

OPTIONS FOR PRUDENTIAL/FIDUCIARY PROVISIONS

Adequate safeguards for prudential and fiduciary measures are an essential part of any agreement that would apply to the financial sector. There are several alternative approaches for such a provision. The following options range from narrow to broad in scope, from a very limited exception to an absolute, unqualified right to take any action for prudential or fiduciary reasons.

Under the first three options, new measures could be subject to review under a dispute settlement mechanism for consistency with the language of the regulation/prudential carve-out. In the fourth, measures invoked for prudential or fiduciary reasons would not be subject to challenge by another party for any reasons.

Option One

Limit prudential "carve-out" to the national treatment provision (most likely standard for other services sectors). Measures taken which parties assert are necessary for prudential or fiduciary reasons would have to be consistent with all other provisions of the agreement.

Under this option, parties would be required to provide national treatment -- treatment no less favorable in like circumstances than that accorded to its own financial institutions. However, parties could be allowed to treat foreign service providers differently from domestic service providers provided that

- o the difference in treatment is no greater than that necessary for prudential or fiduciary reasons, and
- o such differential treatment is equivalent in effect to the treatment accorded to domestic service providers in like circumstances.

Pros

- Least potential for abuse of all the options.

Cons

- Very narrow carve-out and may not adequately protect broad range of necessary financial regulations.
- Under this option, other obligations (e.g. transparency and non-discrimination) would probably also require qualification.

Option Two

Explicit statement of the right to take reasonable actions for prudential or fiduciary reasons, notwithstanding any other provision of the agreement.

Pros

- Emphasizes the need for, and protects the ability of, parties to continue to discharge their prudential/fiduciary responsibilities.
- Avoids the task of customizing the terms of each provision of the agreement in an attempt to achieve a "balance" between the need for prudential/fiduciary regulation and the potential for abuse.

Cons

- Allows interpretation of what is a reasonable measure for prudential/fiduciary reasons by the dispute settlement mechanism, potentially subjecting parties to provide compensation in the event of an adverse ruling or to eliminate or revise prudential/fiduciary measures.