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Five Key Financial Regulation Reforms

Reining in Dodd-Frank and Sarbanes-Oxley Will Help Consumers, Entrepreneurs, and Middle Class Investors

*By John Berlau**

First there was "fintech," now there is "regtech."

Fintech—short for "financial technology"—is the popular term to describe the rapid pace of technological change in various areas of finance, from lending to investing to cryptocurrency. For the most part, this emerging sector has been driven by market forces, as fintech entrepreneurs work and invest to meet the growing consumer demand for faster, more convenient, and individually tailored financial services.

Regtech, by contrast, is the new buzzword for technological solutions to help firms cope with the avalanche of financial regulation over the last decade. Reuters describes the "regtech" sector as "companies whose technology helps banks and investors cope with the welter of post financial crisis regulations and avoid increasingly hefty fines."[1] If regulatory trends continue, the regtech sector will only get bigger. Research firm Celent estimates that spending on technology to comply with regulations will rise from $50.1 billion in 2015 to $72 billion by 2019.[2]

Technological innovation is a good thing, and some regtech products may have broader uses, such as improving delivery of financial goods and services. But when the best minds in technology are focused on complying with red tape, it usually comes at a cost in innovation elsewhere, including fintech innovations that promise benefits to entrepreneurs, investors, and consumers. A healthy fintech sector would be far better than growth in regtech.

The explosion of financial regulation has translated to billions of dollars in lost access to capital, credit, and opportunity for small businesses and consumers. A 2013 study by the Federal Reserve Bank of Minneapolis found that adding just two employees tasked with regulatory compliance makes 33 percent of the smallest banks—those with less than $50 million in assets—unprofitable.[3]

The 2010 Dodd-Frank Act and other laws and the rules issued under them have forced community banks and credit unions to devote many more resources than just two employees to compliance. In an August 2016 letter to the Consumer Financial Protection Bureau (CFPB), the Credit Union National Association warned that rules are limiting credit unions' ability to provide affordable financial products to their customers, making it "harder

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for credit unions to fulfill their mission," as the cost of the regulatory burden on credit unions increased from $4 billion in 2010 to $7 billion in 2014.[4]

Financial services regulations increase the problem of the "unbanked" in the United States, driving poor people out of the mainstream financial services system. It even exacerbates poverty and degrades life for women and children in impoverished parts of Africa.

President Trump and Republican leaders in Congress have called for relief from Dodd-Frank and other red tape. A revised version of the Financial CHOICE Act, first introduced last year by House Financial Services Committee Chairman Jeb Hensarling (R-TX), is expected to offer comprehensive deregulation by repealing and easing provisions of Dodd-Frank and other financial regulations. In the Senate, Banking Committee Chairman Mike Crapo (R-Wyo.) is reportedly looking to craft a more moderate bill that will get the backing of the handful of Democrats needed to get the 60 votes to avoid a filibuster.[5]

Whichever approach the administration and Congress take, their top priority should be to repeal regulations that serve no arguable purpose in restoring financial stability and that have been shown to hurt small banks, low-income and middle class consumers, ordinary investors, and startup entrepreneurs. Here are five such regulatory burdens ripe for repeal.

1. The Durbin Amendment's Price Controls on Interchange Fees. When Sen. Richard Durbin (D-Ill.) first appended an amendment imposing price controls on debit cards to the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, he invoked a prominent constituent: "I had the C.E.O. of Walgreens contact me last week, and he told me that when they look at the expenses of Walgreens, … it turns out the fees that Walgreens pays to credit card companies is the fourth-largest item of cost for their business."[6]

He did not say why these costs should be controlled by government. Walgreens and other large retailers simply persuaded enough Members of Congress—including some who would vote against the final Dodd-Frank legislation—to back Durbin's measure, which mandated that interchange fees charged to process debit card transactions be "reasonable and proportional" to cost.[7]

The Durbin Amendment's price controls do not reflect the full costs of processing debit card transactions, as the Federal Reserve can only consider "incremental costs." This means that the costs of crucial pieces of hardware and software must be fully borne by consumers. Yet, the costs of processing debit card transactions—including fending off threats of identity theft and hacking—did not magically go away after Dodd-Frank was enacted. Instead, they were shifted to the consumers who use debit cards, including some of the very poorest consumers, in the form of higher bank fees and lost access to free checking.[8]

In 2009, the year before Dodd-Frank was enacted, 76 percent of checking accounts were free of charge. By 2011, this share had fallen to 45 percent, and by 2012 to 39 percent. Service charges on non-interest bearing checking accounts increased dramatically.[9] A 2014

George Mason University study calculates that the Durbin Amendment contributed to 1 million Americans losing access to the banking system—becoming "unbanked"—by 2011.[10]

When confronted with these facts, retail industry lobbyists often retort that mandated lower interchange fees for retailers translate into lower prices for consumers. But more than five years after the Durbin Amendment went into effect, evidence of this has yet to emerge. The George Mason University study found the benefits to consumers to date have been miniscule to nonexistent.[11] Even accounting for some lower prices in highly competitive markets, the public still suffered a net welfare loss of $22 to $25 billion, as measured by stock-based appreciation of retail firms, according to a 2015 study published in the *Oxford Review of Law & Economics*.[12]

Any Dodd-Frank reform bill must contain full repeal of the Durbin Amendment to provide low- and middle-income consumers with badly needed relief.

2. The CFPB's Unaccountable Structure. The Dodd-Frank Act ostensibly created the Consumer Financial Protection Bureau to protect consumers of financial products the way the Consumer Product Safety Commission (CPSC) assures homeowners that their kitchen appliances will not catch on fire.[13] However, the CFPB is far more powerful than the CPSC and many other agencies. As constituted under Dodd-Frank, it functions like a fourth branch of government unauthorized by the Constitution.

Unlike other agency heads, the CFPB's director can only be fired by the president for "inefficiency, neglect of duty or malfeasance in office." Normally, agency heads can be fired at the will of the president or broadly "for cause," a standard that can include a variety of reasons. Congress has no control over the CFPB's budget, which is taken from the revenue of the Federal Reserve. That renders the agency unaccountable to the president and Congress. Moreover, some of its rulings are protected from judicial review, because Dodd-Frank requires courts to give extra deference to the CFPB. Dodd-Frank states that the courts should defer to the CFPB as if "the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law."[14]

The Bureau has used this considerable power to issue thousands of pages of regulations, while undertaking enforcement actions that at least one court has found violated the due process rights of defendants.[15] That case, *PHH Corporation, et al. v. Consumer Financial Protection Bureau*, is a recent positive development that merits attention.

In 2012, the Department of Housing and Urban Development (HUD) transferred its investigation of PHH Corporation, a financial services company, to the CFPB, as required under Dodd-Frank for all enforcement of the Real Estate Settlement Procedures Act (RESPA). In 2015, the CFPB suddenly reversed a longstanding HUD interpretation of permissible activity under RESPA. HUD had allowed some referral fees among companies involved in a real estate transaction, not treating them as illegal "kickbacks" under the law. Upending that widespread understanding, the CFPB sanctioned PHH for collecting referral fees from mortgage insurers as far back as 2008, levying a fine on the firm of $109 million.

In October 2016, in a case brought against the CFPB by the beleaguered PHH, the United States Court of Appeals for the District of Columbia ruled that the president has the constitutional power to fire the CFPB director "at will," in the same way he can remove a cabinet secretary without cause. Without that presidential prerogative, the court's opinion noted, the CFPB director would be the "single most powerful official in the entire U.S. Government, other than the President."[16] That ruling has been vacated because the full appeals court is now considering the case, but the panel's reasoning is still instructive.

Community banks and credit unions have criticized the substance of the CFPB's regulations, as well as the pace of its regulatory activity. As Jim Purcell, President of the State National Bank of Big Spring, Texas, puts it: "As the CFPB's own website shows, its rulemakings are the subject of constant, significant revision—and that's when the CFPB bothers with express rulemakings at all, instead of regulating informally through case-by-case 'guidance' and enforcement proceedings."[17] Purcell's small bank is a co-plaintiff with the Competitive Enterprise Institute and the 60 Plus Association in a similar lawsuit that challenges the constitutionality of the CFPB's structure.

The Financial CHOICE Act, introduced in the 114th Congress, would make the director removable at-will by the president and make the CFPB subject to congressional appropriations.[18] Its provisions regarding agency leadership may be rendered moot if the court reinstates the *PHH* ruling that makes the director subject to the presidential appointment power. Nevertheless, Congress should ensure that any reform of the Dodd-Frank Act addresses all questions regarding the CFPB's democratic accountability.

3. Sarbanes-Oxley's "Internal Control" Mandates. As burdensome as Dodd-Frank is, intrusive regulation did not begin with this legislation or with the Obama administration. The Sarbanes-Oxley Act, rushed through Congress in 2002, continues to make it extremely difficult for companies to go or stay public.

Going public, most commonly through an initial public offering (IPO), is the process of raising capital by listing a specified number of shares on a stock exchange and making them available to retail investors. For more than a century, many small and midsize firms used this capital-raising tool to grow into leading U.S. companies. In 1981, for example, Home Depot launched its first stock offering with just four stores in Georgia.[19] Middle class investors with the foresight to invest in Home Depot and other small firms early on saw their own wealth grow, along with that of the companies.

This trend reversed abruptly after Congress passed and President George W. Bush signed Sarbanes-Oxley in 2002, in the wake of the Enron and WorldCom accounting scandals. The number of IPOs on U.S. exchanges fall dramatically, As President Obama's Council on Jobs and Competitiveness noted: "[T]he share of IPOs that were smaller [in market capitalization] than $50 million fell from 80 percent in the 1990s to 20 percent in the 2000s."[20]

The most burdensome provision of Sarbanes-Oxley is Section 404, which mandates companies to audit a broadly defined set of "internal controls." As implemented by the

Public Company Accounting Oversight Board (PCAOB), the quasi-public entity created by Sarbanes-Oxley, companies must audit "internal controls" over any company process that could enable "a reasonable possibility of a material misstatement in the financial statements." This is an extremely broad standard that could encompass all manner of company operations, including relatively trivial matters such as possession of office keys.

This provision caused auditing costs to double, triple, and even quadruple for many companies.[21] A 2009 Securities and Exchange Commission (SEC) study found that smaller public firms have a cost burden from the "internal control" mandate more than seven times greater than large public companies.[22]

Noting the tremendous costs of the law, Home Depot co-founder Bernie Marcus has said that he could not have taken the firm public and financed its growth had Sarbanes-Oxley been in place in 1981.[23] Today, stock in most companies in their early growth phase are available only to wealthy individuals who qualify as "accredited investors" under SEC rules. The SEC put the "accredited investor" exemption in place in the 1980s under the rationale that wealthy investors are better able to fend for themselves and thus can be allowed to take more risks.

Because of Sarbanes-Oxley, entrepreneurs find it much more difficult to go public and raise capital, while investors miss out on opportunities to build wealth with early-stage growth firms. Instead of going public to raise capital when they are small, today U.S. companies typically do not go public today until they are very large. By the time Facebook went public, it was worth $80 billion.[24]

Any financial relief bill should get rid of Sarbanes-Oxley's section 404, clarify that Congress did not intend PCAOB to implement it the way it has, or at the very least, permanently exempt small and mid-size companies.

4. Barriers to Investment-Based Crowdfunding. Crowdfunding has taken the world by storm, offering enormous potential for profit-sharing among entrepreneurs, employees, and funders. Today, it is usually associated with online rewards-based crowdfunding services like Kickstarter and Indiegogo, which allow someone to create a campaign to fund a project. Contributors are generally rewarded with prizes, such as T-shirts or samples of the funded product if the funding goal is met.

Debt-based crowdfunding, on the other hand, offers funders a specific rate of return, while equity-based crowdfunding offers an ownership interest—similar to a share of stock—and a share of the crowdfunded firm's potential profits. This all sounds promising. Yet, with certain exceptions, a U.S. entrepreneur cannot offer contributors a share of the profits or an interest payment without running afoul of securities laws that date back to the 1930s. Those laws broadly define "security" as any promise to a group of prospective investors of a share of a firm's profits or a monetary return on the amount contributed.

As a result of this static definition of "security" being applied to the dynamic process of crowdfunding, the U.S. is losing out on crowdfunding technology as a tool for economic

and employment growth. In reviewing foreign debt- and equity-based crowdfunding campaigns, a 2013 study conducted by Richard Swart, then with the University of California, Berkeley, and researchers at Crowdfund Capital Advisors found that these campaigns have great job-creating potential. Of the 87 firms that responded to the survey, 87 percent either hired new employees or planned to thanks to having raised equity or debt financing through a crowdfunding platform.[25]

The Jumpstart Our Business Startups (JOBS) Act in 2012 provided a narrow exemption for investment-based crowdfunding from securities laws such as Sarbanes-Oxley and Dodd-Frank. It also repealed restrictions on the advertising of private stock available to wealthy "accredited investors." Its passage by an overwhelming margin underscores the urgent need to reform securities laws that are not appropriate to govern small firms engaging in crowdfunding. Unfortunately, the crowdfunding provisions in the JOBS Act's Title III, which grants exemptions for investment-based crowdfunding campaigns raising up to $1 million in increments up to $2000, were not implemented by the Securities and Exchange Commission until more than four years after the law was enacted. These regulations have proven so cumbersome that only about $15 million has been raised. As crowdfunding advocate Dara Albright quips, that barely pays for a house in the Hamptons![26]

Last year, JOBS Act architect Rep. Patrick McHenry (R-N.C.) sponsored the Fix Crowdfunding Act, to greatly expand the JOBS Act's exemption for crowdfunding from securities laws. It raised the threshold for money allowed to be raised in crowdfunding offerings from $1 million to $5 million and the amounts individuals can invest from $2,000 to $5,000. It also liberalized restrictions on advertising crowdfunding offerings and allowed for special purpose acquisition companies, similar to those run by venture capitalists, in which lead investors negotiate deals with entrepreneurs after investors have signed up. Several provisions of the bill were later merged into the Financial CHOICE Act. They should be included in any new version of the bill this year.

5. Harmful "Conflict Minerals" Disclosure Mandates. The Durbin Amendment is not the only Dodd-Frank provision that had nothing to do with the financial crisis. Section 1502 requires public companies to disclose in their annual reports any use of four minerals—tantalum, tungsten, tin, and gold—that may have been sourced from conflict zones in the Democratic Republic of Congo and adjoining countries.

Although the provision seeks to address a serious moral and geopolitical issue, no one can plausibly say it has anything to do with preventing the next financial crisis. Shoehorning this provision into a bank bill and giving authority over it to the Securities and Exchange Commission, a governmental entity that lacks foreign policy experience, makes no jurisdictional sense.

Even worse, this provision has hurt the very people it has intended to help. In order not to run afoul of the provisions, foreign companies simply began avoiding the Congo or adjoining countries. "It's easier to sidestep Congo than to sort out the complexities of Congolese politics — especially when minerals are readily available from other, safer countries," writes *New York Times* journalist David Aronson.[27]

When mining stopped, many Congolese villages took a serious financial hit. Women who previously went to maternity clinics started giving birth at home, children dropped out of school to help support families who could no longer rely on income from the mines, and former miners and their families frequently went hungry. And in the cruelest irony of all, murderous warlords actually profited from the increased demand for smuggling caused by the law.[28]

Ben Radley, former Regional Director for the American NGO Heartland Alliance and producer of *We Will Win Peace*, an acclaimed documentary about the Congo, writes that the conflict mineral mandate "underestimates the importance of artisanal mining to employment, local economies, and therefore, ironically, security."[29] In September 2014, 70 Congolese activists, academics, and government officials signed a letter blasting Dodd-Frank for "contributing to, rather than alleviating, the very conflicts they set out to address."[30] The "conflict minerals" mandate must be repealed as a humanitarian measure.

Conclusion. Empowering citizens with financial choices in a competitive market can help generate economic growth and create financial stability. There are many federal and state laws already on the books that punish fraud and deception, and these should certainly be enforced with regard to crowdfunding or other types of investment transactions. But policy makers need to trust individuals to choose their own financial futures.

Congress should include provisions alleviating the five regulatory burdens discussed above in any Dodd-Frank reforms that it passes. Doing so will help ensure that productive sectors like financial services and fintech grow, and that regtech, which merely mitigates the damage done by poorly formed regulation, does not.

Notes

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