
April 27, 2017

President Directs Review of Dodd-Frank Provisions

On April 21, 2017, President Trump signed two presidential memoranda calling for review of portions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”). These presidential memoranda follow the executive order signed on February 3 (see our client alert [here](#)) setting forth “Core Principles” intended to guide the regulation of the U.S. financial system.

Orderly Liquidation Authority

The first presidential memorandum (available [here](#)) directs the Secretary of the Treasury to review the Dodd-Frank Orderly Liquidation Authority, which provides a mechanism for the seizure, break up and winding down of a failing non-bank financial institution, under the supervision of the FDIC, where the failure of the institution would otherwise threaten financial stability in the United States. The presidential memorandum notes that the existence of the Orderly Liquidation Authority may encourage excessive risk taking by creditors, counterparties and shareholders of financial companies, because section 210(n) of the Dodd-Frank Act also created an Orderly Liquidation Fund that is authorized to use taxpayer funds to carry out liquidations.

Among other things, the Secretary’s review is required to consider:

- Whether the framework for using the Orderly Liquidation Authority is consistent with the Core Principles of (i) preventing taxpayer-funded bailouts and (ii) engaging in a more rigorous regulatory impact analysis that addresses systemic risk and market failures, such as moral hazard and information asymmetry;
- Whether the availability or use of the Orderly Liquidation Authority leads or could lead to excessive risk-taking on the part of creditors, counterparties and shareholders, or otherwise leads market participants to believe that a financial company is “too big to fail”; and
- Whether a new chapter in the U.S. Bankruptcy Code, in which the claims against a failed financial company would be resolved pursuant to the procedures of bankruptcy law rather than the provisions of the Dodd-Frank Act, would be a superior method of resolution for financial companies.

The memorandum further directs the Secretary to refrain from making any determination regarding a financial company under section 203(b) of the Dodd-Frank Act pending the completion of the review of the Orderly Liquidation Authority unless the Secretary determines, in consultation with the President, that the criteria enumerated in section 203(b) require otherwise.

Financial Stability Oversight Council

The second presidential memorandum (available [here](#)) directs the Secretary of the Treasury to review the Financial Stability Oversight Council (“FSOC”), which is authorized under the Dodd-Frank Act to designate large, systemically important non-bank financial institutions for enhanced regulation. The Secretary of the Treasury is directed to report on the FSOC designation and determination processes, considering, among other things:

- Whether these processes are sufficiently transparent;
- Whether these processes provide entities with adequate due process;
- Whether these processes give market participants the expectation that the federal government will shield supervised or designated entities from bankruptcy;
- Whether evaluation of a nonbank financial company’s material financial distress should assess the likelihood of such distress;
- Whether any determination as to whether a nonbank financial company’s material financial distress could threaten the financial stability of the United States should include specific, quantifiable projections of the damage that could be caused to the United States economy, including a specific quantification of estimated losses that would be likely if the company is not subject to enhanced supervision; and
- Whether these processes adequately consider the costs of any designation on the regulated entity.

Notably, several of these factors are implicated in MetLife’s successful 2016 challenge in the D.C. District Court to its designation as a systemically important non-bank financial institution (see our client alert [here](#)). MetLife has requested that the case, currently on appeal, be held in abeyance pending the Secretary of the Treasury’s report.

The memorandum further directs the Secretary to (i) evaluate and report to the President on whether the FSOC designation process is consistent with the Core Principles, and (ii) not to vote for any non-emergency proposed designations or determinations pending the completion of this review and submission of the Secretary’s recommendations. As the Dodd-Frank Act designates the Secretary of the Treasury as the Chairperson of the FSOC and requires the affirmative vote by the Chairperson for any designation or determination, this effectively prevents any designations or determinations during this review period.

While President Trump had already directed the Secretary of the Treasury to review the regulation of the U.S. financial system in light of the Core Principles, these recent presidential memoranda indicate a particular concern with two controversial provisions of the Dodd-Frank Act. When signing the memoranda, President Trump stated his belief that the Dodd-Frank Act has in many cases done the opposite of what it was supposed to do, namely it has enshrined “too big to fail” and encouraged risky behavior.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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