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# The Changing Regulatory Landscape Under the Trump Administration

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# A Tale of Two Processes

- Legislative – Very Emotional and Uncertain
  - Health Insurance
  - Taxes
  - Infrastructure (unfortunately)
  - Border Wall
- Congressional Review Act (CRA) and Executive Orders (EO) – Mostly Steady Progress (Except Immigration)
  - Financial
  - Environmental
  - Labor



# View from the RNC

- Health Insurance
  - Something needs to pass
  - Ideally, whatever passes will contribute to widespread premium decreases (or much lower increases) starting in summer/fall 2018
  - Program savings and state flexibility
- Taxes
  - Tax cuts in 2017
  - 3% GDP growth in 2018
- Infrastructure
  - Mostly viewed as part of 3% GDP growth package
  - Not as important as the other two



# View from Capitol Hill

- Health Insurance
  - Need savings to offset tax cuts (Senate Budget Reconciliation)
  - House wants state flexibility and control growth of Medicaid
  - Not clear what is going to drive Senate
- Taxes
  - Broad support for corporate tax reform
  - If health insurance gets figured out, some kind of tax reform will likely pass
  - Unclear if Congress will take on tax reform without health insurance
- Infrastructure
  - House in particular is not that interested
  - Most likely scenario is mixed funding as part of a growth package
  - Could become linked with tax reform via offshore repatriation, but that seems less likely currently



# View from the White House

- Health Insurance
  - President appears to just want to win, details less important
  - Frustrated that this is slowing tax reform
- Taxes
  - President highly motivated by this issue
  - Will push both corporate and individual reform
    - 20% corporate, 35% individual, and overall simplification?
  - Believes this is very important to GDP growth
- Infrastructure
  - President engaged on this issue, too
  - Could negotiate with Democrats on this
  - Wants a big package for GDP growth
  - Buy American



# Brexit and Trump Effects

- Polling and media reporting not as predictive as it used to be
- Conventional wisdom is that health insurance has to go before taxes or infrastructure
  - May be too much inside baseball and a Washington parlor game for the President
- Alternative Path?
  - Deal with Democrats and Senate Republicans for corporate tax reform and broad-based infrastructure package





# Executive Orders and Presidential Memoranda

- 13766 (Expedited Review of High Priority Infrastructure Projects)
- 13771 (Reducing Regulation 2/1 Rule)
- 13772 (Dodd-Frank Reform)
- 13777 (Regulatory Reform Task Force)
- 13778 (Defining Waters of the US)
- 13781 (Reorganizing Executive Branch)
- 13782 (Repeal of Blacklisting EO)
- 13788 (Buy American/Hire American)
- 13789 (Review of Tax Regulations)
- Memo 4 (American Iron and Steel for Pipelines)
- Memos 5-6 (Restart Dakota and Keystone XL Pipeline Projects)



# E.O. 13766; Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects

- Streamlines and expedites environmental reviews and approvals for infrastructure projects, especially high priority projects.
- Within 30 days of a request by Governor or head of agency:
  - Chairman of the White House Council on Environmental Quality (CEQ) must decide whether project qualifies as a "high priority" infrastructure project.
  - Considerations include project's importance to the general welfare, value to the Nation, environmental benefits, and other factors the Chairman deems relevant.





# E.O. 13766; Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects

- Once a project is determined to be “high priority”:
  - CEQ coordinates with head of relevant agency to establish expedited procedures and deadlines for environmental reviews and approvals.
  - If deadline is not met, the head of the relevant agency must provide a written explanation to the Chairman.
- Likely to be a part of an infrastructure spending package aimed at GDP growth in 2018-2020



# E.O. 13771; Reducing Regulation and Controlling Regulatory Costs

- “2 out, 1 in” Rule.
- For fiscal 2017, whenever an agency proposed or promulgates a new regulation it must identify two regulations to be repealed.
- Total incremental cost of all new regulations (including those repealed) finalized in fiscal 2017 must be zero.
- Any new incremental costs associated with new regulations must be offset by elimination of existing costs associated with at least two prior regulations.



# E.O. 13771; Reducing Regulation and Controlling Regulatory Costs

- Litigation
  - Public Citizen, NRDC, and CWA filed suit February 8
    - Separation of powers and Take Care Clause
  - Administration moved to dismiss on April 10
  - 14 States filed “friend of the Court brief” on April 17
- Litigation theory unlikely to succeed
- Unclear what real impact the regulation will have



# E.O. 13772; Dodd-Frank Reform

- 6 goals
  - Build wealth and retirement
  - Prevent taxpayer bailouts
  - Prevent “moral hazard”
  - Make US companies more competitive
  - Make US financial markets more competitive
  - Rationalize federal financial regulatory framework
- Issued February 3 – report due within 120 days
- Wall Street versus Main Street



# E.O. 13777; Enforcing the Regulatory Reform Agenda

- Establishes a Regulatory Reform Task Force with officials from each agency.
- Purpose is to identify for possible repeal or replacement of regulations that limit job creation, have costs that exceed benefits, or are outdated, unnecessary, or ineffective.



# E.O. 13778; Waters of the U.S.

- Calls for review of the Clean Water Rule by the EPA and U.S. Army Corps of Engineers.
  - Also calls for start to formal notice-and-comment of proposed rule rescinding or revising the rule.
  - Also includes review of all orders, rules, regulations, guidelines, or policies associated with implementation of the Rule, with eye towards rescission or revision.
- Directs EPA and Army Corps to narrow definition of “navigable waters” in proposed rule.
  - References *Rapanos v. U.S.* (2006) – J. Scalia narrows definition of navigable waters to “relatively permanent, standing or continuously flowing” waters or wetlands with a surface connection to navigable waterways.”





# E.O. 13778; Waters of the U.S.

- Obama 2015 Clean Water Rule currently subject to Nationwide stay in litigation
  - Rule includes broad definition of “navigable waterways” covered by the CWA, potentially including artificial canals connected to natural rivers.
- Administration announced March 6 that it will review and possibly repeal Obama Rule and will likely stop defending the Obama Rule
- E.O.’s narrower definition of protected waterways intended to reduce regulatory burden of compliance.



# E.O. 13781; Reorganizing Executive Branch

- Issued March 13
- OMB Director report due with 180 days
- Outsourcing and consolidation



# E.O. 13782; Revocation of Federal Contracting Executive Orders

- Revokes Fair Pay and Safe Workplaces.
  - Executive Order signed by Obama in 2014.
  - Known as the “Blacklisting” Rule.
  - Required self-disclosure of labor law “violations” from past 3 years.
    - “Violations” as defined would include preliminary administrative determinations, such as “cause” findings by the Equal Employment Opportunity Commission.
    - Contractors required to publicly report which labor law they “violated” and the agency that issued the determination .
  - Crackdown on repeat offenders → no contracts awarded.
  - Paycheck data on hours worked, OT, pay, deductions, etc. required.
  - Banned forced arbitration clauses for discrimination claims.
- Also calls on agencies to consider rescinding rules, policies, guidances, etc., implementing or enforcing Fair Pay and Safe Workplaces.



# E.O. 13782; Revocation of Federal Contracting Executive Orders (Fair Pay and Safe Workplaces)

- Fair Pay and Safe Workplaces was enjoined in October 24, 2016 by the Federal District Court for the Eastern District of Texas .
- The reporting requirement was found to violate the First Amendment because it compelled contractors to engage in public speech.
- Also violated the Due Process rights of contractors because it was increased the burden on contractors and the contracting process without credible evidence of benefiting or increasing protections for the government.
- Paycheck Transparency requirement went into effect January 1, 2017, requiring itemized statement in a relevant language.
- As of March 27, 2017, Obama EOs are revoked (H.J. Res. 37).



# E.O. 13788; Buy American and Hire American

- Requires all federal agencies to:
  - Buy American – “scrupulously monitor and enforce Buy American Laws”.
    - Iron and steel 100% American – aligned with pipelines
    - Assess all practices on all Buy American programs – several reports over next 60-220 days of order (March 31).
      - Watch for move toward Buy America (DOT) versus Buy American (FAR) “substantial transformation” and “component parts” test
    - “Judicious Use of Waivers”
    - May agency head delegate public interest waivers?
  - Hire American – “rigorously enforce” laws on hiring foreign workers.
    - Suggest reforms to use H-1B Visas for “most skilled workers”.



# E.O. 13789; Reducing Tax Regulatory Burdens

- Tax system simplification review
- Interim report due 60 days from April 21, 2017
- Report due 150 days from April 21, 2017





# Presidential Memos 4-6 Regarding Construction of Pipelines

- Three memoranda addressing American Pipelines generally, the Dakota Access Pipeline, and the Keystone XL Pipeline, released Jan. 24, 2017.
- American Pipelines – requires construction of pipelines in the U.S. to use materials and equipment made in the U.S.
  - Basically, use American iron and steel.
  - Iron and steel products need to be manufactured in the U.S. from the initial melting stage forward.
  - Iron and steel material or products manufactured in the U.S. from foreign semi-finished iron or steel does not count as made in the U.S.
  - Iron and steel material or products manufactured abroad from American semi-finished iron or steel does not count as made in the U.S.



# Presidential Memos 4-6 Regarding Construction of Pipelines

- Keystone XL – invites TransCanada to resubmit application and to expedite reviews of applications for necessary permits.
- Dakota Access – calls on Army Secretary to take all actions necessary to review and approve all requests for easements across Federal lands and to consider satisfied all applicable environmental requirements and reviews.
  - Feb. 7 – easement granted by Army allowing construction to restart on pipeline.



# Other Regulatory Activity

- Crystalline Silica Rule
- Paid Sick Leave
- Government Mandated Project Labor Agreements
- New DOL Overtime Rule
- Small Business
- OSHA Recordkeeping Rule (Volks Rule)



# Crystalline Silica Rule

- Effective June 23, 2017
  - Reduces exposure to 50 micrograms per cubic meter of air, averaged over an 8-hour shift
- OSHA has delayed enforcement until September 23, 2017 – no enforcement actions between June 23 and September 23, but standard still in effect
- Rule is being challenged in court – final resolution unclear



# DOL Paid Sick Leave Rule

- Effective January 1, 2017.
- Requires federal contractors to provide up to 7 paid sick leave days to employees – expansive number of covered care-givers.
- Applies to any contract for construction covered by the Davis-Bacon Act.
- Employees accrue 1 hour of paid sick leave for every 30 hours worked on or in connection with covered contract.
- Administration's position unclear.



# DOL Paid Sick Leave Rule

- Use requirements—very broad.
  - Most controversial: caring for employee’s child, parent, spouse, domestic partner, “or any other individual related by blood or **affinity whose close association with the employee is equivalent of a family relationship.**
  - Physical/mental injury/medical condition.
  - Diagnosis, preventative care, care from health care provider.
  - Domestic violence, sexual assault, or stalking.
- Vacation time is counted towards 56 hours if it satisfies the use requirements.





# Government Mandated PLAs

- No action taken on Obama-era PLA
- Administration position unclear
- May be an agency-by-agency approach



# New DOL Overtime Rule

- New DOL Overtime Rule—Currently **enjoined** by the federal District Court for the Eastern District of Texas.
- Would have required:
  - Salary for Executive, Administrative, Professional (EAP) exemption to be increased from \$455 per week (\$23,660 annually) to **\$913 per week (\$47,476 annually)**.
  - Salary for Highly Compensated Employee (HCE) exemption to be increased from \$100,000 to **\$134,000 annually**.
- DOJ has requested until June 30<sup>th</sup> to decide whether to continue defending the rule. Most likely dead in the water.



# Small Business – Mentor-Protégé Change

- Policy shift by the Small Business Administration.
  - Expands access to set-aside contracts previously reserved for performance **only by small businesses.**
  - “**All Small**” Program
- All government contractors – small and large – need to consider taking advantage of the new program.
- **Application Period Open** (since October 2016).



# SBA “All Small” Program

- Small business protégés may Joint Venture with large business mentors without being considered affiliated.
  - Joint ventures can participate in small business set-aside contracts.
  - Protégé must qualify as small for the set-aside procurement.
- Previously, only 8(a) Mentor Protégé Program participants could joint venture without being considered affiliated.
- Now, all small businesses have the opportunity to form SBA approved mentor-protégé teams with large businesses.



# SBA “All Small” Program

- Written Mentor-Protégé agreement is required.
  - Must address how assistance from the mentor will help the protégé firm meet goals as defined in its business plan.
- SBA must approve the joint venture **in advance**.
- Agreement must also satisfy 13 C.F.R. 125.8.
  - Describes joint venture requirements for participation in set-aside procurements.
    - Small business must own at least 51% of joint venture entity .
    - Small business must be managing venture and small business employee must be project manager for the contract.
  - Deficient certification of compliance or performance of work reports can be basis for suspension or debarment.



# SBA Credit for Down Tier Subcontractors

- Went into effect on January 23, 2017.
- Not yet incorporated into the FAR.
- Previously, large prime contractors did not count or report the size of second or lower tier subcontractors towards federal small business subcontracting goals.
- Now, large prime contractors are **required** to count and report the size of lower tier subcontractors in subcontracting plans for federal contracts.





# OSHA – Volks Rule Nullified

- Volks Rule – “Clarifying Employer’s Continuing Obligation to Make and Maintain Accurate Records of Each Recordable Injury and Illness”.
  - 5 year retention period – “occurrence” extended from 6 months to five-year reach-back on recordkeeping basis.
  - OSHA had ability to issue citations to employers for not recording work-related injuries and illnesses.
  - Volks Rule was finalized in December 2016, effective January 18, 2017.
- H.J. Res 83 – signed by the President on April 3, 2017, nullifying Volks Rule.



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