

Looking Ahead: The U.S. Legal and Regulatory Environment Under a Trump Administration

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Election Day brought an end to a long period of uncertainty that caused market fluctuations and delayed business planning decisions. As we navigate the post-election landscape, many questions remain regarding the potential policy direction of a Trump administration, including policies that could affect long-standing trade agreements, U.S. investments at home and abroad, the power and reach of regulatory agencies, and the balance of the U.S. Supreme Court. Until the new administration's appointees are announced and confirmed, any forward-looking analysis is inherently uncertain. In addition, a Republican-controlled legislative branch may pursue policy priorities that are not entirely in accordance with those of the president-elect. Despite the unknowns, we offer this snapshot of the changes our clients may encounter. We will provide a more detailed account of these and other topics in our annual *Insights* publication, scheduled for release in January 2017.

Tax Reform

The combination of a Trump administration and Republican control of Congress has greatly increased the prospects for business tax reform. Such reform could have a dramatic impact on the cross-border tax planning that is commonly employed by both U.S. and foreign-parented multinational corporate groups, and would require multinational corporations to rethink all aspects of their corporate structures, including capital structures, supply chain structures and the location of their earnings and operations. Changes in the taxation of domestic and foreign corporate earnings could facilitate M&A activity by enhancing U.S. multinationals' access to their foreign earnings.

- The business tax-reform proposals set forth in President-elect Trump's campaign and the House Republican proposal differ in certain key respects but have common themes, including a significantly reduced corporate tax rate, the ability to deduct capital expenses (at the price of forgoing interest deductions), and a one-time tax on accumulated foreign earnings.
- There also are potentially important differences between the proposals. Most notably, the House Republican proposal features a destination-based tax (*i.e.*, income from foreign sales is exempt from U.S. tax, though income from U.S. sales is subject to full U.S. taxation), while President-elect Trump's proposal has no such tax or exemption. In addition, the House Republican proposal would introduce a territorial tax system (modified by the destination-based tax), while Mr. Trump's proposal is less clear on its treatment of foreign earnings (potentially taxing some or all such earnings at the proposed lower rate of 15 percent).

Looking Ahead: The U.S. Legal and Regulatory Environment Under a Trump Administration

- Given that both President-elect Trump's campaign and the House Republican proposals are expected to be scored by the Joint Committee on Taxation (JCT) to substantially reduce corporate tax revenues, it is uncertain whether the Republicans in Congress would ultimately approve such an expensive tax cut for business.
- In addition, significant changes could be made in the taxation of individuals, pass-through entities and carried interest. In particular, the proposals would generally lower individual tax rates and limit deductions, tax carried interest as ordinary income, and potentially tax pass-through entities in a manner similar to the taxation of corporations.

It is generally expected that the House Ways and Means Committee will introduce a tax reform bill early in 2017. Presumably, the Trump administration will release its own proposals around the same time. Assuming alignment between the Trump administration and House Republicans, a House bill would then be considered in committee in the spring of 2017; if passed by the House, it would be reviewed by the Senate in the summer, with possible enactment by the fall of 2017. If that timetable holds, while most aspects of the reform would presumably only apply prospectively, certain provisions — notably the transition tax on foreign earnings — could take into account transactions undertaken as early as January 1, 2017.

M&A: U.S. Transactions

For the moment, the markets seem to have responded with relative equanimity to the election results, which could indicate that M&A activity levels may not be affected dramatically in the short term. Although a lull in activities is possible as entities considering a transaction assess the potential impacts of changes to be enacted by the new administration, the fundamental drivers — the need to grow revenue and earnings and the need to be positioned competitively for the future — will remain. However, several themes may influence deal activity going forward:

Regulatory Policy: The Obama administration has been perceived as pursuing increased business regulation in a number of areas. While the regulatory priorities of a Trump administration are unclear, to the extent it adopts a deregulation agenda, it may bring with it sector-specific opportunities (e.g., in banking and insurance, natural resources and other industries that were the focus of Obama administration regulatory initiatives) as well as an increase in board and executive suite confidence that is integral to M&A activity.

Antitrust Enforcement: One Obama-era trend that has had some impact on recent M&A activity is a more aggressive attitude toward antitrust merger review. In keeping with a broader theme

of loosening regulation under President-elect Trump, we could see a less aggressive attitude toward merger review, thereby benefiting deal activity. *(See further discussion below in "Antitrust")*

National Security Review: It is unclear whether the Trump administration will take a different approach to national security review of transactions. Given the meaningful proportion of U.S. M&A transactions involving foreign buyers (approximately one-third of the U.S. M&A deal value this year), a change in policy — whether generally or with respect to buyers from selected jurisdictions that have been notable buyers of U.S. assets, such as China — and any foreign regulatory response could impact the timing and execution of both inbound and outbound deals. *(See further discussion below in "Foreign Investment")*

Tax Policy: As discussed above in "Tax Reform," President-elect Trump has made tax reform, including corporate tax reform, a central part of his platform. The structure of taxation of U.S. corporations as well as rates could have a meaningful impact on M&A transactions. For instance, a repatriation holiday or reduced one-time tax for foreign earnings could result in more cash available for domestic transactions by U.S. buyers, particularly in areas such as pharmaceuticals and biotechnology. Lower tax rates could also have an impact on valuations and make U.S. buyers more competitive with foreign acquirors.

Fiscal Policy: A more stimulative fiscal policy resulting from a combination of tax relief and increased infrastructure and other spending could have a profound impact across the economy, including for GDP growth levels, inflation expectations and interest rates. All of these factors could impact M&A in a meaningful way — presumably positively in the case of expectations of increased GDP growth and negatively in the case of expectations of higher inflation driving higher interest rates.

M&A: Cross-Border Transactions

Europe

- Longer-term trends seem to be emerging subsequent to the initial reaction to the Brexit vote. UK and European companies likely will seek to make deeper investments in the U.S., both through cross-border M&A and access to the U.S. capital markets, particularly given the possibility of relaxed regulatory oversight under a Trump administration.
- In addition to a potential relaxation — or even repeal — of the sanctions imposed on Russia, the Russian corporate world believes that the Trump presidency will encourage U.S. and potentially Western European investors to pursue new

Looking Ahead: The U.S. Legal and Regulatory Environment Under a Trump Administration

Russia-related M&A and restart deals that have been on hold since the Crimea situation. (*See further discussion below in “Sanctions”*)

- On the downside, the added uncertainty regarding the WTO and various regional trade agreements, in addition to the inevitable renegotiation of the UK’s trade and tariff arrangements with trading partners, could continue to undermine the executive suite confidence that is integral to cross-border M&A.

Asia

- Significant concern exists among Asian M&A buyers, particularly those in China, that CFIUS (foreign investment) approval might be more difficult to obtain in a Trump administration, particularly in technology and intellectual property-intensive areas of business.
- China’s regulatory authorities could react to general tensions in economic relations with the U.S. This might entail concerns about changes in U.S. policy on trade regulation, exchange rates, foreign investment regulation — whether CFIUS, anti-trust or other — or even geopolitical factors. Feedback from these concerns could extend to China’s regulatory approvals for U.S. multinational corporations investing in China, and potentially to China outbound investment.

National Security/Foreign Investment

Early indications suggest that the priorities of the new administration may be familiar to those who have followed Republican foreign policy for many years: more welcoming of foreign investment generally, but also more willing to cast a skeptical eye on specific purchasers that raise national security risks.

Key cabinet-level appointments will provide important clues as to the Trump administration’s approach to foreign investment, including the Secretaries of Defense, Homeland Security and Treasury; the Attorney General; and the U.S. Trade Representative. In addition, while individual cabinet members have significant control over the strategies of their cabinet departments, senior and mid-level political appointees are responsible for overseeing the day-to-day activities of career government officials. Those additional appointments may not be approved for six months or longer.

Members of the Trump national security transition team have been proponents of close CFIUS reviews of investors with ties to certain foreign governments that have engaged in industrial espionage and cyber attacks, and also of focusing more specifically on cybersecurity threats to critical infrastructure. Both a Trump CFIUS team and the House and Senate intelligence committees may focus increasingly on these issues in CFIUS reviews.

In the interim, investors should expect CFIUS to operate conservatively. Longer reviews and searching questions from the member agencies can be expected, as well as fewer innovative approaches to national security mitigation agreements.

Amidst early speculation about the priorities of the Trump administration, the new, unified Republican Congress should not be overlooked. In general, Congress is likely to be a right-leaning influence on the Trump CFIUS approach, holding the traditional view of encouraging business-friendly reviews of foreign investment that open up capital for use in building the American economy. However, many Republican members of Congress have been engaged in an open discussion about reforming CFIUS staffing, funding, and/or authorities to expand the Committee’s ability to review transactions in which certain national security issues or types of purchasers are present. At the request of several members of Congress, mostly Republicans, the Government Accountability Office recently announced that it will initiate a review of CFIUS statutory and administrative authorities early next year.

Capital Markets

The debt and equity capital markets may experience volatility until President-elect Trump assembles his full team and sets legislative and economic agendas. While the short-term volatility and uncertainty may make it more difficult or costly to access capital and may negatively affect the IPO market, we believe that in the long term, Trump’s pro-growth agenda will create opportunities.

Infrastructure: One of the few areas the presidential candidates agreed upon was the need for investments in infrastructure. Industries related to infrastructure and development should benefit, and likely will be more active in capital-raising activities. (*See further discussion below in “Infrastructure”*)

Health Care: As discussed below under “Health Care,” the health care industry is certain to receive significant attention. The effect on capital markets activity involving industry participants may differ depending on the sectors in which they operate. For example, many specialty pharmaceutical, biotech and device companies have had valuations depressed by proposals set forth by Secretary Clinton. The election of Mr. Trump could result in improved valuations, triggering more IPOs, spin-offs and offerings by these companies, as well as M&A activity and associated financing. On the other hand, hospitals, managed care organizations (MCOs) and generic drug manufacturers may operate in a period of uncertainty that could impede their capital markets activity until there is clarity surrounding changes to the Affordable Care Act.

Looking Ahead: The U.S. Legal and Regulatory Environment Under a Trump Administration

Initial Public Offerings: The uncertainty leading up to the election, combined with the impact of other global events such as Brexit, contributed to a weak IPO market in 2016. While there were already predictions of a recovery in the IPO market in 2017 — particularly in the technology sector, where there is a significant backlog — we expect an increase in IPO activity if the equity markets remain stable, even though prior models assumed a Clinton presidency. Additionally, the fear that President-elect Trump may eliminate favorable capital gains treatment for carried interest may spur some private equity sponsors to monetize more quickly than otherwise intended, which could accelerate the IPO pipeline.

Acquisition Financing: We can expect a significant amount of investment-grade and high-yield offerings to finance M&A activity, if the new administration's tax reform and regulatory policies lead to enhanced M&A dealflow.

Interest Rates: A potential December interest rate hike by the Federal Reserve is generally believed to have been factored into the markets. We believe that if the markets remain relatively stable and if the Federal Reserve raises rates as previously expected, investment grade offerings likely will continue consistent with recent market conditions, at least in the short run. Future interest rate moves by the Federal Reserve and their effect on financing activity are difficult to predict given the overall uncertainty of the tax and economic policies that may be supported by the new Congress.

Financial Services Regulation: The potential decrease in burdens on financial institutions described below could create enhanced capital markets opportunities in the financial and banking sectors.

Infrastructure

Implementation of a plan to significantly increase infrastructure spending in the U.S. was a key component of President-elect Trump's campaign platform, and is likely to be an important priority for the new administration. Mr. Trump's "America Infrastructure First" policy calls for investing as much as \$1 trillion on roads, bridges, water, energy, electric utilities and telecom infrastructure through private sector investment and other measures.

President-elect Trump's advisors have suggested introducing an infrastructure investment tax credit as a means of stimulating private sector investments in these projects. We expect this initiative will also feature proposals to increase the use of public-private partnerships (PPPs), whereby private parties agree to design, construct, finance, operate and/or maintain a road or other infrastructure facility under the terms of a concession agreement with a governmental entity.

The existing Build America Bureau at the Department of Transportation, which provides federal financing for PPPs and other transportation assets planned by state and local governments, could become a more important participant in these efforts. The plans will likely create many more long-term investment opportunities for infrastructure funds, pension plans, insurance companies and sovereign wealth funds, while also increasing bank and capital-market debt financing activity and boosting business for major infrastructure project managers and construction contractors, equipment suppliers and operators.

Antitrust

- Although President-elect Trump did not release any antitrust policy positions during his campaign, Republican administrations generally have taken a less interventionist approach to antitrust enforcement, consistent with the party's views on limited government. It seems reasonable to expect a departure from the rigorous antitrust enforcement conducted during the second term of the Obama administration.
- However, President-elect Trump's public comments and generally populist support driving his election may suggest a more enforcement-minded approach than recent Republican administrations. For example, he stated that he would block AT&T's proposed \$85 billion acquisition of Time Warner to restrain increasing consolidation in the media industry.
- Notably, President-elect Trump has substantial personal experience with the antitrust laws as both a plaintiff and defendant. In 1982, as an owner of a franchise in the upstart U.S. Football League, he was a plaintiff in a federal antitrust suit alleging that the NFL monopolized the professional football market. A jury concluded that the NFL was liable, but awarded damages of only \$1 (trebled to \$3). In 1988, he paid a \$750,000 civil penalty to resolve claims that he violated the Hart-Scott-Rodino Act's reporting and waiting period requirements in connection with his acquisition of stock in two gaming companies. Finally, in 1989, Mr. Trump was a defendant in a New Jersey state court suit alleging that he attempted to monopolize, and conspired to suppress competition in, the casino gambling market in Atlantic City. He prevailed after a 10-month trial. The impact, if any, of his personal experiences on his policy-making remains unclear.

President-elect Trump will nominate the head of the Department of Justice's Antitrust Division and, within the first several months of his term, will have the opportunity to name the Chair of the Federal Trade Commission and up to three Commissioners (two of these positions are vacant, and FTC Chairwoman Edith Ramirez's term expires in April 2017). The Trump transition team has not yet indicated which candidates are under consideration. President-elect Trump's nominee for Attorney General will

Looking Ahead: The U.S. Legal and Regulatory Environment Under a Trump Administration

have substantial influence in making the antitrust appointments; and these appointees will substantially determine the course of antitrust enforcement in the Trump administration.

International Trade

Throughout his campaign, President-elect Trump appealed to voters with promises to reverse decades of U.S. trade policies in order to bring manufacturing jobs back to the United States and increase wages for American workers. Mr. Trump's trade policies could offer substantial opportunities for certain companies and investors and have major negative consequences for others. Given their potential impact, his trade policies undoubtedly will face legal challenges before the World Trade Organization and, to a lesser extent, the U.S. courts.

Trade policies that President-elect Trump likely will attempt to implement include:

Withdrawal from the Trans-Pacific Partnership (TPP): President-elect Trump has promised to have the U.S. withdraw from the TPP, a trade agreement negotiated by the Obama administration, which could significantly impact companies in a number of industries, including the technology industry.

Renegotiating the North American Free Trade Agreement (NAFTA): While Mr. Trump has promised to renegotiate NAFTA, the exact parameters of such a renegotiation are unclear.

Enforcing Trade Laws More Aggressively: The president-elect has made clear that the United States will take action against unfair trade that is harming U.S. companies and workers, using all available remedies under U.S. and international law. This would include more aggressive enforcement of the antidumping and countervailing duty laws against unfairly traded imports into the United States, as well as the use of other trade laws that could significantly restrict imports. The president-elect will likely use the U.S. trade remedy laws as the primary tool to address the United States' trade imbalance with China.

Labelling China as a Currency Manipulator: President-elect Trump has announced that his administration will declare China a currency manipulator. This action will have ramifications under U.S. and international law, including the possibility that China's currency manipulation will be treated as a subsidy for which countervailing duties can be applied. The treatment of currency manipulation as a subsidy would benefit U.S. manufacturers but could have significant adverse effects on anyone involved in the export of goods from China to the United States.

Economic Sanctions

The Obama administration, like its predecessors, has used economic sanctions as a foreign policy tool, deploying them as both a carrot and stick in response to specific global developments. Most notably, over the past few years President Obama has imposed new sanctions on Russia and the Crimea region in response to the crisis in eastern Ukraine, provided for limited easing of the U.S. embargo on Cuba, and suspended nuclear-related sanctions on Iran. President-elect Trump made statements during the course of his campaign that may provide some indication of the course he and his administration will chart with respect to U.S. sanctions on these countries.

Russia: President-elect Trump indicated that better relations with Russia may advance U.S. interests, and in mid-2016 he said he would be "looking at" U.S. sanctions on Russia. Although Congress has imposed certain U.S. sanctions on Russia, most sanctions have been imposed by executive order. Mr. Trump has not provided clear indication of his administration's posture with respect to sanctions on Russia, but nearly all current sanctions could be modified by executive action.

Many in Congress have voiced concerns not only about Russian involvement in eastern Ukraine but also about Russian actions in Syria. Should there be an effort by the Trump administration to unwind U.S. sanctions on Russia, the administration could encounter opposition — and potential legislative efforts to retain certain measures — in Congress.

To date, the U.S. and the European Union have closely coordinated their sanctions efforts with respect to Russia. The imposition and renewal of EU sanctions requires unanimity among the 28 EU member states, and certain EU countries have questioned the effectiveness of EU sanctions on Russia. A new course charted by the Trump administration regarding Russia could make it more difficult for the EU to maintain support among the full 28 member states for a continued sanctions effort.

Iran: While campaigning, President-elect Trump strongly criticized the Joint Comprehensive Plan of Action (JCPOA) negotiated by China, France, Germany, Russia, the United Kingdom and the United States with Iran, which went into effect on January 16, 2016. Mr. Trump stated at different times that he would dismantle the deal, try to renegotiate the deal, and increase U.S. sanctions on Iran. As part of its commitments under the JCPOA, the United States has suspended certain sanctions, with a principal focus on lifting so-called secondary sanctions that targeted non-U.S. financial institutions and other non-U.S. companies doing business with Iran. The U.S. steps to implement sanctions

Looking Ahead: The U.S. Legal and Regulatory Environment Under a Trump Administration

relief under the JCPOA were taken by executive action and, similarly, could be unilaterally undone, in whole or in part, by the incoming Trump administration. The JCPOA has been opposed by most Republicans in Congress and has tenuous support among many congressional Democrats. In recent years, Congress has been very active in passing Iran sanctions legislation and could view the start of the Trump administration as an opportunity to reinvigorate legislative efforts, particularly if the new administration sets a new U.S. policy direction with respect to the JCPOA.

Cuba: Prior to the election, President-elect Trump made statements indicating support for renewed ties with Cuba. He also stated he would reverse the Obama administration's renewal of diplomatic relations and reestablishment of some trade with Cuba unless the Castro regime restores religious and political freedoms and frees political prisoners. In September 2016, President-elect Trump said that "all of the concessions that Barack Obama has granted the Castro regime were done with executive order, which means the next president can reverse them. And that is what I will do unless the Castro regime meets our demands." Since the Cuba policy shift announced by President Obama in December 2014, the Obama administration has issued several rounds of limited easing of U.S. sanctions and export controls applicable to Cuba, with the most recent changes made in October 2016. All of these steps to ease the U.S. embargo on Cuba have been carried out by executive action and, if the Trump administration determines to alter the Obama administration's Cuba policy, those changes similarly could be reversed by executive action.

Financial Regulations

While President-elect Trump's campaign did not address with any specificity its overall plans regarding financial regulation, most expect that a Trump administration and Republican-controlled Congress generally will seek to implement deregulation of the financial sector. However, it is worth noting that in assessing what the new president and Republican Congress can or will do to implement financial deregulation in 2017, the Senate will have 52 Republicans, and 60 votes are needed to defeat a filibuster. As a result, Republicans likely will need at least 8 Senate Democrats to join them in enacting their agenda.

Repealing or Replacing Dodd-Frank: President-elect Trump's platform has been to eliminate or "change greatly" the Dodd-Frank Wall Street Reform and Consumer Protection Act. Dodd-Frank could be amended by all or portions of the Financial CHOICE Act proposed by Representative Jeb Hensarling (R-Texas), Chairman of the House Committee on Financial Services, or a comparable proposal from the Senate.

"21st Century Glass-Steagall": It is currently unclear, if proposed by a Trump administration, whether a Republican Congress will advance the proposal to implement a "21st Century Glass-Steagall Act" to require banks to separate their commercial and investment banking activities.

Volcker Rule: Candidate Trump stated he would keep the Volcker rule intact if "[Paul] Volcker likes it." It is important to note that the Financial CHOICE Act, for which the Trump campaign expressed general support, would repeal the Volcker Rule as set forth in the Dodd-Frank Act.

Department of Labor (DOL) Fiduciary Rule: It is unclear whether a Trump administration would seek to block or delay the DOL fiduciary rule, which is not yet in effect, but would require financial advisors to act in the best interest of their clients with respect to their retirement accounts. It was not directly addressed by the campaign, but an advisor to President-elect Trump had indicated that there would be efforts to reverse it, and Republicans in Congress have previously indicated a desire to do so. Further, President-elect Trump has indicated that a regulatory moratorium would be part of his "100 day" agenda.

Implications for Financial Regulatory Agencies:

Oversight of the Federal Reserve: President-elect Trump has said he supports "proposals that would take power away from the Fed, and allow Congress to audit the U.S. central bank's decision making."

Financial Stability Oversight Council (FSOC): The Trump administration's Treasury Secretary will chair the FSOC panel of regulators. The panel has before it the designation of systemic risk activities, which could reach into the nonbank sector in a significant way. The Financial CHOICE Act would retroactively repeal the authority of the FSOC to designate firms as systemically important financial institutions (SIFI).

Bank Regulatory Agencies: No immediate senior leadership changes are expected for the key federal bank regulatory agencies (Federal Reserve, OCC and FDIC), but President-elect Trump will have the opportunity to replace the heads of these agencies as their terms expire over the next few years.

Consumer Financial Protection Bureau (CFPB): Along with Dodd-Frank Act reform comes the possibility of restructuring and scaling back the CFPB's authority, which could include replacing its single-director structure with a bipartisan commission and reducing its funding. If the single-director structure remains, it is likely that President-elect Trump, relying on a recent ruling by a U.S. court of appeals, would seek to replace Director Cordray before his term expires in July 2018. It also is likely that the

Looking Ahead: The U.S. Legal and Regulatory Environment Under a Trump Administration

CFPB's authority to enforce the vague "abusive" standard may be scaled back, and that its use of other controversial legal theories, such as the application of the disparate impact discrimination theory in consumer lending cases, may be restricted.

House Republicans have maintained the majority needed to advance significant changes to the structure of the CFPB. Senate Republicans will likely have a one-seat majority on most of the committees and retain the majority leader post, which will facilitate the ability to effect change.

Derivatives: Congress could pare back or revise some of Dodd-Frank's swap regulation, especially for swap execution facilities, but is unlikely to repeal those rules in their entirety. It could further limit the cross-border reach of CFTC regulation. Pending CFTC rulemaking proposals are in jeopardy, although some form of new regulation for algorithmic traders is still likely, even with a new Chairman appointed by President-elect Trump. The CFTC may also place greater emphasis on promoting market liquidity and a cost-benefit analysis for any new rules.

Implications for Bank M&A:

We expect the Trump administration and Republican Congress to increase the current \$50 billion automatic SIFI-designation threshold, which has been a meaningful deterrent for bank M&A activity at the regional and community bank level in the United States.

Deregulation, for regional and community banks, is likely to open new opportunities for these banks to grow organically and by merger. While certain changes, such as raising the SIFI threshold, will favor midsize to smaller banks, others could benefit banks of all sizes, encouraging deal-making in the financial services space generally.

However, we expect the bank M&A environment in the U.S. to adjust gradually. It takes time to implement financial deregulation, and regulators that oversee banking institutions on a day-to-day basis will not change their approach to bank M&A.

Technology

As noted earlier, while U.S. equity markets have responded with relative equanimity to the reality of a Trump administration taking the reins of power in January, reactions have varied by industry, with many health care stocks generally reacting positively, presumably on the prospect of repeal (or reform) of the Affordable Care Act, but with the technology sector generally registering a marked decline following the election results. The technology sector generally had significant access and influence in Washington D.C. over the last eight years of the Obama administration. But the technology sector generally, and Silicon

Valley in particular, with the notable exception of well-known entrepreneur and venture capitalist Peter Thiel, lined up fairly solidly and strongly behind the Clinton campaign and can expect its influence to wane in a new administration.

In addition to antitrust and regulation of foreign investment covered above, areas that will be of particular concern for companies operating in the technology sector include the Trump administration's policies in immigration, trade, telecommunications, tax, privacy and cybersecurity, each with potentially differing outcomes for the technology sector, depending on the new administration's priorities and execution of them.

- While President-elect Trump's statements on immigration are well known, amidst a continuing war for talent in Silicon Valley, technology companies are focused on whether the execution of those policies will, in fact, impinge on the ability to obtain H-1B visas for highly skilled software engineers and technology executives who would otherwise be attracted to U.S.-based technology companies.
- On trade, many of the largest technology companies in Silicon Valley generate a majority of their revenues outside of the United States and are dependent on a global supply chain for the delivery of their products and services. Technology companies have been at the forefront of globalization trends and the development of the post-industrial economy, the backlash against which was a core animating force of the Trump campaign. Tech companies will watch to see if the free flow of goods and services upon which they have become dependent will be interrupted or whether, in contrast, a Trump administration will aggressively attack piracy and protection of intellectual property, which have been issues of great importance to the tech sector.
- Candidate Trump was highly critical of net neutrality. President Trump can be expected to appoint an FCC chairman who would undertake, through administrative process, to repeal the net neutrality rules promulgated by the FCC as well as Internet Service Provider privacy rules, which limit how ISPs can use and sell customer data.
- Tax policy has the potential to impact profoundly — potentially positively — the technology sector. High-impact areas include R&D credits (both the Trump and House Republican proposals provide for a retention of the R&D credit), repatriation of "trapped cash" overseas and the potential deductibility of capital investments.

Privacy and Cybersecurity

Companies whose business models depend in part on data monetization will watch for Trump administration initiatives in the increasingly complex privacy area, although as was the case

Looking Ahead: The U.S. Legal and Regulatory Environment Under a Trump Administration

with the Obama administration it is unlikely a Trump administration would take the initiative to advance any type of privacy legislation. However, candidate Trump also strongly supported the ability of the U.S. to access personal data in the name of national security. Any action in this area, including any pressure on Congress to reinstate those provisions of the Patriot Act that were amended by the USA Freedom Act of 2015, could jeopardize the EU-U.S. Privacy Shield. That agreement, which provides a means for companies to send data from the EU to the U.S. in compliance with the EU privacy law, was highly dependent on the U.S. government's agreement to impose safeguards and limitations on bulk access to personal data. If the Trump administration shows signs of renegeing on that commitment, we expect that the Privacy Shield would be invalidated.

Cybersecurity is one area where a Trump administration might support increased regulation. During the first presidential debate, Mr. Trump noted the U.S. needed to get “very, very tough on cyber and cyberwarfare,” and candidate Trump called for the creation of a joint team of public- and private-sector experts to analyze the government's current cyber preparedness. We expect the Trump administration would support increased requirements on companies to implement cybersecurity programs.

The most intriguing issue in the area of privacy and cybersecurity may be how a Trump administration FTC would operate. President-elect Trump will be selecting two new FTC commissioners as well as an FTC chair. During the Obama administration, the FTC was at the forefront of bringing actions against companies that used personal data beyond what was promised to consumers in privacy policies and against companies that did not provide adequate cybersecurity protection. Many asserted the FTC had overstepped its authority in these actions by adopting an overly broad reading of the “likelihood of consumer harm” and “unfair practices” prongs of Section 5 of the FTC Act. While a Trump administration FTC may well interpret Section 5 more narrowly, it is important to note that the protection of personal data and data security have become bipartisan issues, and this may not be an area in which we will see a dramatic scaling back of FTC activity. This may be especially true if privacy protections are scaled back at the FCC (as noted above), leaving the FTC as the one federal agency focused on this important and developing area.

Health Care

Affordable Care Act (ACA): President-elect Trump's health care policy proposals were relatively high-level and focused on repealing and replacing the ACA, reducing market barriers to new drug approvals, permitting the import of lower-cost drugs, and authorizing Medicare to negotiate drug prices. On issues

where President-elect Trump did not stake out a position, we would expect the Republican Congress to push proposals similar to those in the health care reform sections of the House Republicans' “Better Way” agenda.

President-elect Trump's promise to repeal and replace the ACA aligns with the views of congressional Republicans, and we expect legislative action soon after Congress returns. While the repeal/replace process may require 60 votes in the Senate, the majority leadership will seek to overcome efforts by Democrats to stall the legislation. Appropriations bills will be used to defund certain provisions otherwise subject to a supermajority vote in the Senate. Executive orders could immediately impact the administration of key elements of the ACA by the Centers for Medicare and Medicaid Services (CMS) including new reimbursement models. The individual and employer mandates and the minimum benefit package are prime targets for elimination. The provisions permitting individuals under 26 to stay on their parents' insurance, the ban on denials for pre-existing conditions, expanding sales across state lines, and block grants for state Medicaid programs are likely to be retained or included in some form.

Approvals: Speeding drug approval also is consistent with Republicans' prior legislative efforts. Look for Congress to seek prompt approval of reconciled versions of the House and Senate 21st Century Cures Act legislation.

Foreign Drug Imports/Medicare Drug Negotiation: President-elect Trump's proposals on foreign drug imports and Medicare drug price negotiation will be a tougher sell for congressional Republicans. He could insist on some watered-down authority in exchange for his signature on other legislation, but giving Medicare broad authority to negotiate (in the views of many, to set) drug prices will be a struggle. While the election results will diminish the near-term scrutiny of drug prices, certain pricing practices have drawn the ire of both Democrats and Republicans, and rising drug costs (including the costs of high-end specialty drugs and increased generic prices) will continue to be a hot topic.

Fraud and Abuse: The election results are unlikely to diminish the current focus on combatting health care fraud and abuse, including civil and criminal prosecution of health care companies. Cracking down on waste, fraud and abuse has bipartisan support, and the vast majority of investigative and charging decisions lie in the hands of career prosecutors. While the change in the front offices of U.S. attorneys and the DOJ might result in some delays in the pace of enforcement actions, this will be relatively short-lived. Tough enforcement is likely to continue (or even increase) over the next four years and beyond.

Looking Ahead: The U.S. Legal and Regulatory Environment Under a Trump Administration

Political Law

President-elect Trump has given conflicting signals regarding how he intends to treat lobbyists and money in politics. During the campaign, he made unfavorable statements about lobbyists (e.g., references to “draining the swamp”), but some hold important positions on his transition team. It appears that Mr. Trump may withdraw President Obama’s executive order restricting the appointment of lobbyists and ease post-employment restrictions. While he has criticized the role of “big money” in politics, he may face political pressure to roll back-pay-to-play restrictions on political contributions, especially those on investment advisors that stem from Dodd-Frank. In addition, President-elect Trump’s judicial appointments may eventually lead to decisions reducing the regulation of money in politics.

Litigation Reform

With a Republican in the White House, congressional leadership will likely reintroduce and pursue litigation reform ideas that received attention in the current legislative Session. For example, earlier this year, the House passed the Fairness in Class Action Litigation Act, a bill intended to ensure that class action plaintiffs could pursue claims only on behalf of persons who allegedly sustained similar alleged injuries. The House also advanced the Furthering Asbestos Claim Transparency Act, legislation that would require greater public disclosures about plaintiff counsel management of trusts administering asbestos claim funds.

On the Senate side, Judiciary Committee leadership has shown interest in addressing potential abuses arising out of the increasing use of third-party litigation financing – that is, investments in lawsuits. Committee inquiries about such activity may yield disclosure and regulation proposals in the next Session.

Over the past year, the House Judiciary Committee also gave attention to the growing trend of mass tort litigation claims being lodged in federal courts (particularly multidistrict litigation proceedings) without proper pre-filing investigation. Additionally, there may be interest in the growing problem of plaintiffs’ counsel using pleading ploys to avoid federal jurisdiction, setting up several state courts as “magnets” for litigating mass tort controversies lacking any relationship with the jurisdiction.

The Obama administration has undertaken several regulatory initiatives to restrict the use of arbitration clauses in consumer contracts, particularly in the financial services and communications arenas. Since those actions were in reaction to Supreme Court decisions supporting the use of arbitration clauses to avoid litigation, the Trump administration may be inclined to countermand those efforts.

The Supreme Court

Nominating a replacement for Supreme Court Justice Antonin Scalia will top President-elect Trump’s early agenda. The list of potential nominees circulated by his campaign — principally sitting judges — reflects many members of the conservative establishment, but preserves the possibility of a firebrand controversial nominee. Short of a filibuster (if the Senate continues to honor that tool in the Supreme Court nomination context), the Democrats will have limited opportunity to serve as a check on the nomination. Much depends on the administration’s appetite for a contentious nomination fight that might consume its early agenda.

Meanwhile, the Supreme Court will continue — and perhaps even conclude — its current Term with eight members and a prospect of more four-to-four votes. Although the Term’s opening months have been short on controversy, significant disputes, including contentious constitutional questions, are on the horizon. President-elect Trump’s views on those questions — strong support for the Second Amendment and for overturning *Roe v. Wade* and praise for a strict constructionist approach — likely will impact his nominee selection. In the longer term, and especially if the opportunity to fill additional vacancies on the Court arises, his nominees could be poised to define the Court’s direction on many issues important to the business community, including class actions and administrative law. His apparent commitment to deregulation also may play a role in his selection of potential nominees.

President-elect Trump could also use Republican control of the Senate to put an early stamp on the lower courts. When he takes office, almost half of all federal Circuit Court seats will be either vacant or occupied by a judge eligible for senior status.