READY, SHOOT, AIM — FINANCIAL REFORM FINALIZED

BY KATHLEEN W. COLLINS

IT ALMOST SEEMED appropriate that late on June 30, 2010, the U.S. House of Representatives voted to adopt the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Earlier in the day, also on Capitol Hill, the Financial Crisis Inquiry Commission, charged by Congress in 2009 with investigating and issuing a report on the causes of the financial crisis of 2007-2009, held one of its key open hearings—focusing on American International Group, Inc. and the role of collateralized debt obligations in AIG's near-death experience. The Commission, envisioned by some to be a modern day equivalent of the Pecora investigation, is required by statute to deliver its report to the President no later than December 2010.

The bill was finally sent to President Barack Obama on July 15 after the Senate voted 60-39 to pass the massive overhaul, and it was signed into law on July 21. Highlights of the legislation, 2,319 pages containing bold action, convoluted efforts at compromise and provisions completely unrelated to the recent financial crisis—think interchange fees—include the creation of a Financial Stability Oversight Council and a Bureau of Consumer Financial Protection (BCFP), the elimination of the Office of Thrift Supervision, new resolution authority for systemically important non-banks, and a grab bag assortment of other fixes and tune-ups.

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The time line of implementation of the numerous provisions runs on for years, with numerous additional studies and rulemakings mandated, thus guaranteeing gradual implementation of regulatory changes throughout the decade. Some of the more complex provisions such as the law's treatment of federal preemption in the area of consumer protection, or the actual scope of the BCFP, may not be interpreted for several years, due to the need for BCFP rulemaking in one case, and the likely need for litigation to sort out the jumbled effort to "codify" the *Barnett* Standard, a standard that didn't need to be "codified" unless Congress meant to tamper with it.

Given the unintended consequences sure to develop, the banking industry and country can only hope that the legislation is not a missed opportunity.

The general thrust of the legislation is very much in keeping with the version first proposed by the Obama administration in early 2009, so these views were formed as the acrid smell of the crisis was still in the air, before the Financial Crisis Inquiry Commission was even staffed, before the first books analyzing the crisis were published, before the Federal Reserve implemented rulemaking in the area of subprime lending and credit card disclosures and practices, and before the banking regulators initiated hundreds of formal and informal enforcement proceedings aimed at dramatically changing the regulatory climate.

The Pecora investigation began in March 1932 and ended in May 1934, looking into the causes of the Great Depression of 1929. The legislation that it spawned included the Glass-Steagall Banking Act of 1933, the Securities Act of 1933, and the Securities Exchange Act of 1934.

This time around, for a variety of reasons, Congress appeared determined to push through financial reform legislation before the report of the Financial Crisis Inquiry Commission and before its August recess. Financial reform legislation had gathered momentum on the heels of the Senate Permanent Subcommittee on Investigations hearings in April, which focused on Wall Street, and was propelled by voter anger related to the prolonged effects of the crisis on unemployment, retirement savings, foreclosures, and home values.

History's lessons

History is littered with failed efforts at financial reform. Beginning with the Hoover Commission in 1947 and through the Department of the Treasury Blueprint for a Modernized Regulatory Structure in 2007, at least 15 different commissions, Senate-commissioned papers, House Banking Committee studies, Senate Governmental Affairs Committee proposals, task forces, Treasury Department reports, and comprehensive legislative efforts aimed at restructuring the bank regulatory structure have fallen by the wayside, most frequently the victim of turf battles over plans to eliminate or restructure the

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country's banking agencies. The Gramm-Leach-Blilely Act of 1999 stands out as an exception—and it largely avoided turf warfare by not significantly reducing the powers of any of the banking agencies, though the unitary thrift holding company was eliminated and "functional regulation" put a dent in the Fed's oversight of certain firms and gave the Securities and Exchange Commission (SEC) enhanced authority over bank securities activities at cost to the OCC and FDIC.

But this time around, proponents of reform seized the initiative, and they left the crisis inquisitors in the dust. As Presidential Chief of Staff Rahm Emmanuel wryly noted, "You never let a serious crisis go to waste. What I mean by that is it's an opportunity to do things you couldn't do before." The political anger in question is aimed at incumbents, and the desire to address financial reform before November 2010 trumped any interest in methodically identifying and then addressing the causes of the crisis.

Punishing Wall Street and the big banks for their perceived role in the crisis surely will resonate with voters this fall. Many in Congress also believe that issues like enhanced resolution authority needed to be addressed sooner rather than later in order to avoid another Lehman-like situation should it arise in the short term. And many no doubt believe that the 16 Titles of the Dodd-Frank Act truly address the causes of the crisis and will provide protection against a similar crisis occurring in the future. Given the increased cost of conducting a banking business due to the complexity of regulation and added layers of regulators, the baked-in regulatory uncertainty caused by its preemption and other murky provisions, the upheaval among agency personnel, and the unintended consequences sure to develop, the industry and country can only hope that the legislation is not a missed opportunity. ❏

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