X. What Is Left of Dodd-Frank?

A. Introduction

On July 21, 2010, amid the aftermath of the 2008 Financial Crisis, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).[1] Congress left Dodd-Frank largely untouched until May 24, 2018, when it passed the Economic Growth, Regulatory Relief, and Consumer Protection Act (the Growth Act).[2] The Growth Act amends Dodd-Frank in six key ways: (i) altering exemptions to mortgage lending practices; (ii) providing regulatory relief to community banks by way of exemption from the Volker Rule; (iii) enhancing consumer protections among credit reporting agencies; (iv) changing how to determine which banks are subject to enhanced prudential regulation; (v) providing regulatory relief from certain securities regulations in an attempt to encourage capital formation; and (vi) fortifying consumer protection for borrowers of student loans.[3] This article will explore the most direct impacts of the Growth Act.

In addition to the statutory changes effectuated this year, several recent court cases have altered the direction and scope of various provisions within Dodd-Frank. Most notably, in January 2018, the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, handed a victory to the Consumer Financial Protection Bureau (CFPB), when it declined to find the structure of the agency a violation of separation of powers principles.[4] The D.C. Circuit overturned a three-judge panel in finding that the "for cause" tenure afforded to the head of the CFPB did not violate Article II of the Constitution.[5] Several courts in subsequent cases have confronted

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[1] Hellen Cooper, *Obama Signs Overhaul of Financial System*, N.Y. TIMES (July 21, 2010), https://www.nytimes.com/2010/07/22/business/22regulate.html.

[2] Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, 132 Stat. 1296 (2018).

[3] DAVID W. PERKINS ET AL., CONG. RESEARCH SERV., R45073, ECONOMIC GROWTH, REGULATORY RELIEF, AND CONSUMER PROTECTION ACT (P.L. 115-174) AND SELECTED POLICY ISSUES 1 (2018).

[4] PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 95 (D.C. Cir. 2018) (en banc) ("Law and history put the CFPB, led by a Director shielded from removal without cause, on safe ground.").

[5] *Id.* at 77 (holding that the practice of "shielding the Director of the CFPB from removal without cause is consistent with Article II").

the same constitutional challenge, although not all have agreed with the D.C. Circuit; hence, the constitutionality of the CFPB's structure remains in dispute.[6] Moreover, the Supreme Court recently clarified, in a unanimous opinion, the scope of Dodd-Frank's whistleblower protection provisions, which could substantially impact internal compliance systems.[7]

This article will analyze several changes to Dodd-Frank, and whether each of those alterations is consistent with the original intent of Dodd-Frank as envisioned by Congress in the wake of one of the nation's largest financial crises. Section B will discuss a brief history of the origins of Dodd-Frank, along with the financial issues Dodd-Frank was designed to address. Section C will outline the several components of the Growth Act, along with a summary of competing views on the newly-amended financial regulations for which it is responsible. Section D will continue the discussion of relevant court battles over both the constitutionality of the CFPB, one of Dodd-Frank's largest additions to the financial regulatory framework in the United States, and Section E considers the recently-narrowed whistleblower protections within the Act. Section F reviews how closely the changes to Dodd-Frank align to the goals of mitigating systemic risk and consumer protection. The article will conclude with Section G, which will highlight the public debate surrounding all of these issues and consider whether Dodd-Frank remains intact after sustaining varying degrees of influential changes by all three branches of government over approximately the past year.

B. A Brief History: The 2008 Financial Crisis and Congress' Response

Before discussing what is left of Dodd-Frank, it is necessary to provide some background context of the provisions that this article will address. The Financial Crisis of 2008 illuminated a multitude of issues within the financial sector of the United States.[8] Congress

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[6] *See, e.g.,* Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, No. 17-CV-890 (LAP), 2018 U.S. Dist. LEXIS 104132, at *102–104 (S.D.N.Y. June 21, 2018) (embracing Sections I–IV of Judge Brett Kavanaugh's dissent and finding that Title X of Dodd-Frank was not severable, but rather should be struck in its entirety).
[7] Dig. Realty Tr., Inc. v. Somers*,* 138 S. Ct. 767, 777 (2018).
[8] FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT (2011).

sought to address these issues with the Dodd-Frank Act.[9] A pattern of imprudent lending practices formed the bedrock of the 2008 Financial Crisis.[10] Congress sought to address nefarious lending by establishing the Ability to Repay (ATR) requirement.[11] The ATR was designed to incentivize banks to utilize available data to ensure the borrower's ability to repay the loan, thereby theoretically reducing the chance that borrowers would default.[12]

Additionally, in response to the systemic risk posed by massive and interconnected financial intermediaries, Dodd-Frank directed the Board of Governors of the Federal Reserve System to establish "prudential standards" for nonbank financial institutions within the purview of the Federal Reserve and for banks with over $50 billion in assets.[13] These standards are said to be "more stringent" than those applicable to other financial institutions.[14] Also in response to systemic risk, Dodd-Frank authorized a new regulatory authority, the Financial Stability Oversight Council (FSOC), in order to oversee Systemically Important Financial Institutions (SIFIs).[15] Congress also drafted Dodd-Frank to include an independent regulatory agency, the CFPB, with a mission of protecting consumers in their dealings with financial institutions.[16] Finally, Dodd-Frank provided whistleblower protection to individuals who report alleged violations to the Securities and Exchange Commission (SEC).[17]

As explained below, in recent years, these provisions of Dodd-Frank have been profoundly altered by way of statutory amendment and court interpretation. This article will explore the impact of these

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[9] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[10] FIN. CRISIS INQUIRY COMM'N, *supra* note 8, at xxiii.

[11] Dodd-Frank Wall Street Reform and Consumer Protection Act § 1411, 124 Stat. at 2142 (codified at 15 U.S.C. § 1639c).

[12] Neil Bhutta & Daniel Ringo, *Effects of the Ability to Repay and Qualified Mortgage Rules on the Mortgage Market*, BD. OF GOVERNORS OF THE FED. RESERVE SYS.: FEDS NOTES (Dec. 29, 2015), https://www.federalreserve.gov/econresdata/notes/feds-notes/2015/effects-of-the-ability-to-repay-and-qualified-mortgage-rules-on-the-mortgage-market-20151229.html [https://perma.cc/U8WS-DMC9].

[13] Dodd-Frank Wall Street Reform and Consumer Protection Act § 165(a)(1), 124 Stat. at 1423 (codified at 12 U.S.C. § 5365).

[14] *Id.* § 165(a)(1)(A).

[15] *Id.* § 111(a), 124 Stat. at 1392.

[16] *Id.* § 1011(a), 124 Stat. at 1964.

[17] *Id.* § 922(a), 124 Stat. at 1841–42 (codified at 15 U.S.C. § 78u-6).

changes, and whether they are consistent with the original intent of Dodd-Frank.

C. The Economic Growth, Regulatory Relief, and Consumer Protection Act

On May 24, 2018, President Trump signed into law the Economic Growth, Regulatory Relief, and Consumer Protection Act.[18] Two of the Growth Act's major provisions have substantively changed the regulatory framework set out by Dodd-Frank. First, the act exempts certain mortgage lenders from compliance with certain mortgage lending regulations in an effort to provide "regulatory relief" and ease access to credit.[19] Second, the Growth Act narrows the scope of the Federal Reserve's ability to effectuate prudential regulation on large financial institutions whose collapse may pose a risk to the financial system at large.[20]

1. Mortgage Relief

In an effort to repel the risky lending practices prevalent in the years leading up to the 2008 Financial Crisis, Congress empowered the Consumer Financial Protection Bureau to issue regulations that modify the statutory definition of a Qualified Mortgage (QM).[21] The definition of a QM has a substantial effect on whether any particular mortgage satisfies Dodd-Frank's ATR requirement.[22] Some smaller lenders must satisfy less stringent underwriting requirements enumerated in the "Small Creditor Portfolio QM."[23]

The Growth Act provides another option for small lenders. A mortgage from a small lender may now comply with the ATR requirement if it comes from an insured depository and if the lender holds it

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[18] Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, 132 Stat. 1296 (2018).
[19] *Id.* § 101, 132 Stat. at 1297–99 (creating new qualified mortgage guidelines).
[20] *Id.* § 401, 132 Stat. at 1356–59 (modifying the threshold at which banks are subjected to enhanced prudential regulation).
[21] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1412, 124 Stat. 1376, 2148 (2010) (codified at 15 U.S.C. § 1639(c)).
[22] PERKINS ET AL., *supra* note 3, at 6.
[23] 12 C.F.R. § 1026.43 (2018) (enumerating ways in which a lender may satisfy these less stringent requirements).

for the life of the loan.[24] Lenders opting for the compliance option listed in the Growth Act must satisfy certain product feature restrictions and underwriting criteria, but both of these limitations are less burdensome than those set out in the CFPB's definition of a Small Creditor Portfolio QM.[25] Moreover, the Growth Act affords this compliance option to lenders whose assets fall below $10 billion, rather the $2 billion threshold under the Small Creditor Portfolio QM.[26] Proponents argue that keeping the loan inside the original lender's portfolio is provides sufficient incentive to encourage prudent lending practices.[27] However, opponents warn that more lenient regulation could increase mortgage fraud, lending discrimination, unnecessarily risky lending policies, and other practices that arguably contributed to the 2008 Financial Crisis.[28]

2. *New Scope of Prudential Regulation*

The Growth Act's second, and perhaps more controversial, amendment to Dodd-Frank is the newly-defined scope of the Federal Reserve's power to subject banks to "prudential regulation."[29] Title I of the Dodd-Frank Act implemented a prudential regulatory regime for

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[24] Economic Growth, Regulatory Relief, and Consumer Protection Act § 101, 132 Stat. at 1298 (codified at 15 U.S.C. § 1639(c)(F)(ii)(I)(aa)) (describing qualified mortgage as one that is originated and held in portfolio by a covered institution).

[25] *See id.* (codified at 15 U.S.C. § 1639(c)(F)(ii)(I)(aa)–(ee)).

[26] *Id.*

[27] Press Release, Congressman Andy Barr, Barr Introduces Legislation to Help Homebuyers, Prevent Bailouts (Feb. 27, 2015) https://barr.house.gov/media-center/press-releases/barr-introduces-legislation-to-help-homebuyers-prevent-bailouts [http://perma.cc/FFQ4-EFP7] ("When a mortgage lender keeps a loan in its portfolio, the lender retains the risk of a borrower's default. This better aligns the interest of the lender to properly underwrite the loan with the borrower's ability to repay it.").

[28] Press Release, U.S. Pub. Interest Research Grp., U.S. PIRG Statement on House Passage of Bank Lobbyist Act (S.2155) (May 22, 2018) https://uspirg.org/news/usp/us-pirg-statement-house-passage-bank-lobbyist-act-s2155 [https://perma.cc/AQF8-5DUJ] ("It's hard to watch Congress ignore the painful lessons of the Great Recession that started with an historic financial collapse that occurred less than 10 years ago.").

[29] Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, § 401, 132 Stat. 1296, 1356–59 (2018).

banks holding more than $50 billion in assets.[30] Under Dodd-Frank's regulatory framework, banks subjected to prudential regulation had to satisfy stress tests, provide a "living will" as a plan to disperse the assets of a failing bank, maintain higher liquidity requirements than smaller banks, comply with counterparty limits in their transactions in order to reduce risk exposure to a defunct counterparty, and yield to the Federal Reserve's so-called "financial stability requirements" in the event that the Federal Reserve determined that a particular bank posed a systemic threat to the stability of the financial system.[31] The Growth Act exempts banks with between $50 billion and $100 billion in assets from prudential regulation, with the exception of risk committee requirements.[32] Additionally, banks with between $100 billion and $250 billion in assets must pass stress tests and other enhanced prudential regulations.[33] Any bank with assets greater than $250 billion is still subject to prudential regulation.[34]

Proponents of the new changes argue that prudential regulation is now more appropriately tailored to both the size and systemic importance of banks.[35] One relevant discussion is whether there are economies of scale with respect to regulatory compliance.[36] If so, a broad "one size fits all" approach to prudential regulation may unnecessarily burden small and midsized banks.[37] Still, opponents

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[30] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 115, 124 Stat. 1376, 1403–06 (2010) (codified at 12 U.S.C. § 5326).
[31] *Id.*
[32] Economic Growth, Regulatory Relief, and Consumer Protection Act § 401, 132 Stat. at 1358–60 (exempting banks with assets between $50 billion and $100 billion from enhanced regulation, except for the risk committee requirements).
[33] *Id.* § 401(e), 132 Stat. at 1359.
[34] *Id.* § 401, 132 Stat. at 1359.
[35] Daniel Tarullo, Governor, Bd. of Governors of the Fed. Reserve Sys., "Rethinking the Aims of Prudential Regulation" Speech at the Federal Reserve Bank of Chicago Bank Structure Conference (May 8, 2014), https://www.federalreserve.gov/newsevents/speech/tarullo20140508a.htm [https://perma.cc/M6XP-88X4] (arguing against a one-size-fits-all approach to prudential regulation).
[36] *See generally*, Steven Bradford, *Does Size Matter? An Economic Analysis of Small Business Exemptions from Regulation*, 8 SMALL & EMERGING BUS. L. 1 (2004).
[37] Tarullo, *supra* note 35.

voice concerns over loosening the regulatory oversight of large financial institutions only eight years after Dodd-Frank was passed.[38]

D. The Assault on the Consumer Financial Protection Bureau

Title X of the Dodd-Frank Act established the Consumer Financial Protection Bureau.[39] In the wake of a financial crisis, Congress saw the need for an agency "to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[40] Proponents argued that consolidating consumer protection authority with respect to financial products and services could fill regulatory gaps and inconsistencies.[41] However, opponents at the time believed—indeed, probably still believe—that the CFPB represents an unnecessary and dangerous manifestation of paternalism within the federal government.[42] Moreover, some feared that its creation would lay a dangerous groundwork for overly-expansive and tyrannical agencies, sometimes dubbed "supernanny agencies."[43] Whether by way of litigation, administrative guidance, or the appointment of

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[38] Press Release, *supra* note 28.
[39] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011, 124 Stat. 1376, 1964–65 (2010) (codified at 12 U.S.C. § 5491).
[40] 12 U.S.C. § 5511(a) (2012).
[41] Elizabeth Warren, *Unsafe at Any Rate*, 5 DEMOCRACY 8, 8–9 (2007).
[42] *Creating a Consumer Financial Protection Agency: A Cornerstone of America's New Economic Foundation: Hearing Before the S. Comm. on Banking, Housing, & Urban Affairs*, 111th Cong. 4–6 (2009) (statement of Sen. Richard C. Shelby) ("I do not accept the premise that the remedy is to deny consumers decision-making power altogether. I think this would be a very significant and paternalistic departure from the notions of liberty and personal responsibility that have previously guided all our regulatory efforts.").
[43] David S. Evans & Joshua Wright, *The Effect of the Consumer Financial Protection Agency Act of 2009 on Consumer Credit*, 22 LOY. CONSUMER L. REV. 277, 280 (2010) (arguing that the establishment of the CFPB was "a misguided attempt to erect a supernanny agency that would substitute its own choices for how and under what circumstances consumers may be able to borrow money").

adversaries of financial regulation, the opposition to the CFPB has launched a wave of legal challenges in an effort to limit the scope of the agency and remove its independence in the name of political accountability.

1. *PHH Corporation v. Consumer Financial Protection Bureau*

On October 11, 2016, the United States Court of Appeals for the District of Columbia Circuit ruled that the CFPB was unconstitutionally structured.[44] In *PHH Corporation v. Consumer Financial Protection Bureau*, the court, per Judge Brett Kavanaugh, held that the "for cause" tenure afforded to the Director of the CFPB (Director) violated Article 2 of the U.S. Constitution.[45] The 2-1 panel majority decision explained that there exists a historical practice of entrusting commissions, rather than individuals, to run independent agencies.[46] The court held that the CFPB was given broad authority to interfere with individual liberty; for example, the CFPB could impose legal relief, including restitution, damages, and injunctions.[47] The court determined that, without a commission, the Director wielded too much power to be shielded by a "for cause" provision.[48] As a result, the court severed the "for-cause" provision, thereby empowering the President to remove the Director at will.[49]

The D.C. Circuit then reheard the case *en banc* and reversed the three-judge panel. Writing for the majority, Judge Pillard held that the structure of the CFPB was consistent with Supreme Court precedent.[50] In particular, the *en banc* majority found that the Supreme Court's decision in *Humphrey's Executor v. United States* controlled.[51] In *Humhrey's Executor*, the Court upheld the constitutionality of a "for cause" provision that protected Commissioners from presidential

[44] PHH v. Consumer Fin. Prot. Bureau., 839 F.3d 1, 36 (D.C. Cir. 2016).
[45] *Id.*
[46] *Id.* at 6.
[47] *Id.* at 16.
[48] *Id.* at 17.
[49] *Id.* at 8.
[50] PHH v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 93 (D.C. Cir. 2018).
[51] *Id.*

removal.[52] Although the majority opinion conceded that there were some executive officials who must be removable by the President, the court nonetheless found that there existed a long line of precedent upholding "for cause" tenure on independent agency heads.[53] Judge Kavanaugh dissented on the same grounds articulated in the opinion he authored for the three-judge panel.[54] Going even further, Judge Henderson argued in her dissent that Title X of the Dodd-Frank Act was unconstitutional, and that the "for cause" provision was not severable because Congress would not have structured the act in a manner consistent with the remains of the severed statute.[55]

2. *Aftermath of PHH*

The D.C. Circuit did not end the constitutional debate surrounding the structure of the CFPB. Most recently, Judge Loretta Preska of the United States District Court for the Southern District of New York adopted sections I–IV of Judge Kavanaugh's dissent and Section II of Judge Henderson's dissent.[56] Judge Preska therefore agreed that the entirety of Title X is unconstitutional and unseverable.[57] Several District Courts across the country have confronted the

[52] Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) ("We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named.").
[53] *PHH*, 881 F.3d at 79 ("The Court has repeatedly held that [a for-cause tenure provision] does not impermissibly burden the President's Article II powers . . . .").
[54] *Id.* at 167 (Kavanaugh, J., dissenting) ("Under Article II, an independent agency that exercises substantial executive power may not be headed by a single Director.").
[55] *Id.* at 139 (Lecraft Henderson, J. dissenting) ("Accordingly, I would invalidate Title X in its entirety and let the Congress decide whether to resuscitate—and, if so, how to restructure—the CFPB.").
[56] *See* Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, No. 17-cv-890 (LAP), 2018 U.S. Dist. LEXIS 104132, at *35 (S.D.N.Y. June 21, 2018) ("Respectfully, the Court disagrees with the holding of the *en banc* court and instead adopts Sections I-IV of Judge Brett Kavanaugh's dissent . . . .") (citing *PHH Corp.*, 881 F.3d at 163–98 (D.C. Cir. 2018)).
[57] *Id.* ("Also most respectfully, the Court disagrees with Section V of Judge Kavanaugh's opinion wherein he determined the remedy to be to 'invalidate and sever the for-cause provision and hold that the Director of the CFPB may be supervised, directed, and removed at will by the President.'") (citing *PHH Corp.*, 881 F.3d at 163–98 (D.C. Cir. 2018).

constitutionality of the structure of the CFPB, but the vast majority have agreed with the *en banc* decision of the D.C. Circuit.[58] Without a fully developed circuit split, it is unclear whether the Supreme Court will take up this issue.[59]

E. Newly Tailored Whistleblower Protections

Perceiving a need for a more powerful SEC, Congress included in Dodd-Frank certain whistleblower protections for investors who report suspected violations of securities laws to the Commission.[60] The Supreme Court, in its most recent term, clarified the meaning of "whistleblower" within the context of Dodd-Frank.[61] Dodd-Frank defined whistleblower as "any individual who provides . . . information relating to a violation of the securities laws *to the Commission*."[62] The SEC promulgated a rule with two distinct definitions of "whistleblower", one for the purposes of an incentive program within Dodd-Frank, and another for the purposes of a retaliation protection provision.[63] For purposes of retaliation protection, the SEC's promulgated rule did not require whistleblowers to disclose alleged violations to the Commission.[64] In *Digital Realty Trust v. Somers*, the Supreme Court held this rule to be inconsistent with the unambiguous definition of "whistleblower" provided in Section 78u-6(h), which qualifies the term as one who provides information to "the Commission."[65]

The SEC argued that the two different definitions within the promulgated rule were necessary to resolve ambiguity created by a

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[58] *Id.* at 102 n.7.

[59] *See generally* Deborah Beim & Kelly Rader, Evolution of Conflict in the Courts of Appeals (May 12, 2015) (preliminary draft prepared for the 2015 Midwest Political Science Association Annual Meeting), https://cpb-us-w2.wpmucdn.com/campuspress.yale.edu/dist/6/356/files/2011/10/Beim_Rader_Conflicts-xxkfk0.pdf.

[60] S. REP. No. 111-176, at 35–36 (2010) (Conf. Rep.) (finding that "shareholders need a greater voice in corporate governance; the SEC needs more authority; the SEC should be self-funded; and the municipal securities markets need improved regulation . . . .").

[61] Dig. Realty Tr., Inc. v. Somers*,* 138 S. Ct. 767, 778 (2018).

[62] *Id.* at 774 (quoting 15 U.S.C. § 78u-(6)(a)(6) (2012)).

[63] 17 C.F.R. § 240.21F-2 (2011).

[64] *Id.* (dispensing with the requirement to report violations to the commission directly).

[65] 15 U.S.C. § 78u-(6)(a)(6) (2012).

tension between 78u-6(h)(1)(A)(iii), which provides that whistleblowers are protected "in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 . . . ."[66] This would seemingly afford whistleblower protection to some individuals who did not report to the Commission because the Sarbanes-Oxley Act does not require whistleblowers to report alleged securities violations directly to the SEC.[67] The Court, however, rejected this argument, giving weight to what it found to be an unambiguous statutory scheme largely because Dodd-Frank was intended to encourage reporting *to the SEC*.[68]

However, not all are persuaded by this justification. Some reason that the requirement to report alleged securities violations directly to the SEC will effectively destroy a robust network of corporate compliance programs that many companies have initiated to deal internally with whistleblowing.[69] Additionally, *Digital Realty* shrank the number of individuals who are now protected by Dodd-Frank's anti-whistleblowing provision, meaning companies may experience reduced liability.[70]

F. Relevance

After detailing the various changes to Dodd-Frank and its regulatory schemes, the next inquiry is whether, and to what extent, those changes align Dodd-Frank with its original purpose—to mitigate systemic risk and protect consumers.

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[66] *Id.* § 78u-6(h)(1)(A)(iii).
[67] Sommers v. Dig. Realty Tr. Inc., 850 F.3d 1045, 1049 (9th Cir. 2017) ("Reading the use of the word 'whistleblower' in the anti-retaliation provision to incorporate the earlier, narrow definition would make little practical sense and undercut congressional intent. As the Second Circuit pointed out, subdivision (iii) would be narrowed to the point of absurdity . . . ."), *rev'd,* 138 S. Ct. 767 (2018).
[68] *Dig. Realty Tr.*, 138 S. Ct. at 780.
[69] Stephen Kohn, *Digital Realty Trust v. Somers May Kill Corporate Compliance*, LAW360 (Sept. 21, 2017), https://www.law360.com/articles/964208/digital-realty-trust-v-somers-may-kill-corporate-compliance.
[70] Matthew T. Martens et al., *Supreme Court Articulates Dodd-Frank Whistleblower Definition in Digital Realty Trust, Inc. v. Somers*, WILMER CUTLER PICKERING HALE AND DORR LLP: CLIENT ALERTS (Feb. 23, 2018), https://www.wilmerhale.com/en/insights/client-alerts/supreme-court-articulates-dodd-frank-whistleblower-definition-in-digital-realty-trust-inc-v-somers [https://perma.cc/GEP7-AWPB].

Given the relatively limited scope of the change, and the relatively small number of lenders it will affect, it is unlikely that the Growth Act's mortgage lending practice provisions will have a substantial effect on the overall mortgage market.[71] More peculiar are the changes to the prudential regulatory scheme.[72] There remains little data upon which to base a determination of the minimum threshold for enhanced prudential regulations. Moreover, the Growth Act itself mustered bipartisan support, and its effects do not seem to fall squarely within the usual partisan framework.[73] Within this context, it is difficult to argue that the mortgage lending rules and changes to prudential regulation work irreparable harm to Dodd-Frank.

Given the Supreme Court's skepticism of insulating administrative agency heads from executive authority,[74] the CFPB's prospects would appear more dubious in the Supreme Court than in recent District Court cases.[75] Surely Congress did not intend to pass an unconstitutional law, but it is unclear why the CFPB was not structured like other agencies (i.e., with either a removable head or a multi-member commission at the helm).[76] Moreover, the confirmation of Brett Kavanaugh to the Supreme Court necessitates serious doubts about the future independence of the CFPB.[77] Nevertheless, it is hard to see how the CFPB's core functioning would be compromised with either a commission of tenured directors, or a fully removable single

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[71] *See supra* section C.1.
[72] *See supra* section C.2.
[73] Aaron Klein, *Bipartisanship in Banking Is Back*, BROOKINGS INSTITUTION (Mar. 4, 2018), https://www.brookings.edu/research/bipartisanship-in-banking-is-back/ [http://perma.cc/EY3Q-F2X5].
[74] *See, e.g.,* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492 (2010) (holding as unconstitutional the dual for-cause limitations on the president's power to remove Public Accounting Oversight Board members).
[75] *See, e.g.*, Consumer Fin. Prot. Bureau v. TCF Nat'l Bank, No. 17-166 (RHK/DTS), 2017 U.S. Dist. LEXIS 221325, at *19 (D. Minn. Sept. 8, 2017) (rejecting constitutional challenge to CFPB); Consumer Fin. Prot. Bureau v. Future Income Payments, 252 F. Supp. 3d 961, 972 (C.D. Cal. 2017) (rejecting a constitutional challenge to the CFPB).
[76] *See* Consumer Financial Protection Safety and Soundness Improvement Act of 2013, H.R. 3193, 113th Cong. § 1011(d) (2013) (proposing to amend CFPB statute "by striking "Director" each place such term appears and inserting "Financial Product Safety Commission").
[77] *See supra* Section D.1 (describing then-Judge Kavanaugh's dissent in the seminal case on this issue).

director.[78] Furthermore, even assuming that the CFPB's structure is unconstitutional, a proper is unclear.[79] For now, courts seem inclined to sever statutory language and leave intact most regulatory schemes to the greatest extent possible.[80]

Companies may enjoy reduced liability in the short term, for whistleblower behavior may adjust to align with the incentive scheme of the Supreme Court's newly tailored interpretation of Dodd-Frank's whistleblower protection.[81] However, this narrow view of Dodd-Frank's whistleblower protection is arguably in line with an integral motivating factor behind Dodd-Frank—to expand the power of the SEC.[82] By affording protection only to those whistleblowers who report violations to the SEC, the regulatory scheme now theoretically ensures that those with information regarding securities law violations bring that information to the agency Congress thought most appropriate to process it.[83]

G. Conclusion

The changes highlighted above implicate a wide range of issues within the labyrinth of financial regulation in the United States. While the mortgage lending rules are important to the flow of credit to mortgage markets, its scope is relatively narrow.[84] Likewise, although some arguments raised in *PPH* have potentially catastrophic impacts to the future of the CFPB, no material threat to the agency, such as a challenge in the Supreme Court, has yet materialized.[85] Thus, when considering the absence of a fully developed circuit split, the CFPB may be safe—at least in the short run.[86] The most influential

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[78] Kristin E. Hickman, *Symbolism and Separation of Powers in Agency Design*, 93 NOTRE DAME L. REV. 1475, 1485 (2018).
[79] *Id.* at 1488–93.
[80] *Id.*
[81] *See* Martens et al., *supra* note 70.
[82] Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 780 (2018).
[83] *Id.* (observing Congress logically reserved protections of statute "for employees who have done what Dodd-Frank seeks to achieve, i.e., they have placed information about unlawful activity before the Commission to aid its enforcement efforts").
[84] Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, § 401(e), 132 Stat. 1296 (2018).
[85] *Supra* Section D.2.
[86] *See generally* Bein & Rader*, supra* note 59 (explaining that the Supreme Court prefers to allow a circuit split to develop before taking a case).

substantive change to Dodd-Frank is the Growth Act. Specifically, the more tailored scope of prudential regulations is still the subject of a vigorous debate about the propriety of reducing financial regulations in times of economic expansion.[87] It is possible that the government tends to overreact in the wake of a crisis and become imprudent during times of growth. However, it is not rare to unwind regulations so quickly after a financial crisis.[88] Without more data and studies on the cost of regulatory compliance, it is difficult to pass judgment on the prudential regulatory policy. In addition to changes to Dodd-Frank already put into effect, by way of both legislative action and interpretation of various provisions in federal courts, the current administration has proposed several changes to Dodd-Frank, most notably through a series of Treasury Reports which, among other things, proposed to change the process by which the Federal Reserve Council decides which nonbank financial institutions fall within the regulatory jurisdiction of the Federal Reserve System, and the process by which financial institutions are designated as systemically important.[89] It is

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[87] Binyamin Appelbaum, *Yellen Warns Against Erasing Regulations Made after Financial Crisis*, N.Y. TIMES (Aug. 25, 2017), https://www.nytimes.com/2017/08/25/us/politics/yellen-warns-against-erasing-regulations-made-after-the-financial-crisis.html (describing back and forth between Federal Reserve officials and Trump administration).

[88] *See* Graciela L. Kaminsky & Carmen M. Reinhart, *The Twin Crises: The Causes of Banking and Balance-of-Payments Problems*, 89 AM. ECON. REV. 473 (1999).

[89] *See* U.S. DEP'T OF THE TREASURY, REPORT TO THE PRESIDENT OF THE UNITED STATES, ORDERLY LIQUIDATION AUTHORITY AND BANKRUPTCY REFORM (2018) (recommending changes to the bankruptcy code in an attempt to make bankruptcy more effective in dealing with the dissolution of large financial institutions); U.S. DEP'T OF THE TREASURY, REPORT TO THE PRESIDENT OF THE UNITED STATES, FINANCIAL STABILITY OVERSIGHT COUNCIL DESIGNATIONS (2017) (advocating for FSOC to focus on market activity rather than individual firms); U.S. DEP'T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: ASSET MANAGEMENT AND INSURANCE (2017) (exploring stronger liquidity and risk management policies); U.S. DEP'T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: CAPITAL MARKETS (2017) (suggesting methods to make derivative regulation, capital markets, and risk management techniques more efficient); *See* U.S. DEP'T OF THE TREASURY, REPORT TO THE PRESIDENT OF THE UNITED STATES, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: BANKS AND CREDIT UNIONS (2017) (recommending a broad reduction in financial regulation).

not clear, however, whether or how the proposed policies they detail will be effectuated.

The simple answer to "What is left of Dodd-Frank?" is: most of it. The prudential regulation standards, while narrowly tailored, still apply to the largest legacy banks in the United States.[90] Although the Growth Act has affected many areas of Dodd-Frank, the majority of financial regulatory schemes remain untouched. Moreover, not enough time has elapsed to collect data to determine what impact *Digital Realty* will have on the prevalence or effectiveness of SEC reporting. The most immediate question seems to concern the constitutionality of the CFPB—which continues to develop—and whether Congress will continue to relax other provisions of Dodd-Frank.

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[90] *Supra* Section C2.
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