The Dodd-Frank Death Knell

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This Essay recounts a panel discussion regarding certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). It begins by discussing the repeal of the provision requiring SEC adoption of resource extractive industries rules. It then considers the fate of the conflict minerals rule promulgated by the SEC pursuant to Section 1502 of Dodd-Frank. Next, it details several provisions of the CHOICE Act, which is aimed at undermining Dodd-Frank, including the Act's attempt to change the scope of the SEC's whistleblower program. The Essay further discusses the Trump administration's attempt to defund and restructure the Consumer Financial Protection Bureau. Finally, it concludes that despite the many attacks on Dodd-Frank, it is too early to sound the death knell.

INTRODUCTION 656
I. SUCCESSFUL REPEAL OF A DODD-FRANK PROVISION: RESOURCE EXTRACTIVE INDUSTRIES RULES 657
II. LIMITATIONS OF EFFICACY OF DODD-FRANK PROVISIONS: THE CONFLICT MINERALS RULE 659
III. UNSUCCESSFUL (TO DATE) BUT SIGNIFICANT ATTEMPTS TO UNDERMINE DODD-FRANK 660
A. CEO Pay Ratio Disclosure Rule 660
B. Shareholder Proposals 662
1. Changes to the Ownership Threshold 663
2. Proposal by Proxy 664
IV. WHISTLEBLOWER REWARDS 664
V. DEFUNDING AND RESTRUCTURING THE CONSUMER FINANCIAL PROTECTION BUREAU... 665
VI. JUSTIFICATION 667
CONCLUSION.. 667

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INTRODUCTION

The Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or the "Act")[1] has been under attack almost from the moment it was passed. Things only got worse with the new administration, as President Trump frequently makes his antipathy to the Act known. To cite just a few examples of his ad hominems against the Act, the president at various times has stated: "Dodd-Frank is a disaster. We're going to be doing a big number on Dodd-Frank;"[2] "[s]o we're going to do a very major haircut on Dodd-Frank;"[3] and "we're doing a major elimination of the horrendous Dodd-Frank regulations, keeping some obviously, but getting rid of many."[4] In light of these public declarations, it seems wise to consider the fate of Dodd-Frank. Are we hearing its death knell or is all the rhetoric just sound and fury, signifying nothing?

To consider that issue, a panel consisting of Professors Wendy Couture, University of Idaho College of Law; Celia Taylor, Sturm College of Law, University of Denver; and Howard Suskin, Partner, Jenner & Block, provided an overview of the status of certain provisions of the Act. Rather than focusing on the attempts to roll back the provisions of Dodd-Frank that affect major financial institutions,[5] the panel focused on actions that affect investors more directly and those that demonstrate continuing animus toward transparency and investor protection. Specifically (as discussed more fully below), the panel considered the fate of the resource extraction industries rule and the conflict minerals rule. It then looked at the attempts to roll back say-on-pay and CEO pay ratio disclosures and to limit the ability of shareholders to submit shareholder proposals. Finally, the panelists discussed the

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

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

3. Ben Lane, *Trump: We're going to do a very major haircut on Dodd-Frank*, HOUSINGWIRE (Apr. 4, 2017), https://www.housingwire.com/articles/39765-trump-were-going-to-do-a-very-major-haircut-on-dodd-frank.

4. Jeff Mason, *TRUMP: 'We're doing a major elimination of the horrendous Dodd-Frank regulations'*, REUTERS (Apr. 11, 2017), http://www.businessinsider.com/trump-promises-to-revamp-wall-street-reform-rules-2017-4.

5. These include, among others, efforts to: repeal the authority of the Financial Stability Oversight Council to designate financial firms as systemically important financial institutions or "SIFIs" and eliminate the current system of annual bank capital stress tests and resolution plans (a.k.a. "living will") submissions to the Federal Reserve Board and the Federal Insurance Deposit Corporation; repeal the Orderly Liquidation Authority, which was designed to manage the liquidation process of insolvent large banks; and repeal the Volcker Rule, which restricts U.S. banks from engaging in certain kinds of speculative investments and limits bank ownership or sponsorship of hedge funds and private equity funds.

weakening of U.S. Securities and Exchange Commission ("SEC") whistleblower powers and budgetary appropriations as a means of undermining Dodd-Frank, with particular reference to attacks on the Consumer Financial Protection Bureau ("CFPB").[6]

Broadsides on Dodd-Frank are numerous and come on many fronts. The panel focused on three main sources of attack: (1) legislative action aimed directly at taking out provisions of Dodd-Frank, including the CHOICE Act;[7] (2) legislative action to defund the agencies that enforce the provisions of Dodd-Frank; and (3) lawsuits brought by powerful industry groups and others directly challenging the enforceability of certain provisions of Dodd-Frank. It is worth noting that the CHOICE Act did not get support in the Senate and thus did not and will not become law. However, its attack on Dodd-Frank is significant and worthy of discussion as evidence of the determined attempts at undermining Dodd-Frank and as harbingers of future efforts at killing the Act. Furthermore, while the CHOICE Act failed to win support, a newly introduced Senate bill, S. 2155, the Economic Growth, Regulatory Relief and Consumer Protection Act,[8] contains provisions that would also roll back or eliminate key parts of Dodd-Frank.

The following discussion is an encapsulation of and an expansion on (and makes no representation to be a precise rendering of) the comments provided by the panel members.

I. SUCCESSFUL REPEAL OF A DODD-FRANK PROVISION: RESOURCE EXTRACTIVE INDUSTRIES RULES

The first topic of discussion was the repeal of Section 1504 of Dodd-Frank—the provision requiring SEC adoption of resource extractive industries rules. Although this section did not receive the same level of attention as some of the other provisions of Dodd-Frank, it was viewed by many as an important tool in fighting global corruption in the extractive industries (an area particularly prone to corruption).[9] The

6. CONSUMER FINANCIAL PROTECTION BUREAU: THE BUREAU, https://www.consumerfinance.gov/about-us/the-bureau/ (last visited Mar. 8, 2018).

7. H.R.10, 115th Cong. (as passed by House 2017-2018). The CHOICE Act passed in the House on June 8, 2017, by a 233-186 vote, largely along party lines.

8. Kelsey Ramirez, *Senate Banking Committee introduces repeal of Dodd-Frank Act*, HOUSINGWIRE, (Dec. 5, 2017), https://www.housingwire.com/articles/42010-senate-banking-committee-introduces-repeal-of-dodd-frank-act.

9. A number of corruption risk factors account for increased vulnerability to corruption at every stage of the extractive value chain. First, weaknesses in the anti-corruption legal and judicial system may undermine host governments' capacity to effectively detect, prevent and sanction corruption. Regarding the extractive sector more specifically, high politicisation and discretionary power in decision-making processes, as well as inadequate governance arrangements leave room for favouritism, clientelism, political capture and interference,

resource extractive industries rules were intended to "further the statutory objective to advance U.S. foreign policy interests by promoting greater transparency about payments related to resource extraction."[10] Adopted in June 2016, pursuant to Dodd-Frank Section 1504, "the final rules require[d] an issuer to disclose payments made to the U.S. federal government or a foreign government if the issuer engages in the commercial development of oil, natural gas, or minerals and is . . . to file annual reports with the Commission under the Securities Exchange Act. The issuer . . . also [was required to] disclose payments made by a subsidiary or entity controlled by the issuer."[11]

The resource extractive industries rules came under almost immediate legal attack, and were struck down by a Washington, D.C., federal district court in July 2013[12] after the American Petroleum Institute and other industry groups sued to block it. The United States District Court for the District of Columbia said the SEC rules improperly required public disclosure of private payments and failed to allow any exemptions from the disclosure requirements when payments were made in countries where such disclosures would be illegal. After a long delay, the SEC issued new rules in June 2016, as it was required to do under Dodd-Frank.

However, before the rules could have any impact, President Trump signed Joint House Resolution 41,[13] eliminating them. The first sound of the death knell was struck.[14]

> conflict of interest, bribery and other corrupt practices. On the company's side, gaps and discrepancies in internal corporate anti-corruption compliance and due diligence procedures contribute to weakening detection and prevention efforts. Finally, shortcomings in corporate integrity measures, both in host and home governments and in particular with regard to beneficial ownership disclosure, provide opportunities for corruption to thrive.

CORRUPTION IN THE EXTRACTIVE VALUE CHAIN: TYPOLOGY OF RISKS, MITIGATION MEASURES AND INCENTIVES, OECD (2016), http://www.oecd.org/dev/Corruption-in-the-extractive-value-chain.pdf.

10. Press Release, U.S. Securities and Exchange Commission, SEC Adopts Rules for Resource Extraction Issuers Under Dodd-Frank Act (June 27, 2016), https://www.sec.gov/news/pressrelease/2016-132.html.

11. Disclosure of Payments by Resource Extraction Issuers, 81 Fed. Reg. 49359 (July 27, 2016) (codified at 17 CFR Parts 240 and 249b).

12. Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5 (D.D.C. 2013) (holding that the SEC misinterpreted the Dodd-Frank Act to mandate public disclosure of reports).

13. H.R.J. Res. 41, 115th Cong. (2017).

14. It is worth noting that the repeal of the resource extractive industries rules was done pursuant to the Congressional Review Act. It was the first successful use of the CRA this year and only the second time in history. The first was in 2001 when then President George W. Bush signed a resolution of disapproval of an ergonomics rule adopted in 2000 during the Clinton administration. The CRA process begins with a notification to Congress from an agency that it has adopted a new regulation. The notification triggers a sixty-day period in which Congress can introduce a "resolution of disapproval" of a rule. Rules that are still within this sixty-day period when Congress adjourns will have a fresh sixty-day review period at the start of the next Congress. The sixty-day

II. LIMITATIONS OF EFFICACY OF DODD-FRANK PROVISIONS: THE CONFLICT MINERALS RULE

The panel then turned to another of the miscellaneous provisions of Dodd-Frank and considered the fate of the conflict minerals rule promulgated by the SEC pursuant to Section 1502.[15] Like the resource extractive industries rules, the conflict minerals rule has been the subject of intense litigation. The ultimate outcome of that litigation was a ruling by the United States Court of Appeals for the District of Columbia Circuit[16] upholding an earlier decision that certain public-disclosure requirements of the rule "violate the First Amendment to the extent [they] require regulated entities to report to the Commission and to state on their website that any of their products have 'not been found to be 'DRC conflict free.''"[17] The decision did not completely eliminate the conflict minerals rule. Issuers subject to it must still file Form SD and make efforts to determine if their products include any conflict minerals and, if so, to carry out a "due diligence" review of their supply chain. The only portion of the rule struck down was the requirement to state that certain products had not been found to be "DRC conflict free." Given that the heart of the rule was the "non-conflict free" determination, however, this ruling significantly reduced the efficacy of the provision.

After the court ruling, the SEC sought additional comments on the conflict minerals rule. In response to those comments, the agency announced in April 2017 that it would no longer recommend enforcement action to the Commission if a company that is otherwise required to file a conflict minerals report as an exhibit to its Form SD does not file that conflict minerals report.[18]

In addition to judicial and agency weakening of the conflict minerals rule, the Trump administration also got involved. In a memo dated February 2017, the administration proposed suspending the rule for two

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period is calculated in terms of "legislative" days, not actual calendar days. After being passed by Congress, the resolution of disapproval goes to the president for signature or veto. If the president signs the CRA resolution into law, or Congress overrides a presidential veto, the regulation is deemed "disapproved" and will not take effect. Moreover, the CRA prohibits the agency from promulgating any rule which is "substantially the same" as the one disapproved.

15. For more information on Section 1502 and the conflict minerals rule promulgated pursuant thereto, see Celia R. Taylor, *Conflict Minerals and SEC Disclosure Regulation*, HARV. BUS. L. REV. ONLINE (2012), http://www.hblr.org/tag/celia-r-taylor/.

16. Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015).

17. Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 373 (D.C. Cir. 2014), *overruled by* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 22 (D.C. Cir. 2014).

18. Public Statement, U.S. Securities and Exchange Commission: Division of Corporation Finance, Updated Statement on the Effect of the Court of Appeals Decision on the Conflict Minerals Rule (Apr. 7, 2017), https://www.sec.gov/news/public-statement/corpfin-updated-statement-court-decision-conflict-minerals-rule.

years in the interest of "national security." The memo notes:

> While the Conflict Minerals Rule has discouraged some American companies from purchasing materials sourced in the DRC and adjoining countries, there have been both positive and negative unintended consequences, including some job loss and an increase in the profits of certified conflict-free minerals as a result of the Conflict Minerals Rule. In addition to lost livelihoods associated with the Conflict Minerals Rule, the SEC also estimated in 2014 that American companies would be forced to incur upfront compliance costs of $3 to $4 billion, with $200 million per year thereafter.[19]

To respond to these unintended consequences, a more effective means of addressing the problems of the DRC and adjoining countries would be a targeted approach that focuses on specific companies known to be engaging in illegal activities that contribute to the financing of armed groups violating human rights abuses in Central Africa. Section 1502(b) of the Dodd-Frank Act permits the President of the United States to order the Commission to temporarily waive the requirements of the conflict minerals rule for a period of up to two years upon a reasoned determination that the waiver is in the national security interest of the United States.[20]

Like so many of this administration's proposals, the suspension of the conflict minerals rule has not yet come to pass. However, the memo does evidence the continued distaste for Dodd-Frank and the desire to undermine it at every turn.

III. Unsuccessful (to Date) but Significant Attempts to Undermine Dodd-Frank

A. CEO Pay Ratio Disclosure Rule

The panel next turned to several provisions of the CHOICE Act[21] aimed at undermining Dodd-Frank, talking first about the CEO pay ratio disclosure rule. The requirement for this rule was included in Dodd-Frank Section 953(b), which amended Item 402 of Regulation S-K and directed the SEC to issue regulations that would require public companies to disclose the pay ratio between the company's median employee and the company's CEO or other principal executive officer. Emerging growth companies, smaller reporting companies, and foreign private issuers are exempt from the rule. The pay ratio disclosures will be "filed," not

19. Draft Memorandum from President Donald J. Trump to the Securities and Exchange Commission on the Suspension of the Conflict Minerals Rule (Feb. 2017), https://www.documentcloud.org/documents/3457048-Document-Final.html#document/p1.

20. *Id.*

21. *Supra* note 7, at 953(b).

"furnished," and will therefore be subject to Sarbanes-Oxley Act certifications by the CEO and CFO and subject to potential securities laws liabilities.[22]

The SEC finalized the regulations on August 5, 2015,[23] with an effective date of October 19, 2015. They require compliance for the first fiscal year beginning on or after January 1, 2017. Under the final rule, a public company must begin including pay ratio disclosure in its annual proxy statements for the 2018 season, or in its Form 10-K if it does not file a proxy statement. The CEO pay ratio disclosure rule requires each public company to disclose: (1) the median of the annual total compensation of all its employees except the CEO; (2) the annual total compensation of its CEO; and (3) the ratio of the two amounts.

Somewhat surprisingly, the U.S. Chamber of Commerce chose not to mount a legal challenge to this rule: "We decided not to move forward on [the legal challenge],"[24] Tom Quaadman, senior vice president for Capital Markets Competitiveness at the U.S. Chamber of Commerce, said. Instead, the Chamber decided to focus on the conflict minerals rule litigation (see above) and bet that "the political landscape around the rule could also change in Congress and the White House following the 2016 election."[25]

That bet turned out to be accurate on several counts. First, on February 6, 2017, Acting SEC Chairman Michael Piwowar issued a public statement[26] recommending "reconsideration" of the rule and seeking additional public comments on it. The Acting Chairman stated:

> [I]t is my understanding that some issuers have begun to encounter unanticipated compliance difficulties that may hinder them in meeting the reporting deadline. In order to better understand the nature of these difficulties, I am seeking public input on any unexpected challenges that issuers have experienced as they prepare for compliance with the rule and whether relief is needed. I welcome and encourage the submission of detailed comments, and request that any comments be submitted within the next 45 days. I have also directed the staff to reconsider the implementation of the rule based on any comments submitted and to

22. *Id.*
23. *See* Pay Ratio Disclosure, 80 Fed. Reg. 50103 (Aug. 5, 2015) (to be codified at 17 C.F.R. pts. 229, 240, 249).
24. Emily Chasan, *U.S. Chamber of Commerce Won't Challenge Pay Ratio*, WALL STREET J. (Oct. 20, 2015), https://blogs.wsj.com/cfo/2015/10/20/u-s-chamber-of-commerce-wont-challenge-pay-ratio/.
25. *Id.*
26. Press Release, Acting SEC Chairman Michael S. Piwowar, Reconsideration of Pay Ratio Rule Implementation (Feb. 6, 2017), https://www.sec.gov/news/statement/reconsideration-of-pay-ratio-rule-implementation.html.

> determine as promptly as possible whether additional guidance or relief may be appropriate.

The pay ratio rule took an additional hit with the June 2017 passage of the CHOICE Act, as one of the provisions of that Act was a repeal of the pay ratio rule. Inclusion of the repeal provision was spearheaded by Financial Services Committee Chairman Jeb Hensarling (R-TX), who said:

> Chair White prioritized this [pay ratio] rulemaking to appease those that want a government regulator-controlled economy. Instead of focusing on rules that would protect investors or facilitate capital formation for small and medium-sized businesses, Dodd-Frank decided to mandate disclosure rules that burden every U.S. public company that cost the economy billions of dollars without any material benefit. When businesses attempt to comply with this rule, some will seek to make up those costs by reducing their workforce. I'm guessing that a worker who loses his or her job will take little comfort in knowing the ratio between the CEO's pay and the salary that they are no longer receiving because Dodd-Frank has put them out of work.[27]

As of this writing, neither the acting-chairman's stance nor the CHOICE Act provisions have blocked the implementation and efficacy of the pay ratio rules, so issuers must be ready to include such information in their upcoming filings. The panel felt that these attacks on Dodd-Frank were worth noting for several reasons. First, they demonstrate the continued efforts of the current administration to strike down as much of the Act as possible. Second, they have lasting repercussions. The SEC could still act to change or soften the rule. Further, congressional action on the issue is not out of the question simply because the CHOICE Act did not make it to the Senate. That body has indicated its willingness to take up deregulatory measures, such as the "Economic Growth, Regulatory Relief and Consumer Protection Act," S. 2155,[28] advanced by the Senate Banking Committee on December 5, 2017. The seeds of repeal have been sowed; they may yet come to harvest.

B. Shareholder Proposals

Also included in the CHOICE Act were several significant changes that would completely overhaul the shareholder proposal process. While these proposed changes are not a direct attack on Dodd-Frank, they are in

27. Press Release, Financial Services Committee, Chairman Jeb Hensarling (R-TX), Hensarling Statement on Finalized CEO Pay Ratio Rule (Aug. 5, 2015), https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=399543.

28. Economic Growth, Regulatory Relief, and Consumer Protection Act, S. 2155, 115th Cong. (2017), https://www.banking.senate.gov/public/_cache/files/96d07158-bf57-4f2e-9bfe-888db5dad6ab/7EC24EE731A96E317839101D6AE8FF34.sil17981.pdf.

keeping with the deregulatory theme of the panel. There is debate about the efficacy of shareholder proposals as a tool of corporate governance. Some scholars argue, "target firms tend to underperform and have generally poor governance structures, with little indication of systematic agenda-seeking by the proposal sponsors. . . . [R]esults imply that shareholder proposals are a useful device of external control, countering arguments that they should be restricted rather than facilitated. . . ."[29] Others suggest business decisions should be made by

> the top management team operating under the supervision of the board. As for the shareholders, they traditionally have had no role in . . . operational decisions. In recent years, however, shareholders have increasingly used SEC Exchange Act Rule 14a-8 (the so-called shareholder proposal rule), to not just manage but even micromanage corporate decisions.[30]

Regardless of where one stands in the debate over the utility of shareholder proposals, all agree that they provide a voice for shareholders in the governance process. The changes proposed in the CHOICE Act would significantly limit the ability of shareholders to exercise that voice in the following ways.

1. Changes to the Ownership Threshold

Currently, Rule 14a-8[31] allows any shareholder who owns at least $2,000 or 1 percent of a company's stock to offer a proposal for inclusion in the company's proxy statement for the annual meeting. The CHOICE Act changes that ownership and holding requirement significantly. It would require a shareholder seeking to submit a proposal to own 1 percent of the company's securities entitled to vote on the proposal, or such greater percentage as determined by the SEC, provided that the shareholder has held the stock for a minimum of three years. This change eliminates the dollar threshold entirely. Because 1 percent of a large-cap company could be billions of dollars of stock ownership, the amendment would render ineligible almost all of the shareholder proponents who submit proposals under the current regime.

The CHOICE Act would also make it harder to resubmit proposals that did not pass by barring resubmission of proposals that, in the past five years, received less than 6 percent of favorable support once, 15 percent if proposed twice, and 30 percent if proposed three times. The current rule allows resubmission if a proposal received more than 3 percent, 6

29. Luc Renneboog & Peter G. Szilagyi, *The Role of Shareholder Proposals in Corporate Governance*, 17 J. CORP. FIN., 167, 167 (2011).

30. Stephen M. Bainbridge, *Revitalizing SEC Rule 14a-8's Ordinary Business Exclusion: Preventing Shareholder Micromanagement by Proposal*, 85 FORDHAM L. REV. 705 (2016).

31. 17 C.F.R § 240.14a-8 (2015).

percent and 10 percent, respectively, which means a proposal that receives more than 10 percent favorable support can be sent to a company indefinitely.

2. Proposal by Proxy

The CHOICE Act would prohibit "proposal by proxy" by permitting companies to block a proposal submitted by a person in that person's capacity as a "proxy, representative, agent, or person otherwise acting on behalf of a shareholder." This would mean that only a shareholder who actually owns stock could submit proposals, rather than individuals or entities that develop and advocate for proposals without owning any company shares.

As with the pay disclosure ratio rollback proposed by the CHOICE Act, these suggested changes to the shareholder proposal process have not yet come to fruition. Still, they are worth paying attention to as the attacks on Dodd-Frank and other like statutes continue on every governmental front.

IV. Whistleblower Rewards

Section 922 of Dodd-Frank adds a section to the Securities Exchange Act authorizing payments to whistleblowers. The whistleblower program provides

> monetary incentives for individuals to come forward and report possible violations of the federal securities laws to the SEC. Under the program [a person who voluntarily provides the SEC with original information about a possible violation of the federal securities laws] is entitled to an award of between 10% and 30% of the monetary sanctions collected in actions brought by the SEC and related actions brought by certain other regulatory and law enforcement authorities.[32]

Despite protests from industry groups and the Chamber of Commerce,[33] the program has proved to be an "unmitigated success in enabling the SEC to discover fraud, protect investors, and prevent another financial crisis. Whistleblower tips have enabled the SEC to recover nearly $1 billion in financial penalties from wrongdoers."[34]

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32. *See* Office of the Whistleblower, *Frequently Asked Questions*, U.S. SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/whistleblower/frequently-asked-questions#faq-1 (last visited Mar. 13, 2018).

33. *See* Letter from U.S. Chamber of Commerce for Capital Markets Competitiveness and U.S. Chamber Institute for Legal Reform, to Ms. Elizabeth Murphy, Secretary, SEC (May 23, 2011), https://www.sec.gov/comments/s7-33-10/s73310-316.pdf (regarding concerns about the impact proposed whistleblower requirements could have on elements of "sound governance of public companies").

34. Jason Zuckerman & Matt Stock, *One Billion Reasons Why The SEC Whistleblower-Reward*

To the surprise of no one, the CHOICE Act tried to change the scope of the whistleblower program. Section 828 of the CHOICE Act would amend Section 21F of the Securities Exchange Act to deny payment to any whistleblower who was "responsible for, or complicit in, the violation of the securities laws for which the whistleblower provided information to the Commission."[35] This change is significant for several reasons. First, it is not uncommon for a whistleblower to be part of the misconduct at issue. Under the current program, such whistleblowers can be compensated and may also get an exculpatory pass. Under the new definition, such individuals would no longer receive an award and could find themselves facing liability for the misconduct, likely reducing the number of claims brought forward. Second, the CHOICE Act prevents a person from recovering as a whistleblower if that person has a duty to prevent the violation and fails to make an effort the person is required to make.[36] Thus, as noted by Professor John Coffee in comments to the SEC:

> Passivity would now make you complicit. This definition also does not tell us under what body or bodies of law might impose a duty to make "an effort." Suppose, for example, that the corporation's bylaws require upward reporting by corporate officers and employees to the audit committee. Does this impose such a duty for purposes of §828? Also, current SEC rules (which seemingly have never been enforced) require an attorney "practicing before the Commission" to report violations of law or fiduciary breaches to the issuer's audit committee.[37]

The problem here is that a subordinate who does not promptly report on a superior may have been intimidated into silence. Yet, such persons will be disqualified from receiving any bounty, and this could chill the incentive to later blow the whistle. Subordinates should not be seen as complicit wrongdoers simply because they do not behave as heroes.

V. DEFUNDING AND RESTRUCTURING THE CONSUMER FINANCIAL PROTECTION BUREAU[38]

Dodd-Frank created the Consumer Financial Protection Bureau

Program Is Effective, FORBES: THE VERDICT (July 18, 2017), https://www.forbes.com/sites/realspin/2017/07/18/one-billion-reasons-why-the-sec-whistleblower-reward-program-is-effective/#67e378963009.

35. Financial CHOICE Act of 2017, H.R.10, 115th Cong. § 828 (2017-2018).

36. *Id.*

37. 17 C.F.R. § 205 (titled "Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer"). *See also* John C. Coffee, Jr., *Hobson's CHOICE: The Financial CHOICE Act of 2017 and the Future of SEC Administrative Enforcement*, U.S. SECURITIES AND EXCHANGE COMMISSION (June 22, 2017), https://www.sec.gov/spotlight/investor-advisory-committee-2012/coffee-hobsons-choice-act.htm.

38. It must be noted that the panel convened prior to Richard Cordray's resignation on

("CFPB")[39] to oversee federal financial laws that specifically protect consumers—people who keep their money in banks and credit unions, pay for goods and services with their credit cards, and rely on loans to buy homes or pay for college, among other services. The Bureau is tasked with making sure people understand the fine print that explains the risks involved in using these services, and ensuring the banks, credit unions, and other financial companies that provide them play by the rules.

To fans of the CFPB, its existence has been a boon for consumers. It has extracted billions in fines from big banks, including $100 million from Wells Fargo in 2016 for opening millions of sham accounts that customers did not ask for. Even those who do not favor the CFPB concede its efficacy. The Chamber of Commerce noted

> the bureau's success in winning $11.4 billion in relief for more than 25 million aggrieved consumers since Congress created the CFPB in the 2010 Dodd-Frank Act. "[A]ppropriate government enforcement plays a significant role in protecting consumers," the Chamber wrote. "That role is liable to increase substantially given the Bureau's robust supervision and enforcement authority—and its implementation of that authority."[40]

Despite, or more likely because of, its efficacy, the CFPB has been subject to numerous legal attacks. The most successful to date concerned the structure of the Bureau. When creating the CFPB, lawmakers wanted to ensure the agency's independence from the executive branch. Dodd-Frank calls for a single director, rather than a commission, to lead it, and places the Bureau in the independent Federal Reserve System in order to protect its funding. Dodd-Frank states that the CFPB's lone director is to be nominated by the president (and approved by the Senate).[41] It further provides that once the director is confirmed to a five-year term, he or she cannot be removed by the president except for good cause.

The unusual structure of the CFPB was challenged in 2015 by PHH, a mortgage lender, as part of an action in which it challenged CFPB Director Richard Cordray's $103 million increase to a $6 million fine initially levied against PHH for allegedly illegally referring consumers to mortgage insurers in exchange for kickbacks. PHH challenged Cordray's authority to levy the additional fine and the constitutionality of the CFPB. In October 2016, a three-judge panel of the U.S. Court of

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November 24, 2017, as the Director of the CFPB.

39. 12 U.S.C. § 5491 (2010).

40. Gregory Roberts, *CFPB Draws Praise From Unlikely Sources*, BLOOMBERG NEWS (Aug. 26, 2016), https://www.bna.com/cfpb-draws-praise-n73014446997/.

41. 12 U.S.C. § 5491 (2010).

Appeals for the District of Columbia Circuit ruled[42] that the Bureau is unconstitutional under separation-of-powers doctrine because its director is not accountable to anyone—not fellow commissioners, not Congress, and not the president. That decision is under review by the entire D.C. Circuit.

Other attacks on the CFPB continue. President Trump's 2018 budget request[43] contains a section entitled "Restructure the Consumer Financial Protection Bureau." The section suggests defunding the CFPB every year through 2027 with an aggregate reduction in funds totaling $6,833 million.[44] The text of the section reads in its entirety: "The Budget proposes to restructure the Consumer Financial Protection Bureau (CFPB), limit the Agency's mandatory funding in 2018, and provide discretionary appropriations to fund the Agency beginning in 2019."[45]

VI. JUSTIFICATION

Restructuring the CFPB to refocus its efforts on enforcing enacted consumer protection laws is a necessary first step to scale back harmful regulatory impositions and prevent future regulatory hurdles that stunt economic growth and ultimately hurt the consumers that the CFPB was originally created to protect. Furthermore, subjecting the reformed agency to the appropriations process would provide the oversight necessary to impose financial discipline and prevent future overreach of the agency into consumer advocacy and activism.[46]

In addition to President Trump's defunding efforts, Sen. Ted Cruz (R-TX) has sought to eliminate the CFPB entirely.[47] Supporters of such action claim the Bureau has too much power and is hurting financial institutions with burdensome regulations.

CONCLUSION

As the foregoing makes clear, Dodd-Frank is under attack. Despite this, in response to questions from the audience, the panel concluded that, to date, the attacks are mostly just noise. With the exception of the resource extractive industries rules, the current administration has had

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42. PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1 (D.C. Cir. 2016), *on reh'g en banc*, 881 F.3d 75 (D.C. Cir. 2018).

43. OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: A NEW FOUNDATION FOR AMERICAN GREATNESS, FISCAL YEAR 2018 (2017), https://www.whitehouse.gov/wp-content/uploads/2017/11/budget.pdf.

44. *Id.*

45. *Id.*

46. OFFICE OF MGMT. & BUDGET, MAJOR SAVINGS AND REFORMS: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2018 (2017), https://www.whitehouse.gov/wp-content/uploads/2017/11/msar.pdf.

47. Repeal CFPB Act, S. 370, 115th Cong. (introduced Feb. 14, 2017).

little success in repealing provisions of the Act. Issuers to a large degree are still complying with the conflict minerals rule. While House passage of the CHOICE Act demonstrated strong antipathy toward Dodd-Frank, CHOICE did not make it to the Senate. The inability of the current Congress to get much of anything done suggests that Dodd-Frank will be around for a while. Hold the death knell.