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February 28, 2018

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ACREL News & Notes
February 2018

The Regulation of Residential Real Estate Finance Under Trump

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Reducing Regulation and Controlling Regulatory Costs was one of President Trump's first Executive Orders ("Reducing Regulation Executive Order").[1] He signed it on January 30, 2017, just days after his inauguration. It states that it "is the policy of the executive branch to be prudent and financially responsible in the expenditure of funds, from both public and private sources. . . . [I]t is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations." The Reducing Regulation Executive Order outlined a broad deregulatory agenda, but was short on details other than the requirement that every new regulation be accompanied by the elimination of two existing ones.

A few days later, Trump issued another Executive Order that was focused on financial services regulation in particular, *Core Principles for Regulating the United States Financial System* ("Core Principles Executive Order").[2] Pursuant to this second Executive Order, the Trump Administration's first core principle for financial services regulation is to "empower Americans to make independent financial decisions and informed choices in the marketplace, save for retirement, and build individual wealth." The Core Principles Executive Order was also short on details.

Since Trump signed these two broad Executive Orders, the Trump Administration has been issuing a series of reports that fill in many of the details for financial institutions. The Department of Treasury has issued three of four reports that are collectively titled *A Financial System That Creates Economic Opportunities* ("*Economic Opportunities*") that are directly responsive to the Core Principles Executive Order. While these documents cover a broad of topics, they offer a glimpse into how the Administration intends to regulate or more properly, deregulate, residential real estate finance in particular.

What is clear from these documents is that the Trump Administration intends to roll back consumer protection regulation in order to allow the mortgage market to operate with far less government oversight. Such a regulatory approach appears to completely ignore (or accept) the condition of the mortgage market in the early 2000s. During that period, that relatively unregulated market was a hotbed of predatory activity directed at a large swath of American households. This activity led to the financial crisis, the effects of which linger on to this day.

Treasury's first *Economic Opportunities* report addresses *Banks and Credit Unions*; the second, *Asset Management and Insurance*; and the third, *Capital Markets*. Each report addresses important aspects of real estate finance regulation. A fourth report, on *Non-Bank Financial Institutions, Financial Technology, and Financial Innovation*, has not yet been released, but will most likely do the same. These reports are directly responsive to the Core Principles Executive Order and chart a path toward a much less regulated residential mortgage market. I offer a look

[1] Presidential Executive Order 13771 (January 30, 2017).
[2] Presidential Executive Order 13772 (February 3, 2017).

at some of the highlights in the three released reports. For readers who would like to delve more deeply into this topic, I refer them to my longer article on this topic, David Reiss, *The Trump Administration and Residential Real Estate Finance*, WESTLAW JOURNAL DERIVATIVES (Jan. 25, 2018).

Treasury's first report on *Banks and Credit Unions* promotes a much less regulated residential mortgage market. It addresses the supposed harm caused by the Consumer Financial Protection Bureau in that market because of its expansive regulatory approach. It also provides a laundry list of industry criticisms of the Bureau without acknowledging that it changed the ethos of the nonprime mortgage market from "watch your wallet" to one in which borrowers can assume that they are getting a fair shake from their lender.

Treasury's second report on *Capital Markets* addressed, among other things, the future of securitization. The report acknowledges that relatively unregulated subprime MBS contributed to the Great Recession but it argues that stripping away the regulations that were implemented in response to the financial crisis will safeguard our global financial leadership. How's that? A full deregulatory push would return us to the pre-crisis environment where mortgage market players will act in their short-term interests, while exposing counter-parties and consumers to greater risks. Notwithstanding that overreach, the report has some specific recommendations that could make securitization a more effective financial vehicle. These include aligning U.S. regulations with the Basel recommendations that govern the global securitization market; fine-tuning risk retention requirements; and rationalizing the multi-agency rulemaking process.

Treasury's third report, *Asset Management and Insurance*, seeks to make changes in how we talk about finance. The report calls for replacing the term "shadow banking" with "market based finance."[3] While innocent enough as a matter of nomenclature, retiring "shadow banking" reflects the Trump Administration's desire to reduce regulation across the financial services industry and to put an end to any negative connotations that the term "shadow banking" promotes for actors like nonbank lenders. The report makes this crystal clear: "the word 'shadow' could be interpreted as implying insufficient regulatory oversight, or disclosure."[4]

President Trump has made it clear that his Administration's approach to empowering "Americans to make independent financial decisions and informed choices in the marketplace" is to free financial services institutions from regulations that were designed to protect consumers from rapacious behavior in the credit markets, behavior that was endemic before the financial crisis.[5] This approach was not successful for a broad swath of Americans when the George W. Bush Administration and Federal Reserve Chairman Alan Greenspan pursued it. While it is likely to fail consumers once again, it might lead to higher profits in the short-term for the financial services firms that can act with far less government oversight than they have faced in the last decade. In the long term, though, it is far from clear that responsible players in the residential real estate industry will benefit from a return to the Wild West days of the early 2000s.

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[3] Asset Management and Insurance, at 63.
[4] *Id.*
[5] Presidential Executive Order 13772.