COVINGTON

CHOICE Act 2.0: House Financial Services Committee Revises Regulatory Reform Bill

April 24, 2017

Financial Services

On April 19, 2017, the House Financial Services Committee (the "Committee") released a new "discussion draft" of the Financial CHOICE Act, its comprehensive regulatory reform bill ("CHOICE Act 2.0"). The Committee released the first version of the bill ("CHOICE Act 1.0") in June 2016.

Buoyed by the election of a Republican president, and following several months of public and industry outreach, Committee leadership has made a number of significant changes to the bill. Key changes from the CHOICE Act 1.0 include:

- Reducing the burdens of stress testing for all banking organizations by extending the Comprehensive Capital Analysis and Review ("CCAR") cycle to every two years, eliminating the mid-year component of company-run Dodd-Frank Act Stress Tests ("DFAST") entirely, eliminating DFAST requirements for banking organizations that are not bank holding companies, enhancing the transparency of CCAR, and expanding relief from the qualitative aspects of CCAR recently extended to regional banking organizations to the largest banking organizations.

- Forbidding the federal banking agencies from imposing an operational risk capital charge for business lines or products that a banking organization no longer offers, and requiring any operational risk capital requirement to permit adjustments for operational risk mitigants.

- Removing the Federal Deposit Insurance Corporation ("FDIC") from the resolution plan process, and extending reforms in the resolution planning process to insured depository institutions' resolution plans.

- Exempting qualifying banking organizations that maintain a supplementary leverage ratio ("SLR") of 10 percent or more from stress tests, and eliminating the requirement that such banking organizations have a CAMELS supervisory rating of one or two to be eligible for regulatory relief.

- Restructuring the Consumer Financial Protection Bureau (the "CFPB" or "Bureau") so that it continues to be led by a sole director, but providing the President with statutory authority to remove the director at will, rather than restructuring the CFPB to be a multi-member commission.

- Removing a number of authorities from the CFPB, including its supervisory authority and its authority to regulate and enforce Unfair, Deceptive, and Abusive Acts and Practices ("UDAAP").

- Requiring regulatory agencies to adopt policies and procedures to minimize duplication of efforts in enforcement proceedings, which appears to be designed to avoid a "piling on" of penalties by multiple authorities.

- Forbidding federal agencies from using enforcement action settlements to steer money toward third party groups that are not victims of the conduct at issue.

- Overturning the 2015 decision of the Second Circuit Court of Appeals in *Madden v. Midland Funding*, which suggested that loans held by non-bank entities may be subject to state usury laws even where the loans were originated by banks for which such laws are preempted.

- Removing provisions reforming certain practices of the Commodity Futures Trading Commission ("CFTC"), which may be addressed without legislation as a result of the change in leadership at the CFTC, or in separate legislation.

In light of the many sweeping changes the CHOICE Act would make to the regulatory landscape, particularly to the CFPB's structure and authority, the bill, in its omnibus form, is not expected to have substantial, if any, bipartisan support. As a result, prospects for the CHOICE Act's passage by the current Congress are dim so long as Senate leadership retains the filibuster for legislation, which Majority Leader Mitch McConnell has said it intends to do, notwithstanding its recent elimination of the filibuster for confirmations of nominees to the United States Supreme Court.

Nevertheless, the CHOICE Act is an important bill. Discrete pieces of it—particularly those that provide targeted relief to community and mid-sized financial institutions—are more likely to have bipartisan appeal and could be passed separately. It is also possible that some parts of the bill could be passed through the process of reconciliation, whereby certain budget-related legislation can be passed in the Senate by a simple majority.

This client alert summarizes the most significant provisions of the CHOICE Act 2.0 for financial institutions and consumer financial services providers. The bill also includes significant changes to the securities laws, including financial markets regulations, which this client alert does not address.

Differences in the new version of the bill compared to the CHOICE Act 1.0 are italicized throughout this summary.

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Title I: Ending “Too Big to Fail” and Bank Bailouts

FSOC Authority

Title I of the CHOICE Act would limit the authority of the Financial Stability Oversight Council (“FSOC”). Title I of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) created FSOC, a 15-member committee composed of ten voting and five non-voting members. Dodd-Frank tasks FSOC with identifying risks to the financial stability of the United States, promoting market discipline, and responding to emerging threats to the U.S. financial system. Dodd-Frank also authorizes FSOC to designate certain nonbank financial institutions as systemically important financial institutions (“nonbank SIFIs”) if it determines that the institutions “could pose a threat to the financial stability of the United States,” and authorizes FSOC to designate central clearinghouses as systemically important financial market utilities (“FMUs”). FMUs are subject to heightened prudential supervision by the Board of Governors of the Federal Reserve System (the “Federal Reserve”) and also have access to the Federal Reserve’s discount window.

Title I of the CHOICE Act would repeal the authority of FSOC to designate nonbank SIFIs and FMUs. It would also repeal all of FSOC’s existing designations, along with the enhanced prudential standards that apply to designated institutions. In addition, the CHOICE Act would repeal FSOC’s ability to break up large financial institutions that pose a “grave threat to the financial stability of the United States.”

Although the CHOICE Act would limit FSOC’s authority significantly, it would stop short of completely abolishing FSOC. Instead, the CHOICE Act contemplates a new role for FSOC, one where the FSOC’s responsibilities would be limited to:

- monitoring market developments;
- facilitating information sharing and regulatory coordination among agencies;
- bringing primary federal regulators together to identify and mitigate risks to financial stability; and
- reporting to Congress on the risks and making recommendations to address these risks.

The CHOICE Act would also require increased transparency in order for FSOC to continue performing these tasks. For example, FSOC would be subject to the Government in the Sunshine Act, and all members of the commissions and boards that are represented on FSOC (e.g., all members of the Federal Reserve, the Securities and Exchange Commission, the Commodity Futures Trading Commission, and the National Credit Union Administration) would be permitted to attend and participate in FSOC meetings. Further, before any member of FSOC voted, the member’s own commission or board would itself have to vote, and the member’s representative would be required to carry out this vote at the FSOC meeting. Members of the House Financial Services Committee and the Senate Banking Committee would also be permitted to attend FSOC meetings.

Finally, the CHOICE Act would eliminate the Office of Financial Research, an independent office that Dodd-Frank created within the U.S. Department of the Treasury.

The CHOICE Act 2.0 does not make significant changes to these provisions.

Stress Testing

The CHOICE Act 2.0 introduces a number of new provisions designed to reduce the burden of stress testing exercises for all banking organizations subject to them:

- *Reducing the frequency of CCAR so that the exercise occurs every two years, rather than annually.*
- *Eliminating mid-cycle company-run DFAST requirements.*
- *Eliminating DFAST requirements for financial companies* other than *bank holding companies.*
- *Extending to* all *banking organizations the relief from the qualitative portions of CCAR that the Federal Reserve recently extended to bank holding companies that (1) have average total consolidated assets between $50 billion and $250 billion; (2) have average total nonbank assets of less than $75 billion; and (3) are not global systemically important banking organizations ("G-SIBs"). As a result, the Federal Reserve would no longer be permitted to object to a banking organization's capital plan in the CCAR assessment based on qualitative deficiencies; rather, the Federal Reserve would assess the qualitative strength of such an institution's capital planning process through the regular supervision process and targeted, horizontal assessments of capital planning.*
- *Codifying certain of the Government Accountability Office's November 2016 recommendations for improving the stress testing process, including increasing transparency of stress test methodology and data, and providing for more communication between CCAR banking organizations and the Federal Reserve.*
- *Requiring the Federal Reserve to use the notice-and-comment process to implement new stress testing scenarios.*

These changes would provide significant relief to banking organizations subject to stress testing requirements, but would also somewhat dampen the incentives to become a qualifying banking organization under Title VI of the CHOICE Act, discussed below.

Resolution Planning

Section 165 of Dodd-Frank requires bank holding companies with $50 billion or more in assets and nonbank SIFIs to submit to the Federal Reserve and FDIC on an annual basis resolution plans (also known as "living wills") demonstrating that they can be resolved in an orderly manner under the Bankruptcy Code. The consequences of deficient resolution plans can be severe: if a banking organization is not able to remedy deficiencies jointly identified by the Federal Reserve and FDIC, the agencies can jointly decide to subject the institution or any of its subsidiaries to more stringent capital, leverage, and/or liquidity requirements, and/or restrictions on growth, activities, or operations, and eventually, depending on the circumstances, can jointly order the institution to divest jointly identified assets or operations.

The CHOICE Act would make a number of changes to the resolution planning process, including:

- *removing the FDIC from the section 165 resolution planning process, which had not been proposed in the CHOICE Act 1.0*;
- limiting the frequency of section 165 resolution plan submissions to two-year cycles,
- requiring the Federal Reserve to publicly disclose its framework used to review section 165 resolution plans, and subjecting such framework to the notice-and-comment process; and
- requiring the Federal Reserve to provide feedback on section 165 resolution plans within six months of the date of their submission.

The CHOICE Act 2.0 also would require any other federal banking agency that requires the submission of resolution plans to adhere to the limitations that the bill would impose on the Federal Reserve for section 165 resolution plans. In effect, this would extend the CHOICE Act's relief for the section 165 resolution planning process to the plans that the FDIC requires insured depository institutions to submit (known as "IDI plans").

Repeal and Replacement of OLA

Title II of the CHOICE Act would repeal the orderly liquidation authority ("OLA") of Dodd-Frank. OLA permits federal authorities to put a large financial company into FDIC receivership if its failure would present a threat to U.S. financial stability. OLA also establishes an Orderly Liquidation Fund (actually a line of credit from the U.S. Treasury) that the FDIC can tap to both incur administrative expenses to implement the receivership and provide liquidity funding to the successor financial company that has been reorganized or restructured by the receivership.

The CHOICE Act would replace OLA with a new subsection of the Bankruptcy Code for large financial companies, to be located in subchapter V to Chapter 11 of the Code. The new subsection of the Code is intended to facilitate the "single point of entry" strategy that most G-SIBs have adopted in their resolution plans. Under the single point of entry strategy, only the top-tier bank holding company files for bankruptcy, and shortly before the bankruptcy filing, operating subsidiaries are recapitalized so that they can continue as going concerns. Interests in operating subsidiaries can be transferred to a "bridge" financial company that is owned by a resolution trust for the benefit of claimants on the bankrupt holding company.

The CHOICE Act is designed to facilitate this strategy by:

- staying the acceleration or offset of certain qualified financial contracts for 48 hours;
- authorizing the quick transfer of assets and contracts of the debtor to a bridge financial company; and
- providing for an independent special trustee to hold the equity of the bridge financial company in trust for the benefit of the bankrupt estate.

Eligible subchapter V debtors would include a bank holding company of any size, and any other holding company with consolidated assets of $50 billion of which the consolidated assets or annual gross revenues deriving from activities that are financial in nature represent 85 percent or more of the consolidated assets or annual gross revenues of the company. The CHOICE Act would place the decision to file for bankruptcy solely in the hands of the debtor firm; there would be no involuntary bankruptcy allowed under subchapter V. Importantly, there would also be no source of government liquidity, such as the Orderly Liquidation Fund, made available to a bank holding company that filed for bankruptcy under this new subchapter.

The CHOICE Act 2.0 does not make significant changes to these provisions.

Emergency Programs

The CHOICE Act would limit the authority of federal agencies to provide emergency assistance in the event of a financial crisis. Specifically, the CHOICE Act would:

- Further limit the Federal Reserve Banks' ability to lend under the authority of section 13(3) of the Federal Reserve Act, which currently permits broad-based emergency lending programs for participants unable to secure adequate credit accommodations from other banking institutions in "unusual and exigent circumstances," upon a vote of not less than five members of the Federal Reserve and prior approval of the Secretary of the Treasury. Under the CHOICE Act, the Federal Reserve would only be able to establish such a program under unusual and exigent circumstances "that pose a threat to the financial stability of the United States," and only if the presidents of nine Reserve Banks vote in favor (along with five members of the Federal Reserve and the Treasury Secretary). Equity securities issued by the recipient of assistance would not be eligible collateral, and the Federal Reserve would be required to establish by rule a framework for acceptable collateral. Borrowers would not be able to participate in any such lending program unless the Federal Reserve and all federal banking agencies with jurisdiction over the borrower certify to the borrower's solvency at the time of initial borrowing. Finally, the Federal Reserve would be required to impose a minimum interest rate on borrowings pursuant to such a lending program equal to (i) the average of the secondary discount rate of the Reserve Banks over the most recent 90-day period, plus (ii) the average spread between a distressed corporate bond yield index and a bond yield index of debt issued by the United States over the most recent 90-day period.

- Repeal section 1105 of Dodd-Frank, which currently permits the FDIC to establish a program to guarantee any obligations, including non-deposit obligations, of solvent insured depository institutions or solvent depository institution holding companies if the FDIC and the Federal Reserve jointly determine that a "liquidity event" exists that would have serious adverse effects on financial stability or economic conditions, and Congress passes a resolution of approval.

- Eliminate the "systemic risk" exception to the general requirement that the FDIC pursue the resolution method that is the least costly to the Deposit Insurance Fund (the so-called "least-cost resolution" requirement).

- Bar the Exchange Stabilization Fund of the U.S. Department of the Treasury from being used to establish a guarantee program for any non-governmental entity.

- Prevent the Federal Reserve from using its emergency authority to approve applications under section 3(b)(1) of the Bank Holding Company Act of 1956, as amended (“BHCA”), unless the bank to be acquired is critically undercapitalized for purposes of Prompt Corrective Action regulations.

Emergency actions that federal agencies took during the financial crisis of 2008-09 pursuant to section 13(3) of the Federal Reserve Act, under the “systemic risk” exception to the least-cost resolution requirement, and using the Exchange Stabilization Fund, were considered to have been critical in restoring market confidence. Dodd-Frank already limited a number of these authorities by interjecting new requirements for federal agencies to exercise them. For instance, Dodd-Frank amended section 13(3) of the Federal Reserve Act to require prior approval of the Treasury Secretary to establish an emergency lending program under that authority, and to require such a program to have broad-based eligibility so that it can no longer be used to provide exclusive, tailored assistance to specific firms on an ad hoc basis.

Through the provisions described above, the CHOICE Act would further impair the ability of federal agencies to respond to a financial crisis with programs similar to the ones they established to respond to the financial crisis of 2008-09, absent emergency legislation that grants them new authorities. The intent of the CHOICE Act’s limitations appears to be reducing the moral hazard associated with the availability of emergency programs, and strengthening market discipline.

The CHOICE Act 2.0 does not make significant changes to these provisions.

Other

The CHOICE Act 2.0 introduces a new provision that would forbid the federal banking agencies from imposing on a banking organization capital requirements based on operational risk for any business line or product that the institution no longer offers. The CHOICE Act 2.0 would also require any operational risk capital requirements to permit adjustments for operational risk mitigants.

The CHOICE Act would also repeal section 166 of Dodd-Frank, which currently requires the Federal Reserve, in consultation with FSOC and the FDIC, to promulgate regulations to provide for the early remediation of bank holding companies with $50 billion or more in assets and nonbank SIFIs that experience financial distress. The Federal Reserve proposed early remediation requirements in December 2011 but, to date, has not finalized them.

The CHOICE Act would repeal section 117 of Dodd-Frank. That provision, known as the “Hotel California” provision, currently provides that any company that was a bank holding company with total consolidated assets of $50 billion or more as of January 1, 2010, and that participated in the Troubled Asset Relief Program, will automatically be subject to regulation as a nonbank SIFI if the company deregisters as a bank holding company by engaging in a “de-banking” transaction.

Title II: Demanding Accountability from Wall Street

The CHOICE Act would increase, mostly by 50 percent, certain maximum penalties that the federal banking agencies can impose in enforcement actions under the Financial Institutions

Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”), Home Owners’ Loan Act, Federal Deposit Insurance Act, Federal Credit Union Act, Federal Reserve Act, and BHCA.

The CHOICE Act 2.0 does not make significant changes to these provisions.

Title III: Demanding Accountability from Financial Regulators and Devolving Power Away From Washington

Title III of the CHOICE Act would subject federal regulators to constraints that would limit their regulatory and enforcement authority in a number of ways.

Cost-Benefit Analyses and Other Rulemaking Requirements

The CHOICE Act would require the Federal Reserve, Office of the Comptroller of the Currency (“OCC”), FDIC, reformed CFPB, National Credit Union Administration (“NCUA”), Federal Housing Finance Agency (“FHFA”), SEC, and CFTC (collectively, the “federal financial agencies”) to engage in and publish quantitative and qualitative cost-benefit analyses when promulgating regulations, and, absent a waiver from Congress, only promulgate a rule the quantified benefits of which exceed the quantified costs. Each proposed regulation would also be required to be accompanied by a discussion of why the private market or state, local, or tribal authorities cannot adequately address the problem that necessitates the regulation; identification of alternatives to the regulation and justifications for why the regulation would be more effective than the alternatives; and release of the underlying data, methodology, and assumptions underlying the regulation so that the agency’s results are capable of being substantially reproduced.

Rulemakings would presumptively have a minimum 90-day public comment period, unless the agency explained why it would not be able to provide 90 days for comment. The agency would be required to incorporate data and analysis provided by commenters into its final rule or explain why it is not incorporating the data or analysis.

The CHOICE Act would provide a cause of action for any person aggrieved by a final rule to challenge the agency’s adherence to this process in the Court of Appeals for the District of Columbia Circuit within one year of the rule’s publication in the Federal Register. In addition, each agency would be required to conduct a retrospective review of its regulations at least every five years, and develop a plan to make the agency’s regulatory program more effective or less burdensome.

The CHOICE Act 2.0 would add additional rulemaking requirements for the federal financial agencies. Any rule proposal that might result in an annual effect of $100 million or more would be required to be accompanied by summaries of, and responses to, stakeholder comments and concerns, along with estimates of the rule’s future compliance costs and any disproportionate effects on particular regions, types of communities, or market segments. The agencies would be required to provide the same statement to the Office of Information and Regulatory Affairs of the Office of Management and Budget (“OIRA”) for its review. Furthermore, before imposing obligations that significantly or uniquely affect “small governments,” the agencies would be required to develop procedures for notifying and communicating with potentially affected small governments about rulemaking developments. The term “small governments” would be defined as under the Congressional Budget and Impoundment Control Act of 1974, which includes local governments of jurisdictions with less than 50,000 people, and tribal governments. The Act *would require the agencies to develop procedures for the private sector and state, local, and tribal governments to provide meaningful and timely input on the development of regulatory proposals. The Act would authorize courts to compel an agency to comply with any of these requirements and to invalidate a regulation on the basis of an agency's failure to comply with the requirements.*

Congressional Review of Rules

The CHOICE Act would require each "major rule" of a federal financial agency to be approved by a joint resolution of Congress within 70 session days or legislative days of its submission to Congress before it can take effect. The joint resolution would not be subject to filibuster in the Senate, and would proceed to a floor vote of each house of Congress automatically, but the Act recognizes that each chamber may have Constitutional rights to change its rules with respect to the procedures for joint resolutions. Notwithstanding any failure of Congress to approve a major rule, the President would be able to cause a rule to take effect for a single 90-day period if the President determined by executive order that the rule would be necessary because of an imminent threat to health or safety or other emergency, necessary for the enforcement of criminal laws, necessary for national security, or was issued pursuant to a statute implementing an international trade agreement.

The CHOICE Act would adopt the definition of "major rule" in the Congressional Review Act, meaning any rule that OIRA finds has resulted or is likely to result in (a) an annual effect on the economy of $100 million or more, (b) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions, or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Congress would also be permitted to keep a non-major rule from coming into effect by passing a joint resolution of disapproval.

The CHOICE Act 2.0 does not make significant changes to these provisions.

Judicial Review of Agency Action

The CHOICE Act would eliminate so-called *Chevron* and *Auer* deference for judicial review of action by a federal financial agency under the Administrative Procedure Act. Under the *Chevron* doctrine, courts will accord substantial deference to an agency charged with administering a statute in its interpretation of ambiguity or silence within the statute. Similarly, under the *Auer* doctrine, courts will accord deference to an agency in its interpretation of its own regulation, unless the interpretation is "plainly erroneous or inconsistent with the regulation."

Under the CHOICE Act, in reviewing any challenge to an action by a federal financial agency under the Administrative Procedure Act, a court would decide all relevant questions of law, including the interpretation of the Constitution, any statute, and any rule made by an agency, without deference to the agency. *The CHOICE Act 2.0 would delay the effectiveness of this repeal of deference for two years from the date of enactment of the Act.*

Agency Restructuring

The CHOICE Act would restructure the FDIC's five member board so that the Comptroller of the Currency and Director of the CFPB would no longer be members. The FDIC board instead would be comprised solely of FDIC-only members.

While the CHOICE Act 1.0 would have made a number of changes to the structures of other federal financial agencies, the CHOICE Act 2.0 rolls back those proposed changes. For instance, the CHOICE Act 1.0 would have restructured the OCC and FHFA to be made up of five member boards, and added two members to the NCUA board. The CHOICE Act 2.0 would maintain the current structures of the OCC, FHFA, and NCUA, but adds a new provision that would allow the President to remove the FHFA director at will.

Appropriations

The CHOICE Act would subject the OCC, FDIC, FHFA, NCUA, and non-monetary functions of the Federal Reserve to the regular congressional appropriations process. *The CHOICE Act 2.0 would exempt the FDIC's Deposit Insurance Fund from the appropriations process.*

Currently, the OCC and FHFA primarily generate income from fees levied on regulated entities, while the FDIC and NCUA primarily generate income from deposit insurance premiums, all of which is exempt from the appropriations process. The Federal Reserve is unique in that it primarily derives income from securities that it purchases in the conduct of monetary policy. It also earns interest on loans and charges for market services it offers, such as transaction clearing. Subjecting these revenue raising activities to the annual appropriation processes—as is currently the case for the SEC and CFTC—would provide Congress with frequent opportunities to influence the budgets, size, scope, priorities, and activities of any agency subject to the process.

International Standard-Setting Process

The CHOICE Act would require the federal banking agencies, Treasury, SEC, and CFTC to notify the public before participating in a process of setting international financial standards, such as at the Basel Committee on Banking Supervision or Financial Stability Board, and seek public comment on the subject matter, scope, and goals of such a process. The agencies would also be required to consult with the House Financial Services Committee and the Senate Banking Committee before taking part in such a process.

The CHOICE Act 2.0 does not make significant changes to these provisions.

Enforcement Reform

The CHOICE Act 2.0 introduces requirements that the federal financial agencies adopt policies and procedures to establish a "lead agency" for any particular enforcement investigation or action, avoid duplication of efforts and unnecessary burdens and ensure consistent enforcement, and minimize duplication of efforts with other federal or state authorities when bringing enforcement actions. These requirements appear intended to reduce the likelihood that the agencies will "pile on" a banking organization with multiple enforcement actions and penalties for a single violation or pattern of violations.

The CHOICE Act 2.0 would forbid the federal financial agencies, the Department of Housing and Urban Development, the Department of Justice, and the Rural Housing Service of the Department of Agriculture from agreeing to any settlement that provides for payments to any person who is not a victim of the alleged wrongdoing. The Obama-era Department of Justice had entered into settlements with financial institutions that provided for payments to be made to non-profit entities that were perceived by some to be political allies of the Administration.

Punishing Agency Leaks

The CHOICE Act 2.0 would create a new misdemeanor offense for any employee of a federal agency that discloses individually identifiable information contained in confidential agency records to any person or agency not entitled to receive them. The CHOICE Act 2.0 would also make it a misdemeanor for any person to receive such information knowingly and willingly, and under false pretenses.

Title IV: Unleashing Opportunities for Small Businesses, Innovators, and Job Creators by Facilitating Capital Formation

Title IV would include a number of reforms to capital markets regulations.

Title V: Regulatory Relief for Main Street and Community Financial Institutions

Mortgage Lending Relief

Title V would amend consumer financial statutes to provide targeted relief to mortgage lenders, including by:

- Providing a safe harbor from “ability to repay” requirements for a mortgage loan held on the balance sheet of a depository institution since its origination, provided that the loan satisfies the restrictions on prepayment penalties for a “qualified mortgage.”

- Including exemptions from (1) escrow requirements under the Truth in Lending Act (“TILA”) for loans held by a creditor with $10 billion or less in consolidated assets for at least 3 years after origination, (2) requirements under section 6 of the Real Estate Settlement Procedures Act for a servicer that annually serves 20,000 or fewer mortgage loans, and (3) recordkeeping and disclosure requirements under the Home Mortgage Disclosure Act of 1975 for a depository institution that originates fewer than 100 closed-ended mortgage loans in each of the previous two calendar years.

- Amending the S.A.F.E. Mortgage Licensing Act of 2008 to ease the transition of loan originators from one employer to another employer covered by a different licensing scheme.

- Broadening the exemption in the definition of “mortgage originator” in TILA for retailers of manufactured or modular homes.

- Raising the threshold for a mortgage secured by a mobile home or houseboat to be considered a “high-cost mortgage” under TILA.

Miscellaneous Regulatory, Supervisory, and Enforcement Relief

Title V also would provide banking organizations with relief in a variety of other areas. It would, among other things:

- Forbid the federal banking agencies from requesting or ordering a depository institution to terminate a specific customer account or group of customer accounts unless the agency has a material reason other than reputational risk to do so. This provision is aimed at stopping efforts similar to Operation Chokepoint, in which federal authorities encouraged or ordered financial institutions to terminate accounts for customers engaged in certain businesses perceived to involve substantial reputational risk.

- Amend section 951 of FIRREA, which currently provides for larger maximum penalties, a longer statute of limitations, and enhanced investigative powers for federal prosecutors, when there has been fraud "affecting a federally insured financial institution." Federal prosecutors used section 951 to carry out Operation Chokepoint-related investigations, on the theory that frauds allegedly perpetrated by bank customers on third parties "affected" the bank. The CHOICE Act appears intended to curb those types of investigations, as it would replace the phrase "affecting a federally insured financial institution" with "against a federally insured financial institution or by a federally insured financial institution against an unaffiliated third person." In addition, the CHOICE Act would impose new limitations on federal prosecutors' subpoena powers under section 951 of FIRREA.

- Raise the consolidated asset threshold for applicability of the Federal Reserve's Small Bank Holding Company Policy Statement from $1 billion to $5 billion.

- Reform the process for examination of financial institutions and provide a more robust path for challenging examiners' determinations and policies. Specifically, the CHOICE Act would establish within FSOC an Office of Independent Examination Review that would receive and investigate complaints from financial institutions regarding examinations, adjudicate supervisory appeals, and ensure the consistency of examination procedures. The Act would also prescribe specific standards for the circumstances under which federal examiners may place loans on non-accrual status.

- Require the Federal Reserve, OCC, FDIC, NCUA, and CFPB to tailor any new rule, regulation, guidance, or published interpretation to the risk profile and business models of the institutions subject to such action, and conduct a look-back to tailor any such action taken in the last five years.

- Permit any federal savings association to elect to receive the same powers as, and be subject to the same obligations of, a national bank that has its home office in the same state as the federal savings association.

- Repeal section 704B of the Equal Credit Opportunity Act, which was added by Dodd-Frank and requires financial institutions to collect and report information concerning credit applications made by women-owned, minority-owned, and small businesses. To date, the CFPB has not proposed a rule to implement section 704B, and has opined that institutions do not have any obligations under the section until the CFPB issues implementing regulations.

- Require the federal banking agencies to streamline Call Reports for the first and third quarters for any insured depository institution that is highly rated and well-capitalized and satisfies any other criteria that the agencies determine to be appropriate.

The CHOICE Act 2.0 also introduces amendments to the National Bank Act, Federal Deposit Insurance Act, Home Owners' Loan Act, and Federal Credit Union Act to clarify that the interest rate of a loan that is valid when made by a national bank, state-chartered insured depository institution, federal savings association, or federal credit union shall remain valid regardless of whether the loan is subsequently sold, assigned, or otherwise transferred to a third party. These amendments would overturn the 2015 decision of the Second Circuit Court of Appeals in Madden v. Midland Funding*, which suggested that loans held by non-bank entities may be subject to state usury laws even where the loans were originated by national banks for which such laws are preempted. The* Madden *decision has created some uncertainty in the secondary markets for bank-originated loans.*

The CHOICE Act 2.0 no longer includes a provision from the CHOICE Act 1.0 that would have provided for an 18-month examination cycle for certain qualifying credit unions with total assets of less than $1 billion, similar to the 18-month examination cycle that is available to qualifying insured depository institutions under section 10(d) of the Federal Deposit Insurance Act. In October 2016, the NCUA announced that it would transition qualifying credit unions to examination cycles with durations between 14 and 20 months, which presumably reduced the need for a legislative solution.

Title VI: Regulatory Relief for Strongly Capitalized, Well Managed Banking Organizations

Title VI of the CHOICE Act would create an exemption from federal laws and regulations addressing capital and liquidity requirements and capital distribution approval requirements for qualifying banking organizations that maintain an average SLR of 10 percent or more.

While the CHOICE Act 1.0 would have required qualifying banking organizations to maintain composite CAMELS supervisory ratings of one or two, the CHOICE Act 2.0 makes it easier to become and remain a qualifying banking organization by eliminating the supervisory component to eligibility. Nevertheless, the requirements for becoming a qualifying banking organization would remain stringent: an SLR of 10 percent is significantly higher than the regulatory minimum SLR of three percent, as well as the "enhanced" SLR that a banking organization must satisfy to avoid restrictions on capital distributions and discretionary bonus payments, which is five percent for bank holding companies and six percent for insured depository institutions.

Qualifying banking organizations would be permitted to elect on an enterprise-wide basis to be exempt from a number of regulatory requirements, including:

- *CCAR, which had not been included for relief under the CHOICE Act 1.0*;
- any federal law, rule, or regulation addressing capital or liquidity;
- any federal law, rule, or regulation that permits a federal banking agency to object to a capital distribution;

- any consideration by a federal banking agency of the systemic risk that the qualifying banking organization may pose, such as in the context of merger or acquisition applications;
- the deposit concentration limit of section 622 of Dodd-Frank; and
- enhanced prudential standards under section 165 of Dodd-Frank (including single counterparty credit limits, any short-term debt limits, risk committee requirements, and debt-to-equity limits).

A qualifying banking organization would also be deemed "well-capitalized" for the purposes of Prompt Corrective Action rules, restrictions on brokered deposits, restrictions on interstate branching and merger transactions, and other laws and regulations.

Title VI is intended to incentivize banking organizations to become highly capitalized by offering them regulatory relief for doing so. *By including relief from the costly CCAR process, the CHOICE Act 2.0 would sharply enhance those incentives, subject to the fact that, as discussed above, Title I of the CHOICE Act 2.0 would also make the CCAR process less burdensome for banking organizations that do* not *choose to become qualifying banking organizations.*

Title VII: Empowering Americans to Achieve Financial Independence

CFPB Reforms

The CHOICE Act proposes substantial changes to the structure and authority of the CFPB, which the bill would rename the "Consumer Law Enforcement Agency." The result of the CHOICE Act would be a much smaller, more limited CFPB.

Structurally, the CHOICE Act 2.0 proposes that the CFPB be led by a single Director whom the President may terminate at will, a change from the proposal in the CHOICE Act 1.0 to make the Bureau into a bipartisan commission. The bill also proposes allowing the Bureau to eliminate certain offices and functions, such as the offices of fair lending, consumer education, and research. In addition, the CHOICE Act would revise the funding structure of the Bureau, withdrawing its current 'protected' funding source through the Federal Reserve and subjecting the Bureau to Congressional appropriations.

The CHOICE Act 2.0 would curtail the CFPB's law enforcement authority over depository institutions by, among other things, removing the Bureau's authority to bring enforcement actions over unfair or deceptive acts and practices, terminating the Bureau's ability to examine and supervise regulated entities, and eliminating the Bureau's authority over small-dollar lenders; however, version 2.0 would not raise the $10 billion total assets threshold for banks that are subject to the Bureau's supervisory jurisdiction, as was proposed in the CHOICE Act 1.0. In addition, the CHOICE Act would eliminate the Bureau's power to bring enforcement actions over "abusive" acts and practices, allow litigants to compel the Bureau to bring enforcement actions in federal court rather than through its administrative forum, require enforcement actions to undergo a cost-benefit analysis, and mandate a safe harbor advisory opinion process to respond to inquiries concerning specific proposed or prospective conduct.

Among other reforms, the CHOICE Act would also impact the CFPB's rulemaking and public guidance. *The CHOICE Act 2.0 would eliminate the Bureau's authority to prescribe rules to* *deem acts and practices unfair or deceptive, provide for OIRA review of proposed rules, and prohibit the publication of consumer complaints (an extension of the restrictions on the complaint database that were proposed in the CHOICE Act 1.0).* The Act also would eliminate the Bureau's authority to prescribe rules to deem acts and practices "abusive," require the Bureau to subject its rulemaking to more stringent cost-benefit analysis, and give courts more leeway to override Bureau rules and interpretations. In addition, the CHOICE Act would repeal the Bureau's "indirect auto lending" guidance and remove the CFPB's power to limit arbitration provisions.

Durbin Amendment

The CHOICE Act would repeal section 1075 of Dodd-Frank, known as the Durbin Amendment, which currently requires the Federal Reserve to cap interchange fees that banks with $10 billion or more in assets charge in debit card transactions.

GSE Reform

The CHOICE Act would require the Treasury Secretary to issue a report on an annual basis regarding options for ending the conservatorship of Fannie Mae and Freddie Mac.

Title VIII: Capital Markets Improvements

Title VIII would include a number of reforms to capital markets regulations. Of note, these reforms include a repeal of the Department of Labor's Obama-era rule defining the term "fiduciary" under the Employee Retirement Income Security Act of 1974 (the so-called "fiduciary rule"). Title VIII also would repeal section 965 of Dodd-Frank, which requires a number of federal agencies to jointly issue regulations or guidelines with respect to incentive-based compensation practices at specific types of financial institutions that have $1 billion or more in assets. The agencies have twice proposed controversial regulations to implement this statute, but have yet to issue final regulations. Following the 2016 election, Acting SEC Chairman Michael Piwowar reportedly said the incentive compensation regulation is "dead at the SEC."

CFTC Reforms

The CHOICE Act 1.0 would have made several reforms to the operation of the CFTC, but those provisions have been removed from CHOICE Act 2.0. Some of those reforms may be addressed as a result of the change in leadership at the CFTC. For example, CHOICE Act 1.0 would have prohibited the CFTC from using a broad and controversial approach to determine when to apply U.S. swap requirements, an approach that Acting Chair J. Christopher Giancarlo has specifically criticized and so appears unlikely to be adopted. Some reforms may also be addressed in separate legislation—for example, it is possible they could be included in the final version of H.R. 238, the Commodity End-Users Relief Act. H.R. 238 contains some of the provisions included in the CHOICE Act 1.0, including a provision that would allow persons adversely affected by a final CFTC rule to seek review from the Court of Appeals for the District of Columbia Circuit or the Court of Appeals for the circuit in which they reside. H.R. 238 has passed out of the House and been referred to the Senate Committee on Agriculture, Nutrition, and Forestry.

Title IX: Repeal of the Volcker Rule and Other Provisions

Title IX would repeal section 619 of Dodd-Frank. Section 619, known as the "Volcker Rule," prohibits banking organizations from engaging in proprietary trading or forming certain relationships with a hedge fund or private equity fund.

The CHOICE Act 2.0 does not change this provision.

Title X: Fed Oversight Reform and Modernization

Title X of the CHOICE Act includes provisions of the House-passed Fed Oversight Reform and Modernization Act, H.R. 3189 (FORM Act), intended to increase transparency and accountability regarding Federal Reserve monetary policymaking. These provisions would, among other things:

- Require the Federal Reserve to adopt strict formulas to set target interest rates in the course of monetary policymaking.
- Change the composition of the Federal Open Market Committee ("FOMC") so that the president of the Federal Reserve Bank of New York no longer has a permanent seat, and so that a designee of each Reserve Bank will serve on the FOMC every other calendar year.
- Provide for an annual audit of the Federal Reserve and the Reserve Banks by the Comptroller General.
- Create a "Centennial Monetary Commission" comprised mostly of members of Congress to study and report on various aspects of the Federal Reserve's monetary policy, including the effects of the Federal Reserve's "dual mandate" of achieving maximum employment and stable prices on U.S. economic activity, Federal Reserve actions, and federal debt.
- Require the FOMC to record all its meetings and publicly release full meeting transcripts.

The CHOICE Act 2.0 does not make significant changes to these provisions.

Title XI: Improving Insurance Coordination Through an Independent Advocate

Title XI of the CHOICE Act would eliminate the Federal Insurance Office ("FIO"), an office that Dodd-Frank created within the U.S. Department of the Treasury that has the authority to monitor the insurance industry and coordinate industry policy.

In its place, the CHOICE Act would establish the Office of the Independent Insurance Advocate ("OIIA") as a bureau within Treasury. Similar to the OCC, OIIA would have its own presidentially appointed and Senate-confirmed head, and would be subject to the "general direction" of the Treasury Secretary, but Treasury would have no ability to delay or prevent the issuance of any rule or promulgation of any OIIA regulation or intervene in any matter or proceeding before OIIA.

OIIA's mission would be to act as an independent advocate on behalf of U.S. policyholders on prudential aspects of insurance matters of importance, and provide perspective on protecting their interests, separate and apart from any other federal agency or state insurance regulator. To that end, OIIA would have the authority to "observe" all aspects of the insurance industry, represent the United States in the International Association of Insurance Supervisors and participate at the Financial Stability Board, and replace the independent member with insurance expertise as a voting member of the reformed FSOC. OIIA would not have general supervisory or regulatory authority over the business of insurance, and would specifically be barred from participating in supervisory colleges or similar forums that are set up to improve coordination and communication among supervisors from different jurisdictions. Unlike FIO, OIIA would not have the authority to monitor whether traditionally underserved communities and consumers, minorities, and low- and moderate-income people have access to affordable insurance products.

OIIA's authorities would extend to all lines of insurance except for health insurance, long-term care insurance that is not included with life or annuity insurance components, and crop insurance.

The creation of OIIA is intended to avoid upsetting the balance of power between the federal government and state governments with respect to insurance regulation.

The CHOICE Act 2.0 does not make significant changes to these provisions.

Title XII: Technical Corrections

Title XII, which is new to the CHOICE Act 2.0, would make a number of technical corrections to Dodd-Frank that Senator Richard Shelby (R-Ala.) previously included in Title XIII of S. 1484, the Financial Regulatory Improvement Act of 2015.

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