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It's not too late to be tough on Wall Street

President Trump can both rein in Wall Street abuses and adhere to free market principles by allowing the SEC to partner with the private securities bar in prosecuting the most complex and consequential cases

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In a commercial that ran just days ahead of the election, then-candidate Donald Trump lambasted Wall Street as part of "a global power structure that is responsible for the economic decisions that have robbed our working class, stripped our country of its wealth, and put that money into the pockets of a handful of large corporations." Trump promised he would be "tough on Wall Street."

But judging by the evidence so far, Trump's election may be the best thing that could have happened to Wall Street. Not only has Trump filled his administration with Wall Street elites, he has prioritized deregulation of the financial sector while cutting the Securities and Exchange Commission's budget, instituting a hiring freeze, and leaving key SEC vacancies unfilled.

President Trump still can, however, both rein in Wall Street abuses and adhere to the free market principles of his fiscally conservative base. By allowing the SEC to partner with the private securities bar in prosecuting the most complex and consequential cases, Trump can prove his commitment to policing financial fraud while minimizing expenditure of government resources. Trump should reverse Executive Order 13433, which stripped the ability of the SEC and other federal agencies from retaining private law firms on a contingency-fee basis. In so doing, Trump would unleash the SEC to pursue challenging cases that would otherwise go unprosecuted, shifting risks and costs of such enforcement to the private sector.

An SEC Built *FOR* Wall Street?

To date, President Trump has not been tough on Wall Street. First, he appointed a hopelessly conflicted SEC chair, Jay Clayton. Clayton is a Wall Street lawyer who spent his career representing big banks and large corporations. Clayton's ties to Wall Street will likely require him to sit on the sidelines of the SEC's most high-profile and critical cases. Because he represented Wall Street's "finest," Clayton must recuse himself in cases involving former clients for two of the four years he could serve as Chairman. Clayton's pick for director of the Enforcement Division, Steven R. Peikin, has also spent much of the past decade representing large financial institutions and multi-national corporations. Although Peikin briefly served as a federal prosecutor over a decade ago, it is now clear he will join Clayton on the sidelines in many of the agency's biggest enforcement matters due to similar conflicts of interest.

Second, President Trump has failed to appoint nominees to fill two vacancies on the five-member commission. These vacancies will likely prevent the SEC from carrying out its mission because a quorum is needed to pass regulations, launch formal investigations, and take virtually any other action not already delegated to commission staff. Should the three seated commissioners fail to agree on any such matter, a single dissenting commissioner could block the SEC from taking action.

Third, both President Trump and SEC Chairman Clayton have pursued a policy of deregulation at the expense of enforcement. Trump has rescinded more regulations (via the Congressional Review Act) than any other president in history. Most recently, Trump launched an effort to roll back critical financial crisis-era reforms by repealing key parts of the Dodd-Frank Act and replacing them with a more lenient regulatory framework. For his part, Clayton has shifted the SEC's focus away from enforcement by rolling back a wide variety of regulations, including core regulations regarding the requirements for companies to go public. With stock markets and Wall Street bonuses at all-time highs, and financial frauds consistently making front-page news, it is unclear what problem is being addressed by such deregulation. Even Trump has warned of a looming economic crisis, declaring on the campaign trail that "we are in a big, fat, ugly bubble."

The SEC Needs To Do More With Less

Despite his promise to be tough on Wall Street, once in office, Trump gutted the SEC's already scarce resources. Trump's budget proposal for 2018 would reduce the SEC's requested budget by a startling 30 percent and hamstring critical departments like the Office of Compliance Inspections and Examinations, which manages the SEC's examination program, and the Division of Economic and Risk Analysis, which integrates financial economics and rigorous data analytics. Trump even seeks to abolish the SEC's $50 million Reserve Fund, a self-funded program that is critically important to the SEC's initiatives to buttress cybersecurity and combat securities fraud. For the first time in nearly a decade, the SEC will not receive a budget increase and instead faces serious budget cuts.

These deep budget cuts will force the SEC to make tough choices regarding what resources it can devote to enforcement and what types of violations will be investigated and filed. Under Trump's budget proposal, the already understaffed SEC is expected to lose 2 percent of its current full-time work force — about 100 employees — and is imposing hiring freezes, eliminating its use of outside contractors, and banning all non-essential travel. Unless changes are made, the SEC will have no choice but to reallocate employees, further deplete enforcement personnel, and reduce the number of enforcement actions it pursues.

Public-Private Partnerships Are the Solution

As Columbia Law professor John Coffee observed years ago, the SEC is overstrained, underfunded and outmatched by the experience and resources of corporate America's top-tier defense firms, particularly in the largest and most complex cases. Executive Order 13433 — which was signed years ago by President George W. Bush at the urging of Big Tobacco — compounds the problem by preventing the SEC from partnering with private lawyers on a contingency fee basis. This valuable tool — tapping the talents of the best private sector lawyers — has allowed other government agencies to secure massive recoveries in complex litigation, while shifting the costs and risks to the private sector while reaping rewards for the public good. Executive Order 13433 unfortunately continues to prohibit the SEC from pursuing many challenging and meaningful enforcement actions in this manner.

Given the Trump administration's twin policy goals of deregulation and fiscal conservatism, public-private partnership with the private securities bar may be the SEC's best, and perhaps only, weapon to effectively combat the ever-increasing number of complex financial frauds. President Trump can make good on his campaign promise to "police markets for force and fraud" and restore a powerful tool to the SEC's enforcement arsenal by rescinding Executive Order 13433. With the stroke of a pen, Trump can repeal this misguided directive and allow the SEC to draw upon top shelf private-sector legal services at no cost or risk to the American taxpayer.

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