

## Inside the White House and Capitol Hill

The Impact of a New Administration on Global Markets



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On January 25, 2017, Skadden hosted a panel discussion at the London Stock Exchange on the potential policy direction of the Trump administration. The panel touched on tax reform, trade agreements, inbound and outbound U.S. investment, antitrust enforcement and economic prospects, among other topics.

Pranav Trivedi, head of Skadden's London office, introduced the panel:

- Gregory Craig (of counsel, litigation), who served as President Barack Obama's first White House counsel;
- Paul Oosterhuis (of counsel, international tax), who served on the U.S. Congress' Joint Committee on Taxation for five years, including as its international tax counsel;
- Tara Reinhart (partner, antitrust and competition), former chief trial counsel for the Federal Trade Commission (FTC) Bureau of Competition; and
- Ivan Schlager (partner, head of Skadden's CFIUS practice), former Democratic chief counsel to the U.S. Senate Committee on Commerce, Science and Transportation.

The discussion was moderated by BBC economics editor Kamal Ahmed.

### Economic Outlook

To set the scene for the panel discussion, Mr. Ahmed asked the audience to participate in a straw poll on prospects for the global economy in the next three to four years. A number of guests raised their hands when asked if they felt confident about the U.S. economy; a few were optimistic about prospects for the U.K. economy; and one member of the audience expressed confidence in the rest of Europe's economy over the medium term.

### Trans-Atlantic Relations

Mr. Ahmed asked the panelists to consider what advice they would offer President Donald Trump in relation to the United States' future relationship with Europe.

Mr. Craig used the economic sanctions imposed in response to Russia's actions in Ukraine to highlight potential issues that President Trump may face should he seek to do a deal with Russia. If the Trump administration were to seek to unwind existing U.S. sanctions on Russia, it could encounter staunch opposition (including potential legislative efforts to retain certain measures) in Congress.

# Key Takeaways

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Mr. Craig highlighted several policy areas where the positions taken by President Trump and by members of the Republican national security and foreign policy establishment differ, including the role of NATO and the importance of the European Union itself. Mr. Craig said it would be very difficult for President Trump to normalize relations with Russia without first addressing issues concerning Ukraine. Given that European leaders have played a central role in conducting negotiations with Ukraine and that the U.S. and the European Union have closely coordinated their sanctions efforts to date, Mr. Craig suggested that President Trump will likely come to understand the importance of the EU. Mr. Craig also pointed out that President Trump's desire to improve U.S. relations with Russia would be frustrated by Russian President Vladimir Putin's unwillingness to change his approach to Ukraine, Eastern Europe and NATO.

### Trans-Atlantic Trade

In light of President Trump's decision to withdraw from the Trans-Pacific Partnership (TPP), Mr. Ahmed queried whether the panel thought a similar approach to trans-Atlantic trade was likely. Mr. Craig said efforts to develop a common market in the Atlantic community would probably end the same way as TPP, and President Trump will likely favor a more protectionist approach that seeks to put "America first" rather than robustly support free and fair trade.

### Tax Reform

Mr. Ahmed asked Mr. Oosterhuis about the likelihood of tax reform being enacted, as well as the type of reform to be expected, given the president has indicated that such reform is one of his top priorities.

Mr. Oosterhuis noted that this is one area where President Trump should be able to find common ground with Republicans in Congress, many of whom are supportive of pro-growth tax initiatives. The combination of the Trump administration and a Republican-controlled Congress greatly increases the probability of reform. However, Mr. Oosterhuis cautioned that, while reform is pending, the United States could have the greatest uncertainty regarding its basic tax rules since the tax code was rewritten in the 1980s.

Though tax reform is likely, Mr. Oosterhuis explained that it is difficult to predict the precise outcome of any reforms. He referred to the House Republican proposal for U.S. business taxation reform issued in June 2016, which includes a destination-based cash-flow tax. This would essentially convert business tax into an accounts method value-added tax with a deduction for wages, thereby taxing consumption rather than income or produc-

tion. As this is a radical proposal, Mr. Oosterhuis speculated that it could be difficult for it to be adopted in its present form, especially given that there is no consensus in the Senate regarding tax reform (save, perhaps, that it should be pro-growth).

Regarding possible approaches that the Trump administration and the Republicans could take toward tax reform, Mr. Oosterhuis said he thought the House Republican proposal would be a logical starting point, despite its radical nature and potential to cause significant economic disruption, because it fits with the Trump administration's desire to "put America first." Such a reform could be characterized as partially border-adjustable (*i.e.*, a hybrid tax under which imports are not fully deductible and exports are not fully taxed), which seeks to strike a balance between value taxes and income taxes at the business level.

Mr. Oosterhuis also commented on the repatriation of multinationals' foreign earnings, noting that this is one area that enjoys broad consensus and would undoubtedly be included in any reform package. He explained that permitting U.S. companies to repatriate their offshore profits would be indirectly beneficial to the U.S. economy; U.S. dollars that are currently tied up in low return, passive assets could be reallocated more efficiently in the marketplace, for example by allowing companies to repay debt or return value to shareholders.

### M&A: Antitrust Enforcement

Ms. Reinhart discussed the areas where the combination of the Trump administration and a Republican-controlled legislative branch is most likely to lead to change. She noted that in contrast to the aggressive attitude toward antitrust merger review taken by the Obama administration, past Republican administrations have tended to take a step back from enforcement. The conventional wisdom, therefore, is that enforcement under the Trump administration will have a lighter touch. However, Ms. Reinhart noted that President Trump had already taken unprecedented action, both in commenting on the AT&T-Time Warner merger during his campaign and, prior to his inauguration, in meeting with Bayer and Monsanto while regulatory approval of their proposed merger was pending. The extent to which President Trump's appointments to positions in his administration with responsibility for antitrust enforcement will influence future policy direction remains uncertain.

### Foreign Investment and National Security

Mr. Ahmed asked Mr. Schlager whether uncertainty regarding President Trump's intentions in key policy areas will deter foreign investment in the U.S.

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Mr. Schlager said that although it may not be possible for companies to play by the conventional rule book, the Trump administration is likely to welcome foreign investment generally. However, he said, the president will likely seek to secure commitments from specific purchasers through the national security review process, especially in relation to domestic job creation.

Mr. Schlager suggested that we may see a return to an international trade policy reminiscent of the Reagan administration's. And although it is too early to tell how key Cabinet-level appointments will shape foreign investment policies, Mr. Schlager said he believes the administration may take targeted action in specific sectors — using special trade remedy measures for security review purposes, for instance — to create leverage, including a recalibration of the United States' trade deficit with China.

The panelists also discussed whether the Trump administration will pursue policies aimed at achieving more symmetrical, rather than asymmetrical, free trade, highlighting some of the challenges companies encounter when competing against subsidized finance and state-owned enterprises. Mr. Schlager noted that there is a developing Western consensus to enhance protections and defenses in certain sensitive sectors, such as intellectual property and cybersecurity. Mr. Craig said President Trump is likely to focus his energy on the terms of America's trade deficit (be it with China, Japan or Europe) and may use any change in this deficit as a measure of his own success.

### Balance of Power

In response to a question from the audience, the panel discussed the conflicting views heard on Capitol Hill since the election. Despite the fact that many nominees to Trump's administration openly disagreed with President Trump's policies in the past, Cabinet-level appointments may provide clues to the direction that the Trump administration will take. However, as we are still in the infancy of President Trump's term, it is impossible to predict how he will govern and whether he will follow his administration's advice.

Another member of the audience asked how the president has been able to rule by executive order and how important the Republican majority in Congress will be for implementation

of President Trump's plans. There was consensus among the panelists that the president had not, to date,<sup>1</sup> gone beyond the proper custom and practice of use of the executive order, which may be used for national security policies. However, the use of executive orders to impose obligations on American citizens would violate the proper separation of powers under the U.S. Constitution. Mr. Oosterhuis noted that there are certain matters reserved for the legislative branch of government, including taxation.

Mr. Craig also highlighted certain inherent structural limitations on the exercise of executive power by President Trump in the global arena, citing the deployment of ballistic missiles in Poland and Romania operated by NATO, sanctions imposed in relation to Ukraine and negotiations regarding Ukraine's future as examples. It would not be possible for the U.S. to reverse its position on such matters without serious adverse consequences, he said.

### Key Takeaways

Mr. Oosterhuis said some businesses are already advocating for pro-growth initiatives in Washington, D.C. He urged companies to consider what changes might help their respective industries grow, noting that the administration is open to ideas on how tax reform can benefit American businesses.

Ms. Reinhart reflected on how some of President Trump's views conflict with traditional conservative views, including those held by some of his own appointees, which begs the question: "Is it going to be a traditional conservative administration, or is it going to be where we are right now, which is in uncharted waters?" Ms. Reinhart said she believed the president will take advice from some of his more traditional Republican appointees. If that is the case, we may see a pro-business environment emerge over the next three to four years, she said.

Mr. Schlager concluded by observing that President Trump appears to be using his initial days in office to honor his campaign pledges without moderation, and that he may continue the course until there is an event that requires a change in approach.

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<sup>1</sup> We note that the executive order on "Protecting the Nation From Foreign Terrorists on Entry Into the United States" was passed on January, 27, 2017, two days after the panel discussion.