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President Trump Takes Initial Steps Aimed at Reshaping Financial Industry Regulation

Executive Order Requires Fundamental Reassessment of Existing Rules; Labor Department to Reexamine its "Fiduciary Rule"

SUMMARY

Yesterday, President Trump issued an executive order (the "Executive Order") setting forth seven "Core Principles" to serve as the basis for the Administration's financial services regulatory policy. The Executive Order directs the Secretary of the Treasury to consult with the heads of other financial regulatory agencies to evaluate how existing laws, regulations and other aspects of the current financial regulatory framework promote or inhibit the Core Principles and what actions have been, and are being, taken to promote and support the Core Principles. In a separate memorandum (the "Memorandum") to the Secretary of Labor, President Trump expressed concern with the so-called "Fiduciary Rule" issued by the Department of Labor in April 2016.[1] The Memorandum directs the Labor Secretary to examine the Fiduciary Rule against specific standards and to update the Department of Labor's economic and legal analysis accordingly. Depending on the outcome of the examination, the Labor Secretary is directed, as appropriate, to propose revisions to the Rule or to rescind it altogether.

BACKGROUND

During the presidential campaign and afterwards, President Trump has criticized the post-crisis regulatory framework that has emerged following the 2010 passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). He has stated that the Dodd-Frank Act has stifled job creation and inhibited banks' ability to lend. Shortly after the November 8, 2016 election, then President-elect Trump's transition team pledged "to dismantle the Dodd-Frank Act and replace it with new policies to encourage economic growth and job creation."

THE EXECUTIVE ORDER

The Executive Order provides that "[i]t shall be the policy of this Administration to regulate the United States financial system in a manner consistent with" seven Core Principles:

- 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;
- Make regulation efficient, effective and appropriately tailored; and
- Restore public accountability within Federal financial regulatory agencies and rationalize the Federal financial regulatory framework.

The Executive Order directs the Treasury Secretary to consult with the heads of all member agencies of the Financial Stability Oversight Council ("FSOC")[2] and, within 120 days of the Executive Order, to deliver a report to the president on:

- the extent to which existing law, treaties, regulations, guidance, reporting and recordkeeping requirements and other government policies promote the Core Principles;
- what actions have been taken, and are currently being taken, to promote the Core Principles; and
- what laws, treaties, regulations, guidance, reporting and recordkeeping requirements and other government policies inhibit Federal regulation of the United States financial system in a manner consistent with the Core Principles.

The Treasury Secretary is also directed to report to the president periodically thereafter following these same principles.

FIDUCIARY RULE MEMORANDUM

In the Memorandum to the Labor Secretary, President Trump states that one of his Administration's top priorities 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 emergencies." The Memorandum expresses a concern that the Fiduciary Rule, currently slated to become effective beginning in April 2017, "may significantly alter the manner in which Americans can receive financial advice, and may not be consistent with the policies of my Administration."

Accordingly, the Memorandum directs the Labor Secretary to examine whether the Fiduciary Rule "may adversely affect the ability of Americans to gain access to retirement information and financial advice" and to prepare an "updated economic and legal analysis" of the likely impact of the Fiduciary Rule, considering the following:

- Whether the anticipated applicability of the Fiduciary Rule has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information or related financial advice;
- Whether the anticipated applicability of the Fiduciary Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and
- Whether the Fiduciary Rule is likely to cause an increase in litigation and an increase in the prices that investors and retirees must pay to gain access to retirement services.

If the Labor Secretary makes an affirmative determination with respect to any of the foregoing or concludes for any other reason that the rule is inconsistent with the stated priority noted above, the Labor Secretary is directed to propose a new rule that will, as appropriate, rescind or revise the Fiduciary Rule. Unlike the Executive Order, the Memorandum does not impose a timeframe for the required review.

In response to the Memorandum, Acting Labor Secretary Edward Hugler noted that "[t]he Department of Labor will now consider its legal options to delay the [applicability date of the Fiduciary Rule] as we comply with the President's memorandum."[3]

TAKE-AWAYS

The Executive Order and Memorandum appear to be a reflection of the Trump Administration's stated intention to reshape the Dodd-Frank Act and the financial regulatory framework that has developed since its enactment. The Executive Order's broadly-framed Core Principles provide few details on the specific course the Trump Administration's financial regulatory reform initiative will ultimately take. However, statements made by Gary Cohn, the Director of the White House National Economic Council, may provide some insight into the Administration's approach and priorities.

In an interview with the *Wall Street Journal* preceding the release of the Executive Order,[4] Mr. Cohn described Friday's actions as a "table setter" for many things to come and articulated several policy positions, including:

- that there must be further discussion "about whether [the Orderly Liquidation Authority ("OLA") in Title II of the Dodd-Frank Act] works and whether OLA should ever be triggered";
- that further review is necessary to determine whether "nonbanks should be [systemically important financial institutions ("SIFIs")]" and that the Trump Administration will "probably instruct the regulatory authorities that designate SIFIs not to designate SIFIs";
- that the banking system needs to be "unlock[ed]" so that, instead of "hoard[ing]" capital, spending money on regulation and dealing with "four or five different consumer regulatory bodies," banks can use their capital for the benefit of consumers and the larger economy;

- that, with respect to capital requirements, banks in the United States are "way, way, way—and you can put as many 'ways' in there as you want—way out front" of European banks, which he argues has put U.S. banks at a "huge disadvantage" vis-à-vis their European competitors; and
- that a reassessment of the Volcker Rule is in order.

Although the Memorandum expressly asks the Labor Secretary only to reexamine the Fiduciary Rule, Mr. Cohn made clear that the White House "think[s] it is a bad rule."

Friday's actions point to the potential for significant regulatory change for financial institutions. Nonetheless, Mr. Cohn stressed that this initiative is not aimed at dismantling the entire post-crisis regulatory architecture, but is instead intended to recalibrate the equilibrium between promoting financial stability on the one hand and encouraging bank lending, economic growth and job creation on the other.

As described in our November 15, 2016 Memorandum to Clients, two primary blueprints for financial regulatory reform exist in the form of two legislative proposals that Republican lawmakers advanced in the previous Congress[5]:

- ***The "Financial CHOICE Act of 2016" ("CHOICE Act").***[6] This legislation was authored by Chairman Hensarling (R-TX) in June 2016 and subsequently approved by the House Financial Services Committee on a largely party-line vote. Notably, the CHOICE Act shares a number of elements in common with the "Better Way" policy agenda put forth by Speaker of the House of Representatives Paul Ryan (R-WI), also in June 2016. In particular, the CHOICE Act and "Better Way" agenda include parallel proposals to: provide significant regulatory relief for highly capitalized, well-managed financial institutions; eliminate the Dodd-Frank Act provisions regarded as codifying "too big to fail"; fundamentally reform the governance and structure of the Consumer Financial Protection Bureau; eliminate the authority of FSOC to designate nonbank financial companies as SIFIs; generally subject federal regulatory agencies and their rulemaking activities to a greater degree of congressional oversight; repeal the Volcker Rule; repeal certain recent rulemakings regarded as limiting consumer choice, including regulations promulgated by the CFPB and the Fiduciary Rule; and provide regulatory relief for community banks and credit unions.
- ***The Financial Regulatory Improvement Act of 2015 ("FRIA").***[7] Authored by Senate Banking Committee Chairman Richard Shelby in 2015 and subsequently approved by the Committee on a party-line vote, FRIA is generally more limited in scope than the CHOICE Act, but the two bills overlap in a number of respects, potentially signaling areas of bicameral support. Among the key provisions of FRIA are: changes to the process for designation of banks and nonbank financial companies as SIFIs; changes to the operations, structure and accountability of the Federal Reserve System; measures that would relax regulations on smaller institutions, including with respect to the Volcker Rule; and provisions pertaining to the regulation of the insurance market.

It remains to be seen, however, whether the Administration will make its own legislative proposal.

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[1] "Definition of the Term 'Fiduciary'; Conflict of Interest Rule—Retirement Investment Advice," 81 Fed. Reg. 20,946 (Apr. 8, 2016). For further information, see our Client Memorandum, *DOL Releases Final 'Investment Advice' Regulation: Final Regulation Will Significantly Impact the Manner in Which Investment Advice Is Provided to Retirement Plans and IRAs and Will Often Increase the Litigation Risk of Providing Such Advice*, dated April 20, 2016, *available at* https://www.sullcrom.com/dol-releases-final-investment-advice-regulation-final-regulation.

[2] In addition to the Treasury Secretary, the other FSOC member agency heads are the Chairman of the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Director of the Consumer Financial Protection Bureau, the Chairman of the Securities and Exchange Commission, the Chairperson of the Federal Deposit Insurance Corporation, the Chairperson of the Commodity Futures Trading Commission, the Director of the Federal Housing Finance Agency and the Chairman of the National Credit Union Administration Board.

[3] U.S. Department of Labor, *US Department of Labor to Evaluate Fiduciary Rule* (Feb. 3, 2017), *available at* https://www.dol.gov/newsroom/releases/opa/opa20170203.

[4] Michael C. Bender & Damian Paletta, Donald Trump Plans to Undo Dodd-Frank Law, Fiduciary Rule: White House Adviser Gary Cohn Says Banks Burdened by Rules Added After Financial Crisis, Wall Street Journal (Feb. 3, 2017), *available at* https://www.wsj.com/articles/trump-moves-to-undo-dodd-frank-law-1486101602?tesla=y.

[5] *See* our Client Memorandum, *2016 U.S. Presidential and Congressional Elections: Preliminary Observations and Potential Implications for Financial Services Legislation and Regulation*, dated November 15, 2016, *available at* https://www.sullcrom.com/2016-us-presidential-and-congressional-elections-preliminary-observations-and-potential-implications-for-financial-services-legislation-and-regulation.

[6] For a detailed overview of the CHOICE Act's provisions, *see* House Committee on Financial Services, *The Financial CHOICE Act: Creating Hope and Opportunity for Investors, Consumers, and Entrepreneurs* (June 23, 2016), *available at* http://financialservices.house.gov/uploadedfiles/financial_choice_act_comprehensive_outline.pdf.

[7] *See* our Client Memorandum, *Banking Committee Chairman Releases Discussion Draft of "The Financial Regulatory Improvement Act of 2015,"* dated May 13, 2015, *available at* https://www.sullcrom.com/senate-regulatory-relief-proposal-banking-committee-chairman-releases-discussion-draft-of-the-financial-regulatory-improvement-act-of-2015.

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CONTACTING SULLIVAN & CROMWELL LLP

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CONTACTS

New York

John E. Baumgardner, Jr.	+1-212-558-3866	baumgardnerj@sullcrom.com
Thomas C. Baxter Jr.	+1-212-558-4324	baxtert@sullcrom.com
Jason J. Cabral	+1-212-558-7370	cabralj@sullcrom.com
Whitney A. Chatterjee	+1-212-558-4883	chatterjeew@sullcrom.com
H. Rodgin Cohen	+1-212-558-3534	cohenhr@sullcrom.com
Elizabeth T. Davy	+1-212-558-7257	davye@sullcrom.com
Mitchell S. Eitel	+1-212-558-4960	eitelm@sullcrom.com
Michael T. Escue	+1-212-558-3721	escuem@sullcrom.com
William G. Farrar	+1-212-558-4940	farrarw@sullcrom.com
Jared M. Fishman	+1-212-558-1689	fishmanj@sullcrom.com
C. Andrew Gerlach	+1-212-558-4789	gerlacha@sullcrom.com
Wendy M. Goldberg	+1-212-558-7915	goldbergw@sullcrom.com
Charles C. Gray	+1-212-558-4410	grayc@sullcrom.com
Jeffrey D. Hochberg	+1-202-558-3266	hochbergj@sullcrom.com
Shari D. Leventhal	+1-212-558-4354	leventhals@sullcrom.com
Marion Leydier	+1-212-558-7925	leydierm@sullcrom.com
Erik D. Lindauer	+1-212-558-3548	lindauere@sullcrom.com
Andrew S. Mason	+1-212-558-3759	masona@sullcrom.com
Mark J. Menting	+1-212-558-4859	mentingm@sullcrom.com
Camille L. Orme	+1-212-558-3373	ormec@sullcrom.com
Rebecca J. Simmons	+1-212-558-3175	simmonsr@sullcrom.com

William D. Torchiana	+1-212-558-4056	torchianaw@sullcrom.com
Donald J. Toumey	+1-212-558-4077	toumeyd@sullcrom.com
Marc Trevino	+1-212-558-4239	trevinom@sullcrom.com
Mark J. Welshimer	+1-212-558-3669	welshimerm@sullcrom.com
Michael M. Wiseman	+1-212-558-3846	wisemanm@sullcrom.com

Washington, D.C.

Rebecca S. Coccaro	+1-202-956-7690	coccaror@sullcrom.com
Eric J. Kadel, Jr.	+1-202-956-7640	kadelej@sullcrom.com
William F. Kroener III	+1-202-956-7095	kroenerw@sullcrom.com
Stephen H. Meyer	+1-202-956-7605	meyerst@sullcrom.com
Jennifer L. Sutton	+1-202-956-7060	suttonj@sullcrom.com
Andrea R. Tokheim	+1-202-956-7015	tokheima@sullcrom.com
Samuel R. Woodall III	+1-202-956-7584	woodalls@sullcrom.com

Los Angeles

Patrick S. Brown	+1-310-712-6603	brownp@sullcrom.com
William F. Kroener III	+1-310-712-6696	kroenerw@sullcrom.com

London

George H. White III	+44-20-7959-8570	whiteg@sullcrom.com

Paris

William D. Torchiana	+33-1-7304-5890	torchianaw@sullcrom.com

Melbourne

Robert Chu	+61-3-9635-1506	chur@sullcrom.com
Burr Henly	+61-3-9635-1508	henlyb@sullcrom.com

Tokyo

Keiji Hatano	+81-3-3213-6171	hatanok@sullcrom.com