5 LEGAL AND BUSINESS ISSUES TO WATCH IN 2017

The dismantling of Obama-era laws and regulations, broader deregulation, and economic and political nationalism were and remain themes of the 2016 U.S. Election and presidential transition period. Donald Trump and members of the incoming Republican-controlled Congress have singled out for repeal or significant modification the Affordable Care Act (aka "Obamacare") and the Dodd-Frank Wall Street Reform and Consumer Protection Act, along with trade, immigration, foreign affairs, and environmental laws, regulations, and policies. If taken, these actions will not only effect legal changes in specific areas, they will create legal and policy voids that may be filled by U.S. states and localities, foreign governments and multilateral and non-governmental organizations, and the private sector. Five legal and business issues and dynamics to watch in 2017 are highlighted here.

1 ADMINISTRATIVE LAW AND (DE)REGULATION

Some have suggested that Obama-era administrative actions and regulations can be undone "with a stroke of a pen." In reality, the process of undoing, modifying, or replacing key Obama-era administrative actions– whether on U.S. economic sanctions, financial services, healthcare, or the environment—will not be as simple, unilateral, or expeditious as some have suggested. To understand and prepare for potential legal and regulatory changes, businesses and other interested parties should acquaint themselves with the U.S. administrative law process– *e.g.*, rulemaking and the roles of the courts and Congress, including whether and how Congress exercises its untested authority to "disapprove" recent Obama Administration regulations under the rarely used 1996 Congressional Review Act.

2 INCREASED U.S. STATE & LOCAL ACTIVISM

The dismantling or modification of some Obama-era and earlier laws and regulations will likely be met with resistance by U.S. states and localities. Preemptively, some U.S. state officials have announced plans to combat efforts to abandon key Obama-era policies. For example, California officials announced that the state would work with foreign nations and take other measures to preserve Obama-era measures to combat climate change. Some Democratic state attorneys general recently urged the President-elect and Congressional leaders to retain President Obama's Clean Power Plan and stated their willingness to litigate if necessary (the action followed a letter from Republican state attorneys general asking the President-elect to scrap the Clean Power Plan). Increased state and local activism is likely to trigger legal and political controversies about the respective boundaries of state and federal authority, and split state policy positions along bright partisan lines. State activism will probably be felt beyond environmental and energy spaces. For example, U.S. states may step up financial services regulation and enforcement in response to federal deregulation and/or relaxed enforcement.

3 PRIVATE SECTOR ROLE IN ESG/BUSINESS ETHICS

In recent years, segments of the private sector—at times led or pressured by major institutional investors—have affirmatively embraced environmental, social, and governance measures (ESG) and business ethics, such as anti-corruption compliance. For some businesses, pro-ESG and ethics stances are more than cosmetic– they preserve and enhance reputation, limit risk, aid in recruitment and retention (particularly of millennials), and consequently bolster the bottom line. The private sector's commitment to and role in ESG and business ethics is likely to be tested in 2017 and beyond, should the new U.S. President and/or Congress undo or act passively toward pro-ESG policies or enforcement of U.S. business ethics laws, such as the Foreign Corrupt Practices Act. Private sector responses may vary from greater assertiveness to passiveness to retreat.

4 MULTILATERALISM, FINANCIAL REGULATION, AND ECONOMIC SANCTIONS

A key question in 2017 will be whether the isolationist, non-interventionist, and nationalist rhetoric of the 2016 Election—most clearly applicable to trade and foreign intervention– will carry over into other key areas, such as financial stability policy and economic sanctions. The financial crisis gave rise to multilateral bodies like the G-20 Financial Stability Board (FSB) and multilateral policy-making on matters such as the designation of systemically important financial institutions (SIFIs), capital adequacy, and cross-border bank resolution. Republican Congress members, including the Chairman of the House Financial Services Committee, have sought to limit foreign influence on U.S. financial regulation, most notably the influence of the FSB. Such efforts may gain traction with a Trump Administration and Republican-controlled Congress. On economic sanctions, it will be worth watching if the Trump Administration develops a general position on the use of economic sanctions, informed by some philosophies of the 2016 Election– namely non-interventionism, unilateralism, and/or nationalism. U.S. economic sanctions, which are coercive alternatives to military action, are potent on their own. But economic sanctions are most effective when implemented multilaterally, as illustrated by coordinated sanctions on Russia and Iran. Of course, a Trump Administration's use or withdrawal of economic sanctions vis-à-vis these two countries will likely reflect country-specific agendas. More broadly, the Trump Administration may use economic sanctions diffusely, to be "unpredictable."

5 FOREIGN INVESTMENT IN THE UNITED STATES AND NATIONAL SECURITY

Foreign investment in the United States, particularly by Chinese firms and especially by state-owned Chinese firms, has garnered sustained scrutiny in recent years, from some Congress members (Republicans and Democrats), industry groups, and others. Foreign investment skeptics have focused on the Committee on Foreign Investment in the United States (CFIUS), which conducts national security reviews of foreign takeovers of U.S. firms. Some have called for an expanded concept of national security to include sectors and issues– *e.g.*, financial services, agriculture, and food security—that currently do not, without more, warrant national security scrutiny by CFIUS. The Trump transition team recently stated that President Trump will "order" CFIUS to consider food security and reciprocity in national security reviews of foreign investment. It will be worth watching how President Trump acts with respect to foreign investment by Chinese and other foreign firms, including whether his nationalist and/or deal-making proclivities inform his stances on specific transactions and foreign investment in the United States more generally.

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