



Drinker Biddle

U.S. Elections Implications for International Business

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As the U.S. ushers in a new president and a new administration, businesses across the globe are preparing for a number of anticipated changes, challenges and opportunities.

Drinker Biddle's International Team offers comprehensive perspectives regarding the potential impact of the U.S. presidential election on business interests in the following areas:

- General Election Overview
- Corporate
- Cybersecurity
- Insurance
- Intellectual Property
- Labor and Employment
- Litigation
- Supreme Court
- Trade

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TABLE OF CONTENTS

GENERAL ELECTION OVERVIEW	3
CORPORATE: THE OUTLOOK FOR AMERICAN COMPANIES	4
CYBERSECURITY: TRUMP CAMPAIGN POSITIONS AND POTENTIAL ADMINISTRATION POLICIES	4
INSURANCE: THE IMPACT OF DEREGULATION	5
INTELLECTUAL PROPERTY: THE CLIMATE OF INNOVATION UNDER PRESIDENT TRUMP	6
LABOR AND EMPLOYMENT: HOW THE TRUMP ADMINISTRATION'S PRO-EMPLOYER AGENDA MIGHT LOOK	7
LITIGATION: OVERVIEW OF LIKELY KEY POSITIONS	8
SUPREME COURT: ELECTING THE DECIDING VOTE	10
U.S. TRADE: TRADE POLICY TAKES A RADICAL NEW DIRECTION	10

General Election Overview

The 2016 elections produced a seismic quake that hit Washington, D.C. with the surprise election of Donald Trump as president and the near Republican sweep of contested U.S. Senate elections ushering in a new political order that could herald significant and sweeping policy changes. Not only were the results a surprise but the country has never seen such an unconventional candidate as Donald Trump in the White House.

President Trump is neither a Republican nor Democrat in the traditional sense, making it difficult to predict what he will do when he is forced to govern, as opposed to his promises as a candidate. His nominations for key positions in his administration shed light on his administration's policy directions. A prudent course is to be prepared for the unexpected and a bit of inconsistency.

As the president works to set up his administration and Congress settles in after the elections, implications on policy may become clearer than they are at present. What we do know is that the impact of the 2016 election on future policy is significant.

The Senate will stand at 52-48 and the House is at 241-194, with Republicans maintaining the majority share of both. This means that although the Republicans control Congress they still do not have the 60 Senate votes needed to overcome a filibuster and pass most legislation. It is important to note there are a few legislative procedures that only require a majority vote and these will be incredibly important to Republican efforts – reconciliation, which is the vehicle Republicans will use to repeal the Affordable Care Act (“Obamacare”) and attempt to implement tax reform, and the Congressional Review Act, which allows Congress to overturn regulations issued within the past 60 legislative days.

Generally, there are three ways an administration can affect change:

- Items the administration can do unilaterally;
- Regulations; and
- Spending

There are actions the administration can take almost immediately that will impact businesses soon after because they do not involve congressional approval or rulemaking. Executive orders can be rescinded and created immediately and parts of trade policy can be changed without Congress or rulemaking.

Regarding regulations, generally Congress can vote to squash a regulation that has been finalized within 60 legislative working days (which given Congress' light schedule last year actually is on or after June 13, 2016). This would usually require a supermajority because the president who promulgated the regulation would

be expected to veto its repeal. The one time this does not happen is at the end of a change in administration. Regulations older than 60 legislative working days have to go through a more formal time-consuming process to be changed or rescinded. Administrations can also choose not to enforce or fund regulations.

Finally, there are those actions that require the input of Congress. How much funding programs receive or whether programs are zeroed out or greatly diminished fall into this category, as do major legislative restructures such as instituting changes to the tax code.

Although the election and retirements resulted in some changes in committee leadership in the House and Senate, none of the changes signal a major change in policy direction for the committees. The biggest leadership change is the retirement of Senator Harry Reid (D-NV) and the ascension of Senator Chuck Schumer (D-NY) to Senate Minority Leader. How Senator Schumer and Senator Mitch McConnell (R-KY), the Senate Majority Leader, work together will go a long way to determining how much legislation gets around the standard Senate gridlock.

President Trump has promised a lot, some of which his administration can do on its own and some of which will require Congressional approval. Congress does not move fast and cannot possibly handle all the items on the President and Republican leadership's to-do list, so not everything will be done on day one or by day 100 as promised.

It is expected that on issues not really mentioned during his campaign that President Trump may defer to Vice President Mike Pence, Speaker Paul Ryan and Majority Leader McConnell. Where the issues are in the control of agencies, who ends up in key agency slots will be telling for the policy direction of the given agency. Filling agency slots will take some time and there is a natural turnover of positions within the agencies at the second-tier, non-Senate confirmable level, as agency personnel decide whether or not they wish to serve in the new administration.

Finally, much of the policy making agenda will depend on how well Congressional Republicans can work with a Trump administration. For instance, President Trump has stated his plans for a large infrastructure bill, while conservatives in Congress will want any bill paid for with offsets and different factions, and have different positions on trade and tax policy. All of this will need to play out in due course. ■

Corporate: The Outlook for American Companies

A combination of the president's promises for deregulation, a reduction in corporate income tax (reportedly from 35 percent to 15 percent) and other tax reform, together with a drive to "Make America Great Again" has led to an increased optimism by corporate America for the future.

President Trump's targeted focus on major companies – Apple, Ford, Fiat/Chrysler, Boeing, Carrier to name but a few – to keep production in, or move it to, the U.S. and create jobs has led to a belief that companies will be expanding rather than contracting. Whether this will result in a uniform growth across all sizes and sectors of companies or just certain sectors remains to be seen, although one can expect growth in smaller to mid-size companies, both through an increase in hiring as well as mergers and acquisitions.

President Trump has identified assistance for small businesses to include, in addition to reduced taxes and deregulation at the state and federal levels, a streamlined system to communicate with the government and requirements for the federal government to hire small businesses. For larger companies, he has indicated tax and other incentives. Indeed, Ali Baba's Executive Chairman, Jack Ma has told President Trump that his companies plan to bring one million small U.S. businesses onto its platform to sell to Chinese companies over the next five years. Whether this will also have the same effect on the Fortune 500 companies is an open question, even though the founder of SoftBank, a Japanese telecom giant, has committed to create 50,000 new jobs in the U.S. with an investment of \$50 billion. A serious concern for all companies, but particularly small companies, has been increasing medical and health costs under Obamacare. If the Trump administration repeals Obamacare and replaces it with a more cost efficient and streamlined system of health care coverage, it will remove a serious impediment to the growth of small companies.

One important question hanging over the horizon is whether, and if so how, the threatened 35 percent tariff on a U.S. company that moves its production abroad and exports product back to the U.S. will actually be imposed and which companies will be targeted – those U.S. companies that have existing manufacturing operations overseas? Non-U.S. companies that import into the U.S.? Moreover, if such tariffs are imposed, will that increase the cost of U.S. made goods in the longer term? In any event, now may be a good time to establish operations overseas, particularly if production from these operations will not be shipped back to the U.S. but will serve markets outside the U.S. Conversely, foreign companies establishing manufacturing operations in the U.S. will skirt tariffs and trade barriers and benefit from the incentives and relaxed regulations mentioned by the president. Foreign companies, such as Honda, which have manufacturing facilities in the U.S.

and employ U.S. workers, may be well positioned under a Trump administration.

In summary, the outlook for American companies under a Trump administration is generally optimistic although it remains to be seen how the various incentives mentioned above will actually be implemented and how quickly. Certainly, the impact of a reduction in corporate income tax is expected to provide the primary stimulus for corporate growth, although what remains uncertain is the impact of any new legislation or policies that have not yet been mentioned by the Trump administration, and the overall impact on corporate America of the other proposed changes mentioned elsewhere in this briefing. ■

Cybersecurity: Trump Campaign Positions and Potential Administration Policies

Throughout the 2016 primaries and general election, President Trump's campaign and outsider status have made his governing policy positions difficult to predict with respect to cybersecurity. He has yet to engage high-profile national security or policy professionals who could outline in detail the contours of his policy.

Moreover, the president's stances on key issues have changed over time so as to reflect a more pragmatic (and less ideological) approach to cybersecurity.

The general components of the president's approach to cybersecurity are described on his campaign's website. The centerpiece of his approach is a top-down review of the U.S. cybersecurity posture, which will include an "immediate review of all U.S. cyber defenses and vulnerabilities, including critical infrastructure." This "Cyber Review Team" is to consist of key individuals from the military, law enforcement and the private sector.

Military Issues

With respect to the issue of military cyber defense, the president has promised a comprehensive review of all U.S. military cyber capabilities. In particular, the president has stated that he will order the Secretary of Defense and Chairman of the Joint Chiefs of Staff to undertake a review of the United States Cyber Command (CYBERCOM). This review will focus on "both offense and defense in the cyber domain" and comes at a critical time for CYBERCOM: both the Department of Defense and Congress are in a debate over the agency's fate – specifically whether to split it off from its current home at the National Security Agency and promote it to full combat command status, or to create an

entirely distinct military cyber force. The president has not yet taken a firm stance on this particular question.

On a related front, the president has advocated the strengthening of the U.S. arsenal of offensive military cyber capabilities – but details have yet to be announced. The campaign’s website states that President Trump will “develop the offensive cyber capabilities we need to deter attacks by both state and non-state actors and, if necessary, to respond appropriately.” In this regard, the president has cited cyber intrusions by both China and North Korea as examples of where the United States should “respond appropriately.” In sum, the president’s stance on cyber deterrence and on proportional response in the cyber domain will likely evolve as his governing team takes shape. This will become particularly instructive as we observe how he responds to the ongoing issues over Russian hacking/interference with respect to the Democratic National Committee IT systems and the recent U.S. presidential election.

Domestic Security

The president’s campaign vowed to “instruct the U.S. Department of Justice to create Joint Task Forces throughout the U.S. to coordinate federal, state, and local law enforcement responses to cyber threats.” In general, he has sided with law enforcement in the weighing of privacy concerns against security protections, stating that he would “err on the side of security.” For example, in the debate over encryption raised by the FBI’s court battle against Apple to unlock the iPhone of the San Bernardino shooter, he publicly sided with the FBI.

Accordingly, it would appear that the president would be in favor of government-mandated backdoors for law enforcement on digital devices protected by encryption.

Net Neutrality

President Trump’s policies have generally aligned with mainstream Republicans regarding the regulation of Internet carriers, technology and regulatory oversight. For example, he has publicly noted his opposition to the FCC’s Open Internet Order, which preserved the principle of “net neutrality” (the idea that Internet Service Providers should treat all Internet traffic equally). This is a strong indicator that the president may attempt to reverse that ruling, a stance that aligns closely with the positions of many Republican members in Congress.

Additionally, President Trump has advocated against transferring the Internet Assigned Numbers Authority (IANA) to an international body, rather than being managed by the U.S. government. Earlier this year, he supported a measure by Senator Ted Cruz (R-TX) that would stop the transfer and keep it part of the U.S. Department of Commerce’s National Telecommunications and Information Administration (NTIA). Regarding the issue, Trump campaign spokesman Stephen Miller has stated, “The U.S. should not turn control of the Internet over to

the United Nations and the international community.” The opposition appears to be motivated by fears that countries like China and Russia would be able to impose their own Internet censorship and restrictions on the United States or the wider global community. Though Cruz’s bill ultimately failed to pass, during his presidency Mr. Trump may continue to press the issue to return IANA to U.S. control under the U.S. Department of Commerce.

Assessment

Many of President Trump’s stated policy positions appear to have been formed by campaign staff and not policy experts for implementation. This model tracks his overall campaign strategy — which focused on broad messaging over policy detail. In the next few weeks, as his proposed governing team takes shape, the president’s cyber policies will likely evolve as more concrete and robust policy positions are formed for his administration. ■

Insurance: The Impact of Deregulation

Although media attention has been focused on the repeal and replacement of the Affordable Care Act (ACA), President Trump’s presidency, combined with Republican control of Congress, is bound to impact the insurance industry in more ways than one. Indeed, the majority of this impact may come about through large-scale deregulation unrelated to the ACA. Broad financial industry deregulation, which was promoted by Trump and the Republican Party throughout the 2016 election cycle, is expected to decrease the regulatory burden placed on insurers and allow for the states to remain as the primary regulators of insurance.

In order to understand the effects that deregulation would have on the insurance industry, it’s important to understand some background on the way that insurance has traditionally been regulated in the United States. Since the passage of the McCarran-Ferguson Act in 1945, the insurance industry has been exempt from federal regulation that is not expressly directed towards the business of insurance. As a result, the regulation of insurance has primarily been the responsibility of the states. However, in recent years, the amount of federal legislation affecting the insurance industry has increased by way of legislation like the ACA and the Dodd-Frank Act (DFA), which regulates large sectors of the financial services industry including to some extent the insurance industry.

During his campaign, President Trump pledged to repeal the DFA and criticized the regulatory burdens it imposes on the U.S. economy. If the DFA is repealed or limited, one effect could be the elimination or at least a decrease in the regulatory requirements placed upon Systematically Important Financial Institutions (SIFI) such as AIG and Prudential. This would mean that these large insurers, and

others that could qualify as SIFI's, would be able to dedicate less time and money to comply with federal regulations.

The Federal Insurance Office, which was also created by the DFA, may be narrowed or eliminated under the new regime. The Federal Insurance Office is primarily considered an information gatherer that was meant to inform Congress on insurance matters. However, its responsibilities include representing the United States in international negotiations related to insurance, along with the authority to enter into agreements with other nations on insurance regulatory matters. Critics of the Office maintain that it requires insurers to place too much focus on complying with international regulations, and suggest that limiting or abolishing the Office would allow for insurers to focus on the U.S. market. On the other hand, supporters of the Office note that it can play an important role in educating Congress on insurance issues – and some have argued that Congressional understanding of the insurance industry is sometime woefully inadequate. Also, the Treasury Department and the U.S. Trade Representative have reportedly at long last entered into a covered agreement with the European Union.

The covered agreement was principally negotiated on the U.S. side by the Federal Insurance Office and if ultimately adopted could have a material impact on cross border trade for both reinsurance and direct insurance. Some U.S. insurance trade associations representing member insurers for whom cross border trade is an important part of their overall business strategy support the covered agreement for that reason. It remains to be seen what view the Trump administration will take on this agreement.

Although President Trump and Congress are expected to remove many federal regulations placed on the insurance industry, there is a key aspect of the McCarren-Ferguson Act that is expected to be repealed.

The Act currently allows for each state to establish its own mandatory licensing requirements for insurers. Accordingly, an insurer must be licensed in any state where it attempts to do business. Both President Trump and Congress have expressly stated that they intend to repeal this section of the Act, and to permit insurers to sell across state lines as long as the products comply with the regulations of the state where the products are being sold. Proponents of the change suggest that allowing for full competition in the market will cause insurance costs to go down and consumer satisfaction to go up.

Lastly, the manner in which the Trump administration balances consumer protection with deregulation could impact insurers. The Department of Labor's fiduciary rule has received a great amount of criticism from Republicans. The rule – expected to go into effect in April 2017 – requires among other things that financial advisors put their client's interests first by providing impartial retirement planning advice. Republicans claim that the rule will place an undue burden on insurers, many of whom offer products related to retirement, by excessively increasing costs of compliance.

It is expected that implementation of the rule will at least be delayed, if not entirely scrapped.

While the insurance industry will feel the effects of the ACA being repealed, these examples provide insight into the fact that the industry will also feel the effects of the general deregulation that Trump and Congress have endorsed. ■

Intellectual Property: The Climate for Innovation Under President Trump

Intellectual property is a driving force in today's global economy of constant innovation. It is the wellspring of American economic growth and job creation, empowering our nation to be the world leader in innovation for nearly two centuries. With the rise of the digital economy, it has become even more critical that we protect intellectual property rights and preserve freedom of contract rather than create regulatory barriers to creativity, growth, and innovation. That is why it is imperative that we maintain a fair, balanced, non-discriminatory system that improves the climate for innovation that is essential to American competitiveness in the global economy. Threats to the U.S. IP system put our economy, our competitive advantage and our national security at risk.

There are several policy considerations that will be considered by the president, his new administration, the United States Patent and Trademark Office (USPTO), and the Republican Congress. International businesses should consider these likely changes under the new regime when making plans:

- **Enforce Laws Against Infringement:** Protecting intellectual property advances national security and the safety of Americans. It enables the U.S. to guard against counterfeit products that can harm consumers and endanger health and help rid our supply chains of faulty and shoddy counterfeit parts that can compromise the reliability of our weapons systems and the safety of military personnel. Often today, the worst offenses against intellectual property rights come from abroad, especially China. Congress and President Trump will act to enforce intellectual property laws against all infringers, whether foreign or domestic.
- **End Diversion:** The USPTO will be allowed to retain all of the fees that it collects for reviewing and processing patent and trademark applications, and for other services of the Office. Over the past four years more than \$400 million in user fees paid to the USPTO have been diverted in support of unrelated government programs. For the USPTO, ending diversion would help ensure the quality of issued patents,

improve operational efficiencies, and reduce the time it takes for patents to issue. For America's inventors, ending fee diversion would spur investment, economic growth, and the ability of businesses to create new jobs by getting better quality patents out of the door of the USPTO and into their hands more quickly.

- **Address Patent Subject Matter Eligibility:** The U.S. must focus on the protection of intellectual property rights and set the gold standard for nations to follow. American innovations and the intellectual property system that drives them are the envy of the world. The U.S. will ensure that its patent system rewards innovators across all sectors of the economy and guard against an erosion of protection that will drive essential investment outside the U.S. Recent Supreme Court decisions in cases involving diagnostic methods, personalized medicine and software business methods will be narrowly construed and applied as the Court intended. The USPTO will act to ensure that its own practices and procedures support broad patent subject matter eligibility.
- **Improve Post Grant Processes:** In addition, rules governing administrative review proceedings at the USPTO will be reviewed to ensure fairness to patentees and petitioners. The current post-grant processes at the USPTO will be improved to reflect the balance intended by the 2011 America Invents Act. Areas including ensuring the ability of patentees to amend claims, the presumption of validity, standards of claim interpretation, and deterring abuses of post-grant processes will be addressed through USPTO procedures and, if necessary, through legislation.
- **Assess Patent Reform:** Finally, the administration and Congress will continue to assess the need for patent litigation reform, an area that has occupied the courts and policymakers for more than a decade. Too many patent cases are being directed to the Eastern District of Texas, where the parties often have little contact, and venue shopping may require further review if the Supreme Court does not act. Other proposals designed to address asymmetries in some patent litigation will be evaluated to determine the extent to which the courts are tackling abuses and guiding improvements. Any legislative action will be narrowly focused and crafted to preserve the ability of legitimate plaintiffs to assert their patent rights.

Article 1, section 8 of the Constitution gives Congress the power to safeguard intellectual property rights for "Authors and Inventors." By protecting the proprietary rights of creators and innovators, the Constitution promotes the general welfare by providing incentives for investment in all sorts of technology and artistic works. President Trump, his administration, and the Republican majorities in Congress have an obligation to meet to steward our nation's leadership in innovation by ensuring a robust and fair IP system in the U.S. ■

Labor and Employment: How the Trump Administration's Pro-Employer Agenda Might Look

Other than making broad promises to save American jobs from being lost to foreign manufacturing, as a presidential candidate, Donald Trump did not have much to say about labor and employment laws or policy. The alignment of the White House, Senate and House all under the control of the employer-friendly Republican Party, however, creates the opportunity for the Republicans, and interest groups aligned with them, to push forward a pro-employer agenda.

Affordable Care Act (ACA or Obamacare)

Both President Trump and the political party he joined to run for president promised repealing and replacing the entire law, with then-candidate Trump saying multiple times that the ACA will be replaced with "something much better." The new Congress is in session, and there is no clear indication of what the "something much better" will be nor is there any indication of the timing or breadth of repeal. In the meantime, employers should continue to comply with the law as it has been written.

Federal Deregulation Across the Board

Congress is already working on legislation to sweep away many of the regulations put into place by the Obama administration, particularly regulations implemented since June 2016. In fact, Congress is working on a bill that would remove all regulations implemented since June 12, 2016, by amending the Congressional Review Act (CRA).

Likely targets of this law include an obligation by federal contractors to provide paid sick leave, as well as regulations compelling federal contractors to disclose, as part of the bidding and contract process, violations of various labor and employment laws. The overtime regulations that greatly increased the salary that must be paid to exempt employees so that they are not paid overtime for hours worked in excess of 40 in a week appear to have been put in final form too early to be hit by the CRA, but those regulations may be overturned as part of a new regulatory initiative (assuming they survive the current court litigation now in progress, with a preliminary injunction putting them on hold while an appellate court reviews them).

The incoming Secretary of Labor is from the fast-food industry, and he has been an outspoken critic of laws providing labor protections for workers, with particular opposition to any increase in the minimum wage. Under

the regulatory scheme, however, the minimum wage is set by Congress, and not by the Department of Labor.

It is likely that the EEOC will have appointees who will kill the new EEO-1 form, which would in 2018 require the reporting wage bands paid to employees of different races and sex.

Shift of Focus to State and Local Laws

With the retreat of the federal government in providing new labor protections, it is likely that the bigger states will expand their protections for employees. This will result in a yet more complicated patchwork of laws for larger employers, particularly with local governments across the country passing mandatory sick leave laws, each with their own peculiarities.

Litigation

Since the election results were announced, both the FBI and the Southern Poverty Law Center have announced that hate crimes are being committed at new levels of frequency, and there is fairly widespread open and notorious anti-racial speech. In this environment, one can expect open racial, sexual and religious hostility to reveal itself in the workplace, which will result in an increase of claims in response to that hostility, which may well include pattern and practice claims, and the return of race class actions. Harassment training is the best answer for this problem, but the trainers had better be prepared for open push-back against notions of diversity.

Arbitration of Employee Lawsuits

Over the last three decades there has been much back and forth as to what kind of employment claims can be forced into private arbitration, and whether there can be waivers of class action claims. Congress can address this without fear of veto, and as a consequence there may be a legislative initiative to strengthen the Federal Arbitration Act with respect to employment and wage and hour claims, as well as some legislation permitting class action waivers. The United States Supreme Court just announced that it is taking up the class action waiver issue in the labor context, so legislation may be forestalled on that point until the Court addresses the issue.

No Federal Anti-Bullying Legislation

Despite the incoming First Lady's recently announced campaign against cyber bullying, we doubt that contemplated federal anti-bullying legislation will happen. This website likely will disappear: www.stopbullying.gov/laws/. Many states will fill in the gap, likely led by California.

E-Verify (Proof of Employment Eligibility)

Employers must obtain I-9 forms from new employees to ensure that they are eligible to work in the United States. A streamlined way to verify the information given on an I-9 is E-Verify, an online system required for certain federal contractors. It may well be that the requirements to use E-Verify will be expanded to include almost all employers. ■

Litigation: Overview of Likely Key Positions

While in a normal election cycle, a read of the tea leaves regarding expected activity on the litigation front would be easily predictable, we currently face great uncertainty with the onset of the new administration.

With a Republican in the White House, a general expectation would be pursuits designed to reform litigation. Specifically, if one were to follow the lead of recent Republican legislative efforts and typical Republican campaign positioning, there should be expected legislative efforts to reduce both the volume and cost of litigation. In fact, the 2016 Republican Platform contained a specific portion titled, "Better Care and Lower Costs: Tort Reform" which espoused support for "legal reforms" in the medical malpractice arena. The explicit reform supported was federal and state legislation designed to cap non-economic damages in medical malpractice lawsuits.

That being said, the business practices of President Trump seem to signal a potential deviation from this expected position. As a businessman, Mr. Trump has been an active and aggressive participant in litigation, including sitting for a deposition just two weeks prior to his inauguration in a lawsuit he initiated against famed Chef Jose Andres for an alleged breach of an agreement by the chef to open a restaurant in a new Trump hotel in Washington, DC. Further, unlike previous Republican candidates, President Trump did not make litigation reform a centerpiece issue during his campaign. Notably, some of what he did say, including comments in favor of liberalizing libel law to allow more suits against the press, is contrary to the expected goal of a reformed, less costly and more predictable legal system.

Further, from all accounts, President Trump is also going to be a populist president. For example, at his first pre-inauguration press conference, he took aim against pharmaceutical companies for drug pricing issues. With that as a backdrop, President Trump has frequently been involved in litigation as both a plaintiff and defendant. While he may seem to be a proponent of populist-leaning issues and litigation in general, he has not expressed any direct indication that his views regarding litigation and the legal system are pro-plaintiff or pro-trial-lawyer.

Once again, to continue on the train of hedging, there are indicators that the Trump administration will maintain some continuity with the generally expected Republican

tort reform positions of earlier administrations as well as of Congressional Republicans.

Republican congressional leadership will likely introduce and pursue litigation reform ideas, at least some of which will receive full presidential support. These proposals also fall in line with President Trump's stance against over-regulation, and his apparent favoring of the elimination of rules and regulations that could serve to eliminate prospective litigation. For example, it would be expected that President Trump will support current litigation reform proposals designed to block or minimize federal Obama administration initiatives including:

- Eliminating initiatives to restrict or ban the use of arbitration clauses in labor settings and consumer contracts, particularly in the financial services and communications areas.
- Eliminating proposals to extend overtime rules into the white-collar workforce, with wage-and-hour class actions inevitably to follow.
- Stopping the interpretation of the Americans with Disabilities Act to require websites and online services to be made accessible to disabled users under the threat of lawsuits.

Additional litigation reform ideas that received recent legislative attention will also likely be reintroduced and will seemingly not face any opposition by the president. These initiatives include:

- The Fairness in Class Action Litigation Act, a bill designed to ensure that class action plaintiffs could only pursue claims on behalf of individuals who allegedly sustained similar alleged injuries.
- The Furthering Asbestos Claim Transparency Act, legislation that would require greater public disclosures about plaintiff counsel management of trusts administering asbestos claim funds.
- The Senate Judiciary Committee has shown interest in addressing potential abuses arising out of the increasing use of third-party litigation financing of lawsuits (financing by outside parties who arguably may influence attorney-client decision making). Reports indicate that Judiciary Committee inquiries into this type of financing may result in proposals regarding disclosure requirements and regulations.
- The House Judiciary Committee has addressed the trend of mass tort litigation claims being initiated in federal courts and multidistrict litigation proceedings without pre-filing investigation. Additionally, there may be interest in the growing problem of plaintiffs' counsel strategically using pleadings to avoid federal jurisdiction, and to utilize certain specific state targeted state courts for litigating mass torts, even though these jurisdictions lack any relationship with the jurisdiction.

The new administration is also not likely to diminish the current focus on litigation to prosecute health care fraud and abuse, including civil and criminal prosecution of

health care companies. Action against waste, fraud and abuse generally will maintain bipartisan support, and the majority of the decision making regarding investigations and initiating charges are largely in the discretion of career federal prosecutors. While the change in leadership of U.S. attorneys' offices and the Department of Justice may result in some nominal delays in the pace of enforcement actions, this enforcement action is likely to continue.

Also, expect appointment of judges and the nomination of Supreme Court Justices who will support federal preemption of certain types of tort claims. This would serve to preclude/preempt certain types of litigation. For example, failure to warn claims seeking to impose strict liability under state tort law against generic drug manufacturers have been held to be preempted as federal regulations governed and approved the drugs. Despite the president's recent anti-pharmaceutical industry rhetoric, we should anticipate an end to proposed legislation to overturn this type of preemption, and also anticipate the appointment of additional judges who will tilt toward preemption in such cases addressing the relationship between federal regulations that govern the manufacturers and sale of prescription drugs and state tort laws that govern products liability.

In recent years, there has been an increase in federal rulemaking and standard-setting activity relating to issues including product safety requirements, material restrictions and energy efficiency standards. As previously noted, these initiatives do not appear to be high on the radar of the Trump administration, so we can generally expect deregulation, less federal oversight and less of a directive for agencies such as the EPA, the Consumer Product Safety Commission and the FDA to utilize their enforcement powers. This in turn may actually serve to increase civil litigation, however, as the plaintiffs' bar will likely attempt to fill the void caused by federal regulatory inaction, using current product liability laws and litigation as their manner of attempting to check the actions of manufacturers.

Overall, without any definitive positions having been taken by President Trump during the election campaign or to date, this all remains speculative. Further, any predictions depend on approved appointments that are currently in process. It would be surprising if President Trump broke with the prevailing sentiment of the business community and the Republican Party, which all tilts in favor of some form of litigation reform.

However, President Trump's statement in October regarding acceptance of the election results rings true here as well, "What I'm saying is that I will tell you at the time. I'll keep you in suspense." ■

Supreme Court: Electing the Deciding Vote

One of the most obvious consequences of the election is that neither Merrick Garland nor some other like-minded jurist will be taking Justice Antonin Scalia's place on the Supreme Court of the United States. The empty seat on the high court – and more than 100 vacancies on lower federal courts – will now be filled by President Trump, who is expected to nominate much more conservative judges than either President Obama or Hillary Clinton would have named to the bench.

It is worth noting that the two parties contested the 2016 election on precisely this issue, with the Democrats stressing the importance of the justice's deciding vote on issues like abortion and campaign finance (*Citizens United v. FEC*) and the Republicans warning of a threat to the Second Amendment rights the court had recognized by narrow 5 to 4 majorities in *District of Columbia v. Heller* and *McDonald v. City of Chicago*. This latter argument about gun rights was aggressively advanced by the National Rifle Association and may well have been decisive in producing President Trump's lopsided margins in the more rural counties of Michigan, Pennsylvania and Wisconsin.

But while both the Republicans and Democrats argued in the campaign about how the next Supreme Court justice could influence hot button political issues, they paid less attention – at least publicly – to critical questions about executive power and regulatory authority as to which the court also appeared to be deadlocked as of Election Day.

On February 9, 2016, the Court issued a stay in *Murray Energy Corp. v. EPA*, thereby halting implementation of the Environmental Protection Agency's Clean Power Plan pending the resolution of legal challenges. The unexpected stay appeared to forecast a major ruling on an unusually aggressive agency assertion of power that many considered to be well beyond that which Congress had delegated. But when Justice Scalia unexpectedly died a few days after the stay was issued, the 5 to 4 court that had reached that result was suddenly evenly balanced and the ultimate outcome was in doubt.

Similarly, at the end of the last term, in *United States v. Texas*, the Court was deadlocked at 4 to 4 and thus left standing an appeals court ruling blocking President Obama's immigration plan – a plan the president believed he could implement on his own without the consent of Congress. When the court had taken the case the previous January, it was widely believed that a major ruling on presidential power was in the offing. As with the EPA case, however, the death of Justice Scalia had produced a deadlock that left the likely resolution of the scope of the president's executive power in doubt.

Had the Senate "consented" to the nomination of Merrick Garland – or if the Democrats had won the election – 5 to 4 rulings upholding both Obama's claimed executive power to proceed by "pen and phone" and the EPA's unilateral authority to expand the scope of its delegated authority were in the cards. As it has turned out, however, President

Trump's election will almost certainly resolve these cases against executive and regulatory authority whether or not the Supreme Court ends up writing a definitive opinion on either.

The new administration can and presumably will impose its own values and priorities through the use of executive orders and agency decrees such that the pending cases may be moot before they are decided. Also, the new president will of course appoint judges who are less receptive to the positions advanced by President Obama and the EPA in those cases. It is thus one of the ironies of the 2016 election that the unexpected success of the candidate frequently described as having an "authoritarian" streak turns out to have derailed a significant expansion of executive power that a true authoritarian would presumably have welcomed. ■

U.S. Trade: Trade Policy Takes a Radical New Direction

As early as 2000, Donald Trump declared his disdain for U.S. trade policy. In a book entitled "The America We Deserve," he envisioned himself as the top trade negotiator for the United States with the single-minded mission to renegotiate trade deals and end the "rip-off of the United States." Thus, it should come as no surprise that the new administration plans to make good on its previous promise to turn U.S. trade policy on its head. This effort will be directed at bringing back manufacturing jobs to the U.S., punishing China for unfair trade practices, reversing economic sanctions and the expansion of national security reviews conducted by the Committee on Foreign Investment in the United States (CFIUS).

The scale, scope and timing of these initiatives will be shaped by a number of agencies, including the Departments of Treasury, Justice, Homeland Security, Defense and State, as well as the White House Offices of the U.S. Trade Representative and the newly formed National Trade Council. Therefore, the individuals selected to head these agencies and the extent to which there is either cooperation or competition among them may provide the best early indication of where U.S. trade policy is headed.

Competing Voices on the Direction of Trade

For more than 50 years, the office of the U.S. Trade Representative (USTR) has been the chief agency responsible for developing international trade and investment policy, overseeing trade negotiations and representing U.S. interests at the World Trade Organization (WTO). President Trump has picked Robert Lighthizer as head of the USTR,

who served as deputy trade representative during the Reagan administration.

To ensure that there will be a heavier White House hand in trade policy, the president has created a National Trade Council to advise him on innovative strategies in trade negotiations and to assess manufacturing capabilities, as well as to protect the industrial base, among other tasks. The council will be led by Peter Navarro, an academic economist. In addition, it has been reported that Secretary of Commerce nominee, Wilbur Ross, a billionaire investor, will be hands-on in the policy making and negotiations of trade agreements. Other advisors in President Trump's inner circle are expected to have input as well, including Carl Icahn; Gary Cohn, the president of Goldman Sachs, who will head up the National Economic Council; Rex Tillerson, Secretary of State nominee; and Iowa Governor Terry Branstad, President Trump's choice for ambassador to China.

At this time, it is unclear how the USTR's historical role of chief U.S. trade official could be limited or undermined by other voices and agency heads. Further, the fact that these individuals' viewpoints range from adamant free traders (Icahn, Cohn, Tillerson and Brandstad) to trade protectionists (Navarro and Ross) could fuel tensions and lead to internal scuffles over control of U.S. trade policy. However, based on his pre-inaugural statements, President Trump is not likely to empower any one individual or agency with sole oversight of this area but instead will foster competing positions from which he will choose to act upon.

Free Trade Agreements on Uncertain Footing

Statements made by President Trump both pre and post-election have led to many uncertainties regarding the future of bilateral and multilateral trade agreements. The North American Free-Trade Agreement (NAFTA) was harshly criticized during the election primaries, with promises to renegotiate, or withdraw from, this three-way trade arrangement among the United States, Canada and Mexico. Although NAFTA was implemented more than 23 years ago, the Trump transition team pledges to get a better deal for U.S. workers. President Trump has also made numerous statements promising to file a notification of intent to withdraw from the Trans-Pacific Partnership mega-regional trade deal, intended to be a hallmark of President Obama's administration. How the new Trump administration plans to engage in trade negotiations with its trading partners is still to be determined. Nonetheless, based on the President's position and statements, at the core of new or renegotiated trade deals will be safeguarding U.S. commercial interests and protecting U.S. jobs.

Floating the Idea of Increased Import Tariffs

The incoming administration favors imposing a so-called "border adjustment tax" on imports into the United States. This notion has some support within Congress and is

included in House Speaker Paul Ryan's "Better Way" tax-reform blueprint. If implemented, economists predict that the tax would have no effect on the trade balance, could fuel inflation and sporadic recession in manufacturing, and hurt U.S. companies by making U.S. exports more expensive and foreign imports less expensive. Moreover, the envisioned border tax could trigger retaliation under WTO rules and prompt trade wars.

Increased Use of Trade Remedies

The use of antidumping (AD) and countervailing (CVD) duties in the U.S. over the past two years has significantly escalated and is expected to further increase under the Trump administration. This rise can be attributed to a marked increase in U.S. investigations being initiated against China and to bipartisan legislation enacted in 2016 that seeks to strengthen trade enforcement efforts against AD/CVD duty evasion. In addition, the U.S. Ambassador to the WTO has warned that "support in the United States for any future trade liberalization agenda will be on highly unstable ground if injurious dumping and subsidization are not met with effective and enforceable remedies."

Reshaping U.S. Relations with China

President Trump and his trade advisors (Navarro, Ross and Lighthizer) have been highly critical of China for "unfair" trade practices. In addition, President Trump has chastised China for contributing to certain geopolitical tensions, including not taking a stronger stance with North Korea for its aggressive nuclear build-up and otherwise threatening behavior. With an eye towards persuading China to change its ways, the Trump team is exploring various options, including designating the country as a currency manipulator, enforcing trade laws more rigorously and imposing a punitive tariff on Chinese imports. Both politicians and pundits warn that curtailing trade with China is likely to hurt the U.S. economy and prompt a full-scale trade war between the world's two largest economies.

Reversing Sanctions

During the presidential campaign, President Trump was critical of loosening sanctions against Iran and Cuba, and if he so chooses, could reverse many of President Obama's sanction changes early in the new administration. With respect to Iran, much of the Joint Comprehensive Plan of Action and other loosening of sanctions have been implemented through administrative action only, and the new administration could reverse many of these changes unilaterally and immediately. Similarly, recent changes to sanctions against Cuba were made administratively and could be changed unilaterally. Therefore, license exceptions for the sale of goods to Cuba, the loosening of travel restrictions and similar relaxations of restrictions could be reversed immediately by the new administration. On the flip-side, President Trump has been critical of sanctions against Russia, in particular those implemented as a result of alleged interference in U.S. elections. Again, President Trump could reverse these sanctions quite quickly, although he does not appear to be quite in sync with many

of his cabinet appointees on the subject of Russia and its relations with the U.S.

CFIUS

The past year has seen increased activity by the Committee, most notably in connection with China's attempts to expand its access to semiconductor and other technologies. All indications are that this trend will continue and perhaps even expand with the incoming administration's focus on China and concerns regarding the offshoring of U.S. technology and production.

As with many other areas of policy, it is impossible to know with any certainty what the incoming administration will do. However, given the public pronouncements that the president has made, we expect that the early months of the new administration will be fast-paced and transformative. ■

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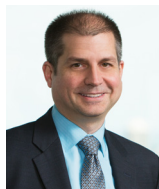
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