Financial Regulation and Enforcement Under the Trump Administration

With a new administration set to assume power in Washington, D.C., on January 20, 2017, this *Alert* looks at its likely agenda for financial regulatory reform and potential shifts in enforcement priorities — changes that stand to have far-reaching implications for financial institutions and other actors from Wall Street to Main Street. While, to some extent, this *Alert* involves an element of "reading the tea leaves," some educated guesses can be made about the likely course the new administration will take. During the presidential campaign, Candidate Donald J. Trump pledged to minimize regulatory burdens on financial institutions by way of fostering increased lending and stimulating economic growth, and President-elect Trump and his transition team have reiterated these pledges. While they have yet to offer a specific policy agenda for financial regulation, based on statements to the media and on the transition website, they may include, but are not necessarily limited to, an immediate moratorium on any new agency regulation, a likely rollback of significant parts of the Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), and possible reinstatement of the Glass-Steagall Act. If and when pursued, these efforts will be facilitated by a Republican-controlled Congress and executive agencies led by Trump's appointees. It remains to be seen the extent to which the minority Democrats, led by Senators Charles Schumer and Elizabeth Warren, will serve as a brake on some of these efforts.

During the presidential campaign, Candidate Donald J. Trump pledged to minimize regulatory burdens on financial institutions by way of fostering increased lending and stimulating economic growth, and President-elect Trump and his transition team have reiterated these pledges.

Potential Legislative and Regulatory Changes

It is likely that, soon after taking office, the incoming administration will impose a temporary moratorium on all new agency regulations, and that the administration's top priority for the first year will be to push for a substantial overhaul of the Dodd-Frank Act with assistance from the House Financial Services Committee Chairman Jeb Hensarling and the rest of the Committee. The administration may also seek reinstatement of the Glass-Steagall Act, which was repealed in 1999, but that remains to be seen.

Imposing Moratorium on New Agency Regulations

During his campaign, President-elect Trump expressed his intention to issue a temporary moratorium once he entered office on all new agency regulations, including ones that have been finalized but are not yet in effect. Pointing to overregulation as the cause for stunted economic growth, the President-elect noted that the moratorium would "give [] American companies the certainty they need to reinvest in our community, get cash off of the sidelines, start hiring again, and expanding businesses."[1]

As part of this moratorium, the President-elect would direct "every federal agency to prepare a list of all of the regulations they impose on Americans which are not necessary."[2] While the President-elect has not advised as to what would constitute "necessary," it is expected that the transition team for the independent financial regulatory agencies, led by former Securities and Exchange Commissioner Paul Atkins, will gather and collect information pertaining to the moratorium.

Reforming the Dodd-Frank Act

The Trump administration is set to make it a top priority to target the Dodd-Frank Act, a complex and wide-ranging piece of legislation enacted in July 2010 in response to the 2008 financial crisis. The President-elect and his team have been outspoken in their strong disapproval of the Act, claiming that it has failed to aid economic recovery and instead has stifled businesses and placed significant costs on the banking industry while deterring more robust business and consumer lending. According to the President-elect, the Dodd-Frank Act has to be "stopped," as it has "made it impossible for bankers to function . . . to loan money for people to create jobs,"[3] and while the Act was enacted to promote economic growth, "six years later, the American people remain stuck in the slowest, weakest, most tepid recovery since the Great Depression."[4] Echoing these views, Trump's nominee for Secretary of Treasury, Steven Mnuchin, has told the media that "the number one problem with Dodd-Frank is [that] it's way too complicated and it cuts back lending," and that "[t]he number one priority is going to be [to] make sure that banks lend."[5]

The Trump administration is set to make it a top priority to target the Dodd-Frank Act, a complex and wide-ranging piece of legislation enacted in July 2010 in response to the 2008 financial crisis.

The President-elect and his team initially proposed to stop the Dodd-Frank Act by repealing it in its entirety, but they seem to have adopted a more nuanced stance since then. During the campaign, Trump stated multiple times that he would "dismantle" the Dodd-Frank Act, and indeed, his transition website upon launch on November 10, 2016, noted that "[t]he Financial Services Policy Implementation team will be working to dismantle the Dodd-Frank Act and replace it with new policies to encourage economic growth and job creation."[6] This language, however, can no longer be found on the website, and no additional details have been provided. In fact, in a November 30, 2016 interview, Mnuchin seemed to avoid the "dismantling" rhetoric altogether, noting instead that the team would "want to stop back parts of Dodd-Frank that prevent banks from lending."[7]

There are three apparent reasons for this seeming recalibration from repeal to reform. First, as the Dodd-Frank Act was enacted six years ago, it is now deeply entrenched in U.S. financial services law, and repealing it could leave significant gaps that would disrupt the banking industry. Large financial institutions have expressed their opposition to wholesale repeal of the Act, since they had expended considerable resources to comply with the Act, and a new financial legislation in place of the Act would force them to again assume sizable compliance and restructuring costs. Second, financial regulators, including Mary Jo White of the Securities and Exchange Commission ("SEC") and Janet Yellen of the Federal Reserve, have warned the incoming administration that a wholesale repeal, which would eliminate higher capital requirements and closer monitoring of derivatives, could potentially lead to another financial crisis. And third, even though the President-elect will govern with a Republican-controlled Congress, there may be enough votes by Democratic and some Republican senators to block proposals for a repeal. Senator Charles Schumer, the incoming Democratic leader, has vowed to fight fiercely any such proposals.

Accordingly, it is likely that the incoming administration may embrace a more nuanced approach by seeking to repeal parts of the Dodd-Frank Act, amending other parts, and keeping intact the remaining provisions. To do so, it may rely on proposals like The Financial CHOICE Act ("CHOICE Act"), which was introduced by House Representative Jeb Hensarling in the summer of 2015 and approved by the Financial Services Committee in September 2016. The CHOICE Act suggests the incoming administration may consider the following changes:

- allow banks to opt out of certain Dodd-Frank Act requirements as long as they maintain an adjusted capital ratio of 10%, especially with an aim to support regional and community banks;
- increase the asset threshold at which banks become subject to stricter prudential supervisory standards;
- loosen or repeal the Volcker Rule, which prevents banks from trading for their own profit (i.e., trading for their own proprietary accounts or investing in investment vehicles like hedge funds);
- limit the scope of future derivatives reform;
- require detailed cost-benefit analysis of future regulations;
- call for increased accountability and transparency from the Federal Reserve by, among other means, requiring a congressional audit of the Board of Governors and Federal Reserve Banks;
- roll back the Department of Labor Fiduciary Rule, which became effective in June 2016, a rule that requires brokers to act exclusively in the client's best financial interests when giving retirement advice;
- adjust how Commodity Futures Trading Commission operates by, among other means, enhancing procedures that govern issuance of no-action letters and limiting when the Commission or its staff may issue subpoenas;
- limit authority of the SEC by *inter alia* repealing rule that empowers the Commission to impose a stricter standard on brokers when they provide investment advice;
- limit authority of the Financial Stability Oversight Council primarily by (1) disabling it from designating certain payment clearing organizations as Systemically Important Financial Market Utilities under Title VIII of the Dodd-Frank Act, thereby subjecting these organizations to enhanced regulatory oversight; and (2)

It is likely that the incoming administration may embrace a more nuanced approach by seeking to repeal parts of the Dodd-Frank Act, amending other parts, and keeping intact the remaining provisions.

repealing Title II of the Dodd-Frank Act, which governs the Council's ability to designate financial institutions as Systemically Important Financial Institutions, thereby subjecting them to stricter regulations; and

- in an effort to promote transparency and accountability, shape the Consumer Financial Protection Bureau's structure from a single director leadership to a five-member commission and mandate Congress, not the Federal Reserve, to provide the Bureau its funding.

The following aspects of the Dodd-Frank Act may remain untouched:

- strict requirements for how much capital large banks are required to hold and what proportion of holdings must be of high quality;
- restrictions on the mortgage system to discourage risky lending;
- right of shareholders to provide nonbinding vote on executive pay packages; and
- enhanced scrutiny of hedge funds.

It has been widely speculated that Mnuchin will not support the CHOICE Act as is, given how broad in scope the proposed reforms are. That said, Representative Hensarling has recently stated to the media that he is working on a revised version of the bill with the President-elect and his transition team. This updated version will be introduced later this year, and in anticipation of the looming showdown with Democrats in Congress, the Republican Steering Committee has assigned ten new representatives to the House Financial Services Committee.

Enacting a "21st Century" Glass-Steagall Act

During his campaign, the President-elect had called for reinstatement of the 1933 Glass-Steagall Act, a change that had also been approved by the Republican Party and included within its 2016 policy platform. While offering no specifics as to what the reinstatement would look like, the President-elect noted that the "21st Century" Glass-Steagall Act would create a smaller banking sector and "help[] African American businesses get the credit they need."[8]

During his campaign, the President-elect had called for reinstatement of the 1933 Glass-Steagall Act, a change that had also been approved by the Republican Party and included within its 2016 policy platform.

The Glass-Steagall Act is a set of provisions that was included in the Banking Act of 1933, enacted in light of bank failures that sparked the early years of the Great Depression. The Act separated commercial banking and securities activities, in order to lower the risk of commercial banks. In 1999, President Bill Clinton signed the Gramm-Leach-Bliley Act, which overturned the Glass-Steagall Act. This repeal was in response to *inter alia* the difficulties American banks faced in competing with their competitor banks in Europe, who could offer both investment and commercial banking services to their clients.

There have been, however, increasing doubts as to whether the incoming administration will continue pushing for this proposal. At a basic level, reinstating the Glass-Steagall Act, with its strict division between commercial and investment banking, would seem to run against the President-elect's pledge for less regulation. In addition, it may contradict ongoing efforts to modify the Dodd-Frank Act. For instance, one of the Glass-Steagall provisions that was repealed was Section 20, which limited the ways in which banks could deploy their assets. The Volcker Rule reinstated some of the Section 20 prohibitions, and the Trump administration has been outspoken about pulling back or repealing the Volcker Rule. This would seem to run contrary to the idea of reinstating the Glass-Steagall Act.

Aside from a new policy agenda, the new Administration will make itself felt through filling senior positions at important federal agencies, and these appointments are likely to have a significant impact on the financial regulatory agenda.

Leadership Shift at Executive Departments and Agencies

Aside from a new policy agenda, the new Administration will make itself felt through filling senior positions at important federal agencies, and these appointments are likely to have a significant impact on the financial regulatory agenda. More specifically:

Cabinet Appointments

Department of Commerce: On November 30, 2016, the President-elect announced that he intends to nominate private equity investor Wilbur Ross as the next Commerce secretary. Ross' confirmation hearing was held on January 18, 2017. If confirmed, Ross would be responsible for implementing U.S. trade laws against the backdrop of Trump's vows to fight against unfairly priced or subsidized goods from China and other countries. Ross has in the past denounced key trade arrangements like the 1993 North American Free Trade Agreement for "draining jobs and wealth from America."[9] He has stated that priorities for the Department include expanding U.S. exports while reducing the U.S. trade deficit.

Department of Justice: The President-elect announced on November 18, 2016, that he plans to nominate Jeff Sessions as Attorney General of the United States. Sessions' confirmation hearing took place January 10–11, 2017. Although it tends to run against the "deregulation" agenda of the administration, Sessions is expected to make financial crimes enforcement a top priority, given his record in the Senate. There is a good chance that, as attorney general, he would aggressively push to prosecute corporate and individual wrong-doers. In the same vein, Preet Bharara will remain the U.S. Attorney for the Southern District of New York pursuant to the request of both Trump and Sessions. Bharara is known for aggressively investigating and prosecuting white-collar crimes.

Department of the Treasury: As noted, the President-elect announced his planned nomination of Steve Mnuchin as the next Treasury secretary, and his confirmation hearing will take place on January 19, 2017. Mnuchin would enter his position with extensive financial industry experience as a former banker at Goldman Sachs. He has vowed to support slashing taxes — including by reducing the corporate tax rate from 35% to 15% — and loosen bank regulation with the aim to increase consumer and business lending. He has also voiced strong criticism of the Dodd-Frank

Act, but unlike the President-elect, has not embraced proposals calling for a wholesale repeal.

Other Federal Agency Developments

Commodity Futures Trading Commission: Timothy Massad plans to step down as chairman on January 20, 2017, and he is likely to be replaced by Christopher Giancarlo, the agency's sole Republican commissioner. During his three-year tenure, Massad had pursued stricter rules for the swaps market and embraced, *inter alia,* margin requirements for uncleared swap transactions and new supervisory stress testing of clearinghouses. He sought wide-ranging implementation of the Dodd-Frank Act in the area of derivatives and clearing. Massad's successor will likely work to ease or undo some of these efforts.

Consumer Financial Protection Bureau: Conceived by Senator Elizabeth Warren and created by the Dodd-Frank Act, the Bureau enjoys vast rulemaking and enforcement authority over all businesses connected to the consumer financial services industry. Congressional Republicans have criticized the agency since its inception and have vowed to limit the Bureau's regulatory and enforcement reach. They have also been galvanized by the U.S. Court of Appeals for the D.C. Circuit's holding on October 11, 2016, that the structure of the Bureau is unconstitutional and that the director needs to be under direct supervision of the president. Given this context, Trump may take immediate steps upon entering office to remove Director Richard Cordray and put in place a Republican appointee. In light of proposals like the CHOICE Act, President-elect Trump may also move to change the agency from a single director structure to a bipartisan, five-member commission.

Federal Reserve: Janet Yellen has confirmed that she will serve as Chair until her term ends in January 2018, and the President-elect does not have authority to remove her before the end of her term. There are, however, two vacancies on the Federal Reserve Board that the President-elect will be able to fill, and in fact, Mnuchin has noted that filling these two vacancies is a priority for the incoming administration. One of the vacancies is for the position of Vice Chairman of Supervision, who would be primarily responsible for leading the Federal Reserve's efforts on bank regulation. Although it is difficult to predict, the new appointees may work to temper the hawkishness on the interest rate hikes recently heard from the Federal Reserve, pushing instead for a policy that allows the economy to "run hot" as part of the new administration's general pro-growth agenda.

Securities and Exchange Commission: On January 4, 2017, the President-elect said he plans to nominate Walter "Jay" Clayton to lead the agency after Mary Jo White steps down later this month. Because Clayton is a corporate attorney who has spent his career representing clients in public and private mergers and acquisitions, capital markets offerings, and regulatory and enforcement proceedings, some expect that the SEC will be friendlier to banks and other regulated firms under his leadership than it has been under that of Mary Jo White. Indeed, President-elect Trump spoke of the need to undo regulations that "have stifled investment" when

On January 4, 2017, the President-elect said he plans to nominate Walter "Jay" Clayton to lead the agency after Mary Jo White steps down later this month. Because Clayton is a corporate attorney who has spent his career representing clients in public and private mergers and acquisitions, capital markets offerings, and regulatory and enforcement proceedings, some expect that the SEC will be friendlier to banks and other regulated firms under his leadership than it has been under that of Mary Jo White.

he named Clayton as his planned nominee, and Clayton has echoed the President-elect's sentiment that policy should be keyed to encourage job creation. It remains to be seen how the SEC will balance the dual goals of investor protection and fostering economic growth under his leadership. Until Clayton gets confirmed, Michael Piwowar, the agency's sole Republican commissioner, is expected to serve as the interim chairman. Piwowar has stated that under his leadership, the Commission will not prioritize any rules required by the Dodd-Frank Act but may advance other measures. In addition, the five-member Commission has two vacancies that Trump is likely to fill with Republican appointees.

Ultimately, federal regulators and agencies in the new administration, particularly at the Treasury Department, Commerce Department and the SEC, will likely work to roll back financial regulation, where regulation is perceived to burden economic growth. That said, it is likely that in the often competitive arena of law enforcement, the Department of Justice and the U.S. Attorneys' Offices, especially in the New York area (whose jurisdiction includes Wall Street), will continue to pursue cases against corporations and executives aggressively. In addition, to the extent there is any softening in federal regulation or enforcement in the financial services area, state agencies (particularly in "blue" states such as New York and California) may step into the breach by aggressively enforcing state consumer protection laws and asserting their broad regulatory authority over financial institutions operating within their jurisdictions and subject to their licensing authority.

Ultimately, federal regulators and agencies in the new administration, particularly at the Treasury Department, Commerce Department and the SEC, will likely work to roll back financial regulation, where regulation is perceived to burden economic growth.

Takeaways

Uncertainty remains as to the specific financial regulatory reforms the President-elect and his team will pursue after January 20, 2017. What can be expected, however, are attempts to roll back existing regulations — Dodd-Frank Act being the most prominent target — and to curtail the authority of financial regulatory agencies. The incoming administration argues that these steps will promote job creation and economic growth by minimizing unnecessary regulatory burdens on financial institutions. A vocal minority, particularly in the Senate, however, will work to limit the extent to which perceived risk is introduced back into the financial system. While it will take time for the new administration's measures to take shape and effect, they will be speeded along by a Republican-controlled Congress, as well as by cabinet members and agency heads who are likely to embrace a small-government agenda and a more *laissez-faire* vision of capitalism than that of their predecessors.

---

1 *Regulations*, Trump-Pence Campaign Website, https://www.donaldjtrump.com/policies/regulations.

2 Philip Bump et al., *Donald Trump's Economic Speech, Annotated*, Wash. Post (Aug. 8, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/08/08/donald-trumps-economic-speech-annotated/?utm_term=.6b802214bd36.

[3] Emily Flitter and Steve Holland, *Trump Preparing Plan To Dismantle Obama's Wall Street Reform Law*, REUTERS (May 18, 2016), http://www.reuters.com/article/us-usa-election-trump-banks-idUSKCN0Y900J.

[4] This quote was on Trump's transition website (https://greatagain.gov/) as of November 10, 2016, the date of the website's launch. While this language can no longer be found on the website, it has been referenced in several news articles. *See, e.g.,* Eugene Grygo, *'Trump'-ing Dodd-Frank Would Be A Huge Effort*, FIN. TECH. FORUM (Nov. 21, 2016), https://www.ftfnews.com/trump-ing-dodd-frank-would-be-a-huge-effort/15389.

[5] Transcript, CNBC's SquawkBox (Nov. 30, 2016), http://www.cnbc.com/2016/11/30/cnbc-transcript-steven-mnuchin-and-wilbur-ross-speak-with-cnbcs-squawk-box-today.html.

[6] *See* Jesse Hamilton and Elizabeth Dexheimer, *Trump's Transition Team Pledges To Dismantle Dodd-Frank Act*, BLOOMBERG (Nov. 10, 2016), https://www.bloomberg.com/news/articles/2016-11-10/trump-s-transition-team-pledges-to-dismantle-dodd-frank-act.

[7] Jacob M. Schlesinger, *Trump Treasury Choice Steven Mnuchin Vows To 'Strip Back' Dodd-Frank*, WALL ST. J. (Nov. 30, 2016), http://www.wsj.com/articles/trump-treasury-choice-steven-mnuchin-vows-to-strip-back-dodd-frank-1480513188.

[8] *Trump's New Deal For Black America*, Trump-Pence Campaign Website (Oct. 31, 2016), https://www.donaldjtrump.com/press-releases/donald-j.-trump-announces-a-plan-for-urban-renewal1.

[9] *Statement From Wilbur Ross And Peter Navarro On Peterson Institute's Project Fear*, Trump-Pence Campaign Website (Sept. 20, 2016), https://www.donaldjtrump.com/press-releases/statement-from-wilbur-ross-and-peter-navarro-on-peterson-institutes-project.

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

Andrew M. Genser
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
www.kirkland.com/agenser
+1 212 446 4809

Robert Khuzami
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/rkhuzami
+1 202 879 5055

Kenneth R. Lench
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/klench
+1 202 879 5270

Sharon Kim
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
www.kirkland.com/skim
+1 212 909 3359