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Flashes and Flurries – Financial Services in the First 30 Days of the Trump Presidency

President Trump stormed into office with an anti-Washington DC, anti-regulation mantra: "Regulations have grown into a massive, job-killing industry – and the regulation industry is one business I will put an end to." Among the many items he has identified as top priorities, few rise to the level of importance as financial services regulatory reform. In fact, in the first month of his Administration, President Trump has issued more than two dozen executive orders, memoranda and proclamations, several of which significantly impact the financial services industry. According to the President himself, no other Administration "in this short period of time has done what we've done."

However, activity in the financial services space is not just coming from the White House. In addition to the Administration, policymakers are turning their time and attention to reforming the nation's financial services laws. In fact, in the near-term, House Financial Services Committee Chairman Jeb Hensarling (R-TX) is expected to reintroduce the Creating Hope and Opportunity for Investors, Consumers and Entrepreneurs Act (the CHOICE Act) – legislation that we believe will serve as the starting point for debate on how to comprehensively reform financial services regulation in the US.

The first part of this article identifies and analyzes the Executive Orders that will (either directly or indirectly) impact the financial services sector. These Executive Orders as written will require: (1) a review of current financial services laws and regulations; (2) a review of the Department of Labor's (DOL) Fiduciary Rule; (3) a regulation "freeze"; and (4) a reduction in the current number of regulations. Part two turns to Capitol Hill and provides an overview of the current state of play of financial services reform and discusses expected developments forthcoming in Chairman Hensarling's "CHOICE ACT 2.0."

Part One: The Executive Orders

Review of Financial Services Laws and Regulations

Overview: Signed by the President on February 3, the Executive Order on Core Principles for Regulating the United States Financial System (the Core Principles Order) directs the Secretary of the Treasury to consult with the other Financial Stability Oversight Council (FSOC) member agencies (CFPB, CFTC, FDIC, FHFA, Federal Reserve Board, NCUA, OCC and SEC) and to report to the President within 120 days the extent to which existing laws, regulations and guidance promote certain Core Principles outlined by the President in the Order.

Specifically, the Order directs the Treasury Secretary to prepare the first report by June 3, 2017, with periodic reports to follow thereafter. Among other things, these reports must assess what current laws, regulations and other policies promote and support the Order's Core Principles, and which inhibit federal regulation of the US financial system in a manner consistent with the Core Principles.

Analysis: This is the first executive action of the Trump Administration that was directed at financial regulation; notably, however, the Order does not call for any stays or repeals of existing laws or regulations. The Core Principles are broad, cover a wide range of aspects of the financial system and provide the Treasury Secretary with much leeway in assessing the existing federal financial regulatory landscape and framework.

Senate Democrats reacted immediately, with Minority Leader Chuck Schumer (D-NY) 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."

In contrast to their Democratic colleagues, however, Republicans were quick to praise the Executive Order. Of particular note, Chairman Hensarling – who, as discussed below, is leading the House's push to reform financial services regulation – emphasized that the Executive Order "closely mirrors provisions that are found in the Financial CHOICE Act." According to the Chairman, "Dodd-Frank failed to keep its promises, but President Trump is following through on his promise to the American people to dismantle Dodd-Frank."

Fiduciary Duty Rule Review

Overview: Also on February 3, President Trump signed an Executive Memorandum (the 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. The Memorandum calls for DOL to conduct a legal and economic review concerning the likely impact of the Rule.

If DOL makes an affirmative determination that the Fiduciary Rule will inhibit access to retirement information and financial advice – or concludes "for any other reason" that the Rule is inconsistent with the Trump Administration's priority of helping Americans save – then the Memorandum instructs DOL to rescind or revise the Rule. Note that this would likely require DOL to provide a reasonable basis as to its policy decision and provide a similar notice and comment period as part of that regulatory action.

Analysis: In the years since DOL first proposed the Fiduciary Rule, it 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. However, DOL has thus far prevailed in each suit that has been decided. In fact, most recently, a Texas District Court found that DOL was properly acting within its jurisdiction in proposing the Fiduciary Rule – another feather in the Department's cap.

On Capitol Hill, last spring, Congress approved a resolution that would effectively block the Fiduciary Rule and replace it with a congressionally mandated fiduciary standard. That resolution was vetoed by then-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, was 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 to ensuring that the Fiduciary Rule never takes effect. As finalized last year, the Rule was set to take effect on April 10, 2017; however, less than two weeks following the issuance of the President's Executive Order, DOL submitted a notice to OMB that it plans to delay the Fiduciary Rule's effective date for 180 days. Note, however, the 180-day delay is not effective until published in the *Federal Register*. As of the time of publication, no such announcement has been published.

Moreover, it is important to note that Mr. Andrew Puzder – who was President Trump's nominee for Secretary of Labor – has recently withdrawn his name for consideration for that post as a result of several Republican Senators withholding their support for his nomination. Nevertheless, we expect that whoever is ultimately selected and approved to lead DOL will be inclined to exercise the Memorandum's broad authority to rescind or significantly revise the Fiduciary Rule.

Regulation Freeze Memo

Overview: On January 20, White House Chief of Staff Reince Priebus issued a memorandum to executive departments and agencies regarding a "Regulatory Freeze Pending Review" (the Regulation Freeze Memo). The Memo instructs executive agencies to "freeze" new and pending regulations. Generally, no new regulations should be sent to the Office of the Federal Register (OFR) until a department or agency head appointed or designated by President Trump reviews and approves the regulation; regulations that have already been sent to OFR but not yet published should be immediately withdrawn until reviewed and approved. Moreover, the effective dates of regulations that have been published in the *Federal Register* but have not taken effect, as permitted by applicable law, are temporarily postponed for 60 days to allow for the review of questions of fact, law and policy.

The Regulation Freeze Memo applies to executive agencies and departments, but does not apply to independent regulatory agencies, including the Federal Reserve Board, CFPB, FDIC, OCC, FHFA, CFTC and SEC.[1]

Analysis: In many ways, the Regulation Freeze Memo is similar to what then-White House Chief of Staff Rahm Emanuel issued on January 20, 2009, with two important differences. First, whereas the 2009 memo instructed agencies to "consider" postponing regulations that had been published in the *Federal Register* but not yet taken effect, the Regulation Freeze Memo instructs the agencies to postpone those regulations, without providing the agencies any discretion. The only exceptions are for regulations that have statutory or judicial deadlines. Secondly, the scope of the Regulation Freeze Memo is much broader than its 2009 counterpart. The 2009 memo only applied to rulemakings, whereas the Regulation Freeze Memo also applies to "guidance documents," which significantly broadens the scope.

Since the Regulation Freeze Memo does not apply to the federal financial regulators, it could have limited impact on financial services regulations. Nevertheless, with President Trump's nominees to lead many of these regulators soon expected to take the helm – and with Republicans generally already leading many of the regulators on an interim basis – it is quite possible that the Executive Order will have a much broader impact across the federal government. Thus, while the Executive Order on its face would have limited impact on the financial services industry, it may well be voluntarily adopted by a wide-range of financial services regulators, resulting in a delay of various regulations and potentially leading to some proposed regulations dying on the vine.

Regulation Reduction

Overview: On January 30, 2017, President Trump signed the Executive Order Reducing Regulation and Controlling Regulatory Costs (the Reg Reduction Order) under which an executive department or agency must identify at least two existing regulations to be repealed when it promulgates a new regulation. For fiscal year 2017, the total incremental cost of all new regulations, including repealed regulations, must be no greater than zero, unless otherwise required by law or consistent with written advice by the OMB Director. It also imposes on the agencies requirements regarding offsetting regulatory costs beginning with fiscal year 2018.

Notably, however, the Order does not include regulations regarding military, national security or foreign affairs, regulations related to agency organization or management, or any other category exempted by the OMB Director.

1 On January 23, 2017, President Trump issued a memorandum ordering a freeze on the hiring of federal civil employees for the executive branch (Hiring Freeze Memo). According to the terms of the memo, no vacant position existing as of noon on January 22, 2017, may be filled and no new positions may be created, with the exception of military personnel. The Administration has not clarified whether it intends for independent agencies, such as the federal financial regulators, to adhere to the hiring freeze. Notably, the OCC and Federal Reserve Board have announced that the agencies are adhering to the terms of the Hiring Freeze Memo. Depending on how broadly the Order is applied, it could result in a capacity issue for financial services regulators, slowing the pace of regulatory action.

Analysis: When initially released, there was some confusion in regard to what agencies must comply with the order. Subsequently, the White House clarified that this Order does not apply to independent regulatory agencies, such as the Federal Reserve Board, CFPB, FDIC, OCC, FHFA, CFTC and SEC.

The Reg Reduction Order instructs the OMB Director to provide guidance to the agencies on the implementation of the Order. As of the time of publication, no such guidance has been provided, nor has President Trump's nominee for OMB Director, Representative Mick Mulvaney (R-SC), been confirmed. While the Order appears only to apply to "significant" regulations, there are many remaining questions as to the impact of this order and how the agencies will implement it. For example, the Order only directs the agencies to *identify* two regulations to be repealed, but does not require the agencies to actually repeal those regulations. Additionally, it is not clear how the agencies and OMB will implement the requirement that the "total incremental cost" of new regulations be no greater than zero.

Moreover, as with the Regulation Freeze Memo, since the Reg Reduction Order does not apply to independent agencies, its impact on the financial services industry could be limited. That said, we believe that the Executive Order could well be voluntarily adopted in principle by a large array of financial services regulators. In other words, while financial services regulators may not repeal two regulations for each one they promulgate, it is highly likely that the approach going forward during the Trump Presidency will be to impose a minimal regulatory burden on the financial services industry. This will likely result in repeal of those regulations that regulators find unnecessary, reform of those regulations that are overly burdensome and an effort to propose only narrowly tailored regulations going forward. In fact, our theory is already proving to be true (i.e., the SEC is reviewing its CEO Pay Ratio Rule, the CFTC is reopening the comment period on its high-frequency trading proposal, etc.), and we expect there will be further such announcements in the coming weeks.

Part Two: Legislative Developments

On the congressional front, Chairman Hensarling is expected to reintroduce the CHOICE Act, which he has suggested "will end taxpayer-funded bailouts of large financial institutions; relieve banks that elect to be strongly capitalized from growth-strangling regulation that slows the economy and harms consumers; impose tougher penalties on those who commit financial fraud; and demand greater accountability from Washington regulators." As introduced last Congress, the legislation, among other things would: (1) provide an "off-ramp" from the post-Dodd-Frank supervisory regime and Basel III capital and liquidity standards for banking organizations that choose to maintain high levels of capital; (2) retroactively repeal the authority of the Financial Stability Oversight Council (FSOC) to designate firms as systematically important financial institutions (SIFIs); (3) fundamentally reform the Consumer Financial Protection Bureau (CFPB); (4) impose stricter accountability requirements on other financial regulators; and (5) impose enhanced penalties for financial fraud and self-dealing.

With speculation that the bill's reintroduction is imminent, it is expected that there will be several changes to the legislation since last Congress. Among those changes, it appears that CHOICE Act 2.0 will, among other things: (1) eliminate the CAMELS requirement from the capital election; (2) exempt banking organizations that make the capital election from stress tests; (3) make targeted "improvements" to stress tests and CCAR; (4) restructure the CFPB as a civil law enforcement agency with additional restrictions on its authority; (5) make numerous SEC-related reforms to improve capital markets; (6) impose additional requirements on financial regulators to hold them accountable, including by designating a "Lead Banking Investigator"; and (7) expand the JOBS Act to improve the atmosphere for small businesses and encourage capital formation. The bill will also likely include a technical corrections section to conform the current legislation with Dodd-Frank.

Once reintroduced, we expect the House Financial Services Committee will begin to hold a series of hearings on the legislation, with additional changes to the bill possible when it is ultimately marked-up by the Committee. As for the Senate Banking Committee, though, how the Committee will approach financial services regulatory reform is unclear (i.e., let the House take the lead, draft their own legislation, etc.), with Senator Mike Crapo (R-ID) at the helm this Congress, it is likely that we will see renewed action from a Committee that was fairly inactive for much of the 114th Congress. That said, we do not anticipate that the CHOICE Act will be the starting salvo for the Committee, which will instead likely continue focusing its efforts more narrowly: relief for community and regional banks.

Even with Republicans in control of the House, Senate and White House, however, financial services regulatory reform will not be an easy task, as the GOP itself does not see eye-to-eye on every area of the CHOICE Act. Namely, there are at least three policy areas that we expect will continue to divide Republicans and be the subject of further debate this year, including: (1) the "Durbin Amendment"; (2) Orderly Liquidation Authority (OLA); and (3) the authority of FSOC to designate certain payments and clearing organizations as systemically important "financial market utilities" (FMUs).

First, as originally drafted, the CHOICE Act would completely repeal the Durbin Amendment, which capped interchange fees (i.e., the fees banks can charge merchants to process customers' debit card transactions). When the bill became law in 2011, interchange fees were capped at 21 cents per transaction plus 5% of the transaction amount. According to a late 2014 Federal Reserve paper, banks have recouped less than a third of the lost interchange fee revenue.[2] Traditional Republican constituencies such as banks and credit unions have suggested that the law has actually hurt consumers overall and has not resulted in lower retail prices. On the other hand, supporters such as retail trade groups like the Merchant Payments Coalition and the Association for Convenience and Fuel Retailing – which are also generally supportive of Republican policies – argue that prices have dropped and that more types of transactions should be covered, including credit card purchases. One likely outcome is that the Committee could vote to repeal the Durbin Amendment, but it could ultimate be stripped out by the Rules Committee, handing the ultimate victory to the retailers.

2 https://www.federalreserve.gov/econresdata/feds/2014/files/201477pap.pdf.

A second example of division between the GOP: the OLA provisions in Dodd-Frank, which created a new federal receivership process, whereby the FDIC serves as receiver for large, interconnected financial companies whose failure poses a significant risk to the financial stability of the US. In its place, the CHOICE Act would add a new Subchapter V to Chapter 11 of the Bankruptcy Code – also known as new Chapter 14 – to facilitate reorganizations for large financial companies. The Clearing House Association (The Clearing House), however, which is also typically known for supporting conservative fiscal policies, supports the existing OLA provisions. According to The Clearing House, they believe the existing law: (1) proved effective in an orderly resolution simulation of a bank failure; and (2) provides certainty to market participants after years of joint-rulemaking from a myriad of federal agencies.

Third, we expect there to be debate among Republicans over the designation of certain FMUs as systemically important. As introduced last Congress, the CHOICE Act would repeal FSOC's authority to designate certain payments and clearing organizations as systemically important FMUs with access to the Federal Reserve discount window, and retroactively repeal all previous FMU designations (of which there are currently eight). Despite the CHOICE Act's approach, however, The Clearing House – similar to its reasoning for supporting OLA – has expressed support for FSOC's ability to designate certain FMUs as systemically important (though, importantly, it is a nuanced position and based on the size of the FMU). Similar to the OLA discussion above, The Clearing House has advocated that the systemically important designation of FMUs "should be reserved only for those systems in which credit or liquidity events could spread because of market participants' loss of confidence in, or refusal to deal with, each other."

No doubt, as the debate draws on, further points of contention will arise between the parties – and potentially even within the Republican Party. That said – and despite these differences – we believe that by leveraging the legislative tools and political pressures at their disposal, policymakers are hopeful they can overhaul the financial services regulatory landscape, extending their reforms to those areas that President Trump cannot address through executive order. Thus, while the path to reforming the current financial services regulatory landscape will clearly not be an easy one, perhaps given the makeup of the 115th Congress and with the help of Fortuna – the Goddess of Fortune – lawmakers may be able to at least achieve certain targeted reforms this Congress.

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