Clients&FriendsMemo

The Trump Administration: President Trump Issues Executive Actions on Dodd-Frank and the DOL Fiduciary Rule

February 6, 2017

On February 3, 2017, President Trump signed two executive actions intended to provide a framework for scaling back the Dodd-Frank Act ("**Dodd-Frank Act**")[1] and rescinding the Department of Labor's "fiduciary rule."[2]

As we have previously written,[3] President Trump and the Republican-majority Congress have various levers to rapidly revise and reverse the previous administration's policies, short of legislative change. Such mechanisms include the Congressional Review Act[4] and various forms of executive action, including executive orders, discretionary agency directives and enforcement decisions. These executive actions are likely the beginning of a series of changes intended to reduce the regulatory burden on U.S. financial markets.

This memorandum discusses the two executive actions and their significance within a broader agenda to reshape financial regulation.

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1 Presidential Executive Order on Core Principles for Regulating the United States Financial System (Feb. 3, 2017) ("**DF Executive Order**"), *available at* https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-executive-order-core-principles-regulating-united-states.

2 Presidential Memorandum on Fiduciary Duty Rule (Feb. 3, 2017) ("**Fiduciary Memo**"), *available at* https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule.

3 *The Trump Administration: Change by Executive Action and Inaction* (Dec. 9, 2016) and *The Trump Administration: Potential Levers of Regulatory Change Affecting the Commodities Markets* (Dec. 21, 2016).

4 *See*, *e.g.*, CADWALADER CABINET, *House Votes to Nullify SEC Resource Extraction Rule* (Feb. 2, 2017).

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Dodd-Frank

Despite indications from the President and the press that the executive order would materially scale back the Dodd-Frank Act,[5] it does not do so (at least not directly). Rather, the executive order sets out six "Core Principles" guiding the Trump Administration's policy towards financial regulation. The executive order then directs the Secretary of the Treasury, along with the heads of the FSOC member agencies (*i.e.*, the Federal Reserve, the FDIC, the OCC, the CFPB, the SEC, the CFTC, the NCUA, and the FHFA) to issue a report within 120 days, and periodically thereafter, addressing whether existing laws, regulations, and similar requirements are consistent with these Core Principles, and identifying any such laws, regulations or similar requirements that inhibit those Core Principles.

The Core Principles are broadly stated and do not identify any particular aspect of existing financial laws or regulations that is a likely target for change. The Core Principles are:[6]

- empower Americans to make independent financial decisions and informed choices in the marketplace, save for retirement, and build individual wealth;
- prevent taxpayer-funded bailouts;
- 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;
- enable American companies to be competitive with foreign firms in domestic and foreign markets;
- advance American interests in international financial regulatory negotiations and meetings; and
- restore public accountability within Federal financial regulatory agencies and rationalize the Federal financial regulatory framework.

Notably absent from the Core Principles is any specific indication as to the President's direction towards the Consumer Financial Protection Bureau, reform of government-sponsored entities (*i.e.*, Fannie Mae and Freddie Mac), the Volcker Rule, or small bank relief – as had previously been anticipated.

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[5] At an event before the release of the executive order, the President was quoted as saying, "We expect to be cutting a lot out of Dodd-Frank . . . ." *See*, *e.g.*, NEW YORK TIMES, *Trump Moves to Roll Back Obama-Era Financial Regulations* (Feb. 3, 2017).

[6] There may be a seventh Core Principle. The DF Executive Order, as published on the White House web site, jumps from clause (e) to (g). According to a version that circulated in press reports, clause (f) would have said, "make regulation efficient, effective, and appropriately tailored; and".

The true direction of the President's financial reform agenda remains somewhat unclear, and likely will not become clearer until the President appoints (and the Senate confirms) new leaders of the various "independent" financial regulatory agencies.[7] Further, it should not be overlooked that the most significant financial reform cannot be accomplished in the absence of legislation or extensive agency rulemaking, and thus is unlikely to occur in the near term. Any near-term impact will be more subtle, as the new agency heads are appointed and begin to adopt supervisory and enforcement policies regarding existing laws and regulations that may deviate from those policies followed by President Obama.[8]

Fiduciary Rule

President Trump also issued the Fiduciary Memo directing the Secretary of Labor[9] to reexamine the "fiduciary rule" adopted by the Department of Labor ("**DOL**"), which is set to become applicable on April 10, 2017.[10] The rule, issued in final form in April 2016, significantly expands the circumstances in which persons will be considered "fiduciaries" to plans and individual retirement accounts under the Employee Retirement Income Security Act of 1974 and Section 4975 of the Internal Revenue Code of 1986 in connection with the provision of investment advice.

The Fiduciary Memo states that among President Trump's priorities are 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 emergencies."

The Fiduciary Memo then directs the Secretary of Labor to examine whether the Fiduciary Rule would adversely impact investors. As part of the examination, the Secretary is directed to prepare an updated economic and legal analysis concerning the likely impact of the Rule which will consider, among other things: (i) whether the Rule has harmed or is likely to harm investors by limiting access to certain retirement offerings, products and advice, (ii) whether the anticipated applicability of the Rule has resulted in dislocations or disruptions within the retirement services industry, or (iii) whether the Rule is likely to cause an increase in litigation and prices to access retirement services.

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7 Unlike the executive agencies (*e.g.*, the Department of the Treasury or the Department of Labor), the President has more limited direct power to shape the agendas of independent regulatory agencies (*e.g.*, the Fed, the SEC and the CFTC).

8 *The Trump Administration: Change by Appointment* (Nov. 18, 2016).

9 President Trump has picked Andrew Puzder (currently the CEO of CKE Restaurants) to serve as Secretary of Labor, but Mr. Puzder has yet to be confirmed by the Senate. Currently, the acting Secretary is Edward C. Hugler.

10 81 Fed. Reg. 20946 (Apr. 8, 2016) ("**Fiduciary Rule**" or the "**Rule**").

If the Secretary affirms any of the negative effects listed above, or if it determines that the Fiduciary Rule is otherwise inconsistent with any of the stated priorities in the Fiduciary Memo, he is directed to publish a proposed rule that rescinds or revises the Fiduciary Rule. The Fiduciary Memo does not include specific information regarding a delay of the applicability date of the rule. Acting Secretary of Labor Hugler separately announced that the DOL is considering legal options to delay the Fiduciary Rule's applicability date in order to comply with the President's memorandum.[11]

Conclusion

While neither of the executive actions taken by President Trump directly modify existing financial regulation or "roll back" the Dodd-Frank Act, they represent a strong initial move to set a regulatory agenda. Moreover, while the impact on independent agency rulemaking and implementation is likely to be felt over time, the DF Executive Order demonstrates a clear intent to use the bully pulpit as well as appointment power over agency heads to set the regulatory agenda in broad but direct terms.

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[11] News Release, *US Department of Labor to Evaluate Fiduciary Rule* (Feb. 3, 2017).