



President Trump Begins Efforts to Roll Back Financial Regulations

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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. [February 3, 2017], 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(DOL) ordering a 180-day postponement of its “fiduciary rule” and directing an analysis of whether the rule should be rescinded or revised.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 Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010).

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;
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

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.

appear for another 120 days, which as a practical matter could mean a delay in congressional consideration of 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, delaying the rule's effectiveness and requiring further analysis.³ The fiduciary rule, which had been 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. Advisors that make recommendations relating to buying, holding, selling, or exchanging securities or other investment property by a plan or IRA for a fee or other compensation would be considered fiduciaries.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 Such a contract would give clients a cause of action for breaches of the advisor's fiduciary obligations.

According to a draft of the memorandum (the White House had not posted the final version as of the time of this alert), DOL must postpone the application of the rule for 180 days beyond its originally scheduled effective date of April 10, 2017, and must prepare an economic and legal analysis of the likely impact of the rule. If this analysis concludes that the rule will harm investors, disrupt the retirement services industry, increase litigation (and therefore the price of retirement services), be undermined as the result of certain exemptions, or violate any statute (including the Administrative Procedure Act) or that the rule is inconsistent with Administration policy, 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 incoming-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.

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.