SQUIRE PATTON BOGGS

Executive Order on Financial Regulation and Executive Memorandum on Fiduciary Rule

On February 3, President Trump issued an executive order related to financial services regulatory reform (generally) and an executive memorandum specifically targeting the Department of Labor's (DOL) rulemaking titled "Definition of the Term 'Fiduciary'; Conflict of Interest Rule—Retirement Investment Advice" (Fiduciary Rule or Rule).

Below, we provide an overview and analysis of each of these documents.

Executive Order on Financial Regulation

The Executive Order on Core Principles for Regulating the United States Financial System (core principles order or order) directs the secretary of the treasury to consult with the other Financial Stability Oversight Council (FSOC) member agencies (CFTC, CFPB, FDIC, FHFA, Federal Reserve Board, NCUA, OCC, and SEC) and to report to the president within 120 days (June 3, 2017) on the extent to which existing laws, regulations and guidance promote certain core principles.

Core Principles

The core principles order states that it is the administration's policy that the US financial system be regulated in a manner consistent with the following principles (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
- Restore public accountability within federal financial regulatory agencies and rationalize the federal financial regulatory framework

Report

The report must:

- Assess whether existing laws, treaties, regulations, guidance, reporting and recordkeeping requirements and other government policies promote the core principles
- Identify what actions have been taken or are being taken to promote and support the core principles
- Identify any laws, treaties, regulations, guidance, reporting and recordkeeping requirements and other government policies that inhibit federal regulation of the US financial system in a manner consistent with the core principles

The first report is due June 3, 2017, and the order calls for subsequent periodic reports.

Analysis

This is the first executive order of the Trump administration that is directed at financial regulation. President Trump's previously issued executive order generally reducing regulation and White House Chief of Staff Reince Priebus's memo ordering a regulatory freeze do not apply to independent regulatory agencies, such as the federal financial regulators (Federal Reserve Board, FDIC, OCC, CFPB, SEC, CFTC and FHFA).

The core principles order does not call for any stays or repeals of existing laws or regulations. Rather, the order directs the treasury secretary to assess existing laws and regulations based on core principles. The principles are broad and cover a wide range of aspects of the financial system (from a consumer's independent financial decisions to companies being competitive with foreign firms). These principles seemingly provide the treasury secretary with much leeway in assessing the existing federal financial regulatory landscape. Seemingly, the report also will include an assessment of the structure of the federal financial regulatory framework.

Notably, the report's assessment will cover more than just existing laws and regulations, but also guidance and other government policies. Some agencies, such as the CFPB, have issued several guidance documents that interpret existing laws and regulations without a notice-and-comment process.

Predictably, Senate Democrats reacted immediately, with Minority Leader, Chuck Schumer, stating: "Wall Street reform will be met with a Democratic firewall in Congress." As we have advised on many previous occasions, relief for financial institutions is likely to come most quickly and in a most practical manner through the policy decisions of new appointees to regulatory agencies. As White House National Economic Director, Gary Cohn , stated in interviews immediately after the release of the Executive Order: "Personnel is Policy."

Executive Memorandum on Fiduciary Rule

President Trump also signed an executive memorandum (memorandum) instructing DOL to examine the Fiduciary Rule in order to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice.

Legal and Economic Review

The memorandum calls for DOL to conduct a legal and economic review concerning the likely impact of the rule. The review shall consider, among other things, the following:

- Whether the anticipated applicability of the 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 rule has resulted in "dislocations or disruptions" within the retirement services industry that may adversely affect investors or retirees
- Whether the 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 DOL makes an affirmative determination on any of the above provisions, then the memorandum instructs DOL to rescind or revise the rule. Additionally, DOL is instructed to rescind or revise the rule if it concludes, "for any other reason," that the rule is inconsistent with the Trump administration priority (priority) 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."

Analysis

The Fiduciary Rule, which is set to take effect on April 10, 2017, requires financial advisers to act exclusively in their clients' best financial interest when offering retirement advice. Current standards simply require advisers to make recommendations that are "suitable" for a given client. The rule, however, holds advisers to the heightened fiduciary standard, which requires them to recommend the best action for the client to take. Opponents of the rule say that it will limit access to retirement advice for small savers and hurt small businesses.

In the years since DOL first proposed the Fiduciary Rule, the rule has faced numerous challenges – both legal and legislative. In courts across the country, several groups representing different aspects of the financial industry have filed lawsuits challenging the rule. On Capitol Hill, last spring, Congress approved a resolution that would effectively block the rule and replace it with a congressionally-mandated fiduciary standard. That resolution was vetoed by former President Obama and neither chamber was able to garner the two-thirds vote required to override the veto. Not to be deterred, in July 2016, House lawmakers approved a spending bill including a provision that would prohibit DOL from enforcing the rule. Neither the appropriations bill, nor the Fiduciary Rule provision, were ever enacted into law. Nevertheless, this Congress, Representative Joe Wilson (R-SC) – along with 29 co-sponsors – introduced the Protecting American Families' Retirement Advice Act, which proposes delaying the rule's implementation for two years. The bill has been referred to the House Ways and Means Committee; there is currently no companion bill in the Senate and a path forward for such legislation remains unclear.

In light of the executive order, however, it appears there may be a new path for those seeking to ensure that the Fiduciary Rule never takes effect. Specifically, it is important to note that Andrew Puzder – President Trump's nominee for secretary of labor – has strongly expressed his opposition to the rule. While Puzder has yet to appear before the Senate for his confirmation hearing, it is likely that – if confirmed – he would exercise the memorandum's broad authority to rescind or significantly revise the Fiduciary Rule.

Contacts

James Barresi
Partner and Chair: Financial Services Practice
T +1 513 361 1260
E james.barresi@squirepb.com

Matthew Cutts
Partner and Chair: Financial Services and Tax Public Policy Practice
T +1 202 457 6079
E matthew.cutts@squirepb.com

James Sivon
Financial Services Regulation and Public Policy
T +1 202 262 4271
E james.sivon@squirepb.com

Brandon Roman
Financial Services and Tax Public Policy Practice
T +1 202 457 5330
E brandon.roman@squirepb.com

Katherine Wechsler
Financial Services Regulation and Public Policy
T +1 202 360 8895
E katie.wechsler@squirepb.com

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