

The Banking Law Journal

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JUNE 2017

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THE BANKING LAW JOURNAL

VOLUME 134

NUMBER 6

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ISBN: 978-0-7698-7878-2 (print)
ISBN: 978-0-7698-8020-4 (eBook)
ISSN: 0005-5506 (Print)
ISSN: 2381-3512 (Online)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

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Editorial Office
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POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207.

Executive Order Outlines “Core Principles” for Evaluating U.S. Financial Regulations

*Thomas J. Delaney, Jeffrey P. Taft, and Alicia K. Kinsey**

The ongoing evaluation of existing laws, treaties, regulations, guidance, and reporting and recordkeeping requirements is significant both for financial services firms and their customers. The authors of this article review President Trump’s executive orders, which are intended to curtail the ability of federal agencies to issue additional regulations.

Since assuming office, President Donald Trump has issued several executive orders intended to curtail the ability of federal agencies to issue additional regulations. The first order is a freeze on all new regulatory actions until his administration has reviewed and approved the actions.¹ The second order requires a repeal of two regulations for each new regulation that is issued.² President Trump also issued an order that requires agencies to appoint “Regulatory Reform Officers” who will be tasked with making recommendations to agency heads regarding regulations that should be repealed, replaced or modified on the basis that they are unnecessarily burdensome.³

THE CORE PRINCIPLES

In many respects, however, those initiatives do not interfere with the ability of the independent financial services regulatory agencies such as the Board of Governors of the Federal Reserve (“Federal Reserve”), the Office of the Comptroller of the Currency (“OCC”), the U.S. Securities and Exchange

* Thomas J. Delaney is a partner at Mayer Brown LLP and co-leader of its global Financial Services Regulatory & Enforcement practice. Jeffrey P. Taft is a partner at the firm focusing on bank regulation, bank receivership, and insolvency issues. Alicia K. Kinsey is an associate in the firm’s Financial Services Regulatory & Enforcement practice. The authors may be contacted at tdelaney@mayerbrown.com, jtaft@mayerbrown.com, and akinsey@mayerbrown.com, respectively.

¹ Memorandum for the Heads of Executive Departments and Agencies from Reince Priebus regarding Regulatory Freeze Pending Review (Jan. 20, 2017), *available at* <https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies>.

² Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs (Jan. 31, 2017), *available at* <https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling>.

³ Presidential Executive Order on Enforcing the Regulatory Reform Agenda, *available at* <https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda>.

Commission (“SEC”) and the Consumer Finance Protection Bureau (“CFPB”) to issue new regulations and additional guidance. President Trump took his first specific action regarding the future regulation of the U.S. financial system by issuing an executive order⁴ that lays out seven high-level “Core Principles” that are intended to guide a review of existing laws, treaties, regulations, guidance, and reporting and recordkeeping requirements that impact the regulation of the U.S. financial system (“Order”). While some have described the Order as a first step toward repeal or significant modification of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), the Order does not explicitly announce that intention but rather is a statement of the president’s policy objectives and the standards against which existing law should be evaluated. The Core Principles are:

- 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 Order also directs the Treasury secretary to consult with the members of the Financial Stability Oversight Council (“FSOC”) and report to the president on existing laws, regulations, guidance, reporting and recordkeeping requirements, and other government policies that promote the Core Principles as well as on actions that have been taken, or are currently being taken, to promote and support the Core Principles.⁵ The Order directs the Treasury secretary to file the

⁴ <https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-executive-order-core-principles-regulating-united-states>.

⁵ The voting members of FSOC are the Treasury Secretary, the Chairman of the Federal Reserve, the Comptroller of the Currency, the Director of the Consumer Financial Protection Bureau, as well as the Chairpersons of the US Securities and Exchange Commission, the Federal

report within 120 days of February 3, 2017 (June 3, 2017, or, more likely, the following business day, June 5, 2017), and contemplates additional periodic reports thereafter.

The Core Principles are, on their face, relatively benign in that they articulate policy elements that are most likely to be broadly supported. However, they are not in every respect clear, bright-line standards. The Core Principles are broad, high-level statements whose interpretation can vary depending on who is doing the interpreting—an open question at the moment because although Steven Mnuchin was confirmed as Treasury Secretary, many of the heads of the agencies tasked with reviewing their regulations are still staffed with individuals appointed during the Obama administration, many of whom wrote the regulations implementing Dodd-Frank that are to be evaluated in line with the Core Principles. Additionally, after Governor Daniel Tarullo stepped down from the Federal Reserve Board on April 5, 2017, the Federal Reserve Board has three vacant seats; as well, Janet Yellen's term as chair expires in February 2018.

The Order lays the groundwork for evaluating the future of many of the most-criticized features of Dodd-Frank—such as the structure of the CFPB, capital and liquidity standards and the ability of the FSOC to designate firms as systemically significant—to be reviewed and determined not to “promote” the Core Principles. Such regulations could then be easy targets for repeal under another of President Trump's recent directives to repeal two regulations for every new regulation that is issued.

Clearly any rollback of Dodd-Frank statutory provisions will require coordination with, and action by, Congress. Since Dodd-Frank's enactment, several bills have been introduced in successive Congresses to repeal aspects of it. The most significant of these proposals is the Financial CHOICE Act, which was introduced by House Financial Services Chairman Jeb Hensarling (R-Texas) in April 2017.⁶ The bill cleared the House Financial Services Committee in May, and is currently awaiting consideration by the House of Representatives. Companion legislation does not presently exist in the Senate.

Deposit Insurance Corporation, the Commodity Futures Trading Commission, the Director of the Federal Housing Finance Agency, and the Chairman of the National Credit Union Administration Board, as well as an independent member with insurance expertise.

⁶ Chairman Hensarling originally introduced the Financial CHOICE Act in the previous Congress. Although it passed the Committee on a party-line vote, it was never considered by the full House of Representatives. The bill that was introduced in April is a revised version of that bill.

FINANCIAL CHOICE ACT

It is not yet clear whether or to what extent Congress will embrace President Trump’s Core Principles. Chairman Hensarling stated in a press release that he was “very pleased” with the Order, which “closely mirrors” the Financial CHOICE Act.⁷ It is equally not clear whether the Trump administration will support congressional action on the Financial CHOICE Act before the ongoing 120-day review is completed and the administration is able to formulate policy priorities in light of that process.

The Core Principles do share some similarities with the “Key Principles” of the Financial CHOICE Act, with both calling for ending taxpayer bailouts of financial institutions, promoting the financial independence of Americans, revitalizing economic growth and restoring government accountability. In other ways, however, the Order differs from the Financial CHOICE Act in that the Order calls for enabling American competitiveness with foreign firms in domestic and foreign markets as well as for the advancement of American interests in international financial regulatory negotiations and meetings. Unlike the Financial CHOICE Act, the Order raises the prospect of consolidating the federal financial regulatory framework in order to “restore public accountability within Federal financial regulatory agencies.” In the aftermath of the financial crisis, consideration was given to streamlining the regulation of financial services firms through agency consolidation, but in the rush to adopt legislation that responded to the market impact of the crisis and in the face of agency objections, those initiatives were dropped. Some could conclude that this aspect of the Core Principles is intended to signal the elimination of the CFPB, which has been the object of some of the most heated criticisms from Republicans in Congress. However, it is possible that the Trump administration is open to a much more sweeping revamp of the federal supervisory structure. As a candidate, President Trump often criticized regulation that created market inefficiencies, and it is possible that he could be receptive to efficiencies that could be gained by combining supervisory jurisdiction currently shared by three agencies (the Federal Reserve, OCC, and FDIC) into one. If that is the case, it is possible that proposals to consolidate the SEC with the Commodity Futures Trading Commission, or the CFPB with the Federal Trade Commission, could also be advanced.

⁷ House Financial Services Committee Press Release, *President’s Executive Action Mirrors Financial CHOICE Act* (Feb. 3, 2017), available at <http://financialservices.house.gov/news/documentsingle.aspx?DocumentID=401457>.

CONCLUSION

The ongoing evaluation of existing laws, treaties, regulations, guidance, and reporting and recordkeeping requirements is significant both for financial services firms and their customers. The outcome of the process is likely to shape priorities for the administration in the financial services arena, possibly through the end of the president's current term. For this reason, institutions, on their own or through intermediaries such as trade associations, should seize this opportunity to make their views known to the Treasury Secretary, relevant regulators and lawmakers before the June deadline.