SEYFARTH SHAW

Presidential Pulse

Changes That Influence Business

10 Key Ways the Trump Administration May Impact The Way You Do Business in 2017

Today marks just over a month since Donald Trump was elected as the next President of the United States. As each cabinet appointment is announced, we get more clues to help us predict which direction the Trump Administration's policies are likely to head. While reality may end up being different from any predictions, it is important for business leaders and managers to be aware of certain key issues that could impact their bottom line and the way they do business in 2017.

Following is a list of some of the most important policy issues to keep an eye on:

Access to Capital and Capital Markets

By Andrew J. Sherman

Both business leaders and the capital markets who invest in their enterprises typically require some predictability of economic conditions before committing to growth and expansion. Under a Trump Administration, we expect to see a pro-business ecosystem driven by tax reform, healthcare reform, and de-regulation which should have a positive impact on the capital markets and overall access to both debt and equity capital.

From a debt perspective, access to the low-interest rate loans of the past five (5) years have been limited to primarily large companies with strong balance sheets. Small to medium-sized companies have turned to FinTech and alternative lenders as well as peer-to-peer platforms to borrow. If there is a partial repeal or reform of the burdens of Dodd-Frank, mid-sized and larger banks should be liberated and motivated to commit to smaller company lending, in addition to continued growth in on-line lending and peer-to-peer marketplaces.

From an equity perspective, tax reform and a pro-entrepreneurship Administration should create an increase in solo angel and angel group investments. We have also seen an uptick in family business office (FBO) direct investment, which should continue to grow and flourish over the next five years, including an increase in "impact investing" designed to foster social objectives.

Venture capital and private equity driven transactions have been relatively flat over the past two years and should remain stable in a Trump Administration, depending in part on the specifics of tax reform and stock market cycles. Sovereign funds, which have been a consistent driver of capital over the last several years, may scale back if they perceive too much social and political populism and/or overly-restrictive immigration reform.

Access to the public markets and to raising capital via initial public offerings (IPO's) may pullback slightly in the tech sector (until the next round of fairly-priced unicorns are identified), but look for offerings in 2017 and 2018 in the healthcare, energy, and infrastructure industries if pre-election policies are put in place in the next six to twelve months.

It remains unclear if the Trump Administration will consider any changes to the JOBS Act or support a pullback in aggressive securities law enforcement against public companies.

Overall, innovation, productivity and pro-business growth conditions should be in place to allow companies to build efficient and profitable business plans and models that the capital markets should be in anxious to fuel.

Tax Reform

By Steven R. Meier

The gridlock that has marked the past six years of federal tax policy is about to end. Although dissimilar in many ways, the tax plans proposed by President-elect Trump and the House GOP overlap in meaningful areas. Because the GOP does not have 60 votes in the U.S. Senate, reconciliation rules would apply to any tax reform that results in a net loss of tax revenue. Nevertheless, in the next six to twelve months, we may see some of the most dramatic changes in tax law since the Tax Reform Act of 1986.

Among the key areas of potential change of particular interest to businesses are the following:

Lowering Tax Rates, but Eliminating Tax Benefits. Both President-elect Trump and the House GOP propose to consolidate tax rates into fewer brackets, to cap the highest tax rates well below current rates (ordinary income taxed at 33% for individuals, 15% to 20% for corporations), and to eliminate the individual and corporate alternative minimum tax and the surtaxes imposed to support the Affordable Care Act. These tax reductions will not, however, come without a cost. Both President-elect Trump and the House GOP would eliminate most deductions other than the deductions for home mortgage interest and charitable contributions, and most business credits other than the R&D (research and development) credit. In other words, although tax rates will be lowered, the net effect of those lowered rates will ultimately depend upon the impact of eliminated deductions and credits.

Resetting America's Place in the (Tax) World. Over the past several years, many tax reform advocates have argued that America's "worldwide" tax system, combined with its high nominal tax rates, have made the business environment in the U.S. increasingly noncompetitive as compared to other developed nations. Under current tax law, U.S. citizens and businesses are taxed on all income earned anywhere in the world, but are provided exceptions for certain business income of foreign corporate subsidiaries, and are given credits for foreign taxes paid. Because of this complex system, multinational tax planners have long advised their clients to minimize their business footprint in the U.S.. A well-publicized symptom of the purported ill health of the U.S. tax system has been the wave of major "corporate inversions" (shifting U.S. multinationals' place of incorporation outside of the United States), which both major party candidates have criticized and which the current administration has battled through increasingly stringent tax regulations. Another symptom is that U.S. multinationals are reluctant to repatriate the untaxed business income of their foreign corporate subsidiaries. The Joint Committee on Taxation currently estimates there are roughly $2.6 trillion in "trapped" offshore profits, which if repatriated to the United States would generally be subject to a tax rate (less foreign tax credits) of up to 35%.

President-elect Trump and the House GOP will seek to hit the reset button on U.S. cross-border tax policy in a few key ways. First, both will propose a tax repatriation holiday, charging a tax of 10% or less, to encourage multinationals to bring their non-U.S. cash earnings back to the United States. Second, although the President-Elect's view on the matter is not entirely clear, there will be a strong push in Congress to move the United States from a "worldwide" tax system to a "territorial" tax system, more in line with the tax systems in place in countries such as the United Kingdom, Japan, Germany, Canada and Ireland, which would be intended to eliminate the inefficiencies in the U.S. tax system that have given rise to corporate inversions. These efforts, combined with the overall reduction of U.S. tax rates and business investment incentives, will be aimed at making the tax environment in U.S. more friendly for domestic and international investment.

Supercharging Incentives to Invest, but Not with Borrowed Money. Under current law, capital investments are depreciated, which means that although they create tax deductions, those deductions must generally be spread out over several years. In a dramatic departure from longstanding tax policy, both President-elect Trump and the House GOP are expected to propose to make capital investments immediately deductible. Part of the *quid pro quo* for this benefit, however, would be the elimination (or significant limitation) on the deductibility of business interest paid for borrowed money.

The policy objectives behind these proposals are clear: to incentivize a substantial expansion of business investment, but in doing so to discourage borrowing and instead encourage businesses to deploy their own capital into the economy. In fact, these policy proposals dovetail with the tax repatriation holiday described above. By turning longstanding tax policy regarding depreciation deductions and the deductibility of business interest upside down, and by inviting the repatriation of non-U.S. profits at a reduced tax rate, President-elect Trump and the House GOP will attempt to unleash the cash of U.S. multinationals "trapped" abroad into substantial new capital investment at home.

Dodd-Frank and Executive Compensation

By Durward James Gehring

President-elect Trump has openly discussed his intent to repeal or significantly revise the Dodd-Frank Act, and one of his key advisors, Rep. Jeb Hensarling of Texas, the Chair of the House Financial Services Committee, is a critic of Dodd-Frank who has proposed his own significant overhaul of the Act. Much of President-elect Trump's criticism has been focused on the Act's restrictions on lending practices and the banking industry generally, which would be significantly loosened, and on the Consumer Financial Protection Bureau, which would either eliminated or have its independence restricted.

Any repeal or significant amendment of Dodd-Frank would require the Trump Administration to overcome a Democratic filibuster in the Senate. However, it is likely that SEC regulations implementing the executive compensation provisions of Dodd-Frank will at least be put on indefinite hold while the SEC waits to see what happens to the Act. The rules that have not yet been finalized, which include the requirement for mandatory clawbacks of executive bonuses and disclosure of the extent to which companies have successfully implemented pay for performance, are very unlikely to be finalized any time soon. Other rules that have already been finalized, such as mandatory say on pay shareholder votes, are less likely to be reversed, although it is possible. One likely target is the mandatory disclosure of the ratio of the CEO's compensation to the mean compensation of other employees, which was scheduled to take effect in 2017 and could be postponed.

A New Trade Environment

By Joseph J. Dyer

The Trump Administration will likely significantly alter the trade environment. President-elect Trump was vociferous in the campaign in attacking the U.S.'s current trade agreements as being stilted in favor of foreign countries and in favoring country-by-country agreements over multilateral trade agreements that have been the prevalent mode of agreement in recent history. Even assuming that President-elect Trump will not seek to abrogate, or revise, existing agreements, it is likely that he will take a harder, more U.S.-focused, approach in negotiating future trade agreements. And it appears likely that he will be supported in that effort by many Democrats. Whatever success the Trump Administration might have in negotiating future agreements more in the United States favor, his attempt will certainly delay any new agreements. One can expect that foreign countries will not be quick to negotiate new deals favoring the U.S. interests. This is especially true for the Trans Pacific Partnership initiative ("TTP"). Given his pointed criticisms of the TTP during the campaign, it is difficult to imagine him allowing it to proceed as negotiated. And any attempt to re-negotiate the agreement will, regardless of its ultimate success, likely push implementation of the agreement far beyond the date originally envisioned for its implementation.

Perhaps less obvious from the campaign, the Trump Administration will likely significantly alter the approval of the export of defense and high technology items. If true to his campaign rhetoric, President-elect Trump will likely eschew direct entanglements in the conduct of foreign affairs in favor of offering encouragement, both positive and negative, in pursuit of his foreign policy objectives. One likely method of doing so is via the approval, or denial, of export licenses. One is likely to see an increased willingness on the part of the Trump Administration to approve exports to friendly countries and deny them to countries not in accord with his foreign policy initiatives.

Finally, while less a change than the absence of anticipated change, the Trump Administration is likely to put the brakes on further easing of restrictions on trade with Iran and Cuba. The waning years of the Obama Administration saw continued easing of the United States' restrictions. It was widely expected that restrictions would continue to be eased. Given President-elect Trump's rhetoric with regard to Iran and Cuba, it is unlikely that we will see any further easing for the foreseeable future.

Minimum Salary for Overtime Exemption

By Alexander J. Passantino

On November 22, a federal district court enjoined the overtime exemption regulations that were scheduled to take effect on December 1. Those regulations would have increased the minimum salary required for exemption from $23,660 to $47,476. As a result of the court's order, the increase will not occur (although it is possible that additional litigation activity, such as an appeal, would change that result).

Assuming the rules continue to be enjoined as of January 20, 2017, the Trump Administration will have the opportunity to revisit the salary level. It is not likely that they will decide to leave the salary at the current level of $23,660; it also is not likely that they would go as high as $47,476. Employers will have the opportunity to again provide input into the level; and, this time, they are likely to get a more sympathetic audience, resulting in a more reasonable -- and workable -- salary level.

In the meantime, however, businesses have struggled with how to proceed with the changes they had planned for December 1. Some have pulled back entirely, while others have gone full steam ahead, and still others have taken a middle ground. Poor communication of the company's plan of action and/or a distant understanding of the employee rumor mill can increase the risk that a business is sued for suspected violations. Communication -- in both directions -- is critical for limiting liability as we navigate the next two months (or longer) of uncertainty about the ultimate status of the overtime regulations. ***For additional information about the overtime regulations, visit Seyfarth's FLSA Exemption Resource Center at http://www.seyfarth.com/FLSA-Exemption-Resource-Center.***

Immigration Policy Changes

By Dawn M. Lurie

Along with the Republican controlled Congress, the Trump Administration will have the power to make significant changes to the business immigration landscape. Since control of illegal immigration served as the foundation of the incoming president's campaign, many now wonder or worry about the future of U.S. employment-based immigration policy and procedure in the Trump Administration. It is possible that the regulatory changes made by President Obama's administration, including those relating to business immigration, such as the USCIS final rule allowing certain F-1 students with STEM degrees to apply for a 24-month extension of their post-completion optional practical training and the H-4 EAD rule allowing certain H-4 dependent spouses to file for employment authorization could be rolled back, along with other Obama Executive Orders. However, the elimination of F-1 STEM employment authorization program does not appear to be in immediate danger. The fact that this program requires employers to participate in E-Verify (an internet-based system that allows businesses to determine the eligibility of their employees to work in the U.S.) rather than having it remain optional should remove it from the target list, at least initially. In fact, Trump supports making E-Verify mandatory nationwide. Depending upon the particulars of such a sweeping mandate, including whether or not current workers would need to be screened through E-Verify, certain U.S. businesses could find themselves in precarious positions and should plan accordingly.

It is likely that the new Administration will target illegal immigration in a way the nation has never before seen. Advocates on both sides of the equation are gearing up for a long battle and employers are likely to get caught in the middle. Accordingly, now is the time to tighten compliance efforts, review or establish the necessary Form I-9 processes and visa procedures to ensure related compliance. Our crystal ball indicates that worksite enforcement actions (aka raids) could make a comeback; often overlooked immigration compliance due diligence efforts will likely become more important in the context of mergers and acquisitions as well as other corporate restructurings; and there will be an increasing interest of the misuse and abuse of all visa types including the B visitor visa as well as more interagency cooperation top deter these problems.

In line with campaign promises, it is likely that President-elect Trump will end the Deferred Action for Childhood Arrivals (DACA) program, an executive action taken in 2012 that allowed a class of foreign nationals who came to the U.S. as children to receive deferred action against enforcement, employment authorization and advance parole travel authorization. It is estimated that over 600,00 Employment Authorization Documents (EADs) were issued as a result of DACA. If the program is canceled DACA recipients, and their employers, will struggle to deal with the pending loss of ability to work in the U.S. In addition to the roll back of executive actions and orders, President-elect Trump could easily stop current immigration rulemaking activity. President-elect Trump will likely focus on immigration enforcement and tie this into his interest in protecting U.S. workers. The appointment of Senator Jeff Sessions as Attorney General may be troublesome to certain employers. Sen. Sessions is known not only for tough stance on illegal immigration but on legal immigration as well. While reforms of the H-1B and L-1 visa programs have been part of the bipartisan agenda in years past they are certain to become a priority for the new administration. This, combined with candidate Trump's discussion of "extreme vetting" of potential immigrants, may have a chilling effect on immigration. On the other hand, the proposed guest worker program from 2007 could be dusted off, expanded and implemented fairly quickly with the support of a republican congress. Finally. it is possible that the EB-5 immigrant investor visa program could see a boom under this administration, including making the foreign investment program permanent and expanding the number of visas available to investors.

For an expanded analysis of what businesses can expect, visit: http://www.seyfarth.com/publications/MA111516-LE.

Environmental Policy Shifts

By Andrew H. Perellis

President-elect Trump has stated that he will likely issue a temporary moratorium on all new environmental regulation, and plans to rescind regulations which his administration deems "unnecessary," including: the Interior Department's proposed Stream Protection Rule intended to safeguard communities from coal mining operations; the EPA and Army Corps of Engineers' Clean Water Rule redefining water bodies subject to federal jurisdiction and protection; and EPA's Clean Power Plan which requires states to develop strategies to reduce carbon dioxide emissions from power plants.

Environmental rules and policies to regulate greenhouse-gas emissions will likely be dismantled or significantly weakened, including the Obama Administration's Climate Action Plan, the Clean Power Plan, and U.S. participation in the Paris Agreement, thus halting efforts of the Obama Administration to address climate change. The new Administration will instead focus on revamping U.S. energy policies to encourage domestic production of fossil fuels by opening up federal land for coal mining and promoting policies and regulations to develop the infrastructure necessary for the export of fossil fuels. At the same time, the Trump Administration will review/retract "anti-coal regulations" intended to require industry to consider the effects of their operations on groundwater, surface water, and endangered species. The renewable energy sector may not see significant change because individual states have taken the lead in developing goals and policies to promote the use of renewable sources, and federal regulation that interferes with such progress is unlikely given President-elect Trump's disfavor for regulations and the Republican position against limiting states' rights.

The EPA as a whole may begin to approach enforcement more reactively when incidents prompt intervention, rather than proactively to prevent environmental disasters. Enforcement may be replaced by increased agency initiatives to promote compliance assistance and more heavily consider the costs of environmental compliance on the regulated community.

Decreased enforcement activity could in turn lead to an increase in citizen suits to either force EPA action or to directly enforce environmental laws against noncompliant actors. Navigating environmental policy under the new administration will likely involve paying closer attention to state regulatory regimes that will move to the forefront in instances of reduced federal regulation.

To view more comprehensive coverage on what to expect in environmental policy, visit: http://www.seyfarth.com/publications/MA111616-LE.

Title III ADA Regulations

By Minh N. Vu

The Department of Justice (DOJ) has been working on issuing proposed regulations for the websites of public accommodations and state and local governments since 2010 and no proposed rules have been issued to date. Any change in administration will typically cause a delay in the rulemaking process as new political appointees need to review the status and substance of regulations under development. President-elect Trump's stated aversion to new regulations may result in further delays in this process, leaving businesses in a state of uncertainty and exposed to the current tsunami of lawsuits and demand letters about their websites and other digital properties. To fill the regulatory void, disability rights advocates may resort to the courts to create law in this area, resulting in more lawsuits against public accommodations.

DOJ enforcement of Title III of the ADA under the new Administration will certainly continue, but we expect that the DOJ will be likely to pursue cases that will expand the scope of the law.

Affordable Care Act

By Nicole D. Bogard

After the November elections, the Republicans control the Senate, but they do not have enough seats to prevent a filibuster (at least 60 votes). This means the promise to repeal and replace the Affordable Care Act could be a challenge. Republicans would need to obtain all the Republican votes (52 seats) and at least eight Democrats to avoid a filibuster stalling the repeal of the Affordable Care Act. Although Republicans have commenced designing proposals for a replacement, the immediate repeal of all aspects of the Affordable Care Act could leave health insurers in a bind and a significant number of people in a difficult situation due to the subsidies and tax credits provided to low income individuals who purchase medical coverage through the Marketplaces (Exchanges).

It is possible that portions of the Affordable Care Act could be repealed through the budget reconciliation (the process by which congress corrects budgetary and revenue items) including the Individual Mandate and Employer Mandate, as well as the additional Medicare tax on high earners, the medical device tax, the health insurer fee, the Cadillac tax and the transition reinsurance fee. The Individual Mandate requires individuals to have medical insurance or pay a penalty tax when they file their taxes. The Employer Mandate requires large employers (*e.g.*, at least 50 full-time equivalent employees) to offer affordable minimum value medical coverage to full-time employees and their dependent children or pay a tax penalty. Other non-budgetary aspects of the Affordable Care Act could not be repealed through this process, like the prohibition on preexisting condition limitations and medical coverage for children up to age 26.

Certain facets of the Affordable Care Act could be chiseled away through regulations issued by the Internal Revenue Service, Department of Labor and Department of Health and Human Services. These agencies could limit the scope of the Affordable Care Act by redefining preventive care, the type of medical coverage employers must offer, and who is considered a dependent under the age of 26.

At this point the Affordable Care Act remains in effect and employers will need to continue the compliance course until a new law is signed by President-elect Trump or new regulations are issued by the agencies. For more information, visit: http://www.seyfarth.com/publications/HCRMA111016.

Intellectual Property Policy and Emerging Technologies

By Thomas A. Haag Ph.D.

President-elect Trump's campaign slogan was "Make America Great Again." He stated, "[w]hether it's producing steel or building cars or curing disease, I want the next generation of production and innovation to happen right here on our great homeland, America." We expect the Trump Administration's short term economic plans to be characterized by economic nationalism. A sharp increase in foreign U.S. patent ownership (20% in 1960 to 55% in 2015) could be interpreted to mean that much of the near term economic benefit of the U.S. patent system is flowing oversees. The Trump Administration will likely attempt to re-patriate some of that economic benefit. It will need to balance the value of international treaties such as the Paris Convention and WTO's TRIPS which have sought to harmonize international IP standards with a strong desire to put U.S. interests first. The ITC as the watchdog of U.S. interests in international trade will likely be strengthened and its mandate shifted to put the interest of domestic parties and domestic U.S. patent owners ahead of foreign parties and foreign U.S. patent owners for instance.

Commerce Secretary Designee Wilbur Ross is a known economic nationalist who has in the past been a vocal critic of international free trade agreements indicating that they are harmful to average Americans. As such, we believe that any patent harmonizing intellectual property provisions of the TPP which might be seen as embodying U.S. short term concessions are basically dead. Indeed, China - which now accounts for more than one in three of the total 2.9 million international patent applications filed in 2015 - is likely to draw much of the ire of the Trump Administration which has stated that, "China's ongoing theft of intellectual property may be the greatest transfer of wealth in history." As such, we also expect to see initiatives toward the strengthening of Trade Secrets laws. In any case, we predict that continued legislative movement toward raising further hurdles to patent enforcement such as those in H.R.9 will decelerate. The risk is that any Trump Administration policy shifts yielding perceived near term benefits to the U.S. economy, could result in damage to the U.S.'s long term competitiveness and beneficial multilateral trade relationships.

One of the winners of the Trump Administration appears to be the bio/pharmaceutical industry. We expect to see a rise in the levels of biomedical R&D budgets - which in turn will lead to an increase in U.S. innovation, patent filings, M&A and bio/pharma asset valuation. Not only will the Federal Government likely allocate more money to the NIH, but tax law reform will likely lead to large American pharmaceutical companies bringing back to the U.S. cash which has been tax-sheltered abroad. Nevertheless, debates surrounding drug pricing, e.g., Senator McCain's FAIR Drug Pricing Act, will continue to impact investors perception of the sustainability of current biotechnology and big pharma business models going forward.

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