

# POSTELECTION REPORT 2016



## PREPARING FOR A **TRUMP** PRESIDENCY

NOVEMBER 2016

### REGULATORY CHANGES ON THE HORIZON THAT WILL IMPACT:

- ANTITRUST
- COMMUNICATIONS AND INFORMATION TECHNOLOGY
- CYBERSECURITY
- ENERGY AND THE ENVIRONMENT
- FINANCIAL SERVICES – INVESTMENT MANAGEMENT
- GOVERNMENT CONTRACTS AND DEFENSE
- HEALTH CARE
- IMMIGRATION
- INTERNATIONAL TRADE
- TAX
- TRANSPORTATION AND INFRASTRUCTURE

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# PREPARING FOR A TRUMP PRESIDENCY:

## What Regulatory Changes Can We Expect?

The results of the U.S. presidential election are historic and unanticipated, and they will have significant economic, political, legal and social implications. As we prepare for the Trump presidency, many uncertainties remain regarding how the incoming administration will govern. President-elect Trump has stated that he will pursue vast changes in diverse regulatory sectors, including international trade, health care, and energy and the environment. These changes are likely to reshape the legal landscape in which companies must conduct their business, both in the United States and abroad.

While Trump has issued statements about the sweeping changes that he intends to make in his first 100 days in office, he is limited in his ability to act unilaterally through executive orders alone. In many areas and ways, as a matter of U.S. law, regulatory changes will require a process of public notice and comment, pursuant to the Administrative Procedure Act, before they can be implemented. Still others will require congressional legislation to comply with established statutes that constrain the President's power to act unilaterally.

Moreover, the Transition Team is in the process of identifying personnel to fill the open Cabinet positions. These selections will provide insight into how the new administration will begin to implement its policies in the months ahead, including the extent to which Trump will pursue his policy positions stated during the campaign.

***With this in mind, we have provided an initial summary of possible regulatory changes that we can expect in the following areas:***

- Antitrust/Competition
- Communications and Information Technology
- Cybersecurity
- Energy and the Environment
- Financial Services – Investment Management
- Government Contracts and Defense
- Health Care
- Immigration
- International Trade
- Tax
- Transportation and Infrastructure.

# Antitrust

Antitrust was not an area on which President-elect Trump campaigned. As a result, there is some uncertainty about the antitrust issues on which a Trump administration will focus (if any). On the campaign trail, Trump made some statements suggesting that he is concerned with at least some aspects of media concentration, saying that one global high-tech company had antitrust problems, that one proposed industry merger should be blocked and that an already-consummated merger should be broken up. These statements, combined with Trump's familiarity with the antitrust laws as both an antitrust plaintiff and defendant, have led some to suggest that the Trump administration might be fairly aggressive on some antitrust issues. Trump also has indicated that he believes that the McCarran-Ferguson Act should be repealed to allow health insurers to offer insurance plans across state lines as long as those plans meet state requirements. This arguably suggests that

he will push policies that limit regulation and let the market create competition.

The Federal Trade Commission (FTC), which has five commissioners at full strength, currently has two vacancies and the term of one of the three sitting commissioners has expired. This means that President-elect Trump can nominate a majority of commissioners when he takes office and reshape the FTC. He will also be nominating a new Assistant Attorney General to head the Department of Justice (DOJ) Antitrust Division. His nominations will provide more insight into what the next four years will look like on the antitrust front. In any event, criminal prosecution of antitrust violators is largely viewed as apolitical, and we expect the Trump administration to continue to vigorously police such behavior.

*Contributing Editors: Corey W. Roush, Ed Pagano and David S. Turetsky*

# Communications and Information Technology

President-elect Trump has not issued formal statements about how his administration will address matters subject to regulation by the Federal Communications Commission (FCC). Nevertheless, given his deregulatory approach, the few statements regarding technology matters made during his campaign and his choice of a deregulatory economist to oversee the FCC transition, the following changes are possible.

## Streamlined FCC Regulations

Because President-elect Trump is focused on economic impacts, it is possible that the Trump-led FCC might initiate review of FCC regulations in an effort to eliminate unnecessary regulations and to streamline those remaining to minimize bureaucratic oversight and delays. He might also require the FCC to justify each new rule or rule change by the application of a more rigorous cost/benefit analysis based on economic impacts. Media ownership is a wild card, given Trump's public statements that media is concentrated in the hands of too few players.

## Net Neutrality

Trump has not made any recent statements concerning net neutrality since his 2014 tweet that "Obama's attack on the internet is another top down power grab. Net neutrality is the Fairness Doctrine. Will target conservative media."

- Trump's apparent anti-net neutrality position (though not his rationale) is consistent with the Republican viewpoint that net neutrality regulations are not needed and that broadband Internet services should not be regulated by the FCC.

- It is possible that either Trump's FCC or Congress will attempt to eliminate or modify the net neutrality rules if the rules withstand the ongoing judicial challenge.
- Elimination of these rules may also provide an additional basis to imperil the FCC's new broadband privacy rules that were justified, in part, because of the reclassification of broadband service under Title II of the Communications Act.

## Mergers and Acquisitions of FCC-Regulated Entities

Generally speaking, Trump is focused on a faster, more efficient and deregulatory approach. Given his business background, Trump is more likely than the present administration to allow industry consolidation and limit the breadth and scope of FCC oversight over such transactions, including the ability of the FCC to use the merger review process and approval conditions to change its regulatory policies outside of rulemakings of general applicability. But, Trump disfavors "big media" and has publicly stated that the media is controlled by too few companies.

## Deployment of 5G Technology and Services

Given his pro-business viewpoint, a Trump-controlled FCC might seek to accelerate actions to adopt rules/policies to authorize 5G services in the United States in an effort to establish America's leadership in this very important area (i.e., to "Make America Great Again"). Trump may call upon the FCC to explore additional spectrum bands to support 5G services, as well as to expand its efforts to incent U.S. companies to develop the technology and systems for the deployment of 5G services.

## Communications and Information Technology, cont.

### **Privatization of Government-Controlled Spectrum**

A Trump-led FCC might seek to accelerate the reallocation of as much government-controlled spectrum as possible to private commercial users and to attempt to reduce the deficit through auction revenue generated by the sale of such spectrum. To the extent that spectrum is used for national security purposes, Trump would be less likely to favor reallocation to private uses.

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# Cybersecurity

President-elect Trump discussed cybersecurity and related issues from time to time in his campaign. He has committed to formulating a diverse group comprising members of the military, private sector and others to launch a major review of U.S. cyber defenses and vulnerabilities, including critical infrastructure, upon taking office. He has also emphasized the development of expert and offensive cyber military capabilities and tools. On December 1, he will also have the benefit of the expected report from the prestigious commission appointed by President Obama that is looking at a cybersecurity agenda for the future.

There are likely to be areas with different emphasis, as well as areas characterized by substantial continuity. Increasingly, federal sectoral regulators have expanded cyber regulation, even where other state or federal agencies also have jurisdiction. Based on congressional Republican ideas and a generally deregulatory approach that is expected to be favored by President-elect Trump, it is possible that, in some areas, this trend will slow, stop or reverse. For example, there have been legislative proposals (with some bipartisan interest), or related

positions taken by some Republican regulators, that are supportive of legislating a national breach notification standard to be administered at the FTC that would pre-empt different state laws and would remove some jurisdiction from other agencies, such as some of the FCC's privacy and security jurisdiction. There could also be some shift in emphasis to more cyber crime-fighting, including through a Trump proposal for the DOJ to create joint task forces throughout the United States to coordinate federal, state and local law enforcement, as compared to punishment of corporate hacking victims for weak security practices. In some areas, there is likely to be continuity, such as voluntary cybersecurity information sharing, which has attracted bipartisan and business support.

President-elect Trump has also indicated that he may strike a different balance between privacy and security. He has said that we should "err on the side of security"; for example, he wanted more cooperation in efforts to capture information from the phone used by the San Bernadino shooter. He may also be more supportive of bulk collection of data by the government.

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# Energy and the Environment

President-elect Trump made a number of formal statements about how his administration would address certain environmental and energy issues during his campaign. Based on statements made during the campaign, the following changes are possible:

## Reversal of U.S. Policy on Climate Change

Trump has vowed to “cancel” the international Paris Agreement on greenhouse gas emission mitigation, adaption and finance that was adopted last year and entered into force earlier this year after enough countries signed onto the agreement. His administration could also choose not to adhere to the terms of the Agreement. Closer to home, he appears likely to withdraw support for the Clean Power Plan and, with it, limits on carbon dioxide emissions from power plants.

## Fossil Fuels

Trump plans to open federal lands to leasing for energy extraction and to emphasize shale energy production, oil reserves, natural gas and coal, and the infrastructure (e.g., pipelines) to transport them. The practical effect of this strategy remains unclear, however, since market forces are driving many decisions by power producers regarding future use of coal.

## Renewable Energy

Renewable sources of energy will come under scrutiny from the administration, though these have enjoyed broader bipartisan support in the past. Federal support for clean energy projects and research could be substantially reduced by the incoming administration. But again, state policies and market forces driving increased use of renewable energy are likely to compel increased deployment of these resources going forward.

## Oil and Natural Gas Pipelines

Given his focus on infrastructure and energy independence, Trump will likely take steps within his executive authority—whether through executive orders, rulemakings, agency nominations or potentially proposing legislation—to support additional oil and natural gas pipeline development. In particular, Trump has said that he will approve the Keystone XL oil pipeline, although the sponsor of that project has not yet indicated whether it will again seek approvals for it. It is also likely that the incoming administration will act to remove government barriers to approval of the contested Dakota Access pipeline project.

## Environmental Protection Agency

Despite earlier statements to the contrary, Trump appears unlikely to dismantle the Environmental Protection Agency. More recent statements have him substantially limiting the role of the Agency in the Obama administration’s emissions reduction initiatives. For instance, he has pledged to cancel U.S. emission reduction commitments encompassed in the Paris climate change treaty, eliminate the Obama administration’s Clean Power Plan requiring carbon reductions from existing power plants and abandon the oil and gas methane emissions controls contained in the administration’s Climate Action Plan.

## The Federal Energy Regulatory Commission

FERC has two open commissioner seats, and an additional seat will open in June 2017. Trump is expected to nominate Republicans to all three seats. He will also be able to select a new chairman, and he will choose one of his Republican nominees. Although Trump did not focus on FERC during the campaign, he can be expected to nominate commissioners and appoint a chairman who will favor expanding natural gas infrastructure.



# Financial Services – Investment Management

## Financial Services

President-elect Trump has not set forth a clear proposal for financial reforms that he would like to achieve in his administration, other than stating that he would like to repeal the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) and that he would like to repeal the Volcker Rule and replace it with a version of the Glass-Steagall Act. While it is difficult to discern exactly what his plans are, the Financial CHOICE Act of 2016 (the “CHOICE Act”), a bill released on September 13, 2016, from the Financial Services Committee of the U.S. House of Representatives, can provide a guide for the potential priorities of the Republican Party.

The CHOICE Act would, if enacted:

- exempt investment advisers from registration and reporting requirements of investment advisers “with respect to the provision of investment advice to a ‘private equity fund’” under the Investment Advisers Act of 1940, subject to certain recordkeeping and reporting requirements
- repeal the Department of Labor (DOL) Fiduciary Rule
- repeal the Volcker Rule
- remove the requirements under Section 956 of the Dodd-Frank Act that prohibit incentive-based payment arrangements that encourage inappropriate risks and require the disclosure of incentive-based compensation arrangements, which have been proposed but not yet adopted
- repeal the “too-big-to-fail” regulation of the Dodd-Frank Act, including the ability to designate a “non-

bank financial company” as a “systemically important financial institution” that is subject to increased regulation

- permit banks that satisfy a specified leverage ratio and a CAMELS rating of 1 or 2 to avoid heightened prudential standards (such as living wills or stress testing) and the Basel III capital and liquidity standards
- statutorily exempt mergers and acquisitions broker-dealers
- substitute the Consumer Financial Protection Bureau with a Consumer Protection Opportunity Commission that has reduced powers
- increase penalties for violations of the securities laws, but permit defendants to remove cases from an administrative law judge to federal court
- limit the risk retention requirements to issuers of asset-backed securities that are composed wholly of residential mortgages.

## Capital Markets

As discussed above with respect to financial services, since it is unclear what President-elect Trump would do with respect to the regulation of businesses raising money in the capital markets, it may be helpful to look at the CHOICE Act. Generally, the CHOICE Act would repeal a number of provisions of the Dodd-Frank Act that many Republicans view as unduly burdensome on businesses. Based on the CHOICE Act, below are specific changes to the current financial regulatory regime that one might expect once

## Financial Services – Investment Management, cont.

President-elect Trump takes office:

- limit the category of companies that must comply with the auditor attestation of a public company's internal financial controls of Section 404(b) of the Sarbanes-Oxley Act of 2002 to those with a market capitalization of up to \$250 million
- eliminate or curtail public company disclosure about executive compensation and the pay ratio between a CEO's compensation and the median annual total compensation of all employees other than the CEO
- impose a moratorium on the need for emerging growth companies and issuers with less than \$250 million in total annual gross revenues to comply with Extensible Business Reporting Language (XBRL) requirements for financial statements and other periodic reporting required to be filed with the U.S. Securities and Exchange Commission (SEC)
- remove the requirement that a company have equity securities listed on a national exchange to be eligible to use Form S-3 for short form registration of certain primary offerings of a company's securities
- provide a safe harbor for certain micro-offerings of up to \$500,000 in a 12-month period to persons with a pre-existing relationship to the issuer or its officers, directors or 10 percent shareholders pursuant to Section 4 of the Securities Act of 1933 ("Securities Act")
- require proxy advisory firms to register with the SEC by filing an application that publicly discloses, among other items, the methods of developing proxy recommendations and the conflicts of interest of the proxy advisor
- repeal provisions of the Dodd-Frank Act requiring disclosure of (i) certain health or safety violations by public mining companies, (ii) the use of conflict minerals by certain persons, and (iii) payments made to the U.S. federal government or a foreign government by public companies engaged in resource extraction activities
- amend crowdfunding exemptions under the Securities Act for securities offered by a company with a public float of less than \$75 million or, if no public float, with annual revenues of less than \$50 million in its most recently completed fiscal year and to carve out the securities issued under the crowdfunding exemption from the reporting requirements of the Securities Exchange Act of 1934
- restrict the ability of the SEC to adopt amendments under Regulation D to require additional filings or expand marketing rules under the Securities Act of 1933
- expand the definition of accredited investors in Regulation D and limit the SEC's ability to increase the net-worth thresholds for individuals
- remove the automatic disqualification from using exemptions under the securities laws due to certain convictions, suspensions or orders.

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# Government Contracts and Defense

## **Increased Department of Defense (DoD)/ Department of Veterans Affairs (VA) Spending, Fewer Socioeconomic Requirements**

Spending on the DoD and VA is likely to increase substantially due to President-elect Trump's speeches and platform calling for the expansion and revitalization of the military and denouncing "reckless" cuts in defense spending and veterans services. Foreign military sales (FMS) spending and direct defense sales to foreign governments will also likely increase if President-elect Trump repudiates the Iranian nuclear deal and/or imposes sanctions on Iran and North Korea.

The Trump administration is also likely to rescind the Obama administration's Executive Orders (EOs) and proposed and final implementing regulations imposing a vast array of socioeconomic requirements on defense contractors, particularly in the labor and employment area. However, enforcement of the Trade Agreement Act, the Buy American Act and cybersecurity regulations on contractors are likely to increase.

## **Increased Department of Homeland Security (DHS) (Immigration), General Services Administration (GSA) Spending**

Spending on these agencies is also likely to increase to cover the actions that Trump has discussed while on the election trail. He has specifically praised GSA for its handling of the Old Post Office property on Pennsylvania Avenue, and we may see an agency that is more active in its handling of its portfolio of federal properties.

## **Executive Orders**

Treatment of EOs is perhaps the easiest to assess, since the President has the authority to act unilaterally. Over the last two years, President Obama issued numerous EOs imposing requirements on government contractors, primarily focused on worker wages and benefits and providing additional information to workers and government officials. President-elect Trump has vowed to "cancel every unconstitutional executive action, memorandum and order issued by President Obama" on day one of his administration. Trump is likely to repeal, among others, the recently issued Fair Pay and Safe Workplaces EO 13673 ("Blacklisting"), Federal Contractor Minimum Wage EO 13658, Pay Transparency EO 13665 and Mandatory Paid Sick Leave EO 13706.

## **Hiring Freeze on Federal Employees**

Trump has pledged to put a hiring freeze on all federal employees so that the government will shrink through attrition. With the reported wave of retirement of contracting officers and other procurement personnel, it may be difficult for government agencies to get new contracts on the street and issue modifications on existing contracts, particularly in light of the increased spending discussed above.

# Health Care

President-elect Trump's health care agenda centers on a call for Congress to repeal the Affordable Care Act (ACA, aka "Obamacare") and immediately replace it with free market-oriented reforms. In fleshing out the details of its agenda, the incoming Trump administration may be inclined to defer to congressional Republicans' existing proposals in many areas of agreement.

## Final Obama Administration Action and Immediate Trump Rollbacks

Rulemakings from the Department of Health and Human Services (HHS) and the Centers for Medicare and Medicaid Services (CMS) may increase during the transition as the outgoing Obama administration seeks to raise the regulatory bar for repeal of its health care priorities. The regulatory rulemaking process takes time, however, and requires a public comment period, so valid action rolling back agency rules would take longer. On the other hand, once Trump assumes the presidency, he can immediately wield the "power of the pen" by issuing EOs or taking executive actions that impact the future of Obamacare. Additional executive action could occur immediately in the form of non-enforcement of ACA policies, which could severely blunt Obamacare's outlook.

## Affordable Care Act

Repeal of the ACA became the health policy priority of the Trump campaign, consistent with congressional Republicans. The campaign also advanced proposals to replace the ACA by allowing the sale of insurance across state lines, making individual health insurance premiums fully deductible, expanding the use of health

savings accounts, requiring price transparency from all providers, adopting bipartisan mental health reforms and block-granting Medicaid. Related health reforms outlined in Speaker Ryan's "A Better Way" white paper from June 2016 include providing pre-existing condition and continuous coverage insurance protections, expanding opportunities to purchase insurance across state lines and through pooling options, funding state high-risk pools, supporting state innovation grants, reforming medical malpractice laws, strengthening Medicare Advantage, combining Medicare Parts A and B, and creating a premium support option for traditional Medicare. The budget reconciliation process is a likely vehicle for action, which requires only a 51-vote majority in the Senate for passage and is not subject to a filibuster. Even a partial repeal of the ACA could leave many Americans without health coverage and create significant financial disruptions for providers and payers, and Vice President-elect Mike Pence and others are cautioning that a transition plan would need to be constructed for those individuals currently covered.

## Other Health Care Priorities

The Trump administration's transition website highlights other priorities for reform. It states that "the problems with the U.S. health care system did not begin with—and will not end with the repeal of—the ACA," and it specifically proposes to work with Congress and the states to:

- protect individual conscience in health care
- protect innocent human life from conception to natural death, including the most defenseless and those Americans with disabilities

- advance research and development in health care
- reform the Food and Drug Administration to put greater focus on the need of patients for new and innovative medical products
- modernize Medicare so that it will be ready for the challenges with the coming retirement of the Baby Boom generation—and beyond
- maximize flexibility for states in administering Medicaid to enable states to experiment with innovative methods to deliver health care to our low-income citizens.

## HHS Leadership

Candidates to become the Secretary of HHS in a Trump administration reportedly include Dr. Ben Carson, a retired neurosurgeon and former GOP presidential candidate; former Louisiana Gov. Bobby Jindal; Rich Bagger, executive director of the Trump Transition team and a pharmaceutical executive; and Florida Gov. Rick Scott. Uncertainty regarding leadership and priorities at HHS and which parts of the ACA might be eliminated could spur an exodus of career senior staff from these agencies, resulting in a significant “brain drain” and delay in agency activity while new political appointees and career staff are recruited.

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# Immigration

President-elect Trump made immigration one of the cornerstones of his campaign, with much of the rhetoric focused on the building of a wall, deportation of undocumented immigrants, and “extreme vetting” of Muslims and others from certain countries of concern. Immigration policy and enforcement is a strong prerogative of the executive branch, and President-elect Trump should be able to make his mark quickly in this area. Based on the 10-point plan publicized by the campaign and statements clarifying this plan, the following changes are of primary concern for businesses.

## Visa Denials

Trump promised to “suspend the issuance of visas to any place where adequate screening cannot occur, until proven and effective vetting mechanisms can be put into place.” Consulates can be expected to scrutinize applicants’ travel histories and apply more extensive background checks. This could mean significant delays in visa issuances to business travelers, particularly those holding passports from “countries of concern,” as well as tourists and others seeking to travel temporarily to the United States.

## Biometric Entry/Exit

Trump has pledged to “ensure that a biometric entry-exit visa tracking system is fully implemented at all land, air, and sea ports.” Until implementation, there could be delays in the entry and exit of persons, including international executives.

## Employment

Trump has promised to “turn off the jobs and benefits magnet” that attracts illegal immigration, and also “reform legal immigration to serve the best interests of America and its workers.” This likely means increased enforcement

against businesses that employ undocumented workers. Employers should expect an increase in I-9 audits and employment site raids. The Republican Congress may also limit the availability of H-1B visas (used by American businesses, particularly the tech industry, to bring in high-skilled workers), but is unlikely to eliminate them entirely. However, employers should expect further restrictions on the hiring of H-1B workers and an increase in H-1B investigations.

## Detention and Removal

Trump has promised to increase detention of immigrants while they contest removal, potentially further increasing the role of the private prison industry in immigration detention. He has also promised to triple the number of Immigration and Customs Enforcement (ICE) agents. A construction of a physical wall on the U.S.-Mexico border will require congressional appropriation, but an increase in the hiring of border patrol agents is within agency power and can be expected.

## Deferred Action for Childhood Arrivals

Trump has pledged to swiftly deport individuals present in the United States without authorization, which includes those who entered unlawfully as children and have been protected under the executive order Deferred Action for Childhood Arrivals (DACA), which is likely to be repealed in the first days of the new administration. DACA recipients currently have work authorization and are legally employed by many businesses in the United States. Logistics and due process may preclude their quick removal. Also, DACA recipients are one of the most sympathetic groups of immigrants in the United States because they were brought to the country as children, so deporting them may be a politically unpopular move and is unlikely to happen in the beginning of the new administration.

# International Trade

## Trade Agreements

President-elect Trump has stated his intention to withdraw from, or renegotiate, U.S. free trade agreements (FTAs), such as the North American Free Trade Agreement (NAFTA). In general, Trump could call for U.S. withdrawal from its bilateral and multilateral trade agreements with six months' written notice and could raise tariff rates on former treaty partners, subject to limits imposed by pre-existing statutes. Should he decide to proceed, such action would represent a radical departure from long-standing bipartisan practice and U.S. policy, and it is likely to be met with strong opposition from a number of lawmakers and the business community. As such, we would expect some lawmakers to oppose the administration's actions either through legislative changes or litigation.

## Trans-Pacific Partnership (TPP)

President-elect Trump has strongly opposed the TPP and has vowed to withdraw from, or renegotiate, the agreement. At this stage, it appears almost certain that the United States will not move forward with the TPP in its present form. Other countries, however, may decide to enter into a separate agreement without the United States.

## Trans-Atlantic Trade and Investment Partnership (TTIP)

President-elect Trump has not stated his policy position on the TTIP, a multilateral trade and investment agreement currently under negotiation with the European Union. While he may take a similar stance on the TTIP as the TPP, he may be open to continuing negotiations, given that it provides an opportunity to shape international trade policy with an important U.S. ally.

## World Trade Organization (WTO)

President-elect Trump has stated that, in his first 100 days in office, he will direct the "U.S. Trade

Representative to identify all foreign trading abuses that unfairly impact American workers and direct them to use every tool under American and international law to end those abuses immediately." Based on this, we can expect that the USTR will act aggressively to investigate trade violations by U.S. trade partners and may bring more disputes under the WTO.

## Retaliatory Duties

President-elect Trump has said that he will take action under the Trade Acts of 1962 and 1974 to levy retaliatory duties on imported goods, if necessary, to protect U.S. rights under an FTA or if he believes a trading partner is restricting trade in an unreasonable or discriminatory manner. His actions could spark opposition within the business community, Congress or with our trading partners. Opponents are concerned that such actions may result in U.S. trading partners responding to increased duties with their own duty increases.

## Tariffs for Offshoring

President-elect Trump has specifically threatened to impose duties of 35 percent or 45 percent on goods made by U.S. companies that have shifted production to Mexico and China. To this end, Trump has stated that, in his first 100 days in office, he will propose a measure to Congress that will impose such tariffs to discourage companies from laying off workers and shifting production overseas.

## Currency Manipulation

The new administration is generally expected to take a stronger stance against currency manipulation. President-elect Trump has stated that, in his first 100 days in office, he will instruct the Treasury Secretary to label China a currency manipulator and will impose tariffs on any country that devalues its currency. While U.S. laws do not allow the President to impose punitive tariffs for currency manipulation, Trump could invoke trade remedy laws to



## International Trade, cont.

label currency manipulation a countervailable subsidy in order to justify increasing duties from countries engaged in this practice. Any such action, however, is likely to draw a challenge under the WTO dispute-settlement mechanism.

### Trade Remedies

President-elect Trump regularly promised on the campaign trail to increase use of U.S. trade remedy laws to crack down on what he believes are unfair subsidies benefiting foreign manufacturers. As a result, we expect the Trump administration to pursue vigorously antidumping and countervailing duty orders and push for the Department of Commerce to utilize its newly enhanced powers under the Trade Preferences Extension Act to enforce trade remedy laws. Doing so would further intensify U.S. trade remedy enforcement, which has already been increasing in recent years, particularly against China. The Trump administration would also likely refrain from reforming U.S. antidumping law to treat China as a market economy, as China insists is now required under the terms of its accession to the WTO.

It is also reasonable to expect an increase in the use of other tools to protect U.S. industries and ensure compliance with existing antidumping and countervailing duty orders, such as anti-circumvention laws. Encouraged by the new administration, the Secretary of Commerce may also self-initiate antidumping or countervailing duty proceedings rather than rely solely on petitions filed by U.S. domestic industry. To date, the Secretary of Commerce has self-initiated only a single investigation.

The Trump administration might also be more inclined to act on long-standing criticism by many U.S. industries to reform or abolish the special dispute settlement mechanism under NAFTA that applies to antidumping and countervailing duty measures within North America.

### U.S. Customs and Border Protection/ Immigration and Customs Enforcement

President-elect Trump campaigned on strong enforcement of U.S. trade and security laws, including targeted increases of U.S. customs duties to promote fair trade. To enhance trade and border security, we expect that Trump

will push to increase funding for the primary agencies responsible for enforcing U.S. trade and security laws at U.S. ports of entry, U.S. Customs and Border Protection (CBP) and ICE. We expect that both CBP and ICE will use increased funding to hire additional officers and special agents. As part of the anticipated effort to repeal Dodd-Frank, we also expect that Trump may push to roll back a key supply-chain mandate known as the "conflict minerals reporting requirement."

### *Enforcement and Penalties*

We expect that CBP and ICE will scrutinize any imports subjected to increased duties and fees due to offshoring or withdrawal from free trade agreements (i.e., NAFTA). To collect any increased duties and fees, CBP and ICE will likely bring to bear potent enforcement mechanisms, including administrative penalty proceedings, detentions, seizures and fraud investigations.

We also expect that CBP and ICE will increase enforcement of U.S. intellectual property laws to address President-elect Trump's concerns with China's lack of enforcement. As such, importers who import products from China may see increased inquiries from CBP and ICE regarding potential violations of U.S. intellectual property laws associated with allegations of counterfeit or pirated merchandise.

Finally, Trump may continue to enhance CBP and ICE enforcement of trade remedy laws. U.S. industry has voiced concern regarding enforcement of trade remedy orders, which sparked congressional action earlier this year to create a new trade remedy investigatory process at CBP. As such, we would expect to see an increase in inquiries and, potentially, enforcement actions against importers that either fail to pay or underpay antidumping and countervailing duties.

### *Border Security and Cargo Screening*

President-elect Trump has promised to build a wall and increase security at U.S. borders. If Trump follows through on these campaign commitments, we expect that his policies may result in increased cargo and passenger screenings at U.S. ports of entry, where CBP is the primary

law enforcement agency. The result of stepped up cargo and passenger screening may be that legitimate importers face increased border delays as more shipments (including cargo and carriers) are subjected to CBP inspection.

### *The Conflict Minerals Reporting Requirement*

President-elect Trump has promised to roll back a broad range of regulations implemented under the Obama administration. Accordingly, Trump may reconsider the conflict minerals reporting requirement under the Dodd-Frank Act. U.S. industry has voiced concern over the reporting requirement because it imposes an extensive review of companies' supply chains. Consequently, elimination of the conflict minerals reporting requirement is a distinct possibility.

## **U.S. Sanctions Programs**

### *Iran and the JCPOA Nuclear Deal*

While many observers currently expect that the new administration will take actions that effectively result in U.S. abrogation of the multilateral Joint Comprehensive Plan of Action (JCPOA) agreement with Iran, President-elect Trump has made somewhat inconsistent statements with respect to the Iran deal. During the campaign, Trump described the JCPOA as "one of the worst deals [he had] ever seen" and suggested that he would "rip it up." He has subsequently moderated his tone, stating as recently as July 2016 that he would seek to renegotiate the deal with Tehran. Importantly, it should also be noted that the official GOP Party Platform includes statements rejecting the deal, and hardliners in Congress are expected to press the new administration to terminate U.S. support for the JCPOA.

While any party to the JCPOA has the unilateral ability to "snap back" its sanctions on Iran, there are a variety of actions available to the Trump administration and the Republican Party as they consider how to potentially "fix" the JCPOA, undermine aspects of it or breach it altogether. For example, the Trump administration and the Republican Congress could enact new or additional sanctions on Iran, revoke existing U.S. sanctions and export controls general licenses and permissive licensing policies in certain areas, refuse to issue specific licenses, or reinstate

extraterritorial sanctions or Specially Designated Nationals (SDN) designations that were lifted with implementation of the JCPOA. Whether these measures are ultimately implemented could depend on a variety of factors, including how such actions may affect key alliances; competing U.S. regional and strategic interests, such as relations with Russia and China; and political and policy considerations associated with the administration's relations with the U.S. Congress.

### *Russia*

During the election campaign, President-elect Trump questioned President Obama's approach to Russia and indicated that he would be open to having a dialog with Russia's President, Vladimir Putin. Many observers interpreted such statements as signaling that Trump would pursue a path of moderation in bilateral relations. Moreover, recent reports further suggest that the President-elect might be open to considering an easing of U.S. sanctions targeting Crimea and Russia, or enforcing such sanctions less vigilantly.

The Trump administration will have executive authority to unilaterally modify or ease many of the current U.S. sanctions targeting Russia, including sectoral sanctions and SDN designations, if it chooses to do so. However, such actions presumably would need to be balanced against broader U.S. foreign policy interests and relations with U.S. allies, with potential repercussions for U.S. interests in Syria, the Baltics and elsewhere. Additionally, an attempt to relax executive branch sanctions could have domestic ramifications, given the support by many congressional Republicans for adopting even more aggressive sanctions against Russia, including due to U.S. cyber concerns and other areas in which many Republican members have been highly critical of Russia.

### *Cuba*

During the U.S. election campaign, President-elect Trump stated that he viewed normalization of U.S. relations with Cuba as "fine," but that he believed the United States needed to have a "better deal" in exchange for lifting U.S. sanctions on the country. However, late in the campaign,

## International Trade, cont.

he said “[a]ll the concessions that Barack Obama has granted the Castro regime were done through executive order, which means the next president can reverse them—and that I will do unless the Castro regime meets our demands.” Given these conflicting statements, it remains to be seen whether the Trump administration will seek to reverse course or press for further easing of U.S. sanctions and a normalization of bilateral relations. Either way, Cuba policy will likely be a lower priority of the new administration than it has been under President Obama, who has seen restoration of bilateral relations with the country as a “legacy” accomplishment.

Absent external factors forcing the new administration to focus on Cuba, there is a good chance that its approach to related issues will develop over time in response to developments in the U.S. business sector and the U.S. Congress. The progress of U.S. companies pursuing business opportunities in Cuba could be an important factor in determining how difficult it will be to roll back the relaxation of sanctions. The debate within Congress between advocates of further sanctions reforms and Cuba sanctions hard-liners will also be important in determining the course and pace of U.S. policy toward Cuba.

### Export Controls

While President-elect Trump has not stated a position on export controls, he has indicated that he proposes to take a stronger stance on matters of national security. This suggests that enforcement of U.S. export control regulations is likely to be a high priority, much like other areas of national security-related trade regulations, such

as U.S. sanctions. The course of Export Control Reform, which has been perceived to be business-friendly, is consequently in question. The Trump administration may move aggressively on enforcement of export controls, particularly against non-U.S. entities.

### Foreign Investment

During the election campaign, President-elect Trump criticized a number of proposed foreign investment deals during his campaign, particularly those that would lead to Chinese ownership interests in U.S. companies, such as the pending acquisition of the Chicago Stock Exchange by a Chinese investor group. As President, Trump can use the Committee on Foreign Investment in the United States (CFIUS) to unilaterally initiate review of any merger, acquisition, takeover, joint venture or certain long-term leases that could result in control of a U.S. business by a foreign person. Consequently, we would expect continued scrutiny of foreign investment in the United States, perhaps resulting in more blocked deals involving Chinese buyers.

# Tax

With Trump's unexpected win on election night, and House and Senate Republicans' retention of their majorities, the prospect for comprehensive tax reform legislation in 2017 has changed dramatically. President-elect Trump has already begun assembling transition-team leaders and laying out his priorities for his first 100 days in office, which includes tax reform.

Throughout his campaign, President-elect Trump has made the reduction of rates and simplification of our current tax system a key component of his plans to revitalize the U.S. economy. While initially very different, President-elect Trump's final tax plan closely aligns with the [Blueprint](#) for tax reform released by GOP Speaker Paul Ryan and House Ways and Means Committee Chairman Kevin Brady earlier this year. President-elect Trump's plan seeks to simplify the tax code and lower taxes for both middle-class and wealthier earners by reducing the existing seven individual tax brackets to three lower-rate brackets. President-elect Trump's plan would also reduce the corporate tax rate to 15 percent and provide a one-time, 10 percent tax rate for the repatriation of foreign earnings. President-elect Trump has said that he would repeal or eliminate many deductions for wealthier individuals (with the exception of the mortgage interest and charitable-giving deductions), while increasing deductions (though he has provided few specifics) for middle-class earners. He has also proposed to cap the total amount of itemized deductions that could be claimed at \$100,000 for single filers and \$200,000 for joint filers.

The House GOP Blueprint would also reduce the number of individual brackets to three (12, 25 and 33 percent, the same as President-elect Trump's plan) and would provide a

50 percent exclusion for an individual's investment income, effectively reducing the tax rate on such income to 6, 12.5 and 16.5 percent. Further, the plan would:

- consolidate the five current family tax deductions into two simpler benefits: a larger standard deduction and an enhanced child tax credit
- retain the current Earned Income Tax Credit
- eliminate all itemized deductions, except the mortgage-interest deduction and the charitable-contribution deduction, while retaining tax incentives for health care and retirement savings
- repeal the estate and generation-skipping transfer taxes, as well as the individual and corporate Alternative Minimum Tax
- reduce the top corporate tax rate to 20 percent, with a 25 percent top tax rate for small businesses and pass-through entities
- adopt a territorial tax system that would allow U.S.-based companies to repatriate foreign earnings without additional tax costs
- eliminate the deduction for net business interest, but retain the research and development (R&D) credit
- move the U.S. to a destination-basis tax system where tax jurisdiction would follow the location of consumption rather than the location of production (while providing for border adjustments exempting exports and taxing imports)
- restructure the Internal Revenue Service (IRS) to modernize and streamline tax administration and taxpayer service.

## Tax, cont.

### Outlook

With Republicans now controlling both the White House and Congress, tax reform is a top priority when the 115th Congress convenes in 2017. Senate Majority Leader Mitch McConnell has said that tax reform will be at the top of the agenda, along with repealing parts or all of the ACA. What remains to be seen is how well President-elect Trump and House Speaker Ryan will be able to work together. While similar in many respects, there are major differences between President-elect Trump's plan and the House Blueprint, including taxation of corporate foreign income going forward (President-elect Trump's plan would end deferral, while the Blueprint would no longer tax such foreign income),

as well as the levels of reduction in the corporate tax rate and increases in the standard individual deduction.

Tax reform has been mentioned by both President-elect Trump and House Republicans as one of the items to be brought forth within the first 100 days of the new administration. On the Wednesday following the election, Ways and Means Chairman Brady stated that he has already begun to prepare legislative text for reform. Speaker Ryan declined to comment on plans for the first 100 days, but met privately with President-elect Trump on November 10 to discuss their approach and noted that he plans to work closely with the President-elect to prepare a significant legislative agenda for the 115th Congress.

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# Transportation and Infrastructure

Trump has said that, during his first 100 days in office, he will work with Congress to pass the “American Energy & Infrastructure Act,” which would authorize \$137 billion in tax credits to leverage \$1 trillion in private investment in infrastructure over 10 years, including toll roads and airports. He has spoken more broadly of pursuing an “America’s Infrastructure First” policy, but has not identified how he would pay for additional investment in transportation projects that do not generate revenues.

Trump has that said he will modernize our air traffic control system and reduce long wait times at airports. With the Federal Aviation Administration (FAA) authorizing legislation expiring at the end of the fiscal year, Trump may support efforts by some in Congress to spin off the Air Traffic Control System from the FAA.

Regulatory reform will be a major focus of the Trump administration. Trump has been critical of existing laws

and regulations that delay infrastructure projects, including environmental review and permitting requirements. We expect the Trump administration to review current regulations and make reforms where it has discretion. We also expect the administration to advocate for statutory reforms to the project delivery process. In addition to environmental regulations, Trump has spoken of reducing project delivery costs through incentive-based contracting.

It is not surprising, with Trump’s focus on revitalizing American manufacturing, that his platform calls for putting “American steel made by American workers into the backbone of America’s infrastructure.” This may translate to his advocating for further strengthening of Buy America laws governing transportation projects or a tightening up of regulatory waivers.

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