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PERSPECTIVE

## Dodd-Frank's future in doubt

By Arthur S. Long and James Springer

Donald Trump's victory in the presidential election, coupled with Republican control of both houses of Congress, raises the issue of the future of the Dodd-Frank Act. Speculation about the future of Dodd-Frank must consider two realities: In the Senate, the Republicans do not have a filibuster-proof majority, and on certain fundamental questions relating to financial regulation, there are still a variety of competing views. Although conclusions must be somewhat speculative, these realities suggest that we will see a reform of Dodd-Frank, not outright repeal.

Six years after Dodd-Frank, there are still diverging views on the best form of regulation for financial institutions, with four principal competing paradigms:

**Administrative control:** This is Dodd-Frank itself, seen in the such provisions as the Volcker Rule, the enhanced prudential standards imposed on \$50 billion-or-greater asset banks and the "resolution planning" process overseen by the Federal Reserve and FDIC.

**Break up the banks:** This paradigm sees the asset size of the largest banks as the principal evil and turning them into much smaller institutions as the principal solution. The paradigm has had popular appeal from time to time but little political traction.

**Glass-Steagall:** This view believes that mixing commercial and investment banking poses systemic risk, and demands that these activities be structurally separated. Both the Republican and Democratic 2016 platforms supported a new Glass-Steagall Act, but Washington has not shown much interest.

**Deregulation:** Under this paradigm, the administrative state is seen to present problems in addition to banks themselves; regulatory authority therefore must be more constrained by congressional action, and banks principally constrained by heightened capital requirements, and not a myriad of rules.

The deregulatory paradigm is seen in Republican Rep. Jeb Hensarling's CHOICE Act. The CHOICE Act is over 500 pages long, but its highlights include repealing the Volcker Rule and certain other Dodd-Frank provisions (including the section mandating more restrictions on executive compensation); changing the Consumer



The New York Times

Steven Mnuchin, reportedly President-elect Donald Trump's choice for Treasury secretary, in the lobby of Trump Tower, on Fifth Avenue in Manhattan on Wednesday

Financial Protection Bureau into a bipartisan commission and giving it a mandate of increasing market competition, and providing an "off ramp" from stricter Dodd-Frank standards if banks meet heightened capital and management requirements. It would also place limits on the Federal Reserve and FDIC's powers to take emergency actions in times of financial stress.

Should Hensarling push a version of the CHOICE Act forward, the substantial Republican majority in the House should be expected to be supportive. But then it would run into the first reality — at best, the Republican majority in the incoming Senate will be 52-48. As a result, the Senate Banking Committee should be expected to have significant influence over reform proposals. That committee will be led by Sen. Michael Crapo of Idaho, who has, in the past, favored the deregulatory paradigm, but is also viewed as more open to consensus. With the filibuster-proof Democratic minority, it would be logical for Crapo to lean toward deregulation appealing to at least eight Democrats, particularly those Democrats who are defending seats in states that the president-elect won.

One example of such reform is the size thresholds for heightened regulation in Dodd-Frank: There have been bipartisan statements that this threshold (currently \$50 billion in total assets) is too low, with even Federal Reserve Gov. Daniel Tarullo agreeing. One could therefore contemplate a number of Senate Democrats agreeing to raise this threshold. A prior Senate bill would have mandated heightened standards at \$500 billion in assets and allowed

regulatory discretion with respect to banks with assets of between \$50 and \$500 billion; others have suggested \$250 billion as the threshold. Raising the threshold would benefit not only U.S. regional banks but certain foreign banks with U.S. operations. Another threshold is the \$10 billion asset size at which banks become subject to Consumer Financial Protection Bureau supervision. Interestingly, secretary of the Treasury nominee Steven Mnuchin, who has criticized Dodd-Frank for inhibiting lending, was the chairman of the \$23 billion OneWest Bank before it was sold in 2015.

There also may well be new congressional focus on Dodd-Frank agencies' engaging in more extensive cost-benefit analysis in their rulemakings. Mandating additional cost-benefit analyses would allow Congress to slow down the unfinished business of Dodd-Frank, of which there still is a substantial amount. Republican appointees to the Dodd-Frank agencies, moreover, should be expected to take a more deregulatory approach. Finally, with respect to recently promulgated regulations, the incoming Congress may also try to make use of the Congressional Review Act to repeal regulations issued beginning in mid-May 2016 forward.

Just as in its enactment — where, for example, the Volcker Rule appeared out of the blue following Scott Brown's surprise Senate victory — the ultimate reforms to Dodd-Frank will appear only after a lengthy process. But the pendulum is certainly swinging back toward the deregulatory paradigm and away from administrative control.

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