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First Steps for the Trump Administration: Restore Financial Freedom

Free Market Reforms to Improve Financial Options for all Americans

By John Berlau[*]

Over the past 15 years—beginning with the George W. Bush administration and accelerating rapidly in the Obama administration—Congress and the executive branch have imposed a series of laws and regulations that place obstacles in the way of entrepreneurs, investors, and consumers. These policies have led to greater concentration in the financial industry and fewer options for credit and capital for consumers and entrepreneurs. They have also limited opportunities for middle-class investors to build wealth, as the number of stocks on U.S. exchanges has shrunk by half from 1996 to 2012, at the same time they rose by 28 percent overseas, according to the National Bureau of Economic Research. To the extent it can, the Trump administration must ease or reverse these policies by executive action. Then, it must work with Congress to repeal the rest.

Policy Recommendations

Replace Richard Cordray with a Pro-Market Director of the Consumer Financial Protection Bureau. The Consumer Financial Protection Bureau (CFPB) was created by the 2010 Dodd-Frank financial services law, and expressly designed to evade Congressional and Presidential oversight. As set up under Dodd-Frank, the CFPB is headed by a single director, who is not removable by the President except under the stringent conditions of "inefficiency, neglect of duty, or malfeasance in office."

However, in October 2016, the U.S. Circuit Court of Appeals for the District of Columbia ruled that Dodd-Frank's removal restrictions on the CFPB head unconstitutionally infringe on the President's powers, and therefore the President could remove the CFPB director at will, just as he can fire the head of any other executive agency. Director Richard Cordray's fixed five-year term does not officially end until the summer of 2018. President Trump should not wait until then to replace him.

During his tenure as director, Cordray has inundated Main Street financial firms, including community banks and credit unions, with a flood of burdensome mandates, and imposed unprecedented large retroactive fines. His rules have made obtaining consumer financing more difficult—and likely impossible for the poorest in America. Under Cordray, the CFPB is building a large database of mortgage and credit card data without authorization from

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[*] *John Berlau is a senior fellow at the Competitive Enterprise Institute.*

Congress and over the objections of many lawmakers, for the vaguely stated purpose of better understanding consumer decision making.

The CFPB needs to be headed by someone who will stop these abuses of power and measure the Bureau's success by other means than the amount of fines assessed on the consumer finance industry. The new President should take whatever steps he can to remove Director Cordray and replace him with someone who will root out burdensome rules and ensure that consumers continue to have access to the financial services they need.

Replacing the current CFPB head is only a first step toward reform, however. To increase accountability, Congress should pass and the next President should sign legislation that would subject the CFPB, which is currently funded by the Federal Reserve, to the Congressional appropriations process.

Delay Implementation of the Department of Labor's Fiduciary Rule Indefinitely until It Can Be Repealed. By the government's own estimates, the Department of Labor's "fiduciary rule" is the most expensive regulation of 2016. It threatens loss of access to investment advice and choices for millions of middle-class savers, as well and the livelihoods of thousands of brokers and insurance agents.

Ease Sarbanes-Oxley's Onerous Internal Control Mandates. While the Obama administration has set records in binding the economy with red tape, it is not the only guilty party. The Sarbanes-Oxley Act (Sarbox), signed by President George W. Bush in 2002 in response to the Enron and WorldCom accounting scandals, continues to hinder companies' ability to go (and remain) public. The most burdensome mandate in Sarbox is the required audit of internal controls, which caused accounting costs to quadruple for many public companies. As implemented by the Public Company Accounting Oversight Board (PCAOB), the quasi-public entity created by Sarbox, companies must audit "internal controls" over any company process that could enable "a reasonable possibility of a material misstatement in the financial statements"—an extremely broad standard that could encompass all manner of company operations. Home Depot co-founder Bernie Marcus has said that he could not have taken the firm public and financed its growth had Sarbanes-Oxley been in place in 1981, when Home Depot launched its first stock offering with just four stores in Georgia.

Both Democrats and Republicans have acknowledged the burden. In 2012, Congress and President Obama responded by enacting the Jumpstart Our Business Startups (JOBS) Act, which gives small and midsize firms going public a five-year exemption from the internal control audit mandate. While there was a small spike in initial public offerings (IPOs) when the JOBS Act went into effect, many entrepreneurs still see this delay as an insufficient remedy for the burdens Sarbox places on public companies.

State of Play

Cordray and CFPB Reform. The CFPB is appealing the D.C. Circuit Court's ruling in *PHH Corp. v CFPB*, but some legal scholars say the president does not have to wait for a final ruling to remove Cordray. CEI is hopeful that the *PHH* ruling will impose accountability on the CFPB and will strengthen CEI's own case, *State National Bank of Big Spring v. Lew*, which challenges the CFPB's constitutionality. CEI is arguing that the structure of the CFPB violates the Constitution's separation of powers because the agency is insulated against meaningful checks by the legislative, executive, and judicial branches of government. This case is currently before the U.S. District Court for the District of Columbia and awaiting a ruling on these constitutional questions.

DOL Fiduciary Rule. Since this regulation is a very creative interpretation of a decades-old statute, there is no doubt it could be repealed under new management. But because the final rule has been written, a new rule must be written to formally withdraw it. By itself, this will not stop the current rule from going into effect, and wreaking havoc, if implemented as scheduled in April 2017.

Fortunately, there are several measures that can be taken to delay the current rule while a new one is being written to repeal it. The DOL can delay implementation, by a year or more if necessary, without violating the underlying statute. Since the fiduciary rule is itself a radical revision of the way the Employee Retirement Income Security Act of 1974 has been interpreted for more than 40 years, it would be difficult to argue that extending the deadline for this rule somehow disregards the statute. Congress, by a simple majority vote not subject to the filibuster, can freeze funds in a spending bill for President Trump to sign. If, as expected, the U.S. District Court of the Northern District of Texas vacates all or part of the rule, the Trump Justice Department can simply decide not to appeal such a ruling.

Sarbanes-Oxley. Sarbanes-Oxley's Section 404 does not require a full audit of internal controls, merely an "attestation" by an outside accounting firm that they are effective in preventing fraud. It was the PCAOB, created by Sarbox, which interpreted this section to require a very costly, full-blown audit of internal controls. So the PCAOB can reverse that expectation to the plain attestation the law envisioned. An administration that wants to change the direction of the PCAOB can do so through the Securities and Exchange Commission (SEC), thanks to a 2010 Supreme Court ruling in *Free Enterprise Fund v. Public Company Accounting Oversight Board*. In this case, in which Competitive Enterprise Institute attorneys served as co-counsel, the Court ruled that members of the PCAOB were subject to at-will removal by a majority of the SEC. So a 3-2 majority of SEC commissioners could immediately fire current members of the PCAOB and appoint new members who could rewrite the accounting standard.

For Further Reading

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