

Client Alert

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Whither the CFPB? In Uncertain Times, Rep. Hensarling's Vision May See New Life

By Donald C. Lampe and Amanda J. Mollo

Given the outcome of the presidential election, the focus is now on President-Elect Trump's campaign promises to scale back the Dodd-Frank Act and pursue deregulation of financial services. As of now, little is known about specific actions the new administration will pursue after inauguration. There is, however, a template for reform, namely, the Financial Creating Hope and Opportunity for Investors, Consumers and Entrepreneurs Act (Financial CHOICE Act), H.R. 5983, a substitute version of which was approved by the House Financial Services Committee on September 13, 2016. This bill, if enacted by Congress, would impose sweeping reform on the regulation of financial services in the United States. Of particular interest are the provisions covering retail financial services and the powerful, controversial regulator of these markets, the Consumer Financial Protection Bureau (CFPB or agency).

On June 7, 2016, House Financial Services Committee Chairman Jeb Hensarling (R-Texas) gave a speech to the Economic Club of New York announcing a Republican plan to replace the Dodd-Frank Act with new legislation: the Financial CHOICE Act. The Financial CHOICE Act, as approved by the House Financial Services Committee, represents a wide-ranging rewrite of Dodd-Frank. Provisions of the Financial CHOICE Act would effectuate reduced bank capital requirements, repeal the authority of the Financial Stability Oversight Council, impose congressional oversight over federal agency decisions, negate the *Chevron*¹ deference doctrine in administrative law, enhance penalties for financial fraud and self-dealing in connection with securities, repeal the Volcker Rule and provide regulatory relief for community banks and credit unions. The Financial CHOICE Act, in fact, includes the text of many House bills previously introduced by Republicans intended to reform financial services regulation as it developed during the Obama administration. From a policy perspective, the question in the 115th Congress will be the extent to which the new Trump administration will back the Financial CHOICE Act or similar legislative initiatives.

The locus of consumer financial services regulatory reform is Title III of the Financial CHOICE Act, which contains extensive amendments to Dodd-Frank Act Title X, through which Congress created and empowered the CFPB.

FINANCIAL CHOICE ACT CHANGES TO THE CFPB

Title III of the Financial CHOICE Act would not abolish the CFPB, but would modify the design of the agency. Title III is organized into three subtitles addressing "Separation of Powers and Liberty Enhancements," "Administrative Enhancements" and "Policy Enhancements." As these names suggest, the Financial CHOICE Act would alter the CFPB by 1) making structural changes and creating additional checks and balances to the agency's authority, as well as altering the agency's mission; 2) changing the agency's operations, practices and jurisdiction; and 3) repealing several of the CFPB's current policies and authorities, including with respect to the "abusive" prong of

¹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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the Dodd-Frank Act's prohibition on unfair, deceptive or abusive acts or practices ("UDAAP").

Separation of Powers

The Financial CHOICE Act would enact fundamental changes to the structure and authority of the current CFPB. To begin with, the legislation would re-establish the CFPB as an independent agency outside of the Federal Reserve led by a bipartisan, five-member "Consumer Financial Opportunity Commission" (CFOC), which would be funded through congressional appropriations. This is in stark contrast to the current CFPB's single director structure and current funding out of the earnings of the Federal Reserve System. Such changes would respond to critics of the CFPB who argue that the agency is not adequately subject to checks and balances in keeping with the principles of separation of powers. Of course, the changes could invite criticism that the new CFOC would lack independence and could be hamstrung by Congress. Depending on the point of view, such a critique could be mitigated or exacerbated by the Financial CHOICE Act's establishment of an independent, Senate-confirmed Inspector General for the CFOC.

The Financial CHOICE Act would also alter the agency's overall mission by bifurcating the mandate to ensure that consumer financial markets are "fair and transparent" and the mission to ensure those markets are competitive, emphasizing the mission to increase competition by adding language regarding the enhancement of consumer choice. Additionally, a new Office of Economic Analysis within the Commission would assess all proposed rules for their impact on consumer choice, price and access to credit products.

Whereas the current CFPB structure provides for appeal of the initiation of enforcement proceedings only to the Director, the Financial CHOICE Act would give defendants in administrative actions the right to remove cases to federal court, allow motions to set aside civil investigative demands (CIDs) to be filed in federal court and create a reasonable timeline for CID recipients to meet and confer with agency investigators. Moreover, under the Financial CHOICE Act, reviewing courts would no longer be required to defer to CFPB statutory interpretations in the event those interpretations conflict with the statutory interpretations of other agencies.

Administrative Powers

Currently, the CFPB has jurisdiction to supervise banks that have greater than \$10 billion in assets. The Financial CHOICE Act would increase this threshold to \$50 billion, thereby decreasing the number of institutions subject to the agency's authority. In addition, the legislation would separate the Commission's market-monitoring and enforcement functions.

The CFPB has refused to be bound by the terms of its guidance in the past, which has left many participants unable to rely on CFPB guidance. The Financial CHOICE Act would change this by establishing an advisory opinion process that would require the agency to "provide written opinions in response to inquiries concerning the conformance of specific conduct with Federal consumer financial law." In addition, the Financial CHOICE Act would create a small business advisory board tasked with presenting information about small business practices with respect to financial products and services.

The Financial CHOICE Act also would impose a number of ministerial changes, such as compensating CFPB employees on the General Services Administration scale and transferring the CFPB's current headquarters facility (currently under a much-criticized renovation) to the General Services Administration. In addition, the legislation would require the agency to create segregated accounts for civil penalty assessments, verify the accuracy of

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complaint data prior to posting complaints publicly in its complaint database and include all studies, data and other analyses that form the basis of research reports in the agency's publications in the interest of transparency. These latter provisions would help address many industry concerns over the way the CFPB has done business since its creation under the Dodd-Frank Act.

Changes in Policy

Additional substantive changes to the CFPB could be imposed through enactment of the Financial CHOICE Act. For example, the legislation would place restrictions on the new CFCO with respect to personally identifiable information, as defined in the Gramm-Leach-Bliley Act—requiring the CFCO to obtain consumer permission before collecting such personally identifiable information about consumers. The Financial CHOICE Act also would repeal a number of CFPB policies, guidance and authorities that have proven controversial, including the “abusive” prong of the prohibition on UDAAP, the CFPB's indirect auto lending guidance and the CFPB's authority to prohibit arbitration clauses in financial services contracts. Separately, the Financial CHOICE Act would repeal the Dodd-Frank Act's Durbin amendment regulating debit interchange fees. Moreover, the Act would enable states and tribes to effectively opt out of certain CFPB agency actions. Specifically, states and tribes would be able to request an unconditional five-year waiver from CFPB regulation governing short-term, small-dollar credit. The Financial CHOICE Act also would repeal the Financial Stability and Oversight Council's authority to set aside CFPB rules and require the new CFCO to consider the safety and soundness of financial institutions when promulgating new rules.

Other Provisions of the Financial CHOICE Act

Numerous other provisions of the Financial CHOICE Act, outside of Title III, would impact providers of retail and consumer financial services. These provisions, most of which were taken from previously introduced legislation, include:

- Imposition across the board on financial regulatory agencies of a requirement to conduct cost-benefit analyses as a condition to promulgating regulations;
- Revised definition of “points and fees” in residential mortgage lending transactions by amending relevant provisions of the Truth in Lending Act;
- Expanded qualified mortgage rule safe harbor for residential mortgage loans held in portfolio;
- Other mortgage regulatory relief for community financial institutions;
- Codification of transitional licensing for mortgage loan originators under the SAFE Act; and
- Recast of loan-volume and institutional requirements for reporting under the Home Mortgage Disclosure Act.

CONCLUSION

To date, there have been no formal announcements from the incoming administration about the Financial CHOICE Act, and the bill has not moved in the current Congress since it was reported out of the House Financial Services Committee. During the next session of Congress, however, there will be any number of potential outcomes for the deregulation of consumer financial services. This includes the re-introduction of all or significant portions of the Financial CHOICE Act. In this regard, there appears to be significant opportunity to pursue the goals previously addressed by the House Financial Services Committee under the leadership of Chairman

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Hensarling. We will continue to monitor developments in the presidential transition and the new Congress for their potential impact on regulation of the financial services industry.

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