President Trump Begins Efforts to Roll Back Financial Regulations

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Financial Institutions

Throughout his campaign, President Donald Trump promised to curtail financial regulations, particularly those promulgated under the Dodd-Frank Act.[1] President Trump argued frequently that the regulations issued under the act have proven overly burdensome and, among other things, limited job growth. This afternoon, the President took his first formal step in implementing his deregulatory agenda. He signed an executive order that will set in motion a comprehensive review of all financial regulatory requirements—including but not limited to those resulting from Dodd-Frank—and he issued a memorandum to the U.S. Department of Labor (DOL) directing an analysis of whether the rule should be rescinded or revised.

In a press briefing shortly before the signing, White House Press Secretary Sean Spicer described Dodd-Frank as a “disastrous” law that had not addressed the causes of the financial crisis. He also referred to the fiduciary rule as “a solution in search of a problem” that limited the financial services available to consumers.

The tone of the order, the memorandum, and the Administration’s statements notwithstanding, today’s actions will not likely result in the full repeal of the Dodd-Frank Act or even necessarily in the full rescission of the fiduciary rule—but they could lead to very significant changes. The order is limited to administrative activity with respect to federal agencies. Press Secretary Spicer indicated that the Administration intends to work separately with Congress on legislative changes relating to the Dodd-Frank Act.

Executive Order: Review Financial Regulations

The order articulates seven “Core Principles” that will guide the Administration’s approach to financial regulation:

1. Empower Americans to make independent financial decisions and informed choices in the marketplace, save for retirement, and build individual wealth;
2. Prevent taxpayer-funded bailouts;
3. Foster economic growth and vibrant financial markets through more rigorous regulatory impact analysis that addresses systemic risk and market failures, such as moral hazard and information asymmetry;

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010).

4. Enable American companies to be competitive with foreign firms in domestic and foreign markets;
5. Advance American interests in international financial regulatory negotiations and meetings;
6. Make regulation efficient, effective, and appropriately tailored; and
7. Restore public accountability within federal financial regulatory agencies and rationalize the federal financial regulatory framework.

On their face, the principles are generally anodyne, but in light of the history of financial regulation under the Dodd-Frank Act, some significant changes are possible. For example, the third principle's reference to "rigorous regulatory impact analysis" may eventually be cited to require more extensive cost-benefit analyses by the banking regulators before issuing new rules. The fifth principle reflects insertion of President Trump's "America First" mantra in the United States' participation in international financial standards bodies such as the Basel Committee on Banking Supervision and the Financial Stability Board. The last principle, rationalization of the regulatory framework, could even produce a new set of recommendations for agency consolidation—a goal that has been popular but extremely difficult to attain in the past.

The order directs the Treasury Secretary to consult with the heads of the member agencies of the Financial Stability Oversight Council.[2] Within 120 days and periodically thereafter, the Secretary is to issue a report on the extent to which existing law and regulation, as well as several forms of informal agency action, including guidance, reporting and recordkeeping requirements, and other policies, promote the Core Principles and actions being taken to support the Core Principles. The 120-day period is likely to be one of intense lobbying to affect the findings and recommendations in the final report.

The consequences of the report are likely to be felt in both the administrative and legislative arenas. On the administrative side, the President may instruct executive branch departments or agencies (like the DOL) to revise their regulations or take other action to implement the conclusions of the report. While the Administration does not have similar direct power over independent agencies such as the FDIC or the Federal Reserve, it has nevertheless suggested that it can indirectly influence agency action through appropriate appointments—and the heads of the independent federal regulators are nearly all scheduled to be replaced in the next year (some sooner than others). In addition, these agencies may have other reasons to voluntarily work with the Administration to modify at least some regulations that they conclude are not consistent with the Core Principles.

On the legislative side, the report's recommendations could serve as a starting point for new congressional action. However, as noted, the recommendations will not appear for another 120 days, which as a practical matter could mean a delay in congressional consideration of

[2] These agencies are the Commodity Futures Trading Commission, the Consumer Financial Protection Bureau (CFPB), the Federal Deposit Insurance Corporation (FDIC), the Federal Housing Finance Agency, the Board of Governors of the Federal Reserve (the "Federal Reserve"), the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Securities and Exchange Commission.

significant changes to Dodd-Frank; it is unclear how the relevant congressional committees will respond.

Memo to DOL: Revise or Rescind Fiduciary Rule

In conjunction with the executive order, President Trump also issued a memorandum to the DOL on the fiduciary rule, requiring further analysis.[3] The fiduciary rule, which is scheduled to take effect on April 10, 2017, expands the group of advisors that would be considered "fiduciaries," entities that are required to act in the best interests of their clients. In broad terms, an advisor is a fiduciary if he or she makes recommendations to a retirement plan, a participant in the plan, an individual retirement account (IRA) or an IRA owner relating to investments in securities or other investment property, investments after a roll-over, or the management of such investments.[4] Such fiduciaries would be prohibited from engaging in transactions that arguably represent a potential conflict of interest with their clients, for example by establishing commission structures where the fiduciary's compensation would vary on the basis of the advice. Fiduciaries could avoid this prohibition by entering into a contract with the client in which, among other things, the adviser promises to act in the client's best interest and provides disclosures regarding fees and potential conflicts of interest.[5]

The memorandum states that the priority of the Administration in the area of consumer savings is "to empower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses, such as buying a home and paying for college, and to withstand unexpected financial emergences." The memorandum requires DOL to examine the fiduciary rule to determine "whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice."

The examination is to include an economic analysis that considers whether the rule: (i) has harmed or likely will harm investors due to reduced access to savings offerings, product structures, information or related financial advice; (ii) has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and (iii) is likely to cause an increase in litigation and resulting price increases for retirement services. If DOL answers any of these questions in the affirmative—that there will be harm to investors, that there will be disruptions or dislocations, or that litigation will increase—or determines that the rule is inconsistent with the Administration's above priority, then DOL must propose rescission of or revisions to the rule.

While the memo does not direct the Department to rescind the fiduciary rule, it sends a strong signal to the DOL's new leadership, including the nominee for Secretary of Labor, Andy Puzder, that the Trump Administration believes the rule in its current form imposes excessive costs and should be rescinded or revised.

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[3] Definition of the Term ''Fiduciary'';Conflict of Interest Rule—Retirement Investment Advice (hereinafter "Fiduciary Rule"), 81 Fed. Reg. 20,946 (Apr. 8, 2016).
[4] Id. at 20,997-21,002
[5] Id. at 21,002.

A draft of the memorandum that was circulated informally on Friday, February 3, 2017, and that was the subject of several media reports included a directive to DOL to delay the effective compliance date of the fiduciary rule for 180 days beyond the currently scheduled date of April 10, 2017. The final memorandum from the President contains no such directive, and April 10, 2017, remains the effective compliance date.

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If you have any questions concerning the material discussed in this client alert, please contact the following members of our Financial Institutions Group:

John Dugan	+1 202 662 5051	jdugan@cov.com
Rusty Conner	+1 202 662 5986	rconner@cov.com
Eric Mogilnicki	+1 202 662 5584	emogilnicki@cov.com
Michael Nonaka	+1 202 662 5727	mnonaka@cov.com
Mark Plotkin	+1 202 662 5656	mplotkin@cov.com
Michael Reed	+1 202 662 5988	mreed@cov.com
Andrew Smith	+1 202 662 5049	andrewsmith@cov.com
D. Jean Veta	+1 202 662 5294	jveta@cov.com
Stuart Stock	+1 202 662 5384	sstock@cov.com
Edward Yingling	+1 202 662 5029	eyingling@cov.com
Christopher DeCresce	+1 212 841 1017	cdecresce@cov.com
Stephen Humenik	+1 202 662 5803	shumenik@cov.com
Dwight Smith	+1 202 662 5329	dsmith@cov.com
David Stein	+1 202 662 5074	dstein@cov.com
Anne Termine	+1 202 662 5827	atermine@cov.com
Eitan Levisohn	+1 202 662 5309	elevisohn@cov.com
Lucille Bartholomew	+1 202 662 5079	lbartholomew@cov.com
Randy Benjenk	+1 202 662 5041	rbenjenk@cov.com
Amber Charles	+1 202 662 5518	acharles@cov.com
Aimee Ezzell	+1 202 662 5087	aezzell@cov.com
Nikhil Gore	+1 202 662 5918	ngore@cov.com
Jason Grimes	+1 202 662 5846	jgrimes@cov.com
Jamie Heine	+1 202 662 5039	jheine@cov.com
Matthew Wood	+1 202 662 5943	mwood@cov.com

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