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Deregulation 2017: Dismantling Dodd-Frank

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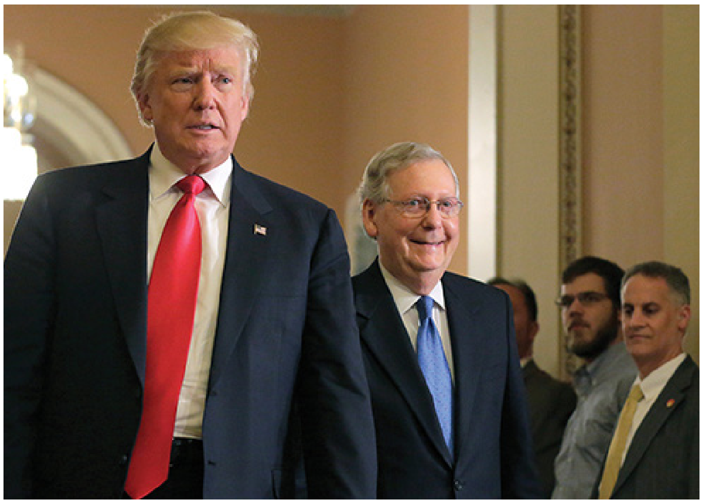
U.S. President-elect Donald Trump (left) walks with Senate Majority Leader Mitch McConnell (R-KY) on Capitol Hill.

Washington's all about new laws, rules, and enforcement, right? Guess again. If you've been serving as a director only in the past decade, you may know just half of what Washington can do. Relatively fresh fiduciaries serving after the passage of the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 know all too well how bills become laws, how laws generate regulations, and how courts and agencies compel compliance. But what about repeals, defunding, orders to strike, and votes to nullify? It's been a while since deregulation dominated Washington on a wide scale. Now it seems to be the order of the day.

Back to the Future?

Following the November elections, the pendulum that had been swinging toward increased regulation in the boardroom reversed course, to the surprise of many. Last year when the National Association of Corporate Directors (NACD) asked directors to identify their five top concerns for 2017, the answers were telling. As the *2016–2017 NACD Public Company Governance Survey* reports, 58 percent of respondents listed growing regulatory burden as their chief concern, ranking second only to global uncertainty. Now it looks as though directors' concerns over regulatory burden may have precipitated votes for a move away from their proliferation.

To be sure, Washington will never be regulation-free. Indeed, some of the campaign promises made by President-elect Donald J. Trump and incoming members of Congress involve newly formed regulations—for example, new taxes on outsourcing or on imports. More to the point, even deregulation involves regulation—there will be new laws, still more new regulations, and decisions to undo what has been done. Overall, however, the current climate promises to be a return to the deregulatory days of yore.

Far from vowing to pass more laws and regulations, many Republican members of the incoming Congress, along with Trump, have vowed to repeal or dismantle Dodd-Frank, among other deregulatory promises.

So how exactly might Dodd-Frank deregulation work, technically speaking? Let's consider some scenarios focusing on what the executive and legislative branches can do immediately to reverse provisions of most direct relevance to the work of directors. *(For a list of the current status of Dodd-Frank provisions, see page* 3.)

Scenario 1

Moratorium on all new rulemaking. In this scenario, the Trump administration would employ a tactic that Presidents George W. Bush and Barack Obama implemented at the beginning of their administrations. Trump's Chief of Staff Reince R. Priebus would direct all departments and independent agencies within the executive branch to stop passing any new rules and to postpone effective dates of rules. Such a moratorium would affect Dodd-Frank provisions not yet in final form, namely pay-for-performance disclosures, executive pay clawbacks, and disclosure of employee and director hedging policies.

REUTERS/JOSHUA ROBERTS

By the Numbers

Regulatory activity was significantly higher during the most recent Democratic administration than in the previous Republican one by a variety of metrics, including rules enacted per law passed; annual average for "economically significant" rules (defined as rules with an economic impact of at least $100 million); and average number of major rules per year, according to the Competitive Enterprise Institute, a regulations watchdog.

Ratio of Regulations Per Law (range from lowest to highest annual)
- **Bush: 13:1 to 38:1**
- **Obama: 16:1 to 51:1**

Economically Significant Rules (average per year)
- **Bush: 49**
- **Obama: 67**

Major Rules (average per year)
- **Bush**: 63
- **Obama**: 81

Source: Competitive Enterprise Institute

Scenario 2

Executive order to mandate enforcement of laws that require regulators to conduct reviews. Trump has been quoted as saying that a "dismantling" of Dodd-Frank is coming. While the precise tactics are not yet known, this particular scenario could see President Trump using an executive order to enforce existing or new laws requiring regulatory self-review.

This would be an entirely legal use of the executive order, which, along with directives, notices, proclamations, and memoranda, is a way the executive branch asserts power. The authority for executive orders comes from Article 2, Section 3, of the United States Constitution, which states that the president "shall take care that the laws be faithfully executed." Whereas it would be illegal for a president to order that a law passed by Congress be contradicted or ignored, a president can take action to ensure that the intent of Congress is followed—in this case, congressional intent to empower agencies to reduce rules deemed unnecessary.

As luck would have it, a law on agency review created during the deregulatory era of the 1990s is due for an upgrade, and President Trump could use the power of the executive branch to enforce it. Early in the administration of President Bill Clinton, a Republican-majority House and Senate passed the Economic Growth and Regulatory Paperwork Reduction Act of 1996, which Clinton, a moderate Democrat, signed into law. This two decade-old law, progeny of the aspirational "Contract with America" advocated by conservative Rep. Newt Gingrich (R-GA) during the 1994 congressional election, mandates that banking agencies or a review council dictated by the Paperwork Reduction Act must conduct reviews of all regulations every 10 years and "eliminate unnecessary regulations to the extent that such action is appropriate." Some members of the 115th Congress would like to give this law new reach by reintroducing legislation specifying Dodd-Frank as a target.

In the House, Rep. Sean Duffy (R-WI) may renew his Comprehensive Regulatory Review Act of 2016, which would "ensure that federal financial regulators perform a comprehensive review of regulations to identify outdated or otherwise unnecessary regulatory requirements…and for other purposes." His bill would reduce the time frame of regulatory review from 10 years to every five years.

Similar measures could be reintroduced in by Sens. Michael D. Crapo (R-ID) and Richard Shelby (R-AL). The Comprehensive Regulatory Review Act proposed by Crapo during the last Congress would "ensure that federal financial regulators perform a comprehensive review of regulations to identify outdated or otherwise unnecessary regulatory requirements imposed on financial institutions, and for other purposes," and specifies that the review shall include "all regulations issued pursuant to any authority provided under the Dodd-Frank Wall Street Reform and Consumer Protection Act."

Shelby could repropose his Financial Regulatory Improvement Act, which updates the 1996 Paperwork Reduction Act mentioned earlier. The Shelby bill goes beyond references to banking authorities to specify that regulatory review would be conducted on "all regulations issued pursuant to any authority provided under [Dodd-Frank]." It also requests a study by the Comptroller General of the United States "to determine the effects that the Dodd-Frank Wall Street Reform and Consumer Protection Act… has had on the availability and affordability of credit for consumers, small businesses, first-time homebuyers, and mortgage lending."

This tactic of partnering an executive order with pending legislation has a high chance of success, given the current alignment of the legislative and executive branches. In accordance to the Supreme Court's ruling in *Youngstown Sheet & Tube Co. v. Sawyer* (1952), still considered to be the legal precedent in this instance, an executive order is valid if it is issued in conjunction with the will of Congress. Conversely, an executive order is invalid if it is issued

Status of Dodd-Frank Rules Impacting Most Boards

(As of Jan. 1, 2017)

Bank Risk Committees: ***Final***

Bank Director & Officer Clawbacks: ***Final***

Whistleblower Bounties: ***Final***

Say on Pay: ***Final***

Independent Compensation Committees and Consultants: ***Final***

Pay for Performance: ***Proposed and Pending***

Pay Ratio: ***Final***

Executive Pay Clawbacks: ***Proposed and Pending***

Employee and Director Hedging: ***Proposed and Pending***

No Broker Vote: ***Final***

Proxy Access: ***Final***

Board Leadership Disclosures: ***Final***

Source: National Association of Corporate Directors, *Dodd-Frank: Where Do We Stand?*

against the will of Congress. When the will of Congress is unclear on the matter, the validity of the action may be challenged in the courts. A case recently heard by the Supreme Court, *United States v. Texas* (2016), was a legal challenge to the program known as Deferred Action for Parents of Americans and Lawful Permanent Residents. The court deadlocked on this matter, citing *Youngstown* and other cases, causing a lower court ruling to stand.

Scenario 3

Congress amends the Congressional Review Act to speed up its own power to dismantle regulations. Under the Congressional Review Act, another Gingrich-era law passed as part of the Contract with America Advancement Act of 1996, Congress may review new regulations passed by federal agencies and may overrule them through a joint resolution of the House and Senate. If the resolution is vetoed, there must be a two-thirds vote of both the House and Senate to override the veto. The law operates one regulation at a time, making it unwieldy to use.

In the new Congress, there could be a bill that would give this law more sweeping power. This law, yet to be proposed, could take its cue from the Midnight Rule Relief Act, proposed at the end of the Obama era by Rep. Darrell E. Issa (R-CA), as well as the twin bill proposed in the Senate by Sen. Ronald H. Johnson (R-WI). If the Midnight Rule Relief Act becomes law, Congress could negate multiple rules with a single vote, thus strengthening this tool as an implement for change.

As proposed, the bill only applies to rules passed in the last several months of a presidential administration—and particularly those passed during the "moratorium period," which is defined as the time between the end of a presidential election and the inauguration of the president-elect—but the same concept could be applied more broadly to all regulations if Congress wants to undo Dodd-Frank regulations in a speedy manner.

Scenario 4

Zombie apocalypse: Congress revives a large number of bills to undo Dodd-Frank. Ever since Dodd-Frank was signed into law six years ago at the end of the 111th session of Congress, Republicans have proposed bills to repeal all or part of it, and these bills have died and been reborn multiple times—in 112th, 113th, and 114th Congresses (January 2009–January 2017)—with no success. The failure of these attempts is understandable, given the counterbalance of partisan powers in those periods. In the 112th Congress, Democrats controlled the Senate, and in all three sessions, a Democrat wielded veto power in the White House.

Now, in the 115th Congress, with a Republican House and Senate joining a Republican White House in a historic trifecta takeover (the first for the Grand Old Party since 1928), the chances for success of anti–Dodd-Frank measures are much higher, if not a slam dunk. Senate rules require a majority, or 51 votes, to pass a law; and the incoming Senate is comprised of 52 Republicans, 46 Democrats, and 2 Independents. Unless a filibuster occurs in the Senate or one of a few, obscure parliamentary rules are called in the House, laws proposed to repeal Dodd-Frank regulations have the personnel to pass with ease.

The new Congress is likely to repropose bills. In the last Congress, some 100 bills referred to Dodd-Frank—generally to repeal all or part of it by undoing changes Dodd-Frank made in previous regulations. These bills are typically carryovers from previous sessions, and are likely to reappear once again with new numbers in the 115th Congress.

Special Zombie Scenarios

Bills to repeal Titles I and/or II of Dodd-Frank affecting bank boards. In the last Congress, retiring Rep. Lynn Westmoreland (R-GA) introduced a bill to repeal the first two titles of Dodd-Frank and later a separate bill to repeal only the second. His successor in the new Congress, Drew Ferguson (R-GA), may revive the bill. Title I, in part, requires banks of a certain size to have risk committees, and Title II, in part, requires compensation clawbacks of pay from any bank director deemed to be substantially responsible for a bank's insolvency. A similar bill was introduced by Sen. John Corwyn (D-TX), called the Taxpayer Protection and Responsible Resolution Act.

Bills to repeal or defund the SEC's pay ratio rule. One of the most controversial provisions of Dodd-Frank was its requirement that companies disclose the ratio of median worker pay to CEO total pay. The final rule on the matter by the U.S. Securities and Exchange Commission (SEC) requires the disclosures to be published in proxies filed for fiscal years starting on or after January 2017. Many companies are already starting to run the calculations, but depending on congressional action, disclosure may become optional rather than required. This would be the case if Rep. Bill P. Huizinga (R-MI) reintroduces his Burdensome Data Collection Relief Act, which would strike the mandate for pay ratio disclosure. Huizinga may also revive another bill he previously introduced that would defund the pay ratio rule. The defunding would occur via an amendment to the 2017 appropriations bill proposed by retiring Rep. Ander M. Crenshaw (R-FL), succeeded now by John H. Rutherford (R-FL). The Huizinga amendment "prohibits funds to finalize, implement, administer, or enforce the Securities and Exchange Commission's Pay Ratio Disclosure rules." The Rutherford appropriations bill, as amended by Huizinga, had a 36 percent chance of passing, with a vote to be timed just as this issue goes to press.

A bill to repeal the pay-for-performance provision of Dodd-Frank. Rep. Jeb Hensarling (R-TX) may reintroduce the Financial CHOICE Act. This bill's broad agenda includes specific reference to Dodd-Frank's pay-for-performance provision. That provision has not yet resulted in a final rule, so congressional action may not be necessary. Delay under SEC Chair Mary Jo White's presumptive Republican successor is a more likely tactic.

Bills to defund or study the conflict minerals rule. Another Dodd-Frank provision considered to be burdensome is the one requiring disclosures of any sourcing of conflict minerals originating in the Democratic Republic of the Congo. Since these minerals are essential to the materials, packaging, and machines used to manufacture a variety of products, the bill has been considered burdensome.

In the last Congress, Huizinga tried to defund the conflict minerals rule via an amendment to a House appropriations bill. The amendment "prohibits funds appropriated in this act to be used to enforce a SEC rule…relating to 'conflict minerals.'" Another bill that could be revived to defund the conflict minerals rule is the Government Accountability Office (GAO) Mandates Revision Act of 2016. This measure introduced by Rep. Jody B. Hice (R-GA), re-elected in November, would require, among other things, that the GAO report on the effectiveness of disclosures relating to conflict minerals originating in the Democratic Republic of the Congo.

And last but not least, a bill to repeal all of Dodd-Frank. Dodd-Frank is a bill many Republicans love to hate—in its entirety. The oldest related zombie bill aimed at repealing Dodd-Frank was introduced in January 2011 during the 112th Congress by Rep. Michele M. Bachmann (R-MN). The exact wording of the Bachmann bill in the 112th Congress was revived in the 113th Congress by Bachmann, and again in the 114th Congress by Rep. Adrian M. Smith (R-NE). An identical bill is likely to be proposed again in 2017 by Smith, who was re-elected in November by a wide margin.

Total repeal would be a gargantuan task. Like any bill affecting existing law or regulations, Dodd-Frank was not a self-contained document. Rather, it was a series of instructions on where and how to amend the United States Code (USC) and Code of Federal Regulations (CFR), massive legal repositories with more than 100 titles between them, each title itself enormous. (Consider, for instance, that Title 26 of the USC comprises the workings of the Internal Revenue Code—itself a vast network of mandates.) In fact, Dodd-Frank made amendments affecting 14 different titles under the USC umbrella (including, notably, the title setting forth the U.S. Banking Code), as well as a title in the CFR.

Deregulation of Dodd-Frank is likely to be partial, targeting only the regulations considered to be most burdensome. Statements made by the two architects of the law may provide some guidance on the path forward. Retired Sen. Christopher J. Dodd (D-CT) recently told a gathering of actuaries that "Efforts to repeal it are ludicrous on its face. The crisis was no accident; it was an outdated regulatory environment. During the next crisis—and we certainly will have one—it will be far more difficult to put that back in the bottle."

Retired Rep. Barney Frank (D-MA), named in 2015 to the Signature Bank board, expressed a different view in a November 2016 interview with NPR's David Greene. The low threshold for banking supervision, he said, was a "mistake." The task in Washington now is to correct such mistakes in Dodd-Frank and other laws and related regulations due for review in this new era.