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# LOOKING AHEAD: THE IMPACT OF THE 2016 ELECTION ON KEY LEGAL ISSUES

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The 2016 presidential election was notable for many reasons, not the least of which is the heightened sense of unpredictability that has been expressed by so many on a range of issues.

PLI's publishing team has always been dedicated to bringing lawyers the guidance they need to best serve their clients and fulfill their professional obligations. Now, in light of the election, we'd like to look toward the future. We've asked some of our authors to give their predictions, reflections, and analysis regarding a variety of legal topics likely to be affected by the new administration in Washington—including corporate and securities law, immigration law, environmental law, and intellectual property law. These experts have responded with a range of insights, presented below. We hope readers will find their views thought-provoking.

Ellen Siegel
Vice President,
Print and Digital Publishing
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# CONTENTS

## CORPORATE AND SECURITIES LAW

## IMMIGRATION LAW



## ENVIRONMENTAL LAW



## INTELLECTUAL PROPERTY LAW

# CORPORATE AND SECURITIES LAW

# A Deal Lawyer's "First Take" on the Impact of the Trump Administration's Potential Changes to Mergers and Acquisitions Laws and Regulations

**Samuel C. Thompson, Jr.**

*Professor and Director Center for the Study of Mergers and Acquisitions, Penn State Law*

## Introduction

### President-Elect Trump's Policy Positions on Law and Regulations Impacting Mergers and Acquisitions

The new Trump administration is likely to have different approaches than the Obama administration to many of the federal laws and regulations impacting mergers and acquisitions (M&A), and this is a "First Take" on the changes in such laws and regulations that may be initiated or implemented by the Trump administration.

This article presents some preliminary observations on the impact on M&A of the following potential changes that could be initiated by the Trump administration, including:

(1) Changes in the federal income taxation of domestic and foreign corporate operations and transactions;

(2) Changes in trade policies, in particular the adoption of tariffs;

(3) Changes in the antitrust enforcement policies of the Antitrust Division of the Department of Justice and the Federal Trade Commission;

(4) Changes in the approval standards utilized by the Federal Communications Commission; and

(5) Changes in the Volcker Rule under the Dodd-Frank Act; and

(6) Changes in the laws, rules and regulations governing securities regulation.

In considering potential changes to corporate taxation, in addition to focusing on the corporate tax proposals of President-elect Trump, this article also looks at the positions taken on the issue by the House Republicans in their *A Better Way* policy proposals. Also, because the tax proposals are more developed than the other proposals, more consideration is given to corporate tax considerations than any of the other issues.

## A Deal Lawyer's "First Take"

It must also be emphasized that this article is a guide for deal lawyers to potential changes in the laws and regulations relating to M&A; it is not designed to be a comprehensive analysis of any of the potential changes.

## Why This "First Take" Is Like Shooting at a Moving Target

It must be emphasized that at this point in the Trump administration, addressing these potential changes is like shooting at a moving target, for today's likely change in a law or regulation, may be *off-the-table* tomorrow. This is true even though all three branches of the federal government are controlled by Republicans, because it seems likely that any significant change in federal laws and regulations will only occur if the change has the support of President-elect Trump. For example, even though House Speaker Ryan has strong positions on many policy issues, it is unlikely that any of those positions could become law without the support, or at least the non-active opposition, of President-elect Trump.

On the other hand, at this point, it would seem that President-elect Trump would likely be able to get the support for his positions from the Republicans in (1) the House and Senate, and (2) the leadership of federal administrative agencies like the SEC, the FTC, and the FCC. If this evaluation is accurate, then if a proponent of a policy change can convince President-elect Trump of the wisdom of the change, then it is probable that the implementation of that change could be realized.

### Illustration of the Power of President-Elect Trump's Views—The AT&T–Time Warner Merger

The pending AT&T-Time Warner merger is an illustration of the above point. When President-elect Trump was running for president, he criticized this deal. However, if the parties could convince him that he should support the deal, I believe that it would be highly unlikely that either the DOJ or the FCC would challenge the deal, without respect to the merits of the deal. I am certain that AT&T and Time Warner realize this and are exploring ways to convince President-elect Trump of the wisdom of the deal.

## Potential Changes in the Federal Income Taxation of Domestic and International Corporate Operations and Transactions

### Present Law

Currently domestic corporations are subject to a maximum rate of 35% on taxable income, and shareholders are subject to a maximum rate of 23.8% on dividends, making the combined corporate and shareholder rate approximately 50%. The 23.8% rate is the combination of a 20% basic tax on dividends and a 3.8% tax on Net Investment Income under Obamacare. Capital gains currently are also subject to a maximum 23.8% rate. The corporate rate is the highest among OECD countries. This article does not address the federal income taxation of flow-through entities that is, partnerships, S corporations, and LLCs.

Domestic corporations are generally not subject to U.S. taxation on the active foreign business income earned by their foreign subsidiaries. Such foreign income is only taxed upon repatriation to the United States in the form of dividends from the foreign subsidiary to the U.S. parent. This is known as the deferral principle: the tax is deferred until the income is repatriated. This deferred income is also referred to as trapped income because corporations generally do not want to incur the tax that would be due upon repatriation. It is estimated that there is approximately $2 trillion of deferred or trapped income in foreign subsidiaries of U.S. parent corporations.

As discussed below, both President-elect Trump and the House Republicans in their *A Better Way on Taxes* have proposed significant changes in this corporate tax structure.

## Trump and House Republican Proposals for Taxing Domestic Income Earned by Domestic Corporations and Dividends Paid by Domestic Corporations

**President-Elect Trump's Corporate and Dividend Rate Proposals Relating to the Taxation of Domestic Corporate Income.** As indicated, corporations are currently subject to a maximum 35% rate, and President-elect Trump has proposed to tax corporations at a 15% rate. He has also proposed to close some corporate loopholes. Further, he has proposed to tax dividends and capital gains received by individuals at a maximum rate of 20%, whereas the current maximum rate on dividends is 23.8%.

President-elect Trump's combined 15% rate at the corporate level and 20% rate at the individual level would be 32%. This can be illustrated as follows: Assume that a corporation has $100 million of taxable income. The corporate tax would be $15 million, and there would be $85 million after tax. If this $85 million were distributed as a dividend, it would be taxed at a 20% rate or $17 million. Consequently, the combined corporate level tax and the individual level tax would be $32 million, which is one percentage point lower than the 33% rate Donald Trump proposes as the highest individual rate on ordinary income.

**The House "A Better Way" Corporate and Dividend Rate Proposals Relating to the Taxation of Domestic Income.** The House Republican *A Better Way on Taxes* would reduce the corporate tax rate to 20%. While individuals would be subject to maximum rate of 33%, dividends and capital gains would be taxed at half the maximum ordinary rate, or 16.5%.

The *A Better Way on Taxes* would also significantly modify the computation of corporate taxable income by, inter alia, in the case of domestic corporate income (1) allowing an immediate deduction for all capital expenditures, thereby eliminating depreciation, and (2) denying the deduction for interest on debt. The denial of the deduction for interest would eliminate the tax benefit corporate debt has over corporate equity.

## Trump and House Republican Proposals for Taxing Foreign Income Earned by Foreign Subsidiaries of Domestic Parent Corporations

**Proposals by President-Elect Trump and House Republicans for Taxing Trapped Foreign Income.** Both President-elect Trump and the House Republicans have proposed to tax all of the deferred or trapped income in a one-time repatriation at a reduced rate. President-elect Trump has proposed a 10% rate. President Obama has also proposed a lower rate of tax on the deemed repatriation of the trapped income.

**President-Elect Trump's Imputation Proposal for Taxing Foreign Business Income of Foreign Subsidiaries of U.S. Parent Corporations.** During the campaign, President-elect Trump proposed on a going-forward basis that the income of foreign subsidiaries be taxed on a current basis by the U.S. parents of the subsidiaries, under what is known as an imputation system.[1] This would eliminate deferral on a going-forward basis, and the proposal is similar to a proposal made by President Kennedy in 1962. It does not seem clear what President-elect Trump's current position is on imputation.

**House Republican's Territorial and Destination Tax Proposal for Taxing (1) Foreign Business Income of Foreign Subsidiaries of U.S. Parent Corporations; (2) The Export Income of U.S. Corporations; and (3) U.S. Import Income ff Foreign Corporations.** In their *A Better Way on Taxes*, the House Republicans make dramatic changes in the taxation of: (1) foreign business income earned abroad by foreign subsidiaries of U.S. parent corporations; (2) income earned by U.S. corporations from the export of goods from the United States; and (3) the income earned by foreign corporations from the importation of goods into the United States. The changes are implemented through the following three principles.

Under the *First Principle*, *Territoriality*, *A Better Way on Taxes* adopts a territorial system for taxing foreign business income earned abroad by foreign subsidiaries of U.S. parent corporations. Under a territorial system, such income is not subject to taxation in the United States at either the time it is earned or the time it is repatriated to the United States. This eliminates the problem with trapped income.

Under the *Second Principle*, *Export Exemption*, *A Better Way on Taxes* adopts a destination-basis tax pursuant to which domestic corporations are not subject to U.S. taxation on their export income.

Under the *Third Principle*, *Import Taxation*, also under the destination-basis tax, *A Better Way on Taxes* provides that foreign corporations (including foreign subsidiaries of U.S. corporations) are subject to U.S. taxation on their income from sales of products in the United States, which is their income from U.S. imports.

*A Better Way* summarizes as follows these three principles (that is, *Territoriality*, *Export Exemption*, and *Import Taxation*):

> This Blueprint eliminates the existing self-imposed export penalty and import subsidy by moving to a destination-basis tax system. Under a destination-basis approach, tax jurisdiction follows the location of consumption rather than the location of production. This Blueprint achieves this by providing for border adjustments exempting exports and taxing imports, not through the addition of a new tax but within the context of the transformed business tax system. The Blueprint also ends the uncompetitive worldwide tax approach of the United States, replacing it with a territorial tax system that is consistent with the approach used by our major trading partners. These two fundamental structural changes in turn allow other important aspects of the international tax rules to be simplified and streamlined significantly.[2]

*A Better Way* elaborates as follows on the rationale for exempting exports from U.S. taxation:

> *Treatment of Cross-Border Sales, Services and Intangibles.* Today, all of our major trading partners raise a significant portion of their tax revenues through value-added taxes (VATs). These VATs include "border adjustability" as a key feature. This means that the tax is rebated when a product is exported to a foreign country and is imposed when a product is imported from a foreign country. These border adjustments reduce the costs borne

> by exported products and increase the costs borne by imported products. When the country is trading with another country that similarly imposes a border-adjustable VAT, the effects in both directions are offsetting and the tax costs borne by exports and imports are in relative balance. However, that balance does not exist when the trading partner is the United States. In the absence of border adjustments, exports from the United States implicitly bear the cost of the U.S. income tax while imports into the United States do not bear any U.S. income tax cost. This amounts to a self-imposed unilateral penalty on U.S. exports and a self-imposed unilateral subsidy for U.S. imports.
>
> Because this Blueprint reflects a move toward a cash-flow tax approach for businesses, which reflects a consumption-based tax, the United States will be able to compete on a level playing field by applying border adjustments within the context of our transformed business and corporate tax system. For the first time ever, the United States will be able to counter the border adjustments that our trading partners apply in their VATs. The cash-flow based approach that will replace our current income-based approach for taxing both corporate and non-corporate businesses will be applied on a destination basis. This means that products, services and intangibles that are exported outside the United States will not be subject to U.S. tax regardless of where they are produced. It also means that products, services and intangibles that are imported into the United States will be subject to U.S. tax regardless of where they are produced. This will eliminate the incentives created by our current tax system to move or locate operations outside the United States. It also will allow U.S. products, services, and intangibles to compete on a more equal footing in both the U.S. market and the global market.

*A Better Way* also discusses as follows the potential reaction of the World Trade Organization (WTO) to the destination-basis tax.

> The rules of the World Trade Organization (WTO) include longstanding provisions regarding the use of border adjustments. Under these rules, border adjustments upon export are permitted with respect to consumption-based taxes, which are referred to as indirect taxes. However, under these rules, border adjustments upon export are not permitted with respect to income taxes, which are referred to as direct taxes. This disparate treatment of different tax systems is what has created the historic imbalance between the United States, which has relied on an income tax—or direct tax in WTO parlance—for taxing business transactions, and our trading partners, which rely to a significant extent on a VAT—or indirect tax in

> WTO parlance—for taxing business transactions. Under WTO rules, the United States has been precluded from applying the border adjustments to U.S. exports and imports necessary to balance the treatment applied by our trading partners to their exports and imports. With this Blueprint's move toward a consumption-based tax approach, in the form of a cash-flow focused approach for taxing business income, the United States now has the opportunity to incorporate border adjustments in the new tax system consistent with the WTO rules regarding indirect taxes.

## A Difference Between the Destination-Basis Tax and a Border Adjustable VAT

While border adjustability is permissible with a value added tax (VAT), virtually all countries with a VAT also have an income tax, and the income tax applies to the taxable income realized from exports. Thus, in these countries with a VAT, exports are not free of the income tax so that there is some tax on exports. On the other hand, the destination-basis proposal in *A Better Way* would presumably eliminate all tax on exports.

## Strange Bedfellows: One Set Supportive; One Set Opposed to the Destination-Basis Tax

With respect to strange bedfellow supporters, two prominent economists, one generally viewed as liberal (that is, Alan J. Auerbach of the University of California, Berkeley) and one generally viewed as conservative (that is, Douglas Holtz-Eakin of the American Action Forum) have jointly written a paper in support of the destination-basis tax.[3] The *Daily Tax Report* explains:

> [Auerbach and Holtz-Eakin] defended the use of border adjustments as sound tax policy.
>
> Border adjustability rules—taxes on imports with rebates for exports—create a level playing field for domestic and overseas competition, Auerbach and Holtz-Eakin said in a new report. The framework eliminates the incentive to shift production offshore to lower-tax jurisdictions and to manipulate transfer pricing to move profits offshore, they said.[4]

With respect to the strange bedfellow opponents, the very conservative Koch brothers and the very liberal Professor Larry Summers, a former Treasury Secretary in the Clinton administration, are both against the destination-basis tax. The Koch brothers argue that by discriminating against imports, the destination-basis tax would "'distort the market' and raise prices."[5] Larry Summers argues, inter alia:

> [T]he tax change would likely harm the global economy in ways that reverberate back to the United States. It would be seen by other countries and [possibly] the World Trade Organization as a protectionist act that violates U.S. treaty obligations. . . . While the WTO process would grind on, protectionist responses by others would be licensed immediately. Moreover, proponents of the plan anticipate a rise in the dollar by an amount equal to the 15 to 20 percent tax rate. This would do huge damage to dollar debtors all over the world and provoke financial crises in some emerging markets. Because U.S. foreign assets are mostly held in foreign currencies whereas debts are largely in dollars, U.S. losses with even a partial appreciation would be in the trillions. Ironically, China, with its huge reserve hoard, would be a major winner. [6]

While acknowledging the need for corporate tax reform, Professor Summers goes on to argue:

> There is no need to reinvent the corporate tax wheel. Let's fix the tax we have by reducing rates, closing shelters and broadening the base, and cracking down on profit shifting to tax havens. That would be an important step to making our economy grow faster and be fairer.[7]

## Impact on M&A of Potential Changes to Domestic and International Corporate Taxation

The proposals of President-elect Trump and the House do not appear to specifically address the impact of the potential changes on M&A transactions. Presumably, the basic rules governing taxable and tax-free purely domestic M&A would continue. However, the reduction in the rates on corporate and dividend income could reduce the incentive to engage in tax free transactions.

When it comes to the destination-basis tax, Mark Mazur, the Treasury's Assistant Secretary for Tax Policy, is reported to have said that the tax "raises major questions—including how big corporate deals would be treated[.]"[8] He is reported to have further elaborated:

> With unanswered questions about how the U.S. would set up tax collection at the border and what precisely would be taxed, the impact of a such a destination-based tax on transactions like corporate spinoffs and mergers and acquisitions is unclear[.] . . .
>
> As work continues on border adjustability in the House, "no one has done this," he said. "That's the open question. Can you resolve all of these questions in a reasonable period of time?"[9]

If a territorial system or a combination territorial, destination-basis system is adopted, fresh consideration would have to be given to the impact of section 367 on cross-border reorganizations.

## The Impact on Cross-Border M&A of Potential Changes in Trade Policies, in Particular the Adoption of Tariffs

### President-Elect Trump's Tariff Proposal

As virtually everyone knows, President-elect Trump has proposed to impose tariffs on U.S. companies that move abroad and then sell their products back into the United States. A tariff could have a similar effect to a destination-basis tax. In explaining President-elect Trump's position, Sean Spicer, his press secretary, said: "I think what [President-elect Trump] is concerned about is American companies who go offshore, get rid of American jobs and then want to sell back to the United States."[10]

### The House's Tentative Response to President-Elect Trump's Tariff Proposals

As indicated in the following discussion in the *Wall Street Journal*, there is apparently a difference of view between House Republicans and President-elect Trump on the advisability of adopting a tariff:

> House Majority Leader Kevin McCarthy (R., Calif.) said Monday that an overhaul of the tax system would better retain domestic jobs than tariffs

> on U.S. companies that move production offshore, in the latest example of how Republicans who have built their ideas around free-market ideology are struggling to reconcile those ideas with the populist grab bag Mr. Trump espouses.
>
> Mr. McCarthy declined to say whether the House would bring up legislation next year turning Mr. Trump's latest comments into federal law. Over the weekend Mr. Trump threatened to impose consequences like a 35% import tariff on goods sold by U.S. companies that have moved jobs overseas and fired U.S. workers.
>
> "I do not want a trade war," Mr. McCarthy told reporters Monday. "I believe in the free market. I don't think government should be picking winners or losers."
>
> Instead, Mr. McCarthy said the government should be reworking its business tax code to make the U.S. a more competitive place for companies to do business. . . .
>
> Republicans have so far avoided directly labeling Mr. Trump's moves as interference in the free market.[11]

Further, as indicated in a January 5, 2017 article in *Daily Tax Real Time*,[12] President-elect Trump, has made it clear that he has not abandoned the tariff proposal, notwithstanding Chairman Ryan's opposition to it. The article explains:

> Border taxes on companies that outsource production overseas are "one piece" of President-elect Donald Trump's plan to improve the economy, incoming White House press secretary Sean Spicer said.
>
> The comment highlights a difference between the next president and House Speaker Paul Ryan (R-Wis.), who said yesterday that Congress won't raise tariffs. The House speaker has said overhauling the tax code will prevent outsourcing. Trump thinks border taxes, coupled with deregulation and a tax revamp, will benefit American workers, Spicer told reporters on a conference call today.[13]

## The Impact of President-Elect Trump's Position on Tariffs on M&A

Ralph Schlosstein, the CEO of Evercore, a leading boutique M&A investment bank, recently expressed the view that President-elect Trump's position on tarriffs could have an adverse impact on the M&A marketplace. Mr. Schlosstein is reported to have said: "[President-elect Trump] has created uncertainties around U.S. policies for global commerce, which could hinder the market for mergers and acquisitions."[14] He further said: "Things we don't know really anything about, in terms of bite-versus-bark, are trade and a more protectionist view, which obviously would not be good for the economy or business, and probably not good for M&A activity either[.]"[15]

The apparent cutback in inbound M&A activity from China is a reflection of Schlosstein's point. As explained in a BNA article,[16] during 2016 "[a]cquisitive Chinese companies . . . led a blockbuster year of dealmaking . . ., accounting for about $225 billion of overseas purchases[.]"[17] The article goes on to explain, however, that "[b]ankers and lawyers are already counseling some Chinese clients to hit the pause button until Trump clarifies his stance on cross-border deals for U.S. targets[.]"[18]

## Potential Changes in the M&A Antitrust Enforcement Policies of the Antitrust Division of the Department of Justice and the Federal Trade Commission

### Introduction

Mergers and other acquisitions are subject to scrutiny under section 7 of the Clayton Act, which makes illegal any acquisition where in any relevant product market or relevant geographic market "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Although the "substantially to lessen competition" standard is short, the application of the standard is complex, and there are hundreds of cases interpreting the standard. Section 7 is enforced by the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ), and these two agencies decide between themselves which agency will scrutinize which M&A transaction. The FTC has five Commissioners who decide on merger and other enforcement policies, and the DOJ's Antitrust Division is headed by a single person who reports to the Attorney General.

Section 7 applies principally to horizontal mergers (that is, mergers between competitors), and the agencies have promulgated Horizontal Merger Guidelines, which were last revised in 2010. Since the early 1980s, the Horizontal Merger Guidelines have been substantially the same across both Democratic and Republican Administrations.

If after applying the Guidelines the reviewing agency determines that the M&A transaction would violate Section 7, the agencies can either reach an agreement with the parties on a divestiture or other remedy or challenge the transaction in court.

To facilitate the review of M&A transactions, the parties to certain large acquisitions (such as, for 2016, acquisitions of a target for more than $312.6 million) must comply with the pre-merger notification rules under the Hart-Scott-Rodino Act. For 2017, this $312.6 threshold will shortly be adjusted for the inflation that occurred in 2016.

The Horizontal Merger Guidelines use market concentration as the starting point for determining whether the reviewing agency will challenge the transaction, and in general, if after the relevant product and geographic markets are determined, the merger does not result in a substantial increase in concentration in the market, the reviewing agency will not consider challenging the merger. The application of the Horizontal Merger Guidelines involves the exercise of substantial discretion by the reviewing agency, and the reviewing agency can take into account many considerations including the possibility that the potential anticompetitive effect of a merger may be mitigated by entry into the market by other competitors or efficiencies.

## Potential Changes in the M&A Antitrust Enforcement Policies

The approach of the Trump administration to M&A antitrust enforcement may be signaled by the appointment of the transition team antitrust adviser: Joshua Wright. An article in the BNA *Antitrust & Trade Regulation Report* gives the following description of the general approach of Wright to antitrust enforcement:

> [Wright is] a former FTC commissioner and antitrust enforcement skeptic[.] . . . [He] earned a reputation as the FTC's most conservative commissioner during his brief tenure there under President Barack Obama. Wright opposed many enforcement actions, most notably the government's successful suit to stop the merger of food distributors Sysco Corp. and U.S. Foods Inc.
>
> Wright is known for taking a pragmatic approach to analyzing antitrust issues that relies heavily on economics and doesn't immediately assume that mergers resulting in high market shares are harmful to consumers. While at the FTC, he zeroed in on defining the scope of antitrust enforcement partly so that companies would better know if their conduct was unlawful.[19]

The article also points out that Wright's "leniency on stopping mergers runs counter to public statements on antitrust made by Trump, who has called for the government to stop the proposed merger of AT&T Inc. and Time Warner Inc. and break up Comcast Corp.'s 2013 purchase of NBCUniversal."[20]

The article also discusses Wright's support of the SMARTER Act, and the opposition to the Act of FTC Chairwoman Edith Ramirez, a Democrat. The "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015" or "SMARTER Act" has been described as follows:

> Federal lawmakers are currently considering legislation that would eliminate differences in the procedures used by the Federal Trade Commission (FTC) and the Department of Justice Antitrust Division in challenging unconsummated acquisitions and mergers. The proposed [SMARTER Act] is intended to address concerns that parties to a proposed merger or acquisition currently face different preliminary injunction standards in court challenges, as well as different processes, depending upon which federal antitrust agency reviews the transaction.
>
> The so-called SMARTER Act has two main objectives: (1) equalize the standards for the two federal antitrust agencies for obtaining a preliminary injunction against a proposed merger or acquisition; and (2) eliminate the FTC's ability to pursue administrative adjudication to challenge a proposed transaction when it seeks a preliminary injunction in court. In effect, it would attempt to standardize the processes used by the two agencies to block a proposed merger or acquisition that raises competition

> concerns. It would not impact FTC challenges to consummated mergers or other antitrust violations.[21]

Another article in the BNA *Antitrust & Trade Regulation Report* says that antitrust enforcement in the Trump administration is "likely to be a throwback to George W. Bush's presidency, which gave an easier ride to mergers than has been typical under Barack Obama[.]"[22]

## Potential Changes in the Merger Approval Standards Utilized by the Federal Communications Commission

An article in the BNA *Antitrust & Trade Regulation Report* gives the following prognosis on potential changes in FCC merger enforcement in the Trump administration:

> The Federal Communications Commission is likely to change course and prioritize lifting newspaper and television station ownership restrictions when it comes under Republican control in 2017, agency watchers said.
>
> Industry analysts who track the FCC expect Republicans to relax rules once they assume control of the agency in President-elect Donald Trump's administration. That would include loosening restrictions on how many broadcast properties one company can own in any given market and lifting the ban on media companies owning newspapers and broadcast TV stations in the same market, a practice known as cross-ownership.[23]

## Potential M&A-Related Changes in the Volcker Rule

The Volcker Rule was enacted as part of the 2010 Dodd-Frank banking law. The rule prevents banks from engaging in certain proprietary trading activities, and as a result of the law, several banks have had to divest their proprietary trading operations. The Volcker Rule has been widely criticized by many in the banking industry.

Although when running for President, he attacked Dodd-Frank generally, President-elect Trump proposed going much further than Dodd-Frank by reinstating the Glass-Steagall Act's prohibition against the combination of commercial banking and investment banking. The Volcker Rule portion of Dodd-Frank partially reinstated Glass-Steagall. An article in CNN Money, discusses as follows then-candidate Trump's positon on reinstating Glass Steagall:

> At Trump's urging, the GOP formally endorsed breaking up America's big banks Monday. It's almost like the Republicans were taking a page from liberal senators Bernie Sanders and Elizabeth Warren who have advocated for exactly that to ensure no bank is "too big to fail."
>
> The official Republican platform for 2016 calls for bringing back the Glass-Steagall Act, a law put in place during the Great Depression to restrict banks from serving both Wall Street and Main Street. President Bill Clinton repealed the law in 1999.
>
> In a sign of just how unpopular Wall Street is in America right now, reinstating the Glass-Steagall Act is in both the Republican and Democratic platforms.[24]

The CNN Money article goes on to explain as follows the position of big banks on the reinstatement of Glass-Steagall:

> Big banks don't like the idea of Glass-Steagall returning because companies like JPMorgan Chase and Bank of America would likely have to break up and get smaller. Goldman Sachs called it a "surprising new position" for the GOP.[25]

One of the arguments against the Volcker Rule is that "curtailing bank trading activity has reduced market liquidity when it is most needed, during times of stress."[26] An article in the *Wall Street Journal* points out that the criticism is also coming from an unlikely source:

> The latest institution to advance this view isn't some self-interested bank or libertarian think tank but the Federal Reserve. In a paper issued just before Christmas, using corporate-bond downgrades as a proxy for stress, it finds deterioration of liquidity around these events has worsened substantially since the rule was put in place. This suggests the Volcker rule "may have serious consequences for corporate bond market functioning in stress times."[27]

While this Federal Reserve analysis is critical of at least part of the Volcker Rule, the *Wall Street Journal* reports that "Carl Icahn, President-elect Donald Trump's new regulatory adviser, might not favor financial deregulation the way many on Wall Street expect."[28] With respect to the Volcker Rule the article says:

> The billionaire investor, tapped for a new post called "special adviser to the president on regulatory reform," has said positive things about the 2010 Dodd-Frank financial-overhaul law and one of its signature initiatives, the Volcker rule bank-trading ban.[29]

Any liberalization of the Volcker Rule would obviously reduce a barrier to acquisitions by banks of businesses engaged in proprietary trading. It does not appear that there is any real effort to reinstate the Glass-Steagall Act.

## Potential M&A-Related Changes in Securities Regulation

President-elect Trump has selected Jay Clayton a partner with Sullivan & Cromwell, one of the nation's leading corporate law firms, to be the next Chairman of the Securities and Exchange Commission. Clayton is a highly experienced securities and corporate lawyer and is obviously qualified for the job.

However, some have questioned whether he will protect small investors. For example the Editorial Board of the *New York Times* writes: "The unanswered question is whether Mr. Clayton would use his knowledge and experience to protect investors from abuse and undue risk in the public markets, or to shield Wall Street from scrutiny."[30]

One area of the securities laws affecting M&A is the Foreign Corrupt Practices Act (FCPA). An article in the BNA *Securities Regulation & Law Report* gives the following background on Mr. Clayton's potential views on the enforcement of the FCPA:

> [Clayton] chaired a New York City Bar Association drafting committee that put out "*The FCPA and its Impact on International Business Transactions—Should Anything Be Done to Minimize the Consequences of the U.S.'s Unique Position on Combating Offshore Corruption?*" The 25-page paper

called for a "reevaluation of the United States' strategy in fighting foreign corruption," saying U.S. companies covered by the FCPA are facing unfair burdens.

"The current anti-bribery regime—which tends to place disproportionate burdens on U.S. regulated companies in international transactions and incentivizes other countries to take a "lighter touch"—is causing lasting harm to the competitiveness of U.S. regulated companies and the U.S. capital markets," the report said.

But the FCPA shouldn't disappear, according to the paper.

"To be clear, this paper is not offered in praise of a 'lighter touch' on bribery," the paper said.

Rather, the federal government should either ratchet up enforcement pressure on companies that aren't covered by the FCPA or dial it back for companies that are.[31]

## Conclusion

Obviously, there will be changes in many laws and regulations with any new president, and this will clearly be true with President Trump. This article has provided a deal lawyer's "First Take" on the impact of several of these potential changes on M&A transactions.

Samuel C. Thompson, Jr. is the author of Mergers, Acquisitions and Tender Offers: Law and Strategies.

# NOTES

1. Samuel C. Thompson, Jr., *Hooray for Trump's Proposal to End Deferral*, 149 Tax Notes 157 (Oct. 5, 2015).
2. *Id*. at 27.
3. Laura Davison, Aaron Lorenzo & Kaustuv Basu, *Border Adjustment Defense; Levin Passes Torch*, Bloomberg BNA, Daily Tax Report (Nov. 2016).
4. *Id*.
5. Richard Rubin, *Koch Industries Criticizes Key Feature of House GOP Tax Plan*, Wall St. J. (Dec. 7. 2016).
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# Dodd-Frank Act: Banking Law Reform


**Arthur S. Long**

*Partner, Gibson, Dunn & Crutcher LLP, New York*


## Overview

The election of Donald J. Trump raises questions about the future of the Dodd-Frank Act. Like the Affordable Care Act, the Dodd-Frank Act was a centerpiece of the Obama program, and, during his campaign, President-elect Trump criticized it for hampering access to credit and economic growth. Before the election, House Financial Services Chairman Jeb Hensarling proposed a Republican alternative to Dodd-Frank, the CHOICE Act. Because the Democrats retained 48 seats in the Senate, however, they will be able to filibuster most legislation. As a result, the prospects for an outright repeal of Dodd-Frank are much less likely than targeted reform of the legislation. This article will discuss those banking law provisions of Dodd-Frank that are most likely to be the subject of attempted reform.

## Title I: Financial Stability Oversight Council

Title I of the Dodd-Frank Act established the Financial Stability Oversight Council (FSOC), the council of regulators tasked with identifying companies and activities that could pose systemic risk. The FSOC was controversial for many Republicans from the start, who argued that the identification of certain companies as "systemically significant" would give them Too Big to Fail status and, thus, more likely to be bailed out by the government in the event of their insolvency. In addition, the FSOC was criticized for certain of its "systemically significant" designations, as well as for the report of the Treasury's Office of Financial Research on systemic risk in the asset management industry. One designation, that of MetLife, Inc., was successfully challenged in the U.S.

District Court for the District of Columbia, a decision currently under review by the D.C. Circuit Court of Appeals.

An attempt to repeal all of Title I's FSOC provisions would appear to raise the potential for a Democratic filibuster. This said, more targeted measures could be designed to appeal to certain Senate Democrats as well as Republicans. There are nine Democratic Senators up for re-election in 2018 from states won by President-elect Trump. One approach would be to take away the FSOC's authority to designate particular companies as systemically significant, and limit its authority to identification of financial practices and activities that could raise risks to the financial system generally. At the present time, other than Met Life, there are only two other companies that were designated systemically significant by the FSOC: Prudential Financial and AIG. The latter company has shrunk considerably since the financial crisis, and it is certainly possible that an FSOC led by a Republican Secretary of the Treasury could decide to reverse prior designations. Moreover, the Board of Governors of the Federal Reserve System (Federal Reserve) still has not applied, as is required by section 165 of Dodd-Frank, heightened prudential regulatory standards to Prudential Financial and AIG.

## Title II: Orderly Liquidation Authority

Certain Republicans also took immediate issue with Title II of Dodd-Frank, which establishes the so-called Orderly Liquidation Authority as an alternative to bankruptcy in the event of the insolvency of a systemically significant bank holding company or nonbank financial company. They criticized this alternative, under which the Federal Deposit Insurance Corporation (FDIC) would be appointed receiver of a failing systemic firm, as enshrining government bailouts. Republican critics also argued that the FDIC was ill-suited for its role as receiver, since most of its experience has been resolving relatively uncomplicated smaller banks and not firms global in reach with substantial nonbank affiliates. It is quite possible therefore that Republican legislation would propose repealing Title II and replacing it with a new chapter of the Bankruptcy Code designed for large financial firms.

## Title VI: Volcker Rule

In the area of core bank regulation, the most controversial provision of Dodd-Frank is of course the so-called Volcker Rule contained in Title VI. Like an attempt to repeal of all of the FSOC's authority, an attempt to repeal all of the Volcker Rule would likely be successfully filibustered. There have been calls, however, for rendering the Volcker Rule inapplicable to smaller banks—one proposal has been to repeal it for banks and bank holding companies with less than $10 billion in total consolidated assets. Banks of that size have, for some time, claimed publicly that the compliance burdens imposed by Dodd-Frank have inappropriately burdened them, given that they do not have the compliance staffing of larger institutions. Once again, a more targeted reform could be seen to appeal to certain Senate Democrats, as a boon to smaller, local firms.

## Prudential Standards

Similarly, there has been for several years an ongoing debate about the level at which the heightened prudential standards of Dodd-Frank—heightened capital and liquidity standards, more granular corporate governance requirements, and resolution plans ("living wills")—should apply. Dodd-Frank subjects all bank holding companies with $50 billion or more in total consolidated assets to these heightened standards. There is a general consensus—shared even by Federal Reserve Governor Daniel Tarullo—that the $50 billion threshold was set too low. It is quite possible that Congress could decide to raise the threshold to some degree, which would benefit regional banks as well as certain non-U.S. banks that focus on retail banking, as opposed to investment banking, in the United States.

There is no similar consensus, however, regarding regulatory relief from heightened prudential standards for the largest banks. Republican Representative Hensarling's CHOICE Act, for example, would permit such banks to escape Dodd-Frank's heightened prudential standards only if, as an alternative, they greatly increased the amount of their equity capital from current levels. This is not a palatable alternative given that the largest U.S. banks are already under pressure to increase returns on equity.

## Title X: Consumer Financial Protection Bureau

Another area of uncertainty involves the Consumer Financial Protection Bureau (CFPB) created by Title X of Dodd-Frank. In 2016, a panel of the Court of Appeals for the D.C. Circuit held that the original structure of the agency, under which its Director, Richard Cordray, could not be fired without cause by the President, coupled with the agency's independent funding and lack of a commission structure, was unconstitutional. The panel held that the constitutional violation would be remedied if the Director was removable at the will of the President.

This decision has not been fully and finally appealed, and it is not clear how President-elect Trump will respond. Director Cordray's term does not expire until 2018, and he has stated that he intends to stay in office until then. Republicans in Congress have been very critical of the CFPB, but Democrats have defended it with equal vigor. In addition, there continue to be consumer-related supervisory issues at many institutions, with the creation of false accounts at Wells Fargo being the most recent example to gain widespread public attention. It is therefore not clear whether substantial changes to the CFPB's structure, such as making it subject to congressional appropriations or turning it into a multi-member commission like the Securities and Exchange Commission, would survive a Senate filibuster. Congressional Republicans could, however, seek to make use of the Congressional Review Act to repeal recent CFPB regulations (essentially those promulgated from mid-May 2016 forward).

## Title XI: Federal Reserve Emergency Lending Power

Congress is also likely to debate the role of the Federal Reserve as lead bank supervisor and emergency lending authority. Although Title XI of Dodd-Frank placed restrictions on the Federal Reserve's traditional emergency lending power under section 13(3) of the Federal Reserve Act, some congressional Republicans believe that this power must be further limited, and they have also raised questions about the amount of transparency in the Federal Reserve's supervision of large bank holding companies as well as systemically significant financial market utilities. In particular, they have criticized the Federal Reserve's stress-testing process and the manner in which it has reviewed the resolution plans of the largest banks.

## Regulatory Agency Commissioner Appointments

Finally, one may see different directions taken at regulatory agencies where President Trump is able to appoint a majority of commissioners. For example, although there does not appear to be much congressional appetite for radically reforming the derivatives provisions of Title VII of Dodd-Frank, it is likely that a Republican-controlled Commodity Futures Trading Commission would take a different approach in a number of areas, such as the extraterritorial application of Title VII. We should also expect to see, at all financial regulatory agencies where a cost-benefit analysis of regulations is required, greater emphasis on analyzing the costs of particular regulations, including their effects on economic growth.

## Conclusion

Dodd-Frank is an exceptionally long and complicated statute. Although it is unlikely that it will be repealed and replaced in large part, Republicans are very likely to move reform through the Congress. In the Senate, incoming Senate Banking Chairman Crapo has shown a willingness to try to build consensus with enough Democrats to shape legislation that can survive a filibuster. For this reason, there may well be areas where Dodd-Frank in 2018 will look different than it does today.

Arthur S. Long is the author of Financial Services Regulation Deskbook.

# How Corporate Compliance May Evolve in the New Administration

**Carole Basri**

*President, The Corporate Lawyering Group, LLP*

General counsels and compliance officers should be aware that with the new Trump administration there is a potential for a change in several areas, including the following:

- There will probably be a simplification of existing regulations.
- The Dodd-Frank Act's sweeping reforms may be rolled back but the likelihood is that the Act will remain largely intact due to corporate comfort with the Act as is; however, enforcement by the Justice Department and the Securities and Exchange Commission will be less rigorous. Even the opportunity to roll back the whistleblower protections and awards will not be pushed by corporate America, because many corporations have learned to live with the whistleblower provisions so long as a requirement is added that the whistleblowers receiving a bounty must first report the incident on the company hotline.
- Interestingly, large American corporations will generally champion keeping Dodd-Frank reforms in place, since they have already created the compliance structure to support the reforms.
- Compliance departments will continue to grow internationally as developing countries (Brazil, Russia, India, and China—BRIC) and underdeveloped countries strive to fight corruption.
- We are already seeing anticorruption efforts in the BRIC countries: In Brazil, with the Petrobras scandal and the impeachment of President Dilma; in India, with the demonetization campaign of Prime Minister Modi; and in China, with the second five-year plan to fight

corruption, the installation of compliance officers in all large Chinese companies, and the decline in the luxury goods market.

- While Russia remains an outlier on the fight against corruption at this time, this will probably change soon. Under a Trump administration, some or all of the sanctions will probably be lifted against Russian banks and other entities. As Russia joins in the larger international market, it will need more compliance with laws and regulations relating to anti-money laundering, antibribery, sanctions, and boycotts. This will lead to larger compliance departments for Russian companies, particularly financial services companies.
- Underdeveloped countries will also have a need for their companies to expand compliance departments if they are to fight corruption and become greater players in the global economy. This will be most apparent in Africa.
- Compliance departments will probably expand globally since compliance is, at its heart, self-regulation rather than government regulation. By this I mean that there will be more industry oversight (like FINRA) of existing compliance programs. The mandate for expansion will not be to increase regulators but to increase the responsibility for effective compliance programs within each industry and company. This is the essence of self-regulation.
- In-house legal departments and compliance departments will be professionalized, with more certification and degree programs like the LLM in Compliance at Fordham Law School. There will be an increased demand for trained in-house lawyers and compliance professionals.

Carole Basri is the editor of International Corporate Practice: A Practitioner's Guide to Global Success; coauthor, with Irving Kagan, of Corporate Legal Departments: Practicing Law in a Corporation.

# Looking Ahead to the Effects of the Administration Change in 2017: Communications

**Laura H. Phillips & Anthony D. Glosson**

*Drinker Biddle & Reath LLP*

Given the results of national elections, 2017 is likely to be a year featuring changes in direction for many aspects of federal communications policy. With Democratic appointees losing control of the Federal Communications Commission (FCC), the regulatory goals in the communications sector will likely shift in a number of high-profile areas. It is also likely that a Republican-led FCC majority will focus more on market-based approaches to spurring communications investments and encouraging infrastructure deployment.

This overview highlights several areas that appear most likely to undergo review or change during 2017. While not an exhaustive list, it includes the review of:

- the FCC's regulatory reclassification of broadband Internet access services (BIAS);
- reassessment of the need for FCC-specific broadband privacy regulations;
- the conclusion of 600 MHz band incentive auction and necessary implementation actions;
- a focus on removing obstacles in the path for rollout of 5G wireless technologies and services; and
- potential updates to the Communications Act.

## Regulatory Reclassification of Broadband Internet Access Services

In 2015 and divided along party lines, the FCC adopted updated "net neutrality" rules reclassifying BIAS providers to be telecommunications services regulated under Title II of the Communications Act.[1] The updated FCC rules include bans on some network management techniques like blocking, throttling, and paid prioritization of traffic, as well as expanded transparency requirements for commercial practices of broadband service providers. While the FCC declined to regulate many aspects of service provision, the agency's updated rules included a prohibition on "unreasonable conduct," which has been singled out by the FCC's Republican commissioners for criticism based on its ill-defined and unpredictable nature. The current Trump FCC transition team is composed of critics of the FCC's net neutrality regime. Whether a Republican-led FCC will seek to reverse the entire reclassification of BIAS or modify the scope or enforcement of existing rules is up for debate.

A significant aspect of the net neutrality order was the decision to apply Title II to BIAS offerings, changing the status of broadband service from its pre-2015 status as a Title I, largely unregulated service. Critics, including senior Republican Commissioner Ajit Pai, have argued that the current rules represent "a solution that won't work to a problem that doesn't exist"[2] and speculated that the rules consequently risk discouraging innovation in the provision of broadband service and investment in infrastructure buildout.

Reversing the regulatory classification, however, may be a heavy lift for the agency to accomplish during 2017.[3] Any move back to a Title I framework would require a rulemaking process and also would mark a major legal and policy reversal at a time when the broadband industry has made substantial investments in Title II compliance. Some more limited steps, such as eliminating the unreasonable-conduct rule that has called into question some "zero-rating" practices of BIAS providers could constitute a near-term middle ground. The FCC also could take other steps like suspending enforcement of particular requirements, while encouraging Congress to reform broadband regulation as part of a more comprehensive legislative package of communications reforms.[4]

## Broadband Privacy

In October 2016, the FCC adopted along party lines a set of broadband privacy rules for BIAS providers that are broader in scope than the privacy regime enforced by the Federal Trade Commission (FTC). They encompass a number of obligations on broadband providers to protect customer privacy, including specification of minimum data security standards, breach notification protocols, a notice and choice framework for data collection, and a prohibition on conditioning broadband service on any waiver of privacy rights.[5] These stricter rules have come under fire from FCC transition team members and FCC Republican commissioners, so these rules appear ripe for modification or repeal.[6]

The Republican commissioners have expressed skepticism toward this FCC-specific privacy regime that they contend unfairly subjects broadband providers to stricter obligations than those of the edge provider competitors also active in the data aggregation market.[7] Because the regulations are in the process of implementation, it could well be that a Republican-controlled FCC will revisit these rules during 2017 to attempt at least to conform them more closely to FTC regulations, if not reverse them entirely.

In addition, the incoming Congress may be able to overturn these regulations via a "joint resolution of disapproval."[8] The mechanism, which was created by the Congressional Review Act (CRA), allows Congress to reject any new regulation within sixty legislative days of its promulgation by an agency. The Congressional Research Service has estimated that any regulations promulgated after June 13, 2016, could be subject to CRA review.[9] These rules were issued on October 27, 2016, and they are within this window. Any joint resolution is subject to presidential veto, so this mechanism is rarely used except in situations where, as here, the White House has changed parties, and the new party also controls both houses of Congress.

Consumer groups are coalescing to urge Congress not to reverse these privacy rules using a CRA joint resolution because the CRA specifically prohibits agencies from promulgating any regulation similar to one struck down via the mechanism.[10] Further, the FTC's section 5 authority, under which it regulates privacy in other industries, generally does not reach common carriers, which broadband providers are currently classified as under Title II.

Consumer groups claim that a successful CRA review would leave an unaddressable privacy gap, with no federal agency with the authority to enforce privacy requirements on BIAS providers.

## Incentive Auction

The FCC's first-ever incentive auction, which repurposes 600 MHz-band spectrum from TV broadcast services to mobile broadband applications, is likely to come to an end in 2017.[11] The auction consists of two separate auctions operating in series: Auction 1001, in which broadcasters sell back spectrum to the FCC (the "reverse auction");[12] and Auction 1002, in which mobile broadband providers purchase the repurposed spectrum (the "forward auction").[13] These auctions, which initially sought to "clear" 126 MHz of spectrum, have cycled through numerous rounds and now appear likely to clear 84 MHz of spectrum.[14] This process will end when would-be mobile broadband providers are willing to pay enough for the amount of spectrum cleared to cover the costs of purchasing the spectrum from broadcasters, reimburse the FCC's administrative costs, and fund public safety network build-out, as required by Congress's authorization for this auction.

Under Republican control, FCC staff or congressional oversight committees may seek a post-mortem review to determine why there was less participation in the auction than the FCC expected and whether changes like a lower initial clearing goal could have expedited the auction's closing and reduce participants' costs. Some have contended that factors beyond auction design contributed to the relatively low clearing and revenue-raising outcome, including industry investment preferences that skewed toward 5G development and maximizing the use of current spectrum holdings rather than acquiring more spectrum at public auction.[15] An increased level of interest in mergers among major market players could also have affected auction participation or levels of interest.[16]

On September 30, 2016, the Media Bureau proposed a repacking plan that seeks to manage broadcasters' transitions to their newly assigned channels with minimal disturbance to viewers. Under the plan, each broadcaster would be assigned to one of ten "transition phases" spanning thirty-nine months. As the FCC explained, "[t]he phase completion date will be the date listed in each station's construction permit as its construction deadline and will be the last day that a station may operate on its pre-auction channel."[17] Several parties filed comments on the proposed timeline, including the National Association of Broadcasters (NAB), which argued that a thirty-nine-month period is insufficient time to complete the transition without service dislocations.[18] The agency and its Republican commissioners' reactions to the NAB plea could serve as a barometer of future attitudes toward issues of concern to broadcasters.

## 5G and Mobile Services Growth

In July 2016, Verizon became the first U.S. wireless provider to adopt radio specifications for its 5G wireless network, and other carriers appear poised to follow suit.[19] 5G will likely mark a sea change from previous iterations of wireless data technologies—not just because of its significant leap forward in download speeds, but also because of its intended flexibility to accommodate a variety of devices beyond merely smartphones and assorted mobile devices. 5G specifications are expected to be aimed at integrating the Internet of Things (IoT) directly into the mobile data network, bypassing the current need for most smart devices to be connected to a home or business wireless network, and delivering a more seamless experience to users.

In July 2016, the FCC released its Report and Order and Further Notice of Proposed Rulemaking, also known as its "Spectrum Frontiers" proceeding, which identified additional spectrum to support 5G rollout in the United States.[20] The order designates spectrum to be made available for both licensed and unlicensed uses. In total, the agency identified nearly 11 GHz that could be available for use by 5G technologies. As there was unanimous support among the commissioners for this action, it is likely that a Republican FCC will attempt to build on this foundation and seek ways to encourage the deployment of 5G. What could change is the emphasis of the FCC in ancillary areas, including whether the agency takes steps to adopt rules on cybersecurity for 5G. For example, in December 2016, the Homeland Security Bureau released a notice of inquiry seeking comment on the potential cybersecurity ramifications of 5G technologies and any actions the FCC should take to incentivize manufacturers to build adequate security into IoT devices relying on 5G spectrum.[21] Though there is broad consensus that security for 5G devices is an important concern, the FCC Republican commissioners have not embraced the idea that the FCC, as opposed to other federal agencies, is the right entity to take an active role in adopting and enforcing security standards. However, in an effort to facilitate 5G deployment, the reconstituted FCC may look to exercise its preemption powers with respect to what it could view to be unreasonable restrictions or delays on local approval for the siting of the nanocells that will be integral to the buildout of 5G networks.

Overall, the FCC's role in 5G development has been to promote flexibility in standards and to identify spectrum suitable for further development and network buildout, spectrum with appropriate characteristics to accommodate IoT devices.[22] Fostering 5G development has been an area of bipartisan consensus at the FCC, so it is anticipated that the agency will continue to support industry as it seeks to meet the growing demands of consumers and device manufacturers.

## Legislative Reform

A modernized Communications Act has long been on the wish list of politicians and regulators from both parties, but much of the energy on that front has come from the Republican caucuses. Advocates contend that the current Communications Act, passed in 1934 and modeled after railroad regulations, is no longer up to the task of addressing modern communications technologies.[23] While the Communications Act of 1934 was amended by the Telecommunications Act of 1996, advocates for reform argue that a modernized regulatory framework is required following the advent of the Internet, widespread consumer adoption of advanced communications technologies, and an entirely new economic ecosystem premised on data collection, aggregation, and resale.

With unified GOP control of the political branches, passage of a modernized Communications Act becomes a more plausible scenario, while it is difficult to speculate on exactly what such legislation might look like. Standard GOP deregulatory preferences are likely to be reflected in the substance of proposed legislation, but the populist distrust of capital-intensive and sometimes concentrated industries should not be discounted when weighing the White House imprint on any such legislative initiatives.

## Conclusion

No modern administrative agency is able to write on a clean slate, and there is much routine work that the FCC must accomplish even while interim and more permanent Republican leadership mulls priorities and then seeks paths to implement them. While landmark decisions will be subject to reevaluation, changes will for the most part not be immediate. Although it is difficult to chart the course of FCC actions on major matters now, perhaps the best source of prediction as to the aspirations of the new FCC leaders will be found in the past statements of Republican FCC commissioners and transition team members.

Laura H. Phillips and Anthony D. Glosson are the editors of Telecommunications Law Answer Book.

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# The Securities Law Crystal Ball


## Anna T. Pinedo & James R. Tanenbaum

*Partners, Morrison & Foerster LLP*


At the beginning of each new year, we find ourselves engaged in discussions of the evolving securities regulatory landscape and the changes that we anticipate may occur. We have done this for many years now. Each January we also begin by reminding ourselves of the E.T. Bell quote, "time makes fools of us all. Our only comfort is that greater shall come after us." That said, we offer some thoughts concerning the securities reforms that the U.S. Congress and the Securities and Exchange Commission (the "Commission") may consider in 2017.

In recent years, the Commission has focused on implementation of the rulemaking requirements of the Dodd-Frank Act, the JOBS Act, and the FAST Act. At least in the case of the Dodd-Frank Act, the Commission was required to promulgate rules relating to executive compensation, such as pay ratio disclosure, say-on-pay vote, pay-versus-performance disclosure and related requirements, which are regarded as burdensome to public companies. Various other specialized disclosure requirements, such as those relating to conflict minerals, extractive industries and mine safety, also were required by the Dodd-Frank Act. The Financial CHOICE Act ("CHOICE Act") proposes to repeal a number of these Dodd-Frank Act requirements. The CHOICE Act also includes measures that would expand some of the capital formation-related initiatives contained in the JOBS Act and the FAST Act. Of course, the Commission on its own undertook amendments to various rules in order to reduce burdens on smaller issuers, such as proposed amendments to the definition of "smaller reporting company" that would have the effect of making available to a broader number of issuers scaled disclosure requirements and other accommodations. Presumably, the Commission, under the Trump administration, would seek to adopt these proposed rules. Finally, the Commission, spurred in part by the mandate in the JOBS Act that it review the disclosure requirements of Regulation S-K, undertook the disclosure effectiveness initiative. This initiative has as its objective removing repetitive and outdated requirements and streamlining public company disclosures in order to make these more user-friendly for investors. Furthering this effort would seem consistent with the pro-capital formation and anti-regulation themes advanced by the Trump administration.

Below, we review some of the proposed measures, including a few included in the CHOICE Act, that may be on the congressional agenda or on the Commission's agenda, as well as our own views regarding areas that require attention. The possible changes can be grouped into the following categories: changes that would provide relief for smaller and private companies; changes that would promote capital formation; and changes that would modernize or simplify disclosure requirements.

## Relief for Smaller and Private Companies

**Smaller Reporting Company.** As discussed above, the Commission proposed amendments in June 2016 that would modify the definition of "smaller reporting company" (SRC) in order to expand the number of companies that would have this status. Currently, a company qualifies as an SRC if it has a public float of less than $75 million. The amendments would change the threshold to $250 million. Moving forward with these amendments would be helpful to smaller and mid-cap public companies. Also, on balance, smaller companies weighing the costs of becoming a public company might regard this change favorably.

**Section 404(b) Relief.** The CHOICE Act would modify the exemption from compliance with Sarbanes-Oxley Act section 404(b) relating to the auditor's attestation of a company's internal control over financial reporting and make the exemption applicable to issuers with a market capitalization of up to $250 million. The CHOICE Act also would provide a temporary section 404(b) exemption for "low-revenue issuers" that are no longer emerging growth companies (EGCs) and are not large accelerated filers and whose revenues are below a specified threshold. These measures also might reduce the costs associated with being a reporting company for smaller and mid-cap companies.

**Stock-Based Compensation.** Section 1006 of the CHOICE Act would increase the threshold for disclosures relating to compensatory benefit plans by requiring that Rule 701 be amended and that the threshold triggering additional disclosure requirements for issuers be raised.

**XBRL.** The CHOICE Act would provide certain exemptions for EGCs and other smaller companies from Extensible Business Reporting Language (XBRL) requirements.

## Changes That Would Promote Capital Formation

**Shelf Registration Eligibility.** The CHOICE Act would expand the eligibility for use of a registration statement on Form S-3.

**Business Development Companies.** The CHOICE Act includes provisions that would modify certain of the Securities Act requirements relating to business development companies (BDCs), change the asset coverage requirements for BDCs, and allow BDCs to own interests in an investment adviser. These changes would enable BDCs to make additional credit available to smaller, privately held companies.

**"JOBS Act Extensions."** There are various other measures contained in the CHOICE Act that aim to address perceived shortcomings of certain JOBS Act provisions. For example, there are various provisions that would "correct" the existing Regulation Crowdfunding framework and make the crowdfunding exemption available to special purpose vehicles or funds. The CHOICE Act would also create a new safe harbor under section 4 of the Securities Act for certain "micro offerings" of securities involving proceeds not exceeding $500,000 in any twelve-month period. In practice, it is difficult to see how these changes would have a significant impact on capital formation.

**Codification of No-Action Letter Guidance.** Various provisions of the CHOICE Act would codify existing no-action letter guidance, including guidance related to the types of communications that are not considered "general solicitations." It is unclear why such changes are needed given that there is little ambiguity as to matters already addressed by the Commission Staff.

**Small Business Interests.** There are various measures contained in the CHOICE Act that would require that the interests of small businesses be considered, including, for example, a requirement for a small business advocate, and a requirement that the Commission formally review the recommendations of the Commission's Government-Business Forum on Capital Formation. While these measures purportedly promote capital formation, it is difficult to ascertain any practical benefit.

**Other Measures to Consider.** In our view, there are a number of other measures that merit attention and that would directly promote capital formation. The Commission Staff delivered its report on the definition of "accredited investor." The report suggested a number of revisions, including permitting individuals with a minimum amount of assets to qualify, permitting individuals that possess certain professional credentials to qualify, and permitting individuals with experience investing in exempt offerings to qualify as accredited investors. The CHOICE Act also would include a person who is a "knowledgeable employee" of a private fund or the fund's investment adviser as an "accredited investor." Amending the "accredited investor" definition would provide additional investors the opportunity to participate in private offerings, which, in turn, would promote capital formation. The Commission should consider amending the eligibility requirements for shelf registration for issuers that have a market capitalization of less than $75 million and currently are limited in their ability to conduct primary issuances in reliance on their shelf registration statements. The Commission should review with the national securities exchanges the rules of the exchanges in respect of shareholder vote requirements in connection with certain offerings. These rules are often referred to as the "20 percent rules," and can have a particularly punitive effect on smaller and mid-cap issuers. The Commission revamped many of the communications rules for the largest and most sophisticated issuers in 2005 as part of Securities Offering Reform. Given the pace of technological changes affecting access to information, it is time for a more comprehensive review of the offering-related and research-related communications rules as they affect all issuers, not just well-known seasoned issuers. The Commission also should consider whether, in light of the now well-established trend of companies remaining private longer and deferring their initial public offerings, some reporting requirements ought to be imposed on companies that have a dispersed stockholder base. Finally, the Commission should consider presenting all of its integration-related safe harbors and integration guidance in a single release for ease of reference by market participants.

## Changes That Would Modernize or Simplify Disclosure Requirements

Above, we referred to the Commission Staff's review of outdated, repetitive disclosure requirements. During late 2015, the Commission published a request for comment regarding various requirements of Regulation S-X. During 2016, the Commission continued its focus on disclosure requirements and issued a concept release on the business and financial disclosure requirements under Regulation S-K. The Commission issued proposed rules relating to disclosure simplification, which would eliminate disclosure requirements that have become redundant in light of other Commission requirements or disclosures required by accounting principles. The Commission also issued a release relating to the hyperlinking of exhibits to public filings, and a request for comment on the Part 400 rules of Regulation S-K. Finally, at the end of the year, the Staff of the Commission delivered the report required under the FAST Act regarding modernization and simplification of Regulation S-K requirements. Advancing all of the work undertaken by the Commission relating to disclosure reform and simplification and adopting amendments to Regulation S-K consistent with the Staff's recommendations should be an important priority.

## Conclusion

We have read and listened to commentators who explain that the 2016 U.S. election results indicate that, among other things, Americans have become increasingly concerned about job creation, capital formation, and the impact of burdensome regulations on companies. Both the Congress and the Commission have been focused on these issues for a number of years. It may be that the changed political landscape may provide the Commission and the Staff with enhanced capability to complete the securities regulatory reforms that were already under way, as well as to undertake additional initiatives. For securities lawyers, this prospect is extremely interesting. We hope that next January, when we look back at 2017, time will not have done to us what it has done so reliably in the past.

Anna T. Pinedo and James R. Tanenbaum are the authors of Exempt and Hybrid Securities Offerings.

# What to Expect in 2017: Anti-Money Laundering and Terrorist Finance Regulation and Enforcement

**Nicole S. Healy**

*Partner, Ropers Majeski Kohn & Bentley PC*

Each new year brings an opportunity to dust off the crystal ball and take a stab at predicting what developments might be on the horizon. This year is the same; yet it is also entirely different. With a new administration in Washington, Brexit looming, terror attacks continuing, the not-fully digested and continuing Panama Papers and 1MDB revelations, among other things, prophesying the future of anti-money laundering (AML) and counter-terrorist finance (CFT) efforts may be harder than ever. Despite that, here are a few areas to watch in 2017.

## Lawyers As Gatekeepers

### Recent Revelations Are Likely to Increase Scrutiny and Result in New Guidelines or Even Regulation

The publication of the Panama Papers (concerning over 214,000 companies, operating in twenty-one offshore jurisdictions, including companies and trusts owned and controlled by senior government officials or their families and associates, as well as individuals on U.S. blacklists) and the continuing disclosures surrounding the 1MDB (1Malaysia Development Berhad) scandal (involving the diversion of over $3.5 billion misappropriated from a Malaysian government economic development fund) have spotlighted the role played by lawyers, bankers, and other professionals in facilitating the movement and concealment of illicit funds. While there are legitimate uses for offshore trusts, limited liability companies, and other similar vehicles, they can be, and have been, just as easily used as smokescreens for wrongdoing. The problem for regulators and legislators will be to develop mechanisms to permit the legitimate use of shell companies and trusts while denying them to kleptocrats, money launderers, and other rogues.

It may be impossible to entirely prevent the criminal activity that generates the proceeds to be concealed, transported, and laundered, particularly if it occurs abroad. However, working with other governments and international bodies, U.S. authorities can direct attention to discrete points within the financial system that are particularly susceptible to abuse. For this reason, financial institutions have long been a key focus of regulatory and enforcement activity. As such, criminals have learned to avoid or work around the formal financial system, at least in the early stages of laundering funds. (Who brings a bag of cash to a U.S. bank these days?) Instead, sophisticated criminals form offshore companies, conduct multiple layers of transactions through shell companies and nominees, buy hard assets and real estate, and use sophisticated schemes to conceal the source and ownership of their funds.

The principals are not acting alone. Their offshore entities are created by lawyers, company formation professionals, and other intermediaries. Their transactions are handled by bankers. Whether wittingly or not, these professionals' services are being used to conceal beneficial ownership and launder funds. Accordingly, regulatory and law enforcement authorities are likely to turn their attention to professionals and intermediaries.

This shift in focus has already begun. Although Malaysia's response has been to deny any wrongdoing by senior officials, other countries have pursued 1MDB-related investigations. Singapore has successfully prosecuted a number of bankers for criminal AML violations. Swiss authorities have brought charges against banks and collected substantial fines and penalties for AML control violations. Given the scope of the 1MDB embezzlement and laundering schemes, it is likely that these investigations, prosecutions, and enforcement actions will continue for some time.

In the United States, federal prosecutors in Los Angeles have filed suit to recover the profits from the film "The Wolf of Wall Street," contending that it was financed, and numerous pieces of real property were purchased, with funds illicitly diverted from 1MDB, allegedly with the complicity of Malaysian officials. Some of those funds were transferred through attorney trust accounts maintained by major U.S. law firms. While the lawyers presumably were unaware of the sources of their clients' funds, these trust accounts, in combination with the attorney-client privilege, are a powerful and previously overlooked means of laundering funds. Along with federal authorities, expect state bar officials and legislators to look into the use of such accounts.

Additionally, while past efforts to impose "gatekeeper" requirements on lawyers have often involved some form of government regulation, the current focus appears to be on voluntary self-regulation. It is possible that the pendulum may swing back in a more proscriptive direction, particularly if additional disclosures reveal not only that lawyers have assisted corrupt actors to conceal and secure illegally obtained funds, but that some of these assets were used to fund terrorist activity.

Driven at least in part by the Panama Papers revelations, which "highlighted that, in completing legal transactions for their clients, lawyers may knowingly or unwittingly assist clients in asset concealment or money laundering," in December 2016, the Organisation for Economic Cooperation and Development (OECD) announced that, working with the International Bar Association (IBA), it would form a task force to consider adopting anti-corruption guidelines for attorneys and make recommendations to governments.[1] In its news release, the OECD stated that the task force will consider various topics including the legal profession's role in "combatting corruption, tax evasion, money-laundering, and terrorism financing" in light of lawyers' professional obligations; appropriate steps to increase transparency while recognizing client confidentiality and privilege; the tensions arising from inconsistencies between the laws of differing jurisdictions, as well as the prohibition of previously lawful activity; data breach, inadvertent disclosure, and the use of illegally acquired information; and presumably other issues as they arise. The OECD and IBA have not set a timetable for the task force's work, so it may well continue past 2017.

Finally, the coming year may bring renewed efforts by some in Congress to pass legislation requiring transparency in beneficial ownership of offshore entities. So far, such legislative efforts have been unsuccessful. However, in the event that the financing of terrorism is publicly linked to the use of offshore accounts or companies, financial transparency legislation (which has previously been introduced in both houses of Congress but died in committee) might well be revived.

## Terrorist Finance

### Greater Focus on Prevention and Disruption

In 2017, we should expect to see a continued and possibly increased focus on terrorist finance. Because terrorists require financial resources as well as willing foot soldiers to carry out their attacks, denying them funding is of critical importance in the fight against terrorism. That objective requires a multipronged approach to detect and prevent terrorists' and their supporters' efforts to raise, transmit, and use any form of funding whether through crowdfunding, by engaging in other criminal activities including theft, fraud, drug or human trafficking, or through other means. Accordingly, we will see a continued effort by regulatory and law enforcement authorities to identify and disrupt money transmission and laundering networks. Given the difficulties in recognizing patterns in which even minor criminal offenses are used to fund terrorism, this effort will require not only the collection of information from disparate organizations, even at the state and local level, but the application of analytical tools to identify even loosely organized networks or affiliations.

As large scale terrorist attacks continue, there may be calls for increased coordination of information both within the United States and with other countries, and for additional resources to collect and process information obtained through social media, messaging systems, and financial records to predict, track, analyze, and deter terrorist activity. The tension between ensuring the public's security and the privacy and civil rights of individuals may increase, particularly if heightened surveillance does not result in publicized reports that specific planned attacks were thwarted.

### Compensating the Victims of Terrorism

Along with government efforts to deny terrorists the resources they need, private civil lawsuits have also been used as a tool to starve terrorists of financing. In recent years, there has been a great deal of civil litigation, under the Antiterrorism Act (ATA)[2] and other federal laws, by victims of terrorist attacks against entities that are alleged to have provided material support to terrorist organizations. Two petitions for certiorari are pending before the U.S. Supreme Court relating to efforts to collect civil judgments awarded to victims of terrorist activity.[3] A third petition asks the Court to resolve whether corporations may be liable under the Alien Tort Statute, in a case alleging that Arab Bank was involved in financing terrorism by providing financial services to proscribed organizations.[4] While the first two cases involve rather narrow issues relating to the execution of judgments and the application of foreign sovereign immunity or exceptions thereto, the third, if taken up by the Court, would more broadly apply to cases asserting ATS claims against corporate entities, including outside the context of terrorist finance.

## Other AML/CFT Priorities

### Human Trafficking and Smuggling

While the paradigm AML predicate offense involves drug crimes, human trafficking and smuggling has grown to rival narcotics violations as a significant source of illicit proceeds. Accordingly, we should anticipate continued and enhanced efforts to detect and target trafficking and smuggling groups and their affiliated money launderers in the coming year.

### Geographic Targeting Orders

In the past year, FinCEN has issued geographic targeting orders (GTOs) to require title companies to collect and file information relating to cash purchasers of residential real estate over certain thresholds, initially in New York and Miami, and later expanded to California and Texas. FinCEN reportedly has obtained useful information regarding the use of high-end real estate to launder illicit funds. Expect these orders to be extended and perhaps expanded further.

FinCEN has also issued GTOs in Florida to collect information relating to electronics exporters. In one well-publicized incident, the information gathered was used to take down a sophisticated money-laundering ring. In April 2016, twenty-two individuals with ties to the Sinaloa cartel were arrested by state authorities in connection with a complex money-laundering scheme involving the black market peso exchange that involved eleven Miami businesses. Such successful cooperation between federal and state authorities is likely to continue with the use of additional GTOs and other targeted information gathering techniques.

### New and Emerging Typologies in TBML, Cybercrime, and Other Offenses

FinCEN is also reportedly seeing new typologies in trade-based money laundering (TBML). As greater attention is placed on TBML and its less well-known sibling, service-based money laundering (SBML), expect to see greater regulatory and law enforcement effort focused on this area. Because it can be difficult to identify a TBML/SBML scheme in its entirety from disparate information, including because money launderers may break up and parcel out components of their transactions to different institutions or partners, effectively creating isolated cells, FinCEN and other regulatory and law enforcement agencies will need to continue to collect volumes of data from multiple sources and to continue enhancing their intelligence and data analysis functionality to detect and recognize TBML/SBML activity.

## Marijuana Legalization

### Continuing Tension Between State and Federal Law and Priorities

As of now, the citizens of twenty-five states have legalized the use of marijuana in some form, although it remains a Schedule I drug under federal law.[5] While the incoming administration is unlikely to modify federal restrictions, in this next, and following years, it will be interesting to watch as the generational issues play out (with younger individuals tending to favor legalization), as well as the continuing tensions between those who favor federalization of law enforcement priorities, and those who favor greater state control.

As of now, however, because marijuana remains a controlled substance under federal law, financial transactions in the proceeds of sales even of marijuana that is legal under state law remain problematic. Expect to see further developments in this area as state coffers continue to fill with the taxes collected on marijuana sales.

## Conclusion

"Prediction is very difficult, especially if it's about the future." Niels Bohr. Let's see what 2017 brings.

Nicole S. Healy is the author of Anti-Money Laundering Deskbook: A Practical Guide to Law and Compliance.

# NOTES

1. *See* News Release, OECD, *OECD and IBA Join Forces to Develop Practice Guidance to Equip Lawyers in Fight Against Corruption*, Dec. 14, 2016, www.oecd.org/newsroom/oecd-and-iba-join-forces-to-develop-practice-guidance-to-equip-lawyers-in-fight-against-corruption.htm.
2. 18 U.S.C. § 2331, *et seq.*
3. *See* Rubin v. Islamic Republic of Iran, 16-534; and Bank Melli v. Bennett, 16-334. The petitions and related case documents have been collected and can be found at SCOTUSblog. *See* www.scotusblog.com/case-files/cases/rubin-v-islamic-republic-of-iran-2/; and www.scotusblog.com/case-files/cases/bank-melli-v-bennett/.
4. *See* Jesner v. Arab Bank Plc, 16-499.The petition involves five separate consolidated lawsuits. The district court had bifurcated the ATS claims from those pled under ATA, which were tried to a jury that found Arab Bank liable for providing material support to Hamas. *See* Petition for Certiorari at 9-10, www.scotusblog.com/case-files/cases/jesner-v-arab-bank-plc/.
5. *See* Abigail Geiger, *Support for Marijuana Legalization Continues to Rise*, Pew Research Center, Oct. 1, 2016, www.pewresearch.org/fact-tank/2016/10/12/support-for-marijuana-legalization-continues-to-rise/.

# IMMIGRATION LAW

# Impact of the U.S. Elections on Immigration

**Austin T. Fragomen, Jr., Careen Shannon & Daniel Montalvo**

Donald Trump made reform of the U.S. immigration system a key part of his presidential campaign. The most dramatic changes a Trump administration would be likely to make to U.S. immigration law and practice would affect border security, foreign nationals (including legal immigrants) with criminal records, and undocumented immigrants. In addition, there are a number of likely policy changes that would affect legal immigration—most significantly, the system for "vetting" prospective immigrants abroad before they are granted visas. In addition, Trump has indicated an intention to focus on "American jobs first" and to renegotiate or withdraw completely from the North American Free Trade Agreement (NAFTA). Helping to ensure that all jobs are open first to U.S. workers might also mean that the administration will propose wage increases for H-1B workers.

## Preliminary Considerations: Implementing Changes in Immigration Policy

With respect to the implementation of major policy changes, there are limits to what the president can do alone.

**Sub-Regulatory Policies and Authorities.** The easiest changes to make are those involving sub-regulatory actions, such as policy memoranda, agency-issued FAQs, executive orders, precedents established by administrative appeal bodies, consular screening procedures, and ICE enforcement policy. Such policies can simply be withdrawn or rescinded and replaced by new interpretative guidance or case precedents. Courts may review such actions only to determine if the agency's new policy is "arbitrary, capricious, or manifestly contrary to the statute." Under this standard, once the court concludes that the statute does not prohibit the agency's interpretation and that the interpretation is permissible under the law, the court will limit its review of administrative policymaking to determine whether the agency took a "hard look"—that is, whether the agency carefully reviewed the salient issues and engaged in reasoned decisionmaking. Sub-regulatory policy changes cannot be retroactive unless authorized by statute.

**Administrative Agency Regulations.** Published regulations are harder to change, as the relevant federal agency would generally need to engage in the rulemaking process pursuant to the Administrative Procedure Act (APA): Before an agency may modify or rescind a regulation, it must give notice to the public and afford the public an opportunity to respond. Regulatory changes generally cannot be retroactive in nature, absent express statutory authority to apply a change retroactively. Such authority is very rare. There is, however, an exception to the rulemaking requirement that allows an incoming administration, with the help of Congress, to dispense with the prior administration's recently finalized regulations without going through the rulemaking process. Specifically, the Congressional Review Act (CRA) allows Congress to revoke regulations that have taken effect within the previous sixty legislative days.

Congress has also indicated its intention to utilize the law to help the new administration revoke recently issued rules on a fast-track basis. In the immigration context, rules that are now subject to revocation under the CRA include the November 2016 AC-21 rule and the July 2016 provisional waiver rule. Any proposed rules that are finalized in the final weeks of the Obama administration may also be revoked under the CRA, including the proposal regarding parole for foreign entrepreneurs. Whether repealed under the APA or the CRA, the action may be challenged by an injured party and will be subject to the same standard of review as new rules—namely, the "arbitrary and capricious" standard of review.

> With congressional support, a Trump administration would be able to revoke any regulation finalized since May 2016.

**Statutes.** Statutes are the hardest to change, as that requires action by Congress. In this context, it is significant that both houses of Congress will remain under Republican control, and many of the recent bills on immigration sponsored by Republicans are similar to Trump's immigration proposals. It is unclear, however, whether even a cooperative Congress will pass the major appropriations needed to implement some of the more costly proposals, particularly those regarding border security and interior enforcement. Note that legislative changes can be retroactive, subject to broad constitutional limits.

**Treaties and International Agreements.** As for treaties, they may be withdrawn or renegotiated under the specific terms detailed in the agreements, but Congress would have a say in any new or renegotiated agreement when it comes up for ratification. Because of the logistics of winding down obligations under treaties, however, the withdrawal process often takes place over an extended period of time.

There are two additional factors in considering the validity of policy changes by Trump in the immigration context. First, section 212(f) of the Immigration and Nationality Act (INA) gives the President broad authority to impose restrictions on, or to suspend the entry into the United States of, any class of foreign nationals whose admission would be detrimental to the interests of the United States. This authority is especially relevant to proposals addressing grounds for denial of admission to particular groups and any new vetting procedures implemented under a Trump administration. Second, the final arbiter of Trump's policies will be a Supreme Court that will have a conservative majority—with one (and maybe two) Justices appointed by Trump himself.

## Trump on Border Security and Interior Enforcement

The majority of the proposals in Donald Trump's position paper on immigration address border security and immigration enforcement, including:

(1) building a wall on the southern border;

(2) ending "catch and release" at the border;

(3) identifying and deporting all criminal non-citizens in cooperation with local law enforcement agencies (and ending sanctuary cities) and forcing foreign countries to cooperate;

(4) terminating executive orders on deferred action for childhood arrivals (DACA) and prosecutorial discretion;

(5) implementing biometric entry-exit tracking system to identify overstayers; and

(6) ending the "jobs magnet" that spurs illegal immigration.

**Border Wall.** No other proposal has received as much attention as Donald Trump's proposal to build a wall at Mexico's expense along the southern border. The cost of building a physical wall 2,000 miles long along the entire border with Mexico would be astronomical—some *estimates have run as high as $25 billion*. The Mexican government has taken every opportunity to indicate that it has no intention of paying for such construction. The proposal is less costly and more feasible if the definition of a border "wall" is expanded to include fencing, electronic sensors, towers, and surveillance technology. In fact, fences already exist along hundreds of miles of the border as a result of the Secure Fence Act—legislation enacted in October 2006 that mandates the construction of a 700-mile fence (or other barriers and sensors) along the southwestern U.S. border with Mexico. Regardless of who pays for the Trump wall, the President will need congressional approval to spend the money. The new Congress could support the installation of more fencing, but the President would likely meet resistance from both parties for construction of a border wall. Even with legislative authority, it would be a number of years before this new fencing could be completed. Construction of the fence mandated by the 2006 law was delayed for several years by the border terrain, treaty obligations, legal fights, and high costs. It is more likely that any new legislation would require the president initially to focus on high-traffic areas initially and later to expand construction to the remaining portions of the southern border, as would have been mandated by H.R. 399 (the Secure Our Borders First Act of 2015) introduced in January 2015. This bill proposed significant increases in spending on the border, set minimum technology standards, added new fencing requirements, and included an "operational control" goal of preventing 100% of unlawful entries and contraband.

**Treatment of Persons Apprehended at the Border.** Donald Trump has indicated that as President he will end “catch and release” at the border so that anyone who is apprehended crossing the border illegally will be subject to mandatory detention and will be removed to his or her country of origin. The Department of Homeland Security (DHS) has indicated that, in fact, it has no “catch and release” policy and that the agency places a high enforcement priority on detaining and removing such individuals. Persons attempting to illegally cross the border constitute a large portion of the record number of removals from the country in recent years. For example, of the 235,413 removals in FY 2015, 165,935 were of individuals apprehended at or near the border or ports of entry.

The Obama administration’s response to the unprecedented refugee crisis at the U.S.-Mexico border, however, has been heavily criticized. With the arrival of tens of thousands of accompanied as well as unaccompanied children from Central America, the Obama administration initiated a sustained border security surge, which has included a massive expansion in family detention, along with assignment of additional border patrol agencies, ICE personnel, criminal investigators, and coordination with the Department of Justice to reorder dockets in immigration courts. Many of the unaccompanied children (UACs) have been released as required by current law. Children who arrive alone must be screened to determine whether they are without a parent or guardian and, if so, must be transferred to the Office of Refugee Resettlement (ORR). ORR must promptly place each child in the “least restrictive setting that is in the best interest of the child,” which in most cases means release to a family member already living in the United States. Once released, the children are served with Notices to Appear in immigration court, thus commencing the government’s removal proceedings against them. A number of provisions included in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 have particularly benefited these children by barring the use of expedited removal procedures against UACs and facilitating the filing of applications for asylum and special immigrant juvenile status by UACs. In contrast, children arriving with at least one parent (usually a mother) are taken into detention and held by ICE in remote facilities in Texas, far from any available legal counsel and social services. Initially, these families’ applications for bond were often either denied, or the bond was set prohibitively high. They were then subjected to bare-bones hearings aimed at removing them from the United States as quickly as possible. In response to litigation challenging the detention policies, however, most of these families who have established a credible fear of persecution have been released from ICE custody to pursue their asylum claims in removal proceedings in jurisdictions where they have access to counsel.

Trump will likely continue the surge in enforcement resources along the border to address the crises by adding Border Patrol agents, constructing more detention space, and adding and/or reallocating ICE and Executive Office for Immigration Review (EOIR) staff and resources to conduct more removal proceedings nearer the border. Under a Trump administration, DHS may also take a more aggressive stance with regard to the treatment of UACs and the detention of individuals who establish a credible fear of persecution. A major change in detention policies will certainly be challenged in federal court, and there is already much precedent addressing these issues that favors the release of individuals who establish a credible fear. Whether a more conservative Supreme Court will uphold these precedents is unclear. Any changes regarding the treatment of UACs will likely require congressional action, however. In fact, there have been several proposals sponsored by Republicans to make it easier to return these children to their home countries, including H.R. 1149 and H.R. 1153 (the Asylum Reform and Border Protection Act of 2015). Among other changes, these bills would permit expedited removal of unaccompanied alien children from countries in Central America or any other nation with which the United States can work out arrangements for the necessary travel documents and other cooperation measures, and would prohibit the release of unaccompanied children from government custody until the children are repatriated. Such proposals are likely to receive strong support from a Trump administration.

**Policies Regarding Criminal Non-Citizens and Ensuring Cooperation on Acceptance of Deportees.** Donald Trump has indicated that he will target criminal non-citizens for removal and mandate cooperation from state and local law enforcement agencies to identify such individuals for removal. Despite the criticism during the presidential campaign of the Obama administration's policies on foreign nationals with criminal records, the current administration has in fact placed a high enforcement priority on detaining and removing foreign nationals with serious criminal records, including lawful permanent residents

(LPRs). Of the record number of removals in recent years, most had criminal records. The latest DHS statistics (from FY 2015) indicate that 59% of all ICE removals in that year, or 139,368, were of persons previously convicted of a crime (criminals constituted 91% of all interior removals). The figures regarding the number of foreign nationals with criminal records currently residing in the United States have been debated (Trump has cited a figure of between 2 and 3 million individuals, while other sources have cited a number closer to 800,000).

The President will have much discretion to implement new policies addressing criminal non-citizens. Trump has already indicated that he will:

(1) re-introduce immigration detainers;

(2) reinstate the Secure Communities program; and

(3) expand the section 287(g) program.

The Obama administration limited the use of immigration detainers used by ICE to request that local and state law enforcement agencies detain removable individuals currently in prison in response to a number of recent federal court decisions ruling that detainer-based detentions by state and local law enforcement agencies violate the Fourth Amendment. Instead of requests to detain, ICE now requests that a state or local law enforcement agency notify ICE of a pending release while the person is still in state or local custody. The reintroduction of detainers will certainly lead to new rounds of litigation. The "Secure Communities" program required state and local law enforcement agencies to cross-check the fingerprints of all arrestees against a federal database and to hold suspected immigration violators for federal authorities. The Obama administration discontinued the controversial program and replaced it with another program, the Priority Enforcement Program (PEP). Although the stated goal of Secure Communities was to identify and remove non-citizen criminals in state prisons and local jails, its practical effect was that any interaction by non-citizens with law enforcement could lead to initiation of removal proceedings. Consequently, the program had the effect of discouraging persons from reporting crimes. The 287(g) program authorizes local law enforcement agencies to question individuals about their immigration status and make related arrests on behalf of ICE. To do so, the local law enforcement agency is required to have a 287(g) agreement with ICE; the number of such agreements significantly decreased under the Obama administration.

Trump has also indicated that he will withhold federal funds as a way to penalize sanctuary cities that refuse to cooperate. Such sanctuary jurisdictions limit their cooperation with federal immigration authorities, although all of these jurisdictions do cooperate with federal authorities to ensure the removal of foreign nationals convicted of serious crimes. It is unclear whether the federal government can mandate local cooperation and whether there is legal authority for sanctioning localities in this regard. Litigation on this issue is likely.

Finally, Trump has stated his intention to triple the number of ICE deportation officers and create a new special Deportation Task Force, focused on identifying and removing criminal non-citizens. Of course, congressional approval will be needed to appropriate more resources to significantly expand ICE and EOIR capacity to achieve the goals set out by Trump to deport between 2 and 3 million individuals within a short period of time. Trump may decide to use alternatives available under current law to the full-blown removal procedures in order to expedite the removal of criminal non-citizens. For example, the expedited removal procedures under section 235 of the INA may be invoked against individuals who were not admitted or paroled and who cannot show that they were physically present in the United States continuously for the previous two years. Until now, expedited removal has been used primarily against individuals apprehended at the border. In addition, an administrative removal process under INA section 238 allows DHS to bypass regular removal proceedings with regard to aggravated felons who are not permanent residents and are not statutorily eligible for any forms of relief.

Note that many foreign nationals (including LPRs) who have been convicted of crimes are not subject to removal either because the offenses are not deportable crimes under the INA or the individuals have been granted relief from removal in the past, such as section 212(c) relief, suspension of deportation, or cancellation of removal. A Trump administration may well seek to cast a wider net by revising ICE and Board of Immigration Appeals (BIA) interpretations of certain immigration crimes. For example, the government may now take different positions with regard to the meaning of such terms as "aggravated felonies" and "crimes involving moral turpitude." The government may also take more restrictive positions on the statutory and discretionary requirements for relief from removal. These new positions will certainly lead to new rounds of litigation.

There are other persons with criminal convictions who cannot be deported because their countries will not accept them (up to 13,000 persons fall into this class). Trump has indicated that he will force countries to accept their nationals by limiting the issuance of visas to persons from countries that refuse to cooperate. Of course, such a policy will also impact legal immigration from non-cooperating countries.

> LPRs with criminal issues—even in the distant past—who are considering traveling or applying for immigration benefits (for example, naturalization) should carefully evaluate (preferably with counsel) whether such actions may trigger issuance of a notice to appear based on their past criminal offenses.

More generally, Trump's proposals with regard to criminal non-citizens will have an impact on both undocumented and legal immigrant communities to the extent that they have interaction with law enforcement agencies.

**DACA and Prosecutorial Discretion.** Trump has indicated that he will end President Obama's Deferred Action for Childhood Arrivals (DACA). About 740,000 individuals were granted deferred action under the program. Since the program was implemented through policy guidance, the program can just as easily be revoked by executive action. Many DACA beneficiaries were issued employment authorization documents (EADs) and are currently employed legally in the United States. Any action to revoke the program would also terminate employment authorization, though not immediately (since EADs can only be revoked after the government has provided the individual with written notice). A Trump administration may immediately terminate DACA benefits or could opt to let the program die a slower death by declining to renew DACA work permits.

The bigger question, of course, is what priority will be given to removing former DACA recipients. The government has information regarding where these young people and their families live and work, and it could adopt an aggressive enforcement posture. For this reason, many practitioners have generally advised against filing initial applications for DACA benefits. While Trump has issued some sympathetic statements about those who arrived in the country as children, there will be significant pressure on the new administration to meet its goals on deportation. To the extent that ICE has trouble identifying criminal non-citizens in sufficient numbers to meet these goals, it is possible that it may turn to the DACA database to identify other individuals for removal.

> Whether Trump immediately terminates DACA benefits or opts to decline to renew DACA work permits, DACA's beneficiaries would lose their right to work legally. Employers will be obligated to re-verify the employment authorization of such workers and terminate their employment if they cannot submit alternative employment documentation.

However the new administration decides to handle DACA, it is almost certain that Obama's subsequent executive action that sought to create Deferred Action for Parents of Lawful Permanent Residents and U.S. Citizens (DAPA) and expand the DACA program will be revoked by Trump. Neither program was ever implemented due to litigation; rescinding the executive action would also serve to end the litigation.

Trump has also indicated that he will revoke current policies regarding the exercise of prosecutorial discretion. Under the prosecutorial discretion process, ICE reviews pending cases to see whether they are considered a low enforcement priority under current policy; if so, ICE may request administrative closure of the case. Under current guidelines, issued in November 2014, prosecutorial discretion may be considered for persons not identified as priorities and for persons who fall within one of the priority exceptions. Priority One consists of threats to national security, border security, and public safety. Priority Two covers persons who have committed certain misdemeanors and new immigration violators, defined as persons without status who have not been continuously present in the United States since January 1, 2014. Priority Three consists of people who were issued a final order of removal on or after January 1, 2014. The guidelines state that prosecutorial discretion should apply to the decision to issue, serve, file, or cancel charging documents and variety of other discretionary enforcement decisions including:

(1) whom to stop, question, and arrest;
(2) whom to detain or release;
(3) whether to settle, appeal, or join in a motion on a case; and
(4) whether to grant deferred action, parole, or a stay of removal.

Prosecutorial discretion may be exercised at all stages of the enforcement process (from investigation to enforcing final orders of removal). While Trump will likely revoke the current guidelines, ICE will still have authority to exercise prosecutorial discretion, but it can be expected that more restrictive eligibility criteria will be applied by DHS under a Trump administration.

**Biometric Exit System and Removal of Over-Stayers.** Trump has stated that his administration will finally implement the biometric entry-exit visa tracking system to identify nonimmigrants who overstay their lawful period of entry. Once implemented, the removal of visa over-stayers would be a top priority under a Trump administration. An entry-exit tracking system has been required since 1996 under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA). While U.S. Customs and Border Protection (CBP) currently collects biometrics from non-citizens who enter the United States (through US-VISIT), the system does not collect information on departures. Pilot exit programs have been tested in the past, but logistical and budgetary limitations have prevented the expansion to all ports of entry. Congressional approval would be needed to fund such an expansion. Once the system is fully expanded, international visitors should expect more delays at ports of departure and should allot more time to satisfy the new departure requirements. Evidence of compliance with the new departure requirements should also be retained to facilitate future travel.

**E-Verify and Worksite Enforcement.** To “turn off the jobs magnet” that attracts illegal immigration, Trump has stated that he will ensure that E-Verify is used to the fullest extent under existing law and will push Congress to enact legislation to mandate its use on a nationwide basis. The E-Verify system allows participating employers to run online employment authorization checks to confirm the employee’s work eligibility using data entered on Form I-9. Participation in E-Verify is voluntary for most employers, although several types of employers are required to enroll in the program under federal or state law, including federal contractors, and businesses operating in states where E-Verify is mandatory. Fewer than 10% of U.S. employers currently participate in E-Verify. Any legislation mandating use of E-Verify would also likely increase the civil and criminal penalties against employers that knowingly employ unauthorized workers or that fail to use the electronic system to verify the employment of new workers. An enforcement bill including almost identical provisions was introduced in the 114th Congress—the Legal Workforce Act (H.R. 1147).

Even without legislation, ICE under a Trump administration is likely to assign more agents to worksite enforcement and conduct more criminal investigations, similar to the Bush-era practices. Under the Bush administration, ICE largely abandoned the I-9 audit and administrative fine procedure under the Immigration Reform and Control Act of 1986 (IRCA) and focused its resources on criminal worksite enforcement investigations involving high-profile raids resulting in the arrests, criminal prosecutions, and/or deportation of thousands of unauthorized workers. These investigations were complaint-driven, initiated after receiving a tip from the public, local law enforcement, former or current employees, DOL inspectors, or state inspectors. The most visible aspect of the policy was the high-profile worksite raid. These raids often resulted in the arrests of sometimes hundreds of unauthorized workers who were detained for criminal prosecution (for example, for document fraud or identity theft) and/or removal from the United States. ICE agents would also seize company records as part of the raids. The investigations could later result in the filing of criminal charges against businesses and individual owners and managers, a forfeiture of illegally derived assets, and debarment from federal contracting. Criminal complaints could include charges of harboring undocumented workers, document fraud, tax evasion, money laundering, and/or knowingly hiring undocumented workers.

## Trump Proposals on Legal Immigration

A number of Donald Trump's proposals would have a direct impact on legal immigration including:

(1) establishing "immigration controls" that would ensure U.S. workers have first access to open jobs, would prevent the movement of jobs overseas, and would boost the wages of U.S. workers;

(2) reforming the immigrant selection system to give preference to skilled workers and to return immigration levels to "historic norms";

(3) establishing procedures for "extreme vetting" of applicants for visas and green cards to ensure that persons seeking entry into this country do not pose a threat to national security and suspending immigration from countries or regions that export terrorism and where safe vetting cannot be ensured.

More generally, Trump has indicated that he may rescind recent regulations and policy memos that were issued in response to President Obama's executive actions. Trump has also pledged a hiring freeze to reduce the federal workforce through attrition (with exceptions for the military, public safety, and public health).

> A hiring freeze of federal workers, if implemented, would have an adverse effect on processing times for a number of immigration filings. While the fee-based applications (such as most applications processed by the USCIS and DOS) may not be impacted significantly, a hiring freeze could cause significant processing delays for non-fee-based applications processed by the DOL, such as PERM, LCA, and H-2 temporary labor certification applications).

**Immigration Controls to Prioritize the Protection of U.S. Workers.** The consensus is that a Trump administration will seek to make it more difficult to obtain immigration benefits for foreign workers by:

(1) revoking existing policy memos and regulations;

(2) establishing policies that are more restrictive (through new interpretative guidance or administrative decisions);

(3) withdrawing or renegotiating existing treaties; and

(4) supporting legislation that would impose additional restrictions on use of specific visa programs.

To ensure that jobs are first offered to U.S. workers and the wages and working conditions of U.S. workers are protected, for example, Trump may propose labor market tests and increased wage requirements for the H-1B category, proposals that would make use of the H-1B program more expensive for U.S. employers. Currently, recruitment and non-displacement obligations exist only for H-1B dependent employers and willful violators of the H-1B program rules. In addition, the H-1B employers must pay H-1B workers the higher of the prevailing wage or the actual wage rate the employer pays to similarly employed workers in the area of intended employment. New restrictions may also be proposed on use of the L-1B category, including new wage requirements, a tougher "specialized knowledge" standard, non-displacement obligations, and additional limits on placement at third-party worksites. Any revisions to the H-1B or L-1 programs that would impose additional obligations on H-1B or L-1 employers or revise existing Labor Condition Application (LCA) obligations would likely require statutory amendment.

On the other hand, no congressional approval is required to have administrative agencies investigate abuses of visa programs that allegedly undercut the wages of U.S. workers, a step urged by Trump. For example, the DOL may engage in more complaint-driven LCA investigations. More agency-initiated investigations may be undertaken by the USCIS's Office of Fraud Detection and National Security (FDNS), and more cases may be referred to ICE for criminal investigation if fraud is involved. The DOL Inspector General, the Department of Justice's Office of Special Counsel (OSC), and the State Department's Inspector General may also investigate visa programs that that are allegedly abused by U.S. employers (for example, the OSC may investigate employers for demonstrating a hiring preference for foreign workers over U.S. workers under current anti-discrimination laws). Liability in these cases may be found for both the petitioner and its end-clients who have used the services of the foreign worker by making aggressive use of co-employment theories (shared liability between H-1B employers and their end-clients). Such investigations may be far-reaching and burdensome for employers. For example, the agency may issue a subpoena for letters of support, emails, and other communications between employers and IT vendors regarding a particular worker.

**Reforming the Immigrant Selection System.** Trump has indicated that he favors an immigrant selection system that would "select immigrants based on their likelihood of success . . . and their ability to be financially self-sufficient." He supports highly skilled migration over family-unification policies. He also favors maintaining immigration levels (measured by population share) consistent with "historical norms," which means that fewer visa numbers for immigrants overall. These goals could benefit employment-based immigration at the expense of family-based and diversity immigrants through a reallocation of existing visa numbers. Trump may also favor a point system, where job skills are given more weight than family ties. Trump has also stated that any immigrant selection system should have a sunset date so that Congress can periodically review the selection criteria and immigration levels.

Any changes to the current selection system that would adjust the priorities for skilled workers would require statutory amendment. There is support for terminating the Diversity Visa program, but a fundamental reversal on policy regarding family unification is likely to face strong opposition.

**Extreme Vetting.** Trump has vowed to impose "extreme vetting" on all foreign nationals seeking entry into the United States, but especially on those hailing from countries deemed to be a threat to the United States. He has also indicated that he would suspend the issuance of visas to persons from any country or region that exports terrorism or where adequate vetting cannot occur.

> "Extreme vetting" would affect immigrant and nonimmigrant visa applications filed at consular posts abroad. More nonimmigrant visa cases, for example, may be placed in administrative processing, significantly delaying (if not preventing) the issuance of visas in these cases. In addition, with extreme vetting, immigrant and nonimmigrant applications (such as I-485 adjustment of status applications, I-130 and I-140 immigrant petitions, and I-129 nonimmigrant petitions) would be subject to more background checks and higher scrutiny, resulting in more processing delays.

Apart from the effect on foreign nationals whose country of origin is subject to extreme vetting, any such system will probably have an impact on the speed with which all immigration adjudications, both at U.S. consular posts and with domestic government agencies, can be completed.

It is likely that the "extreme vetting" procedures will apply to citizens of designated countries or to foreign nationals who have traveled to those countries and will include expanded use of social media vetting. The president-elect may also seek to reintroduce special registration. The National Security Entry-Exit Registration System (NSEERS) obligated foreign nationals from numerous "countries of concern" to comply with special screening, reporting, and departure requirements. Individuals who were subject to NSEERS faced lengthy inspections at U.S. ports of entry and had less flexibility when departing the United States, since they could leave only through specific ports and were subject to follow-up inspection on departure. These requirements were especially burdensome for frequent travelers.

The INA gives the President broad discretion in establishing new vetting procedures. Section 212(f) of the INA states that the President may impose restrictions or suspend the entry into the United States on any class of foreign nationals whose admission would be detrimental to the interests of the United States. President Obama, for example, has used this authority to ban the entry of persons from designated countries who were involved in human rights violations.

## Specific Policies, Regulations, Legislation, and Treaties a Trump Administration Could Change

**Changes to Sub-Regulatory Immigration Policies.** Specific policy or procedural guidance that may be rescinded and/or revised without regulatory action (because they were implemented by means of policy memoranda or agency-issued statements or FAQs) include the following:

(1) The USCIS's August 2015 policy memorandum on specialized knowledge for L-1B nonimmigrants. For the past several years, restrictive and often inconsistent L-1B adjudications have been a major hindrance for employers needing to transfer critical specialized knowledge workers from abroad. The August 2015 guidance incorporated many favorable changes suggested by the business immigration community.

(2) The August 2009 USCIS policy memorandum discussing the factors for making successor-in-interest determinations in the adjudication of Form I-140 petitions filed when there is a change of employers after filing the labor certification and I-140 petition.

(3) The USCIS Policy Manual update, released in November 2016, providing guidance on the eligibility requirements for EB-5 regional centers and immigrant investors. The guidance addresses the requirements for a regional center and non-regional center associated EB-5 petitions and describes the different types of regional center projects.

(4) OFLC FAQs on the PERM, H-1B, H-2A, and H-2B labor certification program. The DOL's Office of Foreign Labor Certification has released numerous documents in the form of frequently asked questions providing interpretative guidance on key issues relating to the labor certification programs administered by that office.

(5) USCIS guidance on early filing of adjustment applications. New USCIS procedures implemented in October 2015 allow for the earlier filing of adjustment-of-status applications and are intended to alleviate some of the hardships of lengthy immigrant visa backlogs. They are also intended to improve the process for determining immigrant visa demand, minimize visa retrogression, and help to ensure that all available immigrant visas are issued each year.

(6) The USCIS Policy Manual update, released in October 2016, providing guidance on determinations of extreme hardship. The guidance, effective December 5, 2016, clarifies the adjudication of certain waiver requests that require USCIS to determine claims of extreme hardship to qualifying relatives.

Some adjudications policy shifts are also possible, and some of these policy shifts may be reflected in new decisions issued by the USCIS's Administrative Appeals Office (AAO), the BIA, or the DOL's Board of Alien Labor Certification Appeals (BALCA). Important decisions issued in recent years may also be revisited. For example, the government may ask the BIA to reconsider its decision in *Matter of Arrabally*, which held that an individual who leaves the United States temporarily under a grant of advance parole does not thereby effect a "departure" resulting in inadmissibility under the three-/ten-year bar.

**Changes to Immigration Regulations.** There are certain immigration regulations that are likely to come under scrutiny in the new administration either because they are determined to be contrary to the best interests of U.S. workers or because they were issued in response to President's Obama's November 2014 executive action on immigration:

- The optional practical training (OPT) rule for foreign students with degrees from U.S. institutions in science, technology, engineering, and mathematics (STEM) fields, originally issued in April 2008 and later expanded in March 2016. The rule allows for a twenty-four-month extension of OPT for college graduates in STEM fields. The program is particularly useful for graduating F-1 students who are closed out of the H-1B cap for a given year who may utilize the OPT extensions to continue their employment.
- A February 2015 regulation permitting certain H-4 spouses of H-1B workers to obtain work authorization. The rule covers H-4 dependent spouses of H-1B nonimmigrants who are either the beneficiaries of an approved employment-based immigrant petition on Form I-140 or who have been granted an extension of their H-1B status past their six-year time limit under section 106(a) of AC-21.
- The November 2016 AC-21 regulation, which will come into effect just three days before Trump's inauguration. The regulation is intended to ease restrictions on job mobility for foreign workers awaiting employment-based permanent residence. The new rule also establishes grace periods for nonimmigrant workers before and after their employment and provides automatic work authorization extensions to adjustment applicants and certain other classes of foreign nationals who have timely filed for renewal of an EAD.
- The rules on substantive H-1B program requirements (including the DHS's regulatory definition of "specialty occupation" and the employer's obligations under the DOL's LCA rules), as well as the procedural rules governing the H-1B lottery applicable when USCIS receives cap-subject H-1B petitions in excess of the annual cap.

- The regulatory definition of "specialized knowledge" for L-1B workers. This definition has been criticized by some members of Congress, and efforts to change it might gain new traction.
- J-1 exchange visitor programs under the J-1 rules. Certain of these programs may be rescinded or revised. For example, the summer work/study (student intern) program for foreign students may be replaced with a résumé bank for young American students.
- The provisional waiver rule. The rule, originally issued in January 2013 and expanded in July 2016, allows certain individuals who are present in the United States but who are ineligible for adjustment of status to request a provisional waiver of the three-/ten-year inadmissibility bars before leaving the United States for an immigrant visa interview—rather than applying for a waiver abroad after the immigrant visa interview. The process reduces family separation by allowing foreign nationals to seek a waiver of unlawful presence before they travel abroad for an immigrant visa interview.

Other regulations, which are still in proposed form, are unlikely to be released for final publication and implementation. One such proposal, issued in response to the November 2014 directive, is the parole program for foreign entrepreneurs. The proposed rule, released in August 2016, would create a mechanism to allow up to five years of temporary stay, on a case-by-case basis, for qualifying foreign entrepreneurs who establish a U.S. start-up entity that has substantial U.S. investment and the potential for rapid growth and job creation.

**Possible Legislative Changes.** Areas in which the new Congress may seek to legislate include reforming the H-1B prevailing wage system, and imposing a labor market test—similar to what already exists in the PERM program—on employers who seek to hire temporary H-1B workers. The current restrictions imposed on employers deemed to be H-1B-dependent could also be expanded. It is also possible that Congress could enact legislation creating wage requirements for L-1 intracompany transferees, similar to what already exists for H-1B workers.

A measure that addressed all of these goals, the H-1B and L-1 Visa Reform Act of 2015 (S. 2266), sponsored by Senators Chuck Grassley (R-IA) and

Dick Durbin (D-IL), may be reintroduced in the 115th Congress. The proposal was also co-sponsored by Attorney General-Designate Jeff Sessions. Key provisions of the bill included:

- stricter H-1B degree requirements;
- three-year maximum period of stay for H-1B beneficiaries, with exceptions;
- preference system for the allocation of H-1B visas;
- higher H-1B wage requirements;
- recruitment and non-displacement obligations for all H-1B employers;
- restrictions on third-party placement of H-1B and L-1 employees (with waivers permitted);
- limits on H-1B and L-1 hiring;
- stricter LCA review and longer processing times;
- new wage requirements for L-1 employers;
- tougher eligibility standard for L-1B employees;
- non-displacement obligation on all L-1 employers;
- elimination of the use of B-1 in lieu of H-1B;
- broad investigatory and enforcement authority to DOL;
- increased penalties for H-1B and L-1 program violations; and
- annual H-1B and L-1 compliance audits

Immigrant vetting bills may also be reintroduced in the 115th Congress. For example, H.R. 4038, entitled the American SAFE Act of 2015, proposed extensive background checks for certain refugees with connections to Iraq or Syria to determine whether the covered individual is a threat to the security of the United States. Such checks must be certified by the Director of the Federal Bureau of Investigation to the Secretary of Homeland Security and the Director of National Intelligence. Further, there must be unanimous agreement among the Director of the Federal Bureau of Investigation, the Director of National Intelligence, and the Secretary of Homeland Security that a covered individual is not a threat to the United States before he or she may be admitted into the United States.

H.R. 4403, the Enhancing Overseas Traveler Vetting Act, would authorize the development of open-source software based on certain systems of the Department of Homeland Security and the Department of State to facilitate the vetting of travelers against terrorist watch lists and law enforcement databases, enhance border management, and improve targeting and analysis.

**Changes to Treaties and Other International Agreements.** Donald Trump has indicated that he might renegotiate or seek to withdraw from NAFTA. Changes to NAFTA may impact the admission of TN workers, L-1 intracompany transferees, and B business visitors from Canada and Mexico. Article 2205 of the agreement provides that any party can withdraw after giving six months' notice in writing. However, Congress would have to weigh in on any new deal with Canada and Mexico. Moreover, the practical workforce and supply chain considerations for U.S. businesses would be significant and would tend to weigh in favor of incremental rather than sudden change.

Trump has also spoken out against the Trans-Pacific Partnership (TPP) and other free-trade treaties. Changes to other trade agreements could impact E-3 and H-1B1 professional workers from Chile, Singapore, and Australia, as well as E-1 and E-2 treaty traders and investors.

Austin T. Fragomen, Jr., Careen Shannon and Daniel Montalvo are the authors of Fragomen on Immigration Fundamentals: A Guide to Law and Practice.

# ENVIRONMENTAL LAW

# Federal Electricity Policy Under the Trump Administration

**Stephen J. Humes & Beth A. Viola**

*Holland & Knight*

## HIGHLIGHTS:

- Most of President Obama's energy policy can be undone or mitigated by the incoming Trump administration.
- Because of the nature of the regulation of the electric utility industry in the United States, the impact of a Trump administration on federal electricity policy is unlikely to be dramatic.
- There are potential short- and long-term actions that Trump can take that would impact federal policy.

The huge unknown about Donald Trump's energy plans is in electric power. Whatever he decides, with a unified Republican Congress behind him, he has the ability to shape federal electric policy in the coming term. It is important to note that President Obama achieved the majority of his energy policy objectives through executive action (regulation, guidance, or executive order), and as such, most of his actions can be undone or mitigated by the incoming Trump administration. However, President Trump's impact on federal electricity policy is unlikely to be dramatic, largely because the electric utility industry in the United States is so heavily impacted by state and regional regulatory structures, as well as the independent regulatory authority and decisions of the independent Federal Energy Regulatory Commission (FERC). Still, there are a couple of short- and long-term actions President Trump may undertake that would impact federal electricity policy.

The first immediate action a Trump administration could take that would impact federal electricity policy is the appointment of new FERC commissioners. FERC currently has two vacant seats. Moreover, the current FERC chairman, a Democrat, has long hinted at resigning before the end of his term. This would open another appointment for the Trump administration and shift the balance of power in the commission. It is worth noting that if Chairman Norman Bay were to resign before the appointment and confirmation of additional members, FERC would lose the necessary quorum to issue decisions and permits. As such, the appointment of FERC commissioners will likely be among the first major actions the Trump administration will take to impact federal energy and electricity policy.

A second, more long-term action Trump may take is to undo a number of President Obama's regulations. During his campaign, Trump vowed to scrap President Obama's Clean Power Plan (CPP), abandon the Paris Agreement, and end Green Climate Fund payments to developing nations. Moreover, Trump has promised that, during his first 100 days in office, he will "end the war on coal, rescind the coal mining lease moratorium ... and conduct a top-down review of all anti-coal regulations issued by the Obama Administration."

## Coal Versus Natural Gas: A New Market Reality

While Trump may overturn executive actions or work with Congress to change laws, one law that he will not be able to change is the economic law of supply and demand that has kept natural gas at historic low prices. According to the U.S. Energy Information Administration (EIA), the price of natural gas as an electric generation fuel has been dropping dramatically the past couple of years, leading to its increase in market share and the steady decline in the use of coal. It is hard to imagine that Trump will be able to reverse the laws of economics and promote coal as a power source, even if he undoes the CPP and other regulations, because coal is simply out of the money as a fuel source.

Coal-fired power generation generally costs more than natural gas, and that trend is likely to continue for the foreseeable future, although the EIA's current outlook forecasts that natural gas prices are likely to edge up higher than coal for the short term, at least through the winter months. For this reason, Trump is unlikely to impact the economic realities facing the coal sector. Furthermore, if Trump implements support for infrastructure spending that might include expanded interstate natural gas pipeline installations, it is expected that expanded hydraulic fracturing ("fracking") and the expanded pipelines will produce an even more abundant supply of natural gas in the long term and continue to drive down the cost of power generation from natural gas.

For decades, natural gas was the second-most prevalent fuel for electricity generation behind coal, but it became the electric utility and independent power production industry's primary fuel source for the first time in April 2015, the EIA reported. Natural gas–fired generation has surpassed coal-fired generation in most months since then, and generation fueled by natural gas reached record levels this past summer. During the first six months of 2016, natural gas supplied 36% of total U.S. electricity generation compared with 31% for coal.

However, for the short-term outlook in the upcoming winter months, EIA expects coal to outpace natural gas. Because natural gas is also in demand for thermal heating, that drives up the natural gas cost in many local markets during the winter. Therefore, especially in markets in which generation capacity exceeds electricity load, power plant operators are expected to select the most efficient fuel source—which could be coal over natural gas—but this trend may not hold, especially in the event of another mild winter. At the beginning of 2016, the national average price of natural gas was consistently below the cost of coal delivered to power plants, reaching a low point of about $16 per megawatt-hour (MWh) in March. Coal, on the other hand, has averaged between $21 per MWh and $23 per MWh for the past two years, according to the EIA. Natural gas prices were low earlier this year because of ample fuel supplies and mild winter weather, which also reduced overall electricity demand.

The Trump administration must identify some strategies to support the coal-fired power plant industry if coal is going to remain competitive beyond the short term, especially in light of environmental regulations such as the coal ash rule, which will continue to be a drag on the coal business. Therefore, it is a safe bet that natural gas-fired generation will continue to outpace demand for coal in the longer term.

## Coal Ash

A major area of focus for the U.S. Environmental Protection Agency (EPA) in its regulation of the coal sector in recent years has been in the area of coal ash, also known as coal combustion residuals (CCR), which includes fly ash, bottom ash, boiler slag, and flue gas desulfurization materials resulting from coal combustion in the power generation industry (including electric utilities and independent power producers).

After several high-profile coal ash impoundment failures triggered localized environmental impacts and expensive clean-up obligations for the responsible parties, the EPA issued a new regulation on coal ash to establish nationally applicable minimum criteria for the safe disposal of CCR in landfills and surface impoundments. After proceeding with notice and comment rulemaking for more than four years, the EPA Administrator signed the final rule on December 19, 2014, and the rule became effective six months after publication in the *Federal Register* on April 17, 2015. Thereafter, the EPA Administrator signed a direct final rule on July 26, 2016, that extended certain deadlines for inactive CCR surface impoundments and became effective on October 4, 2016. (Note that because this rule was adopted more than sixty days before Trump will be sworn into office, it is beyond the reach of the Congressional Review Act.)

The CCR regulations regulate CCR impoundments or landfills as non-hazardous solid waste under Subtitle D of the Resource Conservation and Recovery Act. The rule provides a comprehensive regulatory program to address risks posed by groundwater contamination, structural failures of CCR surface impoundments, and fugitive dust emissions. The rule requires CCR units that pose unacceptable risk to either retrofit or close. The rule applies to new and existing CCR landfills and surface impoundments, as well as any lateral expansion of such units, and is self-implementing, which means that facilities are required to comply with the requirements without regulatory oversight.

The coal-fired power generation industry views the CCR rule as another EPA attack on coal and yet another federal regulatory mandate that increases the cost and risk presented by the continued operation of coal-fired power generation. Therefore, coal-fired power plant owners and operators are forced to consider this rule as part of the regulatory risk they face when deciding whether to shut down coal-fired generation or continuing to operate. When coal generators face the higher cost of fuel and higher regulatory compliance risks, it becomes harder to justify keeping coal-fired generation operating—even if the Clean Power Plan fails.

## Nuclear Power

Nuclear power generation has long been the backbone of the baseload power generation industry nationwide. However, it has become increasingly clear in recent years—as lower natural gas prices set the effective clearing price for all power plants, not just those that are natural gas–fired—that nuclear power plant operators cannot continue to operate their plants in the competitive wholesale power markets without some form of market support.

In addition, according to the April 2016 U.S. Supreme Court decision *Hughes v. Talen Energy Marketing*, states run into trouble in these competitive wholesale power markets if they try to provide out-of-market payments to support any specific generator. In the terms of the Supreme Court decision, "States interfere with FERC's authority by disregarding interstate wholesale rates FERC has deemed just and reasonable, even when States exercise their traditional authority over retail rates or, as here, in-state generation."

Therefore, the fundamental economic law of supply and demand is weighing down nuclear power these days in a way that is similar to that of coal-fired generation, although the stakes are much higher with nuclear than they are with coal. Nuclear power–generating plants take significant effort and resources to ramp up and operate, with refueling costs in the millions, and turning these baseload generators on and off cannot happen quickly. But in competitive wholesale power markets—which include the Northeast, the Midwest, and California—natural gas generators are setting the marginal price of power. With prices trending far below nuclear generators' operating costs, the result is that nuclear facilities are losing money.

Again, similar to coal but on a much broader scale, if Trump favors keeping nuclear generators in business or perhaps favors an "all of the above" power generation strategy, the federal government must identify a strategy to assist the ailing nuclear industry.

One state has already started a program designed to support nuclear power, but it is a “blue state.” Trump is not expected to endorse New York’s energy regulatory approach because it would require him to admit that climate change is a major problem and that supporting nuclear power generation is a part of the solution. On August 1, 2016, the New York Public Service Commission adopted an order implementing a Clean Energy Standard that, among other things, stated that New York’s goal is to achieve 50% renewable energy by 2030 and reduce greenhouse gas emissions in the state by 40% by 2030. Furthermore, the order concluded that allowing upstate nuclear power plants to close would seriously impair the state’s ability to achieve the 40% greenhouse gas emission reduction standard by 2030. The order implemented a controversial payment mechanism whereby the nuclear generators would sell the “zero emission reduction” attributes, or credits, from the upstate nuclear power generators in amounts equal to the megawatt-hours of electricity that all of the state’s load-serving entities sell to end-use customers beginning on April 1, 2017. This mechanism is already being challenged by other market participants that claim the nuclear payments violate the U.S. Supreme Court’s holding in *Hughes v. Talen Energy Marketing*. This litigation is just commencing, but the case illustrates the challenges that states face if they try to assist the nuclear power generation industry in competitive wholesale power markets.

At some point, Trump’s energy policy will need to indicate whether nuclear power is important to the future of the nation’s power generation industry and, if so, how the federal government can provide meaningful support to this industry.

# Forecast for Energy and Environment Regulations


## Beth A. Viola & Isabel Lane

*Holland & Knight*


Like outgoing administrations before it, the Obama administration is working to finalize and publish a wide array of regulations before leaving office—an effort often referred to as "midnight rulemaking." Because it may be difficult to change or eliminate rules after they have taken effect, midnight rules help cement a president's legacy and limit the actions of incoming administrations. Well before Inauguration Day, Donald Trump's transition team had already begun arriving at federal agencies to review the regulatory framework established or expanded under the Obama administration. Trump has promised to bring back jobs in the coal industry and reduce regulations that could inhibit economic growth—particularly targeting the energy and environment space. The review and modification of regulations across multiple agencies is expected to be a cornerstone of Trump's first 100 days in office.

Administratively, Trump will have a limited number of tools available to stop midnight regulations. Past presidents have imposed a moratorium on new regulations from executive departments and independent agencies through the use of an administrative memorandum, such as the Andrew Card memo in the Bush administration, to control last-minute regulations. Such moratoria may be accompanied with a request that federal agencies delay the effectiveness date of final published regulations. The Trump administration may also voluntarily withdraw any proposed rules that have not been published in the *Federal Register* as final rules prior to Obama leaving office.

Once an outgoing administration's final rule has been published in the *Federal Register*, the incoming administration may try to limit its effectiveness by selective enforcement of key provisions, but the rule remains subject to third-party lawsuits and judicial enforcement. The only way for an incoming administration to undo a final rule published in the *Federal Register* is to follow the federal rulemaking process, as prescribed in the Administrative Procedure Act (APA). *See* 5 U.S.C. § 551 *et seq*.

Under the rulemaking procedures established by the APA, agencies are generally required to publish a notice of proposed rulemaking in the *Federal Register*, allow stakeholders to comment on the proposed rule and, after considering those comments, publish the final rule. These APA requirements apply when an agency is issuing, amending, or repealing a rule. These actions are also subject to judicial review.

Legislatively, Congress may examine the issuance of proposed and final "midnight" regulations at the end of an administration and use its legislative power to overturn or change a regulation. To overturn or change a regulation, Congress may use one of the following tools:

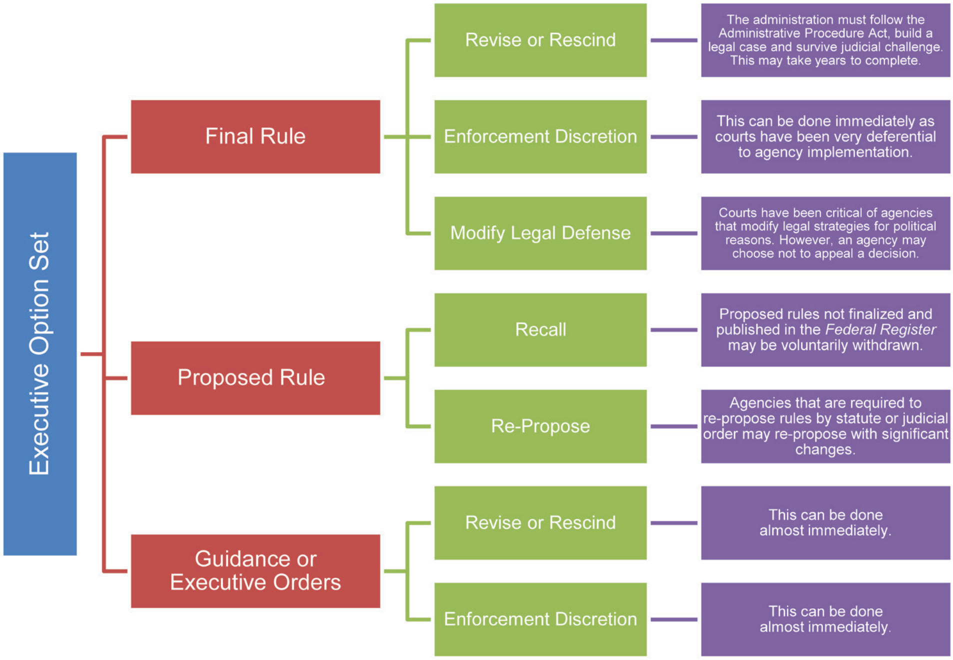
- Congressional Review Act (CRA): Congress may use the expedited procedures provided in the CRA to disapprove of agency rules.
- Appropriations Riders: Congress can add provisions to an agency appropriations bill to prohibit certain rules from being implemented or enforced.
- Statutory Amendment: A change in the underlying statue could force an agency to amend a regulation that has been already issued, or it could provide additional instruction to an agency while a rule is under development.

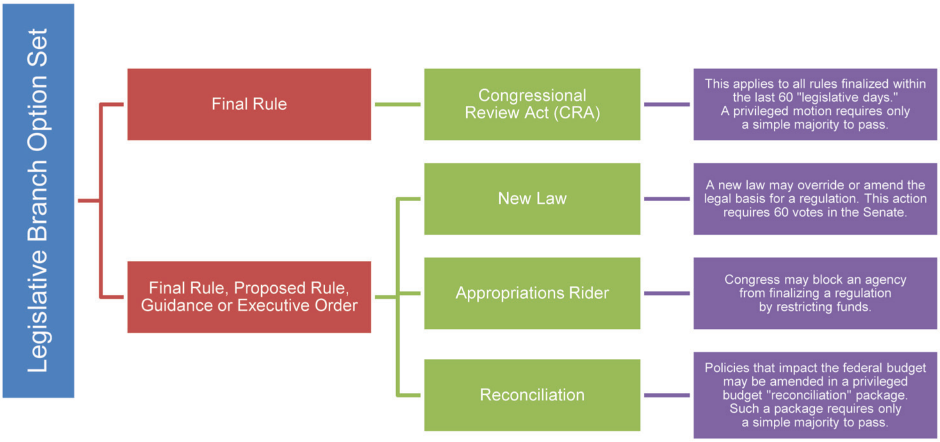
Given the narrow 52-48 margin of Republican control in the Senate, the CRA is likely to play a significant role in the Trump administration's efforts to overturn regulations. Under the CRA, resolutions of disapproval are privileged and not subject to a filibuster. They also require only a simple majority to pass.

Appropriation riders, which bar the use of funds to carry out a regulation, will also be an attractive option, as they are included in "must-pass" legislation to fund the government. However, these riders are less attractive than CRA resolutions as they are enforceable only in the fiscal year covered by the spending bill.

Finally, Republicans may attempt to change underlying statutes to amend or invalidate regulations. However, these actions would likely face stiff opposition in the narrowly controlled Senate, which still requires at least a sixty-vote majority to overcome a filibuster.

These options are summarized in the figures below:






While the Trump administration has been vague on which provisions it will prioritize for elimination or reform, the following regulations will be likely targets in the energy and environment space (regulations marked with an asterisk indicate possible midnight rulemaking or recently finalized actions subject to the CRA):

## Clean Power Plan Regulations

Trump has long stated his intention to eliminate the Clean Power Plan, finalized in August 2015. The rule has a legal challenge pending in the U.S. Court of Appeals for the District of Columbia Circuit that could make its way to the Supreme Court. By then, the Supreme Court would likely have on it a justice appointed by President Trump. Should it survive, the administration could discretionarily enforce the rule, approving lenient State Implementation Plans (SIPs). Also endangered is the Clean Energy Incentive Program (CEIP) established under the Clean Power Plan, which as of this writing the Obama administration is unlikely to finalize before Trump's inauguration.

## Waters of the United States Regulation

The Waters of the United States (WOTUS) regulation, finalized in May 2016, updated the Clean Water Act's jurisdiction by redefining navigable "waters of the United States" to include ditches, seasonal wetlands, and other waters previously outside the Environmental Protection Agency's (EPA) jurisdiction. The regulation has been the subject of criticism from agricultural, energy, local government, and development interests. They all allege the regulation will give the EPA carte blanche power and, for that reason, will be a target for the new administration and the Republican Congress alike. It is unlikely to be eliminated via legislative action this Congress, so if it survives its existing legal challenge pending in the U.S. Court of Appeals for the Sixth Circuit, the 115th Congress may seek to address the issue in 2017. Additionally, Trump has vowed to block WOTUS administratively—likely by discretionarily enforcing the rule until the EPA is able to mount a successful legal case to alter the regulation.

## Renewable Fuels Standard 2017 Rule*

The Renewable Fuel Standard (RFS) 2017 final rule, which was published in the *Federal Register* on December 12, 2016, establishes targets for U.S. renewable fuel blending in 2017. Should a CRA vote pass repealing this annual regulation, the RFS could be permanently crippled as the CRA forbids agencies to ever create a similar rule.

## GHG NEPA Guidance

On August 1, 2016, the Council on Environmental Quality (CEQ) issued its final guidance requirement for all federal agencies to consider GHG emissions and the effects of climate change in National Environmental Policy Act (NEPA) reviews. Criticisms levied against CEQ's direction allege the guidance goes beyond the requirements of the underlying NEPA statute, which already requires NEPA reviews to consider air quality concerns, geologic con-

* Denotes possible midnight rulemaking or recently finalized actions subject to the CRA.

ditions, water quality risks, existing wetlands conservation policies, and safety concerns, among other requirements. It is expected that this guidance will be quickly eliminated.

## Social Cost of Carbon Guidance

In 2010, the Office of Management and Budget (OMB) directed federal agencies to consider financial estimates of the "social cost of carbon," set by pricing the benefits of avoided greenhouse gas (GHG) pollution, when engaging in rulemakings. Essentially used as a calculation to justify regulations on climate change, this guidance has long been a target of Republicans.

## Stream Protection Rule*

The Stream Protection Rule, a final rule published in the *Federal Register* on December 20, 2016, will update the permitting process for coal mines that was established in the 1983 Surface Mining Control and Reclamation Act (SMCRA). The rule has been nearly a decade in the works—the Obama administration began working on the rule just after taking office. The regulation, which Senator Joe Manchin (D-WV) has joined Republicans in dubbing a "job-killing" measure, will be a likely target of congressional Republicans' efforts to utilize the CRA.

## Venting and Flaring Rule*

On November 15, 2016, the Department of the Interior (DOI) issued a final regulation that will limit venting and flaring of natural gas. While the DOI argues that the rule will combat climate change and gather otherwise-wasted natural gas to be reused at power plants, industry interests insist the regulation should provide for more expediency in the permitting process for gas-gathering lines on federal land. The regulation will be an easy target for a CRA vote.

* Denotes possible midnight rulemaking or recently finalized actions subject to the CRA.

## Ozone

The EPA finalized, on October 1, 2015, its national ambient air quality standard (NAAQS) for ozone from 75 parts per billion (ppb) to 70 ppb. The standard is facing legal challenges both from environmentalists, who assert it does not go far enough to protect public health, and from states and industry interests that contend some areas will never be able to achieve the requirement due to existing background levels or upwind pollution sources. A Trump administration may explore options to revise the standard back to 75 ppb.

# INTELLECTUAL PROPERTY LAW

# IP Law and Policy Under President Trump

**Charles S. Barquist**

*Partner, Morrison & Foerster LLP*

It is fair to say that intellectual property rights and patent policy were not emphasized during the campaign of Donald Trump. Trump did say that he wanted to promote "innovation," although this was to be achieved through reducing regulations and bureaucratic hurdles, rather than any actions specifically related to IP policy. Trump often referenced the technology community during his campaign, but did so in the context of national security or trade. And those comments were often critical, complaining, for example, that iPhones are made in China rather than in the United States.

Trump's focus on strengthening the U.S. economy and bringing jobs back to America suggests that his administration will push to strengthen enforcement of U.S. IP rights. Trump accused China of "rampant theft of intellectual property," and promised that improved protection of IP rights could produce two million jobs in the United States. It is not clear, however, how a Trump administration would accomplish this. Some predict increased activity at the International Trade Commission, whose jurisdiction encompasses both IP rights and trade issues. ITC cases asserting infringement of IP rights, however, are initiated by private parties, not the government. Commissioners appointed by Mr. Trump cannot directly influence the nature of infringement cases being filed. Moreover, many complainants at the ITC are foreign companies with sufficient U.S.-based activities to qualify as a domestic industry. Thus, IP enforcement at the ITC is not likely to be the most effective tool to achieve Mr. Trump's goals.

Mr. Trump's selection of Wilbur Ross as Secretary of Commerce appears to be consistent with his focus on undoing and renegotiating international trade deals, but again provides little insight into IP policy. (The Patent and Trademark Office is part of the Commerce Department.) Mr. Ross made his fortune turning around distressed companies in such industries as steel, textiles, coal, and auto parts, none of which is particularly dependent on strong IP rights. Mr. Trump has also picked Todd Ricketts, whose family owns the Chicago Cubs, for the job of deputy commerce secretary. Mr. Ricketts has worked for a bank founded by his father and has owned a bicycle shop, a background that also offers few hints about his experience with IP policy.

On the other hand, there are others among Mr. Trump's supporters and advisors who have spoken out on patent issues. Their potential influence on the new administration suggests that further patent reform legislation could become a priority. Peter Thiel, a tech entrepreneur and a member of the Trump transition team, has been an outspoken critic of nonpracticing entity patent litigation, calling well-known nonpracticing entity Intellectual Ventures "a parasitic tax on the tech industry." Another Trump supporter is Representative Darrell Issa of California, a former businessman with experience asserting his own patents and another critic of NPEs.

Several patent reform bills were introduced in the last Congress, and many of them focused on curbing aspects of patent litigation, especially litigation filed by NPEs, alleged by some to be abusive. These bills are likely to be reintroduced in the new Congress. The bills included provisions regarding fee shifting against losing parties, improper and misleading demand letters, and venue, among others. It seems unlikely that any of these bills will be an initial priority, but they may get some attention after the first 100 days of the Trump administration.

One counterpoint, however, is Mike Pence. Pence has been identified with conservative viewpoints opposing patent reform that may sweep too broadly and unintentionally harm American innovation. Thus, rather than comprehensive patent reform legislation, we may see specific reforms that enjoy broad support.

One such issue could be a limitation on venue shopping. Under the general venue statute, and given the reach of the Internet and nationwide sales and marketing of many products, plaintiffs have been able to file patent lawsuits nearly anywhere they choose. As a result of its perceived pro-plaintiff juries and local rules of practice, the Eastern District of Texas has been the most popular venue for patent litigation for two decades. Legislation has been proposed that would require a plaintiff to file in a district with a direct connection to the underlying litigation and parties, which would likely remove the Eastern District of Texas as an available forum in many cases.

Support for venue reform among American industry suggests that this could be an opportunity for Mr. Trump to notch a legislative win that has previously proved elusive. Any venue legislation could be delayed, however, by the Supreme Court's decision in December 2016 to grant certiorari in the case of *TC Heartland LLC v. Kraft Food Brands Group LLC,* which challenges the Federal Circuit's expansive interpretation of patent venue.

Another reform that could prove attractive to the Trump administration is the issue of Patent Office funding. Most members of the patent community agree that the funds collected by the Patent and Trademark Office—which is entirely funded by user fees collected from patent applicants, patent owners, and those challenging patents—should not be diverted to fund other parts of the government. While the AIA, enacted in 2011, limited fee diversion, sequestration rules diverted about $120 million in 2013.

Pursuing further reform for PTO funding may appeal to Mr. Trump. It has broad support among industry and the PTO user community. And a self-funded agency—indeed one that makes a "profit" (that is, diverted funds)—may set an example that a business-oriented president may want to highlight. Passing this legislation may be a relatively easy task that would allow Trump to claim victory and demonstrate his ability to get things done.

Mr. Trump has laid out an aggressive agenda for his first hundred days as President, and IP policy has not made the list. Nevertheless, after the initial whirlwind of the hundred days, we may see action on specific reforms that have broad support and that can be presented as consistent with promoting American businesses.

Charles S. Barquist is the author of Patent Litigation.

# Is Trademark Registration a Commercial or Private Act, and What Are the Implications for the Constitutionality of Section 2(a)?

**Darin P. McAtee**

*Partner, Cravath, Swaine & Moore LLP*

The election of Donald Trump as President of the United States brings with it widespread uncertainty, including in the area of the First Amendment. On one hand, Mr. Trump has been vociferous in his criticism of the media, threatening to "open up [the] libel laws," for example, to make it easier to sue news organizations[1] On the other hand, Mr. Trump has staunchly defended the use of the REDSKINS trademark for Washington's football team, which some allege violates the prohibition against the use of disparaging marks under section 2(a) of the Lanham Act.[2] The intersection of the First Amendment and section 2(a) will come to a head when the Supreme Court weighs in on whether section 2(a) violates the First Amendment.[3] Although Mr. Trump's position is not clear, his vocal defense of a trademark that has been canceled under this provision suggests a stance that the Lanham Act's prohibition on disparaging marks may be unconstitutional. The Supreme Court's decision in *Lee v. Tam* will likely hinge on whether section 2(a) is subject to strict scrutiny, requiring the law to be narrowly tailored to achieve a compelling government interest, or intermediate scrutiny, requiring only that the law be substantially related to an important government interest.

The leading authority asserting the unconstitutionality of section 2(a) concerns the use of the name THE SLANTS by an Asian-American rock band. Simon Tam gave his band that name because he sought to reclaim a term that has historically been used as an insult against Asian Americans.[4] In December 2015, the Federal Circuit ruled that the prohibition against registration of "disparaging" marks violates the First Amendment,[5] a ruling that flew in the face of decades of legal precedent.[6] In reaching that decision, the Federal Circuit concluded that section 2(a) was subject to "strict scrutiny" because it imposes a burden on private speech "based on disapproval of the message conveyed."[7] The Federal Circuit rejected the idea that section 2(a) regulates commercial speech:

> [T]rademarks identify the source of a product or service . . . . But they very commonly do much more than that. And, critically, it is always a mark's expressive character, not its ability to serve as a source identifier, that is the basis for the disparagement exclusion from registration.[8]

The concurring and dissenting opinions in *In re Tam* objected to the majority's conclusion that trademarks are private speech. Judge Dyk, concurring in part and dissenting in part, concluded that "the statute is constitutional as applied to commercial trademarks, but not as to core political speech, of which Mr. Tam's mark is one example."[9] In his dissent, Judge Lourie called on stare decisis, arguing that this aspect of the Lanham Act has been continuously applied for decades and so should be considered "settled law."[10] Judge Lourie went on to explain that the USPTO's denial of registration "is not a denial of an applicant's right of free speech. The markholder may still generally use the mark as it wishes; without federal registration, it simply lacks access to certain federal statutory enforcement mechanisms for excluding others from confusingly similar uses of the mark."[11] Judge Reyna's dissenting opinion made clear that, in his view, section 2(a) of the Lanham Act was subject to only intermediate scrutiny and "is an appropriate regulation that directly advances the government's substantial interest in the orderly flow of commerce."[12]

Rulings on the use of the REDSKINS mark present the other side of the case law split over the constitutionality of section 2(a). The long and tortured history of the use of the REDSKINS mark began in 1933, when the name "Redskins" was first applied to a National Football League team. The mark was registered with the Trademark Office in 1967 and challenged by the Trademark Trial and Appeal Board (TTAB) in 1999 based on the conclusion that the mark "'may be disparaging of Native Americans to a substantial composite of this group of people,' and 'may bring Native Americans into contempt or disrepute.'"[13] This decision was ultimately overturned by the

D.C. Circuit, which found that the plaintiffs were barred by the doctrine of laches.[14] The D.C. Circuit did not address the issue of disparagement of the mark on the merits.[15] A few years later, a second group of Native Americans, all of whom reached the age of eighteen after the prior ruling, successfully brought suit for the cancelation of the mark.[16] As evidence that a "substantial composite" of Native Americans would have viewed the REDSKINS mark as disparaging in 1967, the TTAB relied on statements made in 1972 by the National Congress of American Indians and a resolution passed by that organization in 1993, opposing the use of the mark.[17]

After the TTAB canceled the mark, the Redskins appealed in *Pro-Football, Inc. v. Blackhorse*, seeking a declaration that section 2(a) of the Lanham Act violates the First Amendment.[18] The district court ruled against the Redskins in July 2015.[19] In reaching its decision, the district court concluded that "the federal trademark registration program is government speech and is therefore exempt from First Amendment scrutiny."[20] The court explained that "[c]ancelling the registration of a mark under Section 2(a) of the Lanham Act does not restrict the public debate on public issues as the mark owner is still able to use the mark in commerce."[21] The Redskins appealed to the Fourth Circuit in August 2015.[22] That appeal is currently pending.

Although both the TTAB and the district court concluded that a "substantial composite" of Native Americans would have viewed the mark as disparaging at the time it was registered, Mr. Trump has insisted: "I know Indians that are extremely proud of that name" and "they think it's a positive."[23] Indeed, the controversy surrounding the REDSKINS mark featured prominently in Mr. Trump's election campaign. In July 2014, Hillary Clinton stated that the name was "insensitive" and that "there's no reason for it to continue as the name of a team in our nation's capital."[24] One of Mr. Trump's campaign advertisements attacked Ms. Clinton for her "politically correct" stance:

> Yeah, you thought you were safe, sitting in your recliner in your man cave, cold beer and a bowl of chips. Ha, you thought you'd escaped politics by focusing on football. Wrong. Hillary Clinton wants to mess up your football, too. Hillary wants to change the name of the Redskins. Hillary's priorities are not your priorities.[25]

Although not directly addressing the constitutionality of section 2(a) of the Lanham Act, Mr. Trump's statements and advertisements suggest he might agree that this section violates the First Amendment. THE SLANTS is a name meant to reclaim a historic insult toward Asian-Americans by a member of that group, but the REDSKINS name does not purport to have any such noble intentions. At a time when Mr. Trump's election victory points toward a backlash against "excessive political correctness,"[26] it is somewhat ironic that whichever way the case law develops, both THE SLANTS and the REDSKINS marks are likely to meet the same fate with respect to registration as the ruling of the Supreme Court in *Lee v. Tam* will likely bind the Court in *Blackhorse*.

It is unclear what position the Supreme Court will take with respect to section 2(a). A key consideration is likely to be whether the Court views trademark registration as primarily commercial speech, subject to intermediate scrutiny, or private speech, subject to strict scrutiny. Historically, the focus in trademark law has been to protect consumers from being misled by confusingly similar marks, and to protect trademark holders from losing market share due to consumer confusion. Trademarks have been treated as commercial speech, requiring certain properties prior to registration. For example, generic marks are not protected; and "descriptive" marks are only protected if they have acquired "secondary meaning." A ruling by the Supreme Court that section 2(a) of the Lanham Act is unconstitutional on the basis that trademarks are private speech rather than commercial speech could have far-reaching implications for future trademark registrations and perhaps for trademark law in general. The exact ramifications of such a ruling remain to be seen.

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Darin P. McAtee is a coauthor of Intellectual Property Law Answer Book.

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# NOTES

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3. Lee v. Tam, 137 S. Ct. 30 (set for oral argument January 18, 2017).
4. *In re Tam*, 808 F.3d at 1331.
5. *Id*. at 1358.
6. *Id*. at 1374.
7. *Id*. at 1334.
8. *Id*. at 1338.
9. *Id*. at 1364.
10. *Id*. at 1374.
11. *Id*. at 1375–76.
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14. Pro-Football, Inc. v. Harjo, 565 F.3d 880, 881 (D.C. Cir. 2009), *cert. denied*, 558 U.S. 1025 (2009).
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16. Blackhorse v. Pro-Football, Inc., 111 U.S.P.Q.2d 1080, 2014 WL 2757516, at *1, *34 (T.T.A.B. 2014).
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20. *Id*. at 448.
21. *Id*. at 457.
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23. Cindy Boren, *New Pro-Donald Trump Ad Appeals to NFL Fans Who Favor Keeping Redskins Name,* WASH. POST, Nov. 7, 2016, www.washingtonpost.com/news/dc-sports-bog/wp/2016/11/06/in-campaigns-11th-hour-trump-ad-targets-nfl-fans-who-favor-keeping-redskins-name.
24. *Id*.
25. *Id*.
26. *Id*.

# Trump's Impact on Intellectual Property*

**Jeffrey G. Sheldon**

*Partner, Leech Tishman*

We do not like to speculate. But we are being asked what effect Trump will have on intellectual property rights. So here is what we (and others) are predicting.

- "Trump" is a brand used for casinos, hotels, and developments. So if there is any effect by Trump on the trademark system, we expect it to be positive.
- Mike Pence has a record of being pro-patents and intellectual property. So again, that is a positive for those with intellectual property.
- Trump is expected to crack down on foreign countries that steal U.S. intellectual property and do not adequately protect the intellectual property of U.S. companies. For companies with foreign sales who have been reluctant to protect rights overseas due to government condoned infringement and lack of enforcement rights, it is time to reconsider that approach. And maybe foreigners will stop stealing trade secrets.
- A patent reform act with many beneficial provisions has been winding its way through Congress. But it will get put on the back burner. Congress will be busy with confirming a Supreme Court Justice, Obamacare, immigration, ISIS, and tax reform. That is good news for patent trolls and the Eastern District of Texas, where trolls like to bring suit. The Eastern District of Texas is well known as being favor-

* A version of this material previously appeared in LawOnIP, a blog written by Jeff Sheldon and his colleagues at Leech Tishman. See www.leechtishman.com/blogs/law-on-ip/.

able to trolls, and its favorable rulings have been good for the local economy and local attorneys. Congress would like to make life more difficult for trolls and spread out, more evenly, the places where patent lawsuits are brought.

- Tax reform, including reducing the capital gains tax, will increase the value of intellectual property that can be sold under capital gains treatment. So parties should consider more patents (after consulting with their accountants and patent attorneys).
- It is expected Trump will nominate a Supreme Court justice who is pro-business. But it is doubtful this will have any effect on Supreme Court decisions relating to intellectual property. Most important IP decisions have been unanimous or close to unanimous and do not appear to follow liberal-conservative lines. (As an aside, it is amazing how such smart people can so totally mess up the concept of patentable subject matter. Wish we had a patent attorney on the Supreme Court.)

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Jeffrey G. Sheldon is the author of How to Write a Patent Application.

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# Where Is Copyright Policy Headed?


## Bruce P. Keller

*Assistant U.S. Attorney, District of New Jersey, and Former Partner, Debevoise & Plimpton LLP*

## Jeffrey P. Cunard

*Partner, Debevoise & Plimpton LLP*


Intellectual property is never a centerpiece of presidential campaigns, and copyright issues are hardly ever discussed—except, perhaps, when pump-up-the-crowd songs are played without a license. The race between Hillary Clinton and Donald Trump was no different in this respect. Nothing in particular about the campaign, or even the positions of congressional Republicans, provides any insight regarding the Trump administration's positions on copyright law or policy.

That said, some crystal-ball gazing is not inappropriate. For the most part, copyright policy in Washington has been reasonably bipartisan, with Democrats, often aligned with Hollywood and the recording industry, being generally more inclined to promoting copyright interests. There have, however, always been Democrats and Republicans in Congress who have championed the rights of consumers and technology companies. The Obama administration, too, has frequently embraced the views of the technology communities and Silicon Valley, which have advocated for what they would argue is a more balanced approach to copyright policy.

In recent times, the views of the Republican Party on copyright policy have grown somewhat difficult to categorize. In general, the GOP's strong philosophical bent toward protecting private property rights guides the party in the direction of promoting and safeguarding copyright as an intellectual property right. Somewhat more libertarian-oriented Republicans are championing an approach that might reduce protection for copyright owners because, they say, copyright impedes both technological advances and freedom of expression. Recent policy papers (including one from Republican congressional staffers) have criticized copyright protection as a government handout that impairs the functioning of the free market.

To a certain extent, the official GOP platform adopted at the Republican National Convention in Cleveland reflects these tensions. It calls for "balanced protections for intellectual property" while recognizing intellectual property as a "driving force" in economic growth and job creation and as an important national security issue. At the same time, hewing to a more expected line, the platform brooks no tolerance for infringers, urging "strong action by Congress and a new Republican president to enforce intellectual property laws against all infringers, whether foreign or domestic."

The new administration has indicated that trade policy will be a focus. For that reason, it would not be surprising to see heightened enforcement of IP laws against foreign infringers. Infringement of intellectual property rights in China or elsewhere may take on a higher profile, perhaps the context of a trade war, beyond simply being singled out for special attention in the annual reports of the U.S. Trade Representative.

Domestically, there could be legislative efforts to reform the institutional structure and autonomy of the U.S. Copyright Office. Over the last few years, the (now-former) Register of Copyrights, Maria Pallante, urged that the Office be extracted from the Library of Congress, where it has long been housed. Bob Goodlatte, Chairman of the House of Representatives Judiciary Committee, has released a paper supporting reform of the Office. Among its key recommendations are establishing greater autonomy for the Office, in terms of both budget and technology needs, adopting a new process for nominating the Register, upgrading the Office's information technology—including by allowing it to build up its reserve accounts and to charge for access to a searchable database of copyright records—and developing a small-claims system that would be hosted by the Copyright Office. Strengthening the Copyright Office and the copyright system in these ways—to implement reforms that now have been percolating in Congress for several years—could find favor with a new administration elected, in part, on a campaign that committed it to reforming the ways in which the federal government operates. It is less clear whether a bipartisan consensus could coalesce around these reforms; however, some copyright owners, and their Democrat supporters in Congress, might be able to get behind legislation that would give the Copyright Office more autonomy from the rest of the Library of Congress.

Another potential topic involves the safe harbor provisions of the Digital Millennium Copyright Act, 17 U.S.C. § 512. Enacted in 1998 to provide some procedural rights for copyright owners and some substantive protections for Internet service providers, these provisions have been the subject of substantial litigation. Some copyright owners have, however, become quite disenchanted with the operation of the safe harbors—and the protection they afford service providers accused of secondary infringement. Technology companies have not, by and large, been as unhappy, although having to respond to large volumes of automatically generated takedown notices is said to be a burden for smaller service providers.

On all sides, interest in the mechanics, protections, and future of the DMCA safe harbors is keen. At the end of 2015, the Copyright Office launched a public study to evaluate the safe harbors, seeking public comment on topics including the costs and burdens of the notice-and-takedown process and how well section 512 balances protection against online infringement while protecting service providers against improper takedown notices.

In response, the Office received more than 92,000 written submissions; it has now asked for additional comments, which are due in 2017. If the study results in the Office's making recommendations regarding section 512, amendments to the statute could be the subject of congressional consideration. What position the new administration might take on section 512 is unclear. But Republicans' traditional support for taking action against infringers might well put them on the side of reform that would advance the interests of copyright owners. Any proposals to amend the safe harbors in ways that would lessen the protection they currently afford for service providers are certain to provoke intense opposition from the technology communities and consumer interests.

The extent to which Republicans in Congress and the new administration will place any priority on copyright policy is unknown, given other, potentially more urgent, priorities. Whether the Trump administration will favor ownership interests, on the one hand, or user interests, on the other, is hard to handicap, given that neither Hollywood and recording companies nor technology companies were particularly supportive of Trump's campaign. Absent some new developments, it seems safe to say that the next four years are unlikely to see major shifts in copyright policy.

Bruce P. Keller and Jeffrey P. Cunard are the authors of Copyright Law: A Practitioner's Guide.