

[Securities Regulation Daily Wrap Up, TOP STORY—President signs DOL, finance reform executive orders; SEC rule repeal on tap, \(Feb. 3, 2017\)](#)

Securities Regulation Daily Wrap Up

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By [Mark S. Nelson, J.D.](#)

President Trump signed two executive orders that will slow implementation of the Department of Labor's fiduciary standard and mandate a review of the Dodd-Frank Act and the wider set of U.S. financial regulations. A brief [transcript](#) posted on the White House website confirmed the DOL order, but the text of that order was not immediately available, although a [presidential memorandum](#) explained how a review of the rule is to proceed. The White House later published the financial regulation [executive order](#).

Also on tap for the White House is a joint Congressional resolution to disapprove the SEC's resource extraction issuers rule. The Senate approved the resolution ([H.J. Res. 41](#)) by a [vote](#) of 52-47 early this morning, while the House approved it by a [vote](#) of 235-187 on Wednesday. As of publication, the White House had not indicated whether the president signed the resolution, but the Administration has previously stated its support for the measure.

"Core Principles" and Dodd-Frank. Speaking at a Strategy and Policy Forum held in the state dining room of the White House, President Trump [alluded](#) to a coming review of Dodd-Frank and other financial regulations. Said the president: "But we expect to be cutting a lot out of Dodd-Frank, because, frankly, I have so many people, friends of mine that have nice businesses that can't borrow money, they just can't get any money because the banks just won't let them borrow because of the rules and regulations in Dodd-Frank."

The president's executive order establishes what it calls "Core Principles" by which U.S. financial regulations are to be judged. These include enabling people to make "independent" and "informed" decisions about retirement savings and the building of individual wealth. The order also speaks of restoring public accountability at agencies that regulate financial matters and of promoting U.S. interests and competitiveness. As legislation in Congress would do in specific ways, the order more broadly calls for enhanced "regulatory impact analysis" with an emphasis on systemic and market risks, and on topics such as "moral hazard" and "information asymmetry." Moreover, the order seeks to prevent taxpayer bailouts.

According to the order, the Treasury secretary must consult with the heads of agencies who are members of the Financial Stability Oversight Council. The secretary then must report to the president within 120 days regarding how U.S. laws and regulations, including guidance and reporting and recordkeeping duties, "promote" or "inhibit" federal regulation of the U.S. financial system consistent with the executive order's "Core Principles." The secretary also must periodically report to president after the initial report.

House Financial Services Committee Chairman Jeb Hensarling (R-Texas) [hailed](#) the several actions taken by President Trump to reconsider parts of the Dodd-Frank Act. Hensarling noted that the executive orders are similar to provisions he included in last year's Financial CHOICE Act, which could be re-introduced in the new Congress.

Senator Elizabeth Warren (D-Mass) issued a [statement](#) critical of President Trump's new executive orders. "Today, after literally standing alongside big bank and hedge fund CEOs, he announced two new orders - one that will make it easier for investment advisors to cheat you out of your retirement savings, and another that will put two former Goldman Sachs executives in charge of gutting the rules that protect you from financial fraud and another economic meltdown."

DOL fiduciary rule. With respect to the DOL fiduciary rule, the Trump executive order would slow work done by the Obama Administration in support of the rule. President Obama [vetoed](#) a resolution to disapprove the rule.

But the DOL's rule may face additional challenges under a Republican-led Congress that could pursue some of the fiduciary duty bills that faltered during the last Congress and would have faced a veto threat from then-President Obama. According to Rep. Ann Wagner (R-Mo), who [praised](#) President Trump's action on the DOL's rule, the executive order may lead to repeal of the rule or to further Congressional action.

The DOL executive order also may add to the uncertainty about whether the SEC will issue a fiduciary rule of its own. The Dodd-Frank Act granted the agency authority to consider rulemaking to impose requirements similar to those in the DOL rule for broker-dealers and others within the SEC's jurisdiction.

Former SEC Chair Mary Jo White, in her first [speech](#) since leaving the agency, said a uniform fiduciary rule would require the Commission to "grapple" with tough questions. As Chair, White told Congress that she had concluded such a fiduciary standard should apply to "personalized securities advice to retail investors," a view she reiterated in her last [appearance](#) before Congress as SEC Chair. Jay Clayton, the Trump Administration's [nominee](#) to succeed White, may be asked about his views on this issue when he has his Senate confirmation hearing.

Resource rule: disclosure, jobs, competition, corruption. Meanwhile, the Trump Administration has indicated the president is likely to sign a resolution disapproving the SEC's resource extraction issuers rule. The White House previously released a [statement](#) that the Administration "strongly supports" this and other resolutions that would roll back some federal regulations by invoking the Congressional Review Act.

The resource extraction issuers rule is one of several social or specialized disclosure rules contained in the Dodd-Frank Act. The House vote came one day after Acting SEC Chairman Michael Piwowar [called](#) for a review of the agency's April 2014 [guidance](#) on implementation of the related conflict minerals rule. The House's action also took place as the Senate was in the process of [confirming](#) Rex Tillerson to be Secretary of State (he has since been sworn in). Tillerson, the former CEO and Chairman of Exxon Mobil Corporation, was a frequent target of representatives opposed to the disapproval resolution because of the company's Russian business dealings and opposition to the resource extraction issuers rule (See e.g., [February 16, 2016](#) comment; [March 8, 2016](#) comment).

In the Senate, as in the House, lawmakers voiced diametrically opposed views of the SEC's resource extraction issuers rule. Republicans who advocated for disapproval of the rule said it was costly to industry and threatened jobs. Democrats argued that the rule's disclosure mandate helps to expose corruption.

Senate Majority Leader Mitch McConnell (R-Ky) [praised](#) the resource extraction issuers disapproval resolution and a related disapproval resolution that impacts the coal industry. McConnell had this to say about the SEC's rule: "Although the Securities and Exchange Commission may have had good intentions, the Resource Extraction Rule costs American public companies up to nearly \$600 million annually and gives foreign owned business in Russia and China an advantage over American workers."

Senator Sherrod Brown (D-Ohio), ranking member of the Senate Banking Committee, opposed the resolution, which he said would roll back energy industry disclosures that have now been replicated by Canada and numerous European countries. "This bill puts Big Oil and its cronies ahead of transparency and accountability, and ought to be called the Kleptocrat Relief Act," said Brown in a [press release](#).

Hensarling [told](#) members the SEC's rule was a "burdensome and controversial" one that disadvantaged U.S. public companies versus foreign competitors. Hensarling, like many other Republicans who spoke on the House floor, criticized the rule as having nothing to do with investor protection or the SEC's other core missions. Hensarling reminded members that the Foreign Corrupt Practices Act already exists to fight bribery and other forms of corruption.

Meanwhile, Rep. Maxine Waters (D-Calif), the House FSC's ranking member, [accused](#) Republicans of using "alternative facts" to bolster their arguments for disapproval of the rule. Waters said the resolution would roll back a rule that helps to fight corruption, informs investors, and helps citizens demand accountability for resource management. Given that the resolution was made under the Congressional Review Act, Waters said the SEC cannot simply adopt a substantially similar rule after disapproval.

Waters also noted that the SEC's rule would bring a degree of transparency to Russia's extractive industries. She also renewed concerns about the Trump Administration's nominee to lead the State Department, Tillerson, who she [said](#) had argued against the SEC's rule.

Republicans also repeatedly cited the rule's estimated \$591 million annual compliance cost in support of the disapproval resolution. The Commission's revised final rule made annual ongoing total compliance cost estimates using separate calculations that both included and excluded fixed costs. In its estimate that assumed fixed costs, and which produced higher cost estimates than the calculation with no fixed costs, the SEC said the lower bound was \$96 million, while the upper bound was \$591 million.

Rule mechanics. The resource extraction issuers rule was the product of several attempts by the SEC to draft a rule that both implemented the congressional mandate and was consistent with court opinions in cases challenging the rule. The re-written rule followed a period of intense litigation and a court [order](#) to speed the rulemaking process, which the SEC eventually [said](#) it could finish by June 2016. The Commission issued a separate [order](#) with the [final rule](#) finding certain countries' disclosure regimes substantially similar to the U.S. requirements.

The SEC first [proposed](#) the rule in 2010, and then [adopted](#) its initial final version of Exchange Act Rule 13q-1 in 2012. A federal judge [ruled](#) that the Commission's initial final rule flunked *Chevron* step one because Section 1504 did not necessarily require the agency to mandate publicly filed resource extraction issuer reports. Moreover, the court said the Commission misread "compilation" in a manner that limited the agency's discretion. The judge also said the Commission should have mulled including an exemption for firms doing business in countries that do not permit public disclosure of royalty payments. The rule would have companies make disclosures on Form SD.

The [revised rule](#) applies broadly to payments that are "not de minimis," meaning one or a series of related payments of at least \$100,000. The rule includes exemptions for acquired companies and for exploratory activities, and it reiterates that the Commission can grant other case-by-case exemptions. The rule also contains provisions that could apply to some companies' [mid-stream](#) operations. The rule became effective September 26, 2016, and compliance was set to begin for fiscal years ending on or after September 30, 2018.

Companies: Exxon Mobil Corporation

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