

## White Paper

December 19, 2016

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- New Administration Takes Office In January
- Potential Ramifications of Campaign Promises to Repeal The ACA and Dodd-Frank
- Impact to Employers, Including Payroll and Employee Benefits
- Information About Presidential Appointees
- Pending and Upcoming Supreme Court Cases

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Authored by Wolters Kluwer Editorial Staff

# Trump's Win Expected to Bring Significant Legal and Regulatory Changes

The November 8, 2016, election of Donald J. Trump (R) and his running mate, Indiana Governor Mike Pence, to the presidency will have a significant impact on federal laws and regulations. The forthcoming changes will affect the practice of several areas of law, corporations, banks, hospitals, and individuals. In addition to controlling the executive branch, the GOP will retain control of both Houses of Congress, with Rep. Paul Ryan (R-Wisc) continuing as Speaker of the House, and Republicans maintaining a slim 52 to 46 lead over Democrats and two Independent Senators who caucus with the Democratic party. One of the President-elect's first orders of business will be to nominate a Supreme Court Justice to replace Justice Antonin Scalia, who died earlier in 2016. Outgoing President Barack Obama (D) nominated D.C. Circuit Chief Judge Merrick Garland to fill the vacancy, but the Senate refused to hold hearings or vote on Garland's nomination. Tom Goldstein of Goldstein & Russell, the publisher of the SCOTUSblog and a veteran of numerous appearances before the Supreme Court, noted that in addition to the Scalia vacancy, there are currently two Justices over 80 years of age, Ruth Bader Ginsburg and Anthony Kennedy. Trump's Supreme Court appointments are likely to have an impact on the legal landscape of the country for 25 years or more, depending on whether the new president serves four or eight years. Trump's stated desire to appoint Justices "in the mold" of Scalia could significantly reshape the Court into a much more conservative Court.

As President, Trump will appoint Cabinet Members, Secretaries, Administrators, and other key agency positions. The President-elect's transition website, [greatagain.gov](http://greatagain.gov), contains information about his planned appointees. The site also lists Trump's plans for his administration's policy priorities. The statements and policies Trump discussed throughout the campaign, not all of which align with those listed on the transition page, can be found at [donaldjtrump.com](http://donaldjtrump.com). This White Paper is based on President-elect Trump's statements and proposals from the campaign and his transition team, as well as proposed legislation introduced by key members of Congress, including Ryan's **A Better Way** plan, which addresses tax reform, health care, and economic changes

Much of Trump’s campaign was premised on dismantling actions taken by the Obama Administration. The President-elect promised to “repeal and replace” the Affordable Care Act (ACA)—which is composed of two laws, the Patient Protection and Affordable Care Act (PPACA) (*P.L. 111-148*), and the Health Care and Education Reconciliation Act of 2010 (HCERA) (*P.L. 111-152*)—and to undo the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) (*P.L. 111-203*). One of the President-elect’s priorities is undoing many of Obama’s Executive Orders (EOs) and so-called “Midnight Rules”—new regulations released during the final weeks of the Obama Administration. Republican leaders of committees that oversee financial regulators have asked those agencies not to pursue major rules before the Trump Administration begins. The House recently passed the Midnight Rules Relief Act of 2016 by a *vote* of 240 to 179. The bill (*H.R. 5982*) would amend the Congressional Review Act to grant lawmakers a method for disapproving rules adopted late in a president’s term. A *similar bill* was introduced in the Senate. However, the Obama Administration issued a *veto statement* on the House bill in which it questioned the “arbitrary” way the bill would allow Congress to package rules for disapproval votes. The White House also argued that the legislative effort aims “to solve a problem that does not exist” under current laws, executive orders, and the review process used by the Office of Information and Regulatory Affairs.

*the Speaker wants to implement. Trump’s statements include a campaign document detailing Trump’s **100-Day Plan**, explaining what he hopes to accomplish during his first 100 days in office. These proposals and plans will become more detailed, and may change, after the 115th Congress convenes on January 3, 2017, and following Trump’s January 20 inauguration.*

*Additionally, according to the President-elect’s transition website, Trump’s **regulatory reforms** will include a “temporary moratorium on all new regulation, canceling overarching executive orders,” and eliminating “unnecessary regulations that kill jobs and bloat government.”*

*This White Paper analyzes the potential impact of the Trump Administration on Tax, Health Care and Life Sciences, Banking and Financial Services, Federal Securities, Antitrust and Competition, Law Labor and Employment Law, Employee Benefits, Payroll, Pension and Retirement, Energy and Environmental Law, and Government Contracts. Each section analyzes the potential changes Trump’s administration may implement based on his statements and proposals during his campaign and his cabinet nominees’ positions on issues; and the risks and impact to the practice of law, businesses, and individuals. Other practice areas, including Intellectual Property and Products Liability, are less likely to face immediate changes under the Trump Administration.*

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## Tax

*By: Wolters Kluwer Tax Editorial Staff*

Donald Trump is expected to bring changes to the tax laws for individuals and businesses. President-elect Trump had made tax reduction a centerpiece of his economic plans during his campaign, saying he would, among other things, propose lower and consolidated individual income tax rates, expand tax breaks for families, and repeal the ACA.

More immediately, the results of the November 8 election may impact year-end 2016 tax planning, because of both last-minute provisions soon expected to be passed by the “lame-duck” Congress—or by the new Congress early in 2017, to be made retroactive to January 1, 2017.

**IMPACT.** Before the November 8 elections, the House approved a number of tax bills, which will likely be part of year-end 2016 tax legislation or legislation to be approved in early 2017. These include bills related to the IRS's civil asset seizure authority, employee stock ownership plans, the tax treatment of certain damaged crops, and more (see discussion below). Congress also needs to pass an omnibus spending bill to keep the federal government, including the IRS, open after mid-December 2017.

## First 100 Days

Within his 100-Day Plan, Trump listed several tax proposals to immediately work with Congress on enacting:

- The Middle Class Tax Relief and Simplification Act—According to Trump, the legislation would provide middle class families with two children a 35 percent tax cut and lower the “business tax rate” from 35 percent to 15 percent. During the campaign, Trump described the plan as “an economic plan designed to grow the economy 4 percent per year and create at least 25 million new jobs through massive tax reduction and simplification.”
- Affordable Childcare and Eldercare Act—A proposal described by Trump during the campaign that would allow individuals to deduct childcare and elder care from their taxes, incentivize employers to provide on-site childcare and creates tax-free savings accounts for children and elderly dependents.
- Repeal and Replace Obamacare Act—A proposal made by Trump during the campaign to fully repeal the ACA, along with associated taxes.
- American Energy & Infrastructure Act—A proposal described by Trump during the campaign that “leverages public-private partnerships, and private investments through tax incentives, to spur \$1 trillion in infrastructure investment over 10 years.”

## Individual Taxation

### Income Tax

During the campaign, Trump proposed to compress the current seven tax brackets, which currently tops out at 39.6 percent, down to three brackets. Trump's proposal would reduce rates on ordinary income to 12, 25, and 33 percent.

**COMMENT.** Trump's tax plan for three-bracket tax rate structure of 12, 25, and 33 mirrors the House GOP Tax Reform Blueprint released in June 2016. Trump has not specified the income levels within which each bracket percentage would fall. The GOP's proposal would lower rates as follows:

### Individual Income Tax Rates

Current Rates	Trump/GOP Rates	Joint Filers : Blueprint	Single Filers: Blueprint
10% 15%	0%/12%	up to \$75,300	up to \$37,650
25% & 28%	25%	up to \$231,450	up to \$190,150
33%, 35% & 39.6%	33%	above \$231,450	above \$190,150

Under Trump's plan, the standard deduction would increase to \$15,000 for single individuals and to \$30,000 for married couples filing jointly. In contrast, the 2017 standard deduction amounts under current law are \$6,350 and \$12,700, respectively, as adjusted for inflation.

Trump also proposed during the campaign to implement a cap on the amount of itemized deductions that could be claimed at \$100,000 for single filers and \$200,000 for married couples filing jointly. Additionally, according to campaign materials, all personal exemptions would be eliminated, as would the head of household filing status.

**IMPACT.** One result of increasing the standard deduction would apparently be to reduce the number of taxpayers who itemize deductions.

### Capital Gains/Dividends

The current rate structure for capital gains would apparently remain unchanged under Trump's plan.

Trump presumably would also retain the same rates for qualified dividend income. However, Trump has proposed to repeal the 3.8 percent net investment income (NII) tax imposed on passive income, including capital gains.

**IMPACT.** *The current rate structure, imposed based upon income tax brackets, would presumably be re-aligned to fit within Trump's proposed percent income tax brackets.*

### Estate and Gift Tax

During the campaign, Trump proposed to repeal the federal estate and gift tax. The unified federal estate and gift tax kicks in at \$5.490 million for 2017 (essentially double at \$10.980 million for married individuals),

**IMPACT.** *Late in his campaign, Trump also added to estate and gift tax repeal a proposal that would disallow "stepped up basis" to shelter otherwise taxable gains of more than \$10 million under the income tax. Currently, any asset that passes through an estate receives a tax basis equal to date of death value, a significant tax advantage when the asset is eventually sold by heirs. Trump's plan would appear to provide exemptions for small businesses and family farms.*

### Alternative Minimum Tax (AMT)

During the campaign, Trump proposed to eliminate the alternative minimum tax (AMT).

**COMMENT.** *National Taxpayer Advocate Nina Olson has recommended Congress permanently repeal the AMT. Although it serves as a revenue source, significant tax reform would likely present other options to offset the cost of elimination.*

### Net Investment Income (NII) Tax

Trump's campaign promise to repeal the ACA would apparently include repeal of the 3.8 percent net investment income (NII) tax as well as the 0.9 percent on compensation income not captured by the NII tax (the Additional Medicare Tax).

### Childcare Tax Benefits

Trump proposed during the campaign to create new deduction for child and dependent care expenses, as well as increasing the earned income tax credit (EITC) for working parents who would otherwise not qualify for the deduction. Trump's plan, as explained during his campaign, would provide:

- "Spending rebates" to lower-income families for childcare expenses through the EITC. "The rebate would be equal to 7.65 percent of remaining eligible childcare expenses, subject to a cap of half of the payroll taxes paid by the taxpayer," according to campaign materials.
- "Above-the-line" deductions for child and elder care expenses, for taxpayers with income of up to \$500,000 for joint filers and \$250,000 for single filers. Caps would be set at state average costs for child care and \$5,000 per year for eldercare.

Trump also proposed during the campaign to create Dependent CARE Savings Accounts (DCSAs), tax-favored savings accounts for children, including unborn children, and dependent care expenses, which would be matched by a 50 percent government contribution. The savings accounts would have an annual contribution limit of \$2,000. Trump's plan would also expand the credit for employer-provided childcare.

### Carried Interest

Trump proposed during the campaign to tax carried interest as ordinary income.

**IMPACT.** *Private equity partners have been taxed at 20 percent, the current top rate for capital gains.*

### Business Taxation

#### Corporate Income Tax

During the campaign, Trump proposed to lower the business tax rate to 15 percent and eliminate the corporate alternative minimum tax.

**COMMENT.** *The current top corporate income tax rate is currently 35 percent.*

## Small Businesses

Trump's campaign materials about as to how pass-through entities (sole proprietorships, partnerships, and S corporations) would be taxed are broad-brush. Generally, Trump's campaign materials indicate that that owners of pass-through entities could elect to be taxed at a flat rate of 15 percent on their pass-through income retained within the business rather than under regular individual income tax rates (the top individual rate would be 33 percent under Trump's plan).

**IMPACT.** *This plan would appear to give the business quasi-corporate status in being able to be taxed at a new 15 percent corporate tax rate until assets are distributed, at which time a second layer of tax would be imposed similar to dividends now taxed to C Corporation shareholders.*

**COMMENT.** *Trump's campaign materials also indicated a consideration of rules that would prevent pass-through owners from converting their compensation income taxes at higher rates into profits taxed at the 15 percent level.*

## Business Tax Incentives

According to campaign materials, unspecified "corporate tax expenditures" would be eliminated, except for the Research and Development (R&D) credit, in exchange for a lower corporate tax rate

**Section 179 expensing.** Specifically directed toward small businesses, Trump during the campaign indicated that he would increase the annual cap on Section 179 expensing from \$500,000 to \$1 million.

**Childcare credit for businesses.** During the campaign, Trump proposed to increase the annual cap for the business tax credit for on-site childcare to \$500,000 per year. Additionally, the recapture period would be reduced.

**Manufacturing expensing.** In lieu of deducting interest expenses, Trump proposed during the campaign that manufacturing firms would be able to immediately deduct all new investments in the business.

## Health Care-Related Taxes

Trump proposed throughout the campaign to "repeal Obamacare," the ACA, entirely, including all associated taxes. Trump's campaign materials, however, only mention repealing the ACA's 3.8 percent NII tax.

**COMMENT.** *During the campaign, Trump indicated that he would call a special session of Congress to repeal the ACA.*

*According to campaign materials, unspecified "corporate tax expenditures" would be eliminated, except for the Research and Development (R&D) credit, in exchange for a lower corporate tax rate.*

## Cadillac Tax

Under current law, the so-called "Cadillac Tax" on high-dollar health insurance plans is scheduled to go into effect in 2018. Trump has not mentioned this tax specifically but repeal of the ACA would presumably include repeal of the Cadillac Tax.

**COMMENT.** *Learn more about the Cadillac Tax impact to employers in the [Employee Benefits](#) section of this white paper.*

## Medical Device Tax

As part of ACA repeal, Trump's plan would apparently envision repeal of the medical device tax.

**COMMENT.** *Repeal of the ACA would also bring about repeal of the individual shared responsibility requirement, the employer shared responsibility requirement, the Code Sec. 36B premium assistance tax credit, the Health Care Marketplace, the SHOP Marketplace, and more.*

**COMMENT.** Learn more about the Medical Devices Tax in the *Health and Life Sciences* section of this white paper.

## International

During the campaign, Trump reasoned that one direct result of lowering the corporate income tax rate would be to make U.S. companies more competitive worldwide, as well as keep U.S. companies onshore.

### Repatriation

During the campaign, Trump proposed to provide a deemed repatriation of corporate profits held offshore at a “one-time” 10 percent tax rate.

## Lame-Duck Tax Legislation

### Tax Extender

A number of popular but temporary tax breaks (known as “extenders”) are scheduled to expire after 2016, unless extended or made permanent by the lame-duck Congress. Energy incentives make up a good portion of these expiring incentives.

For individuals, extenders expiring after 2016 include:

- Higher education tuition and fees deduction;
- Code Sec. 25C residential energy property credit (except some solar property);
- Mortgage debt forgiveness exclusion; and
- Mortgage insurance premium deduction.

For businesses, extenders expiring after 2016 include:

- Film and TV production expense elections;
- Mine safety equipment expense elections;
- Code Sec. 199 deduction for production activities in Puerto Rico;
- Three-year recovery for race horses; and
- Seven-year recovery for motorsports complexes.

Some energy extenders expiring after 2016 include:

- Additional depreciation for second generation biofuel plant property;
- Fuel cell motor vehicle credit;

- Energy efficient commercial buildings deduction;
- Code Sec. 199 deduction for independent oil refiners;
- Credit for new energy efficient homes;
- Second generation biofuel producer credit; and
- Incentives for biodiesel, renewable diesel and alternative fuels.

**IMPACT.** *The energy incentives were expected to be made permanent in year-end 2015 tax legislation. At the eleventh-hour, lawmakers decided on extending, rather than making permanent, many of the energy credits and deductions. Whether year-end 2016 tax legislation will merely extend them again or make them permanent remains to be seen. Budgetary pressures may encourage lawmakers to approve another temporary extension and punt the ultimate fate of these extenders to the new Congress in 2017.*

### Other Pending Tax Legislation

The “lame-duck” Congress is expected to address a number of tax bills that were approved by the House during the summer, as well as pass an omnibus spending bill to keep the federal government, including the IRS, open into 2017. Keeping with tradition, a year-end spending bill could include tax measures.

**Stock Ownership.** The House passed the bipartisan Empowering Employees through Stock Ownership Bill (HR 5719) shortly before recessing in the fall. The bill would allow an employee to elect to defer, for income tax purposes, income attributable to certain stock transferred to the employee by an employer. An identical Senate bill, Sen. 3152, was introduced in July.

**Respect Act.** In September, the House passed the bipartisan RESPECT Act (HR 5523), which prohibits the IRS from seizing money from taxpayers who circumvent the reporting requirements unless the IRS proves that the money was connected to a crime. Similar legislation has been introduced in the Senate.

**Damaged Crops.** The House also approved the Emergency Citrus Disease Response Act (HR 3957) in September. The bill would enhance the tax benefits available to growers who have damaged citrus crops.

**Retirement Savings.** Also shortly before Congress recessed, the Senate Finance Committee unanimously passed the bipartisan Retirement Enhancement and Savings Bill of 2016, a measure that would make changes to the required minimum distribution rules for tax-favored employer-sponsored retirement plans and individual retirement accounts (IRAs)

Before year-end, some stand-alone tax bills may be taken up in the House and Senate either as stand-alone bills or as parts of larger tax bills. A sample of these bills includes:

- The Louisiana Flood and Storm Victims Devastation Act, which provides emergency tax relief for persons affected by severe storms and flooding in Louisiana.
- The Support Small Business R&D Bill, which would expand knowledge resources available

to startups and small businesses in connection with their using the research and development (R&D) tax credit.

- The Middle-Income Housing Tax Credit (MIHTC) Bill of 2016, which would provide tax credits to encourage development of affordable housing.

### IRS Funding

In September, Congress approved and Obama signed a continuing resolution to fund the federal government, including the IRS, through mid-December 2016. The continuing resolution generally funds the IRS at current levels. Congress has been unable to agree on a fiscal year (FY) 2017 budget for the IRS. As January 2017 approaches, lawmakers will likely pass an omnibus spending bill to cover all federal agencies for the remainder of the 2017 fiscal year.

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## Health & Life Sciences

By: Wolters Kluwer Health Editorial Staff

With the incoming Trump Administration, including single-party control of both Houses of Congress and the White House, there is a possibility of big changes to the Medicare and Medicaid programs, FDA regulation of food, drugs, biologics, and medical devices, and the health care reforms created by the ACA.

The Trump transition website includes [information](#) about the President-elect's plans for health care and life sciences. In addition to Trump's campaign promise to repeal the ACA and replace it "with a solution that includes Health Savings Accounts (HSAs), and returns the historic role in regulating health insurance to the States," the incoming administration listed its health care plans, including: (1) advancing research and development in health care; (2) reforming the FDA to put greater focus on the need of patients for new and innovative medical products; (3) modernizing Medicare; and (4) maximizing flexibility for states administering Medicaid by enabling innovative method experimentation. There are few details to explain how these goals will be achieved.

**COMMENT.** *Learn more about the potential impact to HSAs in the [Employee Benefits](#) section of this white paper.*

### Administrative Choices

Trump plans to [nominate](#) Rep. Tom Price, M.D. (R-Ga) as HHS Secretary and Seema Verma, who helped craft Indiana's conservative Medicaid expansion, to lead CMS. [Price](#), an orthopedic surgeon, currently is the chairman of the House Budget Committee and a member of the Health Subcommittee of the House Ways and Means Committee. Price has been a staunch [critic](#) of the ACA and was one of the first Republicans to offer a counter to Obama's landmark health care program in the form of the [Empowering Patients First Act](#).

[Verma](#), a consultant, worked with Pence on Healthy Indiana 2.0, a Medicaid program that requires monthly contributions to HSAs. Verma has worked extensively on a variety of policy and strategic projects involving Medicaid, insurance, and public health, working with various state and federal entities, as well as Sec. 1115 [waivers](#) for Medicaid expansion in a number of states.

**Potential Health Care Actions**

Colin Roskey, partner at *Alston & Bird, LLP*, and member of the Wolters Kluwer Health Law Advisory Board, identified several potential actions the incoming Congress and Administration could take in repealing rules issued by the Obama Administration:

<p>Executive Orders (EOs) can be rescinded, specifically EOs relating to health care, because they are not subject to judicial review.</p>	<p>Under the Congressional Review Act, the 114th Congress will likely issue a resolution putting a hold on regulations released 60 days before its adjournment, known as “midnight rules.”</p>	<p>Republicans may recall sub-regulatory guidance such as frequently asked questions (FAQs), because it is easy to change or ignore such document types.</p>
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*Stakeholder Views*

In a *letter* to the President-elect, the American Hospital Association (*AHA*) included a wish list for the new administration. The list requested fewer regulations, a focus on affordability and value (in particular relating to drug prices), streamlining federal quality reporting requirements, ensuring access to health care (especially in regard to children, mental health services, and health benefits for veterans), and continued support for new delivery models, such as accountable care organizations (ACOs), telehealth, and alternative payment systems. The American Medical Association (*AMA*) expressed its *support* for Trump’s pick of Price to lead HHS, and announced its plans to “actively engage” the incoming administration on improving health insurance coverage and other health system reforms.

*Behavioral Health*

*Gerald “Jud” E. DeLoss*, an Officer in the *Health Care Practice Group* at Greensfelder, Hemker & Gale, P.C., Chicago office, believes that the new administration may impact behavioral health care legislation and regulation. According to DeLoss, “the Substance Abuse and Mental Health Services Administration (SAMHSA) is currently reviewing proposed modifications to the confidentiality regulations for substance-use disorder (SUD) records,” with final regulations expected by the end of 2016. DeLoss noted that such regulations would not “be considered ‘midnight rules’ subject to a Trump administration moratorium. They combine benefits for patients/consumers, providers, and others in the field. As such they will likely remain in place after the new year.”

DeLoss is “relatively optimistic” that behavioral health care will continue to be an important focus, and hopes the Trump Administration will continue the current move “toward improvement and integration of behavioral health into the full health care spectrum.” He praised CMS’ decision to “roll back the restriction on larger SUD treatment facilities prohibited by the institutions for mental disease (IMD) exclusion,” saying it “should dramatically increase the number of beds available for treatment.”

**Drug and Food Regulations**

During the campaign, Trump’s *Health Care Reform Plan* set the following goal: “Remove barriers to entry into free markets for drug providers that offer safe, reliable and cheaper products. ... Though the pharmaceutical industry is in the private sector, drug companies provide a public service. Allowing consumers access to imported, safe, and dependable drugs from overseas will bring more options to consumers.”

**COMMENT.** *While the Trump campaign also criticized the FDA’s food industry regulations, post-election there has been no additional information about the President-elect’s plans for food regulations, and it is unknown whether Trump will follow through and direct the FDA to lower the bar when it comes to food safety.*

**ACA Repeal and Replacement**

The goal of repealing and replacing the ACA will not happen immediately upon Trump taking office, according to Roskey. Speaking at the American



Health Lawyers Association ([AHLA](#)) Institute for Health Plan Counsel in Chicago on December 8, 2016, Roskey said major changes will not occur quickly and Republicans will build in a transition period when replacing ACA provisions. He predicted that any replacement will be delayed to protect both individuals who will be impacted as well as health plans and other businesses.

Roskey added that, although there is pressure to replace the ACA quickly, Congressional committee chairs will moderate the rush for change, allowing the transition to new laws and regulations to occur over an extended period. He believes that the relationship between moderate Republicans, Price, Pence, and Ryan will help win over those in the Republican Party who want to see a faster repeal and replace. He further notes that some current ACA provisions may be redesignated, renamed, or repurposed.

### *Which Provisions May Stay and Which May Go?*

Roskey expects some provisions of the ACA—such as pre-existing condition protection, required coverage of dependent children through age 26, and the continuous coverage provision—will remain part of health care reform. Recent bipartisan legislation that grew out of the ACA, including the Medicare Access and CHIP Reauthorization Act of 2015 (MACRA) ([P.L. 114-10](#)), also will likely continue.

A core theme of the Republicans, Roskey noted, is to bring certain provisions that were governed by the federal government back to the states, but he added this may not be doable for some of the Republicans' plans. For example, allowing insurance companies to sell across state lines to increase competition may need more time to put in place.

Other ACA provisions, which are under Republican consideration for changes, include the medical loss ratio and essential health benefits. The future of Medicaid block grants and per capita and the Children's Health Insurance Program (CHIP) are yet to be determined. When repealing provisions affecting the Medicaid program, Republicans must consider hospitals' position. Hospitals gave up resources to get coverage expansion and will want more payment coverage if coverage expansion is repealed.

**COMMENT.** *Although there will be an immediate call to repeal the contraception mandate by churches and other individuals, it is not a top priority of the new Administration.*

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### *Health Compliance Officers*

Roy Snell, CEO of the Health Care Compliance Association ([HCCA](#)) noted that regardless of changes to the ACA, the workload of compliance officers won't change much. "It would take years to change or eliminate enough regulations to make any material difference in the workload of compliance officers," Snell said. "Although there are many regulations, a vast majority of the compliance officers' risk and workload is connected to billing. Billing is complicated because patient care is complicated, therefore documenting patient care will be always complicated and questioned. That will never change because no administration can simplify patient care. Claims that changes to laws such as the ACA will materially reduce the average health care compliance officers' workload are [only] made by people who haven't studied the typical health care compliance officer's workload."

### *Medicare Spending*

The ACA included many provisions that strengthened Medicare's financial status for the future. It reduced Medicare Parts A and B payments based on the expectation that coverage increases would lead to fewer uninsured hospital patients, and removed a payment per enrollee discrepancy that

paid Medicare Advantage (MA) plans 14 percent more than traditional Medicare. The ACA allowed Medicare beneficiaries to receive certain preventive and screening medical services without cost sharing, and moved to eliminate the “doughnut hole” in Medicare Part D. These changes saved the federal government and Medicare beneficiaries money that, combined with ACA provisions establishing new sources of revenue for the Medicare Trust Funds, extended the predicted solvency of the Medicare program by four years. Repeal of the ACA would [undo these changes](#), leading to increased federal spending on Medicare provider payments and a corresponding rise in beneficiary costs.

### Medicaid and Hospitals

The ACA allowed many states to expand their Medicaid enrollment, with the federal government paying for most of the cost of the expansion. Susan A. Benz, partner and co-chair of the Health Care & Human Service Practice Area at [Barclay Damon LLP](#), noted, “Medicaid expansion has provided reimbursement for hospitals for care that was previously uncompensated. The potential loss of the Medicaid reimbursement to providers could result in a substantial increase in bad debt due to uncompensated care and cause financial stress on front-line providers.”

Trump and Ryan have both indicated a desire to replace traditional Medicaid with a block grant program. Under such a program, states would receive annual fixed amounts to spend on activities permitted under the terms of the program. As a result, federal funding would become disconnected from the number of Medicaid beneficiaries and the cost of providing care. Under such a program, entitlement to coverage could no longer be guaranteed and states would be obligated to substantially restructure eligibility, payment, and coverage rules.

**IMPACT.** *The Congressional Budget Office (CBO) estimated that recently proposed block grant legislation would reduce federal spending by \$1 trillion over 10 years—saving which would result from the denial of coverage to about 14 million people.*

### Fraud Provisions

Benz said, “It is unclear whether the anti-fraud provisions of the ACA will be repealed. One notable anti-fraud provision is the duty to repay Medicare and Medicaid overpayments within 60 days of identification of the overpayment or it is deemed a ‘false claim.’ This provision has caused considerable anxiety for providers due to the ‘60-day clock’ and the risk of false claims liability which multiplies the damages and imposes substantial penalties on providers.” Benz continued, “The repeal of some or all of the ACA is causing instability in the insurance marketplace, anxiety for the 20 million+ individuals who may lose health care coverage, and panic among health care providers who anticipate reduced government reimbursement.”

### Medical Device Tax

Although policy specifics are scarce, during the campaign, Trump spoke out against the unpopular 2.3 percent medical device tax, passed as part of the ACA. The tax was suspended for 2016 and 2017, but will go back into effect in 2018. A Republican bill ([H.R. 160](#)) to repeal the tax passed the House in 2016. The Senate, however, never voted on a companion repeal bill ([S.149](#)). In 2017, rather than repeal through a freestanding bill, the medical device tax could be permanently repealed as part of comprehensive tax reform, also a frequent topic of discussion during the campaign.

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## Banking & Financial Services

By: [John M. Pachkowski, J.D.](#)

With an unconventional campaign that resulted in the election of Trump, along with Republican control of Congress, the stage is set to bring about changes in regulation of the banking and financial services industries.

On the campaign trail, as he secured the delegates needed to become the Republican nominee, Trump called the reforms in Dodd-Frank harmful to the economy and said he planned to overhaul Dodd-Frank. In an [August 2016 speech](#)

before the Detroit Economic Club, he called for a temporary moratorium on new agency regulations and stated that every federal agency will be required to prepare a list of all of the regulations that are “not necessary, do not improve public safety, and which needlessly kill jobs.”

## Dodd-Frank Act

After winning the presidential election, the Financial Services Policy Implementation team, which is part of the Trump presidential transition, *said* the “Dodd-Frank economy does not work for working people.” The team added it will be working “to dismantle the Dodd-Frank Act and replace it with new policies to encourage economic growth and job creation.” Steven Mnuchin, the nominee for Treasury Secretary, said the incoming Trump Administration will strip back parts of Dodd-Frank that prevent banks from lending.

### Total Repeal

Although Republicans control both houses of Congress, the entirety of the Dodd-Frank Act will probably not be repealed once the Trump Administration takes office. Total repeal on “Day 1” of Dodd-Frank probably will not occur due to the small majority the Republicans hold in the Senate. For any legislation to move forward, roughly eight or nine Democrat senators will need to side with the Republican senators. It is possible that Senate Majority Leader Mitch McConnell (R-Ky) could remove the 60-vote cloture rule for legislation to move forward, but he is also *deemed* to be an “institutionalist” and may retain the cloture rule.

**COMMENT.** *However, total repeal of Dodd-Frank may be a possibility following the 2018 mid-term elections. At that time, Democrats will have to defend 25 of the 33 seats being contested.*

### Rollback

Rolling back provisions of the Dodd-Frank Act maybe more feasible. Legislation introduced by Rep. Jeb Hensarling (R-Texas), Chairman of the House Financial Services Committee in the 114th Congress, could be used as a template. The *Financial CHOICE Act*, which Hensarling labeled

a “new legislative paradigm” for banking and the capital markets, would allow strongly capitalized banks to opt out of burdensome regulations, end too-big-to-fail, and impose greater accountability on regulatory agencies. The plan also would repeal Dodd-Frank’s controversial Volcker Rule.

*Total repeal on “Day 1” of Dodd-Frank probably will not occur due to the small majority the Republicans hold in the Senate.*

Other provisions of the Financial CHOICE Act would: incorporate a new “bankruptcy not bailout” chapter into the Bankruptcy Code so that a large financial institution that takes on unsustainable risks could fail without disrupting the financial system; require cost-benefit tests of new regulations; convert financial regulatory agencies now headed by single directors, such as the Office of the Comptroller of the Currency, into bipartisan commissions; and require that the Federal Reserve Board “describe the strategy or rule of the Federal Open Market Committee for the systematic quantitative adjustment” of its policy instruments.

A precursor to the roll back or repeal of the Dodd-Frank Act once Republicans take control of the White House and Congress occurred late in the 114th Congress. The House of Representatives approved H.R. 6392, the *Systemic Risk Designation Improvement Act of 2016*. The legislation would have specified when bank holding companies may be subject to certain enhanced supervision by the Federal Reserve Board. Among other things, the bill would have replaced the \$50 billion asset threshold with business activity standards to determine an institution’s systemic risk.

### What the Industry is Saying

Recently, in an investor presentation, JPMorgan Chase’s James Dimon *remarked* that “We’re not asking for wholesale throwing out Dodd-Frank.” John Gerspach of Citigroup Inc. added, “The first

thing I would ask for is nothing new, no new rules. If you haven’t figured out yet how all the existing rules work together, don’t put on anything else.”

**COMMENT.** *Learn more about the specific provisions that will be repealed or amended under the CHOICE Act in the [Federal Securities](#) section of this white paper.*

Since its inception, Republican lawmakers have sought to abolish or diminish the role of the Consumer Financial Protection Bureau (CFPB).

## Fate of CFPB

Since its inception, Republican lawmakers have sought to abolish or diminish the role of the Consumer Financial Protection Bureau (CFPB); in fact the 2016, [Republican platform](#) called the CFPB a “rogue agency” with a director exercising “dictatorial powers unique in the American Republic.” Republican lawmakers have consistently sought to replace the single directorship with a commission and to make the bureau subject to normal congressional appropriations process.

The October 2016 case of [PHH Corporation v. Consumer Financial Protection Bureau](#) called into question the constitutionality of the bureau’s structure, with the U.S. Circuit Court of Appeals for the District of Columbia “remedying” the constitutional deficiency by placing the CFPB under the Executive Branch, thereby allowing the President to dismiss the director at will.

This ruling in PHH could allow Trump to dismiss the current director, Richard Cordray, and replace him with a person that would take a less vigorous approach to enforcement of consumer financial laws. Since the CFPB has filed a petition for the full appeals court to rehear the case, it might be unlikely that Trump would dismiss Cordray until the case is fully resolved, which may include an appeal to the U.S. Supreme Court. Depending upon how the full

court of appeals rules in PHH, since CFPB may have a [difficult time](#) with an appeal to the Supreme Court since the bureau is required to seek concurrence from the U.S. Attorney General, who under the Trump Administration, would be Sen. Jeff Sessions (R-Ala). Without the Attorney General’s concurrence, the Trump Administration effectively blocks the CFPB’s decision to appeal to the Supreme Court.

**COMMENT.** *If Trump does succeed in removing Cordray in favor of a person less inclined to pursue enforcement actions, it is [conceivable](#) that states such as California, Illinois, Massachusetts, and New York, which all have Democrats as attorneys general, could fill any void left by the CFPB’s inaction.*

## Agency Staffing

Even if Congress is not successful in making changes to the Dodd-Frank Act, the incoming president’s appointments to various independent financial regulatory agencies could, as [noted](#) by Justin Schardin, director of the Bipartisan Policy Center’s Financial Regulatory Reform Initiative, provide “wide latitude to reinterpret or roll back new rules and regulations.”

**COMMENT.** *Although some of the agencies may be headed up by members that could reinterpret or roll back regulations, any type of action would still need to go through the normal proposal and comment process.*

It was also observed with the various agency appointments that the role of the Financial Stability Oversight Council could change, with the new Treasury Secretary using FSOC’s statutory mandate as a means for coordinating regulators to streamline existing regulations.

## Housing Finance Reform

As the conservatorships of Fannie Mae and Freddie Mac begin their ninth year, Congress may address housing finance reform. The last time Congress attempted to tackle the issue was in 2013 and 2014. It expected that Sen. Mike Crapo (R-Idaho) will assume the chairmanship of the Senate Banking Committee. He was one of the senators who drafted legislation that passed the committee on a bipartisan vote in 2014.

## Capital and Liquidity

To address the causes and effects of the global financial crisis, the Basel Committee on Banking Supervision established the Basel III capital framework which set higher levels for capital requirements and introduced new global liquidity requirements.

The U.S. bank regulatory agencies have implemented most of the Basel III capital and liquidity requirements, and banks, depending on their size, have been complying with the new capital and liquidity requirements.

**IMPACT.** *Banks have argued these various requirements have hampered lending, and other stakeholders have contended that these requirements have put U.S. banks at a competitive disadvantage on the world stage. Some have called for the U.S. not to adhere to these international standards, since other countries seek “capital neutrality.” The Vice Chairman of the Federal Deposit Insurance Corporation, Thomas M. Hoenig, cautioned, “The United States should not follow this path nor allow its capital mandates to be compromised in this fashion.”*

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## Federal Securities

By: Mark Nelson, J.D.

### Conflicting policies?

Securities and commodities regulation in the weeks ahead of the start of the Trump administration will be driven by short-term rulemaking goals, such as possibly finishing high priority Dodd-Frank Act derivatives rules and potentially by the Congressional appropriations process, which also could impose some limits on financial regulators before Trump takes office.

The longer term impact of a Trump White House on financial regulation remains somewhat unclear, but the new administration may focus on the repeal or replacement of portions of the Dodd-Frank Act. The Trump transition website [states](#) that its financial policy is to “dismantle” the Dodd-Frank Act. By contrast, the [Republican Party platform](#) published ahead of this year’s Republican convention included language that called for a return to the Depression-era Glass-Steagall Act’s separation of traditional banking from investment banking and insurance activities, a view that also has prompted a bipartisan group of Senators to push for a modern [version](#) of Glass-Steagall.

Still, it remains unclear how the seemingly conflicted goals of Trump and the Republican National Committee (RNC) goals will take shape in the 115th Congress. Significant Democratic majorities in both chambers, but especially in the Senate, could play a role in shaping any financial legislation. House Financial Services Committee Ranking Member Maxine Waters (D-Cal), who was [re-elected](#) as the

committee’s ranking member, has [vowed](#) to hold the Trump administration accountable for its financial policies, including by urging the inspectors general to monitor financial regulators.

### Appropriations

The FY 2017 appropriations process is still ongoing. A [continuing resolution](#) (CR) that was originally set to expire on December 9, 2016, was extended to April 28, 2017, after passing both the House and Senate.

The former CR reflected lawmakers’ desire to bar the SEC from adopting rules to require companies to disclose their political spending habits. Despite being controversial, the SEC politics rider has been signed into law three times, in the current CR and in last year’s omnibus appropriations bill. Democrats have repeatedly called for clean CRs free of poison pill riders.

The new CR contains a number of riders, including one that would aid the incoming administration by making it easier to confirm a defense department nominee. Still, future appropriations bills may be enacted in an environment that emphasizes other Trump Administration goals such as tax reform and infrastructure legislation.

### Midnight Rules

The Commodities Futures Trading Commission (CFTC) recently offered an example of late-term

rulemaking when it unanimously finalized rules on [aggregation of positions](#) and [re-proposed \(CFTC FAQ\)](#) its controversial position limits rules in early December. Senator Roberts again [voiced](#) worries about mid-night rules, but said he was pleased the position limits rule was still at the proposal stage. Ranking Member Debbie Stabenow (D-Mich) [said](#) she was “disappointed” the rules were not finalized. House Agriculture Committee Chairman K. Michael Conaway (R-Texas) [noted](#) that the new Administration will have a chance to “refine” the rules after having previously [urged](#) the CFTC not to move forward on position limits.

Still more questions may arise regarding the fate of the SEC's ongoing [disclosure effectiveness](#) project and whether the Commission will use its Dodd-Frank powers to adopt a fiduciary standard similar to the one finalized by the Department of Labor. But Sen. Elizabeth Warren (D-Mass), who recently called on Obama to demote White, has been critical of the disclosure effectiveness initiative, which the senator said may result in less information for investors. Chair White also has [testified](#) that the Commission should adopt a uniform fiduciary standard for broker-dealers and investment advisers who provide personalized securities advice to retail investors. Moreover, the CFTC awaits passage of legislation to re-authorize the agency and to make changes to the Dodd-Frank Act's derivatives provisions, especially for end-users ([S. 2917](#); [H.R. 2289](#)).

## Personalities

The incoming administration's financial regulatory team will be shaped by the several individuals chosen to lead agency [landing teams](#). According to president-elect Trump's transition website, [Sharon Brown-Hruska](#) of NERA Economic Consulting, and a former commissioner and acting chairman of the CFTC during the second Bush Administration ([CFTC Bio](#); [Speeches](#)), is overseeing the transition for the SEC, the CFTC, and the Farm Credit Administration.

Former SEC Commissioner [Paul Atkins \(SEC Bio\)](#), founder and CEO of Patomak Global Partners, LLC, has been assigned the task of leading the transition for a portfolio of banking agencies (CFPB, FDIC, and OCC). Securities lawyer [Ralph Ferrara](#) of Proskauer Rose LLP previously was chief of staff or special counsel to multiple SEC chairmen

according to his firm biography. Ferrara is heading the Fed transition staff.

**COMMENT.** *As for who may become chairman of the SEC or the CFTC, there is still mostly just speculation. Under existing law, the president has authority to designate an SEC chairman. Given that current SEC Chair Mary Jo White (an Independent) has announced plans to leave the agency at the end of Obama's administration, and that the remaining two commissioners are a Democrat (Kara Stein) and a Republican (Michael Piwowar), it is possible that Trump could designate Piwowar as chairman at least on an interim basis.*

Both the SEC and the CFTC are currently short-handed. Obama's nominations to fill two vacancies on the SEC stalled in the Senate Banking Committee, as have Obama's two nominees for the CFTC.

Senator Pat Roberts (R-Kan), Chairman of the Senate Agriculture Committee, which oversees the CFTC, issued a [statement](#) on the nomination process. According to the Senator, the committee's vetting process for Trump Administration nominees should be identical to the one it followed for Obama's nominees. Roberts also issued a warning about the committee's requests for nominee disclosures. “The vetting process is comprehensive and includes broad inquiries into nominees' finances,” said Roberts. “Until now, I was not aware of any concerns about the Committee's document requests. I see no reason to change course.”

In Congress, the committee leadership is beginning to take shape. Rep. Jeb Hensarling (R-Tex), the current chairman of the House Financial Services Committee, has been [re-elected](#) to that post. Hensarling said he would work with the incoming administration on “bold and ambitious solutions.” The re-election of Hensarling to the chairman role will enable him to re-introduce legislation that would repeal or replace portions of the Dodd-Frank Act.

## Blueprint for Dodd-Frank Repeal or Replacement?

Hensarling has published a draft of the Financial CHOICE Act of 2016 ([H.R. 5983](#); [Substitute version](#) from House FSC mark-up), which is the latest

proposal for making comprehensive revisions to the Dodd-Frank Act. In 2015, current Senate Banking Committee Chairman Richard Shelby (R-Ala), proposed his own Dodd-Frank reform bill ([S. 1484](#)).

**IMPACT.** *The CHOICE Act, if enacted as drafted, could dramatically alter the Dodd-Frank Act by repealing some provisions and revising many others.*

Major provisions slated for repeal under the CHOICE Act:

1. **Title I**—Financial Stability Act of 2010 (many sections impacted) (Section 211).
2. **Title II**—Orderly liquidation provisions (Section 221).
3. **Title VIII**—Financial market utility designation authority (Section 251).
4. **Title VI**—Provisions related to the Volcker Rule ban on many forms of proprietary trading (Section 901).
5. **Title IX**—Impacts 40 provisions within the Investor Protection and Securities Reform Act of 2010 (Section 449).
6. **Title XV**—Repeals the bulk of this title, including provisions requiring companies to make disclosures about conflict minerals, resource extraction issuers, and mine safety (Section 455). Questions have arisen over whether the securities laws are the proper locus of so-called “social” disclosures, but several bills have been introduced to expand this type of disclosure to human trafficking in companies’ labor supply chains ([H.R. 3226](#); [S. 1968](#)).
7. **Dodd-Frank Act Section 413**—Repeals a provision that made adjustments to the definition of accredited investor and would instead amend Securities Act Section 2(a)(15) to codify portions of the accredited investor definition that are now part of Regulation D while extending accredited investor status to licensed/registered brokers and investment advisers, and to professionals with related investment education or job experience (Section 452).

Additional securities and derivatives provisions in the CHOICE Act:

1. **Officer and directors bars.** Repeals Securities Act Section 8A(f) and Exchange Act Section 21C(f);

The bill would add Exchange Act Section 4G to provide for non-automatic disqualifications.

2. **SEC penalties.** The bill would increase penalties in civil and administrative enforcement proceedings and add a fourth tier to penalties provisions in the securities laws to deal

*The incoming administration’s financial regulatory team will be shaped by the several individuals chosen to lead agency landing teams.*

with recidivists. The Exchange Act penalty for controlling persons regarding insider trading would be raised to the greater of \$2 million (from \$1 million) or three times the amount of the profit gained or loss avoided. Elsewhere, the CHOICE Act would require the Commission to have a process for closing investigations and to create the role of enforcement ombudsman. The bill also seeks to ensure that SEC enforcement actions are within the Commission’s statutory powers and would give individuals who receive Wells notices the right to appear before the Commission while also directing the Commission to approve and publish an updated enforcement manual.

3. **Sarbanes-Oxley Act.** The bill would have the PCAOB transmit inspection reports to Congress, make certain confidential information available to Congress in addition to the Commission, and strike a SOX provision that funds the PCAOB’s merit scholarship program. Another provision would increase the amount of penalties the PCAOB can impose in enforcement actions.
4. **CFTC division directors.** The bill would amend Commodity Exchange Act Section 2(a)(6)(C) to provide that the agency’s division directors (i.e., “heads of the units”) would serve at the pleasure of the Commission. Currently, the Chairman appoints the heads of major administrative units, subject to Commission approval.
5. **Derivatives.** Section 468 would direct the CFTC to engage in rulemaking to clarify matters that impact cross-border transactions. Section 471 would direct the SEC and the CFTC to work

- together to eliminate inconsistencies from their separate rules on derivatives.
6. **M&A brokers.** The CHOICE Act would create a new securities law exemption for mergers and acquisitions brokers. The North American Securities Administrators Association adopted a [model rule](#) for an M&A broker registration exemption last year. Bills introduced in Congress ([S. 1010](#); [H.R. 37](#); [H.R. 686](#); and [H.R. 1675](#), which passed the House in February by a [vote](#) of 265-159) would achieve similar results, although questions remain whether they are needed in light of an SEC [no-action letter](#).
  7. **Small business issues.** The bill would create within the SEC the Office of the Advocate for Small Business Capital Formation and the Small Business Capital Formation Advisory Committee. The bill also contains crowdfunding and micro offering provisions similar to those introduced via other bills.
  8. **Regulatory oversight by Congress.** Financial regulators, including the SEC and the CFTC, would have to provide more cost-benefit analysis in rule proposals, could not issue a final rule without a 90-day public comment period, and could not publish a final rule if the quantified costs exceed the quantified benefits. A person adversely affected or aggrieved by a final regulation could sue the agency in the D.C. Circuit Court for violations of the regulatory analysis requirement; the court could stay the regulation's effective date, and the court must vacate the regulation unless the agency can show by clear and convincing evidence that irreparable harm would result from vacating the regulation. The CHOICE Act also contains a Congressional approval procedure for major rules and a related disapproval procedure for non-major rules.
  9. **FIRREA penalties and whistleblowers.** The bill would amend the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, a key part of the federal government's post-Great Recession enforcement activity, to raise the civil penalty amount from \$1 million to \$1.5 million, and the penalty for continuing violations from the lesser of \$1 million per day or \$5 million, to the lesser of \$1.5 million per day or \$7.5 million. But the bill contains no provision to adjust the maximum \$1.6 million amount that can be awarded to FIRREA whistleblowers (former U.S. Attorney General [Eric Holder](#) and current SEC Chair [Mary Jo White](#) have both criticized the low amount available under FIRREA as compared to other federal whistleblower laws). But other bills introduced in the 114th Congress could be models for enhanced whistleblower protections ([H.R. 4619](#); [S. 2591](#)).
  10. **Proxy advisers.** The CHOICE Act contains provisions that would require proxy advisers to register with the Commission. Some proxy advisers currently register with the Commission as pension consultants under an exemption from the prohibition on registration that otherwise applies unless the adviser meets the assets under management requirement. The Hensarling bill is similar to the Corporate Governance Reform and Transparency Act of 2016 ([H.R. 5311](#)), introduced by Rep. Sean Duffy (R-Wisc) and co-sponsor Rep. John Carney (D-Del). The Duffy bill cleared the House Financial Services Committee by a vote of 41 to 18, albeit without the backing of Ranking Member Waters.
- COMMENT.** *Learn more about the potential impact to Dodd-Frank in the [Banking and Financial Services](#) section of this white paper.*

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## Antitrust & Competition Law

By: Jeffrey May, J.D.

There has been a lot of speculation about what impact the election of Trump will have on antitrust enforcement over the next four to eight years. Some commenters have suggested that Trump's rhetoric on the campaign trail signals dramatic changes. Candidate Trump spoke of blocking AT&T

Inc.'s proposed acquisition of Time Warner Inc. He also suggested that online retailer Amazon, Inc. had a "huge antitrust problem." As a result, it has been argued that Trump, the populist, will increase antitrust enforcement. Others suggest that, in light of his Republican-party affiliation



and pro-business stance, Trump may be inclined to let the market decide and not have government interfere in the competitive process.

**COMMENT.** *It would be unwise to assume tougher antitrust enforcement based on comments during the campaign or more lenient antitrust enforcement based on the conservative make-up of the cabinet or transition team members.*

When then-Senator Obama was starting his run for president, he **pledged** to reinvigorate antitrust enforcement. Eight years later, some ponder whether there was such a dramatic shift from the prior Administration of President George W. Bush. It can be argued that most of the enforcement actions brought by the Obama Administration also would have been brought by the antitrust agencies under Bush 43.

The challenge for antitrust practitioners now and in the coming days is to identify which deals and which conduct will get a pass from a new administration and which will be challenged. But it is still important to remember that, while some change is inevitable, there will be significant continuity.

### Continuity

When new leadership arrives at the antitrust agencies, these enforcers often speak of continuity. Not long after taking the helm of the FTC in 2009, FTC Chairman Jon Leibowitz **spoke** of continuity at the Commission after a change in Administration. He identified continuity in the staff and continuity in the bi-partisan approach taken by the Commission. He would later note, “although our priorities may change from time to time, there is a powerful continuity in what we do.”

At the Department of Justice, Bill Baer, former head of the Antitrust Division and current Principal Deputy Associate Attorney General, also **noted** the “important continuity between the efforts of our predecessors, both Republican and Democratic, and the Antitrust Division’s current enforcement efforts and policies.” He added, “Political affiliation means little in this job.”

**COMMENT.** *There is real evidence of continuity at play, particularly at the FTC.*

FTC Commissioner Maureen K. Ohlhausen **attributed** the FTC’s success before the U.S. Supreme Court in the North Carolina Dental decision regarding state action immunity to continuity. Another example is the long-running and ongoing push at the FTC to eliminate so-called “pay-for-delay” settlement tactics used in the pharmaceutical industry.

So what areas of antitrust enforcement are likely to see continuity in the Trump Administration? There are some tea leaves that we can read.

*Criminal antitrust enforcement is relatively non-partisan.*

### Monopolization

Continuity is likely with respect to federal monopolization cases. Enforcement of Section 2 of the Sherman Act has remained steady over the past two administrations, particularly at the Justice Department based on **workload statistics**. While high-profile unilateral conduct cases, such as the Microsoft case of the 1990s, are well-known, they are few and far between.

Although the Department of Justice under George W. Bush did not bring any monopolization cases, the Obama Administration brought only a couple. Also, the Bush Administration continued pursuing—for the better part of a decade—a case brought during President Clinton’s second term against Dentsply International over its restrictive dealing arrangements.

When Christine Varney arrived at the Antitrust Division in April 2009, she soon made news by withdrawing the agency’s September 2008 report, entitled “Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act,” which examined how specific types of single-firm conduct violate Section 2 of the Sherman Act. The move was said to signal a shift in philosophy on Section 2 enforcement. However, it did not open the floodgates for monopolization suits. It wasn’t until 2011 that the administration **announced** its first traditional Section 2 case against United Regional Health Care System of Wichita Falls—a dominant health

care provider. In November 2015, a Section 2 *theory* was used to block a proposed transaction between United Continental Holdings Inc. and Delta Air Lines Inc. to acquire takeoff and landing slots at Newark Airport where United already had a dominant position.

**COMMENT.** *Despite the reversal of the Section 2 report, the Justice Department was and still is faced with Section 2 precedent, which is not favorable to an expansive reading of the statute. Thus, resources have been devoted elsewhere.*

On the campaign trail, Trump created quite a stir when he suggested that Amazon and Jeff Bezos, the company's founder and owner of the Washington Post—had a “huge antitrust problem.” Apparently, Trump was concerned with the online retailer's power, as well as the tactics of the Post.

Some commenters have interpreted this to mean that the Trump Administration will go after Amazon or take a big-is-bad approach to antitrust enforcement. In other words, they suggest that the antitrust agencies will reinvigorate Sherman Act, Section 2 enforcement.

While Amazon is apparently the dominant Internet retailer, most antitrust practitioners would agree that it is very unlikely that the company will face a federal monopolization action. Trump did not provide any examples of anticompetitive or exclusionary conduct to support a monopolization case. Moreover, with the agencies' attention focused on other types of conduct, a reinvigoration of monopolization enforcement under a Trump Administration is unlikely.

**COMMENT.** *The FTC has been somewhat more active in challenging monopolization in recent years, but these cases still reflect a small proportion of the enforcement efforts. Of course, it remains to be seen whether the right case will present itself in the coming years.*

### Criminal Enforcement

Another area where there has been substantial continuity is criminal enforcement. Criminal antitrust enforcement is relatively non-partisan. Bid rigging and price fixing are universally scorned

by Democrats and Republicans. Moreover, multi-year investigations cut across administrations. In addition, crackdowns on some of the particularly local cartel conduct, such as the foreclosure auction bid rigging, have popular appeal and seem to align with Trump's populist persona.

There could be a slight wrinkle for some global cartel enforcement efforts, which generate the largest fines, resulting from the new administration. For instance, the antitrust investigation in the auto parts industry is said to have generated criminal fines of nearly \$2.9 billion—the largest fines in the Antitrust Division's history.

The current acting antitrust chief, Renata B. Hesse, *called* increased international cooperation in antitrust investigations a priority of the Obama Administration. Trump's nationalist rhetoric, on the other hand, could signal a resistance to sharing information with foreign counterparts and working with multinational organizations.

**COMMENT.** *Many of the largest investigations involve international cooperation between the Justice Department and foreign counterparts. This is true for merger investigations, as well. An isolationist approach in the administration could hinder the necessary international cooperation for criminal and merger enforcement.*

### Acquisitions and Mergers

The future of merger enforcement also has been questioned in light of Trump's comments on AT&T's pending acquisition of Time Warner. Trump pledged not to approve this vertical merger combining one of the nation's largest phone and Internet providers with a media entertainment giant, saying it involves putting “too much concentration of power in the hands of too few.”

But it might not be worth reading too much into Trump's comments. There have been press reports that Trump's transition team has already backed away from these assertions.

**IMPACT.** *Currently, the world is in the midst of a significant merger wave, and if the trend continues, the antitrust agencies under Trump will likely be faced with a number of high-profile mergers and acquisitions that raise concerns.*

In June 2016, former Antitrust Chief Bill Baer *commented* on the size and complexity of the transactions and the Justice Department's active enforcement record. "In the seven-plus years of the Obama Administration, we successfully challenged or secured the abandonment of 39 mergers—a dramatic increase from the 16 successful challenges or abandonments during the eight years of the previous administration," Baer added.

**COMMENT.** *While the increase in enforcement could be explained to a certain extent by the boldness of merger parties in recent years, the willingness of the FTC and Antitrust Division to go to court to challenge mergers and acquisitions is apparent.*

Generally, most deals are dropped in the face of a serious challenge or are restructured to reach a settlement with the agencies. But in recent years, court battles over mergers have become more common. As 2016 came to a close, the Justice Department was in the middle of challenging two mergers that would have reduced the country's "big five" health insurers to three.

The FTC also has been actively fighting mergers in court. In addition to recent challenges to hospital mergers in Illinois and Pennsylvania, among others, the agency successfully blocked the proposed merger between Sysco and US Foods, the two largest broadline foodservice distributors in the United States and Staples Inc.'s \$6.3 billion merger with Office Depot, Inc.

**IMPACT.** *The future of merger enforcement at the FTC and Antitrust Division in the Trump Administration might be evident from how the new leadership will handle the AT&T-Time Warner deal and the pending merger challenges involving health insurers if they are not resolved before the transition. Decisions on these deals could signal continuity or a change in priorities.*

### Agency Personnel

The most obvious change at the agency in the coming months will be new leadership. There are only three members currently sitting on the five-member Commission, and only one—Maureen K. Ohlhausen—is a Republican. As a result, two

new Trump appointments could tip the balance at the Commission. Moreover, it is likely that Trump would replace Edith Ramirez, the current chairwoman. He could name Ohlhausen as chair. In February 2009, Obama *named* Jon D. Leibowitz—the sole Democrat on the Commission at the time—to serve as chairman of the agency. Leibowitz replaced William E. Kovacic who continued as a commissioner for another two years.

*There has been a push among Republican lawmakers to bring "reform" to the FTC, and the legislation will likely be reintroduced in the 115th Congress.*

Changes at the agency will not happen overnight, however. As was the case eight years ago, the agency's head could be changed with little interference from Congress. However, nominations for new commissioners could face delays in the Senate confirmation process. Recess appointments were utilized during the George W. Bush Administration to add commissioners. For instance, Deborah Platt Majoras was a recess appointment, who served as chair of the agency and was eventually confirmed by the Senate.

Who Trump will nominate to the FTC is an open question. Former Commissioner Joshua Wright has been named to Trump's transition team. Wright served a little over two years on the Commission. During that time, he recused himself from matters pertaining to Google because some of his research had been funded indirectly by Google while in academia. If Wright, a lawyer and economist, were to be renamed to the Commission, he would likely push the agency towards less intervention.

Trump's *announcement* that he intends to nominate Sessions to serve as CAPS attorney general does not shed much light on antitrust enforcement at the Department of Justice. Although Sessions is a senior member of the Senate's Judiciary Committee, which oversees antitrust, he does not have a detailed record on its enforcement. Details of an assistant attorney general for

antitrust will likely come after the inauguration. While there is no reason to expect that Trump will follow Obama's schedule for staffing the agencies, Trump may move as quickly as Obama did. Just two days after his inauguration, Obama **announced** his intention to nominate Christine Varney, a former FTC commissioner, to serve as assistant attorney general for antitrust.

**IMPACT.** *The agency staff members who will be reviewing deals and working with practitioners to work out settlements or negotiate plea agreements will likely remain the same. There will be new top-level leadership; however, the career staff at both agencies will stay on. This will bring a certain level of continuity.*

### Agency Procedure

Lastly, there is a chance that agency procedures could change under a Trump Administration. There has been a push among Republican lawmakers to bring "reform" to the FTC, and the legislation will likely be reintroduced in the 115th Congress.

One measure that could significantly impact merger enforcement at the FTC is the proposed "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015" or "SMARTER Act" (*H.R. 2745*). The legislation, which passed the House in March 2016, seeks to eliminate differences in the procedures used by the FTC and the Department of Justice Antitrust Division in challenging unconsummated acquisitions and mergers. The measure stalled in the Senate and was **opposed** by the Obama Administration. With a Republican majority in the House of Representatives and the Senate, the measure could make its way to the desk of Trump, who may be more open to changing FTC merger procedures that businesses claim are harmful.

Many who made predictions about Trump have been proven wrong. One could argue that all bets are off. The best approach may be to keep a close eye on his picks to fill vacancies at the FTC and Antitrust Division. Then, practitioners should carefully monitor the speeches and actions of these leaders to determine the direction of antitrust enforcement under the Trump Administration. There likely will be continuity, just don't bet on it.

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## Labor & Employment Law

### Impact on the Department of Labor

*By: Ronald Miller, J.D.*

One of the primary goals of the Obama Administration's Department of Labor (DOL) was an increase in the minimum wage. Although the federal minimum wage has not been increased since 2004, the Republican-controlled Congress balked at proposals to pass an increase, reasoning that it would kill jobs for newer workers entering the job market. However, Obama did issue an executive order that impacted the minimum wage paid by government contractors. Executive Order 13658, "Establishing a Minimum Wage for Contractors," signed by Obama on February 12, 2014, raised the hourly minimum wage paid by contractors to workers performing work on covered federal contracts to \$10.10 per hour, beginning January 1, 2015. Unless rescinded by

the Trump Administration, beginning January 1, 2017, the EO minimum wage rate will increase to \$10.20 per hour and to \$6.80 per hour for tipped workers.

#### Overtime Rule

The DOL also revamped the white-collar exemptions from overtime pay. After rulemaking and comment, the DOL issued new white-collar exemption regulations. Of course, the recent elections prompted questions about the impact on the regulations that would result from the change in administration. While President-elect Trump has not made any comments suggesting his position on the regulations, it was noted that

one of his senior advisers considers the overtime regulations to be “job killers.”

However, in a crucial blow to the Obama Administration’s labor and employment legacy, a federal district court in Texas granted an emergency motion for a preliminary injunction barring the DOL from enforcing its revised overtime rule that had been scheduled to take effect December 1, 2016. The Obama Administration DOL has appealed to the Fifth Circuit, known to be a conservative court. Could an appeal be heard and decided before January 20, when Trump takes office? Even though the Fifth Circuit has agreed to an expedited briefing and hearing schedule, that schedule will not conclude before the new president takes office. In any event, the incoming Trump Administration could either pass legislation—some of which has already been introduced—to nullify or modify the DOL rule, which would make any appeal moot, or the Trump Administration could simply choose to abandon the appeal.

### *Secretary of Labor*

Meanwhile, Trump has picked [Andrew Puzder](#) for the job of Secretary of Labor. As the comments have been steadily rolling in, there is a conspicuous absence of forecasts that would include anything less than a near about-face in policy should the CEO of CKE Restaurants, which operates Hardee’s and Carl’s Jr., be confirmed to head the DOL. More than one commenter likened the nomination to a powerful punch—in the nose or the gut. On the other hand, Puzder does come with business experience that may portend a more pragmatic, realistic approach, according to some.

Perhaps the largest looming question with the upcoming transition at the White House has been whether the Labor Department’s new overtime regulation will survive. Many predict it will not, citing Puzder’s position on wages. Others have expressed concerns about Puzder’s views on the minimum wage and other worker protections. Rep. Bobby Scott (D-Va), Ranking Member on the House Committee on Education

and the Workforce, warned: “President-elect Trump’s nomination of Andrew Puzder for Labor Secretary should signal concern for workers and employers who support fair pay, worker protections, and equal opportunity on the job. As the CEO of CKE Restaurants, Mr. Puzder has opposed raising the minimum wage or strengthening overtime protections. Mr. Puzder’s record indicates that he will not support proposals that strengthen worker health and safety protections.”

*While President-elect Trump has not made any comments suggesting his position on the regulations, it was noted that one of his senior advisers considers the overtime regulations to be “job killers.”*

### *How Business Works*

Jackson Lewis management-side wage and hour lawyer Paul DeCamp said that if confirmed, the nominee can bring to the DOL a “deep understanding of how businesses operate, especially small businesses. He appreciates how regulatory burdens and agency interference can stifle ingenuity, suppress job creation, and make workers worse off than they would have been without government involvement. He knows how businesses respond to regulation and is unlikely to be caught by surprise with unintended consequences such as the Affordable Care Act leading to reduced working hours as employers try to bring workers below the coverage threshold, or businesses shifting to automation as increasing minimum wage and other employment law pressures make it more cost-effective for companies to replace low-skilled workers with computers.”

## Shift in Focus at the EEOC

By: Pamela Wolf, J.D.

Under a Trump Administration and Republican-dominated Congress, the focus of the Equal Employment Opportunity Commission (EEOC) is likely to shift with a change in key players and legislative initiatives aimed at increasing transparency and curbing systemic litigation, among other things.

### Musical Chairs

Chair Jenny R. Yang, whose term ends July 1, 2017, will undoubtedly be replaced, given her role in expanding the agency's data collection to include pay data by sex, race, and ethnicity, and her focus on systemic barriers to equal opportunity. Likewise, Commissioner Chai R. Feldblum, whose term expires one year later, is not likely favored for reappointment, given her considerable efforts at advancing LGBTQ rights and her role as an original drafter of the first version of the Employment Nondiscrimination Act.

**IMPACT.** *Given that the EEOC's transformative General Counsel David Lopez will depart the agency in December, Trump will also pick his replacement, who will steer the agency's litigation program. With the change in key players, the agency may focus less on pay discrimination and LGBTQ rights and become less expansive in terms of its litigation agenda.*

### Limiting Litigation

During the Obama Administration, some employers and lawmakers complained of overreach on

the part of the EEOC, particularly in the context of its systemic litigation program and certain regulatory actions.

**COMMENT.** *Unsuccessful efforts to implement agency oversight by requiring a majority vote by Commissioners before commencing or intervening in litigation that involves multiple plaintiffs or systemic or pattern or practice allegations, as well as public posting requirements about the litigation and the votes, may be revitalized and enjoy much better odds of becoming law.*

Likewise, proposed legislation that would bar the EEOC from commencing suit unless it has exhausted its informal conciliation obligation and certifies that the parties are at an impasse, with the question of whether the agency actually engaged in bona fide conciliation subject to judicial review, may now find legs and become law.

### Pay Transparency

On the regulatory scene, there may be changes ahead for the new EEO-1 report incorporating pay data, with its first reporting deadline on March 31, 2018. The EEOC developed the controversial data collection expansion in partnership with the OFCCP in a move that would purportedly help narrow the persistent gender pay gap. A reshaped Commission may modify the data collection, or rescind it altogether.

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## Course Correction at the NLRB

By: Lisa Milam-Perez, J.D.

The National Labor Relations Board (NLRB) has consistently rankled employers during Obama's eight years at the helm, proving a stalwart supporter of organized labor and ushering in change, in degrees both incremental and sweeping, to that end. Much to the chagrin of employers, the Obama

Board has chipped away at once-reliable Board precedents on important and apparently settled issues, such as the permissibility of union-gerrymandered "micro-units," the right of employers to control their company email systems and bar their use for protected union activity, the employment

status of university graduate students under the National Labor Relations Act and, perhaps most significantly, the test for determining whether an entity is a “joint employer” under the Act.

The NLRB also boldly expanded its reach into nonunion terrain, policing employee handbooks and policies, of both union and nonunion employers alike, and brazenly took on the seemingly sacrosanct Federal Arbitration Act (FAA) with its insistence—given surprising credence in several circuit courts—that employers’ use of mandatory class action waivers in arbitration agreements violated employees’ statutory right to engage in protected, concerted activity. In even broader strokes, in a rare and controversial instance of NLRB rulemaking, the agency revised its longstanding representation election procedures to dramatically shorten the time frame in which employers may respond to a union organizing campaign and restrict their right to challenge adverse determinations regarding the conduct of the election or the composition of the bargaining unit.

Much of this will be undone under the Trump Administration, most labor practitioners confidently predict.

**COMMENT.** *A business owner himself (famously so), the President-elect has had his own run-ins with the NLRB and will surely view such matters through an employer’s lens.*

As naturally occurs when an administration turns from Democratic to Republican (and vice versa), the Board’s makeup turns with it, with the majority of its Members adhering to the party in power. Such is the case with the incoming administration. But expect a more dramatic pendulum swing than usual—in part because the Board under Obama had veered so sharply left that a more assertive course correction will be needed— in part because the President-elect, by personal constitution, makes no small gestures. A Trump Board will surely be comprised of majority Members with similar pro-business bents and a sense of mandate.

### *Class Action Waivers*

Among the new President’s first orders of business will be to nominate a Supreme Court Justice who,

once seated, will join his or her colleagues in deciding whether the Board’s stance on class-action waivers, first set forth in its 2012 D.R. Horton ruling, holds water. Should the High Court take the case (which is quite likely given the current circuit split and the importance of the issue), a conservative Trump nominee will almost certainly join a majority in reaffirming the supremacy of the FAA and the right to enter into voluntary agreements to use individual arbitration—to the considerable relief of employers desperate to control skyrocketing litigation costs and runaway class action verdicts.

*At a minimum, a Trump Board will surely chip away at some of the NLRB’s “quickie election” rule’s more troublesome provisions over time as opportunities to do so arise.*

### *Joint Employer Standard*

Another early agenda item will be to undo, via legislation, the NLRB’s 2015 Browning-Ferris (BFI) decision, which loosened the Board’s standard for determining joint employer for union election purposes. After BFI, a secondary “employer” (e.g., a corporate client of a staffing agency, for example) need merely retain the right to control the work of bargaining unit employees (per the terms of a staffing agency contract, or the like); the employer needn’t actually exercise that control. That test will revert to the prior, more demanding standard, under legislation Congressional Republicans have been chomping at the bit to pass. Trump’s ascendancy virtually assures the measure will find an eager taker in the oval office next year.

**IMPACT.** *Other Board reversals will necessarily be undertaken with more deliberate speed, through the gradual making of Board common law, as a Republican NLRB takes on-point cases percolating up from the regions to overturn those Obama-era precedents that had themselves upended prior caselaw.*

## Quickie Elections

And what of the NLRB’s “quickie election” rule? While there was much sturm und drang among employers when the agency first implemented the revised election procedures, the rule change has not, perhaps, proven quite the boon for union organizing as predicted. At any rate,

an appeals court has upheld the rule’s legality in the face of an employer challenge. Still, expect to see employers file petitions for rule-making, giving the Board an opening to undo its nascent rule. At a minimum, a Trump Board will surely chip away at some of the rule’s more troublesome provisions over time as opportunities to do so arise.

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## Workplace Safety

By: Lorene D. Park, J.D.

With respect to workplace safety, *Jackson Lewis* attorneys speculate the new administration will rescind some EOs, chiefly the *Fair Pay and Safe Workplaces Executive Order*, which requires prospective federal contractors to disclose labor law violations, including OSHA citations, when bidding on certain projects (The DOL has issued a *Guidance* on EO 13673). Significantly, on October 24, a federal court preliminarily *enjoined* key elements of the executive order, including reporting requirements concerning labor law violations.

Jackson Lewis also suggests that under the new leadership, OSHA may ease back on enforcement, including efforts regarding the rule protecting workers from respirable *silica* and the *electronic recordkeeping* rule slated to take effect in July 2017.

Likewise, *Fisher Phillips* attorneys predict record-keeping and other OSHA initiatives will meet their demise under a Trump administration, including the *walking-working surfaces and fall protection rule* issued in November 2016, and OSHA *penalty increases* that took effect August 2, 2016 and apply to violations occurring after November 2, 2015.

**COMMENT.** *Employers are well-advised to stay abreast of the latest developments and to ensure compliance. For example, on November 28 a different federal court refused to enjoin the anti-retaliation provisions of OSHA’s “Improve Tracking of Workplace Injuries and Illnesses” rule, which took effect December 1.*

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## Legal Rights of LGBTQ Individuals

By: Kathleen Kapusta, J.D.

While Trump the candidate claimed to support the rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals, and even argued that he would be a better president for LGBTQ individuals than Hillary Clinton, what does the election of Trump mean for the LGBTQ community? Of particular concern to many may be Trump’s early choice of key individuals who could well have a significant impact on shaping his domestic policies. These individuals include Pence, who not only opposed marriage equality and voted against the repeal of “don’t ask, don’t tell,” but as governor of Indiana, signed into law the controversial Religious Freedom Restoration Act, a law

that opponents argued would create widespread discrimination against lesbian, gay, bisexual, and transgender individuals.

Although he later signed a separate measure clarifying that the law could not be used to discriminate against lesbian, gay, bisexual, and transgender individuals, this “fix” did not go as far as opponents would have liked as it did not add a broadly applicable antidiscrimination law to protect LGBTQ individuals in Indiana. The absence of such a provision was a big part of the problem, critics argued, since the religious freedom law could easily be interpreted to make discrimination against LGBTQ individuals lawful under the guise of religious exercise.



## Key Appointments

Also of concern to many is Trump's selection of Steve Bannon as his Chief Strategist. The highly controversial executive chair of the ultra-conservative website Breitbart News, which has featured anti-LGBTQ rhetoric, recently made anti-transgender comments in reference to Target's policy of allowing people to use the bathroom consistent with their gender identity. In addition, Trump's nominee for U.S. Attorney General, Senator Jeff Sessions, not only opposed pro-LGBTQ legislation throughout his 20 years in Congress, he [co-sponsored the First Amendment Defense Act](#), a law Trump the candidate pledged to sign if elected. Introduced in 2015, FADA prohibits the federal government from taking discriminatory action against a person on the basis that the person believes or acts in accordance with a religious belief or moral conviction that: (1) marriage is or should be recognized as the union of one man and one woman; or (2) sexual relations are properly reserved to such a marriage.

## Marriage Equality

There is also concern over how a Trump presidency might affect marriage equality. As a candidate, Trump said he would consider appointing Supreme Court Justices who would overrule *Obergefell*, the Supreme Court's same-sex marriage decision. However, he has since changed his mind, stating after the election that marriage equality is settled.

## State Law

And while filling the current Court vacancy may not have any immediate impact on *Obergefell*, there could be a potential impact down the road

on emerging state laws like HB 2 in North Carolina, which regulates access to bathrooms for transgender individuals, and laws similar to Indiana's Religious Freedom Restoration Act. While there are currently no such laws before the Court, it has agreed to hear a case involving a transgender high school student who was barred from using the boys' bathroom, and the make-up of the Court will certainly impact the outcome of this case and other future cases for a long time to come.

*As a candidate, Trump said he would consider appointing Supreme Court Justices who would overrule Obergefell, the Supreme Court's same-sex marriage decision.*

## Executive Orders

There is also a possibility that Trump might rescind Obama's pro-LGBT executive order, EO 13672, which prohibits federal contractors from discriminating based on sexual orientation and gender identity. Although he has not specifically stated that he would rescind this particular EO, Trump plans repeal many of Obama's EOs and could easily do so shortly after taking office.

**COMMENT.** *The likely dismantling of the ACA will also have repercussions on the LGBTQ community, as it currently prohibits health insurers from discriminating based on gender identity.*

## Paid Leave for New Mothers

*By: Joy P. Waltemath, J.D.*

As a candidate, Trump espoused a plan to enhance unemployment insurance (UI) to include six weeks of paid leave for new mothers so that they can take time off of work after having a baby. He said his plan would triple the average two weeks of paid leave received by new mothers.

However, the maternity leave plan is not a part of the President-elect's transition website.

## Eliminate UI Fraud

Trump's campaign website noted that providing a temporary unemployment benefit for eight (not

six) weeks through the UI system would cost \$2.5 billion annually at an average benefit of \$300 per week. It suggested that this cost could be offset through changes in the existing UI system, such as by reducing the \$5.6 billion per year in improper payments or implementing the proposals included in the administration’s FY 2017 budget regarding program integrity. In other words, his plan would recoup this expense by eliminating existing fraud, although how is not specified.

**IMPACT.** *The Trump plan contends that providing the benefit through unemployment insurance, which would be “paid for through program savings,” would not be the financial burden on small businesses that mandating paid leave would be. His website cited an unnamed analysis of a similar program in California that unmarried, nonwhite, and non-college educated mothers received the most benefit.*

*Pundits as well as practitioners have noted that there are a number of open questions from the Trump plan, including whether it would cover adoptive mothers.*

### Open Questions

Pundits as well as practitioners have noted that there are a number of open questions from the Trump plan, including whether it would cover adoptive mothers. As written, it would not provide any paid leave for fathers. Lisa Horn, director of congressional affairs for the Society for Human Resource Management, said in an [article](#) published by SHRM that it was “unclear whether reforms of unemployment insurance would be sufficient to fund this program.” This concern was echoed by Bobbi Kloss, director of

human resources management services for the Benefit Advisors Network, also quoted in the SHRM article. Is there enough fraud to cover the costs of Trump’s proposal? Kloss noted that it was “not a self-perpetuating funding source. If you end the fraud, where then does the funding come from?”

**Tom Spiggle**, founder of the Spiggle Law Firm, which focuses on pregnancy discrimination and the Family Medical Leave Act, among other workplace issues, offered a broader perspective of parental leave under a Trump presidency. Currently the only federal parental leave policy is the Family Medical Leave Act, which provides 12 weeks of unpaid leave to those who qualify, typically those who have worked for more than a year for a company of 50 or more employees. “If Trump follows through on his campaign promise, there will be some federal legislation that, for the first time in our nation’s history, offers paid leave. But it will be limited,” Spiggle pointed out. “While the policy is unclear, fathers, parents who adopt, and many same-sex couples could be excluded.”

**COMMENT.** *Employees will, however, have access to some state courts for violations of more robust state parental-leave laws. States and municipalities have proposed and, in some cases, passed paid family leave bills, including California, New Jersey, and Rhode Island. New York has passed a paid family leave law, although it will not take effect until 2018. “Expect this to continue if the Trump administration passes a fig-leaf family leave measure while largely leaving unaddressed the pressing need for broad-based paid family leave,” Spiggle remarked.*

Urging Congressional leaders to reject the plan, Sen. Gayle Goldin (D-RI) and Ellen Bravo, [writing](#) in The Hill, said that the proposed policy “would give only partial pay for six weeks through a state unemployment fund to employed women who give birth. That’s too little time, too little money, covering too few people, relying on a program that is already severely under-funded, and adds rather than removes barriers to women.”

## Immigrant and Non-Immigrant Foreign Workers

By: Lorene D. Park, J.D.

The President-elect's website provides a "[ten-point plan](#)" on immigration, which is a non-detailed list, the top item of which is to build a wall along the southern border of the U.S. Further down the list, there are items more likely to impact employers, including "Cancel Unconstitutional Executive Orders & Enforce All Immigration Laws;" "Suspend the Issuance of Visas to Any Place Where Adequate Screening Cannot Occur;" "Turn Off the Jobs and Benefits Magnet;" and "Reform Legal immigration to Serve the Best Interests of America and its Workers."

How this will actually play out remains to be seen. However, the list suggests employers wanting to sponsor individuals for work visas may face additional hurdles. In addition, [Jackson Lewis](#) attorneys suggest the new administration

may increase enforcement of existing immigration laws by, among other things, working with Congress to expand the mandatory use of E-Verify to verify eligibility for employment in the U.S.

*Suggests employers wanting to sponsor individuals for work visas may face additional hurdles.*

Under current federal law, [E-Verify](#) is voluntary for employers, except as mandated by executive order for federal government contractors.

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## Employee Benefits

By: Tulay Turan, J.D., Carol Potaczek, J.D., and Lauren Bikoff, M.L.S.

Several changes are expected in the employee benefits arena due to Trump's victory in the presidential election. Employer-sponsored health care coverage is especially vulnerable because repealing and replacing the ACA was one of Trump's chief campaign promises. With the Republican Party retaining its majority in both the House of Representatives and Senate, the odds are in his favor to dismantle the law. In addition, his nomination for Secretary of Health and Human Services—Price, an orthopedic surgeon and fervent critic of the law—signals Trump's seriousness and intent to overhaul it.

However, questions remain about how quickly repeal could happen, due to both procedural hurdles and the prospect of tens of millions of Americans losing their health insurance coverage without a companion replacement plan. The president-elect has been vague about a replacement bill although Price's [Empowering Patients First Act](#) could serve as a foundation for future legislation. Congressional Republicans are giving themselves up to three years to come up with a

replacement for the health care law that wouldn't leave millions without coverage, according to Kaiser Health News.

### Procedural Hurdles to Repeal the ACA

The landmark health care legislation was actually two laws, ACA and HCERA. The Senate passed the latter using the budget reconciliation process, which requires 51 votes to pass a bill and eliminates the filibuster option. Without the required supermajority to end a filibuster, Congressional Republicans are expected to use the reconciliation process to repeal the legislation.

However, provisions in HCERA would be subject to repeal via that process, but those in ACA might not due to the missing revenue nexus. For example, the employer mandate and the Cadillac tax were included in HCERA while many non-tax related provisions, such as the prohibition of annual and lifetime limits and the preexisting condition ban, were contained in ACA. The former might meet their

## Price's Plan

Although the president elect hasn't provided details on a replacement plan, Price's plan could serve as a roadmap for a bill. He has "introduced bills offering a detailed, comprehensive replacement plan in every Congress since 2009," according to Kaiser Health News. In addition to calling for a full repeal of the ACA and all health care-related provisions included in HCERA, Price's 243-page plan would use age-adjusted tax credits to help people buy insurance. He also proposes:

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Allowing an employer exclusion of health care coverage up to \$20,000 for a family and \$8,000 for an individual, with any additional funds used to be taxable dollars;

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Increased reliance on HSAs, including increasing the allowable HSA contribution to be equal to the maximum IRA contribution; and

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Amending HIPAA wellness regulations to increase permissible variation for programs of health promotion and disease prevention from a 20 percent allowance to 50 percent of the cost of coverage.

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demise sooner than the latter, nevertheless the Republicans still must confront not only the issue of passing a budget before passing a reconciliation bill, but also the daunting task of securing additional votes to end a possible filibuster if they use the regular legislative procedure. Furthermore, passing a replacement bill will require cooperation from non-Republicans in Congress.

## Status of ACA Provisions

While it's expected that the health exchanges and premium subsidies will remain intact for 2017, the fate of many of the law's provisions remains uncertain. Here's a look at the status of some of the provisions that affect employers.

### Preexisting Conditions

Trump indicated in post-election interviews that he'd like to keep the ban on preexisting condition exclusions. However, Price's plan does not retain the ban. His plan would allow insurers to charge patients with preexisting conditions more if they didn't maintain "continuous coverage."

### Dependent Coverage up to Age 26

Under the ACA, group health plans generally must provide coverage for the adult children of employees until he or she reaches age 26. Although Trump has indicated that he would like to keep this provision, Price's plan does not mention it, although Speaker Ryan's does. Many employers offered dependent coverage before the ACA, so it's

unlikely they would eliminate it whether or not the employer mandate is repealed. In addition, state laws might require such coverage.

### Employer Mandate

Both the ACA's preexisting condition exclusion and coverage for dependents up to age 26 were part of ACA, so it is unlikely that Trump could easily find success in having those provisions overturned, but the employer mandate, as part of HCERA, could be done away with by a simple majority. Therefore, an entirely likely scenario would be for the Trump administration to do away with the mandate, but keep the other two provisions.

**COMMENT.** *Although Trump has said he likes both the preexisting condition exclusion and the provision for coverage of children up to age 26, he has not yet addressed how to avoid a so-called "death spiral" in the exchanges, whereby, upon the elimination of both the employer and individual mandates, mostly young and healthy enrollees would opt out of buying insurance until they get sick, creating a self-reinforcing cycle of increasing premiums and decreasing enrollment.*

Price's plan includes a provision for a high-risk pooling mechanism that would use a supposed \$1 billion in existing funds, which would sunset in 2018.

Price's plan does not mention an employer mandate. It would, instead, allow employers to give employees a defined contribution option in the

form of a pre-tax monetary benefit, which could be used toward premiums for either employer-sponsored or individual market coverage.

**IMPACT.** *It is hard to know if the elimination of the employer mandate would make a substantial difference in coverage for American workers. For example, in 2011 and 2012, prior to the implementation of the mandate, 44.5 percent of Americans already had employer-based insurance, according to Gallup, and employers will probably continue to use this benefit as a magnet for top employees.*

## COBRA

The uncertainty that is likely to be experienced by individuals in the open health insurance market could lead to a heavier reliance on employer-provided health insurance, and it could have the effect of driving more people who have left employment into COBRA coverage.

**COMMENT.** *Certainly, if major portions of the ACA are repealed, or coverage is unaffordable or limited to only a few providers, COBRA could become an attractive option.*

Additionally, it is possible that terminated employees would have to max out their COBRA coverage before becoming eligible for individual market coverage, or it is possible they would have to wait until the next open enrollment period to obtain coverage through the individual market. Certainly, between termination and signing up for other coverage, COBRA would keep an insured's policy from lapsing, so he or she could avoid the 1.5 times premium price that a plan like Price's would charge if someone does not maintain continuous coverage. Finally, if, for some reason, the ban on denials of coverage for preexisting conditions is not retained, COBRA might be a sick person's only option for health insurance.

## Reporting Requirements

Under the ACA, certain employers are subject to reporting and disclosure requirements, including the Summary of Benefits and Coverage (SBC),

Form W-2 reporting, and the Form 1095 series of information returns. The due dates for Form W-2 reporting and the Form 1095 series are approaching and are not likely to be affected immediately by the incoming administration.

*Trump indicated in post-election interviews that he'd like to keep the ban on preexisting condition exclusions.*

Although Republican and the President-elect's proposals regarding the ACA's repeal and replacement do not specifically address the reporting requirements, the repeal of the employer mandate would render most of these requirements moot. Moreover, the elimination of the reporting requirements is consistent with the Republicans' general view on the regulation of businesses.

**IMPACT.** *To that end, despite a possible protracted effective date for the mandate's repeal, which would also stretch out the reporting requirements, the new Administration could address this issue via agency guidance prior to the 2018 reporting due dates.*

## Cadillac Tax

The fate of the ACA's excise tax on high cost health plans—or the “Cadillac tax”—seems relatively clear. Trump has opposed it, Republicans have spent years introducing bills trying to repeal it, and on the campaign trail, even Democrats **began** promising to eliminate the tax. With such widespread bipartisan support for repealing the tax, it seems as though the American public can expect the Cadillac tax to be one of the first sections of the ACA to be eliminated.

Created by the ACA, the Cadillac tax is a non-deductible excise tax that would be imposed on the cost of employer-sponsored health programs that exceed an aggregate value of \$10,200 for employee-only coverage and \$27,500 for family coverage. The tax was originally scheduled to take

effect in 2018, but was delayed until 2020 by the Consolidated Appropriation Act, 2016 ([P.L. 114-113](#)). Lawmakers implemented the Cadillac tax to act as a revenue offset provision to help pay for the cost of the law.

Instead of the Cadillac tax, the Trump Administration may turn to capping employer-sponsored health plans in another way. As noted above, Price's [Empowering Patients First Act of 2015](#), limits the tax exclusion on employer-sponsored coverage to \$8,000 for individuals and \$20,000 for families. Capping the employer deduction on health plans has appeared in other Republican plans, such as Ryan's paper, [A Better Way](#), which the President-elect is expected to consult. However, Trump has not indicated his support for this measure.

### Expansion of HSAs

Trump and other leading Republicans are supportive of expanding high-deductible health plans (HDHPs) and HSAs. It seems likely that in the coming years, there will be legal and regulatory changes that will encourage their use. However, it is hard to predict exactly what these expansions might look like.

Trump's plan, as stated on his campaign website, is vague: "Allow individuals to use HSAs. Contributions to HSAs should be tax-free and should be allowed to accumulate. ... These funds can be used by any member of a family without penalty." This sounds pretty close to the current laws governing HSAs, with some expanded eligibility.

Ryan's vision, laid out in [A Better Way](#), includes a few more specifics: spouses would be allowed to make catch-up contributions to the same HSA account; qualified medical expenses incurred before HSA-qualified coverage begins would be allowed to be reimbursed from an HSA, as long as the account was established in 60 days; and the contribution limits to HSAs would be expanded to \$7,850 for individual coverage and \$15,700 for family coverage.

Price would provide a \$1,000 one-time refundable tax credit for contributions and would increase the amount people could contribute so that it's equal to the maximum IRA contribution level. He also would broaden eligibility, protect the accounts from bankruptcy proceedings and allow older Americans to transfer their required minimum distribution from their retirement accounts into their HSAs.

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## Payroll

By: John W. Strzelecki, J.D.

### Income Tax: Withholding Tables Will Be Revised

Trump promised during the campaign to reduce personal income tax rates, reduce the number of tax brackets, and increase the standard deduction amounts. The exact figures have been tweaked a few times during the campaign. Nevertheless, if a tax bill is signed during 2017, new withholding tables will be released. Generally, it takes the payroll industry about a month to implement new withholding rates.

Indications are that this is a high priority because it was included in one of Trump's 100-Day Plan presentations. However, on November 15, 2016, the House Ways and Means Chairman Kevin Brady (R-Texas) said the timeline for tax reform in 2017, is "to be determined". The key

issue will be the timing of the new withholding tables and whether they will take into account amounts that were previously withheld using the tables that have already been issued for 2017 ([IRS Notice 1036](#)). The IRS will advise employers on this.

### ACA Repeal

The payroll-related provisions summarized below were included in [H.R. 3762, the Restoring Americans' Healthcare Freedom Reconciliation Act of 2015](#), which was the most recent effort to repeal portions of the ACA. The list is not all inclusive. H.R. 3762 was vetoed by the President on January 8, 2016, and a vote to override the veto failed in the House on February 2, 2016.

There are two relatively recent versions of what a replacement health care bill might contain. H.R. 2300 the Empowering Patients First Act of 2015 contains a complete repeal of both ACA and HCERA. A duplicate bill, S.B. 2519 was introduced in the Senate, and another version of a replacement plan was released by the House in A Better Way. Some payroll-related provisions contained in those replacement plans are summarized below.

*H.R. 3762, the Restoring Americans' Healthcare Freedom Reconciliation Act of 2015*

1. **Cadillac Tax/Form W-2 Reporting Repeal.** The excise tax on high cost employer-provided health coverage (popularly known as the "Cadillac tax") would not have applied after 2017. Note that, even though the Form W-2 provision was not included in the vetoed bill, the [House Report 114-293](#) on H.R. 3762 included with the Cadillac repeal a provision immediately repealing the employers' requirement to report the value of employer-provided health care on Form W-2. This is currently reported on Form W-2 in Box 12 using Code DD.
2. **Health Savings Accounts (HSAs), Archer Medical Savings Accounts (MSAs), Health Flexible Savings Accounts (HFSAs), Health Reimbursement Arrangements (HRAs).** Under the bill, HSAs, MSAs, HFSAs and HRAs could be used to pay for over-the-counter medications. The payroll connection is that contributions to some of these accounts are usually made through employee payroll deductions. This means employees may be increasing or decreasing their contributions.
3. **HSA and MSA Distribution Tax.** The bill would have lowered the tax on distributions from HSAs and Archer MSAs that were not used for medical expenses.
4. **Cafeteria Plan Salary Reductions.** Salary reduction contributions to a HFSAs under a cafeteria plan (which are pre-tax deductions) would no longer have been limited.
5. **Additional Medicare Tax Repeal.** The additional Medicare tax on income above certain income thresholds would have been eliminated. The current tax rate is 0.9 percent payroll tax on wages and self-employment income. Currently, an employer must withhold Additional Medicare Tax from wages it pays to an individual in excess of \$200,000 in a calendar year, without

regard to the individual's filing status or wages paid by another employer.

6. **Employer Mandate and Reporting Requirements.** The employer mandate to offer and report on health insurance to full time employees would be repealed. This means that information returns using the Form 1094 and Form 1095 series would no longer be necessary.

*Trump promised during the campaign to reduce personal income tax rates, reduce the number of tax brackets, and increase the standard deduction amounts.*

H.R. 2300/ S.B. 2519, *Empowering Patients First Act of 2015*

1. **Complete Repeal of ACA and HCERA.** All of the payroll-related provisions including those summarized above would be repealed completely.
2. **HSAs.** The maximum contributions to HSAs would be coordinated with retirement savings account savings and would be increased.
3. **Limitation on employer-provided health care coverage.** The amount of any exclusion from income under [Code Sec. 106](#) for any taxable year for any employer-provided coverage under an accident or health plan which constitutes medical care, and any employer contribution to an Archer MSA or a health savings account which is treated as employer-provided coverage for medical expenses under an accident or health plan, could not exceed \$8,000 per employee for self-only coverage and \$20,000 for family coverage.

*A Better Way*

1. **Limitation on employer-provided health care coverage.** Same provision as that contained in H.R. 2300/ S.B. 2519, *Empowering Patients First Act of 2015* (see above).
2. **Cadillac Tax/HSAs.** It appears that this plan does not repeal the Cadillac Tax. According to the plan, the tax itself is a 40 percent penalty,

regardless of income, for each dollar in benefits above Obamacare's thresholds, which means higher income workers bear the smallest burdens. In contrast, a cap would provide relief for lower income workers relative to current law. Moreover, the Cadillac tax fails to adjust for the cost of providing health insurance driven by differences such as cost of living. This plan adjusts the cap so someone is not unfairly penalized if they live in a place where health care costs are higher simply because their cost of living is higher. Thus, this plan provides relief from the Cadillac tax for lower income workers and those who live in areas with higher labor costs.

In addition, according to the plan the Cadillac tax penalizes employee contributions to HSAs. The plan recognizes that it is good policy to encourage use of HSAs. As a result, this plan omits employee contributions made on a pre-tax basis to an HSA from counting toward the cost of coverage for purposes of the cap.

## FLSA Overtime Regulations

On March 23, 2014, Obama issued a memorandum directing the Secretary of Labor to "modernize and streamline the existing overtime regulations for executive, administrative, and professional employees." (*Presidential Memorandum*, March 13, 2014). In response to the President's memorandum, the Department published proposed regulations. (*Notice of Proposed Rulemaking to revise 29 C.F.R. Part 541*). The regulations were finalized on May 23, 2016, with several effective dates, the most current being December 1, 2016.

Two lawsuits were filed against the regulations (*Nevada v. U.S. Department of Labor and Plano Chamber of Commerce v. Perez, No. 4:16-cv-732, E.D. Texas, September 20, 2016*). The cases were consolidated on October 14, 2016. On November 22, 2016, the Court enjoined the DOL from implementing and enforcing the regulations. Among other things, the Court concluded that the DOL's salary level under the final regulations and the automatic updating mechanism were without statutory authority. The DOL filed a Notice of Appeal on December 1, 2016.

**COMMENT.** *To date, there have been reports in the media that Trump has said these regulations need to be revisited. In*

*addition, it appears that the regulation is one that could be repealed by Congress by use of the Congressional Review Act (P.L. 104-121), a law which has been rarely used in the past due the political makeup of Congress. The law allows Congress to repeal recently imposed regulations.*

## Minimum Wages

Trump's positions on the actual minimum wage have varied over the duration of the campaign. However, the most substantive proposal to increase wages (not using government mandates on employers), especially for low-income workers, is through a proposal to expand the use of the Earned Income Credit. Income tax proposals are a priority of the incoming Administration. Therefore this proposal may go somewhere and affect directly or indirectly the hourly amount of wages (i.e., income) an individual actually earns.

## EEOC Requires Payroll Data to be Reported on Form EEO-1

The Equal Employment Opportunity Commission (EEOC) published a Notice (*81 FR 5113*) on February 1, 2016, proposing to change Form EEO-1 and a final comment request (*81 FR 45,479*) on July 14, 2016. The OMB approved the EEOC's Final Revisions on, September 29, 2016

Form EEO-1, Employer Information Report was *changed* to add the reporting of Form W-2 earnings and work hours (summary pay data) to go into effect March 31, 2018.

**COMMENT.** *The new Administration may consider rescinding the changes before the first reporting is due in 2018, or revising the reporting to ease the burden on employers, who adamantly opposed the changes. Note that the makeup of the EEOC is expected to change from a Democrat majority to a Republican majority during 2017.*

## Immigration: Federal Mandate to Use E-Verify

Immigration is a Trump priority and in the *10-point plan on immigration*, he said he would "turn



off the jobs and benefit magnet.” This is widely interpreted to mean an expansion of the use of E-Verify, a federal system used to prove eligibility to work in the U.S. A handful of states make the use of E-Verify mandatory for some. Legislation ([S.B. 1032](#)) has been introduced as recently as

April 21, 2015, that would make E-Verify mandatory for every employer. Note also that, Trump will be appointing the Special Counsel to the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) who is in charge of the E-Verify and Form I-9 programs.

## Pension & Retirement

By: Elizabeth C. Pope, J.D.

President-elect Trump focused little attention on issues directly related to retirement plans during the presidential election campaign. Similarly, in the weeks since Election Day, the Trump transition effort has placed a priority on filling cabinet and administrative slots other than those directly related to retirement policy: the positions of Secretary of Labor and head of the Pension Benefit Guaranty Corporation. (Trump nominated fast-food executive Puzder as Labor Secretary on December 9; the PBGC position has yet to be filled.)

Some industry analysts see this lack of emphasis during the campaign and the transition as a sign that retirement issues will not be at the forefront in a Trump Administration. Will Hansen, Senior Vice President of Retirement Policy for the ERISA Industry Committee (ERIC) predicted, in a [statement](#) issued shortly after the election, that “we will not see much movement at all in the retirement space from a legislative angle.” While conceding that “most tax reform proposals will likely impact retirement policy,” he downplayed Congress’ ability to tackle “tax reform when neither [Republicans nor Democrats] will likely compromise on key issues within tax policy.”

All that said, other conservative voices in Congress and in the private sector have strong views on the direction retirement policy should take. Proposals regarding retirement savings in Paul Ryan’s A Better Way tax reform blueprint that will guide Congressional Republicans in their negotiations with the Trump White House. Those who fiercely oppose the DOL’s new fiduciary rule will view a Republican-controlled government as a golden opportunity to eliminate the rule or minimize its impact. And finally, changes to retirement plan rules that enjoyed bipartisan support in the departing 114th Congress may survive to win passage in the new Congress.

### Impact of Tax Reform

Ryan’s A Better Way [summary](#) of his vision for comprehensive tax reform states that the proposal would “continue the current tax incentives for savings” in the retirement area, presumably referring to existing elective deferral limits available for 401(k), 403(b) and other defined contribution plans. While the proposal includes a promise to “consolidate and reform the multiple different retirement savings provisions in the current tax code,” it offers no specifics.

*Ryan’s A Better Way summary of his vision for comprehensive tax reform states that the proposal would “continue the current tax incentives for savings” in the retirement area.*

The proposal endorses the notion of “universal savings accounts,” which would be created outside the employment context. It mentions legislation (H.R. 4094), proposed by Dave Brat (R-Va), which would create accounts to which “individuals could contribute cash and over which they would have full control of investment decisions” and from which withdrawals could be made at any time, for any reason, without penalty.

### Fate of Fiduciary Rule

During the campaign, Trump [promised](#) to eliminate “radical regulations” that “force jobs out of

our communities.” Some Republican members of Congress and some members of the financial services community have certainly viewed the DOL’s new fiduciary rule (and related Prohibited Transaction Exemptions) as a “radical” change. Under the rule, which is generally applicable in April 2017, parties that provide investment advice for a fee to plans, plan sponsors, fiduciaries, plan participants, beneficiaries and IRAs and IRA owners must make prudent investment recommendations, without regard to their own interests. The rule, while making significant exceptions for investment education, marketing practices, and commission-based compensation, reflects the understanding of the DOL that the disclosure of conflicts of interest alone is not sufficient to mitigate the negative impact of conflicted investment advice on the retirement savings of ERISA plan and IRA investors.

**COMMENT.** *In June 2016, Congress failed to override Obama’s veto of a joint resolution that would have blocked implementation of the rule. The joint resolution had been passed pursuant to the Congressional Review Act (CRA), which gives Congress the authority in some circumstances to stop a federal agency from implementing a regulation.*

According to the [Congressional Research Service](#), CRA timing rules prevent Congress from trying this avenue again after Trump becomes President. However, Congress can pursue legislation to repeal the rule, perhaps as part of a larger effort to repeal Dodd-Frank. A bill, [H.R. 5983](#), approved by the House Financial Services Committee in September, includes such a repeal.

Pending congressional action, a Trump DOL could delay the rule’s April 2017 applicability date. A subsequent regulatory withdrawal is also possible, although that would presumably require a period of notice and comment.

**COMMENT.** *Short of withdrawal, the DOL could withhold the funds necessary for enforcement. A Trump Justice Department could also refuse to contest challenges to the rules.*

Given the extent to which the retirement services industry has already adapted its business practices to accommodate the rule, some experts question whether a full repeal or withdrawal will actually happen. At his [website](#), retirement plan expert Fred Reish predicted that the rule “will be retained, but modified.” Along these lines, the DOL could substantially weaken the rules in future FAQs or other guidance.

**IMPACT.** *While predictions of future action are speculative at best, practitioners and advisers need to be cautioned that the rules remain in effect until overturned or altered.*

## Other Possible Legislation

A bill that would, among other things, make it easier to form multiple employer defined contribution plans received unanimous approval from the Senate Finance Committee in September and thus might eventually be enacted in 2017. The Retirement Enhancement and Savings Act ([S. 3471](#)) was placed on the Senate calendar in mid-November after the election but was not taken up in the lame duck session.

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## Energy & Environmental Law

*By: Pamela C. Maloney, J.D.*

In keeping with his campaign promise to “Make America Great Again,” the focus of Trump’s Administration will be to undo the “onerous regulations” placed on every industry during the Obama Administration. In the energy sector, this means investments in vast infrastructure

projects, tax cuts, and pro-business policies that are designed to make America energy independent. Although Trump has said that he is in support of an “all-the-above” energy policy—from coal to natural gas, and even to solar—conventional thinking indicates that

## 100-Day Action Plan

Among the key energy and environmental initiatives outlined in Trump's 100-Day Plan are the following:

Lift moratoriums on energy production in federal areas and the restrictions on the production of 50 trillion dollars' worth of job-producing American energy reserves, including shale, oil, natural gas and clean coal;	Revoke policies that impose unwarranted restrictions on new drilling technologies such as fracking;	Ask TransCanada to renew its permit application for the Keystone Pipeline; and	Cancel the Paris Climate Agreement and stop all payments of U.S. tax dollars to U.N. global warming programs and use that money to fix America's water and environmental infrastructure.
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In addition to these top priority initiatives, Trump has promised to work with Congress to introduce a number of broader legislative measures and fight for their passage within the first 100 days of his Administration, including the American Energy & Infrastructure Act which will leverage public-private partnerships, and private investments through tax incentives, to spur \$1 trillion in infrastructure investment over 10 years. Trump noted that this proposal would be revenue neutral.

Trump's victory will mean good news for oil and natural gas but bad news for renewable energy sources like solar and wind, which have been relentlessly promoted by the Obama administration through policy prescriptions that include generous federal tax credits.

## Domestic Energy Production

Trump has repeatedly stated that he will lift any of Obama's EOs and regulatory rules that restrict domestic energy production, including those related to fossil fuels. Another fact most experts agree on is that Trump's energy policy could lead to more drilling and exploration on federal lands ... something the Obama Administration had clamped down on.

**IMPACT.** *The Trump Administration will likely mean that there will be more fracking and more pipelines. It also likely marks an end to Obama's Clean Power Plan, and no federal carbon tax or cap-and-trade regime.*

## Oil Policies

While most experts agree that no matter how friendly a Trump energy policy will be toward the oil industry, it will have very little impact because the global over-supply of crude oil will mean that prices for crude in domestic and international

markets will remain low. That being said, other analysts have declared that the Trump victory is bad news for OPEC because more American oil will compete head-to-head with the cartel. Since Obama signed a law last year lifting the ban, exports of American oil have surged to 700,000 bpd, as much as Qatar. Candidate Trump said last March that he would seek to block imports of oil from Saudi Arabia (currently about 1 million bpd) unless the Kingdom did more to fight ISIS. This is exceptionally unlikely. Saudi Aramco's refineries on the Gulf Coast are optimized for Saudi crude and blocking their supplies would be seen as a blow against blue-collar refinery workers, who likely voted overwhelmingly for Trump.

## Coal

Trump has said he wants to bring coal jobs back, but most experts agree that the economics behind the fall of coal is already happening. During the Obama Administration, the EPA passed strict EPA mandates on utility emissions which has accelerated the decline of coal use in the United States. While the election of Trump certainly assumes that those EPA restrictions will be rolled back, the path of lowering carbon emissions has now been ingrained in the utility industry in long-term production goals that they are unlikely to alter much, even if the EPA removes all of their targets for the next decade for two reasons. First, market pressure is being asserted by utilities that

are quickly transitioning to power plants fired by natural gas, which is cheaper and cleaner than coal. Second, power companies and utilities would rather have a gas plant than a coal plant.

**COMMENT.** *Trump's pro-coal stance may be limited because it's unclear how he could change those economics and save coal jobs.*

### *Nuclear Energy*

A Trump bump for oil, gas and coal could mean fewer dollars flowing into renewables and nuclear, according to [one analyst](#). Though candidate Trump spoke about the need for America to build more nuclear power plants, nothing will change the fact that without a cost of carbon neither nuclear nor renewable can compete with natural gas.

However, James Conca, writing for [Forbes](#) expressed his belief that nuclear energy would fit nicely into Trump's energy plan. Trump himself said that it should be the goal of the American people and their government to achieve energy independence as soon as possible. Nuclear power is a valuable source of energy and should be part of an all-the-above program for providing power for America long into the future.

### *Renewables and Alternative Energy*

Trump's administration is likely to pose a setback for wind and solar energy because Trump will not support federal subsidies ... same with research and development centered on alternative energy sources. However, because a reduction in federal support for renewables would result in the loss of many jobs, it is likely that there will be little impact. In addition, most of the push for renewables, and many of the financial incentives, come from individual states. Red states like Iowa and Texas are overflowing with wind energy jobs and money. Finally, given that the Republican-controlled Congress has already extended the Production Tax Credit for five years, it is not clear that much will be done to discourage renewables, or at least not very quickly.

### *Fracking*

During the Trump Administration, American oil and gas production is expected to surge. Experts

predict an abrupt end to the Bureau of Land Management's (BLM) efforts to obtain authority to regulate hydraulic fracturing on federal lands. A federal case on BLM's overreach in making fracking rules was set to be heard by the 10th Circuit Court of Appeals January 17, 2017. Trump's BLM will have no interest in regulating fracking. Voters in Youngstown, Ohio rejected for the sixth time an initiative that would have banned fracking locally. Though a frack-ban did pass in Monterey County, California, that's no biggie: oil companies have plenty more drilling sites frack-friendly Texas, Oklahoma and North Dakota.

Other experts have noted that while fracking has its environmental problems, such as fugitive emissions and poorly-sealed wells, these are minor compared to coal mining, coal waste impoundments, and coal emissions of particulates, heavy metals, sulfur and nitrogen compounds. These latter led to important, and costly, health care issues from burning coal. Successful fracking for natural gas in tight shale formations has enormously increased America's natural gas production, keeping prices low, and outcompeting all other energy sources, especially coal and nuclear. Thus, fracking and its expansion poses yet another blow to any expanded use of coal within the United States.

### *Energy Infrastructure Projects*

Most analysts have predicted that the midstream sector—businesses that move oil and gas from the site of production to processing plants, storage facilities, and end customers using oil and gas pipelines that crisscross underneath North America—will be one of the biggest beneficiaries of Trump's election, as projects that were on the fence might suddenly look a lot more attractive. In fact, immediately in the wake of Trump's victory TransCanada announced that it was prepared to restart talks with the Trump Administration over the Keystone XL pipeline project that the Obama Administration rejected.

Trump also will likely push through the North Dakota Access Pipeline despite the recent victory by Standing Rock Sioux Tribe in its battle to block that part of the pipeline being built near its reservation. On December 4, 2016, the Department of the Army announced that it would not allow the pipeline to be drilled under a dammed

section of the Missouri River. Construction of the route a half-mile from the Standing Rock Sioux reservation has become a global flash point for environmental and indigenous activism, drawing thousands of people to the site of a sprawling prairie camp of tents, tepees and yurts.

Trump recently said he supported finishing the 1,170-mile pipeline, which crosses four states and is almost complete. Even though the Army's decision calls for an environmental study of alternative routes, the Trump Administration could ultimately decide to allow the original, contested route. Representatives for Trump's transition team did not immediately respond to requests for comment. Trump once invested in the company building the pipeline, Energy Transfer Partners, but he has said that his support has nothing to do with his investment.

## Environmental Policies

On the environmental side, experts believe that the most important effect of the Trump presidency is that United States climate change policy and goals will evaporate, as will the Clean Power Plan (which is being challenged before a U.S. appeals court in Washington, DC with a mid-January 2017 hearing date scheduled), the Paris accords, any teeth in the Environmental Protection Agency, and, as mentioned above any hope of a carbon tax.

During the campaign, Trump promised that his energy and natural resource polices will be undertaken "with proper regard for rational environmental concerns" adding, "[i]n a Trump administration, there will be shared governance of our public lands and we will empower state and local governments to protect our wildlife and fisheries. Laws that tilt the scales toward special interests must be modified to balance the needs of society with the preservation of our valuable living resources. My administration will strike that balance by bringing all stakeholders to the table to determine the best approach to seeking and setting that balance."

*During the Trump Administration, American oil and gas production is expected to surge.*

In addition, Trump has declared that he is not a big believer in global warming, calling it a Chinese hoax. Hence, he plans to redirect the EPA's focus away from so-called "man-made" climate change to more immediate and verifiable environmental concerns such as water contamination.

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## Government Contracts

By: [Aaron Broaddus](#), [George Gullo](#), [Marilynn Helt](#), and [William VanHuis](#)

The incoming Trump Administration will likely have a significant impact in the area of federal government contracting. In fact, key elements of Trump's general election platform included vows to reduce regulations, cut spending, and roll back many of the EOs issued by Obama.

**IMPACT.** *Specific areas Trump has targeted include trade agreements, climate change and climate-related energy restrictions, labor preferences, and a reduction in the size of the federal workforce. In addition, Trump's pro-business background could favor changes to how the government*

*acquires services, which could include greater use of simplified acquisition procedures and increased use of commercial items, a renewed effort to outsource non-critical functions, and the use of federal contracts as leverage to keep companies and jobs in the United States.*

In practical terms, the new Administration can implement its policy preferences through a variety of measures, including revoking executive orders, changing regulations and agency guidance, and reallocating resources. Of these, revoking EOs is very a fast and direct means to impact federal

procurement. This is because EOs can be revoked instantly, and with few, if any, restrictions. Also, because Obama relied heavily on executive actions to implement many policy changes, the effect of any wholesale revocations will likely be quite noticeable.

**IMPACT.** *Regulatory changes will be more cumbersome and will take longer to implement. The process typically includes publication in the Federal Register, a comment period, and revision before the changes are finalized. That process can take from several months to several years.*

Although the process for issuing official agency guidance is not particularly complicated, new heads at the various departments and agencies typically require some time get up to speed in their positions. It can also take a fair amount of time to draft, publicize, and implement agency guidance. Of course, many variables are involved, including the particular agency, the individuals leading the agency (and their experience level), the scope of the changes, and internal issues.

With respect to funding, political constraints are likely to affect the new Administration's ability to reallocate resources. Any initiatives will be subject to the budget process and funding earmarks, which in turn are subject to negotiation and conflicting interests. The Trump Administration could use budget reconciliation, which requires only a simple majority and is exempt from filibuster in the Senate, to make contracting-related changes. But it is more likely that avenue will be devoted to higher priority issues, such as the promised repeal, revision, and /or replacement of the ACA.

Overall, federal contracting policy is an area in which the Trump Administration is likely to make significant changes. Below is a list of executive orders and regulations that are likely targets for review, revision, and/or elimination.

## Labor

**FAR Part 22**, Application of Labor Laws to Government Acquisitions, deals with general policies regarding contractor labor relations as they pertain to the acquisition process. These regulations also prescribe contracting policy

and procedures for implementing pertinent labor laws.

- **E.O. 13495** Nondisplacement of Qualified Workers Under Service Contracts
- **E.O. 13496** Notification of Employee Rights Under Federal Labor Laws
- **E.O. 13502** Use of Project Labor Agreements for Federal Construction Projects
- **E.O. 13627** Strengthening Protections Against Trafficking in Persons in Federal Government
- **E.O. 13658** Establishing a Minimum Wage for Contractors
- **E.O. 13665** Non-Retaliation for Disclosure of Compensation Information
- **E.O. 13673** Fair Pay and Safe Workplaces
- **E.O. 13706** Establishing Paid Sick Leave for Federal Contractors

## Trade

Policies and procedures for government procurement of foreign supplies, services, and construction materials, and for contracts performed outside the U.S., appear at **FAR Part 25** and **DFARS Part 225**. The Buy American statute (**41 USC 8301** and following) establishes the government's policy of acquiring only domestic end products for public use inside the U.S. (**FAR 25.102**). The statute allows an evaluation preference to certain domestic bids through the application of a price differential (**FAR 25.105**; **FAR 25.204**).

However, some international agreements provide that the Buy American preference will not apply to certain products of designated countries. The Trade Agreements Act of 1979 (**19 USC 2501**, and following) allows the President to waive the Buy American statute for eligible products from countries that have signed an international trade agreement with the U.S. (**FAR 25.402**). The FAR lists 13 of these agreements, including the World Trade Organization Agreement on Government Procurement and the North American Free Trade Agreement. The Buy American statute and other discriminatory provisions for eligible products is presently waived for acquisitions covered by the WTO GPA and the FTAs (**FAR 25.402**).

U.S. trade policy also appears throughout the **International Traffic in Arms Regulations** and **Export Administration Regulations**, which govern

the export and import of defense-related articles and services.

[E.O. 12260](#) Agreement on Government Procurement

## Climate and Energy

[FAR Part 23](#), Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace, prescribes acquisition policies and procedures to

support the government's program for protecting and improving the quality of the environment, and to foster markets for sustainable technologies, materials, products, and services.

- [E.O. 13514](#) Federal Leadership in Environmental, Energy, and Economic Performance
- [E.O. 13603](#) National Defense Resources Preparedness
- [E.O. 13693](#) Planning for Federal Sustainability in the Next Decade

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## Conclusion

The single-party control of the Legislative and Executive branches of the United States government and an open seat on what is often considered an evenly divided Supreme Court will lead to big changes in many areas of law. Whether President-elect Trump and Speaker Ryan can follow through on their campaign promises and big policy ideas,

most of which are currently lacking in specifics and details, remains to be seen.

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