CARLTON FIELDS

Dodd-Frank in a Trump Administration

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During the recent campaign, President-elect Donald Trump pledged to repeal the Dodd-Frank Act (DFA) if elected, criticizing the regulatory burdens it imposed and contending that it discouraged lending by banks and impaired the growth of the U.S. economy. Mr. Trump stated he would dismantle most of the DFA if elected, because it "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." Shortly after the election, Mr. Trump's campaign adviser Anthony Scaramucci said "the worst anti-business parts of [the DFA] will be gutted." President-elect Trump's transition web page states he will replace the DFA with new policies to encourage economic growth and job creation. Much of this criticism of the DFA has focused on its impact on the banking sector. Neither Mr. Trump nor his advisors have directed specific criticism at its impact on the business of insurance. This article examines one possible alternative Republican legislative approach, based on current policy proposals, focusing on possible DFA changes affecting the insurance sector. 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 issued no policy pronouncements concerning insurance or reinsurance regulation, the Republican approach historically, and specifically in response to the DFA, has been to strongly support the state-based regulation of the business of insurance in the United States, and President-elect Trump has made no statements indicating he disagrees with that approach. Several bills introduced over the past two years would repeal or substantially modify all or part of the DFA. These include the Financial CHOICE Act of 2016 (The Financial CHOICE Act), introduced by House Financial Services Committee chair Rep. Jeb Hensarling, who was mentioned as a candidate for the position of Treasury Secretary in the Trump administration. This bill may provide a possible model for the Trump administration's approach to the DFA. A published Executive Summary of the bill articulates its "Key Principles," which focus on simplicity and accountability of regulation, encouraging competition, consumer protection, avoiding government bailouts, and market management of systemic risk. The Executive Summary does not mention insurance, nor do any of the policy prescriptions laid out in that

document relate directly to the business of insurance. A published Comprehensive Summary of the bill begins with an outline of its provisions, which include "Improving Insurance Regulation by Reforming Dodd-Frank Title V." The insurance "improvement" discussion fills only two of the Comprehensive Summary's 126 pages, and addresses only one modest change: combining the positions of the Director of the Federal Insurance Office and the Financial Stability Oversight Counsel's (FSOC's) independent insurance representative into a single position. It also discusses the repeal of FSOC's Systemically Important Financial Institutions (SIFI) designation authority, which would impact some of the largest insurance companies. The Financial CHOICE Act's approach would have only a modest impact on the business of insurance.

1. SIFI Designations

The SIFI designation process has been widely criticized for reasons that include: (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 court opinion vacating Metlife's SIFI designation may provide further support for changing the SIFI process, at least as to insurance companies. A concerted effort to change or eliminate the SIFI process seems likely. The Financial CHOICE Act would eliminate the SIFI designation process entirely, legislatively rescinding the designation of AIG, Prudential, General Electric Capital, and MetLife as SIFIs, and removing them from prudential regulation by the Federal Reserve.

2. Covered Agreements

The Federal Insurance Office has been engaged in discussions with the European Union (EU) concerning a possible covered agreement on two issues: (1) a temporary declaration that the U.S. markets satisfy 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 alien reinsurers must post for reinsurance agreements in the United States. There is widespread concern over Solvency II's potential impact absent some finding that the U.S. market satisfies its equivalence requirement. Beyond noting a lack of transparency, Republicans have not articulated opposition to a covered agreement addressing the equivalence issue. The National Association of Insurance Commissioners (NAIC) may use the administration change 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 prompted complaints by alien reinsurers and foreign insurance regulators for many years, and the NAIC's effort to address it through a model act has not garnered sufficient support among the states, through the adoption of the model act, to resolve the issue uniformly throughout the United States. The Financial CHOICE Act would leave in place the process for negotiating covered agreements concerning prudential insurance matters of international importance. There may be no changes to this area of the DFA.

3. The FSOC's Role

Republicans have criticized the extent to which the FSOC is involved in setting and implementing policy, and the lack of transparency in its operation. The FSOC's members have been criticized for their lack of insurance expertise and for applying "bank centric" rules to insurance companies. The Financial CHOICE Act would change the FSOC's role into that of, essentially, a monitoring and coordinating body.

4. The Federal Insurance Office (FIO)

The initial concern about the FIO was that it might morph into more of a regulatory office than a monitoring office, but its activities have focused on international issues while respecting the state-based regulation 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 provide a single voice for the U.S. insurance industry at the domestic and international levels, including at the International Association of Insurance Supervisors, while preserving our traditional state-based system of insurance regulation.

5. The Nonadmitted and Reinsurance Reform Act (NRRA)

The NRRA portion of the DFA has been uncontroversial. 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, both of these mechanisms have collapsed, resulting in no changes to that part of the market. The Financial CHOICE Act proposes no changes to the NRRA provisions of the DFA. Conclusion It is still early in the transition to a Trump administration, and little has been said about the DFA and insurance since the election. The development of the approach to the DFA and the issues discussed above will spark considerable interest. Whether the Trump administration will adopt the Financial CHOICE Act approach, or one similar, remains to be seen.

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