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The Trump Administration: Change By Executive Action and Inaction

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The election of Donald J. Trump as the 45th President of the United States, along with Republican control of the majority of both the House of Representatives and the Senate, will likely result in significant changes in U.S. financial services, energy, and commodities laws and markets.

As we have written previously,[i] in considering the changes that are likely in the now-forming Trump Administration, one must consider not only the substance of any potential change, but also the process by which change can be effected. In that memo, we observed that legislative change is often difficult, even when the President has a majority in both houses of Congress, given the ability of the minority party to filibuster. Nonetheless, there is quite a lot a new President can do to rapidly reverse the policies of a previous President's Administration, particularly to the extent that these previous policies were not themselves embedded either in statutory law or in rulemaking. To the extent that outgoing President Obama created policy through the direct and indirect power of his office, incoming President-elect Trump may readily revise or reverse those policies. This memorandum focuses on the ability of President-elect Trump to reshape policy through the use of various forms of executive action, including executive orders, discretionary agency directives and enforcement decisions.

Executive Orders

Presidential "executive orders" are written directives from the President of the United States that manage operations of the federal government.[ii] The President's source of authority to issue executive orders can be found either (i) in Article II of the U.S. Constitution,[iii] which sets out the powers of the three branches of the government or (ii) in authority granted to the President or the executive agencies by Congress.[iv]

Discretionary Agency Directives and Guidance Documents

Despite the attention given to "executive orders," many of the more controversial Obama Administration's policies were instead implemented pursuant to discretionary agency directives and guidance documents, or appointment powers,[v] rather than through executive orders. Discretionary agency directives – which include executive agency policy statements, bulletins, interpretive rules, guidance documents, letters and even press releases – are issued by executive branch agencies,

overseen by the President. These directives are used to notify the public as to an agency's interpretation of a particular law and inform regulated parties as to an agency's enforcement priorities. While "legislative rules" are required to undergo the notice and comment procedures of the Administrative Procedure Act (APA),[vi] thereof, directives are not subject to these agency procedural constraints.

Agency directives may also be used to highlight the manner in which the executive branch intends to enforce the law, or not to enforce it. By way of example, under the current Administration, executive agencies announced that they would not pursue aggressive enforcement in certain immigration cases,[vii] as to the use of marijuana in states where such use had been approved by the state,[viii] and to delay the implementation of certain provisions of the Affordable Care Act (ACA), including the so-called employer mandate[ix] and the requirement that employers subject to the Fair Labor Standards Act (FLSA) automatically enroll health plan participants in such coverage.[x]

President-elect Trump will, on assuming office, be able to direct the head of an executive branch agency to withdraw discretionary directives and guidance documents that were issued by that agency during the Obama Administration.

Financial Services in General and the CFPB In Particular

President Obama did not make extensive use of executive orders in the regulation of financial services. In fact, the most significant and arguably relevant order that he issued pertaining to financial services was directing the executive agencies to consider the burdens of imposing additional rules and regulations.[xi] Given the pace of rulemaking during this administration, it is certainly arguable that this order was honored more in the breach than the observance. Accordingly, rather than repeal this order, President-elect Trump might in fact reiterate and reinforce it by, for example, directing agencies to repeal outdated orders (though the actual revocation would be required to conform to ordinary rulemaking and APA procedures).

Although President Obama did not make material use of executive orders in the area of financial services, President-elect Trump's new authority in this area may serve as a good illustration of the potential uses of executive power. One agency that now falls under the direct control of the President is the Consumer Financial Protection Bureau (CFPB).[xii] One of the more significant actions that the CFPB has taken in this administration is the issuance of a bulletin on the use of "disparate impact"[xiii] to prove discrimination in lending.[xiv] This bulletin was supported by a CFPB "white paper," titled "Using Publicly Available Information to Proxy for Unidentified Race and Ethnicity."[xv] The mathematics of this paper were very heavily criticized.[xvi]

The fact that the CFPB's policy in charging discrimination in lending based on disparate impact, using as an evidentiary base the math of the CFPB's white paper, could be reversed in three different ways, illustrates the powers of the President. First, the CFPB under President Trump could interpret that the Equal Credit Opportunity Act (ECOA), under which the CFPB brought its legal action, does not provide by its terms for discrimination claims where there is no intent to discriminate. Second, with or without changing its interpretation of the ECOA, the CFPB could find that the mathematics used in its white paper were insufficient to demonstrate disparate impact. Third, the CFPB could simply not bring lending discrimination claims based on evidence of disparate impact.

Of these three options, disavowing disparate impact as a legal basis for stating a claim seems the least likely way to go, as it would be highly controversial because the use of disparate impact

analysis to evidence discrimination has been long accepted.[xvii] On the other hand, disavowing the CFPB's disparate impact analysis seems a position that the CFPB could very easily take, since there has been so much criticism of the statistical basis for the CFPB's analysis and it would seem an effective way of disavowing an analysis whose results were viewed by many as having been motivated more by politics than by mathematics. Finally, the CFPB's decision to bring a claim based on evidence of disparate impact will be necessarily case specific and it would not be necessary for the CFPB to announce a particular policy in this regard.

Conclusion

While a good deal of attention has been given to the use of Executive Orders by President Obama – and to the corresponding ability of President-elect Trump to amend or reverse those orders – in fact, executive action takes a wide variety of forms, including the issuance of agency orders, the issuance of interpretations, the selection of which enforcement actions to pursue, and the release of statistical studies. All of these actions involve a significant degree of executive discretion, and thus they will all be, to some extent, in the control of the new President.

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[i] *See* Clients & Friends Memo, The Trump Administration: Change by Appointment (discussing how the President and the Republican Congress may reshape policy through the appointment process with respect to certain key agencies responsible for financial, commodity and energy markets in the United States).

[ii] In addition to Executive Orders, the President may also issue "Memos and Proclamations." There is no legal difference between Executive Orders and these other types of documents, but Memos and Proclamations are typically used for matters of lesser significance. During his term of office, President Obama had, until December 2, 2016, issued roughly 279 Executive Orders (17 were "date corrections"), which is not extraordinary in terms of numbers for recent Presidents, although of course the number of such orders says nothing whatsoever about their substance. The Orders can be divided into the following categories: Cyber (7), Energy (16), Environment (12), Government Functions & Agencies (83), Health (12), Immigration (2), Labor (35), Military (36), Sanctions (37) and Trade (22).

[iii] Under Article II, the President has the authority to issue executive orders that operate within areas that are exclusively subject to presidential power. Article II also authorizes the President to issue executive orders that (a) operate in areas of concurrent congressional-executive authority and (b) do not contravene the expressed or implied will of Congress. For example, the Constitution vests the President's duties as commander in chief, head of state, chief law enforcement officer, and head of the executive branch. When the President issues an executive order to lawfully exercise one of these responsibilities, the President is acting within the highest level of constitutionality and Congress has little ability to circumscribe or regulate the President's actions. *See* Congressional Research Service (CRS) Report, *Executive Orders: Issuance, Modification, and Revocation,* available on the

[iv] When the President issues an executive order to implement a statute, the order serves as an ancillary act of legislation and Congress remains free to modify or negate the underlying authority. For example, shortly after taking office, President Obama issued three executive orders – pursuant to his statutory authority under the Authorization for Use of Military Force (AUMF) – affecting U.S. policy towards Guantanamo detainees. Most notably, Executive Order 13492 called for the Guantanamo detention facility to be closed as soon as practicable, and no later than January 22, 2010. That Executive Order has not been carried into effect, whether because it was not a task to which the President was committed or because Congress was able to frustrate his fulfillment of the task. *See,* e.g., 2016 NDAA and the Consolidated Appropriations Act, 2016 (2016 Omnibus, P.L. 114-113) (stating,

Cuba.").

[v] Although not an "executive order," of note in terms of controversial executive actions for the Obama Administration is *N.L.R.B. v. Noel Canning, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014)*, available on the Cabinet website. At issue before the Court were three appointments that President Obama made to the NLRB during a three-day recess – a longer recess was interrupted by a very brief *pro forma* session, in which the Senate was technically in session but not conducting any business. The Court held those Presidential appointments invalid on the ground that the President must respect the Senate's own determination of when it is in session, and the three-day period in which the President made the appointments was too short to warrant use of the Recess Appointments Clause. Going forward, any recesses shorter than ten days will likely be insufficient to trigger the President's recess appointment power.

[vi] For a general discussion of procedural requirements relevant to rulemaking, see the Office of the Federal Register, *A Guide to the Rulemaking Process.*, available on the Cabinet website.

[vii] In 2012, President Obama used this type of executive action to institute the Deferred Action for Childhood Arrivals program (DACA), which deferred immigration action on certain categories of undocumented "young people." In 2014, President Obama expanded DACA through further executive action to defer immigration action in additional cases. The DACA expansion was challenged in the courts by those arguing that President Obama was being derelict in his constitutional duty to "take care that the laws be faithfully executed." The non-enforcement order was argued to be a proper

District Court's injunction blocking the deportation plan, essentially agreeing with the District Court that the federal government should have pursued notice-and-comment rulemaking because DAPA and expanded DACA determinations are non-discretionary. In addition, the 2-1 decision noted that the new deferred action initiatives are arbitrary and capricious because the federal government did not have authority to promulgate them under the Immigration and Nationality Act. The Obama administration appealed to the U.S. Supreme Court which, in June, deadlocked 4-4, returning the case to the District Court for trial on the merits. Last month, lawyers for both sides asked the District Court to postpone further proceedings until President-elect Trump takes office. All of this effectively prevented the DACA expansion but left the original DACA in place. *See Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec., to David Aguilar, Acting Comm'r, U.S. Customs and Border Prot., et al., at 1* (June 15, 2012) available on the Cabinet website. *See also U.S. v. Texas*, 86 F. Supp. 3d 591 (S.D. Tex.), aff'd, 809 F.3d 134 (5th Cir. 2015), as revised (Nov. 25, 2015), *cert. granted*, 136 S. Ct. 906, 193 L. Ed. 2d 788 (2016) available on the Cabinet website.

[viii] *See Memorandum: Guidance Regarding Marijuana Enforcement*, from James M. Cole, Deputy Atty. General, to All U.S. Attorneys (Aug. 29, 2013), available on the Cabinet website.

[ix] Under the ACA, effective January 1, 2014 an employer with 50 or more full-time equivalent employees is liable for an "assessable payment" if any full-time employee receives a premium tax credit or cost-sharing reduction to purchase health insurance through a state-based exchange and either (1) the employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in "minimum essential coverage," or (2) the employer offers its full-time employees "minimum essential coverage," but such coverage is "unaffordable" or fails to provide "minimum value." However, the Administration concluded that compliance with these requirements would be "impractical" and thus would be delayed one year, as provided for in the IRS Notice. *See* Internal Revenue Service (IRS), *Notice 2013-45 Transition Relief for 2014 Under §§ 6055 (§ 6055 Information Reporting)*, *6056 (§ 6056 Information Reporting)* and *4980H (Employer Shared Responsibility Provisions)*.

[x] The ACA amended the FLSA by adding new Section 18A, which requires employers subject to the FLSA with 200 or more full-time employees to automatically enroll new full-time employees in one of the plans offered by the employer and to continue the enrollment of current employees, effective March 1, 2013. 29 U.S.C. § 218a. The Departments of the Treasury, Labor and Health and Human Services issued guidance confirming that employers were not required to comply with Section 18A until the Department of Labor promulgated regulations to implement the requirement. *See* U.S.

Dep't of Labor, *FAQs About Affordable Care Act Implementation Part V and Mental Health Parity Implementation*. The Department of Labor never issued such regulations thereby postponing the implementation of the automatic enrollment requirement until it was repealed by Section 611 of the

Bipartisan Budget Act of 2015, Pub. L. No. 114-74, signed into law by President Obama on November 2, 2015.

[xi] *See* EO 13610, *Identifying and Reducing Regulatory Burdens* (May 10, 2012); EO 13563, *Improving Regulation and Regulatory Review* (Jan. 18,

2011).

The Securities and Exchange Commission and the Commodity Futures Trading Commission are “independent agencies,” not executive agencies, and thus not directly subject to Presidential direction. However, Presidents may issue Executive Orders that suggest that independent agencies should, to the extent applicable by law, comply with Executive Orders directly governing executive agencies. For example, President Obama issued Executive Order 13579, *Regulation and Independent Regulatory Agencies*, to suggest that independent agencies should comply with EOs 13610 and 13563 referenced above.

[xii] *See Id.*

[xiii] A claim based on “disparate impact” would be required to show that a course of action resulted in improper discrimination, but would not have to show that the result was intentional.

[xiv] *See CFPB Bulletin 2012-04 Fair Lending, Lending Discrimination*, available on the Cabinet website.

[xv] *See CFPB Report Using Publicly Available Information to Proxy for Unidentified Race and Ethnicity*, available on the Cabinet website.

[xvi] *See,* e.g., *Unsafe at Any Bureaucracy: CFPB Junk Science and Indirect Auto Lending* available on the Cabinet website.

[xvii] *See Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, (1988), aff'd, 488 U.S. 15 (1988) (*per curiam*), available on the Cabinet website.

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