ML Strategies Legislative Update

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ML Strategies Update on Financial Services

Introduction

The financial services industry is poised to receive some regulatory relief from an unlikely source: President-elect Donald J. Trump. On the campaign trail, Trump often sounded like a populist crusader bent on reinstating the Glass-Steagall Act and breaking up banks deemed "too big to fail." However, now as he transitions to the presidency, Trump appears to be gearing up to potentially deregulate the financial services industry. Below is analysis on the possible impact of Trump's presidency on financial policy and personnel. It comprises four sections: The Future of Dodd-Frank, the Future of Financial Rulemakings, the Leadership of Monetary and Financial Agencies, and Changes to Congressional Committees of Jurisdiction.

The Future of Dodd-Frank

Trump has vowed to repeal the Dodd–Frank Wall Street Reform and Consumer Protection Act. To try to achieve his pledge, he has a ready-made vehicle in the Financial CHOICE Act, a bill from last Congress that likely will be reintroduced this Congress. Sponsored by Representative Jeb Hensarling (R-TX), the Chairman of the House Financial Services Committee, the bill would repeal most of Dodd-Frank. It would repeal the law's indirect auto lending guidance, the "Volcker Rule" banning certain proprietary investments by banks, and the "Durbin Amendment," which limits the fees retailers pay to process debit-card transactions. The bill also would strip the Consumer Financial Protection Bureau (CFPB) of its authority to ban arbitration and the Financial Stability Oversight Council (FSOC) of its power to designate firms as "systematically important financial institutions" (SIFIs). In addition, it would entrust Congress with funding the CFPB and restructure the Bureau's leadership, replacing its one director with a five-member commission.

During the last Congress, the Financial CHOICE Act passed the House Financial Services Committee. However, it never came up for a full House vote and faced strong Democratic opposition in the Senate. Senator Chuck Schumer (D-NY), the Senate Minority Leader, claims he has the necessary votes to defeat a full repeal of Dodd-Frank. Few Republicans likely would help him in that effort. After all, Dodd-Frank passed the Senate with the support of just four GOP senators – only two of whom (Sens. Susan Collins (ME) and Chuck Grassley[1](IA)) are still serving in the Senate. Nevertheless, with forty-eight Democrats in his caucus, the minority leader appears well-positioned to marshal forty-one votes against the Financial CHOICE Act or similar legislation to sustain a filibuster.

Even if Senate Democrats block a full repeal of Dodd-Frank, they may provide enough votes to repeal parts of the law. Sen. Schumer, for instance, could conceivably sign on to a repeal of the Durbin Amendment; back in 2011, he voted for a measure delaying the Amendment's effect date[2]. In addition, Democrats may support relief for community banks. Even former Representative Barney Frank (D-MA) said of his own law that it places too much scrutiny on banks with assets between $50 billion and $125 billion.

Trump and congressional Republicans may scale back Dodd-Frank, but they probably will keep in place some of the law's signature provisions. Some of the parts of the law thought to be safe include capital requirements for large banks, lending restrictions on mortgage companies, oversight standards for derivatives and hedge funds, and "Say on pay" provisions granting shareholders the power to order nonbinding votes on executive compensation. Other provisions considered at risk may also stay intact if their repeal proves too costly. In particular, those that agencies already have implemented and to which financial institutions already have begun to comply may survive unscathed because they have become entrenched.

Whatever repeal legislation is ultimately introduced will originate in one of the two committes of jurisdiction: the House Financial Services Committee or the Senate Banking Committee. Representative Hensarling will remain the Chairman of the Financial Services Committee. As Chairman, Hensarling has been a thorn in the side of the financial industry. Back when he was writing the Financial CHOICE Act, he reportedly did not consult industry players who tried to meet with him to discuss the bill. He has since said he welcomes proposed changes from stakeholders, but industry remains skeptical. However, the sector is more confident that it will work well with Senator Mike Crapo (R-ID) who has succeeded Senator Richard Shelby (R-AL) as the next Chairman of the Senate Banking Committee.

The Senate Banking Committee may provide an early clue as to whether and, if so which, changes to Dodd-Frank have a chance of becoming law. Senator Sherrod Brown (D-OH), the Ranking Member of the Committee, has a strong working relationship with Crapo. Yet as a staunch supporter of Dodd-Frank, Brown will work hard to protect the law. He will have a close ally in Senator Elizabeth Warren (D-MA), who is expected to use her perch on the Committee to block any changes to Dodd-Frank (which she helped craft). Complicating Brown's strategy is his upcoming reelection campaign. To win in a midterm election in Ohio (which Trump carried by nine points last November), Brown may feel inclined to back some reforms of Dodd-Frank, such as relief for community banks (which he has suggested he could support). Also up for reelection in 2018 are seven other members of the Committee: Senators Warren, Bob Corker (R-TN), Bob Menendez (D-NJ), Dean Heller (R-NV), Heidi Heitkamp (D-ND), Joe Donnelly (D-IN), and Jon Tester (D-MT)[3]. The midterms likely will have a particularly big impact on these members'

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[1] Grassley voted for the Senate's version of Dodd-Frank before voting against the conference bill.

[2] The business community remains sharply divided over changes to the Durbin Amednment, with banks largely supportive of them and retailers and other stakeholders largely opposed to them.

[3] Of these seven senators, four – Senators Heller, Heitkamp, Donnelly, and Tester – represent states that their party's presidential nominee did not carry in the last election.

calculations – and, by extension, the fate of any efforts to repeal Dodd-Frank, either in part or in whole.

The Future of Financial Rulemakings

Outside repeal, the Trump Administration could pursue other avenues to weaken Dodd-Frank. One option for the incoming President may be scaling back the regulations corresponding with the law. Relevant agencies could undertake this task without consulting Congress, but they would have to conduct formal rulemakings. Agencies also could choose to simply not finalize draft rules. Democrats in Congress surely would object to this option on the grounds that agencies are bound by statute to finalize any rules that Congress prescribed. However, Republican-led agencies probably would not feel inclined to promulgate rules that Trump and most congressional Republicans strongly oppose. Under the Congressional Review Act (CRA), Congress could also negate, by a simple majority, any rules enacted in the last sixty days of the 114th Congress (i.e., any rules that were adopted on or after June 13, 2016). House Republicans took the first step in this process by passing the Midnight Rule Relief Act (H.R. 21). Sponsored by Representative Darrell Issa (R-CA), the bill would roll back all the regulations finalized on or after the June 13th cutoff. Senator Ron Johnson (R-WI) introduced companion legislation (S.34), which needs the support of at least eight Democrats to become law.

In the waning days of the Obama Administration, regulators have been working overtime in a last-ditch effort to save rules from the chopping block. Before Trump's election, federal agencies were issuing 2.2 regulations per day, on average; now, they are churning out 10 per day. However, their breakneck pace surely will come to a halt when Trump takes office, as he has pledged to impose a temporary moratorium on new financial regulations.

Below are fifteen rules – some final, some pending – that could be in jeopardy come January 20th:

Final Rules

- **National Credit Union Administration's Rule Expanding Credit Union Membership**: This rule enlarged the pool of consumers who can join credit unions in order to expand access to credit and encourage investments in life savings.

- **The Consumer Financial Protection Bureau's Prepaid Card Rule**: This rule extends protections to prepaid card users that are similar to those that cover credit card holders.

- **The Federal Reserve's Long-Term Debt Rule**: This rule requires the eight largest US banks to hold an additional eighteen percent of high-quality capital to reduce the odds of market contractions and taxpayer bailouts if one or more of the banks declared bankruptcy.

- **The Office of the Comptroller of the Currency's Receivership Rule**: This rule establishes a formal process for dissolving banks that the Federal Deposit Insurance Corporation does not insure.

- **The Securities and Exchange Commission's Rules on Mutual Funds**: One rule requires increased disclosure of retail investors' mutual fund holdings from registered investment companies (RICs) and investment advisors; the other gives mutual funds the tools to slow the pace of withdrawals.

- **The US Treasury's Customer Due Diligence Rule**: This rule requires that financial firms know and verify the identities of their account holders in order to combat financial crime committed by anonymous, or shell, companies.

Pending Rules

- **Joint Agencies' Incentive-Based Compensation Rule**: This proposed rule has two parts: 1) It would require banks to stagger the payment of executives' bonuses over at least four years; 2) it would empower banks, in seven years or less, to "claw back" bonuses from executives who lost the firm money through reckless risk-taking. Authored by six federal agencies, this rule intends to encourage banks to better scrutinize the risk of their investments. ***This rule may be finalized before Trump takes office.***

- **The Consumer Financial Protection Bureau's Mandatory Arbitration Rule**: Under this proposed rule, financial firms could no longer insert mandatory arbitration clauses into customer contracts. ***This rule may be finalized before Trump takes office.***

- **The Commodities Future Trading Commission's Position Limits Rule**: Intended to curb speculation in futures markets, this proposed rule would limit the number of positions that traders can hold in certain commodity markets. Tucked into a bill that the House recently passed to reauthorize the CFTC was an amendment to remove the provision in Dodd-Frank requiring the CFTC to impose position limits. The bill, formally titled the Commodity End User Relief Act (H.R.238), passed the chamber on a mostly party-line vote.

- **The Commodity Futures Trading Commission's Rule on Algorithmic Trading**: Under this proposal, automated traders would have to register with the CFTC, which would have access to their business source codes in order to reconstruct market events. This draft rule seeks to mitigate the risks associated with high-frequency trading.

- **The Consumer Financial Protection Bureau's Debt Collection Rule**: This proposed rule aims to improve debt collectors' information about their borrowers. It would cap the number of times debt collectors can contact their borrowers and require that the people they contact do indeed owe them money.

- **The Consumer Financial Protection Bureau's Payday Lending Rule**: In an attempt to combat predatory lending practices, this proposed regulation would require "payday" and other short-term lenders loan money only to borrowers whom they have determined can repay their loan(s).

- **The Federal Banking Agencies' Net Stable Funding Ratio Rule**: This proposed rule seeks to improve the resilience of big banks to market vagaries by requiring them to have a minimum level of stable funding relative to the liquidity of their assets, derivatives, and commitments over a one-year period. The proposal is a joint product of the Federal Deposit Insurance Corporation, the Federal Reserve, and the Office of the Comptroller of the Currency.

- **The Federal Reserve's Physical Commodities Capital Rules**: Under the proposed rule, banks would have to pony up more capital for their investments in physical commodities. The rule would also restrict banks' dealings with power plants to limit the financial fallout of environmental catastrophes. In December, the Federal Reserve extended the public comment period for this rule, which now ends on February 20th.

- **The Security and Exchange Commission's Order Routing Rule:** This proposed rule adds to the information broker-dealers must disclose about their routing of "institutional orders" in order to boost the process's transparency.

Leading of Financial and Monetary Agencies

The future of both existing and pending financial regulations may very well depend on the leadership of monetary and financial agencies. Below are some of the rumored candidates to serve on the Federal Reserve, Commodities Futures Trading Commission, and the Consumer Financial Protection Bureau.

The Federal Reserve

Donald Trump's impact on the Federal Reserve could be immediate. According to his transition team, the President-elect intends to fill two vacant seats on the Fed's Board of Governors within his first three months in office. Trump may be able to nominate two more people to the Fed in the first half of his term, as Fed chair Janet Yellen's term expires in February 2018 and Vice Chair Stanley Fischer's expires in June 2018. The names thought to be on Trump's shortlist are John Dugan, a former Comptroller of the Currency; David Nason, the chief executive officer of GE Energy Financial Services Inc. who served under former Treasury Secretary Henry Paulsen ; and Randall Guynn, a banking lawyer at Davis Polk & Wardwell who clerked for former Supreme Court Justice William Rehnquist. Also potentially on the shortlist is Paul Atkins, the former Securities and Exchange Commission member leading Trump's transition on appointments to financial agencies.

Commodities Futures Trading Commission

Timothy Massad, the Chairman of the Commodities Futures Trading Commission, announced January 3rd that he will step down from his post the day Trump takes office. Republican Commissioner J. Christopher Giancarlo is expected to chair the CFTC in the interim; he is also the leading candidate to be the Commission's next official Chairman. Under Giancarlo, the CFTC likely would veer sharply to the right. Giancarlo strongly opposes many of the Commission's pending rules, including its pending rule on algorithmic trading.

Consumer Financial Protection Bureau

Richard Cordray, the current Director of the Consumer Financial Protection Bureau, could be one of the few senior-level holdovers from the Obama Administration to serve during the Trump presidency – that is, unless Trump fires him. Congressional Republicans, such as Senators Ben Sasse (NE) and Mike Lee (UT), have urged the incoming President to do just that. Cordray's term does not end until 2018, but Trump could oust him before then if he established that the director were guilty of "inefficiency, neglect of duty, or malfeasance in office." Democrats have vowed to contest these charges in court should Trump make them. Meanwhile, Republicans already have started scouring Cordray's record to try to build a possible case against him.

In perhaps a sign of his interest in new leadership at the CFPB, Trump has met with a possible replacement to head the agency: former Rep. Randy Neugebauer (R-TX). In Congress, Neugebauer strongly opposed the CFPB and tried, unsuccessfully, to convert it into a sub-agency within the Treasury Department. Neugebauer is expected to be the frontrunner for the position, if Trump removes Cordray and if he and congressional Republicans maintain the directorship. Even though they would have a like-minded director in Neugebauer, Trump and congressional Republicans may opt to dismantle the CFPB or short of that, replace its directors with a five-member board (as proposed by the Financial CHOICE Act). Either change would deny Neugebauer (and Cordray) the lead role at the Bureau.

Changes to Congressional Committee of Jurisdiction

As discussed above, the big change on the Senate Banking Committee is that Senator Crapo has succeeded Senator Shelby as Chairman. Senator Brown, who had been the committee's Ranking Member last Congress, will remain in that position. This Congress, the Committee has six new members. Three are Democrats (Senators Brian Schatz (HI), Chris Van Hollen (MD), and Catherine Cortez Masto (NV)) and three are Republicans (Senators David Perdue (GA), Thom Tills (NC), and John Kennedy (LA)). Perhaps the most notable change at the subcommittee level is that Senator Warren is now the Ranking Member of the influential Subcommittee on Financial Institutions and Consumer Protection. Senator Pat Toomey (R-PA) will remain the Subcommittee's Chairman.

The big change on the House Financial Services Committee is that it has fourteen new members. A whopping ten of them are Republicans: Representatives Barry Loudermilk (GA), Trey Hollingsworth (IN), Dave Trott (MI), Ted Budd (NC), Tom MacArthur (NJ), Claudia Tenney (NY), Lee Zeldin (NY), Warren Davidson (OH), Davod Kustoff (TN), and Alex Mooney (WV). Rounding out the changes to the full committee are the addition of four Democrats: Representatives Charlie Crist (FL), Josh Gottheimer (NJ), Ruben Kihuen (NV), and Vicente Gonzalez (TX). While the membership of the full committee changed significantly, its leadership did not: Representative Hensarling is still the Chairman and Representative Maxine Waters (D-CA) is still the Ranking Member. Of note to to the banking industry, Representative Bill Huizenga is now the Chairman of the Subcommittee on Capital Markets and Government Sponsored Enterprises, while Representative Blaine Luetkemeyer (R-MO) is now the Chairman of the Subcommittee on Financial Institutions and Consumer Credit.

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