Published on The National Law Review https://natlawreview.com

The Trump Administration: Change By Executive Action and Inaction

Article By:

Allison F. Saltstein

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, 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, 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), 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 and the requirement that employers subject to the Fair Labor Standards Act (FLSA) automatically enroll health plan participants in such coverage.

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). 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" to prove discrimination in lending. This bulletin was supported by a CFPB "white paper," titled "Using Publicly Available Information to Proxy for Unidentified Race and Ethnicity." The mathematics of this paper were very heavily criticized.

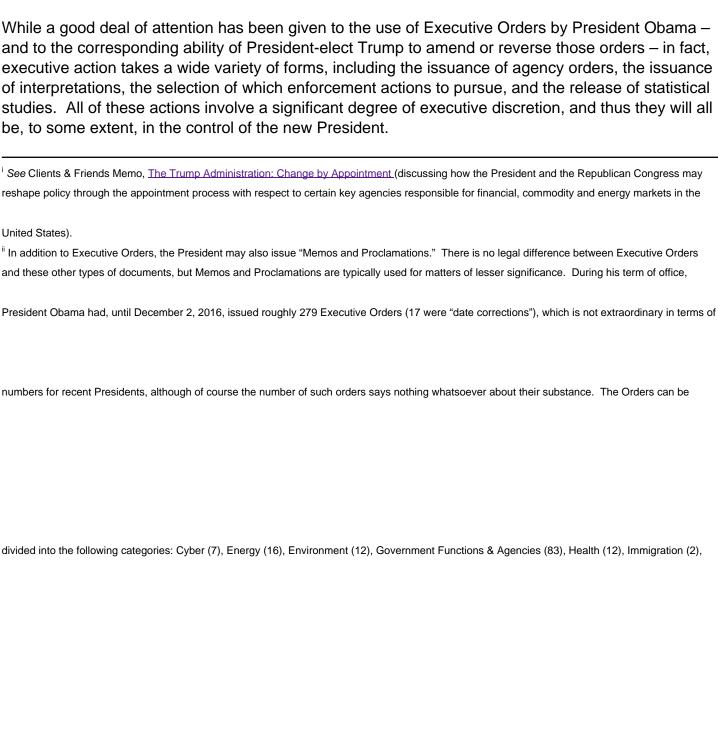
The fact that the CFPB's policy in charging discrimination in lending based on disparate impact, using as an evidentiary base the math of the CFPB's white paper, could be reversed in three different ways, illustrates the powers of the President. First, the CFPB under President Trump could interpret that 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.

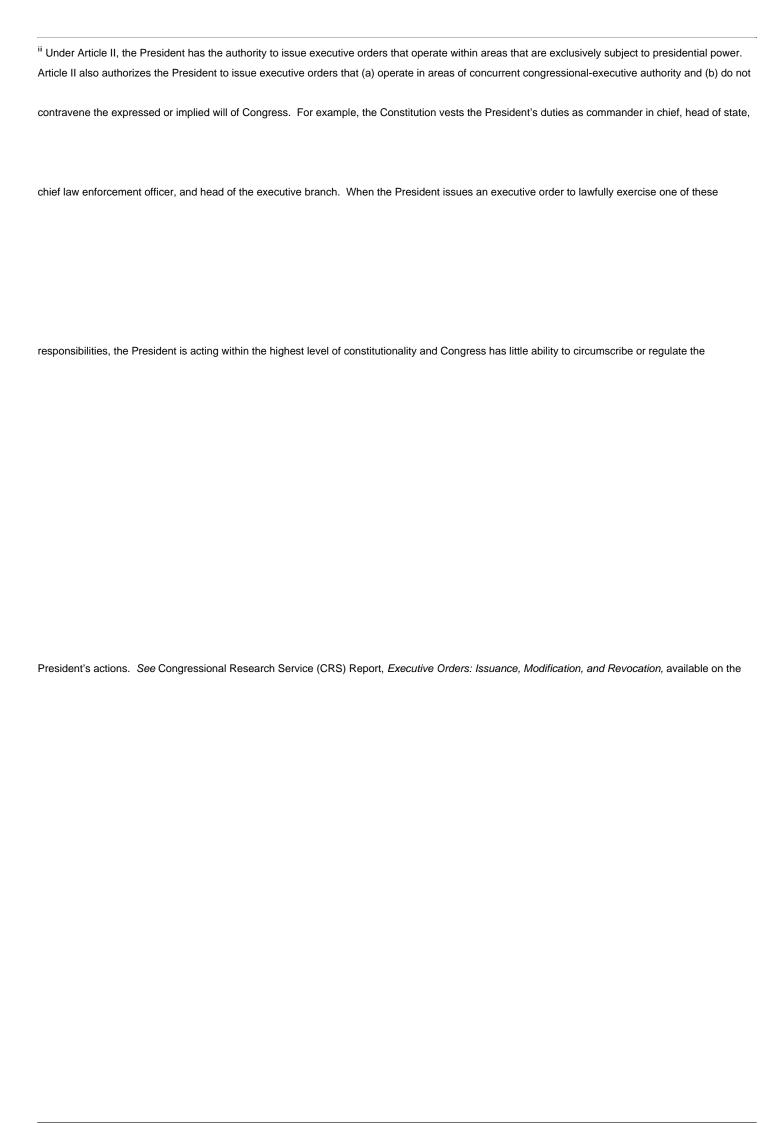
Of these three options, disavowing disparate impact as a legal basis for stating a claim seems the least likely way to go, as it would be highly controversial because the use of disparate impact

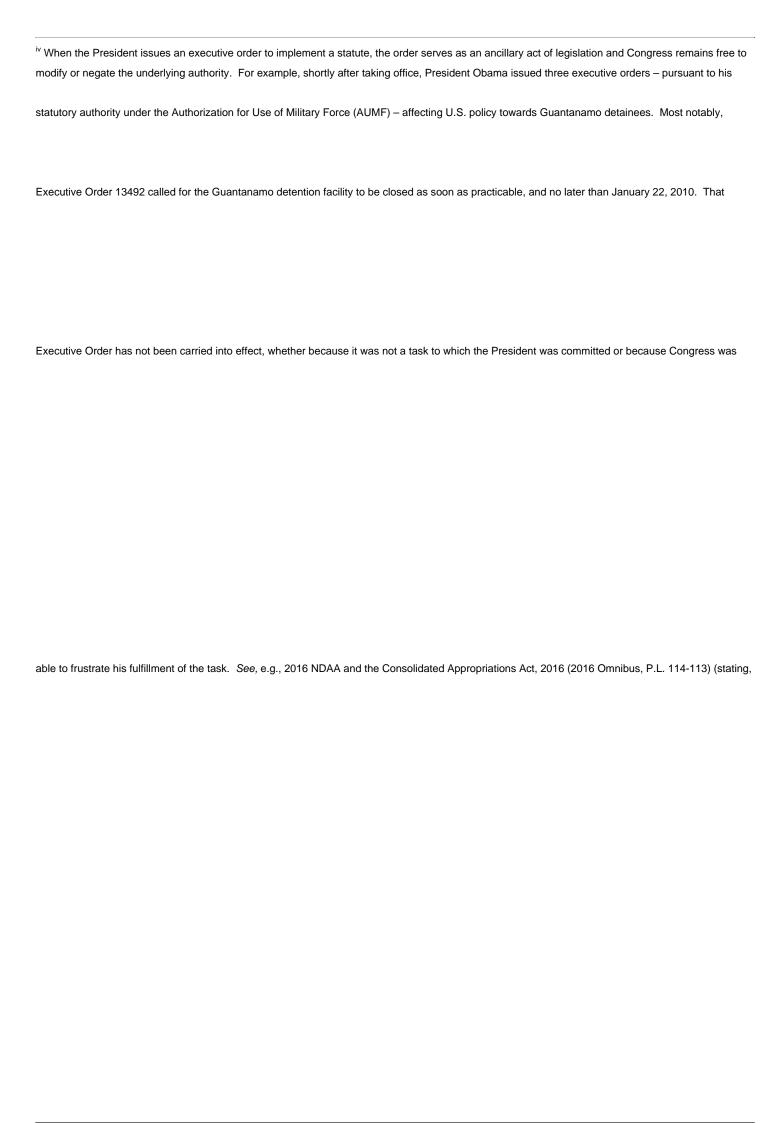
analysis to evidence discrimination has been long accepted. Vii On the other hand, disavowing the CFPB's disparate impact analysis seems a position that the CFPB could very easily take, since there has been so much criticism of the statistical basis for the CFPB's analysis and it would seem an effective 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

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







Cuba.").
Valthough not an "executive order," of note in terms of controversial executive actions for the Obama Administration is <i>N.L.R.B. v. Noel Canning, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014)</i> , 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 <i>pro forma</i> 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, <i>A Guide to the Rulemaking Process.</i> , 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



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).		

Page 10 of 10

Page 10 of 10
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.
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.

© Copyright 2025 Cadwalader, Wickersham & Taft LLP

National Law Review, Volume VI, Number 344

Source URL: https://natlawreview.com/article/trump-administration-change-executive-action-andinaction

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.