

Client Update

Executive Order and DOL Memo Signal Shift in Federal Financial Regulatory Agenda

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On February 3, 2017, President Trump issued an Executive Order (“EO”), titled Core Principles for Regulating the United States Financial System, directing the Treasury Secretary to consult with the member agencies of the Financial Stability Oversight Council (“FSOC”) and report on whether the existing legal and regulatory framework promotes certain “Core Principles” set out in the EO.¹ In addition to the EO, the President issued a Memorandum for the Secretary of Labor (“Memo”) directing the Labor Department (“DOL”) to examine more closely the legal and economic impact of the fiduciary duty rule (“DOL Rule”).²

Both the EO and the Memo signal the new administration’s push to ease federal financial regulatory restrictions promulgated in the wake of the Dodd-Frank Act. In this client update, we discuss the EO and the implications for the financial services industry, as well as the changes to the DOL Rule that could result from the Memo’s directives.

THE EXECUTIVE ORDER, ITS IMPLICATIONS AND THE ROLE OF THE FSOC

We view this EO as the opening salvo in a multi-pronged effort by the administration to reverse the swing of the regulatory pendulum. The EO sets out seven Core Principles, which broadly cover key areas in the financial regulatory framework. The EO’s enumerated principles are:

¹ Exec. Order, *Core Principles for Regulating the United States Financial System* (Feb. 3, 2017), <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, Memorandum to the Sec. of Labor (Feb. 3, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule>.

- Empowering Americans to make independent financial decisions and informed choices in the marketplace, save for retirement, and build individual wealth;
- Preventing taxpayer-funded bailouts;
- Fostering 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;
- Enabling American companies to be competitive with foreign firms in domestic and foreign markets;
- Advancing American interests in international financial regulatory negotiations and meetings;
- Making regulation efficient, effective, and appropriately tailored; and
- Restoring public accountability within federal financial regulatory agencies and rationalizing the federal financial regulatory framework.

As outlined by the EO, the Treasury Secretary is required to consult with the FSOC member agencies to prepare a report within 120 days of the publication of the EO outlining how the current financial regulatory framework supports, promotes or inhibits the Core Principles. Further, the EO calls for periodic reporting on actions being taken to promote and support the Core Principles, suggesting the administration's intent to push for action by independent FSOC member agencies.

Although somewhat "coded," the Core Principles appear intended to address a number of core financial regulatory issues, including:

- The Orderly Liquidation Authority and living wills;
- The use of cost-benefit analysis in the rulemaking process;
- Regulatory capital and liquidity rules;
- The process by which internal fora and bodies arrive at decisions (such as the Basel Committee, Financial Stability Board and other similar bodies);
- CCAR and other supervisory processes that are conducted without rulemaking; and
- The structure and operation of the Consumer Financial Protection Bureau.

The EO's focus on the FSOC member agencies could indicate that the administration will seek to use the FSOC as a means to influence independent

agencies to pursue a de-regulatory agenda.³ The FSOC member agencies, in turn, may face pressure to arrive promptly at proposed recommendations for potential changes with respect to the issues noted above and other aspects of the financial regulatory framework. For example, administration personnel have suggested the Volcker Rule should be reexamined and, as a result, this could be an area where the agencies focus in the near term. We also think that the industry has an opportunity to suggest areas for the agencies to focus their attention as they embark on this process.

THE UNCERTAIN FUTURE OF THE DOL RULE

As anticipated, the Memo directs the Secretary of Labor to review closely the impact of the DOL Rule on retail investors and the overall retirement services industry. Given the impending compliance date of April 10, 2017, the key considerations for firms subject to this compliance date will be the following.

The Memo outlines a list of considerations for the DOL to review in its examination. Among other issues, it must contemplate the DOL Rule's impact on the following:

- Any harm imposed on retail investors due to limitations in access to certain retirement products;
- Any dislocation or disruption to the retirement industry that adversely impacts investors; and
- The likelihood of increased litigation and its correlation to an increase in the price of retirement services.

Upon any findings demonstrating these factors, the DOL must propose a new rule that rescinds or revises the existing DOL Rule, upon notice and comment to the public. This directive also requires the DOL to issue such a proposed rule in the case of any other findings that may be inconsistent with the new administration's priorities of empowering investors to make their own financial decisions and facilitate their ability to save for retirement.

Although earlier drafts of the Memo that circulated publicly contained an order instructing the DOL to postpone the rule for 180 days pending the DOL's review, this provision was removed from the final version of the Memo. Thus, the existing compliance date remains in place, although following receipt of the

³ Ryan Tracy, *How a Financial Council Republicans Loathe Could Work in Their Favor*, Wall Street Journal (Jan. 17, 2017), <https://www.wsj.com/articles/how-a-financial-council-republicans-loath-could-work-in-their-favor-1484581368>.

Memo, the DOL issued the following statement: “The Department of Labor will now consider its legal options to delay the applicability date as we comply with the President’s memorandum.”⁴

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Please do not hesitate to contact us with any questions.

⁴ Ed Hugler, Acting U.S. Sec. of Labor, Statement on U.S. Dep’t of Labor to Evaluate Fiduciary Duty Rule (Feb. 3, 2017), <https://www.dol.gov/newsroom/releases/opa/opa20170203>.