

### XIII. *The Financial CHOICE Act: A Different Path to Reform*

#### A. Introduction

The financial crisis of 2008 nearly destroyed the U.S. economy, sending it spiraling into a recession from which it took years to recover.<sup>1</sup> Many believe the financial reform of the Dodd-Frank Act<sup>2</sup> is central to preventing another devastating crisis.<sup>3</sup> In sharp opposition, the Financial CHOICE Act of 2017, recently passed by the House of Representatives, would dismantle Dodd-Frank, and discard many of those protections.<sup>4</sup> Its proponents argue that the CHOICE Act will help grow the economy, while more effectively reigning in large financial institutions.<sup>5</sup> If the CHOICE Act is signed into law, is the U.S. ensuring its economic demise, or opening the door to a brighter future?

The Financial CHOICE (standing for Creating Hope and Opportunity for Investors, Consumers and Entrepreneurs) Act of 2017 begins boldly with a statement enforcing a general repeal of Title II of

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<sup>1</sup> Jana Kasperkevic, *The 1% Are Recovering From 2008 Recession While 99% Are Still Waiting*, The Guardian (July 8, 2016, 03:12 PM), <https://www.theguardian.com/business/2016/jul/06/one-percent-2008-recession-recovery-income> [https://perma.cc/Z3AL-UPKN] (highlighting that even as of 2015, the bottom 99 percent of income earners have only made back roughly 60 percent of their income lost in the 2008 financial crisis).

<sup>2</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (enacting a wide variety of provisions, many of which are intended to prevent another financial crisis).

<sup>3</sup> Geoff Bennett, *House Passes Bill Aimed at Reversing Dodd-Frank Financial Regulations*, NPR (June 8, 2017, 4:54 PM), <http://www.npr.org/2017/06/08/532036374/house-passes-bill-aimed-at-reversing-dodd-frank-financial-regulations> [https://perma.cc/TRH9-TDSU] (detailing opponents of the CHOICE Act arguing that loosening Dodd-Frank regulations would be “an invitation for another Great Recession, or worse”).

<sup>4</sup> *Id.* (explaining how the CHOICE Act will “defang” the Dodd-Frank Act).

<sup>5</sup> Press Release, Jeb Hensarling, Representative, U.S. House of Representatives, Committee Approves Financial CHOICE Act, the Republican Plan to Replace Dodd-Frank With Economic Growth for All and Bailouts for None (Sept. 13, 2016) [hereinafter Hensarling Press Release], <https://hensarling.house.gov/media-center/press-releases/committee-approves-financial-choice-act-the-republican-plan-to-replace> [https://perma.cc/8C3Z-NQDX] (contending the CHOICE Act will put tougher penalties on banks and help grow the economy by enforcing greater market transparency).

Dodd-Frank, the Orderly Liquidation Authority.<sup>6</sup> It then puts into place its own new standards for large financial institutions to follow, while giving them a chance to avoid costly regulatory scrutiny if certain capital requirements are met.<sup>7</sup> Some advocates of financial reform warn that implementing the CHOICE Act would endanger consumers, investors, and the U.S. economy.<sup>8</sup> They argue that there should be more regulation of large financial institutions, not less.<sup>9</sup> Others contend Dodd-Frank is both ill-designed and ineffective in accomplishing the goals of financial safety and stability it was enacted for, and that the CHOICE Act has not only harsher penalties for financial wrongdoing, but will also encourage economic growth.<sup>10</sup>

This article discusses the Financial CHOICE Act of 2017 and its potential impact on American financial markets. Part B will review the background of the 2008 financial crisis, which eventually brought about the Dodd-Frank Act, leading to the CHOICE Act as a response. Part C explores some main proposals of the CHOICE Act, including its repeal of the Orderly Liquidation Authority and the Volcker Rule. Finally, part D examines various ways in which the CHOICE Act could be implemented.

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<sup>6</sup> Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017) (“Title II of the Dodd-Frank . . . Act is hereby repealed and any Federal Law amended by such title shall, on and after the effective date of this Act, be effective as if title II of the Dodd-Frank . . . Act had not been enacted.”).

<sup>7</sup> *Id.* (advancing the proposition that financial institutions which voluntarily elect to maintain high levels of capital will not be subjected to the Dodd-Frank supervisory regime or Basel III standards).

<sup>8</sup> Bennett, *supra* note 3.

<sup>9</sup> *Id.* (“People believe there should be more—not less—regulation of Wall Street.”).

<sup>10</sup> See Hensarling Press Release, *supra* note 5 (referring to multiple statements from groups supporting the changes the CHOICE Act makes to Dodd-Frank); see also Peter J. Wallison, *Why Large Portions of the Dodd-Frank Act Should Be Repealed or Replaced*, in THE CASE AGAINST DODD-FRANK 11 (Norbert J. Michel ed., The Heritage Foundation 2016) (arguing that the key provisions of Dodd-Frank create costs that outweigh their benefits, and do not achieve the goals they were designed for).

## B. Background

In 2008, a financial crisis rocked American financial markets, precipitating a severe stock market crash and sending equities plummeting around the world.<sup>11</sup> Many large financial institutions either failed completely or received government bailouts.<sup>12</sup> Eager to ensure such a crisis would never happen again, the House and Senate passed the Dodd-Frank Act and President Barack Obama signed it into law on July 21, 2010.<sup>13</sup> Some of the main provisions of the Dodd-Frank Act: (1) equipped the government with more authority to act in times of crisis; (2) enhanced regulatory controls on large financial institutions; and (3) created an entirely new agency to protect consumers and police financial markets, the Consumer Financial Protection Bureau (CFPB).<sup>14</sup> Dodd-Frank authorized the creation of many new regulations, some of which have not yet been formulated.<sup>15</sup> Since no financial crisis has threatened U.S. markets since its passage, Dodd-Frank has not yet been proven in action.<sup>16</sup>

Some express sharp skepticism regarding Dodd-Frank's design and ability to prevent another crisis.<sup>17</sup> This eventually came to a head with the formation of the Financial CHOICE Act, authored by

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<sup>11</sup> Nick Mathiason, *Three Weeks That Changed the World*, THE GUARDIAN (Dec. 27, 2008, 7:01 PM), [theguardian.com/business/2008/dec/28/markets-credit-crunch-banking-2008](http://theguardian.com/business/2008/dec/28/markets-credit-crunch-banking-2008) [https://perma.cc/G7NK-JFRJ].

<sup>12</sup> *Id.* (detailing a timeline of the 2008 financial crisis).

<sup>13</sup> Jesse Lee, *President Obama Signs Wall Street Reform: "No Easy Task"* (July 21, 2010), [obamawhitehouse.archives.gov/blog/2010/07/21/president-obama-signs-wall-street-reform-no-easy-task](http://obamawhitehouse.archives.gov/blog/2010/07/21/president-obama-signs-wall-street-reform-no-easy-task) [perma.cc/5C7K-HS76].

<sup>14</sup> John Maxfield, *The Dodd-Frank Act Explained*, THE MOTLEY FOOL (Feb. 3, 2017, 2:39 PM), [https://www.fool.com/investing/2017/02/03/the-dodd-frank-act-explained.aspx](http://www.fool.com/investing/2017/02/03/the-dodd-frank-act-explained.aspx) [https://perma.cc/K5BT-2MJH].

<sup>15</sup> *Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act*, U.S. SECURITIES AND EXCHANGE COMMISSION, [https://www.sec.gov/spotlight/dodd-frank.shtml](http://www.sec.gov/spotlight/dodd-frank.shtml) [https://perma.cc/Z5GX-HMQR].

<sup>16</sup> Aaron Klein, *A Primer on Dodd-Frank's Orderly Liquidation Authority*, THE BROOKINGS INST. (June 5, 2017), [https://www.brookings.edu/blog/up-front/2017/06/05/a-primer-on-dodd-franks-orderly-liquidation-authority/](http://www.brookings.edu/blog/up-front/2017/06/05/a-primer-on-dodd-franks-orderly-liquidation-authority/) [https://perma.cc/MJW9-UQP7].

<sup>17</sup> See Wallison, *supra* note 10 (referring to the Dodd-Frank Act as "illegitimate" and "a fit subject for repeal or substantial reform"); *see also* Hensarling Press Release, *supra* note 5 (describing Dodd-Frank as enacting "tax-payer funded bailouts of large financial institutions").

Congressman Hensarling, a longtime proponent of deregulation.<sup>18</sup> The bill made it out of the House Financial Services Committee on a 30-26 vote.<sup>19</sup> The House passed the bill along largely partisan lines with 233 votes for and 186 against.<sup>20</sup> Considering the current composition of the Senate, most find it unlikely that the CHOICE Act will pass the Senate in its entirety.<sup>21</sup> Latest indications are the Senate will not even consider the CHOICE Act, but Hensarling is working on passing its provisions piecemeal to get some desired reforms enacted.<sup>22</sup>

### C. Main Proposals of the Financial CHOICE Act

Two of the most important changes the CHOICE Act makes are the repeal of the Orderly Liquidation Authority (OLA) and the Volcker Rule. The OLA lies at the heart of Dodd-Frank's strategy for dealing with a new financial crisis.<sup>23</sup> The Volcker Rule, on the other hand, is one of the key preventative measures put into place to prevent

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<sup>18</sup> Hensarling Press Release, *supra* note 5 ("The [CHOICE Act] holds Wall Street accountable with the toughest, strongest, strictest penalties ever—far greater than those in Dodd-Frank."); *see also* Bennett, *supra* note 3 ("Mr. Hensarling . . . is a very honorable, very pleasant, deeply rigidly ideological conservative who is essentially against any regulation.").

<sup>19</sup> *Id.* ("[The CHOICE Act] passed the House Financial Services Committee 30-26 today.").

<sup>20</sup> Sylvan Lane, *House Passes Sweeping Bill to Strip Back Financial Rules*, THE HILL (June 8, 2017, 4:45 PM), <http://thehill.com/policy/finance/337004-house-passes-sweeping-bill-to-strip-back-financial-rules> [https://perma.cc/FVG9-JCME] (describing the passage of the bill through the House).

<sup>21</sup> *Id.* ("The CHOICE Act is unlikely to pass the Senate, where the Republican majority is too slim to overcome a Democratic filibuster"); *see also* Bennett, *supra* note 2 ("[T]he GOP will run into obstacles in the Senate, because Republicans in the upper chamber don't have the 60 votes needed to pass the legislation").

<sup>22</sup> David Baumann, *House Committee Approves Legislation Pushed by CU Trades*, CREDIT UNION TIMES (Nov. 16, 2017), <http://www.cutimes.com/2017/11/16/house-committee-approves-legislation-pushed-by-cu> [https://perma.cc/LP4W-DBPW] ("In approving the bills, the [House Financial Services] [C]ommittee continued its plan to break Chairman Jeb Hensarling's (R-Texas) Financial CHOICE Act into smaller pieces to make it more palatable to the Senate.").

<sup>23</sup> Klein, *supra* note 16 (describing how the OLA was created to give the FDIC access to cash to operate insolvent firms).

a new financial crisis from occurring.<sup>24</sup> Large financial institutions have tried to escape the SIFI designation that would place them under the authority of the OLA and resent the restrictions of the Volcker rule.<sup>25</sup> Additionally, the CHOICE Act would remove several smaller provisions put in place by Dodd-Frank that have little to do with preventing or handling another financial crisis.<sup>26</sup>

### *1. The Orderly Liquidation Authority*

The OLA is Dodd-Frank's answer to the chaos caused during the 2008 financial crisis when several large financial firms either collapsed or were bailed out by the federal government.<sup>27</sup> Considering the damaging effects of their failure on the markets, the government classified them as too-big-to-fail (TBTF) and defined them as systemically important financial institutions (SIFIs) which must be kept from entering insolvency and default at all costs.<sup>28</sup> The OLA is intended to safely liquidate a SIFI that fails.<sup>29</sup> This avoids the bankruptcy system, which is not equipped to deal with possible resulting risks to the economy.<sup>30</sup> To accomplish this goal, Dodd-Frank extended the authority of the Federal Deposit Insurance Corporation (FDIC), which could already place failing commercial banks into

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<sup>24</sup> Geoffrey Smith, *The Volcker Rule: What Is It, And Why Does It Need Changing?*, Fortune (Apr. 6, 2017), <http://fortune.com/2017/04/06/volcker-rule-banks-donald-trump/> [https://perma.cc/P8RZ-SZYN] (explaining that the Volcker Rule “aims to stop the use of customer deposits by banks for risky or speculative purposes”).

<sup>25</sup> *Id.* (implementation of the Volcker Rule described as “slow rulemaking, excessive reporting and varied interpretations on what the actual rules are” by J.P. Morgan Chase CEO Jamie Dimon); *see also* Klein, *supra* note 16 (recounting that “MetLife fought SIFI designation legally” and General Electric restructured itself to become smaller to escape designation).

<sup>26</sup> Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017) (including provisions such as the CEO Pay Ratio and Conflict Minerals Rule).

<sup>27</sup> Mathiasen, *supra* note 11 (describing the financial crisis of 2008).

<sup>28</sup> Klein, *supra* note 16 (discussing the reasons for implementing the OLA).

<sup>29</sup> *Id.* (“[I]f a large, complex financial institution were to fail, the FDIC would have the authority to resolve the entire institution . . .”).

<sup>30</sup> *Id.* (relating how the failure and bailout of large financial institutions in the 2008 financial crisis “exposed the holes in the system for managing . . . financial institutions that run into trouble, particularly at times of severe financial stress”).

receivership,<sup>31</sup> to include bank holding companies (BHC) and any company designated as a SIFI.<sup>32</sup>

The CHOICE Act repeals the OLA in its entirety and replaces it with a new section of the Bankruptcy Code, the Financial Institution Bankruptcy Act of 2017 (FIBA).<sup>33</sup> Under FIBA, a large financial institution threatened with default can request the bankruptcy court order the placement of their assets in a newly formed bridge company under a “Subchapter V” bankruptcy process.<sup>34</sup> FIBA is intended to adjust the bankruptcy code to deal with large, insolvent financial institutions in a more quick and efficient manner, resulting in a better outcome for creditors than a traditional “reorganization plan” or handing control of the institution to the FDIC.<sup>35</sup> If this provision is passed into law, the FDIC would revert to having potential receivership authority only over commercial banks.<sup>36</sup>

The OLA was one of the most supported measures of the Dodd-Frank Act, passing with strong bipartisan support in the Senate with a vote of 93-5, but has since become a source of great controversy.<sup>37</sup> The OLA has not yet been tested in liquidating a SIFI in danger of default, leaving the effectiveness of the process up for debate.<sup>38</sup> One of the recurring criticisms of the OLA is the “moral hazard” argument.<sup>39</sup> This argument contends that companies are incentivized to

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<sup>31</sup> *Receivership Management Program*, FED. DEPOSIT INS. CORP., <https://www.fdic.gov/about/strategic/strategic/receivership.html> [https://perma.cc/C4MU-25BU] (explaining receivership is the process by which the FDIC assumes responsibility for a failed insured financial institution and liquidates its assets to distribute to creditors).

<sup>32</sup> *Id.* (explaining the FDIC’s broadened scope of authority).

<sup>33</sup> Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017) (detailing OLA repeal and the description of FIBA as a replacement).

<sup>34</sup> *Id.* (detailing the new steps a large financial institution can take when filing bankruptcy).

<sup>35</sup> Brian G. Rich, *Financial Institution Bankruptcy Act of 2017—Big Changes for Big Banks*, LEXOLOGY (Apr. 17, 2017), <https://www.lexology.com/library/detail.aspx?g=b8e5fa20-9be2-44a6-bbf3-4bbcdd6aa75a> [https://perma.cc/E446-LJAX] (breaking down the proposed Bankruptcy Act of 2017, which is now a part of the Financial CHOICE Act).

<sup>36</sup> H.R. 10 (recasting the FDIC’s authority to what it was before Dodd-Frank).

<sup>37</sup> Klein, *supra* note 16 (“This sounds good, so why has it become so controversial?”).

<sup>38</sup> *Id.* (“[The] OLA has never been triggered . . . ”).

<sup>39</sup> *Id.* (explaining the main criticisms of the OLA); *see also* Wallison, *supra* note 10, at 18 (arguing that the perception that the government would inter-

become SIFIs because they would then be guaranteed government bailout and could engage in riskier financial behavior without the risk of suffering the costs in the event of failure.<sup>40</sup> In response, proponents of Dodd-Frank point to the fact that some companies have attempted to avoid SIFI designation—MetLife has so far successfully fought their designation, and General Electric reached a deal with regulators to restructure their company to avoid designation.<sup>41</sup> Additionally, studies by the Government Accountability Office (GAO) and others could not demonstrate market discounts (such as cheaper cost funding) for SIFI-designated financial institutions.<sup>42</sup> Moreover, since Dodd-Frank requires SIFIs to have “living wills,” essentially roadmaps to winding down in case of insolvency, proponents contend the OLA is simply a last resort.<sup>43</sup>

Critics also argue that what the OLA really does is reinforce the TBTF problem.<sup>44</sup> The TBTF argument is that a SIFI cannot be allowed to fail because that failure would trigger a financial crisis.<sup>45</sup> The FDIC only insures smaller banks up to \$250,000 per depositor.<sup>46</sup> Meanwhile, the OLA process ensures that all depositors and any other creditors will be fully covered, skewing the market by granting large financial institutions a powerful advantage when attracting large depositors.<sup>47</sup> In addition, the OLA process ensures that SIFIs will not be broken up during resolution, since any losses are backed by government funds, leading to a potentially unhealthy tendency for

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vene on behalf of large failing financial institutions had a highly negative impact on the financial market).

<sup>40</sup> Klein, *supra* note 16 (explaining the moral hazard argument).

<sup>41</sup> *Id.* (detailing MetLife and General Electric’s reaction to being designated as SIFIs).

<sup>42</sup> *Id.* (explaining the dearth of evidence supporting SIFI market discounts).

<sup>43</sup> *Id.* (outlining proponent’s arguments in support of the OLA).

<sup>44</sup> Paul H. Kupiec, *Title II: Is Orderly Liquidation Authority Necessary to Fix “Too Big To Fail?”*, in THE CASE AGAINST DODD-FRANK 56–57 (Norbert J. Michel ed., The Heritage Foundation 2016) (“[T]he FDIC’s existing bank resolution process is virtually *designed* to create new TBTF institutions”).

<sup>45</sup> *Id.* (explaining the TBTF argument).

<sup>46</sup> *Deposit Insurance FAQs*, FED. DEPOSIT INS. CORP. (last updated June 3, 2014), [www.fdic.gov/deposit/deposits/faq.html](http://www.fdic.gov/deposit/deposits/faq.html) [https://perma.cc/C28V-38DS].

<sup>47</sup> Mark A. Calabria, *Rethinking Title III: The Federal Deposit Insurance Corporation and Other Subtitles*, in THE CASE AGAINST DODD-FRANK 87–90 (Norbert J. Michel ed., The Heritage Foundation 2016) (detailing the problems inherent in deposit insurance and how the FDIC administers it).

financial institutions to form larger and larger conglomerates.<sup>48</sup> By encouraging larger deposits to concentrate in the largest banks, and preventing those institutions from being broken up even if they go into the resolution process, the OLA actually ends up propagating the TBTF problem.<sup>49</sup>

## 2. *The Volcker Rule*

If the OLA is the heart of Dodd-Frank, the Volcker Rule is its brain. The Volcker Rule is intended to stop financial institutions from engaging in risky behaviors that some contend caused the last financial crisis.<sup>50</sup> The Volcker Rule prohibits an insured depository institution (and its affiliates) from engaging in proprietary trading, acquiring any ownership interest in a hedge fund or private equity fund, or sponsoring a hedge fund or private equity fund.<sup>51</sup> The rule was intended not only to cut down on risky trading behavior, but also to prevent conflicts of interest between different sections of a financial institution, such as the difference of priorities between the retail division of a bank and its investment section.<sup>52</sup>

The CHOICE Act repeals the Volcker Rule completely.<sup>53</sup> The Act's supporters contend that the Volcker Rule hampers economic growth, unfairly punishes smaller financial institutions, and is impossible to enforce as written.<sup>54</sup> Large financial institutions are

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<sup>48</sup> Kupiec, *supra* note 44 (“The FDIC’s legal mandate to perform ‘least cost’ resolutions ensures . . . a large failing bank will be sold intact, usually with an agreement for the deposit insurance fund to absorb some portion of a failing bank’s losses.”).

<sup>49</sup> *Id.* (arguing that the end effect of the OLA’s guarantee of all creditor’s funds in a failing SIFI is an exacerbation of the TBTF issue).

<sup>50</sup> Smith, *supra* note 24 (“[T]he [Volcker Rule] aims to stop the use of customer deposits by banks for risky or speculative purposes.”).

<sup>51</sup> *Id.* (detailing the behavior that the Volcker Rule prohibits).

<sup>52</sup> *Id.* (speaking to the intent behind the Volcker Rule’s restrictions); *see also* Abby Callard, *Banks, Firms, and Houses*, SLATE (Sept. 18, 2008, 6:29 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2008/09/banks\\_firms\\_and\\_houses.html](http://www.slate.com/articles/news_and_politics/explainer/2008/09/banks_firms_and_houses.html) [<https://perma.cc/FV3D-TRNY>] (explaining the difference between retail and investment banking).

<sup>53</sup> Financial CHOICE Act of 2017, *supra* note 6 (detailing the removal, rather than alteration, of the Volcker Rule).

<sup>54</sup> Smith, *supra* note 24 (recounting the remarks of Daniel Tarullo, once the FRB’s point man for regulation, who summed up many of the Volcker Rule’s problems in a final speech).

hesitant to enter new markets for fear of violating the Volcker Rule, retarding growth and making it difficult for U.S. markets to compete on an international scale.<sup>55</sup> Enforcing the Volcker Rule leaves regulators in the unenviable position of deciding if certain trades are prohibited speculation or legitimate market making on very little hard evidence.<sup>56</sup> The Volcker Rule also imposed unforeseen costs on smaller financial institutions who were not engaged in risky behavior.<sup>57</sup> Most experts agree the Volcker Rule needs redrafting to operate as intended, even if many of them balk at simple repeal.<sup>58</sup>

### 3. Other Impactful Repeals

There are several provisions in Dodd-Frank that do not address the issues of preventing and managing a new financial crisis. Instead, these provisions address other issues in U.S. financial markets. The CHOICE Act's proposed repeal of these provisions, and thus the rules enforcing them, has led to controversy as supporters of these rules rally in protest, while critics contend the rules are both ineffective and costly.<sup>59</sup> Examples of these provisions are the CEO Pay Ratio

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<sup>55</sup> *Id.* (“[The Volcker Rule] appears to have frightened banks out of making markets in key sectors of financial markets such as corporate bonds.”).

<sup>56</sup> See *id.* (“[The Volcker Rule is] impossible to enforce legally, inasmuch as it requires supervisors to guess what was going through banker’s minds . . .”).

<sup>57</sup> Smith, *supra* note 24 (“The Volcker Rule covers way more banks than it was intended to, imposing unnecessary costs on community banks which don’t do speculative trading.”); see also Amanda R. Huff, *The Volcker Rule: The Prohibitions, Compliance and the Cost on the Small Bank*, 41 W. ST. U. L. REV. 81, 109 (2013) (“One of the greatest costs that the Volcker Rule may impose . . . is the impact that the Volcker Rule may have on the smaller community banks, mutual funds and regional banks.”).

<sup>58</sup> See Smith, *supra* note 24 (concluding that while it would be “harsh” to say that the Volcker Rule has failed to accomplish its aims, the rule’s costs mean it might need to be changed); see also Huff, *supra* note 57, at 113 (supporting enactment of the Volcker Rule, yet proposing amendment to mitigate the costs to small financial institutions); Matthew P. Richardson, et al., Opinion, *Dodd-Frank or the Choice Act? Take the Best Parts of Both*, AM. BANKER (June 16, 2017, 11:38 AM), <https://www.americanbanker.com/opinion/dodd-frank-or-the-choice-act-take-the-best-parts-of-both> (lauding the CHOICE Act’s proposed repeal of the Volcker Rule as a “worthwhile effort[] to alleviate excessive compliance costs.”).

<sup>59</sup> Compare IKE BRANNON, THE EGREGIOUS COSTS OF THE SEC’S PAY-RATIO DISCLOSURE REGULATION, CTR. FOR CAPITAL MKTS. COMPETITIVENESS (2014), [www.uschamber.com/sites/default/files/documents/files/Egregious-](http://www.uschamber.com/sites/default/files/documents/files/Egregious-)

Disclosure Rule (CEO PRDR) and the Conflict Minerals Rule (CMR).<sup>60</sup> The CEO PRDR requires financial institutions to publish the difference in ratio between the institution's CEO and its median employee.<sup>61</sup> The CMR is aimed at preventing U.S. companies from purchasing minerals produced by slave labor from the Democratic Republic of Congo (DR Congo).<sup>62</sup>

The CEO PRDR was passed on August 5, 2015, and comes into effect starting 2018.<sup>63</sup> Critics cite the prohibitive cost of determining the ratio information and argue it serves no important function.<sup>64</sup> Proponents argue it is an important function to require corporate transparency with shareholders.<sup>65</sup> The CMR requires companies to write to their suppliers in DR Congo and ask if any of the minerals they are buying are from mines which use slave labor, and

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Cost-of-Pay-Ratio-5.14.pdf [https://perma.cc/ZX6W-SPTB] (arguing that the CEO Pay Ratio Rule is not needed and can be extremely expensive to comply with), with Sarah N. Lynch, *U.S. Investors Fight to Preserve SEC Rule on CEO Pay Ratio*, REUTERS (Mar. 22, 2017, 9:18 AM), <http://www.reuters.com/article/us-usa-sec-ceopay/u-s-investors-fight-to-preserve-sec-rule-on-ceo-pay-ratio-idUSKBN16T1LE> [https://perma.cc/93HY-5ETU] (describing a letter written by more than 100 institutional investors on March 22, 2017 to the SEC Commissioner arguing the CEO Pay Ratio Rule gives shareholders important information).

<sup>60</sup> See 17 C.F.R. § 229.402(u) (2015); 17 C.F.R. § 240.13-p1 (2012).

<sup>61</sup> Press Release, U.S. Securities and Exchange Commission, SEC Adopts Rule for Pay Ratio Disclosure (Aug. 5, 2015), [www.sec.gov/news/press-release/2015-160.html](http://www.sec.gov/news/press-release/2015-160.html) [https://perma.cc/A6JV-MWSM] (“The Commission adopted a carefully calibrated pay ratio disclosure rule that carried out a statutory mandate . . .”).

<sup>62</sup> Tim Worstall, *Trump's Executive Order to Repeal the Worst Law of the Year*, FORBES (Feb. 9, 2017, 01:33 PM), <https://www.forbes.com/sites/timworstall/2017/02/09/trumps-xo-to-repeal-the-worst-law-of-the-year-section-1502-of-dodd-frank-on-conflict-minerals/#630c700e47f5> [https://perma.cc/K5EA-TP7M].

<sup>63</sup> Client Alert from Baker McKenzie, The SEC's CEO Pay Ratio Disclosure Rule—Strategies for Dealing with Non-US Employees (May 31, 2017), <http://www.bakermckenzie.com/en/insight/publications/2017/05/securities-ceo-pay-ratio/> (summarizing the CEO Pay Ratio Rule and its requirements).

<sup>64</sup> BRANNON, *supra* note 59 (describing the ratio as a “[f]undamentally [m]isleading and [f]lawed [s]tatistic,” claiming some companies would need to expend “hundreds of hours and millions of dollars”).

<sup>65</sup> Lynch, *supra* note 59 (providing that groups expressed in that the rule was “thoughtful, balanced, and carefully crafted” and “give[s] shareholders valuable new information”).

then report that information.<sup>66</sup> This was intended to reduce the amount of minerals U.S. companies buy from suppliers who use slave labor.<sup>67</sup> Critics, however, contend the cost of compliance (\$4 billion in the first year and \$200 million a year thereafter) is too high, and the rule does not accomplish its goal.<sup>68</sup> Supporters disagree, arguing the implications of repealing the rule could have dire implications for DR Congo.<sup>69</sup> These smaller, yet intensely divisive, issues serve to illustrate why it will be very difficult for the full CHOICE Act to pass the Senate. With such a small majority, the Republicans will likely need to concede on some of these issues to pass the bill.<sup>70</sup>

#### D. Paths to Implementing the Financial CHOICE Act

There are still several ways in which parts or versions of the CHOICE Act could be enacted. One proposal is that Senate Republicans craft their own bill, drawing from the CHOICE Act, but working in compromises which would bring in bi-partisan support, enough to reach the magic number of 60 votes which it would need to pass.<sup>71</sup> Another option is that Senate Republicans pass a “lean” version of the CHOICE Act that would pass through the budget reconciliation process, requiring only 50 votes.<sup>72</sup> Given the failure of the Senate

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<sup>66</sup> Worstall, *supra* note 62 (stating that the CMR requires companies “listed on the US capital markets . . . [to] ask all of its suppliers whether . . . the suppliers, use conflict minerals”).

<sup>67</sup> *Id.* (speaking to the intent behind the CMR).

<sup>68</sup> *Id.* (“[W]hat improvements there are on the ground, and they do exist, are coming from other initiatives, ones that existed before and currently exist independently of this law.”).

<sup>69</sup> Conor Gaffey, *U.S. Could Fuel War in Africa by Dropping Conflict Minerals Rule Argue Senators, Rights Groups*, NEWSWEEK (June 8, 2017, 12:55 PM), <http://www.newsweek.com/congo-conflict-minerals-dodd-frank-trump-623235> [<https://perma.cc/T3G9-M39H>].

<sup>70</sup> Brenna Swanson, *Is the Financial CHOICE Act DOA in the Senate?*, HOUSINGWIRE (June 9, 2017), <https://www.housingwire.com/articles/40390-is-the-financial-choice-act-doa-in-the-senate> [<https://perma.cc/4DBB-C9UF>] (“The lack of bipartisan support will make [the CHOICE Act] extremely difficult to pass through the Senate.”).

<sup>71</sup> *Id.*

<sup>72</sup> Sylvan Lane, *House Financial Services Funding Bill Puts New Restraints on Regulators*, THE HILL (June 28, 2017, 5:07 PM), <http://thehill.com/policy/finance/339922-house-financial-services-funding-bill-puts-new-restraints-on-regulators> [<https://perma.cc/L2TB-JR5X>] (detailing the financial

Republicans to pass other substantial legislation in this manner, the odds also seem low on this front.<sup>73</sup> A final path is through piecemeal reform. In the best recent example, House Republicans attached a few parts of the CHOICE Act—including a repeal of the Volcker Rule and a measure placing most major federal financial regulatory agencies under the congressional appropriations process—to a spending bill passed by the House Appropriation Committee.<sup>74</sup> This is perhaps the most likely avenue for the reform envisioned in the CHOICE Act to pass. Considering the number of possible paths to advance the policy, some provisions are bound to be implemented eventually.

### E. Conclusion

The Financial CHOICE Act of 2017 is, like the Dodd-Frank Act it staunchly opposes, an omnibus bill incorporating a laundry list of changes to the current state of federal financial regulation. Unlike in 2010, however, the U.S. economy is no longer reeling from the shock of the 2008 financial crisis. Thus, today's government is under less pressure to pass something to prevent another crisis from occurring.<sup>75</sup> So far, the votes propelling the Act to the Senate have been largely along partisan lines.<sup>76</sup> Given the current divisive nature of the politics and the fragmented nature of the Republican coalition, it is unlikely that the political will and votes exist to realize the CHOICE Act in its entirety.<sup>77</sup> However, considering the many avenues available to the

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reform provisions the House Appropriations Committee attached to a spending bill).

<sup>73</sup> Molly E. Reynolds, *Republicans Learn the Limits of Reconciliation with Railed ACA Repeal*, THE BROOKINGS INST.: FIXGOV BLOG (July 28, 2017), <https://www.brookings.edu/blog/fixgov/2017/07/28/limits-of-reconciliation-and-failed-aca-repeal/> [https://perma.cc/9E89-4F69] (analyzing Senate Republican's failure to repeal the ACA using budget reconciliation).

<sup>74</sup> Agencies put under congressional appropriations process include the FDIC, the CFPB, the National Credit Union Association, the Federal Housing Finance Agency, the Office of the Comptroller of the Currency, and the regulatory functions of the FRB. Lane, *supra* note 72.

<sup>75</sup> See generally Klein, *supra* note 16.

<sup>76</sup> Lane, *supra* note 20 (“The House passed the . . . (CHOICE) Act 233-186, along party lines.”).

<sup>77</sup> Swanson, *supra* note 70 (explaining the CHOICE Act would need 60 votes or more to pass, meaning it cannot pass without support from at least some Democrats, who vigorously oppose the bill); see also Reynolds, *supra* note 73

current administration to enact reform along these lines, and the variety of steps taken towards the same, it would be wise to view the CHOICE Act not on the grounds of whether or not it will pass, but instead as a forecast of reform to come.<sup>78</sup>

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(describing how Republicans were unable to muster the votes to move ACA repeal into debate, despite numerous attempts).

<sup>78</sup> Lane, *supra* note 20 (“Hensarling said he’s also looking to pass some aspects of the bill through budget reconciliation . . .”); Lane, *supra* note 72; *see also* Swanson, *supra* note 70 (considering the possibility of forming a Senate version of the CHOICE Act to reach a compromise with some Democrats); Tory Newmyer, *The Finance 202: Treasury’s Rollback of Financial Rules Does Not Totally Gut Dodd-Frank*, WASH. POST (June 13, 2017), [https://www.washingtonpost.com/news/powerpost/paloma/the-finance-202/2017/06/13/the-finance-202-treasury-s-rollback-of-financial-rules-does-not-totally-gut-dodd-frank/593eec3be9b69b2fb981dcf6/?utm\\_term=.726fada6f874](https://www.washingtonpost.com/news/powerpost/paloma/the-finance-202/2017/06/13/the-finance-202-treasury-s-rollback-of-financial-rules-does-not-totally-gut-dodd-frank/593eec3be9b69b2fb981dcf6/?utm_term=.726fada6f874) [<https://perma.cc/VNJ4-RU3C>] (comparing the Treasury’s Department’s proposed changes with the proposals of the CHOICE Act, noting many similarities despite being a more “moderate” set of proposals).

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