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Why the 'Too Big to Fail' Fight May Get a Revival

By: Victoria Finkle
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The legislative battle over reining in big banks' implicit guarantee is suddenly poised for a comeback.

The issue is expected to reemerge as the Government Accountability Office is said to be finalizing a report on whether big banks get a subsidy based on their size, and vocal critics of "too big to fail" - including Sen. Sherrod Brown, D-Ohio - stand to hold key leadership slots in next year's Congress.

Brown, who last year co-authored a bill with Republican David Vitter to rein in the big banks, is a contender to chair the Senate Banking Committee if Democrats hold the chamber. Observers say he could find a partner in House Financial Services Committee Chairman Jeb Hensarling, R-Texas. Meanwhile, GOP Sen. Richard Shelby, who could also be in line for the Senate panel's gavel, has also opposed "too big to fail."

"The big banks should be worried, especially because this process is going to slip well into 2016, and that's prime presidential election season," said Brandon Barford, a partner at Beacon Policy Advisors.

The GAO report, requested by Brown and Vitter, is likely to be the next catalyst for "too big to fail" opponents. The study, expected to come out later this month or in early August, could validate their claims about big banks enjoying a market subsidy and provide estimates on the size of that subsidy.

But the biggest risk for large banks will come after the November midterm elections. Senate Banking Chairman Tim Johnson, D-S.D., is set to retire at the end of the year, opening up a race to succeed him if Democrats maintain control of the chamber.

If Brown wins the gavel, "too big to fail" is expected to be front and center on his agenda. He would likely take several months to build up his staff and establish a record on the issue through hearings and other investigations, at which point he could also start reaching across the aisle to like-minded Republicans.

"Brown is motivated to actually change the status quo. He's an idealist, but he knows the limits of what government can do," said Barford. "If Brown doesn't have to go out of his way or overtly compromise on something that's a core principle to change the system and neuter the big banks, I believe he would be willing to work hard to get Republicans comfortable with these types of reforms."

Brown and Vitter's bill would have established a sharp hike in minimum capital levels and imposed other growth limits on big banks. But despite drawing ample attention last year, their proposal ultimately lost traction.

Vitter has announced that he will run for governor in his home state of Louisiana in 2015, leaving Brown to find other lawmakers to co-sponsor a similar bill or with whom to craft alternative legislation aimed at ending "too big to fail." One possible partner is Shelby. The Alabama Republican, a former chairman of the Senate committee and a vocal advocate for higher capital standards, could reclaim leadership of the panel if Republicans win control of the Senate.

"Senator Shelby's position in opposition to 'too big to fail' has been consistent and he will continue to fight for financial reform that protects taxpayers and puts an end to bailouts," said Torrie Miller, a Shelby spokeswoman.

Brown could also try and work with Hensarling, a particularly dangerous prospect for big banks. If Brown became chairman of his committee, teaming up with his House counterpart on a bill they both could agree on would significantly increase the likelihood of passage. Spokesmen for Hensarling and Brown did not respond to requests for comment on this story.

Hensarling has previously raised concerns about "too big to fail" in his own committee, and observers said the issue very much remains on his political radar. He could even try to use the issue to expand his political support within the Republican caucus should he seek a higher leadership position in the House.

"Jeb Hensarling could step into the shoes of David Vitter," said Cornelius Hurley, a law professor at Boston University. "Hensarling is the darling of the Tea Party, and the Tea Party is supposedly against big government and out-of-control corporations. It wouldn't be an alliance that would require Hensarling to deviate from his philosophy at all."

Still, despite Brown's common ground with Republicans on ending "too big to fail," he and his counterparts across the aisle may come at the issue from different perspectives, which would create hurdles to crafting a joint bill.

"It is significant that they see the same problem," said Mark Calabria, director of financial regulation studies at the Cato Institute. "But the difficulty is that Brown sees the cause of the problem as the banks, and Shelby or Hensarling sees the problem as the government. The solutions to it are where people start to part ways."

Hensarling, for example, would be unlikely to back legislation to break up the largest institutions, something Brown has pushed for in the past.

Democrats, such as Brown, may take the position that "Dodd-Frank didn't do enough to punish the banks," said one financial services executive, who downplayed the likelihood of lawmakers finding enough common ground to move legislation.

Republicans are focused on "making sure that taxpayer money is never again on the hook for the failure of a financial institution, small or large," the executive said.

But even in the absence of a grand deal, having the issue higher up on the congressional agenda is still likely to create headaches for major financial institutions.

"They will have to expend a lot of energy and money fighting this issue, especially if you have Brown and Hensarling in positions of power," Barford said.