

Policy and Regulation Alert

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What's New in Washington: 10 Things You Need to Know

The Trump administration and Congress continue to take on a new shape. The Presidential Transition Team officially shut its U.S. General Services Administration office on February 28, 2017, and the remaining staff moved to the White House to support personnel decisions. Several key Cabinet positions have been filled, and Congress is entering into a period of six weeks in session. Many campaign promises are unfolding and President Trump reiterated his policy and regulatory direction in his first joint-session address to Congress. Even though the work period is just getting started, it is already drawing heightened attention from business leaders, as well as the American public. Here are 10 important things that we believe are worth focusing on from the last two weeks:

1. **ACA Repeal Plan Targets Tax Provisions:** Last week, a draft of congressional Republicans' plan to repeal and replace the Affordable Care Act (ACA) was leaked to the press. The two-week old draft includes repeal of all tax provisions in the ACA, including the Net Investment Income Tax, the Medical Device Tax and the 0.9 percent Additional Medicare Tax. For the majority of ACA taxes, the draft proposes to repeal the tax provisions effective for tax years following December 31, 2016. Given reports that paying for the "replace" portion of the plan has presented some challenges, the effective dates and other provisions could change in the final version of the ACA repeal bill that emerges from the House.

The only new pay-for in the draft relates to the current tax exemption for employer-sponsored insurance plans. The draft would cap that exemption and tax the amount in excess of the 90th percentile of premiums. The cap would help to pay for proposed enhancements for health savings accounts (HSAs) for both individuals and employees. The plan also creates a refundable tax credit to help individuals pay for premiums.

2. **ACA Repeal and Budget Reconciliation:** As if it weren't challenging enough to try to restructure the ACA in a short period of time, even insiders tend to forget the difficult constraints that budget reconciliation places on such an effort. The budget reconciliation process, designed to enforce budget discipline on an often recalcitrant Congress, has its own restrictions and barriers that legislators must follow if the expedited benefits are to be realized. The process is enforced in the Senate through the Byrd Rule, which allows objections for matters not germane to the reconciliation process and not having a direct impact on increasing or reducing revenues, including prohibitions on implementing policy initiatives that have merely an incidental budgetary impact. The legislation must be carefully crafted in the House to avoid having provisions struck down that violate this rule, thus potentially endangering what will likely be the fragile Republican coalition on ACA restructuring. Additionally, unlike traditional legislation that can bounce back and forth between the House and the Senate, budget rules allow for the House to send a reconciliation bill to the Senate

only once before the measure loses its privileged status and is subject to regular Senate rules. In other words, the House and Senate cannot bounce differing versions between the bodies indefinitely without losing the opportunity to use the fast track process that reconciliation provides. The chambers will have the opportunity to conference the bill, but Republican leaders are seeking the quickest path to passing reconciliation so that legislators can turn to the FY 2018 budgetary process, which cannot begin until lawmakers have concluded their work on the FY 2017 reconciliation process.

3. **Employment-Based Visa Programs:** A draft Executive Order (EO) on employment-based visa programs (titled “Protecting American Jobs and Workers by Strengthening the Integrity of Foreign Worker Visa Programs”) has been leaked to the press. If the EO were to be adopted in its current draft form, it would establish administration policy that the immigration laws protect—to the maximum degree possible—jobs, wages and the well-being of U.S. workers. To further this policy, the EO would call for a review of existing regulations for non-immigrant employment-based visa programs, including B-1, H-1B and L-1. If adopted, the proposed policies would likely mean increased scrutiny for U.S. employers who hire foreign workers pursuant to these programs and further restrictions on their ability to sponsor new workers for positions in the United States. Among other policies, the draft EO directs the government agencies to review all regulations on foreign workers and recommend rescission or modification of the ones that are in conflict with the mandates of the EO, to propose regulations “to restore the integrity of employment-based nonimmigrant worker programs and better protect U.S. and foreign workers affected by those programs,” and to initiate an investigation of the “extent of any injury to U.S. workers caused by” employment of foreign workers. The draft EO also asks the Secretary of Homeland Security to develop a plan for site visits for all employment-based visa programs and to start performing site visits at places of employment of L-1 nonimmigrants (intracompany transferees). Finally, the draft EO calls for the establishment of a commission to analyze immigration policies and make recommendations for changes to “better serve the national interest,” including moving “towards a merit-based system,” and for inclusion of questions regarding U.S. citizenship and immigration status in the national census.
4. **The Administration and NAFTA:** With the confirmation of Wilbur Ross, who continues to be one of President Trump’s most trusted trade advisors, we are expecting the administration soon to launch one of its centerpiece trade initiatives and formally notify Congress of its intent to renegotiate NAFTA. The Trade Promotion Authority law under which those negotiations will take place requires such formal notification 90 days in advance of starting negotiations. The notification letter the President sends to Congress should have more detail on the President’s goals for the renegotiation, which will be focused on reducing the trade deficit with Mexico, and are currently rumored to include changes on the rules of origin for automobiles, remove the Chapter 19 mechanism that permits challenges to trade remedy determinations, and possibly include a border adjustment measure to respond to Mexico’s value-added tax, among other matters.

5. **Environmental Regulation Repeal:** One month into his term, President Trump repealed the Stream Protection Rule, created by President Obama during his final days in office, which sought to protect the nation’s waterways “from debris generated by a practice called surface mining.” The rule was opposed by coal companies, who asserted that the new regulations would cost coal jobs, hurt local economies and preempt what they believe is the states’ rightful role in crafting appropriate environmental protections. This is the second regulation to be reversed by the Trump administration using the Congressional Review Act (CRA)—and only the third time Congress has used the CRA to successfully eliminate any “recently finalized” regulation by a prior administration. This action serves as an example of the aggressive methods Republicans and the President may use in the opening months of the Trump administration to roll back some of President Obama’s most recent initiatives.

On February 28, 2017, just days after his repeal of the Stream Protection Rule, President Trump issued a highly anticipated EO directing the Environmental Protection Agency (EPA) and Army Corps of Engineers to initiate efforts to rescind a June 2015 EPA regulation defining and expanding the scope of federal regulatory authority over “Waters of the United States” (WOTUS). Developers, farmers, energy companies and several states previously filed suit arguing that the 2015 rule would slow or impede development on both public and private lands based on geographic features only tangentially related to traditionally regulated waters. In October 2015, the Sixth Circuit Court of Appeals stayed the Clean Water Rule nationwide. The new EO directs EPA and the Department of Justice to review all pending WOTUS litigation to assess whether changes in the government’s litigation position may be appropriate, and states that EPA will propose new regulations to replace the 2015 language with a narrower WOTUS definition consistent with the late Justice Antonin Scalia’s opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). Continued engagement will be crucial to shaping any future rule or litigation.

6. **Expansion of Buy America:** On January 24, 2017, President Trump issued a Presidential Memorandum directing the Secretary of Commerce to develop a plan within 180 days under which all new pipelines built inside the borders of the United States use materials and equipment produced in the United States, to the maximum extent possible and to the extent permitted by law. What the plan will say and whether it will have any binding authority is not clear. “Buy America” requirements applicable to highway, public transportation, airport and rail projects are different because (i) the requirements are imposed through laws that state that U.S. international obligations, including World Trade Organization obligations, do not apply; and (ii) the requirements apply as a condition of the projects receiving federal funds. Pipelines, in contrast, are privately funded.

Because the Presidential Memorandum only requires that American-made pipes be used “to the maximum extent possible and to the extent permitted by law,” Secretary Ross likely will provide flexibility in his plan, potentially using it to incentivize the use of American-made steel in exchange for quick action on pipeline permits. In any event, it is not likely that the Dakota Access or Keystone

pipelines will be built with U.S. steel. The Dakota Access pipeline is almost complete and hundreds of miles of pipe for Keystone XL have already been purchased.

7. **Congressional Review Act (CRA) Dates:** Congressional Republicans continue to use the CRA to rollback Obama administration rules finalized after June 13, 2017. The CRA allows Congress to overturn executive branch rules with a simple majority and prevents future administrations from reissuing the rule in “substantially the same form.” The CRA places a 60 legislative-day limit on Congress’ ability to use the fast-track procedures to overturn rules. Currently, the deadline for CRA action in the 115th Congress remains fluid due to actions taken in the Senate. Democrats have forced Senate Republican leaders to use up additional legislative days by dragging out the confirmation votes of President Trump’s Cabinet nominees. This has led to the Senate holding previously unscheduled legislative days, which count toward the 60-day limit. Currently, the CRA deadline is expected to arrive early to mid-May.
8. **Rescission of 2014 Broadcast Processing Policies Governing Joint Operation of Television Stations in Same Market:** Less than two weeks after being designated as Federal Communications Commission (FCC) Chairman by President Trump, Chairman Pai caused the FCC’s Media Bureau to rescind its Broadcast Processing Guidelines governing transactions involving (i) agreements to share facilities, employees and/or services and (ii) financing and/or contingent interest agreements (e.g., option agreements). The Broadcast Processing Guidelines were adopted by the Media Bureau, pursuant to delegated authority, in March 2014 and stated that the Media Bureau would “closely scrutinize” transactions involving shared services arrangements and contingent financial interests. As a result, the Broadcast Processing Guidelines effectively served as a bar to such transactions, which, until that time, historically had been implemented by television stations in small and mid-sized markets as a means to use limited resources more efficiently in an increasingly competitive marketplace. Also as a result of the revocation of the Broadcast Processing Guidelines, the Media Bureau will no longer be subjecting transactions with financial guarantees, option agreements and shared services agreements to increased scrutiny. To this end, on February 27, 2017, the Media Bureau granted a 2013 application that initially contemplated contingent financial interests and, accordingly, had not been processed under the 2014 Broadcast Processing Guidelines, even after the transaction had been modified to remove such contingent financial interests. The grant of this application demonstrates that the Media Bureau will no longer unduly delay grant of applications based on the existence of sharing or financial agreements and, thus, the rescission of the Broadcast Processing Guidelines could lead to increased M&A activity in the television broadcast industry.
9. **International Trafficking:** On Thursday, February 9, 2017, President Trump signed an EO to strengthen enforcement of federal law in order to combat transnational criminal organizations and other groups engaged in illicit activities that present a national security and public safety threat to the United States. Some examples listed in the EO include the illegal smuggling and trafficking of humans, drugs or other substances, wildlife and weapons. President Trump made it clear during his campaign that his administration would tackle the revenue streams used by criminal gangs and

terrorist organizations to fund their illegal activities. On February 23, 2017, the President held a meeting with anti-trafficking organizations to discuss the problem of domestic and international human trafficking. President Trump said during the meeting that he would bring the “full force and weight” of the U.S. government to combat what he calls an “epidemic” and has tasked Attorney General Jeff Sessions and Homeland Security Secretary John Kelly to submit a report to him describing recommended actions and progress to combat trafficking in the next 120 days. Companies who have a presence in high-risk countries should pay attention to the outcome of the comprehensive report due to its potential impact on how they conduct their business.

10. **Restrictions on Hiring Former Obama Officials:** On January 21, 2009, President Obama issued an EO requiring all appointees—a full-time, non-career Presidential or Vice-Presidential appointee; a non-career appointee in the Senior Executive Service (SES) or other SES-type system; and an appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency—to sign an ethics pledge that included expanded restrictions on certain postemployment activities. As former Obama administration appointees are seeking roles outside of government service, potential employers should know that Obama administration appointees are subject to various restrictions on their activities after leaving government that may impact their new employment. President Trump also issued an EO requiring appointees to his administration to sign an ethics pledge. President Trump's EO lengthens the postemployment restrictions from the prior administration and prohibits appointees from partaking in any activity that triggers registration under the Foreign Agents Registration Act (FARA) for the duration of their careers. Individuals appointed under President Obama who are continuing to serve in an acting capacity are subject to the restrictions imposed by the 2009 EO. Click [here](#) to read more about the ethics pledge required for appointees to the Trump administration.

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