February 6, 2017

The Trump Administration Launches its (De)Regulatory Initiatives

Implications for the Financial Sector and All Public Companies

By Catherine Dixon, Sarah Downie, David Wohl, Ariel Kronman, Derrick Cephas and Ellen Odoner

On February 3, 2017, President Trump signed an executive order laying out his Administration's "Core Principles" for the regulation of the US financial system. The executive order is available here. The executive order directed the Secretary of the Treasury to consult with the heads of key financial regulatory agencies and report to the President on the extent to which existing laws, regulations and policies promote or inhibit Federal regulation of the US financial system in a manner consistent with the Core Principles. While the President's order did not specifically name the Dodd–Frank Wall Street Reform and Consumer Protection Act and the regulations promulgated thereunder, it is widely assumed that part of the order's intent is to identify provisions of that Act that are viewed as inconsistent with the Core Principles as the first step of an effort to repeal or modify them.

On the same day, President Trump also issued a Presidential memorandum directing the Secretary of Labor to re-examine the "fiduciary duty rules" to determine whether implementation would adversely affect the ability of Americans to gain access to retirement information and financial advice. It is possible that the rules may be indefinitely delayed, revised or rescinded as a result of the directive. The memorandum is available here.

Backdrop of the February 3 Presidential Actions

The President's actions on February 3 are part of a swift and sweeping series of deregulatory initiatives undertaken by the Trump Administration, Congress and the reconstituted Securities and Exchange Commission and Commodities Futures Trading Commission. They follow closely on the heels of a January 20, 2017 memorandum from White House Chief of Staff Reince Priebus imposing a freeze on new and pending regulations to allow review by an executive department or agency head appointed by the new President, and a January 30, 2017 executive order entitled "Reducing Regulation and Controlling Regulatory Costs." The executive order is available here.

Under the January 30 executive order, whenever an executive department or agency proposes a new regulation, it must identity at least two existing regulations to be repealed so that "any new incremental costs associated with" a new regulation are offset by eliminating existing regulatory costs. Moreover, under the executive order, each agency will receive an annual "incremental cost" budget for new regulations—which for fiscal 2017, currently underway, is zero. The Director of the Office of Management and Budget is directed to provide guidance to the covered agencies on complying with these requirements. Several days later, on February 2, the White House acknowledged that the January 30 executive order does not apply to independent regulatory agencies such as the SEC and CFTC. However, the February 2 clarification "encourage[s]" such agencies "to identify existing regulations that, if repealed or revised, would achieve cost savings that would fully offset the costs of new significant regulatory actions."

The Core Principles

The Administration's six Core Principles for financial regulation are to:

- 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.

The February 3 executive order does not have an immediate impact on any specific financial sector regulations. Instead, it directs the Secretary of the Treasury to consult with the heads of the member agencies of the Financial Stability Oversight Council and report back within 120 days (and periodically thereafter) on the extent to which existing laws, treaties, regulations, guidance, reporting and recordkeeping requirements and other Federal government policies promote the Core Principles, and what actions have been taken, and are currently being taken, to promote and support these principles. The report, and all subsequent reports, also must identify any of the foregoing "that inhibit Federal regulation of the United States financial system in a manner consistent with the Core Principles."

The members of the FSOC include, among others, the Department of the Treasury, the Board of Governors of the Federal Reserve, the Consumer Financial Protection Bureau, the Federal Deposit Insurance Corporation, the SEC and the CFTC.

Directive on the DOL Fiduciary Rules

In April 2016, the Department of Labor finalized rules that subject a wide group of investment advisers to fiduciary standards under ERISA in connection with providing so-called investment "recommendations." At the time of issuance, the rules provided for an effective date of April 10, 2017. The rules are aimed primarily at retail-level investment advisers; however, because of their expansive definition of "investment advice," they may affect firms managing pools of assets that include ERISA-subject retirement savings, including private equity sponsors and hedge fund managers. In particular, the rules may affect the relationship between sponsors/managers and potential ERISA-subject investors during the fundraising process. An exemption known as the "sophisticated investor" exemption from the rules may assist sponsors/managers in mitigating the effect of the rules. .

Under the Presidential memorandum, the Secretary of Labor is directed to prepare an updated analysis concerning the likely impact of the rules. The Presidential memorandum appears effectively to supersede the effect of the January 20 memorandum issued by White House Chief of Staff Priebus, which had delayed the effective date of the rules by 60 days. Under the Presidential memorandum, the effective date of the rules will be postponed until the analysis under that memorandum is complete and a determination has been made whether to implement the rules or a modified version thereof in light of the conclusions reached under the analysis.

The analysis is to consider, among other things, whether the rules are likely to reduce investors' access to retirement savings products or information, result in disruptions in the retirement services industry adversely affecting retirement investors, or increase prices that retirement investors must pay to gain access to retirement services. Prior to the issuance of the rules in April 2016, the retirement services industry had cited in hearings before the Department of Labor that the rules could increase the cost of access to advice if, as a result of the rules, retirement services firms switched their business model to a fee based on the amount of assets held with the firm instead of a commission based on the number of trades made by a firm broker.

In the event the rules are revised as a result of the Presidential memorandum, we would expect that a revised version of the rules would continue to provide for a “sophisticated investor” exemption applicable to institutions such as private equity sponsors and hedge fund managers.

Structured Finance and Swaps

A number of Dodd-Frank regulations affecting the structured finance market and the trading of derivatives have gone into effect recently or are scheduled to go into effect on March 1, 2017 (subject to the freeze order). Among the most onerous of these are a requirement imposed by the SEC that CLO managers acquire 5% of the securities of each CLO that they manage (which could indirectly affect corporate borrowing costs), and the requirement imposed by the CFTC and bank regulators, such as the Federal Reserve Board, that many types of entities post margin in connection with their swaps. The new Chairman of the CFTC has indicated that he may delay implementation of the margin rules for at least some classes of entities.

Beyond that, while these regulations will raise the cost of doing business for various entities, and industry groups have begun working to achieve a relaxation of the regulations, the Administration has not, to date, indicated any proposed changes to these regulations. The impending consultation by the Secretary of the Treasury with heads of the CFTC, SEC and other FSOC members, in accordance with the February 3 executive order, could provide a forum for discussion of additional deregulatory initiatives that might affect existing or future Dodd-Frank rules relating to asset-backed issuers and margin requirements for swaps and securities-based swaps.

Implications Beyond the Financial Services Sector

While the February 3 executive order would not appear to have a direct impact on the many public companies outside the financial services sector, there may be longer-term repercussions for SEC rulemaking affecting all public companies should Acting SEC Chair Michael Piwowar or his designated successor Jay Clayton (if confirmed by the Senate) decide to follow the President’s Core Principles. This could occur, for example, in the context of the mandated consultation by the Treasury Secretary with the members of the FSOC. In addition, although the “2 for 1” executive order of January 30 does not apply to independent agencies such as the SEC and the CFTC, the newly appointed Chairs of those agencies, who have the power to set the rulemaking agenda, are free to follow White House policy directives voluntarily.

On January 31, 2017, SEC Acting Chair Piwowar announced that he had directed the staff to reconsider the “misguided” rule on conflict minerals adopted by the SEC under a Dodd-Frank provision. In 2014, the agency partially stayed compliance with certain portions of the rule pending the outcome of litigation that has been remanded by the U.S. Court of Appeals for the District of Columbia to a federal district judge in sitting in Washington, D.C. Mr. Piwowar’s action does not appear to relieve companies of any obligation to file Form SDs and accompanying Conflict Minerals Reports for the calendar year ended December 31, 2016, but does indicate that significant regulatory change at the SEC may be on the horizon. Other Dodd-Frank-mandated SEC rules potentially on the chopping block are the executive compensation rules (pay ratio, which has been adopted, and pending proposals to implement disclosure requirements relating to pay-for-performance, hedging policy and clawbacks).

On February 3, 2017, the Senate joined the House of Representatives in acting under the seldom-used Congressional Review Act of 1996 to revoke the SEC’s Dodd-Frank-mandated rule – which otherwise would have been effective for fiscal years ending on or after September 30, 2018 – requiring oil, gas and mining companies to report any payment of $100,000 or more made to US and/or foreign governmental authorities in connection with the commercial development of oil, gas or minerals anywhere in the world. President Trump is widely expected to approve this joint resolution (H.J. Res. 41).

Although technically the relevant provision of Dodd-Frank still requires the agency to propose another version of the resource extraction disclosure rule, a Republican-led SEC may opt to delay long enough to see the statute itself repealed as part of the larger Dodd-Frank repeal initiative expected to be unveiled quickly by House Republicans in the form of what some are calling "CHOICE Act 2.0," a revised version of the Financial CHOICE Act introduced last year by House Financial Services Committee Chair Jeb Hensarling (R-Tx). According to press accounts, the new legislation would rescind or significantly relax, among other Dodd-Frank provisions, those specifically requiring or permitting SEC rulemaking relating to oil/gas/minerals extraction payments to governmental authorities, conflict minerals, proxy access and executive compensation. In this regard, it may be worth noting that the "Key Principles" of the original Financial CHOICE Act bear some similarity to the Core Principles set forth in the President's February 3 executive order.

* * *

Please contact any of the authors or your regular contact at Weil, Gotshal & Manges LLP:

Catherine T. Dixon	View Bio	cathy.dixon@weil.com	+1 202 682 7147
Sarah Downie	View Bio	sarah.downie@weil.com	+1 212 310 8030
David Wohl	View Bio	david.wohl@weil.com	+1 212 310 8933
Ariel Kronman	View Bio	ariel.kronman@weil.com	+1 212 310 6741
Derrick Cephas	View Bio	derrick.cephas@weil.com	+1 212 310 8797
Ellen J. Odoner	View Bio	ellen.odoner@weil.com	+1 212 310 8438