the regulators administering the tests.

"Reductions in the frequency and public disclosure of stress testing will reduce the credibility of the stress tests that are conducted and weaken public accountability of the regulators administering the tests."

The Federal Reserve has also significantly weakened the credibility of the CCAR stress tests it conducts pursuant to the 2011 Capital Plan Rule. First, it issued a rule that, instead of requiring that banks prefund capital distributions for nine quarters, only requires that banks prefund dividends for four quarters.[223] The Federal Reserve also announced it would no longer make qualitative objections to banks' capital plans, significantly weakening its supervision of banks' risk management practices.[224] It has also committed to disclosing more details about stress tests to the banks subject to the tests, thereby making it easier for banks to game the stress tests.[225] Combined, these changes have seriously undermined the strength and value of this critically important reform.[226]

Reduction of Living Will Requirements

In May 2019, the Federal Reserve and FDIC issued a proposal that would significantly weaken resolution planning requirements.[227] Also, on November 1, 2019, the Federal Reserve, OCC and FDIC issued a final rule weakening resolution planning requirements ("2019 Living Will Rule").[228] For GSIBs, the largest and riskiest banking organizations, the 2019 Living Will Rule reduces the frequency of filing a resolution plan from once a year to once every two years, with every other plan

being a "targeted plan" with reduced requirements. Thus, GSIBs will only be required to submit full living wills every four years.

This is a dramatic, consequential and irresponsible change. For example, if Lehman Brothers filed its full living will as of year-end 2004, then it would not have been required to submit another one until December of 2008, after it had already collapsed. Put differently, the living will plan that would have been applicable to Lehman Brothers when it collapsed in September of 2008 would have been almost four years old and dramatically out-of-date if not useless given the significant changes in size, complexity and activities at Lehman during those three and a half years.

Banks with $250 billion to $700 billion in assets, are only required to file a resolution plan every three years, with every other one allowed to be a "targeted plan." Finally, banks with $100 billion to $250 billion in assets are no longer required to file resolution plans at all. This reduction in the frequency and required content of resolution plans for large banking organizations portends a return to the pre-crisis days when regulators and other policymakers did not have timely, adequate information or insight into the resolvability of systemically important firms. The inevitable result is that regulators would have to assume the worst and likely bail out these banks to prevent feared but unknown contagion and systemic risks.

Volcker Rule

The 2014 Volcker Rule had proven beneficial in instilling strong risk management programs, incentives, and controls at the largest banks, while having almost no measurable negative effect on U.S. capital markets. Nevertheless, the rule has been under constant withering attacks from the industry and its allies. Notwithstanding the many pretextual arguments against the Volcker Rule, that is because reining in big, leveraged, "swing for the fences" prop bets has materially reduced the bonuses of Wall Street's executives and traders. It has also reduced the value and glamor of the swashbuckling traders who have come to dominate those banks. As it has bent to Wall Street's other deregulatory wishes, the Trump administration, via the regulators at the FDIC, Federal Reserve, OCC, CFTC and SEC, have finalized two sets of changes that have significantly weaken the Volcker Rule.[229] In 2019, and again in 2020, those regulators eliminated critical controls on market-making, hedging and other trading activities as well as investments in hedge funds and other private funds ("New Volcker Rule"), all of which made the direct and indirect proprietary trading prohibitions of the Dodd-Frank Act almost impossible to enforce.[230]

The result will be diminished risk management that will impede progress toward encouraging the largest banks to focus on real economy lending to businesses, homeowners and consumers rather than structuring products or engaging in sophisticated trading activities having minimal benefit for everyday Americans.

The de facto repeal of the Volcker Rule's most critical provisions is readily apparent, albeit obscured by misdirection and misleading characterizations of the revised provisions and their effects. In reality, among other things, the New Volcker Rule created at least four major loopholes:

- First, through a combination of technical changes to definitions, the New Volcker Rule substantially narrowed the scope of financial instruments subject to the Volcker Rule's

restrictions and prohibitions. This means that the Volcker Rule, in its current form, does not apply to many types of speculative trading activities within banking entities.

- Second, the New Volcker Rule establishes so-called "presumptions of compliance" for certain market-making and underwriting activities. Those "presumptions" are a truly radical departure from longstanding supervisory practices and represent a return to the same failed industry self-policing policies and philosophies that prevailed before the 2008 financial crisis.
- Third, the New Volcker Rule permits banks to characterize trading activities as "hedging," even when they do not hedge, which then excludes such activities from the prohibition on proprietary trading. Better Markets has called this "Humpty Dumpty Hedging" based on a passage from Lewis Carroll's *Through the Looking Glass*, because a "hedge" under the New Volcker Rule is apparently whatever the bank says it is.[231]
- Fourth, the New Volcker Rule enacted multiple new exclusions from restrictions on speculative investments in hedge funds and private funds. It also expanded a number of existing exclusions and amended definitions and guidance to place far too many of the speculative fund-related activities of taxpayer-backed banks beyond the reach of the Volcker Rule.[232]

These changes, and numerous others in the New Volcker Rule, weaken a core pillar of the Dodd-Frank Act's effort to have taxpayer-backed banks focus on providing credit to the productive economy, rather than engaging in speculative, high-risk trading activities that boost bonuses but risk impairing economic growth and financial stability.[233]

Changing the CFPB from Consumer Protection to Predator Protection

In its first five years, the CFPB established itself as one of the most successful consumer and financial protection agencies ever.[234] One aspect of this was the initiation, and finalization, of strong consumer protection rules, including a strong payday lending rule that would protect consumers from falling into debt traps.

Regrettably, that type of consumer protection dropped dramatically when the Trump administration's brazenly anti-consumer appointees took over the CFPB.[235] President Trump first appointed Acting Director Mick Mulvaney after former Director Richard Cordray stepped down. Acting Director Mulvaney, who has openly admitted that as a Congressman he catered to the desires of the industry interests that lined his campaign's coffers,[236] had an open aversion to the CFPB.[237] Despite only serving in an interim capacity, Mulvaney undertook a number of actions to undermine the CFPB, including: politicizing the professional organization by installing a number of political cronies to senior positions at the CFPB to oversee and interfere with the professional staff;[238] undertaking a pointless, counterproductive effort to rename the CFPB, which would have cost taxpayers $19 million and the financial industry $300 million;[239] firing the CFPB's advisory council;[240] zeroing the CFPB's budget; and reopening the CFPB's well-considered payday lending rule,[241] among other things.

"One aspect of this was the initiation, and finalization, of strong consumer protection rules, including a strong payday lending rule that would protect consumers from falling into debt traps. Regrettably, that type of consumer protection dropped dramatically when the Trump administration's brazenly anti-consumer appointees took over the CFPB."

Significantly, when Director Kathy Kraninger, a Mulvaney protégé with no consumer protection experience, was confirmed as the permanent director, she took up Mulvaney's efforts to neuter the bureau if not decisively move it to favor consumer predators. For example, she continued the work he began to dismantle the payday lending rule by proposing to rescind the requirement that lenders ensure borrowers can actually repay their loans, which would allow payday lenders to continue to make unaffordable loans that trap consumers in an endless cycle of debt.[242] The rule, which was finalized largely as proposed on July 7, 2020, reverses a well-considered rule that was implemented after five years of exhaustive rulemaking, during which the CFPB compiled ample evidence of the harm payday loans impose on consumers.[243]

Notably, in proposing to rescind the payday lending rule, Director Kraninger failed to produce any evidence countervailing the CFPB's previous findings of harm, and in fact disclaimed any responsibility to produce any such evidence.[244] This blatant failure to provide evidence when proposing and finalizing rules the industry seeks has been a hallmark of President Trump's regulators at virtually all the agencies.[245]

The indefensible gutting of the payday lending rule was also corrupted by egregious improper industry influence. Reporting revealed that the CFPB's decision to rescind the underwriting provisions of the payday lending rule was influenced by secret meetings between the payday lending industry (directly or through its lobbyists and representatives) and the CFPB.[246] The existence of these meetings, confirmed by an industry participant, contradicts statements by the CFPB that it did not meet with the industry prior to issuing its proposal.[247]

Also, of significant concern is the dramatic rollback of the CFPB's supervision and enforcement activities.[248] Under the Obama administration, the CFPB, through supervision and enforcement, required the industry to return more than $12 billion to almost 30 million Americans who had been ripped off, cheated or swindled by the financial industry.[249] Since the departure of former Director Cordray, that activity has fallen off considerably. Under former Acting Director Mulvaney, who had an open hostility to the Bureau's very existence, the CFPB brought only 11 enforcement actions, the fewest since 2012, which was the first full year of the Bureau's existence, and less than half the number from the next lowest year (26 in 2013). Between 2015 and 2018, enforcement actions decreased by 80%.[250]

This decline continued under current Director Kraninger. In 2019, the CFPB brought only 25 enforcement actions—a slight improvement from the virtually lawless Mulvaney regime, but still far short of the admirable pace set under former Director Cordray.[251] And in 2020, the CFPB has only

brought 13 enforcement actions [as of July 20, 2020]. This significant reduction in enforcement activities undermines the potential deterrent effect of the CFPB enforcement program, giving fraudsters more confidence they can rip off consumers without being caught, and means that consumer harm that has already occurred is less likely to be remediated and redressed.

Year	CFPB Enforcement Actions
2013	26
2014	33
2015	54
2016	42
2017	35
2018	11
2019	25

Finally, Director Kraninger wholly abandoned the CFPB's defense of its structure. In an extraordinary development, the CFPB actually reversed course and, despite having achieved a favorable outcome in the Ninth Circuit, did an about face at the Supreme Court. Via the Solicitor General, and in accordance with Director Kraninger's determination, the Trump administration embraced the industry view that the CFPB's structure violated the Constitution.[252] On June 29, 2020, accepting these flawed arguments, the Supreme Court held (with Justice Kavanaugh unsurprisingly joining the majority) that the CFPB's structure was unconstitutional, and that the Director must be removable at-will.[253]

Undermining Investor Protection

Finalizing a Flawed Regulation Best Interest

As noted above, under the Obama administration, the SEC, following in the footsteps of the Department of Labor, had taken some preliminary steps towards imposing a uniform fiduciary standard on financial advisers, regardless of label; specifically SEC staff had conducted the required study on the issue and recommended adoption of a uniform fiduciary standard.[254] However, under the Trump administration, the SEC has reversed course. In 2019, the SEC finalized the misleadingly named Regulation Best Interest ("Reg. BI") on a partisan 3-1 vote,[255] with strong support from the financial industry and equally strong opposition from investor advocates.[256] While the SEC heralded the rule as a pragmatic and effective solution to the longstanding problem of conflicted investment advice from broker-dealers, in reality it is a weak and ineffectual rule that betrays Congressional intent and the SEC's primary obligation to protect investors.

Rather than establish a uniform fiduciary standard for broker-dealers and investment advisers alike, Reg. BI preserves different standards; imposes weak requirements on broker-dealers that mirror existing, weaker "suitability" requirements; exacerbates investor confusion; and relies almost entirely on disclosure as the principal investor protection mechanism, despite extensive evidence that disclosure does not protect investors. It imposes vague "best interest" requirements that may have an appealing ring but do little to solve the daunting problems confronting investors who need sound financial advice. This is not what Congress said or intended and not what investors need and deserve.[257]

"Reg. BI imposes vague "best interest" requirements that may have an appealing ring but do little to solve the daunting problems confronting investors who need sound financial advice."

Threatening Whistleblower Protections

While the success of the SEC's whistleblower program has continued under President Trump, the SEC has threatened to reverse this "$2 billion success story."[258] Specifically, the SEC has proposed two rules that would significantly undermine the program: (1) impose a cap on awards of 10% of imposed sanctions, and (2) discount or dismiss a whistleblower's award if the information provided could have been inferred from public sources.[259] These changes, if made, would threaten to undo the success of the whistleblower program, leaving investors more vulnerable.[260]

Undermining Derivatives Reforms

Proposal to Overhaul SEF Regime

As noted above, the CFTC established the SEF swaps trading regime under President Obama, which made some strides in improving the structure and transparency of the swaps market. However, instead of building on that foundation, the CFTC under the Trump administration has proposed a significant step backward. In April 2018, then-Chairman Giancarlo produced a white paper outlining his proposed vision for the SEF regime,[261] which would have significantly weakened it. In November 2018, the CFTC followed up with a proposal which, if finalized, would eliminate mandated swaps trading protocols, limit pre-trade transparency, permit Wall Street dealers to use market power to control and limit access to swaps markets, and reduce oversight of SEFs and individual entities acting on SEFs.[262] In 2020, the CFTC also issued a proposal that would limit post-trade transparency in the markets by increasing delays for public reporting of certain large swaps trades by a ridiculous and arbitrary 19,000%.[263] These changes would further entrench the Wall Street derivatives dealers club,[264] weaken customer and market participant protections, and kill transparency and competition.

On a positive note, the proposal would eliminate the so-called "made available to trade" regime.[265] Under that regime, the CFTC essentially allowed an extra-statutory exception to the trading mandate, allowing swaps that should be traded on an exchange to continue to be traded off-exchange until a SEF or other exchange took the initiative to make a filing and declare the swap available to trade.

Reducing Margin Requirements

Under the Obama administration, the prudential banking regulators required the collection of initial margin for swaps between swap dealers and their affiliates, but the CFTC exempted such inter-affiliate swaps from this requirement. Now, under the Trump administration, the banking regulators have followed the CFTC's flawed approach, to exempt inter-affiliate swaps from the initial margin requirement,[266] which is directly contrary to the express language in the Dodd-Frank Act that requires margin for "all" swaps.[267]

In addition to being contrary to the Dodd-Frank Act, eliminating inter-affiliate initial margin requirements disregards the critical safety and soundness objective that margin serves, including preventing the importation of foreign derivatives dealing risks to the U.S. financial system.

Eliminating inter-affiliate margin will have a significant impact on the amount of risk-reducing margin in the system—ISDA, a trade group, determined that, as of the end of 2018, firms held about $39.4 billion of margin to cover inter-affiliate swaps, constituting 31% of all regulatory margin.[268] Allowing this margin to be drained out of the financial system would have a significantly negative impact on the safety and soundness of the financial system, particularly on taxpayer-backed banks that will take on additional risk from their inter-affiliate transactions involving foreign derivatives dealing activities of affiliates.

Proposed Weak Cross-Border Rules

As mentioned above, while the Dodd-Frank Act contained a broad cross-border provision to ensure that its swaps rules would apply to swaps with a direct and significant connection with activities in, or effect on, U.S. commerce, the CFTC under President Obama did not finalize cross-border rules, opting instead to issue interpretive guidance that the derivatives dealers exploited to avoid the Dodd-Frank Act's reforms. Under President Trump, the CFTC has proposed cross-border rules that would resolve any concerns about the enforceability of guidance.[269] However, this is the sole redeeming quality of the CFTC proposed cross-border rules.

Substantively, the CFTC's proposal would allow significant evasion of U.S. law and regulatory arbitrage by excluding from the coverage of U.S. law transactions and financial arrangements that, in substance, implicate the safety and soundness of U.S. banks and the U.S. financial system. For example, CFTC's proposed cross-border regulations include the following very concerning provisions:

- **Guaranteed Entities:** The CFTC proposed a narrowed definition of "guarantee," which would exclude a host of financial arrangements between U.S. banks (and other U.S. legal entities) and non-U.S. legal entities. This definitional proposal alone could remove tens of thousands of swaps executed with U.S. financial support from the reach of U.S. law and perhaps result in de-registration of non-U.S. SDs posing risks to affiliated U.S. banks (and others) and the U.S. financial system.
- **Significant Risk Subsidiaries:** The CFTC proposed a new category of non-U.S. persons consolidated with a U.S. parent—the significant risk subsidiary ("SRS"). The proposed SRS tests for determining whether sufficient risk is presented to a U.S. parent, however, would exclude far too many (almost all) consolidated non-U.S. entities from the CFTC's oversight and would not address avoidance or evasion risks addressed by the conduit affiliate category it is proposed to replace.
- **Foreign Branch Activities Restrictions:** The CFTC proposed a new foreign branch-related definition that deviates from the SEC's regulations and its own previous guidance. The new proposed definition for "swaps conducted through a foreign branch" would be used to remove thousands of swaps transactions from the requirements of the Dodd-Frank Act. The CFTC's expanded exclusion fails to recognize that foreign branches of U.S. banks are themselves U.S. persons and pose direct and significant risks to such U.S. banks and the U.S. financial system.
- **Swaps Arranged, Negotiated, or Executed through U.S.-Located Personnel:** The CFTC proposed to disregard swaps arranged, negotiated, or executed on behalf of non-U.S. persons (or foreign branches) by U.S.-located persons, which would unlawfully exclude U.S. territorial

activities from the reach of U.S. law and thereby facilitate avoidance or evasion of the Dodd-Frank Act.

- **Substituted Compliance:** The CFTC proposed a standard of review for comparability determinations, which provides the CFTC unreasonably broad, if not unlimited, discretion to consider, or not to consider, several factors in connection with assessments of foreign swaps regulatory frameworks. That discretion would likely be used to permit Wall Street dealers and others to comply with foreign regulatory requirements in lieu of requirements under the Dodd-Frank Act.

The CFTC's proposal remains excessively and unlawfully deferential to foreign regulators. In the above regards, the proposal would invite, if not guarantee, regulatory arbitrage and increase risks to swap dealers, counterparties and the U.S. financial system. The CFTC therefore must refocus its regulatory efforts on its statutory public interest mandates to ensure the safety and soundness of swap dealers and the financial stability of the U.S. financial system, as well as promote appropriate risk management, fair competition, and transparency with respect to U.S. and non-U.S. sales and trading activities that "have a direct and significant connection with activities in, or effect on, commerce of the United States."

Gutting the Financial Stability Oversight Counsel

Abandoning Entity-Designation Authority

Unjustified rescission of AIG and MetLife designations

The Obama administration was extraordinarily cautious in using its entity designation authority, almost to a fault. While innumerable nonbanking institutions received massive bailouts in 2008-2009,[270] which by definition meant that they were systemically important, the Obama administration only designated four systemically important nonbanks for increased regulation before leaving office.[271] Two were and should have been entirely noncontroversial. One was AIG, which not only failed spectacularly and engaged in outlandishly irresponsible conduct, but also required an unlimited bailout that ultimately amounted to $182 billion.[272] The other was GE Capital, which, although with fewer headlines and less egregiousness, would have gone bankrupt without being bailed out as well. The other two were global insurance companies, Prudential and MetLife.[273]

However, as soon as they arguably gained the necessary two-thirds voting representation[274] President Trump's appointees to FSOC (plus then-Federal Reserve Chair Janet Yellen) voted to de-designate AIG,[275] the gigantic global financial firm that was at the center of causing and spreading the catastrophic 2008 financial crash.

Contrary to Treasury Secretary Steve Mnuchin's assertion that de-designating AIG "demonstrates our commitment to act decisively to remove any designation if a company does not pose a threat to financial stability," AIG still very much posed a threat to financial stability. This was detailed by the members of FSOC who dissented from the vote,[276] as well as a report by the Center for American Progress coming to the same conclusion.[277]

"Thus, in addition to its explicit abandoment of its entity-desingation authority, the FSOC appears to also be de facto abandoning its activities-designation authority."

FSOC's action again left AIG unsupervised as a reckless recidivist free to return to its high-risk gambling. This is *not* speculation: at the same time it was deregulated, the *Financial Times* reported that "a team of federal officials who have been stationed within [AIG] to monitor its activities will be heading for the exit" and AIG could go back to doing whatever it wants, including making large acquisitions, which the CEO said it would do. As *Bloomberg News* put it, "AIG Is No Longer Too Big To Fail, So Now It Wants To Get Bigger,"[278] which the *Financial Times* pointed out "will be a reversal for AIG, which since the crisis has shed assets around the world ... in a push to become smaller and simpler." That, of course, was the basis FSOC just used to justify de-designating AIG, which immediately changed course.

The net result is that AIG is now *less* regulated than before the 2008 crash. AIG will be "supervised" by state insurance regulators, which have no capacity to regulate a gigantic global financial company like AIG; AIG will not be subject to any federal oversight.[279]

Under President Trump, FSOC also de facto de-designated MetLife. Specifically, in apparent coordination with MetLife's lawyers, the Trump administration abandoned the meritorious appeal[280] of the lower court's flawed decision vacating MetLife's designation, allowing that flawed decision to stand as the final word on MetLife's designation and on FSOC's designation authority.[281] Finally, FSOC also de-designated Prudential Insurance.[282]

Having de-designated every previously designated firm, the Trump administration is essentially taking the position that there is not one single systemically important nonbank financial firm in the United States, a preposterous and outrageous position on its face.

Flawed entity designation guidance

To put the nail in its own coffin on its designation authority, FSOC issued guidance that intentionally crippled its future ability to designate nonbank financial firms for prudential regulation. Specifically, FSOC's guidance provided that it would:

(i) focus on its weaker, "activities-based" designation authority rather than its more robust "entity-based" designation authority, and only use the latter as a matter of last resort;

(ii) undertake an unnecessary cost-benefit analysis prior to designating nonbank firms for prudential regulation;[283] and

(iii) only designate a nonbank firm for prudential regulation if it determines that "material financial distress" at the firm is likely.[284]

This last aspect of the guidance is especially flawed and flies in the face of lessons learned during the financial crisis, when firms such as Bear Stearns, Lehman Brothers and AIG went from appearing healthy to the brink of failure within months, weeks, and sometimes days.[285]

Abandoning Activity-Designation

In abandoning its entity-designation authority, FSOC indicated it intended to primarily if not exclusively focus on using its activity-designation authority to mitigate systemic risk.[286] This is directly counter to Congress's intent in the Dodd-Frank Act. Congress clearly intended FSOC's entity-designation authority, which involves ***mandatory*** regulation of designated firms, to be its primary tool for mitigating risks to the financial system from systemically significant nonbanks.[287]

By contrast, FSOC's activities-designation authority is extremely limited and only gives the FSOC the ability to make ***recommendations*** to regulators. There is no mandatory component to FSOC's activities-designation authority, which makes it plainly inadequate to serve as the primary tool for addressing systemic risk.[288] Nevertheless, FSOC apparently is not using its activities-designation authority either. Thus, in addition to its explicit abandonment of its entity-designation authority, the FSOC appears to also be de facto abandoning its activities-designation authority.

De Facto Killing the Office of Financial Research

As explained above, OFR is a critical tool for monitoring the financial system, but the Trump administration has drastically cut the staffing and budget of OFR.[289] As a result, OFR is less able to perform its critical function of investigating, researching and monitoring potential systemic risks to the financial system. Notwithstanding that FSOC under the Trump administration has apparently abandoned its entity- and activities-based designation authority, OFR could provide regulators and other policymakers with the analysis and evidence they need to respond to risks in the financial system. However, with grossly insufficient resources and staff, OFR is not likely to be able to provide these critical tools.

"Notwithstanding that FSOC under the Trump administration has apparently abandoned its entity- and activities-based designation authority, OFR could provide regulators and other policymakers with the analysis and evidence they need to respond to risks in the financial system."

WHAT'S NEXT FOR FINANCIAL REFORM,
INCLUDING BEYOND THE DODD-FRANK ACT?

As noted, the Dodd-Frank Act, which was taken seriously and largely implemented by the Obama administration. has been relentlessly attacked and undermined by the Trump administration. However, while significant parts have been weakened, the core pillars are still in place and working (at least so far). The question now is, what comes next for financial reform, including beyond the Dodd-Frank Act? Answering that question in detail is beyond the scope of this Report, but we would be remiss not to at least mention some of the ideas being raised, without necessarily endorsing or taking positions on all of them.

Reversing Dangerous Trump-Era Deregulation

The first step should be to reverse the dangerous Trump-era deregulation. Banking regulators need to ensure that the prudential standards that have enhanced the safety and soundness of banks even as they receive record earnings are restored, along with the requirements relating to stress tests, living wills and the Volcker Rule that have been baselessly weakened. The CFPB and SEC must refocus on protecting consumers and investors, respectively, instead of enabling predators and fraudsters. The CFTC must fully and properly regulate derivatives to ensure they never again bring the financial system to the brink of collapse and to ensure competition and market participant protection. Finally, FSOC must be revived and revitalized so it can effectively monitor the financial system for systemic risks and ensure adequate regulation of the shadow banking system, systemically important nonbanks most of all.

The dangerous mindset that has led to Trump-era deregulation must also be changed. What is good for Wall Street and corporate executives is not necessarily good for Main Street or the public interest. Far too often, Trump administration regulators have conflated private gain with the public interest. Regulators must understand that their mission is to protect, promote and prioritize the public interest, not enlarge the financial industry's private profits at the expense of the public.

As important, financial protection rules, even when called "regulations," are not inherently and necessarily bad, costly or evil. In fact, often they are key protections that save money and vindicate the public interest. The ideology that "regulations" are bad must end. Yes, ineffective, needlessly burdensome or wasteful regulations and rules are bad, but that does not accurately describe the financial protection rules made necessary by the financial industry's reckless and illegal conduct and the 2008 crash it caused. Indeed, the re-regulation of finance, as detailed above, will save the country and hardworking Americans trillions of dollars and untold suffering. And, as also detailed above, it will restore trust in our financial markets and create the conditions that will allow Wall Street to continue prospering as well.

Finishing the Unfinished Obama-Era Business

As mentioned above, several critical Dodd-Frank Act requirements have not been completed. For example, the CFTC must finish its comprehensive regulation of derivatives. That should include position limits to prevent speculative trading from causing excessive price volatility for ordinary Americans[290] and businesses and capital requirements for swap dealers to ensure that they operate in a safe and sound manner. The CFTC must also ensure full cross-border compliance with U.S. laws and break the anti-competitive, anti-consumer oligopoly that dominates the swaps markets.

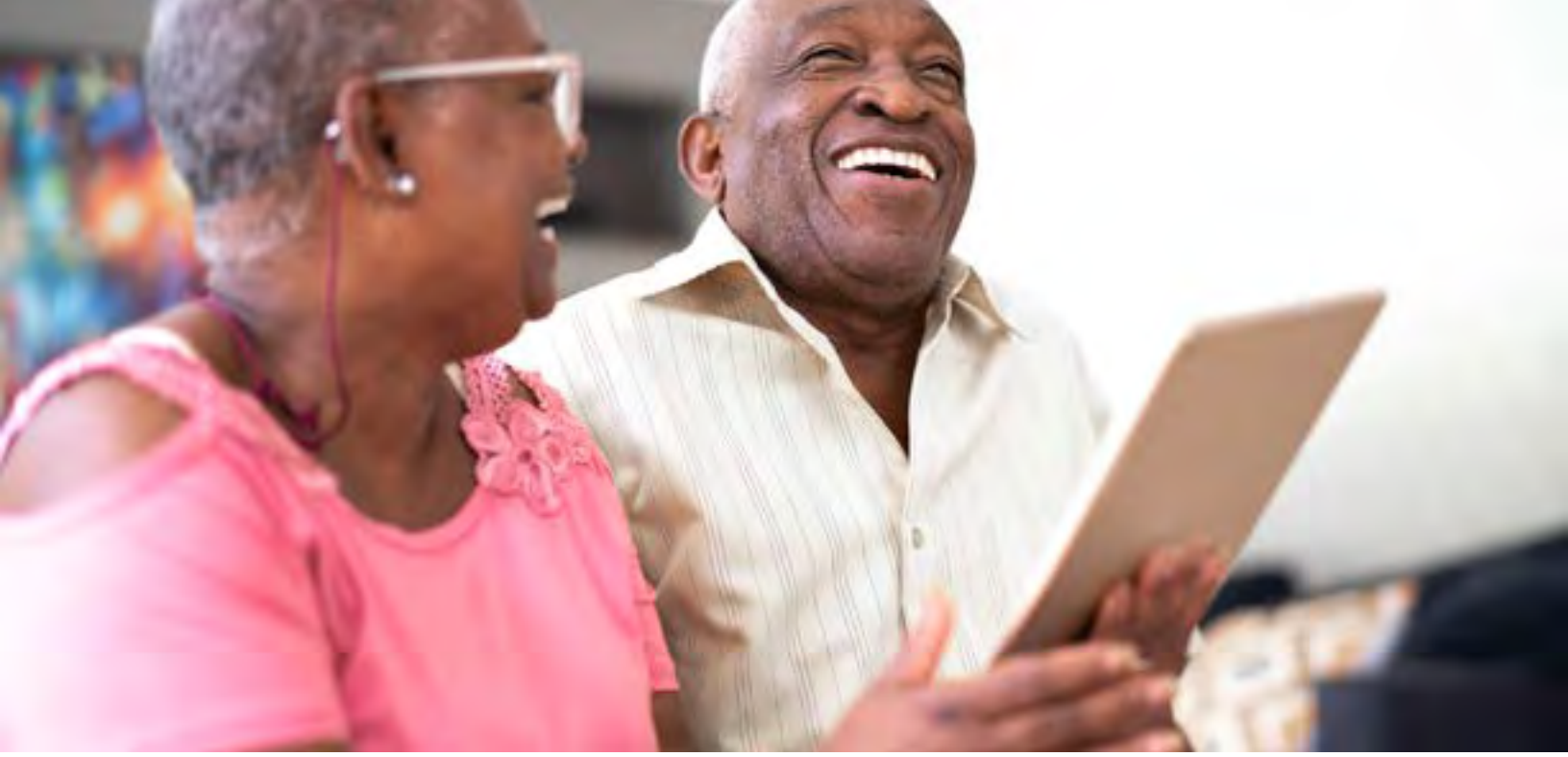
The SEC must also address several issues that led directly to the financial crisis. Executive compensation rules must ensure that executives do not engage in excessive risk-taking, and that their interests are aligned with relevant stakeholders.[291] Moreover, the SEC must enact a tough rule requiring that ill-gotten or undeserved compensation is clawed-back from executives and other corporate officers.[292] The conflicts of interest that still dominate the credit rating agencies also must be reined in. Lastly, the $4+ trillion money market fund industry, which has now been bailed out twice in twelve years, must finally be adequately regulated to protect the financial system and taxpayers.[293]

Financial Reform Beyond the Dodd-Frank Act

The Dodd-Frank Act, as properly implemented, has been and will be a major advance in protecting Americans from the sort of excessive risk-taking and predatory practices that led to the 2008 financial crisis, and it will help prevent or mitigate the next financial crisis. In fact, the performance of the financial system and markets—particularly banks—during the COVID-19 pandemic has, by and large, demonstrated that the financial system has been made safer as a result of the Dodd-Frank Act reforms. Financial markets have not acted as a contagion conduit that exacerbates the economic downturn, as they did in 2008.

However, there is a key difference between ***reining in*** the financial industry so it cannot cause a financial crash or economic crisis, on the one hand, and ending the threat from too-big-to-fail and reforming the financial system so it serves the real economy, on the other.

Even after the Dodd-Frank Act—the financial system remains too much of a dangerous wealth extraction mechanism for the few, rather than a wealth creation mechanism for the many.



Addressing this fundamental structural problem should be the goal of policymakers looking to build on the successes of the Dodd-Frank Act. Some possible policies to achieve this goal include:

- **Breaking Up the Biggest Banks:** Too-big-to-fail, i.e., the idea that the government will always bail out big, systemically important firms rather than let them fail and possibly take down the economic and financial system, is only one problem with oversized firms. These megafirms are simply too-big-to-manage and too-big-to-regulate (in addition to being too-big-to-jail). While most people think of the Wells Fargo "fake account" scandal, that is really only one particularly egregious example of too-big-to-fail banks' record of lawbreaking.[294]

  Better Markets has detailed how the six largest Wall Street banks have racked up an incredible $180 billion in fines and other legal sanctions for violations of law over the past twenty years, and the pace of legal violations has only increased since the 2008 financial crisis.[295] The nature and scope of violations is staggering, and points to the impossibility of managing massive financial institutions. With institutions that large, it is extremely difficult to adequately monitor and detect fraud and wrongdoing, which is why the megabanks treat their frequent fines as nothing more than a cost of doing business. Moreover, these institutions use their enormous economic power to buy political power, which they use to entrench and enlarge their economic power. This corrupts the political system and our democracy, along with our financial and economic systems. Therefore, breaking up too-big-to-fail financial institutions should be a priority, and the solutions under serious consideration should include implementing a size cap and enacting a new Glass-Steagall law, among other things.

- **Ending Taxpayer Bailouts By Making All Financial Firms Stronger and Safer:** All large, systemically important financial firms—whether banks or nonbanks—must be required to have sufficient liquid, high quality capital to absorb their own losses without needing taxpayer bailouts or extraordinary emergency support from the Federal Reserve and other financial regulators. That is clearly not the case today.[296] Thus, all banks, especially

those with more than $50 billion in assets (indexed to GDP growth), should be required to increase their capital, both on a risk-weighted and leverage basis.[297] As it is now, this should be applied on a graduated scale appropriately tailored to the size, activities and risk of the particular institution. In addition, both a "risk fee"[298] and a leverage fee assessed on the largest banks, based on their size and the riskiness of their activities, should also be considered.

- **Forcing Finance To Serve Society:** Require any financial institution that receives any material government support or subsidy, directly or indirectly, to disclose each year in granular detail and plain English all of its revenue and profits by business lines clearly delineated by whether such activities were supportive of the real productive economy or not. Those activities that are oriented towards the real productive economy should receive favorable regulatory and tax treatment and those that are not should be taxed at a higher rate and have other increased regulatory requirements.
- **Making Markets Work For Long-Term and Retail Investors:** Financial markets, especially the equities market, are characterized by a number of predatory trading practices, particularly high-frequency trading, that favor sophisticated market participants at the expense of retail investors, savers and others with long-term investment goals. Ending rigged, opaque, fragmented markets where predators and high-frequency traders rip off investors must be a priority.[299] To its credit, the SEC under the Trump administration has (to some extent) sought to address market structure issues and predatory trading practices, including by trying to initiate a pilot program to study how exchange fee structures contribute to these predatory practices, and gesturing in the direction of building a Consolidated Audit Trail ("CAT") that will dramatically increase the SEC's ability to monitor the markets and catch predators. Unfortunately, these reform efforts have been marked by setbacks; the exchange fee pilot program has been vacated by the D.C. Circuit,[300] and the CAT has been marred by implementation delays.[301]

- **Refocus on Long Term Shareholders and Stakeholders:** American corporate managers are notoriously focused on increasing very short term shareholder value (and their compensation), often at the expense of both the long-term health of the company (to the detriment of long-term investors) as well as the broader community the company serves, including employees.[302] Requiring corporate decisionmakers to take into account the interests of a broader array of stakeholders rather than just short-term focused shareholders could cause managers to refrain from making decisions that are destructive but conducive to increasing short-term profits.
- **Strengthen Investor-Friendly Public Markets and Stop Expanding Dark Private Markets:** The decrease in the number of public companies has been a matter of concern across the political spectrum for some time. Many pro-industry commenters will argue that the reduction in public companies is the result of the cost and burden of being a public company, but at the same time, they seek to expand dark, private markets, which robs public investors of opportunities, transparency and accountability. The SEC under the Trump administration has, unfortunately, been receptive to the argument that it should be easier to raise capital in inherently risky dark private markets. This is precisely backwards; the reality is that any costs and burdens associated with being a public company are necessary and appropriate to have robust, transparent public markets, to ensure that investors have sufficient information to make informed investment decisions, and to provide avenues to redress investor grievances or harms. Expanding private markets is counterproductive to broad, deep public markets. A solution is to stop expanding private markets, close the many loopholes that allow companies to continue to raise money in dark private markets, and promote and protect public markets.[303]

"The SEC under the Trump administration has, unfortunately, been receptive to the argument that it should be easier to raise capital in inherently risky dark private markets."

- **Funding Wall Street Regulators Through a Financial Transaction Tax:** Proposals to impose a small financial transaction tax ("FTT") on the trillions of dollars' worth of financial transactions that take place every day has ignited a very healthy discussion about how such a tax should be structured, and what the funds would be used for. Directing a dedicated portion of any such FTT proceeds to the SEC and CFTC would help ensure that the cops on the Wall Street beat have the tools they need to keep the markets safe and fair. However, the funds could be used for other purposes. For example, Mike Bloomberg called for a 0.1% FTT in his 2020 Presidential campaign, pledging to use the revenue to address wealth inequality,[304] while Hillary Clinton in 2016 called for a tax on high-frequency trading, to make stock markets fairer and more transparent.[305] Better Markets has suggested that a tax on canceled stock market orders could virtually eliminate predatory trading, while leaving the vast majority of other investors unaffected.
- **Ensuring Board and Executive Accountability:** Corporations getting sweetheart deals and using shareholder money to buy "get out of jail free cards" for their executives years after they have pocketed the loot from their wrongdoing and misconduct has to stop. Until CEOs and executives are held personally accountable and meaningfully punished with

criminal sanctions when appropriate as well as fines and disgorgements that they have to personally pay without being covered by insurance, corporate wrongdoing will continue, indeed, increase.

Executives' deniability and lack of liability for wrongdoing at financial firms must end. Their willful ignorance or blindness should not be encouraged by allowing corporations to enable executives to avoid accountability. Financial firm executives take credit and get rewarded for all good things that happen at their firms whether they had anything to do with them or not. They should be similarly required to take responsibility for the bad things that happen as well. If they knew, should have known or failed to exercise appropriate diligence to prevent wrongdoing, they should be liable, pay meaningful personal fines and suffer industry bars and other appropriate sanctions.

Moreover, the details of all settlements between a financial firm and regulators or the Department of Justice ("DOJ") must be publicly disclosed and submitted to a judge to determine whether they are in fact based on a full investigation and are fair, reasonable and in the public interest.[306] That means disclosing in detail the misconduct that was committed, the specific individuals involved, the harm done to investors and markets, the profits reaped, the true nature of any conduct remedies, and how the sanctions will actually punish and deter the wrongdoer. And where sanctions are not imposed on any individual connected to the wrongdoing, settlements must specifically explain the reasons for this omission. Finally, there should be a "three strikes and you're out" law for bank charters and a similar provision for nonbank financial firms.

A starting point for increasing settlement transparency could be considering bipartisan legislation introduced by Senators Elizabeth Warren and James Lankford called the "Truth in Settlements Act." This would require more accessible and detailed disclosures about settlement agreements so that the public can better understand the agreements the federal government is making on their behalf. The bill would aim to correct often

misleading statements regarding settlements, which often fail to disclose how favorable the settlements are to companies, because the payments may be tax deductible or may include "credits" the settling party can earn toward the settlement amount. It also aims to address the fact that agreements are often deemed confidential, with key details or the settlement itself remaining undisclosed, further obstructing public transparency.[307]

- **Tougher Enforcement by Cops on the Wall Street Beat**: The SEC, CFTC, other financial regulators and the Department of Justice simply have to take corporate and white-collar lawbreaking more seriously. The DOJ in particular should have a muscular financial crimes department that is prioritized by the Attorney General. The use of deferred prosecution agreements must be dramatically limited. Actions where no individuals, particularly executives, are held accountable must be the rare case not the norm. 2020 Presidential candidate Mike Bloomberg called for prosecutors to target individual wrongdoers, not just corporations, for violations of the law.[308] Senator Elizabeth Warren has proposed comprehensive plans to hold corporate executives accountable, including criminal prosecutions and jail time.[309] Others have called for executives to lose all or some of their compensation and bonuses if corporate wrongdoing happens on their watch,[310] or for the Federal Reserve to fire the executives and boards of companies that have repeatedly violated the law. All proposals need to be considered and a comprehensive plan for ending financial lawbreaking by too-big-to-fail banks and their executives must end.
- **End Discrimination Against the Public Interest by Expanding Standing in Federal Court**: The financial industry and its trade groups are always able to sue financial regulators whenever they do not like a rule. However, public interest advocates usually cannot sue even when a rule violates the law or is against the public interest because standing discriminates against them and in favor of corporations. Those advocates are often required to show that they face concrete and imminent injury from the agency's actions, typically in the form of economic or commercial harm. This creates an unlevel playing field that decidedly favors industry over the public interest. This is unacceptable and wrong. The law of standing can and should be changed, and bona fide public interest advocacy organizations should be allowed to challenge violations of law by agencies in court, without being forced to show any additional monetary or other concrete harm.
- **End the Washington to Wall Street Revolving Door:** Congress should end the Washington to Wall Street influence peddling racket. It is currently legal for a bank or any corporation to hire former government officials or regulators to de facto corruptly influence policymaking, rulemaking, legislation and litigation or other legal proceedings. The obvious intent is to leverage their new hire's "public service" experience and connections to get the outcomes they want from the government. Instead of tolerating this "revolving door," the government must bar former government officials from directly or indirectly, formally or informally, influencing the government for at least five years, among other things.

- **Crack Down On Lying To Agencies During The Rule-Making Process With A Corporate Perjury Initiative**: Large corporations understand that agencies are required to consider every

comment during the notice and comment process. The process is designed to take into account the good faith concerns of everyone who might be affected by a new rule. But large corporations sometimes act in bad faith by exploiting the process and flooding the rulemaking process with industry-funded lies and misinformation and, at times, entirely fraudulent submissions. This corruption of the rulemaking process must be prohibited and those who engage in it and those who pay for it must be severely punished.

- **Stop Wall Street From Financing Climate Change**: Wall Street should not be making record profits financing climate change while hardworking Americans suffer the consequences and pay the costs. The climate crisis poses systemic risks to the financial system. The potential downside associated with a sudden collapse in fossil fuel assets is of a similar magnitude as the 2008 financial crisis. Foreign financial regulators in England and France have already warned of the possibility of such a "green swan" event. Yet American banks continue to amass exposure to the fossil fuel industry. Many of the largest banks and asset managers have increased their holdings of fossil fuel assets since the Paris Agreement. The Dodd-Frank Act gave our regulators tools to protect our financial system. Regulators, particularly the Federal Reserve and FSOC, should use those tools to address the systemic risk associated with the fossil fuel industry and Wall Street's exposure to it. The Federal Reserve should invoke its authority pursuant to Section 165 of the Dodd-Frank Act to impose enhanced prudential standards on at-risk financial institutions, including higher capital and margin requirements as well as tougher stress testing for climate change risks. Climate change risks to the financial system could be further mitigated by forcing insurers to accurately price climate risk and by forcing better climate change risk disclosure via the SEC.
- **End the Obsession with Wall Street:** Washington, D.C., if not America must overcome the obsession with Wall Street. The notion that what is good for Wall Street is good for the American economy is simply wrong, as definitely proved by the boom-bust cycles and crashes over the last several decades. However, Wall Street's massive lobbying efforts, backed by ever increasing amounts of money, has only reinforced this destructive thinking. Washington continues to give big banks no strings attached bailouts, subsidies, deregulation and favorable tax treatment. This is particularly true of the Trump presidency. But as Wall Street grows more profitable, handing out large executive bonuses and increasing dividends, the middle class shrinks: wages are stagnant while housing and food prices are increasing. Clearly, Wall Street's success does not necessarily help the broader economy. Wall Street is looting the economy, extracting ever increasing amounts of wealth, and Washington is looking the other way, if not helping it happen. In stark contrast, community banks are essential supports for the economy and America's Main Street families. Community banks must displace Wall Street's too-big-to-fail banks and become the core concern of Washington's policymakers and regulators. That would be good for the economy, the financial system and Main Street.

"Wall Street is looting the economy, extracting ever increasing amounts of wealth, and Washington is looking the other way, if not helping it happen."

CONCLUSION

We must heed the lessons of history. Ten years after passage of the Dodd-Frank Act, enacted to respond to a financial crisis that had a devastating impact on tens of millions of Americans, it has proven to be largely effective legislation that has increased the safety, soundness and stability of the American financial system. As the 2008 financial crisis taught us (and as the Great Depression taught us before that), creating and maintaining a stable financial system is critical to many other key goals, including reducing economic inequality; providing sustainable and broad-based economic growth; and protecting consumers, investors and the economy.

Recalling the lessons of history, and the Dodd-Frank Act's critical role in maintaining a safe and stable financial system, is essential as we confront the continuing effort of the financial industry to undermine the Dodd-Frank Act by advocating for weaker rules, an effort which the Trump administration has been far too receptive. We must also keep these lessons in mind as we consider what comes next in financial reform, to achieve those goals so critical to ensuring the continued strength and vitality of the American system and the prosperity of all Americans.

APPENDIX

Republican-Sponsored Amendments to S. 3217 Adopted by the Senate[311]

Amendment Number	Description of Amendment	Sponsor	Vote
Senate Amendment 4146	Excluded "no interest credit instruments" from the definition of "credit"	Senator John Ensign (R-NV)	Adopted by voice vote
Senate Amendment 4072	For a federal entity headed by a board or commission, required vote of 2/3 of board or commission members to remove an inspector general	Senator Chuck Grassley (R-IA)	Adopted by 75-21 vote
Senate Amendment 4056	Changed the net worth standard of "accredited investor" so that it excludes the value of a natural person's home in determining whether they meet the standard.	Senator Christopher Bond (R-MO)	Adopted by voice vote
Senate Amendment 4003	Changed the definition of "nonbank financial company" from company "substantially engaged" in financial activities to one "predominantly engaged" in financial activities	Senator David Vitter (R-LA)	Agreed to by unanimous consent
Senate Amendment 3997	Required companies that use certain minerals from the Congo in manufacturing process to make an annual disclosure of that fact to the SEC	Senator Sam Brownback (R-KA)	Adopted by voice vote
Senate Amendment 3992	Established credit risk retention standards for commercial mortgages	Senator Mike Crapo (R-ID)	Agreed to by unanimous consent
Senate Amendment 3986	Restricted use of federal funds for bailouts of foreign governments	Senator John Cornyn (R-TX)	Adopted by 94-0 vote.

APPENDIX

Republican-Sponsored Amendments to S. 3217 Adopted by the Senate[312]

Amendment Number	Description of Amendment	Sponsor	Vote
Senate Amendment 3918	Exempted small businesses that extend credit for the sale of non-financial goods from CFPB authority	Senator Olympia Snowe (R-ME)	Adopted by voice vote
Senate Amendment 3883	Required certain agencies, including the CFPB, to analyze impact of proposed and final rules on small businesses, and to consult with small businesses during rulemaking	Senator Olympia Snowe (R-ME)	Adopted by voice vote
Senate Amendment 3879	Established leverage and risk-based capital requirements for banks, bank holding companies, and nonbank financial companies designated systemically important by FSOC	Senator Susan Collins (R-ME)	Agreed to by unanimous consent
Senate Amendment 3827	Addressed various aspects of FDIC's Orderly Liquidation Authority, including establishing a judicial review process for exercise of that authority	Senator Richard Shelby (R-AL)	Adopted by 93-5 vote
Senate Amendment 3774	Removes references to credit rating agencies from statutory provisions	Senator George LeMieux (R-FL)	Adopted by 61-38 vote
Senate Amendment 3759	Transferred responsibility for regulating savings and loan holding companies from Office of Thrift Supervision to Federal Reserve and maintains Federal Reserve authority over state banks	Senator Kay Bailey Hutchison (R-TX)	Adopted by 91-8 vote

APPENDIX

Republican-Sponsored Amendments to S. 3217 Adopted by the Senate[313]

Amendment Number	Description of Amendment	Sponsor	Vote
Senate Amendment 3757	Allows mortgage lenders to consider the seasonality of a borrower's income in underwriting loan and establishing a repayment schedule	Senator Olympia Snowe (R-ME)	Adopted by voice vote
Senate Amendment 3755	Eliminated provision in bill that would have required detailed reporting of deposit account data	Senator Olympia Snowe (R-ME)	Adopted by voice vote

Citations

[1] *See.* Alejandro Komai & Gary Richardson, *A Brief History of Regulations Regarding Financial Markets in the United States: 1789-2009* 8-18 (Nat'l Bureau of Econ. Research, Working Paper No. 17443, Sept. 2011) (cataloging the panoply of financial regulations adopted between 1929 and 1980), https://www.nber.org/papers/w17443.pdf; *see also* Frank Partnoy, *Financial Systems, Crises, and Regulation, in* The Oxford Handbook of Financial Regulation 85 (Niamh Moloney et al. eds, 2015).

[2] Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report 28 (2011) ("More and more, regulators looked to financial institutions to police themselves—"deregulation" was the label.") https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf; Alan Greenspan, The Evolution of Banking in a Market Economy, Remarks at the Annual Conference of the Association of Private Enterprise Education (Apr. 12, 1997), https://www.federalreserve.gov/boarddocs/speeches/1997/19970412.htm.

[3] In addition to killing the old laws and rules like Glass-Steagall, Wall Street's allies also prevented the regulation of new financial products and activities. The foremost example is the Commodity Futures Modernization Act ("CFMA") which essentially exempted swaps—the derivatives instruments that would enable the downturn in the housing market to spread to the entire financial system—from any meaningful regulation. See, e.g., William Spencer Topham, *Re-regulating Financial Weapons of Mass Destruction: Thoughts on Repealing the Commodity Futures Modernization Act and Future Derivatives Regulation*, 47 Williamette L. Rev. 133 (2010), https://willamette.edu/law/resources/journals/review/pdf/volume-47/wlr-47-1-topham.pdf.

[4] See Better Markets, Fact Sheet: Repealing Glass-Steagall Contributed to the 2008 Financial Crash; Properly Reinstating it Can be an Important Protection to Prevent Future Crashes and Taxpayer Bailouts (May 1, 2017), https://bettermarkets.com/sites/default/files/Fact%20Sheet%20Glass-Steagall%205-3-17%20FINAL.pdf.

[5] *See* Gerald A. Epstein, *Introduction, in* Financialization and the World Economy 3 (Gerald A. Epstein ed. 2005) ("financialization means the increasing role of financial motives, financial markets, financial actors and financial institutions in the operation of the domestic and international economies."), https://www.peri.umass.edu/fileadmin/pdf/programs/globalization/financialization/chapter1.pdf; Emilio Avgouleas, *Regulating Financial Innovation in* The Oxford Handbook of Financial Regulation 665 (Niamh Moloney et al. eds 2015) (defining financialization as the "commoditization of economic relationships and risk management leading to a dramatic shift of focus from long-term goals to transactions' speed and volume in a drive to maximize commission income and short-term transaction based profit.").

[6] Alejandro Komai & Gary Richardson, *A Brief History of Regulations Regarding Financial Markets in the United States: 1789-2009* 23-33 (Nat'l Bureau of Econ. Research, Working Paper No. 17443, Sept. 2011), https://www.nber.org/papers/w17443.pdf.

[7] Better Markets, The Cost of the Crisis: $20 Trillion and Counting (2015), https://bettermarkets.com/sites/default/files/Better%20Markets%20-%20Cost%20of%20the%20Crisis.pdf; *see also* Regis Barnichon et al., Federal Reserve Bank of San Francisco, *The Financial Crisis at 10: Will We Ever Recover?*, FRBSF Economic Letters (Aug. 13, 2018), https://www.frbsf.org/economic-research/publications/economic-letter/2018/august/financial-crisis-at-10-years-will-we-ever-recover/; Tyler Atkinson et al., Federal Reserve Bank of Dallas, *How Bad Was It? The Costs and Consequences of the 2007–09 Financial Crisis* (Dallas Fed Staff Papers No. 20, July 2013), https://files.givewell.org/files/labs/macroeconomic-policy/staff1301.pdf.

[8] James Andrew Felkerson, Levy Economics Institute of Bard College, *A Detailed Look at the Fed's Crisis Response by Funding Facility and Recipient* 4 (Public Policy Brief No. 123, (2012) http://www.levyinstitute.org/pubs/ppb_123.pdf.

[9] Better Markets, The Cost of the Crisis: $20 Trillion and Counting 66-69 (2015), https://bettermarkets.com/sites/default/files/Better%20Markets%20-%20Cost%20of%20the%20Crisis.pdf.

[10] Better Markets, The Cost of the Crisis: $20 Trillion and Counting 69 (2015), https://bettermarkets.com/sites/default/files/Better%20Markets%20-%20Cost%20of%20the%20Crisis.pdf.

[11] And of course, this false "profitability" claim also ignores the opportunity cost of the bailouts and support

taxpayers extended Wall Street; one can only imagine the greater good that could have been accomplished and the social and economic return if those trillions of dollars were instead invested in America's priorities and neighborhoods, in projects that improved infrastructure, education, health, social services and the lives of all Americans.

[12] *See* FDIC, Quarterly Banking Profile: Third Quarter 2010, https://www7.fdic.gov/qbp/2010sep/qbp.pdf; Better Markets, Updated Fact Sheet: Everything You Need To Know About the $50 Billion Threshold (2018), https://bettermarkets.com/sites/default/files/Fact%20Sheet%20%2450B%20Updated%20Long%20Version%20FINAL.pdf.

[13] Although never mentioned, it is noteworthy that the industry never says it is seeking deregulation to increase its leverage and high-risk activities to increase its revenues, profits and, most importantly, bonuses. They always claim that they are just interested in making the economy grow, being more efficient, creating more jobs and serving their customers. However, like other profit-maximizing enterprises, the point of everything they do is to maximize profits and compensation, most particularly their bonuses. Their behavior and activities before, during and after the Great Depression, 2008 crash and the Great Recession prove this.

[14] Hannah Levitt, *U.S. Banks' Record-Breaking Earnings Streak Has Probably Peaked*, Bloomberg (Jan. 10, 2020), https://www.bloomberg.com/news/articles/2020-01-10/u-s-banks-record-breaking-earnings-streak-has-probably-peaked; Mark Whitehouse, Opinion, *There's Nothing Wrong With Stronger Banks*, Bloomberg (Feb. 11, 2019), https://www.bloomberg.com/opinion/articles/2019-02-11/banks-with-more-capital-are-safer-and-tend-to-do-more-lending.

[15] Ctr. on Budget & Policy Priorities, Chart Book: Tracking the Post-Great Recession Economy (last updated June 25, 2020), https://www.cbpp.org/research/economy/chart-book-tracking-the-post-great-recession-economy.

[16] Better Markets: The Volcker Rule: Liquidity Impacts and Other *Myths* Used to Carry Water for the Banks 15-18 (Sept. 11, 2019), https://bettermarkets.com/resources/volcker-rule-liquidity-impacts-and-other-myths-used-carry-water-banks.

[17] This should really surprise no one because that was largely the system in place for about 70 years after the Great Depression, when the United States became the economic engine for the world and built the largest, most successful middle class in history. That dynamic, broad-based growth continued until the financial industry and its allies promoted and sold the myth that markets knew best and that the least regulation was the best regulation, which took just seven years after full deregulation to cause the worst financial crash since the Great Depression. That history is powerful proof that regulation and financial stability are simply not the enemies of growth and prosperity, but that broad-based de-regulation is. That is why the Dodd-Frank Act re-regulated the financial industry and why the Trump administration's deregulation is so dangerous and unwise.

[18] See Michiyo Nakamoto and David Wighton, *Citigroup Chief Stays Bullish on Buy-Outs*, Fin. Times (Jul. 9, 2007), https://www.ft.com/content/80e2987a-2e50-11dc-821c-0000779fd2ac.

[19] *Regulators? We Just Love 'Em, Says John Mack*, Evening Standard (Nov. 19, 2009), https://www.standard.co.uk/business/regulators-we-just-love-em-says-john-mack-6744822.html.

[20] *See*, Federal Reserve Bank of Boston, Conference Stress Testing: A Discussion and Review (comments of Dennis Kelleher) (Jul. 9, 2019), https://bettermarkets.com/sites/default/files/Stress_Testing_A_Discussion_and_Review_Kelleher.pdf ("Conflict between bankers and regulators in financial regulation is inevitable, healthy and, indeed, a sign of success").

[21] *See* Dennis Kelleher & Tim Clark, Better Markets, No Financial Crash Yet Thanks to Dodd-Frank and Banking Reforms; *A Decade After the Great Recession, Is the Global Financial System Safer?*, Knowledge@Wharton (Sept. 11, 2018) https://knowledge.wharton.upenn.edu/article/ten-years-great-recession-global-financial-system-safer/.

[22] Dodd-Frank passed the House of Representatives on June 30, 2010 by a vote of 237-192 (with three Republican votes) and passed the Senate on July 15, 2010 by a vote of 60-39 (with three Republican votes). Ten years ago today, on July 21, 2010, President Barak Obama signed the Act into law.

[23] *See* Robert G. Kaiser, Act of Congress: How America's Essential Institution Works and How it Doesn't 212

(2014) [hereinafter "Kaiser, Act of Congress"] ("Alan Greenspan, Hank Paulson, and any number of Republican economists had concluded that the Great Crash did indeed represent a failure of the free market to police itself.").

[24] *See* Kaiser, Act of Congress (2014) ("Obama had publicly supported changes in the rules that were also endorsed by Republicans, most prominently Paulson and his Treasury staff.").

[25] Andrew Ross Sorkin, *Paulson Likes What He Sees in Overhaul*, N.Y. Times Dealbook (Jul. 12, 2010), https://www.nytimes.com/2010/07/13/business/13sorkin.html?scp=2&sq=&st=nyt.

[26] *See* Kaiser, Act of Congress 74-75.

[27] Senator Richard Shelby, Speech at Oxford Union on "Too Big to Fail" (Nov. 30, 2009), https://www.shelby.senate.gov/public/index.cfm/mobile/newsreleases?ID=45BC4159-802A-23AD-403C-78AE4B7DBE13; *see also* Kaiser, Act of Congress 202.

[28] Kaiser, Act of Congress 201.

[29] Robert G. Kaiser, *Republican Senator Richard Shelby fights for financial regulatory reform*, Wash. Post (Dec. 17, 2009), https://www.washingtonpost.com/wp-dyn/content/article/2009/12/16/AR2009121603944.html?sid=ST2009121604066.

[30] See Statement of Chairman Chris Dodd on McConnell Letter (Apr. 16, 2010) (detailing significant bipartisan efforts), https://www.banking.senate.gov/newsroom/minority/dodd-statement-on-mcconnell-letter.

[31] Kaiser, Act of Congress 250 ("Corker's novel idea was to create an autonomous division of the Federal Reserve called the Consumer Financial Protection Bureau. It would be funded by a fixed percentage of the Fed's annual earnings, which came from its trading activities and were substantial enough to guarantee hundreds of millions of dollars a year for the CFPB. Its director could act independently of the Fed's Board of Governors, and would be appointed by the president and confirmed by the Senate.").

[32] *See* Congress.gov, S. 3217: Restoring American Financial Stability Act of 2010 (last visited July 3, 2020), https://www.congress.gov/bill/111th-congress/senate-bill/3217.

[33] Kaiser, Act of Congress 366.

[34] *Hearing before the Subcommittee on Oversight and Investigations of the Committee on Financial Services, U.S. House of Representatives on The Dodd-Frank Act and Regulatory Overreach,* 114th Cong. (May 13, 2015) (Remarks of Representative Al Green). https://www.govinfo.gov/content/pkg/CHRG-114hhrg95065/html/CHRG-114hhrg95065.htm.

[35] Senator Sherrod Brown, remarks on the *Economic Growth, Regulatory Relief and Consumer Protection Act*, Congressional Record Vol. 164, No. 45 (Senate - March 14, 2018) ("During the conference committee, televised live on C-SPAN for 48 hours, 17 Senate Republican amendments were accepted").https://www.congress.gov/congressional-record/2018/03/14/senate-section/article/S1696-4.

[36] Importantly, these financial institutions are not only "too-big-to-fail," but are also too systemically important, too interconnected, too complex and too leveraged, with the result that they are also too big to bail, jail, manage, supervise or regulate.

[37] Of course, any threshold like this is ultimately arbitrary. Compounding that problem was the failure to index the threshold to increase it over time by average asset growth, GDP growth or other benchmark, which gave the industry a powerful talking point and created legislative pressure to increase it over time. Some believe that this predictable and foreseeable result was in fact the aim of those who aggressively opposed indexing it when the Dodd-Frank Act was considered.

[38] FDIC, Quarterly Banking Profile: Third Quarter 2010, https://www7.fdic.gov/qbp/2010sep/qbp.pdf; Better Markets, Updated Fact Sheet: Everything You Need To Know About the $50 Billion Threshold (2018), https://bettermarkets.com/sites/default/files/Fact%20Sheet%20%2450B%20Updated%20Long%20Version%20FINAL.pdf.

[39] Eric S. Rosengren, Bank Capital: Lessons from the U.S. Financial Crisis, Speech before the Bank for International Settlements Forum on Key Regulatory and Supervisory Issues in a Basel III World (Feb. 25, 2013), https://www.bostonfed.org/news-and-events/speeches/bank-capital-lessons-from-the-us-financial-crisis.aspx.

[40] Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Minimum Regulatory Capital Ratios, Capital Adequacy, Transition Provisions, and Prompt Corrective Action, 77 Fed. Reg. 52,792, 52,800 (Aug. 30, 2012).

[41] "Leverage standards" refer to requirements that banks finance a sufficient amount of its assets with equity, which reduces the likelihood of individual bank failures and also that any bank will contribute to overall financial market distress. See Better Markets Comment Letter on Regulatory Capital Rules (Oct. 22, 2012), https://bettermarkets.com/sites/default/files/documents/FRS%2C%20OCC%2C%20FDIC-%20CL-3nprs-%2010-22-12.pdf. In the context of the current capital regime, strong leverage standards serve "as the ultimate backstop against the shortage of equity based on risk-weighted capital requirements." Nijolé Valinskyté, et al., *The Leverage Ratio as a Macroprudential Policy Instrument*, VOX CEPR Policy Portal (Apr. 12, 2018), https://voxeu.org/article/leverage-ratio-macroprudential-policy-instrument.

[42] Governor Daniel K. Tarullo, Lessons from the Crisis Stress Tests, Remarks at the Federal Reserve Board International Research Forum on Monetary Policy (Mar. 26, 2010), https://www.federalreserve.gov/newsevents/speech/tarullo20100326a.htm.

[43] On top of the substantial TARP bailout money they had already received.

[44] Governor Daniel K. Tarullo, Lessons from the Crisis Stress Tests, Remarks at the Federal Reserve Board International Research Forum on Monetary Policy (Mar. 26, 2010), https://www.federalreserve.gov/newsevents/speech/tarullo20100326a.htm.

[45] Governor Daniel K. Tarullo, Lessons from the Crisis Stress Tests, Remarks at the Federal Reserve Board International Research Forum on Monetary Policy (Mar. 26, 2010), ("Second, the results were released at a time when uncertainty about bank conditions was very high, and some market participants feared the worst."), https://www.federalreserve.gov/newsevents/speech/tarullo20100326a.htm.

[46] Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report 353 (2011) ("September 15, 2008—the date of the bankruptcy of Lehman Brothers and the takeover of Merrill Lynch, followed within 24 hours by the rescue of AIG—marked the beginning of the worst market disruption in postwar American history and an extraordinary rush to the safest possible investments."), https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf.

[47] Better Markets, Email Shows Goldman Admitted It Was Toast (Sept. 21, 2018), https://bettermarkets.com/newsroom/email-shows-goldman-admitted-it-was-toast.

[48] This was the ultimate regulatory arbitrage and moral hazard. Banks and bank holding companies were backed by the Fed, other financial regulators, taxpayers and, ultimately, the government, but in return they were supposed to be properly regulated to protect the taxpayers from having to bail them out and prevent moral hazard. In stark contrast, Goldman and the other investment banks were lightly regulated if at all because they supposedly were not backstopped by the Fed, other financial regulators, taxpayers or the government. Therefore, they engaged in unregulated, dangerous, highly leveraged, high-risk trading and investments, which provided them with unimaginable riches. For example, Goldman's then CEO, Lloyd Blankfein, pocketed a bonus of $67.9 million (and total compensation of about $100 million) for the 12 months of 2007. But when those reckless unregulated activities put Goldman on the brink of bankruptcy, they nonetheless rushed into the arms of the taxpayers and government to prevent their failure and, not unimportantly, the loss of their riches which were largely tied up in Goldman stock—that all would have worthless in bankruptcy. Thus, Goldman today only exists (in any recognizable form)—and its officers only continue to have their unimaginable wealth—because it was bailed out by taxpayers and the government, having been allowed to pocket all that unregulated cash for all those years before being bailed out. See, Goldman Sachs CEO Gets $100 Mln in Pay, Stock," Jonathan Stempel, Reuters, March 7, 2008, available at https://www.reuters.com/article/us-goldmansachs-compensation/goldman-sachs-ceo-gets-100-mln-in-pay-stock-idUSN0732738820080307.

[49] For more on living wills, *see* Better Markets, Policy Brief: Ending Too-big-to-Fail by Breathing Life into "Living Wills" (Jan. 2016), https://bettermarkets.com/newsroom/better-markets-applauds-treasury-department%E2%80%99s-recognition-necessary-ola-failsafe-protection.

[50] *See* Press Release, Better Markets Applauds Treasury Department's Recognition of Necessary OLA Failsafe Protection, (Feb. 21, 2018), https://bettermarkets.com/sites/default/files/Breathing%20Life%20Into%20Living%20Wills%20%282%29.pdf.

[51] Worse than that, before the 2008 crash, federal regulators sued to prevented state regulators from protecting consumers. See, e.g., Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services* (July 15, 2011), 36 J. Corp. L. 893 (2011), https://www.researchgate.net/publication/228245969_The_Dodd-Frank_Act's_Expansion_of_State_Authority_to_Protect_Consumers_of_Financial_Services

[52] Elizabeth Warren, *Unsafe at Any Rate: If It's Good Enough for Microwaves, It's Good Enough for Mortgages: Why We Need a Consumer Financial Product Safety Commission*, Democracy (Summer 2007), https://democracyjournal.org/magazine/5/unsafe-at-any-rate/.

[53] Derek Thompson, *Safety and Soundness vs. Consumer Protection*, The Atlantic (Mar 2., 2010), https://www.theatlantic.com/business/archive/2010/03/safety-and-soundness-vs-consumer-protection/36941/.

[54] See, infra, n. 51.

[55] *See FSOC Accountability: Nonbank Designation Before the Senate Committee on Banking, Housing and Urban Affairs*, 114th Cong. (Mar. 25, 2015) (opening Statement of Dennis M. Kelleher, https://bettermarkets.com/blog/dennis-kellehers-testimony-senate-banking-committee-0; full testimony available at https://www.banking.senate.gov/imo/media/doc/KelleherTestimony32515.pdf. Video of the Committee hearing is available at https://www.banking.senate.gov/hearings/fsoc-accountability-nonbank-designations.

[56] Dodd-Frank Act Section 120.

[57] Dodd-Frank Act Section 113.

[58] For example, anticipating that the financial industry would resist cooperating with OFR or voluntarily provide information essential for OFR to do its job, the Dodd-Frank Act gave OFR subpoena power to require any bank or nonbank financial institution to provide it with any data needed to carry out the functions of the office. *See* Victoria Finkle, *The Most Important Agency You've Never Heard Of*, Washington Monthly (Summer 2016), https://washingtonmonthly.com/magazine/junejulyaug-2016/the-most-important-agency-youve-never-heard-of/.

[59] *See, e.g.,* Ronald D. Orol, *Senate Probe Alleges Goldman Mortgage Deception*, MarketWatch, (Apr. 13, 2011), https://www.marketwatch.com/story/senate-probe-alleges-goldman-mortgage-deception-2011-04-13.

[60] *See* United States Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, Wall Street and the Financial Crisis: Anatomy of a Financial Collapse 376-635 (Apr. 13, 2011), https://www.hsgac.senate.gov/imo/media/doc/PSI%20REPORT%20-%20Wall%20Street%20&%20the%20Financial%20Crisis-Anatomy%20of%20a%20Financial%20Collapse%20(FINAL%205-10-11).pdf; Press Release, Senate Investigations Subcommittee Releases Levin-Coburn Report on the Financial Crisis, (Apr. 13, 2011), https://www.hsgac.senate.gov/subcommittees/investigations/media/senate-investigations-subcommittee-releases-levin-coburn-report-on-the-financial-crisis.

[61] *See* Landon Thomas, Jr., *$9.4 Billion Write-Down at Morgan Stanley*, N.Y. Times (Dec. 20, 2017), https://www.nytimes.com/2007/12/20/business/20wall.html.

[62] *See, e.g.*, *Examining the Impact of the Volcker Rule on Markets, Businesses, Investors and Job Creation, Part II*, House Committee on Financial Services, 112th Cong. (Dec. 13, 2012) (testimony of Dennis M. Kelleher, President & CEO Better Markets), https://financialservices.house.gov/uploadedfiles/hhrg-112-ba00-wstate-dkelleher-20121213.pdf; *The Volcker Rule Ban Stopping Wall Street From Gambling with Taxpayers' Money*, Better Markets Blog (Aug. 13, 2010), https://bettermarkets.com/volcker-rule; Better Markets' Comment Letter on Proposed Volcker Rule (Feb. 13, 2012), https://bettermarkets.com/sites/default/files/documents/SEC-%20

CL-%20Volcker%20Rule-%202-13-12_1.pdf; Better Markets Comment Letter on Proposed Volcker Rule (Apr. 16, 2012), https://bettermarkets.com/sites/default/files/documents/SEC-%20CL-%20Volcker%20Rule-%202-13-12_1.pdf.

[63] *See* Dept. of Labor, Regulating Advice Markets, Definition of the Term "Fiduciary," Conflicts of Interest - Retirement Investment Advice, Regulatory Impact Analysis for Final Rule and Exemptions (Apr. 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

[64] Alan S. Blinder, *Crazy Compensation and the Crisis*, Wall St. J. (May 28, 2009), https://www.wsj.com/articles/SB124346974150760597.

[65] *See generally* Dodd-Frank Act, Title IX, Subtitle E; *see also* Better Markets Comment Letter on Incentive Based Compensation Arrangements (May 31, 2011), https://bettermarkets.com/sites/default/files/documents/SEC-%20Comment%20Letter-%20Incentive-based%20comp%205-31-11.pdf.

[66] Better Markets Comment Letter on Proposed Listing Standards for Recovery of Erroneously Awarded Compensation (Sept. 4, 2015), https://bettermarkets.com/sites/default/files/SEC%20-%20CL%20-%20Listing%20Standards%20for%20Recovery%20of%20Erroneously%20Awarded%20Compensation%209-14-2015.pdf.

[67] Milosz Gudzowski, *Mortgage Credit Ratings and the Financial Crisis: The Need for A State-Run Mortgage Security Credit Rating Agency*, 2010 Colum. Bus. L. Rev. 245, 263 (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1558807.

[68] Vishal M. Mahadkar, *Defending Skin-in-the-Game: How Regulators Should Structure the Final Credit Risk Retention Rules for the Residential Mortgage Market*, 18 Fordham J. Corp. & Fin. L. 405 (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1558807.

[69] *See* David Kotz, SEC Inspector General, Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme (Aug. 31, 2009), https://www.sec.gov/news/studies/2009/oig-509.pdf.

[70] Better Markets, The SEC's Whistleblower Program: A $2 Billion Success Story Under Threat (June 4, 2020), https://bettermarkets.com/sites/default/files/Better_Markets_White_Paper_SEC%27s_Whistlebower_Program_06-22-2020.pdf.

[71] Warren E. Buffet, Letter to the Shareholders of Berkshire Hathaway Inc. (Feb. 21, 2003) ("We try to be alert to any sort of megacatastrophe risk, and that posture may make us unduly apprehensive about the burgeoning quantities of long-term derivatives contracts and the massive amount of uncollateralized receivables that are growing alongside. In our view, however, derivatives are financial weapons of mass destruction, carrying dangers that, while now latent, are potentially lethal."), https://www.berkshirehathaway.com/letters/2002pdf.pdf.

[72] Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554.

[73] While only "sophisticated" market participants can generally enter into swaps, many of those so-called sophisticated market participants are pension funds, including government pension funds. When those pension funds are misled and suffer losses, the retirement savings of hard-working Americans are put at risk.

[74] Curtis Copeland, Congressional Research Serv. Rulemaking Requirements and Authorities in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Nov. 3, 2010), https://www.llsdc.org/assets/DoddFrankdocs/crs-r41472.pdf.

[75] Binyamin Appelbaum, *On Finance Bill, Lobbying Shifts to Regulations*, N.Y. Times (June 27, 2010).

[76] In fact, the head of one of Wall Street's most powerful Washington lobby trade groups quipped when the Dodd-Frank Act was passed that it was just "half-time," i.e., Wall Street's lobbyist, lawyers and various other paid allies still had an entire half to weaken, gut or kill the financial reform required by the Dodd-Frank Act. *See* Scott Horsley, *Can an Ex-Prosecutor Make the SEC Tougher on Wall Street?*, NPR (Jan. 24, 2013),https://www.npr.org/sections/thetwo-way/2013/01/24/170182625/can-an-ex-prosecutor-make-the-sec-tougher-on-wall-street.

[77] For example, risk-weighting is still a significant component of the revised capital rules, but with an arguably more thoughtful approach to risk-weighting, and a more meaningful leverage backstop. Also, the new capital rules do not require banks to meet all of their capital requirements through common equity, but instead allow banks to meet requirements through a variety of instruments, including long-term debt.

[78] Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Capital Adequacy, Transition Provisions, Prompt Corrective Action, Standardized Approach for Risk-weighted Assets, Market Discipline and Disclosure Requirements, Advanced Approaches Risk-Based Capital Rule, and Market Risk Capital Rule, 78 Fed. Reg. 62,017 (Oct. 11, 2013) ("2013 Capital Rule").

[79] 2013 Capital Rule at 62,030.

[80] 2013 Capital Rule at 62,030.

[81] 2013 Capital Rule at 62,030.

[82] 2013 Capital Rule.at 62,044-67.

[83] Aaron Klein, *Risk Weights or Leverage Ratio? We Need Both*, American Banker (Dec. 20, 2016) ("The beauty of the leverage ratio is its simplicity: It is hard to game and easy to compare across institutions."), https://www.americanbanker.com/opinion/risk-weights-or-leverage-ratio-we-need-both.

[84] The agencies did eliminate a provision that allowed certain banks to have a minimal leverage ratio of 3%, instead of 4%, if they received strong supervisory ratings. 2013 Capital Rule at 62,030-31.

[85] *See* 2013 Capital Rule at 62,026 ("the final rule...will improve the quality and increase the level of regulatory capital, leading to a more stable and resilient system for banking organizations of all sizes and risk profiles."); *see also* Basel Committee on Banking Supervision, Results of the Comprehensive Quantitative Impact Study 8 (explaining impact of revised definitions of capital and risk-weighting on capital ratios), https://www.bis.org/publ/bcbs186.pdf.

[86] 2013 Capital Rule at 62,033-37.

[87] 2013 Capital Rule at 62,033-37.

[88] 2013 Capital Rule at 62,033. See also Dennis M. Kelleher and Jack Reidhill, *Stop Wall Street Payouts That Produce TARP Bailouts*, Medium (Oct. 3, 2018), https://medium.com/@BetterMarkets/https-medium-com-bettermarkets-stop-wall-street-payouts-that-produce-tarp-bailouts-7647792b3246.

[89] 2013 Capital Rule at 62,031-33.

[90] Regulatory Capital Rules: Regulatory Capital, Enhanced Supplementary Leverage Ratio Standards for Certain Bank Holding Companies and Their Subsidiary Insured Depository Institutions, 79 Fed. Reg. 24,528 (May 1, 2014). The rule also required the insured depository institutions of GSIBs to maintain a 6% supplementary leverage ratio to be considered "well-capitalized."

[91] Liquidity Coverage Ratio: Liquidity Risk Measurement Standards, 79 Fed. Reg. 61,440 (Oct. 10, 2014).

[92] Liquidity Coverage Ratio: Liquidity Risk Measurement Standards, 79 Fed. Reg. 61,440 (Oct. 10, 2014).

[93] See, Better Markets' Comment Letter on Net Stable Funding Ratio: Liquidity Risk Measurement Standards and Disclosure Requirements (Aug. 5, 2016), https://bettermarkets.com/sites/default/files/FDIC%20FRS%20OCC%20-%20CL%20-%20Net%20Stable%20Funding%20Ratio%20-%20%28Searchabe%20Text%20Version%29_0.pdf.

[94] Capital Plans, 76 Fed. Reg. 74,631 (Dec. 1, 2011).

[95] Dennis Kelleher & Tim Clark, Better Markets, No Financial Crash Yet Thanks to Dodd-Frank and Banking Reforms.

[96] Supervisory and Company-Run Stress Test Requirements for Covered Companies, 77 Fed. Reg. 62,378 (Oct. 12, 2012); Annual Stress Test, 77 Fed. Reg. 62,417 (Oct. 15, 2012); Annual Company-Run Stress Test

Requirements for Banking Organizations with Total Consolidated Assets Over $10 Billion Other Than Covered Companies, 77 Fed. Reg. 62,396 (Oct. 12, 2012); Annual Stress Test, 77 Fed. Reg. 61,238 (Oct. 9, 2012).

[97] Governor Daniel K. Tarullo, Lessons from the Crisis Stress Tests, Remarks at the Federal Reserve Board International Research Forum on Monetary Policy (Mar. 26, 2010), https://www.federalreserve.gov/newsevents/speech/tarullo20100326a.htm. *See also Stress Tests Are Vital Tools to Protect Taxpayers & Our Economy*, Better Markets Blog (Jul. 3, 2019) https://bettermarkets.com/blog/stress-tests-are-vital-tools-protect-taxpayers-our-economy.

[98] Resolution Plans Required, 76 Fed. Reg. 67,323 (Nov. 1, 2011).

[99] 2011 Resolution Plan Rule at 67,330.

[100] 2011 Resolution Plan Rule at 67,330.

[101] Federal Reserve & FDIC, Resolution Plan Assessment Framework and Firm Determinations 5, (2016), https://www.fdic.gov/news/news/press/2016/pr16031a.pdf.

[102] Dennis Kelleher & Frank Medina, Better Markets, Policy Brief: Ending Too-Big-To-Fail By Breathing Life Into "Living Wills" (Jan. 2016), https://bettermarkets.com/sites/default/files/Breathing%20Life%20Into%20Living%20Wills_0.pdf; Better Markets, Wall Street's Biggest Banks Purposefully Flunk Living Will Test to Ensure Future Bailouts (Aug. 6, 2014), https://bettermarkets.com/newsroom/wall-street%E2%80%99s-biggest-banks-purposefully-flunk-%E2%80%98living-will%E2%80%99-test-ensure-future-bailouts.

[103] Press Release, Better Markets, Statement on Historic Actions of FDIC and Fed Regarding Wall Street's Proposed Living Wills (Apr. 13, 2016), https://bettermarkets.com/newsroom/better-markets-statement-historic-actions-fdic-and-fed-regarding-wall-street%E2%80%99s-proposed.

[104] Press Release FDIC & Federal Reserve, Agencies Announce Determinations on October Resolution Plan Submissions of Five Systemically Important Domestic Banking Institutions (Dec. 13, 2016), https://www.fdic.gov/news/news/press/2016/pr16109.html.

[105] Certain Orderly Liquidation Authority Provisions under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 41,626 (2011).

[106] *See* Press Release, Dept. of Treasury, Treasury Releases Report to The President On Orderly Liquidation Authority (Feb. 21, 2018), https://home.treasury.gov/news/press-release/sm0295.

[107] Definition of "Predominantly Engaged in Activities That Are Financial in Nature or Incidental Thereto", 78 Fed. 34,712 (2013). In a memorandum issued in April 2017, the Department of Treasury under President Trump endorsed the need for the FDIC's Orderly Liquidation Authority. Dept. of Treasury, Orderly Liquidation Authority and Bankruptcy Reform (Feb. 21, 2018), https://home.treasury.gov/sites/default/files/2018-02/OLA_REPORT.pdf. The Trump administration has not attempted to rescind or scale back the current rule.

[108] 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).

[109] Better Markets Letter to FDIC, Federal Reserve, OCC, SEC and CFTC Regarding Finalizing the Volcker Rule and Letter from the Chamber of Commerce (Nov. 21, 2013), https://bettermarkets.com/sites/default/files/documents/SEC-%20Supp%20CL-%20Proprietary%20Trading-%2011-21-13.pdf.

[110] 2014 Volcker Rule at 5542; *see also* Better Markets Supplementary Comment Letter on the Volcker Rule (June 19, 2012) (explaining that if a strong Volcker Rule limits market making activities at banks, other innovative firms will enter the market to fill the gap).

[111] Better Markets Comment Letter on New Volcker Rule Proposal at 4 (Oct. 18, 2018), https://bettermarkets.com/sites/default/files/Better%20Markets%20Comment%20Letter%20on%20New%20Volcker%20Rule%20Proposal.pdf.

[112] Better Markets, The Volcker Rule: Liquidity Impacts and Other Myths Used to Carry Water for the Banks (Oct. 2018), https://bettermarkets.com/sites/default/files/The%20Volcker%20Rule%20Liquidity%20Impacts%20

and%20Other%20Myths%20Used%20to%20Carry%20Water%20for%20the%20Banks%20%28002%29.pdf.pdf. *See also* Better Markets Comment Letter on Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds (Apr. 1, 2020), https://bettermarkets.com/sites/default/files/Better_Markets_Inc._Comment_Letter_on_Prohibitions_and_Restrictions_on_Proprietary_Trading_and_Certain_Interests_in_and_Relationships_With_Hedge_Funds_and_Private_Equity_Funds.pdf; Better Markets Comment Letter on New Volcker Rule Proposal (Oct. 18, 2018), https://bettermarkets.com/sites/default/files/Better%20Markets%20Comment%20Letter%20on%20New%20Volcker%20Rule%20Proposal.pdf; Better Markets Comment Letter on Proprietary Trading (Sept. 21, 2017), https://bettermarkets.com/sites/default/files/OCC%20-%20CL%20-%20Volcker%20Rule%20-%209-21-17.pdf; Better Markets Comment Letter on Goldman Sachs and the Volcker Rule (Jan. 8, 2013), https://bettermarkets.com/sites/default/files/documents/114-%20CFTC-%20Supp.%20CL-%20Volcker%20Rule-%201-8-13.pdf.

[113] CFPB, Factsheet: Consumer Financial Protection Bureau By the Numbers (Dec. 2016), https://files.consumerfinance.gov/f/documents/201701_cfpb_CFPB-By-the-Numbers-Factsheet.pdf; Better Markets Comment Letter on CFPB Request for Information to Assist Task Force on Federal Consumer Financial Law (June 1, 2020), https://bettermarkets.com/rulemaking/better-markets-issues-comment-letter-response-cfpb-request-information-assist-task-force.

[114] Press Release, CFPB, Consumer Financial Protection Bureau Takes Action Against Fay Servicing for Failing to Provide Mortgage Borrowers with Protections Against Foreclosure (June 7, 2017), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-takes-action-against-fay-servicing-failing-provide-mortgage-borrowers-protections-against-foreclosure/.

[115] Press Release, CFPB, CFPB Sues Four Online Lenders for Collecting on Debts Consumers Did Not Legally Owe (Apr. 27, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-four-online-lenders-collecting-debts-consumers-did-not-legally-owe/.

[116] Press Release, CFPB, CFPB and New York Attorney General Sue RD Legal for Scamming 9/11 Heroes Out of Millions of Dollars in Compensation Funds (Feb. 7, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-new-york-attorney-general-sue-rd-legal-scamming-911-heroes-out-millions-dollars-compensation-funds/.

[117] Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z), 81 Fed. Reg. 83934 (Nov. 22, 2016).

[118] Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,695 (Feb. 14, 2013).

[119] Ability to Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 6407 (Jan. 30, 2013).

[120] *See* Better Markets Comment Letter on Delay of Payday Lending Rule Implementation (Mar. 18, 2019), https://bettermarkets.com/rulemaking/better-markets-comment-letter-cfpb-delay-compliance-payday-lending-rule; Better Markets Comment Letter on Rescission of Payday Lending Rule Underwriting Provisions (May 15, 2019), https://bettermarkets.com/rulemaking/better-markets-comment-letter-cfpb-payday-underwriting-rescission. Richard Cordray was appointed by President Obama. Because the Dodd-Frank Act made the CFPB Director removable only for cause, Director Cordray remained in office well into President Trump's term, until November 2017, when the rule on payday lending was issued.

[121] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472 (Nov. 17, 2017).

[122] *See* Better Markets, Judge Kavanaugh: Good For Corporations, Bad for Your Wallet 5-6 (Aug. 28, 2018), https://bettermarkets.com/sites/default/files/Better%20Markets%20Kavanaugh%20Report.pdf.

[123] *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016). It was unsurprising that then-Judge Kavanaugh sided with the industry against a critical consumer protection industry. As Better Markets pointed out during the confirmation process, Justice Kavanaugh had a disturbing history of decisions that benefited industry at the expense of critical protections for consumers and investors. Better Markets, Judge Kavanaugh: Good For Corporations, Bad for Your Wallet (Aug. 28, 2018), https://bettermarkets.com/sites/default/files/Better%20Markets%20Kavanaugh%20Report.pdf. Justice Kavanaugh's inclination to protect industry and harm consumers

ultimately resulted in the 5-4 Supreme Court decision holding the CFPB's structure unconstitutional. *See supra* IV.D; *see also* Press Release, Better Markets, Another Supreme Court Anti-Consumer, Pro-Predator, Pro-Corporate Decision Reduces CFPB Independence (June 29, 2020), https://bettermarkets.com/newsroom/another-supreme-court-anti-consumer-pro-predator-pro-corporate-decision-reduces-cfpb.

[124] *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 77 (D.C. Cir. 2018), *abrogated by Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 19-7, 2020 WL 3492641 (U.S. June 29, 2020). While the en banc decision was issued in 2018, after former Director Cordray had left the CFPB, the case was argued and briefed during his tenure.

[125] *Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 19-7, 2020 WL 3492641 (U.S. June 29, 2020).

[126] *See* Sec. & Exch. Comm'n, Study on Investment Advisers and Broker-Dealers (2011), https://www.sec.gov/news/studies/2011/913studyfinal.pdf.

[127] *See* Sec. & Exch. Comm'n, Study on Investment Advisers and Broker-Dealers (2011), https://www.sec.gov/news/studies/2011/913studyfinal.pdf.

[128] *See* Sec. & Exch. Comm'n, Study on Investment Advisers and Broker-Dealers (2011), https://www.sec.gov/news/studies/2011/913studyfinal.pdf.

[129] *See* Sec. & Exch. Comm'n, Study on Investment Advisers and Broker-Dealers (2011), https://www.sec.gov/news/studies/2011/913studyfinal.pdf.

[130] SEC Investor Advisory Committee, Recommendation of the Investor Advisory Committee Broker-Dealer Fiduciary Duty (2013), https://www.sec.gov/spotlight/investor-advisory-committee-2012/fiduciary-duty-recommendation-2013.pdf.

[131] Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20946 (Apr. 8, 2016); *see also* Better Markets Comment Letter on the Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions (Part 2) (Aug. 7, 2017), https://bettermarkets.com/rulemaking/better-markets-comment-letter-dol-request-information-regarding-fiduciary-rule-and-0; Better Markets Comment Letter on the Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions (Jul. 21, 2017), https://bettermarkets.com/rulemaking/better-markets-comment-letter-dol-request-information-regarding-fiduciary-rule-and; Better Markets Comment Letter on Definition of the Term "Fiduciary" - Proposed Delay on Applicability Date (Apr. 17, 2017), https://bettermarkets.com/rulemaking/better-markets-comment-letter-dol-definition-term-fiduciary-proposed-delay-0; Better Markets Comment Letter on Definition of the Term "Fiduciary" - Proposed Delay on Applicability Date (Mar. 17, 2017), https://bettermarkets.com/rulemaking/better-markets-comment-letter-dol-definition-term-fiduciary-proposed-delay-applicability; Better Markets Second Comment Letter on Best Interest Fiduciary Duty Rule (Sept. 24, 2015), https://bettermarkets.com/rulemaking/better-markets-second-comment-letter-dols-best-interest-fiduciary-duty-rule; Better Markets Comment Letter on Proposed Fiduciary Duty Rule (Jul. 21, 2015), https://bettermarkets.com/rulemaking/better-markets-comment-letter-dols-proposed-fiduciary-duty-rule; Brief of Amici Curiae AARP, AARP Foundation, Americans for Financial Reform, Better Markets, Consumer Federal of America, National Employment Law Project & Public Investors Arbitration Bar Association in Support of Defendants-Appellees and Urging Affirmance, *Mkt. Synergry Grp. v. United States Dep't of Labor*, 885 F.3d 676 (10th Cir. 2018) (No. 17-3038), https://bettermarkets.com/sites/default/files/Markets_Synergy_Group_v._DOL_%2810th%20Cir%29-Amicus%20Brief-9-27-2017.pdf; Brief of Amici Curiae AARP, AARP Foundation, Americans for Financial Reform, Better Markets, Consumer Federal of America, National Employment Law Project & Public Investors Arbitration Bar Association Urging Affirmance of the District Court's Decision in its Entirety, *Nat'l. Ass'n. Fixed Annuities v. Dept. of Labor* (D.C. Cir., filed Sept. 22, 2017) (No. 16-5345), https://bettermarkets.com/sites/default/files/NAFA_v.DOL_%28D.C.%20Cir%29-Amicus%20Brief-9-22-2017.pdf; Brief of Amici Curiae AARP, AARP Foundation, Americans for Financial Reform, Better Markets, Consumer Federation of America & National Employment Law Project Urging Affirmance of the District Court's Decision in its Entirety, *Chamber of Commerce of United States of Am. v. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018) (No. 17-10238), https://bettermarkets.com/sites/default/files/Chamber_of_Commerce_v.DOL_%2810th%20Cir.%29-Amicus_Brief%20-7-6-2017.pdf; Amicus Brief of Better Markets, Inc., Consumer Federation of America, & Americans for Financial Reform in Support of Defendants, *Market Synergy Group, Inc. v. Dept. of Labor*, (D. Kan. 2016) (No. 16-4083),

https://bettermarkets.com/resources/better-markets-amicus-brief-market-synergy-group-inc-v-dol; Amicus Brief of Better Markets, Inc., Consumer Federation of America, & Americans for Financial Reform in Support of Defendants, *Nat'l. Ass'n. Fixed Annuities v. Dept. of Labor*, (D.D.C. 2016) (No. 16-1035), https://bettermarkets.com/sites/default/files/NAFA%20v.%20DOL%20-%20Amicus%20Brief%207-15-16%20Final%20for%20Filing_0.pdf. The Department of Labor's fiduciary rule was not a Dodd-Frank Act rule, but in the course of rulemaking developed an exhaustive record that would have supported a strong SEC rule. The Department of Labor's rule, however, was vacated by the Fifth Circuit, *Chamber of Commerce of United States of Am. v. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018), and the Trump administration abandoned the appeal.

[132] *See XY Planning Network, LLC v. SEC: Broker Conflicts of Interest, Regulation "Best Interest," and Investors' False Sense of Security*, The Duke Law Global Financial Markets Center FinReg Blog (Mar. 5, 2020), https://bettermarkets.com/blog/finreg-blog-duke-law-global-financial-markets-center-xy-planning-network-llc-v-sec-broker. Brief Amici Curiae of Better Markets, Inc., Consumer Federation of America, and Americans for Financial Reform *XY Planning Network v. SEC*, (Jan. 3, 2020) (No. 19-2886), https://bettermarkets.com/sites/default/files/Reg_BI_-_Amicus_Brief_Final_As_Filed_%281-3-20%29.pdf; Better Markets, Fact Sheet on SEC's Proposed Regulation Best Interest (May 29, 2019), https://bettermarkets.com/sites/default/files/documents/Better_Markets_Fact_Sheet_Reg_BI_05-29-2019.pdf.; Better Markets Letter to SEC Regarding Need to Propose and Finalize a Strong Fiduciary Duty Rule Without Delay (Mar. 20, 2018), https://bettermarkets.com/sites/default/files/Better%20Markets%20letter%20re%20Fiduciary%20Duty%203-20-18%20.pdf.

[133] Credit Risk Retention, 79 Fed. Reg. 77,602 (2014).

[134] Stephen Hall, *Weakening Reforms in the Securitization Market to Protect Mortgage Financing From an Uncertain Threat Is a Bad Trade*, Better Markets Blog (Oct. 23, 2014), https://bettermarkets.com/blog/weakening-reforms-securitization-market-protect-mortgage-financing-uncertain-threat-bad-trade. The rule was subject to a lawsuit challenging the authority of regulators to subject investment managers of open-market collateralized loan obligations ("CLOs"), who package highly leveraged corporate loans, to the rule. *See* Brief of Better Markets, Inc. as Amicus Curiae, *Loan Syndications & Trading Ass'n v. Sec. & Exch. Comm'n*, 882 F.3d 220 (D.C. Cir. 2018) (No. 14-124), https://bettermarkets.com/sites/default/files/Amicus%20Brief%20of%20Better%20Markets%20in%20Loan%20Syndication%20v.%20SEC%20%206-15-2015.pdf. In a blow to the credit risk retention regime, the D.C. Circuit held that the credit risk retention requirements did not apply to investment managers of CLOs. *Loan Syndications & Trading Ass'n v. Sec. & Exch. Comm'n*, 882 F.3d 220, 223 (D.C. Cir. 2018). Significantly, the market for these highly leveraged corporate loans have been an increasing source of concern. Lisa Lee, et al., *Trouble Brews for American Companies That Gorged on Cheap Credit*, Bloomberg Businessweek (Oct. 23, 2019), https://www.bloomberg.com/news/articles/2019-10-23/risky-loans-in-the-clo-market-could-be-trouble-for-u-s-companies.

[135] Securities Whistleblower Incentives and Protection, 76 Fed. Reg. 74,300 (2011).

[136] https://bettermarkets.com/resources/secs-whistleblower-program-2b-success-story-under-threat.

[137] One critical aspect of Title VII, the so-called "swaps pushout," required that banks "push out" some of their highest-risk derivatives trading into separate subsidiaries that are not backed by the government's deposit insurance fund, a key reform designed to ensure that taxpayers are not backing some of banks' riskiest activities. In 2014, Wall Street and its allies slipped a repeal of the swap's pushout rule into a critical, must-pass omnibus spending bill, effectively repealing the provision. Matthew Yglesias, *Why Elizabeth Warren Hates the Government Funding Bill,* Vox (Dec. 11, 2014), https://www.vox.com/2014/12/11/7373831/swaps-pushout.

[138] Better Markets Comment Letter on Swap Execution Facilities and Trade Execution Requirement (Mar. 15, 2019), https://bettermarkets.com/sites/default/files/Better%20Markets%20Comment%20Letter%20on%20Swap%20Execution%20Facilities%20and%20Trade%20Execution%20Requirement_0.pdf.

[139] *See* Better Markets Comment Letter on Swap Execution Facilities and Trade Execution Requirement at 7 (Mar. 15, 2019), https://bettermarkets.com/sites/default/files/Better%20Markets%20Comment%20Letter%20on%20Swap%20Execution%20Facilities%20and%20Trade%20Execution%20Requirement_0.pdf.

[140] Swap Transaction Compliance and Implementation Schedule: Clearing Requirement Under Section 2(h) of the CEA, 77 Fed. Reg. 44,441 (Jul. 30, 2012).

[141] Clearing Requirement Determination Under Section 2(h) of the CEA, 77 Fed. Reg. 74,284, 74,337 (Dec. 13, 2012); *see* Better Markets Comment Letter on Clearing Determination for Interest Rate Swaps (Jul. 18, 2016), https://bettermarkets.com/sites/default/files/CL%20-%20CFTC%20-%20Clearing%20Requirement%20Determination%20Under%20Section%202h%20of%20the%20CEA%20for%20Interest%20Rate%20Swaps%207-18-2016.pdf.

[142] Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33,475 (Jun. 4, 2013); *see also* Better Markets Comment Letter on SEF Rules and RFQ-to-1 (Mar. 1, 2013), https://bettermarkets.com/sites/default/files/documents/CFTC-%20CL-%20SEF%20rules%20and%20RFQ-%203-1-13.pdf.

[143] 17 C.F.R. Part 45.

[144] Dennis Kelleher, Caitlin Kline and Victoria Daka, Policy Brief: Stopping Wall Street's Derivatives Dealers Club (Feb. 10, 2016).https://bettermarkets.com/resources/policy-brief-stopping-wall-street%E2%80%99s-derivatives-dealers-club.

[145] Better Markets Comment Letter on Capital, Margin, Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swaps Participants and Capital Requirements for Broker-Dealers (Nov. 19, 2018), https://bettermarkets.com/sites/default/files/Better%20Markets%20Request%20for%20delay%20and%20comment%20SBS%20cap%20margin%20and%20seg%20-%20%2011-19-18.pdf.

[146] Office of the Comptroller of the Currency, Quarterly Report on Bank Trading and Derivatives Activities, Third Quarter 2019 1 (Dec. 2019), https://www.occ.gov/publications-and-resources/publications/quarterly-report-on-bank-trading-and-derivatives-activities/files/pub-derivatives-quarterly-qtr3-2019.pdf (noting that "[a] small group of large financial institutions continues to dominate trading and derivatives activity in the U.S. commercial banking system" and that "four large commercial banks represented 87.2 percent of the total banking industry notional amounts and 83.2 percent of industry net current credit exposure").

[147] Bank for International Settlements, Statistical Release: OTC Derivative Statistics at End-June 2019 at 4, (Nov. 8, 2019), https://www.bis.org/publ/otc_hy1911.pdf (noting that "[l]arge dealers in advanced economies (AEs), who report data to the semiannual survey, accounted for the overwhelming majority (92% of notional amounts, 87% of gross market value) of outstanding positions at end-June 2019").

[148] This is especially the case for those entities that had entered into credit default swaps with AIG to hedge their own exposure to the housing market, who if AIG collapsed would find themselves fully exposed to a crumbling housing market.

[149] Initial margin, as its name suggests, is collected when the swap is entered into. Variation margin is exchanged between the parties on an ongoing basis for the life of the swap.

[150] The SEC was responsible for adopting margin requirements for securities-based swaps but failed to do so until well into the Trump administration. Those rules were, however, inadequate. See, Better Markets Comment Letter on on Capital, Margin, Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swaps Participants and Capital Requirements for Broker-Dealers (Nov. 19, 2018), https://bettermarkets.com/rulemaking/better-markets-comment-letter-sec-capital-margin-segregation-requirements-security-based.

[151] Margin and Capital Requirements for Covered Swap Entities, 80 Fed. Reb. 74,840 (Nov. 30, 2015); Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 Fed. Reg. 635 (Jan. 6, 2016); *see also* Better Markets Comment Letter on Margin for Uncleared Swaps (Sept. 18, 2012), https://bettermarkets.com/sites/default/files/documents/CFTC-%20CL-%20Margin%20Requirements%20for%20Uncleared%20Swaps-%209-18-12.pdf; Better Markets Comment Letter on Margin for Uncleared Swaps (Jul. 11, 2011), https://bettermarkets.com/sites/default/files/documents/CFTC-%20Comment%20Letter-%20Margin%20Requirements%207-11-11.pdf.

[152] Specifically, Covered Swaps Entities must collect and post both initial and variation margin when the counterparty to a swap is another Covered Swap Entity, or a "financial end user" with "material swaps exposure." Variation margin, but not initial margin, is required to be posted and collected with relation to a swap in which the counterparty is a financial end user without material swaps exposure. There is no requirement to post or collect initial or variation margin in connection with a swap with a non-financial end user.

[153] Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants; Final Rule, 81 Fed Reg. 636, 673 (Jan. 6, 2016).

[154] Better Markets Comment Letter on Capital Requirements for Swap Dealers and Major Swap Participants (Mar. 3, 2020), https://bettermarkets.com/sites/default/files/Better_Markets_Inc._Comment_Letter_on_Capital_Requirements_for_Swap_Dealers_and_Major_Swap_Participants_RIN_3038-AD54_%28March_3_2020%29.pdf.

[155] In addition, one of the key pre-crash arguments by Wall Street's swap dealing banks against swap regulation was the claim that each swap was a customized "bespoke" financial instrument that could not be regulated by rules applicable to all swaps. Of course, this was ridiculous because most swaps were standardized, but for the needlessly created complexity.

[156] Better Markets Comment Letter on Business Conduct Standards for Swap Dealers and Major Swap Participants (Feb. 22, 2011), https://bettermarkets.com/sites/default/files/documents/CFTC-%20Comment%20Letter-%20Bus%20%20conduct%202-22-11.pdf.

[157] Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 Fed. Reg. 9734 (Feb. 17, 2012).

[158] Better Markets Comment Letter on Cross-Border Application of Swap Dealer and Major Swap Participation Requirements (Dec. 19, 2016), https://bettermarkets.com/sites/default/files/CFTC-%20CL-%20Cross-Border%20Application%20of%20the%20Registration%20Thresholds%20and%20EBCS%2012-19-2016.pdf.

[159] For a comprehensive discussion and review of materials on cross border regulation of derivatives, *see*, *The CFTC's Regulation of Wall Street's High Risk Global Derivatives Bets Must Protect U.S. Taxpayers*, Better Markets Blog (Jun. 21, 2013), https://bettermarkets.com/blog/cftcs-regulation-wall-streets-high-risk-global-derivatives-bets-must-protect-us-taxpayers/.

[160] *See,* Better Markets Summary Presentation on Cross-Border Derivatives Regulation (June 21, 2013), https://bettermarkets.com/sites/default/files/CFTC%20Cross-border-%206-21-13.pdf.

[161] 7 U.S.C. § 2(i).

[162] Unfortunately, the CFTC issued its interpretation in the form of guidance, rather than final rules, which has raised significant questions regarding enforceability. See, Better Markets, Comment Letter on Cross-Border Proposal (Mar. 9, 2020), https://bettermarkets.com/sites/default/files/Better_Markets_Comment_Letter_on_Cross-Border_Application_of_the_Registration_Thresholds_and_Certain_Requirements_Applicable_to_Swap_Dealers_and_Major_Swap_Participants.pdf.

[163] Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45,292 (Jul. 26, 2013).

[164] *See, e.g., Wall Street's Biggest Banks Are Gambling and Evading Regulation Again*, Better Markets Blog, (June 27, 2018), https://bettermarkets.com/blog/wall-street%E2%80%99s-biggest-banks-are-gambling-and-evading-regulation-again.

[165] *See* Better Markets, Cross-Border Fact Sheet: US Banks Are Again Trying to Evade the Financial Reform Law by Changing a Few Words in a Contract: this Time, it's Called "De-guaranteeing' Overseas Affiliates," (June 9, 2014), https://bettermarkets.com/sites/default/files/Cross-Border%20Guarantee%20Fact%20Sheet%206-19-14%20%282%29_0.pdf.

[166] FSOC, Nonbank Financial Company Designations (last visited June 30, 2020), https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/fsoc/designations. MetLife challenged its designation in court. FSOC, under Obama, ably defended this designation. Unfortunately, the district court issued a fundamentally flawed decision rescinding the designation, a decision that had ramifications not only for the designation of MetLife, but FSOC's designation authority in general. FSOC was in the process of pursuing a meritorious appeal of this flawed decision when President Trump took office; Trump's FSOC abandoned this appeal. *See infra* Section IV.G.1.

[167] Authority To Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 Fed. Reg. 21,637 (Apr. 11, 2012).

[168] Authority To Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 Fed. Reg. 21,637, 21,656 (Apr. 11, 2012).

[169] Better Markets Comment Letter on Proposed Recommendations Regarding Money Market Mutual Fund Reform (Feb. 15, 2013), https://bettermarkets.com/sites/default/files/documents/FSOC-%20CL-%20MMF%20Recommendations-%202-15-13.pdf.

[170] Press Release, Dept. of Treasury, Treasury Announces Temporary Guarantee Program for Money Market Funds (Sept. 29, 2008), https://www.treasury.gov/press-center/press-releases/Pages/hp1161.aspx.

[171] FSOC, Proposed Recommendations Regarding Money Market Mutual Fund Reform 6 (Nov. 2012), https://www.treasury.gov/initiatives/fsoc/Documents/Proposed%20Recommendations%20Regarding%20Money%20Market%20Mutual%20Fund%20Reform%20-%20November%2013,%202012.pdf. The SEC did propose a set of reforms that constituted a step forward but, as Better Markets pointed out in its comment letter on the proposal, needed to go further to protect the public interest. *See* Better Markets Comment Letter on Money Market Reform (Sept. 17, 2013), https://bettermarkets.com/sites/default/files/SEC-%20MMF%20Reform-%209-17-13.pdf. Unfortunately, the SEC did not heed these comments when it finalized the rule; as a result, taxpayers have had to bail out money market funds yet again in the midst of the ongoing COVID-19 crisis. Better Markets, Fact Sheet: Money Market Funds Are Failing and Being Bailed Out Again, As They Were During the 2008 Financial Crisis Just Twelve Years Ago (Mar. 26, 2020), https://bettermarkets.com/sites/default/files/Better_Markets_Fact_Sheet_on_Money_Market_Funds.pdf.

[172] Office of Financial Research, Office of Financial Research Created Under the Dodd-Frank Wall Street Reform and Consumer Protection Act: Frequently Asked Questions (2010), https://www.treasury.gov/initiatives/Documents/OFR_FAQ-11242010-FINAL.PDF.

[173] Office of Financial Research, Bank Systemic Risk Monitor (last visited June 30, 2020), https://www.financialresearch.gov/bank-systemic-risk-monitor/.

[174] Office of Financial Research, Financial Stress Index (last visited June 30, 2020), https://www.financialresearch.gov/financial-stress-index/

[175] Office of Financial Research, U.S. Money Market Fund Monitor (last visited June 30, 2020), https://www.financialresearch.gov/money-market-funds/.

[176] Office of Financial Research, Financial Markets Monitor (last visited June 30, 2020), https://www.financialresearch.gov/financial-markets-monitor/.

[177] The last Financial Markets Monitor was published in August 2017.

[178] Office of Financial Research, Data Quality in Swap Data Repositories (last visited June 30, 2020), https://www.financialresearch.gov/data/data-quality-in-swap-data-repositories/.

[179] Many of these undone rules have been abandoned by the Trump administration or implemented in a substantially weaker version that violates the spirit and letter of the Dodd-Frank Act.

[180] *See The CFTC Must Stop Wild Commodity Speculation that Breaks American Families' Budgets*, Better Markets Blog, (Feb. 12, 2014), https://bettermarkets.com/blog/cftc-must-stop-wild-commodity-speculation-breaks-american-families%E2%80%99-budgets; Dennis M. Kelleher, Better Markets, Excessive Speculation in Commodity Markets is Driving Up Prices and Harming Commercial Producers and Consumers, https://bettermarkets.com/sites/default/files/Five%20page%20Summary%20on%20PL.pdf.

[181] Position Limits for Futures and Swaps, 76 Fed. Reg. 71,626 (Nov. 18, 2011).

[182] *See* David Frenk and Wallace Turbeville, Better Markets, Commodity Index Traders and Boom/Bust in Commodities Prices, (2011), https://bettermarkets.com/sites/default/files/Better%20Markets-%20Commodity%20Index%20Traders%20and%20Boom-Bust%20in%20Commodities%20Prices.pdf; *Excessive Speculation and Compliance*

with the Dodd-Frank Act, Hearing Before the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs, United States Senate, 112th Cong., (Nov. 3, 2011) (Testimony of Wallace C. Turbeville, Derivatives Specialist, Better Markets, Inc.) https://bettermarkets.com/sites/default/files/Testimony%20Senate%20Final%2011-3-11.pdf; Press Release, Better Markets, With WTI Oil Futures Prices Negative, Something Is Fundamentally Wrong in The Oil Derivatives Markets--The CFTC Must Investigate Speculative Oil Trading Activities (Apr. 22, 2020), https://bettermarkets.com/newsroom/wti-oil-futures-prices-negative-something-fundamentally-wrong-oil-derivatives-markets-cftc.

[183] *Int'l Swaps & Derivatives Ass'n v. U.S. Commodity Futures Trading Comm'n,* 887 F. Supp. 2d 259 (D.D.C. 2012).

[184] Brief of Better Markets, Inc. as Amicus Curiae in Support of Defendant CFTC, *Int'l Swaps & Derivatives Ass'n v. U.S. Commodity Futures Trading Comm'n,* 887 F. Supp. 2d 259 (D.D.C. 2012) (No. 11-2146), (https://bettermarkets.com/resources/brief-better-markets-inc-amicus-curiae-support-defendant-cftc-matter-isda-v-cftc; Press Release, Better Markets, CFTC Must Stop Wild Commodity Speculation (Feb. 12, 2014), https://bettermarkets.com/newsroom/cftc-must-stop-wild-commodity-speculation-breaks-american-families%E2%80%99-budgets

[185] Dodd-Frank Act Title IX, Subtitle E.

[186] Pay Ratio Disclosure, 80 Fed. Reg. 50,103 (Aug. 18, 2015).

[187] Shareholder Approval of Executive Compensation and Golden Parachute Compensation, 76 Fed. Reg. 6010 (Feb. 2, 2011).

[188] John Heltman, *Bankshot: Don't hold your breath for an executive compensation rule*, American Banker (Mar. 13, 2019), https://www.americanbanker.com/opinion/dont-hold-your-breath-for-an-executive-compensation-rule.

[189] Better Markets Comment Letter on Executive Compensation (Jul. 22, 2016), https://bettermarkets.com/sites/default/files/FRS%20NCUA%20FDIC%20OCC%20SEC%20FHFA%20-%20CL%20-%20Incentive-Based%20Compensation%20Arrangements%20-7-22-2016.pdf.

[190] United States Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, Wall Street and the Financial Crisis: Anatomy of a Financial Collapse 6 (Apr. 13, 2011), https://www.hsgac.senate.gov/imo/media/doc/PSI%20REPORT%20-%20Wall%20Street%20&%20the%20Financial%20Crisis-Anatomy%20of%20a%20Financial%20Collapse%20(FINAL%205-10-11).pdf

[191] Better Markets, *Fact Sheet: Credit Rating Agency Conflicts of Interest Again Fueling A Financial Crisis* (2020), https://bettermarkets.com/sites/default/files/CRA_Fact_Sheet_updated_5-19-20.pdf.

[192] Ryan Tracy & Andrew Ackerman, *How Congress Rolled Back Banking Rules in a Rare Bipartisan Deal*, Wall St. J., (May 23, 2018), https://www.wsj.com/articles/how-congress-rolled-back-banking-rules-in-a-rare-bipartisan-deal-1527030512.

[193] *See* Dennis Kelleher, President and CEO, Better Markets, The State of Financial Reform (Nov. 2018), https://bettermarkets.com/sites/default/files/State%20of%20Financial%20Reform.pdf.

[194] *See* Anand Sinha, *Financial Sector Regulation and Implications for Growth* (BIS Paper No. 62G, 2012) ("Reform of regulations, covering more dimensions than in the past and with much greater intensity of supervision and oversight by international bodies, has therefore come to occupy centre stage for ensuring the well-functioning financial system that is so vital for economic growth."), https://www.bis.org/publ/bppdf/bispap62g.pdf; Codruta Boar, et al., *What Are the Effects of Macroprudential Policies on Macroeconomic Performance?*, BIS Quarterly Review (Sept. 2017) ("We find that countries that more frequently use macroprudential tools, other things being equal, experience stronger and less volatile GDP growth."); Gregg Gelzinis, Andy Green, and Marc Jarsulic, Ctr. for Am. Progress Resisting Financial Deregulation (Dec. 4, 2017), https://www.americanprogress.org/issues/economy/reports/2017/12/04/443611/resisting-financial-deregulation/.]

[195] *The Impact of Dodd-Frank on Customers, Credit, and Job Creators, Hearing Before the Committee on Financial Services Subcommittee on Capital Markets and Government Sponsored Enterprises*, 111th Cong. (Jul. 10,

2010) (statement of Dennis M. Kelleher, President & CEO of Better Markets) ("Wall Street is not a job creator. Wall Street is a job killer… of historic proportions"), https://bettermarkets.com/sites/default/files/Opening%20Statement%207-10-12_0_0.pdf.

[196] *See* Better Markets, The Cost of the Crisis: $20 Trillion and Counting (2015), https://bettermarkets.com/sites/default/files/Better%20Markets%20-%20Cost%20of%20the%20Crisis.pdf.

[197] *Regulators? We Just Love 'Em, Says John Mack*, Evening Standard (Nov. 19, 2009), https://www.standard.co.uk/business/regulators-we-just-love-em-says-john-mack-6744822.html.

[198] That is not to suggest that the capitalization of systemically significant financial institutions was (or is) adequate. It was not, as then-FDIC Vice Chairman Thomas Hoenig repeatedly detailed, including in a July 31, 2017 letter to Chairman Crapo and Ranking Member Brown of the Senate Committee on Banking, Housing and Urban Affairs, available here: https://www.fdic.gov/about/learn/board/hoenig/hoenigletter07-31-2017.pdf, and in his discussion of "owner equity capital" in a speech titled *Deposit Insurance: Addressing the Moral Hazard Effect*, delivered on October 11, 2017, https://www.fdic.gov/news/news/speeches/spoct1117.html.

[199] This oft-cited point—that banks are now "stronger than 2008" —is clearly not the right benchmark since requirements at that time were so weak that they contributed to an historic crash with devastating consequences for tens of millions of people. Even today's capital levels are below the very bottom of the range which numerous studies have found to be appropriate to protect the system from needing taxpayer-funded bailouts of dangerously overleveraged banks in the future. *See*, Jihad Dagher et al., IMF, Benefits and Costs of Bank Capital (Mar. 2016) (capital should be in the range of 15-23%), https://www.imf.org/external/pubs/ft/sdn/2016/sdn1604.pdf; Fabrizio Perri & Georgios Stefanidis, Federal Reserve Bank of Minneapolis, Capital Requirements and Bailouts (Staff Report 554, 2017) (capital in the range of 20-30% needed to prevent public recapitalization); Federal Reserve Bank of Minneapolis, The Minneapolis Plan to End Too-Big-To-Fail (2017) (same), https://www.minneapolisfed.org/~/media/files/publications/studies/endingtbtf/the-minneapolis-plan/the-minneapolis-plan-to-end-too-big-to-fail-final.pdf?la=en; Simon Firestone, Amy Lorenc & Ben Ranish, *An Empirical Economic Assessment of the Costs and Benefits of Bank Capital in the US,* 101 Federal Reserve Bank of St. Louis Review 203 (2017), (finding that the "optimal range" of capital is between 13%-26%), https://files.stlouisfed.org/files/htdocs/publications/review/2019/07/12/an-empirical-economic-assessment-of-the-costs-and-benefits-of-bank-capital-in-the-united-states.pdf. *See also* Anat R. Admati and Martin Hellwig, The Bankers' New Clothes: What's Wrong With Banking and What to Do About It (2013).

[200] FDIC, Quarterly Banking Profile: First Quarter 2017, https://www.fdic.gov/bank/analytical/qbp/2017mar/qbp.pdf.

[201] Statement of Martin J. Gruenberg, Chairman, Federal Deposit Insurance Corporation, on Fostering Economic Growth: Regulator Perspective before the Committee on Banking, Housing, and Urban Affairs, United States Senate, June 22, 2017, https://www.fdic.gov/news/news/speeches/spjun2217.pdf.

[202] Kate Berry, *Four Myths in the Battle over Dodd-Frank*, Am. Banker, (Mar. 10, 2017), https://www.americanbanker.com/news/four-myths-in-the-battle-over-dodd-frank (emphasis added).

[203] Zeke Faux, Yalman Onaran, and Jennifer Surane, *Trump Cites Friends to Say Banks Aren't Making Loans. They Are*, Bloomberg, (Feb. 4, 2017), https://www.bloomberg.com/news/articles/2017-02-04/trump-cites-friends-to-say-banks-aren-t-making-loans-they-are (emphasis added).

[204] Jeff Cox., *Yellen: Trump is completely wrong that banks aren't lending,* CNBC, (Feb. 14, 2017), http://www.cnbc.com/2017/02/14/janet-yellen-banks-are-lending-and-quite-profitable.html.

[205] Paul A. Volcker, Remarks at the 2017 Annual Meeting of the Bretton Woods Committee (Apr. 19, 2017), https://www.volckeralliance.org/sites/default/files/attachments/Paul%20Volcker_Bretton%20Woods%20Speech_19Apr2017.pdf.

[206] Morris Goldstein, Banking's Final Exam: Stress Testing and Bank-Capital Reform (2017).

[207] Morris Goldstein, Banking's Final Exam: Stress Testing and Bank-Capital Reform (2017); Leonardo Gambacorta & Hyun Song Shin, *Why Bank Capital Matters for Monetary Policy* (BIS Working Paper 558, Apr. 2016), https://

www.bis.org/publ/work558.pdf. *See also* Anat R. Admati and Martin Hellwig, The Bankers' New Clothes: What's Wrong With Banking and What to Do About It (2013); Anat R. Admati and Martin Hellwig, *The Parade of Bankers' New Clothes Continues: 34 Flawed Claims Debunked* (Working Paper, Revised Aug. 2019), https://www.gsb.stanford.edu/sites/gsb/files/paradeofbankers_continues_-aug-27-2019.pdf; Statement of FDIC Vice Chairman Hoenig On The Global Capital Index Semi-Annual Update (Apr. 13, 2017), https://www.fdic.gov/news/news/speeches/spapr1317.html.

[208] Press Release, Better Markets, Wall Street's Biggest Banks Purposefully Flunk Living Will Test to Ensure Future Bailouts (Aug. 6, 2014), https://bettermarkets.com/newsroom/wall-street%E2%80%99s-biggest-banks-purposefully-flunk-%E2%80%98living-will%E2%80%99-test-ensure-future-bailouts.

[209] This is why House Financial Services Chairman Barney Frank quipped at a hearing on September 17, 2008, that "he was going to introduce a resolution declaring September 15 'Free Market Day'" because that was the day "the government declined to step in to rescue Lehman Brothers, but it was ***only one day*** before the government took a much different approach to prevent the collapse of" AIG and then money market funds, Goldman, Sachs, Morgan Stanley, Citigroup and dozens of other financial firms. As Chairman Frank wryly noted, "the national commitment to the free market lasted one day." *See Barney Frank Celebrates Free Market Day*, Wall St. J. (Sept. 17, 2008), https://blogs.wsj.com/economics/2008/09/17/barney-frank-celebrates-free-market-day/.

[210] *See*, Federal Reserve Bank of Boston, Conference Stress Testing: A Discussion and Review (comments of Dennis Kelleher) (Jul. 9, 2019) https://bettermarkets.com/sites/default/files/Stress_Testing_A_Discussion_and_Review_Kelleher.pdf ("Conflict between bankers and regulators in financial regulation is inevitable, healthy and, indeed, a sign of success").

[211] In 2018, Congress passed the Economic Growth, Regulatory Relief and Consumer Protection Act, Pub. L. No. 115-174 ("S. 2155"), a deregulatory bill that, among other things, eliminated the ability of the Federal Reserve to apply enhanced prudential standards to banks with less than $100 billion in assets, and raised the asset threshold for the required application of enhanced prudential standards from $50 billion to $250 billion. *See* Better Markets, Fact Sheet: Correcting the Record on Deregulatory Bill S. 2155 (Oct. 2, 2018), https://bettermarkets.com/resources/correcting-record-deregulatory-bill-s-2155; Better Markets Letter to the Senate Banking Committee Regarding Regulatory Implementation of the Economic Growth, Regulatory Relief and Consumer Protection Act (Oct. 1, 2018), https://bettermarkets.com/sites/default/files/S.%202155%20Hearing%20SBC%20Letter%2010.1.18.pdf; Better Markets Letter to The Honorable Randal K. Quarles Vice Chairman for Supervision Regarding Implementation of S. 2155 (Sept. 24, 2018), https://bettermarkets.com/sites/default/files/Ltr%20to%20Fed%20VC%20Quarles%20re%20Implementation%202155%209-24-18%20FINAL.pdf; Better Markets, Who Does S. 2155 Benefit? Recidivist Giant Banks that Received Trillions in Taxpayer Bailouts (Feb. 28, 2018), https://bettermarkets.com/sites/default/files/Crapo%20Bill%20Rap%20Sheet%20Consolidated%20FINAL.pdf; Better Markets, S. 2155: The Consequences of Deregulating Bailed-Out Banks (Feb. 28, 2018), https://bettermarkets.com/resources/s-2155-consequences-deregulating-bailed-out-banks. The Federal Reserve retained discretion to apply enhanced prudential standards to banks with $100 billion to $250 billion in assets, and nothing in S. 2155 requires that any enhanced prudential standards be weakened. *See* Dennis M. Kelleher, Opinion, *Size Isn't the Be All End All in Banking Regulation*, The Hill (Oct. 1, 2018), https://thehill.com/opinion/finance/409207-size-isnt-the-be-all-end-all-in-banking-regulation Unfortunately, Trump's banking regulators went far beyond the letter and stated purpose of the law, deregulating banks in needlessly dangerous ways. *See, e.g.* Lael Brainard, Member of the Board of Governors of the Federal Reserve, Statement on Proposals to Modify Enhanced Prudential Standards for Large Banking Organizations (Oct. 31, 2018) ("Unfortunately, the proposals under consideration go beyond the provisions of S. 2155") https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20181031.htm.

[212] Regulatory Capital Rules: Regulatory Capital, Enhanced Supplementary Leverage Ratio Standards for U.S. Global Systemically Important Bank Holding Companies and Certain of Their Subsidiary Insured Depository Institutions; Total Loss-Absorbing Capacity Requirements for U.S. Global Systemically Important Bank Holding Companies, 83 Fed. Reg. 17,317 (Apr. 19, 2018); Better Markets Comment Letter on eSLR (June 25, 2018), available at https://bettermarkets.com/sites/default/files/Better%20Markets%20CL%20to%20OCC%20and%20Fed%20eSLR%206-25-18.pdf. Governor Lael Brainard dissented from the proposal (although she did not issue a statement). https://www.federalreserve.gov/aboutthefed/boardvotes2018.htm.

[213] Proposed Changes to Applicability Thresholds for Regulatory Capital and Liquidity Requirements, 83 Fed. Reg. 66,024 (Dec. 21, 2018); Better Markets Comment Letter on Proposed Changes to Applicability Thresholds for Regulatory Capital and Liquidity Requirements (Jan. 22, 2019); https://bettermarkets.com/rulemaking/better-markets-comment-letter-frs-occ-fdic-proposed-changes-applicability-thresholds; Lael Brainard, Member of the Board of Governors of the Federal Reserve, Statement on Proposals to Modify Enhanced Prudential Standards for Large Banking Organizations (Oct. 31, 2018), https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20181031.htm; Statement by FDIC Board Member Martin J. Gruenberg, Meeting of the FDIC Board of Directors, Notice of Proposed Rulemaking on Changes to Applicability Thresholds for Regulatory Capital and Liquidity Requirements (Nov. 20, 2018), https://www.fdic.gov/news/speeches/spnov2018a.html.

[214] Changes to Applicability Thresholds for Regulatory Capital and Liquidity Requirements, 84 Fed. Reg. 59,230 (Nov. 1, 2019); Statement by Martin J. Gruenberg, Member, FDIC Board of Directors on the Final Rule on Changes to Applicability Thresholds for Regulatory Capital and Liquidity Requirements (Oct. 15, 2019), https://www.fdic.gov/news/speeches/spoct1519a.html; Statement by Governor Lael Brainard (Oct. 10, 2019), https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20191010.htm.

[215] According to the Federal Reserve's estimates, there is one domestic bank with $250 billion to $700 billion in assets, and four foreign banks. Federal Reserve, Requirements for Domestic and Foreign Banking Organizations (last visited June 30, 2020), https://www.federalreserve.gov/aboutthefed/boardmeetings/files/tailoring-rule-visual-20191010.pdf.

[216] There are approximately 12 domestic banks in this category. Federal Reserve, Requirements for Domestic and Foreign Banking Organizations (last visited June 30, 2020), https://www.federalreserve.gov/aboutthefed/boardmeetings/files/tailoring-rule-visual-20191010.pdf.

[217] 2019 Capital Rule at 59,259; *see also* Statement by Governor Lael Brainard on Changes to Applicability Thresholds for Regulatory Capital and Liquidity Requirements (Oct. 10, 2019), https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20191010.htm; Statement by Martin J. Gruenberg, Member, FDIC Board of Directors on the Final Rule on Changes to Applicability Thresholds for Regulatory Capital and Liquidity Requirements (Oct. 15, 2019), https://www.fdic.gov/news/speeches/spoct1519a.html.

[218] Enhanced Disclosure of the Models Used in the Federal Reserve's Supervisory Stress Test, 82 Fed. Reg. 59,547 (Dec. 15, 2017); Policy Statement on the Scenario Design Framework for Stress Testing, 82 Fed. Reg. 59,533 (Dec. 15, 2017); Stress Testing Policy Statement, 82 Fed. Reg. 59,528 (Dec. 15, 2017); Better Markets Comment Letter on Stress Test Disclosures (Jan. 22, 2018), https://bettermarkets.com/sites/default/files/FRS%20-%20CL%20-%20Stress%20Testing_0.pdf.

[219] Amendments to the Regulatory Capital, Capital Plan, and Stress Test Rules, 83 Fed. Reg. 18,160 (Apr. 25, 2018); Better Markets Comment Letter on Regulatory Capital, Capital Plan and Stress Test Rules (June 25, 2018), https://bettermarkets.com/sites/default/files/Better%20Markets%20CL%20to%20Fed%20-%20Cap%20buffer%20and%20stress%20testing%206-25-18.pdf.

[220] Prudential Standards for Large Bank Holding Companies and Savings and Loan Holding Companies, 83 Fed. Reg. 61,408 (Nov. 29, 2018); Better Markets Comment Letter on Enhanced Prudential Standards (Jan. 22, 2019), https://bettermarkets.com/sites/default/files/Better%20Markets%20Comment%20Letter%20Fed%20Enhanced%20Prudential%20Standards%20Proposal.pdf; . Statement on Proposals to Modify Enhanced Prudential Standards for Large Banking Organizations by Governor Lael Brainard (Oct. 31, 2018), https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20181031.htm.

[221] Prudential Standards for Large Bank Holding Companies, Savings and Loan Holding Companies, and Foreign Banking Organizations, 84 Fed. Reg. 52,092 (Nov. 1, 2019).

[222] See, Federal Reserve Bank of Boston, Conference Stress Testing: A Discussion and Review (comments of Dennis Kelleher) (Jul. 9, 2019), https://bettermarkets.com/sites/default/files/Stress_Testing_A_Discussion_and_Review_Kelleher.pdf; *see also* Statement by Governor Lael Brainard (Oct. 10, 2019), https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20191010.htm.

[223] Regulations Q, Y, and YY: Regulatory Capital, Capital Plan, and Stress Test Rules, 85 Fed. Reg. 15,576 (Mar. 18, 2020).

[224] https://www.federalreserve.gov/newsevents/pressreleases/bcreg20190306b.htm.

[225] Tim P. Clark, Dynamism and Transparency in Stress Testing (Jul. 9, 2019), *available at* https://www.bostonfed.org/news-and-events/events/2019/stress-testing.aspx. The Federal Reserve's Randal Quarles has indicated a clear desire to reduce supervision. Lalita Clozel, *Banks Get Kinder, Gentler Treatment Under Trump*, Wall St. J. (Dec. 12, 2018), https://www.wsj.com/articles/banks-get-kinder-gentler-treatment-under-trump-11544638267.

[226] This was all made worse by the Fed's June 25, 2020 announcement of the Dodd-Frank Act Stress Test results for 2020. Press Release, Federal Reserve, Federal Reserve Board Releases Results of Stress Tests for 2020 (June 25, 2020), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200625c.htm. That announcement was an exercise in bad decision-making by the Federal Reserve, which has undermined the credibility of the program at a particularly bad time. The stress test used a scenario designed prior to the pandemic and the economic crisis it caused. It used estimates for unemployment and a range of economic activity that were in some areas markedly better than what is actually occurring, though a critical purpose of the test is to assess banks' ability to withstand an environment significantly worse than what is anticipated. In other words, reality has far exceeded what was hypothesized as a severely adverse scenario. While the Federal Reserve did also run "sensitivity analyses" to test against worse conditions, it declined to release bank-by-bank results, creating unnecessary uncertainty. Most importantly, the Federal Reserve failed to use its clear authority under the stress testing rule to require the banks to stop all capital distributions and preserve capital in the face of unprecedented economic calamity and uncertainty. Instead, the Federal Reserve unwisely and potentially recklessly imposed largely meaningless "restrictions" that nonetheless allowed the banks to significantly reduce capital through dividend payouts. *See*, Daniel K. Tarullo, *Are We Seeing The Demise of Stress Testing?*, Brookings Blog (June 25, 2020), https://www.brookings.edu/blog/up-front/2020/06/25/stress-testing/; Natasha Sarin, Opinion, *The Fed Just Bungled Its Bank Stress Tests*, Bloomberg, (June 26, 2020), https://www.bloombergquint.com/gadfly/the-fed-just-bungled-its-bank-stress-tests.

[227] Resolution Plans Required, 84 Fed. Reg. 21,600 (May 14, 2019); Statement by Martin J. Gruenberg Member, FDIC Board of Directors, Notice of Proposed Rulemaking: Title I Resolution Plans (Apr. 16, 2019), https://www.fdic.gov/news/speeches/spapr1619.html; Statement on Proposals to Modify Enhanced Prudential Standards for Foreign Banks and to Modify Resolution Plan Requirements for Domestic and Foreign Banks by Governor Lael Brainard (Apr. 8, 2019), https://www.federalreserve.gov/newsevents/pressreleases/3B1F641BEB4A485B994EBC38165F0F3B.htm#aboutMenu.

Better Markets Comment Letter on Resolution Plans (June 21, 2019), available at https://bettermarkets.com/sites/default/files/Better%20Markets%20CL%20FRS%20FDIC%20Resolution%20Planning%206-21-2019.pdf.

[228] Resolution Plans Required, 84 Fed. Reg. 59,194 (Nov. 1, 2019); Statement by Governor Lael Brainard (Oct. 10, 2019), https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20191010.htm; Statement by Martin J. Gruenberg, Member, FDIC Board of Directors on the Final Rule: Title I Resolution Plans (Oct. 15, 2019), https://www.fdic.gov/news/speeches/spoct1519b.html.

[229] *See, e.g.,* Dennis Kelleher, *Trump Reopening Wall Street Casino by Weakening Volcker Rule*, Am. Banker, (Oct. 22, 2018), https://www.americanbanker.com/opinion/trump-reopening-wall-street-casino-by-weakening-volcker-rule.

[230] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 84 Fed. Reg. 61,974 (Nov. 14, 2019); Better Markets Comment Letter on the New Volcker Rule Proposal (Oct. 18, 2018), https://bettermarkets.com/sites/default/files/Better%20Markets%20Comment%20Letter%20on%20New%20Volcker%20Rule%20Proposal.pdf; Better Markets, Fact Sheet: The Key Changes that Seriously Weaken the Volcker Rule (Aug. 28, 2019), https://bettermarkets.com/resources/fact-sheet-key-changes-seriously-weaken-volcker-rule-detailed-here.

[231] Lewis Carrol, Through the Looking Glass 99 (Rand McNally & Co. 1917) (1871) ("'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.'")

[232] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge

Funds and Private Equity Funds (adopted by Federal Reserve, OCC, FDIC, CFTC and SEC on June 25, 2020), https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20200625a1.pdf. Press Release, Better Markets, Latest Weakening of Volcker Rule Re Covered Funds Creates Multiple Loopholes, Endangers Financial Stability and Makes Bailouts More Likely (June 25, 2020), https://bettermarkets.com/newsroom/latest-weakening-volcker-rule-re-covered-funds-creates-multiple-loopholes-endangers. Again, these revisions to the Volcker Rule inspired a variety of dissents from the agencies responsible. *See* Statement by Martin J. Gruenberg Member, FDIC Board of Directors Final Rule: Volcker Rule Prohibition on Hedge Funds and Private Equity Funds (June 25, 2020), https://www.fdic.gov/news/speeches/spjun2520d.html; Statement by Governor Brainard (June 25, 2020), https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20200625a.htm.; Dissenting Statement of CFTC Commissioner Dan M. Berkovitz Regarding Volcker Covered Funds Final Rule (June 25, 2020), https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement062520b; Dissenting Statement of CFTC Commissioner Rostin Behnam Regarding Revisions to the Volcker Rule (June 25, 2020), https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement062520; Statement of SECCommissioner Allison Herren Lee on the Final Rules Continuing the Repeal of Volcker (June 25, 2020), https://www.sec.gov/news/public-statement/lee-statement-final-rules-continuing-volcker-repeal.

[233] Better Markets, Fact Sheet: The Key Changes that Seriously Weaken the Volcker Rule (Aug. 29, 2019), https://bettermarkets.com/resources/fact-sheet-key-changes-seriously-weaken-volcker-rule-detailed-here. The danger of the 2019 Volcker Rule is further illuminated by the variety of dissents of members of the various regulatory agencies responsible for promulgating the 2019 Volcker Rule. *See* Statement on Final Rule to Modify the Volcker Rule by Governor Lael Brainard (Oct. 8, 2019), https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20191008.htm; Statement by Martin J. Gruenberg, Member, FDIC Board of Directors, The Volcker Rule (Aug. 20. 2019), https://www.fdic.gov/news/speeches/spaug2019b.html; Statement of SEC Commissioner Robert J. Jackson, Jr. on Volcker Rule Amendments (Sept. 19, 2019), https://www.sec.gov/news/public-statement/statement-jackson-091919; Statement of SEC Commissioner Allison Herren Lee on Amendments to the Volcker Rule (Sept. 19, 2019), https://www.sec.gov/news/public-statement/statement-lee-091919; Dissenting Statement of CFTC Commissioner Dan M. Berkovitz on Volcker Rule Amendments—Final Rule (Sept. 16, 2019), https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement091619; Dissenting Statement of CFTC Commissioner Rostin Behnam Regarding Amendments to the Volcker Rule (Sept. 16, 2019), https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamestatement091619. *See also* See, e.g., Jesse Hamilton, *Banks Get Easier Volcker Rule and $40 Billion Break on Swaps,* Bloomberg (June 25, 2020), https://www.bloomberg.com/news/articles/2020-06-25/banks-get-easier-volcker-rule-and-40-billion-reprieve-on-swaps?sref=mQvUqJZj; Better Markets Comment Letter on Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds (April 1, 2020) https://bettermarkets.com/sites/default/files/Better_Markets_Inc._Comment_Letter_on_Prohibitions_and_Restrictions_on_Proprietary_Trading_and_Certain_Interests_in_and_Relationships_With_Hedge_Funds_and_Private_Equity_Funds.pdf.

[234] See, e.g., Dennis Kelleher, Opinion, *Why Every American Should Want a Strong CFPB*, L.A. Times (Dec. 6, 2017), https://www.latimes.com/opinion/op-ed/la-oe-kelleher-why-the-cfpb-is-important-20171206-story.html.

[235] Better Markets Comment Letter on CFPB Request for Information to Assist Task Force on Federal Consumer Financial Law (June 1, 2020), https://bettermarkets.com/rulemaking/better-markets-issues-comment-letter-response-cfpb-request-information-assist-task-force.

[236] Rob Blackwell, *Mick Mulvaney Controversy Magnet*, Am. Banker (last visited June 30, 2020), https://www.americanbanker.com/slideshow/the-many-controversies-of-cfpbs-mick-mulvaney.

[237] https://www.nytimes.com/2019/04/16/magazine/consumer-financial-protection-bureau-trump.html.

[238] Kate Berry, *Meet Mulvaney's 'Politicos': Six Senior Staff Remaking the CFPB*, Am. Banker (May 7, 2018), https://www.americanbanker.com/news/meet-mick-mulvaneys-politicos-six-senior-staff-remaking-the-cfpb.

[239] Renae Merle, *The CFPB Tried to Change Its Name. Here's Why It Gave Up*, Wash. Post (Dec. 19, 2018), https://www.washingtonpost.com/business/2018/12/19/cfpb-tried-change-its-name-heres-why-its-giving-up/

[240] Chris Arnold & Avie Schneider, *Mick Mulvaney Effectively Fires CFPB Advisory Council*, NPR (June 6, 2018), https://www.npr.org/2018/06/06/617612219/mick-mulvaney-effectively-fires-cfpb-advisory-council

[241] Nicholas Confessore, Mick Mulvaney's Master Class in Destroying a Bureaucracy From Within, N.Y. Times Magazine (Apr. 16, 2019), https://www.nytimes.com/2019/04/16/magazine/consumer-financial-protection-bureau-trump.html.

[242] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. 4252 (Feb. 14, 2019).

[243] Better Markets, Comment Letter on Payday Lending Proposal (May 15, 2019), https://bettermarkets.com/sites/default/files/Better%20Markets%20CL%20CFPB%20Payday%20Underwriting%20Rescission%205-15-2019_0.pdf. Payday, Vehicle Title, and Certain High-Cost Installment Loans (Jul. 7, 2020), https://files.consumerfinance.gov/f/documents/cfpb_payday_final-rule-2020-revocation.pdf.

[244] Better Markets, Comment Letter on Payday Lending Proposal (May 15, 2019), https://bettermarkets.com/sites/default/files/Better%20Markets%20CL%20CFPB%20Payday%20Underwriting%20Rescission%205-15-2019_0.pdf.

[245] *See* Better Markets Comment Letter on De Minimis Exception to Swap Dealer Definition (Aug. 13, 2018) (noting that the rulemaking violates the APA because, among other things, the CFTC failed to provide an evidentiary basis for the rule), https://bettermarkets.com/sites/default/files/Better%20Markets%20Comment%20Letter%20to%20CFTC%20on%20De%20Minimis%20Exception.pdf; Better Markets Comment Letter on Brokered Deposits (June 9, 2020) ("But the FDIC fails to provide any credible evidence that regulatory relief is actually necessary either for banks or for deposit brokers."), https://bettermarkets.com/sites/default/files/Better_Markets_Comment_Letter_on_Brokered_Deposits_6-9-2020.pdf; Better Markets Comment Letter on Regulation Best Interest (Aug. 7, 2018) (noting that SEC's proposal fails to account significant evidence of investor harm), https://bettermarkets.com/sites/default/files/Better%20Markets%20Comment%20Letter%20Reg%20BI%20%208-7-18%20Final.pdf.

[246] *See* Kevin Dugan, *CFPB Spoke With Industry Execs Before Relaxing Payday Loan Rules*, N.Y. Post (Feb. 27, 2019), https://nypost.com/2019/02/27/cfpb-spoke-with-industry-execs-before-relaxing-payday-loan-rules/; *see also*, Dennis Kelleher, Opinion, *Keep Industry Insiders Out of the Payday Loan Rulemaking Process*, The Hill (Mar. 11, 2019), https://thehill.com/opinion/finance/433426-keep-industry-insiders-out-of-the-payday-loan-regulatory-process.

[247] Kevin Dugan, *CFPB Spoke With Industry Execs Before Relaxing Payday Loan Rules*, N.Y. Post (Feb. 27, 2019), https://nypost.com/2019/02/27/cfpb-spoke-with-industry-execs-before-relaxing-payday-loan-rules/; *see also* Better Markets Comment Letter on Proposed Payday Lending Rule Rescission at 10-12 (May 15, 2019), https://bettermarkets.com/sites/default/files/Better%20Markets%20CL%20CFPB%20Payday%20Underwriting%20Rescission%205-15-2019_0.pdf. According to the report, when asked about the contradiction the CFPB spokesperson requested speaking with the reporter off the record. When the reporter refused, the CFPB spokesperson stopped responding to requests. This sort of fraudulent, illegal industry misconduct was not limited to CFPB rulemaking. On November 19, 2019, Bloomberg reported that comment letters submitted in support of the SEC's flawed proposal regarding proxy access—including several that Chairman Jay Clayton specifically cited as influential during the vote to finalize the rule—were either fraudulent or materially misleading with respect to the identities of the signers. According to the article, several people denied ever signing the letters that bore their names; several people were prevailed upon to sign their letters without any understanding of the issues they were supposedly addressing; and numerous signers were people with close connections to an advocacy group known as "60 Plus Association" ("60 Plus"), which is funded by corporate supporters of the Proposals. As further reported in the article, those signers included former employees of 60-Plus; a contractor for the group; and friends and relatives of the President of the organization—none of whom disclosed their connection to 60 Plus in their letters. Zachary Mider &Ben Elgin, *SEC Chairman Cites Fishy Letters in Support of Policy Change*, Bloomberg, https://www.bloomberg.com/news/articles/2019-11-19/sec-chairman-cites-fishy-letters-in-support-of-policy-change; *see also* Better Markets Letter to SEC Chairman Jay Clayton Regarding Fraudulent Comment Letters (Dec. 9, 2019), https://bettermarkets.com/sites/default/files/Fraudulent_comment_letters_-_Letter_to_SEC_12-9-19.pdf; Better Markets Letter to Department of Justice Regarding Fraudulent Comment Letters (Dec. 9, 2019), https://bettermarkets.com/rulemaking/better-markets-letter-department-justice-fraudulent-comment-letters; Better Markets Letter to Various Agency Heads Regarding Fraudulent Comment Letters (Dec. 9, 2019), https://bettermarkets.com/sites/default/files/Fraudulent_comment_letters_-_Letter_to_DOJ_12-9-19.pdf; Better Markets Letter to Senate Banking Committee Regarding Fraudulent Comment Letters, https://bettermarkets.com/sites/default/files/Fraudulent_comment_letters_-_Letter_to_Crapo_and_Brown_12-9-19.pdf.

[248] Christopher L. Peterson, Consumer Federation of America, Dormant: The Consumer Financial Protection Bureau's Law Enforcement Program in Decline (Mar. 2019), https://consumerfed.org/wp-content/uploads/2019/03/CFPB-Enforcement-in-Decline.pdf; Better Markets Comment Letter on CFPB Request for Information to Assist Task Force on Federal Consumer Financial Law (June 1, 2020), https://bettermarkets.com/sites/default/files/Better_Markets_Comment_Letter_on_CFPB_Request_for_Information_to_Assist_the_Taskforce_on_Federal_Consumer_Financial_Law.pdf.

[249] Better Markets, Fact Sheet: The CFPB Task Force on Consumer Protection Must Protect Consumers, Not the Financial Services Industry (June 3, 2020), https://bettermarkets.com/sites/default/files/CFPB_Task_Force_Fact_Sheet_6-2-20.pdf; Kevin McCoy, *What the Consumer Financial Protection Bureau Battle Means to You*, U.S.A. Today (Nov. 27, 2017), https://www.usatoday.com/story/money/2017/11/27/what-consumer-financial-protection-bureau-battle-means-you/897704001/.

[250] Americans for Financial Reform, Fact Sheet: Kraninger Lets Industry "Drive the Agenda" at CFPB (Feb. 6, 2020), https://ourfinancialsecurity.org/2020/02/news-release-kraninger-lets-industry-drive-agenda-cfpb/.

[251] In public remarks, Director Kraninger has argued that "supervision is the heart of this agency," while enforcement will apparently be reserved for "bad actors." Speech at the Bipartisan Policy Center By Kathleen L. Kraninger, Director, Consumer Financial Protection Bureau (Apr. 17, 2019), https://www.consumerfinance.gov/about-us/newsroom/kathleen-kraninger-director-consumer-financial-protection-bureau-bipartisan-policy-center-speech/. This conception, while facially appealing, is fundamentally flawed. Few doubt that supervision is a vital aspect of the Bureau's work, and few doubt that many issues can be remedied through the supervisory process without referral for an enforcement action. However, supervision is properly viewed as an appropriate vehicle to remedy weaknesses in systems and controls that might impair a company's "ability to detect, prevent, and correct practices that present a significant risk of violating the law and causing consumer harm." CFPB Supervision Manual at 4. Violations of law that have already occurred are properly remedied through the enforcement process—without regard to whether the violation comes about because the company is a "bad actor" in the Bureau's judgment. Scaling back enforcement in favor of remedying violations of law through the supervisory process is tantamount to printing an endless supply of get-out-of-jail-free cards.

[252] *See* Tucker Higgins, *The head of the CFPB Now Believes that the Financial Regulator Is Unconstitutionally Structured,* CNBC (Sept. 17, 2019), https://www.cnbc.com/2019/09/17/cfpb-head-tells-supreme-court-agency-is-unconstitutional.html.

[253] *Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 19-7, 2020 WL 3492641 (U.S. June 29, 2020).

[254] SEC Staff Study on Investment Advisers and Broker-Dealers (Jan. 2011), https://www.sec.gov/news/studies/2011/913studyfinal.pdf.

[255] Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318 (Jul. 12, 2019).

[256] Better Markets Comment Letter on Regulation Best Interest (Aug. 7, 2018), available at https://bettermarkets.com/sites/default/files/Better%20Markets%20Comment%20Letter%20Reg%20BI%20%208-7-18%20Final.pdf;

[257] For a fuller discussion of these issues, *see XY Planning Network, LLC v. SEC: Broker Conflicts of Interest, Regulation "Best Interest," and Investors' False Sense of Security*, The Duke Law Global Financial Markets Center FinReg Blog (Mar. 5, 2020), https://bettermarkets.com/blog/finreg-blog-duke-law-global-financial-markets-center-xy-planning-network-llc-v-sec-broker. Brief Amicus Curiae of Better Markets, Inc. and the Consumer Federation of America in Support of Petitioners, *XY Planning Network v. SEC* (filed Jan. 3, 2020) (No. 19-2886), https://bettermarkets.com/sites/default/files/Reg_BI_-_Amicus_Brief_Final_As_Filed_%281-3-20%29.pdf; Better Markets, Fact Sheet on SEC's Proposed Regulation Best Interest (May 29, 2019), https://bettermarkets.com/sites/default/files/documents/Better_Markets_Fact_Sheet_Reg_BI_05-29-2019.pdf.

[258] Better Markets, The SEC's Whistleblower Program: A $2 Billion Success Story Under Threat (June 4, 2020), https://bettermarkets.com/sites/default/files/Better_Markets_White_Paper_SEC%27s_Whistlebower_Program_06-22-2020.pdf.

[259] Whistleblower Program Rules, 83 Fed. Reg. 34,702.

[260] *See* Better Markets, The SEC's Whistleblower Program: A $2 Billion Success Story Under Threat (June 4, 2020), https://bettermarkets.com/sites/default/files/Better_Markets_White_Paper_SEC%27s_Whistlebower_Program_06-22-2020.pdf; *Report Shows SEC's Whistleblower Program Is Wildly Successful, Should Not Be Weakened,* Better Markets Blog (Nov. 20, 2019), https://bettermarkets.com/blog/report-shows-sec%E2%80%99s-whistleblower-program-wildly-successful-should-not-be-weakened; Better Markets Comment Letter on Whistleblower Program Rules (Sept. 18, 2018), https://bettermarkets.com/sites/default/files/Better%20Markets%20CL%20to%20SEC%20on%20Whistleblower%20Program%209-18-18.pdf.

[261] J. Christopher Giancarlo & Bruce Tuckman, Swaps Regulation Version 2.0: An Assessment of the Current Implementation of Reform and Proposals for Next Steps (Apr. 26, 2018), https://www.cftc.gov/sites/default/files/2018-10/Whitepaper_CBSR100118_0.pdf.

[262] Swap Execution Facilities and Trade Execution Requirement, 83 Fed. Reg. 61,946 (Nov. 30, 2018).

[263] Real-Time Public Reporting Requirements, 85 Fed. Reg. 21,516 (Apr. 17, 2020); Better Markets Comment Letter on Real Time Reporting Requirements (May 22, 2020), https://bettermarkets.com/sites/default/files/Better_Markets_Comment_Letter_on_Real_Time_Reporting_Requirments.pdf.

[264] *See* Robert E. Litan, Brookings, The Derivatives Dealers' Club and Derivatives Markets Reform (Apr. 7, 2010), https://www.brookings.edu/research/the-derivatives-dealers-club-and-derivatives-markets-reform-a-guide-for-policy-makers-citizens-and-other-interested-parties/; Dennis Kelleher, Caitlin Kline and Victoria Daka, Policy Brief: Stopping Wall Street's Derivatives Dealers Club (Feb. 2016), https://bettermarkets.com/sites/default/files/Better%20Markets%20Policy%20Brief%20-%20Stopping%20Wall%20Street%E2%80%99s%20Derivatives%20Dealers%20Club.pdf.

[265] Better Markets Comment Letter on SEFs at 57(Mar. 19, 2019), https://bettermarkets.com/sites/default/files/Better%20Markets%20Comment%20Letter%20on%20Swap%20Execution%20Facilities%20and%20Trade%20Execution%20Requirement_0.pdf.

[266] Margin and Capital Requirements for Covered Swap Entities (adopted by OCC, Federal Reserve, FDIC Farm Credit Administration and Federal Housing Finance Agency on June 25, 2020).

[267] Better Markets Comment Letter on Margin and Capital Requirements for Covered Swap Entities (Dec. 9, 2019), https://bettermarkets.com/sites/default/files/Better_Markets_Inc_Letter_on_Margin_and_Capital_Requirements_for_Covered_Swap_Entities_12-9-2019.pdf.

[268] https://www.sifma.org/resources/submissions/inter-affiliate-initial-margin-requirements/.

[269] Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants; Proposed Rule, 85 Fed. Reg. 952 (Jan. 8, 2020).

[270] *See* Office of the Special Inspector General for the Troubled Asset Relief Program, Quarterly Report to Congress (Jul. 21, 2009), https://www.sigtarp.gov/Quarterly%20Reports/July2009_Quarterly_Report_to_Congress.pdf; James Andrew Felkerson, Levy Economics Institute of Bard College, *A Detailed Look at the Fed's Crisis Response by Funding Facility and Recipient* 4 (Public Policy Brief No. 123, (2012) https://www.econstor.eu/bitstream/10419/121982/1/689983247.pdf.

[271] *See, generally,* FSOC, Designations (last visited June 30, 2020), https://www.treasury.gov/initiatives/fsoc/designations/Pages/default.aspx.

[272] While the AIG bailout ultimately amounted to $182.5 billion, the amount of money that would be necessary to stop AIG's collapse and the contagion it would have unleashed when it was initially bailed out was unknown. The federal government, with the Federal Reserve in the lead, committed to any amount necessary to prevent that collapse and contagion, thus the bailout was unlimited.

[273] The Obama administration appropriately de-designated GE Capital once it de-risked and was no longer systemically significant and, therefore, no longer met the criteria for designation. Press Release, Better Markets, FSOC's De-designation of GE Capital as a Systemically Important Nonbank Proves Financial Reform is Working and its Critics Are Wrong (June 29, 2016), https://bettermarkets.com/newsroom/fsoc%E2%80%99s-de-designation-ge-capital-systemically-important-nonbank-proves-financial-reform.

[274] The statute requires a two-thirds vote of the 10 voting members of FSOC to de-designate, which in this case would be impossible because there were three votes against de-designation and SEC Chair was recused from voting due to his or his law firm's prior representation of AIG. However, FSOC received a legal opinion that his recusal did not have to count toward the vote tally, allowing de-designation based on a 6-3 vote. See Zachary Warmbrodt, *AIG Escapes Tougher Regulation 9 Years After Bailout*, Politico Pro (Sept. 29, 2017).

[275] Allistair Gray, Barney Jopson, and Ben McLannahan, *AIG freed from 'too big to fail' regulation*, Fin.Times, (Sept. 29, 2017) https://www.ft.com/content/263488f0-a48f-11e7-b797-b61809486fe2?sharetype=share.

[276] Views of Financial Stability Oversight Council Members Regarding Rescission of Determination Regarding American International Group, Inc. (AIG) (Oct. 2, 2017), https://www.treasury.gov/initiatives/fsoc/news/Documents/Member_Views.pdf.

[277] Gregg Gelzinis, Ctr. for Am. Progress, Deregulating AIG Was a Mistake (Oct. 11, 2017), https://www.americanprogress.org/issues/economy/reports/2017/10/11/440570/deregulating-aig-mistake/.

[278] Sonali Basak and Katherine Chiglinsky, *AIG Is No Longer Too Big to Fail, So Now It Wants to Get Bigger*, Bloomberg (Sept. 29, 2017), https://www.bloomberg.com/news/articles/2017-09-29/as-aig-sheds-too-big-to-fail-it-sets-sights-on-getting-bigger.

[279] Dennis Kelleher, Essay, *Financial Reform Is Working, But Deregulation That Incentivizes One-Way Bets Is Sowing the Seeds of Another Catastrophic Financial Crash*, Bus. & Fin. L. Rev. (Apr. 10, 2018), https://gwbflr.org/financial-reform-is-working-but-deregulation-that-incentivizes-one-way-bets-is-sowing-the-seeds-of-another-catastrophic-financial-crash-2/.

[280] Brief Amicus Curiae of Better Markets, Inc. in Support of Defendant-Appellant, *MetLife, Inc. v. FSOC* (June 23, 2016) (No. 16-5086), https://bettermarkets.com/sites/default/files/BM%20MetLife%20Circuit%20Amicus%20Brief%20as%20filed.pdf.

[281] Brief Amicus Curiae of Better Markets, Inc. in Support of Defendant-Appellant Arguing for Disqualification of the Department of Justice as Counsel for Defendant-Appellant, Appointment of Independent Counsel or Amicus Curiae, and Denial of Any Further Abeyance *MetLife, Inc. v. FSOC* (Oct. 24, 2016) (No. 16-5086), https://bettermarkets.com/sites/default/files/MetLife%20v.%20FSOC%20-%20Amicus%20Brief%20on%20Disqualification%207-25-17%20As%20Filed_0.pdf.

[282] Press Release, Better Markets, FSOC's De-designation of Prudential Is An Historic Mistake and a Dereliction of Duty (Oct. 17, 2018), https://bettermarkets.com/newsroom/fsocs-de-designation-prudential-historic-mistake-and-dereliction-duty.

[283] Although beyond the scope of this Report, the flawed embrace of a requirement that financial regulatory agencies conduct cost-benefit analysis when promulgating rules and taking other regulatory actions, first by the courts and, disturbingly, by the agencies themselves under the Trump administration, severely undermines the ability of regulatory agencies to act in the public interest, ultimately undermining the safety of the financial system. For the reader interested in this critical topic, Better Markets has extensively analyzed the issues surrounding the application of cost-benefit analysis in financial regulation, explaining the legal and policy implications of cost-benefit analysis in reports, amicus briefs, and comment letters. *See,* Better Markets, Setting the Record Straight on Cost Benefit Analysis and Financial Reform at the SEC (July 30, 2012 https://bettermarkets.com/sites/default/files/Setting%20The%20Record%20Straight.pdf; Better Markets, Update: Recent Trends in the Law Governing Cost-Benefit Analysis (Dec. 29, 2017), https://bettermarkets.com/resources/update-recent-trends-law-governing-cost-benefit-analysis-securities-and-exchange; Brief Amicus Curiae of Better Markets, Inc. in Support of Respondent at 15-25, *N.Y.S.E v. SEC*, 2020 WL 3248902 (D.C. Cir. 2020) (No. 19-1042), https://bettermarkets.com/resources/court-filing-sec-attempts-protect-investors-and-market-integrity-exposing-exchange-pricing; Brief Amicus Curiae of Better Markets, Inc. in Support of the Defendant-Appellant at 25, *MetLife, Inc. v. FSOC*, (D.C. Cir. June 23, 2016) (16-5086), https://bettermarkets.com/resources/better-markets-amicus-brief-metlife-v-fsoc; Brief of Better Markets, Inc. as Amicus Curiae in Support of Defendant FSOC, *MetLife, Inc. v. FSOC*, 177 F. Supp. 3d 219 (D.D.C. 2016) (15-cv-0045), https://bettermarkets.com/resources/better-markets-amicus-brief-case-metlife-v-fsoc; Better Markets Comment Letter to the CFPB on Debt Collection Practices (Regulation F) at 12-13 (Sept. 18, 2019), https://bettermarkets.com/rulemaking/better-markets-comment-letter-

cfpb-abusive-debt-collection-practices; Better Markets Comment Letter to the Federal Reserve on Resolution Plans Required (Living Wills) at 12 (June 21, 2019), https://bettermarkets.com/rulemaking/better-markets-comment-letter-frs-fdic-resolution-plans-required-living-wills; Better Markets Comment Letter to the FSOC on Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies at 5-6, 14-19 (May 24, 2019), https://bettermarkets.com/rulemaking/better-markets-comment-letter-fsoc-authority-require-supervision-and-regulation-certain.

[284] Authority To Require Supervision and Regulation of Certain Nonbank Financial Companies, 84 Fed. Reg. 9028 (Mar. 15, 2019).

[285] Better Markets, Comment Letter on Designation Authority (May 24, 2019), https://bettermarkets.com/sites/default/files/CL_FSOC_Designation_Guidance%205-24-19.pdf.

[286] Authority To Require Supervision and Regulation of Certain Nonbank Financial Companies, RIN 4030-AA00, 84 Fed. Reg. 9028 (Mar. 15, 2019).

[287] Better Markets, Comment Letter on Designation Authority (May 24, 2019), https://bettermarkets.com/sites/default/files/CL_FSOC_Designation_Guidance%205-24-19.pdf.

[288] Better Markets, Comment Letter on Designation Authority (May 24, 2019), https://bettermarkets.com/sites/default/files/CL_FSOC_Designation_Guidance%205-24-19.pdf.

[289] Pete Schroeder, *Trump Administration Cuts Staff at Financial Markets Watchdog: Source*, Reuters (Aug. 8, 2018), https://www.reuters.com/article/us-usa-ofr-cuts/trump-administration-cuts-staff-at-financial-markets-watchdog-source-idUSKBN1KT23O.

[290] *See* Better Markets, Fact Sheet: The CFTC's Proposed Position Limits Regulations Would Not Adequately Curb Excessive Speculation (May 27, 2020), https://bettermarkets.com/sites/default/files/Fact_Sheet_Position_Limits-5-27-2020.pdf; Better Markets Comment Letter on Position Limits (May 15, 2020), https://bettermarkets.com/sites/default/files/Better_Markets_Comment_Letter_on_Position_Limits_for_Derivatives_Upload.pdf.

[291] *See* Better Markets Comment Letter on Executive Compensation (Jul. 22, 2016), https://bettermarkets.com/sites/default/files/FRS%20NCUA%20FDIC%20OCC%20SEC%20FHFA%20-%20CL%20-%20Incentive-Based%20Compensation%20Arrangements%20-7-22-2016.pdf;

[292] *See* Better Markets Comment Letter on Proposed Listing Standards for Recovery of Erroneously Awarded Compensation (Sept. 4, 2015), https://bettermarkets.com/sites/default/files/SEC%20-%20CL%20-%20Listing%20Standards%20for%20Recovery%20of%20Erroneously%20Awarded%20Compensation%209-14-2015.pdf.

[293] Better Markets, Fact Sheet: Money Market Funds Are Failing and Being Bailed Out Again, As They Were During the 2008 Financial Crisis Just Twelve Years Ago (Mar. 26, 2020), https://bettermarkets.com/sites/default/files/Better_Markets_Fact_Sheet_on_Money_Market_Funds.pdf.

[294] *See* Better Markets, Fact Sheet: Why the Wells Fargo CEO and Board Must Go: Whitewash, Cover Up and Dereliction of Duty, April 24, 2017, available at https://www.huffpost.com/entry/fact-sheet-why-the-wells-fargo-ceo-and-board-must_b_58fdf1b1e4b0f02c3870ec65.

[295] *See* Better Markets, *Special Report: Wall Street's Six Biggest Bailed-Out Banks: Their RAP Sheets & Their Ongoing Crime Spree* (Apr. 9, 2019), https://bettermarkets.com/sites/default/files/Better%20Markets%20-%20Wall%20Street%27s%20Six%20Biggest%20Bailed-Out%20Banks%20FINAL.pdf; *see also* Better Markets, Special Report: Goldman Sachs' 20 Year Rap Sheet of Repeated Illegal Conduct (Jan. 28, 2020), https://bettermarkets.com/sites/default/files/Goldman_Sachs%27_20-Year_RAP_Sheet_Jan-28-2020.pdf. One of the most egregious examples of the too-big-to-manage problem is the Goldman Sachs 1MDB scandal, in which a former Goldman partner and Chairman of Southeast Asia assisted in the $6.5 billion looting of Malaysia's government investment fund. This looting occurred, under the noses of multiple Goldman executives, including the then-CEO, then-COO and future president, among many others and went undetected despite an alarming number of red flags, netting Goldman an exorbitant amount of fees (themselves a red flag). Goldman has asserted that the scandal was the product of a rogue employee—an excuse which Better Markets has dubbed the "Four Monkeys Defense" because it requires Goldman to "Hear no evil, see no evil, speak no evil…and keep all the

money." That Goldman was apparently unable to detect such rampant criminality engaged in by one of its top executives, while reaping its benefits, illustrates all too perfectly the too-big-to-manage problem. *See* Better Markets, Special Report: Goldman Sachs' 1MDB "Four Monkeys" Defense and CEO Solomon's Golden Opportunity (Apr. 25, 2019), https://bettermarkets.com/sites/default/files/Better%20Markets%20-%20Goldman%20Sachs%27%201MDB%20Four%20Monkeys%20Defense%2004-25-2019.pdf.

[296] *See infra* N.198 and Morris Goldstein, Banking's Final Exam: Stress Testing and Bank-Capital Reform (2017).

[297] The question of how much bank capital is the "right" amount to provide confidence that systemically important banks are not a threat to the financial system, the economy and taxpayers continues to be debated. Of course, one reason for that is the industry's relentless opposition to capital requirements no matter how modest or reasonable—that is because more capital means less leverage, which reduces return on equity (ROE) which reduces executive compensation. See, Anat R. Admati and Martin Hellwig, The Bankers' New Clothes: What's Wrong With Banking and What to Do About It (2013). But another reason is that, inexplicably, there has not yet been a robust, data-driven, comprehensive and independent analysis of the capital shortfall experienced by the financial system in the 2007-2010 time period. While such an analysis would be difficult and require estimates and assumptions, it simply must be undertaken. After all, how can anyone intelligently discuss a level of capital without knowing the capital shortfall in the 2008 crisis? Even if that amount of capital was not the right level, knowing that shortfall is an essential guidepost for the discussion. Although, there would be a good argument that that amount of capital would be the right amount because it would be the amount of capital necessary even after the federal government de facto nationalized and bailed out the United States and global financial systems.

[298] *See, e.g.,* Hillary Clinton, Wall Street Reform (last accessed Jul. 2, 2020), https://www.hillaryclinton.com/issues/wall-street/.

[299] Brief Amicus Curiae of Better Markets, Inc. in Support of Respondent at 15-25, *N.Y.S.E v. SEC*, 2020 WL 3248902 (D.C. Cir. 2020) (No. 19-1042), https://bettermarkets.com/resources/court-filing-sec-attempts-protect-investors-and-market-integrity-exposing-exchange-pricing; Better Markets Comment Letter on National Market System Plan Governing the Consolidated Audit Trail (Jul. 18, 2016), https://bettermarkets.com/sites/default/files/CL%20-%20SEC%20-%20Consolidated%20Audit%20Trial%207-18-2016.pdf; Michael Lewis, Flash Boys: A Wall Street Revolt (2015).

[300] *New York Stock Exch. LLC v. Sec. & Exch. Comm'n*, No. 19-1042, 2020 WL 3248902 (D.C. Cir. June 16, 2020); Better Markets, Press Release, Today's Decision from the D.C. Circuit is a Setback for Investors Who Need Protection from Rigged and Predatory Stock Markets (June 16, 2020), https://bettermarkets.com/newsroom/today%E2%80%99s-decision-dc-circuit-setback-investors-who-need-protection-rigged-and-predatory.

[301] Better Markets, Where's the CAT? (Oct. 22, 2018), https://bettermarkets.com/Where-Is-The-CAT.

[302] Some have argued that a solution to corporate managers' short-term focus is to decrease the frequency of disclosures to investors. As Better Markets has pointed out, "[d]epriving investors of timely and meaningful information is not the solution to short-termism"; such concerns can be addressed through, among other things, addressing compensation schemes, and requiring disclosure of ***more*** information, particularly regarding companies' risk and strategic direction. Better Markets Comment Letter on Earnings Release and Quarterly Reports (Mar. 21, 2019), https://bettermarkets.com/sites/default/files/Better%20Markets%20SEC%20CL%20Quarterly%20Reporting%203-21-19.pdf.

[303] Better Markets Comment Letter on Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets (June 1, 2020); Better Markets Comment Letter on Concept Release on Harmonization of Securities Offering Exemptions, https://bettermarkets.com/sites/default/files/CL%20SEC%20Exempted%20Offering%209-19-19%282%29.pdf; Better Markets Comment Letter on Amending the "Accredited Investor", https://bettermarkets.com/rulemaking/better-markets-comment-letter-secamending-accredited-investor-definition.

[304] Mike Bloomberg 2020, Financial Reform (last accessed Jul. 2, 2020), https://www.mikebloomberg2020.com/policies/financial-reform.

[305] Hillary Clinton, Wall Street Reform (last accessed Jul. 2, 2020), https://www.hillaryclinton.com/issues/wall-street/.

[306] Better Markets has pushed regulators to provide greater transparency into the deals they make with financial wrongdoers, particularly large financial institutions. See, e.g., "Fact Sheet: Better Markets Files Lawsuit Challenging the Record-Setting $13 Billion Settlement Agreement Between the DOJ and JP Morgan Chase," February 10, 2014, available at https://bettermarkets.com/blog/fact-sheet-better-markets-files-lawsuit-challenging-record-setting-13-billion-settlement; Complaint of Better Markets, Inc., *Better Markets, Inc. v. United States Dep't of Justice*, 83 F. Supp. 3d 250, 253 (D.D.C. 2015), https://bettermarkets.com/sites/default/files/Complaint-Better-Markets-v-U-S-Department-of-Justice.pdf; Memorandum in Support of Motion for Reconsideration Filed by Better Markets, Inc., *SEC v. JPMorgan Securities* (filed Feb. 4, 2013), https://bettermarkets.com/sites/default/files/SEC%20v.%20JPM%20%28DCD%29-%20Memo%20in%20Support%20of%20Motion%20for%20Reconsideration-%202-4-13_0.pdf.

[307] *See* Press Release, Senators Elizabeth Warren and James Lankford Senators Warren and Lankford Introduce Truth in Settlements Act to Increase Transparency of Federal Agency Settlements (May 16, 2017), https://www.warren.senate.gov/newsroom/press-releases/senators-warren-and-lankford-introduce-truth-in-settlements-act-to-increase-transparency-of-federal-agency-settlements.

[308] Mike Bloomberg 2020, Financial Reform (last accessed Jul. 2, 2020), https://www.mikebloomberg2020.com/policies/financial-reform.

[309] Elizabeth Warren, Opinion, *Corporate Executives Must Face Jail Time for Overseeing Massive Scams* (Apr. 2, 2019), https://www.washingtonpost.com/opinions/elizabeth-warren-its-time-to-scare-corporate-america-straight/2019/04/02/ca464ab0-5559-11e9-8ef3-fbd41a2ce4d5_story.html.

[310] Hillary Clinton, Wall Street Reform (last accessed Jul. 2, 2020), https://www.hillaryclinton.com/issues/wall-street/.

[311] Congress.gov, S. 3217: Restoring American Financial Stability Act of 2010 (last visited July 3, 2020), https://www.congress.gov/bill/111th-congress/senate-bill/3217/amendments?q=%7B%22status%22%3A%22Senate+amendment+agreed+to%22%7D.

[312] Congress.gov, S. 3217: Restoring American Financial Stability Act of 2010 (last visited July 3, 2020), https://www.congress.gov/bill/111th-congress/senate-bill/3217/amendments?q=%7B%22status%22%3A%22Senate+amendment+agreed+to%22%7D.

[313] Congress.gov, S. 3217: Restoring American Financial Stability Act of 2010 (last visited July 3, 2020), https://www.congress.gov/bill/111th-congress/senate-bill/3217/amendments?q=%7B%22status%22%3A%22Senate+amendment+agreed+to%22%7D.

Support and Follow Us

BETTER MARKETS

Donations:
Visit our website
www.bettermarkets.com

Stay Informed with our
Financial Reform Newsletter:
sign up on our website

Follow the Fight:
@BetterMarkets

Current News:
/BetterMarkets

Watch:
/BetterMarkets

Connect:
/BetterMarkets

BETTER MARKETS

Better Banks

Better Businesses

Better Jobs

Better Economic Growth

Better Lives

Better Communities

Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street and make our financial system work for all Americans again. Better Markets works to restore layers of protection between hardworking Americans on Main Street and Wall Street's riskiest activities. We work with allies – including many in finance – to promote pro-market, pro-business and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements and more.

BETTER
MARKETS

1825 K Street NW, Suite 1080 | Washington, DC 20006 | (202) 618-6464 | www.BetterMarkets.com