# REGULATORY REFORM ACCOMPLISHMENTS UNDER PRESIDENT TRUMP'S EXECUTIVE ORDERS

U.S. DEPARTMENT OF THE TREASURY

APRIL 24, 2018

## EXECUTIVE SUMMARY

From the start of this Administration, President Trump has made it a chief domestic policy priority to "alleviate unnecessary regulatory burdens placed on the American people."[1] Through a series of government-wide and agency-specific orders, the President has launched an historic effort to reduce existing red tape and limit new regulatory costs. The Department of the Treasury has undertaken extensive efforts to implement the President's regulatory reform agenda. This report details the steps that Treasury has taken since President Trump issued Executive Order 13777, "Enforcing the Regulatory Reform Agenda," on February 24, 2017. Among the highlights:

- Treasury has reduced its regulatory agenda by approximately 100 regulations, on net, compared to the Fall 2016 agenda.[2] Only two regulations were identified as significant "regulatory" actions in Treasury's Fall 2017 Regulatory Plan, while the remaining items on Treasury's Fall 2017 agenda are burden-reducing or have not yet been classified.

- Treasury and its bureaus are undertaking an extensive retrospective review of existing regulations to identify burdensome, unnecessary, and outdated regulations. In February 2018, for example, Treasury and the Internal Revenue Service (IRS) issued a notice of proposed rulemaking to eliminate as "deadwood" 298 tax regulations that are duplicative or obsolete and require taxpayers to navigate needlessly complex and confusing rules.

- Treasury issued an October 2017 report recommending reform or withdrawal of recent significant IRS regulations. Treasury has already withdrawn two of those regulations and is in the process of proposing modifications to the others.

- Treasury issued a series of reports detailing specific recommendations to make the U.S. financial regulatory system more efficient and better tailored, including recommendations concerning the regulation of banks and credit unions, capital markets, and asset management and insurance. The process to implement many of these recommendations has begun.

- Treasury issued a November 2017 report recommending specific reforms to the process used by the Financial Stability Oversight Council (chaired by the Secretary of the Treasury) to designate nonbank financial companies for enhanced prudential standards. Among other recommendations, Treasury called for the use of cost-benefit analysis to ensure the costs of FSOC's decisions are justified by the expected benefits. The process of implementing those recommendations has begun.

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[1] Executive Order 13777 (Feb. 24, 2017).
[2] *See infra* n.4.

- Treasury issued specific recommendations to reform the Consumer Financial Protection Bureau (CFPB) by improving accountability and reducing regulatory uncertainty. Treasury also published a critical evaluation of the deficient analytical foundation of the Bureau's ban on arbitration clauses in financial contracts—a regulation that would have imposed billions of dollars in new costs on businesses and consumers but that was nullified by a Congressional Review Act resolution.

| **Treasury Department**<br>**Regulatory Reform Under President Trump's Executive Orders**<br>***By the Numbers*** | |
|---|---|
| **305** | Treasury Regulations Eliminated or Proposed to Be Eliminated or Modified |
| **94** | Net Reduction in Regulations on Treasury's Regulatory Agenda[3] |
| **>250** | Specific Treasury Recommendations to Reform & Reduce Burdens of Financial Regulation |
| **0** | Regulatory Actions Under Executive Order 13771 |

## BACKGROUND

President Trump took several executive actions at the beginning of the Administration to establish regulatory reform as a chief domestic policy priority. On January 30, 2017, the President issued Executive Order 13771—"Reducing Regulation and Controlling Regulatory Costs"—declaring that for every one new significant regulation issued, at least two prior regulations—sufficient to offset the incremental cost of the new regulation—be identified for elimination. On February 24, 2017, the President issued Executive Order 13777—"Enforcing the Regulatory Reform Agenda." The order directs each agency to designate a Regulatory Reform Officer responsible for overseeing the implementation of the President's regulatory reform agenda. At each agency, the Regulatory Reform Officer was instructed to convene a

[3] *See id*.

Regulatory Reform Task Force to evaluate existing regulations and make recommendations regarding their repeal, replacement, or modification. The President directed specific attention to regulations that: eliminate jobs or inhibit job creation; are outdated, unnecessary, or ineffective; impose costs that exceed benefits; or create serious inconsistencies or otherwise interfere with regulatory reform initiatives and policies.

In addition, the President has issued Treasury-specific orders concerning regulatory reform. On February 3, 2017, he issued Executive Order 13772—"Core Principles for Regulating the United States Financial System"—which sets forth a series of Core Principles for domestic financial regulations. Those Core Principles call for regulating the financial system in a manner to:

- Empower Americans to make independent financial decisions and informed choices in the marketplace, save for retirement, and build individual wealth;
- Prevent taxpayer-funded bailouts;
- Foster economic growth and vibrant financial markets through more rigorous regulatory impact analysis that addresses systemic risk and market failures, such as moral hazard and information asymmetry;
- Enable American companies to be competitive with foreign firms in domestic and foreign markets;
- Advance American interests in international financial regulatory negotiations and meetings;
- Make regulation efficient, effective, and appropriately tailored; and
- Restore public accountability within Federal financial regulatory agencies and rationalize the Federal financial regulatory framework.

On April 21, 2017, the President issued Executive Order 13789—"Identifying and Reducing Tax Regulatory Burdens." This Executive Order required a retrospective review of all significant tax regulations Treasury issued after January 1, 2016 and ordered Treasury to identify any such regulations that impose an undue financial burden on taxpayers; add undue complexity to the Federal tax laws; or exceed the statutory authority of the IRS.

Treasury has undertaken extensive efforts to advance the Administration's regulatory reform agenda. Treasury issued a June 2017 request for information seeking public comment on its regulatory review project. Treasury's three principal sources of regulation—the Office of Tax Policy (OTP) and IRS; the Alcohol and Tobacco Tax and Trade Bureau (TTB); and the Financial Crimes Enforcement Network (FinCEN)—have also begun a review of their regulations with an eye to the efficient and tailored regulatory system the President's directives envision. Treasury's efforts also include a thorough review of the financial regulatory system pursuant to Executive Order 13772, which is culminating in a series of reports with recommendations. A summary of the efforts Secretary Mnuchin has led in support of the President's regulatory reform agenda follows.

## OVERVIEW OF TREASURY REGULATORY ACTIVITY

### *Regulatory Agenda*

The *Unified Agenda of Federal Regulatory and Deregulatory Actions* reports developing regulatory actions each spring and fall across approximately 60 agencies, including the Treasury Department. The Agenda reports actions at the pre-rule, proposed rule, and final rule stages, as well as long-term and completed actions. The fall edition of the *Unified Agenda* also includes the *Regulatory Plan*, which presents agency statements of regulatory priorities for the coming year. In some cases, regulatory and deregulatory actions are classified as "significant" under Executive Order 12866 and implementing guidance. Pursuant to Executive Order 13771, for the first time, the 2017 *Unified Agenda* identifies significant agency actions as regulatory, deregulatory, fully or partially exempt, or 'other' indicating that the rule has not yet been classified.

As part of its efforts to implement Executive Order 13771 and Executive Order 13777, the Department has streamlined its Agenda and has reduced its size by approximately 100 actions on net since Secretary Mnuchin was sworn into office.[4] Treasury achieved this reduction even after changing IRS's past practice of listing its regulatory priorities in the IRS Priority Guidance Plan but not on Treasury's Regulatory Agenda. The Fall 2017 Regulatory Agenda thus includes IRS regulations that have not appeared on prior Regulatory Agendas. Treasury's Fall 2017 Regulatory Agenda reported the following potentially significant and non-significant regulatory actions:[5]

| Year | Significant Regulations | Non-Significant Regulations |
|---|---|---|
| Fall 2011 | 44 | 554 |
| Fall 2012 | 33 | 535 |
| Fall 2013 | 38 | 511 |
| Fall 2014 | 36 | 525 |
| Fall 2015 | 40 | 519 |
| Fall 2016 | 44 | 511 |
| Spring 2017 | 41 | 496 |
| Fall 2017 | 33 | 428 |

[4] During 2017, Treasury withdrew 62 items from its Regulatory Agenda; it also moved 50 rules from its active agenda to long-term status. Long-term actions are defined as items under development but for which the agency does not expect to have a regulatory action in the 12 months after publication of the Agenda.

[5] These numbers reflect the data available in the RISC and OIRA Consolidated Information System (ROCIS).

***One-In-Two-Out Implementation***

Treasury has begun to implement Executive Order 13771's directive that each regulatory action considered "significant" for purposes of Executive Order 12866 should be offset by two deregulatory actions that together account for any incremental increase in costs. Consistent with Executive Order 13771's "one-in-two-out" principle, Treasury's forward-looking Fall 2017 Regulatory Agenda focuses on burden-reducing measures. Treasury has identified only two of the significant regulations in its Fall 2017 Regulatory Agenda as regulatory—the remaining significant actions are deregulatory or have not yet been classified.

***Burden-Reducing Measures***

The Department has taken no actions considered as "regulatory" for purposes of Executive Order 13771 since the President issued that Order. Treasury has taken the following deregulatory actions following the President's regulatory reform Executive Orders:

- *1545-BI18—Withdrawal of Liquidation of an Interest Proposed Regulation*—On August 4, 2016, Treasury and the IRS published in the Federal Register (81 FR 51413) a notice of proposed rulemaking under section 2704 (REG-163113-02), relating to restrictions on the liquidation of an interest in a corporation or a partnership. The proposed regulations sought to amend the existing regulations: (1) to address what constitutes control of a limited liability company or other entity or arrangement that is not a corporation, partnership, or limited partnership; (2) to address the effect of deathbed transfers that result in the lapse of a liquidation right; (3) to clarify the treatment of a transfer that results in the creation of an assignee interest; (4) to address the effect of restrictions created by state law; (5) to address restrictions on withdrawal from an entity and the liquidation of an interest in an entity; and (6) to address the effect of insubstantial interests held by persons who are not members of the family. Treasury and the IRS received numerous written comments on the proposed regulations from interested parties, and held a public hearing on December 1, 2016. In light of the comments received and in furtherance of Executive Order 13789, the proposed regulations were withdrawn on October 20, 2017.

- *1545-BM99—Withdrawal of Definition of Political Subdivision Proposed Regulation*—On February 23, 2016, Treasury and the IRS published in the Federal Register a notice of proposed rulemaking (81 FR 8870) that defined political subdivision for purposes of tax-exempt bonds under section 103 of the Internal Revenue Code. Treasury and the IRS received public comments and, on June 6, 2016, held a public hearing on the proposed regulations. In response to the proposed regulations, commenters stated that long-settled law establishes the meaning of political subdivision and that no further guidance is necessary. Commenters also stated that the proposed regulations would call into doubt the status of numerous existing issuers and users of tax-exempt bonds and that reorganizing these entities to qualify as political. Consistent with these comments and in furtherance of Executive Order 13789, on October 20, 2017, the proposed regulations were withdrawn.

- *1545-BI18—Transactions Involving the Transfer of No Net Value*—This July 13, 2017 notice withdrew the remaining part of a 2005 notice of proposed rulemaking containing proposed regulations that would have required an exchange or distribution of net value for certain corporate formations and reorganizations to qualify for tax-free treatment under the Internal Revenue Code. Other parts of the 2005 notice of proposed rulemaking were previously adopted as final regulations in 2008 and 2015. Removal of the proposed regulations provides certainty to corporate taxpayers that an exchange of net value is not required for many corporate transactions to be eligible for tax-free treatment.

- *1545-BN58—Amendment of 3402(q) Regulations*—These final regulations, issued September 27, 2017, relate to income tax withholding under IRC section 3402(q) on payments of certain gambling winnings. The regulations amend the rules regarding how payers determine the amount of the wager in pari-mutuel wagering transactions with respect to horse races, dog races, and jai alai. The regulations will result in less reporting and withholding burdens for payors of gambling winnings and less compliance burden for taxpayers.

- *1505-AC57—QFC Recordkeeping Rule Delay.* This April 23, 2018 final rule extended for six months the compliance date for certain record keeping requirements for Qualified Financial Contracts (QFRs). In October 2016, Treasury published a final regulation pursuant to section 210(c)(8)(H) of the Dodd-Frank Act requiring certain financial companies to maintain records with respect to their QFC positions, counterparties, legal documentation, and collateral that would assist the Federal Deposit Insurance Corporation (FDIC) as receiver in exercising its rights and fulfilling its obligations under Title II of the Dodd-Frank Act. That final regulation provided for staggered compliance dates for the bulk of the recordkeeping requirements based on the total consolidated assets of records entities subject to the rule. The first of these compliance dates, for records entities with $1 trillion or more in total consolidated assets, was set for June 23, 2018. After the regulation became effective, Treasury, the FDIC, and the primary financial regulatory agencies received requests for exemptions from the requirements of the regulation for certain types of records entities within a corporate group and certain types of QFCs. Treasury staff, the FDIC, and the primary financial regulatory agencies are currently reviewing these exemption requests. The final rule extended the regulatory compliance dates in light of these pending exemption requests and the Administration's general policy to alleviate unnecessary regulatory burdens.

## COMPONENT-SPECIFIC REGULATORY ACTIVITY

As explained, Treasury issues regulations from three main sources: OTP and IRS, TTB, and FinCEN. But Treasury's regulatory reform efforts also importantly include the various recommendations it has made to improve the broader domestic financial regulatory landscape. To that end, Treasury has issued multiple reports evaluating the current state of domestic financial regulations and recommending burden-reducing improvements to them.

### I. Domestic Finance

#### A. Executive Order & Presidential Memoranda Reports & Recommendations

The President has issued Executive Orders and Presidential Memoranda broadly addressing domestic financial regulations. In response to this direction, Treasury has prepared a number of reports with recommendations addressing financial regulation.

##### 1. Core Principles Reports

On February 3, 2017, the President issued Executive Order 13772, instructing the Secretary to report on the extent to which existing financial regulations promote the Administration's "Core Principles" of financial regulation, which include empowering Americans to make independent financial decisions, save for retirement, and build wealth; prevent taxpayer-funded bailouts; promote American competitiveness at home and abroad; and make regulation efficient, effective, and appropriately tailored. In response to the President's Executive Order, Treasury has issued a series of reports and recommendations.

- **Banks and Credit Unions Report:**[6] Treasury's June 12, 2017, report detailed how capital, liquidity, and leverage rules can be simplified to increase credit flow. Among other things, the report recommended:

  - Raising the threshold for enhanced prudential standards and better tailoring regulations to a bank's complexity and risk;
  - Implementing structural and procedural reforms at the Consumer Financial Protection Bureau (CFPB) to make it more accountable to Congress, the President, and the American people;
  - Reducing the overall regulatory burden for community banks; and
  - Making greater use of cost-benefit analysis in financial regulation.

- **Capital Markets Report:**[7] Treasury's October 6, 2017, report detailed how to streamline and reform the U.S. regulatory system for the capital markets. Treasury's report

[6] *See* Department of the Treasury, *A Financial System That Creates Economic Opportunities: Banks and Credit Unions*, *available at* https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf (June 12, 2017).

identified numerous ways to reduce the burden on companies looking to go public or stay public, while protecting investors. These include:

- Streamlining disclosure requirements and tailoring them to company size;
- Incorporating more robust economic analysis and public input into the rulemaking process;
- Limiting imposing new regulations through informal guidance instead of notice-and-comment rulemaking;
- Opening private markets to more investors through proposals to facilitate pooled investments in private or less-liquid offerings;
- Reviewing the roles, responsibilities, and capabilities of self-regulatory organizations;
- Improving the oversight of financial market utilities;
- Repealing certain Dodd-Frank Act public company disclosure requirements that are not material to investors;
- Investigating how to reduce costs of securities litigation for issuers, with the goal of protecting all investors;
- Increasing the amount that can be raised through crowdfunding from $1 million to $5 million; and
- Examining the impact of Basel III capital standards on secondary market activity in securitized products.

- **Asset Management & Insurance Report:**[8] Treasury's October 26, 2017, report examined the current regulatory framework for the asset management and insurance industries and made recommendations to align that framework with the Administration's Core Principles for financial regulation. Treasury focused on four key areas: the proper evaluation of systemic risk, ensuring effective regulation, rationalizing international engagement, and promoting economic growth and informed choices. Its recommendations include:

    - Supporting activities-based evaluations of systemic risk, instead of a firm-by-firm approach;
    - Adopting a principles-based approach to liquidity risk management rulemaking for registered investment companies;
    - Delaying implementation of the Department of Labor's fiduciary rule pending further evaluation;

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[7] *See* Department of the Treasury, *A Financial System That Creates Economic Opportunities: Capital Markets*, *available at* https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf (Oct. 6, 2017).
[8] *See* Department of the Treasury, *A Financial System That Creates Economic Opportunities: Capital Markets*, *available at* https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-That-Creates-Economic-Opportunities-Asset_Management-Insurance.pdf (Oct. 26, 2017).

- Promoting infrastructure investment by insurers through appropriately calibrated capital requirements;
- Amending rules to avoid dual registration requirements for investment companies;
- Increasing consumer choice by allowing annuities as investment options for employer-sponsored retirement plans; and
- Supporting legislative action to eliminate the statutory stress testing requirement for investment companies and advisers.

### 2. FSOC Designations Report

On April 21, 2017, the President issued a Presidential Memorandum directing the Secretary to review the determination and designation processes of the FSOC under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) and report to the President. Treasury consulted with a wide range of stakeholders to evaluate two FSOC processes: (1) the process for making determinations that nonbank financial companies shall be supervised by the Board of Governors of the Federal Reserve System (the Federal Reserve) and subject to enhanced prudential standards and (2) the process for designating financial market utilities (FMUs) as systemically important.

On November 17, 2017, Treasury issued its report and recommendations.[9] With respect to designations of nonbank financial companies, Treasury recommended that FSOC prioritize its efforts to address risks to financial stability through a process that emphasizes an activities-based or industry-wide approach. Treasury recommended that FSOC implement a process for assessing and addressing potential risks to financial stability that includes three steps: reviewing potential risks to financial stability from activities and products; working with relevant regulators to address any identified potential risks to financial stability; and considering company-specific designations only after consultation with relevant regulators.

The report also made several specific recommendations regarding FSOC's analyses of the risks that a nonbank financial company could pose to U.S. financial stability. These included recommendations to enhance the transparency and analytical rigor of FSOC's analyses. In addition, Treasury recommended that FSOC provide a clear "off-ramp" to designated nonbank financial companies for achieving a rescission of their designation.

With respect to FMUs, Treasury recommended that FSOC add important enhancements to improve the analytical rigor, engagement, and transparency of the process, and to ensure that the designation process is individualized and appropriately tailored.

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[9] *See* Department of the Treasury, *Report to the President of the United States Pursuant to the Presidential Memorandum Issued April 21, 2017: Financial Stability Oversight Council Designations, available at* https://www.treasury.gov/press-center/press-releases/Documents/PM-FSOC-Designations-Memo-11-17.pdf (Nov. 17, 2017).

Treasury has begun the process of implementing these recommended reforms through FSOC.

### 3. CFPB Arbitration Rule Report

In July 2017, the CFPB issued its final rule prohibiting consumers and providers of certain financial products and services from agreeing to resolve future disputes through arbitration rather than class-action litigation. Treasury reviewed the arbitration rule and the CFPB study that supported it. The Department concluded that the arbitration rule would have imposed extraordinary, unjustified new costs.[10] Based on the CFPB's own estimates, the arbitration rule would have generated more than 3,000 additional class action lawsuits over five years, imposing $500 million in additional legal defense fees, $330 million in payments to plaintiffs' lawyers, and $1.7 billion in additional settlements. Treasury also concluded that the CFPB's study and rule showed the vast majority of consumer class actions deliver no relief at all to the putative members of the class—and even then, few affected individuals demonstrate an interest in recovery. Treasury determined that the CFPB failed to consider the share of class actions that lack merit, as well as the benefits of arbitration and regulatory alternatives potentially available to it.

## B. Progress on Recommendations

Treasury and the financial regulatory agencies have made significant progress in pursuing a number of the recommendations detailed in the Core Principles reports.

- **Volcker Rule Request for Information—**In August 2017, the Office of the Comptroller of the Currency (OCC) published a notice soliciting public input on how the regulations implementing the Volcker Rule could be revised. The notice followed Treasury's June 2017 report to the President concerning banks and credit unions and explained that responsive comments could support reforms urged in the Treasury report. Treasury's report had recommended that Congress exempt smaller institutions from the Volcker Rule altogether and exempt larger banks with little trading from the proprietary trading requirements of the rule. The report also included recommendations for regulators to simplify the current definition of "proprietary trading" and to simplify the requirements for permissible market-making and risk-mitigating hedging activities.

- **Pending Legislation—**After Treasury issued several of its reports concerning domestic financial regulation, Senator Crapo introduced the Economic Growth, Regulatory Relief, and Consumer Protection Act, which has passed in the Senate.[11] The bill reflects several of Treasury's recommendations. For example, the bill includes a small-bank exemption from the Volcker Rule, a simpler regulatory regime for highly capitalized community

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[10] *See* Department of the Treasury, *Limiting Consumer Choice, Expanding Costly Litigation: An Analysis of the CFPB Arbitration Rule*, *available at* https://www.treasury.gov/press-center/press-releases/Documents/10-23-17%20Analysis%20of%20CFPB%20arbitration%20rule.pdf (Oct. 23, 2017).

[11] *See* Economic Growth, Regulatory Relief, and Consumer Protection Act, S. 2155, 115th Cong. (2017).

banks, and a higher threshold for subjecting bank holding companies to enhanced prudential standards.

- **Arbitration Rule Repeal—**After Treasury issued its report on the CFPB Arbitration Rule, the Senate passed and the President signed a Congressional Review Act resolution nullifying the rule. A number of Senators, including Senate Banking Committee Chairman Crapo, made arguments echoing Treasury's analysis in statements supporting the vote.[12]

- **Home Mortgage Disclosure Act (HMDA) Reform—**Treasury recommended that the CFPB reexamine its 2015 HMDA regulations to address borrower privacy concerns, allow appropriate time for industry implementation, and provide exemptions for small institutions. In December 2017, the CFPB announced that it will provide additional flexibility for small lenders and that it intends to engage in a rulemaking to reconsider various aspects of the 2015 HMDA rule such as the institutional and transactional coverage tests and the rule's discretionary data points.

- **Leveraged Lending Guidance—**In 2013, the Federal Reserve, FDIC, and Office of the Comptroller of the Currency (OCC) issued guidance on leveraged lending by large financial institutions. The guidance addressed such issues as underwriting, risk management, and valuation standards. Many stakeholders criticized the guidance for making policy shifts outside a notice and comment environment and for unnecessarily restrictive on this type of activity. Treasury recommended that the three agencies re-issue the guidance for public comment. In November and December 2017, heads of the Federal Reserve, FDIC, and OCC announced in separate letters to Capitol Hill that they intended to seek public comment on the guidance and make related changes.

- **Reducing Data Collection—**In November 2017, the Federal Insurance Office (FIO), working with state insurance commissioners, announced the consolidation of two separate data collections from industry on terrorism risk insurance. The competing data collections—one administered by FIO and another by the National Association of Insurance Commissioners—were duplicative and burdensome.

## II. Office of Tax Policy and the IRS

OTP and IRS have undertaken a retrospective review of significant recent tax regulations pursuant to Executive Order 13789 and identified eight such regulations for rescission or modification. They have also undertaken a thorough review of "deadwood" tax regulations to identify and eliminate outdated and unnecessary rules.

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[12] *See, e.g.*, "Chairman Crapo on CFPB Arbitration Rule," https://www.banking.senate.gov/public/index.cfm/2017/10/chairman-crapo-on-cfpb-arbitration-rule (Oct. 24, 2017) (citing Treasury report).

### A. Executive Order 13789 Report

***Summary and Highlights***

Executive Order 13789 directed Secretary Mnuchin to identify significant tax regulations issued on or after January 1, 2016, that (i) impose an undue financial burden on U.S. taxpayers, (ii) add undue complexity to the Federal tax laws, or (iii) exceed the statutory authority of the IRS. In an interim report to the President dated June 22, 2017, Treasury identified eight such regulations.[13] Executive Order 13789 further directs the Secretary to submit to the President a report recommending "specific actions to mitigate the burden imposed by regulations identified in the interim report." In a second report to the President dated October 2, 2017, Treasury recommended specific actions with respect to these eight regulations, including potential modification, partial revocation, or complete withdrawal.[14]

***Proposed regulations to be withdrawn entirely***

1. *Proposed Regulations under Section 2704 on Restrictions on Liquidation of an Interest for Estate, Gift, and Generation-Skipping Transfer Taxes (Reg-163113-02; 82 F.R. 51413) (Withdrawn)*

Section 2704 addresses the valuation, for wealth transfer tax purposes, of interests in family-controlled entities. In limited cases, Section 2704 disregards restrictions on the ability to liquidate family-controlled entities when determining the fair market value of an interest for estate, gift, and generation-skipping transfer tax purposes. Also in limited cases, Section 2704 treats lapses of voting or liquidation rights as if they were transfers for gift and estate tax purposes. The proposed regulations, through a web of dense rules and definitions, would have narrowed longstanding exceptions and dramatically expanded the class of restrictions that are disregarded under Section 2704. In addition, the proposed regulations would have required an entity interest to be valued as if disregarded restrictions did not exist, either in the entity's governing documents or under state law. No exceptions would have been allowed for interests in active or operating businesses.

Treasury and the IRS received numerous written comments on the proposed regulations from interested parties and held a public hearing on December 1, 2016. In light of the comments received and in furtherance of Executive Order 13789, the proposed regulations were withdrawn on October 20, 2017.

2. *Proposed Regulations under Section 103 on Definition of Political Subdivision (Reg-129067-15; 81 F.R. 8870) (Withdrawn)*

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[13] *See* IRS Notice 2017-38, 2017-30 I.R.B. 147, *available at* https://www.irs.gov/irb/2017-30_IRB#NOT-2017-38 (July 24, 2017).

[14] *See* Department of the Treasury, *Second Report to the President on Identifying and Reducing Tax Regulatory Burdens*, *available at* https://www.treasury.gov/press-center/press-releasess/Documents/2018- 03004_Tax_EO _report.pdf (Oct. 2, 2017).

Section 103 excludes from a taxpayer's gross income the interest on state or local bonds, including obligations of political subdivisions. Proposed regulations would have required a "political subdivision" to possess not only significant sovereign power, but also to meet enhanced standards to show a governmental purpose and governmental control. Some commenters argued that settled law only requires a political subdivision to possess sovereign powers. Many commenters also argued that the proposed regulations would force costly and burdensome changes in entity structure to meet the new requirements. Treasury and the IRS continue to believe that some enhanced standards for qualifying as a political subdivision may be appropriate. After careful consideration of the comments on the proposed regulations, however, Treasury and the IRS now believe that regulations having as far-reaching an impact on existing legal structures as the proposed regulations are not justified.

Consistent with these comments and in furtherance of Executive Order 13789, on October 20, 2017, the proposed regulations were withdrawn.

***Regulations to consider revoking in part***

3. *Final Regulations under Section 7602 on the Participation of a Person Described in Section 6103(n) in a Summons Interview (T.D. 9778; 81 F.R. 45409)*

These final regulations provide that the IRS may use private contractors to assist the IRS in auditing taxpayers. Under the regulations, the IRS may contract with persons who are not government employees, and those private contractors may "participate fully" in the IRS's interview of taxpayers or other witnesses summoned to provide testimony during an examination. In particular, the regulations allow private contractors to receive and review records produced in response to a summons, be present during interviews of witnesses, and question witnesses under oath, under the guidance of an IRS officer or employee. These regulations were issued as temporary regulations in 2014 and were finalized in 2016. After reviewing public comments it received and becoming aware of some judicial concern about these regulations,[15] Treasury and the IRS are looking into proposing a prospectively effective amendment to these regulations in order to narrow their scope by prohibiting the IRS from enlisting outside attorneys to participate in an examination, including a summons interview.

4. *Regulations under Section 707 and Section 752 on Treatment of Partnership Liabilities (T.D. 9788; 81 F.R. 69282)*

These partnership tax regulations include: (i) proposed and temporary regulations governing how liabilities are allocated for purposes of disguised sale treatment; and (ii) proposed and temporary regulations for determining whether so-called "bottom-dollar" guarantees create the economic risk of loss necessary to be taken into account as a recourse liability. The first rule would have changed the tax treatment of forming many partnerships. In particular, for disguised sale purposes, the temporary regulations would, in general terms, have applied the rules relating to non-recourse liabilities to formations of partnerships involving recourse liabilities. According

[15] *See United States v. Microsoft Corp.*, 154 F. Supp. 3d 1134, 1143 (W.D. Wash. 2015).

to commenters, the first rule was promulgated without adequate consideration of its impact. While Treasury and the IRS believe that the temporary regulations' novel approach to addressing disguised sale treatment merits further study, Treasury and the IRS agree that such a far-reaching change should be studied systematically. Treasury and the IRS, therefore, are considering whether the proposed and temporary regulations relating to disguised sales should be revoked and the prior regulations reinstated.

By contrast, Treasury and the IRS currently believe that the second set of regulations relating to bottom-dollar guarantees should be retained. Before the proposed and temporary regulations relating to bottom-dollar guarantees were issued, the liability allocation rules permitted sophisticated taxpayers to create basis artificially and thereby shelter or defer income tax liability. Bottom-dollar guarantees permitted taxpayers to achieve these results without meaningful economic risk, which is inconsistent with the economic-risk-of-loss principle underlying the debt allocation rules for recourse obligations. Consequently, although Treasury and the IRS will continue to study the technical issues and consider comments, they do not plan to propose substantial changes to the temporary regulations on bottom-dollar guarantees.

5. *Final and Temporary Regulations under Section 385 on the Treatment of Certain Interests in Corporations as Stock or Indebtedness (T.D. 9790; 81 F.R. 72858)*

The regulations primarily comprise (i) rules establishing minimum documentation requirements that ordinarily must be satisfied in order for purported debt obligations among related parties to be treated as debt for federal tax purposes (the "documentation regulations"); and (ii) rules that treat as stock certain debt that is issued by a corporation to a controlling shareholder in a distribution or in another related-party transaction that achieves an economically similar result (the "distribution regulations").

Treasury has already issued a notice to delay application of the documentation rules until 2019. After further study of the documentation regulations, Treasury and the IRS are considering a proposal to revoke the documentation regulations as issued. Treasury and the IRS are also considering the development of revised documentation rules that would be substantially simplified and streamlined in a manner that will lessen their burden on U.S. corporations, while requiring sufficient legal documentation and other information for tax administration purposes.

In addition, Treasury and the IRS are currently studying the effect of tax reform legislation on the existing distribution regulations.

***Regulations to consider substantially revising***

6. *Final Regulations under Section 367 on the Treatment of Certain Transfers of Property to Foreign Corporations (T.D. 9803; 81 F.R. 91012)*

Section 367 of the Internal Revenue Code generally imposes immediate or future U.S. tax on transfers of property (tangible and intangible) to foreign corporations, subject to certain exceptions, including, prior to tax reform, an exception for certain property transferred for use in the active conduct of a trade or business outside of the United States. Prior regulations provided favorable treatment for foreign goodwill and going concern value. These regulations eliminated the ability of taxpayers to transfer foreign goodwill and going-concern value to a foreign corporation without immediate or future U.S. income tax. However, no active trade or business exception was provided for such transfers. After considering the comments and studying further the legal and policy issues, Treasury and the IRS concluded that an exception to the current regulations may be justified by both the structure of the statute and its legislative history. Statutory changes enacted as part of tax reform, including the elimination of the active trade or business exception and the explicit inclusion of goodwill and going concern value in the relevant definition of intangible property, effectively address the concerns underlying the regulations.

7. *Temporary Regulations under Section 337(d) on Certain Transfers of Property to Regulated Investment Companies (RICs) and Real Estate Investment Trusts (REITs) (T.D. 9770; 81 F.R. 36793)*

These temporary regulations amend existing rules on transfers of property by C corporations to REITs and RICs generally. Treasury and the IRS agree that the temporary regulations may produce inappropriate results in some cases. In particular, Treasury and the IRS agree, for example, that the regulations may cause too much gain in certain cases to be recognized. Thus, Treasury and the IRS are considering revisions that would limit the potential taxable gain recognized in certain circumstances.

8. *Final Regulations under Section 987 on Income and Currency Gain or Loss With Respect to a Section 987 Qualified Business Unit (T.D. 9794; 81 F.R. 88806)*

These final regulations provide rules for: (i) translating income from branch operations conducted in a currency different from the branch owner's functional currency into the owner's functional currency; (ii) calculating foreign currency gain or loss with respect to the branch's financial assets and liabilities; and (iii) recognizing such foreign currency gain or loss when the branch makes certain transfers of any property to its owner. Treasury and the IRS believe that the regulations have proved difficult to apply for many taxpayers. To address these difficulties, Treasury and the IRS have issued guidance indicating that future regulations will permit taxpayers to elect to defer the application of Regulation Sections 1.987-1 through 1.981-10 until at least 2019, depending on the beginning date of the taxpayer's taxable year. In addition, Treasury and the IRS also intend to propose modifications to the final regulations to permit taxpayers to elect to adopt a simplified method of calculating Section 987 gain and loss and translating Section 987 income and loss, subject to certain limitations on the timing of recognition of Section 987 loss.

### B. Priority Guidance Plan Burden-Reducing Measures

On October 20, 2017, Treasury and the IRS published the 2017-2018 annual Priority Guidance Plan, which identified 18 specific guidance projects and a global review of outdated regulations, that will reduce taxpayer burden in the near term in addition to the eight projects identified in the reports pursuant to Executive Order 13789. On February 7, 2018, Treasury and the IRS published an update to the Priority Guidance Plan, which added two additional burden-reducing guidance projects that have been completed. These guidance projects are:

*Completed Burden-Reducing Guidance Projects:*

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| **1.** | ***Guidance under §871(m), including with respect to non-delta-one transactions.*** (Published August 21, 2017 in IRB 2017-34 as NOT. 2017-42; Published February 5, 2018 in IRB 2018-06 as NOT. 2018-05.) |
| **2.** | ***Guidance under Chapter 3 (§§1441–1446) and Chapter 4 (§§1471–1474).*** (Published October 10, 2017 in IRB 2017-41 as NOT. 2017-46.) |
| **3.** | ***Regulations streamlining the §754 election statement.*** (Published Oct. 12, 2017 in the Federal Register as REG-116256-17 (NPRM).) |
| **4.** | ***Relief for late elections due to erroneously late-filed partnership and REMIC returns.*** (Published September 17, 2018 in IRB 2017-38 as NOT. 2017-47.) |
| **5.** | ***Final regulations under §3402(q).*** Proposed regulations were published on December 30, 2016. (Published September 27, 2017 in the Federal Register as TD 9824.) |
| **6.** | ***Guidance under §954(c) regarding foreign currency gains.*** (Published Dec. 19, 2017 in the Federal Register as REG-119541-15 (NPRM).) |
| **7.** | ***Final regulations and related guidance on closed defined benefit plans and related matters.*** Proposed regulations were published on January 29, 2016. (Published September 18, 2017 in IRB 2017-38 as NOT.2017-45.) |
| **8.** | ***Relief for Partnerships and REMICs performing acts by the due date in effect before the enactment of the Surface Transportation Act.*** (Published Dec. 18, 2017 in IRB 2017-51 as NOT. 2017-71.) |
| **9.** | ***Extension of due date for furnishing statements and good-faith transition relief for information reporting required by §§ 6055 and 6056.*** (Published Jan. 16, 2018 in IRB 2018-03 as NOT. 2018-06.) |

*Additional Proposed Burden-Reducing Guidance Projects:*

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| **1.** | ***Regulations under §§1014(f) and 6035 regarding basis consistency between estate and person acquiring property from decedent.*** Proposed and temporary regulations were published on March 4, 2016. |
| **2.** | ***Guidance under §170(e)(3) regarding charitable contributions of inventory.*** |
| **3.** | ***Final regulations under §263A regarding the inclusion of negative amounts in additional §263A costs.*** Proposed regulations were published on September 5, 2012. |
| **4.** | ***Final regulations under §§4051 and 4071 on heavy trucks, tractors, trailers, and tires.*** Proposed regulations were published on March 31, 2016. |
| **5.** | ***Final regulations under §2642(g) describing the circumstances and procedures under which an extension of time will be granted to allocate GST exemption.*** |
| **6.** | ***Guidance under §1362(f) regarding the validity or continuation of an S corporation election.*** |
| **7.** | ***Guidance under §301.9100 regarding relief for late regulatory elections.*** |
| **8.** | ***Guidance on refunds under Combat-Injured Veterans Tax Fairness Act.*** |
| **9.** | ***Guidance under §954, including regarding the use of foreign statement reserves for purposes of measuring qualified insurance income under §954(i).*** |
| **10.** | ***Guidance under §3405 regarding distributions made to payees, including military*** |

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| | ***and diplomatic payees, with an address outside the United States.*** |
| **11.** | ***Update to Revenue Ruling 67-390.*** |

As noted above, nine of these projects have been completed. Treasury and the IRS are continuing to work on the remaining guidance projects and expect their publication in due course, subject to other regulatory and guidance priorities due to tax reform. In addition, Treasury and the IRS will seek to reduce taxpayer burden in forthcoming guidance projects implementing tax reform legislation.

### C. Proposal to Eliminate 298 "Deadwood" Regulations

Executive Order 13777 directed agencies to prioritize the review and potential elimination of "outdated, unnecessary, or ineffective" regulations. In response to this Executive Order, Treasury and the IRS initiated a comprehensive review of all tax regulations, including those that predate January 1, 2016, to identify tax regulations that meet this standard.

Following this review, on February 15, 2018, Treasury and the IRS proposed to repeal 298 regulations that have no current or future applicability under the Internal Revenue Code.[16] Specifically, the identified regulations (1) implement repealed statutes, (2) implement statutory provisions that have been significantly revised, or (3) are no longer applicable under the terms of the relevant statute or the regulations themselves. Removing these regulations from the Code of Federal Regulations will streamline Title 26, Federal Tax Regulations; reduce the volume of regulations taxpayers and tax preparers need to review; and increase clarity so that taxpayers and tax preparers will no longer have to navigate obsolete text to determine the applicable regulations.

## III. TTB

The Alcohol and Tobacco Tax and Trade Bureau (TTB) issues regulations to implement and enforce Federal laws relating to alcohol, tobacco, firearms, and ammunition excise taxes and certain non-tax laws relating to alcohol. TTB's mission and regulations are designed to collect the taxes on alcohol, tobacco products, firearms, and ammunition; protect the consumer by ensuring the integrity of alcohol products; and prevent unfair and unlawful market activity for alcohol and tobacco products.

### A. Regulatory Review Progress

As part of TTB's ongoing efforts to modernize its regulations, TTB continually seeks to identify changes in the industries it regulates, as well as new technologies available in compliance enforcement. TTB's modernization efforts focus on removing outdated requirements and revising regulations to facilitate industry growth and reduce burdens wherever possible.

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[16] *See* 83 FR 6806 (Feb. 15, 2018).

Since Secretary Mnuchin took office, TTB has continued its multi-year regulations modernization effort by prioritizing projects that reduce regulatory burdens, provide greater industry flexibility, and streamline the regulatory system, consistent with Executive Orders 13771 and 13777.

### B. Burden-Reducing Measures on Regulatory Agenda

Treasury's Fall 2017 Regulatory Agenda lists a number of burden-reducing or deregulatory TTB actions. The deregulatory TTB proposals on Treasury's Fall 2017 Regulatory Agenda include:

- ***Proposal to Streamline and Modernize Permit Application Process (RINs 1513-AC46, 1513-AC47, 1513-AC48, and 1513-AC49).*** Through four notices of proposed rulemaking, TTB intends to propose eliminating or streamlining various information requirements for application or qualification of distilled spirits plants, wineries, breweries, and manufacturers of tobacco products or processed tobacco.

- ***Revisions to the Regulations to Reduce Report Filing Frequency (RIN: 1513-AC30).*** On December 18, 2015, President Obama signed into law the Protecting Americans from Tax Hikes Act (PATH Act), which is Division Q of the Consolidated Appropriations Act, 2016. The PATH Act contains changes to certain statutory provisions that TTB administers in the Internal Revenue Code regarding excise tax return due dates and bond requirements for certain smaller excise taxpayers. These amendments took effect beginning in January 2017, and TTB published a temporary rule amending its regulations to implement these provisions. At the same time, TTB published in the Federal Register (82 FR 780) a notice of proposed rulemaking requesting comments on the amendments made in the temporary rule and proposing further amendments to the regulations governing reporting requirements for distilled spirits plants (DSPs) and breweries to reduce the regulatory burden on industry members who pay taxes and file tax returns annually or quarterly. Under the proposal, those industry members would also submit reports annually or quarterly, aligned with their filing of the tax return, rather than monthly as generally provided under current regulations.

- ***Proposal to Modernize the Alcohol Beverage Labeling and Advertising Requirements (RIN: 1513-AB54).*** TTB plans to propose revisions to consolidate and modernize the regulations concerning the labeling requirements for wine, distilled spirits, and malt beverages. TTB anticipates that these regulatory changes will assist industry in voluntary compliance, decrease industry burden, and result in the regulated industries being able to bring products to market without undue delay.

## IV. FinCEN

As administrator of the Bank Secrecy Act (BSA), the Financial Crimes Enforcement Network (FinCEN) is responsible for developing and implementing regulations that are the core of the Department's anti-money laundering (AML) and counter-terrorism financing efforts. The BSA authorizes the Secretary of the Treasury, through FinCEN, to issue regulations requiring financial institutions to file reports and keep records that are determined to have a high degree of usefulness in criminal, tax, or regulatory matters or in the conduct of intelligence or counter-intelligence activities to protect against international terrorism. To implement its mission, FinCEN has established regulatory objectives and priorities to safeguard the financial system from the abuses of financial crime, including terrorist financing, money laundering, and other illicit activity.

Treasury's June 2017 Request for Information following Executive Orders 13771 and 13777 generated a significant number of public comments suggesting revisions to FinCEN regulations under the BSA. FinCEN is reviewing the BSA and the AML rules—a framework originally constructed in the 1970s—to identify regulations that may be outdated and in need of modernization. Public comments have reflected a variety of concerns in this area—for example, some banks are concerned that they are allocating significant resources to filing what could be low value Suspicious Activity Reports (SARs) at the expense of more valuable activities.

At the same time, FinCEN must weigh regulatory burdens against the critical need for financial intelligence to address threats posed by evolving forms of illicit finance. Terrorist groups such as ISIS, al-Qaida, Hizballah, and others seek to infiltrate the financial system to finance their illicit activities that threaten our national security. Rogue regimes in Iran, North Korea, and Venezuela continue to assault the integrity of the financial system, including by using deceptive financial practices to advance their terrorist, corrupt, or criminal aspirations. Transnational criminal organizations, drug kingpins, cyber criminals and others likewise seek out vulnerabilities in the global financial system, including by looking to use emerging technologies such as virtual currencies to launder their ill-gotten gains and advance their malicious enterprises.

FinCEN and other components of the Office of Terrorism and Financial Intelligence (TFI) are working with relevant stakeholders in the private and public sectors to ensure that regulatory resources are deployed efficiently. In particular, TFI seeks to make sure that financial institutions are devoting their resources toward high value activities and are encouraged to innovate with new technologies and approaches so that Treasury and law enforcement are able to better address illicit finance threats. TFI is working closely with its law enforcement and regulatory partners in this effort. TFI is also encouraging more systematic engagement with the private sector, as they are on the front lines of combating financial crime.

Treasury's Fall 2017 Unified Agenda includes one burden-reducing FinCEN regulation—the "Reports of Foreign Financial Account (FBAR)" rule. FinCEN has announced that it will finalize a Notice of Proposed Rulemaking that clarifies which persons will be required to file FBAR reports and what information is reportable, with the goal of achieving statutory objectives at a lower cost.

## CONCLUSION

Treasury has undertaken extensive efforts to support the President's regulatory reform agenda under Secretary Mnuchin's leadership. Treasury's reports concerning domestic finance and tax regulation—which make forward-looking recommendations—will advance the President's policy of regulatory efficiency in support of lower individual and corporate compliance burdens and more robust economic growth for years to come.