

Administration of Donald J. Trump, 2017

Memorandum on Orderly Liquidation Authority

April 21, 2017

Memorandum for the Secretary of the Treasury

Subject: Orderly Liquidation Authority

Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203 (the "Dodd-Frank Act"), established an Orderly Liquidation Authority (OLA). Using OLA, the Secretary of the Treasury (Secretary) may place a financial company in receivership and initiate liquidation after making a determination, in consultation with the President, that it is in default or in danger of default and its failure and resolution under otherwise applicable law would have serious adverse effects on financial stability in the United States, among other considerations. Further, under section 203(b) of the Dodd-Frank Act, 12 U.S.C. 5383(b), OLA shall not be invoked unless and until the Secretary determines, in consultation with the President, that use of OLA would "avoid or mitigate" adverse effects on financial stability in the United States, "taking into consideration the effectiveness of the action in mitigating" those potential effects, "the cost to the general fund of the Treasury," and "the potential to increase excessive risk taking on the part of creditors, counterparties, and shareholders in the financial company." In addition, section 214(c) of the Dodd-Frank Act, 12 U.S.C. 5394(c), requires that taxpayers shall "bear no losses from the exercise of" OLA.

The existence of OLA, however, may encourage excessive risk taking by creditors, counterparties, and shareholders of financial companies, because section 210(n) of the Dodd-Frank Act, 12 U.S.C. 5390(n), also created an Orderly Liquidation Fund (OLF) in the Treasury of the United States that is authorized to use taxpayer funds to carry out OLA liquidations. While any losses incurred from the use of the OLF are ultimately supposed to be covered by assessments on other financial companies, taxpayer money may always be at risk. To the extent that OLA provides a Government backstop that shields creditors, counterparties, and shareholders from losses by shifting their losses to the financial sector as a whole, it may reduce market discipline and increase excessive risk taking. Thus, it is critical to understand OLA's full contours and acknowledge the potentially adverse consequences of its availability and use. If OLA's availability creates a significant risk-taking incentive, for example, the Secretary may be unable to make determinations justifying its use, as required by section 203(b) of the Dodd-Frank Act.

Additionally, it is important to evaluate the extent to which other legislative solutions, such as changes to title 11 of the United States Code (the "U.S. Bankruptcy Code"), could fulfill OLA's policy objectives in a more effective manner.

Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to promote certainty in the financial markets, I hereby direct you to take the following actions:

Section 1. Review of Orderly Liquidation Authority. (a) The Secretary shall conduct a thorough review of OLA and provide a report to the President within 180 days of the date of this memorandum. The review shall consider:

- (i) the potential adverse effects of failing financial companies on the financial stability of the United States;

(ii) whether the framework for using OLA is consistent with the principles set out in sections 1(b) and 1(c) of Executive Order 13772 of February 3, 2017 (Core Principles for Regulating the United States Financial System);

(iii) whether invoking OLA could result in a cost to the general fund of the Treasury;

(iv) whether the availability or use of OLA 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

(v) 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.

(b) The review shall include, where applicable and feasible, a quantitative assessment of OLA's anticipated direct and indirect effects.

(c) The report shall provide recommendations for improvement, including any recommended legislative changes.

Sec. 2. Exercise of Orderly Liquidation Authority. Pending the completion of the review and submission of the recommendations required by section 1 of this memorandum, the Secretary shall, to the extent consistent with law, refrain from making any determination under section 203(b) of the Dodd-Frank Act unless the Secretary determines, in consultation with the President, that the criteria enumerated in section 203(b) require otherwise.

Sec. 3. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

NOTE: An original was not available for verification of the content of this memorandum.

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