Banking *and* Finance

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A Pro-Growth Agenda for the 117th Congress

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5 Banking and Finance

Access to capital, credit, and financial services are fundamental to the operation of a free society. They allow for the formation, expansion, and smooth running of the enterprises that make up the private economy. They also provide room for the experimentation that allows innovation in product and service delivery. A well-functioning financial system helps match investors with enterprises for their mutual benefit, as well as the benefit of their employees and customers. When too many restrictions are placed on such a system, the economy slows both in its general flows and in innovation.

That is particularly true when a free society is strained under a crisis such as a pandemic. "Never needed" red tape that has lingered for years and sometimes decades can hinder the ability of entrepreneurs to raise funds to finance the discovery or delivery of vaccines, drugs, and medical devices. It also makes it harder for businesses to adopt new payment technologies, including cryptocurrency, or to offer new services to respond to challenging times.

In the modern global economy, access to capital generally occurs through the banking system as credit, through loans or credit cards. Once enterprises have reached a certain size, they can access capital markets, such as stock markets and debt offerings. Thanks to technological innovation, recent years have seen an explosion of alternative means of accessing capital—peer-to-peer lending, cryptocurrency, and crowdfunding prominent among them. At the household level, a variety of companies offer small-

dollar loans that often help individual consumers pay the bills and keep the lights on in times of need.

The smooth running of this system was disrupted by the financial crisis. A variety of government interventions—such as the Community Reinvestment Act and the actions of the government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac—led lenders to overextend themselves by extending credit to a variety of borrowers who were unlikely to pay it back. Political convenience replaced sound economic judgment in capital provision decisions. A multitude of other factors added to the problem, including the following:

- The moral hazard of deposit insurance
- Zoning restrictions that fueled unsustainable housing price rises
- Problems with bank modeling of risk
- International regulation, such as the Basel Accords on the risk weighting of capital assets, that inaccurately weighted the risk faced by debt holders

When the banks that had extended the most problematic credit began to fail, the federal government's reaction was to prop them up with taxpayer bailouts, thereby socializing their losses and undermining the incentives for avoiding such problems.

The Dodd-Frank Act of 2010 was meant to help solve the financial crisis, but it did nothing to change the situation and made many of the problems that led to the crisis worse. Instead, it doubled down on a bank regulatory regime that failed to prevent the financial crisis. Moreover, Dodd-Frank regulates extraneous matters that had nothing to do with the crisis, such as debit card interchange fees, arbitration agreements in credit card contracts, and accounting for conflict minerals.

Dodd-Frank was sold as addressing the problem of "too big to fail," but failed to do so. It took aim at Wall Street, but it hit Main Street the hardest. The big banks are more dominant than before the crisis. The vastly increased regulatory burden imposed on smaller banks has led many of them to merge to create bigger banks able to withstand the increased regulatory costs. Some banks have closed. Worse, banking regulators have abused their authority to crack down on legal businesses that regulators find distasteful.

Such overregulation has made banks wary of lending to people without perfect credit or to small businesses and startups. Those parties have turned to a burgeoning industry of alternative funds, but are finding those attacked by regulators as well.

Worse, Dodd-Frank created a much too powerful regulator, the Consumer Financial Protection Bureau (CFPB), supposedly to protect the consumer from "faulty" financial products, much like the Consumer Product Safety Commission (CPSC) purportedly protects consumers from faulty household products. However, Dodd-Frank set up the CFPB to operate free from the traditional checks and balances of an independent agency. The recent Supreme Court ruling in *Seila Law LLC v. Consumer Financial Protection Bureau* declared the structure of the bureau to be unconstitutional under the Appointments Clause, which allows the president to replace executive branch agency heads, while Dodd-Frank allowed removal of a bureau director only "for cause." However, the agency remains unaccountable to Congress' power of the purse, since its budget comes automatically from the Federal Reserve.

In 2018, the 115th Congress passed and the president signed the Economic Growth, Regulatory Relief, and Consumer Protection Act (S. 2155), a significant financial reform bill that rolled back some of the Dodd-Frank Act. Despite that, however, a majority of the Dodd-Frank regulatory framework remains intact.

Lawmakers need to do more to allow for the emergence of a competitive, safe, and sound financial system. Congress should further rein in overreaching regulatory agencies and work to rectify the mistakes of Dodd-Frank. Provisions of the Financial CHOICE Act (Creating Hope and Opportunity for Investors, Consumers, and Entrepreneurs), which passed the House in 2017, will go a long way toward addressing many of the problems arising from Dodd-Frank, which are even more burdensome in a troubled economy hit by a pandemic.

The Financial CHOICE Act, which passed the House in 2017, would:

- Assist in capital formation by allowing banks to swap less stringent regulation for holding more capital.
- Reduce the regulatory burden by repealing several provisions of Dodd-Frank, such as the mandate for publicly traded companies to disclose whether their products contain "conflict minerals" from certain areas of the Congo, and the Volcker Rule,

which bars banks from engaging in broadly defined "proprietary trading." Those provisions add substantial compliance costs for community banks and small and midsize public companies, while offering little to no benefit for the safety and soundness of the financial system.
- Make the Federal Reserve more accountable by subjecting its full operations to Government Accountability Office audits, given that the Fed's monetary policy decisions affecting the economy are currently off-limits to GAO oversight.

Further reforms will be needed, including legislation to allow financial technology (FinTech) firms to pursue innovation in financial services without having to deal with the regulatory burdens that banks have to face. The JOBS and Investor Confidence Act, which passed the House in 2018, and other pieces of legislation described in detail in this section could achieve that outcome.

BRING ACCOUNTABILITY TO THE UNACCOUNTABLE CONSUMER FINANCIAL PROTECTION BUREAU

The Dodd-Frank Act of 2010 created the Consumer Financial Protection Bureau ostensibly to protect the consumer from "faulty" financial products, much like the Consumer Product Safety Commission purportedly protects consumers from faulty household products. However, Dodd-Frank gave the CFPB far more power than the CPSC has ever had. In fact, Dodd-Frank set up the CFPB to operate free from the traditional checks and balances of an independent agency by making its director removable by the president only "for cause." The recent Supreme Court ruling in *Seila Law* declared the structure of the bureau to be unconstitutional under the Appointments Clause and struck the for-cause removal protection that covered the bureau's director. However, the agency remains unaccountable to Congress, since its budget comes automatically from the Federal Reserve.

Congress should:

- Make the Consumer Financial Protection Bureau accountable to Congress by subjecting it to the constitutional congressional appropriations process.
- Require the CFPB to submit adequate justification for its rules to the Office of Management and Budget, and to Congress for higher cost rules.
- Enact, separately or as a package, provisions of the Financial CHOICE Act to restructure the CFPB. Specifically, it should:
    - Change the agency's mandate to provide for both consumer protection and competitive markets.
    - Ratify the *Seila Law* decision to make the director removable by the president.
    - Require the CFPB to conduct comprehensive cost–benefit analyses before adopting regulations.
    - Require congressional approval of significant agency-issued regulations before they take effect.

Congress exercises no power of the purse over the CFPB, because the agency's budget—administered essentially by one person, its director—comes from a fixed amount of Federal Reserve revenues set by Dodd-Frank. That sum amounts to approximately $600 million that Congress cannot touch. Furthermore, judicial review of the CFPB's actions is limited, because Dodd-Frank requires the courts to give extra deference to the CFPB's legal interpretations.

The Financial CHOICE Act (Creating Hope and Opportunity for Investors, Consumers, and Entrepreneurs, H.R. 10, 115th Congress) provides a template for how to get rid of burdensome mandates from Dodd-Frank and other legislation, some of which are only tangentially related to financial safety and soundness. It repealed the Volcker Rule, a Dodd-Frank provision that banned banks' proprietary trading, which involves banks using their own capital to trade in securities. The provision was sold as constraining the power of big Wall Street banks, but hit small and midsize banks hard almost immediately after it went into effect by halting the limited trading they had done for decades to hedge risks from making loans. Although some exemptions from the Volcker Rule made it into the bipartisan legislation that President Trump signed in 2018, the provision is still hindering banks and capital markets from providing desperately needed financing to Main Street businesses.

The Financial CHOICE Act also repealed the provision of Dodd-Frank requiring disclosure of "conflict minerals" from the war zones of the Congo used in manufacturing by public companies. However noble its motivation, the mandate had nothing to do with the safety or soundness of the financial system and had harmful unintended effects. Because it is nearly impossible to source many minerals used in manufacturing to their countries of origin, many manufacturers have told their suppliers to avoid *all* regions of the Congo and *all* nearby countries, which has hurt economically the very regions of Africa supporters of the mandate intended to help. And now, that provision may threaten the U.S. medical device supply chain in the wake of the pandemic. As the medical device trade association AdvaMed has written, "Given the wide variety of medical devices, it is unavoidable that conflict minerals will be used as part of US FDA approved medical devices."

Experts: John Berlau, Iain Murray, Matthew Adams

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OPPOSE REGULATORY OVERREACH IN FINANCIAL SERVICES

Since the passage of the Dodd-Frank Act in 2010, banking regulators have gone into overdrive. Community and regional banks have been affected so badly that their rate of closure and merger has doubled since the Act was passed. Only a dozen new banks have been authorized since the financial crisis. Jelena McWilliams, the current director of the Federal Deposit Insurance Corporation, has worked to clear away red tape and made approval of new banks a priority, but years of red tape from the statute and regulations persist. The result is a lack of choice for consumers and a loss of the personal connection between banker and customer.

In the 115th Congress, Congress passed and President Trump signed the bipartisan Economic Growth, Regulatory Relief, and Consumer Protection Act (S. 2155), which lowered the regulatory burden for hundreds of community and regional banks across the country. Unfortunately, Congress has done little since then. The vast majority of Dodd-Frank's regulatory structure remains, strengthening the biggest banks and hampering small and newly formed firms, such as financial technology companies (known colloquially as FinTech).

Congress should:

- Pass the Modernizing Credit Opportunities Act (H.R. 4439, 115th Congress), which would codify the FinTech–bank partnership model.
- Pass the Protecting Consumers' Access to Credit Act (H.R. 3299, S. 1642, 115th Congress), which would codify into law the "valid when made" doctrine, which holds that loans that are considered valid in the state where they are made are not to be considered usurious when sold to out-of-state parties.
- Pass the Financial Services Innovation Act (H.R. 4767, 116th Congress), to create a "regulatory sandbox," to give new innovative firms a period of relaxed regulation.
- Repeal the Durbin Amendment to Dodd-Frank, which put price controls on what banks and credit unions can charge retailers for processing debit cards, and resist attempts to expand that provision to credit cards.

In July 2020, Varo Money, Inc. became the first FinTech company to be granted a federal bank charter. However, not all firms are able to navigate the regulatory maze required to obtain a federal bank charter. And efforts by the Office of the Comptroller of the Currency to create a special-purpose national FinTech charter have been met with

litigation from state regulatory authorities—including the Conference of State Bank Supervisors and the New York State Department of Financial Services—and are at a standstill. Therefore, nonbank FinTech financial service providers must face a patchwork of conflicting federal and state regulations. As result, FinTech providers generally cannot export the interest rates of the states where they are incorporated to customers in other states, as federally chartered banks can, and may be subject to the interest rate caps of every state. That severely limits consumer choices, including the choice to get a loan or cash advance at an interest rate lower than that of a federally chartered bank, but higher than the interest rate cap set by the borrower's particular state.

In addition, the centuries-old "valid when made" doctrine—under which loans considered valid in the state in which they were made could not be considered usurious when sold to an out-of-state party—has recently come under attack. In *Madden vs. Midland*, the Second Circuit Court of Appeals reversed a century of "valid when made" precedent, when it decided that a New York state usury cap could be applied to a loan that a debt collector had bought from North Carolina–based Bank of America. That ruling created massive uncertainty in the lending market that could devastate FinTech innovations, such as peer-to-peer lending. In 2015, when the case was decided, the number of loans made to less creditworthy borrowers in the Second Circuit declined by 52 percent from the previous year, while increasing by 124 percent outside it during the same period. Congressional legislation codifying "valid when made" into law could boost borrowers' and investors' opportunities everywhere.

Finally, the Dodd-Frank Act gave the Federal Reserve the power to impose a price cap on interchange fees, which banks charge merchants when a customer uses the bank's debit card to make a purchase. Interchange fees had nothing to do with the financial crisis, but the cap was included in the Act at the last minute in a provision known as the Durbin Amendment, named after its sponsor, Sen. Dick Durbin (D-IL). The rationale was that merchants would pass along the cost savings to customers, but research shows that those cost savings never materialized, while banks passed along the loss of revenue to all customers in the form of higher fees. The result of the Federal Reserve's price controls has been a reduction in the number of free checking accounts available, an end to debit card rewards programs, and higher costs at the margin of bank service availability that may have pushed up to 1 million people out of the banking system altogether and are putting the banking system out of reach for many young adults starting out as financial consumers.

Extending that measure to cover credit cards—as retail trade associations have opportunistically urged Congress to do when restaurants were hit by the pandemic—would exacerbate the Durbin Amendment's negative effects on consumers and ultimately hurt merchants as well by reducing investment in payment innovations.

Experts: Iain Murray, John Berlau, Matthew Adams

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ALLOW FINANCIAL SERVICE PROVIDERS TO OFFER CONSUMERS INNOVATIVE NEW SERVICES THROUGH THE GROWTH OF FINTECH, CROWDFUNDING, BLOCKCHAIN, AND CRYPTOCURRENCY

The rise of sharing economy platforms, such as Uber and Airbnb, has vastly improved transportation and lodging options for consumers. Financial services are starting to undergo a similar revolution. But just as Uber and Airbnb had to fight outdated taxi and hotel regulations to gain a foothold, so do new financial service providers face a number of antiquated rules that keep their innovations from growing or even getting off the ground.

Congress should:

- Build on the Jumpstart our Business Startups (JOBS) Act by expanding the amount that can be raised through equity crowdfunding from $1 million to $5 million and the contribution level from ordinary investors from $1,000 to $5,000. Those provisions were contained in the original Fix Crowdfunding Act in 2016. Unfortunately, they were dropped in order for the bill to get bipartisan support in the House of Representatives. In 2020, the SEC expanded the amount that could be raised to $5 million and created a formula to increase the amount investors could contribute based on their income or net worth. Congress should codify this rule and increase the raise and contribution level even further.
- Allow special-purpose acquisition companies, known as SPACs, in which lead investors negotiate on behalf of others, to use crowdfunding for ordinary investors. That is a preferred investing method among angel investors and venture capitalists, and would likely bring benefits to ordinary investors as well. That provision was part of the JOBS and Investor Confidence Act, which the House of Representatives passed overwhelmingly in 2018, and the policy was promulgated through regulation in 2020. Congress should codify this policy to help promote access to capital for entrepreneurs and access to wealth building for middle-class investors.
- Expand the “accredited investor” definition beyond the wealth threshold to include those who have proved their sophistication in other ways, such as by passing exams for financial advisers and brokers. That change would be accomplished by the Fair Investment Opportunities for Professional Experts Act, which passed the House with strong bipartisan support in 2016 and 2017, and was included as part of the JOBS and Investor Confidence Act in 2018. In 2020, the Securities and Exchange Commission (SEC) promulgated that policy through regulation, but Congress should still codify this rule and open up “accredited investing” to even more non-wealthy investors.

- Strip the SEC of the power to regulate peer-to-peer loans as securities. This action has bipartisan support, and passed a Democratic-controlled House as a provision of Dodd-Frank in 2010, but was cut from the Senate version of the bill.
- Protect cryptocurrency from overregulation, particularly from the SEC. Pass legislation to make it clear that neither cryptocurrency nor offerings of it are "securities" and should not be regulated by the SEC. Ensure that government has the tools to punish crypto fraud, through traditional anti-fraud agencies, such as the Federal Trade Commission, but otherwise preserve the culture of "permissionless innovation" responsible for the dynamic growth of the Internet and other technologies.
- Repeal the Durbin Amendment. Short of that, ensure that its price controls apply only to physical debit cards and not to electronic methods of payment, and resist efforts to extend the price controls to credit cards.

Crowdfunding—which allows filmmakers, artists, and entrepreneurs to raise funds online from millions of fans on sites like Kickstarter and Indiegogo—is becoming the next frontier in investing across the world. Entrepreneurs are using portals to find investors, without need for intermediaries like brokers and stock exchanges. But in the United States, even individuals raising small amounts have been barred from equity crowdfunding from investors.

The JOBS Act attempted to change that. It has had some success in allowing entrepreneurs more freedom to solicit and advertise to accredited investors—those who meet the Securities and Exchange Commission's threshold of $1 million in assets or $200,000 a year in earnings. The growth of portals that match entrepreneurs with those wealthy investors, such as CircleUp and Israel-based OurCrowd, has exploded.

Unfortunately, after much delay, the JOBS Act provisions implemented by the SEC in 2015 to allow equity crowdfunding from ordinary investors fell woefully short of their stated goal. Although the rules exempt small public companies from some of the more onerous mandates of the Sarbanes-Oxley and Dodd-Frank financial regulation laws, they contain their own thicket of new red tape. The limits on the amount that can be raised that way are so low that they do not justify the compliance costs for many small firms.

Increasingly, crowdfunding has come to rely on offerings of new cryptocurrency—sometimes called "initial coin offerings"—to fund new business ventures. In reward-based crowdfunding, funders receive products like T-shirts or a sample of the product produced. In equity-based crowdfunding, by contrast, the funders are investors who receive a share in the business or a note with a promised rate of return.

Even though digital coins may grow in value more than T-shirts, which are often the rewards for crowdfunding offerings for movies and recordings, those offerings fall into the "rewards-based" rather than equity crowdfunding, as they do not offer funders either a share of the company or a promised return on investment. Yet the SEC, without congressional authority, has sought to claim jurisdiction by labeling digital currency products as "securities."

Such overreach from the SEC, and the threat of overregulation from other agencies, could chill innovation in this sector and related development in improving the blockchain's distributed-ledger technology, which holds promise in everything from health care to land titling. Cryptocurrency creators could become subject to the thickets of red tape facing public companies, such as the mandates of Sarbanes-Oxley and Dodd-Frank. Securities registration rules could also prove highly impractical for blockchain technology if, for instance, now-anonymous individuals who maintain the blockchain have to register as investors or securities issuers.

Peer-to-peer lending has expanded credit options for consumers and small businesses, but its growth has been limited by the SEC's interpretation of 1930s-era securities laws. The SEC treats peer-to-peer loans as "securities" that must be subject to much of the same red tape as a stock or bond offering. As a result, two large companies, Prosper and LendingClub, have a virtual duopoly on peer-to-peer lending for consumers. And unlike in other countries, there is almost no peer-to-peer lending by ordinary investors to small businesses.

The SEC is one of several regulatory agencies vying—or being pushed—to regulate Bitcoin, Ether, XRP, and dozens of other new cryptocurrencies, which offer benefits from currency hedging to faster payments. The subsets of cryptocurrency known as "stablecoins," such as Tether and the Facebook-developed Libra, have the potential to move money faster and reduce transaction costs by tracking a single currency or multiple national currencies. But overregulation threatens to strangle those beneficial innovations before they can become widely adopted and used.

New payment technologies may also be stifled by Dodd-Frank's Durbin Amendment, which puts price controls on what debit card issuers can charge retailers for whom they process payments. According to George Mason University Law Professor Todd Zywicki and other researchers, the Durbin Amendment may have already caused as many as 1 million consumers to lose access to banking services, as the price controls

shifted debit card costs from the nation's biggest retailers to its poorest consumers. If regulators treat new payment methods such as Apple Pay as electronic "debit cards," innovation that could benefit consumers and retailers will be stifled.

Even with the advent of financial technology, or FinTech, some consumers and providers will always value personalized service. Whether to use automated or personal service should be a choice, not a mandate. The Obama Department of Labor's (DOL) fiduciary rule mandated that financial professionals serve savers' "best interests"—as defined by DOL. That rule threatened to impose so many costly mandates on brokers and insurance agents that it would have made it cost-prohibitive for them to work with middle- and low-income savers, who would have been stuck with "robo-advice" instead. Fortunately, in 2018, the Fifth Circuit Court of Appeals threw out the DOL rule as "arbitrary and capricious," and the Trump administration declined to appeal. Congress should make sure that the Department of Labor and other bodies, such as the SEC, do not promulgate new rules that similarly raise costs and reduce choices for middle-class investors.

Experts: John Berlau, Iain Murray

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ADDRESS "TOO BIG TO FAIL"

The 2010 Dodd-Frank financial regulation law was intended to protect taxpayers against the prospect of future bailouts by ending the phenomenon of "too big to fail" financial institutions. Yet many of its provisions actually enshrine "too big to fail" and the potential bailouts for such large financial institutions.

Most prominently, the federal government can designate certain financial firms as "systemically important financial institutions" (SIFIs) that cannot be allowed to fail through the normal bankruptcy or receivership process. The government also has the authority to make creditors of those SIFIs whole, which gives them a competitive advantage in obtaining credit. It is always harmful for the government to pick winners and losers by designating certain firms for additional protection or regulation.

Congress should:

- End the Financial Stability Oversight Council's (FSOC) exemption from the Freedom of Information Act and require it to open its meetings to the public.
- Repeal the FSOC's power to declare firms as too-big-to-fail SIFIs under Dodd-Frank. The Financial CHOICE Act would accomplish this. Short of that, grant both designated firms and their competitors expedited avenues to challenge a SIFI designation in court.
- Phase out the government-sponsored enterprises Fannie Mae and Freddie Mac and do not replace them.
- Until Fannie and Freddie are phased out, end permanently through legislation the Third Amendment profit sweep and ensure that Fannie and Freddie maintain adequate capital.
- Phase out federal deposit insurance. Short of that, bring down the maximum amount insured per deposit from $250,000 to $100,000, the limit that existed for two decades before the financial crisis.
- Shift the burden of proof to bank regulatory agencies when processing applications for new bank entrants. Require those agencies to give specific reasons why a new bank would harm the safety and soundness of the financial system before rejecting its application. Make denial of an application challengeable in court.

The Financial Stability Oversight Council, a secretive bureaucracy created by Dodd-Frank, designates firms as "systemically important financial institutions" through an arbitrary process that lacks rules for designating the firms and that is closed to the public. Some firms embrace the SIFI designation, while others fight it because of the

added regulation it entails. MetLife has successfully challenged its SIFI designation in federal court, while AIG was de-designated as a SIFI in late 2017.

In spite of all that, the government-sponsored enterprises Fannie Mae and Freddie Mac—arguably the most "systemically important" financial entities, given their role in fomenting the financial crisis—have been allowed to operate with virtually no capital buffer. The government's conservatorship of Fannie and Freddie—which began in 2008, when it bailed out the GSEs in exchange for a 79.9 percent ownership stake in each of them—has increased the hazard they pose to taxpayers.

Fannie and Freddie should be phased out and not replaced. There should be no government-sponsored enterprise for mortgages any more than there should be for other types of credit, such as car loans. That phaseout can be done through the method laid out in the Protect American Homeowners and Taxpayers (PATH) Act (H.R. 2767, 113th Congress), which passed the House Financial Services Committee in 2013. Under the PATH Act, the GSEs sell off parts of their portfolios every year until they are completely liquidated. It can also be done by breaking up the GSEs and ending their line of credit with the U.S. Treasury. Any plan must uphold the rule of law by granting shareholders fair compensation for the value of their shares.

Under the Third Amendment, implemented by the Obama administration in 2012, the government confiscated any profit the GSEs made—even after they had paid the government back. That left the GSEs with no capital reserves, which made them vulnerable to even the slightest hiccup in the economy. The Third Amendment "sweep" was an unjust taking from Fannie and Freddie's private shareholders, and is currently being challenged in several lawsuits as unconstitutional. Fortunately, the sweep was halted temporarily by the Treasury Department and the GSEs' regulator, the Federal Housing Finance Agency (FHFA), in 2019 to allow the GSEs to build capital, and then effectively ended permanently in January 2021 when the Third Amendment was replaced by new amendments agreed to by the FHFA and the Treasury Department. However, the threat of bringing it back looms as long as Fannie and Freddie remain in conservatorship, as those running the federal government will always be tempted to use the GSEs as a piggy bank for big-spending programs.

Both shareholders and taxpayers suffered from the Third Amendment's raid of all the GSEs' profits for the U.S. Treasury. Shareholders saw their assets taken without

government compensation and the taking of that capital left the GSEs less financially stable and more prone to a potential bailout. The Housing Finance Restructuring Act of 2016 (H.R. 4913, 114th Congress) would have been an important step in requiring that any profits made by the GSEs be used for rebuilding capital levels to help prevent future taxpayer bailouts. In November 2020, Federal Housing Finance Agency Director Mark Calabria finalized a regulatory capital framework to require Fannie and Freddie to have specified levels of capital and prevent government takeovers of that capital that would bring the GSEs below the prescribed level. Congress should codify that rule into law.

In addition, the GSE's shareholders have never been compensated, although that may change when the Supreme Court rules on the constitutionality of the "sweep" in the upcoming case *Collins v. Mnuchin*. As long as this arbitrary confiscation is allowed to stand or be brought back, a great amount of private capital will be scared off from the mortgage market, leaving government-backed mortgages as the only alternative for prospective home buyers.

To end "too big to fail," Congress must minimize the damage to the financial system of any one bank failing by limiting deposit insurance and allowing more competition. Deposit insurance creates moral hazard, as banks know they can get bailed out if they take too many risks. Meanwhile, depositors lack incentives to monitor the level of risk to which their banks are exposed. The private sector can create more responsive mechanisms of insurance.

Innovative new entrants in the financial services industry should be allowed to compete. Regulators have rebuffed well-managed non-financial firms, such as Walmart and Berkshire Hathaway, in their attempts to open affiliated banks to serve consumers. Virtually no other developed country has such restrictions to entry for the financial services industry. For example, in Great Britain, the retail giant Tesco runs one of the country's largest banks. Keeping banking as an "old boys' club" with few new entrants makes the financial system less competitive and less safe.

Experts: John Berlau, Iain Murray, Matthew Adams

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ALLOW BANKS AND CREDIT UNIONS TO SERVE LEGAL MARIJUANA BUSINESSES

The legal marijuana industry currently stands at $13.8 billion and is projected to grow at a compounded annual rate of 23.9 percent—reaching $66.3 billion by 2025. However, only 30 percent of marijuana-related businesses can use a bank or similar depository institution, leaving most to conduct their dealings in cash. This situation raises public safety concerns, as those businesses become prime targets for robbery. In fact, the Wharton School of Business Public Policy Initiative has found that one in every two marijuana dispensaries has been robbed. Much of that crime is due to the incongruity between state and federal law over the legality of marijuana, which has forced many banks to forgo offering any services to marijuana-related businesses out of fear of federal penalties.

Congress should:

- Pass the Secure and Fair Enforcement (SAFE) Banking Act (H.R. 1595, S. 1200, 116th Congress) to provide safe-harbor protections for financial services firms doing business with the legal marijuana industry, and to provide the same protections to ancillary businesses.

Although a majority of states have legalized marijuana, to varying extents, the federal government still classifies marijuana as a Schedule I drug, the same as heroin. Because of that, banks and credit unions can run afoul of criminal statutes, such as aiding, abetting, or acting as an accessory to crime, if they offer services to businesses in the legal marijuana industry. Given the often risk-averse nature of banks, many are hesitant to offer services to those businesses to avoid possible federal persecution.

Legislation like the SAFE Banking Act would remedy this public safety issue, respect states' sovereignty, and protect the ability of banks and private businesses to engage in free exchange with one another.

Experts: Matthew Adams, John Berlau, Iain Murray

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