# What Might Be the Future of the Dodd-Frank Act's Insurance and Reinsurance-Related Provisions in a Trump Administration?

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During the recent election campaign, President-elect Donald Trump pledged to repeal the Dodd-Frank Act if elected, criticizing the regulatory burdens it imposed on different portions of the financial services sector and contending that it discouraged lending by banks and impaired the growth of the U.S. economy. In an interview in May 2016, Mr. Trump stated that he would dismantle most of Dodd-Frank if elected, and that "Dodd-Frank is a very negative force, which has developed a very bad name." Mr. Trump continued, "Dodd-Frank has made it impossible for bankers to function … It makes it very hard for bankers to loan money for people to create jobs, for people with businesses to create jobs. And that has to stop."[1]

Recently, Mr. Trump's post-election position on Dodd-Frank has become slightly clearer. Shortly after the election, Mr. Trump's campaign adviser Anthony Scaramucci said that the Trump administration will review the law and "the worst anti-business parts of it will be gutted." Additionally, on his transition web page, Mr. Trump's agenda regarding Dodd-Frank is stated as follows:

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[1] "Trump on North Korea, Wall Street regulation, tech stocks," Reuters, May 18, 2016, http://www.reuters.com/article/us-usa-election-trump-excerpts-idUSKCN0Y82OJ.

> "The Dodd-Frank economy does not work for working people. Bureaucratic red tape and Washington mandates are not the answer. The Financial Services Policy Implementation team will be working to dismantle the Dodd-Frank Act and replace it with new policies to encourage economic growth and job creation."[2]

Much of this criticism of the Dodd-Frank Act ("the DFA") has focused on its impact on the banking sector. There have not been any specific criticisms by Mr. Trump or his advisors directed to its impact on the insurance or reinsurance sectors. This article examines one possible alternative Republican legislative approach, based upon current policy proposals, focusing on possible changes to the DFA affecting the insurance and reinsurance sectors.[3]

**The Financial CHOICE Act – A Possible Approach?**

A discussion of possible changes to the DFA affecting insurance or reinsurance should start with the basic Trump and Republican policy approaches to the regulation of insurance and reinsurance. Although the President-elect has not issued policy pronouncements concerning insurance or reinsurance regulation, the Republican approach historically, and specifically in response to the Dodd-Frank Act, has been to strongly support the state-based regulation of the business of insurance in the United States, and President-elect Trump has not made statements indicating a disagreement with that approach.

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[2] "Financial Services," President Elect Donald J. Trump Transition Website, https://www.greatagain.gov/policy/financial-services.html.

[3] It is not the within the scope of this article to address the non-insurance aspects of the Dodd-Frank Act in other than a cursory fashion.

A number of bills have been introduced over the past year or two which would repeal or substantially modify all or part of the DFA.[4] On September 9, 2016, Rep. Jeb Hensarling, the chairman of the House Financial Services Committee, introduced H.R. 5983, The Financial CHOICE Act of 2016 ("The Financial CHOICE Act"). This 512 page bill proposes some fundamental changes to the DFA.[5] This bill is notable in part because it was introduced by the chairman of the Financial Services Committee, Rep. Hensarling, who has been mentioned as one of several candidates for the position of Treasury Secretary in the Trump administration. Even if he is not named Treasury Secretary, Rep. Hensarling may be a strong voice for the reform of financial services regulation in the Trump administration.[6] This article focuses on The Financial CHOICE Act as a possible model for a Trump administration's approach to the DFA and the regulation of the financial services sector of the U.S. economy.

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[4] *See e.g.*, H.R. 3118 (abolish the Consumer Finance Protection Bureau by repealing Title X of the DFA – introduced July 20, 2015); H.R. 4894 (repeal Title II of the DFA – introduced April 11, 2016); H.R. 4210 (amend the DFA with respect to the Financial Stability Oversight Council – introduced December 10, 2015); H.R. 2094 (repeal Titles I and II of the DFA – introduced April 29, 2015); H.R. 171 (repeal the DFA – introduced January 6, 2015).

[5] Information about The Financial CHOICE Act is available on the web site of the House Financial Services Committee: (1) the full text of the bill (512 pages) (http://financialservices.house.gov/uploadedfiles/bills-114hr-hr5983-h001036-amdt-001.pdf); (2) an executive summary of the bill (3 pages) ("Executive Summary") (http://financialservices.house.gov/uploadedfiles/financial_choice_act-_executive_summary.pdf); and (3) a comprehensive summary of the bill (126 pages) ("Comprehensive Summary") (http://financialservices.house.gov/uploadedfiles/financial_choice_act_comprehensive_outline.pdf).

[6] *See* http://fortune.com/2016/11/16/jeb-hensarling-dodd-frank-financial-reform/.

The Executive Summary of the bill articulates "Key Principles" underlying The Financial CHOICE Act:

- Economic growth must be revitalized through competitive, transparent, and innovative capital markets;
- Every American, regardless of their circumstances, must have the opportunity to achieve financial independence;
- Consumers must be vigorously protected from fraud and deception as well as the loss of economic liberty;
- Taxpayer bailouts of financial institutions must end and no company can remain too big to fail;
- Systemic risk must be managed in a market with profit and loss;
- Simplicity must replace complexity, because complexity can be gamed by the well-connected and abused by the Washington powerful; and
- Both Wall Street and Washington must be held accountable.[7]

Notably, the Executive Summary of The Financial CHOICE Act does not mention either insurance or reinsurance, nor do any of the policy prescriptions laid out in that document relate directly to the insurance or reinsurance sectors.

The Comprehensive Summary of The Financial CHOICE Act begins with an outline of the provisions of the bill:

- The Dodd-Frank Off-Ramp for Strongly Capitalized, Well-Managed Banking Organizations;
- Bankruptcy Not Bailouts;
- Repeal of the Financial Stability Oversight Council's SIFI Designation Authority;

[7] *See* Executive Summary, page 1.

- Reform the Consumer Financial Protection Bureau;
- Relief from Regulatory Burden for Community Financial Institutions;
- Federal Reserve Reform;
- Upholding Article I: Reining in the Administrative State;
- Amend Dodd-Frank Title IV;
- Repeal the Volcker Rule;
- Repeal the Durbin Amendment;
- Eliminate the Office of Financial Research;
- SEC Enforcement Issues;
- Reforms to Title IX of Dodd-Frank;
- Capital Formation;
- Repeal Specialized Public Company Disclosures for Conflict Minerals, Extractive Industries, and Mine Safety; and
- Improving Insurance Regulation by Reforming Dodd-Frank Title V.[8]

The insurance "improvement" discussion fills only two of the 126 pages of the Comprehensive Summary, and addresses only one modest change concerning only the insurance/reinsurance sectors: combining the positions of the Director of the FIO and the FSOC's independent insurance representative into a single position. It also discusses the repeal of FSOC's SIFI designation authority, which would have an impact on some of the largest insurance and reinsurance companies.

[8] See Comprehensive Summary, page 1.

**The Financial CHOICE Act – Possible Legislative Amendments to the DFA**

The Financial CHOICE Act, if adopted, likely would have only a modest impact on the insurance and reinsurance sectors. There are at least five aspects of the DFA which affect the business of insurance and reinsurance which may be the subject of consideration in a Trump administration, and which is addressed by The Financial CHOICE Act.

- The designation of companies as systemically important financial institutions ("SIFIs") for purposes of enhanced prudential regulation by the Federal Reserve, and the accompanying more rigorous capital standards for designated companies (DFA, title I);
- The process of negotiating and entering into "covered agreements" concerning prudential insurance issues of international importance (DFA, title V);
- The role of the Financial Stability Oversight Council ("FSOC") and its members (DFA, title I);
- The role of the Federal Insurance Office ("FIO") and its Director (DFA, title V);
- The Nonadmitted and Reinsurance Reform Act ("NRRA") (DFA, title V).

1. <u>SIFI designations</u>

The SIFI designation process has been widely criticized. Among the criticisms are: (1) the process is unnecessary or unwise; (2) the process violates principles of due process; (3) the process lacks transparency; and (4) the process is inappropriately applied to non-bank financial companies, such as insurance companies. The recent opinion of *Metlife, Inc. v. Financial Stability Oversight Council*, - F.Supp.3d -, 2016 WL

1391569 (D. D.C. Mar. 30, 2016) may provide further support for changing the SIFI process, at least with respect to insurance companies. Although the case considered the designation of Met Life as a SIFI, the criticisms leveled by the court in that opinion apply to FSOC's implementation of the SIFI designation process generally rather than its application only to insurance companies.

A concerted effort to change or eliminate the SIFI process seems likely. While the Federal Reserve has under consideration what the capital standards would be for SIFIs, such effort may well be mooted by the abolition of the SIFI designation, which would return the financial oversight of large insurance and reinsurance companies to the sole purview of state insurance departments.

The Financial CHOICE Act would eliminate the SIFI designation process entirely, not just with respect to non-bank SIFIs. It would legislatively rescind the designation of AIG, Prudential, General Electric Capital and MetLife as SIFIs, and remove them from prudential regulation by the Federal Reserve.

2. Covered Agreements

We have previously posted on the background of the covered agreement process, the issues being considered for a covered agreement and the progress of the discussions concerning a possible covered agreement.[9] There has not been much criticism of this process other than its lack of transparency and the slow pace of the negotiations. The Federal Insurance Office has been engaged in discussions with the

[9] *See, e.g.,* December 2015: Special Focus article on the commencement of the negotiations for a covered agreement - http://reinsurancefocus.com/archives/10785; June 2016: update on negotiations - http://reinsurancefocus.com/archives/11238.

European Union ("EU") concerning a possible covered agreement covering two issues: (1) a temporary declaration of the U.S. markets as satisfying the equivalence requirements of the EU's Solvency II insurance regulatory directive; and (2) what is termed the credit for reinsurance issue, which involves the level of collateral that must be posted by alien reinsurers for reinsurance agreements in the U.S.[10] There is widespread concern over the potential impact on U.S. companies writing risks in the EU and EU companies writing risks in the U.S. if Solvency II is implemented without some finding that the U.S. market satisfies the equivalence requirement of Solvency II. There has not been articulated Republican opposition to a covered agreement addressing the Solvency II equivalence issue.

The NAIC may take the change of administrations as an opportunity to renew its opposition to a covered agreement encompassing the issue of collateral levels for credit for reinsurance provided by alien reinsurers. This issue has been the subject of complaints by alien reinsurers and foreign insurance regulators for many years, and the NAIC's effort to address this issue through a model act has not garnered sufficient support among the states, through the adoption of the model act by a large number of states, to be a practical route to resolve this issue consistently throughout the United States.[11]

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[10] For the latest update from the Treasury Department on the discussions with the EU concerning a possible covered agreement, *see* https://www.treasury.gov/press-center/press-releases/Pages/jl0604.aspx.

[11] Some states have continued to adopt the model act or amend their own requirements for credit for reinsurance and collateral. For a discussion of developments in this area in 2015, *see* http://reinsurancefocus.com/archives/10298. For the latest

It will be interesting to see whether the Trump administration reaches out to the NAIC with respect to this issue. The Financial CHOICE Act would leave in place the process for negotiating covered agreements concerning prudential insurance matters of international importance. The fact that Republicans generally have not criticized the FIO for attempting to negotiate a covered agreement with respect to the two issues mentioned above may be indicative of a lack of momentum to make any changes in this area.

3. FSOC's role

Republicans have criticized the extent to which FSOC is involved in setting and implementing policy, and the lack of transparency in its operation. With respect to insurance and reinsurance, FSOC's members have been widely criticized for their lack of expertise and for the extent to which they have applied "bank centric" rules to non-bank companies, such as insurance companies. The Financial CHOICE Act would change the role of FSOC into essentially a monitoring and coordination body, without power to make or implement policy.

4. The Federal Insurance Office ("FIO")

The initial concern about the FIO after the enactment of the DFA was that it might morph into more of a regulatory office than a monitoring office. The FIO's activities to date, however, have been concentrated on international issues while respecting the

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updates on revisions to the model act and model regulation concerning credit for reinsurance, *see* the web site of the NAIC's Reinsurance (E) Task Force at http://www.naic.org/cmte_e_reinsurance.htm.

state-based regulation of the business of insurance. We see no indication that a Trump administration would substantially change course in this area.

The Financial CHOICE Act would combine the positions of the Director of the FIO and the FSOC independent member with insurance expertise to reduce "fragmentation" and designate one person to "give a unified voice and seat at the table for the U.S. insurance industry at the domestic and international levels, while preserving our traditional state-based system of insurance regulation."[12] This person would represent the United States at the International Association of Insurance Supervisors and "assist" in the negotiation of covered agreements. Although not clear, the role of the FIO (which might be renamed) might be restated to be limited to the monitoring and international scope upon which it has focused.

5. The NRRA

The NRRA, which has been the subject of numerous posts on this blog, has not been controversial.[13] The DFA encouraged the sharing of premium tax revenue for multi-state surplus lines placements among the states, and two mechanisms developed to share such revenues. However, the provisions concerning the allocation among the states of premium taxes for multi-state surplus lines placements have been completely ineffectual. Both of the mechanisms for the sharing of premium tax revenue for multi-state risks have collapsed, resulting in no changes to that part of the market.[14]

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12 *See* Comprehensive Summary, page 123.

13 *See, e.g.,* http://reinsurancefocus.com/?s=NRRA.

14 Concerning the failure of the sharing of premium among the states generally, *see* http://reinsurancefocus.com/archives/11130, and with respect to the dissolution of

The only issue of concern in this area is the treatment of the credit for reinsurance/collateral issue, which is addressed in the covered agreements section above. The Financial CHOICE Act does not propose any changes to the NRRA provisions of the DFA.

## CONCLUSION

It is still early in the transition to a Trump administration, and there has been little said about the DFA and insurance and reinsurance since the election. There will be considerable interest in how the approach to the DFA and the issues discussed above develops. Whether the approach of the Financial CHOICE Act, or an approach similar to it, will be adopted by the Trump administration of course remains to be seen.

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NIMA, *see* http://reinsurancefocus.com/archives/11347.